

Environmental Liability Regimes in Theory and Practice - Six countries, six approaches -

ELD News Edition Nr. 2

The association Justice and Environment (J&E) is a European network of environmental law organisations which was created in 2003 and was founded as non-profit association in 2004. J&E is striving to protect the environment, human health and nature by improving environmental legislation and enhancing the enforcement thereof.

Introduction

As already mentioned in the first Newsletter Edition¹ this year J&E conducted legal analyses focusing on applied liability systems in member states' practice to bring 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. To provide an overview on the national environmental liability practice J&E added case studies on environmental liability from six different member states. National environmental liability systems and cases in Austria, Estonia, Czech Republic, Hungary, Slovenia and Spain have been analyzed regarding amongst others competences, scope, liability regime, costs, access to justice, financial security systems and procedural guarantees. The outcomes of this work have been bundled in a comparative analysis on environmental liability which will be roughly presented in the current ELD Newsletter Edition.

J&E Environmental Liability Reports 2012

In general there is **no overarching environmental liability system** covering all environmental elements within the examined legal frameworks – three types of liability regimes have been detected:

- Public liability within sectoral environmental laws
- Civil liability
- Criminal liability

By assessing the different liability regimes a **broad variety of sectoral liability provisions** – still in force after the transposition of ELD into the national legal frameworks - have been discovered. These liability provisions can be mainly found in different acts each regulating different environmental elements, or dangerous activities having potential impact on environmental elements – e.g. air, water, forest, protected areas and species, waste, GMO, nuclear facilities. A significant characteristic of the national regimes is their

¹http://www.justiceandenvironment.org/files/file/2012/ELD%202012%20Newsletter%20I_Case%20Study_FIN_AL.pdf

fragmentation. In Spain and Slovenia the duty to repair environmental damages is established on constitutional level.

Amongst the analyzed systems **civil liability regimes** basically establish strict liability for the exercise of dangerous activities – being the manifestation of the principle that an operator of dangerous activities is to be held liable for the damage produced by his activities regardless of personal responsibility or fault. But very often the unlawfulness of the damaging event (basically application of permit defences) and the infringement of certain legally protected individual interests is precondition for the liability in these cases.

The **national administrative liability regimes are the ones closest to the ELD** framework. Some states already had Environmental Protection Acts (Hungary², Slovenia³ and Czech Republic⁴) containing liability provisions before ELD came up – those mostly in interaction with single administrative liability provisions within sectoral environmental laws. Spain once worked on a proposal for an Environmental Liability Act in 1999 which was not adopted in the end. Austria and Estonia did not have any concentrated environmental liability regime before ELD.

Single administrative liability provisions within sectoral environmental laws have not been revoked by transposition of ELD into the national legal framework. ELD was transposed mainly by a separate legislative Environmental Liability Act or by amendment of an already existing Environmental (Liability) Protection Act.

- ◆ In nearly all of the analyzed countries the national administrative liability regimes – although fragmented – **cover a much broader range of environmental elements** than ELD prescribes. The Czech Republic even disposes of an overall legal notion of environmental damage as *“any loss or weakening of the natural functions of ecosystems, caused by damage to their constituents or disruption of internal links and processes that are results of human activity”*⁵
- ◆ Also **severity thresholds seem to be rather low** – in lots of cases as we can see on Czech Republic’s example *“any loss”* or *“any weakening”* may constitute already environmental damage according to sectoral provisions.
- ◆ On the other hand preventive **and response measures do not seem to be the rule** within the national liability regimes – often attached to civil

² Act LIII of 1995 on environmental protection

³ Environmental protection act: RS 41/2004

⁴ Law on Environment (No. 17/1992 Coll.)

⁵ Czech Law on Environment

liability methodology the systems are reparation-oriented and if there exists a special civil mechanism only omission (injunctive reliefs) of dangerous/harmful activities may be required (cp. National Environmental Liability Reports: Slovenia, Austria, Spain⁶).

- ◆ None of the analyzed national liability regimes admits **public access to justice** – The regimes follow the general legal principles in civil law where legal standing is granted to those being affected in their legally protected interests.
- ◆ Furthermore **financial security systems** do not state the rule within national administrative liability systems. Some states provide for voluntary financial security systems and some for mandatory financial security systems for particular dangerous activities (e.g. nuclear activities). The lack of adequate financial security systems may lead to an acquittal of operators not prepared to have funds for prevention and remediation measures to be taken in case of an accident. On the other hand financial guarantees for the remediation of damage with respect to major accidents or catastrophes do exist on regional level (e.g. water fund – cp. National Environmental Liability Report 2012: Czech Republic⁷) – but mostly this funds are supplied by taxes which is not at all in line with and in support of the ‘polluter pays’ principle.

Conclusion:

Mainly the **broader scope and lower thresholds** of national administrative liability regimes fused with a **well-rehearsed administrative practice** might be the main reason for the **active application of this regime** – at least there is a sort of regime addressing environmental damages so liability is not just restricted to the ELD. Out of seven case studies we only managed to obtain one ELD case – this imposes the presumption that either there is **very little application of ELD** within the analysed countries or there is hardly **any knowledge/information about ELD application** in practice. Nevertheless the argument of the system’s non-application might be sustained by the fact that ELD has a very narrow scope in every direction compared to other environmental liability regimes. Therefore for the sake of the establishment of an effective and comprehensive environmental liability system in Europe an adequate adaption of ELD might be advisable.

⁶ <http://justiceandenvironment.org/files/file/2012/2012%20ELD%20legal%20analysis.pdf>

⁷ See J&E ELD Publications 2012: <http://justiceandenvironment.org/publications/eld-2012>