



A Message to Our NGOs

Environmental Liability

Toolkit Summary

Justice and Environment 2017

a Udolní 33, 602 00, Brno, CZ
t 36 1 3228462
fb /justiceandenvironment

e info@justiceandenvironment.org
w www.justiceandenvironment.org
tw JustEnviNet

A Message to Our NGOs

Environmental Liability

Toolkit Summary

A summary of the national level tool-kits put together by public interest environmental lawyers of Justice and Environment

Introduction

Since 2011 J&E has dealt with various theoretical and practical aspects of the Environmental Liability Directive. One common element of these comparative studies, case studies, concept notes, newsletters etc. is that the effective and efficacious implementation of ELD has not yet achieved. Conceptual, terminology disagreements, lack of preparedness of the competent authorities, insufficient financial guarantees and many other factors of the unsuccessful implementation were raised by J&E lawyers, in harmony with the outcomes of large international studies commissioned by DG Environment, almost in every years after ELD entered into force and in accordance with the respective literature, too.

One of the recurrent statements in the official documents of the European Commission is that there is a lack of satisfying amount of information concerning actual implementation of ELD in the Member States. This lack of information naturally cannot be supposed to be a result of schemes an evil force that hides away the implementation from the decision-makers on purpose. The lack of proper information about ELD procedures is because there are only a few ELD procedures have started in the majority of the countries, while the existing little data might be misleading, mainly because other administrative procedures that address prevention and remedying environmental damages are categorized as ELD cases by a typical statistical mistake.

If the authorities fail to use the ELD tool, from whom we can expect to initiate such administrative cases? Local communities and environmental NGOs have a key role in ensuring the survival or rather resuscitation of the Directive in the actual practice of the European Union. The „only“ problem is that the ELD procedures have numerous legal and professional ramifications, and what is so complicated is certainly quite resource intensive, too. A toolkit that introduces and guides the civil sector into the world of actual and successful implementation of ELD might mean significant help in this situation. How have we done this, what kind of messages we tried to carry to this audience? Our main messages in five countries could be grouped as follows.

1. Positioning ELD on the map of several kinds of liabilities

Probably the first thing to clarify is that not all liability cases are ELD ones. It is obvious that the criminal and civil liabilities serve different purposes, but there are different regimes within administrative law and administrative environmental law, too. In the majority of the cases the old and new environmental administrative liability regimes are used parallel or kind of competing with each other. For the environmental NGOs and local communities it is important to be aware in which is which and which can be used for what purposes.

- In a 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 seriously and directly endangering activities. 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. (HU)

- Environmental liability does not resemble civil liability, in which individuals claim compensation for damages ELD does not protect legal interests of individuals (i.e. property damages, financial losses etc.). (AT) (SK)

- The ELD therefore regulates the liability of operators of certain activities for damages caused by their activities on the environment, this is reflected in the environmental liability regime as strict liability, but all other economic activities are subject to environmental liability in case of negligence or intention. (SP)

- ELD is not always transposed into national laws organically, while in the practice the authorities rather inclined to use the old, pre-existing environmental liability tools – not last because they might contain less public participation elements (see the sample case in the Austrian tool-kit). (AT)

- The law on prevention of environmental damage and its remedy (PED) considers environmental damage in broader sense than ELD but on the other hand it does not regulate public access to justice. (CZ)

- PED has been in force since August 2008. However, to date CEI has never once initiated any proceedings pursuant to ELD nor PED and never has it imposed preventive nor remedial measures on operators. In practice, the piece of legislation is not being used at all. (CZ)

- In general, in Spain until now the competent bodies of the Administration at the National and Autonomous Communities levels apply primarily the penalty system established in sectorial laws, and only in a few cases the environmental liability regime has been applied. In those cases, the administrative action took place once the damage had been caused. Therefore, the preventive focus of the environmental liability regime has been underused. (SP)

- The legislator strives to eliminate the parallelty and harmonize the 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. (HU)

- In the most grievous instances the criminal law claims of the State are available, too, under the titles of crime of harming the environment and crime harming nature. 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.

2. The polluter pays principle at the heart of ELD, other principles and constitutional provisions

Even if the J&E toolkit is aimed to be a practical guide, attention should be spent on such theoretical and legalistic issues as the basic principles of environmental law. There are several vague points in the regulations and implementation of ELD, their correct interpretation is greatly supported by keeping in mind the principles of environmental law. In addition to that, in a broader scope some constitutional rights and concepts might also mean a great help in interpreting the detailed liability rules properly.

