

Slovenia

Environmental Liability 2012

National ELD Report

Justice and Environment 2012

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I.

Comparative Legal Analysis on ELD and other liability legislation

SLOVENIA

The Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD) is – among others - subject to various shortcomings with regard to scope and definitions which might be one of the reasons for the low number of cases. Problems are also reported with regard to the economic assessment of damages and remediation methods.¹²

This analysis aims to help to collect evidence on the added value/weakness of the ELD to bring specific arguments for better implementation and as to a revision of the directive. Therefore the national ELD legislation is to be compared with similar liability regimes to bring on the one hand more clarity on the interaction of ELD legislation with other liability regimes and to demonstrate on the other hand value and weaknesses of all these systems.

In 2008 Slovenia transposed 2004/34/EC Directive into its legal system with Act amending Environment Protection Act³. However the Environmental Protection Act already had basic provisions before, which were in certain way in compliance with the ELD. Also necessary executive regulation was adopted except one governmental decree is still missing – about the costs of formal estimating of environmental damage. Still no cases are known and also NGO's are not aware enough about new environmental liability regime and their possible role in it. It is necessary also to keep in mind that Slovenia is a small county with 2 mio inhabitants.

1. National liability regimes

The frame for liability system was established before implementation of ELD directive in Environmental protection act⁴ as “polluter pay” general principle (article 9 and 10). The polluter is responsible for preventing and remediation of pollution, usage of environmental sources, and he must pay the costs related to this and the costs in the case of environmental damage. It is possible to

¹ Compare the results of the **Stakeholder and Practitioner Workshop** on the implementation of the ELD in the EU: <http://ec.europa.eu/environment/legal/liability/workshop081111.htm>

EC Report on the effectiveness of the EU Environmental Liability Directive: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0581:EN:NOT>

² See **J&E legal work in 2011** with regard to ELD:

<http://www.justiceandenvironment.org/publications/eld>

³ ZVO-1B, Official gazette of the RS 70/2008

⁴ Official gazette of the RS 41/2004

demand of polluters to give some financial guarantee for payment. These rules are only basic principles that are operationalized further through the Act – in the institute of inspectors procedures (article 156) and “ELD directive” articles (110a do 110i). The polluter is responsible for preventing and for remediation of environmental damage that it causes by its operation.

The environmental damage is defined as damage caused to special parts of environment. The responsibility is connected to special parts as protected species and their habitats, waters and ground. The Ministry for agriculture and environment can prescribe some measures for preventing the damage. The polluter must inform it immediately and begin with activities to prevent the damage. With administrative decision the ministry can demand some measures from the polluter. The same procedure is valid for the case of already existing environmental damage, only that environmental NGOs with status in public interest can be party in this administrative procedure.

As ELD directive deals with pure ecological damage and is based on powers and duties of public administrative authorities, it is distinct from a civil liability system, which exists also in Slovenia. There are also some measures as state bodies obligations which are directed towards improving some “historically” damaged areas. So there are regimes, not similar, but in their effects close to ELD regime. As there are only few environmental court cases, other than about environmental approvals or permits, the following presentation bases mostly on current regulation and theory.

2. Civil and Criminal Liability regimes

A) General environmental prevention mechanism for protection of the constitutional right for healthy living environment - article 72 of the Constitution of the Republic of Slovenia⁵ which declares “Healthy living environment”:

Everyone has the right in accordance with the law to a healthy living environment.

The state shall promote a healthy living environment. To this end, the conditions and manner in which economic and other activities are pursued shall be established by law.

The law should establish under which conditions and to what extent a person who has damaged the living environment is obliged to provide compensation.

The protection of animals from cruelty shall be regulated by law.”

⁵ Available on http://www.pf.uni-mb.si/datoteke/janja/Angleska%20PT/anglesko-slovenska_urs.pdf

Current Environmental Protection Act⁶ adopted in 2004 in its article 14. declares the “principle of protecting rights” as follows:

*“(1) In order to exercise the right to a healthy living environment, citizens may, as individuals or through societies, associations and organizations, file a request with the court demanding that the holder (hereinafter referred to as the 'holder') of the activity affecting the environment stops the activity when it would cause or does cause an excessive environmental burden or it would present or does present a direct threat to human life or health, or that the person responsible for the activity affecting the environment be prohibited from starting the activity when there is a strong probability that the activity would result in such consequences.
(2) The protection of the right to a healthy living environment as a special field shall, in accordance with the law, also fall within the competence of the Human Rights Ombudsman.”*

This right was included also in previous Environmental Protection Act (adopted in 1993), but there were no suit according to this article yet. [If it would come to such case the court is](#) competent to decide about stopping of the damaging activity. Court could on the proposal of interested party in the beginning of procedure temporary stop the damaging activities (till final decision). In the absence of any practical case it is difficult to discuss this.

