Working Paper N° 3

Implementing the EU Methane Regulation

Penalties and selected legal issues

- Establishing the penalty regime at the national level
- Legal powers of the competent authorities
- “Reasonable efforts” of importers
- Delegating inspection tasks to private entities

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The responsibility for the contents lies solely with the authors.

Update July 2024

This paper’s original version from June 2024 was produced before the EU Methane Regulation was published in the Official Journal of the EU, based on its final text. We had assumed it would enter into force in July 2024, but it turns out it will enter into force on 4 August 2024. In this update, we have adapted all references to the date of entry into force and, consequently, to various deadlines for the implementation of individual provisions. We also corrected some typos.

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Contents

Abbreviations

CA	Competent Authorities
CFREU	EU Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CH_4	Methane
CO_2	Carbon dioxide
CO_2e	Carbon dioxide equivalent
COM	European Commission
COP	Conference of the Parties (in international climate negotiations)
CRV	Core Reference Value
ECJ	European Court of Justice
EDF	Environmental Defense Fund
EPA	US Environmental Protection Agency
ETS	Emission Trading Scheme
EU-MER	EU Methane Emissions Regulation
FOI	Frequently occurring infringements
GWP	Global Warming Potential
IED	Eu Industrial Emission Directive
IPCC	Intergovernmental Panel on Climate Change
LDAR	Leak detection and repair
LNG	Liquified natura gas
MRV	Monitoring Reporting and Verification (as prescribed by the EU-MER)
MS	Member States of the European Union
NGO	Non-Governmental Organisation
RMCEI	EU recommendations on minimum criteria for environmental inspections in the Member States
RP	Responsible Party
SCC	Social Cost of Carbon
SCM	Social cost of methane
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the EU
UBA	German Environmental Protection Agency
UNFCC	United Nations Framework Convention on Climate Change

Executive Summary

This paper's first part examines the **penalty regime** for **sanctioning infringements of the EU-MER**. By 4 August 2025, the EU Member States (MS) must establish their own rules on penalties. These rules must conform to the requirements of the EU-MER, which are more detailed than the penalty provisions in many previous EU laws. However, they leave significant scope for implementation by the MS. Once the national rules on penalties are established, the competent authorities (CA) and, in some MS, the courts will have wide discretion in enforcing the rules. How this discretion is exercised will significantly impact the quality of the EU-MER enforcement and, consequently, the level of methane (CH_4) emissions in the EU and in the countries exporting coal, gas and oil to the EU.

The EU-MER provides a "toolbox approach" that combines various types of penalties to address infringements, including fines, periodic penalty payments, and administrative penalties and measures. These civil or administrative penalties may be combined with criminal penalties. However, given the nature of the potential infringements of the EU-MER, this will be relevant only in exceptional cases. The MS must empower their CA to impose at least a range of administrative penalties, including fines. We **recommend** the Member States adopt **a penalty regime consisting primarily of administrative penalties,** including administrative fines.

Among the various types of penalties, fines are likely to play a major role. The major part of this chapter therefore deals with the interpretation and implementation of the EU-MER **rules for setting the level of fines**. We develop a proposal on how these intricate rules can be operationalised and summarised in a simple formula.

The **core criterion** set by the EU-MER is that the level of fines must be **proportionate to** the **environmental damage** and to the **impact on human health and safety** associated with the infringement. By analysing the legal basis, aim, and fields of application of the EU-MER, we conclude that infringements will only impact human safety in very rare cases. The other two core criteria are largely proportional to the amount of CH_4 emissions directly or indirectly associated with the infringement. On this basis, after considering various potential anchor points, **we propose** applying a **Core Reference Value (CRV)** of **6,000 EUR/tCH_4**. The standard fine level determined via this CRV must then be adjusted according to a series of aggravating or mitigating factors and in conformity with the maximum and minimum levels defined by the EU-MER. The formula we develop provides a simple tool that MS can use to consider all these elements.

The **second part of this paper** discusses **three legal issues**:

- the **legal powers the CA need** to effectively fulfil their tasks, with a specific focus on their inspection duties. The list can serve as a resource for MS when empowering their CA, as well as for civil society organisations that may want to verify whether the CA have been granted the necessary powers;
- how to operationalise the clause on **the "reasonable efforts"** the **importers** must undertake to comply with their obligations concerning **ongoing supply contracts** concluded before the EU-MER entered into force. Interpreting this clause is crucial, as most of the CH_4 emissions caused by energy consumed in the EU are associated with imports that happen under long-term contracts;

- the extent to which the CA may **delegate inspection activities to private entities**. We conclude that a large part of the individual activities may be delegated to private entities, but not the inspections as a whole or their most essential tasks. A precondition for such a delegation is that national legal provisions regulate the relationship between the CA and the private entities and prevent conflicts of interests.

About this series of papers

Methane (CH_4) is the second most important greenhouse gas (GHG), having caused around 30% of the global temperature increase since the Industrial Revolution. The energy sector is responsible for more than one third of the global anthropogenic CH_4 emissions, and it offers most of the short term CH_4 abatement potential.[1] In 2021, together with the USA, the EU announced the Global Methane Pledge, a commitment to reduce global CH_4 emissions by at least 30 percent from 2020 to 2030 signed by 155 countries.[2]

The EU Methane Regulation (EU-MER) has been adopted with the overwhelming support of 85% of the European Parliament and of all EU Member States except Hungary. It enters into force on 4 August 2024.[3] If well implemented, it will be instrumental in significantly reducing the CH_4 emissions from the energy sector. Most of the CH_4 emissions associated with the energy consumed in the EU are generated in the producing countries from which the EU imports oil, gas, and coal. Therefore, the EU-MER provisions on imports are of critical importance. However, a thorough application of all EU-MER provisions at the domestic level is a necessary condition for the efficacy and acceptance of those related to imports.

The impact of the EU-MER will depend on the quality of its implementation. Even though EU regulations like the EU-MER are directly applicable in all EU Member States, its implementation requires extensive executive action as well as some regulatory provisions at the national level. This working paper is part of a series that aims to provide analysis, information, and practical support to help the Member States and encourage the newly established teams at the competent authorities (CA) to implement the EU-MER effectively, thoroughly, timely and efficiently.

There are two other working papers in this series:

- Implementing the EU Methane Regulation, Working paper N° 2. Governance at the national level: responsible ministries and competent authorities.[4]
- Implementing the EU Methane Regulation, Working paper N° 3. Penalties and selected legal issues.[5]

This series is intended to provide hands-on assistance to those involved in implementing the EU-MER at the national and at the EU level. Many of the issues we discuss are of relevance during the first 6 to 12 months after the EU-MER enters into force. To provide guidance from the very start of the EU-MER implementation, we worked on a legal text that was still in the approval process and we are releasing this series of papers just days after its formal adoption. Thus, some of the ideas contained herein could be developed further. We welcome any feedback that might help refine them.

[1] : IEA Global Methane Tracker 2024. https://www.iea.org/reports/global-methane-tracker-2024/key-findings
[2] See https://www.globalmethanepledge.org/
[3] Regulation (EU) 2024/1787 of the European Parliament and of the European Council of 13 June 2024 on methane emissions in the energy sector and amending Regulation (EU) 2019/942. See: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32024R1787
[4] Piria Raffaele, Leon Martini: Implementing the EU Methane Regulation, Working paper N° 2. Governance at the national level: responsible ministries and competent authorities. Ecologic Institute, Berlin, 2024. Available at: https://www.ecologic.eu/19719
[5] Piria Raffaele, Stephan Sina and Lina-Marie Dück: Implementing the EU Methane Regulation, Working paper N° 3. Penalties and selected legal issues. Ecologic Institute, Berlin, 2024. Available at: https://www.ecologic.eu/node/19720

1 Penalties

To avoid repeating the summary from the previous pages, we limit this introduction to indicating where specific content can be found.

Chapter 1.1 provides an overview on the EU-MER penalty regime. It provides a compact description of the main EU-MER provisions on penalties, it analyses the scope of implementation let to the Member States and it illustrates the respective roles of the Member States' legislators, competent authorities and in some cases courts as well as of the European Commission.

Chapter 1.2 analyses the different types of penalties foreseen by the EU-MER, it discusses how these can be combined with criminal penalties according to the EU Environmental Crime Directive and it provides the recommendation to opt for a penalty regime consisting primarily of administrative penalties.

Chapter 1.3 examines the EU-MER provisions on how to set the level of penalties. Its first section describes the general EU-MER criteria relevant for all types of penalties. Section 1.3.2 examines a series of additional principle and criteria specifically relevant for fines in great detail. In this section, we develop the concept of a Core Reference Value that helps translating these criteria into a monetary value for fines; we discuss the maximum and minimum level of fines, the rules for repeated serious infringements as well as the aggravating and mitigating factors defined by the EU.MER. Concluding this section, we provide a formula that summarises this complex analysis and provides a simple tool that MS can use to consider all these elements. Section 1.3.3 proposes that member States consider integrating all these criteria and rules into fines guidelines to support a coherent and uniform application of the criteria for determining the level of penalties.

1.1 Establishing and enforcing the penalty regime: an overview

The penalty regime to be applied in case of infringements of the EU-MER is set out in Art 33. Analogously to other recent EU laws, it contains a set of provisions that are significantly more elaborate than penalty provisions in previous EU laws[6]. Nevertheless, these provisions leave a significant scope of implementation to the MS.

As visualised in Figure 1, by 4 August 2025 the MS must[7] lay down their own rules on penalties and take all measures necessary to ensure that these rules are implemented [Art 33(1)]. The rules to be established by the MS must conform to all the requirements of the EU-MER. If they don't, the MS risk an infringement procedure initiated by the European Commission, to which the MS must notify their rules on penalties and any amendments thereof. The Member States'

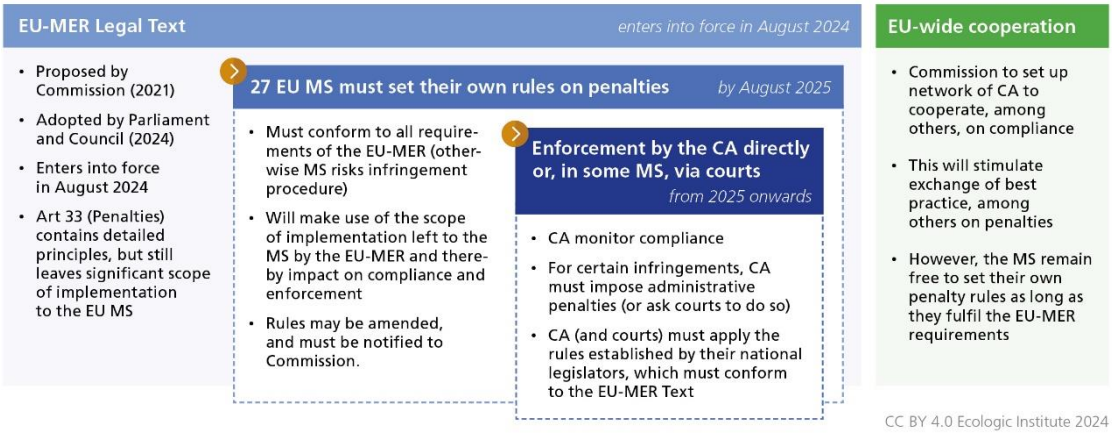
[6] See for example Art 79 Directive 2010/75/EU of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334/17 of 17.12.2010 (IED Directive); for a direct comparison of an old and a new type of penalty provision on the same topic see Art 25 Regulation (EU) No 517/2021 of 16 April 2014 on fluorinated greenhouse gases, OJ L 150/195 of 20.5.2014 and Art 31 Regulation (EU) 2024/573 of 7 February 2024 on fluorinated greenhouse gases, OJ L 1 of 20.2.2024..

[7] For the sake of clarity, we use "must" instead of the original wording "shall" for all EU-MER provisions where "shall" actually means "must" and could therefore be translated in other EU languages with verbs that could be translated back into English as "must", such as *devoir* in French, *müssen* in German and *dovere* in Italian. Usually, the official translations of "shall" in EU legal texts into these three languages completely renounces the use of a modal verb, for instance here: "*Les États membres déterminent le régime des sanctions (…)*" or "*Die Mitgliedstaaten erlassen Vorschriften über Sanktionen (…)*".
See: Felici, A. (2012). 'Shall' ambiguities in EU legislative texts. Comparative Legilinguistics 10 (January):51-66. https://doi.org/10.14746/cl.2012.10.04 .

Competent Authorities (CA) are responsible for monitoring compliance and imposing administrative penalties for certain types of infringements. Otherwise, as described in more detail below, the procedures for imposing penalties and the institutions who may do so, as well as the type of penalties that must or can be imposed, depend on the types of infringements and on the legal system of the MS. When imposing penalties, the CA or the courts must apply the rules established by their national legislators, which must conform to the EU-MER.

According to Art 5(3), the Commission must set up a network of CA to foster cooperation, among others, on compliance and enforcement. This will stimulate exchange of best practice, among others on penalties, However, the MS remain free to set their own penalty rules as long as they fulfil the EU-MER requirements.

Figure 1: EU-MER penalty regime and enforcement: overview



1.1.1 Structure and main content of Art 33 EU-MER

The penalties must be effective, proportionate and dissuasive and shall include at least [Art 33(1)]:

- "*fines proportionate to the environmental damage and impact on human safety and health (…)*", and
- "*periodic penalty payments to compel operators, undertakings, mine operators, undertakings or importers to put an end to an infringement, comply with a decision ordering remedial action or corrective measures, provide information or submit to an inspection*".

Moreover, MS shall ensure that the CA have the legal power to impose a series of specified administrative penalties and administrative measures relating to infringements of a series of provisions of the EU-MER, "*provided that they* [the penalties and measures] *do not endanger the security of energy supply*". Administrative measures other than penalties include the confiscation of the profits gained or losses avoided due to the infringements, insofar as they can be determined, or the issuing of public warnings or notices [Art 33(2)]. In Member States that do not use administrative fines, fines with equivalent effect may be imposed by competent national courts at the request of the CA [Art 33(3)].

