

IMPLEMENTATION OF ENVIRONMENTAL LIABILITY DIRECTIVE IN ESTONIA

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I. Can you give some concise information about your national environmental liability system?

- Are there special provisions on civil liability for environmental damage?

Article 133 of Law of Obligations Act specially regulates environmental liability. This article draws distinction between two kinds of environment related damage – personal damage and environmental damage *per se*. Article 133 prescribes that - if damage is caused by environmentally hazardous activities, damage related to a deterioration in environmental quality shall also be compensated for - in addition to the damage caused to persons or the property thereof. Expenses relating to preventing an increase in the damage and to applying reasonable measures for mitigating the consequences of the damage, and the damage arising from the application of such measures should also be compensated for.

Personal damage shall be compensated pursuant to general law of torts and environmental damage pursuant to environmental law – environmental Acts concerning particular sectors of environment and new Environmental Liability Act which aims to transpose the liability directive.

Estonian tort law draws distinction between fault based liability and strict liability - liability for damage caused by major source of danger. Law of Obligations Act defines that - if damage is caused resulting from a major source of danger or from an extremely dangerous activity, the person who manages the source of danger shall be liable for causing of damage regardless of the person's culpability. A thing or an activity is deemed to be a major source of danger if, due to its nature or to the substances or means used in connection with the thing or activity, major or frequent damage may arise even if it is handled or performed with due diligence by a specialist. It is obvious that fault based liability can be enforced with difficulty in environmental cases – mainly due to problems of proof. In case of strict liability scheme presumption of causal link is applied - if a dangerous activity is a potential cause of damage, it shall be presumed that the damage is caused as a result of particular danger arising from the activity. However, this presumption does not apply if the “operator” proves that the activity is operated according to all requirements and if the normal operation of the activity is not disturbed.

The presumption of causal link seems to be useful in environmental cases. However, in Estonia there is no significant court practice concerning the real implementation and relevant problems of these civil law environmental liability provisions as yet.

- Are there other (administrative type of) special provisions and procedures concerning the prevention and remedying of environmental damage? Do they have a general nature or are they only applicable in one or another environmental field (e.g. soil pollution) ?

Estonian public law on environmental damage is extremely fragmented and inconsistent. There are no general rules of liability. Several acts regulate the issue – Nature Protection Act, Waste Act, Water Act, Hunting Act, Forest Act etc. As a general observation one may state that the existing schemes emphasize compensation of actual damage, preventive effect of these schemes is weak. Unfortunately the aim of the new Act on Environmental Liability is not the “codification” of existing public law environmental liability schemes – its aim is extremely narrow and related to mere minimum transposition of environmental liability directive.

- Is your country party to the international conventions listed in the annexes IV and V of Directive 2004/35/EC?

Estonia has ratified the following Conventions:

- the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage;
- the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
- the International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage;
- the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention of 31 January 1963;
- (b) the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage;
- the Convention of 12 September 1997 on Supplementary Compensation for Nuclear Damage;
- the Joint Protocol of 21 September 1988 relating to the Application of the Vienna Convention and the Paris Convention;

II. Implementation of Directive 2004/35/EC

2.1. General status of implementation:

- Has Directive 2004/35/EC already been fully implemented?

The directive has not been fully implemented as yet

- If not, is it under way?

The draft Act on Environmental Liability, which primary aim is transposition of the directive, was elaborated in the Ministry of Environment (the working group consisted of ministry officials and representatives from Association of Environmental NGOs), approved by the Government in May 2007 and delivered to the parliament for further discussions and hopefully subsequent adoption

- Have deficiencies of the Directive been identified during national discussions ?

There were actually no wider discussions about the directive, its main principles and deficiencies. Some discussions took places between Ministry of Environment and Ministry of Economic Affairs and Communications about certain details of financial security schemes.

2.2. General approach of implementation:

- Has your country reduced the level of environmental protection as a consequence of the Directive ?

No, the level of protection has not been reduced. Certain reduction took place earlier, in 2005, when new Act on Environmental Pollution Charges was adopted. Previous act stipulated that payment of the pollution charge according to the permit does not exempt the person who released pollutants or waste into the environment from payment of compensation for damages to third parties incurred due to the pollution of the environment. It meant that as regards third parties damages permit defence was not valid. New pollution charges act abolished this scheme and introduced partial permit defence.

- Did your country opted for a comprehensive piece of legislation to transpose the Directive? A Separate Act or a new Chapter of a General Act?

Directive will be transposed via adoption of new separate act on environmental liability

- Did your country opted for amending several pieces of legislation?

No, a new act on environmental liability will be adopted, which aim is comprehensive transposition of the Liability Directive

- Did your country opted for a combination of these 2 approaches?

No.

- Did your country opted for a mere transposition of the minimum requirements of the Directive or introduced stricter provisions?

