20 Years in the EU

Two Decades of the Membership of Hungary and the Environmental Liability Directive

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Abstract

Hungary accessed the EU 20 years ago, on 1 May 2004. Prior to and amidst the accession process, Hungary had to harmonize its legal system to the EU legal system which lasted for at least a decade long period. After the accession, as a EU Member State, Hungary may also formulate and modify the legal system of the EU, such as the environmental law of the EU. The present article briefly highlights the main pillars of EU environmental law for the member states, and focuses on a narrower field by taking into account the EU environmental liability issues with regard to the Hungarian aspects and implementation. While the basics of environmental protection and the environmental competences of the EU are enshrined in the founding treaty and other primary norms (for instance, the treaties the EU ratified), the main secondary legal source of environmental liability in the EU is Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Directive or Environmental Liability Directive or ELD). Although it has been modified several times since then, it still remains the basic norm in the environmental field by establishing the regulatory framework based on principles as polluter pays and prevention. The present study provides an overview on the Hungarian legislative steps on its implementation.

Keywords: EU, Hungary, Environmental Liability Directive, polluter pays principle, prevention

1. The Origins of EU Environmental Law and Liability Regulation

The integration of environmental protection and the convergence of environmental policies and legislation are now becoming increasingly important aspects of EU-based integration. Although economic integration was historically regarded as the primary objective of European integration, the emergence of environmental law in the 1970s and the growing interdepen-

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dence of the economy and the environment led to the emergence of a common goal of environmental protection.

Following the 'golden age' of international environmental law, which commenced in the 1990s with the 1992 Rio World Summit[1] and the 1998 Aarhus Convention[2] being signals of such relevance, the legislative action of the EC (later, EU) has progressed at a faster pace. From the 2000s onwards, the Union's policy-making era in environmental law is still being progressed, which has also implied the institution of environmental liability. This significantly expanded the scope of EU's secondary sources of law (thus adopting a directive as a secondary source is the most frequently used form of law in environmental legislation). The directives, however, serve a more interventionist function than the one of imposing liability. It is important to note that even in the case of an *explicit* provision, they are not in themselves capable of legally imposing liability, since the implementation mechanisms of the Member States may specify that.

The integration of environmental issues, both in terms of harmonising the Member States' divergent standards and of integrating them into the EU's wide-ranging system of action, have been defined over the decades, primarily at the level of action plans. However, it should be noted that these are not legally binding.[3] In accordance with Article 4(2)(e) TFEU the environmental protection is a shared competence between the Union and the Member States. Pursuant to the cited part, "the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6."

The latter articles reflect on the exclusive competence of the EU (Article 3) and the EU's (residual, subsidiarity) competence to carry out actions

1 Earth Summit, United Nations Conference on Environment and Development (UNCED). Rio de Janeiro, Brazil, 2–14 June 1991. On the outcomes, *see* Report of the United Nations Conference on Environment and Development. A/CONF.151/26/Rev.1, (vol. I), Corr. 1.

2 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Aarhus, Denmark, 2161 UNTS 447, 38 ILM 517 (1999).

3 This is a solution which has created an opportunity for the states to review their environmental policies, their 'legal environment', and to adapt them to harmonisation. The integrative approach can be observed in almost all areas, from the landscape protection to the issue of pollutant emissions from motor vehicles. Alexandre Kiss & Dinah Shelton, *Manual of European Environmental Law,* Cambridge University Press, Cambridge, 1993, pp. 512–518.

to support, coordinate or supplement the actions of the Member States (Article 6). Therefore, both the EU and the Member States may formulate and adopt binding acts in that area, provided that the Treaties confer on the Union competence shared with the Member States in that particular area (subsidiarity).[4]

Originally, the EC, the predecessor of the EU, initially sought to approximate and unify the rules on civil liability for damage caused by waste,[5] which closely follows from the initial exclusive economic objective of European integration. However, the issue highlights the specificity of the EU in the field of environmental liability, namely the necessity to unify and approximate the different regulatory structures of the Member States, even at the cost of creating their own (secondary) rules. This has consistently been the fundamental principle of the EU liability framework, which the EU and its predecessor, the EC, have been developing since the late 1980s both at the level of primary (*e.g.* Single European Act) and secondary legislation. Consequently, in comparison with the liability clauses of the Member States (which are typically established in a civil law regime and not in the common law system) and the instruments provided by international law, the EU, by declaration and by virtue of its specific legal situation, is unable to play a pivotal role in the creation of liability rules. Nevertheless, several solutions have been devised to clarify liability issues in the Member State-EU relationship. One of the most significant of these is that, in the event of a Member State allegedly infringing the rights of a third party in accordance with the rules of the EU, the third party can only hold the EU liable for the infringement conduct and the resulting damage.

