



Environmental Liability Directive
Position Paper
2007



1. Introduction

About J&E

Justice & Environment (J&E) is an association of public interest environmental law organizations based in the EU member states. J&E aims to use law to protect people, the environment and nature. Our primary goal is to ensure the implementation and enforcement of the EU legislation through the use of European law and exchange of information.

Environmental Liability Directive

The Prevention Principle and Polluter Pays Principle (PPP) are generally recognized basic principles in environmental policy. These principles are subject to ECJ judgments and court decisions on national levels. Furthermore, the principles have been implemented in many sectional European Directives and policies.

It took some time to develop a horizontal European directive on environmental liability. An ambitious Green Paper and a disappointing white paper followed in the 1990s, in 2000 respectively. Finally the Environmental Liability Directive (Directive 2004/35/EC) regarding the prevention and remedying of environmental damage (ELD) was issued in April 2004. The Directive was to be transposed into the legal systems of Member States by April 30, 2007.

The negotiation process of the Directive led to compromises. Issues like the question of fault-based or strict liability, permit and state of the art defense are now certain to extend the process at the discretion of Member States.

As the Directive is based on Article 175 of the EC Treaty, Member states have the choice to implement the Directive in a more stringent way than the minimum the Directive requires. The Directive could become an effective tool for environmental protections in Member States, given proper transposition and implementation of its provisions.

The Directive implements two crucial principles of environmental policy; the **prevention principle** and the **polluter pays principles** that are laid down in Article 174 (2) of the EC Treaty. The system of liability applies to damage on three elements of the environment

- species and habitats,
- water and
- land.

The application of the Directive in cases of imminent threat of environmental damage or on damage that has already occurred is further limited by a minimum threshold.

J&E members from Austria, Czech Republic, Estonia, Hungary and Slovenia put together a collection of legal analyses. This collection reflects situations regarding the transposition of the Environmental Liability Directive into their national legal systems. Based on this one year comparative research, J&E members are summarizing the most pressing issues and outlining specific recommendations to be presented to governments of concerned countries, the European Commission and other interested stakeholders.

Please note that at the time of writing this position paper (December 2007) only Hungary and Estonia have finished their transposition process. Other countries subjected to the analysis have

so far approved drafts of transposition measures by their governments and the drafts are now subjected to legislative procedures in various parliaments. These drafts, prepared in all countries by Ministries of the Environment, may become subject to minor changes. Substantial changes to the drafts are not expected.

2. Problems

Problems based in the directive itself

The legal analyses concluded there are big differences among states in transposition of the Directive. Most of these differences flow from the Directive itself. The Directive allows member states to set up particular issues variously from the provisions of the Directive (e.g. defenses, mandatory financial security, nationally protected species etc.).

These differences are so substantial that they can affect positions of operators (entrepreneurs) on a market and legal positions of the public concerned in enforcement of basic principles of the Directive.

Especially issues like mandatory or voluntary financial security and approaches to the application of defenses, can affect decisions of entrepreneurs where to invest to enjoy the lowest costs and minimal risks of being financially liable for contingent environmental damage.

Non – conformities with the directive

J&E found a number of cases of non conformities of transposition measures with provisions of the Directive. Some are substantial and these provisions shall be amended. As most significant examples of non conformities with the Directive we identified these issues:

- Member states were obliged to bring their national legal systems into compliance with the Directive by 30 April 2007. Four out of five states subjected to the analysis had not fulfilled this obligation. **Austria, Czech Republic and Slovenia** are still late with transposition. As of December 2007, only **Hungarian** and **Estonian** liability acts are in force.
- Provisions concerning the participation of the public are very restrictive in **Austria** and contrary to the provisions of Article 12 and 13 of the Directive and in addition to the Aarhus Convention. The Austrian definition of “public concerned” does not cover those who are “likely to be affected by environmental damage” and those “having a sufficient interest”.

Moreover, persons affected by a damage or imminent threat of damage are entitled to send only a notification to the competent authority to inform the authority on the case and ask what the authority plans to do and has done so far. But there is no possibility to get involved in actual remedial procedures. The Austrian legislature divides a “request for action procedure” from “remedial procedure”. By taking legal action (request for action) directly affected persons gain no status as a party (standing) in the remedial procedure.

- Following non conformity with Article 12 of the Directive the review procedure according to Article 13 is (in **Austria**) unlawfully restricted to the legality of the answer of the authority only, after the public concerned “notification” letter to the authority.
- Provisions concerning participation of the public are very restrictive in **Slovenia**, where definition of public concerned does not include “persons who are likely to be affected by damage”.

- In **Estonia** and the **Czech Republic**, the transposition of permitted action defense is in non conformity with Article 8 paragraph 4 of the Directive. While the Directive provides, that the emission or event which causes the damage, must be „*expressly authorised by, and fully in accordance with the conditions of...an authorisation*“. The national acts only provide, that the named event and emission must be „*in accordance with the conditions of a permit*“. Requirement for express authorization of a named emission or event is missing.
- **Slovenian** law defines operator as “*legal or natural person directly or indirectly, exclusively or simultaneously, polluting the environment, using natural assets or causing any environmental risk or environmental accident*”. The definition is definitely narrower, unclear and as a circle-definition not in conformity with the Directive.
- **Hungary** failed to transpose Article 12 and 13 of the Directive with arguments that these Articles themselves implement the Aarhus Convention, Article 9(3) and in certain aspects Article 6 and 9(2), too, and also that the competent decision-makers in **Hungary** hold that the **Hungarian** environmental law fully complies with the Convention. This approach is rather questionable, because the mentioned rules of the Directive, especially Paragraphs 2-5 of Article 12 are quite special compared to the relevant parts of the Aarhus Convention.
- Most states subject to the analysis define “costs” similarly to the Directive. However, the states have not adopted any specific methods of evaluation of costs. Due to the lack of specific and common methods of evaluation of costs there can be huge differences among member states in calculation of damage and as a corollary dissimilar conditions for operators.

