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EU Forum of Judges for the Environment Annual Conference 2016

The ECHR, ICCPR and EU-Charter as beacons in environmental prosecution and adjudation

Bucharest, 18 and 19 November 2016

Questionnaire

GERMANY

1.1 What usually triggers, in your country, the opening of a file on an environmental offence at the public prosecutor's office? The reception of a notice of violation recording the offence? Other triggers?

Normally the opening of a file on an environmental offence is triggered by a notice of violation by a public authority concerned with environmental protection, e. g. waste disposal. Other ways may be a police report or the report of the offence by a citizen or an NGO, dealing with environmental matters.

1.2 What is the average time required in your country in criminal proceedings to go from a citation to a first instance judgement and to an appeal judgement.

Minor offences are dealt by the local courts. From entering at public prosecution service it takes an average of 7,3 months until the final decision; this time includes a period of 3,5 months at court level. In these cases, the regional court is the court of appeal. Proceedings take 15,6 months since entering at prosecution level including the period of time at first instance court and 6,6 months at the court of appeal. In these cases, the appeal deals with facts and law as well.

The grand criminal chambers at the regional courts deal with major offences, if an imprisonment of more than four years is at stake. These proceedings are twice the length of the proceedings at the local courts. From entering at the public prosecution office these proceedings take 17,2 months, at court level 6,6 months on average. The court of appeal in these cases is the Federal High Court of Justice, which only deals with the law, but not with facts. The proceedings at the Federal High Court of Justice are quite fast; in most of the cases the proceedings will be concluded in less than 3 months. (see: Jehle, Criminal Justice in Germany, 6th ed., 2015 <https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Criminal_Justice_Germany_en.pdf?__blob=publicationFile&v=3>).

I do not have specific data for the length of proceedings regarding environmental offences.

1.3 What procedural steps can take time?

In environmental matters it takes normally quite a long time to obtain an expert appraisal, which is necessary in most of the cases. It also takes time to investigate the personal responsi-

bility in companies, as the public prosecutor has to file charges against single persons, not companies as such.

1.4 Are you aware of difficulties with this guarantee?

Proceedings in environmental offences often have to deal with rather complex facts. Therefore, they will normally take longer than the average criminal proceedings. Furthermore, the punishment is mostly not very severe compared to everyday criminal cases; due to this resources may be allocated to less complex cases, in which a more severe punishment is expected. These circumstances are more likely to lead to undue delay in criminal procedures than in everyday cases (see Klöpfer/Heger, Umweltstrafrecht, 3rd ed., 2014, sec. 400).

1.5 What are the legal consequences of undue delay in your legal system?

The undue delay of a criminal proceeding does not forbid a punishment; therefore the court will not dispense the proceedings, apart from most extreme cases.

The remedy for an undue delay is laid down in Sec. 198 (1) Court Constitution acts, which states: "Whoever as the result of the unreasonable length of a set of court proceedings experiences a disadvantage as a participant in those proceedings shall be given reasonable compensation. The reasonableness of the length of proceedings shall be assessed in the light of the circumstances of the particular case concerned, in particular the complexity thereof, the importance of what was at stake in the case, and the conduct of the participants and of third persons therein." This rule applies also for criminal proceedings.

As the accused is concerned, an undue delay will be taken into account as a mitigating circumstance when the court decides on the sanction. The court will sentence the accused to the appropriate sentence, e. g. a certain time of imprisonment, but will hold that a part of this time will count as having been served. In these cases, the accused will not get a financial remedy. Sec. 199 (2) Court Constitution Act states: "Where for the benefit of the accused a criminal court or the public prosecution office has taken account of the unreasonable length of the proceedings, this shall constitute, pursuant to Section 198 subsection (2), second sentence, sufficient reparation by other means".

2.1 What do you know about the implementation of judgements in your country? Are punitive sanctions (prison sentences, fines, others) implemented? Are remedial sanctions (reinstatement of the environment, compensatory action, other) implemented? Who is in charge? What goes well, wrong?

