
TRANSBOUNDARY ENVIRONMENTAL CRIMES: GERMAN EXPERIENCES AND APPROACHESGALLAS, ANDREAS¹ AND WERNER, JULIA²

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SUMMARY

Criminal enforcement of environmental law is a necessary supplement to administrative enforcement. Also in the field of transboundary environmental protection there are many infringements that are damaging to human health and the environment. Only criminal sanctions offer an adequate response. Under German law most domestic cases of infringements of environmental law can be dealt with using administrative instruments which do not require public prosecution. But as these instruments are at present not well adapted to transboundary cases criminal prosecution in this field is more important than on the national scale.

Criminal infringements of environmental law are not easily prosecuted, neither in serious domestic cases nor in transboundary cases, although the legal instruments for prosecution are sufficient. There are some areas of uncertainty internationally where the lack of harmonized law makes transboundary prosecution difficult. But the main problem is lack of cooperation between the competent authorities, especially between police forces and environmental administration authorities, and the quite often insufficient qualification of officials and judges. An exchange of personnel should help to overcome both deficiencies.

1 INTRODUCTION

Criminal enforcement of environmental law has been on INECE's agenda from the very beginning and is a permanent topic on other international agendas. For example the Birmingham G8 summit in 1998 stressed again the importance of joint law enforcement action against organized environmental crime in order to protect the global environment, the health and livelihoods of people in developed and developing countries alike and last but not least to enforce multilateral environmental agreements.

Combating environmental crimes on the national scale is not an easy task. Profound qualification of and efficient cooperation among the competent bodies are necessary to sentence not only somebody disposing of his refrigerator in an environmentally unsound way but to react adequately as well if somebody disposes illegally thousands of tons of dangerous wastes. The problems increase if the offender goes international. The legal situation becomes much more complicated and less known as the number of authorities and (within Europe) languages involved multiplies.

In Germany, administrative sanctions play a larger role than these statements may suggest. But as these sanctions lack supporting legislation for transboundary cases authorities have no adequate instruments to react efficiently to transboundary infringements. Thus for the time being transnational cases have to be dealt with in Germany by enforcing criminal law.

2 ENVIRONMENTAL CRIMES UNDER GERMAN LAW

However, before dealing with transboundary prosecution it seems necessary to give a short general introduction into the German law concerning environmental crimes, its sanctions, enforcing bodies, practise and scope in contrast to the administrative legal instruments.

2.1 Criminal Offences and their Sanctions

In 1980 most of the regulations dealing with criminal offences were transferred from various Statutes into the Criminal Code thus underlining the seriousness of environmental crimes. Now the following acts or omissions may constitute a major environmental crime:

- water pollution (§ 324 Criminal Code);
- soil pollution (§ 324 a Criminal Code);
- air pollution (§ 325 Criminal Code);
- environmentally unsafe waste management (§ 326 Criminal Code);
- unlicensed running of a plant (§ 327 Criminal Code);
- unauthorized use of nuclear fuel or emission of radiation (§§ 328, 311 d Criminal Code);
- endangering protected species (§ 30 a Federal Nature Conservation Act); and
- illegal handling with dangerous substances (§ 27 Chemicals Act).

Civil servants might become liable under these provisions, too, but presently there is no criminal liability for companies. This might change in the future as some German politicians speak up for criminal liability of corporations in general.

The main sanctions for criminal offences are imprisonment (up to ten years in the most serious cases) and criminal fines. In addition, the following sanctions and measures may be applied: confiscation of instruments and proceeds, including saving of expenditures, ban on driving, revocation of driver's licence, and/or a ban on a professional activity.

2.2 Competent Bodies

Germany is a federal state. Legislation, administration and jurisdiction are divided between the federation (Bund) and the federal states (Laender). Criminal law is federal law, but criminal law is enforced by Laender authorities and by Laender courts without supervision of federal authorities. There are only small, but important federal competences, as is shown in the following summary:

The preliminary investigations are conducted and coordinated chiefly by a number of police forces and other authorities, Laender police forces doing the bulk of the investigation, federal police forces concentrating especially on coordinating activities:

- Police stations/headquarters (Laender authorities): investigation with specialized departments for environmental crimes, and sometimes additional tasks, e.g., monitoring of waste shipments.
- Laender Bureaux of Investigation: mainly coordinating activities.
- Federal Bureau of Investigation (Bundeskriminalamt): focal point for national and international investigations concerning environmental crime, intelligence work/exchange of information; coordination and support in foreign criminal investigations, investigations in cases of special interest, development of counteractive measures, partner of EUROPOL and INTERPOL, membership in INTERPOL Working Parties.
- Customs (federal authority): monitoring the import and export of goods, including related criminal investigations.
- Water Police (Laender authority): investigations on larger rivers and in harbors.
- Federal Border Police: investigations at territorial seas and within the Exclusive Economic Zone, investigations on sites owned by the Federal Railway.
- Mining Authorities (Laender authority): investigations on mining sites.

