

STUDY

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Tackling Environmental Crimes under EU Law: The Liability of Companies in the Context of Corporate Mergers and Acquisitions



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Tackling Environmental Crimes under EU Law: The Liability of Companies in the Context of Corporate Mergers and Acquisitions

Abstract

This study addresses the fate of environmental liability and environmental crime under mergers and acquisitions. It analyses whether environmental liability is passed on, either to a successor or to a parent company. Also the role of companies in the Environmental Crime Directive is analysed with specific attention to succession of companies. Particular attention is given to the concept of ecocide. The study concludes that in case of a merger or acquisition environmental obligations are passed on to the acquiring company. However, there is still the risk that corporations could organise their own insolvency. This can be remedied by imposing mandatory solvency guarantees. Criminal liability of an enterprise can in many legal systems also be transferred to the successor company

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LIST OF ABBREVIATIONS

APS	Amsterdam Port Services
COD	Chemical oxygen demand
CJEU	Court of Justice of the European Union
CSC	Convention on Supplementary Compensation for Nuclear Damage
ECD	Environmental Crime Directive
EFFACE	European Union Action to Fight Environmental Crime
ELD	Environmental Liability Directive
ELT	Environmental Liability Transfer
ENPE	European Network of Prosecutors for the Environment
EU	European Union
EUJFE	European Union Forum of Judges for the Environment
FCFA	French des Colonies Françaises d’Afrique
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
IED	Industrial Emissions Directive
IMPEL	European Union Network for the Implementation and Enforcement of Environmental Law
KCM	Konkola Copper Mines
NEA	Nuclear Energy Agency
NGO	Organisation of Economic Cooperation and Development
OECD	European United Left - Nordic Green Left
TFEU	Treaty on the Functioning of European Union
TOCI	Total organic chlorine

UK	United Kingdom
USD	United States dollar
UTKL	Unilever Thea Kenya Limited

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EXECUTIVE SUMMARY

This study focuses on particular aspects of tackling environmental crimes under EU law and addresses more particularly the liability of companies in the context of corporate mergers and acquisitions. There is a fear that especially in the context of corporate mergers and acquisitions companies may escape their environmental (civil and/or criminal) liability. The goal of this study is to examine the fate of environmental (civil and criminal) liability after a corporate merger and acquisition and to, more generally, examine under what conditions companies may escape their civil and criminal liability.

It is important to expose companies to the social costs of their activities, including the environmental harm they cause. This could be done through instruments of civil liability like the Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive or ELD), but, as civil liability has important limitations, in practice public regulation will be used to remedy environmental harm. Public regulation will need to be enforced through administrative and criminal law. As a result, an optimal enforcement framework for environmental law consists of a combination of civil, administrative and criminal law remedies.

Problems may arise potentially when corporations transfer their assets as a result of a merger or acquisition. However, the various European Directives related to mergers (Directive 2017/1132 of 14 June 2017 relating to certain aspects of company law and Directive 2019/2121 of 19 November 2019 regarding cross-border conversions, mergers and divisions) have clearly stipulated that the acquiring company absorb all assets and liabilities *ipso jure* of the company being acquired. As a result a merger or acquisition cannot be an instrument to escape environmental liability as liability is *ipso jure* transferred to the successor. That means that the acquiring company is bound to take over the environmental liabilities of the company it acquired. That does, however, not mean that there is no problem at all. Indeed, companies can in general still escape their environmental liability by selling off their assets and becoming empty shells or by becoming insolvent and eventually even going into bankruptcy. However, those risks (related to the limited liability of the corporation) also exist outside of the context of a merger or acquisition. That is a good reason to impose mandatory solvency guarantees on the operator to guarantee that the environmental liabilities are fulfilled.

In the case of a merger or acquisition, also the environmental permit will be transferred to the acquiring company according to the rules of Member State environmental law. For particular industrial sectors involving major risks, such as the nuclear sector, such a transfer of the environmental permit not only requires a notification to the competent authority, but also an authorisation from that competent authority.

Generally, acquiring companies will exercise due diligence controls to verify the environmental risks related to the target company they aim to acquire. To the extent that the target company has a solvency guarantee (such as liability insurance) that could be transferred to the acquiring company as well, thus guaranteeing compliance with environmental liabilities. With respect to nuclear facilities there is serious criticism on the structure of the nuclear liability conventions. That concerns mostly the low financial limits on the liability of the operator of the nuclear installation as well as the exclusive channelling of liability to the operator.

Based on the case law of the CJEU (more particularly the Landmark judgement of 10 September 2009 in the case Akzo Nobel), one can increasingly notice a tendency to hold parent companies liable for harm caused by their subsidiaries. The CJEU case law with respect to parental liability so far applies

(under specific conditions) to competition law, but could potentially be extended to the environmental area as well. Also in Member State law, one can find attempts to pierce the corporate veil in order to limit the negative consequences of the limited liability of the corporation. In addition, in some cases, parent companies are held directly liable for environmental harm committed by their subsidiaries in developing countries. There are increasingly examples of cases whereby parent companies in the EU were held liable for damage caused by their subsidiaries outside of the EU. On the one hand corporations in the EU are held liable for environmental violations committed by their subsidiaries outside the EU; on the other hand obligations of due diligence are also imposed upon EU corporations to verify that within their supply chain no environmental or human rights violations are committed.

Companies also play an important role in the Environmental Crime Directive (ECD). The obligations under the ECD apply to companies as well, albeit that the penalties imposed on companies should be effective, proportionate and dissuasive, but not necessarily criminal in nature. There are, however, arguments presented in doctrine to expand the liability of corporations in the ECD towards a truly criminal liability. Member States that were traditionally opposed against corporate criminal liability (such as Germany) are now introducing changes in their legislation towards the introduction of corporate criminal liability as well. Various suggestions for reforming the ECD have been formulated in the literature and also by the various enforcement networks. One of the suggestions relates to adopting autonomous environmental crimes that would allow criminal liability, also when the conditions of an environmental permit are not breached. In addition it is suggested to expand the possible remedies in the ECD, for example by explicitly mentioning complementary sanctions aiming at the restoration of harm done in the past and prevention of future harm. It is equally recommended in the literature that the removal of illegal gains should be explicitly mentioned as a possible remedy. Rather than harmonising penalties, the literature argues that it would be important that Member States provide adequate data on environmental enforcement in order to verify the actual implementation of environmental law within the Member States. Currently the EU level has no adequate information on environmental enforcement within the Member States, which may seriously jeopardise the effectiveness of EU environmental law. Finally, it is also recommended that within the ECD explicit room would be provided for administrative enforcement and remedies. Especially since for corporations administrative enforcement may be important, it should be stressed that deterrence could also be reached through effective administrative remedies.

Criminal liability could in principle be jeopardized in case of a succession. However, the rule that the acquiring company takes over the liability of the company it acquired applies, according to the case law of the CJEU, also to the case of civil liabilities and public liabilities. As a result, for example the obligation to pay a fine (for breaches of competition law) can also be transferred to the successor. Also in Member State law there are possibilities to extend the liability of a target company towards the successor, more particularly in cases where a company dissolved itself to avoid criminal liability and resurrected as a different company. Some Member States also provide possibilities to continue the criminal prosecution, despite the dissolution of a company when particular conditions are met. The European Court of Human Rights has, moreover, held that holding a successor liable for criminal liabilities incurred by the predecessor is no violation of the personal character of punishment.

The Probo Koala case concerns a transport of waste from an EU Member State (the Netherlands) to a third country (the Ivory Coast in Africa), allegedly leading to serious environmental harm and even damage to public health in the Ivory Coast. The case led to a number of cases both in the Ivory Coast, in the United Kingdom and in the Netherlands. But in fact it appeared impossible to prosecute the European company responsible for the transport for the environmental pollution that occurred in the Ivory Coast. Prosecution was only possible for technical violations that occurred within the EU. This

raises important questions with respect to the limits of the territoriality principle in applying criminal liability for these types of cross-border pollution cases. The type of foreign direct liability which applies for civil liability to corporations within the EU for environmental harm committed outside of the EU does not apply to criminal liability yet.

One of the answers has been to create the concept of so-called ecocide. It was introduced at the Rome Conference creating the International Criminal Court in 1998, but limited to widespread, long-term and severe damage to the natural environment in war time, which would be clearly excessive in the relation to the concrete and direct overall military advantage anticipated. As a result of that formulation, it is difficult to apply that provision in practice. However, many have suggested to adopt a different type of formulation as a result of which ecocide would become the fifth crime against peace. The European Parliament has recently supported efforts in that direction. Moreover, the debate concerning ecocide underscores again the importance of having autonomous environmental crimes. Given the danger that in some cases criminal liability would be impossible where environmental crime took place under the conditions of a permit, it is important to have autonomous crimes that would allow, in exceptional cases, criminal liability even when the conditions of a permit would be met. That would provide a possibility for the criminal law to award its protection to the environment, for example in cases of an inadequate or outdated permit. There are today still cases (such as UMICORE) where emissions cause danger (or even damage) to human health where criminal liability is impossible as the emissions (partially) are covered through an administrative permit. The creation of an autonomous environmental crime would make it possible to have criminal liability for serious cases of environmental harm (leading to a threat of health damage) even when the conditions of an administrative permit would be followed.

1. INTRODUCTION

1.1 Background of the study: general

Environmental harm has been a major problem, also in the EU, for several decades now. Member States have via domestic legislation reacted to environmental harm by implementing various instruments. In addition to command and control (public) regulation, also environmental liability has played an important role in both deterring violation of environmental legislation from occurring and in providing adequate compensation to victims of environmental harm. Environmental regulation has often also been enforced through the criminal law. That implies that formally violations of environmental law became environmental crime.

Notwithstanding the availability of a wide array of remedies, both via environmental liability and via environmental criminal law, there have been problems with both instruments in achieving their goals. Environmental liability has often been difficult to apply because of high barriers to access justice. The often wide-spread nature of environmental harm has reduced the incentives of individual victims (for whom the harm may be very small) to bring an environmental liability suit. Environmental criminal law has also suffered from a variety of problems. One issue is that it is often difficult to grasp the nature of environmental crime in an appropriate manner in legislative texts. In addition, the sanctions threatening environmental crime were not always of a sufficiently deterrent nature and, most importantly, there have in many Member States been serious problems with the enforcement of environmental criminal law. This is partially due to lacking capacity for monitoring and inspections, but in some cases also to a lack of specialisation with the enforcement authorities.

Some of those problems in applying both environmental liability and environmental criminal law have become even more serious when environmental harm was caused by companies. An important feature of companies is that they are organised as corporations, thus benefiting from the limited liability of the corporation. When such a corporation causes harm which is larger than the corporate assets, insolvency may lead to the result that the liability mechanism cannot serve its compensatory and deterrent functions. Also in case of environmental crime, the (often) corporate nature of environmental crime causes problems. Some legal systems do not recognise the criminal liability of legal entities. In that case either only administrative penalties can be imposed or criminal liability can be imposed on directors and officers or on other natural persons, having acted on behalf of the corporation. Finding those natural persons may in practice often constitute a problem as a result of which the remedy provided in criminal law cannot always be applied. Moreover, even in legal systems where criminal liability of the legal entity does exist, problems may arise if that legal entity would cease to exist. That situation could have a variety of different origins. The company may become insolvent and go in bankruptcy, but there is also a possibility of a corporate succession, for example, when a corporation is taken over in the context of corporate mergers and acquisitions.

The question therefore arises how the liability of companies is dealt with in the context of corporate successions, more particularly corporate mergers and acquisitions. A problem common to both civil environmental liability and environmental criminal law is that there is always a danger that corporate succession is used to escape either environmental liability or environmental criminal law. The question therefore arises whether corporations could, through corporate reorganisation, reduce or exclude their (civil or criminal) liability and whether there are possibilities to remedy those potential dangers. That is the question that will be the central focus of this study.

1.2 The EU context

Important steps have been taken at the European level to deal with the environmental liability of companies. As far as civil liability is concerned, the Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD) plays a most prominent role; criminal liability is regulated through Directive 2008/99 on the protection of the environment through criminal law of 19 November 2008 (ECD). However, notwithstanding these (and several others) significant European legislative efforts, the question still arises whether companies could escape or avoid environmental liability under particular circumstances. That question arises especially, but not only, in the context of corporate mergers and acquisitions or, more generally, corporate restructuring. There is a danger that companies would use corporate structures (such as take-overs and mergers), for example by being taken over by a non-EU company located outside of the EU, so that they would escape their obligations concerning environmental liability under European law. Similar interrogations can arise in the context of corporate groups, *inter alia* on how the liability of parent companies caused by purchased companies could be ensured.

Related questions also arise with respect to the criminal liability; the question arises *inter alia* whether companies may have possibilities to escape the liability regime via different constructions in corporate law. Furthermore, the various studies and reports for and by the European Commission seem also to indicate that more particularly in cases of large environmental harm, companies may escape liability.¹ Some industrial sectors may involve major risks, whereby the question arises whether the current legal framework is sufficient to deal with these ultra-hazardous activities. In that respect, the European Parliament has recently embraced the concept of so-called ecocide,² focusing on criminal liability for specifically harmful events. The question generally arises whether in the process of revising the ECD, specific attention should be paid to the criminal liability of legal entities; the question arises as well whether the concept of ecocide would be a useful or pertinent one in this context.

1.3 Scope

The study will focus on liability of companies for cases of serious environmental harm, trying to identify where particular gaps could arise, more particularly within the context of corporate mergers and acquisition, but also in the broader horizon of corporate reorganizations. The central question would more particularly be how it can be ensured that in cases of corporate mergers or acquisitions, companies still remain liable for environmental harm. That general question should be addressed both from the civil and the criminal liability perspective, specifically focusing on the aspects where there is scope for improvement of the current legal regime (more particularly ELD and ECD) at the European level.

This study will, among other related issues, address the following issues:

- The liability of a purchasing company for environmental damage, caused by the purchased company. This should include an examination of due diligence obligations in the framework of corporate mergers and acquisition. There will equally be an analysis of the ways and practices by which companies could dilute their liability by the selling of assets to a third company or through a merger.

¹ https://ec.europa.eu/environment/legal/liability/pdf/MAWP_2017_2020.pdf
<https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-204-EN-F1-1.PDF>

² https://www.europarl.europa.eu/doceo/document/TA-9-2021-0014_FR.pdf.

- The study should therefore examine how it can be guaranteed that the new company resulting of the acquisition remains liable for the environmental harm caused. The focus should be on the environmental harm within the framework of the ELD, but could ideally be broader and address particular solutions in Member States.
- As environmental harm may be caused by companies both in the EU and outside of the EU and the study will also explore, principally in the context of corporate groups, how the liability of parent companies can be ensured for harms caused by purchased companies
- It will equally be addressed how the raised liability questions relate to specific industrial sectors involving major risks, such as those potentially coming from the nuclear sector, considering that the ELD excludes nuclear liability from its scope.
- How the environmental liability of companies is regulated in the ECD. In that respect specific attention will be paid to suggestions made by the doctrine for the reform of the ECD, also paying attention to original solutions (more particularly remedies) to be found in relevant and more advanced Member States law.
- There is an increasing interest in the concept of ecocide and it has recently been recognized by the European Parliament. This notion will be examined in this study, looking at its potential when applied to companies.
- Having examined all the previous issues, policy recommendations to the attention of the European legislature will be formulated.

1.4 Approach/method

Given the importance and the breadth of the topic, a variety of different approaches will be used. As the title of the study refers to “Tackling environmental crimes under EU law”, obviously EU law will be the central focus. That implies that the Environmental Liability Directive (ELD) as well as the Environmental Crime Directive (ECD) will be studied with respect to the question whether there is a danger that in case of serious environmental harm, companies may escape their liability. However, for the specific topic of corporate mergers and acquisitions, or more broadly, the succession of corporations, it can be established quickly that nothing is mentioned explicitly, neither in the ELD nor in the ECD. To see whether there is any relevance of EU law in that respect, also the EU legislation with respect to mergers and take-overs will therefore have to be examined. Moreover, given the fact that within European environmental liability and criminal law there is no specific discussion of the consequences of succession of companies (it is striking that this is also the fact for the literature discussing the ELD and the ECD) to some extent also solutions in Member States will have to be reviewed.

In a previous study, the environmental liability of companies was extensively examined.³ That study pays more particularly attention to the general question whether there is any risk that companies may escape civil liability under the ELD. Specific attention in that respect was paid to the limited liability of the corporation and to potential remedies. Criminal liability of companies and the ECD were briefly touched upon as well. The results of that study will to an important extent also be used for the analysis in the current study.⁴

³ Faure 2020.

⁴ To some extent the previous study will be summarised for the simple reason that this study should also be considered as one integrated study that could be read without having to consult other documents.

As the previous study paid especially attention to civil liability under the ELD, barriers to access justice for victims of environmental pollution and possibilities to improve the civil liability under the ELD, this study will have a comparatively stronger focus on environmental criminal law. To some extent that is logic as the title refers to “tackling environmental crimes”. However, some of the topics (such as the liability of companies in the context of corporate mergers and acquisitions) do have an important civil liability and corporate law aspect as well. Those aspects will therefore be analysed in this study as well. There is, however, a second reason to focus more strongly on the criminal law. At this moment, there are discussions on the revision and evaluation of the Environmental Crime Directive. The Directive has been evaluated from 2019 to 2020; at the end of 2020 the European Commission published an inception report concerning the review of the Directive⁵ and at this moment the Environmental Crime Directive is being further reviewed. Obviously, it is not the aim of this study to provide an integrated assessment of the Environmental Crime Directive, as that would merit a separate study in itself. However, to the extent that the issues reviewed in this study (more particularly criminal liability in the context of succession of companies) would give rise to particular recommendations for the Environmental Crime Directive, that will obviously be taken into account as well. In other words, the goal of this study is to look at possibilities to revise the Environmental Crime Directive in a problem-oriented manner, more particularly as it concerns the involvement of companies in environmental crime.

In addition to analysing the current EU legal framework, main studies, reports and legal doctrine will be reviewed and specific attention will be paid to original solutions aiming at filling the gaps in relevant or more advanced Member States. In addition the study will equally use a case method. Chapter 4 will focus on the case of nuclear facilities and chapter 8 will be devoted to the Probo Koala case. Moreover, in chapter 9 specific attention will be paid to the UMICORE case.

The aspects of environmental liability will not only be analysed from a legal perspective, reviewing legal literature and policy documents, but an economic approach will also be used. An economic approach is very suitable to address environmental liability as it has more particularly been the economic literature that has pointed at the fact that environmental liability not only has a compensatory function (as often stressed in legal literature), but that liability rules also provide an incentive effect: by exposing the polluter to a potential liability, the polluter will obtain incentives for prevention resulting from the deterrent effect of the liability rules. That (economic) idea is even explicitly mentioned in the Preamble of the Environmental Liability Directive and was also mentioned in the White Paper⁶ (2000) preceding the ELD. In section 3.6 of the White Paper it was mentioned that “It is expected that liability creates incentives for more responsible behaviour by firms”. Moreover, the basic premise of economic analysis, being that corporations are rational actors striving for wealth (profit) maximisation could in some cases be debated when applied to individuals, but usually poses no problem when it is applied to corporations who are supposed to maximise shareholder value.

It may be clear that the topics to be dealt with in this study are very broad as the study relates to environmental liability, potentially covering both civil and criminal liability in the context of corporate mergers and acquisitions. Given the breadth of the topic it is impossible to discuss the entire literature in this domain in a lot of detail. Rather than discussing every topic in detail, the approach to be followed in this study is to make an inventory of the important issues that may arise with respect to serious

⁵ European Commission, Inception Impact Assessment, improving environmental protection through criminal law, Ref. Ares(2020)7247236 of 1 December 2020, available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12779-Environmental-crime-improving-EU-rules-on-environmental-protection-through-criminal-law>, last consulted on 25 March 2021.

⁶ COM(2000) 66 final. The White Paper is also published in Faure 2003, 365-389.

environmental harm, more particularly within the context of corporate mergers and acquisitions. The study will therefore make an inventory, in a problem-oriented manner, of issues that could arise whereby it will more particularly be attempted to identify where they may be gaps in the (civil and criminal) liability system, more particularly in the context of corporate successions. That inventory should provide the reader (and more particularly the policy-maker) an insight in policy developments, key questions and challenges as well as potential solutions as they are suggested in the literature.

1.5 Structure

After this introduction first a theoretical framework will be provided which will simply sketch why environmental liability of companies is important. Attention will especially be paid to the limitations of civil liability and the need to have public regulation enforced by the criminal law. That theoretical framework hence serves to explain interdependencies between civil and criminal liability for environmental harm (2). Next, environmental risks within mergers and acquisitions will be discussed with a specific focus on environmental liability (3). Chapter 4 will examine how this applies to specific industrial sectors involving major risks, especially the case of the nuclear facilities. Chapter 5 is devoted to the liability of parent corporations. Then the focus shifts in the second part of the study to criminal liability. Chapter 6 first addresses the role of companies in the Environmental Crime Directive (ECD). Chapter 7 looks at the succession of companies and the consequences this may have for criminal liability. Chapter 8 then presents the Probo Koala case as an introduction to the topic of ecocide (chapter 9). Chapter 10 concludes.

2. THEORETICAL FRAMEWORK

KEY FINDINGS

- Environmental liability may have many limits, as a result of which ex ante safety regulation is the primary instrument to control environmental pollution.
- Yet, given the inherent limits in safety regulation, environmental liability of companies plays an important supplementary role to provide incentives for prevention.
- Private law remedies may not suffice if the probability of detection is lower than 100%.
- In that case, administrative fines may provide a counterweight for the low probability of detection.
- However, when the benefits of the violation are substantial and the probability of detection is low, a fine of such a high magnitude would be needed that it could reach the solvency limits of the perpetrator. In that case, non-monetary sanctions would have to be imposed. Given error costs, that should be done via the criminal law and the criminal procedure.
- Specific problems may arise with respect to companies, especially when the criminal law would have to be applied to corporations.
- Problems can equally arise, both with criminal as well as with civil environmental liability in case of a succession of companies.
- That is less the case when the company would remain the same legal entity (but only the ownership structure changes), but more in the case of a corporate acquisition or merger. In that case the question arises whether the successor can be held liable for the civil and criminal environmental liabilities of the company it took over.

2.1 Correcting a market failure⁷

From an economic perspective, the goal of environmental policy is to correct a market failure. This market failure results from the negative external effect (also referred to as an externality) created by environmental harm. Since polluters will not feel the negative consequences of the harm they inflict outside of their enterprise, this is described as an external effect.⁸ This externality is, moreover, a negative external effect since it imposes costs rather than confers benefits on third parties. That negative external effect can create a market failure. If polluters are not forced to pay for the external effects they create through their activities, they would lack any incentive for efficient cost abatement. The negative external effect would, in other words, not be incorporated into their decision-making process. As a rational actor, a polluter would not incur costs to deal with externalities in the absence of legal rules forcing the firm to do so.

The negative externality is considered a market failure for the reason that the relative prices of products and services will be too low. Too low refers in this particular context to the fact that they do not reflect the true social costs of the activity. Since the externality is not taken into account and the polluter does

⁷ Faure 2016a, 114.

⁸ See on the various ways to deal with negative externalities, Butler, Drahozal & Shephard 2014, 185-230.

not invest in pollution abatement, relative prices will be too low and consumers will demand too much of a product or service that creates high costs for society. It would, in other words, result in externalisation, meaning that polluters are able to impose the costs of pollution on society. These costs are not “gone”, but born by society at large.

From an economic perspective, the main goal for environmental law would be to internalise the negative externalities resulting from pollution. This point of view needs to be nuanced in one important aspect. Ronald Coase has shown that if transaction costs were sufficiently low, an optimal allocation of resources would always take place, irrespective of the contents of the governing legal rule.⁹ The essence of the Coase theorem is that, even if polluters were not held liable and there would thus be a “right to pollute”, efficient preventive measures would nevertheless be taken, but they would be paid for by the victims. The Coase theorem, however, only considers the efficiency aspect of pollution, but not its distributional effects. Indeed, in a victims’ pay model, it would be the victims that pay for the abatement technology.

The practical value of the Coase theorem may not be overly important. This is because a zero or low transaction cost setting (whereby polluters and potential victims could bargain on efficient abatement) may not often be realised. As a result, the most important next question is how to determine efficient pollution standards and through which instruments this internalisation of the externality could be achieved.

2.2 Goals of environmental liability

A large variety of instruments could in theory be used to force a polluter to internalise externalities by the adoption of efficient standards. These include liability rules, but also direct regulation through command and control and so-called market-based instruments, like taxes, charges and emission trading.¹⁰ An important role could be played by the type of environmental liability rules as incorporated in the ELD. Liability rules force potential polluters to compensate victims for any environmental harm inflicted upon them, if specific conditions are met. From an economic perspective liability rules can have an important incentive function. The idea is that the foresight to be held liable *ex post* will give potential polluters *ex ante* incentives to invest in efficient standards aiming at prevention of the pollution.

Under particular conditions rules of civil liability could also provide compensation to victims of pollution. In fact, that compensatory function of liability rules cannot be satisfied under a so-called fault or negligence regime. The simple reason is that under negligence the potential polluter will have an incentive to follow the due care level required by the legal system in order to avoid being held liable. The result will be that the potential polluter does take efficient care, but will not be liable for the remaining harm that can nevertheless occur. As a result, under a typical application of the negligence rule,¹¹ potential polluters will follow the required due care level. As a result, they will not be found liable and the victim of pollution will not receive compensation under a negligence regime.¹² Strict liability, on the other hand, shifts all the social costs related to pollution (both the costs of efficient prevention and the expected damage) to the potential polluter. As a result, under strict liability an injurer will take

⁹ Coase 1960.

¹⁰ See further on the choice of instruments, Stewart 2007 and Wiener 1999.

¹¹ Thus assuming that the potential polluter has correct information on the applicable standard and is able to apply the standard and that judges set efficient standards and can also accurately assess actual care levels (see on these refinements and conditions for the effective application of the negligence rule, Shavell 1987, 80-81).

¹² The basic working of the negligence rule has been explained by Shavell 1980, 1-25.

the decision to efficiently internalise the externality, but, moreover, the victims of pollution will be compensated. It is for that reason that, not surprisingly, the strict liability regime has been strongly advocated by environmental lawyers and that it can equally be found in many legal systems.¹³ Not surprisingly strict liability therefore became also the main liability rule in the ELD. The choice for the strict liability regime in the ELD was also justified by reference to the polluter-pays-principle.¹⁴ Civil liability and more particularly the strict liability as incorporated in the ELD is therefore in principle a regime that could guarantee the correction of the market failure, created by environmental pollution. However, the application of civil liability also has serious limitations.

2.3 Limits of civil environmental liability

Although polluting companies could be incentivized to take preventive measures as a result of an exposure to civil liability in practice there may be important limits regarding the deterrent effect of the liability system.

A first important problem is that liability rules only provide incentives for prevention as long as there is a capacity to pay the compensation. From the moment that the potential damages are higher than the wealth of the polluter, liability rules will not provide optimal incentives. The reason is that the costs of prevention are directly related to the magnitude of the expected harm. If the expected harm is larger than the individual wealth of the polluter, the polluter will only consider the harm as having a magnitude equal to its wealth. The polluter will, therefore, only take prevention to avoid harm equal to its wealth, which can be lower than the preventive efforts required to avoid the total pollution risk. This is an application of the principle that the deterrent effect of civil liability works only if the injurer has assets to pay for the harm it causes. If the polluter is protected against such liability by insolvency, the problem of underdeterrence arises.¹⁵

Another problem is related to the fact that in some cases liability suits are never brought for a variety of reasons. A first problem is that the harm can be thinly spread among a number of victims. As a consequence, the damage incurred by every individual victim is so small that no victim has sufficient incentives to bring a suit, i.e. the costs of litigation may exceed the anticipated recoveries. This problem will in particular arise if damage is not caused to an individual, but to common property, such as surface waters or a forest. Individual victims may suffer from a problem of so-called rational apathy¹⁶ as a result of which a lawsuit is not brought and the injurer can escape liability.

A second problem may relate to the long time-lapse that might have elapsed before the damage becomes apparent. It is sometimes referred to as latency. In this case, much of the necessary evidence may be either lost or not obtained. Another problem is that if the damage only manifest itself years after the activity the injurer might have gone out of business.

A third problem is that it is often hard to prove a causal link between an activity and a type of damage.¹⁷ Often a victim will not recognise that the harm had been caused by a particular tort, but might think

¹³ For example, see Faure & Partain 2019, 158-161.

¹⁴ Article 1 of the ELD states that "The purpose of this Directive is to establish a framework of environmental liability based on the polluter-pays-principle, to prevent and remedy environmental damage". See further Cassotta 2012, 142-147 and Van Calster & Reins 2013, 9-30.

¹⁵ See generally on how insolvency leads to underdeterrence, Shavell 1986.

¹⁶ Schäfer 2000.

¹⁷ Wilde 2013, 74-97.

that their particular ailment, e.g. cancer, has another non-tortious origin. In addition, in some cases multiple injurers may be involved as a result of which there is uncertainty over which particular injurer caused the harm. This problem of causal uncertainty¹⁸ may again imply that sometimes an injurer can escape environmental liability.¹⁹

A fourth issue relates to the difficulties for victims in accessing justice. Access to justice is often costly, as a result of which also meritorious suits are in some cases not brought. Especially when victims of environmental harm are risk averse, they may want to avoid the high upfront costs of a lawsuit and refrain from a liability claim, again entailing that the operator will not be held liable even though he did cause environmental harm.

2.4 The case for public regulation and enforcement

It are more particularly those limits of civil liability which have been identified in a famous article by Shavell as reasons to prefer *ex ante* government regulation to control environmental harm.²⁰ A first criterion advanced by Shavell is information. Often the parties in a pollution setting, more particularly small- and medium-size companies, may lack the possibilities to obtain information on optimal preventive measures to abate pollution. If that is the case, it may be more resource efficient to allow the government itself to do the research on the optimal technology and to pass on the results of that research through the issuance of regulation. It can be more efficient for the government to acquire information on the optimal emission standard than it would be for an individual firm, for example, to find out what additional reduction in pollution would produce an optimal reduction of the expected harm from the emission. There are undeniable “economy of scale” advantages in regulation.²¹ In addition, the insolvency argument points in the direction of regulation. Pollution can be caused by individuals or companies with assets that are generally lower than the harm they can cause to a broader community by the pollution. The basic problem is that most companies have been incorporated as a legal entity and therefore their shareholders benefit from limited liability. The likelihood of insolvency in case of environmental harm caused by corporations is therefore substantial. Also, the chance of a liability suit being brought for harm caused by wrongful pollution is naturally very low. Often the damage is spread over a large number of people who will have difficulties organising themselves to bring a lawsuit. In addition, the damage might become apparent only many years after a polluting emission took place. This will create proof of causation and latency problems, which will only make it difficult for a lawsuit to be brought against the polluter. In sum, there are many reasons why *ex ante* public regulation rather than civil liability should be the primary instrument to control environmental harm. Moreover, environmental pollution often has no individual victim that has sufficient incentives to bring a liability suit. That may create collective action problems as a result of which liability suits are not brought. These are not only arguments in favour of public regulation, but also of public enforcement. Another important reason is that in practice there is often a lower probability than 100% of detecting a violation of environmental regulation. Civil liability only forces the polluter to compensate the harm done, which only provides optimal deterrence if the probability of detection is 100%. If that probability is lower than 100%, there should be a remedy which counterbalances that low detection rate. In other words, there should be a remedy, which takes into account the low probability of detection to avoid underdeterrence. That can only be provided via public enforcement, for example with administrative fines leading to optimal deterrence.²²

¹⁸ Porat & Stein 2002.

¹⁹ Liu 2013, 75-79.

²⁰ Shavell 1984.

²¹ Shavell 1984, 359.

²² Faure, Ogus & Philipsen 2009, 173-176.

2.5 The need for criminal law²³

So far, I explained the traditional argument why environmental regulation cannot merely be enforced via private law and why public enforcement with public sanctions is indicated. The main *raison* relates to the low probability of detecting violations of environmental regulation.²⁴ This does not yet explain why administrative fines could not be the perfect remedy and why in particular cases the criminal law equally has to be used. All things being equal, the administrative procedure has the major advantage that it is far less costly than the criminal procedure. Administrative fines can be imposed by administrative authorities after a relatively simple procedure, usually requiring a lower threshold of proof, certainly compared to the criminal law and the criminal procedure.²⁵ Administrative law can therefore easily be used to deter environmental pollution.²⁶ There are, however, two important reasons while not all efficient penalties necessary to deter environmental pollution can be imposed through administrative law and why criminal law is therefore necessary as well.²⁷ A first reason is that since the probability of detecting environmental pollution is in practice often very low, the optimal sanction to deter pollution may become very high as well. The likelihood that this optimal fine might outweigh the individual wealth of the offender is relatively high, precisely given the often mentioned insolvency risk.

In the environmental context this is not imaginary. Suppose that a company would have to install a water treatment plant (which is often very costly, running costs can be in the several tens of millions). Suppose that it has to borrow money from the bank and that it is able to negotiate with administrative enforcement authorities in order to delay the installation of the water treatment plant (*de facto* violating the conditions of its permit). If it would, in this example, have to pay an interest of one million euro to the bank in a period of one year, delaying the installation of the water treatment plant (again, which would *de facto* be a violation of environmental regulation) would therefore create a benefit of 1 million. Given the detection rate (*p*) of 1%, the optimal fine in that example would be 100 million euro. Very few environmental laws in the Member States have these types of high sanctions. There may also be no willingness with administrative authorities to impose fines of those magnitudes and, most importantly, even if this optimal fine were imposed, there is a great likelihood that the operator would not be able to pay. That explains that when the optimal fine is higher than the ability to pay of the company, non-monetary sanctions (such as imprisonment or community service) have to be imposed to provide deterrence.²⁸

Still the question could be asked why the criminal law would be needed to impose non-monetary sanctions. This is exactly the second reason for criminalisation: the goal of the enforcement system is to apply sanctions to the guilty, but also to avoid punishing the innocent. This is referred to as the goal of reducing error costs.²⁹ There is therefore a clear justification why society does not want to impose very stringent sanctions (such as imprisonment, but also high fines) through an administrative procedure. The reason is that the costs of the administrative procedure may be lower than the costs of the criminal procedure, but the accuracy of the latter (where the investigations are often undertaken by professional lawyers) may be a lot higher as well. Error costs are higher when very serious sanctions, like imprisonment, can be imposed, rather than monetary sanctions only. The less costly administrative

²³ See also Faure 2020, 82-84.