Penalties in German Criminal Law are imprisonment and – for minor offences – fines. These punitive sanctions are implemented. There are no specific difficulties with aspect of implementation. There are no remedial sanctions. The public prosecution office is in charge of the implementation.

2.2 Can criminal courts also impose remedial sanctions? If so, can they do so *ex officio* or only on request by the prosecution or a civil party?

Criminal courts are not entitled to impose remedial sanctions. In German criminal procedure, a civil party which was harmed by the offence may try to recover damages in the criminal proceedings (Sec. 403 Code of Criminal Procedure governing the "Compensation for the aggrieved Person"). This does not happen very often.

2.3 Worldwide NGO's play a significant role in the prosecution of environmental offences. Can they be a civil party in criminal proceedings under the law of your country? Do they have an easy access to

criminal proceedings or are there severe conditions to meet? Can they obtain damages? Can they request remedial action?

NGOs cannot be a civil party in criminal proceedings. They can, as anyone else, report a criminal offence to the public prosecution office; even in these cases, they will not be a civil party in criminal proceedings.

3.1 What are the basic principles of evidence in the criminal law of your country? Are the means of proof free or restricted? What evidence is most often used in environmental cases? What type of evidence creates troubles (too costly, too difficult to obtain, too easily mismanaged by environmental inspectorates, …)?

The means of proof are restricted in the proceedings of court, regarding all facts that may be relevant for the question of guilt or the sentence. Apart from that the means of proof are free. As stated above, expert testimony is often needed, but may create troubles, in particular a delay of the proceedings if the expert does not work in appropriate time due to his or her workload. In these cases courts may be reluctant to impose fines to accelerate the work.

3.2 How do you see the impact of the principle of innocence on the prosecution policy? Do you feel it has an overly restrictive impact, in general, for some type of cases?

In my opinion there is no overly restrictive impact of the presumption of innocence on the prosecution policy. Sec. 170 (1) Code of Criminal Procedure states: "If the investigations offer sufficient reason for preferring public charges, the public prosecution office shall prefer them by submitting a bill of indictment to the competent court." In practice, this rule applies if a conviction seems more likely than an acquittal.

3.3 How do you see the impact of the principle on the assessment of facts and guilt (intentional/negligence) in the conviction decision? Do you feel it has an overly restrictive impact, in general, for some type of cases?

I do not see an overly restrictive impact; the presumption of innocence is at the core of the rule of law ("Rechtsstaat"). The limitations imposed by it have to be accepted. The courts handle this presumption in an appropriate way.

3.4 How do you see the impact of the principle on the sanctioning decision? Do you feel it has an overly restrictive impact for some type of sanctions?

No; I may refer to my answer to question 3.3.

4.1 Does the environmental law in your country make (an extensive) use of self-monitoring and -reporting obligations? Does it provide inspection rights to ask for information, sanctioned when not complied with?

The environmental law in Germany is basically laid down in administrative law. These rules often demand self-monitoring of activities which may harm the environment. Such rules are – for example – laid down in the law governing waste disposal, water balance or the use of chemicals. Normally, the authorities are entitled to ask for information or to enter private property for inspections. These rules shall ensure the compliance to rules, laid down in administrative law or administrative acts, they do not aim at criminal prosecution. Both self-monitoring and inspections play a significant role for the effectiveness of environmental law.

4.2 If so, are you aware of prosecution difficulties caused by the privilege against self-incrimination? Is it easy to draw the boundaries between evidence that can be used and evidence that cannot be used because of this privilege? Please illustrate your answer by case-law.

The information gathered by administrative bodies may be used in criminal proceedings. (see also Fed Const.Court, Order, 13.01.1981 – 1 BvR 116/77). *De lege lata* the use of this information does not infringe the privilege against self-incrimination, because this information was given without regard to the criminal proceedings. At the time certain person becomes a defendant this person has to be informed of this status and the right to remain silent. In these cases one may not be forced to fulfil self-monitoring obligations imposed by administrative law; I may refer to sec. 52 subsec. 5 Law Concerning the Protection against Harmful Effects on the Environment through Air Pollution, Noise, Vibrations, and Similar Factors and sec 47 subsec. 5 Closed Substance Cycle and Waste Management Act (see Klöpfer/Heger, Umweltstrafrecht, 3rd ed., 2014, sec. 411).

