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On the Systematisation of Criminal Responsibility by and in Enterprises – Introduction and Overview[**]

The current volume of the European Integrations Studies consists of two parts. The first part contains the written versions of the presentations given at the third conference 'Corporate compliance as a challenge for the design of legal consequences – towards a coherent system of sanctions in commercial criminal law', while the second part contains those given at the fourth, final conference of the Humboldt Research Group Linkage 'On the systematisation of criminal responsibility by and in enterprises' (2020-2025) with the support of the Alexander von Humboldt Foundation.[1]

1. Corporate compliance as a challenge for the design of legal consequences – towards a coherent system of sanctions in commercial criminal law'

On 17 October 2022, the international conference "Corporate compliance as a challenge for the design of legal consequences – towards a coherent system of sanctions in commercial criminal law' organized by the universities of Heidelberg, Germany, and Miskolc, Hungary, was held as part of the Humboldt Research Group Linkage 'On the systematisation of

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[**] This study was prepared as part of the linkage project of the Humboldt Research Group "On the systematisation of criminal responsibility of and in enterprises" led by the University of Heidelberg and the University of Miskolc (2020-2025).

[1] The programme can be found at: https://www.humboldt-foundation.de/en/apply/alumni-programmes/alumni-abroad/research-group-linkage-programme.
Contributions from the first and second Humboldt meetings were published in *European Integration Studies* Vol. 17. No. 1. (2021) [https://ojs.uni-miskolc.hu/index.php/eis/issue/view/33] and Vol. 19. No. 2. (2023) [https://ojs.uni-miskolc.hu/index.php/eis/issue/view/169].

criminal responsibility by and in enterprises' (2020-2025) with the support of the Alexander von Humboldt Foundation. The main objective of the Humboldt Project is to systematise theoretical and practical experience and knowledge about the criminal liability of and within companies from a comparative law perspective in order to develop criminal policy responses to technological and social changes. The project aims to bring together academics, practitioners and students from Hungary and Germany, as well as other EU member states, to address a fundamental problem of modern economic criminal law, which is traditionally discussed in terms of individual issues. The aim is to identify deficits in criminal law doctrine and practice, which are to be systematically localised in academic discourse and addressed with dogmatic solutions, especially since no sufficiently solid structures have yet emerged in practice to deal with legal issues reliably.

The main focus of the event was "Corporate compliance in an intradisciplinary and interdisciplinary perspective. Compliance programmes and measures are becoming increasingly important in our globalised world and are subject to a progressive process of legalisation, meaning that they are now largely no longer a matter of soft law. For example, it is now recognised that when sanctioning a legal violation by a company, a functioning compliance system necessarily leads to a reduction in penalties, and the absence of such a system must be considered an aggravating factor. This means that it is no longer at the discretion of company management to introduce and develop a compliance system. It is obliged to do so in the interests of the company. Compliance, which was adopted from the US legal system, requires integration and anchoring in national law and, with regard to criminal sanctions, in the criminal justice systems of the member state. This task has not yet been adequately fulfilled. Scientists and practitioners from three member states of the European Union addressed these issues: Germany (Universities of Heidelberg and Münster), Hungary (University of Miskolc) and Austria (Vienna University of Economics and Business). This topic of the conference fits perfectly with the current discussions on criminal law in the European Union and its member states. The great interest in the event is reflected in the total number of 150 conference participants.

The contributions to the third and fourth conference are published as part of European Integration Studies. The presentations were followed by

panel discussions about the areas in which further research projects are necessary.[2]

2. Green Criminology and Green Deal: Environmental and Climate Protection – An Urgent Task for Criminal Law'

On 4–5 March 2024, the fourth conference was held as part of the Humboldt Research Group Linkage project funded by the Alexander von Humboldt Foundation. The subject of the congress in Miskolc, Hungary, was 'Green Criminology and Green Deal: Environmental and Climate Protection – An Urgent Task for Criminal Law'.

The European Union attaches great importance to environmental protection. Based on the Green Deal and the 8th Environment Action Programme, the EU pursues a comprehensive sustainability policy. The aim is to achieve climate neutrality by 2050 and to create a sustainable economy through measures in the areas of renewable energies, sustainable transport, circular economy, waste reduction and promotion of biodiversity, which will improve the well-being of citizens. Other objectives and measures of EU sustainability policy include: sustainable financing, sustainability reporting to ensure that companies report comparable information and communicate their sustainability performance effectively, and EU taxonomy to define which economic activities are considered sustainable and to determine which investments in environmentally sound projects are supported. Furthermore, the Unfair Commercial Practices Directive has been amended and expanded several times in recent years. The most important change is the strengthening of consumer rights with regard to environmental and social claims, in particular the prohibition of greenwashing, i.e. the 'prohibition of misleading environmental claims'. Directive (EU) 2024/825, the 'Empowering Consumers for the Green Transition Directive'[3], which came into force at the end of March 2024, introduced additional prohibitions and obligations for companies.

The European Union considers environmental and climate protection to be a new priority and calls for effective criminal, administrative and civil

[2] See Dannecker and Jacsó in this volume.

[3] Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information (Text with EEA relevance), *OJ L, 2024/825, 6.3.2024.*

sanctions to protect human rights and the environment, in particular the foundations of life. However, if fundamental and human rights and environmental protection are to be guaranteed by legal measures, reference must be made to generally recognised values. The decision as to which means should be used to achieve effective protection of these values and the significance of criminal sanctions, in particular sanctions against companies, raises fundamental questions that were the subject of the conference.

The speakers from academia and practice came from four countries: Germany, where issues of criminal law environmental protection and, in particular, criminal law species protection are discussed in depth; Hungary, which has a long tradition of environmental studies at its universities, particularly in Miskolc; Austria, which repeatedly goes its own way when it comes to implementing EU law in criminal law; and Liechtenstein, an EEA state. The aim of this fourth conference was to provide a framework for a knowledge-based, interdisciplinary discourse (first section) and intradisciplinary discourse (second section) on green criminology and the European Union's Green Deal.[4] The presentations were followed by two panel discussions. In the first one, the topic of 'Criminal climate protection as a challenge from a national perspective' was discussed, while in the second, 'National, European and International Research Perspectives' were considered. The presentations were followed by a panel discussion about the areas in which further research projects are necessary.

The contributions given at the two conferences and the 'Research perspectives and approaches for solutions' are published as part of European Integration Studies. We hope that this special edition will make a valuable and useful contribution to the academic discussion on the criminal liability of companies and the role of compliance systems. The contributions offer a variety of perspectives on current developments, challenges and approaches to solutions in this dynamic field of law.

We hope that this special edition will make a valuable contribution to the academic discussion on the criminal liability of companies and the role of compliance systems as well as to criminal law environmental and climate

[4] A conference report can be found at Dannecker and Jacsó: Bericht über die internationalen Konferenz "Green Criminology and Green Deal". *Europäische Zeitschrift für Wirtschaftsrecht (EuZW*), 2024/24, pp. 1153-1158.,
Dannecker and Jacsó: Report on the international conference titled 'Green Criminology and Green Deal. *Journal of Agricultural and Environmental Law,* 2025, 20(38), pp. 519–530; https://doi.org/10.21029/JAEL.2025.38.519.

protection. The contributions offer a variety of perspectives on current developments, challenges and approaches to solutions in these dynamic fields of law. The presentations and lectures will be followed by a presentation of the 'research perspectives and approaches to solutions' developed during the panel discussions at the two conferences. We hope that you will find these publications of interest and that they will stimulate further scientific exploration of the issues addressed, thereby contributing to further professional exchange.

This volume of European Integration Studies was published as part of the Humboldt Research Group Linkage On the systematisation of criminal responsibility by and in enterprises with the support of the Alexander von Humboldt Foundation.'

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Compliance as a strategy to avoid criminal, administrative and civil sanctions**

ABSTRACT: Compliance, which has found its place in the corporate practices of European companies, has changed from the backward-looking, traditionally reactive criminal and administrative offence law to a forward-looking control system with a focus on modern prevention, which refers to the enforcement of legal prohibitions and regulations and the company's internal guidelines, including organizational measures within the company. This is supplemented by the pursuit of the goal of compliance integrity, the creation of a compliance culture within the company and the introduction of formal structures with preventative effects. This article shows the growing legalization and juridification of ethical and internal company rules and the growing importance of sanction-related compliance. One of the main reasons for this development is the increasing plurality of prosecutions in sanctions law - the plurality of sanctions, of sanctioned subjects and of prosecution and sanctioning bodies as well as the parallel administrative and criminal investigations in several states.[1] At present, there is no guarantee that the various sanctions will be applied in a proportionate manner and that appropriate sanctions will be imposed. As a result, the sanctions imposed on companies can lead to overwhelmingly high penalties, which should therefore be avoided at all costs.

KEYWORDS: compliance, compliance strategy, criminal, administrative and civil law sanctions, European Union.

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** This study was prepared as part of the linkage project of the Humboldt Research Group "On the systematisation of criminal responsibility of and in enterprises" led by the University of Heidelberg and the University of Miskolc (2020-2025).
[1] Dannecker, 2022a, pp. 13.

1. Background and practical relevance of compliance

Compliance, which originated in the USA[2], has today found its place in the corporate practices of European companies and can now look back on decades of development in the European Union and its member states. Nevertheless, the concept of compliance[3] is still not unambiguous.[4] It is based on different approaches and perspectives: a legal, an economic, a behavioural-psychological and an organizational one, which focuses on the framework conditions of functioning compliance.[5] Law, economics and behavioral psychology must intertwine as complementary elements: "each supplies what the other cannot" [6] in order to establish an effective compliance system.

Compliance is concerned with creating the framework conditions for a modern, functional control system with preventative structures.[7] This requires a change of perspective: from the backward-looking perspective of a traditionally reactive criminal and sanction law to a forward-looking control system with a strong focus on modern prevention. A key feature of compliance is therefore the need to anticipate responsibility under sanction law and, on this basis, to develop strategies to avoid criminal, administrative and civil sanctions against the management of a company and against legal entities. In addition, board responsibility is now being extended to groups of companies, thus partially overriding the principle of judicial separation under company law. As part of the supply chain responsibility of large companies, responsibility for certain human rights and environmental violations has even been extended to the upstream and downstream supply chain.

It should also be considered that the prevention of unlawful or dangerous conduct must be conceived from the perspective of deviance within and by the company and not, as in continental European criminal law systems, primarily from the perspective of deviance by individuals committed in the (supposed) interests of the company to the detriment of the

[2] On the development of compliance in the USA, see Rotsch, 2024, 4. Chapter 1, No. 11.
[3] In detail Moosmayer and Lösler, 2024, § 1 no. 2 ss. with further references.
[4] Engelhart, 2012; Moosmayer and Lösler, 2024, pp. 1 ss.; Rotsch, 2015, para. 1 no. 1.; Sieber, 2008, pp. 449.
[5] Dannecker, 2023, p. 131.
[6] Aroney, 2023, p. 81.
[7] Rotsch, 2024, 4. Chapter 1, no. 10.

legal interests of the community[8] ("corporate crimes"). Company-related infringements, which primarily include cartel and price fixing, corruption and embargo violations, environmental offenses, tax and accounting offenses or subsidy fraud, have considerable potential to cause damage. These forms of deviant behavior can also be regarded as deviance for which companies are responsible, and which must be countered by sanctions-based compliance.[9]

The specific aspect of strategies for avoiding criminal, administrative and civil sanctions through compliance initially focuses on the obligation to comply with applicable law. However, compliance also refers to adherence to the requirements that have been set as part of corporate self-regulation and are binding for the company's employees. The reason for this is that internal company guidelines and regulations that go beyond the legal requirements are included in the legality obligation and legality control obligation. An illustrative example of this is the German Corporate Governance Code (GCGC), which is drawn up and further developed by a government commission and stipulates for stock corporations[10] that the Management Board must comply with statutory provisions as well as internal company guidelines (legality obligation) and ensure compliance with these by means of organizational precautions, including at subordinate levels, or work towards compliance by companies belonging to the Group (legality control obligation).[11] The Management Board and Supervisory Board of a listed stock corporation must report annually on compliance with the legality and legality control obligations and explain that the recommendations of the "Government Commission on the German Corporate Governance Code" published by the Federal Ministry of Justice and Consumer Protection in the official section of the Federal Gazette have been and are being complied with or which recommendations have not been or are not being applied and why not.

This creates transparency and makes it easier for the authorities to monitor compliance.

[8] Dannecker and Bülte, 2024a, p. 1. Kapitel, no. 6; Dessecker, 2013, 1. Kapitel, A, no. 7.
[9] Pohlmann et al., 2020, p. 14.
[10] On the legal situation for stock corporations, see Spießhofer, 2018, p. 441; Liese, 2024, p. 25.
[11] Cf. No. 4.1.3 S. 1 DCGK; on this Holle, 2014, p. 37; Baur and Holle, 2017, mp. 171 with further references.

In the following, the development of compliance from the backward-looking, traditionally reactive criminal and administrative offence law to a forward-looking control system with a focus on modern prevention, which refers to the enforcement of legal prohibitions and regulations and the company's internal guidelines, including organizational measures within the company, will be discussed. This is supplemented by the pursuit of the goal of compliance integrity, the creation of a compliance culture within the company, and the introduction of formal structures with preventative effects. As a result of the increasing legalization of ethical and internal company rules, a clear increase in the importance of sanction-related compliance can be observed (2.). Subsequently, the plurality of prosecutions in sanctions law - the plurality of sanctions, the plurality of subjects of sanctions and the plurality of prosecution and sanctioning bodies as well as the parallel administrative and criminal investigations in several states - is discussed (3.), in order to then demonstrate the necessity of coordinated, proportionate and appropriate sanctions in a fair and constitutional procedure (4.). On this basis, we conclude by commenting on the importance of compliance as a strategy to avoid sanctions against enterprises (5.).

2. On the development of compliance in the European Union: from a backward-looking, traditionally reactive criminal and administrative offense law to a forward-looking control system with a focus on modern prevention

2.1. The need to anticipate legal responsibility

Observing laws and internal company rules is, first and foremost, the responsibility of the company management. Therefore, this task must not be delegated entirely to subordinate employees. In every company, compliance must be organized and monitored by the company management. The compliance department is also responsible for ensuring that legal and operational regulations are observed. Finally, the directly responsible norm addressees can be held accountable and sanctioned for legal violations. Such sanctions and disadvantages must be avoided. This requires the change of perspective, already mentioned, from the backward-looking perspective of traditional reactive criminal and administrative offense law to a preventive control system that anticipates legal responsibilities in order to counteract behavior that threatens sanctions and avoid violations of the law.

2.1.1. Adherence to legally binding regulations

The first, classic perspective on compliance concerns the legally binding requirements that a company must adhere to.[12] The application of national laws and standards is binding for all companies. In addition to national law, companies that operate across borders must also comply with foreign legal systems and regulations that must be observed abroad. This applies in particular to economic relations with countries such as the USA and the UK, which tend to apply their own regulations extraterritorially. Internationally active companies should therefore endeavor to comply with foreign legal requirements in order to avoid the risk of being prosecuted under liability and criminal law.

Sanctions may be imposed in the event of criminal offenses and breaches of regulations subject to fines for which the company can be held responsible. Furthermore, claims for damages and administrative sanctions such as the exclusion from public contracts and public subsidies or the publication of the company naming the violation of the law may be imposed. Damage to reputation and other negative publicity with an impact on the share price, employee morale, and relationships with authorities must also be avoided.[13] The compliance department's first task is to identify the relevant regulations for its own company and monitor compliance with them.

2.1.2. Observance with internal company standards created through self-regulation

In addition to the binding requirements of laws, material norms, and standards, individual rules of conduct that each company defines within the framework of self-regulation must also be respected. Such guidelines can be, for example, directives or declarations of intent. Companies have a great deal of freedom here, with the result that the compliance rules established by the company generally go far beyond the general obligation to comply with the law. [14]

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[12] For a legal understanding of compliance, see Bussmann, 2009, p. 223; for a critical view, see Kreutner, 2020, p. 24.
[13] For more details, see Lehmann, 2015, § 3 no. 14.
[14] Rotsch, 2015, § 1 no. 52 with further references.

2.1.3. Adherence to state-private co-regulation

In addition to purely state regulation and self-regulation by companies, there is also state-private co-regulation.[15] Public law standards oblige companies to organize themselves in such a way that they take on state functions – standard setting, policing, sanctioning – in a complementary manner. As a first step, companies are obliged to develop appropriate standards, which are reflected in corporate government codes, manuals of good practice, technical or ethical codes, etc. Due to the technical, legal or moral complexity of many areas, state laws are no longer able to regulate all cases in detail, but are increasingly limited to the standardization of principles that must be concretized, specified, and adapted to the different characteristics of the respective company.

In addition, companies in areas such as money laundering and occupational safety are obliged to train and educate their employees in the relevant standards – a task that the state has not always undertaken. Co-regulation is characterized by the fact that government regulations create more or less detailed requirements for self-regulation and/or make self-regulation measures binding. Co-regulation is therefore also referred to as "regulated self-regulation", which has numerous hybrid forms and intermediate stages from self-regulation to state regulation with regard to the freedom of content granted, the intended objectives of the programs, and the coercive or incentive structures used. This gives rise to new forms of control in the economic sector. If the task of regulated self-regulation is not carried out by the companies, this gives rise to liability of the companies under criminal or fine law in the sense of organizational responsibility.[16]

2.1.4. Responsibility for organizational measures in the company and their implementation

Furthermore, effective compliance requires the creation of a compliance organization.[17] If rules are to be enforced, appropriate organizational

[15] Nieto Martín, 2008, p. 489.
[16] In detail Nieto Martín, 2008, p. 498.
[17] Lehmann, 2015, § 3 no. 6 ss. However, the economic aspects have been reflected in various legal regulations; see Kort, 2010, pp. 440 ss.; on the legal situation in France, see Walther, 2019, p. 19.

structures are required[18] to minimize liability damage caused by deviant behaviour and actions by members of the organization. From a business perspective, there are three dimensions: an instrumental, functional, and institutional dimension.[19]

The instrumental concept of compliance is the goal-oriented formulation and safeguarding of rules. The term is instrumental in the sense that criminal compliance is a measure in the sense of an instrument for complying with legal obligations and reducing the likelihood of damage.[20] The formulation of a cross-organizational code of ethics or code of conduct is the top priority. This self-imposed code must be aimed at encouraging members of the organization to follow imposed behaviours and patterns.

The functional character of compliance expresses the tasks and activities associated with how the relevant employee actions can be limited to a legally and economically responsible level. This involves activities in connection with the introduction, planning, implementation and monitoring of compliance programs. This area of responsibility includes structuring, segmenting, and differentiating the decision problem.[21]

The institutional character of compliance is expressed in the organizational integration of compliance, whether in the form of separate departments, as an external service, or in the form of a hybrid solution.[22] The compliance department does not have to know and explain every rule and every law in detail. Instead, the tasks are more of a procedural nature. It is about recognizing relevant changes, implementing them with regard to the specific company, distributing knowledge about the rules, ensuring information flows, setting up notification and reporting structures and documenting issues relevant to liability and sanctions.

If a company does not fully and comprehensively comply with the requirements of organizational law, this can also result in improper conduct, which can lead to the infringement being attributed to compliance employees and the company management. In Germany, such cases constitute at least a breach of the "duty of supervision within the company", which is punishable by a fine under Section 130 of the German Administrative Offenses Act (Ordnungswidrigkeitengesetz, OWiG). The

[18] Bürkle, 2018, pp. 525 ff.; Dannecker and Dannecker, 2010, p. 981.
[19] Lehmann, 2015, § 3 no. p.11.
[20] Lehmann, 2015, § 3 no. p. 76.
[21] Lehmann, 2015, § 3 no. p. 66.
[22] Lehmann, 2015, § 3 no. p. 11, p. 79.

prerequisite for Section 130 OWiG is that a person of the high or middle management intentionally or negligently fails to take supervisory measures that are necessary to prevent violations of obligations subject to criminal penalties or fines in the company. Violations of Section 130 OWiG by company management give rise to liability of the association under fine law.[23]

2.2. Increasing importance of compliance as a result of the legalization of ethical and internal company rules

While ethical and internal company rules were very popular in the 20th century, there is now a clear trend towards the juridification of ethical and internal company rules. This development from soft to hard law is based on very different mechanisms.

2.2.1. Expansion of legal obligations in specific compliance areas

In recent years, there has been a very strong legalization under the influence of the European Union and the USA. Particularly in areas such as money laundering[24], accounting[25], anti-corruption,[26] and terrorism[27], the European Union's guidelines are binding for its member states and thus extend the legal obligations to be complied with in many areas. Regulations in directives of the European Union are not binding for citizens and legal entities, but they must be implemented by the member states in national law and thus become legally binding.

For special areas such as food law, the European Union's basic food law regulation[28] contains numerous obligations that companies must comply with. The inspection, information, and recall obligations regulated there, which also and in particular relate to cross-border situations, can be classified as a standard for dealing with products to be placed on the market, especially as they are in principle in line with the national obligations of the

[23] On the need to introduce criminal sanctions against legal persons in Germany, see Dannecker, GA 2001, p. 101.
[24] Jacsó, 2021, p. 117.
[25] Dannecker and Bülte, 2024.
[26] Dannecker and Schröder, 2021, § 8 no. 93.
[27] Böse, 2019, p.1.; Hecker, 2016, 467 ss.; Weißer, 2021, § 9 no. 82.
[28] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

member states. It therefore makes sense to focus specifically on the food law of the European Union when it comes to specifying the obligations of companies operating across borders.[29]

US regulations must always be taken into account by foreign companies, which have a connection to the USA, because there is a general tendency towards the extraterritorial application of US law; in addition, ideas from other countries are adopted there. Such rules are even suitable for specifying extra-legal expectations of companies if they want to act as good corporate citizens.[30] Finally, there are states with particularly strict regulations, such as the United Kingdom with the Bribery Act. If a company uses these to align its compliance accordingly, it can assume that it has implemented the highest compliance standards, provided that these are actually adhered to.

2.2.2. Adoption of ethical and internal company requirements in European and national law

The simplest form of legalization of ethical or internal company rules is the incorporation of such requirements into European or national law. This is not just about the requirements of stock corporation, accounting, or capital market law[31], but about corporate law in a much broader sense.[32] Examples of explicit inclusion in legally binding instruments include the EU Public Procurement Directives[33], the EU Basic Regulation on Food Law[34],

[29] See Csirszki, 2021, p. 191 ss.
[30] See Dannecker and Schröder, 2023, p. 445.
[31] See Fleischer, 2017, p. 509.
[32] On the regulatory approaches, see Beckers, 2021, p. 223; Möslein and Engsig Søkrensen, 2018, p. 391; Rühl, 2023, p. 14. For climate protection, see Weller, 2024.
[33] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243.
[34] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1.2.2002, p. 1.

occupational health and safety and environmental laws[35], the UK Modern Slavery Act, Section 172 of the UK Companies Act and the Public Benefit Corporation Statutes.[36] Sector-specific due diligence obligations to protect the legal interests concerned can be found in the Conflict Minerals Regulation[37], the Deforestation Regulation[38], the Batteries Regulation,[39] and the Forced Labor Regulation. [40]

Moreover, with the CSR Reporting Directive[41], the European Union has introduced reporting obligations on the impact of activities on non-financial matters[42], such as human rights and environmental protection as well as other social and employee matters, governance factors and the fight against corruption.[43] In addition, parent companies have to report on the sustainability impact of their subsidiaries' activities as part of their consolidated reporting.[44] Since then, the Corporate Sustainability Reporting Directive of 2022 (CSRD)[45] has significantly tightened sustainability

[35] See the articles in De La Cuesta et al., 2016.
[36] See Fleischer, 2017, p. 524; Spießhofer, 2017, p. 70.
[37] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130, 19.5.2017, p. 1.
[38] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023, p. 206.
[39] Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC, OJ L 191, 28.7.2023, p. 1.
[40] Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937, OJ L, 2024/3015, 12.12.2024.
[41] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16.12.2022, p. 15.
[42] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, p.1.
[43] Art. 19a.
[44] Art. 29a.
[45] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC,

reporting by considerably expanding the scope of application[46] and introducing an external audit requirement.[47] The comply-or-explain mechanism has been largely abolished.[48] In addition, the new regulation also extends reporting to the value chain, business relationships, and supply chain of the reporting company itself and - if there is a consolidation obligation - also to subsidiaries.

Further reporting obligations can be found in the Taxonomy Regulation[49] on the scope of environmentally sustainable economic activities of a company (Art. 8) and in the Disclosure Regulation[50] on the consideration of sustainability criteria in the financial sector. The aim of reporting is to increase the comparability of companies with regard to the factors to be mentioned in the report.[51]

Furthermore, the European Union combines reporting with due diligence obligations[52], for example in Directive (EU) 2024/1760 on due diligence obligations of companies with regard to sustainability (CSDDD).[53] This directive for the first time provides for material due diligence obligations to protect certain human rights and the environment at European level, irrespective of the sector. Compliance with these obligations is secured by public law measures of the supervisory authorities[54] and civil liability of the regulated companies.[55] In addition, Article 28 of the CSDDD

Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16.12.2022, p. 15.

[46] Renner, 2022, p. 794.

[47] Atamer and Willi, 2022, p. 44; Leyens, 2023, p. 86.

[48] Cf. to the few exceptions Jentsch, 2023, pp. 24 s.

[49] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, p. 13.

[50] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector. p. 1.
last amended by Regulation (EU) 2023/2869 of the European Parliament and of the Council of 13 December 2023 amending certain Regulations as regards the establishment and functioning of the European single access point, OJ L, 2023/2869, 20.12.2023.

[51] Burckhardt, 2020, p. 75.

[52] Atamer and Willi, 2018, p. 451.

[53] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 2024/1760, 5.7.2024. p.2.

[54] Art. 24–28. CSDDD.

[55] Habersack and Zickgraf, 2023, p. 599; Kieninger, 2024, p. 1044; Nietsch, 2024, p. 2865. Critical evaluation by Thomale and Schmid, 2024, p. 425.

requires Member States to introduce provisions on fines for breaches of due diligence obligations. The directive thus supplements the existing European regulations for achieving the sustainability goals, which primarily provide for reporting obligations and sector-specific due diligence obligations.[56] In the opinion of the EU Commission, soft law and self-regulatory approaches were not sufficiently effective.[57]

The most important innovation in the directive concerns the extension of the scope of corporate responsibility to subsidiaries and business partners in the supply chain. However, these requirements only apply to companies in selected legal forms that exceed high thresholds.[58] The specific details of the due diligence obligations are set out in the provisions of Art. 5-16 CSDDD.[59]

It is apparent here, that the regulatory model addresses rules of conduct for companies and not for natural persons. The aim is for companies to establish preventive measures in their own business area and, where possible, to motivate their suppliers to do the same. A risk analysis is required in the company's own business area and in those of its direct suppliers. If a risk is identified, preventive measures must be taken immediately. It should be noted that breaches of obligations can often go hand in hand with conventional breaches of due diligence with specific hazards and violations at the beginning of the supply chain. In this respect, a duty to act is imposed on companies in advance of relevant violations of the law, obliging them to take remedial measures in the event of specific violations of the law, up to and including the termination of business relationships. If the obligation to introduce supply chain responsibility has not yet been transposed into national law in an EU member state, the UN Guiding Principles on Business and Human Rights 2011 and the OECD Guidelines for Multinational Enterprises 2011 can be referred to.[60]

[56] Cf. Zetzsche and Sinnig, 2024, p. 1342.
[57] SWD(2022) 42 final (no. 16), pp. 14-34.
[58] In detail Atamer and Wittum, 2024, p. 14.
[59] Schuhr, 2023, p. 51.
[60] For more details, see Hübner, 2024, p. 763.

2.2.3. Legalization through the determination of dutiful conduct with recourse to good practices

As already indicated, "soft law with hard sanctions" can also develop if soft law, such as the UN's due diligence obligation, establishes guiding principles for standards of care that are incorporated into tort or criminal negligence liability.[61] Compliance with good practices can also exclude the charge of negligent, i.e. careless, behavior. Domestic and international best practices can therefore gain direct legal relevance through vague legal terms such as negligence.

The same applies in cases of omission, in which the omission contrary to duty lies in the failure to perform the required duties, and here, too, domestic good practices, e.g. recognized ethical rules, can be used for concretization.[62] Criminal liability for failure to act in breach of duty is of central importance in Germany in connection with compliance, after the Federal Court of Justice (Bundesgerichtshof) ruled in the Berliner Stadtwerke decision that the compliance officer of a company is obliged to complain about and prevent legal violations against third parties from within a company. Furthermore, there are cases in which published codes of conduct contain inaccurate promises that can trigger lawsuits for unfair competition.[63]

2.2.4. Legalization of good practices through recognition of compliance as a reason for mitigation under criminal and administrative fine law

Even though good practices are not legally binding rules, they do have a certain legal force in that compliance must be taken into account as a mitigating factor in the event of conduct that is relevant under criminal or administrative law. The Council states this in the draft EU Corruption Directive (11272/24):[64]

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[61] In detail Sieber, 2008, p. 468.
[62] In detail Nieto Martin, 2008, p. 496.
[63] In detail see the articles in Hilty and Bodewig, 2014, p. 3.
[64] Proposal for a directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council, No. 22.

> It is important that courts Member States should ensure that can take into account mitigating circumstances are laid down in national legislation in relation to the offences covered by this Directive, in accordance with the applicable rules established by their legal systems. Subject to judicial discretion, these circumstances should cover those cases in which offenders provide information or otherwise collaborate with authorities. Similarly, where legal persons have implemented genuine, effective and duly assessed internal controls, ethics, and compliance programmes, it should be possible to consider these actions as a mitigating circumstance when sanctioning such legal persons. Lower sanctions penalties should also be considered where, upon discovery of an offence, a legal person swiftly discloses information and takes remedial measures. In any case, it should remain within the discretion of the judge or the court to determine the actual amount of the sanction, taking into account all the circumstances of the individual case, including, where applicable, the fact that the legal person has compliance programmes only for cosmetic purposes, also called 'window dressing'.

In its decision of 09.05.2017 - 1 StR 265/16[65] on the consideration of a compliance management system in the assessment of fines, the German Federal Court of Justice also stated that the extent to which a legal entity has fulfilled its duty to prevent legal violations and has installed an efficient compliance management system aimed at preventing legal violations is important for the assessment of the fine. This raises the question of what specific requirements a compliance system must fulfill in order to be taken into account as a reason for mitigation. In 2020, the German legislator standardized a non-exhaustive list of criteria for the assessment of fines in Section 81d (1) sentence 2 GWB for antitrust fine law, including the consideration of compliance measures before and after the infringement was committed to reduce the fine. The Federal Financial Supervisory Authority (BaFin) has also compiled "Minimum requirements for the compliance function and further conduct, organization and transparency obligations" in Circular 05/2018 (WA) in the version dated 19.04.2018, amended on

[65] BGH, Urteil v. 17.07.2009 — 5 StR 394/08, BGHSt 54, p. 44; JZ 20/2010, p. 1018.

29.04.2020. In Section 3 para. 1 no. 2 of the draft Association Sanctions Act the terms "organization", "selection", "guidance" and "supervision" are mentioned to describe suitable precautions. However, it does not specify what is meant by these terms and which precautions are appropriate.

As internationally active companies have to take into account the various national requirements for an effective and efficient CMS when designing their compliance management system, it is recommended that they look to countries such as the USA (UK Bribery Act 2010), the UK (UK Bribery Act 2010), Brazil (Clean Company Act), France (Sapin II) and Spain (Código Penal), which have long taken compliance efforts into account as a reason to mitigate penalties.[66]

2.3. Higher probability of sanctions as a result of the responsibility of managers, compliance staff, the association and the enterprise as an economic entity

The management board of the company is the first level of duty addressees. In view of the fact that compliance with laws and regulations is first and foremost the responsibility of the company management, this task must not be delegated entirely to subordinate employees. Rather, compliance must be organized by the company management itself in every company. It is therefore essential to set up a compliance department and to delegate compliance tasks. In addition, the company management is responsible for the implementation of self-regulation. Next, the employees of the compliance department are obliged to uphold the tasks assigned to them and can be sanctioned in the event of a breach of duty by company employees if they have not fulfilled their monitoring and control duties. Finally, the conduct of persons with a management function in a company can trigger association[67] or even group responsibility. [68]

The expansion of corporate obligations to include effective compliance thus leads both to an expansion of corporate obligations and to a multiplication of the addressees of sanctions, which increases the risk of sanctions being imposed on the persons responsible for the company and on the associations and groups themselves.

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[66] *Wiedmann und Greubel*, 2019, p. 93*; Makowicz*, 2018, p. 558.
[67] In detail Dannecker, 2022b, p. 85.
[68] Näher Dannecker, 2022b, p. 85; Dannecker, 2021, p. 11.

2.4. Measures to reduce the risk of sanctions

2.4.1. Orientation towards domestic and international good practices

In addition to complying with legally binding rules, it is also advisable for companies to follow domestic and international good practices in order to minimize the risk of liability and sanctions and to avoid any negative publicity. Insofar as activities are carried out in the domestic market, the national requirements are decisive; in the case of cross-border activities, the good practices recognized in the respective country or international good practices can serve as points of reference for the companies.

2.4.2. Supplementing the legal and psychological behavioral requirements with aspects of compliance integrity and compliance culture

The legal view of compliance and the behavioural-psychological requirements are criticized as being too narrow and too strongly focused on individuals acting rationally.[69] In addition, attention must be paid to both compliance integrity[70] and compliance culture[71] within the company.[72]

The importance of corporate culture becomes clear when it is considered that even outside of companies, in society as a whole, crime prevention is achieved least through police control and strict penalties, but most strongly through socialization in instances such as friends, school and at work. However, modern moral research has identified a fragmentation of the application of norms:[73] Although offenses such as fraud are generally firmly rejected, the application of norms is made dependent on the respective situation. In the process of the dynamic differentiation of areas of life, normative expectations, values and moral concepts have lost their absolute validity. Contradictions in values are often no longer perceived as disturbing. Honest people believe that they are allowed to cheat or corrupt in their function as business managers. In private life, they are honest citizens. For this reason, socialization must also take place in companies.

[69] Jüttner, 2021, p. 2.
[70] Bussmann, 2016, pp. 50-54; Dannecker and Schröder, 2020, p. 301.
[71] In detail Bussmann, 2016, p. 52; Jüttner and Barnutz, 2020, p. 250; Ruhmannseder, 2020, pp. 13-24.
[72] In detail Graeff and Kleinwiese, 2020, p. 219; Gebhardt, 2020, p. 247; Jüttner and Barnutz, 2020, p. 250.
[73] Nunner-Winkler, 2000, p. 332.

Compliance must not only be legal, but must also be based on adherence to compliance rules out of insight and conviction. [74]

Particular emphasis is given to the management's commitment to compliance.[75] For effective and efficient corporate compliance, the "tone from the top" must first be right.[76] Company management must show that it takes compliance with all regulations seriously and expects employees to do so.[77] The company management itself must make a clear commitment to compliance.[78] The code of conduct and the management's commitment to it must be set out in writing and regularly communicated to employees.[79] In order for the guiding principle of compliance to become firmly established in the company, the company management must set an unrestricted and authentic example of compliance.[80] In addition, middle management must be involved as their dutiful behavior towards compliance ensures the greatest possible impact within the company. This is a matter of the "tone from the middle".

Compliance integrity means a commitment to questions of legitimacy. It requires not only wanting to comply with the law publicly and formally but also acting in accordance with the law and setting limits for the use of legal leeway. This is a particular challenge for international companies in a legally heterogeneous world in which, for example, human rights and environmental protection are respected very differently. A company that opts for "aggressive tax planning" may still be compliant, but cannot claim to act with integrity. Integrity requires that a "voluntary self-commitment based on insight" is developed.[81]

Compliance culture describes the value system of company employees in terms of the extent to which compliance with the law and adherence to rules

[74] Bussmann, 2016, p. 52.
[75] Wiedmann and Greubel, 2019, p. 89.
[76] Bussmann, 2016, p. 54.
[77] Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA), 2018, p. 12; Bundesverband der Unternehmensjuristen e.V. (BUJ), 2014, p. 20; Makowicz, 2018, p. 558; Wilsing and Goslar, 2017, p. 1203; Glöckner, 2017, p. 906; Hastenrath, 2017, p. 327.
[78] Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA), 2018, p. 12.
[79] Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA), 2018, p. 12; Hastenrath, 2017, p. 328.
[80] Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA), 2018, p. 13; Bundesverband der Unternehmensjuristen, 2014, p. 20; Hastenrath, 2017, pp. 325-329.
[81] Bussmann, 2016, p. 54.

is accepted, respected and supported as a value by all employees.[82] This is associated with the expectation that all company employees, including managers, behave with moral integrity and do not allow themselves to be corrupted.

2.4.3. Creating formal structures with preventative effects

The behavioral-psychological perspective on compliance continues to be countered with the argument that it is too short-sighted to place the human factor in isolation at the center of compliance efforts. Rather, it is necessary to create formal structures that have a preventative effect.[83] Therefore, an organizational approach is called for that focuses on the framework conditions for functioning compliance and the creation of preventative structures. It is not sufficient to implement legal requirements[84] and set up a department that is declared responsible. Adequate framework conditions must also be created that counteract deviant behavior and do not encourage it. If bank employees, for example, can only achieve targets by concluding illegal loan agreements or particularly risky investments, this is an incentive to break the rules. The old saying applies here: "You can't force a plant to grow. But you can encourage it to grow by weeding the ground - and allowing it to grow." [85] It is also necessary to ensure that standards are adhered to and to refrain from exhausting the possibilities of just legal behavior in the border area. This is because the "principle of the thin ice" recognized in English law applies here, which takes into account the fact that no lasting sustainability can be achieved if the limits of what is still permissible are explored and used.

3. Development of a plurality of sanctions and of prosecution by expanding the sanctions and the prosecution and sanctioning bodies

The expansion of the obligations to be fulfilled by companies in order to meet compliance requirements is complemented by the development of sanctions law. This is characterized by the fact that sanctions are being extended, the subjects of sanctions are being multiplied, and new

[82] Schulz and Muth, 2014, p. 265.
[83] Jüttner and Barnutz, 2020, p. 252.
[84] Jüttner, 2021, p. 1.
[85] See Jüttner and Barnutz, 2020, pp. 250-256.

prosecution and sanctioning bodies, such as the EU's anti-money laundering authority AMLA, are being created.[86] In addition, administrative and criminal investigations are being conducted in parallel in several countries without the criminal, administrative and civil sanctions being coordinated.[87]

3.1 Expansion of the sanctions, the subjects of sanctions and of the prosecution and sanctioning bodies

Modern sanctions law today includes a wide range of sanctions, ranging from criminal sanctions (custodial sentences, criminal fines and measures of improvement and security) to criminal sanctions in the broader sense (administrative penalties and administrative fines) and disciplinary measures. In addition, there are sanctions such as the freezing of illegally obtained profits, the seizure and confiscation of instrumentalities and proceeds of crime including their substitute goods, exclusion from public contracts, "shame and blame" sanctions, professional bans, subsidy cuts and subsidy freezes, punitive tariffs and tax surcharges, and the denial of future permits and concessions.[88] Measures to strengthen civil law damages, which the European Union and the ECJ use not only for restitution purposes but increasingly also as a means of private enforcement, should also be mentioned.[89]

This development in the European Union[90], which is strongly influenced by international and, in particular, EU law, reflects a shift in focus from repressive criminal sanctions to preventive administrative sanctions.[91] As a rule, the various sanctions are imposed cumulatively, as they serve different purposes: repression aimed at compensating for guilt, preventive danger prevention and restitution for the damage caused.[92]

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[86] Dannecker, G., 2022, p. 13; Neumann, 2024, passim, und 2021, pp. 449–458.
[87] Brodowski, 2022, p. 26; Graf, 2022, p. 55.
[88] See the articles in Saliger, 2025, p. 13; Sieber, 2019, p. 7.
[89] Thomale, 2024, p. 425.
[90] Dannecker and Bülte, 2024b, p.131.
[91] See Paliero, 1994, p. 245.
[92] On the need to integrate criminal, civil and administrative sanctions into an overall concept of sanctions, see Wess, 2023, pp. 93 - 112; Wegner, 2023, pp. 113 – 131; Groß, 2023, pp. 133 –140.

3.1.1. Supplementation of the classic criminal and fine sanctions by confiscation, disqualification from exercising a profession and publication of convictions

In the following, the supplements to the classic criminal penalties and fines will be shown on the basis of confiscation, disqualifications and notices of judgment.

Criminal penalties, including ancillary penalties and remedial measures (irrespective of guilt), are supplemented by criminal sanctions in the broader sense, such as administrative penalties and administrative fines (Verwaltungsstrafen, Geldbußen). A characteristic of all repressive sanctions is that they must be commensurate with guilt. The principle of culpability (nullum crimen sine culpa) requires not only a "psychological relationship" of the perpetrator to his offense, not "merely" a mental and emotional state with regard to the offense and the success of the offense. Criminal guilt is also about an assessment of the facts, a value judgment about the perpetrator's formation of will and exercise of will: "With the unworthy judgment of guilt, the perpetrator is accused of not having behaved lawfully, of having decided for the wrong, although he could have behaved lawfully, could have taken the right decision."[93] The object of the accusation of guilt is therefore the perpetrator's incorrect attitude towards the behavioral requirements of the law.[94] In the sense of a material concept of guilt, guilt therefore means the reproachability of the act with regard to the legally disapproved attitude on which it is based.[95] The actualized lack of conviction determines the degree of guilt.[96] The compensation for guilt is in turn the basis and limit of repressive punishments, which must serve both special and general preventive purposes.[97] Neither guilt nor prevention alone can legitimize a punishment.[98]

[93] BGHSt 2, 194, 200.
[94] Bringewat 2024, no. 465.
[95] Baumann et al., 2021, § 16 Rn. 11 ff., 14; Jescheck and Weigend, 1996, § 38 I 5; Roxin and Greco, 2020, § 19 Rn. 18 ff.
[96] Baumann et al., 2021, § 16 Rn. 11 ff., 14; Jescheck and Weigend, 1996, § 38 I 5; Roxin and Greco, 2020, § 19 Rn. 18 ff.
[97] Roxin and Greco, 2020, Vol. I § 3 Rn. 59.
[98] Hörnle, 2017, p. 4; Neumann, 2011, p. 125.

A) Supplementation of criminal penalties and fines through confiscation

In addition to the general penalties and measures of improvement and security, criminal and administrative offences law also provides for specific sanctions that are primarily aimed at the perpetrator's or participant's unfair pursuit of profit and serve to confiscate assets. In this regard, the European Union[99] has obliged the member states to introduce confiscation in the Directive "on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union" (Directive 2014/42/EU). This pursues the preventive goal that crime doesn't pay.[100] For this reason, both the proceeds of crime and the instrumentalities of crime, such as tools and objects produced by the crime, as well as counterfeit money and forged documents (crime products), must be confiscated. Confiscation is necessary because the fine, if it follows the daily rate system, does not allow profits to be skimmed off, as the economic benefits derived from the offense cannot be directly taken into account when determining the number and amount of daily rates.

Directive 2014/42/EU is based on a comprehensive concept of proceeds and property: According to Art. 2 No. 1 of the Directive, proceeds means any economic advantage obtained directly or indirectly as a result of a criminal offense. It may consist of property of any kind and includes any subsequent investment or conversion of direct proceeds and pecuniary benefits. Property is defined in Art. 2 No. 2 Directive 2014/42/EU as tangible or intangible, movable or immovable property of every kind and documents or instruments belonging to a person.

If an unlawful act has been committed, the confiscation of the offender's or participant's property is also ordered if this property was obtained through or for other unlawful acts (extended confiscation). Art. 5 para. 2 of the Directive contains a list of offenses that must be covered as a minimum for extended confiscation. This does not only apply to the confiscation of property resulting from the specific offense being prosecuted. It also covers property which, in the opinion of the court dealing with the case, originates from other criminal offenses committed by the offender.

Confiscation from third parties is also possible if they are the beneficiaries of a criminal offense, regardless of whether the beneficiary is at fault. Thus, the proceeds of crime can be recovered wherever they have

[99] For an overview of the measures in Europe, see Krause, 2024, no. 2490.
[100] Bundestags-Drucksache 18/9525, pp. 2-48.

accrued unlawfully because the perpetrator or participant has acted on behalf of the third party and the third party has thereby obtained the pecuniary advantage. In essence, the aim here is to recover this asset from a person who has not committed a criminally relevant act but has benefited economically in some way from a criminal offense. This applies in particular to white-collar and association crime, where financial benefits from criminal offenses usually accrue to the company rather than the perpetrator due to the contractual or agency relationship.[101]

The member states had to transpose Directive 2014/42/EU into national law by October 4, 2016. In Germany, this was done with the Act on the Reform of Criminal Asset Forfeiture, which came into force on July 1, 2017.[102] The aim of the legislator was to completely reorganize confiscation[103] in order to ensure that criminal assets are not tolerated by the state because they create an incentive for offenders to commit profit-oriented crimes and encourage the reinvestment of criminal profits in criminal enterprises. In addition, the public's trust in the justice and integrity of the legal system will suffer lasting damage if criminals are allowed to permanently keep assets obtained through crime.[104] According to the Federal Constitutional Court in its decision of January 14, 2004[105], asset recovery thus serves the "regulatory access" ("ordnenden Zugriff")[106] of the law to correct asset situations that violate criminal law and to restore the validity of the substantive legal order beyond the possibilities of civil law.[107] The criminal policy program of the reform legislator on asset recovery is upgraded to an overriding concern of the common good, which even justifies real reacitivity.[108] This brought confiscation out of its criminal-policy shadowy existence and made it a powerful instrument in the fight against crime with facilitated evidence and genuine retroactive effect.[109]

Furthermore, the European legislator adopted Directive (EU) 2024/1260 of the European Parliament and of the Council of April 24, 2024, on Asset Recovery and Confiscation. This Directive lays down "minimum

[101] Lohse, 2024, no. 193.
[102] Saliger 2023, Vor §§ 73 ff. p. 9.
[103] Ibid.
[104] Bittmann, 2025, p. 49.
[105] BVerfG, NJW 2021, p. 2073.
[106] BVerfG, NJW 2004, p. 2073.
[107] Bundestags-Drucksache 11/6623, p. 7; Bundestags-Drucksache 18/9525, p. 58.
[108] BVerfG, NJW 2004, p. 2078.
[109] Saliger, 2023, Vor § 73 Rn. 3.

rules" for the tracing, identification, freezing, confiscation and management of property in the context of proceedings in criminal matters. The directive applies to a wide range of offences that are primarily attributable to organized crime. However, the offense areas covered also include illegal arms trafficking, money laundering and corruption as well as violations of EU restrictive measures, i.e. violations of sanctions regulations, and environmental offenses. The member states must transpose this directive into national law by 23.11.2026.

Companies can be affected by the issue of asset recovery in very different ways.[110] If the public prosecutor's office conducts a preliminary investigation against a corporate body or an employee of a company for a criminal offense that has benefited the company economically, the company in Germany can generally only be affected by asset recovery as a third party, as there is no criminal liability of legal persons. The decisive factor is who benefits from the economic advantage of the offense: the offender himself or the company. The German Federal Court of Justice has clarified in a series of rulings[111] that the pecuniary advantage is generally to be skimmed off from the person who directly received it. This case law is based on the principle of separation of property, according to which the legal entity has its own property which must be separated from the private property of the organ, representative or agent. In the case of criminal offenses committed for the benefit of a legal entity, the financial benefit generally lies with the legal entity. In such cases, according to the case law of the Federal Constitutional Court[112], a confiscation order can only be considered against the perpetrator in the exceptional case if the perpetrator only uses the legal entity as a "formal shell" or if every inflow of assets to the company resulting from the offense is also passed on to the perpetrator. These are cases in which there is no differentiation between the private assets and the company's assets, but rather a mixture of the respective asset spheres.[113]

[110] See Meißner and Schütrumpf, 2022, Kapitel 6 no. 428.
[111] BGH, wistra 2023, p. 424; BGH, NStZ 2023, p. 301; BGH, BeckRS 2022, 35139; BGH, wistra 2023, p. 289.
[112] BVerfG, wistra 2004, 378, Rn. 53
[113] See Meißner, 2025, p. 30.

B) Professional bans under criminal and administrative law

There are also bans on practicing a profession in cases of misuse of the profession or trade, or gross violation of the duties associated with them. In practice in Germany, however - unlike in many other countries – criminal disqualifications are imposed comparatively rarely.[114] Of greater sectoral significance are the criminal bans on directors of corporations, which were last extended in 2008, particularly in the case of convictions for insolvency offenses, embezzlement or fraud. Loss of office occurs de lege when the criminal judgment becomes final; legal acts carried out after this time are invalid. The court and public prosecutor's office must notify the commercial register of the conviction, which then deletes the entry. In many countries, the non-criminal option of removing members of government and civil servants from office plays a role in the fight against corruption. Disbarment can also take effect automatically upon conviction for certain criminal offenses, for example, for an insolvency offense, as is the case in Germany, without the court having to impose this sanction specifically. In this case, there is no question of guilt, administrative discretion or the principle of proportionality.

In addition to the criminal prohibition from practicing a profession, there is also the administrative prohibition from practicing a trade due to the unreliability of the trader and the exclusion from the liberal professions by a court of honor, the imposition of which is at the discretion of the administrative authority and is subject to the principle of proportionality.

C) Publication of violations of duty on mere suspicion of a violation of the law

Public information can be provided as a criminal sanction in the broader sense, such as the publication of the imposition of a fine for a cartel law violation. The fundamental principles of criminal law such as nullum crimen sine lege, nullum crimen sine culpa and the presumption of innocence apply to such sanctions.[115]

However, the law also recognizes administrative sanctions that serve to create transparency. For example, Section 40 (a) of the German Food and Feed Act (Lebens- und Futtermittelgesetz, LFGB) obliges the authorities to publish suspicions of a violation of food law against limit values, maximum levels or maximum quantities, or against other regulations that serve to

[114] Dazu LK-StGB/Hanack § 70 Rn. 4.
[115] Dannecker and Bülte, 2024b.

protect against health hazards, deception or adherence to hygiene requirements, if the violation is not only insignificant or repeated and the imposition of a fine (Geldbuße) of at least three hundred and fifty euros is to be expected. The expectation of a fine of 350 euros, which is intended to limit the scope of application to more serious cases[116], is linked by preventive administrative law to a prediction of a repressive sanction.

This provision, which serves to inform the public about violations of food and feed law[117], has been met with great reservation by administrative authorities and administrative court rulings,[118] and has led to an intensive discussion about the justification and limits of public information in food law. In particular, the proportionality and specificity of the legal regulation[119] as well as the lack of specifications for the content of official publications relevant to consumers, have been disputed.[120] Furthermore, a violation of the presumption of innocence is also alleged,[121] and due to the sanction-like effect, a prohibited penalty of suspicion is claimed.[122] This particular sanction[123] can be used to show that administrative sanctions must also comply with the rule of law.

Informing the public in accordance with Section 40 para. 1a no. 2 LFGB is only permitted if there is a suspicion of a violation of food or feed law that is sufficiently substantiated by facts, which must not be insignificant or must have been committed repeatedly, and a fine of at least EUR 350 is to be expected. Firstly, requirements are set for the factual basis of the suspicion and its probability, as well as two further requirements - the seriousness of the infringement and the expectation of a fine of at least 350 euros. This is intended to ensure that the mandatory publication, which

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[116] Dazu Böhm, 2019, p. 22.

[117] Zur Verbraucherinformation in der Verwaltungspraxis *Monsees* Behördliches Informationshandeln im Lebensmittelbereich, 2018, S. 207 ff.

[118] VGH Baden-Württemberg, Beschluss vom 28.1.2013 – 9 S 2423/12 –, juris, BayVGH, Beschluss vom 18.3.2013 – 9 C 13.80, Niedersächsisches OVG, Beschluss vom 14.6.2013 – 13 ME 18/13; Hessischer VGH, Beschluss vom 23.4.2013 – 8 B 28/13; OVG Nordrhein-Westfalen, Beschluss vom 24.4.2013 – 13 B 192/13.

[119] Becker, 2011, pp. 391-416; Grube and Immel, 2012, p. 116; Hamm, 2018, p. 2099; Kühne and Preuß, 2012, p. 307; Möstl, 2015; Wallau, 2010, p. 382.

[120] See Bäcker, 2016, p. 595.

[121] Gundel, 2013, p. 662; Hamm, 2018, p. 2101; Möstl, 2015, pp. 185; Wallau, 2010, p. 385; see also Dannecker, 2013, p. 925.

[122] Esser in: Löwe and Rosenberg, StPO, Bd. 11, 26. Aufl. 2006, Art. 6 EMRK Rn. 493; differenzierend Dannecker, 2013, pp. 924-926.

[123] Herold, 2019, p. 53.

constitutes an infringement of professional freedom in particular[124], is proportionate; according to its wording, Section 40 (1a) LFGB is a "must" requirement that does not grant the authority any discretion with regard to informing the public.

The legislator's purpose in providing public information is to enable consumers to make their consumption decisions in the knowledge of the published irregularities and, if necessary, to refrain from contracting with the named company. According to the legislator's intention, the original purpose of the regulation is to provide consumers with an informational basis for their decisions.[125]

In addition, court rulings and literature emphasize that a further function of Section 40 (1a) LFGB is to contribute to the observance of the provisions of food and feed law. The impending disadvantage of the dissemination of information is intended to encourage companies to operate in accordance with the provisions of food and feed law.[126] This deterrent effect of public information, which the German constitutional court (Bundesverfassungsgericht) has recognized[127], is not mentioned by the legislator in the explanatory memorandum to the law. There, the only aim of the law is to create the informational basis for consumer decisions and thus to create transparency.[128] If the legislator's decision to legitimize public information exclusively for transparency purposes[129] is taken seriously, informing the public in accordance with Section 40 (1a) LFGB is an administrative measure.[130] And administrative measures must be assessed based on the principle of proportionality and not, like repressive sanctions (punishment in the broader sense), on the principle of guilt.[131]

Even if public information is not a criminal sanction, the presumption of innocence nevertheless has consequences for such non-punitive measures. The presumption of innocence includes, as it is called, a

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[124] BVerfG, Beschluss vom 21. März 2018 - 1 BvF 1/13 -, NJW 2018, 2109, Rn. 29; kritisch Becker, 2018, p. 1032.
[125] Siehe nur Wollenschläger, 2011, p. 25.
[125] BVerfG, Beschluss vom 21. März 2018 - 1 BvF 1/13 -, NJW 2018, 2109.
[126] Gundel, 2013, p. 673; Joh et al., 2012, p. 428; Möstl, 2015, p. 3; Möstl, 2015, p. 188.
[127] BVerfG, Beschluss des Ersten Senats vom 21. März 2018 - 1 BvF 1/13 -, NJW 2018, 2109, Rn. 32.
[128] Eingehend dazu Dannecker, 2013, pp. 924-928.
[129] Dannecker, 2019, p. 175.
[130] BVerfG, Beschluss vom 21. März 2018 - 1 BvF 1/13 -, NJW 2018, 2109, Rn. 25.
[131] Dannecker, 2013, p. 928.

prohibition on justifying non-punitive measures in a manner similar to punishment.[132] This means that if the sanctioning character is denied because preventive/transparency-related purposes are being pursued, the corresponding measure must also be legitimized exclusively in relation to these purposes. In the context of the constitutional justification of the regulation and the proportionality test, it must not be taken into account that the regulation also increases compliance with the law due to its deterrent effect.[133]

The presumption of innocence has a further implication for public information.[134] It is known from the area of press reporting on criminal offenses that it is incompatible with the presumption of innocence to present criminal offenses (or administrative offenses) as having been committed before they have been legally established in criminal proceedings (or administrative offense proceedings). This does not rule out the possibility of reporting on the suspicion of a criminal offense even before a legally binding decision has been made. In this case, however, it must be expressly stated that it is only a suspicion of a criminal offense in order to maintain the presumption of innocence. Before the legally binding guilty verdict, the "alleged perpetrator", the "alleged offense", the "suspicion of an offense", etc. must always be mentioned. Applied to the constellation of public information, this means that the authority may only publish the fact that there is a "suspicion" of an offense, but not that an offense has definitely been committed, unless there is a legally binding fine notice or a criminal conviction. The food authorities' tabular publications regularly do not take this into account, so it remains to be seen whether such complaints will become the subject of higher administrative court rulings. Finally, this legal aspect is not only relevant at the level of the presumption of innocence, but also collides with the requirement of the substantial accuracy of the published information: the information is inaccurate if the authority claims that there is (definitely) a violation when the authority has only convinced itself that there is a suspicion of a violation.

[132] Ausführlich hierzu C. Dannecker, 2013, p. 925.
[133] Dannecker, 2019, p. 175.
[134] On this aspect from the point of view of the accuracy of the information see Dannecker, 2013, p. 930.

3.1.2. Expansion of the subjects to be sanctioned

In addition to the plurality of sanctions, the subjects to be sanctioned are no longer only natural persons. In addition to natural persons, legal entities can also be considered as subjects to be sanctioned, as all highly developed industrialized nations provide for the imposition of criminal or fine sanctions against legal entities and other associations.[135] It is therefore possible to imagine cases in which the parent company and subsidiary as well as individual executives of the company are simultaneously under criminal investigation. The legal problems associated with this have been comparatively well worked out.[136]

Furthermore, the European Union, following US law, also recognizes companies as economic entities for violations of antitrust, data protection and banking prohibitions.[137] The classic area in which this set of sanctions was developed is antitrust law. In this area, Regulation 17/62[138] introduced corporate fines, which were subsequently developed by the Commission under the supervision of the European Court of Justice into a differentiated system of sanctions[139] with a repressive character[140]. In European Union competition law, the ECJ has consistently defined the term "undertaking" as "any entity engaged in an economic activity, whatever its legal form and however it is financed", i.e. the economic entity.[141] Legal entities that belong to the economic unit and are involved in the cartel infringement are jointly and severally liable for the fine imposed on the undertaking.

Legal entities belonging to the economic unit and involved in the cartel infringement are jointly and severally liable for the fine imposed on the company. In some cases, the Commission imposes the corporate fine on several legal entities belonging to the company, either by imposing a specific fine in each case or by declaring several legal entities jointly and severally liable without specifying the amount for which each legal entity is

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[135] Dannecker, 2022b, p. 85.
[136] Brodowski, 2022, p. 19.
[137] In detail Dannecker and Schröder, 2021, § 8 No. p. 246; Dannecker, 2016, p. 162.
[138] EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, S. pp .204–211.
[139] In detail Dannecker and Fischer-Fritsch, p. 1093; Dannecker, 2007, p. 31; G. Dannecker and Dannecker, 2020.
[140] Dannecker and Dannecker, 2021, § 8 no. 18.37 with further references; Tiedemann, 1985, pp. 1411-1417.
[141] In detail Schildgen, 2020, p. 7.

liable.[142] Only the European Commission is responsible for imposing fines under EU law in accordance with Art. 23 Regulation 1/2003. In 2019, the ECN+ Directive obliged the member states to incorporate the EU concept of corporate liability for antitrust violations into their national legal systems.[143] In this way, a harmonization of the antitrust sanctions systems of the Union and the Member States should be achieved.

In addition, there are EU regulations on fines in the area of banking supervision law, which are mainly directed against legal entities, but also partly against companies.[144] In banking supervision law, the European Central Bank or the central banks of the member states are responsible for imposing sanctions, depending on their responsibility for banking supervision.

The antitrust fine regime with its corporate fines was incorporated into EU data protection law with the General Data Protection Regulation.[145] While the antitrust fines are imposed by the EU Commission and are subject to legal review by the General Court and the ECJ, the corporate fines under data protection law are imposed exclusively by the competent national authorities and then reviewed by national courts.[146]

3.1.3. Expansion of the prosecution and sanctioning procedures

The introduction of alternative preventive regimes, in which criminal law and other preventive sanction systems come together, such as EU fines in the area of antitrust,[147] of the merger regulation,[148] of banking supervision[149] and data protection law[150], of the Digital markets Act,[151] UN sanctions[152]

[142] Biermann, 2024, Vor Art. 23 VO 1/2003 no. 104 ff.
[143] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.
[144] See Dannecker, 2021b, pp. 11–41; Dannecker and Schröder, 2021, § 8 no. 247, pp. 313-325.
[145] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), pp. 1–88.
[146] Schäfer and Klaas, 2024, p. 293 and p. 345.
[147] Hustus, 2024, § 34 no. 108; Müller, 2021, pp. 50-63.
[148] Hustus, 2024, § 34 No. 182.
[149] Schäfer, 2021, p. 64.
[150] Hustus, 2024, § 34 No. 231; Schäfer and Klaas, 2024, p. 293 and p. 345.
[151] Hustus, 2024, § 34 No. p. 188.

and measures to combat money laundering[153], is associated with a plurality of prosecution procedures: public prosecutors are responsible for the investigation and prosecution of criminal offenses. Preventive regimes under administrative law fall within the remit of specialized administrative authorities, which act independently of the public prosecutor's office, sometimes even prior to investigations by the public prosecutor's office. An expansion for a specialized office can also be observed in this area. One example is the Anti-Money Laundering Agency (AMLA) based in Frankfurt, which is responsible for combating money laundering in the European Union.[154] This EU authority is to play a leading role in the supervision of the fight against money laundering - with a European perspective. This fight is considered essential for global security, fair competition on the markets, social cohesion and sustainable growth.

AMLA is also intended to ensure the integrity of the financial system. Protecting the integrity of the financial system requires not only effective money laundering supervision and strong prudential supervision, but also ad-hoc information-sharing between the supervisors of individual institutions. AMLA's close proximity to the ECB, as the authority responsible for the prudential supervision of large banks in the EU, creates a one-stop shop for supervision, which will, in turn, make a significant contribution to strengthening the European financial system. This includes, in particular, the bundling of key competencies in the new Federal Office for Combating Financial Crime (Bundesamt zur Bekämpfung von Finanzkriminalität, BBF). This authority, which is due to commence operations in 2025, will carry out analyses currently conducted by the Financial Intelligence Unit (FIU), criminal investigations, and supervision. This is intended to eliminate the existing fragmentation. The core competencies will be bundled under AMLA in order to facilitate and strengthen cooperation. Insights, expertise, and information can thus be shared and linked more quickly and efficiently. In addition to the FIU, the Central Office for the Enforcement of Sanctions (Zentralstelle für Sanktionsdurchsetzung, ZfS) is also to be integrated into the BBF in the future.

The increasing number of different types of sanctions and the creation of new authorities is associated with new procedures to which companies

[152] Vorrath 2024, p. 7.
[153] Jacsó, 2021, p. 117.
[154] In detail Neumann, 2024.

are exposed in the case of legal violations: In addition to criminal proceedings, there are administrative proceedings, occasionally even several at the same time and in different states, and civil recourse proceedings.

4. Requirements for procedural fairness and coordination of the sanctions

4.1. Procedural fairness

Only in criminal law does the principle of the prohibition of parallel prosecution prior to the first legally binding sanction apply as a requirement of "equality of arms"[155] and, if there is a nonappealable conviction or a legally binding acquittal, the principle of ne bis in idem. Corresponding principles of the rule of law still need to be developed in the relationship between criminal proceedings and civil and administrative proceedings. Overall, there is a need to coordinate criminal, administrative and civil proceedings in an integrated procedure. This raises the question of whether the traditional guarantees of criminal law need to be extended to administrative criminal law.[156] In this respect, the guarantees for criminal and administrative sanctions, in particular the principle of "ne bis in idem"[157], as well as the guarantees for non-criminal sanctions[158] must be put to the test.

Furthermore, the question arises as to whether, in view of the parallel responsibilities of national, European, foreign, and international criminal prosecution and administrative bodies, there is a ban on parallel prosecution of a breach of the law by several prosecuting and investigating authorities even before a first legally binding sanction is imposed, in order to avoid double sanctioning in violation of "ne bis in idem".[159] The right to a fair trial, which is one of the essential principles of a constitutional procedure[160] and is qualified as a general fundamental procedural right[161], as well as the principle of proportionality[162], according to which any measure interfering

[155] Dannecker, 2021c, p. 1073.
[156] For the question "Do human rights belong exclusively to humans?", see Granyák, 2019, p. 17; see also Dannecker, 2021a.
[157] See the articles in Hochmayr (ed.), Ne bis in idem" in Europa, 2015.
[158] Winter, 2019, p. 299.
[159] Dannecker, 2021a; Papakyriakou, 2023, p. 457.
[160] See only BVerfGE 130, 1, Rn. 111.
[161] See only BVerfGE 109, 13, Rn. 67.
[162] Fundamental to this Kaspar, 2014.

with fundamental rights must pursue a legitimate purpose and, moreover, be suitable, necessary and proportionate, come into consideration. Overall, there is a need to coordinate criminal, administrative, and civil proceedings in an integrated procedure.

4.2. Coordination of criminal, administrative and civil law sanctions with each other

The new architecture of sanctions law, in which criminal law is increasingly supplemented by preventive administrative sanctions and private enforcement is increasingly used, requires the various sanctions to be coordinated with each other from the point of view of constitutional proportionality. The sanction as a whole must be appropriate and proportionate. In order to ensure this, all administrative and civil sanctions must be taken into account when determining the main penalties as part of the sentencing or assessment of fines. In order to guarantee this, it must be ensured procedurally that the necessary information is available to the sanctioning authority. If administrative or civil sanctions are imposed in proceedings subsequent to the criminal or fine proceedings, the previous criminal sanction must be taken into account.

5. Compliance as an indispensable strategy to avoid sanctions against enterprises

The current situation of companies in the area of sanctions compliance is characterized by the fact that existing obligations are being intensified and expanded and, in addition, the threat of sanctions has been and will continue to be expanded. In view of this development, it is essential to take compliance seriously to avoid criminal, administrative, and civil sanctions, especially as the guarantees provided by the rule of law are inadequate and are only partially granted to legal entities and companies in particular. As mentioned in the introduction to this article, this requires a change of perspective: from the backward-looking perspective of a traditionally reactive criminal and sanction law to a forward-looking control system with a strong focus on modern prevention.

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ANDRÁS TÓTH [*]

Compliance in competition law[**]

ABSTRACT: This study aims to examine the operation of competition law compliance from two perspectives. First, it examines how competition regulation's compliance mechanism works from the perspective of promoting compliance. Subsequently, it highlights the difficulties associated with corporate competition compliance. Furthermore, it describes how to avoid automatic fine reduction while recognizing compliance efforts.

KEYWORDS: competition law, corporate compliance, ex-ante and ex-post prevention, deterrence, fine reductions.

1. Introduction

There are two approaches to compliance. First, it can be examined in relation to the regulation itself, how it ensures compliance, and what coercive forces influence adherence to it. Second, the issue of compliance can be examined from the perspectives of those affected by the legislation: how they can comply with the legislation, what difficulties they encounter, and how these difficulties can be overcome. In this article, I discuss both approaches.

2. Working of the compliance mechanism in competition law

Compliance has to do with the prevention of harm. The prevention of harm is always more beneficial to society than the subsequent treatment of its occurrence. Pre-empting harm creates public value if it operates strategically, and if it eliminates the causes of harm or its recurrence. Sparrow pointed highlighted this in the field of social regulation (health,

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safety, welfare, working conditions, and environment) when he placed radical solutions to real problems at the heart of public agency actions (e.g., reducing the number of car accidents, which is not necessarily limited to sanctioning speeding).[1] In this sense, proper prevention involves preventing the recurrence of a given problem by identifying and addressing the causes of the damage. The purpose of competition law is to eliminate harmful market cooperations, concentrations, and abuses of power.

2.1 Prevention as compliance mechanism in competition law

Ex-ante prevention seeks to prevent future harm through regulatory action, and unlike ex-post prevention, it is not based on specific, past harmful market behaviour. There are two types of ex-ante prevention: prior authorisation (as in the case of merger control) and the pre-emptive setting of rules for the future. The latter is not based on past market behaviour but on a specific rule of conduct expected from a certain degree of market power in the future, which typically seeks to counterbalance market power (e.g., the obligations of the telecommunications regulation based on significant market power or the Digital Markets Act[2]).

Ex-post prevention is motivated by specific market behaviours that have occurred in the past. It is also possible to impose behavioural and structural remedies for the future under the framework of ex-post prevention; however, in this case, unlike in the case of ex-ante prevention, remedies are based on past market behaviour. Imposing prohibitions and fines are also part of ex-post prevention. However, fines are not the only compliance tools in competition law. There are two distinct views on the purpose of fines. The first considers retribution itself to be the ultimate goal of punishment; the second (in line with Bentham's philosophy) focuses on the prevention of future crimes through deterrence (consequentialist theory).[3] Most competition authorities also position themselves as

[1] Sparrow, 2000.
[2] Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828 (DMA). Available at: https://eur-lex.europa.eu/eli/reg/2022/1925 (Accessed: 26 April 2023).
[3] Huizing, 2020, p. 62.

consequentialists,[4] enforcing competition laws to achieve prevention through deterrence.[5]

Ex post prevention tools also comprise behavioural and structural remedies. The behavioural or structural remedies imposed within the framework of ex-post prevention are based on past market behaviour. These corrections may also have a preventive effect. Article 9 of Regulation 1/2003 enables the Commission to conclude an antitrust proceeding by making commitments made by a company legally binding to a commitment decision. Such a decision does not establish an infringement of the EU competition law but legally binds the concerned company to respect the commitments offered. The EU Commission (EC) has strategically used remedies in the energy sector (sometimes structural remedies) to prevent the recurrence of market problems. Since 2004, almost one-third of all EC commitment decisions under Article 9 of Regulation 1/2003 have dealt with market conduct in the energy sector.[6] Since the liberalisation of the EU energy markets, competition law enforcement has been active in the sector to promote more competitive gas and electricity markets in Europe by accepting divestiture remedies[7] and facilitating market integration, as well as the exchange of energy between Member States.[8]

Prevention is both specific and general, as a specific enforcement measure aimed to prevent future harm from occurring as a result of a

[4] Huizing, 2020, pp. 61-86.

[5] ICN: Report to the 7th ICN Annual Conference, Setting of Fines for Cartels in ICN Jurisdictions, Kyoto, (2008).

[6] PaRR (2018). *PaRR Statistics: One-third of EC commitment decisions in the energy sector*, Available at: https://app.parr-global.com/intelligence/view/prime-2601673?src-_alert_id=117053 (Accessed: 26 April 2023).

[7] In 2013 the Commission accepted the commitment offered by CEZ to divest part of its generation assets (power plants) (800-1000MW) to a suitable purchaser (competitor) in the Czech Republic. (CEZ, a.s. (Case AT.39727) Commission Decision C(2013) 1997 [2013]). In 2009 RWE (RWE AG (RWE Gas Foreclosure) (Case COMP/39402) Commission Decision 2009/C 133/08 [2009] OJ L 133/10), a dominant firm in the gas transmission market by virtue of its network in Germany undertook to divest its German gas transmission system business. In 2008 E.ON (E.ON AG (German Electricity Wholesale Market) (Case COMP/39388) Commission Decision 2009/C 36/08 [2008] OJ L 36/8) undertook to divest one fifth of its generation capacity, and unbundle the entire high-voltage transmission system business from the distribution network controlled by the company in Germany. In 2010 ENI (ENI Spa (Case COMP/39315) committed to divest its international gas transmission pipelines that bring gas from Russia and Northern Europe to a suitable buyer in Italy.

[8] EU, 2017.

particular market player's behaviour (direct prevention) could also send a message to market players, deterring them from engaging in harmful market conduct (indirect). Therefore, the success of specific (direct) prevention is the key to general (indirect) prevention. General prevention can help prevent harm.[9] However, without specific prevention measures, this general preventive effect cannot materialise. The complementary nature of specific and general prevention is much more important for ex post prevention than for ex ante prevention. This is because ex-ante regulation provides greater preventive guarantees given that market players are informed in advance about the behavioural requirements they are expected to abide by.

Conversely, ex-post prevention only provides a preventive mechanism based on the complementary work of general and specific prevention, also known as deterrence-based prevention. However, notably, ex-ante prevention can also have a deterrent effect (see merger control prohibitions or interventions that may also affect future potential mergers).[10]

2.2 Deterrence as a preventive effect of ex-post intervention

As mentioned, ex-post prevention depends on the complementary relationship between specific and general preventions; its success is contingent on the perception of risk In the case of ex-post prevention, however, the threat arises from the regulatory intervention itself (fine, behavioural, or structural remedy) or from the credibility of the threat. The more credible the threat of intervention, the more likely the recipients of the norms believe that sanctions cannot be avoided in the event of an infringement. This relies on the perception of risk, which, in this case, is the high probability of regulatory intervention. According to Gal, the preventive deterrence effect is determined by the severity of the sanctions and the probability of detection.[11] Consequently, a fine is optimal if it expresses not only the damage caused (including the cost of enforcement), but also the likelihood of detection.[12] The more vividly an example is associated with an intervention, the more threatening it appears. Therefore, they are closely linked to specific and general deterrence. The more visible that specific prevention is to those market players, for example, in the form of the elimination of specific behaviours with fines and behavioural and structural

[9] Davies, Mariuzzo and Ormosi, 2017.
[10] Seldeslachts et al., 2007.
[11] Gal, 2000, pp. 91-132.
[12] Smuda, 2021.

remedies, the greater the deterrent effect (this is also known as an indirect mechanism).[13] Recent behavioural science research also confirms that widespread communication regarding the imposition of fines increases the sense of danger of being caught, despite the fact that the chance of detection is not very high.[14] Consequently, ensuring effective communication regarding the imposition of fines is important.[15] The genuine threat of imposing a fine may discourage businesses from behaving anti-competitively in the future. In terms of the competition law toolbox, in addition to fines leniency has a deterrent function by increasing uncertainty among cartel members. Leniency intends to reinforce the prisoner's dilemma by undermining internal trust with the increased risk that one of the parties involved unilaterally reports enjoying the benefits of the leniency program.[16]

Although there are forward-looking studies on the extent to which imposed cartel fines fall short of what is optimally expected,[17] there are additional means to further enhance ex-post deterrence. A study carried out by the European Union identified two main ways in which the deterrent effect of competition enforcement could be increased: through more private damages actions and the introduction of individual sanctions for competition law violations.[18] The CMA also argued that ensuring personal responsibility for compliance with competition laws (including the disqualification of directors) could further enhance the deterrent effect of enforcement.[19] A key result of a survey conducted in the US was that private enforcement seemed to play a larger role in creating a deterrent effect than public enforcement did.[20]

The effectiveness of ex-post deterrence can be further improved through enforcement guidelines (soft law) and clearer reasoning of decisions. The intricate reasoning underlying complex competition cases

[13] Broulík, 2019, pp. 115-127.
[14] Moncuit, 2020, p. 230.
[15] Moncuit, 2020, p. 232.
[16] Spagnolo, 2000.
[17] Smuda, 2021
[18] Feinberg, 1985, pp. 373-384.
19 Letter from Andrew Tyrie to the Secretary of State for Business, Energy and Industrial Strategy. [Online]. Available at: https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy (Accessed: 26 April 2023).
[20] Beckenstein and Gabel, 1982, pp. 459-516.

does not facilitate compliance.[21] (Hawk and Denaeijer, 2000) According to Broulík, there is tension between case-by-case enforcement (where accuracy matters) and general deterrence (where predictability is paramount).[22] Consequently, when reviewing the decisions of competition authorities, courts need to consider the impact of adjustments to the statement of reason they require on clarity, predictability, and, ultimately, general deterrence.[23] However, this is challenging. During the past decade, there has been no doubt that the introduction of restrictions on competition by objects has increased deterrence and, consequently, compliance, which, in turn, has affected the behaviour of market participants. As a result of the strengthening of compliance, competition authorities have begun investigating not only less clear-cut behaviour but also behaviours exerted on markets that operate within more sophisticated and complex business environments. Considering the above factors, it is unsurprising that the question of identifying restrictions on competition by object arises in complex service markets such as insurance (see the Hungarian Allianz case[24]) or the financial sector (see the Hungarian MIF case[25] or the Commission's CB case[26]). The above difficulties in assessing restrictions on competition by object have been encountered not only by the Hungarian authority but also by the Commission[27] and other Member-State competition authorities. [28] However, there is no doubt that the Hungarian competition cases referred to for preliminary rulings on this issue have made a significant contribution to the development of European competition law. Both Hungarian cases referred to the European Court of Justice for a preliminary ruling concerning the insurance and financial sectors, which are complex markets.

[21] Hawk and Denaeijer, 2000.
[22] Broulík, 2019, p. 125.
[23] Broulík, 2019, p. 126.
[24] Judgment of the Court (First Chamber) In Case C-32/11, ECLI:EU:C:2013:160, 14 March 2013.
[25] Judgment of the Court (Fifth Chamber) In Case C-228/18, ECLI:EU:C:2020:265, 2 April 2020.
[26] Judgment of the Court (Third Chamber) In Case C-67/13P, ECLI:EU:C:2014:2204, 11 September 2014.
[27] Judgment of the Court (Third Chamber) In Case C-67/13P, ECLI:EU:C:2014:2204, 11 September 2014.; Judgment of the Court (Fourth Chamber) In Case C-307/18, ECLI:EU:C:2020:52, 30 January 2020.
[28] Judgment of the Court (Fourth Chamber) In Case C-345/14, ECLI:EU:C:2015:784, 26 November 2015.

2.3. Limitations of compliance in competition law

Competition laws create public value if they precede or eliminate market power, which is detrimental to consumer welfare. In this respect, an assessment of the deterrent effect of competition laws must consider the different ways in which market power can be created. There are 'natural' market powers that need to be controlled through long-lasting regulation that substitute the competitive market outcomes in terms of price and quality (see e.g., network industries).[29] Breaking down natural monopolies and making their markets competitive (through competition within and between networks) require ex-ante regulation that goes beyond competition law.[30] There are also situations with emerging market powers in which the ex-post imposition of fines proves ineffective and harm continues to occur (e.g., abusive behaviours). Therefore, giant firms are not fazed when large fines are imposed on them for abusing their dominant position and do not fear a loss of reputation.[31] The recital of the DMA[32] also explicitly acknowledges that competition enforcement occurs ex post and often requires an extensive, case-by-case examination of complex facts.[33] For instance, after 6 years of investigation, the Commission obliged Microsoft, which had a market share of 60%, to grant access to its competitors.[34] Two years later, when the Commission had to compel Microsoft to fulfil its obligation by imposing a penalty payment, the company already had a market share of 74%.[35] Another recent example is Google, where, after a seven-year investigation, the Commission imposed a fine on the undertaking to favour its own price comparison service. In this case, Google's obligation to correct anti-competitive business practices does not appear to have solved its

[29] Viscusi, Harrington, and Vernon, 2005, p. 401.
[30] Tirole, 2004.
[31] Tirole, 2004.
[32] Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828 (DMA), Available at: https://eur-lex.europa.eu/eli/reg/2022/1925 (Accessed: 26 April 2023).
[33] DMA Recital 5.
[34] Case COMP/C-3/37.792, Commission Decision C(2005) 4420 OJ L 166/20 [2008] para 499.
[35] Ibid. 355.

competitors' problems, as it was not well targeted by the measures taken. [36] These examples show that in the case of significant or lasting market power, the deterrent effect of ex-post competition law interventions can be reduced, even though they are the only temporary (pending ex-ante regulation) regulatory tool available.

3. Corporate competition compliance

In the second part of the study, I present the difficulties and advantages of corporate competition compliance.

3.1. Challenges in corporate competition compliance

Compliance with abstract competition rules has always been challenging. Compliance is also a resource matter. Thus, large companies have an advantage over SMEs. Large companies tend to be much more compliant, and SMEs have a significant share of cartel infringements. Another adverse effect on SMEs is that cartel cases are becoming increasingly complicated due to the strengthening of large companies' compliance, which, in turn, adversely affects the ability of SMEs to comply. Moreover, the following circumstances work against compliance:

- high recidivism[37] stemming from infringing companies' optimism that they are unlikely to be caught again,[38] or undertakings may overestimate the low probability that cartels will be detected at all;[39] [40] [41]

36 Reuters (2019). EU's Vestager says Google's antitrust proposal not helping shopping rivals. [Online]. Available at: https://www.reuters.com/article/us-eu-alphabet-antitrust-idUSKBN1XH2I8 (Accessed: 26 April 2023).

37 Barennes and Wolf, 2011, p. 423; Wils, 2012.

38 Moncuit, 2020, p. 233.

39 Deloitte (2007) *The Deterrent Effect of Competition Enforcement by the OFT*, [Online]. Available at: https://webarchive.nationalarchives.gov.uk/ukgwa/20140402181127/http:/www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf (Accessed: 26 April 2023). The survey showed a ratio of 1 to 5 (i.e. five times the deterrent effect) in terms of merger control and cartel enforcement in the UK for the period 2000-2006.

40 Combe, Monnier and Legal, 2008.

41 According to the authors, the annual probability of being caught is between 12.9% and 13.3%.

- anticompetitive practices are not associated with the same level of stigma as white-collar crime or tax evasion.[42]

If shareholders fail to create a corporate culture that requires compliance with the law, the manager of the company is likely to ignore the seriousness of the violation;[43]

- If managers of companies have a high tolerance for risk, they will likely opt for an infringement strategy[44] as they will be tempted by the possibility of destroying competitors, restoring market dominance, and making additional profits by overcharging consumers.[45]

Therefore, promoting compliance is necessary, because it may help reveal and end conduct at an early stage.[46] Some authors argue that compliance programs can also enhance the effectiveness of leniency policies.[47] It has been argued that a company that can better detect potential infringements internally is also in a better position to report infringements to competition authorities before other cartel members.[48] [49]

3.2. How to encourage competition corporate compliance

The mere adoption of a compliance programme should not in itself lead to immunity or the total reduction of fines in any case as this would allow companies to maximise the profits and benefits stemming from illegal conducts, and thus competition compliance would become a *"cheap insurance policy against competition liability.*"[50] An automatic fine reduction in the case of compliance programs that existed before the finding of an infringement may also incentivise companies to implement 'cosmetic' compliance programs.[51]

Based on international experiences, only genuine ex-ante compliance efforts should be recognised, which means that the company must be able to demonstrate how its competition compliance regime resulted in the

[42] Sokol, 2012, pp. 217-218.
[43] Moncuit, 2020, p. 231; Combe and Monnier, 2020, pp. 35-60.
[44] Bernile and Bhagwat, 2017, pp. 167-206.
[45] Moncuit, 2020, p. 236.
[46] Moncuit, 2020, p. 56.
[47] Thépot, 2016, p. 5.
[48] Thépot, 2016, p. 6; Geradin, 2013, pp. 325-346.
[49] However, Geradin states that compliance programmes only contribute to effective leniency programmes if they allow early detection of infringements.
[50] Wils, 2012, p. 70.
[51] Wils, 2012, p. 70.

detection and termination of infringement and the discovery of new or value-added evidence in the case in question. In this case, authorities may further reduce the fine by an extra 5-10 percent.

Ex-post recognition of compliance can be used to improve the attractiveness of cooperation and/or administrative burden-saving procedures such as settlements or non-full immunity leniency. A fine can be reduced by a few percent (up to a maximum of five) in the case of a company that adopts or upgrades an existing compliance program to ensure effective competition compliance for the future in a settlement and/or leniency application for a fine reduction, or if the company has compensated for the damages caused by its infringement during the procedure. The granting of a fine reduction in the case of ex-post compliance could be made conditional on the compliance program in question meeting an established international minimum standard, the use of innovative solutions (e.g., applying modern technologies), and guaranteeing that the program is viable.

Recognition of compliance may raise the question of whether such recognition can only be positive. I am confident that if a company deliberately breaches its compliance program adopted in a previous competition procedure, this can be regarded as an aggravating circumstance. The question is what can be regarded as a deliberate breach, or what should a competition authority do when it learns that an ex-ante compliance program has been used to hide an infringement. For example, when a competition authority is in possession of evidence that the compliance program in question was effective, and the responsible officers of the company received information on the wrongdoing, it neither stopped the infringement nor reported it to the competent authority.

The informant reward mechanism raises several questions: Based on experience, informants normally do not provide high-quality first-hand evidence; therefore, a limited percentage of informant applications is sufficient to trigger a cartel investigation.[52] Consequently, it is desirable if a potential informant subject to a company's compliance program first reports his/her findings to the competent compliance officer(s), unless such an informant would suffer adverse consequences. Furthermore, it is important for the company to have sufficient resources to collect and submit evidence according to the competition authority's needs. If this is not the case, then it is preferable for potential informants to have a direct line of communication with the competent competition authority, provided that companies may be

[52] Tóth, 2016.

tempted to hide the infringements reported to them by informants from the authority.

Finally, compliance programs as a mitigating factor could discriminate SMEs that do not have sufficient resources to develop compliance programs. It is important to consider how we can ensure that ex-post and ex-ante considerations of compliance programs do not discriminate against SMEs.

4. Summary

This study examines competition law compliance from two perspectives. First, I examine how competition regulation compliance mechanisms work from the perspective of promoting compliance. Therefore, deterrence is crucial in this regard. However, I highlight the difficulties associated with corporate competition compliance in addition to highlighting their positive effects. Consequently, I describe how they can be encouraged to avoid the automatic reduction of fines while recognising their outstanding compliance efforts.

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Necessity of considering compliance measures before and after the act in Germany and Hungary[**]

ABSTRACT: This article provides a conceptual and legal overview of the term compliance, with a particular focus on its distinctions between soft compliance and hard compliance. In addition, compliance measures taken both before and after a criminal offence has been committed are examined, highlighting their preventive and remedial functions within corporate and legal frameworks. Particular attention is given to the legal situation in Germany and Hungary, offering a comparative analysis of the regulation and enforcement of compliance in these two jurisdictions.

KEYWORDS: compliance, criminal compliance, soft compliance, hard compliance.

1. Introduction

The term compliance means conformity, observance, obedience, agreement and following rules. However, the concept of compliance remains unclear. There is consent that it incudes the obligation to comply with applicable law and to follow corporate self-regulation.[1] In addition to the *legal requirements, internal company guidelines* are also included in the obligation to ensure legality and monitor compliance. The legal concept of compliance emerged in Anglo-American law during the 1930s with the development of *regulated self-regulation* – the idea that companies should establish their own internal rules for their specific areas of operation, as existing legal provisions were considered insufficiently preventive. Self-regulation (internal rules) often based on *„good practices",* is subject to the

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[**] This study was prepared as part of the linkage project of the Humboldt Research Group "On the systematisation of criminal responsibility of and in enterprises" led by the University of Heidelberg and the University of Miskolc (2020-2025).
[1] See more: Dannecker, 2022, p. 196.

company's self-regulation. *Dannecker* emphasized that in order to minimize the risk of liability and sanctions and avoid negative publicity, companies should go beyond compliance with legally binding rules and follow 'domestic and international best practices'. [2]

Originally, this concept was only used in financial and economic legal practice and has also become part of European corporate practice, but later it also became increasingly widespread in (economic) criminal law. A functioning compliance structure enables companies to protect themselves against criminal offenses and the associated penalties, fines, etc. Compliance rules can go far beyond the general obligation to comply with the law and include stricter requirements through self-regulation.

From an *organizational perspective,* compliance is a collective term for measures aimed at ensuring lawful conduct and compliance with legal requirements, internal rules and other recommendations. Based on the narrower definition used by *Bock*, compliance is a collective term for supervisory measures that serve to ensure that all employees of a company behave lawfully. In this sense, criminal compliance is the obligation of company management to prevent criminal offences by employees within the company.[3] It must be emphasized that compliance must be organized by the *company's management* in every company, as compliance with laws and regulations is a specific task of the management.

