

New law proposed to extend liability for environmental crime in waste management

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In its bill 2015/16:35, *Extended Environmental Crime Provisions*, from 5 November this year, the government has proposed extending the scope of offences for environmental crime committed in conjunction with waste management. The proposal means that all waste management that can cause significant pollution, which is harmful to human health, animals or plants or that can cause other significant environmental nuisance is to be punishable. The penalty for the crime is a fine or imprisonment for up to two years. It is proposed that the change in the law will come into force on 1 May 2016.

Applicable law

Unlawful waste management will trigger the criminal provisions contained in the Environmental Code, the Penal Code and in special legislation. The bulk of the provisions are contained in chapter 29 of the Environmental Code. Several of these provisions concern punishment for actions which comprise improper management of waste or substances, e.g. penalties for environmental crime, unlawful environmental activities, unlawful transport of waste and unlawful dumping and incineration of waste.

Chapter 29 of the Environmental Code provides that the intentional or negligent discharge of a substance that would typically cause pollution/environmental nuisance or is harmful to human health, animals or plants may be subject to criminal charges. The same applies to a person who intentionally or negligently stores or removes waste or other substance that may cause pollution that is harmful to human health, animals or plants to an extent that is not insignificant or that can cause other significant environmental nuisance.

Additionally, a person who intentionally or negligently commences or carries on a business or undertakes measures without a permit or approval, or without having made a notification, or after having made a notification commences activities without complying with the applicable time limits. Likewise, a person who contravenes the prohibition in the Environmental Code on dumping or incineration of waste will be held liable.

A person held liable for any of the above-stated criminal offences will be sentenced to a fine or imprisonment for up to two years. Even if the normal penalty is a fine, it does happen that the penalty is imprisonment for the slightly more serious crimes.

The proposed change

Pursuant to Directive 2008/99/EC on the protection of the environment through criminal law (Environmental Crime Directive) the term "management" covers actions such as the collection, transport, recovery or removal of waste including the supervision of such operations and the after care of disposal sites and also includes actions undertaken by dealers and brokers (waste management). The actions are punishable if they are committed in such a way that they cause or are likely to cause death or serious personal injury or intentionally or substantial damage to air, soil or water quality or to animals or plants.

The aim of the Environmental Crime Directive is to achieve more effective protection of the environment by way of access to criminal law. According to the Directive, criminal penalties are required, amongst other things,

for certain types of unlawful waste management. Such waste management as is concerned in the Directive corresponds in substance with the definition of waste management contained in the Environmental Code. As stated above, in Swedish law, a person who unlawfully manages waste can be penalised for e.g. environment crime. For a person to be found guilty and punished requires, however, that the person in question caused pollution that in turn caused, or can typically cause, damage or nuisance. Thus, it is not a criminal offence to manage waste in a way that merely causes a risk of pollution occurring. However, according to the Environmental Crime Directive, such situations are also to be included and the criminal provisions are to encompass all waste management.

For a person to be found guilty of environmental crime under paragraph 1 or item 2, section 1, chapter 29 of the Environmental Code it is only necessary that a person has managed waste in such a way that it can cause pollution. The requirement is thus a low one. But the provision only covers such waste management that involves the storage or removal of waste. For an action to be considered to be storage of waste, it ought to be required that one has the waste in one's possession. It is therefore such a "physical management of waste" that is covered by the definition of waste management. "Removal" of waste is also covered by the definition. However, the definition of waste management comprises measures other than merely storage and removal, e.g. collection and actions that do not entail having the waste in one's possession. Waste dealers and waste brokers can e.g. undertake measures that constitute waste management without being in possession of the waste. The current provisions of the Environmental Code do not, therefore, cover all types of waste management

Therefore, the government is proposing that a person that intentionally or negligently stores a substance or *manages* waste in such a way that can cause pollution that is harmful to human health, animals or plants to an extent that is not insignificant or that can cause some other significant nuisance to the environment, is to be found guilty of an environmental crime and sentenced to a fine or imprisonment for up to two years.

Consequences of the proposed change

The government feels that effective and dissuasive penalties contribute indirectly to improved possibilities for achieving environmental quality goals. A positive result of the clarification of the provisions is that it ought to

be easier to prosecute crime consisting of environmentally hazardous waste management. By contributing to compliance with important laws protecting human health and the environment, the provisions are expected to have a positive outcome for the general public.

Certainly it is positive that such important provisions are clarified in legislation. It is, however, currently unclear exactly which situations will be covered by the proposed change. It remains to be seen, if the proposal is actually carried through, what impact it will have on the application of the law. Our experience tells us, however, that the supervisory authorities in environmental law are usually very quick to adopt new legislation and are additionally willing to construe the law broadly in its application.

It is our view that the proposed change extending the scope of criminal offences will therefore mean that the number of prosecutions for environmental crime in conjunction with waste management will increase. At least to some extent. Thus there is a risk that, at least initially, this will lead to an increased number of prosecutions and cases before the courts and increased costs for those companies affected by the cases. If the change is carried through, more companies will be brought within the scope of the criminal law. This means that all companies that in any way manage waste must be more careful in how they handle waste. Companies ought to review their waste management and operational routines and seek to prevent situations bringing them within the scope of the criminal law.

If the government's proposal is actually carried through we will certainly have cause to return to this subject with views and advice on how liability can be avoided.