

Estonia

Environmental Liability 2012

National ELD Report

Justice and Environment 2012

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I.

Comparative Legal Analysis on ELD and other liability legislation

ESTONIA

The 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 (ELD) is – among others - subject to various shortcomings with regard to scope and definitions which might be one of the reasons for the low number of cases. Problems are also reported with regard to the economic assessment of damages and remediation methods.¹²

This analysis aims to help to collect evidence on the added value/weakness of the ELD to bring specific arguments for better implementation and as to a revision of the directive. Therefore the national ELD legislation is to be compared with similar liability regimes to bring on the one hand more clarity on the interaction of ELD legislation with other liability regimes and to demonstrate on the other hand value and weaknesses of all these systems.

1. National liability regimes

In addition to environmental liability regime according to ELD (hereinafter referred to as “ELD regime”), we have provisions for obligation to compensate environmental damage, caused to different kind of environmental elements (protected areas and species, forest, fish stock, water etc (see more precisely below).

As a rule, these provisions do not involve obligation to restore the initial condition of environment, but are directed to monetary compensations. There are other major differences, like the scope of application (what is considered to be damage), the procedure of handling the cases etc. However, it can be said that this is another system for dealing with environmental damage, next to the ELD regime.

A significant characteristic of the national regime is its fragmentation. The provisions of this regime are established in different acts (each regulating different environmental element – eg mining issues are regulated in Earth’s Crust Act, water issues in Water Act, waste issues in Waste Act, forestry issues in Forest Act etc.), whereas ELD regime is regulated only by one act – the Environmental Liability Act (ELA).³

¹ Compare the results of the **Stakeholder and Practitioner Workshop** on the implementation of the ELD in the EU: <http://ec.europa.eu/environment/legal/liability/workshop081111.htm>

EC Report on the effectiveness of the EU Environmental Liability Directive: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0581:EN:NOT>

² See **J&E legal work in 2011** with regard to ELD: <http://www.justiceandenvironment.org/publications/eld>

³ It has to be noted that codification of Estonian environmental legislation is in process since 2007 and should be finished by 2014, including revision of the environmental liability regime. Since the process is ongoing, it is not clear yet how the environmental liability will be regulated in future.

A more precise overview of the provisions in different acts is given in table, annexed to the current analysis.

2. Civil and Criminal Liability regimes

In Estonia, both civil and criminal liability is foreseen for causing environmental damage (although, criminal liability is applicable only from certain extent of damage). In current analysis, criminal liability is not described.

3. Main differences of national liability regimes compared with ELD

a) Competent authorities

In ELD regime, the main competent authority is the Environmental Board – an authority who's responsibilities involve also issuing environmental permits, supervising environmental impact assessment, administrating protected areas etc.

The national environmental damage regime is much more fragmented, as there may be three competent authorities in different issues and cases - **Environmental Inspection, Environmental Board** and **municipality** (see more detailed overview in the table). In some cases, two or all of them are competent, according to law (though in practice, only one of them can really act as competent authority).

In most cases, the competent authority is **Environmental Inspection**. It calculates and collects the compensation of environmental damage, issues precepts for eliminating the pollution, and in some issues has a competence for arranging the decontamination. In case of damage caused to protected natural objects (protected areas, species or single objects), the Inspection also has right to file a court suit for collecting the damage.

In some cases, related to water and waste, the **Environmental Board** is the competent authority. In very specific cases (concerning water damage), where the polluter has not eliminated the damage, Environmental Board is entitled to determine a third person to eliminate the damage and collect costs from the polluter. Also, in some specific cases Environmental Board itself has the competence for arranging the decontamination.

In some cases, the **municipality** can be the competent authority, issuing a precept for decontamination. Also, in some cases Environmental Board has a competence for arranging the decontamination. In case of damage caused to protected natural objects, the Environmental Board

also has a right to file a court suit for collecting the damage, if it is the administrator of the protected natural object (eg protected area).

Usually, the competent authorities **are not allowed to eliminate the damage by themselves or arrange it, except in some specific cases** that concern damages from contamination of waste, surface water and body of ground water, forest or soil, or the contamination that is caused by the operator that has to have an IPPC permit.

b) Scope/Damage covered

The damage covered by the ELD regime is significantly narrower than by the national damage compensation regime.

Firstly, the national regime has different meaning for the term “damage”. In fact, the terms used for “environmental damage” under ELD regime and national damage compensation regime are slightly different – in Estonian “keskkonnakahju” (ELD regime) and “keskkonnakahjustus” (damage compensation regime). However, use of the latter term is not consistent – terms like “damage caused to environment” or “damage caused to natural object”, “forest damage” etc are used as well. Therefore, the wording of term “environmental damage” seems to be similar. However, the content of environmental damage in ELD and national damage compensation regime is substantially different in one aspect: whereas under ELD regime, the harmful consequence is regarded to be damage (eg “significant adverse effect” to the elements), the obligation to compensate environmental damage under national regime may in addition arise simply from certain kind of activity (eg cutting trees that are younger than allowed, causing fire in protected area etc).

Secondly, the national damage compensation regime involves wider range of environmental elements. Through different acts, different elements are “protected” by the national liability regime – mineral resources and soil, water, fish stock, protected natural objects, wild game, forest and damage arising from waste or from activity of industry (facilities with IPPC permit). The exact content of what constitutes “damage” in case of each of these elements is very specifically listed in each of the acts regulating the relevant topic (Earth’s Crust Act, Water Act, Nature Protection Act etc).

c) Extent of damage required/Thresholds

There are no certain thresholds for damage established in legal norms. Usually, it is only described what kind of activity causes (or constitutes) the damage – and this itself may involve some kind of thresholds.

Sometimes the damage is defined as “causing contamination”. The definition of contamination, established in IPPC Act, is very broad. It involves the possibility of threatening the human health and environment, causing the material damage, or damage or disturb the use of environment for recreational or other legal purposes.

d) Liability/Accountability

As a general rule, it does not matter who caused the damage (**natural or legal person**), except in Integrated Pollution Prevention and Control Act (only the owner of integrated environmental permit or obligator of this permit could be regarded as the polluter).

There may be special rules. For example, it is regulated in Waste Act that if the transport of waste is not organised by the municipality, the **municipality** must cover the costs of decontamination (this is valid only in some cases).

e) Are Preventive Actions or Response Actions required?

Preventive Actions

The measures preventing damage to occur are mainly established in environmental permits (usually there is specific provision in the relevant act, saying that in the permit conditions have to be set in order to protect environment or in order to reduce the impact from permitted activity). However, in some of the laws it is also established as a general rule that damage must be prevented or kept on minimum level:

- according to the Earth’s Crust Act, the miner has an obligation to implement measures in order to keep damage on minimum level and prevent environmental damage;
- the Water Act establishes an obligation to eliminate the hazard that damage would occur again (after it has already happened);
- the Waste Act requires to decrease the environmental disturbances;
- the Forest Act requires that the damage to forest must be prevented.

This general rule should be followed by every operator or person, but there are no more specific provisions that could guarantee implementation of these requirements.

Response Actions

For response action, there are two options: 1) decontamination or paying costs of decontamination, and 2) paying monetary compensation. Mostly, the monetary compensation is required (see the table in annex for more details).

f) Liability Regime

Mainly, the liability regime in Estonia is **fault-based** - a person will be liable if he/she has been acting deliberately or negligently.

There are exceptions - in some cases the **strict liability** is applied, so the person has increased responsibility. For example, under the Waste Act the owner of the land where the illegal waste is located, is liable without fault and has to eliminate the waste if the real polluter is not ascertained during one year since the procedure of offences was initiated.

The Estonian Environmental Liability Act also uses fault-based liability as a rule. However, there is a list of activities in case of which strict liability is applied (operating facilities with IPPC permit, deliberate release into environment of GMOs etc), ie the person who caused damage, is liable despite of the fault (§ 8(2) of ELA)). This is different from the national damage compensation regime.

