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Manner of the implementation Environmental Liability Directive into Polish law

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

Are there special provisions on civil liability for environmental damage? – yes[1]

The Act on the Environmental Protection Law provides legal ground for filing suit for the protection of public good – the environment: Article 323.1 states that:

Everyone who through unlawful impact on the environment is exposed to injury or upon whom the injury was inflicted may demand from the liable subject for this danger or violation restitution of the lawful state and undertaking preventive measures, especially through installing installations or equipment safeguarding against the danger or violation; in the case there it is impossible or excessively difficult, he may demand that the activity causing the danger or violation be discontinued (Sec. 1).

***If the danger or violation concerns the environment as a public good**, the State Treasury, territorial self-governing unit as well as an ecological organization can file the above mentioned claims* (Sec.2).

This regulation (in sec. 2):

- makes it possible for the enumerated parties to file a claim with a civil court for the protection of public good – the environment;
- ecological organisations, among others, have such standing;
- filing a claim is acceptable both in the case of violation and the danger to the protected good;
- the subject of the claim can be: restitution of lawful state; taking preventive measures; and discontinuation of the activity, if the other two claims are impossible or excessively difficult;

The act provides also a legal basis for **regress claims -** the provisions of Article 326 of the EPLA states that *a subject who repairs an environmental damage caused by another party (*the polluter, B.I.*) is entitled to claim from the polluter reimbursement of the borne expenses for that aim; the amount of the claim is limited by a well grounded expenses of restoration of the lawful state*.

Also **in sectoral environmental regulations** there are measures that enable protection of the environment in civil proceedings. For instance: The Nuclear Law Act or the Act on Genetically Modified Organisms (GMOs'). The last one introduces a severe liability on the user of GMOs' – **strict liability for damages on a person, property and the environment** being a result of activity regulated by this Act (such as controlled use of GMOs' or deliberate release of GMOs'). The liability is not excluded by the circumstances that the activities are conducted on the basis of and within the limits of the granted decision. Each subject that incurred individual or property injury may claim damages (compensation). **If the damage concerns the environment as a public good,** then the State

[1] Provisions on civil liability for environmental damage discussed below were presented in: B. Iwańska, *Access to national court by citizens in environmental matters – Poland, s.13-14.* http://www.avosetta.org/

Treasury, a territorial self-governing unit as well as an ecological organisation may demand compensation. Due to the granted claims, the Act also provides the above mentioned special right to access the information, which allows to prove the liability of polluters.

Are there other (administrative type of) special provisions and procedures concerning the prevention and remedying of environmental damage? Do they have a general nature or are they only applicable in one or another environmental field (e.g. soil pollution) ? - yes, both

There are both kinds of provisions in Polish law. The Act on Environmental Protection Law (hereinafter: EPLA) provides different kinds of administrative legal instruments which are or may be applied in situations where a particular activity has an adverse effect on the environment, causes considerable impairment of the environment or poses a risk to human life or health or when in its course requirements of environmental protection law are violated (e.g. administrative fines, holding the carrying out of the activity or the use of installations, withdrawing or limiting of awarded licenses). The EPLA also include special provisions concerning the prevention and remedying of environmental damage – both of general nature and sectoral one:

- **Administrative redress** (Art. 362 EPLA) – provision of general nature - where a 'subject using the environment' (the subject) adversely affects it, the relevant administrative authority **may take a decision obligating the subject to limit its impact on the environment and its threat to it or to restore the lawful state of the environment**. In its decision the authority may define: a) the scope of the limitation of the effect on the environment or its state to which the environment is to be restored, b) activities aiming at the limitation of an effect on the environment or restoration of the lawful state, c) the deadline for the fulfillment of the obligation. In the event of absence of the possibility to impose such an obligation the authority may obligate the subject using the environment **to pay the amount corresponding to the value of damage** resulting from the impairment of the environment to the relevant communal environmental protection and water management fund (**administrative redress**). The subject's liability pursuant to Art. 362 EPLA is of objective nature. The circumstance that the activity which is a cause of adverse effect on the environment is carried out on the basis of a decision and within its framework does not exempt the subject from liability.