It is worth analysing the issue at the level of the primary sources of EU law, namely the founding treaties (and their subsequent amendments). The abstract and mostly general objectives contained in these treaties reflect the views and ideas of European integration on the environment and liability for damage, which are already expressed in secondary sources of EU law (mostly in regulations and directives). In the system of EC policies, environmental issues and environmental protection were first given broad recognition in the Single European Act (Subsection VI, Title VII – Environment), signed in 1986 and which entered into force in 1987. This

4 Article 2(2) TFEU.

5 *See e.g.* Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, which applies the principle of civil liability.

is noteworthy because it is the first time that environmental protection is mentioned in the Treaties, and at the level of primary legislation.. Furthermore, the polluter pays principle has been incorporated into Article 174(2) EEC Treaty of the Treaty establishing the EEC (now Article 191 TFEU). This effectively means that the polluter must bear the costs of prevention.[6] However, this requires the implementation of secondary legislation to transform the polluter pays principle into an effective principle of liability and compensation within the domestic legislations.[7]

Following the Maastricht Treaty on EU in 1992, Article 130r of Title XVI (Environment) of the Treaty establishing the EC (now also Article 191 TFEU) addresses the core elements of Community environmental policy. In addition to the fundamental objectives, this article also outlines the fundamental principles of the common environmental policy, which now include certain principles of liability for damage in the event of environmental damage. In the former Article 130r(2), the Treaty sets forth the precautionary principle, the principle of prevention, the principle that environmental damage should be rectified at source, and the polluter pays principle. It is important to note that, following the reform of the treaties, the Lisbon Treaty (2007 Treaty of Lisbon amending the Treaty on EU and the Treaty establishing the EC), signed in 2007 and entered into force in 2009, incorporated almost entirely the relevant provisions of the 1992 Maastricht Treaty (including all four environmental principles) in its Title XX, Article 191.

These principles (prevention, precaution, polluter pays, compensation at the source), as evidenced by the primary sources of law, are part of environmental policies and not only basic principles of liability. This is

6 Article 191(2) TFEU: "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

7 As for the causation issue of the polluter pays principle, *see* Youri Mossoux, 'Causation in the Polluter Pays Principle', *European Energy and Environmental Law Review*, Vol. 19, Issue 6, 2010, pp. 279–294. From the Hungarian legal literature, see a very fruitful discussion between Fruzsina Bögös and Katalin Sulyok. *Cf.* Fruzsina Bögös, 'A környezetvédelmi törvény 102. §-ának értelmezése a 2004/35/EK irányelv rendelkezései tükrében', *Közjogi Szemle,* Vol. 11, Issue 4, 2018, pp. 21–30; and Katalin Sulyok, 'Az okozatiság követelmények fontossága a szennyező fizet elv érvényesítésében az uniós és a hazai joggyakorlat tükrében – válasz dr. Bögös Fruzsina tanulmányára', *Közjogi Szemle*, Vol. 11, Issue 4, 2018, pp. 31–39.

because the founding treaties, which are the primary sources of law, do not explicitly address liability issues. Rather, they are only in the sphere of secondary sources of law that they are given real meaning and detailed regulation. In light of the inherent incompleteness of the regulatory system in the Member States, both Article 130r of the former Treaty establishing the EC and the current Article 191 TFEU grant the Community and the Union the authority to establish rules on specific aspects of the environment that give rise to common action, including, of course, any rules on environmental liability (particularly in view of the fact that environmental protection is a shared competence between the Union and the Member States). Nevertheless, the secondary sources of EU law are considerably more closely and specifically linked to the subject of environmental liability, whilst the scope of these rules can be derived from primary sources.

