

Enforcement of EU and national law on industrial emissions with a focus on inspections and penalties

Environmental inspections according to Article 23 IED

Penalties in relation to environmental law

Effectiveness, proportionality, dissuasiveness of the penalties

Special penalties in relation to industrial emissions

Administrative and criminal sanctions related to industrial emissions

JUDr. Vojtěch Vomáčka, Ph.D., LL.M.



How to Handle Court Proceedings Invoking Non-compliance with the EU Industrial Emissions Directive

A long way from IPPC to IED...

The IED entered into force on 6 January 2011 and had to be transposed by Member States by 7 January 2013

Directive 96/61 was repealed by Directive 2008/1, which in turn was replaced by IED

AG in C-81/14:

Although, in 2010, the VOC Directive was replaced by the Industrial Emissions Directive, the request for a preliminary ruling is of prospective interest too, since many of the rules concerning time extensions were reproduced in the Industrial Emissions Directive.

New provision on inspections (Art. 23) and penalties (Art. 79)

„First piece of EU environmental law with provisions on inspections“

- The IED is based on several pillars, in particular (1) an integrated approach, (2) use of best available techniques, (3) flexibility, (4) inspections and (5) public participation.
- The integrated approach means that the permits must take into account the whole environmental performance of the plant, covering e.g. emissions to air, water and land, generation of waste, use of raw materials, energy efficiency, noise, prevention of accidents, and restoration of the site upon closure.



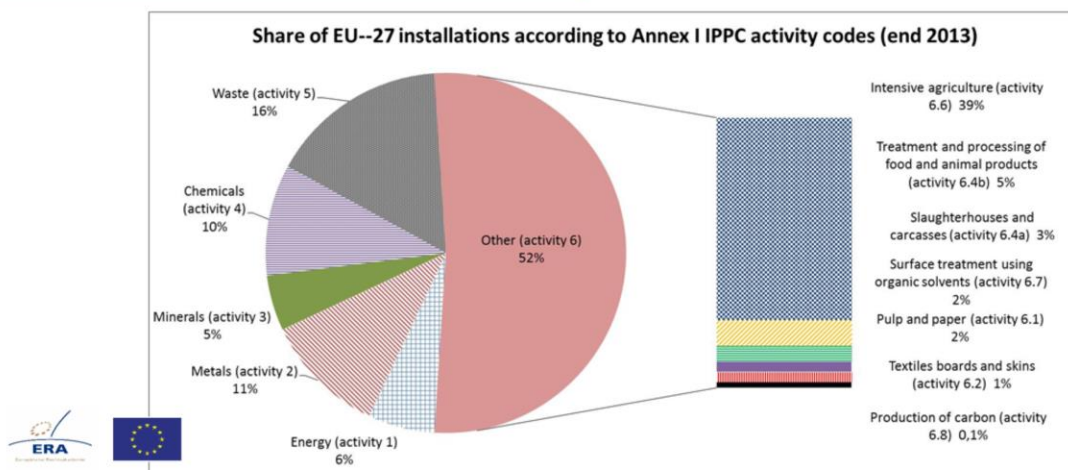
More than two decades have passed since the IPPC Directive was adopted. It was repealed by Directive 2008/1, which in turn was replaced by IED.

Therefore, when dealing with the IED, we already have certain guidance on its interpretation. As the advocate general points out, many of the rules were reproduced in later legislation.

However, the rules on inspections in the IED are somewhat new and it is referred to as the first piece of EU environmental law with provisions on inspections.

IED installations

Approx. 50,000 installations undertaking the industrial activities listed in Annex I of the IED are required to operate in accordance with a permit.



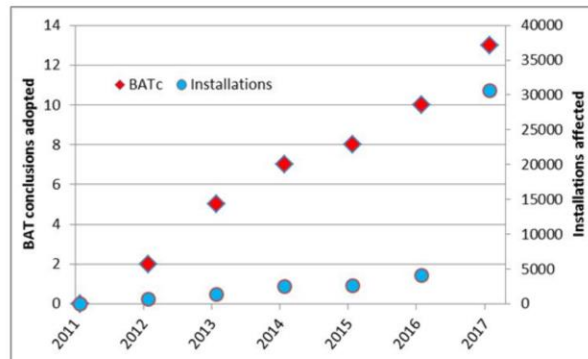
Before we move to the specific requirements on the inspections, let's take a quick glimpse on the application of the IED in practice. Across the EU member states, approx. 50,000 installations undertaking the industrial activities listed in Annex I of the IED are required to operate in accordance with a permit. Waste, metals, chemicals, agriculture being among the most frequent activities.

Report from the Commission on implementation of directive 2010/75/EU - COM(2017)727 final

Despite improvements, the level of information reported remained incomplete, in particular numerical data related to the number of inspections (e.g. total number of installations visited, number of visits including emission measurements).

Several Member States reported insufficient staff...

Some difficulties were reported in relation to the interpretation of definitions...



According to the Commission report on implementation of the IED from 2017, there is not sufficient information regarding inspections. The level of information reported remained incomplete, in particular numerical data related to the number of inspections. However, the problems are evident: For example, several Member States reported insufficient staff.

Some difficulties were reported in relation to the interpretation of definitions. At the same time, precise rules on technologies which should be adopted (decisions on BAT conclusions) have been introduced lately.

This will naturally result into disputes that are likely to end up before the national courts.

HARMONISATION OF INSPECTIONS (CONTROLS)

32001H0331

Recommendation of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States

Official Journal L 118 , 27/04/2001 P. 0041 - 0046

Recommendation of the European Parliament and of the Council

of 4 April 2001

providing for minimum criteria for environmental inspections in the Member States

(2001/331/EC)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee(1),

Having regard to the opinion of the Committee of the Regions(2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3), and in the light of the joint text approved by the Conciliation Committee on 8 January 2001,



At present, the implementation of environmental inspections at EU level is not fully harmonized and individual EU institutions and bodies cannot carry out inspections themselves, with some exceptions. However, carrying out checks is a prerequisite for identifying and remedying shortcomings in the application of EU law (defective application, non-application). At the same time, there is no dispute that the way and scope of controls in specific areas of EU environmental regulation differs significantly across Member States.

In 2001, a Recommendation of the Parliament and of the Council setting out minimum criteria for environmental inspections in the Member States was adopted and is the first formal, though non-binding, document addressed to Member States dealing with the requirements and operating conditions of environmental inspections. In addition to the necessary definitions, the Recommendation covers extensively the issues of the organization and conduct of inspections, inspection plans, on-the-spot checks, reporting and conclusions of on-the-spot checks, investigation of serious accidents, incidents and serious non-compliance. It also commits the Commission to review the implementation and effectiveness of the Recommendation as soon as possible after receiving reports from Member States.

HARMONISATION OF INSPECTIONS (CONTROLS)

1) Direct inspections by the EU authorities

a) Without a necessary consent of the MS

- Art. 101 and 102 TFEU (Competition law), gas trade, fuels and biofuels, pharmaceuticals
- Regulation 2185/96 (Customs)
- Regulation 1073/1999 (OLAF economic crimes)
- ENVIRONMENTAL LAW:
- **DIRECT CONTROLS:** Regulation 1224/2009 (common fisheries policy)
- **CONTROL OF CONTROLS:** Directive 2010/64/EU, Art. 35/1 (protection of animals used for scientific purposes) – competence of the Commission to carry out inspection provided there are reasonable doubts
- **COOPERATIVE CONTROL BUT SEPARATE COMPETENCE TO GATHER INFORMATION:** Regulation 1005/09, Art. 28 (protection of the ozone layer)

b) With the consent of the MS

- Fact finding missions (126, 258 TFEU), no framework, C-387/97 (*Waste in Crete*), C-103/00 (*Caretta caretta*).



The controls carried out directly by the Union institutions and bodies, in particular by the Commission, without the necessary consent of the Member State, appear in particular in areas directly linked to the functioning of the free market (competition, customs, economic crime).

