

Final Report

Criminal Penalties in EU Member
States' Environmental Law

coordinated by

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1. Introduction

A first important task of the project consists in identifying the way in which an important deal of the European Environmental directives are enforced through the criminal law in the member states. It is probably important to stress that this project obviously fits into the harmonisation efforts with respect to environmental criminal law which have recently seen the light. Indeed, after the Council of Europe drafted a convention on the protection of the environment through criminal law¹, also at the European level several initiatives were taken in the field of the criminal law. In this respect we can mention the proposal for a recommendation of the Council concerning minimum criteria for environmental inspections in the member states², which dealt mainly with the aspects of control and enforcement, but more importantly there have been various initiatives recently to harmonise the material environmental criminal law as well. The most important one is definitely a proposal for a directive on the protection of the environment through criminal law, launched on 13 March 2001 by the Commission³. Although various academics are rather critical of criminalizing the non-respect of national legislation implementing European environmental directives⁴ the purpose of the current study is certainly not to undertake a critical analysis of the task of Europe with respect to the environmental criminal law.

However, it is important to mention these various developments as a background for this study. Indeed, the proposal of 13 March 2001 states that the proposed directive wishes to ensure a more effective application of community law on the protection of the environment by establishing throughout the community a minimum set of environmental offences. Thus the idea was that the member states should ensure that when certain offences constitute a breach of the rules of community law protecting the environment, that a criminal enforcement should take place.

It is important to take this evolution as a background for the current study. A first step in any harmonisation effort is obviously that the Commission should know how the non-respect of national rules implementing specific directives and a regulation are sanctioned in the various member states today.

Therefore a first goal of this project is to analyse through what kind of national legislation a number of directives and one specific regulation have been implemented and how they are sanctioned. In that respect it is obviously important to stress that in some cases it is necessary to check how the particular

¹ ETS number 172, promulgated in Strasbourg at 4.11.1998, but not entered into force yet.

² COM (1998) 772 final of 16.12.1998.

³ COM (2001) 139 final.

⁴ See e.g. Buruma, Y. and Somsen, J., "Een strafwetgever te Brussel inzake milieubescherming", *NJB*, 2001, 795-797.

directives were implemented in order to be able to look at the sanctioning system. The first goal of this project is therefore to examine how the non-respect of various European directives dealing with environmental law is sanctioned within the Member States. The country reporters have been asked to provide information, not only on the applicable criminal law, but also on potentially other sanctions (administrative or civil) that may be in place to enforce national rules, implementing the directives.

The focus will, however, be on environmental criminal law. Therefore a first question, addressed in the first part of this project is in what kind of legal texts the provisions can be found. Of course it is also examined through what kind of sanctions a violation of the various directives is enforced.

Part 2 of this report therefore provides an overview of criminal penalties in the EU Member States. The methodology which was followed in this respect is that a questionnaire, asking for specific information has been sent to 15 country reporters. The questionnaire is contained in annex to this report. The reports themselves have not been included in this final report, which would make it excessively large. Instead we have preferred to provide the results directly.

In addition the project also focuses on environmental criminal law in Member States. Part 3 of this report provides the result of the country reports in that respect. Again, the country reports are not published in full, but the relevant information for every country has been included in alphabetical order of the countries. Thus, it is much more reader friendly since the reader can immediately compare the results from various Member States. In this third part a brief, clear, but nevertheless as complete as possible insight into the applicable environmental criminal law in the various Member States is provided. In this respect also information is provided on criminal liability of legal persons. Within this third part an overview is therefore provided of the most important criminal offences for environmental law and the applicable criminal penalties. Indeed, it is considered particularly important to address the issue how environmental criminal law deals with legal entities. In that respect we were interested among others in the question whether the legal entities are fully subjected to the criminal law or whether alternative systems (administrative, civil sanctions) apply to legal entities.

Part 4 deals with environmental criminal law in case law. An important aspect of environmental criminal law is obviously the issue how environmental criminal law is applied in practice. This concerns the important difference between the “law in the books” and the “law in action”. Therefore the country reporters have provided information on the most important case law concerning environmental criminal law. Obviously it is impossible to provide a complete overview of all available case law, but a brief insight in this case law for every Member State is again provided in alphabetical order for every Member State in this fourth part.

In addition a brief insight is also provided in the way environmental criminal procedures take place. It is obviously of importance to know e.g. before what kind of tribunals or courts procedures take place, who initiates the procedures and who supports the costs of these procedures.

The final part (5) contains a comparative analysis, drafted by the coordinators. The goal of this comparative analysis is obviously to provide some insight in the question whether the environmental criminal law in Europe today is based on common principles or whether there are indeed major divergences on various issues. With the view on a possible harmonisation (that is the background and framework for this project) it may seem important to provide a brief comparative analysis, indicating those areas where divergences are huge and those where in fact legal techniques may seem different, but principles may be common.

As far as the used methodology is concerned we should repeat that a questionnaire was used which was sent to 15 country reporters. This questionnaire provided on the one hand basic information on the applicable sanctions in case of a violation of certain environmental directives and one regulation. This information can now be found (in a transposed way) in part 2. In addition the country reports provided information on environmental criminal law in their country and on environmental criminal legal practice. The latter information was necessary to be included in the parts 3 and 4.

For reasons of presentation and reader-friendliness we have preferred not to include the integral texts of all the country reports. Instead parts of the country reports have been included to form the parts 2, 3 and 4. The advantage of this technique is that for every issue the reader immediately becomes an overview of the situation in every Member State.

However, the reader should therefore be aware of the fact that this report is really the result of a joint effort of all the contributors. To make this clear we have repeated the name of every reporter when providing information on the particular Member State.

The reporters for the various Member States are:

- Austria Prof. Dr. Andreas Scheil;
- Belgium Mr. Jan Vanheule, Prof.Dr. Michael G. Faure LL.M.;
- Denmark Prof.dr.jr. Peter Pagh;
- Finland Prof. Ari Ekroos;
- France Prof. Dr. Marcel Bayle;
- Germany Dr. Gerhard Grüner, Prof. Dr. Günter Heine;
- Greece Prof. Dr. George Konstantionopoulos;

- Ireland Prof. Yvonne Scannell;
- Italy Mr. Cristina Forte, Mr. Daniele Serani
- Luxembourg Mr. Fernand Entringer;
- The Netherlands Dr. Mr. Ingeborg Koopmans;
- Portugal Dra. Maria Paula Faria, Prof.Dra. Anabela Miranda Rodrigues, Mr. António Leones Dantas;
- Spain Prof. Dr. Teresa Castiñeira, Dr. Ramón Ragues, Ms. M. Antonieta Fernandez;
- Sweden Per Ole Träskman;
- United Kingdom Dr. Carolyn Abbot;

This final report was coordinated by Prof.Dr. Michael G. Faure LL.M. and Prof.Dr. Günter Heine. It has been sent both to the reporters and to the services of the Commission for feedback. Moreover some of the individual country contributions have been presented at a colloquium jointly organised by the Max Planck Institute for Foreign and International Comparative Law and the Maastricht European Institute for Transnational Legal Research (METRO). The coordinators are indebted to Prof.Dr.Dr. h.c. mult. Albin Eser, director of the Max Planck Institute for International and Foreign Criminal Law for his willingness to host this conference in Freiburg im Breisgau. We are moreover indebted to Suzanne Pycke for useful research assistance and to the secretariat of METRO for drafting the interim and final reports.

Bern-Maastricht, September 2002

Michael Faure

Günter Heine

2. Overview of criminal penalties in the EU Member States

As was indicated above a first step in this project was to indicate for a list of directives (and one regulation) what the particular sanctions are. It concerns the following directives and the regulation:

- Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils
- Council Directive 75/442/EEC of 15 July 1975 on waste
- Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community
- Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds
- Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges.
- Council Directive 88/609/EEC of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants
- Council Directive 91/689/EEC of 12 December 1991 on hazardous waste
- Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora
- Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances
- Council Directive 99/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations
- Regulation (EC) No 2037/2000 of the European Parliament and the Council of 29 June 2000 on substances that deplete the ozone layer.

For every Member State the reporters have been asked to check how the particular directives were implemented in order to be able to give some information on the applicable sanctions. As was mentioned in the introduction, the focus is primarily on environmental criminal law, but in some cases relevant other sanctions may apply as well.

Below the reader can therefore find for every directive and for every Member State (in alphabetical order) a table with the applicable sanctions.

2.1. Directive 75/439 (disposal of waste oils)

2.1.1. AUSTRIA

2.1.1.1. Federal and State administrative penal law:

General: Administrative Penal Code: applicable in federal and state administrative penal cases.

Imprisonment never exceeds 2 months never exceeds 6 weeks. As an alternative penalty for non-payment of a fine, imprisonment is possible, if not excluded expressly by a single law (§ 16 Administrative Penal Code).

Federal law:

- Abfallwirtschaftsgesetz (AWG), Abfallnachweisverordnung and Altölverordnung.
- federal administrative penal provision can be found in § 39 AWG.

§ 39 Abs 1 lit a AWG: fine from € 7 to 36340;

§ 39 Abs 1 lit b AWG: fine from € 360 to 7270;

§ 39 Abs 1 lit c AWG: fine from 7 up to € 2910;

§ 39 Abs 1 lit d AWG: fine from 7 up to € 360;

§ 39 Abs 1 lit e AWG: fine from 7 up to € 70;

§ 39 Abs 1 lit f AWG: fine from 7 up to € 3630.

State law:

- Abfallwirtschaftsgesetze/-ordnungen.
- Fines reach up from € 7 to € 36340.

2.1.1.2. Criminal law (federal): §§ 180-183 StGB, Criminal Code

- Intentional impairment of the environment: § 180: imprisonment up to 3 years or a fine up to 360 daily rates.
- Intentionally endangering the environment by treatment of and clearing away waste (§ 181b) and intentional endangering of the environment by the operation of installations (§ 181d) and other intentional endangering of flora and fauna (§ 182): imprisonment up to 2 years or a fine up to 360 daily rates.
- Negligent impairment of the environment (§181): imprisonment up to 1 year.

- Negligently endangering the environment by treatment of waste (§181c) and negligently endangering flora and fauna (§ 183) and intentional serious impairment by noise (§181a): imprisonment up to 6 months or a fine up to 360 daily rates.

Fines lie in the range of € 4 to € 117720.

2.1.2. BELGIUM

This directive was implemented by a Royal Decree of 3 October 1975, issued under the law of 26 March 1971. This decree contains several provisions, of which the infringements are punishable under the aforementioned law.

This Decree was revoked in the 3 districts and replaced by their own legislation.

2.1.2.1. Flanders

Decree of 2 July 1981, under which an executive order of 17 December 1997 was issued.

Sanctions:

- Art. 56-61 of the Decree: art 56: imprisonment from 1 month up to 5 years and/or a fine from 100 BEF up to 10 million
- Art 57: recidivism (this art was abolished by the Constitutional Court)
- Art 58: seizure/confiscation (again, abolished by the Constitutional Court for the part that deals with the confiscation of means of transport and instruments)
- Art 59 § 1: conviction to remove and obligation to payback of costs
- Art 60: Civil liability of the employer (partly abolished)
- Art 61: indication of natural person
- Art 62: complicity in an offence (this art was abolished by the Constitutional Court)
- Art 63: All of the provisions of book I of the Penal Code, except for chapters V and VII however art 85 included, are applicable. This art 63 was destroyed by the court of Arbitrage.

Decree of 28 June 1985 (environmental license decree), under which several executive orders were issued (VLAREM I and VLAREM II).

Sanctions:

- Art 39 § 1: imprisonment from 8 days up to 1 year and/or a fine from 100 BEF up to 100.000, irrespective of the penalties provided for in the Penal Code.

- Art 39 § 2: safety measure
- Art 39 § 3: All provisions of Book I of the Penal Code are applicable.
- The Constitutional Court decided that this art 39 § 3 violates the rules on the division of competence.
- Art 40: civil liability of the employer (The Constitutional Court decided that this article violates the rules on the division of competence.)

2.1.2.2. The Walloon district

Decree of 5 July 1985, under which executive order of 9 April 1992 was issued.

In respect to sanctions art 26 of this order refers to the decree.

Sanctions:

Art 51, 1 of the Decree Ordinance of 5 July 1985.

The aforementioned Decree Ordinance was replaced by art 65 of the Decree of 27 June 1996.

2.1.2.3. Brussels

Decree 7 March 1991, under which the executive order of 19 September 1991 is issued.

Sanctions:

- Art 26 § 1 of the Decree: imprisonment from 3 months up to 1 year and/or a fine from € 2,50 up to € 12500
- Art 26 § 2: fine from € 2,50 up to € 12500
- In case of hazardous waste: fines in § 1 and 2 become € 12500 up to € 62500.
- Art 27: infringement of the provisions from the plan, mentioned in art 6, which have a binding character towards the citizens, is punishable with a fine from € 2,50 up to € 2500.
- Art 26 § 4: deprivation of the exercise of the rights mentioned in art 31 of the Penal Code and Royal Decree no 22 of 24 October 1934, art 1. (in accordance with art 33 of the Penal Code)
- Art 29: Definite or temporary closure.

Ordinance of 7 June 1996 June 1996

- Art 96 § 1: imprisonment from 8 to 12 months and/or a fine from € 2,50 up to € 2500
- In case of class I.B. or an activity which is acknowledged the fine can be €2,50 up to € 12500.
- Art 96 § 2: fine can go up to € 25000.

- Art 96 § 3: the fines mentioned in the article can be doubled when the infringement was committed intentionally or out of pursuit of profit.

Ordinance of 25 March 1999

- Art 23: Recidivism

N.B. Law of 9 July 1984 on import, export and transport of waste. Import and export are also regulated by Flanders and the Walloon district. Transport is regulated only at the federal level in aforementioned law, under which several executive orders were issued.

Sanctions:

- Art 10 of the law: imprisonment from 8 days up to 1 year and/or a fine from 100 BEF up to 100.000
- Art 11: Recidivism
- Art 12: Seizure/Confiscation
- Art 13: Civil Liability of the employer
- Art 14: All provisions of Book I of the Penal Code, except Chapter V, are applicable.

2.1.3. DENMARK

This directive, which supplements directives 75/442 and 91/689, was implemented by Ministerial Regulation no 619 of 27 June 2000 on waste (=Waste Regulation). This Regulation was issued under the Environmental Protection Act. Permits for waste treatment plants are not covered by the Waste Regulation.

Sanctions:

- Penal code section 196 (max 4 years imprisonment);
- Environmental Protection Act sections 43, 110;
- Section 110(1): unless heavier penalty is due under other legislation: fine;
- Section 110(2): detention or imprisonment for a maximum of 2 years;
- Waste Regulation section 64 (fine-imprisonment. up to 2 years).

The size of the fine is related to the economic benefit of the offence, the normal fine is between 1.000 and 10.000 D. kr. If the offence is done intentional or reckless and the offence also is either done for economic reasons or endanger the environment, the fine will be 25% of the economic benefit of the offence and the economic benefit will be confiscated.

2.1.4. FINLAND

This Directive was implemented in Finland through the Waste Act, Environmental Protection Act, the Environmental Protection Degree, and the Regulation of the Council of State on waste oil treatment.

Sanctions:

Chapter 48, sections 1, 2, 3, 4 of the Penal Code: impairment of the environment
(fine up to max. 6 years imprisonment)

Environmental protection Act under section 116, punishment: fine

Waste Act, section 60, punishment: fine.

2.1.5. FRANCE

Nature du texte et numéro	Date du texte	Références	observations
Loi N°80-531	15 juillet 1980	Art. L. 541-22 et L. 541-38 du code de l'environnement ----- Art. L. 541-44 et suivants du code de l'environnement	Loi relative à l'utilisation des huiles usagées ----- dispositions pénales
Ordonnance N°2001-321	11 avril 2001	Art. L. 521-1 et suivants du code de l'environnement	Contrôle des produits chimiques
Décret N° 77-254	8 mars 1977	Code de l'environnement, 2e partie Eau 210, page 972 du code Dalloz 2002	Décret relatif au déversement d'huiles dans les eaux superficielles, souterraines et de mer
Décret N°79-981	21 novembre 1979	Code de l'environnement, 2e partie Déchets 540, page 1980 du code Dalloz 2002	Décret réglementant la récupération des huiles usagées
Décret N°89-192	24 mars 1989	Code de l'environnement, 2e partie Déchets 540, page 1980 du code Dalloz 2002	Décret réglementant la transmission des huiles usagée du détenteur au collecteur
Décret N°89-648	31 août 1989	Code de l'environnement, 2e partie Déchets 540, page 1980 du code Dalloz 2002	Décret relatif aux conditions de ramassage des huiles usagées
Décret N° 96-	18 novembre	Code de l'environnement,	Déchets industriels spéciaux

1009	1996	2e partie Déchets 540, page 2002 du code Dalloz 2002	Plan d'élimination
Décret 2002-540	18 avril 2002	JO du 20 avril 2002	Classification des déchets dangereux
Arrêté	28 janvier 1999	JO 24 février 1999	Conditions de ramassage de huiles usagées
Circulaire	29 mars 1999	Bulletin Officiel Du Ministère de l'Aménagement du Territoire et de l'environnement 1999/3, p.45.	Conditions de ramassage de huiles usagées

Les huiles usagées posent des problèmes de pollution de l'air, de pollution de l'eau et parfois de la pollution des sols, si leurs détenteurs les éliminent sans précaution. On sait que l'objectif de la directive de 1975, modifiée le 22 décembre 1986, est de faire prendre aux états membres des mesures efficaces de recyclage de ces produits et de prévention des nuisances liées à leur élimination.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Délit d'élimination de déchets sans agrément (délit intentionnel)	code de l'environnement articles L. 541-46 à L. 541-48 pour les personnes physiques Article L.541-47 pour les personnes morales	Avoir éliminé des déchets (tels que les huiles usagées) sans l'agrément nécessaire	Personnes physiques Emprisonnement 2 ans Amende 75 000 euros Affichage ou diffusion de la décision de condamnation
délit d'entrave aux fonctions des agents de contrôle	Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Ou Avoir mis obstacle aux contrôle des agents habilités	Personnes morales Amende 150 000 euros + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9° de l'article 131-39 c.pén.

Les textes sur les substances chimiques prévoient les sanctions suivantes :

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Délit de fourniture de renseignements inexacts	Code de l'environnement		Personnes physiques Emprisonnement 2 ans

<p>susceptibles de faire obtenir des mesures moins contraignantes</p> <p>Délit de violation d'interdiction ou de violation de prescriptions édictées en application de l'art. L.521-6 du code de l'environnement</p>	<p>articles L. 521-21 pour les personnes physiques et pour les personnes morales</p> <p>Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)</p>	<p>Avoir fourni des renseignements inexacts (par exemple sur les processus d'élimination des huiles usagées utilisés dans l'entreprise)</p> <p>Ou</p> <p>N'avoir pas respecté les prescriptions édictées par les règlements CEE N°2455-12, N° 793-93, ou 2037-2000</p> <p>Ou les prescriptions de l'article L.521-6 du code de l'environnement sur la prévention des risques liés à la dissémination de substances chimiques dans l'environnement</p>	<p>Amende 75 000 euros</p> <p>Peines complémentaires : confiscation, interdiction d'exercer l'activité, fermeture des installations, affichage ou diffusion de la décision de condamnation</p> <p>Personnes morales</p> <p>Amende 150 000 euros</p> <p>+ peines mentionnées aux 2° de l'article 131-39 c.pén. (interdiction d'exercer uniquement l'activité à l'occasion de laquelle le délit a été commis), et 3°,4°,5°,6°,8°,9° de l'article 131-39 c.pén.</p>
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2.1.6. GERMANY

Non-respect of the regulation implementing this directive is punishable as Ordnungswidrigkeit with a fine up to 5 million Euro; in some cases a fine of 10 million Euro applies.

In addition of the specific provision of the criminal code protecting the waters (§ 324) or concerning waste disposal (§ 326) can be applied as well.

Before the directive, the Altölg from 1968 already existed. The Altölg was replaced in 1986 by § 5 a, § 5b AbfallG. In 1994 AbfG was replaced by KrW/AbfG in 1994 the § 5a, 5b AbfG remained valid.

Sanctions:

- § 324 StGB (Soil Pollution): imprisonment up to 5 years or penalty payment in cases such as pollution of waters, disadvantageous modification of waters.

- § 324a StGB: imprisonment up to 5 years or fines, in cases such as disposes of substances in the soil, either to a significant extend or in the creation which might affect the health of others, animals or plants.
- § 61 I no: 1, 3 and 4 KrW/AbfG: fines can be sanctioned up to 50.000 € in cases such as illegal utilization storage and disposal or delivery of waste.
- § 61 II KrW/AbfG fines can be sanctioned up to 10.000 € in cases such as non-complying to contribute to the selection and installation of governmental supervision of waste disposal.
- § 4, 62 I No: 1 Bundesimmissionschutzgesetz: fines can go up to 50.000 € for operation of unauthorized waste disposal facilities.

2.1.7. GREECE

This directive was first transposed through Joint Ministerial Decision 71560/3053/1985. This Decision was replaced by JMD 98012/2001/1996.

Sanctions:

Article 14 refers to articles 28, 29 and 30 of the law 1650/86 “about the protection of the environment”.

No penal sanctions have been imposed for breaches of this decision.

Law of 1650/86:

- art 28: criminal sanction: 3 months-10 years;
- sub 2: negligence
- sub 3: penal sanctions can become heavier
- sub 4: legal person
- sub 5: particular legal obligation
- art 29: civil sanction: all individuals or moral entities who cause pollution or any other environmental degradation are responsible for indemnification unless they prove that the damage caused was due to force majeure, or to someone else’s intended activity.
- art 30: administrative sanction: up to 10 million drachmas (in case of disaster: up to € 300.000), imposed to natural or legal persons. Another administrative sanction is the temporary or final cessation of the operation of the industry or company.

2.1.8. IRELAND

This directive was mainly implemented by the Waste Management Acts 1996-2001 and several Waste Management Regulations and Planning and Development Regulations 2001. The most specific

implementing legislation is the Waste Management (Hazardous Waste) Regulations, 1998 and 2000,⁵ These regulations were further amended by Article 54 of the Waste Management (Licensing) (Amendment) Regulations 2002⁶ in relation to the acceptance of hazardous wastes at landfills.

but other legislation may also be relevant.

Waste Management Acts 1996-2001

Sections 32 and 39 in the WMA → penalties: section 10(1) and (3): on summary conviction: a fine not exceeding £ 1,500 and/or imprisonment for a term not exceeding 12 months; conviction on indictment: a fine not exceeding £ 10 million and/or imprisonment for a term not exceeding 10 years.

Administrative enforcement: section 55 of the Act.

- Section 9: provides for the criminal liability of directors, managers, secretaries or other similar officers of a body corporate.

2.1.9. ITALY

This directive was implemented by Decree-law n°95 of 27/01/1992.

Sanctions

Art. 14/1: The activities of waste treatment provided for in this decree-law are regulated for Decree-law 22/1997 (Cfr.).

Art 14/2: The emissions caused by industrial plants provided for in this decree-law are regulated for Decree-law 22/1997 (Cfr.).

Art 14/3: *Used oils elimination* (art. 3/2 lett. a, b); detention for a maximum of 2 years or fine from € 2.500,00 to € 10.000,00.

Art 14/4: *Used oils utilization*(art 9): detention for a maximum of 1 year or fine from € 500,00 to € 2.500,00.

Art 14/5: *Harvesting and elimination of used oils without authorization* (art 15): detention for a maximum of 6 months or fine for a maximum of € 2.500,00.

Art 14/6: *Breach of obligations provided for art 6/3, 4 e 5*: administrative offence: fine from € 250,00 to € 2.500,00.

⁵ S.I. Nos. 163 of 1998; 73 of 2000.

⁶ S.I. No. 336 of 2002.

Art 14/7: *Breach of obligations provided for art 10/3*: administrative offence: fine from € 500,00 to € 5.000,00.

2.1.10. LUXEMBOURG

This directive was implemented by an order of the 26th of June 1980, later replaced by the order of 30th November 1989. This last order is taken in accordance with the law of 17th of June 1994 on waste elimination and management.

Sanctions:

- Article 13 of this order refers to the law penalties. Violation is sanctioned by the law of 17th of June 1994 on waste elimination and management, in article 35.
- The penalties are: imprisonment from 8 days to 6 months and/or a fine from € 250 to € 125.000, confiscation of machines, instruments used by the offenders and vehicles used to commit the offense, restoration of the site at the offender's own expense, under (daily or monthly) penalty in case of non completion. Article 35 refers to the first chapter of the penal code and to articles 130-1 to 132-1 of the criminal procedure code.

2.1.11. PORTUGAL

Aforementioned directive was altered by Council Directive 87/101. This last directive was transposed in Portuguese legislation by Decree-Law 88/91, which is regulated by governmental order 240/92.

Sanctions:

- Decree-Law 88/91: article 6: administrative offence: fine from € 500 up to € 2.500, in the case of individuals, or up to € 30.000 in the case of legal entities, notwithstanding more serious penalties applicable under the law. Negligence and attempt are punishable.
- Articles 279, 280 and 278 of Criminal Code are applicable as well as the Basic Law on Environment.

2.1.12. SPAIN

This directive was implemented by state law: Orden de 28 de febrero de 1989.

Sanctions:

- Section 5: failure to comply: administrative misdemeanor;
- Section 8: management used oils: administrative misdemeanor, according to law on waste 10/1998 of April 21 (art 34), which refers to directive 75/442.

Environmental crimes in penal code:

Causing emissions, the dumping of rubbish, radiations, extractions or excavations, burial, noise, vibrations injections or depositing in the atmosphere, soil, subsoil or in ground, sea or underground waters, including in extraterritorial spaces, and the harnessing of water. For there to be criminal liability, it is necessary that the above-mentioned activities constitute an infringement of a law or other regulation established to protect the environment and that this may seriously damage the balance of natural systems.

Sanctions:

The law establishes that punishments are imposed in the upper range if human health is placed at risk.

Punishments established for an ecological crime are imprisonment. from 6 months up to 4 years, a fine of 8-24 months and professional disqualification from 1 to 3 years (art 325 cp).

The storage or dumping of toxic or dangerous waste which may damage the balance of natural systems or human health is punishable also (art 326 pc). The punishment in this case is a fine of 8 to 24 months, and a weekend arrest for 18 to 24 weekends.

2.1.13. THE NETHERLANDS

This directive was implemented directly in the Environmental Control Law (Wet Milieubeheer).

- Chapter 10: Waste
- Chapter 17: Measures in specific circumstances
- Chapter 18: Enforcement: Administrative Enforcement

Violation of several provisions of the chapters mentioned above constitutes a criminal offence under articles 1a sub 1, 2 and 3 of the Economic Offences Act 1950.

Sanctions:

- Art 6 of the Economic Offences Act 1950; in case of violation of:
- article 1a sub 1: felony: max penalty = 6 years imprisonment. or a fine up to € 45000 misdemeanor: max penalty = 1 year imprisonment. or € 11250;
- article 1a sub 2: felony: max penalty = 2 years imprisonment. or a fine up to € 11250 misdemeanor: max penalty = 6 months or a fine up to 11250;
- article 1a sub 3: see above sub 2.

2.1.14. UNITED KINGDOM

2.1.14.1. England and Wales

This directive was implemented by

- the Environmental Protection Act 1990 (PART II).

Sanctions: Penalties: Section 33: summary conviction (imprisonment up to 6 months and/or a fine up to £ 20,000), conviction on indictment (imprisonment up to 2 years and/or a fine).

- Special waste: summary: imprisonment up to 6 months and/or a fine up to £ 20,000; indictment: imprisonment up to 5 years and/or a fine.
- Section 157: provides for the potential criminal liability of directors, managers, secretaries or other similar officers of a body corporate.
- Pollution Prevention and Control (England and Wales) Regulations 2000

Sanctions: Penalties: Regulation 32: summary conviction (imprisonment up to 6 months and/or a fine up to £20,000), conviction on indictment (imprisonment up to 5 years and/or a fine)

Summary conviction (fine up to statutory maximum), conviction on indictment (imprisonment up to 2 years and/or a fine)

- the Water Resources Act 1991
- Sanctions: section 85: summary: imprisonment up to 3 months and/or a fine up to £ 20,000; indictment: imprisonment up to 2 years and/or a fine.
- Section 217: provides for the potential criminal liability of directors, managers, secretaries or other similar officers of a body corporate.
- Special Waste Regulations (1996)
- Sanctions: Regulation 18: summary: a fine up to level 5; indictment: fine and/or imprisonment up to 2 years.
- Regulation 18 (6): provides for the potential criminal liability of directors, managers, secretaries or other similar officers of a body corporate.
- Civil and administrative penalties:
- Environmental Protection Act: sections 38, 39, 59, and 73;
- Pollution Prevention and Control Regulations 2000: Regulations 21 and 24;
- Water Resources Act 1991: sections 90B, 100, 161A and Schedule 10 paragraph 6.

2.1.14.2. Scotland

This directive was implemented by

- the Control of Pollution Act 1974 (as amended).

Sanctions: penalties: section 30 F: summary: imprisonment up to 3 months and/or a fine up to £ 20,000; indictment: imprisonment up to 2 years and/or a fine.

- Environmental Protection Act 1990

Sanctions: section 33: summary: imprisonment up to 6 months and/or a fine up to £ 20,000; indictment: imprisonment up to 2 years and/or a fine.

section 157: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate. Special waste: summary: imprisonment up to 6 months and/or a fine up to £20,000; indictment: imprisonment up to 5 years and/or a fine.

- Special Waste Regulations 1996

Sanctions: Regulation 18: summary: fine not exceeding level 5; indictment: fine and/or imprisonment up to 2 years.

Regulation 18 (8): Where, in Scotland, an offence is committed by a partnership or an unincorporated association (other than a partnership) is proved to have been committed with the consent or connivance or to have been attributable to any neglect on the part of, a partner in the partnership or, as the case may be, a person concerned in the management or control of the association, he, as well as the partnership or association, shall be liable to be proceeded against and punished accordingly.

- Pollution and Prevention Control (Scotland) Regulations 2000

Sanctions: Regulation 30: summary: imprisonment up to 6 months and/or a fine up to £ 20,000;

indictment: imprisonment up to 5 years and/or a fine.

summary: fine (statutory max);

indictment: imprisonment up to 2 years and/or a fine.

Subsection 4: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.

Civil and Administrative Sanctions:

- Environmental Protection Act 1990: sections 38,39, 59 and 73;
- Pollution Prevention and Control Scotland Regulations 2000: Regulations 17 and 19 and 20;
- Control of Pollution Act 1974: section 37.

2.1.14.3. Northern Ireland

This directive was implemented by. Dit mag weg namelijk dubbel

This directive was implemented by

- Waste and Contaminated Land (NI) Order 1997.

Sanctions: art 4: summary: imprisonment up to 6 months and/or a fine up to £ 20,000; indictment: Imprisonment up to 2 years and/or a fine.

Special Waste: summary: imprisonment up to 6 months and/or a fine up to £ 20,000; indictment: imprisonment up to 5 years and/or a fine.

Article 78: applies section 20(2) of the Interpretation Act (NI) 1954.

- Industrial Pollution Control (NI) Order 1997

Sanctions: art 23: summary: imprisonment up to 3 months and/or a fine up to £ 20,000; indictment: imprisonment up to 2 years and/or a fine.

summary: fine (statutory max);

indictment: imprisonment up to 2 years and/or a fine.

art 32: applies section 20(2) of the Interpretation Act (NI) 1954.

- Water (NI) Order 1999

Sanctions: art 7: summary: imprisonment up to 3 months and/or a fine up to £ 20,000; indictment: imprisonment up to 2 years and/or a fine.

art 9: summary: imprisonment up to 3 months and/or a fine up to £ 20,000;

indictment: imprisonment up to 2 years and/or a fine.

- Special Waste Regulations (NI) 1998

Sanctions: Regulation 17: summary: fine up to level 5;

indictment: imprisonment up to 2 years and/or a fine.

Civil and Administrative Sanctions:

- Waste and Contaminated Land Northern Ireland Order 1997: articles 12, 28, and 45;

- Industrial Pollution Control Northern Ireland Order 1997: articles 12, 13 and 14;

- Water Northern Ireland Order 1999: articles 12, 17 and Schedule 1 paragraph 5.

2.2. Directive 75/442 (waste)

2.2.1. AUSTRIA

2.2.1.1. Federal and State administrative penal law:

General: Administrative Penal Code: applicable in federal and state administrative penal cases.

Imprisonment never exceeds 6 weeks. As an alternative penalty for non-payment of a fine, imprisonment is possible, if not excluded expressly by a single law (§ 16 Administrative Penal Code).

Federal law:

- Abfallwirtschaftsgesetz (AWG), Abfallnachweisverordnung and Altölverordnung;
- federal administrative penal provision can be found in § 39 AWG

§ 39 Abs 1 lit a AWG: fine from € 7 to 36340;

§ 39 Abs 1 lit b AWG: fine from € 360 to 7270;

§ 39 Abs 1 lit c AWG: fine from 7 fine up to € 2910;

§ 39 Abs 1 lit d AWG: fine from 7 up to € 360;

§ 39 Abs 1 lit e AWG: fine from 7 up to € 70;

§ 39 Abs 1 lit f AWG: fine from 7 up to 3630.

State law:

- Abfallwirtschaftsgesetze/-ordnungen;
- Fines reach up from € 7 to € 36340

Criminal law (federal): §§ 180-183 StGB, Criminal Code

- Intentional impairment of the environment: § 180: imprisonment up to 3 years or a fine up to 360 daily rates.
- Intentionally endangering the environment by treatment of and clearing away waste (§ 181b) and intentional endangering of the environment by the operation of installations (§ 181d) and other intentional endangering of flora and fauna (§ 182): imprisonment up to 2 years or a fine up to 360 daily rates.
- Negligent impairment of the environment (§181): imprisonment up to 1 year.
- Negligently endangering the environment by treatment of waste (§181c) and negligently endangering flora and fauna (§ 183) and intentional serious impairment by noise (§181a): imprisonment up to 6 months or a fine up to 360 daily rates.

Fines lie in the range of € 4 to € 117720.

2.2.2. BELGIUM

Before the directive was issued there was the law of 22 July 1974. Its sanctions were later abolished by the three districts. After the directive was issued the law of 9 July 1984 was created, concerning import, export and transport of waste. Later the three districts became authorized to regulate import and export as well. The federal legislator remained competent in regulating transport of waste.

Sanctions:

- Art 10 of the law of 9 July 1984: imprisonment from 8 days up to 1 year and/or a fine from BEF 100 up to 100.000 BEF.
- Art 11: Recidivism
- Art 12: Seizure/Confiscation
- Art 13: : Civil liability of the employer
- Art 14: All provisions of Book I of the Penal Code, except for chapter V, are applicable.

2.2.2.1. Flanders

The laws of 22 July 1974 and of 9 July 1984 first co-existed with the Flemish Decree of 2 July 1981. The Decree of 20 April 1994 abolished the law of 22 July 1974, except for its articles 1 and 7. The aforementioned Decree also replaced the law of 9 July 1984 , in relation to the import and export parts of this law.

Sanctions:

- Art 56 of the Decree of 2 July 1981: imprisonment from 8 days up to 1 year and/or a fine from 100 BEF up to 100.000 BEF.
- (The Decree of 20 April 1994 modified art 56: imprisonment from 1 month up to 5 years and/or a fine from 100 BEF up to 10 million BEF.)
- Art 57: Recidivism (this provision was abolished by the Constitutional Court)
- Art 58: Seizure/Confiscation (the Constitutional Court abolished this article for the part that deals with the confiscation of means of transport and instruments)
- Art 59: Conviction to remove the waste and payback of costs
- Art 60: Civil liability of the employer (this article was abolished by the Constitutional Court)
- Art 61: Indication of a natural person responsible
- Art 62: Complicity in an offence (this article was abolished by the Constitutional Court)
- Art 63: All provisions of Book I of the Penal Code, except for chapters V and VII, art 85 included though, are applicable. This article was abolished by the Court of Arbitrage.

The Decree of 2 July 1981 was modified and adjusted. The Decree of 12 December 1990 added art 41 bis to the Decree of 28 June 1985. The sanctions in the Decree of 28 June 1985 are now applicable in waste issues.

2.2.2.2. The Walloon district

The Decree of 27 June 1996 abolishes the law of 22 June 1974, except for its articles 1 and 7, as well as the law of 9 July 1984 in relation to import and export.

Sanctions:

In case of infringement of Art 11 of the Decree of 27 June 1996, it refers to the Decree of 11 March 1999.

The Ordinance of 27 June 1996:

- Art 51: imprisonment from 8 days up to 3 years and/or a fine from 100 BEF up to 1 million BEF;
- Art 52: imprisonment from 6 months up to 5 years and a fine from 100 BEF up to 1 million BEF;
- Art 53: imprisonment from 1 month up to 5 years and/or a fine from 100 BEF up to 2,5 million;
- Art 54: imprisonment from 8 days up to 2 years and a fine from 100 BEF up to 500.000;
- Art 55: imprisonment from 1 month up to 1 year and/or a fine from 100 up to 10.000;
- Art 55bis: fine from 100 BEF up to 100.000;
- Art 56: Recidivism
- Art 56, 2: Definite or temporary closing/discontinuation
- Art 57: Confiscation of goods
- Art 58 § 1 and 2: Additional penalties
- Art 58 § 3 and 4: Removal of waste and decontamination
- Art 58 § 1 and 4: persons convicted according to these paragraphs, who did not abide the judges' obligation on time or violated the judges' prohibitions or measures is
- punishable with imprisonment from 6 months up to 5 years and/or a fine from 1000 BEF up to 500.000 BEF.

2.2.2.3. Brussels

The Ordinance of 7 March 1991 abolishes the law of 22 July 1974, except for articles 1,7,9 until 15.

Sanctions:

- Art 22 § 1: fine from € 2,50 up to € 250.
- In case of hazardous waste: fine from 200 BEF up to 20.000.
- Art 22 § 2: imprisonment from 1 month up to 6 months and/or a fine from € 5 up to € 2.500.
- In case of hazardous waste: fine from €15 up to € 7.500.
- Art 23 § 1: imprisonment from 1 month up to 6 months and/or a fine from € 5 up to € 2.500, without... Hazardous waste: fine from € 15 up to € 7.500;

- Art 23 § 2: imprisonment from 1 month to 6 months and/or a fine from € 12,50 up to € 2.500; Hazardous waste: 1500 BEF up to 300.000
- Art 23 § 3: The judge can prohibit, in accordance with art 33 of the Penal Code, the exercise of the rights mentioned in art 31 of the Penal Code and in art 1 of the Royal Decree no 22 of 24 October 1934, either completely or partly.
- Art 23 bis: fine from € 2,50 up to € 2.500;
- Art 24 § 1: fine from € 2,50 up to € 125;
- Art 25: refers to art 458 of the Penal Code;
- Art 26 § 1: imprisonment from 3 months up to 1 year and/or a fine from € 2,50 up to € 12.500;
- Art 26 § 2: fine from € 2,50 up to € 12.500;
- Art 26 § 3: Hazardous waste: fine from 5 12.500 up to 62.500;
- Art 26 § 4: See Art 23 § 3
- Art 27: fine from € 2,50 up to € 2.500;
- Art 29: Definite or Temporary closure
- Recidivism: Referred to the Ordinance of 25 March 1999

The Ordinance of 5 July 1997:

- Art 96 § 1: imprisonment from 8 months up to 12 months and/or a fine from € 2,50 up to € 2.500;
- Art 96 § 2: fine from € 2,50 up to € 12.500; fine from € 25 up to € 25.000;
- Art 86 § 3: The fines can be doubled when the infringement is committed intentionally or out of pursuit of profit.
- Recidivism: Referred to the Ordinance of 25 March 1999.
- Art 96 § 1: imprisonment from 8 months up to 12 months and/or a fine from € 2,50 up to € 2.500;
- Art 96 § 2: fine from € 2,50 up to € 12.500; fine from € 25 up to € 25.000;
- Art 86 § 3.

2.2.3. DENMARK

This directive was implemented by Ministerial Regulation no 619 of 27 June 2000 on waste (Waste Regulation). This Regulation was issued under the Environmental Protection Act.

Sanctions:

- Penal code section 196;
- Environmental Protection Act sections 43,110, 110a and 110b;
- Waste Regulation section 64 (fine-imprisonment up to 2 years).

The size of the fine is related to the economic benefit of the offence, the normal fine is between 1.000 and 10.000 D. kr. If the offence is done intentional or reckless and the offence also is either done for economic reasons or endanger the environment, the fine will be 25% of the economic benefit of the offence and the economic benefit will be confiscated.

2.2.4. FINLAND

This directive was implemented mainly through the Waste Act, as well as by the Waste Degree.

Sanctions:

Chapter 48, sections 1, 2, 3, 4 of the Penal Code: impairment of the environment (fine up to max. 6 years imprisonment) as well as in the Waste Act itself under section 60 (fine).

2.2.5. FRANCE

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Contravention d'abandon de déchets (5 ^{ème} classe)	code pénal article R 632-8 pour les personnes physiques et pour les personnes morales Code pénal Articles 131-13 et 131-41	Avoir abandonné des déchets dans un lieu public ou privé, non désigné à cet effet par l'autorité administrative, sans autorisation du propriétaire du lieu, lorsque le transport de ces déchets a été effectué à l'aide d'un véhicule	Personnes physiques Amende 1500 euros Confiscation de la chose qui a servi à commettre l'infraction (notamment) Personnes morales Amende 7500 euros Confiscation de la chose qui a servi à commettre l'infraction (notamment)

En dehors de ce cas, l'abandon de déchets est une contravention de deuxième classe prévue par l'article R632-1 du code pénal.. L'amende encourue est donc faible (38 euros pour les personnes physiques, 190 euros pour les personnes morales).

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Contravention	code pénal article R 632-1 pour les		Personnes physiques Amende 150 euros

d'abandon de déchets (2 ^{ème} classe)	personnes physiques et pour les personnes morales Code pénal Articles 131-13 et 131-41	Avoir abandonné des déchets dans un lieu public ou privé non désigné à cet effet par l'autorité administrative, sans autorisation du propriétaire du lieu.	Personnes morales Amende 7500 euros
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Il existe ensuite un délit d'élimination de déchets sans agrément, susceptible d'être commis par les industriels qui enfreignent sciemment la réglementation. C'est donc un délit intentionnel.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Délit d'élimination de déchets sans agrément (délict intentionnel)	code de l'environnement articles L. 541-46 à L. 541-48 pour les personnes physiques Article L.541-47 pour les personnes morales	Avoir éliminé des déchets sans l'agrément nécessaire Ou Avoir mis obstacle aux contrôle des agents habilités	Personnes physiques Emprisonnement 2 ans Amende 75 000 euros Affichage ou diffusion de la décision de condamnation
délict d'entrave aux fonctions des agents de contrôle	Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)		Personnes morales Amende 375 000 euros + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9° de l'article 131-39 c.pén.

Il existe aussi une infraction de défaut de contribution à l'élimination de ses déchets ménagers par producteur ou importateur. C'est un délict.

Type d'infraction	Textes	Elément matériel	Sanctions pénales

<p>Délit de défaut de contribution à l'élimination de ses déchets ménagers par producteur ou importateur</p>	<p>code de l'environnement articles L. 541-46 à L. 541-48 pour les personnes physiques Article L.541-47 pour les personnes morales Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)</p>	<p>Avoir produit, importé, ou mis en premier sur le marché des produits consommés ou utilisés par les ménages dans des emballages servant à les commercialiser, sans pourvoir ou contribuer à l'élimination des déchets provenant de ces emballages, soit en les identifiant et en les faisant prendre en charge par organisme agréé, soit en établissant un dispositif de consignation, soit en organisant selon des modalités approuvées par arrêté, des emplacements spécifiques destinés à leur dépôt.</p>	<p>Personnes physiques Emprisonnement 2 ans Amende 75 000 euros Affichage ou diffusion de la décision de condamnation Personnes morales Amende 375 000 euros + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9° de l'article 131-39 c.pén.</p>
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2.2.6. GERMANY

German report has dealt with directives 75/442,91/689 en 96/82 together, since they all deal with the obligation of the members states to issue legislation concerning with this boxel issues. The criminal sanctions are therefore similar.

None respect of the german implementing these waste directives constitutes a crime under § 324 German Criminal Code and following; in particular § 326 German Criminal Code, which regulates bad handling dangerous wastes. This also holds the non respect of European waste directives is penitential, for detailed informations see under 2.1.6.

Criminal Law:

§§ 324 ff StGB, applies and in particular § 326 StGB, which regulates unauthorized dealings with dangerous wastes. For more detailed information about § 326 StGB see directive 75/439.

Administrative Law:

The criminal law is flanked by the regulations of the KrW/AbfG and non-criminal fines as well as forfeiture.

2.2.7. GREECE

Initially the directive was transposed through JMD 49541/1427/1986, later replaced by JMD 69728/824/1996.

Sanctions:

The penalties can be found in article 20, which refers to articles 28, 29 and 30 of law 1650/86.

Until today, the criminal provisions of JMD 69728/824/1996 have not been used, and no such cases have been brought in front of a Greek criminal Court.

Furthermore , three more JMD were issued, of a rather complementary nature, namely:

- JMD 114218/97 OJ 1016 (B) of 17/11/97
- JMD 113944/97 OJ 1016 (B) of 17/11/97
- JMD 14312/1302/2000 OJ 723 (B) of 9/6/2000

These JMD do not contain sanctions.

2.2.8. IRELAND

This directive was mainly implemented by the Waste Management Acts 1996-2001 and regulations made under this Act and the Environmental Protection Agency Act 1992. It is also implemented under discretionary powers in other environmental legislation.

The main penalties are fines and/or imprisonment.

Main criminal offences: Waste, Water pollution, Air pollution, and Habitats and Wildlife.

Waste

Sections 32 and 39 in the WMA → penalties: section 10(1) and (3): on summary conviction: a fine not exceeding £ 1,500 and/or imprisonment for a term not exceeding 12 months; conviction on indictment: a fine not exceeding £ 10 million and/or imprisonment for a term not exceeding 10 years.

Administrative enforcement: section 55 of the Act.

Section 9 provides for the potential criminal liability of directors, managers, secretaries or other similar officers of a body corporate.

Water pollution

Section 171 of the Fisheries (Consolidation) Act 1959-90: max penalty is a fine not exceeding £1,000 and/or 6 months imprisonment on summary conviction, max £ 25,000 and/or 5 years imprisonment on conviction on indictment.

Sections 3 and 4 of the Local Government (Water Pollution) Act 1977 as amended in 1990 : offences may be prosecuted summarily by the appropriate local authority, Regional Fisheries Board or any other affected person. The 1990 Acts provide positive incentives for certain public authorities to prosecute. The max fine for conviction on indictment for major offences under the Acts is £ 25,000 and/or 5 years imprisonment The max penalty on summary conviction is £ 1,000 and/or 6 months imprisonment and on conviction on indictment £ 25,000 and/or 5 years imprisonment.

Administrative enforcement: section 12 of the 1977 Act, as amended in 1990 (max fine of £ 1,000 and/or 6 months imprisonment).

Corporate liability is imposed under section 23 of the 1990 Act

Air Pollution Act 1987

- Max penalty for offences created under sections 9 is £ 1,000 and/or 12 months imprisonment. The penalty in case of conviction on indictment is £ 10,000,000 and/or 10 years imprisonment.

Administrative enforcement: by using administrative enforcements mechanisms in legislation referred to above. Corporate liability is imposed under section 11.

2.2.9. ITALY

This directive was implemented by Decree of the Republic's President n°915 and by Decree-law n°22 of 5/2/1997. The first contains guidelines and the second contains the sanctioning system.

2.2.10. LUXEMBOURG

This directive was implemented through Law of 26th of June 1980 on Waste Elimination. Later this law was replaced by the law of 17th of June 1994 on prevention and management of waste. This law serves as a basis for specific orders.

Sanctions:

Criminal: art 35: imprisonment for 8 days up to six months and or a fine from 5.250 up to € 125.000, when the penal code or other specific laws, providing more severe sanctions, are applicable, then they rule.

- The first book of the penal code is applicable, as well as articles 130-1 til 132-1 of Code d'instruction criminelle.
- Sanctions: confiscation of machines, instruments used by the offenders and vehicles used to commit the offense, restoration of the site at the offender's own expense, under (daily or monthly) penalty in case of non completion.

- Administrative: art 28: Environment Minister can take any necessary emergency measures, like for example closing the plant or site or suspending the activity. Decided measures are immediately enforceable. Any breach of the law may be punished
- Civil: art 29 to 34: Waste producer is liable for any damage even if he does not commit any fault.

2.2.11. PORTUGAL

The directive is now transposed by Decree law N 239/97.

Sanctions:

Sanctions range from 500 € to 45.000 €. A sanction of an accessory nature may be applied in addition to these fines pursuant to the sanctions in the Decree Law.

The crimes envisaged in criminal Code 278, 279 and 280 are also applicable.

2.2.12. SPAIN

This directive was implemented through state law: Ley 10/1998 de 21 de Residuos. The use of publicity of the imposed sanction as tool of coercion to stop the infringement

This law includes a wide range of inflictions (art 34) and administrative sanctions (art 35).

Environmental crimes in penal code:

Causing emissions, the dumping of rubbish, radiations, extractions or excavations, burial, noise, vibrations injections or depositing in the atmosphere, soil, subsoil or in ground, sea or underground waters, including in extraterritorial spaces, and the harnessing of water. For there to be criminal liability, it is necessary that the above-mentioned activities constitute an infringement of a law or other regulation established to protect the environment and that this may seriously damage the balance of natural systems. The law establishes that punishments are imposed in the upper range if human health is placed at risk.

Sanctions:

Punishments established for an ecological crime are imprisonment from 6 months up to 4 years, a fine of 8-24 months and professional disqualification from 1 to 3 years (art 325 cp).

The storage or dumping of toxic or dangerous waste which may damage the balance of natural systems or human health is punishable also (art 326 pc). The punishment in this case is a fine of 8 to 24 months, and a weekend arrest for 18 to 24 weekends.

Infringement of a law or other regulation established to protect the environment.

2.2.13. THE NETHERLANDS

This directive was implemented directly in the Environmental Control Law (Wet Milieubeheer).

- Chapter 10: Waste
- Chapter 17: Measures in specific circumstances
- Chapter 18: Enforcement: Administrative Enforcement

Violation of several provisions of the chapters mentioned above constitutes a criminal offence under articles 1a sub 1, 2 and 3 of the Economic Offences Act 1950:

Sanctions:

Art 6 of the Economic Offences Act 1950;

In case of violation of:

- article 1a sub 1: felony: max penalty = 6 years imprisonment. or a fine up to € 45000 misdemeanor: max penalty = 1 year imprisonment. or € 11250;
- article 1a sub 2: felony: max penalty = 2 years imprisonment. or a fine up to € 11250
- misdemeanor: max penalty = 6 months or a fine up to € 11250;
- article 1a sub 3: see above sub 2.

2.2.14. UNITED KINGDOM

2.2.14.1. England and Wales

This directive was implemented by

- Control of Pollution (Amendment) Act 1989.

Sanctions:

section 1: summary: fine up to level 5.

section 7(6): provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.

- Environmental Protection Act 1990

Sanctions:

Section 33: summary: imprisonment up to 6 months and/or a fine up to £ 20,000;
indictment: imprisonment up to 2 years and/or a fine.

Special waste: summary: imprisonment up to 6 months and/or a fine up to £ 20,000;

indictment: imprisonment up to 5 years and/or a fine.

Section 34: summary: fine (statutory max);
indictment: fine.

Section 157: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.

Controlled Waste Regulations 1991

- Environmental Protection Regulations 1991

Civil and Administrative Sanctions:

- Environmental Protection Act 1990: Sections 38,39, 59 and 73;
- Control of Pollution Amendment Act 1991: section 6;
- Controlled Waste Regulations 1991: Regulations 10 and 23.

2.2.14.2. Scotland

This directive was implemented by

- Control of Pollution (Amendment) Act 1989
- Sanctions: section 1 (see above)
- Environmental Protection Act 1990
- Sanctions: sections 33 and 34 (see above)
- Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991
- Environmental Protection (Duty of Care) Regulations 1991

Civil and Administrative Sanctions:

- Environmental Protection (Duty of Care) Act 1990: sections: 38,39, 59 and 73;
- Control of Pollution Amendment Act 1991: section 6;
- Controlled Waste Regulations 1991: Regulation 10 and 23.

2.2.14.3. Northern Ireland

This directive was implemented by

- Waste and Contaminated (NI) Land Order 1997

Sanctions:

art 4: summary: imprisonment up to 6 months and/or a fine up to £ 20,000;

indictment: imprisonment up to 2 years and/or a fine; Special waste: summary: imprisonment up to 6 months and/or a fine up to £20,000: indictment: imprisonment up to 5 years and/or a fine
art 5: summary: fine (statutory max);
indictment: fine;
art 38: summary: fine up to level 5.
art 78: applies section 20(2) of the Interpretation Act (NI) 1954

- Controlled Waste Regulations (NI) 1999

Civil and Administrative Sanctions:

- Waste and Contaminated Land Northern Ireland Order 1997: articles 12, 28, 43, 45;
- Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations Northern Ireland 1999: Regulations 10 and 22.

2.3. Directive 76/464 (dangerous substances)

2.3.1. AUSTRIA

2.3.1.1. Federal and State administrative penal law:

General: Administrative Penal Code: applicable in federal and state administrative penal cases.

Imprisonment never exceeds 6 weeks. As an alternative penalty for non-payment of a fine, imprisonment is possible, if not excluded expressly by a single law (§ 16 Administrative Penal Code).

Federal law:

- Wasserrechtsgesetz (WRG, Code of Water Rights): provides administrative and penal law
- Abwasseremissionsverordnung (Ordinance of Sewage Emissions)
- § 137 WRG: fines up to €36340, no imprisonment.
- Imprisonment for failure to pay a fine is extended up to 6 weeks

2.3.1.2. Criminal law (federal): §§ 180-183 StGB, Criminal Code

- Intentional impairment of the environment: § 180: imprisonment up to 3 years or a fine up to 360 daily rates.
- Intentionally endangering the environment by treatment of and clearing away waste (§ 181b) and intentional endangering of the environment by the operation of installations (§ 181d) and other

intentional endangering of flora and fauna (§ 182): imprisonment up to 2 years or a fine up to 360 daily rates.

- Negligent impairment of the environment (§181): imprisonment up to 1 year.
- Negligently endangering the environment by treatment of waste (§181c) and negligently endangering flora and fauna (§ 183) and intentional serious impairment by noise (§181a): imprisonment up to 6 months or a fine up to 360 daily rates.

Fines lie in the range of € 4 to € 117720.

2.3.2. BELGIUM

This directive was implemented by the Royal Decree of 3 august 1976, issued under the law of 26 March 1971.

Sanctions:

- Art 41 § 1 of the law of 26 march 1971: imprisonment from 8 days up to 6 months and/or a fine from of 26 BEF up to 5000, without prejudice of the applicability of the rules of the Penal Code.
- Art 41 § 2: Prohibition to use installations or equipment
- Art 41 § 3: Recidivism
- Art 41 § 4: All provisions of Book I of the Penal Code are applicable;
- Art 41 § 5: Civil liability of legal persons

2.3.2.1. Flanders

- Decree of 28 June 1985: art 41 § 1 adds art 32 sexies to the law of 26 March 1971.

Art 7.2.0.1 of VLAREM II (1 August 1995) repealed the Royal Decree of 3 August 1976.

Sanctions: art 32 sexies refers to the Decree of 28 June 1985

Art 39 of this Decree: imprisonment from 8 days up to 1 year and/or a fine from 100 BEF up to 100.000.

All provisions of Book I of the Penal Code are applicable. The court of Arbitrage stated that this provision violates the rules that divide competence.

Safety measures

Civil liability of the employer (art 40)

2.3.2.2. The Walloon district

The law of 26 March 1971 was abolished for a great part by the Decree of 7 October 1985, under which several orders are issued.

- Art 70 of the Decree: art 41 of the law of 26 march 1971 remains

Sanctions:

- Art 49 of the Decree: imprisonment from 8 days up to 6 months and/or a fine from 26 BEF up to 500.000
 - Art 50: in case of negligence, when there's no recidivism and authorities were notified
 - Art 52: Prohibition to use the installation or the instruments
 - Art 53: When prohibition is violated referred to penalties in art 51
 - Art 54 and 55: Criminal and civil liability of the employer, civil liability of legal persons
 - Art 56 § 1: Recidivism
 - Art 56 § 2: Book I of the Penal Code is applicable;
 - Art 57 § 1: Publication of the sentence
 - Art 57 § 2: Seizure/Confiscation
- The Decree of 11 March 1999 replaced the Decree of 7 October 1985.

Sanctions:

- Art 79 § 1: imprisonment from 8 days up to 3 years and/or a fine from 100 BEF up to 1 million
- The Decree of 11 March 1999 alters art 49 of the Decree of 7 October 1985;
- Art 78: Recidivism
- Art 79 § 1: Additional penalties
- Art 79 § 2: decontamination
- Art 79 § 3: collateral for the amount of the estimated costs of decontamination
- Art 79 § 4: Violation of paragraphs 1 and 2 is punishable with imprisonment of 6 months up to 5 years and/or a fine of 1000 BEF up to 500.000 BEF.
- Art 79 § 5 and 6

2.3.2.3. Brussels

The law of 26 March 1971 and the Royal Decree of 3 august 1976 still applies.

Executive order 20 September 2001 is issued under the aforementioned law.

Sanctions:

Ordinance of 5 June 1997:

- Art 96 § 1: imprisonment from 8 to 12 months and/or a fine from € 2,50 up to € 2500.

- Art 96 § 2 and 3
- Recidivism: Referred to the Ordinance of 25 March 1999

2.3.3. DENMARK

This directive was implemented through Ministerial Regulation no 921 of 8 October 1996, issued under the Environmental Protection Act section 7, 14, 29, 80 and 110.

Sanctions:

- Penal code section 196;
- Environmental Protection Act section 27, 110;
- Ministerial Regulation no 921 section 12.
- Normally the criminal sanctions are fines, but under specific circumstances the criminal penalty can go up to 2 years imprisonment. The size of the fine is related to the economic benefit of the offence, the normal fine is between 1.000 and 10.000 D. kr. If the offence is done intentional or reckless and the offence also is either done for economic reasons or endanger the environment, the fine will be 25% of the economic benefit of the offence and the economic benefit will be confiscated.

The criminal sanctions do not fully reflect the scope of the directive.

2.3.4. FINLAND

This directive was implemented through the Environmental Protection Act, as well as by the Environmental Protection Degree and a Regulation of Council of State on discharging certain dangerous substances into water.

Sanctions:

Chapter 48, sections 1, 2, 3, 4 of the Penal Code, impairment of the environment (fine up to max. 6 years imprisonment) and in the Environmental Protection Act under section 116 (fines).

2.3.5. FRANCE

<u>Nature du texte et numéro</u>	Date du texte	références	Observations
Loi N° 92-3 Loi N° 64-1245	3 janvier 1992 16 décembre 1964	Art. L.211-1 et suivants code de l'environnement	
Circulaire	4 février 2002	Non publiée au JO	Cette circulaire

			peut être consultée sur le site du Ministère chargé de l'environnement http://www.environnement.gouv.fr
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Type d'infraction	Textes	Elément matériel	Sanctions pénales
Délit de Pollution des eaux douces avec préjudice piscicole (délit non intentionnel)	code de l'environnement Article L.432-2 Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Jeter, déverser ou laisser s'écouler des substances quelconques détruisant le poisson ou nuisant à sa reproduction ou à sa valeur alimentaire	Personnes physiques Emprisonnement 2 ans Amende 18 000 euros publication de la décision de condamnation Personnes morales Amende 90 000 euros Injonction de mise en conformité + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9° de l'article 131-39 c.pén.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Délit de Pollution des eaux douces ou des eaux de mer (dans la limite des eaux territoriales) avec préjudice pour la faune ou la flore aquatique ou (et)	code de l'environnement Article L.216-6 (loi sur l'eau de 1992) Articles 216-9, 216-11 et 216-12 (loi sur l'eau de 1992)	Jeter, déverser ou laisser s'écouler des substances quelconques dont l'action ou les réactions entraînent des effets nuisibles sur la santé ou des dommages à la faune ou à la flore.	Personnes physiques Emprisonnement 2 ans Amende 75 000 euros Restauration du milieu aquatique Affichage ou diffusion de la

atteinte à la santé de l'homme (délit non intentionnel)	Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Si les rejets étaient autorisés par arrêté, le délit n'est constitué qu'en cas d'irrespect des prescriptions de cet arrêté	décision de condamnation Personnes morales Amende 375 000 euros Restauration du milieu aquatique Respect des prescriptions enfreintes, sous astreinte + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9° de l'article 131-39 c.pén.
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Type d'infraction	Textes	Elément matériel	Sanctions pénales
Délit de Pollution maritime - eaux salées (délit non intentionnel)	code de l'environnement Articles L.218-73, 218-74, L.218-79 pour les personnes physiques, et L.218-73, L.218-74, L.218-76 et L.218-80 pour les personnes morales Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Jeter, déverser ou laisser s'écouler des substances ou organismes nuisibles pour la conservation ou la reproduction des mammifères marins, poissons, crustacés, coquillages, mollusques ou végétaux ou de nature à les rendre impropres à la consommation.	Personnes physiques Amende 22 500 euros Affichage ou diffusion de la décision de condamnation Personnes morales Amende 112 500 euros Mesures de régularisation pour faire cesser l'infraction ou éviter la récidive + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9°

			de l'article 131-39 c.pén.
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2.3.6. GERMANY

This directive has implemented via the water conversation law (Wasserhaushaltsgesetz; WHG). In some cases the pollution can be punished under § 324 ff. German Criminal Code, if the specific conditions are fulfilled. In particular § 324 StGB contain such regulations.

Sanctions:

§ 324 German Criminal Code (Soil Pollution): Imprisonment up to 5 years or a fine for anyone, who pollutes water or otherwise detrimentally changes its qualities without authorization. Even an attempt to do so incurs criminal liability. If the offender has acted negligently, the punishment shall be imprisonment not exceeding three years or a fine.

§ 41 WHG: Fines up to 50.000 Euro for anyone in cases such as unauthorized use of waters, neglecting of technically required standards for the use of waters as well as the violation of own monitoring or obligations

§§ 30, 130 Ordnungswidrigkeitengesetz: Fines up to 500.000 Euro as corporate administrative fines against legal persons because of injury of the control duty in cases of non-criminal corporate liability by § 30 OWiG.

2.3.7. GREECE

This directive was transposed through:

- Act of Ministerial Council no 144 of 2 November 1987
- Penal sanctions: art 7 refers to art. 28,28 and 30 of law 1650/86.
- JMD 18186/271/88
- Penal sanctions: art 10 refers to art 28,29 and 30 of law 1650/86.

Again, according to this Act and this JMD, the penal sanctions refer to the sanctions provided in the framework law, and no penal procedures have, till today, been initiated, although of course many cases of violation have taken place. Nevertheless, both civil and administrative sanctions have been imposed.

2.3.8. IRELAND

This directive was mainly implemented by Local Government (Water Pollution) Acts 1977-1990 and several local Government Regulations, as well as by Water Quality Regulations 2001, Waste

Managements Acts 1996-2001, Waste Management Regulations 2001 and the Environmental Protection Agency Act 1992. The more most significant legislation implementing it is

Local Government (Water Pollution) Acts 1977-90. Local Government (Water Pollution) (Control of Hexachlorocyclohexane and Mercury Discharges) Regulations 1986.

Local Government (Water Pollution) (Control of Cadmium Discharges) Regulations 1985.

Local Government (Water Pollution Acts 1977-90) (Control of Aldrin, Dieldrin, Endrin, Isodrin, HCB, HCBD, and CHCl₃ Discharges) Regulations 1993. Local Government (Water Pollution) Act 1977 (Water Quality Standards for Phosphorus) Regulations 1998.

Local Government (Water Pollution) Acts 1977-90 (Control of EDC, TRI, Per and TCB Discharges) Regulations 1994.

Local Government (Water Pollution Acts 1977-90) (Control of Carbon Tetrachloride, DTT and Pentachlorophenol Discharges) Regulations.

Local Government (Water Pollution Acts 1977-90) (Control of Aldrin, Dieldrin, Endrin, Isodrin, HCB, HCBD, and CHCl₃ Discharges) Regulations 1993. See 18 below. Local Government (Water Pollution) Act 1977 (Water Quality Standards for Phosphorus) Regulations 1998. Water Quality (Dangerous Substances) Regulations 2001. Waste Management Acts 1996-2001. Waste Management (Collection Permits) Regulations 2001. Waste Management (Licensing) Regulations 2000-2002. Waste Management (Permit) Regulations 1998

The main penalties are fines and/or imprisonment.

Main criminal offences: Water pollution, Air pollution, Waste And Habitats and Wildlife.

Water pollution:

- Section 171 of the Fisheries (Consolidation) Act 1959-90: max penalty is a fine not exceeding £1,000 and/or 6 months imprisonment on summary conviction, max £ 25,000 and/or 5 years imprisonment on conviction on indictment.
- Sections 3 and 4 of the Local Government (Water Pollution) Act 1977 as amended in 1990: offences may be prosecuted summarily by the appropriate local authority, Regional Fisheries Board or any other affected person. The 1990 Acts provide positive incentives for certain public authorities to prosecute. The max fine for conviction on indictment for major offences under the Acts is £ 25,000 and/or 5 years imprisonment. The max penalty on summary conviction is £ 1,000 and/or 6 months imprisonment and on conviction on indictment £ 25,000 and/or 5 years imprisonment.
- Administrative enforcement: section 12 of the 1977 Act, as amended in 1990 (max fine of £ 1,000 and/or 6 months imprisonment).

Corporate liability is imposed under section 23 of the 1990 Act.

Waste Management Act 1996

- Sections 32 and 39 in the WMA → penalties: section 10(1) and (3): on summary conviction: a fine not exceeding £ 1,500 and/or imprisonment for a term not exceeding 12 months; conviction on indictment: a fine not exceeding £ 10 million and/or imprisonment for a term not exceeding 10 years.
- Administrative enforcement: section 55 of the Act.
- Corporate liability is imposed under section 9.

Air Pollution Act 1987

- Max penalty for offences created under sections 24(1) and 24(2) is £ 10,000 plus £ 1,000 for every day the offence is continued and/or 2 years imprisonment. Max penalty on summary conviction is £ 1,000 plus £ 100 per day for a continuing offence and/or 6 months imprisonment. The penalty in case of conviction on indictment is £ 10,000 plus £ 1,000 per day for a continuing offence and/or 2 months imprisonment.
- Administrative enforcement: section 26.
- Corporate liability section 11.

Environmental Protection Agency Act 1992

- Max penalty for summary offences created under sections 9 is £ 1,000 and/or 12 months imprisonment. The penalty in case of conviction on indictment is £ 10,000, 000 and/or 10 years imprisonment.

Administrative enforcement: by using administrative enforcements mechanisms in legislation referred to above.

Corporate liability is imposed under relevant sections in Air and Water Pollution legislation.

2.3.9. ITALY

This directive was implemented by Decree-law n°133 of 27/01/1992.

Sanctions:

- Art 18/1: New waste discharges without authorization: detention for a maximum of 3 years.
- Art 18/2: Existent waste discharges without authorization: detention for a maximum of 3 years.
- Art 18/3: Waste discharges carried out with breach of authorization prescriptions: detention for a maximum of 2 years.
- Art 18/4: Waste discharges out of bounds provided for enclosure “B”: detention for a maximum of 2 years.
- Art 18/5: Breach of prohibition provided for in art.12: detention from 3 months to 3 years.

- Art 18/6: Breach of firm suspension order: detention for a maximum of 2 years or fine for a maximum of € 1.000,00.

2.3.10. LUXEMBOURG

This directive has not yet been implemented. Luxembourg has its own system:

Law of 29th July 1993.

Penal sanctions: art 26: sanctions: 8 days up to 6 months and/or fine from €2550 up to € 125.000, restoration of the site at the offender's own expense under daily or monthly penalty in case of non completion. When the penal code or other specific laws, providing more severe sanctions, are applicable, then they rule. Also refers to the first chapter of the penal code and to the articles 130-1 to 132-1 of the criminal procedure code..

Administrative sanctions: art 25

Civil sanctions: rules civil code, no specific system. The fault of the producer is presumed.

- Order of 13th May 1994
- Penal sanctions: art 12 refers to art 26 above
- Order of 16th August 1982
- Penal sanctions: art 16 refers to art 26 above

2.3.11. PORTUGAL

This directive was implemented through Decree-Law 236/98, with particular references to articles 63 to 72. The previous legal framework provided by Decree-Law 74/90 of 7 March in connection with water quality and 46/94 of 22 February, the use of water domain, did not entirely meet the objectives of the said directive. Decree law 74/90 was revoked by the Decree law 236/98, while decree-Law 46/94 is still in force and governs the use of water domains, and it is entirely consistent with the directive.

Sanctions:

The sanctions for infringement of the discipline underlying the directive is set out in art 86 and 87 of Decree-Law 46/94, since Decree-Law 236/98 contains no rules governing sanctions in matters concerning the directive.

The fines range from 500 € to 250.000 € for the more serious. Non-compliance with the directive gives rise to more, and therefore the types envisaged in Articles 279 and 280 of the Criminal Code are applicable.

2.3.12. SPAIN

This directive was implemented through three different state norms:

- Real Decreto Legislativo 1/2001, de 20 julio aprueba el texto Refundido de la Ley de Aguas,
- Real Decreto 995/2000 ,de 2 junio,
- Real Decreto 489/1995, de 7 de abril.

The change is in art 100 to 108.

Sanctions:

Real Decreto Legislativo 1/2001

The system of crimes and sanctions is regulated in art 116 to 121.

Art 116: infringements;

Art 117: administrative fines 6.010 euros up to 601.012 euros;

Art 18: the additional or independent obligation to compensate or repair damage;

Art 120: criminal.

Environmental crimes in penal code:

Causing emissions, the dumping of rubbish, radiations, extractions or excavations, burial, noise, vibrations injections or depositing in the atmosphere, soil, subsoil or in ground, sea or underground waters, including in extraterritorial spaces, and the harnessing of water. For there to be criminal liability, it is necessary that the above-mentioned activities constitute an infringement of a law or other regulation established to protect the environment and that this may seriously damage the balance of natural systems. The law establishes that punishments are imposed in the upper range if human health is placed at risk.

Sanctions:

Punishments established for an ecological crime are imprisonment from 6 months up to 4 years, a fine of 8-24 months and professional disqualification from 1 to 3 years (art 325 cp).

The storage or dumping of toxic or dangerous waste which may damage the balance of natural systems or human health is punishable also (art 326 pc). The punishment in this case is a fine of 8 to 24 months, and a weekend arrest for 18 to 24 weekends.

2.3.13. THE NETHERLANDS

This directive was implemented directly through the Wet Verontreiniging Oppervlaktewateren (WVO).

Violation of several provisions in this law constitute a criminal offence under the economic Offences Act 1950, more specific of art 1a sub 1 and 2 (penalties in art 6).

2.3.14. UNITED KINGDOM

2.3.14.1. England and Wales

In general, Integrated Pollution Control under Part I of the Environmental Protection Act 1990 (subsequently IPPC under the Pollution Prevention and Control Act 1999) regulates significant discharges of black list and gray list substances. Other discharges are regulated by the Environment Agency under the Water Resources Act 1991.

With regard to the discharge of trade effluent into sewers, it is the sewerage undertaker which plays the most important environmental protection role.

However, the Secretary of State has prescribed certain substances or processes for which the Environment Agency is effectively made the consenting body. Where any of these substances are present, all discharges must be referred to the Agency which may then issue a direction to the sewerage undertaker on whether to grant a consent and on any conditions it might impose.

- Environmental Protection (Prescribed Process and Substances) Regulations 1992 Schedule 5
- Section 6 Environmental Protection Act 1990
- Section 7 Environmental Protection Act 1990

Sanctions:

- Section 23 of the Environmental Protection Act 1990, see above:

summary: imprisonment up to 3 months and/or a fine up to £ 20,000;

indictment: imprisonment up to 2 years and/or a fine;

Section 157: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.

- Regulation 32 of the Pollution Prevention and Control Regulations 2000: summary: imprisonment up to 6 months and/or a fine up to £ 20,000;
indictment: imprisonment up to 5 years and/or a fine;
summary: a fine (statutory max);
indictment: imprisonment up to 2 years and/or a fine;

Subsection 4: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.

Also: Regulation 9 and 12

Regulation 35: where a person is convicted of an offence under regulation 30(1)(a), (b) or (d) in respect of any matters which appear to the court to be matters which it is in the power of that person to remedy, the court may, in addition to or instead of imposing any punishment, order that person to take such steps as may be specified in that order for remedying those matters.

- Section 85 of the Water Resources Act 1991:

summary: imprisonment up to 3 months and/or a fine up to £ 20,000;

indictment: imprisonment up to 2 years and/or a fine;

Section 82

Schedule 10 section 2

Section 217: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.

- Section 118 of the Water Industry Act 1991:

summary: fine (statutory max);

indictment: a fine;

Section 121 of the Water Industry Act 1991:

summary: fine (statutory max);

indictment: a fine.

Section 210: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.

Civil and Administrative Sanctions:

- Environmental Protection Act 1990: sections 12, 13 and 14;
- Pollution Prevention and Control England and Wales Regulations 2000:
- Regulations 21, 24,25 and 26;
- Water Resources Act 1991: Sections 90B,100, 161A and Schedule 10 paragraph 6.

2.3.14.2. Scotland

In general, Integrated Pollution Control under Part I of the Environmental Protection Act 1990 (subsequently IPPC under the Pollution Prevention and Control Scotland Regulations 2000) regulates significant discharges of black list and gray list substances. Other discharges are regulated by the Scottish Environmental Protection Agency under the Control of Pollution Act 1974. With regard to the discharge of trade effluent into sewers, this is regulated by SEPA under the Sewerage Scotland Act 1968 as amended.

- Environmental Protection (Prescribed Processes and Substances) Regulations 1992 Schedule 5
- Sections 6 and 7 Environmental Protection Act 1990

Sanctions:

- Section 23 of the Environmental Protection Act 1990

Section 157: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.

- Regulation 30 of the Pollution Prevention and Control Scotland Regulations 2000:

summary: imprisonment up to 6 months and/or a fine up to £ 20,000;

indictment: imprisonment up to 5 years and/or a fine;

summary: fine (statutory max);

indictment: imprisonment up to 2 years and/or a fine;

Subsection 4: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.

Also: Schedule 5 Pollution Prevention and Control (Scotland) Regulations 2000

- Regulations 6 and 9

- Section 30 F Control Pollution Act 1974:

summary: imprisonment up to 3 months and/or a fine up to £ 20,000;

indictment: imprisonment up to 2 years and/or a fine;

Also: Section 34

- Section 24 Sewerage Scotland Act 1968:

summary: a fine up to £ 20,000 and a further fine up to £ 50 for each day on which the offence continues after conviction thereafter.

Also: Section 29

Civil and Administrative Sanctions:

- Environmental Protection Act 1990: Sections 12,13 and 14;
- Pollution Prevention and Control Scotland Regulations 2000: Regulations 17,19,20;
- Control of Pollution Act 1974: section 37.

2.3.14.3. Northern Ireland

In general, Industrial Pollution Control Northern Ireland Order 1997 regulates significant discharges of black list and grey list substances. Other discharges are regulated by the Environment and Heritage Service under the Water Northern Ireland Order 1999.

With regard to the discharge of trade effluent into sewers this is regulated by the Environment and Heritage Service under the Water and Sewerage Services Northern Ireland Order.

Sanctions:

- Article 23 of the Industrial Pollution Control Northern Ireland Order 1997:
 - summary: imprisonment up to 3 months and/or a fine up to £ 20,000;
 - indictment: imprisonment up to 2 years and/or a fine;
 - summary: fine (statutory max);
 - indictment: imprisonment up to 2 years and/or a fine;Also: Articles 6, 7 and 32
- Article 26: Where a person is convicted of an offence under article 23 (1)(a) or (c) in respect of any matters which appear to the court to be matters which it is in the power of that person to remedy, the court may, in addition to or instead of imposing any punishment, order that person to take such steps as may be specified in that order for remedying those matters.
- Article 7 Water Northern Ireland Order 1999:
 - summary: imprisonment up to 3 months and/or a fine up to £ 20,000;
 - indictment: imprisonment up to 2 years and/or a fine;Article 9: summary: imprisonment up to 3 months and/or a fine up to £ 20,000;
 - indictment: imprisonment up to 2 years and/or a fine;
- Article 20 of the Water and Sewerage Services Northern Ireland Order 1973:
 - summary: fine up to £ 2,000;
 - indictment: unlimited fine.Also: Article 23

Civil and Administrative Sanctions:

- Industrial Pollution Control Northern Ireland Order 1997: Articles 12,13,14 and 27;
- Water Northern Ireland Order 1999: Article 12, 17 and Schedule 1 paragraph 5.

2.4. Directive 79/409 (wild birds)

2.4.1. AUSTRIA

2.4.1.1. Federal and State administrative penal law:

General: Administrative Penal Code: applicable in federal and state administrative penal cases.

Imprisonment never exceeds 6 weeks. As an alternative penalty for non-payment of a fine, imprisonment is possible, if not excluded expressly by a single law (§ 16 Administrative Penal Code).

Federal law: there is, except the criminal code, no federal law.

State law: All the 9 autonomous states transformed directive into national law mainly by rather uniform Naturschutzgesetze (Nature Protection Codes), but to some extent by Jagd- und Fischereigesetze (Hunting – and Fishing Codes).

Several codes: all provide administrative penal law.

Sanctions: are not so uniform: mainly fines, one state imprisonment.

2.4.1.2. Criminal law (federal): §§ 180-183 StGB, Criminal Code

- Intentional impairment of the environment: § 180: imprisonment up to 3 years or a fine up to 360 daily rates.
- Intentionally endangering the environment by treatment of and clearing away waste (§ 181b) and intentional endangering of the environment by the operation of installations (§ 181d) and other intentional endangering of flora and fauna (§ 182): imprisonment up to 2 years or a fine up to 360 daily rates.
- Negligent impairment of the environment (§181): imprisonment up to 1 year.
- Negligently endangering the environment by treatment of waste (§181c) and negligently endangering flora and fauna (§ 183) and intentional serious impairment by noise (§181a): imprisonment up to 6 months or a fine up to 360 daily rates.

Fines lie in the range of € 4 to € 117720.

2.4.2. BELGIUM

Several aspects of this directive are regulated by the law on hunting of 28 February 1882, under which the Royal Decree of 20 July 1972 was issued.

Sanctions:

Art 31, 2: fine from 5 BEF up to 25 BEF.

2.4.2.1. Flanders

The Royal Decree of 20 July 1972 was replaced by the Royal Decree of 9 September 1981.

Art 12 of the Royal Decree of 9 September 1981, originally referred to the Law on Hunting (art 31). By the Decree of 27 June 1985 several articles were added to the Law on Hunting, which applied only in Flanders. Again, for penalties it referred to art 31. Later the Decree on hunting of 24 July 1991 modifies several articles in the Law on Hunting. Sanctions are now to be found in art 40 of the Decree (a fine from 100 BEF up to 200 BEF) and art 34 (a fine from 50 BEF up to 100 BEF).

Later art 12 of the Royal Decree of 9 September 1981 was modified by the order of 18 December 1998. Art 12: now refers to the sanctions in the law on hunting of 28 February 1882, the Decree on hunting of 24 July 1991 and the nature preservation ordinance of 21 October 1997 (art 58: imprisonment from 8 days up to 3 years and/or a fine from 26 BEF up to 1 million + the provisions of chapter VII and art 85 of the Penal Code applies).

2.4.2.2. The Walloon district

The Royal Decree of 20 July 1972 was replaced by the Decree of 14 July 1994. The Decree can be considered as an equivalent of the Decree of 9 September 1981 in Flanders. Unlike the Flemish Decree, which executed an old law on hunting, the Walloon Decree executes another Decree.

Sanctions:

- Infringements of provisions of the Decree of 14 July 1994 are punished in accordance with art 63 § 1 of the law of 12 July 1973 on nature preservation:
- Imprisonment from 1 month up to 6 months and/or a fine from 100 BEF up to 5000.
- Art 63 § 3: Book I of the Penal Code is applicable.

2.4.2.3. Brussels

The Royal Decree of 20 July 1972 was replaced by the Ordinance of 25 October 1990.

Sanctions:

Art 14 of the Ordinance of 25 October 1990 refers to the provisions in the law on nature preservation of 12 July 1973 (also art 23: recidivism).

2.4.3. DENMARK

This directive has been implemented through regulations issued under the Nature Protection Act and the Act of Hunting and Wildlife Management.

Infringements of Ministerial Regulations issued under the Nature Conservation Act can be criminal penalized by fines and up to 1 year imprisonment, while infringements of Ministerial Regulations issued under the Act of Hunting and Wildlife Management can be penalized with fines and up to 2 years imprisonment, provided that the Regulations include a penalty provision.

The protection of special protected bird areas under the Bird directive has been implemented through Ministerial Regulation no. 782 of 1 November 1998 under the Nature Protection Act: no criminal penalties for infringement.

Regarding the sea territory, Denmark has implemented the obligation to protect designated areas by provisions under:

- the Marine Environment Protection Act: Section 59: infringements of the protection of the designated areas are not in itself subject to criminal penalties, but dumping without a permit is penalized with fines and up to 2 years of impr
Section 14: fine and up to 2 years impr
- the Act on Raw Materials: Section 44: investigation and extraction without a permit are by the Act on Raw Materials sanctioned by criminal penalties (fines and up to 1 year in prison), but infringement of the protection of the designated areas are not in itself subject to criminal penalties

Sanctions:

- Nature Act: fines, imprisonment up to 1 year (section 89);
- Act of Hunting: fines, imprisonment up to 2 years (section 54);
- Ministerial Regulation no 634 of 25 June 2001 section 13: max penalty 1 year impr;
- Ministerial Regulation no 45 of 21 January 1994 section 9: normal penalty is a fine, but if the offence has been committed intentionally and either caused serious damage to the interests protected by the Regulation or was committed out of pursuit of profit, the criminal penalty can go up to 1 year impr;
- Ministerial Regulation no 715 of 22 September 1999 section 8: fines and up to 2 years impr;
- Ministerial Regulation no 821 of 18 September 2001 section 13: fines and up to 2 years impr.

Fines are the normal criminal penalties. Size of the fine is related to the economic benefit of the offence. Normally the fine will be between 1.000 and 10.000 D.kr.

In case of serious offences → imprisonment.

2.4.4. FINLAND

This directive was implemented through the (new) Nature Conservation Act and the Nature Conservation Degree. Further, the hunting Hunting Act is part of the implementation of the directive.

Sanctions:

- Chapter 48, section 5 of the Penal Code (fine-max 2 years imprisonment);
- Chapter 48a, section 1 of the Penal Code (fine up to max. 2 years imprisonment)
- Nature Conservation Act under section 58 (fine).
- Hunting Act, sections 74 and 75, hunting infractions (fine)

2.4.5. FRANCE

Nature du texte et numéro	Date	Références
Loi N° 2000-698	26 juillet 2000	Code de l'environnement Art. L 420-1 et suivants
Décret N° 2000-755	1 ^{er} août 2000	Code rural Art R 224-12-1 et suivants
Décret N° 2002-112	25 janvier 2002	Code rural Art. R 224-5 et 224-6
Décret N° 2002-113	25 janvier 2002	Code rural Art. R 225-15 à R 225-17 Art. R 224-10 second alinéa
Trois arrêtés du MATE Ministère de l'Aménagement du Territoire Et de l'Environnement	28 janvier 2002	JO des 29 et 30 janvier 2002

Infraction	Textes susceptibles de Fonder les poursuites	Peines principales encourues	Peines complémentaires encourues	observations
Chasse en temps prohibé	Article L.428-5 code de l'environnement	4 mois d'emprisonnement 3750 euros d'amende	- Confiscation des instruments de chasse (art. L.428-9 et L.428-10 code de l'environnement) - Privation de 5 ans maxi du droit de conserver ou d'obtenir le permis de	Délit ; mais le tribunal correctionnel statue à juge unique (article 398- 1 6° code de

			chasser (art. L.428-14)	procédure pénale)
Récidive de chasse en temps prohibé	Article L.428-6 code de l'environnement	8 mois d'emprisonnement 7500 euros d'amende	idem	Seuls les 12 mois précédents (contre 5 ans ordinairement) sont considérés

2.4.6. GERMANY

Directives 79/409 and 92/43 aim at the protection of wild birds respectively biodiversity. The directive is implemented by a framework regulation § 20 BNatSchG (Bundesnaturschutzgesetz). This regulation is completed by the protection regulation § 20 a ff.; 30 f. BNatSchG.

