

Transposition of Directive 2004/35/EC (ELD) in Poland: issues of concern

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I. Introduction

The paper addresses selected issues of the ELD transposition into Polish law, in particular:

- cases where Polish law goes beyond the minimum requirements of ELD (i.e either provides for more stringent measures than those required by the Directive or goes for more restrictive option from those proposed by the Directive),
- cases of shortcomings in transposition,
- instances where the transposing provisions are unclear or ambiguous which may cause interpretation problems while applying them.

In addition the paper addresses briefly the issue of financial security - controversial during the process of adoption of the ELD.

The paper is therefore not aimed to provide a full description of Polish transposing measures.

ELD has been transposed into Polish law through the Act of 13 April 2007 on prevention and remedying of environmental damages, published on 26 April 2007¹, in force since 30 April 2007 (hereinafter referred to as: Act of 13 April 2007).

Annexes I and II to the Directive are to be transposed through executive regulations issued by the Minister for the Environment under the Act of 13 April 2007. No drafts of such regulations have been published so far.

Majority of the ELD's provisions seems to be transposed correctly, in some cases Poland adopted even more stringent measures than the minimum required by the Directive.

However, one major case of incorrect transposition may be indicated (an exemption not allowed by the Directive), as well as some cases of ambiguous provisions which may cause interpretation problems.

¹ Journal of Laws No. 75, item 493

II. More stringent measures

Damage to protected species and habitats

The Act of 13 April 2007 defines the damage to protected species and habitats as a damage to all species and habitats protected under Polish Nature Conservation Act of 2004 and not only to those protected under the Habitat and Birds Directives (the Act uses option as foreseen by Article 2.3 (c) of the Directive).

Defences

The Act of 13 April does not provide for “financial defences” allowing the operator not to bear the prevention and remediation costs (“permit defence” and “state of the art defence” provided for by Article 8.4 of the ELD).

Although the first draft of Polish transposing act, as prepared by the Ministry for the Environment on 5 May 2006 provided for both permit and state of the art defence, the next version of ministerial draft of 25 August 2006 already abandoned them. Consequently, the final version of the Act does not include them.

The decision not to include such defences, especially the “permit defence” corresponds well with the traditional approach towards liability for environmental damage in Poland. Already in 60s and 70 the courts in series of verdicts (with the landmark verdict of the Supreme Court of 1970 – III CZP 17/70) made it clear that compliance with environmental standards, and particularly with permits, did not exclude civil liability for environmental damage. The EPA 1980 (in Article 80) gave statutory backing for this view, and now EPLA 2001 (in Article 325) even more clearly reiterates it. therefore even if the 2007 Act

Duties by the competent authority

According to Article 5.4(d) and 6.2(e) of the ELD, competent authority **may** take the necessary preventive and remedial measures by itself.

According to Article 16 of the Act of 13 April 2007 in some instances the competent authority **shall** take preventive and remedial measures.

Under this provision the competent authority shall take these measures when:

- operator liable cannot 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.

Additional responsible parties

Article 16 of the ELD indicates that Member States may adopt more stringent measures in relation to i.a. identification of additional responsible parties (however, according Article 176

of the Treaty, even without this provision Member States are always entitled to adopt more stringent requirements than those required by EU measures adopted under Article 175 of the Treaty).

Article 12.2 and 12.3 of the Act of 13 April 2007 provides for joint and several liability of a holder of land where environmental damage or damage has occurred together with a polluter who caused the damage (threat) - provided that the damage or threat occurred upon consent and to knowledge of the land holder.

Land damage

The ELD's definition limits a notion of "land damage" (requiring remediation) only to land contamination that creates a significant risk of human health.

According to the Act of 13 April the land damage is defined as "*contamination of soil or land, including in particular contamination which may pose a risk of threat to human health*".

This would suggest that the Act does not limit the notion of land damage to the damage which may cause a threat to human health, but encompasses all situations where the soil quality standards - as existing already previously in Polish law (and considered as quite strict) - are exceeded.

The wording of further provision of the Act of 13 April may however cast some doubts as to the real scope of land damage under Polish law (see below).

Anyway, as the Act of 13 April 2007 applies to damage occurred after 30 April 2007, the instances of land damage caused prior to this date are still subject to the pre-existing legal regime, as provided for by the Environmental Protection Law Act (EPLA). Under EPLA a holder of contaminated land (regardless of whether he was or was not contributing to the pollution) is responsible for a clean-up in order to attain the soil quality standards (see Article 35 of the Act of 13 April 2007).

Request for action and access to justice

Article 12 of the ELD requires that certain persons, namely those:

- affected or likely to be affected by environmental damage or
- having a sufficient interest in environmental decision-making relating to the damage or, alternatively
- alleging impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

as well as environmental organizations are entitled to submit to the competent authority any observations relating to environmental damage and to request the authority to take relevant action.