- **Securing claims related to the occurrence of adverse effects in the environment and** damage to the environment within the meaning of the Act on the prevention and remedying of environmental damage (art. 187 EPLA). The competent authority may create security for prospective claims related to the occurrence of adverse effects in the environment and damages to the environment. A prerequisite for the creation of the security in question is an especially important social interest related to the protection of the environment, in particular a threat of considerable impairment of the environment.

- **Reclamation of contaminated soil or land (provisions of sectoral nature)** – the obligation to reclaim contaminated soil or land consists in the restoration of the soil or land to the state required by quality standards. The obligation of reclamation in connection with unfavourable transformation of the natural lie of land consists in the restoration of the land to its former condition. In case of soil contamination existing provisions meet the requirements of the directive concerning the obligation to take remedial actions, to determinate them with the competent authority, and take remedial action by the authority itself in cases specified in the Act. This provisions also provide rules of cost recovery. According to the hitherto provisions (which will still apply to damages that occurred before 30th April, 2007) where contamination of soil or land occurs, the possessor of the land (*the possessor of land means the owner of a real property or, some other subject who is in possession of a real property, who is registered as such in the Register of Land and Buildings*) is obligated[2] to reclaim them unless some other subject – a polluter or an authority – is obligated to do so by virtue of the law[3].

[2] In interim provisions the legislatior defined instances in which the obligation to reclaim contaminated land or soil by the possessor by virtue of the law could be limited or excluded.

[3] "*The Act assumes that the obligation to maintain the land surface in the lawful state rests with the possessor. For that reason the obligation of reclamation basically rests on the possessor except for the situations defined in*

If a possessor proves that some other indicated subject is responsible for contamination of land or soil which occurs after the date of his taking the same into possession, the obligation to reclaim rests with the subject (polluter). The authority is responsible for reclamation when polluter have no title to the land permitting reclamation, when enforcement against the polluter proved ineffective, contamination occurred as a result of natural calamity, and an immediate action is required. The authority carries out reclamation at its own expense or at the possessor's or polluter's expense. The above mentioned provisions came into force in 2004 and for this reason in the interim provisions the legislator specified exceptions concerning the possibility to limit or exempt the possessor of the land from liability.

The sectoral nature has also the Act on the protection of agricultural and forest land which lays down provisions concerning the prevention of land degradation and its reclamation.

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

Annex IV

- the International Convention on Civil Liability for Oil Pollution Damage (1992)
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992)
- the International Convention on Civil Liability for Bunker Oil Pollution Damage (2001);

Annex V

- the Vienna Convention on Civil Liability for Nuclear Damage (1963);
- the Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention (1988)

II. Implementation of Directive 2004/35/EC

2.1. General status of implementation:

On 13th April, 2007 the Act on the prevention and remedying of environmental damage was adopted. It is a transposition of Directive 2004/35 into Polish law. The Act came into force on 30th April, 2007.

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 comprehensive piece of legislation to transpose the Directive? A Separate Act or a new Chapter of a General Act?
Did your country opted for amending several pieces of legislation?
Did your country opted for a combination of these 2 approaches?
Did your country opted for a mere transposition of the minimum requirements of the Directive or introduced stricter provisions?

The Directive concerns the issue of environmental liability which in the system of the Polish legal order are regulated by:

- the general law - the Act on Environmental Protection Law which contains a separate section relating to liability in environmental cases – civil, criminal and administrative liability, including public financial liability for adverse effects in the environment (see part I hereof),

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the Act". A Lipiński, in: *Environmental Protection Law Act.Commentary*, J. Jendrośka (ed.), p.396-397, Wrocław 2001.

- specific acts (e.g. the Act on GMOs, the Water Law Act), which lay down specific regulations pertaining to environmental liability (civil, criminal or administrative) taking into account the specific nature of the field.

