AVOSETTA QUESTIONNAIRE

ENVIRONMENTAL LIABILITY DIRECTIVE - HUNGARY

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I. Can you give some concise information about your national environmental liability system?

The environmental liability regime in Hungary is relatively well-developed as it has already been established by the first general environmental protection act (Act II of 1976). From this early beginning the three pillars of liability system are used, as listed below. The first criminal provision had also been introduced into the Hungarian legal system by this act, also the first connection of the Civil Code provisions on activities entailing increased hazard (no-fault liability) had been given.

General and administrative liability

The environmental liability regime in Hungary is based upon three pillars:

- administrative liability
- civil liability and
- criminal liability

Administrative liability contains provisions on

- direct intervention of the authorities, that is limitation, suspending, shutting down of operations or activities, or obligations, such as the remediation of damages;
- environmental protection fines, with several specific cases;
- petty offences (misdemeanours) in case of private persons.

The basis of administrative liability has been further developed and made as a more or less complex system in the Act LIII of 1995, in Chapter IX (Liability for the environment). The main elements before the adoption of the new provisions, transposing the wording of liability had been:

Article 101
Par (1) – general reference to liability (under criminal law, civil law, administrative law, etc.)
Par (2) Major requirements, such as halting pollution, finishing damaging, responsibility for the damage caused, restoring the state of the environment existing before the activity.
Par (3) The rights of the authority or court to restrict the performance of the activity or to suspend or ban it.
Par (4) and (5) Reference to environmental bond, or environmental liability insurance.

Article 102
Par (1) Joint and several liability of the owner and the possessor (user) of the real property, on which the activity is or was carried out - until evidence is provided to the contrary (this does not cover criminal or petty offence liability).
Par (2) How the owner shall be exempted from the joint and several liability - if names the actual user of the real property and proves beyond any doubt whatsoever that the responsibility does not lie with him.

Par (3) The provisions above shall also apply for the owners and the possessors (users) of non-stationary (mobile) pollutant sources.
Par (4) In case of several users of the environment - legal succession of the founders also constituting joint and several liability with the founders.

These two above mentioned articles have been changed in April 2007, by the act transposing the liability directive, plus Arts. 102/A, 102/B and 102/C have been added.

The main outline of environmental fine is regulated in Arts 106-107 of the same environmental act.
Art. 106
Par (1) Those who violate the environmental requirements or who exceed the standards shall pay an environmental fine in conformity with the level, weight and recurrence of the environmental pollution and environmental damage they caused.
Par (2) The environmental fine shall be paid over any other payment obligations (fees, charges, etc.). The fine shall be collected along the same lines as a tax.
Art 107
The fine shall not exempt one from liability under criminal law, petty offence liability and from liability for damages, furthermore, from the fulfilment of obligations to restrict, suspend or ban the activities, to develop adequate protection and to restore the natural environment or the environment that existed before.

Above the provisions of the framework environmental act, there are several other specific requirements in other media specific legal regulations, which cover preventive or remedial measures. The framework waste management act, for example, also provides overall requirements for every unlawful activity related to prevention, remediation, in integrum restitutio, the rights and duties of administrative authority, joint and several liability, along the lines of the framework environmental act. But one may find special provisions in water management and protection, air quality control, etc. legislation.

Probably the most detailed provisions of remediation are listed in the field of groundwater protection, which also have a direct link to soil protection. It is worth to mention here, that the same detailed requirements of remediation have been introduced to surface water protection by the implementing regulations of the liability directive.

Administrative liability regime usually based on a no-fault liability system, with the exception of petty offences, where negligent or intentional activities are needed.

Civil liability

Civil liability may also be used, among others trespass or nuisance, but also there are also special provisions of the Civil Code in connection with compensation of damages. There are two main sources of such liability: the 1995 environmental act and the Civil Code. According to the Art. 103 of the environmental act in case of damages caused by activities posing hazard to the environment those provisions of the Civil Code shall be applied which were made for activities entailing increased hazard (Civil Code, Arts 345 and 346). In the same article of the environmental act there is also an authorization of the Minister of Environment to enforce the claim for compensation if the injured party does not wish to enforce it. Art 104 covers the liability of the legal successor, unless the parties have agreed otherwise in a contract.