The Act of 13 April 2007 grants the right to submit so called "notification" (Polish equivalent for the right to above rights) to **everyone** and not only to affected etc. persons, however the wording of its relevant provisions is formulated illogically which may cause problems with their interpretation and lead to non-compliance- see below.

III. Non-compliance

New exception

The main problem with transposition concerns a specific exception from the liability rules which was introduced by Article 5 2) of the Act of 13 April 2007. Under this provision the Act does not apply to the “*forest management carried out in compliance with the rules of sustainable forest management as referred to in the Forest Act of 1991*”. Such an exception was not provided for by the Government in any of the consecutive drafts of the Act and was introduced at the very last stage of the legislative procedure, i.e. by the Higher Chamber of the Parliament (Senate).

The above exception means that the whole legal regime of the Act shall not apply to damage caused by activities related to forest management, so for example a damage to protected species caused by use of biocidal products may be exempted from the scheme if use of such products is envisaged by a forest management plan.

Such an exclusion seems to be not allowed by the ELD and therefore the relevant provision of the Polish law seems to be not in compliance with its requirements.

The aforementioned exemption might perhaps resemble the state of the art defence as provided for by Article 8.4 of the ELD, however is not equal to it and cannot be regarded as such a defence - for at least two reasons:

- the state of the art defence allows the operator not to bear the costs of preventive or remedial measures, but does not allow for a total exemption of the legal regime of environmental liability,
- *forest management carried out in compliance with the rules of sustainable forest management as referred to in the Forest Act of 1991* can not be considered as meeting necessarily and automatically the requirements under Article 8.4(b) of ELD (“*not considered likely to cause environmental damage according to the state of scientific and technical knowledge...*”).

Request for action and access to justice

As mentioned above, the Act of 13 April 2007 envisages in Article 24.1 that everyone is entitled to submit so called “notification” (Polish equivalent for the right to “submit to the competent authority any observations relating to environmental damage and to request the authority to take relevant action” as required by ELD. However, paragraph 2 of Article 24 of the Act of 13 April 2007 envisages that if the damage relates to the environment as common good - such notification may be submitted by organ of public administration or environmental NGO. The distinction between the two paragraphs is not clear at all and may cause problems.

First of all, the right granted to everyone covers also public administration and environmental NGOs therefore the specific provision of para 2 does not make any additional value. The only reason for this provision would be if the right to notify the damage related to environment as common good was granted **only** to organs of public administration or environmental NGOs. However, para 2 does not have the word “only” and therefore its legal meaning is very unclear.

Moreover, Article 24.6 grants those organs of public administration and environmental NGOs who submitted notification under Article 24.2 the right to participate in the relevant administrative proceedings with the “party’s rights”. This is meant to assure implementation

of the requirement to provide possibility to participate in decision-making stemming from Article 7.4 of ELD. However, it fulfils this role only partially.

The consequence of Article 24.6 is that NGOs has the right to submit their observations as requested by Article 7.4 only in case of the proceedings related environment as common good but are not granted right to submit their observations in case their submit notification about the damage related to private property under Article 24.1. This seems to be not in compliance with Article 7.4 ELD.

IV. Ambiguous provisions

Land damage

As mentioned above, the Act of 13 April 2007 seems not to limit the notion of land damage to the damage which may cause a threat to human health but to extend this to each situation where the soil quality standards - as existing already previously in Polish law (and considered as quite strict) - are exceeded.

However, on the other hand, Article 6.8(c) of the Act while defining the notion of “recovery” says that in case of land damage “recovery” means the “elimination of risk of adversely affecting human health, including restoring the land to the quality standards”. Such definition seems to be suggesting that restoring the land to the standards is required only in case where a risk to affect human health exists. Thus the provisions of 6.8c) somehow contradicts the provision of Article 6.11 c) which defines ‘damage to land’. Despite the wording of Article 6.8(c) one may argue that the intention of the legislator was to maintain the obligation to restore the quality standards in each case.

Request for action and access to justice

As mentioned above, the scheme is unclear in granting the right to submit notification (request for action) and possibility to participate in the procedure. It is not clear who can submit such notification in relation to damage to environment as common good.

V. Financial security

The Act of 13 April 2007 does not provide for compulsory financial security.

Its provisions regarding the security are based on the scheme already existing in Polish Environmental Protection Law Act of 2001 (the Act of 13 April introduces certain amendments to the latter Act).

Namely, the competent authority is entitled (but not obliged) to impose on the operator arranging for any kind of financial security while granted him an emission permit. The possibility for introducing the financial security is therefore limited only to activities causing emission. Moreover, the Minister of the Environment is entitled (but not obliged) to issue - under the Act of 13 April - an executive regulation listing categories of installations (not activities!) requiring a compulsory security.