Sanctions:

§ 30 a BNatSchG: Regular and habitual damaging of a particular protected species is to be treated as a criminal offence with the imprisonment up to 6 months or with a fine up to 180 daily rates.

§ 30 a BNatSchG: ban on hunting on threatened animals, offences are sanctioned according to § 38 BJagdG (federal hunting law) with fines or imprisonment up to 5 years, in lower cases according to § 39 BJagdG with non-criminal fines up to 5.000 Euro.

Simple damaging of a particular protected animal is in some sanctioned with a non-criminal fine up to 10.000 Euro or up to 50.000 Euro e.g. § 57 I Nr. 9, 10 LNatSchG Schleswig-Holstein.

§ 17 TierSchG (Tierschutzgesetz): killing an a vertebrate animal without reasonable cause or causing substantial pains is sanctioned with imprisonment up to 3 years or with fines.

§ 18 TierSchG: contains as rules of non-criminal fines up to 25.000 Euro for less heavy cases 5.000 Euro.

§ 39 PflSchG (Plant Protection Law): endangering particular protected of stranger plant types is sanctioned by imprisonment up to 5 years. Even the attempt to do so incurs criminal liability, according to § 39 III PflSchG.

§ 40 PflSchG treating plants with unauthorized means can be sanctioned by non-criminal fines up to 50.000 Euro or in less heavy cases up to 10.000 Euro.

§§ 292, 293 German Criminal Code: Prohibition of the hunt and hunt of fishes. The sanction reaches from fines to the imprisonment up to 3 years, in particular heavy cases from 3 months up to 5 years. §

329 III German Criminal Code: Violation of harmfully inflicting pain to animals or plants against special legislation and under BNatSchG.

2.4.7. GREECE

This directive was transposed through Ministerial Decision 414985/1985.

Sanctions:

- Art 9 sub 1: imprisonment up to 10 days or a fine from € 15 up to € 150;
- Art 9 sub 2: imprisonment up to 1 year or a fine from € 60 up to € 300;
- Art 9 sub 3: imprisonment from 3 months up to 2 years or a fine from 5 150 up to € 1.500.

Due to the fact that hunting is an activity widely performed in Greece, many violations of the provisions of this Ministerial Decision have taken place and sanctions have been imposed.

In most of the cases the violations refer to breaches of the areas where hunting is not permitted, breaches of the hunting period, and breaches of the means that can be used for hunting. In all these cases, fines and not imprisonment is imposed.

2.4.8. IRELAND

This directive was implemented by main legislation, by the Wildlife Act 1976 and the Wildlife (Amendment) Act 2000, the Planning and development Act 2000 and several European Communities Regulations notably the European Communities (Natural Habitats) Regulations 1997-8. Numerous Orders, declaring special protection areas, have been made under the European Communities Act 1972.

The main penalties are fines and/or imprisonment.

Main criminal offences: Wildlife Act 1976, as amended by section 68(d) the Wildlife (Amendment) Act 2000

European Communities Habitats Regulations 1997-8

Planning and Development Act 2000

The maximum penalties under the section 74 of the Wildlife Act 1976 as amended in 2001 are a fine of £1500 and/or 12 months imprisonment on summary conviction and £50,000 and/or 2 years imprisonment on conviction on indictment. These penalties also apply in respect of the European Communities (Habitats) Regulations 1997.

Planning and Development Act 2000

The maximum penalty under section 151 is £10,000,000 and/or 2 years imprisonment 2 years imprisonment on conviction on indictment and a fine of £1500 and/or 6 months imprisonment. Corporate liability is imposed under section 158.

2.4.9. ITALY

This directive was implemented by Decree of the Republic's President n°357 of 8/9/1997. This directive contains guidelines and recommendations, but there is not specific sanctioning system.

The European Commission started a procedure for insufficient realization of this directive in Italy (see n°2281/1998).

2.4.10. LUXEMBOURG

This directive has not been, properly speaking, implemented.

Luxembourg legislation makes only reference to the directive in a Minister memorandum of 9 July 1999, which gives the guidelines to the administration customers regarding the sites protected in directive 92/43 and the areas protected in directive 79/409.

Sanctions:

- Penal:

The memorandum may not provide any penal rule. Its sole function is giving instructions to administrative customers. There are 2 Luxembourg laws on fauna and Wild birds protection.

a. law of 11 August 1982: memorandum preamble refers to this law.

art 44: imprisonment from 8 days up to 6 months and/or a fine from € 250 up to € 25.000, without prejudice of other more severe rules. The penal sanctions provided by the law are applicable to any administrative measure taken in accordance to it.

b. law of 24 February 1928

art 9: a fine from € 250 up to € 2.500 and/or imprisonment from 8 days up to 1 month.

The first chapter of the penal code and art 130-1 to 132-1 of the criminal procedure code are applicable.

- Civil:

Restoration is provided as a penal sanction and pronounced by the penal court, although it has got civil characteristics.

2.4.11. PORTUGAL

This directive was transposed by Decree-Law 75/91 of 14 February.

The Decree-Law 140/99 of 24 April revoked Decree-Law 75/91.

Sanctions:

- Art 22 Decree-Law 140/99: Administrative offences are punishable with fines from € 37,5 up to € 3750 for individuals and from € 4000 up to € 40.000 for legal entities. Attempted administrative offences and negligence are punishable.
- Art 23: Additional penalties
- Art 24: Infringement proceedings and application of fines and additional penalties
- Art 25: Restoring prior situation

The Basic Law on the Environment (law 11/87 of 7 April) and art 278 ff. Of the Penal Code should be taken into consideration.

Commission Directive 85/411 altered Directive 79/409.

2.4.12. SPAIN

This directive was implemented by state law: Ley 4/1989, de 27 de marzo de conservacion de los Espacios Naturales y dela Flora y Fauna Silvestres (LCEN).

This does not comply with the Community regulations with sufficient rigor.

Prohibition in art 31.1b LCEN ≠ art 5 EU Directive

Environmental crimes in penal code:

Crimes related to the protection of flora and fauna:

Articles 333, 334 and 336 pc: fine of 8 to 24 months or imprisonment from 6 months up to 2 years.

Article 335 pc: a fine of 4 to 8 months.

2.4.13. THE NETHERLANDS

Since April, this directive was implemented directly through the Flora and Fauna Act.

Violation of several provisions of the Flora and Fauna Act constitutes a criminal offence under article 1a sub 1, sub 2 and sub 3 (penalties in art 6).

2.4.14. UNITED KINGDOM

2.4.14.1. England and Wales

This directive was implemented by

- the Wildlife and Countryside Act 1981

Sanctions: penalties:

Section 1: summary: imprisonment up to 6 months and/or a fine up to level 5 (section 21)

Section 6: summary: imprisonment up to 6 months and/or a fine up to level 5 (section 21)

Section 5: summary: imprisonment up to 6 months and/or a fine up to level 5 (section 21)

- Conservation (Natural Habitats etc.) Regulations 1994

Sanctions:

Regulation 19: summary: fine up to level 4

Regulation 22

Regulation 23: summary: fine (statutory max)

indictment: fine

Regulation 106: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.

Proposed changes to the system of Designation as Special Protection Areas by the Countryside and Rights of Way Act (2000): increase in fine up to £ 20,000 (summary) or unlimited on indictment (new Section 28P).

Also: new section 28 E, H(public bodies), N Wildlife an Countryside Act 1981

2.4.14.2. Scotland

This directive was implemented by

Wildlife and Countryside Act 1981

Sanctions: section 21 (penalties)

Conservation (Natural Habitats etc.) Regulations 1994

Sanctions: Regulations 19, 22, 23 and 106, see above

Proposals under ‘The Nature of Scotland: A Policy Statement’

large compensation payments which reward people for not undertaking projects which damage SSSIs will be reduced.

The courts will be given discretion to impose custodial sentences for wildlife crime.

The designation will impose permanent restrictions to prevent damaging operations unless the consent of the appropriate nature conservation body is obtained.

Incentives will be provided for the positive management of land

2.4.14.3. Northern Ireland

This directive was implemented by the Wildlife (NI) Order 1985

Sanctions:

- art 4: summary: fine up to level 5 (art 27) fine up to level 3 (art 27)
- art 7: summary: fine up to level 5 (art 27) fine up to level 3 (art 27)
- art 12: summary: fine up to level 5 (art 27) fine up to level 3 (art 27)
- Conservation (Natural Habitats etc.) Regulations 1995 (NI)
- Sanctions: Regulation 16: summary: fine up to level 5
- Regulation 22: summary: fine up to level 5

2.5. Directive 83/513 (cadmium discharges)

2.5.1. AUSTRIA

2.5.1.1. Federal and State administrative penal law:

General: Administrative Penal Code: applicable in federal and state administrative penal cases.

Imprisonment never exceeds 6 weeks. As an alternative penalty for non-payment of a fine, imprisonment is possible, if not excluded expressly by a single law (§ 16 Administrative Penal Code).

Federal law:

- Wasserrechtsgesetz (WRG, Code of Water Rights): provides administrative and penal law
- Abwasseremissionsverordnung (Ordinance of Sewage Emissions)

§ 137 WRG: fines up to €36340, no imprisonment.

Imprisonment for not paying a fine is extended up to 6 weeks.

2.5.1.2. Criminal law (federal): §§ 180-183 StGB, Criminal Code

- Intentional impairment of the environment: § 180: imprisonment up to 3 years or a fine up to 360 daily rates.

- Intentionally endangering the environment by handling, dealing and transport waste (§ 181b) and intentional endangering of the environment by the operation of installations (§ 181d) and other intentional endangering of flora and fauna (§ 182): imprisonment up to 2 years or a fine up to 360 daily rates.
- Negligent impairment of the environment (§181): imprisonment up to 1 year.
- Negligently endangering the environment by treatment of waste (§181c) and negligently endangering flora and fauna (§ 183) and intentional serious impairment by noise (§181a): imprisonment up to 6 months or a fine up to 360 daily rates.

Fines lie in the range of € 4 to € 117720.

2.5.2. BELGIUM

This directive can be considered as a daughter-directive of 76/464. This last directive was implemented by the Royal Decree of 3 August 1976. For the execution of art 9 § 1 and art 20 § 1 of the Royal Decree of 3 August 1976 the Royal Decree of 18 March 1987 was issued.

Sanctions:

See discussion of the law of 26 March 1971 (76/464).

2.5.2.1. Flanders

Art 7.2.0.1. VLAREM II abolishes the Royal Decree of 3 August 1976.

See art 41 § 1 of the Decree of 28 June 1985.

Sanctions:

Art 39 of the Decree; imprisonment from 8 days up to 1 year and/or a fine from 100 BEF up to 100.000 BEF.

All provisions of Book I of the Penal Code are applicable. The Court of Arbitrage decided that this provision violated the competence dividing rules.

Also: Safety measures and art. 40: liability of the employer (the Constitutional Court decided that this provision violated the competency dividing rules).

2.5.2.2. The Walloon district

See directive 76/464.

2.5.2.3. Brussels

See directive 76/464.

2.5.3. DENMARK

This directive was implemented through Ministerial Regulation no 921 of 8 October 1996, issued under the Environmental Protection Act section 7, 14, 29, 80 and 110.

Sanctions:

- Penal code section 196;
- Environmental Protection Act section 27, 110;
- Ministerial Regulation no 921 section 12.
- Normally the criminal sanctions are fines, but under specific circumstances the criminal penalty can go up to 2 years imprisonment.

The criminal sanctions do not fully reflect the scope of the directive.

2.5.4. FINLAND

This directive was implemented through the environmental Protection Act, as well as by the Environmental Protection Degree and the Regulation of the Council of State on discharging certain dangerous substances into water.

Sanctions:

- Chapter 48, sections 1, 2, 3, 4 of the Penal Code, impairment of the environment (fine up to max. 6 years imprisonment);
- Environmental Protection Act under section 116 (fine).

2.5.5. FRANCE

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Délit de fourniture de renseignements	code de l'environnement Articles L.521-21 pour les personnes physiques et	Avoir fourni à l'administration de	Personnes physiques Emprisonnement 2 ans Amende 75 000 euros Confiscations,

inexacts susceptibles d'entraîner des prescriptions moins contraignantes en matière de substances chimiques	pour les personnes morales Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	contrôle (DRIRE) des renseignements inexacts susceptibles d'entraîner des prescriptions moins contraignantes en matière de substances chimiques	interdictions d'exercice, fermeture d'établissement, affichage ou diffusion de la décision de condamnation Personnes morales Amende 375 000 euros + peines mentionnées aux 2°,3°,4°,5°,6°,9° de l'article 131-39 c.pén.
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Type d'infraction	Textes	Elément matériel	Sanctions pénales
Délit de violation de mesures d'interdiction ou de violation de prescriptions édictées en application de l'art. L.521-6 c. environnement, en matière de substances chimiques.	code de l'environnement Articles L.521-21 pour les personnes physiques et	N'avoir pas respecté une mesure d'interdiction ou des prescriptions édictées en vertu de l'article L.521-6 c. environnement, ou en vertu des règlements CEE N° 2455/12 ou N° 793/93	Personnes physiques Emprisonnement 2 ans Amende 75 000 euros Confiscations, interdictions d'exercice, fermeture d'établissement, affichage ou diffusion de la décision de condamnation
Délit de violation d'une mise en demeure prononcée en application de l'art. L.521-17 c. environnement, en matière de substances chimiques.	pour les personnes morales Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)		Personnes morales Amende 375 000 euros + peines mentionnées aux 2°,3°,4°,5°,6°,9° de l'article 131-39 c.pén.

2.5.6. GERMANY

Directives 99/13 and 85/513 relates to the restriction of the deletion of organic solvents through certain activities and installations respectively the emission standards for catmion. The objective is to guarantee minimum quality standards for water.

To pollute soil, air and water §§ 324 ff. German Criminal Code and in particular § 324 applies exclusively a qualified soil- and water protection. The protection of dangerous materials is regulated in these terms. To § 324 see the remarks under 2.1.6.

In addition to this term according to § 324a anyone who, in breach of duties imposed under administrative law, introduces, allows to penetrate, or releases substances into the soil, thereby polluting or otherwise detrimentally changing the soil, 1. in a manner likely to damage the health of another person, animals, plants or other things or significant value, or water, 2. or on a significant scale

Shall be punishable with imprisonments not exceeding five years or with fine.

Even the attempt to do so incurs criminal liability.

If the offender has acted negligently, the punishment shall be imprisonment not exceeding three years or a fine.

Special sanctions contains the Chemikaliengesetz from 1980. According to § 1 ChemikalienG purpose objective of the law is to protect humans and the environment against harmful effects by dangerous materials and preparation of those , avoid dangers and prevent its release.

The ChemikalienG does not contain a codified catalog of the dangerous materials an is for his part object of numerous exceptions. Thus the ChemikalienG does not list life-, animal food and medicaments, exactly the same as waste water, radioactive wastes and waste oil. The activity of the of the national originating exchanges for dangerous materials is of crucial importance in accordance with the §§ 8, 9, 11. A formal procedure of admission is not intended however.

Sanctions:

§ 26 ChemikalienG: Non-criminal fines up to 50.000 Euro for the non-compliance ot cooperate during the registration and identification; less serious cases are sanctioned with an non-criminal fine up to 5.000 Euro.

§ 27 ChemikalienG: Fine or imprisonment up to 2 years the violation of the prohibition to produce dangerous materials, which is forbidden by an German statutory order or by legal acts of the European Union which are directly valid in Germany.

2.5.7. GREECE

This directive was transposed through:

- Act of Ministerial Council no 144 of 2 November 1987

- Penal sanctions: art 7 refers to art. 28, 29 and 30 of law 1650/86.
- JMD 18186/271/88
- Penal sanctions: art 10 refers to art 28, 29 and 30 of law 1650/86.

Again, according to this Act and this JMD, the penal sanctions refer to the sanctions provided in the framework law, and no penal procedures have, til today, been initiated, although of course many cases of violation have taken place. Nevertheless, both civil and administrative sanctions have been imposed.

2.5.8. IRELAND

This directive was implemented mainly through the Local Government (Water Pollution) Acts 1977-90, the Waste Management Acts 1996-2001 and the Environmental Protection Agency Act 1992 and specifically by the Local Government (Water Pollution) (Control of Cadmium Discharges) Regulations 1985. Other legislation such as the Air Pollution Act 1987 and the Waste Management Acts 1996-2001 is also relevant.

The main penalties are fines and/or imprisonment.

Main criminal offences: Water pollution, Air pollution, Waste And Habitats and Wildlife.

Water pollution

- Section 171 of the Fisheries (Consolidation) Act: 1959 as amended: max penalty is a fine not exceeding £1,000 and/or 6 months imprisonment on summary conviction, max £ 25,000 and/or 5 years imprisonment on conviction on indictment.
- Sections 3 and 4 of the Local Government (Water Pollution) Act: offences may be prosecuted summarily by the appropriate local authority, Regional Fisheries Board or any other affected person. The 1990 Acts provide positive incentives for certain public authorities to prosecute. The max fine for conviction on indictment for major offences under the Acts is £ 25,000 and/or 5 years imprisonment. The max penalty on summary conviction is £ 1,000 and/or 6 months imprisonment and on conviction on indictment £ 25,000 and/or 5 years imprisonment.
- Administrative enforcement: section 12 of the 1977 Act, as amended in 1990 (max fine of £ 1,000 and/or 6 months imprisonment).

Corporate liability is imposed under section 23 of the 1990 Act.

Waste Management Act 1996

- Sections 32 and 39 in the WMA → penalties: section 10(1) and (3): on summary conviction: a fine not exceeding £ 1,500 and/or imprisonment for a term not exceeding 12 months; conviction on indictment: a fine not exceeding £ 10 million and/or imprisonment for a term not exceeding 10 years.
- Administrative enforcement: section 55 of the Act.

- Corporate liability is imposed under section 9.

Air Pollution Act 1987

- Max penalty for offences created under sections 24(1) and 24(2) is £ 10,000 plus £ 1,000 for every day the offence is continued and/or 2 years imprisonment. Max penalty on summary conviction is £ 1,000 plus £ 100 per day for a continuing offence and/or 6 months imprisonment. The penalty in case of conviction on indictment is £ 10,000 plus £ 1,000 per day for a continuing offence and/or 2 months imprisonment.
- Administrative enforcement: section 26.
- Corporate liability is imposed under section 11.

Environmental Protection Agency Act 1992

Under which Integrated pollution control licences are issued:

- Max penalty for offences created under sections 9 is £ 1,000 and/or 12 months imprisonment. The penalty in case of conviction on indictment is £ 10,000,000 and/or 10 years imprisonment.
- Corporate Liability is imposed under section 8.

Administrative and corporate enforcement is achieved by using enforcements mechanisms in legislation referred to above.

2.5.9. ITALY

This directive was implemented by Decree-law n°133 of 27/01/1992. For the sanctioning system, see n°3

2.5.10. LUXEMBOURG

This directive was implemented by an order of 17 April 1986, modified by an order of 30 June 1989.

Sanctions:

Penal sanctions: art 5 refers to the law of 9 august 1971 (general law on enforcement of EEC decisions) → fine from € 250 up to € 25.000 and/or 8 days up to 5 years imprisonment, confiscation (seizure) of things used to commit the offense as well as the confiscation of any illegal benefit..

When the penal code or other specific laws, providing more severe sanctions, are applicable then they rule.

2.5.11. PORTUGAL

This directive was transposed through Decree-Law 53/99. This norm does not provide any penalties for the administrative offence of its provisions. Its regime is interconnected with the existing general rules in Decree-Law 46/94 and 236/98.

Sanctions:

Fines range from 250 € up to 250.000 € for the more serious. Non compliance with this directive gives rise to more, and therefore the types envisaged in articles 279 and 280 of the Criminal Code are applicable.

2.5.12. SPAIN

This directive was transposed through: Orden 12 de noviembre de 1987 sobre normas de emisión, objetivos de calidad y métodos de medición de referencia relativos a determinadas sustancias nocivas o peligrosas en los vertidos de aguas residuales.

Its annex IV states: emission limits, objectives of quality, method of reference and control procedures when the objectives of quality will be used. The infringement of these duties is sanctionable. However, article 2 allows an infringement of limit emissions whenever the objectives of quality should be respected. And article 4 states "stand still" principle in order to avoid a degradation of places with high level of quality.

In particular, the regulations applicable to the dumping of cadmium are found in Appendix IV. In section a. the rules for emission are established, in section b. the minimum quality standards and methods of measuring, and in section c. the quality control procedures.

Incompliance with these regulations is punishable according to the basic rules applicable to water, also included in Directive 76/464: Art 116-121 of Legislative Royal Decree 1/2001

And Art 254 of Royal Decree 995/2000, which lays down minimum quality levels for certain polluting substances, and modifies the Public Domain Regulations, passed in Royal Decree 846/1986.

Environmental crimes in penal code:

Causing emissions, the dumping of rubbish, radiations, extractions or excavations, burial, noise, vibrations injections or depositing in the atmosphere, soil, subsoil or in ground, sea or underground waters, including in extraterritorial spaces, and the harnessing of water. For there to be criminal liability, it is necessary that the above-mentioned activities constitute an infringement of a law or other regulation established to protect the environment and that this may seriously damage the balance of natural systems. The law establishes that punishments are imposed in the upper range if human health is placed at risk.

Sanctions:

Punishments established for an ecological crime are imprisonment from 6 months up to 4 years, a fine of 8-24 months and professional disqualification from 1 to 3 years (art 325 cp).

The storage or dumping of toxic or dangerous waste which may damage the balance of natural systems or human health is punishable also (art 326 pc). The punishment in this case is a fine of 8 to 24 months, and a weekend arrest for 18 to 24 weekends.

2.5.13. THE NETHERLANDS

This directive was implemented through the Wet Verontreiniging Oppervlaktewateren (WVO).

Violation of several provisions of the WVO constitutes a criminal offence under article 1a sub 1 and 2 of the Economic Offences Act 1950 (penalties in article 6).

2.5.14. UNITED KINGDOM

2.5.14.1. England and Wales

This directive is implemented by the Surface Water Dangerous Substances Classification Regulations 1989.

See section on Directive 76/464 for details of offences and criminal penalties:

- Integrated Pollution Control authorizations under Part I of the Environmental Protection Act.
- Pollution Prevention and Control authorizations under Pollution Prevention and Control Act 1990.
- Water Discharge Consents under Water Resources Act 1991.
- Trade Effluent Consents under Water Industry Act 1991.

Civil and Administrative Sanctions:

See directive 76/464.

2.5.14.2. Scotland

This directive is implemented by the Surface Water Dangerous Substances Classification Scotland Regulations 1990.

See section on Directive 76/464 for details of offences and criminal penalties:

- Integrated Pollution Control authorizations under Part I of the Environmental Protection Act.

- Pollution Prevention and Control authorizations under Pollution Prevention and Control Scotland Regulations 2000.
- Water Discharge Consents under Control of Pollution Act 1974.
- Trade Effluent Consents under Sewerage Scotland Act 1968.

Civil and Administrative Sanctions:

See directive 76/464.

2.5.14.3. Northern Ireland

This Directive is implemented by the Surface Water Dangerous Substances Classification Northern Ireland Regulations 1998

See section on Directive 76/464 for details of offences and criminal penalties:

- Integrated Pollution Control authorizations Industrial Pollution Control Northern Ireland Order 1997.
- Water Discharge Consents under Water Northern Ireland Order 1999.
- Trade Effluent Consents under Water and Sewerage Services Northern Ireland Order 1973.

Civil and Administrative Sanctions:

See directive 76/464.

2.6. Directive 88/609 (air pollution from large combustion plants)

2.6.1. AUSTRIA

2.6.1.1. Federal and State administrative penal law:

General: Administrative Penal Code: applicable in federal and state administrative penal cases.

Imprisonment never exceeds 6 weeks. As an alternative penalty for non-payment of a fine, imprisonment is possible, if not excluded expressly by a single law (§ 16 Administrative Penal Code).

Federal law:

- Feuerungsanlagen- Verordnung (FAV, Ordinance for Combustion Installations)
- Penal law: provided by federal Gewerbeordnung (GewO, Code of Trade and Industry)
- Administrative penal law: § 366, 367 and 368 GewO; fines up to € 3600
- § 367 Z 25 GewO: € 2180 max.

2.6.1.2. Criminal law (federal): §§ 180-183 StGB, Criminal Code

- Intentional impairment of the environment: § 180: imprisonment up to 3 years or a fine up to 360 daily rates.
- Intentionally endangering the environment by treatment of and clearing away waste (§ 181b) and intentional endangering of the environment by the operation of installations (§ 181d) and other intentional endangering of flora and fauna (§ 182): imprisonment up to 2 years or a fine up to 360 daily rates.
- Negligent impairment of the environment (§181): imprisonment up to 1 year.
- Negligently endangering the environment by treatment of waste (§181c) and negligently endangering flora and fauna (§ 183) and intentional serious impairment by noise (§181a): imprisonment up to 6 months or a fine up to 360 daily rates.

Fines lie in the range of € 4 to € 117720.

2.6.2. BELGIUM

This directive was implemented by the Law of 28 December 1964, under which 2 Royal Decrees were issued: the Royal Decree of 8 August 1975 and the Royal Decree of 18 August 1986.

Because both Decrees were issued before the directive an agreement between the government and the producers of electricity was made, in order to adjust and update the Decrees. This agreement lasts until 31 December 2003.

Sanctions:

- Art 26 of the Royal Decree of 8 August 1975 and Art 13 of the Royal Decree of 18 August 1986 refer to Art 10 of the law of 28 December 1964: Art 10: imprisonment from 8 days up to 6 months and/or a fine from 26 BEF up to 5000 BEF, without prejudice to the applicability of the provisions in the Penal Code.
- Art 10, 3: All provisions of Book I of the Penal Code are applicable.
- Art 10, 2: Recidivism

2.6.2.1. Flanders

Art 7.2.0.1, 8° VLAREM II abolishes the Royal Decree of 18 August 1986 and states the Royal Decree of 8 August 1975 is only applicable as long as it completes the provision in VLAREM II.

Both Royal Decrees were replaced by the Decree of 28 June 1985 and the executive orders VLAREM I and VLAREM II.

Sanctions:

- Art 39 of the Decree: imprisonment from 8 days up to 1 year and/or a fine from 100 BEF up to 100.000, without prejudice to the applicability of the provisions in the Penal Code.
- All provisions of Book I of the Penal Code are applicable. The Court of Arbitrage has stated that this provision violates the competence dividing rules.
- Also: Safety measures and art 40: civil liability of the employer

2.6.2.2. The Walloon district

The law of 28 December and both Royal Decrees are still in force.

2.6.2.3. Brussels

Both Royal Decrees were not (yet) abolished. The Royal Decree of 18 august 1986 was modified however by an ordinance of 20 July 1993. Art 13 of the Royal Decree of 18 august 1986 refers to art 10 of the law of 28 December 1964, but art 10 was abolished, by two Ordinances of 25 March 1999.

Sanctions:

Art 23 of the Ordinance of 25 March 1999 about the judgment and imprisonment of air quality: imprisonment from 8 days up to 6 months and/or a fine of € 0.6445.

- Art 2 of the Ordinance of 25 March 1999→ art 23: recidivism

2.6.3. DENMARK

This directive was implemented by Ministerial Regulation no 689 of 15 October 1990 and supplemented by Ministerial Regulation no. 885 of 18 December 1991, both issued under the Environmental Protection Act. In general these regulations do not include provisions on criminal penalties. But criminal sanctions can be provided in relation to the IPPC-permit.

Sanctions:

- Penal code section 196;
- Environmental Protection Act section 33 and 110;

- Ministerial Regulation no 655 section 22.

The size of the fine is related to the economic benefit of the offence, the normal fine is between 1.000 and 10.000 D. kr. If the offence is done intentional or reckless and the offence also is either done for economic reasons or endanger the environment, the fine will be 25% of the economic benefit of the offence and the economic benefit will be confiscated.

2.6.4. FINLAND

This directive was implemented by the Environmental Protection Act as well as by the Environmental Protection Degree, the Regulation of the Council of State on limiting particle emissions of the combustion plants and the Regulation of the Council of State on limiting sulphur dioxide emissions of the combusting plants using fuel peat.

Sanctions;

- Chapter 48, sections 1, 2, 3, 4 of the Penal Code, impairment of the environment (fine up to max. 6 years imprisonment);
- Environmental protection Act under section 116 (fine).

2.6.5. FRANCE

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Contravention d'exploitation d'installation fixe de combustion (classée ou non) d'une puissance supérieure à 400 kW sans se conformer aux prescriptions fixées par le préfet Utilisation de combustibles dans une telle installation sans se conformer aux prescriptions fixées par le préfet	décret N° 2001-449 du 25 mai 2001, article 17 (code de l'environnement Dalloz 2002 p. 1197) Code pénal Articles 131-13 et 131-41	Avoir exploité une installation fixe de combustion (classée ou non) d'une puissance supérieure à 400 kW sans se conformer aux prescriptions fixées par le préfet. Avoir utilisé des combustibles non conformes aux prescriptions fixées par le préfet dans une telle installation.	Personnes physiques Amende 1500 euros Personnes morales Amende 3000 euros

(contraventions de 5ème classe)			
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L'article 17 du décret précise bien que ces infractions sont constituées "sans préjudice des dispositions relatives aux contrôles et sanctions prévus au chapitre 6 du titre 2 du livre 2 du code de l'environnement".

S'applique donc le tableau suivant :

Type d'infraction	Textes	Sanctions administratives	Sanctions pénales
Délit de pollution de l'air (délict non intentionnel)	code de l'environnement : - Article L.226-8 (sanctions administratives) - Articles L.226-9, L.226-10, L.226-11 (sanctions pénales) Code pénal : Article 132-66 à 132-70 Article 131-38 et 131-39 (personnes morales)	Mise en demeure par préfet, consignation de somme, restitution progressive si exécution des travaux de mise en conformité, possibilité de faire procéder d'office à ces travaux de mise en conformité. Possibilité d'ordonner la suspension de l'activité, l'immobilisation ou l'arrêt du fonctionnement du matériel ou de l'engin en cause, jusqu'à mise en conformité	Personnes physiques Emprisonnement 6 mois Amende 7500 euros + peines complémentaires: (confiscation de ce qui a permis de commettre l'infraction ou de ce que l'infraction a produit, interdiction d'exercice de l'activité professionnelle pour 5 ans maxi, affichage ou diffusion de la décision de condamnation) Personnes morales Amende 37500 euros Injonction de mise en conformité + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9° de l'article 131-39 c. pén.
Contravention (5ème classe) de pollution de l'air	Décret N°2001-449 du 25 mai 2001 + arrêtés préfectoraux		Personnes physiques Amende 1500 euros Personnes morales Amende 7500 euros

2.6.6. GERMANY

Directive 88/609 and regulation 2037/2000 deal with obligation of the members states to encourage restrictions of emission by combustion engines and equally deal with isolating and packaging material, which may be responsible for the destruction of the ozon layer. According to Art. 14 of the first mentioned Directive the member states has to work toward the protection of air and climate.

The planning and execution of measures improving the quality of air are regulated under Federal law by the BImSchG (Bundesimmissionsschutzgesetz). Since 1990 with § 47 III BImSchG a binding regulation over the air pure retaining plans as well as after § 47 a BImSchG over the production of official noise protection plans is existing. To that extent also a comprehensive protection from emissions exists by the possibility of related measures of the emission control in case of exchange-poor weather conditions and increased ozone concentration.

From criminal law view § 325 StGB determine the punishability of air pollutions injurious to health. This clause does not apply according to § 325 V StGB to motor vehicles, track vehicles, aircraft or watercraft however. § 329 StGB determine among other the punishability for the operation of fabrics or installations, if during exchange-poor weather conditions strong increasing of harmful air pollutions is to be warned. However the enterprise of airliners is not covered.

Sanction regulations outside of the §§ 324 ff. StGB exist otherwise under Federal law only for the motor traffic. According to §§ 40 a ff. BImSchG in connection with § 24 II StVG (Ordnungswidrigkeit) the administrative authorities can arrange restrictions due to national legal statutory orders in exchange-poor weather conditions. Any violation against this rule of infringement is punished with non-criminal fines. The general exemption of criminal-law concerning the emission of traffic of emissions of air traffic in the environmental criminal law is regarded as problematic and legislative not compelling. The *Verkehrslärmschutzgesetz*, which was faced with this problem, failed to uphold the issue during the consultation in the legislation committee.⁷

The pursued objective of the avoidance of ozone-damaging FCKW emissions (packing materials etc.), followed by regularization guideline is followed only in connection with the principle of waste avoidance or with the disposition of waste according to the regulations of the KrW/AbfG. The rules of infringement included in this law were described under 2.1.6. It is to be noted that the there regulations have the environmental harmful disposal, not however the environmental harmful wastefulness to the article. With the injury of the marking obligations for FCKW materials the imposition of fine as sanction is possible to § 26 ChemikalienG (closer under 2.5.6).

⁷ Heine/Meinberg, GA 1990, 22.

These regulations are executed through the so-called Bundesimmissionsschutzgesetz. Violation of this law is sanctioned as Ordnungswidrigkeit with a non-criminal fine.

2.6.7. GREECE

This directive was transposed through JMD 58751/2370/1993.

Sanctions:

- Art 15 refers to art 28, 29 and 30 of law 1650/86.
- Until today, the criminal provisions of Art 15 of JMD 58751/2370/1993 have not been used, and no such cases have been brought in front of a Greek criminal court.

2.6.8. IRELAND

Directive 88/609/EEC has been mainly implemented by the Air Pollution Act 1987 and the Air Pollution Act, 1987 (Emission Limit Values for Combustion Plant) Regulations, 1996 (S.I. No. 264 of 1996) and the Environmental Protection Agency Act 1992.

Air Pollution

- Max penalty for offences created under sections 24(1) and 24(2) is £ 10,000 plus £ 1,000 for every day the offence is continued and/or 2 years imprisonment. Max penalty on summary conviction is £ 1,000 plus £ 100 per day for a continuing offence and/or 6 months imprisonment. The penalty in case of conviction on indictment is £ 10,000 plus £ 1,000 per day for a continuing offence and/or 2 months imprisonment.
- Administrative enforcement: section 26.
- Corporate liability is imposed under section 11.

Environmental Protection Agency Act 1992

- Max penalty for summary offences created under sections 9 is £ 1,000 and/or 12 months imprisonment. The penalty in case of conviction on indictment is £ 10,000,000 and/or 10 years imprisonment.

Administrative enforcement: by using administrative enforcement mechanisms in legislation referred to above.

- Corporate liability is imposed under relevant sections in Air Pollution legislation.

2.6.9. ITALY

This directive is not implemented. There is not specific sanctioning system: in case of emissions of pollutants into the air from large combustion plants not authorized the sanctions of decree-law n°372 of 4/8/1999 are applied.

Art 13/1: Emissions without authorization or with authorization suspended or repealed: detention for maximum of 1 year or fine from € 2.500,00 to € 25.000,00; Breach of authorization prescriptions: fine from € 5.000,00 to € 25.000,00.

Art 13/2: Emissions subsequent to order of industrial plant closing : detention from 6 months to 2 years or fine from € 5.000,00 to € 50.000,00.

Art 13/3: Breach of obligation provided for in art 9/1: administrative fine from € 5.000,00 to € 50.000,00.

Art 13/4: Breach of obligation provided for in art 9/2: administrative fine from € 2.500,00 to € 10.000,00.

Art 13/5: Breach of obligation provided for in art 4/9: administrative fine from € 5.000,00 to € 25.000,00.

2.6.10. LUXEMBOURG

This directive was implemented by the Règlement grand-ducal du 30 novembre 1989. The règlement grand-ducal du 30 novembre 1989 is taken in accordance to the law of 21 June 1976 against atmosphere pollution, which is the general frame regarding atmosphere protection: provides general principles and contains few regulations, and also fixes the penal sanctions applicable.

Sanctions:

- Penal:

Règlement grand-ducal du 30 novembre 1989: art 16: refers to law of 21 June 1976.

Law of 21 June 1976: art 9: imprisonment from 8 days up to 6 months and/or a fine from € 250 to € 20.000 without prejudice of other sanctions provided by other laws. The first chapter of the Penal Code and art 130-1 and 132-1 of Penal procedure Code are applicable.

- Administrative measures:

art 4,6,7 of the Règlement

art 3,5,6 law of 21 June 1976

- civil liability

Classical rules will apply

2.6.11. PORTUGAL

This directive was implemented by Decree Law 352/90

Sanctions:

- Art 30: Tax for improved air quality
- Art 34: administrative offence; refers to law in general; negligence is always punishable; additional penalties; suspension of subsidies or benefits, suspension or withdrawal of licence or permits;
- Basic Law on the environment: art 8 and 40;
- Penal code art 278 and 280.

2.6.12. SPAIN

This directive was implemented through state law real decreto 646/1991, de 22 Abril, por el que se establecen nuevas normas sobre limitacion a les emisiones a la atmosfera de determinados agentes comtaminantes procedentes de grandes instalaciones de combustion (boe Nr 99, FE 25.04.91)

Act 38/1972 of December 22 Art 12 describes as a sanction able infringement the breaching of what is laid down in this act and the provisions of law that elaborate it. Consequently, the breaching of that which is established in the royal decree 646/1991 may constitute an administrative misdemeanor, without prejudice to the corresponding civil and criminal sanctions.

Environmental crimes in penal code:

Causing emissions, the dumping of rubbish, radiations, extractions or excavations, burial, noise, vibrations injections or depositing in the atmosphere, soil, subsoil or in ground, sea or underground waters, including in extraterritorial spaces, and the harnessing of water. For there to be criminal liability, it is necessary that the above-mentioned activities constitute an infringement of a law or other regulation established to protect the environment and that this may seriously damage the balance of natural systems. The law establishes that punishments are imposed in the upper range if human health is placed at risk.

Punishments established for an ecological crime are imprisonment from 6 months up to 4 years, a fine of 8-24 months and professional disqualification from 1 to 3 years (art 325 cp).

The storage or dumping of toxic or dangerous waste which may damage the balance of natural systems or human health is punishable also (art 326 pc). The punishment in this case is a fine of 8 to 24 months, and a weekend arrest for 18 to 24 weekends.

2.6.13. THE NETHERLANDS

This directive was implemented directly through the Wet op de Luchtverontreiniging.

Violation of several provisions of this law constitutes a criminal offence under article 1a sub 1 and 3 of the Economic Offences Act 1950 (penalties in art 6).

2.6.14. UNITED KINGDOM

2.6.14.1. England and Wales

This directive was implemented by

- the Environmental Protection Act 1990

Sanctions: Section 6

Section 23: summary: imprisonment up to 3 months and/or a fine up to £ 20,000;

indictment: imprisonment up to 2 years and/or a fine;

Section 157: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.

- Pollution Prevention and Control Act 1999
- Large Combustion Plant (New Plant) Directions 1995
- the Pollution Prevention and Control Regulations 2000

Sanctions: Regulation 32:

summary: imprisonment up to 6 months and/or a fine up to £ 20,000;

indictment: imprisonment up to 5 years and/or a fine;

summary: fine (statutory max);

indictment: imprisonment up to 2 years and/or a fine.

Subsection 4 : provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.

Also: Regulation 9

Regulation 35: Where a person is convicted of an offence under Regulation 30(1)(a), (b), or (d) in respect of any matters which appear to the court to be matters which it is in the power of that person to remedy, the court may, in addition to or instead of imposing any punishment, order that person to take such steps as may be specified in that order for remedying those matters.

Civil and Administrative Sanctions:

- Environmental Protection Act 1990: Sections 12,13 and 14;
- Pollution Prevention and Control England and Wales Regulations:
- Regulations 21, 24, 25 and 26.

2.6.14.2. Scotland

This directive was implemented by

- the Environmental Protection Act 1990.
Sanctions: sections 6, 23 and 157, see above
- the Pollution Prevention and Control Act 1999.
- Large Combustion Plant (New Plant) Directions 1995.
- Pollution Prevention and Control (Scotland) Regulations 2000
Sanctions; Regulation 6.
Regulation 30: summary: imprisonment up to 6 months and/or a fine up to £ 20,000;
indictment: imprisonment up to 5 years and/or a fine;
summary: fine (statutory max);
indictment: fine and/or imprisonment up to 2 years.
- Subsection 4: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.
- Regulation 33: Where a person is convicted of an offence under Regulation 30(1)(a), (b), or (d) in respect of any matters which appear to the court to be matters which it is in the power of that person to remedy, the court may, in addition to or instead of imposing any punishment, order that person to take such steps as may be specified in that order for remedying those matters.

Civil and Administrative Sanctions:

- Environmental Protection Act 1990: sections 12,13 and 14;
- Pollution Prevention and Control Scotland Regulations 2000:
- Regulations 17, 19, 20 and 21.

2.6.14.3. Northern Ireland

This directive was implemented by

- Industrial Pollution Control (NI) Order 1997
Sanctions: art 6
art 23: summary: imprisonment up to 3 months and/or a fine up to £ 20,000
indictment: imprisonment up to 2 years and/or a fine
summary: fine (statutory max)
indictment: fine and/or imprisonment up to 2 years

Art 26 : Where a person is convicted of an offence under Article 23 (1)(a), or (c) in respect of any matters which appear to the court to be matters which it is in the power of that person to remedy, the court may, in addition to or instead of imposing any punishment, order that person to take such steps as may be specified in that order for remedying those matters.

Art 32

Civil and Administrative Sanctions:

Industrial Pollution Control Northern Ireland Order 1997: Articles 12,13,14 and 27.

2.7. Directive 91/689 (hazardous waste)

2.7.1. AUSTRIA

The Council Directive 75/439 of 16 June 1975, Council Directive 75/442 of 15 July 1975 and Directive 91/689 of 12 December 1991 have to be discussed together for the following reason:

The “Abfallwirtschaftsgesetz”⁸ (AWG, *Code of Waste Business*) and the “Abfallnachweisverordnung”⁹ (*Ordinance about the Proof of Waste*) and the “Altölverordnung”¹⁰ (*Ordinance about Waste Oils*), which are based on AWG, deals with waste, hazardous waste and waste oils all together¹¹.

The federal administrative penal provision (§ 39 AWG) declares not less than 60 different infringements punishable (legal texts see APPENDIX II A 1). § 39 Abs 1 lit a AWG (pecuniary fine from 7 to 36.340 €) penalizes collecting of dangerous waste and waste oils without permission¹², illegal treatment, storing, mixing etc of dangerous waste and dangerous waste oils¹³, illegal burning of waste oils¹⁴, building, running or changing an installation to treat waste or waste oils without permission¹⁵, hindering controls¹⁶ and so on. § 39 Abs 1 lit b AWG (pecuniary fine from 360 to 7.270 €) penalizes for example not collecting, transporting, storing and treatment of dangerous waste or waste oils separately from other

⁸ Bundesgesetz vom 6. Juni 1990 über die Vermeidung und Behandlung von Abfällen, mit dem das Chemikaliengesetz, BGBl. Nr. 326/1987, das Bundesstatistikgesetz, BGBl. Nr. 91/1965, die Gewerbeordnung 1973, BGBl. Nr. 50/1974, das Altlastensanierungsgesetz, BGBl. Nr. 299/1989, das Umwelt- und Wasserwirtschaftsfondsgesetz, BGBl. Nr. 79/1987, und das Umweltfondsgesetz, BGBl. Nr. 567/1983, geändert werden (Abfallwirtschaftsgesetz - AWG) in the version of BGBl. I Nr. 65/2002.

⁹ Verordnung des Bundesministers für Umwelt, Jugend und Familie über die Nachweispflicht für Abfälle (Altöle) (Abfallnachweisverordnung), BGBl 1991/65.

¹⁰ Verordnung des Bundesministers für wirtschaftliche Angelegenheiten vom 17. Juli 1987 über die Durchführung des Altölggesetzes 1986 (Altölverordnung), BGBl 1987/383 in the version of BGBl 325/1990/325.

¹¹ See *Funk* (ed), *Abfallwirtschaftsrecht – Grundfragen in Einzelbeiträgen*, 1993.

¹² § 39 Abs 1 lit a Z 1 AWG.

¹³ § 39 Abs 1 lit a Z 2 AWG.

¹⁴ § 39 Abs 1 lit a Z 3 AWG.

¹⁵ § 39 Abs 1 lit a Z 4 AWG.

¹⁶ § 39 Abs 1 lit a Z 5b AWG.

substances¹⁷, illegal refusal to take back dangerous waste or waste oils¹⁸ and illegal selling of motor oil¹⁹. Fines for the other less serious infringements of provisions of AWG are from 7 up to 2.910 €²⁰, 7 up to 360 €²¹, 7 up to 70 €²² and up to 3.630 €²³.

The holder of a permission is punishable beside the managing director, if he tolerates the offence deliberately or if he neglected duties by choosing this person as managing director²⁴. Confiscation of profits to deprive the offender or anyone else, who got the profit and knew about the offence, is possible in case of § 39 Abs 1 lit a and lit b AWG²⁵. Temporary injunctions to avoid further risks are possible on a wide scale (§§ 40, 40a AWG).

	prison sentence	re-offending prison sentence	fine €	re-offending fine €	imprisonment for not paying a fine
§ 39 Abs 1 lit a AWG	No	no	7 – 36.340	no	2w
§ 39 Abs 1 lit b AWG	No	no	360 – 7.7270	no	2w
§ 39 Abs 1 lit c AWG	No	no	7 – 2.910	no	2w
§ 39 Abs 1 lit d AWG	No	no	7 – 360	no	2w
§ 39 Abs 1 lit e AWG	No	no	7 – 70	no	2w
§ 39 Abs 1 lit f AWG	No	no	7 – 3.630	no	2w

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¹⁷ § 39 Abs 1 lit b Z 5 AWG.
¹⁸ § 39 Abs 1 lit b Z 9 AWG.
¹⁹ § 39 Abs 1 lit b Z 16 AWG.
²⁰ § 39 Abs 1 lit c AWG.
²¹ § 39 Abs 1 lit d AWG.
²² § 39 Abs 1 lit e AWG.
²³ § 39 Abs 1 lit f.
²⁴ § 39 Abs 4 AWG.
²⁵ § 39 Abs 5 AWG.

“Abfallwirtschaftsgesetze/-ordnungen” (*State Codes of Waste Business*) of Burgenland²⁶, Kärnten²⁷, Niederösterreich²⁸, Oberösterreich²⁹, Salzburg³⁰, Steiermark³¹, Tirol³², Vorarlberg³³ and Wien³⁴ deal mainly, but not only with non hazardous waste and provide further punishable offences (legal texts see APPENDIX II A 2 a, b, c, d, f, g, h, i.). The pecuniary fines reach from 7 up to 36.340 €, the Styrian “Abfallwirtschaftsgesetz” even provides for imprisonment up to 6³⁵ weeks³⁶.

	prison sentence	re-offending prison sentence	fine €	re-offending fine €	imprisonment for not paying a fine
§ 69 BglAWG	no	no	36 – 36.340	no	2w
§ 101 KärntAWO	no	no	7 – 14.534	no	no
§ 33 NÖAWG	no	no	7 – 21.800	no	2w
§ 43 OÖAWG	no	no	7 – 36.340	no	2w
§ 37 SalzAWG	no	no	7 – 14.600	no	4w

²⁶ Gesetz vom 29. November 1993 über die Vermeidung, Sammlung, Beförderung und Behandlung von Abfällen (Bgl. Abfallwirtschaftsgesetz [hit2hit4](#) 1993) Burgenländisches LGBl 1994/10.

²⁷ Gesetz vom 16. Dezember 1993 über die Ordnung der Abfallwirtschaft in Kärnten (Kärntner Abfallwirtschaftsordnung [hit2hit4](#)-K-AWO), Kärntner LGBl 1994/34.

²⁸ Landesgesetz vom 29. 7. 1992 über die Abfallwirtschaft - Niederösterreichisches Abfallwirtschaftsgesetz (NÖ AWG 1992) Niederösterreichisches LGBl 1992/29 in the version of LGBl 2001/220.

²⁹ Landesgesetz vom 7. Mai 1997 über die Abfallwirtschaft im Land Oberösterreich (Oö. [hit2](#)Abfallwirtschaftsgesetz 1997 - Oö. AWG 1997), Oberösterreichisches LGBl 1997/86 in the version of LGBl 2001/90.

³⁰ Gesetz vom 10. Dezember 1998 über die Vermeidung, Erfassung und Behandlung von Abfällen (Salzburger Abfallwirtschaftsgesetz 1998 - S.AWG), Salzburger LGBl 1999/35 in the version of LGBl 2001/46.

³¹ Gesetz, mit dem die umweltgerechte und wirtschaftliche Vermeidung, Sammlung, Verwertung und Entsorgung von Abfall geregelt wird (Steiermärkisches Abfallwirtschaftsgesetz 1990 - StAWG), Steirisches LGBl 1991/5 in the version of LGBl 2002/7.

³² Gesetz vom 10. Mai 1990, mit dem die Abfallwirtschaft in Tirol geregelt wird (Tiroler Abfallwirtschaftsgesetz) Tiroler LGBl 1990/50 in the version of LGBl 2002/3.

³³ Vorarlberger Gesetz über die Abfuhr, die Vermeidung, die Verwertung und die Ablagerung von Abfällen, Vorarlberger LGBl 1998/58 in the version of LGBl 2001/58.

³⁴ Gesetz vom 28. 2. 1994 über die Vermeidung und Behandlung von Abfällen und die Einhebung einer hiefür erforderlichen Abgabe im Gebiete des Landes Wien (Wiener Abfallwirtschaftsgesetz - Wr. AWG), Wiener LGBl 1994/13 in the version of LGBl 2001/49.

³⁵ According to § 12 Abs 1 VStG maximum 6 weeks. The legal text in the Styrian statute (maximum 8 weeks) is obsolete.

³⁶ § 28 Abs 2 StAWG.

§ 28 StkAWG	6w	no	7 – 36.336	no	2w
§ 27 TirAWG	no	no	7 – 36.000	no	2w
§ 33 VbgAWG	no	no	7 – 7.000	no	2w
§ 47 WienerAWG	no	no	7 – 35.000	no	6w

2.7.2. BELGIUM

This directive was set up according to art 2 of directive 75/442.

In each Belgian region a general regulation on waste was set up, which includes hazardous waste. This general regulation is mostly the implementation of directive 75/442. For several categories of waste, like hazardous waste, the general regulation provides special rules.

2.7.2.1. Flanders

In chapter IV of the Decree of 2 July 1981, a separate section is dedicated to hazardous waste. The provisions of this section implement the aforementioned directive.

2.7.2.2. The Walloon District

No separate section concerning hazardous waste is to be found in the Decree of 27 June 1996. For certain obligations a distinction is made, throughout the decree, between hazardous and non-hazardous (inert) waste.

2.7.2.3. Brussels

In the Ordinance of 7 March 1991 hazardous waste is being discussed. Art 18 explicitly refers to the aforementioned directive.

The same penal provisions apply as mentioned under directive 75/442. Although certain penal provisions distinct clearly between hazardous and other waste.

2.7.3. DENMARK

This directive supplements directive 75/442 on waste.

Sanctions:

- Environmental Protection Act
- Waste Regulation: section 64

The size of the fine is related to the economic benefit of the offence, the normal fine is between 1.000 and 10.000 D. kr. If the offence is done intentional or reckless and the offence also is either done for economic reasons or endanger the environment, the fine will be 25% of the economic benefit of the offence and the economic benefit will be confiscated.

2.7.4. FINLAND

This Directive was implemented through the Waste Act as well as by the Waste Degree, the Regulation of the Council of State on information related to hazardous waste and packaging hazardous waste and labelling hazardous waste and the Regulation of the Ministry for Environment on the waste and hazardous waste list.

Sanctions:

Chapter 48, sections 1, 2, 3, 4 of the Penal Code: impairment of the environment (fine up to max. 6 years imprisonment). Waste Act: under section 60 (fines).

2.7.5. FRANCE

Type d'infraction	Textes	Élément matériel	Sanctions pénales
Délit de pollution de l'air (délit non	code de l'environnement : - Article L.226-8 (sanctions administratives) - Articles L.226-9, L.226-10, L.226-11 (sanctions pénales) Code pénal : Article 132-66 à 132-70	Mise en demeure par préfet, consignation de somme, restitution progressive si exécution des travaux de mise en conformité, possibilité de faire procéder d'office à ces travaux de mise en conformité. Possibilité d'ordonner la suspension de l'activité, l'immobilisation ou l'arrêt du fonctionnement du matériel ou de l'engin en cause, jusqu'à mise en conformité	Personnes physiques Emprisonnement 6 mois Amende 7500 euros + peines complémentaires: (confiscation de ce qui a permis de commettre l'infraction ou de ce que l'infraction a produit, interdiction d'exercice de l'activité professionnelle pour 5 ans maxi, affichage ou diffusion de la décision

intentionnel)	Article 131-38 et 131-39 (personnes morales)		de condamnation) Personnes morales Amende 37500 euros Injonction de mise en conformité + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9° de l'article 131-39 c. pén.
Contravention (5ème classe) de pollution de l'air	Décret N°2001-449 du 25 mai 2001 + arrêtés préfectoraux		Personnes physiques Amende 1500 euros Personnes morales Amende 7500 euros

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Délit de pollution des eaux douces avec préjudice piscicole (délit non intentionnel)	code de l'environnement Article L.432-2 Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Jeter, déverser ou laisser s'écouler des substances quelconques détruisant le poisson ou nuisant à sa reproduction ou à sa valeur alimentaire	Personnes physiques Emprisonnement 2 ans Amende 18 000 euros publication de la décision de condamnation Personnes morales Amende 90 000 euros Injonction de mise en conformité + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9° de l'article 131-39 c.pén.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
	code de l'environnement	Jeter, déverser ou laisser	Personnes physiques

<p>Délit de pollution des eaux douces ou des eaux de mer (dans la limite des eaux territoriales) avec préjudice pour la faune ou la flore aquatique ou (et) atteinte à la santé de l'homme (délict non intentionnel)</p>	<p>Article L.216-6 (loi sur l'eau de 1992) Articles 216-9, 216-11 et 216-12 (loi sur l'eau de 1992) Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)</p>	<p>s'écouler des substances quelconques dont l'action ou les réactions entraînent des effets nuisibles sur la santé ou des dommages à la faune ou à la flore. Si les rejets étaient autorisés par arrêté, le délict n'est constitué qu'en cas d'irrespect des prescriptions de cet arrêté</p>	<p>Emprisonnement 2 ans Amende 75 000 euros Restauration du milieu aquatique Affichage ou diffusion de la décision de condamnation Personnes morales Amende 375 000 euros Restauration du milieu aquatique Respect des prescriptions enfreintes, sous astreinte + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9° de l'article 131-39 c.pén.</p>
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Type d'infraction	Textes	Elément matériel	Sanctions pénales
<p>Délict de pollution maritime - eaux salées</p>	<p>code de l'environnement Articles L.218-73, 218-74, L.218-79 pour les personnes physiques, et L.218-73, L.218-74, L.218-76 et L.218-80 pour les personnes morales</p>	<p>Jeter, déverser ou laisser s'écouler des substances ou organismes nuisibles pour la conservation ou la reproduction des mammifères</p>	<p>Personnes physiques Amende 22 500 euros Affichage ou diffusion de la décision de condamnation</p>

(délit non intentionnel)	Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	marins, poissons, crustacés, coquillages, mollusques ou végétaux ou de nature à les rendre impropres à la consommation.	Personnes morales Amende 112 500 euros Mesures de régularisation pour faire cesser l'infraction ou éviter la récidive + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9° de l'article 131-39 c.pén.
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Type d'infraction	Textes	Elément matériel	Sanctions pénales
Installation classée Délit de défaut d'autorisation préalable	code de l'environnement Articles L.511-1, L.511-2, L.511-3, L.514-9, L.514-14 pour les personnes physiques, et Articles L.511-1, L.511-2, L.511-3, L.514-9, L.514-14 pour les personnes morales Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Avoir exploité sans autorisation préalable une installation classée pour la protection de l'environnement soumise à autorisation	Personnes physiques Emprisonnement 1 an Amende 75 000 euros Affichage ou diffusion de la décision de condamnation Personnes morales Amende 375 000 euros Mesures de régularisation pour faire cesser l'infraction ou éviter la récidive + peines mentionnées aux 2°,3°,4°,5°,6°,9° de l'article 131-39 c.pén.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Installation classée Délit de poursuite d'exploitation malgré suspension ou interdiction	code de l'environnement Articles L.514-1 à L.514-18 pour les personnes physiques, et pour les personnes morales Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Avoir exploité ou poursuivi l'exploitation d'une installation classée pour la protection de l'environnement malgré une mesure de suspension, de fermeture ou d'interdiction jusqu'à régularisation	Personnes physiques Emprisonnement 2 ans Amende 150 000 euros Affichage ou diffusion de la décision de condamnation Personnes morales Amende jusqu'à 750 000 euros + peines mentionnées aux 2°,3°,4°,5°,6°,9° de l'article 131-39 c.pén.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Installation classée Délit de poursuite d'exploitation sans se conformer à un arrêté de mise en demeure	code de l'environnement Articles L.514-1 à L.514-18 pour les personnes physiques, et pour les personnes morales Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Avoir exploité ou poursuivi l'exploitation d'une installation classée pour la protection de l'environnement sans se conformer à un arrêté de mise en demeure de respecter, au terme d'un délai fixé, certaines prescriptions techniques.	Personnes physiques Emprisonnement 6 mois Amende 75 000 euros Affichage ou diffusion de la décision de condamnation Personnes morales Amende jusqu'à 375 000 euros + peines mentionnées aux 2°,3°,4°,5°,6°,9° de l'article 131-39 c.pén.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Installation classée Contravention d'exploitation d'ICPE sans se conformer aux prescriptions fixées par le préfet ou par le ministre (contravention de 5ème classe)	code de l'environnement Articles L.512-5, L.512-9, L.512-12 Code pénal Article 131-13	Avoir exploité ou poursuivi l'exploitation d'une installation classée soumise à déclaration sans satisfaire aux prescriptions spéciales ou générales fixées par le préfet. Avoir exploité ou poursuivi l'exploitation d'une installation classée soumise à autorisation sans satisfaire aux prescriptions générales fixées par le ministre.	Personnes physiques Amende 1500 euros Affichage ou diffusion de la décision de condamnation Personnes morales non

Les déchets dangereux intéressent aussi la pollution des sols, mais le droit français est très embryonnaire en cette matière car seule la pollution du sols des réserves naturelles est prise en compte pour l'instant.

2.7.6. GERMANY

German report has dealt with directives 75/442,91/689 en 96/82 together, since they all deal with the obligation of the members states to issue legislation concerning with this boxel issues. The criminal sanctions are therefore similar.

None respect of the german implementing these waste directives constitutes a crime under § 324 German Criminal Code and following; in particular § 326 German Criminal Code, which regulates bad handling dangerous wastes. This also holds the non respect of European waste directives is penitential, for detailed informations see under 2.1.6.

2.7.7. GREECE

This Directive was implemented by JMD 19396/1546/97 of 18 July 1997. This JMD contains also in its Annexes the EWC (European Waste Catalogue), as this catalogue was in force before its amendment through Commission Decision 2000/532.

Sanctions:

Art 18: refers to articles 28,29 and 30 of Law 1650/86

Part B of the same article makes analytical reference to the administrative sanctions imposed in case of violation of the provisions of this JMD. It has to be stressed here that the administrative (but not penal) sanctions are very severe, since the administrative fine imposed can reach the amount of approx. € 300.000.

Until today, the criminal provisions of Part A of Art 18 have not been used, and no such cases have been brought in front of a Greek criminal court.

2.7.8. IRELAND

This directive was mainly implemented by the Waste Management Acts 1996 -2001, the Waste Management (Hazardous Waste) Regulations of 1998, the Waste Management (Hazardous Waste) (Amendment) Regulations 2000, the Waste Management (Licensing) Regulations 2000-2002, Waste Management (Permit) Regulations 1998, Waste Management (Transfrontier Shipment of Waste) Regulations 1998, Waste Management (Collection Permits) Regulations of 2001 and the Planning and Development Regulations 2001.

Waste

- Sections 32 and 39 in the WMA → penalties: section 10(1) and (3): on summary conviction: a fine not exceeding £ 1,500 and/or imprisonment for a term not exceeding 12 months; conviction on indictment: a fine not exceeding £ 10 million and/or imprisonment for a term not exceeding 10 years.
- Administrative enforcement: section 55 of the Act.
- Corporate liability is imposed under section 9.

Environmental Protection Agency Act 1992

- Max penalty for offences created under sections 9 is £ 1,000 and/or 12 months imprisonment. The penalty in case of conviction on indictment is £ 10,000,000 and/or 10 years imprisonment.

Administrative enforcement: by using administrative enforcement mechanisms in legislation referred to above.

2.7.9. ITALY

This directive was implemented by Decree-law n°22 of 5/02/1997

Criminal Sanctions:

Art 50/2: Breach of obligation provided for in arts 14/3, 9/3, 17/2: detention for a maximum of 1 year.

Art 51/1: Harvesting, freight, recovery, treatment, trade and intermediation of waste produced for third party without authorization: detention from 3 months to 1 year or fine from € 2.500,00 to € 25.000,00, for not dangerous waste; detention from 6 months to 2 years and fine from € 2.500,00 to € 25.000,00, for dangerous waste.

Art 51/2: Breach of prohibition provided for in art 14/1 e 2: detention from 3 months to 1 year or fine from € 2.500,00 to € 25.000,00, for not dangerous waste; detention from 6 months to 2 years and fine from € 2.500,00 to € 25.000,00, for dangerous waste.

Art 51/3: Management of refuse dump without authorization: detention from 6 months to 2 years and fine from € 2.500,00 to € 25.000,00, for not dangerous waste; detention from 1 year to 3 years and fine from € 5.000,00 to € 50.000,00.

Art 51/4: Breach of authorization prescriptions: the sanctions of art 51/1,2 and 3 are halved.

Art 51/5: Breach of prohibition provided for in art. 9: detention from 6 months to 2 years and fine from € 2.500,00 to € 25.000,00.

Art 51/6: Breach of prescriptions provided for in art 45: detention from 3 months to 1 year or fine from € 2.500,00 to € 25.000,00.

Art 52/3: Irregularity about the formulary compilation provided for art 15: imprisonment for a maximum of 2 years, for dangerous waste.

Art 53/1: Unlawful waste traffic: detention for a maximum of 2 years and fine from € 1.500,00 to € 25.000,00.

Administrative sanctions:

Art 50/1: Breach of prescriptions provided for in arts 14/1 e 2, 43/2 e 44/1: administrative fine from € 100,00 to € 600,00.

Art 52/1: Breach of obligations provided for in art 11/3: administrative fine from € 2.500,00 to € 15.000,00.

Art 52/2: Breach of obligations provided for in art 12/1: administrative fine from € 2.500,00 to € 15.000,00, for not dangerous waste; administrative fine from € 15.000,00 to € 90.000,00.

Art 52/3: Breach of prescriptions provided for in art 15: administrative fine from € 1.500,00 to € 9.000,00, for not dangerous waste.

Art 52/4: Irregularity, non-conservation or non-dispatch to authorities of registers and formulary: administrative fine from € 250,00 to € 1.500,00.

Art 54/1: Breach of obligations provided for in art 38/3 e 4 e art 40: administrative fine from € 7.500,00 to € 45.000,00.

Art 54/2: Breach of prohibitions provided for in art 43/1 e 4: administrative fine from € 5.000,00 to € 30.000,00.

Art 54/3: Breach of prohibitions provided for in art 43/3: administrative fine from € 2.500,00 to € 15.000,00.

In some case administrative sanctions or security measures (confiscation) are provided.

2.7.10. LUXEMBOURG

This directive was implemented by the Règlement Grand-Ducal du 11 décembre 1996 relatif aux déchets dangereux (Mem. A-91, 23 déc. 1996, p 2796).

The violation of the provisions of the present order is punished through the sanctions provided by the Act of 17 June 1994 on the prevention and management of waste.

2.7.11. PORTUGAL

The legal framework for waste management was defined by Decree-Law 310/95. This law was altered by Decree- Law 239/97. Decree-Law 516/99 approved the Strategic Plan for Industrial Waste Management.

Sanctions:

- Art 20: Administrative Offences: sub 1: punishable with a fine of € 500 to € 3.750 in the case of individuals, and of € 2.500 to € 45.000, in the case of legal entities.
- Sub 2: punishable with a fine of € 250 to € 2.500 in the case of individuals and € 500 to € 15.000 in the case of legal entities.
- Art 21: additional penalties

2.7.12. SPAIN

This Directive was implemented by state law: Real Decreto 952/1997 de 20 de junio. This provision extends the conduct and persons subject to sanctions according to the 10/1998 Act of April 21. The incorporation of the obligation not to mix different categories of toxic and dangerous wastes is especially relevant, in as much as it is described as a serious breach of law in Act 10/1998 of April 21, on wastes, in art 34h.

Environmental crimes in penal code:

Causing emissions, the dumping of rubbish, radiations, extractions or excavations, burial, noise, vibrations injections or depositing in the atmosphere, soil, subsoil or in ground, sea or underground waters, including in extraterritorial spaces, and the harnessing of water. For there to be criminal liability, it is necessary that the above-mentioned activities constitute an infringement of a law or other regulation established to protect the environment and that this may seriously damage the balance of natural systems. The law establishes that punishments are imposed in the upper range if human health is placed at risk.

Punishments established for an ecological crime are imprisonment from 6 months up to 4 years, a fine of 8-24 months and professional disqualification from 1 to 3 years (art 325 cp).

The storage or dumping of toxic or dangerous waste which may damage the balance of natural systems or human health is punishable also (art 326 pc). The punishment in this case is a fine of 8 to 24 months, and a weekend arrest for 18 to 24 weekends.

2.7.13. THE NETHERLANDS

This Directive was implemented by the Environmental Control Law (Wet Milieubeheer).

- Chapter 10: Waste
- Chapter 17
- Chapter 18: Enforcement

Violation of several provisions of this law constitutes a criminal offence under article 1a sub 1,2 and 3 of the Economic Offences Act 1950 (penalties in art 6).

2.7.14. UNITED KINGDOM

2.7.14.1. England and Wales

This Directive was implemented by the Special Waste Regulations 1996.

- Regulations 4-13
- Regulations 16 and 17

Sanctions:

- Regulation 18: summary: fine up to level 5
- indictment: imprisonment up to 2 years and/or a fine
- Regulation 18(6): provides for the potential criminal liability of directors, managers, secretaries or other similar officers of a body corporate.

There is no provision in the legislation for any civil or administrative penalties.

2.7.14.2. Scotland

This directive was implemented by the Special Waste Regulations 1996.

- Regulations 4-13.
- Regulations 16 and 17.

Sanctions:

- Regulation 18 and 18(6)
- Regulation 18(8): Where in Scotland, an offence is committed by a partnership or an unincorporated association (other than a partnership) is proved to have been committed with the consent or connivance or to have been attributable to any neglect on the part of, a partner in the partnership or, as the case may be, a person concerned in the management or control of the association, he, as well as the partnership or association, shall be liable to be proceeded against and punished accordingly.
- There is no provision in the legislation for any civil or administrative penalties.

2.7.14.3. Northern Ireland

This directive was implemented by the Special Waste Regulations (NI) 1998.

- Regulations 4-14
- Regulations 15 and 16

Sanctions:

- Regulation 17: summary: a fine up to level 5
- indictment: imprisonment up to 2 years and/or a fine
- There is no provision in the legislation for any civil or administrative penalties.

2.8. Directive 92/43 (natural habitats flora/fauna)

2.8.1. AUSTRIA

Directive 92/43 has been transformed into Austrian law by the same state statues as directive 79/409, see 2.4.1.

2.8.2. BELGIUM

2.8.2.1. Flanders

This directive was implemented by the Decree of 21 October 1997.

Sanctions:

- Art 58: imprisonment from 8 days up to 3 years and/or a fine of 26 BEF up to 1 million BEF.
- The provisions of chapter VII and art 85 of the penal code are applicable.
- Art 59 § 1: Restore in previous (original) state.

2.8.2.2. The Walloon District

- The Federal Law of 12 July 1973 on Nature Conservation still applies. By Decree of 11 April 1984 a chapter IX was added to the Law, which contains provisions especially for the Walloon District. Chapter 10 also contains penal provisions which only apply in the Walloon District.
- In 2001 a Decree passed, which adjusts the Law of 12 July 1973. A number of new prohibitions and obligations are introduced in the Law of 12 July 1973. The Decree alters art 63 of this Law, which contains the penal provisions for the Walloon District.

Sanctions:

- Art 63 § 1: heavy felony (first category): imprisonment from 1 month up to 6 months and/or a fine of 100 BEF up to 5000 BEF.
- Art 63 § 2, 1: Second category of felonies: imprisonment from 1 day up to 7 days and/or a fine of 10BEF up to 25 BEF.
- The Decree of 6 December 2001 did not alter the penalty but expanded the number of felonies.
- Art 63 § 2, 2: Recidivism
- Art 63 § 3: The first book of the penal code is applicable
- Art 60: Seizure/Confiscation
- Art 61: Administrative fines: Law of 30 June 1971

- Art 62: Restore in previous (original) state

2.8.2.3. Brussels

A large part of the Law of 12 July 1973 was abolished by the ordinance of 27 April 1995.

This directive was implemented by an executive order issued under the aforementioned ordinance.

Sanctions:

- Title VI of the ordinance: 2 categories of felonies
- Art 41: First category: a fine from 10 BEF up to 100 BEF
- Art 42: Second category: a fine from 0,25 euro up to 125 euro
- Art 43: Circumstances which lead to aggravation of sanctions
- Art 23 of the ordinance of 25 March 1999: Recidivism

2.8.3. DENMARK

This directive has been implemented through regulations issued under the Nature Protection Act and the Act of Hunting and Wildlife Management.

Infringements of Ministerial Regulations issued under the Nature Conservation Act can be criminal penalized by fines and up to 1 year imprisonment, while infringements of Ministerial Regulations issued under the Act of Hunting and Wildlife Management can be penalized with fines and up to 2 years imprisonment, provided that the Regulations include a penalty provision.

The protection of locations and species and nature types within the designated location under the Habitat directive has been implemented through Ministerial Regulation no. 782 of 1 November 1998 under the Nature Protection Act: no criminal penalties for infringement.

Regarding the sea territory, Denmark has implemented the obligation to protect designated areas by provisions under:

- the Marine Environment Protection Act: Section 59: infringements of the protection of the designated areas are not in itself subject to criminal penalties, but dumping without a permit is penalized with fines and up to 2 years of impr

Section 14: fine and up to 2 years impr

- the Act on Raw Materials: Section 44: investigation and extraction without a permit are by the Act on Raw Materials sanctioned by criminal penalties (fines and up to 1 year in prison), but infringement of the protection of the designated areas are not in itself subject to criminal penalties.

Sanctions:

- Nature Act: fines, imprisonment up to 1 year (section 89);
- Act of Hunting: fines, imprisonment up to 2 years (section 54);
- Ministerial Regulation no. 637 of 25 June 2001: no criminal penalties;
- Ministerial Regulation no. 67 of 4 February 1991: criminal penalties under section 8: fine, but when intentionally: 1 year impr
- Ministerial Regulation no 45 of 21 January 1994 : section 9: normal penalty is a fine, but if the offence has been committed intentionally and either caused serious damage to the interests protected by the Regulation or was committed out of pursuit of profit, the criminal penalty can go up to 1 year impr;
- Ministerial Regulation no 715 of 22 September 1999 section 8: fines and up to 2 years impr;
- Ministerial Regulation no 821 of 18 September 2001 section 13: fines and up to 2 years impr.

Fines are the normal criminal penalties. Size of the fine is related to the economic benefit of the offence. Normally the fine will be between 1.000 and 10.000 D.kr.

In case of serious offences→ imprisonment.

2.8.4. FINLAND

This Directive was implemented through the (new) Nature Conservation Act and the Nature Conservation Degree. Further, the Hunting Act is part of the implementation of the directive.

Sanctions:

- Section 5 of the penal code: nature conservation offence (fine up to max 2 years imprisonment);
- Chapter 48a, section 1 of the Penal Code (fine up to max. 2 years imprisonment)
- Hunting Act, sections 74 and 75, hunting infractions (fine)
- Nature Conservation Act under section 58 (fine).

2.8.5. FRANCE

Nature des textes actuels	Date des textes	Références des articles et sous-articles	Obs.

Loi N° 2001-1	3 janvier 2001	Art. 3 interprétant l'art. 6§2 de la directive	V. code de l'environnement commenté Dalloz, éd 2002, Page 308
Ordonnance N°2001-321 (valeur de loi)	11 avril 2001	Art. L. 414-1 à L.414-7 code de l'environnement	
Décret N°2001-1031	8 novembre 2001		Connu sous l'appellation « décret de procédure »
Décret N°2001-1216	20 décembre 2001	Art. R.214-32 Code rural	Connu sous l'appellation "décret de gestion"

Sanctions pénales spécifiques	Application du droit pénal Ordinaire de l'environnement	Sanctions administratives
Non	Oui. Par exemple le droit commun de la chasse et de la pêche s'applique	Oui : privation ou remboursement d'aides financières Consignations de sommes d'argent

Il n'y a pas de sanctions pénales directement associées à la protection des habitats découlant de la directive 92/43. Certes, sont applicables les sanctions pénales habituelles. Par exemple, les infractions de chasse ou de pêche restent sanctionnées en vertu des dispositifs ordinaires ; il en est de même pour les travaux non autorisés dans le lit d'un cours d'eau ; mais si un propriétaire détruit un site mis en zone spéciale de conservation, il n'engage pas, *à ce titre*, sa responsabilité pénale. Ce n'est que dans le cas où ce comportement est infractionnel *au titre d'une autre législation* qu'il pourra être poursuivi.

2.8.6. GERMANY

Directives 79/409 and 92/43 aim at the protection of wild birds respectively biodiversity. The directive is implemented by a framework regulation § 20 BNatSchG (Bundesnaturschutzgesetz). This regulation is completed by the protection regulation § 20 a ff.; 30 f. BNatSchG.

Sanctions:

§ 30 a BNatSchG: Regular and habitual damaging of a particular protected species is to be treated as a criminal offence with the imprisonment up to 6 months or with a fine up to 180 daily rates.

§ 30 a BNatSchG: ban on hunting on threatened animals, offences are sanctioned according to § 38 BJagdG (federal hunting law) with fines or imprisonment up to 5 years, in lower cases according to § 39 BJagdG with non-criminal fines up to 5.000 Euro.

Simple damaging of a particular protected animal is in some sanctioned with a non-criminal fine up to 10.000 Euro or up to 50.000 Euro e.g. § 57 I Nr. 9, 10 LNatSchG Schleswig-Holstein.

§ 17 TierSchG (Tierschutzgesetz): killing an a vertebrate animal without reasonable cause or causing substantial pains is sanctioned with imprisonment up to 3 years or with fines.

§ 18 TierSchG: contains as rules of non-criminal fines up to 25.000 Euro for less heavy cases 5.000 Euro.

§ 39 PflSchG (Plant Protection Law): endangering particular protected of stranger plant types is sanctioned by imprisonment up to 5 years. Even the attempt to do so incurs criminal liability, according to § 39 III PflSchG.

§ 40 PflSchG treating plants with unauthorized means can be sanctioned by non-criminal fines up to 50.000 Euro or in less heavy cases up to 10.000 Euro.

§§ 292, 293 German Criminal Code: Prohibition of the hunt and hunt of fishes. The sanction reaches from fines to the imprisonment up to 3 years, in particular heavy cases from 3 months up to 5 years. § 329 III German Criminal Code: Violation of harmfully inflicting pain to animals or plants against special legislation and under BNatSchG.

2.8.7. GREECE

This Directive has been transposed in the Greek national legal order through the JMD 33318/3028/1998.

Sanctions:

- Art 19: refers to articles 28,29 and 30 of Law 1650/86.
- Until today, the criminal provisions of Art 19 of this JMD have not been used, and no such cases have been brought in front of a Greek criminal court.

2.8.8. IRELAND

This directive is implemented mainly by the Planning and Development Act 2000, in sections 2, 10 (c) and 34 (2) (a) (iii), and by the Communities (Natural Habitats) Regulations 1997/1998, and by the Wildlife Acts of 1976 -2000.

Habitats and Wildlife legislation

- Offences created by Regulations are always summary offences. This means that the max fines are rarely more than £ 1500 and/or 6 months imprisonment.

- The max fine for contravention of the European Communities (Habitats) Regulations 1997 is £ 1500 and/or 6 months imprisonment (Regulation 39) on summary conviction and £ 50,000 and/or 2 years imprisonment on conviction on indictment.
- The max fine for contravention of the Wildlife Acts 1976-2000 is £ 50,000 and/or 2 years imprisonment is £ 1500 and/or 12 months imprisonment on summary conviction.

Planning and Development Act 2000

The max fine for contravention of the Act is £1500 on summary conviction and/or 6 months imprisonment and on conviction on indictment £10,000,000 and/or 2 years imprisonment.

Administrative enforcement is taken under sections 154 and 155.

Corporate liability is imposed under section 158.

2.8.9. ITALY

This directive was implemented by Decree of the Republic's President n°357 of 8/9/1997. This directive contains guidelines and recommendations, but there is not specific sanctioning system.

2.8.10. LUXEMBOURG

Directive 92/43 has not been implemented by law or by a specific executive order.

Luxembourg only makes reference to this directive in:

The government decision of 9 October 1998 fixing a list of the "habitats sites" in accordance with the requirement of article 4 of the directive 92/43/EEC.

Instruction ministérielle du juillet 1999 à appliquer par les administrations relevant du Ministère de l'Environnement.

This specific memorandum gives guidelines regarding the places requiring specific protection. Thus the directive has not really been formally implemented in Luxemburg. The addressees of the Ministerial Memoranda are the administrative authorities and these do not provide for any penal sanctions.

However, article 44 of the Act of 11 August 1982 regarding natural resources conservation provides for sanctions from 8 days to 6 months and/or a fine from 10.000 LUF to 1.000.000 LUF (€ 250 to € 25.000). These penal sanctions apply to the violation of administrative measures taken on the basis of this act. The mentioned memorandum of 9 July 1999 makes explicit reference to this Act of 11 August 1982.

2.8.11. PORTUGAL

This directive was transposed by Decree-Law 75/91 of 14 February.

The Decree-Law 140/99 of 24 April revoked Decree-Law 75/91.

Sanctions:

- Art 22 Decree-Law 140/99: Administrative offences are punishable with fines from € 37,5 up to € 3750 for individuals and from € 4000 up to € 40.000 for legal entities. Attempted administrative offences and negligence are punishable.
- Art 23: Additional penalties
- Art 24: Infringement proceedings and application of fines and additional penalties
- Art 25: Restoring prior situation

The Basic Law on the Environment (law 11/87 of 7 April) and art 278 ff. Of the Penal Code should be taken into consideration.

Commission Directive 85/411 altered Directive 79/409.

2.8.12. SPAIN

This directive is implemented by state law:

- Royal Decree 1997/1995, 7 December
- This Royal Decree may raise some legal problems from criminal perspective, for in art 13.1 it establishes exceptions to the general prohibitions applicable to catalogued species described in Bill 4/1989, of March 27, on the Conservation of Natural Spaces and Wild Flora and Fauna (cf Directive 79/409 EEC). These exceptions are also applicable to the protective measures and obligations imposed in the Decree itself, whose infringement may constitute typically criminal conduct.
- Royal Decree 1193/1998
- Orden de 10 de marzo de 2000

Criminal responsibility

Article 332 CP punishes anyone who picks, cuts down, collects or deals illegally in any threatened species or subspecies or any of their propagula, or destroys or gravely alters their habitat.

Article 333 punishes the introduction or liberation of non-local species when this damages the ecological balance, whenever this harms the biological balance and infringes laws or general regulations which protect flora and fauna species.

Article 334 punishes the hunting or fishing of endangered species, actions which impede or make difficult their reproduction or migration, the trade or traffic of these or with their remains (Art 334) In all cases, criminal liability requires the infringement of laws or regulations which protect flora and fauna species.

Article 336 punishes the unauthorised use of explosives or other means of similar destructive capacity in hunting or fishing. (Art 336)

Article 335 punishes the hunting of non-threatened species or those not in danger of extinction, when hunting or catching them is not explicitly authorised.

2.8.13. THE NETHERLANDS

This Directive was implemented by the Flora and Fauna Act and the Law on Nature Protection (Natuurbeschermingswet).

Violation of several provisions of the Flora and Fauna Act constitutes a criminal offence under article 1a sub 1, 2 and 3 of the Economic Offences Act 1950 (penalties in art 6).

Violation of the provisions of the Law on Nature Protection constitutes a criminal offence under article 1a sub 2 and 3 of the Economic Offences Act 1950 (penalties in art 6).

2.8.14. UNITED KINGDOM

2.8.14.1. England and Wales

The sections of the directive prohibiting the hunting or killing etc. of wild birds are implemented by the Conservation (Natural Habitats etc.) Regulations 1994.

The implementation of the provisions of the directive relating to the protection of areas is more complex. These provisions are implemented primarily by the Conservation (Natural Habitats) Regulations 1994 which provide for the establishment of Special Areas of Conservation.

In the UK, such sites are based on designation as Sites of Special Scientific Interest (SSSI) under the Wildlife and Countryside Act 1981. The Countryside and Rights of Way Act 2000 introduced amendments to the 1981 Act which will significantly improve the protection of SSSIs, however the amendments have not, to date, been extended to the 1994 Regulations.

Sanctions:

- Conservation (Natural Habitats) Regulations 1994

- Regulation 39: summary: fine up to level 5
- Regulation 41: summary: fine up to level 5
- Regulation 42: summary: fine up to level 4
- Regulation 106: provides for the potential criminal liability of directors, managers secretaries or other similar officers of a body corporate.
- Section 81 of the Countryside and Rights of Way Act 2000 allows the above regulations to be amended to impose a custodial sentence of up to 6 months.
- Regulation 19: summary: fine up to level 4
- Regulation 22
- Regulation 23: summary: fine up to the statutory max
- indictment: a fine

Proposed changes:

- designation will impose permanent restrictions to prevent damaging operations unless the consent of the appropriate nature conservation body is obtained (new section 28 E Wildlife and Countryside Act 1981).
- New section 28 N
- New section 28 H: extending the offence of causing or permitting damaging operations to public bodies
- Offences- increase in fines- fine of up to £ 20,000 (summary) or unlimited on indictment: new section 28 P

2.8.14.2. Scotland

See above: England and Wales

Sanctions:

- Conservation (Natural Habitats) Regulations 1994:
- Regulation 39
- Regulation 41
- Regulation 42
- Regulation 106
- section 81 of the Countryside and Rights of Way Act 2000
- Regulation 19, 22, 23

Proposals under ‘The Nature of Scotland; A policy Statement’

- designation will impose permanent restrictions to prevent damaging operations unless the consent of the appropriate nature conservation body is obtained
- large compensation payments which reward people for not undertaking projects which damage SSSIs will be reduced
- the courts will be given discretion to impose custodial sentences for wildlife crime
- incentives will be provided for the positive management of land

2.8.14.3. Northern Ireland

The sections of the directive prohibiting the hunting or killing etc. of wild birds are implemented by the Conservation (Natural Habitats etc.) Regulations (NI) 1995.

