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Operators' General Obligations as an Environmental Duty of Care

1. Introduction

In Estonia, the codification of environmental law was started in 2007. In February 2011, the first result to materialise from the codification project—the General Part of the Environmental Code Act^{*1} (GPECA)—was adopted. This defines, alongside many other fundamentals of environmental law, the general (fundamental) environmental obligations as expression of an environmental duty of care. Although the GPECA addresses both general obligations and operators' obligations, the present paper deals with only the latter.

The essence of operators' general environmental obligations lies in taking measures to avoid environmental hazards and taking reasonable precautionary measures with regard to environmental risks at their own initiative and expense. General obligations are likely to be specified in environmental-sector-specific legislation as well.

One of the main reasons for the codification is the overly casuistic style of the legislation in force. There is clear lack of provisions with a greater level of abstraction. The other noteworthy trigger for the codification is the wholly fragmented character of the legislation, which considers individual environmental domains (water, air, nature, etc.), deals with them as isolated from each other, and thus does not provide for holistic environmental protection as well. General environmental obligations as a 'safety net' address both of the above-mentioned issues: they are abstract—leaving considerable room for interpretation and being subject to weighing of interests—and also cross-sector in nature, taking care of the holistic protection of environment-related goods.

While environmental law belongs to the realm of administrative law, general environmental obligations of operators serve a dual purpose. On the one hand, these obligations are enforced by administrative bodies, for instance, in the granting of environmental permits. On the other hand, general environmental obligations should be considered on the operator's own initiative to a reasonable extent, taking into account first and foremost the rights and interests of the private individuals who are likely to be affected and their potential private-law claims.

As general environmental obligations are a new phenomenon not only in Estonian environmental law but also in many other jurisdictions, there is little practical experience with their application overall and a complete lack in Estonia. The goal of this paper is to highlight the main grounds for recognition of general environmental obligations of operators. The present paper also is aimed at pointing out key characteristics of general environmental obligations and considerations that must be taken into account in their application.

¹ Keskkonnaseadustiku üldosa seadus. – RT I, 28.2.2011, 1 (in Estonian).

2. Sources of general environmental obligations

2.1. Anchorage in the Constitution

The fundamental sources of general environmental obligations can be found in the Estonian Constitution. There are three provisions in the Constitution that could be, at least indirectly, relevant. Section 5 of the Constitution stipulates that '[t]he natural wealth and resources of Estonia are national richness which shall be used sustainably'. This section of the Constitution is frequently interpreted as a provision that places the obligation on the state to supply legislative instruments ensuring the sustainable use of the natural environment in the public interest and where necessary by restricting the rights of private persons.^{*2} This provision mandates and directs state environmental policy and pushes the state institutions to take effective environmental protection measures, an example of which is the placing of general environmental obligations on private persons. However, as §5 of the Constitution is formulated in a rather imprecise manner, it leaves very wide discretionary power to the state institutions.

Environmental regulations are likely to be challenged for any infringement of fundamental rights, first of all property rights and the right of free enterprise. Environmental law's regulatory tools are very often indeed various limitations, prohibitions, and other direct or indirect legal prescriptions affecting a person's rights. In such cases, §5 of the Constitution could be referred to as the legitimate aim, serving as a yardstick for a proportionality test.

Section 53 of the Constitution stipulates: 'Everyone has a duty to preserve the human and natural environment and to compensate for damage caused to the environment by him or her.'

It could be argued that this provision can be interpreted such that a certain environment-related 'duty of care' must be integrated into all activities affecting the environment. However, §53 of the Constitution contains many uncertainties and undefined terms whose clarification is necessary. The duty to preserve the human and natural environment cannot be absolute. What constitutes the threshold beyond which we need to consider §53 of the Constitution is at times almost a philosophical question, but it is also a legal issue.^{*3} The need to clarify the content of §53 of the Constitution Act was one of the main elements that triggered the stipulation of general environmental obligations in the GPECA.

Section 19 of the Constitution states: 'Everyone has the right to free self-realisation. Everyone shall honour and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties.'

A referred constitutional provision is another expression of a sort of 'duty of care' in the sphere of self-realisation, wherein rights and freedoms of others should be honestly considered. Environmental protection largely coincides with the protection of fundamental rights. Many of these rights are dependent upon the state of the environment—for example, air and water quality. It follows from §19 of the Constitution that all other persons' environmental-related rights should also be taken into account in initiation of private persons' activities affecting the state of the environment. This is yet another source of general environmental obligations.