Kocziszky/Kardkovács defined the purpose of compliance for the managing body as follows:

> Monitoring and enforcing compliance with laws, regulations, professional standards, internal rules and expectations relating to the company's business activities, as well as avoiding any negative consequences that may arise and managing the associated risks; ensuring transparency and regulation of business processes, the economic and efficient use of resources; creating the conditions for ethical corporate operations and preventing corruption risks.[4]

From the perspective of ethical corporate governance, according to István Ambrus and Ádám Farkas, compliance is

[2] Dannecker, 2022, pp. 196-209.
[3] Bock, 2009, p. 293.
[4] Kocziszky and Kardkovács, 2020, p. 20.

> the set of rules established by various laws (legal norms) and internal rules created by the company itself for its owners, employees and contractual partners, based partly on laws and partly on moral and ethical principles (e.g. as laid down in codes of ethics in certain cases).[5]

The term *'Tone from the top'* is used in auditing to describe the leadership of the company's management and board of directors and their commitment to honesty and ethical behaviour. The 'tone from the top' establishes the cultural environment and corporate values of a company. A *compliance culture* is a workplace environment where every employee, from the leadership to the frontline staff, is committed to following laws, regulations, and ethical standards, also not just the legal requirements. The 'tone from the top' shapes the cultural environment and corporate values of a company. A compliance culture is a working environment in which all employees, from senior management to front-line staff, are committed to complying with laws, regulations and ethical standards, not just legal requirements.

There is also an approach from *Soyer/Pollak* that distinguishes between *hard compliance* and *soft compliance*.[6] *Soft compliance* aims to achieve rule-compliant behavior within a company through the use of organizational self-regulatory measures, the sources of which may include internal regulations, guidelines, codes of conduct or codes of ethics[7] that primarily relate compliance with moral, ethical or economic aspects. The most characteristic feature of criminal compliance is *hard compliance*, which refers to legally binding requirements to prevent rule violations. According to literature sources, the term *criminal compliance*[8] first appeared in 2008 in the title of a document published by Microsoft.[9] These are of central importance for companies in order to prevent criminal offenses and other legally relevant rule violations within the company:

[5] Ambrus and Farkas, 2019, p. 19.
[6] Soyer and Pollak, 2023, pp. 210–240, Soyer and Pollak, 2021.
[7] Codes of conduct contain not only ethical principles, but also procedures to be applied in the event of violations and the expected consequences. See: Benedek, 2014, p. 51.
[8] Rotsch, 2015, pp. 41–42, Rotsch, 2010, p. 614.
[9] Dannecker and Bülte, 2020, p. 133.

punishment of managers, employees or the legal entity itself, as well as administrative sanctions.

2. Anti-Money Laundering Compliance (AML)

The term „money laundering compliance" is used as a collective term for international, EU-wide and national regulations for the prevention of money laundering. In the relevant literature, the area of money laundering compliance is treated separately, partly because it is an area that is well-regulated and harmonized by EU law. Measures related to money laundering compliance can basically be classified as preventive compliance tools. The following section presents the compliance measures set out in the money laundering directives adopted by the European Union[10] will be introduced, followed by an overview of the most important elements of domestic regulations.

3. Consideration of compliance measures

Compliance measures can be introduced or implemented before the violation (ex ante) or after the offence (ex post). In connection to the compliance with money laundering regulations, the company must be organized in such a way that violations of applicable law are avoided. It is the responsibility of the management to ensure the operation of the AML Compliance Management System, which includes, for example, the fulfilment of due diligence obligations such as verifying customer identity.[11] There are regulations that require companies to train their employees according to appropriate standards.

What are the risks of violating money laundering regulations? On the one hand, this can have legal consequences (criminal liability of natural persons or the company), fines (against natural and legal persons), sanctions by supervisory authorities (against natural and legal persons), damage to reputation or financial risks. Violations can also lead to a competitive disadvantage for the company.

In the United States, the Department of Justice (DOJ) has published detailed guidance entitled *'Evaluation of Corporate Compliance Programs'*,

[10] See: Udvarhelyi, 2013, pp. 455-471; Jacsó-Udvarhelyi, 2024, pp. 687-729.
[11] Jacsó, 2023, 905-920; Jacsó, 2024, pp.111-131.

which was first published in February 2017 and updated in June 2024.[12] The 'Principles of Federal Prosecution of Business Organizations' in the Justice Manual describe specific factors that prosecutors should consider when conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. These factors include 'the adequacy and effectiveness of the corporation's compliance program at the time of the offense and at the time of a charging decision" and the corporation's remedial efforts 'to implement an adequate and effective corporate compliance program or to improve an existing one'.[13] The guidance is intended for U.S. prosecutors assess the effectiveness of corporate compliance programmes when making decisions about charges and penalties. While the guidance does not set binding standards, it provides a useful framework for evaluating and improving compliance efforts. The guide focuses on three key questions: 1. Is the compliance program well designed? 2. Is it implemented in good faith and with adequate resources? 3. Does it actually work in practice? Due to its level of detail, the guide also serves as a valuable reference for companies seeking to structure or enhance their own compliance programs.[14]

Compliance measures taken prior to the offense may be considered as a mitigating factor in cases of criminal or administrative misconduct. In this context, the *decision of the German Federal Court of Justice of May 9, 2017*[15] on consideration of a compliance management system when assessing fines is particularly noteworthy.[16] According to this ruling, the extent to which a legal entity has fulfilled its obligation to prevent legal violations within the company and has implemented an efficient compliance management system aimed at preventing legal violations is relevant for the assessment of the fine. When assessing the fine, consideration must be given to the extent to which a legal entity has fulfilled its obligation to prevent legal violations within the company and has implemented an efficient compliance management system to prevent legal violations. In cases of criminal or administrative offenses, certain compliance measures undertaken *after the offense* can be considered mitigating factors. These efforts demonstrate a commitment to rectifying past misconduct and

[12] Evaluation of Corporate Compliance Programs.
[13] Ibid.
[14] Dannecker, 2021.
[15] BGH 1 StR 265/16, 2017.
[16] Dannecker, 2021.

preventing future violations. Examples of such measures include: compensation for damages caused by the offense; improvement of internal compliance structures, policies and procedures; expansion of the compliance department to enhance oversight and internal controls; engaging external consultants, particularly in specialist areas such as tax compliance; improved training programs for employees to raise awareness and ensure adherence to relevant laws and regulations; increased monitoring and auditing of internal processes to detect and prevent future irregularities. All measures aimed at compensating for damages or improvement future compliance.[17]

The following section examines whether *compliance measures taken before or after the offense* may also be taken into consideration in criminal proceedings in Hungary. Under the Hungarian legal framework, only *natural persons* can be held criminally liable; *legal entities* can only be subject to criminal sanctions, namely '*measures*' (dissolution of the legal entity, restriction of activities, fines).[18] The Hungarian Criminal Code regulates the basic principles of sentencing,

> *the Punishment shall be imposed within the limits specified in this Act, bearing in mind its purpose, in such a way that it is proportionate to the gravity of the offense, the degree of guilt, the danger posed by the offender to society, and other mitigating and aggravating circumstances*.[19]

The qualifying circumstances of the punish are listed in detail in the 56th Opinion of the Criminal Division on the circumstances (BKv Nr. 56) to be taken into account when imposing a sanction.[20] It generally states that the perpetrator's actions to avert the outcome are mitigating circumstances. This mitigating circumstance has the greatest weight if the compensation was paid as a result of the perpetrator's intention to make amends and his active conduct.[21] This means that the perpetrator's self-reporting is a mitigating circumstance. It is particularly significant if this action enables the defence

[17] BGH 1 StR 265/16, 2017, p. 46.
[18] Act CIV of 2001 on criminal measures that may be imposed on legal entities.
[19] Article 80(1) Act C of 2012 on the Criminal Code. See more: Pápai-Tarr, 2024.
[20] BKv Nr. 56., 11, [Online]. Available at: https://kuria-birosag.hu/hu/kollvel/56-bk-velemeny (Accessed: 3 February 2024).
[21] See more Pápai-Tarr, 2023, p. 83.

to be detected or has contributed significantly to this. It is also a mitigating factor if the perpetrator cooperated in the detection of the offense and has contributed to the success of the investigation.[22] There are *specific regulations* for *measures* against *legal entities,* but their practical application in Hungary is generally very limited.[23]

It is also worth mentioning the rule of *active repentance* in the Hungarian Criminal Code, according to which, in the case of effective mediation procedure, if the perpetrator has compensated the victim for the damage caused, this may lead either to the cessation of criminal liability or to an unlimited reduction of the penalty.[24]

Active Repentance (1) Any person who has committed any misdemeanor offense against life, physical integrity or health, against personal freedom, against human dignity and fundamental rights, any traffic offense, offenses against property or against intellectual property rights, or any crime punishable by imprisonment not exceeding three years, shall not be prosecuted if he has admitted his guilt before being indicted, and has provided restitution by way of the means and to the extent accepted by the injured party within the framework of a meditation process, or previously if approved in the meditation process. This provision shall also apply in connection with multiple counts of offenses, where the criminal offense against life, physical integrity or health, against personal freedom, against human dignity and fundamental rights, traffic offense, offense against property or against intellectual property rights is considered decisive.

(1a)[25] The penalty may be reduced without limitation if the conditions specified in Subsection (1) are met, however, in order to achieve the purpose of the penalty, the prohibition of practicing a profession, suspension of driving privileges, exclusion or a ban from visiting sport events may not be omitted. In that case, following the successful completion of the mediation procedure, only the prohibition of practicing a profession, suspension of driving privileges, exclusion or ban from visiting sport events may be imposed.

(2) The penalty may be reduced without limitation if the perpetrator has admitted his guilt of having committed either of the crimes specified in

[22] BKv Nr. 56., 11. [Online]. Available at: https://kuria-birosag.hu/hu/kollvel/56-bk-velemeny (Accessed: 3 February 2024).
[23] Sántha, 2000, pp 230-240; Sántha, 2011 and Sántha, 2016.
[24] Article 29 Act C of 2012 on the Criminal Code.
[25] Enacted by Section 19 of Act LXIV of 2024, effective as of 1 July 2025.

Subsection (1), punishable by imprisonment not exceeding five years, before being indicted, and has provided restitution by way of the means and to the extent accepted by the injured party within the framework of a meditation process, or previously if approved in the meditation process. This provision shall also apply in connection with multiple counts of offenses, where the criminal offense against life, physical integrity or health, against personal freedom, against human dignity and fundamental rights, traffic offense, offense against property or against intellectual property rights is considered decisive.

(3) Subsections (1)-(2) shall not apply if the perpetrator:

a) is a repeat offender or a habitual recidivist;

b) committed the crime in the framework of a criminal organization;

c) committed a crime resulting in death;

d) committed a criminal offense intentionally while on probation as a result of suspension of a prison sentence or, in consequence of the commission of an intentional criminal offense, after being sentenced to serve a prison term and before he has finished serving his sentence, or while released on probation or during the period of conditional prosecutorial suspension; or

e) has been a party to a meditation process on account of a previous criminal act of intent, and in consequence Subsection (1) or (2) hereof had been applied, if another criminal act had been committed within two years from the date of the decision that is not subject to further remedy.[26]

Under the new *Code of Criminal Procedure*,[27] the applicability of mediation could be separated from the conditions for active repentance as a ground for eliminating criminal liability under substantive law. The latter means that mediation is no longer applicable only in connection with active repentance as a reason for the removal of criminal liability under substantive law or for the granting other advantages, but independently of this, as long as the objectives of the mediation procedure can be achieved.[28]

In the case of *money laundering* it should be noted that the Hungarian Criminal Code also criminalizes negligent money laundering: *'(1) Any person who is involved in concealing, converting, transferring assets derived from the criminal offences of others, or who participates in the alienation or transfer of assets, performs any financial transaction or*

[26] See the translation in: https://uj.jogtar.hu/.
[27] Act XC of 2017 on the Code of Criminal Procedure.
[28] Kiss, 2018.

receives any financial service in connection with those assets, or makes the necessary arrangements to that effect, and is negligently unaware of the true origin of the asset is guilty of misdemeanor punishable by imprisonment not exceeding two years.' (2) The penalty shall be imprisonment for misdemeanor for up to three years if the criminal offense defined in Subsection (1): a) involves a particularly considerable or greater value; b) is committed by a service provider defined in the Act on the Prevention and Combating of Money Laundering and Terrorist Financing, by an officer or employee of such service provider in connection with the service provider's activities; or c) is committed by a public official. (3) Any person who voluntarily reports to the authorities and unveils the circumstances of commission shall not be prosecuted for money laundering as specified under Subsections (1) and (2), provided that the act has not yet been revealed, or it has only been partially revealed.'[29]

Compliance measures can be taken into account when assessing due diligence obligations. Furthermore, it is punishable under the section entitled *„Failure to Comply with the Reporting Obligation Related to Money Laundering" (Art 401 Penal Code)*:

> Any person who fails to comply with the reporting obligation prescribed by law in connection with the prevention and combating of money laundering and terrorist financing is guilty of misdemeanour punishable by imprisonment not exceeding two years.

4. Fazit

It is important to note that the Act CIV of 2001 on criminal measures that may be imposed on legal entities was amended by the legislator in 2025. The amendment to the Act, which will come into force on January 1, 2026[30], contains detailed regulations on the imposition of measures applicable to legal entities, according to which the following must be taken into account in particular: whether the legal entity a) intended to gain or did gain an advantage by committing the offense, b) compensated for the damage caused by the offense, c) paid the advantage gained from the offense to the authorities, d) remedied the harmful consequences of the

[29] Article 400(1)-(3) Penal Code.
[30] Act XLIX of 2025 on the amendment of laws relating to justice.

offense, and e) taken measures to ensure that the legal entity will not be involved in the future in the commission of the offense that is the subject of the criminal proceedings. According to the explanatory memorandum to this amendment

> the new regulation may bring about a change of era in the field of law by introducing the principle of officiality into proceedings involving legal entities, while at the same time creating a system of procedural cooperation (settlement) and, by modifying the available measures, providing appropriate incentives for cooperation.'[31]

Compliance measures may also be taken into account in the future by the measures that may be imposed on legal entities.

In summary, the following conclusions can be drawn:

1. Sentencing is determined by the offense, the offender's attitude towards the offense and their willingness to provide information and cooperate.

2. Measures that go beyond the specific offense under assessment – such as training or regular monitoring – which are generally aimed at preventing violations before they occurre, must also be taken into account as mitigating circumstances.

3. Post-offense behaviour must generally be taken into account, in particular the compensation for damages and any measures aimed at preventing future offenses. This reduces the special preventive necessity of punishment that the penalty serves.

[31] Explanatory memorandum to the Act XLIX of 2025 on the amendment of laws relating to justice, p. 6.

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FERENC SÁNTHA*

Criminal sanctions against legal persons and their limitations due to the *ne bis in idem* principle**

ABSTRACT: This study examines the system of criminal sanctions applicable to legal persons. The introduction and first part of the paper briefly outlines some general questions and the systematization of sanctions. The sections that follow respectively introduce and discuss various types of corporate criminal sanctions. Thereafter, the principles of sanctioning are examined. The final section is devoted to examining the limitations of sanctions due to the *ne bis in idem* principle.

KEYWORDS: Criminal sanctions against legal persons, corporate criminal sanctions, ne bis in idem.

1. Introduction

'No soul to be damned and no body to be kicked'.[1] This classic statement of the Lord Chancellor of England, quoted many times thanks to John Coffee's famous essay[2], had, until the early 1990s, significant influence on the corporate criminal sanction system. This influence was mainly evident in the fact that almost all exclusively criminal sanctions were considered appropriate on the ground that the majority of criminal legal consequences (e.g. imprisonment, community service, probation) specifically targeted individuals with intent to affect them.

However, recent decades have witnessed significant changes leading to the introduction of a broad range of sanctions in the criminal law of most

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[1] 'Did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked?' Edward Thurlow, 1st Baron Thurlow (1731-1806).

[2] Coffee, 1981.

countries.[3] The idea behind the introduction of these new sanctions was that they should not only represent a reaction to crime already committed, but also result in the formation and establishment of new sanction terms based on proactive purposes.[4] In other words, these sanctions are intended to prevent or minimize law-violating behaviour as much as possible. Another important objective of organizational sanctions is to prevent people from making profit or acquiring advantages through criminal activities.[5]

This study examines the system of criminal sanctions applicable to legal persons. In the first section, the study briefly outlines the systematization of sanctions. The sections that follow respectively introduce and discuss various types of corporate criminal sanctions. Thereafter, the principles of sanctioning are examined. The final section examines the limitation of sanctions due to the *ne bis in idem* principle.

2. Place of corporate sanctions in the criminal sanction system

The systematization of sanctions offers many solutions. Obviously, the question of place of corporate sanction cannot be examined separately from other elements of the criminal liability system, dogmatic standpoints of the act (actus reus), the perpetrator of the crime, and culpability of the perpetrator. Integrating corporate criminal sanctions into the criminal punishment system is not problematic in legal or academic models that

[3] International legal sources also offer a wide range of sanctions. See, e.g. Recommendation (88) 18 of the Committee of Ministers of the Council of Europe to Members States concerning Liability of Enterprises having Legal Personality for Offences committed in the Exercise of their Activities (1988), which contains a comprehensive list of sanctions: warning; reprimand; re-cognisance; a decision declaratory of responsibility but no sanction; fine or other pecuniary sanction; confiscation of property used for commission of the offence or representing the gains derived from the illegal activity; prohibition of certain activities, in particular exclusion from doing business with public authorities; exclusion from fiscal advantages and subsidies; prohibition on advertising goods or services; annulment of licences; removal of managers; appointment of provisional caretaker management by judicial authority; closure of enterprise; winding-up of enterprise; compensation and/or restitution to victim; restoration of former state; publication of decision imposing sanction or measure.

[4] Heine, 1999.

[5] See the explanation of the related Hungarian Act (Act CIV 2001 on Criminal Measures Applicable to Legal Persons) which points out that the aims of criminal measures applicable to legal entities are the effective prevention of violation of criminal law related to the operation of the legal entity and curtailment of the profit and financial advantage obtained through commission of crime.

dogmatically accept the existence of independent corporate culpability. For example, Klaus Tiedemann's concept of corporate guilt is based on the belief that lack of organization and supervision is the main reason for corporate crime.[6] Similarly, the Brent Fisse and John Braithwaite[7] and Pamely Bucy[8] concepts are based on the belief that corporation policy is based on special separated organizational guilt.

The Hungarian criminal sanction system is traditionally dualistic, meaning that it allows for using punishment and other methods to deter crime. However, punishment can be used only when culpability of the perpetrator is declared. For the use of other methods, it is sufficient to establish that an unlawful act has been committed. As punishments are traditionally used only when an indispensable condition of culpability has been satisfied, they clearly cannot be used against legal persons under Hungary law.

If corporate culpability is not accepted, there are two possible solutions: (1) regulate the organizational sanctions using rules corresponding to the (traditional) measures of the Criminal Code, and (2) formulate a third new type of penal sanctions. This latter option was chosen by the Spanish criminal law, which labelled these sanctions as 'accessory consequences.[9]

The Hungarian legislature chose the first option because Article 63 of their Criminal Code corresponded with the criminal measures in Hungarian law under 'measures applicable to legal persons', referring to Act CIV 2001, in the footnotes. However, the legal consequences of this for corporations are different from those of Hungary's traditional sanctions for individuals, and it should be considered a new type of criminal sanction. This should be considered a new type not only because the legislature placed the relevant provisions in a separate act, but also because of the following two additional characteristics:

1. The aim of corporate sanctions is to promote an attitude of compliance among organizations, that is, to influence the law-abiding behaviour of natural persons with legal rights. From the perspective of effectiveness, corporate criminal sanctions are not useful in fighting corporate criminality when their consequences are less effective than

[6] Böse, 2011.
[7] Fisse and Braithvaite, 1988.
[8] Bucy, 1991.
[9] Bacigalupo, 1999.

administrative or civil sanctions.

2. The potential effect of using corporate sanctions is specific; it decreases or destroys the organization's reputation. The stigma of conviction due to corporate criminal sanctions may be significant enough to incentivise 'corporate criminals' to change their irresponsible behaviour.

Corporate criminal sanctions can be categorized in different ways. This study examines the first group that includes legal consequences entailing financial loss.

3. Sanctions resulting in financial loss

3.1. Confiscation of property

Confiscation could be the most widely applied consequence of corporate criminality. The aim of sanctioning this consequence is to undo the 'fruit' gained or income acquired illegally by a legal person.

Under the Hungarian Criminal Code, confiscation of property can be imposed as a 'traditional measure' on natural persons and legal entities. Confiscation of property must be ordered if the commission of a crime against one person enriched the other person. If the 'other person' enriched is an economic entity (such as a business organization), confiscation must be ordered against the entity. Transfer of ownership or dissolution of the economic entity would not prevent the application of this sanction. However, note that the term 'economic operator' has a narrower definition than 'legal person' in Act CIV 2001.

Hungarian criminal courts sanction confiscation of property against all assets, advantages, and profits gained from a criminal act or expenditures incurred to commit the crime, without reducing the 'expenditures of the criminal act'. In other words, courts adopt the so-called gross principle: the confiscated property constitutes the actual enrichment of the perpetrator as well as the property invested to enable perpetration.[10]

3.2. Compensation and restitution

These reparative legal consequences are regulated by the Council of Europe, which recommended them as criminal or quasi-criminal sanctions. The explanatory memorandum of the recommendation considers these sanctions quite significant because they provide the victims a good chance to obtain

[10] Hollán, 2008.

compensation for their damages through criminal proceedings.[11] Moreover, companies and other legal persons are better able to pay compensation than individual offenders.[12] However, one must note the difficulty in defining the specific traits of 'criminal compensation' as compensation is a common practice in civil law as well. However, applying 'criminal compensation' on a wider scale can prove difficult because crimes committed in the framework of a legal person may not have victims but come within the purview of corporate criminality. In Hungarian law, compensation for damages is a legal consequence regulated by civil law, but in some jurisdictions, such as the US jurisdiction, corporate sanctions may include punitive (multiple) damages, with civil sanctions more punitive than criminal sanctions and the clear lines between civil and criminal sanctions disappearing.

3.3. Loss of certain benefits or advantages

This sanction, under French and Dutch criminal law, for example, may include a variety of specific legal consequences such as loss of tax benefits or exclusion from budget support. This is not necessarily a 'light' sanction because loss of subvention can lead to forcible closure of the legal person status when this status decisively depends on external budgetary support. The Hungarian Act CIV 2001 placed this type of sanction under the heading 'restriction of legal person's activities.

3.4. Criminal fine

Fine is a basic type of sanction applicable to legal entities under most legal systems, including the Hungarian legal system. As for calculation of fine, two approaches are adopted. First, the upper limit of the fine is obtained through a predefined multiplication of the maximum possible fine for natural persons. Heine referred to this multiplier as totalisator.[13] Second, the general minimum and maximum fine are defined by law.

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[11] Liability of Enterprises for Offences. Recommendation No. R (88) 18 adopted by the Committee of Ministers of the Council of Europe on October 1988 and explanatory memorandum, Strasbourg, 1990. According to the explanatory memorandum, 'compensation of victims was considered a particularly appropriate sanction as it would relieve persons having suffered damage of the necessity of pursuing their claims in a separate procedure'.

[12] James Gobert – Maurice Punch, *Rethinking Corporate Crime (Law in Context)*, Butterworths, 2003, p. 222.

[13] For example, in France the maximum fine applicable to a legal person is five times the

An appropriate and fair fine can be calculated by carefully considering the sentencing factors and avoiding both the highest and lowest extremes. The first approach may affect the financial standing of the legal person, even inducing insolvency, winding-up, and other serious consequences, including affecting for the legal person's employees and customers. The literature refers to this as 'spillover effect'[14] or 'deterrence trap'[15]. However, a low fine may be inappropriate because this could minimize the seriousness of the crime and undermine the deterrent effect of the sanction and even induce the legal person to 'feel' it worth committing a crime from an economic point of view. As Gobert pointed out, 'if it is cheaper for a company to commit an offence and pay the fine than to operate its business in lawful manner, why would a rational company choose to obey the law?'.

Some alternative approaches can make corporate fines more rightful. For example, equity fine can be applied for share companies. Instead of imposing high fines payable in cash, the court orders the company to issue a predefined number of shares to the state's victim compensation fund. As opposed to the immediate payment of fines, this model will not paralyze the activities of the company or prompt commercial and service companies to adopt defensive mechanisms such as transferring their losses due to high fines to their customers by raising the prices of goods or services. Moreover, another potential impact of high fines is that 'more corporate control over managers would be likely to result'.[16] For another example, some European countries consider the minimum-maximum system along with turnover of the corporation. In Poland, the fine ranges from one thousand to five million Polish zlotys, but this should not exceed 3% of the legal person's revenue earned during the financial year the crime was committed.

In Hungary, the minimum fine is defined absolutely: 500 000 HUF (approximately € 1 700). This minimum is set very low because Hungary has many small family-based enterprises with limited ability to pay huge amounts. The maximum is fixed at three times the financial advantage resulting from the offence. Act CIV 2001 explains the significance of the tripled amount: the fine is imposed not only to withdraw the illegally gained amount from the legal person, but also to prevent future crimes through deterrence. Nevertheless, a fixed maximum fine is desirable because a

fine applicable to individuals.

[14] Harding, 1996.

[15] Coffee, 1981.

[16] Schlegel, 1990.

relatively uncertain fine violates the principle of legality.

4. Sanctions limiting the legal person's actions and operation

4.1. Winding-up

Winding-up means capital punishment for legal persons, the most severe sanction to safeguard the society. Dissolving smaller organizations having only a few members is less problematic. The situation is different for bigger companies, whose dissolution could adversely affect their shareholders (owners), numerous employees, and the consumers purchasing goods and services from the company. This domino effect of winding-up calls for caution while imposing this sanction. Another problem with this is that nothing prevents the members from reestablishing their company after winding-up and picking up activities from where they left[17]. However, this strategy can be impeded by appropriately imposing criminal or civil sanctions on the members of the company along with winding-up proceedings and thus rendering reestablishment of the legal person impossible.

Hungary has mandatory and discretionary forms of winding-up. In mandatory winding-up, a criminal court winds up the legal entity if it is running an illegal economic activity, if it was established for the purpose of covering up a criminal act, or if its activities serve the purpose of covering up a criminal act. In discretionary winding-up, the court can wind up a legal entity even if it is running a legal economic activity. This form of winding-up is based on the court's discretionary powers. The Act notes certain exceptions when winding-up cannot be imposed; for example, when the legal person has strategic importance from the perspective of national public utility or national economy.

4.2. Restriction or prohibition of certain activities

In many countries, criminal courts can impose preventive sanctions. These include prevention of exclusion from subsidies; withdrawal of licenses; exclusion from public tenders or concession contracts; and prohibition from producing certain goods, contracting, advertising, or removal of managers. This sanction is less drastic than winding-up. It imposes restrictions on business activities in various forms. Thus, the application of this sanction is limited to entities engaged in economic activity.

[17] Lederman, 1985.

Hungarian law allows criminal courts to prohibit a legal person from carrying out certain activities. This prohibition may last from one to three years; the duration must be defined in years. During the prohibition period, the legal entity shall not collect deposits based on public invitation, participate in public procurement procedures, or receive funding from central or local government budgets, or from the EU.

4.3. Placing the legal person under supervision

This sanction allows for a legal person to be placed under professional supervision if its activities need to be monitored to ensure lawful operation. According to Schünemann, this is an ideal sanction for organizations because it is both effective and cautious enough to avoid triggering reactive avoidance by legal persons. The court appoints a supervisor to head the legal entity for a limited period. This supervisor can have access to all documents of the legal person, attend meetings of its organs, and ask any employee or officer for information, and reports to the court. Thus, this sanction eliminates the causes that led to the criminal act by influencing the operation of the legal entity through supervision and control. It is therefore like a probation supervision regulated as criminal measure against natural offenders in Hungarian criminal law.

5. Other corporate criminal sanctions

The third group of sanctions includes relatively lighter legal consequences of a cautionary nature, or a combination of other sanctions which cannot be classified into the previous two categories.

5.1. Corporate warning

Warning is the mildest sanction regulated by the Recommendation and, as the name implies, merely declares the commission of crime, establishing the responsibility of the organization, and has no other negative consequences. Consequently, it is applied only when the offence is minor. By sanctioning warning, the court or prosecutor expresses disapproval and orders the legal person to avoid committing further crime.

5.2. Publication of judgement

Publication of judgement is an obligation imposed on a legal person committing the crime to publish, incurring all expenses, an article in a daily

newspaper or economic magazine, or, in our modern times, on the Internet, providing all details of the crime committed, the sanctions imposed on the legal person and its managers, and the legal person's efforts to prevent further crime.[18] Publicity can have negative consequences for the legal person, such as loss of income or prestige. According to a US survey, corporate managers do not believe that legislation can stop crime. However, they do believe that publicity has a considerable deterrent effect[19]. Moreover, publication of judgement, as an ideal corporate sanction, can be more effective than the other 'traditional' court sanctions under criminal law, and is recognized as one of the best responses to corporate criminality.[20]

5.2. Corporate probation and community service

Corporate probation primarily aims to reorganize the legal person and prevent recidivism, rather than imposing heavy fines. Probation makes it obligatory to comply with certain conditions imposed by the court for a certain period. These conditions may include the following:

- Restitution/payment of damages,
- Publication of judgement,
- Reformation of the organization's decision-making system and internal structure in general, and introduction of specific control and security procedures,
- Regular reporting, and appointment of committees or officials with preventive capacity,
- Appointment of consultant to help in examining the situation leading to the crime and making appropriate recommendations for prevention. For example, a US court required a company to participate in a special programme to stop oil spills. [21]

The work specified in a court's community service order is carried out by the legal person through its employees. This sanction against a legal person has the same aim as that for natural persons, namely, reparation for harm caused by the offence and participation in a 'project' beneficial to society. For example, in the US, a bakery was ordered to supply bread to

[18] Sántha and Dobrocsi, 2011.
[19] Clinard and Yeager, 1980.
[20] Sántha and Dobrocsi, 2011.
[21] Stessens, 1994.

homeless persons for a certain period[22] and a chemical company was ordered to repair the environmental damages it had caused.[23]

6. Sanctioning principles

As with the criminal law for natural persons, the circumstances and principles to be considered for imposing corporate criminal sanctions need to be defined. This can be done explicitly based on law or court guidelines. The first case above can be explained by the Finnish Penal Code. Chapter IX of the Code lists the criteria to be considered when imposing corporate fine.[24] The other case implemented US law. The relevant circumstances are set out in Chapter 8 of the US Sentencing Guidelines (Sentencing of Organizations).[25]

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[22] United States v. Danilow Pastry Co., Inc., 563 F. Supp. 1159 (S.D.N.Y. 1983) [Online]. Available at: https://law.justia.com/cases/federal/district-courts/FSupp/563/1159/1591274 (Accessed: 4 May 2025).

[23] United States v. Allied Chemical & Dye Corporation, 42 F. Supp. 425 (S.D.N.Y. 1941). [Online]. Available at: https://law.justia.com/cases/federal/district-courts/FSupp/42/425/1609606/ (Accessed: 4 May 2025).

[24] These circumstances are the following:
- nature and extent of corporate neglect and participation of the management in the offence;
- status of the offender as member of body of the corporation;
- seriousness of the offence committed in operation of the corporation and the extent of criminal activity;
- other consequences of the offence to the corporation;
- measures of the corporation to prevent new offences, prevent or remedy the effects of the offence, or further the investigation of the neglect or offence; - when a member of the management of the corporation is sentenced to a punishment, the size of the corporation and share of the corporation held by the offender, as well as personal liability of the offender based on commitment of the corporation.

[25] According to the Guidelines, the general principles for imposing corporate criminal sanctions are the following:
- the court must, whenever practicable, order the organization to remedy any harm caused by the offense;
- if the organization operated primarily for a criminal purpose or by criminal means, the fine should be set sufficiently high to divest the organization of all its assets;
- the fine range for any other organization should be based on the seriousness of the offense and culpability of the organization. The four factors that increase the ultimate punishment of an organization are (i) involvement in or tolerance of criminal activity, (ii) prior history of the organization, (iii) violation of an order, and (iv) obstruction of justice. Two factors that mitigate the ultimate punishment of an organization are (i) existence of an effective

In Hungary, the court practice is to elaborate on the relevant factors, following Opinion No. 56 of the Penal Board of the Hungarian Supreme Court.[26] This Opinion defines the aggravating and mitigating factors applicable to natural person perpetrators.
These factors include the following:

- Nature and objective weight of the crime committed,
- Financial standing or results and size of the legal person,
- Status of perpetrator in the legal entity or organization,
- Action taken by the legal person to prevent or remedy the damaging consequences of the criminal act,
- Action taken by the legal person to report the crime and cooperate with authorities,
- Analysis to find whether the legal person had a plan or programme to prevent the criminal act,
- 'Record' of the legal person, namely, whether there was a sanction imposed previously.[27]

7. Closing remarks: the *ne bis in idem* principle as limitation of corporate criminal sanction

Finally, I discuss the *ne bis in idem* principle as a limitation of corporate criminal sanction. This principle implies that no one can be prosecuted, tried, or convicted twice for the same criminal act. All national legislations of EU member states adopt this principle. Many member states, including Hungary, enshrine this principle as a constitutional right based on the general principles of EU law under Art. 6 of the Treaty on European Union.[28] The principle covers several aspects.[29] However, this study

compliance and ethics programme and (ii) self-reporting, cooperation, or acceptance of responsibility.
- probation is an appropriate sentence for an organizational defendant when it has to ensure that another sanction will be fully implemented or that the organization will take steps to reduce the likelihood of future criminal conduct. [Online]. Available at: https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf (Accessed: 20 April 2023).

[26] BkV. 56.

[27] Sántha, 2002.

[28] Tzouma, 2014.

[29] For example, the principle may also be breached if the holding company is chargeable for violation of organizational and supervisory duties regarding the subsidiary and the total

considers only the relationship between the (tax) fine imposed under tax administration and the criminal fine applicable against a legal person under criminal law in Hungary. In a budget-fraud case, for example, Hungarian legislation allows for imposing a fine against legal persons under criminal law along with a tax fine under tax administration for the same criminal act.

As regards interpretation of the *ne bis in idem* principle, Hungarian Constitutional Court Decision No. 18/2022 (VIII. 1.) is significant. Considering the prohibition of double sanctioning, the court examined the Engel criteria developed in the ECtHR case law. The Engel criteria required application of the following three tests for the case under scrutiny after legal classification of the offence under domestic law: (I) Did the ECtHR examine whether the unlawful act committed constituted a criminal offence under the state's national law? Note that this criterion has only relative value. A negative answer would not in itself preclude 'criminal' character because the ECtHR considers the qualification under national law only a starting point .[30] Furthermore, if the illegal act in question does not constitute a criminal offence under national law, did the ECtHR take into account (II) the nature of the offence committed and (III) the nature and severity of the sanctions envisaged or applied? It is not necessary to satisfy both these latter criteria because the criminal nature of an act can be established from the existence of any one of the two criteria. To assess these criteria, the following factors need to be considered: (1) whether the legislation providing for application of the fine covered all citizens in general, (2) whether the fine intended to prevent further infringement or serve as monetary compensation, (3) whether the fine was based on a general rule meant for deterrence and punishment, and (4) whether the fine can be considered significant. If these criteria are satisfied, the ECtHR practice is to consider both administrative sanctions and sanctions for infringement (administrative criminal sanctions) as 'criminal' sanction. As the Hungarian tax fine is basically fixed at 50% of the tax revenue loss (it can be as high as 200%) and aims to deter and punish rather than compensate, it can be considered a sanction of criminal nature. Consequently, this fine will constitute a clear violation of the *ne bis in idem* principle if the court applies it in a criminal proceeding against a legal

sales of the group is relevant for sentencing both companies (Rübenstahl and Brauns, 2015).

[30] Szomora, 2022.

person after tax penalty has already been imposed.[31]

Finally, the Supreme Sourt developed a special rule in budget-fraud criminal cases with regard to confiscation of property. Confiscation must be ordered against the perpetrator if the crime committed is related to a budget payment obligation, and against the legal person if illegally obtained property has enriched the legal person. However, the court needs to consider the prohibition of double deprivation: if the perpetrator or legal person was obliged to repay the financial loss of the tax authority, the court shall not order confiscation. This rule has been clarified by an amendment to the Criminal Code in 2021, by which no confiscation of property can be ordered if the tax authority had already imposed an obligation on the legal person to pay tax fine related to the same property on the basis of the same facts up to the amount of obligation. This rule is consistent with the *ne bis in idem* principle.

[31] However, the Constitutional Court's position allows for a different conclusion when it emphasizes that the parallel application of sanctions classified as criminal does not in itself violate the *ne bis in idem* principle when the legislation provides for the possibility of integrated, parallel, and interconnected application of administrative and criminal procedures. This may be the case where the procedures and the resulting sanctions are foreseeable for the person concerned and there is a close material and temporal link between the various legal consequences, in particular when the level of the sanction imposed in criminal proceedings takes into account the administrative fine previously applied.

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Consequences of leniency programmes and whistleblowing measures for the sanctioning process in criminal proceedings**

ABSTRACT: Whistleblowing and leniency programmes are important instruments to detect and successfully solve crimes. Whereas whistleblowers are natural persons who report or disclose legal violations in which they are not necessarily involved, principal witnesses are involved in criminal activities and report their knowledge to the authorities. Legal systems must provide incentives for people to report their knowledge and make it available to the authorities. Whistleblowers must therefore be guaranteed adequate protection, and principal witnesses must benefit from disclosing their knowledge by having their penalties reduced or waived entirely.

KEYWORDS: Leniency programme, whistleblowing, purposes of criminal law.

1. Introduction

Leniency programmes and whistleblowing measures are considered necessary for detecting and investigating criminal offenses. These instruments are therefore becoming increasingly important. Whistleblowers and key witnesses are necessary in some areas of crime in order for convictions and punishments to be handed down at all. At the same time, cooperation with law enforcement authorities can also have an impact on whether and to what extent a penalty is imposed.

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2. Whistleblowing and leniency programmes

"Whistleblowing" means that a natural person working in the private or public sector obtains information about legal violations and irregularities in connection with their work activities and reports or discloses these to internal or external bodies.[1] In particular, it concerns reports relating to criminal economic offences (corruption, breach of trust, antitrust violations, etc.). But whistleblowing can also refer to the disclosure of other grievances, such as shortcomings under administrative law, environmental law or labour law. Whistleblowers are usually driven by a desire to remedy an irregularity within the organization. Since they are usually unable to do this on their own, they turn to someone else (internal or external). Depending on whether the information is disclosed within or outside the organization, the term internal or external whistleblowing is used (Art. 5 Z 4 and 5 Directive 2019/1937/EU). Whistleblowing can occur both in the private sector and in public administration or civil service.[2]

A principal witness is a person who has committed a crime him/herself but now cooperates with the law enforcement authorities and discloses his/her knowledge to them in order to help investigate criminal offences. The difference to a "whistleblower" in the true sense of the word is that the whistleblower was not himself involved in the criminal act. Leniency regulations provide for the state to make concessions in the context of the prosecution or punishment to the principal witness who discloses his knowledge of the criminal acts of others to the prosecuting authorities. The aim is to offer the accused incentives to disclose information beyond their own contribution to the criminal offence and thus facilitate or enable further investigations.

3. Criticism of whistleblowers and leniency programmes

Critics of both whistleblowing and leniency programs often argue that these instruments promote denunciation and villainization and give troublemakers a platform. However, the experience from companies and public whistleblower platforms shows that these fears are largely unjustified and that only a negligible proportion of reports are actually "unjustified" or are used to falsely accuse people of misconduct.

[1] Sixt, 2020, p. 22; Yurttagül, 2021, p. 24.
[2] Soyer and Pollak, 2022, No. 28.68.

In addition to these objections to both institutions, opponents of leniency programs often argue that such programmes do not fit into our legal systems to negotiate punishment or sanctions, that judicial authorities should not make "deals" with criminals and that the leniency program weakens the principle of the search for substantive truth as well as the official principle in favor of the principle of opportunity.

4. Use of whistleblowing and leniency programmes

Is it nevertheless useful and perhaps even necessary to introduce and provide for such instruments to learn about criminal offences and to investigate the commission of criminal offenses? To see the use of whistleblowing and leniency programmes it is necessary to have a look at the goals and purposes of criminal law.

- The purpose of modern criminal law is prevention. Criminal law instruments are intended to prevent the commission of criminal offenses. This is to be achieved on the one hand through deterrence (negative (general) prevention) and on the other hand by strengthening the awareness of norms (positive prevention).[3]
- Modern research into sanctions shows that the preventive effect of criminal law depends less on the threat and imposition of severe penalties, but that it is important for prevention that crimes are prosecuted, investigated and solved by the criminal prosecution authorities. If criminals feel safe in the knowledge that their criminal behaviour will not be discovered and solved anyway, this is not deterrent on the one hand. But above all, there is then also a lack of the necessary confirmation of norms for those who would generally adhere to these norms.
- The task and aim of criminal proceedings is the investigation of criminal offences and enforcement of the state's right to inflict punishment. From the point of view of the citizen affected by a criminal offence, this state monopoly on punishment corresponds to a so-called "right to justice" (“Strafgewährleistungsanspruch”). The state is obliged to enforce the right to punishment resulting from the offence in question. From the victim's point of view, this is a claim for satisfaction. Another purpose of criminal law is thus to ensure that

[3] Roxin and Greco, 2020, § 3 No. 27; Jescheck and Weigend, 1996, p. 68; Kienapfel, Höpfel and Kert, 2024, No. 2.11.

society shows solidarity with the victim.[4] The victim also plays a very important role in criminal proceedings in order to obtain justice.

In order to achieve all these goals, it is necessary that criminal offences are discovered and solved. However, there are fields of crime in which it is difficult or almost impossible to solve a crime unless one of the parties involved discloses information that could lead to the initiation of criminal proceedings or facilitate the investigation. This is the case, for example, in corruption, where none of the parties involved has an interest in solving the crime. This is because neither the briber nor the bribee faces any punishment. Furthermore, both parties often gain an advantage from the offence, while the state administration or the national economy suffers damage. This is also the case in organized crime or in other cases of commercial criminal proceedings such as embezzlement, environmental crime or cartels. In these areas of crime, there are often no direct victims, but only perpetrators who cover for each other in a secret coercive community. Companies in particular also make it possible to conceal and disguise responsibilities for the commission of crimes, so that only information from insiders makes it possible for state law enforcement authorities to fulfill their task. Therefore, the traditional instruments of criminal investigation often do not lead to a successful investigation because there is a lack of usable evidence. In order to achieve the aforementioned purposes of criminal law and criminal procedure law, information from principal witnesses and whistleblowers is therefore necessary, as it enables and promotes the investigation of serious crimes.

However, whistleblowing regulations and leniency programs can also have general preventive effects even before criminal proceedings are initiated. After all, the mere existence of a leniency program or reporting offices for whistleblowers means that accomplices must be afraid that an accomplice goes to the public prosecutor's office and reports about criminal behaviour in the company. Whistleblowing is a method of detecting corruption, but also other grievances in the company or in the public sector at an early stage. On the one hand, it serves to discover and clarify misconduct in companies and from within companies. However, this does not only have to happen when criminal law is involved, but even earlier in the case of minor violations. It is therefore also important for companies themselves to prevent major damage in good time by protecting employees, but above all by protecting the company's reputation. Whistleblowing

[4] Kienapfel, Höpfel and Kert, 2024, No. 2.27.

should therefore not be perceived by companies as an attack, but rather as an opportunity to improve and prevent damage. Whistleblowers are an essential tool especially, but not only, in the fight against corruption and other economic crimes.

5. Leniency programmes

The idea of leniency programmes is basically that an accused person actively approaches the prosecution authorities on his own initiative and provides information about criminal acts in which he is (partially) involved, over and above his own involvement, before the prosecution authorities know anything about them or have started any investigation. The motivation to go to the law enforcement authorities, to provide information to them and to help to investigate crimes lies in the expectation of receiving no punishment or a lesser punishment.[5] In practice, the success of such programmes differs between the states and between the legal fields. Whilst it is a regular occurrence in competition law for leniency applicants to contact the competition authorities, in Austrian criminal procedure for a long time the regulation has only been applied in very few cases in the time of its existence.[6]

It has been shown that it is very rare for an accused person to go to the prosecution authorities before concrete prosecution steps have been taken by the prosecution authorities or are at least imminent. It has been seen as particularly problematic that it is unclear for a long period of time whether the potential leniency applicant will be granted leniency status and that the risk is therefore considered too great. Even if the legislator amended the provision several times, the number of cases where principal witnesses actually received leniency status is quite low. The main reason is that it is a quite long and risky procedure before the status is received. Furthermore, principal witnesses must fear that they will be subject to civil claims by the injured parties.

The prerequisite for leniency status under the Austrian Code of Criminal Procedure is that the perpetrator of one of the listed serious criminal offenses voluntarily approaches the public prosecutor's office or the criminal investigation department, makes a remorseful confession and discloses his knowledge of new facts or evidence, knowledge of which

[5] See Lewisch, 2022, No. 11.1.
[6] Hofinger, 2015.

contributes significantly to the comprehensive investigation of a criminal offense beyond his own contribution to the crime. Such a procedure is excluded if the offender has already been questioned as a defendant because of his knowledge of the aforementioned offenses or if coercion has been used against him because of these offenses. However, in the last years in two cases accused received a leniency status even after house searches have been carried out or even if they have already been arrested. It was argued that this is still possible, if the concerned persons disclose information to the prosecution authorities on facts which have not been known to the authorities.

What are the consequences if the conditions for leniency are met?

In general, leniency programmes lead to a lower sentence than that which would have been imposed without a cooperation with the prosecution authorities or the state refrains from imposing a sentence. This is supposed to be the incentive for cooperation with the prosecution authorities.

The Austrian legislator decided that, if the conditions are met, the public prosecutor's office must provisionally withdraw from the prosecution and, taking into account the weight of the contribution of the information to the clarification or investigation in relation to the nature and extent of his contribution to the crime, a punishment does not appear necessary for special preventive reasons, the public prosecutor's office must order the accused to provide a diversionary measure and further cooperation in the clarification. In such a case, the "offender" is therefore not punished and a diversionary measure is imposed, i.e. the payment of a fine, the provision of community service or the imposition of a probationary period.[7] Prosecution can be resumed if the obligation to cooperate in the investigation has been breached or the documents and information provided were false.

In European Cartel Law, the leniency programme offers the undertakings involved in a cartel which self-report and hand over evidence, either total immunity from fines or a reduction from the fines which the Commission would have otherwise imposed on them. The first cartel participant that informs the Commission of a cartel and provides sufficient information for the Commission to commence an investigation receives full immunity from any eventual fine, if it complies with the conditions of the Leniency Notice. Any other cartel participants that apply for leniency after the investigation has started can receive a reduction of the fine if they provide sufficient evidence that represents a "significant added value" and

[7] Schroll and Kert, 2025, No. 53 ff.

cooperate genuinely. Evidence is considered to be of a "significant added value" for the Commission when it reinforces its ability to prove the infringement. The first company to meet these requirements is granted a reduction of between 30% to 50%, from the fine, which would have otherwise been applied, the second a reduction between 20% to 30%, and subsequent companies up to 20%.[8]

In order to increase the application of the leniency programme, in 2016 the Austrian legislator introduced a basic legal right of the accused to be granted leniency, if the requirements are met. This should provide potential leniency applicants with increased legal certainty and the possibility of judicial review. Nevertheless, the number of cases in which leniency status has actually been granted has so far remained quite low.

To briefly illustrate the problem of leniency programs a current example from Austria shall be used: there was the suspicion that politicians of a political party had commissioned manipulated opinion polls for the benefit of the party, but these opinion polls had been paid with public funds of the Ministry of Finance. In the course of the investigation, houses and offices of a number of politicians and two pollsters were searched and cell phones and computers were seized. A few days later, one of the pollsters, let's call her Ms. B, was arrested. During the subsequent interrogations, Ms. B not only made a comprehensive confession regarding the known offences, but also provided information about a number of other crimes known to her in this context. The public prosecutor's office decided that it grants her leniency if she confirms her statements in the further investigation proceedings and continues to cooperate.

The following questions in particular have now arisen in connection with the public prosecutor's action: How long during the investigation proceedings will a defendant be allowed to benefit from leniency by disclosing new facts? Is the voluntary nature of the leniency still given if the accused has been arrested? Under what conditions can one speak of a voluntary approach to the public prosecutor's office (or criminal investigation department)? What are the consequences of carrying out a house search before the accused has disclosed his/her knowledge?[9] Does such a coercive measure generally exclude the status of a principal witness?

[8] Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17.

[9] See Kert and Schroll, 2022, p. 166.

Is it legally permissible for more than one person to be granted leniency status in the same case?
It is typical for leniency programmes that the state waives the imposition of a penalty or reduces the penalty as a reward for cooperation and the provision of information. Is it legitimate to waive punishment against someone who is believed to have committed a crime in order to motivate them to testify against others? As explained at the beginning, the fight against certain criminal activities requires a cooperation between judicial authorities and justifies to impose no or only a reduced sanction, because these crimes otherwise are almost impossible to solve. And if criminal activities cannot be solved, criminal law cannot fulfill its purpose at all. Reducing the penalty or waiving punishment (under certain conditions) is the incentive to motivate offenders to cooperate. Therefore it is legitimate to provide ways how this cooperation is taken into account in the sentencing process.

However, care must be taken to ensure that the initiative for cooperation comes from the accused, who voluntarily discloses his knowledge without being pressured to do so by the criminal prosecution authorities.[10] Otherwise, the criminal proceedings risk becoming a deal. It is not the prosecution authority that offers something, but the potential principal witness must actively disclose his knowledge on his own initiative. It is therefore not permissible for the prosecution or criminal investigation authoritiy to make a suggestion or offer to the accused as to what might happen if the latter provides new facts or evidence.

6. Whistleblowing

Different questions arise referring to whistleblowing. The focus here is less on punishment, since the whistleblower is often not the perpetrator of a criminal offence, but another person who learns about illegal activities in a company or public department. Instead, it is about protecting the person who discloses or reveals wrongdoing in a company. This is because the disclosure of wrongdoing is linked with a number of risks for the whistleblower (such as termination of employment, harassment, criminal law prosecution or social ostracism). However, whistleblower regulations aim at getting information to detect irregularities and clarify them, to end up illegal behaviour in a company or in public authorities.

[10] Schroll and Kert, 2025, No. 16 ff.

Whistleblower regulations have been in place in the EU for some time in various areas, such as in the case of reports of breaches of anti-money laundering obligations[11] or the Market Abuse Regulation[12].

The Whistleblower Directive[13] is intended to harmonize the protection of whistleblowers at EU level. The directive aims to establish minimum standards that ensure a high level of protection for persons who report breaches of Union law. It obliges companies in the private and public sectors to set up internal reporting channels for legal entities under private and public law with 50 or more employees (Art. 8 and 9) and Member States to set up external reporting channels with Member State authorities to be designated, which should forward the information received to competent EU institutions in a timely manner (Art. 11 to 14). Both types of reporting channels must protect the confidentiality of the whistleblower (Art. 16). Member States shall ensure that the identity of the reporting person is not disclosed to anyone beyond the authorised staff members competent to receive or follow up on reports, without the explicit consent of that person.

The whistleblower may make the information about the breach publicly available if neither the internal nor the external report leads to appropriate action or if he has reasonable grounds to assume that the breach constitutes an immediate or manifest threat to the public interest or that, in the case of an external report, there is a risk of retaliation or little prospect of effective action against the breach (Art. 15).

If a whistleblower makes an internal or external report in good faith (Art. 6 (1)) or makes a disclosure if the conditions are met, the Whistleblower Directive provides for a series of protective measures, ranging from precautions under employment and disciplinary law (prohibition of suspension and dismissal, prohibition of imposition or

[11] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, p. 73.

[12] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173, 12.6.2014, p. 1.

[13] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26.11.2019, p. 17.

administering of any disciplinary measure, reprimand or other penalty, including a financial penalty, etc.) coercion, intimidation, harassment or ostracism, to protection against *de facto* disadvantages such as bullying and the prohibition of psychiatric referrals (Art. 19). In addition, support measures are provided for the whistleblower to protect against retaliation (Art. 21). The Whistleblower Directive also provides for measures for the protection of persons concerned, as the existence of an effective legal remedy, the presumption of innocence and the right of access to the file for persons accused of a violation by the whistleblower (Art. 22).

For reasons of competence, the Directive only applies to reports of breaches of Union law, i.e. breaches of one of the numerous EU legal acts listed in the Annex to the Directive (e.g. in the areas of public procurement, financial services, product safety or environmental protection; Art. 2 (1) (a)), as well as breaches of the Union's financial interests as defined in Art. 325 TFEU (Art 2 (1) (b)) and the internal market rules, including competition and state aid law and the ECSC rules (Art 2 (1) (c)). The area of protection of the Directive includes persons who have become aware of an infringement of EU law in a professional context and have reported it in accordance with the requirements of the Directive. The prerequisite for this is good faith in relation to the accuracy of the reported infringement and that the report falls within the scope of the Directive. The Directive had to be implemented into national law by December 17, 2021.

7. Conclusion

Leniency programs and whistleblowers are indispensable for the detection of legal violations that endanger or harm the public interest and in particular for the detection of cases of corruption and other criminal offenses. Without them, many cases of white-collar crime and abuse of authority would remain undetected. Furthermore, whistleblower systems as well as leniency programs also have a preventive effect against misconduct because the probability of detection is increased. However, such systems require that legal systems provide for incentives for people to report their knowledge and make it available to the authorities. Whistleblowers must therefore be guaranteed adequate protection, and principal witnesses must benefit from disclosing their knowledge by having their penalties reduced or waived entirely.

As the practice of leniency programs also shows, the functioning of such systems presupposes that the persons concerned have the greatest possible legal certainty. Otherwise, such systems will deter them because of the risk to be punished after having given information to the authorities. This means that it must be clear under what conditions protection is granted. For whistleblowing to be successful in the prosecution of misconduct in companies or public bodies, it therefore depends on regulations that are as clear and comprehensible as possible and compatible with the rule of law principle.

Whistleblowers often suffer considerable disadvantages, which can also threaten their existence. Sufficient protection is therefore necessary for them.

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Sentencing guidelines based on the US model for criminal and administrative penalties against associations in the European Union**

ABSTRACT: Associations responsible for criminal violations are sanctioned with various sanctions in the member states of the European Union – criminal penalties or fines. These sanctions vary in severity and are enforced in different ways, as a look at Austria and Germany shows. To achieve fair and consistent sanctioning in this area, the literature repeatedly calls for to establish sentencing guidelines for corporations based on the model of the US sentencing guidelines to reduce sentencing discrepancies and promote transparency and proportionality in sentencing. This article argues that legal systems based on a statute law system are rightly should adhere to their own legal institutions and cultures. This allows for integration of the association sanctions into the respective national criminal justice systems without causing internal systemic distortions, which can lead to a lack of acceptance by the law enforcement authorities and the associations concerned.

KEYWORDS: Sentencing guidelines for corporations, United States sentencing guidelines, Sentencing corporations in Austria and Germany.

1. Introduction

The criminal and administrative liability of legal persons, which was demanded primarily by the European Union and in international legal acts, represented a paradigm shift for the Member States of the European Union – with the exception of the English legal system, which has recognised the criminal liability of companies since the turn of the 20th century. Today, associations can be punished with criminal penalties in most Member States

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of the European Union and with administrative fines in some states like Germany. This required a rethink in these states and poses a major challenge for law enforcement agencies, criminal defence lawyers and corporate lawyers alike. The triumph of compliance, which has become particularly important for larger companies and continues to gain in significance through requirements in EU directives, has contributed to this development.

1.1. Corporate liability under criminal and administrative law as an integral part of the sanction systems in the European Union

Corporate liability has now become an integral part of the sanction systems in the European Union. Nevertheless, national legal systems vary greatly: The majority of Member States imposes criminal penalties on associations, while a few legal systems, such as the German one, continue to provide for the imposition of administrative fines, which can also be imposed by administrative authorities without criminal proceedings, but which are of a criminal nature and are therefore subject to guarantees such as nullum crimen, nulla poena sine lege, the principle of guilt, the presumption of innocence, etc. Administrative fines can be appealed, with the result that they are decided in court proceedings. The EU itself also threatens administrative fines for legal violations in the areas of antitrust and merger control law, banking supervision law and data protection law.

While in the Member States, associations (legal entities) are traditionally the targets of sanctions, and maximum fines are set by law, the fines threatened under EU law are directed at enterprises in the sense of economic units, and the maximum fine is determined as a percentage of the total turnover generated by the company in the year prior to the sanction.

It can therefore be stated that the substantive requirements for sanctions for violations of the law by associations differ considerably at the Member State and EU level. This applies equally to the threatened sanctions, which are predominantly criminal penalties and sometimes also administrative fines. The sanction frameworks also exhibit considerable differences. The same applies to the assessment of sanctions against associations, including the enforcement of fines, which can be suspended in whole or in part. Finally, in addition to the sanction, the confiscation of assets acquired for or through the offense and their surrogates can be ordered against companies, as is the case, for example, in Austria. In Germany, the amount to be recovered must be included in the fine; an order for confiscation in addition to the fine is explicitly excluded in Section 30

(5) OWiG.[1] Since the European Union has established central guidelines specifically for corporate sanctions, the inconsistent assessment of sanctions raises questions about the justice and fairness of the various systems and concerns about equality. Therefore, the following will examine the question of whether sentencing guidelines are appropriate that aim to standardize sanctions against associations influenced by EU law.

1.2. Sentencing guidelines for specific legal areas

The different design of the sanction systems means, in practice, that very different sanctions are imposed for comparable conduct. To remedy this, EU law contains guidelines for determining sanctions, for example, for EU antitrust sanctions[2] and for data protection, for which the European Data Protection Board (EDPB) issued "Guidelines 04/2022 on the calculation of administrative fines under the GDPR" on May 12, 2022.[3] Furthermore, German law, for example, provides guidelines for determining fines for violations of the Securities Trading Act, which regulate the assessment of fines under German administrative offense law (Section 17 (3) OWiG) using step-by-step instructions through the assessment process.[4]

1.3. Necessity of Sentencing Guidelines for Criminal and Administrative Sanctions Against Associations

Given that turnover-related fine frameworks have already been introduced in many specific areas of administrative offense law, such as antitrust, data protection, and the German Securities Trading Act (Wertpapierhandelsgesetz), the question arises whether sentencing guidelines should also be issued for the general sanction provisions against associations, such as those found in the Austrian Association Liability Act (Verbandsverantwortlichkeitsgesetz) or Section 30 of the German Administrative Offenses Act (Ordnungswidrigkeitengesetz), in order to

[1] (5) The imposition of a fine on the legal person or association of persons shall preclude the possibility of ordering confiscation against it for the same offence under Sections 73 or 73c of the Criminal Code or under Section 29a.

[2] Guidelines on the method of setting fines under Article 23(2)(a) of Regulation (EC) No 1/2003, OJ C 210, 1 September 2006, p 81.

[3] The guidelines 04/2022 from the European Data Protection Board (EDPB) provide a five-step methodology for calculating administrative fines under the GDPR, aiming to harmonize the process among supervisory authorities.

[4] Bundesanstalt für Finanzdienstleistungsaufsicht, WPhG-Bußgeldleitlinien II; Becker and Canzler, 2014, p. 1092; Spoerr, 2023, p. 401.

reconcile the often very broad and vague sanction frameworks with the requirements of nulla poena sine lege without jeopardizing fairness in individual cases. A uniform approach to the sentencing process could prevent disparities in the level of sanctions and thus lead to comprehensible, proportionate fines against associations.

In this context, with regard to the sanction provisions that threaten the sanctioning of associations in the event of criminal offenses committed by their managers and employees, reference is made to the U.S. sentencing guidelines, as they were developed in the United States to counteract inconsistent sentencing practices by means of detailed sentencing rules and to achieve consistent and transparent sanctioning. [5]

Therefore, the United States Sentencing Guidelines will be addressed first. Then, based on the Austrian and German legal situation, it will be demonstrated which criminal sanctions against associations are provided for in these countries and how the sanction systems are structured. These two countries were chosen because Austria has been increasingly imposing penalties against associations for several years and pursues a very independent sanction policy of special prevention. Germany, on the other hand, has a traditional system of fines that has significant deficiencies in the area of fine assessment.[6] Finally, the adoption of the US sentencing guidelines into continental European corporate criminal justice systems is discussed.

2. United States Sentencing Guidelines

2.1. System des „indeterminate sentencing“

Until the introduction of the sentencing guidelines in 1984, there were no regulations for judicial sentencing in the United States. [7] Rather, courts were granted very broad discretion to consider the individual circumstances of the offender.[8] The only limit to sanctions was the maximum penalties provided by law.[9] This led to significant variations in the imposition of sentences between states, especially since the judicial system is structured differently

[5] For the transfer of the objective assessment of criminal sanctions to corporate sanctions, see Glotzbach, 2024, p. 26 ff.
[6] Jareborg, 2020, p. 9.
[7] Bowman, 1996, p. 679, p. 682; Nagel, 1990, p. 883, p. 892.
[8] Demleitner et al., 2020, p. 131.
[9] Bowman, 1996, p. 682; Howard-Nicolas, 2013, pp. 665 ss.

in each state. This system of "indeterminate sentencing" meant that natural and legal persons faced the same maximum penalty, with the result that only low fines were imposed on companies despite their financial strength. This, in turn, led to companies tending to ignore the laws if they could expect a corresponding profit. [10] When a crime was discovered, companies vehemently resisted[11] and were unwilling to cooperate with law enforcement authorities.

Furthermore, the courts' broad discretion in sentencing proved problematic, especially since this discretion was supported by the U.S. Supreme Court. [12] Sentencing was unpredictable, and the outcomes varied widely. [13] Furthermore, the judges lacked an anchor point[14] to guide their decisions because there was no list of permissible and impermissible sentencing criteria.[15] Since the courts were not required to justify the severity of the sanctions[16], the higher courts could not monitor the courts' sentencing procedures, with the result that the higher courts could not develop new sentencing criteria.[17]

2.2. Introduction of the Reform Act in 1984

Due to the inadequate sanctioning of associations[18], the Reform Act was passed in 1984[19], with which the United States established the Sentencing Commission to reduce sentencing discrepancies and promote transparency and proportionality in sentencing at the federal level.[20] Furthermore, fines against corporations were regulated separately. Finally, the regulatory framework was created for the creation of the Federal Sentencing Guidelines for corporations, which came into force on November 1, 1991.

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[10] Albano and Sanyshyn, 2016, p. 1046; Eastmann, 2010, pp. 1623, 1620, 1623; Johnson, 2006, p. 640.
[11] United States Sentencing Commission, 1996, p. 27.
[12] Williams v. New York, 337 U.S. 241 (1949), pp. 245 s., 251.
[13] Albano and Sanyshyn, 2016, p. 1027, p. 1046; Reitz, 2012, p. 272; Weisberg, 2012, p. 299.
[14] Freed, 1992, p. 1687.
[15] Bowman, 2005, p. 1322; Freed, 1992, p. 1687.
[16] Ogletree, 1988, p. 1942 s.
[17] Bowman, 2005, p. 1322; Freiberg and Roberts, 2023, pp. 87 ss.; Howard-Nicolas, 2013, p. 670; King, 2012, p. 323.
[18] Johnson, 2006, p. 641.
[19] Gruner, 1994, p. 409; Johnson, 2006, pp. 640 ff.
[20] United States Sentencing Commission, 1996, p. 1; Miller, 1993, p. 211.

These guidelines were significantly tightened in 2004 in light of widespread violations by large corporations such as Amazon, World Come, and Tyco.

2.3 Design of the Sentencing Guidelines for fines against corporations

2.3.1. Purposes of corporate sanctions

18 U.S.C. § 3553(a) regulates the purposes of punishment: Adequate Deterrence, Incapacitation, Rehabilitation, and Just Punishment. This is intended to create a balance between the social need for secure, uniform sanctioning across jurisdictions and the individual punishment of the offender. According to USSG Ch. 8, intro, comment., the sentencing guidelines primarily serve the purposes of just punishment, punishment commensurate with fault, and adequate deterrence, in order to encourage companies to implement internal processes that prevent, detect, and report criminal behavior.[21] Furthermore, associations should be motivated to monitor themselves, avoid unethical behavior, and discipline company employees if they have participated in criminal offenses.[22]

2.3.2. Calculation of the fine

Fines are calculated in four steps:[23] First, the base fine is determined, followed by the culpability score, then the penalty range, and finally the actual penalty. In a further step, the imposing judge examines whether departures from the imposed sanction are possible.

The base amount reflects the seriousness of the offense. Together with the culpability value, it should result in a penalty range that is suitable to deter the company from criminal behavior and provide incentives for a compliance system.[24] The base amount can be determined in three ways: (1) according to a table based on the seriousness of the offense, (2) according to the monetary benefit, or (3) the incurred loss. In this respect, the highest value of the three methods of determination is decisive.[25]

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[21] Ferrell, LeClair and Ferrel, 1998, p. 354; Gruner, 1994, p. 414; Nunes, 1995, p. 1044.
[22] Albano and Sanyshyn, 2016, p. 1048.
[23] Maurer, 1992, p. 806 ff; Gruner, 1922, pp. 225 ss; Nunes, 1995, pp. 1045 ff; see also Beckmann, 2021, p. 54; Engelhart, 2012, p. 155.
[24] Glotzbach, 2024, pp. 161 s.
[25] Johnson, 2006, pp. 632 ss.

The base amount can be taken either from the offense level from the table in USSG § 8C2.4(d), which refers to USSG CH.2. The degree of seriousness is determined using a fiction, in which the crime is treated as if it had been committed by a natural person.[26] The USSG assigns a value to each offense based on its severity, which represents the level of the basic seriousness of the offense.[27] This level can be increased by additional offense-specific factors, thus forming an overall severity level (USSG § 2A1. intro. comment.). However, this method is rarely used because in practice the monetary advantage or disadvantage is usually higher.

Furthermore, the base amount can be determined from the monetary benefit, which is determined based on the gross profit achieved. This involves a comparison between the actual and the fictitious situation in which the company acts lawfully.[28]

Finally, the base amount can correspond to the monetary loss.[29] This describes the economic damage to the victims. Interest payments, late payment surcharges, penalties, and the costs of prosecution are not to be taken into account. The court estimates the monetary loss.

The culpability factor quantitatively describes the degree of culpability of the company, the amount of which is the decisive criterion for the sentence.[30] According to USSG § 8C2.5(a), the culpability factor starts with five points, which are modified by four aggravating and two mitigating sentencing factors. Aggravating factors include acquiescence and participation in criminal conduct, prior convictions, violation of conditions, and obstruction of justice. The severity of the penalty depends partly on the size of the association and the involvement of a leading figure. Effective compliance systems, as well as voluntary disclosure, cooperation, and admission of guilt, are all factors that can lead to reduced penalties.

The penalty range is calculated by multiplying the base amount by the guilt value (USSG § 8C2.7). A minimum and maximum multiplier is assigned to the guilt value based on the number of points, with only points between zero and ten being relevant. This multiplication then results in a penalty range within which the judge determines the sentence at his or her discretion.

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[26] Gruner, 1922, p. 263.
[27] Maurer, 1992, pp. 799 ss.
[28] Gruner, 1922, pp. 225 ss.
[29] Gruner, 1922, p. 259.
[30] Soto, Debold and Chesley, 2020, p. 27.

The deviations represent a corrective measure to ensure the proportionality of the fine when there are aggravating or mitigating circumstances whose nature and extent have not been adequately considered in the sentencing guidelines and which require an expanded range of sanctions. There are three types of variances:

- identified variances (policy statements), which result in a higher or lower penalty range;
- Unidentified variances for cases that are so exceptional that they have not been taken into account in the sentencing guidelines;[31]
- Heartland variances, which are generally taken into account in the sentencing guidelines, but deviate significantly from the standard case, either upwards or downwards.[32]

2.4. Repeal of the binding effect of the Sentencing Guidelines by the Supreme Court

However, the Supreme Court has since repealed the binding effect of the 2005 Sentencing Guidelines in the "Booker" judgment[33] due to a violation of the right to a jury trial.[34] According to this ruling, the judge may only deviate from the maximum sentence if the aggravating factors have been established by the jury. However, the Sentencing Guidelines left this decision to the court.[35] Only a consultation requirement remained.[36]

2.5. Further Development of the Sentencing Guidelines

Initially released in 2017 as a series of 119 "common questions that the Fraud Section may ask in making an individualized determination" for corporate compliance programs,[37] the ECCP describes the factors that the DOJ considers when conducting investigations of corporations, determining whether to bring charges, and negotiating pleas or other agreements. That guidance has been substantially revised and expanded since its release to

[31] Goldstein, 2004, p. 1973.
[32] Goldstein, 2004, p. 1973.
[33] U.S. v. Booker, 543 U.S. 265 (2005), pp. 222 ss.
[34] U.S. v. Booker, 543 U.S. 265 (2005), p. 244.
[35] U.S. v. Booker, 543 U.S. 265 (2005), pp. 244 ss.
[36] U.S. v. Booker, 543 U.S. 265 (2005), pp. 259, 264.
[37] Weiss, P. (n.d.) *New DOJ Guidance For Evaluating Corporate Compliance Programs* (Mar. 20, 2017), [Online]. Available at: https://www.paulweiss.com/insights/client-memos/doj-s-updated-guidance-for-evaluating-corporate-compliance-programs-emphasizes-double-edged-sword-of-new-technologies (Accessed: 21 October 2025).

reflect DOJ's evolving enforcement priorities. In 2019, DOJ began to structure the guidance around three central questions,[38] which have continued in a similar form up to the present version: (1) Is a corporation's compliance program well designed? (2) Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively? and (3) Does a corporation's compliance program work in practice?[39] Further revisions in 2020 and 2023 focused on features such as companies' use of data and technology to improve and review employees' access to compliance materials,[40] management of personal devices and third-party applications, and the preservation of communications.[41]

On September 23, 2024, the Criminal Division of the U.S. Department of Justice ("DOJ" issued an update to its guidance titled Evaluation of Corporate Compliance Programs (the "ECCP").[42] Since its introduction in 2017, the ECCP has been revised periodically, but the update of 2024 shows the Department's increasing emphasis on artificial intelligence ("AI"), on data analysis and whistleblower policies. The revisions are intended "to account for changing circumstances and new risks."[43] The updates further align the

[38] Weiss, P. (2019) *DOJ Updated Guidance for Evaluating Corporate Compliance Programs Focuses on Effectiveness* (May 6, 2019), [Online]. Available at: https://www.paulweiss.com/media/0uvfmsnt/6may19-doj-compliance.pdf (Accessed: 21 October 2025).

[39] ECCP, at 1–2; *see also* U.S. Department of Justice, Justice Manual § 9-28.800. DOJ has adopted a similar analytical structure in its guidance for corporate compliance programs in criminal antitrust investigations, and it has explained that the same three questions guide its evaluations in that context. *See* U.S. Department of Justice, Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* 2 (July 2019).

[40] Weiss, P. (2020) *DOJ 2020 Guidance for Evaluating Corporate Compliance Incorporates Feedback From Business and Compliance Communities* (June 8, 2020), [Online]. Available at: https://www.paulweiss.com/media/y4xd00ft/08june20-fcpa.pdf (Accessed: 21 October 2025).

[41] Weiss, P. (2025) *FCPA Enforcement and Anti-Corruption Developments: 2023 Year in Review* (Jan. 17, 2024), [Online]. Available at: https://www.paulweiss.com/insights/client-memos/2024-year-in-review-fcpa-enforcement-and-anti-corruption-developments (Accessed: 21 October 2025).

[42] U.S. Department of Justice, Criminal Division, Evaluation of Corporate Compliance Programs (updated Sept. 2024).

[43] U.S. Department of Justice, Office of Public Affairs, *Principal Deputy Assistant Attorney General Nicole M. Argentieri Delivers Remarks at the Society of Corporate Compliance and Ethics 23rd Annual Compliance & Ethics Institute* (Sept. 23, 2024).

ECCP with the Department's additional initiatives, such as its efforts to assess the risks of disruptive technology and incentivize whistleblower reporting.

2.6. Critical Assessment of the Sentencing Guidelines from a US Perspective

The Sentencing Guidelines are considered questionable in the US both by practitioners and by scholars[44] because the indeterminacy of sentencing remains[45] and the guidelines as a whole are too complex and confusing.[46] Furthermore, they generate excessively high sentences. Some also criticize the USSG for focusing too heavily on compliance and cooperation and failing to deter or detect crimes.[47] Furthermore, there is a risk that companies will merely introduce a compliance system in order to obtain a reduced sentence.[48] Finally, there are doubts as to whether federal judges are capable of adequately assessing the effectiveness of a compliance system.[49] On the other hand, the increased predictability of sentencing and the judges' duty to provide reasons are supported because they facilitate review by the appellate courts.[50]

3. Corporate Sanctions in Austria and their Assessment

3.1. Threat of Fines

The Austrian legislature regulates the criminal liability of associations in the Corporate Liability Act (Verbandsverantwortlichkeitsgesetz). However, it avoids terms such as criminality, guilt, and punishment and uses the term "fine", which has a general and specific preventive effect and is also intended to express a socio-ethical rebuke. Even though the punitive nature of the fine is sometimes questioned in the literature, the corporate fine nevertheless exhibits all the essential characteristics of a penalty. The only independent sanction provided for by the law for associations is the threatened corporate fine provided for in Section 4 of the Administrative Court Act (VbVG).

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[44] Pryor, 2016, p. 95.
[45] Rakoff, 2013, p. 6; Stith and Cabranes, 1998, p. 8.
[46] Frase and Mitchell, 2020, p. 53; Howard-Nicolas, 2013, p. 637; Mueller, 1990, p. 132; Parker, 1993, pp. 397 ss.; Pryor, 2016, p. 95.
[47] Howard-Nicolas, 2013, p. 637; Parker, 1993, p. 410; Pryor, 2016, p. 97.
[48] Eastman, 2010, p. 1630.
[49] See Baker, 2004, pp. 310 ss.; Webb and Molo, 1993, p. 396; Hertel, 2019, p. 219.
[50] Stith and Cabranes, 1998, p. 8.

3.2. Daily Rate System

The corporate fine is imposed, Like the fines for individual defendants, in two steps: The number of daily rates is determined based on the culpability of the offender or the severity of the charge in corporate criminal law, i.e., purely based on sentencing considerations. The daily rate is set based on financial capacity. This is intended to ensure that financially better-off individuals are not favored and less well-off individuals are not disadvantaged. The minimum sentence is one daily rate. The maximum possible number of daily rates depends on the severity of the offense for which the association is responsible under Section 3 of the Association Act (VbVG) and, depending on the offense, ranges between 40 and 180 daily rates.

According to Section 4 (4) of the Association Act, the daily rate is to be determined based on the association's earnings situation, taking into account its other financial capacity. For associations, it is generally at least €50 and at most €10,000. The annual income must be divided by 360 to calculate the daily rate. This results in a theoretical minimum fine of €50 for a daily rate and a maximum fine of €1,800,000 for 180 daily rates. The assessment based on the profitability is intended to ensure that the responsible association is deprived of the surpluses that would otherwise accrue to the owners as profit. Therefore, the amount that can be skimmed off annually without jeopardizing the association's operating basis must be determined. This is the amount that the association has at its disposal after necessary investments and external financing expenses, as well as after deducting all taxes, and which can potentially be distributed to the owner level.[51] This is intended to ensure that the association's creditors, employees, and suppliers are not affected by the sanction.[52] The association's profitability does not have to be determined precisely; it can be estimated if the estimate is based on verifiable information.[53]

Furthermore, other economic performance must be taken into account: For this purpose, a premium or discount of one-third of the estimated earnings situation is provided for if the association's other economic performance permits it (Section 4 (4) VbVG). This is intended to take

[51] Steininger, 2018, chap. 6 no. 30.
[52] Erläuternde Bemerkungen zur Regierungsvorlage, Beilage zu den stenographischen Protokollen des Nationalrates 994 GP 26.
[53] Bauer, 2004, p. 492 ff.

individual circumstances into account[54], such as a company belonging to a group not distributing profits to the association. Other economic performance must be specifically proven. The mere fact that an association belongs to a group does not per se mean that it is economically more efficient and would therefore justify a higher fine. However, if concrete evidence can be provided that companies in which the association holds a stake have failed to distribute profits, this must be taken into account.[55]

3.3. Assessment of the fine

The assessment of the association fine is governed by Section 5 of the Association Act (VbVG). The association-specific grounds for determining the penalty are listed as examples in Section 5 (2) and (3) of the VbVG, so that additional circumstances can also be considered on a case-by-case basis. The sentencing grounds under individual criminal law (Sections 33 and 34 of the German Criminal Code) are applicable subsidiarily.[56] Since an association cannot act on its own, the aggravating and mitigating factors must be assessed from the perspective of the person who committed the initial offense.[57] The decisive factor is whether the offense committed by the decision-maker or employee contains circumstances in its statutory description that, given the association's structure, also constitute special grounds for sentencing.[58] However, if the sentencing grounds are only linked to certain character traits typically associated with natural persons, these are excluded from the scope of corporate criminal liability.[59]

3.3.1. Aggravating Factors

The aggravating factors expressly stated in Section 5 (2) Nos. 1-3 of the Administrative Offenses Act (VbVG) relate to the damage and the danger[60], and to the advantage, thus the consequences of the offense. Furthermore, a

[54] Baier-Grabner, 2020, 4.12.
[55] Erläuternde Bemerkungen zur Regierungsvorlage, Beilage zu den stenographischen Protokollen des Nationalrates 994 GP 27.
[56] Lehmkuhl and Zeder, 2025, § 5 VbVG no. 2.
[57] Steininger, 2020, § 5 no. 3.
[58] Steininger, 2018, Kap. 6 Rz. 5.
[59] Steininger, 2018, Kap. 6 Rz. 9.
[60] Steininger, 2020, § 5 no. 12.

gross breach of the duty of supervision must be considered. The supervisory deficiencies must, taken as a whole, be grossly negligent.[61]

3.3.2. Mitigating Factors

Section 5 (3) Nos. 1-6 lists measures to compensate for damages, preventive measures, and cooperation in establishing the truth as reasons for a lower assessment of the number of daily night vision rates.[62] Furthermore, compliance measures have been legally implemented as mitigating factors pursuant to Section 5 (3) Nos. 1 and 5 of the Administrative Offenses Act (VbVG).[63]

The following points are listed as mitigating factors:

No 1: Preventive measures before committing an offense

No 2: Act of an employee

No 3: Contribution to the determination of the truth

No 4: Elimination of consequences

No 5: Preventive measures after the commission of the crime

No 6: Disadvantage for the association or its owners

The introduction of corporate criminal liability was intended to provide a strong incentive for companies to pay increased attention to potential risks within their operations and to implement technical, organizational, personnel, and other measures to prevent criminal prosecutions within their operations as far as possible. Compliance measures should have a positive impact on the affected association even if risk management in the specific case was insufficient to prevent the attribution of an association-related offense or to obtain a waiver of prosecution by the public prosecutor or a diversionary settlement.

3.4. Conditional Leniency of the Fine

Section 6 of the Association Act (VbVG) allows for conditional leniency of the fine if there are no objections from a special and general preventive perspective. Compliance measures also play a role in assessing these requirements. The granting of leniency is made by the adjudicating court and must be included in the judgment as part of the sentence.[64]

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[61] Steininger, 2018, Kap. 6 Rz. 14.

[62] Baier-Grabner, 2020, 4 no. 4.40 ss.

[63] Konopatsch, 2010, p. 155.

[64] Lehmkuhl and Zeder, 2025, § 6 VbVG no. 1.

Section 6 (1) VbVG stipulates that the sentence imposed in the judgment for the offense itself may not exceed 70 daily rates. This maximum limit corresponds to a prison sentence of up to two years (Section 4 (3) VbVG). A positive prognosis for both special and general preventive purposes is required. For this, the simple probability that the conditional leniency, possibly in combination with instructions, to deter the association from further criminal offenses is sufficient.[65] Compliance measures must also be considered when assessing these credit criteria.[66]

The conditional remission of the association fine must be accompanied by the determination of a probationary period and is intended to determine whether improvement has occurred.[67] The probationary period must be at least one year and may not exceed three years. If the conditional remission is not revoked, the fine shall be permanently suspended.

3.5. Conditional Remission of Part of the Association Fine, Section 7 VbVB

If the fine exceeds more than 70 daily rates, only part of the fine may be conditionally suspended.[68] There is no upper limit for the conditional remission of part of the association fine. The court of first instance is responsible for granting the conditional remission. The amount to be conditionally suspended must be at least one-third and no more than five-sixths of the total sentence. A further prerequisite for the imposition of a partially conditional fine is that the procedure under Section 6 does not apply and the entire fine is imposed, since the association fine is conditionally suspended. The probationary period is also at least one year and at most three years.

3.6. Confiscation

According to Section 12 of the Association Act (VbVG), the provisions of the Criminal Code regarding confiscation and forfeiture apply and can be imposed in addition to an association fine.[69]

[65] Lehmkuhl and Zeder, 2025, § 6 VbVG no. 3.
[66] Baier-Grabner, 2020, Kap. 4 no. 4.69.
[67] Steininger, 2018, Kap. 6 Rz. 45.
[68] Baier-Grabner, 2020, chap. 4 no. 4.75 ss.
[69] OGH, 17.11.2015, 141 Os 97/15 v.

3.7. Issuing of Instructions

According to Section 8 (1) of the Association Act, in addition to the fine, if the fine is conditionally suspended, instructions may be issued to eliminate the causes of the offense and thus ensure the association's lawful conduct in the future.[70] In addition, the responsible administrative or supervisory authority may be requested to cooperate in monitoring compliance with the instruction.[71]

3.8. Order to Compensate for Damages

Section 8 (2) of the Association Act stipulates, as a mandatory instruction, that the association must make amends for the damages to the best of its ability.[72] This instruction must be specified in figures or at least contain a definable payment obligation.[73] This instruction may only be waived if the damage has already been remedied.

3.9. Special preventive measures pursuant to Section 8 (1) (3) of the Association Act (VbVG)

Furthermore, in the case of partial or partial conditional leniency of an association fine, the association may, with its consent, be instructed to take technical, organizational, or personnel measures as instructions to prevent further offenses. Examples include the modernization or retrofitting of company equipment, the introduction or modification of relevant security measures, the conduct of employee training, changes to job descriptions or employment contracts, changes to employee responsibilities, and the introduction of a dual control principle.[74] Such preventive measures are intended to ensure the association's legally compliant conduct in the future. They require approval because such measures represent a profound change in corporate governance.[75] If the association withdraws its consent after issuing the consensual instruction, this may lead to the revocation of the conditional leniency or the extension of the probationary period (Section 9 (2) and (3) of the VBVG).[76] This shows that the determination and

[70] Steininger, 2018, chap. 6 no. 1.
[71] Baier-Grabner, 2020, chap. 4.84.
[72] Lehmkuhl and Zeder, 2025, § 8 VbVG no. 3.
[73] Baier-Grabner, 2020, chap. 4.85.
[74] Baier-Grabner, 2020, chKap. 4.86.
[75] Erläuternde Bemerkungen zur Regierungsvorlage, Beilage zu den stenographischen Protokollen des Nationalrates 994 GP 29.
[76] Lehmkuhl and Zeder, 2025, § 8 VbVG no. 8.

assessment of the association fine is very much geared to the goal of special prevention.

3.10. Conclusion

In Austria, association sanctioning is fully integrated into the sentencing system and has a very strong focus on specific prevention. This is reflected in particular in the possibility of suspending fines on probation and in the issuing of conditions and instructions that closely resemble the general criminal law system. This means that essential areas that are regulated in the sentencing guidelines are covered by special regulations in the Association Responsibility Act, so that there is no need for additional sentencing rules.

4. Corporate Sanctions in Germany and their Assessment

In Germany, if a company is attributable to misconduct, the association can be sanctioned with a fine in accordance with Section 30 OWiG. The legislature introduced this regulation to prevent the commission of criminal and administrative offenses and to prevent further profit-making. This serves both repressive and preventive purposes. The repressive purposes include retaliation for injustice committed. This purpose is achieved by sanctioning with a fine, which has a punitive part and also skims off the benefits of the association.[77] In general preventive terms, the repetition of legal violations should be avoided and the organs of the associations should be made aware that criminal offenses also result in sanctions against the company.[78] The sanctioning means that the Constitutional Court (BverfG)[79], a "subsequent reminder of obligations that is intended to encourage the association to only appoint law-abiding managers. It is also intended to signal that white-collar criminal behavior will not be tolerated.[80]

4.1. Determination of the fine range

Section 30 (2) OWiG sets the fine limits. A distinction is made here depending on whether the management's related act is a criminal offense or an administrative offense. If it is an intentional crime, the maximum fine is

[77] Achenbach, 2024, chap 1.2 no. 13; Engelhart, 2012, p. 374; Waßmer, 2024, § 30 no. 65; Rogall, 2025, § 30 no. 18; Schmidt, 2024, no. 2268.
[78] Engelhart, 2012, S. 375; Rogall, 2025, § 30 no. 16.
[79] BVerfG, BVerfGE 27, 18, 33; BVerfG 45, 272, 289.
[80] Sieber, 2018, p. 258.

€10 million, and for negligent crimes it is €5 million. According to Section 30 (3) and 17 (4) OWiG, this fine limit can be exceeded in order to reap the benefits of the offense. According to Section 17 (1) OWiG, the minimum fine is five euros, which, however, has no significance in cases where companies are sanctioned.

The penalty portion concerns the sanction solely based on the legal violation.[81] The general attribution rules of Section 17 (3a) OWiG apply here. These principles for individual fines must be applied accordingly to companies.[82] The basis for the assessment is the significance of the administrative offense, the accusation against the perpetrator and the perpetrator's economic circumstances.

The basis for the assessment is, in particular, the injustice of the act and its consequences for the protected regulatory area. In order to define the meaning of the administrative offense, case law has developed a wealth of factors that reduce and increase fines. These include, among other things, the extent of the economic consequences, the severity of the damage caused, the types and intensity of execution and the severity of the breach of duty.

When the perpetrator is accused, the focus is on the perpetrator-related circumstances: motives, goals and predicaments.[83] To determine these aspects, the focus is primarily on the natural person and not on the legal entity.[84] By involving the association, company-related factors can be taken into account, such as the repeated occurrence of legal violations and the company's efforts to prevent such violations through compliance system.[85] The latter can lead to a reduction in punishment if, despite minor deficiencies, the system is fundamentally capable of preventing legal violations and was not just introduced for the sake of appearance.[86] In addition, the subsequent offense can be viewed to the company's advantage if it improves an existing compliance system in order to prevent future legal violations.[87] The same applies if there is active cooperation with the prosecution authorities.[88]

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[81] Engelhart, 2012, p. 63 sff.
[82] Beckmann, 2021, p. 132; Rogall, 2025, § 30 no. 134.
[83] Glotzbach, 2024, p. 66 ss.
[84] Rogall, 2025, § 30 no. 134; critical of this Otten, 2012, p. 2 120; Sieber, 2008, p. 472.
[85] BGH, NZWiSt 2018, 379, 387; Engelhardt, 2012, p. 440 ss.; Glotzbach, 2024, p. 68.
[86] Engelhardt, 2012, p. 441 ff.
[87] BGH, NZWiSt 2018, 379, 387; NZWiSt 2020, 410, 413; Engelhardt, 2012, p. 440 ss.; Eufinger, 2018, pp. 615-619.
[88] Lenk, 2021, pp. 142 ff.

It is undisputed that the economic circumstances of the association must be taken into account.[89] This includes all factors that determine the company's performance. The fine is intended to take into account the liquidity at the time of the decision.

