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AIR POLLUTION, POLLUTER-PAYS PRINCIPLE AND ENVIRONMENTAL LIABILITY DIRECTIVE

Túrkevei Tejtermelő Kft.

Samvel Varvastian

Interpretation of the polluter-pays principle

On 13 July 2017 the European Court of Justice (ECJ) delivered a preliminary ruling in the case *Túrkevei Tejtermelő Kft.*¹ The case concerned the interpretation of the polluter-pays principle under Directive 2004/35/EC (Environmental Liability Directive)² and Articles 191 and 193 of the Treaty on the Functioning of the European Union (TFEU).³ The circumstances of the case are as follows.

On 2 July 2014, the Hungarian Lower Environmental Protection Agency was informed that municipal waste was being incinerated at the Túrkevei Tejtermelő Kft. (TTK) facility in the town of Túrkeve, Hungary. Upon the inspection of the site, the Agency staff found three storage units containing 30 to 40 m³ of incinerated municipal waste, including tin cans and other metallic waste, while more metallic waste resulting from the incineration was found in a 5 x 5 metre area outside the storage units. The inspectors also found three lorries ready to transport the incinerated metallic waste.

The Agency established that TTK, according to a statement given on 12 July 2014, had leased the land since 15 March 2014 to a natural person who had died on 1 April 2014. Therefore, the Agency decided to impose on TTK, in its capacity as the owner of the land, a fine of approximately EUR 1 630 for failing to comply with the provisions of Government Decree 306/2010 on air quality protection.⁴

TTK disputed that fine before the Agency but its complaint was rejected. The authorities explained that the incineration of waste in an open space releases substances which are harmful for human health and the environment and which, therefore, constitute an

¹ Judgment of 13 July 2017, *Túrkevei Tejtermelő Kft.*, C-129/16, EU:C:2017:547.

² Directive 2004/35/EC 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 (OJ L143/56 30.4.2004).

³ Consolidated version of the Treaty on the Functioning of the European Union (OJ C202/47 7.6.2016).

⁴ *Túrkevei Tejtermelő Kft.*, paras 21-22. The Decree, as a general rule, prohibits to incinerate waste either outdoors or in facilities that do not comply with the law on waste incineration and grants the Agency a right to impose fines on any entities that have breached the provisions relating to air quality and, at the same time, order cessation of the illegal activity or rectification of the failure to act.

environmental hazard.⁵ Liability for this environmental hazard rests with the owner of the facility. This is so because the facility where the incineration took place belongs to TTK and in accordance with the legislation on environmental protection persons who own or are in possession of the land at any time are to be held jointly and severally liable, except where the owners can prove unequivocally that they are not responsible for the environmental hazard.⁶ Taking account of the fact that the lessee of the land died, the Agency considered that there had been a reversal of the burden of proof to the effect that the burden was on TTK to prove that it was not liable.⁷

TTK then brought proceedings challenging the decision before the Szolnok Administrative and Employment Law Court. The latter noted that according to the ECJ case-law, in order for the environmental liability mechanism under the Environmental Liability Directive to be effective, the competent authority must establish a causal link between the activity of an identifiable operator and concrete and quantifiable damage, irrespective of the type of pollution caused.⁸ Only in these circumstances can the remedial measures be required of that operator.⁹ The national court held that there was no established causal link between TTK and the environmental damage and, accordingly, no legal basis for imposing an administrative fine on the owner of the land,¹⁰ thus it decided to stay the proceedings and refer the matter to the ECJ.

Principally, the ECJ had to answer two questions: 1) whether the provisions of the Environmental Liability Directive and Articles 191(2)¹¹ and 193¹² TFEU preclude national legislation, which identifies, in addition to operators using the land on which unlawful pollution has been produced, another category of persons jointly liable for such environmental damage, namely the owners of the land, without it being necessary to

⁵ Opinion of Advocate General Kokott delivered on 16 February 2017, ECLI:EU:C:2017:136, para. 21.

⁶ *Túrkevei Tejtermelő Kft.*, para. 18. Under Article 102(1) of the law on environmental protection, “liability for environmental damage or an environmental hazard is - except where evidence to the contrary is provided - to be borne jointly and severally by those who, once the environmental damage or hazard has materialised, own or are in possession (the user) of the land on which the environmental damage or hazard has occurred.” The owner is relieved of joint and several liability if he identifies the actual user of the land and unequivocally proves that he cannot be held responsible (Article 102(2)).

⁷ Opinion of Advocate General, para. 21.