It is also an important provision of the Environmental Act, that in its Art 105 covers the possibility of the termination of an activity without a legal successor during liquidation or final accounting or during the transformation of a state enterprise into an economic association, the commercial exploitation and sales of state property, when the costs of the clean-up of and compensation for environmental damage sustained as a result of the activity shall be shown in the statement of assets on the basis of an assessment of the state of the environment.

Thus since the 1976 environmental act, civil law incorporated the liability for damages caused by activities dangerous to the environment, which one year later could also become a part of the Civil Code, in Art. 345. As it is clear from the above mentioned provisions of the 1995 environmental act, environmental liability is based upon the no-fault liability system of the activities entailing increased hazard. During the past 30 years, some civil court judgments also underlined, that this is a parallel regulation to the original one and in environmental related cases the infringement of environmental requirements and the element of the damage to the environment should be looked after and not the increased hazard in general.

An earlier decision of the Supreme Court (Decisions of the Supreme Court, No. 300, 1997) summarised the main conditions of compensation of damages, caused by activities dangerous to the environment. The case is indirectly connected to the Bős-Nagymaros Dam project, as one of the arguments of the defendant is that the lower water level in the Danube is also a cause of the damage. The damage was a mass loss in fish population, which was due to the lack of oxygen in the water, caused by pollution discharged by a sewage treatment facility. According to the final decision, the damage was caused by several factors, but the most direct cause was the discharge, which could have been prevented by the defendant. According to the court, an operator, as big as the sewage treatment facility must monitor the consequences of its activities in order to take immediate response measures.

Hungarian civil law is based on the continental system, which covers the following elements of the damage (Art 355):

- the actual damage (dannum emergens);
- the economic loss (lucrum cessans);
- the costs;
- the immaterial damage (at the moment it is limited to the protection of private persons and in a more limited scope to legal persons).

We may also mention the general compensation, according to Art 359, which may be used in those cases of damage, where the exact amount of the damage may not be calculated properly. The general compensation should be tailored to be able to provide a full compensation.

Finally, it is worth to mention a useful possibility of prevention in the framework of Civil Code, that is Art 341, according to which the one who may prove that there is a direct and close danger of being damaged, may require the court to adopt preventive measures. Unfortunately the present judicial practice is not too supportive of using this provision, although there are some positive signs in the most recent cases.

A recent decision of the Supreme Court (Decisions of the Supreme Court, No. 235, 2001) discusses the conditions of such preventive measures. In the given case, it happened that at the end of the 90's the environmental authorities annually fined the two power plants, which are the defendants in this case, because the pollution had been over the standard. The public

prosecutor filed a case and asked the court to forbid the harmful activity. The major legal issue here is to understand the meaning of environmentally harmful activity. In the given case, the newly adopted legal regulations provided for a gradual implementation of the new standards, which may even mean that the standard is temporarily infringed. But these legal requirements may not overshadow the essence of environmental harm, which is not the question of administrative decisions or rules. In this case a detailed expert analyses could have been done in order to evaluate the reality of environmental harm, the reality of potential danger, as the required legal remedy – halting the operation – should be in harmony with the possible consequence. If the likelihood of environmental harm is close, the court may undertake the preventive steps.

Criminal liability

Criminal liability means three special provisions in the Criminal Code: damaging the environment, damaging the nature and infringement of waste management regulations (Arts. 280, 281 and 281/A). The latest version of the Code follows the line of the framework decision of 2003. In the Hungarian criminal law system, there is also a chance to criminalize the activities of legal persons since 2004.

Is your country party to the international conventions listed in the annexes IV and V of Directive 2004/35/EC?

INTERNATIONAL CONVENTIONS REFERRED TO IN ARTICLE 4(2)
(a) the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage;
(b) the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage;

- Government Decision 2020/2007. (II. 13.) on the notification to the Secretariat as a Party to the above mentioned two international instruments

(c) the International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage;
(d) the International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea;
(e) the Convention of 10 October 1989 on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels.

