THE ENVIRONMENTAL LIABILITY DIRECTIVE (ELD) IN HUNGARY

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1. Introduction

In the last couple of decades in Hungary there were numerous environmental catastrophes in connection with the polluter had enjoyed significant profit for long time, but when the catastrophe with serious and mostly irreversible damage took place they were not able or willing to avert, mitigate or recover it (amongst others the Metallochemia case, cyanide spill on the Tisza river, the Kolontár red sludge catastrophe, the Illatos street and the latest Kiskunhalas city hazardous waste deposit cases – see their short description in the Annex). Such cases, besides endangering the life and health of the dwellers of the territory directly concerned, mean grievous social injustice and unless we step up against them they carry the message to all the enterprises running similar dangerous activities that they can undertake bigger and bigger environmental risks, the burden will be borne by others. The most serious hindrance of preventing or effectively handling environmental disasters is that in many times there are no directly concerned persons, communities or municipalities, even there might be nobody who would know about them, for instance because the damages take place in the middle of a large forest or the perpetrators store hazardous waste barrels in a hidden place. The consequences become evident for everyone only after a certain time. In such cases we can say that the drinking water, soil and forests of our children and grandchildren are poisoned, our negligence and ignorance is on their account. Fortunately, in Hungary there are hundreds of local communities and civil organisations with environmental conscience and their number and effectiveness is growing. This information package about the Hungarian and European regulations and practice of environmental liability is written for them.
2.2. Domestic implementation of the Environmental Liability Directive (ELD)

Directive 2004/35/EC on Environmental Liability Directive (ELD) is targeting the very situation that while those who suffered and experienced direct harm because of an environmental catastrophe can use several, mostly civil law tools, there are not always directly concerned persons claiming their damages or if there are such persons, their access to justice would require a very complicated proving procedure and a mounting amount of money. Until ELD entered into force and were transposed into the national legal systems the cases that happened on „the land of nobody” belonged to the State and naturally burdened the general budget of the taxpayers. This situation was contrary to a line of basic principles of environmental law, first of all the polluter pays principle and the precautionary and prevention principles and also the principle of remedying environmental damages at the source. As follows we shortly survey the legal tools in Hungary that are available for handling environmental damages of community nature.

Hungary has implemented the Directive in an expanding way first of all in the Governmental Decree No. 90/2007. (IV. 26.) Korm. on the order of prevention and averting environmental damage: its material scope encompasses all the protected natural areas (except areas protected only by a local municipality ordinance) and it ensures an overall protection\(^1\), while in connection with waters the Hungarian law introduced amendments that go further in protection of underground and surface waters, as well\(^2\). The Hungarian rules are very detailed on the immediate measures and in general about management of the catastrophe situation – such activities are primarily the responsibility of the user of the environment (that is the phrase we use for those private or legal persons which run the activity that led to the pollution)\(^3\). A great advantage of this Governmental Decree that it encompasses those cases, too, when the pollution comes from abroad or the source of the pollution cannot be established and also when the user of the environment fails to move or makes improper measures – in all such cases the measures shall be taken by the relevant governmental bodies\(^4\). A disadvantage of the Hungarian regulation, however, that in spite of a detailed and very progressive set of general regulations, the details of the financial background of such measures are poorly regulated, therefore in the practice there is quite frequently no or not satisfying solution for the catastrophe situations\(^5\).

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\(^1\)See 90/2007 Art. 1. Points c)-g) (Annex).
\(^4\)See 90/2007 Art. 3(1)-(3)
\(^5\)Decree 90/2007 Art. 4(1)-(2) stipulates that the damages shall be paid from the sources of the environmental and water management authorities. However, in the practice, these resources are extremely narrow. There is a legal possibility to make the responsible user of the environment pay in accordance of Art. 20, but in the practice the polluter is either not able or not willing to pay.
3. Legal tools apart from ELD and their coexistence with ELD

Naturally in Hungary there were administrative legal tools before ELD that could be used to handle cases with serious pollution or endangering of surface and underground waters, soil and nature with which the environmental authorities could start procedures against the polluter and oblige him to initiate the proper activities. These legal tools were maintained even after introducing ELD into the Hungarian legal system and can be used parallel, however, the new rules in connection with ELD are much more detailed. The legislator strives to decrease the parallelly and harmonize these old and new tools by inserting ELD rules into the old existing laws and also create cross-references in the relevant laws. New laws emerged, too, that implement ELD exclusively (all these laws can be found in the Annex).

