Operationalising Effective Public Enforcement of Environmental Law in the European Union

with a Focus on England, Germany and the Netherlands

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PART 1

Chapter 1 Introduction

Le leggi son: ma chi pon man ad esse? [1]
Dante Purgatorio, Canto XVI, Verso 97

1.1 Setting the scene

Environmental law aims to protect life, including human life, and the living environment from legal and illegal human activities that may adversely impact it or be a source of hazard to it. Such activities may, for example, take the shape of large industrial plants and the legal emission from these plants of pollutants or of noise, smell or vibrations into the air, water or soil; another – more worrisome – example is the illegal dumping of waste from drugs laboratories in a nature protection area, causing the contamination of the living environment with hazardous chemicals. Environmental law seeks to regulate such activities. To protect human health, for example, maximum pollutant, noise and smell emissions levels have been introduced for industrial plants in permits or other legal rules based on legislation. Such emissions levels also aim to ensure the protection of animals, plants, air, water and/or soil. In addition, prohibitions on, for example, the use and abuse of nature protection areas and hazardous waste have been laid down in legislation. Environmental law therefore has an important role in our daily life.

In the European Union (EU), environmental law has developed gradually and incrementally for nearly 40 years and now includes over 200 pieces of law – primarily directives.[2] The EU has used its legislative powers to harmonise environmental standards in many instances, often as a reaction to environmental disasters.[3] As a result, most environmental law in the Member States of the EU emanates from the EU.

> An example of EU legislation is the 1982 Seveso Directive, which was made as a reaction to the environmental disaster that occurred on 10 July 1976 near the town of Seveso in Italy. A malfunction in a chemical manufacturing plant had resulted in the release of six tonnes of toxic dioxin gas. As a reaction to this, Council Directive 82/501/EEC of 24 June 1982 dealt with the major-accident hazards of certain industrial activities, specifically the prevention of major accidents that might result from certain industrial activities and with the limitation of their consequences for man and the environment. Similarly, more recently the EU Directive on ship-source pollution was instigated after the oil spills caused by the

1 This can be translated as: 'there are laws: but who will ensure enforcement?'. In the context of this research one could add: 'and how can that be done effectively?'.
2 See http://ec.europa.eu/environment/basics/benefits-law/applying-eu-law/index_en.htm (last visited 1 June 2019).
3 On the basis of articles 191 and 114 TFEU.

tanker *Erika* in December 1999 and the tanker *Prestige* in November 2002 that led to environmental disasters. This directive aims to protect the environment from discharges of polluting substances from ships in EU waters.[4]

EU environmental law is primarily contained in directives, which must be transposed by the EU Member States into their own national legislation. Article 4(3) of the Treaty on the European Union enshrines the general duty of Union loyalty for the Member States, which is to ensure that EU laws are respected and applied in practice. This includes the enforcement of EU law. The enforcement is of paramount importance to maintain the integrity of the law and to protect the values it safeguards. In particular, in the last two decades, the enforcement of environmental law has become a more central point of focus both at national and EU level due to human-induced disasters resulting in great damage to the environment, which have also included human casualties. The European Court of Justice (ECJ) originated the formula that the enforcement of EU law by the Member States is to be effective, deterrent, proportionate and non-discriminatory.[5] It is (still) quite vague what these elements entail for the enforcement organisation and the sanctions of the Member States.
The European legislator has concretised the enforcement formula of the ECJ, primarily, in directives for the protection of the environment. This includes the Directive on the protection of the environment through criminal law.[6] While, prior to this directive, EU legislation did contain provisions on enforcement, it did not specifically prescribe the type of enforcement – administrative and/or criminal enforcement – that the Member States should use for the protection of the environment.[7] In this directive the EU has required the Member States to establish criminal penalties for serious environmental offences, such as the seriously negligent discharge of materials into air, soil or water or the destruction of protected wild fauna. The purpose of this directive is that the Member States 'strengthen compliance' through criminal law to protect the environment more effectively, as 'existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment'.[8]

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4 Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.

5 This will be further explored in chapter 2.

6 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. Other directives that focus specifically on the enforcement of environmental law are the Directive 2009/123/EC of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements mentioned above.

7 See further chapter 2, section 2.2.

8 Preamble to Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, number 3. See also, similarly, Communication from the Commission of 20 September 2011 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM(2011) 573 final, p. 7.

The harmonisation of criminal enforcement through these and other directives was, at least in part, also a matter of politics with regard to the delimitation of competences of the different EU institutions and the Member States in the then-existing first pillar and/or third intergovernmental pillar of the European Union.[9] Through the entry into force of the Treaty of Lisbon on 1 January 2009 the pillars were abolished and Article 83(2) of the TFEU now makes it possible for the EU legislator to introduce criminal law measures – minimum rules with regard to the definition of criminal offences and sanctions – where this is essential to ensure the effective implementation of EU environmental law. Even considering this political component, the directives mentioned show that the EU pays attention to environmental enforcement and has the intention to make this enforcement more effective, with specific considerations on the effectiveness of criminal enforcement.

According to the preamble to the Directive on the protection of the environment through criminal law, criminal penalties are considered particularly effective for this purpose as 'they demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law'.[10] Moreover, the European Commission has remarked that the enforcement organisation involved in criminal law will provide 'an additional guarantee of impartiality' because investigating authorities, i.e. authorities other than those administrative authorities that have granted exploitation licences or authorisations to pollute, will be involved in a criminal investigation.[11] According to the European Commission, therefore, benefits for effective enforcement may emanate both from criminal sanctions and the enforcement organisation. In the following text, the sanctions and the enforcement organisation will be jointly referred to as 'the enforcement architecture'.[12]

The above shows that the EU aims to make enforcement by the Member States (more) effective. This is relevant as environmental protection is one of the fields of EU law that has a high enforcement deficit in the Member States. In fact, for many years, the lack of ensuring compliance with EU environmental law has been the reason for the highest total of ongoing and yearly commenced infringement procedures against Member States.[13]

9 See also e.g. Herlin-Karnell 2012. From the introduction of article 83, section 2 TFEU by the Treaty of Lisbon on 1 December 2009, a legal basis for introducing criminal law was included in the Treaty for the EU legislator.

10 Preamble to Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, number 3.

11 Explanatory Memorandum to the Directive of the European Parliament and of the Council on the protection of the environment through criminal law COM 2007(51), p. 2. The views of the European Commission are further described in chapter 2, section 2.5.1.

12 For more on this, see section 1.3 of this chapter.

13 Jans, Prechal & Widdershoven 2015, p. 265. See also, for example, the 30th Annual report on monitoring the application of EU law (2012), COM(2013) 726 final and the factsheet accompanying the 35th Annual report on monitoring the application of EU law (2017), COM(2018) 540 (at https://ec.europa.eu/info/sites/info/files/eu28-factsheet-2017_en.pdf) and https://ec.europa.eu/info/sites/info/files/report-2017-commission-staff-working-document-monitoring-application-eu-law-policy-areas-part2.pdf (last visited 1 June 2019).

> Two recent judgments of the European Court of Justice in 2017 illustrate the failure of Member States to ensure compliance with EU environmental law. In these judgments the ECJ established that Germany and the United Kingdom, respectively, had failed to fulfil its obligations under certain environmental directives. The German case concerned the failure of Germany to fulfil its obligations under the Habitats Directive 92/43/EEC by authorising the construction of a coal-fired power plant without conducting an appropriate and comprehensive assessment of its implications.[14] The case involving the United Kingdom concerned a failure to fulfil its obligations to ensure the treatment of urban waste water in compliance with the requirements of Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment.[15]

The purpose of the Directive on the protection of the environment through criminal law was to cause the Member States to strengthen, through the measures described in it, the criminal enforcement they already had in place. However, the directive did not lead to significant changes in the criminal enforcement of environmental law in several Member States, among which were England[16], Germany, and the Netherlands. No separate systems for the enforcement of EU law and national law, respectively, exist in these national jurisdictions. Moreover, the directive did not require much work to transpose it into the national jurisdictions of England, Germany, and the Netherlands.[17] This did not mean, however, that these legal systems were necessarily able to provide for the effective enforcement of environmental law, or that this was not a topic of conversation in these jurisdictions.