4.2. Confiscation of the benefit

According to Section 30 (3) in conjunction with Section 17 (4) OWiG, the fine should exceed the economic advantage that the perpetrator gained from the administrative offense. This means that the confiscation part often is much higher than the punishment part. When Volkswagen AG was sanctioned in connection with the emissions scandal, this meant that the other part was €5 million, while the skimming part amounted to € 995 million. This shows that the economic advantage represents the lowest limit of the fine and is then added to the treatment part.

According to the net principle, the economic advantage corresponds to the Rhine profit derived from the act after deduction of expenses, whereby a hypothetically legitimate profit is not taken into account.[90] The profit also includes saved expenses and other benefits such as an improved market position. Only benefits that are directly related to the administrative offense and have flowed to the company are taken into account. [91]

4.3. Criticism of the legal assessment practice

The literature criticizes Section 30 OWiG. The scope of discretion for the judges is too great because Section 30 OWiG does not name any offenses whose injustice is expressed by a penal name. The lack of clear legal requirements leads to unequal sanctions and a lack of transparency in the assessment process, which means that the risks of legal violations cannot be calculated foreseeably.[92]## 103In addition, the sentencing is not guided by rules.[93] This is due, among other things, to the fact that associations negotiate the fine with the public prosecutor's office in an informal procedure without the involvement of the court. In addition, the legislature has not yet taken the opportunity to develop a concept for determining

[89] Glotzbach, 2024, p. 69 ff.
[90] BGH, wistra 2017, pp. 242, 243.
[91] Rogall, 2025, § 17 no. 140.
[92] von Galen and Schaefer, 2022, § 30 no. 46; Krems, 2015, pp. 5-6; Kubiciel, 2016, pp. 178 s.
[93] Kubiciel, 2016, pp. 178 s.

association fines.[94] There is a lack of concrete and comprehensible assessment rules for company fines.

It is rightly criticized that Section 30 OWiG does not contain its own allocation principles, which results in general uncertainty as to which criteria are to be applied and how they are to be interpreted. In addition, there are no company-specific assessment rules, such as poor organizational structures or criminogenic corporate ethics.[95] There is also no regulation as to the extent to which a compliance system has a mitigating effect on punishment and how associations can help minimize their own risk of sanctions. Since both company-related and perpetrator-related circumstances are taken into account in the assessment, in the absence of a legal provision this raises the question of how these relate to each other and should be weighted.[96] In addition, the focus is on asset recovery, in which there is a very wide scope for discretion. This means that there is a total lack of rules that enable transparent and comprehensible measurement.

5. Conclusion

The goal of uniform sanctioning of associations and companies represents a problem in both the US and continental European legal systems, raising questions about the justice and uniformity of sanctioning. This also applies in particular to the sanctioning of companies and associations, which has gained increasing importance in recent decades, particularly in the European Union. This development has resulted in considerable differences in the sanctioning of associations within national legal systems of the EU member states. This is due, on the one hand, to the different definitions of the criminal offenses and the threatened sanctions, and, on the other hand, to the different goals that states pursue with sanctioning associations. In addition, sanctioning practices often differ regionally within individual states. In Germany, for example, a north-south divide can be observed: in the north of Germany, significantly fewer corporate offenses are prosecuted than in the southern part of the country and the fines are higher in the north.[97]

In areas that are largely influenced by US law, such as antitrust and merger control law, the European Union has introduced its own sentencing

[94] Altenburg and Peukert, 2014, pp. 649 ss.; Lenk, 2021, p. 164.
[95] Wegner, 2000, p. 93.
[96] Lenk, 2021, pp. 344 ss.
[97] Henssler et al., 2017, p. 15.

guidelines based on US law. However, the European Union attaches much less importance to compliance than is the case in the US. In other sanction areas that are largely determined by EU law, such as data protection and banking supervision law, there are both european and national sentencing guidelines. However, the national sentencing guidelines are not accepted by national courts in all countries. For example, the German Federal Court of Justice (BGH) does not consider itself bound by the guidelines of the Federal Cartel Office, even though these guidelines were issued on the statutory basis of Section 83 ### GWB. The Federal Court of Justice (BGH) classifies these guidelines as merely a self-imposed obligation of the administration. The determination of sanctions in court proceedings is considered a primary task of the criminal justice system.[98]

In contrast to the specialised areas of law just mentioned, there is great reluctance in the area of general corporate criminal and administrative fines law to introduce sentencing guidelines, even though in the area of common law, particularly over the last 25 years, sentencing commissions whose main task is to issue sentencing guidelines have been increasingly set up.[99] In the USA, these guidelines have helped to standardise criminal sanctions and thus make a contribution to fairness and uniformity in sanctioning. The USA has made bold progress in this area and has introduced numerous innovations. Over the past few decades, the traditional, discretionary approach to sentencing has been progressively replaced by structured regimes, often administered by sentencing commissions or councils. Sentencing guidelines have proliferated across the common law world and constitute the most significant development in sentencing in a century.[100] As Tonry wrote in 1996, this means that the "Sentencing Commission is alive and well,"[101] and recent publications confirm this conclusion.[102] This sanctions policy has met with widespread approval in the United States.

It is therefore not surprising that the US Sentencing Commissions and sentencing guidelines are repeatedly discussed at academic conferences, but also in academic papers, regarding their suitability as a model for the EU and its member states, and their adoption is repeatedly recommended. Even though internationally "a lively spirit of innovation and adaptation of the

[98] BGH, 26.2.2013, KRB 2012.
[99] Freiberg and Roberts, 2022, pp. 127 ss.
[100] Freiberg and Roberts, 2022, p. 87.
[101] Tonry, 1996, p. 25.
[102] Weisberg, 2008, pp. 179 ss.

directive concept appears to prevail,"[103] the national policy insights are carefully, thoughtfully and cautiously evaluated, with particular consideration given to local requirements, laws, institutions, and cultures, and have so far been rejected. On the one hand, the validity of the principle of legality (nullum crimen, nulla poena sine lege) in the Euroean Union and the continental European states plays a central role here; this, together with the statue law, requires a decision by a democratically legitimized parliament. Especially when new sanction systems are introduced, clearer and more precise legal requirements are needed, as the German Federal Constitutional Court has stated with regard to the the punihment of confiscation of all assets of the of the perpetrator (Vermögensstrafe).[104] Especially when introducing new criminal sanctions systems, integration into an existing constitutional sanctions system, taking into account one's own legal culture, is advantageous because this can lead to a high level of acceptance of the norms by law enforcement authorities and compliance with the principles of the rule of law. For this reason, only the objectives of European Union directives are binding, but not the method by which they are to be achieved. Fundamental changes to a sanctions system often lead to significant disruptions in the national sanctions system, as experience in areas such as criminal confiscation and the fight against money laundering shows. Furthermore, given that sanctions systems can also be used in a discriminatory manner against foreign companies, as is currently the case in the United States, there is particular reason for caution.

Overall, legal systems based on a statute law system are extremely cautious and reserved, and adhere to their own legal institutions and cultures. This is particularly true in the continental European member states of the European Union. There, criminal sanctions are traditionally referred to as the state's "sharpest sword" for responding to misconduct. They are closely linked to the respective national cultural and social roots. Punishment should only be threatened for socially intolerable attacks on the most important legal interests. Threats of punishment are therefore always subsidiary to other solutions. The presumption applies: in dubio pro libertate. Within the supranational structure of the European Union, it is important to preserve the liberal and largely coherent sanction systems of the member states. Furthermore, the harmonization of criminal law to date on the basis of Article 83 TFEU has shown that minimum maximum

[103] Hester, 2020, pp. 180 s.
[104] BVerfG, 20.3.2002, 2 BvR 794/95, no. 62 ss.

penalties established by the EU, in particular, have tended to increase punitiveness in the member states and impair the proportionality of national penal concepts. The reason for this is the EU's arithmetic, absolute understanding of the wording "minimum rules for the determination of [...] penalties". This demonstrates that international policy transfer is particularly problematic in a criminal law governed by the rule of law (Rechtsstaatsprinzip). It is preferable to integrate the sanctioning of legal persons into the respective national criminal justice systems. This has the advantage that no internal systemic distortions arise, which in turn can lead to a lack of acceptance by the law enforcement authorities and the associations concerned.

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Health Care Ethics Committees (HECs) – a useful instrument for legal compliance?**

ABSTRACT: Until now, health care respective hospital ethics committees (HECs) have hardly been considered as an instrument of compliance. This article presents an initial review of this established structure from the point of view of legal compliance. To this end, the emergence, dissemination, and functioning of HECs in the USA and Germany are presented and questions of quality are addressed. The extent to which the structure of ethics committees in health care facilities can be viewed and utilized as a compliance tool is examined in relation to compliance as a means of ensuring legal conformity, preventing legal violations, and as a compliance culture. It is shown that HECs are suitable as a compliance tool if they function well, but that some improvements are still needed, especially with regard to the ethical and legal expertise of the counselors and the financial resources of the structure.

KEYWORDS: Health care ethics committee, ethics consultation, hospitals, legal compliance, patient rights, patient´s well-being, legal conformity, prevention.

1 Introduction

Until now, health care respective hospital ethics committees (HECs) – a widespread form of ethical counselling in hospitals and other health care facilities – have hardly been considered as a tool of compliance. This article presents an initial review of this – in industrialized countries – established structure from the point of view of legal compliance.

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To this end, the emergence and dissemination of HECs in the USA and Germany is first described.[1] As HECs have been established in Germany along the lines of HECs in the USA, the structures, tasks and objectives of HECs are then presented, followed by an outline of the possible outcomes and finally questions of quality.

The extent to which the structure of ethics committees in hospitals can be considered and utilized as a compliance tool is examined in relation to compliance as a means of ensuring legal conformity, as a means of preventing legal violations, and as a compliance culture. In conclusion, it becomes clear that HECs are suitable as a compliance instrument if they function well, but that some improvements are still needed – for the sake of the tasks and objectives of HECs – and possibly also because it would make sense to equip ethics committees well and then also use them as a compliance instrument.

In view of the author's research focus on medical and nursing ethics and applied ethics, this article concentrates on the characterization of HECs with a view to the issue of legal compliance. Possible functions and connection points are identified which are of interest for legal compliance and which could perhaps be utilized more intensively in the future. However, a legally orientated specification of HECs in terms of compliance must be delegated to legal science.

2 Ethics Committees in Hospitals

2.1 Emergence and Dissemination of Ethics Committees

HECs were established in hospitals in the USA from the 1970s onwards to discuss ethical questions that arose during the treatment of patients.[2] This form of ethical consultation, which was outsourced from medical judgement, was partly motivated by doctors seeking guidance in the face of increasingly mechanized medicine that could keep people alive for a long time and partly by patients and relatives who, in the spirit of a citizens' movement, criticized the power of doctors to make decisions and demanded more transparency and participation.[3] In addition, a reference to ethical

[1] In Germany an HEC is called “klinisches Ethikkomitee” – different from “Ethikkommission” appraising human experimentation. For the distinction see also 2.2.

[2] Alexander, 1962; President´s Commission Report, 1983; Annas and Grodin, 2016; Aulisio, 2016; Post, 2021, esp. pp. 257–270.

[3] Post, 2021, p. 257.

norms seemed sensible in view of the emerging pluralism of values. Inspired by developments in the USA, ethics committees were formed in hospitals in Germany and numerous other industrialized countries from the 1990s onwards.[4]

Other forms of ethics counselling have also come up, such as individual counselling by an ethics specialist or case and ward discussions with integrated ethical reflection.[5] Nevertheless, the HEC, sometimes combined with the option of forming a subgroup for ad hoc counselling (also known as an "ethics consilium"), remains the structural standard in many countries today.[6]

The following focuses on the main institutional type of a HEC with the possibility of forming an ad hoc subgroup, as it has become established in Germany in line with the USA. This is because a comparative overview of structures across many nations would not only go beyond the scope of this article but also be at the cost of answering the question of legal compliance, which is dependent on a sufficiently clear outline of what clinical ethics consultation in the form of an ethics committee involves.

2.2 Institutional Review Boards: A Distinction

HECs, which advise on the treatment of patients, are to be distinguished from research ethics committees (IRBs), which review medical studies involving research on humans: As medical research is done to gain generalizable knowledge to benefit medical knowledge and treatment there are risks for significant harm to the patient respective research subject. Since 1964, the World Medical Association's Helsinki Declaration has laid down professional ethical standards for research involving human subjects.[7] Today, in the United States of America and the nations of the European Union, among others, IRBs are required by law and bound by a set of regulations that determine the scope of its authority (limited to human subjects research) and set criteria for its deliberations and decisions.

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[4] Deutscher Evangelischer Krankenhausverband e.V. et al., 1997; Neitzke et al., 2010; ten Have and do Ceo Patrao Neves, 2021; Hajibabaee et al., 2016; cf. contributions on the development process in individual European countries and the USA Wasson and Kuczewski, 2022.

[5] Among others May, 2010.

[6] Among others Hajibabaee et al., 2016; Schochow et al. 2019, p. 986; 989: For Germany an empirical overview from 2014 reports that mainly large and middle-sized hospitals had HECs.

[7] World Medical Association,1964 respective 2024.

3 Ethics Committees in Germany Modelled on the USA

Nowadays, almost all acute care hospitals and sometimes also long-term care facilities, hospices, psychiatric institutions, facilities for the developmentally disabled, and other care-providing centers have HECs that meet on a regular or ad hoc basis.[8]

Between 2000 and 2015 – the main phase in the establishment of HECs – a lively debate developed about different forms of clinical ethics counselling and the associated experiences. This is reflected in numerous publications in English- and German-speaking countries. Following this phase, in which ethics committees were formed in the way described and recommended by the German Medical Association (BÄK) in 2006[9], additional non-clinical ethics committees were formed in Germany in isolated cases, leading the German Medical Association to adopt a recommendation on this in 2019[10.] In the USA, non-clinical ethics committees have already been widespread in nursing homes and other healthcare institutions for several decades. In the following, however, the focus is on ethics counselling in hospitals as the starting point for institutionally visible ethics counselling. In addition, for the sake of the research question, the similarities will be emphasized; the differences between the USA or the Anglo-Saxon world and Germany or the German-speaking world can only be addressed to a limited extent.

3.1. Usual Structures

HECs provide advice at the request of doctors, nurses and, less frequently, patients or their relatives. An HEC, i.e. an interdisciplinary or multi-professional group of hospital staff, meets to discuss ethical issues relating to the treatment and care of patients. Either a case is discussed retrospectively in order to analyze a difficult constellation and possibly learn from it for the future, or it is an acute case in which decisions are still pending. As the HEC usually only meets at longer intervals and cannot be convened quickly, a subgroup of the committee is usually convened promptly to discuss an acute case on an ad hoc basis.

[8] Cf. current overviews Post, 2021; Wasson and Kuczewski, 2022; Fox, 2022.
[9] BÄK, 2006.
[10] BÄK, 2019.

The result of the consultation does not limit the responsibility and decision-making authority of the attending physicians and other professional groups but serves to support the decision-making of those legally responsible. The HEC deals with ethical issues in everyday clinical practice and thus distinguishes itself from bodies such as an employee representation, complaints management or professional supervision.[11]

A HEC consists of around 7 to 20 members from the fields of medicine, nursing, pastoral care, social work and psychology.[12] Employees from the fields of law or administration are less frequently represented. In the USA – unlike in Germany – a patient representative is usually also a member. Some larger hospitals have employed an ethics consultant specifically for the purpose of organization, consultation and training. In most cases, however, there is no full-time specialist for ethics. Instead, the HEC elects a member from the field of medicine or nursing as chair or moderator. The chairmanship can be exercised outside of working hours, i.e. as an honorary position, or with a leave of absence from the employer so that this activity can take place during working hours.

While a HEC usually meets every four weeks, some HECs also offer advice on acute cases by forming an ad hoc subgroup of 2 to 5 members, which conducts a case discussion on site or with those involved in the respective ward promptly, i.e. within one to two days. The sub-groups are organized and moderated by the chair of the HEC.

Overall, the structure of the HEC is not legally regulated. Ethics committees in hospitals and nursing homes can be established ‘bottom up’, i.e. by employees, or ‘top down’, i.e. initiated by the management of the institution. A HEC either recruits its members informally and has them confirmed by the facility management, or the members are proposed by the facility management and elected or confirmed by the HEC. Ethics committees either draw up their own rules of procedure or statutes and inform the facility management about the committee's work, or the hospital management specifies the structure and rules of procedure.

In some hospitals, employees work on a voluntary basis and are ‘tolerated’ by the management; in most hospitals, the management also provides resources (time off during working hours, funding for events or a part-time position for the moderation of the HEC).

[11] BÄK, 2006, p. A 1704.
[12] BÄK, 2006; AMA, 2022; Fox, 2007.

In the US, HECs have been endorsed by prestigious national commissions and medical professional organizations.[13] Today, all major hospitals in the US must demonstrate a structure for handling ethical conflicts in order to be accredited.[14] In the event of a liability lawsuit, the fact that treating physicians consulted an HEC in a controversial case can have an exempting or at least mitigating effect.

In Germany in the 1980s, for example, hospital managements of denominational hospitals took the initiative.[15] They voted for ethics structures, or desired special certifications[16] that made ethics structures necessary.

Ethics committees are the 'classic form' of ethics counselling.[17] In Germany, there are only rarely other forms of medical ethics counselling: ethics working groups, ethics forums and individual counsellors.[18]

3.2 Tasks and Objectives

HECs typically pursue a threefold function:[19] Firstly, they advise on difficult individual cases of patient treatment from an ethical perspective. Secondly, they develop recommendations for dealing with recurring ethical issues. Thirdly, they offer further education and training events for all professional groups in the hospital.

1) Most frequently, HECs advise on the treatment of patients in individual cases. In these cases, the ethics committee is, according to the statement of the BÄK in Germany,[20] independent with regard to the facility management, i.e. not bound by instructions. The American Medical Association (AMA) does not specifically mention independence in its guidelines. Instead, it points out: 'Ethics committees that serve faith-based or other mission-driven health care institutions have a dual responsibility to: (g) Uphold the principles to which the institution is committed. (h) Make clear to patients,

[13] According to Fox, 2007, p. 13: President's Commission, 1983; American Hospital Association, 1986; AMA, 1985; American Society for Bioethics and Humanities, 1998.
[14] BÄK, 2006, p. A 1703.
[15] Deutscher Evangelischer Krankenhausverband et al., 1999; Schochow et al., 2019, p. 988.
[16] May, 2010, pp. 88f; KTQ, 2004; Schochow 2019, p. 988.
[17] Schochow et. al. 2019, p. 988.
[18] BÄK, 2006, p. A 1703.
[19] AMA, 2022, ch. 10.7; Aulisio, 2014; BÄK, 2006, p. A 1704.
[20] BÄK, 2006, p. A 1704.

physicians, and other stakeholders that the institution's defining principles will inform the committee's recommendations.'[21]

2) However, HECs can also draw up ethical guidelines, although this is rarely the case. They cannot fulfil this task independently of the hospital management and the decision-making structures of the institution. Guidelines can be understood as systematically developed decision-making aids on appropriate procedures for specific problems, from which it is also possible to deviate in justified individual cases.[22] A HEC can develop ethics guidelines for recurring problems and propose an implementation process within the framework of the applicable law and on the basis of professional codes of ethics in medicine and nursing – e.g. for dealing with cardiopulmonary resuscitation and living wills, for therapy limitations in the intensive care unit or the use of a percutaneous endoscopic gastrostomy (PEG) tube in very elderly patients. The scope and binding nature of such a guideline must be clarified in accordance with the institutional decision-making structures and legal responsibility.[23] Under certain circumstances, an ethical guideline can be institutionally anchored in a quality assurance system. Transparent development and good communication promote the subsequent acceptance of the guideline.[24]
3) In addition to individual case counselling, HECs perform their task of sensitizing and training in-house members of all healthcare professions by offering a voluntary event on medical and nursing ethics once or twice a year. According to the German BÄK in 2006,[25] a good ethics training program makes it clear that ethical problems should not only be delegated to a committee or ethics experts, but that ethical sensitivity, argumentation, and decision-making competence must lie with all employees of the hospital and should be developed further.

According to the German BÄK, a well-functioning ethics committee can make medical decisions more transparent, improve cooperation between professional groups, and promote a culture of error.[26] 'Clinical ethics

[21] AMA, 2022, ch. 10.7.
[22] Neitzke et al., 2016.
[23] BÄK, 2006, p. A 1705.
[24] BÄK, 2006, p. A 1705.
[25] BÄK, 2006, p. A 1705.
[26] BÄK, 2006, p. A 1707.

committees thus make an important contribution to the cultural, personnel, organizational and quality development of their institution.'[27]

3.3 Synopsis of Perspectives, Moral Consensus or Well-Founded Ethical Judgement?

When ethics committees deliberate on difficult individual cases regarding medical treatment and nursing care in hospitals, they can strive for different types of outcomes: for example, to bring together the professional perspectives and interests of those involved in order to obtain a comprehensive picture of the problem situation; or to identify a moral consensus among the members of the committee; or to reach an ethical judgement that justifiably identifies one or more courses of action as good and right.

In its texts, the AMA shows a certain ambivalence between balancing the values, concerns, and interests of all those involved and prioritizing the rights and well-being of the patient. For example, the AMA's Code of Medical Ethics explains in terms of negotiation: 'Ethics committees, or similar institutional mechanisms, offer assistance in addressing ethical issues that arise in patient care and facilitate sound decision making that respect participants' values, concerns, and interests.'[28] This gives the impression that all interests and values of all participants are to be respected equally.

However, in terms of prioritizing a patient's well-being, it is then stated elsewhere: 'The goal of ethics consultation [as individual consultant or through an institutional ethics committee] is to support informed, deliberative decision making on the part of patients, families, physicians, and the health care team. By helping to clarify ethical issues and values, facilitating discussion, and providing expertise and educational resources, ethics consultants promote respect for the values, needs, and interests of all participants, especially when there is disagreement or uncertainty about treatment decisions. Ethics consultants should seek to balance the concerns of all stakeholders, focusing on protecting the patient's needs and values.'[29] However, there is no mention of ethical norms, only of prioritizing the needs of the patient.

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[27] BÄK, 2006, p. A 1705 (author's translation).
[28] AMA, 2022, ch. 10.7.
[29] AMA, 2022, ch. 10.7.1.

The BÄK in Germany outlines ethical reflection in an HEC somewhat more clearly in relation to ethical norms by drawing attention to the difference between a moral majority opinion and an ethical reflection: 'Good ethics counselling does not focus on a majority decision in the form of a vote, but rather on improving the recognition and analysis of ethical problems and the ethical decision-making process. Ethics consultants can make an important contribution to this through good moderation, ethical expertise, and an outside perspective.'[30] In connection with outpatient ethics committees, the German BÄK points out in its recommendations from 2019 that the so-called Nijmegen method is used in the clinical area,[31] which, based on a current medical analysis of the situation and a multi-perspective reconstruction of the patient's case, examines which available treatment strategies are appropriate in each case in accordance with the four "classic" medical ethical principles of beneficence, non-maleficence, respect for autonomy, and justice.[32] The latter mentioned principles are derived from the American medical ethicists Tom Beauchamp and James Childress.[33] These principles are related to the patient and this at least signals, even if they are prima facie principles, that ethical-normative guidelines are to be respected.

Obviously, the moral and legal rights of patients and their well-being are not naturally at the forefront of every HEC. In this respect, ethics committees should be critically scrutinized with regard to their ethical norms and criteria for consideration.

The philosophical ethicist Mathias Kettner outlines the characteristics of HECs in Germany as follows: They are multidisciplinary ethical advisory bodies that work in a defined institutional context and are intended to fulfil a specific advisory need through their work by specifically reflecting on the morally problematic side of certain problem situations. He critically lists the possible intentions of introducing a HEC: Better (clinical, structural or strategic) decisions, higher patient satisfaction, higher subjective job satisfaction, higher employee identification with the institution, a better operating result.[34]

[30] BÄK, 2006, p. A 1706 (author's translation).
[31] Steinkamp and Gordijn, 2005.
[32] BÄK, 2019, p. A3.
[33] Beauchamp and Childress, 2019.
[34] Kettner, 2008, p. 16.

Kettner's description of the variety of goals of HECs meets empirical findings from the USA: The respondents in the US survey study by Fox et al. confirmed that the central objectives of clinical ethics counselling are protecting patient rights, resolving real or imagined conflicts, changing patient care that improves quality, increasing patient/family satisfaction, educating staff about ethical issues, preventing ethical problems in future, meeting a perceived need of staff, providing moral support to staff, suspending unwanted or wasteful treatments, and reducing the risk of legal liability.[35]

Even though in the national empirical study by Fox et al. the rights and well-being of patients are listed first, it is apparently accepted or even desired that a HEC also serves other interests.[36] The empirical study does not provide any information on how conflicts of interest between the actors involved are handled. However, the follow-up study by Fox et al. from 2022 shows that a HEC recommended a single best course of action in only 46% of the cases discussed.[37] Overall, however, ethics committees do not recommend a specific action or a range of acceptable courses of action in around 49% of cases, which suggests that in these cases no conclusive ethical-normative argumentation is given, but rather that only a synopsis of several perspectives and interests has been made.

From an ethical point of view, however, this should be followed by a discussion about which interests are justified and must be taken into account, and which should be put aside. Such ethical reflection would then also result in a well-founded recommendation for one or more courses of action. After all, the parties involved may have different needs, interests and moral concepts, but a HEC should make a moral statement in the sense of a distinction between morally wrong and morally right.[38] The decisive factor is whether morality is based on reason. In this case, the ethical criteria for a right or wrong moral judgement cannot be based solely on a religious source such as the Koran or the Bible or on the majority opinion of a peer group or an ethics committee.

Firstly, the approach of an ethics committee can therefore be limited to compiling different perspectives. Secondly, a moral consensus can be found among the members of the committee without the reasons for the

[35] Fox, 2007, p. 16.
[36] Fox et al., 2007.
[37] Fox, 2022, p. 12.
[38] Kettner, 2008, p. 20.

consensus being investigated. Thirdly, a committee can – and this is what Kettner demands – give generally understandable moral reasons for a moral judgement that refer to reasonably comprehensible ethical norms. As a basic qualification, members should be willing to engage with the views and technical jargon of the various professional groups, but above all the ability to justify and criticize moral judgements.[39] The author of this article also sees the task of clinical ethics counselling as making moral judgements for which reasonably comprehensible reasons are given.[40] In view of the pluralism of ethical theories, the ethical standards used and their justifications must be disclosed and remain open to criticism.[41]

The sociologist Nassehi explains why ethics must be represented as a scientific discipline which is able to present good reasons form oral judgements: most forms of order and moral concepts in modern societies are different.[42] The pluralism of world views, ways of life and moral intuitions cannot simply remain side by side in conflicts, but requires the differentiation of ethics and morality in the claim: a morality that is empirically valid can only prove itself through empirical implementation. Ethics as a reflection of morality proves itself through its ability to justify its norms and judgements. Ethical reflection is based on the assumption that reasons can be found for maxims for action that can be found in social practice, which may compete but can be distinguished as more or less convincing from an ethical perspective.

If a HEC wishes to provide advice, it should therefore be able to give convincing reasons for its decisions.[43] A group consensus that is not qualified in terms of content cannot make a justified moral claim from an ethical perspective. The philosopher Rosemarie Tong calls for an ethics of persuasion precisely in order to avoid moral pressure on those being advised.

Nevertheless, only those ethical approaches and norms that are compatible with the applicable law will be acceptable in a HEC. This is because conflicting interests are addressed and prioritized differently with a deontological argumentation based on individual moral rights than with a utilitarian or contractual argumentation.

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[39] Kettner, 2008, pp. 20–23.
[40] Cf. in more detail Bobbert, 2009.
[41] Bobbert, 2009, esp. pp. 196–197.
[42] Nassehi, 2008, pp. 163–165.
[43] Bobbert, 2009; see alsoTong, 1991.

3.4 Frequent Topics and Problems

Ethicist Kettner, who has also been involved in ethics committees, outlined a wide range of topics at the beginning of the establishment of HECs in Germany: HECs dealt with morally irritating questions of therapy and diagnostics, patient autonomy, treatment decisions at the end and beginning of life, conflicts in connection with medical confidentiality and the fulfilment of the patient's right to information under adverse circumstances.[44]

George Annas and Michael Grodin, US experts in the field of health law and medical ethics, outlined the range of topics in an interim report in 2016 as follows: 'Conflicts caused by a disagreement between patient or family and the clinical team about demand for treatment judged to be nonbeneficial or even harmful. Mostly it also can be a communication problem compounded by unrealistic expectations on the part of a patient's family. Hospital ethics committees continue to exist and deal mostly with end-of-life conflicts and policies. Nonetheless, the nature, membership, scope, limits of authority, and accountability of institutional ethics committees have still not been well established.'[45]

Just to give an impression of the kind of cases which are presented in HECs, two examples will roughly be given: Kettner describes an individual case discussion in relation to treatment issues at the end of life.[46]

In an intensive care unit, a patient with end-stage AIDS who has an acute intestinal obstruction and a medically predicted lifespan of approx. 3 days has to decide whether she should still be operated on or whether she should remain sedated. The surgeons who want to operate again accuse the anesthetists of not allowing continued sedation. The anesthetists reproached the surgeons, saying that surgery was pointless and would cause the patient even more pain. There was no living will and the only available relative, whose relationship to the patient is unclear, was against the operation.

The author of this article can report a HEC´s case relating to patient autonomy and the decision-making capacity required for this:

A 64-year-old patient who has had Hodgkin's disease for 11 years and has already survived many crises of illness comes to the emergency department with severe shortness of breath. Due to severe bilateral

[44] Kettner, 2008, p. 17.
[45] Annas and Grodin, 2016, p. 55.
[46] Kettner, 2008, p.19f.

pneumonia, the patient is advised to undergo immediate artificial respiration (intubation). The patient refuses with the words: 'I don't want to be artificially ventilated!' However, the patient allows bronchoscopy ventilated and subsequently mask (CPAP) ventilation[47] and thus survives the night to some extent. The next morning, the patient still requires intubation – as mask ventilation is no longer sufficient. After lengthy discussions with the patient and his wife, the doctor manages to get the patient to agree to intubation for a limited period of three days. But after three days, his condition has barely improved. The wife demands that the artificial respiration be terminated in accordance with the agreement. With a heavy heart, the internist ends intubation after three days and the patient dies shortly afterwards. The doctor asks the ethics committee for a retrospective ethical review to clarify the following questions: Was it right to make a 'compromise' because the patient had a chance of recovery, or did I improperly persuade him to be intubated?

The two case studies are representative of many ethics consultations in those ethical issues at the end of life make up the largest proportion of the cases discussed. It also becomes clear that the 'sense of possibility'[48] of all those involved is often required in everyday clinical practice. In the latter example, for example, a discussion about the patient's motives and not just his consent to or refusal of artificial ventilation would probably have been informative: Did he have an aversion to intubation, a fear of long-term ventilation or did he want to die now – after a long road of fighting his cancer?

3.5 Quality of Health Care Ethics Committees: Requirements and Criticism

Questions about the quality of HECs have existed from the time they were founded until today. The very question of which quality standards should be used and how quality can be measured using empirical methods is the subject of a separate discourse.[49] Nevertheless, some points of criticism are obvious: neither in the USA nor in Germany is it mandatory for an ethics committee to have a specialist in ethics, and there are also no requirements

[47] A continuous positive airway pressure (CPAP) ventilation supports the patient's own breathing. It is less invasive respctive "artificial" than a intubation.

[48] According to Musil 2014, 16-17.

[49] Marckmann et al., 2015, AG "Ethikberatung im Gesundheitswesen" on criteria for ethics committees for research involving human subjects Bobbert and Scherzinger, 2017.

for the members with regard to the interdisciplinary composition of the group and ethical expertise or further training.

In their two national overview studies on HECs in the USA, Fox et al. surveyed formal aspects such as workload, financial support, type of information collection and protocol management.[50] One of Fox et al.'s 2022 survey findings is that there is still a lack of ethics education and training for members. The AMA's requirement that ethics consultants have 'appropriate expertise or training – for example, familiarity with the relevant professional literature, training in clinical/philosophical ethics, or competence in conflict resolution – and relevant experience to fulfill their role effectively'[51] is therefore obviously not fulfilled.

Because in the USA, in addition to counselling by HECs, individuals from medicine, nursing, social work or hospital chaplaincy often carry out ethical case consultations,[52] the American Society for Bioethics and Humanities (ASBH) has been developing guidelines for individual counsellors since 1998, which are constantly being revised.[53] The ASBH is the primary society of bioethicists and scholars in the medical humanities and the organizational home for individuals who perform clinical ethics consultation in the United States, as well as for many bioethics professionals from outside the United States. In 1998, ASBH published the first time 'Core Competencies for Health Care Ethics Consultation', which outlined the knowledge base and skill set that consultants should possess to conduct ethics consultation.

The ASBH recommendations are partly formal in that they require relevant courses of study and further training, but the process of ethics counselling is explained in more detail. Accordingly, the following applies to ethics counselors:

- 'Introduce and clarify relevant ethical concepts and normative guidance.
- Identify ethically acceptable options and provide an ethically grounded rationale for each option.
- Facilitate mutual understanding of relevant facts, values, and preferences.

[50] Fox et al., 2007; Fox et al., 2022.
[51] AMA, 2022, ch. 10.7.1.
[52] Fox et al., 2007, esp. pp. 17–18; Fox et al., 2022, esp. 11–14.
[53] ASBH, 1998; 2011; 2024.

- Support ethically appropriate decision-making while respecting differing points of view, values, cultures, religions, and moral commitments of those involved.
- Synthesize the relevant medical and values-based information into an ethical analysis and assessment.
- Make ethical recommendations as appropriate.'[54]

In 2018, ASBH developed a certification course for anyone with a bachelor's degree or higher who had at least 400 hours of clinical ethics consultation experience.[55]

In Germany, too, the further training of the HEC members is not specifically regulated and therefore takes place in different ways, often self-taught or via individually selected further training courses. However, the professional association 'Academy for Ethics in Medicine (AEM)', which fulfils a similar function to the ASBH regarding recommendations for HECs, has developed a curriculum for the further training of ethics consultants, which specifies the minimum theoretical and practical skills that persons working in ethics consulting should have.[56]

The ethical-reflective competences of ethics counsellors are aimed at, among other things:

The person knows the meaning of 'morality' and 'ethics', can distinguish between normative and descriptive statements and reflect on the binding nature of normative statements. The person can distinguish between ethical norms and legal norms and recognize the relevance of each for the solution of normative questions. The person is familiar with various ethical justification approaches (including deontological, consequentialist, virtue ethical, relational ethical and principled ethical approaches). The person is aware of their strengths and weaknesses and can utilize their potential for answering ethical questions.[57] Organizational skills are also required: 'Ethics consultants need application-oriented organizational knowledge in order to advise and moderate ethical conflicts in institutions and services of the health care system.'[58]

An earlier AEM recommendation from 2010 focused less on well-founded ethical and normative judgements and more on a factual consensus

[54] ASBH, 2024, p. 4.
[55] Baker, 2022, p. 9.
[56] AEM, 2019.
[57] AEM, 2019, pp. 6–7.
[58] AEM, 2019, p. 7 (author's translation).

between members of different professional groups and on specific values of the respective institutions: Ethics counselling in healthcare institutions should be geared towards the following objectives, among others:

- 'The implementation of general moral values (e.g. human dignity, autonomy, responsibility, care, trust) and specific values of the respective organization, which are embodied in mission statements and profession-specific traditions, among other things, in reflected actions,
- to seek solutions to conflicts between different individual and/or institutional values and moral concepts and to arrive at and implement viable decisions through joint reflection.
- Ultimately, the aim is to make decision-making processes transparent regarding their ethical aspects and to align them with morally acceptable criteria, i.e. to make 'good decisions' in 'good decision-making processes'.'[59]

In the USA, as in Germany, individual ethics counsellors and ethics committee chairs and members can take continuing education courses on a voluntary basis. However, this is not a prerequisite for participation in an ethics committee. There are obviously no formal requirements, such as a qualification in clinical ethics from philosophy or theology, or specific ethics training courses to ensure that ethical reflection takes place in the narrower sense. In addition, the objectives vary in terms of content: Apart from raising awareness of ethical problems, which is mentioned in all professional ethics recommendations, the naming of objectives varies in terms of the quality of the results of ethics counselling: In some cases, the requirement is merely to take into account different perspectives, values and moral concepts, while in others a well-founded ethical judgement is required.

As far as the quality of results is concerned, it is of interest to a HEC how the members position themselves on a metaethical level: In the face of an ethically reformulated problem, are different information and moral perspectives merely brought together, but the question of which interests and moral concepts are justified or unjustified is not discussed? Or is a consensus sought that expresses the moral concepts of the majority of the group members of the ethics committee or the treatment team on the ward, but is not substantiated by argument? Or is an ethical judgement or at least a

[59] AEM, 2010, p. 250 (author's translation).

preferential judgement made that is based on generalizable ethical norms and a reasonably comprehensible argument? In the latter case, the ethical and legal norms to which the ethics committee considers itself bound when making an ethical and normative judgement would still be variable.

Overall, it remains an open question whether a HEC affirms and 'applies' the moral concepts currently prevailing in the respective composition or in society and thus limits the critical potential of an ethics committee to questions of consistency – or whether critical potential is introduced via ethical-normative standards that questions prevailing moral concepts or confirms them with good reason. In ethics as a scientific discipline, it is certainly debatable whether moral judgements can be justified with reasonably comprehensible arguments or whether this is considered impossible (cf. the metaethical positions of cognitivism or non-cognitivism). Irrespective of this, however, it should be noted in general and regarding the importance of ethics committees for legal compliance that a HEC can contribute more or less reflexive or critical potential.

Apart from this, there is no doubt that the preliminary stages of ethical reflection are positive for every HEC: By presenting a problem or a conflict to a larger group in order to address the specific moral aspects, it is firstly possible to enrich it with relevant further information and perspectives, secondly to ask critical questions (in various respects), and thirdly to activate the "sense of possibility" – i.e. the joint search for alternative courses of action. A multiple-eye principle instead of an individual decision by an attending physician that is not open to discussion can therefore offer advantages from an ethical point of view.

4. Health Care Ethics Committees and Compliance from a Legal Perspective

In accordance with their evolved self-image, HECs have positioned themselves, in terms of their relationship to the law, primarily in relation to the unchanged medical responsibility and the right to self-determination as well as other fundamental legal rights of the patient (4.1). If we now look at the 'HEC' structure from the outside, from the perspective of compliance as 'regulated self-regulation', additional legal perspectives emerge, which are explained in sections 4.4 to 4.6.

4.1. Ethics and Law in Health Care Ethics Committees

HECs must operate within the framework of the law when providing ethical advice and developing guidelines. Where the law opens up room for manoeuvre, ethics counselling can provide valuable assistance.[60] Particularly in the conflict-prone field of limiting therapy at the end of life, the law gives doctors room for decisions by allowing them to choose between different options in order to do justice to the individual case.[61] The right of patients to be allowed to die without being kept alive for a very long time with intensive care is often violated in practice because a doctor does not dare to discontinue life-sustaining treatment that has become ineffective due to inaccurate knowledge of criminal law. Only those who know the room for manoeuvre can make full use of it.

Professional ethics recommendations issued by the AMA in 2022 and by the BÄK in 2006 and 2019 repeatedly emphasize that ethical case consultation does not remove the decision-making authority and responsibility of the individual practitioner: doctors must decide independently and freely. Nor should any pressure be exerted; rather, the results of ethics committees or other forms of clinical ethics counselling are merely advisory in nature and do not have to be followed by the patients and treating physicians.[62] 'The recommendation drawn up should support the person authorized and responsible to make a decision, but not undermine existing decision-making powers or conceal responsibility. This applies in particular to the attending physician.'[63] In case consultations in which anonymity cannot be completely guaranteed, all those involved in a case consultation should be bound to confidentiality by the clinic management, unless they are already subject to a legal and professional duty of confidentiality.[64]

4.2 Compliance in Law

The legal development of compliance originated in Anglo-American law in the 1930s as the idea of regulated self-regulation.[65] It seemed more appropriate for companies to develop their own regulations for their specific

[60] BÄK, 2006, p. A 1706.
[61] Rothärmel, 2010, p. 178.
[62] AMA, 2022, ch. 10.7 (a).
[63] BÄK, 2019, p. A 3 (author's translation).
[64] BÄK, 2006; AMA, 2022, ch. 10.7 (b).
[65] Hauschka, Moosmayer and Lösler, 2016, § 1.

area than for legislators to pass regulations that were not appropriate. Common law, which is based not only on statutes but also on authoritative judicial judgements in precedent cases, predominates in the USA and throughout the Anglo-Saxon-speaking world. For common law it was and is easier to integrate non-codified company-specific or sector-specific regulations into the law than it is for the civil law of continental European countries, i.e. including Germany. Civil law is based on the codified law of the respective legislators and in which the judiciary is bound by the legal code. In this respect, it is not surprising that the legal relevance of HECs has played a greater role in the USA from the very beginning. For Germany and other nations with a civil law, the question of the legal relevance of HECs has hardly been worked out.

In law, the term compliance refers to adherence to rules in the form of law and legislation, as well as internal company guidelines to prevent violations of the law. In relation to companies, this also includes operational measures that are intended to ensure the lawful behaviour of all company employees. The term compliance originally comes from the Anglo-American legal system in the sense of self-regulation in order to fulfil the responsibility of companies to prevent legal violations. As it would go beyond the scope of this article to go into the international legal discussion on compliance in detail, only literature on compliance from the German legal area is referred to below.

4.3 Compliance in Medicine and Psychology: A Distinction

To avoid misunderstandings in the interdisciplinary dialogue, it is important to be aware of the different disciplinary uses of compliance and to differentiate these from compliance in law.

When it comes to the doctor-patient relationship in medicine, compliance (more recently also referred to as adherence or persistence) means following the doctor's therapeutic instructions in order to ensure the agreed therapy plan and the success of the therapy. The term compliance has now established itself as a technical term for therapeutic co-operation and motivation when using professional healthcare services in clinical or psychotherapeutic contexts.[66] Factors of non-compliance in the doctor-patient relationship are analyzed, or it is asked whether it is a case of deviation or ‘reasoned decision making’.[67] The term, which has now been

[66] Schoppmeyer, 2020.
[67] Brody, 2010.

used in medicine for 70 years, has been criticized for being understood as ‘obedience to therapy’, as this does not correspond to respect for patient autonomy.

In medical physiology, compliance is a measure of the elasticity of body structures, e.g. pulmonary compliance for the elasticity of the lungs, vascular or cardiac compliance for the elasticity of blood vessels and the heart wall, and bladder compliance for the elasticity of the urinary bladder wall.[68]

In psychology compliance is a type of social influence that occurs when a person changes her behaviour in response to a direct request of others.[69] Psychologists examine, how reciprocity, commitment and consistency, authority, social validation or social proof, and liking and similarity are used to change people's behaviors.

4.4 Health Care Ethics Committees ensuring Legal Compliance: A Classic Form of Compliance

To date, there is no legal definition of compliance in German law. Only the German Corporate Governance Code (DCGC)[70] contains a basic definition: ‘The Management Board is responsible for ensuring compliance with legal provisions and internal guidelines and works towards their observance within the company (compliance). The internal control system and the risk management system also include a compliance management system geared towards the company's risk situation.’[71] ‘Employees should be given the opportunity to report legal violations within the company in a protected manner; third parties should also be given this opportunity.’[72] ‘This CG Code contains principles, recommendations and suggestions for the management and supervision of German listed companies on the stock exchange that are recognized nationally and internationally as standards of good and responsible corporate governance.’[73] ‘The Code's recommendations and suggestions may serve as a guide for companies that are not listed on the capital market.’[74] ‘The Code emphasizes the obligation of the Management Board and Supervisory Board to ensure the continued

[68] Schoppmeyer, 2020.
[69] Guadagno, 2017, see p. 107.
[70] DCGK, 2022.
[71] DCGK, 2022, A.I. Grundsatz 5 (author’s translation).
[72] DCKG, 2022, A.I.A.4 (author’s translation).
[73] DCGK, 2022, p. 2 (author’s translation).
[74] DCGK, 2022, p. 3 (author’s translation).

existence of the company and its sustainable value creation (corporate interest) in accordance with the principles of the social market economy, taking into account the interests of shareholders, employees and other groups associated with the company (stakeholders). These principles require not only legality, but also ethically sound, responsible behaviour (model of the honourable businessman).'[75]

A member from the legal profession can also participate in a HEC, but the discipline of law does not necessarily have to be represented. In Germany, lawyers are rarely members of an ethics committee, whereas in the USA they are somewhat more common. The recommendations in the USA and Germany for the further education and training of ethics advisors and members of ethics committees do not provide for further legal training. This means that legal expertise is often not represented on HECs.

The lack of knowledge or misunderstandings of doctors in Germany described by the medical law expert Sonja Rothärmel with regard to the criminal law provisions on the termination of treatment (and thus the distinction between passive and active euthanasia), the pregnancy conflict, prenatal diagnostics, the duty of confidentiality or the use of medicines in children should be remedied through legal information or further training.[76] Ethics committees or ethics counselling do not provide this per se, as legal knowledge and further training are not provided as standard. Rothärmel therefore states that the 'urgent need for qualified further training in medical criminal law should not be forgotten'[77]. This is still not the case in Germany today.

However, ethics counselling can be included in the (criminal) legal assessment of medical or nursing actions. It does not relieve the attending physicians and employees from other healthcare professions in the hospital of their legal responsibility. However, doctors who make use of professional ethics counselling or advice from the HEC show that they have fulfilled their duty to make a responsible decision in a difficult situation. The documentation of ethical counselling can also help to demonstrate compliance with the duty of care.[78]

If a HEC can be understood as 'good practice', compliance with "good practice", i.e. the consultation of an ethics committee as a recognized

[75] DCGK, 2022, p. 2 (author's translation).
[76] Rothärmel, 2010, pp. 181–183.
[77] Rothärmel, 2010, p. 184 (author's translation).
[78] Rothärmel, 2010, 183.

ethical procedure, could – in the course of increasing legalization – counteract or even rule out accusations of negligent, i.e. careless behaviour in the future.[79] "Good practice" would therefore gain direct legal relevance through indeterminate legal terms such as negligence. The utilization of the ethics committee as "good practice" could also be a mitigating factor under criminal and fine law.[80] However, the consultation of a HEC as "good practice" would not imply that the attending physician would have to follow the specific advice of the ethics committee. He or she could also deviate from this for good reason. Furthermore, as the AMA and the BÄK repeatedly emphasize, ethics consultation does not protect the individual doctor from punishment, as the doctor bears personal responsibility for the medical and legal correctness of the treatment decisions for the patient within his or her area of responsibility. Furthermore, the ethics counsellor is not liable for his or her counselling, e.g. within the limits of the German Legal Counselling Act.[81]

Beyond the legal framework, a HEC can be seen as an instrument of compliance, provided it follows ethical criteria that correspond to the applicable law. In Germany, deontological ethical approaches in the Kantian tradition, which are based on moral rights and duties, such as the moral philosophical approach of Alan Gewirth (1978), but also the classic medical ethics approach of Beauchamp and Childress (2019), which is based on the prima facie principles of beneficence, non-maleficence, respect for autonomy and justice with regard to doctors and patients, correspond to the current law.[82] In this respect, room for manoeuvre can be interpreted in terms of the law with recourse to such ethical approaches. However, as soon as ethical approaches and criteria are used that do not conform to the applicable legal framework, such as utilitarian or autonomy-centred approaches, e.g. the preferential utilitarian approach of Peter Singer (2011) or the libertarian approach of Tristram Engelhardt (1995), ethical judgements of a HEC based on these approaches may even jeopardise legal conformity.[83]

[79] Dannecker, 2025, ch. 2c.
[80] Dannecker, 2025, ch. 2d.
[81] Rothärmel, 2010, p. 184.
[82] Gewirth, 1978; Beauchamp and Childress, 2019.
[83] Singer, 2011; Engelhardt, 1995.

4.5 Health Care Ethics Committees for the Prevention of Legal Violations: Sanction Compliance

HECs can also have a preventive effect. From a legal perspective, compliance involves preventing violations of the law in a company in order to avoid sanctions and claims for damages as well as negative publicity associated with damage to the company's reputation. An ethics committee could prevent individual wrong decisions by doctors or other persons in positions of responsibility by supporting individuals. An ethics committee would thus have a preventative effect as a structure.

A hospital and its attending physicians and other healthcare professionals must respect patients' informed consent, duties of health care and life protection and other fundamental rights, which is not always possible in everyday clinical practice. If problematic cases or difficult decision-making situations are recognized and discussed in good time with the help of the 'clinical ethics consultation structure, this can have a preventive function. Liability risks caused by deviant behaviour on the part of hospital employees can be reduced by HECs, i.e. they may contribute to a reduction in the likelihood of harm. A HEC can therefore be regarded and used as a structure that counteracts deviant behaviour. However, criminal convictions of doctors are quite rare in Germany.[84] Liability proceedings against doctors and hospitals also occur less frequently in Germany than in the USA.

Soon after the first ethics committees were established in Germany, the medical law expert Rothärmel wrote: 'Ethics counselling in hospitals is preventive legal advice. It can make legal counselling in preliminary proceedings superfluous by preventing the preliminary proceedings themselves. If conflicts are resolved in the hospital and relatives and patients are taken seriously, the filing of charges or compensation in medical malpractice proceedings is usually avoided. Good communication and mediation can therefore significantly reduce the forensic risk in hospital.'[85] And she continues: 'It is not only the relatives of a patient who can experience relief through ethics counselling, but also all hospital staff. Ethics counselling is risk management, because a conflict that has been satisfactorily resolved in the hospital is not taken to court. This saves everyone involved considerable psychological and financial strain and also

[84] Rothärmel, 2010, pp. 180–181.
[85] Rothärmel, 2010, p. 179 (author's translation).

saves the hospital from bad press.'[86] Rothärmel points out a further advantage: 'Ethics consultation that works well also sensitizes employees to the perception of conflicts, promotes communication within the team, and between departments, and can thus also contribute to improving the culture of error in the hospital.'[87]
In other words, ethics committees can therefore contribute to compliance as 'company self-regulation'[88].

4.6 Health Care Ethics Committees as Instrument for Good and Responsible Behaviour: Compliance Culture

In German law, the English term compliance is also associated with acting in accordance with a company's rules that are not directly legally binding.[89] Corporate compliance or governance encompasses the entirety of measures for good and responsible decision-making and behaviour in a company. The aim is to ensure appropriate ethical and legal responsibility for protected legal interests within a company. Experience has shown that usual delegation structures alone are not sufficient. According to the German defence lawyer Thomas Knierim, numerous individual legal requirements have led companies to develop models for 'ethical corporate management and control', which are reflected in today's compliance discussion.[90] In addition to legal compliance, the aim of compliance is to develop principles of behaviour, guidelines, management and control measures that are both an obligation and a framework for an 'ethically superior corporate culture'[91].

The criminal law expert Gerhard Dannecker also speaks of a compliance culture in connection with behavioural psychological considerations on compliance: 'Compliance culture refers to the value system of company employees in terms of the extent to which compliance with the law and adherence to rules is accepted, respected and supported as a value by all employees. This is associated with the expectation that all company employees, including managers, behave with moral integrity and do not allow themselves to be corrupted.'[92] In addition to legal conformity

[86] Rothhärmel, 2010, p. 180 (author's translation).
[87] Rothärmel, 2010, p. 179 (author's translation).
[88] Dannecker, 2023, p. 131 (author's translation).
[89] Rotsch, 2024, esp. pp. 73–75; Knierim, 2025, esp. pp. 389–396.
[90] Knierim, 2025, p. 390.
[91] Knierim, 2025, p. 391.
[92] Dannecker, 2023, p. 139 (author's translation).

and prevention, compliance can also be understood as adherence to compliance rules that are followed out of insight and conviction.[93]

By providing advice, an ethics committee aims to mediate between different perspectives and, if necessary, to persuade by argument. By providing repeated support in difficult cases, it can establish a culture of discussion and shared ethical goals. Further training for all hospital staff – the third task of HECs – can serve to broaden consensus with regard to the implementation of legal requirements and ethical criteria.

If a hospital wants to ensure in a particularly strong way that moral and legal patient rights are respected and the well-being of patients is paramount, this can be regarded as the organization's value system, which should be respected and lived by all employees in everyday life. A HEC promotes the addressing and discussion of difficult constellations in this regard, while ethical training events for all professional groups in the hospital focus on specific questions relating to the hospital's value system.

Lastly, guidelines developed by ethics committees, for example on the question of when cardiovascular resuscitation should no longer be performed or on the question of what to do when a patient is dying or has died in hospital, can to a certain extent become ‘good practice’, i.e. a sensible way of achieving certain goals.

5. Limits and Positive Aspects of Health Care Ethics Committees in Regard to Compliance

5.1 Limits to the Integration of Health Care Ethics Committees in Compliance Structures

In 2017, the Fraud Section of the US. Department of Justice published a guideline entitled ‘Evaluation of Corporate Compliance Programs’.[94] According to this guideline, which attaches great importance to the qualification, equipment, integration and autonomy of the compliance function, the public prosecutor's office assesses the effectiveness of compliance systems when deciding on a mitigation option as part of the imposition of sanctions.

If these criteria are used to evaluate HECs in relation to any compliance functions, the lack of qualifications described above takes central stage: the ethical qualifications of the members of a HEC and also of

[93] Dannecker, 2023, p. 138.
[94] According to Dannecker, 2023, p. 146.

the individual advisors are often not guaranteed, although they have been required since the ethics committees were established. Fox et al. report from the USA in 2022 that respondents from larger hospitals did not consider the financial support for ethics counselling to be sufficient.[95] In Germany, some large university hospitals do have qualified ethics experts, but the financial resources for HECs and the further training of their members are usually very limited. Overall, the quality problem has not been solved. The lack of qualifications is usually linked to a lack of financial resources, for example to hire a suitably qualified ethicist, company-funded training for members of ethics committees during working hours and usually only modest budgets that do not allow more than one training event per year to be offered to all hospital employees.

In addition, further legal training in connection with ethics committees and ethics counsellors is not regularly provided for. In its statement on 'Ethics Counselling in Clinical Medicine', the BÄK only mentions in 2006 that employees of clinical ethics counselling should receive appropriate further training in clinical ethics and in medical law issues, but not in the statement on Non-Clinical Ethics Counselling from 2019. Similarly, medical law content is not represented in the curriculum of the professional association 'Ethics in Medicine'.[96] Consequently, the structure of the ethics committee can contribute little to the traditional understanding of compliance as adherence to legal requirements. However, the structure of HEC, because it promotes the identification of problems of an ethical and, indirectly, partly legal nature, at least opens up an area of awareness and opportunity for discussion.

The autonomy of the compliance function is given in Germany insofar as a HEC must be able to advise and decide independently with regard to the task of individual case counselling and the task of training employees. In the USA, HECs are sometimes more closely integrated into the hospital structure if they are obliged to make the principles that the institution defines the basis of their recommendations.[97]

With regard to HECs, it can be added to the criteria of the 2017 US guidelines on Corporate Compliance that the pluralism of ethical theories and the fact that different ethical norms and considerations can be justified and used for practical judgements depending on the ethical approach poses a

[95] Fox et al. 2022, p. 12.
[96] AEM, 2019.
[97] AMA, 2022, ch. 10.7. (g), (h).

difficulty. On the one hand, the outcome of the deliberations of ethics committees is open and can fill a legal space for action; on the other hand, quite different outcomes are conceivable, at least in theory.

5.2 Positive Aspects of Integrating Health Care Ethics Committees into Compliance Structures

In addition to the formal criteria of the above-mentioned guidelines on Corporate Compliance, three formal aspects can be identified as positive aspects for the issue of compliance:

Firstly, a HEC must function well, i.e. be known in the hospital and accepted in its mode of operation. If an ethics committee is rarely or never called upon, it is ineffective as a structure. If it is called too often, it may not be able to function or may need to communicate a mandate more clearly. The two national overview studies on ethics committees in the USA by Fox et al. (2007; 2022) therefore rightly analyze the workload of ethics committees. There are no current empirical studies for Germany: in contrast to the early decades of their establishment, when there were many reports on individual HEC and rough overviews of the status of their dissemination, it remains to be seen whether HECs are represented throughout hospitals today, how often they are called upon, which problem constellations are discussed and which medical specialties are most frequently affected. The latest survey from Germany, dating from 2014, reports, that mainly large and middle-sized hospitals offered ethics consultation, more than two thirds via HEC.[98] Overall, it can also be stated that publications on the theory and practice of ethics committees in German-speaking countries have declined sharply. Thus, actual information about dissemination und functioning of HECs is necessary.

Secondly, an ethics committee includes competences for constructive conflict resolution. An ethics committee is often called upon to deal with conflicts within the team or between the team and the patient and their relatives because there is hardly any other structure for addressing them in the hospital. It is true that the chairpersons or the committee as a whole must analyze what type of conflict is involved. If, for example, it is a question of communication, division of labour or labour law, where no ethical aspects are in dispute, an ethics committee will not deal with it, but will nevertheless have contributed to clarification. In Germany, the BÄK already emphasized the need to distance itself from the employee representation,

[98] Schochow 2014.

internal complaints management and professional supervision in its recommendations from 2006.[99] However, if the ethics committee reformulates and analyzes a conflict as ethically relevant, it takes further steps towards clarification.

Thirdly, a functioning ethics committee can contribute to de-escalation and finding solutions through its expertise in assigning or analyzing and ethically discussing conflicts between healthcare employees and patients and their families. In this way, ethics committees can also contribute to compliance in the sense of 'corporate self-regulation', which also has an impact on the prevention of legal disputes.

Fourthly, in the USA as in Germany, advice from an ethics committee can show that a doctor who has taken advantage of structured ethics counselling wanted to fulfil their duty to make responsible decisions in a difficult situation. This heightened duty of care can have the effect of preventing or mitigating punishment.

Fifthly, morally controversial issues in healthcare are often linked to legal issues. Ethics committees have the effect of making ethical and legally relevant issues visible and, with their "multiple-eye principle", offer a space for discussion and reflection in which a defined group of hospital employees, who also come from different professional groups, participate. Beyond the HEC, the discussion can result in further actions by those involved in the HEC and even institutional changes – not least through the task of developing guidelines, even if this is rarely carried out by HECs. In this respect, the HEC can contribute to the further development of compliance in hospitals.

6. Conclusion

Overall, HECs are certainly most interesting in their task of advising on difficult treatment cases as an instrument of compliance. A HEC is a structure that can ensure that all ethically relevant aspects that serve the patient's well-being can be considered in a difficult treatment case through a multi-eye principle and multi-professionalism. They therefore represent 'good practice' in the language of compliance. However, the ethics committee structure should be clearly committed to the ethical goal of safeguarding the patient's well-being and guaranteeing respect for the patient's fundamental rights. Since the well-being of patients corresponds to

[99] BÄK, 2006, p. A 1704.

their fundamental moral and legal rights, an ethics committee, which represents a special competence in the hospital because it is composed of members of numerous professional groups and medical specialties, could be used to guarantee respect for the relevant patient rights and serve as a tool of compliance in this clearly defined sense.

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Compliance as a mean for the protection of the financial interests of the European Union[**]

ABSTRACT: The protection of the EU budget and its financial interests is an important task of the Member States as well as the institutions, bodies and agencies of the Union. This objective can be reached by several means: by preventing criminal offences affecting the financial interests of the Union, by monitoring the regular implementation of the EU budget, by strengthening operational cooperation between national and EU authorities and by sanctioning of these criminal offences and illegal activities. However, in order to ensure an effective protection of the financial interests, the European Union has to primarily focus on the preventive measures, since it is always better to detect and prevent the commission of crimes than to react to committed illegal acts. In this context, compliance measures, e.g. risk assessment and risk management, internal investigation or whistleblowing, play an important role. This paper focuses on the protection of whistleblowing. In 2019, the European Parliament and the Council adopted a Directive on the protection of whistleblowers, which lays down common minimum standards that provide a high level of protection for persons reporting breaches of Union law. The scope of the Whistleblowing Directive also covers breaches affecting the financial interests of the Union, since it can be a useful tool for the early detection and prevention of such criminal offences.

KEYWORDS: protection of the financial interests of the European Union, EU budget, risk assessment, whistleblowing, internal reporting, external reporting, public disclosure.

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1. The importance of the protection of the financial interests of the European Union

The European Union (EU) has its *own budget* which amounts to approximately 140-170 billion euros per year. This huge amount attracts the attention of criminals, who use a variety of extremely diverse criminal behaviours and tools to illegally obtain smaller or larger sums from the EU budget. Fraud and other illegal acts that harm the financial interests of the EU can take various forms and cause serious damage. The proliferation of criminal offences affected the EU budget– for economic and political reasons –and forced the EU to create an appropriate framework for this form of crime. Thus, the protection of financial interests can also be considered one of the *legitimizing factors* of EU criminal law.

At the same time, it is important to note that the protection of the financial interests of the EU is primarily the *responsibility of the Member States* who collect the majority of revenues in the EU budget, and mostly use the resources from it. Furthermore, the obligation of the Member States to protect the financial interests of the EU can also be derived from the *principle of sincere cooperation* (Article 4(3) of the Treaty on the European Union (TEU)). Based on this principle, the Member States are obliged to take the necessary measures in order to prevent and sanction fraud, other irregularities and illegal acts affecting the EU budget, as well as to recover illegally acquired assets.[1]

However, the financial interests of the EU cannot solely be protected by the Member States, as the cross-border and supranational nature of such criminal offences requires the action of the EU as well. Therefore, tasks related to the protection of the EU's financial interests are divided between the Member States and EU, especially the European Commission. In order to protect its financial interests as effectively as possible, the EU, in close cooperation with the Member States, is forced to develop a *complex, comprehensive, adaptable anti-fraud policy* that includes the control and monitoring of the EU budget; efficient and effective prevention, detection, and sanctioning of illegal actions harming financial interests, as well as the quick recovery of illegally acquired or used amounts from the supranational

[1] See: Explanatory Report on the Convention on the protection of the European Communities' financial interests [OJ C 191, 23.6.1997] [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51997XG0623(02) (Accessed: 05 December 2024).

budget.[2] For this purpose, the EU has developed several *comprehensive anti-fraud strategies*.[3]

2. Instruments and institutions for the protection of the financial interests of the European Union

From our point of view, the legal protection of the financial interests of the EU is based on the following four fundamental pillars: *prevention*, *monitoring*, *cooperation*, and *criminal sanctioning*.

2.1. Prevention of criminal offences against EU budget

The first step in protecting the financial interests of the EU is *prevention of fraud and other illegal acts* that damage budgets. While the various legal consequences of administrative, civil, and criminal law reactively focus on and react to violations that have already been committed, preventive measures play a role in the early detection and, if possible, the prevention of fraud and other criminal offences. In this context, *compliance measures* can be of utmost importance.

Several preventive measures can be implemented. First, it is desirable for the EU to create a *coherent and simpler regulatory environment* because complicated, too detailed and often incomplete EU legislation provides countless opportunities, regulatory gaps, and loopholes which offenders can use for illegal acts. Increasing the effectiveness of preventive measures and

[2] Farkas, 2001a, p. 35.

[3] See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and the Court of Auditors on the Commission anti-fraud strategy [COM(2011) 376, 24.6.2011] [Online]. Available at. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0376 (Accessed: 05 December 2024); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Auditors – Commission Anti-Fraud Strategy: Enhanced action to protect the EU budget [COM(2019) 196, 29.4.2019] [Online]. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:283041a7-6a5b-11e9-9f05-01aa75ed71a1.0003.02/DOC_1&format=PDF (Accessed: 05 December 2024); Regulation (EU) 2021/785 of the European Parliament and of the Council of 29 April 2021 establishing the Union Anti-Fraud Programme and repealing Regulation (EU) No 250/2014 [OJ L 172, 17.5.2021] [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0785 (Accessed: 05 December 2024).

eliminating support mechanisms that facilitate fraud commissions at the EU level can result in a significant reduction in damage.[4]

It is the legal duty of all actors to manage EU funds to prevent irregularities and fraud from affecting the EU budget. In order to achieve this objective, the institutions involved in the implementation of the EU budget (i.e. the European Commission, the Member States, and other partners) have an obligation to implement *management and internal control procedures* designed to prevent and detect irregularities, errors, and fraud.[5] It is also essential to develop special *information, risk assessment, and management systems* that can provide data on warning signs of fraud and other crimes, fraud patterns, profiles of fraudsters, and the vulnerability of the internal control systems of the EU. With these methods, potential illegal acts can be detected and prevented at an early stage, thus, resources can be used more efficiently. The effective operation of the risk management system requires the adoption of relevant internal regulations, continuation of effective internal and external communication, and establishment of professional training and further education programs for EU and national officials. In order to detect and filter out fraud, the creation of *national and EU-level databases* may also be justified.[6]

2.2. Monitoring the regular implementation of the EU budget

A number of EU institutions are required to fight fraud and other crimes affecting the financial interests of the EU and have the competence for administrative, political, and financial control over the proper use of the EU budget. Among these, the following must be highlighted.

Monitoring the implementation of the EU budget is primarily the task of the *European Commission*, which is responsible for internal control of the EU budget. Within the European Commission, tasks related to budget control are conducted by the *Directorate-General for Budget (DG BUDG)*. The external, political control for the EU budget is provided by the *European Parliament*, which monitors the legality, efficiency, and effectiveness of budget implementation. The Parliament is responsible for

[4] Aronowitz, Laagland and Paulides, 1996, p. 20; Hecker, 2015, pp. 509-510.

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and the Court of Auditors on the Commission anti-fraud strategy [COM(2011) 376, 24.6.2011] [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0376 (Accessed: 05 December 2024).

[6] Bencze, 2007, p. 73, pp. 75-76; Mennens, 1996, p. 139.

monitoring the implementation of the EU budget, cost-effective use of EU funds, and investigating fraud and other irregularities in the implementation. These tasks are carried out by the *Budgetary Control Committee (CONT)* of the Parliament.[7]

The independent external financial audit of the EU is carried out by the *European Court of Auditors*, also known as the Union's financial conscience.[8] The Court of Auditors examine the accounts of all revenue and expenditure of the Union, as well as of all bodies, offices, or agencies set up by the Union in so far as the relevant constituent instrument does not preclude such examination. The Court of Auditors provides the European Parliament and Council with a statement of assurance regarding the reliability of the accounts and legality and regularity of the underlying transactions. The Court of Auditors examines whether all revenue has been received, all expenditures have been incurred in a lawful and regular manner, and whether financial management has been sound. In doing so, it can report any case of irregularity (Articles 285-287 of the Treaty on the Functioning of the European Union (TFEU)).

Another institution whose importance cannot be neglected is the *European Anti-Fraud Office (OLAF)*, which operates within the framework of the European Commission but enjoys complete independence and plays a key role in protecting the financial interests of the EU. The OLAF conducts external and internal administrative investigations to strengthen the fight against fraud, corruption, and other illegal activities affecting the financial interests of the EU.[9] However, it is worth highlighting that the OLAF does not have criminal competencies; its investigations remain within the territory of administrative law.

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[7] Holé, 2004, p. 305; Halász, 2018, p. 216, pp. 241-245; Várnay and Papp, 2005, pp. 829-830; Vervaele, 1992, pp. 75-84.

[8] Jacsó, 2012, p. 67.

[9] See in details: Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF) [OJ L 136, 31.5.1999] [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999D0352 (Accessed: 05 December 2024); Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 [OJ L 248, 18.9.2013] [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0883 (Accessed: 05 December 2024).

Finally, the *Advisory Committee for the Coordination of Fraud Prevention (COCOLAF)*, established by the European Commission in 1994[10] and operated by the European Anti-Fraud Office, deserves special mention. COCOLAF is a consultative body that formulates suggestions for the Commission in relation to the prevention and reduction of EU fraud and other illegal acts affecting financial interests as well as cooperation between Member States and between Member States and the European Commission.[11] Within COCOLAF, four sub-groups have been created:

a) *Fraud Prevention Group*, which stimulates cooperation between the relevant national authorities of EU countries and the Commission by exchanging experiences and best practices in fraud prevention;
b) *Reporting and Analysis of Fraudulent and Other Irregularities Group*, which focuses on introducing and discussing statistical analysis of reported cases and considers other issues relevant to the preparation of the report pursuant to Article 325 of TFEU[12];
c) *Anti-Fraud Coordination Service (AFCOS) Group*, which exchanges experiences and best practices in the investigative cooperation between OLAF and national authorities;
d) *OLAF Anti-Fraud Communicators' Network (OAFCN)*, which brings together spokespersons and public relations officers from relevant national authorities and the OLAF to share media strategies and promote communication on preventing and deterring fraud.[13]

2.3. Strengthening operational cooperation between national and EU authorities

The improvement of *institutional cooperation* between the relevant customs, tax, police, and law enforcement authorities of the Member States, as well

[10] Commission Decision 94/140/EC of 23 February 1994 setting up an advisory committee for the coordination of fraud prevention [OJ L 61, 4.3.1994] [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994D0140 (Accessed: 05 December 2024).
[11] Farkas, 2001a, p. 49; Holé, 2004, p. 306.
[12] Article 325(5) of the Treaty on the Functioning of the European Union (TFEU): *'The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article'.*
[13] The EU's committee for coordinating fraud prevention, [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l33161 (Accessed: 05 December 2024).

as the interaction between the Member States and EU institutions, especially OLAF, can be an important tool in the fight against illegal acts committed to the detriment of the EU budget.[14]

Mutual assistance and operational cooperation between the Member States and EU authorities in the fight against fraud can take many forms, that is, cooperation for preventing criminal offences violating the EU budget; maintaining a regular and close operational relationship between competent authorities; collecting, exchanging, analysing, and evaluating information and good practices; cooperation in order to refund illegally obtained funds affected by irregularities; and mutual assistance implemented in the field of detection, investigation, and sanctioning of committed irregularities. As a prerequisite for the effective use of mutual assistance, the Member States are obliged to ensure that national legislation (i.e. rules on confidentiality) does not slow down, block, or aggravate the exchange of information between the Member States.[15]

Strengthening cooperation between the law enforcement authorities of the Member States is of key importance in protecting the financial interests of the EU. National criminal law and traditional forms of criminal cooperation alone cannot provide an adequate response to cross-border international criminal offences affecting the EU budget, as criminals can move freely between member states, while national law enforcement authorities can only act within their national borders based on the principle of territoriality.[16] This causes countless problems for judicial authorities, such as the collection and use of evidence, exchange of information and data, and resolution of jurisdictional conflicts.[17] Therefore, the successful prosecution of increased cross-border criminal offences presupposes closer, more coordinated, and more effective forms of cooperation between the law enforcement agencies of the Member States.[18]

Since the oldest, classical form of *bilateral, horizontal cooperation* between the law enforcement authorities of the states (e.g. extradition, transfer of criminal proceedings or execution of criminal sentences, mutual legal aid, and assistance) has serious disadvantages and its effectiveness is

[14] Hecker, 2015, p. 509; Kuhl, 1998, pp. 267-269.
[15] Aronowitz, Laagland and Paulides, 1996, pp. 21-26; Bencze, 2007, pp. 73-75; Farkas, 2001a, pp. 36-37; Mennens, 1996, p. 139.
[16] Sieber, 2009, p. 4; Zieschang, 2001, pp. 262-263.
[17] Murawska, 2008, pp. 58-59.
[18] Farkas, 2001b, p. 13.

often questionable,[19] the EU has sought to develop more effective means of cooperation for a long time. These forms are based on the *principle of mutual recognition* which can be regarded as the cornerstone of judicial cooperation in the EU (Articles 67(3) and 82 of the TFEU). Based on this principle, the EU has adopted a number of secondary legal acts, such as the *European Arrest Warrant*[20], the *European Investigation Order*[21], and the *European Protection Order*[22], whose primary objective is to provide a faster and more efficient solution in the fight against cross-border crimes instead of the traditional forms of horizontal cooperation.[23] Therefore, the cooperation system of the EU has gradually *transformed from horizontal to vertical cooperation* in which the Member States prosecute cross-border crimes directly and operatively.[24]

The EU also recognised that the effective protection of its financial interests cannot be solely ensured with the help of the police and law enforcement authorities of the Member States, but the *establishment of different supranational bodies* is also essential in preventing criminal offences against the financial interests of the EU. Some EU institutions contribute to protecting the financial interests of the Union (e.g. Europol, Eurojust, and the European Judicial Network) and aim at operational cooperation, assistance, exchange of information between the police and law enforcement authorities of the Member States, coordination of investigations and criminal proceedings at the national level, and resolution of jurisdictional conflicts.[25] However, with the establishment of the

[19] Ligeti, 2002, pp. 75-76; Sieber, 2009, pp. 17-18, p. 28.
[20] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [OJ L 190, 18.7.2002] [Online]. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:3b151647-772d-48b0-ad8c-0e4c78804c2e.0004.02/DOC_1&format=PDF (Accessed: 05 December 2024).
[21] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [OJ L 130, 1.5.2014] [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0041 (Accessed: 05 December 2024).
[22] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order [OJ L 338, 21.12.2011] [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0099 (Accessed: 05 December 2024).
[23] Spencer, 2011, p. 351.
[24] Farkas, 2017, p. 279.
[25] Holé, 2004, pp. 306-307.

European Public Prosecutor's Office (EPPO)[26], new strategies have been developed in the fight to protect the financial interests of the EU as this supranational EU body conducts investigations and prosecutions in a unified manner.

2.4. Criminal law as a mean for the protection of the financial interests of the European Union

Although the prevention of criminal offences against the EU budget and the mutual cooperation carried out for this purpose plays an important role in the protection of the financial interests of the EU, seriousness of these crimes necessitates the *application of criminal law instruments* as an *ultima ratio*.[27] Due to the volume, severity, and economic and political consequences of these crimes, the EU cannot lack in uniform, EU-level criminal law measures.

In this context, the *Treaty of Lisbon* plays an important role because it provides reinforced and strong legislative competencies for the EU legislator to harmonise the criminal law and criminal procedural law of the Member States, as well as for the adoption of supranational criminal regulations in the field of crimes affecting financial interests.

The criminal law competencies of the EU can be divided into two categories: *legal harmonization* and *supranational legislative competencies*. The continuous harmonisation of legal systems primarily aims at the gradual elimination of differences between the criminal law systems and ensures that criminal offenders are judged in a similar manner in each Member State. Due to legal harmonisation, the Member States must declare the same conducts as criminal acts and impose similar sanctions on perpetrators.[28] However, legal harmonisation results in the adoption of minimum rules which allows the Member States to establish or maintain stricter rules than required by the EU. However, in the case of supranational legislative competence, the EU legislator not only harmonises or approximates, but also unifies the national regulation of criminal offences against the EU budget, as the Member States cannot deviate from the criminal law

[26] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [OJ L 283, 31.10.2017] [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1939 (Accessed: 05 December 2024).
[27] Farkas, 2003, p. 106; Jacsó, 2012, pp. 69-70; Madai, 2011, pp. 235-236.
[28] Karsai, 2008, p. 434.

provisions introduced by the EU. Therefore, supranational criminal law competencies open the way for the development of *'genuine' EU criminal law*.

The legal harmonisation competence of the EU is regulated by *Article 82 TFEU*[29] in the field of criminal procedural law and by *Articles 83(1) TFEU*[30] and *Article 83(2) TFEU*[31] in substantive criminal law, whereas the supranational legislative competence of the EU can be found in *Article 325 TFEU*[32].

[29] Article 82(2) of the TFEU: *'To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern mutual admissibility of evidence between Member States; the rights of individuals in criminal procedure; the rights of victims of crime; any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament. Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals'.*

[30] Article 83(1) of the TFEU: *'The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament'.*

[31] Article 83(2) of the TFEU: *'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned'.*

[32] Article 325(4) of the TFEU: *'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies'.*

3. Compliance as a mean for the protection of the financial interests of the European Union – the legal protection for whistleblowers

As already mentioned, the effective protection of the financial interests of the EU has to primarily focus on the prevention of criminal offences, as it is always better to detect and prevent the commission of crimes than to react to committed illegal acts. In this context, *compliance tools* also play an important role, for example *risk assessment and risk management*, *internal investigation*, or *whistleblowing*. Among these instruments, this paper focuses only on whistleblowing as it has been in focus of the EU legislation since 2019 when the Council and European Parliament adopted a Directive on the protection of whistleblowers.[33]

3.1. The concept of whistleblowing

Whistleblowing is a concept of Anglo-Saxon origin which broadly refers to *any reporting of different violations and abuses*. Whistleblowing covers the reporting of violations of the law in the private or public sector. The types of whistleblowing can be classified differently: some authors distinguish between *active, passive, and embryonic whistleblowing,*[34] others distinguish between *legal and illegal,*[35] *hard and soft*[36] and *intern, extern, and mixed whistleblowing.*[37]

Whistleblowing is one of the *most important areas of compliance*, particularly *corporate compliance*. If a criminal offence is committed within the framework or in favour of a legal person, whistleblowing enables people who first notice corporate abuse to disclose the information they have, thus enabling the initiation of legal proceedings.[38] Unlawful activities can occur in any organisation, either private or public, large or small. People who work for an organisation are often the first to know about such abuses and are in a privileged position to inform those who can address the problem.

[33] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [OJ L 305, 26.11.2019] [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937 (Accessed: 05 December 2024) (hereinafter referred to as Whistleblowing Directive).
[34] Westman, 1991, pp. 19-20.
[35] Vaughn, 2012, p. 11.
[36] Leiter, 2014, p. 436.
[37] Kohn, 2011, p. 23.
[38] Ambrus and Farkas, 2019, pp. 127-128.

Therefore, the effective protection of whistleblowers is essential in order to safeguard the public interest, protect freedom of expression, and promote transparency, accountability, and democratic governance in general.[39]

Whistleblowing can play an important role in protecting the EU's financial interests. Fraud, corruption, money laundering, and other illegal acts that harm the financial interests of the EU are rarely carried out by criminals acting independently and are most often committed by organised groups, hierarchically structured or loosely operating criminal organisations, or within the framework of legal entities, economic organisations, or public institutions and offices. Persons who work for a public or private organisation or are in contact with such an organisation in the context of work-related activities, are often the first to know about criminal offences which arise in that context. By reporting breaches of Union law or irregularities affecting the financial interests of the EU, such persons act as *'whistleblowers'* and thereby play a key role in exposing and preventing such crimes, in protecting the EU budget and in safeguarding the welfare of society (Preamble (1) of the Whistleblowing Directive).

However, in the case of crimes committed within the framework of legal persons and organisations, a *high degree of latency prevails*, as potential whistleblowers are often discouraged from reporting their concerns or suspicions for *fear of retaliation* (Preamble (1) of the Whistleblowing Directive). People who *'raise an alarm'* often risk their careers and livelihoods, and in some cases suffer severe and long-lasting financial, health, reputational, and personal repercussions and/or discrimination.[40] Therefore, whistleblowers should be protected, and reporting should be encouraged while providing positive measures. However, the lack of effective protection across the EU can undermine the proper functioning of the internal market and make it more difficult to detect, prevent, and deter fraud, corruption, and other illegal activities that affect the financial interests of the EU.[41] A consistently high level of whistleblower protection throughout the EU can encourage people to report wrongdoing that may harm the public interest. It can also enhance openness and accountability in government and corporate workplaces and enable journalists to perform their fundamental roles in European democracies.[42] Therefore, the new EU

[39] Baran, 2019, p. 430; Georgiadou, 2018, p. 166.
[40] Baran, 2019, p. 430.
[41] Baran, 2019, pp. 430-431; Georgiadou, 2018, pp. 166-167.
[42] Georgiadou, 2018, pp. 168.

Directive aims to create an *effective framework for the protection of reporters and the encouragement of whistleblowing*.

3.2. The protection of whistleblowers in the European Union

The purpose of the Directive of the EU is to enhance the enforcement of Union law and policies in specific areas by laying down *common minimum standards* that provide a high level of protection for persons reporting breaches of Union law (Article 1 of the Whistleblowing Directive). The Directive also aims to strengthen the protection of whistleblowers and avoid retaliation against them, provide legal clarity and certainty, and support awareness-raising and fight against socio-cultural factors that lead to under-reporting.[43]

The *material scope* of the Directive covers three main areas: first, the breaches falling within the scope of the Union acts in certain areas (public procurement; financial services, products and markets, and prevention of money laundering and terrorist financing; product safety and compliance; transport safety; protection of the environment; radiation protection and nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; protection of privacy and personal data, and security of network and information systems); second, *breaches affecting the financial interests of the Union* as referred to in Article 325 TFEU and as further specified in relevant Union measures (see Preamble (15) of the Whistleblowing Directive); and third, breaches relating to the internal market, including breaches of Union competition and State aid rules, and relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law (Article 2 of the Whistleblowing Directive). In connection with the material scope, the Directive therefore follows a *sectoral approach*, as it cannot be applied to all areas of EU law, but only to various EU policies.[44]

According to the Directive, the *reporting persons*[45] shall *qualify for protection* if they have *reasonable grounds to believe that the information*

[43] White, 2018, p. 172.
[44] Ibid.
[45] Under Art. 5(7) of the Whistleblowing Directive, reporting person can be a natural person who reports or publicly discloses information on breaches acquired in the context of his/her work-related activities.

on breaches[46] *reported was true* at the time of reporting, and they reported either *internally or externally or made a public disclosure* (Article 6(1) of the Whistleblowing Directive). Therefore, the Directive differentiates between three categories of information provision:

- *Internal reporting* refers to the oral or written communication of information about breaches within a legal entity in the private or public sector. Legal entities (in the private sector; those with 50 or more workers) are required to establish impartial, secure, and confidential channels and procedures that enable their workers to report information on breaches (Article 5(4) and Articles 7-9 of the Whistleblowing Directive).
- *External reporting* refers to the oral or written communication of information regarding breaches to competent authorities. As a general rule, *reporting through internal channels has to precede the external reporting*, except when the breach cannot be addressed effectively internally or when the reporting person considers that there is a risk of retaliation. Thus, whistleblowers should first report information to their employers through internal reporting channels. This is necessary in order to ensure that information on violations swiftly reaches those closest to the source of the problem and most capable of addressing it. This also helps prevent unjustified reputational damage.[47] However, people are entitled to *report the violation directly through independent and autonomous external reporting channels* (Article 5(5) and Articles 7, 10-14 of the Whistleblowing Directive).
- *Public disclosure* is referred to making the information on breaches available to the public domain. The Directive stipulates that public disclosure can be made and the person concerned can be qualified for protection if the violation was first reported internally and externally, or directly externally, but *no appropriate action was taken* in response to the report, and the person has reasonable grounds to believe that the *breach may constitute an imminent or manifest danger to the public interest* (such as where there is an emergency situation or a risk of

[46] Under Art. 5(2) of the Whistleblowing Directive, information on breaches means information, including reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur in the organisation in which the reporting person works or has worked or in another organisation with which the reporting person is or was in contact through his/her work, and about attempts to conceal such breaches.

[47] Georgiadou, 2018, p. 168.

irreversible damage), there is a *risk of retaliation* or there is a *low prospect of the breach being effectively addressed* (such as where evidence may be concealed, destroyed, or where an authority may be in collusion with the perpetrator of the breach or involved in the breach) (Article 5(6) and Article 15 of the Whistleblowing Directive).

The Directive stipulates that the Member States are required to ensure that the *identity of the reporting person is not disclosed* to anyone *without his/her explicit consent*, except where this is a necessary and proportionate obligation imposed by the Union or national law in the context of investigations by national authorities or judicial proceedings, including with a view to safeguarding the rights of defence of the person concerned (Article 16 of the Whistleblowing Directive). However, in the context of *anonymous reporting*, the Directive leaves it within the competence of the Member States to decide whether legal entities in the private or public sector and competent authorities are entitled to accept and follow up on anonymous reports of breaches (Article 6(2) of the Whistleblowing Directive).

The protection of whistleblowers can be ensured by two means: on the one hand, by *negative means*, that is, the prohibition of and protection against retaliation, and on the other hand, by *positive, supportive measures*.

Retaliation has an intimidating effect on potential whistleblowers, particularly when the breach remains undeterred and unpunished.[48] Therefore, the Directive obliges the Member States to *prohibit any form of retaliation* against reporting persons, including threats or attempts at retaliation. Retaliation refers to any direct or indirect act or omission which occurs in a work-related context, is prompted by internal or external reporting or public disclosure, and causes or may cause unjustified detriment to the person reporting (Article 5(11) of the Whistleblowing Directive). The Directive lists the following possible types of retaliation: suspension, lay-off, dismissal, or equivalent measures; demotion or withholding of promotion; transfer of duties, change of location of place of work, reduction in wages, change in working hours; withholding of training; negative performance assessment or employment reference; imposition or administration of disciplinary measures, reprimand or other penalty, including a financial penalty; coercion, intimidation, harassment, or ostracism; discrimination, disadvantageous or unfair treatment; failure to convert a temporary employment contract into a permanent one, where the

[48] Ibid.

worker had legitimate expectations of permanent employment; failure to renew or early termination of a temporary employment contract; harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income; blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry; early termination or cancellation of a contract for goods or services; cancellation of a licence or permit; psychiatric or medical referrals. However, this is not an exhaustive enumeration, therefore other possible forms of retaliation are also prohibited. The Member States are required to take necessary measures to ensure that *reporting persons are protected against retaliation*. Potential whistleblowers shall not be considered to have breached any restrictions on the disclosure of information and shall not incur liability of any kind with respect to such a report or public disclosure. Reporting persons shall not incur liability with respect to the acquisition or access to information, which is reported or publicly disclosed, provided that it does not constitute a self-standing criminal offence. The reporting persons shall have *access to remedial measures* against retaliation (Articles 19 and 21 of the Whistleblowing Directive).

For the *encouragement of whistleblowing*, the Directive also prescribes supporting measures, including comprehensive and independent information and advice, which are easily accessible to the public free of charge, on procedures and remedies available, on protection against retaliation, and on the rights of the person concerned; effective assistance from competent authorities before any relevant authority is involved in their protection against retaliation; legal aid in criminal and cross-border civil proceedings, legal counselling or other legal assistance; and financial assistance and support measures, including psychological support. Furthermore, the reporting persons shall enjoy the right to an effective remedy and a fair trial, the presumption of innocence, and the rights of defence, including the right to be heard and the right to access their file, in accordance with the *Charter of the Fundamental Rights of the European Union*. These rights and remedies cannot be waived or limited by any agreement, policy, form, or condition of employment, including a pre-dispute arbitration agreement (Articles 20, 22, and 24 of the Whistleblowing Directive).

Furthermore, the Member States are obliged under the Directive to *prescribe effective, proportionate, and dissuasive penalties* applicable to

natural or legal persons if they hinder or attempt to hinder reporting, retaliate or bring vexatious proceedings against reporting persons, or breach the duty of maintaining the confidentiality of the identity of reporting persons. However, the whistleblowers can also be punished with effective, proportionate, and dissuasive penalties if they *knowingly reported or publicly disclosed false information* (Article 23 of the Whistleblowing Directive).

Finally, it must also be highlighted that the Directive only provides for a *minimum-harmonization*, which does not prevent the Member States from introducing or retaining provisions which are more favourable to the rights of reporting persons (Article 25 of the Whistleblowing Directive). In this context, the Member States are entitled, for example, to provide a more complex encouragement and protection system for whistleblowers or to prescribe more severe sanctions for violations of the Directive.[49]

4. Closing thoughts

In summary, compliance tools can play an important role in protecting the financial interests of the EU. Among the compliance measures, the protection of whistleblowers of legal violations committed within the framework of enterprises can be highlighted, which can help in detecting crimes that harm the financial interests of the EU and reduce the latency associated with such crimes. It is not a coincidence that the scope of the Whistleblowing Directive expressly covers breaches affecting the financial interests of the Union, since it can be a useful tool for the early detection and prevention of such criminal offences.