The implementation of the provisions of the directive relating to the protection of areas is more complex. These provisions are implemented primarily by the Conservation (Natural Habitats) Regulations (NI) 1995 which provide for the establishment of Special Areas of Conservation. In Northern Ireland, such sites are based on designation as Areas of Special Scientific Interest (ASSI) under the Nature Conservation and Amenity Lands (NI) Order 1985 as amended.

Sanctions:

- Conservation (Natural Habitats) Regulations (NI) 1995
- Regulation 34: summary: fine up to level 5
- Regulation 36: summary: fine up to level 5
- Regulation 37: summary: fine up to £ 5,000
- Regulation 16: summary: fine up to level 5
- Regulation 22: summary: fine up to level 5 and in the case of a continuing offence, to a further fine up to £ 100 for each day during which the offence continues after conviction.

2.9. Directive 96/82 (major-accident hazards involving dangerous substances)

2.9.1. AUSTRIA

The Council Directive 96/82/EC on the control of major-accident hazards involving dangerous substances was transformed by GewO directly³⁷, which provides for administrative penal law as well (§§ 366, 367, 368 GewO; legal texts see APPENDIX II D). Punishable for example is the omission of necessary measures to avoid major accidents or to limit effects of such accidents for human beings or for

³⁷ §§ 84a to 84h GewO.

the environment (pecuniary fines from 7 up to 3.600 €)³⁸. Pecuniary fines from 7 up to 2.180 € has to face who does not have a concept or who does not actualize such a concept to avoid major accidents³⁹; and fines from 7 up to 1.090 € has to face who does not for example send safety reports to the authority, exchange useful information with authorities or who does not inform potentially endangered persons about dangers, security measurements and the correct behaviour in case of major accidents, who does not recheck such information every three years or who does not inform the public⁴⁰.

2.9.2. BELGIUM

This directive was implemented by Cooperation Agreement of 21 June 1999 between the Federal State, Flanders, the Walloon District and Brussels.

Sanctions:

- Art 31: imprisonment from 8 days up to 1 year and/or a fine from 1.000 bef up to 1.000.000
- Art 31 in fine: Administrative fines: refers to the law of 30 June 1971→ 2.000 BEF up to 50.000 BEF.
- Art 30: Other administrative sanctions

2.9.3. DENMARK

This directive was implemented by a special provision in the Environmental Protection Act section 41a by Ministerial Regulation no. 106 of 1 February 2000.

Sanctions:

- Seveso-Regulation: section 20: refers to Environmental Protection Act (section 110).

The size of the fine is related to the economic benefit of the offence, the normal fine is between 1.000 and 10.000 D. kr. If the offence is done intentional or reckless and the offence also is either done for economic reasons or endanger the environment, the fine will be 25% of the economic benefit of the offence and the economic benefit will be confiscated.

- In case of serious offences→ imprisonment.

2.9.4. FINLAND

This Directive was implemented through the Chemicals Act, by the Degree concerning the treatment and storage of hazardous chemicals and through the Regulation of the Council of State on prevention of the

³⁸ § 366 Abs 1 Z 7 GewO.

³⁹ § 367 Z 57 GewO.

employee risks related to major-accident hazards, which has been given according to section 47 of the Work Safety Act. The Work Safety Act is part of the implementation of the directive in question.

Sanctions:

- Chapter 48, sections 1, 2, 3, 4 of the Penal Code: impairment of the environment (fine up to max. 6 years imprisonment).
- Environmental protection Act under section 116 (fine)
- Chemicals Act under section 52

2.9.5. FRANCE

Le point a été fait par une circulaire du ministère chargé de l'environnement, du 10 mai 2000. Elle est relative à la prévention des accidents majeurs impliquant des substances ou des préparations dangereuses présentes dans certaines catégories d'installations classées pour la protection de l'environnement soumises à autorisation.

La directive 96-82 est notamment transposée en droit français à travers la modification du décret N° 77-1133 du 21 septembre 1977, la modification du décret du 20 mai 1953 relatif à la nomenclature des installations classées et par l'arrêté ministériel du 10 mai 2000.

Sur le plan pénal, outre le droit des installations classées, existe un délit de mise en danger de la personne d'autrui.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Délit de Mise en danger de la vie d'autrui	Code pénal Articles 223-1, 223-18 (personnes physiques), 223-2, 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Avoir exposé directement autrui à un risque immédiat de mort ou de blessures de nature à entraîner une mutilation ou une infirmité permanente par violation manifestement délibérée d'une obligation particulière de sécurité ou de prudence imposée par la loi ou le règlement.	Personnes physiques Emprisonnement 1 an Amende 15 000 euros Interdiction d'exercice de l'activité professionnelle et autres peines complémentaires Personnes morales

⁴⁰ § 368 Z 13a through Z 13 d GewO.

			Amende 75 000 euros + peines mentionnées aux 2°,3°,8°,9° de l'article 131-39 c.pén.
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2.9.6. GERMANY :

German report has dealt with directives 75/442,91/689 en 96/82 together, since they all deal with the obligation of the members states to issue legislation concerning with this boxel issues. The criminal sanctions are therefore similar.

None respect of the german implementing these waste directives constitutes a crime under § 324 German Criminal Code and following; in particular § 326 German Criminal Code, which regulates bad handling dangerous wastes. This also holds the non respect of European waste directives is penitential, for detailed informations see under 2.1.6.

2.9.7. GREECE

This Directive was transposed through JMD 5697/590/2000 of 29 March 2000.

Sanctions:

- Art 19: prohibiting operation
- Refers to articles 28,29 and 30 of Law 1650/86 : any natural or legal person
- The JMD as far as civil, criminal and administrative sanctions are concerned, refers directly to the provisions of the framework Law 1650/86. Furthermore, also due to the fact that this JMD is relatively recent (issued on March 2000), no cases have yet reached the court regarding violation of its provisions.

2.9.8. IRELAND

This directive is implemented mainly by the European Communities (Major Accident Hazardous Involving Dangerous Substances) Regulations 2000, and the Waste Management (Licensing) Regulations 2000, regulation 12, the Planning and Development Act 2000 and the Planning and Development Regulations 2001, Regulations 3,9, 16, 65, 79, 133-155, 179 and schedule 23.

European Communities (Major Accident Hazardous Involving Dangerous Substances) Regulations 2000.

The max fine for contravention of the Regulations is £1500 on summary conviction and/or 12 months imprisonment.

Corporate liability is imposed under Regulation 41.

Planning and Development Act 2000

The max fine for contravention of the Act is £1500 on summary conviction and/or 6 months imprisonment and on conviction on indictment £10,000,000 and/or 2 years imprisonment.

Administrative enforcement is taken under sections 154 and 155.

Corporate liability is imposed under section 158.

2.9.9. ITALY

This directive was implemented by Decree-law n°334 of 17/08/1999

2.9.9.1. Criminal sanctions:

Art 27/1: Breaches of prescriptions provided for in art 6/1, 7,8: detention for a maximum of 1 year.

Art 27/2: Breaches of prescriptions provided for in art 6/5: detention for a maximum of 3 months.

Art 27/3: Breaches of prescriptions provided for in art 24/1: detention from 6 months to 3 years.

Art 27/5: Breaches of prescriptions provided for in art 7/2: detention from 3 months to 1 year.

Art 27/6: Breaches of prescriptions provided for in art 7/1 e 10: detention for a maximum of 3 months.

Art 27/8: Breaches of prescriptions provided for in art 22/3: imprisonment for a maximum of 2 years.

2.9.9.2. Administrative sanctions:

Art 27/7: Breaches of prescriptions provided for in arts 5/3, 11, 12/2, 14/5: administrative fine from € 15.000,00 to € 90.000,00.

2.9.10. LUXEMBOURG

This directive was implemented by the Règlement Grand-Ducal du 17 juillet 2000 concernant la maîtrise des dangers liés aux accidents majeurs impliquant des substances dangereuses (Mem. A-73, 11 août 2000, p. 1430).

The order provides for the obligation for the concerned firms to take “all the necessary measures to prevent major accidents”. In addition authorities have the power to prohibit the operation of a firm if the measures are not sufficient or if the authorities are not well informed. However, the order does not provide for any penal sanction in case of a violation.

2.9.11. PORTUGAL

This directive was implemented by Decree-Law 164/2001.

Also the Basic Law of the Environment and articles 278 and ff. Of the Penal Code need to be taken into consideration.

System of Inspections:

- art 37: Inspection and Monitoring
- art 38: System of Inspections
- art 39: Pre-emptive measures

Sanctions:

- art 40: Administrative Offences: punishable with a fine of 50.000\$00 to 750.000\$00 or 9000000\$00 , depending upon the offender being an individual or legal entity. Attempts and negligence are always punishable.
- art 41: Additional penalties
- art 42: Attribution of the product of the fines
- art 43: Conditions for the existing of a crime of pollution : art 279 Penal Code
- art 44: Restoring situation to state prior to administrative offence
- art 45: Compensatory Measures
- art 46: Liability for damages to the environment:
- §4 of art 40 Basic Law on the Environment

2.9.12. SPAIN

This directive was implemented by Royal Decree 1254/1999 of 6 July.

For the first time, this Royal Decree legally introduces into the categories for substances those substances which are dangerous for the environment.

Sanctions:

- Articles 5-7,9,11 and 14 contain all the duties and obligations applicable to establishments where dangerous substances specified in the same Royal Decree (Art 2) are present.

- Art 22 establishes that the infringement of what is laid down in the Royal Decree will be described and punished according to Law 21/1992 of 6 July, on Industry. In fact, it remits this to section V of the above-mentioned Law, giving legal coverage to the infractions contained in it. According to Art 16.2 f it is the autonomous communities that can inspect and administratively sanction the above-mentioned infringements.

Environmental crimes in penal code:

Causing emissions, the dumping of rubbish, radiations, extractions or excavations, burial, noise, vibrations injections or depositing in the atmosphere, soil, subsoil or in ground, sea or underground waters, including in extraterritorial spaces, and the harnessing of water. For there to be criminal liability, it is necessary that the above-mentioned activities constitute an infringement of a law or other regulation established to protect the environment and that this may seriously damage the balance of natural systems. The law establishes that punishments are imposed in the upper range if human health is placed at risk.

Punishments established for an ecological crime are imprisonment from 6 months up to 4 years, a fine of 8-24 months and professional disqualification from 1 to 3 years (art 325 cp).

The storage or dumping of toxic or dangerous waste which may damage the balance of natural systems or human health is punishable also (art 326 pc). The punishment in this case is a fine of 8 to 24 months, and a weekend arrest for 18 to 24 weekends.

2.9.13. THE NETHERLANDS

This Directive was implemented by the Environmental Control Law (Wet Milieubeheer), the Arbeidsomstandighedenwet (Law concerning circumstances at work) and the Law on Disasters and serious Accidents (Wet Rampen en Zware Ongevallen).

Violations of several provisions of the aforementioned laws constitute a criminal offence under the Economic Offences Act 1950 (penalties in art 6).

Environmental Control Law: under art 1a sub 1 and 2

Arbeidsomstandighedenwet: under art 1 sub 4

Law on Disasters and Serious Accidents: under art 1a sub 1

2.9.14. UNITED KINGDOM

2.9.14.1. England and Wales

All the provisions of this directive (except art 12) are implemented by the Control of Major Accident Hazards Regulations 1999.

Sanctions:

- Control of Major Accident Hazards Regulations 1999
- Regulation 20: refers to sections 33 to 42 of the Health and Safety at Work etc. Act 1974
- Health and Safety at Work Act 1974 (as amended)
- Section 33: summary: fine up to level 5 (£ 5,000)
 - indictment: unlimited fine
- Section 37: provides for the potential criminal liability of directors, managers, secretaries or other similar officers of a body corporate.

Civil and Administrative sanctions:

Regulation 18 Control of Major Accident Hazards Regulations 1999

2.9.14.2. Scotland

See above: England and Wales

2.9.14.3. Northern Ireland

The provisions of this directive are implemented by the Control of Major Accident Hazards (NI) Regulations 2000.

Sanctions:

- Control of Major Accident Hazards (NI) Regulations 2000
 - Regulation 20: refers to sections 31 to 39 of the Health and Safety at Work (NI) Order 1978
- Health and Safety at Work (NI) Order 1978 (as amended)
 - Article 31: summary: fine up to level 5 (£ 5,000)
 - Indictment: unlimited fine

Civil and Administrative sanctions:

Regulation 18 Control of Major Accidents Hazards (NI) Regulations 2000

2.10. Directive 99/13 (limitation of emissions of volatile organic compounds)

2.10.1. AUSTRIA

Federal and State administrative penal law:

General: Administrative Penal Code: applicable in federal and state administrative penal cases.

Imprisonment never exceeds 6 weeks. As an alternative penalty for non-payment of a fine, imprisonment is possible, if not excluded expressly by a single law (§ 16 Administrative Penal Code).

Federal law:

Lackieranlagen-Verordnung (Ordinance for Varnishing Installations) and CKW-Anlagen-Verordnung 1994

(Ordinance about the Limitation of Emissions of Chlorinated Organic Solutions from Chlorinated Hydrocarbon Installations)

Penal law: provided by federal Gewerbeordnung (GewO, Code of Trade and Industry)

Administrative penal law: § 367 Z 25 GewO: Euro 2180 max.

Criminal law (federal): §§ 180-183 StGB, Criminal Code

Intentional impairment of the environment: § 180: imprisonment up to 3 years or a fine up to 360 daily rates.

Intentionally endangering the environment by treatment of and clearing away waste (§ 181b) and intentional endangering of the environment by the operation of installations (§ 181d) and other intentional endangering of flora and fauna (§ 182): imprisonment up to 2 years or a fine up to 360 daily rates.

Negligent impairment of the environment (§181): imprisonment up to 1 year.

Negligently endangering the environment by treatment of waste (§181c) and negligently endangering flora and fauna (§ 183) and intentional serious impairment by noise (§181a): imprisonment up to 6 months or a fine up to 360 daily rates.

Fines lie in the range of Euro 4 to Euro 117720.

2.10.2. BELGIUM

2.10.2.1. Flanders

The directive was implemented by a new change of the executive orders of the Decree of 28 June 1985. This adjustment was made through the Ordinance of the Flemish government of 20 April 2001 (adjustment of the ordinance of 6 February 1991 and of the Ordinance of 1 June 1995).

Sanctions:

Art 39 of the Decree of 28 June 1985: imprisonment from 8 days up to 1 year and/or a fine of 100 BEF up to 100.000 BEF, irrespective of the penalties provided for in the penal code.

- Safety measures

All provisions of Book I of the Penal Code are applicable. The Constitutional Court decided that this provisions violates the competence dividing rules.

Art 40: Liability of the employer. The Constitutional Court decided that this provisions violates the competence dividing rules.

2.10.2.2. The Walloon District

2.10.2.3. Brussels

The directive was implemented by several Decrees of the Brussels government, in the line of the Decree of 5 June 1997 (art 6 § 1).

Sanctions:

- Art 96 of the Decree of 5 June 1997: imprisonment from 8 months up to 12 months and/or a fine of € 2,50 up to € 2.500
- Art 96 § 2: class I.B.: € 2,50 up to 12.500/class I.A. : € 25 up to € 25.000
- Art 96 § 3 The fines can be doubled when the infraction is committed intentionally or out of pursuit of profit.
- Art 23 of the Ordinance of 25 March 1999: Recidivism

2.10.3. DENMARK

The Directive 1999/13 on emission of VOC from certain installations and activities has formally been implemented into Danish legislation by Ministerial Ordinance no. 350 of 29 May 2002 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations issued under the Environmental Protection Act. The Directive 1999/13 was therefore implemented more than one year after the date expired for the implementation. The reason of the delay of implementation was doubts on the interpretation and implications of the Directive. However, regarding existing installations the Danish implementation does not comply with the Directive. The Directive 1999/13 includes in article 4 a transition period for existing installations granting these installations until year 2205/2007 to comply with the demands under articles 5, 8 and 9. The Ministerial Ordinance includes a similar transition period. But the scope for this derogation is expanded beyond the Directive. According to the Directive 1999/13, article 2(2) existing installations includes installations

existing before the date on which this Directive is brought into effect (April 2001). In contrast, existing installations are in the Danish Ministerial Ordinance defined as installations in operation before 10 July 2002. The substantial obligations under the Directive 1999/13 seems implemented correct, although the Ministerial Ordinance doesn't include any provision comparable to Directive 1999/13, article 10 on non-compliance.

Criminal sanctions are ruled under the Ministerial Ordinance, section 15. According to section 15(1), there are criminal sanctions for (1) installations not notifying the competent authority of compliance with the substantial demands; (2) for existing installations not notifying the competent authority on the plan for compliance; (3) for installations without a limitation program for not complying with the limit values for emission (Directive 1999/13, Annex IIA); (4) for licensed installation not complying with administrative orders on limitation of emissions. In the EU perspective, the provision on criminal sanctions raise at least three questions. First, in contrast to the Directive 1999/13, the Ministerial Ordinance does not include any definition of 'operator' - but normally it will be the operator, who will be criminal liable. Second, the Ministerial Ordinance doesn't include criminal sanctions for violating the limit values of emission under the Directive 1999/13. Regarding licensed installations, criminal sanctions rely under administrative orders from the local or regional authorities - and taken into account the mistakes often made by local authorities, this seems insufficient. Regarding non-licensed installations, there are no criminal sanctions for non compliance with the limit values and preventive measures required under Directive 1999/13. Thus, there are no criminal sanctions if non-licensed installations notify the local authorities on their plans for compliance, but doesn't implement the plans and thereby are offending the obligations under the Directive 1999/13.

The maximum criminal penalty for offending the crimes covered by section 15(1) of the Ministerial Ordinance are two years imprisonment, if the offence has been caused intentional or reckless and the offence has endangered the environment or was done for economic reasons.

2.10.4. FINLAND

This Directive was implemented through the Environmental Protection Act , theEnvironmental Protection Degree and the Regulation of the Council of State onlimiting usage of volatile organic compounds in certain activities andinstallations.

Sanctions:

Chapter 48, sections 1, 2, 3, 4 of the Penal Code: impairment of the environment (fine up to max. 6 years imprisonment).

Environmental protection Act under section 116 (fine)

2.10.5. FRANCE

Sur le plan pénal, le droit pénal des installations classées s'applique lorsque l'installation relève de cette législation

Quant à la pollution atmosphérique engendrée par ces solvants, elle est combattue assez inefficacement avec les instruments pénaux, comme nous l'avons montré au A du II du rapport.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Installation classée Délit de défaut d'autorisation préalable	code de l'environnement Articles L.511-1, L.511-2, L.511-3, L.514-9, L.514-14 pour les personnes physiques, et Articles L.511-1, L.511-2, L.511-3, L.514-9, L.514-14 pour les personnes morales Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Avoir exploité sans autorisation préalable une installation classée pour la protection de l'environnement soumise à autorisation	Personnes physiques Emprisonnement 1 an Amende 75 000 euros Affichage ou diffusion de la décision de condamnation Personnes morales Amende 375 000 euros Mesures de régularisation pour faire cesser l'infraction ou éviter la récidive + peines mentionnées aux 2°,3°,4°,5°,6°,9° de l'article 131-39 c.pén.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Installation classée Délit de poursuite d'exploitation malgré suspension ou interdiction	code de l'environnement Articles L.514-1 à L.514-18 pour les personnes physiques, et pour les personnes morales Code pénal	Avoir exploité ou poursuivi l'exploitation d'une installation classée pour la protection de l'environnement malgré une mesure de suspension, de	Personnes physiques Emprisonnement 2 ans Amende 150 000 euros Affichage ou diffusion de la décision de condamnation Personnes morales

	Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	fermeture ou d'interdiction jusqu'à régularisation	Amende jusqu'à 750 000 euros + peines mentionnées aux 2°,3°,4°,5°,6°,9° de l'article 131-39 c.pén.
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Type d'infraction	Textes	Elément matériel	Sanctions pénales
Installation classée Délit de poursuite d'exploitation sans se conformer à un arrêté de mise en demeure	code de l'environnement Articles L.514-1 à L.514-18 pour les personnes physiques, et pour les personnes morales Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Avoir exploité ou poursuivi l'exploitation d'une installation classée pour la protection de l'environnement sans se conformer à un arrêté de mise en demeure de respecter, au terme d'un délai fixé, certaines prescriptions techniques.	Personnes physiques Emprisonnement 6 mois Amende 75 000 euros Affichage ou diffusion de la décision de condamnation Personnes morales Amende jusqu'à 375 000 euros + peines mentionnées aux 2°,3°,4°,5°,6°,9° de l'article 131-39 c.pén.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Installation classée Contravention d'exploitation d'ICPE sans se conformer aux prescriptions fixées par le préfet ou par le ministre (contravention de 5ème	code de l'environnement Articles L.512-5, L.512-9, L.512-12 Code pénal Article 131-13	Avoir exploité ou poursuivi l'exploitation d'une installation classée soumise à déclaration sans satisfaire aux prescriptions spéciales ou générales fixées par le préfet. Avoir exploité ou poursuivi l'exploitation d'une installation classée soumise à autorisation sans satisfaire aux prescriptions	Personnes physiques Amende 1500 euros Affichage ou diffusion de la décision de condamnation Personnes morales non

classe)		générales fixées par le ministre.	
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Type d'infraction	Textes	Sanctions administratives	Sanctions pénales
Délit de pollution de l'air (délict non intentionnel)	code de l'environnement : - Article L.226-8 (sanctions administratives) - Articles L.226-9, L.226-10, L.226-11 (sanctions pénales) Code pénal : Article 132-66 à 132-70 Article 131-38 et 131-39 (personnes morales)	Mise en demeure par préfet, consignation de somme, restitution progressive si exécution des travaux de mise en conformité, possibilité de faire procéder d'office à ces travaux de mise en conformité. Possibilité d'ordonner la suspension de l'activité, l'immobilisation ou l'arrêt du fonctionnement du matériel ou de l'engin en cause, jusqu'à mise en conformité	Personnes physiques Emprisonnement 6 mois Amende 7500 euros + peines complémentaires: (confiscation de ce qui a permis de commettre l'infraction ou de ce que l'infraction a produit, interdiction d'exercice de l'activité professionnelle pour 5 ans maxi, affichage ou diffusion de la décision de condamnation) Personnes morales Amende 37500 euros Injonction de mise en conformité + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9° de l'article 131-39 c. pén.
Contravention (5ème classe) de pollution de l'air	Décret N°2001-449 du 25 mai 2001 + arrêtés préfectoraux		Personnes physiques Amende 1500 euros Personnes morales Amende 7500 euros

2.10.6. GERMANY

Directives 99/13 and 85/513 relates to the restriction of the deletion of organic solvents through certain activities and installations respectively the emission standards for catmion. The objective is to guarantee minimum quality standards for water.

To pollute soil, air and water §§ 324 ff. German Criminal Code and in particular § 324 applies exclusively a qualified soil- and water protection. The protection of dangerous materials is regulated in these terms. To § 324 see the remarks under 2.1.6.

In addition to this term according to § 324a anyone who, in breach of duties imposed under administrative law, introduces, allows to penetrate, or releases substances into the soil, thereby polluting or otherwise detrimentally changing the soil, 1. in a manner likely to damage the health of another person, animals, plants or other things or significant value, or water, 2. or on a significant scale

Shall be punishable with imprisonments not exceeding five years or with fine.

Even the attempt to do so incurs criminal liability.

If the offender has acted negligently, the punishment shall be imprisonment not exceeding three years or a fine.

Special sanctions contains the Chemikaliengesetz from 1980. According to § 1 ChemikalienG purpose objective of the law is to protect humans and the environment against harmful effects by dangerous materials and preparation of those , avoid dangers and prevent its release.

The ChemikalienG does not contain a codified catalogue of the dangerous materials an is for his part object of numerous exceptions. Thus the ChemikalienG does not list life-, animal food and medicaments, exactly the same as waste water, radioactive wastes and waste oil. The activity of the of the national originating exchanges for dangerous materials is of crucial importance in accordance with the §§ 8, 9, 11. A formal procedure of admission is not intended however.

Sanctions:

§ 26 ChemikalienG: Non-criminal fines up to 50.000 Euro for the non-compliance of cooperate during the registration and identification; less serious cases are sanctioned with an non-criminal fine up to 5.000 Euro.

§ 27 ChemikalienG: Fine or imprisonment up to 2 years the violation of the prohibition to produce dangerous materials, which is forbidden by an German statutory order or by legal acts of the European Union which are directly valid in Germany.

2.10.7. GREECE

The Directive has not yet been transposed in the national Greek legal order.

2.10.8. IRELAND

This directive is implemented mainly by the Air Pollution Act 1987 and specifically by the Air Pollution Act, 1987 (Sulphur Content of Heavy Fuel Oil and Gas Oil) Regulation 2001 (S.I. No. 13 of 2001) and by the Environmental Protection Agency Act 1992.

Air Pollution

- Max penalty for offences created under sections 24(1) and 24(2) is £ 10,000 plus £ 1,000 for every day the offence is continued and/or 2 years imprisonment. Max penalty on summary conviction is £ 1,000 plus £ 100 per day for a continuing offence and/or 6 months imprisonment. The penalty in case of conviction on indictment is £ 10,000 plus £ 1,000 per day for a continuing offence and/or 2 months imprisonment.
- Administrative enforcement: section 26.
- Corporate liability is imposed under section 11.

Environmental Protection Agency Act 1992

- Max penalty for offences created under sections 9 is £ 1,000 and/or 12 months imprisonment. The penalty in case of conviction on indictment is £ 10,000,000 and/or 10 years imprisonment.

Administrative enforcement: by using administrative enforcements mechanisms in legislation referred to above.

2.10.9. ITALY

2.10.10. LUXEMBOURG

The directive has been implemented by the Règlement Grand-Ducal du 4 juin 2001 portant:

- application de la directive 1999/13/EC du Conseil du 11 mars 1999 relative à la réduction des émissions de composés organiques volatils dues à l'utilisation de solvants organiques dans certaines activités et installations.
- modification du Règlement Grand-Ducal modifié du 16 juillet 1999 portant nomenclature et classification des établissements classés.
- This order of 4 June 2001 does not only implement the Directive 1999/13, but also provides for modifications to the list of classified installations.

Since an executive order may not provide for penal offences and sanctions no penal sanctions are provided. The result is that the violation of the executive order of 4 June 2001 will not be criminally punishable, except if it would also constitute at the same time a violation of other legislation.

However, administrative sanctions apply. Examples of the administrative sanctions are the following. Forbidding the use of machines or any activity which could cause the pollution, giving the plant or firm “owner” a delay in which the firm must be put in conformity with the law or suspend all or part of the plant or firm and affix seals.

2.10.11. PORTUGAL

This Directive was implemented by Decree-Law 242/2001. See also articles 8, 40 and ff. Of the Basic Law on Environment as well as articles 278 and ff. Of the Penal Code.

Sanctions:

- Art 16: Inspections
- Art 17: Administrative Offences and fines: punishable with a fine of € 498,8 to € 3740,98 in the case of individuals and € 2493,99 to 44891,81 in the case of legal entities.
- Art 18: Additional penalties
- Art 19: Institution of infringement proceedings and imposition of fines
- Art 20: Product of fines
- Art 21: Liability for damages to the environment : when intent or gross negligence, then liable for damage; referred to § 4 of art 40 of the Basic Law on the Environment; the liability is joint and several where there is more than one offender;
- Art 22: Pre-emptive measures
- Important related laws: Decree-Law 194/2000

2.10.12. SPAIN

This directive was implemented by Royal Decree 2102/1996 of 20 September.

Articles 3-6 lay down the obligations in the design and functioning of those activities being regulated, referring to the corresponding Appendices of the Regulations.

There is no explicit reference to the punishment applicable when legal obligations are not fulfilled. For this, section V of Law 21/1992 16 June on Industry, should be taken into account.

Environmental crimes in penal code:

Causing emissions, the dumping of rubbish, radiations, extractions or excavations, burial, noise, vibrations injections or depositing in the atmosphere, soil, subsoil or in ground, sea or underground waters, including in extraterritorial spaces, and the harnessing of water. For there to be criminal liability, it is necessary that the above-mentioned activities constitute an infringement of a law or other regulation

established to protect the environment and that this may seriously damage the balance of natural systems. The law establishes that punishments are imposed in the upper range if human health is placed at risk.

Punishments established for an ecological crime are imprisonment from 6 months up to 4 years, a fine of 8-24 months and professional disqualification from 1 to 3 years (art 325 cp).

The storage or dumping of toxic or dangerous waste which may damage the balance of natural systems or human health is punishable also (art 326 pc). The punishment in this case is a fine of 8 to 24 months, and a weekend arrest for 18 to 24 weekends.

2.10.13. THE NETHERLANDS

This Directive was implemented by the Environmental Control Law (Wet Milieubeheer).

Chapter 8: Installations and permits

Chapter 18: Enforcement

Violation of several provisions of both chapter 8 and 18 of the Environmental Control Law constitutes a criminal offence under article 1a sub 1 and 2 of the Economic Offences Act 1950.

2.10.14. UNITED KINGDOM

2.10.14.1. England and Wales

This directive was implemented by:

- Environmental Protection Act (Solvent Emissions Directive) (England) Direction 2002
- Environmental protection Act 1990: section 6

Sanctions:

- Section 23: summary: impr up to 3 months and/or a fine up to £ 20,000
indictment: impr up to 2 years and/or a fine
- Section 157: provides for the potential criminal liability of directors, managers, secretaries or other similar officers of a body corporate.
 - Pollution Prevention and Control Act 1999
 - Pollution Prevention and Control (Solvent Emissions Directive) (England and Wales) Direction 2002
 - Pollution Prevention and Control (England and Wales) Regulations 2000: Regulation 9

Regulation 32: summary: impr up to 6 months and/or a fine up to £ 20,000

indictment: impr up to 5 years and/or a fine

summary: fine up to the statutory max

indictment: impr up to 2 years and/or a fine

- Subsection 4: provides for the potential criminal liability of directors, managers, secretaries or other similar officers of a body corporate.

Regulation 35: Where a person is convicted of an offence under Regulation 30(1) (a), (b) or (d) in respect of any matters which appear to the court to be matters which it is in the power of that person to remedy, the court may, in addition to or instead of imposing any punishment, order that person to take such steps as may be specified in that order for remedying those matters.

Civil and Administrative Sanctions:

- Environmental Protection Act 1990: Sections 12,13 and 14

Pollution Prevention and Control (England and Wales) Regulations 2000: Regulations 21,24, 25 and 26

2.10.14.2. Scotland

This directive was implemented by:

Environmental Protection Act (Solvent Emissions Directive) (Scotland) Direction 2002

Environmental Protection Act 1990: Section 6

Sanctions:

- Sections 23 and 157, see above
- Pollution Prevention and Control Act 1999
- Pollution Prevention and Control (Scotland) Regulations 2000

Regulation 30, Summary: imprisonment up to 6 months and/or a fine up to £20,000; indictment: imprisonment up to 5 years and/or a fine, summary: fine not exceeding the statutory maximum; indictment: imprisonment up to 2 years and/or a fine

Regulation 30, subsection 4, provides for the potential criminal liability of directors, managers, secretaries of other similar offices of a body corporate

- Regulation 33
- Pollution Prevention and Control (Solvent Emissions Directive) (Scotland) Direction 2002

Civil and Administrative Sanctions;

- Environmental Protection Act 1990: Sections 12,13 and 14
- Pollution Prevention and Control (Scotland) Regulations 2000: Regulations 17,19, 20 and 21

2.10.14.3. Northern Ireland

This Directive was implemented by the Industrial Pollution Control (Northern Ireland) Order 1997 (article 6).

Unlike the situation in Scotland, England and Wales, the Northern Ireland Executive has not . to date, passed delegated legislation implementing the specific emission limits in the Directive.

Sanctions:

- Article 23: summary; impr up to 3 months and/or a fine up to £ 20,000
- Indictment: impr up to 2 years and/or a fine
- Summary: a fine up to the statutory max
- Indictment: impr up to 2 years and/or a fine
- Article 32
- Article 26: Where a person is convicted of an offence under Article 23 (1) (a) or (c) in respect of any matters which appear to the court to be matters which it is in the power of that person to remedy, the court may, in addition to or instead of imposing any punishment, order that person to take such steps as may be specified in that order for remedying those matters.

Civil and Administrative Sanctions:

Industrial Pollution Control (NI) Order 1997: Articles 12,13,14 and 27

2.11. Regulation 2037/2000 (substances depleting the ozone layer)

2.11.1. AUSTRIA

§ 71 Abs 1 Z 5 “Chemikaliengesetz 1996”⁴¹ (ChemG 1996, *Code of Chemicals 1996*) declares all infringements of this regulation punishable and provides for pecuniary fines from 360 up to 15.530 €, in case of re-offending up to 29.070 € (legal texts see APPENDIX II E).

ChemG 1996	prison sentence	re-offending prison sentence	fine €	re-offending fine €	imprisonment for not paying a fine
§ 71 Abs 1 Z 5	no	no	360 – 14.530	360 – 29.070	2w

⁴¹ Bundesgesetz über den Schutz des Menschen und der Umwelt vor Chemikalien (Chemikaliengesetz 1996 - ChemG 1996) BGBl I 1997/53 in the version of BGBl I 2001/108.

2.11.2. BELGIUM

This Regulation replaced Regulation 3093/94. The Federal Legislator issued the law of 21 December 1998 to implement the previous regulation. This law contains penalties, which refer to the previous Regulation. Now that the previous Regulation was replaced, it is to be expected that the aforementioned law will be adjusted in a way that it will now refer to the new Regulation. This adjustment has not yet taken place.

Sanctions: Violation of several articles of Regulation 3093/94:

- Art 17 § 1: imprisonment from 8 days up to 3 years and/or a fine of 100 BEF up to 1 million BEF.
- The maximum penalties mentioned will be increased to 5 years imprisonment and 10 million BEF when the perpetrator knows that his actions endanger the safety or healthy of human beings.
- Art 17 § 2: imprisonment of 5 days up to 1 year and/or a fine of 20 BEF up to 100.000 BEF
- Art 17 § 3: measures that can be ordered by the judge
- Art 17 § 4: Recidivism
- Art 18 § 5: All provisions of Book I of the Penal Code, except for chapter V, chapter VII and art 85 included, are applicable.
- Art 18: Administrative fines (legal person also liable)

2.11.3. DENMARK

While the Regulation in itself is directly applicable, the criminal sanctions for infringement of the obligations under the Regulation are supposed to be adopted by national legislation. Due to the Danish Act on Chemical Substances and Products section 59 (1), any infringement of the Regulation is criminalized by fines and imprisonment up to 2 years.

2.11.4. FINLAND

This Regulation has been implemented through the Environmental Protection Act and by the amendment of the Penal Code (chapter 48, section 1).

Sanctions:

Chapter 48, sections 1, 2, 3, 4 of the Penal Code: impairment of the environment (fine up to max. 6 years imprisonment). Environmental protection Act under section 116 (fine)

2.11.5. FRANCE

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Installation classée Délit de poursuite d'exploitation malgré suspension ou interdiction	code de l'environnement Articles L.514-1 à L.514-18 pour les personnes physiques, et pour les personnes morales Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Avoir exploité ou poursuivi l'exploitation d'une installation classée pour la protection de l'environnement malgré une mesure de suspension, de fermeture ou d'interdiction jusqu'à régularisation	Personnes physiques Emprisonnement 2 ans Amende 150 000 euros Affichage ou diffusion de la décision de condamnation Personnes morales Amende jusqu'à 750 000 euros + peines mentionnées aux 2°,3°,4°,5°,6°,9° de l'article 131-39 c.pén.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
Installation classée Délit de poursuite d'exploitation sans se conformer à un arrêté de mise en demeure	code de l'environnement Articles L.514-1 à L.514-18 pour les personnes physiques, et pour les personnes morales Code pénal Articles 131-38, 131-39, 131-48 + 131-35 (personnes morales)	Avoir exploité ou poursuivi l'exploitation d'une installation classée pour la protection de l'environnement sans se conformer à un arrêté de mise en demeure de respecter, au terme d'un délai fixé, certaines prescriptions techniques.	Personnes physiques Emprisonnement 6 mois Amende 75 000 euros Affichage ou diffusion de la décision de condamnation Personnes morales Amende jusqu'à 375 000 euros + peines mentionnées aux 2°,3°,4°,5°,6°,9° de l'article 131-39 c.pén.

Type d'infraction	Textes	Elément matériel	Sanctions pénales
	code de l'environnement	Avoir exploité ou poursuivi l'exploitation d'une installation	Personnes physiques Amende 1500 euros

Installation classée	Articles L.512-5, L.512-9, L.512-12	classée soumise à déclaration sans satisfaire aux prescriptions spéciales ou générales fixées par le préfet.	Affichage ou diffusion de la décision de condamnation
Contravention d'exploitation d'ICPE sans se conformer aux prescriptions fixées par le préfet ou par le ministre (contravention de 5ème classe)	Code pénal Article 131-13	Avoir exploité ou poursuivi l'exploitation d'une installation classée soumise à autorisation sans satisfaire aux prescriptions générales fixées par le ministre.	Personnes morales non

Type d'infraction	Textes	Sanctions administratives	Sanctions pénales
Délit de pollution de l'air (délit non intentionnel)	code de l'environnement : - Article L.226-8 (sanctions administratives) - Articles L.226-9, L.226-10, L.226-11 (sanctions pénales) Code pénal : Article 132-66 à 132-70 Article 131-38 et 131-39 (personnes morales)	Mise en demeure par préfet, consignation de somme, restitution progressive si exécution des travaux de mise en conformité, possibilité de faire procéder d'office à ces travaux de mise en conformité. Possibilité d'ordonner la suspension de l'activité, l'immobilisation ou l'arrêt du fonctionnement du matériel ou de l'engin en cause, jusqu'à mise en conformité	Personnes physiques Emprisonnement 6 mois Amende 7500 euros + peines complémentaires: (confiscation de ce qui a permis de commettre l'infraction ou de ce que l'infraction a produit, interdiction d'exercice de l'activité professionnelle pour 5 ans maxi, affichage ou diffusion de la décision de condamnation) Personnes morales Amende 37500 euros Injonction de mise en conformité + peines mentionnées aux 2°,3°,4°,5°,6°,8°,9° de l'article 131-39 c. pén.
Contravention (5ème classe) de	Décret N°2001-449 du 25 mai 2001 + arrêtés		Personnes physiques Amende 1500 euros

pollution de l'air	préfectoraux		Personnes morales Amende 7500 euros
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2.11.6. GERMANY

Directive 88/609 and regulation 2037/2000 deal with obligation of the members states to encourage restrictions of emission by combustion engines and equally deal with isolating and packaging material, which may be responsible for the destruction of the ozone layer. According to Art. 14 of the first mentioned Directive the member states has to work toward the protection of air and climate.

The planning and execution of measures improving the quality of air are regulated under Federal law by the BImSchG (Bundesimmissionsschutzgesetz). Since 1990 with § 47 III BImSchG a binding regulation over the air pure retaining plans as well as after § 47 a BImSchG over the production of official noise protection plans is existing. To that extent also a comprehensive protection from emissions exists by the possibility of related measures of the emission control in case of exchange-poor weather conditions and increased ozone concentration.

From criminal law view § 325 StGB determine the punishability of air pollutions injurious to health. This clause does not apply according to § 325 V StGB to motor vehicles, track vehicles, aircraft or watercraft however. § 329 StGB determine among other the punishability for the operation of fabrics or installations, if during exchange-poor weather conditions strong increasing of harmful air pollutions is to be warned. However the enterprise of airliners is not covered.

Sanction regulations outside of the §§ 324 ff. StGB exist otherwise under Federal law only for the motor traffic. According to §§ 40 a ff. BImSchG in connection with § 24 II StVG (Ordnungswidrigkeit) the administrative authorities can arrange restrictions due to national legal statutory orders in exchange-poor weather conditions. Any violation against this rule of infringement is punished with non-criminal fines. The general exemption of criminal-law concerning the emission of traffic of emissions of air traffic in the environmental criminal law is regarded as problematic and legislative not compelling. The *Verkehrslärmschutzgesetz*, which was faced with this problem, failed to uphold the issue during the consultation in the legislation committee.

The pursued objective of the avoidance of ozone-damaging FCKW emissions (packing materials etc.), followed by regularization guideline is followed only in connection with the principle of waste avoidance or with the disposition of waste according to the regulations of the KrW/AbfG. The rules of infringement included in this law were described under 2.1.6. It is to be noted that the there regulations have the environmental harmful disposal, not however the environmental harmful wastefulness to the

article. With the injury of the marking obligations for FCKW materials the imposition of fine as sanction is possible to § 26 ChemikalienG (closer under 2.5.6).

These regulation are executed through the so called Bundesimmissionsschutzgesetz. Violation of this law is sanctioned as Ordnungswidrigkeit with a non-criminal fine.

2.11.7. GREECE

This Regulation has not yet been transposed in the national legal order of Greece.

2.11.8. IRELAND

This regulation is directly effective. It can be enforced mainly by provisions in the Air pollution Act 1987 and the Environmental Protection Act.1992

Air Pollution

- Max penalty for offences created under sections 24(1) and 24(2) is £ 10,000 plus £ 1,000 for every day the offence is continued and/or 2 years imprisonment. Max penalty on summary conviction is £ 1,000 plus £ 100 per day for a continuing offence and/or 6 months imprisonment. The penalty in case of conviction on indictment is £ 10,000 plus £ 1,000 per day for a continuing offence and/or 2 months imprisonment.
- Administrative enforcement: section 26.
- Corporate liability is imposed under section 11.

Environmental Protection Agency Act 1992

Under which Integrated pollution control licences are issued:

- Max penalty for summary offences created under sections 9 is £ 1,000 and/or 12 months imprisonment. The penalty on conviction on indictment is £ 10,000,000 and/or 10 years imprisonment.

Corporate Liability is imposed under section 8.

2.11.9. ITALY

This regulation is self-executive: the States must predispose an adequate sanctioning system. In Italy this regulation is not promulgated.

2.11.10. LUXEMBOURG

Regulation 2037/2000 has been implemented in Luxembourg through the Règlement Grand-Ducal du 4 juin 2001 relatif à certaines modalités d'applications et à la sanction du Règlement CE nr. 2037/2000 du

Parlement Européen et du Conseil du 29 juin 2000 relatif à des substances qui appauvrissent la couche d'ozone telle que modifiée.

Because the law of 9 August 1971 is applicable, the following sanctions are provided:

a fine from 10.000 LUF to 1.000.000 LUF (€ 250 to € 25.000) and/or a prison sanction from 8 days to 5 years. However, when the penal code or other specific laws provide for more severe sanctions which are applicable as well, these can be applied too.

In addition a confiscation penalty can be applied and the illegal benefit can be removed. Specific control and police powers apply. The violation of these specific controls is a crime in itself as well. No intent is required for criminal liability under these provisions.

The règlement grand-ducal du 4 juin 2001 has chosen only one sanction among those proposed by the law of 9 August 1971. A violation of article 3, 4, 5, 16, 17 and 19 of the regulation 2037/2000 can lead to a fine from 250 € to 125.00 €

2.11.11. PORTUGAL

Decree-Law 119/2000 ensures compliance. See also articles 279 and 280 of the Penal Code and the Basic Law on the Environment.

Sanctions:

- Art 8: Penalties: Administrative offence: sub 1: punishable with a fine of € 1246,99 to € 3740,98, when committed by individuals and € 2493,99 to € 44.891,81 when committed by legal entities.
- Sub 2: punishable with a fine of € 498,80 to € 2493,99, when committed by individuals and € 1246,99 to € 24.939,99 when committed by legal entities.
- Negligence is punishable.
- The competent authority may also impose additional penalties, in accordance with the general law.

2.11.12. SPAIN

Law 4/1998 of 3 March ensures compliance.

The Regulatory framework in Spanish law referring to substances which damage the ozone layer is this law which is previous to the regulations studied by this work. Its aim is to describe, classify and establish the corresponding system of criminal sanctions for the 1994 regulations.

Sanctions:

- In particular, Art 2 sets out the description of the infringements, referring specifically and exclusively to the 1994 regulations. Art 3 lays down the corresponding criminal penalties.
- Spanish law has yet to create the corresponding law for the present 2000 regulations, as had been done in 1998 for the corresponding Directive. The exclusive and specific reference to the 1994 regulations makes it impossible to use the Law in question as a framework for applying the 2000 regulations.

2.11.13. THE NETHERLANDS

This Regulation was implemented through the Regeling ozonlaagafbrekende stoffen Wet milieugevaarlijke stoffen 2001.

Violation of this Statute constitutes an offence of the Wet milieugevaarlijke stoffen. Violation of several provisions of the Wet milieugevaarlijke stoffen constitutes a criminal offence under article 1a sub 1 and 2 of the Economic Offences Act 1950 (penalties in art 6).

2.11.14. UNITED KINGDOM

The Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2000 ensure compliance.

Sanctions:

- Schedule Part I (Regulation 13): summary: a fine up to the statutory max
indictment: a fine
- Schedule Part II (Regulation 13): summary: a fine up to the statutory max
Indictment: a fine
- Schedule Part III (Regulation 13): summary: a fine up to the statutory max
indictment : a fine
- Schedule Part IV (Regulation 13): summary: a fine up to the statutory max
indictment: a fine
- Schedule Part V (Regulation 13): summary: a fine up to the statutory max
indictment: a fine
- Regulation 5: Regulation 13
- Regulation 6:
- Regulation 13
- Regulation 12: provides for the potential criminal liability of directors, managers, secretaries or other similar officers of a body corporate.

3. Environmental Criminal Law

As was mentioned in the introduction in this part 3, we will give an overview of the basic structure of environmental criminal law for every Member State. In that respect a distinction will be made between on the one hand criminal responsibility of natural persons and criminal responsibility of legal persons. For every Member State it will be tried to indicate what the classification is of criminal offences, where criminal penalties can be found and how the responsibility of legal persons is organized.

3.1. Austria

Andreas Scheil

3.1.1. ADMINISTRATIVE PENAL CODE

The general rules of administrative penal law and the rules of administrative penal procedure are laid down in “Verwaltungsstrafgesetz”⁴² (VStG, *Administrative Penal Code*), which is applicable in federal and state administrative penal cases as well. The main differences between administrative penal law and criminal law are: Negligence is sufficient in administrative penal law, if intent is not demanded in particular, and the offender has to substantiate to the authority (no full proof required), that he did not act intentionally or negligently, if not the endangering or injuring of somebody or something, but the simple non-compliance with the administrative law is declared punishable – otherwise he is regarded guilty -⁴³. Administrative penal sanctions are not registered in the criminal record. And punishable infringements of administrative law are not prosecuted by public prosecutors, but by “Bezirksverwaltungsbehörden” (*district administrative authorities*)⁴⁴ themselves, the same authorities that execute the administrative law. That can be the “Bezirkshauptmannschaft” (*offices of districts* headed by the *chief officer*), the “Bürgermeister” (*mayor*) in (bigger) cities or the “Magistrat der Stadt Wien” (*magistrate of the City of Vienna*). Unlike courts these authorities are not independent, they have to obey directives given by the ministers of the state government (state administrative law) or the ministers of the federal government (federal administrative law), even in penal cases. Appeals against their decisions are possible to courtlike “Unabhängige Verwaltungssenate”⁴⁵ (*Independent Administrative Tribunals*) and finally to the “Verwaltungsgerichtshof” (*Administrative High Court*).

⁴² Verwaltungsstrafgesetz 1991 – VStG BGBl 1991/52 in the version of BGBl I 2002/65.

⁴³ § 5 Abs 1 VStG.

⁴⁴ § 26 Abs 1 VStG.

⁴⁵ § 51 VStG.

In administrative penal law as in criminal law only natural persons but no legal entities are liable. Their representatives are liable, but they can and they must, if the authority⁴⁶ or a statute⁴⁷ asks for to secure penal liability, engage another natural person to be responsible for observing the administrative law (“verantwortlicher Beauftragter”, *responsible representative*). The entity is only liable for the pecuniary fine imposed on the (responsible) representative⁴⁸ -. As shown above, some statutes provide for liability for *culpa in eligendo or custodiendo* besides⁴⁹.

The offences, called “Verwaltungsübertretungen”, are not classified under different categories.

The penalties in administrative penal law are mainly pecuniary fines. All of the federal or state statutes provide for them. Minimum fine for an administrative punishable offence is, if not stated otherwise as in § 71 Abs 1 Z 5 ChemG 1996 (360 € minimum), 7 €⁵⁰. Other than pecuniary fines in criminal law with its day rate system pecuniary fines under administrative penal law have fixed maxima in Euro, higher maxima are provided for only for re-offending as in § 71 Abs 1 Z 5 ChemG 1996 (100 per cent increase). So in the field of environmental administrative penal law we have pecuniary fines in the range from 7 up to 36.400 € maximum (under criminal law 4 up to 117.720 € maximum) and up to 36.500 € for already first re-offending⁵¹ (under criminal law maximum is 176.590 € for second re-offending). Confiscation of profits is possible, if the administrative law in particular provides for as in § 39 Abs 1 lit a, lit b AWG.

Imprisonment (minimum 12 hours) is provided for only by few administrative statutes and never exceeds 6 weeks⁵². Imprisonment as sanction must be imposed only to prevent re-offending, but not to prevent others from offences⁵³. As an alternative penalty for non-payment of a fine imprisonment is possible – usually 2 weeks, in some cases extended up to 6 weeks⁵⁴ -, if not excluded expressly by a single administrative law⁵⁵ as two times in Kärnten here⁵⁶.

Contrary to criminal law pecuniary sentences or prison sentences can not be (partially) suspended and contrary to criminal law a fine or imprisonment is imposed for each single act or omission, so the

⁴⁶ § 9 Abs 1 – 6 VStG.

⁴⁷ § 15 Abs 5 AWG for example.

⁴⁸ § 9 Abs 7 VStG.

⁴⁹ § 137 Abs 5 WRG, § 370 Abs 4 GewO.

⁵⁰ § 13 VStG; “Organstrafverfügung”, *tickets* may be less.

⁵¹ § 49 WienerNatSchtzG.

⁵² § 12 Abs 1 VStG.

⁵³ § 11 VStG.

⁵⁴ § 47 WienerAWG, § 137 WRG and others.

⁵⁵ § 16 VStG.

⁵⁶ § 63 KärntFischereiG, § 101 KärntAWO.

sentences have to be accumulated (“Kumulationsprinzip”)⁵⁷: That can lead to very high fines. Similar to criminal law the authority must refrain from punishment (without further proceedings), if the degree of culpability is minor and if the effects of the act are minor (“Absehen von der Strafe”)⁵⁸: Other than in criminal law the offender can be formally warned, to prevent re-offending.

According to “Allgemeines Bürgerliches Gesetzbuch” (ABGB, *General Civil Code*)⁵⁹ a natural person or a legal entity is civilly liable for injurious conduct, if an injury or damage was caused unlawfully. Either restitution has be done or – if impossible – monetary compensation must be paid.⁶⁰ Most of the administrative laws in our field ask for restitution as well: The administrative authorities do not need to seek help by courts, they themselves can give order to the offender or another reliable person to restitute.

The convicted offender has to support the costs of the procedure (first instance 10 per cent of the fine, instance of appeal 20 per cent of the fine, minimum 1.5 €; in case of imprisonment 15 € a day) and for example the (legally limited) expert witness’s fees as well⁶¹. In case of acquittal the authority has to support the costs.

3.1.2. (FEDERAL) CRIMINAL LAW

Infringements of almost all directives and the one regulation mentioned can be criminal offences. As already mentioned, they are punishable then exclusively under the provisions of the Criminal Code.

With the exception of § 182 Abs 1 StGB all criminal offences of the Criminal Code (legal texts see APPENDIX III)⁶² depend absolutely on administrative law (“Verwaltungsakzessorietät”)⁶³, this keeps acts or omissions that take place in accordance with federal or state administrative law or with the license of an authority beyond the reach of criminal law. An error about administrative law does not hinder punishment for intentional acts or omissions, if the offender failed in his professional duty or in his employment or through other circumstances to inform himself about a legal provision or an administrative decision or if there other reasons to blame him for the error and if he acted intentionally

⁵⁷ § 22 Abs 1 VStG.

⁵⁸ § 21 Abs 1 VStG.

⁵⁹ Das Allgemeine Bürgerliche Gesetzbuch, JGS 1811/946.

⁶⁰ §§ 1323f ABGB.

⁶¹ § 64 Abs 3 iVm § 76 AVG.

⁶² Translation by *Faure/Heine*, *Environmental Criminal Law in the European Union*, 13 and by me.

⁶³ *Heine*, *Die Verwaltungsakzessorietät im deutschen Umweltstrafrecht unter Berücksichtigung des österreichischen Rechts*, ÖJZ 1991, 370, *Helm*, *Dogmatische Probleme des Umweltstrafrechts*, JBl 1991, 689, *Schmoller in Kienapfel – Schmoller*, (ed.) *Grundriss des österreichischen Strafrechts*, BT III, Vorbem §§ 180 ff Rz 25, *Triffterer*, *Zur gegenwärtigen Situation des österreichischen Umweltstrafrechts*, ÖJZ 1991, 409.

concerning the other facts of the offence⁶⁴: § 183a StGB provides for an exemption from the general rule, that an error concerning the facts excludes intent.

3.1.2.1. Crimes Against Environment (§§ 180 – 182 StGB)⁶⁵

3.1.2.1.1. Intentional and negligent impairment of the environment (§§ 180, 181 StGB)

“Vorsätzliche Beeinträchtigung der Umwelt” (§ 180 StGB, *Intentional impairment of the environment*; imprisonment up to 3 years or a fine up to 360 daily rates) commits under subsection 1, who pollutes (changing the medium in an unfavorable way) or otherwise impairs (heating up water for example) a river, a lake or another stretch of water, the air or the soil contrary to any federal or state law or any decision of a federal or state authority, if the pollution or impairment causes the abstract risk caused by a typical dangerous act (“potentielles Gefährungsdelikt”)⁶⁶ to life or health of a large number of human beings (3⁶⁷, 5⁶⁸, 9⁶⁹, 10⁷⁰ or more persons) or to any kind of flora and fauna over a large area. According to “Oberster Gerichtshof” - OGH, *High Court in civil and criminal cases* - not necessarily more than a “square kilometer”, but more than a “few square meters” as a pond of “2300 square meters” connected to other ponds and rivers – 109 out of 180 carps lost life in that pond -⁷¹.

This crime commits under subsection 2, who pollutes or otherwise impairs a stretch of water or the soil with lasting effect and seriously and to a wide extent contrary to any federal or state law or any decision of a federal or state authority, if the pollution or impairment lasts for ever or for a long time or if the removal of the pollution or impairment is impossible or economically unreasonable (Z 1); or if an expenditure is necessary for the removal of the pollution or impairment, that exceeds 40.000 € (Z 2). No abstract risk to life or health to others is required under this subsection. The pollution or impairment must be that way, that the removal in a natural way is impossible or would take long time (1 month or more); and it must be so intense and of such an extent, that the removal is reasonable from the environmental point of view⁷².

⁶⁴ Petznek, Zur Neuregelung des Umwelt-Strafrechts, RdW 1988, 123, *Schmoller in Kienapfel – Schmoller*, (ed.) Grundriss des österreichischen Strafrechts, BT III, Vorbem §§ 180 ff Rz 71.

⁶⁵ About the history of environmental criminal law in Austria *Wegscheider*, Zur Entwicklung des Umweltstrafrechts in Österreich, in *Schmoller, Kurt* (ed.), Festschrift für Otto Triffterer, 457.

⁶⁶ *Schroll*, Die Gefährdung bei Umweltdelikten, JBl 1990, 681, *Helm*, Dogmatische Probleme des Umweltstrafrechts, JBl 1991, 689.

⁶⁷ *Mayerhofer-Rieder*, StGB³ § 169 Anm 11.

⁶⁸ *Leukauf-Steiniger*, StGB³ § 169 Rz 27; according to “Oberlandesgericht Wien” 5 are not enough, ZVR 1985/12.

⁶⁹ OGH EvBl 1980/204, „Oberlandesgericht Innsbruck“ LSK 1982/74.

⁷⁰ *Bertel-Schwaighofer*, BT II⁴ §§ 180, 181 Rz 7, *Foregger-Fabrizi*, StGB⁷, § 176 Anm 3, *Schwaighofer*, Strafrechtliche Verantwortung für Umweltschäden – Grundfragen des StGB und des VStG, ÖJZ 1994, 233.

⁷¹ EvBl 1992/78, JBl 1992, 728.

⁷² *Schwaighofer*, Strafrechtliche Verantwortung für Umweltschäden – Grundfragen des StGB und des VStG, ÖJZ 1994, 234.

Committing § 180 Abs 1 or Abs 2 StGB negligently is punishable as “Fahrlässige Beeinträchtigung der Umwelt” (§ 181 StGB, *Negligent impairment of the environment*; imprisonment up to 1 year or a fine up to 360 daily rates).

These two crimes are the most common. They cover more than 90 per cent of the crimes against environment.

3.1.2.1.2. (Intentional) Serious impairment by noise (§ 181a StGB)

„Schwere Beeinträchtigung durch Lärm“ (§ 181a StGB, (*intentional*⁷³) *Serious impairment by noise*; imprisonment up to 6 months or a fine up to 360 daily rates) commits, who in breach of a legal provision (legal noise limits for cars, construction sites etc) or an administrative decision (a mayor’s noise limit for one of the dreaded “Tiroler Abende”, *Tyrolean Evenings*) causes noise in such a scale or under such circumstances, that the physical state of health of many people (30 or more) is persistently and seriously impaired. The impairment, headaches for example, must come close to a physical injury and must last for some days⁷⁴ or two weeks⁷⁵. The impairment of the psychical state of health only does not matter. Therefore the noise, “Tiroler Schützen” (*Tyrolean Guards*) produce with their guns at almost any time, mainly in the early mornings, that causes headaches to many people, but only for a few seconds, minutes or even hours or that causes only neurological disorders with peace loving “Tiroler” a whole life, is not punishable.

Not one single conviction has been handed out yet for that crime (“totes Recht”), so I had to invent the examples.

3.1.2.1.3. Intentionally endangering the environment by treatment of and clearing away waste, § 181b StGB) and Negligently endangering the environment by treatment of waste (§ 181c StGB)

“Vorsätzliches umweltgefährdendes Behandeln oder Verbringen von Abfällen” (*Intentionally endangering the environment by treatment of and clearing away waste*; imprisonment up to 2 years or a fine up to 360 daily rates) commits under subsection 1, who illegally treats, stores or deposits, discharges or otherwise disposes waste (waste oils) and thereby causes the risk of pollution or impairment pursuant to § 180 Abs 1 StGB (causing the abstract risk by a typical dangerous act to life or health of a large number of human beings or to any kind of flora and fauna over a large area; see III. A. a.) or the risk of

⁷³ According § 7 Abs 1 StGB this crime can be committed only intentionally.

⁷⁴ *Triffterer StGB-Komm* § 181a RN 11.

serious persistent pollution or other impairment of a stretch of water, soil or air on a large scale (see II. A. a.) – committing § 181b subsection 1 StGB negligently is punishable as “Fahrlässiges umweltgefährdendes Behandeln von Abfällen” (§ 181c StGB, *Negligently endangering the environment by treatment of waste*; imprisonment up to 6 months or pecuniary fine up to 360 daily rates)⁷⁶.

§ 181b StGB subsection 2 deals with cross-border transportation of dangerous waste. This crime commits, who, illegally imports, exports or brings waste through the area of the domestic country, where the prescribed treatment for that waste (waste oils for example) is necessary because of its nature, composition or quantity in order to avoid one of the risks in the meaning of subsection 1⁷⁷. Domestic rubbish does not fit, it is not dangerous⁷⁸. Negligent cross-border transportation of dangerous waste is not punishable.

This is a rather common crime against environment.

3.1.2.1.4. Intentionally endangering of the environment by the operation of installations (§ 181d StGB)

“Vorsätzliches umweltgefährdendes Betreiben von Anlagen“ (§ 181d StGB, *Intentionally endangering of the environment by the operation of installations*; imprisonment up to 2 years or a fine up to 360 daily rates) declares punishable the illegal release of harmful substances in a manner to risk pollution or impairment in the meaning of § 180 Abs 1 StGB (causing the abstract risk by a typical dangerous act to life or health of a large number of human beings or to any kind of flora and fauna over a large area or the risk of serious and persistent pollution or other impairment of a stretch of water, soil or air on a large by an installation (see III. A. a.). Pollution of the air for example is not required. Negligently endangering of the environment by releasing harmful substances is not punishable.

3.1.2.1.5. Other (intentionally) endangering of flora and fauna (§ 182 StGB) and Negligently endangering flora and fauna (§ 183 StGB)

“Andere Gefährdungen des Tier- oder Pflanzenbestandes”⁷⁹ (*Other (intentionally)*⁸⁰ *endangering of flora and fauna*; imprisonment up to 2 years or fine up to 360 daily rates) commits under subsection 1

⁷⁵ *Schwaighofer*, Strafrechtliche Verantwortung für Umweltschäden – Grundfragen des StGB und des VStG, ÖJZ 1994, 234.

⁷⁶ *Schick, Peter*, Abfallstrafrecht in Österreich, in *Funk Bernd-Christian* (ed.), Abfallwirtschaftsrecht, 269.

⁷⁷ *Wegscheider*, Grenzüberschreitende Umweltbeeinträchtigungen im Spiegel des alten und des neuen Strafrechts, JBl 1989, 214.

⁷⁸ *Triffterer*, Die Vorschläge zur Änderung des Umweltstrafrechts nach der Regierungsvorlage 1996 in rechtsvergleichender Sicht, in *BMfJ* (ed.), Entwicklungslinien im Straf- und Strafprozessrecht, 1996, 338.

⁷⁹ § 182 StGB.

⁸⁰ According § 7 Abs 1 StGB this crime can be committed only intentionally.

number 1, who causes the abstract risk of the spread of an epidemic among animals or under subsection 1 number 2 the abstract risk of the spread of a carrier of disease or a parasite dangerous to an animal or plant population. The breach of a legal provision or an administrative decision is not required.

This crime commits under subsection 2, who in breach of a legal provision or an administrative decision endangers concretely an animal or plant population (15 per cent or more of the population⁸¹) in a large area (20.000 square meters⁸²).

Committing this crime negligently is punishable as „Fahrlässige Gefährdung des Tier- oder Pflanzenbestandes“ (§ 183 StGB, *Negligently endangering flora and fauna*; imprisonment up to 6 months or a fine up to 360 daily rates).

Criminal Code	prison sentence	2 nd re-offending prison sentence	fine € 2 – 360 daily rates	2 nd re-offending fine €	im-prisonment for not paying a fine 1d = 2 daily rates	(partial/total) suspension of fine or prison sentence possible	confiscation of profits possible
§ 180 StGB	1d – 3y	1d – 4.5y	4 -117.720	4 -176.580	1d – 6m	yes	yes
§ 181 StGB	1d – 1y	1d – 1.5y	same	same	same	yes	yes
§ 181a StGB	1d – 6m	1d – 9m	same	same	same	yes	yes
§ 181b StGB	1d – 2y	1d – 3y	same	same	same	yes	yes
§ 181c StGB	1d – 6m	1d – 9m	same	same	same	yes	yes
§ 181d StGB	1d – 2y	1d – 3y	same	same	same	yes	yes
§ 182 StGB	1d – 2y	1d – 3y	same	same	same	yes	yes
§ 183 StGB	1d – 6m	1d – 9m	same	same	same	yes	yes

⁸¹ RdU 1998/106.
⁸² RdU 1998/106.

3.1.2.2. (General) Rules of the Criminal Code

As already mentioned, Austria still sticks to the principle *societas delinquere non potest*⁸³. Discussions about corporate liability are still going on⁸⁴, well informed sources say, it is very likely that Austria is unable to solve this problem and that the European Commission will have to refer this subject to the European Court of Justice – Austria just missed the deadline (June 18th 2002) to comply with the Second Protocol of the Convention on the protection of the European Communities' financial interests⁸⁵ - . The representatives of legal entities are liable, if they commit the crime; and they are liable for *culpa in eligendo or custodiendo* of managers or other employees. Contrary to administrative penal law (see II. F. a.) a legal entity is not liable for the pecuniary fine imposed on a representative or another employee. Additional confiscation of profits to deprive an offender or anyone else of financial profits – that can be a legal entity as well - is possible (“Gewinnabschöpfung”)⁸⁶.

The Criminal Code classifies offences according to threat of punishment and to intention or negligence as “Verbrechen” (only intentional offences with imprisonment for life or longer than 3 years)⁸⁷ and “Vergehen” (the others)⁸⁸. All crimes against environment are “Vergehen”, none of them provides for imprisonment longer than 3 years. This classification is historical and rather formal.

There are no special criminal penalties in environmental law, just the ordinary penalties. “Freiheitsstrafen” (imprisonment) are provided for by all crimes against environment – minimum imprisonment is one day⁸⁹, maximum, as shown, 3 years⁹⁰ or 2 years⁹¹, 1 year⁹² or 6 month⁹³-. A prison sentence not exceeding 6 months must be transformed into a fine of not more than 360 daily rates, if the threat of imprisonment does not exceed five years – all crimes against environment fit into that framework – and if imprisonment is not necessary to prevent re-offending or to prevent others to commit such a crime⁹⁴.

⁸³ Höpfel, Die internationale Dimension des Umweltstrafrechts, in *Schmoller* (ed.), Festschrift für Otto Triffterer, 432, *Zeder*, Ein Strafrecht juristischer Personen: Grundzüge einer Regelung in Österreich, ÖJZ 2001, 630.

⁸⁴ Bertel, Strafen für juristische Personen, in *BMfJ* (ed.), Entwicklungslinien im Straf- und Strafprozessrecht, 1996, 215.

⁸⁵ Official Journal C 221, 19/07/1997 p. 0011.

⁸⁶ § 20 StGB.

⁸⁷ § 17 Abs 1 StGB.

⁸⁸ § 17 Abs 2 StGB.

⁸⁹ § 18 Abs 2 StGB.

⁹⁰ § 180 StGB.

⁹¹ §§ 181b, 181d and 182 StGB.

⁹² § 181 StGB.

⁹³ §§ 181a, 181c and 182 StGB.

As already mentioned, fines in criminal law are calculated by a day-rate system (“Tagessatzsystem”). Minimum fine is two daily rates⁹⁵ - the equivalent of one day of alternative penalty of imprisonment for non-payment⁹⁶, which can last to a maximum of 180 days in every case here -, maximum fine is 360 daily rates, which is provided for by all crimes against environment. One single daily rate goes from 2 up to 327 €⁹⁷, so fines lie in the range of 4 up to 117.720 €. The single daily rate is calculated that way: The offenders net income a month is divided by 30 and such an amount is taken away, that the offender is left the subsistence level of approximately 20 € a day.

In case of the – other than in administrative penal law - *second* re-offending the maximum fine as well as the maximum prison sentence can be exceeded by fifty per cent⁹⁸, so – in the worst case for an offender – a fine up to 176.580 € and a prison sentence up to four and a half years can be imposed in a criminal environmental case. The amount of penalty is determined by the guilt of the offender and by the extent of negative effects he caused. All fines; and prison terms up to two years can be (partially)⁹⁹ suspended¹⁰⁰ and the offender can be put on probation.

Crimes against environment do not provide for higher minimum penalties than the general minimum penalties (a fine of 2 daily rates or 1 day in prison). There is no reason to reduce these penalties. In case of “Mangelnde Strafwürdigkeit der Tat”¹⁰¹ (degree of culpability is minor and no or minor effects of the act or the offender tries seriously to retribute or to remove the effects and no prevention of re-offending or offending of others required) the act is not punishable. Since 2001 a set of measures of diversion could hinder sentences as well, all environmental crimes fit into that new framework laid down in §§ 90a StPO¹⁰² (Strafprozessordnung, *Criminal Procedure Code*) such as “paying a sum”, that shall not be regarded a “fine”.

And the offender must not be punished if he voluntarily eliminates the risks, pollution or the other impairments before an authority that prosecutes criminal offences (court, public prosecutor’s office, police) has gained information about his offence – the authority must know, who the person is – and as long as no damage has occurred (“Tätige Reue”)¹⁰³. Such an *active regret* frees an offender from punishment even then, if another person has eliminated the risks etc and if the offender – having no

⁹⁴ § 37 Abs 1 StGB.

⁹⁵ § 19 Abs 1 StGB.

⁹⁶ § 19 Abs 3 StGB.

⁹⁷ § 19 Abs 2 StGB.

⁹⁸ § 39 Abs 1 StGB.

⁹⁹ §§ 43a, 44 StGB.

¹⁰⁰ § 43 StGB.

¹⁰¹ § 42 StGB.

¹⁰² Strafprozessordnung 1975 (StPO), BGBl 1975/631 (WV) in the version of BGBl 2001/130.

¹⁰³ § 183b StGB.

knowledge about that – tries to eliminate the risks¹⁰⁴: This is within the old Austrian tradition to prolong the threats of penalties over the act or omission and to motivate the offender, who could not have been motivated to avoid a crime, to do everything to hinder further damage (or to retribute) at least.

3.1.2.3. Criminal Procedure Code

Other than in administrative penal law in criminal law public prosecutors refer the cases to courts. In our field that may be a “Bezirksgericht” (*district court*, offences with imprisonment up to 1 year)¹⁰⁵, where that same single professional judge, that decides after taking the evidence in the trial, does the inquiry as well; or a “Landesgericht” (*provincial court*, offences with imprisonment from 1 to 5 years)¹⁰⁶, where a professional single judge will decide. The inquiry should be done by the “Untersuchungsrichter” (*investigating judge*), actually it is done by police, sometimes according to law under the command of the public prosecutor. Courts of appeal are the “Landesgericht” (a body of three professional judges), if the “Bezirksgericht” decided in first instance, or the “Oberlandesgericht” (court of appeal for several states, a body of three professional judges), if the “Landesgericht” decided in first instance.

The convicted offender has to support the costs of the criminal procedure. That are the “Pauschalkostenbeitrag” (a *flat rate* according to the economical capability of the offender and to the costs of the proceedings, he caused)¹⁰⁷ and the „besondere Kosten“ (*sepecial costs*)¹⁰⁸, to which belong in particular – other than in administrative penal procedure – the full expenses of the expert witnesses.

3.2. Belgium

Jan Vanheule

3.2.1. BELGIUM WON'T SET THE WORLD ON FIRE FOR WHAT REGARDS THE IMPLEMENTATION OF EUROPEAN ENVIRONMENTAL DIRECTIVES

Based on the six-monthly “scoreboard” the European Commission is publishing on how the Member States are applying the European rules, it can be stated that the Member States are converting the European directives in environmental matters into internal legislation in dribs and drabs. In Belgium after he had brought the dioxin crisis in Belgium at European level to a happy conclusion, government commissioner Willockx was entrusted by the Government with the smoothing away of Belgium’s lag in

¹⁰⁴ *Schmoller in Kienapfel – Schmoller*, (ed.) Grundriss des österreichischen Strafrechts, BT III, Vorbem §§ 180 ff Rz 78.

¹⁰⁵ § 9 Abs 1 Z 1 StPO.

¹⁰⁶ § 13 Abs 1 StPO.

¹⁰⁷ § 381 Abs 1 Z 1 StPO.

¹⁰⁸ § 381 Abs 1 Z 2 – 6 StPO.

matters of conversion of the European environmental directives.¹⁰⁹ For all that in June 2001 it had to be noted that Belgium was among the worst students of the class¹¹⁰ for what regards the conversion of environmental directives, and the government commissioner could not avoid that Belgium was recently condemned by the European Court of Justice on account of non-compliance with the requirements imposed by the European directives in matters of waste, water contamination by hazardous substances, groundwater protection, air contamination by industry and assessment of the environmental consequences of public and private projects.¹¹¹

It will henceforth not amaze you at all that the Belgian report on this issue did not particularly sound like an ode to the Belgian state. The sophisticated Belgian state structure and associated splitting of competences is generally called in as justification for the late conversion. The Court of Justice does however not take this argument into account. Besides the complicated state structure, one calls also upon a lack of means and a lack of follow-up of the European obligations.

Although the complicated Belgian state structure can hence not apply as justification, it is not at all unnecessary to explain briefly the state structure and splitting of competences. This is indeed important in order to find out who has to convert the European environmental directives in internal law, what is not always that clear in Belgium. The manner how the directives are implemented is largely determined by the structure of the internal environmental law. Against the background of the state structure, it will also become clear why the environmental criminal law differs in Belgium between regions.

3.2.2. THE FEDERAL STATE MODEL OF BELGIUM AND THE CONSEQUENCES FOR THE IMPLEMENTATION OF ENVIRONMENTAL DIRECTIVES

3.2.2.1. The Belgian federal state model

According to the Constitution, Belgium is a federal state constituted of communities and regions. In 1831 Belgium was conceived as a unitary decentralized State. The need for cultural and economic autonomy for its composing linguistic communities, however, has caused it gradually to devolve substantial powers in the economic, cultural and social spheres to newly created subdivisions, i.e. three communities and three regions. The regions are: the Flemish region, the Walloon region and the Brussels-Capital region. The communities are the Flemish community, the French community and the German-speaking community. The federal authority, the communities and the regions all have decision-making power. Communities and Regions are authorities on the same level as the federal authority. The law-making instrument of the federal authority is the law. Regions and communities legislate by way of

¹⁰⁹ De Standaard, 19 July 2000

¹¹⁰ De Standaard, 29 May 2001

¹¹¹ De Standaard, 16 June 2001

decree, except for the Brussels-Capital region that legislates through ordinances. These instruments have force of statute throughout the territory for which the authority is competent.¹¹²

The devolution of competences in the Belgian system between these authorities is essentially based on exclusive powers attributed to the regions and communities. The residual competences remain with the federal legislator. With respect to environmental policy, the regions are exclusively competent for environmental protection and water policy. Explicit exception however is made for three matters that remain within the federal competence: product standardization, protection against ionising rays, including radioactive waste and transit of waste.

It should be emphasized that the allocation of the general competence to the regions in environmental matters does not imply the competence to create an environmental criminal law. The legislative competence in matters of criminal law and criminal procedure law remains indeed after the state reforms, mainly a federal competence. Because the communities and the regions exercise however the highest authority in matters allocated to them, they should in order to add power to their autonomy, also have the possibility to enforce the compliance of their legislation. This is why the constitutioner has given them a limited criminal competence: the communities and the regions are competent to attach a penalty to the non-compliance of their decrees and to fix the penalties. The state reform of 1993 has extended the criminal competence and the regions became also competent to act at legislative level for a limited number of matters of criminal procedural law.

This splitting of competences results in the fact that environmental law in Belgium differs from one region to another and that also each region can fix itself the environmental crimes and the penalty. It should be noted from the outset that the regional legislation cannot change just like that the general principles of criminal law taken up in Book I of the federal Penal Code. This will be dealt with in more detail later on in this presentation.

3.2.2.2. Consequence for the implementation of European environmental directives

Apparently when enacting directives, the European legislator does not take into account the Belgian splitting of competences in environmental matters with the consequence that for the implementation of a guideline in Belgium, it has to be investigated on the basis of the contents of the relevant guideline which authority is competent for the implementation of the guideline. The comprehensive jurisprudence of the Belgian Constitutional Court relating to the splitting of competences in environmental matters shows that answering this question of who is now competent and hence bound to implement a specific guideline or

¹¹² F. SCHUTYSER en K. DEKETELAERE (eds.), *Environmental Law. Belgium*, in R. BLANPAIN (ed.),

part thereof, is definitely no sinecure. In many cases specific obligations of a guideline have to be carried out by the federal authority, while others can and must only be implemented by the regions. It is furthermore not excluded that obligations that have to be complied with in Belgium by a different legislation, are rather close in content, so that previous consultation between the various authorities is recommended. It should be mentioned here also indirectly that the splitting of competences in environmental matters has already been modified repeatedly. A coordinated implementation between the regions together and between the regions and the federal authority is mostly out of the question. There is no central body for steering the implementation in the right direction, and this can also not be expected from a government commissioner. In Belgium it happens hence also that one region has already implemented a guideline, while one of the other two regions remains desperately behind, or that a specific aspect of a guideline is already implemented and others not. The report makes a distinction between the three regions for various directives, and in a number of cases it should also be referred to the federal legislation because the guideline regulates aspects belonging to the competence of the federal legislator.

3.2.3. THE DEVELOPMENT AND STRUCTURE OF ENVIRONMENTAL LAW IN THE REGIONS

Based on the splitting of competences, it happens thus sometimes that four legislators have to get to work for the implementation of one guideline. This does unfortunately not necessarily mean that it will result in only four legislative acts. The European legislator cannot only not take into account the splitting of powers in Belgium, but neither can he consider the structure of environmental law. How the European environmental directives are converted in internal law is decided jointly by the specific structure of regional environmental law. Although environmental policy in Belgium is for some aspects still in its infancy, there is already a great deal of environmental legislation in force, whereby a specific approach has been chosen in the legislative field. We can illustrate the impact thereof in view of environmental law in the Flemish Region.

Before the first state reform in 1970 – hence afore the communities and regions were created – the federal legislator was competent in environmental matters. The environmental legislation enacted at the time was mainly featured by a reactive or problem-solving character on the one hand, and a sectorial character on the other hand. The legislation process was generally started as a result of the discovery of serious cases of environmental contamination such as illegal dumps. The environmental legislation so established protects generally a specific ecological right. As time goes by a very compartmentalized environmental legislation appeared, whereby the various environmental laws are not geared to one another. At that time there is also not really question of a well thought-out general environmental policy. Also after the state reform, the regional environmental law has still these characteristics. The

environmental awareness is however gradually growing and the concern for the environment becomes a separate area of the policy. Increased attention discloses rather quickly the drawbacks of the followed approach. In the Flemish Region, the ex minister for environment has set up a Interuniversity Commission for Environment Review in the Flemish Region with a view to restructuring and further development of environmental law in the Flemish Region. This Commission performed terrific work in the first half of the nineties and presented a rough draft of environmental policy decree. The Rough Draft Environmental Policy Decree that is the reflection of the investigation results of the I.C.E.R. and on which various new environmental decrees are already based, makes on the one hand a distinction between environmental protection law and pollution control law and between general and sector environmental law. The general environmental law contains legal rules that apply for all ecological rights and exceeds henceforth the sectorial compartmentalized environmental legislation. Furthermore part of the environmental legislation remains sectorial out of sheer necessity. Specific ecological rights require a specific protection such that separate rules are necessary. Examples of general environmental law are the rules in matters of environmental policy planning, exactly like the environmental policy principles. The same applies for the civil liability for environmental damage and not at all for the system of environmental license duty. In the Flemish region, various proposals of this Commission have already been implemented, among others a general rule in matters of environmental license. Besides this general environmental law, there is indeed a great deal of environmental law that applies only to a specific sector, such as air, water, waste, etc.

At the centre of the Flemish environmental law, there is a decree of 28th June 1985 on the environmental license. Originally a good deal of laws were introducing a separate license system, whereby some contractors had to go through countless procedures prior to being able to start their activities. The decree on environmental license has integrated a great deal of existing permits in one permit – the environmental license -, whereby one procedure was worked out. In order to find out if an environmental license is needed, a list of disturbing establishments has been established, whereby it was mentioned whether these needed an environmental license or not. The disturbing character of an establishment does now relate to the production of waste and now to the discharge of waste water, etc. When now at European level a specific matter is the subject of an environmental guideline, it does often happen that a system of licenses has to be imposed among others. The Flemish decree-maker who once opted for an integrated environmental license, will then add the disturbing activity that is the subject of the guideline, to the list of disturbing establishments associated with a need of environmental license. A sectorial environmental decree will have to be adapted for other aspects that are also listed in the guideline. A guideline in one region will so often be implemented through various decrees.

For the criminal law-related control of the European environmental directives, this leads to a often complex set of penalization and criminal penalties. So far indeed environmental criminal law in the

Flemish region is split into countless decrees: each decree contains a series of criminal provisions. The applicable penalties are those fixed in the decree on the environmental license for trespasses of said decree, and those fixed in the decree on waste products, for trespasses of the decree on waste products. For various directives, it is hence so that various penalizations and criminal penalties have to be taken into account. This remark applies indeed also apart from the issue of implementation: if a undertaking discharges water without license, it should not only be investigated if the legislation on surface waters has been trespassed, but also if the provisions of the decree on the environmental license have not been harmed. Both legislative acts contain crimes and penalizations. Sometimes indeed both qualifications will be applicable and the rules in matter of concurrence should be applied. This does not prevent that environmental criminal law has so a cluttered character, with which we end up in a second part of the presentation: the characteristics of environmental criminal law in Belgium.

3.2.4. GENERAL APPROACH TOWARDS ENVIRONMENTAL CRIMINAL LAW IN BELGIUM

3.2.4.1. – 1980: hardly an environmental criminal law

The environmental awareness has come into being rather late in Belgium, so that environmental law in general and environmental criminal law in particular are a rather recent discipline. Environmental criminal law limited itself to a series of definitions of crimes and criminal penalties that can generally be found back in the final clauses of the environmental laws. Typical of these criminal provisions was that they were mostly general, to the extent that they stated that the infringement of any provisions of the law was punishable. One and the same penalty maximum and penalty minimum applied for any infringement. This should be understood as a solution for the sake of convenience rather than the expression of a well-thought-out view of the role of criminal law in the fight for environment. Furthermore the punishments were relatively mild, to the extent that they did not always have a deterrent function. The legislator did also not take much pain to set up special criminal penalties: the traditional penalties – deprivation of freedom and fines – were considered as sufficient. It should however be emphasized that at the time special criminal law was not yet strongly developed in Belgium and the emphasis was still on the crimes defined in the Penal Code. The Penal Code did not list true environmental crimes, no more than a series of trespasses relating to the destruction of hedges and hedgerows chastised by minor police penalties aiming at protecting property rather than environment. It is hardly spoken of environmental criminal law. If serious cases of environmental pollution are found, they are generally not prosecuted on the basis of criminal provisions of the environmental legislation, but on the basis of traditional crimes in the Penal Code, such as forgery of documents, etc.

3.2.4.2. 1980-1995: Vicissitudes related to law of competences and lack of view

This situation changes from the time the regions become competent for environmental matters. As it was said, environmental awareness increases strongly and the regional legislator feels the need to act preventively in the field of environment and to develop a true policy. The consequence is an exponential increase of the environmental legislation, not only because three legislators are now mainly competent, but especially because one does no longer wait until one or another form of environmental pollution makes the papers. Unfortunately it cannot be said that this legislation is conspicuous for its quality. Environmental legislation in each of the regions is a patchwork rather than a global and transparent whole. There is especially much environmental legislation. This phenomenon is to be sure very typical of the environmental law, but a considerable trend to regulation can also be observed in various other branches of law. More attention is also dedicated to the preservation of environmental law, at least from a legal point of view. It is conspicuous that criminal law is also always put in hereby, which explains an exponential increase of special criminal law in Belgium in the last decades. It should however be noted that the development of environmental law stops (provisionally) here. In the first place the development was partly limited by the limited competence of the regions with that respect, and on the other hand, there is still no clear vision of the role of environmental law.