²⁴ See also Faure 2009, 324-326.

²⁵ Faure, Ogus & Philipsen 2009, 174.

²⁶ See in this respect especially Ogus & Abbot 2002.

²⁷ See in that respect generally Bowles, Faure & Garoupa 2008.

²⁸ Shavell 1985.

²⁹ On the importance of error costs, see Miceli 1990.

proceedings can therefore only be used in all cases where the consequences (and thus the error costs) will not be too high in the event of a wrongful conviction.³⁰

If one were to summarize the previous expose, one could argue that administrative fines (with the advantage of being a lower cost system) could be applied when:

- there is a first time offender
- who committed a breach of regulation unintentionally
- where the benefit of violation is relatively low
- where there is a relative high probability of detection and
- a relatively modest administrative fine would thus suffice to reach optimal deterrence.

The example might be the case where a small- or medium-size company out of ignorance forgot to appoint an environmental coordinator (assuming that the regulation required to do so). In such a case there is no direct environmental harm or emission; the failure of reporting does not provide great benefits to the company (especially in the case where the coordinator was appointed, but the company merely failed to report this). For controlling agencies, it is relatively easy to detect this failure to report. In such a case, a modest administrative fine (if sanctioning is needed at all given that the breach took place unintentionally) would suffice.

If, however:

- there is a repeat offender
- who committed a breach intentionally
- leading to high benefits
- and a relatively small probability of detection
- a high sanction would be needed, which can be probably not be reached through an administrative fine. A criminal sanction would be appropriate in this case.

Again, this can relatively easily be understood: the fact that it is a repeat offender makes clear that it is not an unintentional breach. The operator might intentionally breach regulation in order to gain profit (for example in case of trade in waste) and the possibilities for authorities to discover the breach might be small, hence a small probability of detection. This is a typical case where a reaction by the criminal law might be needed.³¹

2.6 Mixing civil liability and public enforcement

From the exposé so far it became clear that environmental harm should be internalized and can be internalized through civil liability. However, given important limitations of the civil liability mechanism, public regulation and public enforcement will be the primary instrument to control environmental harm. Within public enforcement an important role can be played by administrative enforcement, but in exceptional cases criminal enforcement will be needed as well. Moreover, it is important to stress that regulation and public enforcement may have their weaknesses as well.

Regulation is dependent upon enforcement, which may be weak. In addition, the influence of lobby groups on regulation can to some extent be overcome by combining safety regulation and liability rules. Safety regulation can also become outdated fast and often lacks flexibility. Environmental liability is more dynamic and flexible. For those reasons it is important that environmental liability supports

³⁰ Faure 2009, 326; Faure, Ogus & Philipsen 2009, 176.

³¹ See further for a summary of those criteria Faure & Svatikova 2012, 258-260.

safety regulation; this complementary role of environmental liability is crucial given the many weaknesses to which safety regulation can be exposed.³² Tort law for environmental harm therefore has an important function to play as a response to regulatory failure.³³

In sum, an effective enforcement mechanism for environmental harm needs a refined combination of public enforcement via administrative penalties and criminal sanctions, backed up with an effective environmental liability regime.³⁴ Those are therefore the most important justifications for the civil liability regime contained in the ELD and the criminal law regime from the ECD.

2.7 The specific situation of companies

There are, however, a variety of difficulties that might arise when applying both civil liability rules and criminal enforcement to corporations, even though the difficulties are of a different nature.

As far as civil liability is concerned, I already pointed several times at the fact that many polluters are de facto incorporated as a result of which they will be protected through limited liability. The limited liability of the corporation can be problematic to the extent that an incorporated polluter could cause environmental harm of which the magnitude can be larger than its assets. The insolvency which could potentially follow from the limited liability of the corporation can lead to two problems. It can first of all imply that the company cannot fulfil its environmental liabilities (more particularly under the ELD), meaning for example that victims of environmental pollution will not be compensated. But the potential insolvency related to the limited liability of the corporation can also lead to underdeterrence, in other words to polluting companies taking too little preventive efforts, realizing that they can anyway never be held liable to compensate any harm going beyond the corporate assets. In some cases, corporations can even (ab)use the corporate structure to limit their own risks and externalizing harm to society. Those dangers related to the limited liability of the corporation and potential remedies have been extensively reviewed in a previous study.³⁵

There may equally be problems in applying the criminal law when pollution is caused in a corporate context, even though the problems are of a different nature. The basic problem is that criminal liability according to the traditional perspective of criminal law is a reaction on the guilt (blameworthiness) of an offender and in that perspective that guilt would always refer to the individual mindset of a natural person. Within that traditional perspective corporations could not have *mens rea* and would thus not be subject to criminal liability. Even though many Member States have now abandoned that traditional perspective and have embraced criminal liability of legal entities, there are still Member States where the criminal liability of corporations is not accepted.³⁶ In those jurisdictions, the alternative is either imposing administrative penalties on the corporation or allocating criminal liability to natural persons (such as directors and officers) who have acted on behalf of the corporation. And even in legal systems where the criminal liability of legal entities is accepted, still questions arise with respect to for example the appropriate penalty for legal entities.

³² Faure 2014.

³³ So Wilde 2013, 170-172.

³⁴ See further Gilissen, De Jong, Van Rijswijk & Van Wezel 2021.

³⁵ Faure 2020, 42-62.

³⁶ This more particularly the case in Germany, although, as will be explained below (in 6.5) there are reform proposals in that country as well.

2.8 Succession

A third complication related to the involvement of companies as subject of environmental liability relates to the succession of companies. It is striking that both the ELD and the ECD do refer to companies in different forms. But both have to some extent taken a rather static perspective, i.e. assuming that the polluting company would continue to remain into existence in the same legal form it had when the polluting activities were committed. The possibility that something may change in the legal form of the polluting company is, strikingly, also not discussed in the rich literature with respect to the ELD. There are, however, many ways in which the legal form of a corporation could change, which might affect the exposure of companies to environmental liability.

A first and relatively innocent transformation would be one whereby the original polluting company remains within the same legal entity, but the ownership structure changes. It would for example be the case where a legal entity, holder of the environmental permit, was purchased by a third party, either natural persons or another legal entity. That would simply imply that the shareholder structure would change and that for example the control over the corporation could change as well. However, to the extent that the legal entity remains unchanged, that does as such not affect the environmental liabilities of the legal entity concerned. Obviously there may be practical changes. If for example the buyer (or new shareholder) would either be insolvent or would drain assets out of the polluting company, there is obviously a danger that the corporation may not be able to meet its environmental liabilities as a result of insolvency. That is the classic problem of insolvency of a polluting corporation, potentially leading to undercompensation and underdeterrence that has been previously discussed.

The same is the case for the second hypothesis whereby a polluting company would become insolvent and would potentially go into bankruptcy. For the civil environmental liability, that again reopens the question of whether there are possibilities to protect involuntary creditors (like victims of environmental pollution) against the insolvency, discussed before. From the criminal liability perspective, this raises interesting questions, more particularly whether the dissolution of the corporation has to be postponed until criminal proceedings against that corporation have been terminated (in those legal systems that accept criminal liability of legal entities). In domestic legislation of some Member States there are indeed solutions to that extent.³⁷

A third hypothesis is the one of a corporate merger or acquisition. The difference with the first hypothesis is that in this case the legal entity might change. Potentially as a result of for example the merger or take-over the original polluting company could disappear and the assets could be taken over by the newly created company. In this particular hypothesis several questions arise. First, from a public law logic, the question will arise whether the environmental permit of the previous company can be taken over by the new company. The second, from this perspective more important question is whether the corporation that took over (for example as a result of a merger) the assets of the previous company is also forced to take over the debts, including environmental liabilities. Again, one can easily see the importance of that question, both for civil as well as for criminal liability. If there were no follow-up of (civil) environmental liabilities, there could obviously be the danger that a take-over would leave victims of environmental pollution empty-handed. In that situation a corporate restructuring could even become a way to escape civil environmental liability. But even in the case that a corporate restructuring would not take place with the intention to escape environmental liabilities, the question still arises whether the new company takes over both assets and debts and whether for example the

³⁷ Those will be reviewed in chapter 7.

obligations under the ELD could also be transferred to the newly created legal entity.³⁸ Similar questions in case of corporate succession can also arise in the context of criminal liability (to the extent that such liability of legal entities is accepted). That also raises the question whether for example the corporate succession would be stalled until a criminal proceeding has been terminated, or whether also criminal liabilities of the previous polluting company would be transferred to the new legal entity as well.

Those questions are undoubtedly important. To some extent they touch upon questions examined earlier with respect to the consequences of limited liability and insolvency. But whereas these questions were in a previous study, mostly examined from the civil liability perspective,³⁹ in this study they will be examined from the criminal law perspective as well. These questions have not been addressed explicitly, neither in the ELD, nor in the ECD and, to the best of my knowledge not either in the literature dealing with those Directives. We are therefore to an important extent on a new and unknown terrain that is nevertheless important as corporate mergers and acquisitions could indeed undermine civil and criminal environmental liabilities of companies. In order to examine potential remedies I will therefore examine EU law concerning mergers and acquisitions, but also evolutions in MS domestic law with respect to the effects of environmental liabilities in the case of succession of companies.

2.9 Summary

This brief theoretical framework showed that environmental harm constitutes a market failure that needs to be internalised through legal rules. An important role in that respect is played by environmental liability (hence the importance of the ELD), but liability rules have important limitations in remedying environmental harm, having to do with the widespread nature of the damage, the difficulties in accessing justice and causal uncertainty. Therefore, in practice, public regulation and enforcement will take the lead as remedies for environmental harm. That public regulation can consist of administrative enforcement. In fact, administrative enforcement can play an important role, especially for first time offenders who committed a breach unintentionally and where a probability of detection was reasonably high. However, in cases where the benefits to the offender were very high and the probability of the detection was lower, non-monetary sanctions should be imposed and this has to be done through the criminal law, given the insolvency risk.

Companies pose specific problems, both from the environmental liability as well as from the environmental crime perspective. The criminal law is traditionally directed against individuals rather than against corporations, which makes it not obvious to apply the criminal law to corporate actors as well. Environmental liability may deter corporations on the important condition that there is no insolvency and that the corporation against which the liability is directed remains into existence. Problems might arise, both in civil as well as in criminal liability in case of a succession of a corporation, whereby the original company (that may have committed the breach of environmental law) disappeared. It is for that reason that the fate of companies in case of succession will be the special focus of this study. Importantly, the theoretical framework also shows that there is not necessarily an exclusive preference for either civil or criminal liability, but that an effective legal framework to enforce environmental law should rather consist of an optimal combination of civil, administrative and criminal enforcement.

³⁸ It is the question that will be addressed in the next chapter 3.

³⁹ Faure 2020, 42-56.

3. ENVIRONMENTAL LIABILITY RISKS IN MERGERS AND ACQUISITIONS

KEY FINDINGS

- On the basis of the Merger Directives the assets and liabilities of the company being acquired are ipso jure and simultaneously transferred to the acquiring company
- Environmental liability of the target company is therefore in principle taken over by the acquirer.
- Problems can still arise when a company becomes insolvent or is simply dissolved; those problems are, however, not necessarily linked to a merger or acquisition, but rather to the limited liability of the corporation.
- Since the acquiring company takes over the environmental liability of the company it acquires, there are various ways for the acquirer to manage environmental risks preceding a merger, including a due diligence control and insurance.
- As a permit has an in rem character in case of a merger, the permit in principle transfers to the new operator. However, Member State law may require the operator to inform the competent authority.
- For specific high-risk categories (like nuclear facilities), the competent authority may be required to authorise the transfer of the permit.

3.1 Introduction

The central question in this study is what the consequences are of a merger or acquisition for environmental liability. Environmental consequences are not discussed specifically or at large within the European literature dealing with mergers and acquisition. If one reviews the literature, this does not seem to be a topic of particular interest. In fact, as will be explained below, the rules in this respect are fairly simple. Section 3.2 will explain that in the case of a succession of a corporation, at the European level a variety of directives regulate corporate liability in the case of mergers and acquisitions. None of these directives has any special rules with respect to environmental liability, but the general rule is that the acquiring company also takes over all the assets and liabilities of the company being acquired.

As was already explained in the introduction (chapter 1), corporate reorganisations can take a variety of different forms. The one that is most interesting from the environmental liability perspective is where the legal entity itself changes. However, it was equally mentioned that even without a change of the formal legal structures, there could be changes in ownership (for example a change of a controlling shareholder) that could potentially affect the possibility for a company to meet its environmental liabilities, even outside of the context of a merger or acquisition. Even stronger, also with a company in going concern (hence without reorganization), there are obvious risks that the company would not meet its environmental liabilities because of a threatening insolvency which may seriously jeopardize the possibility of meeting its environmental obligations. That is not the central focus of this study, but should equally be kept in mind. Also: in this chapter I will merely focus on the rules at the EU level; there may obviously be additional rules at the Member State level.

Another question in the context of environmental liability risks in the case of a succession of company is what that precisely implies as far as the permit of that particular corporation is concerned. Again, it

will be made clear that this is not an issue dealt with at EU level, but that there are specific rules at the Member State level (3.3).

3.2 Environmental liability in case of mergers

It was already sketched that this is, at least in Europe, not a topic, which is widely discussed in the literature. Even stronger, neither in the context of the ELD, nor in the context of the ECD have I come across any specific legal doctrine discussing how these liabilities would be dealt with in the case of a succession of a corporation via mergers or acquisitions. Most of the literature dealing with environmental liabilities in the case of acquisitions deal with the situation in the US.⁴⁰ Most of that (strongly US-based) literature moreover largely focuses on the environmental due diligence required preceding mergers and acquisitions.⁴¹

3.2.1 Economic rationale for mergers

Perhaps it is good to state from the outset that it would be wrong to assume that corporations would merely undertake a take-over or merger to escape environmental liability. As will immediately be made clear, the legal regime in most jurisdictions holds that the successor remains liable before the environmental past of its predecessor. Moreover, from an economic perspective there can be good economic rationales for a take-over, the most importance one being that mergers and consolidations can lead to economies of scale by pooling the assets and liabilities of two or more corporations into a single corporation.⁴² Take-overs have as an important function that they can correct managerial failure and therewith increase the value of the corporation.⁴³ The threat of a take-over is an important instrument to remedy the principal-agent problem between shareholders and the management, since the management of a target company will realise that in case of a take-over their position will be in danger. It is for that reason that within corporate law there are detailed rules concerning the behaviour of the management of a target company in case of a (hostile) take-over.⁴⁴

That does, however, not mean that all take-overs always realise efficiencies. Some take-overs are inspired by managerial myopia and the desire for empire building, but in many cases mergers and take-overs do not have the positive returns that were expected.⁴⁵ Mergers and take-overs may, moreover, bring the new company in a more powerful position within the market as a result of which mergers have been strictly regulated under European competition law and are subject to scrutiny by the European competition authorities if particular thresholds for the merger are met.⁴⁶ These legal rules concerning mergers are, however, not relevant for the current topic as they do not directly affect the effects of a merger for environmental liability.

⁴⁰ See for example Fromm, Lewis & Corken 1996; Bagby, Murray & Andrews 1995.

⁴¹ Italiano, Pomeroy & Tormey 1996.

⁴² Kraakman et al. 2009, 179.

⁴³ Becht, Bolton & Röell 2007, 881.

⁴⁴ Becht, Bolton & Röell 2007, 879-881.

⁴⁵ Martynova & Renneboog 2008.

⁴⁶ See further on the competition law treatment of mergers, Van den Bergh 2017, 499-526.

3.2.2 The merger directives

That aspect has been the subject of a large amount of various directives applicable to different types of corporations the first ones dating from the 1970s,⁴⁷ which has been substantially amended several times. Note that some of those directives apply to cross-border mergers whereas others are broader and apply simply to mergers generally.⁴⁸

As already mentioned, the basic rules contained in all those directives (and in fact hardly commented upon in environmental liability literature) has always been the same. This can be illustrated by a brief overview of the merger directives of more recent date. A first one is Directive 2005/56/EC of 26 October 2005⁴⁹ on cross-border mergers of limited liability companies (meanwhile replaced), which had in Article 14(1)(a) a clear rule that a consequence of a cross-border merger is that:

“All the assets and liabilities of the company being acquired shall be transferred to the acquiring company”.

The merger was broadly defined in Article 2(2) as companies on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, whereby the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10% of the nominal value, or in the absence of a nominal value of the accounting bar value of those securities or shares. It could equally concern an operation whereby a company transfers all its assets and liabilities to the company holding all the securities or shares representing its capital. Whatever the situation was, the rule in Article 14 concerning the consequences of the merger remained the same, being that also all liabilities are being transferred to the acquiring company.

A next directive (equally repealed by 19 July 2017) is Directive 2011/35/EU of 5 April 2011 concerning mergers of public limited liability companies.⁵⁰ This Directive was broader as it generally applied to a variety of mergers, not only in the cross-border context. Recital 7 holds that the goal of the Directive is inter alia to protect creditors having claims on the merging companies, so that the merger does not adversely affect their interests. This is realised in Article 19(1)(a) which has comparable language as previously, being that

“A merger shall have the following consequences *ipso jure* and simultaneously:

- (a) The transfer, both as between the company being acquired and the acquiring company and as regards the third parties to the acquiring company of all the assets and liabilities of the company being acquired”.

Article 23 made clear that this also applied to a merger by formation of a new company.

A next directive of interest is Directive 2017/1132 of 14 June 2017 relating to certain aspects of company law⁵¹ providing in fact a codification of previous directives and holding a Title II concerning mergers and divisions of limited liability companies. This new Directive applies from 20 July 2017 on and again,

⁴⁷ See the Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public liability companies, OJ L295 of 20 October 1978, p. 36.

⁴⁸ For a critical review see inter alia Raaijmakers & Olthoff 2008 and Papadopoulos 2019.

⁴⁹ OJ L310/1 of 25 November 2005. This Directive is no longer in force; the end of its validity was 19 July 2017.

⁵⁰ OJ L110/1 of 29 April 2011.

⁵¹ OJ L169/46 of 30 June 2017.

contains the same formula, being that the merger shall have the following consequences *ipso jure* and simultaneously:

"(a) the transfer, both as between the company being acquired and the acquiring company as, as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired".

The same rules also apply in case of a division of a company (Article 151 Directive 2017/1132).

Finally, I should mention Directive 2019/2121 of 19 November 2019, which amended the previous Directive 2017/1132 as regards cross-border conversions, mergers and divisions.⁵²

Recital 39 of this Directive holds that:

"In order to ensure that the company carrying out the cross-border operation does not prejudice its creditors, the competent authority should be able to check, in particular, whether the company has fulfilled its obligations towards public creditors and whether any open obligations have been sufficiently secured. In particular, the competent authority should be able to check whether the company is subject of any ongoing court proceedings concerning, for example, infringement of social, labour or environmental law, the outcome of which might lead to further obligations being imposed on the company, including in respect of citizens and private entities".

This is the first time that there is actually in a Merger Directive any reference to environmental obligations. Recital 47 holds that as a consequence of a cross-border conversion the company resulting from the conversion should retain its legal personality, its assets and liabilities and all its rights and obligations. Recital 48 holds that as a consequence of the cross-border merger, the assets and liabilities and all rights and obligations, including any rights and obligations arising from contracts, acts or omissions, should be transferred to the acquiring company or to the new company, and the members of the merging companies who do not exercise their exit rights should become members of the enquiring company or the new company respectively".

This is clarified in a new Article 86r which holds that a cross-border conversion shall have the following consequences:

"(a) all the assets and liabilities of the company, including all contracts, credits, rights and obligations, shall be those of the converted company".

From this brief overview it appears that there are different directives applicable either to cross-border mergers or to national mergers only, but that the rule in all those directives and notwithstanding the many changes over the years has always been the same, being that the acquiring company (the successor) takes over all the assets and liabilities of the company being acquired. Obviously these directives had to be implemented in Member State legislation, but the consequences are relatively clear: when a company which is taken over or merges with another company had particular (environmental) liabilities, then those are automatically (the directive refers to *ipso jure*) transferred to the acquiring company. The answer is therefore relatively straightforward: a restructuring of a corporation through a merger, acquisition or conversion cannot lead a company to escaping its environmental liability.

⁵² OJ L321/1 of 12 December 2019.

3.2.3 Example: ILVA Steel

That idea has already been applied in an important pollution case that occurred (and still is ongoing) in Italy with respect to ILVA Steel, which has been discussed at length in the previous study.⁵³ Recall that in that particular case ILVA, one of Europe's largest steel and iron plants, operated in Taranto (Italy) since 1965 and caused serious problems due to emissions. The local municipality claimed more than 3,3 billion euro in compensation for environmental harm. The case is interesting as the damages could not be paid by the polluter and the corporation went into bankruptcy. The claim was directed not only against the (bankrupt) company in Taranto (ILVA), but equally against a parent (holding) company RIVA Fire. In 2018 ILVA merged with ArcelorMittal. The merger was approved, also with explicit reference to the fact that it might facilitate the restoration of the environmental harm. The environmental commissioner (Vestager) held "The sale of ILVA's assets to ArcelorMittal should also help accelerate the urgent environmental clean-up works in the Taranto region. This essential de-pollution work should continue without delay to protect the health of Taranto's inhabitants".⁵⁴ The case shows that not only the holding company, but also the company which with ILVA merged automatically (*ipso jure*) assumed the environmental liabilities of the predecessor (ILVA) and that (probably given the substantial solvency of ArcelorMittal) even positive environmental effects of the merger were expected.

3.2.4 Managing environmental risks in mergers

At the same time, the fact that the acquiring company automatically takes over all environmental liabilities from the company it acquires logically puts an important obligation on the acquirer to verify, manage and control the environmental (hidden) risk that could potentially affect the liability of the successor corporation. Especially in the US, these obligations of an acquiring company to verify the environmental obligations in the company it acquires, have been described as the "environmental due diligence" obligations. There one can find a lot of practical guidance on how to verify environmental obligations in the framework of mergers, acquisitions and real estate transactions. Even environmental due diligence checklists (again mostly applicable to the US) can be found on the internet.⁵⁵

Most of those studies are not academic, but merely practical and contain warnings to advisors concerning mergers and acquisitions on how they should do a due diligence control of the environmental risks of the target company. From the perspective of this study, being whether the liabilities of the target company are transferred to the acquirer, those are less interesting. That transfer is indeed not debated. The studies do, however, indicate a number of case studies showing that important deals did not emerge because a potential buyer was unaware of environmental liabilities of the company it sought to acquire, in some cases leading to a collapse of the deal.

These studies also show how those environmental risks (for an acquiring company) could be mitigated. One possibility mentioned is to use specialised consultants, so-called environmental liability transfer (ELT) facilitators. What happens (in the US context) in such an ELT is that environmental liabilities are removed from a pending transaction, in order to prevent that the environmental liability would jeopardize the deal.⁵⁶ ELT is presented as an inexpensive solution: the ELT provider would bring for example heavily contaminated sites to a regulatory closure in a timely and cost-efficient manner to avoid that corporate deals would be jeopardized through environmental liabilities. The ELT would assume environmental liabilities and would have more than sufficient funds for full regulatory

⁵³ Faure 2020, 113-114.

⁵⁴ Ibidem and Lucifora, Bianco & Vagliasindi 2015.

⁵⁵ Otum 2016; Shields & Futrell 2017; Stanwick & Stanwick 2002; Jostes 2015.

⁵⁶ See further Jostes 2015.

compliance.⁵⁷ From a (European) regulatory perspective the question would of course arise how it could be guaranteed that under such an ELT model sufficient funds would be available to meet all environmental liabilities. Moreover, given the cited texts of the Merger Directives it is highly doubtful whether such an ELT model whereby the environmental liabilities would be separated from the general deal, would be compatible with the text of the cited European directives. Those do indeed require that all liabilities of the acquired company *ipso jure* transfer to the acquiring company and do not seem to leave room for the possibility of separating environmental liabilities in an ELT.

A second instrument advanced in the literature to protect an acquiring company against environmental liabilities in case of a merger or acquisition is insurance.⁵⁸ In this case they do not refer to an existing environmental liability policy of the target company that would be taken over by the acquiring company, but rather to an environmental liability insurance covering specifically unknown environmental risks in case of a merger or acquisition. Again, insurance is presented as an instrument that could avoid that disagreement on the estimation of remediation costs could become a deal-breaker for a merger or an acquisition.⁵⁹ This is, from a societal perspective obviously a much more attractive model as insurance could potentially provide protection against insolvency and (as is also suggested in the ELD) guarantee that the environmental liabilities would be met. From society's perspective environmental insurance is therefore definitely a more attractive model than the so-called ELT.

Finally, it should be mentioned that of course in Member State law there can be particular solutions to guarantee that environmental liabilities will be met. Solutions in Member State law mostly do not (only) address the consequences of environmental liabilities after a merger or an acquisition, but rather the question of a potential liability after the dissolution or bankruptcy of a company. For example in Belgium, elaborate attention is paid to environmental liabilities after a bankruptcy. The question is *inter alia* asked whether there could be liability of directors or of other parties (like a notary public) in case of soil pollution that would appear after a bankruptcy.⁶⁰ In the Netherlands similar questions have been asked in relation to a take-over as well as for the case of bankruptcy.⁶¹

3.3 The environmental permit after succession

3.3.1 No rules on permit transfer at EU level

An important question in the context of a succession of a corporation after a merger or acquisition is what happens with an environmental permit. Several pieces of EU environmental rules award a leading role to environmental permits as instruments to weigh the benefits of the economic activity involved against the potential damage resulting from the environmental impacts that the activity could cause, including emissions to water and soil, generation of waste or the use of energy. The crucial document in that respect is Directive 2010/75/EU of 24 November 2010 on industrial emissions, referred to as either the Integrated Pollution Prevention and Control Directive (after its predecessor) or the Industrial Emissions Directive (IED).⁶² According to that Directive, the permit is the main instrument to control industrial emissions.⁶³ The permit is defined in Article 3(7) as "a written authorisation to operate all or

⁵⁷ At least according to Jostes 2015, who obviously sells this ELT-concept.

⁵⁸ See in this respect especially Stanwick & Stanwick 2002.

⁵⁹ Ibidem.

⁶⁰ For details see De Smedt & Vandamme 2015, 92-112.

⁶¹ See Mellenbergh 2009.

⁶² OJ L334 of 17 December 2010.

⁶³ See further Jans & Vedder 2012, 363-368.

part of an installation or combustion plant, waste incineration plant or waste co-incineration plant". Article 4 holds that Member States have to take the necessary measures to ensure that no installation or combustion plant, waste incineration plant or waste co-incineration plant is operated without a permit. The permit is awarded to an operator which has been defined in Article 3(15) as "any natural or legal person who operates or controls in whole or in part the installation or combustion plant, waste incineration plant or waste co-incineration plant or, where this is provided for in national law, to whom decisive economic power over the technical functioning of the installation or plant has been delegated". According to Article 5(1) the competent authority shall grant a permit if the installation complies with the requirements of the Directive.

The Directive does not contain any specific rules concerning the succession of the operator. It is clear that the permit itself is defined as an authorisation which is granted to an operator to operate all or part of a particular installation. And the operator can be both a natural or a legal person who controls the particular installation, subject of the permit. There are specific rules concerning site closure (in Article 22 of the IED) and concerning a definitive cessation of activities, but not concerning the possibility to transfer a permit in case of a succession, more particularly after a merger or acquisition.

3.3.2 *In rem or intuitu personam?*

The question therefore arises whether the permit to operate can be transferred to the successor as the new operator. As the permit is given for a particular installation, it could on the one hand be argued that to the extent that the installation and the risks from that particular installation do not change, that the new operator (the acquiring company) should be able to keep using the permit of the predecessor for the simple reason that the environmental impacts have not changed as a result of the merger or acquisition. On the other hand there may be cases where the qualification of the operator may also be of importance to the permitting or at least the monitoring authorities. That could more particularly be the case for example when the acquiring company would have an impressive list of convictions for environmental violations. The question therefore arises whether a permit should be considered *in rem*, in the sense of being linked to the particular installation rather than to the operator or whether it should rather be considered as personal and thus linked to the specificities of the particular operator. The IED does not regulate the fate of the permit in case of succession and I have not seen other rules in EU environmental law in that respect. As a result, it will have to be solved by Member State law.

An interesting perspective is provided by Van Oevelen who, meanwhile 40 years ago, analysed whether building permits could have an *in rem* or a personal character.⁶⁴ Van Oevelen argues that building permits have an *in rem* character. That means that they are not awarded *intuitu personae* and that building permits are for that reason transferable.⁶⁵ The same should most likely also be the case with environmental permits as well. Still, I mention that there could be reasons for the authorities at least wishing to be informed of such a transfer of permit, if it were only to be aware of who the new operator might be, which will obviously be important in the framework of monitoring and inspections. The mere fact that a new operator (the successor company) might have a worst reputation than its predecessor (for example resulting from prior convictions for environmental crime) will most likely not be a justification to refuse the transfer, given the *in rem* rather than personal character of the permit. However, at least being aware of who the new operator is, could alert the monitoring authorities and thus for example sharpen monitoring activities. Moreover, one could imagine that at Member State level there might be specific cases where authorities would not only like to be informed, but could

⁶⁴ Van Oevelen 1974-75, 367-381.

⁶⁵ Van Oevelen 1974-75, 369.

under circumstances also object against a transfer to a particular new operator. That might be the case when the transfer of permit would relate to specifically high-risk activities, such as for example a nuclear facility.⁶⁶

3.3.3 Examples from Member States

A few examples from Member States illustrate that this is indeed largely the state of the art. For example, in the Flemish Region in Belgium, an environmental permit is provided to a particular operator and in its name. According to the website of the Flemish Government, that has the advantage that it is clear to whom the rights to operate a particular installation are granted and who has the obligation to guarantee that the permit conditions are complied with.⁶⁷ Article 79 of the Environmental Permit Decree holds that an environmental permit can in principle be transferred without formalities, but the intention concerning this transfer has to be notified to the competent authorities.⁶⁸ An Executive Order stipulates that the notification of the intention to transfer should take place on the basis of a particular form. The competent authority acknowledges the notification and will adapt the permit. That implies that when the activities are completely transferred to a new operator, the permit will henceforth mention the identity of the new operator.⁶⁹ As the next chapter will make clear, when it concerns particular major risks, such as a nuclear facility, different rules may apply and the competent authority may have to formally agree with the transfer.

Similar rules apply in the Netherlands. According to Article 2:25(2) of the general rules concerning the environmental permit, an environmental permit is transferrable. That would only be different if it would be clear from the permit that it is a permit granted *intuito personae* (just for that particular person). In all other cases, an environmental permit is transferrable. The previous operator has to notify the competent authority of the intended transfer.⁷⁰ The rules in the Netherlands are hence very similar to the ones in the Flemish Region.

However, as also the next chapter will make clear, permits for particular high-risk activities, such as a nuclear installation, are granted *intuito personae*. That implies that the permit is granted only to the operator explicitly mentioned in the permit. If the operator changes, the permit has to be changed. In that case a request has to be addressed to the competent authority to transfer the permit to another operator. After such a request has been formulated, the permit holder will receive an administrative act granting permission to transfer the permit. When the transfer has actually taken place, the new operator has to inform the competent authority. Then the new identity of the permit holder will be inserted in the permit.⁷¹

⁶⁶ To be addressed in the next chapter, see 4.4.

⁶⁷ See

<https://www.omgevingsloketvlaanderen.be/overdracht-van-een-vergunning-voor-de-exploitatie-van-een-ingedeelde-inrichting-of-activiteit#:~:text=Als%20de%20omgevingsvergunning%20betrekking%20heeft,inrichting%20of%20activiteit%20wordt%20overgedragen>, last consulted on 9 March 2021.

⁶⁸ Article 79 of the Environmental Permit Decree in the Flemish Region as adapted *inter alia* on 23 February 2017.

⁶⁹ Article 97 of the Executive Order to execute the Decree of 25 April 2014 concerning the environmental permit in the Flemish Region.

⁷⁰ See <https://blenheim.nl/blog/advocaat-overdracht-vergunning>, last consulted on 9 March 2021.

⁷¹ See Autoriteit Nucleaire Veiligheid en Stralingsbescherming, Verzoek voor toestemming overdracht van de vergunning, available at: <https://www.autoriteitnvs.nl/aanvragen-en-melden/aanvragen-vergunningen/verzoek-voor-toestemming-overdracht-van-de-vergunning>, last consulted on 9 March 2021.

3.4 Summary

From this brief sketch of the rules concerning mergers, it seems that a merger or acquisition as such is not the largest risk as far as escaping environmental liabilities is concerned. The various Merger Directives stipulate very clearly that a merger has *ipso jure* as consequence that all the assets and liabilities of the company being acquired are transferred to the acquirer. A merger or acquisition can therefore not be a tool to escape one's environmental liability as this is transferred to the acquiring company. It is for that reason that the corporate law doctrine and practice is very much focused on due diligence obligations in case of mergers and acquisition, focusing on an adequate assessment of the environmental risk in the target company.