2.2. Principles of environmental law as a source of inspiration for general environmental obligations

2.2.1. The principle of a high level of protection

According to Article 191 (2) of the Treaty on the Functioning of the European Union and §8 of the GPECA, environment protection measures must ensure a high level of protection. The content of the above-mentioned principle is that the measures for protecting the environment must provide effective protection against environmental nuisance, and it is not allowed to favour economic considerations automatically over the necessity of protecting the environment and human health and well-being. However, a high level is not to be confused with the highest possible level; accordingly, determining the level of protection presupposes

² See Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne ['Constitution of the Republic of Estonia: Commentary'], p. 88. Available online at http://www.pohiseadus.ee/public/EVPS_kommeteeritud_valjaanne_2012.pdf (most recently accessed on 11.4.2013) (in Estonian).

³ See Eesti Vabariigi Põhiseadus: kommenteeritud väljaanne (Note 2), p. 490.

taking into account economic and political factors.^{*4} With regard to general environmental obligations, this statement highlights the necessity of a proportionality test when one is implementing and enforcing these obligations.

The principle of a high level of protection is associated with the obligation to take into account any new development based on scientific facts.^{*5} This principle also applies to general environmental obligations and renders them continuous and changing with time in tandem with the development of knowledge and technology.

One of the sub-principles associated with a high level of protection is the principle of integrated environmental protection, which takes into consideration the possibility of environmental impact carrying over from one environmental 'medium' to another. Traditionally in environmental law, a sector-based approach has been dominant. In various areas of environmental law—water law, waste law, nature protection law, etc.—sector-specific general obligations were laid down. The results of such a fragmented approach were gaps. Different approaches to controlling emissions into the air, water, or soil separately may encourage the shifting of pollution between the various environmental media rather than protecting the environment as a whole. General environmental obligations are cross-sector in nature and based on an integrated approach.

Nevertheless, the primary EU law does not refer to integrated protection *expressis verbis*; there is a noticeable trend of such an approach in secondary law. In this respect, one may recall the Industrial Emissions Directive^{*6}, whose Recital 12 proclaims that Member States should take the necessary steps to ensure that the operator is complying with the general principles of certain basic obligations. In a more precise manner, Article 3 (1) stipulates as general principles that Member States must ensure that operators take all of the appropriate preventive measures against pollution, particularly through application of the best available techniques; no significant pollution is caused; energy is used efficiently; etc. These goals can be reached in principle by imposing corresponding directly applicable legal obligations on operators. As can be seen, the principles of Article 3 (1) of the Industrial Emissions Directive are very similar to those general environmental obligations stipulated in the GPECA.

2.2.2. Principles of prevention and precaution

One of the rather specific elements of Estonian environmental law is the relatively strict distinguishing of the prevention principle and the precautionary principle. The prevention principle is applied in the case of environmental hazards, when the occurrence of a significant adverse environmental impact is obvious. The implementation of the prevention principle is quite straightforward. When the occurrence of a significant environmental impact is obvious or sufficiently probable, actualisation of the associated hazard must be prevented. The precautionary principle is implemented for the reduction of environmental risks, in terms of scientific uncertainty. In application of the latter principle and the selection of precautionary measures, taking into account the principle of proportionality is of decisive importance: environmental risks have to be minimised as much as possible through reasonable measures.

The prevention and precautionary principles have been 'translated' into general environmental obligations by means of putting a private person (operator) under the obligation to apply the necessary measures for preventing environmental hazards and to take reasonable precautionary measures for reducing environmental risks on said person's own initiative (see Subsection 4.2. of this paper).

2.2.3. The 'polluter pays' principle

In §12 of the GPECA, the principle that the polluter pays is put into words. The GPECA has followed the traditional understanding of the 'polluter pays' principle, according to which the polluter should bear the cost of the measures necessary to reduce pollution in line with the extent of either the damage done to society or the exceeding of an acceptable level (standard) of pollution.^{*7} Polluters are in many cases persons under

⁴ A. Epiney. Environmental Principles. – R. Macrory (ed.). *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?* Groningen, Netherlands: Europa Law Publishing 2006, p. 26.