As for the thresholds, it can be said that according to ELA, the threshold of strict liability is in some cases the threshold of operating capacity above which permit is required. General liability is restricted with the limits of definition of “environmental damage”. No thresholds apply for the national damage compensation regime – the liability depends on what constitutes “damage” in concrete case. In this regard, the systems are similar.

g) Costs

In most cases, the methods for cost evaluation are set in legal norms (sometimes in form of specific formulas) (for more details, see the table in annex). The costs are calculated on basis of particular charges for the use of environment or pollution (pollution charges, extraction charges) or specific amounts of compensation determined in the legal norms (eg the sums of compensation in case of damaging protected species vary depending on the species, there is a whole list). In come cases, the damage on protected natural objects may depend on indicators of feature (protected category, square meters, location, and mass). In some cases, costs may depend on costs of decontamination.

In Estonia, there are two options: monetary compensation only or decontamination. There is no obligation for natural restitution (for example, the natural restitution of damage on fish, protected natural features or wild game) – except for cases that fall under the ELD regime.

h) Access to Justice and Claims for Compensation

The public access to justice and claims for compensation is not granted under the national damage compensation regime (this is different from the ELD regime where NGOs and interested persons can claim preventive or remedial measures to be implemented). Only the Environmental Board or Environmental Inspection is entitled to a remedy.

i) Burden of proof

There are no special rules set for the evidence procedure. **Usually, the harmful consequences must have arrived and the harm must be proved.** In some cases, the harmful consequence does not have to be arrived and the liability applies already for certain kind of activity itself (for example, causing the forest fire).

j) Financial security

There are no systems for financial securities in cases of environmental damage.

k) Time limits for presentation of claims

The time limits for presentation of claims are not regulated in the acts foreseeing the damage compensation system, except for the Waste Act (if the polluter is not ascertained during one year since the procedure of offences was initiated, the owner of the land that illegal waste is located, would be obliged to eliminate the waste himself).

However, the general rule for all civil claims applies: the limitation period of presentation of claim is 10 years since the obligation falls due.

4. Prevailing legal norms

The national environmental damage compensation regime stayed in place after introduction of ELD regime, the provisions were not repealed. However, the ELA foresees that in case environmental damage is remedied according to its provisions, the polluter does not have to pay the monetary compensation. It means the two systems exist parallel, but in scope of ELA its measures have a priority.

It must be noted that the legal norms of environmental liability may change in near future, due to codification process of Estonian environmental law. According to the current draft, the two systems would be more integrated and the obligation for natural restitution would be applied not only to damage in scope of ELD regime (ELA), but also for the elements that are now protected only by the damage compensation system. The draft foresees that only in case natural restitution is not possible, can the damage be compensated in money. However, the final version of the new law (to be enacted in 2014) may differ from the current draft.

5. Damages not covered by a liability system

There might be damages that are not regulated, but the evaluation needs an opinion from environmental experts.

6. Strengths and weaknesses of national liability systems

The major weaknesses of the current national damage compensation system are:

- priority of the monetary compensation instead of restitution in nature;
- the sums to be paid in case of damage are not very well reasoned and in some cases probably do not cover the real damage (ie in case of damaging protected areas or species);
- the system is very fragmented, regarding competent authorities and other aspects of regulation – every different area of environmental law has different rules (though it might be justified, taking into account the different nature of different environmental elements).

The major strength is that the system does exist so the liability is not just restricted to the ELD regime (which is far too narrow to deal with all of environmental damage).

II.

CASE STUDY

Accident with fuel truck of AS Olerex

ESTONIA

The elaboration of case studies on liability proceedings (non-ELD and ELD cases) is meant to give, – in addition to the legal analysis of national liability regimes - an appropriate insight into the practical application of different liability regimes and the shortcomings of ELD legislation regarding its scope and definitions. The identification of respective obstacles and challenges will give important incentives for the improvement of the Environmental Liability Directive (ELD)⁴.