Estonian method of transposition could be characterised as formalistic, no attempts to go further and to be innovative were made. As an exception, Estonian draft Act on Environmental liability is indeed stricter in case of definition of operator. Directive defines the “operator” in connection with occupational activities. Estonian draft defines operator (person who is liable for prevention or remediation) irrespective of the nature of its activity - a person is liable even in the case activity is not carried out in the course of an economic activity, a business or an undertaking. Operations carried on in the public sphere are also covered. It is likely enough that this definition will be actively discussed in the Parliament and the final result is not know as yet

2.3. Options taken during the transposition process (please focus on innovations in your country legislation with respect to the text of the Directive)

2.3.1. Definitions

- How is the definition of environmental damage implemented?

In general this definition is almost literally transposed. The only innovation relates to inclusion of “nationally” protected special and areas

- Did your country included in the notion ‘protected species and natural habitats’ habitats or species, not listed in the Annexes of the Birds and Habitat Directives? (art. 2.3 (c))

Estonia has included in this notion species and habitats (areas) protected under national regime as well. National protection regime is stipulated in the Nature Protection Act. The list of protected natural object in Estonia include: protected areas; special conservation area; protected species, fossils and minerals and species' protection sites;

- Is land damage protected just in case of significant risk of adverse effect on human health?

Yes, the draft Environmental Liability Act stipulates that land damage means: significant risk of adverse effect on human health.

- When is the conservation status of a natural habitat taken as favourable?

Draft Environmental Liability Act refers in this case to Estonian Nature Protection Act. Nature Protection Act uses the concept of Habitats Directive and defines the favourable conservation status as follows. The conservation status of a natural habitat will be taken as favourable when its natural range and areas it covers within that range are stable or increasing, and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and the conservation status of its typical species is favourable. The conservation status of a species will be taken as favourable when population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

- What about the definition of “operator”? Are persons ‘to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of the permit or authorization for such an activity or the person registering or notifying such an activity’ included? (art. 2.6)

See comment to 2.2 above. Estonian draft defines operator as - each person “who carries on” the activity which causes the damage or imminent threat of damage. It is not clear at all what “carries on“ in this context means. Controversial problems related to “decisive economic power” etc. are not reflected by Estonian draft. There were no wider discussions about these problems in Estonia. Hopefully at least some discussion will take place during procedures in the Parliament

2.3.2. Scope

- Did your country opt for a double system of liability (strict and fault based) or for a more stringent regime as allowed by art 3.2?

Estonian draft uses double system – strict and fault based liability. Article 8 of the draft act stipulates as a general rule that operator is obliged to take preventive or remedial measures in case operator is liable. Operator is liable in case of culpability. But when operator carries on listed activities operator is liable (obliged to take preventive or remedial measures) irrespective of culpability. List of such activities includes IPPC related activities, activities which need waste, water, air, GMO permits, activities related to dangerous chemicals, carriage of dangerous goods etc.

2.3.3. Exceptions

- Which are the exceptions to the scope of the liability regime in your country? (art 4)

Article 4 is literally transposed.

- What about the permit defence and the state of the art defence (art. 8.4)?

Estonian draft is controversial – but it seems that permit defence will be used. In case of fault based liability permit defence is fully valid. In case of strict liability permit defence is more limited. Article 26 of the draft stipulates that operator is not obliged to bear the cost of remedial measures if operator acts in accordance with the permit. Accordingly operator should take the preventive and remedial measures (even if the damage or threat is caused by the activity which is fully in accordance with the permit) and bear the cost of preventive measures. Cost of remedial measures should be compensated to the operator – however, the draft does not define the conditions and procedure of such compensation

State of the art defence (8.4.b) is literally transposed

2.3.4. Preventive and remedial actions

- When are preventive (art 5) and remedial (art 6) actions taken by the operator?

Estonian draft law is quite general and vague. According to the draft - preventive and remedial action should be taken immediately by the operator in the case of imminent threat or damage and operator should immediately inform the competent authority about the threat, damage and measures.

- Which is the role of the competent authority?

In this respect Estonian draft simply copies the text of the directive. According to the draft the competent authority **may (but is not obliged – SIC)** at any time require the operator to provide information on imminent threat or damage, require the operator to take the necessary measures; give instructions to the operator to be followed on the necessary measures to be taken; or **may** itself take the necessary preventive measures.

- Is there any way for environmental organisations to participate in the negotiations between the polluter and the administration on the restoration ?

Yes, before competent authority approves the plan of remedial measures (elaborated by the operator and commented by the expert) the public concerned (see comment to point 2.3.7), environmental NGOs and owners of the property which could be affected by remedial measures should be informed about the plan and should be given opportunity to comment. However the draft act does not regulate the particularities of this procedure. Despite these deficiencies of the draft - Estonian Administrative Procedure Act grants general rights of participants in the proceedings – such as right to information and participation. Participants of the proceedings can also enforce the right of access to court and challenge both material and procedural lawfulness of the case.