There is also ombudsman mentioned in article 14. He doesn't have any competence in remediation or in liability procedures. Here it is mentioned because of the importance of the environment. Article 72 of the constitution – right for a healthy environment not in the chapter of human rights, but in the chapter Economic and social relations – so it is not really human right but recognized as kind of human right.

B) Civil liability according to Code of obligations⁷ (article 133): it provides protection against nuisance. Everyone can demand that the other remove a dangerous source that means greater threat to him or other people or demand that other stop the activities that produce disturbances or threat of damage. The court orders suitable measures for preventing the (further) damage. Liability is objective. The interested person can also demand the compensation in the same procedure. But when the danger arises from allowed activities or objects (with all legal permits), then only the compensation of damage that exceed ordinary damage is possible.

Some kind of legal protection is offering also article 134 of the Code of Obligations according to which someone can demand before court that other stops the activities that are violating his personal rights. Fort purpose of this review this institute is of minor importance.

⁶ Version from 2004 available on http://www.arhiv.mop.gov.si/fileadmin/mop.gov.si/pageuploads/zakonodaja/okolje/en/zvo_s.pdf

⁷ Official gazette of RS 83/2001; should be available on http://www.wipo.int/wipolex/en/text.jsp?file_id=180877 or <http://www.lexadin.nl/wlg/legis/nofr/eur/lxweslv.htm#Administrative%20/%20Public%20Law>

*legal protection under A and B together means implementation of the constitutional right for a healthy environment, but the boundary between them is unclear even in theory, much less in non-existent praxis.

C) Civil liability according to Law of Property Code⁸ (article 75. and 99): this is one of the institutes of neighbour law. Every owner must stop the activities or remove sources from his property that could disturb usage of other owners property in the way that exceed normal usage (according to nature of the property and local habits) or they are causing damage. Disturbance with devices is forbidden. The owner can demand before the court that unlawful disturbances stop. Also the compensation can be demanded if some damage was caused.

D) Criminal liability according to Penal Code of the Republic of Slovenia⁹ (articles 332 – 347): most important is article 332, which is a new criminal act »burdening and destruction of environment« since new penal code in 2008:

(1) Whoever endangers the life or health of a substantial number of people, or causes, in whole or in part, damage to, or the destruction of the environment, or causes the threat of such damage or destruction, by breaching regulations

1) or by any other general dangerous action releases or introduces dangerous substances or ionizing radiation into the air, soil or water,

2) processes, including the removal, storage, transport, export or import of waste, dangerous waste or other dangerous substances, or sending these illegally for profit,

3) manages a plant where a dangerous activity takes place or dangerous substances or preparations are stored which results in a threat to the area outside of the plant,

4) significantly degrades a protected habitat,

5) trades in or uses substances which cause ozone layer depletion,

6) causes an excessive pollution of environment, impair the environment or excessively exploits natural goods, shall be sentenced to imprisonment for not more than five years.

⁸ Official gazette of RS 87/2002

⁹ Official gazette of RS 55/2008, available on

<http://legislationline.org/documents/section/criminal-codes>

(2) If the offence under the preceding paragraph is committed through negligence, the perpetrator shall be punished by a fine or by an imprisonment of up to two years.

(3) If the offence under paragraphs 1 or 2 of this Article has as a consequence the impairment of health of a substantial number of people, the destruction, in whole or in part, of flora or fauna, or reservoirs of drinking water, or any other damage to the environment resulting in serious consequences, continuous pollution at a critical level or critical damage to the environment, the perpetrator shall be punished by imprisonment of up to eight years for the offence under paragraph 1, while for the offence under paragraph 2 he shall be punished by imprisonment of up to three years.

(4) If the offence under paragraphs 1 or 2 of this Article results as a consequence in irreparable damage to, or destruction of the environment or protected natural resources, the perpetrator shall be punished by imprisonment of up to ten years for the offence under paragraph 1, while for the offence under paragraph 2 he shall be punished by imprisonment of up to five years.

(5) If the offence under paragraphs 1 or 2 of this Article entails the death of one or more persons, the perpetrator shall be sentenced to imprisonment for not less than one and not more than twelve years for the offence under paragraph 1, while for the offence under paragraph 2 he shall be sentenced to imprisonment for not less than one and not more than eight years.

