

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

NORWAY

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?

Both natural persons and legal persons can be held criminally liable in Norway. The General Civil Penal Code section 48a states that when a penal provision is contravened by a person who has acted on behalf of an enterprise, the enterprise may be liable to a penalty. This applies even if no individual person may be punished for the contravention. The hypothesis in art. 6.1 is not mentioned since the General Civil Penal Code does not require that the person who acts on behalf of the enterprise has a leading position in the enterprise. The hypothesis mentioned in art. 6.2 is mentioned in connection with the assessment of whether the enterprise should be penalized or not.

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

In Norwegian law the person inciting, aiding or abetting the contradiction of the penal provision may be punished in the same way as the actual perpetrator of the crime.

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)?

We are not aware of any gaps in the transposition of the art. 3 of the Directive.

The conducts mentioned in art. 3 a to e and i are prohibited in the Pollution Control Act except if the conduct is authorized by the Pollution Control Authority. Breach of the Pollution Control Act is subject to criminal liability, eg. the Pollution Control Act section 78. Fines or imprisonment for a term not exceeding

three months or both will be imposed on any person that wilfully or through negligence possesses, does, or initiates anything that may cause pollution contrary to the Act or regulations issued pursuant thereto.

The conducts mentioned in art. 3 f to h are prohibited in the Nature Diversity Act section 75. Any person that wilfully or negligently contravenes provisions in the Act is liable to fines or imprisonment for a term not exceeding one year. However, the penal provision only covers provisions mentioned in the penalty clause. The conducts mentioned in the art. 3 of the Directive are among the mentioned provisions.

The more severe breaches of conducts mentioned in art. 3 of the Directive are prohibited and subject to punishment after the General Civil Penal Code section 152, 152a and 152b. These provisions have a maximum sentence of imprisonment for 21 years for the most severe breaches.

3/ How were the Art. 3 offences implemented?

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

The offences in art. 3 are implemented in environmental laws and in the General Civil Penal Code as mentioned above. Criminal liability for enterprises will also be subject to the said assessment of section 48a in the General Civil Penal Code.

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

The legislator has not chosen a "copy paste" solution, and the implementation is found in different laws and different provisions. However, the provisions in the General Civil Penal Code look quite similar to the Directive.

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?

The specific circumstance is not mentioned in the environmental laws, but the result or risk is mentioned in the regulations in the General Civil Penal Code. Substantial damage is also a condition for a more severe punishment in the Pollution Control Act and the Nature Diversity Act.

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?

The specific circumstances are only mentioned when the punishment is more severe. I think this is natural and the damage and/or risk of damage would in any case have been important factors in the assessment of the punishment. However, I think it is a good thing that the conduct can be punished even if the risk or damage is not severe, since the conduct itself can be potentially dangerous even if the risk or damage in the concrete case was not that severe.

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?

Yes, the criminal sanctions also include fines. Fines are probably also the most used sanction even if many of the provisions include imprisonment. There is no legal minimum or maximum for fines. For imprisonment there are different legal maximums. In the environmental laws the maximum term of imprisonment reaches from three months to five years. In the General Civil Penal Code the legal maximum of imprisonment reaches from two to 21 years.

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

The General Civil Penal Code section 60a has a provision making the sanction more severe if the crime is committed by an organized group. The maximum penalty laid down by the penal provision shall be increased to double its prescribed limit, but not by more than five years' imprisonment.

b/ Is forfeiture of illegal benefits possible?

Yes, the General Civil Penal Code allows forfeiture of illegal benefits for proceeds of a criminal act. This also includes proceeds which is a result of savings due to a criminal act, e.g. savings due to not installing a cleaning plant.

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

In Norway there is no division between civil and criminal judges since the court system is general. However, remedial sanctions are part of a civil procedure and in a criminal case the remedial sanction cannot be imposed. The decision of removal or closure may be imposed outside the criminal case as this is an administrative decision and not seen as punishment.

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?

In cases where legal persons are punished, the cases rarely are brought before a court. The reason for this is that the companies normally accept the fines that they are given, even if the fines are high. It may seem that the companies rather face a high fine than a public trial where the environmental crime is displayed in public.

However, in the last few years the number of cases regarding environmental crimes before the courts has been increasing and quite a few cases reach the courts today. With that said, the prosecution of environmental crimes could have been more effective. The laws which applies to the area is good and effective, but the resources for investigation and prosecution are limited and have to be shared with other parts of the prosecuting authority. This implies that the fight against environmental crime could have been better and more effective, even if several cases are investigated and brought to court. In the last few years there have been several cases pending before the courts and even several cases have been brought before the Supreme Court. The cases represent different part of the definition of environmental crimes: Pollution, trade and extinction of endangered species, damaging of a natural reserve and cultural monuments.

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.**

Yes, imprisonment is used for several of the categories in Article 3. Imprisonment is often used together with a fine, or imprisonment is used for the natural person and a fine for the corporation. Imprisonment is in some cases applied without a probation, but due to the fact that several of these cases have taken up to three years to investigate, prosecute and have been before the courts for two to three years, the imprisonment has been subject to probation and been shorter than they normally would have been due to the long time period. The longest applied sentence is two years imprisonment in the most severe case regarding environmental crime in Norway. This case concerned the illegal handling of petrol which resulted in severe fire and explosion and put several employees in grave danger. However, the more normal level for imprisonment is from 45 days to one year.