- Are these discussions public ?

Discussions are not really public - members of the public concerned, NGOs and property owners can simply present their consideration on the matter.

- Are there provisions to develop in further details the common framework concerning the remedying of environmental damage (Annex II)?

No, Estonian draft law does not go further than the directive. Many provision of Annex II are included (literally) into operative provision of Estonian draft Environmental Liability Act. No innovations or going into the details can be discovered.

2.3.5. Preventive and remedial costs

- Is there a system of security over property or other appropriate guarantees (art. 8.2)? Is it a preventive system or shall such measures only be taken after environmental damage has occurred? How the system works?

According to the draft such measure will be taken *ex post*. The draft stipulates that when operator recovers the costs of measure the competent authority has incurred in instalments - the security should be in place. The security could be in the form of suretyship or mortgage in favour of state.

- Is there a special provision to give effect to art. 8.3, *in fine* (appropriate measures to enable the operator to recover the costs incurred in cases the operator shall not be required to bear the cost of preventive or remedial actions)? Must the operator in such cases nevertheless take the remedial measures? Or are they taken by the authorities

No there are not such provisions how the operator will be compensated – it is not clear at all. At the same time it is clear enough - that the operator is still obliged to take preventive measures and remedial measures as well

2.3.5. Cost allocation

- Are there national provisions within the meaning of article 9?

No, such provisions are missing in Estonia. It can be presumed that respective civil law provisions could be applied

2.3.6. Competent authority

- Which authority or authorities were designated for the purposes of article 11?

The competent authorities in Estonia are 15 County Environmental Departments. These departments are generally responsible for implementation of national environmental, nature protection, forest and fisheries legislation in the counties. These departments are also major permitting bodies and issue permits for the use of environmental and natural resources and manage relevant data

In this respect major implementation problem arises. According to the directive national competent authority **may** itself take the necessary protective and remedial measures. Taking of such measure presupposes that the competent authority is equipped with relevant technical means. This is not the case as regards Environmental Departments in Estonia. Consequently schemes of efficient cooperation between different authorities (for example with Estonian Rescue Board) should be in place. Estonian draft act does not address this issue at all.

- Which remedies are available when preventive or remedial measures are imposed? (art. 11.4)

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There are two options. According to the draft the operator can challenge the decisions of County Environmental Department in the Ministry of Environment. The ministry should decide the case in 30 days. The other option is review procedure before the administrative court.

2.3.7. Request for action

- Which of the alternatives listed in art. 12.1. were chosen ?

The formal model of Estonian administrative procedure is yet directed on protection of rights of individuals, similarly to German model of administrative proceedings. National courts also supervise lawfulness of the actions of administration only insofar to which extent it is connected with subjective public law rights. The draft act on Environmental Liability is in this respect innovative – in addition to those whose rights are violated also persons who are affected or are likely to be affected (materially) are entitled to submit the request for action. This is really “historic” innovation. However, the influence of the Aarhus convention should also be pointed out. Only five years ago Estonian courts interpreted subjective rights based

standing standards very narrowly. Since the coming into force of the Aarhus Convention Estonian courts have made surprising turnaround and have been very generous in granting standing in environmental cases – Estonian Supreme Court has even declared that subjective rights protection theory is not applicable in environmental cases at all.

- Is article 12 only applied in cases of remediation of environmental damage or also in cases of imminent threat of damager ? (art. 12.5)

It is applicable in both cases

- What type of review procedure is available under national law? (art. 13)

There are two options:

- Challenge proceedings within the administration. Persons can challenge the decisions of County Environmental Department in the Ministry of Environment. The ministry should decide the case in 30 days.
- The other option is review procedure before the administrative court.

S2.3.8. Financial security

- How was article 14 implemented?

This article has not been implemented as yet. However, this issue was discussed between Ministry of Environment and Ministry of Economic Affairs and Communications. Firm decisions were not taken during these discussions, merely different options were identified and presented.

2.3.9. National law

- Were additional activities included in the scope of the regime? Were additional responsible parties identified?(art. 16.1)

Yes, see comment to point 2.2 and 2.3.1 as regards stricter measures and definition of “operator”

- Are there special provisions to prevent a double recovery of costs in cases of concurrent action ? (art. 16.2)

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There exists only one very vague and general provision about the cooperation between member states, which obviously is not capable of preventing the double recovery.

2.3.10. Temporal application

- How was article 17 implemented?

The provision was transposed literally

2.3.11. Transboundary environmental damage

- How the system works in case of environmental damage in a transboundary context ?

Since the Act on Environmental Liability is not yet adopted it is quite impossible to predict how it will work in real life. Many required implementation mechanisms are missing from the draft. But, as it was stated above, the draft has one very vague provision about the cooperation between member states, but this provision seems to be quite useless and declarative.