



European Union Action to  
**Fight Environmental Crime**

# Fighting Environmental Crime in Sweden: A Country Report

Work package 2 on “Instruments, actors, and institutions”



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Compared to other country reports in this study, this report contains a relatively brief overview of the relevant legal provisions and legal practice in Sweden. When reference is made to the Swedish Environmental Code, mostly the official English translation was used.<sup>1</sup> Because the authors of this report are not native Swedish speakers, they often refer literally to the sources (in English) used.

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<sup>1</sup> Available at: <http://www.government.se/content/1/c6/02/28/47/385ef12a.pdf>.

## ABSTRACT

This country report discusses Swedish environmental and criminal law and its enforcement, based on an analysis of legal documents, policy documents and academic literature. Substantive as well as procedural aspects are discussed. Special attention is paid to the role played by the various actors involved in the enforcement of Swedish environmental criminal law: notably (but not exclusively) prosecutors, police, courts, and administrative agencies.

In addition to a theoretical study of law and literature, in-depth interviews were held with various Swedish experts and professionals. On this basis, some best practices and recommendations are formulated. Best practices include the recent legislative changes in the Swedish Environmental Code that lowered the “burden of proof” for police and prosecutors, the organization and specialization of prosecutors, the guidelines on corporate fees formulated by prosecutors, and Sweden’s participation in all relevant international forms of cooperation in the fight against environmental crime. Furthermore, there is a rather widely shared view that Sweden has a good ‘law on paper’ concerning environmental offenses. Recommendations include improving and/or formalizing the cooperation between police and prosecutors and between police and enforcement authorities, and specific training of forensic experts . Also, investigations into environmental crime could be prioritized more, and inspection regimes could be improved if they focus more on monitoring rather than ex post control. Views differ with regard to the question whether the specialized environmental courts should deal with criminal matters also, or whether judges at general district courts should be (even) better trained in environmental matters.

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## LIST OF ABBREVIATIONS

ELD	Environmental Liability Directive
ENPRO	The Network of Prosecutors on Environmental Crime
EPI	Environmental Performance Index
GMOs	Genetically Modified Organisms
MARPOL	International Convention for the Prevention of Pollution From Ships
NGO	Non-Governmental Organisation
REMA	National Unit for Environmental Crimes (Sweden)
SEPA	Swedish Environmental Protection Agency
UNCLOS	United Nations Convention on the Law of the Sea
WP	Work Package

# Introduction

The Swedish Environmental Code (*Miljöbalk*, Law 1998:808) entered into force on 1 January 1999.<sup>2</sup> It replaced fifteen previous environmental acts which were amalgamated into the Code. The overall purpose of the Code is “to promote sustainable development which will assure a healthy and sound environment for present and future generations”.<sup>3</sup> The Environmental Code only includes the fundamental environmental rules; more detailed provisions are laid down in ordinances made by the Government.<sup>4</sup> The Swedish Penal Code (*Brottsbalk*, Law 1962:700) does not include specific provisions on environmental crime.

Nilsson (2011) notes that the Environmental Code, despite bringing environmentally relevant legislation under one comprehensive regulatory system, still consists of many different sectorial regulations and many different authorities. The Code aims to be a “unified regulation which is to take a full and holistic perspective on environmental issues. [It] is consequently applicable to all activities that have significance to the aims of the Code, even when this overlaps with other areas of legislation and regulation.”<sup>5</sup>

The Environmental Code includes, for example, rules on land and water management, nature conservation, protection of species, and control of environmentally hazardous products and waste. Bjällås (2010) points out that the Code covers nature conservation, activities harmful to the environment, and protection of health and water resources. It includes special chapters concerning chemicals and waste. Moreover, there are provisions about emissions and energy use. And the Code provides for damages.<sup>6</sup>

Chapter 2 of the Environmental Code contains a number of general rules of consideration, such as the precautionary principle, the polluter pays principle, and the product choice principle. Supervisory and licensing authorities have the power to base their decisions concerning injunctions, bans, permit conditions, etc., on these general rules. As a result, the content of these rules becomes much more specific through regulations or decisions in each individual case.<sup>7</sup>

The Code also includes references to other laws of importance to the environment, such as the Forestry Act, the Mineral Act, and the Act on Planning and Building. Moreover, it “covers environmental law, civil law, administrative law and criminal law as well as procedural rules for the environmental courts.”<sup>8</sup>

Compliance with the previous environmental legislation in Sweden was poor, inter alia because the risk of being penalized for an environmental crime was rather low. As a result, there was “a need for a rapid and effective way of responding to infringements of the environmental rules. Penalties in the form of environmental sanction

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<sup>2</sup> The translated version incorporates changes until 1 August 2000 and can be found at <http://www.government.se/content/1/c6/02/28/47/385ef12a.pdf>. A more recent version, incorporating all changes until 2014, is available in Swedish here: <http://www.notisum.se/rnp/sls/lag/19980808.HTM>.

<sup>3</sup> Section 1:1 of the Swedish Environmental Code.

<sup>4</sup> Website Regeringskansliet, available at: <http://www.regeringen.se/sb/d/2023/a/22847>.

<sup>5</sup> Annika K. Nilsson, *Enforcing Environmental Responsibilities. A Comparative Study of Environmental Administrative Law* (Uppsala: Uppsala University, 2011), 133.

<sup>6</sup> Ulf Bjällås, “Experiences of Sweden’s Environmental Courts”, *Journal of Court Innovation* 3 (2010): 178.

<sup>7</sup> Website Swedish Environmental Protection Agency (SEPA), available at: <http://www.swedishepa.se>.

<sup>8</sup> Bjällås, “Experiences”, 178.

charges (*miljösanktionsavgifter*) were therefore introduced with the Environmental Code. These charges are levied directly by the supervisory authorities when an infringement has been established.”<sup>9</sup>

Penalty provisions are contained in Chapter 29 of the Environmental Code. Depending on the seriousness of the offence, the penalty can be a fine or a term of imprisonment not exceeding two years, or imprisonment of up to six years.

Faure (2010) notes that, like in many other countries, broad notions are used in Sweden when defining environmental offences.<sup>10</sup> For example, section 29:1(1) of the Environmental Code criminalises anyone who deliberately “pollutes land, water, or air in a manner which involves or is liable to involve risks for human health or detriment to flora and fauna that are not inconsiderable or other significant detriment to the environment.” Section 29:1(3) criminalises the causing of a “substantial detriment to the environment as a result of noise, vibration or radiation.” When considering the seriousness of the offence, section 1 explicitly mentions that “special attention shall be paid to whether it caused, or might have caused, lasting damage on a large scale or whether the act was otherwise of a particularly dangerous nature”.<sup>11</sup> It follows that “even a modern Environmental Code such as the Swedish one not only uses vague notions, but also introduces subjective elements (‘significant’, ‘substantial’); however, it provides an interesting criterion [...] by which to assess the seriousness of the offence in the lasting character of the damage”.<sup>12</sup>

According to a Network of Prosecutors on Environmental Crime report from 2012, in Sweden each year “about 300-400 cases of environmental crimes are brought to court or result in fines by prescription of a prosecutor.” A majority of these convictions result in the application of a corporate fine.<sup>13</sup> Recent estimates by a Swedish Prosecutor at the National Environmental Crimes Unit, however, suggest that each year around 3000 cases are reported and around 20% of those cases are sanctioned, which implies a higher number of 600 cases.<sup>14</sup>

Nilsson (2011) points out that the general idea in Sweden is that criminal enforcement has limited possibilities to solve environmental problems.<sup>15</sup> “The sanction system is therefore structured such as to have the administrative system carry the large part of the enforcement, with the help of administrative sanctions and other coercive instruments, and criminalising only the most serious offences with what should be harsh penal sanctions. In reality the strong impact of criminal enforcement has been difficult to obtain, and legislative and organisational reforms are being made to try to remedy these problems. Until then, the administrative system has an even more central role in the environmental enforcement system than intended.”<sup>16</sup>

It is interesting to point out, finally, that according to the 2012 Environmental Performance Index (EPI), Sweden ranks ninth in the world in environmental sustainability out of 132 countries, and is classified in the group of strongest performers.<sup>17</sup> In 2008 Sweden even ranked first. The Nordic EU Member States are all known for their high level compliance with the European environmental legislation.<sup>18</sup>

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<sup>9</sup> Website SEPA, available at: <http://www.swedishepa.se>. For details on the environmental sanction charges, see Chapter 30 of the Environmental Code.

<sup>10</sup> Michael Faure, “Vague Notions in Environmental Criminal Law (Part 2)”, *Environmental Liability* 5 (2010): 166.

<sup>11</sup> Chapter 29 of the Swedish Environmental Code.

<sup>12</sup> Faure, “Vague Notions”, 166.

<sup>13</sup> ENPRO, *Manual on Prosecuting Environmental Crime in the Baltic Sea Region* (2012), 12.

<sup>14</sup> Interview with Lars Magnusson, Senior Prosecutor at the National Environmental Crimes Unit, 26 May 2014. He indicated that only the Prosecutor-General has more specific data on the number of environmental crimes reported, brought to trial, and convicted. We were not able to obtain these data.

<sup>15</sup> See on this also Elina Pirjatanniemi, “Desperately Seeking Reason – New Directions for European Environmental Criminal Law”, *Scandinavian Studies in Law* 49 (2009).

<sup>16</sup> Nilsson, *Environmental Responsibilities*, 148.

<sup>17</sup> <http://epi.yale.edu/epi2012/rankings>.

<sup>18</sup> Elina Pirjatanniemi, “Desperately Seeking Reason”, 410.

## *Methodology*

In the sections below we will not only describe and analyse Swedish environmental (criminal) law and practice, but we will also provide an evaluation, focusing on the role played by the various actors and institutions. Best practices and recommendations, as well as possible shortcomings of the Swedish system, will be presented in the concluding chapter.

That evaluation will follow logically from the legal analysis and literature review presented throughout this report. However, special attention is paid to the information provided by Swedish experts and practitioners. We conducted semi-structured interviews with these experts and practitioners, based on a questionnaire that was sent to the interviewees at least one week in advance. Some interviewees provided (extensive) written replies; others were interviewed by phone. The telephonic interviews each lasted about 60 minutes and provided a wealth of information. Summary reports of these interviews were sent to the interviewees for approval and possible additions.

The following experts and practitioners participated in the interviews:

- Jan Darpö, Professor of Environmental Law, Uppsala University, phone interview 22 May 2014
- Lars Magnusson, Senior Prosecutor at the National Environmental Crimes Unit, Malmö, phone interview 26 May 2014
- A Land and Environmental Court of Appeal Judge, who in the past also worked for the Ministry of the Environment, phone interview 26 May 2014
- Andrea Hjärne Dalhammar, legal consultant at the Malmö City Environmental Department, written reply, 3 June 2014
- A legal adviser at the Ministry of the Environment, written reply, 12 June 2014
- Christer B. Jarlås, Senior Prosecutor at the National Environmental Crimes Unit, written reply, 3 June 2014

In addition we received two emails with additional information from Anders Bengtsson, Senior Judge at the Land and Environmental Court of Växjö (19 May and 10 July 2014).

# 1 Definition of environment

The Swedish Environmental Code does not include a definition of ‘environment’ or ‘environmental harm’.

More generally, Section 1:1 contains five points specifying how the Code is to be applied:

*“The purpose of this Code is to promote sustainable development which will assure a healthy and sound environment for present and future generations. Such development will be based on recognition of the fact that nature is worthy of protection and that our right to modify and exploit nature carries with it a responsibility for wise management of natural resources. The Environmental Code shall be applied in such a way as to ensure that:*

- 1. human health and the environment are protected against damage and detriment, whether caused by pollutants or other impacts;*
- 2. valuable natural and cultural environments are protected and preserved;*
- 3. biological diversity is preserved;*
- 4. the use of land, water and the physical environment in general is such as to secure a long term good management in ecological, social, cultural and economic terms; and*
- 5. reuse and recycling, as well as other management of materials, raw materials and energy are encouraged with a view to establishing and maintaining natural cycles.”*

In a publication by the Swedish Ministry of the Environment, the Environmental Code’s objectives are further clarified: “The [five] objectives described above determine the application of all of the Code’s provisions. In connection with permit application procedures and supervision under the Code, the Code’s rules are to be implemented in the way that is best calculated to achieve its objectives. The same applies to operations or measures that affect the environment or human health.”<sup>19</sup>

Swedish legal experts have confirmed that the overall purpose of the Environmental Code is to promote sustainable development, which will assure a healthy and sound environment for present and future generations.<sup>20</sup>

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<sup>19</sup> Regeringskansliet, *The Swedish Environmental Code: A Resumé of the text of the Code and related Ordinances* (Stockholm: Ministry of the Environment), 7.

<sup>20</sup> Viktoria Ljung, “Sweden”, in *Criminal Enforcement of Environmental Law in the European Union*, ed. Michael Faure and Günther Heine (The Hague, Kluwer Law International, 2005), 158. See also Nilsson, *Environmental Responsibilities*, 134.

## 2 Definition of environmental crime / offence

There is no uniform definition of environmental crime/offence in Swedish law. However, the Environmental Code in Chapter 29 (Penalty provisions and forfeiture) uses the concept ‘environmental offence’ (*miljöbrott*). Activities falling within the ambit of ‘environmental offence’ are listed in Section 1 of this Chapter.

Section 29:1 of the official translated version (i.e. updated until 1 August 2000) reads as follows<sup>21</sup>:

*“Any person who deliberately:*

- 1. pollutes land, water or air in a manner which involves or is liable to involve risks for human health or detriment to flora and fauna that are not inconsiderable or other significant detriment to the environment;*
- 2. stores waste or other matter in a manner which may give rise to health risks, damage or other detriment referred to in point 1 as a result of pollution; or*
- 3. causes substantial detriment to the environment as a result of noise, vibration or radiation shall, unless a competent authority has permitted the practice or it is generally accepted, be liable to a fine or a term of imprisonment not exceeding two years for environmental offence.”*

If such an offence is serious, penalties will be increased. For further activities that are considered environmental offences, see the discussion of substantive environmental criminal law in section 5 below.