⁵ Treaty on the Functioning of the European Union, Article 114 (3).

⁶ Directive 2010/75/EU. – OJ L 334, 17.12.2010, pp. 17–119.

⁷ For more, see H.C. Bugge. The polluter pays principle: Dilemmas of justice in national and international context. – J. Ebbesson, P. Okowa (eds). *Environmental Law and Justice in Context*. Cambridge: Cambridge University Press 2009, pp. 411–428.

private law who use environmental resources in order to gain profit or other benefits. Therefore, it is right to expect that the polluter also take care of reducing the environmental nuisance associated with his or her activity and bear the relevant costs.

3. The inherent characteristics of general environmental obligations

3.1. The functions of general obligations—the resemblance to civil law

One of the traditional goals of environmental law is to transfer possible private-law claims related to activities affecting the environment and a private person's rights to the realm of public law.⁸ For example, environmental permit procedures are aimed at excluding as far as possible the potential for future private-law defence claims by affected third parties. The idea is to induce the affected third parties to assert any potential defence claims already within the context of the permit procedure and, from the opposite perspective, also safeguard the operator, at least to some extent, against such claims in the course of the commencement of the permitted activity. Therefore, there is reason to expect environmental law's regulatory schemes to be broadly comparable to those of private law.

'Duty of care' is a legal and a moral concept that departs from the fundamental ethics principle of non-maleficance originating from the Hippocratic maxim '*primum nil nocere*'—paraphrased as 'do no harm'.

In short, a duty of care refers to the responsibility of each and every person to take all reasonable steps to prevent harm to another person or to property of another. The concept of the duty of care is firmly embedded in civil law, wherein an individual is considered to be responsible and accountable for having breached a duty of care if acting negligently.

Usually law assigns a person responsibility to avoid negative impact on another person or his or her health or property. Here, it is relevant to recall that environmental protection largely coincides with the protection of people's health, well-being, and property rights. But modern environmental law might recognise also that a person may owe a duty of care to the environment *per se*.

In civil law, the concept of liability for damage caused by a major source of danger has been recognised for a long time. If damage is caused as a result of danger characteristic to the given activity or a thing constituting a major source of danger or on account of an extremely dangerous activity, the person who manages the source of danger shall be liable for the causing of damage regardless of said person's culpability. Such persons are deemed to be liable for the negative consequences proceeding from their activities, and bear the relevant risks at their own expense.

The above-mentioned ethical and legal approaches also underlie the concept of general environmental obligations, and they declare the recognition of a general environmental duty of care that could be expected of operators within a reasonably expected scope.

3.2. Obligations for operators' own initiative

General environmental obligations as an expression of the environmental duty of care are under Estonian law essentially binding on all operators, even those whose activities are not to be authorised via environmental permits. In this respect, Estonia's law differs from that of Germany, where according to Article 5 of the BImSchG⁹, general environmental duties of operators are linked with the operation of installations subject to permit-related requirements. Accordingly, fulfilment of general environmental obligations of operators in Estonia should essentially be guaranteed by the operators on their own initiative, as this follows in large part from the polluter-pays principle with its insistence on internalisation of environmental externalities. In other words, since the particularities and extent of these obligations are not specified

⁸ H. Schlemminger, C.-P. Martens (eds). *German Environmental Law for Practitioners*. 2nd edition. The Hague: Kluwer Law International 2004, pp. 45–46.

⁹ Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge (Bundes-Immissionsschutzgesetz, BImSchG). – (neugefasst) 17.05.2013 BGBl. I S. 1274; 02.07.2013 BGBl. I S. 1943.

exhaustively in the legislation, the operators are inherently under the burden of the obligation to assess the possible impact of their particular activities on the environment, human health, and well-being in addition to property and to choose their course of conduct in view of what could be reasonably expected from them by other persons and the public in general.

Such an innovative approach may bring with it truly substantial changes in the basic framework of environmental law. Within the traditional legal framework, an operator might be reproached for violation of requirements specifically set forth in the legislation, a permit, or an administrative act but charging the operator with any further action was ruled out. Ultimately, it could be argued that general environmental obligations perform the role of a subsidiary 'safety net' in cases wherein legislation or administrative acts do not guarantee adequate and reasonable protection of the environment and a person's environment-related rights—e.g., to health, well-being, and property. Of course, the ultimate role of the proportionality test should not be forgotten in this connection.

