



Fighting Environmental Crime in Germany: A Country Report

Work package 2 on “Instruments, actors, and institutions”



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AUTHOR

Dr. Stephan Sina, Ecologic Institute

With contributions by (all Ecologic Institute):

Ennid Roberts (chapter 15)

Katharina Klaas (in chapters 1 and 8)

Andrew Eberle, Elizabeth Dooley (proofreading)

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ABSTRACT

Germany has a sophisticated set of rules regarding environmental crimes, consisting mainly of a chapter on offences against the environment in the Criminal Code (primary criminal law, *Kernstrafrecht*), and of various environmental offences spread over different environmental laws (secondary criminal law, *Nebenstrafrecht*). These criminal provisions are complemented by a multitude of administrative penal offences, which may be imposed by the administrative authorities who have jurisdiction to prosecute and sanction administrative penal offences according to the Administrative Offences Act (OWiG). In criminalising a wide range of environmentally harmful behaviour, German environmental criminal law is a typical example of a modern legal system based on prevention and risk assessment.

German environmental criminal law already conformed by and large to Directive 2008/99/EC on the protection of the environment through criminal law (ECD). In spite of the limited changes introduced in German criminal law, the 'Europeanisation' of German environmental criminal law through the ECD has some important general impacts, for example an increased dependency of environmental criminal law on administrative law, and an even larger criminalisation of environmentally harmful behaviour.

In spite of the sophisticated regulatory framework, Germany faces a number of problems enforcing environmental criminal law. Due to the scientific complexity of the circumstances surrounding environmental crime cases, it is difficult to find enough evidence against perpetrators. Particularly in decentralised large-scale enterprises, the division of work makes it difficult to attribute criminal liability to a particular person. In addition to these legal barriers, there are factual barriers such as insufficient resources and expertise of the prosecution service. These legal and factual problems of proof are the main reason that the vast majority of environmental criminal proceedings are terminated for insufficient grounds to proceed with public charges. This environmental crime enforcement deficit is probably the main reason for the constant decline of the number of reported crimes against the environment since 1999. It is still to be clarified whether the enlarged criminalisation due to the transposition of the ECD into German law results in better protection of the environment or exacerbates the existing enforcement deficit.

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LIST OF ABBREVIATIONS

BGBI.	Bundesgesetzblatt (Federal Law Gazette)
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen (decisions of the Federal Court of Justice in criminal matters)
BT-Drs.	Bundestagsdrucksache (Bundestag document)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (decisions of the Federal Constitutional Court)
ECD	European Crime Directive
EU	European Union
GG	Grundgesetz (German Basic Law)
OWiG	Ordnungswidrigkeitengesetz (Administrative Offences Act)
StGB	Strafgesetzbuch (Criminal Code)
StPO	Strafprozessordnung (Code on Criminal Procedure)
TFEU	Treaty on the Functioning of the European Union

1. Introduction

In their Second Period Report on Security, published in 2006, the Ministries of the Interior and of Justice stressed that the German government continues to consider criminal law as an important instrument to combat environmental offences, and welcomes the development of international criminal instruments to protect the environment.¹ This statement is, to some extent, quite representative of the state of the art of environmental criminal law in Germany. On the one hand, Germany has a sophisticated set of rules on environmental crimes, which were developed primarily in the 1980s and 1990s.² However, over the last decade there has seemingly been a decline in attention paid to environmental criminal law by the public authorities and researchers alike, as demonstrated by a substantially lower number of recorded environmental crimes, a lack of prominent environmental crime cases brought to trial, and a reduced number of scientific publications on the subject.³

On the other hand, environmental criminal law has been receiving more attention in Germany in connection with Directive 2008/99/EC on the protection of the environment through criminal law (Environmental Crime Directive⁴, ECD), which was transposed into German law by the Law of 6 December 2011 (*45. Strafrechtsänderungsgesetz*).⁵ Furthermore, the German Act Approving the Treaty of Lisbon was subject to a judgement of the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) which dealt explicitly with the enlarged EU competence on criminal matters.⁶ The Court decided that the Lisbon Treaty was compatible with the German Basic Law (*Grundgesetz*, GG).⁷ However, the Court also held that the new authority given to the EU had to be understood in a restrictive sense; according to the Court, this applied in particular to the provisions on criminal law and criminal procedure, which are especially sensitive from the perspective of democratic self-determination. Using the EU's new authority in the area of criminal law requires particular justification, according to the German Constitutional Court: the legislator has to demonstrate that a grave enforcement deficit exists that can only be eliminated through criminal sanctions. The Court reserved its right to determine whether these conditions were met; if that was not the case, the Court could, according to its jurisprudence, declare EU law incompatible with the German Basic Law. The decision was criticised for, among other reasons, establishing criteria which could not be fulfilled in practice (an enforcement deficit that could only be eliminated by criminal sanctions) and because the Court retained a right of review that does not appear to be compatible with the explicit veto right of Member States according to Article 83 para. 3 of the Treaty on the Functioning of the European Union (TFEU).⁸ Despite the requirements stipulated by the Constitutional Court and a statement of the German Association of Lawyers (*Deutscher Anwaltverein*) pointing to statistics that showed a substantial decrease in recorded environmental crimes during the last decade,⁹ the German legislature passed the law transposing the

¹ Bundesministerium des Innern/Bundesministerium für Justiz, Zweiter Periodischer Sicherheitsbericht, 2006, p. 279-280.

² Frank Saliger, *Umweltstrafrecht*, München 2012, annotation 18-21.

³ Saliger, *Umweltstrafrecht*, introduction.

⁴ Saliger, *Umweltstrafrecht*, introduction and annotation 22-23.

⁵ BGBl. 2011 I, p. 2557.

⁶ BVerfGE 123, 267. An English summary is provided by press release no. 72/2009 of 30 June 2009, <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html>.

⁷ The *Grundgesetz* is the German equivalent to a constitution, a term not used for historical reasons.

⁸ Katharina Reiling/Dennis Reschke, Die Auswirkungen der Lissabon-Entscheidung des Bundesverfassungsgerichts auf die Europäisierung des Umweltstrafrechts, *wistra* 2010, 47, 50-51.

⁹ Deutscher Anwaltverein, Stellungnahme Nr. 71/2010 zum Referentenentwurf eines Strafrechtsänderungsgesetzes (vom 13.10.2010) zur Umsetzung der Richtlinie des Europäischen Parlaments und

ECD without providing any empirical evidence that a grave enforcement deficit existed and that criminal law was necessary to eliminate it.¹⁰ Furthermore, although the German Association of Judges (*Deutscher Richterbund*) had issued a statement asking for a fundamental reform of German environmental criminal law,¹¹ the law was passed without any debate in the lower house of the German parliament (*Bundestag*).¹²

As far as statistics are concerned, a total of 31,847 cases of environmental crime were recorded in 2012. Environmental crimes accounted for only 0.5% of the total number of reported crimes. The clearance rate amounted to 68.7%. The category of environmental crime includes offences against the environment included in the Criminal Code (*Strafgesetzbuch, StGB*), but also offences contained in environmental, food- and medicine-related legislation. Considering only offences against the environment, 12,749 cases were recorded in 2012, a decrease of 4.4% from 2011, with a clearance rate of 61.7%. Among the offences against the environment, the unlawful treatment of dangerous waste accounted for the largest share, followed by water pollution and soil pollution (see figure 1).

What has to be kept in mind is that these statistics do not provide information regarding the impact of environmental crimes. A recorded case may consist of the illegal treatment of thousands of tons of hazardous waste, or of the illegal disposal of a single wrecked car. More importantly, it is widely assumed that in the field of environmental crime there are a considerable number of cases that go unreported and which are therefore not reflected in official statistics.¹³ The number of reported crimes is heavily dependent upon the willingness of the public to inform the authorities of suspected environmental crimes and upon the enforcement approach of the investigating authorities.¹⁴

Figure 1: Cases of environmental crime

Key	Offences/Offence groups	Recorded Cases		Change		Clearance Rate	
		2012	2011	absolute	In %	2012	2011
898000	Environmental Crime Including:	31,847	33,038	-1,191	-3.6	68.7	68.8
676000	Environmental Offences, §§ 324, 324a, 325-330a StGB Including:	12,749	13,342	-593	-4.4	61.7	59.6
676010	Soil pollution, § 324a StGB	1,038	999	39	3.9	64.4	66.2
676100	Water pollution, § 324 StGB	2,587	2,912	-325	-11.2	51.9	50.3
676200	Air pollution, § 325 StGB	165	256	-91	-35.5	82.4	60.9
676300	Causing noise, vibrations and non-ionising radiation, § 325a StGB	23	24	-1	x	60.9	91.7
676400	Unauthorised handling of waste, § 326 StGB, except para. 2	7,966	8,369	-403	-4.8	61.6	59.5
676500	Unlawful operation of facilities, § 327 StGB	494	469	25	5.3	95.3	95.7
676600	Unlawful handling of radioactive substances, dangerous substances and goods, § 328 StGB	108	113	-5	-4.4	74.1	68.1

des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 3-4, <http://anwaltverein.de/interessenvertretung/stellungnahmen+23>.

¹⁰ Andreas Ransiek, Vor §§ 324 ff. in Urs Kindhäuser/Ulfried Neumann/Hans-Ulrich Paeffgen (Eds.), *Nomos Kommentar Strafgesetzbuch (NK-StGB)*, volume 3, 4th edition 2013, annotation 61.

¹¹ Deutscher Richterbund, Stellungnahme Nr. 48/10 zum Referentenentwurf eines Strafrechtsänderungsgesetzes zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 1, <http://www.dr.de/cms/index.php?id=681>.

¹² Ransiek, NK-StGB, Vor §§ 324 ff., annotation 61; Hero Schall, Das 45. StÄG: Echte Gesetzesreform oder auftragsgemäße Erledigung?, in Mark A. Zöller/Hans Hilger/Wilfried Küper/Claus Roxin (Eds.), *Gesamte Strafrechtswissenschaft in internationaler Dimension. Festschrift für Jürgen Wolter zum 70. Geburtstag am 7. September 2013*, Berlin 2013, p. 643-660, 644.

¹³ Deutscher Anwaltverein, Stellungnahme Nr. 71/2010 zum Referentenentwurf eines Strafrechtsänderungsgesetzes (vom 13.10.2010) zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 4; See also the references given by Ransiek, NK-StGB, Vor §§ 324 ff., annotation 34.

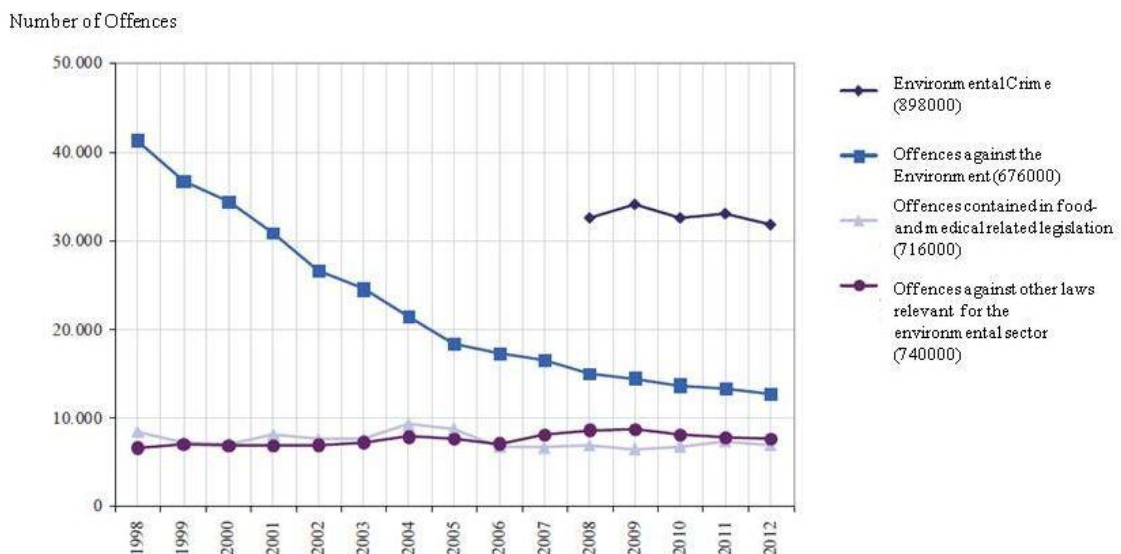
¹⁴ Saliger, *Umweltstrafrecht*, annotation 62, 530, with further references.

676700	Endangering protected areas, § 329 StGB	30	36	-6	x	60.0	66.7
676800	Illegal cross-border shipment of waste, § 326 para. 2 StGB	223	117	106	90.6	86.5	87.2
676900	Causing a severe danger by releasing poison, § 330a StGB	115	47	68	x	33.0	36.2
677000	Causing a common danger by poisoning and negligent creation of a common danger, §§ 319, 320 StGB	14	7	7	x	7.1	42.9
716000	Criminal offences related to food and medicines, Including:	6,880	7,424	-544	-7.3	88.8	90.3
716100	Offences according to the Food and Feed Code	2,261	2,418	-157	-6.5	95.1	94.7
716200	Offences according to the Medicines Act	4,333	4,690	-357	-7.6	85.0	87.5
	Offences according to the Wine Act	203	232	-29	-12.5	98.0	99.1
740000	Criminal offences against secondary criminal law on the environmental sector (besides key 716000) Including:	7,689	7,788	-99	-1.3	61.6	62.7
741000	Offences according to the Chemicals Act	379	412	-33	-8.0	93.1	88.3
742000	Offences according to the Protection Against Infection and Epizootic Diseases Act	40	26	14	x	77.5	92.3
743000	Offences according to the Nature Conservation Act, Federal Hunting Act, Animal Act, Plant Protection Act	7,006	7,040	-34	-0.5	59.2	60.3

Source: Bundeskriminalamt 2013. Polizeiliche Kriminalstatistik Bundesrepublik Deutschland. Berichtsjahr 2012 (Uniform Police Statistics in Germany, reporting year 2012; translated into English by Ecologic Institute)

The number of reported crimes against the environment increased from the beginning of their statistical coverage, reaching a peak in 1998¹⁵. Since 1999, absolute as well as relative numbers have been decreasing constantly, as shown in figure 2.

Figure 2: Development of environmental crime numbers



The key 898000 has only been used since report year 2008.

Source: Bundeskriminalamt 2013. Polizeiliche Kriminalstatistik Bundesrepublik Deutschland. Berichtsjahr 2012 (Uniform Police Statistics in Germany, reporting year 2012; translated into English by Ecologic Institute)

¹⁵ Bundesministerium des Innern/Bundesministerium für Justiz, Zweiter Periodischer Sicherheitsbericht, 2006, p. 264.

This development is reaffirmed by the recently published Uniform Police Statistics for the reporting year 2013.¹⁶ The only significant exception to this trend is the illegal cross-border shipment of waste, for which reported cases increased by 90% from 2011 to 2012 (from 117 to 223 cases) and again by 39% in 2013 (312 cases).

This constant decline may be interpreted either as a success of the environmental criminal system, or as an indicator of its failure to diligently identify and report crimes which fall under this category.¹⁷ Among researchers, at least, there is widespread consensus that these numbers can be best explained as the result of an environmental crime enforcement deficit.¹⁸ Overall, many in Germany are critical of the ECD's approach of turning more environmental offences into criminal offences; in particular, they question whether criminalisation may, in fact, exacerbate rather than ameliorate the existing enforcement deficit.¹⁹

¹⁶ Available at http://www.bka.de/nn_205960/sid_C34944B7A86002AD6479A71E65B5557A/DE/Publikationen/PolizeilicheKriminalstatistik/pks__node.html?__nnn=true.

¹⁷ Ransiek, NK-StGB, Vor §§ 324 ff., annotation 34; Bernd Hecker, et al., Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung. Eine exploratorische und rechtsdogmatische Studie, Polizei + Forschung, volume 37, 2008, p. 55-63; both provide further references.

¹⁸ Bundesministerium des Innern/Bundesministerium für Justiz, Zweiter Periodischer Sicherheitsbericht, 2006, p. 278; Ransiek, NK-StGB, Vor §§ 324 ff., annotation 27; Salinger, Umweltstrafrecht, annotation 60-61, all with further references.

¹⁹ Deutscher Richterbund, Stellungnahme Nr. 48/10 zum Referentenentwurf eines Strafrechtsänderungsgesetzes zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 1, <http://www.drb.de/cms/index.php?id=681>; Deutscher Anwaltverein, Stellungnahme Nr. 71/2010 zum Referentenentwurf eines Strafrechtsänderungsgesetzes (vom 13.10.2010) zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 3-4, <http://anwaltverein.de/interessenvertretung/stellungnahmen+23>; Salinger, Umweltstrafrecht, annotation 23; Ransiek, NK-StGB, Vor §§ 324 ff., annotation 36.

2. Definition of the environment

There is not a general definition of the environment in environmental criminal provisions. In particular, the provisions on “offences against the environment” in chapter 29 of the Criminal Code do not refer to the environment as an abstract term, but to its specifications (*Umweltmedien*) such as the water, the air, the soil, and its natural manifestations, such as animals and plants (for further details, see chapter 5 below). As an exception, § 326 para. 6 StGB mentions harmful effects on “the environment”, but immediately provides a specification: “in particular on persons, bodies of water, the air, the soil, productive livestock and agricultural crops”. This is in line with other environmental laws which define the environment by enumerating the protected environmental specifications. For example, according to § 2 para. 1 sentence 2 of the Environmental Impact Assessment Act (*Gesetz über die Umweltverträglichkeitsprüfung, UVPG*), “environmental impact assessment comprises identification, description and assessment of the direct and indirect impacts of a project on (1) human beings, including on human health, animals, plants, and biodiversity; (2) soil, water, air, climate and landscape; (3) cultural heritage and other material assets, and (4) the interactions between the foregoing protected assets.”

However, environmental criminal law is more restrictive than other environmental laws like the UVPG in that it does not explicitly include cultural heritage or other aspects of the socio-cultural environment. Accordingly, the prevailing view within the literature regarding the German legal definition of “environment” in environmental criminal law holds that it is restrictive and confines itself to protecting the natural environment of humans.²⁰ This opinion is derived from the perceived intention of the legislature to protect (only) vital natural components of humans’ living space, such as water, air, and soil, by enforcing environmental protections via criminal law.²¹ The prevailing view thus combines elements of an ecological understanding of the environment with those of an anthropocentric one.²² However, in some criminal provisions, the ecological approach is of primary importance (e.g., water, soil and air pollution, §§ 324, 324a, 325 StGB), whereas in others the anthropocentric approach is dominant (e.g., causing noise, vibrations and non-ionising radiations, § 325a StGB).²³

Finally, the definition of environment in criminal law does not correspond to the “natural resources” that the State should protect, together with animals, according to Art. 20a GG.²⁴ The term natural resources is instead understood in a wider sense to include the environmental elements soil, water, air, climate, landscape, animals, plants, as well as their interactions.²⁵ In general, Art. 20a GG also addresses prosecution authorities and the criminal courts that must take this constitutional provision into account when interpreting criminal provisions. However, other principles of criminal law based on the Basic law, such as the *lex certa* requirement or the prohibition to interpret a criminal provision beyond its wording (see below), must not be disregarded.²⁶

²⁰ Saliger, Umweltstrafrecht, annotation 25 with further references.

²¹ BT-Drs. 8/2382, p. 9-10; BT-Drs. 8/3633, p. 19.

²² Deutscher Anwaltverein, Stellungnahme Nr. 71/2010 zum Referentenentwurf eines Strafrechtsänderungsgesetzes (vom 13.10.2010) zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 3-4, <http://anwaltverein.de/interessenvertretung/stellungnahmen+23>; Saliger, Umweltstrafrecht, annotation 44 with further references.

²³ Saliger, Umweltstrafrecht, annotation 44.

²⁴ Saliger, Umweltstrafrecht, annotation 26.

²⁵ Wolfgang Kahl, Umweltrecht, 8th ed., München 2010, § 2 annotation 4 with further references.

²⁶ Saliger, Umweltstrafrecht, annotation 26.

3. Definition of environmental crime/environmental offence

The bulk of German environmental criminal law is incorporated into chapter 29 (§§ 324-330d) of the Criminal Code (StGB) as “offences against the environment”. The Criminal Code does not, however, provide a definition of “environmental offences” or “environmental crimes”, nor does any other law. According to the legal literature, the offences against the environment in chapter 29 StGB constitute environmental criminal law in a narrow sense, whereas environmental criminal law in a wider sense is defined as those legal provisions that impose a criminal sanction, such as a prison sentence, for acts against the environment.²⁷ It is distinct from administrative (penal) law (*Ordnungswidrigkeitenrecht*), which merely imposes a fine for such conduct.

Establishing environmental criminal law within the Criminal Code as “primary criminal law” (*Haupt- or Kernstrafrecht*) demonstrates that environmental offences are not considered to be minor offences, but rather they are treated as serious criminal wrongdoing.²⁸ Additionally, some environmental “offences causing a common danger” are part of chapter 28 StGB (e.g., nuclear- and radiation-related offences in §§ 311 and 312). Finally, the remaining environmental offences were established by specific environmental laws, e.g., in §§ 27 to 27c of the Law on Chemicals (*Chemikaliengesetz*, ChemG) and §§ 71 and 71a of the Law on Nature Conservation (*Bundesnaturschutzgesetz*, BNatSchG). In these laws the criminal provisions function merely as supplements to environmental administrative law (“secondary criminal law”, *Nebenstrafrecht*).

Directive 2008/99/EC on the protection of the environment through criminal law (ECD) was transposed both into the StGB and secondary criminal law by the Law of 6 December 2011 (45. *Strafänderungsgesetz*).²⁹

4. Substantive criminal law principles

4.1 Principle of legality

The principle of legality (*Gesetzlichkeitsprinzip, nullum crimen, nulla poena sine lege*) is a fundamental legal principle, which is laid down in Art. 103 para. 2 GG and § 1 StGB. According to this principle, an act can only be punished if a law provided for such punishment before the act was committed. This limits the scope of criminal law in a number of ways:³⁰

- Laws imposing criminal liability may not be retroactive in effect (*Rückwirkungsverbot*).
- The punishment for a particular act may not be increased after the act was carried out (§ 2 StGB).
- Rules of criminal law shall be formulated with a sufficient degree of certainty (*lex certa* requirement, *Bestimmtheitsgebot*).

²⁷ Saliger, Umweltstrafrecht, annotation 9.

²⁸ BT-Drs. 8/3633, p. 19.

²⁹ BGBl. 2011 I, p. 2557.

³⁰ Gerhard Robbers, An Introduction to German Law, 5th ed., Baden-Baden 2012, annotation 444.

- New offences may not be created through an analogy to existing crimes (*Analogieverbot*) or otherwise by the judiciary. Accordingly, the prevailing view does not allow an extensive interpretation of criminal provisions beyond the wording of the particular rule.³¹
- Rules regarding criminal liability which may lead to imprisonment may only be contained in an act of parliament (*formelles Gesetz*) in accordance with Art. 104 para. 2 GG.

However, blanket provisions in an act of parliament which set forth punishments for the contravention of other acts, regulations, or even administrative decisions are permissible, as long as they are sufficiently precise.³²

4.2 Necessity of criminal law

The legislature criminalises certain conduct if it concludes that there is a particular need for protecting society against that conduct. A type of conduct may only be made a crime if penalising that conduct is the only means with which to protect society against that conduct in an adequate way (necessity of criminal law, *Strafbedürftigkeit*).³³ Criminal law is thus the legislative means of last resort (*ultima ratio*) when limiting the general right to freedom protected by Article 2 para. 1 GG.³⁴ However, the legislature has broad discretion in deciding whether criminal law is necessary in a given instance.³⁵ Whether criminalising certain conduct is necessary depends on a combination of three components:

- The importance of the protected legal interest (*Rechtsgut*)
- The level of danger posed by the activity (*Handlungsunrecht*)
- The attitude of the perpetrator (*Gesinnungsunrecht*)³⁶

In accordance with the doctrine of necessity, criminal law is different from other means of protecting legal interests. Thus, an action that is considered to require a repressive reaction from the State, but not one amounting to a criminal sanction, may be subjected to a system of administrative penal law according to the Administrative Offences Act (*Ordnungswidrigkeitengesetz*, OWiG). This system allows administrative agencies to impose a fine (*Geldbuße*) which normally ranges from €5 to €1,000 (§ 17 para. 1 OWiG). The original idea behind establishing the category of administrative offences was the decriminalisation of ethically neutral disregard for administrative rules. However, in modern times even serious offences are dealt with under this law. Accordingly, many of these offences are set out in specialised acts often imposing penalties much higher than the usual maximum penalty, corresponding to the basic idea that the fine should be greater than the economic benefit which the wrongdoer obtained by committing the offence. The procedure for the imposition of administrative fines is similar to criminal procedures, but considerably simpler. In contrast to criminal law, legal persons can be held liable under these rules (§ 3 OWiG). If an action is subject to both criminal law and administrative penal law, only the former is applied. However, if no criminal sanction is imposed, an administrative fine may still be imposed (§ 21 OWiG).

³¹ BVerfGE 71, 108, 114 ff.; BGH 4, 144, 148; Hans-Heinrich Jescheck/Thomas Weigend, Lehrbuch des Strafrechts, Allgemeiner Teil, 5th edition, Berlin 1996 (Strafrecht AT), p. 158.

³² BVerfGE 75, 329, 340 ff.

³³ Jescheck/Weigend, Strafrecht AT, p. 50 .

³⁴ BVerfG 39, 1, 47.

³⁵ Reiling/Reschke, wistra 2010, 50-51 citing BVerfG NSTZ 1989, 478.

³⁶ Jescheck/Weigend, Strafrecht AT, p. 51.