(6) The same punishment as referred to in the preceding paragraph shall be imposed on a perpetrator who commits the offences referred to in the preceding paragraph as a member of a criminal association for the commission of such criminal offences.

This criminal act is sanctioning one of the worst forms of burdening the environment. Also the legal person (organisation) can be responsible for this criminal act. But according to the Penal Code of the Republic of Slovenia and Criminal procedure Act of the Republic of Slovenia¹⁰ there is no reinstatement of the environment situation as sanction possible.

E) Environment inspectors intervention according to Environmental protection act: there are numbers of violations that are in environment inspectors competence. The inspectors have also a lot of efficient measures available according to the Environment Protection Act, but last years the environment inspectorate is ineffective due to lot of cases, lack of stuff and financial sources. They

¹⁰ Official gazette of RS 63/1994

surely are competent to stop the violent activities or order monitoring and if the activities don't stop the inspector could permanently forbid the activities, working of devices, usage of dangerous materials or technological procedure and others.

F) Governmental measures for remediation environmental downgraded areas according to Environmental protection Act (article 24): the government can declare a certain area as downgraded if there are the standards of allowed sensibility or burdens for this exceeded or there is a danger that the level of pollutants would exceed one or more alarming levels. The purpose of such declaration is to take some measures to improve the environment in this area (remediation). After defining the area and parts of it that are damaged, the government lists the measures and specifies them as tasks for state, local community(ies), for polluter and for environmental public services. So the costs are connected to the mentioned subjects. According to this article the government has already adopted some measures for Meziska valley in 2007¹¹. Also there are in the process of preparation the measures for Zasavje valley and Celje. There it is planned that measures are matter of state and local communities in the valley and they will make yearly programmes of specific tasks.

Although the effects of measures under F are very close to the ELD measures of administrative authorities, there is no liability exposed. The ELD preventive measures are not enumerated – they are just described as appropriate measures from case to case, but the ELD measures for remediation are described in Decree on types of measures for remediation of environmental damage ¹²So for the purpose of this review it is reasonable to compare the environmental connected liabilities presented under A, B, C and D.

3. Main differences of national liability regimes compared with ELD

a) Competent authorities

The competent authority for ELD regime is the ministry for Agriculture and environment or more correct its competent body the Environmental Agency of the Republic of Slovenia. The Agency can issue an administrative order to the polluter with prevention measures when there is a threat of environmental damage. Or when damage is already caused it can issue the administrative order with measures for remediation the damaged area. Against this administrative decision there is no appeal possible, but interested subject can go directly on the administrative court. In the administrative procedure for remediation also the NGO with status of public interest on the environment protection (according to Environmental protection act) can be the parties in the procedure. Against administrative decision there is possible (but according to Administrative dispute act not always allowed – only if the court changed the administrative act) an apply to the Supreme court. As already mentioned so far no cases.

¹¹ Ordinance on the areas of the highest environmental burden and on the programme of measures for improving the quality of the environment in Zgornja Mežiška dolina (Official gazette of RS 119/2007)

¹² Official gazette of RS 55/2009

All other procedures (under A, B, C and D) are going on before district court. On the first level of regular court decision there are two types of courts – county and district court. For environmental cases there is not determined under which court the case should go. According to Civil Procedure Act¹³ it is defined for which cases are district courts competent and also county courts, but county courts are competent also for every other cases there are not defined for district courts. Regarding the cases with payment demands county courts can deal only with cases under 8.345 €, all other cases are for district courts. Against the decision of the first level court there is always possible an appeal to Higher Court (there are 4 Higher courts in Slovenia). Against the decision of the Higher court there is revision possible under some condition. The financial demand must be higher than 4.173 € and it is possible only because of procedural mistakes or wrong usage of material law. It is obligatory that the revision makes a lawyer.

Regarding criminal procedure all mentioned criminal acts are prosecuted by state prosecutor. For criminal cases are competent county or district courts according to the years of imprisonment – county courts for max 3 years, for higher penalty is district court competent. Therefore district court would be competent for most criminal offences against environment (also the most important article 332 of Criminal Code) because the penalty is higher (except for some minor kinds of these criminal offences) than three years of imprisonment.