⁸ *Túrkevei Tejtermelő Kft.*, para. 33 (citing judgment of 4 March 2015, *Fipa Group and Others*, C-534/13, EU:C:2015:140).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Article 191(2) TFEU sets out the principles of the EU environmental policy, namely the precautionary principle, the principle of preventive action, the principle that environmental damage should as a priority be rectified at source and the polluter-pays principle. The current case concerned only the interpretation of the polluter-pays principle.

¹² Article 193 TFEU allows Member State to maintain or introduce more stringent protective measures than those adopted at the EU level, provided that such measures are compatible with primary law.

establish a causal link between the conduct of the owners and the pollution found to have occurred;¹³ 2) in the case of a positive answer to the first question, whether a fine aimed at protecting air quality may be imposed on the basis of national legislation, which is more stringent within the meaning of Article 16 of Environmental Liability Directive¹⁴ and Article 193 TFEU, or can that more stringent legislation not, at any rate, result in the imposition of a fine which is solely punitive in nature on the owner of the property, who is not responsible for the pollution caused.¹⁵

The Judgment and Commentary

At the outset, the ECJ observed that Article 191(2) TFEU defines the general environmental objectives of the EU; consequently, it is directed at action at the EU level and cannot be relied on by individuals in order to exclude the application of national legislation.¹⁶ Therefore, invoking the polluter-pays principle under the above-mentioned Article is possible only in those situations, which are covered by the relevant EU legislation.¹⁷

With regard to the latter, the ECJ addressed the alleged relevance of the Environmental Liability Directive. The scope of the Directive is to “establish a framework of environmental liability based on the ‘polluter-pays’ principle, to prevent and remedy environmental damage”.¹⁸ The Directive, however, does not specifically list air pollution as environmental damage within the meaning of Article 2(1).¹⁹ Nevertheless, recital 4 of the Directive stipulates that environmental damage also includes damage caused to natural resources outlined in Article 2(1) by airborne elements.

The ECJ held that it was for the referring court to determine, whether, in the present case, the air pollution from waste incineration was capable of causing such damage or the imminent threat of such damage so as to give rise to the need to take preventive or remedial measures within the meaning of Environmental Liability Directive.²⁰ The ECJ therefore, has reiterated the importance of recital 4, leaving open the possibility for air pollution to be

¹³ *Túrkevei Tejtermelő Kft.*, para. 35.

¹⁴ Article 16(1) of the Environmental Liability Directive establishes that the Directive “shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage”.

¹⁵ *Túrkevei Tejtermelő Kft.*, para. 34.

¹⁶ *Ibid.*, paras 36 and 37.

¹⁷ *Ibid.*, para. 38.

¹⁸ Article 1.

¹⁹ Article 2(1) defines “environmental damage” as damage to protected species and natural habitats or damage affecting water or land.

²⁰ *Túrkevei Tejtermelő Kft.*, para. 44.

considered environmental damage under the Directive, in case it damages or threatens to damage the natural resources covered by Article 2(1).²¹

At the same time, it may be observed that TTK was held liable not as polluter, but rather as owner of the land on which the pollution took place.²² Meanwhile, as rightly noted by the national court, the environmental liability mechanism under the Environmental Liability Directive requires the competent authority to establish a causal link between the activity of one or more identifiable operators and the environmental damage or the imminent threat of such damage.²³ Notably, the ECJ emphasized in its earlier case-law that a causal link should be established both in case of strict environmental liability and the fault-based liability (when liability arises from fault or negligence on the part of operator), as provided in Articles 3(1)(a) and (b) of the Environmental Liability Directive.²⁴ Otherwise, the situation is dealt with solely by national legislation.²⁵

In that context, the causation element is all the more relevant given the fact that in situations like this the polluter-pays principle and, accordingly, the Environmental Liability Directive are invoked when the operator did not contribute to the pollution, nor to the risk of such pollution. The ECJ stressed that according to Article 8(3)(a) and recital 20 of the Environmental Liability Directive, an operator should not be liable if he can prove that the environmental damage was caused by *force majeure*, including, for instance, damage caused by a third party, which occurred despite the fact that appropriate safety measures were in place, or resulted from an order or instruction emanating from a public authority.²⁶ This protects the owners from being liable for any environmental damage to their property

²¹ Ibid., para. 46: “[I]f the referring court should find that the air pollution at issue in the main proceedings has also caused damage or given rise to an imminent threat of such damage to water, land or protected natural species or habitats, such air pollution would come within the scope of [Environmental Liability Directive].”

²² Ibid., para. 54.

²³ Ibid. See Article 4(5): “This Directive shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators”; Article 11(2): “The duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which remedial measures should be taken [...] shall rest with the competent authority. To that effect, the competent authority shall be entitled to require the relevant operator to carry out his own assessment and to supply any information and data necessary”; recital 13: “Not all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there need to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the identified polluter(s). Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts or failure to act of certain individual actors.”