2. Environmental Liability in the EU – The Directive 2004/35/EC

A landmark development in the field of environmental liability within the EU, namely the Environmental Liability Directive[8] was adopted by the Council and the European Parliament on 21 April 2004. It entered into force within ten days, on 30 April 2004. The Directive was initially amended in 2006 by Directive 2006/21/EC.[9] The Directive (2006/21/EC), which first came into force on 1 May 2006 and gave Member States a two-year deadline for implementation, sets out a three-year period for the Member States to comply with the implementation obligation. However, it was not until the summer of 2010 (*i.e.* after a three-year delay) that all Member States managed to implement the Directive. The two other amendments to the Directive (which left the liability methodology essentially unchanged) were made by Directive 2009/31/EC[10] and Directive 2013/30/EU.[11]

8 For more on the Directive, *see* Gerd Winter *et al.*,'Weighing up the EC Environmental Liability Directive', *Journal of Environmental Law*, Vol. 20, Issue 2, 2008, pp. 163–191.

9 Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC.

10 Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006.

11 Directive 2013/30/EU of the European Parliament and of the Council on safety of offshore oil and gas operations and amending Directive 2004/35/EC.

The obvious objective of the Directive is to establish a framework for environmental liability based on the polluter pays principle in order to prevent and remedy environmental damage (Article 1). In this context, the definition of liability represents an inherent conceptual element that extends beyond the polluter pays principle. This latter principle may be considered more of a principle than a legal obligation.

The Directive addresses two principal areas, where it makes a clear differentiation according to the typology of liability, with regard to the environmental liability form: *(i)* firstly, it applies the principle of objective liability for activities involving high risk (the existence of a causal link between the tort and the damage);[12] *(ii)* secondly, in the case of activities not involving increased and high risk, the imputability, the behaviour of the operator (intentionality, reckless negligence) must also be examined. In this latter form, the liability is dominated by the fault approach.[13]

The Directive assigns liability for damage to the term 'operator'[14] and the scope of their activities. The Directive thus applies the principle of civil liability and does not require the State to pay compensation in express terms if the operator cannot be identified or is unable to compensate for the environmental damage caused. Ultimately, the Member States retain discretion to determine whether or not to provide compensation for environmental damage. In the event that the damage is caused by the State itself or by a State-owned entity, the State is obliged to compensate as the polluter (*cf.* the polluter pays principle). Nevertheless, this analysis of liability does not constitute the clear recognition of state responsibility (which is also missing from general international law too). Rather, it represents the application of liability based on civil law principles pertaining to property rights.

It is important to note, however, that according to Article 3(3) of the Directive, without prejudice to the relevant national legislation, the Directive does not give individuals a right to compensation for environmental damage or the imminent threat of such damage. In the context of liability

12 *See* Article 3(1) of the Directive and the list of activities in Annex III of the Directive.

13 In fact, the principle of negative definition applies here, since the text of the Directive implicitly 'reads' that this category does not include activities involving increased risk.

14 *See* Article 2(6) of the ELD, which reads as follows: the 'operator' means "any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity".

for damage, it is imperative that priority be given to claims brought by individuals. However, the Directive is addressed to Member States and its scope extends to environmental damage, which is a concept of damage at the level of States rather than individuals. In the case of damage to the environment, the State having jurisdiction must be assigned the means of action. As other forms of damage to individuals, such as traditional damage (damage to health, damage to property, loss of property), are not encompassed by the Directive, claims brought by these individuals or entities are not covered by the Directive.

The Directive's explicitly mentioned aim is to establish a framework for environmental liability based on the polluter pays principle. This is with the intention of preventing and remedying environmental damage [Article 2(1)(a)].[15] In order to achieve this, the definition of liability is an inherent conceptual element.

The Directive also includes the obligation of prevention (Article 5) and cooperation between Member States (Article 15). The Directive leaves the creation of financial guarantees to the Member States, without establishing an international financial fund in the traditional sense. Although it is acknowledged that the Union is capable of providing assistance to individual Member States in various ways, including the adoption of financial assistance instruments, this could ultimately be aligned with the principle of cooperation between Member States as set out in Article 15.