Against the first level court decision there is always appeal possible at the Higher court. Against the Higher court decision there is a request for protection of legality before Supreme court because of the violation of Penal Code of the Republic of Slovenia or serious procedural mistakes.

b) Scope/Damage covered

A) The key definition is there “exceeding burdening” of environment. This means that everything is undesired that exceed regulated limits of emissions, standards, rules and usage – everything that is regulated. In Slovenia the regulation is adjusted to EU directives and no other kinds of possible damages are regulated.

B) Under Code of Obligation (article 133): according to this can be stopped activities or disturbances that exceed normal, usual limits (courts usually consider the limits of current regulation for each kind of emission) This is the case when emissions or activities could threaten to damage health of people or natural balance. This is can only be the final measure – if disturbances or emissions cannot be prevented with other measures. The court praxis is mentioning as possible damages: damaged trees, death of bees, lower value of the property.

¹³ Official gazette of RS 26/1999

C) Under Law of Property Code there is only request for stopping the activities or disturbances, but together with this request it can be also compensation for damage required in the same suit (under conditions of compensation rules according to Code of Obligations. The important element of such disturbances is that they must exceed locally normal disturbances and concrete nature and purpose of land – property.

D) Under Penal Code of the Republic of Slovenia and Code and Criminal procedure Act of the Republic of Slovenia in the criminal procedure court can also decide about the compensation request of the injured party. But if information collected during the criminal procedure are not enough good basis for decision, then the court direct injured party to the regular court with compensation request to begin the civil procedure. Usually it is so.

c) Extent of damage required/Thresholds

A) According to article 14 of Environmental Protection Act the article itself doesn't give the basis for compensation as article 133 of Code of Obligation or article 99 of Law of Property Code. So if the damage is already caused the compensation request should follow the rules of Code of Obligations.

According to the Environmental protection act the environmental damage is defined as damage, cause to special parts of nature (protected species, their habitats). The damage should have greater influence according to the Rules on the content defining environmental damage¹⁴ adopted by minister for environment (following the directive 2004//35/ES). This states that in concrete case of damage the assessment of damage is made by comparing the state of damage with the reference state of certain environment (by using relevant data about the state before damaging event).

B) If the damage is already caused then the compensation request it possible under conditions of compensation rules of Code of Obligation, but only for the damage that exceed usual limits (the Code is not explicit by what these limits are, but the praxis showed out that these are limits established by regulation for certain disturbances – for example noise).

C) The same as under B.

* The damage that someone according under civil liability is not the same as environmental damage according to Environmental Protection Act. Under civil liability we are talking only about legally defined material or immaterial damage/loss, not every possible loss.

¹⁴ Official gazette of RS 46/2009

D) As it would be unusual (because of complexity) to decide about environmental damage (only in the limits of injured party request) in the criminal procedure, the compensation would be the matter of the procedure under B – so further answers will only limit on A, B and C institute of liability.

d) Liability/Accountability

There are no exceptions, all can be liable, of course if they cause the damage. Only the state can be liable also if the causer cannot be defined. Also the state can be liable according to article 72 of the constitution, because establishing healthy environment is duty of state – it should establish suitable regulatory, administrative and juridical frame for implementing this human right. In opposite the state could be responsible also for polluters that operates in the frame of permits and regulation.

e) Are Preventive Actions or Response Actions required?

According to ELD regime implemented into Environmental protection act the whole operationalization of this institute is consisting of measures that are the matter of executive regulation adopted by government. This is Decree on types of measures for remediation of environmental damage¹⁵, which is following up to the annex II of ELD directive. In the ELD regime the preventive measures are taken when the Ministry for agriculture and environment is informed about the danger for environment. The ministry with administrative decision orders to the potential “polluter” to take certain measures. If the damage is already caused the Ministry for Agriculture and environment also orders measures for remediation by administrative decision (in the procedure also environmental NGOs with status in public interest can participate).

A) There is no need to take some preventive measures before put the claims according to the article 14 of Environmental protection Act on court.

B) According to article 133 Code of obligation the interested party should primary claim for measures to prevent or remove the danger or disturbances. Then secondary could the claim for stopping or omission can be put.

f) Liability Regime

According to ELD regime (specified in articles 110a-110i Environmental protection Act) article 110a explicitly defines the operations/activities that are under strict liability (absolute). The liability is established when the damage is caused and it is possible to define cause/effect connection between the operation and environmental damage.

¹⁵ Official gazette of RS 55/2009

A) Here is a kind of absolute liability established, because there is no need to prove unlawfulness. The liable subject could also be a subject who operates in public good and has all permits. This is similar as by ELD regime. It would be possible to demonstrate both regimes at the same time. According to the article 14 of the Environmental protection act citizens could demand from “polluter” to stop (or not to begin) the activities and also inform the ministry about the situation. According to ELD regime the ministry would order some preventive or remediation measures to the polluter.

