

ELD Survey on thresholds and assessment of the notion of damage in seven EU Member States

- Comparison of Hungarian and Estonian significance thresholds in ELD and national environmental liability systems -

ELD News Edition 2013/2

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.

Survey on the notion of environmental damage

J&E has been studying the transposition of the Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (ELD) for three years. Continuing the last years' research, J&E deepened its knowledge, in particular in important focus areas, such as the thresholds and the notion of damage in environmental liability regimes and, studied the relation between the ELD regime and the national liability systems. These threshold surveys assess the notion of damage in seven EU Member States (Austria, Croatia, Estonia, Germany, Hungary, Romania and Spain) and will be published soon on J&E website.¹

The current newsletter aims to present the comparison of Hungarian and Estonian significance thresholds in ELD and national liability regimes.

ELD in the national legislations

The transposition of ELD was carried out in different ways in these Member States. Estonia transposed ELD by one act and, - in parallel with the ELD regime - the national environmental liability system defining other concrete criteria and consequences for causing different environmental damages according to laws on forestry, on nature protection or on water still exists.

When implementing ELD, Hungary has amended its already existing environmental protection Act, the relevant governmental decrees and new decrees have also been adopted. As result of these amendments, the main, general provisions of ELD melted in the national environmental protection act

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

and the detailed conditions, thresholds are mostly regulated on governmental level that decrees apply with respect to the environmental protection act.

Estonia adopted a separated act on environmental liability, and the thresholds of the definitions of different environmental damages covered by ELD can be found in this act, whilst in Hungary, the environmental protection act defines solely the general concept of environmental damage and the further, ELD-based damage-definitions and thresholds were stipulated in the governmental decrees.

Outcomes of the comparison

When comparing the thresholds defined in the ELD transposing national legislations there appear the following similarities and differences.

As regards the definition of damage to protected species and natural habitats both national legal systems' regulation covers broader range of species and habitats than ELD. The Estonian definition extends to the significant unfavourable effects on protected areas, which could also include species or habitats protected only by national law; and the wording of the Hungarian definition of damage to nature incorporates not only species and habitats, but also "areas" protected by the national legislation.

The concept of damage to water has been implemented in both national legislations taking the provisions of the Water Framework Directive into account as well. The Hungarian legislation defined damage to water as any direct or indirect, measurable, significant and adverse change in qualitative or quantitative status of the groundwater; or the direct/indirect, measurable, significant and adverse change in any service of the groundwater or of the surface water and also incorporated detailed qualitative and quantitative conditions for evaluating the significance of the change.

In the Estonian regulation the term "significant adverse effect" is further defined as an effect which impairs the status of a surface water body, coastal waters or groundwater body in such a way that the class of the status of a surface water body, coastal waters or groundwater body changes. The concept that water damage means change of the water class has been designed on basis of the Water Framework Directive. Therefore the concepts of damage to water are not more or less stringent than ELD.

The definitions and thresholds for land damage appear differently in the Estonian and the Hungarian legislation. The Estonian defines land damage according to ELD, the Hungarian however extends the definition of ELD when wording it as damage to geological media (as soil, bed sediment, rocks, including minerals in their natural or transitional form) that includes not only the significant risk of human health, but also the exceeding of pollution limit values set out by the separated piece of legislation as a result of the land contamination.

Relation between the ELD regime and the national liability regimes

As mentioned earlier, beside the ELD system, the Estonian national liability regime includes different liability provisions for damages to nature, to waters and to earth's crust- The determination of different damages are not bound to thresholds but rather to certain unlawful activities that result or may result in environmental damages. If the national liability rules apply, the person damaging the environment shall pay monetary compensation.

In comparison, as the Hungarian liability system is based on the administrative, civil and criminal liability for environmental damages, the transposition of ELD extended and therefore made the existing administrative liability more detailed. However, the existing administrative sanctions and legal consequences for causing environmental damages and for breaching the environmental laws are also in effect. In Hungary environmental fine can be imposed, the polluting activity can be suspended, limited or terminated in case of breaching the environmental regulations or the obligatory provisions of permissions.

The two countries regulated the relation between the ELD regime and national liability differently. The Estonian act transposing ELD regulates the relation between ELD-based and the national liability system expressing that in case of the polluter should pay compensation according to the national liability regime but the damage has been remedied on basis of the ELD transposing legislation, the monetary compensation under the national liability regime is no longer obligatory. These provisions thereby order the application of the principle of "lex specialis derogat legi generali" regarding to the national regime.

In Hungary the measures of ELD were incorporated into the rules already in effect, the prior sanctions and measures have been amended by ELD. According to the present regulation, the environmental fine and the other possible measures are applicable in case of environmental damages covered by the ELD as well. The regulation of environmental fine expressly states that it exempts nor from civil and criminal liability, nor from the suspension, limitation and termination of the activity neither from the obligation of remediation.

Consequently, in Hungary causing environmental damage by breaching the environmental regulation will result in imposed environmental fine, and/or in suspended, limited or terminated activity regardless of that the measures of the ELD regime are to apply.

By the comparison of the Estonian and the Hungarian regulation, the variety of thresholds as well as the different relations between the liability regimes based on ELD and on the national environmental regulation was illustrated, as the focal points of J&E's survey.