A first obstacle for the development of a well thought-out environmental law is caused by the splitting of powers in federal Belgium. As has been said the competence to act on the legislative field in environmental matters cannot be understood as if it were containing right away the power to set up environmental crimes and penalties. A separate indication of competence was necessary to this end. Consistent with the initial qualification provision, the regions could only formulate crimes and fix penalties. However no criminal penalties could be imposed and one could under no circumstance depart from the general provisions of book I of the Penal Code. Concretely this meant that for instance, the decree-maker could not set up any special penalties and could also not proceed to the introduction of a criminal liability of legal entities. Originally the regions had also no competence at all in criminal procedural law. The limitation of the competence was largely inspired by the fear that larger competence would lead to the development of separate criminal law in each of the three regions. The decree-maker has not always complied as strictly with these rules of competence and the Belgian Constitutional Court has henceforth repeatedly blown out the whistle on him. After the splitting of competences in the field of environmental criminal (procedural) law was refined by the special legislator – depicted by some people as a Belgian joke-, the vicissitudes of competence disappeared largely. As of 1993 criminal penalties can be imposed, new additional penalties can be introduced and generally speaking, it can be departed from the general provisions of Book I of the Penal Code. For this however the concurrent advice of the federal Council of Ministers is required.

The issue of competences that subsided thus as time went by, was however not the main issue. As has been said any view was also missing on the role of criminal law in the fight against environmental pollution. It should so be noticed that the deployment of criminal law for the enforcement of environmental law goes obviously without saying and can infrequently be tested against the criteria of penalization worked out in the doctrine: “*It is relatively infrequent that during a parliamentary debate, even few attention is devoted to the issue of knowing if criminal penalties are indeed necessary*”.¹¹³ The penalizations provided by decree that continue regularly to present themselves as final clauses, are generally also formulated bluntly, to the extent that the minimum and maximum of the criminal penalty are the same for the trespass of any provision of the relevant decree and of its decrees of enforcement¹¹⁴, while the content of the trespasses can strongly differ from an ecological perspective.¹¹⁵ If we take into account the technique of penalization, it can be stated that the larger part of the crimes is characterized by an administrative dependence and that one makes mainly use of abstract hazard-creating offences. The consequence of this is, as you know, that the ecological rights are protected at most indirectly. In a number of cases only an administrative interest is protected.

That criticism was directed mainly against the Flemish region should not be understood as if the other two regions had indeed developed an effective environmental law. The decree- or ordinance-maker dedicates usually still less interest to this and there is little interest in environmental law from a scientific point of view.

3.2.4.3. 1996-2002: reform movement

The still questionable quality of Flemish environmental criminal law prompted to reflection. The I.C.E.R. set up in the Flemish region is intended among others to the “*rise of the suitability of criminal and other means for enforcing environmental law*”. The *Rough Draft Decree of Environmental Policy*¹¹⁶ that proposes a rationalized consistent Flemish environmental legislation and stating a separate title for

¹¹³ FAURE, M., “De handhaving van het bodemsaneringsdecreet via toezicht, dwangmaatregelen en strafsancities”, in DEKETELAERE, K. (ed.), *Het Decreet betreffende de bodemsanering. Milieurechtstandpunten 7*, Bruges, Die Keure, 1995, 218-222.

¹¹⁴ For instance art. 39, §1 of the Decree of 28th June 1985 on the environmental license:
§1. Without prejudice to the application of the penalties set in the Penal Code, is penalized with a penalty of imprisonment of eight days to one year and a fine of 100 francs to 100,000 francs or with one of these penalties alone:

(...)

2° who does not comply with the provisions of this decree and its decrees of enforcement or the conditions of the license.

¹¹⁵ FAURE, M. and VISSER, M., *De strafrechtelijke bescherming van het leefmilieu in België, Duitsland en Nederland. Modellen van strafbaarstelling en hun bewijsrechtelijke implicaties*, Antwerp, Intersentia, 1999, 284-285.

¹¹⁶ INTERUNIVERSITAIRE COMMISSIE TOT HERZIENING VAN HET MILIEURECHT IN HET VLAAMSE GEWEST, *Voorontwerp Decreet Milieubeleid*, Bruges, Die Keure, 1995, 1225.

the criminal enforcement of environmental law, proposes¹¹⁷ a thorough reform of environmental law. The abstract hazard-creating offences are largely kept, but supplemented with concrete hazard-creating offences and independent environmental offences. Also the penalty is considerably increased and it is also proposed to introduce other penalties. The proposed criminal provisions showed on a series of points a clear fracture vis-à-vis the past situation (*infra*). The *Voorontwerp Decreet Milieubeleid* was already in the past the point of departure for various environmental decrees of the Flemish Region and seemed also to be the main source of inspiration for the rough draft decree on the enforcement of Flemish environmental law approved by the Flemish government on 23rd July 1998.¹¹⁸ The rough draft did however not reach the end of the previous legislature. The new Flemish Minister of Environment and Agriculture emphasises in her policy document the importance of an efficient and appropriate legislation, with a view to an integral and efficient environmental policy. In furtherance of this policy document, countless new draft rules were prepared, especially also in the field of the criminal enforcement of environmental law in the Flemish Region. Also in the Federal Safety and Detention Plan of 31st May 2000, the Minister of Justice postulates a rationalization and simplification of the environmental enforcement legislation and argues for uniform penalties for similar forms of environmental criminality.¹¹⁹ It is nice to note that the interest in environmental law is still growing, also with the legislator. For all the good intentions, environmental criminal law in the Flemish Region experienced so far however only few fundamental changes and the criticized situation remains.

At the very same moment, a new decree for criminal enforcement of environmental law in the Flemish Region is being prepared. The aim is that also an administrative enforcement section should be coupled to this decree. Whether or not a decree will effectively come into being remains however the question. We are again, if you allow me to express myself somewhat critically, in the last year of a legislature. This can mean two things: either the legislator gets an enormous thirst for action and much pressure is exerted to get the draft passing through the legislative process, or the draft disappears because countless other objects will get the priority.

3.2.5. PENALTIES IN ENVIRONMENTAL CRIMINAL LAW

A difference should be made between the various types of legal – law-regulated – penalties. Belong to the legal penalties the criminal, civil, administrative and disciplinary penalties. We shall address mainly the criminal penalties.

¹¹⁷ Part 7, Enforcement, Title 3. Criminal penalties; reporter M. Faure.

¹¹⁸ Rough draft of decree supplementing the decree of 5th April 1995 containing general provisions in the field of environmental policy with titles relating to control provisions, administrative penalties, safety measures and criminal penalties.

¹¹⁹ Federal Safety and Detention Plan from the Minister of Justice dated 31st May 2000.

3.2.5.1. The distinction between penalties and measures

The criminal penalties that will be given a chance here, are not the extra-judicial criminal penalties that can be imposed without intervention of the judge of the facts, but rather the criminal penalties that can only be imposed by intervention of the judge of the facts and are hence called judicial criminal penalties. In Belgian criminal law the judicial criminal penalties are split into penalties and measures. Both penalties and measures can only be imposed if a fact defined as a crime is verified. Unlike penalties, measures have however no repressive function, but a protective function: they aim primarily at protecting society against people or situations that can be a danger for rights protected in criminal law, which does not prevent that they are in fact experienced as a true penalty.¹²⁰ Penalties can only be imposed to people capable of committing the fault and find their foundation in the juridical reproach that implies a depreciation of the offender's behaviour, while a measure is legitimated by the need to secure the rights protected by criminal law, and can consequently be imposed to people incapable of committing the fault. As far as environmental law is concerned, the distinction between penalties and measures is also of great importance from the point of view of the law of competence. Art. 11 BWHI is indeed not applicable for the introduction of measures by the regions, so that the regions can introduce new measures without limitation, towards natural people as well as towards legal entities. Their power to introduce new penalties is much more limited. It is henceforth especially unusual to have to verify that this distinction is not always made clear by the decree- and ordinance-maker and that it is not always indicated unequivocally whether we have here an additional penalty or a measure.

3.2.5.2. Need for additional penalties in environmental criminal law

Various jurists deem indeed that the classical main penalties – deprivation of freedom and fines – are not sufficient to fight environmental criminality. The penalties should not only have a repressive and preventive effect, but should also restore the reduced quality of the ecological rights. It should be noted that trespassers pay the imposed fines with a smile, but next continue to interfere with the environment. There is a need for an adapted arsenal of penalties. Special penalties and measures are henceforth of great importance for environmental law.

3.2.5.3. Additional penalties with respect to legal entities

As a result of the introduction of the criminal liability of legal entities in Book I of the Penal Code, a distinction should be made between the penalties that can be imposed to natural persons and those that can be imposed to legal entities. The point of departure should be that legal entities and natural persons have to be assimilated as much as possible, but because penalties of deprivation of freedom can not

¹²⁰ L. DUPONT, *o.c.*, 273.

possibly - because of their nature - be imposed to legal entities on the one hand, and because on the other hand, the legislator concentrates the chastisement of crimes on the natural person, a new set of penalties for legal entities had to be developed. The main penalty that should always be imposed to the legal entity is a fine. To this end the criminal legislator has developed in art. 31bis of the Penal Code a conversion mechanism to convert penalties of deprivation of freedom into a fine. Furthermore the legislator has provided a series of additional penalties that can be imposed dependent on the case in criminal, correctional and police matters (the special confiscation) or only in criminal and correctional matters: (winding-up (art. 35), prohibition to carry on activities forming part of the corporate object (art. 36), closing of one or more establishments (art. 37) and publication or circulation of the decision (art. 37bis).

It is of great importance that the prohibition to carry on activities forming part of the corporate object of legal entities, temporary or definitive closing of one or more establishments of the legal entity and publication or circulation of the decision at the costs of the convict can be imposed only as additional penalty to the legal entity *in the cases provided by the Law*. For what regards the winding-up and special confiscation, no additional legal basis is required. For environmental law, that is mainly a regional matter, this means concretely that the regional decree-maker should determine each time explicitly in which cases these three additional penalties are possible. This does not apply to the provisions in the matter of the winding-up and special confiscation that are in principle applicable automatically.

3.2.5.4. Additional penalties with regard to natural persons

With regard to natural persons, the traditional penalties can be pronounced - deprivation of liberty and fine – either as main or additional penalty. Special confiscation, publication of orders and judgements, removal and deprivation of the exercise of specific civil and political rights apply as additional penalties. It should be noted that consistent with these general rules, the closing-down of an establishment or prohibition to carry on specific activities as additional penalty cannot be pronounced against a natural person.

As already indicated above, the communities and regions are competent in view of art. 11 BWHI for penalizing the non-compliance of their provisions and determining the penalties on account of such non-compliance. In principle the provisions of Book I of the Penal Code are applicable, but the decree-maker is competent for stating exceptions for special infringements, for instance introduction of a new penalty. If it is departed from the provisions of Book I, the concurrent advice from the Council of Ministers is required for every deliberation in the Community or Region government on a rough draft decree mentioning a penalty or penalization that is not provided in book I of the Penal Code, whereby the federal Council of Ministers can bring about some uniformity in criminal law. This means that the decree- or ordinance-maker can introduce penalties other than those taken up in the Penal Code for the

chastisement of environmental crimes, but in such cases, the concurrent advice of the federal Council of Ministers is required.

The decree-maker has made use of his possibility to introduce new penalties and measures. We can obviously not linger extensively over all additional penalties and measures of the Belgian environmental criminal law. It is however possible to state a series of recent developments. A first conclusion implies that older environmental laws practically contain no additional penalties or measures. However an evolution is to be perceived in all three regions. More and more additional criminal penalties turn up here and there in various environmental decrees and ordinances. Taken on its own this evolution has our approval. However the introduction of additional penalties and measures has also drawbacks. These additional penalties and measures are indeed introduced separately in each decree or ordinance, so that also the terms and conditions always differ, which results in environmental criminal law becoming an inextricable tangle.

To get rid of this lack of harmonization, the Region of Brussels-Capital has made a special effort. The ordinance of the Region of Brussels-Capital dated 25 March 1999 relating to the detection, verification, prosecution and chastisement of crimes in environmental matters harmonizes indeed the additional penalties and measures for the Region of Brussels-Capital. The ordinance that has been approved and published prior to the introduction of the criminal liability of legal entities in the Belgian Penal Code, aims at a harmonization of environmental criminal law in the Region of Brussels Capital. The purpose of the ordinance is twofold: on the one hand it aims at unification in the field of method and measures for the control and check and on the other hand, it wants *to introduce new means in order to better detect and chastise environmental crimes*, whereby it wishes to take into account the super-saturation of the criminal courts and overload of the municipal police forces.¹²¹ Harmonization has thus nothing to do with the environmental crimes themselves, so that the ordinance leaves henceforth alone the existing penalizations contained in countless ordinances and laws. A few examples will be discussed below.

Consistent with art. 28 of the ordinance, in case of condemnation on account of trespass of the environmental legislation, the judge may order partial or full discontinuance of the activity or the closing-down of the establishment. Discontinuance as well as closing-down can be temporary or final if the convict is the owner or operator of the installation. If it is however a third person who is neither owner nor operator, the closing-down and discontinuance can only be temporary, with a maximum duration of two years. The judge can also prohibit either provisionally or definitively to the convict to run similar establishments either personally or via go-betweens.

¹²¹ *Parl. St.*, Brusselse Hoofdstedelijke Raad, A 312/2, 3

This penalty raises a problem that appears also in various other additional penalties or measures in Belgian environmental criminal law. It is stipulated that the closing-down or discontinuance can also be imposed if the convict is not the owner of the establishment, so that the question raises whether this additional penalty is indeed compatible with art. 1 of the first supplementary protocol of the EVRM protecting title and with art. 6, paragraph 1 EVRM that guarantees the right to fair treatment by the judge. As a matter of fact, the question raises whether environmental interest is sufficiently important to justify a limitation of the title. Under this assumption one should then raise the question whether the owner who is per hypothesis not condemned in criminal law, should be involved in the criminal procedure in order to be able to put his rights forward or to obtain possibly damages. The ordinance-maker in Brussels does not come up to the mark clearly for what regards this issue.¹²²

3.2.5.5. Criminal liability of legal entities

3.2.5.5.1. The connection between the introduction of criminal liability of legal entities and environmental criminal law

The criminal liability of legal entities was introduced in Belgian criminal law by the law of 4th May 1999 introducing the criminal liability of legal entities¹²³. This law adds a series of new provisions to book I of the Belgian Penal Code. Book I is entitled “The crimes and their chastisement in general” and formulates the general rules applicable unless otherwise specified, on all crimes defined in the criminal laws. The basic principle of the criminal liability of legal entities is given expression to in art. 5, §1 Penal Code:

“A legal entity is criminally responsible for crimes that have either an intrinsic connection with the realization of its object or the defence of its interests, or have been committed for its account, as results from the concrete circumstances.”

¹²² M. FAURE, “Recente ontwikkelingen inzake federaal regionaal en lokaal milieustrafrecht in K. DEKETELAERE en M. DEKETELAERE (eds.), *Jaarboek Milieurecht 1999. Milieurechtstandpunten 14*, Brugge, Die Keure, 2000, 146-148 en M. FAURE, “Ordonnance du 25 mars 1999 relative à la recherche, la constatation, la poursuite et la repression des infractions en matière d’environnement”, *Aménagement-Environnement 2000*, 179-195.

¹²³ B.S., 22 June 1999. Zie hierover A. DE NAUW en F. DERUYCK, “De strafrechtelijke verantwoordelijkheid van rechtspersonen”, *R.W.* 1999, 897-914; F. DERUYCK, “Sociétés-loi du 4 mai 1999 – Responsabilité pénale des personnes morales”, *Rev. Dr. Commerc.* 1999, 653-657; J. MESSINE, “Propos provisoire sur un texte curieux: la loi du 4 mai 1999, instituant la responsabilité pénales des personnes morales”, *Rev. Dr. Pén.* 2000, 637-659; H. VAN BAVEL, “De wet tot invoering van de strafrechtelijke verantwoordelijkheid van rechtspersonen”, *A.J.T.* 1999-2000, 209-225; Ph. HAMER en S. ROMANIELLO, *La responsabilité pénale des personnes morales*, Diegem, Kluwer, 1999, 73 p.; M. FAURE, “De strafrechtelijke verantwoordelijkheid in de onderneming”, *T.P.R.* 2000, 1293-1370; A. MASSET, “La loi du 4 mai 1999 instaurant la responsabilité pénale des personnes morales: l’extension du filet pénale modalisée”, *J.T.* 1999, 653-660; G. STESENS, “De wet van 4 mei 1999. Een eerste schets van het beginsel van de strafrechtelijke verantwoordelijkheid van rechtspersonen”, *Vennootschapsrecht en Fiscaliteit 1999*, 224-238.

That this has eventually led to a law on the criminal liability of legal entities can cause some amazement, if one considers that the countless bills filed in the first half of the nineties never got through the end of the lawmaking procedure.¹²⁴ As part of the project it is however suitable to note that these initiatives were not only taken at federal level, like the bill introducing the criminal liability of legal entities that led to an adaptation of the federal Penal Code, but also the regional legislator kept his end up. It is conspicuous that the regional bills fit precisely in within environmental criminal law. One pleads for the introduction of the criminal liability of legal entities for one category of crimes: the environmental ones.¹²⁵ The discussion around the introduction of criminal liability that dates indeed from before these regional bills restarted to an important extent in Belgium from the environmental criminal law.¹²⁶ The introduced criminal liability is as already said before, taken up in the general part of the Belgian Penal Code and the criminal liability of legal entities is *ratione materiae* in principle unlimited, insofar as the legal entity can in principle be held liable and responsible for all crimes and is henceforth not limited to environmental crimes. Although the bill exceeds from the outset the environmental criminal law, it can be inferred from the parliamentary documents that environmental criminal law is one of the sectors of special criminal law for which the introduction of the criminal liability of legal entities is especially relevant. Various examples quoted during the parliamentary debates are indeed borrowed from the environmental criminal law.

¹²⁴ Voorstel van wet inzake de vervolging van rechtspersonen (ingediend door de heer Cuyvers), *Parl. St. Senaat* 1992-93, nr. 805/1, 1-23; Wetsvoorstel tot invoering van de strafrechtelijke aansprakelijkheid van rechtspersonen en van enkele specifieke sancties (ingediend door de heer Landuyt), *Parl. St. Kamer*, 1992-93, nr. 1136/1, 1-6; Wetsvoorstel inzake de vervolging van rechtspersonen (ingediend door de heren Barbé en Dejonckheere), *Parl. St. Kamer*, 1993-94, nr. 1219/1, 1-22; Voorstel van wet tot invoering van de strafrechtelijke aansprakelijkheid van rechtspersonen, met aangepaste bedrijfsstraffen (ingediend door de heer Cuyvers), *Parl. St. Senaat*, 1994-95, nr. 1273/1, 1-38; Wetsvoorstel tot invoering van de strafrechtelijke aansprakelijkheid van rechtspersonen, met aangepaste bedrijfsstraffen (ingediend door de heer Boutmans en mevr. Dardenne), *Parl. St. Senaat*, 1995-96, nr. 1-131/1, 1-38.

¹²⁵ *Parl. St. W. Gew. R.*, 1993-94, nr. 240-1; I.C.H.M., *Voorontwerp Decreet Milieubeleid*, Brugge, Die Keure, 1995, 86 en 799-805. Zie hierover M. FAURE, "Recente ontwikkelingen inzake federaal regionaal en lokaal milieustrafrecht in K. DEKETELAERE en M. DEKETELAERE (eds.), *Jaarboek Milieurecht 1999. Milieurechtstandpunten 14*, Brugge, Die Keure, 2000, 146-148 en M. FAURE, "Ordonnance du 25 mars 1999 relative à la recherche, la constatation, la poursuite et la repression des infractions en matière d'environnement", *Aménagement-Environnement 2000*, 179-195.

¹²⁶ D. ROEF, "De strafrechtelijke aansprakelijkheid van publiekrechtelijke rechtspersonen voor milieuverontreiniging", *T.M.R.* 1997, 87-103; D. ROEF, "De strafrechtelijke aansprakelijkheid van overheden voor milieuverontreiniging in rechtsvergelijkend perspectief", in M. FAURE en K. DEKETELAERE (eds.), *Ius Commune en milieurecht. Actualia in het Milieurecht in België en Nederland*, Antwerpen, Intersentia, 1997, 243-289; D. ROEF, *Strafbare overheden. Een rechtsvergelijkende studie naar de strafrechtelijke aansprakelijkheid van overheden voor milieuverstoring*, Antwerpen, Intersentia, 2001, 635 p.; M. FAURE, "Recente ontwikkelingen inzake federaal, regionaal en lokaal milieustrafrecht" in K. DEKETELAERE en M. DEKETELAERE, *Jaarboek Milieurecht 1999. Milieurechtstandpunten 14*, Brugge, Die Keure, 2000, 85-123; H. VAN DRIESSCHE, "Evolutie naar de strafrechtelijke (milieu-) aansprakelijkheid van alle publiekrechtelijke rechtspersonen", *R.W.* 1999-2000, 833-843; F. VAN REMOORTERE, "La question de la responsabilité pénale des personnes morales en droit de l'environnement", *R.D.P.* 1991, 311-371.

3.2.5.5.2. Origin of the connection: the enterprise-linked character of environmental criminality and the issue of criminal imputation

That the introduction of the criminal liability of legal entities and the environmental criminal law are tightly linked together is hardly amazing, considering that a great deal of cases of serious environmental pollution happen as part of industrial activities organized within the framework of a legal entity.¹²⁷ Environmental criminality presents usually a enterprise-linked character. Prior to the introduction of the criminal liability of legal entities in Belgian criminal law, a crime committed in the lap of a legal entity or as part of the activities of a legal entity was out of sheer necessity imputed to a natural person.¹²⁸ Since 1946 the Court of Cassation has been accepting that legal entities can commit a crime, but they cannot be condemned criminally for this.¹²⁹ In such cases, the natural person through which the legal entity was acting or omitted to act is criminally liable. In Belgian criminal law it is precisely in this framework that the dogma of the imputation of crimes is developed in the doctrine.¹³⁰ To impute a crime to a person is defined by R. LEGROS as follows: “*Imputer le fait au prévenu, c’est affirmer que c’est lui qui l’a commis*”¹³¹. That a legal entity can perpetrate a crime does not prevent that a natural person is the offender. The prominent criminal jurist DE NAUW has emphasized with regard to this that the criminal liability of the natural person for a crime perpetrated within the framework of a legal entity, does not differ conceptually from the criminal liability of a natural person for a crime that has not been perpetrated within the framework of a legal entity. It is hence neither a criminal liability for the fact of another person, nor an automatic criminal liability.¹³²

The doctrine makes a distinction between three forms of imputation: the legal imputation, the conventional imputation and the judicial imputation.¹³³ The first form of imputation implies that the legislator has indicated explicitly or implicitly the person to whom the crime should be imputed. The conventional imputation means that the legislator obliges the legal entity to indicate a person in-charge of specific obligations imposed by law to the legal entity. Because the imputation does not relate to a

¹²⁷ F. GEYSELS, R. MEEUS en J. VANHEULE, *Onderzoek in leefmilieustrafzaken. Deel 1. Theoretische beschouwingen over milieurecht, milieubeleid, milieucriminaliteit en handhaving van de milieuwetgeving*, Diegem, Kluwer, 2000, 55-69; M. FAURE, *De strafrechtelijke toerekening van milieudelicten*, Antwerpen, Maklu, 1992, 13.

¹²⁸ See F. DERUYCK, *De rechtspersoon in het strafrecht*, Gent, Mys & Breesch, 1996, 3-43.

¹²⁹ Cass. 8 april 1946, *Arr. Verbr.* 1946, 137.

¹³⁰ L. DUPONT, *Beginselen van strafrecht*, II, Leuven, Acco, 2000, 209-210.

¹³¹ R. LEGROS, *L’Elément moral de l’infraction*, Parijs, Sirey, 1952, 30; R. LEGROS, “La responsabilité pénale des dirigeants des sociétés et le droit pénal general”, *R.D.P.* 1963-64, 3-28; R. LEGROS, “Imputabilité pénale et entreprise économique”, *R.D.P.* 1968-69, 365-385 en R. LEGROS, “Le droit pénal dans l’entreprise”, *J.T.T.* 1977, 169-178.

¹³² A. DE NAUW, “La délinquance des personnes morales et l’attribution de l’infraction à une personne physique par le juge”, (noot onder Cass. 23 mei 1990)”, *R.C.J.B.* 1992, 571.

¹³³ For an overview of different forms of imputation, we refer to F. DERUYCK, *De rechtspersoon in het strafrecht*, Gent, Mys & Breesch, 1996, 16-39; F. DERUYCK, “Pour quand la responsabilité pénale des personnes morales en droit pénal belge?”, *J.T.* 1997, 698-702 en R. LEGROS, *L’Elément moral dans les infractions*, Parijs, Sirey, 1952, 30-45.

form of automatic criminal liability, it is assumed that the person to whom the crime is imputed legally or conventionally and can demonstrate that it did not perpetrate a fault, should be discharged. In the cases where the legislator did not indicate anybody or when the legal entity is not obliged to indicate a natural person and in the cases where it is indeed the case, but the indicated person is itself a legal entity, the judge has to impute the crime. The judge has in such cases, to indicate the offender. In doing this it is not necessary that the person to whom the crime is imputed be the material offender, to the extent that it has performed itself the crime. Other criteria can also play a role here, such as the function in the enterprise and the associated possibility to avoid a result *ex delicto*. In such case it is precisely the omission to act to avoid the result *ex delicto*, although this was possible, that is the criminal reproach.

The imputation of crimes to natural persons is problematical from a dual point of view. In first instance the criminal imputation is hardly substantiated as theory in Belgian criminal law and few attention is dedicated to the criteria on the basis of which the imputation should take place.¹³⁴ Furthermore there is no consensus on the issue whether the judge can impute the crime to another person if the person indicated by the law or by the legal entity on the basis thereof, can demonstrate that the fault is not with it. Various jurists conclude in this case to the impossibility to chastise the crime.¹³⁵ Besides the poor theoretical substantiation and the vagueness of the imputation criteria, according to the supporters of the criminal liability of legal entities, the imputation of crimes did also in practice not lead to the desired result.

The imputation supposes indeed the identification of one or more natural persons through the action of which the legal entity has acted or omitted to act. Considering the sometimes complicated and not transparent enterprise structures, this identification is not always a piece of cake, so that among others dozens of natural persons are subpoenaed by the Prosecutor and it is left to the judge to determine who has the criminal liability. A problem raises also if the situation *ex delicto* is the consequence of a collegial decision. In such case the absence of record on the positions of the people involved plays in favour of the accused.¹³⁶

The problems which the criminal judge has to face in the criminal imputation of crimes in general and environmental crimes in particular, perpetrated as part of the activities of a legal entity, are called upon by the supporters of the criminal liability in support of the introduction of the criminal liability of legal entities. This topic is also referred to at various places in the parliamentary documents. Supporters of the criminal imputation such as LEGROS do not consider the impossibility to chastise legal entities as a

¹³⁴ With respect to environmental criminal law, we refer to: M. FAURE, *De strafrechtelijke toerekening van milieudelicten*, Antwerpen, Maklu, 1992, 151 p.

¹³⁵ For an overview of different opinions, see F. DERUYCK, "Pour quand la responsabilité pénale des personnes morales en droit pénal belge?", *J.T.* 1997, 698-702.

problem and expect much good from the criminal imputation. The main theoretical argument called upon in doctrine against the introduction of a criminal liability of legal entities is that it would be incompatible with the moral element of the crime or the fault. The notion of fault such as conceived in Belgian criminal law follows indeed human patterns and has always been called upon to justify the fault incapacity of the legal entity.¹³⁷

3.2.5.5.3. Basic principle of the criminal liability of legal entities

3.2.5.5.3.1. Point of departure: assimilation of the legal entity with the natural person

The notion of criminal liability of legal entities leans on a far-reaching assimilation between natural person and legal entity. With this one means in the first place that the legal entity is considered as a private social reality that does not coincide with the collectivity of individual natural persons. In the second place this means that the criminal liability of the legal entity is not a derived liability. The legal entity can perpetrate a criminal fault by itself. There is thus no need for identifying a natural person to whom the crime is imputed and whose behaviour can then be imputed to the legal entity.¹³⁸ The quality of offender of the legal entity is not based on the quality of offender of the natural person.¹³⁹ The law is so somewhat a continuation of the jurisprudence of the Court of Cassation. Originally it was accepted in Belgian criminal law that the legal entity could not commit crimes. This principle was articulated by the well-known adage “*societas delinquere non potest*”. In an order of 8th April 1946, the Court of Cassation assumed that a legal entity can perpetrate a crime, but cannot be condemned criminally for this: “*societas delinquere potest, sed non puniri*” and in an order of 19th October 1992, the Court of Cassation decided that the legal entity can perpetrate a continued crime and that the intention necessary to this end can be decided upon by the judge without the natural person, organs or employees through which the legal entity was acting, having to be pointed out.¹⁴⁰

3.2.5.5.3.2. The scope of application ratione personae

The point of departure is that the scope of application *ratione personae* is general. In principle legal entities of public law as well as of private law and corporations as well as associations can incur criminal liability. Art. 5, paragraph 3 of the Penal Code extends even the scope of application to a series of organs that have no legal personality, but that are assimilated to a legal entity in the light of the law on the

¹³⁶ M. FAURE, De strafrechtelijke toerekening van milieudelicten, Antwerpen, Maklu, 1992, 13-15.

¹³⁷ For an overview of all arguments, see C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht in hoofdlijnen*, Antwerpen, Maklu, 1998, 99-109.

¹³⁸ Toelichting, *Parl. St. Senaat*, 1998-99, nr. 1217/1, 2 en 1217/6, 6.

¹³⁹ L. DUPONT, *o.c.*, 211-212.

criminal liability of legal entities.¹⁴¹ This extension fits in within the application of the principle of equality, insofar as the legislator wanted to avoid so an unequal treatment between legal entities with in essence economic activities and groupings with activities of the same kind without legal personality. In such case the legal form is considered as not being a sufficiently relevant criterion to justify the difference in treatment. This assimilation is limited to bodies with mainly economic activities. The topic is less pertinent for other groupings, see with this respect the explanation of the bill.¹⁴²

The scope of application *ratione personae* is however sharply reduced for what regards the legal entities of public law by the exclusion of: the federal state, regions, communities, provinces, Brussels conurbation, municipalities, inter-municipal territorial organs, French Community Commission, common community commission and public centres for social welfare.¹⁴³ The legislator devotes few attention to the justification of this exclusion. It relates to democratically elected bodies, as the saying goes. This exclusion can certainly not count upon general approval in the doctrine. A specific trend in Belgian and Dutch doctrine refutes the arguments according to which the criminal liability of legal entities of public law is rejected, such as separation of powers, and shows itself a supporter or the criminal liability of legal entities of public law.¹⁴⁴

The impunity of the government is certainly not unimportant as part of environmental criminal law. Precisely like for other tasks of special criminal law, in this sector also it applies that it is not at all excluded that the offender perpetrates a crime by itself, like unlawful operation of a dump or an incinerator by a municipality. It can also happen that the authorities themselves do not cause the environmental pollution, but are indeed at the origin of an environmental pollution caused by a third person. One should recall that for a great part, the authorities are the ones fixing the conditions under which environmental-unfriendly activities can be organized. As a consequence of the administrative

¹⁴⁰ Cass. 19 oktober 1992, *A.C.* 1991-92, 1204. Zie L. DUPONT, *o.c.*, 212 en A. DE NAUW, “Le vouloir propre de la personne morale et l’action civile résultant d’une infraction”, (noot onder Cass. 19 oktober 1992), *R.C.J.B.* 1995, 237-258.

¹⁴¹ This relates to temporary associations, participations in a syndicate, associations of which the deed of incorporation is not yet filed, consistent with art. 68 Company Code, with the registry of the commercial court of the jurisdiction on which the legal entity has its registered office, trading companies pending incorporation, civil companies that did not take the form of a trading company and get hence no legal personality. See S. VAN DYCK, “De (privaatrechtelijk) rechtspersoon als strafbare dader van een misdrijf. Het toepassingsgebied *ratione societatis privati iuris* van de wet van 4 mei 1999”, *T. Strafr.* 2001, 227-260.

¹⁴² Toelichting, *Parl. St. Senaat*, 1998-99, No. 1-1271/1, 2-3.

¹⁴³ Art. 5, *in fine* Penal Code.

¹⁴⁴ D. ROEF, “De strafrechtelijke aansprakelijkheid van publiekrechtelijke rechtspersonen voor milieuverontreiniging”, *T.M.R.* 1997, 87-103; D. ROEF, “De strafrechtelijke aansprakelijkheid van overheden voor milieuverontreiniging in rechtsvergelijkend perspectief”, in M. FAURE en K. DEKETELAERE (eds.), *Ius Commune en milieurecht. Actualia in het Milieurecht in België en Nederland*, Antwerpen, Intersentia, 1997, 243-289; D. ROEF, *Strafbare overheden. Een rechtsvergelijkende studie naar de strafrechtelijke aansprakelijkheid van overheden voor milieuverstoring*, Antwerpen, Intersentia, 2001, 635 p.; H. VAN DRIESSCHE, “Evolutie naar de strafrechtelijke (milieu-) aansprakelijkheid van alle publiekrechtelijke rechtspersonen”, *R.W.* 1999-2000, 833-843.

dependence of environmental criminal law, the authorities are fixing eventually the punishability. By postulating too flexible conditions in contradiction with higher rules, the authorities can be a concurrent cause of serious environmental pollution. The authorities in-charge of the control of the compliance with environmental legislation can also contribute to serious disturbance of the environment by insufficient control or “red-line” policy.¹⁴⁵ The acceptance or not of a criminal liability of the public authorities is hence of great importance for environmental criminal law in Belgium because environmental law pertains to a large extent to administrative law, whereby the administrative authorities play a particularly important role.

The scope of application *ratione materiae*

The starting point is that the scope of application *ratione materiae*, that means crimes that can be perpetrated by a legal entity, is not limited by the legislator. In principle legal entities can henceforth commit any crimes. Within the framework of the legal imputation, it should however be noted that if the legislator indicates explicitly or implicitly a person with a specific quality, to whom a specific crime should be imputed, the crime will not be imputed to a legal entity if the latter does not possess the required capacity. The same principle that applies towards natural persons should hence be applied. Some jurists observe that the formulation of some crimes does not authorise to conclude to the criminal liability of the legal entity for these crimes.¹⁴⁶

The imputation of crimes to legal entities

As already stated above, the doctrine of imputation of crimes has developed in Belgian criminal law as a result of the impossibility to condemn legal entities in criminal law. Through the introduction of the criminal liability of legal entities, the criminal imputation as concept does not disappear from criminal law. The criminal imputation is maintained, but the problem that should be solved by the imputation is of another nature. We remind here the starting point of the law: the legal entity is assimilated to the natural person and the criminal liability of the legal entity is a direct and not a derived liability. This starting point does obviously not prevent that a crime for which a legal entity is held criminally responsible, will still always be effected through a natural person. In other words a legal entity cannot commit a crime in the same way as a natural person.¹⁴⁷ While for the natural person, the starting point is that it is committing the crime in the literal – physical – meaning of the word, in other words commits the material behaviour constituent of the crime, will be indicated as offender, other criteria should be developed for the legal entity. The quality of offender of the legal entity differs conceptually from that of the natural person. The criteria for the legal entity are explicitly taken up by the legislator in art. 5 of the

¹⁴⁵ See in detail, M. FAURE, *De strafrechtelijke toerekening van milieudelicten*, Antwerp, Maklu, 1992, 93-114.

¹⁴⁶ L. DUPONT, *o.c.*, 215.

Penal Code and should allow to indicate a legal entity as offender. The legal entity can only incur a criminal liability for crimes that show an intrinsic connection with the realization of its corporate object or the defence of its interests and for crimes that, as results from the concrete circumstances, are committed for its account. As one of these criteria should be complied with, one avoids that the legal entity be held criminally liable for each crime perpetrated in its lap.¹⁴⁸

It does not suffice that a legal entity can be indicated as offender on the basis of one of the aforementioned criteria or that the crime can be imputed materially to the legal entity on the basis of one of these criteria. The crime should also be imputable morally to the legal entity. The legislator deemed however that it was not necessary to determine himself the moral imputation criteria and leaves this whether wisely or not, to the jurisprudence. The explanatory memorandum sums up a series of criteria. It is so that a crime can be imputed morally to the legal entity if the penal act derives from an intentional decision taken within the legal entity or if an omission in causal connection with the crime is verified at the level of the legal entity (for instance, faulty internal organisation). With respect to unintentional crimes, it will have to be demonstrated that employees or representatives knew about the risk of perpetration of a crime and were careless in taking measures to prevent it.¹⁴⁹ How jurisprudence will shape these criteria remains to be seen.

Concourse of criminal liability of natural persons and legal entities, cumulative or “decumulative” effect

Art. 5, second paragraph, Penal Code, belongs no doubt to the most unclear provisions of the law on the criminal liability of legal entities and is henceforth the subject of countless studies. The provision states as follows: *“When the legal entity is held liable exclusively on account of the action of an identified natural person, only the one who has committed the heavier fault can be condemned. If the identified natural person has perpetrated the fault knowingly, it can be condemned together with the responsible legal entity.”* With this provision the legislator aimed at installing the “decumulative” effect as general rule, in order not to get bogged down in a system of automatic criminal liability of the natural persons and legal entities. The cumulative effect is accepted as exception in order to avoid the suppression of all sense of responsibility of natural persons.¹⁵⁰

¹⁴⁷ A. DE NAUW en F. DERUYCK, “De strafrechtelijke verantwoordelijkheid van rechtspersonen”, *R.W.* 1999-2000, 902.

¹⁴⁸ Voor een overzicht van mogelijke criteria, zie D. ROEF en Th. DE ROOS, “De strafrechtelijke aansprakelijkheid van de rechtspersoon in Nederland: rechtstheoretische beschouwingen bij enkele praktische knelpunten”, in M. FAURE en K. SCHWARZ (eds.), *De strafrechtelijke en civielrechtelijke aansprakelijkheid van de rechtspersoon en zijn bestuurders*, Antwerpen, Intersentia, 1998, 49-121.

¹⁴⁹ M. FAURE, “De strafrechtelijke verantwoordelijkheid in de onderneming”, *T.P.R.* 2000, 1309.

¹⁵⁰ Report VERHERSTRAETEN, *Parl. St. Kamer*, 1998-99, No. 2093/5-15.

Obviously the starting point is that this provision should only be applied if a crime can be imputed to a identified natural person as well as to a legal entity. A “decumulative” effect is only possible if the crime was perpetrated out of carelessness or unintentionally. In such case, only the one who has perpetrated the heaviest fault, can be condemned criminally. How the seriousness of the fault should be appreciated is again left over to jurisprudence. The law contains no indication at all with this respect. The heavier fault of another person applies in such case with respect to the person who committed the less severe fault, as a penalty-excluding excuse. In an order of 3rd October 2000, the Court of Cassation stated that this penalty-excluding excuse cannot be attributed any retroactive effect.¹⁵¹

In case the natural person has perpetrated the fault knowingly, it can be condemned together with the legal entity. The most important question raised in relationship with this rule is whether the expression “knowingly” refers to the legal qualification of the crime (a construction in-abstracto) or to the concrete fact. In this last case, crimes that are already punishable in case of negligence, but were as a matter of fact perpetrated intentionally, fall under the rule of exception and a cumulative criminal condemnation of the natural person and the legal person is possible.

3.3. Denmark

Peter Pagh

As the other Member States, Danish criminal law including environmental criminal law is based on *nulla poena sine lege*. Criminal sanctions for infringements of environmental legislation are only applicable if the defender has acted in conflict with the law and if the legislation includes criminal sanctions for this particular offence. According to the Penal Code section 19 criminal sanctions are not limited to intentional infringements but include also offences caused by negligence. The Act on Chemical Substances and Products section 60 even provide criminal sanctions based on strict liability for certain offences of the Act, but none of these offences relates to ozone depleting substances.

Danish environmental legislation are mainly adopted as public law, defining the obligations of the public authorities and the obligations of the citizens. The division is important regarding criminal penalties for two reasons. First, infringements by citizens are mainly subject to criminal sanctions, while the

¹⁵¹ See B. SPRIET, “(De)cumul van strafrechtelijke verantwoordelijkheid van rechtspersonen en natuurlijke personen – Retroactiviteit van de decumulbepaling voor natuurlijke personen”, (noot onder Gent 14 januari 2000), *T. Strafr.* 2000, 223-226; L. FESTAETS, “De retroactieve toepassing van art. 5, tweede lid Sw.”, (noot onder Antwerpen 13 september 2001), *R.W.* 2001-2002, 1617-1620; H. VAN BAVEL, “Over de toepassing in de tijd van art. 5, tweede lid, van het Strafwetboek”, noot onder Cass. 3 oktober 2000, *A.J.T.* 2000-2001, 495-497; F. DERUYCK en B. SPRIET, “De (niet)-retroactiviteit van de decumulbepaling van art. 5, tweede lid, van het Strafwetboek: een gesloten discussie?”, (noot onder Cass. 3 oktober 2000), *T.*

obligations on public authorities are generally not sanctioned by criminal penalties. Second, most of the obligations on citizens are related to permit schemes (named permit, approval, consent) based on the principle that certain types of activities are prohibited without a permit. Thus, complying with the permit and its conditions cannot be sanctioned by criminal penalties irrespective whether the activity in itself is found against the standards of the legislation in stake. Misconduct of the public authority is not normally sanctioned by criminal penalties.

3.3.1. THE LEGISLATIVE FORM OF CRIMINAL PENALTIES IN DANISH ENVIRONMENTAL LEGISLATION

Technical, the Danish environmental legislation is expressed in fifty Acts adopted by Parliament supplemented by more than thousands Ministerial Regulations issued under the different Parliamentary Acts which all together establish an extreme enormous and complex system. For example under the Environmental Protection Act there are 134 Ministerial Regulations in force at the beginning of year 2002. Most of the Parliamentary Acts and Ministerial Regulation contain provisions on criminal sanctions for offences of the Act or Regulation. These provisions are normally to be found in the last part of the legislative act and refer specific to which of the other provisions of the Act or Regulation the criminal penalty apply. The structure of the criminal penalty provisions can be illustrated by the criminal provisions of the Environmental Protection Act translated into English.

Offences: The first penalty provision defines which offences are subject to criminal penalty in form of fines by referring to other provisions of the legislative Act. Because of the complexity, inconsistency and overlaps of the environmental legislation its not easy to identify the relevant criminal provision of an environmental offence - and mistakes are often done by the prosecutors. The problems can be illuminated by the Environmental protection Act section 110(1) containing fourteen listed offences - see box at next page.

Environmental protection Act section 110(1)(1)and(2):

“Unless heavier penalty is due under other legislation, the offenders of the following provisions are liable to a fine:

violation of section 19(1) or (2), sections 20, 20a(1) 22, 23, section 27(1) or (2), section 28(4), section 43, section 45(4), section 50(1), section 50a(1) and (2) and section 72a above,

failure to comply with orders or prohibitions under this Act, including orders to rectify illegal conditions or orders under section 26a,

failure to comply with requirements laid down under sections 9a and 10(4) above,

disregard of terms of a permit, a derogation or an approval issued under this Act,

Strafvr. 2000, 265 en L. DELBROUCK, “De werking in de tijd van artikel 5, tweede lid Sw.”, noot onder Cass. 3 oktober 2000, *R.W.* 2000-2001, 1235-1237.

failure to close tanks for mineral oil as required by ministerial Regulations or failure to comply with section 21,
establishment, commencement or operation of activities without approval under section 33,
failure to provide information or submit samples under section 72 or to give notification as specified in sections 21, 71 and 72a above,
failure to submit notification stipulated in rules laid down under section 7(1) above, and disregard of terms under such notification or failure to submit an application, cf. section 39 above,
preventing access by the authorities to properties, localities or means of transport in violation of section 87 above,
deliberate removal, garbling or damaging of marks set up in connection with activities and investigations under this Act,
violation of provisions laid down in regulations adopted by the European Communities on matters covered by this Act, cf. section 2 above,
submission of false or misleading information or failure to submit information under sections 53b, 55b or 56a above, or
failure to comply with the decision of the approval or the appeal authority concerning provision of security under section 39a above,
in conflict to section 41e(3), prevent conditions under section 34(2) or administrative orders under section 41 order are implemented and complied with”.

Serious offences: In most of the environmental legislation this is supplemented by a second provision which provide the legal basis for higher penalties in case of more serious offences. This can be illustrated by the Environmental Protection Act section 110(2):

Environmental protection Act section 110(2):

“The penalty may be detention or imprisonment for a maximum term of two years if the offender acted deliberately or by gross negligence if the infringement resulted in: [1] damage to the environment or risk of damage, or [2] achieved or intended economic advantages, including savings, for the offender or for others”.

Ministerial Regulations: To ensure not only the Parliamentary Act but also Ministerial Regulations and decisions can be enforced by criminal penalties, the Parliamentary Act include a provision on this.

Environmental protection Act section 110(3):

“Rules and regulations issued under sections 7-10, 12-16, section 17(3), section 18, section 19(5-7), section 20b(2), section 27(3), sections 35, 35a and 44, section 45(2 and 3), section 47(3), sections 48, 51, 53, 56(3), section 72a(3), section 89(2), and section 89a, may specify the penalty of fine. The penalty

may be detention or imprisonment for a maximum term of two years under the same conditions as those specified in subsection (2) above”.

Legal persons: To ensure that criminal penalties do not only apply for physical person but also apply for legal persons the Parliamentary Acts also include a provision on this.

Environmental protection Act section 110(4):

“Corporations and other legal persons may incur criminal liability under the rules of Part 5 of the Penal Code”.

Confiscation: To prevent economic benefits through infringement of environmental legislation, the environmental Parliamentary Acts often includes a provision on confiscation.

Environmental protection Act section 110(5):

“Where violations gave rise to profits, they are confiscated in accordance with Part 9 of the Penal Code, even if the violation did not result in damage to the environment or risk of damage. Where profits cannot be confiscated, this shall be considered when metering out a fine, including possible additional fines”.

Limitation: Under the Danish Penal Code section 93, the period of limitation of criminal liability is two years for offences which can not be penalized with more than two years in prison. Because of problems in discovering environmental crimes and time spending in the preparation of criminal proceedings the Danish Parliament in 1984 decided to enlarge the period of limitation of environmental crimes to five years for certain crimes under the Environmental Protection Act. The same period of limitation is now found for certain offences in the Contaminated Soils Act and the Act on Chemical Substances and Products. The period of limitation does not only apply to offences of this Act, but also to Ministerial Regulations issued under these provisions of the Acts.

However, regarding offences to legislation on nature protection, the period of limitation of criminal liability is still two years. According to the police, the limitation period make it almost impossible to prosecute for illegal collection of bird eggs.

Environmental protection Act section 110(7):

“The period of limitation of criminal liability is five years for violations etc. specified in nos 1, 2, 3, 4, and 5 of subsection (1) above, and for violation of rules laid down under section 19(5) above.”

Accepted fines: If the offence is only expected to be penalized by a fine and the defendant accepts the fine, the case can be settled without involving the court, if the relevant legislation so provide. Most of the environmental legislation includes a provision on this.

Environmental protection Act section 110a:

“(1) Where violation of rules or regulations laid down under section 53 above are estimated to result in a maximum penalty of fine, the Minister, or where the administration and collection is delegated to the central customs and tax authorities, the Minister of Taxation or anyone authorized by him, may notify to the party concerned that the matter can be decided without legal action, if that party pleads guilty of the offence and declares ready within a specified time limit, renewable at request, to pay a fine stipulated in such notification.

(2) As regards the notification referred to in subsection (1) above, the provisions on how to bring charges laid down in section 930, cf. section 926, of the Administration of Justice Act are equally applicable.

(3) Where the fine is paid in due time, or where the fine is collected or a sentence is served in lieu of the fine, further action will not be brought”.

Restrictions on citizens right: The right to apply for public licenced activities (e.g. operating a chemical plant, a transport company or a restaurant) and to use the license can be suspended by order of the court under the Penal Code section 79(2) - but the provision has never been used in environmental crime cases. The provision was i 1997 supplemented by a special provision on suspending the right to operate IPPC-plants in case of serious crimes - the Environmental Protection Act section 110b. However until now, the provision has not been used.

Environmental protection Act section 110 b:

“(1) The right to carry out activities under chapter 5 of this Act [IPPC-permits] can be revoked in case of conviction for criminal offence, where the defendant:

1. is convicted under section 196 of the Penal Code, or
2. has repeatedly or in otherwise aggravated circumstances:

[a] violated the provisions of this Act or of regulations issued under this Act, or
[b] failed to comply with order or prohibition notices served under this Act or under rules issued under this Act, or
[c] disregarded the terms of permits, derogations or approvals granted under this Act or under rules issued in pursuance of this Act.

(2) Under the same rules the right to be founder, manager or member of the board of a limited liability company, a company or association requiring public approval, or a corporate fund covered by Part 5 of the Act, can be revoked.

(3) The rules of section 79 subsections (3) and (4) of the Penal Code shall apply otherwise.”

The criminal sanctions are supplemented by a rather percula regime within the Environmental Protection Act which can be applied by the public authorities after the court has found a physical or legal person criminal liable - its something like an anticipated sanction. In case of fines of more than 10.000 Danish kr., the convicted can be subject to registration in a special register for “non-environmental-responsible-persons” under the Environmental Protection Act section 40a and section 40b. The registration does not effect the rights of the registered citizens. Instead the potential legal implication is related to the discretion of the inspecting authorities which are granted more administrative power in relation to IPPC-plants, if the registered person is director or in the board of IPPC-plants (see: Environmental Protection Act section 34(2) and section 41 d. However, the very complicated regime has never been used. Its not recommendable to kopi the regime.

The anticipated administrative sanction: Environmental protection Act section 34(2) & 41d

section 34(2) The approval authority may refuse to approve or stipulate special terms in the approval, including terms on provision of security under the rules of section 39a, where the applicant, members of the management or board of the applicant, or others with controlling interests in the operation of the enterprise, are covered by section 40a.

section 41d(1) The approval authority may revoke an approval or stipulate special terms in an existing approval, cf. section 39a, if:

- 1) the owner, members of the management or board of the owner, or others with controlling interests in the operation of the enterprise, fall under section 40a,
- 2) persons or enterprises etc. covered by section 40a, become owners or co-owners of the enterprise, or
- 3) persons covered by section 40a enter the board or management of an enterprise etc. operating approved activities.

Who are subjects to anticipated sanctions: Environmental protection Act section 40a & 40b

40a. Sections 34(2) and 41d are applied to the following:

1. persons disqualified from the right to operate polluting activities under section 110b of this Act or under section 79 of the Penal Code,
2. persons convicted under section 196 of the Penal Code,
3. persons and corporations convicted under section 110(2) of this Act or similar provisions in statutory orders issued under the Act, provided a prison sentence was pronounced or a fine of 10,000 Danish kr. or above was imposed, and provided a maximum of ten years have passed since the criminal offence was committed,
4. persons or enterprises etc. owing 100,000 Danish kr. or more to the public for self-regulatory measures taken by the supervision authority under sections 69 and 70 of this Act, provided the debt is

accepted or established in court. Moreover, the debt shall be due for payment and not be covered by unbreached respite arrangement or agreement on payment by instalments, and two reminders shall have been presented to the debtor.

40b(1) The Minister draws up a register of persons and enterprises etc. covered by section 40a. The register can be computerized as provided for by the Minister.

(2) In cases concluded by judgement and in cases decided finally by the prosecutor by acceptance of a fine, reporting to the register is made by the prosecutor. In cases of debt to the public for self-regulatory measures reporting to the register is made by the supervision authority involved.

(3) Before registration, notice is given to the person or the enterprise etc. concerned.”

3.3.2. TYPES OF CRIMINAL PENALTIES:

As indicated, Danish environmental legislation provides five types of criminal penalties: (1) fines; (2) imprisonment; (3) confiscation; (4) suspending of right to operate licenced activities; (5) anticipated administrative sanctions. As a semi-penalty sanction, the court is under the Court Procedural Act section 997(3) entitled to use penalty payment to force the defendant to bring the offence to an end. After a date fixed by the court, the convicted has to pay a fixed sum of money for each day, week or month the infringement continues. Finally, the local public authorities are obliged to at least respond to infringements of the environmental legislation. The obligation can be illustrated with the Environmental Protection Act section 68, which says:

“The inspecting authority shall ensure illegal activities are corrected, unless the matter is quite insignificant.”

The obligation of the inspecting authority to respond to illegal activities is not directly enforced by the police, but is subject to a rather unusual regime under the Act on Governing of the Local Councils. According to this Act the Minister of Interior has the inspecting authority to ensure the elected local and regional councils are acting within the limits of their discretions under the Law. If elected Members of the Local Council ignore this obligation in serious cases preventing enforcement of for example environmental legislation, these Members - but not the Council - can be subjects to criminal sanctions (fines) under the Act section 61c. Regarding environmental legislation, this provision has only been used in few cases. In one case, the Council has licensed a plant in conflict with the Physical Planning Act. The Supreme Court fixed the fine for the chairman of the Environmental Committee of the Council to 5000 Danish kr.¹⁵² In another case, the members of the Environmental Committee of another local Council had interfered and prevented enforcement against an industrial plant which discharges more pollutants than

permitted. For this passivity the Members of the Committee were penalized with a fine on 2000 Danish kr.¹⁵³

3.3.3. MAXIMUM AND MINIMUM CRIMINAL PENALTIES

Fines are the normal criminal penalties for infringement of Danish environmental legislation. The size of the fine is related to the economic benefit of the offence, the normal fine is between 1.000 and 10.000 D. kr. If the offence is done intentional or reckless and the offence also is either done for economic reasons or endanger the environment, the fine will be 25% of the economic benefit of the offence and the economic benefit will be confiscated.

In case of serious offences, the criminal sanction can include imprisonment. The Danish legislation always defines a maximum penalty regarding imprisonment. The maximum penalty under the Environmental Protection Act is two years imprisonment and the same goes for the Act on Chemical Substances and Products and for the Act on Protection of the Marine Environment - which are the relevant Danish legislation for most of the Directives and the Regulation covered by this study. In case of even more serious offences, the maximum criminal sanction is 4 years imprisonment under the Criminal Code section 196. However, imprisonment has only been used in few environmental crime cases - and none have go up to more than one year.

Regarding the Habitat Directive and Bird Directive, the relevant Danish legislation are the Nature Protection Act and the Act on Hunting and Wildlife Management. While the Act on Hunting and Wildlife Management has the same maximum criminal penalty as the Environmental Protection Act, the maximum criminal penalty under the Nature Protection Act is one years imprisonment.

Neither Danish environmental legislation nor the Danish Penal Code include a minimum criminal penalty - only a maximum regarding imprisonment - and the maximum penalty can not be exceeded by the court. When the offence is subject to sanctions under different legislation, the maximum penalty is the highest - and under special circumstances the penalty can even exceed the maximum, but this exception has never been used in environmental crime cases.¹⁵⁴ Re-offendings are a factor which is taken into account in fixing the penalty, but do not give the possibility of exceeding the maximum penalty of the offended legislation.

Under the Penal Code the court has the power to reduce the penalty in case of mitigating circumstances. In fact, under the Penal Code sections 84 and 85 its a duty of the court in fixing the penalty to take into

¹⁵² The case is reported in the weekly legal magazine, Ugeskrift for Retsvæsen, 1993, p. 462.

¹⁵³ Skive byrets dom of 17 June 1992, SS 101/1990.

account various subjective factors of the defendant and objective factors of the circumstances. In environmental crime cases, the most important factors for reducing the penalty are: (1) if the court finds the defendant has acted in excusable misunderstanding of the legislation; (2) if the court finds the offence is not intentional and only caused by negligence of the defendant; (3) if the defendant after the offence has restored the damage or brought the offence to an end by complying with the administrative order.

3.3.4. CRIMINAL SANCTIONS OF LEGAL PERSONS, ENTITIES AND PUBLIC AUTHORITIES

Legal persons: In most cases corporations and other legal persons including public authorities are criminal liable under Danish environmental legislation. The different Parliamentary Act on environment all include a provision on the criminal responsibility of legal persons in the same formulation found in the Environmental Protection Act section 110(4): “Corporations and other legal persons may incur criminal liability under the rules of Part 5 of the Penal Code”.

If the offence regards a Ministerial Regulation, legal persons are only criminal liable, if the Ministerial Regulation includes a provision similar to the Environmental Protection Act section 110(4). For example, in a criminal proceeding against a local council operating a sewage, it was obvious the discharged wastewater didn't comply with the limit values in the Ministerial Regulation no. 785 of 10 December 1987 on limit values for discharge of certain substances into the aquatic environment. However, because the Regulation at that time didn't include a provision on criminal liability of legal persons including, the local council was at the appeal court found not criminal liable for this offence.¹⁵⁵ The old Ministerial Regulation has been replaced by Ministerial Regulation no. 501 of 21 June 1999 on wastewater permits under the Environmental Protection Act, which in section 60(4) contain a provision on criminal liability of legal persons.

Legal entities fall within the scope of this provision. However, in practice, the prosecutor goes against the daughter-company - not the mother company or the legal entity as a whole. So until now, no legal entities have been found guilty in an environmental crime.

Cumulation: In environmental crime cases its often seen that the corporation as well as the manager of the corporation are convicted. The manager will normally be penalized by a fine (in few cases imprisonment in few month) and the corporation will be penalized by a fine and confiscation of the profit gained from the offence.

¹⁵⁴ Penal Code section 88.

¹⁵⁵ The case has been reported in the environmental case-law quarterly journal, *Miljøretlige afgørelser og domme* 1999, p. 410.

3.3.5. MOST IMPORTANT CRIMINAL OFFENCES OF ENVIRONMENTAL LAW

The overall most important criminal offences are violation of the Environmental Protection Act, in particular by illegal emission of pollutants into the water, by illegal waste treatment and by non-compliance with IPPC permits. The relevant penalty provisions are cited above under 3.1, the applicable penalties are described in 3.2 and the fixed penalties in 3.3.

3.4. Finland

Ari Ekroos

3.4.1. CRIMINAL SANCTIONS

3.4.1.1. General

3.4.1.1.1. Introduction

The Penal Code of Finland, which is originally from 1889, was thoroughly revised in 1995 (578/1995) relating to e.g. environmental crimes. The changes came into force in the beginning of September 1995. The main modification related to environmental crimes was that the criminal penalties, earlier enacted by a number of legislation concerning various sectors of the environment, were gathered into the Penal Code. After these changes the substantial environmental legislation only includes infraction type of offences. Before these changes every piece of environmental legislation included a whole range of criminal penalties, although the ranges varied a lot and some of the acts contained only one type of offence. The scale of sanctions was before the changes diverse and same type of offence might lead to a different sanction depending on the legislation. One of the main ideas was that the environmental legislation should include only fine penalties. Now the Penal Code contains the whole scale of criminal penalties.

In Finland, the criminal penalties are regulated only in Acts that have been passed the parliament. The degree or regulation level legislation does not include provisions of criminal penalties. Finland is not a federal state and the different provinces of Finland do not have legislative powers, except the Åland Island, which has quite wide autonomy (the legislation of the Åland Islands will be left aside in this article). The local municipalities have very limited legislative power and the municipal legislation does not include provisions of criminal penalties.

3.4.1.1.2. Corporate Criminal Liability

The Penal Code of Finland includes the special provisions concerning the corporate criminal liability. These provisions are in chapter 9 of the Penal Code. According to section 1 (chapter 9) of the Penal Code a corporation, a foundation or any other legal entity, in whose operations an offence has been committed, may on the request of the public prosecutor be sentenced to a corporate fine, if such sanction has been provided in this Penal Code. The provisions concerning corporate liability shall not be applied to offences committed in the exercise of public authority (paragraph 2, section 1, chapter 9). Section 9 (chapter 48, environmental offences) it is stated that the provisions on corporate criminal liability apply to the offences referred to in chapter 48 (environmental offences) of the Penal Code.

Section 2 (chapter 9) of the Penal Code contains the prerequisites for liability. A corporation may be sentenced to a corporate fine, if a person belonging to a statutory organ or other management thereof, or exercising actual power of decision therein, has been an accomplice to an offence or allowed the commission of the offence, or if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation. It should be noticed that it is not compulsory to sentence a corporate fine. A corporate fine may be imposed even if the offender cannot be identified or otherwise is not punished. However, no corporate fine shall be imposed for a complainant offence which is not reported by the injured party so as to have charges brought, unless there is a very important public interest for the bringing of charges. The offence shall be deemed to have been committed in the operations of a corporation, if the offender has acted on the behalf or for the benefit of the corporation, and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation (section 3, chapter 9). The corporation shall not have the right to compensation from the offender for the corporate fine that it has paid, unless such liability is based on separate provisions on corporations and foundations.

The Penal code also includes provisions concerning the amount of the fine and the basis for calculation of the corporate fine. A corporate fine shall be imposed as a lump sum and it shall be at least 850 € and at most 850.000 € (section 5, chapter 9). The amount of the corporate fine shall be determined in accordance with the nature and extent of the neglect and the participation of the management and the financial standing of the corporation. When evaluating the significance of the neglect and the participation of the management, the following shall be duly taken into account: the nature and seriousness of the offence; the status of the offender as a member of the organs of the corporation; whether the violation of the obligations of the corporation manifests heedlessness of the law or the orders of the authorities; as well as the grounds for sentencing provided elsewhere in the law. When evaluating the financial standing of the corporation, the following shall be duly taken into account: the size of the corporation; its solvency; as well as the earnings and the other essential indicators of the financial standing of the corporation.

It is notable that there is a bill proposal (governments proposal 53/2002) on the amendment of the Penal Code concerning the corporate criminal liability. According to the proposal, the corporate fine would, according to the principal rule, be obligatory in the future. The parliament will handle the proposal later in 2002 and the legislation will probably come into force in 2003.

3.4.1.2. Environmental Offences - Penal Code

3.4.1.2.1. Introduction

The chapter 48 of the Penal Code of Finland includes six different types of environmental offences, namely impairment of the environment (section 1), aggravated impairment of the environment (section 2), environmental infraction (section 3), negligent impairment of the environment (section 4), nature conservation offence (section 5) and building protection offence (section 6). These provisions - the essential elements of an offence - especially section 1 of chapter 48, are quite general, because they must cover a very wide range of actions. Although the penal provisions are formally included in the Penal Code, the material contents of the penal provisions appears often in the appropriate piece of environmental legislation whilst provisions of the Penal Code include several references to the material environmental legislation.

Chapter 48, which has 9 provisions in total, includes also a provision concerning liability (section 7), a provision on statute of limitations (section 8) and a reference provision concerning the corporate criminal liability. Section 7 clarifies the criminal liability, but not the liability for damages, because environmental liability damages is regulated in Finland on the Act on Environmental Damages, (19.8.1994/737). According to section 8, the minimum statute of limitations for an environmental offence other than environmental infraction shall be ten years. Section 9 is very important, because according to it the provisions on corporate criminal liability apply to the offences referred to in chapter 48. The specific provisions concerning the corporate criminal liability are in chapter 9 of the Penal Code. The general provisions on forfeiture in chapter 10 of the Penal Code are significant from the environmental penalties point of view (chapter 10 was totally renewed in 2001 (26.10.2001/875) and the new provisions came into force in the beginning of year 2002).

All environmental crimes are subject to the public prosecutor, who can bring charges for offences regardless the report of the possible injured party. The attempt of a deliberate offence is punishable only when related to offences referred to in section 1, paragraph 1, subsection 3 (import or export of waste and other substance (including products and goods harmful for the ozone layer)).

3.4.1.2.2. Punishments - General

The penal scale of the environmental criminal offences follows the systematics of the Penal Code, which was reformed in 1995. The scale follows the general division of offences: infraction (fine - max 6 months), “normal” (fine - max 2 years) and aggravate (4 months - 6 years). So, the maximum punishment is 6 years imprisonment (aggravated impairment of the environment) and the minimum is a fine. The basic scale for the “standard” crime is from a fine to imprisonment for at most 2 years (impairment of the environment). The scale for the infraction level offence is from fine to imprisonment for at most 6 months (environmental infraction). (See also annex 3.)

In practice, the most common punishment of the environmental crimes is a fine. The fines are calculated in so called day fines, which are based on the net income. So, in practice the fine scale is progressive according to the net salary of private persons. The minimum fine is, according to the Penal Code chapter 2a, section 1 one day fine and the maximum is 120. The amount of a day fine shall be set so, that it is reasonable in view to the solvency of the person fined. One sixtieth (1/60) of the average monthly income of the person fined, less the taxes and fees defined by a Decree (21.5.1999/609) and a fixed deduction for basic consumption (according to the Degree 1500 FIM, about 252 €), shall be deemed to be a reasonable amount of a day fine. The maintenance liability of the person fined may decrease the day fine and his/her assets may increase it. The primary basis for the calculation of the monthly income and the assessment of the assets of the person fined shall be his/her income and assets, as indicated in the most recent tax record. The minimum for a day fine is, according to the Degree, 6,73 € (40 FIM). (Examples: A. net income: 3000 €/month (no maintenance liability), day fine (calculation: $(3000-252)/60=$) 45,80 €; B. net income 2000 €/month (no maintenance liability), day fine 29,13 €; C. net income 1000 € (no maintenance liability), day fine 12,46 €. If the punishment is 20 day fines, A will have to pay 916 € and B 582 € and C 249 €.)

3.4.1.2.3. Impairment of the Environment (section 1, chapter 48, Penal Code)

The impairment of the environment has four different essential elements of an offence. The starting point is “the standard offence”, the section 1 of the chapter 48 of the Penal Code, which includes 3 different types of actions that lead to criminal liability. The general preconditions of the offence are related to the character and the result of an action. The character of the action should be deliberate or gross negligence. The act should be conducive to cause a danger of spoiling or littering of the environment or a health hazard.

At first, a person who introduces, emits or disposes into the environment an object, a substance, radiation or suchlike in defiance of law, a provision based on law, a general or a specific order, or without a permit

required by law or in defiance of permit conditions, commits an environmental offence, if the general preconditions are met. In general, this type of actions can be called “emission type” offences.

Secondly a person who produces, conveys, transports, uses, handles or stores a substance, products or goods, or operates a device, in defiance of a provision based on the Environmental Protection Act, in defiance of Regulation (EC) No 2037/2000 of the European Parliament and of the Council on substances that deplete the ozone layer, or in defiance of a provision referred to in section 60 of the Waste Act or a provision or a specific order or prohibition based on the Waste Act, or neglects his/her duty to organise waste management, as provided for in the Waste Act, commits to an impairment of the environment, if the general requirements are in hand. These types of actions can be called “production type” offences.

Thirdly a person who imports or exports waste or transports waste through the territory of Finland in defiance of the Waste Act or a provision or specific order based on the Waste Act or in the manner referred to in Article 26 of the Waste Shipments Regulation, as referred to in section 45 of the Waste Act, or imports or exports a substance, products or goods in defiance of a Decree based on the Environmental Protection Act or in defiance of the Regulation on substances depleting the ozone layer, makes oneself guilty of environmental offence presuming that the general requirements (deliberate or gross negligence and environmental harm) are met. These types of actions can be called “import/export type” of offences.

The punishment following from the offence of impairment of the environment will be a fine or to imprisonment for at most two years. Also an attempt of a deliberate offence of the “import/export” type of offence is punishable.

According to paragraph 3 of section 1 (chapter 48) of the Penal Code, also other type of acts may lead to environmental offences. These acts are not related to those directives and one regulation that are the subject of this article. According to paragraph 3, a sentence for impairment of the environment shall likewise be passed on a person who, deliberately or through gross negligence, in a manner other than those referred to in paragraph 1 (section 1, chapter 48), undertakes to alter the environment in defiance of the provisions of the Land Use and Building Act (5.2.1999/132), the Water Act (19.5.1961/264) or the Land Extraction Act (24.7.1981/555), or of the Drainage Rules of the Saimaa/Vuoksi Water System, or of provisions or general or specific orders based on the same, or of a plan or a permit, so that the act is conducive to causing an alteration comparably serious as the spoiling of the environment.

The provisions concerning more serious acts of offence - aggravated impairment of the environment - are in section 2 (chapter 48) of the Penal Code. The requirements for the aggravated impairment are: 1) the damage or danger of damage caused to the environment or health is especially serious, with regard to

the long duration, wide effect and other circumstances of the realised or imminent damage, or 2) the offence is committed in defiance of an order or a prohibition of an authority, as issued because of conduct referred to in section 1 (chapter 48). The offence should be aggravated also when assessed as a whole. The offender shall be sentenced for aggravated impairment of the environment to imprisonment for at least four months and at most six years.

The provisions concerning less serious acts of offence - environmental infraction - are in section 3 (chapter 48) of the Penal Code. At first, one will be sentenced for an environmental infraction to a fine or to imprisonment for at most six months, if the impairment of the environment, with regard to the insignificance of the danger or damage caused to the environment or health, or the other circumstances of the offence, is minor when assessed as a whole. Secondly, a sentence for an environmental infraction shall likewise be passed on a person who, deliberately or through gross negligence, defies orders based on section 64 of the Environmental Protection Act. Thirdly, a sentence for an environmental infraction shall likewise be passed on a person who neglects the duty to apply for an environmental permit, as referred to in sections 28 and 29 of the Environmental Protection Act, unless the act is punishable as impairment of the environment. Fourthly a sentence for an environmental infraction shall likewise be passed on a person who deliberately or through gross negligence violates section 5 of the Waterway Traffic Act or the prohibitions and restrictions issued on the basis of section 15 or 16 of the Waterway Traffic Act, so that the act is conducive to causing danger to the environment.

Usually, the act of criminal offence should - as mentioned above, be deliberate or gross negligence and a special provision is needed if the "common" negligence will cause criminal liability. The Penal Code of Finland has a special provision concerning this situation (section 4, chapter 48). A person who, through negligence not to be deemed gross, 1) affects the environment in a manner referred to in section 1, paragraph 1, subsection 1 or subsection 3, or 2) defies the Waste Act or the Environmental Protection Act or the provisions or orders based thereon in a manner referred to in section 1, paragraph 1, subsection 2 or 3, so that the damage or danger of damage caused to the environment or health is especially serious, with regard to the long duration, wide effect and other circumstances of the realised or imminent damage, shall be sentenced for negligent impairment of the environment to a fine or to imprisonment for at most one year.

The following directives and regulation are sanctioned through penal provisions concerning impairment of the environment:

Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils

Council Directive 75/442/EEC of 15 July 1975 on waste

Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community

Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges.

Council Directive 88/609/EEC of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants

Council Directive 91/689/EEC of 12 December 1991 on hazardous waste

Council Directive 96/82/EC of 9 December 1996 on the control of major accident hazards involving dangerous substances

Council Directive 99/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations

Regulation (EC) No 2037/2000 of the European Parliament and the Council of 29 June 2000 on substances that deplete the ozone layer.

3.4.1.2.4. Nature Conservation Offence (section 5, chapter 48)

The essential elements of an offence differ from general impairment of the environment and the nature conservation offence is therefore regulated separately in the Penal Code of Finland. The provision of nature conservation offence is primary and the provision at the Nature Conservation Act (section 58, see below) includes only provisions on infraction type of offence.

According to section 5 (chapter 48), a person who, deliberately or through gross negligence,

1) unlawfully destroys or impairs an area, an animal, a plant or another natural object protected by the Nature Conservation Act (1096/1996) or protected, restricted or set under an injunction based thereon, or
2) in defiance of the Nature Conservation Act or a provision or order based thereon, removes from its environment, imports or exports an object or transports an object through the territory of Finland, or sells, conveys, purchases or receives an object so removed, imported or exported, shall be sentenced for a nature conservation offence to a fine or to imprisonment for at most two years. A sentence for a nature conservation offence shall likewise be passed on a person who, deliberately or through gross negligence, uses a Finnish vessel in whaling or defies the import ban provided in section 2 or 2a of the Whale and Arctic Seal Protection Act or the protection provision or acquisition ban in section 3 of the same Act. Likewise shall a sentence for a nature conservation offence be passed on a person who, deliberately or through gross negligence, causes damage to organisms native to Antarctica, by violating a prohibition referred to in section 4(2) of the Act on the Conservation of Antarctic Nature (28/1998) or by acting without a permit or contrary to the conditions in a permit required in the Act, in a manner referred to in section 21(1), 23(1) or 25(1) of the Act. However, an act of minor significance with regard to nature conservation shall not be deemed a nature conservation offence. Also an attempt of a deliberate offence is punishable according to section 5 (paragraph 5).

The Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora is partly sanctioned through the criminal penalties of chapter 48, section 5 of the Penal Code.

In very rare cases also provisions concerning hunting offence (section 1, chapter 48a of Penal Code) can be applicable related to sanctions that are possible in violating directive in question. The maximum sanction according to section 1, chapter 48a of the Penal Code is 2 years imprisonment and minimum sanction is fine.

3.4.1.3. Environmental Legislation - Offences

3.4.1.3.1. Introduction

The most important pieces of environmental legislation in Finland are at least: Environmental Protection Act, Nature Conservation Act, Water Act, Waste Act and Land Use Planning and Construction Act. Certainly there is more legislation that can be classified as environmental, but the importance of that legislation is not that high as the legislation mentioned. In following only the legislation relevant from the point of view before mentioned directives and regulation will be explained and the examination is limited to penal provisions. Therefore only penal provisions in Environmental Protection Act, Nature Conservation Act, Waste Act and Chemicals Act will be handled.

3.4.1.3.2. Environmental Protection Act

The Environmental Protection Act includes only infraction type of penal provision that can lead only to fine punishment.

According to section 116 of the Environmental Protection Act, a person who deliberately or through gross negligence in a manner other than sanctioned in the Penal Code, 1) neglects submission of a notification as referred to the Act, 2) neglects his duty under orders issued by an authority pursuant to this Act or acts contrary to a notification submitted by him to an authority, 3) neglects his duty under Council Regulation (EC) No. 3093/94 on substances that deplete the ozone layer, or 4) violates a prohibition as referred to in sections 7-9 of the Act, a decree issued under chapter 2, neglects his duty under section 75, 76, 90, 103 or 104 of the Act or violates the terms of a Ministry decision issued under section 111 of the Act, shall be sentenced to a fine for violation of the Environmental Protection Act, unless a more severe punishment is provided for elsewhere in the law.

According to section 115 paragraph 2, the punishment for violating confidentiality as laid down in section 109 of the Act shall be imposed in accordance with chapter 38, section 1 or 2, of the Penal Code, unless the act is punishable under chapter 40, section 5, of the Penal Code or a more severe punishment is provided for the act elsewhere in the law. In addition a parking ticket in accordance with the Act on Parking Tickets (248/1970) can be ordered to be paid for violation of a prohibition on idling of motor vehicles.

As referred to above, the provisions concerning punishment for impairment of the environment in violation of the Environmental Protection Act or provisions or regulations issued under it are laid down in chapter 48, sections 1-4, of the Penal Code.

The following directives and regulation are sanctioned through penal provisions of section 116 of the Environmental Protection Act:

Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community

Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges.

Council Directive 88/609/EEC of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants

Council Directive 96/82/EC of 9 December 1996 on the control of major accident hazards involving dangerous substances

Council Directive 99/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations

Regulation (EC) No 2037/2000 of the European Parliament and the Council of 29 June 2000 on substances that deplete the ozone layer.

3.4.1.3.3. Waste Act

The Waste Act contains only an infraction type of penal provision, so called “waste infraction”, in section 60 (4.2.2000/91) of the Act and a provision of referral in section 61 (21.4.1995/712).

According to section 60 (paragraph 1, subsection 1) of the Waste Act, a person who deliberately or through gross negligence violates the prohibitions laid down in sections 5 (paragraph 1, subsections 1, 3 or 4), 6 (paragraph 1, subsections 6 or 8), 7 (paragraph 4), 17 (paragraph 1), 18, 19, 22 (paragraph 1), 40 (paragraph 3), 50, 55 (paragraphs 2 or 3), 57 or 73a of the Waste Act or the prohibitions or regulations given according to these provisions, shall be sentenced to a fine for a waste infraction, unless a more severe punishment is provided for elsewhere in the law. Likewise a person who neglects, deliberately or

through gross negligence, his duty under sections 7-9, 12, 14, 15 (paragraph 1), 22 (paragraphs 2 or 3), 51 (paragraphs 3 or 4), shall be sentenced. In addition, a person who violates, deliberately or through gross negligence, article 26 (subsection 1) of the Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, shall be sentenced to a fine. Likewise a person who deliberately or through gross negligence violates regulations given according to section 13 (paragraph 1) or neglects the his duty under sections 11 (paragraph 1, 20 (paragraphs 1 or 2), 21 or 49, shall be fined.

The provisions concerning punishment for impairment of the environment in violation of the Waste Act or provisions or regulations issued under it are laid down in chapter 48, sections 1-4, of the Penal Code.

The following directives and regulation are sanctioned through penal provisions of section 60 of the Waste Act:

- Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils
- Council Directive 75/442/EEC of 15 July 1975 on waste
- Council Directive 91/689/EEC of 12 December 1991 on hazardous waste.

3.4.1.3.4. Nature Conservation Act

The Nature Conservation Act includes two provisions related to criminal penalties. Section 58 contains an infraction type of provision and section 59 is a special provision on forfeiture.

According to section 58 of the Nature Conservation Act, a person who deliberately or through gross negligence 1) violates the prohibitions or regulations given according Act or buys or receives something that has been obtained violating provisions or regulations, or 2) obtains, transfers, buys or transports for sale purposes, imports or exports an animal or a plant or part or derivative of it contrary to sections 40 or 45 or 49 (paragraphs 2 and 4) of the Act, or 3) imports or export or transports via Finland an animal or a plant or part or derivative of it that is mentioned in the Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein without a permission or certificate or neglects the conditions of a permission or certificate, or 4) imports from a third country or exports to a third country an animal or a plant or part or derivative of it that is mentioned in the Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein via frontier crossing point that is not approved according to Nature Conservation Act or neglects the export declaration required according to the Regulation, or 5) buys, obtains for commercial purposes, introduces publicly in commercial purposes, uses in commercial profit purposes, sells, obtains for selling, offers or transports for selling an animal or a plant or part of it or derivative of it that is meant in the Council Regulation (EC) No 338/97 of 9 December 1996 on the

protection of species of wild fauna and flora by regulating trade therein contrary to article 8 of the Regulation, shall be sentenced to a fine for nature conservation infraction, unless the action is a nature conservation offence.

The provisions concerning punishment for impairment of the environment or nature conservation offence are laid down in chapter 48, section 5 of the Penal Code.

The Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora is partly sanctioned through the criminal penalties of section 58 of the Nature Conservation Act.

Also Hunting Act (28.6.1993/615) plays a small part in implementation of the directive in question. Therefore sanctions (fines) on sections 72, 73, 74, 75, 76 and 77 concerning hunting infractions may - in very rare cases – be applicable.

3.4.1.3.5. Chemicals Act

The Chemicals Act contains an infraction type of penal provision, so called “chemical infraction”, in section 52 of the Act and a provision of referral in section 52a. The provisions concerning punishment for impairment of the environment in violation of the Chemicals Act or provisions or regulations issued under it are laid down in chapter 48, sections 1-4, of the Penal Code

The Council Directive 96/82/EC of 9 December 1996 on the control of major accident hazards involving dangerous substances is partly sanctioned through the criminal penalties of section 52 of the Chemicals Act.

3.4.1.4. Forfeiture

The legislation concerning possibility to order the economic advantage that has been gained with the criminal act to the State, is very important also related to the environmental offences. General precondition for a declaration of forfeiture is according to section 1 (chapter 10) of the Penal Code that an act is an offence by an act of law.

According to section 2 (chapter 10) of the Penal Code, the proceeds of crime shall be ordered forfeit to the State. The forfeiture shall be ordered on the offender, a participant or a person on whose behalf or to whose advantage the offence has been committed, where these have benefited from the offence. If there is no evidence as to the amount of the proceeds of crime, or if such evidence is difficult to present, the

proceeds shall be estimated, taking into account the nature of the offence, the extent of the criminal activity and the other circumstances. Forfeiture of the proceeds of crime shall not be ordered in so far as they have been returned to the injured party, or in so far as they have been or will be ordered to be reimbursed to the injured party by way of compensation or restitution. If a claim for compensation or restitution has not been filed or if the claim has not been decided when the request for forfeiture is being decided, the forfeiture shall be ordered.

Forfeiture shall be ordered according to section 9 (chapter 10) of the Penal code on the request of a prosecutor or an official (normally police) referred to in section 3 of the Act on Penal Order Procedure (692/1993). Also an injured party may make a request for forfeiture when prosecuting a charge on his or her own in accordance with chapter 7 of the Criminal Procedure Act (689/1997). Section 8a (Chapter 1) of the Criminal Procedure Act contains provisions on the grounds on which a prosecutor may decline to make a request for forfeiture. Forfeiture need not be ordered, if: the proceeds of crime are, or the value of the object or property is, insignificant; the punishment of the offender is waived in accordance with chapter 3, section 5(3) or (4), or another corresponding provision; or the forfeiture would be unreasonable in view of the nature of the offence and the object or property, the financial standing of the defendant, and the other circumstances.

There are several cases related to forfeiture on environmental matters. The most interesting cases - at least from the number of forfeiture - are dealing with water pollution.

3.4.2. FINAL REMARKS

The significance of the penal provisions for environmental protection or nature conservation policy has been relatively small. This does not mean that the penal provisions are insignificant, but the role of these kind of repressive legislation is to be on the background and if everything goes according to legislation the penal provisions will not be applied. On the other hand penal provisions related to environmental offences are naturally very a important part of the system, because the control system necessarily need them as a “final safety net”. In general, the system has needed penal provisions in environmental matter quite seldom.

It has been discussed in Finland to use penal provisions more “effectively”. One reason for this has been a quite large gap between numbers of environmental offences reported to the police (annually about 250) and sentences from the courts (annually about 30). There has been also some opinions expressed that the public environmental administration should inform the police more often when they suspect a criminal offence. The resources of the police and administration as well is are quite limited and this can also explain that the number of criminal environmental offences has been so low. The resources of the

administration has been directed towards more progressive approach from the environmental point of view and only the most serious offences has been reported forward. It should also be noted that in Finland the forfeiture has been used quite successfully and the consequences of an offence are not limited to criminal sanctions (imprisonment and/or fine), but the forfeiture can lead to very severe economic sanction.

3.5.France

Marcel Bayle

3.5.1. CRIMINAL RESPONSABILITY OF NATURAL PERSONS

3.5.1.1. Classification of criminal offences

* Le droit français établit une distinction entre les crimes, les délits et les contraventions, d'où trois catégories de peines et des échelles de peines internes à chaque catégorie.

Inutile d'évoquer les peines criminelles : il n'existe pas d'infraction environnementale classée crime. On note au passage que ce mot, en français, a deux sens : il désigne soit la globalité des infractions et est alors synonyme du mot infraction, soit il désigne la catégorie la plus grave des infractions. C'est dans ce dernier sens que les juristes français utilisent le mot crime.

Les délits font encourir à leurs auteurs des peines dites correctionnelles car elles sont prononcées par le tribunal correctionnel. En droit de l'environnement, l'emprisonnement prévu ne dépasse pas deux ans en principe. Les délinquants, c'est à dire les auteurs de délits, encourrent aussi d'autres peines : amendes, jour-amendes, travail d'intérêt général, peines privatives ou restrictives de droits¹⁵⁶ et des peines complémentaires¹⁵⁷.

Les contraventions ne peuvent plus être sanctionnées par de l'emprisonnement depuis le code pénal entré en vigueur en 1994. La seule peine contraventionnelle est l'amende. Cinq classes de contraventions existent. Les amendes encourues sont de 38 euros, 150 euros, 450 euros, 750 euros et 1500 euros selon que la contravention commise est une contravention de première, deuxième, troisième, quatrième ou cinquième classe.

La récidive fait encourir des peines plus graves. La peine encourue est portée au double ; par exemple l'amende encourue est portée à 3000 euros pour les récidives de contraventions de cinquième classe.

¹⁵⁶ Art. 131-6 du code pénal

* Il existe de nombreuses infractions spécifiques en droit de l'environnement. Les principales ont été décrites avec les développements du point 2.