4.3 Causation

The perpetration of a crime presupposes a causal connection between an act and a certain undesired effect, e.g., an injury. As a starting point, courts require a particular act which is considered a potential cause for a crime to constitute a *conditio sine qua non* of the effect, meaning that without this act the effect would not have materialised and thus the crime would not have occurred (*Bedingungstheorie*). Thus, every cause is of equal weight (*Äquivalenztheorie*). The courts meet the obvious need to limit liability more strictly by requiring the fulfilment of further elements, e.g., creating or increasing the risk that an offence will be committed. This is a very contentious topic.³⁷

Problems of causality and/or attribution are common in environmental criminal law. This is due to its complexity, the use of environmental goods by a multitude of people, and the abstract character of environmental goods such as “water” or “air”. In order to facilitate the application of environmental criminal law, the lawmakers have designed many criminal provisions as abstract risk crimes (*abstrakte Gefährungsdelikte*), which penalise the creation of even a merely abstract danger. In addition, the judiciary has reduced the requirements to prove causality or attribution in certain areas, such as product liability, which are relevant for environmental criminal law.³⁸

4.4 Unlawfulness and grounds of justification

The accused can only be punished if he or she has committed a crime. Establishing this requires the fulfilment of three criteria:

- The accused’s behaviour must be among those disapproved of by the law which are listed under the specific offences of the StGB or in some other statute (*Tatbestandsmäßigkeit*).
- The act or state of affairs in question must be unlawful (*Rechtswidrigkeit*). This criterion is not considered to have been met if the accused is able to establish legally accepted grounds of justification (*Rechtfertigungsgründe*).
- The accused’s behaviour must be culpable, meaning that it must be possible to hold him or her responsible for having fulfilled the elements of a crime (*Schuld*). This is not the case if the accused lacked the mental capacity to be held accountable for his or her actions (*Schuldfähigkeit*), or if any legal grounds for exemption (*Entschuldigungsgründe*) are applicable.

Among potential justifications, the most important for environmental criminal law is the assertion that the action was permitted or authorised by an appropriate administrative authority (*behördliche Genehmigung*). This reflects the **principle of the dependency of environmental criminal law on environmental administrative law** (*Verwaltungsakzessorietät*), which is the core element of German environmental criminal law and exhibits its complementary function.³⁹ According to the currently prevailing legal view, the term “unlawful,” (*unbefugt*) as used to describe certain conduct in §§ 324 para. 1 and 326 para. 1 StGB, is to be understood as opening the door for utilisation of this type of justification (for more details, see below at §§ 324, 326 StGB).⁴⁰ That is to say, for example, an individual accused of “unlawful dumping” could use a valid dumping permit granted by an administrative authority as a justification for their conduct and thereby avoid criminal sanctions. If a criminal environmental provision explicitly punishes a certain type of conduct only if it occurs without a permit or another form of authorisation, then an action in conformity with administrative law does not fulfil the elements of the specific criminal provision (*Tatbestandsmäßigkeit*) and is thus not in violation of the law.⁴¹

³⁷ Robbers, *An Introduction to German Law*, annotation 458.

³⁸ Saliger, *Umweltstrafrecht*, annotations 223-224, 231-233.

³⁹ Saliger, *Umweltstrafrecht*, annotation 50.

⁴⁰ Saliger, *Umweltstrafrecht*, annotation 96-98; Thomas Fischer, *Strafgesetzbuch (StGB)*, 61th ed., München 2014, Vor § 324 annotation 6, both with further references.

⁴¹ Saliger, *Umweltstrafrecht*, annotation 95; Fischer, *StGB*, Vor § 324 annotation 6, both with further references.

In addition to having been given permission by an administrative authority, necessity (*rechtfertigender Notstand*, § 34 StGB) is another relevant justification in the context of criminal environmental law. If a person acts to avert a current danger to his or her legal interests or those of some other person, he or she will be able to rely on this defence if two requirements are satisfied. First, it must not have been possible to avert the danger in any other way, and second, the balance of the conflicting interests must indicate that the protected interests were significantly more important than the interests infringed upon. Section 34 StGB is applicable to incidents and disasters, e.g., if water is used to fight a fire and then runs off and pollutes a body of water. Furthermore, the jurisprudence has extended § 34 StGB to other categories of cases, in particular to situations of colluding duties, e.g., the duty to dispose of sewage water conflicting with the duty not to pollute the local bodies of water.⁴²

4.5 Mens rea rules

Most actions only lead to criminal liability if the perpetrator acted intentionally (§ 15 StGB). To act intentionally, the perpetrator must have known that his or her actions fulfilled the objective elements of the crime and he or she:

- must have been motivated by the desire to cause the criminal consequence (direct intention, *Absicht*),
- must have seen the criminal consequences as an inevitable result of his or her actions (direct intent, *direkter Vorsatz*), or
- must have consciously taken the criminal consequence into account as it was necessary to achieve some other objective (contingent intent, *bedingter Vorsatz*).

If expressly provided for by law, simple negligence may also lead to criminal liability (§ 15 StGB). Here the basis for criminal liability is an unlawful lack of due care. Either the accused is aware that s/he is in breach of a duty of care but hopes to be able to avoid the criminal result (conscious negligence, *bewusste Fahrlässigkeit*), or s/he does not foresee the criminal consequence and acts carelessly even though s/he should have been able to foresee and avoid the result (unconscious negligence, *unbewusste Fahrlässigkeit*). The German Criminal Code imposes criminal penalties for environmental crimes even in cases of simple negligence, unlike its handling of many other areas of criminal law.⁴³

As stated above, the accused is only liable for punishment if his or her actions fulfil the elements of a crime, were unlawful, and were done with a culpable state of mind (*schuldhaft*). Culpability means that the accused can be held personally responsible for the relevant act and that the act is reproachable. This presupposes that the accused has had the ability and opportunity to act in conformity with the law. If, due to his or her age (§ 19 StGB) or for other reasons (§ 20 StGB), the accused lacks such criminal capacity (*Schuldfähigkeit*), he or she cannot be punished. Diminished responsibility may lead to a reduced sentence (§ 21 StGB). The principle of culpability is considered a principle of constitutional law (*nulla poena sine culpa*).⁴⁴

4.6 Perpetrators of and participants to a crime

If a person commits a crime alone, s/he is liable as the perpetrator (*Täter*). If several people commit a crime together, then a distinction must be made according to what part each of them played. Several people acting to carry out a common purpose (*gemeinsamer Tatentschluss*) are co-perpetrators (*Mittäter*) and each of them is liable as if s/he had committed the crime as an individual perpetrator (§ 25 para. 2 StGB). There is also the possibility that someone commits a crime through the agency of another person, thereby using the other person as an instrument by steering that person's will (*mittelbare Täterschaft*, § 25 para. 1, second alternative StGB). In this case, the rule is that only the former person is liable as a perpetrator.

As far as non-perpetrating participants to a crime (*Teilnehmer*) are concerned, a distinction is made between instigators (*Anstifter*, § 26 StGB) and accessories (*Gehilfen*, § 27 StGB), that is, persons guilty of aiding and abetting the crime. The instigator gets the perpetrator to do the deed, e.g., by promising him or her benefits, and is therefore liable as if s/he were the perpetrator. Accessories, on the other hand, are punished less severely, as their contribution to the crime consists of assisting the perpetrator to commit it. Both in the case of instigators and of accessories, a necessary condition for liability is the unlawful and intentional commission of some act which

⁴² BGHSt 38, 325, 331; Saliger, Umweltstrafrecht, annotation 259 with further references.

⁴³ Saliger, Umweltstrafrecht, annotation 59.

⁴⁴ BVerfG 6, 389, 439; Jescheck/Weigend, Strafrecht AT, p. 23.

corresponds with the elements of a specific independent crime by the perpetrator. If the main act consists of some negligent act, then there can be no liability for accessories or instigators.

4.7 Criminal sanctions

The primary types of punishment are imprisonment (*Freiheitsstrafe*) and the imposition of fines (*Geldstrafe*).⁴⁵ Apart from the maximum penalty of life imprisonment, the period of imprisonment which may be imposed ranges between a minimum of 1 month and 15 years (§ 38 StGB), but less than six months may only be imposed in exceptional circumstances.

Today the most common form of punishment for environmental crimes is the imposition of a fine, with imprisonment only being applied in particularly severe cases.⁴⁶ Following the Scandinavian example, German law measures fines in daily units (*Tagessätze*), an amount of money roughly corresponding to the sum which a given individual would earn from a day's work, though it also can take into account other personal and economic circumstances (§ 40 StGB). This amount is determined by the court for each individual separately, though there is a statutory minimum of €1 and a statutory maximum of €30,000. The minimum fine which can be levied is five daily units up to a maximum of 360 daily units. If a person has incurred a fine not exceeding 180 daily units, the court may in some cases issue a warning and reserve sentencing (*Verwarnung mit Strafvorbehalt*, §§ 59-59c StGB) to avoid inflicting a disproportionate amount of suffering on the criminal. In such cases, the court sets a probation period of up to 3 years.

A further consequence (*Nebenfolge*) of being sentenced to a term of imprisonment of a year or more for a felony is that the convict automatically loses the right to hold public office, or to gain or exercise any rights or privileges from an election, for the next five years (§§ 45 to 45b StGB).

The Criminal Code also provides for the forfeiture of benefits which the perpetrator or his or her accomplices have derived from the crime (§§ 73 to 73e StGB). Objects which were used in a crime or were intended for the preparation or commission of a crime can be permanently confiscated. The same applies to objects created by criminal activities (§§ 74 to 76 StGB).

Criminal sanctions are recorded in the Federal Central Criminal Register (*Bundeszentralregister*). Offenders have a criminal record (*Vorstrafe*) if they have been convicted to imprisonment beyond three months or to a fine exceeding 90 daily units.

4.8 Criminal responsibility of legal persons

German criminal law follows the axiom "*societas delinquere non potest*", which is based on the principle of personal culpability, leading to only natural persons – and not merely legal ones – being liable under criminal law. Thus, criminal liability within corporations follows the general "parties to the offence" rules described above. The most notable exception regards specific rules which have been established in order to ascribe the liability for actions taken by the organs of a legal entity or by other persons acting on behalf of someone else, which are established in § 14 StGB. However, in decentralised, large-scale companies, the limits of traditional criminal law are quite clear.⁴⁷ Specifically, the division of work within corporations makes it difficult to attribute criminal liability stemming from that company's activities to a particular person within the company. The German judiciary has developed some modifications of the general rules, which have proven quite controversial (see below).

Within a corporation, three categories of persons may be held criminally liable for that corporation's activities: (1) persons in leadership positions (directors, managers, etc.) due to their decision-making power and their authority over the whole organisation (*Organisationsherrschaft*), (2) officers or employees to which these responsibilities have been delegated, and (3) employees which have personally committed the crime in question. In individual cases, the liability of each of these persons depends on their individual, personal responsibility in

⁴⁵ This chapter is based on Robbers, *An Introduction to German law*, annotations 492-504.

⁴⁶ Jescheck/Weigend, *Strafrecht AT*, p. 744-746.

⁴⁷ Michael G. Faure/Günter Heine, *Criminal Enforcement of Environmental Law in the European Union*, Report on behalf of the European Union Network for the Implementation and Enforcement of Environmental Law, Maastricht, July 2000, p. 47.

relation to that of other persons in their same category and in relation to that of persons in different categories.⁴⁸ Within a single category, generally speaking, each employee is responsible for his or her own scope of duties. However, when the question concerns those in leadership positions, the Federal Court of Justice (*Bundesgerichtshof*, BGH) established a principle that holds all members of the management, under some circumstances, jointly responsible for preventing illegal conduct within the company.⁴⁹ When addressing relations between these categories of workers, if a more senior employee orders an act leading to a crime, s/he may not only be an instigator of the crime, but also an indirect perpetrator (*mittelbarer Täter*) using the more junior employee as an instrument. Recently, the BGH ruled that directors and managers of a corporation may also be responsible as indirect perpetrators due to their authority over the whole organisation (*Organisationsherrschaft*).⁵⁰ In contrast to this highly controversial jurisprudence, it has been generally accepted that officers delegating responsibilities to other persons may themselves be held criminally liable if the officer violated his or her duties of supervision, organisation, control, or careful selection of supervisory personnel.⁵¹ Finally, the criminal liability of specialist officers, who are specifically responsible for ensuring that the corporation is not in violation of environmental laws, is quickly becoming an important issue.⁵²

Legal entities may be responsible under administrative (penal) law according to § 30 of the Administrative Offences Act (*Ordnungswidrigkeitengesetz*, OWiG) (*Verbandsgeldbuße*). This will be described in more detail in Chapter 9.

Although the Commission on the Reform of the System of Sanctions, established by the German federal government, clearly voted against it in 2000,⁵³ a new political discussion has begun in Germany regarding the establishment of corporate criminal liability.⁵⁴ In particular, the federal state of North Rhine-Westphalia has recently presented a corresponding draft law based on the respective Austrian law⁵⁵ and intends to initiate a legislative process to introduce such a law via the Bundesrat.⁵⁶ Advocacy and business representatives strongly oppose this concept that they criticise as unnecessary and excessive, and instead favour an improvement of the Administrative Offence Act.⁵⁷ In fact, the federal government has announced its intention to strengthen the Administrative Offence Act, but also to consider criminal liability for multinational companies.⁵⁸

⁴⁸ For details see Saliger, Umweltstrafrecht, annotations 162-170.

⁴⁹ “Lederspray” decision, BGHSt 37, 106, 123, 131-132.

⁵⁰ BGHSt 49, 147, 163-164.

⁵¹ Saliger, Umweltstrafrecht, annotation 170 with further references.

⁵² Saliger, Umweltstrafrecht, annotation 171.

⁵³ Abschlußbericht der Kommission zur Reform des strafrechtlichen Sanktionensystems, März 2000, chapter 12.2.1, <http://www.bib.uni-mannheim.de/fileadmin/pdf/fachinfo/jura/abschlussber-der-komm-strafreform.pdf>.

⁵⁴ Ransiek, NK-StGB, Vor §§ 324 ff. annotation 33; see already Faure/Heine, Criminal Enforcement of Environmental Law in the European Union, p. 44.

⁵⁵ Gesetzesantrag des Landes Nordrhein-Westfalen, Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden, http://www.justiz.nrw.de/JM/justizpolitik/jumiko/beschluesse/2013/herbstkonferenz13/zw3/TOP_II_5_Gesetzentwurf.pdf.

⁵⁶ Frankfurter Allgemeine Zeitung (FAZ) of 11. November 2013, p. 19.

⁵⁷ Bundesrechtsanwaltskammer, Stellungnahme Nr. 9/2013 zur Einführung einer Unternehmensstrafe, Mai 2013, p. 2-3, <http://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2013/mai/stellungnahme-der-brak-2013-09.pdf>; Deutscher Anwaltverein, Stellungnahme Nr. 54/2013 zum Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden des Landes Nordrhein-Westfalen, Dezember 2013, p. 3-4, <http://anwaltverein.de/downloads/DAV-SN54-13.pdf>; see also the legislative proposal to amend the Administrative Offence Act by Bundesverband der Unternehmensjuristen (BUJ), Gesetzgebungsvorschlag für eine Änderung der §§ 30, 130 des Ordnungswidrigkeitengesetzes (OWiG) of April 2014, with further references at p. 4, http://www.buj.net/resources/Server/BUJ-Stellungnahmen/BUJ_Gesetzgebungsvorschlag_OWIG.pdf.

⁵⁸ Deutschlands Zukunft gestalten, Koalitionsvertrag zwischen CDU, CSU und SPD, 18. Legislaturperiode, p. 145.

5. Substantive environmental criminal law

As stated before, substantive environmental criminal law is either incorporated in the Criminal Code as “primary criminal law” or established by specific environmental laws as “secondary criminal law”.

5.1 Environmental offences in the Criminal Code

5.1.1 Water pollution, § 324 StGB

This provision provides punishment for any person who unlawfully pollutes a body of water or detrimentally alters its qualities. A body of water is defined in § 330 para. 1 no. 1 as surface water, ground water, or the sea.

This law utilises an ecological approach and protects the public legal interest in the purity of water. According to the prevailing view, § 324 punishes damage to a body of water (*Erfolgsdelikt*).⁵⁹

If the offender acts intentionally, the penalty can range from a fine up to five years in prison. If the offender merely acts negligently, the punishment can range from a fine up to three years in prison. Attempted pollution of a body of water is also punishable.

The offender does not act unlawfully if s/he is acting in a manner authorised by environmental administrative law, for example, according to a permit (principle of the dependency of environmental criminal law on environmental administrative law, *Verwaltungsakzessorietät*).

Under § 324 StGB, the unlawful discharge, emission, or introduction of a quantity of materials into water, which causes or is likely to cause substantial damage to the quality of that water (Article 3 lit. a ECD), has, at least by and large, been punishable in German criminal law already before the passage and transposition of the ECD. However, whereas § 324 only penalises damage done to water, the ECD also encompasses the likelihood of damage. According to the legislature, § 324 is considered sufficient to transpose the Directive, as it already considers any detrimental alteration of water qualities to be “damage”.⁶⁰ Furthermore, intentional endangerments of the protected legal interest are covered by para. 2 criminalising the attempt.⁶¹ In contrast to the official view, there is an opinion in the literature that considers the structure of § 324 StGB insufficient to transpose the ECD, as it would not apply to a case involving a discharge of materials into water which was likely to cause substantial damage to the quality of water without detrimentally altering its qualities. According to this opinion, in such a case it would not help that attempted pollution was punishable since the attempt requires intentional behaviour whereas the ECD also includes serious negligence.⁶²

According to the German legislature, § 324 StGB already meets the requirement of Article 5 lit. a of Directive 2009/123/EC to criminalise ship-source discharges according to Articles 4 and 5 of the Directive by effective, proportionate and dissuasive sanctions according to Article 8 lit. a. Therefore, no changes in German criminal law were required to transpose the Directive.⁶³

In especially serious cases of an intentional offence under § 324 StGB, § 330 StGB states that a punishment of up to ten years in prison may be applied. Instigators and accessories to this offence can be punished according to the general provisions of the law (§§ 26, 27 StGB, see the chapter on principles of substantive criminal law above); thus, they also meet the requirements of Article 5 lit. b of Directive 2009/123/EC.

⁵⁹ Fischer, StGB, § 324 annotation 2 with further references.

⁶⁰ BT-Drs. 17/5391, p. 12.

⁶¹ Ulrich Weber, Das deutsche Umweltstrafrecht nach dem 45. StrRG, in Martin Heger/Brigitte Kelker/Edward Schramm (Eds.), Festschrift für Kristian Kühn, München 2014, p. 747-748.

⁶² Martin Heger, Das 45. Strafrechtsänderungsgesetz – Ein erstes europäisiertes Gesetz zur Bekämpfung der Umweltkriminalität, HRRS 2012, p. 211, 222.

⁶³ BT-Drs. 17/5391, p. 15.

Due to these attributes, largely there was no need to amend § 324 StGB in order to transpose the ECD or Directive 2009/123/EC. However, some doubts remain as to whether the structure of § 324 StGB fully transposed the ECD concerning dangerous conduct which does not lead to a detrimental change of water qualities, as well as whether any deficiencies could be remedied by interpreting the provision in a way that conforms to the ECD. In any case, it would have been more secure to amend the existing structure requiring damage to water qualities to instead require the likelihood of a danger of damage (“Eignungsdelikt”).⁶⁴

Section 324 StGB is the second most relevant provision of chapter 29 of the Criminal Code in practice. Due to its conciseness, it is considered a particularly efficient provision.⁶⁵

5.1.2 Soil pollution, § 324a StGB

Section 324a StGB criminalises the pollution or detrimental alteration of soil by introducing or releasing substances into the soil: 1) that are capable of harming the health of other people, animals, or plants, 2) that have the potential to damage valuable property or a body of water, or 3) in an otherwise substantial quantity.

Soil quality, the health of people, animals, plants, valuable property, and the purity of water are the protected legal interests. Section 324a StGB does not protect the soil quantitatively, e.g., against excessive land consumption or surface sealing.⁶⁶ The provision punishes any damage done to the soil (*Erfolgssdelikt*).⁶⁷

The relevant action has to be undertaken “in violation of duties under administrative law” (principle of the dependency of environmental criminal law on environmental administrative law, *Verwaltungsakzessorietät*). According to § 330d para. 1 no. 4 StGB, such administrative duties may result from legal provisions, court decisions, enforceable administrative acts or charges, or from certain public-law contracts. In addition, the administrative duties must serve to protect against the endangerment of or detrimental effects to the environment, particularly people, animals, plants, water, air, and soil.

If the offender acts intentionally, the penalty can range from a fine up to five years in prison. If he or she acts negligently, the punishment can range from a fine up to three years in prison. Attempted soil pollution or degradation is also punishable.

According to § 324a StGB, the unlawful discharge, emission, or introduction of a quantity of materials into soil which causes or is likely to cause serious injury to any person or substantial damage to the quality of soil or water, or to animals or plants (Article 3 lit. a ECD), was punishable under German criminal law prior to passage of the ECD. Whereas § 324a only penalises damage done to the soil, the ECD also encompasses the likelihood of damage; however, § 324a sufficiently transposes the Directive as it already considers any detrimental alteration of soil qualities to be “damage”.⁶⁸ Concerning the other protected legal interests, endangering soil quality is sufficient.

Thus, there was no need to amend § 324a StGB in order to transpose the ECD.

Concerning the number of registered environmental crimes, § 324a StGB is the third highest.⁶⁹

⁶⁴ Such a transformation was proposed by Heger, HRRS 2012, p. 222; see also Weber, Festschrift für Kristian Kühl, p. 747-748, who is, however, of the opinion that the alleged violation of the ECD was strongly relativised by the endangerment elements in § 324.

⁶⁵ Saliger, Umweltstrafrecht, annotation 337 with further references.

⁶⁶ Fischer, StGB, § 324 annotation 2.

⁶⁷ Fischer, StGB, § 324 annotation 2 with further references.

⁶⁸ BT-Drs. 17/5391, p. 12.

⁶⁹ Saliger, Umweltstrafrecht, annotation 369 with further references.

5.1.3 Air pollution, § 325 StGB

Section 325 StGB criminalises air pollution by anyone operating a facility capable of harming the health of people, animals or plants, or capable of damaging valuable properties or a body of water (para. 1). Furthermore, § 325 StGB regulates the punishment for releasing harmful substances in significant amounts into the air (para. 2 and 3). Harmful substances are defined as substances which are capable of harming the health of people, animals or plants, or capable of damaging valuable properties or a body of water, the air and the soil in a lasting way (para. 6). According to para. 7, facilities under para. 1 do not include motor-vehicles, rail vehicles, aircraft or watercraft.

Air quality⁷⁰, human health, the health of plants and animals, as well as the protection of valuable property are the legal interests protected by this law; para. 2 and 3 also explicitly invoke protections of water and soil quality. Whereas § 325 para. 1 punishes a combination of damage to the air and endangerment of the other protected legal interests (*Eignungsdelikt*), para. 2 and 3 punish the mere endangerment of the protected legal interests (*abstraktes Gefährdungsdelikt*).⁷¹

According to the prevailing view, § 325 can only apply to the operator of a facility or by persons acting for a facility operator, according to § 14 StGB (*Sonderdelikt*).⁷²

If the offender acts intentionally in the case of para. 1, the penalty can range from a fine up to five years in prison. The same penalty applies if the offender releases harmful substances in significant amounts into the air either when operating a facility or outside the grounds of the facility (para. 2). If s/he releases such substances into the air in other cases (para. 3), or if s/he acts negligently in the case of para. 1 or 2, the penalty can range from a fine up to three years in prison. If the charge is serious negligence (*Leichtfertigkeit*) under para. 3, punishment can range from a fine up to one year in prison. Attempted violation of para. 1 is also punishable.

The relevant action has to be undertaken “in violation of duties under administrative law” (principle of the dependency of environmental criminal law on environmental administrative law, *Verwaltungsakzessorietät*). Technical standards, such as the Technical Instructions on Air Quality (*Technische Anleitung Luft*, or *TA Luft*), are not administrative duties as defined by § 330d para. 1 no. 4 StGB, as they are only directed at administrative authorities.

Under § 325 StGB, the unlawful discharge, emission or introduction of a quantity of materials into the air which causes or is likely to cause serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants (Article 3 lit. a ECD) was already largely punishable in German criminal law. However, § 325 had to be adapted to the ECD in three respects. First, the former requirement of a serious infringement of administrative duties in para. 2 was deleted in order to comply with the ECD. Second, para. 3 was introduced to cover the release of harmful substances in significant amounts into the air that is not related to the operation of a facility. Third, the former general exemption for motor-vehicles, rail vehicles, aircraft or watercraft had to be reduced to conduct covered by para. 1, as the ECD does not include such an exemption.⁷³ The legislature has actually been criticised for maintaining this exemption, which had always been contested, in para. 1.⁷⁴ On the other hand, concerns have been raised that minor cases involving motor vehicles releasing harmful substances in significant amounts into the air might be unduly criminalised since para. 2, contrary to para. 3, includes negligent behaviour.⁷⁵ Therefore, it has been claimed that the legislature should restrict § 325 para. 2 StGB to the level required by the ECD, which is serious negligence.⁷⁶

⁷⁰ Saliger, Umweltstrafrecht, annotation 392 with further references, also to other views.

⁷¹ Saliger, Umweltstrafrecht, annotation 393 and 407 with further references, also to other views.

⁷² Saliger, Umweltstrafrecht, annotation 393 with further references, also to other views.

⁷³ BT-Drs. 17/5391, p. 12.

⁷⁴ Heger, HRRS 2012, p. 215 with further references; see also Fischer, StGB, § 325 annotation 22.

⁷⁵ Deutscher Richterbund, Stellungnahme Nr. 48/10 zum Referentenentwurf eines Strafrechtsänderungsgesetzes zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der

5.1.4 Causing noise, vibrations and non-ionising radiation, § 325a StGB

§ 325a provides punishment for anyone who, in the operation of a facility, causes noise which is capable of harming the health of others (para. 1), or which violates duties under administrative law that serve to protect against noise, vibrations, or non-ionising radiation (e.g., electromagnetic radar or laser radiation), and thereby endangers the health of people, animals, or valuable properties not belonging to the operator (para. 2). According to para. 4, this provision does not apply to motor-vehicles, rail vehicles, aircraft or watercraft.

Human health is the primary legal interest that this law sets out to protect; additionally, para. 2 establishes protections for animals or valuable properties not belonging to the operator. Para. 1 punishes the endangerment of the protected legal interests (*Eignungsdelikt*), whereas para. 2 only punishes their concrete endangerment (*konkretes Gefährungsdelikt*).⁷⁷

If the offender acts intentionally in the case of para. 2, the penalty can range from a fine up to five years in prison. If s/he acts intentionally in the case of para. 1, or if s/he acts negligently under para. 2, the penalty can range from a fine up to three years in prison. If s/he acts negligently in the case of para. 1, the punishment can range from a fine up to two years in prison.

The relevant action has to be undertaken “in violation of duties under administrative law” (principle of the dependency of environmental criminal law on environmental administrative law, *Verwaltungsakzessorietät*). Technical standards such as the Technical Instructions on Noise (*Technische Anleitung Lärm, TA Lärm*) are not administrative duties as defined by § 330d para. 1 no. 4 StGB as they are only directed at administrative authorities.

§ 325a StGB is not affected by the ECD since the ECD does not include provisions pertaining to the emission of noise, vibrations, or non-ionising radiation.

In practice, § 325a StGB has almost no significance.