B) According to article 133 of the Code of Obligations – there is objective liability – but as mentioned only the damage which is caused by emissions that exceed normal limits is taking into consideration. According to ordinary rules for liability for compensation for damage there is general fault based liability, but if the damage is caused from dangerous device or operation the liability of the cause is objective/absolute. This liability system is different to the previous, because this is the regime that means the base for compensation claim.

g) Costs

What needs to be done if natural restitution of the damaged area is not possible (compensation, satisfaction in money)?

According to the ELD regime implemented into environmental protection act the Environmental Agency estimated from case to case costs of prevention or rehabilitation measures.

According to the Code of Obligations there are always money compensations if it is about material damage or immaterial damage. As mentioned there are not much environmental cases to make some conclusions. More can be clear from the case study.

h) Access to Justice and Claims for Compensation

As concerns ELD regime also NGOs with status of public interest can be party in the administrative and then also administrative court procedure regarding the administrative decision about measures for rehabilitation of already caused environmental damage. Of course the polluter is also the obligatory party. The ELD regime is basically the regime that regulates the polluter - nature (environment) relation, not polluter-individual. The base for compensation claims would always be Code of obligations, but in possible connection with “polluter pays” rules in Environment protection act (and/or in connection with constitutional right according to article 72 of the constitution).

A) In all civil procedures according to Civil procedure Act only a party with legal interest (legal standing) can begin the court procedure. The praxis did not yet show out if also this could be NGOs with public interest on environmental area (status is possible from 2009 – till now 13 NGOs) although according to the Civil procedure Act the court could recognise some organized associations if they fulfil main condition to be a party. So individuals are mostly a part with legal interest, but only if it is affected by environmental damage. If not, there is only possibility according to ELD regime established in the Environmental protection Act. When the procedure is going on also an accessory intervention from the third party is possible if third party can demonstrate the interest for one party to win. When parties are recognized as parties they have access to all remedies (appeal, revision, reopening of the case) except the request for protection of legality (only public prosecutor's office is entitled). This is important general rule, because all (not) administrative procedures (ELD regime is more administrative regime) would begin at regular court (country or district court regarding the amount of compensation claim).

Everyone has right to claim for compensation if the legally recognized damage was caused to him. According to the Code of obligations the damaged party always demand first the remediation of damage. If this is not possible the compensation is claimed.

i) Burden of proof

The basic rule for compensation claims according to Code of Obligations (article 131) for damage is to prove only cause /effect connection. The guilt of cause is assumed, unless the causer prove otherwise. The injured party need to prove only cause/effect connection. If the damage is caused from more dangerous device or activity then there is objective liability of the causer – the injured party don't need to prove the cause/effect connection – it is assumed. But the opposite party can prove that this connection doesn't exist.

According to the Code of Obligations (article 133) it is also possible to claim for compensation also when the damage is cause of the subject that is doing for public good and has all permits – but only if the emissions exceed normal limits. Then there is a huge problem to prove that the “part of damage” which was caused only by such emissions.

For environmental cases are there no special rules for evidences. In civil procedures the parties have to propose all of their evidence (documents, witnesses, experts) to the court by the end of the first court hearing. The court will reject all evidence proposed after this deadline unless the party can prove he/she was not able to do so before. In smaller cases (up to 2.000 EUR) all the evidence of the plaintiff has to be proposed already in the lawsuit. The court will make the decision based only on the evidence produced by the parties and will not look for additional evidence on its own.

j) Financial security

Yes there is defined for nuclear damage liability according to Ionising Radiation Protection and Nuclear Safety Act¹⁶. Also according to Environmental protection act the government can define some financial guarantee for costs of burdening the environment during and after operation - Decree on the implementation of the Regulation (EC) No. 1013/2006 on shipments of waste¹⁷ and Decree on the landfill of waste¹⁸. So far this is regulated for waste deposits. According to ELD regime the Ministry for Agriculture and Environment can (obligatory) order (together with preventive or remediation measures) also to give financial insurance – bank guarantee for costs and established a mortgage on the polluters property.

k) Time limits for presentation of claims

According to ELD regime implemented into Environmental protection act the time limit for claims before court for environmental damage is 30 years. According to Code of obligations the claims for compensation for damage must come to the court in the time of 3 years after the injured party know about the damage and of the causer. But absolute time limit is 5 years from time when damage occurs. In the environmental cases caused by emissions this limit in reality can be extended because the damage is caused repeatedly and it is very difficult to establish exact time of occurring the damage.