The principle of the polluter's obligation to pay compensation for environmental damage is one that imposes financial liability on the economic operator whose actions or omissions have caused the damage in question. A comparison of this idea with Articles 5 to 10 of the Directive[16] reveals

15 The term 'environmental damage' means: "damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I. Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation."

16 In this context, the secondary legislation provides for prevention and remedial actions, as well as their costs, cost allocations and limitation period for recovery of costs.

a detailed and unprecedented process of elaboration of the polluter pays principle. It is where the Directive has brought about a fundamental change, and it can be stated with confidence that the polluter pays principle is now an integral part of the extensive body of EU *acquis communautaire*.[17]

There are necessarily exceptions to the polluter pays principle as a relatively objective principle. The Directive defines the grounds for exceptions from liability,[18] *i.e. (i)* damage caused by armed conflict, state of war, civil war or insurrection; or *(ii)* damage caused by an exceptional, unavoidable and inevitable natural phenomenon are not covered by the Directive.

Nor does the Directive apply to damage caused as a result of activities falling within the scope of specific international treaties[19] or as a result of activities in the field of national defence, international security or protection against natural disasters.[20]

Moreover, the Directive does not affect the obligations of Member States under international treaties, provided that such treaties regulate the activities falling within the scope of the Directive in a more detailed and comprehensive manner. Furthermore, other international obligations of Member States under international treaties are not affected by the Directive if they regulate more strictly and/or more comprehensively the question of activities falling within the scope of the Directive. In fact, according to Article 4(2) of the Directive, the

> "Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV, including any future amendments thereof, which is in force in the Member State concerned."

17 *See* Kristel De Smedt, 'Is Harmonization of Environmental Liability Rules Needed in an Enlarged European Union?', *Review of European Community and International Environmental Law*, Vol. 13, Issue 2, 2004, pp. 164–174; Hubert Bocken, 'Financial Guarantees in Environmental Liability', *European Energy and Environmental Law Review*, Vol. 15, Issue 1, 2006, pp. 13–32; Monika Hinteregger (ed.), *Environmental Liability and Ecological Damage in European Law*, Cambridge University Press, Cambridge, 2008, p. 697; Lucas Bergkamp & Barbara Goldsmith (eds.), *Environmental Liability Directive – A Commentary*, Oxford University Press, Oxford, 2013, p. 408; Henrik Josefsson, 'The Environmental Liability Directive, the Water Framework Directive and the Definition of Water Damage', *Environmental Law Review*, Vol. 20, Issue 3, 2018, pp. 151–162.

18 *See* Article 4 of the Directive.

19 *See* Article 4(2)-(4) of the Directive and Annex IV.

20 *See* Article 4(6) of the Directive.

Among the treaties listed in Annex IV, Hungary is party to a number of such treaties.[21] Furthermore, according to Article 4(4) of the Directive, the Directive

> "shall not apply to such nuclear risks or environmental damage or imminent threat of such damage as may be caused by the activities covered by the Treaty establishing the European Atomic Energy Community or caused by an incident or activity in respect of which liability or compensation falls within the scope of any of the international instruments listed in Annex V, including any future amendments thereof."

Hungary is also a party to the 1963 Vienna Convention on Civil Liability for Nuclear Damage and to the Joint Protocol for the Implementation of the 1960 Paris Convention on Civil Liability in the Field of Nuclear Energy and the 1963 Vienna Convention.[22]

The obligation of prevention (Article 5) and cooperation between Member States (Article 15) are included in the Directive as a matter of principle, as in many international treaties, while the desirable but not obligatory system of financial guarantees (Article 14) differs from the method used in treaties, where it is frequently an obligation. The Directive leaves the margin of appreciation and discretion of guarantees to the Member States, without creating an international financial fund.

As regards the question of *ratione temporis* (temporal scope), the Directive does not apply to damage occurring before 30 April 2007, if it is the result of a specific activity which took place before that date and was completed before that date. The Directive therefore applies to damage caused by an emission, event or incident occurring after the entry into force, provided that the damage *(i)* arise from activities carried out after that date; or *(ii)* from activities carried out before that date but not yet completed at the end of that date. The Directive also recognises an objective limitation period of 30 years from the date of the harmful emission, event or incident.[23]

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21 For example, the 1992 Convention on Civil Liability for Oil Pollution Damage and the 1992 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

22 Government Decree No. 130/1992 (IX. 3.) on the implementation of the Joint Protocol on the Application of the Vienna Convention on Civil Liability for Nuclear Damage and the Paris Convention on Civil Liability in the Field of Nuclear Energy, signed on 20 September 1989.