To ensure that administrative fines and other administrative measures are effective and consistently designed and applied in the EU, the CA shall cooperate closely [Art 33(4)].

Art 33(5) provides a list of minimum infringements that shall be subject to penalties. Under certain conditions, Member States shall consider reducing or not imposing penalties for venting

or flaring on operators for a certain implementation period [Art 33(6) and Art 15(8)]. For the imposition of penalties, Member States shall take into account at least a series of indicative criteria that act as aggravating or mitigating factors [Art 33(7)].

MS must notify the European Commission of the rules on penalties within twelve months after the entry into force of the EU-MER Art 33(1), i.e. by August 2025. Any subsequent amendments must also be notified. MS shall publish information on the type and size of the penalties imposed under the EU-MER, on the infringements and on the operators, mine operators, undertakings and importers subject to penalties. Where applicable, such information shall be reported in accordance with Art 21 of the revised Environmental Crime Directive [Art 30(8)].

1.1.2 Member States' scope of implementation to set a penalty regime

It must be noted at the outset that the EU-MER is a regulation, i.e. binding in its entirety and directly applicable in all Member States (cf. Art 288 TFEU). The wording of Art 33 EU-MER, however, reflects the establishment of penalties being a competence of the MS ("*Member States shall lay down the rules on penalties*"). According to the detailed explanation of the specific provisions in the proposal of the European Commission, Art 33 EU-MER only sets out guiding principles for penalties.[8] In EU regulations, sanctions are a typical example for additional provisions that the Member States need to adopt autonomously within the limits established by the EU regulation.

Although the limits set by the rather extensive provisions of Art 33 EU-MER are probably narrower than the average of EU Regulations, the MS still have a considerable margin of discretion when setting up the penalty regime.

Moreover, the way these penalties are enforced is left to the Member States as well. Art 33(1) only obliges the MS to "*take all measures necessary to ensure that they are implemented*". Without effective enforcement, the existence of adequate rules on penalties alone does not ensure their effect on the ground. Thus, sufficient resources and expertise for investigating infringements and for imposing sanctions are necessary. In addition, in cases such as those covered by the EU-MER, where a large number of potential infringements cannot be detected from the outside (e.g. in industrial premises), inspections are needed. In our Working Paper (WP) N° 1, we have discussed in detail the types of resources needed by the CA and the MS to implement the EU-MER and the relevant parameters needed to quantify these resources.[9]

1.2 What kind of penalties?

Art 33(5) lists the infringements that must be subject to penalties. The wording "*at least*" means that Member States are free to subject any other infringements to penalties.

Art 33 does not comprehensively prescribe what kind of penalties the MS should lay down. However, Art 30(1) requires that the penalties include at least "*fines*" and "*periodic penalty payments*". For infringements of certain provisions listed therein, Art 30(2), prescribes *"administrative penalties",* i.e. penalties that can be directly imposed by CA. Combined with the administrative measures that can equally be imposed by the CA listed in Art 30(2), the EU-MER provides for a „toolbox approach" that combines several instruments to react to infringements.

[8] See p. 11 of the COM proposal on the EU-MER, COM(2021) 805 final, https://eur-lex.europa.eu/resource.html?uri=cellar:06d0c90a-5d91-11ec-9c6c-01aa75ed71a1.0001.02/DOC_1&format=PDF

[9] See Piria, Raffaele, Ramiro de la Vega, Leon Martini and Eike Karola Velten: Implementing the EU Methane Regulation, Working paper N° 1. Tasks and resources needed at the national level. Ecologic Institute, Berlin, 2024. Available at: https://www.ecologic.eu/19718

Beyond these basic requirements, the Member States have the choice of how to set up their penalty regimes. In general, dependent on the MS´ legal systems, one can distinguish between civil penalties, i.e. penalties imposed by civil courts, criminal penalties imposed by criminal courts and administrative penalties that, as a rule, are imposed by administrative authorities. In environmental matters like methane emissions, administrative authorities such as the CA have a key position, e.g. regarding monitoring, reporting, and inspections. Therefore, civil penalties are of minor importance since civil law (or private law) addresses the relationship between private individuals or organisations but not their relationship to the state.[10] On the other hand, both administrative and criminal penalties are typical instruments of environmental law. The advantage of administrative fines is that they can be imposed by administrative authorities with a simpler procedure and lower threshold of proof than in a court proceeding. Thus, administrative fines are a sufficiently deterring penalty for minor infringements. Criminal penalties, on the other hand, are necessary for more serious infringements (with high social harm and potential gains) where a more severe sanction is needed.[11]

Regarding the national penalty regimes according to the EU-MER, one option would be to set up **a system consisting completely of administrative penalties** including administrative fines and periodic penalty payments,[12] since Art 33(2) does not exclude other infringements of EU-MER provisions being subject to administrative penalties. There are, however, MS that do not provide for administrative fines at all, e.g. Denmark. Art 33(3) requires these MS to introduce a similar system where the fine is imposed by the national courts and the penalty procedure is initiated by the CA. Such a system could also be used for the other infringements listed in Art 33 (5).

Another option would be to **combine administrative penalties with criminal penalties**. Criminal offences are indirectly mentioned in the second sentence of Art 33(8) EU-MER, which refers to Art 22 of Directive (EU) 2024/1203, i.e. the revised Environmental Crime Directive (ECD).[13] That provision on statistical data on environmental criminal offences presupposes the potential existence of such offences. However, the wording "*where applicable*" in Art 33(8) EU-MER shows that the EU-MER does not assume that infringements against the EU-MER will necessarily be sanctioned by the MS with criminal penalties. In fact, the EU and the MS are rather reluctant to impose criminal sanctions for infringements of obligations related to greenhouse gases. However, considering that methane is a powerful greenhouse gas and a major air pollutant, methane-related offences could be considered serious enough for criminal offences if the impact of the infringement in question is major enough. For example, if the unlawful emission of methane or the unlawful operation of an installation falling under the Industrial Emissions Directive (IED)[14] dealing with methane can cause death or serious injury to persons or substantial damage to the quality of air, soil or water, or to an ecosystem or animals or plants, it would be a criminal offence in the MS´ legal systems according to the requirements of Art 3 (a) or (j) of the ECD. According to Art 3 (5) ECD, Member States could provide for additional criminal offences to protect the environment, which might include offences according to the EU-MER. However, a very large majority of the EU-MER infringements sanctionable according to its Art 33 (5) will not fulfil these criteria.

[10] For a more detailed discussion see Faure, M. G. and Partain, R. A., Environmental Law and Economics, 1st ed. 2019, Cambridge University Press, p. 213-214.
[11] Ibid., p. 214-216.
[12] Periodic penalty payments are both included in the general penalties mentioned by Art 33 (1) and in the administrative penalties and administrative measures mentioned by Art 30 (2).
[13] Directive of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, OJ L/1 of 30 April 2024.
[14] Directive 2010/75/EU of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334/17 of 17.12.2010.

Moreover, considering the option of applying criminal penalties alongside administrative penalties raises, some difficulties. In particular, Art 33 (2) obliges the Member States to empower the CA to impose administrative penalties for certain infringements. While it is possible in some MS to subject an infringement both to administrative penalties and criminal penalties dependent on certain criteria (e.g. in the Netherlands), it is not possible in others (e.g. in Germany). Generally, however, the use of criminal penalties is restricted to particularly serious offences (criminal law as „ultimate resort"). The infringements listed in Art 33 (5) do not, at least as a rule, fall under this threshold. Thus, criminal law may only apply in particularly serious constellations of an infringement of the EU-MER, which would still enable the use of administrative penalties for the less serious constellations of that infringement – if at all.

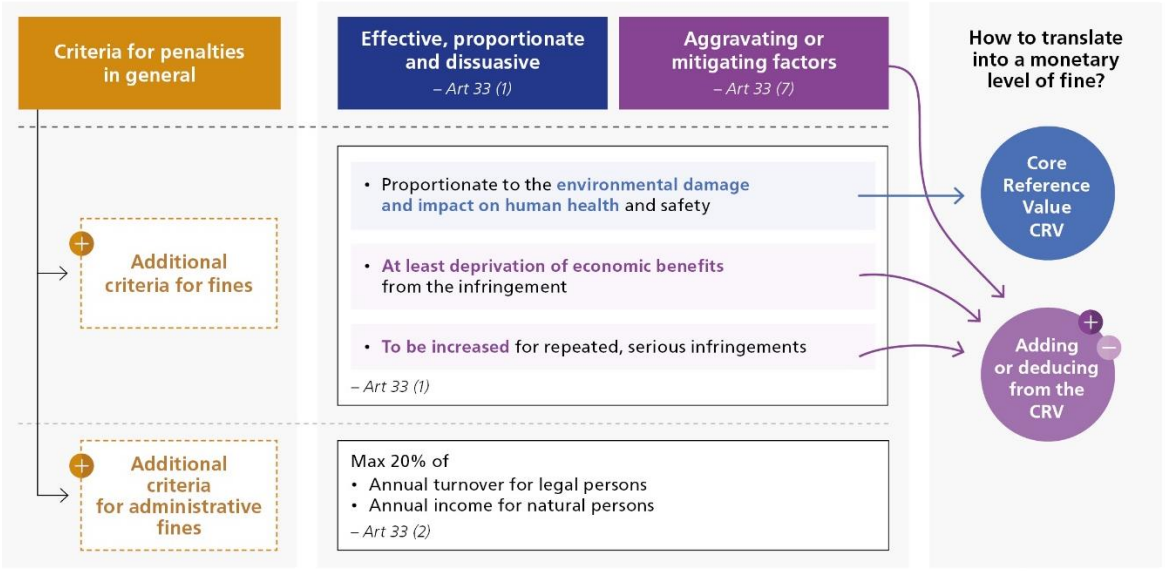
***Recommendation**:* Member States should opt for a penalty system that consists, at least primarily, of administrative penalties. Where a MS´ legal system does not provide for administrative fines, a similar system should be established where the fine is imposed by national courts and the fining procedure initiated by the CA [see Art 33 (3)]. This would ensure the ability to impose penalties relatively quickly and easily since the CA are themselves responsible for controlling the potential offenders through monitoring, inspections etc. For particularly serious infringements, criminal penalties might be foreseen as well, provided they do not completely replace administrative penalties for the infringements listed in Art 33 (2).

1.3 Level of penalties

In this chapter, we analyse the EU-MER provisions concerning the **criteria to be used to determine the level of penalties**, with a specific focus on the level of fines. Moreover, we develop proposals on how the MS can translate those criteria into the monetary values necessary to impose fines.

The first section of this chapter looks at the general EU-MER criteria applicable to all types of penalties. As seen above, (administrative) fines are likely to play a central role in the EU-MER penalty regime: 1.3.2We therefore elaborate on the additional criteria for (administrative) fines in section 1.3.2. As the EU-MER does not stipulate how these criteria are to be translated into monetary values, this step belongs to the MS' scope of implementation. By analysing the nature of the various elements, we determine that the core criterion is the proportionality of the fine to the environmental damage and to the impact on human health that can be directly or indirectly associated with the infringement. Therefore, we develop a proposal on how to define a **core reference value** representing this core criterion. Finally, in section 1.3.3, we argue that MS should establish fines guidelines taking into account the core reference value as well as all other criteria stipulated by the EU-MER.

Figure 2: Criteria for the level of penalties



1.3.1 General criteria for the level of penalties

As seen above, Art 33(1) stipulates that the penalties must be **effective, proportionate and dissuasive**. This trias developed by the European Court of Justice[15] (now Court of Justice of the European Union, CJEU) is regularly used in EU legislation to determine the level of penalties. The problem, however, is that these notions are rather vague, and their interpretation may depend on country-specific characteristics.[16] Thus, beyond exceptionally massive deviations of the national sanction system from these minimum requirements stipulated by EU law,[17] it is difficult to operationalise the trias. There is, therefore, a tendency in EU legislation to concretise the trias with more specific provisions and additional criteria. This is also the approach taken by Art 33 of the EU-MER.

Additionally to this trias of principles, Art 30(7) EU-MER provides a minimum list of **aggravating or mitigating factors** that the MS must take into account when defining the level of penalties "*as appropriate*":

"(a) the duration or temporal effects, the nature and the gravity of the infringement;

(b) any action taken by the operator (…)to timely mitigate or remedy the damage;

(c) the intentional or negligent character of the infringement;

(d) any previous or repeated infringements by the operator (…);

(e) the economic benefits gained or losses avoided, directly or indirectly, by the operator, (…) due to the infringement, if the relevant data are available;

[15] See ECJ, decision of 21.9.1989, C-68/88 (*Greek Maize*).
[16] Faure, M. G., Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Ship-source Pollution Directives: Questions and Challenges, (2010) European Energy and Environmental Law Review, p. 256 (277-278).
[17] In a recent case regarding Romanian coal plants, the low level of penalties compared to other Member States for infringements of the Industrial Emissions Directive (IED) originally foreseen in Romanian law led to Romania being referred to the Court of Justice of the EU (CJEU). After extensive reforms, including increasing penalties to approximately ten times previous levels, the Commission withdrew the infringement proceeding, https://www.endseurope.com/article/1861540/legal-comment-romanian-coal-plant-case-tells-us-effective-penalties-eu-environmental-law.

(f) the size of the operator, undertaking, mine operator or importer;

(g) the degree of cooperation with the authorities;

(h) the manner in which the infringement became known to the authorities, in particular whether, and if so to what extent, the operator (…) timely notified the infringement;

(i) any other aggravating or mitigating factor applicable to the circumstances of the case, including third party actions."

All these points can be seen as ways of concretising one or more of the components of the generic trias mentioned above. The wording "*aggravating or mitigating factors*" in the last point makes clear that each of these criteria can increase or decrease the level of the penalty.

1.3.2 Additional criteria for fines

The trias of principles as well as the aggravating and mitigating factors described in the previous section refer to all kinds of penalties outlined in chapter 1.2 above. **Specifically for fines**, Art 33(1) sets **additional criteria**, which concretise the trias of effective, proportionate and dissuasive penalties. Accordingly, the level of fines must:

1. be **proportionate to** the environmental damage and impact on human safety and health;
2. **at least deprive** those responsible for the infringement of the economic benefits derived from it in an effective way;
3. **gradually increase** for repeated serious infringements.

In the following sections, we explore potential methods to operationalise these three principles. The most attention is then given to the first one, as the EU-MER text implies that the **first of these three principles is the decisive reference value** to determine the level of fines. This is clear from the fact that the first principle could stand alone, while the other two principles require an external reference point, in this case set by the first one: The **minimum level** established by the second principle only sets a minimum to the level of fines but cannot in itself determine it. The same applies to the **gradual increase** required by the third principle in certain cases.

1.3.2.1 Core Reference Value based on environmental damage and impact on health

In this section, we first discuss how to weigh the three principles: environmental damage, impact on human health, and on human safety. We conclude that, for the vast majority of the potential infringements against the EU-MER, the environmental damage and the impact on human health are the decisive ones and that both can be meaningfully and pragmatically quantified using as a benchmark the volume of CH_4 emissions that can be directly or indirectly associated with an infringement. Subsequently, we discuss how the penalty regimes to be established by the MS can translate this benchmark into the monetary values necessary to impose a fine.

The overall **aim of the EU-MER** is to reduce CH_4 emissions from the energy sector. Its main motivation is that CH_4 is the second most important greenhouse gas after CO_2 (recitals 1-2 EU-MER). A further motivation is that CH_4 is also a precursor gas for harmful ground-level ozone (recital 3 EU-MER), which has major negative impacts on human health[18] and on ecosystems[19]. Given that the only legal basis of the EU-MER is Art 192 TFEU, which refers to environmental policies, the risk for human safety associated with CH_4 emissions is not mentioned as a formal

[18] US Environment Protection Agency: Health Effects of Ozone Pollution. https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution

[19] See also: European Environmental Agency: Exposure of Europe's ecosystems to ozone. https://www.eea.europa.eu/en/analysis/indicators/exposure-of-europes-ecosystems-to-ozone

motivation of the EU-MER. With reference to the safety of personnel in relevant facilities (e.g. coal mines, gas infrastructure) and of humans in their proximity, the EU-MER mentions human safety at several points as a reason to grant exceptions to certain EU-MER provisions [e.g. Art 14(9)]. In these cases, the overall principle is that human safety comes before environmental protection.

However, in order to determine the seriousness of an infringement of the EU-MER, the CA must "*consider the* ***environmental damage and the impact on human safety and health***" (recital 15). Correspondingly, as mentioned above, Art 30(2) also stipulates that the fines must be proportionate to these **three criteria, without establishing a hierarchy** among them.

Nevertheless, in practice human safety will seldom play a role. Directly or indirectly, any infringement of the EU-MER will result in more, or a higher risk of, CH_4 emissions. However, while CH_4 emissions always damage the environment and human health, the vast majority of the potential and expectable infringements of the EU-MER will not cause CH_4 concentrations that could pose risks for human safety, i.e. explosion, fire, and intoxication. Even in the rare cases where an infringement of the EU-MER does pose such risks, we assume that the same action or omission will usually also be sanctionable under other legal provisions focused on human safety. This does not mean we argue that the impact on human safety should not be considered by the MS and CA when determining the seriousness of an EU-MER infringement. As noted, the legal text clearly states that it must be considered. However, **human safety will only be relevant in exceptional cases**. Therefore, in the following **we focus** on the **environmental damage** and on **human health**.

Considering both these criteria, the **core reference value** that should be used to determine the seriousness of an infringement of the EU-MER is the same: **the volume of actual or potential CH_4 emissions** that can be directly or indirectly **associated with the infringement**. Other parameters may have an impact on the chemical and physical processes by which CH_4 contributes to the formation of ground-level ozone, and on how it impacts human health. Such parameters may include, for example, the location, the timing and the atmospheric conditions under which the emissions occur[20]. However, taking these more complex parameters into consideration when defining the penalties for EU-MER infringements would require the application of complex modelling requiring that multiple variables are measured or quantified and considered for a wide range of individual cases. It is far from certain – not to say unlikely – that univocal and incontestable results are achievable. Whether and how this could be done in a practical and legally sound way goes beyond the scope of this paper. As long as such an operationalisation of additional parameters is not practised, the volume of actual and potential CH_4 emissions attributable to an infringement of the EU-MER is arguably the main parameter that the MS and the CA can and should use to determine the seriousness of the infringement with regard to its environmental damage and impact on human health.

Having established this, the question remains as to **how the quantity of emissions can be converted into a monetary value in order to determine the level of the fine.** In other words: How can a value **(in x EUR/tCH_4)** be defined that can be used in practice to determine the level of fines. Here, we discuss four possible anchor points: the social cost of methane, the social cost of carbon, the excess emission penalty in the EU ETS system, and the shadow cost of carbon applied by the EIB.

[20] Mar et al. (2022) provide an overview and quote a number of other peer-reviewed articles, among others, on how CH_4 contributes to the formation of tropospheric ozone, how it harms human health, on the quantification of impacts on terrestrial ecosystems, specifically on vegetation and agriculture. See: Kathleen A. Mar, Charlotte Unger, Ludmila Walderdorff, Tim Butler: Beyond CO_2 equivalence: The impacts of methane on climate, ecosystems, and health, Environmental Science & Policy, Volume 134, 2022. https://doi.org/10.1016/j.envsci.2022.03.027

Potential anchor point 1 - Social Cost of Methane: In theory, the concept of social cost of methane (SCM), would be the perfect anchor point for determining the level of the EU-MER fines, as the SCM should ideally include all three criteria (environmental damage, impact on human health and safety) mentioned by Art 33(1) EU-MER. However, the problem is that there are **widely diverging estimations** about the SCM. Recently, a group of authors from the University of Gothenburg estimated "the SCM to lie in the range 880–8100 USD/tCH_4 in 2020, with a base case estimate of 4,000 USD/tCH_4", whereas the authors note that their base case is "larger than the average SCM presented in other studies mainly due to the revised damage function we use."[21] According to an estimation of the US Environment Protection Agency (EPA) of November 2023, the SCM in 2020 was set at a range of 1900-3200 USD/tCH_4, growing to 2700-4200 USD/tCH_4 in 2040, depending on the assumed discount rate.[22] We are not aware of analogous official estimations of the SCM by an EU institution, nor of any process in this direction.

Potential anchor point 2 - Social Cost of Carbon + X: As far as the climate impact is concerned, the social cost of carbon (SCC) can be easily converted into methane on the basis of its global warming potential (GWP), as discussed more in detail below. However, the EU-MER requires that the level of fines must be proportionate not only to the infringements' impact on the climate, but also on the additional environmental damage and on their impact on human health, which are not represented by the GWP. To take into account these impacts**, an additional factor (X) must be added**, in case the core reference value is based on the SCC. Similarly to the SCM debate, **wide ranges of estimations** are also found in recent contributions to the closely related debate on the social cost of carbon. For example, in an article recently published by Nature, a group of known US scholars, based on a wide range (factor 1-10) of SCC estimations, propose to use of a value of 185 USD USD/tCO_2[23]. Similarly, the German Environmental Agency suggests using a social cost of carbon growing from 195 EUR/tCO_2 in 2020 to 215 EUR/tCO_2 in 2030[24].

CO_2 values must be converted into methane. In this paper we use the lower (29.8) **CH_4/CO_2 equivalency rate** mentioned in the recital 2 of the EU-MER[25], which is based on the latest IPCC report estimation of the global warming potential of methane over 100 years (GWP_{100}). This is in line with overall EU and global climate reporting system, which have always been based on GWP_{100}. However, given the increasing urgency of climate mitigation, there would be good arguments in favour of using the much higher GWP_{20} value (82.5), or some value in between, to calculate the reference value for the fines to be applied on companies that do not comply with their legal obligations. This would lead to EUR/CH_4 values that are almost three times as high as when using the GWP_{100} value. We refrain from applying the higher CH_4/CO_2 equivalency rate to avoid the risk of being interpreted as questioning a fundament of climate reporting at the global level. However, when comparing of the various anchor points illustrated

[21] Azar, C., Martín, J.G., Johansson, D.J. et al. The social cost of methane. Climatic Change 176, 71 (2023). https://doi.org/10.1007/s10584-023-03540-1

[22] US Environmental Protection Agency, EPA Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances https://www.epa.gov/system/files/documents/2023-12/epa_scghg_2023_report_final.pdf

[23] Rennert et al. (2022). Comprehensive evidence implies a higher social cost of CO_2. Nature. 2022 Oct. https://www.nature.com/articles/s41586-022-05224-9. See also: EDF et al.: Comment on the Environmental Protection Agency's (EPA) application of the social cost of greenhouse gases, 8 August 2023, https://www.nrdc.org/sites/default/files/2023-08/comments-epa-power-plant-rule-social-cost-carbon-20230808.pdf.

[24] Umweltbundesamt, Methodenkonvention 3.1 zur Ermittlung von Umweltkosten Kostensätze, Stand 12/2020 https://www.umweltbundesamt.de/sites/default/files/medien/1410/publikationen/2020-12-21_methodenkonvention_3_1_kostensaetze.pdf

[25] Recital 2 EU-MER: "(…) *according to IPCC, while methane has 29.8 times greater global warming potential than CO_2 on a 100-year timescale, it is 82.5 times more potent on a 20-year timescale*".

in Table 1 below, this significant underestimation of the medium-term impact of methane on global warming must be taken into account. We see this as an additional argument for not anchoring the Core Reference Value to one of the lower values illustrated in Figure 1.

The existence of a wide range of estimations about both the SCM and the SCC and their inherent disputability are not expected to change, because they are a consequence of the large number of variables and uncertainties to be taken into account. Therefore, applying the SCM or the SCC as a main point of reference for setting the level of the EU-MER fines would, in any case, require each MS to make a value judgement to determine which of their possible quantifications should be used. Should a common EU value for the social cost of methane be established in the future, it could become an appropriate indicator.

Potential anchor point 3 – The EIB's shadow cost of carbon: An alternative anchor point could be the shadow cost of carbon applied by the European Investment Bank (EIB) to evaluate its investments. An advantage is that it is already recognised as part of the EU climate when evaluating the climate impact of infrastructure investments.[26] However, the EIB's shadow cost of carbon has not been designed to represent the damage caused by emissions, but rather the total cost of the marginal investments needed to reach the Paris Agreement targets. For this reason, the EIB's shadow cost of carbon strongly increases over time, as the marginal investments needed to achieve additional emission reductions are increasingly restricted to hard-to-abate sectors. Started from a level of 85 EUR/tCO_2 in 2020, it amounts EUR/tCO_2 in 2025, 250 EUR/tCO_2 in 2030 and 800 EUR/tCO_2 in 2050. Such a dynamic makes perfect sense for climate proofing investments with a lifespan of several decades. However, mechanically basing the level of fines for breaches of the EU Methane Regulation on this would lead to a constant and sharp increase in the level of fines, which we do not consider appropriate. Nevertheless, this potential anchor point provides another element of context for the exercise of finding an appropriate reference value for our purpose.

Potential anchor point 4 – Penalty regime in the EU ETS system: In our view, the most practicable anchor point could be the penalty regime foreseen in Art 16 of the EU ETS Directive to sanction the behaviour of operators who do not surrender sufficient emission allowances to cover their emissions during the preceding year. It consists of two elements: first, the excess emission penalty itself is set at 100 $EUR_{2012}/tCO_{2\,eq}$. This value refers to the EUR price level of 2012 and must be increased in accordance with the European index of consumer prices. In mid-2024 the first element is worth approximately 130 EUR $tCO_{2\,eq}$.[27] Additionally, as a second element, the operators subject to the penalty must still purchase and surrender a number of allowances equal to the amount of their excess emissions. At a current allowance price of approximately 75 EUR/$tCO_{2\,eq}$, companies in breach must pay circa 205 EUR/ $tCO_{2\,eq}$. Converting the total to methane with the low equivalency rate mentioned in the EU-MER (see above) results in a core refence of value of **6,109 EUR/tCO_4**.

This anchor point has the important **advantage** of being **easily applicable and meaningful**, given that it establishes a level of fine comparable to the one used in the core of the EU climate legislation. However, a level of fines dynamically based on this anchor point would partly be influenced by the EU ETS price, which is not an indicator of the costs of the climate impact of CH_4 emissions, and even less for their overall impact on the environment and on human health. The EU ETS price is the outcome of market forces that work on the basis of constantly changing market parameters across the economy, and of the evolving parameters set by the EU ETS legislation. However, the EU ETS price can be seen as a good indicator of the price that EU

[26] European Commission, Technical guidance on the climate proofing of infrastructure in the period 2021-2027, C(2021) 5430 final. See: https://ec.europa.eu/newsroom/cipr/items/722278/en

[27] See: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/monitoring-reporting-and-verification-eu-ets-emissions_en#penalty-for-excessive-emissions

policy makers are willing to make the economic actors covered by the ETS pay for the legal right to emit one ton of $CO_{2\ eq}$. From 2026 onwards, the EU ETS will include CH_4 emissions from the shipping sector, notably from LNG carriers the CH_4 emissions of which will also flow into the importers' reports foreseen by the EU-MER. With this minor exception, the EU-MER applies to sectors that will remain uncovered by the EU ETS in the foreseeable future. However, there is no reason why infringements of the EU-MER should be subject to a significantly lower penalty level than disallowed emissions in the EU ETS, considering the similarities: In both cases, economic actors do not comply with a legal obligation, the direct or indirect result is an increased (risk of) GHG emissions.