4. Prevailing legal norms

With the introduction ELD system nothing has changed in other legislation.

5. Damages not covered by a liability system

Not that we would know yet.

6. Strengths and weaknesses of national liability systems

The only strength of it could be that the regulation is rather good in determining the rights for environmental protection. But also to good regulation are immanent some deficiency because it doesn't encourage court practice. Or the reason for this is in altogether regulation/administrative/judicial situation. To explain:

¹⁶ Official gazette of the RS 67/2002

¹⁷ Official gazette of the RS 71/2007

¹⁸ Official gazette of the RS 32/2006

- first of all the court procedures last very long; because of the complexity (and lack of knowledge) the environmental cases would last even longer – then the preventive measures would lose their efficiency (after 3 to 5 years);
- the burden of proof is huge: in the polluted areas there are usually more polluting actors, and their emissions lay on historically downgraded area (industrialization of 20. century – such are Zasavje area, Jesenice, Meziska valley, Celje, and because of agriculture Prekmurje). Each one of polluters could even operate in the limits of allowed emissions, but all together have damaging effect. So, who is responsible? Also because of this there is extremely hard to prove cause/effect connection between the causer and the altogether damage;
- financial risk is also great. The expert analysis are expensive. The active party can easily lose the case because of the reasons under previous point and would have to pay back the costs to usually more powerful opposite party with well-known lawyers (the costs could be enormous);
- environmental NGO's could be good promoter of legal protection of environmental rights but they are small and also financially very weak and they don't have enough legal knowledge yet (the environmental regulation is enormous, there are very rare lawyers specialized also for environment). Although NGOs with status in public interest on the environmental area can access to free legal aid, but it doesn't cover costs of the opposite party in the case of losing the case (this would drown every environmental NGO in Slovenia);
- altogether the environmental regulation in Slovenia in an implementation deficit in many areas (also as it concerns ELD institutes).

II.

CASE STUDY

Noise from heavy trucks on road G1-3

SLOVENIA

The elaboration of case studies on liability proceedings (non-ELD and ELD cases) is meant to give, – in addition to the legal analysis of national liability regimes - an appropriate insight into the practical application of different liability regimes and the shortcomings of ELD legislation regarding its scope and definitions. The identification of respective obstacles and challenges will give important incentives for the improvement of the Environmental Liability Directive (ELD)¹⁹.

As already mentioned we don't have any ELD cases in Slovenia yet. So we can look on other cases of compensation cases for damage caused to individuals.

There are no statistics how many environmental cases there are, but if there are any important in the media they can be found. Currently the most important cases are **wind power plant Volovja Reber** and **emissions from the Lafarge** – in both cases environmental NGOs are involved and they are fighting against environmental permits/approvals. So they are not suitable cases for this case study. Beside this in history we had some individual cases because of **health damage caused by asbestos**, until Act Concerning Remediating the Consequences of Work with Asbestos in 2006 was adopted. Also we have from 1995 ongoing case of 26 farmers from Zasavje valley that are suing four companies in Zasavje for compensation for damage caused on their forests and fields (more information could be available in Ekokrog NGO²⁰ - and at his president Uroš Macerl²¹). Because this case is not based on current regulation we decide to present the following case which is currently interesting, involving lots of injured parties as individuals and because of successful suit causing a lot of problems to authorities. But there are no NGOs involved. The case is not directly connected with ELD regime and not with environmental damage. It is case about objective state body responsibility for immaterial damage of individuals caused by noise from trucks (that exceeded the acceptable level according to the noise regulation). Because noise could affect also other living beings, it would be possible that this would be also an ELD case. In the end there is a description about possible ELD case in this situation, because in real, the regime is not functioning yet and nobody started the case in this way.

¹⁹ DIRECTIVE 2004/35/CE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004

²⁰ <http://www.ekokrog.org/>

²¹ eko.krog@gmail.com

1. Matter of case

Compensation for immaterial damage because of noise from international transit of heavy trucks on regional road G1-3 (from Maribor to Slovenian-Hungary state border) caused to the residents living near the road; violation the right to healthy environment.