²⁴ Varvaštian, Samvel. “Environmental liability under scrutiny: The margins of applying the EU ‘polluter pays’ principle against the owners of the polluted land who did not contribute to the pollution” *Environmental Law Review* 17.4 (2015): 274. See also *Fipa Group and Others*, paras 55 and 56.

²⁵ Ibid.

²⁶ Ibid., at 275.

arising from the acts of third parties, including the potentially deliberate acts of sabotage, which goes beyond the scope of the Environmental Liability Directive.²⁷

Nevertheless, it should be kept in mind that Article 16 of the Environmental Liability Directive does allow more stringent national provisions with regard to prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and remediation requirements and the identification of additional responsible parties.²⁸ In the present case, such national legislation, namely Article 102(1) of the law on environmental protection, provides that, unless proven otherwise, the “persons who own or are in possession of the land ‘on which the environmental damage or hazard occurred’ are to be held jointly and severally liable; the owner can discharge himself of his liability only if he can identify the actual user of the land and can prove beyond reasonable doubt that he did not cause the damage himself.”²⁹ In other words, the above-mentioned national law seeks to prevent the lack of care and attention on the part of the owner, as well as to encourage the owner to adopt measures and develop practices likely to minimise the risk of damage to the environment.³⁰ Therefore, the owners of land are deemed to monitor the conduct of those persons using their property and to report them to the competent authority in the event of environmental damage or the threat of environmental damage, failing which the owners will themselves be held jointly and severally liable.³¹

The ECJ agreed that since such legislation strengthens the liability mechanism established by the Environmental Liability Directive by identifying a category of persons who can be held jointly liable in addition to operators, it does fall under Article 16.³² The Court therefore concluded that, if applicable in the present circumstances (which is for the national court to determine), the Environmental Liability Directive and Articles 191 and 193 TFEU do not preclude national legislation identifying another category of persons who, “in addition to those using the land on which unlawful pollution was produced, share joint and several liability for the environmental damage, namely the owners of that land, without it being necessary to establish a causal link between the conduct of the owners and the damage established.”³³

Similarly, the ECJ held that the above-mentioned provisions do not preclude national legislation to impose fines upon such persons by the competent national administrative authority. This is because when a Member State identifies those owners of land as being

²⁷ Ibid.

²⁸ *Túrkevei Tejtermelő Kft.*, para. 56.

²⁹ Ibid., para. 57.

³⁰ Ibid., para. 58.

³¹ Ibid., para. 59.

³² Ibid., para. 60.

³³ Ibid., para. 63.

jointly liable, “it may prescribe sanctions designed to increase the effectiveness of this more stringent protection mechanism” in accordance with the discussed provisions of the Environmental Liability Directive and TFEU.³⁴ Hence, an administrative fine imposed on the owner of land as a result of unlawful pollution which he has not prevented and in respect of which he is not able to identify the party responsible can come under the liability mechanism because it can be appropriate for the purposes of contributing to the attainment of the objective of more stringent environmental protection.³⁵ This, however, is left for the national court to determine.³⁶ Likewise, it is the national court that should determine whether the methods for calculating the amount of the fine go beyond what is necessary to attain the above-mentioned objective.³⁷

Concluding remarks

The ruling in the present case underscores that the Environmental Liability Directive may be invoked in situations where environmental damage occurs via air pollution, although its application is contingent on whether such damage affects protected species, natural habitats, water or land.³⁸ What is more, Article 16(1) of the Environmental Liability Directive may be used to support the imposition of fines for such environmental damage, even despite the fact that the Directive does not contain any provisions on penalties.³⁹ The ECJ’s reasoning in the present case once again endorses the leeway enjoyed by the Member States in setting national environmental liability standards.⁴⁰

³⁴ Ibid., para. 65.

³⁵ Ibid., para. 66.

³⁶ Ibid., para. 67.

³⁷ Ibid., Para. 68.

³⁸ Opinion of Advocate General, para. 74.

³⁹ Ibid., para. 2: “[the Environmental Liability] Directive is not applicable because it does not contain any provisions on penalties. Penalties for the illegal incineration of waste instead should rather be assigned to the Waste Directive.”

⁴⁰ In its previous significant ruling on the Environmental Liability Directive in 2015, the ECJ held that the Directive does not preclude national legislation, “which, in cases where it is impossible to identify the polluter of a plot of land or to have that person adopt remedial measures, does not permit the competent authority to require the owner of the land (who is not responsible for the pollution) to adopt preventive and remedial measures, that person being required merely to reimburse the costs relating to the measures undertaken by the competent authority within the limit of the market value of the site, determined after those measures have been carried out” (*Fipa Group and Others*, para. 63).

