

EUFJE Conference 2015

Protection of the environment through criminal law: the implementation and application of the Eco-crime Directive in the EU Member States

Bolzano, 30 and 31 October 2015

SWEDEN

Answers given by Judge Åsa Marklund Andersson, and Technical Judge Anna-Lena Rosengardten, both from the Land and Environment Court of Appeal in Stockholm, Sweden

1/ *Who can be held criminally liable in your country?*

a/ Natural persons only or natural as well as legal persons?

In the latter case: does their criminal liability extent to all types of crimes or only to very specific crimes?

Also: under which circumstances can they be held criminally liable? In particular: is there a precondition requiring a conviction or particular result of a criminal proceeding against a natural person? Are the hypotheses mentioned in art. 6.1 and 6.2 of the Eco-crime Directive covered?

b/ What about persons inciting, aiding and abetting the actual perpetrators of a crime?

1 a) Formally only natural persons can be held criminally liable. Legal persons can however be subject to corporate fines which are applicable on environmental crime as well as on crime in general. The provision in Chapter 36, section 7 in the Penal Codes states that for a crime committed in the exercise of business activities the entrepreneur shall, at the instance of a public prosecutor, be ordered to pay a corporate fine if:

1. the crime has entailed gross disregard for the special obligations associated with the business activities or is otherwise of a serious kind, and
2. the entrepreneur has not done what could reasonably be required of him for prevention of the crime.

In practice corporate fines are often applied in the area of environmental crime.

1 b) Attempt, preparation, conspiracy and complicity is generally criminalized according to provisions in the Penal Code.

2/ Are the Art. 3 offences criminal offences in your country?

Do you know about gaps in the transposition of Art. 3 of the directive (e.g.: not always serious negligence criminalized, one of the Art. 3 offences only partially transposed)?

2. Art. 3 offences are criminalized in Sweden. An adjustment of our legislation is however about to be carried out regarding waste (art. 3 b). The Commission has argued that all types of unlawful handling of waste, including handling by dealers and brokers, have not been properly dealt with in our legislation. Thus a proposal of a minor change in the penal section of the Environmental Code is currently being processed (expected in place by 1 Jan. 2016).

3/ How were the Art. 3 offences implemented?

a/ Only in the criminal code, only as parts of environmental laws or combining both ways?

b/ Did the legislator choose for a “copy paste” or not?

c/ All but one of the Art. 3 offences are defined by specific circumstances, notably specific results or risks of results that need to be fulfilled:

- Four conducts need to be considered a criminal offence if “[causing] or (..) likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants” (art. 3.a, 3b, 3.d and 3.e)

Four other conducts need only to be considered a criminal offence when involving a *non-negligible quantity / a non-negligible impact* (art. 3.c, 3.f, 3.g) or causing a “significant” deterioration.

Are those requirements present in your law? Or were they dropped when the legislator implemented the directive?

How do you feel as a judge about them? Would they hamper you when conducting a criminal case or could you rather easily cope with them?

3 a) Both ways, mainly in the Environmental Code and in the Penal Code but to some extent in other parts of environmental legislation.

3 b) The existing legislation was, on the whole, found to be in compliance with the directive thus no implementation measures were needed. Copy paste was not applied.

3 c) The central provision on environmental crime concerning discharge and emissions is found in Chapter 29, section 1 of the Environmental Code. According to that provision it is a criminal offence to, deliberately or through negligence, into air, water or soil cause a discharge or emission of a substance which typically or in a specific case leads to or may lead to (a) pollution which is harmful to human health, flora or fauna and is not inconsiderable, (b) some other significant detriment to the environment. It is also, according to the same provision, a criminal offence to cause substantial detriment to the environment as a result of noise, vibration or radiation.

General provisions regarding crimes against life and health can be found in Chapter 3 of the Penal Code. There one will also find provisions concerning crimes involving public danger (Chapter 13) which may be applicable.

Applying environmental criminal law is generally regarded as complicated and rather difficult. The judges dealing with environmental crime cases are, as a rule, inexperienced as regards environmental law and are thus unfamiliar with that area of law. Environmental legislation can often be quite complicated, e.g. this can be said about some provisions in EU legislation which are subject to criminalization. The amount of criminal charges that do not lead to conviction is higher than as regards “ordinary” crimes. As an environmental judge it is however not very difficult to apply the various requirements implemented in the environmental crime legislation. It can also be mentioned that since Chapter 29, section 1 of the Environmental Code was reformed in 2007 it has been easier to apply and thus more efficient.

4/ *What about the availability of criminal sanctions to punish environmental offences?*

a/ Do the principal criminal sanctions include fines as well as imprisonment?

What are the legal minimum (if applicable in your national system) and maximum levels of fines and prison sentences?

What impact does it have on sanction levels if the crime is committed by an organized criminal group?

b/ Is forfeiture of illegal benefits possible?

c/ Can criminal judges also impose remedial sanctions, for instance order the removal of waste, the closure of an illegal facility?