1. Matter of case:

A fuel truck belonging to company named AS Olerex and transporting the specially marked diesel fuel drove off the road to the ditch, because of slippery road. About 6000 - 8000 liters of fuel flowed out of the container to the snow and soil. In result, a threat of damage to the surface water and ground water was discovered as well as damage to the human health.

2. Country:

Estonia

3. Location:

Harju County (North-Estonia), Rae municipality, on the boundary of Aruvalla and Saula villages (on 30rd km of Tallinn-Tartu road).

4. Short summary of the case:

This is the biggest and most significant accident in Estonia in case the preventive and response action have been implemented (although it is definitely not the biggest accident where environmental damage has been caused).

On 13 December 2010 a fuel truck belonging to company named AS Olerex and transporting specially marked diesel fuel drove off the road. 6000-8000 liters of fuel flowed out of the container to the snow and soil. After the accident, approximately 6,2 tons of residues of fuel was collected from the polluted area. However, some amount of the fuel sunk in the soil (approx. 1,8 tons of residues of

⁴ DIRECTIVE 2004/35/CE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004

fuel) and 150 m² of area was polluted. On 22 December 2010, AS Olerex submitted an explanation letter and on 6th January 2011 a plan for remedial measures to the Environmental Board (competent authority in environmental liability cases).

The Environmental Board approved the plan for remedial action in January 2011, and ordered the remedial measures to be implemented within one month. Accordingly to the plan, the snow and soil mixed with fuel were collected and taken away by AS Olerex for proper waste handling. The polluted water in the pit where the polluted soil had been removed was pumped out and the pit was filled with clean soil.

In Spring 2011, control samples of surface water quality were taken by the Environmental Board. The results were in accordance with limit values in legal acts. Therefore, in June 2011 the Environmental Board concluded that the environmental damage to human health through the damage on soil and the threat of damage on surface water and groundwater were eliminated and the caused environmental damage was remedied by implementation of preventive and remedial measures.

5. Applicable national laws:

Environmental Liability Act (ELA)

6. Type of procedures (administrative and/or judicial) and competent authority:

The case involved only administrative procedure, not judicial:

- The accident was registered and an on-site inspection carried out by the Environmental Inspection;
- Environmental Inspection forwarded the case to Environmental Board;
- The Environmental Board took the samples from the water (from the ditch near to the accident place) three times and identified the threat of damage on surface water and ground water and environmental damage on human health through the soil damage.
- A precept for implementation of preventive and remedial measures was issued by the Environmental Board. With this precept, the authority approved the plan of remedial action, submitted by AS Olerex.
- After AS Olerex had carried out the preventive and remedial activities, the Environmental Board issued a decision that the environmental damage to human health through the damage on soil and the threat of damage on surface water and groundwater were eliminated and the caused environmental damage was remedied by implementation of preventive and remedy measures.

7. Polluter:

AS Olerex

8. Claimant:

The procedure was only administrative and there were no third parties except for the polluter and Environmental Board.

9. Other participants involved:

Environmental Inspection (*Keskkonnainspektsioon*) – checked the place of accident and forwarded the case to Environmental Board for requiring a plan of remedial measures.

Environmental Board (*Keskkonnaamet*) – identified the environmental damage and threat of damage and the person that caused the damage. Required and approved the plan for remedial measures, presented by AS Olerex, giving also additional guidelines/requirements.

AS Maves – expert that helped to identify the environmental damage and threat of damage and to determine the relevant preventive and remedy measures.

Estonian Road Administration (*Maanteeamet*) – the soil reparation works were approved by the Estonian Road Administration.