In an even broader circle, there are legal possibilities for the persons that suffered direct harm because of environmental endangerment or environmental damages, according to the relevant rules of civil law, including not only the claims for actual damage, but also claims to ban by the court any serious and directly endangering activities. Furthermore, in the most grievous instances criminal law claims of the State are available, too, under the titles of crime of harming the environment and crime harming nature. Environmental protection civil organisations and local communities can accompany to the environmental civil law cases as plaintiffs and as amicus curae, too, supporting the decision-making procedure with expert opinions, witness statements and with other factual data. In the criminal cases the members and organisations of the civil society can take part as complainants, that position entails with certain procedural rights, such as sending a complaint to a higher level police department or to the relevant State prosecutors’ office in case the police fails to examine the case. The civil and criminal legal aspects, however, fall outside the frames of the present information summary.

In other to make our legal survey relatively full, we mention the relevant provisions of our Constitution, such as rights to life, health, healthy environment and even the protection of the interests of the future generations. Naturally, such a strong constitutional support has not only a symbolic value, the provisions of the Constitution, together with the two and a half decades long practice of the Hungarian Constitutional Court have decisive roles in interpretation and implementation of the all relevant lower level Acts and Decrees.

6Actually, Hungary’s new constitution was accepted in 2011, hence the modern phrases and content.
Contrary to the relatively narrower circle of persons to issue a request for action in the ELD, the Hungarian ELD Governmental Decree opens the possibility to anybody to report to the authorities about an environmental hazard or damage situation. In the same time the legal position of the complainant under the Hungarian law is weaker than that of under the ELD. The text of the Governmental Decree carries the message that the basic source of information in ELD cases is the surveillance service of the environmental, water management authorities and national parks, rather than the public. Besides, the first two mentioned authorities have information centres that receive reports in principle day and night. The phrase “reporting”, however, makes obvious that the Hungarian law-makers did not wish to give to broad rights of public participation in the identification, clarification, clean up etc. procedures. As a balance to this situation, the European rules are detailed and concrete enough for their direct application, so it is expectable that the authorities inform the complainants about the measures they took or failed to take. An already existing tool on public complaints and also the Hungarian and European implementation rules of the Aarhus Convention on public participation in environmental decision-making might also be used when claiming access to information, having a say and access to justice in such procedures. Furthermore, the Hungarian Environmental Code can be referred to, which ensures standing for the environmental civic

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7 See 90/2007 Art. 15(1). Interestingly Decree 220/2004 Art. 36(4) point b) determines more serious amounts of fines against the polluter when he fails to announce the emergency situation but it gets into the knowledge of the authority by a third person.

8 Decree 219/2004 is even more reserved, it fails to mention the complaint at all, it refrains itself only to the phrase „information that got into the possession of the authority” in Art 19(2), similarly to Decree 220/2004 in its Art.39/A(1).

9 See Art. 12 (4) of the Directive.
organisations in all environmental administrative cases both in the cases when they initiated the procedure or when someone else did it so\textsuperscript{10}. However, the conditions of this procedural position of standing were contested by the majority of the authorities, that induced the Supreme Court of Hungary to issue a mandatory decision (a so called legal unity decision) on that question\textsuperscript{11}. According to this decision all the administrative cases count to be environmental where the environmental authorities play either a decisive or a contributing authority position in the procedure – the ELD matters undoubtedly belong under this category. Whenever the standing of an environmental NGO is acknowledged it can take part in all the stages of the damage elimination procedure, starting from fact finding (revealing and detailed phases) through the management and measures up to the monitoring stage\textsuperscript{12}. In all these stages the operators are obliged to issue numerous data, plans and reports and there are formal decisions brought in all the stages and phases, where the general administrative procedural rules and the specific public participation rules prevail, therefore the NGOs can actively participate and use legal remedies if necessary.