4a) Yes, the central provision in Ch. 29 sec. 1 in the Environmental Code mentioned above include sanctions reaching from fines to two years imprisonment – unless the crime is considered to be serious then the penalty is a term of imprisonment of not less than six months nor more than six years.

Fines are generally imposed as day-fines. Day-fines shall be determined in number to at least thirty and at most one hundred and fifty. Each day-fine shall be imposed as a fixed amount from

thirty up to and including one thousand SEK, having regard to what is judged to be reasonable with account taken of the income, wealth, obligations to dependants and other economic circumstances of the accused. If special reasons exist, the amount of the day-fine may be adjusted.

The maximum level of a prison sentence according to Swedish criminal law is a life sentence.

The fact that a crime is committed by an organized criminal group will be considered when assessing penal value and could then be regarded as an aggravating circumstance. It may also affect the determination of penalty and the consideration of the seriousness of the crime itself. Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime has been implemented in Sweden.

4b) Yes, according to Chapter 36, section 1 of the Penal Code the proceeds of a crime as defined in the Code shall be declared forfeited unless this is manifestly unreasonable. In Chapter 29, section 12 of the Environmental Code it is stated that animals, plants and products extracted from animals or plants, products extracted from quarrying, chemical products biotechnical organisms and products that contain chemical products or genetically modified organisms, as well as products containing or consisting of genetically modified organisms, which are involved in an offence referred to in sections 1, 2, 2 b, 3, 4, 5, 6 or 8 may be declared forfeited, unless this is manifestly unreasonable. The same shall apply to the value of the property or the proceeds of such an offence. Means of transport and property that has been used as means for crime may also be forfeited.

4c) No. But in an environmental trial it is possible to bring forward a case that may lead to recantation of a permit and also a ruling that prohibits a certain activity.

5/ *What about the actual use of criminal sanctions to punish environmental offences?*

a/ Are environmental offences brought to criminal courts? Does this happen rather often or only exceptionally? What kind of cases reach the court?

b/ What are the penalties inflicted to convicted offenders?

i) Is imprisonment used and, if yes, also without probation? If so, what is the length of the inflicted prison sentences? Please indicate to which category of offences under Article 3 your reply refers.

ii) How high are the fines that are imposed in practice? Is forfeiture of illegal benefits used as an additional monetary sanction?

iii) Do criminal courts also impose remedial sanctions?

c/ What is, to your opinion, the main reason why environmental offences would not reach a criminal court? Not enough inspections? Practical difficulties to prosecute environmental offences successfully (e.g. lack of training or specialization, lack of time, lack of financial resources, difficulties of proof, unclear criminal law)? Is there a tradition to rather sanction such

offences with administrative sanctions? Or are environmental rules simply not, or nearly not, enforced?

5a) Yes, it happens rather often. Among the most common cases you will find *environmental crime* (e.g. pollution - Chapter 29, section 1 of the Environmental Code), *crime against the protection of species* (Chapter 29, section 2 b), *unauthorized environmental activity* (e.g. lack of permit for a certain activity or violation of conditions - Chapter 29, section 4) and *unauthorized transport of waste* (Chapter 29, section 4 a).

5b) The most common penalty is a corporate fine. For natural persons the most common penalty is a fine (day-fines). Prison sentences are rare.

i) Prison sentences exceeding six months would be described as unique (for an environmental crime in the strict sense),

ii) A fine would generally be settled between 30–80 day-fines. Corporate fines could amount to somewhere between 5 000 SEK and 10 000 000 SEK. Corporate fines in the area of environmental crime very rarely exceed 1 000 0000 SEK. Forfeiture is, to our knowledge, not often used as a sanction.

iii) No.

5c) According to a study performed in 2005 there are a number of factors that affect the efficiency in dealing with environmental crime. Among those are: improved capacity to discover environmental crimes, better co-operation between prosecutors, police and supervisory authorities and a higher amount of unannounced inspections.

The Swedish National Council for Crime Prevention follows the area of environmental crime and reports that in 2014, approximately 5 900 Environmental Code offences were reported. 165 individuals were prosecuted for environmental crimes in 2013. Only 4 % of environmental crimes were cleared so that a person could be tied to the crime (2014). The majority of suspects are middle-aged men. The crimes that are detected happen mostly in business activities.

6/ *As to structure of prosecuting environmental crime*

Are prosecution and/or court procedure for environmental crimes concentrated on specialized prosecution offices/ courts or specialized sections within prosecution offices/courts?

6) Yes, there exists an organization with specialist prosecutors for environmental crime. There are no specialized courts as regards environmental crime – the issue has however been discussed.

In Svea Court of Appeal in Stockholm environmental crime cases are dealt with by the division of the court which normally serves as the Land and Environment Court of Appeal.

7/ *What about the availability of administrative sanctions to punish environmental offences?*

By ‘administrative sanction’ we mean sanctions imposed by an administrative body, an administration.

a/ Is it possible in your country to punish environmental offences by administrative fines?