During formal investigations all of them act under the supervision of the (Laender) public prosecutor. As criminal sanctions require always a court decision and the right to bring action before a court rests with the public prosecutor in environmental cases, he is in a key position. By now public prosecution has specialized departments dealing with environmental crimes.

Whereas Laender police forces and public prosecution are not supervised (although sometimes advised) by their federal counterparts, a sentence of a criminal court may be contested by lodging an appeal to the Federal Supreme Court (Bundesgerichtshof). In contrast to police forces and public prosecution there are no special courts for environmental crimes.

The role of environmental administrative authorities is important because they have decisive information on the administrative legal situation and can provide technical and scientific assistance.

2.3 Some Statistics

The police reported about 40,000 cases of environmental crimes in 1997 of which the front runner was the environmentally unsafe waste management (nearly 29,600 cases, including 58 cases of illegal transfrontier shipment of wastes), followed by water pollution (6,300 cases) and soil pollution (1,900 cases). The success rate of the police in solving cases has been falling over the last years and was about 60% in 1997.

One reason for the large number of cases of illegal waste management might be that it is especially profitable to dispose of the wastes ignoring the provisions and tight procedures of the law.

The data have to be taken with some care as experts estimate that the number of unrecorded cases is particularly high with regard to environmental offences. An important factor might be the problem of evidence, for example in cases of rapidly evaporating atmospheric pollutants. In addition, environmental crimes are reported less often than other crimes. The police force is the most frequent reporter of environmental crimes, followed by municipal and local authorities and private individuals. State authorities only rarely call in public prosecution.

The large scope of administrative sanctions explains at least partly the reluctance of administrative bodies to choose criminal sanctions and the cooperation with criminal enforcement bodies. Another reason for slow cooperation might be insufficient communication

structures as the example of the Land Hessen shows: only after the police had transferred one officer into the Hessian Ministry of Environment did prosecution start to become more efficient. On the other hand internal instructions for environmental authorities aiming at a better cooperation with the police proved less successful. Finally the prospect of criminal liability of the individual civil servant may have hindered cooperation with the police in some cases.

Further it has to be taken into account that the data reflect the monitoring activities of the police and other authorities. An increase in recorded cases might be due to an increasing number of inspections.

If a case comes before a public prosecutor despite these obstacles, the public prosecutor or the judge usually will stop investigations. In case a wrongdoer is actually sentenced, imprisonment is rarely imposed; in addition in most cases of imprisonment up to two years probation is granted. Usually a criminal ban on a professional activity is imposed in serious cases only, i.e. if there is a danger of recidivism. In 1996 there were two cases.

These rather low sanctions are due to the fact that most cases coming before the courts are of a minor nature. In addition, most offenders are first time offenders.

2.4 Other Sanctions

Most infringements of environmental law are dealt with not by criminal law but by administrative law. There exists quite a variety of possible reactions for the authorities. In a noncompliance situation the authorities have different options:

- order alterations (including a deadline);
- order that the operation of the installation/other activity be discontinued;
- order a ban on a professional activity.

If the order is unchallengeable or immediate enforcement is ordered the authorities have three options for action:

- order the payment of a certain sum and take the money until the illegal situation has ended (coercive payment);
- ask a third party to carry out the modifications or close the factory at the operator's expense (substitute performance);
- carry out the alterations or shut down the factory themselves (direct compulsion).

If these measures prove unsuccessful they might be repeated, especially the coercive payment, or combined responses.

In addition, the authorities might impose a non-penal fine of up to 100,000 DM (1,000,000 DM for companies; in practice the fines are usually much smaller). The non-penal fine may also cover the confiscation of proceeds. The confiscation of instruments is possible as well.

It is within the discretion of the authorities to decide whether and how to proceed if this course of action is reasonable and no rights (health or property) of a third party are infringed upon.

One other common feature of all these administrative reactions is that the power to enforce administrative law is with the authorities. They do not have to ask a court in advance, but rather it is up to the private party affected to seek protection by taking legal action. This is often done by summary proceedings. The courts might stop the enforcement or - in case it already happened - they might order compensation.

To sum up: Administrative authorities have their own set of instruments. These instruments are rather efficient as

- they include the possibility to give orders to companies, not to individuals only;
- enforcement does not require a prior court decision; and
- except for imprisonment administrative instruments can achieve nearly the same results as criminal sanctions.

2.5 Interim Conclusions

German administrative and criminal law offers adequate sanctions to serious infringements of environmental law. As environmental crimes are committed quite often for economic reasons it is essential to confiscate the illegal profits and thus give an economic incentive to comply with environmental legislation. Confiscation is possible under administrative law as well as under criminal law.

However the majority of cases concerns minor offences. There are only few serious cases recorded which is partly due to the fact that causation and individual responsibility is difficult to prove. Additionally cooperation between environmental authorities and the police is often slow and sometimes the professional qualification of the officials should be better. The qualification and specialization have sometimes been improved during the last years although more qualification and specialization in environmental law particularly within the judiciary is desirable. But presently the main problem seems to be a certain reluctance of environmental authorities to cooperate with police forces.

3 TRANSBOUNDARY PROSECUTION

3.1 The Legal Framework

Germany is party to most multilateral environmental agreements, namely the CITES Convention, the Basel Convention and the Montreal Protocol. But these conventions, the decisions of the bodies set up by the conventions, as well as national legislation implementing the conventions, do not provide legal provisions for transboundary enforcement. Rather it is necessary to have its own set of international law to enable transfrontier enforcement.

For example Germany is Party to the following treaties:

- European Convention on Mutual Assistance in Criminal Matters (service of summonses, transmissions of writs, interrogation of witnesses, letters of rogatory for search and seizure).
- European Convention on Extradition.
- Convention on the Transfer of Prisoners.
- Schengen Convention and Schengen Agreement (including interstate police cooperation, e.g. hot pursuit across the border, informal exchange of information; and transfer of execution).

By contrast there is only a small number of treaties facilitating transboundary administrative enforcement. The number of Contracting Parties is very small and the number of cases even smaller. Thus the administrative instruments which are effective in domestic cases fail in transboundary cases. Under existing international legislation criminal law is better adapted to deal with transboundary infringements than administrative law.

3.2 Practice

Except for illegal waste management there are no specific statistics dealing with transboundary offences. But the general impression is that the vast majority of suspected and sentenced offenders committed minor crimes, e.g. tourists trying to import souvenirs made out of endangered species. So far the overall picture is similar to that of domestic cases. By contrast the types of serious crimes committed across borders (presumably) differ partly from the national ones. Illegal shipment of wastes, dangerous substances and endangered species as well as oil pollution at sea are deemed as the main offences.

To illustrate the problems of transboundary prosecution two recent cases may be described below.

3.2.1 Case 1

The first case concerns the illegal trade of ozone depleting substances. Up to now this case is the single one recorded but it very well could be the tip of the iceberg. In 1997 a German enterprise imported some 1,200 tons of CFCs from China which had been shipped via the Netherlands and Belgium by companies seated in the United Kingdom and Belgium. The firm pretended that its CFCs were recycled German CFCs whose trade is legal under existing legislation. They even got a certificate of the chamber of commerce confirming the domestic origin. But the chamber of commerce did not check the information obtained from the enterprise. Based on information received by the European Union's anti-fraud unit the national authorities were able to trace the actual origin and started criminal proceedings.

A crucial point in CFCs cases was according to a customs officer that he - and presumably his colleagues, too - could not "distinguish CFCs from olive oil". The competent federal ministries responded by issuing a guideline on the characteristics of CFCs. But implementation will probably take some time.

3.2.2 Case 2

Another area of environmental crimes occupying the Federal Bureau of Investigation right now concerns the illegal shipment and disposing of shredded wood waste. In 1997, 22 cases were reported, 9 of them concerning illegal export, chiefly to Italy. The main obstacle to prosecution is that there is no clear classification of wastes, i.e. it is open to discussion whether shredded wood waste is waste falling into a list of especially dangerous waste and requiring a formal permit before shipment. A Bund-Laender-working group drafted a guideline on shredded wood waste, but did not implement the draft. Instead they asked for a federal binding regulation which is still under consideration. Therefore, the key problem here is that uncertain legal provisions might be interpreted in a way that at least some of the offenders did not commit an environmental crime at all. Under the clause of the conventions on mutual assistance requiring dual criminal liability a second problem might arise if the state of export classifies shredded wood waste as waste demanding a permit but the state of import does not. In these cases transboundary prosecution is possible only subsequent to international harmonization of the classification of wastes.

4 CONCLUSIONS

In Germany transboundary enforcement of environmental law is limited by two legal deficits:

- Although German administrative law can deal with infringements of environmental law rather efficiently in domestic cases, it does not provide sufficient international rules for transboundary cases.
- Criminal law depends on environmental law which it is proposed to protect. It cannot compensate for the deficits of environmental law. Thus criminal prosecution in general is hindered by unclear environmental provisions and transboundary criminal prosecution is hindered by not harmonized environmental law.

But these legal deficits are not the main obstacles to efficient transboundary prosecution. Deficiencies in administrative cooperation dominate. The cooperation between environmental authorities and police forces has to be improved and officials and - especially judges - need further training, including language training. Pure internal guidelines prove less helpful whereas the exchange of personal is particularly apt to minimize both shortcomings.