Although as such the various Merger Directives contain clear rules, the effectiveness of course depends upon the implementation within the Member States and the compliance with the specific rules. There can still be risks, for example for environmental authorities who have a claim for environmental restoration (in connection with the ELD or otherwise) on a target company. The risks are probably not so much related to the merger or acquisition, but rather to the fact that the company could still be unable to meet its environmental obligations for a variety of reasons. It could (intentionally or unintentionally) become insolvent; assets could be removed from the corporation, as a result of which it would become an empty shell or there would be other creditors as a result of which the company becomes overdebted and would, in case of a bankruptcy, not be able to meet its environmental liabilities. In other words: as has been examined in detail in a previous study, the limited liability of the corporation has many inherent risks, as a result of which companies in some cases are not able to meet their environmental liabilities.⁷² Also the European Parliament recognised recently explicitly that "operator insolvency as a consequence of major accidents remains a problem in the EU".⁷³

Interestingly, if one examines, as was done in the previous study, the official Commission reports on the effectiveness of the ELD as well as previous studies by consultants concerning the application of the ELD, it appears that there are indeed particular cases (like Kolontár and Moerdijk) where as a result of the company's insolvency it could not meet its environmental liabilities.⁷⁴ However, those were both cases where insolvency created the inability to meet the environmental obligations outside of the context of a merger or acquisition. Moreover, the only case in which there was a take-over (ILVA) was judged positively as the take-over by a wealthy corporation (ArcelorMittal) guaranteed that the environmental responsibilities of the target company could be met.⁷⁵

Of course there are particular remedies possible in case of insolvency and those are often explored in practice as well, again outside of the context of a merger or acquisition. For example in some Member States, such as in the Netherlands, the possibility is examined to hold the trustee in bankruptcy personally liable in case of environmental harm caused by a bankrupt corporation.⁷⁶ Legal doctrine equally examined possibilities of personal liability of the trustee in bankruptcy and the possibility to have a priority in bankruptcy on the basis of a lien, according to the American example.⁷⁷ Those and many other remedies were examined and assessed in the previous study and it was concluded that the

⁷² For details, see Faure 2020, 43-47.

⁷³ European Parliament, Resolution of 20 May 2021 on the liability of companies for environmental damage (2020/2027 (INI))O.

⁷⁴ Faure 2020, 112-113.

⁷⁵ Faure 2020, 113-114.

⁷⁶ See *inter alia* "Provincie wil dat curator persoonlijk bloedt in zaak van failliete North Refinery", Dagblad van het Noorden, 30 September 2019, available at: <https://www.dvhn.nl/groningen/Provincie-pakt-curator-North-Refinery-aan-24865460.html>, last consulted on 3 February 2021.

⁷⁷ See Mellenbergh 2009, 502-509.

only and favoured remedy is to introduce mandatory financial guarantees according to a balanced model, guaranteeing that those corporations constituting the highest risk of high environmental damage would mandatorily have to provide a solvency guarantee.⁷⁸

Of course other remedies are still possible and are equally explored. One possibility is to make parent companies liable for debts of their subsidiaries. It is a possibility that was equally explored in the previous study⁷⁹ and will be discussed below in chapter 5 as well. Moreover, questions still arise as to the specific application of the rule that a merger shall have as consequence that the liabilities of the company being acquired are *ipso jure* transferred to the acquirer. That raises *inter alia* the question whether that equally applies to criminal liabilities of the company being acquired. Given the personal character of criminal liability and sanctions, that may not be obvious. There are important developments in the case law in that respect that will be further discussed in chapter 7.

Finally, the question was equally addressed whether in case of a merger or acquisition the acquiring company would automatically become the new operator and holder of the environmental permit. Given the crucial function of the permit in (European) environmental law, that is undoubtedly an important question. It is not explicitly addressed in European environmental law, but in the Member States. The few examples discussed showed that an environmental permit has to be considered as having an *in rem* (rather than an *intuitu personae*) character, as a result of which a transfer is possible. However, a prior notification to the competent authority is required. That would at least allow the competent authority (and the public at large) to know the identity of the operator, also in view of monitoring and inspection. However, there may be specific high-risk categories where it is important that competent authorities are not only notified, but would also have the possibility to authorise the transfer. As the next chapter will show, in particular high-risk cases, such as those involving nuclear risks, that is indeed the case.

⁷⁸ Faure 2020, 56-61 and 127.

⁷⁹ Faure 2020, 51-56.

4. THE CASE OF NUCLEAR FACILITIES

KEY FINDINGS

- In case of a merger or acquisition with respect to a company engaged in a high-risk, like a nuclear power plant, in principle the liabilities of the company being acquired are equally transferred to the acquirer.
- Also in the nuclear sector, the acquiring company will therefore engage in an environmental due diligence verification of the target company before a merger or acquisition.
- A difference with the general rules is that in the nuclear case, the IAEA rules prescribe that the competent authority has to authorise the transfer of the nuclear permit.
- Nuclear facilities are subject to compulsory solvency guarantees (like mandatory liability insurance); the solvency guarantee of the target company will be transferred to the acquiring company, guaranteeing that in principle the nuclear liabilities could still be met in case of a merger or acquisition.
- The nuclear liability conventions which constitute the basis for the liability of the nuclear power plant operator have been seriously criticised in the literature.
- It is more particularly argued that the financial limit on liability and the legal channelling of liability have distortive effects for prevention and lead to undercompensation.
- There are good reasons for European action in the domain of nuclear liability; a legal basis for such action can be found in Article 98 or Article 203 of the EURATOM Treaty.

4.1 Introduction

The question arises how the previous rules concerning environmental liability under mergers and acquisitions relate to specific industrial sectors involving major risks, such as those potentially coming from the nuclear sector. The question is an interesting one as the ELD does not apply to nuclear accidents. Recital 10 preceding the ELD holds that express account should be taken of the EURATOM Treaty and relevant international conventions and of community legislation regulating more comprehensively and more stringently the operation of any of the activities falling under the scope of this directive. Article 4(2) explicitly holds that the ELD shall not apply to such nuclear risks or environmental damage or imminent threat of such damage as may be caused by the activities covered by the Treaty establishing the European Atomic Energy Community or caused by an incident or activity in respect of which liability or compensation falls within the scope of any of the international instruments listed in Annex V, including any future amendments thereof. Annex V refers *inter alia* to the various conventions with respect to civil liability for nuclear damage.

In fact, as will be made clear, the general rules regulating environmental liability in case of succession of companies as laid out in the previous chapter apply in the same way to all specific industrial sectors, also those involving major risks. Of course the nuclear sector is an interesting case as it is subject to specific international conventions regulating its liability. That implies that the rules concerning liability are different, but that does not necessarily concern the rules with respect to the succession of companies.

One could therefore roughly mention that in case of a merger or acquisition of a company that would be the licensee of a nuclear power plant, all existing liabilities and obligations will be taken over by the company that acquires the corporation. As a consequence, also nuclear liabilities, i.e. the obligation to comply with the domestic legislation implementing the international conventions, will also be transferred to the acquiring company. As will be made clear below, also in case of transfer of the operator status, the administrative permit will be transferred to the acquiring company that will require the approval of the licencing authority.

The most important aspect of the nuclear liability is the compulsory solvency guarantee, more particularly mandatory insurance, which guarantees that the operator would be able to meet the statutory obligations. One of the points that the licencing authority will therefore necessarily have to verify is whether the acquiring company also takes over the insurance obligations, as a result of which the guarantee of solvency remains also after the merger or take-over.

In that respect, the nuclear case does not present itself radically different than the ordinary case of environmental liability after a merger or take-over. Nuclear liability is, however, specific as the international nuclear liability conventions deviate to an important extent from common liability law and equally from the ELD. In a previous study, nuclear liability has been addressed in more detail.⁸⁰ This chapter will start with a brief summary of the nuclear liability arrangement in the international conventions and will equally summarise that there has been serious criticism formulated on these international conventions as a result of which there might be a need for the EU to issue separate legislation going further than the current regime in the international conventions. The real problem with nuclear liability is not so much the potential risk in case of a merger or take-over, but rather the fact that the conventions provide extremely low limits on the liability of the nuclear operator, which could potentially lead to both undercompensation and underdeterrence. After this brief sketch of the nuclear liability conventions (4.2) it will be explained that the general rules concerning the transfer of liability in case of a merger and acquisition similarly apply to the nuclear case (4.3). A few specific rules apply to the transfer of the nuclear permit (4.4). Section 4.5 summarises.

4.2 Nuclear liability: a summary⁸¹

4.2.1 Nuclear liability conventions

The liability and compensation system for nuclear damage within the EU is fully relying on international conventions. Two main regimes deserved to be mentioned, namely the OECD Nuclear Energy Agency (NEA) regime and the International Atomic Energy Agency (IAEA) regime. Under the auspices of the NEA, the 1960 Paris Convention on Nuclear Third Party Liability (Paris Convention) was developed, as well as the 1963 Brussels Supplementary Convention on Third Party Liability in the Field of Nuclear Energy (Brussels Supplementary Convention or BSC). Under the aegis of the IAEA, the 1963 Vienna Convention on Civil Liability for Nuclear Damage was developed. These two regimes have been qualified the first generation of nuclear liability conventions.⁸²

The second generation of Nuclear Liability Conventions was triggered by the Chernobyl accident of 1986. That accident highlighted a few shortcomings of the existing compensation models under the international legal framework. Subsequently, there was a proliferation of amendments and protocols, namely the Joint Protocol Relating to the Application of the Vienna Convention and the Paris

⁸⁰ See Faure & Kindji 2019.

⁸¹ This builds further on Faure & Kindji 2019, 42-57.

⁸² See Faure 2016b.

Convention (Joint Protocol), the Protocol to amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage (the Protocol to the Vienna Convention), the Convention on Supplementary Compensation for Nuclear Damage (CSC), the Protocol to amend the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 (the Protocol to the Paris Convention) and the Protocol to amend the Convention of 31 January 1963 supplementary to the Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy (the Protocol to the Brussels Supplementary Convention).

Conventions	Date of adoption	Date of entry into force
Joint Protocol	21 September 1988	27 April 1992
Protocol to the Vienna Convention	12 September 1997	4 October 2003
Convention on Supplementary Compensation (CSC)	12 September 1997	15 April 2015
Protocol to the Paris Convention	12 February 2004	Not yet into force
Protocol to the Brussels Supplementary Convention	12 February 2004	Not yet into force

Table 1: Overview of the second generation international conventions

There are several fundamental principles underlying the international nuclear liability conventions:

- strict liability of the nuclear operator;
- exclusive liability (channelling) of the operator of a nuclear installation;
- limitation of the liability in amount and in time;
- mandatory financial coverage of the operators' liability;
- exclusive jurisdiction of the courts of the country where the nuclear accident occurred;
- additional public funding by the state in whose territory the nuclear installation of the liable operator is situated +
- additional funding by all parties to the convention.

For the current purposes it is most important to mention that the central figure under the Paris Convention is the operator of the nuclear installation who is, in the Convention defined as "the person designated or recognised by the competent public authority as the operator of that installation".⁸³ It is that operator who is strictly liable for the damage caused by a nuclear incident in a nuclear installation or involving nuclear substances coming from such installations. Of crucial importance is also that both conventions require the operator to have and maintain insurance or other financial security up to its liability cap.⁸⁴ Financial security can take many forms, but insurance coverage is the most common. Insurance is usually provided by the nuclear insurance pools through a bundling of resources at the national level. To be clear: the insurance only covers up to the amount of the limited liability of the operator.

⁸³ Article 1(a)(vi) of the Paris Convention.

⁸⁴ Article X of the Paris Convention; Article VII of the Vienna Convention.

The Chernobyl accident brought about important changes in the international regime. According to the 2004 Protocol to amend the Paris Convention,⁸⁵ the first tier liability (the liability of the operator of the nuclear power plant) shall increase to € 700 million.⁸⁶

Moreover, according to the Protocol to the Brussels Supplementary Convention, the Contracting Parties will undertake that financial compensation in respect to nuclear damage shall be provided up to an amount of EUR 1.5 billion per nuclear incident. This will be divided as follows:

- Up to an amount of at least EUR 700 million: funds provided by insurance or other financial security or out of public funds provided pursuant to Article 10(c) of the Paris Convention;
- Between this amount and EUR 1,200 million: public funds to be made available by the Contracting Party in whose territory the nuclear installation of the operator liable is situated;
- Between EUR 1.2 million and EUR 1.5 million, out of public funds to be made available by all the Contracting Parties according to the formula for contributions.

If one were to summarise the situation, one could hold that in addition to the individual liability (with financial caps) of the nuclear operator there are two additional types of funding mechanisms: there is an obligation of an Installation State to make certain amounts of money available; it can do so either by providing for public funding, or by making the nuclear operator liable for the total amount – this is the second tier of the Brussels Supplementary Convention and the first tier under the CSC.

Finally, there is a system that can be called an international solidarity fund, funded by all Contracting Parties.⁸⁷ This public funding can as such not be shifted as this is the case for a third tier of the Brussels Supplementary Convention and for the second tier under the CSC.

The total amounts available in the nuclear liability regime can be summarized in the following table 2:

Amount in million EUR			
What Convention?	Who pays?	First generation	Second generation
Paris Convention	Nuclear operator	57	700
Brussels Supplementary Convention	Installation State (or nuclear operator)	193.7	500
	Collective State Fund	142.4	300
Total NEA-regime		341.8	1,500
Vienna Convention	Nuclear operator	4.2	170.9
	Collective State Fund	-	170.9
Total Vienna Convention		4.2	341.8
Convention on Supplementary Compensation	Operator/Installation State		341.8
	Collective State Fund		341.8
Total CSC			683.7

Table 2: Available amounts of compensation under the international nuclear liability conventions⁸⁸

⁸⁵ 2004 Protocol to Amend the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982, 12 February 2004.

⁸⁶ Article I(H)a of the Protocol to Amend the Paris Convention.

⁸⁷ Articles. III(a)-III(b) of the Brussels Supplementary Convention; Liu 2013, 214; Sands & Peel 2012, 740.

⁸⁸ See Faure & Vanden Borre 2008, 239 (providing the amounts of compensation in USD according to the exchange rate in 2008).

Table 2 demonstrates that under the nuclear compensation scheme of the second generation, public funding is either newly created or kept at the same level as in 1963 in relative terms.⁸⁹ In absolute terms, there is considerably more public funding in the second-generation conventions: under the 2004 Brussels Supplementary Convention, the public intervention has more than doubled⁹⁰ and under the IAEA regime, no public intervention existed under the conventions of the first generation.

4.2.2 Criticisms

There has been serious criticism on the nuclear liability regime by various scholars.⁹¹ The first criticism concerns the fact that the nuclear operator is only liable for a relatively small part of the damage. As a result, the liability limit creates a distortive financial subsidy for the nuclear operator.⁹² The financial cap may reduce the incentives of the operator to invest in prevention and there could be a reduced compensation to victims.⁹³ When the damage is higher than the amount of the cap provided by the operator, the state will provide a second layer (without making the operator pay any price for this financing), as a result of which the nuclear operator is *de facto* subsidised and the costs of nuclear accidents are externalised to the tax payer.⁹⁴ The Fukushima disaster has made clear that the currently available estimates of the total costs of the disaster are well above the financial caps on the liability of the operator, but also of the additional layers. A world nuclear industry status report of 2017 mentioned an estimate of the total official costs of the Fukushima disaster of 200 billion USD. Some other estimates put the total costs at 444-630 billion USD, depending on the level of water contamination. It may be clear that the current nuclear liability regime (which would only provide EUR 1.5 billion if the additional protocols and the Brussels Supplementary Convention had entered into force) are totally unable to compensate the real costs of a nuclear accident. The result may be underdeterrence and undercompensation.

A second problematic effect in the nuclear liability conventions is the exclusive channelling of the liability to the operator. This effectively means that liability suits against third party contributors are totally excluded, even though they could have contributed to the accident risk as well.⁹⁵ Channelling of liability could in practice lead to underdeterrence of those parties whose liability is excluded as a result of legal channelling of liability.

4.2.3 A task for Europe?

From the analysis of the international liability framework it appears that there are many limitations which make the international regime inadequate. Even though the EU has excluded nuclear liability from the scope of the ELD, it has not put in place an alternative in the sense of an EU legislative framework for nuclear liability. The reason is obviously that the Member States are member of one of the international legal framework. But after Chernobyl (1986) and Fukushima (2011), both at the policy level and in scholarship, there was an increasing awareness that the international nuclear liability regime has important limitations. That led to the question whether there should be a separate action at EU level with respect to nuclear liability. Within the European Commission an expert group has been working on the question whether it would be possible to generate substantially higher amounts than

⁸⁹ See Vanden Borre 2007, 303-304.

⁹⁰ In the second tier of the Installation State the amount rose from EUR 202 million to EUR 500 million; in the third tier, the Collective State Fund went from approximately EUR 150 million to EUR 300 million.

⁹¹ See, *inter alia*, Vanden Borre 2001 and Heldt 2015.

⁹² Faure & Fiore 2009.

⁹³ Faure & Liu 2013, 16.

⁹⁴ Faure & Vanden Borre 2013, para. 116.

⁹⁵ Liu 2013, 212.

are currently available in the international nuclear liability framework. It is already striking that some of the Member States, more particularly Germany, generate substantially higher amounts than the international regime.⁹⁶ Although there are good arguments to take action at the EU level to improve the nuclear liability regime, it is not very likely that this will emerge. This is, to an important extent related to the limited willingness of Member States to have further EU action in the domain of nuclear liability and generally in the domain of energy. Experts are therefore pessimistic with respect to the likelihood of EU action concerning nuclear liability.⁹⁷

It is, however, important that in a 2015 doctoral dissertation by Heldt, he has argued that there are articles that could provide an empowerment of the EU level to legislate concerning nuclear liability.⁹⁸ He points in the first place at Article 98 of the EURATOM Treaty, which states:

“Member States shall take all measures necessary to facilitate the conclusion of insurance contracts covering nuclear risks.

The Council, acting by a qualified majority on a proposal from the Commission, which shall first request the opinion of the economic and social committee, shall, after consulting the European Parliament, issue directives for the application of this article”.

Heldt argues that, if one were willing to interpret this article extensively, the obligation of Member States arising from Article 98(1) of the EURATOM Treaty entails both the obligation to abolish any barriers with respect to the conclusion of insurance contracts to cover nuclear risks and the obligation to establish a nuclear liability framework.⁹⁹

Heldt further points at Article 203 of the EURATOM Treaty, which holds:

“If action by the Community should prove necessary to attain one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures”.

Heldt argues that this article could serve as an authority of the Community's jurisdiction in the area of nuclear liability.¹⁰⁰ Some argue that the exclusion of the nuclear risk from the ELD is a missed chance to achieve a more comprehensive system, because under the ELD the environment is offered protection *per se*. A modernisation of the definition of nuclear damage (including environmental restoration) would therefore be indicated to bring the nuclear liability regime more in line with new insights concerning the goal of environmental remediation. Initiatives to regulate nuclear liability at the EU level could help to achieve a comprehensive and broad approach that would remedy the current shortcomings in the nuclear domain.¹⁰¹

⁹⁶ For details, see Faure & Kindji 2019, 64-66.

⁹⁷ See in that respect more particularly Pelzer 2006, 94.

⁹⁸ Heldt 2015, 85-90.

⁹⁹ Heldt 2015, 94.

¹⁰⁰ Heldt 2015, 95. See also Handrlica 2009, 39-45.

¹⁰¹ So Heldt 2015, 104.

4.3 Nuclear liability in the case of mergers and acquisitions

There is, as already mentioned, nothing in the ELD with respect to the effects of liability in case of succession. The same is the case in the nuclear liability conventions. They are silent with respect to the issue and it is not discussed in the literature either.

The European legislative framework concerning mergers, discussed in the previous chapter, has a relatively broad scope, albeit that they apply to specific types of companies, most directives focussing more particularly on public limited liability companies. To the extent that the operator of a nuclear power plant would at the domestic Member State level have taken the form of such a company type to which the directive applies, there is no reason to argue that the regulation concerning mergers would not apply to the nuclear field. There is as such nothing in the Merger Directive that provides any exclusion for a specific field like the nuclear. As a result, in case in a Member State a particular industry potentially creating major risks, such as those potentially coming from the nuclear sector, would have taken the form of a public limited liability company and would merge with another company through acquisition, in principle the European framework concerning merger applies, implying that the acquiring company also takes over all the assets and liabilities of the company being acquired. That could thus equally extend to the nuclear liabilities of the company being acquired which would automatically be transferred to the acquiring company.

An expert in nuclear liability held that in case of an acquisition liability is automatically transferred to the acquirer. In other words, a merger or acquisition will not provide a possibility to a nuclear operator to escape liability.¹⁰² That is exactly the reason why in case of a merger or an acquisition a detailed so-called due diligence monitoring takes place during several weeks before the merger or acquisition in order to assess the possible liabilities that the acquirer would take over. This is usually done via a checklist which for nuclear power plants often occurs along the following model.¹⁰³

- 1.1.1 Is the Target Group being run in compliance with the applicable regulatory framework?
- 1.1.2 How is the Target Group protecting itself against liability for nuclear/radioactive damage?
- 1.1.3 Have any problems, e.g. interactions with regulators/breaches, been identified which require remediation?
- 1.1.4 Are any decommissioning provisions and associated surety arrangements adequate, and has the Target Group complied with any obligations to report on such provisions?
- 1.1.5 Has adequate insurance been taken out (if required)?
- 1.1.6 Have any major commercial agreements been reviewed to identify and assess nuclear liability and other nuclear-related risks?
- 1.1.7 Confirm that only the (country) Nuclear Regulatory Commission Authority's consent is the only nuclear related consent required in connection with the Proposed Transaction.

The checklist points at two important issues: first of all that the transfer of liabilities will equally include a transfer of the insurance policies, which are linked to the particular nuclear facility. That is a logical consequence of the fact that, according to the international nuclear liability conventions, as mentioned above, the liability of the nuclear power plant operator has to be compulsorily covered through a solvency guarantee, mostly taking the form of insurance. The second important issue mentioned is the required consent of the nuclear regulatory commission authority in the country concerned. Indeed, the licence of the nuclear power plant is provided to a specific operator which raises the question whether

¹⁰² Information provided by attorney Evelyne Ameye to Ludo Veuchelen, transferred to Michael Faure on 19 February 2021.

¹⁰³ Ibidem.

that licence can be transferred from one operator (the acquired company) to the successor (the acquiring company).

4.4 Transfer of permit

The main obligations that Member States need to impose on nuclear power plants emerge from a convention created within the framework of the International Atomic Energy Agency (IAEA), the Convention on Nuclear Safety (CNS), an international instrument adopted in 1994.¹⁰⁴ That Convention provides in Article 19 that each contracting state shall take the appropriate steps to ensure that the initial authorisation to operate a nuclear installation is based upon an appropriate safety analysis and a commissioning programme demonstrating that the installation, as constructed is consistent with design and safety requirements. Article 19 of the CNS provides further obligations on the contracting parties with respect to the obligation to create regulations and procedures aiming at nuclear safety. However, the design, construction and operation of nuclear installations lay within the competence of the national authorities.¹⁰⁵

At EU level, a Nuclear Safety Directive (2009/71/EURATOM) regulates nuclear safety.¹⁰⁶ Again, the Directive is constructed in such a way that the main obligations to create a legislative, regulatory and organisational framework for nuclear safety lays on the Member States. Again, an important role is provided for the licence holders: Article 6(1) provides that Member States have to ensure that the prime responsibility for nuclear safety rests with the licence holder. Article 6 provides further obligations imposed upon the licence holders.

As such, neither the Convention on Nuclear Safety, nor the EU Nuclear Safety Directive have any explicit provisions on how to handle in case of a transfer of ownership of the nuclear power plant, in other words, the succession of the corporation which effectively is the licence holder. There is one document providing a further publication to the Member States, being the specific safety guide (NOSSG-12) of the IAEA safety standards, *Licensing process for nuclear installations*. That specific safety guide has an Article 2.19 on licencing principles which should be established in the regulatory and legal framework. Article 2.19 provides a long list of examples of licencing principles among which:

“(I) a licence may be transferred, depending on national regulations; however, this should be done only with the authorisation of the regulatory body, which may attach provisions and conditions to the transfer”.

The rule from the IAEA is therefore clear: Member State law should have specific rules concerning the transferral of a licence (which could be needed in case of succession of the company of the licence holder). The transferral is only possible with the authorisation of the regulatory body.

There are indeed examples of that requirement of an authorisation by the (nuclear) regulatory authority implemented at Member State level. For example in Belgium, it is the Federal Agency for Nuclear Control (FANC) that controls the transfer of a licence. Recently, an example of such a transfer of licence was provided in a case where a company had a nuclear licence for the production of therapeutic implants containing jodium-125 to treat prostate cancer and other illnesses at its plant in Seneffe. The installations at the site were closed in 2008, but the licence holder (IBT NV, indeed a limited public

¹⁰⁴ See further Faure & Kindji 2019, 26-27 and 86-87.

¹⁰⁵ Faure & Kindji 2019, 91-92.

¹⁰⁶ Council Directive 2009/71/EURATOM of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations, OJ L172 of 2 July 2009, 18-22.

company) remained liable for the safety of the site. The FANC transferred the licence to a new firm Eckert & Ziegler Bebig NV (EZB) who took over the activities in 2011 of the company that since 2008 no longer was active. There were, however, still cyclotrons and radio-active waste present at the site. In 2020 the licence for the site was eventually transferred to Telix Pharmaceuticals Belgium. The regulatory authority (FANC) was from the beginning of the negotiations concerning the transfer closely involved and insisted that the specific nuclear liability obligations would be taken over by the acquirer.¹⁰⁷

Similar examples can be provided from other Member States where nuclear authorities verify the transfer of nuclear liabilities. For example in France this would be the Autorité de Sûreté Nucléaire (ASN). An example constitutes the nuclear power plant Areva, who demanded the French minister in charge of nuclear safety on 21 December 2012 the authorization to change the licence holder for particular nuclear production installations that were until that moment run by FBFC.¹⁰⁸ In fact, a press release mentioned that FBFC was taken over by Areva by 31 December 2014. Subsequently a formal Decree of 2014 authorised Areva to take over the nuclear installations that were so far run by FBFC. The nuclear regulatory authority, the ASN, verified that the acquirer, Areva, complied with the obligations following from the environmental code. In France, such a transfer of the licence therefore leads to a formal decision of the ASN.¹⁰⁹

Finally, it may be interesting to mention that this regime, of a verification by the nuclear authority not only applies in the EU Member States, but to all other contracting parties to the IAEA, including the US. In the US the licencing agency, the Nuclear Regulatory Commission (NRC), provides in its regulations that a change of ownership of a nuclear power plant whether direct (for example the sale of the physical assets) or indirect (for example the acquisition of the owner or operator of the nuclear power plant) is treated as a licence transfer and therefore requires the consent of the NRC. A factsheet from the NRC concerning reactor licence transfers clarifies that mergers, acquisitions and reorganisations are all financial events that prompt requests from the NRC to transfer nuclear power reactor operating licences.¹¹⁰ Since the NRC approved the sale of the Three Mile Island, Unit 1 reactor in 1999, the NRC has reviewed more than 115 licence transfer applications. A list of the licence transfer applications can be found on the NRC website and the website equally provides an overview of the regulations governing licence transfers and related regulations.

Interestingly, the NRC reviews licence transfer requests to ensure that there is no foreign control of safety-related activities. In the US, the Atomic Energy Act and the NRC regulations prohibit that a proposed licensee would be “owned, controlled or dominated” by a foreign individual or entity. The NRC factsheet mentions the 1999 transfer of Three Mile Island Unit 1, to an energy company which involved a 50% ownership by British Energy, a foreign company. As a result, the NRC required the American energy company to have a plan to guarantee that the other 50% would retain control over safety-related decisions. Finally, the NRC also reviews licence transfer applications to make sure that the proposed owners (the acquirers) have insurance available.

¹⁰⁷ <https://fanc.fgov.be/nl/dossiers/industriële-inrichtingen/industriële-inrichtingen-van-klasse-ii-a/overdracht-vergunning>, last consulted on 10 March 2021.

¹⁰⁸ Société Franco-Belge de Fabrication de Combustibles.

¹⁰⁹ <https://www.asn.fr/Reglementer/Participation-du-public/Installations-nucleaires-et-transport-de-substances-radioactives/-Archives-des-participations-du-public/Changement-d-exploitant-des-INB-n-63-et-98>, last consulted on 10 March 2021.

¹¹⁰ <https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-transfer.html>, last consulted on 10 March 2021.

As a result the NRC will satisfy that the new licensee (the acquirer) obtains and maintains the requisite amount of liability insurance coverage.¹¹¹ In sum, a corporate restructuring of ownership of a US nuclear power plant could not deprive the victims of their potential compensation.

4.5 Summary

This chapter analysed whether the analysis performed in the previous chapter concerning the fate of environmental liability in case of succession of companies changes in the case of companies that could potentially create major risks as they are involved in ultra-hazardous activities. The answer is that in principle the same rules apply, i.e. the (environmental) liabilities in case of succession are transferred to the acquirer. Moreover, in particular circumstances, when there is a transfer of the licence, the competent authority has to approve that transfer. That is more particularly the case with one specific industry posing major risks, being the nuclear industry. A broad framework created by the IAEA and the EU Nuclear Safety Directive forces Member States to have regulations guaranteeing that competent authorities approve a transfer of the licence. Examples of Member States show that this is also done in practice.

There is one particular feature that guarantees that the statutory liabilities of a nuclear power plant will be met, also in case of succession, which is the fact that there is compulsory solvency guarantees that have to be in place, in practice often mandatory liability insurance. The authority will in practice often verify if the acquirer also continues the obligation to have insurance, as required by law. In that particular case there should therefore not be a problem for the successor to meet the statutory liability as there is mandatory solvency guarantees in place. Note, however, that when that is not the case, there is always a risk (also irrespective of succession) that a licence holder will not be able to meet its liability, due to its insolvency and the limited liability of the corporation.

Also note that, notwithstanding the positive aspect of the nuclear liability framework (of having mandatory solvency guarantees in place), the regime is generally very much criticised for having too low limits on the liability of the operator, for generally having too limited compensation (even if the additional funding by the state(s) is taken into account) and for the exclusive channelling of liability to the operator, which may dilute incentives of other parties who could equally contribute to the accident risk. It is for that reason that increasingly the question is asked whether there should not rather be a European legislative initiative with respect to nuclear liability instead of merely relying Member States to comply with the international framework, as precisely this framework is subject of heavy criticism. Legal doctrine holds that the EURATOM Treaty provides a sufficient legal basis for such an action at the EU level with respect to nuclear liability.

¹¹¹ Mail by Mr. Jay Kraemer, expert in nuclear law, to Mr. Ludo Veuchelen, forwarded to Michael Faure on 19 February 2021.

5. LIABILITY OF PARENT CORPORATIONS

KEY FINDINGS

- Many legal systems allow, under particular conditions, a piercing of the corporate veil, although there are important differences in that respect between the Member States.
- Some Member States have specific forms of veil piercing like enterprise or parental liability.
- In addition, increasingly, parental liability can be found for environmental violations of subsidiaries that occurred in developing countries; they are inter alia based on corporate environmental responsibility as well as on the need of a parent company to control its supply chain.
- There are indeed, an increasing number of (non)-ELD cases of liability of parent companies for (environmental) harm caused by their subsidiaries outside of the EU (often in developing countries).

5.1 Introduction

A question of general importance related to the fate of environmental liability in the framework of mergers and acquisitions relates to the liability of parent corporations for environmental harm committed by their subsidiaries. This question is mostly of importance in the framework of civil environmental liability. As will be explained in chapter 7, criminal liability if of a personal nature and that principle also applies (with very limited exceptions) to criminal liability. As a result, the possibilities to transfer criminal liability to a parent for environmental crimes committed by a subsidiary are very limited.

The liability for parent corporations has in fact been extensively dealt with within the context of the previous study dealing with environmental liability of companies.¹¹² But for sake of completeness the main findings of that study will be summarised here as the liability of parent corporations undoubtedly is a crucial aspect of the topics to be addressed within the context of the current study as well.

Roughly two scenarios can be distinguished of which also examples are found, both in the literature and in practice: the first is parental environmental civil liability, whereby (under different constructions) parent companies can be held liable for the environmental harm caused by their subsidiaries (5.2). A specific application of parental liability is the so-called foreign direct liability of European companies for harm committed, either by themselves or through their subsidiaries in third countries, and more particularly often developing countries. To the extent that this liability extends to European parent corporations for environmental harm caused outside of the EU by their subsidiary, this foreign direct liability in fact equally constitutes an example of parental environmental liability (5.3).

¹¹² See more particularly Faure 2020, 51-55 and 115-117.

5.2 Parental environmental liability

The liability of parent companies for debts of their subsidiaries is a reaction to the general rule of the limited liability of the corporation. Under particular circumstances and if specific conditions are met, various jurisdictions restrict the limited liability of the subsidiary and extend the liability to the parent. This extension of liability for debts caused by a subsidiary towards the parent corporation can take place under various headings.

5.2.1 Piercing of the corporate veil

There are circumstances where the courts will not recognise the limited liability and reach assets, for example of an owner/manager in a closely held corporation or a parent company (in a corporate group).¹¹³ Veil piercing is, in the words of Sjøfjell et al., "A doctrine which is marred by confusion and inconsistency".¹¹⁴ In law and economics scholarship piercing the corporate veil is considered to promote efficiency in two situations. The first is where the corporate form is used in order to limit tort liability to accident victims.¹¹⁵ It would be the example of a taxi corporation incorporating each taxicab separately. Still, Posner argues that permitting tort victims to reach the shareholders assets imposes additional risk on the shareholders. Moreover, "piercing the corporate veil is an administrative nightmare when there are many shareholders and shares turn over frequently".¹¹⁶ An alternative would be to require from the corporation engaged in a dangerous activity to post a bond equal to the highest reasonable estimate of the probable extent of its tort liability.¹¹⁷ This is to a large extent equal to a compulsory solvency guarantee which is indeed the preferable solution.¹¹⁸

The less problematic case for veil piercing is where separate incorporation misleads creditors. Again, Posner distinguishes between the publicly held corporation and the close corporation. The case is much stronger with closely held small firms where the danger of abuse of the corporate form is greatest.¹¹⁹ But even if a large publicly held corporation operates through wholly owned subsidiaries, as long as those subsidiaries are in unrelated businesses, maximisation of the enterprise's profits, will require that the profits of each subsidiary be maximised separately. In other words, the subsidiaries should be treated as if they were in separate firms, as creditors are not prejudiced by being limited to their rights against the particular subsidiary with which they dealt.¹²⁰ The situation is different when creditors are misled into thinking that they are dealing with one single corporation (for example when a subsidiary has a name confusingly similar to that of the holding company).¹²¹

The normal justifications for limited investor liability (like the advantage that shareholders no longer have to monitor the solvency of other shareholders, nor the performance of the board and the assurance that their personal assets will not be exposed to liability) do not apply where the shareholder in question is a parent company or a controlling shareholder.¹²²

¹¹³ For a discussion of the conditions for veil piercing in the environmental context, see Bergkamp 2001, 306-329.

¹¹⁴ Sjøfjell et al. 2015, 137.

¹¹⁵ Posner 2014, 558.

¹¹⁶ Posner 2014, 559.

¹¹⁷ Ibidem.

¹¹⁸ As has been extensively argued in the previous study (Faure 2020, 59-64).

¹¹⁹ Posner 2014, 560.

¹²⁰ Ibidem.

¹²¹ Posner 2014, 561.

¹²² Sjøfjell et al. 2015, 137-138.

Typical veil piercing cases are those where there is a small and undercapitalised firm that is managed by a controlling shareholder who holds the real wealth of the enterprise or the parent company of a corporate group keeps its operating companies thinly capitalised.¹²³ Courts are likely to pierce the corporate veil when wealthy shareholders appear to have shifted assets to frustrate creditors. Veil piercing can deter shareholders from externalising harm to tort victims.¹²⁴ But legal systems impose strict conditions for veil piercing. Undercapitalisation or undertaking risky but legitimate activities are as such not a sufficient reason to set aside the corporate veil on behalf of tort creditors.¹²⁵ Depending upon the legal system usually additional requirements are necessary, showing that the limited liability of the corporation was “abused” to disadvantage tort creditors. In some cases models of vicarious liability are extended by treating the aggregation of different firms as a single enterprise or an enterprise-wide guarantee of any residual tort liability left unpaid by an asset constraint individual firm is imposed.¹²⁶ These types of models encourage integrating related businesses into a single firm and they encourage mutual monitoring between different entities.¹²⁷ Piercing the corporate veil is therefore a mechanism whereby the courts ignore the corporate entity and hold shareholders directly liable.¹²⁸ The justification is usually an abuse of limited liability, more particularly in relation to involuntary creditors (like tort victims). Again, this type of veil piercing is especially advocated in the context of closely held corporations, but there are always dangers of evasive behaviour to escape the veil piercing.¹²⁹ Law and economics scholars hold that veil piercing can be seen as a situation where the courts trade off the benefits of limited liability against the costs.¹³⁰ In other words: when the costs of limited liability (more particularly for involuntary creditors) exceed the benefits, there is a high likelihood that the veil will be lifted.

Piercing the corporate veil is also a doctrine that is increasingly referred to and in some cases also applied for environmental harm. Especially in case of large environmental accidents and disasters, where the corporation having caused the environmental harm may be insolvent, often attempts are undertaken to set the limited liability aside and make shareholders liable to finance environmental remediation and restoration.¹³¹

5.2.2 Parental liability

There has been an important evolution in the case law of the Court of Justice of the EU in the domain of competition law. Already for a long time in EU competition law the possibility to hold a parent company liable for violations of competition law by a subsidiary where highly debated. In a landmark judgment of 10 September 2009 (*Akzo Nobel*)¹³² the Court of Justice endorsed the attribution of liability to Akzo Nobel for the conduct of its fully owned subsidiary on the ground that they were part of a “single economic unit”. In a later decision the court held “what counts is not whether the parent company encouraged its subsidiary to commit an infringement of the EU competition rules or whether it was directly involved in the infringement committed by its subsidiary, but the fact that those two companies constitute a single economic unit and thus a single undertaking for the purpose of Article

¹²³ Kraakman 2013, 251.

¹²⁴ Kraakman 2013, 252.

¹²⁵ Kraakman 2013, 257.

¹²⁶ Kraakman 2013, 258.

¹²⁷ Kraakman 2013, 258-259.

¹²⁸ Kraakman 1998, 653.

¹²⁹ *Ibidem*.

¹³⁰ Easterbrook & Fischel 1985, 109.

¹³¹ For examples, see Bergkamp & Pak 2001.

¹³² *Akzo Nobel v. Commission of the European Communities* (C-97/08 B), judgment of 10 September 2009. For a commentary see Briggs & Jordan 2009.

101 TFEU which enables the Commission to impose a fine on the parent company".¹³³ The Court moreover established in *Akzo* a rebuttable presumption of decisive influence for fully owned subsidiaries. In that situation, the burden of proof is reversed and the parent company must demonstrate the autonomy of the subsidiary in conducting its commercial policy.¹³⁴ The literature has examined to what extent this parental liability based on the "single economic unit" approach is compatible with the principle of personal liability and has found that this is indeed the case, although criticism is formulated as well.¹³⁵ Some argue indeed that the parental liability under *Akzo Nobel* amounts to an almost strict liability as rebutting the assumption of control over its subsidiaries would be almost impossible. Some authors consider this unfair towards the parent company and violating fundamental rights and principles, such as the personal character of the penalty.¹³⁶

This approach is obviously far-reaching as there is, moreover, a presumption of decisive influence (sufficient to justify parental liability) in the case a subsidiary is fully owned. This reversal of the burden of proof is in line with suggestions by Antunes¹³⁷ and supported by other literature¹³⁸ arguing that when a victim of environmental harm had proved that a subsidiary company has caused environmental harm, the company would be required to bring evidence as to whether the challenged decisions have originated from its control or were taken autonomously by the subsidiaries.¹³⁹

There have not yet been cases regarding parental liability in the context of corporate groups for environmental liability to the court, but it may be interesting to consider whether this concept of parental liability as applied in EU competition law could also be extended to environmental liability, thus holding parent companies liable for environmental liability obligations under the ELD incurred by their subsidiaries. It has already been suggested in the literature related to the ELD that such a jurisprudential development, whereby a parent would also be presumed to control the 100% daughter with determinant influence in the environmental domain should be welcomed. As a result of which the parent company would equally be liable to fulfil the obligations of the subsidiary under the ELD.¹⁴⁰

That suggestion is, however, debated. Cassotta and Verdure argue that parent companies could fit into the definition of operator in Article 2(6) of the ELD, as they would de facto control the professional activity involved.¹⁴¹ They therefore argue in favour of a joint liability of a parent company and a subsidiary for ELD obligations. This would, so they argue, require a modification of the ELD, as the current version¹⁴² of the ELD would not allow such a joint liability. Another solution would exactly be to hold the parent company liable along the same line as in the *Akzo Nobel* case, a parent company was held liable for the fines incurred for competition law violations by a subsidiary. Others, however, argue against expanding ELD liability to parent companies, arguing that it may give parent companies incentives not to control the environmental management within the subsidiary in order to avoid parental liability.¹⁴³

¹³³ Judgment of 20 January 2011, *General Química and others v. Commission*, C-90/09. See Bellamy & Child 2013, 1142.

¹³⁴ See further Kalintrini 2018.

¹³⁵ See Amory 2019, 69-79.

¹³⁶ This is for example argued by Leupold 2013, 570-582 and by La Rocca 2011, 68-76.

¹³⁷ Antunes 1994, 132-384.

¹³⁸ Sjøfjell et al. 2015, 143.

¹³⁹ Ibidem.

¹⁴⁰ This has more particularly been suggested by Cassotta & Verdure 2012, 242-243.

¹⁴¹ Cassotta & Verdure 2012, 242.

¹⁴² Ibidem.

¹⁴³ Bergkamp & Van Bergeijk 2013, 54.

I will come back to the case law of the Court of Justice of the EU with respect to parental liability and the liability of successors in relation to criminal liability in chapter 7.

5.2.3 Enterprise liability

A situation where an entire group is held liable for the losses incurred by one of its affiliates is usually defined as enterprise liability.¹⁴⁴ There is some confusion concerning this notion: in corporate law enterprise liability is used to describe a situation where several corporate entities within a group could be held jointly and severally liable for the debt of one of the members in the group. The entire group is seen as one enterprise that is made liable. However, in tort law, enterprise liability has also been developed in accident law as a way to increasingly introduce strict liability for harms caused by companies within American common law.¹⁴⁵ That development of enterprise liability within tort law has been heavily debated by law and economics scholars such as, for example, George Priest.¹⁴⁶ That second (tort law) interpretation of enterprise liability is less interesting for the scope of this study. I therefore focus on enterprise liability as it is discussed in the corporate law literature. Enterprise liability in that sense is just a form of veil piercing and setting aside the limited liability of the separate corporations.

The literature mentions that a problem with the piercing the corporate veil doctrine (generally, but also in the creation of enterprise liability) is that in many legal systems the specific conditions under which it can be applied are vague and discretionary.¹⁴⁷ Usually (case) law allowing piercing the corporate veil is intended to eliminate the protection of limited liability in cases where owners are considered to abuse the rationales of incorporation. But still, in many countries it is difficult for courts to formulate precise conditions under which this would be possible. Courts rather work with a list of variables that can be applied, such as 1) undercapitalisation of the firm; 2) comingling of corporate and personal assets; 3) assets stripping, transfer of assets; 4) disregard for corporate formalities; 5) owners control or domination over management issues; 6) fraud or misrepresentation of business operations.¹⁴⁸ But the conditions under which veil piercing is possible largely differ between the EU Member States.

A country which is representative for a legal system that easily accepts enterprise liability is Germany. The German *Konzernrecht* is recognized as the most sophisticated regulatory scheme applicable to corporate groups with explicit standards for parental liability.¹⁴⁹ German law relatively easily accepts liability of a parent company for obligations of a controlled subsidiary.¹⁵⁰ At the other end of the spectrum is the United Kingdom which views companies as distinct legal entities, even when they operate under the direction of a parent firm. British courts therefore persistently rejected the application of the enterprise approach.¹⁵¹ In the UK the role of piercing the corporate veil is therefore very limited and in fact only applied as a sanction against fraudulent behaviour.¹⁵² In Germany to the contrary, when a subsidiary is completely dominated by the parent or subordinated to its interests, the parent will be held liable for losses incurred by the subsidiary.¹⁵³

¹⁴⁴ See Bainbridge & Henderson 2016, 194-198.

¹⁴⁵ See in that respect for example Keating 2001.

¹⁴⁶ Priest 1985.

¹⁴⁷ So Belenzon, Lee & Pataconi 2018, 11.

¹⁴⁸ Ibidem.

¹⁴⁹ So Sjøfjell et al. 2015, 138.

¹⁵⁰ Belenzon, Lee & Pataconi 2018, 5.

¹⁵¹ Ibidem.

¹⁵² Belenzon, Lee & Pataconi 2018, 13.

¹⁵³ Belenzon, Lee & Pataconi 2018, 14.

There is currently no harmonised rule with respect to enterprise (group) liability within the EU. However, a European Company Law Experts (ECLE) group has formulated a proposal for reforming group law in the European Union. But that proposal mostly aims at regulating the relationships between the controlling shareholder (the parent company) and the subsidiary and does not explicitly deal with the potential liability of the group towards third parties.¹⁵⁴ A Draft Proposal for a 9th Company Law Directive was created in the 1970s and eventually abandoned in the 1990s.¹⁵⁵ That seems to be the only piece of major legislation covering corporate groups specifically, but never formally enacted. Sjøfjell et al. rightly stress that a distinction should be made between on the one hand direct liability schemes (whereby a parent can be held liable solely on the formal basis of its relationship with its subsidiary) and indirect liability schemes (where the parent company is held liable for its own wrongdoings through the use of the concept of the duty of care).¹⁵⁶

In an elaborate study Belenzon, Lee and Patacconi analyse enterprise liability in many countries, including many European Member States, and score their intensity as far as the easiness to pierce the corporate veil is concerned.¹⁵⁷ Some Member States, such as for example Italy, France and the Netherlands, are considered intermediate cases, but with a stronger tendency towards the (German) enterprise approach.¹⁵⁸ Cheffins for example noticed concerning English law that a court can lift the corporate veil and declare a shareholder personally liable for companies' debts when there is evidence of an unlawful purpose or deliberate concealment of the true state of affairs. With public corporations, courts rarely disregard corporate personality; for closely held companies veil piercing suits will be more successful when defendants served as directors or officers.¹⁵⁹ Ong notices that US law and practice regarding veil piercing should alert both UK and continental European companies to the potentialities of far-reaching tendencies of corporate environmental liability affecting an entire group.¹⁶⁰ There could be a positive incentive effect as the possibility of shareholder liability for corporate environmental damage may lead to pressure from shareholders on company directors.¹⁶¹

Belenzon, Lee and Patacconi also analysed the effects of enterprise liability, i.e. the propensity of courts to hold an entire group liable for the obligations of one of the subsidiaries. They found that where enterprise liability is weaker, groups tend to partition their assets more finely into distinct legally independent subsidiaries and grant their subsidiaries more autonomy.¹⁶² Their study does therefore underscore the point that there is a relationship between enterprise liability and the internal organisation of corporate groups. In countries with strong enterprise liability asset partitioning into separate legally independent subsidiaries may make less sense, but the contrary is true in legal systems where enterprise liability is weaker.

¹⁵⁴ European Company Law Experts, A proposal for reforming group law in the European Union. Comparative observations on the way forward, available at: <https://europeancompanylawexperts.wordpress.com/publications/reforming-group-law-in-the-eu/>. See also ECLE 2017, 1-49.

¹⁵⁵ It only remained in the status of an internal document. See ECLE 2017, 3.

¹⁵⁶ Sjøfjell et al. 2015, 140-141.

¹⁵⁷ For details, Belenzon, Lee & Patacconi 2018, 12-15.

¹⁵⁸ Belenzon, Lee & Patacconi 2018, 14.

¹⁵⁹ Cheffins 1998, 505.

¹⁶⁰ Ong 2001, 721.

¹⁶¹ Ibidem.

¹⁶² Belenzon, Lee & Patacconi 2018.

5.3 Foreign direct liability

5.3.1 Theoretical basis

One weakness of parental liability schemes is that they usually lack extraterritoriality. It is rare that enterprise liability can apply to all affiliated companies, also cross-national borders whereas environmental harm often has a cross-border character.¹⁶³ It is therefore increasingly argued, especially by private lawyers, that multinational corporations from the North doing business in developing countries in the South have a due diligence obligation to respect human rights and environmental rights in the South. The mere fact that standards in developing countries are often lower is no reason for multinational enterprises within the EU to violate environmental and human rights in the countries in the South where they are doing business.¹⁶⁴ Corporations in the North have an obligation of due diligence to control the compliance with environmental and human rights standards of the corporations with whom they do business along their supply chain. As a result, increasingly due diligence requirements are imposed upon European corporations through their supply chain. There are various bases provided for that obligation, such as the UN Guiding Principles on Business and Human Rights as well as the OECD Guidelines for Multinational Enterprises.¹⁶⁵ Whereas those due diligence obligations originally emerged from soft law and general principles, they increasingly are transferred into hard law containing legal obligations.¹⁶⁶ A report has been presented by the Committee on Legal Affairs of the European Parliament to the Commission to make due diligence obligations along the supply chain legally enforceable.¹⁶⁷ As a consequence, when violations of human rights or environmental rights would occur along the supply chain this could lead potentially to liability of corporations located in the EU. A specific case is the one where subsidiaries of multinational enterprises located in the EU would engage in environmental harm in developing countries. One can in that situation notice a parental liability of companies located in the EU for the environmental harm that occurred in the South. Recently, the European Parliament also called on the Commission:

“to assess the introduction of a secondary liability regime, namely parental and chain liability for damage caused to human health and the environment, and to carry out an assessment of the current liability situation of subsidiaries active outside the EU, including possible improvements for cases of environmental damage”.¹⁶⁸

5.3.2 Examples

There is now in many Member States an increasing number of cases where victims of pollution outside of Europe (or NGOs) allegedly caused by subsidiaries of European companies try to bring environmental liability lawsuits against parent companies before courts in the EU. As the ELD has no territorial effect beyond the EU, those cases obviously do not come within the scope of the ELD. It is, however, interesting to briefly mention some of those cases as they constitute examples of parental liability, but

¹⁶³ Sjøfjell et al. 2015, 142-143.

¹⁶⁴ Van Dam 2011.

¹⁶⁵ See for an extensive justification of foreign direct liability based on the role of multinational corporations in global business regulation, Enneking 2012.

¹⁶⁶ For a recent study analysing due diligence requirements through the supply chain, see *inter alia* Smit et al. 2020.

¹⁶⁷ European Parliament, Committee on Legal Affairs, Report (2020/2129(INL)) of 11 February 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, available at:

https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.html, last consulted on 28 April 2021.

¹⁶⁸ European Parliament, Resolution of 20 May 2021 on the liability of companies for environmental damage (2020/2027 (INI)) Recommendation 38.

also of the increasing tendency to make European companies liable in the North-South relationship for environmental harm occurring in the South.

An interesting case was *inter alia* brought by the King of the Ikebiri community in the Niger delta in Nigeria against ENI in Milan (Italy), supported by Friends of the Earth Nigeria and Friends of the Earth Europe.¹⁶⁹ ENI, an Italian based company, had a Nigerian subsidiary, the Nigerian AGIP Oil Company (NAOC), having activities in Nigeria. On 5 April 2010, an oil pipeline operated by NAOC bursted 250 m from a creek north of the Ikebiri community. The spill affected the creek, fishing points and trees. Some initial payments were made by NAOC/ENI (of approximately € 14.000), but that was rejected as being insufficient. The Ikebiri community launched a case against ENI in the Court of Milan, seeking clean-up and compensation for damages from the oil spill that affected their community in the Niger delta. In Court the community is seeking damages of approximately € 2 million. The plaintiffs brought the case to Italy as they consider ENI, the parent company, the one who is ultimately liable as the parent also profits from the oil production in Nigeria. The plaintiffs did not want to bring their case to a Nigerian Court because of lack of access to justice and poor enforcement.¹⁷⁰

The case is interesting as it shows an attempt to make parent companies in Europe liable for environmental harm caused by its subsidiary in the south. This could make parental liability realistic. In this particular case, given the assets of ENI, the potential insolvency did not appear to be a problem and neither was the potential limit of liability of NAOC the reason to bring the case in Italy, but rather the lack of trust in the court and enforcement system in Nigeria.

Many similar cases have been brought with variable success for the plaintiffs. Another case concerned the Swedish mining giant Boliden and dates from longer ago: the 1980s. Boliden was accused of having disposed 20.000 tons of lead and arsenic contaminated smelter waste in Chile.¹⁷¹ Not realizing the toxic nature of the deposits, housing developments took place within yards of the waste and children played on a toxic playground. Even though the case originated from the 1980s, the public uproar only started at the beginning of this century when the damage, more particularly to human health, became clear. A lawsuit had been brought for the damage which occurred in Chile, in September 2013 against Boliden in Sweden. The Swedish Court passed judgment in March 2018 in favour of Boliden for a variety of reasons, but an appeal has been filed.¹⁷²

A number of interesting cases were also filed in the UK on parent company liability.

In the case of *Okpabi v. Shell*, the London High Court rejected in a decision of January 2017, jurisdiction over the claims against the parent company, finding that the claimants failed to present an arguable claim that the parent company was responsible for the systematic pollution caused by its subsidiary. The decision was confirmed by the Court of Appeals on 14 February 2018, ruling that there is no arguable case that the parent company (Royal Dutch Shell) could be held legally responsible for the actions of its Nigerian subsidiary.¹⁷³

¹⁶⁹ Friends of the Earth Europe, *ENI and the Nigerian Ikebiri case*, Press briefing, 4 May 2017, available at: https://www.foeeurope.org/sites/default/files/extractive_industries/2018/foee-eni-ikebiri-case-briefing-update.pdf, last consulted on 13 May 2020.

¹⁷⁰ Ibidem.

¹⁷¹ Boliden/Environmental Law Defender Law Center (ELDC), available at: <https://edlc.org/cases/remedying-health-and-environmental-harms/mining-waste-from-sweden-poisons-chileans/>, last consulted on 13 May 2020.

¹⁷² Ibidem.

¹⁷³ <https://www.business-humanrights.org/sites/default/files/documents/Shell%20Approved%20Judgment.pdf>, last consulted on 13 May 2020. See also www.bhrinlaw.org/key-developments/58-united-kingdom, last consulted on 13 May 2020.

Another case of *Lungowe v. Vedanta*, dealt with damage that occurred in Zambia by a UK mining firm Vedanta, leading to a claim by Zambian villagers against Vedanta. Vedanta was the parent company of Konkola Copper Mines (KCM) an extractive resources company active in Zambia. Both the High Court and the Court of Appeals ruled that the case could be heard in English courts.¹⁷⁴ The case went to the UK Supreme Court where it was confirmed that it could be heard by UK courts.¹⁷⁵ An author concludes “that it is now harder for UK parent companies to deny that they have a duty of care for the acts of their subsidiaries... This case could act as an important weapon for claimants to mitigate environmental impacts which can be linked to multinational companies operations”.

A third case dealt with ethnic violence of which Kenyan nationals were victims following the 2007 Kenyan presidential election. 218 Kenyan nationals brought together in a group (AAA) sued Unilever Tea Kenya Limited (UTKL) as well as Unilever PLC. UTKL was the Kenyan domiciled subsidiary whereas UPLC the UK domiciled parent. The argument of the victims was that ethnic violence was carried out on the plantation whereas the risk of violence was foreseeable and the defendants owed them a duty of care to protect them from these risks.¹⁷⁶ In that particular case the Court found that the claims concerning a duty of care did not have arguable merit and so the case could not be heard in English courts. Meade argues that these cases all show that the question arises whether the parent company with a separate legal entity has sufficient control over the subsidiary to be held liable for harm caused by the subsidiary outside of the EU.¹⁷⁷ There is in general, so he argues, an important development towards improved access to remedy in the UK for victims of overseas corporate related harm which calls for reforms “thereby mitigating against risk of parent companies distancing themselves from subsidiaries and enable victims of environmental and human rights abuse to access justice”.¹⁷⁸ And these developments are certainly not limited to the UK, but can be found in many other EU jurisdictions as well, indicating an increased likelihood of imposition of a duty of care on parent companies located in the EU for environmental harm (or other violations) caused by their subsidiaries outside the EU.

A recent interesting case concerns the decision of the Court of Appeals in The Hague (the Netherlands) whereby a Dutch environmental NGO (Milieudefensie) and four farmers from Nigeria claimed compensation from Shell for the damage that would have been caused by Shell’s subsidiaries in Nigeria as a result of oil leakages through underground pipelines. The Court held in two decisions of 29 January 2021 that according to Nigerian law there would be liability for the specific damage and holds Shell liable for compensation.

5.4 Summary

From the above it appears that there are (under various headings) different possibilities (of course depending upon the requirements in the specific jurisdictions concerned) to hold parent companies liable for environmental harm caused by their subsidiaries. It are all examples of cases where the limited liability of the subsidiary can no longer provide a protection to the parent company. Especially in cases of pollution taking place in countries outside the EU by subsidiaries of European companies, there is increasingly a search for possibilities to hold the European parent company liable. Increasingly it is argued that the European parent has a duty of care to prevent (environmental and other) harm to be

¹⁷⁴ See also www.bhrinlaw.org/key-developments/58-united-kingdom, last consulted on 13 May 2020.

¹⁷⁵ See Lloyd 2019, available at: <https://www.freshlawblog.com/2019/05/01/uk-supreme-court-considering-parent-company-liability-for-environmental-harm-caused-by-overseas-subsidiaries/>, last consulted on 13 May 2020.

¹⁷⁶ www.bhrinlaw.org/key-developments/58-united-kingdom, last consulted on 13 May 2020.

¹⁷⁷ Meade s.d., 1, available at:

<https://www.business-humanrights.org/en/recent-decisions-in-the-uk-on-parent-company-liability-cases-show-the-need-for-law-reform>, last consulted on 13 May 2020.

¹⁷⁸ Ibidem, 4.

caused by its subsidiaries active outside of the EU. Increasingly EU courts accept cases even though the damage occurred outside the EU and the foreign subsidiaries were domiciled outside of the EU.

6. COMPANIES IN THE ENVIRONMENTAL CRIME DIRECTIVE

KEY FINDINGS

- An important step towards harmonisation of environmental criminal law was taken with the 1998 Convention on the protection of the environment through criminal law.
- That Convention recognises the importance of administrative enforcement and also has an independent environmental crime, both of which are desirable in an effective environmental enforcement framework.
- The ECD relies on a system of administrative enforcement and is structured as an instrument to solve the enforcement deficit rather than as a tool to provide a minimum protection to the environment (such as the Council of Europe Convention).
- Legal persons should also be made liable in Member State law on the basis of the ECD, but the penalties to be imposed should not necessarily be criminal in nature.
- Even though there may not be important practical implications, there can be arguments in favour of the introduction of a corporate criminal liability in the ECD if it were possible to gain support for that change.
- The literature has suggested many other changes in the ECD, which could be incorporated into a possible revision.
- One option is to change the structure of the ECD in order to remove the absolute administrative dependence and allow for the possibility of having an autonomous environmental crime.
- The ECD could equally specify the importance of particular remedies, such as complementary sanctions aiming at restoration of harm done in the past and prevention of future harm and the removal of illegal gains.
- It would equally be important that the ECD recognises the role of administrative enforcement and remedies within an effective framework for environmental enforcement.

6.1 Relevance

After having discussed how a succession of companies might affect civil environmental liability in various ways, I will now shift the attention to the criminal law as the title of this study indicates that it deals with “tackling environmental crimes under EU law”. In that respect this first chapter of this study dealing with the criminal law will address the specific position of companies within the Environmental Crime Directive (ECD); the next chapter will deal with the criminal liability in case of succession of companies (more particularly in the context of corporate mergers and acquisitions). Since criminal liability of companies is not explicitly provided for in the ECD, a few examples will be provided from Member States which do have criminal liability of legal entities and equally have particular rules to deal with the exposure of companies to criminal liability in the case of succession, more particularly in the context of corporate mergers and acquisitions (7). Chapter 8 will deal with a specific case study to

indicate that there is no such thing as a universal competence to deal with serious environmental crimes of a cross-border nature. That raises the question whether the creation of a specific crime of "ecocide" would be able to deal with very serious cases of environmental harm (9).

This chapter first starts with a brief historical background concerning the creation of the ECD (6.2). That is relevant, not so much because many institutional conflicts preceded the promulgation of the ECD, but because there were previous documents (more particularly a Convention of the Council of Europe) following a different structure of criminalisation of environmental harm than the ECD which is therefore worth discussing. Next, the structure of the ECD will be briefly explained (6.3) as well as the specific position of companies within the ECD (6.4). Next, as the ECD currently lacks criminal liability of legal entities, the question will be addressed whether there are arguments in favour of incorporating such a criminal liability for example in the framework of a revision of the ECD (6.5). Finally, this chapter will review some of the suggestions that have been formulated for the revision of the ECD, both in legal doctrine as well as in opinions of particular stakeholders (6.6). This will allow a further refinement of the analysis incorporating the cross-border aspect of environmental crime and the discussion concerning the introduction of the crime of ecocide, which both may have importance within the revision of the ECD as well. Section 6.7 concludes.

6.2 Brief historical background

6.2.1 Council of Europe Convention

In the 1980s and 1990s several changes in environmental criminal law of European Member States took place, sharpening both the criminal provisions as well as the penalties. In addition, a debate took place on whether environmental criminal law should also be regulated at the supranational level. At that moment, originally the debate did not take place within the EU as it was still debated whether the EU had competences to force the Member States towards a criminalisation of environmental harm. The first attempt towards the creation of a transboundary instrument covering environmental criminal law came therefore from the Council of Europe, which created in 1998 a Convention on the protection of the environment through criminal law.¹⁷⁹ In this Convention the various signatory states agreed to adopt specific provisions to protect the environment in their criminal law. It contains minimum provisions on environmental criminal law. In addition to various concrete endangerment crimes (punishing unlawful emissions), the Convention also created an independent crime aimed at serious pollution in Article 2.1(a): "The discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water, which: (i) causes death or serious injury to any person or (ii) creates a significant risk of causing death or serious injury to any person". In this particular case, when an emission has the serious consequence of causing death, serious injury or creating a significant risk of death or serious injury, there is no requirement that the discharge should be unlawful. In other words: this provision applies irrespective of the violation of administrative obligations and is therefore considered an independent crime.¹⁸⁰

The Council of Europe Convention also refers in Article 4 to a provision focusing on "the unlawful operation of a plant". However, in that particular case the Convention holds: "Each party shall adopt such appropriate measures as may be necessary to establish as criminal offences or administrative offences, liable to sanctions or other measures under its domestic law". In this particular case, where merely an unlawful operation takes place (and ecological values are not necessarily endangered as

¹⁷⁹ To be found *inter alia* in Faure & Heine 2000, 407-416.

¹⁸⁰ Faure 2017a, 343.

there was no emission), the signatory states could rely on administrative offences only. In this Convention the criminal law is therefore considered as a means of last resort (*ultima ratio*). This is stated in the Preamble where it is claimed that “Whilst the prevention of the impairment of the environment must be achieved primarily through other measures, criminal law has an important part to play in protecting the environment”.¹⁸¹ As far as companies is concerned, it is striking that Article 9 of this Convention explicitly addresses corporate liability, mentioning that each party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence has been committed by their organs or by members thereof or by another representative.

The Convention never entered into force because of the lack of the necessary ratifications. The main reason why the Convention did not have a success is that it was somewhat overshadowed by the path towards approximation of environmental criminal law of the Member States of the EU.¹⁸² Still it is important to recall the contents of this Convention, as it has a few elements that are remarkably different than the ECD and that may be interesting in the framework of a revision of the ECD.

6.2.2 The case law of the CJEU

The harmonization of criminal law at EU level has a long and debated history, the details of which are beyond the scope of this study.¹⁸³ Suffice it to state that in 2000, Denmark took a first step within the framework of the then-called Third Pillar, with an initiative targeting serious environmental crime.¹⁸⁴ Subsequently the Council of the European Union accepted a framework decision on January 27, 2003 on the protection of the environment through criminal law.¹⁸⁵ This Council framework decision was based on the Council of Europe Convention on the Protection of the Environment through Criminal Law. However, the Commission had already formulated a proposal for a directive on 13 March 2001 on the protection of the environment through criminal law.¹⁸⁶ As a result there was an institutional conflict leading the Commission to launch an appeal against the Council Decision, more particularly to launch a framework decision.¹⁸⁷ In a well-known judgment of 13 September 2005 in Case 176/03 the Court of Justice of the EU held that: “[although] as a general rule neither criminal law nor the roles of criminal procedure fall within the community competence ... the last-mentioned finding does not prevent the community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combatting serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the roles which it lays down on environmental protection are fully effective”.¹⁸⁸

A second decision of the Court resulted from the other area in which legislative action was taken, being ship-source pollution. Again, a Council Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution was established.¹⁸⁹ This Council Framework Decision prescribed specific penalties to be imposed upon offenders who committed

¹⁸¹ See Vagliasindi 2017a, 35.

¹⁸² Pereira 2015, 20-21.

¹⁸³ See, e.g., Comte 2003, 147-156; Comte 2006, 190-231; Hedemann-Robinson 2008, 71-91 and Mitsilegas & Giuffrida 2017, 28-32.

¹⁸⁴ 2000 OJ (C39) 11.

¹⁸⁵ 2003 OJ (L29) 55.

¹⁸⁶ OJ C180E of 26 June 2001.

¹⁸⁷ OJ C135/21 of 7 June 2003. See on this development also Pereira 2007.

¹⁸⁸ 2005 E.C.R. C-176/03.

¹⁸⁹ OJ L255/164 of 30 September 2005.

particular violations and therefore prescribed minimal sanctions. On 7 September 2005 also a Directive was promulgated on ship-source pollution and on the introduction of penalties for infringements.¹⁹⁰ The contents of the Directive was similar to the one of the Framework Decision. In this case there was hence not a conflict between the institutions, but rather a traditional co-operation whereby the Commission (acting within the so-called first pillar) used the larger enforcement possibilities of the Council (within the framework of the so-called third pillar). However, as the Court made clear in its Decision of 13 September 2005, that the Commission itself was competent, within the conditions of necessity and proportionality, to force Member States to impose criminal sanctions, the Commission appealed against the Framework Decision of 12 July 2005. That resulted in a second Decision of the Court in Case 140/05 of 23 October 2007. Not surprisingly, the Framework Decision was annulled by the Court as the Court argues that the articles requiring Member States to apply criminal penalties must be regarded as being essentially aimed at improving maritime safety, as well as environmental protection and could therefore have been validly adopted within the framework of the first pillar. However, an important comment is added in the Decision:

“By contrast and contrary to the submission of the Commission, the determination of the type and level of criminal penalties to be applied does not fall within the Community’s sphere of competence”.

The result of this case law of the Court was clear: when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential matter for combatting serious environmental offences, criminal law may be prescribed on the condition that it is necessary in order to insure that the rules which it lays down on environmental protection are fully effective and that it is also proportionate. However, the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence.¹⁹¹

On the basis of this evolution in the case law, two environmental directives were adopted: Directive 2008/99, adopted with respect to environmental crime, and Directive 2009/123, with respect to ship-source pollution.¹⁹² Obviously the case law is no longer relevant, since the entry into force of the TFEU. As will be briefly discussed below, the Lisbon Treaty made it possible to use new powers to force Member States also to introduce criminal penalties of a specific type and level.¹⁹³

6.3 Structure of the ECD

One important difference between the Council of Europe Convention and the ECD is that whereas the Council of Europe Convention sees an important role for administrative offences, the ECD takes a different perspective. Recital 3 of the ECD holds explicitly that criminal penalties “demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law”. The ultima ratio perspective which could be found in the Preamble to the Council of Europe Conventions is therefore absent in the ECD. Article 5 of the ECD holds that specific violations need to be regarded as criminal offences in the national legislation implementing the Directive. Member States have to take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive penalties. Article 3 of the ECD provides for a detailed list of nine offences that should be criminalised by the Member States when

¹⁹⁰ OJ L255/11 of 30 September 2005.

¹⁹¹ See further on this evolution in the case law, Vagliasindi 2017a, 36-40 and Pereira 2015, 183-198.

¹⁹² 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, 2008 OJ (L328) 28; Directive 2009/123 of the European Parliament and of the Council of 19 November 2009 on ship-source pollution and on the introduction of penalties for infringements, 2009 OJ (L280) 52.

¹⁹³ See further Pereira 2015, 199-207 and Grasso 2017, 19-22.

the particular behaviour is committed intentionally or at least with serious negligence.¹⁹⁴ According to the formulation in Article 3, all of these offences require unlawfulness which is defined in Article 2(a) of the ECD as infringing:

- the legislation adopted pursuant to the EC Treaty and listed in Annex A; or
- with regard to activities covered by the EURATOM Treaty, the legislation adopted pursuant to the EURATOM Treaty and listed in Annex B; or
- a law, and administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community Legislation referred to in (i) or (ii).

An important conclusion is therefore that unlawfulness, i.e. breaching some of the mentioned regulations, is a basic condition for the criminal liability under the ECD.¹⁹⁵ It is also important to note an important difference between the ECD and the Council of Europe Convention. The Council of Europe Convention provided for several specific criminal provisions that signatory states would include in their domestic legislation. The Preamble of the Council of Europe Convention also refers to the “need to pursue a common criminal policy aimed at the protection of the environment” and “that environmental violations having serious consequences must be established as criminal offences subject to appropriate sanctions”. If one examines the history of the ECD and more particularly the case law of the court, it becomes clear that the role of the ECD is rather to support an effective implementation of the environmental *acquis* and more particularly the legislation listed in Annex A to the ECD. Criminalisation for the ECD is therefore an important tool to guarantee that the domestic legislation implementing European environmental law will be complied with. That also explains the different structure of the Council of Europe Convention versus the ECD.

6.4 Liability of companies in the ECD

The Preamble to the ECD does not explicitly refer to companies. Liability of legal persons is referred to in Article 6. Article 6(1) ECD obliges Member States to ensure that legal persons can be held liable for offences referred to in Articles 3 and 4, where such offences have been committed for the benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person, based on:

- (a) a power of representation of the legal person;
- (b) an authority to take decisions on behalf of the legal person; or
- (c) an authority to exercise control within the legal person.

Article 6(2) holds that Member States shall also ensure that legal persons can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Articles 3 and 4 for the benefit of the legal person by a person under its authority.

Article 6(3) mentions that the liability of legal persons shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles 3 and 4.

Article 7 stipulates that Member States shall take the necessary measures to ensure that legal persons held liable pursuant to Article 6 are punishable by effective, proportionate and dissuasive penalties.

¹⁹⁴ Vagliasindi 2017a, 41-42.

¹⁹⁵ Mitsilegas & Giuffrida 2017, 36-37.

Summarising: Member States have to ensure that legal entities are also held liable for the offences contained in the ECD, and it follows from Article 7 that effective, proportionate and dissuasive penalties have to be available to punish legal persons.¹⁹⁶ However, whereas Article 5 mentions that these penalties should be criminal penalties, the reference to criminal has been omitted in Article 7, as a result of which a Member State could also punish violations committed by legal entities through sanctions that are not necessarily criminal in nature.

As the ECD clearly opted for a liability of legal entities without having a duty to make this liability criminal in nature, I will now briefly review the arguments in favour of corporate criminal liability and relate that to the model in the ECD.

6.5 Criminal liability of legal entities

6.5.1 Economic justifications for corporate criminal liability

From an economic point of view, designating the liable party is unimportant so long as sanctions are freely transferable and the parties are fully informed. With transferable sanctions, either the corporation charges the liable employee for the fine that it paid, or the employee asks the corporation for reimbursement of the fine that he paid. According to this line of reasoning it is unimportant whether the fine is imposed on the corporation or the individual, because the contractual relationship between the individual and the corporation governs these matters.¹⁹⁷ This is referred to as the so-called "irrelevance principle". According to this principle, the structure of sanctions is irrelevant if there is a frictionless transfer of fund between the principal and the agent.¹⁹⁸ It follows, thus, that from an economic perspective it does not matter whether the principal or the agent that is held liable, so long as they can bargain to distribute the sanctions. The irrelevance principle might be seen as the application of the Coase theorem to corporate criminal liability.¹⁹⁹ The Coase theorem holds that in a zero or low transaction cost setting an optimal allocation (efficiency) will automatically follow irrespective of the legal rule. In this context, it would imply that when negotiations between the employer and the employee are possible, it would not matter whether liability is allocated either to the employee or to the employer, as they could negotiate to shift the burden of the fine in an efficient manner.

However, this Coasean solution to penalties within corporate entities may not always work in practice. One problem is that the monetary sanctions are not always freely transferable between the employer (the corporation) and the employee. Sometimes the law prohibits paying someone else's fine. A contractual transfer may thus not always be possible. In those cases, it does matter at whom the penalty is directed.²⁰⁰ The most important reason for corporate criminal liability is the danger of insolvency with the employee. Since usually employees have less assets than corporations, holding the corporation liable implies that less costly fines can longer be applied in reaction to corporate (environmental) crime.²⁰¹

¹⁹⁶ Mitsilegas & Giuffrida 2017, 37-39.

¹⁹⁷ See Faure 2009, 331.

¹⁹⁸ Mullin & Snyder 2009, 226.

¹⁹⁹ Faure & Visser 2003, 20, available at:

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.549.9704&rep=rep1&type=pdf>.

²⁰⁰ Segerson & Tietenberg 1992, 63-65.

²⁰¹ Mullin & Snyder 2009, 229-230 and Faure 2009, 331.

According to Shavell, a criminal's assets can be lower than the optimal fines in several situations. *First*, when the agent's assets are already limited compared to the necessary sanction to deter the agent from committing the crime. *Second*, when the probability of escaping liabilities is high, the law needs to compensate it by increasing the monetary sanction such that the benefits of committing a crime will be lower than the costs of conducting the crime. The increased of monetary sanction will also increase the possibility that the agent's assets will be lower than the necessary sanction to deter. *Third*, the larger the agent's private benefits from conducting a crime, the higher the sanction needed to deter the crime, and hence, the more likely it is that the agent's assets are less than the necessary sanction.²⁰²

The corporation (employer) which is held criminally liable for the crimes committed by its employees can in turn apply sanctions to the employee, such as refusing promotion or termination of the contract. Corporate liability is therefore justified when the corporation is in a better position compared to the state in controlling the agent's behaviour.²⁰³ This is especially the case when the corporation can observe the employees' conduct in relation to the operation of the corporation, through internal control, monitoring, or sanctioning. It should be noted, however, that when the principal (corporation) cannot control the agent's conduct, it might be desirable to impose non-monetary sanctions to the agent although the principal's assets are sufficient to pay the monetary sanction.²⁰⁴

6.5.2 Combining corporate criminal liability with liability of individuals

The law and economics literatures therefore generally hold that there are strong arguments for corporate criminal liability.²⁰⁵ However, this does not imply that corporate criminal liability should exclude the liability of individuals within the corporation that have through their behaviour (acts or omissions) contributed to the corporate crime. One argument is that corporate entities may equally be unable to pay for the optimal fines. Optimal sanctions may exceed the corporate assets and (due to limited corporate liability) they may even organize their own insolvency. As a result, corporate criminal liability may not always have a deterrent effect. In that case non-monetary sanctions would need to be applied, but obviously particular non-monetary sanctions like incarceration cannot be applied against the corporation. That is therefore a strong argument in favor of individual criminal liability for those individuals (like corporate officers) that contributed to the crime. That individual liability can provide additional deterrence and avoid underdeterrence by shifting criminal liability exclusively to (potentially insolvent) corporate actors.²⁰⁶ Moreover, monitoring by firms may often be imperfect. As a result, employees may not be induced to exercise socially optimal levels of care. The possibility of non-monetary sanctions applied against employees (imprisonment) can therefore provide additional deterrence in addition to the fines applied to corporations.²⁰⁷ In the words of Roef: "Corporate and individual liability should not be understood as competing strategies, but as complementary approaches to fighting corporate crime. This prevents natural persons from hiding their own role in the corporate misconduct behind the so-called 'criminal corporate veil'".²⁰⁸

²⁰² Shavell 1985, 1236-1237. Also: Shavell 2004, 510. It should be noted here that the references above are actually Shavell's explanation on cases where non-monetary sanctions are preferable to monetary sanctions. This study, however, borrows the explanation for the justification of corporate criminal liability because it also explains conditions where assets of a criminal agent are less than the necessary monetary sanctions.

²⁰³ Mullin & Snyder 2009, 230-231.

²⁰⁴ Polinsky & Shavell 2007, 435.

²⁰⁵ See also Friedman 2000, 833-858 and Kahan 1998, 609-622.

²⁰⁶ The point has been made extensively by Polinsky & Shavell 1993, 239-257.

²⁰⁷ Kornhauser 1982, 1345-1392.

²⁰⁸ Roef 2019, 340.

6.5.3 Corporate criminal liability in the ECD?

In 1994 the general report of the Association Internationale de Droit Pénal on environmental criminal law still held that the majority of continental European countries adhered to the principle of personal liability and that as a result, corporations cannot commit a crime.²⁰⁹ A lot has changed since 1994, as many European Member States have now introduced corporate criminal liability.²¹⁰ Member States' points of view differ, however, as to whether the nature of that corporate liability should be criminal or administrative. Some Member States, like for example France, Belgium, Poland, Spain, accept criminal responsibility, but Member States like Germany and Italy (as well as a few others) do not. Those differences may perhaps not be that relevant in practice, since even countries that reject corporate criminal liability have other systems in place that effectively allow the imposition of similar penalties as under a criminal liability regime.

Germany takes the position that "*societas delinquere non potest*".²¹¹ They therefore adopt an alternative approach of administrative liability of legal entities as they are considered to lack the capacity to act in a blameworthy way.²¹² Nevertheless, the label "administrative" sanctions should not mislead into thinking that that system would be less punitive than traditional criminal law approaches. Administrative penalties can often be quite substantial and as deterrent as criminal sanctions.²¹³ There is some movement in Germany in the sense that criminal liability of companies is at least debated. A draft law introducing the criminal liability of companies and other associations has been introduced in the *Bundesrat* in 2013 through the state of North-Rhine Westphalia.²¹⁴ The draft proposes the introduction of corporate criminal liability in a specific *Verbandsstrafgesetzbuch* (criminal code for associations) and provides for specific punishment and measures that could be imposed on corporations and associations. More recently, in the summer of 2019, the German Federal Ministry of Justice published a draft corporate sanctioning act (*Verbandssanktionengesetz*) to combat corporate crime.²¹⁵ Some legal doctrine holds that there is no legally compelling necessity for the introduction of the corporate sanctioning act and that simply the current procedure for sanctioning corporations would need improvement. It is held that already today corporations would suffer large burdens and risks related to internal investigations, fines and civil law consequences, as a result of which a corporate criminal liability would not be necessary to deter corporate crime.²¹⁶ Others are, however, more positive concerning the idea of introducing corporate criminal liability in Germany.²¹⁷ It is therefore very likely that one of the leading Member States that rejected corporate criminal liability (Germany) might in the near future change its position by accepting corporate criminal liability. That may be important for the revision of the ECD. It was obviously the political opposition coming from the Member States that do not (yet) have criminal liability of legal entities that may explain the current absence of corporate criminal liability in the ECD. Most Member States do allow a cumulation between the liability of the corporation with the liability of natural persons.

²⁰⁹ Prabhu 1994, 715.

²¹⁰ For an overview, see Faure & Heine 2005, 41-44.

²¹¹ Corporations are not able to commit crimes.

²¹² Roef 2019, 340.

²¹³ Ibidem.

²¹⁴ Gesetzesantrag des Landes Nordrhein-Westfalen, Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstige Verbänden, Bundesrat.

²¹⁵ For an explanation on how the 2013 draft from North-Rhine Westphalia changed into the proposed corporate sanctioning act, see Jungermann 2019, 4-5.

²¹⁶ Jungermann 2019, 10.

²¹⁷ See *inter alia* Taschke, Schoop & Ballo 2019.

The question arises whether that absence of corporate criminal liability is really a large problem and whether it should therefore be subject to revision. Theoretically, arguments in favour of corporate criminal liability are not only given in the economic literature, but also in the criminal law doctrine. For example, Roef provides a powerful overview of the reasons why corporate criminal liability should exist:²¹⁸

- since corporations are viewed as a legal entity separate from its employees and shareholders, this personality should also be subject to the rules of criminal law;
- the general objectives of criminal law (like retributive justice and utilitarian goals like general deterrence) can also be reasonable justifications for punishments of corporate entities. Corporate criminal liability may therefore discourage other companies from disobeying the law;
- without corporate criminal liability there would be a risk of only a few individuals being prosecuted for offences that were in reality caused by corporate policies and practices that transcend individual actions and
- finally: if through an illegal practice a company enjoys a financial or other benefit, like a better market position, the legal entity should be the one to pay the price and not the employees who have contributed to the commission of the offence.

Although theoretically there are strong arguments in favour, some authors consider the position adopted in the ECD simply pragmatic as it facilitates the introduction of a form of corporate liability for environmental crime in those legal systems where the admissibility of a truly criminal liability of legal entities is constitutionally controversial.²¹⁹

From a practical perspective the absence of corporate criminal liability may not make that much of a difference. Whether one adopts a model of corporate criminal liability or another corporate liability model, the main sanction will anyway be a monetary penalty (fine). The main important difference is that the criminal sanction is also supposed to lead to a “shaming” of the criminal. Recall in that respect the Recital in the ECD holding that only criminal penalties “demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law”. If that expression is to be taken seriously, the fact that particular Member States (and the ECD) do not accept corporate criminal liability remains problematic, also from a practical perspective. There is indeed always a danger that the lacking criminal liability may lead to lower incentives for more particularly the law enforcement agencies (and potentially the judiciary) to take a particular case of environmental pollution seriously. If the ECD were to keep the current model, it should probably be stressed that also administrative sanctions can be “effective, proportionate and dissuasive” and should probably be even strengthened, more particularly in their application to legal entities (in those Member States that lack corporate criminal liability).

6.6 Suggestions for reform

6.6.1 Many suggestions

The ECD was promulgated in 2008 and has since then been subject to a variety of studies and reports, many of which have been initiated by the European Commission, but also by academic studies. Within the scope of this study it is obviously not useful to review all of those. It suffices in this respect to mention an evaluation study performed by Milieu on the implementation of Directive 2008/99/EC on

²¹⁸ Roef 2019, 333-334.

²¹⁹ Vagliasindi 2017a, 49. She therefore holds that this pragmatic approach has to be positively assessed.

the protection of the environment through criminal law by Member States.²²⁰ The main goal of that study was to assess the way in which the Member States have implemented the ECD. In addition to detailed country reports, there is equally a summarising final report of March 2013 with an update of May 2014. One interesting conclusion with respect to the role of companies is that the maximum level of sanctions for legal entities, either criminal or administrative falls below the benchmark of € 750.000-1.500.000, which was set in the annulled Framework Decision 2005/667/JHA for the most serious cases in at least 11 Member States.²²¹ Among many other actions taken at EU level, in 2018 the Commission published an EU Action Plan to improve environmental compliance and governance, including in the area of combatting environmental crime.²²² In addition, a formal evaluation of the Directive took place from 2019 to 2020 with a final report setting out the results of the evaluation being published in October 2020 on the Commission's website. After that a Commission Staff Working Document was issued on the results of the evaluation of the Directive.²²³ As a result of the Communication to improve environmental compliance and governance²²⁴ a Commission Decision followed to set up a group of experts on environmental compliance and governance.²²⁵ Furthermore the European Parliament made a series of Recommendations for action at EU and international levels, thereby strongly focusing on wildlife trafficking. On 1 December 2020 the Commission published an inception impact assessment concerning the ECD indicating the need to strengthen the provisions in the ECD. The report stresses that a variety of topics related to the ECD will have to be examined, such as the legal technique used to define the scope of the directive (unlawfulness requirement), the possibility to clarify certain vague notions and the application of appropriate sanction types for environmental crime. Also the collection, sharing and reporting of statistical data on environmental crime is mentioned as an important issue. The inception impact assessment mentions a variety of options that could be followed in the revision of the ECD.²²⁶ Currently a study is taking place to supply an impact assessment of the ECD. All of those documents will undoubtedly be used as the basis for a revision of the ECD.

In addition, there are networks of enforcers (such as IMPEL and EnviCrimeNet), prosecutors (ENPE) and environmental judges (EUFJE) which also did important work to improve compliance assurance and equally formulating recommendations for the reform of the ECD.²²⁷ The same is the case for Eurojust and Europol which both play an important role in supporting and coordinating the competent national authorities dealing with investigations and/or prosecutions on transnational environmental crime.²²⁸

Finally, there is also a large amount of academic studies that have addressed environmental enforcement in general, but also the ECD in particular. In this respect I should mention the EFFACE-project (European Union action to fight environmental crime) which was a 40 month EU-funded research project that has given rise to a large amount of detailed studies, reports and recommendations.²²⁹ One of the products of the EFFACE-project has been an edited volume on

²²⁰ Available at: https://ec.europa.eu/info/sites/info/files/milieu_implementation_report_2013.pdf, abbreviated as Milieu 2014, last consulted on 25 February 2021.

²²¹ Milieu 2014, 91.

²²² EU Action to improve environmental compliance and governance, http://ec.europa.eu/environment/legal/compliance_en.htm.

²²³ https://ec.europa.eu/info/news/evaluation-environmental-crime-directive-2020-nov-05_en, Commission Staff Working Document. Executive summary of the evaluation of the Directive 2008/99/EC on the protection of the environment through criminal law, SWD (2020) 260 final of 28 October 2020 and SWD (2020) 259 final of 28 October 2020.

²²⁴ COM(2018) 10 final of 18 January 2018.

²²⁵ Commission Decision 2018/C1903 of 18 January 2018, OJ C19/3 of 19 January 2018.

²²⁶ See European Commission, Inception impact assessment, Ref. Ares(2020)7247236 of 1 December 2020.

²²⁷ See in that respect *inter alia* Billiet 2018, abbreviated as ENPE 2018.

²²⁸ See Mitsilegas & Giuffrida 2017, 1.

²²⁹ Still all available at: <https://efface.eu> and at <https://ec.europa.eu>.

environmental crime in Europe, which equally contains a critical evaluation of the ECD.²³⁰ But also other monographs have been devoted to environmental crime²³¹ and also journal articles.²³²

It is within the framework of this study obviously not useful to review all suggestions that have been made in those different reports, studies and academic books and papers. As this study focuses on the danger that companies might escape their liability for environmental crime under the ECD, I will only focus on those suggestions that are relevant for the specific position of companies within the ECD or that could, more generally, improve the ability of the ECD to deal with corporate environmental crime. That implies that for example suggestions made in the literature to provide more guidance concerning the many vague notions used in the ECD will not be further discussed as that is an issue which is not specifically relevant for the role of companies with respect to environmental crime.²³³ Another aspect of crucial importance for the liability of companies which might undoubtedly play a role within the division of the ECD is of course whether there should be an explicit criminal liability of companies in the ECD. That point was already addressed in section 6.5.3. In the following I will therefore mainly focus on three aspects that could potentially give rise to revision in the ECD, being the so-called administrative dependence of environmental criminal law (6.6.2), the remedies, more particularly in relation to corporations (6.6.3) and administrative enforcement (6.6.4).

6.6.2 Farewell to administrative dependence?

I already mentioned before that an important feature of the ECD in its current form is that the conducts mentioned in Article 3 of the ECD will only give rise to criminal liability “when unlawful and committed intentionally or at least with serious negligence”. As unlawfulness is defined in Article 2 as violating either European environmental directives or domestic (usually administrative) environmental law implementing European environmental directives, the ECD has been qualified as providing a criminalisation whereby the criminal liability is dependent upon administrative law. In other words: if there is no violation of a particular administrative regulation as defined in Article 2 ECD, there is, at least under the ECD, no criminal liability.²³⁴

The ECD makes an explicit link with the environmental acquis by incorporating the acquis (to be found in Annex A of the ECD) into the criminal provisions. This can be understood as the ECD came to an important extent as a reaction to the implementation deficit in environmental law. Criminalisation of a violation of domestic legislation implementing the environmental acquis was considered as a way to generally deal with the implementation deficit.²³⁵ But a consequence is that within this framework there is no role for autonomous, independent crimes whereby criminal law could be applied even in the absence of a violation of administrative regulations or obligations.²³⁶ Recall that in that respect the structure of the ECD is different than of the Council of Europe Convention. First of all, the Council of Europe Convention does not limit the unlawfulness to a (rather restrictive) list of Regulations (Annex A of the ECD) that would have to be violated to constitute unlawfulness. Second, the Council of Europe Convention has explicitly provided for an autonomous crime as well for serious cases of environmental harm. This is especially important within the framework of the recent tendency to focus on the

²³⁰ Farmer, Faure & Vagliasindi 2017. There is another product of the EFFACE project which is a rather criminological perspective on environmental crime in Europe, see Sollund, Stefes & Germani 2016.

²³¹ For example Pereira 2015.

²³² See for example Faure 2017a; Mitsilegas & Giuffrida 2017 and Vervaele 2016.

²³³ See further on those vague notions, Faure 2010a and Vagliasindi 2017a, 47.

²³⁴ Vagliasindi 2017a, 47.

²³⁵ Faure 2017a, 143.

²³⁶ The suggestion to examine whether the unlawfulness requirement should be abandoned was also suggested in a Commission Staff Working Document of 28 October 2020 (SWD (2020) 259 final, 81).

criminalisation of “ecocide”, which is, as will be argued below,²³⁷ to some extent equally an attempt to criminalise serious environmental crimes in an independent manner.

6.6.3 Remedies

Recall that the ECD now only requires in Article 7 with respect to legal persons that they should be punishable by effective, proportionate and dissuasive penalties. Recall also that the implementation study of Milieu identified that in 11 of the Member States where they examined the implementation legislation, the monetary penalties were lower than the amount that was suggested at the time in the Framework Decision which was at the basis of the institutional conflict between the Council and the Commission and which was finally annulled. That raises the question whether it would be indicated to further clarify what is meant with effective, dissuasive and proportionate sanctions, more particularly in relation to legal entities.

Complementary sanctions

It has been argued earlier that more particularly the effectiveness requirement of penalties implies that the penalty should not only be dissuasive (deterrent) and proportionate, but that more particularly in the case of environmental harm, the penalty should equally lead to a restoration of harm done in the past and prevention of future harm.²³⁸ The problem is that, more particularly with respect to legal entities, a monetary penalty (fine) could be imposed, but that does not guarantee that the environmental harm caused with the crime would also be restored or that future harm would be prevented.²³⁹ For example in the case where a company would be liable for having illegally deposited waste, the remedy should not only focus on dissuasion (through a deterrent and proportional fine), but the liable polluter should equally be forced to restore the harm done in the past. In concreto, that may amount to an obligation to remove the waste that was illegally deposited in order to restore the environment in the original state. Problems could not only relate to the past, but to the future as well. It is theoretically imaginable that a company that would operate a particular installation without a valid licence, would be prosecuted for that violation and be imposed a fine. That does, however, not guarantee that the same violation would not continue in the future. For that reason the remedy should also aim at specific prevention by avoiding the pollution to continue. The court could for example impose an injunction ordering the company to refrain from further violations in the future. The necessity to have these specific types of remedies (aiming at restoration of harm done in the past and prevention of future harm) are specific to the case of environmental crime and are important as the classic penalties (imprisonment for natural persons and fines for legal entities) may not suffice to reach that goal.

A comparative research showed that legislation in the Member States often provides for possibilities to impose those remedies (usually via complementary sanctions aiming at restoration of harm), but there is still substantial divergence and those complementary sanctions aiming at restoration and prevention are not always systematically imposed.²⁴⁰ Since it is of importance, more particularly in case of environmental crime committed by companies, to guarantee that also these ecological remedies (restoration and prevention) are applied, one could consider to refer explicitly to the importance of those remedies and to include them in Member State law. An explicit reference may raise the awareness among prosecutors of the importance to require not only the imposition of for example a monetary

²³⁷ See chapter 9.

²³⁸ Faure 2010b, 260.

²³⁹ The importance of having accessory sanctions both for effectiveness and deterrence is also stressed in the Commission Staff Working Document of 28 October 2020 (SWD (2020) 259 final, 80-81).

²⁴⁰ See Faure 2017b, 313-314.

penalty, but also complementary sanctions. An explicit mention of the importance of those sanctions can also be important to raise awareness concerning the importance of those remedies among the judiciary.

Removal of illegal gains

A second important aspect of the “effective, dissuasive and proportionate” penalties is that in practice for a variety of reasons (more particularly the principle of *mens rea* or blameworthiness) the monetary sanction imposed for environmental crime (especially in the case of companies) is often not sufficiently deterrent, especially taking into account the profits that can be gained through environmental crime. For that reason it could be considered to explicitly mention that in environmental crime, in addition to the formal penalty (fine), also a confiscation of illegally obtained gains should take place. From a legal perspective it could be argued that the confiscation of illegal gains is not in the first place aiming at deterrence (as it is formally no punishment), but rather at a *restitutio in integrum*. By removing the gains obtained through environmental crime from the polluter, the polluting company is so to say put back in a situation *ex ante*, before the environmental crime was committed. As this is a measure rather than a punishment, there is also no objection against combining the removal of illegal gains with a deterrent punishment (like a fine).²⁴¹ Moreover, as fines that are imposed for environmental crime in practice are often not sufficiently deterrent, also from an economic perspective it makes sense to combine a forfeiture of illegal gains with punitive sanctions.²⁴² The removal of illegal gains is an instrument that is gaining increasing popularity and importance in other domains (like the fight against organised crime and drug trafficking), but can be considered an important tool in the fight against environmental crime as well. Again, the same reasoning applies: it merits to be considered to refer explicitly to the importance to remove illegally obtained gains from environmental crime in the ECD and thus to transpose this in domestic legislation in order to raise awareness for this important remedy among prosecutors and the judiciary.

Harmonisation of penalties?

Another question that could be asked with respect to remedies is whether it would make sense to further harmonise for example the type and level of penalties. Under the old institutional model (before the Lisbon Treaty), the court decided that there was no EU competence to harmonise also the level and type of penalties. That has, however, changed with the Lisbon Treaty.²⁴³ The area of freedom, security and justice now provides a legal basis for the adoption of measures to fight environmental crime and organised crime, if the unanimity required for expanding the list of crimes of Article 83 TFEU is met.²⁴⁴ The second paragraph of Article 83 TFEU now provides a legal basis for a harmonisation of the sanctions and some authors argue that this may have “a real added value”.²⁴⁵

One can, however, seriously wonder whether it are really the differences that currently exist in the level and type of penalties provided for in the domestic legislation of the Member States that constitutes the main problem in environmental law enforcement today. A much more important problem, also clearly recognised by the European Commission, is that essential information to check effective compliance, such as the amount of classified installations that have to be inspected, the number of available inspectors, the number of violations and the results of those inspections, is largely lacking.

²⁴¹ Faure 2005a.

²⁴² See for the economic justification of the removal of illegal gains, Bowles, Faure & Garoupa 2000 and 2005.

²⁴³ Mitsilegas & Giuffrida 2017, 51-57.

²⁴⁴ See Fajardo 2017, 6-7.

²⁴⁵ So Grasso 2017, 28.

Data collection at the Member State level is highly problematic. And even if Member States do collect these data it is not adequately passed on to the European Commission. The importance of collecting reliable data on environmental incidents is also recognised in a recent Resolution of the European Parliament.²⁴⁶ The (non-binding) Recommendation 2001/331²⁴⁷ provides for minimum criteria for environmental inspections in the Member States. This Recommendation equally holds that Member States should report data *inter alia* on staffing, details of the environmental inspections carried out, an evaluation of the success or failure of the plans for inspections etc. But the problem is that this Recommendation is hardly complied with in practice. The Commission reviewed the effectiveness of this Recommendation in 2007.²⁴⁸ This 2007 report is based on national reports on the implementation and experiences with the Recommendation. Many of these reports were incomplete, contained gaps in the information provided and were difficult to compare.²⁴⁹ As a way forward, the Commission finds it necessary to consider establishing legally binding requirements for environmental inspections.²⁵⁰ In a 2008 Resolution on the review of this Recommendation, the European Parliament voiced its concerns. The European Parliament showed to be in favour of transposing the Recommendation into a legally binding directive²⁵¹ which to date has not occurred. The 20 May 2021 Resolution from the European Parliament again recommends that the Recommendation of 2001 should be updated if necessary and transposed into a Binding Document or Regulation.²⁵²

There is therefore a danger that the mere decision to harmonise sanctions would not solve the implementation deficit as even after a harmonisation of sanctions there would still remain important differences between the Member States concerning for example the available inspectors, number of inspections, discretionary powers of both prosecutors (in Member States where the opportunity principle applies) and of the judiciary. There is, in other words, reason to be sceptical that a harmonisation of sanctions as such would improve the enforcement of environmental law.²⁵³ It seems as a first priority more important to focus on data collection which is rightly so equally stressed in the position of the European Commission concerning the revision of the ECD.²⁵⁴

6.6.4 Room for administrative enforcement and remedies

Currently there is no mention in the ECD of administrative remedies or enforcement. The only reference to administrative remedies is in fact a negative one, where Recital 3 mentions that compliance with environmental law can only be achieved through criminal penalties “which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law”.

²⁴⁶ European Parliament, Resolution of 20 May 2021 on the liability of companies for environmental damage (2020/2027 (INI)), General Observation 7 and Recommendation 16.

²⁴⁷ Recommendation of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States, OJ 2001 118/41.

²⁴⁸ European Commission, Report on the implementation of Recommendation 2001/331/EC providing for minimum criteria for environmental inspections in the Member States (Staff Working Paper), SEC(2007) 1493 final.

²⁴⁹ European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the review of Recommendation 2001/331/EC providing for minimum criteria for environmental inspections in the Member States, COM(2007) 707 final, 3.

²⁵⁰ COM(2007) 707 final, 8-10.

²⁵¹ European Parliament, Resolution of 20 November 2008 on the review of Recommendation 2001/331/EC providing for minimum criteria for environmental inspections in the Member States P6_TA (2008) 0568.

²⁵² European Parliament, Resolution of 20 May 2021 on the liability of companies for environmental damage (2020/2027 (INI)) Recommendation 56.

²⁵³ Faure 2017c, 144-145.

²⁵⁴ The importance of data collection is *inter alia* stressed in the Commission Staff Working Document of 28 October 2020, SWD (2020) 259 final, 79 as well as in the inception impact assessment of 1 December 2020.

There are at least three reasons why administrative enforcement and remedies merit to at least be mentioned and thus receive a place in the ECD.

First, it seems too one-sided to focus a remedy system for environmental violations merely on the criminal law and criminal enforcement. Increasingly a so-called toolbox approach has been defended, arguing that it is important that enforcers have a wide variety of different tools (civil penalties, administrative fines and criminal law) at their disposal, allowing them to choose a tool which would be inappropriate remedy for a particular type of offence and offender. Given the ineffectiveness of a “criminal law only” approach, Ogus and Abbot have powerfully argued in favour of a more restrictive role for the criminal law and a stronger focus on administrative law enforcement.²⁵⁵ In many Member States important changes have taken place as a result of which criminal law is no longer the primary remedy for environmental violations, thus giving also room to administrative law enforcement.²⁵⁶

Second, a nuanced and differentiated environmental enforcement regime would also need to have administrative law enforcement as the primary reaction, for example in case of abstract endangerment crimes, whereby only administrative obligations are violated.²⁵⁷ This is equally recognised in the Council of Europe Convention. As mentioned above the Council of Europe Convention explicitly mentions that for example the unlawful operation of a plant could be sanctioned either as a criminal or as an administrative offence. It would be indicated that the ECD further differentiates the various offences and provides for a possibility of administrative enforcement for those cases where criminal enforcement may not be necessary.

Third, in those legal systems that do not have the criminal responsibility of legal entities, legal entities will only be punished with administrative sanctions. I already indicated that there is in fact an inherent contradiction in the ECD as it on the one hand argues in Recital 3 that only criminal penalties can demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law, but on the other hand it only requires effective, proportionate and dissuasive penalties for legal persons according to Article 7 without requiring that those would be criminal in nature, thus recognising that administrative penalties can equally be “effective, proportionate and dissuasive”. It would be recommended that the ECD explicitly recognises the importance of administrative law enforcement.²⁵⁸

Finally, the strong reliance on the criminal law in the ECD runs the risk of the old-fashioned approach, simply assuming that problems are solved by imposing a criminal sanction on a particular behaviour. Empirical evidence showed that Member States that merely relied on the criminal law saw a large amount of dismissals and a minimum amount of prosecutions for environmental crime.²⁵⁹ The dismissals meant in the past that effectively nothing happened. It is for that reason that it is useful to recall Ayres and Braithwaite’s work on the enforcement pyramid.²⁶⁰ Their work has been relied on strongly for example by Macrory in reviewing regulatory enforcement regimes for the UK Cabinet Office.²⁶¹ He argued that the enforcement pyramid should equally be applied to regulatory enforcement, which implies a greater use of administrative penalties and relying on the criminal law only as a means of last resort, when all other remedies have failed. It would be useful if that toolbox

²⁵⁵ Ogus & Abbot 2002.

