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Matter for Discussion

Liability for Environmental Damage According to Directive 2004/35/EC

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Abstract

By virtue of Directive 2004/35/EC on environmental liability, and with regard to the prevention and remedying of environmental damage, the European Community has developed a legal framework for liability for threat of environmental damage or the occurrence of environmental damage. Its provisions have also determined the duty of the Member States concerning the implementation of regulations necessary to force through the provisions of the above-mentioned act of union law by 30 April, 2007. Such a state of affairs extorts actions, the aim of which is to settle contentious matters which will make the introduction of necessary legal changes possible. Due to the lack of consensus both among the academic representatives in Polish legal circles and other Member States as to the kind of responsibility (which was used by the EC legislator in the Directive), the issue undoubtedly belongs to the group of problems indicated above. On the other hand, the relevance of the issue for the process of effective realization of the aim of the legal act being established, the law unequivocally recommends that its settlement should have priority.

Keywords: administrative liability, civil liability, environmental damage.

Preliminaries

Identifying the essence of environmental damage and developing the community framework for liability for threat of its occurrence or causing it for a long time has been a subject of interest among legal circles of the Member States. The need to determine common rules of conduct in this area was all the more necessary as in some national legal systems the regulations concerning damage caused to the environment do not exist, or the internal standards do not always combine liability for this damage with the duty to prevent or remedy the damage [1].

The necessity to establish a legal act which would standardize the subject issues also resulted from the acceleration of the process of biodiversity degradation as well as from the occurrence of pollution endangering the environment. At the same time it was acknowledged that prevention and "polluter pays" had not brought about the expected results [2].

The causes indicated were the reason why, following long preparations and discussions [3], Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage was adopted [4]. The aim of this Directive is to avoid future negative environmental consequences [2].

Besides, the act is to be the first positive step in the process of gradual harmonization of the regulations of the Member States in the area of liability for environmental damage. Undoubtedly, the process will demand intensified efforts on the part of legislators in these countries. Nevertheless, its undertaking is irrevocable, as far as the content of Art. 19 of the Directive is concerned, which states that the countries are obliged to implement regulations necessary to execute the established legal act by 30 April, 2007. Omission of actions necessary in this matter

could bring about the occurrence of liability for non-fulfilment of the implementation of community law [5-6].

The wide spectrum of activities mentioned is conditioned by the necessity to adopt not only the statutory regulations, but also administrative regulations and the rules laid down for implementation.

Thus, priority should be given to the activities aimed at determining possibly prompt settlement of contentious issues existing in the matter regulated by the directive being adopted.

The main weight of activities in the initial period, preceding the introduction of possible legal changes enabling the norms of this community act to function effectively, for understandable reasons will be the charge of academic representatives of the legal profession, whereas after 30 April 2007, a significant role will be played by organs that administer the law. Only the operation of these organs will allow for an indication of all the existing factual problems related to the implementation of the Directive's aim. The settlement of these problems will next require the co-operation of both the theoreticians and practitioners of the law.

The necessity of undertaking the latter activities is additionally reinforced by the obligation imposed on the Member States by virtue of the provisions of Art. 18, section 1 of the community act being adopted. According to this regulation the countries mentioned shall submit to the Commission reports on the experiences collected as a result of the application of the provisions of the community law act by 30 April, 2013, at the latest.

Doctrinal Disputes on Liability

The perspective of operations presented will definitely concern the contentious key issue existing as to the regulations of the Directive, which is the type or types of liability existing within the range of the responsibility framework developed by the community legislator.

According to Art. 1 the responsibility is to be accomplished based on the "polluter pays" principle [7-9]. However, such a method of fulfilment does not prejudge the type of responsibility. Thus, the wording of the regulation does not allow for the settlement of the above problem.

Further searching for an answer to the question requires the development of a standpoint pertaining to the genesis of the legal act being adopted. Allowing for such a state of affairs, it should be indicated that at the discussion stage over the draft of the Directive, a question was raised that the wording of its provisions suggest a digression from the civil concept of damage and the principles for its remedy. The developers of the Directive were also criticized for the fact that at the same time the system of administrative liability was not determined clearly enough [10.12]. Despite the doubts raised, further works over the wording of the community law act did not bring the elimination of the above-mentioned faults. Due to this fact, also on the grounds of the version of provisions adopted, ambiguities were pointed out concerning the type of liability that was determined in the act (civil or administrative liability) [13].

Among views expressed by the academic representatives of the Polish legal profession, diversified opinions concerning the above-indicated issue can be found.

Undoubtedly, most often there are statements that signal doubts as to the type of liability adopted in the provisions of the Directive, for it is indicated that in the regulations of this act, a non-homogeneous system of liability for damage has been established, to a significant extent based on the administrative liability system [11].

The question is also raised that within the range of financial liability for environmental damage, in the provisions analyzed, "public law financial liability" was adopted in preference to "civil law liability" [7].

On the other hand, though, an opinion was expressed unequivocally that we are dealing with administrative liability [14].