Here another connection with civil law must be pointed out. Under neighbourhood rights (regulated in Estonia in the Property Act¹⁰), owners of property near the activity may claim illegal infringement of their property rights, demand to prevent or pre-empt the conduct of the operator, or at least seek compensation. This option also prompts operators to take hazard-prevention and risk-reduction measures on their own initiative in order to eliminate the potential for civil-law claims.

3.3. The supervisory and enforcement role of public authorities

Despite the fact that general obligations should be complied with on the operator's own initiative, it is still likely that these might not always be self-executive. Accordingly, the supervisory and enforcement role of public authorities is essential. One of the reasons for this may be the operators' lack of expert knowledge about environmental impacts, which in many cases are subject to scientific uncertainty. In most cases, the role of public authorities is tied to permit-linked requirements, because, even though the 'operator' concept is not always linked in theory with permit-related requirements, this link still exists in practice, for the most part.

The links between general obligations and permit-linked requirements in the GPECA are obvious and deliberate. Only a few of them are pointed out here. According to §42 of the GPECA, as early as in the stage of filing of the application for a permit, the operator is obliged to state data about the possible environmental nuisance, together with the measures planned for reducing the environmental risks (e.g., fulfilment of general obligations). Clause 52 (1) 4) of the GPECA stipulates that the permit-issuer shall refuse to grant an environmental permit in, among other cases, the event of the planned activity not complying with the requirements prescribed by legislation—for example, showing manifest disregard for general obligations to prevent hazards and reduce environmental risks. According to §§59 and 62 of the GPECA, it is possible to suspend or even revoke the permit on grounds of the operator's obvious and unreasonable disregard for the general obligation.

3.4. Continuous and changing nature

One of the inherent characteristics of operators' general environmental obligations is their continuous nature and changing substance. While most of the general obligations have to be fulfilled already in the inception or planning stage of the activity, the content of these obligations does not constitute a permanent yardstick for the entire duration of the activity. The general obligations imposed on the operator shall constantly be observed in their most up-to-date form, following the development of scientific knowledge and technology, changes in environmental conditions, and the current and possible future land-use purpose specified for the location of the activity. An operator is under the obligation to obtain knowledge about these new developments to a reasonable extent in order to adjust the activity to said developments. Furthermore, the threshold for the general obligations and their content, especially with respect to the obligation to prevent hazards and minimise environmental risks, may depend not purely on the emissions generated by the activity in question. For example, also the overall pollution load in the area of influence of the activity may be decisive for the observance of these obligations.

¹⁰ Asjaõigusseadus. – RT I 1993, 39, 590; RT I, 23.4.2012, 1 (in Estonian).

All of the above-mentioned circumstances may outweigh the operator's trust that the environmental obligations (and also the permit conditions) will remain valid in unchanged form and content for the full duration of the activity.

4. Content of the general obligations of operators

4.1. An operator's obligations according to the GPECA

Operators' general obligations are listed in §§16 to 21 of the GPECA. Under those sections, operators are obliged to:

- apply the measures necessary to prevent hazards to the environment and take appropriate precautionary measures to reduce risks to the environment (§16 (1));
- acquire the knowledge necessary for preventing hazard to the environment and taking precautionary measures to reduce risks to the environment before commencing with the activity (§16 (2));
- avoid the use of substances, mixtures, or organisms that may be replaced by such as present less extensive risk to the environment (§16 (3));
- use raw materials, natural resources, and energy in an efficient and sustainable way, giving preference to renewable sources of energy (§17);
- choose the location of any new installation with the aim of reducing environmental nuisances and consider them when expanding or changing the installation (§18);
- ensure that the workers at the relevant installation receive reasonable training related to environmental protection (§19);
- notify the Environmental Inspectorate or other competent state authorities of significant environmental nuisances resulting from the installation (§20); and
- ensure that no significant environmental nuisances are going to be created during and after the closure of the installation (§21).

All of the obligations listed reflect the principles of prevention and precaution. Those principles, defined in §§10 and 11 of the GPECA, serve as guidelines to administrative bodies that enforce environmental law. Operators' obligations support their realisation by requiring operators to follow these principles on their own initiative and specify the content of obligations in more specific spheres of activity.

