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

Danish report

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?

Answer*: Legal persons can be held criminal liable under the Criminal Code section 25-27 regarding offences of the Criminal Code and legal persons van be held criminal liable regarding offences of environmental legislation under the Criminal Code section 306.*

Section 306 of the Criminal Code applies for all criminal offences and is not restricted to very specific crimes, provided that the relevant legislation includes a legal basis for making legal persons criminal liable. All environmental legislation includes such a legal basis for making legal persons criminal liable.

There is no precondition that there has been a criminal proceeding against a natural person before a legal person is find criminal liable for an offence. Moreover, there is no precondition that an identified natural person acting on behalf of the legal person has a leading position.

Under the criminal code section 23 persons inciting, aiding or abetting the criminal offence can be held criminal liable. In most cases regarding environmental crimes the prosecution is restricted to the penetrator but there are exceptions. In UfR 2004.2181 V regarding none compliance with a permit for a municipal owned sewage and pollution of a stream and lake, the Western High Court found that the municipality as operator as well as the consultant who advice the municipality was criminal liable for the offence of the Environmental Protection Act.

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)?

Answer*: All the listed offences in art. 3 are made criminal under Danish legislation and this was the case even before the Directive 2008/99 on environmental crimes was adopted with the exception of the offence in art. 3(h) regarding damage to natural habitats protected by the Habitat Directive. After an opening letter from the Commission regarding insufficient implementation of the Habitat Directive this was solved by Parliamentary Act no. 514 of 12 June 2009 amending the Nature Protection Act section 29 a and section 29 b and section 89 making damages to natural habitat criminal.*

Moreover is shall be mentioned that while the Directive art. 3 is restricted to intentionally or serious negligence criminal offences of Danish Environmental legislation also include simple negligence.

3/ ***How were the Art. 3 offences implemented?***
a/ Only in the criminal code, only as parts of environmental laws or combining both ways?

Answer: *The listed offences in art. 3 is reflected in the environmental legislation but supplemented by section 196 of the Criminal Code which is restricted to very serious and intentional offences of environmental legislation with a maximum criminal sanction on 6 years imprisonment. The Criminal Code section 196 doesn't include serious and intentional damage to natural habitats protected by the Habitat Directive – art. 3(h) offences – and one could question whether is in accordance with the Directive that the maximal penalty for these offences is 1 year imprisonment – see Nature Protection Act section 89.*

Section 196 of the Criminal Code was adopted in 1997 but first time the provision was used by the prosecutor was in August 2015 regarding organized environmental crimes regarding illegal waste dumping.

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

Answer: *When the Directive 2008/99 was adopted in 2008, the Danish Government concluded that the requirements in the Directive was already implemented and no further legislation was needed. This is correct with the above mentioned later correction regarding protection of natural habitats.*

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 "*significan*t" deterioration.

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

Answer: *The specific circumstances expressed in art. 3 are not reflected in Danish legislation.*

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?

Answer: I can rather easily cope with them.

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?

Answer: *Criminal sanctions include fines as well as imprisonment. There is no minimum punishment. The maximum punishment under section 196 of the Criminal Code is 6 years imprisonment. The maximum punishment of criminal offences of the Environmental Protection Act and Chemical Act as well as other legislation regarding pollution and chemical risk is 2 years imprisonment while maximum penalty regarding criminal offences of the Nature Protection Act is 1 year imprisonment.*

The criminal sanction is increased if the crime is committed by an organized criminal group?

b/ Is forfeiture of illegal benefits possible?

Answer: *Under the Criminal Code as well as under the Environmental Protection Act there is a legal basis to take away civil rights of penetrator as for example banning the penetrator's right to operate an industrial plant or a waste facility. Moreover, the profit gained by the criminal offence will normally be confiscated.*

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

Answer: *Remedial actions are decided by the environmental authority but can be upheld in criminal cases.*

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?

Answer: *The number of cases regarding environmental crimes have increased during the last five years and this is no more an exception although most cases regarding environmental offences are decided/solved by administrative enforcement.*

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?

Answer: *Imprisonment is only used in very few environmental cases (estimate less than 10 cases during the last five years) and the imprisonment has until now been under 1 year except in cases where other serious crimes are involved.*

When legislator in 2008 increased sanctions regarding environmental crimes a guidance on offences were included in the preparatory work defining the normal minimum sanction. For example, the minimum fine for operating an IE-installation without an IE-permit is 50.000 D.kr. but if the operator has gained profit from the offence, the fine is about 25 % of the profit plus confiscation of the profit.

Criminal courts does not impose remedial actions – such decisions are taken by the administrative authority but can be supported by court imposing monthly or weekly fines until the penetrator has complied with administrative order.

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?

Answer: Lack of training and specialization, lack of time, lack of financial resources and difficulties of proof.

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?

Answer: *Prosecution of environmental crimes is not subject to any special procedure and is in hand of the ordinary prosecutor – but in complicated cases, support can be given from a special unite under the national prosecutor (Rigsadvokaten).*

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.

Answer: *With very few exceptions the environmental authority is not granted power to impose administrative sanctions and has only competence to remedy the offence.*

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

Answer: *No.*

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;
ii) what are the legal minimum and maximum of those administrative fines;
iii) 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? …

Answer: *The administration of the environmental legislation is mainly placed on the municipalities but is on some few areas given to the Ministry of Environment as the competent authority. The competent authority has the power to order to stop an illegal conduct and it can suspend a permit if the offence is not expected to stop. But the environmental authority does not have the competence to make temporary suspensions of permits until the offence has ended. Only the court has such discretion.*

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?

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

Answer: *The most used sanction against environmental offences is an administrative order to stop the criminal conduct and eventually to remedy the illegal condition created by the offence (cleaning up or*

restore the natural damage). However, an increasing number of environmental offences are also prosecuted by fines imposed by criminal courts.