

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

Statement of Renate Philipp Judge at the Federal Administrative Court of Germany

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?

In Germany only natural persons can be held criminally liable. If an offence against the environment is committed as part of the business of a legal person in general any natural person who is responsible for the illegal conduct (legal representative, CEO, employee) can be held criminally liable. If special personal attributes, relationships or circumstances form the basis of criminal liability and if these characteristics only exist in the legal person the Criminal Code stipulates that the legal representative or CEO be treated as if the characteristics were their own. For example: Duties imposed on operators of installations by the competent administrative authorities are considered such personal characteristics. Therefore if a legal person violates the duties imposed the violation is attributed to its legal representatives or CEO. In this way they can be held criminally liable (sec 14 Criminal Code <CC>).

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

Any person who deliberately assists another in the deliberate commission of an unlawful act shall be convicted and sentenced as if he were a perpetrator (sec 26 CC). Any person who deliberately assists another in the deliberate commission of an unlawful act shall be convicted and sentenced as an aider. The penalty for the aider shall be based on the penalty for a perpetrator. It shall be mitigated pursuant to section 49 (1) CC (sec 27 CC).

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)?

The Criminal Code contains a separate chapter “Offences against the environment” since 1980 (Gesetz zur Bekämpfung der Umweltkriminalität vom 28. März 1980, BGBl I S. 373). Therefore directive 2008/99/EC caused only little need for further legislation. It was transposed in 2011 (45. Strafrechtsänderungsgesetz vom 6. Dezember 2011, BGB I S. 2557). Gaps in the transposition of Art. 3 of the directive have not been invoked, neither by the courts nor by law professors.

3/ How were the Art. 3 offences implemented?

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

Most Art. 3 offences were implemented in the criminal code, chapter “Offences against the environment”. Only Art. 3.f and Art. 3.g were implemented in the Federal Nature Conservation Act and in the Federal Hunting Act.

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

The implementation was integrated into the existing legislation.

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?

These requirements were not present in the “Offences against the environment” before the directive entered into force. As far as the existing legislation was already stricter than required, the legislator did not implement the requirements. Under the existing provisions injury to any person need not to be “serious” and damage not “substantial”. For example Section 324 of the Criminal Codes – Water pollution - simply provides: “Whosoever unlawfully pollutes a body of water or otherwise alters its qualities in a

negative manner shall be liable to imprisonment of not more than five years or a fine.”
The alterations of water qualities must only be “negative” and “unlawful”.

As far as new legislation had to be passed to implement Art. 3 of the directive, the legislator implemented the requirements in a few of the new provisions, in most provisions he did not.

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?

In most provisions we don't have these requirements, see above. If they are implemented they are aimed at not criminalizing bagatelles. Keeping this objective in mind it should be possible to apply them adequately.

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

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

Yes.

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

In Germany a fine shall be imposed in daily units equaling a certain amount of money which the court has to define, considering the personal and financial circumstances of the offender. In doing so, it shall typically base its calculation on the actual average one-day income of the offender or the average income he could achieve in one day. A daily unit shall not be set at less than one and not at more than 30 000 euros. The minimum fine shall consist of 5 and, unless the law provides otherwise, the maximum shall consist of 360 full daily units (sec 40 CC). Consequently fines can – in theory - range from 5 euros to 10 800 000 euros.

Imprisonment shall be for a fixed term unless the law provides for life imprisonment. The maximum term of fixed-term imprisonment shall be 15 years, the minimum term one month (sec 38 CC).

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

Being a member of a criminal organization is an offence by itself (sec 129 CC). If the act committed not only violates sec 129 CC but also constitutes an offence against the environment, only one sentence shall be imposed. It shall be determined according to

the law that provides for the most severe sentence. The sentence may not be more lenient than the other applicable laws permit (sec 52 CC).

b/ Is forfeiture of illegal benefits possible?

Yes (sec 74 CC). As far as legal representatives or CEO of legal persons – under civil or public law – are concerned illegal benefits obtained by the legal person can be seized (sec 75 CC).

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

No. Remedial sanction can only be imposed by the competent administrative authorities and they can only be obliged to do so by the administrative courts.

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?

Environmental offences are brought to criminal courts, but there are not a lot of cases. The number of cases (offences against the environment pursuant to the Criminal Code) increased from the late 1970es up to 41 381 cases in 1998. Since then it has been declining (13 342 cases in 2011). Most cases concern unlawful disposal of dangerous waste (sec 326 CC – 8 369 cases in 2011), followed by water pollution (sec 324 – 2 912 cases) and soil pollution (sec 324a CC – 999 cases).¹ In 2012 only 0,3 % of all registered criminal offences were offences against the environment.²

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.

In 2012 3 % of the criminal sanctions imposed for environmental offences were imprisonment, 97 % fines - compared with 18 % imprisonment and 92 % fines imposed for all criminal offences on average. ³ 88 % of the sentences of imprisonment were suspended for probation (70 % on average). The term of imprisonment was in 60 % of the sentences shorter than 6 months, in 35 % shorter than one year.

¹ Kloepfer/Heger, Umweltstrafrecht, 3. Auflage 2014 Rn.

² Kloepfer/Heger a.a.O. Rn. 427

³ Kloepfer/Heger a.a.O. Rn. 438

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

The number of inflicted day fine units for offences against the environment does not differ significantly from those for other offences. In about 50 % of the environmental cases 31 to 90 day fine units were imposed, in most of these cases one day fine unit ranged from 10 to 50 euros.⁴ Data about forfeiture are not available.

- iii) Do criminal courts also impose remedial sanctions?

No. See question 4/c.

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?