In the area of EU environmental regulation, however, we can already observe the differentiated elements of the Union's interference in the controls carried out by the Member States. The first stage is control of control, that is to say, where the EU authorities do not carry out direct controls on the fulfillment of the target obligations, but control the national inspection system itself. One such example is Article 35 (1) of Directive 2010/64/EU on the protection of animals used for scientific purposes. The second level of EU controls are those carried out in cooperation with Member State authorities, but with a separate power of information. The third stage is to carry out direct checks by EU inspectors.

The second category of controls carried out directly by the EU authorities can be described as fact finding missions. These are supplementary on-the-spot checks following Articles 126 and 258 TFEU, which serve to clarify the facts of the case. However, there is a lack of sufficient legal and organizational framework to carry out these checks by the EU authorities, so that they are carried out only occasionally. The interest in their implementation is due to the fact that the Commission relies heavily on information provided directly by the Member State or other entities, which may not be complete or reliable. However, due to the absence of authorization, any official or

scientific checks of this type must be carried out only with the prior consent of the Member State or the inspected person.

HARMONISATION OF INSPECTIONS (CONTROLS)

1) Inspections by the national authorities

- Comprehensive directive proposed by the Parliament but denied by the Council and the Commission
- Sophisticated rules concerning food safety (Regulation 882/2006, Directive 90/425/EEC)

ENVIRONMENTAL LAW:

- Art. 20 Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances
- Art. 23 Directive 2012/19/EU on waste electrical and electronic equipment (WEEE)
- Art. 23 Directive 2010/75/EU on industrial emissions (IED)
- Art. 34, 35 Directive 2010/64/EU on protection of animals used for scientific purposes
- Art. 15 Directive 2009/31/EC on the geological storage of carbon dioxide
- Art. 28 Regulation 1005/2009 on substances that deplete the ozone layer

Specific procedural requirements:

Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste Art. 13(b) a landfill or part of it may only be considered as definitely closed after the competent authority has carried out a final on-site inspection (see C-498/17 – *Italy*, C-626/16 – *Slovakia*)



Uniform EU regulation of the implementation of national environmental controls has not yet been adopted, although partial discussions have been ongoing in this respect since the 1990s.

Taking environmental law broadly, it contains the most comprehensive and consistent regulation of national product, animal and veterinary product safety controls, which, after three decades of development after the turn of the century, has largely shifted into the content of EU regulations, industrial products.

As regards the requirements laid down in a more narrowly conceived material of environmental law, the conditions for carrying out national inspections are limited, exceptionally, to the provisions of directives and not regulations, and we can observe a very different approach to their legislative establishment. We will see both a wide-ranging adjustment of inspection requirements, including specific criteria to be assessed, as well as a sparse adjustment, which, however, imposes wide-ranging obligations.

Environmental inspections according to Article 23 IED

- Main tool to find out compliance with the **conditions set in the permit or mandatory emission limit values**
- And to clarify discrepancies between submitted documentation and real life
- No harmonised legislation at EU level
- Competent authority can be different for inspections and penalties

Directive 2008/1/EC Art. 14(c)

*operators of installations afford the representatives of the competent authority **all necessary assistance** to enable them to carry out any inspections within the installation, to take samples and to gather any information necessary for the performance of their duties for the purposes of this Directive.*



On a closer look, it is clear that Article 23 of the Industrial Emissions Directive is essentially a summary of the basic principles of the 2011 Recommendation of the Parliament and of the Council.

The former requirements in Directive 2008/1/EC were much less elaborate, merely stipulating an obligation of the operators of installations to afford the representatives of the competent authority all necessary assistance.

Environmental inspections according to Article 23 IED

*Rec. 26: In order to ensure the effective implementation and enforcement of this Directive, operators should **regularly report** to the competent authority on compliance with permit conditions. Member States should ensure that the operator and the competent authority each take necessary measures in the event of non-compliance with this Directive and provide for a system of environmental inspections. Member States should ensure that sufficient staff are available with the skills and qualifications needed to carry out those inspections effectively.*

Art. 3(22): 'environmental inspection' means all actions, including site visits, monitoring of emissions and checks of internal reports and follow-up documents, verification of self-monitoring, checking of the techniques used and adequacy of the environment management of the installation, undertaken by or on behalf of the competent authority to check and promote compliance of installations with their permit conditions and, where necessary, to monitor their environmental impact;



The ratio and motives behind the comprehensive requirements on inspections in the IED can be found in Recital 26 to the IED. Please note the effectiveness is linked to sufficient staff available with the skills and qualifications needed to carry out those inspections effectively.

Art. 3(22) provides a wide definition of environmental inspection which covers all actions undertaken by the competent authority to check and promote compliance of installations with their permit conditions and, where necessary, also monitoring.

Art. 23 IED Environmental inspections

Art. 21(2): When reconsidering permit conditions, the competent authority shall use any information resulting from monitoring or inspections.

Art. 23 IED Environmental inspections

1. Member States shall set up a system of environmental inspections of installations addressing the examination of the full range of relevant environmental effects from the installations concerned.

Member States shall ensure that operators afford the competent authorities all necessary assistance to enable those authorities to carry out any site visits, to take samples and to gather any information necessary for the performance of their duties for the purposes of this Directive.

- *Is a „surprising“, random site visit possible, even in the absence of the operator?*
- *What is a representative sample?*



Article 23 of the Industrial Emissions Directive is relatively brief, imposing an obligation on Member States to set up a system for the inspection of environmental installations aimed at examining the full range of significant environmental effects of the installation concerned.

Under this provision, Member States shall ensure that operators provide all necessary assistance to the competent authorities for any on-site visits, sampling and collection of all necessary information necessary to carry out their duties under this Directive. Furthermore, the installation must be subject to an inspection plan, the details of which are also laid down in the Directive.

Art. 23 IED Environmental inspections

Validity of the measurements: Is it sufficient to estimate the amount of the emissions/waste?



Obviously, many practical aspects of inspections are not covered by the IED. For example, the estimating the amount of emissions or waste. In principle, it is up to the national law to establish detail rules on inspections.

Art. 23 IED: Routine and non-routine environmental inspections

2. Member States shall ensure that **all installations are covered by an environmental inspection plan at national, regional or local level and shall ensure that this plan is regularly reviewed and, where appropriate, updated.**

3. Each environmental inspection plan **shall include the following:**

- (a) a general assessment of relevant significant environmental issues;
- (b) the geographical area covered by the inspection plan;
- (c) a register of the installations covered by the plan;
- (d) procedures for drawing up programmes for routine environmental inspections pursuant to paragraph 4;
- (e) procedures for non-routine environmental inspections pursuant to paragraph 5;
- (f) where necessary, provisions on the cooperation between different inspection authorities.

4. Based on the inspection plans, the competent authority shall regularly draw up **programmes for routine environmental inspections**, including the **frequency of site visits** for different types of installations.

The period between two site visits shall be based on a **systematic appraisal of the environmental risks** of the installations concerned and shall not exceed 1 year for installations posing the highest risks and 3 years for installations posing the lowest risks.



There are two basic types of inspections established by Art. 23 of the IED: Routine and non-routine environmental inspections. The routine inspections should be based on the inspection plan at national, regional or local level, which is regularly reviewed and, where appropriate, updated.

Art. 23 IED: Routine and non-routine environmental inspections

The **period** between two site visits shall be based on a **systematic appraisal of the environmental risks** of the installations concerned and **shall not exceed 1 year** for installations posing the **highest risks** and **3 years** for installations posing the **lowest risks**.

If an inspection has identified an **important case of non-compliance** with the permit conditions, an additional site visit shall be carried out **within 6 months** of that inspection.

The **systematic appraisal of the environmental risks** shall be based on at least the following criteria:

- (a) the potential and actual impacts of the installations concerned on human health and the environment taking into account the levels and types of emissions, the sensitivity of the local environment and the risk of accidents;
- (b) the record of compliance with permit conditions;
- (c) the participation of the operator in the Union eco-management and audit scheme (EMAS), pursuant to Regulation (EC) No 1221/2009.

The Commission may adopt guidance on the criteria for the appraisal of environmental risks.

