ELD News Edition 2014/2

Spotlight on Estonian Environmental Liability

by Kärt Vaarmari, Environmental Lawyer at the
Estonian Environmental Law Centre (EELC)

1. Coastal pollution in Harku: struggles with claiming the costs

In February this year, mazut[1] pollution was discovered on several kilometers of coast in Muraste, Harku municipality in Estonia. The Rescue Board – the state authority responsible for actions in emergency situations – announced that it monitors the situation, but stated that removal of the pollution is the responsibility of the local municipality. The division of tasks between different authorities in cases like this is not clear under national law. If this case would be regulated by the EU Environmental Liability Directive (ELD), there would be a specific state authority responsible for the remedial measures (Environmental Board). But since this was bunker oil pollution, liability for this kind of incidents is regulated by the Bunker Oil Convention (2001). Art. 4/1 of the ELD outlines exceptions and Art. 4/2 of the ELD provides that the Directive does 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 the International Conventions listed in Annex IV".

After the notice from the Rescue Board, the municipality immediately organised the removal of the pollution, using volunteers and purchasing the necessary equipment. In the course of the works it became clear that the pollution has spread more than initially estimated and the amount of work and costs grew larger than anticipated. After the pollution removal the municipality presented a claim to state agencies for the compensation of its costs. It claimed that in fact the situation should have been considered as an emergency and the Rescue Board did have an obligation to act. By then, the actual polluter was identified, turning out to be a ship named Inzener Trubin, sailing under Russian flag and residing near the coast. The ship had had an accidental bunker oil spill in the course of bunkering. Would the ELD be applicable to such incidents the operator itself would have been obliged from the very beginning to inform the competent

[1] Mazut is a heavy, low quality fuel oil, used in generating plants and similar applications. In the United States and Western Europe, mazut is blended or broken down, with the end product being diesel.

authority and take immediate steps in order to control the situation and remove damage. The Bunker Oil Convention does not contain such obligations.

Neither the Bunker Oil Convention nor the Estonian national law provides for specific provisions on compensation claims. Thus the general Law of Obligations applies. The state authorities assembled the claims against the ship owner and presented them jointly via a common law firm. The Harku municipality refused to join the claim, due to the high costs of legal representation. However, since the state agencies claimed that they are not responsible for the costs, in the end the municipality was forced to bear its own costs.

The foregoing analysis shows the problems which arise when environmental incidents happen not covered by the ELD. Had the current incident fallen under the ELD regime, the state authorities would have been responsible for taking immediate action, as well as for claiming the costs from the polluter. In all cases of sea pollution, the responsibilities of local governments are unclear. Big part of Estonia borders with the Baltic Sea – the country disposes of a coastal line of about 3800 km. Thus the risk for coastal pollution from passing ships is constant and has proven to be a real problem in practice. It seems not to be fair to put an obligation on the coastal local governments to clean up the coast when risk of pollutions from sea is frequent. Some of the problematic issues could be solved when activities leading to sea pollution would also fall under scope of the ELD.

Nevertheless, the current version of the ELD itself provides a loophole which considerably decreases its effectiveness in practice. The Directive does not contain a subsidiary obligation for the competent authority to take preventive and remediation measures if the operator does not comply with its obligations, is not required to bear the costs or cannot be determined for several reasons. (Art. 5/4 and Art. 6/3: „may take these measures itself“). The Directive should provide for such a provision so damage prevention and remediation may be effectively granted.

2. Developments in Estonian legislation: attempts to integrate two liability systems

The current Estonian environmental law reform intends to harmonize and unify Estonian environmental law. Amongst others, the rules on environmental liability will be amended. The Estonian environmental liability regime according to the Environmental Liability Directive (ELD) is regulated by a separate law, namely the Environmental Liability Act (2007). However, the Estonian legal framework contained environmental liability provisions in different acts already before the transposition of the ELD into national law. This national liability regime still co-

exists with the ELD regime. The current reform expects to preserve only some areas (forestry, nature protection) of the co-existing national liability regime, while in other areas like water management and mining the national co-existing regime shall be abandoned.

The main pros and cons of these two systems:

- The pre-existing national liability regime is based on monetary compensation for different kinds of environmental damage. The compensation comes into the state budget and its part is consequently distributed through a specific foundation to environmental projects. This system has only a partial and indirect effect - it mitigates general damage caused to the environment. It does not remediate the concrete environmental damage, nor does it pay particular attention to the prevention of environmental damage as intended by the ELD regime.

- On the other hand, the ELD regime can only be applied when a certain damage threshold is reached. Only then the obligation for the operator who endangers the environment arises to prevent and remediate environmental damage and bear the costs for it.

Basically we see the harmonisation of different laws as a positive development. The basis (e.g. how the compensation is calculated) of the current national liability regime is not really clear or uniform. In addition to the compensation, the polluter has to pay a fine for the violation of legal requirements, so in practice the compensation is often seen as a 'double fine' and regarded to be not fair. Further the national regime does not always oblige the polluter to take preventive and remedial measures on concrete environmental damages. On the other hand, the amendments would increase damage thresholds. In this respect, the consequences of the amendments are not clear. Since they are not explained in the explanatory letters accompanying the drafts, it seems the changes have not been thoroughly analysed. We believe that the Art. 16 of ELD should be thoroughly considered. It defines its relationship with national law and states that it „shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage".