

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

Implementation 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 interest” 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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