10. Description of the damage and the applied liability regime:

a) Main impact and sort of damage caused

Main impact caused to the weakly protected groundwater and surface water and environmental damage to human health. In result of the accident, big amount of hazardous chemical – diesel fuel – was discharged to the environment. If being in contact with people, such chemical could potentially cause serious health damage. The impacts of oil pollution to nature could be as disastrous.

b) Extent of damage caused

The extent of damage was not clearly determined. It is only clear that regarding possible damage to groundwater and surface water, only a threat was determined (it was only likely that in near future, environmental damage may occur), whereas human health was considered to be damaged.

The damage was local.

c) Preventive/response actions being taken

On 13 December the works for removing the contaminated soil started. The pollution was eliminated by excavation of polluted snow and soil. The polluted water in the resulting pit was pumped out and handled. Afterwards, the dredge was filled with clean soil. On 17 January 2011, filling of dredge was finished.

In spring 2011 (after 4 months of accident), the water quality was sampled in ditch that was located 40 meters from the place of accident (28.12.2010; 20.01.2011; 18.04.2011). The sample results were in accordance with the limit values in legal acts.

The works were completely finished on 20 May 2011.

d) Applied liability

Usually, under the ELA the fault-based liability is applicable, but there are some exemptions. In that case, **absolute liability** was applied, because it concerned the use of hazardous chemicals.

e) Type of compensation

The polluter removed contaminated soil to the extent possible, thereby restoring the initial condition of the environment. No monetary compensation was foreseen, as the ELA excludes such obligation, in case the environmental damage has been remedied according to its provisions (§ 40 (1) of ELA).

The costs of decontamination works amounted about 21 000 EUR.

f) Description of the evidence procedure

The Environmental Board did not have to prove that there was causal link between the damage and the action, because the causal link between the use of hazardous chemicals and damage was presumed.

The authority had to prove that the damage or the threat of damage was caused. Evidence about causing damage and threat of damage was collected by sampling of water and soil by Environmental Board. The Environmental Board took control samples of water after 4 months of the accident. The results were in accordance with the limit values in legal acts.

g) Time limits for presentation of claims

According to ELA, its provisions can be enforced in case no more than 30 years has passed from the event, causing environmental damage (ELA § 1 (4)).

The Environmental Board is justified to submit the calculation of costs and the payment notice to the person that caused the damage within 5 years after the day that implementation of preventive or remedial measures has ended or after the day that the person that caused the damage was identified. It depends on which situation arrived firstly. (ELA § 27 (5))

11. Outcome of the proceedings:

According to the decision of Environmental Board, the preventive and remedial measures were successfully implemented and the caused environmental damage was remedied. The existing situation was restored.

However, residues of pollution still stayed in the soil. According to decision of the Environmental Board, it was not possible to eliminate them without disproportionately high costs. Such exemption is allowed under Estonian ELA.

12. Remedies taken:

The pollution was eliminated by excavation of polluted soil and was handled. In result of the dredging operations the polluted water caused in the hole was pumped out and handled. Afterwards, the dredge was filled with clear soil. In spring (after 4 months of accident), the water quality was sampled in ditch. The sample results of water quality were in accordance with limit values.

13. Current status of case:

The case is ended. The final soil works were ended on 20th May 2011.

14. Obstacles/Challenges generated in this case:

It is worth mentioning that not all the pollution could be removed. Although the Environmental Board declared that the caused environmental damage was remedied and existing situation restored, it also marked in its final decision that there will be continuous contamination in the soil, which needs to be taken into account by local municipality or Road Administration when planning future road repair works.

Nevertheless, the case is remarkable from another aspect. According of the statistics of Environmental Board, it is one of the 2 cases in practice where the environmental damage or threat of damage has been identified according to ELA. Altogether, only 9 environmental liability cases have been reported to be handled by the Environmental Board (it is worth mentioning that ELA is in force since December 2007). It means that there are either very few cases of environmental damage that fall under the environmental liability regime (and it is difficult to determine that environmental damage has actually occurred), or that the officials are just not sufficiently competent or equipped to use provisions of ELA even if they could be applicable. Either way, it means that environmental liability regime is not working very efficiently for its purpose – to avoid or remedy environmental damage.

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