The Member States had to implement the provisions of the Directive on 17 December 2021. In Hungary, at the time of the adoption of the Directive, Act CLXV of 2013 on complaints and public interest disclosures, which came into force on 1 January 2014 contained the most important rules in connection with whistleblowing. Although the Act was generally in line with the requirements of the EU, several important differences could be observed because of which the European Commission initiated an infringement procedure against Hungary (along with fourteen other Member

[49] Ambrus and Farkas, 2019, p. 138.

States) for not having transposed the Directive until the required deadline.[50] Consequently, the Hungarian legislation adopted a new Act in 2023 (Act XXV of 2023 on complaints, public interest disclosures, and rules related to the reporting of abuses), which contains more detailed regulations and a *complex whistleblowing system*, which better complies with the provisions of the Directive of the EU.

[50] July Infringements package: key decisions, [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/EN/inf_22_3768 (Accessed: 05 December 2024).

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Workplace compliance and whistle-blowing in Hungary[***]

ABSTRACT: Employers have several obligations that do not stem from labour law alone. This study presents the phenomenon of workplace compliance with several associated issues. This study examines diversity management, one of the most colourful challenges of companies, and discusses the workplace whistle-blowing system, with its domestic rules and possible future amendments.

KEYWORDS: workplace compliance, whistle-blowing, labour law.

1. Introduction

Employers have several legal obligations in managing their operations. When organising production, it is essential to monitor, comply with, and enforce rules with employees. This includes obligations arising from labour law, health and safety standards, and other requirements arising from national and international legal sources. Global regulations have a significant impact on the way employers operate, organise, and administer their businesses. As Balogh states, independent companies no longer exist.[1] As part of the global market, employers face diverse expectations, such as the increasing need to produce ESG (environmental, social, and governance sustainability) reports or the development of a labour compliance audit process. There is a growing expectation of sustainability from companies, with an increasing focus on social sustainability in addition to environmental sustainability. The expectations of sustainability have many dimensions, one of which is meeting social needs. The world is now curious

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[1] Balogh, 2019.

about the processes and corporate policies using which a product or service was created, and the impact it had on the rest of the world.[2]

2. Workplace compliance

Compliance with the law is generally recognised as having an impact on companies' interests, however, there is growing social and business recognition that morally objectionable behaviour threatens companies' interests.[3] One of the pillars of sustainable business is workplace compliance, which is a prerequisite for ethical business. Workplace compliance permeates all segments of a company's activities and decisively influences operational strategies. Employers' workplace compliance can be considered as a form of risk management that can be divided into two parts: regulatory and corporate compliance. Regulatory compliance comprises what an employer does to comply with the external standards and regulations that apply to its industry. In contrast, corporate or company compliance comprises the internal measures implemented to ensure that the actors and employees in the organisation comply with external and internal requirements in their work and conduct so that individuals behave appropriately and create a safe working environment.[4]

Ensuring maximum effective compliance in the workplace includes the development, implementation, and monitoring of company policies and practices, and appropriate training for staff and employers.

How can we define the areas of workplace compliance? Violations of workplace compliance can assume several forms. It can include violations of the requirement of equal treatment that cannot be objectively justified, sexual harassment in the workplace, corrupt practices by employees, unfair business policies, and breaches of duty by employers, such as late payment, endangering the safety of employees, and failure to respect the work-life balance of employees.[5]

[2] Balogh, 2019.
[3] Ambrus, 2020.
[4] Malyk, no date.
[5] Malyk, no date.

3. An area of workplace compliance: diversity management

Employees in the workplace often perform their work based on uniform contracts, however, each employee has a unique range of skills, qualities, motivations, and competences. The protection of the individuality of the worker is also reflected in the prohibition of discrimination based on the principle of equality, the regulation and practice of which are constantly evolving and face new pitfalls and difficulties such as gender issues. To reduce discrimination in Hungary, Act No. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (hereinafter, the Equal Opportunities Act) provides in Article 63 Section (4) that budgetary bodies and majority state-owned legal entities with more than 50 employees are obliged to adopt an equal opportunity plan. The legislature only imposes the obligation to draw up an equal opportunity plan on the public sector employers, however, many employers in the competitive sector also have an equal opportunity plan. Equal opportunity plans cover, among other things, workplace support measures for women, young workers, ageing workers, and workers with disabilities, which may go beyond what is required by law. Therefore, we must formulate a system for organising diversity management. Diversity management aims to ensure that the advantages and disadvantages arising from belonging to a particular group do not play a role in the workplace.[6] This is a holistic and strategic set of behaviours that aims to maximise the potential of each individual to contribute to the achievement of the organisation's goals by harnessing individual talent and differences in a diverse workforce environment. Managing interpersonal relationships in a diverse workforce environment presents several challenges related to changes in social, legal, and economic environments; individual expectations and values; and inevitable changes in organisational culture.[7]

This activity requires a wide range of employer skills. An important step is to understand and embrace the concepts of diversity management, recognising that diversity permeates all aspects of management. Moreover, employer awareness of their own internal culture is of paramount importance in understanding prejudices and stereotypes. The employer’s

[6] Primecz, 2019.
[7] Gwele, 2009.

attitude is emphasised, as it requires a willingness to critically examine and change institutional practices that create barriers for different groups.[8]

Managing diversity on a broad scale is a clear advantage in the labour market, as flexibility and creativity are key to competitiveness. Employer organisations must be flexible and adaptable to meet new consumer demands; therefore, adequate diversity management is an integral part of this. Heterogeneity fosters creativity, and heterogeneous groups have been proven to produce better problem solving and higher levels of critical analysis. A study conducted by an international organisation, the Boston Consulting Group, reveals that running diverse organisations, is clearly advantageous.[9] This can be a vital advantage when companies are undergoing significant changes to identify new and more efficient mechanisms to operate sustainably.[10] According to Primecz, eight groups in Hungary are eligible for support: women, Roma, immigrants, non-Christians, people with disabilities, young people, people over 50 years of age, and people with a minority sexual orientation. There are many ways to support them; however, previous studies suggest that the most effective way is not to provide undue advantages. Rather, what is required is training and information for employees who are not part of the protected groups (the majority) to eliminate prejudice and develop a more inclusive organisational culture.[11]

Diversity management offers appropriate programmes for women and other workers with protected characteristics to strategically promote better outcomes. However, workplace and family issues owing to the COVID-19 pandemic have also caused setbacks in this area. Clearly, the caregiving role has shifted to women, with more women being forced to reduce their previous work activities.[12] According to a United States (US) survey, only 35% of working mothers stated they planned to work in the same manner as before the pandemic. These challenges imply that companies require more nuanced tools to ensure that vulnerable groups, such as women, can advance and develop their talent. Therefore, based on this analysis, researchers hypothesise that once the requirements of such workforces are identified

[8] UC Berkeley, no date.
[9] Jenei et al., 2021.
[10] UC Berkeley, no date.
[11] Primecz, 2019.
[12] Novacek et al., 2022.

and met as accurately as possible, companies can achieve positive employee outcomes.[13]

Contrary to the US experience, the area is unregulated in the European Union (EU), with a plethora of internal regulatory material. An initiative was launched in 2004 with the creation of the European Diversity Charter, which set out to promote EU anti-discrimination and equal opportunity policies in the workplace. Its aim is to shape attitudes, engage, and support managers in achieving organisational diversity and inspire the development and rethinking of human resource management. In 2016, several large companies in Hungary signed the European Diversity Charter, whose primary objectives included striving for equal opportunities and non-discrimination in the workplace.[14] Another important objective is to inform employees about their rights and obligations in relation to the implementation of the principle of equal treatment and to provide them with opportunities for work-life balance and individual development. As aforementioned, one of the benefits of joining the Charter is its potential for better business results. Increasingly, domestic employers are also recognising that improving work-life balance, improving employee satisfaction, and retaining talent are important factors in promoting organisational competitiveness and are important objectives for organisations adopting the Charter. Diversity management addresses a wide range of issues within an organisation, among which it is essential to demonstrate a commitment to well-known CSR (corporate social responsibility), as diversity is one of the cornerstones of CSR. In addition, the optimisation of human resource management stands out, which can contribute to management objectives by identifying and better exploiting available employee competencies and improving the working environment. The aim is to improve a company's economic performance by improving its innovation capabilities, enhancing its image, and better understanding its customers' expectations.

Compliance with legal and regulatory constraints is of particular importance and can be achieved through the effective management of compliance in the workplace.

[13] Novacek et al., 2022.
[14] Az Európai Sokszínűségi Karta Magyarországon, 2019.

4. The system of whistle-blowing in Hungary

The proper functioning of the compliance system requires that employees of the company anonymously report about irregular workplace practices, equal treatment violations, or suspected cases of corruption to the employer through appropriate reporting channels. Corporate internal whistle-blowing systems have become increasingly common in multinational companies following a change in regime with the emergence of multinationals. In Hungary, a law came into force in 1977 under the socialist system[15].[16] According to the explanatory memorandum, the Act provides uniform rules for the submission, investigation, and substantive handling of citizens' notifications, complaints, and proposals of public interest and provides more effective protection for citizens who make proposals. Simultaneously, it is intended to prevent unfounded and irresponsible reports and complaints. Ambrus stated that despite its socialist nature, the legislation was forward-looking and modern. This legislation was in force until 1 May 2004 after which a uniform standard came into force in 2009, Act No. CLXIII of 2009 on the Protection of Fair Procedure and Related Amendments. This Act introduced whistle-blowing protection for the first time in Hungary. The aim of the legislature was to expose corruption and protect people who reported corruption. In addition to the classic preventive measures, the Act places under the Office for Public Procurement and Public Interest Protection the power to investigate cases of violations of the requirement of due process and to protect employees who make whistle-blowing reports. An employee's complaint may concern any breach of public interest, and not only those which fall within the scope of the Office's investigations.

Comparing the Hungarian legislation of the time with the institution of whistle-blowing known abroad, the explanatory memorandum of the Act states that the institution is based on a civil organisation, and the person who discloses the abuse is primarily provided legal protection, and there is no automatic remuneration for their activities, only compensation. In practice, a well-established whistle-blowing system creates a transparent and well-regulated working environment in which reporting channels and investigations can effectively resolve organisational problems. The safe atmosphere, awareness of the rights and values of those involved, and predictable consequences mean that whistle-blowers' primary objective is

[15] Act No. I of 1977 on Public Interest Reports, Proposals, and Complaints.
[16] Ambrus, 2019.

not to settle personal disputes with others, pursue their own career goals, or obtain financial benefits, but to help the organisation function effectively. This approach contributes significantly to preventing corruption and prioritises the prevention of sanctions.

In Hungarian legislation, the notifier is also entitled to a success fee, and if the Office imposes a fine based on the notification, the notifier is entitled to 10% of the fine. Unfortunately, the law on the establishment of the Office for Public Procurement and Public Interest Protection did not enter into force; it was sent back to the Constitutional Court, which did not create new legislation after the 2010 parliamentary elections. Therefore, in the absence of the necessary authority to apply this law, the procedures under the law could not be conducted, making the law inapplicable.

On 1 January 2014 Act No. CLXV of 2013 on Complaints and Notifications of Public Interest (hereinafter Pkbt.) entered into force. Since then, it has been the law currently in force.

The legislature has recognised that private employers are increasingly using whistle-blowing systems, which has raised data protection concerns for the legislature. Therefore, in relation to employment reporting schemes the Act aims to establish the basic conditions for the use of such reporting schemes, while simultaneously limiting and conditioning the processing of employees' personal data.

The legislature has provided guarantees for the operation of such systems, such as, purpose limitation, notification to the register of data processing, prohibition of processing of specific personal data, conditions for the cessation of processing, information to employees, and prevention of abuse.

This law lays down the primary principles for examining notifications. This ensures the protection of whistle-blowers and the employer's obligation to investigate. The employer must provide whistle-blowers the opportunity to defend themselves in accordance with the principle of due process and must be able to conduct a proportionality test to ensure that minor cases do not overburden the available resources. In addition, the employer is under a general obligation of confidentiality with regard to the investigator of the complaint. From a data protection viewpoint, an important principle is to define the conditions for guaranteeing the transfer of data abroad. Moreover, the law regulates procedural deadlines and defines the measures to be adopted following notification.

The law must be applied in conjunction with the principles of the general provision of personal rights in the Labour Code (Act I of 2012 on the Labour Code). According to this principle, an employee's right to privacy may be restricted if the restriction is absolutely necessary for reasons directly related to the purpose of the employment relationship and proportional to the achievement of the objective. Moreover, the Labour Code stipulates that employees must be informed in writing in advance of the manner, conditions, and expected duration of the restriction of the right to privacy and of the circumstances justifying its necessity and proportionality. The employer may, considering the above labour law rule, establish rules of conduct protecting public interests or overriding private interests, which the employer must publish in a manner accessible to all, together with a description of the procedure involved. This internal set of rules is known in the employer sector as the Code of Conduct or Code of Ethics.

A Code of Ethics can set standards of conduct in several areas, the most relevant being mission, core values, organisational vision, workplace culture, reputation protection, fair business conduct, dealing with customers, dealing with third parties (e.g. suppliers, authorities), use of the Internet, social media, dealing with the media, relationships within the organisation, respect for each other, health and safety, and expectations for behaviour outside the workplace. In addition, anti-corruption, giving/accepting business gifts, hospitality, conflicts of interest, data protection, confidentiality, cybersecurity, competition law, expectations of managers, communication within and outside the organisation, and credibility of financial reporting are also significant. Areas of direct relevance to employment relationships are protection of the working environment, working conditions, work equipment, energy efficiency, obligation to attend required training, prohibition of equal treatment, discrimination, prohibition of harassment, psychoterrorism, intimidation, and reporting of abuse. Further, the Code of Ethics sets out the penalties and measures to be adopted, that is, the consequences of breaching it.

Therefore, the employer may establish a whistle-blowing system for reporting breaches of these rules of conduct (which are rules protecting the public interest or overriding private interests) and of the law, under which employees of the employer and persons who have a contractual relationship with the employer's organisation or who have a legitimate interest in

reporting or in remedying or ending the conduct which is the subject of the report may report abuse (Article 14 of the Pkbt.).

To ensure publicity, the Act requires employers to publish detailed information on the operation of the notification system and the notification procedure on the website of the employing organisation (Article 14, Section (2) of the Pkbt.)

In addition to substantive rules, the law provides procedures and investigations. When filing a notification, the notifier must declare that the notification is made in good faith concerning the circumstances in which he/she is aware of or has reasonable grounds to believe that they are true (Article 15, Section (6) of the Pkbt.). The employer, or the representative who conducts the investigation, must draw the whistle-blower's attention to the consequences of making a report in bad faith, the procedural rules governing the investigation, and the fact that if the whistle-blower's identity is disclosed, it will be treated confidentially by the employer at all stages of the investigation.

Further, the law provides safeguards for the person concerned in the report as if it were based on the presumption of innocence. These include informing the person concerned with the notification, their rights in relation to the protection of personal data, rules governing the processing of their data, their right to legal representation, and the possibility of presenting evidence.

The legislature provides two time limits for conducting investigations: subjective and objective. The general time limit is 30 days from the receipt of the notification (subjective time limit), from which, except in the case of a notification by an anonymous or unidentified notifier, an exception may be made only in particularly justified cases with simultaneous information of the notifier; however, even in this case, the duration of the investigation may not exceed three months. However, if the notification is made six months after the date on which the notifier became aware of the act or omission complained of, the investigation may be waived (objective time limit).

It is important that the whistle-blower's identity remains completely confidential if the whistle-blower has provided his/her name. This is the purpose of the rule that states that the notification system should be designed such that the identity of the non-anonymous notifier cannot be known to anyone other than the notification investigators. Until the investigation is closed or formal prosecution is initiated as a result of the

investigation, the investigators of the report must keep confidential information on the content of the report and the persons involved in the report, and may not share it with any other department or employee of the employing organisation, except for the person involved in the report (Article 15, Section (2) of the Pkbt.).

Employers may adopt different measures depending on the seriousness of the infringement or ethical breach. If the facts of the case justify this, the employer initiates criminal proceedings by complaining to the investigating authorities. If no criminal offence is suspected but other rules have been infringed upon by the person concerned, other types of employer action may be adopted. These measures may include termination of employment, which is the most serious legal sanction, but the employer may also apply other legal sanctions, such as a reprimand or a fine.

If the notification is unfounded or no further action is required, data should be deleted within 60 days of completion. At the end of the investigation, the employer should inform the whistle-blower of the outcome of the investigation and the actions to be taken. If the complaint is made before an administrative authority, the complainant must also be informed. However, the content and quality of the measures may not be challenged by the whistle-blower, even before the court of law. If the whistle-blower does not consider the measures adopted to be sufficiently serious, he or she may initiate administrative proceedings before the appropriate administrative authority.[17]

No investigation is required under the Act - an investigation may be waived - if the notification was made by the notifier without revealing his/her identity, the notification was a repeat notification by the same notifier with the same content as the previous notification, the notification was made by the notifier six months after the date on which he/she became aware of the act or omission complained of. Moreover, the procedure may also be waived if the harm to the public interest or overriding private interest is not proportionate to the restriction of the rights of the person concerned resulting from the investigation of the notification.

[17] The Supreme Court, Kpkf. 39.155/2022/3.

5. The European Union Directive and expected changes to national legislation

The European Union (EU) has recently made it an important objective for Member States to detect and act upon breaches of EU law. The creation of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report infringements of EU law (the "Directive") was an important moment in this legal policy objective. The Directive had to be transposed by Member States by 17 December 2021.

The Directive aims to establish a common set of minimum standards for the protection of persons reporting infringements of EU law in specific EU policy areas (including public procurement, financial services, prevention of money laundering and terrorist financing, product safety, transport safety, environment, nuclear safety, food and animal health, public health, consumer protection, data protection, competition law, financial interests of the European Union, internal markets, and corporate taxation) by means of a horizontal, uniform EU legal instrument. Within the framework of these minimum standards, EU encourages Member States to establish a three-step notification system. The first step is the internal notification channel, which involves the notification of the infringement within the legal entity concerned. The second step is the external notification channel, whereby the notifier communicates the infringement to the competent national authority designated by the Member State. The third step is the publication of the infringement.

On 28 February 2023 the Minister of Justice submitted a proposal for a law in conformity with the EU Directive. The proposal for Law No. T/3089 ‘On complaints, notifications of public interest and rules relating to the notification of abuses’ (hereinafter: the Proposal).

The Proposal regulates the protection system for whistle-blowing in detail in accordance with the rules of the Directive.

The legislation mandates the establishment of an internal abuse reporting system for private employers who employ at least 50 persons in an employment relationship, a provision which is in accordance with the Directive.

The Proposal uses the relief allowed by the Directive for entities with between 50 and 249 employees - these entities may establish a joint internal abuse reporting system, thus reducing the burden on smaller businesses -

and provides in a transitional provision that the obligation to establish an internal abuse reporting system will be fulfilled from 17 December 2023.

The Proposal sets out the guarantee rules for the functioning of the internal whistle-blowing system and the primary issues related to the making, receiving, and handling of whistle-blowing reports, in this context, the rules for the control of the functioning of the internal whistle-blowing system. The Proposal is based on the premise that whistle-blowing is easier to handle if there are fewer bureaucratic rules and conditions. Therefore, it provides for the handling of all whistle-blowing in general and relieves employers from having to handle whistle-blowing in a differentiated manner to decipher the complex scope of the Directive, which often leads to litigation.

The Proposal lays down different obligations for public sector employers. Generally, all public sector entities and all entities owned or controlled by public sector entities must establish an internal whistle-blowing system. Under the Directive, Member States may be exempt from this obligation if they have municipalities with fewer than 10,000 inhabitants, municipal bodies with fewer than 50 employees, or entities owned or controlled by public bodies or local authorities. The Proposal uses this derogation and, in accordance with the Directive, provides the possibility for several municipalities to share the operation of an internal whistle-blowing system. This is intended to reduce the burden on smaller bodies. The Proposal states that rules applicable to a public sector employer in the context of the operation of an internal whistle-blowing system should be applicable to a private sector employer, as required by the Directive.

In any event, the submission of this Proposal to Parliament represents an important step forward, which, if adopted, should lead to a greater number of reports of employer abuse, considering its binding scope.

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ZSÓFIA PAPP*

The new anti-money laundering and countering the financing of terrorism (AML/CFT) legislative package of the European Union**

The expected amendments of the Hungarian Anti-Money Laundering Act according to the "EU Single Rulebook"[1]

ABSTRACT: The final elements of the new anti-money laundering and countering the financing of terrorism legislative package of the EU were published in the Official Journal on 19 June 2024. The highly ambitious legislative package delivers a stronger and consistent set of anti-money laundering and countering the financing of terrorism rules at EU level. The implementation of the legislative package can be achieved by comprehensively amending the Hungarian AML/CFT Act (or the adoption of a new AML/CFT Act) and the provisions of the current AML/CFT Act must be reviewed and modified on the basis of the new requirements.

This study analyzes some of the most important differences between the requirements of the EU AML/CFT Directive currently in force and the EU Single Rulebook (the new EU AML/CFT Regulation and Directive), referring also to the necessary amendment of the AML/CFT Act in these fields. The study especially focuses on key requirements of obliged entities, especially regarding the scope and the elements of the customer due diligence.

KEYWORDS: money laundering, financing of terrorism, AML/CFT, EU AML/CFT legislative package, EU Single Rulebook, EU AML/CFT Directive, AML/CFT Act.

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[1] Manuscript closed: 20 June 2024.

1. Introduction[2]

The final elements of the new anti-money laundering and countering of the financing of terrorism legislative package of the European Union (hereinafter: new EU AML/CFT legislative package) were published in the Official Journal of the European Union on 19 June 2024.

The highly ambitious new EU AML/CFT legislative package delivers a stronger and more consistent set of anti-money laundering and countering the financing of terrorism (hereinafter: AML/CFT) rules at EU level, in order to protect EU citizens and the EU's financial system more effectively against money laundering and the financing of terrorism. Furthermore, it covers the institutional side by creating a new EU authority to fight money laundering, which will be at the core of the system implementing the new framework.

The elements of the new EU AML/CFT legislative package will replace and supplement the EU AML/CFT Directive currently in force (Directive (EU) 2015/849[3] as amended, hereinafter: Directive (EU) 2015/849) and recast the Transfer of Funds Regulation[4]. Accordingly, this will result in a significant change in the AML/CFT system of the EU member states.

The Hungarian AML/CFT Act[5] (hereinafter: AML/CFT Act) is fully compliant with the requirements of the Directive (EU) 2015/849. Accordingly, the implementation of the new EU AML/CFT legislative package can be achieved by the comprehensive amendment of the AML/CFT Act (or the adoption of a new AML/CFT Act) and the provisions

[2] This point used the „News Article" of 24 April 2024 by the European Commission, available: Latest update on Anti-money laundering and countering the financing of terrorism legislative package - European Commission (europa.eu); furthermore the „Press Release" of the Council of the European Union, available: Anti-money laundering: Council adopts package of rules - Consilium (europa.eu)

[3] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

[4] Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006

[5] Act LIII of 2017 on the Prevention and Combating of Money Laundering and Terrorist Financing

of the AML/CFT Act must be reviewed and modified based on the new requirements.

This study analyzes certain important differences between the requirements of the Directive (EU) 2015/849 and the new EU AML/CFT legislative package, referring also to the necessary review and amendment of the AML/CFT Act in a number of areas.

2. The new EU AML/CFT legislative package

2.1. Background[6]

Money laundering and terrorism financing pose a serious threat to the integrity of the EU economy and financial system and to the security of its citizens. In July 2019, following a number of prominent money laundering cases in the EU, the Commission adopted a *Communication*[7] on better implementation of the EU's AML/CFT framework, accompanied by *four reports* on the effectiveness of the different aspects of AML/CFT policy. As a result, the Commission concluded that reforms were necessary.

On 7 May 2020, the Commission presented an *Action Plan*[8] for a comprehensive Union policy on preventing money laundering and terrorism financing. The Action Plan set out the measures that the Commission will undertake to better enforce, supervise and coordinate the EU's rules in this area. The Action Plan was built on six pillars: 1. Ensuring the effective implementation of the existing EU AML/CFT framework; 2. Establishing an EU Single Rulebook on AML/CFT; 3. Bringing about EU-level AML/CFT supervision; 4. Establishing a support and cooperation mechanism for financial intelligence units (hereinafter: FIUs) (the national bodies which collect information on suspicious or unusual financial activity

[6] This point used the „*News Article*" of 24 April 2024 by the European Commission, available: Latest update on Anti-money laundering and countering the financing of terrorism legislative package - European Commission (europa.eu); furthermore the „*Press Release*" of the Council of the European Union, available: Anti-money laundering: Council adopts package of rules - Consilium (europa.eu)

[7] „Communication from the Commission to the European Parliament and the Council - Towards Better Implementation of the Eu's Anti-Money Laundering and Countering The Financing of Terrorism Framework", [Online]. Available at: https://eur-lex.europa.eu/legal-content/en/txt/?uri=celex:52019dc0360 (Accessed: 5 May 2024).

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in member states); 5. Enforcing Union-level criminal law provisions and information exchange; 6. Strengthening the international dimension of the EU AML/CFT framework.

Pillars 2, 3 and 4 of the Action Plan required legislative action. Accordingly, a package of legislative proposals (comprising four elements) was presented by the Commission in July 2021 in order to strengthen the EU's AML/CFT rules. The package harmonizes the AML/CFT rules across the EU and also proposes the creation of a new EU authority to fight against money laundering.

Following a rather long legislative process, the co-legislators finally reached political agreement, and the Council adopted the package of new anti-money-laundering rules on 30 May 2024, which will protect EU citizens and the EU's financial system against money laundering and the financing of terrorism.

It is worth mentioning some important features of the current EU AML/CFT framework:

1. It takes the form of a directive that requires transposition into the national law of the member states, which often leads to delays in implementation and divergence in national rules.
2. The current regime is not detailed or granular enough for proper convergence.
3. There is no central coordination body at EU level, which hinders cooperation between national supervisors and FIUs. These gaps have been remedied by the reform.

2.2. Elements of the package

The new EU AML/CFT legislative package (i.e. the new Union's AML/CFT framework) consists of four legal acts, as follows.

2.2.1. New EU AML/CFT Regulation[9] and new EU AML/CFT Directive[10] (hereinafter collectively referred to as: EU Single Rulebook)

With the new EU AML/CFT legislative package, all requirements applicable to the service providers will be transferred to the (directly applicable) new EU AML/CFT Regulation, which for the first time comprehensively harmonizes AML/CFT rules throughout the EU to effectively strengthen the EU framework. Among the most important provisions of the new AML/CFT Regulation are:

- The extension of the AML/CFT rules to new obliged entities (such as most of the crypto-sector, traders of luxury goods, football clubs and agents).
- More detailed and tighter normal, simplified and enhanced customer due diligence requirements (including detailed rules regarding internal policies, procedures and controls of the obliged entities, as well as specific provisions applying to groups and outsourcing).
- Comprehensive regulation of beneficial ownership transparency.
- More detailed requirements regarding the reporting obligation (including the reporting obligation regarding suspicious transactions and the threshold-based reports of transactions); and
- The definition of specific measures to mitigate risks derived from anonymous instruments, including a cash payment limit of EUR 10,000.

The new EU AML/CFT Regulation was published in the Official Journal of the European Union on 19 June 2024 and shall enter into force on the twentieth day following of its publication. Most of its provisions shall apply from 10 July 2027. The new EU AML/CFT Regulation shall be binding in its entirety and directly applicable in all member states.[11]

[9] Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

[10] Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849.

[11] Article 90 of the new EU AML/CFT Regulation.

At the same time, the new EU AML/CFT Directive will address the organization of national competent authorities fighting against money laundering and terrorism financing. The new EU AML/CFT Directive replaces Directive (EU) 2015/849 and contains provisions that are not appropriate for regulation, thus requiring national transposition. It will improve the organization of national anti-money laundering systems by setting out clear rules on how FIUs and supervisors work together.

The new EU AML/CFT Directive was published in the Official Journal of the European Union on 19 June 2024 and shall enter into force on the twentieth day following its publication. The new EU AML/CFT Directive requires national transposition, and the EU member states must bring into force the necessary laws, regulations and administrative provisions to comply with this Directive by 10 July 2027 at the latest.[12]

2.2.2. AMLA Regulation[13]

The AMLA Regulation establishes an EU AML/CFT Authority (hereinafter: AMLA) in the form of a decentralized EU regulatory agency. The AMLA will have two main areas of activity: AML/CFT supervision and support for EU FIUs. The AMLA will become the center of an integrated system of national AML/CFT supervisory authorities, ensuring their mutual support and cooperation. Furthermore, the AMLA will facilitate cooperation, information exchange and identification of best practices among FIUs. The AMLA will be based in Frankfurt, Germany.

The AMLA Regulation was published in the Official Journal of the European Union on 19 June 2024 and shall enter into force on the seventh day following its publication. Most of its provisions shall apply from 1 July 2025, and the Regulation shall be binding in its entirety and directly applicable in all member states.[14] (The detailed requirements of the AMLA Regulation are not analyzed in this study.)

[12] Article 78-79 of the new EU AML/CFT Directive.

[13] Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

[14] Article 108 of the AMLA Regulation.

2.2.3. New Transfers of Funds Regulation (recast)[15]

The new Transfers of Funds Regulation has amended the Regulation (EU) 2015/847 to extend its scope to transfers of crypto assets. This means that full information about the sender and beneficiary of such transfers must be provided by crypto-asset service providers with all transfers of crypto-assets, just as payment service providers currently do for wire transfers (in order to identify those who send and receive crypto-assets for AML/CFT purposes, detect possible suspicious transactions, and, if necessary, block them). (It is worth mentioning that the Regulation (EU) 2015/847 has been recast for the sake of clarity.)

The new Transfers of Funds Regulation was published in the Official Journal of the European Union on the 9 of June 2023 and entered into force on the twentieth day following its publication. It shall apply from 30 December 2024 and will be binding in its entirety and directly applicable in all member states.[16] (The detailed requirements of the new Transfers of Funds Regulation are not analyzed in this study.)

2.3. New requirements of the EU Single Rulebook and its impact on the AML/CFT Act

As mentioned in the Introduction, this study analyzes some of the most important differences between the requirements of the Directive (EU) 2015/849 and the EU Single Rulebook, referring also to the necessary amendment of the AML/CFT Act in these fields. The study especially focuses on key requirements of obliged entities, particularly regarding the scope and the elements of the customer due diligence.

2.3.1. Directive vs. Regulation

As noted earlier, the current AML/CFT framework of the EU takes the form of a directive: Directive (EU) 2015/849, which requires transposition into the national law of the member states. The directive is binding as to the result to be achieved, but that leaves member states discretion as to how to

[15] Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849 (recast)

[16] Article 40 of the new Transfers of Funds Regulation.

achieve the result. The Directive (EU) 2015/849 is a minimum-harmonization directive: member states may adopt or retain in force stricter provisions in the field covered by the directive to prevent money laundering and terrorist financing, within the limits of EU law[17]. The directives are addressed to the member states, and in the case of the Directive (EU) 2015/849, member states had to bring into force the necessary laws, regulations and administrative provisions to comply with the directive by 26 June 2017 (with some exemptions)[18].

As mentioned earlier, the EU Single Rulebook consists of the new EU AML/CFT Regulation and the new EU AML/CFT Directive. All requirements applicable to the service providers will be transferred to the new EU AML/CFT Regulation, which is binding in its entirety and directly applicable in all member states and must be applied immediately from the date of its entry into force (without needing to be transposed into national law). (The member states may adopt implementing provisions, if they consider it necessary on the basis of the content of the Regulation.)

At the same time, the new EU AML/CFT Directive will address the organization of national competent authorities fighting against money laundering and terrorism financing and, as characteristic of a directive, requires national transposition.

In Hungary, the requirements of Directive (EU) 2015/849 have been transposed into national law by the AML/CFT Act. Accordingly, the transposition and implementation of the EU Single Rulebook require a comprehensive review and subsequent modification or repeal the affected provisions of the AML/CFT Act, taking into account the following aspects:

- According to the above mentioned features of a regulation, it will not be necessary (nor possible) to regulate issues already covered by the new EU AML/CFT Regulation.
- According to the mentioned features of a directive, it will be necessary to modify the AML/CFT Act in order to transpose into the national law the requirements of the new EU AML/CFT Directive (taking into account the possible decision-making options for the member states).
- It will be necessary to take decisions whether it is more appropriate to comprehensively modify the provisions of the AML/CFT Act or adopt a new one in view of the large number of amendments.

[17] Article 5 of the Directive (EU) 2015/849.
[18] Article 67 of the Directive (EU) 2015/849.

2.3.2. Extension of the scope

Directive (EU) 2015/849 lists the types of institutions – as well as natural or legal persons acting in their professional activities – that fall under its scope as obliged entities. These include credit institutions, financial institutions and certain designated non-financial businesses and professions (hereinafter: DNFBPs). The following DNFBPs are under the scope of the directive: auditors, external accountants and tax advisors; notaries and other independent legal professionals; trust or company service providers; real estate agents; traders in goods (where payments are made or received in cash amounting to EUR 10,000 or more); gambling service providers; virtual asset service providers (including those engaged in exchange services between virtual currencies and fiat currencies, as well as custodian wallet service providers); traders in works of art (where the value of the transaction is 10,000 EUR or more). In the case of notaries and other independent legal professionals (including lawyers), the directive specifies the concrete types of transactions in which they are subject of the directive.[19]

With the exception of casinos, and following an appropriate risk assessment, member states may decide to exempt, in whole or in part, providers of certain gambling services from national provisions transposing this directive, based on the proven low risk posed by the nature and, where appropriate, the scale of their operations.[20]

Member states may also decide that persons engaging in a financial activity on an occasional or very limited basis, where there is little risk of money laundering or terrorist financing, do not fall within the scope of the directive (provided that all of the criteria mentioned in the directive are met).[21]

Based on Directive (EU) 2015/849, member states shall, in accordance with the risk-based approach, ensure that the scope of the directive is extended, in whole or in part, to professions and categories of undertakings other than the obliged entities mentioned in the directive, if these entities engage in activities that are particularly likely to be used for money laundering or terrorist financing.[22]

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[19] Article 2 (1) of the Directive (EU) 2015/849.
[20] Article 2 (2) of the Directive (EU) 2015/849.
[21] Article 2 (3)-(9) of the Directive (EU) 2015/849.
[22] Article 4 of the Directive (EU) 2015/849.

According to the EU Single Rulebook there will be several additions to the list of obliged entities, subject to the EU AML/CFT rules.

The new EU AML/CFT Regulation determines those entities that are considered obliged entities for the purposes of the regulation: credit institutions, financial institutions and DNFBPs, with a number of additions compared to the Directive (EU) 2015/849. The new EU AML/CFT Regulation also extends its scope to include: all types and categories of crypto-asset service providers (which will be considered as financial institutions under the new rules); traders in precious metals and stones; traders in high-value goods; crowdfunding service providers and crowdfunding intermediaries; credit intermediaries for mortgage and consumer credits (other than credit institutions and financial institutions); investment migration operators (permitted to represent or offer intermediation services to third-country nationals seeking to obtain residence rights in a Member State in exchange for any kind of investment); non-financial mixed activity holding companies; football agents and professional football clubs (in respect of certain transactions with investors, sponsors or agents).[23]

According to the new EU AML/CFT Regulation, member states may decide to exempt (in whole or in part) certain service providers (under specific conditions) from the requirements set out in the Regulation: for example gambling service providers; professional football clubs and persons engaging in a financial activity on an occasional or very limited basis.[24]

Furthermore, it is important to mention, that according to the new EU AML/CFT Directive the member states have the option to identify exposed sectors at national level. If a member state identifies that, in addition to the obliged entities, entities in other sectors are exposed to money laundering and terrorist financing risks, it may decide to apply all or part of the new AML/CFT Regulation to those additional entities.[25]

The scope of the AML/CFT Act fully complies with the requirements of Directive (EU) 2015/849 and applies to financial service providers and certain DNFBPs (with a registered office, branch or business establishment in Hungary)[26], as specified in the Directive (EU) 2015/849. According to the

[23] Article 3 of the new EU AML/CFT Regulation.
[24] Article 4-6 of the new EU AML/CFT Regulation.
[25] Article 3 of the new EU AML/CFT Directive.
[26] Credit institutions; financial services institutions; institutions for occupational retirement provision; voluntary mutual insurance funds; operators accepting and delivering

Directive (EU) 2015/849, in the case of lawyers and notaries, the AML/CFT Act determines the specific transactions in which they fall under its scope. On the basis of Article 4 of the Directive (EU) 2015/849 (in accordance of the risk based approach), the scope of the AML/CFT Act has been extended to include certain additional service providers (among others, traders in precious metals or voluntary mutual insurance funds).
With respect to the EU Single Rulebook, the following issues need to be reviewed and the necessary amendments implemented in the AML/CFT Act:

- As mentioned above, the new EU AML/CFT Regulation determines entities considered obliged entities for AML/CFT purposes. The new EU AML/CFT Regulation shall be binding in its entirety and directly applicable in all member states. It has to be applied immediately from the date of its entry into force as the norm in all member states, without needing to be transposed into national law (contrary to the EU directives). Accordingly, it will not be necessary (and possible) to regulate the scope in the AML/CFT Act for service providers already covered by the new EU AML/CFT Regulation.
- It will be necessary to decide on possible exemptions (based on the new EU AML/CFT Regulation) and on the possible extension of the scope (based on the new EU AML/CFT Directive), and to incorporate the appropriate legal provisions into the AML/CFT Act accordingly.

2.3.3. Limit of EUR 10,000 to cash payments

Directive (EU) 2015/849 already acknowledges the risk posed by large cash sums: traders in goods fall under the scope of the Directive (EU) 2015/849 if payments are made or received in cash amounting to EUR 10,000 or more (whether in a single operation or in several linked operations) and are required to apply AML/CFT requirements.[27] Additionally, member states

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international postal money orders; real estate agents; auditors, accountants, tax advisors; gambling service providers; traders in precious metals; traders in goods (where they receive or make a cash payment in the amount of three million forints or more); lawyers and notaries; fiduciary managers; virtual assets service providers (service providers engaged in exchange services between virtual currencies and fiat currencies, furthermore custodian wallet service providers); traders in cultural goods (where the value of the transaction or a series of linked transactions amounts to three million forints or more); providers of corporate headquarters services.

[27] Article 2 (1) and Article 11 of the Directive (EU) 2015/849.

may adopt or retain stricter provisions in this respect;[28] however, the Directive (EU) 2015/849 does not set a general limit for cash payments.

The new EU Single Rulebook will introduce a limit to large cash payments in exchange for goods and services. Under the new EU AML/CFT Regulation, persons trading in goods or providing services may accept or make a cash payment only up to EUR 10,000 or the equivalent in another currency (whether the transaction is carried out in a single operation or in several linked operations). Member states remain free to maintain or introduce lower limits at the national level. Furthermore, the member states shall ensure that appropriate measures (including the imposition of penalties) are taken against natural or legal persons acting in their professional capacity who are suspected of breaching the cash payment limit set by the new EU AML/CFT Regulation, or of a lower limit adopted at the national level.[29]

In addition, obliged entities have to identify and verify the customers when carrying out an occasional cash transaction amounting at least EUR 3 000, or the equivalent in national currency (whether the transaction is carried out in a single operation or through linked transactions).[30]

The provisions of the AML/CFT Act fully comply with the requirements of Directive (EU) 2015/849 in this respect. Accordingly, traders in goods that receive or make cash payments amounting of three million forints or more fall within the scope of the AML/CFT Act and they are required to apply AML/CFT measures.[31] At the same time, the AML/CFT Act does not set a general limit for cash payments.

With respect to the EU Single Rulebook, the following issues need to reviewed and the necessary amendments implemented in the AML/CFT Act:

- As mentioned above, the new EU AML/CFT Regulation determines a limit for large cash payments (up to EUR 10 000) in exchange for goods and services.
- The new EU AML/CFT Regulation shall be binding in its entirety and directly applicable in all member states, without needing transposition into national law. Accordingly, it will not be necessary (nor possible) to transpose this requirement into the AML/CFT Act (or other national

[28] Article 5 of the Directive (EU) 2015/849.
[29] Article 80 of the new EU AML/CFT Regulation.
[30] Article 19 (4) of the new EU AML/CFT Regulation.
[31] Article 1 (1) and Article 6 of the AML/CFT Act.

legislation). However, this requirement necessitates a comprehensive review and, if necessary, the modification or repeal of the relevant national legal act in order to avoid conflicting legislation being in force.

- It will also be necessary to decide whether it is justified to introduce a lower limit at the national level.
- Furthermore, it is necessary to adopt the national implementing legislation, among others to ensure that appropriate measures (including the imposition of penalties) are taken against natural or legal persons which are suspected of a breach of this requirement.
- Additionally, as mentioned above, under the new EU AML/CFT Regulation, obliged entities must identify and verify the customers when carrying out an occasional cash transaction of at least EUR 3,000. As this is a requirement set by an EU regulation, it need not necessary (and cannot) be transposed into the AML/CFT Act, however, national implementing legislation must be adopted in this respect.

2.3.4. High-value goods

Directive (EU) 2015/849 includes certain requirements regarding large cash payments by classifying traders in goods as obliged entities when they make or receive cash payments above EUR 10,000[32] (while allowing member states to introduce stricter measures).

To enhance the system's effectivesness – given that practical experience has shown that the approach of Directive (EU) 2015/849 is ineffective in light of the poor understanding and application of AML/CFT requirements[33]- the EU Single Rulebook introduced changes in this respect.

As mentioned above, to adequately mitigate risks deriving from the misuse of large cash sums, a limit on large cash payments above EUR 10,000 has been established. Consequently, traders in goods no longer need to be subject to AML/CFT requirements in the same way as before.

However, some categories of traders in goods are particularly exposed to ML/FT risks. For that reason, traders in precious metals and precious stones and other high value goods should be subject to AML/CFT

[32] Article 2 (1) of the Directive (EU) 2015/849.
[33] Preamble (1) of the new EU AML/CFT Regulation.

requirements where such trading is either a regular or a principal professional activity (regardless of the means of payment used).[34] 'High-value goods' are defined as the goods listed in Annex IV of the new EU AML/CFT Regulation, such as: jewellery, gold- or silversmith articles of a value exceeding EUR 10,000: clocks and watches of a value exceeding EUR 10,000 or the equivalent in national currency; motor vehicles priced at over EUR 250,000 or the equivalent in national currency; aircraft exceeding EUR 7,500,000; and watercraft exceeding EUR 7,500,000. Furthermore, the new EU AML/CFT Regulation establishes requirements for threshold-based reports of transactions in certain high-value goods. Traders in high-value goods and financial institutions shall report to the FIU all transactions involving the sale of such goods when they are acquired for non-commercial purposes – specifically motor vehicles for a price of at least EUR 250,000; watercraft for a price of at least EUR 7,500,000; and aircraft for a price of at least EUR 7,500,000.[35]

The provisions of the AML/CFT Act fully comply with Directive (EU) 2015/849 in this respect. Accordingly, traders in goods that receive or make cash payments amounting to three million forints or more are subject to the AML/CFT Act and its requirements.[36] Furthermore, based on Article 4 of the Directive (EU) 2015/849, the scope of the AML/CFT Act has been extended to traders in precious metals.

With respect to the EU Single Rulebook, the following issues need to be reviewed and the necessary amendments implemented in the AML/CFT Act:

- The provisions of the new EU AML/CFT Regulation regarding high-value goods will be binding in their entirety and directly applicable in all member states. Accordingly, it will not be necessary (or possible) to transpose these requirements into the AML/CFT Act, similar to other provisions of the Regulation.
- At the same time, these requirements necessitate a comprehensive review and, if necessary, modification or repeal of the relevant national legal acts (especially the AML/CFT Act) to avoid conflicting legislation.

[34] Article 3 (3) of the new EU AML/CFT Regulation.
[35] Article 74 of the new EU AML/CFT Regulation.
[36] Article 1 (1) and Article 6 of the AML/CFT Act.

- Furthermore, based on the comprehensive review, it will likely be necessary to adopt the national implementing legislation in this respect.

2.3.5. Third-country policy

Directive (EU) 2015/849 already acknowledges the potential risks posed by third countries and establishes a third-country policy based on the following elements. The Directive (EU) 2015/849 states, that third-country jurisdictions with strategic deficiencies in their national AML/CFT regimes, which pose significant threats to the the Union's financial system (referred to as 'high-risk third countries') must be identified to protect the proper functioning of the internal market. The Commission is empowered to adopt delegated acts[37] to identify high-risk third countries (taking into account certain strategic deficiencies).[38]

According to the Directive (EU) 2015/849, for business relationships or transactions involving high-risk third countries, member states shall require obliged entities to apply enhanced customer due diligence measures: the directive defines both mandatory and additional (optional) customer due diligence measures.[39]

The EU Single Rulebook aims to ensure that external threats to the Union's financial system are effectively mitigated by implementing a harmonized approach at EU level.

Under the new EU AML/CFT Regulation, third countries with significant strategic deficiencies in their national AML/CFT regimes shall be identified by the Commission and designated as 'high-risk third countries'. In order to identify third countries, the Commission is empowered to adopt delegated acts to supplement this regulation.

Where a third country is identified as high-risk, obliged entities shall apply *enhanced due* diligence measures (listed in the regulation for the cases of higher risk) with respect to business relationships or occasional transactions involving natural or legal persons from that third country. Furthermore the delegated act shall identify specific countermeasures to mitigate the risks

[37] Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council by identifying high-risk third countries with strategic deficiencies.

[38] Article 9 of the Directive (EU) 2015/849.

[39] Article 18 of the Directive (EU) 2015/849.

arising from each high-risk third country. Additionally, if a member state identifies a specific ML/TF risk from a third country that the Commission has identified but that is not addressed by general countermeasures, it may require obliged entities to apply specific additional countermeasures.[40]

Furthermore, based on the new EU AML/CFT Regulation third countries with compliance weaknesses in their national AML/CFT regimes shall be identified by the Commission, as well. In order to identify third countries, the Commission is empowered to adopt delegated acts to supplement this regulation.

In this case, the delegated act will specify the enhanced due diligence measures (among those listed in the regulation for the cases of higher risk), that obliged entities must apply to mitigate risks related to business relationships or occasional transactions involving natural or legal persons from that third country.[41]

In addition the Commission is empowered to adopt delegated acts by identifying additional third countries where, in exceptional cases, it considers it indispensable to mitigate a specific and serious threat to the Union's financial system and the proper functioning of the internal market posed by those third countries (autonomous assessment by the Commission).

If the identified threat amounts to a significant strategic deficiency, obliged entities shall apply enhanced due diligence measures, and the delegated act shall identify the necessary countermeasures. Where the identified specific and serious threat from the third country concerned amounts to a compliance weakness, the delegated act shall identify the enhanced due diligence measures required to mitigate the risks. [42]

The provisions of the AML/CFT Act fully comply with the requirements of Directive (EU) 2015/849 in this respect. Accordingly, under the AML/CFT Act, service providers must apply enhanced customer due diligence measures for high-risk customers, among others if the customer is from a third country identified as high-risk with strategic deficiencies. The AML/CFT Act defines 'high-risk third countries with strategic deficiencies', as those listed in Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016, which supplements Directive (EU) 2015/849 by identifying such

[40] Article 29 of the new EU AML/CFT Regulation
[41] Article 30 of the new EU AML/CFT Regulation
[42] Article 31 of the new EU AML/CFT Regulation

countries. The AML/CFT Act also determines the specific enhanced customer due diligence measures (both compulsory and optional).[43]

With respect to the EU Single Rulebook, the following issues need to be reviewed and the necessary amendments implemented in the AML/CFT Act:

- As mentioned above, the new EU AML/CFT Regulation and the Commission's delegated acts will determine the relevant third countries and the applicable specific enhanced customer due diligence measures/countermeasures by the obliged entities.
- The new Regulation shall be binding in its entirety and directly applicable in all member states, without transposition. Accordingly, it is neither necessary nor possible to transpose these requirements into the AML/CFT Act for service providers already covered by the new EU AML/CFT Regulation. However, this makes it necessary to comprehensively review and, if required, modify or repeal the AML/CFT Act to avoid conflicting legislation.
- Furthermore, based on this comprehensive review, it will most likely be necessary to adopt the national implementing legislation in this respect.

2.3.6. Harmonized customer due diligence process

Directive (EU) 2015/849 contains detailed provisions regarding customer due diligence requirements. The directive specifies the following (among others)[44]: cases in which the obliged entities must apply the customer due diligence measures[45]; the concrete customer due diligence measures[46]; the

[43] Article 3 and Article 16-16/A of the AML/CFT Act

[44] Article 11-29 of the Directive (EU) 2015/849.

[45] When establishing a business relationship; when carrying out an occasional transaction that amounts to EUR 15 000 or more, or constitutes a transfer of funds exceeding EUR 1 000; in the case of persons trading in goods, when carrying out occasional transactions in cash amounting to EUR 10 000 or more; for providers of gambling services, upon the collection of winnings, the wagering of a stake, or both, when carrying out transactions amounting to EUR 2 000 or more; when there is a suspicion of money laundering or terrorist financing; when there are doubts about the veracity or adequacy of previously obtained customer identification data.

[46] Identifying the customer and verifying the customer's identity; identifying the beneficial owner and taking reasonable measures to verify that person's identity; assessing and, as appropriate, obtaining information on the purpose and intended nature of the business

timing of the customer due diligence; simplified customer due diligence requirement; enhanced customer due diligence requirement; reliance on third parties.

Directive (EU) 2015/849 requires transposition into the national law of the member states. The directive is binding as to the result to be achieved, leaving member states discretion as to the means of achieving that result.

The EU Single Rulebook emphasizes that customer due diligence requirements are essential to ensure that obliged entities identify, verify and monitor their business relationships with their clients in relation to the ML/T risks that they pose. It is necessary to achieve a uniform and high standard of customer due diligence in the Union, by relying on harmonized requirements and reducing national divergences. At the same time, it is essential that obliged entities apply customer due diligence measures in a risk-based manner.[47]

Accordingly the new EU AML/CFT Regulation provides directly applicable and significantly more detailed requirements regarding customer due diligence, including[48]: circumstances under which obliged entities must apply customer due diligence measures (with specific requirements, among others, regarding the crypto-asset service providers and cash transactions, or the definition of the customers in certain sectors); customer due diligence measures (including, among others, a harmonized approach to identification of beneficial ownership); third country policy (as elaborated above under point 2.3.5.); simplified due diligence requirements; enhanced due diligence requirements (including specific requirements, among others, for cross-border correspondent relationships, transactions with a self-hosted address in case of crypto-asset service providers, applicants for residence by investment schemes, politically exposed persons); specific customer due diligence provisions (for example, for the life and other investment-related insurance sectors); reliance on third parties.

The new EU AML/CFT Regulation is binding in its entirety and directly applicable in all member states without transposition into national law.

As mentioned above, the requirements of the Directive (EU) 2015/849 have been transposed into the Hungarian law by the AML/CFT Act. With respect to customer due diligence, the provisions of the AML/CFT Act fully

relationship; conducting ongoing monitoring of the business relationship.

[47] Preamble (51)-(52) of the new EU AML/CFT Regulation.

[48] Article 19-50 of the new EU AML/CFT Regulation.

comply with Directive (EU) 2015/849, although where the member state has discretionary power, it has set country-specific requirements. In light of the EU Single Rulebook, it will be necessary to review the following issues and implement the necessary amendments in the AML/CFT Act:

- The provisions of the new EU AML/CFT Regulation regarding customer due diligence will be directly applicable in all member states; therefore it is neither necessary nor possible to transpose these requirements into the AML/CFT Act.
- At the same time, these requirements necessitate a comprehensive review, if necessary, modification or repeal of the relevant national legal acts (especially the AML/CFT Act to avoid conflicting legislation.
- Furthermore, based on the comprehensive review mentioned, national implementing legislation will likely need to be adopted in this respect.

3. Conclusion

This study analyzes only the most significant differences between Directive (EU) 2015/849 and the new EU AML/CFT legislative package, with a particular focus on the substantive new elements introduced by the legislative package that will lead to significant changes in domestic regulation regarding scope and customer due diligence requirements. The amendment of the AML/CFT Act (or the adoption of a new AML/CFT Act) based on the new EU AML/CFT legislative package – and the incorporation of the most important provisions analyzed above into the domestic legislation – will make a significant contribution to the effectiveness of the Hungarian anti-money laundering and countering terrorist financing regime.

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Conclusions**

1. Corporate compliance and criminal law

The title of this conference "Corporate compliance as a challenge for the design of legal consequences – towards a coherent system of sanctions in commercial criminal law" suggests that we currently have a multitude of sanctions in different laws in all Member States of the EU, but that these are only coordinated to a very limited extent. And it was in my opinion very fruitful not only to hear criminal law experts, but experts in competition law, labour law and ethics.

The concept of compliance has been a central topic in commercial and corporate criminal law for several years now. It is not only an important topic in criminal law, but many companies have to deal with it and have to think about setting up compliance programmes and establish compliance departments. The term “criminal compliance” is used by everyone, but it is quite vague and its implications for criminal law are largely unclear. In order to take a broadly conceived area of responsibility seriously, compliance rules are being created to ensure that legal violations of any kind are prevented. This specifies the obligations prescribed by the legal system (specification of standards through compliance regulations). However, compliance measures can go beyond the legal requirements and include higher requirements. It is a matter of regulatory compliance.

On this conference interesting examples of compliance from ethics, antitrust law and labour law on the basis of clinical ethics counselling were presented. Clinical ethics counselling can contribute to careful action. It seems important to me that the law gives a framework and that within this framework there is room for ethics to play a role. The problem is that ethics is not so clear-cut. Prof. Bobbert's thesis was that clinical ethics counselling is a weak instrument for legal compliance.

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2. Variety of sanctions and subjects to sanctions

On the one hand, we heard about a number of parties subject to sanctions: managers/decision-makers, employees, the company or association, and in some cases also corporations. On the other hand, a range of different sanctions or measures are provided for: criminal sanctions, i.e. classic fines and prison sentences, but also confiscation, forfeiture, administrative sanctions such as the exclusion of bidders from procurement procedures, labour law measures (dismissal, termination, loss of salary), civil law recourse claims, claim for damages etc. We can see that in modern law criminal, civil and administrative aspects are intertwined. These sanctions are foreseen for the same or similar violations of law. However, they have different purposes, as Prof. Dannecker explained: prevention, repression, averting of a danger, restitution.

Dr Toth introduced us to the system of sanctions in antitrust law. He raised the question of whether fines against companies have a sufficiently deterrent effect and whether it makes more sense to expose managers to a higher risk of being held personally accountable. This shows that it is not so easy to choose the "right" sanction and the right subject to sanction in order to achieve the desired purposes, since sanctions have different effects and not for every irregularity the same sanctions are adequate and appropriate. Mr Toth also pointed out the problems and shortcomings of private enforcement in competition law.

How do all these sanctions relate to each other? When are they proportionate and when do they go beyond the intended goal?

The problem is that these sanctions are largely imposed independently of each other, since they are foreseen in different laws and imposed by different authorities that do not cooperate or refer to one another in this regard.

As long as it concerns criminal sanctions, the principle of "ne bis in idem" sets limits on imposing sanctions by prohibiting multiple punishments and prosecutions for the same offence. However, we can already see here that it is not always clear whether a sanction is of a criminal nature and if the sanction is not of criminal nature, the “ne bis in idem” principle is not applicable.

But what about other sanctions? How are they taken into account in such a diverse system of sanctions?

It depends on the rules of determination of sanctions whether the imposition of other sanctions has to be taken into account in the sanctioning process. The principle of proportionality requires that other sanctions and other consequences of the violation of law – i.e. other sanctions and measures – must be taken into account in the sentencing process in criminal law. This also applies to associations. Other sanctions such as professional bans, exclusion from public procurement procedures and loss of office must therefore be taken into account. However, there is a lack of clear principles and of a coherent concept of sentencing that takes these other sanctions into account.

Although the variety of sanctions is certainly appropriate in order to respond to legal violations in a suitable and appropriate manner, it must not lead to sanctions being placed outside the scope of criminal law in order to avoid the application of criminal law guarantees, even though these sanctions are similarly intrusive and fulfil criminal law functions. We need to coordinate sanctions in order to achieve a coherent system.

What significance can sentencing guidelines have for the assessment of sanctions?

They are repeatedly discussed but rejected for criminal law because it is the criminal judge's inherent task to determine penalties. However, they are accepted in administrative penal law. It makes sense to use sentencing guidelines for sanctions against legal entities. When introducing sentencing guidelines, however, care must be taken to ensure that they do not lead to disproportionate penalties, especially for repeat offenders. Prof. Dannecker proposed the inclusion of sentencing guidelines for sanctioning companies in EU directives and has set out requirements for this.

3. Concluding thesis

These considerations lead to the following concluding thesis

- If we look at the purpose of criminal and sanctioning law, it is prevention. If prevention is regarded as the central purpose, it is essential to answer the question of how this purpose can be achieved in the best possible and proportionate manner. Since criminal law is supposed to be the "ultima ratio", i.e. that only these means must be used which are sufficient to achieve the purposes, it is always necessary to consider whether the preventive purposes can be achieved with less severe sanctions.

- What role does compliance play in sanctions? Is compliance soft law or hard law? Compliance concerns the obligations of companies in which way they have to take care to avoid irregularities. These obligations and how they are fulfilled are relevant to criminal negligence, not only of companies or associations, but also the duties of natural persons which influence the guarantor position in cases of offences committed by omission. Therefore, compliance is part of criminal law and consequently hard law. However, care must be taken in the case that companies set higher standards for themselves than they are foreseen by (general) law. These must not be automatically elevated to general standards of care for the companies, because these voluntary commitments do not also raise the standard of diligence.
- Sanctions must be tailored to the individual perpetrator and specifically targeted at them. This applies in particular to associations. The question must be asked: Which sanctions are necessary and which are sufficient to guide them towards legally compliant behaviour?
- If compliance measures are taken in a company, this constitutes a mitigating factor, provided that these measures are also suitable for preventing non-compliant behaviour.
- It is always a question is when these measures should be implemented. Only before the offence or also in the event of corresponding post-offence behaviour?
- If an association establishes compliance systems, it implements measures to prevent non-compliant behaviour. If, despite this, a non-compliant conduct is committed by decision-makers or employees of the association, it must be examined whether this is due to a deficiency in the compliance system, whether it was not implemented correctly, or whether it was due to the behaviour of the natural person(s) that could not be prevented even with a well-working compliance system.
- What does it mean, if a company implements compliance measures after the criminal offence? Is this a mitigating factor or even sufficient to have a preventive effect, and are penalties or other sanctions superfluous in such a case? The Austrian regulations on corporate criminal law e.g. provide that the public prosecutor's office may withdraw from prosecution if the association takes measures to prevent misconduct within the association in the future.

- Compensation for damages should in any case be considered as a mitigating factor.
- Could imposing the establishment of appropriate compliance measures on associations be a sanction in itself? One could consider that imposing an obligation on the association to establish compliance systems to prevent future offences within the company constitutes a sanction. If this happens, other penalties and sanctions, such as fines, may be waived.
- At European level, care must be taken to ensure that the sanctions required by harmonisation legislation allow Member States sufficient flexibility to adapt the sanctions to their respective national sanctions/criminal law.

Section II.

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PÉTER POLT*

Protection of the environment in the European Union (Green Deal) Practical experience in Hungary from the perspective of the Prosecution Service**

ABSTRACT: In the recent years, greater importance and attention have been paid to the protection of environment. The European Union has also recognized the risks of climate change and the risks of negative impacts on the ecosystem. In 2019, the European Union issued the so-called European Green Deal initiative, with the objective of making Europe the first climate-neutral continent in the world by 2050. In 2022, the Consultative Council of European Prosecutors (CCPE) adopted an Opinion on the role of prosecutors in the protection of the environment. The Hungarian legislation complies with the standards set out in the CCPE Opinion, and the Prosecution Service of Hungary to take effective actions against perpetrators of environmental crimes. Prosecutors play a crucial role in the fight against environmental crime and in enforcing liability for environmental damages.

KEYWORDS: environmental criminal law, European Green Deal, climate change, Consultative Council of European Prosecutors, Prosecution Service.

The wider and smaller natural environment surrounding us is an abundant source of goods, which contributes to the well-being of not only our country but also of the European community and – at least indirectly – of the entire population of the Earth. Hans Bruyninckx, the former Executive Director of the European Environment Agency, who held this position until 1 June 2023, pointed out that the rapid growth of the world's population and economy was leading to an increased use of natural resources. However, the excessive demand on our environment has a negative impact on the ecosystem and triggers climate change. According to available data, 75% of

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the terrestrial environment and about 40% of the marine environment have already severely altered; unfortunately, most of the changes have been negative.[1]

In the recent decades, and obviously as a result of this trend, the political and scientific community, including a wide range of scientific disciplines, and civil society have paid greater attention to the protection of the environment. As part of this process, the European Union has also recognized the risks of climate change and the risks of negative impacts on the ecosystem. For this reason, the EU has recently placed environment-protection policy at the heart of EU policy-making, opening the way for initiatives such as the European Green Deal. This document was presented by the European Commission in December 2019, with the objective of making Europe the first climate-neutral continent in the world by 2050. The Commission prescribed the climate neutrality targets and the legal obligations necessary to achieve this in the so-called European Climate Law, which is binding and directly applicable to Member States and entered into force in July 2021.[2] We all know, however, that it is not the legal norm that really matters, but the results which are actually achieved. The Regulation on the *European Climate Law*[3] is therefore far not the end, but a great tool to help us reach the desired results. I believe, it is important to highlight this, because everyone must contribute to the achievement of the aim to the best of their possibilities. In the spirit of this thought, I would like to share some ideas in general about the Prosecution Service, and of course more specifically, about the role played by the Prosecution Service of Hungary in environmental protection.

The close connection between the high-level protection of the environment and the enforcement of human rights is pointed out not only by the European sources of law but also by several international instruments, which fundamentally aim at the preservation and improvement of the present and future generations' quality of life and wellbeing. The Consultative Council of European Prosecutors (CCPE) adopted its Opinion

[1] Bruyninckx, n. d.

[2] The European Green Deal. Striving to be the first climate-neutral continent https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_hu (Accessed: 20 February 2024).

[3] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999.

No. 17 on the role of prosecutors in the protection of the environment in 2022.[4]

The Opinion emphasizes the importance of prevention, but also the idea that the environment should be protected by every possible means, including the means used by administrative and civil law.[5] In cases, however, where violations of law posing greater danger or causing greater damage occur, those who are liable should be held accountable also by means of criminal law. As a result, Opinion No. 17 clearly displays the need for a coordinated application of the different legal areas, which – as I will elaborate later – is fully accomplished in the work and operation of the Prosecution Service of Hungary.

With regard to environmental crimes, the above-referred CCPE Opinion underlines that these crimes often relate to other serious crimes (such as human-trafficking, drug-trafficking, counterfeiting, cybercrime, corruption and the financing of terrorism).[6] In addition, perpetration in criminal organization or cross-border crimes often occur. Therefore, sanctions, whether imposed on natural or legal persons, need to comply with the standards of efficiency and proportionality, and they need to be dissuasive. Moreover, the sanction regime needs to include financial and non-financial elements. We should also strive to ensure that not only the direct perpetrators but accomplices, instigators and accessories as well as those who benefit from perpetration should face appropriate legal sanctions.[7]

Considering that environmental crimes are often international, both as far as their commission and their results are concerned, international cooperation is an essential element of effective actions. Every organization, even if indirectly significant to this area of law, can be key to this activity. In this way, apart from the activity of Europol, the activity of Eurojust and professional networks including the European Judicial Network and the European Network of Prosecutors for the Environment must be highly evaluated.

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[4] https://rm.coe.int/opinion-no-17-2022-en/1680a875de (Accessed: 24 February 2024).

[5] Opinion No. 17 (2022) of the Consultative Council of European Prosecutors (CCPE) on the role of prosecutors in the protection of the environment, Chapter III, para 31 and 35.

[6] Opinion No. 17 (2022) of the Consultative Council of European Prosecutors (CCPE) on the role of prosecutors in the protection of the environment, Chapter IV, para 36.

[7] Opinion No. 17 (2022) of the Consultative Council of European Prosecutors (CCPE) on the role of prosecutors in the protection of the environment, Chapter IX, Recommendation 5; Chapter IV/B, para 47.

The CCPE Opinion stresses that national prosecution services play a key role in effective actions. Consequently, they need to be provided with the necessary legal and investigative tools, and prosecutors handling environmental cases need to be adequately trained and qualified.[8]

In my opinion, it can be concluded that, on the one hand, the Hungarian legislation complies with the standards set out in the CCPE Opinion, and on the other hand, other conditions are also provided for the Prosecution Service of Hungary to take effective actions against perpetrators of environmental crimes. Let me also briefly note that environmental protection is a recurrent issue at trainings, professional meetings and discussions held by the Prosecution Service. This, I assume, is highly important, since environmental protection is a branch of science and a field of law, where continuous professional development is crucial and necessary for effective professional work.

The Prosecution Service is traditionally viewed as a constitutional, autonomous and independent organization, which, as a contributor to justice, has the exclusive right to exercise the punitive power of the state.[9] The main activity of the Prosecution Service traditionally focuses on the performance of criminal law tasks. At the same time, it is a less known fact to the public that the Prosecution Service also has duties and carries out activities outside the criminal law field, where, in the protection of the public interest, it contributes to the enforcement of legal provisions in relation to various fields of law.

Specific laws provide for the tasks and competences of the Prosecution Service outside the criminal law field. The Prosecution Service exercises these competences primarily by initiating litigious and non-litigious proceedings at court (called the right to file lawsuits), by launching administrative proceedings and pursuing legal remedy (which are collectively called: action).[10] Accordingly, laws on the environment, nature and the protection of animals specifically empower the Prosecution Service to file lawsuits. Thus, for example, Act LIII of 1995 on the General Rules of Environmental Protection entitles a prosecutor to file a lawsuit to impose a

[8] Opinion No. 17 (2022) of the Consultative Council of European Prosecutors (CCPE) on the role of prosecutors in the protection of the environment, Chapter V, para 61; Chapter IX, Recommendation 8.

[9] The Fundamental Law of Hungary, Article 29.

[10] Act CLXIII of 2011 on the Prosecution Service of Hungary (Prosecution Service Act), Section 26 (1).

ban on the activity or to elicit compensation for the damage caused by the activity posing hazard to the environment.[11] Since 2012, the Prosecution Service may only examine specific violations of the law coming to its notice, and depending on the outcome, it may recommend the inspected body to take various measures without having the right to change the decision. While fulfilling its duties relating to the protection of public interest and environmental protection, the Prosecution Service can use instruments provided by the law: it can access documents and registers, can request a copy of documents and data from them, can contact other public bodies, business and other entities, or can use an expert.[12] The latter is considered to be a very important instrument during the preliminary procedure due to the complexity of environmental cases.

Prior to a prosecutorial action, for the purpose of procedural economy, the law provides for the possibility of issuing a reminder for the voluntary elimination of the violation of the law, where the offending party itself has the opportunity to restore legality as stated in the reminder.[13] The result of the procedural economy measure may be, for example, that the party subject to the inspection reduces the environmental pollution by means of technical upgrades and eliminates the pollution that has occurred. The Prosecution Service also plays an active role in the legislative process, both by providing a preliminary professional opinion on draft legislation and by helping to amend existing legislation, for example by initiating legislative amendments.

In addition to the appropriate legislative environment and the widest possible use of international cooperation, cooperation within the organization itself is an important element of effective prosecutorial action against environmentally harmful acts. Both the criminal and non-criminal branches of the Prosecution Service have important tasks relating to environmental protection. Cooperation and sharing information between the two branches are of paramount importance, and a complex approach is therefore essential. Close cooperation between the two branches is necessary both because of the above-mentioned sharing of information, and because it may occur that the liable ones are held accountable in several

[11] Act LIII of 1995 on the General Rules of Environmental Protection, Section 109 (1).
[12] Instruction 3/2012 (I. 6.) LÜ issued by the Prosecutor General on the public interest protection tasks of the prosecution service, Section 36 (1).
[13] Act CLXIII of 2011 on the Prosecution Service of Hungary (Prosecution Service Act), Section 26 (3).

areas of law at the same time. In addition, measures relating to economic law, company law or labour law may also be needed.

The framework for cooperation is defined by two principles: continuity and timeliness, which are realized in the mutual provision and circulation of information, data and documents.[14] In this sense, prosecutors assigned to environmental tasks – which means that specialization in the activity has been introduced – immediately forward information in their possession concerning the criminal law branch to their colleagues in the criminal law field, and they also take the necessary action based on the information received from the criminal law branch.[15] In this context, prosecutors may take actions and initiate administrative proceedings, such as administrative inspections, the imposition of environmental, nature conservation or other administrative fines, or they can impose obligations, restrictions or prohibitions.

The cooperation between the different branches is, of course, mutual: prosecutors in the criminal field send decisions dismissing a complaint or terminating an investigation, expert opinions, indictments and court decisions in criminal proceedings conducted for criminal offences against the environment and nature, which are defined in Chapter XXIII of the Criminal Code, to the public interest prosecutors of the county chief prosecution offices, so that they can take the necessary measures.[16]

Unfortunately, the latency rate for environmental offences is extremely high. The main reason for this is that in most cases the victim is a living organism, a community, or a part of the natural or built environment that is not capable of defending their rights on their own. The main source of information for prosecutorial action is the cooperation between the different branches of the Prosecution Service. Furthermore, a smaller amount of information comes from individuals, external bodies through requests, reports and enquiries. Due to the obligation of public bodies, municipalities, other organizations and institutions to cooperate, the environment and nature protection authority informs the Prosecution

[14] Circular 1/2014 (III.31.) LÜ issued by the Prosecutor General on the prosecution's environmental activities, para 3.
[15] Instruction 3/2012 (I. 6.) LÜ issued by the Prosecutor General on the public interest protection tasks of the prosecution service, Section 9(1).
[16] Circular 1/2014 (III.31.) LÜ issued by the Prosecutor General on the prosecution's environmental activities, para 4.

Service of its decisions imposing fines and obligations. The *statistics*[17] show that in 2022 the Prosecution Service took 533 prosecutorial measures in the course of its environmental protection activities. The county chief prosecution offices:

- initiated 279 administrative procedures,
- issued 38 signals,
- brought 42 actions,
- issued 16 reminders and initiations aimed to avoid litigation.

As regards the initiation of proceedings by the Prosecution Service, county chief prosecution offices initiated 156 criminal and 2 administrative proceedings.

It can be concluded that the total number of measures has almost doubled compared to 2021, with a steady and dynamic increase from 2019 onwards. It is particularly noteworthy that the number of criminal proceedings has also increased more than two and a half times, compared to the previous year. There has also been a significant increase in the number of administrative proceedings, which has more than doubled.

As to criminal proceedings, it is usually the violation of waste management regulations that has been registered the most. In 2022, the number of registered offences also increased in the case of environmental and nature damages, but the increase was particularly high for waste management offences. This is partly due to the amendment of the legal definition and stricter regulation of the latter criminal offence.

Finally, I would like to explore a criminal case briefly, as it is an excellent illustration of the necessity and effectiveness of international cooperation, inter-sectoral cooperation among state bodies, and cooperation within the Prosecution Service between the different fields.

The court found the defendants guilty of the offence of violating the waste management regulations and other offences in a case where the Hungarian company concerned did not have a permit for the treatment, disposal, storage, processing and import of waste into the country, nor did it have the necessary machinery and equipment for processing. The defendants, as representatives of the company, agreed with a German citizen to take baled, pre-sorted waste from him, and in return, the German citizen paid them 80 euros for every ton of waste imported into Hungary. To this

[17] Prosecutor General's Report on Activities of the Prosecution Service in 2022, pp. 32-33. https://ugyeszseg.hu/en/wp-content/uploads/2023/09/angol-nyelvu-kiadvanyszerkesztett-kivonat.pdf (Accessed: 15 February 2024).

end, one of the defendants signed a declaration on behalf of the company, stating that the company had the necessary official authorizations and licences to receive and process the bales.

As a result of this agreement, between June and December 2006, a total of 1,810 tons of bales of waste were imported from Germany. Some of them were stored at the company premises and others at different sites rented by the company.

Through an international cooperation, the German authorities arranged the return of some of the waste to Germany. Then, the Hungarian court re-seized the waste bales still stored in Hungary, and after the expert examination, lifted the seizure of all waste bales and ordered their release to the National Inspectorate for Environment, Nature and Water. These bales of waste have also been partially returned to Germany by the German authorities and, as to the remaining bales, the regional inspectorates obliged the waste owners to comply with their waste management obligations.

At the end of the procedure, the criminal liability of the defendants was established, and the environmentally dangerous situation was also put to an end. The prosecution's action was therefore effective in all respects.

In conclusion, I would like to highlight the following: our experience shows that the most effective types of measures, when applied rigorously and consistently, are those aimed at prevention and restoration. It is important to emphasize that in the rule of environmental law prosecutors are key players, who play a crucial role in the fight against environmental crime and in enforcing liability for environmental damages. In their everyday work for the environment, prosecutors defend human rights, such as the right to life, health, respect for private and family life, decent working conditions and, last but not least, the rights of children

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[2] Opinion No. 17 (2022) of the Consultative Council of European Prosecutors (CCPE) on the role of prosecutors in the protection of the environment

[3] Prosecutor General's Report on Activities of the Prosecution Service in 2022. [Online]. Available at: https://ugyeszseg.hu/en/wp-content/uploads/2023/09/angol-nyelvu-kiadvanyszerkesztett-kivonat.pdf (Accessed: 15 February 2024).

[4] The European Green Deal. Striving to be the first climate-neutral continent [Online]. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_hu (Accessed: 20 February 2024).

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LAJOS SZALONTAI [*]

Climate protection from an engineering perspective – innovative research projects at the University of Miskolc[**]

ABSTRACT: In the 21st century, technical and engineering higher education, along with industrial companies, play a crucial role in addressing climate change challenges. Universities and research institutes educate specialists, engineers responsible for developing sustainable technologies and innovations essential for climate protection. Decision makers and industrial companies not only adopt these technologies but also strive to make their operations more sustainable, directly contributing to the reduction of global carbon emissions.

Joint research and development (R&D) efforts bring together higher education, industry, and research institutions to develop technologies and solutions aimed at mitigating the impacts of climate change. These collaborations are vital across multiple areas (energy, renewable energy utilisation, agriculture – precision farming, raw materials, circular economy, etc.).

Furthermore, education is undergoing significant transformation to meet the demands of climate change and the evolving needs of industry. New courses, disciplines, and training programs are being developed to equip students with the knowledge and skills required to address climate-related challenges. Universities and technical institutes are introducing specialized programs focused on renewable energy, sustainable engineering, environmental management, and green technology.

In this article I would like to present the main achievements of the engineering disciplines of the University of Miskolc - especially the Faculty of Earth and Environmental Sciences and Engineering - through projects directly or indirectly related to climate change and climate protection.

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KEYWORDS: climate protection, engineering, university R&D, sustainability, earth sciences.

1. Introduction

Climate change is one of the greatest global challenges of our time, which requires urgent and comprehensive solutions. Higher education and research and development play a key role in finding answers to this complex problem. Universities and research institutes contribute to climate change mitigation by developing innovative technologies and sustainable solutions, while training professionals – engineers who will be able to respond to the changing needs of industry and society in the future. Through education and R&D cooperation, we develop new methods and technologies that are essential for creating a sustainable future.

Of course, the technical faculties of the University of Miskolc: the Faculty of Earth and Environmental Sciences, the Faculty of Materials and Chemical Engineering, the Faculty of Mechanical Engineering and Informatics, are trying to respond through both undergraduate and postgraduate training, training developments, and domestic and international research.

2. Education and climate change

The educational portfolio of the three technical faculties includes, among others, undergraduate and postgraduate training, short courses, and further training tailored to corporate needs, which indicate that the faculties are constantly striving to develop training in line with the challenges of the times. The model curriculum reviews are carried out with the involvement of alumni from renowned companies in the given sector, thus ensuring quality curriculum changes. As a result of these professional review processes, the topic of sustainability and climate protection has been incorporated into subject topics at a certain professional and more general level.

In the case of undergraduate and master's degrees in technical geosciences, environmental engineering, geography, materials and chemical engineering, mechanical engineering, energy, and information technology, students can choose from specializations specifically related to climate change mitigation and sectors related to climate change (energy, renewable

energy production and utilization, water and raw materials research, waste management - recycling, CO2 storage). Since 2022, thanks to an EIT program, the TIMREX specialization in the master's degree in geosciences engineering offers Double degree training for students wishing to deal with raw material research and research of critical elements. Thanks to the TIMREX program, in addition to the University of Miskolc, students can also study at the universities of Zagreb, Lulea, Wroclaw, and, from 2025, the Montanuniversität Leoben. Also starting in 2025, a double degree program will be created in the Master's Department of Petroleum Engineering, where students who choose the program can acquire knowledge of subsurface field development, subsurface CO2 and hydrogen storage.

Our graduate programs can be studied in both the basic and master's departments in a dual format, during which a company phase also appears. In addition to the mandatory professional internship for students (6 weeks in the basic department, and 4 consecutive weeks in the master's department), they also spend 22 weeks per year at the company offering dual position. This way, in addition to the salary, they can immediately see the applicability and utilization of their studies in practice. For students who do not wish to commit to a professional partner for a longer period of time (more than 4 semesters) and would like to focus on their university studies, but would like to write a thesis in addition to project-based education with industrial partners in their final year (in exchange for payment), cooperative training has been developed and introduced, which can also be called the “little brother” of dual training, only in the last 2 semesters it means a “load” of 100-110 working days for students, ideally at the future employer.

In the case of specialized further training courses, the expansion of the 2- and 4-semester postgraduate training portfolio can also be observed in response to climate change and related areas. Without claiming to be exhaustive, the following postgraduate training courses have appeared in the portfolio of the 3 technical faculties over the past decade: Nuclear Power Plant Operation Engineer, Solar Power Plant and Solar Collector Installation Engineer, Geothermal Engineering, Hydrogen Supply Engineering, Waste Management and Utilization Engineering, Climate Adaptation Engineering, Precision Soil Mapping Engineering, Urban Operation Engineering, Sustainable Energy Engineering, which courses offer a focused opportunity to acquire immediately usable practice-oriented knowledge.

A total of 14 undergraduate, 16 master's and 16 postgraduate courses can be found in the range of programs offered by the University of Miskolc in the 2024/2025 academic year.

In addition to higher education - adult education, the technical faculties also pay special attention to ensuring the appropriate supply of students. In addition to additional energy expenditure, they offer popular science and engineering lectures for secondary and primary schools, during which they present, among other things, the issues of climate change - climate adaptation, renewable energy sources, sustainability, and how they can contribute to a livable future/environment as engineers after completing their bachelor's and master's degrees. Such programs include the lecture series entitled "Sustainability as an Engineer" and "Climate Change? Should We Fear or Adapt?", within which teaching colleagues have been touring the regions of Hungary during the school years since 2023 as a roadshow, and they also go to secondary and primary schools upon invitation.

Finally, short courses and needle-like training courses should be mentioned, which open up new opportunities for increasing the competence of company employees in expanding the knowledge base related to a specific sub-area (e.g. sustainability, climate change, climate adaptation). Such sub-knowledge training courses include the course created in the field of teacher training in 2024, entitled "Environmental sustainability in practice from school to professional". With this training, the Faculty of Earth and Environmental Sciences and Engineering, with the active participation of the lecturers of the other two technical faculties, aims to provide primary and secondary school (but not exclusively) science teachers with up-to-date, new knowledge related to the topics of sustainability and climate change, as well as to present and transfer low-cost experiments that can be implemented in schools or even in the students' homes.

3. International Research Projects

The greatest added value of higher education institutions in the field of technology and natural sciences is in research and development, in addition to the training of well-educated, practice-oriented students. At the University of Miskolc, the 3 technical faculties have an extensive domestic and international network of corporate, research and higher education institutions, which in many cases look back on a history of several decades, even nearly a century (hydrocarbon exploration, production and storage). In

the next chapter - without claiming to be complete - I would like to briefly present the main domestic and international research and developments with a focus on climate change and sustainability, implemented under the leadership or participation of the Faculty of Earth and Environmental Sciences and Engineering, seeking and providing answers to these challenges.

As mentioned in the introduction, the process of climate change, its effects and the mitigation of the effects of climate change are complex topics, to which the technical faculties are connected in many areas. New, innovative research and development play a major role in the areas of raw material research and production, raw material production, CO2 storage, utilization of conventional and renewable energy sources, environmental protection, identification of pollution sources and disposal of natural resources, waste management, collection of environmental data and its interpretation from a geoscientific and environmental science perspective, with the help of which we can contribute to mitigating the effects of climate change, achieving a greater degree of climate adaptation and creating adoptable good practices.

3.1. 7th Framework Programme projects

The 7th Framework Programme (FP7) of the European Union, which ran from 2007 to 2013, was one of the largest research and innovation funding schemes on the continent, with a budget of nearly €55 billion. The programme provided significant support to universities, research institutes and industrial actors and played a fundamental role in strengthening European research collaborations. The University of Miskolc also participated in several FP7 projects, several of which had topics directly or indirectly related to climate change.

One such project was KNOWBRIDGE (The Cross Border Knowledge Bridge in the Renewable Energy Sources Cluster in the Eastern Slovakia and North Hungary), which was implemented between 2009 and 2012 with the participation of Eastern Slovakia and Northern Hungary. The aim of the initiative was to create a cross-border innovation network in the field of renewable energy sources. The project implemented cluster development, prepared a joint strategic plan, and developed a mentoring and experience-sharing system to strengthen cooperation between regions. Its results contributed to expanding local research and development capacities and the utilization of renewable energies.

The other significant project was E-SOTER, which aimed to create a unified European database based on the digital processing of soil and terrain data. The project used GIS and remote sensing technologies to accurately map soil conditions and topography. Researchers from the University of Miskolc actively participated in field data collection, modeling, and thematic mapping tasks, including using drone sensor technologies and modern analysis software. The data obtained in this way became important tools for environmental assessment and sustainable land use planning.

The FP7 programme laid the foundation for later larger-scale research initiatives, such as Horizon 2020, and played a key role in strengthening the European Science and Innovation Area.

3.2. Horizon 2020 projects

It was the EU's largest R&D funding initiative, with a budget of nearly 80 billion euros between 2014-2020. Its aim was to promote scientific excellence, strengthen industrial leadership and address environmental and societal challenges. The Faculty of Earth and Environmental Engineering was the most successful applicant and project implementer in the field of earth sciences in Hungary with 7 winning applications (KINDRA, INTRAW, UNEXMIN, CHPM2030, GROW Observatory, ROBOMINERS, REFLECT). I would like to briefly describe the purpose and relevance of these projects below.

UNEXUP – UNEXMIN Upscaling

The project is a continuation of the UNEXMIN H2020 program implemented between 2016-2019, in which an autonomous robot was developed to map flooded mines. The new phase aims to build on previous achievements by creating advanced robots that can explore up to 1500 meters deep. These robots will collect geological and mineralogical data using 3D mapping to help make decisions about reopening abandoned European mines, thereby contributing to reducing our dependence on rare earth metals, critical raw materials (which are essential for e.g. electronic devices, batteries). No similar device currently exists, so the development is groundbreaking. UNEXMIN GeoRobotics Ltd. will operate as a spin-off company after the project is completed.[1][2][3]

[1] https://www.unexmin.eu/ (Accessed: 14 May 2025)
[2] Zajzon et al., 2023.
[3] Zajzon et al., 2017.

ROBOMINERS

The project, implemented with the participation of 14 international partners, aims to create a new type of mining ecosystem that combines developments in robotics and other scientific fields. The project focuses on a small, amphibious – i.e., operating both on land and underwater – mining robot swarm, capable of extracting hard-to-reach or small-volume ore deposits. The robots are sent deep into the ground through medium-diameter boreholes, where their modules assemble independently. Their sensor systems enable them to recognize their environment, control and optimize extraction. During their work, they create mineral mud, which is transported to the surface for processing. The project aims to build a TRL 4–5 prototype and test it in the laboratory.[4][5][6]

REFLECT

The REFLECT (Redefining geothermal fluid properties at extreme conditions to optimise future geothermal energy extraction) project was implemented under the European Union's Horizon 2020 programme between 2020 and 2023, with a grant of nearly €5 million. The project aimed to increase the efficiency of geothermal energy exploitation by preventing problems caused by chemical reactions in heat-carrying fluids, such as precipitation, corrosion and gas evolution.

Within the framework of REFLECT, researchers collected new, high-precision data on the physical, chemical and microbiological properties of geothermal fluids under extreme temperature and pressure conditions. These data contributed to the creation of a European geothermal atlas and the development of predictive models that help to optimally operate geothermal systems and prevent unwanted reactions.

The project collected more than 80 fluid samples from various European geothermal sites and conducted laboratory experiments to investigate the effects of precipitation, gas evolution and microbial activity. These results allowed for the optimization of the design and operation of geothermal power plants, reducing maintenance costs and increasing energy efficiency.

[4] https://robominers.eu/ (Accessed: 14 May 2025)
[5] https://robominers.eu/publications/ (Accessed: 14 May 2025)
[6] Berner and Sifferlinger, 2024.

The REFLECT project was coordinated by the German GFZ Helmholtz Centre for Geosciences and the consortium included 14 partners, including the University of Miskolc.[78]

CHPM 2030

The CHPM2030 (Combined Heat, Power and Metal extraction) project aimed to develop an innovative technology that enables simultaneous geothermal energy and metal extraction from ultra-deep ore bodies.

Its main objectives included the development of a technology that combines geothermal energy production and metal extraction, especially at depths where conventional mining is not economical, the conversion of ultra-deep ore bodies into artificial geothermal systems capable of producing heat and electricity while the heat transfer fluid transports dissolved metals to the surface, and last but not least the development of a technology for metal extraction from the returning fluid, including nanotechnology solutions such as targeted metal ion adsorption.

The results of the project could contribute to increasing Europe's raw material and energy independence and create new opportunities for sustainable resource utilization.[9][10]

GROW Observatory

The project, which ran from 2016 to 2019, aimed to create a sustainable, community-based observation system for monitoring soil moisture and land use, supporting precision agriculture, sustainable irrigation and land use.

One of its main objectives was to implement “Citizen Science”, involving more than 20,000 European smallholder farmers and gardeners who collected data on their own land using low-cost soil moisture sensors. The data collected contributed to improving the accuracy of Sentinel-1 satellite soil moisture measurements and to developing sustainable land use practices. Based on the experience gained and accumulated during the project, online courses and local workshops were organized for participants

[7] https://www.reflect-h2020.eu/ (Accessed: 14 May 2025)
[8] https://www.reflect-h2020.eu/scientific-publications/ (Accessed: 14 May 2025)
[9] https://www.chpm2030.eu/ (Accessed: 14 May 2025)
[10] CHPM2030 Overview and project results [Online]. Available at: https://eurogeologists.eu/wp-content/uploads/2019/06/CHPM_results-Delft_2019_05_22.pdf (Accessed: 14 May 2025).

to learn about regenerative agriculture methods and soil monitoring techniques.

The project created a unique, high-resolution soil moisture database that serves as a valuable resource for researchers and policymakers. The GROW Observatory has shown how citizen science tools can be used to promote sustainable agriculture and environmental monitoring.[11]

3.3. EIT Programmes

The European Institute of Innovation and Technology (EIT) is a flagship initiative of the European Union, aiming to foster innovation by connecting education, research and entrepreneurship. The EIT RawMaterials partnership within the EIT focuses on increasing the security of raw materials supply and improving the sustainability of the raw materials value chain.

The EIT's main objectives in the field of raw materials and sustainability are to strengthen the raw materials industry in Europe, with a particular focus on critical raw materials (e.g. rare earths), to support the sustainable use of resources along the entire value chain from mining to recycling, to promote the circular economy by improving the efficiency of material use and to support the green transition by providing the raw materials needed to mitigate climate change (e.g. electric mobility, battery production, renewable energies).

In addition, education development and knowledge transfer are also a key goal of the EIT RM, to create innovative educational programs (e.g. international MSc programs – AMIR, TIMREX, summer universities) to train future raw materials specialists. Below I would like to mention a few EIT programs implemented with the participation of the University of Miskolc.

AMIR-RIS

AMIR-RIS is a two-year master's degree program that focuses on different stages of the raw materials life cycle, especially recycling. The goal is to train professionals who have in-depth knowledge in the field of materials technology and are open to innovation and entrepreneurial thinking.[12]

[11] https://growobservatory.org/ (Accessed: 14 May 2025)
[12] https://www.amir-master.com/ (Accessed: 14 May 2025)

REEBAUX
The REEBAUX project investigated how to extract rare earth metals from bauxite and bauxite processing waste (e.g. red mud) in the ESEE region. The project provided guidance for future research and technological developments in this area.[13]

ESEE Education
ESEE Education aims to improve education on raw materials in the Eastern and South-Eastern European region. The programme includes training at different levels, from school lessons to university courses and professional development.

MineTALC
The MineTALC project aimed to improve the efficiency of backfill mining of low and medium-strength ore bodies. To this end, new technical solutions and mining methods were developed, considering environmental aspects.

RM@Schools
RM@Schools is an educational initiative that brings raw materials science closer to students. The programme presents the role of raw materials and the importance of their responsible and sustainable use through interactive activities and experiments.[14]

3.4. LIFE projects
The LIFE programme is one of the oldest and most important funding instruments of the European Union for the environment and climate action. It has been in operation since 1992 and has supported more than 5,500 projects across Europe.

The main aims and objectives of LIFE projects are to protect nature and biodiversity, with particular regard to Natura 2000 sites, to address environmental challenges such as reducing air, water and soil pollution, improving waste management, mitigating and adapting to climate change, supporting sustainable energy use and energy efficiency, and to help implement policy and legal instruments to achieve EU environmental and climate policy objectives.

[13] http://reebaux.gfz.hr/ (Accessed: 14 May 2025)
[14] https://rmschools.isof.cnr.it/ (Accessed: 14 May 2025)

In the LIFE 2021-2027 cycle, projects can be implemented in the following areas:

1. Nature and biodiversity
2. Circular economy and quality of life
3. Climate change mitigation and adaptation
4. Clean energy transition

The following activities must be implemented within the framework of the projects:

- LIFE projects offer practical, on-site solutions to environmental and climate challenges.
- Support the testing and demonstration of innovative technologies.
- Promote the dissemination and adoption of good practices.
- Pay special attention to systemic impacts and the preparation of policy measures.

The LIFE programme does not require co-financing from participating countries, making it a particularly useful tool for municipalities, research institutions, civil society organisations and businesses to achieve their environmental and climate goals.

In recent period, the technical faculties of the University of Miskolc have directly participated in 2 LIFE programs: LIFE IP HungAIRy and LIFE CLIM-COOP.

LIFE IP HungAIRy

This project aims to improve the air quality of Hungary in the long term. The program is implemented in ten Hungarian cities, including Miskolc, and focuses mainly on reducing air pollution from residential heating, transport and industrial activities. The project involves the preparation of new air quality plans, modern data collection and public awareness-raising. The aim is to reduce the concentration of particulate matter and other harmful substances in urban air through the cooperation of decision-makers and the public.[15]

LIFE CLIMCOOP

This project promotes adaptation to the effects of climate change, in a unique way through joint action between the municipality and industry. The

[15] http://hungairy.hu/ (Accessed: 14 May 2025)

pilot site is Kazincbarcika, where the city and the BorsodChem company are working together to develop a climate adaptation strategy. Practical steps include expanding green areas, introducing rainwater management solutions and mitigating the effects of heat waves and flash floods. The project aims to create a model of cooperation that other cities can follow.[16]

4. National projects

Last but not least, I would like to provide a brief overview of the currently larger domestic project aimed at climate protection and mitigation of the effects of climate change. The National Laboratories program is one of Hungary's priority research and development initiatives, launched within the framework of the Recovery and Resilience Plan (RRF). The program aims to strengthen the domestic research and innovation ecosystem, especially in areas that provide answers to the challenges of the future economy and society.
National laboratories are research centers where universities, research institutes and industrial partners work together on long-term, strategically important scientific and technological goals. The focus is on digital transition, artificial intelligence, green technologies, climate change and the transformation of energy systems. The technical faculties are actively involved in 3 such National Laboratory projects: Multidisciplinary National Laboratory for Climate Change (ÉMNL), National Laboratory for Water Science and Water Security (VVNL), National Laboratory for Renewable Energies.

Multidisciplinary National Laboratory for Climate Change (ÉMNL)
This laboratory investigates the complex issues of climate change, with particular attention to its environmental, economic and social impacts. The research aims to understand the factors that trigger climate change and their impacts on nature and human societies. In addition, the laboratory also deals with the development of technological, economic and social adaptation strategies to help communities prepare for changing environmental conditions. Within the framework of subprojects 7A and 7B, the University of Miskolc is working on the development of raw material production processes and methodologies for CO2-intensive industries, and on the development of low-cost sensor networks for recording environmental data

[16] https://life-climcoop.hu/ (Accessed: 14 May 2025)

in agricultural and settlement environments, and on the development of geoinformatics methodologies to support decision-making.[17]

National Laboratory for Renewable Energy
This laboratory conducts research in the field of renewable energy sources, especially hydrogen technologies and carbon capture and storage (CCU). Its goal is to develop and test technologies that enable the production and storage of clean energy and the environmentally friendly utilization of carbon dioxide. The laboratory also performs economic and legal analyses to facilitate the integration of these technologies into the industrial and energy sectors.[18]

National Laboratory for Water Science and Water Security
This laboratory focuses on issues of water management and water security. Its research includes the assessment of the status of surface and groundwater bodies, monitoring water quality, and the study of aquatic ecosystems. The laboratory aims to contribute to the development of sustainable water management practices and to increase water security, especially in the face of challenges caused by climate change and human activities.[19]

FLUMEN project – Hydrogen blending in the natural gas network
The FLUMEN project is a joint research and development initiative launched by the University of Miskolc and FGSZ Földgázszállító Zrt. The aim of the project is to map the transport options for a mixture of hydrogen (10%) and natural gas in the domestic natural gas system, thereby contributing to Hungary's climate neutrality efforts. The project will build and test a pilot system that will enable the safe transport of hydrogen-enriched natural gas, and will develop measurement, monitoring and accounting methods for the mixture of hydrogen and natural gas.
The technical implementation will be carried out in two phases. In the first phase, the system components required for the transport of hydrogen-

[17] https://www.uni-miskolc.hu/palyazati-tevekenyseg/elnyert-hazai-es-nemzetkozi-palyazatok/rrf-2-3-1-21-2022-00014/ (Accessed: 14 May 2025)
[18] https://www.uni-miskolc.hu/palyazati-tevekenyseg/elnyert-hazai-es-nemzetkozi-palyazatok/rrf-2-3-1-21-2022-00009/ (Accessed: 14 May 2025)
[19] https://palyazatok.uni-miskolc.hu/RRF-2-3-1-21-2022-00008-viztudomanyi-es-vizbiztonsagi-nemzeti-laboratorium (Accessed: 14 May 2025)

enriched natural gas will be designed and tested. In the second phase, the operation of the entire system will be evaluated and optimized.

In addition to all these domestic and international projects, numerous industry-induced and financed R&D projects (Market R&D+I) have been and are being implemented to this day, which may have domestic and international patents, contributing with their results to increasing sustainability, combating climate change, and reducing the effects of climate change (utilization of lignite for agricultural purposes, testing of rare earth metal content; testing and extracting lithium content of subsurface fluids, precision agriculture – smart irrigation technologies, development of irrigation decision support systems).[20]

5. Conclusion

In the study, I tried to summarize and demonstrate through good practices that the 3 faculties of the University of Miskolc operating in the technical training areas are active players and sometimes shapers of the fight against climate change and the increase of economic sustainability from an environmental perspective. Thanks to continuous monitoring and reviews, both undergraduate and postgraduate trainings are characterized by renewal, updated knowledge transfer and practice orientation, and the issues of the challenges of our time are integrated into the model curricula, as well as the answers to questions and challenges, for which the results of successful domestic and international R&D projects provide a good basis. The network of contacts between the lecturers and researchers of the technical faculties (higher education and industry), as well as the modern infrastructural features of the faculties, provide an excellent basis for the University of Miskolc to continue to be one of the leading knowledge centers of Hungary and Central and Eastern Europe in the 21st century, even in the fields of green transition, sustainability and the fight against climate change.

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[20] https://www.uni-miskolc.hu/palyazati-tevekenyseg/elnyert-hazai-es-nemzetkozi-palyazatok/flumen-projekt-2-fazis/ (Accessed: 14 May 2025)

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[4] *CHPM2030 Overview and project results*, [Online]. Available at: https://eurogeologists.eu/wp-content/uploads/2019/06/CHPM_results-Delft_2019_05_22.pdf (Accessed: 14 May 2025).

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Environmental damage, climate change and the precautionary principle from an ethical perspective[**]

ABSTRACT: Preventing major damage or a disaster usually requires action before damage occurs, especially if this damage would be irreversible. The precautionary principle is central to environmental and climate issues, but has only recently become more important, for example as one of the four fundamental principles of the European Union. With regard to the precautionary principle, the open flanks and possible areas of dispute that characterise the debates on this principle are shown from an ethical perspective.

Firstly, the scope of the precautionary principle has expanded and with it the goods worthy of protection. Secondly, potential risks in many different areas need to be identified or researched - with the help of an interdisciplinary approach. Fourthly, the risks must be assessed in relation to ethical and legal norms. Psychological pitfalls must be avoided in the assessment. Fourthly, precautionary measures must be discussed in terms of their effectiveness and priority in view of other areas of risk.

KEYWORDS: precautionary principle, climate change, environmental ethics, risk assessment, uncertainty.

1. Introduction

1.1. On the question

Preventing major damage or a disaster usually requires measures to be taken before damage occurs, especially if these damages were irreversible.[1] Political precautionary concepts have been around for a long time, for

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example, in the field of public health in the 19th century. Even though the precautionary principle is central to environmental and climate issues, it has only recently gained in importance. This article examines the precautionary principle, highlighting the open flanks and possible areas of dispute that characterise the ethical and legal debates surrounding it.

In the 1970s, precaution became the guiding principle of German environmental policy, partly as a result of the forest dieback caused by air pollution.[2] As early as 1971, a kind of precautionary principle was listed in the German government's first environmental programme: Environmental protection should not merely react to damage that has already occurred, but must prevent future damage from occurring in the first place through precaution and planning.[3] The benchmark for any environmental policy was defined as the protection of human dignity, which is considered threatened when human health and well-being are at risk, either now or in the future.[4] In Germany, after several decades of discussion and legal development, the precautionary principle has become one of the core principles of environmental law.[5]

At the international level, the 1992 Rio Declaration on Environment and Development makes a clear reference to the precautionary principle in principle 15:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of

[2] The brief historical approach merely serves as an introduction to the topic. The focus is on developments in Germany and the European Union. Addressing the historical developments in other European or non-European countries in a comprehensive manner would exceed the scope of this contribution.
For the German government's environmental protection programme of 1969/1971, see Engels, 2006, pp. 275-293.

[3] Cf. Deutscher Bundestag, 1971, p. 3.

[4] Cf. Deutscher Bundestag, 1971, p. 9. Cf. also in 1974 the Federal Immission Control Act §1 (2), 2: The Act serves precautionary purposes.

[5] The precautionary principle is expressly regulated in Article 34 (1) on environmental protection of the Unification Treaty of June 1990 as a voluntary commitment of the legislator and is therefore applicable federal law. The precautionary principle is also enshrined in Article 20a of the Basic Law of the Federal Republic of Germany: the state is tasked with protecting the natural foundations of life, also in responsibility for future generations, which may also require precautionary measures in addition to hazard prevention.

> full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[6]

The precautionary principle was first developed as a concept in 2000 in a communication from the EU Commission, which states that the precautionary principle requires a rapid response in the face of potential risks to human, animal, or plant health, or in regard of the need to protect the environment:[7] In particular, in cases where the available scientific data do not allow a comprehensive risk assessment, the precautionary principle could be used to impose a marketing ban or a recall of products that are harmful to health. More recently, in 2010, the growth strategy adopted by the EU, the Green Deal, also refers to the precautionary principle in the context of addressing climate change.[8] This concept aims to reduce net greenhouse gas emissions in the European Union to zero by 2050, making it the first 'continent' to become climate neutral.

Today, the precautionary principle is widely recognized as one of the four fundamental principles of the European Union's environmental policy, although it is interpreted with varying emphases. For example, the European Parliament's brief overview of environmental policy states: 'If an action or policy has the potential to cause harm to the environment or public health, and there is persisting scientific uncertainty about its effects, this action should not be applied until further evidence is provided.'[9]

This is distinguished from the second principle of prevention: This principle is 'a tool aimed at preventing environmental damage, rather than reacting to it. This requires preventing measures to be taken to anticipate and avoid environmental damage.'[10]

In turn, a summary of the European Commission on the principles of EU environmental law explains the precautionary principle as follows:

> Where there is uncertainty about the risk of environmental harm, the precautionary principle allows or requires protective

[6] United Nations General Assembly 1992, principle 15.
[7] European Union, 2000.
[8] European Union, 2019, chapt. 2.1.1, p. 6 (but here is used the term "prevention" instead of precaution).
[9] European Parliament 2025, p. 2.
[10] European Parliament 2025, p. 2.

> measures to be taken without having to wait until the harm materialises. There is a set of factors shared in every definition of the precautionary principle - existence of danger and scientific uncertainty. As a result, the precautionary principle always deals with potential harm and serves as a tool to bridge uncertain scientific information and a political responsibility.[11]

In the meantime, numerous national regulations have taken up the precautionary principle. However, the contours of the precautionary principle in terms of areas of application, objectives, prioritisation, and kind of measures continue to be the subject of political debate, legal interpretation disagreements and ethical-normative discussions.

The precautionary principle is linked to the developments of a modern society, which the German sociologist Ulrich Beck labelled a "risk society" in 1986.[12] He states that Western industrialised societies bring forth new technologies such as nuclear energy, biotechnology and nanotechnology, as well as social risks such as unemployment, and therefore have to deal with varying degrees of uncertainty: On the one hand, the full extent of the effects and risks of new technologies is unknow; on the other hand, uncertainty cannot generally prevent the use of new technologies. However, the lack of reliable knowledge must lead to precautionary measures aimed at preventing the emergence of risks or the occurrence of harm. Precautionary measures are necessary, particularly in view of long-term damage or irreversible damage that could also affect subsequent generations. Beck also points out that risks are always the result of a social construction process: It is not the abstract risks themselves that are perceived as threatening, but the way they are communicated by mass media and their schemata of safety and danger. [13] The phenomena of irrational responses to risk will be discussed further below. The sociologist Ulrich Beck has not only pointed out problems but has already articulated ethical normative demands himself.

1.2. Application-related ethical judgements as mixed judgements

Since the 1970s, environmental ethics and ecologically sensitive economic ethics have developed within the field of ethics. In addition, ethical questions concerning the responsible handling of new biomedical and

[11] European Commission, 2025.
[12] Beck 1992; 1986 originally in German.
[13] Beck 1992, p. 56.

technological developments have been discussed. When forming ethical judgements, such application-related or area-related ethics consistently refer to empirical statements and problem descriptions that can already be questioned as such or whose benefits and potential risks of harm can also be the subject of debate.

Application-related ethical judgements are therefore always so-called mixed judgements, i.e. they are based on certain presuppositions, refer to ethical norms and at the same time are based on more or less contested statements about facts.[14] For example, one might assert that biodiversity is ethically significant (prior assumption) and that it is being reduced by intensive agriculture (empirical assumption). However, it would first have to be shown empirically how animals and plants or, more broadly, the environment and climate are damaged, in order to then argue from an ethical point of view that biodiversity must not be reduced, e.g. in relation to relevant norms of nature and animal ethics as well as fundamental moral rights and duties of humans. Furthermore, the perception of the problem interacts with the ethical evaluation: 'Data gain their ethical relevance only against the background of norms and values being deemed appropriate, which assume not only a justifying function but also an orientating function.'[15]

2. The precautionary principle in relation to environment and climate

Before addressing the open flanks and possible areas of dispute that shape the ethical and legal debates surrounding the precautionary principle, it should be distinguished from similar principles: The precautionary principle in politics and law pursues the goal of risk avoidance. This must be distinguished from aftercare and hazard defence.

2.1. Aftercare in the event of damage

If damage to humans and the environment has already occurred, the only option is to remedy it through aftercare. The necessity of a precautionary principle has been demonstrated, for example, by the experience with halogenated hydrocarbons, which destroy the ozone layer. Although the problems had already been recognised in the 1970s, it was not until the mid-

[14] Bobbert 2012, pp. 174-197; Bobbert, 2015; Dietrich, 2008.
[15] Dietrich 2012, p. 513.

1980s that measures were taken.[16] Because action was not taken until late, major damage was caused that required extensive aftercare. For instance, the chlorine content in the stratosphere – which today is six to seven times higher than it was in 1950 – is a contributing factor to the so-called greenhouse effect. In addition, the holes in the ozone layer are leading to a sharp increase in the rate of skin cancer worldwide due to increased UV radiation. In the next 50 years, as today's children grow up, there will be several thousand more cases of skin cancer than before, as they will have been exposed to stronger UV radiation. This UV radiation penetrates the earth's atmosphere through holes in the protective ozone layer created by chlorofluorocarbons (CFCs) and other synthetic chemicals.[17]

2.2 Hazard prevention in the event of known risks

If a hazard exists, i.e. if damage to humans and the environment is foreseeable with a certain degree of probability, hazard prevention requires that its occurrence be prevented. Nuclear power plants, for example, are subject to numerous regulations due to the risk of excessive radiation exposure for the surrounding population and the potential danger of a nuclear worst-case scenario, i.e. a maximum credible accident.

2.3 The precautionary principle in the face of potential risks

The precautionary principle goes further than hazard prevention: the aim is to prevent hazards from arising in the first place. It requires recognising potential risks and taking proactive measures at an early stage to prevent harm to humans and the environment. The precautionary principle includes the two dimensions of risk prevention and resource precaution:

> Risk precaution means taking preventive action in the event of incomplete or uncertain knowledge about the nature, extent, probability and causality of environmental damage and hazards in order to avoid them from the outset. Resource precaution means that we treat natural resources such as water, soil and air with care in order to safeguard them in the long term and preserve them in the interests of future generations.[18]

[16] European Union 2001, pp. 76-83.
[17] European Union 2001, p. 3.
[18] Umweltbundesamt, 2021 (translated by the author).

3. The precautionary principle in practice: open flanks and possible points of contention

The precautionary principle is well established in Germany and at the EU level with regard to emissions, food, animal feed and chemical substances. In these areas, the precautionary principle is comparatively limited because it concerns substances, products or emissions that should not have any negative consequences. The corresponding measures typically involve preventing the distribution of a substance or product, recalling it, or refraining from operating a facility or halting its operation. In this context, both the causes and their possible consequences are relatively straightforward. Moreover, the focus is primarily on protecting the life and health of people currently living.

The German Supply Chain Act[19] from 2021 and the European Supply Chain Directive[20] from 2024 also contain the precautionary principle. However, in this context, the scope of application is significantly broader and therefore more difficult to define. The difficulties begin with the fact that the entire company, and not just a single product or a specific production branch, is to be considered in its entirety.

The scope or context of the precautionary principle can therefore be seen to have been extended. The following section will outline the points of contention that are emerging in this regard and where the precautionary principle has open flanks.

3.1. Scope of the precautionary principle: a debate on objectives and the nature of risks

The precautionary principle is very broad in terms of its objectives. What are the legally protected goods to be protected and how should tensions between different legally protected goods be dealt with?

The protection of humans and animals, but also biodiversity, the environment, safeguarding climate compatibility and the protection of future generations of humans are usually cited as objectives. Should or must these objectives be prioritised? How do national and international perspectives relate to one another? What time period should be taken into account?

[19] Deutscher Bundestag, 9 June, 2021.
[20] European Union, 2024.

Unless there is already reason to assume a potential risk, the perception and analysis of potential risks depend on the social or political focus: Which objectives are currently attracting heightened sensitivity?

The very fact that only selected disciplines are surveyed for potential risks represents a preliminary decision on the type of risks to be identified: Medicine focuses on human health risks, biology, among other things, problematises the threat to biodiversity and the destruction of ecosystems, geosciences and agricultural sciences raise the alarm with regard to soil or water contamination and meteorology identifies weather disasters and climate shifts.

Indications of problems also depend on implicit weightings concerning the objectives: Contemporary societies and nations tend to focus primarily on the health of currently living people or their energy and mobility needs and less on the abstract of future generations lacking resources essential for survival, such as clean water or raw materials.

The perception of problems is also currently shifting because the protection of animals and the intrinsic value of functioning ecosystems are gaining importance in ethical debates, in some legal discourses, and among political stakeholders. Anthropocentric national and international law prioritises the life and health of people currently alive. From an ethical perspective, there are good reasons for this. However, exploring this issue in depth is beyond the scope of this article.[21] However, an anthropocentric prioritisation is no longer universally accepted, at least in animal and environmental ethics.[22] For example, it must at least be discussed: Do animals have rights comparable to those of humans? Do biodiversity and functioning ecosystems have intrinsic value or do they still have to be related to humans?

The precautionary principle may therefore be subject to tension with regard to objectives and potential risks, which should be discussed and justified not only in factual terms, but also from an ethical-normative and legal perspective. Implicit preliminary decisions in relation to the protected good, place and time must be clearly communicated and ultimately at least plausibly justified.

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[21] For a justification of fundamental individual rights and duties, see Gewirth, 1978, and for anthropocentric animal ethics, see Lintner, 2017, esp. chap. 3; 4 and the overview articles on this question by Petrus, 2018; Basaglia, 2018.

[22] See articles in the section „Theories of Animal Ethics“ in Ach et al., 2018.

It will also have to be determined in more detail whether potential risks relate to lifestyle and thus - ethically speaking - to goals of the good life that are only associated with a particular claim to validity, or whether potential risks affect fundamental legally protected goods or fundamental moral rights and thus, ethically speaking, norms that are associated with a universal claim to validity. With regard to questions of the good life, examples include mobility during the holiday season or the year-round availability of seasonal vegetables and fruit. However, if potential risks relate to the basics of life, such as clean air, clean water and sufficient food for people and societies currently living, these are ethical-normative questions that deal with unconditional moral obligations.[23]

3.2. The precautionary principle: knowledge of potential risks to be considered and sought

The precautionary principle is inevitably related to knowledge of potential risks. What existing knowledge must be taken into account and what degree of certainty must be given? There is also the challenge of working interdisciplinarily in order to prudently gather and integrate knowledge relevant to the precautionary principle across various fields of expertise. In addition, it must be determined in which areas of human life, the environment and the climate there may still be a lack of knowledge that needs to be researched.

Experience from the past 100 years has led us to the principle of precaution. For example, reports of radiation damage date back to 1896 and the first clear and credible warnings about asbestos, which damages cells and therefore has a carcinogenic effect, followed two years later, in 1898.[24] However, precautionary measures were only taken half a century later and then only gradually.

The precautionary principle is applicable today precisely in cases where risks appear possible or, in other words, where their occurrence is more or less probable but there is little scientific knowledge or no scientific consensus.

But when is this knowledge sufficient? What knowledge can be considered reasonably certain, so that it must be taken seriously as a warning? These questions will remain controversial. The probability of a

[23] Cf. for more details on the distinction between ethical questions of the good and successful life and ethical-normative questions see Düwell, 2008, here pp. 37-41.
[24] European Union, 2001, pp. 31-37; pp. 52-63.

risk occurring, but also the question of how serious the occurrence of damage to humans, animals, the environment, etc. is considered to be, will also be the subject of debate.

Now it is absolutely necessary to turn to the individual sciences and bring together relevant findings from relevant disciplines. In doing so, it is important not to close our minds to questions about the reliability of findings. The significance of different scientific methods will repeatedly be a topic of discussion. With regard to the concern to be able to refer to scientifically proven knowledge, however, the tendency to narrowly focus on quantitative research approaches in the natural and social sciences and more specifically on experimental methods must be countered. Potential risks can also be identified through experiential knowledge, which may even be transferable to other scientific domains, provided that such experiential knowledge is subject to critical scrutiny and is open to scientific explanation and verification.

Furthermore, analysing specific examples of damage from the perspective of a precautionary principle has shown that the simple science of linear and mechanistic interpretations must be supplemented by the dynamic and constantly evolving characteristics of systems science.[25] In this respect, lessons have been learnt from the past 100 years, in which problems that were long ignored despite clear evidence – such as the extreme decline in marine fish stocks, environmental damage caused by halogenated hydrocarbons and sulphur dioxide and health damage caused by substances such as asbestos, benzene, polychlorinated dibenzofurans (PCBs) and growth-promoting hormones in animal husbandry – have been addressed. The potential systemic instabilities of such complex phenomena as climate change, such as factors that determine the stability of the Gulf Stream, or the behaviour of human cells that become genomically unstable due to radiation exposure, could be decisive, but perhaps unpredictable, determinants.

However, there are not always indications that draw attention to potential risks. In some cases, research must first be conducted in order to assess risks at all. Such research can be carried out in advance – e.g. in conjunction with the requirement of a moratorium, as an accompanying measure or as an evaluation at a defined point in time. The potential damage identified, its severity and probability of occurrence, will be decisive in deciding whether the use of a particular technology is justifiable. For example, during the further development of reproductive medicine in the

[25] European Union, 2001, p. 4.

1970s to 2000s, moratoria were repeatedly demanded for new techniques such as intracytoplasmic sperm injection (ICSI) or pre-implantation genetic diagnosis (PGD) in order to clarify whether biotechnologically induced damage to germ cells and embryos might occur.

An example where specific research and consideration of the precautionary principle are lacking is the legalization of the drug cannabis in Germany[26]: this law represents an experiment with an open outcome with regard to young adults. By legalizing the possession of cannabis for personal use, legislators are initially accepting known and potential risks, particularly with regard to young adults, even though there is evidence that the physical and mental well-being of young adults in particular can be permanently endangered by cannabis use.

As mentioned above, the perspectives of different disciplines also lead to different findings with regard to potential risks. In this respect, a risk analysis should adopt a multidisciplinary approach as comprehensively as possible. In addition, selected questions relating to the objectives or even legally protected goods of the precautionary principle must be addressed to these scientific fields. For example, geosciences can investigate either changes in biodiversity in groundwater stocks or toxic residues in river water that also have an impact in neighbouring countries.

If scientific data is available, its significance and the degree of uncertainty must be determined. The extent to which a potential risk affects the precautionary principle must ultimately be decided. However, the state of knowledge is often inhomogeneous. In addition to contradictions on the merits, power interests and academic disputes can play a role in the scientific community. It is therefore essential to establish procedures that enable a serious scientific debate in which scientific disagreements – for example regarding assumptions or interpretations – are made transparent. Particularly in the case of divergent scientific findings, it is important to understand where the disagreements lie in detail. For an appropriate determination of the degree of scientific uncertainty and an evaluation based on this, the ambiguities and open questions in particular must be articulated.

Distorting research interests or entanglements between science and politics can lead to scientists interpreting their findings in ways that support non-scientific interests. Therefore, effective procedures must be established to disclose such conflicts of interest. One way to establish scientific distance

[26] In Germany, adults have been allowed to have up to 25g of cannabis in public and up to 50g at home since 2024 – cf. Deutscher Bundestag, 27.03.2024.

or ‘impartiality’ in order to be able to select and evaluate knowledge is, for example, to bring together scientists from related fields who can easily familiarise themselves with the contested area in order to review the findings.[27]

3.3. The precautionary principle and risk analyses: spatial and temporal extension of the analysis as well as intra- and interdisciplinary scope

How far must the view extend in terms of space and time and what level of intra- and interdisciplinary complexity of the search of risks does the precautionary principle demand?

Given the globally relevant and future-oriented goods such as “future generations” and “climate protection,” potential risks must be assessed over broad spatial regions and extended time periods. In addition, as part of the risk analysis, consideration must be given to which areas of human life and which aspects of the earth and its atmosphere are to be included. It is therefore an important preliminary decision which scientific disciplines are consulted for the risk analysis. These will be risk scenarios, i.e. the degree of scientific uncertainty will be difficult to determine in some cases. Nevertheless, the nature of possible damage, its severity and the costs of any precautionary measures must be assessed and, finally, decisions must be made on the implementation of certain measures, which will be characterised not only by ethical or legal norms, but also by pragmatic aspects – such as financial viability, rapid implementation or a good cost-benefit ratio.

3.4. Risk perception and risk evaluation as psychological pitfalls of the precautionary principle

Potential negative consequences or damage can be identified and are already leading to precautionary measures. However, there are numerous psychological pitfalls when analysing potential risks that may cause precautionary efforts to fail:[28]

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[27] The theological ethicist Lars Ostnor in Oslo has realised this in an exemplary way with regard to embryonic stem cell research by inviting not only scientists from embryonic stem cell research, but also scientists from neighbouring fields of molecular biology to assess the opportunities and risks competently and at the same time more impartially. See Ostnor (ed.), 2008.

[28] Vgl. e.g. Sunstein, 2001; Sunstein, 2005.

- Acute risks are perceived more strongly than creeping, long-term risks.
- A serious risk is overlooked because the focus is on combating a marginal risk.
- There is a widespread tendency to overestimate dangers that stand out cognitively – either due to their acute visibility or because people are not yet accustomed to them.
- In addition, localised risks are often rated higher than distant risks. In Europe, for example, the risk of a local storm is perceived as a serious and significant threat. The risk of a sharp global rise in sea levels – caused by climate change – and its consequences for Europe as well, are less focussed on.
- Most people can only visualise a linear rather than an algorithmic increase in risk.
- Many people cannot weigh up different probabilities against each other, i.e. they cannot distinguish between a risk of 1 in 1 million and a risk of 1 in 20 million.
- However, there is also the opposite effect of overestimating barely assessable abstract risks in comparison to more probable concrete dangers: For example, the government of Zambia rejected an American donation of several thousand tonnes of grain, citing the precautionary principle and the risks of genetically modified food, thereby exposing around 3 million people to the risk of starvation. [29]

Overall, a rational analysis and assessment of risks can therefore be made more difficult due to psychological effects.

3.5. Precautionary measures: questions of effectiveness and necessity

Which measures are effective can also be the subject of disputes, and it must also be decided whether a measure is merely recommendable or necessary. This in turn depends on the assessment of the effectiveness of the measures, the evaluation of possible damage and the assumed probability of occurrence in each case. Unlike a moral or legal prohibition, the precautionary principle, even in its strictest form, does not require a specific

[29] Vgl. Bohannon, 2002.

measure. However, any measure taken under the precautionary principle should at least fulfil certain requirements: [30]

- Firstly, the effectiveness of a measure in relation to a precautionary goal should be analysed or given a certain probability.
- Secondly, the advantages and disadvantages associated with taking or not taking action must be weighed. Like any medical treatment, an intervention should not cause harm or cause more harm than non-intervention.
- Thirdly, an intervention should be proportionate to the level of protection sought.
- Fourthly, it should be decided who should bear which measure – as well as the associated costs.
- Fifthly, the effectiveness and the actual advantages and disadvantages associated with the measure should be continuously monitored – if necessary, through accompanying research.

However, in view of the high solution-orientation of these minimum requirements, which is appropriate in medicine, which can largely refer to the rules of the art, but which cannot do justice to the complexity of most problems in which the precautionary principle is applied, one important aspect should not go unmentioned: The precautionary principle responds to potential risks for which there is insufficient knowledge. It is in the very nature of the principle that measures, which may be highly cost-intensive and aimed at preventing a potential risk, might prove to be ineffective or unnecessary in retrospect. A psychological 'hindsight bias' – in which one assumes superior knowledge after the fact and retroactively judges earlier decisions as erroneous – should be avoided. On the other hand, it is also conceivable that the analysis and assessment of risks and the decision to take measures were 'negligently' wrong, as one could have known better at an early stage.

In many areas of climate protection, it is no longer the scientific findings or the potential risks or risk scenarios that are controversial, but rather the type of measures, the weighing up of their positive and negative consequences and the question of at whose expense or cost the measures should be implemented.

[30] The prerequisites mentioned here are derived from considerations on treatment decisions in medicine, on which the author has worked. Cf. e.g. Bobbert, 2012; Bobbert, 2017.

The example of lithium shows that the even assessment of precautionary measures, which have both positive and negative consequences, can be controversial: lithium is required for solar cells and batteries, for example in smartphones, laptops and electric vehicles. The largest deposits are located in South America, where lithium is extracted via evaporation processes in salt lakes. However, the water consumption in this process is very high, causing local populations to fear for their water supplies, both for personal use and for their livestock.[31]

An example of disagreement regarding the type of measures and the question of who bears the associated costs or burdens can be found in the statistical correlation between climate change and the growing world population. In some cases, a reduction in the global population is proposed as an effective measure for climate protection. In this proposal, it should not be overlooked that a reduction in the birth rate would affect the economically weaker nations on the continents of Africa and Asia. What is more decisive for CO_2 emissions, however, is the way we live and produce. [32] In contrast, the proposal to reduce resource consumption and CO_2 emissions would impact the living standards of Western industrialised nations. But this comparison of measures – apart from questions of power and justice – does not adequately capture the complexity of the problem, as the question of effectiveness is already more complex:

Africa, with its rapidly growing population, currently contributes around four per cent of global emissions and per capita emissions in Africa are generally less than one tonne per person. This amounts to roughly one-tenth of the average emissions in Europe and one-twentieth of those in North America. China, currently the world's largest CO_2 emitter, has a relatively stable population and yet its CO_2 emissions are rising. The education of women, their position in society and their rights are decisive for a falling birth rate. [33] For example, the population growth rate in Kenya, an economically somewhat more successful country compared to other African countries, has halved and population growth in China is now also declining.

However, another approach is also sensible: A global coal phase-out is considered essential for climate protection.[34] This would require financial

[31] Among others Health, 2025.
[32] Edenhofer et al, 2019, p. 27.
[33] Cf. e.g. Adhikari et al., 2024, Lutz, 2011.
[34] Cf. Edenhofer et al., 2019.

support from industrialised nations to assist poorer countries. New technologies and a circular economy with renewable energies and a more efficient use of raw materials would also have to be introduced.

4. Summarising sector-related decisions from a resource and justice perspective

Every measure is associated with 'costs' in both a concrete and figurative sense, be they disadvantages and burdens or financial expenditure that is not available elsewhere. This is because every nation has only limited financial and other resources at its disposal.

4.1. Summarising sector-related decisions

In view of limited budgets, decisions on measures can only be made after considering all sub-sectors. For example, investing in costly precautionary measures in the food sector in order to protect the health of citizens when financial resources for precautionary measures are lacking in other areas must be well justified. Very unlikely risk scenarios may have to be postponed in favour of other scenarios with very high damage potential. Depending on which assets are at risk and to what extent, it may also be necessary to take greater precautions in one area than in another.

4.2. Global justice

For reasons of justice, western industrialised countries and other countries, such as China or India, which are consuming increasing amounts of energy and producing significant emissions, must bear the main burden of the costs of environmental and climate measures.

Overall, the precautionary principle will probably require people in Western industrialised countries to accept a loss of prosperity in the future because the livelihoods and fundamental rights of current or future people in other regions of the world are irreversibly threatened. Under certain circumstances, new technical developments, e.g. in the circular economy or artificial intelligence, could lead to the discovery of new effective measures.

From a justice perspective, nations must implement hazard prevention measures (cf. global warming with its many negative consequences) and precautionary measures in line with their ecological footprint. Not least for reasons of effectiveness and pragmatism, i.e. to ensure that something is

implemented, Western industrialised nations must support poorer countries in the ecological restructuring of their economies.

5. Conclusion

Case studies of harm to humans and the environment over the last 100 years show that both early warnings and loud and late warnings have often been ignored.[35] The increasingly legally codified precautionary principle, as complex and controversial as it may be in some areas, can ensure that the political will to act, but also company management and other decision-makers, contribute to reducing risks to the environment and climate – and thus to people.

The art of taking the first smart steps and weighing up the numerous necessary precautionary measures will certainly include identifying and implementing those measures that promise a major positive effect with little effort. In addition, those measures that can prevent potential 'worst case' scenarios relatively reliably should be prioritised.

Overall, the precautionary principle calls for new forms of cooperation to be established with scientists from relevant disciplines. For a constructive, application-related debate on scientifically controversial issues (in relation to potential risks and effective measures), procedures should be established to ensure that open questions and uncertainties in risk analyses and precautionary measures are reliably identified and communicated. In most cases, there will be no clearly correct solutions, but potentially better and worse ones.

[35] European Union, 2001, p. 3.

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Climate change and vulnerability from the perspective of psychology and pedagogy[**]

ABSTRACT: From the perspectives of psychology and pedagogy, climate stress provides useful psycho-educational references for professional discourse in various disciplines. Knowledge of the basic concepts of climate change and sustainability opens up possibilities that can bring us closer to understanding the experiences of the younger generation. Awareness and conscious development of sustainability competences will make a major contribution to addressing climate change, which is affecting an increasing number of people. In my study, I also highlight the importance of early prevention, which can reduce anxiety related to climate change.

KEYWORDS: climate change, climate risk, sustainability competences, sustainability awareness, pedagogical methods.

1. Introduction

The concept of sustainability awareness demonstrates that it can be measured in terms of attitudes, thinking and behaviour. Pedagogical aspects provide methodological tools for responsible preparation for a sustainable future. A deeper understanding of the subject also shows that concepts that we might consider traditional, such as talent management, are also worth reinterpreting in the light of sustainability.

2. Basic concepts related to climate risk

Ecopsychology is a transdisciplinary field that draws attention to our relationship with living systems and their psychological implications, thus approaching climate change from a psychological perspective. Its starting

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point is systems thinking.[1] Ecopsychology argues that the human psyche is inseparable from natural systems and that we are intimately connected to nature. By listening to the signals of our natural environment, many questions about the human psyche can be answered. This approach also states that ecological crises can be traced back to deeper psychological and social causes.[2] The practical aim of ecopsychology is to help people develop a positive relationship with nature, thereby promoting sustainable behaviour and active participation in solving environmental problems. It also emphasises the healing power of the natural environment, for example, through forest bathing or nature-based therapies.

In recent years, several new concepts have entered public consciousness and international literature, which must be defined precisely and distinguished clearly. In this chapter, we will review the most important concepts related to negative earth feelings.

Climate stress: in our everyday lives we are increasingly confronted with the ever more threatening consequences of climate change, which threaten not only our environmental but also our psychological well-being. In particular, we are becoming increasingly sensitive to issues affecting younger generations. The concept of 'climate anxiety' is gaining attention as we show emotional reactions to environmental degradation, uncertainty about the future and the impact of the climate crisis. For example, increasingly hot summer periods can be a cause for serious concern. Climate anxiety is often associated with coping mechanisms such as cognitive biases and self-protection strategies. People tend to avoid information that triggers anxiety or even to trivialise the significance of climate change[3]. However, these mechanisms do not reduce anxiety in the long term, they may actually exacerbate the problem. A more severe form of climate anxiety is climate depression, which is dominated by a sense of hopelessness about the future. This condition results from the emotional burden of the ecological crisis and a sense of helplessness due to the lack of a solution.[4]

The issue of climate change and existential anxiety is receiving increasing attention in the psychological literature, especially through the work of Zoltán Kőváry.[5] He explores climate change anxiety as a modern

[1] Molnos, 2020, p. 29.
[2] Roszak, 1992; Fisher, 2013.
[3] Clayton et al, 2017.
[4] Hickman et al, 2021.
[5] Kőváry, 2019. 2021.

existential threat and points out that the environmental crisis is not only an ecological but also a psychological problem, reinforcing people's uncertainty about the future, their existential fears, and the effects on their identity. Climate stress is increasingly becoming a social phenomenon and affects mental health on both an individual and community level. It is important to highlight that climate change anxiety is not necessarily pathological; it can also serve as an opportunity for individuals and society to promote positive change.[6]

Eco-anxiety is an emotional state that arises from the loss of nature or biodiversity due to climate change. This feeling can be similar to the grief associated with personal loss, as we maintain an emotional connection with nature in our everyday lives, albeit to varying degrees.[7]

Nature-deficit disorder describes the adverse effects on the human psyche resulting from a lack of contact with nature, especially in urban settings.[8] This is also reflected in the Sustainability Competency Framework, which points out that "Nature-deficit disorder" indicates the neative consequences of alienation from nature. These include reduced sensory engagements, difficulties in concentration, higher incidences of physical and emotional illnesses, increasing rates of myopia, as well as higher rates of childhood and adult obesity and vitamin D deficiency."[9]

Biophobia, the fear of certain species and aversion to nature, is closely linked to modern society's alienation from nature. Biophobia also has evolutionary roots. It often stems from a fear of potential dangers in nature, such as poisonous snakes or insects. While biophobia can be understood as an adaptive response linked to human survival, in modern urban contexts these fears may prevent individuals from experiencing the positive effects of nature.[10] The psychological relevance of biophobia is closely related to the concept of biophilia, which describes the human attraction to nature. Some research suggests that these opposing emotional responses - biophilia and biophobia - together shape people's connection to nature. For example, one study has shown that even young children associate both positive (e.g. happiness) and negative (e.g. fear) emotions with images of nature,

[6] Kőváry, 2021.
[7] Albrecht, 2012.
[8] Louv, 2008.
[9] Bianchi, Pisiotis and Cabrera, 2022, p. 19.
[10] Britannica, 2023; APA Dictionary of Psychology, 2023.

depending on how safe or threatening they appear.[11] The educational and design implications of biophobia are also significant: in addition to creating a natural environment, schools are increasingly focused on providing practical knowledge about the living environment. In contrast, *necrophilia* - a preference for the dead, inanimate, artificial - often results from the overuse of technology and neglect of the natural environment. According to Fromm, necrophilia is one of the most damaging psychological tendencies of modern society.[12] The generation growing up in the digital space could be at real risk of the latter.

2.1. The role of early prevention and socialisation in tackling climate risk

Prevention must begin at a very early age, particularly regarding sustainability and mental health. The family and the school environments play crucial roles in helping children learn the basics of sustainable living and develop skills to protect their mental health.[13] Emotional education, the development of constructive problem-solving skills and the reinforcement of community values all help children cope with anxiety and stress. Above all, parental role modeling is crucial. Moreover, talent management should not focus solely on cognitive development but also on increasing emotional intelligence, which is also important in addressing climate stress. [14]

A very important part of early prevention is ensuring that adults understand the ecological model of health, which states that an individual's mental and physical well-being is closely linked to the natural environment. This holistic approach emphasizes that individuals, especially younger generation, can only be truly healthy if they develop constructive social relationships and adapt effectively to changing environmental and social stressors.[15] An individual's health depends not only on their physical condition but also on their social relationships, their ability to cope with stress, and their life goals. Therefore, a combination of mental, physical and social dimensions is necessary for a healthy life. However, climate change poses serious challenges for both adults and young people, often leading to anxiety, depression or detachment from nature.[16] A balanced approach to

[11] Olivos-Jara et al., 2020
[12] Fromm, 1964.
[13] Bronfenbrenner, 1979.
[14] Sternberg and Davidson, 2005.
[15] Capra, 1996.
[16] Clayton et al, 2017.

the ecological model of health can help address these issues, as individuals must consider not only physical health but also mental, social and environmental contexts.

3. Psychological aspects of the sustainability competence framework

Accurate knowledge of sustainability competences has become indispensable. Sustainability is a key priority for the European Commission for the period 2019-2024, and the European Sustainability Competences Framework was developed and published in January 2022.[17] GreenComp's main objective is to promote learning about environmental sustainability. Incorporating this topic into our education and training systems is a priority, as the multi-factorial socialisation process that can lead to sustainable living, work and activities must begin at an early age. The pedagogical and psychological importance of this starts at the level of skills and attitudes.

The purpose of the Framework of Reference for Sustainability Competences is multifaceted. It includes reviewing curricula against the Framework, developing teacher training programmes, and encouraging thematic self-evaluation and reflection. The long-term goal of making the EU a climate-neutral continent by 2050 requires that sustainability competences be developed at all levels of education and training. "Let's bring nature back into our lives!"[18] This mission fits well with the concept of lifelong learning, which integrates sustainability issues throughout learning process. GreenComp provides learners with a common basis of concepts and competences, as well as a precise guidelines for educators to develop a solid, practice-oriented vision of sustainability. The Sustainability Competency Framework is the result of professional consultation with 75 experts and groups. Although the framework has not yet been tested in real-life contexts, it should be treated as a living document.[19] Critical and systemic thinking on the part of teachers is also highlighted. The notion of sustainability is multidimensional, which is why the term „sustainability" is retained of environmental sustainability.

"Sustainability means prioritising the needs of the planet and all life forms while ensuring that human activity does not exceed the limits of our

[17] Bianchi, Pisiotis and Cabrera, 2022.
[18] Bianchi, Pisiotis and Cabrera, 2022. p. 3.
[19] Bianchi, Pisiotis and Cabrera, 2022. p. 9.

planet's tolerance".[20] Viewed from a life-cycle perspective, this definition uses abstract concepts that can be difficult to grasp, even for adolescents. When understanding sustainability, it is important to recognize that it requires a certain level of cognitive development, the ability to think abstractly, and the ability to analyze complex systems. It is crucial that GreenComp is relevant to all ages, types of learning, and areas of life. Understanding and internalizing the concept requires mature cognitive processes and must be interpreted not only in an age-specific manner but also in a way that builds on experiential and prior knowledge, translating into tangible experiences that children can grasp. "Sustainability literacy enables learners to embody sustainability values and consider complex systems in order to take or articulate actions that restore and preserve ecosystem health and enhance equity, enabling them to envision different sustainable futures." The central idea of environmental sustainability learning is that humans are part of nature and dependent on it. This needs to be integrated into everyday thinking from childhood to adulthood, developing and mastering sustainability competences.

The four competency areas cover a total of 12 competences, which comprehensively cover the different dimensions of sustainability. Importantly, the Recommendation provides precise definitions to guide teachers. 'Like the other EU competences frameworks, GreenComp is not prescriptive. It provides a conceptual reference model that can be used by all stakeholders in lifelong learning with different objectives.'[21] The 12 sustainability competences are presented in the table below.

Table 1 *The 12 sustainability competences*

Territory	**Competence**	**Description**
1. Embodying sustainability values	1.1. Assessing sustainability	Reflecting on personal values; identifying and explaining how values diverge across individuals and over time, while critically assessing how they align with sustainability values
	1.2. Promoting fairness	Promoting equity and justice for present and future generations, and learning from previous

[20] Bianchi, Pisiotis and Cabrera, 2022. p. 12.
[21] Bianchi, Pisiotis and Cabrera, 2022, p. 30; Dessart, 2022.

		generations for sustainability.
	1.3. Promoting nature	Recognising that humans are part of nature; and respecting the needs and rights of other species and nature to restore and regenerate healthy and resilient ecosystems.
2. Taking into account the complexity of sustainability	2.1. Systems thinking	Approaching sustainability problems from all possible angles; consider time, space and context to understand how elements interact within and across systems.
	2.2. Critical thinking	Evaluating information and arguments, identifying assumptions, questioning the status quo and reflecting on how personal, social and cultural backgrounds influence thinking and conclusions.
	2.3. Outline of the problems	The formulation of current or potential challenges as sustainability problems in terms of difficulties, people involved, time and geographical scope, in order to anticipate and prevent problems and to identify approaches to mitigate and adapt to existing problems .
3. Outlining sustainable visions	3.1. Future literacy	Outlining possible sustainable futures by imagining and developing alternative scenarios and identifying the steps leading to the preferred sustainable future.
	3.2. Adaptability	Managing transitions and challenges in complex sustainability situations and making decisions about the future

		in a context of uncertainty, ambiguity and risk.
	3.3. Exploratory thinking	Developing a relational mindset by exploring and connecting different disciplines, thinking creatively and experimenting with new ideas or methods.
4. Action for sustainability	4.1. Political self-determination	Navigating the political system, identifying political responsibility and accountability for unsustainable behaviour, and demanding effective policies for sustainability.
	4.2. Collective action	Acting with others for change.
	4.3. Individual initiative	Identifying own sustainability potential and actively contribute to improving the prospects of your community and the planet.

Source: Bianchi, Pisiotis, Cabrera, 2022, pp. 14-15, own ed.

For each of the 12 competences, a list of knowledge, skills and attitudes has been developed, which can be particularly useful in education and serve as a basis for developing training courses or integrating them into existing training courses.[22]

3.1 Methodological options, pedagogical perspective

The long-term goal is to develop a sustainable mindset and the ability to change attitudes in the emerging generation. Sustainability competences are fundamentally transversal, i.e. they cut across disciplines and subjects. This calls for both a systems approach and a holistic approach to sustainability at all levels of educational institutions. This interdisciplinarity can also a pose challenges in the educational arena, as it affects all subjects yet does not belong exclusively to any one discipline.[23] 'The other problem is that as a

[22] Bianchi, Pisiotis and Cabrera, 2022, pp. 43-54.
[23] Réti and Varga, 2008.

consequence of "overloading" a subject, the additional activity is lost, especially if the output regulation (graduation requirements) does not support it.'[24]

From a pedagogical methodological point of view, the Recommendation highlights several potential pedagogical practices:

- experiential learning, which is essential for the acquisition of sustainability competences
- project-based learning
- analysis of real life case studies
- gamification, role-playing games
- learner- and activity-centred methods [25]

This can only be effective if teachers develop a school-wide culture of sustainability. Sustainability competences can also be integrated into psychology courses, provided they address topics such as:

- self and peer knowledge
- social psychology, cooperation
- problem-solving thinking and decision-making
- themes of responsibility and the development of indentity.

'The pedagogy of sustainable development is an opportunity for both methodological and content innovation.'[26] The same is true for the psychological aspects of sustainable development, an opportunity for methodological and content renewal along the themes, further deepening self-awareness competences and coping points of the personality.

3.2. Sustainability awareness

In parallel with the systematization of sustainability competences, a psychological construct has emerged, encompassing knowledge, attitudes and behaviours related to sustainability. This construct summarizes sustainability competences from a broader perspective. In Hungary, several initiatives have been taken in this field, such as the sustainability guide of the BGE (Budapest University of Economics and Business).[27] The aim of this study is to show how sustainability can be integrated into education with a focus on multidisciplinary approaches. It presents practical ways of

[24] Réti and Varga, 2008, p. 28.
[25] Réti and Varga, 2008, p. 27. Sourgiadaki and Karkalakos, 2023.
[26] Réti and Varga, 2008, p. 27.
[27] Budapest University of Economics and Business (BGE) (2023). *Guide to teaching sustainability and responsibility*. EFFORT project.

applying sustainability and responsibility concepts in educational programmes across different disciplines. The study from the University of Szeged discusses the development and socio-economic context of sustainability concepts in detail.[28] After presenting the historical and theoretical foundations of sustainable development, the study highlights challenges arising from the post-industrial era, such as natural resource depletion and the unsustainability of economic growth. Earlier works have focused on the social and economic dimensions of sustainability,[29] including sociological, legal and regional science aspects, analyzing how sustainability can be understood from the social sciences' perspective and applied to the economy and everyday life.

The SCQ-S (Sustainability Consciousness Questionnaire - Short form)[30] is a psychometric instrument that measures various aspects of sustainability awareness. The questionnaire is based on the three pillars of sustainability (environmental, social and economic dimensions). The shortened version (SCQ-S) contains 27 items that reliably measure the secondary (sustainability knowledge, attitudes and behaviours) and tertiary (sustainability awareness) constructs. The instrument has excellent psychometric properties and is widely applicable in educational and research contexts, as well as for assessing the effectiveness of sustainability initiatives. This paper presents the instrument, and empirical research results will be reported in a future publication. The questionnaire is suitable for measuring the effectiveness of educational programmes and interventions and for identifying areas for improvement at individual and group level. It is particularly relevant in education as it helps to assess the preparedness of the younger generations to address sustainability challenges. Positive experiences with the questionnaire have been documented, for example Ariza et al. (2021), who used the SCQ to investigate the impact of educational interventions in developing sustainability awareness. Their research indicated significant positive effects ont he knowledge and attitude dimensions in countries such as Spain and Belgium.[31]

[28] Kincses et al., 2023.
[29] Láng and Pálinkás, 2010.
[30] Gericke et al., 2019.
[31] Ariza et al., 2021.

3.3. Sustainable talent

A whole new perspective is offered by the horizon of understanding sustainability. Knowledge grows through learning, work, and diligence, which is now accelerated by talent and creativity. These qualities are increasingly scare and becoming bottlenecks, making their personalized development more critical. Access to opportunities is becoming more important than ownership, and this idea underpins a re-interpretion of the concept of talent. For every individual, family and community, access to the essential goods - such as education, housing, quality healthcare, and knowledge – is fundamental fpr nurturing talent and creativity.

Research[32] suggests the following steps to consider in integrating sustainability and talent management:

- Integrate sustainability competences into talent management programmes, for example through the GreenComp framework.
- Providing real-life learning opportunities that help people understand and solve environmental problems.
- Community projects and interdisciplinary learning models in which gifted students can be active participants.

Linking talent management and sustainability gives talented students the opportunity to contribute to more sustainable future while developing their individual skills. Such integrated approaches play an important role in connecting education with social responsibility and represent a holistic method that fits into a systems approach to sustainability, opening up new directions for thinking about gifted education.

3. Conclusions

The aim of the study was primarily to provide a literature review that informs and raises awareness of the importance of sustainability issues for legal professionals, and to provide an accurate understanding of sustainability competences. It is intended to inspire further questions rather than offer concrete answers or a definitive recipe for knowledge transfer processes and methods. However, the issue of sustainability is relevant to all professionals, and education must prepare young people for the challenges of climate change. The catalysts for this change are the teaching materials and curricula. The focal points and watchwords for learning sustainability

[32] Adams et al., 2021; Taber et al., 2017.

are: practice-oriented, socio-emotional, interdisciplinary, lifelong. These elements, developed at the level of practical skills, form a complex and constructive repertoire for coping with climate risk.

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The urgent need for climate protection as reflected in supreme court rulings in the European Union**

ABSTRACT: It goes without saying that the climate change will affect the enjoyment of human rights, e.g., the right to life, the right to private life, economic rights. It is therefore not surprising that applications are being brought up to the supreme courts to enforce the effective climate protection measures. Nevertheless, the human rights documents in most of the European states as well as the EU Charter of Fundamental Rights and the European Convention on Human Rights do not contain a fundamental right to climate protection or to a healthy environment.

The article will provide an overview of the respective decisions of several supreme courts across Europe without claiming to be complete. It will also analyze the relevant case law of European courts, i.e. the ECJ and the ECtHR. Against this background, the question is raised as to whether fundamental rights actions can be regarded as an effective instrument for enforcing climate protection measures.

KEYWORDS: climate protection, fundamental right, case law of the highest courts in Europe.

1. Introduction and research questions

The need for effective climate protection is now undisputed.[1] In the Paris Agreement of 2015, the international community agreed on a series of

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common climate targets. Specifically, global warming ought to be limited to a maximum of two degrees Celsius compared to pre-industrial levels and, if possible, stabilized at 1.5 degrees Celsius. Global greenhouse gas emissions should peak as quickly as possible and be reduced to net zero by the middle of the 21st century in order to achieve climate neutrality.[2] According to Article 4 of the Paris Agreement, states should also submit and implement national emission reduction contributions every five years. Ambitions should be continuously increased. However, signing the Paris Agreement by a state results in a national commitment that remains legally non-binding.[3] Neither the measures with which these targets are to be achieved nor their intensity and urgency are specified in a binding manner in the Paris Agreement. The definition of concrete measures as well as their implementation remain at the discretion of the states. They may be the subject of international political negotiations and political decision-making at national level. Political priorities are often shifted by current global political developments, such as the Russian attack on Ukraine, but also by domestic political developments, and the importance of climate protection among other targets is varying accordingly. Nevertheless, in the political and legal discourse, the Paris Agreement serves as an important point of reference for calling on states and international organizations to make greater efforts to protect the climate.

Against this backdrop, fundamental rights, namely national and EU fundamental rights as well as those of the ECHR, are also being brought into play. Committed individuals, associations, and NGOs use them as instruments to promote climate protection with the help of the courts.

Climate cases before courts are a topical issue and both the general public and experts debate intensely.[4] The term "climate case" has become established to describe proceedings in which climate activists seek to achieve more or more intensive measures for climate protection or adaptation to climate change with the help of the courts. Like other lawsuits, they are often motivated by a political objective ('strategic litigation'). They

[1] On the following, see Pabel, 2024, pp. 16-37.
[2] Art 2 para 1 lit a Paris Agreement of December 2015 (UN, 2015).
[3] There is no agreement under international law that the member states of the Convention are bound by the calculations of the Intergovernmental Panel on Climate Change (IPCC). There is also no consensus on the question of how the calculated residual CO2 budget should be distributed among the states.
[4] See Stürmlinger, 2020, pp. 169-185; Krömer, 2021, pp. 178-184; Schulev-Steindl, 2022, pp. 17-19; Ennöckl, 2022a, pp. 137-143; Ennöckl, 2022b, pp. 184-191.

serve not only to achieve legal success, but often also (or above all) to generate attention and advance climate protection politically.

"Climate lawsuits" against large international companies whose climate-damaging projects are to be stopped or which are to be obliged to pay compensation are cases of civil law nature.[5] In the following, however, the focus will be on climate lawsuits that are based on fundamental rights. Those lawsuits deal with constellations in which state action or inactivity is challenged in court and is potentially qualified as a violation of fundamental rights.[6] The aim of these climate cases is to oblige the legislator (or the executive branch) to take more effective climate protection measures.

The following article presents some judgments of supreme courts in the EU and Switzerland that can be described as decisions in fundamental rights climate cases, without claiming to be exhaustive. Furthermore, it will briefly examine the relevant case law of the ECJ, followed by a more detailed look at the case law of the ECtHR to date. Finally, a summary will address the question of whether fundamental rights actions are an effective instrument for enforcing climate protection measures.

2. No fundamental right to a healthy environment

Before examining the case law of the various courts, I would like to discuss some more general aspects of fundamental rights.

There is no doubt that climate change and global warming have an impact on the enjoyment of fundamental rights and will have an increasing impact in the future. In a more hostile environment, the level of protection of fundamental rights will no longer be the same. In the political debate, the reference to fundamental rights can therefore be useful to illustrate the effects of climate change on humanity. However, it is less clear whether, from today's legal perspective, the enforcement of fundamental rights before the courts is (or should be) an effective instrument for forcing through climate protection measures.

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[5] See e.g. LG Essen 15.12.2016 - 2 O 285/15; Rechtbank Den Haag, 26.5.2021 - C/09/571932.

[6] The ECtHR also understands climate claims in this sense, see *Klimaseniorinnen and others v. Switzerland*, App. No. 53600/20, 9 April 2024, para. 439-440 and 545-549*; Carême v. France*, App. No. 7189/21, 9 April 2024, para. 17 see also; *Duarte and others v. Portugal and others*, App. No. 39371/20, 9 April 2024, para. 192.

Neither the EU Charter of Fundamental Rights nor the ECHR or the national catalogs of fundamental rights contain a specific fundamental right to a healthy environment or a healthy climate. Some national constitutions may have enshrined environmental protection or climate protection as a state objective, but without granting it the quality of a subjective right, i.e. a fundamental right. For example, Article 20a of the German Grundgesetz states that the state – mindful also of its responsibility towards future generations – shall protect the natural foundations of life and animals by legislation and by executive and judicial action. In Austria, the Federal Constitutional Law on Sustainability and Comprehensive Environmental Protection commits the federal, state, and local governments to the principle of sustainability in the use of natural resources and comprehensive environmental protection.[7] At best, the national objectives aimed at climate protection oblige the state to pursue the goal in its policy, and just answer the question whether states have to take climate protection into consideration while making decisions. The extent to which and by what means climate protection is actually pursued is not determined by the state objective. Furthermore, climate protection is always one of several state objectives that require attention and, in some constellations, require measures that are less or not expedient for the fulfillment of another state objective.

Fundamental rights climate cases are therefore based on unspecific, one could say "climate-neutral", fundamental rights. Typically, applicants refer to the right to life (Art 2 ECHR) and the right to respect for private and family life (Art 8 ECHR). Points of reference in this respect can be found in the case law of the ECtHR.[8]

In terms of fundamental rights doctrine, fundamental rights in the context of climate cases are usually positioned in their function as the state's positive obligation (i.e. obligation to protect).[9] The state should take measures to protect the legal interests guaranteed by fundamental rights that

[7] Bundesverfassungsgesetz über die Nachhaltigkeit, den Tierschutz, den umfassenden Umweltschutz, die Sicherstellung der Wasser- und Lebensmittelversorgung und die Forschung, BGBl I 111/2013 idF BGBl I 82/2019.

[8] *Öneryildiz v. Turkey*, App. No. 48939/99, 30 November 2004, para. 90; *Fadeyeva v. Russia*, App No. 55723/00, 9 June 2005, para. 134; *Budayeva and others v. Russia*, App No. 15339/02 and others, 20 March 2008, para. 160. See below 9.

[9] Spieth and Hellermann, 2020, p.1406; Calliess, 2021, p. 325; Piska, 2021, pp. 1149-151; Hollaus, 2023, pp. 379-381.

are challenged by climate-damaging behavior (of private and state actors).[10] In this respect, one specific problem with climate cases becomes clear: as a rule, the courts will – if at all – find a violation of a positive obligation due to a lack of protection, but will not impose an obligation to take any specific additional or further-reaching measures on the legislator.[11] Courts, including constitutional courts, are not and should not be substitute legislators. Apart from this, the traditional dogmatic understanding of positive obligations requires a direct threat to, or impairment of the legal interests of the holders of fundamental rights, which is not yet so easy to establish in the case of the effects of climate change.

Against this background, we now embark on a tour of the highest courts in Europe and their case-law on climate issues.

3. The Dutch Hoge Raad

The starting point of our tour is the judgment of the Hoge Raad of the Netherlands from 2019 in the *Urgenda* case.[12] This broke new legal ground by obliging the Netherlands to make specific reductions in greenhouse gases.[13] The decision has certainly boosted climate litigation across Europe. It was the non-governmental organization Urgenda, together with 886 other private plaintiffs, who pursued the procedure as a public interest action under Art 3:305a of the Dutch Civil Code.[14] The Hoge Raad confirmed a decision by the Court of Appeal in The Hague obligating the Netherlands to reduce greenhouse gas emissions by at least 25% by 2020 compared to the 1990 baseline. The court did not consider this to be an unlawful interference in the political decision-making sphere or a contradiction to the global nature of the problem of the obligation to reduce emissions. In its reasoning, the court also referred to Article 2 ("right to life") and Article 8 ("right to respect for private and family life") of the ECHR, which the Netherlands

[10] Calliess, 2021, p. 325; Hollaus, 2023, p. 379.
[11] See BVerfGE 149, 293 (Fixierungen) para. 74; BVerfG 1 BVL 8/15, para. 70; see also Spieth and Hellermann, 2020, p. 1406-1407.
[12] Hoge Raad 20.12.2019, 19/00135; see Stürmlinger, 2020, pp. 170-171; Binder and Huremagic, 2021, pp. 109-111; Van der Veen and De Graf, 2021, p. 363; Ennöckl, 2022a, p. 142.
[13] See also Wegener, 2019, pp. 3-4; Binder and Huremagic, 2021, p. 109; Van de Veen and De Graf, 2021, p. 363 para. 10-11; Ennöckl, 2022a, p. 142.
[14] See also Burtscher and Schindl, 2022, pp. 660-661.

would be violating.[15] The court assumed that climate change posed a real threat, resulting in a serious risk that the current generation of citizens would be confronted with the loss of life and/or disruption of family life.[16]

The Hoge Raad based its decision on the UN Climate Convention and the legal obligations of the state to protect the life and well-being of its citizens and explicitly pointed out that the Constitution requires Dutch courts to respect the ECHR.[17]

With these decisions, the Dutch courts further developed the approach by the ECtHR on positive obligations, which I will discuss later. The Hoge Raad derives specific CO_2 reduction obligations from the Intergovernmental Panel on Climate Change (IPCC) 2007 report, which identifies specific reduction quantities for states for certain periods of time. Additionally, it referred to the voluntary commitment of the Dutch government. In conjunction with the duty to protect the dimension of fundamental rights, it concludes an obligation to reduce harmful greenhouse gases of the Dutch government.[18] This is one of the first and one of the not very numerous[19] cases to date in which a national supreme court has assumed an obligation on a governmental entity to reduce greenhouse gas emissions. [20]

4. The German Bundesverfassungsgericht

The climate case delivered by the Bundesverfassungsgericht (BVerfG) in March 2021 also attracted a great deal of attention. It has taken a completely different, very innovative dogmatic approach in terms of fundamental rights.[21]

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[15] Hoge Raad 20.12.2019, 19/00135, para. 5.8-5.10.
[16] Hoge Raad 20.12.2019, 19/00135, para. 4.2.
[17] Ennöckl, 2022a, p. 142.
[18] See also Stürmlinger, 2020, pp. 170-174; Binder and Huremagic, 2021, p. 109; Ennöckl, 2022a, p. 142.
[19] Another climate action, albeit of a private law nature, is the case against Royal Dutch Shell. In the judgment of the court of first instance, the Dutch court ruled that companies along their value chain are also bound by human rights, in this specific case Articles 2 and 8 ECHR; see Rechtbank Den Haag, 26.5.2021, C/09/571932.
[20] Binder and Huremagic, 2021, p. 109; Ennöckl, 2022a, p. 142.
[21] Also on the following already Pabel, 2024, pp. 16-37; on the decision of the BVerfG in particular Calliess, 2021b, pp. 355-358; Ekardt and Heß, 2021, pp. 579-585; Hofmann, 2021, pp. 1587-1590; Meßerschmidt, 2021, pp. 109-120; Möllers and Weinberg, 2021, pp. 1069-1078; Polzin, 2021, pp. 1089-1136; Ruttloff and Freihoff, 2021, pp. 917-922;

The BVerfG expressly examined the possible violation of positive obligations to protect life and physical integrity as well as property and rejected them in their entirety.[22] It does assume that the positive obligations arising from the fundamental right to life and physical integrity *inter alia* require protection through measures that contribute limiting anthropogenic global warming and the associated climate change and to take adaptation measures to counter the dangers of climate change that has already occurred or can no longer be stopped.[23] However, the BVerfG leaves it up to the legislator to decide how these dangers are to be counteracted and how a protection concept and its normative implementation are to be specifically designed. Given the legislature's discretion for assessment, evaluation and design, the extent of constitutional court review is limited.[24] The BVerfG therefore expressly rejects a violation of fundamental rights due to inadequate fulfillment of positive obligations.[25]

The Bundesverfassungsgericht then becomes creative in terms of the doctrine of fundamental rights and develops the concept of "intertemporal safeguarding of freedom" ("intertemporale Freiheitssicherung"), to which the fundamental rights oblige.[26] The Karlsruhe climate case was therefore rightly described as the 'most innovative decision in terms of fundamental rights doctrine'[27] among climate cases. The BVerfG defines the concept of intertemporal protection of freedom as follows: 'The Basic Law obliges, under certain conditions, to safeguard freedom protected by fundamental rights over time and to distribute opportunities for freedom proportionately across generations.'[28] In order to counteract a one-sided shift of the greenhouse gas emissions imposed by Article 20a of the German Grundgesetz (protection of the natural foundations of life) into the future, the fundamental rights therefore have the effect of safeguarding freedom intertemporally. The Bundesverfassungsgericht therefore assumes an

Schlacke, 2021, pp. 912-917; Britz, 2022, pp. 825-834; Fister, 2022, pp. 460-465; Jahn, 2022, pp. 47-72; Wolf, 2022, pp. 451-464; Holoubek, 2024, pp. 102-104.

[22] BVerfGE 157, 30 *(climate protection)* para. 165, 168, 170, 172.

[23] BVerfGE 157, 30 *(climate protection)* para. 149-150.

[24] BVerfGE 157, 30 *(climate protection)* para. 152.

[25] BVerfGE 157, 30 *(climate protection)* para. 170, 172.

[26] BVerfGE 157, 30 *(climate protection)* para. 116-135 (admissibility), para. 182-265 (merits); see also Ekardt and Heß, 2021, pp. 579-581; Ruttloff and Freihoff, 2021, pp. 917-918; Schlacke, 2021, pp. 913-914; Fister, 2022, pp. 460-463.

[27] Holoubek, 2024, p. 102; see also Calliess, 2021b, p. 355.

[28] BVerfGE 157, 30 *(climate protection)* guiding principle 4.

'interference-like effect on the freedom of the complainants – freedom that is comprehensively protected under the Basic Law'[29], which requires justification.

This interference-like pre-emptive effect is the result of a decision by the ordinary legislator, which allows a certain amount of CO2 emissions *until* 2030 as part of the Climate Protection Act of 2019 (KSG[30]). Consequently, the possibilities for permissible emissions for the period *after* 2030 are significantly reduced.[31] By deriving from the state objective of Article 20a GG the obligation to distribute the restriction of emission possibilities in a forward-looking and proportionate manner, the BVerfG concludes that the regulation of the KSG 2019 constitutes a future encroachment on fundamental rights.[32]

In order to justify this interference-like pre-emptive effect, the BVerfG first refers to the state objective of "protecting the natural foundations of life" pursuant to Article 20a GG. The temperature threshold laid down in the Climate Protection Act is regarded as a concretization of the climate protection objective of the GG and therefore constitutionally relevant.[33] According to the BVerfG, the measures taken by the legislator to tackle climate change are covered by the legislator's "prerogative of concretization".[34] However, the principle of proportionality has been violated. According to the Karlsruhe judgment, this requires an even distribution of the CO2 reduction burdens up to climate neutrality over time:[35]

> However, since the current provisions on allowed emission amounts have now already established a path to future burdens on freedom, the impacts on future freedom must be proportionate from the standpoint of today – while it is still possible to change course.[36]

[29] BVerfGE 157, 30 *(climate protection)* para. 183.
[30] Bundes-Klimaschutzgesetz, BGBl I 48/2019.
[31] BVerfGE 157, 30 *(climate protection)* para. 183.
[32] Ekardt and Heß, 2021, p. 580; Möllers and Weinberg, 2021, p. 1073; Burtscher and Schindl, 2022, pp. 651-652.
[33] BVerfGE 157, 30 *(climate protection)* para. 209.
[34] BVerfGE 157, 30 *(climate protection)* para. 211.
[35] The keyword 'intergenerational justice' is not mentioned but is certainly taken into account in relation to future generations.
[36] BVerfGE 157, 30 *(climate protection)* para. 192.

In the proportionality test, the BVerfG actually applied an equal rights approach.[37] It is a question of an equal distribution of the reduction in freedom, ultimately a burden-sharing that is fair to all generations.[38] When assessing the equality of the distribution of the restriction of freedom it is once again the state objective and the climate neutrality that follows from it that functions as a benchmark.

For this purpose, a relationship is established between the current government measure that serves to reduce CO2 emissions and the hypothetical measure that the remaining CO2 budget would make necessary in an anticipated future scenario. The prerequisite for establishing this relationship is a fixed, remaining CO2 budget (i.e. an identifiable 'residual budget').[39] Based on this reasoning, the BVerfG declared the provision of the Climate Protection Act that determines emissions up to 2030 unconstitutional.

The outcome of the BVerfG's decision has been widely welcomed.[40] In terms of legal doctrine, however, some critical comments have been made.[41] In particular, some scholars questioned which fundamental right the BVerfG is actually examining. Furthermore, it can be criticized that according to the judgment's contents of the climate agreement under international law were granted constitutional effect, meaning that they were lifted to the level of the constitution. The calculations of the national residual budget of the "Sachverständigenrat für Umweltfragen" (national expert committee for environmental issues), based on the reports of the Intergovernmental Panel on Climate Change (IPCC), are decisive for the BVerfG's assessment. These values are non-binding guidelines which the legislator shall consider as part of its obligation under international law but do not have constitutional quality.[42]

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[37] See also Möllers and Weinberg, 2021, p. 1073; Ruttloff and Freihoff, 2021, p. 921; Holoubek, 2024, p. 107.

[38] Ekardt and Heß, 2021, p. 580; Möllers and Weinberg, 2021, p. 1073; Ruttloff and Freihoff, 2021, p. 918; Schlacke, 2021, pp. 914-915; Wolf, 2022, p. 462.

[39] BVerfGE 157, 30 *(climate protection)* para. 246-247.

[40] Schlacke, 2021, p. 914; Jahn, 2022, p. 49; with further references Hofmann, 2021, pp. 1587-1590.

[41] See inter alia Hofmann, 2021, p. 1587; Meßerschmidt, 2021, p. 114, pp. 119-120; Möllers and Weinberg, 2021, p. 1076; Polzin, 2021, p. 1099.

[42] Pabel, 2024, pp. 27-28.

For the purposes of this article, I will leave well alone with these reflections, which could be dealt with in detail. The development of the dogmatic figure of the ‘intertemporal safeguarding of freedom‘ is fascinating because it finds a new solution for the dogmatic question of the negative and positive effects of fundamental rights.[43] On second glance, however, it seems to be an artifice relying on the constitutional anchoring of concrete climate targets, which the German Grundgesetz probably does not contain.[44] It is questionable whether this concept can be transferred to other legal systems.

5. The Swiss Bundesgericht

In November 2016, the association “Klimaseniorinnen Schweiz” and four other applicants, supported by the NGO, applied at federal level. They stated that the federal government is violating the Swiss Federal Constitution (precautionary principle and right to life) and the ECHR with its current non-sufficient measures to achieve the climate target as a warming of more than 2 degrees is very likely to lead to a ‘‘dangerous anthropogenic disruption of the climate system”. The “Klimaseniorinnen” considered the risk that the federal government is taking by not currently pursuing the 2-degree target to violate human rights. According to the application, the federal government is not adequately fulfilling its duty to protect fundamental rights as enshrined in constitutional law.[45]

The “Eidgenössiche Departement für Umwelt, Verkehr, Energie und Kommunikation” (Swiss Department for the environment, transport, energy and communications) refused to deal with the application. An appeal against this to the Federal Administrative Court was rejected in December 2018 on the grounds that senior citizens are not more affected by the effects of global warming than other people. The applicants then lodged an appeal with the Bundesgericht. In May 2020, the Federal Supreme Court dismissed the appeal: It held that the applicants’ concerns should not be enforced by legal means but by political means.

The applicants lodged an application with the ECtHR. In the proceedings there, the Swiss federal government argued that Switzerland’s

[43] Möllers and Weinberg, 2021, p. 1073; Jahn, 2022, p. 68, with the finding of a convergence or mixture of the doctrines of defensive rights and protective obligations.
[44] See Schlacke, 2021, p. 915; Britz, 2022, pp. 826-827.
[45] Klagebegehren Klimaseniorinnen, 2016, para. 198.

political system with its direct-democratic instruments offered sufficient opportunities to advance climate issues.[46] "Judicialization" of such processes, i.e. assigning the decision on climate protection measures to the ECtHR, would be in tension with the principle of separation of powers and the principle of subsidiarity of the Convention system. It would also shorten the democratic debate and make it more difficult to achieve political solutions. This argument must of course be seen against the specific background of the Swiss legal system, which provides for far-reaching instruments of direct democracy but lacks a judicial review of norms. However, this highlights a general problem of climate cases concerning the principle of separation of powers between the courts and the administration/government. [47]

6. The Austrian Verfassungsgerichtshof

In international comparison, the Austrian Verfassungsgerichtshof (VfGH) has so far acted very cautiously regarding climate cases. To date, it has neither further developed the doctrine of the positive obligations, as the Dutch Hoge Raad did, nor has it followed the example of the German Bundesverfassungsgericht and added an intertemporal effect to fundamental rights or developed its specific own legal approaches of handling climate cases with respect to human rights.

It is discussed whether climate actions under fundamental rights are popular actions that are fundamentally inadmissible under the existing system of legal protection, which is geared towards the enforcement of individual legal positions.[48] The focus on the assertion of individual, subjective rights is an essential characteristic of legal protection under Austrian and German law as well as under the ECHR.[49] Accordingly, the –

[46] *Klimaseniorinnen and others v. Switzerland*, App. No. 53600/20, 9 April 2024, para. 338.
[47] On 9.4.2024, the ECtHR ruled on the complaint by the 'Klimaseniorinnen'. The complaint of the individual applicants was declared inadmissible due to a lack of victim status (Art. 34 ECHR). The ECtHR considered the complaint by the Climate Senior Women's Association to be admissible and found a violation of the duty to protect under Art 8 ECHR and Art 6 ECHR. In essence, the ECtHR considered the inadequate measures taken by Switzerland to combat climate change to be a violation of the duty to protect under Art 8 ECHR, see also 9 below.
[48] Schäffer and Kneihs, 2013, para. 57; Rohregger and Pechhacker, 2024, para. 171.
[49] On Austria Schäffer and Kneihs, 2013, para. 56; Rohregger and Pechhacker, 2024, para. 170-171; on Germany Bethge, 2021, para. 336; Grünewald, 2022, para. 81; on the ECHR

at least potential – violation of individual rights is a prerequisite for the admissibility of fundamental rights applications. This has so far led to the inadmissibility of climate cases in proceedings before the Austrian Verfassungsgerichtshof.[50]

7. The French Conseil d'Etat

The French Conseil d'Etat also had to decide on a climate case.

In 2019, the municipality of Grande-Synthe, which is located in northern France in an area considered to be at high risk of climate change, and the mayor of Grande-Synthe turned to the Conseil d'Etat to challenge the government's failure to take additional measures to achieve the Paris Agreement's goal of reducing greenhouse gas emissions by 40% by 2030. The cities of Paris and Grenoble as well as several NGOs took part in the proceedings. In its first decision on November 19, 2020, the Conseil d'Etat declared the application admissible insofar as it was submitted by the municipality of Grande-Synthe. However, the Conseil d'Etat rejected the mayor's individual application on the grounds that he had no legally protected interest in the matter. It was not enough that he had argued that his private house was located in an area that was at risk of flooding from 2040 onwards.

On the merits, the Conseil d'Etat decided in favor of the applicants. It found that the reduction in emissions in 2019 was too low and not significant enough in 2020, as economic activity had been reduced by the coronavirus crisis. It also found that compliance with the target pathway, which provides for a 12% reduction in emissions for the period 2024-2028, could not be achieved if new measures were not taken quickly.[51] The Conseil d'Etat therefore called on the government to take additional measures by March 31 2022 in order to achieve the target of a 40% reduction in greenhouse gas emissions by 2030.[52] Again, although not for the individual plaintiff, the climate case was successful on the merits, as the

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ECtHR *Findlay v. United Kingdom*, App. No. 22107/93, 25 February 1997, para. 67; Grabenwarter, Pabel and Edtstadler, 2018, para. 34; Grabenwarter and Pabel, 2021, p. 66, para. 16; Meyer-Ladewig and Kulick, 2023, Article 34 para. 22.

[50] Constitutional Court 30.9.2020, G 144/2020. On the popular complaint, see also Pabel, 2024, pp. 32-33.

[51] Conseil d'Etat, 1.7.2021, 427301, para. 5.

[52] Conseil d'Etat, 1.7.2021, 427301; see also Abel, 2023, pp. 13-14; Richter, 2022, pp. 217-218.

application proceeded by the municipality of Grande-Synthe achieved the objective of taking new and more effective measures against climate change in any case.[53]

8. The ECJ

We will now turn our attention to the European courts, the first one being the European Court of Justice (ECJ):

The vast majority of relevant cases before the European Court of Justice (ECJ) concerned EU emissions trading. In the first four years of its existence, there were more than 40 cases, mainly from member states that questioned the EU Commission's responsibility for reviewing the national allocation plans (NAPs) or the legality of the procedures.[54] Plant operators also tried to take the matter to court, but were not admitted.[55] In its decisions, the ECJ reaffirmed the importance of climate protection and the significance of EU emissions trading but stated that the EU Commission was not allowed to take market effects into account when reviewing NAPs.[56]

In 2018, an EU court dealt with a climate case similar to aforementioned ones for the first time. In the People's Climate Case, ten families from the EU, Kenya and Fiji brought an action before the General Court of the European Union (General Court) against the European Parliament and the Council of the European Union over the dangers of climate change directly affecting them in order to achieve a tightening of the EU's climate targets.[57] In May 2019, the GC dismissed their action as inadmissible due to a lack of individual concern. The applicants appealed to the ECJ in July 2019.[58] The main point of contention was the interpretation of "individual concern", which is required for a natural or legal person to

[53] Conseil d'Etat, 10.5.2023, 467982; Richter, 2022, pp. 217-219.
[54] *Saint-Gobain Glass Germany v. Commission, App. No.* C-503/07 P, 8 April 2008; *US Steel Košice v. Commission,* App. No. C-6/08 P, 19 June 2008; *Germany v. Commission,* App. No. T-374/04, 7 November 2007; *United Kingdom v. Commission,* App. No. T-178/05, 23 November 2005; *Poland v. Commission,* App. No. T-183/07, 23 September 2009.
[55] *Fels-Werke and others v. Commission,* App. No. T-28/07, 11 September 2007.
[56] *United Kingdom v. Commission,* App. No. T-178/05, 23 November 2005, para. 60; *Poland v. Commission,* App. No. T-183/07, 23 September 2009, para. 113.
[57] *Carvalho and others v. Parliament and Council,* App. No. T-330/18, 8 May 2019.
[58] *Carvalho and others v. Parliament and Council,* App. No. T-330/18, 8 May 2019.

have standing to bring an action for annulment under Article 263 para. 4 TFEU. Both the General Court and the ECJ followed the established case law ("Plaumann formula")[59] and demanded that the applicant must be particularly affected by the contested legal act of the Union. However, this was not the case for the applicants.[60]

With this decision, the ECJ confirms that, as a rule, legal protection for individuals is to be granted by the courts of the Member States. In doing so, it has ultimately taken itself out of the game when it comes to individuals' fundamental rights actions on climate change.

9. The ECtHR

All eyes are currently on Strasbourg, where the Grand Chamber of the ECtHR recently ruled on three climate cases.[61] The Court had postponed six other climate cases in order to await the leading decision of the Grand Chamber.[62]

Even before the decisions in the climate cases, the case law of the ECtHR recognized positive obligations in principle[63] and assumed the violation of Convention rights in several cases relating to environmental

[59] *Plaumann v. Commission of the EEC,* App. No. C-25/62, 15 July 1963; see also Fitz and Rathmayer, 2021, pp. 37-38; Winter, 2022, p. 367; Christiansen and Masche, 2023, pp. 32-33.

[60] *Carvalho and others v. Parliament and Council,* App. No. T-330/18, 8 May 2019, para. 71-80.

[61] The judgments of the ECtHR were delivered after this article was written, *Klimaseniorinnen and others v. Switzerland*, App. No. 53600/20, 9 April 2024; *Carême v. France,* App. No. 7189/21, 9 April 2024; *Duarte and others v. Portugal and others,* App. No. 39371/20, 9 April 2024.

[62] *Uricchio v. Italy and others,* App. No. 14615/21, case pending – 3 March 2021; *De Conto v. Italy and others,* App. No. 14620/21, case pending – 3 March 2021; *Müllner v. Austria and others,* App. No. 18859/21, case pending – 25 March 2021; *Greenpeace Nordic and others v. Norway and others,* App. No. 34068/21, case pending -16 December 2021; *Grandparents' Climate Campaign v. Norway and others,* App. No. 19026/21, case pending – 26 March 2020; *Soubeste and others v. Austria and others,* App. No. 31925/22, case pending – 21 June 2022; *Engels v. Germany and others,* App. No. 46906/21, case pending -lodged in September 2022.

[63] See for all *Belgian Language Case v. Belgium,* App. No. 1474/62 et al, 23 July 1986*; Hokkanen v. Finland,* App. No. 19823/92, 23 September 1994, para. 55; *Siliadin v. France,* App. No. 73316/01, 26 July 2005, para. 112-130; *López Ostra v. Spain,* App. No. 16798/90, 9 December 1994, para. 51-58; see also Grabenwarter and Pabel, 2021 pp. 164-166.

law, in particular violations of Article 2 and 8 ECHR.[64] However, the assumption of a violation presupposes that the asserted environmental impacts are of a certain weight and represent a 'real and immediate risk' to the legal interests of the respective applicants.[65] In order to come to an interference with fundamental rights in need of justification, it is therefore required that the danger to the protected interests of life, private life, family, or property has, if not materialized, then at least intensified and become more concrete. State authorities had to be able to recognize that a danger exists ("foreseeability").[66] As a third prerequisite, the ECtHR only assumes a violation of a positive obligation if it does not place a disproportionate burden on the state; the ECtHR grants states a wide margin of discretion.[67] Strasbourg case law has so far, i.e. prior to the decisions on the climate cases in April 2024, accepted environmental protection obligations on this basis in cases involving potential hazards from direct sources of danger such as a rubbish tip,[68] a gold mine,[69] or a river that is prone to flooding.[70] General, as yet unspecified hazards, such as those caused by climate change, had not yet been successfully brought before the ECtHR. However, if the risk of violations of fundamental rights becomes more concrete as a result of the temperature rise– think of flooding events caused by extreme weather conditions, such as those that occurred in Germany in the summer of 2021,[71]

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[64] *Öneryildiz v. Turkey*, App. No. 48939/99, 30 November 2004, para. 90; *Budayeva and others v. Russia*, App. No. 15339/02 and others, 20 March 2008, para. 160; *Kolyadenko and others v. Russia*, App. No. 17423/05 and others, 28 February 2012, paras. 187, 217; *Fadeyeva v. Russia*, App. No. 55723/00, 9 June 2005, para. 134.

[65] *Öneryildiz v. Turkey*, App. No. 48939/99, 30 November 2004, para. 101; mutatis mutandis *Osman v. United Kingdom*, App. No. 23452/94, 28 October 1998, para. 116; *Paul and Audrey Edwards v. United Kingdom*, App. No. 46477/99, 14 March 2002, para. 55; *Mastromatteo v. Italy*, App. No. 37703/97, 24 October 2002, para. 68.

[66] *Budayeva and others v. Russia*, App. No. 15339/02 and others, 20 March 2008, para. 158; see also Holoubek, 2024, p. 105.

[67] *Hatton and others v. United Kingdom*, App. No. 36022/97, 8 July 2003, para. 100; *Taşkin and others v. Turkey*, App. No. 46117/99, 10 November 2004, para. 116; *Fadeyeva v. Russia*, App. No. 55723/00, 9 June 2005, para. 134; *Budayeva and others v. Russia*, App. No. 15339/02 and others, 20 March 2008, para. 134-137; Grabenwarter and Pabel, 2021, pp. 345-346.

[68] *Öneryildiz v. Turkey*, App. No. 48939/99, 30 November 2004,

[69] *Taşkin and others v. Turkey*, App. No. 46117/99, 10 November 2004.

[70] *Kolyadenko and others v. Russia*, App. No. 17423/05 and others, 28 February 2012.

[71] Mehr als 100 Tote nach Überschwemmungen in Deutschland, Der Standard 16.7.2021, Available at: https://derstandard.at/story/2000128224261/lage-in-deutschlands-hochwassergebieten-weiter-angespannt (Accessed: 9 June 2024).

or the risk of landslides or avalanches in certain places – then it does not seem impossible that, in continuation of ECtHR case law, the violation of positive obligations will also be assumed for such climate impacts.

On April 9, 2024, the Grand Chamber of the ECtHR delivered its judgments in three climate cases. A violation of fundamental rights was only found in the case of the "Klimaseniorinnen" against Switzerland. Firstly, the Court found a violation of Article 6 ECHR due to the rejection of the case by the Swiss courts. Secondly, Article 8 ECHR was violated because the Swiss authorities had not acted in time and in an appropriate way to devise, develop, and implement relevant legislation and measures that could combat the negative effects of climate change.[72] In another climate case, Portuguese teenagers and young adults filed another application against Portugal and 32 other states.[73] They objected to the states' contribution to greenhouse gas emissions, which led to global warming and thus to increased heat waves. The applicants alleged a violation of the state's obligation to protect the right to life and respect for private life and referred to the Paris Agreement on climate change. They also considered the prohibition of discrimination to be violated, as, due to their young age, the expected adverse effects on them were greater and more severe than on members of older generations. The ECtHR declared the application inadmissible with regard to Portugal, as the applicants had not exhausted the domestic appeal procedure (see Article 35 ECHR). The application against the other states was also inadmissible, as the ECtHR did not recognize a case of the extraterritorial effect of the Convention in the constellations in question.[74]

The third case was brought by the now former mayor of the municipality of Grande-Synthe in the north of France. As mentioned before, his proceedings were declared inadmissible by the Conseil d'Etat,[75] against which he subsequently appealed to the ECtHR. The ECtHR also declared this application inadmissible, as the applicant, who no longer lived in the French municipality, did not meet the requirements for victim status.

[72] *KlimaSeniorinnen and others v. Switzerland,* App. No. 53600/20, 9 April 2024.
[73] *Duarte and others v. Portugal and others,* App. No. 39371/20, 9 April 2024
[74] *Duarte and others v. Portugal and others,* App. No. 39371/20, 9 April 2024, para. 213-214.
[75] See point 7.

It may also be interesting to note the pending application of an applicant from Austria[76] who suffers from a temperature-dependent form of multiple sclerosis, which makes him reliant on a wheelchair from a temperature of around 25 degrees and on external assistance from around 30 degrees. Particularly in comparison to the Swiss 'Klimaseniorinnen', for whom the ECtHR had denied victim status, the case of the applicant in the Austrian case once again focuses on the question of what degree of affectedness the Court requires for the assumption of victim status. The person concerned, who has multiple sclerosis, is already suffering from health problems due to the increased number of hot days caused by climate change. If the victim status due to the effects of climate change were to be rejected in this constellation as well, it would be difficult to imagine an individual situation at present that would warrant a complaint to the ECtHR. Applications to Strasbourg against inadequate state climate protection measures would then be limited to eligible associations or organizations.

This article does not provide a comprehensive analysis of the ECtHR's climate cases. It is an open question whether the reasons given by the ECtHR in the various proceedings and the legal consequences of Switzerland's condemnation of climate protection in this country will strengthen hopes for the effectiveness of climate cases based on fundamental rights.

10. Can fundamental rights actions be regarded as an effective instrument for enforcing climate protection measures?

Following this overview of the case law of the highest courts in Europe on fundamental rights climate cases, I will briefly summarize and highlight three points by ending with open questions.

1. Whether a climate case is successful before courts depends not least on the structure of legal protection in the respective legal system. In the Netherlands and France, proceedings in which the focus is not on the individual violation of fundamental rights, exist. It is rather the conduct of state bodies that is objectively assessed against the standard of fundamental rights. Ultimately, the most recent case law of the ECtHR also points in this direction as it is very cautious in granting individuals the status of victim and thus, the right to applications but considers the application of an

[76] *Müllner v. Austria and others,* App. No. 18859/21, case pending – 25 March 2021; see Krömer, 2021, p. 179.

association to be admissible without it being clear which subjective rights it represents.

2. In proceedings, such as those in Germany and Austria, but also before the ECtHR, where the fundamental rights review is based on the possible violation of subjective rights, the traditional effect of fundamental rights in their negative and positive dimension is not sufficient to fully grasp the typically not yet concretized threats to individual fundamental rights posed by climate change. Successful climate actions therefore require innovative approaches by the courts, be it the development of the intertemporal effect of fundamental rights by the Bundesverfassungsgericht or the conception of a form of representative action in climate actions by the ECtHR. The climate targets set by the Paris Agreement play a key role in both developments of the protection of fundamental rights. It was only by referring to these targets that the courts were able to define a (protective) minimum standard which, if not met, led to a violation of fundamental rights.

3. It is remarkable that climate activists are relying heavily on the effectiveness of the courts to achieve their goals with climate actions. The courts, especially the constitutional courts and the European Court of Human Rights, therefore, have high hopes of advancing climate protection and persuading states and politicians to do more to protect the climate. At the same time, however, this also shows a lack of trust in the democratic processes in the states. Activists seem to regard state actors as too hesitant and the existing democratic procedures as too slow, thus concluding that they have no real influence in this matter with ordinary methods. However, the role of jurisdiction in the concept of the separation of powers should be reflected. In a legal system that provides for constitutional court control of legislation, the powers of the legislature and the judiciary are intertwined in this aspect. The constitutional courts exercise control over the legislature within the scope of their powers, and their standard of review is determined by constitutional law. This in turn can be bound by international law or be amended and supplemented. So, what are the implications of the Constitution and fundamental rights for climate protection? Are the Paris climate protection goals part of domestic constitutional law? And does the political goal of limiting global warming take precedence over other political goals? Does the Constitution give it priority? Or is it not ultimately up to the legislator to decide?

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Environmental law of the European Union and its mechanisms for sustainability policies from a European perspective**

ABSTRACT: EU environmental law has a long tradition. During the last decade, however, EU environmental law developed into a cornerstone of EU policy. The European Green Deal aims to promote the combined policy objectives of sustainable development and protection of the environment for current and future generations. Within this policy framework, and based on a comprehensive legal framework, the EU has established mechanisms to address a wide range of environmental issues, including air and water quality, waste management, biodiversity conservation, and climate change mitigation. From a legal perspective, EU environmental law is characterized by its integration into all areas of EU policy and its binding nature on the Member States. The Treaty on the Functioning of the European Union (TFEU) already enshrines environmental protection as one of the EU's objectives and mandates the integration of environmental considerations into all policy areas, ensuring a coherent and holistic approach to sustainability. Key mechanisms for sustainable policies within EU environmental law include directives, regulations, and decisions, that set forth common standards and objectives for Member States to achieve. These legal instruments provide a framework for harmonizing environmental policies across the EU while allowing for flexibility to accommodate national circumstances and priorities. In summary, the environmental law of

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the European Union embodies a comprehensive and integrated approach to sustainability, combining customized legal instruments, institutional mechanisms, and policy frameworks to promote environmental protection, economic prosperity, and social well-being across the EU.

KEYWORDS: European Union, environment, European Green Deal, climate change, biodiversity, sustainable development, subsidiarity principle, precautionary principle, polluter pays principle, horizontal actions, environmental action programmes, environmental impact assessment, United Nations Environment Programme, UN Sustainable Development Goals.

1. Development of the European Union´s climate and environmental law

1.1. International Foundations

The objectives of climate and environmental protection at the European level are not fundamentally new. However, when the European Economic Community (EEC) was founded in 1957 as an intergovernmental agreement between the six founding states with the aim of strengthening economic prosperity after two world wars, it entailed neither an environmental policy nor an environmental administration or an environmental law.[1] The development towards an environmental law of the EU has developed rapidly since the 1970s.

Today, the protection of the environment and the fight against climate change are one of the core objectives of the EU Commission as well as central and important areas of European environmental policy within the framework of the European Green Deal (EGD) with various political and legal aspects.[2] The EGD is a response to the challenges of global warming, climate change, and the imminent loss of one million of the world's eight million species.[3] With its ambitious targets, the EU could influence global

[1] Jordan, Gravey and Adelle, 2021, p. 1.
[2] For political and legal aspects of the Green Deal see Bloomfield and Steward, 2020, pp. 770-779; Dobbs, Gravey and Petetin, 2012, pp. 316-326; Dupont and Torney, 2021, pp. 312-315.
[3] EU Commission, Communication from the Commission: The European Green Deal, Brussels 11.12.2019, COM(2019) 640 final, p. 1.

negotiations on climate change.[4] The Green Deal, however, is not the first important step towards the EU´s climate and environmental legislation.[5] The first United Nations Conference on the Human Environment, the so-called Environmental Conference, in Stockholm in 1972 was the first world conference to make the environment a major issue and it was the beginning of international global environmental policy.[6] It is interesting to note that the conference was called "Human Environment", so the protection of the environment was seen in the context of nature for mankind and the protection of nature was not an objective in its own right. This Conference, however, marked the beginning of international global environmental policy: It highlighted the interconnectedness of environmental issues and emphasized the need for collective action to address challenges such as pollution, biodiversity loss, and resource depletion.[7] The Environmental Conference resulted in the Stockholm Declaration, which laid the groundwork for international environmental law, set forth principles for sustainable development, and led to the establishment of the United Nations Environment Programme (UNEP),[8] which serves as the leading global environmental authority. For Europe, it was also the global policy foundation for developing European environmental policy.[9] The foundations of European environmental policy were laid at a meeting of the European Council in Paris in the same year in 1972, at which the "heads of state or of government" declared that a European Community environmental policy was necessary to complement economic policy and called for an action program.[10]

[4] For the role of the EU already before the Green Deal see Bäckstrand and Elgström, 2013, pp. 1369-1386.
[5] For the development of the EU environmental policy in the past five decades see Knill and Liefferink, 2021, pp. 13-32.
[6] See for the 1972 United Nations Conference on the Human Environment the documents on United Nations Conference on the Human Environment, [Online]. Available at: https://www.un.org/en/conferences/environment/stockholm1972.
[7] For further details on the Stockholm Conference and the outcomes see Kennet, 1972, pp. 33-45.
[8] UN Environment Programme (UNEP), https://www.unep.org/.
[9] For the background and the documents see United Nations Conference on the Human Environment, https://www.un.org/en/conferences/environment/stockholm1972.
[10] CVCE, 1972.

1.2. European Foundations

On July 1, 1987, the Single European Act (SEA)[11] entered into force, affecting a series of amendments to the EEC Treaty providing a constitutional base to the Community's environmental policy by introducing a new title "Environment" that defines its objectives.[12] The SEA was the first legal basis for a common environmental policy at European level. The aims were in particular to preserve the quality of the environment, protect human health, and rationalize the use of natural resources. Environmental protection became increasingly important at European level through the subsequent treaties.[13]

The Maastricht Treaty[14] of July 29, 1992, made environmental policy an official policy area of the EU.[15] The Treaty of Amsterdam[16] of October 2, 1997, established the obligation to integrate environmental protection into EU measures in all policy areas in order to promote sustainable development.[17] In summary, the EU began further developing an environmental policy in the 1990s that already comprised a climate policy.[18] The EU built up a broad portfolio of mitigation policy measures and governance tools on this basis, such as legally binding targets to reduce greenhouse gas emissions as well as policy measures addressing emissions trading, renewable energy and energy efficiency.[19] In this regard, the EU Commission has pointed out that the 'EU has steadily decreased its

[11] For the background see for example Meltzer, 1990, pp. 579-613; Vandermersch, 2003, pp. 407-429.
[12] Single European Act, OJ L 169/1, 29.6.1987.
[13] For an overview of the development of the European environmental policy see Boons, 1993, pp. 84-109; Jugde, 1993, pp. 1-12; Hildebrand, 1993, pp. 13-44; van der Straaten, 1993, pp. 65-83; Weale and Williams, 1993, pp. 45-64.
[14] Treaty on European Union, OJ 191/1, 29.07.1992 (Maastricht Treaty).
[15] See also Jordan and Jeppsen, 2000, pp. 64-74; Verhoeve, Bennett and Wilkinson, 1992, pp. 1-47.
[16] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340/1, 10.11.1997.
[17] For the European Environmental Policy after the Amsterdam Treaty see Bär and Kraemer, 1998, pp. 315-330.
[18] Dupont et al., 2023, p. 1.
[19] Dupont et al., 2023, p.1. For the EU policy on greenhouse gas emissions see Christiansen and Wettestad, 2003, pp. 3-18; Gulbrandsen and Christensen, 2014, pp. 503-528; Howes, 2010, pp. 117-152; Oberthür and Pallemaerts, 2010, pp. 27-64.

greenhouse gas emissions since 1990, reaching a total –32.5 % in 2022.'[20] The fight against climate change is also not new, as it has not only been an important EU policy area since the Green Deal.[21] In fact, combating climate change and promoting sustainable development in the context of relations with third countries was already a subject of the Treaty of Lisbon of December 13, 2007,[22] which provided the EU with a new legal framework and instruments to tackle future challenges, including environmental and climate challenges, by amending two main treaties of the EU: the Treaty on European Union (TEU)[23] and the Treaty establishing the European Community (EC), with the former being renamed later as the Treaty on the Functioning of the European Union (TFEU).[24] Specific targets for protecting the environment and combating climate change were already set out there.[25]

1.3. Importance of the Legal Personality of the EU

It is significant in this context that the Treaty of Lisbon gave the EU legal personality for the first time: Art. 47 of the Treaty of Lisbon "explicitly recognizes" the "legal personality of the European Union, making it an independent entity in its own right." This legal personality of the EU is of immense importance because it enables the EU to conclude international agreements as a union on the basis of its "own" legal personality.[26] As a consequence, this in turn led to the EU's function at global level in the area

[20] EU Commission, Progress made in cutting emissions, Available at: https://climate.ec.europa.eu/eu-action/climate-strategies-targets/progress-made-cutting-emissions_en (Accessed: 9 August 2024).

[21] For the background of the EU policy against climate change see EU Parliament, EU measures against climate change. Available at. https://www.europarl.europa.eu/topics/en/article/20180703STO07129/eu-measures-against-climate-change (Accessed: 9 August 2024). See also Cifuentes-Faura, 2022, pp. 1333-1340; da Graça Carvalho, 2012, pp. 19-22.

[22] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306/1, 17.12.2007.

[23] Consolidated Version of the Treaty on European Union, OJ C 326/13, 16.10.2012.

[24] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, OJ C 326/ 26.10.2012.

[25] Vedder, 2010, pp. 285-299. For the background also see Benson and Jordan, 2010, pp. 468-474; de Botselier, 2017, pp. 4-28; de Sadeleer, 2023, pp. 21-33.

[26] See de Zwan, 2009, pp. 75-113; Rosas, 2011, pp. 1304-1343.

of global environmental protection also gaining in importance. In addition, this further strengthened the EU's pioneering role in global environmental protection with effects not only on the individual policy areas of the Green Deal, but also on the fight against climate change in particular. It is precisely here that the Union has a pioneering and leading role to play with Regulation 2021/1119 on establishing the framework for achieving climate neutrality of 30 June 2021 – the so-called "European Climate Law".[27] As the EU Commission points out, the "European Climate Law writes into law the goal set out in the European Green Deal for Europe´s economy and society to become climate-neutral by 2050".[28] Against this backdrop, the European Commission introduced the European Green Deal (EGD) in 2019 as a central component of its strategy for economic growth.[29] In its Communication on the EGD, the EU Commission points out, that in response to these challenges, the EGD is a 'new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use.'[30] Furthermore, the EGD 'aims to protect, conserve and enhance the EU´s natural capital, and protect health and well-being of citizens from environment-related risks and impacts', whereas 'this transition must be just and inclusive'.[31] In addition to combating climate change, the Union is confronted with other complex environmental problems. Examples include the loss of biodiversity, environmental pollution, and the depletion of natural resources, such as water and raw

[27] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (`European Climate Law´), OJ L 243/1, 09.07.2021.

[28] European Commission - European Climate Law. Available at: https://climate.ec.europa.eu/eu-action/european-climate-law_en (Accessed: 15 September 2024). For the European Climate Law see also Schlacke, Köster and Thierjung, 2021, pp. 620-626; Stangl and Mauger, 2021, pp. 44-205. For the EU´s obligation for emission reduction for EU Member States see Peters and Athanasiadou, 2020, pp. 201-211.

[29] EU Commission, The European Green Deal: Striving to be the first climate-neutral continent, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en.

[30] EU Commission, Communication from the Commission, The European Green Deal, Brussels, 11.12.2019, COM(2019) 640 final, p. 1.

[31] EU Commission, Communication from the Commission, The European Green Deal, Brussels, 11.12.2019, COM(2019) 640 final, p. 1.

materials. As a core part of the EGD, the EU developed a Biodiversity Strategy for 2030 which contains specific commitments and actions to protect nature and reverse the degradation of ecosystems.[32] The EU Commission points out, that the Biodiversity Strategy is the 'EU´s contribution for the upcoming international negotiations on the global post-2020 biodiversity framework' and will 'also support a green recovery following the Covid-19 pandemic'.[33]

Before the EU mechanisms for sustainable policies and the various instruments for its implementation will be analyzed, the basic principles of environmental law shall be presented in a short overview below.

2. Principles of European Environmental Policy

2.1. Legal Framework of the European Environmental Policy in the Primary Law

2.1.1. EU Charter of Fundamental Rights (CRF)

The Union's environmental policy is enshrined in primary and secondary law of the EU. Article 37 of the EU Charter of Fundamental Rights (CFR)[34] states that a 'high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principles of sustainable development.' This article lays down the duties of public authorities in relation to environmental integration in policymaking and implementation but does not establish any individually justiciable right to environmental protection, or to an environment of any particular quality.[35]

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[32] European Commission - Biodiversity Strategy for 2030. Available at: https://environment.ec.europa.eu/strategy/biodiversity-strategy-2030_en (Accessed: 8 September 2024).

[33] European Commission - Biodiversity Strategy for 2030. Available at: https://environment.ec.europa.eu/strategy/biodiversity-strategy-2030_en (Accessed: 8 September 2024).

[34] Charter of Fundamental Rights of the European Union (CFR), OJ C 326/391, 26.10.2012.

[35] Morgera and Marin-Duran, 2021. For the importance and function of Art. 37 CFR for the EU environmental law see also Bogojević, 2017, pp. 8-10; Hectors, 2008, p. 165.

2.1.2 Treaty of the Functioning of the European Union (TFEU)

A) Article 11 TFEU

The environmental law in the EU is based on a shared competence between the EU and the Member States according to Article 4(2)(e) of the TFEU[36] Pursuant to Article 11 TFEU environmental protection requirements 'must be integrated into the definition and implementation of the Union´s policies and activities, in particular with a view to promoting sustainable development'.[37] Thus, Article 11 TFEU has an important function in relation to strategic assessments of individual measures and policies also in the context of mechanisms for sustainable policies. This applies in particular to the new green policy of the EU. The EGD sets a 'new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases 2025 and where economic growth is decoupled from resource use.'[38] It follows from Article 11 TFEU that in terms of the EGD its strategic key components are substantiated and made binding within the 8th Environmental Action Programme (EAP) of the EU that will guide EU environmental policy until the end of the decade.[39] Building on the EGD, the action programme aims according to the EU Commission 'to speed up the transition to a climate-neutral, resource-efficient economy, recognising that human wellbeing and prosperity depend on healthy ecosystems' and 'sets out priority objectives for 2030 and the conditions needed to achieve these.'[40]

B) Article 191 to 193 TFEU

The environmental policy objectives of the EU can be found in Title XX 'Environment', in particular in the Articles 191 to 193 TFEU. Based on

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[36] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47, 26.10.2012.

[37] For the environmental integration obligation of Article 11 TFEU see for example Calliess, 2023; Klamert, 2019; Nowag, 2018; Nowag, 2016; Sjåfell, 2014; Voigt, 2014.

[38] EU Commission, The European Green Deal, COM(2019), 640 final, p. 2.

[39] European Commission - Environment action programme to 2030. Available at: https://environment.ec.europa.eu/strategy/environment-action-programme-2030_en (Accessed: 11 September 2024).

[40] European Commission - Environment action programme to 2030. Available at: https://environment.ec.europa.eu/strategy/environment-action-programme-2030_en (Accessed: 11 September 2024).

these provisions, the EU is competent to act in various areas of environmental policy, such as air and water pollution, waste management, and climate change. The EU is the primary legislator in most areas of environmental policy, particularly concerning transboundary issues, such as climate change, biodiversity, air and water pollution, industrial pollution, waste, and chemicals.[41]

Article 191 TFEU comprises the main provisions of EU environmental law and provides the objectives of EU environmental policy: the preservation, protection, and improvement of the quality of the environment, the protection of human health, the rational utilization of natural resources, and the promotion of international measures to deal with environmental problems.[42] According to Article 191(1) TFEU the 'Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources' and 'promoting measures at international level to deal with regional and worldwide environmental problems, and in particular combating climate change.'

Article 191(2) TFEU sets out four main environmental principles for the environmental policy within the scope of EU law. According to this provision, the policy of the EU on the environment 'shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union.' Thus, the three fundamental principles of EU environmental law are: the precautionary principle, the principles for preventive actions and the polluter pays principle. According to this provision, the EU environmental policy 'shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay'.

These provisions authorize the EU to take action in principle in all areas of environmental policy, including air and water pollution, waste disposal, and climate protection. The principles have influenced a wide range of EU secondary law. However, they are directed at policies and measures at the EU level. Thus, Article 192(2) TFEU cannot be relied on neither by individuals to exclude the application of national legislation in the context of environmental policy for which there is no EU legislation

[41] See van Zeben, 2022.
[42] For Article 191 TFEU see for example Garben, 2019.

adopted nor can competent environmental authorities rely on this provision if there is no national legal provision as a basis for environmental policy or measures.

2.1.3. Principle of Subsidiarity

The scope for action in the EU is, however, limited by the principle of subsidiarity and the requirement for unanimity in the Council in the fields of fiscal matters, town and country planning, land use, quantitative water resource management, choice of energy sources, and structure of energy supply.[43] As environmental policy does not fall in the exclusive competence of the EU, the principle of subsidiarity applies – not to allocate powers but rather to regulate the use of powers.[44] The principle of subsidiarity laid down in Article 5(3) of the Treaty on European Union (TEU)[45] governs the exercise of the EU´s competences in areas in which the EU does not have exclusive competence, whereas the principle of subsidiarity seeks to safeguard the ability of the Member States to take decisions and action and authorises intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States, but can better be achieved at Union level.[46]

The principle of subsidiarity lays down two conditions for new EU legislation: subsidiarity and proportionality. The principle requires a justification for an EU measure and also requires that the intensity of the measure must be appropriate in relation to the objective.[47] While the principle of subsidiarity appears to be a good approach to the division of competences between the EU and its Member States, there is a risk of inconsistencies in environmental policy and its application.[48] This could also be relevant to the EU mechanisms for sustainable policies. Before

[43] For the requirement for unanimity in the Council in the context of environmental policy see Jordan, 2000; Andersen and Nordvig Rasmussen, 1998.
[44] See de Sadeleer, 2012.
[45] Consolidated version of the Treaty on European Union, OJ C 326/13, 26.10.2012.
[46] European Parliament: The principle of Subsidiarity. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity (Accessed: 14 September 2024).
[47] Shaw, Nadin and Seaton, 2000. For the history of application of the principle of subsidiarity see Jeppesen, 2000; Jordan and Jeppsen, 2000.
[48] Flynn, 2000.

analysing these EU mechanisms in more detail, the four main environmental principles of Article 191(2) TFEU, as described above, are explained below.

2.2. Principles of the EU Environmental Law

2.2.1. Importance of these Principles

EU environmental policy is based on the four central principles set out in Art. 191(2) TFEU. These are the principles of precaution, prevention, elimination of environmental damage at source and the polluter pays principle. Compared to the principle of prevention, the source principle and the polluter pays principle, the precautionary principle has shown significant effects and an important influence on the EU environmental law, particularly in the secondary law and the statements rendered by the EU institutions.[49]

2.2.2. Principles of precaution and prevention

The precautionary principle, as one of the central principles of the EU environment and set out in Art. 191 TFEU, follows the approach of risk avoidance. However, this principle is not defined in the TFEU or any other EU Treaty. According to this principle, a policy or measure may not be implemented if it could lead to damage to the environment or human health, and there is not yet a scientific consensus regarding the risks or hazard potential of the policy or measure. The principle is thus an instrument of risk regulation if the "whether" and "how" of the risk is still unknown or not sufficiently scientifically proven.

The precautionary principle was first set out in the EU Commission´s Communication on the Precautionary Principle[50] adopted in 2000, which defined the concept and envisaged how it would be applied.[51] The principle

[49] For an overview on these principles and their importance see Proelss, 2016.

[50] EU Commission, Communication from the Commission on the precautionary principle (Communication on the precautionary principle), Brussels, 02.02.2000, COM(2000), 1 final. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0001:FIN:en:PDF (Accessed: 14 September 2024).

[51] EU, EUR-Lex, Glossary, Precautionary Principle- Available at: https://eur-lex.europa.eu/EN/legal-content/glossary/precautionary-principle.html (Accessed: 14 September 2024).

has significantly influenced how the EU should deal with different uncertainties and environmental risks by observing the principle of proportionality when implementing precautionary measures.[52] The importance of the precautionary principle is highlighted by the Communication according to which the principle should apply 'to the dilemma of balancing the freedom and rights of individuals, industry, and organizations with the need to reduce the risk of adverse effects to the environment, human, animal or plant health'.[53] The influence of the precautionary principle, although mentioned in the context of the environmental policy goes far beyond the protection of the environment. The precautionary principle has now become a general guiding principle that enables decision-makers to take precautionary measures, even when there is scientific uncertainty about the impact of new technologies or products on the environment and health.[54] The precautionary principle has developed not only as an important principle in the regulation of chemical substances,[55] but also in food law.[56] However, the principle is also particularly important in the regulation of new technologies – such as genetic engineering[57] or nanotechnology.[58]

Although the precautionary principle has emerged as a fundamental and general principle of precaution, it is not generally applicable, but only if certain conditions are met. This applies in particular to the existence of a risk. The precautionary principle is an approach to risk management, where, if a given policy or action might cause harm to the public or the environment and if there is still no scientific agreement on the issue, the policy or action in question should not be carried out.[59] According to the Communication on the precautionary principle this principle "should be considered within a structured approach to the analysis of risk which

[52] See Proelss, 2016.
[53] EU Commission, Communication on the precautionary principle, p. 2.
[54] See also de Smedt, 2022.
[55] For chemical substances see for example Alaranta, and Miettinen, 2022; Bor-Rasmussen et al., 2021; Müller-Herold, Morosini and Schucht, 2005.
[56] For food law see for example Purnhagen, 2015; Recuerda, 2008; Szajkowska, 2012.
[57] For genetic engineering see Dederer, 2016; Seitz, 2021.
[58] For nanotechnology see for example Coria, Kristiansson and Gustavsson, 2022; Dimitrijević, 2011; Haum et al., 2004; Heselhaus, 2009; Saldívar-Tanaka and Hansen, 2021.
[59] EU, EUR-Lex, Glossary, Precautionary Principle- Available at: https://eur-lex.europa.eu/EN/legal-content/glossary/precautionary-principle.html (Accessed: 14 September 2024).

comprises three elements: risk assessment, risk management, risk communication.[60] The precautionary principle is particularly relevant to the management of risk."[61] Thus, the precautionary principle can only be invoked if there is a potential risk. Since the precautionary principle is a risk management tool, a policy or action needs to be reviewed when more scientific information becomes available.[62] As a consequence, the policy or measure can be reconsidered as soon as further scientific information is available.

2.2.3. Polluter pays principle

The polluter pays principle (PPP) as comprised in Article 191(2) TFEU states that those who cause environmental pollution should be responsible for measures to prevent, reduce, and eliminate it and should pay for the costs incurred by society as a result of the pollution.[63] Thus, the PPP requires polluters to bear the environmental and social costs of their actions. The EU Commission summarises that the PPP is 'a simple idea at the core of EU environmental policy' that 'those responsible for environmental damage should pay to cover the cost'.[64] As such, this principle applies to the prevention of pollution, remediation, liability, e.g. criminal, civil, and environmental liability, and the costs imposed on society of pollution.[65]

The PPP is implemented by the Environmental Liability Directive,[66] which entered into force in 2007 and aims to prevent or remedy

[60] EU Commission, Communication on the precautionary principle, p. 2. For the three criteria see also Garnett and Parson, 2017.
[61] EU Commission, Communication on the precautionary principle, p. 2.
[62] EU, EUR-Lex, Glossary, Precautionary Principle- Available at: https://eur-lex.europa.eu/EN/legal-content/glossary/precautionary-principle.html (Accessed: 14 September 2024).
[63] For the polluter pays principle (PPP) see for example Bleeker, 2010; de Sadeleer, 2009; Nash, 2009.
[64] European Commission - Ensuring that polluters pay. Available at: https://environment.ec.europa.eu/economy-and-finance/ensuring-polluters-pay_en (Accessed: 14 September 2024).
[65] European Commission - Ensuring that polluters pay. Available at: https://environment.ec.europa.eu/economy-and-finance/ensuring-polluters-pay_en (Accessed: 14 September 2024).
[66] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Law Directive), OJ L 143/56, 30.04.2004.

environmental damage to protected species, natural habitats, water, and soil. This Directive established a comprehensive EU-wide liability regime for environmental damage based on the PPP.[67] As a consequence, operators of certain economic activities, such as the transport of hazardous substances or activities that lead to the discharge of wastewater into water bodies, must take precautionary measures in the event of an immediate threat to the environment. If damage has already occurred, operators are obliged to take appropriate measures to remedy the damage and bear the costs. The Environmental Liability Directive now also covers a wide range of areas, such as the management of mineral waste, the operation of geological storage sites and the safety of offshore oil and gas activities.

2.3. Environmental Protection in Secondary Law

2.3.1. General Relationship

The EU environmental law based on Articles 191 to 193 TFEU is shaped through the numerous directives and regulations that have been adopted based on the EU's shared environmental competence pursuant to Article 4(2)(e) TFEU as described above. In general, environmental protection has a special status as an objective of general interest – both at the EU level and for the Member States. This objective is therefore pursued at both the Member State and EU level. Thus, the national regulations of the Member States might influence the environmental regulations of the EU, while conversely, the EU particularly provides for environmental protection regulations at the EU level, as just mentioned.

As a result, regulatory approaches and regulatory models for environmental protection that have proved successful at the national level serve as a model for regulations at the Union level. Against the background of the ecological, environmental, political and economic diversity between the Member States, EU environmental law is mostly adopted through directives, whereas Articles 36, 114(4)–(5), and 193 TFEU stress the possibility for potentially stricter environmental regulation at the Member

[67] European Commission - Environmental liability. Available at: https://environment.ec.europa.eu/law-and-governance/compliance-assurance/environmental-liability_en (Accessed: 15 September 2024).

State level, if supported by national circumstances and/or new scientific insights.[68]

In addition, the principle of subsidiarity, as mentioned above, plays an important role. These regulations in the EU secondary law – in particular European liability law and regulations especially regarding the EGD – in turn limit the regulatory options of the Member States by having a "blocking effect". Due to the primacy of Union law, secondary environmental law has an overriding effect on national environmental law, which limits the sovereignty of the Member States in the areas of environmental protection regulated in this way. However, this overriding effect is in turn limited by the possibility for Member States to reinforce protection, as set out in Art. 193 and Art. 114 (4) to (7) TFEU. The regulations at the EU level might thus develop a minimum standard in specific parts of EU environmental policy. Within the framework of the harmonisation of certain environmental standards, the Member States therefore have scope for action and innovation that is in line with the principle of subsidiarity.

2.3.2. EU Environmental Law as a Minimum Standard

A) Harmonisation Through Minimum EU Standards

Against the background of the harmonisation of certain environmental standards at the EU level, EU environmental law has a harmonising effect on the national law of the Member States. The minimum standard for the EU environmental law is established, as already briefly mentioned, in Article 193 TFEU. Accordingly, the safeguard measures at the Union level ‘shall not prevent any Member State from maintaining or introducing more stringent safeguard measures. The measures in question must be compatible with the Treaties. They shall be notified to the Commission.’ On this basis, a comprehensive body of secondary European environmental law has developed as already briefly described. However, the protective measures taken in accordance with Art. 192 TFEU do not prevent the individual EU Member States from maintaining or adopting more stringent protective measures. The EU Commission has for example issued a Recommendation providing for minimum criteria for environmental inspections in the Member States.[69]

[68] See van Zeben, 2022.

[69] Recommendation 2001/331/EC of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States,

B) Internal Market and Economic Goals

The possibilities of Member States on their national level to take progressive actions are also limited by the requirement to prevent obstacles to the internal market which leads to the fact that EU environmental goals are often connected with EU economic goals.[70] This connection is also a fundamental principle in the EGD, which is highlighted already in the second paragraph of the Communication of the EU Commission to the ECG:

> It is a new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use.[71]

Thus, the link of EU environmental policy is linked with economic objectives in the EU, as evidenced by the EGD, as the EU strives to be a global leader on issues, such as the circular and green economy while maintaining a competitive social market economy.[72]

C) Primacy of EU Law and the Role of the EU Courts

A harmonized application of EU environmental law is achieved through various instruments, in particular the binding nature of implementing legislation, i.e. by adopting regulations and implementing directives concerning legal positions and obligations on the one hand, and by the interpretation and application of implementing legislation, which must be interpreted "in the light of EU law", i.e. in conformity with EU law, on the other hand.

A consistent application of EU environmental law is based on the direct effect of EU legislation in the light of the primacy of EU law, the consistent interpretation of EU environmental law by the European Courts

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OJ L 118, 27.04.2001. [Online]. Available at: https://eur-lex.europa.eu/EN/legal-content/summary/environmental-inspections-minimum-criteria.html (Accessed: 15 September 2024).

[70] See van Zeben, 2022.

[71] Communication on the precautionary principle, p. 2.

[72] van Zeben, 2022.

and the instrument of state liability.[73] As a result of the interpretation in conformity with EU law and in particular, due to the high need for concretization of a large number of regulations and directives of secondary law, the EU case law of the Court of Justice and the General Court was and is becoming increasingly important.[74] The main instruments for referrals to the ECJ are referrals by national courts under Art. 267 TFEU, which are by far the most important, and infringement proceedings under Art. 258 TFEU. This is partly reinforced by national law. For example, under German law, a breach of the obligation to refer may constitute a violation of Art. 101 of the German Constitution (German *Grundgesetz*), and a deprivation of the right of the statutory judge.[75]

3. Mechanisms of Climate and Environmental Law at the EU Level

3.1. Implementation at Member State Levels and Enforcement

The mechanisms of climate and environmental law for pursuing a sustainable policy at the European level are diverse and the implementation at the national level of the Member States is often not sufficient. The EU Commission points out that, whereas the EU has 'made broad progress on adoption to climate change, in particular through the ongoing implementation of the EU Adaptation Strategy', the 'progress has been uneven across areas'.[76] As the EU Commission explains, the

> assessment of progress on adaption at the national level shows that Member States need to take significantly more action to adapt to climate change – for instance, on governance, funding, risk assessments, nature-based solutions, as well as monitoring,

[73] For the importance of judicial protection in the context of EU environmental law see Hadjiyianni, 2021; Krämer, 2015; Squintani, 2019.

[74] A detailed analysis of the case law of the Court of Justice and the General Court is not possible in the context of this paper. For an overview on the case law of the EU Courts in environmental law cases see Eliantonio, 2023; Krommendijk and Sanderink, 2023; Lavrysen, 2023; Pouikli, Tsoukala and Tsakalogianni, 2024; Passer and Pazderová, 2023. For the role of the case law of the European Court of Human Rights (ECHR) see for example Kobylarz, 2023.

[75] For details of the obligation for example Schröder, 2011; Thomale, 2016.

[76] European Commission - Environment action programme to 2030. Available at: https://environment.ec.europa.eu/strategy/environment-action-programme-2030_en (Accessed: 11 September 2024).

> reporting and evaluation in order to reduce their social and economic vulnerabilities to the intensifying climate-related risks.[77]

The EU has established various mechanisms for the implementation of climate and environmental protection goals to address the challenges of climate change and environmental degradation. These mechanisms include a wide range of legal instruments, institutions and policy measures to promote sustainability, reduce greenhouse gas emissions and protect natural ecosystems as already described above. As the EU has put in place environmental rules, the Member States are responsible for fully and correctly implementing EU rules, which require environmental compliance with oversight responsibilities and adjudication power to a very wide set of public authorities as the EU Commission mentioned.[78] The EU Commission ensures that all Member States apply EU environmental law correctly and initiates infringement proceedings if this is not the case. The EU Commission points out that this is a major task with over 200 pieces of environmental legislation to be monitored in 27 Member States.[79] Against this background, the EU Commission focuses its enforcement policy on the most important violations of EU law that affect the interests of EU citizens and companies, as well as on cases with a strategic or structural dimension.[80] For a harmonized approach, the EU has developed several mechanisms for climate and environmental law as well as for sustainability.[81] Those mechanisms and instruments shall be illustrated and analysed below.

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[77] European Commission - Environment action programme to 2030. Available at: https://environment.ec.europa.eu/strategy/environment-action-programme-2030_en (Accessed: 11 September 2024).

[78] European Commission - Environmental compliance assurance. Available at: https://environment.ec.europa.eu/law-and-governance/compliance-assurance_en (Accessed: 15 September 2024).

[79] European Commission - Legal Enforcement. Available at: https://environment.ec.europa.eu/law-and-governance/legal-enforcement_en (Accessed: 16 September 2024).

[80] European Commission - Legal Enforcement. Available at: https://environment.ec.europa.eu/law-and-governance/legal-enforcement_en (Accessed: 16 September 2024).

[81] For an introduction see Damro, Hardie and MacKenzie, 2008.

3.2. Environmental Action Programmes

The environmental policy of the EU has essentially evolved from a group of measures aimed at creating strategies for sustainable development, based on the fact that the economy, social inclusion and environmental protection are interdependent.[82] One of the instruments of the environmental policy of the EU are multinational Environmental Action Programmes (EAPs), which are based on the principles of prevention and precaution. They are the most important documents defining the environmental policies within the EU.[83] The Commission has been adopting multi-annual EAPs since 1973, in which upcoming legislative proposals and objectives of EU environmental policy are set out.[84] Their implementation, over the previous 50 years, represented a 'significant advance in raising eco-friendly awareness and suggesting solutions for environmental problems in the EU.'[85]

EAPs are a useful instrument for environmental protection, as they provide a comprehensive framework for setting environmental priorities, defining targets and coordinating action at both the EU and national levels of the Member States. The programmes are aimed at setting goals that will be achieved in the context of the environmental protection objectives of the EU.[86] Since EAPs set out clear priorities for environmental protection based on scientific evidence, stakeholder consultations and policy assessments, they identify the key challenges and areas where action at the EU level is most needed, and help to focus resources and actions where they can have the greatest impact. They usually cover several years and enable long-term planning for the implementation of strategies and measures. This enables Member States and stakeholders to tackle complex environmental problems, such as climate change mitigation, biodiversity conservation and pollution reduction.

Since EAPs facilitate coordination and cooperation between the Member States, regions and different stakeholders they establish also harmonising strategies to promote synergies, leading to more effective and efficient environmental management. While EAPs also contain mechanisms for monitoring progress and evaluating the effectiveness of strategies and

[82] See Popeangă, 2013.
[83] See Pindaru et al., 2023.
[84] For the history of EAPS as instruments to support the sustainable development strategy of the EU since 1972 see Halmaghi, 2016; Uluirmak, 2016.
[85] Pindaru et al., 2023.
[86] Halmaghi, 2016.

measures, they are an important tool for regular reporting on environmental indicators that enable political decision-makers to assess the impact of measures and, if necessary, make adjustments in order to achieve environmental goals.

In addition, EAPs provide a legal framework for the concept and implementation of environmental policy and ensure that EU Member States comply with their environmental obligations. In order to achieve those objectives, they may contain binding targets, directives and regulations that set minimum standards for environmental protection, all already mentioned above, and provide a basis for enforcement measures. Finally, EAPs often provide for public consultation, so that citizens, NGOs and other stakeholders can contribute to the decision-making process, which promotes transparency and thus public confidence in environmental policies and measures.

The latest EAP is the 8th Environmental Action Programme of the EU which entered into force in May 2022.[87] This Programme, as already mentioned above, is the EU's common agenda for the environmental policy of the EU until the end of 2030. It includes an "obligation for the Commission to present a monitoring framework, based on a limited number of headline indicators" that should include 'systematic indicators that address interlinkages between environment-social and environmental-economic policy considerations.'[88] The 8th EAP defines objectives for environmental policy as measures to prevent, reduce or end adverse effects on nature and natural resources while recognizing that environmental policy objectives must be aligned with reducing greenhouse gas emissions which is the main goal of the EU´s climate policy.[89] The climate policy of the EU is regulated by the European Climate Law.[90] The 8th EAP, which is aligned

[87] For the 8th EAP see Pindaru et al., 2023; Tosun, 2023.

[88] EU Commission, 8th Environment Action Programme: EU sets out to measure progress on Green Deal environment and climate goals, Press release, 26.07.2022. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4667 (Accessed: 16 September 2024).

[89] See European Commission - Environment action programme to 2030. Available at: https://environment.ec.europa.eu/strategy/environment-action-programme-2030_en (Accessed: 11 September 2024).

[90] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021, establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (´European Climate Law`), OJ L 243/1, 09.07.2021. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R1119 (Accessed: 11 September 2024).

with the EGD, provides for a renewed commitment to the 2050 vision of ensuring the well-being of all people while respecting the limits set by the planet.

The 8th Environmental Action Programme of the EU supports the environmental and climate targets from the Green Deal in terms of six priority goals:[91]

- Achieving the targets for reducing greenhouse gas emissions by 2030 and achieving climate neutrality by 2050.
- Improving adaptability, strengthening resilience and reducing vulnerability to climate change.
- Progress towards a regenerative growth model, decoupling economic growth from resource use and environmental degradation and accelerating the transition to a circular economy.
- Pursuing a zero-pollution strategy for air, water and soil, and protecting the health and well-being of Europeans.
- Protecting, preserving and restoring biodiversity and enhancing natural capital, particularly in terms of air, water, soil, forests, freshwater, wetlands and marine ecosystems.
- Reducing the environmental and climate impact of production and consumption, particularly in the areas of energy, industrial development, buildings and infrastructure, mobility and the food system.

The 8th EAP calls for active engagement of all stakeholders at all levels of governance, to ensure that EU climate and environment laws are effectively implemented. It forms the EU's basis for achieving the United Nation's 2030 Agenda and its Sustainable Development Goals.[92]

In summary, EAPs play an important role in implementing the EU environmental policy. Although, as mentioned above, there are still challenges, such as ensuring effective and harmonized implementation by the Member States, these programmes provide a valuable framework at the EU level. They set the framework for future action for all areas of

[91] For the goals of the 8th Environmental Action Programme see See European Commission - Environment action programme to 2030. Available at: https://environment.ec.europa.eu/strategy/environment-action-programme-2030_en (Accessed: 11 September 2024).

[92] European Commission - Environment action programme to 2030. Available at: https://environment.ec.europa.eu/strategy/environment-action-programme-2030_en (Accessed: 11 September 2024).

environmental policy.[93] The close links of the 8th EAP with the 2030 Agenda for Sustainable Development and the EGD represent an important step towards greater applicability of environmental policies in the EU.[94] Since the 8th EAP comprises a list of headline indicators for monitoring progress towards the EU´s environment and climate goals to 2030 'the EU gets back on track to living and working within planetary boundaries', as the Commission points out.[95] As such, 'the indicators capture progress towards environmental wellbeing, including also economic and social aspects.'[96] Thus, the 8th EAP is an important instrument for implementing the objectives of the EGD.[97]

3.3. Horizontal Strategies

In addition to the EAPs, the so-called horizontal strategies are effective mechanisms for achieving the environmental protection goals of the EU. The horizontal strategies in EU environmental law have an important role to play in ensuring a coordinated and integrated approach to tackling environmental problems in various policy areas. They allow integrating environmental objectives into other policy areas, such as agriculture, energy and various fields of industry, e.g. transportation or waste management. By integrating environmental objectives into various sectors, these horizontal strategies ensure that environmental concerns are taken into account in decision-making processes and policy development.

Horizontal strategies support and promote coherence between different policy areas and coordinate these areas. Horizontal strategies also help to identify synergies between different policy areas and avoid conflicts between environmental objectives and other policy objectives. In this way, they ensure that policies and measures in different sectors complement each other, thereby promoting more efficient results. For example, the EU

[93] Halmaghi, 2016.
[94] Pindaru et al., 2023.
[95] EU Commission, 8th Environment Action Programme: EU sets out to measure progress on Green Deal environment and climate goals, Press release, 26.07.2022. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4667 (Accessed: 12 September 2024).
[96] EU Commission, 8th Environment Action Programme: EU sets out to measure progress on Green Deal environment and climate goals, Press release, 26.07.2022. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4667 (Accessed: 12 September 2024).
[97] For the Environment Actions Plans see Langlet and Mahmoudi, 2016, p. 28.

introduced its first sustainable development strategy back in 2001,[98] thereby incorporating environmental aspects into the Lisbon Strategy as mentioned above.

As a result of the 2030 Agenda for Sustainable Development,[99] which was adopted by the United Nations in 2015, the EU Commission published the communication "Towards a sustainable future – European Sustainability Policy" in 2016.[100] In this communication, the EU Commission explained how the Sustainable Development Goals should be integrated into the EU's political priorities. This was followed in 2019 by the reflection paper entitled "Towards a sustainable Europe by 2030", in which the Commission sets out the Sustainable Development Goals.[101]

Concerning the protection of biodiversity, the EU already pursued a horizontal strategy over a decade ago. For example, the EU adopted the "Biodiversity Strategy 2020" back in 2011.[102] The biodiversity strategy is also based on international agreements on the protection of biodiversity. The United Nations Convention on Biological Diversity, the ´Biodiversity Convention´ (CBD),[103] contains numerous obligations to protect biodiversity, as well as access to genetic resources and the fair and equitable sharing of benefits arising from their utilisation, as reflected in the Nagoya Protocol.

[98] EU Commission, Communication from the Commission – A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, Brussels, 15.05.2001, COM(2001) 274 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0264&from=LV (Accessed: 12 September 2024).

[99] For the 2030 Agenda for Sustainable Development of the United Nations see United Nations, Transforming our world: the 2030 Agenda for Sustainable Development. Available at: https://sdgs.un.org/2030agenda (Accessed: 12 September 2024).

[100] EU Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strassburg, 22.11.2016, COM(2016), 739 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0739 (Accessed: 12 September 2024).

[101] EC, 2019.

[102] European Commission - Biodiversity Strategy for 2030. Available at: https://environment.ec.europa.eu/strategy/biodiversity-strategy-2030_en (Accessed: 11 September 2024). For the strategy see also Wulf, 2022.

[103] United Nations - Convention on Biological Diversity (Biodiversity Convention, CBD). Available at: https://www.cbd.int/ (Accessed: 11 September 2024).

The CBD is not just the basis for the two agreements – the Cartagena Protocol[104] and the Nagoya Protocol.[105] Rather, the CBD is the most important international agreement in the field of biodiversity protection to which the EU has acceded. As a contribution to the debates on a global framework for biodiversity post-2020 (UN Biodiversity Conference 2022 (COP15)), the Commission presented its EU Biodiversity Strategy for 2030[106] in May 2020 as a comprehensive, ambitious and long-term plan to protect nature and reverse the degradation of ecosystems.

In June 2021, Parliament approved this strategy and made further proposals to strengthen it. The EU also pursued another horizontal strategy in a completely different area: In 2020, for example, the Commission presented the "From Farm to Fork" strategy as part of the EGD, which aims to make food systems fair, healthy and environmentally friendly. Regarding the combat of climate change, the Commission adopted a new EU strategy on adaption to climate change on February 2021 as part of the EGD which sets out how the EU can adapt to the unavoidable impacts of climate change and become climate resilient by 2025.[107] As the Commission points out, this strategy 'will support the further development and implementation of adaption strategies and plan at all levels of governance with three cross-cutting priorities: integrating adaption into macro-fiscal policy, nature-based solutions for adaption' and 'local adaption action'.[108] Thus, horizontal

[104] United Nations - Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol on Biosafety). Available at: https://bch.cbd.int/protocol (Accessed: 11 September 2024).

[105] United Nations - Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol on Access and Benefit Sharing (ABS). Available at: https://www.cbd.int/abs/default.shtml (Accessed: 11 September 2024).

[106] EU Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (EU Biodiversity Strategy for 2030), 20.05.2020, COM(2020) 380 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020DC0380 (Accessed: 12 September 2024). For the background see also European Commission - Biodiversity Strategy for 2030. Available at: https://environment.ec.europa.eu/strategy/biodiversity-strategy-2030_en (Accessed: 12 September 2024).

[107] European Commission - EU Adaption Strategy. Available at: https://climate.ec.europa.eu/eu-action/adaptation-climate-change/eu-adaptation-strategy_en (Accessed: 17 September 2024).

[108] European Commission - EU Adaption Strategy. Available at: https://climate.ec.europa.eu/eu-action/adaptation-climate-change/eu-adaptation-strategy_en (Accessed: 17 September 2024).

strategies play as cross-cutting or horizontal policies are essential in the environmental policy of the EU, since they align environmental objectives with other EU policies, ensuring coherence and assisting in implementing complex environmental objectives across all related sectors of EU policies.

3.4. International Cooperation on Environmental Issues

International cooperation of the EU can be mentioned as a further mechanism within the framework of climate and environmental legislation at the EU level. It is widely recognised and understood that many environmental challenges, such as climate change, biodiversity loss, and pollution are global in nature and cannot be effectively tackled by individual countries alone. As these problems are global, measures are also needed that go beyond national borders.

International cooperation enables the EU to work with other countries and international organisations to tackle these challenges together. Environmental problems are very often not limited to one state but extend beyond national borders. This means that they not only affect the state in which they originate but also neighbouring states and distant regions. Cooperation with other states helps not only the EU but all states to tackle cross-border environmental problems, such as air and water pollution, marine litter and biodiversity loss. The EU Commission emphasizes in light of high environmental standards in the EU, that 'even robust EU environmental legislation is not sufficient to address transboundary and global environmental degradation, nor to sufficiently reduce the impact of the EU´s economic activity on natural resources worldwide.'[109]

As already mentioned, the EU has had its own legal personality since the Lisbon Treaty and therefore has the right to negotiate, conclude, amend and terminate international agreements on its behalf.[110] Thus, the EU plays an active role in multilateral environmental agreements and other environmental negotiations and processes.[111] Already before the EGD, the EU had also the function of a leader in global environmental governance.[112]

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[109] European Commission - International Cooperation. Available at: https://environment.ec.europa.eu/international-cooperation_en (Accessed: 17 September 2024).

[110] Jančiková and Pásztorová, 2021.

[111] European Commission - International Cooperation. Available at: https://environment.ec.europa.eu/international-cooperation_en (Accessed: 17 September 2024).

[112] See for example, Kelem, 2011.

The EU is already a party to numerous global, regional and sub-regional multilateral environmental agreements on various topics, such as nature conservation and biodiversity, climate change and transboundary air and water pollution based on its own legal personality, taking into consideration that the goals of the EGD cannot be achieved by Europe alone. Climate and environmental protection at the EU level therefore have an international influence. For example, the Union has contributed to the drafting of important international agreements that were adopted at the United Nations level in 2015. These include in particular the United Nations 2030 Agenda for Sustainable Development,[113] the 17 global goals for sustainable development of the 2030 Agenda[114] and the associated 169 targets, known as the Sustainable Development Goals (SDGs) and the Paris Climate Agreement.[115]

In light of the EGD, the Commission points out that sustainable development is a core principle of the TFEU, as already mentioned above, and in particular with regard to Articles 191-193 TFEU, and a priority objective for the EU´s internal and external policies.[116] In light of this, the EU, 'as a leading proponent of international environmental action and cooperation, is a Party to many multilateral environmental agreements.'[117] The Commission emphasizes the need for international action by addressing 'the triple planetary crisis of climate change, biodiversity loss and pollution, as well as other global environmental challenges' that require 'efficient international cooperation" since "most environmental problems also have a transboundary nature'.[118] Therefore, for the many reasons mentioned above,

[113] For the United Nations 2030 Agenda for Sustainable Development see United Nations - Transforming our world: the 2024 Agenda for Sustainable Development. Available at: https://sdgs.un.org/2030agenda (Accessed: 17 September 2024).
[114] For the sustainable development goals see EC, no date7.
[115] For the Paris Climate Agreement see United Nations - The Paris Agreement. Available at: https://unfccc.int/process-and-meetings/the-paris-agreement (Accessed: 17 September 2024).
[116] See European Commission - Sustainable Development Goals. Available at: https://commission.europa.eu/strategy-and-policy/sustainable-development-goals_en (Accessed: 18 September 2024).
[117] European Commission - Multilateral Environmental Agreements (MEAs). Available at: https://environment.ec.europa.eu/international-cooperation/multilateral-environmental-agreements-meas_en (Accessed: 18 September 2024).
[118] See for the importation of international agreements as well as for a list of those agreements European Commission - Multilateral Environmental Agreements (MEAs).

international co-operation is crucial for the EU to solve global environmental challenges that can only be solved by working together with other countries and stakeholders. Only in this way can the EU achieve its EGD objectives.

3.5. Environmental Impact Assessments

A further instrument and mechanism of climate and environmental law at the European level for pursuing environmental protection goals and the objective of a sustainable policy at the European level is the obligation to carry out Environmental Impact Assessments (EIA).[119] EIA provide the basis for identifying and assessing the potential environmental impacts of, e.g. new projects, plans and programmes. By assessing the potential impact on ecosystems, biodiversity, air and water quality and human health, environmental impact assessments provide valuable information for making informed decisions and avoiding or at least mitigating negative impacts. Certain public or private projects that are likely to have a significant impact on the environment, such as the construction of a motorway or an airport, are subject to an EIA. The requirements for this are set out in Directive 2011/92[120] on the environmental impact assessment of certain public and private projects. EIA are, however, not only mandatory for new constructions but are also relevant in several other areas which might have an impact on the environment, such as genetically modified organisms according to the Deliberate Release Directive 2001/18/EC[121] or the market authorization of new pharmaceutical products pursuant to Directive 2008/105/EC.[122]

Available at: https://environment.ec.europa.eu/international-cooperation/multilateral-environmental-agreements-meas_en (Accessed: 18 September 2024).

[119] For the methods of EIAs see Morris and Therivel, 2001.

[120] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L26/1, 28.01.2012.

[121] Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/2002/EEC, OJ L 106/1, 17.04.2001.

[122] Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directive 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council, OJ L 348/84, 24.12.2008.

In addition, a similar procedure is provided for a large number of public projects and programmes, such as in the areas of land use, transport, energy, waste or agriculture. In this so-called Strategic Environmental Assessment (SEA), environmental considerations are already included in the planning phase. Possible consequences are taken into account before the project is authorised or approved in order to ensure a high level of environmental protection. Both assessment procedures – EIAs and SEAs – provide for public consultation.

The basis for this is the Aarhus Convention of 2001, the so-called Aarhus Convention as a multilateral environmental convention of the United Nations for Europe (UNECE), to which all member states have acceded.[123] The Aarhus Convention as the leading international agreement on environmental democracy protects every person´s right to live in a healthy environment and guarantees the public three rights on environmental issues: access to information, public participation and access to justice.[124] The Directive 2002/4/EC on public access to environmental information,[125] the Directive 2003/35/EC for public participation[126] and Directive 2003/4/EC on public access to environmental information[127] implement the obligations of the Aarhus Convention as comprised in the Regulation (EC) 1367/2006.[128]

[123] Aarhus Convention, 1998.

[124] See EU Commission, The Aarhus Convention and the EU. Available at: https://environment.ec.europa.eu/law-and-governance/aarhus_en (Accessed: 18 September 2024).

[125] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41/26, 14.02.2003.

[126] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156/17, 25.06.2003.

[127] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 42/26, 14.02.2003.

[128] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation and Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264/13, 25.09.2006.

3.6. Environmental Inspections and Environmental Criminal Law

In order to improve the enforcement of EU environmental law, the Union laid down non-binding minimum criteria for environmental inspections back in 2001. Environmental inspections as an instrument to observe and ensure compliance with obligations as comprised in environmental laws and regulations of the EU are carried out by the competent national authorities of the Member States to monitor and enforce environmental standards in various sectors, including industry, transport, agriculture or waste management. Through inspections, authorities control and verify compliance with EU environmental directives and regulations, identify non-compliance and take enforcement action, such as fines, penalties or corrective measures to remedy non-compliance.[129]

The Commission emphasizes that the 'Member States are responsible for fully and correctly implementing EU rules' and as a result of this obligation 'Member States have developed oversight responsibilities and adjudication powers to a very wide set of public authorities", the so-called "environmental compliance assurance authorities'.[130] According to the Commission, there are, however, major implementation challenges which are 'linked to persistent environmental problems, such as water pollution, poor urban air quality, unsatisfactory waste treatment and declining species and habitats'.[131] The Commission has summarized these issues in the Environmental Implementation Review (EIR).[132] In 2018, the Commission has already published an Environmental Compliance Assurance Action Plan[133] containing a set of nine measures that are specific to environmental

[129] For the inspections of EU secondary legislative measures and provisions and the management of inspections see Hedemann-Robinson, 2016.

[130] European Commission - Environmental compliance assurance. Available at: https://environment.ec.europa.eu/law-and-governance/compliance-assurance_en (Accessed: 18 September 2024).

[131] European Commission - Environmental compliance assurance. Available at: https://environment.ec.europa.eu/law-and-governance/compliance-assurance_en (Accessed: 18 September 2024).

[132] European Commission - Environmental compliance assurance. Available at: https://environment.ec.europa.eu/law-and-governance/compliance-assurance_en (Accessed: 18 September 2024).

[133] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU actions to improve environmental compliance and governance, Brussels, 18.01.20218, COM(2018)10. Available at: https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2018)10&lang=en (12. September 2024).

policy intending to improve compliance with EU environmental law and strengthening environmental governance in both Member States and the EU.[134]

In addition to environmental inspections, environmental criminal law is also becoming increasingly important at the EU level. The EU has created a legal framework for serious environmental offences that pose a significant threat to the environment, public health or natural resources to support its environmental policy. The objective is to ensure effective enforcement of EU environmental law by harmonising criminal law provisions in the Member States and providing for sanctions, including fines and imprisonment, for serious breaches of environmental legislation. The Environmental Crime Directive 2008/99/EC[135] stipulate 'criminalization of serious violations of 72 environmental pieces of legislation in the environmental field and requires effective, proportionate and dissuasive sanctions.'[136] As the Commission emphasizes, the Directive 'aims at supplementing existing administrative sanction systems with criminal law penalties to strengthen compliance with the laws for the protection of the environment', whereas 'criminal penalties demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.'[137]

From a criminal law perspective, the question has been discussed whether criminal law can protect the environment by functioning as a means, for example of controlling environmentally hazardous activities.[138] The concept of general prevention has been particularly emphasized in relation to criminalization whose objective is environmental protection.[139] There have been serious doubts that criminal law can ensure the enforcement of environmental law, since the enforcement faces many more

[134] For the environmental compliance of the EU before the EGD see Angelov and Cashman, 2015; Čavoški, 2019.

[135] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328/28, 06.12.2008.

[136] European Commission - Environmental Crime. Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/criminal-justice/environmental-crime_en (Accessed: 20 September 2024).

[137] European Commission - Environmental Crime. Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/criminal-justice/environmental-crime_en (Accessed: 20 September 2024).

[138] See Du Rées, 2010.

[139] See for the conditions for general prevention in the context of environmental criminal law Du Rées, 2010.

challenges which cannot be faced merely with criminalization.[140] Furthermore, it has been argued that the EGD should follow a comprehensive approach in regard to understanding harms holistically done to the environment, e.g. by means of categorizing the types of crimes, the EGC 'could at least illustrate the interlinkages between criminal acts, environmental damage and negative impacts on the functioning of societies, state institutions and the rule of law in democratic regulatory regimes.'[141]

4. Summary and Conclusion

Global environmental problems cannot be solved by states alone. Thus, national environmental regulations in themselves are not sufficient to address the protection of the environment and to combat climate change, environmental pollution or the loss of biodiversity. In order to protect the environment effectively, measures are required at the international level as well as at the level of the EU. For this reason, international environmental law, which is designed to protect the global environment, is one of the areas of international law as well of EU law.

Climate and environmental law at the EU level is not new. Its roots go back to the 1970s. The result of this is comprehensive regulation at the EU level with a previously almost unmanageable range of secondary legislation of directives, regulations and decisions. However, regulation at the EU level often only provides for a minimum standard. In addition, the effectiveness of climate and environmental policy at the EU level often depends on implementation at national, regional and local levels. With the aim of achieving greater harmonisation, various mechanisms for environmentally friendly and sustainable policies have emerged. With the EGD, however, a globally pioneering stage has been reached in climate and environmental protection. The EGD not only provides for political initiatives and measures in the area of climate and environmental protection. Rather, the EGD encompasses a large number of initiatives in all EU policy areas intending to make the EU climate-neutral by 2025. In light of this comprehensive approach, which encompasses all of the EU's policy areas, it is important not to weaken the Union's competitiveness in the global context.

This in turn requires a new, holistic and cross-sectoral approach in which all relevant policy areas contribute to the overarching climate goal.

[140] Faure, 2017.
[141] See Holland, Holland-Kunkel and Röhl, 2023, p.55.

This includes in particular the policy areas of climate, environment, energy, transport, industry, agriculture and sustainable finance. With regard to the global competitiveness of the EU, it must be taken into account that the transition to climate neutrality can also lead to new business models, markets and jobs, as well as to innovation and technological development – and thus to economic growth overall. The EGD is therefore not only pursuing very fundamental, but also ambitious goals. As such, it could – hopefully - have a global impact.

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Sustainable Animal Welfare: A 21st Century Imperative and Transnational Legal Considerations, with Emphasis on Hungary[***]

ABSTRACT: In the 21st century, Sustainable Animal Protection (SAP) has emerged as a critical imperative, intertwining ethical, environmental, and legal considerations. This article explores the multifaceted nature of SAP, with a focus on its potential legal dimensions within Hungary. SAP extends beyond mere humane treatment, encompassing broader sustainability goals, such as environmental preservation and economic viability. The legal landscape governing animal welfare is complex, requiring a delicate balance between advancing animal welfare and addressing economic interests. International conventions and supranational legislation guide in promoting sustainable practices, emphasizing the importance of transnational cooperation. However, further legal research is needed to address critical areas such as legal harmonization, enforcement mechanisms, public participation, and stakeholder capacity-building. By aligning national legislation with EU standards, participating in international agreements, the appointment of dedicated officials, and the establishment of advisory bodies, Hungary contributes to global efforts in sustainable animal welfare. However, challenges remain in translating legal frameworks into effective action, particularly in enforcement and public commitment. Moving forward, prioritizing SAP within policy agendas and fostering collaboration across sectors and borders will be essential to ensure the well-being of animals while advancing sustainability goals in the 21st century. By integrating sustainability principles into all aspects of animal protection, investing in research and education, and promoting responsible animal-keeping practices, nations can work collaboratively to achieve a more sustainable future for both animals and humans.

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KEYWORDS: sustainable animal protection, environmental conservation, one health, one welfare, biophilia hypothesis, deadly link.

1. Introduction

In the 21st century, the concept of Sustainable Animal Protection (SAP) has emerged as a goal in the environment-sensitive global society.[1] This term, now being endeavored to be integrated by experts in Hungary, not only encompasses the ethical treatment of animals but also the legal frameworks that support their protection.. While the experts are working on localizing this concept, public interest in this topic is increasing significantly. SAP is gaining traction as a vital aspect of contemporary discourse, prompting a closer examination of its legal aspects. It is a field that not only evokes strong emotions but also requires expertise from a multidisciplinary perspective. What sets the viewpoint of sustainable animal welfare apart from the traditional understanding of animal welfare is its focus on aspects that can win over the majority of society in the long term, while also considering economic factors. This article delves into the multifaceted nature of SAP as a goal for the 21st century, with a particular focus on its potential legal dimensions within the Hungarian context.

2. Animal Protection in the Light of Sustainability

The scientific approach to animal protection highlights human responsibility in the relationship with animals, as animal protection is the practical manifestation of the obligation towards them.[2] From another point of view, sustainable environmental sustainability could be defined as a condition of balance, resilience, and interconnectedness that allows human society to satisfy its needs while neither exceeding the capacity of its supporting ecosystems to continue to regenerate the services necessary to meet those needs nor by our actions diminishing biological diversity.[3] It is an essential component of sustainability and a dynamically evolving pillar of circular economy, requiring evidence-based, balanced approaches free from exaggeration. The well-being of animals is intertwined with environmental, social, and economic considerations, it is increasingly recognized as an

[1] Vetter, 2024.
[2] Csintalan et al.,2016, p. 110.
[3] Morelli, 2011.

integral part of sustainability goals worldwide. SAP goes beyond simply ensuring humane treatment; it involves creating systems and practices that promote the health and welfare of animals while also taking into account their ecological impact and the needs of future generations. This includes developing policies and regulations that prioritize animal welfare and promoting responsible consumption and production practices.

2.1. Animal Protection in Sustainability

Sustainability, as defined in the 1987 report of the United Nations, entails meeting the current needs of humanity while preserving the environment and natural resources for future generations.[4] In this context, SAP represents an approach that emphasizes the long-term viability of the animal protection system, it aims to ensure the well-being of animals in harmony with the sustainable use and preservation of environmental resources, social considerations, and economic factors. The '3P' theory, which stands for People, Planet, and Profit, is a framework often used in sustainable development.[5] In the context of sustainable animal welfare, this theory emphasizes the importance of balancing the well-being of animals for the benefit of human society (People), the preservation of the environment (Planet), and economic viability (Profit).

The goal of SAP is to avoid harmful negative externalities on the environment,[6] such as environmental pollution. By adopting sustainable animal welfare practices in animal husbandries, we can reduce the release of pollutants into the environment, such as excess nutrients from animal waste, greenhouse gas emissions from livestock, and chemical residues from veterinary treatments.

When discussing animals in the context of SAP, it's important to consider all categories of animals. Certain authors argue that non-human animals are often overlooked in discussions of sustainability and related accounting efforts due to an ontology that fails to integrate them adequately.[7] The general public often associates animal protection with *pet animals*, such as dogs and cats. These animals provide companionship and emotional support, requiring responsible ownership practices. Animal welfare research primarily focuses on livestock, on *farm animals*. Through

[4] UN, 1987.
[5] Slingerland et al., 2003.
[6] Vetter et al., 2014.
[7] Vinnari and Vinnari, 2022.

interdisciplinary approaches, researchers investigate the physiological, behavioral, and psychological aspects of animal well-being, informing evidence-based practices and policies. Ultimately, these findings have a significant impact on shaping legal regulations and guidelines concerning animal care and management. Sustainable practices here involve ethical treatment standards and minimizing environmental impact. Biodiversity conservation is focusing on *wild animals* in their natural habitats, conservation efforts include habitat preservation and combating illegal wildlife trade. Integrating these aspects is crucial for a comprehensive approach to SAP, considering the welfare of all animals in various contexts.

2.2 Sustainability in Animal Protection

Establishing sustainability in animal protection entails more than just ensuring the well-being of animals. It must be integrated with broader social and environmental goals. This includes creating a stable economic background to support sustainable practices. It is essential to develop infrastructure that is not only sustainable for farm animals but also addresses the needs of stray and wild animals. Moreover, for these initiatives to be successful, the operators of these institutions must possess adequate knowledge of economics, management, and marketing. Institutions have to develop strategies that not only benefit animal welfare but also contribute to economic stability and environmental conservation.

2.3 Relating concepts

Interconnectedness of various fundamental ideas and principles can be found within the realm of animal welfare and conservation. This section explores the synergy between the One Health approach, which emphasizes the interdependence of human, animal, and environmental health, the biophilia hypothesis, which suggests an innate connection and affinity between humans and other living organisms and finally the concept of the "deadly link," which examines the correlation between animal cruelty and violence against humans. By examining these interconnected concepts, we gain insights into the complex web of relationships that shape our approach to sustainable animal protection and environmental stewardship.

2.3.1 One Health, One Welfare Concept

The "One Health, One Welfare" approach is a collaborative, multisectoral, and multidisciplinary framework rooted in the understanding that human health is intimately linked with animal health and the state of our shared environment. With the world's population growing and expanding into new territories, humans are in closer physical proximity to animals than ever before. This, coupled with international tourism and trade, exposes millions of people and animals to zoonotic diseases annually worldwide.[8]

Less frequently acknowledged, yet equally significant, are the intertwined and parallel patterns between human and animal well-being, extending beyond narrow health considerations.[9] Both "positive" aspects, related to healthy psychological functioning, and "negative" elements, such as maladaptive or deviant behaviors, demonstrate a close interaction between humans and animals. The "One Health, One Welfare" approach recognizes the intricate relationships among humans, animals, and the environment, emphasizing the importance of considering all these factors holistically for sustainable health and welfare.

2.3.2 Biophilia Hypothesis

The term "biophilia" was first used by Fromm (1973) to describe a passionate love for all living things.[10] According to Wilson's (1984) biophilia hypothesis, humans are innately attracted to animals and living organisms. From an evolutionary perspective, paying attention to animals enhances an individual's chances of survival, as animal behavior reliably signals safety and warns of danger.[11] Animals, especially those in motion, capture human attention, aiding in diverting focus during stressful situations. This contributes to achieving a more relaxed state, and regular relaxation helps to maintain overall health. The psychological significance of animal welfare is undeniable: a series of studies confirm the positive effects of animals on human health, well-being, and personality

[8] Center for Disease Control and Prevention, One Health Basics. Available at: https://www.cdc.gov/onehealth/basics/index.html (Accessed: 30 August 2023).
[9] Tarazona et al., 2020.
[10] Fromm, 1973.
[11] Wilson et al., 1984.

development. These are the foundations of the widely used animal-assisted interventions today.[12]

2.3.3 The „Deadly Link"

The entire interconnected system of animal cruelty, interpersonal violence, and its societal implications is often referred to as the "Deadly Link". This term encapsulates the intricate relationship between childhood cruelty to animals, domestic violence, and broader patterns of violent behavior in society. Throughout history, numerous great thinkers, philosophers, and naturalists have recognized the connections between animal cruelty and violence against humans. Sparse references to this issue appeared in scientific literature from the 19th century, but it wasn't until the second half of the 20th century that studies on this topic became more prevalent. Noteworthy is John MacDonald's controversial triad from 1961[13] and studies that found links between childhood animal abuse and later violent behavior. Another important finding is the link between animal cruelty and domestic violence, where aggression often starts with animals and extends to family members. Children who witness animal abuse are more likely to be exposed to domestic violence. Studies from different countries have found significant rates of simultaneous exposure to animal abuse and domestic violence among victims.[14] The limited Hungarian sources also support this correlation,[15] highlighting how acts of animal cruelty often go unreported to authorities, although victims mention them during interviews. These findings underscore the complex relationship between animal cruelty, domestic violence, and societal behavior.[16]

3. Exploring Transnational Legal Dimensions of Sustainable Animal Protection with a Spotlight on Hungary

The task of legislators in developing animal protection laws is challenging, as they must strike a delicate balance between advancing animal welfare and considering economic interests. On one hand, there is a growing societal

[12] Babos, 2013.
[13] Macdonald et al., 1961.
[14] Vetter, 2024.
[15] For example Kárteszi, 2023.
[16] Vetter, 2023.

demand for stronger animal protection measures to ensure the well-being of animals. On the other hand, there are economic considerations, such as the interests of industries that rely on animal products. Legislators must navigate this complex landscape, taking into account ethical considerations, scientific evidence, and economic factors.

According to some authors, the prevailing ideas of sustainability and the safeguarding of animals exhibit a gap, largely due to the anthropocentric focus of most sustainability frameworks, including sustainable development. Criticisms of this divergence typically stem from the context of industrial animal agriculture, and as of yet, a comprehensive model embracing all species within the concept of sustainability has not materialized.[17] However, it is crucial to note that the legislation regarding animal welfare is also largely governed by the *paradox of anthropocentric empathy*: legal efforts to protect animals are discernible, yet these efforts are "human-centered," creating unresolved contradictions within the legal framework.[18]

Animal welfare provisions are present at both local and global levels, in the form of national and supranational legal sources. It is important to emphasize that legal provisions protecting animals – especially regulations aimed at ensuring the welfare of animals under human control – do not define the optimal or best possible animal husbandry, but rather set minimum requirements. Failure to comply with these requirements can lead to negative legal consequences. The role of regulation is to establish the threshold at which a violation, sometimes animal cruelty, occurs, rather than to outline an ideal system of animal care.

To halt and reverse harmful trends affecting biodiversity, it is necessary to strengthen environmental, nature, and climate protection efforts, and ultimately, to adopt an individual-focused approach to animal welfare. These efforts should also be reflected in transboundary legislation. The principles of sustainability are increasingly reflected in international conventions that guide efforts in animal protection. For instance, the United Nations Framework Convention on Climate Change (UNFCCC)[19] and the Convention on Biological Diversity (CBD)[20] specifically address sustainability issues related to animals. The UNFCCC emphasizes the role of animals in climate change and the importance of their protection for

[17] Bergmann, 2019.
[18] Vetter, 2020.
[19] UN, 1992.
[20] CBD, 2011.

sustainable development. The CBD sets goals for the conservation and sustainable use of biodiversity, including the protection of animals and their habitats. The CBD was adopted because the state of biodiversity was rapidly deteriorating. Biological diversity is a measure of the variation in genes, species, and ecosystems. It is valuable because diversity is the base of the stability and sustainable function of natural systems of its enormously wide range for potential and unexplored uses. Human intervention has resulted in a profound modification of the original landscape, through deforestation, agriculture, drainage of wetlands, mining, and urbanization. As a result, many species had to find refuge in relatively small enclaves, sometimes only possible in legally designated protection areas.[21] The erosion of biodiversity also has an impact on domestic animals. Biological diversity is not only the result of the natural evolution of the environment but also of the selection of species by human societies. Even if the number of domesticated animals is limited in comparison with wild species, these domesticated species are very significant for human societies, as food strapless or to fulfill basic needs.[22]

In the European Union, sustainability has become a central theme in animal welfare legislation. The protection of animals is a fundamental value within the EU, enshrined in Article 13 of the Treaty on the Functioning of the European Union.[23] While the Member States of the European Union collaborate on certain aspects of foreign policy, justice, and internal affairs, the Union was primarily established for economic reasons, aiming to boost trade and create a single market. Therefore, greater emphasis is placed on issues directly impacting the economy. The EU has implemented various directives and regulations aimed at promoting sustainable practices in farm animal husbandry, transport, and slaughter. For example, the EU Regulation on the protection of animals during transport and related operations[24] sets out requirements to ensure the welfare of animals during transportation, also with a focus on sustainability. Additionally, the EU's Farm to Fork Strategy emphasizes the importance of sustainable food systems, including animal

[21] Pearce and Moran, 1994.
[22] Boisvert and Vivien, 2005.
[23] The consolidated version of the Treaty on the Functioning of the European Union, Art. 13.
[24] Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations.

welfare, in achieving environmental and health objectives.[25] EU legislation increasingly reflects the interconnectedness of animal welfare and sustainability, signaling a commitment to addressing these issues holistically.

Hungary participates in international agreements and conventions that promote sustainable animal protection. For instance, the country is a signatory to the Convention on Biological Diversity, which emphasizes the conservation of biodiversity and the sustainable use of natural resources. Hungary also joined the agreement concerning the international trade of wild, protected animals and plants. This Convention was adopted in Washington in 1973.[26] When the idea for CITES was first formed in the 1960s, international discussion of the regulation of wildlife trade for conservation purposes was something relatively new.[27] The Washington Agreement regulates the international trade of endangered wild animals. It is very important, because some of these animals have already become extinct, whileothers seriously endangered. This situation was sped up by hunting and capturing of these animals for illegal trade.[28] An important objective of the Convention is to reduce illegal wildlife trade. Hungary joined this Agreement in 1985. In Hungary after the accession to the Agreement, legal regulation concerning these species became stricter. In 1997, the Convention on the Conservation of Migratory Species of Wild Animals, shortly the Bonn Convention entered into force.[29] All parties accepted that wild animals living in several forms are irreparable part of the natural system of the Earth, therefore they should be preserved for the sake of humanity. Wild animals posess an increasing value in environmental, ecological, scientific, cultural, educational, social and economical aspects. Protected animals that migrate through borders deserve special attention. Appendix I. lists endangered migrant species. These are the species that are entitled to be endangered under reliable dates. Appendix II. lists migratory species which have an unfavorable conservation status, and which require international agreements for their conservation and management, as well as those that have a conservation status that would significantly benefit from

[25] Farm to Fork strategy for a fair, healthy and environmentally-friendly food system. Available at: https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy_en (Accessed: 23 March 2024).
[26] CITES, 2019.
[27] Perczel, 1992.
[28] Paulovics and Bragyova, 2018.
[29] CMS, 1979.

the international cooperation that could be achieved by an international agreement. Several Agreements have been concluded to date under the auspices of CMS. They aim to conserve for example bats in Europe, Marine turtles, or the Siberian Crane. Hungary acceded to the CMS in 1986.[30] Since the adoption of the CMS, climate change impacts have posed a serious threat to the migratory wild species and their natural habitat. Climate change is complicating the enterprise of international cooperation for migratory wildlife conservation, on account of the shifting ranges and particular vulnerabilities to climate change of migratory species. The CMS regime has in fact already begun to come to terms with the novel challenge of helping migratory species adapt to climate change with minimal losses.[31] The Bonn Convention has been criticized as being too weak to effectively protect endangered species. However, it should not be forgotten that it is up to the contracting parties to effectively implement protective measures. On a European level, for example, this is achieved through the Bern Convention on the Conservation of European Wildlife and Natural Habitat 1979 and pertinent nature conservation laws, such as the Bird Directive 1979.[32] The aims of the Bern Convention are to conserve flora and fauna and their habitats, especially those species and habitats whose conservation requires the cooperation of several states, and to promote such cooperation. Particular emphasis is given to endangered and vulnerable species, including endangered and vulnerable migratory species. Each Contracting Party has to take steps to promote national policies for the conservation of wild flora, wild fauna, and natural habitats. COPs have to promote education and disseminate general information on the need to conserve species of wild flora, fauna and their habitats. Parties should prohibit all means of capturing or exterminating, actions that can cause local disappearance or serious disturbance of wild animals. Each party can make exceptions to the control regulations and bans if other solutions are not available and it does not cause damage to maintaining the populations. In the aspect of migrant species, the Agreement contains separate regulations.[33] The Convention on Wetlands of International Importance especially as Waterfowl Habitat was adopted in 1971.[34] This is an agreement about the

[30] Paulovics, 2003.
[31] Trouwborst, 2012.
[32] Sellheim and Schumacher, 2022.
[33] Paulovics, 2003.
[34] UNESCO, 1994.

protection of wild waters and the natural habitat of water birds. Hungary joined the agreement in 1979. Ramsar Convention was the first of the modern global intergovernmental treaties on conservation and wise use of natural resources, but, compared with more recent ones, its provisions are relatively straightforward and general. Over the years the Conference of the Contracting Parties has further developed and interpreted the basic tenets of the treaty text and succeeded in keeping the work of the Convention abreast of changing world perceptions, priorities, and trends in environmental thinking. Over the years, however, the Convention has broadened its scope to cover all aspects of wetlands conservation and wise use, recognizing wetlands as ecosystems that are extremely important for biodiversity conservation in general and for the well-being of human communities.[35] Under the Ramsar Convention conservation and wide use means that parties must promote the conservation of listed wetlands and the wise use of all other wetlands. In 1987, the third meeting of the parties of the Ramsar Convention accepted the following definition of wise use. The wise use of wetlands is their sustainable utilization for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem.[36]

In the context of the EU's supranational influence, Hungary implements EU regulations on animal welfare and aligns its national legislation accordingly. This integration ensures that Hungary's approach to animal protection is in line with the broader sustainability objectives of the EU. By adhering to supranational standards and agreements, Hungary contributes to the collective efforts of the EU and the international community to promote sustainable practices in animal protection.

Since 2020, Hungary has taken significant steps towards SAP by appointing a single government official responsible for animal welfare. Initially, this role was designated as a ministerial commissioner subordinate to the Minister of Agriculture.[37] In 2022, Hungary elevated its commitment to SAP by appointing a government commissioner responsible for developing and implementing an animal welfare action plan. This commissioner collaborates closely with relevant ministries, organizations, and civil society groups to enhance coordination and cooperation in

[35] Paulovics, 2003.
[36] Farrier and Tucker, 2000.
[37] The directive of the Minister of Agriculture 7/2020. (IX. 30.) AM regarding the appointment of a ministerial commissioner.

promoting sustainable animal welfare practices.[38] Additionally, Hungary established the National Animal Welfare Council in 2021 to serve as a recommending, consulting, and advisory body in discussions related to animal protection.[39] In addition to governmental initiatives, Hungary established the "Our Common Cause Animal Protection Foundation" in 2023 to promote sustainable animal welfare practices. Operating under the Ministry of Justice, the foundation aims to disseminate information, coordinate conferences, manage grants, and support initiatives that align with SAP. [40] Through these efforts, Hungary seeks to foster a culture of responsible animal keeping that contributes to long-term environmental and social well-being.

4. Conclusions and Recommendations

In conclusion, Sustainable Animal Protection (SAP) represents a crucial imperative for the 21st century, requiring a multidimensional approach that integrates ethical, environmental, and legal considerations. SAP is increasingly recognized as an essential component of sustainable development, reflecting the interconnectedness of animal welfare, environmental conservation, and human well-being.

The legal dimensions of SAP present both challenges and opportunities for policymakers. While there is growing societal demand for stronger animal protection measures, legislators must navigate complex economic interests and ethical considerations to develop effective legal frameworks. International conventions and supranational legislation provide valuable guidance in promoting sustainable practices in animal protection, highlighting the importance of transnational cooperation in addressing global challenges.

There is a pressing need for further legal research to address critical areas within the realm of animal welfare. Firstly, legal harmonization across jurisdictions warrants comprehensive analysis to *identify best practices in*

[38] Government Decree No. 1271 of 2022 about appointing and defining the tasks of the government commissioner responsible for the development and implementation of the animal welfare action plan.
[39] Government Decree No. 1124 of 2021 about regarding the National Animal Welfare Council.
[40] Government Decree No. 1531 of 2022 about on the establishment of the "Our Common Cause Animal Protection" Foundation and the provision of necessary conditions and resources for its operation.

animal protection legislation. By conducting comparative legal studies, policymakers can glean insights into effective approaches and mechanisms for harmonizing national laws with international standards, while also considering contextual variations. Secondly, the *effectiveness of existing enforcement mechanisms requires thorough investigation*. This entails assessing the implementation and enforcement of animal welfare regulations, identifying gaps or deficiencies in current enforcement practices, and proposing enhancements to ensure greater compliance with established standards. Thirdly, *mechanisms for enhancing public participation* in the development and implementation of animal protection policies merit further examination. Lastly, *capacity building among relevant stakeholders* is essential for the effective implementation of animal protection laws. This includes identifying opportunities for training and professional development among law enforcement agencies, veterinary professionals, and animal welfare organizations.

In the Hungarian context, recent government initiatives demonstrate a commitment to advancing SAP through the appointment of dedicated government officials, the establishment of advisory bodies, and the creation of supportive institutions. By aligning national legislation with EU standards and participating in international agreements, Hungary contributes to broader efforts to promote sustainable animal welfare practices.

Moving forward, it is essential for Hungary and other nations to continue prioritizing SAP within their policy agendas, integrating sustainability principles into all aspects of animal protection. This includes fostering public awareness, promoting responsible animal-keeping practices, and investing in research and education to support evidence-based policymaking. By working collaboratively across sectors and borders, we can ensure the well-being of animals while advancing the goals of sustainability and environmental stewardship in the 21st century.

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Supplying the population as a challenge for agricultural policy**

ABSTRACT: The main task and role of the agricultural economy is to supply the population with food. Agricultural management has a significant impact on the environment, which poses a significant challenge in terms of sustainable development. There are number of tools available in the field of agri-environment protection to address this situation. Some of these are legal tools with mandatory rules, some are voluntary tools, and some are support tools. The new risk management model (ESG) could be the authoritative information system that serves as an indicator of the environmental impact of economic activity and a compass for the monitoring system.

KEYWORDS: sustainable development, food safety, multifunctional agriculture, ESG.

1. Environmental dimensions of sustainable development

In our lives, the only constant is that everything changes. Einstein described the environment as everything that is not me. In a legal term, the definition of the environment can be found in the legal regulation, which we use in legal interpretation and must take into account in terms of the scope of legal regulation. Our environment also constantly changes and transforms. Some changes are a natural process, caused by nature itself, while others are the result of human behaviour. There is practically no human behaviour that does not cause change in our environment. Our environment is capable to adapt and repair itself, even from the consequences of human behaviour. However, there are some human behaviours that the environment is unable to restore. It is necessary for humans to develop mechanisms that are capable to prevent and manage harmful consequences and bringing about

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favourable changes. The answer to these questions can be found in environmental policy documents, policy documents and legal regulators at international, EU and Member State level.

The provision of the Hungarian Fundamental Law on the protection of natural resources[1], the right to physical and mental health[2] and the right to a healthy environment[3] give rise not only to the obligation to designate a level of protection and to maintain this obligation in an unchanged form, but also to a continuous obligation of protection, which is in line with the principles of precaution and prevention. It can be effectively implemented in connection with the principle of non-regression. The principle of non-regression does not refer to the determination of the expected level of environmental protection, but rather to the fact that the level of protection already achieved cannot be reduced. This applies to the fact that the results already achieved, sustainability performances and the effectiveness of environmental measures cannot be reduced by taking into account environmental regulations. "The principle of non-regression applies to substantive law, procedural law and organizational regulation as well. All of these should be considered from the view whether it has or could have – precaution! – effect on the enforcement of the right in question. Not only actual regression is prohibited, but even the possibility of decrease, shortage, or even the risk of it is not allowed."[4] Prevention and precaution come to the fore. This legal principle appears in many international and EU environmental documents, as well as in Member State regulations. The principle of non-regression applies to substantive, procedural and organisational regulations alike. The principle of non-regression may be restricted if the restriction is justified by another fundamental right or constitutional value, and the necessity and proportionality of this can be established.[5] The Hungarian Constitutional Court has referred to the principle of non-regression in several decisions.[6]

[1] Hungarian Fundamental Law Article P (1)
[2] Hungarian Fundamental Law Article XX (1)
[3] Hungarian Fundamental Law Article XXI (1)
[4] Bándi, 2021, p. 46.
[5] Bándi, 2021, pp. 34-48; Fodor, 2007, p. 15; Olajos, 2018, pp. 157-173; Szilágyi, 2018, p. 79.
[6] 28/1994. (V. 20.) AB decision, 106/2007 (XII.20.) AB decision, 16/2015 (VI.5.) AB decision, 28/2017. (X. 25.) AB decision, 3223/2017 (IX.25.) AB decision, 14/2020 (VII.6.) AB decision,

The Hungarian Fundamental Law contains the right to public trust (the present generation acts as a trustee for future generations, and accordingly the interests of future generations must be taken into account). In some cases, even against the economic interests of the present generations. And the doctrine of intergenerational equity (according to which present generations have free access to available resources as long as they respect the legitimate interests of future generations). Both doctrines can be derived from Article P) of the Fundamental Law.

