

Environmental Administration and Legislation

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Environmental Liability



Environmental vs. criminal law

- Most environmental laws do outline possible punishments for noncompliance, e.g. revoking an environmental permit
- Mostly these “punishments” apply to the company and aim at:
 - remediation of polluted environmental media,
 - compensation of damage caused or
 - improvement of environmental performance. e.g. remediating at the polluter’s expense,
 - fines,
 - compensations...



LIABILITY

Directive on Environmental Liability

- Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage.
 - establishes a framework for environmental liability based on the polluter pays principle, with a view to preventing and remedying environmental damage.

Environmental Damage

defined as:

- direct or indirect damage to the **aquatic environment** covered by Community water management legislation and by the Framework Directive relating to marine strategy;
- direct or indirect damage to **species and natural habitats** protected at Community level by the 1979 Birds Directive or by the 1992 Habitats Directive;
- direct or indirect **contamination of the land** which creates a significant risk to **human health**.

Actions of authorities

Where there is an imminent threat of environmental damage, the competent authority designated by each Member State may:

- require the operator (the potential polluter) to take the necessary preventive measures; or
- take the necessary preventive measures and then recover the costs incurred.

Actions of authorities

Where environmental damage has occurred, the competent authority may:

- require the operator concerned to take the necessary restorative measures (determined on the basis of the rules and principles set out in Annex II to the Directive); or
- take the necessary restorative measures and then **recover the costs incurred**.
 - Where several instances of environmental damage have occurred, the competent authority may determine the order of priority according to which they must be remedied.

Remediation of damage

Environmental damage may be remedied in different ways depending on the type of damage:

- for damage affecting the land, the Directive requires that the land concerned be decontaminated until there is no longer any serious risk of negative impact on human health;
- for damage affecting water or protected species and natural habitats, the Directive is aimed at restoring the environment to how it was before it was damaged.
 - For this purpose, the damaged natural resources or impaired services must be restored or replaced by identical, similar or equivalent natural resources or services either at the site of the incident or, if necessary, at an alternative site.

Conclusions

In order to determine liability to compensate harm or damage caused or require remediation, it is necessary to

- Establish harm or damage that requires compensation or remediation
- Determine the amount of compensation or extent of remediation
- Determine the need for criminal evaluation

Determining Liability

- Establishing "unreasonable harm" can sometimes be extremely difficult.
 - The subjective nature of harm
 - Land use planning legislation – intended use of property and construction requirements
 - Time priority
- Establishing damage that needs to be remedied can be somewhat easier
 - Quality standards for air, water, soil...

Determining Liability

- Environmental legislation provides tools for determining the amount of compensation or extent of remediation
- If the possibility of a crime exists, the case must be subjected to criminal investigation.

Environmental Crimes



Environmental crimes

- What is a crime?

”Crime is the breach of rules or laws for which some governing authority (via mechanisms such as legal systems) can ultimately prescribe a conviction.“
- What is an environmental crime?

“Environmental crime can be broadly defined as illegal acts, which directly harm the environment.“

Environmental crimes

- Serious environmental crimes involve negligent, knowing, or willful violations of law.
- These acts are deliberate — not an accident or a mistake.
- Often aim at to benefit the violator financially

For example

- Illegal wildlife trade of endangered species in contravention to the CITES
- Smuggling of Ozone depleting substances (ODS) in contravention to the 1987 Montreal Protocol
- Dumping and illicit trade in hazardous waste in contravention of the 1989 Basel Convention

Environmental vs. criminal law



LIABILITY

- Environmental law points out liability for damage caused.



BLAME

- Criminal law, on the other hand, also seeks to punish the offender in addition to liability.

Directive 2003/104/EC “on the protection of the environment through criminal law” aims at obliging Member States to impose criminal penalties on certain behavior which is seriously detrimental to the environment.

Types of environmental crimes

1. unlawful discharge into air, soil or water, of materials or ionising radiation which causes or is likely to cause death or serious injury to any person or substantial damage to the environment;
2. unlawful collection, transport, recovery or disposal of waste which causes or is likely to cause death or serious injury to any person or substantial damage to the environment;

Types of environmental crimes

3. unlawful shipment of waste in a non-negligible quantity;
4. unlawful operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used, and which causes or is likely to cause death or serious injury to any person or substantial damage to the environment;

Types of environmental crimes

5. the unlawful manufacture, treatment, storage, use, transport, import or export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the environment;
6. the unlawful killing, destruction, possession or taking of, or trade in, protected animal and plant species;

Types of environmental crimes

7. unlawful damage to protected habitats;
8. unlawful trade in or use of ozone-depleting substances.

“Member States should also ensure that inciting, aiding and abetting the committing of a criminal act is also punishable.”

Some Definitions

- Legal liability: a person is said to be legally liable when they are financially and legally responsible for something.
- Legal person: any legal entity having such a status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations.

Liability

“Member States shall ensure that legal persons, can be held liable where offences have been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person, based on:

- a power of representation of the legal person;
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person.”

Liability

“The Member States shall plan action to ensure that the liability of legal persons is incurred if a person under the authority of a legal person has not fulfilled their duties of supervision or control thus allowing an offence to be committed for the benefit of a legal person.”

In very simple terms (EU):

- Once a crime is suspected an investigation is carried out by the police.
- Based on the investigation prosecutors decide whether there is grounds for a criminal charge.
- A prosecutor is a state official, whose task it is to see to it that the proper statutory sanction is attached to a criminal act.
- The district court hears the charges and the case is put to trial.

What if contamination still occurs?

Directive 2004/35/EC on environmental **liability** with regard to the prevention and remedying of environmental damage:

- direct or indirect damage to the **aquatic environment**
- direct or indirect damage to **species and natural habitats** protected at
- direct or indirect **contamination of the land** which creates a significant risk to human health.

Preventing and remedying environmental damage

“Where there is an imminent threat of environmental damage, the competent authority will require the operator to take the necessary preventive measures, or will take such measures itself and recover the costs incurred at a later date.”

Preventing and remedying environmental damage

“Where environmental damage has occurred, the competent authority will require the operator to take the necessary restorative measures or will take such measures itself and recover the costs incurred at a later date.” (Annex II contains further information on the methods)