Insofar a civic organisation does not wish or is not able to invest energy and resources more than a simple reporting about the perceived problem, they should leave indeed the whole procedure to the authorities and the other participants. A report can be issued either at the environmental authorities or at the water management authorities, while in nature protection issues these authorities involve the relevant National Parks, the fishery and forestry authorities, too. All of these authorities are bound to examine the report immediately on the scene. Although it is not mandatory under the Hungarian law, it seems to be reasonable to attach to the report as many data and evidences as possible. No specific format is prescribed for the reports and no fees or other expenses shall be paid. However, taking into consideration of the vague legal position of the complainant, there are no clear rules of reimbursement of the expenses of the complainant either.

Insofar the complaint is not followed by proper measures by the authorities, the complainant has the right for appealing or starting a court procedure according to Article 13 of the Directive, in harmony with the aforementioned European and domestic rules.

\textsuperscript{10}See Art. 98(1) of the Environmental Code in the Annex.
\textsuperscript{11}Legal Unity Decision of the Hungarian Supreme Court No. at 4/2010 http://www.lb.hu/hu/joghat/42010-szamu-kjehatarozat
\textsuperscript{12}See the relevant chapters of 219/2004 and 220/2004 in the Annex.
\textsuperscript{13}See 90/2007 Art. 15(5).
5. In such cases and at which authorities is worth to initiate environmental damage prevention cases?

The ELD Governmental Decree determines the triggering factors for the measures of the authorities by the terms “endangerment of environment” and “damaging of the environment”. These terms are defined by the definition section of the relevant Governmental Decrees on the details of ELD procedures in the case of a) surface waters b) underground waters and c) nature (see. Decrees No. 219/2004, 220/2004 and 91/2009 respectively), in harmony with the definition section of the Environmental Code (see all these laws in the Annex). The definition elements are the following: measurable, significant negative changes/risk of changes in the elements of environment, as well as measurable, significant decrease in the ecological services. The mentioned Governmental Decrees give a much more detailed description of the terms, especially the nature protection Decree, with breaking down the term to species, habitats, national level protected zones and Natura 2000 territories where the elements of the definition are: the width of the concerned territories, number and role of the concerned species and habitats in the given ecosystem, regenerative capacities thereof and role in larger ecological networks.

An environmental NGO is not entitled to take measures directly in order to prevent an environmental danger situation or remedy an environmental damage situation, unless it is obvious that any delay would entail with irreversible damages. The NGO however can offer its assistance to the environmental and water management authority and can support their work with photos, films or samples taken according to the proper standards (otherwise their proving force is much smaller) or with other data. Such contribution of an NGO might be really valuable in the later phases of the procedure in order to avoid unnecessary professional and legal disputes. As it was hinted earlier, however, reimbursement of the expenses of the complainants is not ensured by the relevant laws, so the measures of the NGOs should be economical. Instead of expensive surveys or expert opinions in a given case the opinion of the own experts of the NGO or a short, preliminary opinion of other experts might be enough. Even if collection of evidences is the responsibility of the authorities, the NGOs could better underpin their complaints with their own data and also they can use these data in remedy procedures or in procedures at other bodies such as the public prosecutors or ombudsmen. In complicated cases such as diffuse pollution or when there are abandoned old polluted sites, such independent, parallel evidences collected by the NGOs might turn out to be especially useful, even decisive.

While the major route of handling environmental damages and dangers is a complaint to the mentioned administrative bodies, other organisations might play an important role in ensuring proper management of the situation. Seeking the contribution of the public prosecutors’ offices might be especially appropriate in situations where a suspect of more grievous acts (for instance abuses and mishandling hazardous waste or dangerous materials) emerge and a criminal case might seem necessary. On the other hand cases of large volume, with recurrent patterns might be best handled by the relevant ombudspersons who are in the position to initiate the appropriate planning or legislative responses.

\[14\] Naturally, NGOs do not refrain themselves exclusively on individual cases. They might be interested in general decision-making procedures such as the National Environmental Damage prevention Program (Országos Környezeti Kármegelőzési Program in 119/2004 Art. 20).
6. The legal position of the user of the environment (polluter) in the ELD cases