- The liability comes into effect in a way that the operator has to carry out prevention and remediation measures and has to bear the respective costs (AT)

- Aligning to the principles of precaution, prevention and rectifying environmental damage primarily at source, ELD created the legal frame for identifying environmental damage caused by industry and production activities (CZ) (SK) (SP)

- The law on prevention of environmental damage and its remedy (PED) is based on the constitutional principle of the right on healthy environment enacted in Art. 35 of Charter of Fundamental Rights and Freedoms (CZ)

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

3. Definitions

An other overly legalistic issue is definitions, an issue frequently overlooked by laymen users of laws – in the case of ELD the definitions have an especially important role, for instance a common understanding of the terms danger or environmental damage would clearly determine the material scope of implementation of the Directive and the national level equivalents.

a. Imminent Environmental Threat

Imminent environmental threat refers to a situation where it is strongly probable that in near future an environmental damage will occur. (SK)

b. Environmental damage

- According to the national legislation damage is understood as significant adverse or chemical effect on water, land and protected species and habitats of European importance. There are three types of damages:

i. damage on protected species and habitats which has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats and species with exception of previously identified adverse effects which were consequence of authorised operator's actions

ii. damage on water which has significant adverse effects on ecological, chemical and quantitative status or ecological potential of waters with exception of adverse effects stipulated in specific act

iii. damage on land which refers to any contamination of the land that creates a significant risk on human health being adversely affected as result of direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms. (SK)

- 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 to species, habitats, national level protected zones and Natura 2000 territories where the elements 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.

4. The constraints of using ELD in harmony with its scope of time and material scope

We have to underline that the major shortcoming of laymen application of such complex legal systems as environmental law is the narrow vision of certain (favourable looking) substantial laws, while forgetting about the limitation in time and the circle of subjects these substantive provisions can be used.

- Environmental liability is not applicable in certain cases, namely in the following:
 - damage which has occurred prior to 2007 (e.g. Inherited contaminated sites = old landfills and industrial sites having caused damage to land and groundwater bodies), unless the damage occurs continuously even after 2007
 - Oil pollution at sea, the transport of dangerous goods, nuclear activities (e.g. Operating a nuclear power plant), etc., which are governed by international agreements (see Appendix IV and V of the Environmental Liability Directive) (AT)

5. The liable person

In reaching the socially desirable purposes of ELD there should be proper legal guarantees for finding the liable persons who are actually the closest to the environmental danger or damage both in social-economic-financial and in environmental-administrative legal terms. Defences might prevent the NGOs or communities from legal side to find the proper person who can be actually liable for the preventive or remedial actions. Lack of financial securities, on the other hand, can prevent the successful prevention or remedy from material side.

- The operator liable for state of environment pursuant to ELD is any natural or legal, private or public person who operates or controls the occupational activity, which means any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character (CZ)
- Natural or legal person – entrepreneur who operates or controls occupational activity or person who has decisive economic competences over technical exploitation of such activity, including the permit or license holder for such activity, person registered for such activity or person performing such activity on the basis of a notification. (SK)
- In case the damage has already occurred the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services. (SK)
- In certain countries the liability without any fault or negligence might occur when only preventive measures are required. (SP)
- Exception of the liability regime is when vis major steps in – such as extreme weather conditions or armed conflicts. (CZ)
- Natural phenomenon of exceptional, inevitable and irresistible character; armed conflict, civil war or insurrection; and activities for national security and defence. (SP)
- The operator’s financial responsibility may be also indirect when competent authority acted, itself or through a specialised undertaking, in the place of the liable operator, that authority shall recover the costs it has incurred from the operator. (SK)
- Decree implementing ELD 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 with the decree, but in the practice the polluter is either not able or not willing to pay. (HU)
- Under the ELD the user or the environment shall face with strict liability that is closely related to the approach in the civil law, the approach called „responsibility of dangerous facilities” in the Hungarian 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. Not all unpreventable reasons (vis maior) are viable defences for the perpetrator, only armed conflicts and natural disasters. The state of art defence and the authority permit defence are not generally used. (HU)
- According to the Environmental Act the owner of a 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 responsible. (HU)
- In the cases of multiple causers their responsibility shall 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). It 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 by the

environmental authorities ordering a ban on alienation or burdening of their real estates or establishing mortgage right on their movables, too. (HU)

