

Criminal and Non-Criminal Sanctions in Germany

Effective Environmental Enforcement
A Conference in Honour of Richard Macrory

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	purpose	prosecution	compet. authority	Illegality	mens rea	liability of head persons	liability of enterprise
criminal offense, prosecution	moral reproach re effect	obligatory	public prosecutor, court	permit excuse	yes	only if indirect actor	no, except forfeiture
administrative offense, prosecution	illegality reproach re behavior	discretionary	adm agency => court	permit excuse	yes	If supervisory failure	sanction on enterprise
administrative non-compliance, enforcement	correction of behavior	discretionary	adm agency=> court	permit excuse alteration	no	liability of enterprise	full liability of enterprise

Application to cases IE and RE

Criminal Law

- sec. 324 Penal Code: significant pollution (Verunreinigung) = activity capable of causing damage. IE and RE: fish kill is a damage
- duty to prosecute. But discretion of adm auth. to inform prosecutor => adm offense and enforcement
- actor: IE and RE: employee
- mens rea: IE and RE: the employee
- unlawful: IE and RE: yes (problem: accessoriness of criminal law to regulation)
- liability of leading personnel? only if indirect actorship (“actor behind actor”) IE and RE: not the case; if breach of supervisory duty: liability as adm offense
- liability of enterprise? acting individual responsible; no sanction on enterprise; forfeiture of gains if accrued to the enterprise; no corporate rehabilitation order, no publicity order

Application to cases IE and RE

Adm offenses law

- sec. 103 Water Act: introduction into river of substances without legally required permit: IE and RE: to be sanctioned if no criminal prosecution
- Discretion to prosecute
- Adm authority in charge
- actor: IR and ER: employee
- mens rea: IE and RE: the employee
- unlawful: IE and RE: yes
- liability of leading personnel? genuine duty to supervise, organisational failure. IE : no indication. RE: employee should have been trained before starting work (sec. 130; see Dir 2008/99/EC)
- enterprise: IE: no indication. RE: sanction on enterprise if an organ committed act; offense still to be attributed to a negligent act but no name to be identified (§ 30 IV); no corporate rehab or publicity orders

Application to cases IE and RE

Adm law enforcement

- Discretion to intervene; but see Env Liability Directive
- Normal sequence of action
 - abatement order
 - announcement of enforcement tools
 - application of enforcement tools
 - fine (Zwangsgeld)
 - Ersatz action at cost of perpetrator
 - Physical force
- in fact: negotiations, curative measures, enforcement powers used as bargaining position; possibly formalised by adm order or contract; ~ Macrory ‘undertaking’?

Empirical observations

- Criminal law rarely used
 - Decline of inspection resources since 90ies (e.g. Bremen)
 - Env damage less visible
 - Preponderance of waste issues (esp toxic waste)
 - Political power of large enterprises
 - Corrective approach of adm agencies
- Adm offenses
 - Often used, but only routine offenses (car exhaust, littering etc)
 - Only financial penalty possible = use as bargaining position
- Adm enforcement
 - Normal approach, but due to inspection decline enforcement deficit