Response on behalf of the Judiciary of the Austrian Association of Judges in respect of the 3rd Study Commission Questionnaire for the International Association of Judges’ Annual Meeting in Yalta, Ukraine, 5-10 October 2013.

TOPIC 2013: Environmental pollution: is Criminal Law a good instrument?

Questionnaire/Reponses

Question 1.

Has your country special legislation for:

1.1. the violation of laws concerning environment in general?

In the recent decades environmental protection developed to a top ranking issue. It is not only a national, but also a social and economic interest to safeguard the natural resources like water, soil, air, wildlife and biodiversity. Therefore nearly all important European directives has been transposed in national law. In addition to it especially in waste and food matters the legislative and administrative standard is higher than in many other members of the EC - i.e. laws referring to genetically unmodified food or the ban of atomic energy.

1.2. Are there special rules for criminal investigation?

Since 2008 the public prosecutor leads the investigation referring to criminal law matters. In cases of certain offences against environmental safeguard there are no special rules differing from general criminal procedural law.

1.3. If no, is there any such legislation under consideration?

There is no such consideration, because there is no awareness for a need to introduce such special proceedings. Nevertheless the police has a specialised branch to investigate such cases, in more difficult affairs experts were installed. Both measures guarantee effective prosecution, which is represented by a respectable number of condemnations.
Question 2.

2.1. Do the laws which deal with environment include specific punitive measures?

In the Austrian Criminal law codex a special chapter deals with environmental offences referring to water, air and soil pollution and protection of plants and wildlife. Intention or negligence is required. Specific punitive measures in criminal law cases are not installed.

2.2. What are the possible sentences? Could you give an example?

Due to the effective nuisance the sentences differs between pecuniary and prison penalties. In the overwhelming cases of prison sentences a probation (maximum 3 years) is ordered.

Question 3.

3.1. Is “restitution“ possible. Is it for instance possible that the sentence is suspended in that sense that the sentence will be executed only if the offender does not fulfill certain conditions; for example a condition to repair all damages and take measures to prevent new damages in the future.

In nearly all cases of probation restitution is ordered by the court. Injured persons can claim compensation for damages.

3.2. Is it possible in your country that the Public Prosecutor decides to impose a fine instead of taking the case to Court (out of Court settlement).

Since 2000 the Austrian Code of criminal procedure knows this possibility called “Diversion”. The public prosecutor approbates (without the court!) a fine or a certain number of days working for public purposes. Additionally restitution is generally ordered (if it is possible). The consent of the accused person is necessary, otherwise an accusation to the court is the result. The benefit for the offender is that he is not pleaded guilty and registrated.

3.3. Is it possible for the Public Prosecutor to take coercive measures?, i.e. measures the public prosecutor may take in criminal proceedings (like temporarily closing of a factory)

For such measures special administrative authorities are competent. They get immediate reports from the police.

Question 4.

4.0 Has your country set up one or more specialised agencies to investigate and indentify violation of environmental laws?
Unfortunatelly the competences in environmental law affairs are spread between a lot of union and federal administrative authorities. Specialized branches with experts are implemented.

**Question 5.**

5.1. Has your country signed and ratified Agreements, Treaties or other forms of international cooperation regarding protecting environment? To mention a few:

5.2. Has your country ratified:

  
  This convention was signed and entered into force.

- **The Hong Kong International Convention for the safe and environmentally sound recycling of ships 2009;**
  
  This convention was not ratified.

- **The UN Treaty on the Law of the Sea; (Monetgo Bay, November 16/1994) See f.i. articles 207 etc on the pollution of the marine World;**
  
  This treaty was ratified.

  **The international Convention for the prevention of Pollution from ships 1973 (Marpol and its annexes);**
  
  This convention was signed and entered into force.

5.3. The European Union (EU) has set up a system for the supervision and control of shipments of waste within its borders and with the countries of the European Free Trade Organisation (EFTA), the organisation for Economic Cooperation and Development (OESO) and third countries which are party to the Basel Convention (Act 7.15.2006; amendig acts 6.25.2009, 4.20.2009 and 1.1.2010); Have you had any experience with this system?

  In Austria we have no experiences with this system.

**Question 6.**

6.1. Could your country be more active in the field?

  I don’t think so.

6.2. Is there pressure from companies or governemntal organisations to be more lenient when environment is concerned based on economical reasons (or f.i. employment)?
Such arguments are brought in public discussions especially in times before elections.

**Question 7.**

7.1. Could you as Judge be more active in the field?

Jurisdiction is our competence not the legislation.

7.2. Are you as an individual active in the protection of the environment (f.i. by being member of a society which has a goal to protect the environment?)

Yes, i am like some other judges a (non-active) member of several NGO like Greenpeace,NABU,Bird-life protection.
I only pay my annual contribution.

Does that raise questions in the Court were you are working?

Not yet. In case of a partiality an other judge has to handle it.

7.3. Do you think that you have enough instruments and qualifications to handle these type of violations in Court?

The work in criminal and civil law matters concerning environmental cases is rather difficult,because in most cases there are a lot of materials and expert opinions, the judge needs much more time to prepare the case, the hearing and the decision.

7.4. Is it considered to be a specialisation to handle these cases in Court?

No, but it would be useful to give theses cases to a specialised branch at each court.

**Question 8.**

8.1. Do you think there should rules to govern the situation in which a pollution is discovered long after the company involved has disappeared or changed ownership?

It would be very useful to implement such rules.

**Question 9.**

9.1. Is there any other comment on the subject that you would like to make?

Since 2005 in Austria not only natural persons baut also juristic entities like companies can be accused and punished for special criminal offences dealing with environmental pollution.
The measure of penalty is a fine relating to the annual turnover.
These sentences become more and more an effective way for prevention.