6. Citizens' and NGOs' request for action according to ELD

Naturally, the most elaborated part of the national tool-kits is about the conditions and ways of public participation. Within the system of ELD public participation starts with a special procedural step from the members and associations of the public that is called „request for action“. In most of the European laws there is a difference between request or observation. The latter seems to be a simple communication of a fact to the authority and thereafter it is up to the authority how it handles this information. Observation usually does not entail with special procedural rights and responsibilities for the members of the public. However, the general rights to participate under the Aarhus Convention and its implementing rules seem to be relevant in such cases, too.

The most important elements of the request for action are the following ones:

a. What is the request for action?

- A request for action is a compelling motion from the civil side in case of an environmental emergency that makes the competent authority obliged to act. (AT)

b. When can you file a request for action?

- If you base your action directly on ELD the activity in question shall be on the list of Annex III of ELD or otherwise should be a negligent or purposeful action. (AT)

- The danger or damage shall be significant: there is no ready answer to all cases, but when they affect human health, they have to be significant, while if they threaten with or cause less changes than natural fluctuations they will not be considered significant. (AT)

c. Who can file a request for action?

The exact circle of persons differ from country to country

- Concerned people, recognised environmental NGOs and environmental ombudspersons, as well as in case of biodiversity damage any person. (AT)

Incentive for the authority to initiate the proceeding can be submitted by anyone who has information on possible existence of environmental damage or on the treatment of it. It is however not totally identical with a request of which can be submitted by natural or legal person affected or likely affected by environmental damage. Environmental NGOs belong to this group. (CZ)

- Owner, administrator or tenant of the property which is or is likely to be affected by the environmental damage, natural or legal persons affected or likely to be affected by environmental damage, or having a sufficient interest, or whose rights have been impaired, NGOs have right to inform the competent authority about facts suggesting that an environmental damage has occurred or may occur. (SK)

- Civil association or other organization which objective according to the statutes, foundation charter, memorandum of association or foundation document or their amendments in force for at least one year in the environmental protection can file such notification on the occurrence of environmental damage or its threat as well. (SK)

Any non-profit organization which fulfil the following requirements:

- General or concrete interest on environmental protection provided in their by-laws.
- At least constituted for 2 years before the request of action and have been defending environmental interests during that period.
- The imminent risk or the environmental damage must affect the territorial scope of activity of the organization set by Statutes (SP)

d. Where and how do you file a request for action?

As concerns the loci of submitting the request the national toolkits give a list of the competent authorities with contact information. The format is discussed below:

- The request usually shall be submitted in writing, but email and fax is generally accepted – when general procedural laws allow verbal motions, they can be applied in the ELD cases, too, however, the technical nature of such cases makes written form advisable even in these cases.

(AT)

- There are no special conditions about the form or content for the request for action, however, it seems to be advisable to equip the request with all the evidences the requester could collect and the documents that bolster their rights to submit the request where applicable. It is important to note, however, that it is not upon the applicant to demonstrate beyond doubt, that environmental damage has been caused. This is the task of the environmental authority. (AT)

- The request does not have to identify the polluter, however it is convenient to suggest the origin of environmental damage where there is a likelihood that the polluter is a concrete operator. The fact that polluter is not known is by no means an obstacle to filing a request or an incentive. (CZ)

- The ELD does not set any formal requirements for the request – there is no obligatory form to fill nor it has to be submitted in writing (while it is likely the usual way to submit a written request). ELD only prescribes the request to contain relevant information and data supporting the observations submitted regarding the environmental damage. (CZ)

- Notification is to be filed in written form and shall mainly contain:

- Name of the operator whose activity caused the environmental damage
- Localisation of the environmental damage
- Description of the facts
- Evidence of described facts contained in the notification
- Name, surname and permanent residence of applicant, if he/she is natural person.
- Name and seat of the applicant and name and surname of applicants, who are statutory representatives of the applicant which is legal entity (SK)

- The request for action must be written and it has to specify the damages or the imminent risks to the environment. When possible, it has to specify other aspects as:

