AVOSETTA MEETING, STOCKHOLM, 2-3 OCTOBER 2009

Danish Report: Enforcement of Environmental Law

Q.1. Most important tools for the enforcement of environmental law and the relative "weight" of private law, administrative law and criminal law for the enforcement.

Enforcement of Environmental Law in Denmark is generally based on the principle that the competent authority of the matter has the obligation to ensure that unlawful situation is legalized either by physical measures remedying the unlawful situation or by legalizing the unlawful situation by granting a permit. In this respect the enforcement is based on two pillars: (1) criminal prosecution and (2) administrative enforcement by administrative measures.

Criminal prosecution is decided by the prosecutor under the Minister of Justice – mainly based on request from the competent authority. Criminal prosecution is not the normal respond to environmental offences. Rather few cases are reported yearly and the reported cases illustrate that the authority often has made so many mistakes that criminal sanctions are rejected by the court.

Administrative enforcement is the normal response to environmental offences - (if the offence has been discovered and not ignored). The most common tool in administrative enforcement is a request to the offender to make the situation legal. If that doesn't work (and the case isn't forgotten), next step is a more tough request and/or negotiations. If this still doesn't help, next step will be an administrative order to legalize (provided the case hasn't been forgotten). If the offender doesn't comply with the administrative order to legalize the situation, next step depends whether it is an offence of the Environmental Protection Act or of the Nature Protection Law. On nature protection enforcement of the administrative order requires the administrative order has been upheld by the court. Is the offence covered by the Environmental Protection Act not court ruling is needed to enforce the order by physical remedying, but regarding soil pollution the offender is only obliged to pay for remedying the offence need a court order, if the offender refuses to pay.

In case the authority has reason to suspect an offence of environmental law, the inspection is subject to certain restrictions and must be carried out in accordance with criminal procedure: (1) because of the principle of non-self-incrimination the offender must be informed that he isn't obliged to supply the authority with information which concerns the offence; (2) Any self monitoring obligations laid down in an IPPC-permit or other permits which concern the suspected offence stop; (3) the authority hasn't access to the site without either a permit from the offender or a court order regarding inspection which concerns the suspected offence.

Q.2. I: Which sanctions are provided under national law (criminal, administrative etc.)?

Offences of the Environmental Protection Act are subject to criminal and administrative sanction. Criminal sanctions provided by the Act goes from fines up to two years imprisonment and confiscation. Normally the fine is ¼ of the profit gained by the offence and the profit is confiscated. In serious cases imprisonment can go up to 6 years imprisonment under the criminal code section 196 but until now there hasn't been a single case under the criminal code. The administrative sanctions are described under Question 1.

Q.2.II: Can NGOs and/or citizens challenge the enforcement – or lack of enforcement – by the competent authority, or is it within the full discretion of the competent authority to decide whether and how offences should be sanctioned? (If NGOs and citizens can challenge such decisions and omissions, including failures of a procedural character, please describe how.)

Neither the environmental legislation nor the Civil Procedural Code provides any provisions regarding measures for citizens to challenge missing enforcement of the competent authority. Citizens can ask the department under the Minister of Interior to ensure that the local authorities (municipality) enforce environmental law including conditions in permits but it is left to the department whether it will investigate the claim or not. Mainly such claims are investigated and if the department finds that the municipality has acted inadequate the department can order the municipality to take further measures for enforcement. However, since the department only has the power to act if the missing enforcement is obviously unlawful this indirect way to ensure enforcement has a narrow scope.

Regarding lack or failure in the Environmental Impact Assessment or the IPPC-permit, NGOs have access to challenge decisions of authorities – but regarding enforcement of conditions laid down in the EIA permit or the IPPC permit or other permits or dispensations it is disputed in theory whether NGOs have access to bring the matter before a court.

In one case before the Compliance Committee under the Aarhus Convention it was assumed by the Compliance Committee that at least NGOs have the right to challenge missing enforcement of authorities – but the assumption is not supported by any case. I can however not be excluded that Danish Courts will accept that NGOs have such access to challenge missing enforcement of authorities.

Q.2.III: In light of European Community law, including the possible direct or indirect effect of directives, does national law grant NGOs and/or affected citizens the right to take direct enforcement measures against the polluter?

In case the offence causes nuisance to neighbours, the neighbours as effected citizens are accepted as having standing but the allegation only concerns the nuisance not the offence in it self. For the other matters see Q.2.II.

Q.2.IV: Could the competent authority under national law be held liable for erroneous acts and for omissions (non-enforcement) in the cases listed below? If so, how?

The competent authority can be held liable for erroneous act as if construction permit has been granted without a prior EIA and/or IPPC-permit. In theory – but not in practice – the competent authority could be liable for not issuing an administrative order to protect a Natura 200 site or not issuing an administrative order to reduce emission in accordance with the basic requirements laid down in legislation. Regarding failure to adopt plans under the Water Frame Directive or the Air Frame Directive it seems not possible to held the competent authority liable. Regarding lack of enforcement the competent authority could be hold liable by the department under the Ministry of Interior – se Q.2.II.

a. *When an EIA project is established without an EIA permit* - **Yes.**
b. *When conditions attached to the EIA decision, granting a development consent, are disregarded* - **No, only indirectly**

c. *When an IPPC facility is established without an IPPC permit* - **yes.**

d. *When an IPPC facility is permitted without prior assessment in accordance with article 6(3) of the Habitat Directive* – **Yes – at least in theory.**

e. *When an IPPC facility is operated in violation of conditions of an IPPC permit* – **no, only indirectly.**

f. *When an IPPC facility releases greenhouse gases beyond what is provided for by allowances under the ET Directive* – **no – since the State is the competent authority**

g. *When an IPPC facility has negative impact on Natura 2000 sites beyond the threshold in article 6(2) of the Habitat Directive* – **Yes – at least in theory.**

h. *When water plans adopted under the Water Framework Directive – or for the moment existing water quality standards laid down in the "old" water directives – are not complied with* – **No: - the water plans have until now only been guiding and not legally binding. The new plans are binding, but enforcement rely on prior decision under other legislation.**

i. When air plans under the Air Framework Directive are not complied with. – No, since it is the Danish EPA which is responsible the Danish legislation provides for no sanctions in case of none compliance

Please, comment on whether you find the national means of enforcement adequate, and if, based on the national experiences, you have any general suggestions for improving the enforcement.

Q.3 How is article 9(3) of the Aarhus Convention, regarding access to administrative or judicial procedures for members of the public to challenge violations of environmental law, complied with? In which situations is it NOT complied with?

Article 9(3) is not implemented – and Danish legislation doesn't provide legal remedies for NGOs in case of offences of environmental law and it doesn't make any difference whether the offence is committed by private parties or public authorities public. The Compliance Committee under the Aarhus Convention assumes however that NGOs have access – which might be the case – but which until now can not be supported by any case.

Q.4 Possible factors, such as costs, length of procedures or other practical matters, that may prevent effective access to justice for members of the public.

Costs of procedures have until recently not been a substantial border – but in a case from last year a local union of landowners challenging a missing EIA-screening before a new Beach Park was decided lost their case and was obliged to pay about 70.000 Euro in costs plus own cost – despite the fact that the high court concluded that certain factors of environmental impact was ignored when the Ministry of Traffic decided that not even an EIA-Screening was necessary. This ruling might have the effect to prevent such legal actions in the future – unless the State prior decides to pay the costs of the case.

Q.5 Do NGOs and/or citizens have access to injunctive relief and interim legal remedies? Do you know any national cases which have dealt with this?

The Danish Procedural Code doesn't provide such measures in cases against authorities but based on the Factortame ruling of the ECJ in case 249/89 the Supreme Court did in UfR 1995.634 regarding the Oresund Bridge and missing EIA recognize that interim measures can be granted. In the case this was however rejected based on an interpretation of the EIA-Directive which was overruled by the ECJ in C-435/97 WWF v. Borzen. A second try to use interim measures was tried in a case regarding insufficient EIA before approving the establishment of some part of the Metro in Copenhagen – but the request was dismissed because the High Court didn't found that the NGO has documented that their were so extraordinary circumstances that interim measures could be granted (MAD 2004.1360).

Q.6 Are there any examples where a final administrative decision has been reopened because of a complaint based on later case law from the ECJ?

No

Q.7 Has there been any national case in which the State or the local authority have been held liable for not remedying environmental damage or other damage in violation of EC environmental law?

No

Q.8. Do you now of any significant developments, good practices or failures (e.g. cases, new laws, new institutional arrangements, or new policies) with regard to the enforcement of EC environmental law, not covered by the previous questions, that you would like to highlight?

No