5.1.5 Unauthorised handling of waste, § 326 StGB

Section 326 regulates the unauthorised handling of waste. Para. 1 concerns the unlawful management (e.g., storage, treatment, recovery, disposal) of certain kinds of dangerous waste, listed under numbers 1 to 4, which includes substances capable of harming an existing population of animals or plants in addition to human health. Para. 2 punishes the illegal cross-border shipment of waste, whereas para. 3 punishes the unauthorised failure to deliver radioactive waste.

If the offender acts intentionally according to para. 1 or 2, the penalty can range from a fine up to five years in prison. In the case of para. 3, or if s/he acts negligently under para. 1 or 2, the penalty can range from a fine up to three years in prison. If s/he acts negligently in the case of para. 3, punishment can range from a fine up to one year in prison. The *de minimis* clause in para. 6 exempts from punishment small amounts of waste that are clearly not dangerous. Under para. 1 and 2, even attempted violations are punishable.

Umwelt vom 19.11.2008, p. 2; Deutscher Anwaltverein, Stellungnahme Nr. 71/2010 zum Referentenentwurf eines Strafrechtsänderungsgesetzes (vom 13.10.2010) zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 7.

⁷⁶ Deutscher Anwaltverein, Stellungnahme Nr. 71/2010 zum Referentenentwurf eines Strafrechtsänderungsgesetzes (vom 13.10.2010) zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 7.

⁷⁷ Fischer, StGB, § 325a annotation 2a, 6.

Human health and environmental quality, specifically the quality of soil, water, and air, and the health of valuable animals and plants are the legal interests protected by § 326. Section 326 also punishes the mere endangerment of any of the protected legal interests (*abstraktes Gefährungsdelikt*).⁷⁸

In principle, waste is defined in accordance with environmental administrative law, i.e., the Recycling Management Act (*Kreislaufwirtschaftsgesetz, KrWG*), which transposed the Waste Management Directive 2008/98/EC. Thus, waste is defined as materials or objects which the possessor wants to dispose of (a subjective definition of waste), or whose orderly disposal is crucial to public welfare (an objective definition of waste). However, according to the prevailing view, the waste definition in criminal law does not strictly depend on the waste definition in administrative law when necessary to protect the relevant legal interests effectively. In particular, the various exemptions from the waste definition in the Recycling Management Act do not apply to § 326 StGB.⁷⁹ Para. 2 no. 1, however, explicitly refers to waste as defined by the Waste Shipment Regulation no. 1013/2006 (which itself refers to the waste definition in the Waste Management Directive 2008/98/EC). The definition is neither restricted to dangerous waste nor requires the capability to harm the protected legal interests, as § 326 para. 1 requires. Thus, para. 2 no. 1 adheres directly to the European definition of waste. On the other hand, contrary to administrative law, § 326 StGB only punishes the shipment of a non-negligible quantity of waste.

The offender does not act unlawfully if s/he is acting in a manner authorised by environmental administrative law (principle of the dependency of environmental criminal law on environmental administrative law, *Verwaltungsakzessorietät*).

Under § 326 para. 1 StGB, unlawful waste management which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, or water, or to the health of animals or plants (Article 3 lit. b ECD), was already largely punishable in German criminal law. However, § 326 had to be adapted to the ECD in several respects. In para. 1, domestic waste shipment was included, the terminology in para. 1 no. 2 was adapted to the ECD, and waste management was introduced as the generic term in accordance with the Waste Framework Directive. Furthermore, § 326 para. 2 StGB had to be adapted to Article 3 lit. c ECD by referring to the definition of waste in the Waste Shipment Regulation and requiring the shipment of a non-negligible quantity of such waste as in no. 1.⁸⁰

Section 326 para. 2 no. 1 StGB has been criticised for introducing a second waste definition based solely on European legislation. In particular, it has been claimed that the definition of what constitutes waste under this legislation is not sufficiently clear and that § 326 para. 2 no. 1 StGB would therefore not conform to the *lex certa* requirement.⁸¹ There is also concern that the restriction of the punishable acts to shipments beyond a negligible quantity is unclear and thus difficult to handle in the practice.⁸² Finally, critics claim that the lines between pure

⁷⁸ Fischer, StGB, § 326 annotation 2 with further references.

⁷⁹ Saliger, Umweltstrafrecht, annotation 274, 279 with further references.

⁸⁰ BT-Drs. 17/5391, p. 13, 17-18.

⁸¹ Deutscher Richterbund, Stellungnahme Nr. 48/10 zum Referentenentwurf eines Strafrechtsänderungsgesetzes zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 3; Deutscher Anwaltverein, Stellungnahme Nr. 71/2010 zum Referentenentwurf eines Strafrechtsänderungsgesetzes (vom 13.10.2010) zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 8; André-M. Szesny/Laura Görtz, Das neue Umweltstrafrecht – Kritisches zur Umsetzung der Richtlinie Umweltstrafrecht, ZUR 2012, 405, 407.

⁸² Deutscher Richterbund, Stellungnahme Nr. 48/10 zum Referentenentwurf eines Strafrechtsänderungsgesetzes zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 3; Szesny/Görtz, ZUR 2012, 407; Schall, Festschrift Jürgen Wolter, p. 651. This difficulty in the practice is confirmed by the Federal Criminal Police Office (BKA), interview with BKA of 6 June 2014.

disobedience, to administrative laws and criminal behaviour were becoming blurred since § 326 para. 5 also includes negligent behaviour and thus extends criminal liability to a considerable extent.⁸³

Whereas the latter criticism could have been easily avoided by limiting criminal liability to the extent necessary to conform to the ECD (serious negligence), the former criticism points more to the ECD and EU Waste Shipment Regulation than to national criminal law that has to conform to the ECD. There is widespread consensus among researchers that there are a number of deficiencies concerning the regulation and enforcement of shipment of waste.⁸⁴ Although as a matter of principle, the EU Waste Shipment Regulation is considered to be potentially effective, the approval procedure is considered complicated and fault-prone.⁸⁵ Additionally, there is the risk of sham recoveries.⁸⁶ According to a recent study, there are also serious enforcement deficits concerning criminal prosecution.⁸⁷ The EU Waste Shipment Regulation and its enforcement in the Member States has been called a prime example of postulated harmonisation with grave legal and practical barriers which make it difficult for the prosecution authorities to find sufficient evidence for criminal prosecution and to provide the courts with a safe basis for subsequent conviction.⁸⁸ Whereas Member States cannot unilaterally improve the regulatory system that is defined by EU legislation, they are able and obliged to improve their enforcement of the Waste Shipment Regulation. This may include (more) effective controls, sufficient resources for their enforcement authorities, and intensified transnational cooperation.⁸⁹

Section 326 is by far the most important provision of the chapter 29 of the Criminal Code.⁹⁰ According to the recent Uniform Police Statistics, there has been a substantial increase of recorded cases concerning cross-border shipment of waste (§ 326 para. 2) since the transposition of the ECD into German criminal law (see chapter 1).

5.1.6 Unlawful operation of facilities, § 327 StGB

Section 327 regards the operation of particular dangerous facilities without the required permit or planning approval, or in contradiction of an enforceable prohibition, including: nuclear facilities as defined by § 330d para. 1 no. 2 (para. 1 no. 1), industrial premises using nuclear fuel rod(s) (para. 1 no. 2), facilities as defined by the Federal Immission Control Act (*Bundesimmissionsschutzgesetz*) (para. 2 no. 1), pipeline systems for the conveyance of substances hazardous to waters that are subject to approval by the Environmental Impact Assessment Act (*Umweltverträglichkeitsprüfungsgesetz*) (para. 2 no. 2), and waste recovery installations according to the Federal Recycling Act (para. 2 no. 3). According to the legal definition as provided by § 330d para. 1 no. 2, a nuclear facility is a facility for the production, treatment, processing, or fission of nuclear fuels, or for the enrichment of irradiated nuclear fuels.

Furthermore, para. 2 sentence 2 provides for punishment in the case of the unauthorised operation of a plant in another state of the EU, in which dangerous activity is carried out or in which dangerous substances or preparations are stored or used. This unauthorised operation must be likely to cause death or serious injury to any

⁸³ Deutscher Anwaltverein, Stellungnahme Nr. 71/2010 zum Referentenentwurf eines Strafrechtsänderungsgesetzes (vom 13.10.2010) zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 8; Szesny/Görtz, ZUR 2012, 407.

⁸⁴ Hecker, et al., Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung, p. 251 with further references.

⁸⁵ Fischer, StGB, § 326 annotation 49 with further references.

⁸⁶ Hecker, et al., Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung, p. 304.

⁸⁷ Hecker, et al., Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung, p. 58-63.

⁸⁸ Hecker, et al., Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung, p. 254-255; see also Saliger, Umweltstrafrecht, annotation 321.

⁸⁹ Hecker, et al., Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung, p. 305-306.

⁹⁰ Fischer, StGB, § 326 annotation 1; Saliger, Umweltstrafrecht, annotation 270.

person or substantial damage to the quality of air, soil, or water, or to the health of animals or plants outside the plant.

Human health and environmental quality are the two protected legal interests (as defined in chapter 2). Even the endangerment of the protected legal interests at an early level is punishable in order to enable the authorities to control the facilities before they go into operation (*abstraktes Gefährdungsdelikt*).⁹¹ There are different views as to whether or not the unauthorised operation of a plant in another EU Member State can only be prosecuted in Germany if it results in a concrete danger on German territory according to § 3 StGB.⁹²

If the offender acts intentionally in the case of para. 1, the penalty can range from a fine up to five years in prison. If s/he acts intentionally in the case of para. 2, or if s/he acts negligently under para. 1, the penalty can range from a fine up to three years in prison. If s/he acts negligently in the case of para. 2, punishment can range from a fine up to two years in prison.

The relevant action has to be undertaken “in violation of duties under administrative law” (principle of the dependency of environmental criminal law on environmental administrative law, *Verwaltungsakzessorietät*). According to the BVerfG, § 327 does not violate the principle of certainty (*lex certa*) as it does not sanction the mere disobedience of administrative duties.⁹³

According to the prevailing view, § 327 can only be committed by the operator of the plant or by persons acting for him or her according to § 14 StGB (*Sonderdelikt*).⁹⁴

Under § 327 StGB, the unlawful operation of a plant in which dangerous activity is carried out or in which dangerous substances or preparations are stored or used which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, or water, or to the health of animals or plants (Article 3 lit. d ECD) was already largely punishable in German criminal law. However, § 327 had to be adapted to the ECD by including the operation of such plants in another EU Member State in para. 2 sentence 2.⁹⁵ There was a discussion between the Government and the *Bundesrat* about whether the reference to plants operated in another Member State dispensed with the general requirements for the applicability of German criminal law in §§ 3 to 9 StGB (e.g., German nationality of the perpetrator); the Government clarified that this was not the case.⁹⁶

Concerning the number of registered environmental crimes under chapter 29 StGB, § 324a StGB ranks fourth.⁹⁷

⁹¹ Saliger, Umweltstrafrecht, annotation 442, with further references.

⁹² Only conditional prosecution: Fischer, StGB, § 327 annotation 13; unconditional prosecution: Szesny/Görtz, ZUR 2012, 408.

⁹³ BVerfG 75, 329, 340.

⁹⁴ Fischer, StGB, § 327 annotation 18; Saliger, Umweltstrafrecht, annotation 442, both with further references, also to other views.

⁹⁵ However, according to Weber, Festschrift für Kristian Kühl, p. 748, the separate amendment of § 327 in that respect was superfluous, since § 327 is referred to in the general provisions on the applicability of illegal conduct according to the legal order of other Member States in § 330d para. 2 StGB; see also Manfred Möhenschlager, Bericht aus der Gesetzgebung: Regierungsentwurf einem 45. Strafrechtsänderungsgesetz über den strafrechtlichen Schutz der Umwelt, wistra 3/2011 XXXIII, XXXV.

⁹⁶ BT-Drs. 17/5391, p. 25-26, 29; see also Saliger, Umweltstrafrecht, annotation 449; Schall, Festschrift Jürgen Wolter, p. 652. For the opposite view, see Szesny/Götz, ZUR 2012, 408.

⁹⁷ Saliger, Umweltstrafrecht, annotation 442 with further references.

5.1.7 Unlawful handling of radioactive substances, dangerous substances and goods, § 328 StGB

Section 328 declares punishable the unauthorised handling of radioactive substances and other dangerous substances and goods. Para. 1 concerns the production, use, import, and export of nuclear fuel or other radioactive substances which are capable of causing death or serious health damage to other persons, or substantial damage to the quality of air, soil, or water, or to the health of animals or plants due to ionising radiation without the required permit or contrary to an enforceable prohibition. Para. 2 describes further cases of unauthorised handling of such substances, e.g., causing a nuclear explosion, and the instigation of or the assistance with such an act (no. 3 and 4). Para. 3 provides punishment for anyone who, by violating duties under administrative law, uses radioactive substances or other dangerous substances (no. 1), or conveys or otherwise handles dangerous goods as defined by § 330d para. 1 no. 3 StGB (no. 2), and thereby endangers human health, the health of animals or plants, or the quality of water, air, soil, or of valuable properties not belonging to him or her.

Human health, environmental quality – namely the quality of the soil, water, and air – and the health of valuable animals and plants are the primary protected legal interests in § 328, whereas para. 2 also protects third parties' valuable property. Para. 1 and 2 even punish the abstract endangerment of the protected legal interests (*abstraktes Gefährdungsdelikt*), whereas para. 3 addresses their concrete endangerment (*konkretes Gefährdungsdelikt*).⁹⁸

If the offender acts intentionally, the penalty can range from a fine up to five years in prison. If s/he acts negligently, the penalty can range from a fine up to three years in prison, with the exception of para. 2 no. 4 where negligence is not punishable. Attempted violations are also punishable, except in the case of para. 2 no. 4.

With the exception of para. 2 no. 3 and 4, which constitute absolute prohibitions of nuclear explosions, including tests,⁹⁹ the relevant action has to be undertaken contrary to administrative law, e.g., without the required permit (para. 1 no. 1) or “in gross violation of duties under administrative law” (para. 3) (principle of the dependency of environmental criminal law on environmental administrative law, *Verwaltungsakzessorietät*).

Under § 328 StGB, the unlawful handling of nuclear materials or other hazardous radioactive substances which cause or are likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, or to the health of animals or plants (Article 3 lit. e ECD) was already largely punishable in German criminal law. However, § 328 had to be adapted to the ECD by including the production of nuclear materials or other hazardous radioactive substances in para. 1, and radioactive substances likely to cause harm to the environment in para. 1 no. 2. Furthermore, the former requirement of a serious infringement of administrative duties in para. 1 no. 2 and in para. 3 was deleted in order to comply with the ECD. Finally, the former reference in para. 3 no. 1 to the Chemicals Act (*Chemikaliengesetz*) was replaced by a reference to Regulation (EC) no. 1272/2008 on classification, labelling and packaging of substances and mixtures in order to include crimes committed in other Member States.¹⁰⁰ It has been indicated that including a static reference requires constant updating of § 328 StGB to conform to the respective EU legislation.¹⁰¹ However, the alternative is a dynamic reference to the respective EU legislation in force, which is widely considered by researchers to be generally incompatible with the *lex certa* requirement.¹⁰² Furthermore, it has been criticised that the complexity of the respective EU legislation, which includes an annex of about 100 pages in order to classify substances and

⁹⁸ Fischer, StGB, § 328 annotation 2.

⁹⁹ Saliger, Umweltstrafrecht, annotation 491 with further references.

¹⁰⁰ BT-Drs. 17/5391, p. 19.

¹⁰¹ Heger, HRRS 2012, p. 217-218; Schall, Festschrift Jürgen Wolter, p. 654, who further considers the new reference to EU legislation unnecessary; see also Weber, Festschrift für Kristian Kühl, p. 748-749.

¹⁰² See Kai Ambos, Internationales Strafrecht, 3rd edition, München 2011, § 11 annotation 30; Helmut Satzger/Georg Langfeld, Europarechtliche Verweisungen in Blankettstrafgesetzen und ihre Vereinbarkeit mit dem Bestimmtheitsgebot. Anmerkung zu BGH 5 StR 543/10 – 17. März 2011 (LG Hamburg), HRRS 2011, 461-464, 463, both with further references.

mixtures, causes trouble for everyone dealing with the legislation¹⁰³, and serious concerns have been raised as to whether this was still compatible with the *lex certa* requirement.¹⁰⁴

In practice, § 328 StGB is of low relevance.¹⁰⁵

5.1.8 Endangering protected areas, § 329 StGB

Section 329 punishes certain activities which may affect certain areas or types of areas requiring special protection, e.g., the operation of a facility, the clearing of a forest, or the hunting and/or killing of a protected animal species. Such areas include smog areas and other areas requiring special protection against detrimental environmental effects of air pollution or noise (para. 1), water or mineral spring conservation areas (para. 2), nature conservation areas or national parks (para. 3), and Natura 2000 areas (para. 4).

The physical integrity of people, animals, plants, and property are the protected legal interests. Section 329 para. 1 and 2 punish the abstract endangerment of the protected legal interests (*abstraktes Gefährdungsdelikt*). There is some disagreement concerning whether para. 3 and 4 only punish damaging the protected legal interests (*Erfolgssdelikt*) or if their abstract endangerment is punishable as well.¹⁰⁶ Section 329 harmonises federal and state legislation in this area, and adds to secondary environmental criminal law on nature conservation (see below).

One view, which is contested in the literature, holds that § 329 para. 1 and 2 can only be committed by the operator of the plant or by persons acting for him according to § 14 StGB (*Sonderdelikt*).¹⁰⁷

If the offender acts intentionally in the case of para. 3 and 4, the penalty can range from a fine up to five years in prison. If s/he acts intentionally under para. 1 and 2, acts negligently in the case of para. 3, or with serious negligence (*Leichtfertigkeit*) in the case of para. 4, the penalty can range from a fine up to three years in prison. If s/he acts negligently in the case of para. 1 and 2, punishment can range from a fine up to two years in prison.

The offence presupposes an infringement upon the national provisions or enforceable prohibitions designed to protect the respective areas. Thus, the offender cannot be held liable if s/he is acting in a manner authorised by environmental administrative law (principle of the dependency of environmental criminal law on environmental administrative law, *Verwaltungsakzessorietät*). However, as an exception to this principle, an authorisation obtained by abusive means is considered equal to unauthorised conduct by § 330d para. 1 no. 5.

Under § 329 StGB, any unlawful conduct which causes the significant deterioration of a habitat within a protected site as defined by Article 2 lit. c ECD (Article 3 lit. h ECD) was already largely punishable in German criminal law. However, § 329 had to be adapted to the ECD by including the criminalisation of significant harm to habitats within Natura 2000 areas in para. 4 and 6.¹⁰⁸

As with § 328 StGB, it has been indicated that the static reference to EU directives in para. 4 requires constant updating of § 329 StGB in order to conform to the respective EU legislation.¹⁰⁹ Furthermore, the German Association of Judges raised doubts about whether the sanction of up to five years in prison provided in para. 4 was justified according to considerations of criminal policy.¹¹⁰

¹⁰³ Schall, Festschrift Jürgen Wolter, p. 654-655.

¹⁰⁴ Szesny/Götz, ZUR 2012, 408.

¹⁰⁵ Saliger, Umweltstrafrecht, annotation 468 with further references.

¹⁰⁶ Saliger, Umweltstrafrecht, annotation 468 with further references.

¹⁰⁷ Saliger, Umweltstrafrecht, annotation 453, 491 with further references, also to other views.

¹⁰⁸ BT-Drs. 17/5391, p. 14, 20.

¹⁰⁹ Heger, HRRS 2012, p. 218.; Schall, Festschrift Jürgen Wolter, p. 656; Weber, Festschrift für Kristian Kühl, p. 748-749.

¹¹⁰ Deutscher Richterbund, Stellungnahme Nr. 48/10 zum Referentenentwurf eines Strafrechtsänderungsgesetzes zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 3.

In practice, § 329 StGB is of no relevance, holding the very last position in the Uniform Police Statistics ranking concerning environmental crimes under the different available provisions.¹¹¹

5.1.9 Aggravated cases of environmental offences, § 330 StGB

Section 330 provides special rules for more severe punishment of especially serious cases of environmental crime.

Para. 1 enumerates examples of serious commission of the crimes regulated in §§ 324 to 329: lasting damages to water, soil, or protected areas (no. 1), the endangerment of the public water supply (no. 2), lasting damage to a population of a strictly protected species of animal or plant (no. 3), and conduct motivated by greed (no. 4). In such cases, the penalty is imprisonment from six months to ten years.

If the offender intentionally commits crimes regulated under §§ 324 to 329 and thereby causes the death of another person (no. 2), or puts another person in mortal danger, in danger of serious damage to his or her health, or if the offender puts a large number of people in danger of damage to their health (no. 1), the penalty is imprisonment from one to ten years for violations of para. 1. In the case of violations of para. 2, the penalty is imprisonment for at least three years, except if the offense is punishable according to § 330a para. 1–3 StGB. In minor cases of para. 2 no. 1 violations, the penalty is imprisonment from six months to five years, whereas in minor cases of para. 2 no. 2, it is imprisonment from one to 10 years (para. 3).

Thus, the more serious criminal acts in § 330 para. 2 StGB qualify as felonies, i.e., acts punishable by a term of imprisonment of at least one year, in contrast to the less serious misdemeanours (§ 12 StGB).

5.1.10 Causing a severe danger by releasing poison, § 330a StGB

§ 330a provides special rules for acts leading to the serious endangerment of the life or health of another person or a large number of other persons by diffusing or releasing poisonous substances. The punishment is imprisonment ranging from six months to 10 years, depending on the seriousness of the consequences to the life or health of another person or persons.

Section 330a is an exceptional provision within chapter 29 of the Criminal Code. It takes a purely anthropocentric approach and is not dependent on environmental administrative law.¹¹² Moreover, as this provision is not affected by the ECD, it will not be described or analysed further.

5.1.11 Preventing completion of the offence, § 330b StGB

Section 330b regulates active remorse. In certain cases, the court may, under its own discretion, mitigate a given punishment or dispense with it entirely if the perpetrator voluntarily averts the danger or eliminates the condition he or she caused before substantial damage results.

5.1.12 Deprivation order, § 330c StGB

Section 330c regulates the confiscation of certain objects which were generated by the commission of a crime included under this chapter, an object used in such a crime, or one otherwise related to it. Such confiscation is already provided by the general rule in § 74 StGB. However, § 330c StGB allows for its application in cases of the negligent perpetration of certain environmental crimes (§§ 326, 327, 328 and 329 StGB), and in certain other cases not regulated by §§ 74, 74a StGB, in order to adapt the primary environmental criminal law to corresponding provisions of secondary environmental criminal law.¹¹³

¹¹¹ Saliger, Umweltstrafrecht, annotation 453 with further references.

¹¹² Saliger, Umweltstrafrecht, annotation 501 with further references.

¹¹³ Fischer, StGB, § 330c annotations 1-4.

5.1.13 Definitions, § 330d StGB

Section 330d para. 1 StGB provides the legal definition of relevant special terms used in chapter 29 of the German Criminal Code: Body of water (no. 1), nuclear facility (no. 2), hazardous goods (no. 3), duty under administrative law (no. 4), and action without permit, planning approval, or other authorisation (no. 5), the latter including an authorisation obtained by abusive means.

Section 330d para. 2 clarifies that for certain criminal offences (§§ 311, 324a, 325 to 328) committed in another EU Member State, duties under administrative law, procedures, interdictions, prohibitions, licensed facilities, permits, and planning approvals include those based on a law, an administrative regulation of a Member State, or on a decision taken by a competent authority of a Member State. This is only valid if they give effect to legislation adopted pursuant to the EU Treaty or the Euratom Treaty in order to protect people from danger and the environment from detrimental effects, either by transposing EU legislation into national law or by implementing EU legislation which is directly part of the national legal order.

Para. 2 was introduced in order to comply with Article 2 lit. a (iii) ECD, stating that “unlawful” also means infringing upon a law, an administrative regulation of a Member State, or a decision taken by a competent authority of a Member State that gives effect to Community legislation referred to in Article 2 lit. a (i) or (ii) ECD.¹¹⁴ It allows for environmental crimes, as defined by the ECD, that were committed in another Member State to be prosecuted in Germany if the other requirements of the Criminal Code concerning its applicability to crimes committed abroad are met (§§ 5-9 StGB). In particular, this concerns environmental crimes committed by German citizens in another Member State.

The introduction of § 330d para. 2 StGB has been strongly criticised by the German Association of Judges and the German Association of Advocates.¹¹⁵ Both contest the necessity of enlarging the international jurisdiction of German criminal law concerning acts committed in other Member States, precisely because the ECD aims to harmonise environmental criminal law in the EU. On the contrary, both organisations are in favour of restricting this jurisdiction accordingly, in particular on the grounds that perpetrators can be extradited according to the European warrant of arrest procedures.¹¹⁶ Furthermore, they raise concerns that in spite of the *ne bis in idem* requirement in Art. 54 of the Schengen Convention, the problem of double prosecution has not yet been solved properly. In addition, the German Association of Advocates pointed to the fact that the dependency of environmental criminal law on environmental administrative law leads to a double legal protection of citizens, including legal protection against administrative decisions, and requested that a corresponding level of legal protection be guaranteed in all other Member States before combining German environmental criminal law with the administrative law of other Member States.¹¹⁷

Apart from these general considerations, § 330d para. 2 StGB raises some substantial technical problems. In particular, it does not refer to all the criminal environmental provisions of the Penal Code, only to some of them.¹¹⁸ In its official justification, the Government argued that this provision was only declaratory, since the “duty under administrative law” in para. 1 no. 4 had to be interpreted in conformance with the ECD as including

¹¹⁴ BT-Drs. 17/5391, p. 20-21.

¹¹⁵ Deutscher Richterbund, Stellungnahme Nr. 48/10 zum Referentenentwurf eines Strafrechtsänderungsgesetzes zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 1-2; Deutscher Anwaltverein, Stellungnahme Nr. 71/2010 zum Referentenentwurf eines Strafrechtsänderungsgesetzes (vom 13.10.2010) zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 4-7.

¹¹⁶ As to the latter, see also Heger, HRRS 2012, 220.

¹¹⁷ See also Saliger, Umweltstrafrecht, annotation 132 with further references,.

¹¹⁸ Kirsten Meyer, Führt § 330d Abs. 2 StGB zur endgültigen Europarechtsakzessorietät des deutschen Umweltstrafrechts?, wistra 2012, 371, 372-373.