Thus, the new Act does not introduce "a wholly new legal solution, but it presents an improved, more precise and developed legal instrument already known in Polish law"[4], Nonetheless, the national legislator decided to adopt new act (and to abolish or change the hitherto provisions) rather than to introduce provisions of the Directive into the existing acts and change them appropriately.

At present the new Act constitutes a specific regulation with regard to the binding provisions on administrative liability but exclusively in the scope which is regulated by this Act – i.e. public financial liability of subjects using the environment for threats and damage to water, land, protected species and habitats done by occupational activity as specified in the Directive. The hitherto provisions on administrative liability in matters related to environmental protection, including the discussed Art. 362 of EPLA, apply to other cases (not regulated by the new Act). The Act is without prejudice to regulations on civil and penal liability either[5].

Undoubtedly, the new Act will have a positive effect on environmental protection and effective implementation of the polluter pays principle The principle is a subject of a constitutional regulation[6] and in the general law - the Act on Environmental Protection Law[7] - in the Polish legal order[8]. The new regulation will force operators to adopt measures and develop practices to minimize the risks of environmental damage so that their exposure to financial liability is reduced.

The Act correspond the scope of the Directive – it concerns damage in water, land, protected species and natural habitats, done by occupational activities as specified in the Directive. However, the Act transposes provisions of the Directive taking into account the existing terminology and rules of administrative liability in environmental protection in Polish law, which makes provisions of the act more stringent in a certain scope than the minimum requirements defined in the Directive. For example, the Act refers to the notion existing in the Polish legal order, namely "a subject using the environment", which seems to have a broader scope than the notion "operator", referred to in Art. 2(6) of the Directive. At the same time, the Act implements the same rule as in art. 362 EPLA, according to which the circumstance that the activity causing a threat of damage or damage is carried on the basis of a decision and within its framework does not exclude financial liability (an exception is a formerly identified and accepted adverse effect on Natura 2000 and protected species – art. 2.1 (a) of the Directive). With respect to protected species and natural habitats, the Act broadens its application covering species and habitats which are protected under provisions of national law (in the Nature Protection Law), not only those which are implementations of the Directive 92/43 and Directive 79/409.

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

[4] W. Radecki, "Legal opinion concerning the environmental protection authority competent for matters of liability for prevention and remedying environmental damage*"* (2007.02.08), p.2. http://orka.sejm.gov.pl/rexdomk5.nsf/Opwsdr?OpenForm&1307.

[5] M. Bar, J. Jendrośka, „Opinion on the draft act on the prevention and remedying of environmental damage" (2007.01.22), p.2. http://orka.sejm.gov.pl/rexdomk5.nsf/Opwsdr?OpenForm&1307

[6] Art. 86 of the Constitution of the Republic of Poland: "*Everyone shall care for the quality of the environment and shall be held responsible for causing its degradation. The rules of such responsibility shall be specified by law*".

[7] Art. 6 of EPLA „*Who causes contamination of the environment shall bear the costs of the removal of the effects of contamination*" (para.1) „*Who may cause contamination of the environment shall bear costs of the prevention of contamination* (para.2).

[8] M. Bar, J. Jendrośka, as above, p.2.

2.3.1. Definitions

How is the definition of environmental damage implemented?

Did your country included in the notion 'protected species and natural habitats' habitats or species, not listed in the Annexes of the Birds and Habitat Directives? (art. 2.3 (c))

Is land damage protected just in case of significant risk of adverse effect on human health?

When is the conservation status of a natural habitat taken as favourable?

'Environmental damage'
Environmental damage means a negative and measurable condition or function of natural elements assessed with reference to the **baseline condition** – i.e. the condition before the occurrence of damage as assessed on the basis of available information.

The Act concerns damage to protected species, natural habitats, water and land.

With reference to protected species and natural habitats the legislator took advantage of the possibility provided for in Art. 2 para.3 point c and extended the scope of the application of the Act beyond the species and habitats listed in the Annexes to the Birds and Habitat Directives ("community species and habitats"), covering with protection all the natural habitats and species which are protected under the Nature Conservation Act i.e. also "the species and natural habitats which are protected by national forms of nature conservation" (the need of such broadening of the scope of the Act was emphasized by the National Board for the Conservation of Nature in its opinion on the planned act[9]). Damage to protected species and natural habitat does not include (pursuant to Art. 2.1a of the Directive) such **an adverse effect** which has been previously identified and accepted through the issue of the relevant decision permitting the undertaking of an action which causes such an effect.