Expected problems with implementation

J&E studies show that all countries subjected to this analysis use the identical or very similar wording of important definitions as a Directive. These definitions are rather unclear and vague and the national legislators failed in their obligation to transpose it in more precise and specific ways.

On national levels, these definitions will cause problems with their interpretation and application. There could be huge differences in interpretation among member states that may finally broaden or narrow practical application of environmental liability regimes.

In the **Czech Republic** and **Hungary**, the current legal practice in access to justice in environmental issues limits review of substantial legality of administrative bodies’ decisions. Although formally the courts are not excluded from review of substantial environmental legal issues of the cases, in practise it is so (mainly due to historical development and lack of expertise and capacities).¹ There is no presumption of changes with this malpractice in environmental liability procedures.

¹ For details please see J&E Aarhus Legal Analysis: <http://www.justiceandenvironment.org/wp-content/wp-upload/JE2006Aarhuslegalanalysis.pdf>

3. Examples of positive transposition

J&E studies show that there are also cases of positive transposition from environmental protection point of view. The most positive examples of member states approaches to transposition of the Directive are as follows:

- **Hungary** and **Estonia** broaden a protection of biodiversity to territory and protected area respectively.
- All of the states subjected to this analysis broaden to a certain extent a protection to species protected by national legislation, only not covered by Natura 2000.
- **Hungarian** law gives more detailed guideline to raise a probability of significant adverse effect on water.² This is however rare example of more specific definition of aspects of environmental damage.
- In **Hungary, Austria** and **Estonia** the range of persons that can be held liable is broader than in the Directive.³
- **Slovenia** has not applied permitted action defense, allowing operators to escape costs of damage in case of compliance with a permit.
- **Hungary** and **Slovenia** have not applied state of the art defense, **Estonia** has not made use of it for GMOs.
- **Austria** implements mandatory financial security; it will enter into force without any postponement and applies to all operators falling under the scope of the Environmental Liability Act.
- **Estonian** national law provides, that the causation between activity or failure to act and occurred damage is presumed, when it is probable that the damage has occurred in the course of activities listed in § 8 (2) of Environmental Liability Act. These activities correspond to the activities listed in Annex III of the Directive.

² These factors are to be considered: “a) adverse changes of conditions necessary of maintenance of habitats and living organisms directly depending from the surface waters, b) limitation or hindering normal usage of waters, c) emergence of environmental-health risk, d) exceeding environmental quality thresholds determined in separate law, e) pollution of surface waters with materials determined in Annex 1C and materials in Annex 1D if coming from certain technologies, f) adverse change of a starting status established in a decision of the authority.”

³ For the term “operator” the Hungarian transposition laws apply the term “user of the environment”. This definition covers anyone that uses or burdens any elements of the environment. In Austria, under some conditions also owner of the property can be held liable instead of a person who has caused the damage. Estonian legislation defines operator as “person who causes damage“. It is a person, whose action or failure to act causes environmental damage or threat of damage (§ 6 (2) of Estonian Environmental Liability Act).

4. Suggested Solutions

Suggested solutions for an ongoing transposition process

The member state shall quickly finalize their legislation processes to ensure transposition measures in force as soon as possible.

Member states shall amend their drafts to obviate the non conformities J&E studies have found. All of the non conformities specified in section 2.B shall be amended in national transposition acts before entering into force.

The member states shall seriously consider applying more stringent measures in relation to prevention and rectification of environmental damage, to secure that **prevention principles** and **polluter pays principles** work properly. Incidentally, the Directive itself evokes member states to do so (Art. 29 of the Preamble). Member states can be inspired by abovementioned list of examples of positive transposition.

Member states shall first of all consider:

- extending the list of species and habitats covered by the Directive to ensure broad application of liability regimes without unreasonable differences between species and habitats protected by national law and those protected by Natura 2000,
- not making use of permit defense and state of the art defense to ensure that damage is paid by the responsible polluter, not by the public,
- creating mandatory financial security systems to ensure that there will in all cases be funds for remedial costs and
- also guarantee public participation in cases of imminent threat of damage, to ensure that threat of damage is (in cooperation with the local public) detected and obviated.

Suggested solutions for application and implementation of the Directive

After national transposition measures enter into force, there will be an important phase of energizing the systems of liability. The state bodies will begin to learn to apply provisions of the Directive and how to set up the whole system of prevention and liability regimes.

J&E suggestions for this very important phase are as follows:

- The Commission shall issue guidelines for the Directive and interpretation of particular provisions and definitions.
- Following the guidelines by the Commission, Member states shall issue guidelines for application and interpretation of the transposition measures on national levels.

- Member states shall allocate adequate resources and capacities for competent authorities and ensure constant training for responsible officials.
- Member states shall constantly exchange information and experiences with the Commission and among each other, so as to diminish divergences in application and interpretation of particular provisions and definitions of the Directive. Member states and the Commission shall search unique approaches toward substantial issues of the liability regimes, such as financial security and evaluations of cost.
- Member states shall consider a positive role for the public in enforcement of **prevention principles** and **polluter pays principles** and exchange information and skills with representatives of NGOs and the active public.

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