Taking responsibility=liability
(Environment law)

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The courts' widening of liability for polluted land and groundwater continues. From two new rulings it can be understood that taking responsibility in agreements can be held against the company that has chosen to be responsible.

The fact that a person who pursues an activity or takes a measure (an "operator") which results in pollution is also liable for the pollution is made clear in chapter 10 of Sweden's Environmental Code. However, it has been left to the courts to clarify who the actual *operator* in the individual case is. According to what is now generally accepted practice, it is the person that has *a legal and factual possibility* to *control and influence* the harmful activity that is the *operator*.

In what is known as the *Proton* decision, the Land and Environment Court expanded this liability when the court made it clear that a parent company that gives group contributions to a subsidiary, and which is able to exercise control over the subsidiary, is the operator and is independently liable. This despite the fact that it was only the subsidiary that pursued the environmentally harmful activity.

In a decision by the Land and Environment Court of Appeal in November 2016 and a decision by the Land and Environment Court in January 2017, both of which relate to an oil company's liability for pollution that has arisen at a fuel filling station, the courts continue on their well-trodden path – in other words, widening the liability.

It is interesting that the courts attach great importance to what the parties involved agreed between themselves. In the decisions the courts analyse individual provisions of agreements and arrive at the conclusion, *inter alia*, that if a party takes responsibility in an agreement, this can provide a basis for liability under the Environmental Code.

The ruling by the Land and Environment Court of Appeal states that the oil company has *reserved the right to take direct action if the retailer fails to meet requirements made by the oil company in its environmental and quality policy.*

The decision by the Land and Environment Court similarly states that the oil company has *reserved legal and factual possibilities to intervene against the activity.*

The same argument, i.e. that the oil company has reserved the right to intervene, is then used in both of the decisions to hold the oil company liable.

Certainly it is not entirely new for the courts to look at such content when ruling in civil law cases. What I feel is new, however, is that *taking responsibility* to a certain extent is being turned against the company that has chosen to assume responsibility. Thus in the agreements concerned, one party required the other party to actually comply with an environmental policy, which might be thought to be positive from an environmental perspective. In addition to this, the same party has declared that if the other party fails to comply with the environmental policy – something which could result in land and groundwater being polluted – then the party that drew up the environmental policy is entitled to take measures. The latter might also be thought to be a positive thing from an environmental point of view.

As a result of these provisions in the agreement, however, the court regards the oil company as an operator with independent liability.

What effects does this have in general? If one of our clients were to be faced with the alternative of taking on control responsibility in an agreement or not taking on such responsibility, then in view of the decisions mentioned my recommendation would be to relinquish the right of control – that is, if the issue of environmental liability were the only thing needing to be taken into consideration.

Whether this is really a desirable development is questionable.