If the penalty for excess emissions in the ETS system is used as anchor point, a share of the core reference value for the level of fines to be applied in case of infringements of the EU-MER would float with the EU ETS price. As long as the EU ETS price remains below circa 130 EUR_{2024}, this floating share would be minor. A simple way of avoiding any floating would be to fix the core reference value at the current level of EU ETS pricing, e.g. establishing it for instance at circa 6,100 EUR/tCO_4 (correspondent to circa 130+75 EUR /tCO_2, as shown above).

The following table summarises some of the anchor points emerging from the analysis above, based on an USD/EUR exchange rate of 0.94. The CH_4/CO_2 equivalency is set at 29.8 (see above).

Table 1 :Core reference value (CRV) obtained from selected anchor points

Anchor Point	Variant	CRV in EUR /tCH_4
Social cost of methane	Base case in Azar et al. (2022)	3,760
Social cost of methane	US EPA range 2020	1,786-3,008
Social cost of methane	US EPA range 2040	2,538-3,948
Social cost of carbon	Suggested in Rennert et al. (2022)	5,182 + x
Social cost of carbon	German UBA for 2050	5,811 + x
Social cost of carbon	German UBA for 2030	6,407 + x
Shadow cost of carbon	EIB– for 2025	4,917
Shadow cost of carbon	EIB– for 2030	7,450
ETS Excess Emission Penalty	Both elements	6,109

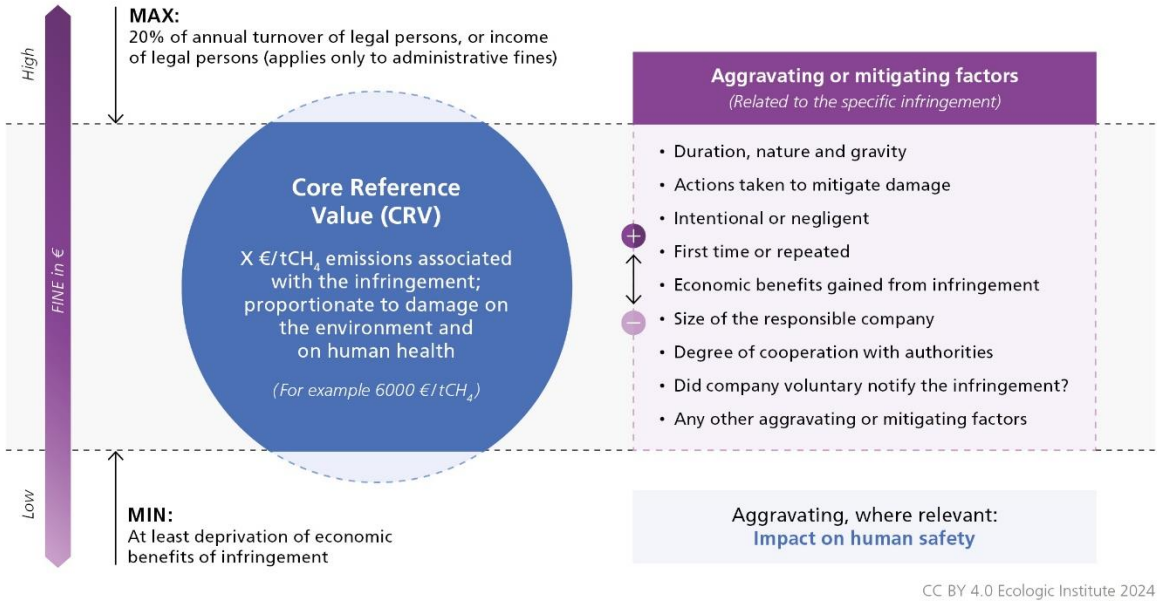
The analysis above shows that none of these anchor points perfectly corresponds to the EU-MER criteria. However, the MS must notify their penalty rules to the Commission by 4 August 2025. In order to do so, they must find ways to make the level of fines proportionate to the damage on the environment and on human health. Thus, each MS will soon face the challenge of implementing this in practice. Therefore, the question is not whether a perfect solution can be found, but rather how meaningful and practicable solutions can be developed in time, even though they may be less than perfect. Establishing a CRV consisting of a monetary amount related to the amount of CH_4 emissions directly or indirectly associated with an infringement is a practical means of implementing the EU-MER principles, as we have argued above. If such

a CRV is not established by the national laws implementing the EU-MER penalty regime, the CA – or, in some MS, the courts – will face exactly the same difficulties in each individual case. The existence of a CRV, although unavoidably set at the level that some people might find too low or too high, ensures at least a more coherent and predictable enforcement of the penalty regime.

With this in mind, we make a pragmatic proposal on the basis of these anchor points. In our view, there are strong arguments to base the core reference value on the ETS excess emission penalty regime. Therefore, **we propose a core reference value of 6,000 EUR/tCH$_4$**. And we refer to it in the following examples. Whatever level is chosen, it is advisable to foresee an automatic yearly adaptation to inflation.

Having established that a core reference value (CRV) which must be proportionate to the damage caused by the infringement on the environment and on human health is necessary, and having furthermore considered various possible anchor points and developed a proposal to set the CRV at 6,000 EUR/tCH$_4$, we now proceed to illustrate how the CRV will interact with the other criteria that, according to the EU-MER, must be considered when setting the level of fines against infringements of EU-MER provisions.

Figure 3: Core reference value and other criteria to determine the level of fines



Before discussing the minimum and maximum rules as well as the aggravating and mitigating factors illustrated in the figure, it is important to note that the entire construct requires that the CA **determine the volume of CH$_4$ emissions** that can be concretely or abstractly associated with a specific infringement. In some cases, for instance if an inspection shows that certain obligations concerning venting, flaring or leak detection and repair (LDAR), or that measures have not been fulfilled, it may be possible to identify a **concrete, direct causal effect** between the infringement and a measurable amount of CH$_4$ emissions per time unit. The only missing element to calculate the volume of CH$_4$ emissions attributable to the infringement would be the duration of the offense, which must be (approximately) determined by an investigation and/or by assumptions. However, many of the potential infringements of the EU-MER cannot be concretely tied to specific emission volumes. For example, infringements of rules concerning MRV do not necessarily cause CH$_4$ emissions, although the EU-MER explicitly states that they may be considered serious infringements (see section 1.3.2.4 below). The reason is that the

ultimate purpose of the MRV obligations is to provide data to inform mitigation measures. Thus, even in such a case, **(potential) CH_4 emissions can be indirectly associated with the infringement**. For instance, a complete lack of MRV could be associated with an abstract level of emissions expressed as a X% of the volume of natural gas that passes through a certain piece of infrastructure element each year. A partial failure to provide MRV documentation could be calculated as a share of X commensurate to the level of failure. The value X could be based, as far as possible, on empirical data about the level of emissions reductions that can, on average, be achieved when building upon the data emerging from compliant MRV behaviour. In any case, even when the amount of emissions directly or indirectly associated with the infringement is very low, the fine must at least deprive those responsible from the economic benefit derived from the infringement, as further discussed below.

It is clear that attributing real or potential CH_4 emission amounts to infringements of the EU-MER will often not be an exact science. However, analogous to considerations concerning the unavoidable degree of approximation involved in defining the CRV discussed above, it is important to note that these are a consequence of the EU-MER provision stipulating that the level of fines must be proportionate to the environmental damage and the impact on human health attributable to each specific infringement. The approach taken in this paper is a way of operationalising these principles in a more transparent and predictable way than if the CA or the courts would be left dealing with these questions every time they must decide on a penalty.

1.3.2.2 Maximum level of administrative fines

According to Art 33(2), the **maximum level** mentioned in the upper part of Figure 3 **only applies to administrative fines**, i.e. to fines directly imposed by the CA. This maximum caps the amount of the fine in case its level, as calculated according to the other criteria, is higher than 20% of the annual turnover of a legal person, or of the annual income of a natural person. In case of fines imposed by courts at the request of the CA, this maximum limit does not necessarily apply (see also chapter 1.2 above).

Turnover-linked penalties are being increasingly used in EU legislation. For example, the revised Environmental Crime Directive (ECD) stipulates that Member States may not set the maximum level of criminal or non-criminal fines for certain criminal offences lower than defined in Art 7(3) (a) and (b). Depending on the offence in question, the ECD sets the maximum level of these fines at 5% respectively 3% of the total worldwide turnover of the legal person, or an amount of EUR 40 and 24 million, respectively. Art 83(4) to (6) of the General Data Protection Regulation (GDPR) provide that certain infringements shall be subject to administrative fines up to EUR 10 and 20 million, respectively, or in the case of an undertaking, up to 2% respectively 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher.

1.3.2.3 Minimum level of fines: Deprivation of economic benefits derived from infringements

As seen above, according to the second of the three principles mentioned in Art 33(1), fines that sanction infringements of the EU-MER must **at least deprive** those responsible for the infringement **of the economic benefits** derived from it. This criterion aims at ensuring that infringements do not pay off from a cost-benefit-perspective. It sets a **minimum level of fines** but does not prevent the competent authorities or the courts from imposing fines at a higher level, if the other criteria established by the EU-MER suggest doing so.

For example, consider an infringement to the MRV rules that has no impact on human safety, does not directly cause any emissions and is associated with a very low risk of emissions quantifiable for instance in 2 tCH_4. Applying a CRF of 6,000 EUR/tCH_4, the standard level of

the fine would be 12,000 EUR. Let us now assume that this infringement is only associated with mitigating rather than with aggravating factors and that the company responsible for it has no previous history of infringements. Applying the deductions as shown in Figure 3 and discussed below in greater detail, the level of fine would be reduced to 7,000 EUR. However, if the economic benefit derived by the company responsible for the infringement is higher than 7,000 EUR, than the fine must be at least as high as this benefit. This minimum level has no practical effect if the calculation of the fine based on the other criteria results in a fine level higher than the benefit derived from the infringement.

The question arises of how to determine the economic benefits derived from the infringements. In the specific case of the EU-MER, they essentially consist of the avoided net costs of compliance. Therefore, to apply this principle, **the CA must be able to determine the economic benefits** that non-compliant operators and importers derive from each infringement. If the CA are not able to determine the benefits, they will neither be able nor allowed to apply this important principle. However, it must be noted that even in case the CA is not able to determine the economic benefits, it can still impose (in some MS ask a court to impose) a fine that, based on the other principles, may be significantly higher than this minimum level. The **MS should encourage and explicitly ask their CA to acquire the necessary know-how and information** to determine these economic benefits in a legally sound manner and provide the CA with the resources necessary to do so. This is a task that would highly benefit from the collaboration of the CA of all MS, coordinated by the European Commission, which is envisaged in Art 5(3) of the EU-MER.

A first, early step in this direction could be to **identify** a series of potential **frequently occurring infringements** (FOI). In the course of the implementation, the list of FOI could be updated in light of empirical experience. For each of these FOI, the CA, coordinated by the Commission, should try to gather information about the **typical cost of implementation**. Perhaps some of the highly compliant companies subject to the corresponding obligations are prepared to share this information. They might consider this to be in their interest, since it would help the CA to effectively sanction their non-compliant peers and perhaps competitors, thus depriving them from an unfair competitive advantage. The more comprehensive the list of FOI and the amount of data available on their cost, the better the CA can implement this important criterion.

According to Art 33(2), the Member States must "*ensure that the competent authorities have the power to impose*" a series of administrative penalties and measures, including "*the confiscation of the profits gained or losses avoided due to the infringements insofar as they can be determined*"). Thus, the CA will be bound to apply this criterion cautiously, since their authority to do so is limited to benefits they can determine with reasonable clarity. The clause on the confiscation enables the CA to impose a separate administrative penalty which, in practice, deprives the offenders from the economic benefits of their infringements. If a CA does so, it should and may not take the deprivation of economic benefits into account in determining the level of the fine of the same infringement. Doing so would constitute an inappropriate double penalty.

1.3.2.4 Repeated serious infringements

According to the third of the three principles mentioned in Art 33(1), as seen above, fines that sanction infringements of the EU-MER must be set at a level, which "(…) *gradually increases for repeated serious infringements*". The seriousness of an infringement of the EU-MER is addressed in recital 15:

"In order to determine the seriousness of an infringement of this Regulation, the competent authorities should consider the environmental damage and the impact on human safety and

health, as well as the likelihood of the infringement to affect, to a significant degree, data reliability and robustness in the monitoring and reporting obligations under this Regulation."

These criteria are exactly the same as those discussed above and included in Art 33(1), with the addition of data reliability and robustness. This addition implies that infringements of the MRV obligations foreseen by the EU-MER can be considered as serious, although they may only indirectly damage the environment or human health and safety. This reinforces our interpretation underlying the CRV model discussed above.

1.3.2.5 Aggravating and mitigating factors

Art 30(7) provides a list of aggravating and mitigating factors that we have shown and discussed in chapter 1.3.1 and summarised in Figure 3. When defining the level of penalties, including fines, the MS must take these factors into account "*as appropriate*".

These factors do not only apply to the fines, but also to other kind of penalties (see chapter 1.2). This is the reason why the criteria mentioned in article 33(1) are repeated with slightly different wording in Art 33(7). Of course, this does not mean that the same criterion should be applied twice. For example, if a fine has been calculated according to the procedure we have suggested, the environmental damage and the impact on human health of the amount of CH_4 emissions that can be associated to the infringement will already have been included in the Core Reference Value. Therefore, the "*duration or temporal effects, the nature and the gravity of the infringement*" will have, at least to a significant extent, already been taken into account.

Additionally, as shown in Figure 3, the **impact on human safety** mentioned as a core criterion in Art 33(1) can, in practice, also be handled as an additional aggravating factor. Due to the rarity of expectable EU-MER infringements that might cause damage to human safety (more on this in chapter 1.3.2.1), we have not included this criterion in the CRV, although it is mentioned in the same sentence as the two factors included there (environmental damage impact on human health). For the same reason, the absence of an impact on human safety should not be seen as a mitigating factor. Therefore, the impact on human safety should only be considered as an aggravating factor if it occurs.

As far as fines are concerned, these aggravating and mitigating factors can be easily incorporated into the level of the fine. The MS should assign to each of them **an adjustment range** that can be **expressed as a share of the level of the fine** established through the core criteria expressed by the CRV discussed above. A factor considered to be potentially more impactful might be assigned a wider adjustment range than a factor considered to be potentially less impactful. The function of such adjustment ranges will be to provide guidance to the judicative authority, be it the CA or a court, thereby increasing the predictability and the legal certainty of the penalty regime.

At least concerning the fines, operationalising the adjustment ranges via **absolute monetary amounts is not advisable**. The main criterion of proportionality of the fine to the environmental damage and to the impact on human health associated with the infringement implies that the level of fine can vary very significantly. If the adjustment range of one or several mitigating/aggravating factor(s) were large enough to be meaningful for large fines, it would not be meaningful for small fines, and vice versa. Consider for **example** two fines for infringements associated with, respectively, 2.5 tCH_4 and with 2,000 tCH_4 emissions. According to the CRV procedure mentioned above, before the aggravating and mitigating factors are considered, the former would be sanctioned with a fine of 15,000 EUR, the latter with a fine of 12 million EUR. To be significant for the larger fine, the adjustment range would need to be in the range of at least several hundreds of thousands of EUR. However, such a large range of impact would not

be meaningful for the small fine, leaving the judicative authority without practical guidance and all involved actors with less legal certainty.

The various **aggravating and mitigating factors complement each other** and may move the fine in opposite directions. For instance, one infringement might have had a high duration and gravity, and be the responsibility of a large company, resulting in two aggravating factors. However, the same infringement might have been unintentional, proactively reported by the operator to the competent authority, and the operator might have taken action to mitigate the damage, resulting in three mitigating factors.

In the case of **unintentional non-compliance**, the infringements would not be the result of a deliberate choice. One reason could be that the management initiated the relative processes too late and was then unable to procure the needed staff and equipment or to finish the work on time. Another reason could be that some unforeseen events prevented the execution of decided measures. However, there may also be situations where compliance was not possible, for example because the necessary staff and equipment could not be procured despite of the best efforts undertaken by the company subject to the EU-MER obligation. It may therefore be less straightforward to determine the economic benefit from unintentional non-compliance. In cases where all the costs of the outstanding measures have already been incurred, it could be argued that the infringement has not brought any benefit. However, one could also argue that these infringements would not have happened if sufficient resources, and therefore money, had been allocated to the task. And that delays in (certain) EU-MER measures are (likely) to result in additional CH_4 emissions, and thus increase the damage to environment and human health.

1.3.2.6 Summarising: a formula for the level of fine

To summarise this in-depth discussion of how to set the level of fines, we provide a formula that reflect our analysis above.

$$LF = CH_4A \times CRV \times (MAF_i \times AF_i) \times \ldots \times (MAF_n \times AF_n)$$

$$LF \geq MIN$$

$$LF \leq MAX \ (this\ only\ applies\ to\ adminstrative\ fines)$$

Variable	Explanation
LF	Level of fine
CH_4A	CH_4 emissions amount directly or indirectly associated with the infringement (see Chapter 1.3.2.1)
CRV	Core Reference Value (see Chapter 1.3.2.1)
MAF_i	Mitigating or aggravating factors (see Chapter1.3.2.5)
AF_i	Adjustment factors (see Chapter1.3.2.5)
i = 1, 2, 3 …, n	Index for different mitigating, aggravating or adjustment factors
MIN	Minimum level of fine (see chapter1.3.2.5 1.3.2.3)
MAX	Maximum level of administrative fines (see chapter1.3.2.5 1.3.2.2)

1.3.3 Development of fines guidelines

All the criteria for the imposition of penalties discussed above show that the EU-MER explicitly asks the Member States to define a broad set of criteria allowing the CA and/or the courts to consider several factors when defining the level of a penalty.

A way to support a coherent and uniform application of the criteria for determining the level of fines would be to integrate them into fines guidelines. In Germany for example, the federal states have issued “fines catalogues” for administrative fines in many areas of environmental law.[28] They aim to ensure a consistent and comprehensible treatment of comparable cases by providing a range for fines to sanction the most common infringements based on their seriousness. More generally, to the extent that sentencing guidelines are used in Europe (e.g. for environmental crime), they provide flexibility for judges to differentiate sanctions according to economic criteria, as opposed to the USA where strict sentencing guidelines apply (but are not always adhered to in practice).[29]

In the case of the EU-MER, the prime objective of fines guidelines would be to compile the criteria mentioned or suggested for the imposition of fines in one or more central place(s), depending on whether a Member State establishes a penalty regime based exclusively on administrative penalties imposed by the CA or a combined regime that includes penalties imposed by courts (see section 1.2), and on whether it has a centralised or a federal system. The guidelines would specify that the core reference value should be taken as the starting point for imposing fines, but that the other criteria must be taken into account as well. In particular, the aggravating and mitigating circumstances prescribed by Art 30(7) need to be considered in the individual case. To the extent that typical infringement cases can be identified (e.g. the FOI suggested in the section 1.3.2.3), the fines catalogue of the EU-MER could resemble the fines catalogues mentioned above. In any case, the compilation of operative criteria for the imposition of fines in guidelines would have an added value as they facilitate uniform application and transparency.

[28] See https://www.bussgeldkatalog.org/umwelt-naturschutz/.
[29] See Faure, M. G. and Partain, R. A., Environmental Law and Economics, 1st ed. 2019, Cambridge University Press, p. 223-224.

2 Selected legal issues

This second part of the paper discusses three legal issues. Chapter 1 examines the legal powers the national competent authorities (CA) need to effectively fulfil the duties assigned to them by the EU-MER, with a specific focus on their inspection duties. The list of the necessary legal powers we provide can serve as a resource for Member States when establishing and empowering their CA, as well as for civil society organisations that may want to verify whether the CA have been granted the necessary powers.

Chapter 2 discusses the clause on the 'reasonable efforts' that the importers must undertake to comply with their obligations concerning ongoing supply contracts concluded before the EU-MER entered into force, according to Art 28 and 29. Interpreting this clause is crucial since most of the CH_4 emissions associated with energy consumed in the EU occur at production sites in the countries from which the EU imports coal, oil and gas. A significant portion of these imports happens under long-term contracts. Therefore, during the initial years of implementation, many of these contracts will fall under the 'reasonable efforts' clause. We conclude this chapter with recommendations on how to operationalise this clause.

Chapter 3 explores the extent to which the CA may delegate inspection activities to private entities. This question arises because two provisions within Art 6 can be interpreted in different ways. Since inspections are a core task of the CA and are essential for the proper implementation of the EU-MER, this chapter aims to provide more clarity on this issue.

2.1 Legal Powers the competent authorities need to have

According to Art 4(1) of the EU-MER, each Member States (MS) must "*designate one or more competent authorities responsible for monitoring and enforcing the application of this Regulation*" and "*notify the Commission the names and contact details of the competent authorities*" by 4 February 2025. Moreover, Art 4(3) stipulates that the MS must "***ensure that the competent authorities*** *(…)* ***have adequate powers*** *and resources* ***to perform the tasks set out in this Regulation***".

This chapter lists the legal powers the national competent authorities (CA) need to have in order to be able to effectively carry out the inspection as well as other tasks the EU-MER assigns to them. In Chapter 2.2., we discuss the clause on "*reasonable efforts*" with regard to certain obligations the importers are subject to. In chapter 2.3, we discuss the extent to which the CA may delegate to private entities tasks related to their inspection duties.

The EU-MER, like any other EU Regulation, is directly applicable in all EU MS[30]. Consequently, one might wonder whether the CA are automatically empowered to carry out all actions necessary to perform the tasks assigned by the EU-MER, even if (some of) these powers are not explicitly stated or conferred in the act in which the MS designates the CA. The fact that Art 4 of the EU-MER explicitly requires the MS to ensure that the CA have these powers suggests that the legislators assumed that, at least in some MS, such an automatic empowerment would not necessarily be effective. Therefore, for the sake of legal certainty, it is advisable that the Member States confer all necessary powers to their CA explicitly rather than just implicitly.

[30] Art 288 para. 2 Treaty on the Functioning of the European Union.

2.1.1 Legal powers needed to carry out inspections

The EU-MER requires that the CA are granted the following powers:

- **deciding on the scope and intensity of inspections** based on a risk assessment;
- having **access to and inspecting company premises** with/without notification, including the power of flying drones over the inspected premises and other areas that must be crossed to reach them, and the right to make use of relevant satellite data;
- having **access to relevant records and documents,** including commercially confidential operational data as far as it is needed to verify the completeness and plausibility of the reports provided by the operators and to verify compliance;
- **requesting and gathering additional information** necessary for monitoring and enforcement, including interviewing company personnel;
- **publishing the inspection reports**;
- where an inspection shows non-compliance, the power to **set deadlines for the operators and importers to implement all actions needed** to bring their operations into compliance.

2.1.2 List of powers needed to carry out other tasks than inspections

The powers the CA need to perform their other tasks in addition to inspections, include:

- the power to collect and process the data contained in the reports to be submitted by the operators, importers, responsible parties and Member states subject to reporting obligations according to the EU-MER. Where it requires publishing of reports, this encompasses the right to public disclosure;
- the power to initiate, lead and terminate administrative procedures, including hearings and other tools admitted under administrative law;
- the power to issue warnings, and notices;
- the power to impose to operators and importers remedial actions, (dis)approve and amend their leak detection and repair programmes, implementation schedules concerning venting and flaring, and other reports and proposals;
- the power to request additional evidence to operators and importers;
- the power to impose sanctions to address non-compliance;
- wherever the EU-MER provides leeway, the power to make use of it within the limits defined by the EU-MER and by other general principles of law, such as the principle of proportionality;
- the power to cooperate and share information with other authorities and other regulatory bodies, both at the national and at the EU and at the international level;
- the power to exempt certain operators from specific obligations, if the conditions defined in the EU-MER are fulfilled;
- the power to require from importers “sound” justification to explain their failure to achieve MRV-equivalence and to provide all due information.

2.2 "Reasonable efforts" in Art 28-29 of the EU-MER

2.2.1 Background

The bulk of the CH_4 emissions associated with energy consumed in the EU occur in the countries where fossil fuels imported into the EU have been extracted. Therefore, a thorough and strict implementation of the comparably soft EU-MER provisions applicable to imported fossil fuels is of outmost importance. Moreover, it is desirable that these provisions are implemented in a coherent way across the Union to prevent a "race to the bottom" between MS that may be eager to attract legal entities that act as fossil fuel importers.

Therefore, understanding the scope of the leeway that the MS and their CA have when implementing the EU-MER provisions on imports may also serve as guidance to NGOs acting as watchdogs alongside the CA. From this point of view, one of the crucial aspects is how to interpret the "*reasonable efforts*" mentioned in the Art 28 and 29 of the EU-MER.

Articles 28 (MRV equivalence) and 29 (methane intensity associated to crude oil, natural gas and coal) are central provisions introduced into the EU-MER text during the last phase of negotiations,[31] as a result of discussions on how to address the methane emissions associated with fossil fuels imported into the EU[32].

Art 28 requires that the crude oil, natural gas and coal placed on the EU market by importers are subject to equivalent monitoring, reporting and verification obligations ("MRV equivalence") as if they had been extracted in the EU. Art 29 obliges importers to report on the methane intensity in the production of the fossil energy products they import. These obligations apply immediately, although the corresponding reports by importers are not due until 1 January 2027 (Art 28) and four years after entry into force (Art 29), i.e., by August 2028.

Both articles distinguish between contracts concluded on or after the entry into force of the Regulation (for the sake of simplicity, we call them in the following: "new contracts") and those concluded before that date ("old contracts").

- In case of new contracts, importers must incorporate these obligations into their supply contracts.
- In the case of old contracts, importers are not obliged to achieve compliance, but (only) to undertake "*reasonable efforts*" to require compliance from their contracting partners. The rationale is that a new EU law cannot interfere in ongoing contracts by imposing clauses that require the collaboration of suppliers outside the EU.

Regardless of whether they refer to old or new contracts, and consequently irrespective of whether they only require "*reasonable efforts*", these articles are among those for which the EU Regulation prescribes the imposition of penalties in the case of non-compliance [Art 33(5)].

Therefore, the CA will have to assess whether an importer has undertaken "reasonable efforts" within the meaning of Art 28 and Art 29. Thus, a clear understanding of the term would assist the CA in performing their tasks.

[31] See the history of amendments, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:805:FIN, and the latest amendments adopted by the European Parliament on 9 May 2023, which still does not contain the Art 28 and 29, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202301081.

[32] See, for example, CAN Europe, 2022, Report on Extension of Provisions under the Regulation on Methane Emissions in the Energy Sector Outside EU Borders; Parliamentary question and answer - E-001364/2023; American Petroleum Institute, Center for LNG et al., 2023, Joint letter on methane emissions import requirements, https://iogpeurope.org/wp-content/uploads/2023/09/230829-DEF-joint-letter-methane-emissions-import-requirements.pdf.

2.2.2 Legal Analysis

2.2.2.1 Analysis of the Regulation text and accompanying documents

Art 28(2) states:

> *"For **contracts concluded before [the date of the entry into force** of this Regulation] for the supply of crude oil, natural gas or coal produced outside the Union**, importers shall undertake <u>all reasonable efforts</u> to require** that crude oil, natural gas or coal is subject to **monitoring, reporting and verification measures** at the level of the producer that are **equivalent to those set out in this Regulation**. Those **efforts may include the amendment of those contracts**. From 1 January 2027, importers shall annually **inform** the competent authorities of the Member State in which they are established **of the results of such efforts**, as part of the information to be provided pursuant to Art 27(1) and, **in case of failure, provide sound justification** to those competent authorities for such failure **and set out the actions that they have undertaken** as part of those efforts.*" (our emphasis)

Art 29(1) states:

> "(…) *For the supply **contracts concluded before [the date of entry into force** of this Regulation], **Union producers and**, pursuant to article 27(1), **importers shall undertake <u>all reasonable efforts</u> to report** to the competent authorities of the Member State in which they are established **the methane intensity of the production** of crude oil, natural gas and coal placed by them in the Union market in accordance with the methodology established pursuant to paragraph 4 of this Article. From [four years after the date of entry into force of the Regulation], Union producers and importers placing crude oil, natural gas or coal on the Union market shall **report** annually to the competent authorities of the Member State in which they are established **of the results of such efforts**.*" (our emphasis)

According to the Court of Justice of the European Union (CJEU), such wording establishes "*obligations to use best endeavours*" where "*it is clear that the deployment of efforts is sufficient to comply with the requirements laid down*", in contrast to "*obligations as to the result to be achieved*"[33]. Following this logic, the "*reasonable efforts*" wording of Art 28(2) and Art 29(1) makes clear that MRV-equivalence and methane intensity reporting are the desirable outcome of the required efforts, but not the legal requirement themselves.

Arts 28 and 29 do not contain any concrete explanation of the term "*reasonable efforts*", nor do the recitals or any other accompanying document related to the EU-MER[34]. Art 28(2) refers to the amendment of the supply contracts as an example of what such efforts may include. As MRV-equivalence to the EU-MER cannot realistically be in place in contracts established before the EU-MER was adopted, in practice the amendment of existing contracts will always be needed. However, since such an amendment cannot be achieved unilaterally, Art 28(2) presumably refers to the effort of asking the suppliers to amend an ongoing contract.

In case the importers fail to achieve MRV-equivalence, which means in our view in practice the envisaged amendment of their supply contracts, Art 28(2) additionally requires to "*provide sound justification*" for this failure, and to "*set out actions*" that have been undertaken. This shows that, at least for the MRV-equivalence, more than one action is required in order to comply with the reasonable effort clause. However, it remains unclear, what exactly a "*sound*

[33] European Court of Justice: Judgment, 16 March 2023, C-351/21, para. 53.
[34] See the COM's official proposal and all other related official documents, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:805:FIN.

justification" shall encompass beyond a list of actions. Such additional requirements are missing in Art 29, which may indicate a different scope of efforts needed. Yet again, the exact scope remains unclear.

Within a systematic comparison with other provisions of the EU-MER containing comparable terms, we find that:

- The term "*reasonable efforts*" is also used in Art 18 (1), when referring to the efforts the MS must undertake "*to locate and document all revealed inactive wells, temporarily plugged wells, and permanently plugged and abandoned wells located on their territory or under their jurisdiction, based on a robust assessment taking into account the most up-t- date scientific findings and best available techniques*". Similarly to the case we are discussing here, also Art 18(1) prescribes a desirable outcome, but it does not pretend that it is achieved. In this case, probably because even with the best available techniques some of the wells described in Art 18 may not be findable and the desired outcome impossible to achieve;
- the use of the term "*reasonable* (efforts)" stands in contrast with the use of the term "*all the necessary* (measures/actions/data/assistance)"[35]. The use of different terms – assumed intentional – shows that the legislators aimed at different scopes of obligations. This understanding is also reflected by corresponding CJEU-jurisprudence, as we will describe below.

Moreover, Art 28 and 29 stand in contrast with Art 27 concerning the information to be provided by importers: Art 27 puts the latter under the strict obligation to achieve a specific result, not only to undertake reasonable efforts. It is important to note that the softer requirements in Art 28 and 29 only refer to old contracts. For new contracts, i.e. contracts the negotiation of which is still open, importers are strictly obliged to achieve MRV-equivalence and to report methane intensity data. These different levels of obligations can be seen as a result of general considerations of proportionality. The motivation for this differentiation is also explained in Recital 72:

> "*New contracts which Union importers conclude for the supply of crude oil, natural gas or coal should strengthen the take up in third countries of rules to monitor, report and verify methane emissions equivalent to those set out in this Regulation. Rules should be put in place to enable third-country suppliers and Union importers to demonstrate the equivalence of such measures with the requirements of this Regulation, with regard to crude oil, natural gas or coal imported to the Union. While clauses to that effect* ***cannot be imposed in the case of existing contracts****, it is possible to include such clauses in new contracts or in existing contracts which are in the process of being renewed, even tacitly. (…)*" (our emphasis)

The wording "*renewed even tacitly*" constitutes a noteworthy difference between the text of Recital 72 and the text of Art 28 and 29, which only refers to "*the contracts concluded or renewed on or after the date of entry into force of this Regulation* ", without the specification "*even tacitly*". In EU law, recitals are not legally binding and cannot support the interpretation of a provision contrary to its clear wording.[36] Nevertheless, they can and must be used to interpret unclear provisions in accordance with their purpose[37]. We understand this provision to mean that the legislators assumed that tacitly renewed contracts would be

[35] See Art 18(6) („all the necessary measures"), Art 3(2) („all the data necessary"), Art 5(2) („all assistance necessary"), Art 6(6) ("all the necessary actions"), Art 8(5) ("all the assistance necessary").
[36] ECJ, Judgments of 19.6.2014, Case C-345/13, para. 31; of 13.9.2018, Case C-287/17, para. 33.
[37] See e.g., ECJ, Judgment of 18.4. 2024, Case C-79/23, paras. 56 et seq.; of 13.9.2018, Case C-287/17, para 37.

considered as renewed for the purpose of Arts 28 and 29 EU-MER. Therefore, even if an old supply contract contained a clause stating that it would be tacitly renewed for a certain period unless one of the parties explicitly terminated it by a certain date, the provisions of Art 28 and 29 EU-MER for new or renewed contracts would apply once it has been tacitly renewed in this manner.

2.2.2.2 Principle of proportionality

Art 5(4) of the Treaty on European Union (TEU) provides that

> "*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*."

According to the CJEU, the principle of proportionality – one of the general principles of EU law – requires that measures implemented through a provision of EU law be appropriate for attaining the (legitimate) objective pursued and must not go beyond what is necessary to achieve it.[38]

The obligations under the EU-MER limit the freedom to conduct a business (Art 16 EU Charter of Fundamental Rights (CFREU). Limitations must comply with Art 52(1) of the Charter, stating that

> „[a]*ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the* ***principle of proportionality****, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*."

Art 51(1) CFREU states that the Charter "*shall apply to the institutions, bodies, offices and agencies of the Union*".

Therefore, EU legislation must respect the principle of proportionality. In the case of the EU-MER, this principle requires a distinction to be made between importers and operators/producers on the one hand, and between the different points in time at which the contracts are concluded on the other.

Importers are not directly responsible for methane emissions that occur outside the EU. In addition, some requirements would simply be impossible for importers to comply with on their own, since they require the cooperation of the suppliers. As such, importers cannot legally be treated the same way as operators.

Similarly, contracts concluded in the past cannot be treated the same way as contracts that are still open for negotiation, since requiring changes to existing contracts implies a much deeper intervention into contractual freedom.

Against this background, the term "*reasonable efforts*" ensures that the principle of proportionality is respected when regulating the importers' obligations.

2.2.2.3 Other areas where the term "reasonable efforts" is used

EU legislation: Some other legal acts require "*reasonable efforts*" from private addressees. The context of such provisions shows that the obligation to merely undertake reasonable efforts is chosen where it would be disproportionate to introduce a duty to achieve a certain result, e.g., because the latter requirement would be impossible or disproportionately complex to fulfil for the persons obliged.

[38] ECJ, Judgments of the Court, Cases C-221/09, para. 79, C-210/03, para. 47, and C-558/07, para. 41.

For instance, the Digital Services Act[39] requires that providers of online platforms

> "*make reasonable efforts to randomly check whether the products or services offered have been identified as being illegal in any official, freely accessible and machine-readable online databases or online interfaces available in a Member State or in the Union*" [Art 31 (3)].

or that providers of very large online platforms

> "*shall make reasonable efforts to ensure that the information [of advertisements on their online interface] is accurate and complete*" [Art 39 (1)].

Other EU legislation refers to reasonable efforts that public bodies must undertake. This is, e.g., the case in criminal law procedure, where authorities or courts have to undertake reasonable efforts to gather facts and evidence.[40] Similarly, Art 3(1)(b) of the General Data Protection Regulation[41] requires that

> "*the competent authorities in the Member State have made reasonable efforts under the circumstances to provide the organisation with notice and an opportunity to respond*."

With regard to the principle of proportionality (see above), the word "*reasonable*" can be used in these contexts synonymous with "*proportionate*".

Rulings of the CJEU: Within the limited scope of this Paper, no CJEU-judgements could be found that explicitly dealt with the meaning of the term "*reasonable efforts*" used in EU legislation.

However, the Court has already contrasted the very similar category of "*obligations to use best endeavours*" on the one hand with "*obligations as to the result to be achieved*" on the other hand.[42] According to the CJEU, whereas under the first category "only" reasonable efforts must be undertaken, where the law introduces an obligation to achieve a certain result, the obligated party must undertake all actions that are both "necessary and sufficient" to achieve the intended result.[43]

International law and commercial contracts: The term "*reasonable efforts*" is commonly used in commercial contracts, where one party must "undertake reasonable efforts" in order to achieve some contractual goal. The term is usually left undefined, giving discretional leeway to the parties. In the event of disagreement, the competent court must interpret its meaning with regard to the context of the particular contract and the particular parties involved. A recent example is the dispute between Astra Zeneca and the European Commission on the alleged infringement of the contractual obligation to supply the EU with vaccine doses. In the supply contract AstraZeneca agreed to apply "*best reasonable efforts*" to get approval for the production of vaccines, and to deliver a certain number of doses.[44]

[39] Regulation (EU) 2022/2065 on a Single Market for Digital Services.
[40] For instance, Art 8 para. 3 of the Directive 2016/343 ('Right to be present at the trial') requires reasonable efforts to locate a suspect or accused person before trial can be hold without him/her.
[41] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.
[42] ECJ, Judgment, 16 March 2023, C-351/21, para. 50, 53.
[43] ECJ, Judgment, 16 March 2023, C-351/21, para. 57 and 60.
[44] https://ec.europa.eu/commission/presscorner/detail/fr/qanda_21_3107, https://europeanlawblog.eu/2021/04/08/misunderstanding-the-european-commissions-dispute-with-astrazeneca/.

Other frequently used terms are "*best efforts*" or "*best endeavours*", which imply similar obligations.[45]

Art 5.1.4 of the UNIDROIT Principles of International Commercial Contracts 2016 states:

> *"(1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.*
>
> *(2) To the extent that an obligation of a party involves a* ***duty of best efforts*** *in the performance of an activity, that party is bound to* ***make such efforts as would be made by a reasonable person of the same kind in the same circumstances.****"*[46]

According to the TransLex-Principles on transnational commercial law,[47] "*best efforts undertakings*" mean

> *„all efforts which can be expected from a* ***reasonable party of the same kind in the same circumstances****, taking into account the particular nature of the contract and the intentions and interests of the parties."*[48]

Despite the different context, this understanding seems equally adequate for the implementation of Arts 27a and b EU-MER as it contains general aspects of proportionality.

2.2.3 Conclusions of the legal analysis on "reasonable efforts"

By choosing the wording "*importers shall undertake all reasonable efforts*" in Arts 28 and 29 EU-MER with reference to ongoing supply contracts, the EU legislators deliberately introduced "only" obligations for the importers to act and abstained from imposing any obligations to achieve a certain result on them, as done in other provisions of the EU-MER.

However, there are no legal provisions nor relevant case law of the CJEU that contain a definition of the term "*reasonable efforts*", not even in other legislative areas. It is therefore an indefinite legal term that must be determined by interpretation, ultimately by the ECJ in the event of disputes.

Until the CJEU has clarified the term clearly and conclusively**, the competent authorities therefore have a great – though not indefinite – deal of discretion in interpreting the "*reasonable efforts*"** in Art 28 and Art 29 EU-MER.

Conversely, for the affected companies, this means considerable legal uncertainty about the efforts they must undertake to avoid fines according to Arts 33(2) and 33(5).

However, it is clear that while importers are obliged to take certain actions in relation to old contracts and at least justify the lack of success of their efforts in relation to MRV equivalence, they cannot be held responsible for any failure to achieve MRV equivalence or for any failure to report methane emission intensity.

Nonetheless, there are **some indications** that competent authorities will have to consider when interpretating the term and which would play a role in a corresponding legal dispute:

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[45] Legal literature in US law tends to take a different view, saying that the required amount of efforts is higher under the "best efforts"-clause than with the term "reasonable efforts", see e.g. https://www.bdplaw.com/insights/interpreting-best-efforts-vs-reasonable-efforts-in-contracts/.

[46] UNIDROIT Principles of International Commercial Contracts, Art 5.1.4, https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/chapter-5-section-1/#1623699276062-689fbd04-1f98.

[47] Systematic online-collection of principles and rules of transnational commercial law with commentaries and comparative law reference, see https://www.trans-lex.org/principles/of-transnational-law-(lex-mercatoria).

[48] Commentary to Trans-Lex Principle, No. IV.6.5, .

- the most important point of reference for the scope of the term "*reasonable efforts*" is the **principle of proportionality**. The requirements of the CA must be proportionate, i.e., there must be a reasonable balance between the efforts required from the importer and the purpose pursued;
- a comparison with international and transnational contract law indicates that the term "*reasonable efforts*" should be interpreted in the same way as the similar term "*best efforts*", namely with regard to **what can be expected from a reasonable person in a similar situation** taking into account the interests of both the importer involved and of the authority.

2.2.4 Recommendation on how to operationalise the "reasonable efforts" clause

Based on the legal analysis above, we provide a practical recommendation on how the CA can operationalise the "reasonable effort" clause.

A minimalistic, passive approach to operationalising the "reasonable effort" clause could require importers to prove that they have asked their suppliers at least twice to amend existing contracts in order to comply with the requirements of Arts 28 and 29. If the suppliers refuse, the importers only need to demonstrate to the CA that they have sent two letters requiring such a contract amendment.

A more proactive and ambitious operationalisation could involve requesting importers to explicitly ask their suppliers under what conditions they would be able and willing to comply with the requirements of Arts 28 and 29 EU-MER. This could include terms of additional compensation, time and of any other conditions the supplier might request. If these requests result in successful negotiations leading to a contract amendment conforming to Arts 28 and 29, the importer only needs to demonstrate that this has occurred. Otherwise, the importer would be required to disclose the conditions requested by the suppliers to the CA and to provide "*sound justification*" for why the importer was unable or unwilling to accept them.

In our view, this more proactive approach would have several advantages that justify interfering with trade secrets and with data protection:

- Regardless of their answer, simply receiving the proposed specific questions would immediately prompt suppliers to examine how and at what cost they could implement the MRV equivalence and report the methane intensity of their products. Without this proactive approach, some suppliers with existing contracts lasting several years might postpone this analysis to a later time. If they want to continue doing business with EU importers, they will all have to comply once their ongoing contracts expire. In some cases, this earlier focus is likely to trigger earlier investments in the procedures and equipment necessary to implement MRV equivalence and methane intensity monitoring.
- The more proactive approach would yield more comprehensive information on the pricing, timeframes and other conditions requested by suppliers to meet the requirements of Arts 28 and 29. If properly analysed, this data (anonymised as necessary) could enable the CA of individual MS (and the European Commission, if the data were accessible to it) to identify best practices in implementation and potentially exaggerated requests. It must be noted that an importer could not be made responsible for the exaggerated requests. However, merely announcing such a data analysis process could deter suppliers from making inflated demands to comply.
- Very important: while the minimalistic approach essentially allows importers to fulfil EU-MER requirements on existing contracts merely formally, i.e. by simply sending two

formal letters, possibly signalling to suppliers that they can refuse without providing reasons, the proactive approach would compel importers to request specific price offers and carefully consider whether to refuse them. If an importer could demonstrate that requesting the supplier to comply would significantly increase the cost of the imported oil, gas or coal, the CA would find it difficult to dispute the importer's decision not to accept this amendment. However, if the price increase be negligible or very low, the CA could argue that the importer's refusal to accept these costs does not comply with the "reasonable efforts" clause. The cost gap is likely to decrease as ongoing contracts approach expiration since, as mentioned earlier, suppliers will have to comply anyway if they wish to secure new contracts with EU importers.

Besides the interference with trade secrets and data protection, the main disadvantage of the more proactive approach would be additional transaction costs imposed on the importers and suppliers. However, we consider such costs very limited: As the question of how to comply with the EU-MER provisions will be on the agenda regardless, the additional transaction costs of the more proactive approach would therefore only consist of anticipating the effort required to calculate the price and conditions for compliance. The more proactive approach does not entail any disadvantage in terms of the EU's security of energy supply or competitiveness, since it would not create any additional obligation, only more transparency.

On the other hand, the advantages mentioned above could lead to a substantial reduction of CH_4 emissions associated with the extraction of coal, gas and oil exported to the EU, and therefore generate substantial benefits in terms of climate mitigation and human health. Therefore, taking into account the principle of proportionality, we consider the more proactive approach appropriate.

2.3 May inspections be delegated to private entities?

Among the tasks assigned by the EU-MER to the EU MS and their CA, the inspections are one of the most substantial.

The purpose of the inspections is to verify compliance of operators and importers with the EU-MER obligations they are subject to. The inspections can include site checks, field audits, examination of documentation and records, and methane emissions detection and concentration measurements [Art 6(2)]. The first routine inspections of all sites must be completed by May 2026, thereafter every site must be inspected at least every 3 years. If an inspection finds serious infringements, the next inspection is due within 10 months [Art 6(3)]. In addition, the CA must carry out non-routine inspections [Art 6(4)].

In Member States with a large number of methane emission points, it can be expected that carrying out inspections will require significant resources, such as specialised staff, equipment, logistics and coordination. As the MS and their CA will be planning how to implement the EU-MER in the next months, setting up the resources needed to carry out the inspections will be an important aspect.

This leads to the question discussed in this chapter: T**o what extent may inspection activities under Art 6 be delegated by the CA to private entities?** This question arises because two provisions within Art 6 EU-MER could be interpreted in different ways. In a nutshell, our conclusion is that a large part of the individual activities may be delegated to private entities, but not the inspections as a whole or their most essential tasks. A precondition for such a delegation is that national legal provisions regulate the relationship between the CA and the private entities and prevent conflicts of interests.

We are not aware of any previous analysis dealing with this question. The following is the first attempt to provide answers.

In the first section of this chapter, we introduce general principles of EU and national law. In the second section, we provide a legal analysis of the relevant passages of Art 6, and we develop our interpretation. In the third section, we confirm our interpretation by comparing with other specific EU legal sources.

In a separate paper of this series, we discuss in detail how the MS and their CA can effectively and efficiently implement their EU-MER tasks, including the inspections, and how to quantify the resources required.

2.3.1 General aspects

In general, including private entities into the performance of state tasks is not forbidden by EU law.[49] On the contrary, it is often explicitly mentioned in EU legal acts.

Considering the principle of "*effet utile*" – the goal and duty of effective implementation of EU law"[50] – Member States are bound to adopt the best way of implementation of EU obligations, which may in some cases involve outsourcing (parts of) their tasks to private entities.

In fact, national law can integrate private sector entities into the performance of state tasks making them act and appear like a public body. However, since the exercise of sovereign powers interferes with fundamental rights, the corresponding tasks may only be transferred to private parties in exceptional cases, and by means of specific legal provisions. Such a privatisation of public tasks may be practiced to different extents in individual EU MS, depending on their constitutional boundaries and national legislation.

In Germany, for example, there are two main forms. In the delegation of tasks without sovereign power, the public authority uses a private entity or person as an "administrative assistant". This form typically involves simple auxiliary activities carried out in accordance with the instructions of the authority[51]. The delegation of tasks with sovereign powers typically involves a "transfer"[52] of specific sovereign powers from the public authority to a private entity, limited to the purpose of enabling the private entity to carry out specific duties, such as issuing administrative decisions that legally bind the addressee. Under this form, the designated (private) entity is considered an authority according to the law. In Germany, such a transfer requires a specific legal provision and is possible only under very limited conditions.

As far as we are aware, there are no general EU law provisions that determine the limits and concrete forms of such transfers of sovereign powers to private entities when enacting and enforcing EU legal provisions. In the absence of such general EU provisions, these questions are left to the MS who have the responsibility to enact and enforce EU law. However, some boundaries may result from the provisions of specific EU legal acts.

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[49] ECJ, Judgment of 10 October 2017, C-413/15, paras. 34, 35, where the Court ruled that a directly applicable provision of EU law can be held against a private law entity, which had been assigned by a Member State the task of providing a public service. For this purpose, the Member State had transferred special (sovereign) powers to that private law entity. This case implies that, in principle, the Court accepts the delegation of public tasks stemming from EU law.

[50] The principle of "effet utile" is commonly used as a criterion when interpretating EU law. See Koch/Hofmann/Reese, § 2 European and National Environmental Constitutional Law, Environmental Law Handbook 6th Edition 2024, margin para 80 and the cases cited there concerning the implementation of EU environmental law: ECJ Judgment of 30 May 1991 - C-59/89- TA Luft II, Judgment of 28 February 1991 - 131/88 - Groundwater Directive, Judgment of 13 February 2003 - C-75/01 - Commission v. Luxembourg, Judgment of 06 May 1980 - C-102/79 - Commission v. Belgium, Judgment of 14 October 1987 – 208/85 - Commission v. Germany.

[51] See the German concept of a "Verwaltungshelfer" ("administrative assistant").

[52] See the German concept of "Beleihung".

In the following sections, we will therefore analyse the wording, purpose and systematic context of Art 6(2) and Art 6(7) of the EU Regulation in detail and compare them with analogous EU legal acts in order to answer the question of whether and to what extent inspection activities under the EU Regulation can be outsourced to private entities.

2.3.2 Art 6(2) EU-MER

2.3.2.1 Wording

Art 6(2) subpara. 2 states:

> *"Inspections shall include, where relevant,* ***site checks or field audits, examination of documentation and records*** *that demonstrate compliance with the requirements of this Regulation,* ***detection and measurement of methane emissions and any follow-up action undertaken by or on behalf of the competent authorities*** *to check and promote compliance with the requirements of this Regulation."* (our emphasis)

The wording "*by on or behalf of the competent authorities*" makes it clear that the CA may in principle outsource to external entities at least the actions listed in the provision, which are:

- site checks or field audits;
- examination of documentation and records;
- detection and measurement of methane emissions;
- follow-up actions.[53]

Art 6(2) is silent on the kinds of entities that may perform some of these actions on behalf of the CA. However, based on its the text, there is no reason to assume that private entities should be excluded.

Conversely, there is a strong indication, that other tasks related to inspections as described in Art 6(2) subpara. 2 and Art 6(3), and (5) are not to be delegated, since in these provisions, only "*the competent authorities*" are mentioned, without including the addition of "*on behalf of*".

These tasks encompass:

- issuing a notice of remedial actions with clear deadlines [Art 6(2) subpara. 2];
- instruct the operator to submit a set of remedial actions and (dis-)approve it [Art 6(2) subpara. 2];
- draw up inspection programmes [Art 6(3);[54]
- prepare reports [Art 6(5)].[55].

2.3.2.2 Purpose of the clause "by or on behalf"

When interpreting a provision of EU law it is necessary to consider not only its wording, but also its context and the objectives pursued by the legislation of which it forms part.[56]

[53] It remains unclear, what is meant by the term "follow-up actions", leaving considerable discretional leeway to the CAs.
[54] According to Art 6(3), the inspection programs are to be based on risk assessments. Although those risk assessments are not part of the inspection activities described in Art 6(2), there can be made an argument for the admissibility of outsourcing them as well, since they are "only" preparatory and do not entail a binding administrative decision.
[55] Art 6(5) also contains the obligation to publish the report. However, we would not see the mere publication as "core" part of the inspection task, that would imply the exercise of sovereign powers.
[56] See CJEU, Judgment of 12 January 2023, C-132/21, para. 32 and the case-law cited).

The general purpose of the inspections is "*to check and promote compliance with the requirements of this Regulation*" and, conversely, to identify infringements of the regulations by operators, mine operators and importers [Art 6(1-2)].

With regard to the specific passus "*by or on behalf*" that we are analysing here, no specific motivations and explanations can be found in Art 6, nor in Recital 14, which generally provides background and justifications for the inspection clauses. In absence of such motivations, the most obvious interpretation is that the passus "*by or on behalf*" is meant to help the MS and their CA to address capacity and efficiency issues. The possibility to delegate parts of the inspection task to external (private) entities shall help the CA to carry out the inspections timely and efficiently.

In some cases, it may not be possible or efficient for CA to have sufficient in-house technical capacities (trained staff, equipment) to carry out all required[57] inspection measures on all types of sites. Thus, it may be more feasible and efficient to outsource (parts of) the inspection activities to an external entity. In some cases, this feasibility and efficiency gain can be best or only achieved by outsourcing elements of the inspection activities to private entities.

We conclude that the passus "*by or on behalf*" can be understood literally, i.e. that it intends to give the CA the possibility to outsource certain inspection actions also to private entities. At least in some cases, the purpose of the clause might even be best achieved by involving private entities.

2.3.2.3 Systematic

This interpretation of Art 6(2) is not contested, but rather confirmed by the fact that it does not establish any procedural requirement before assigning tasks to external entities, private or public.

A systematic comparison with Arts 8 and 9 EU-MER shows that Art 9 – in contrast to Art 6(2) – requires the formal accreditation of external verifiers in charge of verifying the emissions reports due by operators and importers. This difference must be seen as a consequence of the significantly different nature of the tasks and, therefore, of the specific EU requirements concerning the verification of reports, as compared to inspection activities. Art 9 EU-MER refers to Regulation (EC) No. 765/2008, which sets out general requirements for accreditation and market surveillance relating to the marketing of products. An analogous procedure is established by the Commission Implementing Regulation (EU) 2018/2067 with regard to the verification of emissions reports under the EU ETS.

The different handling also indicates the different extent to which the inclusion of private entities is admissible. An (accredited) verifier has the power and duty to issue a verification statement, which is in principle binding for the CA [Art 8(4)].

In contrast to this, it seems that Art 6(2) only allows private entities to carry out on behalf of the CA the specific inspection actions listed in the text of Art 6(2) and to provide the gathered information to the CA. According to Art 6(5), the CA remains legally responsible for issuing and publishing the formal inspection reports, and for making a series of decisions based on its evaluations of the reports (further inspections, remedial orders, sanctions etc.).

[57] Art 6(2) makes it clear that inspections must cover a certain scope of actions ("*Inspections **shall** include*, *where relevant*, …"), even though the CA has some discretional leeway to determine which measures seems to be necessary ("*where relevant*").

2.3.3 Art 6(7) EU-MER

Art 6(7) EU-MER contains a provision that might seem to conflict with the possibility of outsourcing inspection tasks to private entities according to Art 6(2) analysed above. We analyse Art 6(7) to clarify this issue.

2.3.3.1 Wording

Art 6(7) states:

> "***Member States may*** *enter into* ***formal agreements*** *with relevant* ***institutions, bodies, agencies or services*** ***of the Union or with other Member States*** *or* ***other appropriate intergovernmental organisations or public bodies,*** *where available, for the provision of specialised expertise to support their competent authorities in carrying out the tasks attributed to them by this article. For the purposes of this paragraph* ***an intergovernmental organisation or public body shall not be deemed appropriate where its objectivity may be compromised by a conflict of interest***." (our emphasis)

The list of the entities with which the MS may enter into such agreements is exhaustive[58] and excludes private entities[59]. If the legislators had intended to include private entities in this list, they could and would have explicitly done so. Thus, as far as the formal agreements mentioned in Art 6(7) are concerned, MS may not enter into them with private entities.

A more restrictive interpretation of this wording could be that it prevents the CA from outsourcing to private entities any activity that requires "*specialised expertise*". Since core inspection activities, such as CH_4 measurements or audit examinations, do require expertise that may be considered as "*specialised*", this interpretation would end up contradicting the passus of Art 6(2) discussed above. This argument, which we do not support, could be made as following: The wording "*Member States may enter*" in Art 6(7) implies that, without this provision, it would not have been sufficiently clear whether Member States were allowed to enter such agreements. Furthermore, the fact that the (only) subject allowed to act under Article 6(7) is the MS could be interpreted as preventing competent authorities from independently signing contracts ("*formal agreements*") with organisations supporting them by providing "*specialised expertise*", especially in the case of private companies not included in the exhaustive expertise" and related to inspections. Such an interpretation would practically prevent the CA from outsourcing to private entities anything involving "*specialised expertise*" and related to inspections.

The question now arises as to whether such a restrictive interpretation is appropriate. In the following, we argue that this is not the case, as Article 6(7) is not intended to prevent the involvement of private entities in the fulfilment of (parts of) the control tasks. In order to substantiate this argument, we must first interpret the purpose of Article 6(7).

2.3.3.2 Purpose of Art 6(7)

The origin of Art 6(7) is an amendment proposed by the Council and slightly refined in the course of the Trilogue negotiations.[60] There is no further explanation of the specific provision

[58] It is exhaustive, because it names two clearly defined cases with the conjunction "or", and it does not contain any of the elements that typically indicate a non-exhaustive lists in EU law, such as: explicitly mentioning that a list is non-exhaustive; explicit phrases like "*among others*" or "*including but not limited to*"; open ended language like "*such as*" or "*for example*".

[59] All mentioned entities are either "*of the Union"* or *"other Member States*" or "*intergovernmental*" or "*public bodies*".

[60] See Interinstitutional File: 2021/0423(COD), 15 December 2022.

in Article 6(7) either in recital 13, which contains the background and justification for the control clauses in Article 6, or elsewhere in the EU-MER text.

In absence of motivations in the legal source, our interpretation is that Art 6(7) – similar to and complementing Art 6(2) – is meant to help MS and their CA to address capacity and efficiency[61] issues with regard to the implementation of Art 6 by providing cross-border flexibility and encouraging collaboration to achieve synergies at inter- or supranational level. This can help the MS and their CA to benefit from economies of scale.[62] If this is the purpose of Art 6(7), it cannot simultaneously be intended to prevent the CA from outsourcing specific inspection tasks to private entities as allowed by Art 6(2).

Our interpretation of Art 6(7) avoids a conflict with Art 6(2), as it enables inspection activities to be carried out "*by or on behalf*" of the CA (see above). Moreover, this interpretation is in line with the recommendation of the European Parliament and of the Council providing for minimum criteria for environmental inspections in the Member States and with the modalities of implementation of comparable EU legislation, as we show below.

In opposition to ours, the more restrictive interpretation of Art 6(6) outlined above would lead to the conclusion that Art 6(6) would forbid that "*specialised expertise*" be provided to the CA by private entities. And even by public entities, unless a formal agreement is signed by the relative MS with some foreign or supranational public entity. Such an interpretation is not plausible: it contradicts Art 6(2); it contradicts Art 5(3) of the EU-MER, which requires the CA to collaborate with each other and with the Commission;[63] it is not in line with the general EU recommendations concerning environmental inspections that we discuss in the next section.

Therefore, the only way to solve the apparent contradiction and give sense to both provisions is in our view to interpret Art 6(6) as covering a different scope of support than Art 6(2). In consequence, we argue that Art 6(6) does not intend to prevent the involvement of private entities in the performance of (parts of) the inspection tasks as indicated in Art 6(2).

2.3.4 EU Recommendations related to environmental inspections

Our interpretation is supported by the EU *Recommendations on minimum criteria for environmental inspections in the Member States* (RMCEI).[64] These are general recommendations of the European Parliament and the Council to Member States on the implementation of duties concerning environmental inspections.

Section II. 2. of the RMCEI defines the term "***environmental inspection"*** providing examples that are very similar to those listed as possible inspection actions in Art 6(2) EU-MER (e.g. in general checking compliance and monitoring, site checks including visits of premises and equipment,

[61] For example, for the CA of a MS with only one or a small number of specific type of CH_4 emission sites (e.g. only one coal mine and a handful of abandoned oil wells), may be inefficient to develop on its own all the specific inspection know-how, since this capacities would be idle most of the time. It may be more efficient to get support by another institution of another EU MS with plenty of such sites.

[62] Learning effects and economies of scales in the EU-MER implementation are possible. The increased attention for CH_4 emissions monitoring at global level is likely to lead to a dynamic evolution of CH_4 detection and measuring technologies.

[63] Art 5(3) states: "*The competent authorities shall cooperate with each other and with the Commission and may cooperate with authorities of third countries, in order to ensure compliance with this Regulation."* Notably, by not mentioning the Member States in this context, Art 5(3) makes the CA subjects of international cooperation on issues related to the EU-MER implementation. This cooperation certainly must include issues that require "specialised expertise". It would be very strange if CA may cooperate with each other but may not autonomously ask for specialist advise unless the Member States enters into formal agreements with public entities to do so.

[64] Recommendation of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States (2001/331/EC).

checking relevant records). We therefore consider these recommendations to be relevant to the EU-MER.

Section II. 4. (b) generally recommends that the (originally) competent public authorities "***may, in accordance with their national legislation, delegate the tasks*** *provided for in this recommendation to be accomplished, under their authority and supervision,* ***to any legal person whether governed by public or private law"***. Any private sector company that has been assigned such tasks is then considered as '*inspecting authority*' under the said Recommendations [Section II. 4.(c)]. (our emphasis)

Notably, such delegation is put under the condition that the entity carrying out the activity on behalf of a public authority **remains under the authority and supervision of the competent authority** and "***has no personal interest*** *in the outcome of the inspections it undertakes*" [Section II. 4.(b)]. (our emphasis)

Against this background, it seems convincing to interpret Art 6 EU-MER as allowing the outsourcing of specific activities listed in Art 6(2), but not the "core" tasks of issuing binding administrative decisions based on the results of the inspection activity.

However, it is necessary for national law to ensure that the authority retains sufficient control to exercise its powers and supervisory function. Without specific national legislation, there is much to suggest that delegation of control tasks would be unlawful. In Germany, for example, case law has declared certain fines for road traffic offences invalid because the local police authority had commissioned a private company to carry out the speed measurements and the first step of analysing the data, although the relevant national legislation did not provide a legal basis for such a delegation of tasks.[65]

2.3.5 Comparison with other EU legislative acts

2.3.5.1 The Industrial Emissions Directive

The wording of Art 6(2) EU-MER, "*undertaken by or on behalf of the competent authorities*", was already mentioned in the EU-MER Impact Assessment, thereby quoting the EU Industrial Emissions Directive (IED),[66] which the EU-MER Impact Assessment indicates as a model with regards to the inspections to check and promote compliance.[67] Art 23 of the IED, which regulates environmental inspections, neither forbids nor explicitly permits outsourcing.

To verify whether outsourcing of inspection activities takes place in practice, we reviewed the situation in one MS and found that this is the case.

The German law allows the delegation of parts of the IED inspections to private entities. The relevant provision stipulates that, in general, "*competent authorities are responsible for monitoring the implementation of this law*", that they "*may take the necessary measures for this purpose"* and that they may "*appoint agents* ["Beauftragte"] *to carry out these measures*".[68]

Thus, inspections may be carried out not only by the authority's own employees, but also by appointed experts. For example, the competent authorities can obtain expert opinions to clarify the facts (e.g. on the state of the art).[69] However, the relevant provision does not allow a "*systematic and comprehensive shifting of fact-finding to private experts*". The power to issue orders/administrative decisions lies solely with the competent public authority. This means that

[65] Higher Regional Court Frankfurt, decision of 26.04.2017, 2 Ss-Owi 295/17.
[66] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010L0075-20110106.
[67] Impact Assessment, SWD 2021(459) final, p. 65.
[68] Section 52(1) Federal Immission Control Act – Bundesimmissionsschutzgesetz.
[69] Landmann/Rohmer, Environmental Law, 2023, § 52 BImSchG, No. 17 and 18.

under German law neither sovereign powers may be delegated[70], nor may the "core" parts of the inspection task or the inspection task as a whole be delegated.

In Germany, the admissibility of including private third parties in inspection tasks has been confirmed by the competent courts.[71] The admissibility of outsourcing is also mentioned by executive public institutions responsible for the IED implementation. For example, according to the Ministry for Environment, Energy, and Climate Protectionstate of Lower Saxony

> "(...) *State monitoring according to § 52 of the Federal Immission Control Act takes place - if necessary, also* ***with the involvement of agents (such as experts or approved monitoring bodies)*** *(…)"*[72]

We conclude that parts of the IED inspections may be outsourced to private entities and that this is the case in the only EU MS where we have verified whether such an outsourcing happens in practice.

2.3.5.2 Other EU legislation

A look at two other EU legal acts that assign the task of carrying out inspections or control functions to the competent national authorities also confirms that their partial outsourcing to private entities is frequently practised.

For instance, Regulation (EU) 2017/625 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, assigns to the competent authorities a variety of "*official control tasks*" and explicitly allows the delegation of some of these tasks to private sector entities. This option of delegation comes with a bunch of conditions as well as limitations. Art 28 of Regulation (EU) 2017/625 allows the delegation of "*certain*" but not all "*official control tasks to one or more delegated bodies*[73] *or natural persons*". At least with allowing the delegation of tasks to natural persons, this provision can be understood as explicitly allowing the inclusion of the private sector.[74] Art 29-31 contain specific conditions for such delegation and Art 32 requires special audits or inspections of such bodies or persons by the competent authority (para. 1(a)).[75]

Regulation (EC) No 300/2008 on common rules in the field of civil aviation security e explicitly stipulates that security audits to verify the implementation of the required standards may only be carried out by certified auditors (Annex II, para. 15). However, when it comes to the required Common Basic Standards at national airports, Regulation (EC) No 300/2008 (Art 4) remains silent on how exactly the MS shall ensure their implementation. At least one MS, Germany, interpreted this clause as allowing the delegation of tasks to private sector companies: The

[70] Here we mean sovereign powers that go beyond the mere right to enter and inspect a company's site and documents. The powers that may not be delegated are for instance the power of issuing binding administrative decisions or issuing reports that present the inspection process as a whole and are the basis for further administrative decisions.

[71] See e. e.g. Higher Administrative Court North Rhine Westphalia, Judgment of 22.11.2005, Az. 9 A 7/02, No. 69.

[72] Monitoring of industrial plants according to the Federal Immission Control Act in Lower Saxony, Guidelines for plant operators and members of monitoring authorities, Status: August 2017, https://www.umwelt.niedersachsen.de/startseite/themen/technischer_umweltschutz/anlagenuberwachung/leitfaden-ueberwachung-128560.html.

[73] Art 3(5) defines a 'delegated body' as "*a separate legal person to which the competent authorities have delegated certain official control tasks or certain tasks related to other official activities*".

[74] Only in very few exceptional cases, not relevant for our discussion, a natural person may also constitute a state institution, such as the President of the Republic or the Monarch in some EU MS.

[75] Germany, for instance, incorporated this possibility in its national legislation (see Section 42 Food, Commodities, and Feed Code together with Food Inspector Regulation - Lebensmittelkontrolleur-Verordnung.

German Aviation Security Act provides the possibility of officially delegating certain security-related tasks to private sector entities,[76] u provided that the designated bodies fulfil a number of specific requirements, which are also laid down in the Act.

2.3.6 Conclusions on inspections

In light of a partly confusing wording in Art 6(7) EU-MER, for which no motivation is provided in the recitals, we have discussed in this chapter the extent to which the CA may delegate inspection activities under Art 6 to private entities.

Taking into account general aspects of EU law, other provisions of the EU-MER, comparable EU legislation as well as the EU Recommendations related to environmental inspections, we come to the following clear conclusions:

- the competent authorities may delegate to public and private entities certain parts of their inspection work, notably when it comes to those explicitly listed in Art 6(2): site checks, field audits examination of documentation and records, methane emissions detection and concentration measurements and follow-up actions;[77]
- however, there are strong arguments against the possibility of delegating to private entities the inspections as a whole or their most essential tasks, notably: drawing up inspection programmes based on a risk assessment [Art 6(3]]; issuing a notice of remedial actions with clear deadlines [Art 6(2) subpara. 2]; instructing the operator to submit set of remedial actions and (dis-)approve it [Art 6(2) subpara. 2]; preparing reports [Art 6(5)]. In broader terms the CA may not outsource the “core” parts of the inspection tasks, which are integral part of their exercise of sovereign powers;
- delegating EU-MER inspection tasks to private entities requires that national legal provisions lay down specific requirements regulating the relationship between the competent authority and the private entities being assigned those tasks, as well as the requirements these entities must fulfil with regard to adequate expertise;
- the national legislation must also prevent conflicts of interests: the private entities may have no interest in the outcomes of the inspections;
- in addition to that and complementing Art 6(2), Art 6(7) introduces the possibility of formal agreements between MS (as well as between MS and bodies of the Union) to provide support that goes beyond the scope of the inspection activities mentioned in Art 6(2). Under Art 6(7), MS may not enter into formal agreements with private entities for the purpose of providing such specialised expertise in accordance with Art 6(7).

[76] See Sections 16a and 5 LuftSiG.
[77] It remains unclear, what is meant by the term “follow-up actions”, leaving considerable discretional leeway to the CAs.

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