EU law and the law of other Member States.¹¹⁹ However, now that § 330d para. 2 exists, such an interpretation regarding § 329 might violate the principle against creating a crime by analogy with existing crimes, since the latter provision has been omitted in the wording of § 330d para. 2 for no reason.¹²⁰

Concerning § 324 StGB, the Government argued that no specific regulation was necessary as “unlawful” in that provision was not restricted to violations of German law.¹²¹ However, as the Government itself admits, foreign acts such as permits may only justify otherwise criminal behaviour if they are recognised in Germany, which is not always the case.¹²² Furthermore, it is unclear whether § 330d para. 1 no. 5 StGB concerning authorisation obtained by abusive means is applicable to authorisations by other Member States, since § 330d para. 2 does not refer to this provision.¹²³

Finally, it has been questioned whether § 330d para. 2 is compatible with the *lex certa* requirement since it requires the administrative law of other Member States implementing EU environmental legislation to be taken into account to a wide extent.¹²⁴

5.1.14 Releasing ionising radiation, § 311 StGB

Section 311 StGB provides punishment for releasing ionising radiation (para. 1 no. 1) or causing nuclear fission activities (para. 1 no. 2) which are capable of causing death or serious health damage to other persons, or damage to valuable properties of others, or substantial damage to the quality of air, soil, or water, or to the health of animals or plants, without being authorised to do so.

Human health, third parties’ valuable property, and environmental quality – namely the health of animals and plants, the quality of soil, water, and air – are the protected legal interests in § 311. Endangerment of the protected legal interests is also punishable under § 311 (*Eignungsdelikt*).¹²⁵

If the offender acts intentionally in the case of para. 1, the penalty can range from a fine up to five years in prison. If s/he acts negligently and thereby, in the operation of a facility, acts in a way capable of causing damage outside of the facility (para. 3 no. 1), or seriously violates administrative duties in other cases of para. 1 (para. 3 no. 2), the penalty can range from a fine up to two years in prison. Attempted release of ionising radiation is also punishable under § 311.

The offence presupposes a violation of administrative duties as defined by § 330d para. 1 no. 4 and para. 2 StGB. Thus, the offender cannot be held liable if s/he is acting in a manner authorised by environmental administrative law (principle of the dependency of environmental criminal law on environmental administrative law, *Verwaltungsakzessorietät*). However, as an exception to this principle, an authorisation obtained by abusive means is considered equal to unauthorised conduct under § 330d para. 1 no. 5.

¹¹⁹ BT-Drs. 17/5391, p. 11; see also Meyer, *wistra* 2012, 372 with further references; for another opinion see Weber, *Festschrift für Kristian Kühl*, p. 750.

¹²⁰ Meyer, *wistra* 2012, 375; see also Günter Heine/Bernd Hecker, § 330d in Adolf Schönke/Horst Schröder (Eds.), *Strafgesetzbuch. Kommentar*, 29th edition, München 2014, annotation 40, who still consider an interpretation conforming to the ECD possible and necessary in order to prevent methodic contradictions; of the latter opinion is also Schall, *Festschrift für Jürgen Wolter*, p. 658-659, with further references.

¹²¹ BT-Drs. 17/5391, p. 10-11.

¹²² Meyer, *wistra* 2012, 373; see also Saliger, *Umweltstrafrecht*, annotation 131 with further references.

¹²³ See Heger, *HRRS* 2012, 218-219, with an argument against its applicability; for its applicability and against the latter argument Schall, *Festschrift für Jürgen Wolter*, p. 659, and Heine/Hecker, Schönke/Schröder, § 330d annotation 40 with further references.

¹²⁴ Meyer, *wistra* 2012, 375.

¹²⁵ Fischer, *StGB*, § 311 annotation 1, with further references.

Section 311 is not affected by the ECD, except for its extension to acts committed in other Member States (para. 1 with § 330d para. 2 StGB). However, § 311 para. 1 was modified to clarify that substantial damage to the environment is included in order to fully comply with an amendment of 8 July 2005 to the Convention on the Physical Protection of Nuclear Materials adopted on 26 October 1979.¹²⁶

5.1.15 § 312 StGB

Section 312 provides punishment for the consequences resulting from the construction or delivery of a defective nuclear facility as defined by § 330d para. 1 no. 2 StGB, ranging from three months to ten years depending on how serious these consequences are on the life and health of another person or persons, or valuable property of other persons.

As this provision is not affected by the ECD, it will not be described or analysed further.

5.2 Criminal offences in environmental administrative law

As stated above, various criminal offences are spread over different environmental laws, where they function as annexes to environmental administrative law. The following examples of this secondary criminal law were chosen due to their relevance for the transposition of the ECD.

5.2.1 §§ 71, 71a BNatSchG

Section 71 and § 71a of the Federal Nature Conservation Act (*Bundesnaturschutzgesetz, BNatSchG*) provide punishment for offences against protected species and thus complement § 329 StGB on the endangerment of protected areas.

Section 71 BNatSchG penalises offences against strictly protected species. In para. 1, certain intentional conduct such as the killing, capture, or destruction of such wild fauna or flora species, or certain contraventions against provisions of the Wildlife Trade Regulation (Regulation (EC) No 338/97) concerning the permission of imports or exports of such species is penalised. In para. 2 certain conduct towards strictly protected species, such as conducting trade in them contrary to Article 8 of the Wildlife Trade Regulation is penalised.

Section 71a BNatSchG provides punishment for offences against protected species and certain offences against strictly protected species. Para. 1 no. 1 concerns acts against protected species according to the Bird Directive (79/409/EEC), including the killing, taking, or disruption of its developmental stages. Para. 1 no. 2 punishes certain conduct such as the possession or handling of strictly protected species according to the Habitats Directive (92/43/EEC) (lit. a) or of protected species according to the Birds Directive (lit. b). Para. 1 no. 3 provides punishment for the commercial or habitual commission of certain intentional conduct referred to in § 71 para. 1, but without the restriction to strictly protected species. Para. 2 penalises certain conduct towards protected species such as trading in them, contrary to Article 8 of Regulation (EC) No 338/97.

The physical integrity of animals and plants are the primary protected legal interest.

If the offender acts intentionally in the case of § 71, the penalty can range from a fine up to five years in prison. If s/he acts commercially or habitually, s/he shall be liable for a term of imprisonment ranging from three months to five years (§ 71 para. 3). If the offender acts intentionally in the case of § 71a, the penalty can range from a fine up to five years in prison. Negligent behaviour is only punishable in combination with intentional behaviour. In case the offender negligently fails to recognise that the relevant action is oriented to an animal or a plant of a strictly protected species, the penalty can range from a fine up to one year in prison. The same penalty applies if, by serious negligence (*Leichtfertigkeit*), s/he fails to recognise that the relevant action is oriented to an animal or a plant of a species referred to in § 71a para. 1 no. 1 or 2 or para. 2. However, in the case of § 71a, the offence

¹²⁶ BT-Drs. 17/5391, p. 15, 16.

cannot be punished if the conduct concerns a negligible quantity of such specimen and has a negligible impact on the conservation status of the species (para. 4).

Under § 71 BNatSchG, any unlawful conduct which causes the killing, destruction, possession or taking of specimens of protected wild fauna or flora species (Article 3 lit. f ECD) was already largely punishable in German criminal law in relation to strictly protected species. In relation to protected species, however, where offences had been only punishable according to penal administrative law (in § 69 para. 2 OWiG), § 71 had to be complemented by para. 1 of the new § 71a BNatSchG. Equally, in order to transpose the ban on unlawful trading in specimens of protected wild fauna or flora species (Art. 3 lit. g ECD) into German criminal law, § 71 had to be complemented by para. 2 of the new § 71a BNatSchG in relation to protected species. Also, the *de minimis* rule, which excepts a negligible quantity of such a specimen and a negligible impact on the conservation status of the species, was introduced into § 71a para. 4 BNatSchG.¹²⁷

Concerning both § 71 and § 71a, the fact that negligence is only punishable in combination with intentional behaviour, meaning that seriously negligent killing of a protected species is not covered, arguably does not fully conform to Art. 3 lit. f ECD, which requires that the killing of the protected species constitute a criminal offence when committed at least with serious negligence.¹²⁸

Furthermore, the *de minimis* rule in § 71a para. 4 excepting a negligible quantity of such a specimen and a negligible impact on the conservation status of the species has been criticised for being difficult to implement in practice without expert evidence; thus, its adherence to the *lex certa* requirement has been questioned.¹²⁹

Finally, the legislature, when adapting § 71 and introducing § 71a BNatSchG, did not change the administrative penal offences in § 69 BNatSchG that thus partially overlap with the new criminal provisions. Such an overlap should be avoided, although § 21 para. 1 OWiG regulates this type of conflict in favour of the criminal offence.¹³⁰

5.2.2 §§ 38, 38a BJagdG

Sections 38 and 38a of the Federal Hunting Act (*Bundesjagdgesetz, BJagdG*) provides punishment for certain conduct concerning protected species of wild fauna which fall under the legal hunting regime. Section 38 concerns the unauthorised killing and hunting of certain wild animals, whereas § 38a addresses the possession of and trade in protected and strictly protected wild animals, as defined by the Federal Protection of Wild Animals Regulations (*Bundeswildschutzverordnung*).

The physical integrity of animals and plants is the primary protected legal interest.

If the offender acts intentionally in the cases of § 38 or § 38a para. 1, the penalty can range from a fine up to five years in prison. If s/he acts intentionally in the case of § 38a para. 2, the penalty can range from a fine up to three years in prison. If the offender acts negligently in the case of § 38, the penalty can range from a fine up to one year in prison. In the case of § 38a, as with §§ 71, 71a BNatSchG, negligent behaviour is only punishable in combination with intentional behaviour.¹³¹ If, by serious negligence (*Leichtfertigkeit*), the offender fails to recognise that he or she is trading in protected or strictly protected animals, as defined by the Wild Animals Regulations, the penalty can range from a fine up to two years in prison (para. 3). If s/he fails to recognise that s/he is in possession of an animal referred to in these Regulations, the penalty can range from a fine up to one

¹²⁷ BT-Drs. 17/5391, p. 14, 21-22.

¹²⁸ Heger, HRRS 2012, 220; also Manfred Möhrensclager, Bericht aus der Gesetzgebung: Regierungsentwurf einem 45. Strafrechtsänderungsgesetz über den strafrechtlichen Schutz der Umwelt (Fortsetzung), wistra 4/2011, XXXVII, XXXIX, who still considers the possibility of a restrictive interpretation of the ECD according to the German provisions.

¹²⁹ Szesny/Görtz, ZUR 2012, 410-411.

¹³⁰ Szesny/Görtz, ZUR 2012, 409.

¹³¹ Heger, HRRS 2012, p. 221.

year in prison (para. 4). However, in the case of § 38a, the offence cannot be punished if the conduct concerns a negligible quantity of such specimen and has a negligible impact on the conservation status of the species (para. 5).

Under § 38 BJagdG, any unlawful conduct according to Article 3 lit. f and lit. g ECD was already largely punishable in German criminal law, with relation to protected wild fauna species falling under the hunting regime. Section 38 merely had to be adapted in relation to the maximum penalty for negligent behaviour (formerly six months, now one year), in order to conform to the requirement in Article 5 ECD that penalties have to be effective, proportionate, and dissuasive. However, the new § 38a BJagdG was introduced in order to penalise the trade in and possession of protected and strictly protected wild fauna specimens in conformity with Article 3 lit. g ECD.¹³²

As with § 71 and § 71a, the fact that negligence is only punishable in combination with intentional behaviour under § 38a BJagdG arguably does not fully conform to Art. 3 lit. f ECD, which requires that the killing, etc. of the protected species constitutes a criminal offence when committed at least with serious negligence.¹³³

Concerning § 38a BJagdG, there are also doubts concerning the *lex certa* requirement because punishment is made dependent on (future) provisions in the Wild Animals Regulations, referring to § 38a BJagdG.¹³⁴ According to the BVerfG, the elements of a criminal offence may be specified in a regulation if the sanctions and the preconditions of punishability are already apparent to the citizen from an act of parliament, either the blank criminal provision referring to the regulation or the provision empowering the Government to enact the regulation. This is also necessary in order to ensure that the parliament does not delegate its exclusive competence to enact criminal provisions to the government.¹³⁵ Arguably, neither § 38a nor the empowering provision of § 36 para. 1 BJagdG set out the preconditions of punishability as requested by the BVerfG..¹³⁶

5.3 Concluding remarks on substantive environmental criminal law

From the description above, some peculiarities of German environmental criminal law¹³⁷ have become visible:

- The dependency on administrative law
- Most provisions are designed as abstract endangerment crimes
- Negligent behaviour is regularly punishable
- The attempt is often punishable

In criminalising a wide range of environmentally harmful behaviour, German environmental criminal law is a typical example of a modern legal system based on prevention and risk assessment.¹³⁸

Concerning transposition of Directive 2008/99/EC, according to the legislature, German environmental criminal law already conformed by and large to this Directive and needed to be amended only in some parts.¹³⁹ Directive 2009/123/EC did not require any changes in German criminal law.

¹³² BT-Drs. 17/5391, p. 14 , 22-23.

¹³³ See Heger, HRRS 2012, 221; Möhrenschrager, wistra 4/2011, XL.

¹³⁴ Szesny/Görtz, ZUR 2012, 411.

¹³⁵ See e.g. BVerfGE 75, 329, 340-341.

¹³⁶ Szesny/Görtz, ZUR 2012, 411 with respect to § 36 BJagdG.

¹³⁷ See Saliger, Umweltstrafrecht, annotations 50-59.

¹³⁸ Saliger, Umweltstrafrecht, annotations 59.

However, in spite of the limited changes described and analysed above, the 'Europeanisation' of German environmental criminal law through the ECD has some important general impacts. First, ECD transposition has resulted in an even larger criminalisation of environmentally harmful behaviour since the German legislature restricted itself to a minimum of necessary amendments. In particular, whereas new criminal provisions introduced in order to comply with the ECD were restricted to conduct committed with serious negligence, necessary amendments to existing provisions have led to an enlargement to criminal conduct committed with mere negligence.¹⁴⁰ In some cases, this has resulted in blurring the line between truly criminal behaviour and mere disobedience to environmental legislation, corresponding to the general distinction between criminal offences and administrative penal offences. Thus, the way Germany transposed the ECD corresponds to the general tendency to extend criminalisation in environmental criminal law.¹⁴¹ Arguably, it would have been preferable to limit all environmental criminal provisions to conduct committed either intentionally or with serious negligence, and possibly also to exempt the attempt to commit environmental crimes.¹⁴²

Second, the dependency of environmental criminal law on administrative law has grown, since the latter extends more and more to environmental legislation by the EU or based upon EU legislation, including environmental legislation of other Member States.¹⁴³ Thus, it has become even more difficult for the citizen to assess whether certain behaviour would constitute a criminal offence.¹⁴⁴ It is no surprise that with respect to many amendments introduced in order to transpose the ECD, doubts have been raised whether the *lex certa* requirement is (still) met. The constant growth and change of environmental legislation with mostly vague terminology also results in difficulties to enforce the respective criminal law provisions in a proper and coherent way.¹⁴⁵ On the other hand, there are no alternatives to the dependency of environmental criminal law on administrative law¹⁴⁶, which is by and large based upon EU legislation. However, at least partially, better ways to refer to EU legislation could have been chosen.¹⁴⁷

Third, it is still to be clarified whether the transposition of the ECD into German law results in better protection of the environment. It is still too early to assess whether the transposition of the ECD has led to an increase in the number of prosecutions or to the imposition of more severe fines. All that can be observed by now is a substantial increase in recorded crimes concerning cross-border waste shipment (§ 326 para. 2 StGB).¹⁴⁸ Apart from that, as stated in the introduction, statistics show that the number of reported crimes against the environment is constantly decreasing since 1999, which is best explained by enforcement deficits. These deficits might be further exacerbated by enlarging criminalisation of environmental harmful behaviour, further extending the application of the Criminal Code to crimes abroad, and increasing the complexity of environmental criminal law and thus the

¹³⁹ BT-Drs. 17/5391, p. 10.

¹⁴⁰ Heger, HRRS 2012, 222-223; Szesny/Görtz, ZUR 2012, 405, 411.

¹⁴¹ Michael Kloepfer/Hans-Peter Vierhaus, Umweltstrafrecht, 2nd ed., München 2002, p. 167 with further references.

¹⁴² See Heger, HRRS 2012, 222-223; concerning the former Deutscher Anwaltverein, Stellungnahme Nr. 71/2010 zum Referentenentwurf eines Strafrechtsänderungsgesetzes (vom 13.10.2010) zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 7, 9; Weber, Festschrift für Kristian Kühl, p. 748.

¹⁴³ See Ransiek, NK-StGB, Vor §§ 324 ff, annotation 64.

¹⁴⁴ Meyer, wistra 2012, 375.

¹⁴⁵ Interview with BKA of 6 June 2014.

¹⁴⁶ Ransiek, NK-StGB, Vor §§ 324 ff, annotation 45; Fischer, StGB, Vor § 324 annotation 6; Saliger, Umweltstrafrecht, annotations 134 with further references.

¹⁴⁷ See e.g. Schall, Festschrift für Jürgen Wolter, p. 659-660.

¹⁴⁸ Interview with BKA of 6 June 2014.

risk of faults.¹⁴⁹ Regardless, one has to keep in mind that environmental criminal law cannot replace but only complement environmental administrative law as the main instrument to protect the environment.¹⁵⁰

¹⁴⁹ See Saliger, Umweltstrafrecht, annotation 23.

¹⁵⁰ See Deutscher Anwaltverein, Stellungnahme Nr. 71/2010 zum Referentenentwurf eines Strafrechtsänderungsgesetzes (vom 13.10.2010) zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über den strafrechtlichen Schutz der Umwelt vom 19.11.2008, p. 3; Saliger, Umweltstrafrecht, annotation 5-6 with further references.

6. Substantive criminal law on public servants liability in relation to environmental crimes/offences

The liability of public servants for environmental crimes is not specifically regulated in either primary or secondary environmental criminal law. Legislators feared that a specific provision to this effect would give the impression of a disproportionately high level of misbehaviour by public servants in the environmental sector and simultaneously unsettle those public servants and dissuade them from cooperating with the public prosecutors.¹⁵¹ Thus, only the general principles regarding the parties to the offences apply to the liability of public servants. According to these rules, public servants may be liable for environmental crimes in two scenarios:

- public servants are themselves operating facilities (e.g., municipal sewage or waste incineration plants)
- public servants act inappropriately in their function as authorising or controlling authorities

In the first scenario, as a general rule there is no difference between the liability of public operators and that of private operators according to §§ 324 ff. StGB.¹⁵² In the second scenario, however, the liability of public servants for environmental crimes is very controversial. For instance, it is disputed which kind of infringement of administrative duties by public servants may lead to criminal punishment. Whereas it is recognised that only administrative duties that endanger or damage environmental legal interests are relevant, a restrictive view limits the criminal liability of public servants to clear cases of such infringements. In contrast, a broader view includes any kind of such infringements, including any abuse of administrative discretion.¹⁵³ Furthermore, in the second scenario, the criminal liability of public servants is restricted to criminal offences which can be committed by anyone (*Allgemeindelikte*).¹⁵⁴ Notwithstanding these general questions, three categories of cases may be established:

- The issuance of an illegal permit
- The non-revocation of an illegal permit
- The non-intervention against environmental offences of third parties

For the first category, it is crucial to note that, according to general administrative law, an illegal administrative decision is still effective if it is not void (§ 43 para. 2, 3 Administrative Procedures Act - *Verwaltungsverfahrensgesetz*, VwVfG). The latter is the case even if it suffers from a particularly grave, undisputable defect (§ 44 para. 1 VwVfG). According to this distinction, public servants may be liable for environmental crimes if they issue a permit which is void, and thereby contribute to the crime either as co-perpetrators, instigators or accessories (§§ 25 para. 2, 26, 27 StGB). If a public servant issues a void permit by negligence, he or she may be liable if the crime in question may be committed by negligence. If public servants issue a permit which is illegal but not void and thus still effective, there is no unlawful main act to which he or she could contribute. According to the prevailing view, however, a public servant may commit a crime through the agency of another person (*mittelbare Täterschaft*, § 25 para. 1, second alternative StGB) by allowing the other person to commit the act in a lawful way.¹⁵⁵ The Federal Court of Justice supported this view in the decision for a case concerning a landfill.¹⁵⁶

¹⁵¹ Saliger, Umweltstrafrecht, annotation 174 with references.

¹⁵² Saliger, Umweltstrafrecht, annotation 177.

¹⁵³ Saliger, Umweltstrafrecht, annotation 185-186 with further references.

¹⁵⁴ Saliger, Umweltstrafrecht, annotation 183.

¹⁵⁵ Saliger, Umweltstrafrecht, annotation 198 with further references.

¹⁵⁶ BGHSt 39, 381, 387 ff.

In the second category, the non-revocation of an illegal permit, public servants may commit an environmental crime by omission. If omissions are not explicitly penalised by certain criminal offence, they may only lead to punishment if the person who fails to prevent a certain result which is part of a criminal provision is responsible by law to ensure that the result does not occur (§ 13 StGB). This responsibility is called guarantee obligation (*Garantenstellung*). In the category in question, such a guarantee obligation may arise either from prior conduct by which the danger is created (*Ingerenz*) or from a duty to protect the relevant legal interests within the public servant's scope of responsibilities (*Beschützergarant*).¹⁵⁷

This duty to protect the relevant legal interests within the public servant's scope of responsibilities (*Beschützergarant*) may also lead to the liability of public servants in the third category, as it includes the duty to intervene against environmental offences undertaken by third parties.¹⁵⁸ For instance, the Federal Court of Justice has held a mayor liable for not intervening against the contamination of a body of water by local landowners.¹⁵⁹ In these cases, however, difficult problems of hypothetical causality may arise, i.e., whether the intervention of the public servant would almost certainly have prevented the crime.¹⁶⁰

Although researchers have repeatedly asked for specific regulation of the liability of public servants for environmental crimes, the majority of researcher contest the necessity of such a regulation.¹⁶¹ In practice, the liability of public servants is of low relevance.¹⁶²

¹⁵⁷ Saliger, Umweltstrafrecht, annotations 203-212 with further references.

¹⁵⁸ Saliger, Umweltstrafrecht, annotation 214.

¹⁵⁹ BGHSt 38, 325, 332 ff.

¹⁶⁰ Saliger, Umweltstrafrecht, annotation 216.

¹⁶¹ See Hero Schall, Umweltschutz durch Strafrecht: Anspruch und Wirklichkeit, NJW 1990, 1263-1273, 1270, with a further reference; Kloepfer/Vierhaus, Umweltstrafrecht, annotation 58 with further references.

¹⁶² Two percent of all environmental offences according to Kloepfer/Vierhaus, Umweltstrafrecht, annotation 58 with further references.

7. Substantive criminal law on organised crime

Organised crime is not defined by German law. In practice, a working definition has been adapted by the Working Party of the German Police and Judicial Authorities (AG Justiz/Polizei) in May 1990 and serves as the basis for collecting data on organised crime:

“Organised crime is the planned commission of criminal offences determined by the pursuit of profit or power which, individually or as a whole, are of considerable importance if more than two persons, each with his/her own assigned tasks, collaborate for a prolonged or indefinite period of time,

- a) by using commercial or business-like structures, or
- b) by using force or other suitable means of intimidation, or
- c) by exerting influence on politics, the media, public administration, judicial authorities or the business sector.”¹⁶³

There are no special organised crime provisions in German law except § 129 StGB on the forming of criminal organisations, and § 129b StGB on criminal organisations abroad. According to § 129 para. 1 StGB:

- whoever forms an organisation whose aims or activities are directed at the commission of offences, or
- whoever participates in such an organisation as a member, recruits members or supporters, or supports it,

shall be liable for a fine or imprisonment not exceeding five years.

According to the jurisprudence, a criminal organisation consists of at least three persons, must be conceived of as continuous, and requires the pursuance of the common aim to commit crimes, the subordination under a common will, and a common identity.¹⁶⁴

The attempt to form such an organisation is also punishable (para. 3). In especially serious cases, particularly if the offender is one of the ringleaders, the penalty ranges from six months to five years (para. 4). Other specifically serious cases which may lead to a penalty up to ten years do not apply to environmental offences. The court may refrain from imposing a sentence against accomplices whose guilt is of a minor nature or whose contribution is of minor significance (para. 5). Finally, para. 6 regulates active remorse. In certain cases, the court may, based on its own discretion, mitigate the punishment or dispense with it if the perpetrator voluntarily and earnestly makes efforts to prevent the continued existence of the organisation, the commission of a crime, or discloses his knowledge to government authorities in time to prevent planned offences.

Section 129b para. 1 StGB extends the applicability of § 129 StGB to criminal organisations abroad, and was introduced to implement the EU Joint Action of 1998, which makes it a criminal offence to participate in a criminal organisation in the Member States of the EU.¹⁶⁵ Offences related to organisations outside the EU may only be prosecuted if there is a sufficient link to German territory or German citizens, and on the authorisation of the Federal Ministry of Justice (*Bundesministerium der Justiz*, BMJ). Para. 2 extends the general forfeiture instruments in § 73d and § 74a StGB to § 129 StGB.

The practical significance of §§ 129, 129b StGB, however, is negligible.¹⁶⁶ According to a report by the consulting firm *Betreuungsgesellschaft für Umweltfragen* (BfU) and the Max-Planck-Institute for Foreign and

¹⁶³ BKA, Organised Crime. National Situation Report 2012, p. 8.

¹⁶⁴ Fischer, StGB, § 129 annotation 6 with references to the jurisprudence of the Federal Court of Justice (*BGH*).

¹⁶⁵ BfU/Max-Planck-Institute for Foreign and International Criminal Law, Organised environmental crime in the EU Member States, Final Report, Kassel, 15 May 2003, p. 222.

¹⁶⁶ BfU/Max-Planck-Institute for Foreign and International Criminal Law, Organised environmental crime in the EU Member States, p. 222.

International Criminal Law, different factors contribute to this situation.¹⁶⁷ First, the Federal Court of Justice established extremely high evidentiary standards for criminal intent in these cases, which can hardly be met by the prosecution to a sufficient degree as to make a charge appear successful.¹⁶⁸ Furthermore, the low statutory penalty provided in § 129 StGB “makes any effort of police and prosecution in order to meet the Federal Court’s high requirements appear too work-intensive, if not even senseless, from the outset if compared to the low sentence “outcome” that may be reachable at best”. Finally, § 129 StGB exclusively covers the organisational component and does not transform the basic crime, e.g., an environmental crime, into an ‘organised environmental crime.’ Organisational and environmental offences would remain two independent elements of the verdict, formally linked only through the legal figure of real cumulation (*Tatmehrheit*).

Germany also has no general rules applicable to the offences committed as part of a criminal organisation, neither in terms of a general aggravating factor nor as qualifying circumstance of commission (qualification). Unlike in other areas of crime, chapter 29 of the Criminal Code on environmental crimes does not even provide any specific aggravation or qualification rules for commission by gangs or other organised crime groups.¹⁶⁹ This is only the case with secondary criminal law, e.g., § 71 para. 3 BNatSchG increases the maximum penalty if the offender acts commercially or habitually.

However, two legislative links exist between organised crime and environmental crime. First, unauthorised handling of waste (§ 326 StGB) and radioactive substances and other dangerous substances and goods (§ 328 StGB) are included as predicate crimes to the provision on money laundering in § 261 para. 1 no. 4 StGB. Money laundering is deemed to be an indicator of organised crime and the statutory offence of money laundering has been created as one of the main instruments in combating organised crime. Second, forfeiture and confiscation of illegal proceeds are important instruments of intervention against organised crime and are available in the area of environmental crime too. They apply according to the general principles (§§ 73 *et seq.* StGB) and further options are provided in § 330c StGB. However, extended forfeiture according to § 73d StGB, which was introduced exclusively for organised crime in 1992, is not applicable to any of the environmental offences.¹⁷⁰

In sum, it is difficult to avoid the conclusion that environmental crime plays no significant role in organised crime legislation.¹⁷¹ This corresponds to the statistical data, according to which environmental crime accounts for only 1.4% of all organised crime in Germany.¹⁷² However, due to significant shortcomings, these data do not present a valid picture of the extent of organised environmental crime; rather, only a rough estimate.¹⁷³

¹⁶⁷ BfU/Max-Planck-Institute for Foreign and International Criminal Law, Organised environmental crime in the EU Member States, p. 222-223.

¹⁶⁸ Also Fischer, StGB, § 129 annotation 4, 8.

¹⁶⁹ BfU/Max-Planck-Institute for Foreign and International Criminal Law, Organised environmental crime in the EU Member States, p. 223. In an interview with BKA of 6 June 2014, a corresponding amendment to § 330 StGB was suggested.

¹⁷⁰ BfU/Max-Planck-Institute for Foreign and International Criminal Law, Organised environmental crime in the EU Member States, p. 223.

¹⁷¹ BfU/Max-Planck-Institute for Foreign and International Criminal Law, Organised environmental crime in the EU Member States, p. 225.

¹⁷² BKA, Organised Crime. National Situation Report 2012, p. 21. However, this number is dependent on the application of the working definition of organised crime in practice, interview with BKA of 6 June 2014.

¹⁷³ BfU/Max-Planck-Institute for Foreign and International Criminal Law, Organised environmental crime in the EU Member States, p. 213-217.

8. General criminal law influencing the effectiveness of environmental criminal law: sanctions in practice

According to the Prosecutorial Statistics (*Staatsanwaltschaftsstatistik*) for 2004, only 4.8% of the environmental crime investigation proceedings terminated by the public prosecution's office itself resulted in the suspect being charged, compared to 15.2% in total crime.¹⁷⁴ However, applications for a penal order (*Strafbefehl*) were higher than in other areas (19.8 compared to 16.23%). Thus, the rate of environmental crime investigation proceedings aimed at a conviction is lower by 7% compared to total crime (24.6 compared to 31.5%). For statistics on dismissals because of small interests within the case and dismissals with conditions, see chapter 11.2.3 below. If dismissals with conditions are included (*Interventionsrate*), the difference between environmental and total crime is only marginal (36.3 compared to 38.3%).¹⁷⁵

According to the National Statistics on Convictions and Sentencing (*Strafverfolgungsstatistik, StVSt*) for 2012, 1,523 suspects were charged and 1,075 were convicted for environmental crimes according to the Criminal Code.¹⁷⁶ Thus, from the 12,749 recorded suspects according to the Uniform Police Statistics for 2012, 11.9% were charged and 8.4% convicted (compared to a general charge rate of 13.7% and a general conviction rate of 11.3%).¹⁷⁷

Today the normal form of punishment is the imposition of a fine, with imprisonment only being applied in particularly severe cases.¹⁷⁸

In addition, in most cases, imprisonment sentences of two years or fewer are suspended on probation.¹⁷⁹ The court shall suspend a prison sentence not exceeding one year on probation if there is reason to believe that the mere imposition of the sentence will have a sufficient warning effect on the person convicted to deter him or her from committing any further crimes even without the serving of the sentence (§ 56 para. 1 StGB). It may suspend a prison sentence not exceeding two years if, after a comprehensive evaluation of the offence and character of the convicted person, special circumstances can be found to exist (§ 56 para. 2 StGB). The period for which the sentence is suspended (*Bewährungszeit*) is set by the court at between two and five years. When suspending a sentence, the court can also impose various conditions, e.g., the performance of community service, and issue various directions, in particular to place the convicted person under the supervision of a probation officer with the duty to help him or her lead a law-abiding life. If the convicted successfully completes the period of probation, the court will remit the sentence; otherwise, it will order the sentence to take effect.

It is also possible to release a person who has been serving a term of imprisonment on probation for the rest of his or her term of imprisonment.¹⁸⁰ This generally shall be done once the convict has served two-thirds of his or her

¹⁷⁴ These numbers and the numbers that follow are reproduced in Bundesministerium des Innern/Bundesministerium für Justiz, Zweiter Periodischer Sicherheitsbericht, 2006, p. 275.

¹⁷⁵ Bundesministerium des Innern/Bundesministerium für Justiz, Zweiter Periodischer Sicherheitsbericht, 2006, p. 275.

¹⁷⁶ Statistisches Bundesamt, Rechtspflege. Strafverfolgung 2012, Fachserie 10 Reihe 3, Wiesbaden 2014, p. 56, https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafverfolgung2100300127004.pdf?__blob=publicationFile.

¹⁷⁷ Other data provided by different studies are reproduced at Michael G. Faure/Katarina Svatikova, Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe, *Journal of Environmental Law* 2012, 1, 24-34.

¹⁷⁸ Jescheck/Weigend, *Strafrecht AT*, p. 744-746.

¹⁷⁹ Jörg-Martin Jehle, *Criminal Justice in Germany. Facts and Figures*, 4th ed., Berlin 2005, p. 30-31; Faure/Heine, *Criminal Enforcement of Environmental Law in the European Union*, annex 2, p. 133.

¹⁸⁰ Robbers, *An Introduction to German Law*, annotation 500.

term of imprisonment, but not less than two months (§ 57 para. 1 StGB). There must be a reasonable chance that the convict will not commit any further crimes on his or her release, and s/he must consent to being released on probation. If the convicted person is serving his or her first sentence of imprisonment, the term does not exceed two years, or under certain special circumstances, the court may even grant early conditional release after the convict has served half of his or her sentence, but not less than six months (§ 57 para. 2 StGB).

After a certain period of time, criminal offences with the exception of murder cannot be prosecuted any more (limitation of prosecution, § 78 StGB). Equally, as a rule, sentences cannot be enforced after a certain time has expired (limitation of enforcement, § 79 StGB). The limitation period depends on the maximum sanction provided for in the respective criminal provision. The limitation of prosecution period relevant to environmental criminal offences is twenty years in the case of offences punishable by a maximum term of imprisonment of more than 10 years, 10 years in the case of offences punishable by a maximum term of imprisonment of more than five years but no more than 10 years, five years in the case of offences punishable by a maximum term of imprisonment of more than one year but no more than five years, and three years in the case of other offences (§ 78 para. 3 no. 3 to 5 StGB). Certain circumstances described in §§ 78c StGB, such as the first interrogation of the accused, interrupt the limitation period, whereas circumstances described in § 78b StGB, such as the formal request for extradition to a foreign state where the offender resides, result in the stay of the limitation period. The respective limitation of enforcement periods are substantially longer than the limitation of prosecution periods (e.g., 20 years compared to 10 years for the same maximum sanction), and shall be stayed or may be prolonged once under certain circumstances described in §§ 79a and b StGB, respectively.

Compared to total crime, the level of sanctions for environmental crime appears particularly low. Imprisonment sentences are even rarer (4% compared to 17.9% of convicted in 2012), and probation is granted in even more cases than for total crime (93% compared to 70% of imprisonment sentences in 2012), although the gap has been decreasing in recent years.¹⁸¹ If an offender is sentenced to imprisonment, the sentence is at the lowest level of the range, rarely going beyond one year (16.3% compared to 25.9% of imprisonment sentences in 2012).¹⁸² Equally, the level of fines appears rather low; in 2012, only 5.3% of the convicted (compared to 5.7% in total crime) had to pay a severe fine which officially established a criminal record.¹⁸³ One of the reasons for the low level of sanctions could be that the percentage of convicted with a criminal record is particularly low in environmental criminal law.¹⁸⁴

Thus, it can be said that in environmental criminal law, the tendency of the legislature to enlarge criminalisation is faced with the tendency of the judiciary to restrict criminalisation.¹⁸⁵ This raises the question whether overall the level of sanctions in environmental criminal law conforms to Art. 5 ECD that requires effective, proportionate and dissuasive penalties.

¹⁸¹ StVSt 2012, p. 56, 91. See also Vierhaus/Kloepfer, Umweltstrafrecht., annotations 194-195; Bundesministerium des Innern/Bundesministerium für Justiz, Zweiter Periodischer Sicherheitsbericht, 2006, p. 276-277: 2,3% (81% on probation) compared to 16% (80% on probation) convicted for fraud (prosecution statistics for West Germany including Berlin of 2004; 3,5% according to Christian Almer/Timo Goeschl, Environmental Crime and Punishment: Empirical Evidence from the German Penal Code, September 7, 2009, Table 2.

¹⁸² StVSt 2012, p. 194. According to the Second Report on Security of 2006, sentences to imprisonment beyond one year comprise 3% compared to 17% for fraud, Bundesministerium des Innern/Bundesministerium für Justiz, Zweiter Periodischer Sicherheitsbericht, 2006, p. 277; see also Ransiek, NK-STGB, Vor §§ 324 ff., annotation 29 for the conviction statistics in 2010, who even notices a more severe sentencing practice of the courts than formerly; Kloepfer/Vierhaus, Umweltstrafrecht, annotation 196 (for 1997).

¹⁸³ StVSt 2012, p. 194. 6.4% according to Almer/Goeschl, Environmental Crime and Punishment: Empirical Evidence from the German Penal Code, Table 2; for older data see Kloepfer/Vierhaus, Umweltstrafrecht, annotation 198-199 with further references.

¹⁸⁴ Kloepfer/Vierhaus, Umweltstrafrecht, annotation 196; Faure/Heine, Criminal Enforcement of Environmental Law in the European Union, annex 2, p. 133.

¹⁸⁵ Kloepfer/Vierhaus, Umweltstrafrecht, annotation 214.

In transposing the ECD, the Government obviously assumed the general conformity, raising that point only once concerning § 38 BJagdG where the former sanction was increased (see above). According to the economic approach to law enforcement, effectiveness and dissuasiveness are dependent on the expected costs of the crime being higher than the expected benefits.¹⁸⁶ Whereas the expected benefits correspond to the resulting harm to society, the expected costs are determined by the economic costs of the penalty and the probability of being detected, prosecuted and convicted.¹⁸⁷ The higher the expected benefits and the lower the likelihood of being apprehended and convicted, the higher the penalty must be.¹⁸⁸ According to the statistical data for 2012¹⁸⁹, in Germany there is only a probability of 15.9% (compared to 39.2% of total crime) that an offender is apprehended and prosecuted.¹⁹⁰ Thus, in order to have a deterrent effect, penalties must be rather high—but they also have to be proportionate. According to a recent study, environmental criminal sanctions in Germany, in spite of being low on average, do have a deterrent effect.¹⁹¹ However, the deterrent effect was not achieved due to the severity of sanctions, but presumably by the public nature of the sanction, that is the reputational loss by standing trial in a public court of law.¹⁹² These findings contradict parts of the legal literature characterising the deterrent effect of environmental criminal law as negligible.¹⁹³ However, they seem compatible with the opinion according to which criminal sanctions are more appropriate for the most serious cases, whereas administrative fines may be more efficient for minor violations¹⁹⁴, as seen from the findings that there is a higher probability of sanctions to be imposed in administrative penal law than in criminal law (see below at chapter 13).

Irrespective of these considerations on the deterrent effect of criminal sanctions, Member States have considerable leeway with regard to ensuring that their level of criminal sanctions is effective, dissuasive and proportionate according to Art. 5 ECD.¹⁹⁵ One view in academic literature holds that, to conform to the

¹⁸⁶ Michael G. Faure, The Implementation of the Environmental Crime Directives in Europe, in: Jo Gerardu/Danielle Gabriel/Meredith R. Koparova/Kenneth Markowitz/Durwood Zaelke (Eds.), Proceedings of the 9th International Conference on Environmental Compliance and Enforcement – INECE, Washington 2011, p. 360, 366-368.

¹⁸⁷ Faure, The Implementation of the Environmental Crime Directives in Europe, p. 367; see also Almer/Goeschl, Environmental Crime and Punishment: Empirical Evidence from the German Penal Code, p. 11.

¹⁸⁸ Michael G. Faure, The Implementation of the Environmental Crime Directives in Europe, p. 367.

¹⁸⁹ PKS 2012 and StVSt 2012, which do not correlate properly, however, so the result can only be taken as an approximation.

¹⁹⁰ According to Bundesministerium des Innern/Bundesministerium für Justiz, Zweiter Periodischer Sicherheitsbericht, 2006, p. 274, the probability of being prosecuted (*Anklagewahrscheinlichkeit*) corresponds to the number of suspects (*Tatverdächtige*) divided by the number of prosecuted persons (*Abgeurteilte*); the number of suspects hereby correspond to the number of recorded crime. According to Almer/Goeschl, Environmental Crime and Punishment: Empirical Evidence from the German Penal Code, table 2, as interpreted by Faure/Svatikova, Journal of Environmental Law 2012, 27, the probability of being prosecuted is maximum 15.5%. Hereby, the probability that an offender is identified (=clearing rate) is multiplied by the probability that he will be tried. A very low probability of being sanctioned according to criminal law is also attested by Kloepfer/Vierhaus, Umweltstrafrecht, annotation 201.

¹⁹¹ Almer/Goeschl, Environmental Crime and Punishment: Empirical Evidence from the German Penal Code, p. 6, 27-27, 33.

¹⁹² Almer/Goeschl, Environmental Crime and Punishment: Empirical Evidence from the German Penal Code, p. 7, 28-29, 33-34.

¹⁹³ Almer/Goeschl, Environmental Crime and Punishment: Empirical Evidence from the German Penal Code, p. 33 with references at p. 10; further references in Saliger, Umweltstrafrecht, annotation 60.

¹⁹⁴ Faure/Svatikova, Journal of Environmental Law 2012, 32-33; Ranisek, NK-StGB, Vor §§ 324 ff, annotation 36.

¹⁹⁵ Klaus Meßerschmidt, Europäisches Umweltrecht, 1st. ed., München 2011, § 5 annotation 269.

dissuasiveness criterion, Member States need to provide imprisonment alongside criminal fines as sanctions.¹⁹⁶ According to this standard, there is no indication that the level of sanctions in German environmental criminal law does not conform to Art. 5 ECD.

¹⁹⁶ Meßerschmidt, *Europäisches Umweltrecht*, § 5 annotation 268; a slightly different point of view from an economic theory perspective is put forward by Michael G. Faure, *Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Ship-source Pollution Directives: Questions and Challenges*, *European Energy and Environmental Law Review* 2010, 256, 266: Fines should be used for environmental crime as primary penalty and non-monetary sanctions (like imprisonment) should only be used to the extent that an insolvency problem arises.

9. Responsibility of corporations and collective entities for environmental crimes

The chapter on principles of substantive criminal law above clarified that under German law there is no criminal responsibility for corporations or collective entities. However, legal entities may be responsible under administrative penal law according to § 30 and § 130 of the Administrative Offences Act (*Ordnungswidrigkeitengesetz*, OWiG).

Section 30 para. 1 OWiG allows the imposition of an administrative fine against a legal person or another company or association if a leading representative of the organisation commits a crime or an administrative penal offence either in violation of a duty imposed on this organisation, or by which the organisation has been or should have been enriched (*Verbandsgeldbuße*). If the leading representative intentionally commits a crime, the administrative fine is up to €10 million; if s/he commits a crime by negligence, a fine can be levied up to €5 million. If the leading representative commits an administrative penal offence, the fine depends on the maximum rate provided in the relevant provision, which is to be increased tenfold if the relevant provision refers to § 30 OWiG (para. 2). However, para. 3 in conjunction with § 17 para. 4 OWiG allows the fine to exceed the maximum rate in order to eliminate the ill-gotten profits. As a consequence, forfeiture cannot be ordered besides as an administrative fine (para. 5). The administrative fine may also be imposed if the legal representative is not prosecuted or punished for other than legal reasons (para. 4). It is not even necessary to identify the responsible representative if it can be established that at least one of such representatives has committed a pertinent crime or administrative penal offence.¹⁹⁷

The prime example of a violation of a duty according to § 30 para. 1 OWiG is the violation of the duty of supervision by the legal representative facilitating the commission of a crime or an administrative offence by a subordinate person (§ 130 OWiG).¹⁹⁸

Under § 30 OWiG, legal persons can be held liable for offences referred to in Articles 3 and 4 ECD, where such offences have been committed for their 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 (Article 6 para. 1 ECD, Article 8b para. 1 Directive 2005/35/EC). Under § 130 OWiG, legal persons can be held liable where the lack of supervision or control by such a person has made possible the commission of such an offence (Article 6 para. 2 ECD, Article 8b para. 2 Directive 2005/35/EC). According to Article 7 ECD, Article 8c Directive 2005/35/EC, legal persons held liable pursuant to these provisions must be punishable by effective, proportionate and dissuasive penalties. Following a report of the OECD raising doubts whether penalties against legal persons in Germany conformed to these criteria¹⁹⁹, the legislature in June 2013 increased the maximum penalty for intentional conduct tenfold, from €1 million to €10 million and for negligent conduct from €500,000 to €5 million.²⁰⁰ As stated in the chapter on principles of substantive criminal law above, under German criminal law, the liability of legal persons under Article 6 ECD does not exclude criminal proceedings against natural persons for offences referred to in Articles 3 and 4 ECD (Article 6 para. 3 ECD, Article 8b para. 3 Directive 2005/35/EC).

¹⁹⁷ Erich Göhler/Franz Gürtler/Helmut Seitz, *Gesetz über Ordnungswidrigkeiten: OWiG*, 16th edition, München 2012, § 30 annotation 40 with further references.

¹⁹⁸ Gürtler/Seitz, *OWiG*, § 30 annotation 17.

¹⁹⁹ OECD, *Deutschland: Phase 3. Bericht über die Anwendung des Übereinkommens über die Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr und der Empfehlung des Rats zur weiteren Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr*, issued 17 March 2011, p. 5-6, 45, 83, <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/48967037.pdf>.

²⁰⁰ Bundesverband der Unternehmensjuristen (BUJ), *Gesetzgebungsvorschlag für eine Änderung der §§ 30, 130 des Ordnungswidrigkeitengesetzes (OWiG) of April 2014*, p. 4; see also *Deutscher Anwaltverein, Stellungnahme Nr. 54/2013 zum Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden des Landes Nordrhein-Westfalen*, Dezember 2013, p. 12.

Sections 87 and 88 OWiG provide procedural rules if incidental consequences (confiscation or forfeiture) or an administrative penal fine are ordered against a legal person or association of persons, e.g., provisions concerning participation in the proceedings, the appointment of an attorney, or the rule that confiscation or forfeiture shall be ordered in separate proceedings.

Although there are no statistical records on administrative penal offences²⁰¹, it seems that in practice, the corporate non-criminal fine does not play an important role.²⁰²

One of the reasons may be that in the field of administrative penal law, the principle of discretionary prosecution applies (see below at chapter 13).²⁰³ Further reasons include the emphasis in criminal investigations on the criminal responsibility of individual natural persons, and the principle of cooperation between administrative agencies and enterprises.²⁰⁴ Among researchers, there is a wide consensus that corporate sanctions should go beyond the existing provision of § 30 OWiG.²⁰⁵ However, there is no agreement whether such a sanction should be a criminal sanction or not, or on the details of the sanction.²⁰⁶ As demonstrated by competition law practice, a non-criminal fine may reach such amounts that it is equal to or even potentially stronger than a criminal sanction.²⁰⁷

In 2006, the guidelines concerning criminal and administrative penal proceedings (*Richtlinien für das Straf- und Bußgeldverfahren*, RiStBV)²⁰⁸, addressed primarily to the public prosecutor's office, were amended (no. 180a RiStBV) in order to oblige the public prosecutor to consider the imposition of an administrative penal fine against the legal person according to § 30 OWiG alongside sanctions against one of its leading representatives. Indeed, according to the OECD report mentioned above, this is one of the reasons for the current trend to prosecute and sanction legal persons in a more active way.²⁰⁹ As mentioned above in Chapter 4, there is currently a new debate on whether criminal liability of corporations could and should be introduced, or whether improvement of the Administrative Offence Act is sufficient.

²⁰¹ Bundesministerium des Innern/Bundesministerium für Justiz, Zweiter Periodischer Sicherheitsbericht, 2006, p. 277, 279.

²⁰² Faure/Heine, *Criminal Enforcement of Environmental Law in the European Union*, p. 46; see also Gesetzesantrag des Landes Nordrhein-Westfalen, Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden, p. 23; Deutscher Anwaltverein, Stellungnahme Nr. 54/2013 zum Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden des Landes Nordrhein-Westfalen, Dezember 2013, p. 12.

²⁰³ See Gesetzesantrag des Landes Nordrhein-Westfalen, Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden, p. 23.

²⁰⁴ Faure/Heine, *Criminal Enforcement of Environmental Law in the European Union*, p. 46.

²⁰⁵ Ransiek, NK-StGB Vor §§ 324 ff, annotation 39-40 with further references.

²⁰⁶ Ransiek, NK-StGB Vor §§ 324 ff, annotation 40 with further references; see also Bundesverband der Unternehmensjuristen (BUJ), Gesetzgebungsvorschlag für eine Änderung der §§ 30, 130 des Ordnungswidrigkeitengesetzes (OWiG) of April 2014, p. 5.

²⁰⁷ Ransiek, NK-StGB Vor §§ 324 ff, annotation 41; with regard to recent administrative penal fines against enterprises in general see also Bernd Groß, Auch den Unternehmen selbst drohen harte Strafen, *Frankfurter Allgemeine Zeitung (FAZ)* of 27. November 2013, p. 19.

²⁰⁸ http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_01011977_420821R5902002.htm.

²⁰⁹ OECD, *Deutschland: Phase 3. Bericht über die Anwendung des Übereinkommens über die Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr und der Empfehlung des Rats zur weiteren Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr*, issued 17 March 2011, p. 42-43; see also Bundesrechtsanwaltskammer, Stellungnahme Nr. 9/2013 zur Einführung einer Unternehmensstrafe, Mai 2013, p. 4.

10. General procedural provisions

The rules for the investigation and the prosecution of crimes are contained in the Code of Criminal Procedure (*Strafprozessrecht*, StPO). The criminal procedure consists of the contentious proceedings (*Erkenntnisverfahren*) and the execution proceedings (*Vollstreckungsverfahren*). The former is divided into three stages:

- Investigation proceedings (*Ermittlungsverfahren*), aimed at preparing public charges
- Interim proceedings (*Zwischenverfahren*), in which the court decides whether to open main proceedings according to the bill of indictment
- Main proceedings (*Hauptverfahren*) in court

As a general rule, the public prosecutor's office is obliged to take action in relation to all prosecutable criminal offences, provided there is a sufficient factual basis (§ 152 para. 2 StPO, *Legalitätsprinzip*). In some cases explicitly provided by law (§§ 153-154 StPO), however, the principle of discretionary prosecution applies (*Opportunitätsprinzip*), which means that the public prosecutor's office takes only such action as it deems appropriate. In most cases, the exercise of this discretion requires the consent of the court which would be responsible for the main trial, and sometimes the consent of the suspect himself or herself is required. For instance, according to § 153 para. 1 StPO, the public prosecutor's office may dispense with the prosecution for a misdemeanour if the perpetrator's guilt is considered of a minor nature and there is no public interest in the prosecution.

11. Procedural provisions on environmental crimes

Environmental criminal law and the law of criminal procedure are linked in two ways. First, there are procedural provisions which apply exclusively to environmental crimes. Second, there are procedural provisions which typically apply in relation to environmental crimes.

11.1 Procedural provisions specifically for environmental crimes

The Code of Criminal Procedure contains three provisions which apply exclusively to environmental crimes.

11.1.1 Jurisdiction according to § 10a StPO

If no venue is established for criminal offences committed at sea outside German territory, the venue is Hamburg and the competent local court is the Hamburg Local Court (§ 10a StPO). This subsidiary rule of jurisdiction concerns international environmental crimes related to the sea.²¹⁰

11.1.2 Seizure of property, § 443 para. 1 no. 2 StPO

According to § 443 StPO, property or individual pieces of property located within German territory may be seized if they belong to a person against whom public charges have been filed or for whom a warrant of arrest has been issued for certain criminal offences. These crimes include the provisions referred to in § 330 para. 1 sentence 1 StGB, provided that the accused is suspected of intentionally endangering life or limb of another or another person's property of considerable value, or under the conditions in § 330 para. 1 sentence 2 no. 1 to 3, para. 2, and § 330a para. 1 and 2 StGB. Thus, seizure of property is only applicable to environmental crime when there are considerable grounds for thinking that the accused might be guilty of having committed an aggravated environmental crime (§§ 330, 330a StGB).²¹¹

11.1.3 Gathering of evidence from self-monitoring

Several environmental laws obligate the operators of certain facilities and other persons to provide certain information to the environmental authorities. For instance, § 47 para. 3 of the Recycling Management Act obliges producers and holders of waste, any persons obliged to recover or to dispose of waste, and operators of waste treatment facilities to provide information to the waste authorities or their authorised agents. Furthermore, operators of facilities have to undertake broad self-monitoring and documentation of impacts on the environment if they want to shift the burden of proof for liability according to § 6 of the Environmental Liability Act (*Umweltschadensgesetz*).

According to § 55 StPO, to which most of the relevant environmental provisions on the obligation to give information to the authorities refer (e.g., § 47 para. 5 Recycling Management Act), any witness may refuse any questions if the reply would incriminate the witness or his or her relatives in a criminal offence or an administrative penal offence. However, as a rule, the persons obliged to give information to the authorities are not identical or relatives of the persons who might have committed a criminal or an administrative penal offence. Therefore, there is an argument that the state may not prosecute persons who fulfil a request for information by the authorities using that same information. According to this view in the literature, evidence gathered from such information or self-monitoring must not be used against the accused according to the principle *nemo tenetur se ipse accusare*.²¹² The prevailing view in literature, however, rejects such an extension of the recognised

²¹⁰ Saliger, Umweltstrafrecht, annotation 519.

²¹¹ Saliger, Umweltstrafrecht, annotation 521.

²¹² Saliger, Umweltstrafrecht, annotation 524, with references to this view.

prohibitions on the use of evidence (*Beweisverwertungsverbote*), utilising, among others, the argument that the general interest to ascertain the truth, which is especially difficult with regards to companies, has more weight than the accused's interest not to be prosecuted.²¹³

11.2 General procedural provisions typically at stake in cases of environmental crimes

11.2.1 Obtaining knowledge of suspected crimes, §§ 158, 160 StPO

As soon as the public prosecutor's office learns of a suspected criminal offence either through criminal information or by other means, it must investigate the facts to decide whether public charges are to be filed (§ 160 para. 1 StPO). Thus, obtaining such knowledge is the first and most crucial step for the investigation proceedings which may ultimately lead to public charges. Concerning environmental crimes, this knowledge may be obtained mainly in two ways.

First, individuals may file a report regarding a criminal offence or make an application for criminal prosecution with the public prosecutor's office, with police authorities and officials, or with the Local Courts (§ 158 para. 1 StPO). Although most of the criminal information stems from the general public, people are rather reluctant to file reports. The main reason is that, in the case of environmental crimes, people are either not directly affected by such offences, or there is an anonymous multitude of victims. Thus, the ordinary citizen is rarely confronted with the infringement of his or her legal interests, which is often the decisive motivation for people to make a criminal complaint.²¹⁴

Second, and even more important due to their particular knowledge, the public prosecutor's office may obtain information on potential crimes from the environmental authorities. However, for several reasons these authorities are also reluctant, if not unable, to provide the public prosecution office with such information:²¹⁵

- The continuous task of the environmental authorities results in a rather cooperative relationship between them and the operators of facilities. If they consider that preventive measures are not sufficient, they use the administrative enforcement instruments at their disposal rather than refer to criminal law.²¹⁶
- Due to this cooperative relationship, environmental authorities fear getting involved in criminal proceedings themselves
- The tendency of administrative authorities, especially at the local level, to solve conflicts between economic and ecologic interests through a compromise at the expense of the environment
- The relative lack of successful proceedings by the criminal justice system
- Perhaps most importantly, in recent years the environmental agencies lack the resources (staff and monitoring equipment) to provide regular controls to lead to relevant information (see below at chapter 14)

Concerning environmental offences committed by farmers and small business, on the other hand, there is less reluctance on the part of the general public to file reports of crimes to the public prosecutors, as these offences are

²¹³ Saliger, Umweltstrafrecht, annotation 525; Kloepfer/Vierhaus, Umweltstrafrecht, annotation 179 both with further references..

²¹⁴ Schall, NJW 1990, 1270; Saliger, Umweltstrafrecht, annotation 527, with further references to criminology.

²¹⁵ Schall, NJW 1990, 1271; Saliger, Umweltstrafrecht, annotation 528, with further references to criminology; Hecker, et al., Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung, p. 61

²¹⁶ Schall, NJW 1990, 1271, with further references; According to Volker Meinberg, Praxis und Perspektiven des Umwelt-Ordnungswidrigkeiten-Rechts, NJW 1990, 1273-1283, 1282, administrative authorities are reluctant to use any repressive means including administrative penal law.

generally much more visible. Equally, the tendency of the environmental authorities to cooperate with potential violators is most true in the case of large companies. As a result, there is a certain asymmetry concerning prosecution and sanctioning between offences committed by industry and big business on the one hand, and offences committed by farmers and small business on the other.²¹⁷ Furthermore, the number of detected environmental offences depends on the amount of monitoring undertaken by the authorities, which has decreased in the last decade.²¹⁸ Both causes have contributed to a decline in the number of reported environmental crimes in the last decade.²¹⁹

11.2.2 Difficulties regarding proof and sufficient grounds to suspect the commission of a criminal offence, §§ 170, 203 StPO

According to §§ 170 and 203 StPO, investigation proceedings may only lead to public charges if there are sufficient grounds to suspect that the accused has committed a criminal offence. This requires the likelihood that, according to a preliminary assessment, the accused will be convicted.²²⁰ In particular, due to the scientific complexity of the circumstances surrounding environmental crime cases, it is often difficult to find enough evidence against the accused. In the chapter on principles of substantive criminal law, it has already been stated that, due to this complexity, causality and/or attribution are frequent problems in environmental criminal law. In this chapter it has also been noted that, particularly in decentralised large-scale enterprises, the division of work makes it difficult to attribute criminal liability to a particular person. In addition to these legal barriers, there are factual barriers, such as insufficient resources and expertise of the prosecution service, and a corresponding dependency on experts' reports.²²¹

These legal and factual problems of proof are the main reason that the vast majority of environmental criminal proceedings are terminated for insufficient grounds to proceed with public charges according to § 170 para. 2 StPO. However, it seems that contrary to some decades ago, the rate of termination of proceedings related to environmental crimes according to § 170 para. 2 StPO does not considerably deviate from the rate of termination related to other criminal offences.²²²

11.2.3 Terminate prosecution according to §§ 153, 153a StPO

It has been stated above that, by way of exception in cases provided by law, the principle of discretionary prosecution applies (*Opportunitätsprinzip*). Thus, according to § 153 para. 1 StPO, the public prosecutor's office may drop the prosecution for misdemeanour crimes if the perpetrator's guilt is considered of a minor nature and there is no public interest in the prosecution. In cases of misdemeanours, the prosecution office may also, with the consent of the accused, provisionally suspend public charges and concurrently impose conditions and instructions upon the accused if these are of such a nature as to eliminate the public interest in prosecution and if the degree of guilt does not present an obstacle (§ 153a StPO). If the accused complies with the conditions and instructions, e.g., pays a certain sum of money to a not-for-profit institution or to the German government, the offence can no

²¹⁷ Saliger, Umweltstrafrecht, annotation 529; Kloepfer/Vierhaus, Umweltstrafrecht, annotation 202-206, both with further references.

²¹⁸ Saliger, Umweltstrafrecht, annotation 62, 530, with further references.

²¹⁹ Saliger, Umweltstrafrecht, annotation 529-530, with further references to criminology; Hecker, et al., Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung, p. 61.

²²⁰ Saliger, Umweltstrafrecht, annotation 534, with further references.

²²¹ Saliger, Umweltstrafrecht, annotation 533, with further references.

²²² According to Saliger, Umweltstrafrecht, annotation 534, with further references, the termination of proceedings related to environmental crimes according to § 170 para. 2 StPO concerned 47,5% of all proceedings between 1982-1986 and diminished to 29% in 2003. However, he also mentions an analysis of 2007 which rather points to continuity to the results in the 1980s.

longer be prosecuted as a misdemeanour. Section 153a StPO aims at terminating criminal proceedings in a cooperative way, thereby combining aspects of economising judicial resources and decriminalisation.²²³

As almost all environmental criminal offences are misdemeanours, §§ 153 and 153a StPO are generally applicable. Furthermore, the legal and factual barriers to obtaining proof often eliminate the public interest in prosecution and give the perpetrator's guilt the appearance that it is of a minor nature (§ 153 StPO), or at least allow for compensation of the public interest in prosecution through the conditions and instructions imposed (§ 153a StPO). It has to also be taken into account that perpetrators of environmental crimes are regularly fully integrated into society. For these reasons, the termination of criminal proceedings according to §§ 153 and 153a StPO by the public prosecutor's offices and the courts is considerable in environmental law.²²⁴ In spite of this, the rate at which proceedings terminated in environmental criminal law (60% on average since 1998) and in criminal law in general (53% on average) have converged.²²⁵

11.2.4 Plea bargaining, § 257c StPO

According to § 257c para. 1 StPO, the court may in suitable cases reach an agreement with the participants on the further course and outcome of the proceedings. Basically, the defendant may achieve a reduced sentence if s/he confesses to the crime of which s/he is accused. However, whereas the confession shall be an integral part of any negotiated agreement, the guilty verdict must not be the subject of such an agreement (para. 2). The court may only, when announcing what content the negotiated agreement could have, indicate an upper and lower sentence limit. The agreement comes into force when the defendant and the public prosecutor's office agree to the court's proposal (para. 3). Under certain conditions, such as new legal or factual circumstances, that convince the court that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of guilt, the court is not bound to the agreement. The defendant's confession may not be used in these cases (para. 4). The defendant has to be instructed about the possibility that the court ceases to be bound by the agreement under such circumstances (para. 5). Finally, a waiver of the right to file an appellate remedy is excluded if a negotiated agreement has preceded the judgement (§ 302 para. 1 sentence 2 StPO).

With § 257c StPO, in 2009 the legislature regulated the very controversial issue of plea bargaining according to the lines of the jurisprudence of the Federal Court of Justice.²²⁶ In a judgement of 19 March 2013, the Federal Constitutional Court ruled that the Plea Bargaining Act introducing § 257c StPO sufficiently ensures compliance with the constitutional requirements, such as the right to a fair trial, the right against self-incrimination, and the presumption of innocence. However, the Court declared that the implementation of the Act fell considerably short of these requirements, e.g., by the continued use of informal agreements which take place outside the legal framework, and required the legislature to continually assess the effectiveness of the law's safeguard mechanisms.²²⁷

The legal and factual complexity of environmental crime cases, the corresponding proof problems, and the usual strong representation of the defendant by a lawyer make these cases particularly suitable for plea bargaining.²²⁸

²²³ Saliger, Umweltstrafrecht, annotation 538.

²²⁴ According to Saliger, Umweltstrafrecht, annotation 540 with further references, the rate of terminations in environmental criminal proceedings in 2003 was 14% according to § 153 StPO and 10% according to § 153a StPO.

²²⁵ Saliger, Umweltstrafrecht, annotation 540 with further references.

²²⁶ Saliger, Umweltstrafrecht, annotation 545-547 with further references.

²²⁷ BVerfG, 2 BvR 2628/10, 2883/10, 2155/11 of 19.3.2013. A summary in English is provided in press release no. 17/2013 of 19 March 2013.

²²⁸ Saliger, Umweltstrafrecht, annotation 542.

11.2.5 Excessive duration of proceedings

The difficulties with environmental crime proceedings demonstrated above may lead to considerable delay. Excessive duration of proceedings may infringe Article 6 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which guarantees everyone's right to a hearing within a reasonable time. In 1993, the District Court Bad Kreuznach declined to open proceedings in an environmental criminal case which had already lasted 6 years.²²⁹ However, the Federal Court of Justice, according to its recent jurisprudence, takes the delay into account only in crediting it against the sentence to be served by the convicted.²³⁰

²²⁹ LG Bad Kreuznach NJW 1993, 1725.

²³⁰ BGHSt (GS) 52, 124 et seq. , with comments by Saliger, Umweltstrafrecht, annotations 556-557.

12. Procedural provisions - actors and institutions mentioned in legal texts

12.1 Actors and institutions for enforcing environmental criminal law

Whereas the law of criminal procedure regulated primarily in the Code of Criminal Procedure contains the rules for the investigation and prosecution of crimes, provisions containing the institutions of criminal procedure, particularly the courts and the state prosecution service, are contained in the Constitution of Courts Act (*Gerichtsverfassungsgesetz, GVG*).

Courts

Only a judge can convict and sentence an accused person (Article 92 GG). For criminal offences, there are four types of courts:

- **District Court (Amtsgericht):** This court is the court of first instance for less serious crimes. Where the prosecutor is seeking no more than one year's imprisonment, the case will be heard by a professional judge alone; where the prosecutor is seeking more than one but less than four years, it will be heard by one professional judge and two lay assessors (Schöffen).
- **Regional Court (Landgericht):** This court is the court of first instance for more serious crimes (Grand Criminal Chamber) and may function as a court of appeals on points of fact and law regarding decisions of the District Court (Small Criminal Chamber). In the former function, the case is heard by two or three professional judges and two lay assessors; in the latter by one professional judge and two lay assessors.
- **Higher Regional Court (Oberlandesgericht):** This court is the court of first instance for special criminal matters, primarily those involving offences against the state, and otherwise functions as the court of appeals on points of law regarding certain decisions of the District Court and regarding appellate decisions of the High Court. The case is heard by three or five professional judges without any lay assessors.
- **Federal Court of Justice (Bundesgerichtshof, BGH):** This court is Germany's highest court of general jurisdiction in civil and criminal matters. It functions as the court of appeals on points of law regarding decisions of the Regional Court and the Higher Regional Court. Its principle task is to ensure uniformity of the law through clarifications of fundamental points of law and development of the law. The case is heard by five professional judges.

Apart from the particular jurisdiction for criminal offences at sea according to § 10a StPO described above, German law does not establish special divisions for environmental criminal matters in contrast to the economic offence divisions established by § 74c GVG. In practice, however, there is a tendency at the Regional Court level to establish such divisions.²³¹

Cooperation with authorities in foreign states concerning criminal matters in general is regulated by guidelines for the communication with foreign countries in criminal matters (*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten*, RiVAST), which are directed to courts, the public prosecutor's office and other

²³¹ Saliger, Umweltstrafrecht, annotation 520.

authorities.²³² As a rule, these authorities are also obliged to transfer information to Eurojust upon request, if this is necessary for the administration of Eurojust's duties according to § 4 of the Federal Eurojust Act (*Eurojust-Gesetz*). As in practice, the necessity of the information transfer cannot be assessed from the national authorities' restricted perspective; they have to rely on Eurojust's expertise to ascertain the validity of the request.²³³

As stated in chapter 8, in practice, the judiciary has a tendency to restrict criminalisation. According to a study in 2008 on waste crime, an expert criticised this restrictive approach.²³⁴

Public Prosecutor's Office

The whole process of investigating criminal activities up to the stage of charging the accused with the crime is the business of the public prosecutor's office (*Staatsanwaltschaft*), as is the presentation of the prosecutor's case at trial (§§ 141 et seq. GVG).²³⁵ The public prosecutor's office is an executive authority but also, like the courts, an independent organ administering the law. In particular, it must also investigate and assess facts which tend to exculpate a suspect or the accused (§ 160 StPO). It is thus a strictly neutral institution, and not a party to the case in a criminal trial. However, it may receive directives from the relevant minister of justice (on federal or state level, §§ 146, 147 GVG).

The public prosecutor's office is attached to every court empowered to deal with criminal matters. In the lower courts, the public prosecution office falls within the sphere of authority of the relevant individual state (*Land*). At the level of the Federal Court of Justice and in cases of first instance before the Higher Regional Court, the public prosecutor's office is part of the Federal Government (*Bund*). At this level, the office is directed by the Federal Attorney General (*Generalbundesanwalt*).

It is not common for the public prosecutor's offices to have special environmental departments. According to the report of the BfU and the Max-Planck-Institute for Foreign and International Criminal Law of 2003, such departments have only been set up in some of the larger metropolitan areas (e.g., Berlin, Hamburg, Frankfurt am Main), which have several prosecutors at their disposal who are responsible for all environmental crimes, in addition to other topics.²³⁶

Being in charge of the investigations according to §§ 152, 160 StPO, the public prosecutor's office makes use of and issues instructions to its auxiliaries, in particular the police (§ 152 GVG). As described below, it is thereby outweighed by the police, which in most cases conduct the investigations independently of the public prosecutor's office.

Furthermore, the public prosecutor's office is entitled to request information from all authorities during investigation proceedings (§ 161 para. 1 StPO). According to the guidelines concerning criminal and administrative penal proceedings (*Richtlinien für das Straf- und Bußgeldverfahren*, RiStBV)²³⁷, which are addressed primarily to the public prosecutor's office, the prosecutor shall, when investigating secondary criminal offences and administrative penal offences, cooperate with the competent administrative authorities and give them the opportunity to make statements, if appropriate (no. 255, 272 RiStBV).

²³² http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_05122012_III19350B13002010.htm.

²³³ Ambos, *Internationales Strafrecht*, § 13 annotation 17.

²³⁴ Hecker, et al., *Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung*, p. 60.

²³⁵ The following refers to Robbers, *An Introduction to German Law*, annotations 537-540.

²³⁶ BfU/Max-Planck-Institute for Foreign and International Criminal Law, *Organised environmental crime in the EU Member States*, p. 516. Concerning Berlin, an interview with the Berlin Public Prosecution Office of 4 June 2014 confirmed that according to the annual plan of task division (*Geschäftsverteilungsplan*), two public prosecutors are responsible for environmental crimes.

²³⁷ http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_01011977_420821R5902002.htm.

Concerning organised environmental crime, the public prosecutor's office does not cooperate with NGOs, as this may impair their reputation of neutrality. However, there is an indirect cooperation, also in the case of police investigations, as the public prosecutor's office is obligated to record and investigate every reported crime.²³⁸ According to a study in 2008, an expert criticised that environmental crimes were unpopular with prosecutors at the local level and thus neglected.²³⁹

Police

The central authority in fighting environmental crime lies with the police authorities, which have a duty independent of the public prosecutor's office to investigate if they suspect that a crime has been committed, but they must inform the public prosecutor's office immediately. In practice, however, the police are leading the majority of investigations concerning crimes, and the public prosecutor's decision on charge and dismissal usually follows the results of the police investigations without any further investigations by the public prosecutor's office.²⁴⁰ In some areas of crime, such as economic crimes, however, the public prosecutor's office is involved to a considerable degree in the investigation of serious cases. Furthermore, the police involve the public prosecutor's office if they want to be sure that the investigations comply with legal requirements in order to gather evidence which can be accepted by the courts.²⁴¹

The structure of the police organisation is oriented along the federal organisation of Germany.²⁴² Each state commands its own police force. The organisation of the state police may vary depending on the state's size, its financial power, and the political intentions. However, all state police are ultimately responsible to the respective Ministry of the Interior, and all states have a State Criminal Police Office (*Landeskriminalamt*, LKA).

In all the states, there is a basic difference between the protective forces (uniformed police) and the criminal police. In the majority of states, uniformed police investigate small and petty crimes, as well as non-criminal offences. In addition, they are responsible for the "first strike"²⁴³ and participate in searches in areas falling under the responsibility of the criminal police. The criminal police are charged with fighting those crimes which may be described as serious offences. Cases of serious environmental crime are thus transferred to the criminal police after initial investigation by the uniformed police force.

In each state, there is a State Criminal Police Office (*Landeskriminalamt*, LKA), securing the cooperation of the federal state and the single states in order to fight crime. In general, their focus is not on investigations, but on coordination and on managerial authority. They collect information, evaluate it and coordinate non-local activities, searches, and criminal-technological research. In addition to other offences, the State Criminal Police Offices are responsible for serious offences in the areas of economic and environmental crime, as well as organised crime. Accordingly, each of the LKAs has one department that is responsible for environmental crime (mostly together with economic crime), and some of these offices have special units for environmental crimes.

²³⁸ BfU/Max-Planck-Institute for Foreign and International Criminal Law, Organised environmental crime in the EU Member States, p. 521.

²³⁹ Hecker, et al., Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung, p. 60.

²⁴⁰ BfU/Max-Planck-Institute for Foreign and International Criminal Law, Organised environmental crime in the EU Member States, p. 518.

²⁴¹ BfU/Max-Planck-Institute for Foreign and International Criminal Law, Organised environmental crime in the EU Member States, p. 518-519.

²⁴² The following refers to BfU/Max-Planck-Institute for Foreign and International Criminal Law, Organised environmental crime in the EU Member States, p. 485 et seq.

²⁴³ General measures for fighting crime, encompassing all non-delayable statements and measures for solving a criminal offence.

For example, the LKA Berlin has two divisions (*Kommissariate*) that deal exclusively with environmental crimes.²⁴⁴ Since Berlin is a metropolitan state, these units are able to investigate all environmental crimes, including the work at the scene. In addition, the LKA Berlin has its own Scientific-Technical Department, a unit in of which is dealing with environmental crimes and supporting the investigating units. Thus, the LKA Berlin has the awareness, the expertise, the equipment, the experience, and the time necessary to deal with environmental crimes in an appropriate way. Sometimes, however, the financial resources are lacking to provide for regular external training. Although not every element of this particular structure could be transferred to the larger federal states, let alone other (centralised) countries, the combination of specialist units exclusively responsible for environmental crimes and supporting scientific-technical units can be considered as an example of best practice.

To coordinate crime suppression on the national and international level, the Federal Criminal Police Office (*Bundeskriminalamt*, BKA) was established in Wiesbaden as an upper government agency directly subordinate to the Federal Ministry of the Interior.²⁴⁵ According to its legal mandate defined by § 1 of the Law on the Bundeskriminalamt and the Cooperation between Federal and State Authorities in Criminal Police Matters (*Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeitlichen Angelegenheiten*, BKAG), it is the central office for the cooperation between the federation and the states in criminal police matters. Thereby, the BKA works as a supporting partner with the police forces of the federation and of the individual states but does not have the competence to issue instructions to them. It supports the police information and knowledge exchange systems and collects information coming from the states. Concerning criminal offences, the BKA coordinates both federal and state criminal police in investigating crimes that involve more than one state and that are of international significance or otherwise of considerable significance. The fight against environmental crime is not of original concern for the BKA. In practice, there are about 300 occasions per year to deal with cases concerning environmental and consumer protection offences.²⁴⁶

As the central police agency in Germany, the BKA is the key office for international police cooperation. In general, it is responsible for police communications with the law enforcement and judicial authorities as well as with other public authorities in other countries. In particular, it serves as the interface with Europol and Interpol. The responsible office is the German National Contact Office at Europol (liaison office), uniting staff from the BKA, the states, as well as customs officers. These Europol liaison officers are also responsible for the area of environmental crime. The BKA is also involved in the cooperation with other countries on international criminal prosecution and execution²⁴⁷, which is regulated by the Act on International Mutual Assistance in Criminal Matters (*Gesetz über die international Rechtshilfe in Strafsachen*, IRG) and the Directives on International Cooperation in Criminal Matters (*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten*, RiVAST). Moreover, the BKA maintains a global network of currently 64 liaison officers serving in 50 countries who obtain information of significance for law enforcement in Germany.²⁴⁸ According to an interview with a representative of the BKA, the international police cooperation is considered good and worth being increased.²⁴⁹

In the area of organised environmental crime, the activities of the BKA are mostly evaluative, e.g., gathering information through special administration reporting duties, i.e., within the framework of national and international exchange of information and news. The BKA also uses the Schengen Information System (SIS), for which it is also the national central office (SIRENE²⁵⁰). In general, the police authorities have control over police

²⁴⁴ This and the information that follow have been obtained through an interview with LKA Berlin of 28 May 2014.

²⁴⁵ http://www.bka.de/nn_194538/EN/TheBKA/OurMandate/ourMandate__node.html?__nnn=true.

²⁴⁶ Interview with BKA of 6 June 2014.

²⁴⁷ Interview with BKA of 6 June 2014.

²⁴⁸ http://www.bka.de/nn_195530/EN/TheBKA/Tasks/InternationalFunction/internationalFunction__node.html?__nnn=true.

²⁴⁹ Interview with BKA of 6 June 2014.

²⁵⁰ Supplementary Information Request at the National Entry.

data collected internally or by Europol, whereas the public prosecution office may only gain access to this information via the police authorities. According to the Federal Europol Act (*Europolgesetz*), the BKA is obliged to inform the public prosecutor's office about relevant data without delay, but has a margin of leeway concerning the transfer of the data. This situation is hardly compatible with the principle that the public prosecutor's office has overall authority over criminal investigative proceedings (§ 161 StPO).²⁵¹

Generally, experts criticise the low significance of the fight against environmental crime compared to other areas of crime, and a lack of qualified staff as well as technical and financial resources.²⁵² According to a study, the decrease in reported environmental crimes corresponds to a decrease in funding for environmental investigations undertaken by authorities in some federal states, whereas in federal states without staff reductions, the registered crimes remained constant.²⁵³

Customs Customs is a federal-government administration headed by the Federal Ministry of Finance.²⁵⁴ In order for Customs to be actively involved in a criminal proceeding, there needs to be a connection between the crime and matters relating to either borders or taxes. In the area of environmental crime, Customs' task encompasses the control of the regulations and limitations in cross-border traffic of goods, also covering the Endangered Species Agreement, as well as environmental protection in connection with waste treatment. There are often overlapping areas of activities with the police forces. Thus, in order to handle crimes with diverse aspects, there are often SOKOS (task forces) with parity representation of the separate departments of customs and police forces.

The Customs Investigation Services (*Zollfahndungsämter*) are local institutions responsible for pursuing customs and tax law offences as well as non-criminal offences. As auxiliary forces to the public prosecutor's office, they are also responsible for investigating environmental crime. The Customs Criminal Office (*Zollkriminalamt, ZKA*) in Köln is coordinating and steering these investigations. Furthermore, it is the central customs office for the collection of information and data. On the international level, the ZKA cooperates through its liaison officers with Europol. A regional office of the World Customs has its seat at the ZKA premises so that a close link for information exchange is available. In the area of wildlife crime, the ZKA is the official implementation agency in the sense of Article IX of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and is responsible for the exchange of information with the CITES Office for all matters relating to fighting crime connected to endangered species.

The Customs Investigation Service and the Customs Criminal Office (ZKA) cooperate closely with national and international agencies.

Individuals

As already stated above, individuals may report crimes or make an application for criminal prosecution with the public prosecutor's office, with authorities and officials in the police force, or with the Local Courts (§ 158 para. 1 StPO). However, due to the lack of individual victims in most environmental crimes, people are rather reluctant to do so.

If an individual is a victim of an environmental offence, the Code on Criminal Procedure confers certain rights on him or her. First, the victim may lodge a complaint against a decision of the public prosecutor's office not to

²⁵¹ Ambos, *Internationales Strafrecht*, § 13 annotation 9.

²⁵² Hecker, et al., *Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung*, p. 58-59; Saliger, *Umweltstrafrecht*, annotation 533 with further references; see also Bundesministerium des Innern/Bundesministerium für Justiz, *Zweiter Periodischer Sicherheitsbericht*, p. 278.

²⁵³ Hecker, et al., *Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung*, p. 58.

²⁵⁴ The following refers to BfU/Max-Planck-Institute for Foreign and International Criminal Law, *Organised environmental crime in the EU Member States*, p. 506 et seq.

prosecute (§ 172 StPO). Second, victims may bring a private prosecution without the involvement of the public prosecutor with respect to certain offences enumerated in § 374 StPO. However, environmental offences are not included. Third, a victim may participate in the criminal proceedings as a private accessory prosecutor (*Nebenkläger*) under certain conditions (§ 395 StPO). Environmental crimes fulfil these conditions either if someone's relative has been killed by an unlawful act, or if someone has successfully lodged a complaint against a decision of the public prosecutor's office not to prosecute (para. 2), and possibly in further cases if, for particular reasons, that appears to be necessary to safeguard the interests of the relevant person (para. 3). Fourth, the aggrieved person or his or her heir is entitled to bring a property claim as part of the criminal proceedings before the Local Court, and may have legal representation for this purpose (§ 403 StPO). In that case, the court is obliged to make a finding as to the claim as part of the overall verdict, which is equivalent to a judgement in civil litigation (§ 406 para. 3 StPO). Finally, §§ 406d to g StPO confer some rights on victims of crimes, e.g., to be notified, upon application, of the termination of proceedings and of the outcome of court proceedings to the extent that they relate to them, and § 406h StPO requires that the relevant persons are informed of these rights as soon as possible.

12.2 Procedural provisions on organised crime relating to environmental crime

Similar to the substantial provisions on organised crime, there are no procedural rules explicitly focused on organised crime, only particular provisions which allow the police to conduct special measures of investigations in the context of organised crime, e.g., telephone tapping or acoustic surveillance of premises. These provisions refer to lists of offences that are deemed to be typically linked to organised crime, for instance, § 100a para. 2 StPO concerning telephone tapping. However, environmental offences are not part of these offences.²⁵⁵ Thus, according to the opinion of the legislature, environmental crimes do not belong among those types of crimes that are typically relevant in the context of organised crime in Germany. They may only indirectly become relevant if participation in a criminal organisation or money laundering is one of the subject-matters of the investigations (e.g., § 100a para. 2 no. 1c and m StPO). Hence, as with the substantial provisions on organised crime, environmental crime plays no significant role.²⁵⁶

²⁵⁵ In an interview with BKA of 6 June 2014, it was suggested to include aggravated cases of environmental offences according to § 330 StGB.

²⁵⁶ BfU/Max-Planck-Institute for Foreign and International Criminal Law, *Organised environmental crime in the EU Member States*, p. 223-225.

13. Administrative environmental offences: instruments

The system of administrative penal law following the Administrative Offences Act (*Ordnungswidrigkeitengesetz*, OWiG) was described in the chapter on principles of substantive criminal law above. Like the secondary criminal law, the administrative penal offence provisions are contained in the relevant environmental laws. As already stated above, the maximum fine is €1,000 if the relevant law does not provide a penalty itself (§ 17 para. 1 OWiG). However, environmental laws regularly levy much higher fines, usually up to €50,000, as § 17 para. 4 OWiG requires that the administrative penal fine exceeds the financial benefit that the perpetrator obtained by committing the offence. Besides or instead of a fine, confiscation of objects (§ 22 OWiG) or forfeiture (§ 29a OWiG) may be imposed by the administrative authorities, which have jurisdiction to prosecute and sanction administrative penal offences (§ 35 OWiG). In contrast to criminal procedure, the principle of discretionary prosecution (*Opportunitätsprinzip*) applies to administrative penal procedure, allowing the authorities to make use of administrative penal fines only as a last resort. This explains why in most cases investigation proceedings concerning administrative penal fines start at the police service.²⁵⁷

Concerning the environmental matters covered by Article 3 ECD, the relevant environmental laws contain provisions enumerating a multitude of administrative penal offences, which complement criminal provisions. In some cases, however, the same conduct may be punishable both as a criminal offence and as an administrative penal offence. In this case, only the former is applied. However, if no criminal sanction is imposed, an administrative fine may be imposed (§ 21 OWiG).

- **Water:** § 103 para. 1 of the Federal Water Management Act (*Wasserhaushaltsgesetz*, WHG) enumerates 18 cases of conduct which may be sanctioned as administrative penal offences if committed either intentionally or negligently, e.g., the use of a body of water without a permission according to § 8 para. 1 WHG, or the discharge of wastewater in a wastewater treatment plant without a permit. Some of these offences may lead to a fine of up to €50,000. The fine for the other offences can reach up to €10,000.
- **Soil:** According to § 26 of the Federal Soil Protection Act (*Bundesbodenschutzgesetz*, BBodSchG), intentional or negligent infringements of an ordinance issued under this Act, of certain enforceable decisions, or on the duty to provide information on self-monitoring measures, may be sanctioned by a fine up to €10,000. In certain serious cases, e.g., concerning enforceable decisions to prevent danger from the soil or the groundwater, the fine may reach up to €50,000.
- **Air:** § 62 of the Federal Immission Control Act (*Bundesimmissionsschutzgesetz*, BImSchG) enumerates in para. 1 to 3 a variety of administrative penal offences, e.g., the erection of a facility subject to a permit that is done without a permit, the violation of certain enforceable decisions, etc. Para. 3 concerns certain infringements of directly applicable provisions of EU law, provided that these provisions are declared punishable as administrative penal offences by a federal ordinance. Certain offences may lead to a fine of up to €50,000. The fine for the other offences can reach €10,000.
- **Waste:** § 69 of the Federal Recycling Management Act (*Kreislaufwirtschaftsgesetz*, KrWG) enumerates a multitude of cases of conduct which may be sanctioned as administrative penal offences if committed either intentionally or negligently, e.g., the erection of a landfill without the necessary planning approval, or dealing with hazardous waste without authorisation. The more serious offences of para. 1 may be sanctioned by a fine of up to €100,000. Less serious offences in para. 2 can be punished with a fine of up to €10,000. Furthermore, § 18 of the Waste Shipment Act (*Abfallverbringungsgesetz*, AbfVerbrG) implementing EC Regulation no. 1013/2006 on waste shipment provides sanctions for violations of both this law and in conjunction with the Waste Shipment Ordinance (*Abfallverbringungsbußgeldverordnung*, AbfVerbrBußV) for certain infringements of EU Ordinances on waste shipment. In the latter case, if it concerns the consent of the authorities to the shipment of waste or

²⁵⁷ Michael Kloepfer, *Umweltrecht*, 3rd edition, München 2004, § 7 annotation 80.

a prohibition on the import or export of waste, the fine can reach up to €100,000. In certain other cases, the fine can reach up to €50,000. Otherwise the general maximum limit is €20,000.

- **Nuclear material:** According to § 46 of the Atomic Energy Act (*Atomgesetz*, AtomG), certain conduct relating to nuclear material may be sanctioned as an administrative penal offence, e.g., the shipment of such material without having provided evidence of the necessary compulsory cover. The fine for this offence can reach €50,000, but in the case of minor offences, it can lead to fines of up to €500. If certain offences have been committed intentionally, this may also lead to the confiscation of certain objects (§ 49 AtomG).
- **Nature Conservation:** § 69 of the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*, BNatSchG) enumerates a multitude of administrative penal offences concerning nature conservation. Para. 1 concerns the disturbance of animals living in the wild; para. 2 certain conduct detrimental to wild animals or plants or their developmental stages. Para. 3 deals with offences concerning, among other things, protected areas and trade in protected species. Para. 4 concerns certain violations of EC Regulation no. 338/97 on the protection of wild fauna and flora by regulating trade therein; para. 5 covers certain violations of EEC Regulation no. 3254/91 prohibiting the use of leghold traps in the Community and related conduct. The fine for offences under para. 1, 2 and 5, as well as for certain cases of para. 3 and 4 is up to €50,000, otherwise the maximum is €10,000.

Concerning ship-source pollution according to the MARPOL Convention and Directives 2005/35/EC as amended by Directive 2009/123/EC, the MARPOL Contravention Ordinance (*MARPOL-Zu widerhandlungsverordnung*, MARPOL-ZuwV) provides administrative penal offences for violations of annexes I to VI of the MARPOL Convention, and for related offences. According to § 9 MARPOL-ZuwV, the fine is, dependent on the respective offence, up to €50,000, €30,000, or €10,000. Section 10 of the Ordinance determines the competent fining authorities.

In contrast to criminal law, administrative penal offences also apply to legal persons (§ 30 OWiG). Thus, as stated above, under § 30 OWiG, legal persons can be held liable for offences referred to in Articles 3 and 4 ECD where such offences have been committed for their 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 (Article 6 para. 1 ECD, Article 8b para. 1 Directive 2005/35/EC).

According to a study by Meinberg, the less important violations of environmental provisions are handled through administrative fines rather than criminal sanctions.²⁵⁸ Most of the procedures in administrative penal law with respect to environmental violations end with a decision to impose an administrative fine.²⁵⁹ The amount of the sanction is, however, on average lower than what would be imposed through the criminal law.²⁶⁰ According to another study by Lutterer and Hoch, the administrative penal law has a higher probability of a sanction being imposed than the criminal procedure; however, the average fines imposed through the criminal system were higher than the average fines imposed through administrative penal law. For both cases, the formal statutory possibilities to impose much higher sanctions are rarely used.²⁶¹ Thus, as already stated above in the chapter on criminal sanctions in practice, administrative fines may be more efficient for minor violations whereas criminal sanctions are more appropriate for the most serious of cases²⁶².

²⁵⁸ Volker Meinberg, Empirische Erkenntnisse zum Vollzug des Umweltstrafrechts, *Zeitschrift für die gesamte Strafrechtswissenschaft* 100 (1998) p. 112-157. The text follows the account of main findings by Faure/Svatikova, *Journal of Environmental Law* 2012, 25.

²⁵⁹ 53% according to the table of Wolfram Lutterer/Hand J. Hoch, *Rechtliche Steuerung im Umweltbereich*, 1997 presented by Faure/Svatikova, *Journal of Environmental Law* 2012, 26; see also Meinberg, *NJW* 1990, 1280.

²⁶⁰ Faure/Svatikova, *Journal of Environmental Law* 2012, 25 referring Meinberg.

²⁶¹ Faure/Svatikova, *Journal of Environmental Law* 2012, 26 referring Lutterer/Hoch.

²⁶² Faure/Svatikova, *Journal of Environmental Law* 2012, 32-33; Ranisek, *NK-StGB*, Vor §§ 324 ff, annotation 36.

14. The role of administrative authorities

14.1 Administrative penal authorities

According to § 35 OWiG, administrative authorities have the jurisdiction to prosecute and punish administrative penal offences. There are no special punishment authorities, only an internal division of responsibilities within the competent authority. According to § 36 para. 1 no. 1 OWiG, the competent authority is often designated by the statute describing the relevant administrative penal offence, e.g., in § 70 of the Federal Nature Conservation Act, which assigns responsibility for this task, dependent on the respective offence, to the Federal Agency for Nature Conservation (*Bundesamt für Naturschutz*, BfN), the main customs office (*Hauptzollamt*), or the competent authority pursuant to the legislation of the states (*Länder*). Otherwise, substantive jurisdiction lies within the highest substantively competent state (*Land*) authority, or, if the law is implemented by federal authorities, the substantively competent Federal Ministry (§ 36 para. 1 no. 2 OWiG). These competences may be delegated by legal ordinance to other authorities (§ 36 para. 2 and 3 OWiG).

If there are indications that the offence constitutes a criminal offence, the administrative authority transfers the case to the public prosecutor's office. If criminal proceedings are not initiated then the case is returned to the administrative authorities (§ 41 OWiG). The public prosecutor is also responsible for prosecution if there is a connection between a criminal and an administrative penal offence (§§ 40, 42 OWiG). Otherwise, the public prosecutor's office is only involved in administrative penal offences if the accused objects to the fining notice according to § 67 OWiG. In this event the prosecutor decides on the submission of the files to the District Court judge, and represents the accusation in the court proceedings (§ 69 para. 3 and 4, § 71 para. 1 referring to § 152 para. 1 StPO).

In the main proceedings, the court becomes responsible for punishing the administrative penal offence (§ 35 OWiG). According to § 46 para. 1 OWiG, as a rule, provisions concerning criminal proceedings, in particular the Code on Criminal Procedure, applies *mutatis mutandis* to the administrative penal offence proceedings. The court of first instance is the District Court. The Regional Court functions as court of appeals on points of fact and law regarding certain decisions of the District Court (§ 73 para. 1 GVG, §§ 304 et seq. StPO); otherwise, it is up to the Higher Regional Court to decide on points of law only (§ 121 para. 1 no. 1a GVG). If, thereby, they want to deviate from a decision of another Higher Regional Court, they have to submit the case to the Federal Court of Justice (§ 121 para. 2 GVG). Administrative penal offences are enforced by subdivisions of each level of the court system (§ 46 para. 7 OWiG).

In practice, it is mainly the police that investigate administrative penal offences and forward the files to the competent administrative authority.²⁶³ Thereby, as a rule, they have the same rights and duties as apply to the prosecution of criminal offences (§ 53 OWiG).

14.2 Environmental enforcement authorities

According to Article 30, 83 GG, enforcement of legislation lies within the competence of the federal states (*Länder*). Thus, as a rule, the *Länder* set up enforcement authorities and the respective procedures (Article 84 para. 1 GG). In that case, the federal government may only exercise a legal control (*Rechtsaufsicht*), not a supervisory control (*Fachaufsicht*). In all federal states, there is a Ministry for Environment. Larger states also have intermediate and lower levels of environmental administration; the other states, in particular the metropolitan states (Berlin, Bremen, Hamburg) only have a lower level. The lower authorities usually act both as lower state authorities and as local authorities, thereby exercising competences of self-administration independent of the federal state (Article 28 para. 2 GG).

In environmental matters, there are certain special authorities on the different levels, such as the State Environment Offices (*Landesumweltämter*) in several federal states. As a rule, however, the general

²⁶³ Meinberg, NJW 1990, 1278-1279.

administrative authorities act as environmental authorities, e.g., as with the Lower Nature Conservation Authorities.

The powers of the competent authorities to enforce national and EU environmental law are described in the relevant national legislation and in EU legislation directly applicable in Germany, mainly EU regulations. All major environmental laws include a section on control powers of the competent authorities in order to ensure compliance. In the chapter on special criminal procedure provisions on environmental crimes, it has been stated that several environmental laws obligate the operators of certain facilities and other persons to give certain information, e.g., relating to self-monitoring, to the environmental authorities. In addition to obtaining information from the controlled persons, the authorities may gather information themselves. For instance, § 52a of the Federal Immission Control Act (BImSchG) contains requirements for the inspection of sites in accordance with the Directive on Industrial Emissions 2010/75/EU. Besides such explicit means, § 52 BImSchG allows the authorities to use any means necessary to ensure compliance with the Federal Immission Control Act and related legislation.

Thus, the environmental authorities have pro-active monitoring instruments at their disposal to ensure compliance with the relevant legislation. However, as already mentioned in the chapter on criminal procedure provisions applicable to environmental crime, in practice the environmental authorities lack resources, in particular staff and measuring instruments.²⁶⁴ This situation is aggravated by the fact that, for financial reasons, in recent times environmental authorities have been diminished, e.g., by dissolving special authorities like the state environmental agencies and transferring their competences to the lower administration authorities.²⁶⁵

Therefore, whereas in theory the administrative authorities should be able to bring any information relevant to environmental crime to the attention of the prosecutors, in practice they are not always able to do so, and, for this and other reasons stated above, are rather reluctant to file such information with the prosecutor's office.

The state governments have issued administrative guidelines on the cooperation between the administrative authorities and the prosecutor's office concerning the fight against environmental crimes.²⁶⁶ In addition to prescribing cooperative measures such as regular meetings, these guidelines instruct the administrative authorities to inform the public prosecutor's office of any suspicion concerning a criminal offence. However, several of these guidelines differentiate between absolute duties to inform – concerning more serious environmental crimes – and relative duties to inform in the case of less serious environmental crimes.²⁶⁷ The latter are dependent upon the authority's administrative discretion.

²⁶⁴ See also Hecker, et al., *Abfallwirtschaftskriminalität im Zusammenhang mit der Osterweiterung*, p. 60-61.

²⁶⁵ Sachverständigenrat für Umweltfragen (SRU), *Umweltverwaltungen unter Reformdruck: Herausforderungen, Strategien, Perspektiven, Sondergutachten*, Februar 2007.

²⁶⁶ Kloepfer/Vierhaus, *Umweltstrafrecht*, annotation 46, with an overview on these guidelines.

²⁶⁷ E.g. the current administrative guidelines of Baden-Württemberg and Schleswig Holstein.

15. Implementation of Environmental Liability Directive and links between environmental liability and responsibility for environmental crimes

15.1 Implementation of Directive 2004/35/EC

The Act concerning the Prevention and Remedying of Environmental Damage of 10 May 2007 transposed Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive, ELD). Its structure adheres closely to the ELD's provisions. Section 1 EDA clarifies that the EDA applies if and only to the extent the prevention and remedying of environmental damage is not already (sufficiently) addressed in legislation enacted by the Federal Government or the *Länder*. Section 2 EDA defines the relevant terms used in the EDA and § 3 EDA defines the scope of application. Sections 4-8 EDA establish specific obligations to prevent and remedy environmental damage. Section 9 EDA concerns prevention and remediation costs. According to this provision, the operator generally bears the prevention and remediation costs unless he can prove, for example, that the environmental damage or imminent threat of such damage was caused by a third party.²⁶⁸ Section 10 EDA determines which natural or legal persons are entitled to submit a request for action to the competent authority. Section 11 EDA concerns information on legal remedies, and organisations' access to justice.²⁶⁹ The final provisions of the Act are: § 12 EDA (Cooperation between Member States), § 13 EDA (Temporal application) and § 14 (Transitory provision on Annex 1). Finally, three Annexes are attached to the EDA.²⁷⁰

When the Federal Government transposed the ELD, it also amended the Federal Water Act (*Wasserhaushaltsgesetz*) and the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*), which the EDA refers to in its § 2. The government did not amend the Federal Soil Protection Act (*Bundesbodenschutzgesetz*), which is also mentioned in § 2 EDA "because it considered that it was not necessary to do so".²⁷¹

15.2 Subsequent amendments to the EDA

The EDA has been amended several times since its entry into force.²⁷² However, nearly all amendments were of a formal rather than a substantial nature, which required adapting the wording of the EDA to amendments to other Acts, such as the Federal Water Act or the Federal Nature Conservation Act after constitutional reforms²⁷³, or due to national obligations to transpose EU Directives. A substantial amendment was implemented in August

²⁶⁸ See below, 15.4 for details.

²⁶⁹ See below, 15.3.

²⁷⁰ Annex 1 on occupational activities (as referred to in § 3 para. 1 EDA), Annex 2 International Agreements (as referred to in § 3 para. 3 No 3 EDA) and Annex 3 International Agreements (as referred to in § 3 para. 3 No 5 EDA).

²⁷¹ See for this "two-tier approach" also BIO Intelligence Service, Implementing challenges and obstacles of the Environmental Liability Directive, Chapter on Germany, Annex - Part A: Legal Analysis of the national transposing legislation prepared for European Commission – DG Environment. In collaboration with Stevens & Bolton LLP, 2013, p. 113.

²⁷² All amendments to the EDA are listed here: <http://www.buzer.de/gesetz/7698/1.htm>.

²⁷³ BIO Intelligence Service, Implementing challenges and obstacles of the Environmental Liability Directive, Chapter on Germany, p. 114.

2013 after the ECJ Decision *Trianel Kohlekraftwerk Lünen* (C-115/09) on the “Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice”. The Court held that “[EU law] precludes legislation which does not permit non-governmental organisations promoting environmental protection [...] to rely before the courts [...] on the infringement of a rule flowing from the environment law of the Union and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.”²⁷⁴ The wording of § 11 EDA was subsequently adapted to the Law on supplementary provisions governing actions in environmental matters that was amended in accordance with the ECJ decision.

15.3 Scope of application of the EDA in comparison to the NCA, SPA and Water Act

The EDA is supplemented by other laws (i.e., the Federal Water Act, Federal Nature Conservation Act and the Federal Soil Protection Act). It only applies if these other laws do not regulate environmental damage-related issues in more detail.²⁷⁵

In several cases, the **Federal Nature Conservation Act** (NCA) is more specific than the EDA. For example, the NCA does not limit liability to occupational activities listed in Annex I EDA and thus applies to any person damaging the environment. Furthermore, it applies to all species and habitats, not only those protected by the Birds and Habitats Directives.²⁷⁶ Unlike the EDA, it also covers negative effects on climate change, air quality and characteristic landscapes. In contrast, the actual compensation scheme under the EDA is wider than that of the NCA. The EDA also covers “compensatory” remediation, i.e., “action taken to compensate for interim losses occurring from the date of damage until primary remediation has achieved its full effect”.²⁷⁷

The **Federal Soil Protection Act** (SPA) is generally broader than the EDA. Unlike the EDA, it also covers soil impairments that do not damage health.²⁷⁸ Like the NCA, the SPA does not only apply to contamination caused by specific occupational activities.²⁷⁹ In addition, the EDA only stipulates obligations for future environmental damage and does not cover disused hazardous sites, which are, however, addressed by the SPA. Finally, both the SPA and the EDA contain provisions regulating the obligation to avert dangers (§ 5 EDA and § 7 SPA). However, § 7 SPA goes beyond what is required by § 5 EDA.²⁸⁰

²⁷⁴ Judgment of the Court (Fourth Chamber) of 12 May 2011, Case C-115/09 (*Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*), Summary of the Judgment, annotation 1.

²⁷⁵ Cp. BIO Intelligence Service, *Implementing challenges and obstacles of the Environmental Liability Directive*, Chapter on Germany, p. 123.

²⁷⁶ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds and Council Directive 92/43/EEC of May 21, 1992 on the conservation of natural habitats and of wild fauna and flora.

²⁷⁷ Andrea Eberlein/Gerhard Roller, *Application of the Environmental Liability Directive (ELD) in practice. The German experience*, Institute for Environmental Studies and Applied Research, Bingen, 2012, p. 8.

²⁷⁸ Martin Beckmann/Antje Wittmann, *Umweltschadengesetz*, in Martin Beckmann/ Wolfgang Durner/ Thomas Mann/ Marc Röckinghausen (Eds.), *Landmann/Rohmer, Umweltrecht, Band I*, München, 2013, § 1 UmwSchG annotation 15.

²⁷⁹ BIO Intelligence Service, *Implementing challenges and obstacles of the Environmental Liability Directive*, Chapter on Germany, p. 118/119.

²⁸⁰ Cp. Ralf Brinktrine, *Der Bodenschutz im Umweltschadengesetz*, ZUR 2007, 346.

Official measures taken under the **Federal Water Act** against the responsible person require illegal conduct. Thus, the authorities are not entitled to intervene if the person causing the damage invokes a permit. Furthermore, some of the federal states' water laws only stipulate that the environmental damage must be removed whereas the EDA goes further as it also requires that the previous state is in fact restored. Thus, the EDA is more specific in that respect as it requires also the restoration of damaged waters and allows for measures to be taken irrespective of existing permits.²⁸¹

The EDA has also brought about certain improvements. In general, the EDA establishes obligations by law. Thus, in contrast to other administrative environmental laws, the competent authority does not need to take certain measures to create obligations applicable to those responsible for environmental damage. The obligation to remedy damage exists by virtue of the law. The authority merely determines the specific content of the remedying measures. Furthermore, the EDA obliges the operator to inform the competent authority of all relevant aspects concerning environmental damage or any imminent threat of such damage.²⁸² Finally, its §§ 10 and 11 also extend the protection and rights of third parties.

15.4 Rules on costs

According to § 9 EDA, the federal states are entitled to enact their own legislation to settle the reimbursement of costs. Exceptions from the obligation to bear the costs can be made, for example, in cases in which the damage was caused by a third party although all suitable preventive measures had been adopted by the operator or if the operator successfully invokes permit or state-of-the-art defences.²⁸³ The reason for such exceptions is not to legalise the damage but to protect legitimate interests if the operator acts in accordance with a permit or adheres to the state of the art. Furthermore, an exemption from costs does not exempt from the obligations established under §§ 4-6 EDA.²⁸⁴ However, the federal states have not yet enacted such optional provisions on costs.²⁸⁵

The general approach of the federal government to leave it to the federal states to regulate the abovementioned cases has been criticised for potentially leading to legal fragmentation and disturbing the economic unity.²⁸⁶

15.5 Links between environmental liability and criminal liability

The EDA does not contain criminal sanctions or direct links to environmental criminal law. Disregarding the obligations under § 5 EDA (Obligation to take preventive measures) or § 6 EDA (Obligation to take the necessary remedial measures) is not punishable under criminal law or subject to administrative fines. However, certain conduct relating to the EDA can be sanctioned by environmental criminal law or by administrative penal law,

²⁸¹ Beckmann/Wittmann, Landmann/Rohmer, Umweltrecht, § 1 UmwSchG annotation 13.

²⁸² See below, 15.5.3.

²⁸³ Beckmann/Wittmann, Landmann/Rohmer, Umweltrecht, § 9 UmwSchG annotation 12; see also Deutscher Bundestag, Drucksache 16/3806, 13.12.2006, Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden, p. 26.

²⁸⁴ Beckmann/Wittmann, Landmann/Rohmer, Umweltrecht, § 9 UmwSchG annotation 12.

²⁸⁵ BIO Intelligence Service, Implementing challenges and obstacles of the Environmental Liability Directive, Chapter on Germany, p. 115; Gerhard Roller, Das Umweltschadensgesetz, Bislang kaum Anwendungsfälle in der Praxis, KGV-Rundbrief 2+3/2009, 38.

²⁸⁶ Brinktrine, ZUR 2007, 344.

e.g., soil pollution by § 324a StGB or § 26 SPA. In addition, breaching §§ 5, 6 EDA can, under the German law of torts, potentially lead to liability for damages pursuant to § 823 para. 2 of the German Civil Code (*Bürgerliches Gesetzbuch*).²⁸⁷

Assuming that an action causing environmental damage under the EDA is at the same time sufficiently severe to be covered by environmental criminal provisions, a criminal proceeding would arguably not take into account whether the perpetrator has taken measures under the EDA to remedy the damage. Section 46a StGB²⁸⁸ holds that a court is entitled to alleviate criminal sanctions if the perpetrator voluntarily endeavoured to reconcile with the victim or make restitution for damage done to the victim or compensated the major part of the damage. The first problem with this provision is that environmental crimes mostly do not have a victim in the sense that an individual is the target of the crime. However, it is generally assumed that the general public is, arguably, a victim of environmental crimes. Thus, a perpetrator could endeavour to compensate the damage done to the general public.²⁸⁹ However, the decisive requirement of § 46a StGB is the voluntary effort to achieve reconciliation and make restitution. This is not the case with remediation under the EDA as the latter is required by law and thus not (necessarily) done voluntarily.

As mentioned above²⁹⁰, § 4 EDA establishes substantial information duties obliging the operator to inform the competent authority of all relevant aspects concerning environmental damage or any imminent threat thereof. This obligation could conflict with the general principle of criminal law enshrined in §§ 55 para. 1, 136 para. 1, 163 para. 4 StPO establishing that no man is bound to accuse himself (*nemo tenetur se ipsum accusare*). For that reason it is generally assumed that it may be necessary to limit the duty to provide information under § 4 EDA in the light of this principle.²⁹¹ In German case law, it has also been emphasised that the *nemo tenetur* principle applies in administrative proceedings.²⁹² The problem how to deal with the situation that the person subject to an information duty does not correspond to the one potentially subject to criminal prosecution has already been addressed above at chapter 11.1.3.

15.6 Concluding remarks

Generally, the EDA has little practical relevance.²⁹³ It did not bring significant changes to German law. One reason is that the soil protection, nature conservation and water laws also cover environmental damage and provide a high level of protection already. Furthermore, they partially go beyond the provisions of the EDA,

²⁸⁷ Beckmann/Wittmann, Landmann/Rohmer, Umweltrecht, § 5 UmwSchG annotation 4, with further references, and § 6 UmwSchG, annotation 1 with further references.

²⁸⁸ “If the offender, 1. in an effort to achieve reconciliation with the victim, has made full restitution or the major part thereof for his offence, or has earnestly tried to make restitution; or 2. in a case in which making restitution for the harm caused required substantial personal services or personal sacrifice on his part, has made full compensation or the major part thereof to the victim, the court may mitigate the sentence pursuant to section 49(1) or, unless the sentence to be imposed on the offender is imprisonment of more than one year or a fine of more than three hundred and sixty daily units, may order a discharge.”, http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0249.

²⁸⁹ See Bert Götting, Schadenswiedergutmachung im Strafverfahren: Ergebnisse eines Modellprojektes zur anwaltlichen Schlichtung, Münster, 2004, S. 73 with further references.

²⁹⁰ See above, 15.3.2.

²⁹¹ Beckmann/Wittmann, Landmann/Rohmer, Umweltrecht, § 4 UmwSchG annotation 14; see also Karen Wieland, Umweltschadengesetz (USchadG) richtig umsetzen: Risiken erkennen, ecomed Sicherheit, 2008, p. 38.

²⁹² BVerwG, adjudication of 11 August 1999 – 3 B 96/99 – NZV 2000, 385.

²⁹³ Eberlein/Roller, Application of the Environmental Liability Directive (ELD) in practice, p. 11.

leaving the latter only a negligible field of application. In a survey of 2011 dealing with the question whether and why the EDA has little practical relevance, the questioned environmental agencies named only four cases that were dealt with under the EDA and some emphasised that the existing laws were sufficient and/or that there is little information on the EDA.²⁹⁴

Concerning links to environmental crime, the EDA does not contain criminal sanctions or direct links to environmental criminal law. However, certain conduct relating to the EDA can be sanctioned by environmental criminal law or by administrative penal law, e.g., soil pollution by § 324a StGB or § 26 SPA. In criminal proceedings, measures of the perpetrator under the EDA to remedy the damage would arguably not be taken into account by the judge when determining the criminal sanction, as they are obligations by law and thus cannot count as voluntary restitution or compensation of the damage according to § 46a StGB. Hence, environmental liability according to the EDA does not play any role in environmental criminal law.

²⁹⁴ Roller, KGV-Rundbrief 2+3/2009, 40.

16. Summary

Substantive environmental criminal law and transposition of ECD

Germany has a sophisticated set of rules regarding environmental crimes, consisting mainly of a chapter on offences against the environment in the Criminal Code (primary criminal law, *Kernstrafrecht*), and of various environmental offences spread over different environmental laws (secondary criminal law, *Nebenstrafrecht*). Establishing the bulk of environmental criminal law within the Criminal Code as primary criminal law demonstrates that environmental offences are not considered to be minor offences, but rather they are treated as serious criminal wrongdoing.

According to the prevailing view in literature, the definition of environment in environmental criminal law is restrictive and encompasses merely the natural environment of humans. Furthermore, German environmental criminal law has some peculiarities:

- The dependency on administrative law
- Most provisions are designed as abstract endangerment crimes
- Negligent behaviour is regularly punishable
- The attempt is often punishable

In criminalising a wide range of environmentally harmful behaviour, German environmental criminal law is a typical example of a modern legal system based on prevention and risk assessment.

Directive 2008/99/EC on the protection of the environment through criminal law (ECD) was transposed both into the Criminal Code and into secondary criminal law by the Law of 6 December 2011 (*45. Strafrechtsänderungsgesetz*). According to the legislature, German environmental criminal law already conformed by and large to these Directives and needed to be amended only in some parts. Directive 2009/123/EC amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements did not require any changes in German criminal law. Concerning the amendments introduced to transpose the ECD, three of them raise serious problems of conformity with EU legislation or with substantive German criminal law principles:

First, some doubts remain whether the structure of § 324 StGB on water pollution fully transposed Article 3 lit. a ECD concerning dangerous conduct not leading to a detrimental change of water qualities, and if any deficiencies could be remedied by interpreting the provision in a way that conforms to the ECD. In any case, it would have been safer to transform the existing structure requesting damage to water qualities into a structure requiring likelihood of danger (*“Eignungsdelikt”*)

Second, the introduction of § 330d para. 2 StGB, extending unlawful conduct to illegal conduct according to the legal order of other Member States for certain criminal offences committed in the respective Member State, has been strongly criticised for general and technical reasons. Practitioners contest the necessity to enlarge the international jurisdiction of German criminal law concerning acts committed in other Member States, precisely because the ECD leads to the harmonisation of environmental criminal law in the EU, and they raise concerns that this extension might lead to problems in practice concerning the *ne bis in idem* requirement. As to the technical problems, researchers criticise that § 330d para. 2 StGB does not refer to all the criminal environmental provisions of the Penal Code, thus creating serious problems concerning the applicability of the remaining provisions. Finally, it has been questioned whether § 330d para. 2 is compatible with the *lex certa* requirement since it requires consideration of the administrative law of other Member States implementing EU environmental legislation to a wide extent.

Third, concerning § 71 and § 71a BNatSchG as well as § 38a BJagdG, the fact that negligence is only punishable in a combination with intentional behaviour, meaning that the seriously negligent killing of a protected species is not covered, arguably does not fully conform to Art. 3 lit. f ECD, which requires that killing a protected species

constitutes a criminal offence when committed at least with serious negligence. Concerning the latter provision, there are also serious doubts whether § 38a BJagdG meets the *lex certa* requirement, because punishment is made dependent on (future) provisions in the Wild Animals Regulations, arguably without setting out the preconditions of punishment as requested by the Federal Constitutional Court (BVerfG).

In spite of the limited changes introduced in German criminal law, the ‘Europeanisation’ of German environmental criminal law through the ECD has some important general impacts.

First, ECD transposition has resulted in an even larger criminalisation of environmentally harmful behaviour, since the German legislature restricted itself to a minimum of necessary amendments. In particular, whereas new criminal provisions introduced in order to comply with the ECD were restricted to conduct committed with serious negligence, necessary amendments to existing provisions led to an enlargement of criminal conduct committed with mere negligence. In some cases, this has resulted in blurring the line between truly criminal behaviour and mere disobedience of environmental legislation, corresponding to the general distinction between criminal offences and administrative penal offences. Thus, the way Germany transposed the ECD corresponds to the general tendency to extend criminalisation in environmental criminal law. Arguably, it would have been preferable to limit all environmental criminal provisions to conduct committed either intentionally or with serious negligence, and possibly also to exempt the attempt to commit environmental crimes.

Second, the dependency of environmental criminal law on administrative law has grown, since the latter extends more and more to environmental legislation by the EU or based upon EU legislation, including environmental legislation of other Member States. Thus, it has become even more difficult for the citizen to assess whether certain behaviour would constitute a criminal offence. It is no surprise that with respect to many amendments introduced in order to transpose the ECD, doubts have been raised whether the *lex certa* requirement is (still) met. The constant growth and change of environmental legislation with mostly vague terminology also results in difficulties to enforce the respective criminal law provisions in a proper and coherent way. On the other hand, there are no alternatives to the dependency of environmental criminal law on administrative law, which is by and large based upon EU legislation. However, at least partially, better ways to refer to EU legislation could have been chosen.

Third, it is still to be clarified whether the transposition of the ECD into German law results in better protection of the environment. It is still too early to assess whether the transposition of the ECD has led to an increase in the number of prosecutions or to the imposition of more severe fines. All that can be observed by now is a substantial increase in recorded crimes concerning cross-border waste shipment (§ 326 para. 2 StGB). Apart from that, statistics show that the number of reported crimes against the environment is constantly decreasing since 1999, which is best explained by enforcement deficits (see below). These deficits might be further exacerbated by enlarging criminalisation of environmental harmful behaviour, further extending the application of the Criminal Code to crimes abroad, and increasing the complexity of environmental criminal law and thus the risk of faults. Regardless, one has to keep in mind that environmental criminal law cannot replace but only complement environmental administrative law as the main instrument to protect the environment.

Criminal liability of public servants

The liability of public servants for environmental crimes is not specifically regulated and follows the rules regarding parties to the offences. However, the application of these rules to public servants engaging in misconduct in their capacity as authorising or controlling authorities is very controversial. Although researchers have repeatedly asked for a specific regulation of the liability of public servants for environmental crimes, the majority of them contest the necessity of such a regulation. In practice, the liability of public servants is of low relevance.

Responsibility of corporations and collective entities

In Germany, only natural persons are liable under criminal law. Thus, criminal liability within corporations follows the rules regarding parties to the offences, with some controversial modifications established by the

courts. In particular, the division of work in corporations makes it difficult to attribute criminal liability to a particular person. However, legal entities may be responsible under administrative (penal) law according to § 30 of the Administrative Offences Act (OWiG). Following a report of the OECD raising doubts whether penalties against legal persons in Germany were effective, proportionate and dissuasive as required by Article 7 ECD, Article 8c Directive 2005/35/EC, the legislature in June 2013 increased the maximum penalty for intentional conduct tenfold, from €1 million to €10 million and for negligent conduct from €500,000 to €5 million.

Although there are no statistical records on administrative penal offences, it seems that in practice, the corporate non-criminal fine does not play an important role. One of the reasons may be that in the field of administrative penal law, the principle of discretionary prosecution applies; further reasons include the emphasis in criminal investigations on the criminal responsibility of individual natural persons, and the principle of cooperation between administrative agencies and enterprises. Among researchers, there is a wide consensus that corporate sanctions should go beyond the existing provision of § 30 OWiG. However, there is no agreement whether such sanctions should be criminal sanctions or not or on the details of the sanctions. As demonstrated by competition law practice, a non-criminal fine may reach such amounts that it is equal to or even potentially stronger than a criminal sanction.

In 2006, the guidelines concerning criminal and administrative penal proceedings (*Richtlinien für das Straf- und Bußgeldverfahren*, RiStBV), addressed primarily to the public prosecutor's office, were amended in order to oblige the public prosecutor to consider the imposition of an administrative penal fine against the legal person according to § 30 OWiG in addition to sanctions against one of its leading representatives. Indeed, this is one of the reasons for the current trend to prosecute and sanction legal persons in a more active way. Based on a political initiative by Nordrhein-Westfalia to extend criminal liability to corporations, there is currently a new debate on whether criminal liability of corporations could and should be introduced, or whether improvement of the Administrative Offence Act is sufficient.

Administrative penal offences in environmental law

Concerning the environmental matters covered by the ECD, the relevant environmental laws contain provisions enumerating a multitude of administrative penal offences, which complement the criminal provisions and which may be imposed by the administrative authorities who have jurisdiction to prosecute and sanction administrative penal offences according to the OWiG. According to a study, the less important violations of environmental provisions are handled through administrative fines rather than criminal sanctions. Most of the procedures in administrative penal law with respect to environmental violations end with a decision to impose an administrative fine. The amount of the sanction is, however, on average lower than what would be imposed through the criminal law. According to another study, the administrative penal law has a higher probability of a sanction being imposed than the criminal procedure; however, the average fines imposed through the criminal system were higher than the average fines imposed through administrative penal law. For both cases, the formal statutory possibilities to impose much higher sanctions are rarely used. Thus, administrative fines may be more efficient for minor violations whereas criminal sanctions are more appropriate for the most serious of cases.

Organised crime and environmental crime

Organised crime is not defined by German law. In practice, a working definition has been adapted by the Working Party of the German Police and Judicial Authorities (*AG Justiz/Polizei*) in May 1990 and serves as the basis for collecting data on organised crime. There are no particular provisions, neither substantive nor procedural, for environmental organised crime. Furthermore, in organised crime legislation, environmental crime plays no significant role. This corresponds to the statistical data which state that environmental crime accounts for only 1.4% of all organised crime in Germany; however, due to significant shortcomings, these data do not present a valid picture of the extent of organised environmental crime, but only a rough estimate.

Statistics on environmental crime

As far as statistics are concerned, a total of 31,847 cases of environmental crime were recorded in 2012. Environmental crimes accounted for only 0.5% of the total number of reported crimes. The clearance rate amounted to 68.7%. The category of environmental crime includes offences against the environment included in the Criminal Code, but also offences contained in environmental, food-and medicine-related legislation. Considering only offences against the environment, 12,749 cases were recorded in 2012, a decrease of 4.4% from 2011. Among the offences against the environment, the unlawful treatment of dangerous waste accounted for the largest share, followed by water pollution and soil pollution.

It is widely assumed that in the field of environmental crime there is a considerable number of cases that go unreported and which are therefore not reflected in official statistics. The number of reported crimes is heavily dependent upon the willingness of the public to inform the authorities of suspected environmental crimes and upon the enforcement approach of the investigating authorities.

The number of reported crimes against the environment increased from the beginning of their statistical coverage, reaching a peak in 1998. Since 1999, absolute as well as relative numbers have been decreasing constantly. This development is reaffirmed by the recently published police statistics on crime for the reporting year 2013. The only significant exception to this trend is the illegal cross-border shipment of waste, where the reported cases increased by 90% from 2011 to 2012 (from 117 to 223 cases) and again by 39% in 2013 (312 cases).

This constant decline may be interpreted either as a success of the environmental criminal system, or as an indicator of its failure to diligently identify and report crimes which fall under this category. Among researchers, at least, there is widespread consensus that these numbers can be best explained as the result of an environmental crime enforcement deficit. Overall, many in Germany are critical of the ECD's approach of turning more environmental offences into criminal offences, in particular they question whether criminalisation may, in fact, exacerbate rather than ameliorate the existing enforcement deficit.

According to the Prosecutorial Statistics (*Staatsanwaltschaftsstatistik*) for 2004, only 4.8% of the environmental crime investigation proceedings terminated by the public prosecutor's office itself resulted in the suspected being charged, compared to 15.2% in total crime. However, applications for a penal order (*Strafbefehl*) were higher than in total crime (19.8 compared to 16.23%); thus, the rate of environmental crime investigation proceedings aimed at a conviction is lower by 7% compared to total crime (24.6 compared to 31.5%). If dismissals with conditions are included (*Interventionsrate*), the difference to total crime are only marginal (36.3 compared to 38.3%).

According to the National Statistics on Convictions and Sentencing (*Strafverfolgungsstatistik*) for 2012, 1,523 suspects were charged and 1,075 convicted for environmental crimes according to the Criminal Code. Thus, from the 12,749 recorded suspects according to the Uniform Police Statistics for 2012, 11.9% were charged and 8.4% convicted (compared to a general charge rate of 13.7% and a general conviction rate of 11.3%).

Compared to total crime, the level of sanctions for environmental crime appears particularly low. Imprisonment sentences are even rarer (4% compared to 17.9% of convicted in 2012), and probation is granted in even more cases than for total crime (93% compared to 70% of imprisonment sentences in 2012), although the gap has been decreasing in recent years. If an offender is sentenced to imprisonment, the sentence is at the lowest level of the range, rarely extending beyond one year (16.3% compared to 25.9% of imprisonment sentences in 2012). Equally, the level of fines appears rather low; in 2012, only 5.3% of the convicted (compared to 5.7% in total crime) had to pay a severe fine which officially established a criminal record. One of the reasons for the low level of sanctions could be that the percentage of convicted with a criminal record is particularly low in environmental criminal law.

Thus, it can be said that in environmental criminal law, the tendency of the legislature to enlarge criminalisation is countered with the tendency of the judiciary to restrict criminalisation. However, according to a recent study, environmental criminal sanctions in Germany do have a deterrent effect, in spite of being low on average and in spite of a probability of about 16% that an offender is apprehended and prosecuted, presumably due to the reputational loss of standing for trial in a public court of law. These findings seem compatible with the opinion according to which criminal sanctions are more appropriate for the most serious cases whereas

administrative fines may be more efficient for minor violations. Irrespective of these considerations on the deterrent effect of criminal sanctions, Member States have considerable leeway with regard to ensuring that their level of criminal sanctions is effective, dissuasive and proportionate according to Art. 5 ECD. Arguably, the only clear limit to this wide scope for implementation is that Member States need to provide imprisonment alongside criminal fines as sanctions. According to this standard, there is no indication that the level of sanctions in German environmental criminal law does not conform to Art. 5 ECD.

Procedural provisions on environmental crime

Rules regarding the investigation and prosecution of crimes are contained in the Code of Criminal Procedure (StPO). The relevant criminal procedure consists of the investigation proceedings (*Ermittlungsverfahren*) aimed at preparing public charges, the interim proceedings (*Zwischenverfahren*) in which the court decides whether to open main proceedings according to the bill of indictment, and the main proceedings (*Hauptverfahren*) in court. As a general rule, the public prosecutor's office is obliged to take action in relation to all prosecutable criminal offences, provided there is a sufficient factual basis (§ 152 para. 2 StPO, *Legalitätsprinzip*). In some cases explicitly provided by law (§§ 153-154 StPO), however, the principle of discretionary prosecution applies (*Opportunitätsprinzip*), which means that the public prosecutor's office takes only such action as it deems appropriate.

Environmental criminal law and the law of criminal procedure are linked in two ways. There are a few procedural provisions which apply exclusively to environmental crimes and some procedural provisions which typically apply in relation to environmental crimes, for instance, the rules on obtaining knowledge of suspected crimes, or the rule on plea bargaining (see below).

Procedural provisions – actors and institutions mentioned in legal texts

Provisions containing the institutions of criminal procedure, particularly the courts and the state prosecution service, are contained in the Constitution of Courts Act (*Gerichtsverfassungsgesetz, GVG*). Concerning **courts**, German law does not establish special divisions for environmental criminal matters, in contrast to the economic offence divisions established by § 74c GVG. In practice, however, there is a tendency at the Regional Court level to establish such divisions. In practice, the judiciary has a tendency to restrict criminalisation.

The whole process of investigating criminal activities up to the stage of charging the accused with the crime is the responsibility of the public prosecutor's office (*Staatsanwaltschaft*), as is the presentation of the prosecutor's case at trial. The public prosecutor's office is a strictly neutral institution, and not a party to the case in a criminal trial. As a rule, similar to the courts, there are no special divisions for environmental criminal matters. The public prosecutor's office is entitled to request information from all authorities during investigation proceedings. According to the guidelines concerning criminal and administrative penal proceedings (*Richtlinien für das Straf- und Bußgeldverfahren, RiStBV*), the prosecutor shall, when investigating secondary criminal offences and administrative penal offences, cooperate with the competent administrative authorities and give them the opportunity to make statements, if appropriate. According to a study, an expert criticised that environmental crimes were unpopular with prosecutors at the local level and thus neglected.

In practice, the **police** conduct the vast majority of investigations independently of the prosecutor's office, and are thus the central authority in fighting environmental crime. In each state there is a State Criminal Police Office (*Landeskriminalamt, LKA*), securing the cooperation of the federal government and the individual states in order to fight crime. Some of these offices have special divisions for environmental crimes. For example, the LKA Berlin has two divisions (*Kommissariate*) that deal exclusively with environmental crimes. Since Berlin is a metropolitan State, these units are able to investigate all environmental crimes, including the work at the scene. In addition, the LKA Berlin has its own Scientific-Technical Department, a unit in of which is dealing with environmental crimes and supporting the investigating units. Thus, the LKA Berlin has the awareness, the

expertise, the equipment, the experience, and the time necessary to deal with environmental crimes in an appropriate way. Sometimes, however, the financial resources are lacking to provide for regular external training. Although not every element of this particular structure could be transferred to the larger federal states, let alone other (centralised) countries, the combination of specialist units exclusively responsible for environmental crimes and supporting scientific-technical units can be considered as an example of best practice.

The Federal Criminal Police Office (*Bundeskriminalamt*, BKA) is the central office for the cooperation between the federation and the states in criminal police matters. It supports the police information and knowledge exchange systems, and collects information coming from the states. Concerning criminal offences, the BKA coordinates both federal and state criminal police in investigating crimes that involve more than one state and that are of international significance or otherwise of considerable significance. The fight against environmental crime is not of original concern for the BKA. In practice, there are about 300 occasions per year to deal with cases concerning environmental and consumer protection offences. As the central police agency in Germany, the BKA is the key office for international police cooperation. In particular, it serves as the interface with Europol and Interpol. The BKA is also involved in the cooperation with other countries on international criminal prosecution and execution. Moreover, the BKA maintains a global network of currently 64 liaison officers serving in 50 countries who obtain information of significance for law enforcement in Germany. According to an interview with a representative of the BKA, the international police cooperation is considered good and worth being increased.

Concerning the prosecution authorities, experts generally criticise the low significance of the fight against environmental crime, compared to other areas of crime, and a lack of qualified staff as well as technical and financial resources. According to a study, the decrease in reported environmental crimes corresponds to a decrease in funding for environmental investigations undertaken by authorities in some federal states, whereas in federal states without staff reduction the registered crimes remained constant.

Enforcement problems and procedural consequences, cooperation with administrative authorities

The prosecution authorities are dependent upon obtaining information on suspected crimes by the administrative authorities and/or individuals. Although most of the criminal information stems from the general public, people are rather reluctant to file reports. The main reason is that, in the case of environmental crimes, people are mostly not directly affected by such offences. On the other hand, the environmental authorities, in addition to obtaining information from the controlled persons, may gather information themselves. They thus have pro-active monitoring instruments at their disposal in order to ensure compliance with the relevant legislation and should thus be able to bring any information relevant to environmental crime to the attention of the prosecution authorities. In practice, however, environmental authorities lack resources, in particular staff and instruments, and have recently even been diminished for financial reasons, e.g., by dissolving special authorities. Therefore and for other reasons, such as their continuous task that results rather in a cooperative relationship with the operators of facilities, environmental authorities are rather reluctant to file such information with the prosecution authorities. The state governments have issued administrative guidelines on the cooperation between the administrative authorities and the prosecutor's office concerning the fight against environmental crimes instructing the administrative authorities to inform the public prosecutor's office of any suspicion concerning a criminal offence, which is, however, partially dependent upon the authority's administrative discretion. Together with a lack of resources and expertise within the police authorities, the inability or reluctance of the environmental authorities to cooperate with the prosecutor's office contributes to the enforcement deficit in German environmental criminal law.

Concerning environmental offences committed by farmers and small business, on the other hand, there is less reluctance on the part of the general public to file reports of crimes to the public prosecutors, as these offences are generally much more visible. Equally, the tendency of the environmental authorities to cooperate with potential violators is mostly true in the case of large companies. As a result, there is a certain asymmetry concerning prosecution and sanctioning between offences committed by industry and big business on the one hand, and

offences committed by farmers and small business on the other. Furthermore, the number of detected environmental offences depends on the amount of monitoring undertaken by the authorities, which has decreased in the last decade. Both causes have contributed to a decline in the number of reported environmental crimes in the last decade.

Another enforcement problem is the difficulty, due to the scientific complexity of the circumstances surrounding environmental crime cases, to find enough evidence against the accused. Due to this complexity, causality and/or attribution are frequent problems in environmental criminal law. Particularly in decentralised large-scale enterprises, the division of work makes it difficult to attribute criminal liability to a particular person. In addition to these legal barriers, there are factual barriers such as insufficient resources and expertise of the prosecution service, and a corresponding dependency on experts' reports. These legal and factual problems of proof are the main reason that the vast majority of environmental criminal proceedings are terminated for insufficient grounds to proceed with public charges according to § 170 para. 2 StPO. However, it seems that contrary to some decades ago, the rate of termination of proceedings related to environmental crimes according to § 170 para. 2 StPO does not considerably deviate from the rate of termination related to other criminal offences.

Furthermore, the legal and factual barriers to obtaining proof often eliminate the public interest in prosecution and let the perpetrator's guilt appear of a minor nature or at least, allow for a compensation of the public interest in prosecution through certain conditions and instructions. Thus, the termination of criminal proceedings by the public prosecutor's offices and the courts in cases when the principle of discretionary prosecution exceptionally applies (§§ 153, 153a StPO) is considerable in environmental law. In spite of this, the rate at which proceedings terminated in environmental criminal law (60% on average since 1998) and in criminal law in general (53% on average) have converged.

Finally, the legal and factual complexity of environmental crime cases, the corresponding proof problems, and the usually strong representation of the defendant by a lawyer make these cases particularly suited for plea bargaining according to § 257c StPO.

Environmental Liability Directive and environmental criminal law

Directive 2004/35/EC on environmental liability (ELD) was transposed into German law by the Act concerning the Prevention and Remedying of Environmental Damage of 10 May 2007 (EDA). It only applies if other laws do not regulate environmental damage-related issues in more detail. Although the EDA has brought about certain improvements, e.g., the obligation of the operator to inform the competent authority of all relevant aspects concerning environmental damage or any imminent threat of such damage, it generally has little practical relevance and did not bring significant changes to German law. One reason is that the soil protection, nature conservation and water laws also cover environmental damage and provide a high level of protection already. Furthermore, they partially go beyond the provisions of the EDA, leaving the latter only a negligible field of application. In a survey of 2011 dealing with the question whether and why the EDA has little practical relevance, the questioned environmental agencies named only four cases that were dealt with under the EDA and some emphasised that the existing laws were sufficient and/or that there is little information on the EDA.

Concerning links to environmental crime, the EDA does not contain criminal sanctions or direct links to environmental criminal law. However, certain conduct relating to the EDA can be sanctioned by environmental criminal law or by administrative penal law, e.g., soil pollution by § 324a StGB or § 26 of the Federal Soil Protection Act. In criminal proceedings, measures of the perpetrator under the EDA to remedy the damage would arguably not be taken into account by the judge when determining the criminal sanction, as they are obligations by law and thus cannot count as voluntary restitution or compensation of the damage according to § 46a StGB. Hence, environmental liability according to the EDA does not play any role in environmental criminal law.

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