review of european administrative law; vol. 1, nr. 2, #-#, europa law publishing © 2008

European Influence on National Environmental Law Enforcement: Towards an Integrated Approach

Dr. Aletta B. Blomberg

Associate professor of environmental law at Utrecht University

Abstract

This article analyses the European influence – by means of EC enforcement requirements, infringement proceedings and monitoring – on national environmental law enforcement. It will be argued that adequate enforcement, necessary to achieve a high level of protection of the environment, requires an integrated enforcement approach, in which a combination of administrative, civil and criminal sanctions is available and 'tailor-made' enforcement can be established. The present European influence, however, seems too fragmented to provide sufficient guidance, despite the many improvements that have been made over the years. It will be concluded that, in particular, the European standards for national enforcement of EC environmental law need to be clarified and expanded. To that extent, in the final section a rough sketch of a European framework for an integrated enforcement approach will be made.

1 Introduction

Developments over the years have made it clear that Europe, in particular the Commission, is striving to regain its hold on environmental law enforcement in the Member States. Lately, much attention has been focused on the proposals for directives on criminal enforcement of environmental law, which resulted in a dispute – more or less resolved by judgments of the Court of Justice[1] – between the Commission and the Council on EC competence in criminal matters. But other developments may also be mentioned, such as a booming number of enforcement provisions in Community law in general, the increase of bad application cases brought before the Court of Justice by the Commission, including a tendency to denounce more systematic breaches of Community law (the GAP-approach[2]) and the 'discovery' of the usefulness of interim measures pending infringement proceedings, as well as the less obvious but nevertheless important efforts made by the Commission to collect as much and as accurate information as possible on compliance.

The importance of adequate enforcement of European environmental law may be obvious: enforcement is necessary to ensure 'full' implementation of EC law. Most European environmental legislation consists of obligations of result, and the onus is upon the Member States to ensure not only

---

1 Case C-176/03 and Case C-440/05.

2 GAP stands for '*g*eneral *a*nd *p*ersistent' infringements. See § 4.3 below.

implementation of Community law in their national legislations but also in actual practice. The regulatees (often citizens and companies) are not always inclined to comply voluntarily, which emphasizes the need for enforcement, as does also the perspective of environmental protection. Moreover, securing an effective and efficient enforcement of environmental law in the Member States is vital to ensure a level playing field within the Community.[3] Considering the Commission's recent initiatives, one could conclude that Member States' enforcement of environmental law is more and more dominated by 'Europe' and that the Commission thus keeps the Member States 'on a leash'. In practice however, Europe is extremely dependent on the Member States, since it is primarily their task to deal with violations of (European) environmental law, concerning which they have considerable discretion, at least *de facto*. What is more, in the field of environmental law the Commission does not have the power to interfere directly in cases of non- compliance by private actors nor the power to investigate on the site (for example in case of complaints), powers that can be found in several other policy areas such as competition rules and the protection of the financial interests of the Community (anti-fraud).[4] Therefore, in relation to environmental law enforcement the Commission is to a large extent dependent on information provided by the Member States themselves, on top of – and often in addition to – information it obtains from third parties such as individual complainants or environmental interest groups. For all these reasons, the European influence on national environmental law enforcement is of the utmost importance.

This article discusses whether the European influence on national environmental law enforcement is adequate and sufficient, which can only be the case if the key elements of this national enforcement (monitoring, inspections and sanctions), both in law and in practice, are covered. 'Measuring' the actual influence is practically impossible, but the existence of an enforcement deficit (see § 2 below) indicates that improvements are still necessary. The various ways of influence will be described in §§ 3-5, which will respectively deal with EC enforcement requirements, infringement proceedings and the information exchange between the Commission and

[3] Recent research has confirmed that stakeholders in several policy areas experienced level playing field problems due to differences in enforcement efforts in the various Member States (P.C. Adriaanse e.a., *Implementatie van EU-handhavingsvoorschriften* (with a summary in English) (Den Haag 2008)). See also Christopher Harding, 'Member State Enforcement of European Community Measures: The Chimera of 'Effective' Enforcement' [1997] 4 *Maastricht Journal of European and Comparative Law*, p. 14.

[4] Occasionally, Commission officials do investigate the alleged violations on the site, see e.g. Case C-103/00 *Commission* v. *Greece* [2002] ECR I-1147. However, since the Commission is not vested with explicit inspection powers, these officials are dependent on the cooperation of national authorities and they will not be able independently to conduct activities such as entering premises and requiring information from, for instance, operators.

Member States. In § 6 we will evaluate the present influence. It will be concluded that, notwithstanding current efforts, a more integrated enforcement approach is needed. In § 7 a rough sketch of a European framework for such an integrated approach will be made. This article does not address the – important – role of private parties, such as individuals or environmental groups, in environmental law enforcement.

2 Challenging the European Enforcement Deficit; Introduction

Despite the high priority given to the enforcement of Community law over past decades, Europe is still facing a huge enforcement deficit, especially in the field of environmental law. Jans et al. point to various reasons for this deficit, such as the complexity and ambiguity of Community rules, sometimes the lack of support by the regulatees and/or authorities (legitimacy) and the lack of political priority given to enforcement.[5] The fact is that a lot of Member States still fail to establish substantial enforcement systems and to take on violations of European environmental law adequately in practice[6], which becomes obvious when one is confronted with the many infringements in the field of environmental law.

Pursuant to Article 211 EC Treaty the Commission has the task of ensuring that the provisions of the Treaty and the measures taken by the EU institutions on them are applied. As a result the Commission has primary responsibility for the monitoring and enforcing of the application of European law in the Member States. For this general supervisory or 'watchdog' function the Commission is vested with several general powers, such as the right to be informed about the implementation and application of European law in the Member States – in fact, Member States are under all kinds of obligations to provide information thereon – and the right to start infringement proceedings before the European Court of Justice. But basically, there are three different ways to influence Member States' law enforcement, thereby reducing the enforcement deficit, and in general a combination of the three is used. From the Commission's point of view the most important tool is its competence to bring infringement proceedings under Articles

[5] J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007), p. 200.

[6] See with regard to inspections: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the review of Recommendation 2001/331/EC providing for minimum criteria for environmental inspections in the Member States of 14 November 2007, COM(2007)707 final, and § 3.3 below. As to sanctions cf. the various studies that can be found on the DG Environment's environmental crime website at http://ec.europa.eu/environment/crime/studies_en.htm.

226-228 EC Treaty, because these proceedings comprise direct enforcement aimed at the Member States as part of the general supervisory task of the Commission. A second instrument, which is also an element of this supervisory task, is the information gathering on Member States' implementation and application of Community law, for which purpose Community law contains numerous information obligations. Of maybe even more influence is the ECJ's case law, in which the Court has established several principles of enforcement of Community law, based on Article 10 of the EC Treaty (Community loyalty). Partly as a result of this case law, a growing number of quality requirements and obligations with respect to enforcement by the Member States can be found in EC legislation, such as regulations and directives. These European enforcement requirements, deriving from both case law and legislation, form the third way of influencing Member State enforcement. The three methods will be described below, beginning with the European enforcement requirements because they can be considered as the starting point, and we will try to explore at the same time how well these methods function in challenging the European enforcement deficit in the field of environmental law.

3 Enforcement Requirements in Community Law

3.1 General

The primary responsibility for enforcement of European environmental law rests upon the Member States. For a number of reasons, such as geographical proximity, local legitimacy and democratic accountability, local knowledge and experience, and available powers and resources, national authorities are simply the best suited to engage in 'the bulk of law enforcement'.[7] Member States enjoy in principle wide discretion as to their choice of enforcement methods and sanctions[8], sometimes referred to as 'enforcement autonomy'[9], provided that they fulfil their obligations under EC law. At this point, reference should be made to the nature of most European environmental legislation: directives that are binding as to the results to be achieved, but that leave the choice of form and methods to the national authorities. Member States may opt for criminal or administrative enforcement proceedings and sanctions, or even civil law enforcement, and a combination can often be found. Thus, on the one hand, there is a possible

7 M. Hedemann-Robinson, *Enforcement of European Union Environmental Law* (London and New York 2007), p. 446.

8 Case C-50/76 *Amsterdam Bulb BV* v. *Produktschap voor Siergewassen* [1977] ECR I-137 and Case C-14/83 *Von Colson and Kamann* v. *Land Nordrhein-Westfalen* [1984] ECR I-1891.

9 J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007), p. 43.

diversity of forms and methods and, on the other, there is a required objective and result.[10] As a result, Member States' discretion has been limited by general enforcement principles set in case law as well as by specific enforcement requirements deriving from EC legislation. Both will be described below.

3.2 Community Loyalty and General Enforcement Requirements

The basic principle of enforcement is to be found in Article 10 EC Treaty, which lays down the principle of Community loyalty or the duty of co-operation: Member States shall take all measures necessary to guarantee the fulfilment of obligations arising out of Community law and they shall abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. Particularly based on the positive obligation first mentioned, the Court of Justice has established a general obligation adequately to enforce directly applicable Community regulations as well as national regulations that have been issued to implement EC law. This general obligation has been translated into four quality requirements: equivalence, effectiveness, dissuasiveness and proportionality. Enforcement of violations of Community law should take place with the same diligence as comparable and equally serious violations of national law. In addition, the sanctions should be effective, proportional and they should act as a deterrent.[11]

Besides, Member States must observe fundamental rights, the general principles of Community law and the Treaty freedoms.[12] Because this article focuses on the instrumental aspects of environmental law enforcement, these protective requirements will not be discussed further.

Moreover, the general obligation of adequate enforcement also includes inspection and supervision. Even if EC law does not expressly require Member States to introduce supervisory measures and inspection procedures, nevertheless that obligation may follow, in some cases implicitly, from the fact that under the rules in question it is for the Member States to organise an effective system of inspection and supervision.[13]

Effectiveness and dissuasiveness

For the purpose of this article whose author wishes inter alia to scrutinize the European fascination for criminal enforcement of environmental

[10] C. Harding, *o.c.*, p. 7.

[11] Case C-68/88 *Commission* v. *Greece* [1989] ECR I-2965.

[12] J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007), p. 201.

[13] Case C-418/06 P *Commission* v. *Belgium* [2008] nyr, para. 70.

law, it is necessary to dwell on the requirements of dissuasiveness and effectiveness in particular. The Court is not very clear as to the exact meaning of these requirements, and usually combines the two. An important general obligation relates to enforcement in practice; not only must national law provide for sanctions on breaches of Community law, such sanctions also have to be actually enforced by national authorities in order to assure compliance with EC law (practical implementation), for in principle the aim of national enforcement should be fulfilment of the obligations under EC law. The effectiveness of enforcement is therefore strongly related to the substantive obligations at stake. In the field of environmental law this will very often imply remediation (termination of the violation, restoration of the damage) in order to protect the environment from (further) harm. As a result, effective enforcement of environmental law by definition requires remediation enforcement at the very least.

> In some Member States remediation may be seen as being part of a regulatory or compliance strategy rather than as a sanction or even as enforcement. In this article, however, the concepts 'enforcement' and 'sanction' are being used in a broad sense, enforcement comprising any reaction on breaches of (environmental) law in order to accomplish compliance and sanction being any obligation formally imposed on violators in reaction to their violation.

On the one hand, EC law requires the fulfilment of all obligations deriving from it, which means in theory 100% compliance, thus compelling Member States to detect and enforce every breach. On the other hand, it is common sense that such a result is an illusion and moreover, mandatory enforcement for various reasons is highly undesirable.[14] In practice, for instance, the proportionality principle could hamper enforcement because of an imbalance between the nature and seriousness of the violation and the possible consequences of enforcement for the violator. Although the Court generally takes a strict stance on non-compliance, not accepting any argument put forward by Member States to justify breaches of EC law[15], a few judgments seem to leave some discretion in exceptional cases.[16] Taking into account that most cases brought before the ECJ concern extreme situations, in which violations have occurred for a long period of time and usually also with

---

[14] See also M. Lee, *EU Environmental Law. Challenges, Change and Decision-Making* (Oxford 2005), p. 50, who for example points at the 'last 10 percent problem', the solving of which often becomes 'disproportionately onerous'.