5. **Non-routine environmental inspections** shall be carried out **to investigate serious environmental complaints, serious environmental accidents, incidents and occurrences of non-compliance as soon as possible** and, where appropriate, **before the granting, reconsideration or update of a permit**.



Is a „surprising“, random site visit possible, even in the absence of the operator?

Based on the inspection plans, the competent authority shall regularly draw up **programmes for routine environmental inspections**, including the **frequency of site visits** for different types of installations. The period between two site visits shall be based on a **systematic appraisal of the environmental risks**. **The IED stipulates the minimal set of criteria on systematic appraisal of the environmental risks**.

Non-routine environmental inspections shall be carried out to investigate serious environmental complaints, serious environmental accidents, incidents and occurrences of non-compliance as soon as possible and, where appropriate, before the granting, reconsideration or update of a permit.

Art. 23 IED Environmental inspections

6. Following each site visit, the competent authority shall prepare **a report** describing the relevant findings regarding compliance of the installation with the permit conditions and conclusions on whether any further action is necessary.

The report shall be notified to the operator concerned within 2 months of the site visit taking place. **The report shall be made publicly available** by the competent authority in accordance with Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information **within 4 months** of the site visit taking place.

Without prejudice to Article 8(2), **the competent authority shall ensure that the operator takes all the necessary actions identified in the report within a reasonable period.**

Summary:

- The IED contains mandatory requirements on routine and non-routine environmental inspections.
- Member States shall set up a system of environmental inspections and draw up inspection plans accordingly.



The IED requires a site visit to take place at least every 1 to 3 years, using risk-based criteria.

The outcomes of the inspection must be summarised in a report which shall be made publicly available within 4 months of the site visit taking place. The competent authority shall ensure that the operator takes all the necessary actions identified in the report within a reasonable period.

----- IED Inspections -----

The work of this group was continued after the meeting. Below is the final result.

Indicative list of graduation of non-compliance

6. Inspection plan: How should we understand the register that is mentioned in the IED and should this be made part of the inspection plan.
COM: Register of installations with names and location. This could also be a reference in the inspection plan but there should be public access. An inspection plan isn't necessarily a paper version.
7. Inspection programme: What is exactly meant with inspection programme?
COM: The IED only mentions that frequencies should be addressed in the programme. It doesn't mention that time, inspectors etc. should be in it as well.
A programme could also be software.
8. Graduation of compliance: Does the graduation in the guidance book reflect the different types of non-compliances in IED.
COM: Yes but it seems too complicated. A simpler version is recommended.



To be assessed from case to case, maybe warning/note and additional site visit



Additional site visit required + enforcement required



*Environmental inspections of industrial installations in accordance with the
Industrial Emissions Directive (IED)*

The image shows the cover of a guidance document titled "Guidance on inspections". The cover is primarily blue with yellow text. On the left side, there is a vertical sidebar with a green-to-blue gradient. The sidebar contains the following text from top to bottom: "IED Insp", "Guidance", "executio", "EUROPEAN UNI", "ENFORCEMENT", three yellow stars, "Europ", "the Implemen", and the URL "http://impel.eu/wp-c". At the top of the sidebar, it says "Chapter 2" and "RMCEI / IED". In the center of the sidebar, there is a vertical flowchart with four boxes labeled "1. Planning", "2. Execution", "3. Reporting", and "4. Evaluation". Arrows indicate a downward flow from "1. Planning" to "2. Execution", and then to "3. Reporting" and "4. Evaluation". To the right of the sidebar, the main title "Guidance on inspections" is written in large yellow letters. Below the title, the authors "Hubert Fallmann, Umweltbundesamt GmbH" and "Christian Heller, Umweltbundesamt GmbH" are listed. Further down, the event "7th EU ETS Compliance Conference" and the dates "Brussels, 8 & 9 November 2016" are mentioned. At the bottom right, there is a small logo for "Climate Action" with the text "European Commission" above it.

IED Insp

Guidance

executio

EUROPEAN UNI

ENFORCEMENT

1. Planning

2. Execution

3. Reporting

4. Evaluation

<http://impel.eu/wp-c>

Guidance on inspections

Hubert Fallmann, Umweltbundesamt GmbH
Christian Heller, Umweltbundesamt GmbH

7th EU ETS Compliance Conference
Brussels, 8 & 9 November 2016

Climate Action

There is a guidance on inspections prepared by IMPEL. It might be useful for interpretation of Art. 23 of the IED and other provisions since it describes discussions about their meaning. Furthermore, a guidance on inspections in the ETS régime might be useful too as it shares some similar instruments and definitions.

Inspection plans and programmes

Each inspection plan should as a minimum:

- define the **geographical area** which it covers, which may be for all or part of the territory of a Member State,
- cover a defined **time period**, for example one year,
- include **specific provisions for its revision**,
- **identify the specific sites** or types of controlled installations covered,
- prescribe the **programmes for routine inspections**, taking into account environmental risks;

These programmes should

- include, where appropriate, **the frequency of site visits** for different types of specified controlled installations,
- provide for **coordination between the different inspecting authorities**, where relevant.

Inspection plans should be **available to the public** according to the "Aarhus" convention (and the directive on public access to environmental information).



The guidance also provides a summary concerning the content and scope of the inspection plans and programmes. It is however very similar to the explicit requirements of the IED.

IED - Penalties

Reports by the Commission

IED Articles 30(9) and 73 require the Commission to review the need to control emissions from certain types of animal rearing and combustion plants and to report the results. The reviews are available [here](#) and the [report](#) was adopted by the Commission in May 2013.

IED Article 76 requires the Commission to report on the exercise of the power to adopt delegated acts conferred on it. The [report](#) was adopted by the Commission in June 2015.

IED Article 73 requires the Commission to report on the implementation of the Directive on the basis of information reported by Member States. The first of these [reports](#) was adopted by the Commission in December 2017.

A short summary of the IED is also available at the [Europa-site](#).

Last updated: 07/08/2019 | [Top](#)



The IED also focuses on penalties and requires the member states to lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and ensure that they are implemented. Those penalties should be effective, proportionate and dissuasive.

Member States shall notify the implementing provisions to the Commission but are not subject to reports provided by the Commissions. It is assumed that there are large differences among the member states as regard sanctions but comprehensive reports or other data are not available.

OVERVIEW OF PENALTIES

IED - KEY ENFORCABLE PROVISIONS

- **Obligation 1: To apply for a permit for existing and new installations**
- **Obligation 2: To supply information for application for permits**
- **Obligation 3: To notify the competent authority of any changes in the operation of an installation**
- **Obligation 4: To comply with the conditions set in the permit or mandatory emission limit values**
- **Obligation 5: In the event of an incident, an accident or a breach of the permit conditions, to inform the competent authority, take necessary and complimentary measures (Art. 7, 8)**
- **Obligation 6: Upon definitive cessation of the activities, to take necessary actions aimed at the removal, control, containment or reduction of relevant hazardous substances (Art. 22)**



Since the IED requires the member states to introduce effective sanctions for infringements of the national implementing provisions, it is necessary to first determine the key enforceable provisions of the IED.

ASPECTS OF LIABILITY

KEY ENFORCABLE PROVISIONS ?

C-172/19 P *Euracoal v Commission*

Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing the best available techniques (BAT) conclusions under the IED – NOx emissions which result from the combustion of coal and/or lignite

T-699/17 *Poland v. Commission*

Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU of the European Parliament and of the Council, for large combustion plants (notified under document C(2017) 5225)

- *Do you reflect that?*
- *Can you reflect that?*



There are many aspects of liability that deserve some attention in relationship to environmental protection.

Similarly to the national law, the EU penal law is based on the criminal law principles.

For example, the *nullum crimen nulla poena* requires that both crime and punishment must be defined by law. However, some difficulties may arise if the substance of the crime is based on EU law which is challenged at the court. Currently, there are two proceedings regarding the best available techniques. If successful, the actions may impact national proceedings based on breach of these BAT techniques.