The notion of **damage to the land surface** refers to "*contamination of soil or land, in particular including contamination which can constitute a risk to human health*". Thus, the Act does not limit the notion of damage to the land surface to the damage which can constitute threat to human health but also refers to every contamination which has resulted in measurable change of the land or soil condition assessed with reference to the baseline condition by which the Act understand the condition compliant with the standards of soil or land quality. Damage to land may also consists in unfavourable transformation of the natural lie of land. At the same time the Act uses the notion '*contamination which can constitute a risk to human health'* without qualification this risk as 'significant'.

What about the definition of "operator"? (art. 2.6)

Manner of the implementation of the notion "Operator" into Polish law"

The Act does not introduce a new notion of "operator" but refers to the notion existing in Polish law, namely "**a subject using the environment**" (hereinafter the 'Subject') which is defined in the Act on Environmental Protection Law and includes a large variety of subjects:

a) entrepreneurs – i.e. natural persons, legal persons and organizational entities which are not a legal person, which under a separate law have legal capacity, who on their own behalf conduct business activity (i.e. manufacture, construction, services, commercial activities and exploration, identification and exploitation of natural resources, performed in a continuous and organized manner)

b) persons conducting manufacturing activity in agriculture in the scope of farming, breeding or animal husbandry, horticulture, vegetable growing, forestry or inland fishing,

[9] On-line: http://www.mos.gov.pl/prop/stanowiska_opinie/zm_liability_directive.pdf

c) persons performing medical profession within the framework of individual practice or individual specialized practice,

d) an organizational entity which is not "an entrepreneur" (i.e. educational entities, health care entities),

e) natural persons who are not entrepreneurs but who use the environment in the scope in which the use of the environment requires licence.

2.3.2. Scope

Did your country opted for a double system of liability (strict and fault based) or for a more stringent regime as allowed by art 3.2?

The new Act provides – **the same as the Directive does** - two distinct liability regimes. The New Act applies to an imminent threat of environmental damage or to environmental damage:

a) caused by activity of 'a subject using the environment' which gives rise to a threat of damage to the environment - *potentially risky activities* (the same as listed in Annex III of the Directive)

b) caused by any activities other than the ones referred to in point (a) carried on by 'a subject using the environment' if they concern protected species or natural habitats and occur whenever the subject is at fault.

2.3.3. Exceptions

Which are the exceptions to the scope of the liability regime in your country? (art 4)

What about the permit defence and the state of the art defence (art. 8.4)?

A **catalogue of exemptions provided by the Act, in principle, is based on the provisions of the Directive,** which was justified by the need to ensure '*uniform conditions for the operation of Polish companies on the European market and the competitiveness of Polish economy*'[10]. The Act is not applied in the following cases:

- in situations specified in Art. 4 paras.1,5 and 6 of the Directive,
- in the situation specified in Art. 17 hyphen 3 of the Directive (elapsing of 30 years from the event)
- to nuclear damage in the scope regulated by the Nuclear Law Act (exemption under Art. 4 para.4 of the Directive)

The Act **introduces a new prerequisite** excluding its application which is not listed in Art. 4 of the Directive. The Act is not applicable to forest economy realized in compliance with the rules of the permanently sustainable forest economy referred to in the Act on Forest (which also provides liability provisions). The justification for this exemption is the acceptance of changes in the natural environment resulting from forest economy based on the plans of setting up forests[11].