[15] Case C-217/88 *Commission* v. *Germany* ('Table wines') [1990] ECR I-2879, Case C-56/90 *Commission* v. *United Kingdom* ('Blackpool') [1993] ECR I-4109, Case C-52/95 *Commission* v. *France* [1995] ECRI-4443, Case C-265/95 *Commission* v. *France* ('Spanish strawberries') [1997] ECR I-6959, Case C-103/00 *Commission* v. *Greece* [2002] ECR I-1147.

[16] See Case C-365/97 *Commission* v. *Italy* [1999] ECR I-7773 and recently Case C-215/06 *Commission* v. *Ireland* [2008] nyr. Cf. also Case C-112/00 *Schmidberger* [2003] ECR I-5659.

obvious damage to the environment, one might assume that the notion of effective enforcement in practice could encompass some discretion as well. The question of effectiveness is therefore above all a matter of defining the desired, adequate level of enforcement.[17]

As regards the specific measures or sanctions, the *Von Colson* case provides some clues. The Court stated, first, that a sanction must guarantee real and effective judicial protection. Secondly, it must also have a real deterrent effect on the violator, or – in the words of the Commission – the sanction should 'prompt him to respect' the norm in question. Thirdly, the sanction must be adequate in relation to the damage sustained.[18] From this, one can conclude that enforcement is effective if it supports and reinforces the value of the norms and standards which have been violated. For that purpose, enforcement action has to take into account the nature and seriousness of and the damage caused by the violation, in which one could also recognize the principle of proportionality.[19] In addition, and here the dissuasiveness comes into play, enforcement has to inhibit further violations and prevent future violations, thus securing future compliance.[20] The ultimate goal remains, of course, fulfilment of the obligations of result under the EC law at stake.

Member States may have different opinions as to what type of enforcement or what kind of sanction is effective, and in fact, due to the previously mentioned enforcement autonomy, minor and major differences between national sanctioning systems exist.[21] In the Netherlands for instance, most environmental law enforcement and by far most imposed sanctions are administrative by nature, whereas in the United Kingdom criminal law enforcement is more common and administrative sanctions are either not available or rarely used.[22] There is no case law available that prescribes in more detail what standards environmental law enforcement must meet in

[17] Cf. Harding, *o.c.*, p. 22.

[18] Case C-14/83 *Von Colson and Kamann* v. *Land Nordrhein-Westfalen* [1984] ECR I-1891, para. 23.

[19] This mingling has brought Harding (*o.c.*, p. 11. See also p. 13) to question whether proportionality and dissuasion could be best understood as elements of effectiveness rather than as separate criteria.

[20] Harding, *o.c.*, p. 11.

[21] See M. Faure and G. Heine, *Criminal enforcement of Environmental Law in the European Union* (The Hague 2005). Notwithstanding its title, this book also provides an insight into the available administrative sanctions.

[22] A. Ogus and C. Abbot, 'Sanctions for Pollution: Do We Have the Right Regime?'[2002/3] 14 *Journal of Environmental Law* 283-298. See for some rough data on the number of enforcement actions taken by the various Member States, the Commission Staff Working Paper – Report on the implementation of Recommendation 2001/331/EC providing for minimum criteria for environmental inspections Annex to the Communication from the Commission on the review of that Recommendation, SEC(2007)1493.

the light of the principles of effectiveness and dissuasiveness. One may wonder whether it is at all possible to specify these principles further, other than on a case-by-case basis, as is – by nature – generally the Court's approach. Specific circumstances of the case, in particular the nature of the violation in conjunction with the interests at stake on the one hand and the nature and impact of the imposed sanction on the other – the latter often also dependent on characteristics of the violator – determine the effectiveness and dissuasiveness of an enforcement action. Furthermore, the legal traditions and culture of the Member State concerned are important, for instance whether one considers administrative fines as something to be ashamed of or as a simple 'buying off', as they might have an influence on the impact of a particular sanction as well. Besides, the notion of dissuasiveness also seems to be influenced by legal culture. At the European level, for instance, it seems to be common opinion that in many cases only criminal sanctions can be really dissuasive[23], while administrative sanctions or the threat of them can also keep (potential) violators on the right track and thus can have a deterrent effect.[24] Administrative sanctions such as the withdrawal of a permit or the closure of an illegal facility can be very severe and consequently dissuasive because of their far-reaching consequences – provided that they are actually being used. A third factor that may influence effectiveness and dissuasiveness is of an economic nature. The scale of economic activities – large versus smaller companies – and thus the type of violator, can differ and as a result may cause divergence among but also within Member States[25], which is sometimes needed from a perspective of proportionality. The latter applies in particular in relation to financial penalties, whereby the impact of the amount imposed usually correlates with the financial resources of the violator.

It may have become clear at this point that further specification of the principles of effectiveness and dissuasiveness is not easy, which explains the still rather vague criteria and the case-by-case approach of the Court. Nevertheless, in the European discourse all kinds of notions about the effectiveness of certain types of enforcement, in particular criminal law enforcement, are doing the rounds. In § 3.5 we will discuss whether these notions are justified. For now, we may conclude that because of this vagueness the general enforcement requirements mainly play a role in judging – retrospectively – whether a Member State has fulfilled its obligations; thus the requirements of effectiveness and dissuasiveness will obviously be assessed in the light of the substantive obligations concerned. If a violation has not

[23] See the explanatory memorandum on the proposal for a Directive on the protection of the environment through criminal law, COM(2001)139.

[24] As demonstrated by Ogus and Abbot, *o.c.*, who explore the deterrence dimension to the use of administrative penalties by means of a law-and-economics model.

[25] Harding, *o.c.*, p. 21, with reference to A. Butt Philip, in H. Siedentopf and J. Ziller (eds.), *Making European Policies Work* (London 1988), p. 183-184.

yet been terminated or has continued for too long, (past) enforcement – if any – apparently lacked effectiveness and dissuasiveness. This may, again, signify the importance of remediation enforcement.

3.3 Environmental Inspection Requirements and Responsibilities

Monitoring and inspections are crucial for effective environmental law enforcement, not only for their preventive and deterrent effects but also because information on compliance, and in particular on non-compliance, forms the starting point of any enforcement action. As has been mentioned before, the general obligation of adequate enforcement deriving from Article 10 EC Treaty also includes inspection and supervision, and occasionally this general obligation might also imply specific inspection obligations.[26] Further, several environmental regulations and directives contain obligations regarding environmental inspections or monitoring compliance with EC environmental law. These obligations vary from very broad obligations, such as the general obligation to monitor compliance with the conditions laid down in the authorizations for discharges of substances into groundwater[27] or the obligation to provide for 'appropriate periodic inspections' of waste facilities[28], to quite detailed inspection responsibilities such as those provided in the new Waste Shipment Regulation, for instance that 'checks on shipments shall include the inspection of documents, the confirmation of identity and, where appropriate, physical checking of the waste'.[29] The Seveso II Directive provides another example of a specific and in fact almost complete inspection regime.[30] Member States need to establish a system of inspections or other measures of control that can guarantee a planned and systematic examination of the safety systems of the establishments concerned. The required inspection programme, for example, must entail in principle at least one on-site inspection of each establishment concerned per year, and each inspection has to be reported on. Furthermore, Member States must make sure that competent authorities have the power to require the operator to provide any additional information necessary, inter alia to allow the authority fully to assess the possibility of a major accident. Considering the importance of preventing major accidents, it may be

---

[26] Case C-418/06 P *Commission* v. *Belgium* [2008] nyr, para. 70.

[27] Council Directive of 17 December 1979 on the protection of groundwater from pollution caused by certain dangerous substances (80/68/EEC), Article 13.

[28] Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste, Article 13.

[29] Regulation 1013/2006/EC of the European Parliament and of the Council of 14 June 2006 on shipments of waste, Article 50(4).

[30] Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances, Article 18.

expected that national competent authorities – even regardless of the Seveso II Directive – are already vested with the necessary investigative powers, but this obligation is nevertheless noteworthy since it is one of the few examples in EC environmental law where more detailed, specific powers are required. The Court has established in its case law that, for the implementation of these kinds of inspection obligations, it is not sufficient to create – by law – some kind of inspection authority, but that there must also be a legal obligation to monitor compliance, even in the case of Community obligations in very general terms.[31] As a consequence, there must be at least some national legal guarantee, for instance by means of a legal duty to inspect, that inspections will actually be carried out.

A more general framework as regards environmental inspections is set out in Recommendation 2001/331 providing minimum criteria for environmental inspections in the Member States (hereafter: RMCEI).[32] This recommendation contains inter alia guidelines for the planning of inspection activities, criteria and conditions for routine and non-routine site visits, and reporting provisions. Besides the official purpose of strengthening compliance and contributing to a more consistent implementation and enforcement of EC environmental law in the Member States (see para. I RMCIE), a prominent aim of the Recommendation was to reduce the wide disparity in the inspection systems and mechanisms of Member States.[33] According to Parliament and Council, the merits of adequate inspection systems lay in their functioning 'as a deterrent to environmental violations', thus forming 'an indispensable link in the regulatory chain'.[34] The scope of the Recommendation is limited to industrial installations and other enterprises and facilities, whose air emissions and/or water discharges and/or waste disposal or recovery activities are subject to authorization, permit or licensing requirements under EC law, thereby covering inspection of the most polluting installations but not reaching the entire field of environmental inspections. The Recommendation does not encompass an inspection system at European level, as may be found in, for instance, EC competition law (see Regulation 1/2003[35]); the provisions are restricted to national inspections alone, with only some recommendations on cooperation in the context of cross-border violations. Hedemann-Robinson is critical about that and puts forward that the underlying view, that the principles of subsidiarity and proportionality do not warrant an EC-level inspection system, does not reflect existing EC policy on environmental law enforcement, and is in

[31] See f.i. Case C-360/87 *Commission* v. *Italy* [1991] ECR I-791, Case C-131/88 *Commission* v. *Germany* [1991] ECR I-825 and Case C-392/99 *Commission* v. *Portugal* [2003] ECR I-3373.

[32] Recommendation of the European Parliament and of the Council of 4 April 2001.

[33] Recitals 2 and 8 of Recommendation 2001/331/EC.

[34] Recital 7.

[35] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

particular inconsistent with the general supervisory duty of the Commission (Article 211 EC Treaty).[36] In the light of these arguments, the fact that the inspection powers arising from Regulation 1/2003 serve the enforcement of 'European' provisions, whereas *environmental* inspection powers would mainly be used for the enforcement of national (implemented) provisions, could be considered irrelevant. This difference might explain the current reluctance to introduce a competition-law-like inspection system in the field of environmental law, but the need for such an inspection system should be assessed on more substantive grounds, like the effectiveness of environmental law enforcement.

The recommendations themselves are to a large extent procedural by nature (make plans, exchange information, coordinate, follow-up and report on site visits etc.). As far as they contain more substantive criteria, like the circumstances in which non-routine site visits need to be carried out, they leave the Member States a wide margin of discretion by frequently using the words 'where appropriate', or reflect such common sense that it is unlikely that the particular recommendation will not be followed.[37] Nevertheless, adequate application of more procedural recommendations could undoubtedly contribute to more professional and better environmental inspections, and thus enhance national environmental law enforcement. The Recommendation, however, is only a non-binding guidance document and Member States are not formally required to adhere to the criteria in question. Consequently, there is no possibility of taking any legal action, such as infringement proceedings, if the recommendations are being ignored. Formally, the reasons for opting for a non-binding instrument to 'harmonize' environmental inspections, lay in the principles of subsidiarity and proportionality and in the differences in inspection systems and mechanisms in the Member States – the latter being remarkable, since this disparity forms the *raison d'être* of the Recommendation!

A noteworthy role has been reserved for the European Network for the Implementation and Enforcement of Environmental Law (commonly known as the IMPEL network), an informal network of European regulators and authorities concerned with the implementation and enforcement of environmental law.[38] Originally created, in 1992, as an informal forum for the exchange of information and experience, the IMPEL network has practically evolved into an intergovernmental – though still informal – advisory body/entity, which not only provides the Commission with more technical input on implementation and enforcement issues but also advises on proposed and existing legislation,

---

[36] *O.c.*, p. 467-468.

[37] See for example paragraph V(3)(a) and (b) RMCEI, which suggest that non-routine site visits are carried out in case of serious environmental complaints and serious environmental accidents.

[38] See the IMPEL website: www.ec.europa.eu/environment/impel/index.htm.

> thereby, whether appropriate or not, introducing a more political element into its activities.[39] Hedemann-Robinson, although stressing the benefits of the IMPEL network in terms of exchanging best practices and information on different regulatory approaches among Member States, has criticized this development, because the network seemed to have become a new route for the Member States for lobbying the Commission on policy development, without the proper safeguards with respect to transparency and accountability.[40] A serious accusation, and possibly also a hurdle for further enhancement of European environmental law enforcement, is for instance that IMPEL has effectively quashed the discussion as to whether there should be greater supranational controls in respect of law enforcement at national level.[41]

The aforementioned aspects have brought Hedemann-Robinson to criticize sharply the soft law nature of the Recommendation.[42] And, without denying the positive effects of the RMCEI, it became clear from the recently submitted review that nothing like all Member States have achieved full implementation.[43] There appear to be still large disparities in the way environmental inspections are being carried out, which means that the full implementation of EC environmental law cannot be ensured. The disparities also lead, according to the Commission, to distortions of competition for businesses. This incomplete implementation is partly due to differing interpretations by national authorities of the definitions and criteria of the RMCEI. Of more serious concern are the apparently large differences in political priority given to environmental inspections in Member States. This touches, more than anything, upon the European enforcement deficit. As long as the minimum inspection criteria do not have legally binding force, there is little the Commission, in its role of European supervisor, can do.

> When deficits in environmental inspections lead to non-compliance with EC law – due to insufficient deterrence for environmental violations – the Commission could start infringement proceedings under Article 226 EC Treaty, provided that there is sufficient evidence to prove such non-compli-

---

39 Cf. M. Hedemann-Robinson, *o.c.*, p. 458.

40 *O.c.*, p. 465.

41 M. Hedemann-Robinson, *o.c.*, p. 463. See also L. Krämer, *EC Environmental Law* (London 2003), p. 382.

42 *O.c.*, p. 466 and 476.

43 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the review of Recommendation 2001/331/EC providing for minimum criteria for environmental inspections in the Member States of 14 November 2007, COM(2007)707 final. See also the Commission Staff Working Paper (SEC(2007)1493) containing the Report on the implementation of Recommendation 2001/331/EC annex to the aforementioned Communication.

> ance.[44] Often this requires, besides information from third parties, additional information from the Member State in question, which would not be able to provide the necessary information if inspections have not been sufficiently carried out.

The Commission seems to have realised the aforementioned problem and has proposed – besides several amendments of the Recommendation with respect to scope, criteria and reporting system – to include specific, legally binding requirements for the inspection of certain installations or activities in sectoral pieces of legislation. Although the RMCEI explicitly leaves open the possibility of a proposal for a general directive on the minimum criteria for environmental inspections (see para. IX(1)), the Commission prefers to incorporate inspection requirements in – presumably existing – sectoral legislation.[45] The value of more specific legal obligations, tailored to the particular circumstances, can certainly be endorsed.[46] Specific inspection requirements can build on the more general minimum criteria. Member States that meet the minimum criteria will face fewer difficulties when implementing the specific requirements, because the infrastructure for environmental inspections is, in a manner of speaking, already available. The combination of general minimum standards and more specific 'sectoral' obligations could also pave the way for the development of a more uniform environmental inspection system in the Member States, which can contribute to effective enforcement. It is therefore unsatisfactory that the Commission considers the current criteria, 'due to their very general and descriptive nature', not suitable for transformation into legally binding requirements.[47] Apparently, the current Recommendation leaves room for different interpretations and some Member States have experienced difficulties with categorizing their different types of inspections, but most of the issues can quite easily be clarified.[48] The minimum criteria address several key elements of an adequate environmental inspection system, such as (strategic) inspection plans and (operational) inspection programmes, the recommendation to base those inter alia on the risks, environmental impacts and compliance history of the installations concerned, and last but not least the follow-up and publication of inspection results – the latter being for the benefit of transparency and accountability – and should therefore be adhered to by all Member States. If compared with many other European monitoring or inspection obligations, these criteria still leave sufficient discretion to the Member States as to practical inspections; in fact, they basically concern essential preconditions for effective inspections.

---

[44] Cf. § 4 hereafter.

[45] Communication on the review of RMCEI, COM(2007)707 final § 3.2.

[46] Cf. also M. Lee, *o.c.*, p. 74.

[47] Communication on the review of RMCEI, COM(2007)707 final § 3.1.

[48] See the Communication on the review of RMCEI, COM(2007)707 final § 2.2.

Another shortcoming might be the absence of a recommended minimum set of inspection powers: Member States should only ensure that inspectors have 'a legal right of access to sites and information, for the purposes of environmental inspection' (para. V(1)(d) RMCEI), which is rather vague if compared with the investigatory powers required elsewhere under EC law[49] and in general not sufficient for environmental inspections. Environmental inspectors should at least also be vested with sampling powers and with the power to demand all necessary assistance from, for instance, the operator.[50] The IPPC Directive already includes such an obligation (Article 14(c)), but these powers should be available for all environmental on-site inspections.

3.4 Specific Enforcement Requirements

Formerly, EC legislation usually only required – if at all – Member States to take 'appropriate measures' to ensure compliance with the goals of the directive, thus leaving the Member States a very wide discretion. In the case of contraventions, achieving compliance by enforcement is usually an 'appropriate measure', but the result required by the specific EC provision can sometimes – depending on the kind of obligation – also be achieved in another way.[51] A classic example is granting the required permit for an up until that moment illegally performed activity. For the purposes of this article, however, we will leave this issue alone. More recent or recently amended legislation reflects the Court's case law by requiring that enforcement should be effective, dissuasive and proportionate.[52] As can be seen above, these requirements still provide a wide discretion as to the national enforcement methods.

Only occasionally does EC environmental legislation contain provisions that require Member States to respond with a specifically described sanction. See for example Article 16(3) of the Emissions Trading Directive, based on which competent authorities shall impose 'an excess emissions penalty' of EUR 100 for each tonne of carbon dioxide equivalent emitted for which

[49] For example Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[50] Of course with respect for limits set by fundamental rights, such as the right not to incriminate oneself.

[51] A.B. Blomberg and F.C.M.A. Michiels, Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained, in: T.F.M. Etty and H. Somsen (ed.), *The Yearbook of European Environmental Law* (vol. 4) (Oxford 2005), p. 181-208.

[52] See for instance Article 50(1) Regulation 1013/2006/EC of the European Parliament and of the Council of 14 June 2006 on shipments of waste, and Article 25 Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC.

the operator has not surrendered allowances.[53] The fact that this obligation does not leave any discretion can directly be traced back to the need to avoid distortions of competition, since allowances can be traded throughout the EU. Obligations like this are scarce. More often, but still not very frequently, provisions require compulsory enforcement but leave the choice of method and measures to the Member States, as in Article 17.1(1), first phrase, of the Seveso II Directive. According to this provision Member States shall prohibit the use or bringing into use of any establishment, installation or storage facility, or any part thereof where the measures taken by the operator for the prevention and mitigation of major accidents are seriously deficient.[54] The criterion 'seriously deficient', although, implies some discretion as to whether or not to take these ultimate enforcement steps. There are also examples of less compulsory enforcement requirements, such as the second phrase of Article 17.1(1) of the Seveso II Directive, that describes when Member States 'may prohibit' the use or bringing into use of the aforementioned entities. Quite a few specific enforcement requirements are related to administrative obligations and require, for instance, the withdrawal of a consent, registration or accreditation.[55] In absolute figures, however, specific enforcement requirements are rare and they seem to be set at random; an important environmental directive like the IPPC Directive, for instance, does not include specific enforcement requirements. It is noticeable that most specific enforcement requirements aim at bringing an end to illegal situations (remedial enforcement).

The Environmental Liability Directive

Special attention needs to be paid to the Environmental Liability Directive[56] (hereafter: ELD), because of its general scope. In short, the ELD establishes a legal framework of environmental liability, based on the

[53] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

[54] Other examples are Article 10(b) of Council Directive 1999/13/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, and Article 12(2) of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances.

[55] See several provisions in Regulation No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and Regulation No. 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing voluntary participation by organizations in a Community eco-management and audit scheme (EMAS).

[56] Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. For more elaboration on enforcement of environmental law by means of environmental civil liability, see M. Hedemann-Robinson, *o.c.*, p. 479-515.

'polluter-pays' principle, that concerns not only the prevention but also the remedying of environmental damage, two goals that fit perfectly well in an enforcement strategy. Improving enforcement has in fact been one of the underlying aims of this Directive whereas environmental liability should serve to induce operators to adopt measures and to develop practices to minimize the risks of environmental damage so that their exposure to financial liabilities is reduced.[57] Moreover, for the scope of the Directive reference is made to Community legislation containing provisions with regard to occupational activities that may pose potential or actual environmental risks, thus expressing a close relationship between environmental liability and existing, substantive environmental legislation.[58] As regards damage to protected species and natural habitats, reference to existing legislation is not required, but liability is in such cases limited to fault and negligence (Article 3(1)(b) ELD), which reflects an enforcement approach. According to the ELD, Member States shall inter alia require that in case of imminent threat of environmental damage preventive measures are taken by the operator (Article 5(4)), and that where environmental damage has occurred remedial measures are taken by the operator (Article 6(3)). If the operator fails to comply with his duties, the competent authority may take these measures itself. The operator shall in principle bear all the costs (Article 8), but Member States may exclude cost recovery in case, for instance, the operator was not in fault or negligence and the activity that caused the damage was expressly authorised (the 'permit defence'; Article 8(4), under a, ELD). This feature, as well as the focus on remedial measures instead of compensation, furthermore limited to *environmental* damage, also indicates the presence of an enforcement tool, aimed at compliance. Environmental damage has been defined – in brief – as damage to protected species and natural habitats, water and land, that is measurable and may occur directly or indirectly (for instance by airborne elements).[59] This means that not all violations of permit conditions and other relevant provisions will constitute environmental liability under the ELD.

The core obligations to compel the operator to take preventive remedial action seem to leave the competent authorities no discretion, but some inherent discretion lies in their duty to assess the significance of the damage and to determine which remedial measures should be taken.[60] Additionally, the ELD allows for several exceptions, for instance in case of *force majeure*. Nevertheless, the aforementioned obligations are much stronger than most other enforcement requirements in EC environmental legislation. It will be interesting to see how national authorities are going to deal with this

[57] Recital 2.

[58] M. Lee, *o.c.*, p. 68. See also M. Lee, 'The Changing Aims of Environmental Liability', *Environmental Law and Management Journal* 14(4) [2002] 189.

[59] See Article 2 and recital 4.

[60] Cf. Article 7. See also Recital 24.

'enforcement' obligation and whether the given discretion is sufficient to strike a fair balance between the environmental interest and the interests of the operator. However, one has to keep in mind that – despite the possible 'deterrent' effects – the ELD establishes in principle administrative and, more important, remedial enforcement, aimed at prevention and restoration of environmental damage. In relation to that type of enforcement too much compassion shown towards violators could be out of place, for that type of enforcement directly serves the protection of the environment.

3.5 Enforcement of Environmental Law by Criminal Law

'Legislative' history

Since the 1990s there has been a growing call for the use of criminal law measures against serious environmental offences in Europe, resulting in 1998 in the establishment of the Convention on the protection of the environment through criminal law of the Council of Europe.[61] A certain need was felt for a common criminal policy as regards serious environmental crimes, partly because of possible transboundary aspects thereof but also more in general as a means to achieve a high level of protection of the environment. In 2001 the Commission issued a proposal for a Directive on the protection of the environment through criminal law[62] (hereafter: the 2001-proposal) based on Article 175 EC Treaty, as a reaction to a similar initiative from the Member States.[63] Nevertheless, the Council of the EU adopted a – competing – Framework Decision on the protection of the environment through criminal law in 2003, for the Council was of the opinion that the third pillar provided the appropriate legal basis for such measure. The Commission contested this Framework Decision, because it considered the Community competent to require the Member States to impose sanctions at national level – including criminal sanctions if appropriate – where that proved necessary in order to attain a Community objective, as was the case in this environmental matter. The end of the story may be well known: the Court made clear in its landmark judgment of 13 September 2005[64] that EC law in principle may prescribe criminal law enforcement of Community law, after which a new proposal was issued[65] (hereafter: the 2007-proposal) that established among other things the approximation of sanction levels

[61] Convention of 4 November 1998, ETS No. 172. To date this Convention has not yet entered into force.

[62] COM(2001)139.

[63] The Danish government, inspired by the 1998 Convention on the protection of the environment through criminal law of the Council of Europe, had presented a draft Framework Decision on the matter in 2000 (OJ 2000 C39/4; see recital 6).

[64] Case C-176/03 *Commission* v. *Council* [2005] ECR I-7879.

[65] Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, COM(2007)51 final.

for particularly serious environmental crimes. In a subsequent judgment of 23 October 2007 on another Framework Decision concerning criminal law enforcement[66], which was issued in parallel with the 2007-proposal of the Commission, the Court limited Community competence by stating that the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence.[67] Consequently, EC legislation may force Member States to introduce or maintain criminal law enforcement in certain policy fields, but has to leave the choice of the kind and size of sanctions to the discretion of the Member States. Pending proposals for EC legislation aimed at the protection of the environment through criminal law thus had to be brought into line with the Court's case law, which has now been done.[68]

The dispute between the Commission and the Council on the question under which pillar the EU could define criminal offences and stipulate penalties has led to a lot of debate, especially among academics.[69] Without doubt criminal law enforcement has proved to be a sensitive political issue, for it touches heavily upon national sovereignty.[70] From a constitutional point of view this discussion and the following judgments of the Court of Justice are therefore very important, but for the purposes of this article we will leave this subject and instead focus on the aim and content of the proposed obligations. Because of its more general scope, the Proposal for a Directive on the protection of the environment through criminal law, as adopted by the European Parliament, will be taken as a reference point.

---

66 Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (OJ 2005 L 255, p. 164).

67 Case C-440/05 *Commission* v. *Council* [2007] ECR I-9097. See on this M. Hedemann-Robinson, The EU and Environmental Crime: The Impact of the ECJ's Judgment on Framework Decision 2005/667 on Ship-Source Pollution, *Journal of Environmental Law* [2008] 20(2) 279-292.

68 The 2007-proposal was amended and adopted by the European Parliament on 21 May 2008. On 22 May the EU Council reached an agreement at COREPER-level (Committee of Permanent Representatives). See also the Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, COM(2008)134 final, issued on 11 March 2008.

69 See inter alia F. Comte, 'Criminal Environmental Law and Community Competence' [2003] *EELR* 147-156; J.A.E. Vervaele, The European Community and Harmonization of the Criminal Law Enforcement of Community Policy. A Cessio Bonorum from the Third to the First Pillar?, in: Kimmo Nuotio (ed.), *Festschrift in honour of Raimo Lahti* (Helsinki 2007) 119-142; A. Dawes and O. Lynsky, The Ever-longer Arm of EC Law: the Extension of Community Competence into the Field of Criminal Law [2008] *CMLR* 45 131-158.

70 Cf. M. Hedemann-Robinson, *Enforcement of European Union Environmental Law* (London and New York 2007), p. 519.

The Proposal for a Directive on the protection of the environment through criminal law

The principal aim of the Proposal for a Directive on the protection of the environment through criminal law (hereafter: PECL Directive) is to achieve a more effective enforcement against environmental crime, in order to guarantee the required high level of protection of the environment (cf. Article 174(2) EC Treaty). For that purpose, national sanctioning systems need to be strengthened with criminal law enforcement. Only criminal penalties are supposed to have a sufficiently dissuasive effect, a presumption for which the European legislator gives the following reasons:

- application of criminal sanctions demonstrates a social disapproval of a qualitatively different nature compared with administrative sanctions or compensation mechanisms under civil law;
- administrative or other financial sanctions may not be dissuasive in cases where the offenders are impecunious or, on the contrary, financially very strong;
- criminal law enforcement provides for more effective methods of investigation, prosecution and of mutual legal assistance within and between Member States than are available under administrative co-operation;
- criminal law enforcement provides for an additional guarantee of impartiality because the responsibility for investigating and enforcing falls to authorities which are independent of those which grant exploitation licences and discharge authorizations.[71]

The proposed PECL directive establishes first of all a minimum set of serious environmental offences that should be considered criminal throughout the Community when the conduct is committed intentionally or with at least serious negligence (Article 3). These offences concern *unlawful* conduct only, for which reference is made to EC and EURATOM legislation set out in the Annexes and to national legislation or decisions giving effect to the mentioned Community legislation (Article 2(a)). Inciting, aiding and abetting the *intentional*[72] conduct referred to in Article 3 must also constitute a criminal offence (Article 4). All these offences should be punishable by effective, proportionate and dissuasive *criminal* penalties (Article 5); for legal persons effective, proportionate and dissuasive penalties should be available (Article 7), thus leaving open the option of *non-criminal* punishment as a concession to Member States that do not recognize the criminal liability of legal persons in their national law. Furthermore, the scope of liability of legal persons is elaborately defined (Article 6).

---

[71] Explanatory Memorandum, COM(2007)51 final, p. 2. See also the initial proposal, COM(2001)139 final.

[72] This limitation had been established by amendment of the EP; in the 2007-proposal this provision did not distinguish between intentional and serious negligence.

In the 2001-proposal it remained vague whether it was the Commission's intention that all criminal offences would actually be punished by criminal law sanctions, in those cases no longer leaving room for administrative or civil enforcement,[73] or that the mere possibility of criminal law enforcement was sufficient, leaving it to the discretion of the national authorities whether criminal or other sanctions would be imposed.[74] In the first alternative, the proposal has provoked a lot of criticism, because such an approach would deny the existence of other effective enforcement systems and would in fact undermine rather successful administrative and integrated[75] enforcement in several Member States. It should therefore be welcomed that the current proposal undoubtedly acknowledges *practical* enforcement discretion for national authorities, by stating 'This Directive creates no obligations regarding the application of such [criminal – ABB] penalties or any other available system of law enforcement, in individual cases'.[76] The 2007-proposal already allowed for the application of other sanctions and measures, among which was the obligation to reinstate the environment and the publication of the judicial decision ('naming and shaming'), on top of the prescribed criminal sanctions (see Article 5(5) and Article 7(4)). Although the relevant provisions have been deleted, from the cited recital it becomes clear that the PECL Directive does not necessarily touch upon current administrative or civil enforcement practice.

An important question is what implications the PECL Directive could have for practical enforcement in the Member States. Obviously, the PECL Directive no longer requires – if indeed it ever did – that every detected environmental crime has to be prosecuted and punished with criminal penalties. But introducing criminal penalties without actually imposing them in practice can never be sufficient to fulfil the obligations of the PECL Directive. Moreover, the Commission strives, at the very least, for an increase of criminal law enforcement[77], irrespective of the final text of the Directive and its recitals. Therefore there will definitely be more pressure on national enforcement authorities actually to instigate criminal proceedings

[73] See for instance Michael Faure, European Environmental Criminal Law: Do we really need it? [2004/1] *EELR*, p. 23 and G.J.M. Corstens, Criminal law in the first pillar? [2003] *European Journal of Crime, Criminal Law and Criminal Justice*, p. 137.

[74] R. Pereira, Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the European Union? [2007] *EELR*, p. 266. See also J.A.E. Vervaele, The European Community and Harmonization of the Criminal Law Enforcement of Community Policy: Ignoti nulla cupido?, in: U. Sieber e.a. (eds.), *Strafrecht und Wirtschaftsrecht. Festschrift für Klaus Tiedemann* (Köln 2008), p. 1355-1384.

[75] Meaning a well-balanced combination of administrative – and if available civil – enforcement and criminal enforcement, as described in A.B. Blomberg, *Integrale handhaving van milieurecht* (Den Haag 2000).

[76] Recital 10, second phrase (text as adopted by Parliament, see A6-0154/2008).

[77] Cf. the Explanatory Memorandum, COM(2007)51 final, p. 6.

in the case of environmental crimes, which might cause tension with the 'opportunity principle', practised in most Member States, according to which prosecution is no duty but a discretionary power, the use of which has to be considered carefully in each particular case. Certainly, the proposal focuses on serious offences alone, which moreover only have to be labelled 'criminal' when committed intentionally or with at least serious negligence. But some of these offences are likely to occur on a regular basis and then such great pressure for criminal enforcement must be considered undesirable for the above mentioned and other reasons. The advantages of criminal law enforcement, for instance, seem to be overestimated. Criminal law enforcement authorities often lack the knowledge and the resources to handle typical environmental crimes. For that reason criminal investigations in the field of environmental law are very often carried out by administrative authorities. Prosecution of environmental crimes also demands specific expertise, which is not always sufficiently available in traditional enforcement organizations.

> In the Netherlands for instance, environmental law enforcement has formally been a prosecution priority for many years, but still – and despite additional funds and the appointment of specialized environmental prosecutors – the number of successfully prosecuted cases is rather small, especially when compared with the number of administrative enforcement actions.[78] One of the main reasons is that environmental crimes differ from traditional crimes. Very often there is no victim or otherwise evident damage, which means that violations will not be reported automatically but have to be 'fetched' – in the Netherlands we speak of 'fetch-crimes'.[79] Judicial authorities therefore need to search actively for these kinds of crimes, which is not what they are used to and which demands a cultural change in the way they collect and analyse information.

It is therefore not surprising that in many Member States administrative authorities are somehow involved in or even empowered to undertake criminal law enforcement, and that many administrative sanctioning systems comprise punitive sanctions as well. Usually, all kinds of legal or organizational safeguards are taken to make sure that these authorities or the officials involved operate separately from the authorities or officials that have granted licences and permits, which does somewhat take the edge off one of the Commission's arguments in favour of criminal law enforcement ('the additional guarantee of impartiality').[80] A more fundamental remark is

---

78 And this may be the case in more Member States. Cf. M. Faure and G. Heine, *Criminal Enforcement of Environmental Law in the European Union* (The Hague 2005), p. 23.

79 Commissie Herziening Handhavingsstelsel VROM-regelgeving, *De tijd is rijp* (Den Haag 2008), p. 37.

80 Cf. also M. Faure, *o.c.*, p. 22. This argument, however, is no longer mentioned in the recitals of the PECL Directive, because it was 'superseding the principle of "loyal cooperation" and

that the supposed supremacy in terms of effectiveness and dissuasiveness of environmental protection through criminal law is not beyond doubt.[81] On the one hand, criminal law enforcement may in practice not be dissuasive at all, merely because of the above mentioned practical and not easy to tackle problems, whereas, on the other hand, (severe) punishment and criminal stigmatization may even have reverse effects, such as a less cooperative or even obstinate attitude of the violator, which may complicate further compliance. In cases of environmental violations in particular, it is of utmost importance that ongoing violations are terminated, future violations are prevented, eventual environmental damage if possible is restored and future compliance is, in general, more encouraged. These objectives require at least remedial sanctions and measures, which are often administrative by nature. In so far as criminal law systems comprise remedial (corporate) sanctions, these are hardly being used.[82] Furthermore, a more responsive approach, adjusted to the conduct of the violator, is generally preferable. Although there has never been a thorough examination, based on empirical data, of the effectiveness and dissuasiveness of the various national sanctions and measures[83], practice has proved that both criminal and administrative law enforcement can be effective, of course depending on the circumstances of the case.[84] In some cases, for instance, criminal sanctions will definitely be the most effective or even only suitable way of enforcement, but that should carefully be considered on a case-by-case basis and not in general, not even for specific crimes, regardless of the specific circumstances of the case ('regulatory formalism'[85]).