CRIMINAL LIABILITY

Directive 2008/99/EC on the protection of the environment through criminal law

Rec.(9) *The obligations under this Directive only relate to the provisions of the legislation listed in the Annexes to this Directive which entail an obligation for Member States, when implementing that legislation, to provide for prohibitive measures.*

- *Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control*

Article 3 Offences

Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence:

(a) the discharge, emission or introduction of a quantity of materials or ionising radiation into 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;

(b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker (waste management), 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;



The basis for the liability under the IED Directive is provided by the Directive 2008/99/EC on the protection of the environment through criminal law which lists the „old“ IED Directive in the list of the legislation which entail an obligation for member states to introduce a system of criminal liability. Furthermore, it provides a list of activities which must be considered crime in the member states. There are some activities related to operation of a large facility under the IED.

CRIMINAL LIABILITY

Directive 2008/99/EC on the protection of the environment through criminal law

(c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (6) and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;

(d) 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;

Article 5 Penalties

*Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by **effective, proportionate and dissuasive criminal penalties.***



And the 2008/99/EC directive also provides that the crime should be constituted by 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

As regards penalties, the directive only requires that the offences are punishable by effective, proportionate and dissuasive criminal penalties

LIABILITY OF INDIVIDUALS - SYSTEM

1) Duty of cooperation of the member states

Geelhoed in C-304/02:

Member States are under a general obligation under Article 10 EC to take all measures necessary to ensure that Community law is applied and enforced effectively and that its 'effet utile' is achieved.(...) to ensure 'that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

- Taken as a whole, the system of remedies must be dissuasive (see **C-565/12**)

2) General systems of liability

- Directive 2004/35/EC **on environmental liability** with regard to the prevention and remedying of environmental damage (ELD)
- Directive 2008/99/EC on the **protection of the environment through criminal law**

3) Particular requirements

Numerous directives require MS to establish 1) effective system of sanctions, 2) effective system of sanctions with particular sanctions and measures (withdrawal of permit, measures to ensure that compliance is restored within the shortest possible time)



From the wider scope, the Member States have a general obligation to take all appropriate general or specific measures to fulfill obligations arising from the Treaties or from acts of the institutions of the Union. The CJEU not only implies a general requirement arising from the principle of non-discrimination that infringements of EU law must be treated by national authorities with the same care as the implementation of the corresponding national legislation, but also requires that the sanctions in place be effective, proportionate and dissuasive.

The EU has harmonised the conditions of the two liability systems more consistently - criminal liability under Directive 2008/99 / EC and environmental damage under Directive 2004/35/EC. Besides, there are specific requirements on penalties embodied in particular directives.

OVERVIEW OF PENALTIES

PENALTIES IN RELATION TO ENVIRONMENTAL LAW

COM study (Oct 2011): Provisions on penalties related to legislation on industrial installations

- **Administrative and criminal sanctions**
- **In many MS, parallel use of both systems**
- **Adoption of penalties as an enforcement mechanism for ensuring that legislation is complied with - competence of the Member States – differences**
- **Discretionary application of penalties by Member States**
- **Differences between centralized and federal states**
- **Often shared competence among multiple authorities**
- **Often multiple offenders**
- **Frequent amendments to the national regulation**



The studies on penalties in environmental protection suggest that there is a huge variability of sanctions among the national systems. At the same time, some e specific of environmental liability can be recognised. For example, there is often a shared competence among multiple authorities and frequently, there are even multiple offenders.

TYPES OF SANCTIONS

Main tool: fines (amount may vary significantly amongst the different MSs)

General practice: legislation provides a range of fines, depending mainly on

- **severity of the offence and**
- **its effect on the environment.**

ADDITIONAL/OTHER ADMINISTRATIVE MEASURES

- **restriction, suspension or prohibition/ban of the activity (in general);**
- **cancellation of the licence or restriction of its terms;**
- **seizure of tools, machinery and equipment;**
- **suspension of the right to obtain subsidies or other benefits issued by national or European public authorities or services;**
- **loss of tax benefits, credit benefits and credit financing acquired prior to the offence;**
- **imposition of rectification or corrective measures on the operator;**
- **closure of the installation concerned.**



As a general practice, the national legislation provides a range of fines depending mainly on severity of the offence and its effect on the environment. The list of the sanctions or additional administrative measures adopted by the EU member states is very long.

PENALTIES IN RELATION TO INDUSTRIAL EMISSIONS

CRIMINAL SANCTIONS

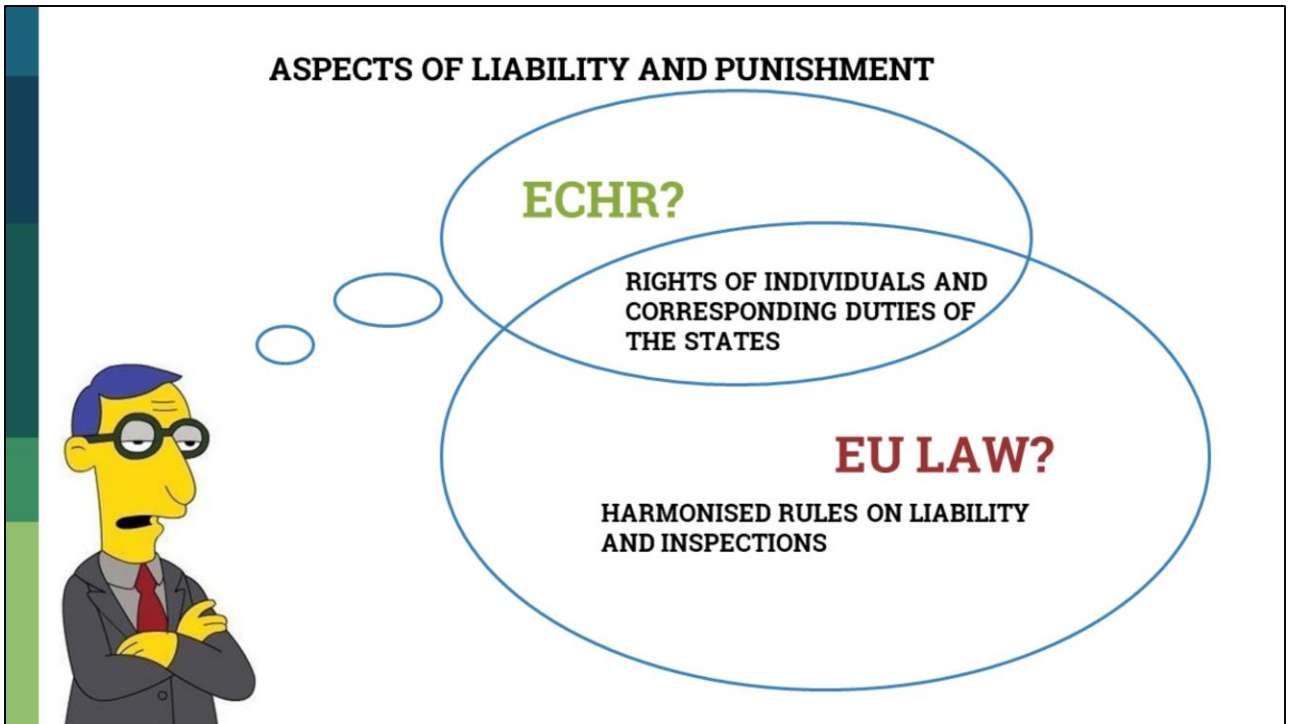
- **In the vast majority of Member States, usually combined with sectoral legislation;**
- **Primary penalties: imprisonment, fine (with wide variations)**
- **Combination of criminal sanctions is possible in most MSs;**
- **Daily fines: Austria, Germany ;**
- **maximum penalty is €15,000,000 / 15 years imprisonment.**

QUASI-CRIMINAL SANCTIONS

- **Not applied generally;**
- **"Misdemeanours", "petty offences";**
- **Similar penalties to criminal sanctions with a simplified procedure;**



In the vast majority of Member States, criminal sanctions are combined with sectoral legislation. As a primary penalties, imprisonment or fine are used.



Lets take a look at various aspects of liability and punishment.

