JUSTICE AND ENVIRONMENT
European Network of Environmental Law Organizations

Environmental Liability 2014
Between the Limits of Environmental Damage

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Justice and Environment (J&E) is a Network of European Environmental Law Organisations from 12 different countries aiming at a better legislation and implementation of environmental law on the national and EU level to protect the environment, people and nature.

Since 2007, the J&E network has been monitoring the implementation of the Environmental Liability Directive (ELD) with the aim to improve this valuable legal instrument, by doing comparative evaluations and raising awareness on its strengths and weaknesses.

With the Environmental Liability Directive (ELD), the EU seeks to contribute to a common framework for the prevention and remediation of water, soil and biodiversity damage (so-called environmental damage) to a reasonable cost for society. The negative environmental and financial impacts of environmental disasters such as the Aznalcollar Case in Spain[1] or soil contamination in Prostejov in the Czech Republic[2] could have been prevented if the ELD regime had been applied effectively or been applicable at that time. ELD enables the public as a watchdog to notify damages and advocates for an adequate financial security system which could prevent problems with the bearing of costs or even state liability in case of environmental damages.

In spite of the ELD's benefits current developments show certain reluctance on Member State level to fully engage with the idea of Environmental Liability as brought forward by the EU Directive:

1. Spanish Environmental Liability Law amended - progress or relaxation of previous rules?

by Ana BARREIRA, Director of the Spanish member of J&E, Instituto Internacional de Derecho y Medio Ambiente – IIDMA

Spain complied with its obligation to transpose the ELD in October 2007 only a few months after the transposition deadline. The Spanish Environmental Liability Act was welcomed by environmental NGOs but mistakenly considered a stricter instrument than the Directive prescribed since it required mandatory financial security (pertained a Ministerial Order, which was never passed!) for all activities listed in its Annex III. In January 2014, the government submitted a Bill to amend

[1] http://www.justiceandenvironment.org/_files/file/2012/2012%20ELD%20report%20Spain.pdf

[2] http://www.justiceandenvironment.org/_files/file/2012/2012%20ELD%20report%20Czech%20Republic.pdf

the Spanish Environmental Liability Act, which was recently approved by the Parliament and is now pending at the Senate House. The Bill actually introduces a mandatory financial security regime for Spain and widens the definition of environmental damage. It generated heated debate, main points of which are addressed below.

According to the Bill, financial security shall not be compulsory for those operators whose activities might cause an environmental damage for which remediation is assessed to cost less than 300,000 Euros and those operators, for whom remediation is assessed to cost between 300,000 and 2,000,000 Euros, if adherence to certain environmental certificates can be proven. Further, the use of phytosanitary products and biocides for agricultural and forestry purposes and other low-level risk activities are excluded from the mandatory financial security scheme.

The initial Spanish Environmental Liability Act provided for the adoption of a Ministerial Order which should introduce mandatory financial security for all Annex III operators. Now - 7 years after the adoption of the Environmental Liability Act - still no Ministerial Order was passed and thus no financial security to cover Environmental Liability was obligatory in Spain. The current Bill intends to introduce a mandatory financial security scheme only for those Annex III activities that exceed the above mentioned thresholds. The principle intention of the Environmental Liability Act was – although not implemented – more ambitious.

The Bill also intends to transpose Directive 2013/30/EU on the safety of offshore oil and gas operations, which amends the definition of water damage given in the ELD. It widens the scope of the law to damage to the environmental status of the marine waters as defined in the Marine Strategy Framework Directive (Directive 2008/56/EC), whereby a better protection to marine waters may be guaranteed.

In conclusion, we may say that the Environmental Liability Law has hardly been implemented in Spain and we have yet to see how effective it will be in the future. Ambitiousness seems to be a common feature of the EU environmental directives, unfortunately it becomes dissolved when they are to be applied, complied with and enforced.

2. Austria - Lack of practice and the case Kwizda

by Birgit SCHMIDHUBER, Environmental Lawyer from the Austrian member of J&E, ÖKOBÜRO – Alliance of the Environmental Movement

The application of the Austrian environmental liability regime leaves room for criticism. Damage cases that are treated under the Federal or one of nine Regional Liability Acts are non-existent. Rather, authorities seem to avoid the application of the environmental liability regime. An illustrative example is the remediation procedure on damage caused by the pharmaceutical and pesticide manufacturer Kwizda Agro GmbH. After an incident in 2010, a pesticide contamination of the groundwater - which is still ongoing - was caused by the company's activities in the area of the Lower Austrian city of Korneuburg. Samples taken in 2012 by Friends of the Earth Austria (GLOBAL 2000) revealed that the competent authority did not adequately ensure remediation of the groundwater (cp. https://www.global2000.at/wassertest-ergebnisse-korneuburg). As a reaction, GLOBAL 2000 requested the authority to take appropriate remediation measures according to the Austrian Environmental Liability Act and to involve the organization into the remediation proceedings.

After half a year the authority then decided – based on a not indicative expert opinion – that the damage caused by the company had occurred before the entry into force of the Austrian Environmental Liability Act and thus the environmental organization is neither entitled to file a request for action nor to participate in remediation proceedings. The whole damage remediation could have benefited from the application of the environmental liability regime and the participation of additional environmental experts. As authorities are historically used to have only a "one-party procedure" with respect to public liability cases, they seem rather reluctant to use instruments allowing for more inclusive and open proceedings. The case is still ongoing as the regional administrative court recently ruled that the expert opinion the authority based its decision on does not support the authorities' decision – assessment on the application of the environmental liability regime to this case has to be repeated.