Still, it can be concluded that the final text of the PECL Directive seems to leave sufficient discretion to national enforcement authorities in individual cases. Furthermore, the Commission would not start infringement proceedings if an individual environmental crime, however serious, has not been punished with a criminal penalty. The GAP-approach (see § 4.3 below), however, could enable the Commission to denounce enforcement practices that fail to use (sufficient) criminal law enforcement, which constitutes a certain pressure on national enforcement authorities. It is to be hoped that

---

the established legal principle of "*effet utile*".' Cf. Draft European Parliament Legislative Resolution on the proposal, Report of 15 April 2008, A6-0154/2008.

81 See for instance P. Pagh, Administrative Criminal Law Systems in Europe: an Asset for the Environment?, in: F. Comte and L. Krämer (eds), *Environmental Crime in Europe: Rules of Sanctions* (Groningen 2004).

82 M. Faure and G. Heine, *o.c.*, p. 13.

83 R. Pereira, *o.c.*, p. 258 and the literature mentioned in his article. See also Harding, *o.c.* p. 14.

84 Cf. M. Faure and G. Heine, *o.c.*, p. 77-81. See also N. Struiksma, J. de Ridder en H.B. Winter, *De effectiviteit van bestuurlijke en strafrechtelijke milieuhandhaving* (Den Haag 2007), empirical research, based on 58 case-studies in the Netherlands.

85 John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford 2002), p. 29.

they will, on the one hand, take the message of the PECL Directive – 'serious environmental crimes should be punished' – seriously, but will, on the other hand, adjust their enforcement actions to the circumstances of the case, thereby keeping in mind the ultimate enforcement goal: protection of the environment.

3.6 Findings

The European 'norm-setting' for (environmental) law enforcement has obviously been expanded over the years, first in case law and recently more and more in EC legislation itself. The European legislator seems to strive for an optimum balance between respecting the margin of discretion of the Member States (subsidiarity) on the one hand, and the need for general or specific enforcement requirements on the other (cf. the Seveso II Directive, the new Waste Shipment Regulation and the proposed PECL Directive). A few points are notable. *General* enforcement requirements in sectoral EC legislation are often more or less copied from the general enforcement requirements deriving from case law. This improves the uniformity of European enforcement law, but the added value of such codification is limited, especially since the exact meaning of the key requirements of effectiveness and dissuasiveness is not very clear-cut. The practicality of these requirements is therefore limited. Naturally, these requirements have to be related to the fulfilment of EC obligations, but the differences in enforcement systems, practice and levels among Member States illustrate that in particular guidance in advance – particularly so with respect to the establishment of effective enforcement schemes and practices – fails.

As far as EC environmental legislation includes more detailed, *specific* enforcement requirements, these are either strongly tailored to the specific circumstances of the case (and therefore not necessarily suitable for generalization), or leave considerable discretion as to when and how, although the intention is obviously that non-compliance eventually has to be ended (remedial enforcement). Why some legislation does and other does not comprise specific enforcement requirements, still remains an unanswered question. There are, however, a few examples of more detailed requirements with a general scope, like the minimum criteria for environmental inspections and the Environmental Liability Directive. The minimum criteria for environmental inspections, although non-binding, are very significant, because they concern a crucial element of law enforcement, which is not necessarily related to the fulfilment of certain substantive obligations under EC law, but rather 'autonomous'. Without sufficient inspections, the information, necessary for adequate enforcement, cannot be obtained. The absence of legal effect is in that respect a serious shortcoming, once more underpinned by the fact that many Member States do not seem to meet these minimum criteria. The ELD is also noteworthy, because it offers a general legal framework for environmental liability that, contrary to many regular

liability systems which aim at compensation, aims for the actual prevention and restoration of environmental damage. Although its scope is limited to (the threat of) serious and measurable environmental damage, the ELD can therefore be considered to be the first more general steering instrument for remediation enforcement.

A third example of more detailed requirements with a general scope, which has however not yet entered into force, is the proposed PECL Directive. Notwithstanding some criticisms (see § 3.5), an important benefit of the PECL Directive would be the availability of criminal penalties in the field of environmental law to ensure that serious environmental crimes can be punished with severe, criminal sanctions in all Member States, thus reflecting the seriousness of these types of violations and the importance of serious enforcement. The same applies to the liability of legal persons, although the proposal does not go so far as to oblige Member States to introduce *criminal* liability. Furthermore, criminal law enforcement is essential in case of cross-border violations for reasons of mutual assistance. The PECL Directive therefore in general should be welcomed. It may have become clear, however, that the introduction of criminal law enforcement alone will not be a panacea for the enforcement deficit. Effective environmental law enforcement requires the availability of a mixture of instruments, among which are not only criminal sanctions, but also a variety of administrative, in particular remedial, sanctions. Then why is there so little EC legislation in which attention is being paid to the need for remedial enforcement, which is of vital importance for a high level of protection of the environment and is anyhow less controversial than criminal law enforcement? The need for integrated enforcement seems to be totally disregarded.[86]

4 Infringement Proceedings

4.1 Procedure

If a Member State has failed to fulfil its obligations, for instance by not or not sufficiently enforcing violations of (European) environmental law, the Commission may start infringement proceedings based on Article 226 EC Treaty. In short, the Commission may bring such a case before the Court of Justice, which then can establish on the basis of evidence provided by the Commission that the particular Member State has failed to fulfil one or more obligations under the Treaty. If a Member State persists in its infringements, the Commission may start a second procedure (Article 228 EC Treaty), in which the Court may be asked to impose a sanction (see § 4.2 below).

[86] Also M. Faure, European Environmental Criminal Law: Do we really need it? [2004/1] *EELR*, p. 23.

The Commission distinguishes three types of cases:

- failures to formally adopt and communicate implementing legislation to the Commission (non-communication cases);
- failures to correctly transpose Community legislation into national law (non-conformity cases);
- failures to correctly apply Community law in a given case (bad application cases).[87]

'Bad enforcement cases' belong to the last category, which forms the largest group in terms of numbers of cases registered with the Commission. Just a small percentage eventually reaches the Court though, due to the fact that they are the most difficult cases to prove.[88] The Commission exercises complete discretion as to whether and when to use its power under Article 226.[89] Current priorities are non-communication cases, breaches of Community law raising issues of principle or having particularly far-reaching negative impact for citizens (such as those concerning the application of Treaty principles and main elements of framework regulations and directives) and Article 228 cases.[90]

Infringement proceedings are meant to be used as a last resort. The procedure itself already contains the possibility of an out-of-court solution: proceedings start with a letter of formal notice, by which the Commission notifies a Member State of the alleged non-conformity and sets out its arguments. The defendant Member State is given a certain period of time to react and thereby implicitly time to solve the problem. If afterwards the Commission still considers that there is a breach of Community law, a reasoned opinion may be issued, which again contains a certain deadline for the defendant Member State to attain compliance. Moreover, this non-contentious phase is usually preceded by a more informal phase in which one aims for a solution without formal proceedings. So, in fact, defendants get at least three opportunities (the informal phase and two pre-litigation deadlines) to prevent the Commission from bringing the case before the Court.[91] An exception concerns the non-communication cases. In these cases a practice has evolved whereby the Commission will warn Member States which have not yet informed the Commission about their implementation measures,

---

87 S. Grohs, *Commission Infringement Procedure in Environmental Cases, in: M. Onida, Europe and the Environment. Legal Essays in Honour of Ludwig Krämer* (Groningen 2004), p. 27.

88 S. Grohs, *o.c.*, p. 29-30.

89 Case 7/71 *Commission* v. *France* [1971] ECR I-1003 respectively Case 324/82 *Commission* v. *Belgium* [1984] ECR I-1861.

90 Communication from the Commission – A Europe of Results – Applying Community Law, COM(2007)502 final, p. 9.

91 This system is rather effective: around 93% of the cases are closed before a ruling from the Court. See Communication from the Commission, A Europe of Results – Applying Community Law, COM(2007) 502, p. 4.

three months before expiry of the implementation time limit. After expiration of this time limit, the Commission will automatically start proceedings under Article 226.[92]

4.2 Sanctions

Until now, the ECJ has not had the power to impose any sanctions in a judgment based on Article 226 (or 227); the judgments are purely of a declaratory nature. Partly as a consequence, Member States sometimes persist in their breaches of Community law, notwithstanding the prior judgment of the ECJ and the fact that according to Article 228(1) they should take the necessary measures to comply with this judgment. Since the Maastricht Treaty of 1992 the Commission may therefore bring such a case before the ECJ again (Article 228(2) EC Treaty), which in this so-called 'second round'[93] proceedings may impose a lump sum or penalty payment on the defendant Member State, provided the latter has not complied with its judgment at the start of the formal proceedings.[94] As pointed out before, Article 228 cases are one of the Commission's priorities. According to fairly recent case law, a lump sum and a penalty payment may be imposed simultaneously on Member States.[95] This possibility has potentially enhanced the effectiveness of infringement proceedings: the lump sum may serve as a punishment in the particular case and as a deterrent in general, whereas the penalty payment forms a strong incentive to comply with Community law as soon as possible. However, it should be noted that these second round proceedings also have their weaknesses. Although the length of the procedure has been reduced considerably over the years, a second procedure nonetheless takes quite a time. Moreover, the Commission is limited by the scope of Article 228(2), which strongly relates to compliance with the – first – judgment of the Court. Sanctions may only be applied with respect to the period of non-conformity after the judgment of the Court, and may not take into account the duration of the infringement as a whole, a restriction which has triggered another criticism (infringements during the first proceedings are 'free of charge').

In the light of the remarks made above, it is interesting to examine two adjustments to the infringement proceedings made by the Lisbon Treaty.[96] First, second round proceedings will be shortened by disposing of the

---

[92] Jan H. Jans and Hans H.B. Vedder, *European Environmental Law* (3rd edition) (Groningen 2008), p. 159.

[93] M. Hedemann-Robinson, *o.c.*, p. 31.

[94] See on this A. Bonnie, 'Commission Discretion under Article 171(2) E.C. [1998] 23 *ELR* 537-551.

[95] Case C-304/02 *Commission* v. *France* [2005] ECR I-6263.

[96] The Irish 'no' has definitely jeopardized this Treaty, but for the purpose of this article it is presumed that 'Lisbon' will somehow go through at some time.

reasoned opinion obligation. The length of Article 228 proceedings can thus be reduced by a considerable amount of time, since the reasoned opinion phase also includes another pre-litigation deadline, usually of several months, for the defendant Member State. The second adjustment is the introduction of the competence to impose sanctions in first round proceedings. A third paragraph has been added to Article 228 – Article 260(3) in the consolidated version – which states:

> 'When the Commission brings a case before the Court pursuant to Article 258 [226 in the current Treaty – ABB] on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
>
> If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.'

Although the scope of the second adjustment is limited to non-communication cases, it might be interesting to see whether this power could lead to a more effective enforcement. Its effectiveness is to a large extent dependent on the willingness of the Commission to use its power to request a sanction, because this explicitly concerns a discretionary power ('when it deems appropriate'). Since non-communication cases are one of the Commission-wide horizontal priorities, it is rather likely that the Commission will exercise this power, but to what extent remains uncertain. The role of the Court is relatively marginal due to the fact that it may only impose a sanction at the request of the Commission and, moreover, the sanction imposed in first round proceedings may not exceed the amount specified by the Commission. A remarkable clause that cannot be found in Article 228(2), is that the Court has to determine as at which date the penalty payment shall take effect. On the one hand, it does indeed seem rational to grant the Member State concerned a certain period of time to fulfil its notification obligations. If the penalty payment was to have effect immediately after the Court's judgment, it would after all *de facto* function as a fine instead of as an incentive to comply.[97] On the other hand, one could argue that the Member State has already had several opportunities to comply (see § 4.1). Granting another period of time is therefore only justifiable if the time limit is tailored to what is reasonably necessary to fulfil the notification obligations. Given the nature of non-communication cases such a period should be short.

[97] For this reason, sanctions like remediation orders and coercive fines usually comprise such remediation time limits.

