

Applied Liability on Water Damages – ELD vs. National administrative liability systems –

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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

Within its current Work Plan J&E conducted several studies and analysis on existing environmental liability systems within national legal practice. As part of these activities national case studies provided an interesting insight to the handling of water damage cases. In this Newsletter edition we would like to share the outcomes of part of our research and present an Estonian ELD case on water damages in comparison with an Austrian administrative liability case on water damages. The full version of the respective case studies will be available on J&E Web – Publications section¹ presumably in November 2012.

Liability on water damages in Estonia according to ELD

On 13th December 2010 a fuel truck (AS Olerex) transporting specially marked diesel fuel had a road accident in the Estonian *Harju* County – consequently about 6000 - 8000 liters of flown-out fuel produced imminent threats to surface and ground waters, including threats to human health. According to official records, this has been the biggest and most significant accident in Estonia where preventive and response actions according to the Estonian ELD regime have been implemented (although it is probably not the biggest accident where environmental damage has been caused). Remediation plans have been elaborated immediately by the polluter (AS Olerex). The Environmental board was able to order adequate remediation measures within two months after the accident. In spring 2011 (4 months after the accident) the water quality was sampled – no exceeding in existing pollution limits was detected at that time.

This is one of two cases in practice where environmental damage or threat of damage has been identified according to the Estonian Environmental Liability Act (ELA) – the Estonian ELD regime. The current case seems to have been handled in a timely and effective manner in mutual cooperation between the

¹ <http://www.justiceandenvironment.org/publications/eld>

polluter and the competent authorities. This shows that ELD regime is (very scarcely but) practically applicable and allows setting preventive and remedial measures in a timely manner.

Altogether, only nine environmental liability cases have been reported to be handled by the Environmental Board (although in Estonia ELA is in force since December 2007). It is to be assumed that there are either very few environmental damage cases falling under the environmental liability regime (and it is difficult to determine that environmental damage has actually occurred), or that the officials are just not sufficiently competent or equipped to apply ELA in practice even if it could be applicable. So on the one hand the environmental liability regime, if applied, could contribute to a better standard of damage prevention and remediation, but against the background of low numbers of cases it definitely is not working very efficiently for its purpose – to avoid or remedy environmental damage.

Liability on water damages in Austria according to the national administrative liability regime

Austria transposed ELD in 2009 by enacting one Federal Liability Act and nine Regional Liability Acts. As far as we know, these acts have not yet been applied in practice. Water damages are persistently (even after ELD transposition in 2009) assessed under the administrative environmental liability regime of the Austrian Water Management Act. Due to its practical significance in the past the here presented case falls under the scope of the Austrian Water Management Act, even though the incident happened before ELD entered into force.

During the renovation of a salesroom in October/November 2000 - in the Austrian region *Schärding* - a pipeline was damaged. In January 2001 a thereby produced leakage led to a discharge of about 5000 liters of heating oil extra light into the ground. This incident produced imminent threats to soil and groundwater.

The water authority imposed several informative, preventive and remedial measures to the objective polluter. These administrative orders have been repeatedly challenged by the latter – consequently safeguarding and remediation proceeded very slowly. This may be a considerable weakness in comparison with the Estonian case where ELD was applied and prevention and remediation rules are in place and applied in a timely manner. The Austrian Water Management Act lacks of detailed prevention, safeguard and remediation rules, one possible cause for long-standing processes. Furthermore (as a general remark) this liability system does not provide for public participation (“*one party*” procedure) – only the authority itself may initiate procedures – another reason why administrative actions may not been taken in time.

On the other hand the administrative liability according to the Water Management Act is stricter in comparison to the Austrian Environmental Liability Acts (ELD regime). Especially the scope of the Water Management Act regarding the concept of the polluter and the notion of damage is quite broad – therefore a broader range of water damages fall under this liability regime which is vividly applied in practice.

Conclusion:

Obviously a well established system handling environmental damages within the national states (sufficient organizational resources, clear task sharing, efficient use of existing resources etc.) would definitely improve the practical application of preventive and remediation measures once an environmental damage or catastrophe has taken place. Uniform procedures for the application of the Estonian ELA may not be established still and this circumstance probably reduces its practical application considerably. Furthermore the ELD notion of environmental damage is very limited impeding a broad practical application already out of dogmatic reasons. On the other hand the Austrian administrative liability system regarding water damages is applied broadly in practice – inhibiting the application of ELD regime due to several reasons. Nevertheless this system consists of major weaknesses regarding public participation and the procedural framework – both very important pillars of an effective environmental liability system. Most probably the merge of these two systems (ELD and national administrative liability) would lead to a more satisfying application of environmental liability throughout Europe.

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