23 See Articles 17 and 19 of the Directive.

In summary, the Directive's 'added value' in this area can be demonstrated on multiple levels. *(i)* On the one hand, for the first time, it set out the environmental liability guidelines for a *sui generis* entity (as the EU). *(ii)* On the other hand, the theory and practice of environmental liability, excluding other types of damage from its scope, is unprecedented in the field of international law, and thus serves as a novelty kind of benchmark for future legislative efforts on similar subjects. *(iii)* Thirdly, the secondary source of law of the EU provides a detailed explanation of the inherent elements of the polluter pays principle, which extend beyond the legal definition of principles and can be interpreted in the language of legal obligations. This is in contrast to other rules, where such elements are not present. *(iv)* Fourth, the deliberate and clear duplication of liability forms may be a useful solution when regulating certain complex or high-risk activities (where a given standard covers both activities involving increased risks and other activities). *(v)* Finally, the Directive does not prevent Member States from adopting more stringent provisions on the prevention or remediation of environmental damage. This can be considered an example of the *subsidiarity principle*.

3. Transposition of the Directive in Hungary

The accession to the European integration was a primary political aim of Hungary after the 1990 system change and the newly adopted multiparty and free market system, and the implementation of environmental norms was the forerunner of several harmonisation outcomes.[24]

Four Member States, namely Latvia, Lithuania, Hungary and Italy had transposed the Directive by the implementation deadline of 30 April 2007. By 2010, however, all countries had completed their transposition obligations. As regards Hungary, the domestic transposition of the Directive actually consisted of a wave of implementation in 2007 and a subsequent series of minor, sporadic amendments until 2015. In the initial phase of harmonisation, which spanned up to 2007, amendments were introduced to align the legislation with the Directive. The following is a non-exhaustive list of the most significant amendments: *(i)* Act LIII of 1995 on the General Rules of Environmental Protection; *(ii)* Act LVII of 1995 on Water

24 *See* Allan Tatham, 'European Community Law Harmonization in Hungary', *Maastricht Journal of European and Comparative Law*, Vol. 4, Issue 3, 1997, pp. 249–283.

Management; *(iii)* Act LIII of 1996 on Nature Conservation; *(iv)* Act XLIII of 2000 on Waste Management (not in force), later by Act CLXXXV of 2012 on Waste as of 1 January 2013); *(v)* Government Decree No. 90/2007 (IV. 26.) on the rules for preventing and remedying damage to the environment; *(vi)* Government Decree No. 91/2007 (IV. 26.) on establishing the extent of damage caused to the natural environment and on the rules of remedying the damage; *(vii)* Government Decree No. 92/2007 (IV. 26.) amending Government Decree No 219/2004 (VII. 21.) on the protection of underground waters; *(viii)* Government Decree No. 93/2007 (IV. 26.) amending Government Decree No. 220/2004 (VII. 21.) on the rules of protecting the quality of surface waters.

Nevertheless, the minor and sporadic, non-comprehensive amendments made after 2007 until 2015 represent more implementation solutions, focusing on specific requirements of the Directive. It shall be noted that the Civil Code (Act V of 2013) is certainly compatible with the Environmental Liability Directive (notwithstanding that the Directive does not address the civil liability of individuals) under clear implementation.

With regard to Hungary, financial guarantees are in principle provided by four insurance companies in accordance with the provisions of the Environmental Liability Directive. However, this is not generally mandatory in Hungary, except for the amendments to the Act LIII of 1996 on Nature Conservation in 2005 and 2008, which are not yet sufficient and should be included in more environmental legislation. It is also worth noting that Hungary has not yet established a financial fund to cover the costs of preventing and remedying environmental damage in cases where the responsible party is unable to pay or cannot be identified. A further suggestion specific to Hungary is that the environmental insurance market is relatively small, and consequently the environmental clauses in insurance contracts and general terms and conditions for property insurance are no longer sufficient. It is therefore necessary to introduce more specific and clearer provisions to address environmental damage. It is also necessary to supplement the institution of independent environmental insurance, as it is currently limited in Hungary. This is mainly due to the fact that these insurance schemes do not, as a rule, take into account environmental damage or pollution resulting from 'normal' operations. Furthermore, they are limited to pollution resulting from accidents only.