In fact, an operator's obligations can be divided into three groups in line with their level of generalisation. The obligations listed in §16 (1) of the GPECA are the most general in nature, being applicable only in cases wherein no more specific provisions have been set forth.

Other general operator obligations, found in §§16 (2) to 21 of the GPECA (referred to above), form the intermediate group, being somewhat more specific in nature. However, they too are applicable only if there are no more specific requirements that the operator is obliged to follow in a given situation.

Alongside general obligations imposed on operators, many more specific requirements are found, in several sector-specific acts. Although the principle of *lex specialis derogat legi generali* and the fact that sector-specific laws contain many specific obligations mean that general obligations found in the GPECA will not be applied very often in practice, one should not undervalue their role as a safety net in cases not anticipated by legislators.

The operator obligations set forth in the GPECA are quite similar to those found in other European countries, including in Swedish and German law. As previously brought out (see part 3.2 of this paper), the obligations found in Article 5 of the German BImSchG differ from operators' obligations under Estonian law in that the former apply to operators requiring a permit only. There are also differences in the precise content of the obligations. Obligations in German law are more general; in addition to obligation to prevent nuisances and hazards and to take precautionary measures, only two more specific obligations have been laid out. One of them—for sustainable and efficient use of energy—is also found in the GPECA (§17). The fourth obligation in the BImSchG—to follow the waste hierarchy (avoiding waste to the greatest extent possible and giving preference to reuse, recycling, and recovery over other disposal)—is not set forth as a general obligation in the GPECA.

4.2. Measures for prevention of hazards and reduction of risks to the environment

As stated above, operators' general obligations are all aimed at specifying the principles of prevention and precaution (elaborated upon in part 2.2.2 of this article). The clearest manifestation of this is the most general of the obligations found in §16 (1) of the GPECA. Said section stipulates: 'An operator is obliged to apply necessary measures for avoiding hazards to the environment and appropriate precautionary measures for reducing risks to the environment.'

For full understanding of the content of the obligation, the concepts 'hazards to the environment' and 'risks to the environment' must be explained.

A hazard to the environment is defined by the GPECA as 'sufficient likelihood of significant environmental nuisances'¹¹; such hazard should, as a rule, be avoided according to the principle of prevention set forth in §10 of the GPECA. The definition of 'environmental nuisances', in turn, is very wide in the GPECA, including all direct or indirect impacts on the environment related to human activities, encompassing effects on human health, well-being, property, or cultural heritage.¹² What constitutes a 'significant' environmental nuisance is not clearly stated. However, significance of nuisance is presumed in some cases according to the GPECA—when limits set for environment quality are exceeded, environmental damage as defined in the Environmental Liability Act is caused, etc.

Risks to the environment, on the other hand, are defined in the GPECA as 'likelihood of causing environmental nuisances that require reduction'. Such risks, as a rule, do not need to be avoided totally but should be reduced as much as possible under §11 of the GPECA (with its precaution principle).

As can be seen, risks and hazards to the environment differ in two respects:

- 1) Likelihood—risks to the environment are only 'likely', whereas hazards must be 'sufficiently likely' if the requirements are to apply. It should be noted in this context that 'sufficiently likely' does not refer to a constant degree of probability but depends on the 'legal good' that is threatened by the possible nuisance. The more valuable this 'legal good' is considered, the lower the level of probability of occurrence is permitted to be. If the good is human life, the degree of probability needed is lower than in the case of property;
- 2) Significance of nuisances—risks to the environment are related to nuisances that are not significant but still require reduction, whereas hazards are related to 'significant nuisance', which should, as a rule, be prevented.

Therefore, in both respects, the threshold for definition of potential negative consequences of operators' activities as 'risk to the environment' is lower than for their definition as 'hazard to the environment'.

This underlying difference between hazards and risks is also reflected in the most general of operators' general obligations. Subsection 16 (1), in line with the principles of prevention and precaution, requires measures to be taken to prevent hazards; at the same time, only reduction is required for risks.

Two of the more specific obligations are only related to 'significant nuisances'—namely, the obligation to notify the authorities and that to prevent nuisances after the installation is closed. This means that these obligations are not applicable if a lesser level of nuisances is created. Other of the more specific obligations apply without prejudice to the potential negative consequences of operators' activities.