The official policy of the EU puts a strong emphasis on stimulating the use of criminal enforcement and – at the same time – aims at strengthening enforcement systems that rely strongly on administrative enforcement. The Member States, by transposing the Environmental Crime Directive have to attach to the existing prohibitions some criminal sanctions. Very often, they keep a combination of criminal and administrative punishment which should achieve that only the offenders who commit the most severe and harmful violations should be criminally prosecuted, while less serious offences can be dealt with using administrative enforcement.

Simultanously, the ECHR protection applies to criminal liability.

WHAT IS A CRIMINAL CHARGE AND SANCTION?

ECHR:

- autonomous concept
- *Engel criteria*: the scope of the rules that have been violated, purpose of the sanction, (punitive and deterrent), severity of the sanction (repleacable by imprisonment?)
- Administrative fines, tax surcharges
- Penalty x measure: Revocation of the planning permit in Morscher (54039/00)

CJEU:

Confirmed in C-45/08 (Spector Photo Group), C-60/12 (Baláž)

Penalty x measure, C-210/00 (Käserei Champignon Hofmeister – agricultural aid scheme, not penalty if agreed upon, for example blacklisting)



Not every breach of a legal obligation constitutes a criminal act. Whether an unlawful act can be considered a crime, depends on domestic legislation and the specific circumstance of the individual case. The criterion according to which the legislator usually differentiates between administrative and criminal sanctions is the seriousness or gravity of the attack and the degree of damage or endangerment.

Legislation in the numerous Member States provides a range of administrative fines, depending mainly on the severity of the offence and its effect on the environment. The additional administrative measures include restriction, suspension or prohibition/ban of the activity; cancellation of the licence or restriction of its terms; seizure of tools, machinery and equipment; suspension of the right to obtain subsidies or other benefits issued by national or European public authorities or services; loss of tax benefits, credit benefits and credit financing acquired prior to the offence; imposition of rectification or corrective measures on the operator; closure of the installation concerned etc.

Ever since the *Engel* judgment (*Engel and Others v. the Netherlands*, 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), the ECtHR has clarified that the national label is not the only criterion to assess the nature of an afflictive measure, and even a formally administrative measure could be considered criminal in nature.

The CJEU has taken into consideration the case-law of the ECtHR, particularly as regards the assessment of the criminal nature of a sanction. Most remarkably, it has

paid increasing attention in order to define what amounts to 'idem', i.e. the material conduct and not the legal classification, notwithstanding that Protocol No. 7 ECHR refers to 'offence' instead of facts (see *Zolotukhin v. Russia*, 14939/03, para. 33-38).

The administrative sanctions might in effect turn out as punitive as criminal measures. A criminal sanction may take the form of even rather low fines or administrative measures (for example revocation of the planning permit in *Morscher*, 54039/00, from the CJEU case law, see C-45/08, *Spector Photo Group* and C-60/12, *Baláž*).

Criminal sanctions, both criminal (in a strict sense) and administrative trigger the safeguards provided by criminal law including the principles of legality and the right not to be prosecuted or punished twice for the same offence (*ne bis in idem*).

PRINCIPLE OF LEGALITY

ECHR:

Art. 7

CJEU:

C-549/09 (*Arubis Bulgaria*): Principle of legality is a general principle of EU law and precludes imposing sanction by the MS not recognized in the national law. **Now Art. 49 of the EU Charter**

C-210/00 (*Käserei Champignon Hofmeister*): Clear and unambiguous legal basis



Principle of legality is protected by ECHR and, according to the CJEU, is one of the general principles of EU law. It precludes imposing sanction not recognised in the national law (see C-549/0,9 *Arubis Bulgaria*). To constitute a crime, it requires a clear and unambiguous legal basis (C-210/00, *Käserei Champignon Hofmeister*). This may present a difficulty if the national environmental law implements the EU law with its autonomous definitions.

NULLUM CRIMEN...

Article 50(1) of the Waste Shipment Regulation (1013/2006) concerns penalties for infringements:

'Member States shall lay down the rules on penalties applicable for infringement of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. ...'

C-624/17 – Tronex

AG:

51. It is reasonable to question, however, whether the concept of waste is defined with sufficient precision to justify a criminal penalty in the main proceedings. In accordance with the first sentence of Article 49(1) of the Charter of Fundamental Rights, after all, much importance is attached, both in the EU legal order and in national legal systems, to the requirements which the principle of the legality of criminal offences and penalties (nullum crimen, nulla poena sine lege) imposes with respect to foreseeability and precision.



For example, see the opinion of the General Advocate in C-624/17, *Tronex*, para 51: “*It is reasonable to question, however, whether the concept of waste is defined with sufficient precision to justify a criminal penalty in the main proceedings. In accordance with the first sentence of Article 49(1) of the Charter of Fundamental Rights, after all, much importance is attached, both in the EU legal order and in national legal systems, to the requirements which the principle of the legality of criminal offences and penalties (nullum crimen, nulla poena sine lege) imposes with respect to foreseeability and precision.*”

NULLUM CRIMEN...

C-624/17 – Tronex

CJEU:

The shipment to a third country of a consignment of electrical and electronic appliances, such as those at issue in the main proceedings, which had been initially intended for retail sale but which were returned by the consumer or which, for various reasons, were sent back by the retailer to its supplier, is to be regarded as a 'shipment of waste' within the meaning of Article 1(1) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, read in conjunction with Article 2(1) thereof, and Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, where that consignment contains appliances the good working condition of which has not been previously ascertained or which are not adequately protected from transport damage.

Such goods which have become redundant in the seller's product range and which are in their unopened original packaging, on the other hand, must not, without indications to the contrary, be regarded as waste.



TERMINOLOGY (SCOPE OF LIABILITY)

- *emissions?*

STARTING POINT: In order to ascertain the meaning and scope of a provision, it is necessary **to interpret it by taking into account the wording of the provision and the objective pursued** by the legislation in question (C-184/14, para. 32, for IED C-304/15)

CONSEQUENCE:

The second subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as follows: 'emissions into the environment' within the meaning of that provision covers the release into the environment of products or substances such as plant protection products or biocides and substances contained in those products, to the extent that that release is actual or foreseeable under normal or realistic conditions of use C-442/14 (also see C-673/13 P)

Art. 3(4) IED "emission" means the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land.'



As a general rule, the meaning and scope of terms for which EU law has no definition must be determined in accordance with their normal meaning in the current language, taking into account the context in which they are used and the objectives pursued by the legislation of which they are based. included. While the objective of EU environmental legislation is not disputed, it is no longer a simple task to determine the usual meaning of an expression in everyday language.

On the other hand, there is undoubtedly an interest in the use of uniform terminology across EU legislation, particularly when problems of interpretation may further deepen the diversity of language versions. According to the CJEU, the need for a uniform interpretation of the different language versions of a provision of EU law requires that, in the event of a difference between the language versions, the provision in question be interpreted not only with regard to the purpose of the legislation but also its general scheme.

TERMINOLOGY (SCOPE OF LIABILITY)

A sow is a female that has reproduced. A gilt is a female that has not reproduced.



Another example is the judgment in Case C-585/10 (Møller), in which the CJEU dealt with the interpretation of the term 'sow' within the meaning of the then IPPC Directive. The farmer, who was ordered to reduce the size of the establishment to a maximum of 750 sows, argued that a distinction should be made between gilts and sows. According to him, the term 'sow' refers only to adult female pigs after the first farrowing, whereas the term 'gilts' refers to an embedded adult female pig before the first farrowing.

TERMINOLOGY (SCOPE OF LIABILITY)

A sow is a female that has reproduced. A gilt is a female that has not reproduced.

STARTING POINT: *It is therefore necessary also to examine the general scheme **and** purposes of Directive 96/61(C-585/10 Møller, para. 28)*

*The Kommune submits, before the Vestre Landsret, that it was justified in including the places for gilts in the number of places for sows. It maintains that **the objective of Directive 96/61 is to protect the environment and that there is no reason to take the view that a gilt pollutes less than, or in a different manner to, a sow**. It concludes that places for gilts are covered by the expression 'places for sows'. According to the Kommune, the legislation on animal welfare is not relevant in that regard.*

CONSEQUENCE:

31 As the purpose of Directive 96/61 has therefore been broadly defined, subheading 6.6(c) of Annex I to that directive cannot, as Mr Møller **and** Ireland suggest, be interpreted restrictively in such a way as to exclude places intended for gilts (see, by analogy, *Association nationale pour la protection des eaux et rivières* **and** *OABA*, paragraph 27).