The Swedish Prosecuting Authority defines environmental crime in an internal document as “violations of the Environmental Code and related ordinances and regulations”. With respect to the latter, the document refers in particular to health and safety offenses and offenses against the Working Environment Act, violations of the Act on Measures against Pollution caused by Ships, environmental crime prosecuted under other primary legislation such as the Penal Code, and crimes related to the hunting of protected animal species.<sup>22</sup>

Similar - rather general - definitions of environmental crime can be found in the Swedish academic literature and on the website of the Swedish Police.<sup>23</sup>

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<sup>21</sup> Section 29:1 has been amended by Law 2006:1014 and Law 2011:512. See below, in Section 5 of this report.

<sup>22</sup> Information provided by Lars Magnusson, Senior Prosecutor at the National Environmental Crimes Unit, interview 26 May 2014.

<sup>23</sup> [Http://polisen.se/Lagar-och-regler/Om-olika-brott/Fakta-om-miljobrott](http://polisen.se/Lagar-och-regler/Om-olika-brott/Fakta-om-miljobrott). Information provided by Andrea Hjärne Dalhammar, legal consultant at a local inspectorate, 3 June 2014.

## 3 Substantive criminal law principles

The Swedish Penal Code (*Brottsbalk*, Law 1962:700) was adopted in 1962 and entered into force on 1 January 1965. The most recent translation of the Swedish Penal Code into English, as published on the official *Regeringskansliet* website, takes account of amendments to the Penal Code up to 1 May 1999.<sup>24</sup> Part I of this Penal Code contains general provisions; part II describes specific crimes.

Swedish laws dealing with crimes are traditionally regulated in both the Penal Code and in special laws such as the Narcotics Crime Law and the Tax Crime Law. In order for an offence to fall under the scope of the Penal Code, the said offence has to be of an aggravating nature causing substantial harm or danger. According to ENPRO (2012), *environmental* crimes are not included in the Penal Code; they can be found in (a specific chapter of) the Environmental Code.<sup>25</sup> An exception, however, are the crimes of *spreading poison or a contagious substance* and *causing destruction* included in Chapter 13 on ‘Crimes Involving Public Danger’.<sup>26</sup>

Below we will first discuss criminal law principles (4.1), followed by a discussion on possible sanctions (4.2).

### 4.1 Principles

Sweden clearly adheres to the legality principle as Section 1:1 of the Penal Code provides that “a crime is an act defined in this Code or in another law or statutory instrument for which a punishment as stated below is provided”. This incorporates the well-known principle *nullum crime nulla poena sine praevia lege penali*.

Section 2 of the Penal Code provides that unless otherwise stated, an act shall be regarded as a crime only “if it is committed intentionally”.

### 4.2 Sanctions

As far as the punishments are concerned, section 4 of the Swedish Penal Code holds that “the use of punishments is regulated by the provisions on the particular crimes and any further special provisions”. Section 4 also holds that “[o]ther sanctions may be imposed in accordance with the provisions concerning their use, even if they are not mentioned in the provisions concerning particular crimes”. Section 5 states that imprisonment is to be considered a more severe punishment than a fine. Sections 8 of the Penal Code holds that “[a]part from a sanction, a crime may, in accordance with what is provided, result in forfeiture of property, corporate fines or some other special consequence defined by law and may also entail liability for the payment of damages”.<sup>27</sup>

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<sup>24</sup> <http://www.government.se/content/1/c6/02/77/77/cb79a8a3.pdf>. A more recent version (updated until 2013) in Swedish is available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/53916/110480/F-771959810/SWE53916SwedishConsolidated.pdf>. To the extent possible, recent amendments have been taken into account in the analysis below.

<sup>25</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 22.

<sup>26</sup> See Sections 13:7 and 13:8 of the Penal Code. These provisions refer to ‘a general danger to human life or health by poisoning or infecting food, water, or the like, or in other ways by spreading poison or the like, or by transmitting or spreading serious disease’ (which, if the crime is gross, will lead to imprisonment between four and ten years, or even imprisonment for life) and to ‘a general danger to animals or plants by means of poison or by transmitting or spreading malignant disease or by spreading noxious animals or weeds’ (if the crime is gross, imprisonment between 6 months and 2 years will be imposed). Furthermore, Section 13:9 relates to *careless handling of poison or contagious substance*.

<sup>27</sup> This section was added to the Penal Code in 1986.

Part III of the Swedish Penal Code deals explicitly and in a detailed manner with specific sanctions and elaborates on the conditions under which those particular sanctions can be imposed. The sanctions mentioned in Part III of the Swedish Penal Code are the following:

- Chapter 25 on fines
- Chapter 26 on imprisonment
- Chapter 27 on conditional sentence
- Chapter 28 on probation
- Chapter 29 on the determination of punishment and exemption from sanction
- Chapter 30 on choice of sanction
- Chapter 31 on committal to special care
- Chapter 35 on limitation on sanctions
- Chapter 36 on forfeiture of property, corporate fines and other special legal effects of crime.

When crimes are committed in Sweden under the practice of a business, usually the only sanction used is the corporate (criminal) fine. Such fines can be ordered both to a legal entity and to a person responsible for a private business. The majority of environmental crimes fall under these provisions.<sup>28</sup> Since 2006, Chapter 36 of the Swedish Penal Code explicitly provides that a corporate fine can be imposed upon corporations for crimes committed in the exercise of business activities.<sup>29</sup> Interestingly, since 2006 there is also no longer a need for the prosecutor to prove intent in relation to environmental crimes; negligence is sufficient. Moreover, there is no need to prove exactly which individual is connected to the intent or negligence.<sup>30</sup> According to various interviewees, the level of corporate fines has increased substantially in recent years, particularly since the revisions in 2006, although some interviewees argue that the fines are still not very serious.<sup>31</sup>

In the 2012 report by the Network of Prosecutors on Environmental Crime (ENPRO), it is noted with respect to the Baltic Sea region (i.e. not focusing on Sweden only), that violations of the Penal Code can be sanctioned with imprisonment for up to four years and in some countries even more, e.g. in Norway, where environmental crime according to the Penal Code can be sanctioned with imprisonment for up to 10 years or in more severe cases up to 15 years. Nevertheless, the reporters add that the sanctions actually imposed in these countries predominantly include fines or suspended imprisonment. A sanction like imprisonment will be imposed only if the crime was committed with intent and if there is an aggravating nature causing substantial harm to the environment or people or even resulting in the loss of lives.<sup>32</sup> The reporters also point out that all countries in the Baltic Sea region<sup>33</sup> except Sweden have special sections in their Penal Codes dealing with environmental crime.

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<sup>28</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 45.

<sup>29</sup> The corporate fine will be discussed in further detail in Sections 6 and 9 below.

<sup>30</sup> Interview with Andrea Hjärne Dalhammar, legal consultant at a local inspectorate, 3 June 2014. See Section 5 below, for the discussion of provisions on environmental crime.

<sup>31</sup> For details, see Section 5.1 and Section 16 below.

<sup>32</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 23.

<sup>33</sup> Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Norway, Poland and Russia.

## 4 Substantive environmental criminal law

Most provisions concerning the protection of the environment in Sweden can be found in various laws and statutes and in the Environmental Code which we already mentioned above. Before the entry into force of the Environmental Code, environmental law in Sweden consisted of rather fragmented separate environmental statutes. This had historical sources.<sup>34</sup> The Swedish Constitution does not pay particular attention to environmental issues.<sup>35</sup> Until the entry into force of the Environmental Code on 1 January 1999 the most comprehensive law in the environmental field was the Environmental Protection Act of 1969. However, since the entry into force of the Environmental Code, that instrument plays an important role in providing protection to the environment, as we will illustrate in more detail below.

### 5.1 Environmental offences under Section 29:1 of the Environmental Code

Chapter 29 of the Swedish Environmental Code, called “Penalty provisions and forfeiture”, has the ambition to cover all crimes related to the environment. The stipulated penalty for an “environmental offence” (*miljöbrott*) is a fine or a term of imprisonment not exceeding two years.<sup>36</sup> However, if the offence is serious, the penalty will be a term of imprisonment of between six months and six years. When considering the seriousness of the offence, Section 1 prescribes special attention to “whether it caused, or might have caused, lasting damage on a large scale or whether the act was otherwise of a particularly dangerous nature.”

Chapter 29 was established in 1999 and was subject to a major revision in 2007. According to ENPRO (2012), the main focus of this revision was on clarity and efficiency. “*One fundamental issue for the 2007 revision was to adopt the law to the fact that environmental damage rarely has a concrete and delimited appearance. Consequences of even a large discharge of harmful substances could extend over long time and not being visible or even measurable at the time of the crime. [...] Therefore [...] the 2007 version of Environmental crime (discharges) does not need any proof of actual damage but only proof that the substance discharged - regardless of the specific conditions of the recipient - was potentially harmful to the environment.*”<sup>37</sup>

Now follows an overview of the activities that are considered as environmental offences under the original, translated, version of Chapter 29 (i.e. updated until 1 August 2000).<sup>38</sup>

Section 29:1 “*Any person who deliberately:*

- 1. pollutes land, water or air in a manner which involves or is liable to involve risks for human health or detriment to flora and fauna that are not inconsiderable or other significant detriment to the environment;*
- 2. stores waste or other matter in a manner which may give rise to health risks, damage or other detriment referred to in point 1 as a result of pollution; or*

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<sup>34</sup> S. Westerlund, “Public Environmental Law in Sweden”, in *Comparative Environmental Law in Europe. An Introduction to Public Environmental Law in the EU Member States*, ed. R. Seerden and M. Heldeweg. (Antwerp: Intersentia, 1996), 372.

<sup>35</sup> See Michael Faure and Günther Heine, *Environmental Criminal Law in the European Union. Documentation of the Main Provisions with Introductions* (Freiburg im Breisgau: Max Planck Institute for Foreign and International Criminal Law, 2000), 307.

<sup>36</sup> Swedish Environmental Code, Section 29:1.

<sup>37</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 37.

<sup>38</sup> Source: the official translation of the Swedish Environmental Code, Chapter 29, Sections 1-7. Available at: <http://www.government.se/content/1/c6/02/28/47/385ef12a.pdf>. Amendments to the Code after this date could only be taken into account to the extent possible, based on secondary literature in English or on informal translations of the more recent provisions.

3. causes substantial detriment to the environment as a result of noise, vibration or radiation shall, unless a competent authority has permitted the practice or it is generally accepted, be liable to a fine or a term of imprisonment not exceeding two years for environmental offence. If the offence is serious, the penalty shall be a term of imprisonment of not less than six months nor more than six years. When the seriousness of the offence is considered, special attention shall be paid to whether it caused, or might have caused, lasting damage on a large scale or whether the act was otherwise of a particularly dangerous nature. If the act may be deemed to be justifiable in view of the circumstances, no penalty shall be imposed pursuant to this section.”

These activities are clearly qualified as an offence. The protected legal interest in this particular case seems to be the environment or at least ecological interests. However, the mentioned behaviour is no longer an offence when “a competent authority has permitted the practice” (continuation of Section 29:1). This seems to indicate that administrative interests are protected. The concept of the “environment” protected in this particular provision seems to be relatively broad and, moreover, the provision is not only ecological, but also anthropocentric. Take for example Section 1(1), which indicates that environmental pollution not only leads to criminal liability when it causes a detriment to flora and fauna, but also when it involves risks for human health. The provision is moreover formulated rather broadly, as is the case for all other provisions in Chapter 29, as “any person” can be involved in the conduct. In this Section 29(1) the *mens rea* is that the act should be committed “deliberately”. As already mentioned, justifications relate to the fact that either the competent authority has permitted the practice or that the practice is “generally accepted”. The sanction can either be a fine or an imprisonment term not exceeding two years. However, when the offence is serious, the penalty shall be a term of imprisonment of not less than six months and not more than six years.

Importantly, since Law 2006:1014 amending the Environmental Code (*Lag (2006:1014) om ändring i miljöbalken*), Section 29:1 now makes a specific reference to Chapter 23 of the Penal Code in case of attempting or preparing to commit a serious environmental crime. Moreover, in a fourth paragraph a reference is now made to “changing the surface and ground water in a manner that harms or may harm human health, animals or plants”.<sup>39</sup> All experts and practitioners we interviewed<sup>40</sup> noted that this was in fact a very important change. Before this reform, which became effective in 2007, it was practically impossible for prosecutors to invoke Section 29:1, due to the high burden of proof. Since the reform, however, “prosecutors only need to prove negligence in discharge of substances that may be dangerous to human health, fauna and flora, without having to specify the amount of doses causing the harm.”<sup>41</sup> In other words, the new Section 29:1 “captures the *risk* involved in discharge of an environmentally harmful substance, instead of the *effect* of such discharge.”<sup>42</sup> One may hence conclude that the *mens rea* of (the amended) Section 29:1 now also includes negligence.<sup>43</sup>

According to a legal advisor at the Swedish Ministry of the Environment, the amendment of Section 29:1 “can best be seen as a paradigm shift, meaning that it is now a punishable offence to release dangerous substances when before 2007 it was dependent on several more or less unpredictable circumstances whether it was a punishable offence or not. The regulation is now easier to understand and apply.”<sup>44</sup> According to various interviewees, the amendment has also resulted in a higher rate of prosecutions. “In some cases the courts have deemed the crime to be a gross environmental offence, which before 2007 was a very rare outcome. Several offences that were regarded as trivial in nature, and therefore not punishable, are now penalized to a significant extent.”<sup>45</sup>

## 5.2 Environmental disturbances under Section 29:2 of the Environmental Code

<sup>39</sup> [Http://www.notisum.se/rnp/sls/lag/19980808.HTM](http://www.notisum.se/rnp/sls/lag/19980808.HTM) (own translation).

<sup>40</sup> Section 16 below provides details on the interviews we conducted.

<sup>41</sup> Interview with Lars Magnusson, Senior Prosecutor at the National Environmental Crimes Unit, 26 May 2014.

<sup>42</sup> Interview with a Land and Environmental Court of Appeal Judge, 26 May 2014.

<sup>43</sup> Interview with a legal adviser at the Ministry of the Environment, 12 June 2014.

<sup>44</sup> Interview with a legal adviser at the Ministry of the Environment, 12 June 2014.

<sup>45</sup> *Ibid.*

Section 29:2<sup>46</sup> defines the concept of “causing environmental disturbance” (*vållande till miljöstörning*), which relates to offences committed through negligence (instead of deliberately). The penalty is a fine or a term of imprisonment not exceeding two years.