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

The fines of course vary according to the crimes committed. However, for the corporate penalties the fines may be of several millions NOK. The illegal benefits are normally seized in addition to the punishment.

- iii) Do criminal courts also impose remedial sanctions?**

No, this has to be part of an administrative decision.

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?

As stated above, some of the reasons for cases not reaching the courts are the limited resources and that fines given to corporations in connection with criminal liability often are accepted by the companies without a trial. Other factors are that the administrative authority does not press charges – which is necessary for some of the crimes – and the reason for not pressing charges seems to be that the police and the prosecution do not always have the time or resources to follow up. Hence, the administrative authority in many cases will choose to apply administrative sanctions instead. In addition smaller infringements of the laws regarding environmental crimes could be decided with conditional waiver of prosecution or just a warning.

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?

The most serious offences or the most extensive cases are prosecuted by the national authority for investigation and prosecution of economic and environmental crime. However, more general environmental crime will be prosecuted by the local police district. The national authority for investigation and prosecution of economic and environmental crime will be available to give advice in such cases. In Norway there is a general court system, hence there are no specialized court for environmental law.

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, several of the laws applied to different aspects of the environment have regulations which punish environmental offences by administrative fines. Normally these administrative fines are coercive fines which are applied if the entity/person does not change the polluting activity or adjust in accordance with orders from the relevant authority. However, some laws also have more regular administrative fines, e.g. the Act relating to aquaculture. It is also a development in Norwegian law which indicates that there may be more administrative fines in the future. As an example it can be mentioned that there is a proposition regarding introduction of administrative fines to the Pollution Control Act, however, this proposition is only in an initial phase.

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;**

The coercive fine is normally not deemed as punishment, and e.g. a coercive fine in cases regulated by the Pollution Control Act is not an obstruction for fines in accordance to the regulations of criminal offences. Administrative fines, however, may be deemed to be punishment. It is stated in the preparatory works of the Act relating to aquaculture that there should be made a decision to which route to follow. In practice the choice of route is done by the Directorate of Fisheries and they choose whether to press charges or initiate an administrative route themselves. This is also the general procedure in other laws with administrative fines.

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

There are normally no legal maximum or minimum, but in relation to aquaculture there are a regulation stating the legal maximum of both the coercive fine and the administrative fine. The maximum is 15 times the basic amount set by the National Insurance, which today is NOK 90 068. This gives a legal maximum of NOK 1 351 020.

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

The administrative body will be the one responsible for the specific area of law. Hence, there are several administrative bodies that can inflict such fines. However, the Norwegian Environment Agency is the administrative body responsible for e.g. the Pollution Control Act and hence, an important administrative body in this respect. The authority regarding the Act relating to aquaculture is divided on four different bodies, but the Directorate of Fisheries is the main body for sanctions.

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

As stated above, this will be the administrative body which is responsible for the specific area and is normally the same as the one that can inflict administrative fines.

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?

The remedial sanctions can somewhat change in the different acts that apply to the broad area of environmental law. In the most wide-ranging law, the Pollution Control Act, the remedial sanctions are coercive fines to make sure that orders from the relevant authority is given effect, order of immediate

effect and effectuation by the authority themselves, order of payment of expenses and loss in relation to pollution. The relevant authority may also give order to stop, remove or restrict the polluting activities.

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?

Yes, our impression based upon a conversation with the Norwegian Environment Agency is that environmental sanctions are used. Orders to stop or clean up pollution are used frequently. The coercive fine is also used in many different cases, and is used where the case is suitable. The case is deemed suitable for a coercive fine if the breach of law is something the polluter may stop, alter or clean up and which there may be applied an economic incentive to do. The coercive fine will not be used where the polluter can not change the circumstances at the given time. Then a fine may be the only applicable sanction, but for the time being a fine can only be given by the prosecuting authority. However, as stated above there is a proposition to give the Norwegian Environment Agency a provision to apply administrative fines. The sanction order of payment of expenses and loss is also used regularly if the polluter will not clean up himself. The Norwegian Environment Agency has informed us that in 2013 they had given notice to polluters about coercive fine in 296 cases, given order of coercive fine in 26 cases and enforced 4 fines. In 2014 there were 308 notices, 28 order and 5 cases where the fine was enforced.

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

The most used administrative sanction is orders to stop pollution or clean up pollution. The coercive fine is used in addition to this if the polluter does not follow the order. But as seen from the numbers above a notice of coercive fine is normally enough to put pressure on the polluter.

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

As stated above in the Pollution Control Act there is no provision for applying administrative fines, only coercive fines. These fines are determined individually and are adjusted to the individual case. The factors in the measurement of the coercive fine are what kind of breach of the regulations the polluter has done, how serious the breach is, and what kind of expenditure cut the entity has because of the illegal pollution. It is important that the fine is adjusted so the necessary economic pressure is put on the entity. Hence, there is great diversity of the amount of the fines.

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

Remedial sanctions are used in all cases where it is possible to use such order and sanction. The Norwegian Environmental Agency is of the opinion that remedial sanctions and sometimes together with coercive fines are very effective, as the numbers stated above reflects.