His breeding consists of 875 sows less than one year old, which was confirmed by the inspection investigation. The CJEU accepted the view of the national administration that the purpose of the IPPC Directive is to protect the environment and there is no reason to consider that the gilts pollute less than sows or otherwise pollute the environment.

NE BIS IN IDEM

CJEU:

C-436/04 (Van Esbroeck): Charges in multiple MS, non bis in idem applies
Art. 50 Charter

ECHR:

A. and B. v Norway (24130/11 and 29758/11):

double penalty is permissible if it is foreseeable for the perpetrators, and the second sanction is taken into account in proceedings before administrative authorities or courts proceedings, especially if the penalty was imposed earlier, so the sanctions in their the summary is not unjust and disproportionate

Reference to C-617/10 (Åkerberg Fransson)

Johannesson and Others v. Iceland (22007/11)



The right not to be prosecuted or punished twice for the same offence (*ne bis in idem*) is a fundamental principle of criminal law. At the European level, the *ne bis in idem* principle is enshrined in Art. 4 of Protocol No. 7 to the ECHR and in Art. 50 of the EU Charter of Fundamental Rights. Under both legal texts, the following four elements are necessary to trigger its application: 1) two sets of proceedings of criminal nature (*bis*), 2) concerning the same facts (*idem*), 3) against the same offender, and 4) a final decision.

Until 2016, the jurisprudence of both courts on *ne bis in idem* aligned towards a higher level of protection, covering both administrative and criminal punishment. In practice, however, several countries provide for a combination of administrative and criminal responses to similar violations of substantive regulations. Not only have they introduced a combined system of criminal and administrative liability (see above) but a combination of the two serves for adequate protection of the environment. In some countries, more administrative bodies have the competence to deal with the unlawful act, each on different grounds. For example, destruction of a riverbank can be punished by both the water protection authority and the nature protection authority, each acting on a different legal ground. This fragmented architecture of enforcement can be justified by the fact that each type of sanction pursues a different goal, that administrative penalties better comply with demands of speediness and effectiveness, and that previous administrative sanctions would prevent otherwise criminal investigations against organised criminal networks.

Starting with the landmark decision of the ECtHR in *A and B v Norway* (24130/11 and 29758/11), followed most notably by the three CJEU 2018 decisions in C-524/15, *Menci*, C-537/16, *Garlsson*, C-596/16 and C-597/16, *Di Puma and Zecca*, all dealing with the so-called double-track enforcement regimes, the *ne bis in idem* principle has been seriously modified.

The courts concluded that the duplication of punitive sanctions does not necessarily violate the *ne bis in idem* principle provided there is a precise mechanism of coordination between criminal and administrative enforcement at national level, e.g. a mechanism precluding the continuation of administrative proceedings if there are some elements that justify the application of criminal law, and *vice-versa*.

PROPORTIONALITY

ECHR:

Jussila (73053/01): VAT and an additional 10% surcharge (no violation)

CJEU

Art. 13/2 TEU: General principle of EU law

Principle of proportionality applies to administrative sentencing...

(Urbán (C-210/10, para. 23 and cited case law).

... including method of determining the sanction, taking account of the circumstances of the wrongful act and taking into account the nature and gravity of the breach of the duty for which the sanction is imposed.

Rodopi-M 91 (C-259/12, para 38 and cited case law)



In practice, fines are by far the most commonly used sanction for environmental offences and it is sporadic for prison sentences to be issued. The level of sanctions for specific crimes differs significantly among the Member States. Consequently, in a situation in which there are different regulatory frameworks, criminals are likely to operate under the jurisdiction of the one that has the least stringent rules and sanctions.

Nevertheless, the Member States are under a general obligation to take all measures necessary to ensure that EU law is applied and enforced effectively and that its *effet utile* is achieved. They have to ensure that infringements of EU law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to violations of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (see opinion of GA in C-304/02 *Commission v France*).

EFFECTIVENESS, PROPORTIONALITY, DISSUASIVENESS

- **three criteria closely interlinked**
- **inherent challenge: limited literature and case-law, divergence between MSs,**
- **Challenges arising from the definition:**
 - **lack of empirical and evidential analysis of the penalties as applied in practice (application of criteria should be guided by the specific circumstances of individual cases and viewed within the wider context of the national enforcement systems within MSs)**
 - **significant differences between national legal and institutional frameworks and practices and economic situations of each MS**
 - **differences in the sanctions applied (e.g. administrative, criminal, quasicriminal) and in the ranges and levels of penalties imposed**
 - **no EU mandatory level of 'minimum' or 'maximum' fine for non-compliance with a particular legislative provision.**



This general requirement is further specified in the secondary EU law including the Environmental Crime Directive which requires certain offences to be punishable by effective, proportionate and dissuasive criminal sanctions. The directive does not stipulate types or levels of penalties. The Member States are provided with the degree of flexibility regarding determining the quantity and quality of sanctions. Moreover, a plethora of EU environmental directives require the Member States to establish 1) effective system of sanctions, or 2) effective system of sanctions with particular sanctions and measures such as withdrawal of permit, or actions to ensure that compliance is restored within the shortest possible time. Once again, the sanctions have to be effective, proportionate and dissuasive.

OVERVIEW OF PENALTIES

EFFECTIVENESS, PROPORTIONALITY, DISSUASIVENESS

- Criteria undefined in current EU legal framework, COM study/workshop tried to develop certain lines of interpretation
- **Effectiveness:** penalties are **capable of ensuring compliance** with EU law and achieving the desired objective
- **Proportionality:** penalties adequately **reflect the gravity** of the violation and do not go beyond what is necessary to achieve the desired objective
- **Dissuasiveness:** penalties have a **deterrent effect** on the offender which should be prevented from repeating the offence and on the other potential offenders to commit the said offence



How should the requirement that sanctions be effective, proportionate and dissuasive be interpreted? According to the study conducted in 2011 for the application of the Industrial Emissions Directive (Milieu Ltd. *Provisions on penalties related to legislation on industrial installations*), efficiency of the sanction is linked to the ability to achieve the Union's regulatory target, proportionality requires taking into account the seriousness of the negotiations and assessing the level of sanction sufficient to achieve the desired objectives. Deterrent sanctions should encourage the perpetrator not to repeat his actions and discourage other persons from doing so.

CJEU ON DISSUASIVENESS

C-494/01 - Commission v Ireland (Waste directive)

GA:

The Commission claims that Ireland has not taken sufficient action to enforce the provisions implementing the waste directive and that where penalties are imposed these do not have deterrent value. Ireland objects to this and refers to figures on enforcement action taken and to certain judgments of Irish courts in which severe penalties were imposed. As the Commission has shown in a number of situations (inter alia complaints 2, 3, 5 and 8), a fact which was not expressly denied by the Irish Government, **either penalties were not imposed or these were so low as not to be considered to act as a deterrent**.

CJEU (on several different operations):

106 As regards waste dealt with by private operators, the Commission contends that the Irish authorities, at various levels, also tolerate the continuation over long periods of unauthorised operations in a very large number of places in Ireland, failing to ensure that they cease or are punished, as is apparent in particular from investigation of Complaints 1997/4705, 1997/4792, 1999/4478, 1999/4801, 1999/5112, 2000/4145 and 2000/4633. The **few penalties that are imposed continue, moreover, to have no deterrent effect at all**, as is shown in particular by examination of Complaint 1997/4847. Unscrupulous operators are thus encouraged, on making a simple financial calculation, to continue their illegal activities, while their competitors who comply with the Directive's requirements are penalised.