What was mentioned before (in relation to the original version of Section 29:1) on the qualification of offences applies to a large extent also to Section 29:2. The main difference between both sections is not the protected interest, but rather the *mens rea*. Whereas Section 29:1 addresses deliberate behaviour, Section 29:2 addresses negligence. The corresponding sentence is (remarkably) the same as in Section 29:1: an imprisonment not exceeding two years or a fine. For offences under Section 29:1 a higher sanction can only be imposed when the offence is serious.

### 5.3 Further environmental offences mentioned in the Environmental Code

Further environmental offences are defined in subsequent sections of Chapter 29:

- 29:3 “environmentally hazardous handling of chemicals” (maximum 2 years of imprisonment).

Again this offence seems to be both protecting the environment (ecological interest) and human health (anthropocentric interest). The provision explicitly refers to “damage to human health or the environment”. The author can again be “any person” and interestingly this provision is not dependent upon the violation of administrative provisions. It hence seems to be an autonomous offence: violation of a permit condition or the need to obtain a permit is not a condition for the application of Section 29:3. The *mens rea* required in this case is either “deliberately or through gross negligence”. Specific justifications or defences are not mentioned and the sanction to be imposed is again an imprisonment not exceeding two years. However, this Section 3 *in fini* provides one type of important exception since it holds that “no penalty shall be imposed pursuant to the first paragraph if the act is punishable in accordance with section 1 or section 2”.<sup>47</sup> Section 29:3 hence seems to have a supplementary character. The criminal conduct at which this section is directed is the handling “of a chemical product or a product that contains or is treated with a chemical product without taking any protective measures, considering an alternative product or taking any other precautions that are necessary in view of the product’s intrinsic characteristics in order to prevent or combat damage to human health or the environment”.

- 29:4 “unauthorized environmental activities”<sup>48</sup> and not committing to a certain condition for a permission (maximum 2 years of imprisonment)

This offence is explicitly referred to as an “unauthorized environmental activity” (*otillåten miljöverksamhet*). Here the protected legal interest seems to be administrative since specific endangerment of the environment is not required. “Any person” can be the author and the criminal conduct consists of starting or pursuing an activity or taking some other measure “without obtaining a decision concerning permissibility or a permit, approval or consent or without submitting a notification required by this Code or by rules issued in pursuance thereof”. This is referred to as the unauthorised environmental activity. The same, however, also applies to “the failure to comply, whether deliberately or through negligence, with a condition attached to a decision concerning permissibility or a permit, approval or exemption taken pursuant to this Code or to rules issued in pursuance thereof or in connection with a review of such permits or conditions”. Again, this clearly aims at the criminalisation of licensed activities (such as the running or operation of a plant) without obtaining the necessary

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<sup>46</sup> Note again that this refers to the ‘official’ translated version of the Environmental Code, i.e. updated until 1 August 2000. This section was later amended by Law 2009:532.

<sup>47</sup> Since the 2006 amendments to Chapter 29, Section 3 no longer refers to Section 2:

<sup>48</sup> “Any person who, whether deliberately or through negligence, starts or pursues an activity or takes some other measure without obtaining a decision concerning permissibility or a permit, approval or consent or without submitting a notification required by this Code or by rules issued in pursuance thereof”.

permit or in violation of the permit conditions. This type of provision is usually considered as abstract endangerment offences. In that sense one could hold that the provision not only aims at protecting administrative interests, but also at the protection of the environment, albeit in an indirect (abstract) way. By e.g. operating a plant without a permit or in violation of permit conditions an operator could (at least in an abstract way) endanger the environment and thus ecological interests as well. The required *mens rea* for this provision is either “deliberately” or “through negligence”. However, like in Section 29:3 a typical feature of Section 29:4 is also its supplementary character since it holds *in fine* that no penalty shall be imposed in accordance with this section if the act is punishable in accordance with sections 29:1 or 29:2.<sup>49</sup> The sanction is a term of imprisonment not exceeding two years.

- 29:5 “obstruction of environmental control” (maximum 2 years of imprisonment)

It seems that this provision, like the previous one, rather protects administrative interests. The interests that are protected through this provision are those that are inherent to an adequate inspection and control. Again, “any person” could commit the offence. The criminal conduct refers to the submission of a notification or information or the supply of incorrect information, thus hindering a permit application procedure. Again, this may be considered as an abstract endangerment crime. The required *mens rea* is that the act has to be committed “deliberately or through negligence”. An imprisonment not exceeding two years can be applied for this offence of “obstruction of environmental control” (*försvårande av miljökontroll*).

- 29:6 “incomplete environmental information”; including in relation to labelling products containing e.g. GMOs or chemical products (a fine or maximum 1 year of imprisonment)

Again, this provision is qualified as an offence and seems to aim at the provision of correct information. Hence, it is probably not directly the environment itself that is protected, but rather the right to accurate information related to the environment. “Any person” can commit the criminal conduct and the criminal conduct can consist of various acts: (1) omitting to submit a document that is required by this Code or by rules issued in pursuance thereof, or submitting incorrect information or omitting information; or (2) omitting to comply with the obligation laid down in the Code or in rules issued in pursuance thereof to label a product containing or consisting of genetically modified organisms or a chemical product, a biotechnical organism or a product that contains or is treated with a chemical product. The required *mens rea* is that the act has to be committed either “deliberately or through negligence”. Interestingly it should be mentioned that a condition for criminal liability is that “the act or omission is likely to impede an assessment of the risk of damage to human health or the environment”. If those conditions for criminal liability are fulfilled, either a fine or a term of imprisonment not exceeding one year can be imposed.

- 29:7 Littering (a fine or a maximum 1 year of imprisonment).

This offence aims at the prohibition of littering and hence clearly aims at the protection of the environment, i.e. ecological interests. “Any person” can commit the offence and the criminal conduct is described as “leaving litter outdoors in a place to which the public has access or which is within its view”. No specific justifications or defences are applicable and the sanction range is either a fine or a term of imprisonment not exceeding one year.

#### 5.4 Other laws

Apart from the Environmental Code, provisions concerning crimes against the environment can be found particularly in two other special laws, the Water Pollution Law and the Hunting Law. The former deals with

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<sup>49</sup> Since the 2006 amendments to Chapter 29, Section 4 no longer refers to Section 2.

forbidden discharges from ships (implementation of UNCLOS and MARPOL); the latter deals with forbidden hunting of endangered species like wolves, bears and eagles.<sup>50</sup>

The Act 1980:424 concerning measures against pollution caused by ships<sup>51</sup> prohibits the pollution of the marine environment by ships, regulates the discharge of polluted substances by ships, the construction of ships, and other matters for the prevention of pollution.<sup>52</sup> According to this Act, “[a]n unlawful oil discharge or discharge of other harmful substances rise a penalty for environmental crime or liability for environmental damage to the vessel and the responsible person on board.”<sup>53</sup> Criminal liability may again lead to a fine or imprisonment. In addition to this Act 1980:424, the ENPRO report also refers to Ordinance (10980:789) concerning measures for the prevention of pollution from ships and to a Decree by the National Maritime Administration (SJÖFS 1985:19). Together, these three regulations “contain binding rules concerning [the] prohibition of water pollution from ships, reception of contaminated ballast and tank water from ships, ship construction, supervision and other measures for the prevention or limitation of water pollution from ships.”<sup>54</sup>

### 5.5 Implementation of EU Directives

The previous sections, dealing with the implementation of UNCLOS and MARPOL show that Swedish law to some extent had already introduced criminal provisions in order to comply with international law. Interestingly, many of the provisions that we have just described do (to some extent at least) also correspond with the requirements of Directive 2009/123/EC. It is impossible within the scope of this report to provide a detailed analysis of the implementation of Directive 2008/99/EC in Sweden.<sup>55</sup> However, when looking at the offences specified in Articles 3 and 4 of Directive 2008/99, it certainly seems as if particular sections in the original Chapter 29 of the Swedish Environmental Code did already cover the behaviour aimed at in these articles.<sup>56</sup> It is, however, not always easy to find the precise criminal provision back in the Swedish Environmental Code.

Take, for example, Article 3 (a) of Directive 2008/99/EC which aims at the discharge or emission of particular materials into the air, soil or water which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants. Such a provision can, at first sight, not literally be found back in the original version of Chapter 29 of the Swedish Environmental Code. However, the original version of Section 29:1 clearly aims at any person who deliberately pollutes land, water or air in any manner which involves or is liable to involve risk for human health or detriment to flora and fauna that are not inconsiderable or other significant detriment to the environment. The formulation is different, but it can certainly be held that this Section 1:1 also aims at the type of behaviour that should be punished under Article 3 (a) of Directive 2008/99/EC.

The same could be said when looking at Article 3 (b) of Directive 2008/99/EC which aims at the criminalisation of the collection, transport, recovery or disposal of waste, including the supervision of such operation and the after-care of disposal sites, which causes or is likely to cause death or serious injury to any person or substantial

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<sup>50</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 38.

<sup>51</sup> Lag (1980:424) om åtgärder mot förorening från fartyg (amended last by SFS 2006:1318).

<sup>52</sup> Website Legal Office FAOLex, at: <http://faolex.fao.org/>.

<sup>53</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 59-60. An English version of this Act could not be found. Elsewhere in the ENPRO report it is stated that “A person who intentionally or by negligence violates any prohibitions of water pollution from ships or who neglects to minimize as far as possible the consequences of a discharge caused by accident, shall be fined or condemned to imprisonment up to two years, if the deed is not imposed with more severe punishment in the Criminal Code or the Environmental Code” (81-82).

<sup>54</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 64.

<sup>55</sup> At this point the reader should also be pointed to the authors’ disclaimer at the beginning of this report; and the fact that official recent translations into English are not available for the relevant Swedish laws.

<sup>56</sup> This was confirmed in the interviews we had with several practitioners/experts in Sweden, who all stated that the two European Directives had only limited effects, because everything was already in place in Swedish law. See below, Section 16.

damage to the quality of air, the quality of soil or the quality of water or to animals or plants. The threshold for criminalisation of this article of the Directive is very high. Again, Section 1(2) of the original version of Chapter 29 of the Swedish Environmental Code criminalises the storage of waste or other matter in a manner which may give rise to health risks, damage or other detriment referred to in point 1 as a result of pollution. Again, the formulation is obviously different, but at the same time the formulation in the Swedish Environmental Code seems to be broader than in the Directive and hence seems to largely cover the type of behaviour mentioned in the Directive.

To provide yet one other example: Article 3(d) of Directive 2008/99/EC demands the criminalisation of the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants. Moreover, it should be remembered that these activities only constitute a criminal offence when committed unlawfully and intentionally; and unlawfulness for the purposes of the Directive, as defined in Article 2, means that a violation has infringed legislation adopted pursuant to the EC Treaty and listed in one of the annexes to the Directive. This Article 3(d) aims generally at the criminalisation of the illegal operation of a plant in which a dangerous activity is carried out. This seems to correspond largely with Section 29:4 of the Swedish Environmental Code, discussed above.

It is important to point out in this respect that recent amendments have been made to Section 29:4. This section now specifically mentions the types of unauthorized environmental activities, concerning the protection of special natural areas, regulation of hazardous activities, water activities, disposal of groundwater, placing GMO products on the market, release of dangerous substances, placing on the market and use of chemical and biological pesticides, chemical and biotech goods, and plant protection. No liability shall be imposed under this section, if such liability may be imposed under Chapter 30:1 - the obligation to pay an environmental penalty. Paragraph 4(a) now deals with illegal waste transport and the respective Regulation (EC) No 1013/2006 in more detail.<sup>57</sup> A legal adviser at the Swedish Ministry of the Environment refers to this amendment, i.e. the introduction of the crime of illegal waste transport, as the most important recent change in the Environmental Code. "This change has meant that some actions that were hardly punishable at all in the past, are now considered to be a serious crime. So far, mostly persons of foreign citizenship and with no known home address in Sweden have been caught when transporting illegal waste. When a defendant is not a resident in Sweden he or she is detained and prosecuted within a few months of being caught. Usually the penalty imposed is imprisonment, whereby the defendant can deduct the time in custody."<sup>58</sup> Again, it should be noted that this amendment, which became effective in 2007, is not directly related to the EU Directives on environmental crime.

Interestingly, Law 2006:1014, Law 2008:240 and Law 2010:742 have made some amendments to Section 29:3. It now makes specific references to activities violating the prohibition to apply pesticides, safeguard and precautionary measures, detergents, persistent organic pollutants, disposal and recycling of waste, a fluorinated greenhouse gas, labelling and packaging of chemical products or explosives, ozone depleting substances, and the presence of a prohibited substance in cosmetic products. All provisions are a result of obligations of Sweden under the relevant EU Regulations. Fines are imposed for unlawful handling of chemicals or other biotechnical products<sup>59</sup>, while manufacture and import of unregistered substances or if such registration was based on inaccurate or incomplete information, is punishable either by fine or imprisonment of up to two years.<sup>60</sup>

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<sup>57</sup> <http://www.notisum.se/rnp/sls/lag/19980808.HTM>.

<sup>58</sup> Interview with a legal adviser at the Ministry of the Environment, 12 June 2014.

<sup>59</sup> Section 29:3(a) in conjunction with Chapter 14.

<sup>60</sup> Section 29:3(b).

In addition to the examples just discussed, Section 8 of Chapter 29 of the Swedish Environmental Code<sup>61</sup> includes a list of 28 items that are criminalised as well and Section 9 contains a list of 11 types of behaviour that are equally criminalised. It is interesting to mention that within these Sections 8 and 9 many of the provisions exactly aim at violations of legislation implementing European environmental legislation. For example Section 8 (26) refers to a criminalisation of a prohibition against providing information laid down in Council Regulation 3093/94 on substances that deplete the ozone layer. This seems to correspond (at least partially) with the offence mentioned in Article 3(i) of the Environmental Crimes Directive. The same is true for specific crimes mentioned in Sections 8 and 9 of Chapter 29 dealing with crimes against wildlife. Section 8(28), for example, explicitly aims at behaviour violating Council Regulation 338/79 on the protection of species of wild fauna and flora, i.e. largely corresponding with Article 3(f) of Directive 2009/99/EC.<sup>62</sup>

### 5.6 Evaluation by Swedish experts and practitioners<sup>63</sup>

#### 5.6.1 Impact of EU Directives

As pointed out in the preceding sections, the impact of the Environmental Crime and Shipment Pollution Directives has been limited in Sweden. According to the interviewee who was working at the Ministry of the Environment at the time, Sweden did not have to take any implementation action, because the necessary provisions were already in place. The most important recent revisions took place in 2007, before the introduction of the EU Directives.