In accordance with Article 101 of Act LIII of 1995 on the General Rules of Environmental Protection, the user of the environment is obliged to provi-

de environmental security (for his activity as defined in a separate government decree) and may also be obliged to take out environmental insurance to ensure the financing of the remediation of unforeseeable environmental damage caused by his activity. The user of the environment or the operator is liable for the environmental damage caused by them and for the costs of prevention and remediation. According to a 2020 amendment (already not in force but the implemented part of Act LIII of 1995 on the General Rules of Environmental Protection is still in force),[25] in the event of failure to do so or ineffectiveness, the authority or court entitled thereto may restrict the performance of the activity or may suspend or ban it until the conditions it established are ensured (Article 101). This amendment is more consistent with the stipulations of the Environmental Liability Directive.

Act LIII of 1996 on Nature Conservation states in Article 73 (Insurance and Security), as amended in 2005 and 2008 by the Hungarian lawmaking bodies, that

> "any legal person, other organisation, private entrepreneur or full time farmer using hazardous substances in protected natural areas or pursuing activities otherwise dangerous to the character or conditions of the natural value shall – in accordance with separate legislation – provide security or draw up an insurance contract."

Furthermore, any individual or entity that utilises the environment is required to obtain environmental insurance to guarantee the financing of the remediation of unforeseen natural damage caused by their activities. However, in two sectors, the legislator has already acted earlier than in the two main sectoral laws discussed above. This has been achieved through the introduction of minor amendments to the law and the adoption of a government decree, which have made the role of financial guarantees in the sectoral standards on environmental liability more effective. On the one hand, following the amendment of Act XLVIII of 1993 on Mining, Article 41(7) provides that

> "in order to provide financial cover for the obligations of the mining operator arising from mining activities, the Minister shall, in the concession contract and the Mining Supervisory Authority in the permit, require the conclusion of an insurance contract or the provision of a guarantee, taking into account the offer of the mining operator."

25 *See* Act LI of 2020.

Furthermore, the aforementioned financial cover must also include compensation for damage to the mine and the obligation to carry out landscape restoration, including environmental damage and rehabilitation work on waste treatment facilities.

In contrast, with regard to Act CLXXXV of 2012 on Waste, a government decree has already entered into force on this subject, which also contains detailed rules on certain property securities. However, the operator's obligation to provide a security, the amount and the way of its calculation, regulated by Government Decree No. 19/2014 (VIII. 1.) on waste management activities related to electrical and electronic equipment, cannot be considered to be in the general environmental interest. In accordance with Article 14(1) of the Government Decree, the environmental insurance is but one of the potential forms of property security. In addition, Government Decree No. 314/2005 (XII. 25.) on the environmental impact assessment and the unified environmental authorisation procedure also requires specific regulations regarding the provision of security and the establishment of a reserve fund for the purpose of compliance with the Directive.

Thus, although the enactment of a government decree on the satisfactory provision of financial guarantees remains pending under Act LIII of 1995 on the General Rules of Environmental Protection and Act LIII of 1996 on Nature Conservation, Hungary appears to comply with the financial guarantee requirements of the EU Environmental Liability Directive in the latter sector through the amendment of the Mining Act and the Government Decree linked to the Waste Act.

It has to be stated that one of the most disastrous environmental damages in the EU and definitely in Hungary was the red mud disaster in Kolontár in 2010, which really tested the Hungarian liability rules. That disaster and its legal implications however hardly justified the environmental liability rules, since the scale of environmental damage as well as the seriousness of the disaster was really unprecented (not just in Hungary but mostly in Europe too). That meant that the operator (which went bankrupt almost immediately after the exceptionally serious disaster and the company was later nationalized by the Hungarian lawmaker) was unable to compensate the damage, which exceeded 115 million euros (later compensated, partly by the central budget of Hungary). It is worth noting that the European Parliament adopted a resolution 'lessons learned from the red mud diaster'

in 2015.[26] With regard to the Directive, the European Parliament noted that "the 2010 red mud disaster was Hungary's worst industrial catastrophe", and recognised the rapid and effective intervention of the national authorities. The resolution confirmed that the cause of the disaster was the poor implementation of EU laws and the poor performance of the site operator, it also called for ensuring appropriate inspection in Member States and better disaster prevention by using best available techniques, and called on the Commission and Member States for further steps and proposals and better implementation based on transparency and involving local authorities.