Sustainable development, multifunctional agriculture, etc., are principles, strategies and directions that must respond to an integrated system of agri-environmental protection, from an economic, social and environmental aspects.

Sustainable development has been the greatest challenge facing environmental regulation since the 1980s. The definition of sustainable development focuses on the social and economic area through the lens of environmental protection, keeping in mind the interests of future generations. "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." (1987 Brundtland Report). [7]

The institutional and regulatory background for sustainable development can be found in environmental regulations. From a regulatory methodology perspective, these aspects appear in integrativeness, compulsory environmental regulation, voluntary environmental protection measures, technological and measurement system regulations. Among these, I would like to highlight integrative regulation, through which environmental aspects are reflected in various policy areas and related regulatory elements. On the other hand, voluntary environmental protection institutions available to economic actors, such as the eco-label, which shows the favourable environmental parameters of the product produced by the company, and the environmental management and certification audit systems (ISO, EMAS), which reflect the company's environmental commitment and, to this end, the environmental certification of the regulation of its internal processes. The use of these voluntary tools depends on the decision of the enterprise; therefore, enterprises do not have to introduce them. However, its introduction has several advantages, both economically (for example, as a marketing tool to orient consumers) and it

[7] Bándi, 2020; Bándi, 2022; Szilágyi, 2022;

may reduce and simplify the examination criteria during official control and supervision activities.

With regard to the social and economic focus areas of sustainable development, expectations and regulations affecting businesses have also appeared in addition to environmental regulations that point towards of sustainable development. In the following, we will examine the economic and environmental aspects.

2. The substantive aspects of the agricultural structure

Agricultural land is a key production tool and natural resource for the agricultural economy. Agricultural land is the basis and tool of agricultural production and food economy.

The protection of arable land has two ways: it can be distinguished between its qualitative and quantitative sides. Quality protection is soil protection, in which environmental aspects appear. Quantitative protection means the protection of the agricultural economy. The goal is to keep arable land under agricultural cultivation, i.e. to take as little arable land as possible out of cultivation. Maintaining agricultural production means carrying out agricultural activities and producing agricultural products.

There are about 160 million hectares of arable land in the EU. There are about 7.5 million hectares of arable land in Hungary. In the EU and in Hungary, a significant amount of arable land is being taken out of cultivation, and agricultural production is being discontinued.

Compared to domestic needs, Hungary produces more agricultural products. Hungarian exports are larger than imports. However, most of the exported products are raw materials.

The food industry is an important, strategic sector for every country in terms of self-sufficiency, but this is especially true for Hungary due to the favourable agricultural conditions. Production conditions, food expectations and food safety requirements have become very complex, which only some businesses can meet, so efficiency, quality and environmentally conscious production come to the fore.

Globally, forecasts indicate that the world’s population will grow rapidly in the coming decades and exceed 10 billion people. The rapid growth of the world's population creates significant additional consumer demand. Together with its growth, primarily in developing countries, it could be a driving force behind a significant increase in food production.

This growth cannot be achieved extensively, it requires the concentration of available resources and production, and this also applies to the opportunities of domestic agriculture and the food industry. At the same time, from an environmental point of view, food waste must be reduced, selective household biowaste collection must be applied, and a solution must be found for the utilization of expired food.

3. The importance of the Common Agricultural Policy

The Common Agricultural Policy (CAP) provides an answer to the management of sustainable agricultural and agri-environmental issues at EU level. The aim of the reform of the Common Agricultural Policy is to make the Common Agricultural Policy fairer than before, to be more environmentally friendly and more performance-based, and to ensure that the future of European farmers is sustainable. Agriculture and rural areas play a central role in the European Green Deal and the CAP will be key to delivering the Farm to Fork strategy that is part of the European Green Deal.[8]

The aim of the Farm to Fork Policy Strategy is to achieve climate neutrality by 2050 and to make food management sustainable and environmentally friendly. To this end, it formulates objectives and initiatives. The objective of the policy for the food supply chain is:

- sustainable food production;
- sustainable food processing and distribution;
- sustainable food consumption;
- preventing food loss and waste.

Key areas of this policy include, among others, food processing and distribution objective, which involves promoting sustainable practices in food processing, food wholesale and retail food trade, catering, and food service. This objective targets food processors, food industry service providers and retailers. There are seven specific policy actions in this area:

- initiatives to improve the corporate governance network, including the requirement to integrate sustainability into corporate strategies in the food industry;
- developing an EU code and monitoring framework for responsible business and marketing behaviour in the food supply chain;

[8] Olajos, 2023.

- initiatives to encourage changes in the composition of processed foods, including the setting of maximum levels for certain nutrients;
- initiatives to promote the transition to healthier diets, such as developing nutrient profiles to limit the promotion of foods high in salt, sugar and/or fat;
- propose a revision of EU legislation on food contact materials to improve food safety and public health, support the use of sustainable packaging materials and reduce food waste;
- propose a revision of EU marketing standards to ensure the uptake and supply of sustainable agricultural products and to strengthen the role of sustainability criteria, considering the impact on food loss and waste;
- implementing the Food Fraud Action Plan to create a level playing field for operators and strengthen control powers, including by making greater use of the investigative capacities of the European Anti-Fraud Office.

The financial resources available for achieving the CAP objectives support the functioning of ecosystems, providing stronger incentives for climate- and environmentally-friendly farming practices, including organic farming or improving carbon-intensive farming. Rural development devotes a larger part of its resources on climate and environmental protection measures. Let's look at the facts in terms of positive and negative effects, without claiming to be exhaustive: (a) The size of the areas under organic farming in the EU has doubled in the last 10 years (about 6% in Hungary and 10% in Germany compared to the agricultural area), (b) The agricultural sector accounts for almost 11% of total greenhouse gas emissions. Agricultural emissions are generally related to farming, animal husbandry and incineration. Total greenhouse gas emissions in the EU are on a slow downward trend. (c) On the positive side, the size of land at risk of soil erosion has slightly decreased, while other indicators of soil degradation have continued to increase. (d) The conservation status of ecosystems and biodiversity in the EU is unfavourable.

4. Institutions supporting the implementation of the Common Agricultural Policy

In addition to agricultural subsidies, there are a number of legal institutions available that help to enforce the defined objectives specifically from an

environmental point of view, supporting the principles of sustainability and prevention. These instruments can be classified as partly mandatory and partly as voluntary instruments. The ESG risk management model system ensures, among other things, the enforcement of the principles governing not only at the level of state regulation, but also at the level of the company's internal regulation and activities.

The ESG Act[9] defines the principle of materiality as requiring companies to disclose appropriate information about the ESG risks and opportunities they face as part of their ESG reporting.[10] Its application presupposes the fact that the company must have an appropriate integrated risk management system. These include environmental risks (a risk that involves damage to the environment due to use, contamination or pollution, as well as negative changes in climate or natural events or factors[11]), risks in the context of social responsibility (risks arising from failure to respect fundamental rights, lack of support for families, failure to ensure fair working conditions, or social inequalities as well as unfair, non-transparent or malicious business practices[12]) and corporate governance risks (risks arising from inappropriate corporate behaviour or governance activities, measures or regulations, including money laundering, bribery and corruption, or violations of laws related to the operation of the business, in particular tax laws, as well as inadequate complaint handling activities[13]).[14]

This also means that the model can only function effectively if the company's internal processes work properly which requires an adequate external and internal regulatory environment and an effective control system.

[9] Act CVIII of 2023 on the Rules of Corporate Social Responsibility (ESG Act) for the promotion of sustainable financing and uniform corporate responsibility, taking into account environmentally-conscious, social and social aspects, and other related acts (hereinafter referred to as ESG Act)
[10] ESG Act § 3(1)
[11] ESG Act Section 7 Point 18.
[12] ESG Act § 7 Point 28.
[13] ESG Act, Section 7, Section 29.
[14] Hornyák and Lindt, 2023.

5. Final Thoughts

Economic interests and environmental interests are constantly competing with each other. This can also be observed in climate protection and agri-environmental protection.

According to the environmental regulation methodology, the following questions arise:

- sectoral or integrative regulation is needed
- based on the level of public intervention:
  the use of administrative tools (e.g. official procedures, permits); the use of economic instruments (according to the OECD classification, this includes, for example, taxes, contributions, but also emissions trading); voluntary instruments (e.g. the introduction of ISO or EMAS schemes, which are management systems for the environmental certification of companies); Consensual tools, agreement between the authority and the company.

The methodological questions present the framework and theoretical possibilities of the regulatory directions and tools. Environmental regulation focuses on the principle of prevention, i.e. avoiding environmental pollution, reducing environmental impact, and complying with emission and emission limits.

In the studies of several authors[15] and in several decisions of the Hungarian Constitutional Court [16], the so-called prohibition of retreat, i.e. the principle of maintaining the level of protection already achieved, appears. The enforcement of the principles can be achieved through legal regulation.

The Hungarian Fundamental Law has several environmental provisions that justify the high level of protection of environmental interests and values. Among these, it can be highlighted:

- we nurture and protect the natural and man-made values of the Carpathian Basin. We bear responsibility for our descendants, so we protect the living conditions of future generations through the careful use of our material, intellectual and natural resources.

[15] Bándi, 2021; Fodor, 2007, p. 15., Olajos, 2018, pp. 157-173; Szilágyi, 2018, p. 79.
[16] 28/1994. (V. 20.) AB decision, 106/2007 (XII.20.) AB decision, 16/2015 (VI.5.) AB decision, 28/2017. (X. 25.) AB decision, 3223/2017 (IX.25.) AB decision, 14/2020 (VII.6.) AB decision, 5/2025 (VI.30.) AB decision

- natural resources are the common heritage of the nation, the protection, maintenance and preservation of which for future generations is the duty of the state and everyone.
- everyone has the right to physical and mental health, which Hungary promotes by ensuring that its agriculture is free from genetically modified organisms, by providing access to healthy food and drinking water, and by ensuring the protection of the environment.
- Hungary recognises and enforces everyone's right to a healthy environment.
- anyone who causes damage to the environment is obliged to restore it or bear the cost of restoration in accordance with the law.

The provisions of the Hungarian Fundamental Law include provisions that are not included in the Fundamental Laws of other Member States (e.g. GMO-free agriculture or the prohibition of the import of polluting waste)

If the principles are violated, conduct contrary to legal regulation triggers legal liability. Administrative, civil and criminal liability is applied.

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JUDIT BARTA[*]

The importance of agreements restricting economic competition of small and medium-sized enterprises and the compliance programmes in Hungary[**]

ABSTRACT: This study presents the economic role of small and medium-sized enterprises, their competitive culture, and the practices they typically employ to restrict economic competition, as well as the relevant Hungarian competition law and case law. In Hungary, compliance programmes with a focus on competition law play an important role in monitoring competitive practices, and it is crucial that small and medium-sized enterprises also implement and utilise them. Therefore, this papers also addresses the competition law and jurisprudential background underlying these compliance initiatives.

KEYWORDS: competition law. compliance, small and medium-sized enterprise, SME, compliance policy, agreements restricting economic competition.

1. Definition, economic importance and competition culture of small and medium-sized enterprises

Small and medium-sized enterprises (hereinafter: SMEs) are a key focus of EU policies due to their significant role in the economy.[1] To support them, a single definition was needed at the EU level, which is provided by

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[**] This study was prepared as part of the linkage project of the Humboldt Research Group "On the systematisation of criminal responsibility of and in enterprises" led by the University of Heidelberg and the University of Miskolc (2020-2025).

[1] 99 percent of EU companies are SMEs. SMEs employ around 100 million people and are a vital source of entrepreneurship and innovation, which is key to the competitiveness of EU companies, [Online]. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/63/small-and-medium-sized-enterprises; https://single-market-economy.ec.europa.eu/smes/sme-fundamentals/sme-definition_en (20 January 2025).

Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises (hereinafter: Recommendation).[2]

SMEs are highly diverse in terms of the form and size of their operations. It is not possible to provide a single definition; instead, they are defined in terms of economic parameters. Their categorisation depends on factors such as the number of employees, annual revenue (turnover) and annual balance sheet total. In addition, their relationship with other enterprises also plays an important role.[3]

Based on the Recommendation, the Hungarian legislator defined the concept of SMEs in Act XXXIV of 2004 on small and medium-sized enterprises and support for their development (hereinafter: SME Act).[4]
SMEs play a significant role in the Hungarian economy. In 2021, their number exceeded 850,000, employing more than 2 million people.[5] According to 2023 statistics, there are 893,692 SMEs and 57,381 self-employed individuals (without employees). The most enterprises are one-person enterprises with one employee (598,412), followed by micro enterprises with 2-9 employees (196,537), small enterprises (35,739) and medium-sized enterprises (5,623).[6]

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[2] ELI: http://data.europa.eu/eli/reco/2003/361/oj (20 January 2025).
[3] EC, 2020.
[4] Definition of Small and Medium-Sized Enterprises Section 3
(1) An enterprise is considered to be an SME
a) which employs fewer than 250 persons and
b) which has an annual turnover not exceeding the forint equivalent of EUR 50 million, and/or an annual balance sheet total not exceeding the forint equivalent of EUR 43 million.
(2) Within the SME category, a small enterprise is defined as an enterprise which
a) employs fewer than 50 persons and
b) whose annual turnover and/or annual balance sheet total does not exceed the forint equivalent of EUR 10 million.
(3) Within the SME category, a micro enterprise is defined as an enterprise which
a) employs fewer than 10 persons and
b) whose annual turnover and/or annual balance sheet total does not exceed the forint equivalent of EUR 2 million.
[5] Hungarian Central Statistical Office: 9.1.1.17. Business performance indicators by category of small and medium-sized enterprises, [Online]. Available at: https://www.ksh.hu/stadat_files/gsz/hu/gsz0018.html (20 January 2025) https://www.ksh.hu/sajtoszoba_kozlemenyek_tajekoztatok_2022_03_01 (20 January 2025).
[6] Hungarian Central Statistical Office: 9.1.1.17. Business performance indicators by category of small and medium-sized enterprises, [Online]. Available at: https://www.ksh.hu/stadat_files/gsz/hu/gsz0018.html (20 January 2025).

SMEs are characterised by a strong regional concentration, with Central Hungary being the most important region. Micro enterprises are basically dominant.[7]

Like large companies, the fundamental goal of SMEs is economic growth, and this ambition is accompanied by sometimes fierce market competition. However, SMEs often lack the sophisticated legal and competition law culture – including compliance programmes – that large companies possess. Consequently, SMEs are more likely to commit competition law infringements.

The SME sector is less endowed with financial and human resources, has less sector-specific knowledge and typically does not require as extensive competition law expertise as large companies. Large companies invest more effort in acquiring competition law knowledge and prioritising compliance policies. The difference between the two sectors can also be observed in terms of motivation; large companies tend to be more concerned about the fines and potential reputational damage resulting from infringements. Competition compliance is more effective in large companies because they have the resources to implement, maintain and update the compliance programme. What is more, subsidiaries can benefit from support provided by their parent companies. In contrast, SMEs usually lack the capacity and resources to maintain adequate and up-to-date knowledge in this area.[8]

Research conducted in 2012 with the support of the Hungarian Competition Authority showed that, although SMEs are active participants in economic competition, they have a low level of compliance with competition rules. A possible reason is that a significant proportion of SMEs have limited direct exposure to competition law and little or no direct understading of its operation and importance. The results of the research showed that the majority of the participating companies did not have a clear idea of how to comply with competition rules. Only a small proportion of them (typically around 10-20 percent) have made active efforts to comply with competition rules. Among the four main competition law compliance tools (competition law education, internal rules, audit and employee reporting), reporting and internal rules were the most commonly adopted measures.[9]

[7] Vertesy, 2018, pp. 4-5.
[8] Kelecsenyi, 2016, pp. 16-17.
[9] Nagy and Salgó, 2012.

In the area of improving competitive culture, the Hungarian Competition Authority's priority is to increase SMEs' awareness of competition.

Data from a 2015 survey commissioned by the Hungarian Competition Authority indicate a slight improvement in knowledge. In a 2012 survey, 22 percent of SME managers had not heard of competition law; while this figure remained unchanged for small businesses in 2015, it improved to 16 percent among medium-sized enterprises. The survey also revealed that businesses, especially SMEs, are generally unaware of the concept of cartels, the associated legal sanctions (criminal, public procurement, competition and civil) and other negative consequences (e.g. damage to the company's reputation). The capacity of the Hungarian Competition Authority alone lacks the capacity to address the issue of limited awareness of competition among SMEs.[10]

According to the Hungarian Competition Authority, between 2002 and 2013, 71.5 percent of the companies involved in cartel cases were SMEs, while 28.5 percent were large companies.[11]

The lack of knowledge of competition law among SMEs is also reflected in the Hungarian Competition Authority's lash Report 2021, which shows that 75 percent of the companies affected by the Hungarian Competition Authority's decisions in the first half of 2021 (including both competition and consumer protection decisions) belonged to the domestic SME sector.[12]

This is despite the fact that the 2022 Eurobarometer on EU competition policy indicates that a significant majority of respondents, including Hungarian SMEs, consider competition to be necessary and beneficial, believing that it promotes innovation, and increased choice.[13]

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[10] 2025 Annual Report of Hungarian Competition Authority tot he Hungarian Parliament, p. 12. [Online]. Available at: https://www.ort.hu/wp-content/uploads/2019/02/gvh_ogy_pb_2015.pdf (20 January 2025).

[11] 2025 Annual Report of Hungarian Competition Authority tot he Hungarian Parliament, p. 13. [Online]. Available at: https://www.ort.hu/wp-content/uploads/2019/02/gvh_ogy_pb_2015.pdf (20 January 2025).

[12] Flash Report on the activities of the Hungarian Competition Authority in 2021 - 2021/1., p. 34. [Online]. Available at: https://gvh.hu/pfile/file?path=/gvh/gyorsjelentesek/gvh_gyorsjelentes_2021_i&inline=true (20 January 2025).

[13] Competition: Eurobarometer surveys show strong support among EU citizens and SMEs for competition policy, [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6374 (20 January

2. Relevant practices restricting competition and the legal consequences in cases of SMEs

Hungarian Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (hereinafter: Unfair Competitive Act) regulates the illegal practices that restrict economic competition. Notably it is the so-called agreements that restrict economic competition which are often committed by SMEs. Due to their smaller market share, abuses of dominant positions are uncommon in the SME sector.

The prohibition of agreements restricting economic competition is set forth in Section 11 (1) of the Unfair Competitive Act, which states:

> Agreements and concerted practices between companies, as well as the decisions of the organizations of companies established based on the right of association, their public bodies, associations and other similar organizations (hereinafter referred to collectively as "association of companies") (hereinafter referred to collectively as "agreements"), which are aimed at the prevention, restriction or distortion of economic competition, or which may display or in fact displays such an effect, are prohibited.

The Act also provides an exemplary list of agreements considered restrictive of competition, such as agreements fixing purchase or selling prices, restricting production, distribution, technical development or investment; allocating supply or markets, or excluding entities from sales, among others.

Section 12 of the Unfair Competitive Act defines a cartel separately as *an agreement or concerted practice between competitors* that aims to restrict, prevent, or distort of competition, particularly by fixing purchase or selling prices or other trading conditions (either directly or indirectly), limiting production or distribution, dividing markets, including collusion, or restricting imports or exports.[14]

2025).SMEs' expectations for an effective competition policy, [Online]. Available at: https://europa.eu/eurobarometer/surveys/detail/2655 (20 January 2025).

[14] The concept of a cartel was introduced by transposing the Directive on damages actions for breach of the EC antitrust rules. According to the explanatory memorandum of the

According to Section 13 of the Unfair Competitive Act, *agreements* of minor importance are exempt from prohibition. An agreement is *concered minor*:

- in the case of *agreements between competitors*[15], if the combined share of the parties to the agreement, including any companies not independent from those parties, does not exceed ten percent in any *relevant market*[16],
- in the case of *agreements between non-competitors*, if the combined market share of each party to the agreement, including any companies not independent from those parties, does not individually exceed fifteen percent in any relevant market.

These market share thresholds must be maintained throughout the duration of the agreement, and for each calendar year if the agreement lasts longer than one year.

Thus, the law utilises market share thresholds to quantify what constitutes a non noticeable restriction of competition.

Section 13 of the Unfair Competitive Act takes into account both Commission Notice (2001/C 368/07) on agreements of minor importance which do not appreciably restrict competition (de minimis) under Article 81(1) of the Treaty establishing the European Community and the Commission Notice (2014/C 291/01) on agreements of minor importance which do not appreciably restrict competition (de minimis) under Article 101(1) of the Treaty on the Functioning of the European Union.[17]

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legislator: 'The transposition of the Directive, in line with it, justifies the inclusion of the concept of cartel in the Unfair Competitive Act.'

[15] Based on Unfair Competitive Act Section 13(2a), competitor agreement means an agreement between undertakings which are actual or potential competitors on any of the relevant markets.

[16] Unfair Competitive Act Section 14 defines relevant market-in connection of the goods which are subject and the geographic area of the agreement.

In addition to the goods which are the subject of the agreement, account must be taken of goods which are reasonable substitutes for the goods in terms of purpose, price, quality and conditions of performance (demand substitutability) and supply substitutability.

A geographical area is the area outside which

a) the customer cannot obtain the goods or can obtain them only on significantly less favourable terms, or

b) the seller of the goods cannot sell the goods or can sell them only on significantly less favourable terms.

[17] The Hungarian legislator took the content of the two notices into account, despite the fact that the communications are not binding even in the application of the law.

De minimis agreements that do not appreciably restrict competition are, as a general rule, not considered infringements. Accordingly, an agreement falls outside the scope of the prohibition if, considering the weak market position of the parties involved, it has only an insignificant effect on the relevant market.

SMEs can enter into agreements that restrict economic competition with companies of any size. However, it should be noted that agreements between SMEs are mostly considered to be of minor importance and thus the exemption rule for such agreements may be particularly relevant in this context. [18]

However, agreements of minor importance may also be prohibited under Section 13 (3) of the Unfair Competitive Act, which states that: *an agreement between competitors which* has as its object the restriction, prevention or distortion of competition – particularly through fixing purchase or selling prices or other trading conditions, or dividing markets, including collusion in the competitive process – is prohibited.

The text of Section 13 (3) was amended as of 10 May 2024; however, the original text still includes the phrase "the agreement restricting compatition *between competitors"*. According to the explanatory notes accompanying the amendment, Section 13 (3) applies to all three cases covered by the definition of agreements under Section 11 (1) – namely, agreements and concerted practices between enterprises, as well as

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See C-226/11, *Expedia Inc. v Autorité de la concurrence and Others,* 13 December 2012, Points 26., 27., 28., also the Point 24 of the Judgment:
The Court of Justice of the European Union (CJEU) has already ruled in several cases that Commission communications in the field of European competition law do not have binding legal effects on national authorities and courts. This also applies to de minimis communications.
It also follows from the wording of the de minimis notice that it merely expresses the Commission's legal position and is 'not binding' on the authorities and courts of the Member States.By issuing de minimis notice, the Commission has merely sought to make transparent its administrative practice in applying Article 81 EC and to provide guidance with useful interpretative references for undertakings operating in the internal market and for the authorities and courts of the Member States.

[18] For years, the Unfair Competitive Act provided for the possibility for undertakings to request an examination of their agreements and a finding that they do not fall under prohibition ont he basis of Section 13.
This legal possibility was abolished from 14 July 2005. Until then, undertakings made use of the negative finding in a number of cases, requesting a finding that their agreement was of minor importance and not restrictive of competition, e.g. cases 31/2000 VJ, 74/1998 VJ, 153/1998 VJ, 86/2000 VJ, 195/2001 VJ.

decisions of associations, public bodies, mergers and other similar organisations formed under the law of association – and the amendment was intended to clarify this. However the amending law does not fully align with the provisions of the Section 13 (3), and the term "agreement between enterprises" has been replaced by "agreement between competitors".

It should be stressed that targeted restrictions of competition are inherently harmful to the proper functioning of a competitive market and therefore constitute infringements of significant gravity. In any event, enterprises entering into an agreement with an anti-competitive object have as their object an appreciable restriction of competition, regardless of their market share or turnover. This is why restrictions based on the object of the agreement are prohibited, irrespective of the market share of the parties, and are excluded from the exemption. The Act does not list all anti-competitive agreements, but – similar to the de minimis notice – it provides examples.

It should be noted that the Commission's failure to apply the de minimis market share thresholds to anti-competitive agreements

> is not only of legal importance, but also of importance from a competition policy perspective: market share thresholds such as those in the de minimis notice are intended to create legal certainty. They create a safe harbour within which undertakings party to an agreement do not have to fear infringing antitrust rules. A similar favourable treatment is unlikely to be granted to undertakings that enter into agreements for anti competitive purposes. Otherwise, undertakings with market shares below the thresholds of the de minimis notice would be directly encouraged to refrain from effective competition between themselves and to form cartels in violation of the principles of the internal market.[19]

To sum up, an agreement restricting competition between SMEs, if it is caught by the Act Section 13 (3), it constitutes prohibited conduct.[20] The

[19] See C-226/11, *Expedia Inc. v Autorité de la concurrence and Others,* 13 December 2012, Point V. 52.

[20] See: Hungarian Competition Authority's Decision VJ-21/2005/117 and the Supreme Court Kfv.37.258/2009/8 Decision, which reviewed the decision at second instance. The conduct of the undertakings concerned the fixing of prices and the allocation of the market in-tendering procedures. And Hungarian Competition Authority's Decision VJ-21/2005/47 and the Supreme Court Kfv.37.236/2009/11 Decision, which reviewed the decision at

legal consequences of such an agreement can vary, including fines[21], damages, nullity of the agreement, criminal sanctions in the case of a public procurement cartel [22], or exclusion from public procurement [23].

In terms of applying fines, the Unfair Competition Act favours SMEs. Since 2015, Section 78 (8) of the Act states that for a first offense committed by SMEs, the regulatory authorities may issue a warning instead of a fine, if the company's conduct suggests that such a measure will ensure that the company will obey the law and refrain from committing other infringement in the future. However, Section 78 (9) does not permit the

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second instance. SMEs have agreed their bids and prices through a public procurement procedure. Also, Hungarian Competition Authority's Decision VJ-41-191/2016 and the Supreme Court Kfv.39.962/2020/4 Decision. The SMEs involved in the case were bidding for energy efficiency tenders and colluded by matching bids.

Hungarian Competition Authority's Decision VJ-69/2008.538 and the Supreme Court Kfv.II.37.672/2015/28 Decision. The SME mills negotiated on the price of some wheat flour in the wheat flour market and divided the market among themselves.

In the meantime, a practice has developed within the Hungarian Competition Authority and the courts, according to which, if an agreement restricting economic competition aims at price determination or market division, if the restriction of competition is intentional, it cannot be exempted from the prohibition even in cases of minor significance; and the minor significance is not examined.

In several case decisions, the Supreme Court has indicated (e.g., Kfv.IV.37.258/2009/8., Kfv.IV.37.236/2009/11.) that in the case of price-fixing or market-sharing cartels, neither the determination of market share nor the definition of the relevant market is of particular relevance. The geographical and product-based definition of the relevant market is specifically regulated by the Unfair Competition Act in terms of determining the insignificance of the agreement. If the agreement is aimed at price-fixing or market allocation, even if the agreement is of minor significance, it falls under the prohibition of anti competitive agreements. A precise, comprehensive market definition is not necessary in the procedure of the Hungarian Competition Authority.

All this resonates with the case law of the CJEU, see C-226/11, *Expedia Inc. v Autorité de la concurrence and Others*, 13 December 2012, Point V. 53. and 57.

[21] Unfair Competitve Act Section 78 (1) The adjudicating competition council may impose a fine on anyone who engages in unlawful conduct within the jurisdiction of the Hungarian Competition Authority.

[22] See Hungarian Criminal Code Section 420. Agreement in Restraint of Competition in Public Procurement and Concession Procedure and Miskolczi Bodnár, 2019, p. 169.

[23] Act CXLIII of 2015 on Public Procurement not only contains relevant sections among the exclusion grounds, but also obliges the issuer to report any competition violations they observe to the Hungarian Competition Authority.

waiver of fines if the infringement involves an agreement aimed at price-fixing or market division in the context of a public procurement procedure.[24]

During competition supervision proceeding the enterprise must demonstrate and substantiate that it qualifies as an SME.

According to Section 36 (6) of the Unfair Competitive Act, the Hungarian Competition Authority, together with the President of the Competition Council is entitled to issue a directive outlining the judicial principles previously applied by the Hungarian Competition Authority and those intended for future application.

Based on this statutory authorization, the 1/2020 announcement issued by the President of the Hungarian Competition Authority and the President of the Competition Council serves, among other things, as guidance for determining the amount of fines in cases involving agreements that restrict economic competition (hereinafter: Fine Announcement).

As specified Section 78 (3) of the Unfair Competitive Act, the amount of the fine must be determined in consideration of all relevant circumstances, particularly the severity and duration of the violation, the benefits derived from such conduct, the infringer's market position, the degree of responsibility and cooperation during the investigation, and the recurrence and frequency of the infringing behaviour.

The Fine Announcement reviews these factors and clarifies their content and significance. It specifically takes SMEs into account: according to Point 20 of the Fine Announcement, the Hungarian Competition Authority pays particular attention to recognizing SMEs, and according to Point 31, depending on the severity of the infringement and the size of the enterprise, SMEs that do not qualify for under Section 78 (8) may receive an additional fine reduction of up to 10 percent.

3. The significance of compliance programs

Since 2018, Section 76 (1) of the Unfair Competitive Act has stipulated that if the Hungarian Competition Authority issues a warning to a SME under Section 78 (8) of the Unfair Competitive Act, the SME must implement a compliance program aimed at preventing competition law violations.

[24] A significant portion of the anti competitive agreements of SMEs come before the Hungarian Competion Authority because prices were fixed or markets were divided during public procurement procedures, which is why it is rare for fines to be waived. See, for example, cases VJ 19/2020, VJ 41/2020, VJ 29/2021, VJ 39/2021.

Since 2017, the Hungarian Competition Authority has also encouraged the adoption of corporate competition law compliance programs through various initiatives.

The aforementioned Section 78 (3) of the Unfair Competitive Act provides an exemplary list of factors to be considered when imposing a fine (such as the severity of the infringement, the benefit derived from the violation, the market position of the infringer, culpability, cooperation, etc.). As this list in is not exhaustive, the Hungarian Competition Authority may consider other additional factors. Since 2017, the Fine Announcement has specified that the fine amount may be reduced if a company has implemented a compliance programme.

According to the Fine Announcement: 'The Hungarian Competition Authority considers it a priority to promote voluntary compliance, and one tool to achieve this is to encourage the development and implementation of compliance programmmes aimed at preventing, detecting, and addressing violations.'

Both preliminary and subsequent compliance efforts may be taken into account when reducing fines, although preliminary measures are weighted more heavily.

However, the mere existence of compliance programmes cannot serve as a mitigating factor on its own; the company must provide evidence for [25]:

- its appropriate compliance efforts,
- following the detection of the infringement, the company ceased the infringement,
- it must be proven that the cessation of the infringement occurred due to the compliance programme,

[25] In the case VJ 43/2015 one of the affected companies had a compliance program, and therefore requested a reduction in the fine. During the proceedings the Hungarian Competition Authority emphasized that it is essential for the reduction of the fine that the infringement was ceased due to the compliance program. The company argued that it would then undertake the further development of its compliance program and, therefore, requested a reduction in the fine in light of its subsequent compliance efforts. However, the Hungarian Competition Authority only granted a 2 percent fine reduction instead of the 5 percent requested.

In the case VJ 103/2014 Husqvarna Hungary Ltd. had compliance program but the additional conditions specified in the Fine Announcement were not met. The company undertook to significantly improve its compliance program and organize competition law training for both its employees and distributors to avoid future competition law violations. In this regard, as a post-compliance effort, it received a 5 percent of fine reduction.

- must be proven that the company's executives were not involved in the violation.

The Hungarian Competition Authority may reduce the fine by up to 7 percent in recognition of the preliminary compliance programme, and if significant additional evidence is provided, the reduction may be increased to up to 10 percent.

Subsequent compliance programmes serve primarily to promote future law-abiding behavior. Consequently, if a company undertakes to develop a post-compliance programme, the fine may be reduced by up to 5 percent, provided the company also fulfils additional obligations or assists in the proceedings (e.g., by issuing a statement of cooperation or participating in a settlement procedure.)[26]

The Hungarian Competition Authority mandates the implementation of a compliance programme as a condition in its final decision and may verify its fulfillment through a follow-up inspections.[27]

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[26] In case VJ 110/2015 the Hungarian Competition Authority ignored the post-compliance program of one of the enterprises, no fine discount was provided because the company did not admit the viloation of the law; it did not participate in the settlement procedure.

[27] See e.g. case VJ 77/2016.

In the competition supervision procedure concerning public procurement, three limited liability companies participated in a settlement procedure and additionally undertook to develop a subsequent compliance program. In light of this, they requested further reduction of the fine. In this case, the companies without a compliance program undertook to develop, implement, operate, and regularly review a comprehensive compliance program meeting international standards. In this regard, the Hungarian Competition Authority reduced the fine by an additional 5 percent.

Case VJ 39/2021

Three SMEs colluded in public procurement procedures, coordinating prices. They participated in a settlement procedure and, in addition, undertook to develop a subsequent compliance program. In light of this, they requested further reduction of the fine and received a 5 percent fine reduction.

Case VJ 19/2017

The Hungarian Competition Authority found that GE Hungary Ltd. and Silver Wood – IT Ltd. had committed a competition law infringement in the course of purchasing the radiology IT products of St. John Hospital and North Buda Joined Hospitals, as the concerned undertakings had entered into an agreement which determined the winning bidder of the tender process in May 2015, with the undertakings coordinating their prices accordingly. However, during the proceeding both undertakings cooperated with the Hungarian Competition Authority, and therefore a total fine reduction of more than ten million forints (cca. 31 thousand EUR) was granted.

The significant total fine reduction of more than ten million forints was partly a result of the fact that GE Hungary Ltd. had submitted a leniency application in which it acknowledged

Between 2016 and 2020, the Hungarian Competition Authority granted penalty discounts totaling at least 540 million forints to businesses in recognition of their compliance efforts.[28]

In 2020, the Hungarian Competition Authority permitted in eight cases that companies under investigation had developed a compliance programme, and in this context, granted approximately 200 million forints in fine discounts.

4. Summary

The legal cases presented indicate that a significant portion of the identified anti-competitive agreements are related to tendering or public procurement procedures and involve collusion among competitors. There are also competition-restricting agreements between non competitors.

In most cases, SMEs are also involved, or SMEs are the primary actors. Almost all competition-restricting agreements involve price-fixing or market-sharing, which means that typical competition law benefits for SMEs (such as exemptions due to negligible significance, warning instead of a fine, and the requirement to implement a compliance programme) cannot be applied. In the majority of the examined competition law

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that it had committed a competition law infringement, also attaching evidence supporting the establishment of an infringement. On the other hand, Silver Wood – IT Kft. acknowledged the statement of facts established by the Hungarian Competition Authority and forfeited its right of appeal in the framework of a settlement procedure; consequently, the Hungarian Competition Authority reduced the fine imposed on Silver Wood – IT Kft. by 30 percent. A further reduction of 5 percent was granted because the undertaking elaborated a post-compliance programme and undertook to verify the implementation of it in a detailed manner.
https://www.gvh.hu/en/press_room/press_releases/press_releases_2018/substantial_reduction_of_fine_thanks_to_cooperatio
Case VJ 29/2021
The SMEs colluded and coordinated prices in the public procurement procedure for the Danube passenger transport service. They applied for leniency and undertook to develop a subsequent compliance program. In light of this, they received an additional 5 percent reduction in the fine.

[28] Trends and Result of the Decisions of the Hungarian Competition Authority 2010-2020., pp. 9-10. [Online]. Available at: https://www.gvh.hu/pfile/file?path=/gvh/kiadvanyok/tematikus-kiadvanyok/Tematikus_kiadvanyok_Dontesi_trendek_210630.pdf1&inline=true (20 January 2025).

violations committed by SMEs, the enterprises did not have a competition law compliance programme.

In Hungary, thanks to the Fine Announcement, compliance programmes are considered when imposing fines in competition law proceedings. The commitment to implement a post-compliance programme—subject to certain conditions—can lead to a reduction of the fine. Consequently, companies that are able to take advantage of this opportunity do so. This approach effectively promotes the adoption of competition law compliance programmes, improves the competition law culture, and prevents future violations.

The implementation and operation of compliance programmes are significantly less expensive than the fines imposed for antitrust violations, as well as the associated costs and losses incurred.

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EFSER ERDEN TÜTÜNCÜ[*]

Criminal climate protection as a challenge from perspective of Türkiye[**]

ABSTRACT: The challenges of environmental protection and the climate crisis cannot be addressed by any single state in isolation; they require a collaborative approach at the international level. To effectively tackle these global issues, it is essential to harmonize national legislation and judicial practices with international standards and the domestic laws of other nations. In accordance with the principle of 'common but differentiated responsibilities and respective capabilities,' it is expected that the objectives and legal frameworks established by each nation will exhibit considerable divergence. Consequently, disparate legal systems adopt various approaches to environmental protection through criminal law.

While most legal systems traditionally rely on administrative and civil law for environmental protection, there is a growing recognition of the role of criminal law as an instrument for safeguarding the environment. This shift presents several challenges at the national level regarding the application of criminal sanctions for environmental protection.

In the case of Türkiye, which is not a member of the European Union (EU), a comprehensive review of relevant legislation is required. Given its climate zone and rich biodiversity, Türkiye is particularly vulnerable to the effects of the climate crisis and has a significant stake in addressing this global challenge. However, there are notable deficiencies in national legislation and implementation of environmental protection compared to the EU.

The level of public interest in climate change and environmental issues in Türkiye is relatively low compared to that observed in EU societies. This study will initially examine the level of environmental

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awareness among the Turkish population. Subsequently, it will analyze Turkish environmental criminal law, focusing on how the environment is addressed within criminal law, the current state and deficiencies of Turkish environmental criminal legislation, and the challenges encountered in judicial practice. Ultimately, the study will offer recommendations to address these deficiencies and enhance Türkiye's contribution to the global climate effort.

KEYWORDS: Turkish environmental criminal law, environmental protection through criminal law, global climate crisis, environmental crimes, climate protection through criminal law.

1. Introduction

In order to provide a general framework for Turkish environmental criminal law, it is essential to first explore the perception of the concept of "environment" and the lack of public awareness regarding this issue among the Turkish population. This paper will begin with an overview of how Türkiye's geographical location and the lack of public awareness influence the country's vulnerability to the climate crisis.

The following section will examine the importance of the environment in national legislation, starting with a historical overview of the concept of "environment" in Turkish law. The paper will then analyze the acceptance of the environment as a protected legal value within Turkish Criminal law, particularly considering the international conventions to which Türkiye is a party aimed at environmental protection.

Subsequently, legislation pertaining to the environment in the general provisions of the Turkish Penal Code (Law No. 5237) and those concerning offences against the environment in its special provisions will be elucidated. Additionally, based on official justice statistics from the Ministry of Justice, the paper will highlight statistical data on criminal proceedings related to environmental offences and the challenges encountered in judicial practice. Ultimately, conclusions and recommendations regarding legislation and judicial practice will be presented.

2. The Level of environmental awareness in Turkish society

In this study, environmental awareness is defined as the sensitivity of individuals to the environment and the degree of care they demonstrate in protecting it.[1] The Ministry of Environment, Urbanization, and Climate Change has yet to publish any official statistical data on the environmental awareness of Turkish society. Similarly, the official statistical organization of the Republic of Türkiye ("TÜİK") has not released statistics about this topic.[2] Nevertheless, several studies on climate awareness in Türkiye have been conducted at various scales by private institutions, organizations, and non-governmental organizations. In academic research on the subject, the target group is often limited. For instance, some research findings concentrate on specific professional groups or restrict the scope to geographical areas, such as individual cities.[3] Conversely, there is currently no scientific research specifically examining the environmental awareness of law students or legal professionals in Türkiye.

Since 2018, İklim Haber, an independent broadcasting organization, and KONDA, an independent research organization, have been engaged in a joint research initiative examining environmental awareness in Turkish society.[4] The findings of this research are disseminated to the public annually in reports titled "Perception of Climate Change in Türkiye." These reports have revealed that members of Generation Z in Türkiye exhibit a heightened level of environmental awareness compared to preceding generations.[5] Despite evidence of awareness regarding environmental pollution among the Turkish population, there is a notable lack of effort to effect meaningful behavioral change, particularly in private life. For example, although a significant proportion of the population aspires to use

[1] Örs, 2018, pp. 188 – 196.
[2] On the other hand, annual statistical data on environmental protection expenditures are shared with the public by TÜİK (*Turkish Statistical Institute*). The most recent data on this subject pertains to 2022. For further details, see TÜİK Environmental Protection Expenditure Statistics 2022 [Online]. (Accessed: 26 May 2024).
[3] Doğan and Purutçuoğlu, 2017, pp. 389 – 405; Yalçın and Çaycı, 2018, pp. 578 – 590; Caba, 2021.
[4] All reports [Online]. Can be accessed at: https://www.iklimhaber.org/raporlar/ (Accessed: 26 May 2024).
[5] "İklim Değişikliği ve Algısı Raporu (*Climate Change and Its Perception Report*)" by Konda, 2021.

heating methods that are less harmful to the environment, empirical evidence indicates that the predominant preference remains solid fuels, such as coal and natural gas.[6] While air pollution and waste are often considered the most pressing environmental concerns, the percentage of individuals who separate their garbage is relatively low.[7]

On the other hand, an insightful outcome emerges when the responses to the issues concerning the linkage between ecological sustainability and economic advancement are scrutinized. Despite the majority of the population opposing the notion that "air pollution must be tolerated for economic development," the proportion of individuals who prioritize economic development over environmental concerns has doubled since 2012.[8] This suggests that, although there has been a notable rise in public awareness regarding the environment and climate change in Türkiye in recent years, prevailing economic challenges significantly impede the prioritization of these issues.

3. Environmental Protection in Turkish Law

The Republic of Türkiye has undertaken significant international obligations by signing various conventions, resolutions, and protocols aimed at environmental and climate protection. Additionally, the Turkish Constitution explicitly safeguards the environment, with Article 56 establishing “the right to live in a healthy and balanced environment” for the first time in 1982.

In Turkish law, environmental matters are primarily governed by civil and administrative law, which is common in many legal systems. The emergence of environmental criminal law is a relatively recent development. The current Turkish Penal Code (“TPC”), which took effect on June 1, 2005, represents the first formalization of environmental criminal law in Türkiye, addressing crimes against the environment. However, the scope of

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[6] Ibid.

[7] Ibid.

[8] KONDA, "Çevre Bilinci ve Çevre Koruma Araştırması (*Environmental Awareness and Environmental Protection Survey*)" March 2018, p. 26. [Online]. Available at: https://konda.com.tr/uploads/tr1803-barometre85-cevre-bilinci-ve-cevre-koruma-3f00e4c6a34482a7e3414097ef5cbd0203b283d1c985bd09cb814cd8fcbd5a54.pdf (Accessed: 24 May 2024). Additionally, insights from the report "Türkiye İklim Değişikliği Algısı 2023 (*Perception of Climate Change in Türkiye 2023*)" provide further context. [Online]. Available at: https://www.iklimhaber.org/wp-content/uploads/2024/03/konda-arastirma-rapor-2023_v2.pdf (Accessed: 22 September 2024).

protection for these offenses remains limited, and enforcement mechanisms are not particularly successful. There are also related environmental laws, such as the Animal Protection Law[9] and the Forestry Law.[10] When compared to the German Penal Code and EU law, it is evident that Turkish environmental criminal law, still in its early stages, needs to be aligned with EU legislation.

3.1. International environmental and climate agreements associated with Türkiye and their legal status

According to official data from the Ministry of Environment, Urbanisation and Climate Change of the Republic of Türkiye, the country is a party to numerous international treaties, agreements, and protocols, including the UN Framework Convention, the Paris Climate Agreement, and the Kyoto Protocol.[11]

Article 90 of the Turkish Constitution states that 'International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.' Consequently, international treaties aimed at protecting the environment and climate take precedence over national laws within the hierarchy of norms, but only when they are related to fundamental rights and freedoms.[12] As a result, the protection of the "environment" or "climate" as a distinct legal value in Turkish law is quite limited. Current judicial practices often reflect a "human-centered" approach.

[9] Law No. 5199.
[10] Law No. 6831
[11] For the complete list of international treaties to which Türkiye is a party for the protection of the environment and climate. [Online]. Available at: https://ab.csb.gov.tr/en/contracts-i-100216 (Accessed: 23 March 2024).
[12] In this context, the potential impacts of the ECtHR's Case of Verein Klima Seniorinnen Schweiz and Others v. Switzerland decision on Turkish law will become clearer in the coming days.

3.2. Protection of the environment at the constitutional level: The right to live in a healthy and balanced environment

The Constitution of the Republic of Türkiye, enacted in 1982, was the first to explicitly protect the environment at the constitutional level. The previous constitutions of 1924 and 1961 did not contain any direct regulation of the right to a healthy environment.[13] However, this is not unusual, considering that constitutional protection of the environment globally only emerged in the 1970s.[14] Article 56 of the 1982 Constitution, which is still in force, is located in the section titled "Social and Economic Rights and Duties" and bears the title "Health Services and Protection of the Environment." According to Article 56 of the Constitution:

> Everyone has the right to live in a healthy and balanced environment. It is the responsibility of the state and its citizens to improve the quality of the environment, protect environmental health, and prevent environmental pollution.

In light of this, it can be seen that the protection of the environment and the prevention of pollution are associated with the "right to health" and are regulated with an anthropocentric approach.[15]

The Constitution explicitly imposes on both the state and citizens the duty to develop and protect the environment, as well as to prevent pollution. Those who are the beneficiaries of the right to a healthy environment are also the duty-holders concerning this right.[16] The right to live in a healthy and balanced environment, which is a third-generation solidarity right, is both a right and a duty for citizens. In the doctrine, it is argued that the term "citizens" should be interpreted purposively and understood in the sense of "everyone".[17]

Is there any valid rationale that the State could provide for failing to fulfill its constitutional obligation to protect the environment and prevent pollution? To address this question, an assessment of Article 65 of the

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[13] Although the 1961 Constitution did not directly mention the right to a healthy environment, there were views suggesting that this right was indirectly protected within the context of the right to health (Article 49, Paragraph 1). See Keleş, 1978, pp. 79 – 115; Çörtoğlu, 1982. Compare Gemalmaz, 1986, pp. 233 – 278.

[14] Boyd, 2013, pp. 1 – 39.

[15] Gemalmaz, 1986, p. 249.

[16] Uygun, 2020, p. 587.

[17] Güveyi, 2018, pp. 633–659; Özdek, 1993; Semiz, 2014, pp. 9 – 46.

Constitution, titled "The Limits of the Economic and Social Duties of the State," is necessary. This article stipulates that the State must fulfill its social and economic duties as defined in the Constitution, provided its financial resources are sufficient and that it considers the priorities aligned with these duties. At this point, it is essential to establish that the right to live in a healthy and balanced environment constitutes one of the social duties of the State. The State is required to adhere to priorities relevant to this purpose and to meet its obligations within the limits of its financial resources. However, the duties related to environmental protection do not always impose a financial burden on the State. It would be incorrect to view the limitation in Article 65 as a blanket justification for non-compliance, even when financial constraints are present.[18] Regarding the right to a healthy and balanced environment, which is linked to fundamental rights and freedoms, especially human dignity, it is unreasonable to assume that financial limitations alone can exempt the State from fulfilling its obligations.[19]

In conclusion, the Constitution provides the State with a broad margin of appreciation. At this point, government policies play a crucial role in prioritizing the right to a healthy and balanced environment. The reliance on this policy mechanism poses an obstacle to the adequate protection of this right. To overcome this barrier, it is suggested that the existing provision in the Constitution, which is currently merely a guiding principle and almost a "wish", be made more binding, and that the right to legal recourse is explicitly stated in the Constitution.[20]

3.3. Fundamental environmental protection laws in Türkiye

Turkish law encompasses numerous statutes that directly or indirectly contribute to environmental protection. This section will briefly highlight a selection of these laws. In addition to the TPC and the Environmental Law (Law No. 2872), which serves as a comprehensive framework for environmental protection, there are specific regulations governing forests and mining activities, as well as the Bosphorus Law (Law No. 2960), which addresses unique aspects of the region.

A common characteristic of this legislation is that it primarily imposes administrative sanctions, with few criminal sanctions that are often not

[18] Yalçın, 2021, pp. 89 – 115. Also see Dinler, 2008, p. 1 – 19.
[19] It can be argued that a prioritization should be made to allocate financial resources. See Güveyi, 2018, pp. 648–649.
[20] Güveyi, 2018, p. 653.

sufficiently deterrent. Thus, it can be argued that these laws function as supplementary environmental criminal laws.[21]

3.3.1 Environmental Law (Law No. 2872)

The Turkish Environmental Law serves as the principal legislation within the Turkish legal system aimed at protecting the natural environment. This legislation seeks to ensure the safeguarding of the environment, regarded as a shared asset for all living organisms, in alignment with the principles of sustainable development and environmental sustainability. Predominantly, the sanctions outlined in this legislation are administrative, with only a limited number of offenses subject to criminal penalties.

According to Article 26, titled "Criminal Penalties," the provision of false or misleading information in violation of the notification and information obligations established by this law is classified as an offense warranting imprisonment for a term ranging from six months to one year. Additionally, in instances involving the issuance of false and misleading documents, the relevant provisions of the TPC regarding document forgery will be applied. Article 27 further clarifies that administrative penalties imposed under this law do not preclude the application of penalties prescribed by other legislation. It is evident that the administrative sanctions under this law do not have a *ne bis in idem* effect concerning criminal law penalties.[22]

> In accordance with Article 28, individuals engaged in activities leading to environmental degradation and pollution are held liable for the damages resulting from their actions, regardless of any contributory fault. Additionally, the polluter is responsible for compensating any damages incurred, in line with general legal provisions. A claim for compensation for environmental damage is subject to a statute of limitations of five years, commencing from the date the injured party becomes aware of the damage and the identity of the liable party.

[21] Balcı, 2022, p. 52.
[22] Taneri, 2021, pp. 393 – 454.

Furthermore, according to Article 3 of the Turkish Law on Misdemeanours[23], this legislation is classified as a general law concerning administrative sanctions. Consequently, the provisions of the Law on Misdemeanours relating to legal recourse against decisions imposing administrative sanctions apply to all actions that necessitate the imposition of administrative fines or property confiscation, unless otherwise specified in other laws or general provisions.

3.3.2. Turkish Law on Misdemeanors (Law No. 5326)

Article 1 of the Turkish Misdemeanours Law defines the following:

> (a) general principles concerning misdemeanours, (b) the types and consequences of administrative sanctions that may be imposed for misdemeanours, (c) the decision-making process for such violations, (d) legal remedies against administrative sanction decisions, and (e) principles for the enforcement of these sanctions, along with various misdemeanours. These provisions are established to safeguard public order, public morality, public health, the environment, and economic order.

Article 2 defines a "misdemeanour" as an unlawful act for which the law prescribes the imposition of an administrative sanction. This law, considered a general law regarding misdemeanours requiring administrative sanctions in Turkish law, has a complementary function, it is applied in cases where no specific provision exists under Environmental Law, which is a special law for environmental protection.

The legal reforms introduced in 2005 established a clear distinction between misdemeanours and criminal offences. This was achieved by excluding misdemeanours from the TPC and the Misdemeanour Law, thereby avoiding criminal penalties. To sum up, the Turkish Misdemeanour Law establishes the framework for administrative sanctions and serves as secondary legislation in relation to the Environmental Law. Criminal offences related to environmental protection are addressed within the TPC, while additional criminal sanctions for environmental offences are stipulated in other special laws.

[23] Law No. 5326.

3.3.3. Other Laws

Turkish law encompasses numerous legal regulations that directly or indirectly contribute to the protection of the environment and climate. The laws highlighted below offer a general overview of this framework.[24]

The Forestry Law No. 6831, specifically Article 91 and the subsequent provisions, contains penal sanctions. Notably, the Forestry Law stipulates a broader range of criminal offences compared to the Environmental Law. Furthermore, the final paragraph of Article 83 designates proceedings related to forest offences as urgent matters.

The Mining Law No. 3213 imposes administrative penalties, without prejudice to the provisions of the TPC.

The Bosphorus Law No. 2960 was enacted to establish and regulate zoning legislation for the Istanbul Bosphorus Area, with the aim of preserving and enhancing its cultural, historical, and natural values in the public interest. The Law also seeks to restrict construction activities that would lead to increased population density in the region. Article 18 outlines the criminal sanctions for violations of this legislation, including imprisonment and fines.

Similarly, Law No. 2863 on the Protection of Cultural and Natural Heritage focuses on safeguarding Türkiye's cultural and natural assets. It specifies the procedures for identifying and registering cultural and natural properties requiring protection, along with the measures necessary for their preservation. The Law also details the authorisation process for conducting works or restorations within protected areas and prescribes penal sanctions for actions that cause damage to these assets, as outlined in Articles 65 and following.

4. Historical development and current legal framework of Turkish environmental criminal law

4.1. Evolution of Turkish environmental criminal law

In Turkish law, as in many other legal systems, environmental protection and pollution prevention are primarily governed by administrative and civil law. Criminal law, in this context, plays a secondary role, adhering to the

[24] For a detailed examination of other laws aimed at environmental protection, as well as various administrative regulations (by-laws) stemming from administrative obligations, see Aygörmez, 2021, pp. 10-13.

principle of *ultima ratio*.[25] Moreover, Turkish environmental criminal law demonstrates a significant *administrative dependency*.[26]

In 2005, significant reforms were enacted in Turkish criminal legislation, introducing a series of innovations as part of the harmonisation process with the European Union. As a result, the evolution of Turkish environmental criminal law can be categorized into two distinct phases: pre- and post-1 June 2005.[27] This date marks the enactment of the Turkish Penal Code No. 5237, which remains in force today. Notably, this legislation was the first to recognize the concept of "environment" as a "protected legal value" within the framework of criminal law.[28] The section titled "Offences against the Environment" outlines various offenses, including intentional and negligent pollution, noise pollution, and zoning violations.

In contrast, the previous Turkish Penal Code No. 765 did not contain specific offenses aimed at directly protecting the environment; it included only a few provisions that served an indirect protective function.[29]

The TPC, currently in force, places a particular emphasis on the direct protection of the environment through the criminalisation of offences against it. In addition to specific offences, the general provisions of the law also include regulations related to environmental crimes. Turkish environmental criminal law encompasses not only the norms found in the TPC but also various legal texts, such as the Environmental Law and the Law on the Protection of Cultural and Natural Assets.[30] However, due to the scope of this study, these subsidiary criminal law regulations will not be addressed, and the regulations within the TPC will be deemed sufficient.

[25] Turgut, 1998, p. 613.
[26] Balcı, 2022, p. 52; Özgüç, 2020, p. 34.
[27] Savaşan and Sümer, 2020, p. 41.
[28] Balcı, 2022, p. 52. Also see Aygörmez, 2021, pp. 24 and following.
[29] For detailed explanations on this topic, see Savaşan and Sümer, 2020, pp. 41–45.
[30] Talas, 2013, pp. 1147–1150.

4.2. Regulations related to "environment" in the general provisions of the TPC

4.2.1. Protection of the environment as one of the objectives of the TPC

Article 1 of the TPC outlines the purposes of the law and explicitly includes the "protection of the environment" among them.[31] Following this purpose, various environmental offenses are specifically regulated under the title of offenses against the environment in the special provisions of the Law. During the legislative process, these offenses, initially omitted from the Government draft, were incorporated at the commission stage. According to the General Grounds of the Justice Commission[32], several factors heightened the legislator's awareness of the "environment":

[1] A prevailing trend towards the criminalization of acts against the environment in contemporary penal codes, which prompted the Turkish legislator to transition from administrative to criminal sanctions.

[2] Increased social sensitivity due to incidents involving the dumping of radioactive and chemical waste on Turkish shores during the law's enactment period.

[3] The realization that environmental pollution occurring outside the country's sovereignty can reach its borders through various means.

[4] The operation of aging atomic energy power plants in neighboring countries, which lacked adequate technology and equipment to prevent environmental pollution during the same period.

In addition to the explicit recognition of environmental protection as one of the legislation's objectives, two additional regulations related to offenses against the environment are included in the general provisions. These regulations will be outlined below.

[31] Article 1 of the TPC states that the purposes of the Code include the protection of individual rights and freedoms, public order and security, the rule of law, public health, and the environment, as well as the maintenance of public peace and the prevention of offenses. To achieve these objectives, the Code outlines the fundamental principles of criminal responsibility and regulates the types of offenses, penalties, and security measures.

[32] For detailed explanations on this topic, see TBMM, 2021, p. 224 and following. Also see Talas, 2013, p. 1150; Özgenç, 2021, p. 1088.

4.2.2. Application of the principle of universal jurisdiction concerning the offence of intentional pollution of the environment

Pursuant to Article 13 of the Law, the offence of intentional pollution of the environment[33] is classified among those to which the universal jurisdiction rule applies. Accordingly, if this offence is committed by either a citizen or a foreigner in a foreign country, legal proceedings may be initiated in Türkiye at the request of the Minister of Justice, and Turkish laws will be applicable. Furthermore, Article 13/3 of the TPC states that 'even if a conviction or acquittal decision has been made in a foreign country for the offences specified in subparagraphs (a) and (b) of the first paragraph, a trial shall be held in Türkiye upon the request of the Minister of Justice.'[34] Notably, the offence of intentional pollution of the environment is not included among the offences referenced in these two subparagraphs. Thus, from the contrary interpretation of Article 13/3, it can be concluded that for prosecution under the universal jurisdiction rule for the offence of intentional pollution of the environment, there must not have been a prior conviction or acquittal in a foreign jurisdiction.[35]

Although the explicit condition of the defendant's presence in Türkiye is not stipulated for the prosecution of the offence of intentional pollution of the environment within the framework of universal jurisdiction as per Article 13 of the TCP, Turkish criminal procedure law prohibits trials in absentia. Therefore, it is not feasible to prosecute a defendant who is not present in Türkiye.[36]

Furthermore, paragraph 4 of Article 15 of the Turkish Code of Penal Procedure[37], which describes the jurisdictional rules for offences committed on or by sea, air, and rail vehicles, stipulates that 'if the offence of polluting the environment is perpetrated by a ship flying a foreign flag outside Turkish territorial waters, the court closest to the site of the offence or the

[33] Article 181 of the TPC.

[34] These crimes include international offenses (such as genocide, crimes against humanity, human smuggling, and human trafficking), crimes against the state's symbols and the dignity of its organs, crimes against national security, crimes against the constitutional order and its functioning, crimes against national defense, crimes against state secrets, and espionage and offenses related to foreign relations.

[35] Aygörmez, 2021, p. 73.

[36] This point is also explicitly expressed in the preamble of the article. For detailed explanations on this issue, see Özgenç, 2021, pp. 1085, 1095 - 1096.

[37] Law No. 5271 - "TCPP".

court located at the first port of call of the ship in Türkiye shall have jurisdiction.' This provision is inadequate as it only addresses environmental offences committed by ships, thereby limiting the scope of universal jurisdiction in this context.[38]

4.2.3. Prepayment as a Procedural Condition in Cases of Negligent Environmental Pollution

Prepayment is an alternative dispute resolution method under Turkish law and serves as a procedural condition in offences that fall under this procedure.[39] If an indictment is issued before the prepayment process has been attempted, the indictment must be returned[40]. Upon successful completion of the prepayment procedure, a public case cannot be initiated, and a decision of non-prosecution is issued during the investigation phase. In cases where a public prosecution is launched without applying the prepayment process, or where the nature of the offence changes during prosecution, the court will apply the prepayment procedure during the prosecution phase, resulting in a dismissal if successful. Successful completion of the prepayment process requires the suspect or defendant to pay the prepayment amount within the specified timeframe.[41] Except for negligent offences, the amount of the prepayment to be offered pursuant to this paragraph shall be increased by half to the perpetrator who commits an offence subject to prepayment within five years from the date of the decision of non-prosecution or dismissal of the public case based on the prepayment.[42]

Except for the crimes within the scope of reconciliation[43], crimes that require only a judicial fine[44] or for which the upper limit of the prison

[38] While noting the deficiencies of the regulation, it also represents a significant advancement (see Yenisey and Nuhoğlu, 2021, p. 285.); Özgenç, 2021, p. 260.
[39] Öztürk and Erdem, 2023, p. 189; Öztürk et al., 2023, p. 57; Yenisey and Nuhoğlu, 2021, p. 606. In doctrine, there are differing views on the legal nature of the pre-payment institution. For discussions of these views and critiques, as well as regarding the argument that this institution possesses a "hybrid" structure (see Özgenç, pp. 798–799). Also see Yenisey, 2021, pp. 193 – 194.
[40] Article 174/1, c of the TCPP).
[41] Öztürk et al., 2023, pp. 187 –189.
[42] Öztürk et al., 2023, p. 59.
[43] The offences falling within the scope of reconciliation are defined in Article 253 of the TCPP.

sentence stipulated in the article of the law does not exceed six months, and the crimes included in the catalogue in Article 75 paragraph 6 of the TPC are subject to prepayment.[45]

The fundamental form of the offence of environmental pollution by negligence, along with the qualified forms that are aggravated by the consequences outlined in the initial paragraph, are subject to prepayment. Article 182/2 of the TPC does not mandate the utilisation of the prepayment procedure in instances where the qualified form of 'causing the negligent release of wastes or residues into the soil, water or air, which have the qualities that may cause the emergence of diseases that are difficult to treat for humans or animals, atrophy of reproductive ability, change the natural characteristics of animals or plants' is concerned. Furthermore, prepayment is not a prerequisite for prosecution in relation to the other offences outlined in the section on environmental offences.

4.3. Crimes against the environment in the special provisions of the TPC

There are four types of offenses in Articles 181 to 184 of the TPC, which are included in Chapter titled “Offenses against the Environment” of Part titled “Offenses against Society”. These are, respectively, intentional pollution of the environment, negligent pollution of the environment, causing noise, and pollution caused by construction. The effective dates of these offenses differ from each other. While the effective date of the offences of intentional and negligent pollution of the environment was set at two years after the entry into force of the Code, the articles on the offences of causing noise and pollution caused by construction entered into force on the date of the entry into force of the law.

The first notable aspect of environmental offences is that they are classified as "offences against society" within the framework of the law, which is based on the protected legal value. This may suggest that the Turkish criminal legislator adopts a human-centered approach to environmental protection.[46] According to a particular perspective, however, a closer examination of the articles reveals that the offences in this category

[44] Accordingly, all offences that require only a judicial fine, regardless of the amount, fall within the scope of prepayment. See Özgenç, p. 801.

[45] In cases where an offence is punishable by both a judicial fine and imprisonment, or where both of these forms of punishment are permitted as optional penalties, pre-payment may be applied. This is provided that both forms of punishment fall within the scope of pre-payment. See Özgenç, p. 801.

[46] Özkurt, 2023, pp. 167 – 168.

are framed as crimes of danger, primarily targeting flora and fauna, regardless of whether they cause direct or indirect harm to humans.[47]

Since a thorough analysis of the types of environmental offences, including all their elements, would exceed the scope of this study, the following section will provide general information while highlighting the specific aspects of these offences.

4.3.1. Intentional pollution of the environment

The offense of intentional pollution of the environment is regulated in Article 181 of the TPC. According to the first paragraph, intentionally discharging waste or residues into the soil, water, or air in a manner that violates technical procedures determined by relevant laws and causes harm to the environment constitutes this crime. The penalty is imprisonment for a term of six months to two years.

According to the second paragraph, smuggling waste or residues into the country without permission is punishable by imprisonment from one year to three years. The third and fourth paragraphs address aggravated circumstances of the crime. If the waste or residues exhibit permanent characteristics in the soil, water, or air, the penalties are doubled (third paragraph). If the acts defined in the first and second paragraphs are committed with waste or residues that can cause serious diseases in humans or animals, impair reproductive capabilities, or alter the natural characteristics of animals or plants, the punishment shall be imprisonment for no less than five years and a judicial fine of up to one thousand days (fourth paragraph).

The fifth paragraph stipulates that specific security measures shall be imposed on legal entities for the acts described in the second, third, and fourth paragraphs.[48] The absence of a provision for security measures against legal entities concerning the regulation in the first paragraph is considered a deficiency.[49] It is also noteworthy that a similar provision has not been included for other types of crimes regulated in the section on environmental offenses.

[47] Taneri, 2021.
[48] Legal persons are not criminally liable under Turkish criminal law; however, they may be subject to special security measures.
[49] Özgüç, 2020, pp. 273 – 274.

As stated in general explanations, the effective date of this article is set to be two years after the law's entry into force. However, the Court of Cassation (*Yargıtay*) has ruled that if acts constituting the offense of intentional pollution of the environment were committed before the effective date, but the environmental danger they caused continued after the effective date, liability for this crime still exists.[50]

This offence is problematic in many respects, particularly with regard to the principle of legality.[51] For example, although the first paragraph mentions "violation of the technical procedures regarding waste and residues determined by law" within the framework of a partial administrative obligation, none of these technical procedures are regulated by "law". All regulations in this area are made through regulations and communiqués. This situation has made the application of the article theoretically impossible. In practice, investigations and prosecutions have been carried out in violation of the principle of legality by concluding that the procedures established by regulations can be considered as offences on the basis of the references made in the relevant laws.[52] In order to solve this problem, the doctrine suggests that either a special law should be enacted on these issues, or the phrases referring to the relevant procedures being regulated by law should be removed from the text of the law.[53] Another problematic issue regarding the principle of legality is that the concepts of waste and residues, which represent the means used in the offence, are not clearly defined.[54]

Regarding the offence outlined in the second paragraph of the article, the unauthorized entry of wastes and residues into the country is punishable, while their removal from the country is not included within the scope of the offence. This regulation reflects a deficiency concerning Türkiye's international obligations, such as the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal.[55] Additionally, since this second paragraph overlaps with the Anti-Smuggling

[50] Otacı, 2015, pp. 283–284; Özgüç, 2020, p. 266.
[51] Taneri, 2021, p. 73.
[52] This is explained by the fact that it is considered sufficient to refer to the regulation in the relevant law (e.g. Environmental Law). For a detailed explanation of the Court of Cassation's opinion together with its case law on the subject, see. Otacı, 2015, p. 282. Also see Özgüç, 2020, p. 270; Taneri, 2021, pp. 40 – 41.
[53] Özgüç, 2020, p. 271.
[54] Özgüç, 2020, p. 272; Taneri, 2021, p. 41.
[55] Özgüç, 2020, p. 272.

Law No. 5607 in many cases, its area of application is severely limited. To address this issue, it would be beneficial to clearly define this provision as a special regulation for wastes and residues.[56]

In relation to the offence regulated in the first paragraph, it is possible to apply the simplified trial procedure introduced by Law No. 7188 on October 17, 2019.[57]

4.3.2. Negligent Pollution of the Environment

The offence of negligent pollution of the environment is regulated under Article 182 of the TPC and shares many similarities with the offence of intentional pollution of the environment. Several concepts outlined in the offence of intentional pollution also apply to this offence. Notably, the entry into force of the offence is two years after the entry into force of the Code, as is the case with the offence of intentional pollution of the environment.

The offence of negligent pollution of the environment can be committed by negligently causing wastes or residues to be discharged into the soil, water, or air in a way to harm the environment. Only a judicial fine is provided for this simple form of the offence.[58] If the wastes or residues subject to the offence leave a permanent effect on the soil, water, or air, the perpetrator shall be sentenced to imprisonment from two months to one year.

An aggravating circumstance based on the consequences is included in the second paragraph of the article. Anyone who negligently causes the release of waste or residues into the soil, water, or air, which have properties that may cause the emergence of diseases that are difficult to treat in humans or animals, atrophy of reproductive capacity, or change the natural characteristics of animals or plants, shall be sentenced to imprisonment for a term of one to five years.

Unlike the offence of intentional pollution, this offence does not include the phrase "in violation of the technical procedures determined by the relevant laws". However, this is not considered to be a serious deficiency

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[56] Özgüç, 2020, p. 273.

[57] Taneri, 2021, pp. 80 and following.

[58] This situation highlights the inadequacy of the regulation in terms of deterrence; see Maviş, 2021, pp. 316 – 317; Balcı, 2022, pp. 180 – 181. Also see Talas, 2013, p. 1156, and compare with Balcı, 2022, p. 168.

in the doctrine, as violations of legal norms are merely part of the broader breach of the duty of care and diligence.[59]

Furthermore, the nature of the offence does not regulate the negligent form of the act of unauthorised import of waste or residues into the country, and security measures are not provided for legal entities within the scope of this offence. This offence is prosecuted *ex officio* and a simple trial procedure may be applied.[60]

4.3.3. Causing noise

A person who causes noise in a manner capable to harm another person's health, in violation of the obligations established by the relevant laws, is punishable by imprisonment for a term of two months to two years or by judicial fines (Art. 183 of the TPC). As seen, the punishment for causing noise is only applicable if it is capable to harm another person's health. Therefore, noise that does not reach this level of severity is not subject to penal sanctions under this article. However, liability for administrative fines due to "causing noise in a way that disturbs the peace and tranquility of others" is preserved under Article 36 of the Misdemeanor Law.[61] Additionally, making noise "persistently" with the sole intention of disturbing the peace may be assessed within the scope of the offence of disturbing the peace and tranquility of individuals, as regulated by Article 123 of the TPC.[62]

The offence of causing noise is classified as a danger crime. Indeed, it is sufficient that the noise in question "is capable of harming the health of

[59] Maviş, 2021, p. 302.
[60] Taneri, 2021, pp. 151 – 152.
[61] According to Article 36 of the Misdemeanor Law titled "Noise": '*(1)* A person who causes noise in a way that disturbs the peace and tranquility of others is subject to an administrative fine of fifty Turkish Liras. *(2)* If this act is committed within the scope of a commercial enterprise's activities, the owner of the enterprise, whether a natural or legal person, shall be fined between one thousand and five thousand Turkish Liras. *(3)* Administrative fines for this misdemeanor shall be determined by law enforcement or municipal police officers.'
[62] According to Article 123 of the TPC titled "Disturbing the Peace and Tranquility of Individuals": "If a person makes persistent phone calls, causes noise, or engages in any other unlawful behavior with the sole intention of disturbing another's peace and tranquility, the offender shall be sentenced to imprisonment for a term of three months to one year, upon the complaint of the victim." See Özkurt, 2023, pp. 177–178.

another person"; no actual harm needs to occur in the concrete case.[63] On the other hand, it is evident that this provision is framed from a distinctly anthropocentric (human-centered) perspective; therefore, it should be reformed to adopt a more ecological approach, especially regarding its impact on animal health.[64]

This offence was included within the scope of the speedy procedure established by Law No. 7188, dated October 17, 2019. If this procedure cannot be applied for any reason, the simplified trial procedure may be implemented in the court of first instance.[65]

4.3.4. Pollution caused by construction

The offence of pollution caused by construction is the most common environmental offence encountered in Turkish judicial practice.[66] Various actions are defined as crimes in the different paragraphs of the article, and penalties are prescribed according to their severity.[67]

First, constructing or having a building constructed without obtaining a building permit (paragraph 1) and allowing electrical, water, or telephone connections to construction sites initiated without a building permit (paragraph 2) are defined as offences. The penalty for these actions is imprisonment for a term of one to five years. In paragraph 3, it is stipulated that a person who permits any industrial activity in buildings that do not have a certificate of occupancy shall be punished with imprisonment for a term of two to five years.

There are restrictions on the application of the actions covered by this article in terms of location and time. According to paragraph 4, the provisions of this article, except for paragraph 3, shall only be applicable within municipal boundaries or in areas subject to special zoning regulations. Paragraph 6 includes a temporal condition for application; thus, the provisions of paragraphs 2 and 3 do not apply to structures built before October 12, 2004.

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[63] Maviş, 2021, pp. 326 and following.
[64] Maviş, 2021, pp. 319 – 320. See also Yokuş Sevük, 2013, p. 372; Yenerer Çakmut, 2023, p. 96; Kaplan and Atladı, 2019, p. 633, and compare Hafızoğulları and Özen, 2017, p. 63.
[65] Taneri, 2021, pp. 190 and following.
[66] In the next section, where the deficiencies in practice will be addressed, statistics on this issue will be provided.
[67] Yıldız, 2019, p. 257. For criticism regarding the lack of balance in the penalties for the three offences regulated in the article, see Maviş, 2021, pp. 377 and following.

In the first two paragraphs, a provision for effective remorse is included as a restorative justice mechanism in the fifth paragraph of the article.[68] Accordingly, if a person brings a building constructed without a permit or in violation of the permit into conformity with the zoning plan and the permit, public prosecution shall not be initiated in accordance with the provisions of paragraphs one and two, any initiated public prosecution shall be dropped, and the imposed penalty shall be annulled in all respects. There is no limitation in the law regarding the application of this paragraph.[69] Therefore, it can be said that a person has the opportunity to benefit from this provision an unlimited number of times. This situation creates negative consequences regarding the deterrent effect of the provision. At this point, it is necessary to mention the provision commonly known as "zoning peace", which has been enacted several times in Türkiye and undermines the deterrent effect of the offence in question.[70] With the most recent "zoning peace (or amnesty?!)", illegal constructions made before December 31, 2017, have essentially been granted amnesty.[71] Under this provision, the demolition orders issued under the Zoning Law for structures that have been granted building registration documents can also be annulled, along with unpaid administrative fines.[72] In my opinion, such provisions, introduced under the name of “zoning peace” and essentially functioning as an

[68] According to the dominant opinion in the doctrine and the case law of the Court of Cassation, the legal nature of this provision is effective remorse. However, there is also an opinion that it has the characteristics of a *de facto* amnesty. Taneri, 2021, p. 205. For this reason, a request for the annulment of the provision was submitted to the Constitutional Court, but the request was rejected. For detailed explanations on this matter, see Maviş, 2021, pp. 373 and following.

[69] However, in Turkish law, provisions on effective remorse are limited in terms of the number of applications for certain offenses. For example, in the case of the offense of unjust enrichment, it is not possible to benefit from the provision on effective remorse more than twice (Article168 paragraph 5 of the TPC).

[70] A provision regulating the procedures and principles for granting building registration certificates for structures that violate zoning legislation was added as a temporary Article 16 to the Zoning Law No. 3194 by Article 16 of Law No. 7143, published in the Official Gazette dated May 18, 2018, and numbered 30425, concerning the restructuring of taxes and other receivables. According to this article, for structures built before December 31, 2017, a building registration certificate can be granted if an application is made by December 31, 2018, the conditions set out in the article are fulfilled, and the registration fee is paid by December 31, 2018.

[71] Özlüer, 2018, p. 317.

[72] Temporary Article 16 of Zoning Law No. 3194.

"amnesty purchased by paying a fee", significantly diminish the deterrent effect of the offence of pollution caused by construction.

4.4. Turkish Environmental Criminal Law Practice and Its Deficiencies

In Turkish judicial practice, offences against the environment remain relatively limited in application compared to all types of offenses. This situation can be easily understood by examining the justice statistics published annually by the Ministry of Justice. Despite the significant burden on the Turkish judiciary, the low number of investigation and prosecution files related to environmental offences is striking. This indicates that there is a need to enhance awareness of environmental offences, not only among the public but also within the judicial system.

According to the 2023 Justice Statistics published by the Ministry of Justice, in the ranking of criminal case numbers that came before the Turkish judiciary last year, the top three categories were crimes against property (particularly fraud, theft, and robbery), crimes against life and bodily integrity, and crimes against liberty.[73] When examining the graph of crime rates in cases received by criminal courts under the TPC in 2023, it is observed that offences against the environment represent a very low percentage (approximately 0.2%) among these cases. Additionally, in 2023, a total of 38,891 cases related to offences against the environment were reported to public prosecutors, with public prosecutions initiated for 28,565 of these cases.[74] For the other cases, decisions were made indicating that there was no basis for prosecution or other resolutions (such as dismissal). Of the 23,837 cases that reached criminal courts, convictions were established in 15,979 cases, while 3,186 cases resulted in acquittals, 690 cases had the verdict deferred, and the remaining 3,982 cases ended with other decisions.[75]

The offense of causing environmental pollution by negligence (only the first paragraph) is subject to a prepayment, as explained above. The General Directorate of Criminal Affairs of the Ministry of Justice has published a statistical report on the prepayment procedure for the year 2023. According to this report, in 2023, 27,034 cases were resolved through prepayments, while public prosecutions were initiated in 8,938 cases due to

[73] Turkish Ministry of Justice, 2024, p. 82, Graph 2b.
[74] Turkish Ministry of Justice, 2024, p. 72, Table 1.9.
[75] Ibid.

non-compliance with the prepayment.[76] The report includes a table listing the top five offenses resolved through prepayments, and the offense of causing environmental pollution by negligence is not among these offenses.[77]

The combination of deficiencies in legislation, indifference in implementation, and a lack of specialization makes it challenging to combat environmental offences. The main deficiencies of Turkish environmental criminal law can be outlined as follows:

- The narrow scope of environmental offences within the existing legal framework, the lack of deterrent sanctions;
- the weakening of the threat of punishment due to the implementation of various legal mechanisms during investigation or prosecution stages, such as speedy procedure, simple trial, pre-payment, and postponement of the announcement of the verdict;
- the lack of sufficient expertise among legal professionals in environmental offences,
- the absence of criminal liability for legal entities in environmental offences and the limited nature of their liability in terms of security measures;
- insufficient opportunities for the public to play an active role in the prosecution processes of environmental offences;
- the lack of comparative legal studies on the subject, and
- weak environmental and climate awareness among the public, legal professionals, and academics.

5. Conclusion and Recommendations

According to data from the European Commission, environmental crimes rank fourth among the most commonly committed offences worldwide.[78] The top three are drug trafficking, human trafficking, and corruption/fraud crimes. As is well known, environmental offences are often committed as organized and transnational crimes.[79] Due to its unique geographical location straddling continents, Türkiye functions as at least a transit country for many environmental offences. Furthermore, due to its extraordinary

[76] Turkish Ministry of Justice, 2023.
[77] Ibid.
[78] European Commission, n. d. Also see UNEP & INTERPOL, n. d.
[79] UNODC, 2020.

biodiversity, it is at significant risk as both a target and source country, especially for offences against biodiversity. Despite this, an examination of the workload of the Turkish judiciary reveals that offences against the environment constitute a remarkably low percentage. This situation suggests that the public and the judiciary have not yet achieved the necessary level of awareness. Indeed, policies related to environmental protection are directly tied to the prevailing understanding within the country. Therefore, it is essential to conduct efforts aimed at increasing awareness regarding environmental pollution and climate change among both the public and the judicial sector in Türkiye.

The understanding of protecting the environment through criminal law in Turkish law has essentially developed since 2005. This can largely be attributed to the influence of the European Union's accession process at that time. Unfortunately, over the years, the suspension of full membership processes and the near end of hopes for accession have led to a slowdown in developments in this area.[80] Currently, discussions regarding the role of criminal law in addressing climate change have yet to commence in Türkiye, whereas this topic is actively debated within the European Union and German law.[81] Even the topic of environmental protection through criminal law remains behind EU standards. Conducting a comprehensive comparative legal study on this issue could be beneficial in providing recommendations for Turkish law.

In order to Turkish environmental criminal law to align with international standards and potentially establish a climate criminal law, it is essential to prioritize environmental and climate issues. There is a need for efforts to raise awareness that these matters, beyond being political issues, are also crucial for the fundamental rights and freedoms of future generations.

It is indisputable that specialized judicial expertise is required to effectively address environmental and climate issues through criminal law, which are multidisciplinary challenges. Issues even arise in the processes of obtaining and preparing official expert reports in trials related to environmental crimes.[82] Establishing specialized courts within the Turkish judiciary that serve the protection of the environment and climate, or at least

[80] Savaşan and Sümer, 2020, pp. 7 and following.
[81] For discussions regarding these current debates, see Satzger, H. And von Maltitz, N., 2021, pp. 1 – 34.
[82] Otacı, 2015, pp. 304 – 305.

achieving specialization within the existing system, could be a significant step toward ensuring that Turkish environmental and climate justice meets universal standards.[83]

In conclusion, I propose the following recommendations for the enhancement of Turkish environmental criminal law, specifically addressing both substantive and procedural legal frameworks[84]:

1. Redefining environmental offences to move away from a purely anthropocentric perspective.
2. Clearly defining the concepts related to environmental offences in the legislation, ensuring there is no uncertainty, while also considering all receiving environments and the implications of climate change.
3. Implementing all necessary measures that serve the preventive purpose of criminal law, including the "precautionary principle".
4. Adjusting the sanctions prescribed for environmental offences to be sufficiently severe and deterrent, particularly in comparison to the costs associated with compliance procedures. It is important to note that excessively harsh penalties will not serve as an effective solution; imposing unpayable fines will not deter these offenses, as they will likely remain unenforceable. The key here is to achieve a balance.
5. Establishing the criminal liability of legal entities for environmental offences.
6. Providing in-service training to legal professionals, especially decision-makers, to enhance their expertise in environmental and climate issues.
7. Establishing specialized judicial branches focused on environmental and climate issues.
8. Revising participation rights to enable the public to play an active role in judicial processes.

[83] Güveyi, 2018, pp. 653 – 655.

[84] For detailed recommendations regarding this issue from the perspectives of substantive and procedural law, see also: Taşkın, 2015, pp. 119 – 166.

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Climate and environmental protection as a challenge for the law, especially criminal law**

ABSTRACT: Climate protection is one of the most urgent tasks to be addressed by international, EU, and national law. This affects international and constitutional law, environmental administrative law, as well as criminal and civil law. Climate protection is increasingly being strengthened by the judgment of the European Court of Human Rights, the opinion of the International Court of Justice, and decisions of national courts based on fundamental and human rights. Legal proceedings are increasingly being conducted strategically in order to force states to take climate protection measures and thus help international treaties such as the 2015 Paris Agreement to achieve a breakthrough. Even if these court decisions do not specifically deal with criminal law, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union provide a framework for criminal law within which the European Union Directive on environmental criminal law (2024) and the Convention on the Protection of the Environment through Criminal Law of the Council of Europe (2025) must comply. When implementing these legal requirements into national law, criminal law has a considerable degree of methodological, conceptual, and argumentative independence from constitutional law. Therefore, effective and consistent penal solutions must be developed in national criminal law systems.

KEYWORDS: climate protection, environmental and climate criminal law, ECHR, ICJ, green criminology.

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1. Climate protection as the challenge of the 21st century

Hardly any other development has had such a transformative impact on a global scale as the climate crisis, with its ecological challenges resulting from increasingly extreme weather conditions, rising sea levels, and accelerating species extinction. 1972, the Club of Rome, an association of experts from various disciplines from more than 30 countries committed to a sustainable future for humanity, pointed to the limits to growth and warned of the urgent need for effective protection of natural resources and the environment.[1] Shortly thereafter, the 1987 Brundtland Report of the United Nations established a link between security and the effective protection of natural resources, highlighting conflicts over limited resources on the one hand and migration caused by environmental problems on the other. [2] A second report by the Club of Rome, published 40 years later, predicted that the planet would collapse in the foreseeable future if growth policies remained unchanged and the associated damage to the natural environment continued.[3] Although all the essential scientific findings[4] have been available for more than 40 years, [5] the measures implemented to reduce greenhouse gas emissions are insufficient to achieve the goal set out in the United Nations Framework Convention on Climate Change *adopted at the first Rio Earth Summit in* 1902. This raises the question of which instruments are needed to protect the natural foundations of human life.

From a legal policy perspective, it has proven particularly relevant that the protection of natural resources cannot be reduced to a national issue, meaning that environmental law issues arise in the context of international law, EU law, and national law. The integration of environmental and climate protection law is a particular challenge for the legislative and executive branches, which have had to and must continue to deal with climate protection, adaptation to climate change, species protection, and resource management in order to combat the causes of anthropogenic climate change as quickly and comprehensively as possible. But the courts

[1] Meadows, Randers and Behrens, 2005.
[2] Brundtland-Report, 1987.
[3] Randers, 2012.
[4] A summary of the recognized findings of scientific climate research can be found in the IPCC's 6th Assessment Report, [Online]. Available at: https://www.de-ipc.de/307.php (Accessed: 01 January 2026).
[5] On the development of the discussion in the USA between 1979 and 1989 see Rich, 2019.

have also had to deal with an increasing number of climate lawsuits,[6] including lawsuits against states[7] as well as civil lawsuits against large corporations[8] and administrative lawsuits.[9] The transformative momentum is being reinforced above all by the climate protection decisions of national constitutional and supreme courts, the European Court of Human Rights, and the advisory opinion of the International Court of Justice, which decided on the obligation of states to protect the climate on the basis of fundamental and human rights. This will be addressed in the first part, which deals with the obligation to protect the climate as the basis of human life as reflected in the case law of the highest courts, in particular the ECtHR and the ICJ, as well as selected decisions of national supreme courts (see 2.).

Subsequently, the expansion and tightening of environmental and climate protection criminal law will be discussed, as called for in particular in Directive (EU) 2024/1203 on the protection of the environment through criminal law of 11 April 2024 and in the Convention on the Protection of the Environment through Criminal Law (CETS 172) of the Council of Europe. In this context, the connection to the protection of life as a mandatory area of legal protection will be highlighted and comments will be made on specific criminal law issues in connection with environmental and climate protection (see 3.).

2. The legal obligation to protect the basis of life as reflected in the case law of the ECtHR, the ICJ, and the national courts of EU member states

In this context, the climate protection decisions of national constitutional and supreme courts,[10] the European Court of Human Rights, and the opinion of the International Court of Justice, which comment on the obligation of states to protect the climate on the basis of fundamental and human rights, are of central importance.

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[6] See Peel and Osofsky, p. 37; Kahl and Weller, 2021; Franzius, 2022a, § 7 no. 4 ss. Differentiating between claims based on ambition, civil liability claims, and claims against admission decisions; see also Franzius, 2025, pp. 67 ss.
[7] Wernicke, 2025, pp. 54 ss.
[8] Tran, 2024, pp. 24 ss.; Schlacke, 2020, p. 355 ss.
[9] Franzius, 2025, p. 72 ss.
[10] In detail below 2.1.

2.1. Climate protection decisions by national constitutional and supreme courts

Climate protection was initially the subject of various supreme court decisions in Europe, for example in the Netherlands in 2019,[11] in Noreway,[12] Ireland,[13] Austria,[14] Switzerland[15] in 2020, in Belgium,[16] Germany,[17] France,[18] Great Britain,[19] Ireland[20] in 2021, Czech Republic[21] in 2022, Estonia[22] and Spain[23] in 2023, and Norway[24] in 2024.

A milestone was the decision by the Dutch Supreme Court, which was the first successful climate protection case before a national court to result in a CO_2 reduction obligation for the state. Furthermore, the decision of the German Federal Constitutional Court (BVerfG) in spring 2021 attracted a great deal of attention because the German Federal Constitutional Court took an innovative approach to fundamental rights doctrine in order to guarantee the basis and prerequisites for the exercise of all human freedoms without specifying the future use of freedom in certain forms.[25] Finally, of central importance are the decision of the ECtHR in the Clima Senior Switzerland case and the Advisory Opinion of the ICJ, which essentially confirms the decision of the ECtHR.

