Environmental Liability and Environmental Crime – Polish experience

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Scope of presentation

• Implementation of the Environmental Liability Directive in Poland
  – Transposition
  – Practice
    • High number of cases
  – Recent amendments in the transposing legislation
• Protection of the environment through criminal law in Poland
ELD - transposition

• ELD transposed by Act of 13 April 2007
  – two executive regulations issue under the Act
    (on the types of remedial measures and on
    assessment criteria for environmental damage)

• Amendments to several other Acts

• 2007 Act – recently amended by Act of 11
  July 2014 (in force since 5 September 2014)
Relation to former liability schemes in Poland – according to the original 2007 Act

• Stricter and more precise liability schemes for damage to
  – protected species/habitats
  – water

• Different liability scheme for land damage caused after 30 April 2007

• Does not affect civil and criminal liability (they may be applied in parallel – see judgement of the Main Adm Court of 21 Feb 2006, II OSK 339/05)
Definition of environmental damage – according to the original 2007 Act

- Land damage
  - stricter than in ELD
  - used strict soil quality standards (already existing)

- Damage to protected species/habitats
  - covered also areas and species protected under national law (optional under Art. 2.3(c) of ELD)

- Damage to water – formulated as in the ELD
  - also unclear whether refers to water or water bodies (rather waters)
Land damage under Polish law

Who is liable:

• Under former legislation (2001 Env Protection Law Act) - **owner of the land** (this rule applied also after the 2007 Act entered into force - for damage revealed before 30 April 2007)

• Under the 2007 Act (for damage revealed after 30 April 2007) - **person who caused the damage**

• Quite strict soil quality standards
Defences

- Defences to costs not to liability
- Permit defence and state-of-art defence are not adopted
- Defences of Art. 8.3 of the Directive are adopted (damage caused by a third person and compliance with the compulsory order by a public authority)
Remedial measures by the competent authority (1)

• According to the 2007 Act in some situations the competent authority shall undertake remedial measures

• According to ELD - the competent authority may undertake such measures
Remedial measures by the competent authority (2)

- Under the 2007 Act the competent authority shall undertake these measures when:
  - liable operator can not be identified
  - enforcement action against liable operator turned out to be ineffective
  - immediate action is necessary because of:
    - threat to human life or health
    - threat of causing an irreversible damage to the environment
Request for action (Art. 12 ELD)

According to Article 24 of the 2007 Act

• Request for action may be brought by every person (regardless of his/her interest in the case)
  • Including environmental NGO
  – NGOs may also participate in the further proceedings
Impementation of ELD in practice

• High number of cases (over 500 reported for years 2007-2012)
• Does not mean that the cases of environmental damage are so numerous
High number of cases – possible reasons

• Definition of land damage:
  – very broad, soil quality standards apply, even small accidents were included

• Broad right to file a request for action (no „sufficient interst” needed)
  – Plus active NGOs

• Former provisions re water damage and biodiversity damage insufficient / imprecise – thus provisions transposing ELD = very needed new tool

• Obligation of public authority to carry out remedial measures
Latest amendment to the 2007 Act

- Land damage – no longer strict quality standards; the amended Act (+ new executive regulations) apply the approach of the Directive (land damage = contamination that creates a significant risk of human health being adversely affected)
- Damage to biodiversity – limited to habitats and species protected under EU law (no longer by national law only)
- No practice under the amended provisions yet
- The amendments might cause decrease in number of cases
Protection of the environment through criminal law in Poland

- Directive 2008/99/EC transposed by several catch-all provisions in the Penal Code, the Nature Protection Act, and the Ozone-Depleting Substances Act
- Transposition rather correct
Implementation of the criminal environmental provisions (1)

• The transposing provisions are rather poorly applied in practice (not many cases in courts finalized with a convicting verdict)
Implementation of the criminal environmental provisions (2)

Possible reasons (as identified by public prosecutor):

• using the vague notions in the transposing provisions (substantial damage) which are not defined by law and there are no interpretations provided by case-law or in the literature;

• lack of relevant cooperation between public prosecutors and environmental authorities (which often inform the prosecutors about offences)

• lack of trainings on environmental law for public prosecutors

• errors in proceedings made by public prosecutors.
Criminal liability of legal persons

• Directive’s provisions on liability of legal persons - although transposed - are not implemented at all in practice, in Poland
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