5.1 Are criminal courts in your country confronted with double jeopardy when dealing with environmental offences? If so, what is the typical case-set: a combination with administrative fines, with penalties from other policy areas such for instance as agricultural policies?

The typical case-set is the combination of criminal and regulatory offences. This concurrence is dealt with in Sec. 21 Act on Regulatory Offences. It states: "(1) If an act is at the same time a criminal offence and a regulatory offence, only the criminal law shall be applied. […] (2) In cases arising under subsection 1 however, the act may be sanctioned as a regulatory offence if no criminal penalty is imposed." The prohibition of double jeopardy only applies if a court has already sentenced an act as a regulatory offence; in these cases the act cannot be punished as a crime.

5.2 Are there discussions with regard to the scope of the guarantee? Areas of doubt, vagueness? What, for instance, about EU-regulations regarding extensive farming and mandatory cuts in the income support to farmers when infringing the cross-compliance conditions?

Under German law such cases are not regarded as such of double jeopardy. If a farmer, for example, does not comply with rules for the use of antibiotics, he may lose subsidies, given by a public body. This will be taken into account when determining the sentence for the criminal offence, but does not inhibit from a criminal sentence as such.

6.1 Have you noticed, in your practice, environmental cases where the penalties inflicted were too severe?

No. In environmental matters, the penalties are more lenient than in other areas of criminal law. A custodial sentence is rather rare compared to other crimes (year 2012: 3 % for environmental crimes compared to 18 % for crimes in general), the absolute figures are pretty low (34 cases of imprisonment in Germany in 2012, 30 of them suspended sentences ("on approbation")).

6.2 If so, could you elaborate and tell why you felt the penalty was too severe?

I may refer to my answer to question 6.1.

6.3 At the level of the Council of Europe, Recommendation No. R (92) 17 of the Committee of Ministers to member states concerning consistency in sentencing states, in its point B.7.a: "As a matter of principle, every fine should be within the means of the offender on whom it is imposed." Do you consider that proportionality in punishment requires to have consideration for the extent to which

the penalty hurts the offender, implying, for instance, that for identical offences a firm with healthy finances should be punished with quite higher fines than an individual with a low income? What is the punishing practice in this regard in your country?

Proportionality in punishment is necessary in German criminal law; a sentence always has to be proportional. The principles of sentencing are laid down in Sec. 46 German Criminal Code. It states: "(2) When sentencing the court shall weigh the circumstances in favour of and against the offender. Consideration shall in particular be given to the motives and aims of the offender; the attitude reflected in the offence and the degree of force of will involved in its commission; the degree of the violation of the offender's duties; the modus operandi and the consequences caused by the offence to the extent that the offender is to blame for them; the offender's prior history, his personal and financial circumstances; his conduct after the offence, particularly his efforts to make restitution for the harm caused as well as the offender's efforts at reconciliation with the victim."

Regarding fines, differences in income must be taken into account by the court. In doing so the court applies Sec. 40 German Criminal Code: „(1) A fine shall be imposed in daily units. The minimum fine shall consist of five and, unless the law provides otherwise, the maximum shall consist of three hundred and sixty full daily units. (2) The court shall determine the amount of the daily unit taking into consideration the personal and financial circumstances of the offender. In doing so, it shall typically base its calculation on the actual average one-day net 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 thirty thousand euros. (3) The income of the offender, his assets and other relevant assessment factors may be estimated when setting the amount of a daily unit. (4) The number and amount of the daily units shall be indicated in the decision."

Companies themselves cannot be held liable under criminal law.

7.1 Have you noticed an impact of the right to respect for private of family life on the environmental adjudication in your country? If yes, could you please provide examples form the case-law illustrating this influence?