In practice, all these criteria overlap largely, since the penalties must be proportionate to the gravity of the infringements they penalise, in particular by ensuring a substantial deterrent effect, while respecting the general principle of proportionality. A non-dissuasive sanction can generally not be effective either. For example, see C-494/01 *Commission v Ireland*, para 106: “*Unscrupulous operators are thus encouraged, on making a simple financial calculation, to continue their illegal activities, while their competitors who comply with the Directive’s requirements are penalised.*”

CJEU ON EFFECTIVENESS

- **C-535/15 (Pinckernelle)** –possibility to export the unregistered chemical out of the EU

Recital 122 of the REACH Regulation

*In order to ensure transparency, impartiality and consistency in the level of enforcement activities by Member States, it is necessary for Member States to set up an **appropriate framework for penalties with a view to imposing effective, proportionate and dissuasive penalties** for non-compliance, as non-compliance can result in damage to human health and the environment.'*

Article 126 of the REACH Regulation 'Penalties for non-compliance':

'Member States shall lay down the provisions on penalties applicable for infringement of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be **effective, proportionate and dissuasive**.



In most cases, the CJEU does not go into the assessment of a specific sanction and either merely states what the sanction is under national law or refers the evaluation of proportionality to the national courts (see C-535/15 *Pinckernelle*).

CJEU ON EFFECTIVENESS

- C-535/15 (Pinckernelle)

AG:

73. Therefore, the competent authorities of the Member States **may deploy any or all of the following to correct non-registration under the REACH Regulation**. The means resorted to will inevitably vary depending on all the circumstances to hand. Such means include **(i) orders compelling registration; (ii) any necessary interim orders**, such as, for example, orders impounding the chemicals pending the termination of remedial processes so that, in practical terms, they cannot be exported; **(iii) the levying of fines, and (iv) in severe cases the imposition of criminal sanctions**.

74. The application of Member State remedial regimes to the end of enforcing the REACH Regulation is, of course, **subject to compliance with the fundamental rights protected under the EU Charter, and general principles of law such as the principle of proportionality**. This means that the sanction or sanctions chosen must be appropriately adapted to achieve the aims of the REACH Regulation, **and must not go beyond what is necessary to secure them**. It is at this juncture that a trader can argue, for example, that registration imposes disproportionate costs or that the sanction chosen by the Member State authority is otherwise excessive.

CJEU:

In the present case, it must be pointed out that, as was noted in paragraph 18 above, under German law a person is liable to **punishment of up to two years' imprisonment or a fine** if he infringes the REACH Regulation.



However, it provides the national courts with particular guidelines as to the aspects of the unlawful behaviour that should be taken into account in determining the amount of the fine.

CJEU ON PROPORTIONALITY

T-177/12 (Spraylat v. ECHA)

In the context of an application to the European Chemicals Agency (ECHA) for registration of a certain chemical substance, recital 11 of Regulation No 340/2008 states that the **submission of false information should be discouraged by the imposition of an administrative charge by the [ECHA] and a deterrent fine by the Member States, if appropriate.**

An administrative charge **more than 17 times greater** than the amount of the fee which the undertaking had to pay for registration of the substance concerned and **28 times greater** than the amount of the fee which could have been avoided by reason of the false declaration by that undertaking is **manifestly disproportionate** compared to the objective pursued by the legislation.

The principle of proportionality is one of the general principles of EU law and requires that measures implemented through EU law provisions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them. Furthermore, where the institution which adopted the measure has a broad discretion, only if a measure is manifestly inappropriate having regard to the objective which the competent institution is required to pursue can its lawfulness be affected.

(see paras 33, 34, 36, 38)



In its judgment in Case T-177/12 (Spraylat v ECHA), the General Court considered that the administrative fee imposed for the submission of false information when registering a chemical was disproportionate. The disproportionality was mainly due to the ratio of the fee to the amount that could be recovered on the basis of an incorrect declaration (EUR 720).

CJEU ON PROPORTIONALITY

T-392/13 (La Ferla v Commission and ECHA)

Nonetheless, ***the applicant failed to produce evidence to show that the administrative charge imposed on it in the present case was tantamount to a fine.*** In particular, the applicant's argument is essentially based on the claim that the administrative charge was calculated by reference to the verification-related costs borne by the ECHA, including costs which, ultimately, will not be borne by undertakings which have correctly provided information on their size. That, in itself, cannot lead to the conclusion that the amount of the administrative charge, as imposed on the applicant in this instance, is tantamount to a fine, since the charge in question also contributes to the objective of discouraging the transmission of false information by undertakings.

(...)

It should also be borne in mind that, as is apparent from the case-law cited in paragraph 112 above, the imposition of an administrative charge contributes to the objective of discouraging the transmission of false information by undertakings. ***The pursuit of that objective may, where appropriate, require account to be taken of the actual size of registrant companies.***



However, the actual ratio of the amount of the fee to the amount received is not decisive, it is necessary to take into account its deterrent effect as well as the personal circumstances of the companies applying for registration. As the General Court concluded in its judgment in Case T-392/13 (La Ferla v Commission and ECHA), the amount of the administrative fee may not be the same for all applicants, but may take account of their size.

CJEU ON EFFECTIVENESS

- **C-129/16 (Túrkevei Tejtermelő Kft.) - whether the owner of a leased-out plot of land may be penalised because waste was illegally incinerated there**

Article 36 of the **Waste Directive**:

- 1. Member States shall take the necessary measures to prohibit the abandonment, dumping or uncontrolled management of waste.
- 2. Member States shall lay down provisions on the penalties applicable to infringements of the provisions of this Directive and shall take all measures necessary to ensure that they are implemented. **The penalties shall be effective, proportionate and dissuasive.'**

AG: Penalties for the illegal incineration of waste instead should rather be assigned to the Waste Directive. It is also based on the **polluter-pays principle** and expressly requires effective penalties for breaches. And, because penalties are involved, in addition to the polluter-pays principle, the proportionality principle, which limits the imposition of penalties, must also be considered, as must the presumption of innocence.

In addition, the EU legislature always needs to integrate the polluter-pays principle when adopting environmental laws in accordance with Article 191(2) TFEU. The Waste Directive is one such legislative text, as it was based on Article 175(1) TEC (now Article 192(1) TFEU). Therefore, this directive must be construed in the light of the polluter-pays principle.

Accordingly, the obligation in Article 36(2) of the Waste Directive to impose penalties in respect of breaches must also be construed in such a way as to give effect to the polluter-pays principle.



The system of accountability itself, even if it stands otherwise in terms of the principles of punishment, may run counter to the principles of environmental protection which it must fulfill.

Typically, it will be the polluter pays principle, which leads to the internalisation of environmental protection costs - for example, the recent judgment in Case C-129/16 (Túrkevei Tejtermelő Kft.).

CJEU ON EFFECTIVENESS

- **C-129/16 (Túrkevei Tejtermelő Kft.) - whether the owner of a leased-out plot of land may be penalised because waste was illegally incinerated there**

AG:

43. Conversely, it would be inconsistent with the polluter-pays principle to penalise persons in respect of breaches for which they are not responsible. This would also be unnecessary and would therefore infringe the principle of proportionality, which must be observed in the implementation of EU law. This principle also applies under Article 49(3) of the Charter to the level of penalties and is also expressly mentioned in the second sentence of Article 36(2) of the Waste Directive.

44. Because a penalty is involved, other principles are also important, including the lawfulness of the punishment, *nulla poena sine lege*, in accordance with the first sentence of Article 49(1) of the Charter, and the presumption of innocence enshrined in Article 48(1) of the Charter. The presumption of innocence also includes the fault principle, *nulla poena sine culpa*, which requires guilt, that is to say, liability for the breach.

The admissibility of rebuttable presumptions

56. However, in addition to the justification of such a presumption, we must also emphasise **the rights of defence**. The accused must have the opportunity to rebut the presumption of guilt.



In that regard, the Court dealt with the Hungarian legislation providing for joint liability for environmental damage to the owner of the land affected by the pollution and the polluter, without requiring proof of a causal link between the conduct of those owners and the damage found. It concluded that EU law does not preclude such legislation.