A noter qu'il n'existe pas, en droit français, une infraction générale de pollution, contrairement à la proposition pourtant judicieuse de certains auteurs¹⁵⁸. On peut le regretter car le rôle des agents de constatation et celui du juge seraient dans une certaine mesure simplifiés pour qualifier juridiquement les faits. La grande diversité des infractions environnementales pose des problèmes de connaissance des données techniques nécessaires pour qualifier l'infraction. Néanmoins, la casuistique du droit français a pour objet un respect plus affiné de l'intention du législateur dans le prononcé des peines. Une solution protectrice de l'environnement est instituée en droit pénal de l'eau : dès lors qu'il y a déversement de substances nuisibles dans le milieu aquatique, le délit de pollution de l'eau est constitué, comme nous l'avons noté plus haut. En revanche les autres types de pollutions ne sont constitutifs d'infractions que lorsque le constat de pollution est complété par la constatation d'autres faits ; par exemple le non respect d'une mise en demeure. A titre d'illustration, on peut se reporter à nos développements sur la pollution de l'air¹⁵⁹.

3.5.1.2. Criminal penalties in environmental law

* On l'a dit, des peines correctionnelles et des peines contraventionnelles existent en droit français de l'environnement. Il n'est pas possible d'énumérer toutes les infractions et peines tant les incriminations sont nombreuses. On a cité de nombreuses illustrations en étudiant la transposition des directives dans ce rapport. On peut aussi consulter les manuels de droit pénal de l'environnement, notamment celui de Dominique Guihal, « droit répressif de l'environnement »¹⁶⁰.

* Tout texte d'incrimination fixe la peine maximale encourue. Depuis le nouveau code pénal de 1994, il n'y a plus dans les textes français de fixation d'une peine minimale (sauf en matière criminelle, mais cela est sans objet en droit de l'environnement). C'est pourquoi la technique des circonstances atténuantes a disparu également. En clair, le juge est libre de prononcer une peine fort différente du maximum indiqué dans le texte d'incrimination. S'il retient la culpabilité du prévenu, il est certes obligé en principe de prononcer une peine ; mais celle-ci peut être réduite à un euro, amende symbolique, ou à un jour d'emprisonnement, le cas échéant avec sursis.

¹⁵⁷ Art. 131-10 du code pénal

¹⁵⁸ En particulier madame Delmas-Marty.

¹⁵⁹ Supra, p. 14.

¹⁶⁰ *Economica*, 1997.

Le juge peut aussi prononcer une dispense de peine¹⁶¹ si le reclassement du coupable est acquis, si le dommage est réparé, et si le trouble lié à l'infraction a cessé.

Ce régime juridique découle du principe de personnalisation de la peine¹⁶² par le juge. Ce dernier doit évaluer la personnalité du coupable, ses ressources et charges, et pondérer la peine en fonction de ces paramètres et en fonction des circonstances de fait constituant le contexte de l'infraction.

* Il n'existe donc pas de minimum que le juge ne pourrait pas réduire. Il existe certes des hypothèses de circonstances aggravantes modifiant la peine encourue¹⁶³ ; mais même dans ce cas, le juge conserve sa liberté de fixer la peine à un niveau très bas si cela lui paraît justifié par la personnalité de l'auteur.

* Le juge ne peut pas appliquer des peines supérieures au maximum prévu dans le texte d'incrimination. Seul le cas de récidive le lui permet car un autre maximum est alors prévu. Ainsi l'amende est-elle portée au double, ce qui constitue alors une nouvelle limite que le juge ne peut pas dépasser.

3.5.2. CRIMINAL RESPONSABILITY OF LEGAL PERSONS

* Le droit français a institué la responsabilité pénale des personnes morales depuis l'entrée en vigueur du nouveau code pénal en 1994. Les juristes français ont donc eu le temps de réfléchir à cette question et peuvent faire part du début de cette expérience institutionnelle. C'est d'autant plus important qu'une proposition de directive « relative à la protection de l'environnement par le droit pénal »¹⁶⁴ invite à la généralisation de ce type de responsabilité « dans toute la Communauté », sans toutefois l'imposer¹⁶⁵.

* Les principes que nous avons indiqués pour les personnes physiques restent valables pour les personnes morales. Les variantes sont connues : notamment, les amendes encourues par les personnes morales sont multipliées par cinq (par rapport à celles encourues par les personnes physiques). Ainsi est déterminé le maximum que le juge ne peut pas dépasser, sauf cas de récidive qui double la peine encourue. On remarque que cette fixation forfaitaire du montant de l'amende désavantage les très petites entreprises condamnées¹⁶⁶ et reste négligeable dans les grands groupes de sociétés. Les vertus préventives du droit pénal sont donc sacrifiées à l'égard des entreprises à forte capacité de pollution.

¹⁶¹ Art. 132-58 du code pénal.

¹⁶² Art. 132-24 du code pénal.

¹⁶³ Supra, note 7 dans les développements consacrés à la "directive Habitats".

¹⁶⁴ Présentée par la Commission le 15 mars 2001, JOCE 26 juin 2001.

¹⁶⁵ Dixième considérant de cette proposition de directive.

¹⁶⁶ Singulièrement dans le cas de sociétés unipersonnelles dans lesquelles l'associé unique est une personne physique.

La proposition de directive situe la généralisation de la responsabilité pénale des personnes morales dans le cadre d'un renforcement de « l'application effective de la législation communautaire sur la protection de l'environnement ». L'entrée en vigueur aurait lieu le 1^{er} septembre 2003.

Nous souhaitons ici apporter quelques critiques constructives à ce projet. Il nous semble en effet que, loin de renforcer la protection effective de l'environnement, la responsabilité pénale des personnes morales peut jouer en sens inverse. De nombreux auteurs français, sans le dire ainsi, prônent une sorte de *flexibilité de la protection environnementale* comme d'autres ont pu défendre la flexibilité de l'emploi. Leur doctrine reçoit un écho important en France et ailleurs.

Nous allons rappeler l'évolution récente de la loi française en matière d'appréciation de l'élément intentionnel. Elle s'explique en grande partie par ce jeu d'influence : le doute quant à la pertinence de la protection pénale de l'environnement y a joué un rôle non négligeable. Il semble que le personnel judiciaire français soit plus sensible au vœu de flexibilité qu'à celui de protection stricte de l'environnement.

Nous venons de faire émerger le concept de flexibilité de la protection juridique de la nature. Il mérite d'être illustré car, paradoxalement, on le rencontre peu, même sous la plume des auteurs les plus favorables à la dépénalisation. Dès l'institution de la responsabilité pénale des personnes morales, la chancellerie a invité les magistrats à orienter poursuites et sanctions en direction de ces êtres informels que sont les sociétés et associations, plutôt que de s'en prendre aux personnes physiques dirigeantes. Poids des habitudes et survie sociologique de la loi ancienne ont fait que cette orientation voulue par le pouvoir politique n'a pas été prise spontanément par les magistrats ; mais les nouvelles exigences du législateur en matière de preuve de l'élément moral des infractions reprochées aux personnes physiques dirigeantes vaincront les habitudes.

Sanctionner une personne morale n'a pas le même effet que punir un dirigeant, à titre personnel, notamment pour infraction environnementale. A cet égard aussi, les vertus préventives du droit pénal sont affaiblies. De plus, ce même exemple donne un élément de réponse à une question fondamentale en matière d'exécution des sanctions : *qui doit exécuter la sanction prononcée ?* Derrière l'évidence de la réponse « mécanique » (c'est bien sûr le condamné qui exécute *sa* peine) se cachent des intérêts vitaux pour la protection de la nature. L'institution de la responsabilité pénale des personnes morales a redistribué les cartes en matière de responsabilité personnelle des dirigeants. Or les règles contraignantes imposées pour prévenir les pollutions de toutes sortes, règles pénalement sanctionnées pour la plupart d'entre elles, tenaient et tiennent en souci de nombreux dirigeants de personnes morales. Cela est vrai aussi bien dans le secteur privé, l'entreprise privée étant assujettie à ces règles, que dans le secteur public où des élus ont été sanctionnés pour leur gestion de certains équipements collectifs polluants ou dangereux.

Les élus ont fait bruyamment entendre leur indignation. Dans le même temps, les chefs d'entreprises privées se montraient plus discrets, percevant qu'ils devraient profiter des conséquences juridiques de la

croisade entamée par les élus, sur fond de principe d'égalité. C'est ainsi que tous ont d'abord bénéficié de la possibilité donnée au juge de condamner seulement la personne morale auteur de l'infraction environnementale, même si l'article 121-2 du code pénal prévoyait, dès 1994, *in fine*, que ce type de responsabilité « n'exclut pas celle des dirigeants, auteurs ou complices des mêmes faits ». Puis vint la réforme de 1996¹⁶⁷. Le législateur voulut obliger les juges à raisonner *in concreto* pour établir des faits constitutifs d'imprudence ou de négligence. Les atteintes à l'environnement en font partie dans l'immense majorité des cas. Il est exceptionnel qu'une personne pollue volontairement la nature¹⁶⁸. Cette évolution législative n'a pas suffi à abriter ceux dont la situation constituait l'enjeu des débats. Une proposition de loi présentée par le Sénateur Fauchon fut alors adoptée pour qu'intervienne une nouvelle évolution du texte afin d'aboutir à une dépenalisation encore plus marquée. A nouveau l'élément moral de l'infraction d'imprudence ou de négligence fut redéfini et ce, remarque directement liée à notre propos, au bénéfice des seules personnes physiques. En effet, à partir de la loi du 10 juillet 2000, l'article 121-2 précité a été complété par une réserve, en référence à l'art 121-3 modifié : la superposition¹⁶⁹ de sanctions infligées d'une part à la personne morale et d'autre part au (aux) dirigeant n'est possible que « sous réserve des dispositions du quatrième alinéa de l'article 121-3 ». C'est à dire que désormais le droit pénal français ne retient *plus* la causalité indirecte pour des faits de négligence ou d'imprudence reprochés à des personnes physiques, sauf dans les cas de faute délibérée ou caractérisée de leur part. « En cas de faute ordinaire, la responsabilité pénale des personnes morales joue comme un moyen de substitution, afin de mieux tempérer celle des personnes physiques », constate un commentateur. Le même auteur remarque d'ailleurs que « les débats parlementaires sont en ce sens, qui témoignent de la volonté de compenser par la responsabilité des personnes morales ce qui n'est plus à la charge des personnes physiques »¹⁷⁰.

D'autres auteurs ont proposé plus encore : le système juridique de superposition des responsabilités est, de leur point de vue, archaïque ; ils suggèrent alors de supprimer la responsabilité pénale du dirigeant

¹⁶⁷ Parmi l'abondante littérature consacrée à l'application de cette réforme, v. notamment les notes de Y. Mayaud, en particulier à la Rev. sc. crim. 1997 et la chronique de N. Rontchevsky, « Les conditions de la mise en jeu de la responsabilité pénale des personnes morales à la lumière de la jurisprudence récente, RJDA 3/98, p. 175.

¹⁶⁸ Néanmoins, on rencontre quelques comportements volontairement nuisibles à l'environnement, par exemple les destructions volontaires par incendie (art.322-6, 322-11 et 322-15 c. pénal), notamment en zone boisée, ou l'usage de drogue ou appât en vue d'enivrer ou de détruire le poisson (art L.436-7 c. de l'environnement, délit puni de deux ans d'emprisonnement et de 4500 d'amende).

¹⁶⁹ On évitera de parler de « cumul » car cette expression, si elle peut être employée dans un sens purement illustratif, est juridiquement incorrecte : ce n'est pas exactement le même comportement qui est sanctionné deux fois. Il n'y a pas d'atteinte au principe « non bis in idem ». Pour une analyse de ce thème, v. Cl. Lombois, rapport de synthèse au colloque de Limoges, N° spécial des Petites Affiches, 6 octobre 1993 N° 120, p. 48 et s.

¹⁷⁰ Yves Mayaud, « Retour sur la culpabilité non intentionnelle en droit pénal... (à propos de la loi N° 2000-647 du 10 juillet 2000 », D. 2000, chr., p. 603.

personne physique¹⁷¹. Plaidant pour une sublimation juridique de la référence au corps humain en matière de responsabilité pénale, ils imagent leur propos : « C'est dans des systèmes de droit archaïque où cette sublimation juridique n'est pas opérée que l'on tranche la main qui a volé ou les pieds qui ont voulu s'enfuir. Or le code pénal superpose la responsabilité pénale de la personne morale et celle du dirigeant. C'est alors tout à la fois revendiquer la réalité abstraite de la personne morale et maintenir une responsabilité, désormais archaïque, de l'organe par la voix duquel elle exprime sa volonté. Voilà bien ce qui peut être l'objet de critique : le maintien de la responsabilité pénale du dirigeant, personne physique. » En somme, la modernité supposerait de supprimer la responsabilité pénale des personnes physiques dont l'intelligence ou la fortune leur a permis de constituer une personne morale (même unipersonnelle ?) pour gérer une activité polluante, dangereuse, ou plus généralement susceptible de commettre des infractions réputées involontaires.

Bien que nous vivions « une époque moderne », le législateur français de l'an 2000 n'est pas allé jusque là. Toutefois, il a subtilement instauré une dépenalisation au profit des personnes physiques, sans supprimer, en théorie, la possibilité de superposer la responsabilité personnelle du dirigeant à celle de la personne morale en cas de faute qualifiée du premier. Il a su sauvegarder les droits des parties civiles par dissociation de la faute pénale et de la faute civile ; ainsi le juge peut-il condamner civilement une personne à indemniser la victime de sa faute, alors même qu'il ne s'agirait pas d'une faute de nature à engager sa responsabilité pénale personnelle. Dès 1993, l'auteur du présent rapport avait exprimé ses réticences à l'égard de l'évolution juridique qui se profilait, et à l'égard de ses conséquences prévisibles sur la protection concrète de l'environnement. Nous écrivions, quitte à encourir le sarcasme des « modernes », « Les juristes de notre temps auraient une responsabilité historique s'ils ne percevaient pas l'absolue nécessité de lutter efficacement contre la délinquance écologique »¹⁷². Et plus loin nous ajoutons : « Mieux vaudrait renoncer à l'institution d'une responsabilité pénale des personnes morales, plutôt que d'en faire l'instrument d'une dissimulation aisée des *véritables responsabilités* »¹⁷³. Ce propos, auquel nous n'avons rien à retrancher à neuf ans de distance, reflète le conflit des logiques qui oppose la doctrine majoritaire et le courant environnementaliste. Une doctrine autorisée résume bien la pensée majoritaire en indiquant qu'il s'agissait de « rompre avec le système de *responsabilité fictive* qui pesait trop souvent » sur les dirigeants de personnes morales¹⁷⁴.

Tout se passe comme si un divin postulat indiquait qu'il n'est pas légitime de condamner pénalement un dirigeant de personne morale, lorsque le comportement de cette personne physique dirigeante n'a qu'un

¹⁷¹ En ce sens Marie-Anne Frison-Roche, « Une typologie des analogies dans le système juridique (« bonnes » et « mauvaises » analogies en droit) », RRJ 1995-4, p. 1043 et s., spécialement p. 1052.

¹⁷² Colloque de Limoges, N° spécial des Petites Affiches, 6 octobre 1993 N° 120, p. 43

¹⁷³ Ibid. N° spécial des Petites Affiches, 6 octobre 1993 N° 120, p. 44.

¹⁷⁴ Yves Mayaud, chronique précitée p. 608.

lien indirect, souvent situé dans le domaine de l'abstention ou de l'inertie, avec le fait directement générateur de pollution ou, plus généralement, de dommage pour autrui. Bien éloignée d'une parole d'évangile, n'est-ce pas plutôt une tyrannie des plus forts économiquement, qui trouvent des relais juridiques compréhensifs ?

Pour des entreprises à forte rentabilité, la menace des amendes, tel que leur montant est fixé en France, n'est pas crédible. Les juges n'osent pourtant pas aller plus loin et prononcer, par exemple, les confiscations des biens issus des procédés de fabrication illégalement polluants¹⁷⁵ ; en pareil cas en effet, aussitôt, les salariés des entreprises poursuivies manifestent pour protéger leur outil de travail ou leur production.

En l'état actuel des textes français, seule la condamnation des personnes physiques dirigeantes dissuade de récidiver, notamment s'il s'agit de condamnations à des peines d'emprisonnement avec sursis. La logique des managers intègre évidemment le caractère dissuasif ou dérisoire des sanctions encourues. Conflit des logiques aidant, certains soutiendront que « la chaîne du progrès »¹⁷⁶ légitime l'absolution de tel ou tel producteur en occultant ses frasques polluantes. L'utilitarisme du droit pénal de l'environnement se trouve en débat, une nouvelle fois, mais la réponse apportée par le législateur français concrétise les inquiétudes que nous avons exprimées en 1993. Chacun doit aujourd'hui réfléchir à l'évolution du droit communautaire, qui seule pourrait inverser le courant...

Ne conviendrait-il pas de modéliser les comportements illicites en matière environnementale, et ce à l'échelon communautaire ? En d'autres termes, ne faudrait-il pas faire apparaître le calcul d'optimisation auquel se livre l'infacteur, calcul qui intègre inévitablement le risque juridique, donc la vigueur des sanctions encourues par ceux-là même qui se livrent à ces calculs¹⁷⁷.

Laissera-t-on, à l'exemple du droit français, les personnes morales devenir des « responsables de substitution »¹⁷⁸ ? La fonction actuelle de la responsabilité pénale de ces êtres informels se traduit aujourd'hui en France par « un rôle subalterne de satisfaction des victimes »¹⁷⁹ sous couvert de l'affichage d'une amélioration, d'ailleurs douteuse, de leur indemnisation¹⁸⁰.

¹⁷⁵ Possibilité offerte par l'art. 131-39 alinéa 8 du code pénal.

¹⁷⁶ Chronique précitée au D. 2000, p. 603, 2^{ème} colonne.

¹⁷⁷ Comp. en matière de criminalité d'affaire, l'étude conduite par Pierre Kopp, « Criminalité d'affaire : les sanctions pénales sont-elles efficaces ? », Lettre d'information de la Mission de Recherche Droit et Justice, N°12, janvier 2002 p. 3, compte-rendu de L. Michel.

¹⁷⁸ Yves Mayaud, « La loi du 10 juillet 2000 tendant à préciser la définition des délits non intentionnels », Gaz. Pal., 31 juillet 2001, p.9.

¹⁷⁹ J.C. Planque, « Influence de la loi du 10 juillet 2000 sur la responsabilité pénale des personnes morales », D. 2002, J., 514, obs. sous Cass. Crim. 24 octobre 2000.

¹⁸⁰ La loi du 10 juillet 2001 a en effet dissocié la faute pénale et la faute civile. Plus précisément, en matière d'infractions non intentionnelles, l'art. 4-1 du code de procédure pénale précise que, même si une faute pénale n'est pas constituée, l'action civile, devant les juridictions civiles reste possible pour que les victimes obtiennent réparation du dommage involontairement causé, et cela sur le fondement de l'article 1383 du code civil. L'avantage recherché est que les juges n'aient pas à se sentir obligés de condamner pénalement pour donner une satisfaction civile aux victimes.

La généralisation de la responsabilité pénale des personnes morales aux Etats de l'Union européenne nous semblerait dangereuse pour la protection de l'environnement. Nous ne pensons pas qu'elle ait sa place dans une directive destinée à renforcer cette protection, sauf si elle imposait aux Etats membres de donner trois précisions¹⁸¹ dans leurs textes internes :

- Fixer les amendes encourues par les personnes morales à un certain pourcentage de leur chiffre d'affaire, par exemple 5%, comme en droit de la concurrence.
- Prévoir que les dirigeants personnes physiques continuent d'engager leur responsabilité pénale personnelle chaque fois que leur propre négligence ou imprudence a contribué, même indirectement, au dommage environnemental ou au dommage à des personnes¹⁸².
- Inviter les juges à vérifier qu'une personne morale au casier judiciaire vierge ou peu chargé n'est pas la reconstitution frauduleuse, directe ou indirecte, d'une précédente entité juridique dissoute, dont le casier judiciaire était chargé. En cas de constat de cette fraude, considérer que le casier judiciaire de la précédente entité est assimilable à celui de l'actuelle personne morale reconstituée.

3.6. Germany

Gerhard Grüner

3.6.1. GENERAL

For a better understanding of the European guidelines in the Criminal Law of the German Federal Republic a systematic sketch about the structure of the German Sanction Law under special consideration of the environment criminal law will be discussed first. In general the actual German Criminal Law distinguishes between the *Strafrecht* (criminal law) and the *Ordnungswidrigkeitenrecht* (administrative penal law). The criminal law only deals with criminal acts, which realization harms and in a special way disturb the social living-together. Therefore it is sanctioned with fines or imprisonment, according to § 46 I StGB is mostly determined by personal responsibility. In comparison the administrative penal law deals with facts, which realization presents a punishable breach of law without however affecting the society to the extent which would legitimate the appliance of the criminal law.¹⁸³

3.6.2. STRAFRECHT/ORDNUNGSWIDRIGKEITENRECHT

¹⁸¹ Ce qui serait difficile sur le fondement du premier pilier et ce qui est improbable sur le fondement du troisième pilier.

¹⁸² Il serait concevable de ne pas traiter pareillement les élus, gestionnaires de collectivités territoriales et faiblement rémunérés pour ce travail, et les chefs d'entreprises assumant alors une sorte de risque-profit, comme cela fut connu dans l'évolution du droit de la responsabilité civile. Cette réflexion est à approfondir, en particulier pour mesurer à quel point le principe d'égalité pourrait faire obstacle à cette dissociation.

¹⁸³ *Bohnert* Jura 1984, 11 ff.

The difference between Strafrecht- and Ordnungswidrigkeitenrecht lies mainly on the degree rather than on the nature of the fact.¹⁸⁴ The degree difference effects in particular the type of punishment charged. This gradual difference has an effect especially on the kind of punishments. Ordnungswidrigkeiten are solely sanctioned by non-criminal fines and not by imprisonments. Due to the limited personal principle of guilt according to the general Ordnungswidrigkeitenrecht the imposition of fines up to 500.000 EUR against companies are possible, if company-related duties are violated § 30 OWIG. From the side of criminal law only the representative can be sued of a legal entity under the valid right after § 14 StGB. The regulation is very complicated The courts do not use it frequently. In the German jurisprudence it is discussed whether the structure of the German criminal law must be changed in such a way that also punishments can be imposed against enterprises.¹⁸⁵

3.6.3. ENVIRONMENTAL CRIMINAL LAW

In order to regulate the environmental legislation the German legislation has passed specific rules of the *Strafgesetzbuch* in 1980, which sum up and expand the different, thus far scattered affairs of environmental criminal law.¹⁸⁶ By this the legislation intends to follow the general preventive guidelines aimed to strengthen the environmental consciousness in the German public.¹⁸⁷ Legally protected right, as already expressed in the headline, is the environment as a whole rather in its media (air, soil, water) and in its representation (animals and plants). However it is not as extensive as the Art. 20 a of the German constitution (Grundgesetz), which provides that the state, aware of its responsibility for future generations, should protect natural resources. In this meaning Art. 20 a is related to the extensive protection of natural live requirement.¹⁸⁸ This aim of constitution goes further than the rules of national criminal law.

Accordingly, the German Criminal Law distinguish between

- water pollution (§ 324 German Criminal Code)
- soil pollution (§ 324 a German Criminal Code)
- air pollution (§ 325 German Criminal Code).

Particularly sentencable are:

- disposition of emission when operating facilities or machines (§325 StGB)
- illegal handling of waste
- illegal operation of facilities - especially nuclear - which are seriously damaging to the environment (§ 327 StGB)

¹⁸⁴ *BVerfGE* 51, 60 (74).

¹⁸⁵ Generally Heine, *Strafrechtliche Haftung von Unternehmen* (1992).

¹⁸⁶ *Geulen ZRP* 1988, 323 ff.

¹⁸⁷ *Triffterer ZStW* 91, 310

¹⁸⁸ *Kloepfer, DVBl* 1996, 77.

- and the illegal handling of radioactive materials and other dangerous substances or products (§ 328 StGB)

The § 330, 330 a StGB contain increased degree of punishment for especially severe cases of criminal environmental acts particularly those that release poisonous air. An advancement of punishable actions in a phase of abstract risk is effected by § 329 StGB which criminalizes the illegal operation of installations in areas which either are especially protected by national law, or where weather conditions with a reduced air exchange rate, a strong increase of dangerous environmental impacts due to air pollution is predictable.

The punishing framework for criminal offences after §§ the 324-329 StGB is the imposition of fines or from imprisonments for deliberately (consciously and intentionally) committed criminal offences to five and/or three years. For negligently (care-adversely) committed criminal offences the legal punishing framework provides the imposition of fines or imprisonments to two and/or three years. §§ 330, 330 a codify punishing frameworks of at least one year and/or three years up to ten years imprisonment. Only §§ 330 III, 330 a III StGB contain a general clause, according to which the punishing threats in particularly heavy cases are again reduced if the particularly heavy cases fall in category of less heavy cases. The criminal sanctions is then between six months and five years and/or between a year and ten years imprisonment.

§ 49 I, II StGB forwards that the punishing framework of a criminal regulation for the case of being present special legal circumstances in mitigation of punishment changes in favor of the criminals. That gives the possibility to the court of appropriately deviating in a less heavy case from the legal punishing framework which in particular plays a role in connection with the “Deal in the criminal procedure”. In the environmental criminal law the legislator made no use of this.

In addition German criminal law possesses a whole variety of additional sanctions and measures. Contrary to the situation in Belgium, for instance, these are not incorporated in the separate environmental statutes, but can be found in the central criminal code and therefore apply generally, not only for environmental crimes. One well-known example is the prohibition on exercising a particular profession (Berufsverbot) which can be ordered under § 70 German Criminal Code. Another possibility is the confiscation of illegal gains (§ 73 German Criminal Code) and the seizure of certain property according to § 74 German Criminal Code. The possibility of seizure has, moreover, been enlarged for a conviction in certain environmental crimes. For instance § 330 c allows for a confiscation of a wider variety of objects, including, in principle, entire industrial plants.¹⁸⁹ However, in practice these collateral consequences are apparently rarely imposed. As far as the amount of the criminal fine is concerned, the provisions in the criminal code simply state that a fine can be imposed. The magnitude of the fine is

¹⁸⁹ Heine; IRPL 1994, 756,

determined according to § 40 and the following sections of the German Criminal Code. The fines takes into account the financial situation of the offender and is based on the so-called Tagessatzsystem (day rate system). Every sanction depends of the personal responsibility according to § 46 German Criminal Code.

A general feature of these facts is the *Verwaltungsakzessorität*; punishable as a principle is only the administratively unauthorized bringing in of environmental harmful materials, made under the breach of administrative obligations. Most of the criminal provisions are, however, still very much dependent upon administrative law.

Under § 324 I StGB only the ‘unauthorized’ water pollution is punishable (also under § 326 StGB); according to § 324 a StGB only those who dump substances into the soil under violation of verwaltungsrechtliche duties are to be punished (also under § 325 325a StGB); according to § 328 StGB the offensive handling of radioactive substances without the required permission or despite an actionable failure is punishable. The details of the *Verwaltungsakzessorität* are not finally settled in theory and practice. As a guideline it can be noted, that a legitimated administrative permission excludes the criminal law; further the official acceptance of actions to a certain extent excludes punishment, if documented in a legal permission in a comparable way, excludes the criminal law also.¹⁹⁰ Abusive exercise of a right is after § 330 d NR. 5 StGB ineffective. The principle of *Verwaltungsakzessorität* results in a close connection to the rights of the public administration, especially the right to prevent a potential danger (police regulations).

The German Legislation has up to now not yet introduced a comparable structure of concentrated environmental infringement rules in the *Ordnungswidrigkeitenrecht*. Actions of infringements under the environment law are however regulated individually in the administrative regulations. The severity of a sanction, meaning the possible amount of a given fee, is also specially regulated, § 17 I OWiG. For individual cases in connection with the realization of European directives the legislation reacts by enacting new sanction rules in the corresponding administrative regulations.

3.7. Greece

George Konstantinopoulos

3.7.1. THE GREEK NATIONAL CONTEXT

¹⁹⁰ Heine NJW 1990, 2425.

Greece has a total population of 10.8 million people according to the latest consensus (2001) and covers a total surface area of 132 000 km². The country has a coastline of 16 000 km and more than 3 500 islands. According to the National Statistical Agency, the working population of the country amounts to approximately 3.5 million people, 20% of whom are employed in the industrial sector. There are over 130 000 industrial installations most of which (about 99.5%) are small and medium size enterprises (SMEs) employing less than 50 people.

3.7.1.1. Administrative structure for environmental management

The regime in Greece is parliamentary democracy, according to the National Constitution of 1975. The Parliament is at the head of the hierarchy of public institutions and is at the same time the main and most important legislative instrument.

Greece has four levels of administration according to the Constitution and legislation. The first level is the National Government, which is responsible for planning the strategy for environmental protection, for proposing new legislation as well as for the implementation of the legislation. Most of the Ministries have some environmental competence. The first Ministry with the most significant environmental responsibilities is the Ministry of Environment, Physical Planning and Public Works. It was established in 1980 by the Law 1032/1980 under the title of Ministry of Environment, Regional Planning and Ekistics and merged in 1983 with the Ministry of Public works. The Minister is assisted by a deputy minister and two secretaries general - one for public works and one for the environment, physical planning and human settlements.

Other Ministries with environmental competence are the following: The Ministry of National Economy responsible for funding specific environmental projects. The Ministry of Agriculture, which is responsible for the protection of the forests and the preservation of national parks. The Ministry of Interior, which is responsible for the financing of projects concerning mainly municipal waste and wastewater through the Cohesion Fund. This Ministry has also competence on drinking water, solid waste and municipal waste treatment, as part of its supervision responsibilities over the local authorities. The Ministry of Development is responsible for the operation of the industry and it co- finances projects aiming at pollution prevention and abatement in the field of industrial activities. The Ministry of Health is competent for the protection of public health by monitoring the drinking water systems, the sewage systems, waste disposal and waste treatment. The Ministry of Labor has responsibilities in issues concerning worker protection, health and safety. Finally the Ministry of Merchant Navy is competent for marine pollution.

The second level of administration includes the 13 Regions, which are administrated by a Secretary General, who presides over the Regional Council. They have economic planning responsibilities, elaborate and implement the regional plan and play a coordinating role between the Prefectures that constitute the respective Region.

The next level of administration consists of the 54 Prefectures (nomoi). Each Prefecture is ruled by the Prefect and the Prefectoral Council. The Prefectures have certain responsibilities in the field of the conduction of environmental impact assessments and are also competent for the licensing of municipal solid waste disposal sites and for the control of compliance to the existing legislation.

The Local Authorities are the following level of administration. They consist of approximately 350 Municipalities and 6000 Communities. The term Municipality refers to cities with population greater than 10,000 people, while the term Community refers to a city with a population less than 10,000 people. They are governed by the Mayors and the Municipal Councils who are elected by the citizens every four years. The local Authorities are supervised by the competent Prefect, but they maintain their self-existence and can develop their initiative and free action. It is important to emphasize here that the Local Authorities have exclusive competence on issues concerning the local water and sewage systems, the roads, the parks and the local waste management systems.

3.7.1.2. Instruments for environmental policy in Greece

The environmental policy in Greece is realized by the use of three basic instruments. These are legislation, economic instruments and problem socialization.

3.7.1.2.1. Legislation

Legislation can be considered as the main policy instrument used in Greece for achieving environmental goals. The first and most significant legal provision related to the environment lies in the Constitution of 1975 and namely in Article 24 paragraph 1, which determines:

“The protection of the natural and cultural environment constitutes a duty of the state. The state is bound to adopt special preventive and repressive measures for the preservation of the environment.(...)”

According to this Article the protection of the natural environment constitutes both a positive and a negative obligation of the state. It is first of all a positive obligation in terms that the legislative bodies and the public authorities have to provide the concrete and integrated framework of rules of law that are necessary in order to achieve the protection of the environment and all of its elements. The negative

obligation that arises from the Article is that the public authorities and the judicial courts have the duty not to establish or to apply provisions which are contrary to this Article and in case of vacancy of a legal framework to apply the constitutional provision.(Siouti 1993)

Further to the constitutional provision, which was amended in 2001 during the constitutional reform, providing, at some extent for an even stricter environmental protection framework, a large number of Laws, Presidential Decrees and Ministerial Decisions are currently in force, containing provisions for various aspects of environmental protection. The principal laws which contain general rules about environmental protection are the following (G.Siouti-1993): Law 947/1972 , “About Residential Areas”, Law 360/1976 “About Regional Planning and the Environment”, Law 743/1977 “About Protection of the Marine Environment and Other Topics”, Law 998/1979 “ About the Protection of Forests and Forest Expanses”, Law 1032/1980, creating the Ministry of Regional Planning, Urban Development and the Environment, the Presidential Decree 1180/1981 “ About Various Subjects Relative to the Establishment and Function of Industries”, Law 1327/1983 “ About Measures for Exceptional Conditions of Pollution of the Environment and Other Relative Topics” and Law 1515/1985 “Regulative Plan and the Program of the Protection of the Environment in the Area of Athens”.

Special reference should be made to the Law 1650/1986 “ About the Protection of the Environment”. This Law establishes the basic framework for the development of the national environmental policy, while at the same time it provides concrete definitions (Article 2) of crucial terms such as “Environment”, “Pollution”, “Environmental Protection”, etc. It is a framework Law, the provisions of which are specialized and activated by a number (more than eighty up to the moment) of administrative acts (Presidential Decrees, Acts of the Ministerial Council, Ministerial and Joint Ministerial decisions).

The law includes:

the legal notion of environment and environmental protection (Articles 1-2). The environment is defined as the whole of natural and cultural factors and elements that are found in interaction and exert an influence upon the ecological balance, the quality of life, the health of people, the historical and cultural tradition and the aesthetic values. Environmental protection encompasses particularly (1) preservation of the character of the natural environment and of the relations that have been established among its elements as an ecological system; (2) protection of the natural environment from the harmful consequences of human activities and interventions; and (3) control of the development of natural resources and effort of achieving a balance between protection of the environment and economic development.

subjects about environmental protection with regard to projects and activities (Articles 3-6), i.e. the categories of projects and activities, according to the significance of their effects to the environment; the

procedure for Environmental Impact Assessments (EIAs) and the approval of environmental terms; the publicity for the EIAs.

subjects about environmental protection with regard to pollution (Articles 7-17), i.e. air quality and measures for the protection of the air; water quality and measures for the protection of the waters; soil quality and measures for the protection of the soil; waste management; protection against noise; hazardous substances; measures against radio activity.

subjects concerning protection of nature and landscape (Article 22), i.e. criteria for the characterization and protection principles for areas of special natural beauty, national parks, protected ecosystems; protection of the species and of the wild flora and fauna; economic measures.

subjects pertaining to special environmental protection zones and productive activity development zones (Articles 23-24).

competent environmental agencies (Articles 25-27), i.e. creation of a Single Environmental Agency and of groups for the control of environmental quality.

penal and administrative sanctions and civil liability (Articles 28-33).

3.7.1.2.2. Economic instruments

Incentives

The Ministry of the National Economy is responsible for the formulation, development and implementation of the national incentive strategy. This strategy is expressed mainly through the Law 1892/1990 as amended by Law 2234/1994 and Law 2324/1995. It includes provisions aiming directly and indirectly at the environmental protection in different ways. First of all the Law stimulates through economic incentives the installation of productive investments outside the boundaries of the Prefectures of Attica and Thessaloniki. These two regions face a very serious pollution problem due to the amount of industries operating there and due to the accumulation of population to the two biggest cities of Greece, Athens and Thessaloniki. The next incentive is given by awarding the investments installed within these prefectures, which do not pollute the environment. Also the Law stimulates the strengthening of environmental technology, including the use of renewable energy sources and energy conservation.

In general, the Development Incentives benefit financially the construction, expansion and modernization of plants by providing to companies (industries, hotels, etc.) the following awards:

- The State Grant
- Interest Rate Subsidy
- Tax Allowance

These development laws actually express the main choices of a Development Policy geared to the requirements of the Internal Market and the European Union in economic and social terms and therefore

they are being constantly adjusted to this altering reality. The use of this instrument has proven to be effective since it influences directly strategic company decisions by linking and depending the support of various investments to environmental issues.

Funding

- Another instrument used for the promotion of environmental policy is the funding of activities, directly or indirectly related to environmental protection. This funding is financed by the European Union and by the national economical resources. Many activities concerning the environment are financed within the Community Support Framework for Greece.
- infrastructure for the connection of Greece with the European Environmental Agency
- infrastructure for the confrontation of global environmental problems
- management of water resources, waste waters, solid wastes, hazardous wastes
- restoration of damaged areas
- protection of natural ecosystems
- spatial and urban planning
- risk assessment of large projects
- energy conservation in industry

The Community Support Framework also finances important projects indirectly related to environmental protection such as the modernization of the railway network and the construction of the Athens Underground Network.

In addition, other actions concerning the infrastructure of environmental protection are financed within the framework of the Cohesion Fund and other European programmes and initiatives. As far as the Cohesion Fund is concerned, it was created in 1993 aiming at the financial support of the four less developed countries of the EU, namely Spain, Portugal, Ireland and Greece. During the first year of its operation, the Cohesion Fund provided 280 million ECU to Greece. From the total amount given in 1993, 62% was spent for projects related to the environment and 38% for projects related to transportation. For the period 1993-1999, Greece got 16-20% of the total budget of the Cohesion Fund, namely approximately 15.5 billion ECU. Some of the projects already subsidised by the Cohesion Fund included research and construction of biological treatment plants, sanitary landfills and sewage systems.

Finally, reference should be made to the role of the European Investment Bank, which is an official E.U. institution, aiming at providing long term financing for sustainable investment plans which contribute to the realisation of the EU policy. In the field of the environment, the main target of the Bank is the support of investments which are directed towards the following aims:

- the improvement of the drinking water network

- the improvement of wastewater treatment
- the abatement of atmospheric pollution
- the promotion of environmental friendly technologies for toxic and solid waste treatment
- the promotion of environmental friendly technologies for industrial production
- the protection of the environment and the improvement of life quality in the urban areas

The total amount provided from the European Investment Bank for Greece in the field of the environment during the year 1995 was 114.8 million ECU.

3.7.1.2.3. Problem Socialization

Communicative instruments are used widely in Greece in order to promote the socialization of environmental policy objectives. Both public and private actors are involved in the implementation of this instrument.

First of all, the Government and the competent Ministries have organized a number of campaigns concerning the most crucial environmental issues. The information diffusion is mainly performed through TV spots, posters and leaflets attached to public utility bills. For example major campaigns were organized concerning vital issues such as recycling of packaging, protection of the forests against fire and reforestation, cleaning up the coasts and protecting the marine environment etc.

Secondly the Local Authorities contribute significantly to the socialization of environmental problems by organizing various programs such as seminars, speeches, reforestation actions, waste management information programs, etc.

Thirdly, the Non Governmental Organizations have taken initiative aiming at creating awareness to people concerning certain environmental problems. The efforts of the NGO's are considerable but not always effective, since the rate of participation to these organizations is relatively low, and therefore they do not manage to influence significantly public opinion.

Finally, the industrial sector has shown in many cases a proactive behavior, by organizing or sponsoring environmental activities or by communicating environmental messages to the consumers on the packaging of their product.

3.7.2. CRIMINAL PENALTIES IN GREECE

3.7.2.1. General criminal law in Greece

Criminal law in Greece is mainly based on the Greek Criminal Code. The Code has a General Part (art. 1-133), which includes all the general principles applicable to all crimes, and a Specific Part, which includes the prerequisites and definitions of each crime, and the criminal penalty imposed. Criminal law in Greece is a part of Public Law, since it determines the legal relationship between the criminal and the State, and not between the criminal and another person.

Greek criminal law comes quite close to the German criminal law. All basic principles applied in most EU countries are principles applicable also in Greece, for example:

- Nullum crimen nulla poena sine lege
- Nullum crimen nulla poena sine lege stricta
- Nullum crimen nulla poena sine praevia lege
- Nullum crimen nulla poena sine lege certa
- In dubio pro libertate
- In dubio pro analogia
- In dubio pro mitiore

The criminal penalties in Greece are:

- The death penalty (not implemented)
- Penalties concerning the restriction of freedom
- Penal fines

The usual penalties concerning the restriction of freedom are further divided in:

- imprisonment for life or imprisonment for 5 to 20 years, called “kathirxi”
- imprisonment for 10 days up to 5 years, called “filakisi”
- restriction from 1 day to one month, called “kratise”

The crimes are divided in categories according to the degree of seriousness, thus meaning according to the penalty provided for each crime. Through this criterion, the crimes are divided in three categories:

- Crimes for which the death penalty or imprisonment for life or imprisonment for 5 to 20 years is imposed (kathirxi), which are called “kakourgimata”
- Crimes for which imprisonment for ten days to 5 years is imposed (filakisi), which are called “plimmelimata”
- Crimes for which restriction of 1 day to one month is imposed (kratise), or a penal fine is imposed, which are called “ptesmata”

3.7.2.2. Criminal penalties according to framework environmental legislation

As already mentioned above, Law 1650/1986 constitutes the framework law for the protection of the environment in Greece. This Law determines penal, civil and administrative sanctions for activities that do not respect the protection of the environment.

The penal sanctions (Article 28) for individuals causing pollution of the environment start from three month imprisonment and reach up to ten years if the pollution has caused death or heavy injury to someone's health. If the polluter is a legal entity responsible is not only the person who caused the pollution incident, but also the legal entity.

More specifically, according to Article 28 of Law 1650/86, penal sanctions are provided for the persons who intentionally commit an offence against the environment.

Punishment by imprisonment of not less than three months nor more than two years and by a pecuniary fine is applicable to:

persons who cause pollution or degradation to the environment by an act or the Omission of an act contrary to the provisions of this law or the decrees and ministerial decisions issued upon its authority;

persons who perform an activity or business without the permission or approval required by this law or the decrees and ministerial decisions issued upon its authority, or who exceed the limits of the permission or approval which has been granted and this results in environmental damage.

If such offences are committed by negligence, imprisonment of not more than one year is imposed.

If the type and the quantity of the pollutants and the extent and the importance of the environmental damage have caused one of the following offences, then the penal sanctions become heavier:

- if danger of death or grievous bodily injury was created, imprisonment of not less than one year and a pecuniary fine are imposed;
- if grievous bodily injury or death has been caused, imprisonment of not more than ten years is imposed;
- if it is a foetus which suffers grievous bodily injury or death, imprisonment of not less than two years and a pecuniary fine are imposed;
- If environmental pollution or degradation is caused by the activity of a legal person, that legal person is also liable for the payment of the pecuniary fine.
- A particular legal obligation is imposed on the following persons, for compliance with the provisions pertaining to the protection of the environment:
 - the chairman of the board of directors of corporations;
 - the executive or managing directors of corporations;
 - the managers of limited liability companies;
 - the chairman of the board of directors and the supervising council of co-operatives;

- the persons who exercise the management or administration of all other legal entities of the private or public sector.
- For any act or omission of an act by a legal person, which is intentionally committed, these persons are punished as authors of the crime, independently of the penal responsibility of the natural persons and the civil liability of the legal entity, if by intention or negligence they have not fulfilled their particular legal obligation of compliance with the provisions pertaining to the protection of the environment.

The civil sanctions are provided in Article 29 of the Law by determining that all individuals or moral entities who cause pollution or any other environmental degradation are responsible for indemnification unless they prove that the damage caused was due to *force majeure*, or to someone else's intended activity.

As far as administrative sanctions are concerned, these are presented in Article 30 and reach the amount of ten million drachmas. The sanctions are imposed by Prefectoral Decision to natural or legal persons who cause any kind of pollution or environmental degradation. In cases of very severe pollution or degradation and especially when the type or the quantity of the pollutants can cause death or serious damage to human health or a severe ecological disaster, then the amount can reach 100 million drachmas (approx. 300.000 Euro). Further to the above, another administrative sanction is the temporary or final cessation of the operation of the industry or company that pollutes the environment.

3.8. Environmental criminal law in Ireland

Yvonne Scannell

There is no specific environmental criminal law in Ireland: instead the ordinary criminal law applies. Almost all of this is statute based. However there are emerging differences between environmental criminal law and ordinary criminal law which are not yet of general application but which indicate that a distinctive environmental criminal law may be emerging. These include:

the tendency to provide for large or even unlimited financial penalties,
 provision for corporate liability for environmental crimes,
 mandatory provision for the recovery of costs and expenses incurred by the prosecution,
 reversal of the burden of proof so that the prosecutor is no longer required to prove all the elements of the environmental offence.
 extensive powers of entry and inspection of premises where environmental offences may have occurred.

provision for the payment of fines to the prosecuting authority generally rather than to the General Exchequer which is normally the case.

provision for penalising non-compliance with regulatory notices.

provision of remedies to regulatory authorities or members of the public to obtain injunctive relief (which would be classified as a civil law rather than a criminal law remedy) from the courts when one of the main environmental criminal offences is being, has been or is likely to be committed.

conferring of express rights to prosecute on individuals and appropriate public authorities.

extensive powers to serve notices on suspected offenders requiring information on activities carried on by them.

Criminal responsibility of natural persons

Classification of criminal offences

Criminal offences are classified as those which can be prosecuted summarily and those which can be prosecuted on indictment. Some offences may be prosecuted summarily or on indictment at the discretion of the prosecutor. The difference between the two offences is that summary offences are mostly minor in nature and can be prosecuted in the lower courts i.e. the District Courts, whereas indictable offences are prosecuted in the Circuit Court or Central Criminal Court. A person prosecuted on indictment is entitled to trial by jury, a factor which deters prosecutors from prosecuting on indictment because of the time and expense that this will involve. The Constitution guarantees a right to trial by jury for major offences and this right could not be abolished by mere legislation. It is important to remember this when considering reforming environmental criminal law. Major offences are usually defined as those for which the penalties exceed about £1500-£2000 and/or six months imprisonment.

Apart from the common law offence of public nuisance, the specific criminal offences for environmental law are all provided for by statute or statutory instruments.

3.8.1. CRIMINAL PENALTIES IN ENVIRONMENTAL LAW

3.8.1.1. What type of criminal penalties exists for breaches of environmental law?

3.8.1.1.1. Fines and Imprisonment

The main penalties are fines and/or imprisonment. There is usually provision for penalising continuing offences. Sometimes provision is made for confiscation of illegally used vehicles. Anyone convicted of serious environmental crime may be precluded or disqualified from obtaining a waste licence..

3.8.1.1.2. Confiscation of vehicles and equipment

Sometimes provision is made for confiscation of vehicles and equipment used for illegal purposes. So, for example, under section 14 of the Waste Management Act 1996 authorised officers have powers to halt and board vehicles and to detain them under section 14(1).

Where proceedings are instituted for the prosecution on indictment of an offence under section 36, 39 or 51 of the WMA a judge of the District Court for the appropriate District Court district¹⁹¹ may, if the relevant local authority¹⁹² or the EPA applies, make an order requiring the defendant to enter into a bond of the judge's estimated value of any vehicle or equipment owned by the defendant that is alleged by the local authority or by the EPA to have been used in the commission of the offence.¹⁹³ If a defendant fails to comply with such an order, the judge can (without prejudice to any other means of enforcing the order) make an order authorising the local authority concerned or the EPA to detain the said vehicle or equipment pending determination of the proceedings for the offence concerned.¹⁹⁴

If a person is convicted on indictment of an offence under section 36, 39 or 51, the court can order the forfeiture to the relevant local authority¹⁹⁵ or the EPA of any vehicle or equipment owned by the defendant used in the commission of the offence or the amount of any bond entered into by the defendant in compliance with an order under s.61 (1) of the Act.¹⁹⁶ This forfeiture order cannot take effect until the ordinary time for instituting an appeal against the conviction or order concerned has expired or, where such an appeal is instituted, until it or any further appeal is finally decided or abandoned or the ordinary time for instituting any further appeal has expired.¹⁹⁷ A local authority or the EPA is entitled to deal with or (as appropriate) dispose of, as it thinks fit, any vehicle or equipment, or the amount of any bond, forfeited to it under s.61 (3) of the Act.¹⁹⁸

3.8.1.1.3. Refusals of authorisations to unfit persons

A licence under the Waste Management Act 1996, may only be given or transferred to a fit and proper person. Under section 40(7) and (8) a person is considered to be a 'fit and proper person' if:

neither the applicant nor any other relevant person¹⁹⁹ has been convicted of a prescribed offence²⁰⁰ unless the EPA waives this requirement. In the opinion of the EPA, the person is likely to be able to meet any

¹⁹¹ In the present context, 'appropriate District Court district' means the District Court district in which the offence concerned is alleged to have been committed or the defendant resides or carries on business.

¹⁹² Being the local authority in whose functional area the offence is alleged to have been committed. WMA,
¹⁹³ WMA, s.61 (1)(a).

¹⁹⁴ *Ibid.*, s.61 (2).

¹⁹⁵ Being a local authority in whose functional area the offence was committed. WMA.

¹⁹⁶ WMA, s.61 (3).

¹⁹⁷ *Ibid.*, s.61 (4). This subsection appears to be defective. It should refer to the time for instituting proceedings instead of which it states "time for instituted against" which is meaningless.

¹⁹⁸ *Ibid.*, s.61 (5).

¹⁹⁹ In this context, 'relevant person' means a person whom the EPA determines to be relevant for the purposes of considering the application concerned having regard to any criteria that the Minister by regulations provides it is to have regard to in determining such a matter: , s.40 (9). Under article 49 of the Licensing Regulations, where an applicant is a body corporate, the EPA in determining whether a person is a 'relevant person', must have regard to whether he is a director, manager, secretary or other similar officer of the body

financial commitments or liabilities which EPA considers will be entered into or incurred by him in carrying on the licenced activity in accordance with the terms thereof or in consequence of ceasing to carry on that activity. The Agency has a discretion to disregard convictions of a person or other relevant persons in a particular case if it considers it proper to do so.²⁰¹

Under section 35 of the Planning and Development Act 2000, a local authority or An Bord Pleanala may refuse to grant planning permission to any person who has substantially failed to comply with a previous planning permission if satisfied that there is a real and substantial risk that the person or company would not comply with the permission sought or any condition attached to it.

3.8.1.2. Does the law of Ireland provide a scheme of minimum and maximum possible penalties?

Yes. Offences are classified as those which can be prosecuted summarily (minor offences) and those which can be prosecuted on indictment (major offences). The minimum penalties are those which can be imposed for summary offences. These often vary according to when the legislation imposing them was enacted: recent legislation imposes larger fines and there is no systematic way of updating fines in older legislation. Maximum penalties for summary offences are typically an amount up to about £1500 and some smaller amount £200 for each day an offence continues after conviction and/or six months imprisonment. The maximum penalties can be unlimited or very large e.g. the Waste Management Act 1996 provides in section 10 that the maximum fine for an offence under that Act is £10,000,000 and £100,000 for continuing the offence after conviction and/or 10 years imprisonment or even unlimited fines under Sea Pollution legislation.

3.8.1.3. Does the law of the state studied provide a scheme of minimum penalties, which a judge cannot reduce?

There are no minimum penalties which a judge cannot reduce in Environmental statutes and the legislature is usually reluctant to prescribe such penalties in view of the doctrine of the separation of powers enshrined in the Constitution. Interfering with the discretion of the judiciary as to the fines which they may impose could be viewed as interference by the legislature with judicial powers. However, it is possible for the legislature to prescribe mandatory sentences of various kinds. It has not done this for environmental offences.

corporate or is otherwise in or likely to be in a position to direct or control the carrying on of the activity to which the relevant application relates.

²⁰⁰ Article 48 of the Licensing Regulations prescribes the following offences: ss.32 (1), 32(3) or 39(1), 14(6), 15(3), 34(1), 36(3), 45(4), 57(4) or 58(7) of the WMA. All the prescribed offences relate to waste.

²⁰¹ The Environmental Management Programme, which all licensees are in practice conditioned to prepare under waste licences, typically requires details of the qualifications of site personnel.

3.8.1.4. Does the law of the state studied confer upon a judge the power to reduce the penalty in the case of certain specific breaches (for example where there are mitigating circumstances)?

Yes. In general, legislation prescribes maximum penalties. Judges have a general discretion to reduce these in the light of extenuating circumstances. The factors which are to govern the exercise of this discretion are not generally prescribed by legislation. In practice, the following would be considered relevant in determining the appropriate penalty: the record of the polluter, whether the offence was deliberate or accidental, negligent or reckless etc., the economic circumstances of the polluter, the risk or extent of the environmental polluting arising from the act or omission constituting the offence, the attitude of the prosecuting authority. Occasionally legislation prescribes matters which are to be taken into account by a judge in exercising his or her discretion e.g. section 10(4) of the Waste Management Act 1996 states that in imposing a penalty under section 10(1) the court shall "in particular have regard to the risk or extent of environmental pollution arising from the act or omission constituting the offence."

3.8.1.5. Does the law of the state studied confer upon a judge the power to apply a penalty greater than the maximum in the case of certain specific breaches (for example where there has been re-offending)? Describe this.

In general yes. Most statutes provide for the imposition of further penalties for offences which are continued after the offender has been convicted of the original offence.

1) Criminal responsibility of legal persons

Does the law of the state studied provide for criminal responsibility of legal persons?

Yes. Most criminal offences in environmental law apply not only to individuals but also to companies and to directors and senior management of companies although there are minor differences in how corporate liabilities are imposed under various pieces of legislation. The actual person who committed the offence and the corporate entity and the directors/senior manager can be prosecuted although in practice, prosecutors tend to prosecute the company only. The same penalties apply to all except that the corporate entity cannot be imprisoned. There have only been two examples (to this writer's knowledge) ever of company directors being imprisoned for environmental offences. There is no jurisprudence on corporate liability for environmental offences in Ireland but Irish and English law on this subject are probably the substantially similar. The discussion of the main criminal offences below illustrates the nature of corporate liability for environmental crimes.

3.8.2. MAIN CRIMINAL OFFENCES

Note that under section 9 the Environmental Protection Agency Act 1992, the Environmental Protection Agency has powers to prosecute for non-compliance with EC legislation transposed into Irish law on most environmental matters (including all the air, water and waste offences above) where a holder of an integrated pollution control licence has violated the terms of the licence or where a person operates an activity which should be licensed without the required licence. The maximum penalties on conviction on indictment under section 9 of that Act are £10,000,000 and/or 10 years imprisonment and on summary conviction £1000 and/or 6 months imprisonment. Continuing an offence after conviction is punishable is £100,000 per day for each day the offence continues on conviction on indictment and £200 for each day the offence continues after summary conviction.

There are also specific criminal offences for e.g. water pollution and illegal waste disposal. It is particularly concerning these specific environmental offences that a lot of case law exists. These will therefore be dealt with in part 4.

3.9. Italy

3.9.1. INTRODUCTION TO ENVIRONMENTAL CRIMINAL LAW

3.9.1.1. The environmental legal system

The Italian Republic is a unitary state divided into various decentralized territorial entities, regions, provinces and municipalities.²⁰² The most important are the regions, which enjoy a certain degree of legislative, administrative and financial autonomy. The relationship between these relatively autonomous regions and the provinces and municipalities is regulated by Law 142/90 of 8 June 1990. As far as environmental law is concerned it is important to stress that these provinces and municipalities have administrative competences in areas such as the protection of the soil, the protection and care of the environment, the protection of flora and fauna and the protection of water.²⁰³

The starting point for the analysis of Italian environmental law is Law 349/86, which, among other things, established a Ministry of the Environment.²⁰⁴ ANPA, a national agency with the role of steering, rationalising and organising environmental monitoring in the various Italian regions, has been set up recently to ensure more effective controls. Before 1986 there were certainly laws aiming at the protection of the environment as well, but the institutional and political framework for integrated action was lacking. Law 349/86, which, among other things, lays down the min tasks of the Ministry of the Environment can be considered as a framework law. A typical feature of Italian environmental law is the

²⁰² This has been established in articles 114-133 of the Italian Constitution of 1948.

²⁰³ Further details can be found by Francioni/Montini, *Public Environmental Law in Italy*, pp. 242-244.

²⁰⁴ See Heine/Catenacci, *ZStW* (1989), p. 164.

so-called concerted decision procedure (*concertazione*) introduced by this law 349/86 and reproduced in later statutes and regulations. It was meant as a tool to strike the balance between the various interests at stake by involving other ministries in the decision-making process. But this concerted decision-making procedure makes it very complicated and difficult to pursue a consistent environmental policy.²⁰⁵ In practice it means that the powers of the Ministry of the Environment are usually shared with other ministries. It has also led to numerous, often uncoordinated, regulatory instruments which together form the body of Italian environmental law.²⁰⁶

Although Italy is still characterised as a unitary state the large powers awarded to the regions lead to complexities and uncertainties as to the division of competences.²⁰⁷ However, it is important to stress that Italian public environmental law is characterised by substitutive powers awarded to the state. This allows the federal state to intervene in certain areas even if they have been attributed to the exclusive legislative competence of the regions, whenever the region persistently takes no action. This substitution of powers clause is apparently often used by the state to justify intervention in environmental matters, even if they have been delegated to the regions.

A variety of administrative environmental laws has been enacted in Italy. In addition to the above-mentioned law 349/86 there is Law no. 615 of 13 July 1966 on air pollution (the so-called *Legge Anti-Smog*) and the Water Protection Act no. 310 of 10 May 1976 (*Legge Merli*).²⁰⁸

It is clear that in Italy the result of various actions taken by the minister on the basis of this general Law 349/86 is that Italian environmental law does not yet present itself in a very systematic way. In 1994 a special commission appointed by the Ministry of the Environment formulated a draft proposal for a framework law on environmental protection.²⁰⁹ This draft framework law which, among other matters, provides for principles of environmental protection in accordance with the European Environmental Principles and guidelines for environmental offences, does not seem likely to be approved in the near future.²¹⁰

In 1992 a draft for a new Criminal Code was published.²¹¹ It contains environmental offences (Art. 102 f. draft Criminal Code 1992). Among others, it is a crime to unlawfully emit substances which cause detrimental changes to the environment.

²⁰⁵ See Francioni/Montini, (supra 203), p. 248.

²⁰⁶ See Caravita, Italy, pp. 243 f.; Catenacci, Italien, pp. 277-285.

²⁰⁷ So Francioni/Montini, (supra note 203), pp. 252-256.

²⁰⁸ For details see Heine/Catenacci, ZStW (1989), pp. 165-170; Catenacci, (supra note 206), pp. 291-300.

²⁰⁹ Published in the Rivista Giuridica del' Ambiente (1994), p. 552.

²¹⁰ Francioni/Montini, (supra note 203), pp. 248-249.

²¹¹ Documenti giustizia 1992, nr. 3.

3.9.1.2. The legal instruments and environmental criminal law

The enforcement of environmental law remains mainly a responsibility of local authorities (provinces and municipalities). There is, however, equally a national agency for the protection of the environment which was created by Law 61/94 of 21 January 1994. This provides guidance and coordination towards the other agencies; indeed, Law 61/94 created regional agencies charged with the protection of the environment as well as with the task of providing for environmental monitoring and control on a regional basis.

As far as the instruments to enforce environmental law are concerned we must again refer to this important Law 249/86. Article 18 of this law introduced provisions concerning the reparation of environmental harm, although principally it only awards a right to claim compensation for damage to the environment as such to the state.²¹² Some rights to take action have also been awarded to environmental organisations, provided they have been formally approved according to strict conditions.

An important feature of Italian environmental law, as laid down in principle 18 of Law 349/86 is that it also permits the intervention of environmental organisations in the criminal courts. This was rather controversial because the former Italian Code on Criminal Procedure did not contain any provision allowing for such intervention. However, when the new Italian Criminal Procedure Code entered into force in 1989, article 91 expressly provided for a right for associations representing interests violated by a crime to intervene in criminal proceedings.²¹³

As far as the more punitive legal instruments are concerned, the Italian Penal Code would punish, for example, in article 439 anyone who was guilty of poisoning drinking water or in article 500 of the Penal Code anyone who has spread a dangerous disease which might be harmful to forests or agriculture. However, it is clear that the aim of these traditional provisions is not the protection of ecological values.²¹⁴

Furthermore Italian environmental criminal law mainly consists of criminal sanctions provided for in the various environmental statutes. In addition administrative sanctions may be applied as well.²¹⁵ However, administrative measures are the dominant tools in practice. Many Italian experts share the opinion that

²¹² Details of the Italian experience with environmental liability are provided by Pozzo, *European Review of Private Law* (1996), pp. 131-134.

²¹³ See generally on the rights of victims to claim damages or restitution in a civil action under Italian criminal procedure, Corso, *Italy*, p. 233.

²¹⁴ Heine/Catenacci, *ZStW* (1989), p. 163.

²¹⁵ For further details, see Caraccioli, *IRPL* (1994), pp. 1019-1020.

control over polluting activities is chiefly of an administrative nature and criminal law protection seems simply to be a possibility which is envisaged by the law and may represent an additional safeguard reinforcing the administrative protection of the environment.²¹⁶

It is important to stress that Law 349/86 does not contain criminal sanctions. The main goal of that particular law is to regulate compensation for environmental damage and the right of intervention by NGOs. Criminal sanctions can be found, however, at the end of other administrative environmental laws, e.g. concerning surface water pollution and solid waste. The criminal liability is hence strongly dependent upon prior administrative decisions.²¹⁷ This dependency upon administrative law was very clear in the early version of Law 615/1966 on air pollution: there was only criminal liability if the offender omitted to comply with the specific order of the mayor. Law 319/1976 on water protection makes an emission without a licence or in violation of the licence conditions a criminal act.²¹⁸

Corporate liability, as such, has up to now been considered as clashing with the constitutional principle of the personal character of criminal liability (Art. 27, § 1, Const.).²¹⁹

3.9.1.3. The sanctions

The criminal sanctions available for environmental offences are relatively low. The typical sanction is a prison sentence of two years in case of offences against such Acts as those on surface water pollution and air pollution. In the case of a violation of the emission values of the Surface Water Protection Act art. 21, al. 3 of Law no. 319/1976 even provides for a compulsory prison sentence. The fine is 500,000 lire to 10 million lire and in the most serious cases a prison sentence of 2 years applies. Originally, the sanction provided for in art. 20 of law 615/1966 on air pollution was the relatively low fine of 3 million lire, but Decree no. 203 of 24 May 1988 substantially increased the fine and provided for a prison sentence of up to 2 years.²²⁰ Decree 915/1982 on Solid Waste Disposal Sites provides in art. 25-29 for a series of sanctions in case of a violation: a fine of 5 million lire and a prison sentence between 6 months and 1 year.

Another example is provided by Decree no. 236 of 24 May 1988, implementing the Drinking Water Directive 80/778. Art. 21 of this Decree holds that anyone who violates the provisions of this decree and

²¹⁶ Caravita, (supra note 206)

²¹⁷ Heine/Catenacci, ZStW (1989), p. 164.

²¹⁸ Heine/Catenacci, ZStW (1989), pp. 167-169.

²¹⁹ See Caravita, (supra note 206), pp. 483 ff. with further discussion and proposals.

²²⁰ Heine/Catenacci, ZStW (1989), pp. 172-173; Catenacci, (supra note 206), pp. 326-329.

supplies drinking water which does not comply with the quality requirements may be punished by a fine up to 2 million lire or with imprisonment of a maximum of 3 years.²²¹

As far as additional sanctions and measures are concerned, environmental criminal law applies similar rules to other domains of special criminal law. The court may order that the offender may not become a director of a company any longer. Another possibility is that the offender may be prohibited from making an offer in a public tender. In certain cases a conviction may also be made public, for example, when emission standards have been violated. Finally, Italian environmental criminal law provided several possibilities to the court to order an offender to make good the harmful consequences of the crime.²²²

Actually, criminal sanctions do not play a prominent role. Control over polluting activities is mostly regarded as being of an administrative nature with flexible measures. Criminal law protection is “simply a possibility which is envisaged by the law and may represent an additional safeguard reinforcing the administrative protection of the environment”.²²³

3.10. Luxemburg

Fernand Entringer and Claude Veriter

3.10.1. GENERAL PENAL RULES

3.10.1.1. List of penal sanctions

Most of the time, the studied laws refer to the first book of the penal code and articles 130-1 to 132-1 of the criminal procedure code. These provisions enumerates the general rules like the kinds of penal sanctions, the power of the judge to reduce or aggravate the fixed sanctions, etc.

3.10.1.1.1. Prison and fine: principal sanctions

The penal code or a specific legislation fix for each offence a minimum and maximum scheme for prison and/or fine sanction into which the judge will choose the adequate penalty.

Luxembourg law has adopted the classification in three kinds of offences, in relation with the degree of seriousness:

²²¹ For details, see Faure, *The EC Directive on drinking water: institutional aspects*, pp. 39-87.

²²² Details have been provided by Heine/Catenacci, *ZStW* (1989), pp. 172.-175.

²²³ Caravita, (*supra* note 206), p. 244.

"*crimes*" are offences sentenced to a prison penalty of more than 5 years and /or to a fine sanction of minimum 251 €

"*délits*" are offences sentenced to a prison penalty from 8 days to 5 years and / or to a fine of 251€ minimum

"*contraventions*" are offences sentenced to a prison penalty of 8 days maximum and / or to a fine from 25€ to 250 €

Depending the scheme of sentence provided, the offence will be included in one of the three categories and will be submitted to the adequate procedure rules.

For instance:

murder, kidnapping, falsification of documents are *crimes*

theft, drugs detention are *délits*

road traffic offences are often *contraventions*

In environmental laws, the prison sanctions are sanctions applicable to *délits* but fine are more severe: they reach the *crime* level.

The judge is bound by the minimum and maximum scheme fixed for each and every breach of the law except in some limited circumstances that are analysed here under.

The Investigation Magistrate and the State Prosecutor have the power, on basis of article 130-1 to 132-1 of criminal procedure code, to transform a *crime* into a *délit*. The procedure to be followed will be the procedure applicable to *délits*, which is not so heavy as for crimes. The maximum sanction will be limited to the maximum applicable to *délits*.

3.10.1.1.2. Confiscation: principal or accessory sanction

In addition to the imprisonment and the fine, the penal code organises accessory confiscation: it is pronounced only in addition to a prison or fine penalty.

The "classical" accessory confiscation is organised by article 31 of the penal code.

Article 31 provides that confiscation may apply on:

- things that constitute the offence (for instance drugs, weapons, caught birds)
- things that helped for or things that are made for committing the offence, if they belong to the offender
- things produced by the offence or things bought with the product (money) of the offence (there is here no condition about the offender being the owner)

The judgment pronouncing confiscation also pronounce a fine for the case that confiscation cannot be executed.

As specific environmental laws refer to the first book of the penal code, article 31 is applicable in case of breach of the said laws.

Any specific law may provide a more specific kind of confiscation.

Confiscation, as accessory sanction, is often provided by environmental specific laws.

See for instance the law of 17 June 1994 on waste elimination and management; the law of 9 August 1971 fixing sanctions to be applied in case of violation of executive orders implementing European Directives and Regulation and taken in accordance to the said law (see: executive order of 29 June 2000 implementing the EC Regulation n° 2037/ 2000 and implementing the directive 83/513/EEC); the law of 11 August 1982 on nature and natural resources protection.

- Article 19 of the penal code provides that when a *délit* is sentenced to imprisonment, a confiscation may be pronounced as principle sanction (even if the court does not convict the offender to an imprisonment or to a fine).

As specific laws refer to first book of the penal code, the rule of article 19 is applicable, too.

- The conviction of confiscation described here above is optional and left to the appreciation of the judge.

Nevertheless, the law of 11 August 1982 on nature and natural resources protection organises a compulsory confiscation.

- Finally, the judge may order the restitution of things belonging to victims (generally seized by the police or administrative services during inquiry or control).

3.10.1.1.3. Public works

Article 22 of the penal code organises the public works as an alternative sanction (instead of prison or fine)

They are only applicable to offences that are not sentenced to a prison sanction superior to 6 months. It is required that the offensor agrees to replace the prison sanction by such works.

The environmental specific laws do not provide expressly the public works but most of them provide that the whole first book of the penal code applies. In practice, it has not been applied yet.

3.10.1.1.4. Revocation of certain rights

We will not analyse the revocation of civil and politic rights, which are not provided by the studied environmental law.

Nevertheless, it must be mentioned that an accessory sanction could take place in environmental law: the closing of a site.

This sanction is often provided in case of re-offence, notably in legislation about drugs.

There is no similar provision in environmental laws, except as administrative sanctions, submitted to other conditions and procedures than penal sanctions.

3.10.1.1.5. Publication of a judgement

Such a sanction is not provided in the studied environmental law.

3.10.1.1.6. Restoration

The prevention of pollution requires a strong sign towards polluters like fines of an important amount. But in a trial the stake will often be the restoration of the site. The restoration is always provided at the offensor's expenses.

In environment specific laws, the maximum delay to be given to the offensor to proceed to such restoration is one year beginning on the day the judgement enters into force.

The judges often give three months (or six months in case a building must disappear). When the case is relative to water pollution, the judge often grants one year.

The judge is habilitated to pronounce a (daily or monthly) penalty, in case of non completion of the restoration. The amount of the penalty is left to the sole appreciation of the judge. For instance, case law shows that the average amount is often 3.000 LUF to 5.000 LUF per day (75 € to 125 € per day) in case of offenses to law on waste.

In case the offensor does not execute the restoration, only the State Prosecutor or the civil party may require the enforcement of the judgement.

This sanction is considered by the courts as a civil sanction even if it is provided by penal legislation.

3.10.1.2. Rules of aggravation, non existence or reduction of prison and fine sanctions

3.10.1.2.1. The aggravating circumstances

- Some are personal: killing one's parents is sentenced more severally than killing anyone else. There is no personal aggravating circumstances in studied environmental laws.

- Some are material: committing a theft with violence or threat is more serious than a simple theft. Such aggravating circumstances are not provided by studied laws, but a gradation could be organised, for instance, by providing a difference whether a breach of the law causes a pollution or not.

A controversy exists about knowing if aggravating circumstances are applicable to the accomplices or are personal.

3.10.1.2.2. Re-offence

- It is a strictly personal characteristic that may aggravate a penalty.

When a definitive judgment of conviction already exists, the commission of a new offence in a certain delay after the first judgment may entail a more severe prison or fine penalty.

- A distinction must be made between:

-general re-offence: regarding *délits*: after having committed a *crime* or a *délit* sentenced to imprisonment of minimum one year, there is re-offence when the offensor commits any new *délit* in the 5 year period following the end of the execution of the first sanction. The court may apply an aggravate sanction.

- specific re-offence: the aggravation of the sanction will apply only if the same offence (or at least a similar offence provided by the same legislation) as the first time is committed again in a certain delay. It is organised by specific provisions.

Reading the studied laws, most of them organise the specific re-offence.

- The sanction provided by penal code or specific law may be doubled.

There is no obligation for the judge. He can choose the height of the penalty regarding the entire file and the personality of the offensor.

He can refuse an aggravation of the sanction and apply the minimum provided.

- Some more accessory (compulsory or not) penalties could be added in case of re-offence: publication of the judgment, closing of a site, etc.

The studied laws do not provide any accessory sanctions to be applied in case of re-offence.

3.10.1.2.3. No sanction or reduction of the sanction

- *Causes d'excuses absolutoires*: When it is expressly provided by a legal provision, the offensor, even if it is considered as guilty, will not receive any sanction because of an excuse:

- hierarchic obedience

- denunciation of accomplices

(applicable to a limited number of offences and in very restricted circumstances)

- *Causes d'excuses atténuantes*

Only when expressly provided by the penal code or a law, certain circumstances will interfere and the sanction must be reduced by the judge under the minimum scheme

For instance, the provocation made by the victim of "assault and battery".

As no *cause d'excuse* is organised by studied law, we will not develop this point further.

3.10.1.2.4. Suspended sentence, stay of execution with or without conditions (probation)

Rules are a little different whether they are applied to a *crime*, a *délit* or a *contravention*.

We will develop the rules applicable to *délits*.

These rules are provided by the criminal procedure code (code d'instruction criminelle) and not the penal code. The judges may apply them in any trial laid before them.

a. Suspended sentence (art. 621 Code d'instruction criminelle)

The offensor is declared guilty but no sentence is pronounced.

As the offensor is declared guilty, the penal court can take a decision on civil party indemnification.

The suspended sentence may be pronounced by almost all courts.

The suspension may already be pronounced at the end of the inquiry, in order to avoid a public trial.

Article 621 of the criminal procedure code fixes the following conditions to a suspension:

- a sentence of guilty
- the agreement of the offensor
- offensor has never been convicted of a prison sanction of more than 8 days
- the offense committed is punishable of a prison sanction not superior to 2 years.

The judgment must be motivated and must indicate the duration of the suspension (not shorter than one year and not longer than five years beginning on the day of the judgment).

The file will be kept in life during five years, and if a re-offence is committed by the offensor, the court will take back the file and pronounce two sanctions: one for the old offence and one for the new one.

The court still has the possibility to pronounce the restitution of things belonging to victims or a specific confiscation (see here above), even if they are accessory penalties.

b. Stay of execution (article 626 Code d'instruction criminelle)

Rules are a little different whether they are applied to a *crime*, a *délit* or a *contravention*.

We will develop the rules applicable to *délits*.

These rules are provided by the penal procedure code (code d'instruction criminelle) and not the penal code. The judges may apply them in any trial laid before them.

The stay of execution concerns only imprisonment and fine.

The offensor is declared guilty by the court and a sanction is pronounced, but its execution is suspended. Several conditions are to be fulfilled, according to article 626 of the code d'instruction criminelle.

- The offensor has never been convicted in contradictory trial of a prison sanction or a more severe sanction in Luxembourg.
- The offensor sincere regrets and it was an isolated "accident".

The offensor will have a proof period of 5 years beginning on the day of the judgement.

If no second offence is committed during these 5 years, the sanction may not be executed anymore and the accessory sanctions disappear.

If he commits another offence, the sentence pronounced in the first judgement will be executed and the offensor will be convicted to a second penalty in relation to the second offence.

Remark: The stay of execution may be pronounced for all or part of the global sanction.

c. Probation (article 629-1 Code d'instruction criminelle)

These rules are provided by the penal procedure code (code d'instruction criminelle) and not the penal code. The judges may apply them in any trial laid before them.

Any stay of execution or any suspension of a conviction may be submitted to conditions provided partially by the law and to be defined partially by the court.

The offensor will be followed by social and penal services. He may be required for instance to execute works or repair the damage done as a condition of the stay of execution or the suspension of sentence.

3.10.1.3. General comments on applied sanctions

In a general way, the environmental laws provide prison and fine sanction.

The confiscation and the restoration are accessory sanctions that are often provided, too.

The studied environmental laws refer to rules provided by the first book of the penal code.

The rules over stay of execution, suspension of the sentence and probation are applicable, too.

According to case law, a court has not yet convicted anyone to a prison sanction in case of a breach of an environmental law.

Seeing legislator politics, it gives more importance to fine sanctions than to imprisonment.

For instance, regarding nature protection, the prison sanction is fixed only at 8 days to 6 months but the fines are fixed from 250€ to 25.000 € and may raise, regarding law on waste, to 5 million LUF (124.000 €).

Anyway, it cannot be excluded that the person committing multiple re-offences would be convicted of a prison penalty.

In practice, most of the convictions are fine penalties and are sometimes completed with confiscation.

The restoration whose non completion entails daily penalties finds an important place in environmental areas and is provided by almost all environmental law (except law against atmosphere pollution).

3.10.1.4. Criminal responsibility of natural persons in Luxembourg

The "classical" offences provided by penal code require the commission of a material act and a fraudulent intention.

In addition, some of them require the existence of a damage (murder, assault and battery for instance).

Following the courts interpretation, the environmental breaches of law are material offences, which means that they do not require fraudulent intention nor the existence of a damage.

For instance, if an emission exceeds the limit value, there is a breach of the law even if the person using products ignores the excess and has not committed any damage (pollution).

Choosing material offences has been motivated by a more efficient repressive politics, as it is difficult for the State Prosecutor or the victim to prove a fault or a fraudulent intention. Moreover, it is an "incentive" to people and industrial firms to organise controls and take the decisions in favour of the environment.

3.10.1.5. Criminal responsibility of legal persons in Luxembourg

Luxembourg has not yet organised the penal responsibility of legal persons.

As many offences are committed in the context of the running of a company, the State Prosecutor sues the manager and the courts do not hesitate to convict him.

It was easy for the courts to pronounce penal convictions against the company directors (organ of the company) or the employees, as the environmental breaches of environmental law are only "material offences"(see here above): they exist even if the offensor has not fraudulent intention and has not committed any fault.

When defining the company director, the courts include the manager *de facto*, the one having real power of management in the company.

The courts of Luxembourg justify the conviction by the fact that the manager or director has the authority on men and machines constituting together the factory.

The case law is directly influenced by a decision of the French *Cour de cassation* (Cass., 28/2/1956, D. 1956, p. 391).

Regarding the French Cour de Cassation motivation (Cour d'appel de Luxembourg, 22/10/1990, n° 160/90, non published):

In principle the penal responsibility is personal and concerns acts committed personally.

In exceptional circumstances, the penal responsibility of a company director may appear from an illegal act (or omission) committed by another person.

It happens when legal provisions require from the company director to control personally smooth running of the firm.

He has to use his authority and to control directly the operations done by the employees, especially in factories submitted to public security and health rules.

In order to obtain a verdict of not guilty, a company director has invoked the delegation of power that he gave to an employee.

The court have followed this theory (Trib. d'arrondissement Luxembourg, 21/4/1992, n°518/92):

- When the company has a quite important size to prevent the director to control everything alone AND
- if the control of determined areas is delegated to an employee AND
- if this employee is qualified enough and has received enough authority to make controls and give orders AND
- the employee has accepted such delegation,

then there is a delegation of power inside the company and the employee may be convicted instead of the director.

What happens when a company director is personally convicted to a fine and the restoration of a site?

In practice, the fine and the restoration are paid by the company but it is not bound by the law.

Nor the State Prosecutor nor the Tax Services (in charge of receiving the fines) are ready to raise the question.

As a matter of fact, the personal penal responsibility of the companies director helps to keep the pressure on him in a view of environment respect.

At this moment in Luxembourg, we can find only legislation on financial sector and on insurances, which provide administrative fines against companies; these fine are not penal provisions but are at least punitive.

Nothing similar exists in environmental law.

The only penal sanction against legal persons can be found in article 203 of the law on commercial companies, which provide that the *Tribunal d'arrondissement* may pronounce (on request of the State Prosecutor) the winding-up of a company that leads activities against any penal legislation.

3.10.2. CIVIL LIABILITY IN LUXEMBOURG

- Article 1382 of the civil code provides the general principle of civil liability: any person who commits a fault causing a damage must repair it.

Article 1383 of the civil code adds that each person is liable for the damage that he caused by his act, or his negligence or carelessness.

The liability on these basis require three conditions to be fulfilled:

- a fault or a negligence or carelessness,
- a personal damage
- a causal link between both

The damage must be personal, which entails a difficulty about damage caused to nobody's things (air, water, etc).

If a damage is caused by several facts or faults, each and every person whose act has participate to cause the damage is jointly and severally liable.

The fault is a behaviour opposite to social norms.

Any breach of the law is a fault.

A penal offence is a civil fault.

The victim still has to prove the existence of a personal damage and above all that the fault is the cause of the damage.

- As the proof of a fault and of a causal link is sometimes difficult to establish, the first key for civil party will be article 1384, alinea 1 of the civil code.

The defected object entrusted to somebody's care, which cause a damage, entails the liability of the keeper.

The victim must prove that he has a personal damage, that there is a "defected object" (movable or immovable, moving or immobile), that this defected thing intervened in the realisation of the damage (which is an element easier to prove than causal link), and who is the keeper of the object.

Most of the time, the keeper is the owner of the thing.

But anybody acting as if he was the owner becomes the keeper (for instance a thief).

And anybody being entrusted of the survey of the object (a leaser, etc.) will be considered as a keeper.

What about abandoned things?

For instance, waste is left on the plot of land n°1 and it pollutes plot of land n° 1 and n°2. The plot n° 1 having waste on it constitutes a defected thing.

Even if the owner n° 1 ignores that waste was there, he is the keeper of the land, which is a defected thing. He is presumed having committed a fault. The defected thing being neighbour of the plot of land n°2, the "intervention" is also proved.

- The most frequently used legal basis of civil liability is article 544 of the civil code: the "neighbourhood troubles".

Article 544 is based on the principle of equality between two plots of land.

The equality is broken when one land suffers excessive charges or abnormal troubles from the other land.

The owner of the land suffering excessive nuisances is entitled to ask indemnification of the disbalance.

The judge appreciate *in concreto* if the charges are excessive.

The scale to appreciate excess is different in an industrial zone than in a residential area.

- We will not develop the cases of exoneration of liability, like case of distress, which are submitted to strict conditions.
- The law of 17 June 1994 on prevention and management of waste organises a specific civil liability (articles 29 to 34).

The law provides that a waste producer can be liable for any damage caused by such waste even if he does not commit any fault (art. 29).

In order to obtain compensation, the victim must only prove

- a damage and
- the existence of waste (and not a fault made by the waste producer) and
- a relation of correspondence between the damage and the presence of waste.

If the victim proves these three elements, the producer will be automatically condemned by the court to repair the damage, except if he proves that:

- the damage results from the victim fault (or someone the victim is responsible of) or
- the damage was caused by unforeseeable circumstances

(article 32)

If several persons are liable for the same damage, they are jointly and severally liable for the whole damage (article 31).

A special statute of limitation period is provided by article 33 of the law:

The victim is to sue the waste producer in a three year delay running from the day the victim discovers or should have discovered the damage and the producer(s) identity.

Yet, the victim still has the possibility to sue the producer or any other person on basis of any more favourable rule of liability, especially the rules provided by civil code (for instance, contractual liability or torts have a longer statute of limitation period but still require that the victim prove a fault made by the sued person) or any other specific liability rule.

- The victim is entitled to ask reparation in kind like the restoration of a site.

When it is not possible (an irreplaceable thing has been destroyed, the victim needs medical care), the victim will obtain reparation in equivalent.

3.11. Portugal

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3.11.1. ENVIRONMENTAL CRIMINAL LAW

The revision of Portugal's 1982 Criminal Code (CP) in 1995 introduced two purely ecological crimes into Portuguese legislation for the first time: the crimes of "damage to nature" (CP, Article 278) and of "pollution" (CP, Article 279).

Indeed, the environment appeared in Portugal as a good meriting autonomous legal-criminal protection following the revision of the Criminal Code in 1995. This is a perfectly valid statement not only in matter regarding the criminal offences envisaged in the Criminal Code but also in other legislation. Till then, environmental protection could only be achieved in a reflex or derived manner under traditional criminal legislation dealing with the defence of the life and health of individuals or under legislation dealing with the so-called "common danger crimes" Indeed, though the 1982 Criminal Code did not side-step the new demands that were being felt in the field of criminal thinking, the neo-criminal demands that could be seen were "restricted almost entirely to common danger crimes". This is, moreover, the classical legal configuration of incrimination that adequately responds to the "risks and dangers" of a society that is "increasingly technical and sophisticated in material instruments" in which "the person and the community itself are often aggrieved" (introduction to Decree-Law 400/52 of September 23, N° 23, which approved the CP). In any case, it is an indirect tutelage of the environment

that can be achieved by rendering “certain types of conduct that generate dangers that threaten in a particular manner the life and health of mankind” a criminal offence. The crime of Article 280 of the CP (“pollution with common danger”), which was also introduced in 1995, fits in with this reasoning, calling as it does for the incrimination of certain polluting activities (described in Article 279.1), that cause danger to life or to the physical integrity of others or to third-party property of considerable value.

Autonomous protection of the environment was the result of the community’s progressive awareness of the seriousness of the deterioration of the environment, driven by the growing industrialisation and sophistication of activities hazardous to ecological balance.