In fact, England, Germany and the Netherlands recognized shortcomings in the criminal enforcement of environmental law in their jurisdictions and explored options to strengthen the effectiveness of their enforcement architecture, previous to the developments at EU level on the criminal enforcement of environmental law. Effective enforcement has been an explicit topic of discussion in academia and at governmental level in the three jurisdictions.[18] In all three countries, both criminal enforcement and administrative enforcement are available for the public enforcement

14 ECJ C-142/16 ECLI:EU:C:2017:301.

15 ECJ C-502/15 ECLI:EU:C:2017:334.

16 The United Kingdom, of which England is a part, is the official Member State to the EU. In this research, English law, specifically as it applies in England, is the topic of research and not the full United Kingdom. This will be further explained in section 1.4 of this chapter.

17 Although the lack of transposition by Germany of certain aspects caused the European Commission to warn Germany and give it two months to implement the Directive. See the press release of the European Commission on this topic http://europa.eu/rapid/press-release_IP-11-739_en.htm?locale=en (last visited 1 June 2019).

18 The Netherlands has a well-established literature and policy practice in discussing aspects of effective enforcement, going back at least 30 years. In the last decade, England has seen a surge in literature on (optimal) enforcement, particularly through government reviews of sanctions. In Germany as well a debate on enforcement is taking place. Academic literature as far back as, at least, 1975 has signalled the enforcement deficits with regard to environmental law. See also chapter 2, section 2.6.1.

of environmental law. One of the ways to strengthen effective enforcement in all three jurisdictions has been the strengthening of the enforcement in the hands of the administrative enforcement authorities. In doing so, the role of criminal enforcement in the protection of the environment in the three jurisdictions also changed.

England had had a persistent focus on criminal enforcement of environmental law as the primary course of action. This focus shifted to also include administrative sanctions for the enforcement of environmental law. Importantly, the rationale behind this development was an identified, profound lack of effectiveness and deterrence of the criminal sanctions, a lack of criminal stigma, and the lack in substance of the administrative set of sanctions.[19]
In Germany, a process of decriminalisation occurred through the creation of alternatives to criminal law enforcement. In a move taking place much earlier than the development in England described above – the formal process started in the 1950s – regulatory offences (*Ordnungswidrigkeiten*) were created as an alternative to criminal enforcement to be sanctioned by administrative authorities outside the criminal 'realm'. The rationale behind this move was the effective functioning of the courts and relieving the individual of the burden a criminal prosecution would bring with it.[20] Since then, many environmental contraventions have been formulated as regulatory offences.[21]
In the Netherlands, (formerly) criminal sanctions applied by administrative authorities, for example, in the form of the so-called administrative criminal decision (*bestuurlijke strafbeschikking*), have recently become an avenue for environmental enforcement.[22] In addition, in the Netherlands, as in England, the enforcement organisation has been further developed, with specialised enforcement authorities considered important for effective enforcement.[23]

In sum, both the EU and England, Germany, and the Netherlands have looked at the effective enforcement of environmental law and explored avenues towards strengthening enforcement in that respect. The EU has presented an effective enforcement formula that is quite abstract. EU legislation has aimed to undo shortcomings in enforcement by the Member States by (also) focussing on the criminal enforcement of environmental law. England, Germany, and the Netherlands have each seen developments within their jurisdictions for the benefit of an effective enforcement architecture. From this follow research questions on how effective

19 See further, chapter 3 of this research.
20 ECtHR 8544/79 ECLI:NL:XX:1984:AC9954, para. 52.
21 See further, chapter 7 of this research.
22 See further chapters 9 and 11 of this research.
23 See further chapters 4 and 12 of this research.

enforcement can be shaped and what effective enforcement looks like, which are discussed in the next section.