As for the latest environmental implementation review for Hungary, the country report of 2022[27] reflects that "Hungary implemented a project to process and publish cases of damage (under the ELD) in the Environmental Liability Database. The project was led by the Ministry of Agriculture and involved the regional authorities in 2020–2021." The review also confirmed that

> "a mandatory financial security system for liabilities under the ELD has not been fully introduced yet. However, as of now, this system mostly deals with waste management where the Act on Waste requires, under certain circumstances, the licensee to have a financial deposit, bank guarantee or environmental insurance. […]. In 2019 […] Hungary received three priority actions for compliance assurance. There has been no progress on the first action related to public information about promoting compliance, monitoring and enforcement. There has been some progress on the action to ensure there is more information on how professionals dealing with environmental crime work together."

The report emphasized that more progress is necessary in Hungary for financial security for liabilities, the environmental liability directive guidance and publication of information on environmental damage.[28]

26 European Parliament resolution of 8 October 2015 on lessons learned from the red mud disaster, five years after the accident in Hungary (2015/2801(RSP)), 2017/C 349/09.

27 Environmental Implementation Review 2022. Country Report of Hungary. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. European Commission, Brussels, 8 September 2022, SWD(2022) 259 final.

28 Environmental Implementation Review 2022. Country Report of Hungary, p. 45.

4. Review of the Directive

In 2010, the ECJ delivered a landmark judgment in the so-called *ERG* case (C-378/08).[29] This case concerned the interpretation of the Directive. The Grand Chamber of the ECJ held that where the conditions for the application of this directive are not met in the case of environmental pollution, such a situation falls within the scope of national law. This is in compliance with the rules of the Treaty and without prejudice to other acts of secondary law.[30] In relation to the polluter pays principle, the judgment stated that

> "the legislation of a Member State may provide that the competent authority has the power to impose measures for remedying environmental damage on the basis of the presumption that there is a causal link between the pollution found and the activities of the operator or operators concerned due to the fact that their installations are located close to that pollution."[31]

In certain instances, the competent authority may also impose measures to rectify environmental damage on operators subject to the Directive, regardless of any fault, negligence or intent. However, the competent authority must establish a causal link between the activities of the operators subject to the remedial measures and the pollution in question, in accordance with the national provisions governing the taking of evidence.[32]

It can be concluded from the above that the case law of the CJEU provides a significant source of guidance and direction for EU environmental law, which is characterised by a multitude of action programmes and directives. This is particularly relevant given that environmental protection has been an integral part of European law for several decades. After being established at the level of primary legislation, environmental protection is now becoming an increasingly significant aspect of the *acquis communautaire* and its objectives, particularly through the influence of secondary sources of law.

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29 The case concerned a reference for a preliminary ruling in which the polluter pays principle played a significant role, in relation to national legislation conferring on the public authority the power to impose on private undertakings the implementation of remedial measures without an investigation to determine who is responsible for the pollution. Judgment of 9 March 2010, *Case C-378/08, ERG and others,* ECLI:EU:C:2010:126.

30 Id. para. 70.

31 Id. para. 56.

32 Id. para. 65.

In 2016, an implementation summary report[33] was adopted to examine the outcome of the implementation of the Directive between 2007 and 2013. This included an evaluation carried out under the Commission's Regulatory Fitness and Performance Programme (REFIT). The report indicates that considerable progress has been made at the national level, including at the European level, in addressing and preventing certain environmental damage. Nevertheless, the REFIT identifies a number of additional factors that have contributed to the observed differences in the impact of the Directive. These include the necessity for standardisation of the registration of damage covered by the Directive and the importance of public participation and involvement. It is often the case that measures to prevent damage to biodiversity from becoming significant are not taken, based on the incorrect assumption that preventive measures can only be taken if it is known that the damage will become significant.