INTERNATIONAL INSTRUMENTS REFERRED TO IN ARTICLE 4(4)
(a) the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention of 31 January 1963;
(b) the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage;
(c) the Convention of 12 September 1997 on Supplementary Compensation for Nuclear Damage;
(d) the Joint Protocol of 21 September 1988 relating to the Application of the Vienna Convention and the Paris Convention;
(e) the Brussels Convention of 17 December 1971 relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.

- Government Decree 130/1992. (IX. 3.) on the ratification of the 1989 joint protocol to the Vienna Convention and Paris Convention on civil liability for nuclear damage

- Decree of the Council of Ministers 24/1990. (II. 7.) on the ratification of the 1963 Vienna Convention on civil liability for nuclear damage

II. Implementation of Directive 2004/35/EC

2.1. General status of implementation:

Has Directive 2004/35/EC already been fully implemented?

Some days before the April 30th deadline, the implementation has been finished. There were two major steps of transposition:

- The Act XXIX of 2007 on the amendment of different environmental related acts in connection with environmental liability. The major part of the act is the amendment of the framework environmental act (Act LIII of 1995), while there are also three other related acts, which all have direct reference to environmental liability, namely the followings:
  - > The Act LVII of 1995 on water management
  - > The Act LIII of 1996 on nature protection,
  - > The Act XLIII of 2000 on waste management.

  The above mentioned three acts do not have their own liability system, but they refer back to the framework environmental act.

- There are four implementing Government Decrees, covering several important details:
  - > Gov. Decree 90/2007. (IV.26.) on the system of preventing and remedying environmental damage
  - > Gov. Decree 91/2007. (IV.26.) on the provisions related to the rectification of the size of damage to nature and on the rules of remedying the damage
  - > Gov. Decree 92/2007. (IV.26.) on the amendment of Gov. Decree 219/2004. (VII. 21.) on groundwater protection
  - > Gov. Decree 93/2007. (IV.26.) on the amendment of Gov. Decree 220/2004. (VII. 21.) on surface water protection

Have deficiencies of the Directive been identified during national discussions ?

There were no open or organised discussions related to the implementation, the views of environmental scholars, practitioners, etc. had not been searched for. The only way of "discussion" was through the internet – according to the rules of openness of legal drafting all the drafts should be put on the web and opinions are welcome. This means that if you are not looking at the web every day, you may simply miss the very short deadline.

2.2. General approach of implementation:

Has your country reduced the level of environmental protection as a consequence of the Directive ?
Did your country opted for a mere transposition of the minimum requirements of the Directive or introduced stricter provisions?

It is better to take these two questions together. First of all, we may say, that the level of environmental protection has not been reduced, but on the contrary, the level has rather been raised as some requirements became stricter. In theory, there are not too many changes in the

general environmental act, as compared with the previous situation, although the new system is a bit more comprehensive, more detailed. Also, new definitions have been introduced, and some general terms clarified – for example, how is it possible to escape from liability. The escape clauses are generally speaking the same as in the judicial practice, but these clauses have never been specified in law. The same is true for the time limits of liability, as everybody was aware of the fact that those rules shall be used which are covered by the newly adopted rules, but it was not codified properly. Thus the possibility of implementing liability provisions to a greater extent is closer.

Also, new requirements have been introduced, which have not been regulated up till now:

- a new system of preventive and remediation measures, based upon the obligation to adopt remediation plans by the operators and by the authorities;
- a systematic approach how to rectify the size of damage to nature and on the rules of remedying the damage to nature;
- a new system of remediation measures in the field of surface water protection.

The method of transposition

As it is clear from the above listed legal rules, transposing the directive, there is a mixed approach:

- once there are major changes in the general environmental act, introduced by the Act XXIX of 2007;
- second, there are major changes in some of the implementing regulations;
- third, four new government decrees, made just for the implementation.

2.3. Options taken during the transposition process (please focus on innovations in your country legislation with respect to the text of the Directive)

2.3.1. Definitions

The definition of environmental damage is a bit more detailed then in the directive, but the major problem is that the word "significant" is inserted in the definition. That means, that the minor damages are not covered. It is also true for land damage or any other damages. The three specific elements of environmental damage – water, soil and nature – have not been identified, these definitions are missing from the Hungarian system, only a more general definition of environmental damage is covered.

The notion "protected species and natural habitats" also covers those nature protection elements, which are regulated only in the Hungarian law, thus it is broader then the two directives (wild birds and habitat).