Problems with Determination of the Type of Liability

Removing the above-mentioned differences of attitudes expressed by the representatives of the legal circles is additionally is hindered in Poland by the fact that in the Polish doctrine, a position is hardly ever declared on detailed determination of the features of administrative liability in the field of the natural environment [15, 16]. Such a state of affairs contrasts with the features widely commented on civil liability. This situation to a great extent adds to the fact that the following assumption is adopted as a basic criterion discriminating the administrative liability from other types of liability: all that is not explicitly contained within the range of the civil, criminal or employee liability should be counted as administrative liability [14].

However, even the application of this criterion does not lead to an unequivocal answer as to the type of liability regulated by the Directive, for some of the legal constructions it contains are difficult to identify unequivocally with the legal institutions known to Polish law, despite existing similarities. In the legal literature it is indicated, for example, that in Art. 3, section 1 of the legal act adopted, torts have been regulated [8]. However, potential acknowledgement of this statement being accurate simultaneously brings a reflection as to the possibility of adoption, that on the grounds of the provisions discussed we are dealing with compensation liability [22], quasi compensation [23.24] or some other liability, whereas introduction of warranty liability (Art. 14, section 1) raises the question of the jurisdiction it shall assume in our national legal system, whether it shall have a form of insurance, e.g. due to civil liability, or some other legal instrument.

In light of the above it is necessary to employ some other indicator that will make it possible to identify the type or types of liability determined in the provisions of the Directive. A position, according to which the protection of individual interest lies at the basis of settlement of the civil law concerning liability for damage, can be as-

sumed as such an indicator, whereas the aim of analogical administrative instruments as a matter of principle is the protection of common good [17].

Nevertheless, its application will also cause the occurrence of some doubts, brought about at least by the necessity to determine the shape it is to assume in the Polish law on warranty liability, indicated in Art. 14, section 1 of the Directive. It is also impossible to overlook the fact that there are also situations when the individual interest is the subject of its protection, despite it being a matter of principle that the administrative instruments protect the common interest.

Solution Suggested

The above discussion inevitably leads to the conclusion that it will be indispensable to perform a detailed comparative analysis of the features of administrative and civil liability in the Polish doctrine of law with the solutions adopted in the community act under discussion. Due to the circumstances signaled above, it certainly will not be a problem which is rapidly solved and free from contentious legal issues.

Such a situation will certainly also occur due to the adoption in the Polish legal system of constructions that manifest "civil law construction is applied in administrative regulations" (Polish term: *publicyzacja*) in the field of civil law relations or combining the civil law compensation relations with the instruments of administrative law [17].

It is also impossible to overlook the question of difficulties with harmonizing the legal institutions functioning in the Member States' systems. The problem distinctly revealed itself even on the occasion of developing community principles of liability for unlawful acts [18]. The weight of this problem additionally reinforces the fact that, as already signaled above, in the literature on the subject it is indicated that in the Directive analyzed, torts have been regulated [8].

Despite the occurrence of these difficulties, effective functioning of the regulations of the Directive, comprising first of all taking accurate decisions on the grounds of particular factual circumstances, will force a solution to exemplary detailed issues. This definitely will involve unequivocal determination of principles of liability for threat of environmental damage or the fact of its occurrence, in the context of the principles of administrative and civil liability. It should also be noted here that the concept of principles itself is not defined uniformly in the doctrine of law [19]. In this area it will be justified to indicate the capacity of the concept of damage and damage to the environment in light of provisions of the Directive and in the context of the essence of environmental damage as well as the features of damage in the civil law sense.

It will also be necessary to assume an attitude to the matter of guilt as a premise of liability, which is of particular importance if we allow the assumption that on the grounds of this legal act we are dealing with administrative liability. For among the opinions expressed by the representatives of the legal circles on the one hand we may find a position indicating that the liability takes place irrespective of carrying the blame by the subject responsible [16], while on the other hand, the fact cannot be overlooked that the judicature has expressed an opinion, according to which the administrative liability depends on the fault caused by the subject [20].

Final Conclusions

Closing this brief draft concerning an uncommonly crucial problem of the type of liability regulated in the provisions of the Directive, it is necessary to point out further arguments that speak for the necessity of its identification. Firstly, the legal act being adopted, until the time of implementation of its provisions, will bring about preliminary results of a preventive character. Due to this fact, a Member State, including Poland, should not issue provisions that would raise doubts as to the fulfilment of the aim determined in its provisions [21].

Secondly, the indicated necessity to identify the type of liability is a priority in the view of the wording of Art. 16 of the act, and specifically upholding in force more rigorous regulations connected to the prevention and remedying of the damage caused to the natural environment in relation to the provisions of the Directive.

The legitimacy of undertaking the activities indicated is thus unquestionable. Such a conclusion should be regarded as just, all the more since the problems indicated above, only in an exemplary manner, may significantly influence the uniformity or jurisdiction developed on the basis of the facts of cases comprised by the hypotheses on the rules of law of the community act discussed.

This may next bring about the development of an unfavourable legal surrounding, in the view of the reliability of the law, to the subjects using the environment and those who pursue its maintenance in a state that makes functioning possible for present and future generations.

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