If the alleged non-communication is caused by implementation failures, which will often be the case, Member States will definitely face great difficulties in complying within short notice. It is therefore doubtful whether the possibility of imposing sanctions in first round proceedings will really contribute to a more effective enforcement of European law. In those cases, it is more likely to initiate infringement proceedings for bad implementation. For bad application – including bad enforcement – cases, on the other hand, sanctions in first round proceedings may be an interesting option, because attaining compliance would generally not require (often time-consuming) legislative action but in principle only a change of conduct.[98] A potential risk, however, is that the selection of bad application cases could be more arbitrary than 'routine' non-communication cases, the former being largely based on complaints[99] as opposed to Member State reports (or the absence thereof).

4.3 General and Persistent Infringements

One of the efforts of the Commission to improve the effectiveness of the infringement proceedings concerns the GAP-approach: several complaints and/or cases of non-compliance, usually bad application cases, are bundled up and taken into one single infringement procedure to prove that a Member State has infringed Community law in a general and structural manner, or is responsible for – in the words of the Commission – 'general and persistent infringements'.[100] This practice has been approved by the ECJ. On account of eventually twelve complaints, the Commission built a case around numerous violations of the Waste Directive, among which were illegal landfills and unauthorised waste storage and waste treatment operations, in more than fifteen different regions and counties in Ireland. The Court ruled that:

'in principle nothing prevents the Commission from seeking in parallel a finding that provisions of a directive have not been complied with by reason of the conduct of a Member State's authorities with regard to particular specifically identified situations and a finding that those provisions have not been complied with because its authorities have adopted a general practice

[98] Although there also might be cases in which bad enforcement is the result of bad implementation. See the Commission's press release 'Maritime safety: European Commission acts against Finland' of 5 June 2008, IP/08/890, in which the Commission announces the issue of a reasoned opinion for failure to implement the legislation on port state control.

[99] R. Macrory, The Enforcement of EU Environmental Law. Some Proposals for Reform, in: R. Macrory (ed.), *Reflections on 30 Years of EU Environmental Law. A High Level of Protection?* (Groningen 2006), p. 387 and 391-392.

[100] Pål Wennerås, A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments [2006] 43 *CMLR*, see in particular p. 33-34.

> contrary thereto, which the particular situations illustrate where appropriate.'[101]

The novelty of this approach is the possibility of extrapolating a 'general and persistent' breach of Community law from several individual and apparently isolated infringements,[102] and thus denouncing far more serious forms of bad application. An additional advantage is that if some of the clustered individual breaches or even all of them have been remedied before the expiry of the time limit set in the reasoned opinion (or earlier in the pre-litigation phase), the Commission may still have a case and is even allowed to bring in facts on new individual breaches, although the latter were not referred to during the pre-litigation procedure, to demonstrate the general and persistent character of the infringement.[103] It also leaves open the possibility of 'second round' proceedings under Article 228 in case the individual breaches of the first round proceedings have been restored but new breaches of the same type have occurred, thus 'bypassing a new round of Article 226 EC cases'[104] and depriving Member States of a method of frustrating Commission enforcement. In later case law it is even accepted that the Commission could challenge the administrative practice of a Member State without taking on a specific incident, although this presented the Commission with insurmountable evidence problems in the particular case.[105] According to established case law the Commission has to prove the existence of the alleged infringement and has to provide the Court with the information necessary for it to determine whether the infringement is made out. With respect to bad application cases, hence by definition to GAP-cases, the Court has set a higher standard of proof than usual. As a result, the Commission has to prove a certain number of individual cases of non-conformity from which a general and persistent infringement can be extrapolated.[106]

It will not be easy for Member States to challenge the Commission's claim of a general and persistent infringement once the Commission has succeeded in providing evidence for a sufficient number of individual breaches which may constitute a repeated and persistent practice. They will have to challenge in substance and in detail both the information produced 'and the consequences flowing therefrom'[107], which means that they must show that it concerns isolated incidents which do not point to a general and consistent practice.[108]

[101] Case C-494/01 *Commission v. Ireland* [2005] ECR I-3331.

[102] Pål Wennerås, o.c., p. 34.

[103] Case C-494/01 *Commission* v. *Ireland* [2005] ECR I-3331, see para. 32 and para. 38-39.

[104] Pål Wennerås, *o.c.*, p. 62.

[105] Case C-342/05 *Commission* v. *Finland* [2007] ECR I-4713.

[106] Case C-287/03 *Commission* v. *Belgium* [2005] ECR I-3761, see para. 28.

[107] Case C-494/01 *Commission* v. *Ireland* [2005] ECR I-3331, para. 47.

[108] Cf. Case C-441/02 *Commission* v. *Germany* [2006] ECR I-3449, para. 53.

Although the Court has not yet formulated specific conditions for the establishment of a GAP-infringement, certain conditions with respect to time, scale and seriousness of the infringements will have to be fulfilled.[109] In general one could say that a period of several years can already constitute a GAP-infringement.[110] The infringements do not have to occur nation-wide; it is sufficient if authorities in one or more regions or areas are, at different localities, guilty of structural breaches of Community law. It is hard to say how many cases should be involved at a minimum. In the Irish case[111] the Commission concentrated on 14 illegal dump sites, which was sufficient, whereas in the Finnish wolf hunting case[112] two incidents, although definitely in breach of the Habitats Directive, could not be seen as sufficient evidence for an administrative practice generally and persistently in violation of Community law. Noteworthy is the German case, in which the Commission listed around fifty decisions, taken over a period of almost nine years, in contravention of the freedom of establishment.[113] Germany was able to refute the allegation by proving that the breaches were partly remedied and partly had to be seen as isolated decisions. A relevant factor in relation to the latter argument was that the decisions in question (also) constituted violations of German law and formed exemptions from general administrative practice, the latter being proved to be in conformity with both German and Community law. Therefore, it may be concluded that the absolute number of incidents is not decisive for the required scale of the infringement. As to the seriousness of the infringements, which relates to the discrepancy between the actual situation and the result required by Community law, an important notion is that environmental damage seems not to be necessarily required.[114]

4.4 Interim Relief

Regarding the considerable length of the infringement procedure, which will be – even with rather tight pre-litigation deadlines – at least several years, a notable enforcement tool is provided for in Article 243 EC Treaty. Based on this provision the ECJ has a broad power to issue interim measures in the scope of any[115] legal action brought before it – in relation to infringement proceedings for example a judicial order to the

[109] Opinion of Advocate General Geelhoed in Case C-494/01 *Commission* v. *Ireland* [2005] ECR I-3331, para. 43-48. For an elaboration on these conditions, both substantive and procedural, in the light of the Court's case law see Pål Wennerås, *o.c.*, p. 36-41.

[110] In Case C-420/02 *Commission* v. *Greece* [2004] ECR I-11175 the alleged infringement covered a period of only four years.

[111] Case C-494/01 *Commission* v. *Ireland* [2005] ECR I-3331.

[112] Case C-342/05 *Commission* v. *Finland* [2007] ECR I-4713.

[113] Case C-441/02 *Commission* v. *Germany* [2006] ECR I-3449.

[114] Pål Wennerås, *o.c.*, p. 38.

[115] Case 31/77 R *Commission* v. *United Kingdom* [1977] ECR 921 and Case 61/77 R *Commission* v. *Ireland* [1977] ECR 937 made clear that interim measures also could be awarded against

defendant Member State to abstain from a particular activity or to take active remedial steps – pending its final judgment.[116] Especially in bad application cases, where the alleged breach is likely to be continual by nature, interim measures may be used to prevent or minimize probable or actual environmental damage. This instrument may be of significant value in infringement proceedings if there is an urgent threat of irreversible damage to the environment. Whether interim relief could also be of relevance in bad enforcement cases, will be examined below.

Until recently, interim measures have rarely been sought in infringement proceedings.[117] Over the last two years, however, the Commission has asked for interim measures in several – remarkably all environmental! – cases, initiatives that fit very well with its efforts for a more effective enforcement. Two cases concerned hunting in violation of the Wild Birds Directive. This directive in principle forbids the hunting of certain species in certain periods like rearing seasons (see Article 7), but Article 9 provides some derogation opportunities. Derogation measures have to be reported annually to the Commission. The President of the Court ordered Italy to suspend a law implementing this derogation option for the hunting season of 2006/2007 and ordered Malta to refrain from adopting any measures allowing for the hunting of quails and turtle doves on the 2008 spring migration.[118] A third case, against Poland, dealt with a large road construction project through the Rospuda Valley, a Special Protected Area designated under the Wild Birds Directive which should have been designated under the Habitats Directive as well.[119] This case, in which a request for interim measures was put in twice – first to stop a compensatory afforestation programme[120] and secondly to stop the road works – ultimately has not led to an order; apparently the threat was enough in the end.

Connectivity with pending proceedings

An important condition for the admissibility of a request for interim relief is that the applicant, *in casu* the Commission, is party to a case before

Member States. See also C. Gray, Interim Measures of Protection in the European Court, *ELR* [1979] p. 98-99.

[116] M. Hedemann-Robinson, *o.c.*, p. 104-111, in particular p. 106.

[117] Scarce examples are Cases 24 and 97/80 R *Commission* v. *France* [1980] ECR I-1319 and C-57/89 R *Commission* v. *Germany* [1989] ECR I-2849. In both cases the application for interim measures was rejected.

[118] Order of the President of the Court of 19 December 2006, Case C-503/06 R *Commission* v. *Italy*; Order of the President of the Court of 24 April 2008, Case C-76/08 R *Commission* v. *Malta*. In the first case the Court in the meantime has judged that Italy failed to fulfil its obligations under the Wild Birds Directive (ECJ 15 May 2008, Case C-503/06 *Commission* v. *Italy*, nyr).

[119] See press release of 21 March 2007, 'European Commission takes Poland to court to protect threatened wildlife habitats', IP/07/369.

[120] Case C-193/07 *Commission* v. *Poland*, brought before the Court on 5 April 2007.

the Court and that the application relates to that case (Article 83(1) Rules of Procedure). In other words, the application must be made in the context of pending proceedings, which can be described as formal connectivity. As a consequence, the request may not go beyond the subject-matter of the main action (substantive connectivity) and may not prejudge the main case. From the Maltese case it becomes clear that this condition does not exclude interim measures regarding the future.[121] In environmental cases this notion is of great importance, because if such provisional, anticipative measures could in principle not be granted under Article 243 EC Treaty, the possibility of injunctive relief would in many cases be an empty formality, not the least in bad application and GAP-cases. Especially in the latter it is important to be able not only to 'freeze' – temporarily – measures that have already been taken in violation of EC law, but for the purpose of the protection of the environment also to prevent future violations.

Conditions for interim relief

Besides the condition of connectivity, it is settled case law that interim measures may only be ordered if the three following cumulative requirements are fulfilled[122]:

- it must be established prima facie, in fact and in law, that interim measures are justified;
- there must be urgency in so far as it cannot wait for the judgment of the Court in the main action;
- it must be necessary to avoid serious and irreparable harm to the interests at stake, which in the context of environmental law often means the threat or the existence of serious environmental damage.

The first condition, to establish a prima facie case, means that the claiming party has to provide evidence which is sufficient to raise a presumption that interim measures might be justified. To that extent it has to come forward with both facts and legal reasoning to indicate the necessity of interim measures, but since this condition strongly relates to the condition of urgency, which will be discussed next, the emphasis seems to lie on the factual substantiation of the matter.

Because of the purpose of interim relief (guaranteeing the full effectiveness of the Court's final judgment), the second condition – urgency – needs to be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the interim relief, and hence is strongly related to the third condition (harm or damage). It is for the party claiming such damage to establish its existence, whilst absolute certainty that the damage will occur is not required; a sufficient degree of probability is enough, although the prospect of such

[121] Case C-76/08 R, see para. 15-17.