1.2 Research questions

In light of the above, this study operationalises the concept of effective enforcement and the potential for effectiveness of the public enforcement architecture, which is defined for the purposes of this research as 'the organisation and the sanctions available for the administrative and criminal enforcement of environmental law'.[24] The research does not deal with the question whether or not enforcement should take place; it focuses on how enforcement could take place when it is pursued. Specific subjects of this exploration are the jurisdictions of England, Germany and the Netherlands.[25] This leads to the following central research question:

> **What are, in comparison, the good practices of the enforcement organisation and sanctions in England, Germany and the Netherlands for the effective public enforcement of environmental law?**

Good practices for effective enforcement are identified that are specific to one or more of the three jurisdictions and, as such, may serve as an inspiration to the other(s). The practices refer to the legal systematics of the enforcement organisation and sanctions as laid down in the law and not actual practice.[26]
The central research question will be answered in chapter 12 of this book. To determine the answer to this question, the following three supportive questions will first be answered in chapter 2 to chapter 11 of this book.

1. **What is an effective public enforcement architecture for environmental noncompliance?**

First and foremost, a model of requirements for an effective enforcement organisation and sanctions – the enforcement architecture – for the public enforcement of environmental law will be formulated as an evaluative framework in chapter 2. This question provides the foundation to this research. Effective enforcement will be approached from a legal systematic perspective, which is understood here as a perspective on the enforcement organisation and sanctions as laid down in the law (and not as executed in practice). When the framework is fulfilled, it is presumed enforcement is effective from a legal perspective, i.e. that the enforcement

24 For more on definitions, see section 3 of this chapter.
25 For more on the choice of these three jurisdictions, see section 1.1 and section 1.4.3 of this chapter.
26 See below and further chapter 2 and chapter 12.

architecture, in principle, enables effective enforcement.[27] No (normative) standards for effectiveness in practice, such as requirements for resources and capacity, are formulated.
European Union law forms the basis for the evaluative framework. First, the EU legislation on environmental enforcement is explored. Second, the 'effective enforcement formula' as coined by the ECJ will be described. Third, the European human rights standards as relevant to effective enforcement will be highlighted, to the extent that these are necessary for a model on an effective enforcement architecture. EU law itself only provides an abstract framework for effective environmental enforcement. Following this, several Opinions of the Advocates General and the view of the European Commission are described as sources for the evaluative framework. Finally, the evaluative framework for effective enforcement is completed with the concept of 'tailored enforcement'. Literature on this concept is used in this research to refine the course charted in EU law on effective environmental enforcement.

2. How is the public enforcement architecture in England, Germany, and the Netherlands regulated?

For each of the three jurisdictions the organisation and instruments for sanctioning breaches of environmental law through public enforcement are described as regulated by law in the three jurisdictions (chapters 3-11).[28] This description consists of three country chapters per jurisdiction. One chapter has an overview of the public enforcement of environmental law in the specific jurisdiction, a second chapter considers the organisation, and a third chapter describes the sanctions.

The normative standards, following on from the answer to question 1 above, are then applied to the public enforcement architecture in the three jurisdictions, as found in the answer to question 2, for an answer to question 3 below.

3. To what extent does the public enforcement architecture in the three Member States have the potential for the effective enforcement of environmental law?

27 As has already been mentioned in this chapter, it is not measured in practice whether enforcement is effective, i.e. achieves the intended effects. Compare also, for example, Van den Broek 2015, p. 23.

28 The definitions of 'public' and 'enforcement' as used in this research are described in section 1.3.2 and section 1.3.3 of this chapter.