²⁵⁶ Faure & Svatikova 2012.

²⁵⁷ Faure 2017a, 334-335.

²⁵⁸ Also the Commission Staff Working Document recognises the importance of clarifying the relationship between criminal and administrative sanctions (SWD (2020) 259 final, 83-84).

²⁵⁹ See for data on the prosecution in the Flemish Region of Belgium, Faure & Svatikova 2010.

²⁶⁰ Ayres & Braithwaite 1995.

²⁶¹ Macrory 2006.

approach, which brings back the criminal law proportions to its right dimensions, would be reflected in the ECD as well.

6.7 Summary

This chapter reviewed the role of companies in the ECD. A first important instrument marking the harmonisation of environmental criminal law in Europe was the 1998 Convention on the protection of the environment through criminal law. Even though that instrument never entered into force, it has particular important features such as a reference to administrative enforcement as well as an independent crime. After a long and complicated history, the CJEU accepted that Member States could be forced through a directive to put criminal penalties in legislation implementing the environmental acquis. And that is exactly what subsequently the Environmental Crime Directive 2008/99 did. Article 6(1) of the ECD obliges the Member States to ensure that legal persons can be held liable for offences, but, given the differences between Member States, the liability should not necessarily be of a criminal nature.

Subsequently the question was addressed whether, also in view of a possible revision of the ECD, there should be a criminal liability of legal entities. From a practical perspective it could be argued that the differences between the imposition of administrative fines or criminal liability of the corporation may not be that large, but as a principle matter many have still pleaded in favour of a truly corporate criminal liability.

Other suggestions for the reform of the ECD were also reviewed, taking into account the rich literature that has been published since its promulgation in 2008. One possibility is to reduce the administrative dependence of criminal liability as is currently incorporated in the ECD. That would open the possibility of having truly independent environmental crimes, the importance of which will be underlined again in chapter 9. Another possibility is to explicitly address complementary sanctions that could be imposed against corporations. Especially since corporations are in practice often subject to administrative enforcement, it would be important that the ECD recognises that for particular types of environmental crimes administrative enforcement may equally play an important role.

One question that still has to be addressed is what the consequences are of criminal liability of corporations in case of a merger or acquisition, in other words a succession of companies. That will be the subject of the next chapter.

7. CRIMINAL LIABILITY AND SUCCESSION OF COMPANIES²⁶²

KEY FINDINGS

- There is no specific regulation, neither in the ELD, nor in the ECD dealing explicitly with successor liability. The general rule applies that an acquiring company takes over the liabilities of the company its acquires after a merger or acquisition.
- In the domain of competition law, the CJEU held in *Akzo Nobel* that a parent company can be held liable for competition law infringements committed by the subsidiary.
- The CJEU also held that a successor company can be held liable for fines addressed to their predecessors for violations of European competition law. The same principle applies according to the CJEU in cases of private claims.
- When there is de facto economic continuity and the activities between the predecessor and successor are the same, the separate legal status of the successor is not a limiting factor for attributing liability towards it.
- Also the European Court of Human Rights held that imposing a fine on a successor for acts committed by the predecessor is not a breach of the personal character of a punishment.
- In Member State laws, moreover, various solutions can be found either to prosecute the “old” company as long as there is no dissolution, or to impose criminal liability on the successor.
- When a company dissolves itself and resurrects as a different company, the resurrected company can be held liable for the companies committed by its predecessor in both France and the Netherlands.
- The case law of the CJEU has played an important role in developing successor liability, mostly in the domain of competition law. However, it is likely that this case law could also have influence on successor liability in case of environmental crimes.

7.1 Introduction

The central question of this study is whether legal entities can avoid their environmental liability through a merger or acquisition. The question was already addressed in chapter 3 as far as civil liability is concerned and chapter 5 focused on the potential liability of parent companies. Following on the previous chapter where we focused on the criminal liability of companies, the question will now be asked whether corporations could avoid or limit their criminal liability through an acquisition or merger. In other words: would it be possible for a company to “disappear” through an acquisition or merger as a result of which it would not longer be subject to criminal liability?

It was sketched in chapter 3 that in case of a take-over normally the new entity takes over all liabilities of the previous corporation that it has taken over or with which it has merged. The solution is therefore relatively clear as far as the civil environmental liability of the corporation is concerned in case of a take-over. The answer is, however, more complicated if it concerns criminal liability. The reason is that there may be two conflicting tendencies or interests to take into account. On the one hand in criminal liability, there is an important principle which makes it different than civil liability, being the personal character

²⁶² This text has been co-authored with Csobán Gőcze.

of criminal liability and the corresponding criminal sanction. That principle also applies to corporations. As a result, a person (but also a corporation) cannot be held liable for criminal acts committed by someone else. On the other hand there is equally the principle of the autonomy of the criminal law. That implies that the criminal law will in some cases disregard constructions in corporate law if they would merely be creations to escape criminal liability, for example in the case that a corporation would be dissolved in order to avoid its criminal liability, but the same persons would continue the same activities in a succeeding corporation.

Other than the Merger Directive discussed in chapter 3, there is no specific regulation at EU level, neither in the ELD, nor in the ECD dealing with this type of successor liability. Solutions have therefore to be found in Member State law. Domestic law of the Member States mostly deals with the scenario where a company dissolves itself to avoid criminal liability and resurrects as a different company. There is no legislation to tackle the scenario where a company dissolves itself to avoid criminal liability and remains dissolved. There is, however, important case law both from the CJEU as well as from the European Court on Human Rights which is highly relevant for the issue of successor liability. Most of those decisions do not deal with environmental liability, but rather with other domains, such as competition law or employment law, but these decisions may still point at a tendency within the case law of these high courts to accept successor liability in order to avoid that corporations could escape liability as a result of corporate restructuring. The solutions in these other domains could therefore inspire environmental liability as well.

7.2 Successor liability: general

Chapter 5 already discussed the case law of the CJEU with respect to parental liability for competition law infringements. It is striking that the Akzo Nobel Decision of 10 September 2009 concerned public enforcement and attributed a competition law fine to Akzo Nobel for the conduct of a fully-owned subsidiary on the ground that they had to be considered as a "single economic unit".²⁶³ In 2011, the CJEU confirmed that it is not necessary for a parent company to be directly involved in the EU competition law violation of its subsidiary in order to hold that parent liable. Instead, the fact that the two companies constituted a single economic unit and therefore a single undertaking for European competition law was sufficient.²⁶⁴ Consequently, a fine for a competition law violation committed by the subsidiary could be imposed on its parent company. Additionally, in the Akzo Nobel decision a rebuttable presumption was established that in case of fully-owned subsidiaries, there is a decisive influence of the parent on the policy of the subsidiary.

Legal doctrine has criticised the aforesaid case law as being at odds with the personal character of a penalty.²⁶⁵

Nevertheless, the CJEU has further developed not only parental liability, but also successor liability. That is, liability inherited by an absorbing company from a company being absorbed. As opposed to parental liability, which is liability of a parent company derived from the fault of its subsidiary. An example of the further development of successor liability would be SNIA adjudicated in 2013. In it, the CJEU *inter alia* decided that successors can be held liable for fines addressed to their predecessors for violations of European competition law.²⁶⁶ Moreover, the CJEU decided in Case C-343/13 Modelo Continente

²⁶³ Akzo Nobel v. Commission of the European Communities (C-79/08 B), judgement of 10 September 2009.

²⁶⁴ CJEU judgment of 20 January 2011, General Química and others v. European Commission (C-90/09).

²⁶⁵ Leupold 2013, 570-582 and La Rocca 2011, 68-76.

²⁶⁶ CJEU Case C-448/11 B-SNIA/Commission of 5 December 2013.

Hipermercados that a merger entails the transfer to the absorbing company of all the assets and liabilities of the absorbed company, including faults constituting criminal offences.²⁶⁷

The CJEU has equally applied the same principles in cases of private claims. For example, in Case C-724/17 Vantaan Kaupunki v. Skanska of 14 March 2019, the CJEU found that the concept of undertaking has to be interpreted autonomously in competition law and is applicable when claiming for damages inflicted by breaches of EU competition law. Skanska concerned a preliminary ruling requested by the Finnish Supreme Court in a damage claim against a cartel in the Finnish asphalt market. The cartel consisted of several companies which merged with each other and changed names as time progressed. The question became whether these new companies were liable for the deeds of their predecessors. The Finnish lower courts followed the basic idea that only the legal entity that caused the damage can be held liable. The CJEU held that the concept of “undertaking” as developed in the CJEU case law is also applicable in national anti-trust damages cases. Thus, for the CJEU economic reality prevails over legal reality meaning that the successor can be held liable for damage caused by its predecessor.²⁶⁸ The consequence being that the notion of undertaking under EU law prevails over the limited liability in domestic corporate law.²⁶⁹

This case law indicates that for the CJEU the competition law notions of undertaking and of economic continuity play an important role. When there is *de facto* economic continuity and the activities between the predecessor and successor are the same, the separate legal status of the successor is apparently not a limiting factor for attributing liability towards it. The CJEU focuses strongly on how the entity works in real life, rather than on its legal structures. Hence for the CJEU, it is unproblematic to hold a successor liable for the acts of its predecessor under EU competition law. Of course, the economic notions of undertaking and economic continuity have a strong basis in European competition policy. So it remains to be seen whether the same notions apply vis-à-vis environmental liability. That said, successor liability does apply to civil liability, like private damage actions such as in the Skanska case, but also to public enforcement and thus to fines, like in the Akzo Nobel case.

Although most of the case law just mentioned concerned European competition law, successor liability has appeared beyond this realm, particularly within labour law. The previously referred to Case C-343/13 Modelo Continente Hipermercados dealt with a merger where the Portuguese authority for working conditions had imposed a fine on the successor for violations committed by its predecessor. The predecessor was dissolved as a result of a merger with the successor company prior to the imposition of the fine. The CJEU referred to Article 19 of the Merger Directive providing that there is a “transfer to the acquiring company of all the assets and liabilities of the company being acquired”. Based on this, liabilities connected to offences committed by the acquired company were transferred to the acquiring firm. Meaning, fines could be imposed on the acquiring firm for these prior offences.

Obviously, there are differences between parental liability (like in the case of Akzo Nobel) and successor liability after a merger, but the CJEU generally seems to hold both successors and parents (conditionally) liable for the obligations committed by either predecessors or subsidiaries. Apparently the CJEU attaches more importance to the economic reality that continuity exists between the activities of a predecessor and a successor, even if the legal entity that committed offences ceased to exist.

²⁶⁷ CJEU judgement of 5 March 2015, in case C-343-13 Modelo Continente Hipermercados.

²⁶⁸ See Van Eetvelde & Verhulst 2019.

²⁶⁹ See also De Jong 2019, 220.

The European Court of Human Rights also had to express itself on whether a fine could be issued on a successor company for infringements committed by a company it merged with. The case concerned a judgment against the company Carrefour France. Based on the principle of economic and operational continuity, Carrefour France was fined for acts in breach of the commercial code committed by the company Carrefour Hypermarchés France.²⁷⁰ Carrefour Hypermarchés France was already dissolved and as a result of a merger operation absorbed by Carrefour France, its sole shareholder. The European Court of Human Rights observed that the company had ceased to exist for legal purposes, but that its activities were continued under Carrefour France. The Court therefore considered that the imposition of a fine on Carrefour France for acts by Carrefour Hypermarchés France was not a breach of the rule that a punishment should be applied to the offender only and not to other persons.²⁷¹

Notably, this development to expand – both civil and criminal – successor liability in the EU (and the Council of Europe) reflects similar developments in the US, given US successor liability applies explicitly to environmental crimes as well. American case law has interpreted the liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, commonly known as Superfund) as extending to a successor company in four cases: 1) the successor expressly or impliedly agrees to assume the liabilities; 2) a *de facto* merger or consolidation occurs; 3) the successor is a mere continuation of the predecessor; or 4) the transfer to the successor corporation is a fraudulent attempt to escape liability.²⁷²

Furthermore, American courts have used a variety of general principles under corporate law to interpret the CERCLA with respect to successor liability, such as the Mere Continuation Doctrine (MCD), the Continuity of Enterprise Doctrine (CED) and the Substantial Continuity Principle (SCP).²⁷³ Looking at the American example, it would therefore certainly be possible, also at the EU level, to take the principles developed for competition law and EU corporate law by the CJEU and to expand those to establish successor liability for environmental crimes as well.

7.3 Belgium

The Act of 4 May 1999 Establishing the Criminal Liability of Legal Persons introduced the criminal liability of legal entities into Belgian criminal law. Due to issues arising regarding the overlap between criminal liability of legal entities with the individual liability of directors and officers, a legislative change took place almost 20 years later, with the Act of 11th of July 2018 amending the Belgian Criminal Code and its Preliminary Title on Criminal Procedure. This reform changed the formulation of the criminal liability of legal entities, despite the underlying personality principle remaining the same.

The criminal liability of legal entities can be found in Article 5 of the Belgian Criminal Code.

Specific provisions deal with the prosecution of liquidated companies. There are also thought-provoking provisions dealing specifically with the prosecution of liquidated companies. Article 20 of

²⁷⁰ <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2237858/14%22%5D%2C%22itemid%22:%5B%22001-197205%22%5D%7D>.

²⁷¹ See Press Release ECHR 364 (2019) of 24 October 2019 “Complaint by the company Carrefour France about a fine for acts committed by Carrefour Hypermarchés France declared inadmissible”. Available at:

[https://www.google.com/search?q=ECHR+364+\(2019\)+of+24+October+2019+Complaint+by+the+company+Carrefour+France+about+a+fine+for+acts+committed+by+Carrefour+Hypermarch%C3%A9s+France+declared+inadmissible&sa=X&ved=2ahUKEwiSiKLiiJfVhVFWKQKHb8wD1IQgwN6BAGEEAE&biw=1280&bih=610](https://www.google.com/search?q=ECHR+364+(2019)+of+24+October+2019+Complaint+by+the+company+Carrefour+France+about+a+fine+for+acts+committed+by+Carrefour+Hypermarch%C3%A9s+France+declared+inadmissible&sa=X&ved=2ahUKEwiSiKLiiJfVhVFWKQKHb8wD1IQgwN6BAGEEAE&biw=1280&bih=610).

²⁷² K.C.1986 Ltd. P’ship v. Reade Mfg., 472 F.3d 1009, 1021 (8th Cir. 2007).

²⁷³

<https://corporate.findlaw.com/law-library/cercla-successor-liability-theories-of-liability.html#:~:text=In%20imposing%-20CERCLA%20liability%20on,that%20Congress%2C%20aware%20of%20this>.

the Preliminary Title to the Code of Criminal Procedure holds that criminal prosecution is no longer possible in case of the death of the subject. As the “death” of a legal entity can take place in various ways, the legislator decided to regulate the end of the criminal liability of a legal entity in the same article. Article 20 provides that there are three ways in which the criminal prosecution against a legal entity can end: 1) the conclusion of a liquidation of the company; 2) a judicial dissolution of the corporation and 3) a dissolution without liquidation.

The legal doctrine preceding the promulgation of the Act of 4 May 1999 made clear that the autonomy of the criminal law has to be taken into account. Stemming from this, criminal liability should not be avoided solely based on a legal entity’s dissolution, when *de facto* all assets of this criminal entity is transferred to a controlling shareholder for instance.²⁷⁴ In fact, the legislator did indeed introduce specific exceptions allowing prosecution even after liquidation of the corporation into Article 20. Thus, prosecution after liquidation is still possible under three exceptions. Firstly, if the liquidation is executed to avoid prosecution. Secondly, if the investigating judge finds serious grounds indicating the guilt of a dissolved legal entity. Finally, if the dissolved company has been referred by a pre-trial court or directly summoned to appear before a criminal court. Previously, the investigating judge could suspend dissolution or liquidation of a company. That has, however, been amended in the light of a constitutional review judgment passed by the Constitutional Court in 2017.²⁷⁵

The idea behind Article 20 is to avoid that companies intentionally dissolve in order to avoid their criminal liability. Legal doctrine in Belgium pointed at the fact that it would be possible that the liquidated legal entity would be “reincarnated” in a new legal entity which would show socio-economic identity with the liquidated company. In that case legal doctrine suggested that the preferable solution would be to address the criminal prosecution towards the new entity instead of trying to revive the “dead” corporation.²⁷⁶

In Belgium criminal prosecution against the old corporation is still possible, even in case of bankruptcy. Examples can be found in case law. A corporation held in a criminal trial that it no longer had legal personality as a result of the bankruptcy and could therefore no longer be prosecuted. The court, however, held that the legal entity only loses its legal personality when the bankruptcy is completely concluded and liquidation took place, which was not the case yet. The mere fact of bankruptcy does not prevent criminal prosecution against the corporation.²⁷⁷

Article 5(2) of the Belgian Criminal Code explicitly provides that the criminal liability of the legal entity does not exclude the criminal liability of natural persons who committed the same facts. This is the new formulation according to the Act of 11 July 2018. That means that natural persons such as directors and officers connected to the company can be held liable for crimes committed by the company, on the condition that the requirements for their personal liability (e.g. blameworthiness) are met. That equally implies that the dissolution of a corporation would not obstruct a criminal prosecution of the corporation’s directors and officers on the condition that they are liable for the criminal acts committed by the corporation.

²⁷⁴ Faure & Roef 1995, 428-429.

²⁷⁵ <https://www.eubelius.com/en/news/dissolution-or-liquidation-of-a-legal-person-in-the-course-of-criminal-proceedings>.

²⁷⁶ See Faure & Waeterinckx 2004, 340.

²⁷⁷ Criminal Court of Ghent, 28 January 2003, *Tijdschrift voor Milieurecht*, 2003, 314 (it concerned an environmental case).

7.4 France

Since the entry into force of the New Code Pénal on 1 March 1994, France recognises corporate criminal liability.²⁷⁸ According to Article 121-2 of the French Penal Code, legal persons, with the exclusion of the state, are criminally liable according to the distinctions in Articles 21-4 to 121-7 for offences committed on their behalf by their organs or by their representatives.

Article 121-1 of the Penal Code provides that no one is criminally liable other than for their own acts. A consequence of this personal character of criminal liability was that when company A performed an environmental crime, then loses its legal personality by being merged into company B, company B could not be held liable for the acts of A, because *de jure* B did not commit the criminal acts that A committed.²⁷⁹ In a landmark ruling of 25 November 2020 (in Case No. 18-86.955) the criminal division of the Cour de Cassation made an important reversal of this case law in case of a merger.²⁸⁰ Henceforth, an acquiring company in good faith can be held liable for crimes committed by the acquired company, although courts may only impose fines and forfeitures.²⁸¹ This implies that when a company would merge with another company in order to avoid criminal liability, French courts can therefore impose the criminal sanction on the acquiring company.²⁸²

The Cour de Cassation makes clear in an explanatory note that the decision is limited to public limited liability companies (both joint stock corporations and simplified joint stock corporations).²⁸³ This decision of the French Cour de Cassation is therefore in line with the CJEU judgment of 5 March 2015 in the case *Modelo Contniente Hipermercados*, discussed before. In that 2015 judgment the CJEU decided that a merger (in the sense of the Merger Directive) entails the transfer to the absorbing company of all the assets and liabilities of the absorbed company, including the faults constituting criminal offences.²⁸⁴ In an earlier decision made on 25 October 2016, the French Cour de Cassation refused to align itself with the case law of the CJEU as it held that the legal principle of *nula poene sine culpa* (no punishment without blame) precluded a transfer of criminal liability. This time around, the new decision of the Cour de Cassation of 25 November 2020 refers explicitly to the *Hipermercados* case. The earlier mentioned decision of the European Court of Human Rights of 24 October 2019 in the case of *Carrefour France* was a second European case also referred to by the Cour de Cassation in the same judgment. With this new decision of 25 November 2020 the Cour de Cassation therefore explicitly reversed its previous case law, where the court still held that a company cannot be held criminally liable for the acts of previous companies which merged with it.

Claims against natural persons indirectly involved in a company's crime can still give rise to criminal liability, even after dissolution. Article 121-3 of the Penal Code provides that someone can be held liable for breaching a duty of care, taking into account the nature of their mission, functions and competence, as well as their powers and available means.²⁸⁵ Yet, there must be an explicit statutory basis for this criminal liability. As a result, Article 121-3 of the Criminal Code cannot be relied on its own to hold executives (like directors and officers) liable for the environmental crimes committed by their company.

²⁷⁸ Deckert 2011, 148.

²⁷⁹ Barsan, Guyot-Réchar & Balian 2020.

²⁸⁰ https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/2333_25_45981.html.

²⁸¹ *Ibid.* para. 35.

²⁸² *Ibid.* para. 41.

²⁸³ Société anonyme et société par actions simplifiées. See further Barsan, Guyot-Réchar & Balian 2020.

²⁸⁴ Barsan, Guyot-Réchar & Balian 2020

²⁸⁵ Deckert 2011, 158-161.

7.5 Germany

Germany does not have a corporate criminal liability regime as the German Criminal Code only applies to individuals.²⁸⁶ Corporation can, thus, only incur administrative liability under the *Ordnungswidrigkeitengesetz* (Regulatory Offences Act) of 1968. This act adopted general provisions on corporate fines (*Verbandsgeldbusse*) in paragraph 30(1).²⁸⁷ Under paragraph 30, if any of the persons listed under subsections 1-5 committed a crime while representing their company and this violation amounts to a violation of duties incumbent on the company itself, then the company can be liable for an administrative fine between € 5 and 10 million. The application of the administrative fine does not require the identification of a natural person as perpetrator.²⁸⁸ The corporate fine can be imposed on all legal entities and to other entities that enjoy at least partial legal capacity and can therefore be addressed as entities separate from their human representatives.²⁸⁹

Fines issued under paragraph 30 can, moreover, be passed on to the legal successor of a fined enterprise according to paragraph 30(2a). The article provides that in the event of a universal succession or of a partial universal succession by means of splitting, the regulatory fine may be imposed on the legal successor(s). In such cases, the regulatory fine may not exceed the value of the assets which have been assumed, as well as the amount of the regulatory fine which is applicable against the legal successor. The legal successor(s) shall take up the procedural position in the regulatory fine proceedings in which the legal predecessor was at the time when the legal succession became effective. In other words, the size of the fine imposed on the successor should be the same as the size of the fine that would have been imposed on the infringing predecessor and the fine cannot be higher than the net value that the successor acquired in assets of the predecessor.

In August 2020 a bill was introduced before the German Parliament (*Bundesrat*) called the *Verbandssanktionengesetz* (Corporate Sanctioning Act), which is meant to establish a corporate criminal liability regime.²⁹⁰ Paragraph 6 of that bill provides that the legal successor of a company can still be held liable for fines incurred by that company as a result of committing corporate crimes.

Directors and officers are liable in Germany on the basis of paragraph 43 of the Private Companies Act (*GmbH Gesetz*) or paragraph 93 of the Public Companies Act (*Aktiengesetz*). Both provide that a director must act as a prudent business man. What that precisely entails has been further developed by case law. It includes inter alia that directors have to manage the company in a proper way, have to be loyal to the company, cannot disclose confidential information and are not allowed to take advantage of their personal position. Arguably, a director who dissolves his company to avoid criminal liability acts in breach of his duty to act as a prudent business man. Nevertheless, it happens rarely in practice that the mentioned articles concerning directors' liability would be used against directors who would dissolve a company to avoid criminal liability.

²⁸⁶ Böse 2011, 228 and

<https://globalcompliance.com/white-collar-crime/corporate-liability-in-germany/>;
<https://www.oecd.org/germany/2386529.pdf>, p. 2 confirms German criminal law only applies to natural persons.

²⁸⁷ Böse 2011, 229-230.

²⁸⁸ Böse 2011, 230-231.

²⁸⁹ Böse 2011, 232-233.

²⁹⁰ https://www.bundesrat.de/SharedDocs/drucksachen/2020/0401-0500/440-20.pdf?__blob=publicationFile&v=1. To the best of our knowledge this bill has not been accepted by the German Parliament yet.

7.6 The Netherlands

The legal basis for corporate criminal liability can be found in Article 51 of the Dutch Criminal Code. It originates from the Economic Offences Act, which already introduced criminal liability of corporations in the Netherlands in 1951.²⁹¹ In 1976 the criminal liability of corporations was generalised and incorporated in Article 51 of the Dutch Criminal Code. On the basis of Article 51(2)(1), corporations can in principle be held liable for all crimes that natural persons could equally commit. As a result, corporations can equally be held liable for environmental crimes.

There is in principle nothing in Dutch criminal law that prevents a company from dissolving to avoid criminal liability. It was debated in legal doctrine what the procedural consequences would be if a company dissolved during a criminal procedure.²⁹² In case a corporation was dissolved and therefore ceased to exist according to the rules of corporate law, but where the activities were *de facto* continued by a new corporation, there may be an identity between the old and the new corporation. A decision of the Hoge Raad (Dutch Supreme Court) in the case Atlantic Oil held that when there is identity between the old and the new corporation, in any case the new corporation can be criminally prosecuted.²⁹³ In this case, it is the social reality and not corporate law that is decisive. This possibility to prosecute the new legal entity would not only be possible in case of a "reincarnation" of the dissolved corporation in a new legal entity, but also in case of a merger.²⁹⁴

Summarising, the public prosecutor in the Netherlands can prosecute the "old" company, even if it is in dissolution as long as the company's dissolution has not been made public at the Chamber of Commerce. Additionally, those responsible for the legal persons criminal offence can still be held criminally liable, even after the company's dissolution.²⁹⁵ That then concerns the prosecution of natural persons. Finally, based on the "social reality" perspective, courts can also attribute criminal liability to the successor, on the condition that the successor is *de facto* the same corporation as the predecessor, merely acting under a different name.²⁹⁶

Article 51(2)(2) provides that where a natural person ordered the offence or actually controlled the forbidden act, the natural persons can be held criminally liable as well. This article does not solely apply to directors, but to whomever exercised *de facto* control over the legal person. Moreover, the dissolution of the company, which committed the crime is no obstacle for prosecuting the natural person who led the company into committing the crime.²⁹⁷ Note, however, that the criminal liability of natural persons on the basis of Article 51(2)(2) is of an accessory character: if it would not be established that the legal entity committed a criminal offence, there can also not be any criminal liability for ordering the offence or actually controlling the forbidden act.²⁹⁸

7.7 Summary

From the above it appears that even though there is no specific rule at the European level concerning the fate of criminal liability in case of succession, there seems to be a clear tendency in the case law of

²⁹¹ Keulen & Gritter 2011, 178-179.

²⁹² For an in-depth discussion, see Van Strien 1996, 66-73.

²⁹³ HR 28 October 1980, NJ 1981, 123.

²⁹⁴ Van Strien 1996, 72-73.

²⁹⁵ Keulen & Gritter 2011, 186-187.

²⁹⁶ See in addition to the Atlantic Oil case also other decisions of the Hoge Raad, such as *inter alia*, HR 24 November 1987, NJ 1988, 395; HR 20 March 1990, NJ 1991, 8 and HR 13 October 1998, NJ 1999, 498.

²⁹⁷ HR 6 December 1988, NJ 1989, 497; HR 12 February 1991, NJ 1991, 528; HR 26 April 2016.

²⁹⁸ Kesteloo 2013, 72-73.

the CJEU to interpret the rule that the acquiring company obtains all the assets and liabilities of the acquired company, in such a manner that also civil liabilities and even public liabilities (e.g. in the form of fines) are transferred to the successor, at least in the specific case of violations of competition law. It is likely that such a successor liability could also be extended to the case of environmental liability, although there is no explicit case law in this domain yet.

The examples discussed from Member State law show that case law in the Member States deals with the specific situation where a company dissolves itself to avoid criminal liability and resurrects as a different company. For that scenario the Netherlands and recently France find that the resurrected company can be held liable for the crimes committed by its predecessor. This is comparable to the approach in the US, although in the US successor liability specifically addresses environmental crimes, whereas the cases found in Europe so far mostly deal with competition law infringements. Also in Germany, administrative fines imposed can be passed on to the successor of the fined company even though that Member State lacks a corporate criminal liability regime (subject to change given there is a bill under discussion).

A specific position is taken by Belgium, as there is not so much a focus on the successor, but rather on the predecessor. Belgium has specific provisions allowing criminal prosecution to continue despite the dissolution of a company when specific conditions are met. That will more particularly be the case when the dissolution was triggered to avoid criminal liability.

From the previous examples it appears that, also inspired by case law from the CJEU (and the European Court on Human Rights), Member States no longer accept a situation where a company would commit an (environmental) crime, dissolve itself and then re-establish itself under a different name to avoid criminal liability. However, a firm can still avoid criminal liability by dissolving itself as long as it remains dissolved. Another possibility is that a company would formally remain in existence, but would take action to have all assets disappear as a result of which the company becomes *de facto* an empty shell. If it cannot be discovered where the assets went, there is a danger that there could formally be criminal liability of the legal entity, but that a sanction (mostly a fine) could simply not be executed.

Still, the countries that were examined (Belgium, France, Germany and the Netherlands) all have provisions with respect to directors' liability. As a director is a separate entity from the company she manages, the dissolution of her company does not imply that there is no longer criminal liability of the director. Even if the company of the director would be dissolved, she could still be prosecuted.

Finally, the case law of the CJEU has played an important role in developing successor liability, more particularly in the domain of competition law. Moreover, that case law has also had an important influence on the development of successor liability in Member States, such as France. It is likely that that case law would have its influence on successor liability in case of environmental crimes as well. But it is important to recall that so far that step has not been taken yet.

8. THE PROBO KOALA CASE

KEY FINDINGS

- In a case of transboundary shipment of waste like the Probo Koala case, often procedures take place in different jurisdictions, even in different continents.
- Effective prosecution for environmental crimes in the Ivory Coast largely failed as the case was settled.
- In the Netherlands, criminal prosecutions took place for rather technical violations (breaches of administrative law provisions), but not for the environmental pollution that occurred in the Ivory Coast.
- An attempt was undertaken to bring criminal charges in the Netherlands for the pollution in the Ivory Coast, but given a missing link with the Netherlands, that attempt failed.
- The Probo Koala case shows the difficulty in bringing extraterritorial prosecutions for environmental crimes that have taken place outside of the state of origin.

8.1 Introduction

The case of the ship Probo Koala that released particular slops in the Ivory Coast near the large city of Abidjan with, allegedly, several deaths and many injured persons as a consequence, is an interesting one to discuss, as an intermezzo concerning the criminal liability of companies for several reasons.²⁹⁹ It is first of all a classic case whereby particular wastes (although it was debated whether the substances were formally waste under the Basel Convention) were shipped from Europe (more particularly from the port of Amsterdam) to the South (first in Lagos, Nigeria and then to Abidjan, Ivory Coast). It is a case that received a lot of media attention, given the claim by the authorities in the Ivory Coast that the release of the substances would have caused 10 people to die, 69 to be in hospital and more than 107.000 to seek medical advice.³⁰⁰ The special rapporteur for the United Nations on the case came to the conclusion that there was “strong *prima facie* evidence that the reported deaths and adverse health consequences are related to the dumping of the waste”, but that “a causal link between the deaths and health problems and the waste from the Probo Koala had not yet been fully established”.³⁰¹

The case is also interesting as legal proceedings took place both in the Ivory Coast but also in different places in Europe, more particularly a personal injury group litigation in the UK and criminal prosecutions in the Netherlands. In the Netherlands, an NGO (Greenpeace) attempted to force the public prosecutor in the Netherlands to initiate criminal procedures against the company involved,

²⁹⁹ The case has been extensively reported and discussed in the literature. See *inter alia* Chukwuka 2008; Dorn, Van Daele & Vander Beken 2007; Jesse & Verschuuren 2011; MacManus 2018; Van Wingerde & Bisschop 2019 and Verschuuren & Kuchta 2011. Also NGOs have drafted critical reports on the case. See *inter alia* Greenpeace and Amnesty International, The Toxic Truth. About a Company Called Trafigura, a Ship Called the Probo Koala and the Dumping of Toxic Waste in Côte d'Ivoire, London, Amnesty International Publications, 2012. Also Trafigura has a website with information on the Probo Koala case (<https://www.trafigura.com/probo-koala/>). For this chapter I will obviously not discuss this case from all of these different perspectives but try to use those studies to focus on the most important aspects from the perspective of this study.

³⁰⁰ Decision of the High Court of Justice, Queen's Bench Division between Yao Pesai Motto and others v. Trafigura Limited and Trafigura Beheer B.V. (Abidjan Personal Injury Group Litigation) of 2007 (further abbreviated as High Court Decision).

³⁰¹ Report of the special rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights of 3 September 2009, cited by Van Wingerde & Bisschop 2019, 11.

Trafigura. That attempt failed because there was no sufficient link with the Netherlands.³⁰² The case illustrates the difficulties in engaging in criminal prosecutions in Europe for facts that allegedly took place outside of Europe, more particularly in this case in a developing country in Africa, the Ivory Coast. It illustrates how the territorial limitations of the criminal law make prosecutions within Europe (even in case European companies would be involved) difficult or even impossible. That is one of the reasons why some plead in favour of a “universal” crime of ecocide.³⁰³ I first sketch the factual background (8.2) and then sketch the different proceedings that took place (8.3) and pay specifically attention to the attempt of Greenpeace to have a criminal procedure in the Netherlands for the environmental pollution that occurred in Abidjan (8.4). Section 8.5 concludes.

8.2 Factual background

Trafigura is a commodity trader in the energy sector and one of the largest in the world. According to Van Wingerde and Bisschop Trafiguar has 80 offices in 41 countries around the globe, over 5.000 employees worldwide, and in 2019 it ranked 27th in the Global Fortune 500 ranking with a net profit of almost 900 million USD.³⁰⁴ Trafigura engaged the ship Probo Koala, which was under the control of its master, Captain Chertov. Probo Koala, sailing under the flag of Panama engaged in operations of oil trading for Trafigura. The Probo Koala transported so-called slops, which had a high concentration of mercaptan sulphur. The slops (554 tonnes) were the result of the washing of naphta at sea on board the Probo Koala.³⁰⁵ Trafigura contacted the Amsterdam Port Services (APS) to dispose of the slops. The Probo Koala sailed to Amsterdam, estimated to arrive there on 2 July 2006 with the intention to dispose of the slops. Starting to remove the slops from the Probo Koala in Amsterdam there were smells noticed and APS asserted that the chemical oxygen demand (COD) and the total organic chlorine (TOCI) in the slops was considerably higher than previously stated.³⁰⁶ APS therefore claimed higher disposal costs and Trafigura decided that the slops were to be taken back onto the Probo Koala. The Dutch authorities gave permission to APS to reload the slops onto the Probo Koala. The Probo Koala subsequently sailed on its voyage first to Baldiski and next to Lagos (Nigeria). The ship arrived in Abidjan in August 2006 and the activities of de-slopping were handled by Pume, a wholly-owned subsidiary of Trafigura located in the industrial zone of Abidjan. A company Tommy was requested to dispose of the slops. Tommy had a government licence from the Ivory Coast and was permitted to carry out waste disposal within the port of Abidjan. The slops were unloaded 19-20 August 2006 into a series of tankers, but subsequently Tommy would have disposed of the slops in an improper manner, by dumping them around the village of Akouédo. On 3 September 2006 reports of casualties were made and it was discovered that Tommy had probably dumped the slops at various locations around Abidjan

Three people would have died by 8 September 2006 and 3.000 people were seeking medical care.

8.3 Procedures

The case gave rise to a variety of procedures, both in the Ivory Coast and in Europe.³⁰⁷ The decision of the High Court of Justice in the UK refers, as far as the Ivory Coast is concerned, to an agreement

³⁰² Dakouri & Tiebley 2013, 31.

³⁰³ With this, I obviously do not want to suggest that the facts in the Probo Koala case would qualify as such. The case is merely interesting to illustrate some of the jurisdictional difficulties that may occur in a large case of cross-border pollution, especially in the North-South relationship.

³⁰⁴ Van Wingerde & Bisschop 2019, 12.

³⁰⁵ Van Wingerde & Bisschop 2019, 9.

³⁰⁶ Instead of an original estimated cost of 27 euro/m³ the cost would have been approximately 1.000 euro/m³ (so Van Wingerde & Bisschop 2019, 10).

³⁰⁷ Van Wingerde & Bisschop 2019, 10 and see Cardesa-Salzmman 2015.

between the state of Côte d'Ivoire and Trafigura on 12 February 2007 whereby Trafigura agreed to pay 95 billion CFA to the Ivorian state of which 73 billion CFA was reserved for victims. This amounted to approximately 152 million euro.³⁰⁸ The agreement was without any admission concerning liability.

This agreement between Trafigura and the Ivorian state followed after the Ivorian state had filed lawsuits against Trafigura Beheer B.V., Trafigura Limited and Pume before the civil courts in the Ivory Coast on 5 and 17 October 2006, claiming a provisional compensation of 100 billion FCFA.³⁰⁹ Scholars in the Ivory Coast were critical of this arrangement claiming that the 23 billion FCFA that was meant for the compensation of 108.000 victims in fact only reached 55.000 victims that each received 725.000 FCFA. The remainder of the money therefore stayed with the state.³¹⁰ There is criticism on the fact that there was a transaction with Trafigura rather than a criminal prosecution. They argue that this shows the limits of the justice system in the Ivory Coast to deal with a large cross-border pollution case like this.³¹¹

In addition, there was an Abidjan personal injury group litigation before the High Court of Justice in the United Kingdom, grouping together more than 30.000 victims.³¹² With respect to the claims of the victims, the High Court mentioned that in the agreement between Trafigura and the Ivory Coast, an amount of 73 billion CFA was reserved for the payment of the victims. The High Court therefore argues that the claims before the Court should take into account the sums that victims would already have received as a result of the agreement with the Ivory Coast.³¹³ Apparently later an agreement was reached between the 30.000 claimants and Trafigura as a result of which Trafigura accepted to pay each of the victims a sum of \$ 1.500, however, without any recognition of liability and with a denunciation on the side of the victims of any further claims against Trafigura.³¹⁴

In the Netherlands several criminal procedures took place with respect to technical offences (for example infringement of European waste shipment regulations and the delivery of dangerous materials). The case against the chairman of Trafigura was initially dismissed by the Amsterdam Criminal Court and this dismissal was confirmed by the Court of Appeal after appeal by the public prosecutor. After an annulment by the Supreme Court of the Netherlands, the Court of Appeal had to reconsider the case. Trafigura was convicted and had to pay a fine of € 1 million and the captain of the Probo Koala was convicted to a conditional jail sentence of 5 months.³¹⁵

Criminal prosecutions were also brought against the Amsterdam Port Services (APS), a director of APS and the city of Amsterdam. That proceedings resulted in an acquittal. According to the Court, the APS could trust the information by the city of Amsterdam that the return of the smelling slops to the Probo Koala was allowed.³¹⁶

In the Netherlands, also a civil procedure took place that was started by an NGO representing Ivorian victims. In April 2018, the District Court of Amsterdam ruled that the case against Trafigura was

³⁰⁸ Ibidem.

³⁰⁹ Dakouri & Tiebley 2013, 29.

³¹⁰ According to Dakouri & Tiebley 2013, 30.

³¹¹ Ibidem. Moreover, in the period of the Probo Koala case, the Côte d'Ivoire was still in the middle of a civil war (Dezalay 2019, 96).

³¹² It was apparently Britains' biggest ever group action lawsuit, according to Dezalay 2019, 94.

³¹³ High Court Decision, 95.

³¹⁴ Dakouri & Tiebley 2013, 32; Van Wingerde & Bisschop 2019, 10; Delazay 2019, 98.

³¹⁵ Van Wingerde & Bisschop 2019, 10.

³¹⁶ Ibidem.

inadmissible, but that decision was overturned in April 2020 by the Court of Appeal in Amsterdam. Trafigura lodged an appeal to the Dutch Supreme Court where the case would currently be pending.³¹⁷

Interestingly, also a procedure started in France, based on a complaint brought by 20 victims from the Ivory Coast and supported by the French and Ivory Coast human rights organisations to the public prosecutor in Paris. The public prosecutor in France has, however, rejected the claim for reasons of any link with the French territory.³¹⁸ The foundation for the jurisdiction of France consisted, according to the claimants in the fact that the chair of the board of directors (Mr. Dauphin) and one member of the board (Mr. Valentini) of Trafigura were both French citizens. But they did not hold a residence in France and according to the public prosecutor, there was no relationship between the French territory and the mentioned directors.³¹⁹

In the Netherlands, there was in fact only a prosecution for rather technical violations (breaches of administrative law provisions) committed in the Netherlands, but there was no prosecution for the environmental pollution that occurred in the Ivory Coast.³²⁰ All attempts to file criminal charges against Trafigura for the events in the Ivory Coast failed.³²¹ That was precisely the reason that Greenpeace attempted to force the public prosecutor in the Netherlands to bring criminal charges in the Netherlands for the pollution in the Ivory Coast.

8.4 Jurisdiction of the Netherlands for environmental crimes in the Ivory Coast?

The Netherlands has an interesting provision criminalising environmental pollution directly in the criminal code. It has, however, strict conditions which may make it difficult to apply to the case at hand. The problem is especially that it contains an unlawfulness condition and is in that sense not a truly independent crime. However, the most problematic aspect is most likely that it can be questionable that the Netherlands has jurisdiction over an environmental crime committed in the Ivory Coast.

8.4.1 Conditions to apply Article 173a of the Dutch criminal code

Article 173a of the Dutch criminal code reads as follows:

“Threat of harm as endangerment to public health or human life

Any person who deliberately and unlawfully releases a substance onto or into the soil, into the air or into surface water, will be punishable by:

1. A prison sentence of a term not exceeding 12 years or a category 5 fine, if this creates danger to public health or danger to the life of another person;
2. A prison sentence of a term not exceeding 15 years or a category 5 fine, if this creates danger to the life of another person and the offence causes the death of another person”.

It is clear from this article that there are many conditions to be met for it to be applicable.

Release/emission. A first condition is that a release of a substance (emission) has taken place. Here already a first problem arises, being what exactly should be considered as a release in this particular

³¹⁷ Van Wingerde & Bisschop 2019, 10.

³¹⁸ Dakouri & Tiebley 2013, 32-33.

³¹⁹ Delazay 2019, 99.

³²⁰ Van Wingerde & Bisschop 2019, 11.

³²¹ Delazay 2019, 99.

case. Most likely it was not the loading of the substances onto the Probo Koala (which took place in Amsterdam), as that was not a release of substances into air, water or soil (which is required for the application of Article 173a. Such a release only took place in the Ivory Coast when Tommy dumped the slops in an illegal manner.

A second condition is "*unlawfulness*". From the facts, it is also not clear who would have acted unlawfully. That may undoubtedly have been the case for Tommy who dumped the slops in an illegal manner, but not as far as the loading of the slops on the ship is concerned, as that apparently took place with the approval of the Amsterdam environmental authorities. They gave permission for the reloading of the slops onto the Probo Koala and for the Probo Koala to leave the Amsterdam port.

A third condition is the *endangerment of public health*. This requires that there is 1) endangerment; 2) of public health and that 3) it is the release that caused the endangerment to public health, in other words that there is also proof of causation. From the facts of the case it is not crystalclear whether the slops as such could be considered as dangerous. Trafigura also contested that it were the slops that would have led to the serious physical injuries that took place in the Ivory Coast. The difficulty is that Dutch case law requires a direct causal relationship between the release on the one hand and the endangerment of public health on the other.

Mens rea. Article 173a of the criminal code requires that the release should have taken place deliberately.³²² Again, that mens rea could most likely be shown concerning Tommy who deposited the slops in the Ivory Coast, but it might be much more difficult vis-à-vis Trafigura.

Summarizing, it appears from the conditions of Article 173a of the criminal code, that it may perhaps be possible to apply this provision to the behaviour of Tommy who deliberately dumped the slops in the Ivory Coast, but it may be much more difficult to apply it to Trafigura, which was exactly the aim of the Greenpeace claim, who wanted to see a prosecution of Trafigura for environmental crimes committed in the Ivory Coast before a Dutch criminal court. Most of the constituent elements of Article 173a of the criminal code all took place in the Ivory Coast, which raises the question whether Dutch courts would have jurisdiction to deal with such a claim.

8.4.2 Jurisdiction³²³

The first possible ground of jurisdiction is the territoriality principle (Article 2 of the Dutch criminal code). It holds that the Dutch criminal law is applicable to anyone making himself guilty of a criminal act in the Netherlands. It is apparently difficult to use this principle to justify Dutch jurisdiction for an endangerment of public health taking place exclusively in the Ivory Coast. At least one of the constituent elements of Article 173a would have to take place in the Netherlands.

Another possibility would be to grant jurisdiction to the Netherlands on Article 5 of the Dutch criminal code. This article contains the active personality principle³²⁴ and makes it possible to prosecute Dutch citizens who have committed crimes abroad in the Netherlands if certain strict conditions are met. A first condition is that the actor of the crime should be Dutch. Second, prosecution in the Netherlands is only possible for several specifically mentioned crimes and Article 173a is not among them. Second,

³²² Before 2004, the Article even required that the release should have taken place "knowingly", but that condition was removed as a result of a legislative amendment.

³²³ For an elaborate discussion of the various grounds of jurisdiction, see Ryngaert 2018, 11-20.

³²⁴ This is also referred to as the nationality principle. See Ryngaert 2018, 12.

Article 5(2) of the Dutch criminal code requires double incrimination, meaning that also the Ivory Coast should have a criminal provision punishing concrete endangerment of human health through an emission. It is doubtful whether that is the case. Also the active personality principle could therefore not provide jurisdiction to the Netherlands.

A third possibility would be to base jurisdiction on the universality principle contained in Article 4 of the Dutch criminal code. For specific offences, these could be prosecuted in the Netherlands, even if they would have been committed completely abroad. Among the many offences listed in Article 4, Article 173a is not mentioned.³²⁵ A condition for the universality principle to apply is moreover the presence requirement, meaning that the suspect has to be found in the Netherlands. That could, however, be based on the territorial presence of a subsidiary.³²⁶

8.4.3 Decision

Based on the analysis above, it is very doubtful that it would be possible to prosecute Trafigura in the Netherlands for environmental crimes it would allegedly have committed in the Ivory Coast. Even irrespective of the conditions for the application of Article 173a of the Dutch criminal code, the most important problem seems to lay in the lack of jurisdiction. All constituent elements of Article 173a seem to have been committed in the Ivory Coast and most likely not by Trafigura, but by Tommy. It would therefore be doubtful that the territoriality principle could provide for jurisdiction of the Netherlands. The active personality principle could only help if one of the defendants were of Dutch nationality (there was a corporation Trafigura Beheer, which seemed to be Dutch). But it is doubtful that the Ivory Coast would have a similar provision as Article 173a and that therefore the requirement of double incrimination would be met.

The Court of Appeals of Amsterdam decided on 13 April 2011 that criminal prosecutions against Trafigura for environmental crimes committed in the Ivory Coast was impossible. The Court mentions to motivate its decision that there is a lack of cooperation from the authorities in the Ivory Coast, which constitutes a serious obstacle to an effective prosecution in the Netherlands. Moreover, the Court refers to the fact that none of the suspects had the Dutch nationality or lived in the Netherlands and that the activities of the companies involved also took place outside of the Netherlands.³²⁷

The attempt of Greenpeace to force the Dutch public prosecutor to file criminal charges against Trafigura for the environmental crimes that occurred in the Ivory Coast therefore failed.³²⁸

8.5 Concluding

This interesting case shows the difficulties of applying criminal law against corporate actors and individuals involved in the corporation in case of a suspicion of serious cross-border environmental criminality. Various procedures were brought, but legal doctrine is especially critical of the fact that in the Ivory Coast itself no effective criminal prosecution took place, as the case was settled via a transaction between Trafigura and the state of the Ivory Coast.³²⁹ That led to the result that the

³²⁵ See further on the jurisdiction under the universality principle, Ryngaert 2018, 17-20.

³²⁶ So Ryngaert 2018, 19.

³²⁷ Van Wingerde & Bisschop 2019, 11.

³²⁸ Dakouri & Tiebley 2013, 31.

³²⁹ Dakouri & Tiebley 2013, 32-33.

European companies could be prosecuted for the formal violations (breaches of administrative rules) committed in the Netherlands, but not for the environmental crimes that occurred in the Ivory Coast, given the limits of the territoriality principle. The probably somewhat unsatisfactory result is that in the end no criminal prosecution whatsoever took place regarding the environmental crimes (more particularly the release of the slops) in the Ivory Coast, although these releases allegedly caused several casualties and injuries to many victims. The Probo Koala case also underlines the difficulties that arise in case of extraterritoriality, which limits or excludes the possibilities of states of origin to enforce the case.³³⁰ Currently, criminal law is limited in addressing transboundary corporate environmental crime. That is why it is suggested in the literature that there is a need to design innovative strategies that prevent the externalisation of environmental harms.³³¹

That raises the question if a possibility should be opened to hold European companies that are connected to environmental crimes committed outside of the European Union, also criminally responsible before criminal courts in the EU, precisely because in a developing country like the Ivory Coast (also given serious problems in the criminal justice system) an adequate criminal prosecution may not take place. This is one of the questions that has been asked in relation to a possible broadening of the jurisdiction for serious environmental crimes via the notion of a so-called ecocide.

³³⁰ See in that respect also Ryngaert 2018, 13-17.

³³¹ Van Wingerde & Bisschop 2019, 13.

9. ECOCIDE³³²

KEY FINDINGS

- There is currently a recognition of ecocide in the Rome Statute of the International Criminal Court, punishing widespread, long-term and severe damage to the natural environment, but the conditions are currently such that it is almost impossible to apply this provision.
- There have been proposals by various scholars to incorporate a sui generis crime of ecocide in the Rome Statute, either in the context of armed conflict (Freeland) or also more generally as the fifth crime against peace (Higgins).
- Critical criminologists also point at the importance of the concept of ecocide and indicate various theoretical bases for this concept.
- One policy consequence of this debate is a movement to include ecocide in the Rome Statute of the International Criminal Court, a movement that is equally supported by the European Parliament.
- Given the heavy conditions for changing the Statute, it may, however, not be easy to reach that particular goal.
- The debate on ecocide also points at the importance of having autonomous environmental crimes, providing a possibility of criminal liability, even in the case of compliance with a permit; the recent UMICORE case underscores the importance of such a possibility.
- The ecocide debate equally points at the limits of the territoriality principle in applying criminal law to environmental crimes of a transboundary nature; some serious environmental crimes (ecocide) potentially call for universal jurisdiction.

9.1 Introduction

There has been a long debate, first in the literature, but increasingly now also at the policy level to create a separate provision penalising the intentional destruction of the environment under the Rome Statute of the International Criminal Court. During the discussions preceding the creation of the International Criminal Court there was an awareness that in conflicts increasingly an intentional destruction of the environment takes place. That led to a debate on the possibility to either bring the intentional destruction of the environment under the existing war crimes, or to create a separate crime of ecocide. At the Rome Conference in 1998, a provision was adopted that explicitly criminalises damage to the natural environment under specific circumstances. Article 8(2)(b)(iv) of the Rome Statute specifies that “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes” a war crime within the jurisdiction of the court includes:

“(b) ... serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
(...)”

³³² This chapter is drafted with cooperation by Minzhen Jiang.

(iv) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or wide-spread, long-term and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”.

The provision contains several vague notions, such as the concepts of “wide-spread”, “long-term” and “severe” that have not been further defined in the Rome Statute. Moreover, the formulation of the provision makes clear that the military importance can justify the damage to the natural environment and there is no precise threshold indicating what level of environmental damage would be required for the provision to be applicable.³³³ The provision was on the one hand welcomed as it was the first time that destruction of the environment could (under limited circumstances) be considered as a war crime, but there were equally criticisms. Decisions of military commanders to intentionally target the environment could be excused as long as there is a military justification. The article is, moreover, only applicable in an “international armed conflict, within the established framework of international law”, thus seriously limiting its application.³³⁴ The provision did not target wide-spread, long-term and severe damage to the natural environment, which did take place outside of the context of an international armed conflict.

The inclusion of serious damage to the natural environment in the Rome Statute was undoubtedly an important step forward in the development of international criminal law.³³⁵ It entered the international debate as it became increasingly clear after the Iraq war that warfare can create serious damage to the natural environment. In some cases, the natural environment was even effectively used as a weapon, for example when the Iraqi burned the oil fields after retreating from Kuwait. Those examples provided the momentum to include wide-spread, long-term and severe damage to the natural environment in the Rome Statute. However, in addition to the symbolic importance, the practical importance is probably limited. First of all, the provisions in the Rome Statute do not provide any independent protection to nature as damage to the natural environment can be excused as long as it fits into a military strategy. Moreover, the specific way in which the conditions for criminal liability have been formulated may lead to potentially insurmountable legal hurdles³³⁶ as a result of which it is very doubtful that this provision will ever be applied in practice. However, the inclusion of this provision in the Rome Statute has launched a wider debate on the concept of ecocide as an international war crime. It has led to an intense debate, both in academic literature and at the policy level whereby some have formulated proposals to include a new crime of ecocide in the Rome Statute (with lower thresholds of application), still focusing on damage to the natural environment in the context of an armed conflict³³⁷ whereas others go much further and propose the inclusion of ecocide as a specific crime against the global commons or the earth ecological system, also outside of the context of international warfare.³³⁸ As the notion of ecocide has also been introduced in the Committee on Legal Affairs of the European Parliament,³³⁹ it is worthwhile to pay briefly attention to this development, with a focus on the question to what extent it affects the liability of companies, central to this study.

³³³ Freeland 2015, 209-210.

³³⁴ Freeland 2015, 210-211.

³³⁵ Freeland 2015, 212-213.

³³⁶ Ibidem.

³³⁷ For example Freeland 2015, 245-283.

³³⁸ This is the goal of for example the International Parliamentary Alliance for the Recognition of Ecocide. See Ecocidealliance.org and see Toussaint 2020.

³³⁹ See the opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on Legal Affairs of 29 January 2020, referring *inter alia* to the importance “to allow independent and effective investigations to be conducted in order to fight environmental crimes that adversely affect biodiversity and human health, including ecocide” and “calls on the Commission and the Member States to raise awareness of and promote solutions for the protection of environmental rights and

I first briefly sketch the different strands of literature regarding ecocide (9.2) as well as the feasibility at the policy level (9.3). I then link the concept of ecocide to the debate on autonomous environmental crimes, equally relevant for the revision of the ECD (9.4).³⁴⁰ There has been a debate on the introduction of those autonomous environmental crimes in some Member States (9.5). That goes obviously slightly beyond the debate on ecocide, as not all proposals for autonomous crimes relate to the cases which are qualified as ecocide in the literature. However, from a practical perspective (of the revision of the ECD) the option of introducing autonomous crimes is probably even more realistic than the adoption of an ecocide provision within the Rome Statute. Section 9.6 concludes.

9.2 Theoretical basis

9.2.1 Freeland

There is a wealth of environmental, criminological and other literature that has emerged discussing the notion of ecocide from various angles, obviously too much to be discussed within the scope of this study. One important study has been the dissertation of Steven Freeland (2015) addressing the intentional destruction of the environment during warfare under the Rome Statute of the International Criminal Court.³⁴¹ As I already sketched in the introduction, Freeland describes how the intentional destruction of the environment during warfare was brought into the Rome Statute. He makes clear that there is in fact no specific environmental crime in the Rome Statute and that the intentional destruction of the environment during armed conflict can at best be considered as an “add-on”. But given the insurmountable legal hurdles, Freeland argues that for all practical purposes the current provision will serve to curtail any effective prosecution.³⁴² He therefore pleads in favour of incorporating a *sui generis* crime of crimes against the environment in the Rome Statute. He still wants to limit the provision to environmental crimes committed during armed conflicts, but has several proposals to formulate the crimes against the environment more precisely in order to comply with the *lex certa* principle which requires that the preconditions for criminal responsibility be expressed clearly and in sufficient detail.³⁴³ Freeland therefore proposes a new crime against the environment, being “employing, within the context of and associated with an armed conflict, a method or means of warfare with intent to cause wide-spread, long-term or severe damage to the natural environment”. The main difference with the current formulation is that he subsequently provides a detailed definition of the various elements of the crime.³⁴⁴

9.2.2 Higgins

A scholar and activist who has been very influential in this debate is Polly Higgins. She wrote an influential book eradicating ecocide, which saw a second edition in 2015.³⁴⁵ And she published a variety of articles on that topic as well.³⁴⁶ Higgins proposes the inclusion of the crime of ecocide in international law defined as:

the recognition of ecocide in international law that consider the risks posed by the transboundary nature of environmental damage and serious organised crime”.

³⁴⁰ As I argued *supra* in 6.7.2.

³⁴¹ Freeland 2015.

³⁴² Freeland 2015, 213.

³⁴³ Faure & Visser 1995, 358-361.

³⁴⁴ Freeland 2015, 245-283.

³⁴⁵ Higgins 2015.

³⁴⁶ See inter alia Higgins, Short & South 2013.

"The extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished".³⁴⁷

The proposal of Higgins and her co-authors is to include ecocide as the fifth crime against peace. For Higgins ecocide would also apply in peace time as also during peace time severe damage to human, natural or economic resources could take place. The idea of creating a crime of ecocide is that it will no longer be lawful to commit daily damage, destruction or loss of ecosystems of the kind already criminalised during time of war.³⁴⁸ The idea of ecocide is that the destruction of the environment can also be conceptualised in legal terms as evidence of a specific sort of crime. It is premised on the idea of earth stewardship. Threats to nature can thus be conceptualised as, in essence, a crime of ecocide and thus punishable by law.³⁴⁹ Higgins and co-authors have therefore called for the establishment of a specific crime of ecocide and the incorporation of ecocide into existing criminal laws and international instruments.³⁵⁰

9.2.3 Other scholars

There are in addition also various scholars from different disciplines, including green and critical criminology, that have discussed the concept of ecocide. For example, Kalkandelen and O'Byrne present a conceptual framework concerning ecocide as a genocidal project. They present six different frameworks for ecocide research: Marxist ecology, theory of risk society, the atrocity paradigm, deep ecology, eco-feminism and the social constructionist theory of paradigm shift.³⁵¹ They argue that it should be recognised that ecocide is a manifestation of the original definition of genocide executed within a new paradigmatic framework.

Critical criminologists argue that the concept of ecocide (the human cause destruction of the environment) also aptly describes the role of powerful interest groups in contributing to global warming.³⁵² Increasingly the concept of ecocide is also applied by critical criminologists to climate change.³⁵³

9.2.4 Examples

Many of the studies do not so much provide a theoretical basis, but discuss examples of human destruction of the environment, arguing that they constitute typical examples of ecocide. Kalkandelen and O'Byrne for example discuss the threats posed by oil operations on tribal communities in the Amazon region of Ecuador as an ecocide that results in the application of an anthropocentric paradigm that adheres to human-centred economic and unsustainable knowledge and does not concern itself with environmental protection and human rights.³⁵⁴ Several studies examine oil pollution occurring at different places in Nigeria as an example of ecocide. Katz presents a comparison of corporate crime and cancer mortality putting Nigeria and the related oil exploration high on the list.³⁵⁵ Lynch, Fegadel and Long discuss the case of the pollution in Nigeria as an example of the ecocide-genocide nexus from a

³⁴⁷ Higgins 2015, 63.

³⁴⁸ Higgins, Short & South 2013, 257.

³⁴⁹ So White & Kramer 2015, 394-395.

³⁵⁰ See also Higgins 2012.

³⁵¹ Kalkandelen & O'Byrne 2017.

³⁵² White 2017 and White & Kramer 2015.

³⁵³ See in this respect especially Wyatt & Brisman 2017, who refer to "bio piracy" and "thefts of nature".

³⁵⁴ Kalkandelen & O'Byrne 2017, 343-345.

³⁵⁵ Katz 2012, 104-105.

green criminology perspective.³⁵⁶ Several studies pay attention to the international Monsanto Tribunal, which was an opinion tribunal arguing that Monsanto was responsible for a variety of environmental crimes, *inter alia* in relation to the global food system. The tribunal made a legal advisory opinion and was meant to examine the difficulties in making corporations liable for the international crime of ecocide.³⁵⁷ Another case documented in the literature concerns chronic arsenic intoxication in Brazil which, according to the authors, created an environmental and humanitarian disaster and led to problems of genocide, geocide and ecocide.³⁵⁸

9.3 Policy aspects

9.3.1 Developments

Although it seems that the concept of ecocide now gets higher on the political agenda, it is certainly not new. Higgins shows that the concept was in fact already introduced as early as 1933 and that a draft international convention on the crime of ecocide was being written in 1973 which had even been presented to the UN.³⁵⁹ This refers to a paper by Falk (1973) on the historical evolution of the debate on ecocide.³⁶⁰ Higgins, Short and South also sketch that during various moments in time the creation of a crime concerning the intentional causing of wide-spread, long-term and severe damage to the natural environment had been on the agenda of the International Law Commission (ILC).³⁶¹ Toussaint sketches that the interest in ecocide came especially in the aftermath of the Vietnam war and the ramifications of the use of agent orange.³⁶² It led to lawsuits of Vietnamese victims of agent orange against 26 multinationals who produced agent orange, including Monsanto and Dow Chemical. Later, the attention shifted to getting ecocide into legislation at a national, European and international level.³⁶³ Polly Higgins submitted a draft model law on ecocide to the United Nations Law Commission, proposing ecocide to be the fifth crime against peace.³⁶⁴ A recent international research project also elaborated a proposal aimed at environmental protection at a national and international level. The outcome of that project consists of two different draft conventions, one concerning the introduction of the international crime of ecocide and one dedicated to transnational crimes, labelled as eco-crimes. In both cases, corporate liability is acknowledged and central importance is given to corporate remediation.³⁶⁵ In fact, the already mentioned Draft Convention on Ecocide, even though it was never ratified, provided an important impetus to the debate.³⁶⁶ There was equally a reference to the so-called Citizens' Convention on Climate. This is an unprecedented experiment in France, whereby 150 people all drawn by lot, representing the diversity of French society, were provided a voice to accelerate the fight against climate change.³⁶⁷ This Citizens' Convention proposed to legislate on the crime of ecocide and more particularly to adopt a law that penalises the crime of ecocide within the framework of the planetary limits.

³⁵⁶ Lynch, Fegadel & Long 2020.

³⁵⁷ See further on this Monsanto tribunal, Busscher et al. 2020; Prete & Cournil 2019 and see generally: Corporate Europe Observatory, News: Monsanto Tribunal: The Outcomes (18 April 2017), available at: <https://corporateeurope.org/en/food-and-agriculture/2017/04/monsanto-tribunal-outcomes>, consulted on 9 March 2021

³⁵⁸ Dani et al. 2019.

³⁵⁹ Higgins, Short & South 2013, 258-259.

³⁶⁰ Falk 1973.

³⁶¹ Higgins, Short & South 2013, 259-262.

³⁶² Toussaint 2020.

³⁶³ Ibidem.

³⁶⁴ Colacurci 2021, 2.

³⁶⁵ So Colacurci 2021, 4.

³⁶⁶ So, Colacurci 2021, 19-24.

³⁶⁷ See Convention Citoyenne pour le Climat, available at : <https://www.conventioncitoyennepourleclimat.fr/>.

9.3.2 Including ecocide in the Rome Statute

Various Member States, including Belgium, have been pleading to the International Criminal Court to include the crime of ecocide. A general assembly of the International Criminal Court took place on 14 December 2020 and the prime minister Wilmès held a plaidoyer to include ecocide into the Rome Statute, as suggested by the earlier mentioned literature. In Belgian media it was held that Belgium was the first European Member State to put this on the agenda of the court.³⁶⁸ Also at the EU level and more particularly in the European Parliament, there has been a strong action in favour of including ecocide in the Rome Statute. Most recently, on 20 January 2021, the Parliament would have recognised ecocide and demanded that it would be included as a crime in the Rome Statute.³⁶⁹ The European Parliament accepted a text on human rights and democracy in the world and the EU's policy on the matter (Annual Report 2019) where under point 12 the Parliament stressed:

"that biodiversity and human rights are interlinked and interdependent, and recalls the human rights obligations of states to protect the biodiversity on which those rights depend, including by providing for the participation of citizens in biodiversity-related decisions and providing access to effective remedies in cases of biodiversity loss and degradation; expresses its support to the nascent normative efforts at international level in relation to environmental crimes; in this regard encourages the EU and the Member States to promote the recognition of ecocide as an international crime under the Rome Statute of the International Criminal Court (ICC)".³⁷⁰

More recently even on 20 May 2021 the European Parliament referred to ecocide in a Resolution on the liability of companies for environmental damage:

"takes note of the Member States' increasing commitment to working towards the recognition of ecocide at national and international level; asks the Commission to study the relevance of ecocide to EU law and EU diplomacy".³⁷¹

9.3.3 Limits

Notwithstanding the increasingly large support for making ecocide formally a war crime and to include it in the Rome Statute some warn that there is also reason for caution.³⁷² More particularly:

- this requires a formal change of the Statute, requiring a two-third majority;
- the International Criminal Court may not be equipped yet to deal with non-conflict related environmental crimes;
- the attribution of environmental crimes in a globalised economy may pose particular difficulties; and

³⁶⁸

<https://www.hln.be/binnenland/belgie-wil-dat-ecocide-erkend-wordt-als-misdaad~a3229d00/?fbclid=IwAR1SBIWHFaBs-EhaFI2L8keV8vziIXY6uNRVYkjWiO6iHQfU19KM2KND8pyY>, last consulted on 9 March 2021.

³⁶⁹

https://lareleveetlapeste.fr/le-parlement-europeen-reconnait-lecocide-et-demande-son-inscription-a-la-cour-penale-internationale/?fbclid=IwAR3bP2nDWyXKPk0xZYMLuJUXfBQUFV6mWbTX1n4QBm_9USLf-fEEECZoHVs, last consulted on 9 March 2021.

³⁷⁰ European Parliament, Resolution of 20 January 2021 on human rights and democracy in the world and the European Union's policy on the matter – Annual Report 2019, p.9_TA-PROV (2021) 0014.

³⁷¹ European Parliament, Resolution of 20 May 2021 on the liability of companies for environmental damage (2020/2027 (INI)), Recommendation 12.

³⁷² See comments in the Belgian press: https://lareleveetlapeste.fr/le-parlement-europeen-reconnait-lecocide-et-demande-son-inscription-a-la-cour-penale-internationale/?fbclid=IwAR3bP2nDWyXKPk0xZYMLuJUXfBQUFV6mWbTX1n4QBm_9USLf-fEEECZoHVs, last consulted on 9 March 2021.

- corporations cannot be sued before the International Criminal Court.

The latter point is of particular importance and an issue that has also been mentioned in the literature. Colacurci mentions that only national states can prosecute corporations since the Rome Statute of the International Criminal Court (ICC) does not envisage corporate liability.³⁷³ The literature is clear that at international level corporations can currently not be held liable for ecocide under international law.³⁷⁴ Under the Rome Statute it is the duty of states to take action first.³⁷⁵ Some scholars, however, warn that crimes committed by corporate executives and by corporations always implicate states and that their production is always conditioned by a process of regulation. They warn that if criminalising ecocide could for example apply to chief-executive-officers (CEOs) of major oil companies, this is at least symbolically important as it leads to a shaming and labelling of CEOs for their environmentally destructive commercial activities.³⁷⁶ Yet, there may be the danger of criminalising a narrow band of CEOs without dealing with the practices that the law (and thus the state) has generally conventionalised, such as the production of plastics and the wholesale destruction of the Amazon and other rain forests for corporate economies.³⁷⁷ It is therefore always important to focus on the state-corporate nexus as it is often state regulation that facilitates the creation of ecocide.³⁷⁸

The question, however, can be asked if the debate on ecocide may not equally have consequences for the criminalisation of corporate environmental crime at the domestic level as well.

9.4 Autonomous environmental crime

9.4.1 Punishing environmental crime directly

In addition to attempting to make ecocide the fifth war crime to be incorporated into the Statute of the International Criminal Court, there is equally a movement to criminalise ecocide at the domestic level as well. This attempt has two separate aspects. On the one hand the literature mentions that some states have incorporated ecocide also as a crime in their domestic legislation. Schwegler mentions 10 ex-Soviet countries that have all made ecocide during peace time a crime.³⁷⁹ These states that were formed after the collapse of the Soviet Union were no signatories to the Rome Statute.³⁸⁰ In addition to the post-Soviet countries there are others that have incorporated ecocide into their domestic legislation.³⁸¹ One of those is Vietnam, not surprisingly, as the result of the massive environmental destruction experienced during the wartime.

The second aspect relates to the argument by Tombs and Whyte about the state-corporate nexus and the fact that ecocide can *de facto* often take place as a result of a regulatory framework created by the state (for example allowing deforestation).³⁸² Recall that in most systems environmental crime can only be punished under the law on the condition that there is a violation of administrative regulations or for example the conditions of a permit. It is the well-known administrative dependence of environmental

³⁷³ Colacurci 2021, 3.

³⁷⁴ Schwegler 2017, 81-84.

³⁷⁵ Harvey 2012, 11.

³⁷⁶ Tombs & Whyte 2020, 21.

³⁷⁷ Ibidem.

³⁷⁸ Ibidem.

³⁷⁹ See Schwegler 2017. It includes *inter alia* Armenia, Belarus, Moldova, Ukraine, Georgia, Kazakhstan, Kyrgyzstan and Tajikistan.

³⁸⁰ For the simple reason that they were only established following the secession from the Soviet Union after 1998, whereas the Rome Statute was created in 1996. See Schwegler 2017.

³⁸¹ Higgins, Short & South 2013.

³⁸² Tombs & Whyte 2020.

criminal law.³⁸³ As a consequence, the structure of most environmental laws is such that serious harm to the environment cannot be punished as long as it is covered by government regulation or by a permit. This could equally apply to environmental harm that formally could be qualified as ecocide. Given the state-corporate nexus it is even likely that also serious environmental harm could take place under the umbrella of regulation or a government permit. To the extent that corporations follow the conditions of regulation or a permit, in most jurisdictions (including in the ECD) environmental criminal liability would be excluded, no matter how serious the harm to the environment would be.

This is precisely where the debate concerning ecocide can provide important lessons for improving the structure of domestic environmental criminal law and also the ECD, more particularly in its application to corporations.

It is more particularly a strong argument in favour of including a so-called autonomous environmental crime. Such a crime would make it possible to punish serious cases of environmental pollution, also if the perpetrator (a corporation) would be following the conditions of a government permit. This would entail the punishment of particular emissions of which the consequences are very serious, for example leading to long-lasting pollution, serious consequences for the health of persons and/or a significant risk of injuries to the population. In that case, the link between criminal law and prior administrative decisions would be left aside totally. Under such an autonomous provision, serious environmental pollution (that even could potentially be qualified as ecocide) could be punished even if the defendant has complied with the conditions of regulation or a permit. The underlying notion is that administrative regulation could never allow this specific risk or harm. It is an important tool to call on an autonomous obligation of industry to respect environmental principles and not to hide behind compliance with a regulation.

9.4.2 Examples

Examples of these types of autonomous environmental crimes are rare, but do exist. A classic example is paragraph 330a of the German Criminal Code. That provision punishes the endangerment of human life or health through the emission of toxic substances. In addition, in some countries it has been advanced in the literature that in order to provide a truly autonomous protection of ecological values, serious attacks on the environment should be punishable, even if these would be allowed under an administrative licence. Therefore, for example, in the Flemish Region, a proposal has been made by an interuniversity commission for the reform of the environmental law in Flanders to introduce a new article within a decree on environmental policy that would punish cases of serious pollution irrespective of administrative law. This proposed Article 7.3.4 punishes anyone who emits substances into the water, soil or air if he/she knew or should have known that these emissions pose a concrete danger to human health.³⁸⁴ The importance of this provision is that unlawfulness is no longer required. The provision merely requires "a real danger to human health". The advantage of focussing on "danger" instead of on "death or serious injury of a person" is that it is of course much easier to prove that a certain emission caused danger to human health than that it actually caused death or injury. Requiring the proof of death or injury not only has the disadvantage that proof of causation would be required, but also that the criminal law would intervene when it is too late, namely when these consequences have already occurred.

³⁸³ *Inter alia* discussed in relation to the Environmental Crime Directive, *supra* in 6.7.2.

³⁸⁴ See Article 7.3.4 Voorontwerp Decreet Milieubeleid, Brugge, die Keure, 1995, 82.

Note that this autonomous environmental crime could also be found in the Council of Europe Convention for the protection of the environment through criminal law, discussed above.³⁸⁵ In this Convention the signatory states agreed to adopt measures to criminalise the intentional discharge which causes death or creates a significant risk of death or injury to any person. Again, unlawfulness was not required. It is a truly autonomous crime as the provision applies irrespective of the violation of regulations or administrative obligations. Also at the XVth International Congress of Penal Law a resolution was accepted holding that the justificative effect of a licence should no longer apply if the defendant knowingly caused serious harm to the environment.³⁸⁶

9.4.3 The UMICORE case

When I was in the middle of writing this report, I watched a programme on Flemish television reporting on a long ongoing case of emissions of heavy metals taking place in the area of Hoboken, to the south-west of Antwerp.³⁸⁷ The programme mentioned that the metallurgic UMICORE had been emitting heavy metals and that already in the 1970s there were cases of lead poisoning among young children in the nearby neighbourhood, resulting from a high amount of lead in their blood. According to the report, now 50 years later, there are still high levels of lead in the blood of the children, leading to serious problems in the development of the children, some having autism.

UMICORE emits, in accordance with an administrative permit, awarded by the province of Antwerp, which explicitly allows a maximum amount of 10 micrograms of lead per decilitre blood in specifically indicated areas in Hoboken. A paediatric expert interviewed was extremely critical of that 10 micrograms standard. It was apparently based on an outdated WHO norm, which according to the expert, meanwhile had been adapted. The WHO would now hold that there cannot be any standard for lead in blood as there should simply not be any lead in the blood.

The programme interviewed parents who reported on the retarded developments of some of their kids and on the instructions they received from the company, inter alia to clean their houses intensively to remove the lead dust, to keep children inside (not letting them play in the garden), to avoid eating vegetables and fruit from the garden etc. The company even paid a free subscription to the Antwerp zoo for the inhabitants, so that kids would be less exposed to the lead dust in their own neighbourhood. An interviewed bee-keeper reported that after examination the honey his bees had produced were considered unfit for human consumption as a result of which 100 kilo honey had to be destroyed. The paediatric expert held that the consequences of lead for the human body could be dramatic and even have negative effects after many years, potentially leading to dementia.

The deputy responsible for awarding the permit was interviewed and said that it is always easy judging with hindsight bias. Another civil servant of the province, chair of a monitoring team for the health situation in Hoboken, admitted that she had been focussing too much on improvements (as the lead concentrations now were substantially lower than in the 1970s) but had lost out of sight that today lead concentrations are still too high.

The CEO of UMICORE was interviewed and declared that the company invested a lot in continuous improvement of the emissions. He recognized the responsibility of the company and said that the company pays for all of the medical expenses. He declared that the adverse consequences are simply

³⁸⁵ See 6.2.

³⁸⁶ Resolution 10 of the XVth International Congress of Penal Law, *International Review of Penal Law*, 1995, 50.

³⁸⁷ Report by Pano, broadcasted on VRT 1 on 17 March 2021, available at: <https://www.vrt.be/vrtnws/nl/2021/03/12/de-kinderen-van-de-rekening/>.

the unavoidable result of industrial production that society has to accept. The programme makers added that the company made an annual profit last year of more than 300 million euros. It was equally reported that in addition to lead there were also emissions of other heavy metals, more particularly arsenic and cadmium of which traces equally could be found in the blood of the monitored children. When asked about those the CEO declared that it would take at least another 5-10 years until that could be solved.

Of course, I do not have further possibilities to check the information provided by the programme makers and therefore assume that the information is correct. In fact, a brief search on internet teaches that there have been reports on high levels of lead in the blood of children for many years. A study in the framework of an FP7 project scrutinised UMICORE in 2013, arguing that UMICORE has an ecological debt of 50 million euros for the loss of not-growing vegetables and fruits; another 50 million for all cancer treatments, 200 million euros for the cancer deaths and another 10 million euros for the treatment of children with lead in their blood.³⁸⁸ Also in August 2019, there was a report on UMICORE putting it on the Environmental Justice Atlas.³⁸⁹ Also in the covid-19 year 2020 there were various reports of high levels of heavy metals (lead, zinc and arsenic) measured near the UMICORE company³⁹⁰ and also still high levels of lead in the blood of the children.³⁹¹ Those and many other reports that can be found on internet do in fact confirm what was broadcasted on 17 March 2021.

I immediately realised that this is an important example of exactly the issue discussed in this chapter for a variety of reasons:

1. One does, unfortunately, not have to look for spectacular cases of environmental pollution with consequences on human health in developing countries as is now often done within the framework of foreign direct liability of European companies for pollution taking place, for example in Nigeria or in the Ivory Coast. Even in Belgium, in the heart of the EU, in 2021 still pollution cases occur with serious consequences for human health.
2. To a large extent the pollution (at least the high lead concentrations) are covered under an administrative permit (although there were also cases reported where the lead concentrations in the blood were higher than allowed in the permit).
3. There seems to be a failure of the administrative authorities to adequately monitor the adequacy of the permit conditions and to protect the environment and human health.
4. Many of the damaging health consequences are covered by an administrative permit as a result of which criminal liability would be impossible in a model (such as Belgian environmental criminal law) where criminal liability is dependent upon the violation of administrative conditions.³⁹²

³⁸⁸ Nick Meynen, Is Umicore really the most sustainable company in the world? (31-01-2013), Ejolt, available at: <http://www.ejolt.org/2013/01/is-umicore-really-the-most-sustainable-company-in-the-world/>, last consulted on 23 March 2021.

³⁸⁹ Umicore, Hoboken, the ecological debt of an industrial plant, Belgium (18-08-2019), EJATLAS, <https://ejatlas.org/conflict/umicore-hoboken-the-ecological-debt-of-an-industrial-plant-belgium>, last consulted on 23 March 2021.

³⁹⁰ Un nouveau pic de pollution mesuré près de l'entreprise Umicore (17-09-2020), available at: <https://www.lalibre.be/dernieres-depeches/belga/un-nouveau-pic-de-pollution-mesure-pres-de-l-entreprise-umicore-5f6301fb7b50a677fb9620b8>, last consulted on 23 March 2021.

³⁹¹ Trop de plomb dans le sang des enfants près de l'usine Umicore d'Hoboken (04-07-2020), available at: <https://www.7sur7.be/belgique/trop-de-plomb-dans-le-sang-des-enfants-pres-de-l-usine-umicore-d-hoboken~a6738c26/?referrer=https%3A%2F%2Fwww.google.com%2F>, last consulted on 23 March 2021.

³⁹² Although according to me in this particular case, criminal liability would be possible based on the provisions in the Belgian Criminal Code punishing personal injury as that cannot be justified by an administrative license (I argue this already in Faure 1990, 50-52).

5. The entire case underscores the importance and need to have an autonomous environmental criminal liability making it possible to prosecute and punish serious cases of emissions endangering human health irrespective of the compliance with a permit.

9.4.4 ECD

This may have an important consequence, also for the revision of the ECD. The debate on ecocide supports the need to revise the ECD in the sense that the unlawfulness requirement should be abolished. Instead, the model adopted in the Council of Europe Convention could be followed. Thereby, for the most serious environmental crimes an autonomous criminalisation could be created, allowing to punish a serious endangerment of the environment, irrespective of any unlawfulness requirement.

9.5 France and Italy

It is interesting to briefly focus on two particular EU Member States since there have been interesting developments with respect to the incorporation of autonomous crimes, to some extent inspired by the debate concerning the criminalisation of ecocide.

9.5.1 France

In France there is undoubtedly a tendency to broaden the protection of the environment through the criminal law. For example, the Act concerning the protection of surface waters of 3 January 1992 introduced a new crime.³⁹³ It became Article L216-6 of the Code de l'Environnement. The provision criminalises the person who throws or emits substances in the surface waters of which the reactions lead to an endangerment for human health or to harm to the flora or fauna. At first blush this seems like a very broadly formulated provision. However, this scope of application is apparently limited as the article finishes by providing that when the emission is authorised by a permit, that the article only applies if the provisions of the permit have not been respected. Several authors have therefore criticised the fact that an administrative authorisation leads to a justification of criminal responsibility.³⁹⁴

There are, however, also provisions in French law that protect the environment in a more autonomous manner.³⁹⁵ A new crime of pollution has been introduced in the French Penal Code. It did not lead to a general incrimination of environmental harm, but to a new Article 421-2 that punishes "ecological terrorism". The article punishes an emission of substances that are able to endanger the health of humans, animals or the natural environment. The scope seems relatively limited. Still, it is considered as an important step by including the environment among the values that are protected by the criminal law.³⁹⁶ The new Penal Code does not punish damage to the environment independently.³⁹⁷

The strong administrative dependence of criminal law has been criticised in the literature and several attempts have been done to introduce the concept of an autonomous environmental crime in France. Many reports aiming at the creation of a general environmental crime were drafted, *inter alia* proposing the introduction of a general offence of "délinquance écologique", but so far without success.³⁹⁸ Most recently, there was a proposal to introduce the crime of ecocide in France as a part of the already

³⁹³ See Littmann-Martin 1994, 137.

³⁹⁴ See *inter alia* Guihal 2000, 535-537.

³⁹⁵ See Guihal 2000, 541 and ff.

³⁹⁶ Faure 2005b.

³⁹⁷ Bianco & Lucifora 2017, 61.

³⁹⁸ Bianco & Lucifora 2017, 63-64.

mentioned Citizens' Convention for the Climate. A first draft was rejected by the senate in May 2019 for being not specific enough and too broad, thereby potentially being unconstitutional.³⁹⁹ A new proposal was to create a general crime of pollution and a crime of endangering the environment. There was, however, strong opposition from industry against this provision arguing that this crime of ecocide would be a catastrophe for the French economy and that only Georgia, the Ukraine, Kazakhstan and Vietnam had ecocide in their domestic legislation, but so far no European country.⁴⁰⁰ The lobby was apparently effective as the ecocide would have disappeared again from the draft of the statute concerning the climate.⁴⁰¹ It is doubtful whether the proposed provision concerning ecocide was a truly autonomous environmental crime as the provision would only apply in case of a violation of a specific duty of care, prescribed in a law of regulation.⁴⁰² That formulation seems to be rather administrative dependent instead of autonomous.⁴⁰³

9.5.2 Italy

In Italy a new Law No. 68/215 introduced interesting provisions transposing the Environmental Crime Directive, such as the environmental disaster provision in Article 452 *quater* of the Criminal Code. The environmental disaster is defined as alternatively: (i) the irreversible alteration of the equilibrium of an ecosystem; (ii) the alteration of the equilibrium of an ecosystem whose elimination is particularly costly and can be undertaken only through exceptional measures; (iii) the offence to public safety, determined by reason of the relevance of the fact owing to the extent of the damage or its harmful effects, or to the number of people affected or exposed to danger".⁴⁰⁴ However, the problem is that this new article again has an unlawfulness requirement as a result of which it is not truly independent or autonomous.⁴⁰⁵

The proponents of the criminalisation of ecocide see in this criminalisation of environmental disasters in Italy an example of an ecocide provision as damaging ecosystems becomes a separate crime.⁴⁰⁶ However, the problem remains that even in this case an unlawfulness requirement applies. That shows once more that even if one were to cause an environmental disaster, as long as that takes place under the umbrella of regulation or a permit, the criminal provision cannot apply.

9.5.3 Lessons

The examples of France and Italy both illustrate that on the one hand the policy-makers in (some) EU Member States see the importance of protecting the environment in an adequate manner by introducing ecocide-like provisions in their legislation. However, when it comes to translating this intention into a concrete provision it appears to become much more difficult to get this accepted at a legislative level. France has a history of already several decades attempting to create an autonomous environmental crime. But even a spectacularly sounding crime like ecological terrorism remains administratively dependent. The same is the case for Italy. The country has been hailed for criminalising

³⁹⁹

<https://www.lefigaro.fr/economie/le-scan-eco/ce-delit-d-ecocide-qui-va-causer-tant-de-mal-a-l-economie-francaise-20210106>, last consulted on 10 March 2021.

⁴⁰⁰ Ibidem.

⁴⁰¹

<https://reporterre.net/Le-projet-de-loi-Climat-entree-le-delit-d-ecocide?fbclid=IwAR0mQxTtBXyGSEfZvr8-oulm0dGXij16-yva4aimliokoyCMNdVDhdFpaHM>.

⁴⁰² "Violation manifestement délibérée d'une obligation particulière de prudence ou de sécurité prévue par la loi ou le règlement".

⁴⁰³ See further Toussaint 2020.

⁴⁰⁴ Vagliasindi 2017b, 139.

⁴⁰⁵ Faure 2017b, 279,

⁴⁰⁶ Toussaint 2020.

environmental disasters, but when it comes to the concrete formulation the unlawfulness requirement may still limit its practical interpretation.

Those examples show, in other words, that it is important to relate the ecocide debate to the need to create truly autonomous crimes that can punish the most serious cases of environmental pollution irrespective of compliance with environmental regulation.

9.6 Concluding

The debate on ecocide has become very topical and has changed from a hobby of a few environmental activists to the agenda of the European Parliament. The ecocide debate is for various reasons important for this study.

The most important reason is that activists try to obtain a recognition of ecocide as crime against humanity and to have it included in the Rome Statute of the ICC. The mere fact of recognizing that also long-lasting, wide-spread and severe damage to the environment should be separately recognised as a crime against humanity is undoubtedly important, if it were only for symbolic reasons. Note, however, that in the literature different definitions of ecocide are presented. Some see it rather as an attempt to address the intentional destruction of the environment during warfare,⁴⁰⁷ whereas others see it more broadly as the need to generally criminalise wide-spread, long-lasting and severe environmental harm as a separate crime in international law, also irrespective of conflict.⁴⁰⁸

The practical relevance for the criminal liability of corporations may be small as the Rome Statute of the ICC does not recognise the criminal liability of corporations. At the same time the literature has indicated that the recognition of ecocide within the Rome Statute may have important repercussions for corporate criminal liability as well. Adopting ecocide as an international crime can affect corporate accountability as it offers the possibility to create a debate on the instruments to tackle corporate ecocide in an effective manner.⁴⁰⁹ The entire debate on ecocide, although not primarily focussed on corporate criminal liability, has equally sparked a debate on the implementation of corporate criminal liability for ecocide.⁴¹⁰ The debate is therefore certainly of interest for corporate criminal liability for environmental harm as well.

The second, potentially even more important aspect of the debate, is that it forces the policy-maker again to think about the formulation of environmental crime. Recognition of the concept of ecocide as well as the awareness of the state-corporate nexus, more particularly in the creation of ecocide⁴¹¹ makes evident that an environmental criminal law that remains to rely on an administrative dependency (via the notion of unlawfulness) will not be able to provide an adequate protection against the extensive destruction, damage to or loss of ecosystems.⁴¹² As that could well take place under the cover of regulation or permits and therefore fail to meet the unlawfulness requirement. This is also of crucial importance in the debate concerning the revision of the ECD. The formulation of criminal liability in the ECD currently still completely relies on the unlawfulness concept, which undoubtedly limits the scope of protection that the criminal law can offer. For the most serious cases of environmental harm, there should be a possibility for the criminal law to intervene in an autonomous, independent manner, irrespective of the unlawfulness requirement.

⁴⁰⁷ Like Freeland 2015.

⁴⁰⁸ Higgins 2015, 62-66.

⁴⁰⁹ So Schwegler 2017, 99.

⁴¹⁰ Colacurci 2021, 19-24.

⁴¹¹ Tombs & Whyte 2020.

⁴¹² As ecocide is defined by Higgins 2015, 63.

The third interesting consequence of the ecocide debate is that the literature equally made clear that many corporate crimes are global in nature and facilitated by a capturing of regulatory agencies by transnational corporations.⁴¹³ The case of oil pollution in Nigeria is often cited as an example of transboundary ecocide case.⁴¹⁴ As the Probo Koala case, discussed in the previous chapter showed, that equally raises questions concerning the jurisdiction to deal with this type of environmental pollution cases that cross national borders. Recall the impossibility to bring transnational corporations which are located in the EU to justice in the EU for environmental crimes allegedly committed in the Ivory Coast. The debate on ecocide equally shows the importance to recognise the transboundary and in some cases global nature of some cases of environmental harm which may (in the most serious cases) call potentially for a universal jurisdiction.

⁴¹³ So Katz 2012.

⁴¹⁴ See also Lynch, Fegadel & Long 2020.

10. CONCLUDING REMARKS

10.1 Main findings

This study constituted a follow-up of a previous study with respect to the environmental liability of companies in the EU⁴¹⁵ whereby the focus of the current study was on the liability of companies in the context of corporate mergers and acquisitions. The main question, sketched in the introduction, was whether there are still possibilities for companies to escape their environmental liability either under civil law or under criminal law. This led to an examination of various situations where this problem might arise, both in the context of civil as well as criminal liability, with a particular focus on mergers and acquisitions.

Starting point (presented in a theoretical framework in chapter 2) was that a combination of administrative, civil and criminal environmental liability is necessary in order to expose companies to the social costs of their activities. That allows the correction of the market failure created by environmental harm. Companies do constitute specific problems, both in civil and in criminal liability. In civil liability insolvency may arise as a consequence of the limited liability of the corporation. The question moreover arose whether corporations remain liable in case of a succession after a merger or take-over. Within the context of criminal law, the question first of all arises whether corporations can at all be held criminally liable; in addition the question arose whether corporations would be able to escape criminal liability via a succession after a merger or take-over.

Chapter 3 found that the various directives concerning mergers and acquisitions in fact clearly state that the acquiring company takes over the liabilities from the company it acquired. As a result, a merger or take-over can in principle not be an instrument for a company to escape its environmental liability, for example by transforming itself into a new legal entity. Moreover, the environmental permit in case of a merger is in principle also transferred to the acquiring company, although a notification to the competent authority is necessary.

This does, however, not imply that there are no problems concerning the exposure to (civil) environmental liability at all. In fact, corporations could remove assets from the company, effectively making the corporation an empty shell or simply dissolve the corporation as a result of which the debtor of the environmental liability has disappeared or is not able to meet its obligations. Various remedies could in theory be used against such a scenario (such as directors' liability, liability of a trustee in bankruptcy etc.), but the most effective and simple one is the introduction of compulsory solvency guarantees. Indeed, if one addresses some of the cases where serious problems have arisen of corporations not being able to meet their environmental obligations (like Moerdijk or Kolontár) it were both cases of insolvency (related to the limited liability of the corporation) and not resulting from either a merger or an acquisition. It is therefore important to recall that the real problem and potential danger as far as meeting environmental obligations is concerned, is not the merger or acquisition, but rather the potential insolvency of the corporation, which can equally arise outside of the context of a merger or acquisition.

The rule that environmental liabilities in principle are transferred to the acquiring company after a merger, also applies in specific industrial sectors involving major risks, such as the nuclear sector. That is why acquiring companies will always engage in intensive due diligence verifications. In those cases,

⁴¹⁵ Faure 2020.

the transfer of the permit not only requires notification but even authorisation from the competent authority.

Various techniques have been developed in case law and legislation, mostly at Member State level (but also by the CJEU) to pierce the corporate veil. As a consequence under particular circumstances (and mostly for breaches of competition law) parent corporations can be held liable, also for the debts of subsidiaries. It is a mechanism that could potentially also be applied to environmental cases where subsidiaries would not be able to meet their environmental obligations. One specific case concerns the one where a parent corporation would have failed its due diligence obligation to accurately verify the activities of its subsidiary in a developing country. In case where the subsidiary would have caused environmental harm one can increasingly notice a tendency to hold foreign parent corporations in the North directly liable for environmental harm committed by subsidiaries in developing countries.

Corporations are specifically addressed in the Environmental Crime Directive, even though the liability of the corporations should not necessarily be of a criminal nature. There are, however, important justifications to adopt criminal liability of the corporation, also for the ECD. Member States that were traditionally opposed against a corporate liability (like Germany) also are facing important changes. Many suggestions for revising the ECD have been formulated in the literature. It seems especially important to introduce an autonomous environmental crime, allowing criminal liability to occur irrespective of the violation of administrative norms, to be introduced in the ECD. Also the realm of remedies could be extended, *inter alia* to address complementary sanctions necessary to restore the environment explicitly.

Many legal systems have possibilities to transfer the criminal liability from a target company to a successor. And some Member States also have rules to prevent the dissolution of a corporation just to avoid criminal liability. Moreover, case law both of the CJEU and the European Court on Human Rights not only allows parental liability (as in the Akzo Nobel case), but also successor liability, even for fines (more particularly in competition cases), more particularly in cases where a corporate reorganisation would result in escaping criminal liability. The personal character of a punishment does therefore not restrict the possibility of shifting the criminal liability to a successor.

The Probo Koala case, dealing with a transboundary shipment of waste, allegedly leading to serious environmental harm and harm to public health in the Ivory Coast, showed in an interesting way the limits of applying criminal liability to corporations in Europe for environmental harm that would have occurred in a third country. The traditional principles of jurisdiction only allow criminal liability for facts committed either within an EU Member State or by a national of that Member State; only in exceptional cases can criminal liability also be based on the so-called universality principle, but that is not the case of environmental crimes. It is one of the reasons why there is increasingly a debate on so-called ecocide. Even though the concept of ecocide is described differently in various studies, it mostly amounts to criminalising widespread, long-term and severe damage to the natural environment under the Rome Statute of the International Criminal Court. However, the debate on ecocide is equally important as it stresses the importance of having the possibility to criminalise even without a violation of administrative norms.

10.2 Recommendations

The recommendations follow the main findings that were just presented. In some cases it will be recommended to consider the introduction of particular instruments. That language indicates that particular instruments are still either debated in the literature or relatively innovative. The cautious language used suggests to first devoting more research to the particular issue before coming to strong

policy recommendations. In other cases the recommendations are formulated in a more direct manner, as there seems to be a larger consensus in the literature.

As one of the main findings of the study is that in fact mergers and acquisitions as such do not constitute a major problem as far as environmental liability is concerned. The Merger Directive clearly holds that the acquiring company takes over the liabilities from the company it acquired. That does, however, not mean that no problems whatsoever could arise. Indeed, as insolvency is an important risk for environmental liability, given the limited liability of corporations, it will be recommended that that issue should be taken care off. The recommendations will be formulated in a brief manner, referring to the accompanying texts in the study that constitute the basis for the recommendation:

1. Make financial guarantees for ELD liabilities mandatory.⁴¹⁶

Without mandatory financial guarantees (like compulsory insurance) there is a serious risk that companies would not be able to meet their environmental liability obligations. That could lead to underdeterrence (not taking sufficient preventive measures aiming at the reduction of environmental harm); it could equally lead to victims not being compensated and environmental harm not being restored. That is why it is of utmost importance to have an obligation imposed upon operators to seek financial security.

2. Consider examining the possibility of parental liability, under particular conditions, also for environmental harm and more particularly ELD liabilities.⁴¹⁷

Some case law nowadays already accepts (conditional) liability of parent companies for (competition) violation committed by their subsidiaries. There may be reasons to consider such a parental liability also for the environmental harm (and more particularly ELD liabilities) committed by their subsidiaries. However, this requires careful research and consideration as such a potential parental liability may also potentially have adverse effects (for example, parent companies not exercising sufficient supervision over subsidiaries in order to avoid liability).

3. Consider extending the possibilities of foreign direct liability of European parent corporations for environmental harm caused by their subsidiaries in third countries.⁴¹⁸

European companies often operate on a global scale and may purchase material along a supply chain from companies outside of the EU; they may also have subsidiaries active outside of the EU. It is important to impose due diligence obligations on those EU companies to control the activities of other actors along their supply chain, more particularly as far as the respect for human rights and environmental regulations is concerned; the same goes for the supervision of their subsidiaries outside of the EU as far as the potential environmental harm is concerned that they could create. A violation of those due diligence obligations could potentially give rise to liability of those (parent) corporations in the EU for harm committed along the supply chain or by subsidiaries outside of the EU. There are already precedents in that respect, but it merits further research if that foreign direct liability of European (parent) corporations should be expanded.

⁴¹⁶ See 3.4 and Faure 2020, 56-61.

⁴¹⁷ See 5.2.

⁴¹⁸ See 5.3.

4. Consider the incorporation of criminal liability of corporations in the Environmental Crime Directive.⁴¹⁹

From a theoretical perspective, it is important to realise that the real actor committing environmental crime is often a corporation. It is therefore often rather artificial to search for the individuals within the corporation through whom the corporation would have acted and to make them criminally liable. Many Member States have already accepted criminal liability of legal entities. And in some Member States where criminal liability of the legal entity was traditionally debated (like Germany) there are now initiatives to introduce criminal liability of legal entities as well. It is from that perspective both theoretically and practically important to recognise criminal liability of legal entities also in the ECD.

5. Consider introducing an autonomous environmental crime in the Environmental Crime Directive.⁴²⁰

The crimes contained in the ECD all rely on the concept of unlawfulness. That means that criminal liability is not possible as long as there is a compliance with environmental regulation and more particularly the conditions of a permit. It is the so-called administrative dependence of the criminal law. However, the problem is that a permit may sometimes be outdated or simply wrong in the sense that it allows emissions that can cause serious harm to the environment and even to human health. In those exceptional cases it is important that the criminal law could still intervene even when the conditions with a licence have been respected. By creating those autonomous environmental crimes, the criminal law can provide an autonomous protection to the environment in cases of serious environmental harm.

6. Specify in the Environmental Crime Directive the importance of complementary sanctions aiming at the restoration of harm done in the past and prevention of future harm.⁴²¹

The traditional sanctions applied in the criminal law (mostly fines and prison sanctions) may not be adequate for the case of environmental harm. After all, even after the payment of a fine or an imprisonment of an executive director, there may still be harm to the environment (for example waste that was illegally deposited) that has not been restored and it is even possible that the environmental crime (for example employing an installation without a permit) continues after a conviction. For that reason complementary sanctions beyond the traditional sanctions need to focus on a restoration of harm caused in the past (like for example a duty to restore the environment to its original state) and on the prevention of future harm (for example a prohibition to further use an installation that was at the origin of the crime).

7. Address explicitly the importance of administrative enforcement and remedies in the Environmental Crime Directive.⁴²²

At this moment, the ECD is silent with respect to administrative enforcement. In practice administrative enforcement plays an important role in the enforcement of environmental law. Administrative remedies (and more particularly administrative fines) can be an effective remedy that can adequately deter, for example first time offenders, that have committed minor environmental offences (e.g. violating administrative obligations, but no emissions). In those cases there may not be a need for a criminal sanction and administrative enforcement may be adequate. Administrative enforcement is equally important as administrative remedies can be applied rapidly

⁴¹⁹ See 6.5.

⁴²⁰ See 6.6.2 and 9.4.

⁴²¹ See 6.6.3.

⁴²² See 6.6.4.

and aim at restoration and prevention of further harm. Moreover, in those countries where the criminal liability of legal entities is not accepted, administrative sanctions will be the only ones applied. Also for that reason it is important to recognize the role of administrative enforcement and remedies, also in the ECD, avoiding the suggestion that effective, dissuasive and proportional penalties could only take the form of criminal sanctions.

8. Address the importance of the removal of illegal gains in the Environmental Crime Directive.⁴²³

Often the main sanction imposed (like for example a fine) does not provide full deterrence and may in practice (for example because of the principle of guilt) be relatively low. The effect could be that the benefits obtained by the environmental crime remain with the offender, even after payment of a fine. Given the idea that “crime should not pay” the offender should be put back to its original state by removing the gains he obtained through the environmental crime from the offender. A removal (confiscation) of the illegal gains obtained through the environmental crime can serve that purpose.

9. Consider introducing jurisdiction for serious environmental crimes (ecocide) on the basis of the universality principle.⁴²⁴

As the Probo Koala case showed, in some cases also European companies could be involved in environmental crimes taking place outside of Europe. The case, however, also showed that it is difficult, if not impossible, to apply criminal liability for environmental crime committed outside of Europe on EU companies. This is a limitation of the so-called territoriality principle. Developments that can be observed in the domain of civil liability, like extending civil liability on European (parent) corporations for harms committed outside of the EU, cannot be observed to a similar extent in the domain of criminal liability. That is why it could be considered to introduce so-called universal jurisdiction for very serious environmental crimes.

10. Consider the introduction of ecocide in the Rome Statute of the International Criminal Court.⁴²⁵

Currently the Rome Statute already contains ecocide as a war crime. However, the conditions are such that it may be extremely difficult to apply ecocide as a war crime in practice. There is no clear definition of what is meant with widespread, long-term and severe environmental harm. It is therefore suggested to include a new war crime of ecocide that could be applied, also in peace time is severe time to human, natural or economic resources would take place.

⁴²³ See 6.6.3.

⁴²⁴ See 8.4.2.

⁴²⁵ See 9.2 and 9.3.2.

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