#### 5.6.2 Sanctions

The penalty for environmental offense under Chapter 29 of the Swedish Environmental Code is either (1) a fine; (2) a term of imprisonment not exceeding two years; or (3) in case of a serious offence, a term of imprisonment of between six months and six years. Whether the level of sanctions in relation to environmental crime is dissuasive or proportionate as compared to other (non-environmental) crimes, is of course a subjective question. Nevertheless, most interviewees stated that the sanctions for environmental crimes are not very serious when compared to sanctions for other types of crimes, when the sanctions that are actually imposed (i.e. in practice) are considered.

According to Senior Prosecutor Magnusson, deterrence of operators from committing environmental crimes is not closely linked to the level of fines, because the court can always rule in the low range of the punishment. Imprisonment is very rarely used – there were only 3-4 environmental cases where imprisonment was imposed. Prof. Darpö explained that in these rare cases it does not concern crimes committed by businesses / professional operators, but by individuals or groups of individuals. He gave the example of a recent case related to a waste-burning incident which resulted in 6 months jail sentence, where misbehaviour caused by alcohol was involved. Also the Land and Environmental Court of Appeal Judge confirmed that very few prison sentences have been imposed for environmental crimes committed by private individuals; if they were, it mostly concerns cases where these individuals were charged with other criminal activities too. Nevertheless, she argues that *on paper* the penalty for environmental crime is comparable to other types of crimes.

Senior Prosecutor Magnusson argued that, if a crime is committed within a company, prosecution for individuals is very difficult to impose. Corporate fines for companies are in practice the only sanctions available.<sup>64</sup> The

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<sup>61</sup> Note again that reference is made here to the ‘official’ translated version of the Environmental Code, i.e. updated until 1 August 2000.

<sup>62</sup> Sections 8 and 9 of Chapter 29 have recently been amended as well. For example, there are now even more types of prohibitions under the current wording of Section 8, including GMOs and fishing. Section 9 imposes only fines and no longer includes fishing, but rather provisions on idling and street music, GMOs, cosmetic products and waste disposal.

<sup>63</sup> For information on the interviewees, see the Introduction to this report (Section 1).

<sup>64</sup> See also Section 8 below.

levels of corporate/individual fines are based on the guidelines for environmental prosecutors, which are published on the internet. In three recent judgements the Supreme Court has found that these fines are reasonable. Therefore, according to Magnusson, lower courts should also follow these guidelines, at least in similar cases.<sup>65</sup>

Prof. Darpö pointed out that sanctions in the form of criminal fines (i.e. corporate sanction fees) are now much higher than they were some years ago, when sanctions were definitely too lenient. An example is given of a case from 2007 involving large discharges of oil (Shell), which led to a substantial fine of about € 150,000 EUR.<sup>66</sup> When asked about the role of the administrative sanction fees used by the administrative authorities, Darpö confirmed that these are used for minor offenses (“petty crimes”) only and are very low.<sup>67</sup>

Legal consultant Dalhammar, in her experience working with the environmental inspectors at local level, concludes that the penalties imposed in practice “are extremely low, and most crimes do not lead to any penalties or judgment at all.” The sanctions probably would be proportionate compared to sanctions for non-environmental crimes, if they were ever used to the full extent, she argues.

### 5.6.3 Best practices

The legislative changes from 2007 in the Environmental Code (described extensively in this Section), particularly the amendment of Section 29:1, have repeatedly been mentioned as a best practice.<sup>68</sup> Senior Prosecutor Magnusson explained that before this amendment, it was practically impossible to invoke Section 29:1 of the Environmental Code, due to a “too high burden of proof”. According to the Land and Environmental Court of Appeal Judge we interviewed, this amendment has been a success: “Prosecutors and the police are satisfied as now it is easier for them to convict the perpetrators. The current construction captures the *risk* involved in discharge of an environmentally harmful substance, instead of the *effect* of such discharge.”

Prof. Darpö argued that from an international perspective, there are certainly some interesting and peculiar aspects to the Swedish system, not so much regarding substantive environmental criminal law, but more in relation to procedural matters. As an example, Darpö pointed to the fact that in Sweden environmental technicians are used in the courts as judges.<sup>69</sup>

Senior Prosecutor Jarlås mentioned the guidelines on corporate fines, formulated by the prosecutors, as a best practice. The relevance of this document, as discussed above, was also pointed out by Senior Prosecutor Magnusson and legal consultant Dalhammar.

Interviewees also mentioned various best practices in relation to the expertise of prosecutors and some examples of good cooperation between different actors. These will be discussed below, in the sections on enforcement.

### 5.6.4 Recommendations

Looking at the law *on paper*, interviewees did not come up with concrete suggestions for improvement.

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<sup>65</sup> Similar info was provided by legal consultant Dalhammar.

<sup>66</sup> See also <http://www.dn.se/nyheter/sverige/rekordskadestand-for-bensinutslapp>.

<sup>67</sup> Legal consultant Dalhammar added that since 1999, Chapter 29 of the Environmental Code has been considerably revised by de-criminalizing lesser offences; instead there have been more administrative sanctions since then, as indicated by the Regulation of Environmental Sanction Charges: <http://www.notisum.se/rnp/sls/lag/20120259.htm>.

<sup>68</sup> For example, by the legal consultant at the Ministry of the Environment, by the Land and Environmental Court of Appeal Judge, and by Senior Prosecutor Magnusson.

<sup>69</sup> See <http://www.jandarpö.se/inenglish.asp> for some of Darpö’s publications on the Swedish system, notably “Justice through the Environmental Courts” (2007) and Study on the Implementation of Article 9.3 and 9.4 of the Aarhus Convention in 17 of the Member States of the European Union (2012).

However, perhaps a point raised by legal consultant at a local inspectorate Dalhammar, which will be discussed in Section 12 below, can already be mentioned here. Namely, that, the environmental supervision in Sweden is since 1999 based on the industry's obligation of self-monitoring, relying on the honesty of industries, and resulting in a more administrative form of inspection and the risk that some crimes are "hidden under the papers".

## 5 Substantive criminal law on public servants liability in relation to environmental crimes/offences

When discussing the reform of the corporate fine<sup>70</sup>, the question whether the corporate fine (as provided in Chapter 36 of the Swedish Penal Code) could also be applied to public authorities has been discussed. The corporate fine can be imposed on legal persons, but the literature holds that also public authorities, such as the State and municipals, "can fall under the business concept [*entrepreneur*]. The same applies to state and municipal utilities and to SOEs (State controlled enterprises) running business."<sup>71</sup>

The reason for also applying the corporate fine to public authorities is that municipalities and the State often have a choice on how to operate a particular activity. It could either be operated by the public authority or in an independent company. If the corporate fine would not be applicable in a municipality where the activities are run directly by the municipality, whereas the fine would be applicable in another municipality where the business activity would be run by a company, this would create an unequal treatment.<sup>72</sup> Hence, the corporate fine can in principle also be applied to public authorities when the other conditions are met.

In a report preceding the legislative changes it was held that State and local government should only be excluded from the corporate fine when crimes are committed "in using of public power".<sup>73</sup> That proposal, however, was ultimately not accepted. As a result, the rules concerning the corporate fine apply to public entities in the same way as they apply to private companies.

Nuutila (2012) provides an unofficial but recent (after the amendments in 2006) translation of Section 36:7 of the Swedish Penal Code, which deals with corporate fines.

*"For a crime committed in the exercise of business activities the entrepreneur shall, at the instance of a public prosecutor, be ordered to pay a corporate fine if the most severe penalty provided by the law is not a fine and if:*  
*(1) the entrepreneur has not done what could reasonably be required of him for prevention of the crime, or*  
*(2) the crime has been committed by*

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<sup>70</sup> The legal provisions on corporate fines were introduced in Sweden in 1986 (*Law 1986:1007*) and entered into force on 1 January 1987. Important amendments were made in 2006 (*Law 2006:283*, amending the Swedish Penal Code). For more information on this corporate fine, see section 4 above and section 9 below.

<sup>71</sup> Ari-Matti Nuutila, "Corporate Criminal Liability in Sweden", in *Corporate Criminal Liability and Compliance Programs*, ed. A. Fiorella and A. Stile (Rome, 2012), 6.

<sup>72</sup> Nuutila, "Corporate Criminal Liability", 6.

<sup>73</sup> Nuutila, "Corporate Criminal Liability", 3.

*(a) a person in a leading position, which is based on a capacity to represent the entrepreneur or to make decisions on behalf of the entrepreneur, or*  
*(b) a person who otherwise has had a special responsibility to inspect or control the business activities.*  
*The provisions of the first paragraph shall not apply if the crime was directed against the entrepreneur. (Law 2006:283)”.*

The author notes that, although the term refers to legal persons, the provision is equally applicable to individuals and non-profit organisations engaged in activities that can be described as professional.<sup>74</sup>

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<sup>74</sup> Nuutila, “Corporate Criminal Liability”, 6 and 19.

## Substantive criminal law on organised crime

There are no specific instruments for dealing with organized environmental crime such as illegal hunting, smuggling of dangerous species or illegal waste transport, but there are general provisions offered by the Penal Code and the Swedish Code of Judicial Procedure. Telephone tapping is only allowed if the sanction associated with a crime goes beyond a certain threshold; namely, a minimum of 2 years of imprisonment.<sup>75</sup> According to Prof. Jan Darpö, Swedish prosecutors in the past have been somewhat reluctant to allow for telephone tapping in environmental crime cases. However, nowadays prosecutors more commonly ask the courts to grant telephone wiring at least in illegal hunting (wildlife trade) and poaching cases. This may be explained also by the fact that these types of cases are now rather concentrated to particular prosecutors' offices.<sup>76</sup>

Andrea Hjärne Dalhammar, legal consultant at a local inspectorate, notes that investigations in relation to environmental crime require special legal, chemical, biological and other competences. In Sweden, a lack of experts, competences, and resources results in the outcome that crimes other than those related to negligence are seldom discovered. The police and prosecution are not allowed to search premises (*husrannsakan*) on the basis of anonymous tips. There needs to be a reasonable suspicion. Organized crime is therefore not easily discovered since this generally requires tips from the public. Environmental inspectors (like the office of Dalhammar) can – and are even obliged to – investigate and act on anonymous tips, but lack proper resources. The environmental inspections nowadays are mostly financed through fees collected from the industries that are inspected – and it seems unlikely that fees can be collected from criminal organizations.<sup>77</sup>

According to Lundin (2000), however, Sweden allocates the most resources to the prevention of environmental crime from amongst the Scandinavian countries. It has trained some 70 investigators and 20 heads of investigation (prosecutors) specialised in environmental offences. In addition, a group of four persons whose area of responsibility is environmental crime works under the authority of the Rikspolisens's money laundering unit.<sup>78</sup>

In a 2003 report for the European Commission, the *Betreuungsgesellschaft für Umweltfragen* investigated reported cases on organised crime in EU Member States. With respect to Sweden, no cases were found regarding endangered species, waste, radioactive waste, timber or fishing. However, four cases were reported in relation to ozone depleting substances, *in casu* illegal disposal of used refrigerators which contain CFC. These refrigerators were shipped, in order to bypass costly regular recycling or disposal, from Sweden to the UK or Denmark (where the transports were stopped), with African countries as final target regions. The Swedish police, customs and Environmental Protection Agency, after preliminary investigations, managed to stop the cargo in the UK port with help from the competent UK authorities. The report mentions this as an example for working international cooperation between Sweden and another country.<sup>79</sup>

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<sup>75</sup> Information provided by various interviewees (for details on the interviewees see Section 1 above). Legal provisions on secret wire-tapping can be found in Chapter 27 of the Swedish Code of Judicial Procedure.

<sup>76</sup> Interview with Jan Darpö, Professor of Environmental Law, 22 May 2014; confirmed in interviews with Lars Magnusson, Senior Prosecutor at the National Environmental Crimes Unit, 26 May 2014 and Christer B. Jarlås, Senior Prosecutor at the National Environmental Crimes Unit, 3 June 2014.

<sup>77</sup> Interview with Andrea Hjärne Dalhammar, legal consultant at a local inspectorate, 3 June 2014.

<sup>78</sup> Lars-Christer Lundin, *River Basin Management*, (Uppsala University, 2000), 143 – 147.

<sup>79</sup> Tanja Fröhlich, coordinator, *Organised Environmental Crime in the EU Member States*, (Kassel: Betreuungsgesellschaft für Umweltfragen, 2003), 127-128.

## 6 General criminal law influencing the effectiveness of environmental criminal law: sanctions in practice

Although the Swedish Environmental Code allows for imprisonment for up to six years, according to ENPRO (2012) the majority of cases seems to be based on negligence, which often results in a fine.<sup>80</sup> When crimes are committed under the practice of a business, usually the only sanction is the corporate (criminal) fine. Such fines can be ordered both to a legal entity and to a person responsible for a private business. The majority of environmental crimes fall under these provisions.<sup>81</sup>

In an interview with Prof. Jan Darpö, it was confirmed that nowadays much use is made of the corporate criminal fines, while in the past only individuals could be prosecuted and not corporations. According to Darpö, EU law has surely had an impact on this particular aspect of Swedish criminal law (more so than the more recent EU Directives on environmental crime).<sup>82</sup>

As we noted earlier (see Section 1), it is estimated that each year between 300 and 600 cases of environmental crime are brought to court, resulting in fines by prescription of a prosecutor.<sup>83</sup>

In Sweden, “[t]he statutory period of limitation for sanctions depends on the most severe sentence stipulated for the crime. If it is no more than imprisonment for two years, the limitation is five years from the day of detention or the day of serving notice of the prosecution.” Sanctions can never be imposed later than 15 years from the day of the offence, if the maximum punishment is a two year term of imprisonment.<sup>84</sup>

Chapter 28 of the Swedish Penal Code provides for the possibility of probation, in case imposition of a fine seems to be inadequate. Section 28:2 stipulates that probation may be combined with up to two hundred day fines, regardless of whether a fine is prescribed for a particular offence or not. This in practice means that probation in conjunction with day fines can be imposed for any type of environmental crime under Chapter 29 of the Environmental Code.

Probation can be also combined with community service upon consent of the accused<sup>85</sup>, or between fourteen days to three months of imprisonment. In the latter case, other forms of punishment, i.e. fines and conditional community service must be excluded.<sup>86</sup> Sections 28:7 and 28:8 further define conditions in case of non-compliance with the obligations of the probation sentence. The last section provides for the possibility of revocation by the Court and deciding on another form of sanction for the crime in question.

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<sup>80</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 23.

<sup>81</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 45.

<sup>82</sup> Interview with Jan Darpö, Professor of Environmental Law, 22 May 2014.

<sup>83</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 12; interview with Lars Magnusson, Senior Prosecutor at the National Environmental Crimes Unit.

<sup>84</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 52.

<sup>85</sup> Swedish Penal Code, Chapter 28, Section 2a.

<sup>86</sup> Swedish Penal Code, Chapter 28, Section 3.



## 7 Responsibility of corporations and collective entities for environmental crimes

According to a report (for the Latvian government) by Rone<sup>87</sup>, Sweden does not know the criminal liability of legal entities. As a result only natural persons can be held responsible for criminal offences. However, Chapter 36 of the Penal Code provides for the possibility that a company may be subjected to criminal sanctions, more particularly corporate fines, in case a crime has been committed in the context of a commercial activity<sup>88</sup>. The prosecutor can claim for a fine to be imposed upon a legal entity, but that fine will not be considered as a criminal punishment. A so called “corporate fine” can be imposed upon an “entrepreneur” according to Chapter 36, Section 7 of the Penal Code if the crime was committed “in the exercise of business activities” and (1) the crime has entailed gross disregard for the special obligations associated with the business activities or is otherwise of a serious kind and (2) the entrepreneur has not done what could reasonably be required of him for prevention of the crime.<sup>89</sup> This literal formulation of the conditions for the imposition of the corporate fine is obviously not very clear. It appears, however, that the combination of conditions 1 and 2 holds that the crime as such has to entail a gross disregard for specific obligations or be otherwise serious and that the entrepreneur at the same time failed to take measures aiming at the prevention of the crime. The latter could more specifically refer to the fact that, for example in the environmental context, a corporation failed to install e.g. an environmental management system aiming at the prevention of crimes committed by its employees.

Rone holds that when the requirements of the Penal Code are satisfied the corporate fine must be imposed. It can moreover be cumulated with parallel civil proceedings against the corporation. The only reason not to impose the corporate fine is when the crime was directed against the entrepreneur or if it would be “manifestly unreasonable” to impose such a fine. According to Rone this would be the case if (1) the nature of the crime is such that it would be unreasonable to expect the entrepreneur to have taken protective measures; (2) a new owner took over the business after the crime was committed or (3) the business would no longer exist<sup>90</sup>.

Other authors, however, hold that there is an outright corporate criminal liability in Sweden. This is more particularly the opinion of Nuutila.<sup>91</sup> Nuutila holds that a government commission filed a report in 1997 suggesting a reform of the corporate fine, more particularly to impose the fine on legal entities also for crimes which individuals would have committed in the business of the corporations. That proposal, however, was not accepted. Another legislative bill was presented by the government in order to increase the effectiveness of the corporate fine system. That bill from 2006 had the goal to introduce criminal liability for legal entities.<sup>92</sup> The bill would *inter alia* lead to abolishing the requirement that the crime has to entail a gross disregard for the special obligations associated with the business activities<sup>93</sup> and the amount of the fines that could be imposed as “corporate fine” would be increased as well.<sup>94</sup> These amendments to the Swedish Penal Code changed Sections

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<sup>87</sup> Dana Rone, *On Institute of Criminal Liability of Legal Entities in Eight Countries – Nordic Countries (Finland, Sweden, Norway, Iceland and Denmark) and Baltic countries (Latvia, Lithuania and Estonia)* (Riga: Ministry of Justice of the Republic of Latvia, 2006).

<sup>88</sup> Rone, “On Institute”, 16. See also the discussion in section 6 above.

<sup>89</sup> Rone, “On Institute”, 16-17.

<sup>90</sup> Rone, “On Institute”, 17.

<sup>91</sup> Nuutila, “Corporate Criminal Liability”.

<sup>92</sup> See Rone, “On Institute”, 17.

<sup>93</sup> Rone, “On Institute”, 17.

<sup>94</sup> Rone, “On Institute”, 18.

7-10a of Chapter 36 and became effective on 1 July 2006.<sup>95</sup> The important change was that the former requirement that the crime had to involve a serious breach of special obligations or otherwise be of serious nature, was abolished.

Section 36:7 of the Penal Code now holds that for a crime committed in the exercise of business activities the entrepreneur shall, at the instance of a public prosecutor, be ordered to pay a corporate fine if the most severe penalty provided by the law is not a fine and if:

- (1) The entrepreneur has not done what could reasonably be required of him for prevention of the crime, or
- (2) the crime has been committed by:
  - (a) a person in a legal position, which is based on a capacity to represent the entrepreneur or to make a decision on behalf of the entrepreneur or
  - (b) a person who otherwise has had a special responsibility to inspect or control the business activities.

According to Section 8 of Chapter 36, the corporate fine shall consist of at least 5,000 SEK and at most 10 million SEK (approximately 550 EUR – 1.13 million EUR). Section 9 moreover provides that in determining the amount of the corporate fine, account shall be taken of the damage or danger which the crime has implied as well as the extent of the criminal activity and its relation to the business activity.

In practice, the Swedish Economic Crime Authority (*Ekobrottsmyndigheten*) demanded 189 million SEK (€ 20.8 million) in 2009 of corporate fines and forfeiture. The amount for the year 2010 was 89 million SEK (€ 9.8 million).<sup>96</sup> Most of those cases concern environmental crimes, work, safety offences, bookkeeping offences, tax fraud and bankruptcy crimes.<sup>97</sup> The usually imposed corporate fine is around 5,000-50,000 Swedish Crowns (€ 550-5,500).<sup>98</sup>

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<sup>95</sup> Nuutila, “Corporate Criminal Liability”, 4-22.

<sup>96</sup> Nuutila, “Corporate Criminal Liability”, 5.

<sup>97</sup> Nuutila, “Corporate Criminal Liability”, 5.

<sup>98</sup> Nuutila, “Corporate Criminal Liability”, 5.

## 8 General procedural provisions

Irrespective of the way in which a suspected environmental crime comes to the attention of a prosecutor, e.g. via a private party or via one of the administrative environmental agencies (see section 14 below), “it’s the prosecutor’s conclusive decision under the law to initiate an investigation and eventually bring the case to court.”<sup>99</sup>

Indeed, the public prosecutor may decide not to initiate a preliminary investigation or to discontinue it if he considers that there are insufficient grounds for its completion. After a preliminary investigation has been completed it is the prosecutor who decides on the question whether prosecution is indicated or not.<sup>100</sup> The public prosecutor must determine whether a crime has been committed and must also investigate whether there is sufficient evidence against the person involved, qualified as the suspect. If both of those questions are answered positively, in principle the prosecutor must institute prosecutions. In that sense in Sweden prosecution is in principle obligatory, unless otherwise prescribed.<sup>101</sup> In principle Sweden hence relies on a duty to prosecute and not on an opportunity principle. However, under specific conditions the prosecutor may decide not to prosecute. This is referred to as a waiver of prosecution. Such a waiver of prosecution is for example indicated on grounds of efficiency. It could for example be the case when a person has been sentenced already for a crime and new crimes are discovered which are of no major significance from a sanctioning perspective.<sup>102</sup> Another way of not-prosecuting is that the prosecutor may, in case of minor offences, order a summary punishment via a fine. If the suspect accepts the order the prosecutor does not have to take the case to court.

The numbers also indicate that, although on paper Sweden has a duty to prosecute, in practice – at least according to older sources - prosecution is often waived. A 2005 study mentions that on a yearly basis prosecutors examined approximately 270,000 cases. Of those cases 75,000 were prosecuted; 15,000 were granted a waiver of prosecution, among whom 8,000 were juvenile offenders. Orders of summary punishment by fine have been issued against more than 75,000 individuals. In approximately 100,000 cases the prosecutor decided not to prosecute for different reasons, principally because of insufficient evidence, but also because the act was not a crime or because the suspect was considered innocent.<sup>103</sup>

These numbers show that even though there is formally a duty to prosecute in Sweden, in practice approximately only 25 % of all cases are prosecuted before the court; the other cases are terminated in different ways. Obviously these numbers are general and do not apply for environmental crime only. It needs to be stressed also that the data originate from 2005.

More recent (but rough) estimates relating to *environmental* crime were provided to us in our interviews with Swedish experts and practitioners. According to a Senior Prosecutor at the National Environmental Crimes Unit, around 3000 cases of environmental crimes are reported each year (mostly by supervisory authorities, sometimes by police or private individuals); around 20% of these are eventually sanctioned. It was noted also that prosecutors do not have the possibility to forward the case back to the administrative system of the supervisory

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<sup>99</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 21.

<sup>100</sup> Ljung, “Sweden”, 156.

<sup>101</sup> Ljung, “Sweden”, 156.

<sup>102</sup> Ljung, “Sweden”, 156.

<sup>103</sup> Ljung, “Sweden”, 156.

authorities (to be discussed below, in Section 12); if these administrative agencies impose an injunction or prohibition, they should themselves take the necessary measures and enforce their decisions.<sup>104</sup>

In a report by Givati (2011), Sweden is classified among countries that do not have plea bargaining (or a similar procedure) or that may have plea bargaining but restricted only to minor crimes where a prison sentence may not be imposed. From this we may conclude that there is no plea bargaining in Sweden.<sup>105</sup>

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<sup>104</sup> Interview with Lars Magnusson, Senior Prosecutor at the National Environmental Crimes Unit, 26 May 2014. Empirical data on the number of environmental crimes reported, brought to trial, and sanctioned, are available at the level of the Prosecutor-General. We were not able to obtain these data. Other interviewees indicated that their estimates on number of cases brought to trial and convicted are too rough to be included in this report.

<sup>105</sup> Yehonatan Givati, “The Comparative Law and Economics of Plea Bargaining: Theory and Evidence”, Discussion Paper (Cambridge: Harvard University, 2011), 22.

## 9 Procedural provisions on environmental crimes

There are no special rules that apply in criminal proceedings in relation to environmental crime. General rules apply.<sup>106</sup>

In case of ship-source pollution, the competent district courts handle criminal cases. Again, ordinary rules of procedure apply.<sup>107</sup>

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<sup>106</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 42.

<sup>107</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 75.

## 10 Procedural provisions – actors and institutions mentioned in legal texts

Ljung (2005) notes that the public prosecutor is the link in an important chain of official bodies: public prosecutor, police, court of law and correctional service which together have the aim of protecting the community against crime.<sup>108</sup> In this section we will first address the role of the public prosecutor (12.1), followed by a brief discussion of the role of the police (12.2), courts (12.3) and inspection authorities (12.4), respectively. In addition, we provide some information on the role played by NGOs (12.5) and on cooperation with EU institutions and international organisations (12.6).

In each subsection, we will also provide an evaluation of the role played by the actors discussed, based on information we received in our interviews with Swedish experts and practitioners.<sup>109</sup> Best practices and recommendations are presented in the final subsection (12.7).

### 12.1 Public prosecutor

A central role is given to the public prosecutor who has the following main duties:

- to direct investigations of crime;
- to make decisions in prosecution issues;
- to prosecute in court.<sup>110</sup>

The highest public prosecution authority in Sweden is the Prosecutor-General. The Prosecutor-General has responsibility for the direction of the public prosecution system. He is also the public prosecutor in the Supreme Court and can be represented by one of the assistant-prosecutors to the prosecutor-general.<sup>111</sup> One task of the Prosecutor-General is to review decisions of subordinate prosecutors; he also gives advice to public prosecutors and directions concerning the exercise of their duties. In 1998 the office of the Prosecutor-General was assigned to draw up a general proposal for procedures for investigating all types of crime against the environment.<sup>112</sup> This report of the Prosecutor-General provided recommendations on the authorities to be responsible for investigation, coordination, capacity building and collaboration between inspection authorities and crime-investigation authorities.<sup>113</sup>

According to ENPRO (2012), “there are about 850 prosecutors in Sweden, stationed in 35 regional public prosecution offices.” In addition to these regional offices there are four specialized offices (or units) working nationally. “One of these – alongside units dealing with corruption, offences committed by the police and national security - is the *National Environmental Crimes Unit (REMA)*.”<sup>114</sup>

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<sup>108</sup> Ljung, “Sweden”, 157.

<sup>109</sup> For details on the interviews, see the Introduction to this report (Section 1).

<sup>110</sup> Ljung, “Sweden”, 155.

<sup>111</sup> Ljung, “Sweden”, 157.

<sup>112</sup> Ljung, “Sweden”, 158.

<sup>113</sup> Ljung, “Sweden”, 158.

<sup>114</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 12.

The ENPRO report from 2012 states that “REMA is a highly specialized office with 20 prosecutors and administrative personnel stationed in various parts of Sweden. The head office is located in Malmö in the south of Sweden. REMA, established in 2009, has emerged from the effort back in the year of 2000 to appoint specialized prosecutors for dealing with environmental crimes. In addition to environmental crimes the unit also responds to crimes against health and safety in working environment. Prosecutors of REMA as well as prosecutors in general lead investigations of crimes, decide on various coercive measures, institute proceedings and appear in court. The prosecutor steers the progress of the case, both during the investigative phase as well as during the court hearings.”<sup>115</sup>

REMA receives reports from the supervisory authorities and decides on initiating preliminary investigations. If an investigation is initiated, REMA drafts directives on interviewing people, producing evidence and taking samples/specimen. It is responsible for the entire investigation.<sup>116</sup>

From our interviews with Swedish experts and practitioners, it followed that the organization and concentration of the prosecutors’ offices, as well as the specialization of the prosecutors dealing with environmental crimes, are generally regarded as very positive characteristics of the enforcement of Swedish environmental law, inter alia because – as argued by the legal advisor at the Ministry of the Environment – “environmental crimes are often very complicated.”<sup>117</sup>

## 12.2 Police

Although prosecutors lead the investigations, they are carried out by the (regional or local) police or - in case of illegal discharge from ships at sea - by the Coast Guard. According to the ENPRO report, all police investigators in the field of environmental crime have a special education in environmental law and nature science.<sup>118</sup>

According to a report by the Swedish National Police Board, it cooperates closely with Swedish prosecution authorities in tackling environmental crime. A common strategy was developed, which aims to catch those who commit serious environmental crimes, to increase knowledge of environmental crime within the national judicial system, and to work more effectively against transnational environmental crime. A primary task of the police is to control and manage activities that pose risks to human health and the environment.<sup>119</sup>

However, this positive view of the role of the police in the enforcement of environmental criminal law was only partly confirmed in the interviews we conducted with Swedish experts and practitioners. It was noted repeatedly that, even though more and more police officers are trained to investigate environmental crimes, high officers are generally not interested in environmental crime. Unlike e.g. crimes related to murder or drugs, environmental crime is not “sexy” enough.<sup>120</sup> Moreover, most of the police officers dealing with environmental criminal investigations are working in divisions that do not primarily investigate environmental crimes. According to Senior Prosecutor Lars Magnusson, there are very few forensic experts at the police force engaged in environmental crime investigation. Many of them do not know how to take specimen in environmental crime cases.<sup>121</sup>

According to the Land and Environmental Court of Appeal Judge we interviewed, a study was made in 2006 pointing out weaknesses in the Swedish system, concerning local authorities, supervisory authorities and their

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<sup>115</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 12.

<sup>116</sup> Interview with Lars Magnusson, Senior Prosecutor at the National Environmental Crimes Unit, 26 May 2014.

<sup>117</sup> Interview with a legal adviser at the Ministry of the Environment, 12 June 2014.

<sup>118</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 16.

<sup>119</sup> Swedish National Police Board, *The Swedish Policy – An Introduction* (Stockholm, 2011), 53.

<sup>120</sup> Interview with Christer B. Jarlås, Senior Prosecutor at the National Environmental Crimes Unit, 3 June 2014; interview with Jan Darpö, Professor of Environmental Law, 22 May 2014.

<sup>121</sup> Interview with Lars Magnusson, Senior Prosecutor at the National Environmental Crimes Unit, 26 May 2014.

cooperation with the police. It is important to have sufficient resources on the local level. However, environmental crime is not highly prioritized: “Even though the prosecutor’s office is organized in special environmental crime sections it seems at police level e.g. training and status could improve.”<sup>122</sup>

On the positive side, there are some examples of ‘best practices’. An example is Gothenburg, where the police has a special ‘equipped van’ which allows the investigators to approach and interrogate witnesses and suspects at the site of the crime, creating a potential of storing samples.<sup>123</sup> Another example is the cooperation between some police units, prosecutors and supervisory authorities concerning inspections at harbours or roads to find illegal transports of waste. According to Andrea Hjärne Dalhammar, as of 2011 the police has been granted an extra 4.8 million SEK per year for improvement of the criminal enforcement of illegal waste transports. The enforcement takes place in cooperation with relevant authorities such as the County Administrative Boards and Customs.<sup>124</sup>

### 12.3 Environmental courts

Since the introduction of the Environmental Code, Sweden has had a special system of environmental courts. According to the original Section 20:1 of the Code<sup>125</sup>, there are five Environmental Courts (*Miljödomstolar*), now called ‘Land and Environmental Courts’ (*Mark- och miljödomstolarna*).<sup>126</sup> There is also a Land and Environmental Court of Appeal (*Mark- och miljööverdomstolen*). These are linked to the general court system (five regional courts and a Court of Appeal), which deal mostly with criminal law and private law cases. The Land and Environmental Courts “try administrative enforcement law cases like appeals of enforcement orders. They moreover act as permitting authorities. The permitting of larger installations under environmental law is therefore a court case, and decided through the court’s judgment.”<sup>127</sup> The regional environmental courts “have power to review and rule on both the legality and the merits of decisions made by regional boards and by local authorities.”<sup>128</sup>

It should be stressed here that the Land and Environmental Courts do not deal with environmental crime cases, but only with administrative cases related to supervision (prohibitions, orders, administrative sanction fees, etc). Environmental crime cases are tried at the ordinary district courts. The pros and cons of this have been much discussed in Sweden.<sup>129</sup>

Most experts and practitioners we interviewed<sup>130</sup> highlighted the fact that the Land and Environmental Courts do not deal with criminal matters, but only with administrative cases, related to supervision, administrative sanction fees, and so on. Ordinary district courts, which seemingly lack specific knowledge on environmental law, deal with cases involving environmental crime. Judge Bengtsson, however, notes that judges at the Land and Environmental courts come from various backgrounds: in the district of Växjö, half of the judges have their background in general courts and half in administrative courts, while in the other environmental courts most judges have their background in general courts.

Nevertheless, according to Prof. Darpö, “a reform is needed (e.g. merging criminal cases on environmental law into the system of the Land and Environmental Courts), also because the current situation leads to disparities in

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<sup>122</sup> Interview with a Land and Environmental Court of Appeal Judge, 26 May 2014.

<sup>123</sup> Interview with Lars Magnusson, Senior Prosecutor at the National Environmental Crimes Unit, 26 May 2014.

<sup>124</sup> Interview with Andrea Hjärne Dalhammar, legal consultant at a local inspectorate, 3 June 2014.

<sup>125</sup> Chapter 20 was repealed by Law 2010:923.

<sup>126</sup> See Law 2010:921 on the Land and Environment Courts and Chapter 16 of the amended Environmental Code. Chapter 21 of the amended Environmental Code describes the competences of the Land and Environmental Courts.

<sup>127</sup> Nilsson, *Environmental Responsibilities*, 138-139.

<sup>128</sup> Bjällås, “Experiences”, 180. It should furthermore be noted that appeal procedures are now arranged in Chapter 23 of the (amended) Environmental Code.

<sup>129</sup> Email from Anders Bengtsson, Senior Judge at the Land and Environmental Court of Växjö, 19 May 2014.

<sup>130</sup> For details on the interviews, see the Introduction to this report (Section 1).

case law between e.g. decisions taken by the Stockholm Court of Appeal and the other four courts on the appeal level.”

Judge Bengtsson explained in his email that the Land and Environmental Courts are civil/administrative courts, which are in principle district courts with a specific geographical and subject-matter jurisdiction, other than the general district courts. The argument against the Land and Environment courts trying criminal cases is that there is a risk of developing a certain practice regarding punishment that is not in compliance with the general practice of how other crimes are judged. Such a problem may, however, be resolved after appeal when the appeal court (and the Supreme Court) has a wider view and its decisions will set precedent for the lower courts in future cases. Another argument is the possibility of overlapping competencies of environmental courts, which might be biased in favour of their own decisions, e.g. when the crime is a result of failure to comply with a permit issued by the court.

The anonymous Land and Environmental Court of Appeal Judge made the following remarks on this issue: “Judges of district courts deal with environmental crime cases rarely and these cases are often technical and complicated. The Land and Environmental Courts do not deal with environmental crime cases even though the judges there have experience and knowledge of environmental law. However, accessibility may be an issue, as environmental courts are located only in a few places, compared to ordinary district courts.” She noted furthermore that the Land and Environmental Court of Appeal, also being part of Svea Court of Appeal<sup>131</sup>, deals with the environmental crime cases that appear in the court.

Furthermore, Judge Bengtsson added that the education for judges is provided by the Courts Academy, where he himself offered a session on environmental crimes some years ago. However, judges are rather reluctant to spend their time on education in substantial law for types of cases they may deal with once a year or even once in two years, such as environmental crime cases. Regarding the accessibility, judges of the Land and Environmental courts often have their hearings near the site or have a view at the site. Travelling is part of their work and they are thus becoming “flying judges”.

Senior Prosecutor Magnusson argued that (rather than merging criminal cases into the system of the environmental courts or making better use of the expertise of these courts) “local criminal courts should have more training in environmental criminal law. Environmental courts don’t know much about criminal procedure and evaluating evidences in criminal cases. But that might probably only be a temporary problem.”

#### *12.4 Inspection authorities*

An important role in crime investigation is equally played by inspection authorities (to be discussed in section 14 below). Around 80% of all environmental crime cases reported to prosecutors are notified by these supervisory agencies.<sup>132</sup> However, it is important to stress that the central role in the enforcement of environmental crime still lies with the public prosecutor. Furthermore, it should be noted that the obligation to report crimes to the prosecutor or police, does not lessen the obligation of supervisory authorities to enforce environmental law by means of injunctions, prohibitions and administrative fines.<sup>133</sup>

Supervisory agencies in Sweden do not actively monitor *ex ante*. A special characteristic of the Swedish system – in contrast to many other countries – is the self-responsibility of operators to report.<sup>134</sup> Andrea Hjärne Dalhammar, legal consultant at a local inspectorate, has highlighted one particular problem in that respect.

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<sup>131</sup> The Svea Court of Appeal, which is located in Stockholm, is one of the appellate courts in Sweden.

<sup>132</sup> Interview with a Senior Prosecutor at the National Environmental Crimes Unit, 26 May 2014. The remaining 20% is notified by police and private individuals. It should be stressed that these are estimates rather than hard data.

<sup>133</sup> Interview with Andrea Hjärne Dalhammar, legal consultant at a local inspectorate, 3 June 2014.

<sup>134</sup> Interview with Jan Darpö, Professor of Environmental Law, 22 May 2014. See also Nilsson, *Environmental Responsibilities*.

Namely, that “the enforcement authorities are more and more supervising the monitoring system rather than the industry itself. The industry takes its own samples and does its own tests, and reports the results to the authorities, who then check these but do not take any sample themselves to control the results. Swedish environmental supervision is based on the image of honest industries, and therefore the supervision is becoming more administrative. Intentional crimes are easily hidden under the papers.”<sup>135</sup>

### 12.5 NGOs

Before 2013, the only legal redress in environmental matters for NGOs was by means of filing a complaint with the European Commission, which has the power to sue Member States directly in the Court of Justice of the European Union (CJEU). Since last year, however, NGOs may argue their case in Sweden’s administrative courts.<sup>136</sup> In addition, NGOs have the right to appeal decisions taken under the Code, pursuant to Chapter 16, Sections 13 and 14.

Currently, NGOs have also a priority access to Land and Environmental Courts in Sweden. Chapter 16, section 13 of the Environmental Code sets the requirements an NGO has to meet in order to qualify:

- it must be a non-profit organization and have as its purpose promotion of nature conservation or environmental protection;
- it must have 100 members or else show that it has public support;
- it must have existed in Sweden for at least three years.

The criteria for qualification of NGOs to have access to national courts in environmental matters, as required by the Aarhus Convention, have been relaxed following the decision in the case *Djurgården*.<sup>137</sup> Before the decision by the CJEU, NGOs were required to have at least 2000 members, which was a criterion many of them were unable to meet.<sup>138</sup>

### 12.6 Cooperation with EU and international organisations

The police, customs, prosecution and external border control of all EU Member States collaborate in the area of “justice and home affairs”. The Swedish National Police Board actively participates in working against transnational crime together with the competent authorities of other EU Member States.<sup>139</sup>

The Schengen countries also cooperate in order to combat transnational crime, using the joint information system SIS. The Swedish Police, the Customs and the Coast Guard use this system with the aim to conduct international searches and police enquiries.<sup>140</sup>

Europol, as the law enforcement agency of the EU, helps Sweden and other Member States to achieve closer and more effective cooperation in preventing and combating organised international crime.<sup>141</sup>

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<sup>135</sup> Interview with Andrea Hjärne Dalhammar, legal consultant at a local inspectorate, 3 June 2014.

<sup>136</sup> Yaffa Epstein and Jan Darpö, “The Wild Has No Words: Environmental NGOs Empowered to Speak for Protected Species as Swedish Courts Apply EU and International Environmental Law”, *Journal for European Environmental & Planning Law* 10.3 (2013), 252.

<sup>137</sup> Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* Case [2009] ECR I-09967, 62008CJ0263.

<sup>138</sup> See also Michael Faure and Niels Philipsen (eds), *Access to Justice in Environmental Matters* (The Hague: Eleven International Publishing, 2014).

<sup>139</sup> Swedish National Police Board, *The Swedish Police*, 55.

<sup>140</sup> Swedish National Police Board, *The Swedish Police*, 56.

<sup>141</sup> Swedish National Police Board, *The Swedish Police*, 57.

Sweden has been a member of Interpol since 7 September 1923, which enables the Swedish police and prosecution authorities to submit requests to another country for questioning, search warrants or identifying suspects. The unit for international police cooperation at the National Bureau of Investigation in Sweden serves as the point of contact.<sup>142</sup>

According to prosecutor Jarlås, Sweden cooperates within Eurojust and Europol and is using them more and more. Sweden also takes part in various other forms of cooperation at the international and EU level - including the European Network of Prosecutors for the Environment, the prosecutors' project IMPEL on transportation of waste, and the EU level cooperation concerning endangered species<sup>143</sup> - and is part of all important bilateral and multilateral agreements. However, Jarlås notes that "nowadays many transnational crimes, e.g. in waste, are committed because some EU Member States do not care about the EU rules."<sup>144</sup>

### *12.7 Evaluation by Swedish experts and practitioners*

This subsection summarizes, in bullet point form, the specific 'best practices' and 'recommendations' in relation to the enforcement of Swedish environmental (criminal) law, as mentioned by the Swedish experts and practitioners we interviewed.

#### 12.7.1 Best practices

- Several interviewees (Prof. Jan Darpö, Senior Prosecutor Magnusson, a legal adviser at the Ministry, legal consultant Dalhammar) referred to the organization, specialization and concentration of prosecutors as a best practice.
- Some successful examples of cooperation between supervisory authorities and police/prosecutors in two or three regions were highlighted (Prof. Jan Darpö, Senior Prosecutor Magnusson, legal consultant Dalhammar), although it was added that in the majority of regions this cooperation is not optimal.
- The fact that the new guidelines on corporate fees for public prosecutors are referred to even by the highest courts in Sweden, is considered by Senior Prosecutor Jarlås as a best practice.<sup>145</sup>

#### 12.7.2 Recommendations

The following recommendations were mentioned by all or some of the interviewees:

- The police ought to prioritize environmental crime investigations (Senior Prosecutor Magnusson, Prof. Darpö, Land and Environmental Court of Appeal Judge).
- The cooperation between police and prosecutors should be formalized (Prof. Darpö) / improved (Senior Prosecutor Magnusson).<sup>146</sup>
- The cooperation between police and enforcement authorities should be formalized (Darpö) / improved (Land and Environmental Court of Appeal Judge).
- Similarly, the legal adviser at the Ministry of the Environment argued that improving inspection regimes and cooperation between authorities involved in fighting environmental crimes is a necessary

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<sup>142</sup> Swedish National Police Board, *The Swedish Police*, 57-58.

<sup>143</sup> Interview with Lars Magnusson, Senior Prosecutor at the National Environmental Crimes Unit, 26 May 2014.

<sup>144</sup> Interview with Christer B. Jarlås, Senior Prosecutor at the National Environmental Crimes Unit, 3 June 2014.

<sup>145</sup> Legal consultant Dalhammar noted furthermore that the forest authorities and the County Boards have developed good cooperation between the local police and local supervising authorities to search for and discover crimes against the Swedish Forestry Act – although she does not have first-hand experience.

<sup>146</sup> Note again that there are also some examples of good cooperation between police and prosecution, mentioned above. With regard to formalized forms of cooperation between police and prosecutors/enforcement authorities, Prof. Jan Darpö mentioned that Norway might provide an example.

element of effective enforcement. For example, the Swedish government is currently aiming at strengthening the enforcement of wildlife crimes.

Other specific recommendations include:

- According to Prof. Darpö, environmental crimes should be dealt with by environmental courts, which are specialized in environmental matters, rather than by general district courts. In the words of the Land and Environmental Court of Appeal Judge, these Land and Environmental Courts “do not deal with environmental crime cases even though the judges there have experience and knowledge of environmental law.” However, she adds that e.g. accessibility may be an issue, as environmental courts are located only in a few places, compared to ordinary district courts. Senior Prosecutor Magnusson mentioned as an explanation for the fact that general district courts (rather than the specialized administrative courts) deal with environmental crime cases that the administrative courts lack the expertise to deal with criminal cases. We can conclude that this is a heavily debated issue in Sweden, also in the literature.
- According to Senior Prosecutor Magnusson, each police unit that deals with environmental criminal investigations should be organized similarly to the National Environmental Crimes Unit (REMA). Currently, most of the investigators are working in divisions that primarily do not investigate environmental crimes. Similarly, the Land and Environmental Court of Appeal Judge argued that the internal organization of the police in dealing with environmental crimes is relevant in order to strengthen enforcement of environmental criminal law.
- According to Senior Prosecutor Magnusson, every forensic expert should have training on how to take sample in environmental criminal cases.
- According to Senior Prosecutor Jarlås, better rules within the EU are needed. EU Member States “should work shoulder to shoulder so that’s all crimes are punished. Now a lot of transnational crimes, e.g. in waste, are committed because some Member States don’t care about the EU-rules”.
- According to legal consultant at a local inspectorate Dalhammar, there is need for alternative ways of funding the inspection agencies, other than (predominantly) by means of fees collected from the industries that are inspected.

# 11 Administrative environmental offences: instruments

In Sweden, the system of administrative fines, called environmental sanction charges (*miljösanktionsavgifter*), “is regarded as a complement to the [criminal] law and is the only regressive consequence to several infringements, and is considered to be less serious and at the same time doesn’t need a criminal court procedure to be established.”<sup>147</sup> Swedish experts and practitioners that we interviewed noted that these administrative fines are indeed useful, but really deal with smaller breaches of law.

## 13.1 History

The old Environmental Protection Act of 1969 already provided for the imposition of administrative fines.<sup>148</sup> Since a reform in 1981 an environmental charge could be imposed according to this Environmental Protection Act if certain rules were violated.<sup>149</sup> Until 1987 it was in addition required that the violation had to cause a considerable impact on the environment or the risk of such an impact. This criterion was later abandoned because the difficulties of proving this impact were too large. The level of the environmental protection charge could take into account the sum that had been saved or gained through the violation. It therefore resembled the confiscation of illegal gains. The charge could moreover be imposed as soon as the objective conditions for criminal liability had been established. Hence, even if the offender had no *mens rea* the charge could be imposed.<sup>150</sup> The charge therefore differed from a criminal sanction since it merely required the objective conditions for criminal liability to be fulfilled.<sup>151</sup>

## 13.2 Administrative sanctions in the Environmental Code

Currently, Chapter 30 of the Environmental Code includes legal provisions on the environmental sanction charges. Section 1 of the official translated version (i.e. updated until 1 August 2000) reads as follows:

“A special charge (*environmental sanction charge*) shall be paid by any economic operator who in his business activities:

1. neglects to comply with rules issued pursuant to this Code;
2. commences an activity for which a permit must be obtained or notification submitted pursuant to this Code or to rules issued in pursuance thereof although a permit has not been granted or notification submitted; or
3. neglects to comply with the terms of a permit or conditions laid down pursuant to this Code or to rules issued in pursuance thereof.

However, this shall only apply to infringements for which the Government has imposed an environmental sanction charge pursuant to section 2. An environmental sanction charge shall also be payable where

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<sup>147</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 24.

<sup>148</sup> Faure and Heine, “Environmental Criminal Law”, 308.

<sup>149</sup> For details see K. Cornils, “Schweden”, in *Umweltstrafrecht in den Nordischen Ländern*, ed. K. Cornils and G. Heine (Freiburg im Breisgau: Max Planck Institute for Foreign and International Criminal Law, 1994), 513-514. And see Ch. Steen-Sundberg, “‘Suède’, Crimes against the Environment in Sweden”, *International Review of Penal Law* (1994): 1165.

<sup>150</sup> See Steen-Sundberg, “‘Suède’”, 1182 and Westerlund, “Public Environmental Law”, 390.

<sup>151</sup> Faure and Heine, “Environmental Criminal Law”, 310.

*the infringement did not occur deliberately or through negligence. However, the charge shall not be payable where this is manifestly unreasonable. Environmental sanction charges shall accrue to the state.”*

Section 30:2 of the official translated version (i.e. updated until 1 August 2000) provides some details on the amount of the charges<sup>152</sup>.

*“The Government shall issue rules concerning infringements for which environmental sanction charges are payable and the amounts to be paid for various infringements. The amounts shall be determined in relation to the seriousness of the infringement and the importance of the provision to which the infringement relates. The minimum environmental sanction charge shall be SEK 5,000 and the maximum charge shall be SEK 1,000,000.”*

Section 3 adds that supervisory authorities shall decide matters relating to environmental sanction charges. The person who is liable for payment of the charge will be provided with an opportunity to make a statement before the environmental sanction charge is imposed by the supervisory authority.

Over the last decade, both the structure and content of Section 30 have been amended by Law 2006: 1014 and Law 2011:322. The latter *inter alia* changed the range of the fee to SEK 1,000 – SEK 1,000,000 (approximately EUR 113 – EUR 113,000). With regard to the former, ENPRO (2012) notes that the aim of the 2007 revision was to avoid double sanctioning and to reserve the criminal law system for more serious offences. “Minor infringements now fall outside the criminal law system and are instead subject to administrative fees.”<sup>153</sup>

In the amended Section 30:1, paragraph 3 now makes an explicit reference to non-compliance with EU regulations in the scope of the Environmental Code. The part on an infringement that “did not occur deliberately or through negligence” and on unreasonable charges were shifted to Section 30:2, whereas the part on seriousness of the crime and the amount of the charge is now included in Section 30:1.

As a result, the amended Section 30:2 now states four criteria of ‘unreasonable charging’, namely in case of mental illness of the person to be held liable; if the circumstances could not have been anticipated; if the person to be held liable has taken steps to prevent a breach from occurrence; or if the penalty for breach was determined under Chapter 29.<sup>154</sup>

Section 30:3 remained unchanged.

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<sup>152</sup> In addition, see the Ordinance on Environmental Sanction Charges (*Förordning 1998:950 om miljösanktionsavgifter*).

<sup>153</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 41-42.

<sup>154</sup> Chapter 29 of the Environmental Code is discussed more extensively in Section 5 of this report.

## 12 The role of administrative authorities

In Sweden there are various administrative environmental agencies at the central, regional and local level. According to ENPRO (2012), these agencies “have a supervisory function over factories, companies and other activities that could affect the environment and nature”. These authorities are often the first to detect a violation of environmental law. In that case, “they are obliged by law to report the suspected crime to the prosecution or the police”.<sup>155</sup> As was indicated in section 10 above, only the prosecutor decides whether to initiate an investigation and eventually bring the case to court. Administrative authorities take no formal part in the investigation or the trial, but its officers might appear in the process as witnesses and/or experts.<sup>156</sup>

### 14.1 An overview of the relevant actors

Chapter 26 of the Swedish Environmental Code lists the supervisory authorities, as being:

- The Swedish Environmental Protection Agency (SEPA, *Naturvårdsverket*)
- Marine and water authorities (*Havs- och vattenmyndigheten*)
- The Surgeon-General of the Swedish Armed Forces (*generalläkaren*)
- County Administrative Boards (*länsstyrelsen*)<sup>157</sup>
- Other government agencies and municipalities (supervisory authorities) in accordance with the Government’s instructions.<sup>158</sup>

While the SEPA has the overall responsibility for supervising environmental regulations - and is involved also in matters of transnational waste exports, reporting infringements of EU regulation on waste transportation - the operative responsibility is delegated to the above-mentioned counties and municipalities. Each of them obtains a certain number of firms to supervise.<sup>159</sup> According to the Environmental Code, the County Boards are responsible for cooperation at the regional level between supervisory authorities, police forces and the prosecution.

According to Section 26:2 of the Swedish Environmental Code, the inspection authorities are obliged to report suspected violations to the police or to the public prosecutor.<sup>160</sup> This provision holds that the supervisory authority shall report infringements of the provisions of this code or rules issued in pursuance thereof to the police or public prosecution authorities where there are grounds for suspicion that an offence has been committed. In this respect it is interesting to note, however, that municipal and county inspectors in Sweden have declared

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<sup>155</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 21. The legal basis is Section 26:2 of the Environmental Code, to be discussed below. Some cases are reported by private persons.

<sup>156</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 21.

<sup>157</sup> These County Administrative Boards, which are regional authorities under the Government (and thus state authorities), not only have responsibilities in the field of environmental matters, but also within e.g. health care and infrastructure. See Nilsson, *Environmental Responsibilities*, 137.

<sup>158</sup> Section 26:3 of the Environmental Code, last amended by Act 2011:608. According to Judge Bengtsson (email 10 July 2014), responsibilities of the authorities are more closely described in the Governmental Ordinance 2011:13 on environmental supervision. Municipality authorities are given a mandatory responsibility directly by the Environmental Code regarding *inter alia* environmental harmful operations which do not require a permit. This may be confusing in practice, so Bengtsson argues, e.g. when the Land and Environmental Court of Appeal, for practical reasons and to avoid parallel responsibilities, has interpreted the ordinance to take over what is decided by law.

<sup>159</sup> Ing-Marie Gren and Chuan-Zhong Li, “Enforcement of Environmental Regulations: Inspection Costs in Sweden”, *Environmental Economics* 2 (2011): 51. For that purpose, firms are classified into four categories, each with a different ‘environmental seriousness’. The SEPA recommends on the priority of inspections among these four categories.

<sup>160</sup> Ljung, “Sweden”, 158.

that they are exposed to pressure by their municipality to *not* report suspected environmental crimes, because the municipality seeks to preserve employment and entrepreneurship in the community.<sup>161</sup>

As explained in previous sections, the administrative authorities handle a system of administrative fees (administrative sanction charges) that apply to less serious infringements of the environmental law.

In cases of water pollution, the Swedish Coast Guard is competent to charge ‘water pollution fees’, “if the prohibition to discharge oil from ships has been infringed and the discharge is not insignificant” or if an accidental discharge has not been limited as far as possible.<sup>162</sup> Such a decision may be appealed to a district court.

Nilsson (2011) notes that there are still many different bodies with administrative enforcement competences, which “sometimes [...] overlap, and the same activity can be under the supervision and control of several different authorities. This is a reminiscence of the patchwork environmental regulatory system [of the past]”.<sup>163</sup> In addition to SEPA and the County Administrative Boards referred to above, the author mentions specialised sector agencies such as the Swedish Chemicals Agency (*Kemikalieinspektionen*) and the National Board for Health and Welfare (*Socialstyrelsen*).

As was indicated in section 10 above, in 1998 the office of the prosecutor-general in Sweden drafted a report on the prosecution of environmental crime. The report at that time showed that the number of reported environmental crimes in Sweden was low: approximately 350 per year. The report pointed at the necessity of an improved collaboration between inspection authorities and crime investigation authorities in order to increase the number of observed violations.<sup>164</sup> The problem that was especially mentioned in the report was that investigation authorities and inspection authorities did not speak the same language, as a result of which the cooperation was bad and many misunderstandings occurred.<sup>165</sup> Therefore the report called for a closer collaboration between the various authorities, also at the operational level, including joint training sessions.<sup>166</sup>

With the Environmental Code from 1999, also a new system of investigation and prosecution was introduced (in the year 2000).<sup>167</sup> Ljung (2005) holds that the amount of reported cases has largely increased since then. For example, in 2002 more than 3,000 cases were reported to the prosecutor’s office.<sup>168</sup> Nevertheless, various experts and practitioners we interviewed noted that there is still a need for further (formalized) cooperation between the different actors involved in the enforcement of environmental criminal law, notably between the police and prosecutors and between police and enforcement agencies.<sup>169</sup>

#### 14.2 Evaluation by Swedish experts and practitioners

Prof. Darpö refers to SEPA as a “nice father giving advice”, without any real assignment on the ground. SEPA does bring cases of its own, although these are not criminal cases. Its main tasks are supervision and education. Senior Prosecutor Magnusson added that SEPA is involved mostly in work on transnational wastes exports and reports infringements of EU regulation on transportation of waste.