The public environmental enforcement organisation and sanctions in England, Germany, and the Netherlands are evaluated in light of the normative standards for effective enforcement as established in answer to question 1. The effectiveness of the public enforcement organisation and sanctions available in the three countries will be assessed. This evaluation not only establishes gaps in effectiveness, but also aims to signal where improvements to effectiveness can be made. This assessment will be done for each of the jurisdictions separately, in the chapters specific to the topic of the enforcement organisation, and the sanctions (chapters 4 and 5; 7 and 8; 10 and 11 respectively).

The central research question of the book is answered in chapter 12, by assessing what are, in comparison, the good practices that the three jurisdictions have to offer in light of the normative standards for effective enforcement. For this purpose, the answers to questions 1, 2, and 3 – as described above – are utilised.

1.3 Important concepts: definitions

1.3.1 Introduction

In this section the concepts used in this study are defined. Definition is necessary for two reasons: first, to delineate the context and focus of this research, and, second, to establish the substance of the concepts used. Here, 'public' as part of the term public enforcement, and 'enforcement' will be detailed. The concept of environment law was already defined at the start of this chapter as the legal rules that aim to protect life, including human life, and the living environment from legal and illegal human activities that may adversely impact it or be a source of hazard to it.

Doing comparative research means that special attention should also be given to the interpretation of these concepts in each of the countries examined. Therefore, the country chapters – specifically chapters 3, 6, and 9 that provide the introduction to each of the three jurisdictions respectively – will address the definition of the concepts of public enforcement and the environment within each of the jurisdictions. This is especially relevant considering that the topic under study – the enforcement architecture, i.e. the enforcement organisation and sanctions – will very much be shaped by the national traditions and politics in a given country. Moreover, considering the number of jurisdictions covered in this research and the breadth of the areas of law examined within those jurisdictions, the interpretation of each of the concepts used may not necessarily be considered self-evident or uniform at first glance.

1.3.2 'Public' enforcement

The term public enforcement refers here to the enforcement by public authorities through administrative and criminal law. The term 'public' refers to the vertical relationship between a government and its citizens, with public authorities acting in their capacity of regulators of the public sphere in which issues play out that are in the interest of the state and the general public.[29] The competences and instruments of these public authorities are laid down in public law, which also contains obligations and legal rights of citizens in their relationship with these authorities. The public law rules that govern the public authorities when carrying out enforcement powers are generally provided in constitutional law, general and/or specific administrative law and criminal law.[30] In section 1.3.4 below I will touch upon the two types of public enforcement that are involved in this research: administrative enforcement and criminal enforcement.

1.3.3 Enforcement

In this research, enforcement is seen as the action or reaction by the public authorities with regard to non-compliance with the law.[31] The scope of enforcement is the formal enforcement, i.e. the action or reaction by the public authorities that consists of administrative inspection, criminal investigation, and imposition of administrative and criminal sanctions, as laid down in the law.[32] The focus in this research is on the organisation of all phases of enforcement according to this definition, i.e. the organisation of inspection and the imposition of sanctions, and on the sanctions themselves.[33] As noted previously, the enforcement organisation and sanctions as

29 See, for example, Slapper & Kelly 2016.

30 In some jurisdictions, for example in England, there is only specific administrative law and no general administrative law that provides general rules for administrative authorities. General administrative law does exist in the Netherlands and Germany.

31 This study focusses on non-compliance by individuals and legal persons; the enforcement towards public authorities that are in non-compliance with environmental law is not discussed. The concept of enforceability is not part of this study, although it also plays a role in the discussion on factors influencing enforcement and its effectiveness. This concept is dealt with in the Netherlands and in England through the Table of Eleven. This Table details eleven aspects that should be reviewed when making new legislation. This aspect will not be further explored, as this research only deals with enforcement of rules, not calling into question the rules themselves. See Baldwin, Cave & Lodge 2011, p. 236-238; Dutch Ministry of Justice, The Table of Eleven: a versatile tool, The Hague, 2004; and the Hampton Review 2005, p. 57.