[122] See also Article 83(2) Rules of Procedure of the Court of Justice.

damage must be founded on facts.[123] The nature of the damage claimed for in the Maltese case is remarkable: the Commission invoked 'damage to the common heritage' of the Member States that would result if Malta permitted spring hunting of quails and turtle doves again. In discussion subsequently was whether hunting activities in one Member State could be considered as having a devastating effect on the species concerned in Europe. Demonstrating this kind of impact would be practically impossible, a fact the President recognized. The Commission argued that the fact that spring hunting would result in the death of certain numbers of those birds was sufficient in itself to establish irreparable damage. With respect to this way of applying the criterion as to urgency, the President held, however, that in that case urgency would always be considered to be established. Instead, he adopted a different approach by stating that Community legislation on the conservation of wild birds must be interpreted in the light of the precautionary principle, which is one of the foundations of the high level of protection pursued by EU environmental policy.[124] When assessing urgency, the protection of birds therefore is regarded as being a matter where management of the common heritage is entrusted to the Member States in relation to their respective territories.[125] It may be concluded from this case that bad application in one Member State which is *likely* to result in harm to the common heritage of the Community, could already justify interim measures. This lowering of the burden of proof for prospective environmental damage could enhance the applicability of interim relief in infringement cases. Future case law will show whether this possibility could also be applied to environmental interests more in general. The President specifically referred to ecological justifications of the interest in protecting the common heritage,[126] which might indicate the need for a relation with ecological issues. This might limit the relevance of this instrument, because in many bad enforcement cases the potential loss or damage will be merely local and not per se ecological.

To return to the second condition: urgency is not only about the prevention of damage but also about the timing of interim relief. In the Maltese case, the Commission's application for interim measures was partly dismissed, because with regard to 2009, urgency had not been made out. An application for interim measures thus must not be made too early. On the other hand, urgency may be difficult to demonstrate if the application is late in the sense that most damage has already occurred.[127] The urgency requirement might therefore be a serious hurdle in cases in which the

[123] Case C-76/08 R *Commission* v. *Malta* [2008] nyr, para. 31-32, and the cases cited.

[124] Para. 37.

[125] Para. 38, with reference to Case C-60/05 *WWF Italia and others* [2006] ECR I-5083.

[126] Para. 48.

[127] Case C-57/89 R *Commission* v. *Germany* [1989] ECR I-2849. See for elaboration M. Hedemann-Robinson, *o.c.*, p. 110-111.

competent authority has failed to enforce for a long time and this is widely known, as for instance in the Naples waste crisis, for which the Commission has recently started infringement proceedings.[128]

Once the three conditions are fulfilled, it has to be determined whether the balance of interests favours one or the other of the parties with regard to the interim relief requested, for which a comparison of both interests should be made. As regards this decision, one has to keep in mind that the interim measures may not prejudge the final judgment of the Court. Depending on the specific circumstances, this may impose a certain limit on the applicability of interim relief. Further, it is worth noting that the interest in protecting the common heritage of the Community is considerable in itself. Consequently, the Commission does not need to establish this interest once more.

Interim measures, although not new, have recently been rediscovered by the Commission in the context of infringement proceedings. For several reasons, mainly related to speed and prevention, interim relief can be considered a welcome enrichment of the Commission's enforcement tools. Interim measures enable the Commission to respond immediately or at least relatively quickly[129] to (the threat of) serious and irreparable environmental damage, thus ensuring that the behaviour of the defendant before the final decision does not deprive that decision of any point ('justice delayed is justice denied').[130] From an enforcement perspective, this is an extremely important possibility. Although interim relief does not entail the power actually to interfere, there will obviously be moral and political pressure to carry out the order of the President and Member States will not often be inclined to ignore such order. In practice, the *request* for interim measures may already have effect. The Maltese government, for instance, promised that no decision permitting spring hunting would be taken before the Court had given its interim decision. In the Polish case, the Commission went to the Court twice, but no formal order was issued because the Polish authorities agreed to await the final judgment before commencing any possible afforestation and road works.[131] One could call this the preventive or even dissuasive effect of interim relief. On the other hand we must not put all our faith in interim measures. It remains to be seen whether this instrument could actually contribute to better law enforcement in the Member States, since all conditions have to be met and the requirements in particular of urgency in relation to serious and irreversible damage might not always be fulfilled in

[128] 'Italy: Commission pursues legal action over waste management in the Campania and Lazio regions', Press Release IP/08/705.

[129] It is even possible to request the *provisional* grant of the application, even before the Member State concerned has submitted its observations (Article 84(2) of the Rules of Procedure of the Court of Justice).

[130] C. Gray, *o.c.*, p. 85.

[131] In fact, it seems an order was on its way, but was rescinded by the ECJ on 25 January 2008 (C-193/07 R-2) after Poland proposed to wait for the final judgment.

bad enforcement cases. Besides, the capacity of the Commission to take on cases remains limited.[132]

4.5 Findings; 'Facts and Figures'

Infringement proceedings form the Commission's most important enforcement tool, enabling it to show its teeth[133] and if necessary even to bite. It is embarrassing for Member States to witness themselves in the statistics on 'bad implementation and application' in general and to be judged by the ECJ for violations of Community law in particular. Even so, the ever limited resources restrict the Commission in the number of cases that can be taken on – although some argue that the rarity with which Article 226 proceedings are being used, adds to its effectiveness.[134] The 'good' news is that environmental cases are relatively well represented: around 20% of the total number of cases taken on by the Commission.[135] In general, some 25% of the infringement cases concern bad application cases, the category into which bad enforcement of Community law by Member States would fall. Although it is often difficult to distinguish between bad enforcement and bad application in general (for example violation of prescribed procedural and substantive requirements, such as environmental impact assessments, protected area designation and permitting), the number of infringement cases where a lack of environmental law enforcement by a Member State was at stake is relatively small. Two examples are the cases concerning the poor protection of endangered species and illegal landfills, although in the latter failures with respect to permit requirements also played a role. Another case that may be mentioned here is the Greek turtle case, which concerned Greece's failure to take the necessary measures to protect sea turtles during their breeding period, for instance by preventing disturbing activities such as the (prohibited) use of mopeds on the breeding sites.[136]

All in all, infringement proceedings may address only the tip of the iceberg when it comes to insufficient environmental law enforcement by Member States. Therefore the GAP-approach, which enables the Commission to use its limited capacity to get some grip on the (bad) enforcement

[132] For that reason the Commission is striving for a more efficient management and resolution of infringement cases. See Communication from the Commission – A Europe of Results – Applying Community Law, COM(2007)502 final, p. 8-9, according to which a communication on priorities in the field of environment is forthcoming.

[133] Cf. the high rate of cases 'settled' before they get to Court.

[134] Alberto J. Gil Ibáñez, The 'Standard' Administrative Procedure for Supervising and Enforcing EC Law: EC Treaty Articles 226 and 228 [2004] *Law and Contemporary Problems* 68, p. 140.

[135] 24th annual Report from the Commission on monitoring the application of Community law (2006), COM(2007)398 final, p. 7.

[136] Case C-103/00 *Commission* v. *Greece* [2002] ECR I-1147.

practice in the Member States, provided of course that the individual cases occur in a manner that could constitute a persistent and general breach of EC law, is an important improvement in the application of Article 226 and should be encouraged. As may be derived from case law, the presentation of sufficient evidence is quite an exercise in bad application cases (cf. the proving of illegal land fills and other unauthorized activities) and might therefore be a serious hurdle. In particular, situations that *appear* to be in conformity with EC law – the required permit has been issued – but are in fact not, for instance because (serious) violations of the permit conditions occur, are generally harder to prove. In relation to bad enforcement, infringement proceedings are thus most likely in case of more systematic breaches. The importance of this opportunity needs to be stressed, though, because third parties may – at least in some Member States – have possibilities to challenge individual cases of bad enforcement but usually lack the power to fight a more general practice of bad enforcement.

Interim measures are the Commission's formal instrument to respond in relatively short notice to non-compliance by Member States. Interim relief may be very helpful in the case of an urgent threat of irreversible damage to the environment, which may also be caused by bad enforcement of environmental law. This instrument could, however, only be useful in exceptional cases, due to the conditions under which interim relief may be granted. In individual cases of bad enforcement, it is therefore not very likely that interim measures – although probably very usable – will be imposed, because they may only be requested in the context of pending (infringement) proceedings, which are more likely to address structural enforcement problems.

5 Information Obligations and Information Strategy

As may be concluded from the previous section, infringement proceedings, particularly the GAP-approach, are a scarce but essential and ultimate method of taking hold of bad enforcement by Member States. Accurate information on implementation, application and enforcement practices in the Member States is crucial for a successful use of this instrument. Although the information position of the Commission has improved over the years[137], there is still an information deficit, in particular with respect to the state of the environment and site-specific information. This is partly caused by the fact that the Commission has no investigative powers. When it concerns the (bad) application of Community law in particular, the Commission is to a large extent dependent on information provided by the Member

[137] Cf. for instance the many reports and databases with information on Europe's environment, published on behalf of the European Environment Agency (accessible on http://www.eea.europa.eu/).

States, because information on this matter must be obtained 'in the field' and third parties, who form a particular important source of information in the sector of environmental law[138], usually lack the powers and resources to obtain all the information required to build a case. But also, more generally, the Commission is in need of sufficient information to fulfil its supervisory task.[139] Over the years, Europe has therefore realized that the gathering of more detailed information on compliance in the Member States is necessary to challenge the European enforcement deficit.

Traditionally, EC legislation has contained information obligations regarding national implementation measures.[140] Nowadays, many directives also include obligations to report regularly on the implementation and application of such measures.[141] In its annual reports on monitoring the application of Community law, the Commission reports on the progress that is being made with implementation by the Member States and gives an account of its activities in connection with monitoring the application of Community law.

In a Communication of 2007, in which the Commission suggests ways to improve the application of Community law, the necessity of further enhancing information exchange is stressed. To that extent, inter alia, several changes in the Commission's working method concerning complaints about the application of EC law are proposed, for instance giving the Member States a short deadline to provide the necessary clarifications, information and solutions directly to the complainants and inform the Commission accordingly.[142] These suggestions, however, do not solve the problem of the dependence of the Commission on Member States' information, although the 'continuing inter-institutional dialogue'[143] is likely to improve the problem solving.

---

[138] 24th annual Report from the Commission on monitoring the application of Community law (2006), COM(2007)398 final, p. 5. See also Commission communication on better monitoring of the application of Community law, COM(2002)725 final/4, p. 12-13.

[139] See on this P. Van den Bossche, In Search of Remedies for Non-Compliance: the Experience of the European Community [1996] *Maastricht Journal*, p. 371-398 and J.P. Gaffney, The Enforcement Procedure under Article 169 EC and the Duty of Member States to Supply Information Requested by the Commission: Is There a Regulatory Gap? [1998] 25 *Legal Issues of European Integration*, p. 117-130.

[140] See for example Council Directive 1975/442/EEC of 15 July 1975 on waste, Articles 13 and 14.

[141] Cf. Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, Article 17(3) and recital 18.

[142] Communication from the Commission, A Europe of Results – Applying Community Law, COM(2007)502 final, p. 2 and 7-8. This Communication builds on the 2002 Communication on better monitoring of the application of Community law (COM(2002) 725 final) and the 2006 Communication, A strategic review of better regulation in the European Union (COM(2006) 689).

[143] A Europe of Results, p. 8.

Policy fields other than the environment provide several examples of EC legislation containing obligations for national authorities to inform the Commission in particular on enforcement.[144] Still, such obligations are not very common[145] and the introduction of them in EC environmental law in general would require very careful consideration. It is, on the one hand, important that the Commission is or can be well posted on national enforcement practice, but on the other hand, considering the amount of EC environmental legislation, presumably very ineffective if Member States were to report on all conducted controls, discovered infringements and enforcement actions which had been taken – thereby literally overloading the Commission.[146] For its supervisory duty it is sufficient that the Commission has a general impression of national enforcement practice and can obtain the necessary information in a case of specific concern. Research in the Netherlands has shown that authorities in general did not or not always adequately register their enforcement data.[147] I have no reason to believe that this would be any different in other Member States. One could therefore consider imposing registration obligations, to improve the availability of empirical data. That would not only benefit the problem solving as is mentioned above, but also add to the professionalization and thus effectiveness of national environmental law enforcement. Without sufficient knowledge of one's own enforcement practice it is practically impossible, for instance, to formulate an adequate enforcement policy and strategy. In addition, one could consider vesting the Commission with inspection powers of its own, as can be found

[144] See for instance Regulation 2847/93/EEC of the European Parliament and of the Council of 13 October 1993 establishing a control system applicable to the common fisheries policy, Article 28(3), containing the obligation to inform the Commission inter alia on the type of infringements discovered and the action taken; and Regulation 882/2004/EC of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, Article 44, which obliges the national authorities to submit annual reports on for example control plans and the results of controls and audits conducted.

[145] See for a rare 'environmental' example Regulation 1907/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), Article 117 in conjunction with Article127.

[146] For similar reasons the European Parliament has considered the reporting obligations in the Proposal for a Directive on the protection of the environment through criminal law (COM(2007)51 final; see Article 8) 'bureaucratic and in this case superfluous, given that for the purposes of Community law, contrary to the position regarding the third pillar of the European Treaties, there are appropriate means in place to ensure compliance'. See the Draft European Parliament Legislative Resolution on that proposal, Report of 15 April 2008, A6-0154/2008, p. 31-32.

[147] A.B. Blomberg and F.C.M.A. Michiels, *Handhaven met effect* (Den Haag 1997), p. 206 and 252.

in several other areas of EC law, or even establishing a European environmental inspectorate. Attempts in this direction, however, were effectively torpedoed by the European Parliament and the Council back in the 1990s,[148] and also more recently the Council has made it clear that such powers will not be welcomed in the field of environmental law.[149] Besides, the Commission itself seems very cautious in considering EC inspection powers.[150]

Another part of what may be seen as an information strategy[151] is to provide Member States with information on enforcement methods, such as best practices, guidelines, benchmarks and standards, in order to influence national enforcement of European environmental law. An example of this type of soft law instrument in the field of environmental law is the Recommendation on minimum criteria for environmental inspections, which has been discussed in § 3.3. Furthermore, IMPEL, the informal Network for the Implementation and Enforcement of Environmental Law, initiates all kinds of activities to improve enforcement in practice,[152] largely based on experiences in the various Member States, thus also constituting an important source of information for the European Commission.[153]

6 Evaluation

The European influence on national environmental law enforcement has been expanding over the years, as may be concluded from the previous sections. Not only have we witnessed an increase of enforcement requirements ('norm-setting'), the Commission also tries to get more of a grip on the application and enforcement of EC law, which is illustrated by the GAP-approach and the use of interim measures in infringement proceedings ('enforcement'). Despite the many efforts, it is questionable whether this will be sufficient really to tackle the enforcement deficit. In short, the Commission's information position still needs improvement, in particular with respect to the application and enforcement of EC law in practice; general enforcement requirements are too vague to provide adequate guidance for practical enforcement or focus on criminal law enforcement alone (the PECL directive); specific enforcement requirements, though less

[148] See M. Hedemann-Robinson, *o.c.*, p. 460 for an elaborate history of the debate.

[149] See Recital 5 of Recommendation 2001/331 providing for minimum criteria for environmental inspections in the Member States, as repeated in COM(2007)707 final.

[150] L. Krämer, *EC Environmental law* (London 2003), p. 381.

[151] P.C. Adriaanse e.a. (ed.), *o.c.*, p. xxiv.

[152] See the IMPEL website www.ec.europa.eu/environment/impel/ under 'Reports' for a number of documents containing best practices, guidelines et cetera. Similar initiatives at international level are taken by the International Network for Environmental Compliance and Enforcement (INECE). See www.inece.org.

[153] Cf. M. Hedemann-Robinson, *o.c.*, p. 455.

vague and mostly aimed at remedial enforcement, are scarce; and infringement proceedings, although generally successful, can only address the tip of the iceberg.

It may be tempting to challenge the deficit by vesting the Commission with more powers, such as direct inspection or enforcement powers. For political reasons, the establishment of these is not feasible at the moment. And even if there was a European inspectorate or some other form of direct enforcement at the European level, that would, given the size of the recently enlarged European Union and the huge amount of EC environmental legislation, still be just a drop in the ocean and could never replace national enforcement. So, enforcement by national authorities will always be of great importance and the challenge is therefore above all how to frame national environmental law enforcement to ensure its effectiveness.

The current European 'framework', as described in the previous sections, seems too fragmented to provide sufficient guidance. With respect to inspections, EC obligations are scarce and, in as far as available, very specific; the general criteria for environmental inspections that have been 'adopted' in Europe lack legally binding force. Further, Member States still enjoy a fairly large discretion as to their choice of enforcement methods and sanctions, since the PECL Directive only creates obligations regarding the availability of criminal penalties in national legislation and does not address the application of such sanctions. The only certainty is that the underlying EC obligations have to be fulfilled; but it is, as has been mentioned before, easier to conclude afterwards that enforcement did not meet the standards of effectiveness and dissuasiveness than to determine in advance – especially in abstracto – what enforcement actions are necessary to comply with these requirements. This might explain the differences among Member States in practical enforcement as well as the variations in their levels of enforcement. Differences in practical enforcement could quite easily be avoided, since there is a lot of knowledge and experience, including scientific, on practical enforcement.[154] Variations in enforcement level might partly be ascribed to the available enforcement schemes and instruments, but political priorities are presumably of more influence and changing those will require more than a random use of enforcement requirements. It has to be made clear that adequate enforcement, necessary to achieve a high level of protection of the environment, requires coherent enforcement systems that comprise an appropriate set of tools – inspection and sanctioning powers – and procedures that enable national authorities to adopt a responsive enforcement approach, with sufficient safeguards against too lenient enforcement. Europe therefore needs to fill the existing gaps in its 'norm-setting' for environmental law enforcement, or, in other words, to establish a coherent and integrated framework for environmental law enforcement.

[154] Cf. IMPEL.

7 An Integrated Enforcement Approach

To what extent EC law should further influence national environmental law enforcement, has of course to be examined along the lines of the subsidiarity principle (Article 5(2) EC Treaty). We must distinguish between inspections and sanctions.

Inspections

Inspections are indispensable for effective enforcement, partly indirectly, as a source of information necessary for eventual enforcement action, but also partly directly, for inspections may have preventive and deterrent effects as well. Member States are already obliged to establish adequate inspection systems and mechanisms (cf. Article 10 EC Treaty), but there are still large disparities among the Member States. So it would seem that it is necessary to add some flesh to the bones of this general obligation. The current European framework for inspections comprises general, non-binding recommendations for mainly procedural aspects of inspections (the RMCEI), such as obligations to make inspection plans and programmes, exchange information and follow-up and report on site visits, which reflect several 'best practices' on inspections and are very useful for setting up effective inspection schemes. These essential preconditions for effective inspections should be legally binding, preferably in a reviewed, comprehensible form.[155] In addition, a minimum set of inspection powers (access to sites and information, sampling powers and the power to demand all necessary assistance) should also be prescribed. Quite a few Member States may already adhere to these requirements, but for others giving the recommendations binding force might be just the push they need. If these general obligations are limited to the preconditions for effective inspections, they still leave a considerable discretion to the inspection authorities as to practical inspections. In the light of the subsidiarity principle it should then further be examined whether additional inspection obligations regarding the execution of inspections are necessary, for instance their frequency or content, which then could be imposed by sectoral EC legislation. Several such obligations already exist and have been mentioned in section 3.3. To bring an end to the seemingly random choice for these specific inspection obligations, the European legislator should develop criteria, such as the risk to the environment, to determine when additional inspection obligations are needed.

Sanctions

An adequate scheme of environmental law enforcement should comprise a combination of sanctions and measures with which all possible enforcement objectives (prevention, remediation, deterrence and punishment) can be achieved. For that purpose, Europe needs to stop focusing solely on

[155] Cf. the Communication on the review of RMCEI, COM(2007)707 final § 2.2.

criminal penalties and must also advocate other sanctions, in particular (administrative) remedial sanctions and measures, in order to encourage an adequate responsive, integrated enforcement. This seems even more feasible in the light of the principles of subsidiarity and proportionality, since remedial enforcement of environmental law is not only less controversial than criminal enforcement but also of primary importance for the protection of the environment. However, unlike criminal penalties, remedial sanctions cannot in general be prescribed for certain categories of violations; the choice of particular sanctions or measures is, in situations that require remediation, highly dependent on the circumstances of the case. Moreover, national administrative (and civil) enforcement systems differ more from one another than criminal enforcement systems. But it would be possible to oblige Member States to provide a sufficient 'tool-kit', with such sanctions and measures as necessary for the accomplishment of the various enforcement objectives (including punishment), thus ensuring that national enforcers are 'fully equipped'.[156] In the same way as regards inspections, a distinction could be made between such general preconditions, here for effective sanctioning, and specific obligations in more sectoral EC environmental law if that is deemed necessary. Those specific obligations may vary, of course. As a result, it might be possible that some parts of EC environmental law will be principally enforced by criminal penalties, such as legislation concerning cross-border activities, whereas other parts, for instance legislation with respect to mainly local activities, may be primarily enforced with administrative measures.

Additionally, it would be conceivable to create more European guidance with regard to practical enforcement, for example in the form of a so-called 'preference order of enforcement goals'.[157] Such preference order, for which the interest of the protection of the environment should be taken as a starting point, could be:

1) prevention of the violation;
2) termination of the violation;
3) remediation of the effects of the violation (possibly in combination with 2);
4) encouraging further compliance;
5) compensation of environmental damage;
6) punishment.

Punishment is ranked last, because the environment does not directly benefit from a penalty. However, whereas punitive sanctions may have a preventive effect as well, they could for instance also serve enforcement goals 1 and

[156] M. Lee, *o.c.*, p. 78.

[157] This concept has been introduced in the Dutch debate on effective environmental law enforcement in 1997. See A.B. Blomberg and F.C.M.A. Michiels, *Handhaven met effect* (Den Haag 1997).

4. This example indicates that the lines between the different enforcement goals are fluid and that combinations could be achieved quite easily.

By using a preference order of enforcement goals as a guiding principle, it would be possible to adjust enforcement actions to the specific circumstances of the case. The nature and seriousness of the violation, but also the type and intention of the violator, might determine for instance what kind of reparative measure or sanction is appropriate or whether punishment is necessary.[158] Provided that a sufficient 'tool kit' of sanctions is available, national enforcement authorities can thus establish 'tailor-made' enforcement.[159] For this kind of guidance, a recommendation or other form of non-binding guidance instrument would probably be sufficient and even preferable, because an integrated enforcement approach (or responsive enforcement) presumes regulatory discretion, necessary to adjust one's enforcement action to the circumstances of the case.[160]

In conclusion

Besides norm-setting, the monitoring and enforcement by the Commission in its role as supervisor (Article 211 EC Treaty) are also vital to ensure an adequate level of national enforcement of EC environmental law. In the previous sections, several positive developments with respect to these instruments have been described, like the GAP-approach and the monitoring improvements. Both instruments are necessary to complete the regulatory chain – norm-setting, monitoring and enforcement – at European level and several further improvements might perhaps still be needed (and some suggestions were made previously in this article and elsewhere[161]). Given the current enforcement deficit, however, the call for a European integrated enforcement approach is rather urgent and priority should therefore be given to the clarification and expansion of the European standards for national enforcement of EC environmental law. In this last section a rough sketch of a European framework for an integrated approach has been made. It is now up to the European legislator to demonstrate that it truly cares for environmental law enforcement that actually contributes to a high level of protection of the environment.

---

[158] Cf. the regulatory pyramid of Ayres and Braithwaite (I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Regulation Debate* (New York 1992)).

[159] A.B. Blomberg, *Integrale handhaving van milieurecht* ('Integrated enforcement of environmental law'; with a summary in English) (Den Haag 2000), p. 520.

[160] M. Lee, *o.c.*, p. 78.

[161] See for instance R. Macrory, The Enforcement of EU Environmental Law. Some Proposals for Reform, in: R. Macrory (ed.), *Reflections on 30 Years of EU Environmental Law. A High Level of Protection?* (Groningen 2006), p. 392.