

# Case-study - Administrative sanctions and other oppressive measures in environmental matters

Riga 7 – 8 September 2017

## The BT-Chemicals case

*This case is based on events taking place in the early 1970s and on what was to become the first major “environmental scandal” in Sweden. It was a wake-up call for the public, the authorities and the legislator. - With the current regulation on authorization of such activities, including EIA, and the requirements inter alia under the Seveso-legislation, and the supervision this will not happen again - or?*

### Some introductory facts:

Since a chemical industry (BT-Chemicals, hereinafter called BT) started its production on the premises of an old sugar factory in Torp, the air has been increasingly flavored with a distinct chemical odor. BT has a permit for its operations. The permit includes several conditions e.g. on emissions to air and water and on waste management; the total amount that is allowed to be stored within the factory area, for how long and to where the (chemical) waste should be transported. BT is the only Swedish producer of pesticides and by far the biggest employer in Torp. The factory is run by a company with Danish owners and the company is a subsidiary to a parent company in Denmark.

Monica N, a single mother with four children, is worried as her youngest son has asthmatic problems and now has severe problems going to sleep at night. She asks the local authority (LA), responsible for health issues, for advice. The LA contacts BT and is reassured that the emissions to air are totally harmless. The LA informs Monica N that there is no reason to worry.

Monica N is not satisfied and wants the LA to investigate the pollutants. There are rumors that suspicious activities have been undertaken by BT during night-time. Rumor says that the pollutions to air are exceeding the limits prescribed in the permit and that for several years barrels containing waste substances have been dumped in landfills within the factory area.

Monica N asks the LA to act, but is referred to the regional supervisory body responsible for the supervision of the factory (environmental harmful operations). The RA (regional authority) is short of staff and leaves her complaints without any measure. She is persistent in her complaints and now a farmer, whose property borders a small river 400 meters downstream the chemical factory, claims that the plants in his greenhouse are withering and dying. He uses surface water from the river to water the plants. He has analyzed the water at his own expense and it shows high concentrations of phenol, the kind of substances manufactured by BT.

Now more than a year has passed since Monica N made her first complaints. The farmer engages a lawyer who initiates a civil case, suing BT in the district court for damages related to his economic loss. A petition from 600 inhabitants in Torp is delivered to the LA, protesting against the BT factory and the risks it creates to people's health. The LA calls BT to a closed meeting, where representatives of the company argues that the contamination of water may originate from the use of pesticides on the fields upstream and on both sides of the river, thus other sources are possible. BT withholds that the emissions to air are harmless and within the limits prescribed in the permit. However, in order to bring a stop to the protests from the inhabitants, BT promises to improve its purification processes. The LA is satisfied and closes the case.

The RA still does not act but when the matter reaches the headlines of the local and national newspapers, the RA visits the factory. The RA notes that the whole village of Torp is reeking of a peculiar chemical odor, but over a nice cup of coffee they find the explanations and argumentations from the company convincing. A walk around the premises doesn't change the positive impression of a serious operator. The RA closes the matter without any further measure.

**Case 1:** Monica N challenges the decision not to act and appeals to your court.

- Does she have a standing, what can the court do? Who has the burden of proof at this stage?

Now the events in Torp are noticed by the local TV channel and the RA is illustrated as a dying seagull on a bridge. The chief of the authority, the county governor, is interviewed in a rather rude manner. He takes the problems (mainly the insults) very seriously and later on tells his staff that he won't tolerate to be further humiliated and that the RA must start acting against BT. Shortly after an article is published in the local paper where an anonymous former worker at BT confesses that he has participated in burying several barrels containing chemical waste in the factory grounds.

The RA makes a renewed visit but still can't find anything unusual or illegal. BT is asked to show documentation on their waste management, how it is disposed of etc. The company refuses upon which the RA issues a formal order to deliver the documents. BT argues that its operations are in compliance with the permit and all conditions.

BT admits, though, that barrels have been dumped in the area, but containing silicate, not more dangerous than the sand the municipality spreads on the roads during winter-time on black ice.

**Case 2:** BT contests the order in court arguing that all conditions in the permit are complied with and that the requested documents contain commercial secrets that must not be disclosed.

- Is it appropriate for an authority to order a private company to disclose such documents – are there legal grounds for such a decision? Which questions are relevant for the court to consider?

The documents are subsequently delivered but nothing suspicious can be found. Voluntarily BT makes some investigations in the area showing no traces of dumped waste. New details are constantly delivered to the papers by anonymous workers; how long the dumping has been going on, which substances etc. The complaints from neighbors are becoming increasingly aggressive. What is happening in Torp is top news on the national TV-channels and is now called an "Environmental Scandal".

The RA orders BT to, within a time limit of two months, undertake a thorough investigation by an independent entrepreneur, on the grounds in order to find out if and if so where waste has been dumped. A map is attached to the decision, showing where and how deep the samples should be taken. The order obliges BT to deliver a report on the findings and is combined with a penalty sum of 15 000 Euros. The decision is immediately executable.

**Case 3:** BT contests the order in court, claiming that the decision should be quashed and calls for interim measures. BT argues that the decision is unjust and disproportionate. They further argue that there is no proof of illegal activities and that the company has always complied with their permit and its conditions. Their operations have not polluted the water and the only conclusion that can be drawn from the analysis from the river, is that there are traces of pesticides frequently used by farmers upstream the greenhouse. To base a, for them very costly, decision on

anonymous information smearing them in the media is gravely unjust. The time limit is too short and the penalty sum is too high. The order should not be addressed to BT as the company purchased the factory in 2001 and there have been a chemical industry on the site for more than 30 years, run by other companies.

- Which questions are relevant for the court to answer and ask? How does the change of operators affect the possibility to order the operator who currently runs the factory? Where is the threshold in order to act in such a case? Who has the burden of proof? Which formal requirements must be fulfilled for an order to be justified?

Let us assume that the order stands and that no report of an investigation has been filed within the time limit.

**Case 4:** The RA files an application to the court in order to have the penalty sum imposed. Simultaneously the RA files an application to the Enforcement Agency to execute the order.

- May this be a case in your court or which instances are involved in this stage of the process? Regarding the decision to impose the fines, which prerequisites are relevant for granting the application? Is it possible for the court to mitigate the penalty sum? Which circumstances may then be relevant?

The investigation shows that the whole area is more or less contaminated and that the concentrations of the phenolic substances in some areas are extremely high. Several traces of rusted barrels have been found in the ground. The findings also include around 600 barrels filled with toxic waste. Such findings have been made outside the factory-buildings as well as under the floor in a separate warehouse-building. A copy of the report is delivered to the public prosecutor to investigate whether there have been any criminal offences and a preliminary enquiry is opened.

BT is ordered by the RA to

- immediately close down the factory,
- within 3 months make investigations covering the ground under the factory building,
- within the same time limit excavate the masses of soil within an area, specified in a map attached to the decision, and
- transport the masses to a specified waste management plant in order to have them decontaminated.

The order regarding the stop of further operations is combined with a penalty sum on 300 000 Euros and the other parts of a lump sum on 350 000 Euros.

**Case 5:** BT contests the order in court and claims that the order to close down the factory is unlawful, unjust and way out of proportion. The company demands a prohibition and the whole decision to be immediately stopped. They argue that they have a valid permit for the operations and that the authority has no legal right to take a decision that is intervening with their given rights. It is obviously violating their rights protected by the European Convention on Human Rights (ECHR). The fact that the analysis-report is filed with the public prosecutor means that the supervisory authority no longer is entitled to act in the matter. Further on, to decontaminate the whole area would be all too expensive for the company to manage. They would go bankrupt and the order is therefore disproportionate also on that ground. They ought to at least have the right to maintain the operations as they always have followed their conditions. What has taken place happened before their purchase of the factory. If barrels containing waste has been dumped during time that BT has run the factory, it still is without any order, consent or knowledge by the management. The substances are harmless to human health (which was proven by the managing director of the factory, drinking a glass of phenol in a televised news-program – unfortunately he died shortly after by pancreatic cancer....).

To discuss:

- The closing down of the factory is the ultimate solution – which prerequisites can motivate such a decision – and what about the powers of the permit?
- The relation to the ECHR?
- The relation to the prosecutor's enquiry?
- Who can be addressed as responsible for the excavation and decontamination – the shift of operators?
- The burden of proof in relation to the different measures and claims?
- The possibility to mitigate the outcome – which factors may be relevant?

/Ander Bengtsson