Furthermore, ecological concern was reflected in Portugal, in the Constitution, as a fundamental task of the State (Articles 9.d) and e) of the Constitution) and as a fundamental right of the citizens (Article 66 of the Constitution). The express enshrinement of the fundamental right to the environment within the scope of the wording of the Constitution legitimises the creation of criminal offences in the protection of the environment, which occurs when a relationship is established between the legal good protected by incrimination and by the legal-constitutional axiological order, provided that the criminal legislator considers the constitution of a criminal offence essential to real, effective protection of the legal good.

The inability to hold legal persons criminally responsible derives from Article 11 of the CP, which enshrines the *personal* nature of criminal responsibility in classical criminal law or justice. Thus, only individuals can be punished for crimes of damage to nature and pollution.

There is therefore a serious breach in the legal-criminal protections of the environment, all the more serious since one cannot doubt that the greatest source of environmental problems is currently to be found in companies.

Furthermore, the said Article 11 of the CP does not exclude the possibility of sundry legislation calling for the criminal responsibility of legal persons. To date, however, the Portuguese legislator has not yet made use of this faculty in the field of aggression against the environment.

Possible means of dealing with “corporate criminality” include punishment for “acting in the name of others” (article 12 of the CP), in keeping with which punishment may be meted out to “those voluntarily acting as the holder of office in the service of a legal person, company or *de facto* association”, or the punishment of natural persons (the manager of a company, for example), through the general participation criteria.

The crimes of “damage of nature” and “pollution” constitute crimes of qualified disobedience for causing environmental damage.

Thus, for there to be a crime of “damage of nature” the perpetrator must, from the outset, not have due regard for the legal or regulatory provisos protecting the fauna, the flora, the natural habitat and the underground resources; and in addition to this disobedience there must be ecological damage: elimination of examples of fauna or flora, destruction of a natural habitat or depletion of underground resources. The objective type of crime is, however, fulfilled only if the perpetrator acts “in a serious manner”. The legislator endeavoured to specify this concept through the provisos of Article 278.2, Indents a), b) and c): thus, those who cause “the disappearance or contribute decisively to the disappearance of one or more species of animal or vegetation from a given region” eliminate examples of fauna and flora; there is destruction of natural habitat if “the destruction leads to major losses in the populations of species of legally-protected wild fauna or flora”; there is depletion of underground resources when “an underground resource in an entire regional area is exhausted or its renovation prevented”.

One cannot but point out that the fact that an endeavour is made to specify the indeterminate concept of “in a serious manner” through other indeterminate concepts such as “contributing decisively to the disappearance”, “region” and “major losses”, is capable of creating huge difficulties in the application of the law by the courts.

For there to be a crime of pollution it is necessary that the pollution of the water, ground or air or the noise pollution occurs *to an inadmissible extent*. That is, under the terms of Article 279.3, “in the event that the nature or amount of the pollutant emissions or immissions are contrary to proscriptions or limitations imposed by the proper authority in keeping with legal or regulatory provisos and subject to the application of the penalties envisaged in this article”.

Thus, what is enshrined is a *relative* dependence of criminal law on administrative law. That is: mere administrative disobedience, without taking into account its ecological effects, does not constitute violation of criminal law; but rather, what is at stake is activities with harmful effects on the environment.

Within the various forms of such dependence, the legislator opted for *de jure* dependence – which will have very important dogmatic repercussions – on enshrining as a crime of pollution *disobedience of proscriptions or limitations imposed by the proper authority*, which can take the form of licences, authorisations, prohibitions, directives, etc.. This means that legal-criminal protection does not necessarily stop when there is a lack of action (a “communication”) by the proper administrative entity

or agent. Such dependence of criminal law on an administrative act specifically directed at the party in question provides obvious advantages of clarity and stipulation of the duties of the said party, though this is countered by the no less evident fact that criminal law must be adapted to the diffuse and not very clear practice of the proper administrative authorities. It is against this variation of accessoriness that the criticisms of criminal doctrine are largely directed, which accuse it of transferring to criminal law the “deficit of execution” of administrative law in matters of environmental protection, responsible therefore for opening up “areas free of punishment” in criminal intervention. Through the relative *de jure* accessoriness, under the terms enshrined by the Portuguese legislator – need for *proscriptions or limitations to constitute conduct harmful to the environment* issued in keeping with legal and regulatory provisos and subject to the application of the penalties envisaged in the respective criminalisation – it is more feasible to close the “areas free of punishment”.

The reduction of the scope of the criminal tutelage implicit herein must be viewed in the light of greater legal security and certainty “which, to a greater extent, may avoid the errors concerning prohibitions and lack of awareness of the offence”.

The fact is that the Administration must not be excused from its measures governing activities contrary to the environment through the production of the necessary legislation and that it must implement the law through proscriptions and limitations

It is on these grounds that the dominant doctrine of our days defends the *accessoriness* of criminal law with regard to administrative law. This is the price to pay for criminal law to be able to accompany the evolution of contemporary industrial societies. What must be said is that referral, under these terms, to administrative legislation often ensures a greater legal security than the options open to criminal law. In short: completing criminal legislation “left in blank” by administrative proscriptions is nothing but the necessary consequence of the mutable, changeable and specific nature itself of the law of the environment and, therefore, a *conditio sine qua non* of the efficacy – which, as we have said, is also a legitimising factor – of the protection of the environment through criminal legislation. The dependence of criminal law on administrative law will therefore constitute, for the foregoing reasons, not a loss but an advantage from a politico-criminal standpoint.

Having established the form and degree of the accessoriness of the crime of pollution, one must appraise the repercussions of this accessoriness from a dogmatic viewpoint.

As we have said, the content of the felony in the crime of pollution stems from violation of administrative proscriptions and limitations, in the sense that violation of the *limitation* contained therein: it is a crime of disobedience *that implies damage to the environment*. Therefore, faced with

behaviour based on an unlawful administrative act, there is no purpose in ascertaining, for the purpose of possible punishment of such behaviour, the validity of the act at administrative level. What must be ascertained is whether the act is unlawful because it is not in accordance with the legal or regulatory provisos concerning the limitation of the prohibited pollution. Thus, for example, in those cases in which the perpetrator acted under an authorisation or licence that did not have due regard for the limitation in question, obtained by means of bribery, coercion or fraud, the perpetrator will be punished not because he/she acted under an unlawful authorisation, null in the light of administrative law, but only because he/she acted under an unlawful authorisation obtained, by the said means, for the purpose of polluting to an extent prohibited under the terms of the administrative provisos. Let us consider a “case of corruption of the administration by an individual with the intention (successful) of securing authorisation to act in a manner harmful to the environment and prohibited by administrative legislation. If in this case the perpetrator were to be punishable merely for the crime of bribery it would be a case of unwarranted benefit to the transgressor and no less an unwarranted putting of the environmental value between parentheses”. Now the perpetrator would not be punished if he/she obtained the authorisation by the same means but without the said intention, but rather to obtain it more quickly than stipulated by law. In this case, we would be faced with a “lawful” authorisation with regard to the matter of concern in the committing of a crime of pollution, that is, with regard to the limitation of prohibited pollution, which the said authorisation does not disregard since it is in accordance with legal or regulatory provisos thereon.

And this same reasoning warrants non-punishment of an act by an individual in respect of which the Administration did not impose an order or prohibition that was, nevertheless, imposed by legal or regulatory provisos. What happens, strictly speaking, is that the perpetrator acting in an area free of administrative regulation commits no crime of pollution.

And, in turn, it also justifies the fact that the showing of *tolerance* by the administrative authorities with regard to an unlawful polluting act – even in the case of a *tacit act of authorisation* in administrative terms – does not mean that punishment of the act in question is set aside. There may be a problem in those cases in which the individual does not apply for authorisation or a licence that he/she ought to have requested and the administration takes no steps to issue an order or a prohibition called for by administrative legislation. Since the perpetrator should not be punished, as we have said, the apparent inequality in relation to those cases in which the perpetrator requested but was refused authorisation or a licence – the perpetrator being punished if he/she acts – the situation can only be overcome if we consider that the punishment of the functionary is justified for omission of acts that would have prevented the pollution, since the case is one in which the functionary is in a position of guarantor, in that, according to the law, he/she is charged with the *duty* of preventing aggression of the environment.

A final consideration. It must be pointed out here that certain doctrine has raised the problem in Portugal of the unconstitutionality of this legislation – blank criminal legislation – for violation of the principle of legality in its material (disregard for the determinability of the legal type of the crime) and formal (disregard for the principle of the reserve of the law since it is not the Assembly of the Republic or the Government, with adequate authorisation, that stipulates the content of the criminal legislation in question) aspects.

For the crime of “damage to nature” and of “pollution” prison sentences of up to 3 years or fines of up to 600 days are called for, provided the crimes are committed with intent; and or up to 1 year or 360 days in the event of being committed through negligence. In either case the minimum prison sentence is 1 month and the minimum fine 10 days (cf. Articles 41.1 and 47.1 CP).

There is no punishment for *attempted* crimes (cf. Article 23.1 CP). In this regard the *general rules* are applicable of special attenuation of the penalty (Articles 72 and 73 CP) and of aggravation of the penalty in the event of repeat offence (Articles 75 and 76 CP).

It should be noted that the legislator was somewhat timid in the punishment of these crimes. This is clear to see when compared to the punishment for the crime of “pollution with common danger” (article 280), in which what is at stake is the direct protection of classical legal goods: life, physical integrity or property. In this case, should the pollution and creation of danger to such goods be with intent, the perpetrator is punished with a prison sentence of 1 to 8 years; if the pollution was with intent and the creation of danger was through negligence the perpetrator is punished by a prison sentence of up to 5 years (with a minimum of 1 month). In this case there is no alternative of a fine and the prison sentence is far more severe than in the case of purely ecological crimes.

We believe that it is becoming increasingly less reasonable to question the legitimacy of criminal intervention in the protection of the environment.

It is not a matter, henceforth, of advocating the intervention, right from the outset, of criminal law to solve “all the problems” of the environment. That would be to forget the *fragmentary and omissive* (or subsidiary) nature of criminal law.

Thus, a first aspect that we should like to underscore is that, in the law of the environment, one should start by making use of the *non-judicial* means of economic and social policy and of general policy and of the *non-criminal judicial* means, particularly and in a very special manner, the administrative-judicial means.

Moreover, the role of administrative law is recognised in the judicial-legislative discipline of the environment. In addition to the *ultima ratio* nature of criminal law, several valid reasons come together in favour of the “proper space” that this branch of law has earned for itself: in the first place, the fact that administrative law is the law that is closest and more closely linked to the more dangerous perpetrators of pollution; then, the administrative legislation, for its ease of issuing legislation, for its proximity to technological process and progress and for the attention that it must give to them, has a flexibility and a plasticity that, being proper and adequate to this branch of law, could be neither possible nor desirable in criminal law. Furthermore, the fundamentally preventive nature of environmental law can only be pursued using the means of administrative law. It is at this level, therefore, that aggression of the environment should be punished. The contribution made by administrative law in the field of punishment is well known, through the intervention of a law “of repressive nature in the services of the efficacy of the Administration itself”: the misdemeanour law. Nor can one doubt the dissuasive effect of these sanctions when one considers that, in addition to the fine, there is a whole range of accessory sanctions that can be employed, which, in certain cases, are particularly severe: interdiction of the exercise of professions or activities; deprivation of the right to subsidies or grants; revocation of licences or authorisations linked to the exercise of the respective activity; apprehension and forfeiture of the objects in use at the time of the inspection; loss of tax, benefits, credit and financing, etc.. It should also be remembered that it is not difficult for administrative sanction law does to accept the responsibility of legal persons and their consequent punishment.

The second aspect that I wish to mention has to do with the fact that recognition that offences against the environment considered by the legislator as “already” warranting this type of protection (criminal) should be reserved to criminal law. The truth is that the same postulations of the “risk society” that demand, on the one hand, that conduct harmful to the environment be made a criminal offence, requires, on the other, that a distinction be made between “admissible offences and inadmissible offences”, only the latter warranting criminal intervention. Along these lines it has already been written in Portugal that “in view of the complexity, massification and globalisation of contemporary industrial societies, to which, for the very nature of things, a multiplicity and diversity of countless types of conduct harmful to the environment are linked” (...) “the tutelage that criminal law is in a position to provide to the environment *cannot be absolute*”.

The merely “relative” criminal protection of the environment thus reflects the “moods” of the times. Or, should we prefer, the necessary concern for *balance* between a “maximalist stance” – that could lead either to the existence of “purely symbolic incriminations” or, inversely, determine an “asphyxiation of the industrial, economic and productive activity of a country” – and a *minimalist stance*, which might even open up the way to a prospect of abolition of criminal intervention.

Having accepted this, one cannot doubt, as said earlier, the legitimacy of punitive intervention when, in today's society, the "right" to environment turns into "responsibility" for the environment.

3.11.2. CRIMINAL RESPONSIBILITY OF NATURAL PERSONS

3.11.2.1. Classification of criminal offences

Does the law of the state studied provide for a classification of offences under different categories, such as by degree or seriousness? Describe these.

Portuguese law only distinguishes between MINOR CRIMINAL ACTS (crimes punishable with terms of imprisonment of up to 6 months), MEDIUM CRIMINAL ACTS (crimes punishable with terms of imprisonment of up to 3 years), MAJOR CRIMINAL ACTS (crimes punishable with terms of imprisonment of 3 years or more). Crimes against the environment fall into the scope of medium and major criminal offences.

Are there specific criminal offences for environmental law? Describe these.

3.11.3. CRIMINAL PENALTIES IN ENVIRONMENTAL LAW

What type of criminal penalties exists for breaches of environmental law?

The principal penalties that exist under the Penal Code are prison terms and fines (see the articles cited above). Portuguese criminal law also provides that additional penalties may be applied to the offender: art. 66 (prohibition of offender's activity), and art. 67 (suspension of offender's activity). Art. 109 establishes that objects that have been used or intended for committing a typified unlawful act or that are the result of said act, are permanently confiscated by the State, when, by their very nature or under the particular circumstances in question, they jeopardize the safety of people, public morals or order, or are likely to be used for committing new illicit acts typified as such by law, and art. 111 refers to the incapability of the offender benefiting from the crime.

Does the law of the state studied provide a scheme of minimum and maximum possible penalties? Describe this

3.11.3.1. Art. 41 (Duration of prison term)

1. Prison terms, as a rule, have a minimum duration of 1 month and a maximum of 20 years.

2. The maximum prison term is 25 years where permitted by law.

3. Under no circumstances whatsoever may the maximum limit referred to in the previous paragraph be exceeded.

3.11.3.2. Art. 47 (fines)

1. The penalty of a fine is set in terms of days, in accordance with the criteria established in paragraph 1 of article 71, wherein, generally, the minimum is 10 days and the maximum is 360.

2. Each day of a fine corresponds to a sum between 200\$00 (1 euro) and 100.000\$00 (498,80 euros), that the Court sets, taking into consideration the economic situation of the guilty party and his or her personal financial responsibilities.

Does the law of the state studied provide a scheme of minimum penalties, which a judge cannot reduce? Describe this.

The judge must determine the extent of the penalty (the application of a concrete penalty) within the legal limits established by law for the specific types of crimes foreseen, whereby the actual penalty applied may not be less than the minimum penalty provided under the law. Thus, for example, in the case of art. 278 (Damage to nature), the concrete penalty can never be less than a prison term of one month or a 10 day fine. The same applies to arts. 279, 280 and 281 of the Penal Code.

Does the law of the state studied confer upon a judge the power to reduce the penalty in the case of certain specific breaches (for example where there are mitigating circumstances)? Describe this.

3.11.3.3. Art. 72 (Special Reduction of Penalty)

1. The court may specially reduce the penalty, in addition to the situations expressly provided by law, when circumstances prior, subsequent or concurrent to the criminal act, are such that they clearly diminish the unlawful nature of the act, the guilt of the perpetrator, or the need for a penalty.

Pursuant to the provisions of the prior paragraph, the following circumstances, among others, are taken into consideration:

The act was committed under serious threat or under the dominance of a person on whom the perpetrator is dependant or obliged to obey;

The act was committed for honourable reasons or due to strong solicitation or temptation by the victim or due to unfair provocation or undeserved offence;

The perpetrator demonstrates sincere repentance, namely, by repairing, as far as possible, the damages caused;

The amount of time lapsed since the act was committed, during which time the perpetrator has maintained good conduct.

2. Each circumstance which, taken by itself or jointly with other circumstances, would give rise to the special reduction provided by law and in this article, may be considered only once.

3.11.3.4. Art. 73 (Conditions for Special Reduction)

1. Whenever there is cause for special reduction of the applicable penalty, the following provisions shall be observed with respect to the limits of the applicable penalty:

The maximum limit of the applicable prison terms are reduced by one third;

The minimum prison terms are reduced by one fifth if equal or greater than 3 years and to the legal minimum if less;

The maximum limit of fines is reduced by one third and the minimum limit is reduced to the legal minimum;

If the maximum limit of a prison term is less than 3 years, it can be substituted by a fine, within the general limitations under the law.

2. A specially reduced penalty which has been effectively applied may be substituted or suspended, as applies under the law in general.

3.11.3.5. Art. 74 (Dispensation of penalty)

1. When the crime is punishable with a prison term of 6 months or less, or with a fine only that is no more than 120 days, the court may find the defendant guilty but not apply any penalty if:

The unlawful nature of the act and the guilt of the perpetrator are not great;

The damage has been repaired; and

Considerations of prevention do not conflict with the dispensation;

2. If the judge has reason to believe that the reparation of the damages caused is under way, he may postpone sentencing to re-examine the case within 1 year, on a date which will be immediately set.

Does the law of the state studied confer upon a judge the power to apply a penalty greater than the maximum in the case of certain breaches (for example where there has been re-offending)? Describe this.

3.11.3.6. Recidivism

Pursuant to art. 75 of the Penal Code, anyone who, alone or conspiring with others in any manner, wilfully commits a criminal act punishable with imprisonment of 6 months or more, after having been sentenced for another criminal act committed with wilful intent, with a prison term of 6 months or more,

shall be punished as a re-offender, depending on the circumstances in question, if the prior sentence or sentences did not serve as sufficient warning to the offender against committing crimes. The prior crime for which the offender was sentenced shall not be relevant for the determination of recidivism if more than 5 years have elapsed since it was committed; any amount of time during which the offender has fulfilled measures applied by the court, served a prison sentence or other procedural safety measures which deprived him of freedom of movement, shall be discounted from this period. Decisions rendered by foreign courts are taken into account for the determination of recidivism provided that the act was also a criminal offence under Portuguese law. Lapse of the penalty due to statute of limitations, amnesty or generic pardon and reprieve are not an obstacle to the existence of recidivism.

3.11.3.7. Effects (art. 76)

In case of re-offense, the minimum applicable penalty is increased by one third and the maximum penalty remains unaltered. The increase may not exceed the limits for the most serious of the penalties applied in prior sentencing.

3.11.3.8. Multiple crimes

Art. 77 of the Penal Code establishes that whenever someone has committed several criminal acts prior to final sentencing for any one of them, the sentence shall be in the form of a single penalty only. The extent of the penalty shall take into consideration both the facts and the personality of the offender. The maximum applicable penalty is the sum of the penalties effectively applied, which cannot exceed 25 years, in the case of imprisonment, and 900 days in the case of a fine; the minimum penalty applicable is the highest of the penalties effectively applied to each of the various crimes. If some of the penalties applied to the crimes are of imprisonment and others are of fines, the different nature of the penalties is maintained in a single penalty, imposed as a result of the application of the criteria established in the preceding paragraphs. Additional penalties and security measures are always applied to the offender, even if foreseen in only one of the relevant legal norms.

3.11.3.9. Relatively Indeterminate Penalty

A relatively indeterminate penalty is applied to the so-called habitual offenders (art. 83). The application of such a penalty depends on the existence of wilful perpetration of a crime punishable with imprisonment of at least 2 years, where the offender has previously wilfully committed two or more crimes, to which a minimum of two year prison terms were also effectively applied. A further prerequisite is that an evaluation of the acts committed together with the offender's personality reveals a marked proclivity toward crime, which persists at the date of sentencing. A relatively indeterminate

penalty has as its lower limit two thirds of the prison term which would apply effectively to the crime committed and as a maximum limit, said term plus 6 years, without exceeding 25 years in total. Art. 84 of the Penal Code establishes other situations in which a relatively indeterminate penalty is applicable, whenever the offender has wilfully committed a crime to which a prison term has been effectively applied and has previously committed four or more crimes, to each of which a prison term has been or comes to be effectively applied. Here also it is presupposed that the combined evaluation of the facts and the personality of the offender reveal a marked proclivity towards crime.

3.11.3.10. Criminal responsibility of legal persons

Does the law of the state studied provide for criminal responsibility of legal persons?

No. Criminal responsibility is considered to be eminently personal, warranting social and moral condemnation for the acts committed, which cannot be expressed with respect to legal persons. Thus, they are not considered to be criminally responsible. A possible solution would have been to include crimes against the environment in separate criminal legislation, creating specific sanctions for legal persons (closure of a company, for example). The proposed revision of the Penal Code provided in its art. 273 that the criminal responsibility of legal entities would be governed in a special law, but that provision did not pass into the final text of the Penal Code.

However, administrative penal fines can be imposed on legal persons, see for example Art. 22 Decret 140/99.

Is criminal law applicable to legal entities as well as natural persons or are alternative systems (administrative, civil sanctions) applicable? Can the environmental criminal law that you have described before also be applied to legal entities or do specific problems arise in that respect?

As legal entities are not criminally responsible there is also no criminal responsibility of public legal entities. There is no special rule contained in the Penal Code with respect to punishment of public servants for crimes against the environment. Illegal authority granted by a government employee to a polluting agent does not render said employee criminally responsible for a crime of pollution, as criminal responsibility arises from violation by the agent of prohibitions or limits imposed by the competent administrative authority. The employee is also not punishable in such cases, for omission of acts which could have prevented the polluting result, as the employee is not in the position of guarantor. Only where the employee has the duty to avoid the environmental assault can he be considered criminally responsible.

3.12. *Spain*

Teresa Castañera

Ramon Ragués

Antonieta Fernandez

In Spain, the system of distribution of jurisdictions in the environmental field is specially complex. This complexity explains the large number and variety (in terms of range, material and territorial extension) of regulations used to transpose and carry out the ten directives indicated in the questionnaire.

The complexity is the result of two factors. Firstly, in the Spanish state, the constitutional system established a distribution of government power which is highly decentralised amongst the national government and other sub-national bodies: 17 Autonomous Communities, and local bodies. Consequently, in the task of transposing and enforcing Community Law various government agents intervene, with different authorities and territorial scopes. Secondly, the many-sided nature of environmental protection is another complicating factor.

Each sector or element of environmental protection regulated by the mentioned Directives has a regulation at the level of State Law, in which all those obligations and prohibitions for public and private subjects whose activities may have an effect on the environment are gathered. Often, certain aspects of these obligations are left by the legal regulation itself to be developed in regulations which may be at the state or autonomous region level. Also, the state regulation gives importance to specifying how behaviour that infringes the regulations may constitute an administrative misdemeanour or in some cases a crime. And it classifies, often in a generic way, infringements as a function of their seriousness or how much they damage the environment. Normally, the exact specification of the degree of infringement is also left to the regulations. It should be noted that this basic state legislation normally contains minimum rules of protection. Consequently, the Autonomous regulatory framework is as much the development of the basic legislation (as when it distributes jurisdictions based on the opposition between basic rules and their development) as it is the improvement of the level of protection established by the state (as when it is based on Art. 149.1.23 Spanish Constitution), with the corresponding increase in the number of activities which may be sanctioned.

3.12.1. CRIMES AGAINST NATURAL RESOURCES AND THE ENVIRONMENT

3.12.1.1. Environmental crime

Environmental crime consists of directly or indirectly causing emissions, the dumping of rubbish, radiations, extractions or excavations, burial, noise, vibrations injections or depositing in the atmosphere,

soil, subsoil or in ground, sea or underground waters, including in extraterritorial spaces, and the harnessing of water. For there to be criminal liability, it is necessary that the above-mentioned activities constitute an infringement of a law or other regulation established to protect the environment and that this may seriously damage the balance of natural systems. The law establishes that punishments are imposed in the upper range if human health is placed at risk.

Two comments:

1. The legislator has decided on remission (not to specify in criminal law), which has led to numerous constitutional appeals. As from Sentence 127/1990, and on numerous occasions, the Constitutional Court has rejected the appeals and declared that Article 325 is constitutional.
2. The crime is interpreted as a crime of abstract danger (*“delitos de peligro abstracto”*, *“abstrakter Gefährdungsdelikt”*).

3.12.1.2. Toxic waste

Spanish law penalises the storage or dumping of liquid or solid waste which is toxic or dangerous and which may damage the balance of natural systems or human health (Art 328).

3.12.1.3. Crimes committed by state employees or public authorities

The Spanish Criminal Code describes as a crime the following actions by state employees or public authorities which may have an impact on the environment:

1. Granting a clearly illegal licence which allows the operation of polluting industries or activities referred to in Articles 325 and 328.
2. Remaining silent about the infringement of laws or regulations when inspections occur.
3. Approving or voting in favour of the granting of a licence whilst knowing that it is illegal, whether individually or as a member of a public body.

3.12.1.4. Protected natural spaces

Article 330 punishes anyone who seriously damages any of those items which have caused a natural space to be classified as protected.

The above crimes are punishable whether they have been committed with intent and knowledge (*dolus*) or by gross negligence. In the latter case, the sentence will be that immediately inferior in degree.

3.12.2. CRIMES RELATED TO THE PROTECTION OF FLORA AND FAUNA

Article 332 CP punishes anyone who picks, cuts down, collects or deals illegally in any threatened species or subspecies or any of their propagula, or destroys or gravely alters their habitat.

Article 333 punishes the introduction or liberation of non-local species when this damages the ecological balance, whenever this harms the biological balance and infringes laws or general regulations which protect flora and fauna species.

Article 334 punishes the hunting or fishing of endangered species, actions which impede or make difficult their reproduction or migration, the trade or traffic of these or with their remains (Art 334) In all cases, criminal liability requires the infringement of laws or regulations which protect flora and fauna species.

Article 336 punishes the unauthorised use of explosives or other means of similar destructive capacity in hunting or fishing. (Art 336)

Article 335 punishes the hunting of non-threatened species or those not in danger of extinction, when hunting or catching them is not explicitly authorised.

Besides the above, and outside the section on the environment, the Criminal Code punishes several crimes which may affect this. Thus, for crimes related to forest fires, their connection with the environment is outlined in the crime described in Article 352, that of lighting non-forest fires where serious damage to the environment is involved, those related to nuclear energy and ionising radiation in articles 341 ff, the manipulation of explosive, toxic or asphyxiating substances in article 348, the manipulation, transport or possession of organisms in Article 349, and excavations or demolitions in Article 350. In these last three cases, there is an explicit reference to the possible damage to the environment.

- Criminal penalties in environmental law

3.12.2.1. What type of criminal penalties exists for breaches of environmental law?

The Spanish Criminal Code establishes three kinds of sentences for crimes against the environment:

a) Sentences involving loss of freedom: prison or weekend imprisonment. Most environmental crimes are punished by prison sentences. Weekend imprisonment is only laid down for storage or dumping. Only the crime of unauthorised hunting or fishing does not have a punishment involving loss of freedom (remember that the Supreme Court has considered this unconstitutional).

b) Fines: normally additional to the prison sentences

c) Disqualification: also additional to a) and b) above.

The Criminal Code also foresees the possibility of taking actions which are different to the sentences: to order the guilty party to take such actions as re-establish the ecological balance and any other action for the protection of protected goods (Article 339).

For offences against the environment described in Articles 325 and 326, there is a possibility of imposing some of the measures described in Article 129 a), referring to the closure of a company, its offices or establishments, either temporarily or permanently, with a maximum temporary closure of five years, and Article 129 b), which allows state intervention in the affairs of the company to protect the rights of the employees or creditors for the necessary period of time, which cannot exceed five years. Temporary closure may be imposed by the trial judge during the case procedures.

3.12.2.2. Does the law of the state provide a scheme of minimum and maximum possible penalties ?

The Criminal Code sets a minimum and maximum sentence for all crimes. For environmental crimes, it sets different sentences for different crimes. The minimum prison sentence is six months, the minimum fine is 288,49 €, the minimum weekend imprisonment is 18 weekends, and the minimum disqualification is one year. Maximums are 4 years prison, a fine of 21.636,44 €, 24 weekend imprisonments, and 10 years disqualification.

3.12.2.3. Environmental crimes

Environmental crimes described in Article 325 are punishable with a prison term from six months to four years, a fine of 8 to 24 months, and special disqualification for a profession or trade for a period of one to three years.

Dumping or depositing toxic waste as described in Article 328 is punishable with a fine of 18 to 24 months and weekend imprisonment of 18 to 24 weekends.

Crimes committed by state employees are punishable with the sentence which corresponds to the crime of misfeasance in office (Article 404 CP), which is that of disqualification for state employment or public office for a period of seven to ten years and, as well, a prison sentence of six months to three years or a fine of 8 to 24 months.

3.12.2.4. Protected natural spaces

Causing grave damage to one of the aspects which defines a natural space as protected in Article 330 is punishable with a prison sentence of one to four years prison, and a fine of 12 to 24 months.

3.12.2.5. Crimes relating to flora and fauna

The sentence for the crimes described in Articles 332, 333, 334 and 336 is six months to two years prison or a fine of 8 to 24 months. The upper half of this period will be applied when it is a question of endangered species as in Article 334, hunting or fishing endangered species, impeding or hindering their reproduction or migration, and trafficking or trading in these species or their remains and when the damage is very important as in Article 336, use in hunting or fishing of highly destructive methods.

The crime of hunting or fishing that which is not explicitly authorised in article 335 is punishable with a fine of four to eight months.

Does the law of the state studied provide a scheme of minimum penalties, which a judge cannot reduce? Spanish Criminal Code describes a series of attenuating circumstances (Article 21) which are applicable to all crimes and which generally determine the casting of a sentence in the lower half of the range (Article 66.2). In exceptional circumstances, the sentence imposed may be one or two levels lower (Article 66.4).

If no attenuating circumstance is present, the judge cannot impose a punishment of less than the minimum laid down in law for each case. The possible sentences for imperfect degrees of execution and participation must be taken into account.

The Criminal Code contains an attenuating circumstance for environmental crimes, which is the voluntary reparation of the damage caused (Art 340). When this happens, the lightest sentence is given.

Does the law of the state studied confer upon a judge the power to apply a penalty greater than the maximum in the case of certain specific breaches?

In principle, the judge cannot impose a sentence which is more severe than the maximum laid down in law. Exceptions to this are specified. A more severe sentence can only be imposed if the circumstances described in Article 326 are present and when protected natural spaces are affected.

The Spanish Criminal Code is based on the description of the essential kinds of environmental crimes, and then establishes some aggravating circumstances which are applicable to a concrete crime, or in general to all crimes against the environment, flora and fauna.

1-. Aggravating circumstances applicable to particular crimes.

1. Affecting persons: Article 325 describes two sentences, depending on whether the actions give rise to a grave risk to the health of people. In this case, the sentence must be in the upper half of the range.

2. Administrative offences and the seriousness of the risk. Article 326 states that the harsher sentence will be imposed when:

- a) industries or clandestine activities are involved which have not been granted the corresponding authorisation or administrative approval;
- b) a specific order from the administrative authority has been disobeyed;
- c) information has been falsified or hidden;
- d) the official inspector's activity has been obstructed;
- e) there is risk of irreversible or catastrophic damage;
- f) water is extracted illegally in a period of restrictions.

As well, Article 327 lays down the possibility of applying the measures described in Article 129 of the Criminal Code, which are: a) the temporary or permanent closure of the company, its buildings and offices. Temporary closure may not exceed five years. And e), which allows state intervention in the affairs of the company to protect the rights of the employees or creditors for the necessary period of time, which cannot exceed five years. Temporary closure may be imposed by the trial judge during the case procedures.

Objects needing special protection. For the crime of hunting or fishing endangered species, actions which impede or make difficult their reproduction or migration, or the trade or traffic of these or with their remains, Article 334.2 lays down a higher sentence in the upper half of the range when species or subspecies which are in danger of extinction are involved.

Because of the seriousness of the damage caused, the use of highly destructive methods for hunting or fishing is punishable in the upper half of the range of the sentence when the damage caused is of well-known importance.

2. Aggravating circumstances applicable to all crimes against natural resources and the environment and to crimes relating to the protection of flora and fauna.

Affecting protected natural spaces. In this case, the highest sentence is imposed.

Repairing of damage and other preventative or reparatory measures. Article 339 also makes it possible for judges or courts to order that the author of the damage take such measures as will restore the ecological balance and/or any other measure necessary to protect the environment, or the flora and fauna.

2) Criminal responsibility of legal persons

Does the law of the state provide for criminal responsibility of legal persons?

The Spanish Criminal Code does not establish criminal responsibility for legal persons. However, Article 129 establishes a series of consequences, imposed on legal persons, some of which are applicable to the environmental crimes described in Articles 325 and 326 (Art. 327). There are no other legal provisions. In practice, liability exists for those natural persons who act in the name of and represent legal persons, whether directly or through the structure of the commission by default or indirect authorship.

3.13. *The Netherlands*

Ingeborg Koopmans

Some Introductory Notes About Criminal Penalties for Environmental Crimes in General

The available criminal sanctions can be found in article 9 of the Dutch Criminal Code. The possible sanctions are:

1. Major penalties

Imprisonment, article 10 Dutch Criminal Code

Detention, article 18 Dutch Criminal Code

unpaid labour, article 22b Dutch Criminal Code

fine, article 23 Dutch Criminal Code

Article 23 of the Dutch Criminal Code is about fines. The article distinguishes into different fine categories. There are six different categories:

Category 1: € 225,--

Category 2: € 2250,--

Category 3: € 4500,--

Category 4: € 11250,--

Category 5: € 45000,--

Category 6: € 450000,--

The minimum fine is € 2,--, according to article 23 section 2 of the Dutch Criminal Code. There are no minimum penalties for imprisonment, the minimum penalty for detention is one day.

2. Secondary penalties

deprivation of certain rights, article 28 Dutch Criminal Code

confiscation, article 33 Dutch Criminal Code

publication of the judicial verdict, article 28 Dutch Criminal Code

The Dutch Criminal code also knows measures that can be imposed next to or apart from the criminal sanctions mentioned in article 9. These measures are:

withdrawal of goods from the free flow of goods, article 36b Dutch Criminal code

withdrawal of illegally obtained profits, article 36e Dutch Criminal Code

compensation, article 36f Dutch Criminal Code

placement in a mental institution, article 37 Dutch Criminal Code

preventive detention under the Mental Health Act, article 37a Dutch Criminal Code

Apart from the Dutch Criminal Code, the Economic Offenses Act has its own penalty system. This penalty system is specifically designed for economic offenses and contains, besides the penalties mentioned in article 9 of the Dutch Criminal Code and the measures, typical penalties and measures for economic offenses.

The penalties can be found in article 6 of the Act:

A. The maximum penalties in case of violation of the provisions criminalized under article 1a sub 1 of the Economic Offenses Act are:

- In case of a felony according to article 6 of the Economic Offenses Act:

6 years imprisonment

Fine of 45.000 Euro

In case of a corporate defendant: maximum fine is 450.000 euro

- In case of a misdemeanor according to article 6 of the Economic Offenses Act:

1 year detention

Fine of 11.250 Euro

In case of a corporate defendant: maximum fine is 45.000 euro

B. The maximum penalties in case of violation of the provisions criminalized under article 1a sub 2 of the Economic Offenses Act are:

- In case of a felony according to article 6 of the Economic Offenses Act:

2 years imprisonment

Fine of 11.250 Euro

In case of a corporate defendant: maximum 45.000 euro

- In case of a misdemeanor according to article 6 of the Economic Offenses Act:

6 months of detention

Fine of 11.250 Euro

In case of a corporate defendant: maximum 45.000 euro

C. The maximum penalties in case of violation of the criminalized provisions under article 1a sub 3 of the Economic Offenses Act are:

- In case of a felony according to article 6 under 4 of the Economic Offenses Act:

6 months of detention

Fine of 45.000 Euro

In case of a corporate defendant: maximum 450.000 euro

- In case of a misdemeanor according to article 6 under 4 of the Economic Offenses Act:

Fine of 11.250 Euro

In case of a corporate defendant: maximum 45.000 euro

Article 23 of the Dutch Criminal Code is also applicable to the Economic Offenses Act. Within the Economic Offenses Act it is possible to deviate from the Dutch Criminal Code due to the special characteristics of Economic offenses and Environmental Crimes are commonly recognized, as shown above, as Economic Offenses.

Therefore, article 6 of the Economic Offenses Act states that in case the defendant is a corporation and the total value of the goods directly or indirectly used to violate the Economic Offenses Act is higher or equal to a quarter of the maximum fine which can be imposed according to article 6, under 1 to 4 of the Economic Offenses Act, the maximum fine can be exceeded one category up to a maximum of 450.000 euro according to article 6 of the Economic Offenses Act (a similar provision can be found in article 23, section 7 and 8 of the Dutch Criminal Code).

The secondary penalties can be found in article 7 of the Economic Offenses Act, they are:

deprivation of rights

total or partly shut down of the corporation of the convicted where the economic offense has been committed for the maximum of a year

confiscation

total of partly deprivation of rights conferred by the government in relation to the enterprise of the convicted

publication of the judicial verdict

The measures can be found in article 8 of the Economic Offenses Act, they are:

the measures as set forth in the Dutch Criminal Code

placement of the enterprise of the convicted , under supervision, in case of a felony for a maximum of 3 years, in case of a misdemeanor for a maximum of 2 years

restitution, or the obligation to do what is illegally neglected or omitted, or to abolish or undo what is illegally established

3.14. United Kingdom

Carolyn Abbot

3.14.1. ENVIRONMENTAL CRIMINAL LAW IN THE UK

Unless otherwise stated, the information below is applicable to the law in England, Wales, Scotland and Northern Ireland.

3.14.1.1. Natural persons and criminal liability

3.14.1.1.1. Classification of criminal offences

There are two ways in which criminal offences are classified – these also apply to criminal environmental offences.

3.14.1.1.1.1. Classification by Mode of Trial

Criminal offences in general (including those relating to environmental law) can be classified according to the way in which they are tried.

England, Wales and Northern Ireland

In England, Wales and Northern Ireland, the distinction here is between summary and indictable offences. Summary offences are less serious than indictable offences and are tried before a Magistrates' Court. Indictable offences are more serious and tried in the Crown Court, before a judge and jury.

Many offences are triable either way.²²⁴ The decision as to whether an offence should be tried summarily or on indictment is made by the Magistrates' Court having regard to the representations made by the prosecutor and the accused and all the circumstances of the case – these considerations include the gravity of the offence and the relative sentencing powers of the Magistrates' and Crown Courts. If the court decides to proceed summarily, the consent of the accused is required as he may wish to assert his rights to trial by jury.

Scotland

A similar distinction exists in Scotland, where there are two forms of criminal procedure – offences triable by summary procedure and offences triable by solemn procedure. Offences triable only by summary procedure must be heard in the Sheriff Court. Offences triable by solemn procedure are often referred to in Scottish legislation as indictable offences – this amounts to trial by jury. Such offences may be commenced in either the Sheriff Court or the High Court of Justiciary. In such cases, the prosecutor decides if the case is to go to the Sheriff or High Court.

As is the case in England, Wales and Northern Ireland, many environmental offences are triable either way.²²⁵ In such cases, the procurator fiscal chooses between summary or solemn procedure.

3.14.1.1.2. Classification Based on Strict and Fault-Based Liability

Offences not requiring fault are said to be offences of “strict” or “absolute” liability. However, absolute liability is a misnomer because in all cases, defences are available e.g. where the defendant can establish that the act of a third party or natural event was abnormal or extraordinary, the defendant may escape liability or there are a number of statutory defences available to a defendant. If an offence in an environmental statute is deemed to be one of “strict liability”, it is necessary only for the *actus reus* to be made out: there is no need to establish *mens rea* or fault in the form of intention, recklessness or negligence.

Conversely, in general, offences such as “knowingly cause or knowingly permit” tend to impose fault-based liability, thus a prosecutor will have to prove that the offence was intentional, reckless or negligent. It is these phrases which have proved extremely difficult to interpret.

²²⁴ For example, section 33 Environmental Protection Act 1990 and regulation 32 Pollution Prevention and Control (England and Wales) Regulations 2000.

²²⁵ For example, regulation 30 Pollution Prevention and Control (Scotland) Regulations 2000 and section 30F Control of Pollution Act 1974.

3.14.1.2. Criminal penalties available for environmental offences

3.14.1.2.1. Fines

Fines should be the starting point for the sentencing of both persons and companies for environmental offences because the offences are non-violent and carry no immediate physical threat to the person and the offences are generally committed in situations where the defendant has failed to devote proper resources to preventing a breach of the law.

On summary conviction, the fine levels are often referred to as level 1, 2, 3, 4 or 5. These amounts correspond to the standard scale of fines on an adult prescribed under the Criminal Justice Act 1982, section 37. These are as follows:

Level on the Scale	Amount of Fine
1	£200
2	£500
3	£1,000
4	£2,500
5	£5,000

Guidance as to the level of fines awarded is given by the Sentencing Panel’s Advice to the Court of Appeal.²²⁶ Under the Criminal Justice Act 1993, judges can look at all associated offences when deciding the seriousness of the offence before them.

3.14.1.2.2. Custodial Sentence

In relation to a person aged 21 or over, a sentence of imprisonment or a suspended sentence is a custodial sentence. A suspended sentence is where the court passes a sentence of up to two years imprisonment but the sentence does not take effect unless the offender commits another imprisonable offence during a period fixed by the court (between one and two years). Only a minority of environmental offences are so serious that a custodial sentence can be justified. To cross this threshold, a case would need to combine serious damage, or the risk of serious damage, with a very high degree of culpability on the part of the offender.

3.14.1.2.3. Community Sentence

²²⁶ “Environmental Offences: The Panel’s Advice to the Court of Appeal” (1st March 2002). See Appendix A.

There are a full range of community sentences available to the courts which are, of course, only available where the sentence is imprisonable. A probation order places the offender under the supervision of a probation officer for a fixed period between six months and three years. The court (after consultation with the probation officer) usually imposes conditions on the probation order. A court can also award a community service order where the offender will perform, over a period of 12 months, a specified number of hours of unpaid work for the benefit of the community. In cases of greater seriousness involving an individual offender, the court should consider whether there may be merit in imposing a community sentence rather than a fine.

3.14.1.2.4. Compensation Orders

Compensation orders are rarely used in environmental cases and it is suggested that where there is a specific victim (e.g. a landowner who has incurred expense in cleaning up their property), the court should always consider making such an order.

England, Wales and Northern Ireland

Under sections 130 to 134 of the Powers of Criminal Courts (Sentencing) Act 2000, where an offence causes personal injury, loss or damage, the court may order the offender to pay compensation. This can be up to £5,000 in a Magistrates' Court and is unlimited in the Crown Court.

Scotland

Under sections 249 – 253 of the Criminal Procedure (Scotland) Act 1995, a court may, in addition to, or instead of, imposing a penalty, make a compensation order requiring a person convicted of an offence to pay compensation for any personal injury, loss or damage caused directly or indirectly by acts constituting an offence. In summary proceedings there is a limit of £5,000 but in solemn proceedings there is no limit on the amount which may be awarded under a compensation order.

3.14.1.2.5. Absolute and Conditional Discharges

If the court finds an offender guilty of any offence but believes that in the circumstances it is unnecessary to punish the person and probation is inappropriate, it may discharge the defendant either absolutely or conditionally. An absolute discharge effectively means that the defendant's conduct is wrong in law, but no reasonable person would blame them for doing what they did. On the other hand, a conditional discharge means that no further action will be taken unless the offender commits another offence within a specified period of up to three years.

A relatively high proportion of cases involving an individual defendant result in an absolute or conditional discharge by the court rather than a fine. This might be attributable to the courts' alleged lack of awareness of the seriousness of environmental offences. However, in some circumstances, a discharge rather than a fine may be appropriate where one or more factors are present.²²⁷

3.14.1.2.6. Maximum and minimum penalties

The maximum and minimum penalties which can be awarded for breach of environmental law depend on the court in which the offence is tried. Maximum and minimum penalties only apply to cases heard in the Magistrates' Court (England, Wales and Northern Ireland) and Sheriff Court (Scotland). As noted previously, in determining the level of penalty imposed on the defendant, the Court of Appeal, in March 2000, produced sentencing guidelines for environmental offences.²²⁸

England, Wales and Northern Ireland

Offences Tried in Magistrates' Court

Summary offences are punishable by a fine and/or imprisonment. The maximum fine for a summary offence is such sum as may be specified in the statute creating the offence or £1,000, whichever is the higher. In most cases, breach of environmental law attracts a higher maximum fine in a Magistrates' Court. There is no minimum fine. Before deciding on the amount of fine to be imposed on the offender, the magistrates must inquire into the defendant's financial circumstances and, when fixing the amount, must take these into account, together with the circumstances of the case. The amount of any fine imposed must be such as in the opinion of the court reflects the seriousness of the offence.²²⁹

In the case of a custodial sentence, the maximum sentence that can be imposed for a summary offence is usually six months²³⁰ and the minimum is five days.²³¹

Where an offence is triable either way, (as is the case with most environmental offences)²³² following summary conviction of the defendant, the magistrates' powers of punishment are limited to a maximum of six months' imprisonment for any one offence. The general maximum fine for any one offence is

²²⁷ Ibid at paragraph 26.

²²⁸ See Appendix A.

²²⁹ Criminal Justice Act 1991 section 18 as amended.

²³⁰ Section 31 Magistrates' Courts Act 1980

²³¹ Section 132 Magistrates' Courts Act 1980.

²³² See, for example, Parts I and II Environmental Protection Act 1990 and Article 4 Waste and Contaminated Land (Northern Ireland) Order 1997.

£5,000 however higher fines e.g. £20,000 are available in cases involving health and safety, and pollution.²³³

Magistrates cannot award a fine and/or imprisonment above the maximum provided for, therefore if a person has been convicted summarily of an offence triable either way he may sometimes be committed to the Crown Court for sentencing. One such case is where the magistrates are of the opinion that the offence, or the combination of the offence and one or more offences associated with it, is so serious that greater punishment should be inflicted than they have the power to impose. On committal for sentence to the Crown Court, the court will inquire into the circumstances of the case in the same way as if the defendant had been convicted there.

Offences Tried in Crown Court

There is no limit to the level of fine/imprisonment which can be imposed by the Crown Court. However, in most environmental offences, the maximum term of imprisonment will be two years.

Scotland

Offences triable only by summary procedure must be heard in the Sheriff Court. In trying such an offence, a sheriff can impose up to three months' imprisonment and/or a fine at level five on the standard scale. However, higher fines and/or imprisonment are available in cases involving health and safety, and pollution.

Solemn procedures (used in serious cases with a jury), can be heard in either the Sheriff Court or the High Court of Justiciary. In solemn proceedings, a sheriff can impose up to 3 years imprisonment and/or an unlimited fine. The fines and imprisonment that can be imposed by a judge in the High Court of Justiciary is not limited.

3.14.2. CORPORATE CRIMINAL LIABILITY

Although most pollution is caused by companies, such pollution inevitably stems either directly or ultimately from the acts or omissions of individual employees or directors working for such companies. When is a company held criminally liable for the acts of individuals working for it? Where a company is liable, it is trite to say that the company cannot be the subject of a custodial sentence – the penalties available to courts in such circumstances are fines and compensation orders.

Until recently, corporate criminal liability was based on two sets of rigid distinctions. Firstly, there was the distinction between vicarious liability (where a company is liable for offences committed by

²³³ See, for example, section 85 Water Resources Act 1991 and section 118 Water Industry Act 1991.

employees in the course of employment) and direct liability (where the offence is committed by somebody who is part of the ‘directing’ mind of the company e.g. director). The courts also distinguished between strict liability and *mens rea* offences. Effectively, a company could only be vicariously liable for strict liability offences, however, if the offence involved *mens rea*, then the company could only be liable by the direct liability route.

However, now the courts have adopted a more purposive approach to statutory interpretation whereby they interpret the offence to determine whose acts will be attributed to the company. With some offences, the purpose of the statute will require only the acts of the directing mind.²³⁴ However, in other instances, the purpose of the statute will be defeated unless the acts of employees can be attributed to the company.²³⁵

The approach of the court in the case of Shanks & McEwan (Teeside Ltd) v Environment Agency has been accepted as the correct approach.²³⁶ In this case, Shanks & McEwan was charged with ‘knowingly causing’ the deposit of controlled waste in breach of a waste management licence condition. In finding the company liable, the court was effectively saying that a purposive approach requires the company to be liable one way or the other.

The Environment Agency’s Prosecution Policy makes provision for the liability of companies, stating that:

“Criminal proceedings will be taken against those persons responsible for the offence. Where a company is involved, it will be usual practice to prosecute the Company where the offence resulted from the Company’s activities.....”²³⁷

Similarly, the Scottish Environmental Protection Agency’s Policy Statement on Enforcement states that:

“Those responsible for the offence will be reported with a recommendation for prosecution. If a company is involved, SEPA will normally recommend action against the company.”

²³⁴ Seaboard Offshore Ltd. v Secretary of State for Transport [1994] 2 All ER 99 (House of Lords).

²³⁵ National Rivers Authority v Alfred McAlpine Homes East Ltd. [1994] 4 All ER 286. R v British Steel Plc. [1995] 1 WLR 1356.

²³⁶ [1998] 2 WLR 452. See Section 3A of Report for further details.

²³⁷ Environment Agency Enforcement and Prosecution Policy (November 1998) paragraph 24.

3.14.2.1. Liability of company directors and other senior managers²³⁸

Most of the key environmental regulatory regimes examined in this project provide for personal criminal liability of directors.²³⁹ The key question to ask in determining whether a senior manager should be individually liable under pollution control regulation is whether or not that person has the power and responsibility to decide corporate strategy and policy.²⁴⁰ Waste is the area where personal liability has been most frequently used and whilst there are such cases in other fields of pollution regulation, waste appears to be the only area where directors have been imprisoned for environmental offences. This is probably due to the fact that in the waste industry there are numerous, small ‘cowboy’ outfits where the company amounts to not much more than the directors themselves.²⁴¹ It is important to note that where a company officer is found guilty, the court has the power to impose any penalty detailed in section 1.2 of this report.

The Environment Agency’s Enforcement and Prosecution Policy makes provision for the liability of company officers, stating that:

“... [T]he Agency will also consider any part played in the offence by the officers of the Company including Directors, Managers and the Company Secretary. Action may also be taken against such officers (as well as the Company) where it can be shown that the offence was committed with their consent, was due to their neglect or they “turned a blind eye” to the offence or the circumstances leading to it. In appropriate cases, the Agency will consider seeking disqualification of Directors under the Company Directors Disqualification Act 1986”.²⁴²

SEPA’s Policy Statement on Enforcement states that:

“... However, individuals in the company such as directors, managers or the company Secretary may also be reported for prosecution where it can be shown that the offence was committed with their express or implied consent or was due to their negligence.”

3.14.3. CRIMINAL PROCEDURE IN ENGLAND, WALES AND NORTHERN IRELAND

²³⁸ See P. Jewkes, “Personal Liability of Directors in the United Kingdom for Environmental Offences” [1996] Environmental Liability 87. For a more up-to date analysis, see C. Hilson, *Regulating Pollution – A UK and EC Perspective* (Hart Publishing, Oxford; 2000) 144-146.

²³⁹ For example, section 157 Environmental Protection Act 1990, section 217 Water Resources Act 1991 and section 37 Health and Safety at Work etc. Act 1974.

²⁴⁰ *Woodhouse v Walsall Metropolitan Borough Council* [1994] Env. LR 30.

²⁴¹ See Hilson, *supra* n. 238 at page 145.

²⁴² Above n. 237 at paragraph 24.

Unless otherwise stated, the information below is applicable to England, Wales and Northern Ireland. Appendix 1 provides a diagrammatic explanation of the court systems in England, Wales and Northern Ireland.

3.14.3.1. The prosecution system

3.14.3.1.1. Public prosecutions

England and Wales

With the exception of Directive 79/409 on the conservation of wild birds and Directive 92/43 on the conservation of natural habitats, the prosecuting authority in England and Wales is the Environment Agency. The competent prosecuting authorities for the purposes of section 1, 5 and 6 of the Wildlife and Countryside Act 1981 and regulations 39, 41 and 42 of the Conservation and Natural Habitats Regulations 1994 which implement the bird and plant provisions of Directives 79/409 and 92/43 respectively are the police and Customs and Excise.²⁴³ Regulations 19 and 23 of the Conservation and Natural Habitats Regulations 1994 (implementing the habitat provisions of Directive 92/43) are enforced by English Nature.²⁴⁴ All these bodies have the power to bring their own prosecutions using specialist staff.

Northern Ireland

The enforcing body in Northern Ireland is the Environment and Heritage Service (EHS), an executive agency of the Department of the Environment, Food and Rural Affairs. The Service is divided into discrete units, for example, industrial pollution, water quality, natural heritage. Like the Environment Agency, the EHS has the power to bring its own prosecutions using specialist staff. In practice, all cases are handled by the Director of Public Prosecutions.

3.14.3.1.2. Private prosecutions

Unless a statute specifically restricts the right, anyone can bring a private prosecution and in the case of most environmental laws, an individual can prosecute an offence.²⁴⁵ Unlike the situation in Scotland, the consent of a law officer is not required. Nevertheless, private prosecutions in England, Wales and Northern Ireland are relatively rare (although not unknown) and it is often the threat of private prosecution by groups such as Friends of the Earth and Greenpeace which triggers the enforcing

²⁴³ See section 1.2 for the position of the Royal Society for the Prevention of Cruelty to Animals (RSCPA).

²⁴⁴ English Nature's Position Statement provides that English Nature will: "Investigate any damaging activities on SSSIs and take appropriate enforcement action, including securing appropriate restoration wherever possible." (see www.english-nature.gov.uk)

²⁴⁵ Section 6 Prosecution of Offences Act 1985.

authority to bring a criminal action. However, in the case of sections 1, 5 and 6 of the Wildlife and Countryside Act 1981, the RSPCA has, on a number of occasions, issued criminal proceedings against offenders by way of private prosecution.

3.14.3.1.3. The prosecution procedure

There are two methods of trying persons accused of criminal offences. One is by judge and jury in the Crown Court (on indictment) and the other is to proceed summarily in a magistrates' court without a jury.

The Magistrates' Court has the power to hear summary offences and over 95% of all offences are tried summarily. The court also has the power to hear offences triable either way. These are offences which are triable either on indictment or summarily, but may only be tried summarily with the accused's consent.

The more serious crimes will be prosecuted on indictment in the Crown Court where the penalties available are higher. The jurisdiction of the Crown Court extends to cases committed to it by the Magistrates' Court. These include cases triable either way, where the magistrates' bench has taken the view that the matter should be committed to the Crown Court (or the defendant has not consented to summary trial by magistrates), and cases triable only on indictment. The magistrates may also, when they have tried a case summarily and feel that the circumstances warrant a higher sentence, transfer the defendant to the Crown Court for sentence.

Appeals from the Magistrates' Courts in criminal matters normally go to the Crown Court, which may reverse, confirm or vary the decision made by the magistrates. On appeal from the Crown Court, the case will progress to the High Court (Queens Bench Division), Court of Appeal (Criminal Division) and House of Lords. For an overview of the court structure in England and Wales, see Appendix 1. Very few environmental law cases proceed to the Court of Appeal and House of Lords.

3.14.4. COSTS

A court should normally make an order for costs in favour of the prosecuting agency. This order will reflect the costs of the investigation, together with file preparation and presentation costs, and should not exceed the sum which the prosecutor has actually and reasonably incurred. In general, the order for costs should not be disproportionate to the level of the fine imposed (Northallerton Magistrates' Court, *ex parte Dove*²⁴⁶). The court should fix the level of the fine first, then consider awarding compensation, and

²⁴⁶ [2000] 1 Cr App R (S) 136.

then determine costs. If the defendant is unable to pay all components, the order for costs should be reduced rather than the fine. In all cases, compensation should take priority over both the fine and costs.

3.14.5. COMPETENT JUDGES

3.14.5.1.1. Magistrates' court

In a Magistrates' Court, it is usual for three lay magistrates to sit at the bench. Lay magistrates are appointed by the Lord Chancellor in the name of the Crown, on the advice of Local Advisory Committees. The only qualifications laid down for appointment to the magistracy are that the applicants must be under 65 and live within 15 miles of the commission area for which they are appointed. However, in practice, they should also be able to devote an average of half a day a week to the task. Legal knowledge or experience is not required; nor is any level of academic qualification.

In addition to these 'lay' magistrates, there are also 92 professional judges who sit in the magistrates' courts - these are called "district judges (magistrates' court)".²⁴⁷ These are professional judges who must have considerable legal experience including a seven-year advocacy qualification. They act as sole judges in the court, mostly in the large cities and London, in particular.

3.14.5.1.2. Crown Court

Judges in the Crown Court are High Court judges (drawn from the Queen's Bench Division), circuit judges (full-time permanent judges), recorders (part-time judges appointed for a specified period, but not less than five years) and justices of the peace. Justices of the Peace may only sit as judges of the Crown Court with a High Court judge, circuit judge or recorder. It should also be remembered that where a defendant pleads not guilty in the Crown Court, there will be trial by jury.

In the Crown Court, criminal offences are classified into four classes according to gravity and complexity.²⁴⁸ For the purposes of criminal environmental law, offences will fall into either Class 3 or Class 4. Class 3 offences are normally tried by a High Court judge but may be tried by a circuit judge or by a recorder in accordance with general or particular directions given by a Presiding Judge. Class 4 offences may be tried by a High Court judge, a circuit judge or a recorder but will not normally be tried by a High Court Judge.

3.14.5.1.3. High Court

²⁴⁷ They were previously known as stipendiary magistrates.

²⁴⁸ Practice Direction [2000] 1 All ER 380. See Appendix 2.

The High Court is comprised of a number of “senior” judges including the Lord Chancellor and the Lord Chief Justice. The ordinary High Court judges are sometimes referred to as ‘puisne’ judges. To be qualified as a puisne judge, a person must either have a ten-year High Court qualification or have been a circuit judge for at least two years.

3.14.5.1.4. Court of Appeal

The Court of Appeal is comprised of the Lord Chancellor, any former Lord Chancellor willing to sit, any Lord of Appeal in Ordinary willing to sit, the Lord Chief Justice, the Master of the Rolls, the President of the Family Division of the High Court, the Vice-Chancellor of the Chancery Division and up to 35 Lords Justices of Appeal.

3.14.5.1.5. House of Lords

The president of the House of Lords as a court is the Lord Chancellor, assisted by between 7 and 12 Lords of Appeal in Ordinary and any peer who holds or has held high judicial office such as a former Lord Chancellor or retired Court of Appeal judge.

3.14.6. LENGTH OF TRIAL

The length of time for environmental cases to progress through the courts depends on a number of factors.

In all cases, before a trial is listed, the court usually holds a hearing, called a pre-trial review to discuss administrative matters such as the likely length of hearing and the number of witnesses. Where the case is straightforward, only one pre-trial hearing is necessary however for more complex cases, several pre-trial reviews may be required. When a case is finally listed, there will usually be a delay of approximately 6 months due to pressure on court time. Where a case is more complex, a period of 12 months can have passed between the issue of summons and the trial.

All trials (apart from those only heard on indictment) are commenced in the Magistrates’ Court where the defendant can either plead guilty, not guilty or ask the trial to be adjourned to another date because extra time is required (e.g. where either side need to obtain further evidence). If a guilty plea is entered at a Magistrates’ Court, the magistrate will hear an outline of the case from the prosecution, mitigation put forward on behalf of the defendant and will normally sentence on that same day.

Where a guilty plea is not entered, the Magistrates first decide whether it is appropriate for the case to be heard in the Magistrates’ Court or whether it should be committed to the Crown Court for trial. A further

hearing, a “committal” is needed to transfer a case to the Crown Court. As the Crown Court is trial by jury, these cases will take longer to be heard, however I could not obtain any official information on the average length of time for such hearings.

Where a case is referred from the Magistrates’ Courts to the Crown Court for sentence and appeal, 90% of ALL cases (including environmental cases) were dealt with within 10 weeks and 85% of ALL appeals (including environmental appeals) were dealt with w

3.14.7. CRIMINAL PROCEDURE IN SCOTLAND

3.14.7.1. The prosecution system

3.14.7.1.1. Public prosecutions

With the exception of Directive 79/409 on the conservation of wild birds and Directive 92/43 on the conservation of natural habitats, the prosecuting authority in Scotland is the Scottish Environmental Protection Agency (SEPA). Contrary to the Environment Agency in England and Wales, SEPA cannot bring its own prosecutions. Instead, if it wishes criminal proceedings against a person, it must send a report to the local public prosecutor (the procurator fiscal), who has discretion to decide whether or not proceedings are to be brought. If the procurator fiscal considers the case to be complex, he may refer it to an advocate-depute.²⁴⁹

The competent prosecuting authorities for the purposes of section 1, 5 and 6 of the Wildlife and Countryside Act 1981 and regulations 39, 41 and 42 of the Conservation and Natural Habitats Regulations 1994 which implement the bird and plant provisions of Directives 79/409 and 92/43 respectively are the police and Customs and Excise.²⁵⁰ These bodies have the power to bring their own prosecutions using specialist staff. Regulations 19 and 23 of the Conservation and Natural Habitats Regulations 1994 (implementing the habitat provisions of Directive 92/43) are enforced by Scottish Natural Heritage. Like SEPA, Scottish Natural Heritage must send a report to the local public prosecutor who has discretion to decide whether or not proceedings should be brought.

3.14.7.1.2. Private prosecutions

In Scotland, individuals and organisations can also bring prosecutions – these are known as private prosecutions and can be brought where the enforcing authority has failed to take action. Such

²⁴⁹ For criticisms of this two-stage process see C. Smith, N. Collar and M. Poustie, *Pollution Control: The Law in Scotland* (T&T Clark, Edinburgh, 1997), pages 40-41.

²⁵⁰ See section 1.2 for the position of the Royal Society for the Prevention of Cruelty to Animals (RSCPA).

prosecutions are, however, very rare in Scotland due to the fact that the consent of the Lord Advocate (the government's chief law officer in Scotland) is required. In the case of sections 1, 5 and 6 of the Wildlife and Countryside Act 1981, the RSPCA has, on a number of occasions, issued criminal proceedings against offenders by way of private prosecution. However, to date, no other legislative provisions have been the subject of private prosecutions in Scotland.

3.14.7.1.3. The prosecution procedure

The decision whether or not to proceed summarily or on indictment (trial by jury) is entirely within the discretion of the prosecutor and normally depends on the seriousness of the alleged offence. The more serious crimes will be prosecuted on indictment where the penalties available are higher.

In respect of environmental offences, summary proceedings may only be commenced in the Sheriff Court. Proceedings on indictment may be commenced in either the Sheriff Court or the High Court of Justiciary – the High Court of Justiciary is the trial court for major crime. An appeal from any of these courts goes to the Court of Criminal Appeal. Although there is no further appeal to any other court in the UK, there can, of course, be a reference to the ECJ in Luxembourg.

The court having jurisdiction to try a criminal case will be determined by the place in which the criminal act is alleged to have occurred. The onus of proof is on the prosecution which must prove 'beyond reasonable doubt' that the offence was committed.

3.14.7.2. Costs

In Scotland, costs are not recoverable in the event of a successful prosecution. This is in contrast with the situation in England, Wales and Northern Ireland where costs may be recovered by the Environment Agency in the event of a successful prosecution. Legal aid is not available to those wishing to bring private prosecutions. If a private prosecution is unsuccessful, the party bringing the action will usually be required to pay the other side's costs.

3.14.7.3. Competent judges

3.14.7.3.1. Sheriff Court

Today, there are six sheriffdoms, each with its own sheriff principal. Sheriffs, including sheriff principals are appointed by the Queen on the nomination of the First Minister and after consultation with the Lord President. Those who have been advocates or solicitors for at least ten years are eligible to be appointed

sheriff but in practice, few are appointed with less than a couple of decades of experience. Sheriffs are salaried. Full-time salaried 'floating' sheriffs are appointed to a particular sheriffdom but may be directed to sit anywhere to relieve pressure of business. There are also temporary sheriffs who must be solicitors or advocates of at least five years standing.

3.14.7.3.2. High Court of Justiciary

The High Court of Justiciary is the supreme criminal court in Scotland and it is both a trial court and a court of appeals. There is no appeal from it to the House of Lords. The judges are the same as those in the Court of Session (the supreme civil court in Scotland). The Lord President of the Court of Session is the Lord Justice-General. Temporary judges of the Court of Session are also temporary judges of the High Court. Normally, only one judge sits at trial, but in cases of importance or difficulty, two or more can sit, and there is always a jury. An appeal from the High Court will be made to the Court of Criminal Appeal.

4. Environmental Criminal Law in Case Law

An important aspect of environmental criminal law is obviously the way in which environmental criminal law is dealt with in legal practice. Therefore all the country reporters have equally been asked to address the most important case law concerning the national rules, implementing the measures transposing the directives and giving effect to the regulation, covered in this project. Obviously the focus has been on the most striking and important cases, since a complete overview of all available case law is not possible within the limited scope of this project.

In addition the country reporters have equally been asked to provide a brief insight in the way in which environmental criminal procedure takes place. Thus it has been asked who initiates a procedure and whether specific rules apply for criminal environmental law.

Obviously in some cases the reporters have provided the information when the directives were discussed (see part II); in other cases some of the most important case law has already been dealt with when discussing material environmental criminal law in part III. Moreover, in some members states there simply was no case law available, so that no information could be provided on this issue. Therefore, not for all members states detailed information could be provided on this issue.

Below follow these parts of the country reports that deal specifically with environmental criminal law and case law.

4.1. Austria

Andreas Scheil

4.1.1. MATERIAL LAW

In criminal law we have detailed information about cases registered by police²⁵¹ and about persons convicted by the courts and about sanctioning²⁵². I deal only with the two most common crimes against environment, *Intentional impairment of the environment* (§ 180 StGB) and *Negligent impairment of the environment* (§ 181 StGB) and – concerning sanctioning – only with the years 1990, 1995 and 2000.

²⁵¹ Data from „Bericht der Bundesregierung über die innere Sicherheit in Österreich“ 1990 to 2000 and „Polizeiliche Kriminalstatistik“ 1990 to 2000, ed. by Bundesministerium für Inneres.

²⁵² Data from Gerichtliche Kriminalstatistik 1990 to 2000, ed. by Österreichisches Statistisches Zentralamt or STATISTIK AUSTRIA.

4.1.1.1. *Intentional impairment of the environment* (§ 180 StGB; imprisonment up to 3 years or pecuniary fine up to 360 daily rates)

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
cases registered by police	132	217	165	112	92	96	127	81	64	43	34
convicted	12	8	14	19	9	7	8	6	5	2	3

Sanctions 1990: 10 out of the 12 convicted got fines (5 totally suspended, 4 unsuspended and 1 partially suspended), 2 got prison sentences (one in the range of 1 to 3 months and the other in the range of 3 to 6 months, both totally suspended). The most common sanction this year was a suspended fine in the range of 60 up to 180 daily rates (4) or – in Euro - in the range of 363 to 726 € (3).

Sanctions 1995: 4 out of the 7 convicted got fines(2 totally suspended, 2 unsuspended), 3 got prison sentences (all in the range of 1 to 3 months, all totally suspended). The most common sanction this year was a totally suspended prison sentence in the range of 1 to 3 months (3).

Sanctions 2000: all 3 convicted got totally suspended fines. The most common sanction this year was a totally suspended fine in the range of 60 to 180 daily rates (3) or – in Euro - in the range of 727 to 817 € (2).

4.1.1.2. *Negligent impairment of the environment* (§ 181 StGB; imprisonment up to 1 year or pecuniary fine up to 360 daily rates)

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
cases registered by police	229	684	293	209	208	135	189	163	114	139	111
convicted	26	35	33	37	12	11	14	24	15	18	13

Sanctions 1990: 24 out of the 26 convicted got fines (15 totally suspended, 9 unsuspended), 2 prison sentences (1 in the range of 1 to 3 months, 1 in the range of 3 to 6 months, both totally suspended). The most common sanctions this year was a totally suspended fine in the range of 60 to 180 daily rates (13) or – in Euro - a totally suspended or a unsuspended fine in the range of 727 to 817 € (5 each) or in the range of 1.817 to 3.634 € (5).

Sanctions 1995: all 11 convicted got fines (8 totally suspended, 2 unsuspended, 1 partially suspended). The most common sanction this year was a totally suspended fine in the range of 60 to 180 daily rates (7) or – in Euro - in the range of 727 to 817 € (5).

Sanctions 2000: 11 out of 13 convicted got fines (5 totally suspended, 1 unsuspended, 5 partially suspended), 2 got prison sentences (both in the range of 1 to three months, both totally suspended). The most common sentences this year were partially suspended fines (3) and totally suspended fines (3), the last in the range of 1.817 to 3.634 €.

Crimes against environment don't play a significant role. 231 cases (§§ 180, 181 StGB) registered by police in 1995 for example out of 486.433 cases in total make less than 0,05 per cent; 18 persons convicted that year for these two crimes out of 69.779 make less than 0,03 per cent. Although figures are very low, we can see a trend: Both, cases and convicted persons, are on a significant decline in the second half of the last decade. Is there less crime? Is there less investigation by police? Are there less reports by private persons to the police in the second half of the last decade?, we do not know. A public prosecutor says that "Grün-Gruppierungen" (*members of Green Parties*) lost a lot of enthusiasm to report environmental crime²⁵³. And concerning sanctions: Not one single unsuspended prison sentence has been handed out for these two and the other crimes against environment between 1990 and 2000. Most common sanctions are (partially/totally) suspended pecuniary fines in the range of 60 up to 180 daily rates (in Euro between 727 and 3.634 €) or totally suspended prison sentences in the range of 1 to 3 months. So sanctioning on a low level did not lead to an increase of environmental crimes²⁵⁴.

Thanks to constant research²⁵⁵ about case law in the field of criminality against the environment by *Wegscheider*²⁵⁶ we know that for example in 1990 the poison number one to the environment – according to criminal law - is liquide manure (50 per cent of the convictions) followed by sewage (24 per cent) and (waste) oil (20 per cent) and that the convicted offender number one is a farmer (52 per cent – in reports to the police only 16 per cent), dealing with that manure. Reports to the police concern the medium soil (21 per cent), that disappears in convictions: 100 per cent of the convictions concern water, 40 per cent fishing waters. Figures about time after 1990 to be published by *Wegscheider* this year, will draw the almost same picture.

²⁵³ *Hintersteiniger*, Umweltstrafrecht aus der Sicht der Praxis – Alltagsprobleme bei der Behandlung von Umweltstrafsachen, in *BMfJ* (ed.), Entwicklungslinien im Straf- und Strafprozessrecht, 1996, 398.

²⁵⁴ *Against Triffterer*, Die Vorschläge zur Änderung des Umweltstrafrechts nach der Regierungsvorlage 1996 in rechtsvergleichender Sicht, in *BMfJ* (ed.), Entwicklungslinien im Straf- und Strafprozessrecht, 1996, 361, who demands higher maxima and sanctions on a higher level.

²⁵⁵ *Wegscheider*, Die Praxis des Umweltstrafrechts in Österreich, *ÖJZ* 1985, 481, *Wegscheider*, Zur Praxis des Umweltstrafrechts in Österreich, *RZ* 1986, 154, *Wegscheider*, Zur Praxis des Umweltstrafrechts in Österreich, *ÖJZ* 1989, 641.

²⁵⁶ *Wegscheider*, Die Praxis des Umweltstrafrechts nach der Reform 1989, *ÖJZ* 1994, 648.

4.1.2. FORMAL LAW

Only few non directly affected private persons report environmental offences²⁵⁷. Procedures are initiated mainly by reports from administrative authorities, citizens' action groups and directly affected private persons²⁵⁸.

1990 police founded investigation teams (2 to 3 officers) in Lower and Upper Austria, that work only in the field of environmental offences. Training of police officers about investigating in environmental cases takes place repeatedly and police is supplied with the necessary technical equipment to take evidence ("Umweltsets")²⁵⁹. 1998 the "Zentralstelle zur Bekämpfung der Umweltkriminalität" (*Central Office to Fight Criminality Against Environment*) in the Ministry of the Interior was founded and a program started to train police and custom officers to "umweltkundigen Organen" (UKOs, *environmentally well-informed organs*). Austria shall be covered with such "UKOs", to get "*an appropriate net of perception*"²⁶⁰.

Thanks to *Wegscheider*²⁶¹ again we know that in 1990 753 cases were reported to the public prosecutors. 92 per cent of this cases were settled by the prosecutors in favor of the offenders, only 8 per cent were referred to the courts: half of them convictions (27 cases, 2 per cent of all), half of them acquittals (28 cases, 2 per cent of all). The rate of acquittals (50 per cent) is relatively high (less than 20 per cent in other cases).

33 per cent of the cases were so clear (in favor of the offender) that they could be settled within 3 days, another 10 per cent within a week. In 16 per cent of the cases the proceedings lasted between 8 days and 1 month, in 11 per cent between 1 and 3 months, in 16 percent between 3 months and 1 year, in 7 per cent the proceedings lasted more than a year. The most common case took 21 days to be settled.

If a case was referred to a court, the court needed more than one year in 42 per cent of the cases to come to a final decision (most common case 382 days). In only 37 per cent of the cases the proceedings, that led to a conviction, lasted longer than a year (most common case 280 days).

²⁵⁷ *Triffterer*, Viktimologische Aspekte im Umweltstrafrecht, *Strafrechtliche Probleme der Gegenwart* 14, 122 and *Hintersteiniger*, Umweltstrafrecht aus der Sicht der Praxis – Alltagsprobleme bei der Behandlung von Umweltstrafsachen, in *BMfJ* (ed.), *Entwicklungslinien im Straf- und Strafprozessrecht*, 1996, 398.

²⁵⁸ *Hintersteiniger*, Umweltstrafrecht aus der Sicht der Praxis – Alltagsprobleme bei der Behandlung von Umweltstrafsachen, in *BMfJ* (ed.), *Entwicklungslinien im Straf- und Strafprozessrecht*, 1996, 398.

²⁵⁹ „Bericht der Bundesregierung über die innere Sicherheit in Österreich“ 1990, ed. by Bundesministerium für Inneres Sicherheitsbericht, 140.

²⁶⁰ „Bericht der Bundesregierung über die innere Sicherheit in Österreich“ 1998, ed. by Bundesministerium für Inneres Sicherheitsbericht, 107.

²⁶¹ *Wegscheider*, Die Praxis des Umweltstrafrechts nach der Reform 1989, *ÖJZ* 1994, 648.

4.1.3. FINAL REMARK

Most Austrian cases are not very spectacular²⁶². And the – in my personal view – most impressive (“Fischer-Deponie”) is not a criminal one.

Starting in 1970 almost 900.000 tons of waste including approximately 24.000 barrels containing chlorinated organic and chlorinated hydrocarbon material are deposited with permission/toleration of the administration near Vienna in an unsealed deposit site (80.000 square meters) a few meters above the water table of one of the largest ground water lakes in Europe, that supplies almost 300.000 people with water and that is regarded to be a water reserve for Vienna. 1982 first signs of pollution of the ground water are discovered and depositing is been stopped. Battles at different courts start about who (the private owner of the site, the state or the federation) is responsible for removal and treatment of the dangerous waste – the final decision is not yet handed out, costs of the court battles till now approximately 11 million €. 1990 the Minister of the Interior gives order to removal to the in between impoverished private owner. That order is final since a decision of the Administrative High Court in 1998. May 17th 2002 the invitation to tenders for removal and treatment of the waste started (expected costs 140 million €). No criminal procedures ever.

If an incompetent or an administration under too great a strain or unable to know all that tremendous amount of relevant administrative law²⁶³ permits²⁶⁴, the humiliation of the environment is not a subject to criminal prosecution thanks to “Verwaltungsakzessorietät”.

Unfortunately there is absolutely no (reliable) information about cases, sanctioning, amount of time for the proceedings and who initiates the procedures in the field of federal and state administrative (environmental) penal law. We do not know how many infringements are registered and how many people are sanctioned by the hundreds of different authorities a year and we do not know what the sanctions are. But it is very much likely that almost all sanctions unsuspended fines and that the most common fine in an environmental case should be approximately 150 €.

One typical case from Tirol (1989): A professional liquid manure collector clears the soakaway of a hotel and empties his transporter into the sewers of a little village. The sewage plant is not built to take

²⁶² See *Wegscheider*, Rechtsmittelentscheidungen zum neuen Umweltstrafrecht, RdU 1994, 104.

²⁶³ *Hintersteiniger*, Umweltstrafrecht aus der Sicht der Praxis – Alltagsprobleme bei der Behandlung von Umweltstrafsachen, in *BMfJ* (ed.), Entwicklungslinien im Straf- und Strafprozessrecht, 1996, 405.

²⁶⁴ *Schick*, Der umweltkriminelle Beamte – Probleme strafrechtlicher Haftung der Beamten für rechtswidriges Verhalten Dritter, *Strafrechtliche Probleme der Gegenwart* 1985, 105, *Triffterer*, Zur gegenwärtigen Situation des österreichischen Umweltstrafrechts, *ÖJZ* 1991, 409.

such a load at once. 30.000 square meters of a lake (7.5 square kilometers) are polluted for almost one week. Fine: 181 €²⁶⁵.

4.2. Belgium

Jan Vanheule and Michael Faure

4.2.1. ORGANISATION OF THE PUBLIC PROSECUTOR WITH A VIEW TO THE PROSECUTION OF ENVIRONMENTAL CRIMES

In 1994 and in 2002 the Belgian Association for Environmental Law sent out an inquiry to all Public Prosecutors of Belgium, with among others the purpose to get an idea of the organisation of the various Prosecution Departments for what regards the treatment of environmental files.²⁶⁶ The point of departure is that, one uses that seen on average, the number of environmental files makes up about % of the total workload of the prosecution departments. In order to may get a concrete image of the organisation, we can take the Flemish-speaking part of the country as example. The Flemish-speaking part of the country has at the lowest level 14 prosecution departments, among which three bit ones, which means with more than 30 magistrates, and 2 small ones, with less than 15 magistrates. It results from the inquiries that but for two prosecution departments, each of them has an environmental section with one to three magistrates. However we do not get a completely true image, to the extent that this does not at all mean that these magistrates would be busy exclusively with environmental files. Indeed based on the answers to other questions of the inquiry, it ensues that none of the environmental sections is exclusively busy with environmental files. The environmental sections are generally called otherwise, namely special sections, namely the special criminal law section, that treats mainly files relating to crimes not mentioned in the Penal Code. This section deals for instance also with hormone traffic, doping, food, etc. Eventually the confirmation of the existence of environmental sections means nothing else than the fact that a series of magistrates are specialising in these matters, but are besides dealing with countless other files. In Belgium there are no true environmental assistant public prosecutors, like there are public prosecutors specialized in tax matters in Belgium. These are assistant prosecutors with a specialised university training in that field. At the lowest level, one is against that kind of assistant public prosecutors.

4.2.2. CIVIL CLAIMS BEFORE THE CRIMINAL COURT

²⁶⁵ *Schwaighofer*, Strafrechtliche Verantwortung für Umweltschäden – Grundfragen des StGB und des VStG, ÖJZ 1994, 231.

²⁶⁶ J. VAN DEN BERGHE, Vervolging en handhaving inzake milieudelicten – La répression des infractions en matière d’environnement, Diegem, Kluwer Rechtswetenschappen, 1994, 181 p. and Documentation bundle of the Workshop De handhaving van het milieurecht – La répression des infractions en matière d’environnement, Brussels, Friday 22nd February 2002.

One important feature of Belgium criminal procedure worth mentioning is that it allows for a very active role of the victim.²⁶⁷ Indeed, the victim of a crime has the right to start legal proceedings in the criminal court against the offender and to claim compensation for the damage he suffered. Even in cases where the victim did not take this initiative himself, he has the right to follow up on the public prosecutor's action against the offender by claiming compensation in the criminal court. This rule plays an important role in environmental legal practice in Belgium since in many cases, e.g. of soil pollution, local authorities may be the victim of an environmental crime. They can then bring their civil claim directly in the criminal court claiming damages or restitution of the wrong done, acting jointly with the public prosecutor against the offender.

This system has obvious advantages for victims. First of all, they can make use of the investigations of the public prosecutor, who can also gather evidence which may be useful to support the civil claim brought by the victim. In addition, the victim has no need to file a separate claim with the civil court, but can simply join the prosecutor in the proceedings against the defendant.

Hence, costs may be substantially lower for the victim than they would be in a separate civil proceeding.

In environmental practice in Belgium, it is therefore frequent that victims join the public prosecutor in an action. Often these victims are administrative authorities, such as the Flemish Waste Agency (OVAM), which may be trying to get compensation, for instance, for illegal soil contamination. The only requirement in case law is that the administrative authority's private (usually monetary) interests were indeed violated.²⁶⁸ In such a case, administrative authorities may not only claim compensation, but also the *restitutio ad integrum* of the polluted site. Complications may arise, since a similar measure could also be ordered by the criminal court as a criminal sanction on the request of the public prosecutor. More particularly, problems may arise if a victim or an administrative authority acting as a civil party gives preference to a different method of treatment than the public prosecutor.²⁶⁹

Although these particular features of Belgian environmental procedure may prove to be quite beneficial in practice, since they allow for the use of an optimal mix of various legal instruments to attack the pollution problem, they also pose problems. For instance, the Law of 12 January 1993 gives the public

²⁶⁷ See Ch. Van den Wyngaert, *Strafrecht en strafprocesrecht in hoofdlijnen*, Antwerp, Maklu, 1994, pp. 520-535; Ch. Van den Wyngaert, 'Belgium', in: Ch. van den Wyngaert (ed.), *Criminal procedure systems in the European Community*, London, Butterworths, 1993, pp. 16-18; R. Verstraeten, *De burgerlijke partij en het gerechtelijk onderzoek*, Antwerp, Maklu, 1990 and R. Verstraeten, *Handboek Strafvordering*, Antwerp, Maklu, 1994, pp. 89-106.

²⁶⁸ See, for instance, *Cour de Cassation*, 25 April 1984, R.W., 1984-85, 116; *Pas.*, 1984, I, 1054; R.D.P., 1985, 487.

²⁶⁹ See, with respect to these kind of issues, M. Faure and P. Morrens, 'De vervaging van grenzen in het milieustrafrecht', R.W., 1995-96, 1201-1202.

prosecutor the right to request an injunction from the president of the civil court of first instance. However, one can also find administrative authorities acting as victims with a civil claim against the defendant before a criminal court. Through these developments, the boundaries between the traditional legal areas have become increasingly vague. This once more shows that environmental law is an area where traditional boundaries seem to disappear.

4.3. Denmark

Peter Pagh

4.3.1. GENERAL INFORMATION ON ENVIRONMENTAL CRIME CASE LAW

Based on the reported environmental crime cases for the last five years,²⁷⁰ the most important criminal offences of environmental law brought to court can be quantified: illegal pollution of the aquatic environment (20%), illegal storage or treatment of waste (20%), infringements of legislation on chemicals (15%), non compliance with the Physical Planing Act (10 %) and infringements of the Danish legislation on fish farming (10 %), infringements of legislation on nature conservation and protection (10 %). The majority of the last 15% of the crime-cases are on infringement of the Water Supply Act.