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<sup>161</sup> Vania Ceccato and Adriaan Uittenbogaard, “Environmental and Wildlife Crime in Sweden”, *International Journal of Rural Criminology* 2 (2013): 28.

<sup>162</sup> ENPRO, *Manual on Prosecuting Environmental Crime*, 88. The fee is charged irrespective of a criminal punishment, not to replace it.

<sup>163</sup> Nilsson, *Environmental Responsibilities*, 137.

<sup>164</sup> Ljung, “Sweden”, 158.

<sup>165</sup> Ljung, “Sweden”, 159.

<sup>166</sup> Ljung, “Sweden”, 159.

<sup>167</sup> Fröhlich, *Organised Environmental Crime*, 129-130.

<sup>168</sup> Ljung, “Sweden”, 158.

<sup>169</sup> Interview with Jan Darpö, Professor of Environmental Law, 22 May 2014.

Legal consultant Dalhammar confirmed that supervisory authorities (like the local inspectorate where she is now working) have an obligation to report environmental crimes to the prosecutor or police, and “doing so does not lessen their obligation to act through supervision with injunctions, prohibitions, etc.” According to the Land and Environmental Judge, “experience from the supervisory environment authorities shows that since there are not enough resources to be very proactive, enforcement mostly takes place on an ex-post basis. There is however pro-active monitoring, consisting of environmental reporting. The authorities in Sweden have an obligation to supervise activities that may have an impact on the environment, including an obligation to notify the police/prosecutor’s office if a crime can be suspected. The supervisory authorities have a number of options – they can issue injunctions and prohibitions, and make them subject to penalty of an administrative fine. “In sections 12 and 14 above we already presented legal consultant Dalhammar’s concern about this system of self-reporting: “Swedish environmental supervision is based on the image of honest industries, and therefore the supervision is becoming more administrative. Intentional crimes are easily hidden under the papers. Also, local environmental inspectors find it hard to know what to do when an operator does not act according to the law and the injunctions. They need more education on difficult situations and how to act practically in such situations.”

As mentioned above, Senior Prosecutor Magnusson argued that the supervisory authorities have problems deciding what constitutes an environmental crime and they find it rather tricky to write a report. “Their interest is merely to solve a problem and to stop an improper behaviour. If a perpetrator is acquitted in an environmental crime case, the environmental inspectors wonder if there was something wrong with their report. [...] At local level, many smaller municipalities do not have sufficient resources to deal with environmental crimes in an adequate manner. To a certain extent and especially in the early years of the Environmental Code, this has led to an abundance of notifications to the police about petty offences.”

With regard to the role of the County Administrative Boards, Magnusson explained that, according to the Environmental Code, they are responsible for cooperation between supervisory authorities, police forces and the prosecution. Cooperation groups for different purposes are divided in regions. These groups meet several times a year and exchange information on cases, taking samples etc. County Boards are also responsible for local authorities. According to Prof. Darpö, “critics have argued that the County Boards are under-financed and therefore cannot function efficiently. An additional problem regarding both the municipalities and the county boards is that they may be open to political influences in the decision making. “

# 13 Implementation of Environmental liability

## Directive and links between environmental liability and responsibility for environmental crimes

### 15. 1 Implementation of the Environmental Liability Directive

Sweden has transposed Directive 2004/35/EC of 21 April 2004 on environmental liability and subsequent modifications (the Environmental Liability Directive, ELD) on 1 August 2007 by:<sup>170</sup>

- amending the Environmental Code by Amendment of the Environmental Code Act (*Lag om ändring av miljöbalken*) of 20 June 2007 (SFS 2007/660); and
- adopting the Ordinance on serious environmental damage (2007/667).

The Swedish Environmental Code implemented the ELD by amending its Chapter 10. In that Chapter, liability for biodiversity damage and extended liability for water damage were introduced. Other changes were made to Chapters 2, 9, 16 and 26.

The transposing legislation introduced an obligation to prevent or remediate damage or detriment to human health or the environment. It has a retrospective effect and thus any person who carried out operations, leading to environmental pollution, after 30 June 1969 may be held liable.

The following changes were introduced:

- the permit defence and the state-of-the-art-defence as factors mitigating liability (applicable only to serious environmental damage);
- liability for biodiversity damage (extended to nationally protected biodiversity);
- liability for complementary and compensatory remediation to water damage;
- liability for primary, complementary and compensatory remediation to biodiversity damage.

The Code lists fewer non-applicability exceptions than the Directive, omitting the exception for pollution covered by nuclear conventions; exception for activities for the purpose of serving in national defence or international security; and the diffuse pollution exception.

Certain provisions of the Swedish transposing legislation impose an even more stringent regime than the Directive. The definition of an ‘operator’ is broader and includes also owners or occupiers of a property; liability can be assigned to owners or occupiers of the damaged land; and strict liability applies also in case of negligence. Other obligations imposed by the Directive were already contained in the pre-existing legislation.

Ordinance 2007/667 requires the Swedish Protection Agency to submit a report on Sweden to the European Commission, as stipulated in the Directive. Law 2007:660 provides for a 30-year limitation period for the legislation transposing the Directive.

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<sup>170</sup> The information below is based on a report by BIO Intelligence Service in collaboration with Stevens & Bolton LLP. See BIO Intelligence Service, *Implementation Challenges and Obstacles of the Environmental Liability Directive, Annex - Part A: Legal Analysis of the National Transposing Legislation*, prepared for European Commission – DG Environment (16 May 2013), 335 – 356.

According to various Swedish practitioners and experts we interviewed, the ELD has not had any effect on Swedish environmental law in relation to crimes.<sup>171</sup> Most provisions on environmental liability were already in place in the Environmental Code.<sup>172</sup> According to a Land and Environmental Court of Appeal Judge, some changes may have been made, but environmental liability was mostly covered by sanctions which were already in place, such as the environmental offence of pollution and waste storage and the offence of obstruction of environmental control. Also, the obligation to report and notify the authorities was already criminalized.<sup>173</sup>

The ELD was added as an extra layer into the existing liability regime in Chapter 10 of the Environmental Code, which creates serious delineation problems. According to Prof. Jan Darpö, there were only very few ELD incidents mentioned in the recent report from the SEPA to the Commission about the existence of ELD incidents in Sweden.<sup>174</sup>

### *15.2 Links between the Environmental Liability Directive and national environmental crime provisions*

Chapter 10 of the Environmental Code implementing the Directive deals with activities that cause environmental damage. There are two main differences between the provisions of the ELD and the provisions of the Environmental Code. Firstly, Section 10:1 of the Swedish Environmental Code refers to ‘serious’ environmental damage and prescribes actions, while Article 2(1) ELD merely defines the scope of ‘environmental damage’. Thus, the threshold of the Directive for environmental damage is set lower and protection under Article 2(1) is stricter.

Secondly, an obligation to inform the regulator about “the discovery of a contaminant on the property [that] can cause damage or detriment to human health or the environment” is contained in Section 10:11 of the Code. Article 5(1) of the ELD, however, contains an obligation to take the necessary preventive measures where “there is an imminent threat of [a] damage occurring”. The ELD clearly imposes the obligation on the operator to take preventive action even before it is requested by the competent authority. Such requirement seems to be missing in the Swedish Environmental Code.

Moreover, it is interesting to note that under the national law of Sweden, failure of the owner or occupier of a property to immediately notify the competent authority if “any pollution is discovered on the property that may cause damage or detriment to human health or the environment” is a criminal offence. However, unlike under the ELD, according to the national environmental crime provisions, non-compliance with a preventive or remediation order results in the imposition of administrative sanctions and does not constitute a criminal offence.<sup>175</sup>

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<sup>171</sup> Interview with Andrea Hjärne Dalhammar, legal consultant at a local inspectorate, 3 June 2014.

<sup>172</sup> Interview with Lars Magnusson, Senior Prosecutor at the National Environmental Crimes Unit, 26 May 2014; interview with a legal advisor at the Ministry of the Environment, 12 June 2014.

<sup>173</sup> Interview with a Land and Environmental Court of Appeal Judge, 26 May 2014.

<sup>174</sup> Interview with Jan Darpö, Professor of Environmental Law, 22 May 2014.

<sup>175</sup> BIO Intelligence Service, *Implementation Challenges*, 335 – 356.

## 14 Summary

The Swedish Environmental Code (*Miljöbalk*, Law 1998:808) entered into force in 1999 and has been amended many times since, also as a reaction to the EU Directives on environmental crime. Provisions related to ‘environmental offences’ and the related (criminal) sanctions can be found in Chapter 29 of the Environmental Code, discussed in Section 5 of this report. The stipulated penalty for an ‘environmental offence’ is a fine or a term of imprisonment not exceeding two years. However, if the offence is serious, the penalty will be a term of imprisonment of between six months and six years. When considering the seriousness of the offence, special attention is paid to whether an offence caused, or might have caused, lasting damage on a large scale or whether the act was otherwise of a particularly dangerous nature.

There is also a system of administrative fines, called ‘administrative sanction charges’, which is regulated in Chapter 30 of the Code, and which is discussed in more detail in Section 13 of this report. The Swedish legislator attempts to avoid double sanctioning, by reserving the criminal law system for more serious offences, whereas minor infringements are subject only to administrative fees.

The overall purpose of the Environmental Code, as defined in its first Chapter, is to promote sustainable development, which will assure a healthy and sound environment for present and future generations. There is, however, no explicit definition of ‘environment’ or ‘environmental harm’. Instead, the various environmental offences are listed in Chapter 29, as just mentioned. Chapter 2 of the Environmental Code contains a number of general rules of consideration. The role of the Swedish Penal Code (*Brottsbalk*, Law 1962:700) in relation to specific environmental crimes is rather limited. However, important criminal law principles of course apply, and we discussed those, as well as sanctions laid down in the Penal Code, in Section 4 of this report. General procedural provisions were analysed in Section 10.

In Sweden, only the public prosecutor decides whether to initiate an investigation and eventually bring the case to court. The role of the public prosecutor, the police, and the courts (Land and Environmental Courts and Land and Environmental Court of Appeal) is discussed in Chapter 12 of this report. Administrative authorities take no formal part in the investigation or the trial, but play an important role in the inspection and reporting of suspected violations of the provisions of the Environmental Code and related rules to the police and prosecutor, as was discussed in Section 14. The Swedish Environmental Protection Agency has the overall responsibility for supervising environmental regulations.

An issue of debate in Sweden is the distribution of tasks between the Land and Environmental Courts (administrative courts) and the general district courts. Some argue that environmental crimes should be dealt with by environmental courts, because they are much more specialized in environmental matters. However, accessibility may be an issue, as environmental courts are located only in a few places, compared to ordinary district courts which are located throughout Sweden. Some argue that the current situation, where general district courts deal with environmental crimes rather than the specialized administrative courts, is acceptable, because administrative courts lack the expertise to deal with criminal cases.

The Environmental Code was amended in 2007. Various interviewees have mentioned this amendment as a best practice. Before this amendment, it was practically impossible to invoke Section 29:1 of the Environmental Code, due to a too high burden of proof. Since the amendment, it has been easier for prosecutors and the police

to convict perpetrators: the current construction of Section 29:1 captures the *risk* involved in discharge of an environmentally harmful substance rather than the *effect* of such discharge.

The Swedish experts and practitioners we interviewed are generally positive about Swedish environmental law *on paper*. Indeed, the EU Directives on environmental crime (and the Environmental Liability Directive) had only a very limited impact on Swedish law, as most provisions were already included in Swedish law. With regard to the question whether the sanctions imposed in practice are dissuasive, however, most interviewees stated that the sanctions for environmental crimes are not very serious when compared to sanctions for other types of crimes. This is especially so when the sanctions imposed *in practice* are considered. Mostly corporate fines have been imposed; and although the amount of these fines has increased in recent years, the question remains whether on average these fines are high enough to deter environmental offenses. Prison sentences have been reserved for exceptional cases only, almost exclusively involving individuals rather than businesses.

As argued in Section 7, in order to fight *organized* environmental crime, actors have to rely on general provisions contained in the Penal Code and the Code of Judicial Procedure. The Code of Judicial Procedure in cases of serious crimes sets a minimum of 2 years of imprisonment as a requirement for using telephone tapping so environmental crimes are covered by this. Various interviewees stated that in severe cases of poaching and wildlife trade crimes, telephone tapping and other means are now more and more applied. An explanation may be the fact that these types of crimes are now rather concentrated to particular prosecutors' offices, who are specialized in dealing with these crimes. However, organized crime is not easily discovered since police and prosecution are not allowed e.g. to search premises solely on the basis of anonymous tips. There needs to be a reasonable suspicion. And although environmental inspectors are even obliged to investigate and act on anonymous tips, they lack sufficient funding.

In Sections 5 and 12 we presented some specific 'best practices' and 'recommendations' regarding Swedish environmental law and its enforcement, based on the input we received from Swedish experts and practitioners. Here we summarize the main points (for details, see Sections 5 and 12):

#### Best practices:

- The legislative changes from 2007 in the Environmental Code (mentioned above and described extensively in Section 5 above), particularly the amendment of Section 29:1, Before this amendment, it was practically impossible to invoke Section 29:1 of the Environmental Code, due to a "too high burden of proof". It is now much easier for prosecutors and the police to convict the perpetrators.
- The organization, specialization and concentration of prosecutors; and more particularly REMA.
- Some successful examples of cooperation between supervisory authorities and police/prosecutors in two or three regions (although most interviewees stressed that in the majority of regions this cooperation is not optimal).
- The guidelines on corporate fees formulated by public prosecutors, which have been referred to even by the highest courts in Sweden.
- The participation of Sweden in all relevant international forms of cooperation in the fight against environmental crime.

#### Recommendations

- Prioritizing investigations into environmental crime (police)
- Improving and/or formalizing the cooperation between police and prosecutors
- Improving and/or formalizing the cooperation between police and enforcement authorities

- Improving inspection regimes, which are largely based on ex post control rather than ex ante monitoring; in that respect, there is a need for alternative ways of funding inspection agencies, i.e. other than by means of fees collected from the industries that are inspected
- Either environmental courts should deal with environmental crimes rather than general district courts (but then judges need to be trained more in criminal matters), or judges at general district courts should be (even) better trained in environmental matters
- Training forensic experts on how to take sample in environmental criminal cases

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