We can only speculate about the dark figure of crime against the environment. If for a certain conduct a permit is required, compliance with the permit will be supervised by the competent administrative authorities. At least great operators will usually try to avoid the risk of criminal proceedings which necessarily lead to negative publicity. But of course there are rotten apples, especially in the field of waste management. The staff of the administrative authorities has been reduced substantially within the last two decades in order to balance the budget. Consequently there is less time for on-site inspections. At least the obligation of operators to monitor the operation of their installations by themselves has been expanded. If an operator is convicted, the criminal court will punish him by dissuasive penalties. For example an operator who was mandated to recultivate disused waste sites which had been operated in the GDR and who had filled them with waste which was not admitted for this purpose was sentenced to 4 years and 3 months in prison.⁵

In the field of agriculture and forestry, small businesses and even private activities the dark figure of crime against the environment is probably higher. It is not possible – and, in my view, not desirable - to have inspections all over the country. But agriculture in particular is a big player in the usage – and often: misuse – of the environment. The environment could substantially benefit from more inspections in agricultural businesses. This would require more inspectors and the willingness to weather a conflict with the farmers lobby.

⁴ Kloepfer/Heger a.a.O. Rn. 445, 447

⁵ Bundesgerichtshof, judgment of 20th February 2013 – 5 StR 306/12 – BGHSt 58, 152.

Please provide, if available, empirical data of summaries of interesting cases that illustrate your answer.

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?

Environmental crimes are not exclusively dealt with by specialized prosecution offices / courts. Prosecution offices usually have specialized sections for environmental crimes. Some courts have specialized divisions for offences against the environment, others don't.

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?

Yes.

If so,

- i) 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;

If an act is at the same time a criminal offence and a regulatory offence, only the criminal law shall be applied (sec 20 (1) Act on Regulatory Offences / Ordnungswidrigkeitengesetz <OWiG>). The prosecution offices or the courts do not have a choice which "route" to follow.

- ii) what are the legal minimum and maximum of those administrative fines;

The amount of the administrative fine shall not be less than 5 Euros and unless otherwise provided by statute shall not exceed 1 000 Euros (sec 17 (1) OWiG). Environmental legislation provides for higher fines, for example the Waste Management Act (KrWG) for 100 000 Euros, the Federal Immission Control Act and the Federal Nature Conservation Act for 50 000 Euros.

- iii) which are the administrative bodies who can inflict such fines?

The administrative bodies which have jurisdiction to sanction regulatory offences have to be designated by law. Usually federal legislation leaves this designation to the Länder.

b/ Which administrations can impose remedial sanctions to end environmental offences and remediate to the damages they caused?

In general the Länder designate the administrative authorities which can impose remedial sanctions.

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? ...

In general the competent administrative authority can issue all orders which are necessary to implement the law.

For example: If the operator of an installation subject to licensing under the Federal Immission Control Act <BImSchG> fails to comply with an additional condition or an enforceable subsequent order or a definitive obligation ensuing from an ordinance, and if any such condition, order or obligation has a bearing on the nature or operation of the installation, the competent authority may, completely or in part, prohibit operation pending compliance with the condition, order or obligation ensuing from the ordinance (sec 20 (1) BImSchG). The competent authority shall order to close down or dismantle any installation constructed, operated or materially altered without the required licence to do so. It shall order the dismantling of the installation where the general public or the neighbourhood cannot be adequately protected in any other way (sec 20 (2) BImSchG). The competent authority may prohibit the continued operation of an installation subject to licensing by the operator or any person in charge of operation if there are proven facts supporting their incompetence to observe the legal provisions concerning the protection against any harmful effects on the environment and if such prohibition is necessary to ensure the public welfare (sec 20 (3) BImSchG).

If any illegal conduct has deteriorated the environment the competent authority can request the polluter or the owner of the site to remediate the damage within an adequate time-limit. If the addressee of the order fails to comply the authority can commission a third party to do the job at the expense of the polluter / site owner.

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?

At least if a license is required the administrative authorities supervise the operation of the installment and take action in case of environmental offences. If a license is not

required it depends on whether they are aware of the illegal conduct or not. If an illegal conduct is brought to their notice and if it could have a significant adverse effect to the environment the administrative authority usually will assess the facts and take action if necessary.

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?

First of all the administrative authorities will order to stop the illegal conduct. If the illegal act constitutes a regulatory offense they will impose an administrative fine which usually cannot surmount 50 000 Euros, in some cases 100 000 Euros (see question 7/a/ii). If the illegal act constitutes a criminal offense the administrative authorities will inform the Public Prosecution Service. If the illegal conduct has damaged the environment and if the damage can be remediated they will request the polluter alternatively the site owner to do so at their own expense.

Please provide, if available, empirical data of summaries of interesting cases that illustrate your answer.

Polluter-pays-principle – “Ewigkeitshaftung”

A mine, in which pyrite had been excavated since 1852, was closed down in 1993. The mine drainage stations were stopped in 1996, the mine was flooded. Since 1999 mine water leaks out of the mine without regulation. It is contaminated by heavy metals. Permits which required the operator to clear the mine water expired in 2007. The administrative authority requested the operator to apply for a new permit providing a further mine water treatment. The operator argued that his responsibility could not last eternally. The Federal Administrative Court dismissed his claim. It held that the polluter pays principle is not limited by the profit which could be made by operating the mine. The obligation to treat the mine water is justified by the long lasting operation of the mine which caused extraordinary risks for the environment; it does not expire by lapse of time. Only when it is no longer clear that the operation of the mine is the main cause for the contamination of the water the operator’s responsibility will end.

Federal Administrative Court, judgment of 18 December 2014 – 7 C 22.12