On the other hand, the Act does not determine the question of its application to damage covered by the scope of the application of the International Conventions listed in Art. 4 para.2 of the Directive and the

[10] Justification to the draft of the Act.
http://orka.sejm.gov.pl/Druki5ka.nsf/0/F6BDF6B30B1441F2C1257261004A8631/$file/1307.pdf

[11] Resolution of the Senate of the Republic of Poland of 29th March, 2007, p.5. The Senate introduced an amendment "in order to eliminate in the process of application of the new Act incoherence with regulations regarding nature protection and forest management as well as possible conflicts with foresters and ecologists".
http://orka.sejm.gov.pl/Druki5ka.nsf/0/2B7FEE4F8754AE14C12572B300292538/$file/1581.pdf

possibility of limiting liability in accordance with provisions of the Conventions listed in Art. 4 para.3, which may give rise to practical problems with its application in that scope.

The Act **does not provide for "permit defence**" as a general prerequisite excluding its application.

2.3.4. Preventive and remedial actions

When are preventive (art 5) and remedial (art 6) actions taken by the operator?

Preventive actions – in the case of the occurrence of an imminent threat of damage to the environment

Remedial actions – in the case of the occurrence of damage. The criteria of assessment whether damage occurred in the given instance are laid down in the ordinance of the minister competent for the environment, which is to make the evaluation of the situation easier for the polluter and the authority:

- with respect to damage to protected species and natural habitat the criteria were defined taking into consideration Annex I in the Directive[12],
- while assessing whether damage to waters occurred, one has to take into account changes concerning: deterioration of the quality of water, the possibility of using bathing places for recreational purposes, changes of the standards of the quality of water, the diversity of organisms in water, and the limitation of the possibility of the development of preying,
- while assessing whether damage to the surface of land occurred, one has to take into account at least one of the following measurable data: non-compliance with the standards of the quality of soil or land, the limitation of the possibility of carrying on agricultural activity, the necessity to change the hitherto manner of the utilization of land, the occurrence of secondary effects, e.g. erosion, dying out of plants or finding out the effects of damage outside the place of its occurrence.

Which is the role of the competent authority?

The role is:

- to establish which 'Subject' has caused the damage or the imminent threat of damage,
- to assess the significance of damage and to determine which remedial actions should be taken
- to oblidge the Subject to take preventive or remedial actions in the case of negligence to fulfill the obligation to take them
- to take – in cases provided for in the Act - necessery preventive or remedial actions indyvidually; according to the New Act the authority takes actions: a) if the polluter cannot be identified or it is not possible to levy an execution against him or the execution turned out inneffective (a prerequisite laid down in the Directive), b) it is necessary to take actions immediately by reason of an existing threat to human life or health or a possibility of the occurrence of irreversible damage to the environment (a prerequisite not provided for in the Directive[13]);
- to collect information concerning an imminent threat of environmental damage and actual environmental damage;
- to gather information necessary to prepare reports for the Commission[14] (the competent authority forwards to the Chief Inspection of Environment Protection the notified instances of imminent threats of damage or the actual damage, and then, after obtaining information about

[12] Justification to the draft of the Act, as above.
[13] Justification to the draft of the Act, as above, p.7.
[14] Justification to the draft of the Act, as above, p.10.

the completion of preventive or remedial actions, notifies the Chief Inspection of Environment Protection thereof).

The Act lays down additional obligations of the authority which do not directly arise out of the Directive but are to make its application more effective[15]. They concern what follows:

- an obligation to gather information about the completion of preventive or remedial actions,
- a possibility to obligate the Subject (polluter) to examine the condition of the environment (to measure the contents of substances in water, soil or land or carry out monitoring of biological and landscape diversity); in the event that the authority itself undertakes preventive or remedial actions, the examination of the condition of the environment is performed by the Voivodeship Inspection of Environment Protection,
- definition by decision of obligations and qualifications of the possessor of the land on which preventive or remedial actions are to be carried on; the possessor of the land does not take such actions (except for the situation where s/he is liable jointly and severally with the subject[16]), but s/he must enable their implementation in the manner defined in the decision; the possessor of the land is entitled to compensation for damage caused by the actions the amount of which is fixed by the authority by decision on his or her request.

Is there any way for environmental organisations to participate in the negotiations between the polluter and the administration on the restoration ?