A year later, a *Multi-Annual Work Programme 2017–2020 – 'Making the Environmental Liability Directive more fit for purpose'* was adopted in response to REFIT, to assist national governments in a consultative way. In this context, the Commission proposed the implementation of the Directive's objectives by outlining three distinctive pillars of the Work Programme. The first expectation of the programme is that all stakeholders should provide the Commission with reliable data, which is essential for evaluation and decision-making. The second pillar of the Work Programme calls for the implementation of tools and measures to enhance the effectiveness of the Directive's implementation by Member States. The third pillar is to guarantee the availability and enforceability of financial guarantees by Member States.

In 2018, the Commission initiated the drafting of the document *'Improving financial security in the context of the Environmental Liability Directive'*. This was completed in May 2020 and provides an overview and analysis of financial security at national and EU level.

33 Report from the Commission to the Council and the European Parliament under Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. COM/2016/0204 final, at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016DC0204. In addition, in the same year, the European Parliament adopted a resolution on the implementation of the Environmental Liability Directive (2016 Resolution of the European Parliament on the Implementation of the Environmental Liability Directive), at www.europarl.europa.eu/doceo/document/TA-8-2017-0414_EN.html.

In 2019, the Directive was amended by *Regulation (EU) 2019/1010*, which harmonised and simplified Member States' reporting obligations in the field of environmental legislation. The new regulations, which have been in effect since 26 June 2019, require Member States to report to the Commission on the experience gained in implementing the Directive.

In 2020, the *Multi-Annual ELD Rolling Work Programme (MARWP) for the Period 2021–2024 – 'Making the Environmental Liability Directive More Fit for Purpose'*[34] had also been adopted by national experts of the Member States for the sake of guidance on key issues, training programmes on the Directive as well as strengthening follow-up mechanisms, and better stakeholder engagement.

The aforementioned documents and mechanisms are likely to have a profound impact on the implementation of the Directive at the national level. This is because they will also have the potential to incorporate 20 years of experience of the practical application of the Directive.

5. Conclusion

The EU's relevant actions in this area can be measured in terms of habitats, natural characteristics in need of local and regional protection, the protection of certain animal and plant species, on the basis of tackling climate change and other sub-areas (*e.g.* consumer protection). The majority of these issues inherently involve specific liability issues, therefore particular attention must be paid to the development of the relevant liability modalities, even if *sui generis* rules and concepts of liability are not to be found in the EU legal system. If liability is considered within the context of the dual system of domestic law and international law, it becomes evident that the situation is rather vague and fragmented. The 27 liability regimes of the current 27 Member States, in conjunction with the hundreds of obligations undertaken under international treaties, serve to illustrate the necessity for action by the EU and its aspiration for unification and harmonization.

However, as integration deepens and new competences emerge, the system of shared competences, which determines the scope of the EU and the Member States, is becoming increasingly indispensable. Moreover, the

34 *See* Multi-Annual ELD Rolling Work Programme (MARWP) for the Period 2021–2024 – 'Making the Environmental Liability Directive More Fit for Purpose', at https://commission.europa.eu/system/files/2020-11/eld_mawp-approved.pdf.

differing environmental characteristics, environmental education and environmental awareness of the Member States collectively guarantee the urgent need of EU environmental law and the environmental liability regime.

In terms of the transposition and implementation of the Directive in Hungary, it can be stated that Hungary has implemented the Environmental Liability Directive in an exemplary manner at EU level, within the deadline set by the Directive. In the initial phase of implementation in 2007, the legislature primarily introduced amendments to the principal sectoral legislations (general protection on the environment, nature conservation, legislation on waste, etc.), with the objective of ensuring direct compliance with the Directive. Nevertheless, there are still a number of potential issues for improvement to submit regular reports and assessments to the Commission and to assist the Commission in the interpretation of environmental damage on a common EU level.

The aforementioned REFIT requirements also include the clarification, where possible, of the concepts of significant damage, significant risk and significant adverse impact under the Directive. These concepts, in their current, rather general wording, provide Member States with a wide and discretionary range of interpretation, making it difficult to treat the concept of damage and damage events uniformly at EU level.