CJEU ON EFFECTIVENESS

- **C-129/16 (Túrkevei Tejtermelő Kft.) - whether the owner of a leased-out plot of land may be penalised because waste was illegally incinerated there**

CJEU:

37 Consequently, since Article 191(2) TFEU, which establishes the polluter-pays principle, is directed at action at EU level, that provision cannot be relied on as such by individuals in order to exclude the application of national legislation – such as that at issue in the main proceedings – in an area covered by environmental policy for which there is no EU legislation adopted on the basis of Article 192 TFEU that specifically covers the situation in question

48 As follows from Article 4(5) and Article 11(2) of Directive 2004/35, read in conjunction with recital 13 thereof, the **environmental liability mechanism provided for by that directive requires the competent authority to establish a causal link between the activity of one or more identifiable operators and the environmental damage or the imminent threat of such damage**

56 **However, it must be noted that Article 16 of Directive 2004/35 grants Member States the power to maintain or adopt more stringent provisions in relation to the prevention and remedying of environmental damage**, including the identification of additional activities to be subject to the prevention and remediation requirements of that directive and the identification of additional responsible parties.



CJEU ON EFFECTIVENESS

- **C-129/16 (Túrkevei Tejtermelő Kft.) - whether the owner of a leased-out plot of land may be penalised because waste was illegally incinerated there**

CJEU:

63 In those circumstances, the answer to the first question is that (...) **do not preclude national legislation**, (...) which identifies another category of persons who, in addition to those using the land on which unlawful pollution was produced, share joint and several liability for the environmental damage (...) **provided that such legislation complies with the general principles of EU law**, all relevant provisions of the EU and FEU Treaties and of the acts of secondary law of the European Union.

66 (...) **provided that the legislation laying down such a fine is, in accordance with the principle of proportionality, appropriate for the purposes of contributing to the attainment of the objective of more stringent protection**, which is the purpose of the legislation prescribing joint liability, and that the methods for determining the amount of the fine do not go beyond what is necessary to attain that objective.

67 In the present case, **it is for the referring court to establish whether the national legislation at issue** in the main proceedings, notably Article 34(1) of Government Decree 306/2010, **fulfils these conditions**.



CJEU ON PROPORTIONALITY

- C-69/15 (Nutrivet) - administrative fines imposed for infringements of the rules on shipments of waste

CJEU:

48 By its second question, the referring court asks, in essence, whether Article 50(1) of Regulation No 1013/2006, under which penalties levied by the Member States in the event of offences under the provisions of that regulation must, inter alia, be proportionate, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, providing, **where the accompanying document contains incorrect or inconsistent information, for the imposition of a fine the basic amount of which corresponds to that of the fine levied in the event of infringement of the obligation to complete that document.**

It is clear that that regulation does not contain more precise rules with regard to the establishment of those national penalties and, in particular, that it does not establish any express criterion for the assessment of the proportionality of such penalties.

52 However, **it is ultimately for the national court**, by taking into account all the factual and legal circumstances of the case before it, **to assess whether the amount of the penalty does not go beyond what is necessary to attain the objectives pursued by the legislation in question.** As regards the specific application of that principle of proportionality, it is for the national court to determine whether the national measures are compatible with EU law, the competence of the Court of Justice being limited to providing the national court with all the criteria for the interpretation of EU law which may enable it to make such a determination as to compatibility



The amount of the sanction should not go beyond what is necessary in order to achieve the objectives of ensuring a high level of protection of the environment and human health, taking into account all the factual and legal circumstances of the case (see also a similar case C-69/15, *Nutrivet*: “*the national court is required, in the context of the review of the proportionality of such penalty, to take particular account of the risks which may be caused by that infringement in the field of protection of the environment and human health*”).

CJEU ON PROPORTIONALITY

- C-69/15 (Nutrivot) - administrative fines imposed for infringements of the rules on shipments of waste
- CJEU:

the national court is required, in the context of the review of the proportionality of such penalty, to take particular account of the risks which may be caused by that infringement in the field of protection of the environment and human health.

...Such an infringement may, in principle, be subject to an equivalent penalty to that provided for in respect of infringement of the obligation to complete that document. (...) if the circumstances of the infringement make it possible to find that they involve equally serious infringements in the light of the risks they entail for protection of the environment and human health, which it is for the national court to ascertain



CJEU ON PROPORTIONALITY

- **C-487/14 (Total Waste Recycling)** - Point of entry different from that specified in the notification and in the prior consent

Recital 4 of Directive 2005/35 on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences states as follows:

(4) Measures of a dissuasive nature form an integral part of the Community's maritime safety policy, as they ensure a link between the responsibility of each of the parties involved in the transport of polluting goods by sea and their exposure to penalties; in order to achieve effective protection of the environment there is therefore a need for effective, dissuasive and proportionate penalties.

Article 8 of Directive 2005/35 specifies that Member States are to impose sanctions that are **effective, proportionate and dissuasive** for discharges of polluting substances.



In C-487/14 (*Total Waste Recycling*), the CJEU assessed the proportionality of the fine imposed by the Inspectorate for breach of waste shipment legislation. The fine was imposed on a transport company, which used a different border crossing point than agreed by the competent authorities. The fine was equal to a penalty imposed in the complete absence of the transportation permit. According to the CJEU, the national court should assess whether the amount of the sanction reflects, in particular, the risks of harm which may be caused by specific conduct in the field of the environment and human health.

CJEU ON PROPORTIONALITY

- **C-487/14 (Total Waste Recycling)** - Point of entry different from that specified in the notification and in the prior consent

*Article 50(1) of Regulation No 1013/2006, as amended by Regulation (EC) No 669/2008, according to which the penalties applied by the Member States for infringement of the provisions of that regulation must be proportionate, must be interpreted as meaning that the imposition of a fine penalising the illegal shipment of waste, such as that referred to in Annex IV to that regulation, in the country of transit at a border crossing point which differs from that provided in the notification document which had been consented to by the competent authorities, of which the basic amount is the same as the fine imposed for a breach of the requirement to obtain consent and to give prior notification in writing, **is to be considered to be proportionate only if the circumstances of the infringement make it possible to find that they involve equally serious infringements. It is for the national court to determine, by taking into account all the factual and legal circumstances of the case before it, and, in particular, the risks which may be created by that infringement in the field of the protection of the environment and human health, whether the amount of the penalty does not go beyond what is necessary to attain the objectives of ensuring a high level of protection of the environment and human health.***



CJEU ON PROPORTIONALITY

- **C-487/14 (Total Waste Recycling)** - Point of entry different from that specified in the notification and in the prior consent
- The Court has made reference to the **principle of a high level of protection**. The penalty should not, according to its conclusion, go beyond what is necessary to attain objectives of ensuring a high level of protection of the environment and human health.
- This is a good example of the application of the general principles set out in Article 191 (2) TFEU.



CJEU ON PROPORTIONALITY

C-580/14 (Sandra Bitter)

C-203/12 (Billerud Karlsborg a Billerud Skärblacka)

- Directive 2003/87/EC (Scheme for greenhouse gas emission allowance trading)
- *During the three-year period beginning 1 January 2005, Member States shall apply a lower excess emissions penalty of EUR 40 for each tonne of carbon dioxide equivalent emitted by that installation for which the operator has not surrendered allowances.*
- No moderation, wide discretion of the EU legislator
- necessary in the pursuit of the legitimate objective of establishing an efficient carbon dioxide equivalent allowance trading scheme
- *The overall scheme of the directive is thus based on the strict accounting of the issue...*

Nordzucker (C-148/14)

On the other hand, the penalties which the Member States are required to provide under Article 16(1) of Directive 2003/87 constitute an appropriate instrument in such a situation in so far as, in accordance with the wording of that provision, those penalties **must be proportionate to the infringement committed**. That means, inter alia, that it is for the competent national authorities to have regard to all the considerations of fact or law specific to each case in order to determine whether a penalty must be imposed on an operator and, where appropriate, which penalty. **That assessment requires, in particular, that the behaviour of the operator be taken into account, as well as its good faith or its fraudulent intentions.**



THANK YOU FOR YOUR ATTENTION!

vomacka@mail.muni.cz