- The action or inaction of the suspected operator.
- Identification of the polluter.
- The date when the action occurred.
- The place where the damage/risk was occasioned.
- The causal link between the action/inaction and the damage (SP)

- 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. (HU)

- e. Which rights and options does a request for action confer to the applicant?
- The applicant in several countries has legal standing in the administrative remediation procedure. (AT)
 - In other countries the applicant has only participatory rights that are, however very close to standing because ELD ensures that the requester shall be able to submit any evidences, request the authority to take actions, be informed about the measures and decisions and can complaint against these motions if dissatisfied with them. (AT)
 - So applicants who file notification will acquire legal standing in the administrative procedure. In this sense civil association or other environmental organization which file a notification shall also notify its interest to be party to proceeding within seven days from day it received notification from competent authority confirming the threat or occurrence of the environmental damage. (SK)
 - Contrary to the relatively narrower circle of ELD the national 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 this 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. (HU)
 - The phrase “reporting” makes obvious that the national law-makers did not wish to give to broad rights of interfering with the identification, clarification, clean up etc. procedures. However, 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.

7. How long do the proceedings last?

The time dimensions of the ELD procedures are very important – these procedures are about imminent threat of or actual environmental emergency situations. On the other hand, revealing the complicated causal procedures might consume considerable time in the procedures.

- While the authority shall take measures within the shortest possible time the procedures cannot be closed until all necessary remediation measures have been taken. This may even take several years (AT).
- ELD does not set particular timeframe for the competent authority to deal with the observation, but it does oblige the competent authority to as soon as possible inform the persons who submitted observations to the authority of the decision to accede or to refuse the request for action and shall oblige the reasons for it. (CZ)
- The competent authority is obliged to inform the person who submitted the observation within 10 days since receiving the observation about whether the proceedings would be initiated or whether no reasons were found for starting the proceedings (SP)
- 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 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, fishery and forestry authorities, too. All of these authorities are bound to examine the report immediately on the scene. (HU)

8. Costbearing

In the ELD procedures the following expenses might emerge:

- Own expenses of the requester (including submission fees to the authorities) – usually the parties bear their costs. Therefore the requester shall be careful when hiring private experts, their fee could be really high (AT, HU)
- Usually there is no loser pays principle in ELD cases, i.e. the requester shall not pay the other parties costs even if the request is rejected
- In some countries the authorities can impose incurred cash expenses to the parties above the submission fees (AT).
- There is no cost to submitting neither incentive nor request and the submitter does not bear costs of the potential administrative procedure. If, however, the observation is supported by e.g. expert opinion or data, these costs are covered by the submitter (CZ)
- There is no cost for submitting neither request nor observations and the submitter does not bear costs of the potential administrative procedure. If, however, the observation is supported by e.g. expert opinion or data, these costs are covered by the submitter. (SP)
- No fees or other expenses shall be paid in the national ELD procedure. 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. (HU)

9. Legal remedies

When speaking about legal remedies, apart from ELD the Aarhus Convention (Art. 9) and its implementing rules on European and national level should be taken into consideration, too. Remedies are usually ensured on administrative and court level, as well. Exhaustion of the first might be a condition of the second.

- If the competent authority does not impose any preventive or remedial measures, even though they should have been imposed, participants have the right to appeal against such decision and subsequently file an administrative action against the decision. (CZ)
- 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. (HU)
- 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. 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. (HU)

10. Information system on prevention and remediation of environmental damages

We have seen in several countries that the environmental and related authorities would rather consider the environmental emergency cases as an internal administrative matter. This is why publicly available registers on ELD cases have such a significance.

- The Agency for the Environment established and has administered the Information system on prevention and remediation of environmental damages (hereinafter “Information system”). This website is supposed to gather and distribute information related to environmental damages, mainly the date and place of their occurrence, extent of the damage, responsible operator, adopted measures and financial costs and eventually judicial proceedings lead in this respect. (SK)

Contact information:

name: Sandor Fulop
organization: J&E
address: Garay u. 29-31., Budapest, Hungary, 1076
tel: +36 1 3228462
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

The Work Plan of J&E has received funding from the International Visegrad Fund through its Standard Grant funding scheme. The sole responsibility for the present document lies with the author and the International Visegrad Fund is not responsible for any use that may be made of the information contained therein.



The Work Plan of J&E has received funding from the European Union through its LIFE+ funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein