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[11] Hoge Raad, 20.12.2019, 19/00135 – Urgenda.
[12] Noregs Høgsterett, 22.12.2020 – People/Arctic Oil, 20-051052SIV-HRET.
[13] High Court of Ireland, 31.7.2020, 205/19 – Friends of the Irish Environment.
[14] Verfassungsgerichtshof G 123/2023-12 – Klimaschutzgesetz; dec. 30.9.2020, G 144-145/2020-13 – Greenpeace/Österreich; furthermore Verfassungsgerichtshof v. 27.6.2023, E 1517/2022-14 – Fliegenschnee.
[15] Swiss Federal Court, 5.5.2020, 1C_37/2019 – Climate Senior Switzerland.
[16] Tribunal de première instance francophone de Bruxelles, 30.11.2023, 2021/AR/ 1589 – Klimaatzaak.
[17] German Federal Constitutional Court, BVerfGE 157, 30.
[18] Conseil Constitutionell v. 13.8.2021, Commune de Grande Synthe; Tribunal Administratif de Paris, 3.2.2021 and 14.10.2021, 1904967 – Greenpeace/France.
[19] High Court of Justice, 21.12.2021, CO/1587/2021 – Plan B Earth/Premierminister.
[20] High Court of Ireland, 31.7.2020, 205/19 – Friends of the Irish Environment.
[21] Mestsky soud v Praze, 15.6.2022, 14A 101/2021 Czech Republic: Klimaticka.
[22] Riigikohus, 11.10.2023, 3-20-771 – Fridays for Future Estonia/Eesti Energia.
[23] Tribunal Suprema, 24.7.2023, STS 3556/2023 – Greenpeace/Spain.
[24] Oslo Tingrett, 18.01.2024, 23-099330TVI-TOSL/05, Greenpeace/Norway.
[25] For the decision of the Federal Constitutional Court, see Calliess, 2021, p. 355; Ekardt and Heß, 2021, p. 579; Hofmann, 2021, p. 1587; Meßerschmidt, 2021, p. 109; Möllers and Weinberg, 2021, p. 1069; Polzin, 2021, p. 1089 ss.; Ruttloff and Freihoff, 2021, p. 917; Schlacke, 2021, p. 912; Britz, 2022, p. 825; Fister, 2022, p. 460; Jahn, 2022, p. 47; Wolf, 2022, p. 451; Holoubek, 2022, p. 102 ss.

2.2.1. Climate protection ruling by the Dutch Supreme Court

In 2019, the Dutch Supreme Court addressed climate protection in its Urgenda ruling. It obliged the Netherlands to reduce Greenhouse gas emissions by 25% by 2020 compared to 1990 levels.[26] Previously, a reduction of only 17% had been planned. The lawsuit was brought by the non-governmental organization Urgenda, together with 886 private plaintiffs, by means of a public interest lawsuit, which is possible under the Dutch legal system.[27] With this ruling, the Hooge Raad confirmed the ruling of the Court of Appeal (Civil Court) in The Hague, which had ordered the Netherlands to reduce greenhouse gas emissions by 2020 to the extent just outlined.

The Hoge Raad based its decision on Articles 2 and 8 of the ECHR,[28] which Dutch courts are required to observe under the Constitution,[29] as well as on an environmental protection clause in the Dutch Constitution, obligations under international law, and the environmental protection provisions in the TFEU. According to the case law of the ECtHR, the fundamental rights to protection of life and private and family life give rise to environmental protection obligations on the part of the contracting states. These must take state measures to avert real and imminent threats to these fundamental rights. The court classified the dangers as a real threat posing a serious risk that the current generation of citizens would be confronted with the loss of life and/or a disruption of family life.[30] Whether these dangers threatened individuals or large groups or the entire population, and whether the dangers were imminent or would only materialize in the future, was irrelevant. Although it cannot be inferred from fundamental rights that the state must undertake impossible or disproportionate protective measures, measures may be required that are suitable for averting potential infringements of fundamental rights as far as possible.[31]

To specify these measures, the Hoge Raad relied on the UN Climate Convention and on the state's legal obligations to protect the lives and well-

[26] See also Binder and Huremagic, 2021, p. 109; Kahl and Weller, 2021, p. 363, p. 366; Ennöckl, 2022, p. 137, p. 147.
[27] Vgl Burtscher and Schindl, 2022, p. 649, p. 651 s.
[28] Hoge Raad, 20.12.2019, 19/00135, no. 5.8 ss.
[29] See Ennöckl, 2022, p. 137, p. 150 ss.
[30] Hoge Raad, 20.12.2019, 19/00135, no. 4.2.
[31] Wegener, 2019, p. 3.

being of its citizens. It drew on the 2007 report by the Intergovernmental Panel on Climate Change (IPCC) 2007, which sets out specific reduction targets for states for certain periods of time that are widely agreed upon, as well as from the Dutch government's voluntary commitment to specific CO2 reduction obligations (25% instead of 17%), and affirmed an obligation to reduce harmful greenhouse gases in connection with the duty to protect fundamental rights.[32] The Dutch government had not presented sufficient reasons why it had deviated from the target it had originally pursued in favor of a reduced reduction of only 20%. In its decision, the Hooge Raad saw neither an inadmissible interference in the decision-making sphere of politics nor a contradiction with the global nature of the problem of the obligation to reduce emissions.

2.2.2. Climate protection ruling by the German Federal Constitutional Court

In spring 2021, the German Federal Constitutional Court ruled on several climate-related constitutional complaints.[33] The issue at stake was whether the provisions of the Climate Protection Act of December 12, 2019 (KSG) on national climate protection targets and permissible annual emission levels until 2030 were incompatible with fundamental rights because they lacked sufficient measures for further emission reductions from 2031 onwards.

The court dealt with the civil liberties of those living today who will also live in the future, because current actions, the consequences of which will only become apparent in later years, will affect older people less than young people. The future burdens resulting from today's actions will therefore be borne more heavily by the young than by the old.[34] In this context, the future feasibility of fundamental freedoms is discussed both in terms of their protective dimension[35] and their defensive dimension.[36]

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[32] See Stürmlinger, 2020, p. 169, p. 170 ss.; Binder and Huremagic, 2021, p. 109 ff.; Ennöckl, 2022, p. 137, p. 142.
[33] BVerfGE 157, 3; more about this court decision Britz, 2022, p. 825 ss.; Kalscheuer, 2022, p. 463 ss.; Gärditz, 2023, p. 79 ss.; Barczak, 2023, p. 925 ss.; Hasenau, 2024, p. 361ff.; Groß, 2024, p. 893, p. 898 ff.
[34] Britz, 2024, pp. 199-202.
[35] BVerfGE 157, 30 (111 s. no. 145 s.).
[36] BVerfGE 157, 30 (97 ss. no. 116 ss., 130 ss., 182 ss.).

The court initially rejected the violation of duties to protect life, physical integrity, and property, thus denying any duty to protect.[37] The state's duty to protect, which derives from the fundamental right to life and physical integrity, also applies to measures that contribute to limiting anthropogenic global warming and the associated climate change, as well as to adaptation measures to counter the dangers posed by climate change that has already occurred or can no longer be stopped.[38] However, the court leaves it to the legislature to decide how these dangers should be counteracted and how a protection concept and its normative implementation should be specifically designed. In view of the legislature's scope for assessment, evaluation, and design, constitutional review is only possible to a limited extent.[39] A violation of fundamental rights due to insufficient fulfillment of duties to protect is therefore expressly rejected. [40]

The Federal Constitutional Court then develops, based in particular on the guarantee of freedom enshrined in Article 2(1) of the Basic Law in its form as general freedom of action,[41] the concept of "intertemporal freedom protection," to which fundamental rights oblige, in a new, "creative"[42] way in terms of fundamental rights doctrine.[43] The BVerfG defines the concept of intertemporal freedom protection as follows:

'Under certain conditions, the Basic Law requires that freedoms protected by fundamental rights be safeguarded over time and that opportunities for freedom be distributed proportionately across generations.'[44]

In order to counteract a unilateral shift of greenhouse gas emissions into the future, as stipulated by the state objective provision of Article 20a of the Basic Law (protection of natural resources), fundamental rights therefore have the effect of safeguarding freedom across time. The Federal

[37] BVerfGE 157, 30 (120 ss. no. 165, 168, 170, 172).
[38] BVerfGE 157, 30 (113 no. 149 f.)
[39] BVerfGE 157, 30 (114 no. 152.)
[40] BVerfGE 157, 30 (123 s. no. 170, 172).
[41] BVerfGE 157, 30 (98 no. 117, 131 ss.; 184 ss.).
[42] Holoubek, 2022, p. 102 sees this decision as the "most innovative decision in terms of fundamental rights doctrine"; see also Calliess, 2021, p. 355.
[43] BVerfGE 157, 30 no. 116 ss. and 182 ss.; see also Ekardt and Heß, 2021, p. 579 ss.; Ruttloff and Freihoff, 2021, p. 917 s.; Schlacke, 2021, p. 912 ss.; Fister, 2022, p. 460 ss.
[44] BVerfGE 157, 30, 130 s. no. 183: „Das Grundgesetz verpflichtet unter bestimmten Voraussetzungen zur Sicherung grundrechtsgeschützter Freiheit über die Zeit und zur verhältnismäßigen Verteilung von Freiheitschancen über die Generationen."

Constitutional Court sees this as an "intervention-like preliminary effect on the freedom of the complainants, which is comprehensively protected by the Basic Law,"[45] which must be justified.

The court considers the current measures to be an infringement on the freedom of younger generations because they will inevitably lead to comprehensive restrictions on freedom in the future due to their irreversible consequences. At issue is the excessive impact of today's actions on the fundamental conditions of existence in the future, which justifies future-oriented responsibility in the present to avert damage.[46] This intervention-like preliminary effect is the result of a decision by the ordinary legislature, which, under the Climate Protection Act of 2019 (KSG), allows a certain amount of CO_2 emissions until 2030. However, this also means that the possibilities for permissible emissions for the period after 2030 are significantly reduced.[47] The court refers to the state objective provision in Article 20a of the German Basic Law (GG), which, as a climate protection requirement, aims to halt the continuous global warming that has been progressing since the beginning of the industrial age, leaving only a limited CO_2 budget[48] that may be released into the atmosphere if a certain global temperature is not to be exceeded.[49] By deriving from the state objective provision of Article 20a of the Basic Law the obligation to allocate the restriction of emission possibilities in a forward-looking and proportionate manner, the Federal Constitutional Court concludes that the provision of the KSG 2019 constitutes an infringement of fundamental rights.[50]

To justify this intervention-like preliminary effect, the BVerfG assesses the temperature threshold specified in the KSG as a constitutionally relevant concretization of the climate protection goal of the Basic Law.[51] According to the BVerfG, the chosen climate target is covered by the legislature's "concretization prerogative" as set out in the state objective provision. However, the principle of proportionality, which requires an even distribution of CO_2 reduction burdens over time until climate neutrality is achieved, has been violated:

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[45] BVerfGE 157, 30 (130 no.183).
[46] Britz, 2024, p. 199, p. 207.
[47] BVerfGE 157, 30 (130 no. 183).
[48] BVerfGE 157, 30 (138 s. no. 191).
[49] BVerfGE 157, 30 (62 ss. no. 35 s.).
[50] Ekardt and Heß, 2021, pp. 579-580; Möllers and Weinberg, 2021, p. 1069, 1073; Burtscher and Schindl, 2022, p. 649, p. 654 s.
[51] BVerfGE 157, 30 (145 no. 209).

> *However, because the course for future restrictions on freedom has already been set by the current regulation of permissible emission levels, its impact on future freedom must be proportionate from today's perspective and at the present time – when the course can still be changed.*[52]

The principle of equality is referred to in the prohibition of unilateral distribution of reduction burdens at the expense of the future.[53] Nevertheless, the subsequent remarks refer entirely to the principle of reasonableness associated with civil liberties, without referring to the need for an even distribution of burdens between today and tomorrow. This avoids a proportionality test based on equality, which would have required horizontal balance in the sense of a fundamentally symmetrical distribution.[54] Nevertheless, the right to freedom is linked to "echoes of equality law." [55] What is required is an even distribution of the restriction of freedom, ultimately a generationally equitable distribution of burdens.[56] Once again, the factor relevant for assessing the evenness of the distribution of the restriction of freedom is the state objective and the resulting climate neutrality. To this end, a relationship is established between the current government measures aimed at reducing CO_2 emissions and the hypothetical measures that would be necessary to achieve the remaining CO2 budget in an anticipated future scenario. The prerequisite for establishing this relationship is a fixed, remaining CO_2 budget (ascertainable "remaining budget"). This reasoning led to the provision of the KSG determining emissions until 2030 being declared unconstitutional.

The court thus bases the success of the constitutional complaint on the defensive function of fundamental rights, even though there was no current violation of fundamental rights, but only a fear of such a violation in the future. Nevertheless, the Federal Constitutional Court already declared that

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[52] BVerfGE 157, 30 (135 no. 192).
[53] BVerfGE 157, 30 (135 no. 192).
[54] See Britz, 2024, p. 199, p. 219.
[55] Britz, 2024, p. 199, p. 217; more extensive Möllers and Weinberg, 2021, p. 1069, p. 1073; Ruttloff and Freihoff, 2021, p. 917, p. 921; Holoubek, 2022, p. 107, who see this as an approach to equality.
[56] Ekardt and Heß, 2021, pp. 579-580; Möllers and Weinberg, 2021, p. 1069, p. 1073; Ruttloff and Freihoff, 2021, p. 917, p. 918; Schlacke, 2021, p. 912, p. 914 ss.; Wolf, 2022, p. 451, p. 462.

the complainants' fundamental rights had been violated, citing the "preliminary effect of the laws, which is equivalent to an encroachment." The contested legal situation gives rise to a "currently insufficiently contained risk of future infringements of fundamental rights." [57] Although the reason for the unconstitutionality of the contested provisions lies in the future, the Federal Constitutional Court extends its review to this as well.

2.3. The ECtHR's Climate Senior Women Switzerland ruling: "Protection from the negative effects of climate change" as an expression of the right to private and family life (Art. 8 ECHR)

The Climate Seniors ruling by the Grand Chamber of the ECtHR concerns several complaints brought by individual plaintiffs and an association seeking to obtain a ruling against Member States to protect the climate.

2.3.1. Facts

In November 2016, the association Climate Seniors Switzerland and four other plaintiffs, supported by the environmental organization Greenpeace, filed a petition at the Swiss federal level.[58] Because global warming of more than 2 degrees Celsius would very likely lead to a "dangerous anthropogenic disturbance of the climate system," the federal government's current measures to achieve its climate target violate the Swiss Federal Constitution, namely the precautionary principle and the right to life, as well as the ECHR. The risk that the federal government is taking by not pursuing the 2-degree target is unacceptable because it means that Switzerland is not adequately fulfilling its constitutionally guaranteed duty to protect the holders of fundamental rights. The Federal Department of the Environment, Transport, Energy and Communications (UVEK) refused to consider the petition.

The appeal against this decision to the Federal Administrative Court was rejected in December 2018 on the grounds that senior citizens are no more affected by the consequences of global warming than other people. The plaintiffs and the Climate Senior Switzerland association then lodged an appeal with the Swiss Federal Supreme Court. The Swiss federal government took the view that Switzerland's political system, with its instruments of direct democracy, offered sufficient opportunities to advance

[57] BVerfGE 157, 30 (163 no. 243, 246 s.),
[58] Grosz, 2023, p. 351 ss. on climate protection in Swiss courts.

climate issues.[59] The judicialization of such processes conflicted with the principles of separation of powers and subsidiarity. It also curtailed democratic debate and made it more difficult to achieve political solutions. This argument must be seen in the specific context of the Swiss legal system, which provides for extensive opportunities for direct democracy but does not recognize judicial review of legislation. The Swiss Federal Supreme Court largely agreed with this view and dismissed the appeal in May 2020 on the grounds that the appellants' concerns should be addressed through political means rather than legal action. This exhausted the legal remedies available in Switzerland, as Switzerland has no constitutional court, meaning that the Federal Supreme Court was the highest national court. The climate seniors and the Climate Senior Switzerland association therefore brought an action before the ECtHR.

2.3.2. Decision of the Grand Chamber of th ICJ

In its judgment of April 9, 2024, [60] the Court ruled on these climate lawsuits. It first commented on the admissibility of the lawsuits.

A) Recognition of the right to protection from the negative effects of climate change

In the “Climate Senior Switzerland” case, the European Court of Human Rights (ECHR) concluded that the Swiss courts had violated the right of access to a court (Art. 6 ECHR) by dismissing the case.[61] Furthermore, the Grand Chamber affirms a violation of Article 8 of the ECHR due to slow and insufficiently determined government measures to combat the negative effects of climate change. Article 8 of the ECHR, which protects the right to respect for private and family life, home, and correspondence, is assigned climate protection as one of its protective dimensions. However, it does not protect a “new right to climate protection.” In this regard, the Court clarifies that “no article of the Convention specifically aims to ensure general

[59] *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, 9 April 2024.

[60] *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, 9 April 2024; *Case of Carême v. France (dec.),* App. No. 7189/21, 9 April 2024; *Case of Duarte Agostinho and Others v. Portugal and 32 Others (dec*.), App. No. 39371/20, 9 April 2024.

[61] *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, 9 April 2024, no. 570-640.

protection of the environment as such."[62] It is a question of "the existence of a harmful effect on a person and not simply the general deterioration of the environment."[63]

The right to protection from the negative effects of climate change is protected by Article 8 of the ECHR because the harmful effects of a lack of climate protection hinder the exercise of the right to shape one's personal sphere, one's privacy. The state must grant this protection. This is an expression of the state's duty to protect, which must prevent violations of citizens' rights through breaches of climate law. In addition, Article 2 of the ECHR – protection of life and health – is examined and found to have been violated. However, this standard is ultimately irrelevant to the decision because Article 8 of the ECHR already carries the result and the action must therefore be upheld.

The ECtHR is hereby applying its case law on the violation of positive obligations to climate impacts when the rise in temperature gives rise to a concrete risk of violations of fundamental rights because extreme weather conditions cause flooding or create landslide or avalanche risks in certain locations. Even before this decision in 2024, the ECtHR had already recognized the principle of positive obligations on the part of the state and, in several cases relating to environmental law, had found violations of Convention rights, in particular Articles 2 and 8 ECHR. However, a duty to protect requires that the environmental impacts asserted are of a certain magnitude and pose a real and immediate risk to the legal interests of the respective complainants.[64] In order to reach the threshold of an infringement of fundamental rights requiring justification, it was required that the danger to the protected interests of life, private life, family, or property, if not realized, had at least intensified and become more concrete, and that state authorities could recognize that a danger existed ("foreseeable").[65]

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[62] *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, 9 April 2024, no. 445.

[63] *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, 9 April 2024, no. 446.

[64] *Case of Öneryildiz v. Turkey*, App. No. 48939/99, 30 November 2004, no. 90; *Case of Budayeva and Others v. Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 29 September 2008, no. 160; *Case of Kolyadenko and Others v. Russia*, App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 09 July 2012, no. 187, 217; *Case of Fadeyeva v. Russia*, App. No. 55723/00, 30 November 2005, no. 134

[65] App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 29 September 2008, no. 158.

As a further prerequisite, the ECtHR required that the positive obligation not place a disproportionate burden on the state, thus granting it broad discretion.[66] The cases in which the ECtHR had previously affirmed environmental protection obligations concerned exclusively situations involving potential hazards from immediate sources of danger such as a landfill site, a gold mine, or a river prone to flooding. General threats that have not yet materialized, such as those caused by climate change, have not yet been successfully asserted before the ECtHR.

Now, in the context of climate change, the criterion of "real and immediate" is understood as "a serious, actual, and sufficiently determinable threat to life, health, well-being, and quality of life, which includes an element of material and temporal proximity of the threat to the alleged damage. According to the established case law of the ECtHR on the exercise of protective duties in the context of environmental issues, states are obliged to establish a legal and administrative framework that ensures effective protection of human health and life, and they must apply this legal and administrative framework in a timely and effective manner." In doing so, the state has a wide margin of discretion in exercising its protective duty. The ECtHR merely reviews whether the state matter has been addressed with due care and whether all competing interests have been taken into account.

The Grand Chamber substantiates the state's responsibility under the ECHR for CO_2 emissions in detail, citing scientific studies and international conventions and resolutions.[67] On this basis, environmental protection, which affects the foundations of life and is therefore important for all human rights guarantees, is integrated into the Convention. This leads to a duty on the part of the state to reduce emissions, even though the state itself does not produce the emissions.[68] It is held responsible for the absence or inadequacy of legal regulations if it fails to fulfill its duty to minimize CO_2 emissions and introduce appropriate laws. It is therefore not held

[66] *Case of Hatton and Others v. The United Kingdom*, App. No. 36022/97, 8 July 2003, no. 100; *Case of Taşkin and Others v. Turkey,* App. No. 46117/99, 30 March 2005, no. 116; *Case of Fadeyeva v. Russia*, App. No. 55723/00, 30 November 2005, no. 134; *Case of Budayeva and Others v. Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 29 September 2008, no. 134 ss.

[67] *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, 9 April 2024, no. 102-120, 412, 431.

[68] *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, 9 April 2024, no. 545, 548.

accountable for legislative behavior that violates or jeopardizes the ECHR, but for failing to prevent damage caused by third parties. Switzerland has not fulfilled its obligations in this regard. [69] The state's obligations to act are based on national and international commitments to minimize CO_2 emissions. Since the violations or threats are relevant within the framework of Article 8 ECHR, the state must be regarded as the violator, upon whom corresponding obligations to remedy the situation must be imposed.[70]

B) Foundations of international law and standards of human rights obligations, with particular reference to the Paris Agreement (2015)

As a basis and benchmark for the obligation, the ECtHR refers in particular to the Paris Agreement (2015), which was adopted at the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change in Paris in December 2015 and entered into force on November 4, 2016. By 2023, 195 countries had signed the Paris Agreement. This international treaty obliges the signatory states to combat climate change. The signatory states commit themselves to limiting global warming to well below 2°C, and if possible to 1.5°C, compared to pre-industrial levels. The individual states agreed to set their own national targets for achieving CO2 neutrality. Specifically, the states committed to climate protection by submitting climate action plans for reducing their emissions. The Paris Agreement relies on national commitments, known as Intended Nationally Determined Contributions (INDCs): each country is to declare by what percentage it intends to reduce its climate-damaging emissions. Most countries had already made such commitments in the run-up to the climate summit. What is new compared to the previous Kyoto Protocol is that not only industrialized countries, but also emerging and developing countries have made such commitments. The agreement also stipulates that governments must submit new and stricter targets every five years (known as the "ratchet mechanism") and report transparently on their progress (biennial transparency reports) in order to make compliance with the targets verifiable ("naming and shaming"). In addition, the signatory states commit to not falling short of the targets achieved to date. The treaty has a legally

[69] *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, 9 April 2024, no. 72-75, 782, 569 ss.
[70] *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, 9 April 2024, no. 539-550.

binding framework, while the specific climate targets (NDCs) are primarily based on the voluntary commitments of the states.[71]

The Paris Agreement represents a milestone in that it marks a shift in how countries work together on climate change. The 1992 UN Framework Convention on Climate Change and the 1997 Kyoto Protocol were still based on a two-tiered approach: binding commitments for industrialized countries and low expectations for developing countries. The Paris Agreement replaced top-down targets for some countries with a bottom-up model in which all countries were required to specify nationally determined contributions to environmental protection, which were to be enforced not through legal obligations but through transparency, peer pressure, and regular reviews. This systemic change in international climate negotiations increased the capacity for action and significantly improved the conditions for change.

The ECtHR explicitly refers to this agreement and states that, by ratifying this treaty, Switzerland has committed itself to complying with the obligations set out therein and to making the contributions it has specified. Each individual state is called upon to define its own national path to achieving carbon neutrality. If the ECtHR derives the obligation to act from international agreements that Switzerland has signed and which are binding under international law, in particular the Paris Agreement and the Aarhus Convention, this requires justification, because environmental protection agreements do not, in principle, have any legal significance for the validity and application of the ECHR. In this regard, however, the Grand Chamber states: [72] "The States' obligations under Articles 2 and 8 should be read in the light of the precautionary principle, the principle of intergenerational equity, and the duty of international cooperation."[73] If Articles 2 and 8 of the ECHR must be interpreted in the light of the precautionary principle, intergenerational equity, and the duty of international cooperation, this assigns a binding and justiciable effect to the obligations of states under international law, thus counteracting the weakness of international law in enforcing obligations, which does not provide for sufficient sanctions in the event of treaty violations. This continues the previous case law of the

[71] See Bodle, Donat and Duwe, 2016, pp. 5 ss.
[72] *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, 9 April 2024, no. 377.
[73] *Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, 9 April 2024, no. 377.

ECtHR, which treats environmental protection as a guarantee under the Convention[74] and has used the importance of environmental protection to expand the scope of the Convention. In this context, the Grand Chamber adopts a creative and progressive interpretation in light of modern developments (Convention as a living instrument).

2.3.3. Statement on the ECtHR's Climate Senior Women Switzerland ruling

With its ruling on Climate Senior Switzerland, the ECtHR has continued the development of human rights – a history of expansion, extensification, intensification and unfolding of human rights functions as defensive rights against the state and protective obligations. Overall, the ECtHR refers to the need for an evolutionary interpretation of human rights in light of the conditions in today's society. It has not adhered to a traditional, restrictive understanding of jurisdiction, but has developed its case law, interpreted its own competence extensively[75] and greatly expanded its supervisory function.

In this regard, the allegation is often made that the climate protection law encroaches on the political sphere.[76] Admittedly, the far-reaching protective effect of the human rights guarantees of the Convention, which the Grand Chamber accepted in its Climate Seniors decision, is new. However, the Court intervenes far less in the legislative branch's sphere of competence than it appears at first glance. This is because the ECJ fills the gaps in human rights law with regard to environmental protection, which require legal policy decisions, by drawing on obligations under international law that parliaments have agreed to when ratifying international treaties. In doing so, the ECtHR gives international law an unusually strong enforcement power, which does not usually exist and is often cited as a weakness of international law.

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[74] Critical of this Kühne, 2024, p. 917, p. 920.
[75] Langer, 2023, p. 159, p. 161.
[76] See Wegener, 2022, p. 425, p. 430; Wagner, 2021, p. 2256. Calliess, 2024, p. 820 (828 f.), takes a different view, seeing the limitation of the Federal Constitutional Court to an evidentiary review of violations of fundamental rights protection obligations as an "idealistic overestimation" of the legislature; see also Franzius, 2022b, p. 383 (425 f.). On the judiciary as a climate actor, see Völzmann, 2024, p. 903.

2.3.4. Significance of the Climate Seniors ruling for Council of Europe member states

A) Consequences of the duty to protect against climate change and its consequences for national legal systems

It has become apparent that threats to climate protection are increasingly being linked to fundamental and human rights, which predominantly give rise to a far-reaching state duty to protect against climate change and its consequences or, according to the German Federal Constitutional Court, an obligation 'to safeguard freedoms protected by fundamental rights over time and to distribute opportunities for freedom proportionately across generations'. The courts have not recognised an independent right to climate protection, as demanded by NGOs.

Despite the courts' commitment to the separation of powers and their lack of jurisdiction over independent climate policy, the decisions outlined above have led to stricter control of national climate protection plans. The courts are demanding clear and precise guidelines on how states intend to implement their self-imposed climate protection commitments in a manner that preserves freedom and is fair to future generations, and are pointing to the inadequate action taken by their governments. To justify the failure of governments, reference is made to the IPCC reports and other scientific findings on climate protection, in particular the 2015 Paris Climate Agreement and the commitments made by states in connection with it. These guidelines are declared to be the standard to be adhered to. This counteracts the weakness of international law, which lies in the lack of enforcement mechanisms.

B) Human rights complaints before the ECtHR as a means of enforcing obligations under international law

The ECtHR's ruling in the Climate Seniors case means that all member states of the Council of Europe are obliged to protect against the negative effects of climate change. In particular, they will be measured against the 2015 Paris Agreement, insofar as they have ratified it and reported long-term net-zero targets in their nationally determined contributions to the agreement. These commitments cover approximately 90% of global economic activity, with the aim of achieving net-zero emissions between 2050 and 2070.[77] The ECtHR's Climate Senior Switzerland ruling shows

[77] Allen et al., 2022.

that international law obligations are being used to specify human rights protection duties. This creates a law enforcement mechanism that eliminates a weakness in international law, namely the lack of sanctions. As further climate protection lawsuits are pending and new lawsuits are expected, it is likely that the ECtHR will continue to exercise stricter control over national climate protection plans.

2.4. Case law of the European Court of Justice on climate protection

The European Court of Justice in Luxembourg has also dealt with climate lawsuits on several occasions. The majority of the relevant cases concerned EU emissions trading. Member States in particular questioned the competence of the European Commission to review national allocation plans or the legality of the procedures.[78] Plant operators also attempted to bring cases before the Court, but their actions were not admitted.[79] In its rulings, the Court reaffirmed the high importance of climate protection and the significance of EU emissions trading, but concluded that the European Commission should not take market consequences into account in its review of national action plans.[80]

In 2018, an EU court dealt with a case comparable to the current climate lawsuits for the first time: In the People's Climate Case, ten families from the EU, Kenya and Fiji brought an action before the Court of Justice of the European Union (CJEU) against the European Parliament and the Council of the European Union on the grounds of the dangers of climate change directly affecting them, with the aim of achieving stricter EU climate targets.[81] The lawsuit was dismissed in May 2019 as inadmissible

[78] See Case C-503/07 P, *Saint-Gobain Glass Deutschland GmbH v Fels-Werke GmbH, Spenner-Zement GmbH & Co KG, Commission of the European Communities*, 8 April 2008; Case C-6/08 P, *Steel Košice vs Commission,* 19 June 2008; T-374/04, *Federal Republic of Germany v Commission of the European Communities*, 7 November 2007; General Court of ECJ,23.11.2005, T-178/05, *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*, 23 November 2005; T-183/07, *Republic of Poland v Commission of the European Communities,* 23 September 2009.

[79] T-28/07, *Fels-Werke GmbH, Saint-Gobain Glass Deutschland GmbH and Spenner-Zement GmbH & Co. KG v Commission of the European Communities*, 11 September 2007.

[80] T-178/05, *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*, 23 November 2005, no. 60; T-183/07, *Republic of Poland v Commission of the European Communities*, 23 September 2009, no. 113.

[81] T-330/18, *Armando Carvalho and Others v European Parliament and Council of the European Union*, 8 May 2019.

due to a lack of individual concern. The plaintiffs lodged an appeal with the ECJ in July 2019.[82] The main point of contention was the interpretation of "individual concern", which is required for a natural or legal person to have standing to bring an action for annulment under Article 263(4) TFEU. Both the General Court and the ECJ followed previous case law and denied that the plaintiffs were affected in a special way, as required by the so-called Plaumann formula,[83] which had been developed 60 years earlier.[84] With this decision, the ECJ confirmed that legal protection for individuals must generally be granted by the courts of the Member States, thereby declaring climate lawsuits brought by individuals on the basis of fundamental rights to be inadmissible.

2.5. Advisory Opinion of the International Court of Justice on the threat to human rights posed by climate change

The United Nations General Assembly has adopted a resolution requesting the International Court of Justice (ICJ) in The Hague to issue an opinion on the obligations of States in relation to climate change and to identify the relevant legal bases. The main issues addressed in relation to climate protection were the existence of an obligation under international law to protect the climate and possible claims for damages between states in the event of non-compliance. Numerous states and international organisations participated in these proceedings, and civil society actors also submitted statements. In addition, the International Court of Justice heard expert testimony on climate change.

2.5.1. Advisory Opinion of the ICJ

The ICJ, acting as a kind of global constitutional court,[85] took on this task and, in its Advisory Opinion issued on 23 July 2025,[86] established a comprehensive obligation for all states worldwide to protect the climate and compensate for damage caused by climate change, based primarily on

[82] Case C-565/19 P, *Armando Carvalho and Others v European Parliament and Council of the European Union*, 25 March 2021.
[83] Case C-25/62, *Plaumann & Co. v Commission of the European Economic Community*, 15 July 1963; see Fitz and Rathmayer, 2021, p. 32; Winter, 2022, p. 367; Christiansen and Masche, 2023, p. 31, p. 32 s.
[84] C-330/18, *Bruno Gollnisch v European Parliament*, 21 March 2019, no. 71 ss.
[85] See Ekardt and Heß, 2025, p. 1297 ss.
[86] IGH, Advisory Opinion: Obligations of State in Respect of Climate Change, 23.7.2025.

international climate law, human rights and customary international law, including other international treaty law. The court concluded that climate change poses a significant threat to all states. Therefore, states must take measures against climate change, which, given its negative effects, impairs a number of human rights. This is because protecting the environment is a prerequisite for the exercise of many human rights, in particular the right to life and health. The ICJ emphasises the importance of the human right to a clean, healthy and sustainable environment for climate protection and refers to the difficulties of fulfilling numerous human rights obligations without simultaneously guaranteeing the protection of the human right to a healthy environment. To this end, it is necessary for states – in addition to taking their own measures against climate change – to also oblige companies to behave in a climate-friendly manner. This is particularly relevant at present because climate protection regulations aimed at companies are being repealed worldwide, such as the EU Supply Chain Directive on corporate due diligence, which is to be deregulated and de-bureaucratised.

The ICJ also refers to the 2015 Paris Agreement. It reaffirms that states must aim for 1.5 degrees and not 'well below 2 degrees', as the 1.5-degree target of the Paris Agreement has now become legally binding. It implicitly assumes that the structure of Articles 2, 3 and 4 of the Paris Agreement suggests that the target pursued therein is legally binding.

The ICJ sees environmental protection and human rights as closely linked. The current major international climate agreements, namely the UN Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement, are not definitive regulations for combating climate change. Rather, climate protection is an obligation that already arises from human rights treaties: 'The Court thus concludes that, under international law, the human right to a clean, healthy and sustainable environment is essential for the enjoyment of other human rights.' Therefore, even those states that are not (or no longer) party to climate protection agreements but are party to human rights treaties are also obliged to protect the climate. The 1.5-degree limit is justified by the fact that climate change currently poses a double threat to the freedoms guaranteed by the constitution in liberal democracies: on the one hand, there is a danger that the basic prerequisites for freedom – life, health and a minimum standard of living – will be destroyed. Secondly, there is a danger that effective climate protection will be postponed until it can only be implemented extremely quickly and in a way that challenges freedom. Unlike the German Federal Constitutional

Court, the ICJ[87] focuses on the right to a healthy environment and not on the danger of massive future infringements of freedom if no environmental protection measures are taken now. The ICJ refers to this as the right to a healthy environment. However, it does not consider this right to be comprehensively protected as such, but only to the extent that the impairment of the environment affects the life, health and minimum subsistence level of human beings, which are explicitly included in national and transnational human rights catalogues. These rights arise implicitly from the guarantees of freedom: without life, health and a minimum subsistence level, there is no freedom.

Furthermore, the ICJ bases the obligation to adhere to the 1.5-degree limit on customary international law. In particular, the court refers to the customary legal obligation to avoid significant environmental damage by observing duties of care with regard to technical risks.[88] This may give rise, on the one hand, to an obligation to refrain from further damage and, on the other hand, to a liability for damages on the part of states towards other states if they have contributed to climate change in a negligent and culpable manner, thereby causing certain damage elsewhere. This is of particular practical significance because industrialised countries have contributed disproportionately to greenhouse gases in the atmosphere.

With this advisory opinion, the ICJ has aligned itself with the advisory opinion of the United Nations International Tribunal for the Law of the Sea on climate change of 2024. It also refers to the decisions of regional human rights courts, such as the Inter-American Court of Human Rights and the European Court of Human Rights, which have dealt with the relationship between human rights and climate change. The ICJ concludes that human rights establish a state duty to protect, to take decisive action to combat climate change and to take mitigation, adaptation and cooperation measures in the context of climate change.

2.5.2. On the significance of the ICJ legal opinion[89]

A comparison of the ICJ Advisory Opinion with the decision of the German Federal Constitutional Court reveals that the German view that protective rights or ‘protective obligations’ are, in cases of doubt, less important and

[87] No. 369 ss. and 387 ss. of the Opinion.
[88] No. 271 ss. of the Opinion.
[89] See Ekardt and Heß, 2025, p. 1297 ss.

more open to consideration than defensive rights is not shared. On the other hand, the ICJ implicitly shares the view that fundamental rights have a precautionary dimension, as affirmed by the Federal Constitutional Court when examining the 'present nature' of the infringement of fundamental rights. Furthermore, unlike the German Federal Constitutional Court, the ICJ does not deal in detail with the requirements arising from the principle of proportionality.

Furthermore, the ICJ's reference to customary international law and human rights is of central importance. This has significant implications for countries that have withdrawn from the Paris Agreement, such as the United States, as primary and secondary claims resulting from climate change are recognised independently of the Paris Agreement and can therefore form the basis of climate lawsuits against both states and companies.

Although this opinion is not legally binding on states, it can nevertheless have an impact in many areas. National and regional courts repeatedly refer to the International Court of Justice in their decisions and follow its reasoning. Civil society can also use the opinion to strengthen its demands for more climate protection from states.

2.6. Significance of the Climate Seniors ruling and the Advisory Opinion of the ICJ for the member states of the Council of Europe

2.6.1. Consequences of the duty to protect against climate change and its consequences for national legal systems

It has become apparent that threats to climate protection are increasingly being linked to fundamental and human rights, which predominantly give rise to a far-reaching state duty to protect against climate change and its consequences or, according to the German Federal Constitutional Court, an obligation 'to safeguard freedoms protected by fundamental rights over time and to distribute opportunities for freedom proportionately across generations'. The courts have not recognised an independent right to climate protection, as demanded by NGOs.

Despite the courts' commitment to the separation of powers and their lack of jurisdiction over independent climate policy, the decisions outlined above have led to stricter control of national climate protection plans. The courts are demanding clear and precise guidelines on how states intend to implement their self-imposed climate protection commitments in a manner

that preserves freedom and is fair to future generations, and are pointing to the inadequate action taken by their governments. To justify the failure of governments, reference is made to the IPCC reports and other scientific findings on climate protection, in particular the 2015 Paris Climate Agreement and the commitments made by states in connection with it. These guidelines are declared to be the standard to be adhered to. This counteracts the weakness of international law, which lies in the lack of enforcement mechanisms.

The ECtHR's ruling in the Climate Seniors case means that all member states of the Council of Europe are obliged to protect against the negative effects of climate change. In particular, they will be measured against the 2015 Paris Agreement, insofar as they have ratified it and reported long-term net-zero targets in their nationally determined contributions to the agreement. These commitments cover approximately 90% of global economic activity, with the aim of achieving net-zero emissions between 2050 and 2070.[90]

2.6.2. Human rights complaints before the ECtHR as a means of enforcing obligations under international law

The ECtHR's Climate Seniors ruling and the Advisory Opinion of the ICJ show that obligations under international law are being used here to give concrete form to human rights protection obligations. This creates a law enforcement mechanism that eliminates a weakness in international law, namely the lack of sanctions. As further climate protection lawsuits are pending and new lawsuits are expected, it is likely that the ECtHR will continue to exercise stricter control over national climate protection plans.

In contrast, the German Federal Constitutional Court has chosen a new construct for the protection of future freedom and has derived from this an obligation to set targets, but not to take concrete measures.[91] These decisions, which are often classified as the result of strategically conducted

[90] Allen et al., 2022.
[91] BVerfGE 157, 30 no. 182 ff.

litigation,[92] have a significant impact on the future and thus take into account the 'generation-oriented dimension' of human rights.[93]

3. The call for criminal law to protect the environment and climate

In view of the dramatic reports on the current state of affairs and the equally dramatic future scenarios in the field of environmental and climate protection, it is not surprising that there are increasing calls to use criminal law to protect the natural environment and climate. Environmental criminal law concerns those offences that are central to the protection of ecological sustainability goals[94] – the interlinking of economic, social and ecological concerns, taking into account the interests of future generations.[95] Climate criminal law, on the other hand, primarily concerns the protection of the atmosphere, which is polluted by greenhouse gases, especially CO2. Unlike environmental criminal law, climate criminal law is not primarily concerned with the pollution of the air as such, but with long-term changes to the atmosphere. The injustice of 'climate crimes' is seen in the fact that greenhouse gases are emitted without appropriate compensation measures being taken to achieve climate neutrality.[96] From a criminal law perspective, this raises the question of whether the atmosphere needs criminal law protection by making climate-damaging behaviour punishable by law.[97]

Requirements for environmental and climate criminal law can be found in European Union law,[98] which also aims to strengthen the criminal law protection of the environment and climate with the Green Deal.[99] Particularly noteworthy in this context is Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law, which specifies the minimum offences that Member States must criminalise and the minimum upper limits

[92] Vgl. Hahn, 2024, passim; Graser, 2019, 317. For the decision of the German Federal Constitutional Court see Wieland, 2022, p. 167 ss.; for a different view see Wolff, 2024, p. 1402.
[93] Schmalenbach, 2024, p. 55 ss.
[94] Schmoller, 2025, p. 75.
[95] Calliess, 2025, p. 1 ss.; Glaser, 2006, p. 44; Kahl, 2009, p. 2, p. 6.
[96] Satzger, 2024, p. 280, p. 281.
[97] In more detail Kaiafa-Gbandi, 2023, p. 41, p. 45 ss.; Satzger and von Maltitz, 2021, p. 1 ss.; Schmoller, 2025, p. 112.
[98] Calliess, 2025, p. 1 ss.; Glaser, 2006, p. 44; Kahl, 2009, p. 2, p. 6.
[99] Mitteilung der Kommission v. 11.12.2019 3 KOM (2019) 640 endg.

for sanctions. In particular, new criminal offences and tougher sanctions for individuals and companies are planned. This directive also contains provisions on the framework conditions and procedures, e.g. for the systematic collection and publication of data and information on environmental crime and for cooperation between Member States. The Member States of the European Union must transpose the provisions of this Directive, which the European Union has adopted to combat transnational, organised, profit-driven environmental crime through criminal law, into national law by May 2026 (see 3.1.).

The Council of Europe has also been active in the field of environmental criminal law for decades. With the Convention on the Protection of the Environment through Criminal Law of 4 November 1998,[100] it pursued the goal of harmonising environmental criminal law[101] and formulated environmental criminal offences in which intentional or negligent acts are punishable. The Council of Europe has pursued the goal of harmonising environmental criminal law and formulated environmental criminal offences in which intentional or negligent acts are to be punished if they have caused or are likely to cause lasting damage to the quality of the air, soil or water or to animals and plants. However, this convention did not enter into force because the minimum number of three ratifications required for its entry into force was not reached. In 2025, the Council of Europe pushed for criminal law protection of the environment and climate through new, stricter regulations by adopting the groundbreaking Convention of the Council of Europe Convention on the Protection of the Environment through Criminal Law in May 2025 (see 3.2).

These activities at the level of the European Union and the Council of Europe, which provide for significant tightening of environmental and climate criminal law, raise a number of questions when transposed into national law, which will be addressed in conclusion (see 3.3.).

3.1. Green Criminology and the European Union's Green Deal: Combating transnational, organised, profit-driven environmental crime through criminal law

The European Union sees environmental and climate protection as a new priority and calls for effective criminal, administrative and civil sanctions to protect human rights and the environment, especially the foundations of life.

[100] See Hecker, 2024, chap. 3 No. 11.
[101] See Knaut, 2005, p. 243 ss.

However, if fundamental and human rights and environmental protection are to be guaranteed by legal measures, reference is made to values that are generally recognised and are not further questioned or justified. The means to be used to achieve effective protection of these values alone are open to debate. Nevertheless, constitutional concerns have been raised, particularly in Germany, regarding the use of criminal law to protect the climate, especially from the perspective of the constitutional principle of proportionality and the idea of ultima ratio.[102] However, since all EU law takes precedence over the national law of EU Member States and, in the opinion of the ECJ, this also applies if the national law is constitutional law,[103] the criminal law provisions of the European Union, as set out in Directive 2024, must be transposed into national law by the Member States without regard to the constitutional provisions of national law, such as the ultima ratio principle.[104] National law is 'superseded' by EU law.

3.1.1. European Union activities in the field of environmental criminal law up to the Green Deal

In order to adequately sanction legal violations in the field of environmental and climate protection, a set of supervisory measures and penalties is available in environmental, administrative and criminal law that can and should be used effectively. Although the European Union does not have the power to introduce criminal sanctions at EU level, it does have the power to oblige Member States to introduce criminal measures and to set minimum maximum penalties. It has been making use of this power in the field of environmental criminal law for more than 20 years.

A) Proposal of a Directive on the protection of the environment through criminal law (2001)
The Commission first presented a Proposal of a Directive on the protection of the environment through criminal law on 13 March 2001.[105] It assumed that the criminal sanctions imposed by Member States were not sufficient to ensure full compliance with Community environmental law. Article 3 of the

[102] In particular Burchard and Schmidt, 2023, p. 83 ss.; Ransiek, 2024, p. 644 ss.
[103] Case C- 6/64, *Flaminio Costa v E.N.E.L.*, 15 July 1964.
[104] See Brodowski and Jahn, 2017, p. 363, p. 366; Eckardt, 2024, p. 85 ss.; Luef-Kölbl, 2024, p. 65 ff;.
[105] KOM (2001) 139 endg.

proposed directive therefore obliged Member States to make certain intentional or grossly negligent activities punishable by criminal penalties if they violate specific environmental protection regulations of the European Community or regulations of the Member States implementing such regulations. The proposed directive did not contain any further provisions on the structure of the general and specific parts of environmental criminal law or on the legal consequences. However, this proposal for a directive from the Commission was rejected by the Member States in the Council due to reservations regarding the competence of the European Community. The Council therefore adopted Framework Decision 2003/80/JHA on the protection of the environment through criminal law,[106] which contained a list of environmental offences that should be punishable by effective, proportionate and dissuasive penalties in the Member States. In terms of content, the Framework Decision was largely aligned with the Convention on the Protection of the Environment through Criminal Law (ETS No. 172) of 4 November 1998,[107] which never entered into force because the required minimum number of ratifications or accessions was not reached.

B) EU powers with regard to the criminal law of Member States for the protection of the environment

However, the Commission took the view that the Council had encroached on the European Community's powers to issue instructions in the field of criminal law by adopting the Framework Decision,[108] and therefore brought an action before the ECJ for the annulment of the Framework Decision. In its judgment of 13 September 2005, the ECJ declared the Framework Decision invalid.[109] Environmental protection is one of the Community's essential objectives. In principle, criminal law and criminal procedure do not fall within the competence of the Community. However, this could not prevent the Community legislator from taking measures relating to the criminal law of the Member States which were necessary to ensure the full effectiveness of the legal norms it had adopted for the protection of the environment, if the application of effective, proportionate and dissuasive

[106] ABl EG 2003 Nr. L 29, S. 55; see Knaut, 2005, p. 340 ff.; Lienert, 2022, p. 102 ff.
[107] See Knaut, 2005, pp. 243–295.
[108] Heger, 2009, pp. 118 ff.; Hugger, 2000, p. 92 f.
[109] EuGHE 2005, 7879 = JZ 2006, 307; see Kisseler, 2021, p. 53 ff.; Lienert, 2022, p. 92 ff.; Plump, 2021, p. 227 ss.

penalties by the competent national authorities constituted a measure essential for combating serious damage to the environment.

C) Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law

In light of this ruling by the ECJ, on 9 February 2007 the Commission presented a new proposal for a directive on the protection of the environment through criminal law, which came into force on 26 December 2008 as Directive 2008/ 99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.[110] This directive, which has been described as a 'prototype for the Europeanisation of economic and environmental criminal law',[111] concerned in particular air pollution and the disposal of hazardous waste. The ECJ regarded the necessary competence for this as an ancillary criminal law competence to environmental law. According to this, air, soil and water must be protected by criminal law from significant unlawful damage caused by intentional or at least grossly negligent acts. Furthermore, Member States had to establish criminal provisions on the management and shipment of waste, the operation of dangerous installations, the handling of nuclear materials or other radioactive substances, and the protection of living animals and plants. Sanctions had to be provided for both natural and legal persons.

D) Evaluation of the Directive on the protection of the environment through criminal law

In March 2019, the Commission initiated an evaluation of European environmental criminal law,[112] which concluded that the 2008 Directive had not had a significant impact. Over the past ten years, the number of cases of environmental crime that have been successfully investigated and prosecuted has been very low. In addition, the penalties imposed have been too low to have a deterrent effect. It was therefore recommended that the

[110] *OJ L 328, 6.12.2008, pp. 28–37;* see Kisseler, 2021, p. 66 ff.; Lienert, 2022, p. 92 ff.
[111] Heger, 2012, p. 211, p. 212.
[112] Commission Staff Working Document Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19.11.2008 on the protection of the environment through criminal law 3 SWD (2020) 259 final; see Schnichels and Seyderhelm, 2020, p. 829, p. 832.

2008 Environmental Crime Directive be revised with the aim of updating the scope of the Directive and clarifying or deleting vague terms in the definitions of environmental crime. It was recommended that penalties in the Member States be harmonised, that the level of penalties be more closely linked to the financial situation of legal persons, and that aspects of cross-border and organised crime be taken into account.

On 15 December 2021, based on this recommendation, the Commission presented a proposal for a directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC, which was also intended to be part of the European Green Deal climate plan.[113] The proposal aimed to increase the effectiveness of criminal law in combating environmental crime.

E) Directive (EU) 2024/1203 on the protection of the environment through criminal law of 11 April 2024

On 20 May 2024, Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC entered into force.[114] In the Directive on the protection of the environment through criminal law, the Commission sees criminal law as part of a comprehensive EU strategy to protect and improve the state of the environment, to be used as a last resort when other measures are not sufficient to ensure compliance with environmental and climate protection regulations. It bases its call for more effective environmental criminal law on the central role of transnational organised environmental crime and the assumption that considerable criminal profits are made in this field. The prospect of criminal profits, reinforced by low risks of prosecution, creates significant incentives for organised crime groups. Certain forms of waste crime and trade in protected species, such as wildlife trafficking, poaching of elephants and rhinos, deforestation of tropical forests and illegal mining in Europe, are particularly lucrative. Although these offences are less significant in Europe than in the countries of origin, Europe plays a key role as a sales market. However, Europe plays a central role as a sales market: it is one of the most important sales markets, especially for protected species and tropical woods. In this respect, there are points of contact for European countries arising from the illegal import and transit of timber, fauna, flora

[113] COM(2021) 851 final; see Burgert and Veljovic, 2023, p. 156 ff.; Heghmanns, 2024, p. 256 ff.

[114] *OJL, 2024/1203, 30.4.2024.*

and other products related to environmental protection and/or other conflict resources.[115]

Furthermore, reference is made to the low risk of detection and prosecution in the area of environmental crime, as well as to inadequate cooperation between administrative and law enforcement authorities, because environmental authorities do not consistently forward information about crimes committed to law enforcement authorities in order to avoid exposing their own failings or questionable cooperation practices with industry. If no remedy is found here, it is unlikely, for procedural reasons, that environmental criminal law will go beyond punishing easily visible everyday actions or dealing with spectacular accidents. In addition, action must be taken against public corruption in this context.

The environment as a (natural) basis of life, biodiversity and species protection are cited as legal interests worthy of protection. Member States are obliged to introduce new environmental and climate offences.[116] In future, for example, illegal timber trade, illegal recycling of environmentally harmful ship parts ('beaching')[117] and serious violations of chemical legislation will be penalised.[118] The Environmental Crime Directive also contains provisions for 'behaviour comparable to ecocide' and recommends the inclusion of ecocide in the Rome Statute. This development marks a clear shift from voluntary protection measures to enforceable international standards aimed at preventing, deterring and prosecuting the most serious environmental damage.

The Commission proposes a common minimum level of penalties for environmental and climate offences. For offences that result or may result in the death or serious injury of a person, Member States must provide for a minimum prison sentence of up to ten years.

Member States shall ensure that legal persons can be held liable for criminal offences 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. Member States shall take the necessary measures to ensure that, at least for legal persons, criminal offences are punishable by criminal

[115] Price, Donavan and de Jong, 2007, p. 117.
[116] Heghmanns, 2024, p. 256, p. 259 ff.
[117] De lege lata, see Altenburg and Kremer, 2023, p. 133 ff.; Elsner, 2023, p. 135 ff.; Saliger, 2023, p. 585 ff.
[118] Hecker and Lorenz, 2024, p. 33.

or non-criminal fines. New sanctions are also being called for for legal entities, ranging from exclusion from public funding or tenders to the withdrawal of licences and the obligation to establish compliance management systems.[119]

An act is 'unlawful' within the meaning of Article 3(1) of Directive 2024 if it infringes Union law, national laws or administrative provisions of a Member State, or a decision of a competent authority of a Member State implementing the Union law referred to in point (a). Such an act is also unlawful if it is committed in the context of a permit issued by a competent authority of a Member State, if that permit was obtained fraudulently or through corruption, extortion or coercion, or if that permit clearly contravenes the relevant substantive requirements. The Directive 2024 thus ties in with the structure of offences under European environmental criminal law, which is ancillary to Union law and was already implemented by the Environmental Criminal Law Directive 2008.

Furthermore, cooperation in criminal prosecution will be strengthened, and Member States will be obliged to support persons who report environmental offences.

3.2. Activities of the Council of Europe in the field of environmental criminal law

The Council of Europe, being the institution which adopted the first international instrument to combat environmental crime in the Convention on the Protection of the Environment through Criminal Law of 1998 (CETS 172) acknowledges, as well as the European Union**,** the need for an enhanced international approach to combat these crimes. The 1998 Convention never entered into force as the necessary minimum number of ratifications or accessions was not attained. Therefore, the Steering Committee of the Council of Europe for overseeing and coordinating activities in the field of crime prevention and crime control established a Working Group of Experts on the Protection of the Environment through Criminal Law to consider in a Feasibility Study the possible way forward, by assessing whether the elaboration of a new Convention was feasible and appropriate. In June 2022 this group of experts decided that a new Convention was feasible and appropriate. On 23 November 2022, the Committee of Ministers of the Council of Europe adopted the Terms of

[119] Burgert and Veljovic, 2023, p. 156, p. 161.

Reference for a new Committee of Experts on the Protection of the Environment though Criminal Law.

On 14 May 2025, the Committee of Ministers of the Council of Europe adopted the Convention on the Protection of the Environment through Criminal Law (CETS 172). This Convention is the first international legally binding instrument to address environmental crime, covering a broad range of criminal acts that aggravate the triple planetary crisis of climate change, pollution and biodiversity loss. The purpose of the Convention is to prevent and combat environmental crime, promote national and international cooperation, and establish minimum legal standards to guide States in their national legislations. The main goal is the promotion and enhancement of the protection of the environment.

The convention establishes a wide range of environmental offenses and enables states to prosecute intentional conduct resulting in environmental disasters tantamount to ecocide. Provisions on corporate liability, sanctions, and organised crime reflect the evolving nature of environmental offenses and their links to transnational criminal networks. The convention includes a mechanism to monitor implementation and accountability.

Concerning the consistency with existing policy provisions in the policy area of the European Union, the European Commission, representing the Union in the negotiations of the Convention and participating actively in the negotiations, agreed on the text of the new Convention and declared this Convention fully compatible with Union law in general, and the European Criminal Directive in particular.[120] While the European Criminal Directive only concernes environmental criminal offences in the European Union, the Convention has a broader geographic reach encompassing Council of Europe members and third states around the world that can become parties to the Convention. The Convention thus represents the opportunity to foster environmental protection beyond the Union in an international legally binding treaty.

3.3. Statement

The climate crisis is omnipresent, and extreme weather conditions, floods, and crop failures attributable to anthropogenic climate change are now

[120] Council Decision (EU) 2025/2493 of 1 December 2025 on the signing, on behalf of the European Union, of the Council of Europe Convention on the Protection of the Environment through Criminal Law, no. 3.

almost a daily occurrence. This raises the question of whether "securing the future by means of criminal law" is necessary[121] and what answers criminal law has to offer in response to the climate crisis.[122] In Germany, there are some who question whether criminal law is a suitable means of controlling behavior.[123] However, the European Union and the Council of Europe have decided to use criminal law in the climate crisis.[124] This is because punishment alone—in contrast to purely preventive measures—aims at repression and retribution for legally prohibited behavior[125] and therefore cannot be replaced by other sanctions.

3.3.1. Lack of sufficient quantitative and qualitative empirical data

However, critics of the European Union's approach point out that there are considerable shortcomings in the field of environmental criminology, both in terms of quantitative and qualitative data.[126] However, the lack of quantitative data is less significant than is often assumed, because it may be sufficient for legal policy measures if qualitative studies, such as those frequently conducted by and in the EU through expert surveys, can prove the existence of criminal behavior, even if the frequency remains unknown or the manner in which it is carried out often cannot be clarified, e.g., whether and to what extent it involves organized (economic) crime.

3.3.2. Dogmatic and criminal policy challenges in implementing international and EU law requirements in national law

Although the EU and the Council of Europe have established far-reaching requirements, there are considerable dogmatic and criminal policy challenges in implementing international and EU law requirements in national law, which future environmental and climate criminal law will have to address.[127]

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[121] So already Stratenwerth ZStW 105 (1993), 679.
[122] See Schrott, 2024, p. 59, p. 62 ss.
[123] Burchard and Schmidt, 2023, p. 83. Prittwitz and Tiedeken, 2024, p. 59, p. 81.
[124] Also advocating the use of criminal law Frisch, 2024, p. 23 ss.; Satzger and von Maltitz, p. 1.
125 Federal Constitutional Court BVerfGE 20 323, 331; Appel, 1998, p. 217 ff; Jescheck and Weigend, 1969, § 8 I 2; Schmidhäuser, 2004, p.1. p. 16.
[126] Albrecht, 2023, p. 29, p. 35 ss.; Heghmanns, 2024, p. 256 ss.
[127] Schrott, 2024, p. 59, p. 62 ss.

The classic dogmatic categories of attribution of success and individual responsibility raise questions. When defining offenses, it is therefore particularly important to ensure that harmful consequences can be traced back to the actions of individuals. However, threats to the environment and climate are often not caused directly by individuals or single causes, but rather result from cumulative effects. This raises the question of whether the cumulative risk justifies the threat of punishment. [128]At the same time, the requirements of the principle of specificity (nullum crimen sine lege) must be upheld.[129]

Another key aspect concerns the administrative accessory nature of environmental criminal law, which both the European Union and the Council of Europe rightly advocate. Overall, criminal law needs to be designed in an administratively accessory manner, with priority given to the principles of (ecological) sustainability and precaution. In order to prevent gaps in criminal liability, specific regulations are required in this regard for illegally obtained permits, for the recording of circumvention acts, and for the cross-border effect of environmental permits and their limits.

In the business sector, gross negligence should be punishable by law in addition to intentional conduct. Emphasis should be placed on the criminal and administrative liability of legal entities and companies, as well as on confiscation. Furthermore, provisions need to be made for compensation for damages—as a rule, not in the form of restoration to the previous state, but in the form of the most environmentally compatible state.

Environmentally destructive practices that take place outside the Member States of the European Union (e.g., deforestation of rainforests) should also be made punishable in the Member States of the European Union so that companies from the European Union that instigate criminal offenses in non-European countries can be prosecuted in the European Union. It is not sufficient to extend national criminal law rules, as the conditions for double criminality—criminality at home and abroad—are often a prerequisite for the application of criminal law (criminal law norms with foreign connections).[130]

[128] In detail, see Krell, 2024, p. 139 ss.
[129] Schrott, 2024, p. 59, p. 64.
[130] Satzger and von Maltitz, 2021, p. 1, p. 25 ss.; on the principle of universality, see Papathanasiou, 2024, p. 421, p. 423 ss.

3.3.3. Neceessity to develop consistent penal soutions

From a legal policy perspective, it has proven particularly relevant that the protection of natural resources cannot be reduced to a national issue, meaning that environmental law issues arise in the context of international law, EU law, and national law. National criminal law occupies a special position in this regard. It is not only applied or concretized constitutional law, but also enjoys a considerable degree of methodogical, conceptual, and argumentative independence.[131] Therefore, in criminal law, the non-criminal discorse referred to in section 2 must be taken up and dealt with independently in order to develop effective and consistent penal solutions.

[131] Auer, 2007, p. 27, p. 40; zustimmend Schrott, 2024, p. 59, p. 68; furthermore, see Hesse, 1995, p. 265, p. 268; Wahl, 1981, p. 485, p. 507.

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European Union requirements regarding criminal law and civil and administrative sanctions**

ABSTRACT: Directive (EU) 2024/1203 on the protection of the environment through criminal law was adopted on 11 April 2024 and must be implemented into national law until 21 May 2026. It brings the obligation to introduce a lot of new criminal provision to protect the environment comprehensively. The Directive does not only contain provisions on minimum maximum penalties for natural and legal persons, but also other sanctions and measures aimed at prevention and restoration of the environment. It is the task of the courts and authorities to find adequate reactions to a conduct which damages the environment.

KEYWORDS: Directive (EU) 2024/1203, environmental criminal law, minimum maximum penalties, administrative and civil measures.

1. Protection of the environment as important legal interest

The environment is – as hardly anyone would doubt given the climate crisis currently affecting the entire world population – an important legal interest to be protected, because we all want to and can only live in a healthy, intact environment. It is therefore necessary to protect this environment also by means of criminal law. Nevertheless, if one looks at most national legal systems, environmental criminal law plays a rather subordinate role. Often only minor cases – such as farmers who over-fertilise their fields or small production companies that spill chemicals – are actually prosecuted. In contrast, major environmental problems are very rarely prosecuted. The number of actual convictions is clearly disproportionate to the importance of environmental protection as a whole. Just to illustrate the situation in Austria: In the last years, there were never more than ten convictions

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because of environmental offences! Last year, there were five convictions for the central offense of intentional environmental damage and one conviction for the corresponding negligent offense. With a total of 26,500 convictions, this is a numerically insignificant group of offences, which begs the question of why we are even bothering with it. It seems that the law has not yet been fully implemented in practice by the law enforcement authorities. But it is clear that increasing environmental problems cannot be addressed without criminal law.

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

Recognising the necessity of an effective protection of the environment at the beginning of the 2000s, the EU had a major influence on the development of national environmental criminal law provisions. In 2008, the Directive 2008/99/EC on the protection of the environment through criminal law[1], which replaced an initially adopted framework decision that had been declared null and void by the CJEU[2]. As can be seen from the explanatory memorandum, the European legislator's motivation was concern about the increase in environmental offences and their effects, which increasingly transcend the borders of the individual states in which the criminal offences are committed. In addition, the existing penalty systems were considered insufficient to enforce full compliance with environmental protection law. To this end, it was also considered necessary to increase the use of criminal penalties, which express a social disapproval of a qualitatively different nature than administrative penalties or civil damages.

The Directive contained a number of offences that had to be transposed into national law by the Member States, such as:

- the introduction, discharge or emission of a quantity of substances or ionising radiation into the air, soil or water which causes or is likely to cause death or serious injury to persons or substantial damage to the quality of the air, soil or water or to animals or plants;
- the collection, transport, recovery and disposal of waste, including the operational monitoring of these processes and the aftercare of disposal

[1] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, *OJ L 328, 6.12.2008, 28.*
[2] *C-176/03, Commission v. Council of the European Union,* 13 September 2005.

facilities, as well as actions undertaken by dealers or brokers (waste management);

- the shipment of waste in contravention of Union law;
- the operation of an installation in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used;
- the production, processing, handling, use, possession, storage, transport, import, export or disposal of nuclear material or other dangerous radioactive substances;
- the killing, destruction, possession or removal of specimens of protected wild animal or plant species;
- the trade in protected wild animal or plant species, parts or products thereof;
- any behaviour that causes significant damage to a habitat within a protected area;
- the production, import, export, placing on the market or use of substances that contribute to the depletion of the ozone layer.

With regard to the penalties for infringements of these provisions, the Directive only contained a general obligation for Member States to 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. No minimum maximum penalties were provided for. In addition, the Directive required that legal persons can be held responsible for the offences.

In the course of an evaluation of the Directive in 2020[3], the Commission found that the Directive had little impact in practice, as the number of cases of environmental crime that had been successfully investigated and prosecuted remained very low. Furthermore, in the Commission's view, the penalties imposed were too low to have a deterrent effect, and cross-border cooperation was not functioning satisfactorily. In addition, shortcomings in the areas of resources, expertise, awareness, prioritisation, cooperation and information exchange were identified and established in the Member States.

[3] Commission Staff Working Document, Executive Summary of the Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Environmental Crime Directive), SEC(2020) 373 final.

3. Directive (EU) 2024/1203 on the protection of the environment through criminal law

Against this background, the European Commission presented at the end of 2021 a proposal for a recast of the Directive on the protection of the environment through criminal law.[4] At the end of last year, the Council and the European Parliament had already submitted their opinions and proposed amendments.

On 11 April 2024 the directive[5] was adopted by the European Parliament and the Council. It has to be implemented into national law until 21 May 2026 (Article 28 para. 1).

3.1. Unlawful conduct

Like the old directive, the new Directive stipulates that certain intentional and seriously negligent acts should constitute a criminal offence, if that conduct is 'unlawful'. However, in contrast to the current legal situation, this unlawfulness is not only understood as a violation of Union law or national law, regulation or administrative provision, or a decision taken by a competent authority of a Member State, which gives effect to the Union law which is exhaustively listed in the annex to the Directive. But also such conduct shall be unlawful even where it is carried out under an authorization issued by a competent authority of a Member State if such authorization was obtained fraudulently or by corruption, extortion or coercion, or if such authorization is a manifest breach of relevant substantive legal requirements.

3.2. Criminal offences

The list of acts to be criminalised (Art. 3(1)) was significantly expanded. The Directive contains a quite long list of acts which shall constitute a criminal offence where they are unlawful. For example, the following conduct which shall constitute a criminal offence is new:

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[4] Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, SEC(2021) 428 final, COM(2021) 851 final.

[5] Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law, OJ L, 2024/1203, 30.4.2024.

- the placing on the market of a product the use of which on a larger scale, namely the use of the product by several users, regardless of their number, results in the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation into air, soil or water and causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants (lit. b);
- the manufacture, placing or making available on the market, export or use of substances, whether on their own, in mixtures or in articles where such conduct causes or is likely to cause the death of, or serious injury to, any person, substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants and which is not in compliance with certain EU Regulations (lit. c);
- the manufacture, use, storage, import or export of mercury, mercury compounds, mixtures of mercury, and mercury-added products where such conduct is not in compliance with the requirements set out in Regulation (EU) 2017/852 and causes or is likely to cause the death of, or serious injury to, any person, substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants (lit. d);
- the execution of projects within the meaning of Directive 2011/92/EU where such conduct is carried out without a development consent and causes or is likely to cause substantial damage to the quality of air or soil, or the quality or status of water, or substantial damage to an ecosystem, animals or plants (lit. e);
- the recycling of ships falling within the scope of Regulation (EU) No 1257/2013, where such conduct is not in compliance with the requirements referred to in Article 6(2), point (a), of that Regulation (lit. h);
- the ship-source discharge of certain polluting substances which causes or is likely to cause deterioration in the quality of water or damage to the marine environment (lit. i);
- the construction, operation and dismantling of an installation used for offshore oil and gas operations, where such conduct causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants (lit. k);

- the abstraction of surface water or groundwater, where such conduct causes or is likely to cause substantial damage to the ecological status or ecological potential of surface water bodies or to the quantitative status of groundwater bodies (lit. m);
- the placing or making available on the Union market or the export from the Union market of certain commodities and products associated with deforestation and forest degradation, except where such conduct concerns a negligible quantity (lit. p);
- any conduct which causes the deterioration of a habitat within a protected site, or the disturbance of certain animal species, where such deterioration or disturbance is significant (lit. q);
- the bringing into the territory of the Union, placing on the market, keeping, breeding, transporting, using, exchanging, permitting to reproduce, growing or cultivating, releasing into the environment, or the spreading of invasive alien species of Union concern under breach of certain restrictions or conditions under EU law (lit. r);
- the production, placing on the market, import, export, use, or release of fluorinated greenhouse gases, whether alone or as mixtures, or the production, placing on the market, import, export or use of products and equipment, and parts thereof, containing fluorinated greenhouse gases or whose functioning relies upon those gases, or the putting into operation of such products and equipment.

Member States shall ensure that criminal offences relating to conduct listed in Article 3 para. 2 constitute qualified criminal offences if such conduct causes either the destruction of, or widespread and substantial damage which is either irreversible or long-lasting to, an ecosystem of considerable size or environmental value or a habitat within a protected site, or widespread and substantial damage which is either irreversible or long-lasting to the quality of air, soil or water (Article 3 para. 3).

In assessing whether the damage or likely damage is substantial, according to Article 3 para. 6 it shall be relevant:

- the baseline condition of the affected environment
- whether the damage is long-lasting, medium-term or short-term;
- the extent of the damage
- the reversibility of the damage.

3.3. Intention and gross negligence

Most of these acts shall only be criminalised if committed unlawfully and intentionally (Article 3 para. 1). For most of the acts listed in para. 2 also serious negligent conduct shall constitute a criminal offence. This shall be the case for the conduct listed in para. 2 lit. a to d, f, g, I to q, r (ii), s and t.

4. Sanctions against natural persons

4.1. Custodial sentences

The provisions on sanctions contained in the Directive are particularly comprehensive. The Directive does not only provide for more extensive obligations with regard to custodial sentences, but also for a range of other penalties and sanctions.

First, Member States are required to take the necessary measures to ensure that the offences covered can be punished with effective, proportionate and dissuasive criminal penalties (Article 5 para. 1). In addition, the Directive contains a series of so-called minimum maximum penalties, i.e. EU legal acts set minimum limits for the maximum prison sentences for certain offences.

For more severe criminal offences according to Article 3 para. 2 lit a to d, f, j, k, l and r (as e.g., the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation, into air, soil or water which causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water) a minimum maximum penalty of ten years is provided for, if they cause the death of any person (Article 5 para. 2). For (other) qualified offences according to Article 3 para. 3 (e.g. if the destruction of or widespread and substantial damage is irreversible or long-lasting to an ecosystem of considerable size)[6] a maximum penalty of at least eight years must be foreseen. If such more severe offences do not cause the death of any person, maximum prison sentences of at least five years shall be provided for.

Criminal offences committed seriously negligently which cause the death of any person are punishable by a maximum penalty of imprisonment of at least five years. For other (less severe) offences a maximum term of imprisonment of at least five years must be provided for.

[6] See under 3.3.

4.2. Additional criminal or non-criminal penalties and measures

However, the Directive does not stop at custodial sentences, but also provides for Member States to impose additional sanctions and measures (Article 5 lit 3). This list, which was already contained in the Commission's proposal, has been partially expanded by the Council (Council document of 22 December 2023). It includes:

- The obligation to restore the environment within a given period, if the damage is reversible, or the obligation to pay compensation for the damage to the environment if restoration is impossible or the perpetrator does not have the capacity to carry out such restoration;
- Fines that are proportionate to the gravity of the conduct and to the individual, financial and other circumstances of the natural person concerned and, where relevant, that are determined taking due account of the gravity and duration of the damage caused to the environment and of the financial benefits generated from the offence;
- exclusion from access to public funding, including tender procedures, grants, concessions and licences;
- disqualification from holding, within a legal person, a leading position of the same type used for committing the offence;
- withdrawal of permits and authorisations to pursue activities that resulted in the relevant criminal offence;
- temporary bans on running for public office;
- the publication of all or part of the judicial decision that relates to the criminal offence committed and the penalties or measures imposed, which may include the personal data of convicted persons only in duly justified exceptional cases, if there is a public interest, following a case-by-case assessment.

Regarding these sanctions, Member States are not obliged to introduce all of them, but some of them should be provided for.

4.3. Liability of legal persons

As is known from a number of other directives on the harmonisation of criminal law, the Directive contains an obligation to establish a liability of legal persons (Article 6). However, what is new in the area of criminal law is that the Directive not only provides for the obligation to introduce effective, proportionate and dissuasive sanctions, but also a catalogue of sanctions against legal persons (Article 7).

The Directive provides for the mandatory introduction of financial penalties, for which minimum maximum penalties are also provided, based on the total worldwide turnover of the legal person, either in the business year preceding that in which the offence was committed, or in the business year preceding that of the decision to impose the fine. For serious offences, the fines imposed on associations should amount to at least 5% of the worldwide annual turnover of the legal person; in less serious cases, the fine should be 3% of the worldwide annual turnover (Article 7 para. 3). Alternatively, Member States can also provide for minimum maximum fines of EUR 40 Mio respectively EUR 24 Mio.

The concept of fines referring to the worldwide turnover familiar from competition law and administrative criminal law – for example, from financial market law – is now incorporated into criminal law directives. These obligations could pose a challenge for at least some national criminal legislators to transpose these fines into national law, as their corporate criminal law follows different models for determining fines for associations. For example, the Austrian Corporate Liability Act provides for fines that are calculated according to a day fine system which refers to the company's returns and whose maximum amount is significantly lower (around EUR 5 Mio).

In addition to fines, other sanctions and measures are also envisaged for legal persons:

- the obligation to restore the environment to its previous state within a certain period of time or to pay compensation for environmental damage if the damage is irreversible.
- the exclusion from entitlement to public benefits or aid;
- exclusion from access to public funding, including tender procedures, grants, concessions and licences;
- temporary or permanent disqualification from the practice of business activities
- withdrawal of permits and authorisations to pursue activities that resulted in the relevant criminal offence;
- placing under judicial supervision;
- judicial winding-up;
- closure of establishments used for committing the offence;
- an obligation to establish due diligence schemes for enhancing compliance with environmental standards;

- the publication of all or part of the judicial decision that relates to the criminal offence committed and the penalties or measures imposed, which may include the personal data of convicted persons only in duly justified exceptional cases, if there is a public interest, following a case-by-case assessment.

In addition, Member States shall ensure that the illegal profits generated by the offence and the annual turnover of the legal person are taken into account when determining the appropriate level of a penalty.

5. Evaluation of the penalties and measures provided for in the Directive

5.1. A wide range of different penalties

The Directive provides for a wide range of different sanctions and measures in response to environmental offences. Looking at these sanctions and measures, not all of them are of criminal or even penal nature, but can be classified differently as civil or administrative sanctions. The Directive says 'does not specify who should be responsible for imposing these sanctions'. According to the recitals, such accessory penalties or measures are seen as being more effective and should be therefore available in the relevant proceedings.[7]

Prison sentences are clearly criminal sanctions. The obligation to restore the environment to its previous condition is a civil law consequence. Compensation for damage does not constitute a criminal sanction as long as it is limited to the restitution of the damage. If the amount to be paid exceeds the amount of the damage, they have also a penal character.

The exclusion from access to subsidies and permits, the withdrawal of permits and licences, and the temporary prohibition of candidacy for elected or public office are administrative sanctions. However, if they are of sufficient duration and intensity, they may also be considered criminal in nature. Exclusions from benefits (subsidies, grants) qualify as criminal sanctions if they are mandatory as a consequence of a violation of the norm, without a prior prognosis decision to assess the reliability of the applicant for the grant. Reductions in subsidies or grants constitute a criminal sanction if the person concerned is deprived of more than is necessary to reverse the

[7] Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law (31), OJ L, 2024/1203, 30.4.2024.

granting of the subsidy and if the reduction exceeds the amount unlawfully obtained. In such cases, these measures fulfil not only a preventive and behavioural control function, but also a punitive function. Therefore, criminal law guarantees must also be observed when imposing them.

In principle, it is to be welcomed that the European legislator provides for sanctions other than mere custodial sentences and fines. In environmental criminal law in particular, mere sanctions in the form of fines and custodial sentences are not sufficient; appropriate preventive measures must also be taken. Therefore, for example, the obligation for companies to set up systems to fulfil their duty of care in order to improve compliance with environmental standards is a preventive measure that may be more effective in protecting the environment than imposing a prison sentence, which would result in a managing director being dismissed and replaced by another person who would continue the environmentally harmful behaviour.

However, it should be noted that the other sanctions and measures provided for are also intrusive and, despite the desirability of using a variety of sanctions, care must be taken to ensure that a cumulation of sanctions does not lead to a disproportionate response to criminal offences. The relationship between parallel sanction systems in the EU needs to be clarified in order to avoid disproportionate multiple sanctions on the one hand and problems of double jeopardy on the other. National legislators will have to pay particular attention to this when implementing the directive.

5.2. Minimum maximum penalties

It is not surprising that the Directive provides for minimum maximum penalties. What is remarkable is the high level of these minimum maximum penalties, which exceeds that which we are familiar with from other directives. For example, Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children[8] provides for minimum maximum penalties of five years, while the Directive (EU) 2017/1371 on the criminalisation of fraud against the financial interests of the Union (PIF Directive)[9] provides for minimum maximum penalties of four years. The

[8] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, p. 1.

[9] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, pp. 29.

high level in Directive (EU) 2024/1203 is justified to a certain extent by the importance and significance of the legal interest of the environment and the seriousness of the offences. Moreover, the Directive differentiates between the different offences and provides for four different levels of minimum maximum penalties depending on the gravity of the offences.

It is apparent that the prescription of minimum maximum penalties can lead to friction and systemic inconsistencies in the implementation of mandatory minimum maximum penalties, because penalties are envisaged that no longer fit into the national penal system because they are no longer proportionate to the penalties for other offences.[10] It can be seen that minimum maximum penalties of such a high level make the implementation of the Directive in the Member States much more difficult. E.g. in Austria, a maximum level of eight years is unknown and the legislator has to find solutions to fit the new criminal provisions of environmental criminal law into the penalty system of the Criminal Code.

Such breaches of the system can only be justified if they enabled cooperation in cross-border proceedings or if prosecution would otherwise be made more difficult or impossible. However, custodial sentences of at least ten years are not necessary to achieve this, because there are no rules on mutual assistance which require such a high level of penalties. For preventive reasons it does not appear necessary to harmonise and increase maximum penalties across the EU. Saying this, it does not mean that environmental crimes are trivialised and should not be punished adequately. On the contrary, for effective prevention and thus effective environmental protection, it is more important that environmental crimes are actually prosecuted as soon as possible after they have been committed. This requires, on the one hand, clear and comprehensible environmental criminal law provisions and, on the other hand, authorities that focus on prosecuting such crimes.

5.3. Rights of the public to participate in proceedings

The Commission's proposal for the Directive provided for expanded opportunities to claim damages from environmental crimes. It envisaged strengthening the procedural position of the public concerned. The public should be granted rights that enable it to participate in environmental criminal proceedings, for example as a civil party, and thus to assert claims for damages in criminal proceedings (Article 14 of the proposal).

[10] Referring to the general problem see Kert, 2019, p. 13.

The Directive provides that persons affected or likely to be affected by the environmental criminal offences and persons having a sufficient interest or maintaining the impairment of a right, as well as non-governmental organisations that promote environmental prtotection and meet requirements under national law, have appropriate procedural rights in environmental crime proceedings. However, this obligation is limited in that the possibility only needs to be provided for if such procedural rights for the public concerned exist in national law of the Member State in proceedings concerning other criminal offences, e.g as a civil party (Article 15).[11]

6. Conclusion

Directive 2024/1203 on the protection of the environment through criminal law is a comprehensive and innovative instrument for protecting the environment. The sanctions it provides for are not limited to imprisonment and fines, but also include a range of other sanctions and measures aimed at prevention and restoration of a healthy environment. However, whether and to what extent the penalties and measures provided for will actually contribute to improving environmental protection will depend primarily on how the measures are applied and enforced by the law enforcement authorities. There are still major shortcomings in the enforcement of environmental criminal law, which significantly reduces the effectiveness of environmental criminal law regulations. Eliminating these shortcomings will be crucial in determining the extent to which criminal law contributes to environmental protection.

[11] Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law (58), OJ L, 2024/1203, 30.4.2024.

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Research perspectives and approaches of the third and fourth conference of the Humboldt Research Group 'On the systematisation of criminal responsibility by and in enterprises'[***]

1. 'Corporate compliance as a challenge for the design of legal consequences – towards a coherent system of sanctions in commercial criminal law'

On the conference "Corporate compliance as a challenge for the design of legal consequences – towards a coherent system of sanctions in commercial criminal law', the presentations of scientists and practitioners from three member states of the European Union: Austria, Germany, Hungary were followed by a panel discussion about the areas in which further research projects are necessary.

The following research perspectives and approaches were developed:

Compliance as regulated self-regulation

(1) The legal development of compliance began in Anglo-American law in the 1930s as the idea of regulated self-regulation: companies should develop their own rules for their area of activity because the legal regulations were not sufficiently preventive.
(2) Regulated self-regulation requires the integration of non-codified rules into the legal system and has led to the juridification of ethical and internal company rules.

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(3) This process of juridification is indispensable in continental European legal systems, which are subject to the principle of legality within the framework of the rule of law (Rechtsstaatsprinzip).

Compliance as a legal response to corporate deviance

(4) Compliance serves to prevent unlawful or dangerous behaviour.
(5) Compliance primarily focuses on the company as a whole, as an abstract actor. It is based on corporate deviance and not primarily on the deviance of individuals.
(6) Antitrust violations, corruption and embargo violations, environmental crimes, tax offences and subsidy fraud harbour considerable potential for damage. These forms of deviant behaviour can be understood as deviance for which companies are responsible and which must be countered by compliance backed by sanctions.
(7) However, sanction-based compliance can only be enforced if legalisation has taken place.

Compliance as a functional control system with preventive structures

(8) Compliance is about creating the framework conditions for a modern, functional control system with preventive structures. This involves a shift in perspective from the backward-looking approach of traditional, reactive criminal and sanction law to a forward-looking control system with a modern, preventive focus.
(9) An essential feature of compliance is the need to anticipate liability under sanctions law. On this basis, strategies must be developed to avoid criminal, administrative and civil sanctions against the management of a company and against the company itself.
(10) Management responsibility has been extended to group companies (enterprises), thereby partially overriding the principle of separation under company law, particularly in the area of EU fine regulations, which are addressed not to individual legal entities but to companies as economic entities, for example in the area of EU antitrust law, the General Data Protection Regulation and banking supervisory law.
(11) In addition, the supply chain responsibility of large companies provides for responsibility for certain human rights and environmental violations, a responsibility that even extends to the upstream and downstream supply chain.

Law, economics and behavioural psychology as complementary elements of compliance

(12) In addition to the legal approach, compliance is also based on business management, behavioural psychology and organisational approaches that focus on the framework conditions for effective compliance.

(13) Law, economics and behavioural psychology must interact as complementary elements: 'each supplies what the other cannot' in order to establish an effective compliance system.

(14) This requires a comprehensive and systematic identification and assessment of compliance risks within the company. Based on this, a compliance programme must be developed and an adequate compliance organisation created.

Process-oriented compliance in the corporate reality

(15) In the everyday preventive corporate reality of large companies, the goal of avoiding legal violations is often implemented in a 'process-oriented' manner in the business sense. To this end, 'guidelines,' application forms, approval processes and justification requirements are introduced that are highly formalised and fragmented. Such standardisations are largely detached from the decisive legal categories, the legal elements of the offence.

(16) Indications and questions that point to delinquent behaviour in international business transactions are often difficult to map in formalised processes and operationalisable criteria. The FATF's lists of 'high-risk countries' are excellent as checklist criteria, but they are of little practical use because they are at best an indication of marginal significance. Know-your-customer processes, which serve to identify and verify new and existing customers on the basis of money laundering requirements, are important, but ultimately do not enable effective verification of the integrity of business partners abroad.

(17) Even if compliance standardisation lags significantly behind a classic retrospective legal review of a matter, it can raise awareness and sensitivity within a company, enabling management to assess and decide on individual cases. The following applies here: compliance raises awareness simply by its existence and thus contributes to lawful corporate behaviour, even if it cannot guarantee it.

Criminal consequences of compliance violations

(18) Violations of compliance obligations can lead to fines for natural persons as well as legal entities.

(19) Such sanctions require integration into the respective national sanctioning system. Member States can incorporate criminal sanctions into their respective national sanctioning systems, which are generally largely consistent and coherent.

(20) Insofar as the sanctioning of compliance violations involves the enforcement of European Union law, and this is largely the case with compliance, the requirements of EU law must also be taken into account, in particular the constitutional guarantees of fundamental rights enshrined in the Charter of Fundamental Rights.

2. 'Green Criminology and Green Deal: Environmental and Climate Protection – An Urgent Task for Criminal Law'

On the conference 'Green Criminology and Green Deal: Environmental and Climate Protection – An Urgent Task for Criminal Law', the presentations of scientists and practitioners from three member states of the European Union: Austria, Germany, Hungary, as well as from Liechtenstein and Turkey were followed by a panel discussion about the areas in which further research projects are necessary.

The following research perspectives and approaches were developed:

1) The recognition of subjective, enforceable rights of citizens by constitutional jurisprudence and the Human Rights Court in Strasbourg with regard to environmental protection measures affects criminal law and raises the question of the extent to which the distinction between supra-individual and individual legal interests should be abandoned and further developed in the environmental field.

2) There is a need for cross-border solidarity in the field of environmental and climate protection, which requires a new ethical and legal foundation.

3) The issue of resilience, which is becoming increasingly important in the European Union, must also be included in considerations and studies on environmental protection.

4) With regard to climate protection, it is clear that the need for climate protection is much more difficult to communicate than the need for environmental protection, and therefore measures to promote acceptance of climate protection are indispensable. In this regard, a special area of law should be created for the economic sector – with the consequence that, in addition to intentional behaviour, negligent behaviour should also be subject to criminal penalties or fines, and emphasis should be placed on the criminal and financial liability of legal entities, as well as on confiscation and compensation for damages – generally not in the form of restoration to the previous state, but in the form of the most environmentally compatible state.
5) Environmentally destructive practices that have no practical significance in the Member States of the European Union (e.g. rainforest deforestation) should nevertheless be made punishable by law so that companies from the European Union that instigate criminal offences in non-European countries can be prosecuted. It is not sufficient to extend national criminal law provisions, as double criminality – criminal liability at home and abroad – is often a prerequisite for the application of criminal law (criminal law provisions with international implications).
6) There are considerable shortcomings in the field of environmental criminology, both in terms of quantitative and qualitative surveys. However, the lack of quantitative data is less significant than is often claimed in the literature, because it is often sufficient for legal policy measures if qualitative studies – such as those frequently carried out by and in the EU – can prove the existence of criminal behaviour, even if the frequency remains unknown or the manner in which it is carried out often cannot be clarified, e.g. whether and to what extent organised crime is involved.
7) From a legal policy perspective, it has proven particularly relevant that the protection of natural resources cannot be reduced to a national issue, meaning that environmental law issues are subject to conflicts between international law, EU law and national law.
8) The administrative law accessory nature of environmental criminal law requires administrative law provisions that exclude gaps in punishment. This requires specific regulations for illegally obtained permits, for the recording of circumvention activities and for the cross-border effect of environmental permits and their limits.
9) The question of human rights protection beyond humanity should be pursued further and made fruitful for criminal law.

10) Consideration should also be given to introducing the offence of ecocide under international law.
11) The establishment of a duty of care for companies by the UN and the OECD should be made fruitful for environmental compliance and resilience.
12) The requirements for supply chain responsibility are strongly based on the provisions of French law, which was favoured by NGOs and therefore needs to be revised from a legal perspective.
13) Member States of the European Union which, like Poland and Hungary, tend to take a different path within the European Union and refer to their own legal culture, do not question the need for joint protection of natural resources, especially water. This makes it easier to achieve a uniform and coordinated approach by the European Union in such areas than in other policy areas where different speeds can be observed. This opportunity should be used to achieve a common and uniform approach in the field of climate and environmental protection.
14) The international dimension of the issue, which is particularly evident in the discussion on the creation of an international legal offence of ecocide, should be taken into account by making greater use of experience and expertise in the field of international negotiations in order to implement an international environmental and climate protection policy that transcends the borders of the European Union.

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