4.3. General obligations' relationship with other regulations

General operators' obligations do not form a separate, closed system of norms; rather, they are interlinked with other norms and regulations. Therefore, they contribute not only to realisation of the principles of prevention and precaution but toward reaching of other goals and aims of the environmental law just as well.

According to §3 (2), the environmental nuisance is presumably significant if environmental quality limit values (limit values for pollutants in the air and water, environmental noise limit values, etc.) will be exceeded. These values are often rooted in EU-level legislation aimed at the protection of human health. The obligation to prevent environmental hazards (i.e., prevent a certain ('sufficient') likelihood of exceeding

¹¹ Section 5 of the GPECA.

¹² Section 3 (1) of the GPECA.

limit values) is therefore also aimed at remaining within the environmental limit values specified in various (medium-specific) legal acts.

Being obliged to avoid the use of substances, mixtures, or organisms that may be replaced by such as present a lesser degree of risk to the environment directly coincides with the EU legislation on chemicals, most notably the REACH Regulation.^{*13} According to Article 55, the aim of the requirement of authorisation for dangerous chemicals found in Annex XIV of said regulation (carcinogens, mutagens, substances toxic for reproduction and other toxins, and persistent and bioaccumulative substances) is that these substances be progressively replaced. Subsection 16 (3) of the GPECA goes one step further and widens the 'substitution principle' to encompass all chemicals, not just the most dangerous.

The obligation to use energy in an efficient and sustainable manner and prefer renewable sources of energy also is aimed at reaching more goals than just fulfilment of the principle of precaution. Fulfilment of this obligation also contributes to reducing greenhouse gases' emission and increasing energy-efficiency, both required under the EU Climate Package. Use of fossil fuels for energy also causes other pollutants besides CO₂ to be emitted into the air, most notably SO₂ and NOx. Because these compounds cause transboundary pollution and acidification of the soil, their emission is regulated under the EU National Emissions Ceilings Directive.^{*14} Efficient use of energy and preference for renewable sources is, therefore, also compatible with the aims of the latter directive.

Obligation to choose the location for a new installation on the basis of its impacts is closely linked with regulation of spatial planning. According to §1 (2) of the Estonian Spatial Planning Act^{*15}, the aim of spatial planning is to create conditions for sustainable and balanced land use. The operators' obligation as stated in §18 of the GPECA is one of the measures found outside the Spatial Planning Act that are aimed at achievement of this aim.

The obligation to notify state authorities is closely linked with Estonian authorities' obligations under the Aarhus Convention^{*16}'s Article 5 (1) c) and under Article 7 (4) of the EU Environmental Information Directive. According to these provisions, state authorities are obliged to disseminate information held by them in the event of environmental emergencies resulting from, *inter alia*, installations. This obligation is transposed into the national legislation by the Public Information Act^{*17}'s §30 (3) and §25 of the GPECA.

5. Proportionality and reasonability

According to §22 of the GPECA, operators' general obligations must be applied only to a 'reasonable extent'. According to the wording here, this condition is principally aimed at the administrative bodies enforcing general obligations (see the discussion of enforcement of obligations in Subsection 3.4 of this paper), but it also affects operators, specifying the minimal effort required from them on their own initiative. The provision has an explanatory rather than normative character where its relevance in the realm of administrative law is concerned. The principle of proportionality referred to by this provision is a general legal principle guiding the activities of administrative bodies. Formulated in the Administrative Procedure Act^{*18}, the principle of proportionality means that the administrative act or activity in question must be suitable, necessary, and proportional (in the narrow sense) with regard to the goals set.

Operators' general obligations may thus be enforced by administrative authorities if and only to the extent that they are firstly aimed at some legitimate goal. The goals that justify application of operators' general obligations are, among others, those that are listed as goals of the GPECA in its §1. In more general

¹³ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 Concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), Establishing a European Chemicals Agency, Amending Directive 1999/45/EC and Repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 As Well As Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

¹⁴ Directive 2001/81/EC of the European Parliament and the Council of 23 October 2001 on National Emission Ceilings for Certain Pollutants.

¹⁵ Planeerimiseseadus. – RT I 2002, 99, 579; RT I, 14.2.2013, 3 (in Estonian).

¹⁶ United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

¹⁷ Avaliku teabe seadus. – RT I 2000, 92, 597; RT I, 19.12.2012, 5 (in Estonian).