To be a bit more specific and relate the information to EC law, approximately 80% of the cases on pollution of aquatic environment concern farmers storage and spread of manure and fertilizers. Neither in these cases, nor in the other cases on discharge of waste water and pollutants, there have been any reference to the relevant EC-legislation. Regarding waste, 50% of the waste cases concerns illegal treatment of end of life vehicles - but neither in these nor in the other waste cases references have been made to EC-legislation - although that might have had impact on the judgements in some of the cases. The same picture of ignorance towards the important EC-legislation are seen in the chemical cases. Almost all the cases regarding the Physical Planing Act concerns the use of summerhouses and are not related to any piece of EC legislation. The fish farming cases are all related to a specific Danish regulation on the permitted amount of fish-feedings which are fixed based on previous use. Although not interesting from an EC perspective, the fish farming cases are important in respect of penalties which compared to Danish standards have been extremely high based on a theoretical calculated profit of the offence.

The annual amount of environmental crime cases before the Danish courts are on average 30-40.

²⁷⁰ Almost all environmental crime cases have since 1996 been reported in the quarterly journal, *Miljøretlige afgørelser og domme* (I am one of the editors).

4.3.2. MOST IMPORTANT CASES

The most public known environmental crime cases besides the cases on fish farming, have been cases on illegal storage of waste. Two of these cases have been decided by the Danish Supreme Court. The first case was Dansk Kabelskrot A/S concerning a plant for recovery of cable-waste.²⁷¹ The company which have an IPPC-permit to storage up to 300 tons of shredderwaste had because of financial problems storage 3-4000 tons of shredder waste at the site of the plant. The storage caused nuisances to neighbors. After several attempts from the public authorities to use administrative enforcement measures, a criminal case was started against the director and owner of the company for violating the IPPC-permit and the Danish legislation on dangerous waste. The lower court found the director guilty as charged, and fixed the penalty to a fine on 200.000 Danish kr. The company was in the meantime went bankrupt, so confiscation was not possible. The appeal court also find the director guilty as charged, but in fixing the penalty, the appeal court took into account the passivity of the public authorities. The prosecutor appealed to the Supreme Court, which not only found the director guilty as charged, but increased the fine to 300.000 Danish kr. because of the seriousness of the offences and because the offences were done for profit reasons.

The second very spectacular case was the Prom-case concerning a chemical plant which in more than one way violates Danish Environmental Legislation. One of the first environmental crime cases from the 1960'ties was against this plant. In 1985 and 1989 the company accepted a fine for breaching the permits regarding emission of wastewater. In 1992 a new environmental criminal case was raised against the company and the owners of the company for violation of the limit values for discharge of wastewater and for falsification of the reported values. However, because the IPPC permit was found not to contain any binding provision on how pollutants in the wastewater should be monitored and analyzed measured and because of unclear evidences, the lower court found in 1993 the defendants not guilty. After appeal, one of the owners was in 1998 found guilty as charged by the appeal court, but taken into account the circumstances, the fine was fixed to 50.000 Danish kr. But this was not the only offence. Since the end of the 1980'ties and in contrast to the IPPC-permit, chemical waste was stored at the plant. In 1994 the company went bankrupt, and the plant was purchased by a new company own by the sons of the owners of the bankrupt company. Because the new company had not removed the previous stored chemical waste, criminal prosecution was initiated for this offence and some minor offences. Based on the polluter pays principle and the evidence and arguments presented, the lower court found the new owners not guilty as charged. At the appeal court, the prosecutor presented a new tactic arguing that the two new owners (the sons) were directors in the old company and by this related to the offence - a concept which in Denmark is named: *corporate identification*. The appeal court accepted this reasoning and found one of the directors guilty as charged and fixed the fine to 300.000 Danish kr. (the other director did not met

²⁷¹ The case is reported in the weekly legal magazine, Ugeskrift for Retsvæsen, 1994, p. 267.

in court and is staying in United Kingdom). The Supreme Court upheld the penalty - but in contrast to the appeal court the criminal liability was only reasoned with the knowledge of the new owner before the transfer. The premises of the Supreme Court has later on been disputed as going too far in recognizing that new owners can be held criminal liable for activities done by previous owners and operators.²⁷²

In particular the last Prom-case has been important for the former Danish Government's initiating of EC involvement in environmental crimes. First, one of the owners was not brought to court, because he was staying in another Member State. Second, after the criminal case was started, the owners have been involved in management of chemical plants in other states. However, the EC legislations on waste and water-pollution were not even mentioned in the case.

The third very important case goes back to an accident in 1982. A farmer had accepted that a railway carriage tank containing hazardous substance (perchloroethylene) owned by a chemical company was placed at his property. Because of an accident 13.000 liters of the hazardous substance was released and polluted a watercourse nearby the site. The local authority took actions cleaning up the pollution - the costs was payed by the chemical plant after reconciliation. After further research, criminal actions for offences of the previous Environmental Protection Act section 17(1) was initiated against the chemical company two years after the release. The previous section 17(1) is almost similar to the recent Environmental Protection Act section 27(1) - see box.

Environmental Protection Act, section 27(1):

“Substances likely to pollute water shall not be discharged into watercourses, lakes or the sea, and shall not be stored so that the water might be polluted. However, under section 28 below, a license may be issued to discharge wastewater into watercourses, lakes or the sea”.

At the lower court the chemical plant was found guilty. The judgement was reversed by the appeal court, which found that such incidental pollution of the aquatic environment was not covered by the Environmental Protection Act section 17 and therefore not an offence. This judgement was by the prosecutor brought before the Supreme Court, which in contrast to the appeal court found, that the prohibition of non-permitted emission of pollutants into the water also include emissions caused by negligence.²⁷³ The Supreme Court annulled the judgement of the appeal court, and the case then returned to the appeal court. In its second judgement the appeal court also found the defendants not guilty, but this time because of the prosecutor couldn't prove the prosecution was initiated before a court before less than two years after the accident took place because of uncertainty on the exact time of the incident.²⁷⁴ If

²⁷² The case is reported in the weekly legal magazine, Ugeskrift for Retsvæsen, 2001, p. 2045.

²⁷³ The case is reported in the weekly legal magazine, Ugeskrift for Retsvæsen, 1987, p. 256.

²⁷⁴ Not published judgement of Vestre Landsret, 25 June 1987, 5. div. S 290/1987.

the case had been based on recent legislation, the result would have been the opposite, because offences of the Environmental Protection Act section 27(1) are subject to five years period of limitation under section 110(7).

4.3.3. PROCEDURES AND PRACTICE IN ENVIRONMENTAL CRIME CASES

Initiating: Environmental crime cases starts normally, when the local environmental authority ask the police to initiate a criminal case. Its within the discretion of the police - and in the end the prosecutor of the State - to decide whether a criminal prosecution shall be initiated. Before the cases are brought to court, the police will normally make further investigations - and rather often then close the case even before any charge have been raised. Until about five years ago, the general experience was that the environmental authorities were not confidential with the needed evidences and often the authority had made so many mistakes that the police gave up the case. These problems are not solved, but its the general impression that authorities make less mistakes today.

Accepted fines: If the police find a penalty of the suspect can be expected, next step of the case will in most environmental crime cases be that the police by a letter ask the defendant, whether the defendant can accept a fine fixed by the police - but based on the same criteria as used by the court. If this is accepted, this is the end of the case. However, this option is only applicable for fines and confiscation but can not be used for imprisonment. If there are more than one defendants and only one of the defendant accept the fine, the criminal penalty for the other defendants will be decided by court. To illustrate how these accepted fines work, one criminal case for illegal treatment of hazardous waste can be mentioned. At the Danish island, Bornholm, the local councils in corporation owned a company operating a wasteincinerator and a landfill. To save money, the company decided to treat the hazardous waste at the plant, despite the plant didn't have any permit for treatment of hazardous waste. The board of the company accept a fine on 135.000 Danish kr. and confiscation of 550.000 Danish kr. (the calculated profit of the offence). The director of the company could not accept the offence, and the criminal case against the director went to court. The appeal court fixed the penalty to 25.000 Danish kr. arguing that in normal environmental crime cases, the penalty for the director of the plant will be 1/10 of the fines to the corporation, but because of the seriousness of the environmental offence, the appeal court almost double the fine.²⁷⁵

Competent judge: If the defendant does not accept the fine or if the prosecutor ask for imprisonment, the case goes to the lower court. All environmental crime cases starts at the lower court with one legal

²⁷⁵ The case has been reported in the environmental case-law quarterly journal, Miljøretlige afgørelser og domme 2000, p. 328.

educated judge. The judge will normally not be familiar with environmental law, but is the judge in all type of cases: civil law actions, family cases and all types of minor crime cases.

If the prosecutor ask for imprisonment, the judge will be supplemented by two jurymen. The question of guilt as well as the fixing of penalty are decided by majority, but en practice, the jurymen follows the legal educated judge.

The judgement at the lower court can be appealed to the appeal court by the defendant as well as by the prosecutor.²⁷⁶ Under appeal the judgement will be decided by three of the judges at the appeal court. If imprisonment is in question the three judges will be supplemented by three jurymen. Normal the judgement of the appeal court is final, but the defendant and the prosecutor can ask the independent board of court procedure (Procesbevillingsnævnet) for permission to appeal to the Supreme Court under the Court Procedural Act section 966. Permission to appeal is granted only, if the case is principle or appeal is reasoned by special circumstances. The test at the Supreme Court is limited to procedural error, wrong application of legislation and the fixing of the criminal penalty. In practice, very few environmental crime cases end up at the Supreme Court.

Costs: The costs of the criminal procedures are paid by the state - and an advocate can in complicated cases be appointed for the defendant payed by the state. However, if the defendant is found guilty, the defendant can be requested by the court to pay some part of the costs of the procedure. The amount of money the defendant has to pay, is fixed by the court.

Time spending: The time spending of environmental criminal cases from the case is raised by the prosecutor to the final judgement at the lower court are with few exceptions relatively short: between 6 month and one year. In case of appeal, the total time spending differs from almost two years until more than 8 years.

4.4. Finland

Ari Ekroos

4.4.1. PROCEDURE PRIOR TO THE COURT HEARING

Suspected environmental offence will be examined prior to the Court hearing normally at the public environmental administration, the police and the public prosecutor. In most of the serious cases the environmental administration puts forward a request of a preliminary investigation to the police.

Naturally it is also possible that an offence is reported to the police by a citizen or group of citizens. All of environmental offences are subject to the public prosecutor. Public prosecutors may bring charges for offences regardless of the report of the possible injured party.

The police makes annually about 250 investigations related to environmental offences (see table, annex 4). Every year more or less 70 environmental suspected offences are reported to public prosecutors by police. Public prosecutors take up to courts around 30 suspected environmental offences annually. Public prosecutors may, according to Regulation concerning in force coming of the Penal Code (1889/39B), decide not to bring charges. Annually, public prosecutors make 20-30 decisions of such in suspected environmental offences. The most common reasons for these decisions are that the act has not been felonious, there is not enough evidence to bring charges or the violation has been minor.

4.4.2. CASE LAW RELATING TO CORPORATE CRIMINAL LIABILITY

There is a very small number of case law related to corporate criminal liability in environmental matters, because the provisions concerning it has now been into force only 7 seven years (came into force 1st of September 1995). In quite recent case the Supreme Court made an interesting judgement concerning the corporate fine for a small enterprise.

Supreme Court 2002:39:

The district court considered clarified that A had exported 1998 - 1999 several dozens of cubic metres of waste of a different type as the managing director of company without due waste permit to the quarry area that was in the control of the company. The quarry was located in the groundwater area. Several wells of municipal water supply were located in the groundwater area. To the area had been exported e.g. potato waste, sawdust, metal scrap, forklift truck equipment, abrasive band, thinner, the cardboard waste, the waste paper and dissolvent vessels. A had burnt a part of the waste in the groundwater area without the waste permit and had covered the part with a gravel and sand.

The district court (Käräjäoikeus) sentenced A to the suspended imprisonment for 9 months and company X corporate fines of 50.000 FIM (8409 €) according to section 1 (chapter 48, Penal Code). The court of appeal (Hovioikeus) lowered the suspended imprisonment for 3 months and lowered the corporate fine to 10.000 FIM (1682 €).

According to the Supreme Court, the act of A was dangerous from the general point of view. The cleanness of such ground water which dozens of economies use as their household water had been

²⁷⁶ Denmark has 2 appeal courts - Østre Landsret and Vestre Landsret - which are also courts of first instance in cases against the State authorities and in principle cases.

endangered with the act. Thus the act had caused the danger to the general health in the ways which are shown in the sentence of the court of appeal. For this reason the act had to be considered exceptionally dangerous. A had known that the area of placed waste belonged to the forming area of the ground water. As the managing director of the company which transports waste professionally and as the chairman of the water co-operative he also had known about that danger which results from industrial wastes to the ground water. Furthermore, he had exported waste to the area against the prohibition in the quarry permit given by the town in 1994 and partly had burned and covered them. A had shown outrageous carelessness with its procedure by orders of a law and authorities and by the people's health. In the act of A or in his motives relieving points had not appeared.

Taking the exceptional dangerousness of the crime of A and the guilt which was shown in the crime and points at the outrageous carelessness of A, the Supreme Court considered that the punishment determined by the court of appeal was too slight and that to A the punishment condemned by the district court was in just relation to the dangerousness of the crime and to the guilt of A which was shown in the crime.

In this case, the shares of the company were owned by the parents of In addition to them, the members of the board of the company are the A as the managing director of the company and his wife. The area of operation and ways of action of the company had been independently decided by A.

According to the balance sheet of the completed accounting period of the company the allowances of the company were about 1.750.000 FIM 31.1.1998 and the debts about 1.730.000 FIM and the own capital about 20.000 FIM. According to the profit and loss account of the same accounting period, the turnover of the company was about 950.000 FIM, the result before direct taxes of about 8.000 FIM and the number of the paid salaries about 200.000 FIM. In addition to A, the company had one regular worker. The office work of the company had been managed by the wife of A as its part-time work. Thus the company was a small enterprise whose essential significance was in the fact that it had given the job to A.

Even though A did not own the shares of the company and even if in the story a report had not been presented from the fact that he would be responsible for the obligations of the company, one can conclude from the real decision-making of the company and from an economic position that the effects of the corporate fine in the fact would be essentially directed to A itself. This does not support the condemning of the corporate fine.

When considering grounds for corporate fine together and estimating their mutual significance, the Supreme Court considered that for the sentencing the corporate fine the dangerousness and the part of

the management of the company speak the crime for the doing of the crime the strongest. On the other hand, the directing A of the corporate fine to which the imprisonment also is sentenced, in talks very distinctly against the condemning of the corporate fine. Because it is against the main task of the corporate fine to be directed a corporate fine and imprisonment for the same person, the Supreme Court considered that, in this case the consideration lead against the condemning of the corporate and the prosecution's demand for the sentencing the corporate was rejected. The Supreme Court made following changes in the sentence of the court of appeal: 1) to A the sentenced punishment was raised for 9 months of suspended imprisonment and 2) the corporate fine to company X was rejected.

4.4.3. CASE LAW RELATED TO FORFEITURE

Supreme Court 1995:181

The Water Court had granted the permission to lead to the water system the waste waters which formed when paper was made at the paper mill of the company no more than 420 000 tons per year. The factory had simultaneously crossed the limit values of waste water emissions and production values that have been laid down in the terms of the permit. The crossings both the outputs and the limit values were considered to a punishable procedure which is against permission according to section 2 (chapter 13) of the Water Act. The company was ordered to lose as an economic advantage the cost savings and the additional income. When deciding the additional income the business profit produced by paper production was taken as a starting point from which the reduced the interest costs and direct taxes and the number of cost savings lost. The total number of forfeiture was 4.914.276 FIM (826.521 €).

Supreme Court 1989:97

A had tried to export from the country the eggs of birds that have totally been preserved according the Nature Conservation Act. A was sentenced for the smuggling only in so far as he had taken the export of which had been forbidden in the section 16a of the Nature Conservation Act. When A had been sentenced to lose the eggshells that he has emptied, he did not have to be sentenced in addition to it to lose the value of eggs. A was sentenced to the suspended imprisonment for 2 months.

Supreme Court 1983 II 170

The fish farm of the company bred more fish than it was permitted on the permission given by the Water Court. In addition water had been conducted through the farm over a number allowed in the permit decision. When it had been shown that the increase of the number of fish and in the conducted amount of water caused a harmful change of the water quality, the managing director of the company, who was in charge of the operation, was sentenced according to the section 19 (chapter 1) and section 2 (chapter 13) of the Water Act and section 2 (chapter 7) of the Penal Code to fine of 2.400 FIM (40 day fines of 60 FIM) (403 €). The company was sentenced to lose the economic advantage of 100.000 FIM (33.947 €).

As it can be seen on the Supreme Court case 1995:181 the total number of forfeiture can be relatively high and there is no maximum limit to it on the Penal Code of Finland.

4.4.4. CASE LAW INFORMATION

The statistics show that a number of environmental crimes, meaning sentenced crimes, is quite small. The number of environmental offences that are sentenced annually has been less than 30 in years 1996-2000. Almost half of these offences are misdemeanours (environmental infraction, section 3, chapter 48, Penal Code). The number of “normal” environmental impairments (section 1, chapter 48, Penal Code) has been less than 10 in years 1996-2000. According to statistics, in this period there was only one aggravated impairment of the environment. (See also annex 4.) In last 10 or 15 years there has been one or two serious environmental crimes every year.

The punishment has been in most of the cases fine. Imprisonment punishments are quite rare in practice and most of the them are suspended sentences. To give an example there were 28 crimes classified as environmental crimes in year 2000 (impairment of the environment: 8, environmental infraction: 16, nature conservation offence:1 and building protection offence:3) and in all of them the sentence was fine.

From the point of view of the directives mentioned before, the offences against the waste legislation are relatively common, but most of them are minor (e.g. littering). There has also been offences against the nature conservation legislation and in some cases the object of the has been species mentioned in habitats or birds directive, but annually the number of this kind of offences is very low.

4.5. *France*

Marcel Bayle

2-4-1 La jurisprudence française a été étudiée avec l’analyse de la transposition des directives. Elle se caractérise par l’absence de sévérité du juge à l’égard des contrevenants et des délinquants. Par exemple, lorsqu’une peine d’emprisonnement est prononcée, c’est toujours en pratique avec sursis. En matière de pollution, les amendes sont elles-mêmes souvent assorties du sursis.

Il semble qu’existe un important “chiffre noir” de la délinquance environnementale : de nombreuses infractions ne sont pas poursuivies, soit qu’elles n’ont pas été constatées, soit qu’ayant été constatées, elles ne font pas l’objet de poursuites de la part du Parquet.

2-4-2 En matière correctionnelle, entre le moment où l'infraction est constatée et celui de l'éventuelle condamnation, s'écoule souvent une année, et jusqu'à trois ans si la première décision de justice est frappée d'appel. Le pourvoi en cassation rallongera la procédure pour deux ans de plus en moyenne.

Le coût de la procédure est en principe supporté par le contrevenant ou par le délinquant, sauf si un tiers paie pour lui. Cette question présente un intérêt particulier en matière de responsabilité pénale des dirigeants de personnes morales. Si le dirigeant est condamné à une amende du fait de sa négligence ou de son imprudence dans la conduite de la personne morale, cette dernière peut-elle payer pour lui ? Le Trésor public français n'y voit pas d'inconvénient et ne crée pas de difficulté pour le condamné. En revanche, le procédé semble illégal au regard du droit des sociétés : si le dirigeant fait payer à la personne morale l'amende à laquelle il est personnellement condamné, il commet en principe le délit d'abus de biens sociaux ; toutefois, nous n'avons pas eu connaissance d'affaire qui aurait permis d'illustrer ce propos.

L'initiative des poursuites appartient au Parquet. Il en a le monopole en principe. Toutefois la victime d'une infraction non poursuivie par le Parquet peut déclencher l'action publique par le biais d'une plainte avec constitution de partie civile ou d'une citation directe. Elle doit alors consigner une somme d'argent au greffe du tribunal compétent. Cette somme sera perdue si elle ne parvient pas à faire établir la culpabilité de son adversaire. Le montant de cette somme est fixé par un juge du siège appelé "juge consignateur". Il la fixe en tenant compte des ressources de l'auteur de cette initiative. En pratique, ce sont souvent des associations environnementales qui utilisent le procédé. Elles défendent en cela leur objet social (la protection de l'environnement), ce qui rejoint l'intérêt général. Elles obtiennent, en cas de condamnation pénale de leur adversaire, des dommages-intérêts que les tribunaux fixent à un niveau de moins en moins symbolique, de plus en plus substantiel. Le rôle des associations se trouve donc renforcé dans le processus de défense pénale et civile de l'environnement.

Le juge compétent pour prononcer des sanctions pénales est le juge du tribunal de police en cas de contravention. Ce sont les juges du tribunal correctionnel en cas de délit. Ces juges pénaux peuvent statuer sur les intérêts civils si la victime le leur demande. La victime peut aussi plaider devant les juridictions civiles, le pénal tenant le civil en l'état.

Depuis la réforme du 10 juillet 2001, une faute non intentionnelle peut ne pas recevoir de qualification pénale tout en étant répertoriée comme faute civile. Le législateur français a souhaité que le juge pénal ne soit pas obligé de condamner pénalement le civilement responsable pour prononcer l'indemnisation de la victime. Cela s'inscrit dans un processus de dépénalisation des infractions considérées, à tort ou à raison, comme peu graves.

4.6. Germany

Gerhard Grüner

4.6.1. ENVIRONMENTAL CRIMINAL PROCEDURE

In Germany, specific environmental criminal case procedure right does not exist; the same applies to the mechanism of special environmental criminal law chambers or appropriate public prosecutor's offices. Essentially, the deciding factor for criminal courts is, according to general rule, the expected punishment for the condemnation. More extensive cases are frequently noticed by the public prosecutor's offices for economy criminal laws by economic crimes court. The duration of such procedures depends substantially on the defense behavior of the defendant; in the environmental criminal cases the position of proof requests (e.g. expert opinions) range of possibilities are open to the defense. The public prosecutor's offices try to accelerate the process in heavy cases (§ § 330, 330 a StGB) by exercising pressure on the offender with an extensive understanding of suspicion-jay. Generally the conclusion of such criminal procedures over the Deal between public prosecutor's office, court and defense represents is a usual instrument in the practice of the environmental criminal law. In this connection court costs and/or the risk of costs for the defendant play a large role. The court costs, according to general rule, thus e.g. also consultant costs has the offender to bear. Also in the case of the acquittal not all lawyer costs, but only the legally prescribed fees are reimbursed to the defendant. These usually do not cover actual court costs. Because environmental criminal actions are usually very extensive and require due to the principle *Verwaltungsakzessorietät* a special know-how of the defender.

The substantial decisions of the Federal High Court in the last years to the environmental criminal law concern first of all the responsibility of persons in charge within an enterprise, secondly the definition of the criminal waste term in relation to the administrative law and to the European law as well as thirdly the principle of the *Verwaltungsakzessorietät*. A further decision, which has to be called in connection with the environmental criminal law, concerns the payment of fines by enterprises for the employers in charge. To the responsibility of persons in charge within enterprises the Federal High Court took the position in the so-called “*Lederspray-Entscheidung*” in detail (BGHSt 37, 106 ff.). The court set up strict obligations to act and take care for persons in charge within enterprises. Person in charge are also criminally liable if their personal responsibility for the concrete damage is not provable, as long as only the aggravation of risk for the damaged or endangered right goods is to be proven. This applies, even if it is not provable whether a managing director could itself have interspersed within an enterprise at all. These principles were transferred by the decisions BGHSt 28, 330/ 39, 382 ff. in principle also the office holders in the environmental protection authorities.

The criminal definition of waste has a specific meaning in criminal law in accordance with the decisions BGHSt 37, 27; 37, 334 ff. It is based on the meaning of the European Community law as well as the German administrative law (KrW/AbfG 1994). But the criminal term carries however because of the criminal peculiarities (fault principle) its own character.

The Verwaltungsakzessorietät of the environmental criminal law was the subject of different decisions of the Federal High Court. The Federal High Court imposes thereby strictly formal standards. Thus by the administrative authority the application of the §§ 324 ff. according to BGHSt 31, 315 ff. also an incorrect prohibition (or the incorrect revocation of a permission) justifies for the operators of plants. The Federal High Court cuts the justification of an administrative permission in cases of abuse of an administrative right (threat; Bribery; forbidden arrangements). In these cases for the criminal law, mostly in accordance to the administrative law, there is no effective (futile) act of administration (BGHSt 39, 386). In the jurisprudence partially criticism is practiced in regards to this. In connection with the execution of a penalty is the so-called “Geldstrafen-Entscheidung” of the Federal High Court to call (BGHSt 37, 226 ff.). In this decision it went around the payment of a fine through a waste federation for its managing director. The Federal High Court decided to the fact that a punishing obstruction (enforcement obstruction) is not object of § 258 I StGB. Punishment of the managing directors of the enterprise can be possible regarding the inadmissible installation of tied funds, in particular at public bodies. The decision was heavy disputed in the jurisprudence because of the problem of the maximum personality from criminal sanctions. Partially there was discussed to create a new section of German Criminal Law specially concerning mechanism of new facts payment of foreign fines in the environmental criminal law.²⁷⁷

Altogether it has to be stated that the personal punishing adhesion of economy management is widely presented by the German courts in order to not only punish but to use the criminal law as preventive instrument against pollution of the environment. Therefore the risk of persons in charge specially executive directors being convicted has increased.

4.6.2. THE DEVELOPMENT OF THE GERMAN SANCTION RIGHT

In the development of the environment criminal law in the last years stands in particular the so-called quantitative protection of soil in front position. Here is particularly the federal soil protection law (Bodenschutzgesetz) from 1998 to be mentioned.²⁷⁸ According to § 26 the sealing of the soil (bringing materials on or into the soil) against national statutory orders or against binding resolutions of the EEC is sanctioned with fines up to 50.000 EUR. The injury of obligations to co-operate with national control of

²⁷⁷ Vierhaus ZRP 1992, 162.

²⁷⁸ Bodenschutzgesetz vom 17.03.1998, BB. I S. 502.

old or old suspected dump surfaces is sanctioned with fines up to 10.000 EUR. Particularly within this range enterprise sanctions in accordance with § 30 OwiG (enterprise fine) as well as the application of § 310 I OwiG (fine against line persons because of injury of the control duty) are possible. This quantitative protection of soil is also important according to a planning draft for an environmental law book, which was provided by an expert commission on behalf of the Federal Government. Sanctions for the cases of adverse permission or permissionless use of land are planned in the environmental law book.²⁷⁹

4.7. Greece

George Konstantionopoulos

It has to be stressed that never, until today, has the provisions concerning criminal penalties been applied in Court, the main problem being the generality of the provision. It is not clearly stated through this article under which particular circumstances can a certain activity be classified or determined as a criminal offence.

Furthermore, the monitoring system in Greece regarding environmental inspections can be considered as rather poor. It was not until 2001 that Greece formulated an official environmental inspectorate. Before that, the inspections were performed either by employees of the Ministry of Environment or by employees of the Environmental Department of each Prefecture.

4.8. Ireland

Yvonne Scannell

Criminal Offences for Water Pollution

The main criminal offences for water pollution are section 171, as amended,²⁸⁰ of the Fisheries (Consolidation) Act 1959 and sections 3 and 4 of the Local Government (Water Pollution) Act 1977.

Section 171, as amended,²⁸¹ of the Fisheries (Consolidation) Act 1959

Section 171 (1) provides that:

²⁷⁹ Umweltgesetzbuch (UGB-KomE), draft of the independent committee of experts under the direction of the *Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit* of 1997, E-§ 354.

²⁸⁰ Fisheries Amendment Act 1962, section 2(1); Local Government (Water Pollution) (Amendment) Act 1990, section 25. Provision was made for the repeal of these sections in section 34 (c) of the Local Government (Water Pollution) Act 1977 but the order commencing this was never made and section 34(c) was repealed by section 30 of the 1990 Act. Consequently, they are still in force.

Any person who:

(a) steps in any waters any flax or hemp, or

(b) throws, empties, permits or causes²⁸² to fall into any water any deleterious matter shall, unless such act is done under and in accordance with a licence granted by the Minister under this section, be guilty of an offence.

'Waters' for the purposes of sections 171 and 172 mean 'any river, lake, watercourse, estuary or any part of the sea.'

'Deleterious' matter is defined in section 3²⁸³, as:

any substance (including any explosive liquid or gas) the entry or discharge of which into any waters is liable to render those or any other waters poisonous or injurious to fish, spawning grounds or the food of any fish or to injure fish in their value as human food or to impair the usefulness of the bed and soil of any waters as spawning grounds or their capacity to produce the food of fish.

It is relatively easy to establish that a person "throws or empties" something; it is much more difficult to prove that a person has "caused or permitted" a polluting offence. For this reason, the jurisprudence on the meaning of these terms will be discussed. It should be noted that Irish courts frequently have regard to English decisions on statutory provisions which are similar in the two jurisdictions due to the common heritage of both legal systems.

Causing

The courts have always stated that the notion of "causing" is one of common sense but have nonetheless given many inconsistent rulings on what it involves. Whether an accused has "caused" something is a question of fact, not of law.²⁸⁴ The prosecution must prove that the defendant did the prohibited act but it is not necessary for it to prove that his act was the *immediate or main or only* cause of the pollution. If the answer to the question "did the defendant cause the pollution" is "yes", that will suffice to establish the offence even if others also caused it.²⁸⁵

It is generally -but not universally²⁸⁶- accepted that the offence of "causing or permitting" deleterious matter to enter waters is a strict liability offence.²⁸⁷ Therefore the state of mind of the accused is

²⁸¹ Fisheries Amendment Act 1962, section 2(1); Local Government (Water Pollution) (Amendment) Act 1990, section 25.

²⁸² See section below for discussion on the scope of 'to cause' and 'to permit'.

²⁸³ As amended by Fisheries Act 1982, section 2.

²⁸⁴ *NRA v Yorkshire Water Services Ltd.* [1995] 1 AER 225. Confl.R.m this.

²⁸⁵ See *Empress Car Hire Company (Abertillery) Ltd. v National Rivers Authority* [1998] 1 All ER 481 at 487.

²⁸⁶ See Keane J's dissenting judgment in *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 I.R. 268.

irrelevant and it is not necessary for the prosecution to prove a "guilty mind" or, as it is called legally, *mens rea*.²⁸⁸

The offence in section 171 does not create an absolute liability in the sense that all that has to be shown is that the pollutants emanated from the accused's lands although it comes very near to doing so. It must always be proved that the defendant did *something* that caused the pollution.²⁸⁹ It does not matter if other parties are also guilty of the offence.

Permitting

Permitted is a word commonly found in statutes creating criminal offences. Its meaning depends upon the context. It may be confined to "allowed" or "authorised" or it may be wider and embrace failure to take reasonable steps. If it has the former meaning, the prosecution must prove that the accused was aware that the polluting event was happening or about to happen. If it has the latter meaning, it will not be necessary to prove actual knowledge: it will suffice to show that the accused was reckless as to whether or not the polluting event was happening or liable to happen. Permitting is not an offence of strict liability.

In *Alphacell Ltd. v Woodward*, Lord Salmon stated:

"The creation of an offence in relation to permitting pollution was probably included in the section so as to deal with the type of case in which a man knows that contaminated effluent is escaping over his land into a river and does nothing at all to prevent it."²⁹⁰

This suggests that permitting requires actual knowledge, but the statement is *obiter*. In practice, the *Empress* decision may have removed the need for an inquiry as to whether actual knowledge is required because, according to it, passive permitting would usually amount to "causing" and knowledge need not be established for causing. Consequently, there would rarely if ever be any need to prosecute for "permitting" pollution.

Jurisprudence of the Irish Courts

²⁸⁷ *Alphacell Ltd. v Woodward* [1972] AC 824; Attorney General's Reference (No.1 of 1994) [1995] 2 All ER; Shannon Regional Fisheries Board v Cavan County Council [1996] 3 I.R. 268.

²⁸⁸ *Alphacell Ltd. v Woodward* [1972] AC 824; Shannon Regional Fisheries Board v Cavan County Council [1996] 3 I.R. 268 at 277

²⁸⁹ Ryan has suggested that "he must at least be aware that a potential pollutant is on his land or do something identifiable as "causing" such as the establishing, maintaining or operating of a system that gives rise to pollution. 10 Vol.2 (1998) JEL at 361.

²⁹⁰ [1972] 2 All. ER 475 at 479.

The Irish courts have taken a similar approach to interpreting the meaning of "causing" or "permitting" as the English courts. Liability under section 171 is strict. This was expressly confirmed by the High Court (Lynch J.) in *Maguire v. Shannon Regional Fisheries Board*.²⁹¹ In that case, whey for feeding pigs leaked through a fractured PVC pipe into waters causing a fish kill. The pig farmer had not intended to let whey into the waters nor had he been negligent in his operations. In fact he taken all reasonable steps to prevent the accident at considerable expense and his staff had done everything in their power to prevent the accident. The cause of the fractured pipe was unknown. Nonetheless the farmer was convicted of causing deleterious matter to enter waters. Lynch J observed that it would be very difficult ever to establish an offence if proof of *mens rea* was required in these kinds of cases. Lynch J's finding that section 171 was an offence of strict liability was confirmed by a majority of the Supreme Court in *Shannon Regional Fisheries Board v Cavan County Council*.²⁹² In that case, the Council had deliberately discharged imperfectly treated sewage (deleterious matter) to a river from an overloaded sewage treatment plant. When prosecuted under section 171(1) it pleaded that it had taken all reasonable care to prevent the entry of the deleterious matter to waters but that it had no other option because it was legally obliged to accept discharges into its sewers and it had not been possible to obtain public funding to upgrade its inadequate sewage treatment plant. The majority of the Supreme Court rejected this defence effectively holding that the offence was one of strict liability. But Mr. Justice Keane's powerful dissenting judgment questioned the policy reasons underlying this approach. He argued, *inter alia*, that one of the primary objectives in treating a statutory offence as one of strict liability (i.e. "to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act") would be undermined if the accused was not allowed the defence that he took all reasonable care. Indeed, not allowing the defence could encourage laxer standards by potential polluters. He questioned the widely held notion that conviction for strict liability offences did not involve the stigma of an ordinary criminal conviction describing the penalties on conviction for water pollution as "anything but trivial."

Problematic Aspects of the offence

The wide scope and strict liability nature of the offence of "causing or permitting" raises problems about potential liabilities for pollution. McIntyre²⁹³ commenting on *Empress* states that the House of Lords has so greatly increased the number of actors falling within the scope of the offence of causing that this may cause confusion. He asks whether a road authority is liable for water pollution by spillages caused by road accidents. After all, they have created "a state of affairs" in which this can happen.

Although there are good policy reasons for the imposition of strict liability for environmental crimes, the intrinsic unfairness of such liability should be balanced by the provision of statutory defences. Mr.

²⁹¹ [1994] 2 I.L.R.M. 253.

²⁹² [1996] 3 I.R. 267.

²⁹³ in "The Concept of Causi.ng" in *Environmental Offences* 5 IPELJ 57 at 60

Justice Keane suggested this in *Shannon Regional Fisheries Board* when he suggested there should be an intermediate type of offence where proof of the prohibited act *prima facie* imports the commission of the offence but where the accused can avoid liability by proving that he took reasonable care. This is the position for offences under section 3 of the Local Government (Water Pollution) Act 1979. It is suggested that it should also be the case for offences under section 171. The penalties and extraordinary exposures to civil and criminal liabilities on conviction for causing or permitting polluting emissions are too serious to justify making these offences offences of strict liability. The consequences of so doing can be fundamentally unfair. So, for example, it is difficult to see why justice requires that a person who operates a properly guarded facility in an exemplary manner should be exposed to civil liability under section 20(1)(b) of the Local Government (Water Pollution) Act 1990, for damage caused by the entry of polluting matter to waters caused by a vandal. Mr. Justice Keane considered that it is questionable whether it is constitutional to impose such liabilities in many cases.²⁹⁴

Statutory Defences

It is not an offence under section 171 to cause or permit deleterious matter to enter water under and in accordance with a licence granted by the Minister for the Marine under that section.

Section 83(7) of the Environmental Protection Agency Act 1992, provides that it shall be a good defence to a prosecution under any enactment other than Part IV of that Act that the act complained of is authorised by a licence or a revised licence granted under Part IV of that Act. This means that it is a defence to a prosecution under sections 171 and 172 above that the discharge was authorized by an IPC licence issued by the EPA. Section 40(12) of the Waste Management Act 1996 provides a similar defence in relation to compliance with a waste licence.

Section 59(7) of the Environmental Protection Agency Act provides that it shall be a good defence to a prosecution for an offence under any enactment other than that Act that the act constituting the alleged offence was in compliance with a standard or other requirement specified by the Minister for the Environment in relation to the collection, treatment, discharge or disposal of sewage or other effluents to waters from any sanitary authority plant or drainage pipe for the treatment of drinking water, or from any sanitary authority plant, sewer, or drainage pipe for the treatment and disposal of sewage or other effluents, or that the act constituting the alleged offence was in compliance with an authorisation granted by the Environmental Protection Agency to a sanitary authority for the discharge of effluents. Accordingly, it will be a defence that certain discharges complied with standards or other requirements

²⁹⁴ Shannon Regional Fisheries Board v Cavan County Council at 289.

in the Urban Waste Water Treatment Regulations 2001 or a licence to discharge sewage effluents granted under those Regulations.²⁹⁵

Advantages of prosecuting under section 171

Section 171 has two major advantages over other statutory remedies for water pollution, (1) liability under this section is strict and once the prosecution proves that the accused threw, emptied, caused or permitted deleterious matter to enter waters, the accused may not raise any defence except statutory defences such as those provided in the Local Government (Water Pollution) Act 1977, the Environmental Protection Agency Act 1992 and the Waste Management Act 1996 (e.g. that the entry of deleterious matter was authorized under and in accordance with licences granted under any of those Acts) and (2) it applies to deleterious discharges to *any* waters *irrespective of the identity of the discharger and the location of the waters*²⁹⁶ and thus accords no special immunity to those discharges exempted from the provisions of section 3(1) of the Local Government (Water Pollution) Act 1977²⁹⁷ or which occur at places which may be outside the jurisdiction of local authorities or the EPA.

Enforcement

Sections 171 and 172 are enforceable by the Garda Síochána, Fisheries Boards, the Minister for the Marine, an officer or servant of a Fisheries board, a private waterkeeper within the meaning of Part XVIII of the Fisheries Act 1980 and *any other person*.²⁹⁸ The maximum penalty for breach of section 171 or 172 is a fine not exceeding £1,000 and/or six months imprisonment on summary conviction, and £25,000 and/or five years imprisonment on conviction on indictment.²⁹⁹ The court is obliged to award certain costs and expenses a local or sanitary authority or of a Regional Fisheries Board incurred in bringing a successful prosecution unless there are special and substantial reasons for not doing so.³⁰⁰ Section 310 of the 1959 Act, unusually, gives unsuccessful prosecutors of offences in the District Court under the 1959 Act a right to appeal the decision. The constitutionality of this section was upheld in *Considine v Shannon Fisheries Board*.³⁰¹

²⁹⁵ S.I. No.354 of 2001.

²⁹⁶ Provided of course that they are in the national jurisdiction.

²⁹⁷ See section 3 (5).

²⁹⁸ Fisheries Act 1980, section 49. See Part XV111 of the 1959 Act, as amended, for the conditions on which enforcement powers may be exercised.

²⁹⁹ Local Government (Water Pollution) (Amendment) Act 1990, section 25.

³⁰⁰ Local Government (Water Pollution) Act 1990, section 28.

³⁰¹ [1994] I.L.R.M. 499.

In practice, the sections are enforced almost exclusively by Fisheries Boards in District Courts. Guidance on enforcing the fisheries laws has been issued to fisheries officers.³⁰² The most commonly prosecuted offenders are local authorities and farmers.

Sections 3 and 4 of the Local Government (Water Pollution) Act 1977

These offences relate to causing or permitting the discharge of polluting matter to waters (section 3) and causing or permitting the discharge of trade or sewage effluents to waters except under and in accordance with a licence granted under of the Act (section 4).

Definition of Water

'Waters' are defined in section 1 of the 1977 Act, as amended, to include:

- (a) any (or any part of any) river, stream, lake, canal, reservoir, aquifer, pond, watercourse or other inland waters, whether natural or artificial,
- (b) any tidal waters, and
- (c) where the context permits, any beach, river bank, and salt marsh or other area which is contiguous to anything mentioned in paragraph (a) which is for the time being dry, but does not include a sewer.

The inclusion of an aquifer in the above definition and the further definition of an aquifer in section 1 as 'any stratum or combination of strata which stores or transmits groundwater' means that the Acts apply to the vast bulk of ground waters. Furthermore they apply to both inland and sea waters, because 'tidal waters' in section 1 is defined to include 'the sea and any estuary up to high water mark medium tide and any enclosed dock adjoining tidal waters'.

Definition of pollution

There is no definition of water pollution in the Act but "polluting matter" is very widely defined in section 1 to include:

any poisonous and noxious matter and any substance (including any explosive, liquid or gas) the entry or discharge of which into any waters liable to render those or any other waters poisonous or injurious to fish, spawning grounds or the food of any fish, to injure fish in their value as human food, or to impair the usefulness of the bed and soil of any waters as spawning grounds or their capacity to produce the food of fish or to render such waters harmful or detrimental to public health or to domestic, commercial, industrial, agricultural or recreational uses.

³⁰² Enforcing the Fisheries Laws—A Guide for Fisheries Officers, Institute of Fisheries Management, 1982. See also Maloney, 'Prosecution of Pollution Offences under the Fisheries Acts 1959 to 1987 and the Local Government Water Pollution Act 1977' in *Environmental Protection and the Impact of European Community Law*, Irish Centre for European Law, 1990, 41-81.

It should be noted that matter will be defined as "polluting" even though it does not *actually* injure the stated beneficial uses of water: it is sufficient that it is *liable* to do this. In most cases, prosecutors will prove that beneficial uses were adversely affected but where this is not the case, it is submitted that they should be able to prove that particular uses are *liable* to be harmfully or detrimentally affected.

But what is liable to damage to beneficial uses of waters? This can be proven by showing that the matter that entered the waters could (not necessarily did) detrimentally affect the water in a manner envisaged by the definition of "polluting matter". Standards for particular waters or uses of waters or emissions to waters can be specified in Regulations prescribing environmental standards for waters made by the Minister under section 26 of the Act or under section 59 of the Environmental Protection Agency Act 1992 or under the European Communities Act 1972. Quality standards for certain waters have been prescribed by EC directives implemented in Ireland. Thus, matter entering waters which results in or is liable to result in their failure to comply with quality standards prescribed for those waters will, *prima facie*, be polluting matter. When water quality standards are not breached or liable to be breached, it is suggested that it must be more difficult for prosecutors to establish that matter is polluting or liable to be polluted.

Prohibition on the entry of polluting matter to waters

Section 3(1) of the 1977 Act provides that 'a person shall not cause or permit any polluting matter to enter waters'. It should be noted that the section creates two separate offences: (1) causing and (2) permitting polluting matter to enter water. This formula 'to cause or permit' recurs frequently in much legislation dealing with environmental pollution and it was extensively discussed above. That discussion is equally relevant to this section.

There appears to be a distinction between the "entry" of matter to waters and the "discharge" of matter to waters. Discharge implies a release through a pipeline or other connection. In *NRA v Coal Producers Ltd*³⁰³ a magistrates court held that hydrocarbons and phenols had *entered* the waters but that it had not been *discharged* when trade effluent had percolated into waters through the ground. In practice many Irish authorities consider that section 3(1) only applies to entries to waters from non-point sources but it is unclear whether or not matter spread by slurry tankers and other vehicles from which certain wastes are applied to lands is classifiable as an entry or a discharge.

Defences

Common Law

The common law defences of Acts of God and sometimes, depending on the particular circumstances, acts of a third party are available.³⁰⁴ These were discussed above. In addition, there are a number of statutory defences.

Statutory Defences

Defences in the Act

Defence of reasonable care

Section 3(3), as substituted by section 66 of the Waste Management Act 1996, provides that it is a defence to a charge of committing an offence under section 3(1) for the accused to prove he

"took all reasonable care to prevent the entry to waters to which the charge relates by providing, maintaining, using, operating and supervising facilities, or by employing practices or methods of operation, that were suitable for the purpose of such prevention, and, where appropriate, that the entry to waters to which the charge relates arose from an activity carried on in accordance with a nutrient management plan approved under section 21A (inserted by the Waste Management Act 1996) of the Local Government (Water Pollution) (Amendment) Act 1990."

This defence distances the offence in section 3(1) from the concept of strict liability. That is why regulatory authorities dealing with pollution incidents usually prosecute under section 171 of the Fisheries (Consolidation) Act 1959. Section 3(3) meets Mr. Justice Keane's concerns in *Shannon Regional Fisheries Board v Cavan County Council* discussed above.³⁰⁵ In fact, the section 3(3) defence is a narrow one. The burden of proving all reasonable care rests with the accused but it is on the balance of probabilities.³⁰⁶ The English courts tend to construe similar defences narrowly.³⁰⁷ The accused must show that his facilities, practices, methods of operation and staff capabilities were such as to prevent the polluting matter entering waters. This defence will be easier to establish if the accused has properly implemented a management plan for preventing entries of polluted matter to waters.

Where agricultural effluents are involved, the accused should be able to prove that his operations were conducted according to good agricultural practice or, if the offence relates to spreading of animal wastes,

³⁰³ ENDS Vol. 227, 45. See Environmental Law (Oxford University Press 2000) at 381 where the editors approve this finding.

³⁰⁴ See discussion on this above.

³⁰⁵ Ibid.

³⁰⁶ R. v. Carr Briant [1942] 2 All ER 156; Sherratt v. Gerald the American Jewellers, 1970 Solicitors Journal 147.

³⁰⁷ See e.g. Durham CC v Peter O'Connor Industrial Services 1993 Env.LR 197.

or sewage sludge used in agriculture³⁰⁸ or other such matters, that these were carried out in accordance with an approved nutrient management plan and all relevant legislation.

Non-Application of Section 3(1)

Section 3(1) does not apply

Section 3(5)(a) as substituted in 1990 and amended by article 4 of the Environmental Protection Agency (Extension of Powers Order) 1994,³⁰⁹ provides that section 3(1) does not apply to:

(a) (i) a discharge of a trade or sewage effluent made under and in accordance with a licence under section 4,³¹⁰ or an emission made under or in accordance with a licence or revised licence under Part IV of the Environmental Protection Agency Act 1992, CHECK WMA 1996 TO SEE IF EXEMPTED ALSO

(ii) a discharge of a sewage effluent from a sewer: provided that, where the discharge complies with any standard prescribed by any regulations made under section 26, the discharge complies with that standard,

(iii) a discharge of a trade effluent or sewage effluent to which regulations under section 4(10) apply: Provided that, where a standard applying to the effluent stands prescribed under section 26, the discharge complies with that standard;

(aa) any entry authorized by or under any enactment specified in the Table to section 3(6).

(b) entry to tidal waters of any matter from vessels, from apparatus for transferring any matter to or from vessels, or from marine structures.

These entries are controlled under other legislation.

(c) any deposit authorized under sections 3 or 13 of the Foreshore Act 1933, or section 48 of the Harbours Act 1946.

(d) any substance or thing authorised under section 88 of the Harbours Act 1946, to be put into any waters.

(e) any works authorized by an order under section 134 of the Harbours Act 1946.

(f) any entry authorized under the Fisheries Acts 1959 to 1976.

Discharges of sewage effluents from a sewer

Section 3(5)(a)(ii) provides that section 3(1) does not apply to discharges of sewage effluents from a sewer provided effluents discharged comply with effluent standards if these are prescribed under section 26. Regulations prescribing standards for the discharge of sewage effluents from were never made under

³⁰⁸ See Waste Management (Use of Sewage Sludge in Agriculture) Regulations 1998-2001 which provide that sewage sludge in agriculture must be disposed of in accordance with a nutrient management plan.

³⁰⁹ S.I. Nos. 206 of 1994.

section 26.³¹¹ Instead, the Urban Waste Water Treatment Regulations 2001³¹² made to implement EEC Directive 91/271/EEC³¹³ prescribe standards for discharges from sewers made by sanitary authorities but the immunity from prosecution conferred under section 3(5)(a)(ii) does not apply to these discharges. Instead, Section 59 (7) of the EPA Act 1992 provides that it is a good defence to a prosecution for an offence under any enactment other than the EPA Act that the act constituting the alleged offence complied with a standard or other requirement specified under section 59(2)(c) or an authorization granted by the EPA under section 59. Consequently, it will be a defence to a prosecution under sections 3(1) that discharges of sewage effluents from a sewer complied with the standards or other requirements in the Urban Waste Water Treatment Regulations 2001.

The Minister conferred powers on the EPA to license discharges from sanitary authority sewers in the Urban Waste Water Treatment Regulations 2001 made under section 59(5) of the EPA Act 1992. Section 59(7) provides that compliance with standards prescribed in such licences is defence to a prosecution under section 3(1).

Discharges exempted by regulations

Section 3(5) provides that section 3(1) does not apply where the effluents discharged are exempted from licensing requirements under section 4 (10).³¹⁴ However, it also provides that *if* the Minister has prescribed standards under section 26 of the Act for those effluents section 3(1) applies but it is a defence that the accused complied with those standards. The Minister has made exemptions under section 4(10) but has not made Regulations under section 26 for those discharges. Consequently, section 3(1) does not apply to discharges exempted under section 4(10).

(aa) Discharges controlled under specified legislation

Under section 3(5)(aa), inserted by the 1990 Act, section 3(1) does not apply to any entry authorised by or under any of the following enactments listed in the Table in section 3(6). These are:

Section 16 of the Shannon Electricity Act 1925.

Section 16 of the Liffey Reservoir Act 1936.

Section 10 of the Arterial Drainage Act 1946.

Section 11 of the Electricity Supply (Amendment) Act 1945.

³¹⁰ Licensed discharges of trade and sewage effluents are controlled under section 4 and prosecutions may be brought for contravening that section.

³¹¹ Section 59 (8) of the EPA Act 1992 amended section 26 so that Regulations made under that section cannot relate to sewage or other effluents discharged by sanitary authorities to waters.

³¹² S.I. No. 254 of 2001.

³¹³ O.J. No.L135/40 of 30 May 1991 on urban wastewater treatment.

³¹⁴ See section xxx below.

Section 27 of the Turf Development Act 1946.

Section 6 of the Local Authorities (Works) Act 1949.

The Minister for the Environment has power under section 3(2) to vary or repeal exemptions under section 3(5) and (6).

Defences under other Legislation

Section 83(7) of the Environmental Protection Agency Act 1992, provides that it is a good defence to a prosecution under section 3(1) that the act complained of is authorised by a licence or a revised licence under Part IV of that Act i.e. an IPC licence. Section 40 (12) of the Waste Management Act 1996 provides a similar defence in relation to a waste licence.

Offence of non-compliance with licence to discharge trade or sewage effluents to waters

Section 4(1) of the 1977 Act provides that (subject to exceptions) a person shall not after 1 October 1978 discharge or cause or permit the discharge of any trade effluent³¹⁵ or sewage effluent³¹⁶ to any waters except under and in accordance with a licence under the section. Licences must prohibit the discharge of dangerous substances when this is required by Community law. Discharging a controlled effluent except under and in accordance with a licence is an offence. This obligation does not apply to activities for which a licence under Part IV of the Environmental Protection Agency Act 1992 is required. Licences may be granted by local authorities³¹⁷ or water quality control authorities if they are established under section 25.³¹⁸

It should be noted that licences are required for *discharges*. A discharge is generally from a point source only. (Broadly speaking, a point source is one that enters waters from a particular source at a particular identifiable location). It has always been assumed that run-off of effluents, slurry, fertilisers and biocides from land and discharges from slurry tankers are not controlled under section 4. This assumption may have to be revised (at least in so far as the implementation of Community law is concerned) in the light of decisions of the European Court of Justice in *Nederhoff and Van Rooij*³¹⁹ ruling that emissions of

³¹⁵ Section 1 of the 1977 Act defines trade effluent as effluent: from any works, apparatus, plant or drainage pipe used for the disposal to waters or to a sewer of any liquid (whether treated or untreated), either with or without particles of matter in suspension therein, which is discharged from premises used for carrying on any trade or industry (including mining), but does not include domestic sewage or storm water. 'Trade' includes agriculture, aquaculture, horticulture and any scientific research or experiment.

³¹⁶ 'Sewage effluent' is defined in section 1 of the 1977 Act as: effluent from any works, apparatus, plant or drainage pipe used for the disposal to waters of sewage, whether treated or untreated. A sewer" is defined as "a sewer within the meaning of the Local Government (Sanitary Services) Acts 1878-1964, that is vested in or controlled by a sanitary authority and includes a sewage treatment works, and a sewage disposal works, that is vested in or controlled by a sanitary authority."

³¹⁷ Defined in section 1 of the 1977 Act to mean the larger local authorities.

³¹⁸ 1977 Act, section 1.

³¹⁹ Cases C-232/97 and C-231/97. See 2 Environmental Law Review 35.

steam containing dangerous substances can constitute a discharge and that an authorisation system can properly apply to placing creosote coated timber posts in waters. These occurrences would not normally be regarded as discharges under existing Irish law.

Exemption from licensing requirement in the Act

Section 4(2) provides that the licensing obligation does not apply to discharges:

- (a) to tidal waters from vessels or marine structures,
- (b) from a sewer,
- (c) the subject of regulations under subsection 10.

Tidal waters

The exemption of (a) above is understandable as these discharges are controlled under other legislation.

Discharges from a sewer

The exemption of (b) however is a major defect in the Act and is, once again, evidence of the general tendency in Irish environmental legislation to provide different regulatory procedures for public sector and private sector activities. Effluents from sewers are discharged mostly by sanitary authorities because, all existing and future sewers were vested in sanitary authorities under section 15 of the Public Health (Ireland) Act 1878 except:

- (i) sewers made by a person or company for profit,
- (ii) sewers made and used for the purpose of draining, preserving or improving land under any local or private Act of Parliament for the purpose of irrigating land.

But because 'sewer' is defined in section 1, as amended in 1990, to mean a sewer or sewage treatment or disposal works vested in, or controlled by, a *sanitary authority*, the exemption granted in respect of discharges from sewers does not apply to sewers which are not owned by sanitary authorities referred to in (i) and (ii) above. Nor does it apply to a drain or combined drain³²⁰ because these are not sewers as defined in section 1, unless a sanitary authority has made an order under section 22 of the 1990 Act declaring a combined drain a sewer for the purposes of the Water Pollution Acts 1977-90. Instead, discharges to waters by sanitary authorities are controlled by EPA licences and/or by Regulations made under section 59 of the Environmental Protection Agency Act 1992. So, for example, the Urban Waste

³²⁰ A combined drain is defined in section 1 of the 1977 Act as amended by section 1 of the 1990 Act as "a drainage pipe, or a system of such pipes, that is not vested in or controlled by a sanitary authority and is used to convey trade effluent or other matter (other than storm water) from two or more premises to any waters or to a sewer."

Water Treatment Regulations 2001³²¹ require sanitary authorities to comply with prescribed standards for effluents discharged from the waste water treatment plants which are subject to the Regulations. Section 59(7) of the EPA Act provides that compliance with an authorisation granted under that section or with a standard or other requirement prescribed under it will be a defence to any prosecution under any enactment except the EPA Act.

Discharges exempted by Regulations

The Local Government (Water Pollution) Regulations 1978³²² exempt:

(i) Domestic Discharges

Domestic sewage not exceeding five cubic metres in any 24 hour period which is discharged to an aquifer from a septic tank or any other disposal unit by means of a percolation area, soaking pit or any other method;

Small domestic sewage discharges are often controlled under planning legislation.

(ii) trade effluent discharged by a sanitary authority in the course of the performance of its powers and duties, other than from a sewer.

Sanitary authorities may be obliged to comply with standards prescribed for trade effluents by Regulations made under the European Communities Act 1972, or section 59 of the Environmental Protection Agency Act 1992, or in EC directives which have come into force but are not yet transposed. So for example, the Protection of Groundwater Regulations 1999³²³ made under section 59 of the EPA Act 1992, prescribe quality standards for, *inter alia*, certain trade effluents discharged to an aquifer by or on behalf of a sanitary authority for certain harmful substances and subject many direct discharges containing a harmful substance specified in the First and Second Schedules to the Regulations discharged by or on behalf of a sanitary authority to an aquifer to licensing by the EPA.

Other Statutory defences

Section 4(11) provides that it is a good defence to a prosecution for an offence under *any* enactment other than the 1977 Act that the act constituting the alleged offence is authorised by a licence under section 4.

It is a good defence to a prosecution under any enactment other than Part IV of the EPA Act and to any proceedings under sections 10 and 11 of the 1977 Act, section 20 of the 1990 Act, and sections 28, 28A

³²¹ S.I. NO 254 of 2001 implementing EEC Directive 91/271/EEC on urban waste water treatment and D.I.R.ective 2000/60/EC- the Water Framework Directive. OJ L 371/1, 22 December 2000.

³²² S.I. No. 108 of 1978; hereafter called the 1978 Regulations, article 4

and 28B of the Air Pollution Act 1987, to prove that the act complained of is authorized by a licence or a revised licence granted under Part IV of the Environmental Protection Agency Act 1992 or Part V of the Waste Management Act.³²⁴

Enforcement

The Local Government (Water Pollution) Acts 1977-90 are enforceable by the courts or by regulatory action taken by public authorities or sometimes even by any member of the public. In exercising their enforcement powers, public authorities have ancillary enforcement powers of entry and inspection, powers to require information and monitoring powers described above.

Prosecutions

All offences relating to discharges to waters or sewers may be prosecuted by the appropriate local or sanitary authority. Offences under sections 3(1) and 4(1) (already described) may be prosecuted summarily by the appropriate local authority, Regional Fisheries Board or any other affected person. It appears therefore that a member of the public must be affected in a particular way before he may bring a prosecution under these sections. Prosecutions for failure to comply with a court order made under section 10 of the 1977 Act, as amended in 1990, may be brought by the applicant for the court order, and the offence of obstructing an authorised person performing his duties under section 28 may be prosecuted by the person who appointed the authorised person. The appropriate prescribed public authorities must bring other prosecutions. Prosecutions must be taken by the EPA for activities licensed by it other than activities to which section 99(2) of the Environmental Protection Agency Act 1992 applies.³²⁵

The 1990 Act provides positive incentives for certain public authorities to prosecute. The maximum fine for conviction on indictment for major offences under the Acts is £25,000 and/or five years imprisonment.³²⁶ The maximum penalty on summary conviction is £1,000 and/or six months imprisonment and on conviction on indictment £25,000 and/or five years imprisonment³²⁷ The court is obliged to award certain costs and expenses incurred in bringing a successful prosecution to specified public authorities unless there are special and substantial reasons for not doing so.³²⁸ Substantial costs, which frequently exceed fines imposed, are frequently awarded to successful prosecutors. Local and sanitary authorities, Regional Fisheries Boards and the EPA may apply to the court to have fines

³²³ S.I. No. 41 of 1999 implementing Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances.

³²⁴ *Ibid.*, section 4(11); Environmental Protection Agency Act 1992, section 83(7); Waste Management Act 1996, s.40 (12)

³²⁵ Environmental Protection Agency (Extension of Powers) Order, 1994. S.I. No.206 of 1994.

³²⁶ 1990 Act, section 24.

³²⁷ 1990 Act, section 24.

³²⁸ Local Government (Water Pollution) Act 1990.

imposed made payable to them.³²⁹ Summary proceedings must be commenced within specified time limits but not more than five years from the date from the date the offence was committed.³³⁰

Corporate liability for offences under sections 3 and 4

Section 10(1)(e) of the 1977 Act provides that prosecutions for offences committed by a body corporate may also be brought against any director, manager, secretary or other officer, or any person acting in that capacity, who consented or connived in the commission of the offence or to whom the offence is attributable by reason of his neglect.³³¹

Administrative Enforcement

Administrative enforcement is solely the prerogative of public authorities.

Notices under section 10 of the 1977 Act

A local authority may serve a notice under section 10(5) on any person specified in section 10(1)(a), requiring the termination of the entry or discharge of polluting matter and the remedying of any effects of the entry or discharge in such manner and within such period as the notice may specify, and requiring that any of the measures specified in section 10(8) be taken. Failure to comply with this order empowers the local authority to take 'any steps it considers necessary' to secure the termination, mitigation or remediation of the pollution and to recover the costs from the person served with the notice. This administrative power is not exercisable by Fisheries Boards but they can always seek court orders under section 10(1). If an IPC licence is involved, the EPA must exercise the powers of the local authority under this section.³³²

Administrative Notices to prevent or control pollution

Where it appears to a local authority that it is 'necessary' to do so in order to prevent or control water pollution, it may serve a written notice under section 12 of the 1977 Act, as amended in 1990, on any person having custody or control of any polluting matter on premises in its functional area requiring action to be taken to prevent water pollution.

This section is aimed primarily at non-point sources of pollution, particularly at agricultural waste disposal facilities, but it has many other potential applications. Failure to comply with a section 12 notice is a criminal offence punishable by a maximum fine of £1,000 and/or six months imprisonment.³³³

³²⁹ Local Government (Water Pollution) Act 1990.

³³⁰ Local Government (Water Pollution) Act 1990, section 27; EPA Act 1992, section 11.

³³¹ *Ibid.*, section 23. See Waite, 'Criminal and Civil Liability of Company Directors', 3 *Land Management and Environmental Law Report*, 74-78.

³³² Environmental Protection Agency (Extension of Powers) Order 1994, article 4. Note that article 6 of this Order provides that section 10(8)(f) does not apply where the EPA is enforcing the section.

³³³ 1990 Act, section 24 (2).

It also entitles the local authority to take any steps it considers necessary to prevent polluting matters entering waters at the expense of the defaulter. If an IPC licence is involved, the EPA must exercise the powers of the local authority under this section.³³⁴ Only a local authority may prosecute this offence.

This section is the most frequently used enforcement section in water pollution law.

Sea Pollution Act, 1991

Article 29 Penalties

A person who commits an offence under this Act shall be liable

- a. on summary conviction, to a fine not exceeding IR£1,000, or to imprisonment for any term not exceeding 12 months, or, at the discretion of the court, to both such fine and such imprisonment, or
- b. on conviction on indictment, to a fine not exceeding IR£10,000,000, or to imprisonment for any term not exceeding five years, or, at the discretion of the court, to both such fine and such imprisonment.

Article 30 Proceedings for offences

- (1) Summary proceedings for any offence under this Act may be brought and pro-secuted by the Minister.
- (2) Summary proceedings for an offence in relation to a particular harbour or a particular harbourmaster may be brought and prosecuted by the harbour authority.
- (3) Notwithstanding section 10(4) of the Petty Sessions (Ireland) Act, 1851, summary proceedings in relation to an offence under this Act may be instituted:
in every case, within two years from the date of the offence, or
if, at the expiry of that period, the person to be charged is outside the State, within six months of the date on which he next enters the State.
- (4) Proceedings in relation to an offence under this Act may be taken at any place in the State, and the offence, for all incidental purposes, may be treated as having been committed in that place.
- (5) Without prejudice to any other jurisdiction, proceedings in relation to an offence under this Act may be brought against a person at any place where he may, for the time being, be.

Article 31 Offences by body corporate

Where an offence under this Act is committed by a body corporate and the offence is proved to have been committed with the consent, or connivance, of, or to have been facilitated by any neglect on the part of, any director, manager, secretary, or other similar officer of such body, or of any person who was purporting to act in any such capacity, he, as well as such body, shall be guilty of that offence.

³³⁴ Environmental Protection Agency (Extension of Powers) Order 1994, article 4.

Article 32 Indictment of body corporate

- (1) A body corporate may be sent forward, with or without recognisances, for trial, on indictment, for an offence under this Act.
- (2) On arraignment before the Central Criminal Court or the Circuit Court, the body corporate may enter in writing by its representative a plea of guilty or, as the case may be, not guilty, and, if it does not appear by a representative appointed by it for the purpose, or, though it does so appear, fails to enter any plea, the court shall order a plea of not guilty to be entered and the trial shall proceed as though the body corporate had duly entered that plea.
- (3) A statement in writing purporting to be signed by the secretary of the body corporate to the effect that the person named in the statement has been appointed as the representative of the body for the purposes of this section shall be admissible without further proof as evidence that the person has been so appointed.
- (4) Any summons or document required to be served for the purpose, or in the course, of proceedings for an offence under this Act on a body corporate may be served by leaving it at, or by sending it by registered post to, the registered office of that body or, if there is no such office in the State, by leaving it at, or sending it by registered post to, any place in the State at which the body conducts its business.

Article 33 Collection and application of fines

- (1) Subject to subsection (3), all fines in respect of offences under this Act shall be paid into the Exchequer in accordance with such directions as may, from time to time, be given by the Minister for Finance.
- (2) Where a fine imposed on the owner or master of a ship is not duly paid, the court may, without prejudice to any other powers for enforcing payment, direct that any amount of the fine remaining unpaid be levied by the distress and sale of such property, comprising the ship, its equipment and stores as the court thinks necessary.
- (3) Where it appears to the court imposing a fine that any person has incurred, or will incur, expense in removing any pollution, or making good any damage attributable to the offence, the court may order that the whole of the fine, or such part thereof as may be specified in the order, be paid to that person for or towards defraying the expense.

Article 34 Proof of certain documents

Every document purporting to be a record kept in pursuance of this Act, the Intervention Convention, the Intervention Protocol or the MARPOL Convention, or to be a true copy, certified as such by the person required to keep the record, of any entry therein shall, unless the contrary is shown, be presumed to be such and be admissible as evidence of the facts therein without further proof.

Article 35 Presumption of discharge

Where, as respects a ship registered in the State or a ship wherever registered while in the State, a discharge of any substance to which this Act applies is sighted and the ship is sighted in close proximity to the discharge, it shall be presumed, until the contrary is proved, that it was discharged from the ship.

Dumping at Sea Act, 1996

Article 8 Indictment of bodies corporate

(1) A body corporate may be sent forward for trial on indictment for an offence under this Act with or without recognisances.

(2) On arraignment before the Central Criminal Court or the Circuit Court, the body corporate may enter in writing by its representative a plea of guilty or not guilty and, if it does not appear by a representative appointed by it for the purpose, or, though it does so appear, fails to enter any plea, the court shall order a plea of not guilty to be entered and the trial shall proceed as though the body corporate had duly entered that plea.

(3) A statement in writing purporting to be signed by the secretary of the body corporate to the effect that the person named in the statement has been appointed as the representative of the body for the purpose of this section shall be admissible without further proof as evidence that that person has been so appointed.

(4) Any summons or other document required to be served for the purpose or in the course of proceedings under this section on a body corporate may be served by leaving it at or sending it by registered post to the registered office of that body or, if there be no such office in the State, by leaving it at, or sending it by registered post to, the body at any place in the State at which it conducts its business.

Article 9 Collection and application of fines

(1) Subject to subsection (3), all fines in respect of offences under this Act shall be paid into the Exchequer in accordance with such directions as may, from time to time, be given by the Minister for Finance.

(2) Where a fine imposed on a person under this Act is not duly paid, the court may, without prejudice to any other powers for enforcing payment, direct the amount remaining unpaid to be levied by distress and sale of the vessel, aircraft or offshore installation concerned and its tackle, fixtures, fittings and equipment.

(3) Where it appears to a court imposing a fine that any person has incurred or will incur expense in removing any vessel, aircraft, offshore installation, substance or material which has been dumped or unlawfully disposed of or in making good any damage attributable to the offence, the court may order the whole or part of the fine to be paid to that person for or towards defraying the expense.

Article 10 Penalties

(1) A person guilty of an offence under this Act shall be liable, on conviction on indictment, to a fine of such amount as the court considers appropriate or, at the discretion of the court, to imprisonment for a term not exceeding 5 years or to both the fine and the imprisonment.

(2) A judge of the District Council shall have jurisdiction to try summarily an offence under this Act if: the judge is of the opinion that the facts proved or alleged against a defendant charged with such an offence constitute a minor offence fit to be tried summarily,

the Attorney General consents, and

the defendant (on being informed by the judge of the right to be tried by a jury) does not object to being tried summarily, and upon conviction under this subsection, the said defendant shall be liable to a fine not exceeding IR£1,500 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or to both the fine and the imprisonment.

(3) Section 13 of the Criminal Procedure Act, 1967, shall apply in relation to an offence under this Act as if, in lieu of the penalties specified in subsection (3) of the said section 13, there were specified therein the penalty provided for by subsection (2) of this section, and the reference in subsection (2)(a) of the said section 13 to the penalties provided for in the said subsection (3) shall be construed and have effect accordingly.

(4) A person guilty of an offence under this Act shall be liable, on summary conviction, to a fine not exceeding IR£1,500 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or to both the fine and the imprisonment.

(5) Where a judge of the District Court proposes to make an order for the release on bail of a defendant before him charged with an offence under this Act who is ordinarily resident outside the State, he shall (unless he is satisfied that all documents including an indictment required by law to be served on the defendant in connection with or for the purpose of the charge or of any proceedings arising out of or connected with the charge can be duly served on the defendant in the State) direct that those documents may, in lieu of being served on the defendant, be served on a person who is ordinarily resident in the State.

(6) Where a judge of the District Court who has given a direction under this section or another judge of the District Court acting in his place is satisfied that, owing to the death or absence from the State of a person specified in the direction or for any other reason, a document referred to in subsection (5) cannot be served on that person, the judge shall direct that the document may be served on another person who is ordinarily resident in the State.

(7) Service of a document referred to in this section on a person specified in a direction under this section shall be deemed for all purposes to be service on the defendant concerned.

Article 11 Prosecution of offences by Attorney General

(1) Section 3 of the Prosecution of Offences Act, 1974, shall not apply to the prosecution of an offence under this Act or to any functions in relation to that matter to which, but for this subsection it would apply.

(2) References in Part II of the Criminal Procedure Act, 1967, and section 62 of the Courts of Justice Act, 1936, to the Director of Public Prosecutions shall, in so far as that Part and those sections apply in relation to an offence referred to in subsection (1) of this section or to any functions referred to in that subsection, be construed as references to the Attorney General.

Article 12 Prosecution of offences under Sea Pollution Act, 1991, by Attorney General

(1) Section 3 of the Prosecution of Offences Act, 1974, shall not apply to the prosecution of an offence under the Sea Pollution Act, 1991, or to any functions in relation to that matter to which, but for this subsection, it would apply.

(2) References in Part II of the Criminal Procedure Act, 1967, and section 62 of the Courts of Justice Act, 1936, to the Director of Public Prosecutions shall, in so far as that Part and those sections apply in relation to an offence referred to in subsection (1) of this section or to any functions referred to in that subsection, be construed as references to the Attorney General.

Article 13 Fees

(1) Fees under this Act shall be taken and collected in such manner as the Minister for Finance may from time to time direct and shall be paid into or disposed of for the benefit of the Exchequer in accordance with the directions of the Minister for Finance.

(2) The Public Offices Fees Act, 1879, shall not apply in respect of such fees.

Waste

The main obligations in the WMA concerning waste are imposed by sections 32 and 39

Section 32

Section 32(1) of the WMA provides:

A person shall not hold, transport, recover or dispose of waste in a manner that causes or is likely to cause environmental pollution.

A holder is defined in section 5 of the WMA as "the owner, person in charge, or any other person having, for the time being, possession or control of the waste."

The obligation in section 32 is the core obligation in article 4 of the WFD.

Transfer of waste

Section 32(2) provides that a person shall not, save in such circumstances as may be specified by regulation made under section 32(4), transfer the control of waste to any person other than an appropriate person. Section 32(5) defines an ‘appropriate person’ as a local authority, the corporation of a borough that is not a county borough, the council of an urban district or a person otherwise authorised under and in accordance with the Waste Management Act or the Environmental Protection Agency Act 1992 to undertake the collection, recovery or disposal of the *class of waste* in question. Article 5 of the Waste Management (Miscellaneous Provisions) Regulations 1998³³⁵ provides that the obligation in section 32(2) does not apply to the transfer of waste to a person who is "not prohibited" (*sic*) under the Waste Management Act, 1996 or the Environmental Protection Agency Act, 1992 from undertaking the collection, recovery or disposal of the category of waste in question.

Section 32(2) seeks to ensure that a person holding waste transfers it to another person who is deemed by the Act to be environmentally responsible e.g. a local authority or a person who is authorised to receive it under the WMA or the EPA Act 1992.

Offences

Contravention of section 32(1), 32(2) and 32(3) is a criminal offence.

Defences

It is a defence to a prosecution under section 32(1) that the waste activity was carried on in accordance with a waste collection permit, a waste licence or an Integrated Pollution Control licence. The reason for this is that regulatory authorities oversee activities controlled under these licences.

Section 39

Licences to dispose or recover waste

Section 39(1) of the Waste Management Act requires a person disposing of waste or undertaking the recovery of waste, on or after certain prescribed dates,³³⁶ to obtain a waste licence from the EPA. This requirement even applies to local authorities. Licences may be required for mobile waste disposal and recovery facilities and may authorise the operation of mobile plant at more than one facility.

Criminal Offence

³³⁵ S.I. No 164 of 1998.

³³⁶ S.39 (2) provides that different dates may be provided in respect of different waste disposal or recovery activities, different classes of activities, different classes of facility and different classes of waste. The prescribed dates are in the First Schedule to the Waste Management (Licensing) Regulations 2000, S.I. No. 185 of 2000.

A person who does not apply for a licence in time or who does not comply with it is guilty of a criminal offence for which the maximum penalty is £10 million and/or 10 years imprisonment. Members of bodies corporate are also liable for this offence.

Enforcement

The WMA gives considerable discretion to authorised officers exercising enforcement powers. There is virtually no official guidance on how these are to be exercised.

Criminal Enforcement

Penalties

Sections 10(1) and (3) provides that person convicted of an offence under the WMA, except an offence under section 10(2), is liable:

on summary conviction, to a fine not exceeding £1,500 and/or imprisonment for a term not exceeding 12 months, or

on conviction on indictment, to a fine not exceeding £10 million and/or imprisonment for a term not exceeding 10 years plus £200 per day for each day an offence is continued after summary conviction and £100,000 after conviction on indictment

In imposing liability under section 10(1) the court must, in particular, have regard to the risk or extent of environmental pollution arising from the act or omission constituting the offence.³³⁷ Other matters which it is submitted may be relevant are the entry of a guilty plea, the effect of a fine on the offender's ability to operate especially if it has public functions.³³⁸

Section 10(2) provides that a person guilty of an offence under sections 16(5), 32(6) (where the offence consists of a contravention of regulations under s.32 (4)) 33(8), 38(7) or 40(13) is liable on summary conviction to a maximum fine of £1,500 and/or 12 months imprisonment.³³⁹

Under section 13 of the Act, the prosecuting bodies referred to (which currently include any other person) can apply before the fine is imposed for a court order directing that fines imposed, affirmed or varied under the Act be paid to that body. Section 12 of the Act provides for the implementation of the Polluter Pays Principle in the waste regulatory framework.

Costs and expenses of prosecution

Where a person has been convicted of an offence under the Act, the court is obliged, unless it is satisfied that there are “special and substantial reasons for not doing so”, to order the person to pay the costs and

³³⁷ WMA, s.10 (4).

³³⁸ See *R v Milford Haven Port Authority* 2 Environmental Law Review 218.

³³⁹ *Ibid.*, s.10 (2).

expenses, measured by the court, incurred by a local authority, the EPA or any person prescribed (which currently includes any other person for a summary prosecution) in relation to the investigation, detection and prosecution of the offence.³⁴⁰ There is no public document on prosecution policies adopted by enforcement authorities.

Persons who may prosecute

Section 11(1) states that summary proceedings may be brought by a local authority (whether or not the offence is committed in its functional area) and by the EPA but also empowers the Minister to prescribe other persons to prosecute summarily. The Minister has prescribed "any other person"³⁴¹ However, section 11(5) provides that summary proceedings for breach of a condition in a waste licence or any other requirements of or under the Act in relation to the carrying on of an activity covered by a waste licence may only be brought by the EPA or such other person to whom its functions in this respect have been transferred under section 69 of the Act. Section 11(3) prescribes time limits within which prosecutions must be brought. The absolute maximum period is five years from the date the offence was committed.

Offences by bodies corporate

Section 9 (1) provides that where an offence under the Act has been committed by a body corporate and is proved to have been committed with the consent or connivance of, or which is attributable to any neglect on the part of, a person being a director, manager, secretary or other similar officer of a body corporate, or a person purporting to act in that capacity, that person shall also be guilty of an offence and liable to be prosecuted for an offence under the Act. Section 9(2) states that where the affairs of a body corporate are managed by its members, this subsection applies in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director of the body corporate.

Administrative enforcement

Notices to prevent or limit environmental pollution

Section 55 of the Act empowers a local authority as regards its functional area, so to serve a notice on a person who is or was holding, recovering or disposing of waste, as the case may be, whenever they think it necessary to do so in order to prevent or limit environmental pollution caused or likely to be caused by those activities requiring:

³⁴⁰ Including costs and expenses incurred in the taking of samples, the carrying out of tests, examinations and analyses and in respect of the remuneration and other expenses of directors, employees, consultants and advisors, as the case may be.

³⁴¹ Waste Management (Miscellaneous Provisions) Regulations, 1998 (S.I. No 164 of 1998), article 4.

- (a) the taking of *specified* measures which the local authority considers necessary in order to prevent or limit the environmental pollution concerned or prevent a recurrence thereof,
- (b) the cesser of the holding, recovery or disposal concerned,
- (c) the mitigation or remedying of any effects of any activity aforesaid in a *specified manner*

Other measures that may be specified in the notice are specified in section 55(7). The notice must be complied with within a specified time not less than 14 days from the date it was served. The person served with the notice may make written representations regarding the terms of the notice within the time specified in the notice for doing this. The local authority may, having considered the representations, confirm, amend or revoke the notice and must notify the person of its decision. It is an offence not to comply with the notice within the time specified. If the notice is not complied with the local authority may take "such steps as it considers reasonable and necessary" to secure compliance with the notice at the expense of the defaulter. Section 55 powers can also be vested in the EPA or other nominated body.

Section 55 does not mandate the local authority to specify what it requires but one of the problems experienced with substantially similar sections in English legislation concerns the degree of particularity required in the notice.³⁴² In general, it is submitted that the notice recipient must be clear what is expected of him to avoid committing a criminal offence. Notices which do not comply with section 55 or which are vague will be *ultra vires*.³⁴³ It is questionable whether a notice that merely requires abatement of the risk of environmental pollution would comply with the European Convention of Human Rights unless the abatement action is obvious. Article 7 of the Convention provides that no one shall be guilty of a criminal offence on account of any act or omission which did not constitute a criminal offence at law at the time when it was committed. In *Handyside v United Kingdom*³⁴⁴ and *Kokkinakis v Greece*³⁴⁵ the Commission and the Court of Human Rights respectively held that not only does Article 7 bar retroactive liability, it also requires acts which entail criminal liability to be clearly set out in law. If those acts are not clearly set out in a notice, the question of its compatibility with Article 7 rights will arise.

Air Pollution

The definition of air pollution Section 4 of the Act defines 'air pollution' as:

a condition of the atmosphere in which a pollutant is present in such a quantity as to be liable to (i) be injurious to public health, (ii) have a deleterious effect on flora or fauna or damage property, (iii) impair or interfere with amenities or with the environment.

³⁴² See Malcolm, "Statutory Nuisances: the Validity of Abatement Notices, 2000 Journal of Planning and Environmental Law 894.

³⁴³ Network Housing Association v Westminster City Council (1994) Env. LR 176.

³⁴⁴ (1974) YB 228.

Section 7(1) of the Act, as amended by section 18 and the Third Schedule to the Environmental Protection Agency Act 1992, defines 'pollutant' as:

any substance specified in the First Schedule or any other substance (including a substance which gives rise to odour) or energy which, when emitted into the atmosphere either by itself or in combination with any other substance, may cause air pollution.

This definition of 'air pollution' is similar to that in EC Directive 84/360/ EEC on combating air pollution from industrial plants³⁴⁶ and in the Convention on Long-Range Transboundary Air Pollution, 1979, which Ireland has ratified. But the Irish definition is stricter in that it merely requires that a pollutant be *liable* to produce the effects mentioned whereas the definitions in the directive and the Convention require that the pollutant/s result in the deleterious effects mentioned in their definitions.

Causing or permitting air emissions which are nuisances

Section 24(1) places a duty on the occupier of *any* premises other than a private dwelling, to use the 'best practicable means'³⁴⁷ (b.p.m.) To limit and, if possible, to prevent an emission from such premises. This section goes much further than EC requirements in that it effectively requires the use of the b.p.m. by all industrial and commercial concerns and all local authority and State premises and not just premises listed in directives.

Prima facie, it is the responsibility of occupiers themselves to determine what the b.p.m.s are for their premises except where the premises concerned are subject to the licensing provisions of Part III of the Act, or Part IV of the Environmental Protection Agency Act 1992, when local authorities or the Environmental Protection Agency respectively will become involved in the process of determining the b.p.m.. The Minister has power to issue directions on the b.p.m. for specified emissions under section 5(3) of the Act and the EPA has power under section 5(3) of the Environmental Protection Agency Act 1992, to specify the best available technology not entailing excessive costs (BATNEEC) (which is often the same thing as the b.p.m.) for controlling emissions.³⁴⁸ Any Ministerial directions issued under section 5(3) relating to an emission will lapse when the EPA specifies the BATNEEC for the same emission.

Offence

It is a criminal offence under section 24(2) for the occupier of any premises, including a private dwelling, to 'cause or permit'³⁴⁹ an emission from such premises in such a quantity, or in such a manner,

³⁴⁵ (1993) EHRR 397.

³⁴⁶ OJ L188, 16 July 1984.

³⁴⁷ Defined in section 5.

³⁴⁸ See Chapter 14.

³⁴⁹ As to the meaning of 'to cause or permit', see above.

as to be a nuisance. An emission is defined in section 7(1) as an emission of a pollutant into the atmosphere.

Defences

Section 24(3) sets out six good defences to a charge of contravening the previous two subsections. Any charge under the section will be dismissed if any of these defences is established. These defences are that:

- (a) the best practicable means have been used to limit or prevent the emission concerned,
- (b) the emission was in accordance with a licence under the Act. Licences are issued to certain industrial plant under section 30, probably subject to pollution controlling conditions,
- (c) the emission concerned was in accordance with an emission limit value.
- (d) the emission concerned was in accordance with a special control area order in operation in relation to the area concerned,
- (e) in the case of an emission of smoke, the emission concerned was in accordance with regulations made under section 25. Regulations under section 25 may relate to private dwellings,
- (f) the emission did not cause air pollution.

A further defence is provided under section 83(7) of the Environmental Protection Agency Act 1992, that is, that the act complained of is authorised by a licence or a revised licence granted under Part IV of that Act. In *Truloc Limited v. District Justice Mc Menamin and Donegal County Council*³⁵⁰ the High Court held that the making of regulations by the Minister or the issue of directions by him as to the best practicable means or the making of an air quality management plan are not necessary prerequisites to the prosecution of offences under section 24.

Licences for specified air emissions from certain processes

Offence

Section 30(1) of the Act provides that it is an offence for any person to operate an 'industrial plant', other than an existing industrial plant, without a licence after 1 February 1989.

Section 83(5) of the Environmental Protection Agency Act 1992, provides that a licence under Part III of the Air Pollution Act 1987, may not be granted in respect of an activity which is required to be licensed under Part IV of that Act.

'Industrial plant' is defined in section 6(1) and includes plant and parts thereof used in trade, business or industry for the purposes of, or incidental to, any industrial process specified in the Third Schedule.

³⁵⁰ [1994] 1 I.L.R.M. 151.

Thirty processes are listed in the Third Schedule. Section 30(2) empowers the Minister to extend the obligation to obtain a licence to specified existing industrial plant. The Preamble to EC Directive 84/360/EEC provides that the provisions in the directive which made the enactment of Part III necessary 'are to be applied gradually to existing plant, taking due account of technical factors and economic effects' but this obligation is omitted from subsection 2. Nonetheless, the subsection applies with respect to existing industrial plants which are covered by both the directive and the Third Schedule.

'Existing industrial plant' means industrial plant for which planning permission was granted prior to 1 February 1989 or which was used for the purposes of, or incidental to, any industrial process specified in the Third Schedule on 31 January 1989 or at any time in the previous twelve months,³⁵¹ other than industrial plant which is an unauthorised structure or the use of which constitutes an unauthorised use. The Air Pollution Act (Industrial Plant) Regulations 1988³⁵² extended the obligation in section 30(2) to 10 classes of existing industrial plant from 1 March 1989.

Existing industrial plant listed in the Third Schedule which has not yet been subjected to licensing requirements is nonetheless subject to the obligation to comply with any emission standards prescribed under section 51. Operators of such plant could be required to monitor their emissions and air quality under section 54. They are also subject to the enforcement provisions in sections 24, 26, 27 and 28 of the Act discussed in section 10.4.23. All of these sections may also be used to enforce compliance by a licensee with his obligations under section 31.

Section 30(3) provides that the operation of existing industrial plant to which the Minister extends the licensing obligations under section 30(2) will be deemed not to have contravened the provisions of the Act in the period between the lodgment of a proper application for a licence in accordance with section 31 regulations and the date the licence is granted or refused, provided that the licence application is made before the date specified in the regulations. This date was 1 March 1989.³⁵³ In *Cork County Council v. Angus Fine Chemicals*³⁵⁴ the defendants claimed that they were entitled to the statutory immunity from prosecution conferred by section 30(3) when they were prosecuted for failure to notify an air pollution incident under section 29. The High Court held that section 30(3) conferred immunity in respect of the *operation* of existing industrial plant and that this is totally distinct from a failure to give notice. Blayney J ruled that the 'operation' of a plant 'simply means setting it in motion and keeping it in motion' and that only this is exempted from contravening the provisions of the Act.

³⁵¹ Air Pollution Act 1987, section 6(2) and Air Pollution Act (Licensing of Industrial Plant) Regulations 1988, S.I. No. 266 of 1988, article 4. Hereafter called the 1988 Regulations, where convenient.

³⁵² S.I. No. 266 of 1988.

³⁵³ *Cork County Council v. Angus Fine Chemicals* [1991] I.L.R.M. 173; Air Pollution Act (Licensing of Industrial Plant) Regulations 1988, article 5.

³⁵⁴ *Ibid.*

Air pollution incidents

Occupiers of any premises (other than a private dwelling) are obliged by section 29 to notify the appropriate authority 'as soon as practicable' after the occurrence of any incident which may cause air pollution. An 'incident' includes an accidental emission. The penalties for failure to comply with this obligation are specified in section 12. Contravention of this section might also destroy a defence to a civil action taken under section 28(B) of the Act. Licences granted under the Act sometimes specify the exact manner in which obligations under this section are to be observed. The EPA must be notified if an activity licensed by it is involved.

Enforcement

Prosecutions The Act is primarily enforceable by local authorities³⁵⁵ but the Minister has power to make regulations conferring enforcement powers on any other person or body of persons.³⁵⁶ He has conferred power on the EPA to prosecute instead of a local authority where there has been a breach of an IPC licence or revised licence.³⁵⁷ Section 11(1) makes it a criminal offence for any person to contravene a provision of the Act or of any regulations made there under or of any notice served there under.

Section 11(3) extends the meaning of contravention of a provision to include, where appropriate, a reference to a refusal or a failure to comply with that provision. The Minister has powers under sections 13 and 21 of the Air Pollution Act and section 101 of the Environmental Protection Agency Act 1992, to confer enforcement powers in the Air Pollution Act 1987 on the EPA. This he has done in the Environmental Protection Agency (Extension of Powers) Order 1994. The EPA also has powers to ensure that local authorities carry out their various functions under the Act properly.³⁵⁸

Penalties

The maximum penalty for offences created under sections 24(1) and 24(2) is £10,000 plus £1,000 for every day the offence is continued and/or two years imprisonment.³⁵⁹ The maximum penalty on summary conviction is £1,000 plus £100 per day for a continuing offence and/or six months imprisonment. The penalty on conviction on indictment is £10,000 plus £1,000 per day for a continuing offence and/or two months imprisonment.³⁶⁰

Defences

³⁵⁵ Air. Pollution Act 1987, section 13.

³⁵⁶ Ibid., section 21; Environmental Protection Agency Act 1992, sections 53, 54, 101.

³⁵⁷ Environmental Protection Agency (Extension of Powers) Order 1994, article 10.

³⁵⁸ See section 14.6 and (1994) IPELJ 115.

³⁵⁹ Air Pollution Act 1987, section 12.

³⁶⁰ Ibid., section 12.

Section 83(7) of the Environmental Protection Agency Act 1992, provides that it shall be a good defence to a prosecution under any enactment other than Part IV of that Act that the act complained of is authorised by a licence under Part IV of that Act. Time limits for prosecutions are specified in section 13 of the Act.

Corporate Liability

Section 11(2) provides that where an offence is committed by a body corporate, and is proved to have been committed with the consent, connivance or approval of, or to have been facilitated by any neglect on the part of, any director, manager, secretary or other official of such body, such person shall also be guilty of an offence. The use of the word 'official' in this context (instead of officer) is unusual. An official of a company could be a company employee other than an officer of the company. Whether the expression includes company employees who are not involved in the management of the company, is a matter for judicial interpretation. It is conceivable that an independent contractor (for example, a consultant, or a person brought in to service or repair equipment) could be deemed an official of the company if this was considered necessary to achieve the purposes of the Act. In *Truloc Limited v. District Justice McMenamin and Donegal County Council*³⁶¹ applicants for a judicial review of convictions under section 24(2) of the Act unsuccessfully claimed that some officer of the company should also be joined where a body corporate is prosecuted having regard to section 11 of the Act and the penalties imposed under section 12.

Administrative Enforcement

Section 26 enables a local authority which considers that it is necessary to do so in order to prevent or limit air pollution, to serve a notice on the occupier of any premises (whether the premises are in its area or not) from which there is an emission requiring measures to be taken to limit or prevent air pollution. In considering whether to serve this notice, a local authority is obliged under section 26 to have regard to any air quality management plan and any special control area order for the area in which the premises are situate, to any relevant emission limit value or air quality standard, to the availability of the means necessary to comply with the notice and the expense which would be incurred in complying with it. A notice must specify:

shall specify the measures which appear to the local authority serving the notice to be necessary in order to prevent or limit air pollution could be extremely burdensome for a local authority which may not have the expertise to devise what could be a complicated air pollution prevention or limitation system.

³⁶¹ [1994] 1 I.L.R.M. 151.

Section 55 of the Act provides a remedy through the District Court for any occupier who is precluded by lack of consent from the owner or other relevant person, from complying with a notice or similar requirement under the Act.

The occupier has a right under section 26(5) to make written representations to the local authority concerning the terms of the notice which representations may result in an amendment or revocation of the notice. Failure to comply with the notice as required is a criminal offence. The EPA has this power under section 26 where an IPC licence is involved. Article 10 of the Environmental Protection Agency (Extension of Powers) Order 1994 provides that a notice under section 26(5) may be served whether or not there has been a prosecution for an offence under Part IV of the Environmental Protection Agency Act 1992 or the Air Pollution Act 1987 in the case of an emission from an activity in respect of which an IPC licence or revised licence is in force or, in any other case, a prosecution for an offence under the 1987 Act in relation to the emission concerned. It also provides that the service of a section 26 notice shall not prejudice the initiation of a prosecution under the Part IV of the 1992 Act or the 1987 Act in the case of an emission from an activity in respect of which an IPC licence or revised licence is in force or in any other case, a prosecution for an offence under the 1987 Act in relation to the emission concerned.

Habitats and wildlife legislation

Offences created by Regulations are always summary offences. This means that the maximum fines are rarely more than £1500 and/or six months imprisonment. The maximum fine for contravention of the European Communities (Habitats) Regulations 1997 is £1500 and/or six months imprisonment. (Regulation 39). Corporate liability is provided for in Regulation 40.

The maximum fine for contravention of the Wildlife Acts 1976-2000 is £50,000 and/or two years imprisonment.

4.9. Luxembourg

Fernand Entringer and Claude Veriter

Most of the offenses in environmental law are *crimes* transformed into *délits* or délits.

The penal section of the *Tribunal d'arrondissement* knows about offenses constituting *délits*.

The *Tribunal d'arrondissement* is organised in three sections: civil section, penal section and commercial section.

They are two in Luxembourg: one in Luxembourg and one in Diekirch.

The *contraventions* are sued before the Tribunal de police, whose geographic competence corresponds to the territory of a few municipalities.

Appeal of Tribunal de police judgements is made before the Tribunal d'arrondissement.

Appeal of *Tribunal d'arrondissement* judgements is made before the Court of appeal.

- The State Prosecutor initiates the procedure.

He has the power to appreciate the opportunity of suing or not.

He could also require from the offender to act in accordance to the law and, only if the offender does not obey, decide to sue him.

- The State Prosecutor convokes the offender to a court public audience.

The offender is heard by the court and a judgement is taken on the proofs brought by the State Prosecutor (and eventually by the civil party or an ecological association, if any).

In order to obtain indemnification, the civil party has the choice between being a party in the penal proceedings or suing the offender before the civil court in a separate procedure.

- A particular procedure exists without public audience.

When an offense may raise a sentence of maximum 100.000 LUF (2.500 €), the State Prosecutor may ask an unilateral judgement.

The offender is informed of the will of the prosecutor.

The decision is taken without any hearing of the offender.

As the judgement correspond to a judgement by default, the offender may lay an *opposition* (a new decision of first degree is taken by the same judge after having heard the offender and this judgement is appealable) or an *appeal* immediately before the court of appeal.

This procedure is not as expensive as classical proceedings.

- The civil party takes sometimes a most important place in the initiative of the proceedings.

Without asking the State Prosecutor's opinion, the civil party may sue the offender before the court. The State Prosecutor will be present and give his opinion.

- When an offense constitutes a *délit* and the facts are complicated or when the inquiry requires special investigation means (search warrant or order of arrest, for instance), the civil party or the State Prosecutor may lay the case before the Investigating Magistrate. His inquiry is neutral: he searches facts against and facts in favour of the offender.

When finished, the Inquiry Magistrate makes a report to the court, which will hear the Prosecutor, the civil party and the offender in closed session and take a judgement:

- the file is empty and the presumed offender is not guilty.
 - the offender is guilty but a suspension of sentence (eventually submitted to conditions - *probation*) is preferable.
 - the file contains elements giving cause for suspicion and a trial in public audience must take place.
- The file is laid before the court.

- Several environmental laws provide the possibility for agreed ecological associations to bring an action against offenders if
 - a violation of such a law is committed and
 - if the violation of the law has caused a direct or indirect damage to collective interests that the association protects,even if they have not suffered a material damage and even if the collective interests are not different from the general interest protected by the State Prosecutor.

see

- the law of 17 June 1994 on prevention and management of waste implementing the directive 75/442/EEC,
- the law of 21 June 1976 against atmosphere pollution and its executive order of 30 novembre 1989 implementing the directive 88/609/EEC,
- the law of 11 August 1982 on nature and natural protection organising notably an agreement of ecological associations.

- The proceedings take several months from the initiation by the State Prosecutor to a first judgement. It does not take one year.

In particular cases, when the file is more complex, the inquiry by an Inquiry Magistrate could take longer.

- The costs of the procedure are taken in charge by the State during the proceedings. If someone is declared guilty, these costs will be at the offender's expenses.

Article 5 of the law of 21 June 1976 against atmosphere pollution (and the executive order of 30 November 1989 implementing the directive 88/609/EEC, taken in accordance to this law) gives the possibility to administrative agents to proceed to controls of limit values. In case of conviction of the controlled person, the controls and measures expenses will be assumed by the offender.

The restoration will always be made at the convicted person's expenses. The daily penalty in case of non completion of the restoration will be paid to the civil party, if any. In fact, the restoration and the penalty in case of non completion have civil aspects.

4.10. Portugal

Maria Faria

Environmental criminal law in case law

What is the average amount of time for criminal environmental procedures?

There is insufficient case law to answer this question.

Who supports the costs of the procedure?

Art. 513 of Criminal Procedure Code (Responsibility of the defendant for court costs)

1. The defendant is responsible for court costs if he is sentenced in the court of first instance, if he loses an appeal, whether wholly or in part, or if he is unsuccessful in any interim procedural measures which he has applied for or opposed.

2. The defendant is sentenced to pay a single court tax, even if he is being tried for several crimes, provided they are in the same action.

3. Responsibility for court costs is always individual and the respective amount is fixed within the limits established for the procedure corresponding to the most serious of the crimes for which the defendant is sentenced.

Art. 514 (Defendant's responsibility for charges)

- 1.If the defendant is sentenced to pay court costs he is also responsible for all other charges incurred by his actions.
- 2.If several defendants are sentenced to pay court costs and it is not possible to determine the individual responsibility for the charges incurred, they are all joint and severally responsible for said charges, when they are the result of a common and joint activity, unless otherwise decided by the court.
- 3.If the plaintiff and defendant are simultaneously sentenced to pay court costs, the responsibility for charges which cannot be imputed to the actions of one or the other is shared equally.

Art. 515 (Plaintiff's Responsibility for court costs)

1.The plaintiff is responsible for courts costs in the following cases:

- a) If the defendant is cleared or found not guilty of some or all of the crimes contained in the accusation brought or accepted by the plaintiff;
- b) If the plaintiff is unsuccessful, whether totally or in part, in an appeal that he or she has brought or opposed;
- c) If the plaintiff loses any procedural measure that he or she has requested or opposed;
- d) If plaintiff terminates the action by withdrawing from it or by unjustified failure to accuse;
- e) If the action is stopped for more than a month, on account of plaintiff's negligence;
- f) If the accusation Plaintiff has filed is rejected;
- g) If there are several plaintiffs, each one pays the respective court costs;

2. The limits to court costs in the situations in subparagraphs a) and b) of paragraph 1 correspond to the limits which would apply to the procedure for the most serious crime included in the rejected accusation.

Art. 520 (Responsibility of other parties)

The following parties also pay court costs:

- a) Civil claimants, if they are not the plaintiff or defendant and they are considered to have caused the costs, in accordance with the rules of civil procedure;
- b) Any person that is not a party to the action, for any procedural incident provoked, if unsuccessful;
- c) The plaintiff, when it is shown that his complaint was brought in bad faith or with gross negligence.

Who initiates the procedure?

All the crimes foreseen in articles 278 to 281 of the Penal Code are public crimes, that is, crimes in which the Public Prosecutor has legitimacy to initiate the procedure (art. 48 of the Penal Code). The Public Prosecutor is informed of the crime on his own initiative, through the intervention of criminal police, (who are obliged to report any crime that has come to their attention), or through a complaint. Pursuant to art 242 of the Criminal Procedure Code, filing a complaint is obligatory for members of the police force with respect to any crimes that come to their notice, and for public servants (art. 386 Penal

Code), with respect to crimes that they become aware of, due to, or in the course of performing their duties. Filing a complaint is optional in all other cases (anyone who has knowledge that a crime has been committed may report it to the Public Prosecutor, to other judicial authorities or to the criminal police, unless the criminal procedure in question depends on a formal complaint by the injured party. From this point on the Public Prosecutor initiates the criminal proceedings in accordance with due process.

Who is the competent judge?

Pursuant to art. 16 of the Criminal Procedure Code the court comprised of a single judge is competent to judge the crimes foreseen in articles arts. 278, 279, 280, paragraph b), and 281 of the Penal Code. With respect to paragraph a) of art. 280, and because the maximum penalty applicable is more than 5 years' imprisonment, (the maximum limit in this case is 8 years), the competent court is the collective court (comprised of 3 judges, art. 14, paragraph 2, subparagraph b) of the Criminal Procedure Code), except for cases where the Public Prosecutor in his accusation or petition, believes that in the specific situation in question, an effective penalty of less than 5 years should apply, whereby the singular court is the court of competent jurisdiction (art. 16, paragraph 3 do of the Criminal Procedure Code). It should be mentioned that in the latter case, and pursuant to paragraph 4 of art. 16 of the same Code, the judge may not then impose a prison term greater than 5 years.

4.11. Spain

Teresa Castiñiera

Ramon Ragues

Antonieta Fernández

4.11.1. BEGINNING THE PROSECUTION PROCESS

In Spain, the prosecution of ecological crimes begins in the vast majority of cases with the action of the police, whether on their own initiative or because the crime has been reported. The police force which is usually in charge of beginning procedures in these cases is the Nature Protection Service (SEPRONA) of the Civil Guard. Without looking further a field, in 2001 this police force received 70.000 reports related to industrial or urban waste or infringements of the law on hunting and dumping in continental waters, all possibly constituting an administrative misdemeanour or a crime. Also, there were more than 5.000 reports of possible crimes related to fires, a crime which in Spain is of enormous environmental importance.

In those autonomous communities which have their own police forces, the processing of an ecological crime is often begun by the autonomous community police (particularly in Catalonia by the "Mossos d'Esquadra"). However, none of these above-mentioned police forces has exclusive jurisdiction in these

matters, so at times one can see in case law prosecutions initiated by municipal police or forest guards. In some cases, prosecution is begun as a result of the activity of government inspectors whose task is ensuring the environmental regulations are not contravened.

When reported, a case is taken to the investigating judge, who is the competent authority in Spain to direct the investigation of crimes. The public prosecutor may also intervene in the case, as he/she can receive the report of a crime and request that certain kinds of investigative procedures are carried out. In fact, the Spanish Prosecutor's Office has had prosecutors specialised in environmental crime for some years. In certain circumstances, when an administrative process has begun, there may be evidence which indicates a crime, in which case the case will be given to the criminal authorities, who will always have higher jurisdiction.

4.11.2. COMPETENT COURTS

After the first part of the procedures, the Prosecutor may decide to make a formal accusation, which means there will be a trial. In Spain, the injured parties can take part in the procedures as accusers (“private accuser”) as can any other person with an interest in the case (“popular accuser”). In practice, this second legal figure allows ecological organisations or naturalist groups to take part in the procedures, and they are able to sustain an criminal accusation even against the opinion of the Prosecutor’s Office.

Depending on to the seriousness of the case, it will be resolved before a court with a judge called “criminal judge”, or before a tribunal with three judges called a “Provincial Court”. The Criminal Judge’s sentences can be appealed (“*recurso de apelación*”) in the Provincial Court, whilst the decisions of the latter court can be appealed in the Second Chamber of the Supreme Court (“*recurso de casación*”). When it is considered that a particular sentence may violate fundamental rights, there is the possibility of appealing to the Constitutional Court (“*recurso de amparo*”).

4.11.3. DURATION AND COST OF THE PROCEDURES

The duration of the procedures varies considerably in function of the crime committed. In this area, it is useful to distinguish between an “ecological crime” in its various forms (Art 325-331, CP) and the “crimes against flora and fauna” (Art 332-337, CP). For the former, the length of the procedures is clearly less than the latter.

This difference is explained above all by the different complexity of the process of investigation of each type of crime. So whilst crimes against flora and fauna are generally simpler, and are proven with a minimum of evidence (witnesses’ testimonies and corpus delicti), for ecological crimes there must be

aspects which are more difficult to prove (the origin and contents of polluting substances, the level of effect on the ecosystem). The obligation to carry out complicated chemical analyses and counter-analyses and the need to present expert opinions on how the presumably criminal acts have affected the ecological balance usually extends the period of the preparation of the case, even if this difficulty and the need to carry out multiple investigations is used by the defence to draw out the procedures as a procedural strategy.

In concrete terms, this means that the procedures for ecological crimes, heard first in the Provincial Court and then by the Supreme Court, usually last an average of five years, from the date of the actions to the final sentence. However, between 2000 and 2001, there were a significant number of appealable sentences in the Provincial court which took five years to be reached, which suggests that in the future the duration of the procedures for ecological crimes which reach the Supreme Court may be one or two years more than this. In contrast, the few cases of crimes against flora and fauna which have reached the Supreme Court have taken between three and four years on average.

With respect to ecological crimes heard firstly by the Criminal Judge, and secondly by the Provincial Courts, the average duration is between five and six years, although on occasions some have been drawn out to nine or ten years. Quite different is the data relating to crimes against flora and fauna, which are usually resolved in an average period of approximately two years, and whose processing rarely goes beyond three years³⁶².

In Spain, payment of court costs depends on the final result of the trial. When the defendant is found guilty, he/she must assume payment of all costs, which may include the costs of the private accuser if their role has not been irrelevant. On the other hand, where the sentence is not guilty, the state must pay the costs caused by the investigation.

4.11.4. ACTIONS BROUGHT TO COURT

With respect to ecological crimes, those actions which have most often reached the Spanish criminal courts are dumping polluting substances into rivers (31 of the 62 cases studied), and the administrative regulation most affected is the Regulation of the Public Water Domain, passed by Royal Decree 849/1986, of April 11. At a considerable distance, the next most frequently tried actions are emission into the atmosphere (six cases), storing or abandoning polluting substances (six cases), and extraction or dumping of earth (three cases). For crimes against flora and fauna, the cases have more often been related to the hunting of unauthorised species.

³⁶² Thus, the sentence of the Barcelona Provincial Court of April 27, 2000.

4.11.5. RESULTS OF THE PROCEDURES: PUNISHMENTS IMPOSED.

Both ecological crimes and crimes against flora and fauna are crimes which in a large number of cases have ended in acquittal. So of the 107 sentences studied for this article, 57 finished in the dismissal of the case

In the case of ecological crimes, this high number of acquittals has several reasons. Firstly, there are the enormous difficulties in proving certain aspects of the crime, such as, above all, whether or not the specific behaviour of the defendant has really exposed the ecological balance to real danger. On many occasions, it can be proven that the defendant carried out a particular polluting activity, but not just what the exact consequences of his/her behaviour were on the ecological balance. Similarly, in practice, there have been many problems in determining exactly which polluting chemical components are present in the substance dumped or emitted by the accused, whether because in taking the samples the procedural guarantees were not respected or because certain errors in the taking of the samples prevented them from being used as incriminating evidence. With respect to crimes against flora and fauna, the number of acquittals has also been very high, because of the frequent discrepancies amongst Spanish judges over how the administrative regulations affect the criminal relevance of certain behaviours, especially in the case of the hunting on unauthorised species.

In those cases of conviction for an ecological crime, the maximum sentence found was four years' prison³⁶³. However, the majority of sentences are not so severe, and although they consist formally of a prison sentence, this does not normally mean that the guilty party must go to prison because the prison terms are generally less than two years. In the majority of cases, prison sentences are accompanied by fines, in some circumstances higher than 42,000 €³⁶⁴, and disqualification for industrial activities. The sentences for crimes against flora and fauna are considerably less, and the most normal is the payment of a not specially serious fine (seldom more than 2,000 €), and only in exceptional circumstances have prison sentences been given³⁶⁵.

4.11.6. MOST RELEVANT CASES

Since the introduction of the ecological crime into Spanish criminal law, there have been various cases and decisions which deserve the public's special interest, whether or not they are specialists in Law. In

³⁶³ In this sense, the sentences of the Supreme Court of September 17, 2001, the Barcelona Provincial court of May 7, 2001, and the Madrid Provincial Court of February 126, 2001 (appealable in the Supreme Court).

³⁶⁴ Thus, the sentences of the Supreme Court of April 6 and January 27, 1999.

³⁶⁵ A sentence of a year's imprisonment was imposed in the Supreme Court ruling of May 8, 2000, for a crime against fauna (the killing of birds of prey).

the case law of the Constitutional Court, specially important is the sentence 177/1999, of October 11, which declared that it is unconstitutional to try a person for an ecological crime if he/she had previously been convicted at the administrative level. Sentence 42/1999, of March 22, is also particularly interesting, for it laid down that a subject that had dumped unauthorised substances in a “dead river”, with no kind of animal or vegetable life, could be legally convicted for this crime, since this dumping could make the ecological recovery of the river more difficult. At the time, sentence 127/1990, of July 30, was also much discussed, as it declared constitutional the fact that cases of crimes against the environment may be remitted to the regulations at a lower level (the so-called “empty criminal laws”).

In the case law for the Supreme Court, the recent sentence of November 23, 2001 is important, where it declares that the taking of samples of dumped substances by the police is not evidence existing before the trial, and thus the results of these samples can be admitted as incriminating evidence (expert or attesting) in trial, even if the accused was not present when the samples were taken. The sentence of February 14, 2001, is also noteworthy, as it states that dangerousness for the environment is not something consubstantial to certain toxic products, but rather that in each case the danger for the health of people or for animal or vegetable life which is created by dumping said product must be demonstrated. Finally, in crimes against flora and fauna, the sentence of February 8, 2000, must be mentioned, as it challenges the constitutionality of article 335 of the Criminal Code, which penalises the hunting of unauthorised species, for not respecting the obligation to specify precisely and for leaving in the hands of the Autonomous Communities practically all of the specification of the prohibited behaviour.

For public opinion, the case with the greatest repercussions was without doubt the sentence of four years’ prison imposed on a businessman from the textile industry in 1995 by the Provincial Court in Barcelona, and confirmed by the Supreme Court in 1997, for dumping waste into a river. The controversy created by this case was because, for the first time, a Spanish businessman went to prison for an ecological crime. However, in 1998, the collapse of a dam in Aznalcóllar (Huelva) which stored a large quantity of waste from a mine, and which polluted rivers and areas near the Doñana National Park, did not lead to prosecution, because the Investigating Judge understood that there had not been any negligence on the part of the those in charge of the mine and dam. This decision caused huge protests from the ecology movement. Many Spanish specialists cannot avoid the conclusion that the majority of the cases which end up in the courts are for secondary crimes and that the really damaging actions are never prosecuted, because they are carried out with the corresponding administrative authorisation.

4.12. The Netherlands

4.13. *United Kingdom*

Carolyn Abbot

4.13.1. INTRODUCTION

This section of the project requires each country reporter to consider the most important cases concerning those provisions which implement the ten Directives and Regulation detailed in Section 1. I have taken the major environmental provisions (in chronological order) in England, Wales and Scotland, listed the relevant Directives/Regulation and provided a summary of some of the key cases. The majority of environmental cases are not reported in official law reports as they are held in the lower courts i.e. the Crown Court (High Court of Justiciary in Scotland) or Magistrates' Court (Sheriff Court in Scotland). A list of abbreviations used is provided at the end of Section 3A. A list of the relevant prosecuting authorities is provided in Appendix 1.

Case-law concerning the provisions implementing the Directives and Regulation in Northern Ireland is not available.

The information has been obtained from the following sources:

Environmental Data Services: www.endsreport.com (ENDS Report)

Environment Action (produced by the Environment Agency)

Environment Agency Annual Report and Accounts 1997/1998, 1998/1999, 1999/2000

Lexis Nexis: <http://web.lexis-nexis.com/professional/>

RSPB, *Birdcrime 1999*, *Birdcrime 2000* (available from the RSPB).

SEPA View (SEPA publication available on www.sepa.org.uk)

Tolley's Safety, Health and Environment Cases (compiled by CMS Cameron McKenna) (Tolley, 2000)

Westlaw Database: www.westlaw.co.uk

<p>Sections 1, 5 and 6 Wildlife and Countryside Act 1981 (protection of birds) (Scotland, England and Wales)</p>
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Applicable to: Directive 79/409

In most cases, the prosecuting authority for offences under sections 1, 5 and 6 of the Wildlife and Countryside Act 1981 is the police (or occasionally Customs and Excise). However, in some instances, the RSPCA (Royal Society for the Prevention of Cruelty to Animals) initiates a private prosecution. As can be seen from the table below (which details prosecutions taken in England, Wales and Scotland), prosecutions under these sections are relatively rare.

Table 1A: Prosecutions Under Section 1 Wildlife and Countryside Act 1981³⁶⁶

	Total No. of Prosecutions	Convictions	Acquittals
1999	36	35	1
2000	50	35	15

Table 1B: Prosecutions Under Section 5 Wildlife and Countryside Act 1981³⁶⁷

	Total No. of Prosecutions	Convictions	Acquittals
1999	7	5	2
2000	4	2	2

Table 1C: Prosecutions Under Section 6 Wildlife and Countryside Act 1981³⁶⁸

	Total No. of Prosecutions	Convictions	Acquittals
1999	0	0	0
2000	2	1	1

Below are two examples of cases brought by the prosecuting authorities for breach of sections 1, 5 and 6 of the Wildlife and Countryside Act 1981.

Prosecution of Douglas Ross (Birdcrime 2000)

Mr Ross, a gamekeeper in Morayshire, Scotland, was found guilty by Elgin Sheriff Court in Scotland, of shooting a young hen harrier. The Court fined him £2,000.

Prosecution of Andrew Preedy (Birdcrime 2000)

³⁶⁶ RSPB, Birdcrime 1999 , RSPB, Birdcrime 2000 (available from the RSPB).
³⁶⁷ Ibid.
³⁶⁸ Ibid.

Mr Preedy pleaded guilty to charges of disturbing nesting avocets and little terns and to possession of items capable of being used to disturb birds. Cromer Magistrates' Court fined him a total of £400 plus £55 costs. The court also ordered forfeiture of all of his maps, egg related books, photographs and a camera.

Section 1 Control of Pollution (Amendment) Act 1989 (carriers of waste to be registered)
(Scotland, England and Wales)

applicable to: Directive 75/442

Section 1 of the Control of Pollution (Amendment) Act 1989 states that it is an offence for any person who is not a registered carrier of controlled waste, to transport controlled waste to or from any place in Great Britain. It would appear that the Environment Agency is very reluctant to use its powers under section 1. In fact, in July 2001, the Agency could not say how many carriers had been prosecuted. However, here is an example of a prosecution brought under section 1.

Keith Taylor v Environment Agency (2001) 323 ENDS Report

Keith Taylor, head of a Teesside firm 'Taylor's Transport Services', was fined £1,000 with £567 costs by North Tyneside Magistrates in December 2001 after pleading guilty to an offence under section 1 of the 1989 Act. The firm's carrier registration had lapsed in June 1999.

Part I Environmental Protection Act 1990 (particularly sections 6 and 23) (IPC and LAAPC authorisations)
(Scotland, England and Wales)

applicable to: Directive 88/609
 Directive 99/13

There are very few reported cases relating to prosecutions taken by the Environment Agency for offences under sections 6 and 23 of the Environmental Protection Act 1990, and even fewer by SEPA. This is partially due to the low number of prosecutions taken by the Environment Agency and SEPA.

Table 2A: Environment Agency's IPC Prosecution Record (Part I Environmental Protection Act 1990)³⁶⁹

	Prosecutions	Successful Prosecutions	Fines (£)	Average Fine (£)
1997/98	12	12	£220,500	£18,375
1998/99	17	16	£176,000	£11,000
1999/00	22	21	£228,000	£10,857

Table 2B: SEPA's IPC Prosecution Record (Part I Environmental Protection Act 1990)³⁷⁰

	Referrals to the Procurators Fiscal	Convictions Secured
1998/99	0	0
1999/00	0	0
2000/01	2	0

The following case illustrates the highest fine imposed to date for breach of sections 6 and 23:

Environment Agency v ICI Chemicals and Polymers (1998) 278 ENDS Report

Following a major chloroform spill at its Runcorn works, Warrington Crown Court fined ICI £300,000 for breaching an IPC authorisation condition contrary to section 6(1) of the Environmental Protection Act 1990.

ICI was also fined £80,000 for a spillage of chlorinated solvent, the second largest fine ever imposed for an integrated pollution control offence under sections 6 and 23 of the Environmental Protection Act 1990.³⁷¹

The following case demonstrates the first IPC prosecution of a director and also illustrates the courts' ability to impose a community sentence on an offender:

Environment Agency v Gerald Jones (1998) 281 ENDS Report

³⁶⁹ Environment Agency Annual Report and Accounts 1997/1998, 1998/1999, 1999/2000.

³⁷⁰ SEPA Annual Report 1998/1999, 1999/2000, 2000/2001 (available at www.sepa.org.uk).

Gerald Jones, Director of Gath Drums pleaded guilty to five charges of breaching IPC authorisation conditions, contrary to section 6(1) of the Environmental Protection Act 1990. Bradford Crown Court, accepting that Mr Jones had no assets and that neither a fine nor a custodial sentence was appropriate, ordered Mr Jones to do 60 hours' community service.

Section 33 Environmental Protection Act 1990 (waste management offences)
 (Scotland, England and Wales)

applicable to: Directive 75/439
 Directive 75/442
 Directive 91/689

The Environment Agency is most prolific in its prosecution of waste offences. Compared with water and IPC offences, prosecution numbers are considerably higher, as demonstrated by Table 3A. SEPA also initiates waste prosecutions – see Table 3B below:

Table 3A: Environment Agency’s Waste Prosecution Record (Part II Environmental Protection Act 1990)³⁷²

	Prosecutions	Successful Prosecutions	Fines (£)	Average Fine (£)
1997/98	345	313	£625,705	£1,999
1998/99	367	301	?	-
1999/00	342	336	£851,647	£2,535

Table 3B: SEPA’s Waste Prosecution Record (Part II Environmental Protection Act 1990)³⁷³

	Referrals to the Procurators Fiscal	Convictions Secured
1998/99	32	9

³⁷¹ (1998) 281 ENDS Report.
³⁷² Supra n.369.
³⁷³ Supra n. 370.

1999/00	23	15
2000/01	16	5

Many reported cases on the implementation of the “waste” directives deal with the definition of waste.³⁷⁴ However, several cases have been selected to illustrate the expansive scope of section 33 as interpreted by the courts.

There have been many cases concerning the meaning of the word “deposit” contained in section 33. One of the most important recent cases is:

Thames Waste Management Ltd v Surrey County Council [1997] Env. L.R. 148

The appellants (TWM) were convicted by Surrey Magistrates’ of unlawfully depositing controlled waste on land other than in accordance with the conditions of the waste disposal licence in force. On appeal, the High Court construed the term “deposit” widely, stating that the term not only includes temporary deposits (following the case of R v Metropolitan Stipendiary Magistrate ex parte Lwra³⁷⁵) but also refers to continuing activities where the context of the licence would suggest that it is appropriate to do so.

This case is distinguished from the decision of the Divisional Court in Leigh Land Reclamation Ltd and Others v Walsall Metropolitan Borough Council³⁷⁶ where the court interpreted the word ‘deposit’ narrowly, applying it only to the final resting place for the waste.

The following cases indicate the highest fines/imprisonment imposed on a defendant to date, for breach of section 33.

Winston and Michael Samuel (2001) 312 ENDS Report

These two men were fined a total of £48,000 for dumping large quantities of waste in a south Wales woodland. The defendants’ company, T&L Plant, Tool and Skip Hire, ran a waste transfer station from which large quantities of construction and demolition waste, plastic, paper and other materials were taken to the woodland and burned. The men pleaded guilty to a total of 15 charges brought under section 33.

³⁷⁴ See, for example, Mayer Parry Recycling v Environment Agency [1999] CMLR 963, Castle Cement v Environment Agency [2001] EWHC Admin. 224.

³⁷⁵ [1993] Env. L.R. 417.

³⁷⁶ [1991] JPL 867.

Environment Agency v John Hawskworth (1998) 282 ENDS Report

Following a history of repeated offending, John Hawskworth was sentenced to 21 months imprisonment by Sheffield Crown Court for breaching section 33 of the Environmental Protection Act 1990. Mr Hawskworth had deposited 4,000-6,000 tonnes of mainly industrial waste in an unlicensed landfill site, setting fire to the waste which included asbestos. He was also ordered to pay £3,000 in costs.

Another important case concerning section 33 discusses the issue of corporate criminal liability for environmental offences.

Shanks v McEwan (Teeside Ltd) v Environment Agency [1998] 2 WLR 452

The company was charged with ‘knowingly causing’ the deposit of controlled waste in breach of a waste management licence condition. The site supervisor had decided to put the waste in a different place but had failed to fill out the correct forms as required by the licence. The company was convicted in the Magistrates’ Court on the grounds that the site supervisor was part of the directing mind of the company. This was upheld on appeal in the Crown Court but the reasoning was different as the Environment Agency conceded that the site supervisor could not be regarded as part of the directing mind of the company. Justice Mance stated that the knowledge required by the offence related only to knowing that waste was being deposited NOT knowledge as to the breach of the condition in the licence. There was no need to decide whether or not the company was liable under the principle of vicarious or direct liability because either principle was satisfied.

<p style="text-align: center;">Section 85 Water Resources Act 1991 (water discharge consents) (England and Wales)</p>

applicable to: Directive 74/439
 Directive 76/464

In England and Wales, prosecutions relating to water quality are slightly lower than those relating to waste management (see Table 4). Unfortunately, it has not been possible to determine the number of prosecutions brought under section 85 of the Water Resources Act 1991.

Table 4: Environment Agency’s Water Quality Prosecution Record (including section 85 Water Resources Act 1991)³⁷⁷

³⁷⁷ Supra n. 369.

	Prosecutions	Successful Prosecutions	Fines (£)	Average Fine (£)
1997/98	231	222	£945,366	£4,258
1998/99	270	258	£4,838,545	£3,250 *
1999/00	246	236	£1,467,705	£6,219

* excludes £4 million fine for Sea Empress disaster (see below for further details)

The following cases are concerned with the definition of the term “causing or knowingly permitting any poisonous, noxious or polluting matter or any solid waste to enter controlled waters”.

Empress Car Company (Abertillery) Ltd. v National Rivers Authority [1999] 2 AC 22

The appellant company had installed a large diesel tank in their yard. The tank was surrounded by a bund to contain any spillages that occurred and diesel was obtained from the tank via a tap which was not locked. At the material time, an extension pump running from the tap into a smaller drum was in use, because the company found that small quantities of diesel could be more easily obtained from the drum rather than the tank. The drum was outside the bund. One night, an unknown person opened the tap which meant that the contents of the tank made its way into storm drain and thence into a nearby river – the third party could not be traced. The company was charged with causing poisonous, noxious or polluting matter or solid waste to enter into controlled waters, contrary to section 85(1) of the Water Resources Act 1991. The case went to the House of Lords and the leading judgment was given by Lord Hoffman

The House of Lords agreed that to have caused pollution, there needs to be some positive act on the part of the company. The court held in this case that maintaining the diesel tank was enough i.e. that was the positive act. In addition, if a defendant were to stand by and not prevent pollution from happening, he would probably be guilty of “knowingly permitting” the pollution. The court went on to say that the offence of causing water pollution is strict, not absolute, so whilst it is not incumbent that the prosecution prove fault on the part of the defendant in order to secure conviction, it does not follow that the defendant is guilty of the offence in all imaginable circumstances. Liability may be escaped on the grounds that the necessary chain of causation (i.e. the physical connection between the defendant’s action and the damage) is broken by the effect of natural forces or an Act of God. Also liability may be escaped where third parties break the chain of causation, however, not all third party acts will break the chain. Acts of a third party which are “normal and a familiar fact of life” will be insufficient to break the

chain of causation. However, if the act is “extraordinary”, the defendant’s conduct cannot have caused the water pollution (for example, an act of terrorism would come under an “extraordinary” act, thus breaking the chain of causation).

In conclusion, the House of Lords held that Empress Car Co. was guilty of causing poisonous, noxious and polluting matter to enter controlled waters. The act of vandalism did not break the chain of causation as it was a normal and familiar fact of life.

This case has been followed on a number of occasions. See, for example, Environment Agency v Brock plc, where the company was charged with causing the pollution of controlled waters, namely tip leachate to enter a ditch.³⁷⁸ The pumping of the tip leachate by Brock plc was a positive act, without which the pollution would not have occurred, and, whilst the bursting of the seal was unforeseeable, it was a normal fact of life rather than an extraordinary occurrence.

The following cases illustrates the highest fine imposed on a company to date for breach of section 85 (1) Water Resources Act 1991.

R v Milford Haven Port Authority [2000] Env. L.R. 632

In January 1996, the *Sea Empress*, bringing crude oil to Milford Haven, ran aground at the entrance to the waterway as a result of the negligent navigation of her pilot. The ship was grounded for 7 days, during which time, about 7,200 tonnes of crude oil and 250 tonnes of heavy fuel oil was released. A further 230 tonnes of fuel oil was released after the tanker had been towed to a jetty within the waterway. In the main area affected by the spill, there were in excess of 40 specially protected sites. The cost of cleaning up the spill was over £60 million. The Milford Haven Port Authority pleaded to causing polluting matter to enter controlled waters contrary to section 85(1) of the Water Resources Act 1991. The Authority was fined £4 million and ordered to pay £85,000 in costs, the largest fine ever awarded in a water pollution case. On appeal to the Court of Appeal, the fine was reduced to £750,000, the court ruling that the fine was “manifestly excessive” in view of the authority’s financial means, and that the offence was one of strict liability.

<p style="text-align: center;">Sections 118 and 121 Water Industry Act 1991 (trade effluent consents) (England and Wales)</p>

³⁷⁸ [1998] Env. L.R. 607.

applicable to: Directive 83/513

Yorkshire Water v Hickson & Welch (1996) 252 ENDS Report

Following a leak of toxic effluent which caused serious damage to a Yorkshire Water sewage works, Hickson & Welch was fined £35,000 and ordered to pay £40,437 costs for breach of section 118 and 111 of the Water Industry Act 1991.

Welsh Water v Gower Chemicals (1998) 281 ENDS Report

In October 1996, two workers of Neith and Port Talbot Council died while working in a chamber at a pumping station near Swansea. The Health and Safety Executive prosecuted the local authority under the Health and Safety at Work Act 1974 and the local authority was fined £150,000. Later, it was found that the workers had suffocated from fumes originating from substances present on the Gower Chemicals site. The discharges of these substances was not consented under Gower Chemicals trade effluent consent with Welsh Water. Welsh Water therefore brought three charges under section 121 of the Water Industry Act 1991. A fourth charge under section 111 of that Act was also brought. The company pleaded guilty to two of the charges and the Swansea Crown Court fined Gower Chemicals £50,000 for each of these two offences and ordered the company to pay £33,000 in costs.

Regulation 18 Special Waste Regulations 1996 (consignment note procedure for special waste)

(Scotland, England and Wales)

applicable to: Directive 75/439

Directive 91/689

There are relatively few cases brought under regulation 18 of the 1996 Regulations. Where prosecution has been brought, this tends to be in conjunction with breach of the duty of care prescribed under section 34 Environmental Protection Act 1990. Section 34 is fundamental to the waste management provisions and places a responsibility on those in the waste chain to ensure that waste is dealt with and disposed of correctly. The duty of care has four limbs and waste holders must ensure that:

1. other persons are prevented from breaching section 33 of the Environmental Protection Act 1990 (see above)

2. the escape of waste is prevented
 3. waste is transferred to an authorised person or to a person for authorised transport purposes
- on the transfer of waste, there is a written description of that waste

The Special Waste Regulations 1996 have specific relevance to the fourth limb of the duty for in the case of special waste, a revised consignment note procedure must be complied with.

Agrivert v Environment Agency (2001) 321 ENDS Report

Wellingborough Magistrates fined Agrivert £7,000 with £1,604 costs for duty of care and special waste offences relating to the delivery of quicklime to a landfill site for non-hazardous waste. The material was not identified as special waste and was therefore not accompanied by a special waste consignment note

In some cases, special waste offences attract unusually low fines:

UK Waste v Environment Agency (1999) 292 ENDS Report

UK Waste was prosecuted for dispatching drums of waste which it had described as low-hazard cosmetics when in fact the waste turned out to be highly flammable special waste. There was not special waste consignment note. UK Waste pleaded guilty to two offences under the Special Waste Regulations 1996. The company also pleaded guilty to failing to provide an adequate description of the waste contrary to section 34 of the Environmental Protection Act 1990. The special waste convictions attracted no penalty, while the duty of care offence attracted a penalty of only £1,000. The company was also ordered to pay £1,720 in costs.

Regulation 19 Conservation and Natural Habitats etc. Regulations 1994 (carrying out of potentially damaging operations on special protection areas and special areas of conservation)

applicable to: Directive 79/409
 Directive 92/43

Following correspondence with English Nature, the enforcing authority for the purposes of the 1994 Regulations in England and Wales, there have been no criminal prosecutions initiated under regulation 19. Similarly, there are no prosecutions in Scotland. This is due to the fact that a good working relationship with the landowner is essential if effective land management is to be maintained. This

position would be jeopardised if a prosecution was initiated. Therefore, English Nature has, in all instances, reached a compromise with the landowner, usually through the system of management agreements.

Control of Major Accident Hazards Regulations 1999 (and section 33 Health and Safety at Work Act etc. 1974 which provides for criminal offences) (control of major accident hazards)

(Scotland, England and Wales)

applicable to: Directive 96/82

Following a search of the Health and Safety Executive's Prosecution Database, it would seem that, to date, there has been only one prosecution brought under the Control of Major Accident Hazards Regulations 1999.

General Trading Services v Health and Safety Executive (2002) ENDS Report

General Trading Services, trading as King's Lynn Baggage and Handling failed to notify the Health and Safety Executive and Environment Agency that it was operating a major hazard activity involving ammonium fertiliser. The company was fined £1,200 by West Norfolk Magistrates.

The following case may also be of interest as it illustrates the factors that a court will take into account when determining the level of fine imposed for breach of health and safety requirements generally. Were a prosecution to be brought under COMAH, the court would have regard to such guidelines.

R v F Howe & Son (Engineers) Ltd. [1999] 2 All ER 249

The case involved an appeal by F Howe and Son against a fine of £48,000 for four separate offences under the Health and Safety at Work etc. Act 1974 and related legislation. The Court of Appeal allowed the appeal and substituted a fine of £15,000. The Court also gave guidance on the factors to be taken into account by the courts when imposing such penalties. In determining the seriousness of the offence, the court might consider how far short of the appropriate standard the defendant had fallen. Other relevant matters might be the degree of risk and extent of the danger involved, the defendant's resources and the effect of the fine on its business. Aggravating factors include failure to pay attention to warnings,

deliberate breach and loss of life. Mitigating factors include an early admission of responsibility and a plea of guilty, the taking of action to remedy the breach and a good safety record.

**Regulation 32 Pollution Prevention and Control Regulations 2000 (IPPC permits)
(England and Wales)**

applicable to: Directive 75/439
 Directive 76/434
 Directive 83/513
 Directive 88/609
 Directive 99/13

As stated in the country report, the Pollution Prevention and Control Regulations 2000 are replacing Part I of the Environmental Protection Act 1990 (for our purposes, most importantly, sections 6 and 23 of the Act). As these Regulations only came into force on 1st August 2000, as yet, no cases have been pursued under these Regulations.

There are no reported cases of breach of the following:

Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2000 (S.I. 2002/528) (implementing Regulation 2037/2000) (applicable in Scotland, Northern Ireland, England and Wales)
Regulations 36, 41 and 42 Conservation and Natural Habitats Regulations 1994 (implementing Directive 92/43) (applicable in Scotland, England and Wales)

4.13.2. CASE LAW APPLICABLE TO SCOTTISH LEGISLATION

As is the case in England and Wales, there have been no prosecutions under:

Pollution Prevention and Control (Scotland) Regulations 2000 (applicable to Directives 75/439, 76/464, 83/513, 88/609 and 99/13)

There is no information available on prosecutions brought under section 24 of the Sewerage (Scotland) Act 1968 (applicable to Directives 76/464 and 83/513).

Section 30F Control of Pollution Act 1974 (as amended)

applicable to: Directive 76/464
 Directive 83/513

Prosecution of John Porter (SEPA View, Spring 2002)

In January, Arbroath Sheriff Court fined John Porter £1,000 for allowing diesel oil to enter a burn contrary to section 30F of the Control of Pollution Act 1974.

Prosecution of Ben Nevis Distillery (Fort William) Ltd. (SEPA View, Spring 2002)

The Ben Nevis Distillery (Fort William) Ltd. pleaded guilty to causing fuel oil to enter a watercourse contrary to section 30F. Fuel had entered a fuel tank which in turn caused a leakage of fuel oil that reached the watercourse through the site drainage system. In fining the company £2,000, the court took into account the fact that the company had taken immediate steps to place a boom across the stream to mitigate the effects of the pollution.

5. Comparative Analysis

Michael Faure and Günter Heine

5.1. Introduction

In the questionnaires all reporters have been asked to provide a brief insight into the applicable environmental criminal law in their specific country. In this comparative analysis we will try to have a brief look at the main similarities and differences. It is, however, not possible to provide an indebt comparative analysis of all the detailed environmental legal systems. Moreover, similar studies are already available today.³⁷⁹ The goal of this comparative analysis is therefore limited: we just want to show in what respect environmental criminal law in Europe today is based on common principles or whether there are indeed major divergences on various issues. With a view on a possible harmonization (this being the background and framework for this study) it is important to provide a brief comparative analysis.

Thus we will focus on the structure of environmental criminal law, dependence upon administrative law and the important issue of criminal responsibility of legal persons. But again, this issue has also been addressed in previous publications as well.³⁸⁰ Therefore also on this issue we can be relatively short.

Everyone engaging in this type of comparative research should of course be aware of the difficulties: the country reporters were merely asked to provide a brief insight into the structure of their environmental criminal law in their particular Member State. Thus it is not possible e.g. to compare what the particular sanction would be on a particular offence in e.g. Greece or Portugal. If one issue became clear from the tables presented in Part 2, then it is at least that is extremely difficult already to provide detailed

³⁷⁹ See for instance the publication of Heine of 1986 in which a comparison of applicable provisions and criminal sanctions for water pollution was executed (Heine, G., 'Aspekte des Umweltstrafrechts im internationalen Vergleich', *Goltdammer's Archiv für Strafrecht*, 1986, 67-88 and see Faure, M. and Heine, G., *Environmental Criminal Law in the European Union. Documentation of the main provisions with introduction*, Freiburg im Breisgau, Max-Planck-Institute für ausländisches und internationales Strafrecht, 2001.

³⁸⁰ See e.g. Heine, G., "Rethinking Criminal Liability of Enterprises: International Developments, Basic Models, National Consequences" in: Faure, M. and Schwarz, K. (eds.), *De strafrechtelijke en civielrechtelijke aansprakelijkheid van de rechtspersonen en zijn bestuurders*, Antwerpen, Intersentia, 1998, 163-178; Heine, G., "Umweltstrafrecht", in Brandt (ed.), *Studium der Umweltwissenschaften: Rechtswissenschaften*, 2001, 201-209; Heine, G., Gleß, S. and Grote, R., *Justitielle Einbindung und Kontrolle von Europol. Kurzvorstellung der Ergebnisse eines rechtsvergleichenden Gutachtens im Auftrag des Bundesministeriums der Justiz*, Freiburg, 2001; Heine, G., "Moderne Erscheinungsformen der Tatbeteiligung mehrerer", in Eser, A., Yamanaka, K. (eds.), *Einflüsse deutschen Strafrechts auf Polen und Japan, 2. Deutsch-Polnisch-Japanisches Strafrechtsskolloquium 1999 in Osaka*, Baden-Baden, 2001, 101-107; Heine, G., "Unternehmen, Strafrecht und europäische Entwicklungen", *ÖJZ*, 2000, 871 – 881; Heine,

information on the applicable criminal provisions as well as on the sanctions. It is as such not difficult to investigate through what kind of legal measures directives have been implemented, but these legal measure as such can be sanctioned through a variety of (administrative and criminal) sanctions, sometimes to be found in a criminal code, sometimes in specific environmental statutes, but in other cases also in provincial or municipal decrees. For that reason we are not tempted to engage in e.g. a comparison of sanctions on the non-respect of provisions implementing the directives on the basis of the material provided in Part 2. There is indeed a great risk that this would lead to false interpretations and the results would be misleading. It is far more interesting to briefly examine how environmental criminal law is generally structured.

5.2. Source of environmental criminal law

One could be tempted to argue that the place where one can find environmental criminal law (in a penal code or in specific statutes) is totally irrelevant. Thus one could argue that the only important issue is how the criminal law has formulated provisions aiming at a protection of the environment, not the places where this can be found. However, the literature has rightly indicated that such a point of view would be too simple. There are practical and theoretical consequences on the place where environmental criminal law can be found.

Indeed, especially for those countries where traditionally classical values were protected in penal codes it may well have an important signalling effect that environmental offences are also protected in a penal code. Indeed: many of the legal systems which were subjected to codification had in their penal codes (many of which emerged in the nineteenth century) provisions aiming at the protection of individual interests and values, such as honour, property, health and individual life. Many have argued that today an important function of the criminal law is also to protect social values, such as the environment. Thus, the fact that environmental interests would be protected directly in the penal code would at least have the important signalling effect that the legislator considers (serious) infringements on the environment in some cases as important as violations of individual interests.

In addition to this theoretical argument some have also argued that environmental officers would give a higher priority to crimes punished in the penal code. The country reports have indicated that indeed in the last decennia many legislations have now introduced environmental crimes directly in the criminal codes. This is for instance the case for Austria, Denmark, Spain, Germany, the Netherlands, Finland and Portugal. Many legal systems that also adopted recently new criminal codes took the opportunity of introducing environmental crimes or reshaping old ones at the occasion of that reform. That was also the

G, "Europäische Entwicklungen bei der strafrechtlichen Verantwortlichkeit von Wirtschaftsunternehmen und deren Führungskräften", *Schweizerische Zeitschrift für Strafrecht*, 119, 2001, 22–39.

case for Spain and Portugal where new penal codes were introduced relatively recently and for Finland where environmental crimes were introduced in the penal code at the occasion of revision in 1995. Rather surprisingly in the Nouveau Code Pénal in France no specific provisions protecting environmental interests can be found. The same is true for Belgium, Greece, Italy, Luxembourg. And the Swedish Legislator changed its Penal Code (1999) and introduced criminal provisions protecting the environment into a basic eco-regulation, following other countries.

Obviously environmental interests are not protected in penal codes in those legal systems that traditionally do not rely on codification, such as Ireland and the United Kingdom.

Therefore one can conclude that although there seems to be some convergences in the sense that many of the countries that have codification have now introduced provisions aiming at the protection of the environment also in their penal codes (or at least in a basic eco-regulation) there still is some divergence as well, basically having to do with the fact that the common law countries do not have a codified system of criminal law.

5.3. Structure of environmental crimes

In the literature various models of environmental criminal law have been developed. It would lead us too far to discuss these here into detail.³⁸¹ However, it is interesting to mention that this literature holds that the criminal law can protect the environment on the basis of a variety of models. A first (and rather simple) model is followed in those countries where basically the criminal provisions can be found in administrative environmental laws and where the criminal law basically sanctions the non-respect of administrative provisions. These models are usually referred to as '*abstract endangerment*' models. One can indeed argue that these administrative laws, e.g. prohibiting the operation of a certain plant without a license, aim at the protection of the environment. However, the danger that could be created if one operates such a plant without the license is only an abstract one. Those models can be found in many of the legal systems discussed in this report, for instance in Belgium, the Netherlands and Denmark, but also in countries which have incorporated environmental criminal law into the penal code, such as Germany. Also in the penal code, e.g. of Spain, provisions are contained aiming at the punishment of abstract endangerment.

However, in some cases the criminal law aims at the punishment of a *concrete endangerment* of ecological interests and values. This often takes place with those provisions that prohibit the emission of

³⁸¹ For a discussion see Faure, M. and Heine, G., *Environmental criminal law in the European Union*, 1-4 and Faure, M. and Visser, M., 'How to punish environmental pollution? Some reflections on various models of

certain substances into the environment, on the condition that this emission took place illegally. With a concrete endangerment a mere risk of danger does no longer suffice. An emission of course can cause a more concrete danger and therefore the potential harm to the environment is more serious than with a mere abstract endangerment.

One can notice that in those countries in which environmental criminal law has recently been reformed (usually with an incorporation of specific provisions into the penal code), such as in Austria, Denmark, Finland, Germany, Greece and Spain, that a large number of rather detailed provisions can be found with a lot of nuances, taking into account the seriousness of the endangerment. Indeed: whereas traditional criminal law merely provided for sanctions in case of a violation of administrative environmental law, the criminal law in more modern statutes provides the conditions for the punishability of environmental crimes itself. Thus one can notice that more serious sanctions threaten in case of concrete endangerment than with a mere abstract endangerment and moreover, most legal systems now tend to have a classification with differences between offences being committed with intent or merely negligently. Most countries accept also criminal liability in the latter case although the sanction that threatens in that particular case is less serious. Only the United Kingdom seems to go as far as even accepting strict liability in environmental criminal law in particular cases (even though it is argued in the report that even with strict liability some form of *mens rea* is still required).

We have incorporated the most important results of the comparative analysis concerning these models of criminalizing environmental harm in tables to be found in annex 2 to this report.

It is striking that most European legal systems now seem to agree that the mere punishment of a violation of administrative provisions does not suffice to provide an adequate protection of the environment, but that on the other hand very vague provisions, punishing e.g. 'anyone who pollutes the environment' go too far as well. The latter type of provision would not only be too vague and would thus violate the *lex certa* principle of criminal law; it might also be totally ineffective. Indeed, if a criminal provision would require actual 'pollution' this would mean that the criminal law could only intervene if the public prosecutor could actually show that a pollution, i.e. a change of the natural environment has taken place. In many cases it may either be totally impossible to bring this proof or the pollution may be already too far developed. In other words: all European legal systems now seem to agree that ecological values and interests are that important that the criminal law may provide its powerful protection at an early stage, being also when there is mere endangerment of ecological values. However, there still are important differences between the legal systems as far as the specific protection awarded through the criminal law is concerned for the following reason:

criminalization of environmental harm', *European Journal of Crime, Criminal Law and Criminal Justice*,

5.4. Administrative dependency of environmental criminal law

Many country reporters indicate that a crucial notion in environmental criminal law is that, contrary to the protection of classic values and interests, the criminal law does not provide a direct protection of the environment. Indeed: another reason why most European legal systems do not have a criminal provision punishing ‘anyone who pollutes the environment’ is that this would include a large number of industrial activities that are not considered undesirable and should not be covered by the criminal law. Most of these ‘polluting’ activities are allowed, but controlled under administrative permits and licenses. That obviously also explains why the task of the criminal law originally was limited to a punishment of the non-respect of administrative violations.

Many reporters, for instance dealing with Austria, Germany and Spain point at this administrative dependency of environmental criminal law (also referred to in German legal doctrine as *Verwaltungsakzessorietät*). These reporters indicate that even in the criminal provisions included in the penal code, the criminal law is still (absolutely according to the Austrian reporter) dependent upon administrative law. Indeed, the penal codes will usually hold in their provisions that a certain pollution is only punishable if the emission took place ‘illegally’. The consequence therefore is that still today administrative authorities possess a large power to define the scope of protection awarded to the environment via the criminal law. If administrative law would be very flexible and lenient and allow all kind of emissions the protection awarded via the criminal law would be relatively limited. Although this technically complicated issue was not discussed in great detail in the country reports there seems nevertheless to be a tendency in some legal systems to move away from this absolute dependency of the environmental criminal law upon administrative law especially to loosen this dependency. Some countries argue strongly that the judiciary must have the possibility e.g. to test the legality of administrative acts such as licenses (that is for instance the case in Belgium); in other cases the legislators try to provide specific provisions for those cases where the criminal law should intervene, even if the conditions of a license were met. It is then held that some cases of very serious pollution causing significant risks to human health should be punishable irrespective of administrative law (this is the case for instance in Germany).

Without discussing this issue in further detail one can, summarizing, stress that most authors agree that some dependency of environmental criminal law upon prior administrative decisions is unavoidable. It is indeed mostly the administrative agency and not the judge in a criminal court who has the best expertise to define what the optimal level of pollution is. At the same time academics studying the way the

legislator should describe environmental criminal provisions also realize that the protection awarded through the criminal law can be extremely weak if it can be totally removed through lenient administrative decisions. Thus in some (but certainly not in all) European legal systems there is some tendency to provide a direct protection of the environment through the criminal law, either without requiring a prior violation of administrative norms or even when the administrative decisions were respected (but very serious pollution took place). However, in this respect there still is a relatively large degree of divergence today in Europe.³⁸² With a view on a potential harmonization of environmental criminal law it is crucial to take this issue of the administrative dependency into account. Indeed: if one would merely harmonize e.g. formal provisions aiming at a protection of the environment and not take into account the amount to which prior administrative decisions have a justificative effect, the factual scope of protection awarded through to the criminal law may well be very different.

5.5. Administrative law and quasi penal law

Without going into this issue in much detail, it should be mentioned that almost all country reporters indicate that the protection of the environment is obviously not only awarded through the criminal law, but also through administrative law. Thus in many countries administrative bodies do much more than merely controlling whether administrative environmental law is complied with. In some cases these administrative bodies have the power to impose administrative sanctions themselves. In other countries such as Ireland, administrative agencies have the power to prosecute. Some countries, such as for instance Austria and Germany have a specific administrative penalty procedure. These are referred to as the so-called *Ordnungswidrigkeiten*. In case of an application of these administrative penalties a fine (or administrative fee) can be imposed. But also other countries than Austria and Germany even if they don't have a system of administrative penalties, sometimes have detailed administrative sanctioning systems. Administrative sanctions are for instance also discussed in the Greek report.

There seems to be some tendency that more countries (including for instance recently the Netherlands) seem to be willing to rely on administrative sanctions, sometimes as a substructure to the Penal Code, simply given the lower costs involved in imposing an administrative sanction. For instance for the minor cases where criminal courts would merely impose a fine one can discover a tendency in some countries to prefer the (simply and) cheaper administrative procedure. But again, there is no factual harmonization on this issue yet.

³⁸² See further on these issues of administrative dependency of environmental criminal law Heine, NJW (1990), pp. 2425 ff.; Heine, ZStW (1989), pp. 728-732; Heine, ÖJZ (1991), pp. 370 ff. and Schall, NJW (1990), pp. 1265-1266. Prabhu refers in this respect to the "administrative accessoriness of penal law" (Prabhu, IRPL (1994), p. 708).

5.6. Sanctions

From the country reports it appeared that most legal systems still know a variety of criminal sanctions which can in theory be applied to environmental offences, although the sanctions mostly mentioned are still the traditional ones, being imprisonment and fines. Almost all country reporters refer to the fact that the sanctioning practice in environmental criminal law is using fines and imprisonment. It is striking that in Austria also in administrative penal law a prison sanction is provided for (although it is a maximum of six weeks). Most of the other legal systems only have an imprisonment via the traditional criminal law and not via administrative penal law.

The severity of the punishment, at least as it is provided for in legislation, can of course substantially vary. That is also what became clear from the tables provided in Part 2. As was mentioned before, in the more modern, elaborated systems, the severity of the sanction is related to the severity of the environmental crime committed.

As far as the fines are concerned some countries (more particularly Austria, Finland and Germany) have a system of so-called day fines. In that case the fine is imposed as a certain number of days at a certain sum each day. The size of the sum that will have to be paid ultimately depends upon the monthly income and assets of the offender. Thus the day fine system is meant to relate the amount of the fine to the financial situation of the offender. Ireland has provision for fines for offences continued after first conviction.

The description of the sanctions in part 2 already made clear that in some cases it is very difficult to answer the simple question of what the sanction on a specific violation is. In some cases this answer can only be given by consulting a variety of statutes, decrees and the penal code. Moreover, all legal systems (with a few exceptions) indicated a great flexibility for the judge to choose between the minimum and maximum penalties. In some cases there is no minimum, but only a (relatively high) maximum penalty, whereby apparently a lot of discretion is left to the judge.

Strikingly, many reporters specifically those discussing some actual cases, argue that the sanction which is mostly imposed is the *fine*. Imprisonment is almost never imposed (only a few reporters mention a few spectacular prison sanctions). Thus, some critics could argue that criminal penalties are apparently that weak that environmental criminal law is largely ineffective. That statement would of course be too simple. It is rightly mentioned in one report that although merely fines are imposed and although the prison sanction is seldomly applied, this fact has not led to less environmental criminality. To the contrary, many country reporters indicate that the number of environmental crime cases seems to go down instead of increase.

In addition it should be mentioned that all country reporters indicate an increasing use of so-called *complementary sanctions* (in addition to the imprisonment and fines). The various legislators apparently have a lot of imagination in that respect. In the Netherlands the Economic Offences Act contains a variety of measures that the judge can impose; in Belgium, Luxemburg (but also many other countries) the judge can order the restoration of the harm done to the environment and in some (but certainly not in all) countries, (such as Belgium, Germany, Finland and the Netherlands) there is a high interest for the removal of illegal gains. It is held that through environmental criminality polluters can gain substantial profits, which can not be removed by merely imposing a fine. Thus it is in some cases made possible for the judge to order the removal of the gains which the polluter made with the environmental crime. But again, this seems to play an important role in some countries, but definitely not in all.

Some countries report specifically original additional sanctions. Worth mentioning is the Danish example of a registration as non fit enterprise (enterprises which have been convicted for environmental crimes can be black listed) and the Irish example of the future refusal of a licence. The Waste and Management Act and the Planning and Development Act 2000 provides that the licence or planning permission respectively should only be given to someone who is considered to be a “fit and proper person”. A prior criminal conviction for certain offences may well make someone applying for an authorisation “unfit” for it.

5.7. Corporations

An important issue within environmental criminal law is obviously the question how the legal systems deal with the issue of corporate criminal liability. There again one can only conclude that there still is a lot of difference between the many legal systems, although there seems to be a trend towards convergence in the sense of more systems accepting the idea of corporate criminal liability. Until a few years ago the axiom “*societas delinquere non potest*” dominated the theory of continental European criminal law. This now has changed dramatically, as the country reporters indicate. Corporate criminal liability is well developed in Ireland and the UK and has existed in the Netherlands and Denmark for a long time. Recently Belgium and France introduced corporate criminal liability as well. Finland in addition allows corporate criminal liability. Only some legal systems still lack criminal liability for corporations, such as Luxemburg, Portugal, Spain, Austria and Germany, but almost in all of these countries there is strong discussion at the academic level to introduce a system of corporate liability. In some cases the discussion is not merely academic, but has reached the political level as well, for example in Austria.

Many now agree that some form of sanctioning system aiming specifically at corporations is crucial for an effective functioning of environmental criminal law. Indeed, it has been held that it may make relatively little sense to reform environmental criminal law if that crucial aspect, being criminal corporate liability is not dealt with. Most environmental crime, so it is often held, is indeed committed by individual actors and not by corporations. Countries neglecting corporate criminal liability had in the past often difficulties locating the individuals within the corporation who could be held liable of environmental crime.

This then led (for instance in France in the past and in Luxemburg still today) to systems whereby some kind of automatic criminal liability was imposed upon directors and managers (although this was sometimes questionable from a theoretical dogmatical perspective).

Obviously there are a lot of variety and details, which cannot be discussed at this place. For instance, even the countries rejecting criminal liability of the corporation sometimes have systems whereby the corporation can be held civilly liable for the fines imposed upon the employee (leading to an indirect criminal liability). In addition: the countries which accept criminal liability of the corporation usually do not have an exclusive liability of the corporation, but accept (under certain conditions and circumstances) the possibility of a cumulation of the criminal liability of the corporation with that of certain individuals within the corporation who can be considered responsible for the pollution that occurred.

In many countries enterprises can be sanctioned by kinds of quasi penal law, such as administrative penal fines (Germany, Portugal), or additional sanctions can be imposed, for instance in Spain (closure of the enterprise).

Although today there still is a lot of divergence in this respect one can undoubtedly argue that, certainly if one compares it with the situation of e.g. 20 years ago, a lot has happened in this respect in the Member States. The trend is now undoubtedly in the direction of a larger responsibility (even if it sometimes merely takes the form of administrative penal law) of corporate entities. It does not need any discussion to see that for environmental criminal law to be effective it is indeed crucial that one takes into account the crucial role of corporate entities.

5.8.Procedural aspects

The questionnaire also addressed the issue how environmental crimes are prosecuted in the various Member States. Again, there seems to be a great amount of similarity between the continental Member States, but some divergence with the UK and Ireland. Several reports (see e.g. Denmark, Finland and Spain) indicate how environmental criminal cases are initiated. These (and others) reports indicate that it

is usually on the own initiative of administrative authorities who control the respect of environmental legislation, that a procedure is initiated. Once an administrative agency discovers that environmental law is violated the formal proceedings can take place. In other cases it are victims (or other individuals) who file a complaint or report about environmental crimes they suspect. These individuals can address themselves (again with some small differences between the Member States) either to administrative protection agencies (with specific controlling powers) or to the police.

Once an administrative authority has discovered an environmental incident (e.g. a violation of a licence condition) most Member States know a procedure whereby the administrative authorities themselves can settle the matter administratively. In some countries, however, (e.g. in Belgium) administrative controlling officers are obliged to report every crime they discovered to the police. In other legal systems the administrative authorities have the right e.g. to settle the case by requiring the offender to pay an administrative fine. Some Member States foresee in that particular case a right of control of the public prosecutor. This one can understand: it is of course in the public interest to avoid that administrative authorities would be too lenient towards enterprises and would thus be tempted too easily to settle cases with enterprises committing environmental crime.

Most reporters also indicate that only for the more serious cases administrative authorities will ask the assistance of the police.

Although there are obviously differences in the form, this seems to be the model that is followed in most of the continental Member States. For the serious cases (that is to say the ones that the administrative authorities do not wish or cannot settle themselves) it is finally the public prosecutor that brings charges. Obviously most country reporters (see for instance Finland, Luxemburg and Portugal) indicate that an individual who would suspect an environmental crime also has the possibility to report this directly either to the police or to the public prosecutor. There is hence no formal need to involve the administrative authorities.

Some interesting peculiarities are worth mentioning: many countries now seek to reduce the workloads of the criminal courts and thus various models have been developed to allow either administrative authorities, the police or the public prosecutor to settle (one could call this a form of plea-bargaining) with the offender. Interesting in that respect is the Danish example where a settlement is possible if the defendant accepts to pay the fine that otherwise the public prosecutor would ask the criminal court to impose. Thus the offender can avoid to go to court by paying this fine. Other countries (the Netherlands, Belgium and France) know similar systems or bargaining structures have been adopted by the practice, for instance in Germany, although the form may be different.

Usually the public prosecutor (in the continental systems) then brings a criminal charge (if the case is not settled before) before the ordinary criminal courts. No country reported of the existence of specific environmental courts that would only deal with environmental crime. Hence, environmental crime is apparently dealt with as any other ordinary crime and treated before the criminal courts.

An exception is the situation in the Netherlands where so-called economic crimes (infringements of the Economic Offences Act) are dealt with by the economic criminal court. Since most environmental laws are considered economic offences, environmental crimes are dealt with by this economic criminal court as well.

The situation is different in one important respect in the common law countries, being that there is no monopoly to sue before a criminal court for the public prosecutor. By the way, also the French and Belgian legal systems provide for a right for the victim (the so-called civil party) to bring a criminal charge directly before the criminal court. The system is, however, far more outspoken, e.g. in Ireland where it is not the public prosecutor, but the environmental protection agency who prosecutes environmental cases and in the United Kingdom, where in principle anyone could bring a criminal charge. The British report indicates that NGOs (like Greenpeace or Friends of the Earth) also sometimes threaten to use their right to bring a criminal charge. This is also possible in Ireland. The common law reporters also indicate that in environmental legal practice it are indeed often other institutions than the public prosecutor who bring charge for environmental crimes. That seems to be an important difference with the continental systems. Indeed, even in systems where in theory victims (the so-called civil parties) could bring the criminal charge (like in Belgium and France) this seldom happens in practice in environmental cases.

It is finally interesting to indicate that some reporters have provided highly interesting empirical material on the amount of environmental crimes, or at least on the amounts of cases. One issue that is striking in that respect is that some countries (like the United Kingdom) seem to be able to provide detailed information on the amount of environmental cases tried (the same is the case for Austria) whereas other countries simply had to indicate that this information is apparently not available in accessible form. Within this (modest) empirical material it is striking that e.g. the Austrian reporter notes a decline in the number of environmental cases (and gives a number of rather interesting explanations for which we refer to the Austrian report). The Spanish reporters indicate that the number of dismissals in environmental criminal cases seems to be very high. Also this seems to comply with other empirical research concerning environmental crime. Almost 50% of all cases tried in Spain apparently lead to an acquittal. Also the reasons given by the Spanish reporters are definitely worth further examination.

If that is one issue that one can conclude from this information it is that if Europe should take any initiative with respect to environmental criminal law it might be interesting to organise a system of monitoring and data collection concerning environmental crime, cases tried, sanctions imposed and other relevant matters. If this kind of data collection could somehow be standardised valuable information could be gathered cross Europe e.g. on the effectiveness of specific environmental legislative measures.

Annex 1 Questionnaire for project criminal penalties in EU member states environmental law for country reports

Introduction: general background

A first important task of the project consists in identifying the way in which an important deal of the European Environmental directives are enforced through the criminal law in the member states. It is probably important to stress that this project obviously fits into the harmonization efforts with respect to environmental criminal law which have recently seen the light. Indeed, after the Council of Europe drafted a convention on the protection of the environment through criminal law³⁸³, also at the European level several initiatives were taken in the field of the criminal law. In this respect we can mention the proposal for a recommendation of the Council concerning minimum criteria for environmental inspections in the member states³⁸⁴, which dealt mainly with the aspects of control and enforcement, but more importantly there have been various initiatives recently to harmonize the material environmental criminal law as well. The most important one is definitely a proposal for a directive on the protection of the environment through criminal law, launched on 13 March 2001 by the Commission³⁸⁵. Although various academics are rather critical of criminalising the non-respect of national legislation implementing European environmental directives³⁸⁶ the purpose of the current project is certainly not to undertake a critical analysis of the task of Europe with respect to the environmental criminal law.

However, it is important to mention these various developments as a background for this project. Indeed, the proposal of 13 March 2001 states that the proposed directive wishes to ensure a more effective application of community law on the protection of the environment by establishing throughout the community a minimum set of environmental offences. Thus the idea was that the member states should ensure that when certain offences constitute a breach of the rules of community law protecting the environment, that a criminal enforcement should take place. Strikingly the list of directives and the regulation mentioned in this proposal for a directive in the annex correspond to some extent with the directives which have to be examined within the current project. Note, however, that the list of directives contained in the annex to the proposal of directive is substantially longer than the list of directives mentioned in the technical annex.

³⁸³ ETS number 172, promulgated in Strasbourg at 4.11.1998, but not entered into force yet.

³⁸⁴ COM (1998) 772 final of 16.12.1998.

³⁸⁵ COM (2001) 139 final.

³⁸⁶ See e.g. Buruma, Y. and Somsen, J., "Een strafwetgever te Brussel inzake milieubescherming", *NJB*, 2001, 795-797.

It is important to take this evolution as a background for the current study. A first step in any harmonization effort is obviously that the Commission should know how the non-respect of national rules implementing specific directives and a regulation are sanctioned in the various member states today.

Overview of provisions of criminal law transposing ten directives

A first step to be addressed is to provide a list of the following directives and to indicate through what kind of national legislation these directives and the specific regulation are sanctioned in your particular member state.

It concerns the following directives and regulation:

Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils

Council Directive 75/442/EEC of 15 July 1975 on waste

Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community

Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds

Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges.

Council Directive 88/609/EEC of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants

Council Directive 91/689/EEC of 12 December 1991 on hazardous waste

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances

Council Directive 99/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations

Regulation (EC) No 2037/2000 of the European Parliament and the Council of 29 June 2000 on substances that deplete the ozone layer.

It is obviously important to stress that in some cases it will have to be necessary to check how the particular directives were implemented in order to be able to look at the sanctioning system. Although the focus should primarily be on environmental criminal law, could you please provide information as well on possible other sanctions (administrative or civil) that may be in place to enforce national rules, implementing the mentioned directives.

Please indicate clearly for every directive in what kind of legal texts (statutes, ordinances, decrees) the criminal provisions can be found and please indicate clearly what the applicable sanction is in case of a violation. Make a distinction between the various legal acts and statutes where environmental criminal law can be located, going from the penal codes to specific environmental statutes, but even regional or provincial regulations or ordinances.

Please provide for every directive and one regulation, mentioned above, a list of the relevant provisions along with the specific references and this in chronological order.

Could you also provide the complete texts of the relevant provisions, classified in the same manner.

Environmental criminal law in your country

Please provide in your country report a brief, clear, but nevertheless complete as possible insight in the applicable environmental criminal law in your country.

Please focus in this respect among others on the following questions:

2) Criminal responsibility of natural persons

Classification of criminal offences

- Does the law of your member state provide for a classification of offences under different categories, such as by degree or seriousness? Describe these.

Are these specific criminal offences for environmental law? Describe these.

Criminal penalties in environmental law

- What type of criminal penalties exists for breaches of environmental law?

- Does the law of your member state provide a scheme of minimum and maximum possible penalties?

Describe these.

- Does the law of your member state provide a scheme of minimum penalties, which a judge cannot reduce?

Describe this.

- Does the law of your member state confer upon a judge the power to reduce the penalty in the case of certain specific breaches (for example where there are mitigating circumstances)?

Describe this.

- Does the law of your member state confer upon a judge the power to apply a penalty greater than the maximum in the case of certain specific breaches (for example where there has been re-offending)?

Describe this.

3) Criminal responsibility of legal persons

Does the law of your member state provide for criminal responsibility of legal persons?

If it does, respond to the questions in paragraph 2 (above) relating to the classification of offences and their corresponding penalties.

Please try to classify the information in such a way that an insight is provided in the criminal responsibility of natural (and if applicable legal) persons in a basic way. Please provide thus an overview of the most important criminal offences for environmental law and the applicable criminal penalties. Please focus on the basic structure of environmental criminal law in your particular member state. Given the restricted time, discussions of legal dogmatic problems can be avoided.

As mentioned above, please indicate also how your member state deals with legal entities. Is criminal law applicable to legal entities as well or are alternative systems (administrative, civil sanctions) applicable? Can the environmental criminal law that you have described before also be applied to legal entities or do specific problems arise in that respect?

Please also indicate whether there are possibilities of cumulating the criminal responsibility of legal entities with the responsibility of natural persons.

Environmental criminal law in case law

The third part of your country report should deal with the way environmental criminal law is dealt with in legal practice. In this respect please address first of all the most important case law concerning the national rules implementing the measures transposing the directives and giving effect to the regulation, covered in the project. Please focus on the most striking and important cases, since a complete overview of all available case law may not be feasible within the scope of the project. Describe these most important cases. Moreover, the focus of this brief insight in case law, will again, mainly be on environmental criminal law.

In addition to this brief overview of case law in your country, could you please also provide a brief insight in the way environmental criminal procedures take place. In that respect please indicate before

what kind of tribunals or courts these procedures take place, who initiates the procedure and who supports the costs of the procedure. Please provide a brief insight in the average amount of time that a criminal environmental case may take before a court.

Also with respect to this last part of the country reports, it should be mentioned that the project team can rely on prior information, since the team has been involved in previous projects where also these procedural aspects have been addressed in a comparative perspective. Again, it will be an important task of the reporters to update this information and present it in a more concise and comprehensive manner.

Please provide in this third part more particularly an answer to the following questions:

What is the average amount of time for criminal environmental proceedings?

Who supports the costs of the procedure?

Who initiates the procedure?

Who is the competent judge?

Annex 2 Basic models

Relationship Criminal Law/Administrative Law Criminal Law

Classical Model 1	Model 2	Model 3
<p>absolutely dependent on admin. Law</p> <p>® • guarantee of functioning of administrative system,</p> <ul style="list-style-type: none"> • cooperation • whole system <p>prosecution by agency? (IRE) by criminal pros. ag. (UK)</p> <ul style="list-style-type: none"> • substructure <p>kinds of administrative penal Law (mostly)</p>	<p>relatively dependent on admin. Law</p> <p>® protection of environment. media</p>	<p>absolutely independent of admin. Law</p> <p>® prevention of (public) danger</p>

CRIMINAL OFFENCES**BASIC STRUCTURES**

I (Public) Endangerment	II Damage to environmental media	III Dangerous conduct endangerment of environments / persons endangerment of control system
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CRIMINAL OFFENCES

I. (Public) Endangerment

kind of endangerment	conduct	justification by admin, law?	sanction max.	country
endangering public health	exposure to ionising radiation	no	15 y	NL
	discharge of substances	no	5 y	B
	“	yes	12 y	NL
significant risk of death	releasing poisons	no	10 y	G
conducive to endanger health of many people				
	operating a plant	yes	6 y	SF
	waste disposal	yes	5 y/y	SF
significant risk of serious harm	discharge of substances	yes	5 y	Gr

CRIMINAL OFFENCES

I. (Public) Endangerment

kind of endangerment	conduct	justification by admin. law	sanction max-	country
significant risk to health or property	polluting water, soil, air	yes	8 y	Port
likely to cause risk to life of many persons/a big plant/animal population	polluting water, soil, air	yes	3 y	A
risk to endanger human health	polluting water, land, air	yes	2 y	S

CRIMINAL OFFENCES
II. Damage to environmental media

damage	add. requirement	conduct	sanction	country
environment pollution	-	illegal causing, operating a plant	2 y/3 y	Gr/Port
water pollution	-	illegal causing	5 y	G
water, soil, air pollution	risk of significant damage to environment	illegal causing	2 y	S
water, soil, air pollution	likely to cause serious damage	serious breach	4 y	DK
destruction of fish/damage to its reproduction	-	illegal discharge of substances	2 y	F
substantial detriment to environment	-	illegal causing noise, vibration, radiation	2y	S
		waste disposal	10 y	Ire
serious pollution removal unreasonable or impossible, damage more than EUR 35.000	-	illegal causing	3 y	A

CRIMINAL OFFENCES

III. DANGEROUS CONDUCT

endangerment of environment / persons

conduct	add. requirements	sanctions max.	country
I. operating a plant, illegal	-	6 m. – 2 y	mostly
	specific dangerous plants	3 resp. 5 y	D, F, I
	conducive to pollute environment	2 y	SF
	risk to pollute environment endangering health of many people	2 y	A
		4 y	DK
II. waste disposal, illegal	-	mostly (administr.) fine	mostly
	classification of waste	6 mon	J
	likely to detrimentally change, water, soil or air	5 y / 2 y	G/DK
	likely to give rise to an environmental hazard	5 y	UK
	likely to cause persistent pollution	2 y	A

CRIMINAL OFFENCES

III. DANGEROUS CONDUCT

endangerment of control system

conduct	add. requirements	sanctions	country
failure to comply with conditions		mostly admin. fines 2 y	S, I, UK, DK
failure to apply for a permission		mostly admin. fines	UK, Ire, I
false information		mostly admin. fines	IK, I

SANCTIONS

BASIC STRUCTURES

restrictions of Liberty	monetary sanctions	others
imprisonment	fines	warning
suspension of certain rights	administrative fines	decision declaratoring of responsibility
prohibition of certain activities	skimming-off of extra profits	corporate probation
closure of the enterprise / departements	forfeiture	publication of the judgement
winding-up of the enterprise	compensation	coercive improvements of industrial activities
	restitution	

SANCTIONS

BASIC STRUCTURES

restrictions of Liberty	monetary sanctions	others
	exclusion from advantages	
	repressive fee (S)	
	penalty payment (DK)	

Table 1 Environmental Penal Law: Location

country	years of reform	location			
		penal code	basic eco-regulation	specific administrative laws criminal non-criminal sanctions	
European Union					
Austria	1975/87/96	+	-		+
Belgium	1980/85/91/95	-	+	+	
Denmark	1973/87/91/96/97	+	+	+	+
Finland	1978/82/95	+	-	+	
France	1975 ff./	-	-	+	
Germany	1970 ff./80/94/96	+	-	+	+
Greece	1986 ff.	-	+	+	+
Ireland	1977/87/92/96	-	+	+	
Italy	1966/76/86 ff.	-	-	+	+
Luxembourg	1976/80/82/90	-	-	+	
Netherlands	1969/89/93	+	+	+	
Portugal	1982/87/95	+	+		+
Spain	1983/96	+	-	+	+
Sweden	1969/81/85/99	(+)	+	+	+
UK	1974/89/90/95	-	+	+	