

The 2024 Environmental Crime Directive: Opportunities for a New Take on Corporate Liability and Sanctions

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(EU) 2024/1203 on the protection of the environment
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Outline

- Introduction
- Corporate liability and environmental crime
 - Main elements of EU corporate liability
 - Points of attention
- Corporate sanctions
 - Diversification -> challenges
 - Punishment goals
 - Sentencing principles
- Case studies
- Conclusions

Introduction (1)



- Legal persons = ?

- EU definition (art. 2(2)(a) 2024 ECD)
 - Legal entities under national law (mind certain difference!)
 - Excluding States and public bodies exercising State authority (>< national law of certain MSs)

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Introduction (3)



- Those differences matter!
 - Liability
 - Effective *and* fair regime? (*infra*)
 - *Right* incentives?
 - Sanctions (*infra*)
 - Objectives?
 - Sentencing principles!

Introduction (4)

- Those differences matter!
 - No one size fits all



Corporate liability and environmental crime (1)



- Main elements of EU corporate liability

- Art. 6 2024 ECD = EU ‘standard clause’ or provision
 - Liability for criminal offences $\neq$ criminal liability(!)
- 2 distinct regimes – overview
 - Indirect liability (Art. 6(1) 2024 ECD)
 - Functional liability (Art. 6(2) 2024 ECD)

Corporate liability and environmental crime (2)



• Main elements of EU corporate liability

- Art. 6(1) 2024 ECD: indirect liability (or ‘directive mind’ theory)
 - ‘1. Member States shall ensure that legal persons can be held **liable for criminal offences** referred to in Articles 3 and 4 where such offences have been committed **for the benefit of those legal persons by any person who has a leading position** within the legal person concerned, acting either individually or as part of an organ of that legal person, based on:
 - (a) a power of representation of the legal person;
 - (b) an authority to take decisions on behalf of the legal person; or
 - (c) an authority to exercise control within the legal person.’
- Criminal offence committed by a (natural) person in a leading position (*de facto* or *de iure*)
- Attribution to the legal person: ‘for the benefit of’ = ?
- Mental element (*mens rea*)?
 - On the part of the NP (intent, serious negligence) >< LP?



Corporate liability and environmental crime (3)



• Main elements of EU corporate liability

- Art. 6(2) 2024 ECD: functional liability
 - ‘2. Member States shall take the necessary measures to ensure that legal persons can be held **liable** where the **lack of supervision or control** by a person referred to in paragraph 1 **has made possible** the commission of a **criminal offence** referred to in Articles 3 and 4 for the benefit of the legal person by a person under its authority.’
- Who commits the offence(s)? Material element (*actus reus*)?
 - Criminal offence committed by a (natural) person (NP 1)
 - Made possible by lack of supervision (compliance measures!) by a (natural) person in a leading position (NP 2)
 - Attribution to the legal person: ‘for the benefit of’
- Mental element (*mens rea*)?
 - On the part of NP 1, NP 2, LP? **Not** the same!!
 - Adequate legal provisions in the (national) law? Principle of legality!

Corporate liability and environmental crime (4)



- Main elements of EU corporate liability

- Critical reflections
 - ‘Right’ approach?
 - Intentional version negligence offences
 - Possible defences for the LP?
 - Limited... ‘for the benefit of’ = broad!
 - Instead: focus on mitigating circumstances (Art. 9 2024 ECD)
 - Restoration
 - Cooperation with authorities
 - >< other national approaches: e.g. BE criminal law, Art. 5 CC (= Art. 18 new CC)
 - Criminal liability >< civil & administrative(!)
 - Principles of assimilation & anthromorphism
 - Direct liability -> *mens rea* to be established on the part of the LP

Corporate liability and environmental crime (5)



- Points of attention

- Standard provision, but national regimes still differ
 - Diversity: direct v. indirect liability (in different forms and degrees)
- Interplay criminal and administrative law
 - ‘Criminal’ = ? (Art. 6 ECHR, Engel/Bonda criteria)
 - Objectives 2024 ECD = criminal! (*infra*)
 - Application fundamental rights in the field of criminal law!
 - Eg presumption of innocence, rights of defence, legality (not simply legal certainty), ne bis in idem, ... -> to be translated in adequate procedural rights for LPs !!
 - Principle of equal treatment = limit on LG’s choice
 - Liability criteria under administrative law = ?

Corporate sanctions (1)



- 2024 ECD = increased diversification!

- = positive!

- Cf. Council of Europe Recommendation on Corporate Criminal Liability (R (88) 18

- It is *unlikely* that all MSs will already have in place all these sanctions, whether under criminal, administrative or civil law



Corporate sanctions (2)

- Sanctions in Art. 7 2024 ECD – overview
 - General requirement unchanged
 - ‘effective, proportionate and dissuasive’ penalties/measures
 - Criminal nature?
 - Art. 7(1): ‘criminal or non-criminal’
 - MSs maintain discretion
 - But be mindful of Art. 6 ECHR!
- Mandatory v. optional
- Still: strong focus on financial penalties...
- Other sanctions
 - Some (important) new ones



Corporate sanctions (3)

- Sanctions in Art. 7 2024 ECD – further analysis
 - Mandatory v. optional
 - Art. 7(2) 2024 ECD = penalties or measures, **optional**
 - Much longer list than we know from other EU Directives
 - Cf. CoE suggestions (*supra*)
 - Art. 7(3) 2024 ECD = fines, **mandatory**
 - But mind the scope:
 - Only Art. 6(1) liability
 - Only Art. 3(2) criminal offences (unlawful and intentional) + Art. 3(3) (cf. ‘ecocide’)
 - Two systems, one to choose from (rec. 33)



Corporate sanctions (4)

- Sanctions in Art. 7 2024 ECD – further analysis (cont'd)
 - Mandatory v. optional (cont'd)
 - Art. 7(3) 2024 ECD = fines, **mandatory**
 - Reminder: criminal or non-criminal
 - Strong focus on financial penalties... at least for certain offences!
 - Who will (eventually) pay? (risk of spill-over effects)
 - Interesting attenuation: rec. 31 !!
 - ‘Accessory penalties or measures are often seen as being more effective than financial penalties, especially for legal persons.’
 - = very welcome!



Corporate sanctions (5)

- Sanctions in Art. 7 2024 ECD – further analysis (cont'd)
 - Mandatory v. optional (cont'd)
 - Two alternative systems
 - Turnover-based system
 - Cf. competition law, financial markets, GDPR, etc. – but different percentages(!)
 - Cf. day-time fines for NP in certain legal systems
 - Challenges
 - Determining the turnover
 - ‘of the legal person’ -> *quid* group of legal persons? (cf. ‘undertaking’ in competition law)
 - Worldwide -> for all activities, even if unrelated to the offence? (>< competition law)
 - Fall-back rules if impossible (even a fixed amount but not necessarily the same maximum level as under the fixed-amount system?! – rec. 34...)
 - Fixed-amount system
 - But mind proportionality: ‘no one size fits all’ (*supra*)
 - Gravity of the offence +
 - Individual, financial and other circumstances of the LP
 - Inflation – need to review the fine levels ‘regularly’ (rec. 35)



Corporate sanctions (6)

- Punishment goals – what do we want to achieve (and how)?

- Prevention and deterrence
 - What really deters?
 - Deter who?
 - Empirical evidence scarce(!) – C. Harding: deterrence is ‘overrated’
- Social disapproval
 - Criminal law: stronger than administrative law (rec. 4)
 - Communicative/symbolic function
- Restoration/reparation
- *Quid* restraint & rehabilitation?
 - Less affirmative perhaps in the 2024 ECD, but clearly present
 - Eg judicial winding-up, closure of establishments, judicial supervision, obligation to establish due diligence schemes for enhancing compliance (art. 7(2))



Plea for a gradual or layered approach

- Best Solution: *Prevention of Criminal Offences*
- Second-Best Solution: Punish and Deter
- Third-Best Approach: Reform and Restraint (more intrusive!)
- Finally – always – reparation (esp. in the case of environmental crime)

Corporate sanctions (7)



- Punishment goals – what do we want to achieve (and how)? (cont'd)

- Interesting: ‘complementarity of criminal and administrative law’ to achieve prevention and deterrence of unlawful conduct damaging the environment
 - Rec. 4
 - Call for **integrated approach**
 - Investigation and prosecution
 - Sanctioning!
 - NBII
 - Proportionality (two-sided principle! ‘janus face’) (cf. Art. 7(1) and 7(3) 2024 ECD)



Plea for a gradual or layered approach

+ **integration administrative and criminal enforcement!**

- Impact on procedures
- Cooperation and exchange of information (Eurojust!) (national/cross-border, multi-agency)
- Rules on transfers of proceedings
- Procedural rights
- Admissibility of evidence

- Competent sentencing authorities? -> specialisation!



Corporate sanctions (8)

• Sentencing principles?

- = **guarantees** against disparate, excessive, arbitrary and inadequate sentences
- Examples
 - Proportionality (in a protective way too!)
 - Interesting development in the 2024 ECD
 - Culpability (whose guilt?!)
 - Personal punishment (punishment targeting individuals behind the LP??)
 - Parsimony (linked to subsidiarity, *ultima ratio*)
 - Harm reduction (spill-over effects?)
 - Legality
 - Equal treatment
- **Balancing exercise** by the competent authorities (courts or otherwise)
- Need for **adequate reasoning** (separate sentencing hearing?)



Case studies (1)

• Case 1: Deepwater Horizon

- Facts
- Offender
- Role of authorities (regulatory capture)
- Sanctioning (crim./civil/collateral consequences) + enforcement (plea agreement + corporate monitors)



Case studies (2)

- Case 2: Dieselgate



Case studies (3)



- Case 3: Pollution of the Meuse (BE/NL) (Sept. 2025)
 - See e.g. <https://www.rtbef.be/article/une-pollution-au-propamocarbe-dans-la-meuse-perturberait-la-production-d-eau-potable-aux-pays-bas-11605577>



Conclusions



The 2024 Environmental Crime Directive, a new take on corporate liability and sanctions? (1)

- Liability
 - Continuity ('standard clause')
 - But still challenges and
 - Window of opportunity for national law
 - Criminal liability $\neq$ administrative or civil liability
- Interplay with administrative law
 - = important point of attention for implementation

Conclusions



The 2024 Environmental Crime Directive, a new take on corporate liability and sanctions? (2)

- Sanctions
 - Whole new realm! Not just fines!!
 - Important to ...
 - Improve sentencing decision-making (not just an 'addendum' to the verdict on guilt)
 - Reflect more on sentencing goals & principles
 - Integrated approach (admin./criminal)
- Enforcement of sanctions!
 - Specialised competent authorities?
 - Necessary means to enforce (human, financial, technical)

Some literature



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Thank you for your attention!

Questions?

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