If so, could they be applied alongside criminal sanctions or only instead of them and at which point in the procedure has a decision to be made which “route” to follow; what are the legal minimum and maximum of those administrative fines; which are the administrative bodies who can inflict such fines?

b/ Which administrations can impose remedial sanctions to end environmental offences and remediate to the damages they caused? And which are the remedial sanctions they can impose? Can they give remedial orders? Can they themselves clean-up the damages and oblige the offender to pay the bill? Can they order to stop an illegal conduct? Can they suspend permits until the cause of the pollution of offence was remediated?

7a). Yes, it is possible to punish certain environmental offences through environmental sanction charges. The regulations on this are found in the Environmental Code. Only infringements that are less serious, easily detectable and that can be clearly specified are considered to be suitable for environmental sanction charges. The charges are decided by the supervisory authority. Serious infringements and infringements of a more complicated nature are criminalized and dealt with by prosecutors and handled within the general court system. Typically, the environmental sanction charges concern formal matters, like having failed to submit a required application, notification or report to an authority.

It is also possible to punish failure to follow an order, like an injunction or a prohibition, through prospective (pending) fines, decided by administrative bodies (supervisory authorities), but imposed by the Land and Environment courts. The system of prospective fines is described below under section b).

i) According to provisions in the Environmental Code an environmental sanction charge must not be payable if it would be unreasonable in view of the fact that the infringement has led to a penalty pursuant to the provisions in the chapter of the Code that regulates environmental criminal offences. Generally sanction charges and criminal sanctions do not cover the same offence.

ii) According to the Code the size of charges should be specified in an ordinance issued by the Government and charges are set at min. 1000 SEK (approx. 100 €) and max. 1 000 000 SEK (approx. 100 000 €). The present ordinance on environmental sanction charges issued by the Government however does not contain charges higher than 50 000 SEK (approx. 5 000 €).

iii) It is the supervisory authorities (often municipalities or county administrative boards) that can decide on environmental sanction charges. Anyone liable for payment of an environmental sanction charge pursuant to a decision taken by such an authority may appeal against the decision to a Land and Environment Court.

7b) In this case too, it is the supervisory authorities (often municipalities or county administrative boards) that can impose remedial sanctions to end environmental offences and remediate the damages they caused. The supervisory authority has extensive means to act when rules set by the Environmental Code or its ordinances are violated. All of the administrative sanctions can be applied on legal persons as well as private persons.

The supervisory authorities may issue any injunctions and prohibitions that are deemed necessary in individual cases to ensure compliance with the provisions of the Environmental Code and rules, judgements and other decisions issued in pursuant of the Code. The injunctions and prohibitions must not be more intrusive than necessary in individual cases. These injunctions and prohibitions can be subject to prospective (pending) fines. The size of the fine is decided by the supervisory authority.

Such an injunction can for instance state that

“XX(Name of person or company) should at the latest by the 31 December 2015 have removed the waste (specified) stored on his/her property to a waste disposal plant that is authorized by the authorities, or a fine of 50 000 SEK can be imposed.”

Such an injunction can be appealed to a Land and Environment court. If the injunction is not followed, the supervisory authority can apply for the fine to be imposed by the Land and environment court.

It is also possible, if an injunction or prohibition is not complied with, for the Swedish Enforcement Authority to enforce the decision on request by the supervisory authority.

The supervisory authority can also decide that a fault should be corrected at the expense of the party at fault, i.e. the authority can do the cleaning up by itself and then send the bill to the polluter.

As is stated above any illegal conduct can be stopped by the supervisory authority through a prohibition order.

Concerning an activity that is carried out in accordance with a permit issued by a permit authority (an environmentally hazardous activity - often an IED-plant or a water activity) the supervisory authority can act only if the permit or the conditions of the permit are violated, or if an urgent injunction or prohibition is needed to avoid health effects or serious damage to the environment.

When there is a permit and the conditions of the permit are not followed, the supervisory authority can apply for the permit authority to withdraw the permit and prohibit further activity. The same procedure can be taken if the application for permit or the environmental impact statement that founded the permit was incorrect or misleading.

8/ *What about the actual use of administrative sanctions against environmental offences?*

a/ Are environmental offences sanctioned by administrative authorities? Does this happen rather often or only exceptionally? In what kind of cases?

b/ What are the administrative sanctions that are used in practice?

Is fining used? How high are the fines that are imposed in practice?

Are remedial sanctions used frequently, are rather seldom? Are they effective?

8a + b) Injunctions and prohibitions are very often used by the supervisory authorities in a wide range of situations and with or without prospective fines. The use of injunctions and prohibitions is by far more common than environmental sanction charges or criminal cases. The prospective fines are set individually in each case and are normally decided on such a level that it is cheaper to take the measures stated, than to pay the fines. Remedial sanctions in the form of injunctions and prohibitions are also common. In our opinion the injunctions and prohibitions issued by the supervisory authorities are effective, especially when subject to a prospective fine.