32 As opposed to informal enforcement. Informal enforcement is action by the public authorities that does not have a basis in legislation on enforcement, e.g. the giving of informal guidance explaining the content of legislation and the tasks and duties therein to the regulated, in particular companies, preceding or following inspection, or informal warnings about violations and bargaining to achieve compliance preceding sanctioning. See also the pyramid of enforcement responses in Ayres & Braithwaite 1992. At the bottom of the pyramid of enforcement responses is persuasion, see Ayres & Braithwaite 1992, p. 35. See also e.g. Hawkins 2003, p. 43-44.

33 There are many more factors that are also relevant to (effective) enforcement but are outside of the scope of the enforcement architecture, such as the possibility for citizens to ensure that the law that protects their interests is enforced by the public authorities, for example, through requesting enforcement from those public authorities, including the courts. In this study, such factors are not discussed.

regulated by law, in combination, are also referred to as the enforcement architecture.[34] The powers of inspection are not included in this research. The enforcement focussed upon is that within the national borders of the jurisdictions studied.[35]

> The scope of the concept of 'enforcement' may range from broad to narrow, dependent on the phases of enforcement that are included.[36] In the terminology of the European Union, enforcement is generally defined broadly, consisting of administrative inspection (also called supervision) and criminal investigation as well as sanctioning and even more informal enforcement instruments.[37]

The term administrative inspection is used in this research to indicate the inspection by administrative authorities according to administrative law. This includes monitoring to preventively check if environmental law is complied with. This also includes the administrative investigation that takes place when there is a suspicion that non-compliance has taken place, but this suspicion has to be confirmed, including what kind of non-compliance has taken place and whether it is perhaps a criminal offence. The term criminal investigation is used to indicate inspections to uncover a criminal offence and/or to prepare the imposition of a criminal sanction.[38] Inspection can be the starting point of enforcement, when it uncovers non-compliance, or be the ending point of it, as the discovery of a violation in the inspection phase often has a correcting effect and leads to compliance.[39] Inspection may also follow the imposition of sanctions, to check whether a violation has been terminated or whether damage has been repaired,[40] or if violations re-occur.[41] Inspection is usually the constant in enforcement. Administrative inspection may come across alleged criminal violations. As a result, a criminal investigation may be started.

> In EU environmental law, the terms 'inspections' and 'monitoring' and the more technical term 'verification' are used. Commonly, the term 'control' refers to the regular supervision on compliance with the law. The terms 'verification'

34 The more-or-less static term 'architecture' is used to reflect that this research focuses on the enforcement organisation and sanctions as laid down in the law, and not the practice of enforcement.
35 For transnational enforcement and mutual recognition issues see e.g. extensively Luchtman 2007.
36 A narrow scope of enforcement would be where it only refers to sanctions.
37 The European Commission has provided a detailed definition of environmental enforcement, defining it as 'all approaches of the competent authorities to encourage or compel others to comply with existing legislation (e.g. monitoring, on the spot controls, sanctions and compulsory corrective measures) in order to improve the performance of environmental policy with the final goal of improving the overall quality of the environment.' See Communication from the Commission, *Implementing Community environmental law*, COM(96) 500, p. 25.
38 See e.g. Corstens/Borgers & Kooijmans 2018, p. 241.
39 Sometimes also called 'preventive inspection'.
40 This is also called 'repressive inspection'.
41 The control on the re-occurrence of violations is often also the start of a new cycle of enforcement.

and 'inspection' indicate the procedure according to which it is ascertained whether a breach of legislation has occurred.[42] There is no clear terminological distinction to indicate the phases of inspection and investigation.

Sanctions can be imposed after the phase of inspection and investigation. In some instances it may be possible for the authorities to impose sanctions before a breach of legislation has been committed, when a suspicion thereof is raised. