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Parent company liability for the environmental liabilities of its subsidiary

In June 2013, the Land and Environment Court handed down a judgment in a case concerning parent company liability for environmental pollution caused by a subsidiary, (Case No. M 11429-12). Initially, we give a brief description of the term operator followed by an account of the judgment in question.

The term operator

In accordance with chapter 10 § 2 of the Environmental Code, the term "operator of a contaminated site" refers to anyone who operates or has operated a business or undertaken actions that have contributed to pollution. In certain situations, e.g. when several legal entities or natural persons have been involved, it can be difficult to assess which person should be regarded as the operator. The determining factor must then be who had the actual and legal resolution for the activities that contributed to the contamination.

Questions regarding the term operator are complex. Some guidance may however be found in the Seveso legislation (1999:381) regarding measures for the prevention and limitation of the consequences of serious chemical accidents. The legislation contains inter alia the following definition:

> *Operator: any natural or legal person who operates or owns a business or facility, or in any other way holds the right to make key financial decisions for the technical operation of the business or facility. If several businesses with a common owner are co-located, they shall be regarded as a single operation and the common owner as the operator.*

According to the commentary of the Environmental Code, the provision in the Seveso legislation stipulates that whoever has overall superior command responsibility for a business is regarded as the operator of the business and may consequently be subject to public liability in addition to the actual operator.

In our opinion, this hypothesis should be considered as adopted under the current ruling.

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Ruling of the Land and Environment Superior Court

The company, which is party to the proceedings, is the parent company of the group. One of the company's former subsidiaries engaged in surface finishing treatment activities from October 2002 until the beginning of 2007, i.e. over a period of approximately five years. The activities were conducted on property that was later found to be contaminated. Since it was not possible to make the business of the subsidiary profitable, it received a substantial infusion of capital from the parent company. The total group contribution amounted to slightly more than MSEK 43. Given the lack of profitability, the parent company finally resolved to wind up and liquidate the subsidiary. The question at issue was which company should be regarded as the operator and thus responsible for the bioremediation of the contamination in question, pursuant to chapter 10 § 2 of the Environmental Code?

In August 2011, the County Administrative Board ruled that the parent company should be held liable for the contamination caused by the subsidiary. The parent company appealed the decision and the Land and Environment Court decided in favour of the parent company. The case was then appealed by the County Administrative Board to the Land and Environment Superior Court, which adopted the decision of the County Administrative Board.

The Land and Environment Superior Court begins by noting that chapter 10 of the Environmental Code in its wording prior to 1 August, 2007, applied at the time the business ceased operations. It was also established that there are no general provisions within the scope of environmental legislation regarding the cut-off of responsibility, to the effect that shareholders are held personally liable for the company's obligations, even although they have not violated any rule or failed in their obligations to the company. It is emphasised that the circumstances of each individual case have significant implications when deciding who is to be regarded as the operator, pursuant to chapter 10 § 2 of the Environmental Code, and that the section does not preclude two or more natural or legal persons being simultaneously regarded as operators.

For the parent company to be regarded as the operator, even though the business has been operated by a subsidiary, the parent company must have been able to influence the conduct of the business operations and must also have had a legal and actual opportunity to intervene. The court finds that the parent group enabled the operations of the subsidiary from 2003 until 2007, which is why the parent company has had a decisive influence on the activities that contributed to the contamination in question. The parent company has also had a legal and actual opportunity to influence the business through its strong position as sole shareholder and group contributor. Overall, the parent company is regarded as an operator in addition to

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the subsidiary. Furthermore, the Land and Environment Superior Court establishes that the responsibility for the consequences of bioremediation is joint and several for multiple operators, and finds that the County Administrative Board was thus entitled to order the parent company to take necessary steps for bioremediation.

Conclusion

The ruling may have consequences with regard to the public liability of a parent company, although the Land and Environment Superior Court emphasises that the circumstances of each individual case are of great significance. The question is how praxis will evolve in the future, i.e. if it will open up a very broad interpretation of who should be considered as operators.

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