It seems to be natural that an NGO that experiences a serious environmental damage or danger situation will primarily ask for the measures of a professional administrative body that has the proper equipment and experience to handle the case effectively. No wonder that even ELD does not contain provisions that enable an NGO to turn directly against the persons or companies that pollute or endanger the environment. Contrary to all of these the Hungarian Environmental Code in principle makes this possible. An NGO can sue the polluter and ask the court to oblige him to take preventive and/or management measures\(^{15}\). As an alternative that might occur in the practice more frequently is that the NGO wishes to help those local people that suffered material harm directly because of the pollution (these typically civil law cases will not be discussed in details within the frames of the present paper). A further strategic solution could be that the NGO keeps collecting data and evidences, consider the level of responsibility of the concerned users of environment and strives to take part in the said administrative procedures or legal remedies. Taking all of these into consideration it seems to be necessary to survey shortly the legal position of the user of the environment that is responsible for the pollution or endangerment.

Under the ELD the user or the environment shall face with strict liability that is closely related to the liability in the civil law. This approach is called „responsibility of dangerous facilities” in the Hungarian civil law, according to which the person shall be liable notwithstanding with his will or negligence. However, the Hungarian administrative law do not use this concept expressis verbis, while the exemptions under responsibility are very narrow, indeed. Not all undefendable reasons (vis maior) are viable defences for the perpetrator, only armed conflicts and natural disasters. Furthermore the state of art defence and the authority permit defence are not generally used in the Hungarian environmental administrative law\(^{16}\). According to the Hungarian Environmental Act the owner of a

\(^{15}\text{See Article 99(1)-(2) of the Environmental Code (Ktvv).}\)

\(^{16}\text{Unless the decision of the authority obliging (i.e. not permitting!) the user of the environment to the very activity that directly led to the damage – see Ktv Art. 102/A(2).}\)
polluted land shall be responsible even if the pollution was caused by any earlier owners or users unless he proves beyond reasonable doubt that one of these persons was concretely responsible. In the cases of multiple causers their responsibility should be joint and several (i.e. anyone of them can be claimed to pay the whole amount and the causers shall later divide the payment amongst themselves). However, Hungarian environmental law is not unambiguous in this respect, avoiding a longer legal argumentation we have to sum that in effect joint and several responsibility is rather a vague exemption than a rule in the environmental liability cases in our country. On the other hand, that is an exceptionally progressive rule that the circle of owners or shareholders and even managers can be obliged to contribute to the expenses in cases when it seems to be plausible that the perpetrator firm has not acted independently but rather as a cover organisation of the owners or shareholders or the harm was a result of a reckless, ignorant behaviour of the managers.

Legal guarantees are built into the Hungarian law, too, for the cases when the responsible persons try to hide their resources from under the responsibility: either the environmental authorities can order a ban on alienation or burdening of their real estates and/or they can establish a mortgage right on their movables.

Finally, the financial background of the users of the environment that run dangerous activities is decisive in elimination or mitigation of a future environmental danger or damage situation. For the civil organisations and persons that are ready to act against such dangers or damages the most important question is if the given user of the environment has a proper insurance contract. In Hungary, unfortunately, there are few insurance packages available at the time being that are tailored to environmental damage responsibility or more closely to ELD cases. Also it is vital in this aspect if the responsible company had an earmarked financial reserve or bond for the occasion of an environmental emergency happened at their facilities. Such security measures are prescribed in the Environmental Code in general. However, detailed, implementing regulations hasn’t been issued in the last 25 years. This situation is untenable, it means a serious threat on the environmental situation in Hungary, taking into consideration the very limited budgetary sources of the relevant administrative bodies.