The favourable conservation status of natural habitats is regulated by the new implementing Government Decree (91/2007) strictly following the wording of the Directive.

Operator as such is not defined in the Hungarian legal system. The definition which may be used here is the "environmental use". This has been changed now towards a broader scope. According to the previous (before April 2007) version, this meant: "an activity involving the utilization or loading of the environment or a component thereof that is subject to an official licence". After the transposition of the directive the term is broader, as the reference to the

licence has been left out. Here the problem may be how to define the limits to such environmental uses.

2.3.2. Scope

The transposition did not change the already existing general concept/regime of liability, that is:

- no-fault liability in case of administrative liability – with the exception of petty offences and one type of environmental fine,
- no-fault/strict liability for damages caused by activities dangerous to the environment,
- fault based (intentional or negligent) liability in case of criminal law, with a minor move towards a "no-fault" system, in connection with legal persons (in the case of which it is hard to understand the content of intentional or negligent action).

2.3.3. Exceptions

The exceptions have not been listed, the jurisprudence formulated more or less the same exceptions as of the Directive. Thus it proved to be much easier to use the wording of the Art. 4 of the Directive with similar language. On the other hand, in line with the broader definition of environmental uses, the Art. 8.4. exceptions do no apply.

2.3.4. Preventive and remedial actions

The scope of preventive and remedial actions are more or less the same, as in case of the Directive, with the difference that the definition of such conditions are given in subsequent terms.

Te role of the competent authority may also be taken as identical to the requirements of the directive.

Environmental associations have been granted the right to be a party in environmental administrative procedures by the 1995 Act, thus they already had the same role, which is even wider then a simple participatory right. Which has been added to this original right is that those owners and users of real estates, whose estate lies within the boundaries of impact area of environmental harm or hazard of environmental harm could also receive the same rights, that is they are taken as parties to the procedure.

As Annex II of the Directive concerns, there are three separate implementing regulations in this new set of rules:

- one for the evaluation and remedying damage to nature, which is very detailed with several annexes,
- one for the remediation of surface water damages, also with several details, along the lines of similar actions in case of groundwater,
- one for the groundwater, with minor changes as compared with the already existing detailed provisions on remediation.

2.3.5. Preventive and remedial costs

The environmental authority may issue an order to add to the land register a security over the property, and is some cases a mortgage may also be implemented, but only in cases where the environmental damage has been rectified by the authority with a final decision.

Otherwise the user of the environment shall take the necessary preventive or remediation measures, even if otherwise may escape from liability. Thus the primary responsibility is on the user and the environmental authorities have only a secondary responsibility.

2.3.5. Cost allocation

There are already existing cost allocation provision in case of multiple causation.

2.3.6. Competent authority

The environmental inspectorates, as general environmental authorities.

The imposition of preventive and remedial measures are governed by the general or framework regulations of administrative procedures, thus the same provisions apply, that is the possibility to appeal and then also the right to challenge the administrative decision in front of the court.

2.3.7. Request for action

The new regulations did not add anything to the already existing provisions of the framework environmental act, which provided the right of NGOs to require the administrative authority to intervene in case of environmental harm. The NGOs may also go to court to require the same action to be taken. There are no limits for these actions, thus the threat or exact damage both may be taken as a sufficient ground for action.

The review procedures are the same as above, appeal and judicial review.

2.3.8. Financial security

Financial security has been a part of the Hungarian environmental legal system since the 1995 act, as an option, but still there are no implementing regulations. Among others such requirements are also repeated in the framework waste management act, also without any implementation.

2.3.9. National law

These possibilities are still open.

2.3.10. Temporal application

<u>How was article 17 implemented?</u>

The retroactive effect has been excluded, thus only those activities are covered, which cause damage or a potential of damage after the entering into force, which is April 30, 2007. The other elements of Art. 17 ar enot covered by the amendments of major environmental acts.

2.3.11. Transboundary environmental damage

There is only some simple reference to the transboundary damage in Art. 10 of the Act XXIX of 2007:

- in case of environmental damage or the danger of environmental damages, which may have an effect to other EU member states, the Act requires cooperation;
- in case if other countries are effected, the environmental minister shall inform the effected country.