The right to respect for private and family life has already influenced the environmental adjudication, notably in administrative proceedings concerning flight noise. The plaintiffs claimed a violation of their right by administrative acts allowing the building and the operation of airports

The Federal Constitutional Court rejected this argument. The Court stated: "The right to respect for private of family life and housing in Art. 8 sec. 1 ECHR offers protection against untolerable noise, deriving from an airport, which was approved by state authorities. On the other hand the European Court of Human Rights acknowledges a prerogative for the contracting states, to balance the combatting private and public interests. When deliberating, if the contracting state has violated his duties, the noise abatement measures and procedural safeguards have to be taken into account." (Fed. Const. Court, Order, 20.02.2008 – 1 BvR 2722/06 – Airport Berlin-Brandenburg; similar Fed. Const. Court, Order, 15.10.2009 – 1 BvR 3474/88 - Airport Leipzig-Halle). Thus, the Federal Constitutional Court held, that the right to respect for private and family life does not exceed the right to life and physical integrity as guaranteed in German Basic Law.

7.2 Would you be willing to use this right in support of environmental adjudication and, if so, in which type of cases?

The right to respect for private and family life has to be taken into account by the courts as part of the ECHR. In general, the Federal Constitutional Courts stated: "1. a) The European Convention on Human Rights and its protocols are agreements under public international law. The Convention leaves it to the States parties to decide in what way they comply with their duty to observe the provisions of the Convention […]. The federal legislature consented to the above treaty in each case by a formal statute under Article 59.2 of the Basic Law […]. In doing this, the federal legislature transformed the Convention into German law and made an order on the application of the law to this effect. Within the German legal system, the European Convention on Human Rights and its protocols, to the extent that they have come into force for the Federal Republic of Germany, have the status of a federal statute […]. This classification means that German courts must observe and apply the Convention within the limits of methodically justifiable interpretation like other statute law of the Federal Government. […]." (Fed. Const. Court, Order, 14.10.2004 – 2 BvR 1481/04).

Therefore, the right to respect for private and family life has to be taken into account. Albeit that, the impact on environmental matters remains low, as this right does not exceed the rights to life and physical integrity, given by national constitutional law.

8.1 Have you noticed an impact of the right to life on the environmental adjudication in your country? If yes, could you please provide examples form the case-law illustrating this influence?

The right to life as such has not yet played a crucial role on the environment adjudication. Normally, it is treated together with right to physical integrity, guaranteed in Article 2 Subsec. 2 Basic Law of Germany. In most of these cases, the plaintiffs claim, the public authority has failed to fulfil its duty to protect these rights. According to German Courts, it is namely the duty of the legislator to obey this duty. E. g. the Federal Administrative Court stated: The legislator has a wide margin, how he wants to fulfil its duty to protect the right of life and physical integrity. Courts may find a violation of this duty only in cases, in which the legislator does not do anything or in cases, in which the means of the legislator are clearly and without any doubt insufficient (Fed. Admin. Court, Judgement, 17.12.2013 – 4 A 1.13). If there is no such violation, the court has to examine if the public authorities met the demands of the law, given by the legislator.

8.2 Would you be willing to use this right in support of environmental adjudication and, if so, in which type of cases?

As stated above, the right to life has to be taken into account, when examining environmental cases. Although, the impact of this right is limited, hence it is usually only the underlying background for the rulings of the national legislator.

9.1 Do you consider this right to have impact on environmental adjudication?

The right to environmental protection does not have a direct impact on environmental education. Art. 27 EU-Charter has not been cited in German adjudication so far.

9.2 Do you agree with the proposition that, in environmental adjudication, it is only fit to impact on the sanctioning policy, meaning choice and level of sanctions inflicted?

Yes, I do agree. As far as German law is concerned, there is a similar provision in Art. 20a German Basic Law. It states: "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional

order.” Being a provision of an aim of the state, it may serve as a background, but it is has been regarded as too vague to draw direct and binding legal consequences.