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17 See Ktv Art. 102(1)-(3).
18 The Governmental Decree No. 119/2004 in its Art. 31(6) mentions that joint and several liability shall take place in case of multiple polluters, but it further refers to the Environmental Code, Art. 102 as the source of this provision. In our opinion this reference is faulty, because the Environmental Code fails to regulate joint and several responsibility of this kind.
19 See Ktv Art. 102 (4)-(6).
20 See Ktv Art. 102/B.
21 See Ktv Art. 101. We mention that the legal institutions of the earmarked fund and bond for environmental emergencies are handled as „existing” by a line of other laws, too, such as several mining and waste management regulations. Moreover the Act on book-keeping determines their places and methodology in he files at a company (Act C of 2000 Art. 41(1) and 94(3)) – yet, they are non-existent in effect.
The Kolontár red sludge catastrophe
On 4th of October, 2010 the dam of a red sludge reservoir of 400×600m of the Hungarian Aluminium Ltd. Company (MAL Magyar Alumínium Termelő és Kereskedelmi Zrt.) between Ajka city and downstream village Kolontár. The more than one million m3 red sludge flooded the lower lying parts of the surrounding villages, causing serious damages of economic and ecological nature by its strongly alkali solvent in approximately 40 km2. 10 people died and more than 150 suffered bodily harm. The soil, habitats and the whole Torna creek living species were destroyed just as in the river following the creek, called Marcal. The responsible company was sued for damages where the court has established its responsibility. In addition to that the Central-Trans Danube Environmental, Nature Protection and Water Management Inspectorate has fined MAL in 135,14 billion HUF (540 million Euro) fine because of infringing waste management rules. A criminal case was started against the managers of MAL at the Veszprém County Court for causing negligent public danger that entailed with death as well as the crimes of damaging environment, nature and infringing the order of waste management in connection with 15 defendants – all of them were found not guilty, because the experts the court has heard could not establish a solid causational link between any failures or mismanagement of the defendants and the catastrophe. The prosecutor has appealed the decision, the final verdict is to come yet.

Chemical spill at Illatos street, Budapest
One of the oldest chemical factory of Hungary was established in 1876 on the Illatos street and numerous kinds of chemical basic materials were handled and produced there, inter alia chlorinated and fluorinated hydrocarbons and hydrochloric acid. In 2008 a bankruptcy
procedure started against the legal successor of the earlier firms, the Budapest Chemical Ltd.. Although in the last decade the company and the State has performed operations to clean underground water, they failed to eliminate the source of pollution. The irregular way of storage and handling of the hazardous wastes and the effect of precipitation and other factors resulted in serious pollution of the soil and underground water. More than half of the barrels were damaged, corrosion resulted in leakages, their content spilled on the ground. The liquidator aimed to cover the expenses of recultivation from the income ensuing from selling the polluted real estate, while the transaction has failed several times. He should have formed the conditions of the announcements of selling the contaminated land that only such companies could apply that were able to clean up the facility in harmony with the legal requirements and in possession of the necessary financial tools and expertise.

The green authority, based on an opinion of an expert company (Elgoscar-2000 Ltd.) has established that there are 1300 ton hazardous and 1500 ton non-hazardous wastes that far exceed the amount expected as a target state according to the damage elimination plan. In the last couple of years the case has got an enormously great media coverage and several local and national political forces lobbied for solution, too. As a result of all of these efforts in 2016 the authorities transported the majority of waste (2283 ton) from the facility and they promised to start to clean up the contaminated soil and underground water, too.
10. Annexes

I. Access information for complaint announcement

National Water Management Chief Directorate (Országos Vízügyi Főigazgatóság) green number of the central duty: 06-80-204-240
Announcement of complaints at a day and night duty at the National Environmental and Nature Protection Chief Inspectorate: +36 30 465 0224
List of successors of the former territorial environmental inspectorates:

II. Available literature from the last couple of years

Csák, Csilla: A typology of environmental damages - Miskolc Law Review (Miskolci Jogi Szemle);
Kecskés, Gábor: Responsibility for environmental damages int he international law – University István Széchenyi, dissertation (Széchenyi István Egyetem, doktori értekezés), especially chapters 5.3 and 5.4;
Csapó, Orsolya: Borders of the environmental responsibility – University Péter Pézmány, dissertation (Pézmány Péter Egyetem, doktori értekezés), especially chapters 5.2 and 5.3;
Kisfaludi, András: Legal responsibility of the management of a legal personality under the new Civil Code – Memory Tome of prof. Lábady (Lábady Emlékkötet), especially chapters 1, 3 and 4;
Julesz, Máté: Developments int he field of environmental insurance and environmental security payment – the homepage of www.insurance.hu (Biztosítás.hu).

III. NGOs dealing with the issues of environmental liability

Apart from Environmental Management and Law Association (EMLA) several other NGOs have accumulated considerable experiences int he field of revealing and realising environmental damages int he last couple of decades. The Reflex Environmental Association of Győr city, the Humus Alliance and the Greenpeace Hungary might be the most significant ones amongst them.