¹⁸ Haldusmenetluse seadus. – RT I 2001, 58, 354; RT I, 23.2.2011, 8 (in Estonian).

terms, legitimate goals refer to the protection of human health, well-being, and property, and to the natural environment in itself (biodiversity).

All administrative measures that are aimed at some legitimate goal must pass a three-stage test if they are to be considered proportional.^{*19} They must be:

- suitable—i.e., they must ensure the achievement of promotion of the goal set (an activity or decision of the administrative authority is not suitable if there can be no cause–effect relationship between the measure and the goal; in the case of an activity for which an environmental impact assessment (EIA) must be carried out, the suitability of the measures can be easily assessed in the context of the EIA);
- necessary—i.e., the measure is to be the least burdensome to its addressee (burdens associated with measures may be strictly financial, as when one is choosing between technical measures, such as filtering systems, or take the form of wider restrictions to the scope or allowed impact of the activity, as in the case of lower emission thresholds); and
- proportional in the narrow sense—i.e., the positive effects gained (such as an increase in air quality) from applying a measure must outweigh the negative consequences (e.g., costs to the operator or loss of profit).

As a consequence of general obligations as a safety net, operators are required to take hazard-prevention and risk-reduction measures also on their own initiative (without external pressure from the authorities). However, they are thus obliged only to the extent that can be reasonably expected from them.

What is proportional or reasonable should be decided on a case-by-case basis; therefore, it is hard to cite general guidelines on this matter. Certain elements may still be considered important in most cases, including:

- the nature of the (potential) environmental nuisance (geographical extent, intensity, and duration);
- the rights and values threatened by the (potential) environmental nuisance;
- the degree of certainty of the (potential) environmental nuisance arising, and its predictability; and
- negative impacts for the operator (amount of direct costs, delays in commencement of the operation of an installation, etc.).

As the operators' obligations not only are tied to administrative law and proceedings but also have relevance for possible private-law claims, §22 of the GPECA makes it clear in addition that operators' duty of care in terms of private law is not an absolute one but is limited by 'reasonability'. What is considered reasonable is a matter of common practice among operators of similar facilities. Therefore, it is subject to changes over time with the development and commercialisation of new knowledge and technologies.

6. Conclusions

General environmental obligations of operators should not be considered an arbitrary burden to economic freedoms; instead, they are firmly anchored in the Constitution of Estonia, most importantly in §5, §19, and §53. These sections constitute the framework for the general environmental duty of care. Firstly, they authorise and direct the state in taking measures that affect persons' rights and obligations in order to protect the environment. Secondly, they set limits to persons' freedom of self-realisation for purposes of guaranteeing sustainable use of the environment.

General obligations are also directly derived from basic principles of environmental law and policy, such as high-level and integrated environmental protection and the principles of prevention and precaution. These principles, which in most cases stem from EU environmental law, are framed by the concept that the polluter—that is, the person using the environment to gain personal benefits—should pay for necessary and reasonable protection measures.

The underlying rationale for operators' obligations can be found in bringing potential civil-law claims into the sphere of administrative proceedings and thereby, to a certain extent, avoiding unpredictable and costly civil litigation. Although these obligations are realised mainly through supervision and enforcement

¹⁹ The three-stage proportionality test has been continuously applied by the Supreme Court of the Republic of Estonia since the landmark decision in case 3-4-1-1-02 (decision, in Estonian, available via <http://www.nc.ee/>).

by public authorities, the fulfilment of general obligations must be undertaken also by operators on their own initiative. Therefore, they serve as a safety net in cases wherein legislative or administrative acts do not guarantee adequate protection of the environment and persons' rights, including those with civil-law origin. By nature, these obligations are continuous and changing in character, obliging the operator to update its knowledge and adjust its activities to new developments affecting environmental conditions and technology.

Operators' general obligations can be classified into a hierarchy in accordance with their level of abstraction. Most universal are the fundamental obligations to prevent environmental hazards and to reduce risks.

General environmental obligations are discretionary by their very nature. Public authorities may enforce them only as far as this is proportional, taking into account the aim of the environmental regulation—a high level of protection of the environment and individuals' rights related to it (e.g., to their health and property). Operators should also take measures on their own initiative; however, these are also subject to the test of reasonableness. Neither proportionality nor reasonableness can be universally defined; they should be determined on a case-specific basis.