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June 2012

# When responsibility has a price

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*The Supreme Court makes clear that a party that has started to clean up contamination caused by another party is also deemed to be a business operator. This gives rise to joint and several liability for the original contamination. The fact that remedial work was intended to reduce the environmental impact is of no importance.*

## Background

A company which was later incorporated into JM Värmdöstrand ("JM") operated a casting works from the 1940s to the 1980s on a site in Oxelösund. After JM cleaned up contamination on the site, it was sold to a company which was later incorporated into Kustbostäder i Oxelösund AB ("Kustbostäder"). Since further contamination was discovered on the site, Kustbostäder carried out a variety of remedial work for which the company claimed compensation from JM through a right of regress claim at the Land and Environment Court. The ground for the claim was that JM had caused contamination through the activities they had previously carried out on the site.

Under Chapter 10 of the Environmental Code, responsibility for cleaning up contamination rests in the first place with the business operator which caused the damage. If there are more than one operator, then these have joint and several liability. This joint and several liability means that the supervisory authority can order any one of the parties to take the remedial measures deemed necessary. The business operator thus appointed, may then have a right of recourse to the other operators. It was such right of recourse that Kustbostäder claimed in respect of JM. JM, for their part, alleged that Kustbostäder had no right to make a claim because the company could not be held to be a business operator in the sense intended by the Environmental Code.

## Judgment of the Supreme Court

The Supreme Court held in case T 2052-10 that the rules on business operators in Chapter 10 of the Environmental Code must be applied in a way which facilitates, as far as possible, the assessment of who is to be deemed to be a business operator. The court also held that there was no scope to consider the reasons for the remedial

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measures being taken or whether the measures taken were necessary and actually led to a reduction in the environmental impact. These circumstance may, instead, be taken into consideration at the next step, i.e. when liability for each individual business operator is determined.

In the case at hand, the Supreme Court held that the excavation and removal work carried out by Kustbostäder, with the aim of remedying the contamination, undeniably led to the release and spread of pollutants which meant that Kustbostäder contributed to the contamination. Kustbostäder were thus to be seen as a business operator under Chapter 10 of the Environmental Code. The ruling raises the question of whether this perspective may lead parties, which take over a business which has caused contamination, to refrain from starting remedial work so as not to risk incurring liability as a business operator. The Supreme Court stated, however, that the value of a clear and effective system for remedial measures in this respect outweighs the above-mentioned interest.

The ruling of the Supreme Court is not controversial and in fact merely confirms what has already been made clear in previous judgments. The conclusion is clear; if you put a spade in the soil, liability as a business operator will arise.



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