Yes, there is but exclusively **through participation in the proceedings** in the matter concerning a decision obligating the subject to take preventive or remedial actions. The New Act grants NGO the right to participate "as a subject within the party's right" in the proceedings in the matter concerning a decision about imposing the obligation to take preventive or remedial actions if NGO notified an imminent threat of damage or damage to the environment and the authority deemed the notification justified. Then NGO's right of participation is by virtue of the Act.

If the proceedings in the matter of the decision concerned were not instituted on the basis of NGO's notification (but some other subject's or ex officio), the right of NGO to participate in those proceedings results – in my opinion – from the general rules of participation of social organizations in administrative proceeding laid down in the Code of Administrative Proceedings, in accordance to which: social organizations (including NGO) can participate as a subject within the party's right if: a) the case concerns rights or duties of another person, and not rights or duties of a social organisation; b) the case has a direct relationship with statutory objectives of the social organisation, c) and the public interest justifies the participation of the social organisation. The conditions are checked by competent authority which adopts a decision about allowing the organization to participate in proceedings or refuses the same (negative decisions are subject to complaint and action brought to an administrative court).

Are these discussions public ? No

Are there provisions to develop in further details the common framework concerning the remedying of environmental damage (Annex II)?

There is only a draft of the executory order of the Ministry for the Environment which transposes the requirements provided in Annex II of the Directive into Polish law.

[15] Justification to the draft of the Act, as above, p.8.
[16] M. Bar, J. Jendrośka, as above, p.5.

2.3.5. Preventive and remedial costs

Is there a system of security over property or other appropriate guarantees (art. 8.2)? Is it a preventive system or shall such measures only be taken after environmental damage has occurred? How the system works?

In the instances in which the authority (see point hereof) and not the polluter takes preventive or remedial actions, the Act **imposes on the authority an obligation to recover the costs incurred**. Exceptionally, the authority may renounce a demand to have full or a part of costs reimbursed:

- if the 'Subject' was not identified (a prerequisite laid down in art. 8.2 of the Directive) or it is not possible to levy an execution against him or the execution turned out inneffective,
- where the expenditure required to do so would be greater than the recoverable sum (prerequisites laid down in art. 8.2 of the Directive).

The obligation to bear the costs of preventive and remedial actions, their volume and the manner of covering them is defined by the environmental protection authority by decision. **To liabilities/dues** arising from the obligation to pay the costs of preventive and remedial actions **are applied the provisions concerning tax obligations, including a developed system of the securing of their execution**, proceedings in case of arrears and interest, third-person liability for tax arrears (e.g. company purchaser's liability, liability of members of management boards of legal entities). **The securing of payables** related to the costs **may take place** in the course of the proceedings in the matter concerning a decision about the reimbursement of costs or after it has been issued **if there is a justified doubt as to whether it will be executed**. Security may be created pursuant to regulations on executory proceedings in administration or, on the party's request, in one of the forms provided for in the tax law (e.g.: bank or insurance guarantee, bank warranty, bill of exchange with a bank aval). A compulsory mortgage created on real properties (after a decision has been served) or a tax office pledge on movables is also possible.

Measure of preceding nature – the presented in part I instrument of securing claims regulated by the Act on Environmental Protection Law (art. 187) has a preceding nature (the instrument of securing claims is still regulated by the Act on Environmental Protection by reason of the fact that it is connected with the issuance of emission permits). In the emission permit the competent authority may secure claims related to the occurrence of adverse effects in the environment and actual damage to the environment within the meaning of the new Act concerned. A prerequisite for securing claims is a particularly significant social interest connected with the protection of the environment, and in particular with a threat of substantial impairment of the environment condition. Security can have the form of a deposit, a bank guarantee, or an insurance guarantee or policy.

The New Act changed the presented provision (art. 187) in order to ensure more effective application thereof in case of environmental damage. The New Act authorizes the minister competent for the environment to pass a regulation in which, firstly, he may define types of installations with regard to which such security should be created and, secondly, he may harmonize the methods of fixing the value of such security.