2. Country

Slovenia

3. Location

Pomurje (north-east Slovenia)

4. Short summary of the case

On the regional road G1-3 through years traffic with heavy trucks has increased and was increasing every year until the highway was finished in 2008 and traffic was redirected there. The intensity increased in 2005 - that was after Slovenia entered the EU. There were about 1,4 million heavy trucks per year passing by this road. The road G1-3 is regional and is going through the villages. According to Roads Act the purpose of regional roads is to connect important centers of local communities. Some houses are only one or few meters far from the road. The disturbances from the road affected about 600 households.

Directorate of the Republic of Slovenia was forced (by EU regulation and public pressure) to get some measurements of noise for the establishment of some protections from noise. In 2004 it engaged the Institute of health care Maribor (Zavod za zdravstveno varstvo Maribor) to make measurements for part of the road Črenšovci-Donji Lakoš. The noise from heavy trucks exceeded critical limits according to the Decree on limit values for environmental noise indicators. Then the Directorate started to make some protection against the noise on the most critical points (walls, fences, changing windows). Also local communities' bodies have discussed the problem (in 2006). This was also one of starting sources for people to inform themselves about the official measurements.

First suits were brought in the end of 2006 and the main wave was then in 2007. Also last greater amount of suits were brought in 2010, when first compensations were paid. Altogether there was/is about 2100 suits for about 14 million €. So far there are about 700 cases final (judgements or settlements) and 8,3 millions € already paid (mostly in 2009 and 2010). The final compensations are from about 2.400 € to maximum 7.000-8.000 € for individual. In 2011 the payments were reduced (due to state bad financial situation) and they are now in delay.

5. Applicable national laws

- material:

- The Constitution of the Republic of Slovenia²² – article 72 (the right to healthy environment):

“Everyone has the right in accordance with the law to a healthy living environment.

The state shall promote a healthy living environment. To this end, the conditions and manner in which economic and other activities are pursued shall be established by law.

The law should establish under which conditions and to what extent a person who has damaged the living environment is obliged to provide compensation.

The protection of animals from cruelty shall be regulated by law.”

- Code of obligation²³ (from 2001) – main article 133 (protection against nuisance) and similar article 156 in previous Obligations Act - it provides protection against nuisance. Everyone can demand that the other remove a dangerous source that means greater threat to him or other people or demand that other stop the activities that produce disturbances or threat of damage. The court orders suitable measures for preventing the (further) damage. Liability is objective. The interested person can also demand the compensation in the same procedure. But when the danger arises from allowed activities or objects (with all legal permits), then only the compensation of damage that exceed ordinary damage is possible.
- Code of obligation - article 179 about money compensation of immaterial damage – money compensation is possible also for psychological pains if the intensity and duration of them justify it and it is independent of possible compensation for material damage;
- Decree on limit values for environment noise indicators²⁴

- process:

- Civil Procedure Act²⁵
- Public Roads Act²⁶ (for defining the responsible defendant in the process)

The constitutional right of article 72. is the basic right for a healthy environment. It is implemented through article 14. of the Environmental protection act²⁷ and also through article 133 of the Code of obligations.

²² Available on http://www.pf.uni-mb.si/datoteke/janja/Angleska%20PT/anglesko-slovenska_urs.pdf

²³ Official gazette of RS 83/2001; should be available on http://www.wipo.int/wipolex/en/text.jsp?file_id=180877 or <http://www.lexadin.nl/wlg/legis/nofr/eur/lxweslv.htm#Administrative%20/%20Public%20Law>

²⁴ Official gazette of the RS 105/2005

²⁵ Official gazette of the RS 26/1999

²⁶ Official gazette of the RS 33/2006

²⁷ Official gazette of the RS 41/2004

This case is a positive case in Slovenia, leading to a payment obligation for the state. Direct “noise polluters” are not responsible, but the state that allowed so intense traffic on a specific road.

6. Type of procedures and competent authority

Judicial procedure; on the first level it was/is going on County court in Gornja Radgona, second level on Higher Court in Maribor (appeals) and third level on Supreme Court of the Republic of Slovenia (revisions).

7. Polluter

Directly heavy trucks; but accordingly to Roads Act indirectly and objective is responsible Republic of Slovenia Directorate of the Republic of Slovenia for Roads (Direkcija Republike Slovenije za ceste), because it manages state roads, which include regional roads. In the process general state attorney was representing the defendant Directorate.

8. Claimant

Individuals living by the road G1-3.

9. Other participants involved

No other participants.

10. Description of the damage and the applied liability regime:

a) Main impact and sort of damage caused

immaterial damage – psychical discomfort (insomnia, bad concentration, nervousness) due to noise (also vibration and gas emissions) from heavy trucks – according to article 179 of the Code of obligations.

b) Extent of damage caused

psychical discomfort from about 2100 individuals living in about 600 households by the road G1-3.

c) Preventive/response actions being taken

according to article 133 of the Code of obligation there should be main claims directed into preventive or removal measures of disturbances. But in this case no such measures were objective possible. Because this was in that time only road for transit traffic and the (problem solving) highway was under construction in normal time limits.

d) Applied liability

absolute, because the Directorate is according to Road Act responsible body for state roads (regional roads are also State roads).

e) Type of compensation

Compensation was claimed and received only in money. According to opinions of the Supreme court of the Republic in Slovenia the starting point of evaluation of damage was a previous court decision on a similar case (case of the Cankarjeva and Tišinska street in Murska Sobota – II Ips 148/2007). The damage was evaluated according to article 179 of the Code of obligation (rules for money compensation of immaterial damage – for psychological pains: the degree of pains, last of pains and damaged good) and taking into account personal circumstances - specially how close to the road individual lived and how long he was exposed to disturbances (cumulatively and by average daily exposure) - intensity. Also there has been taken into consideration the fact that the intensity of traffic was the highest in the last years before redirection the traffic on highway. The fact of established protection from noise was not important, because they were only easing the influence, not preventing it.

f) Description of the evidence procedure

as evidence the plaintiffs were proposed the expertise about critical limits of noise in relevant period with respect to Decree on limit values for environment noise indicators that was made by Institute of health care Maribor in 2004. According to the process rules such evidence could be taken into consideration by the court only if the defendant would agree with it. But he didn't, because he claimed that this analysis was made exclusively for the purpose of establishing the protections against the noise. So the first plaintiffs suggested the evidence with expertise. The defendant agreed that the expertise could be done by Institute of health care Maribor. Such expertise was accepted in all further cases. But the burden of costs for the expertise was at first with the plaintiffs. Of course according to the final court decisions the defendant party was obliged to pay back these costs.

g) Time limits for presentation of claims

according to the Code of obligations (article 352) there has to be respected time limits for claims for compensation for damage must come to the court in the time of 3 years after the injured party know about the damage and of the causer. But absolute time limit is 5 years from time when damage occurs. In these cases the problem was to establish the time when the damage was caused, because it is about a successively arising damage. The question was – when was the moment the damage occurred, the moment after which we can count the years before the right for claims expire (3 years). The expertise has shown that the noise begun to exceed the critical levels already in 2001 and then the intensity was increasing till 2008. In 2011 the Supreme Court has stated, that the claims could last until the situation is stabilized. In the concrete case this was on 31.10.2008 when the traffic was redirected to the highway. This means that for example on 31.10.2010 someone can claim for compensation from 31.10.2007 till 31.10.2008. So the right for claims expired on 31.10.2011.

11. Outcome of the proceedings

As already mentioned the plaintiffs won the cases - eligibility for compensation, but they won in different degree according to the height of claims and height of award amount.

12. Remedies taken

In many cases there were complaints filed and in some cases also revisions to the Supreme Court.

13. Current status of case

After a certain number of closed (won) cases the state (ministry of justice) in November 2011 offered the plaintiffs in still open cases a settlement. According to the previous Minister of Justice Aleš Zalar the state has made a reservation for about 14 millions € for compensations that would be paid till July 2012. This didn't happen and due to the difficult financial situation, there are no regular payments for the victims. The last payment was issued in January 2011. The lawyers did not yet go for juridical executions but they will do after summer.

14. Obstacles/Challenges generated in this case

Due to previous legal praxis in the case of Murska Sobota (mentioned in 11.e) there were no uncertainties on part of the claimants' regarding the their rights within the legal proceedings and there should not be any obstacles during the process. But it wasn't so. The general state prosecutor was trying to fight with all possible objections – mostly using the plea of statute of limitation. This was a matter of the revisions till the final decision of the Supreme Court (see 11.g).

If this case would be following the ELD regime rules, there would not be any compensation paid to individuals. Suppose an environmental NGO with status in public interest would have started the case – for example because the noise would endanger a protected animal species. It would first inform the Ministry of Agriculture and environment (then the Ministry for Environment and spatial

Planning) about the caused damage (change in at the species). The ministry would then gather information and order some measures to the “polluter”. But here the individual polluters (trucks) could not be involved – so the measures would be addressed to the responsible state body for roads. The measures would be determined regarding the circumstances of the situation and according to the Decree on types of measures for remediation of environmental damage²⁸.

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²⁸ Official gazette of the RS 55/2009