Is there a special provision to give effect to art. 8.3, in fine (appropriate measures to enable the operator to recover the costs incurred in cases the operator shall not be required to bear the cost of preventive or remedial actions)? - yes

Must the operator in such cases nevertheless take the remedial measures? Or are they taken by the authorities ? – yes

Exemption of the 'Subject' from the obligation to bear costs of preventive or remedial actions in situations defined in the New Act - *when he can prove that the environmental damage or imminent threat of such damage: (a) was caused by a third party and occured despite the fact that appropriate safety measures were in place; or (b) resulted from compliance with a compulsory order emanating from a public authority other than an order consequent upon an emission or incident caused by the subject's own activities (prerequisites which comply with the ones laid down in Art. 8. 3 (a) and (b) of*

the Directive) - **does not exempt him from the obligation to take these actions**[17]. In such cases the 'Subject' takes the remedial actions but he is entitled to have his costs reimbursed.

Recovery of the costs incurred is possible by way of the prosecution of a claim for their reimbursement in a civil court. Either the polluter (in the case when an imminent threat of damage or actual damage were caused by him) or the authority (when damage or a threat of damage resulted from the fulfilment of an order issued by the administrative authority) is obligated to reimburse the costs.

2.3.6. Cost allocation

Are there national provisions within the meaning of article 9?

The issue of **multiple party causation** is regulated in Art. 12 of the Act, which pertain to situations in which:

- an imminent threat of damage to the environment or actual damage to the environment were caused by more than one subject using the environment – then these subjects' obligation for taking preventive and remedial actions is joint and several,
- an imminent threat of damage to the environment or actual damage to the environment were caused upon consent and knowledge of the possessor of the land – then the possessor is obligated to take preventive and remedial actions jointly and severally with the 'subject using the environment' which was at fault; this provision is not applied when the possessor of the land notified the authority of an imminent threat of damage to the environment or actual damage to the environment immediately after having learned about the same.

2.3.7. Competent authority

Which authority or authorities were designated for the purposes of article 11?

The competent authority in matters which are regulated by the Act are:

- Voivode (local authority of the government administration), except for matters concerning GMO. In the case of a threat of damage or damage in the area of the operation of two or more than two authorities, local competence is determined on the basis of the criterion of which authority received information about a threat of damage or damage first (granting local competence to the Voivode is a departure from the hitherto model of the division of competence as set forth in the Act on Environmental Protection Law, the Act on Water and Waste Law, in accordance with which the competence of the Voivode used to be limited to the activity carried on in closed territories[18]).
- Minister for the Environment with respect to threats and damage caused by activities with the use of GMO.
- Inspection of Environmental Protection authorities in the scope of obligations connected with gathering information about threats and damage, and the preventive and remedial actions taken. Gathering such information is necessary to draw up obligatory reports for the Commission.

Which remedies are available when preventive or remedial measures are imposed? (art. 11.4

Decisions made in the matters of preventing and remedying damage are subject to **general rules of verification of administrative decisions** laid down in the Code of Administrative Proceedings and the Act on Proceedings Before Administrative Courts Law – there is a possibility to appeal against

[17] M.Bar, J. Jendrośka, as above, p. 5. Justification to the draft of the Act, p. 9.
[18] W. Radecki, as above, p. 5.

taken decisions, to file a complaint with the Voivodeship Administrative Court and present a claim for cassation to the Supreme Administrative Court.

2.3.8. Request for action

Which of the alternatives listed in art. 12.1. were chosen ?

Is article 12 only applied in cases of remediation of environmental damage or also in cases of imminent threat of damager ? (art. 12.5) – in both cases.

What type of review procedure is available under national law ? (art. 13)

Art. 12 and 13 of the Directive were transposed to Art. 24 paras.1-7 of the New Act. The transposition pertains to the following three issues: notification, participation in the proceedings and control over the decisions given. Pursuant to Art. 25 paras.1-7 of the Act:

1. *The environment protection authority is obligated to accept notification from everybody about an imminent threat of damage to the environment or damage to the environment*
2. *If a threat to the environment or damage to the environment concerns the environment as common good, the notification (...) may be made by a public administration authority or an ecological organization.*
3. *(...)*
4. *(...)*
5. *The environment protection authority, recognizing as justified the notification referred to in paras.1 and 2, makes a decision to institute proceedings in the matter of giving decision referred to in Art. 15 para.1 (*i.e. decision obligating the operator to take preventive or remedial actions, BI) *or takes preventive or remedial actions in the instances referred to in Art. 16 (...).*
6. *The subjects referred to in para.1, which made notifications, are entitled to participation in the proceedings as subjects within the parties' rights.*
7. *The environmental protection authority refuses to institute proceedings by way of decision against which a complaint may be lodged.*

The manner of the transposition of Art. 12 and 13 to the national law (to art. 24 of the new Act) may give rise to doubts as to the compliance of the national law with the Directive and the rationality of the legislator's action[19]. However, in such cases the provision of art. 24 must be interpreted in the light of obligations arising out of Art. 12 and 13 of the Directive. Thus, one should assume what follows:

- firstly, everybody may notify a threat of damage or damage (para.1); the Act does not limit this right or the need to prove "damage effect" or "satisfactory interest";
- the right of notification is due also to NGO and public authorities if the notification concerns the environment as public good,
- if the environment protection authority recognizes the notification as justified and institutes proceedings (upon request), the notifying person has the right to participate in the proceedings either as "a subject within the party's right" (if NGO or an administrative authority was the notifier), or as a party (if some other entity was the notifier),
- the notifier, participating in the proceeding as a party or a subject within the party's right have the right to appeal against the decision taken and then lodge a complaint to an administrative court,
- in case of refusal to institute proceedings, the notifier (everybody, including NGO) has the right to lodge a complaint and bring an action to an administrative court.

[19] See: M. Bar. J Jendrośka, as above, p. 6-8.

Thus, the new Act **must be interpreted as guarantees a broad range of the qualified persons to notify** an imminent threat of damage or actual damage (everybody, including NGO and public authorities), and **grants every notifier the right to participate** in the proceedings (as a party or a subject within the party's rights), **and in consequence the right of access to court**.

2.3.9. Financial security

How was article 14 implemented?

There is no obligation under Polish law to provide financial security for a risky activity. Even in the case of the discussed instrument of securing claims regulated in art. 187 of the EPLA (see part. 2.3.5), a decision about creating such security is taken at discretion provided for in the Act. In practice applying new liability regime should force operators to take all necessary preventive measure, including those concerning 'financial security'

2.3.10. National law

Were additional activities included in the scope of the regime? Were additional responsible parties identified?(art. 16.1)

No additional **activities** were included.

More stringent national regulations connected with the identification of **other parties** responsible for preventing and remedying threats and damage are as follows:

- a broad definition adopted by Polish law of the notion „a subject using the environment",
- indicating a possessor of land as a subject who is liable jointly and severally with the polluter in the situation in which a threat of damage or damage to protected species, habitats, water and land, occurred upon his consent and to his knowledge.

Are there special provisions to prevent a double recovery of costs in cases of concurrent action ? (art. 16.2)

The Act does not contain special provisions concerning the issue concerned..

2.3.11. Temporal application

How was article 17 implemented? – the same as in the directive

To the imminent threat of damages and damages caused by an emission, event or incident that took place before 30, April 2007 or which derived from a specific activity that took place and finished before the said date the hitherto provisions are applied (i.e. administrative provisions presented in part. I of the questionnaire).

The new Act is not applied if more than 30 years have passed since the emission, event or incident, resulting in the imminent threat of damage or damage to the environment, occurred.

2.3.12. Transboundary environmental damage

The issue is the subject of Art. 27 of the Act according to which:

"After having been informed about an imminent threat of damage to the environment or damage to the environment which were caused by a subject using the environment who operates in a territory of EU Member State other than the Republic of Poland, the environment protection authority may, through the minister competent for environmental matters, refer to that state with a request to do what follows:

1) to take preventive or remedial actions; 2) to reimburse the incurred costs of the preventive or remedial actions taken".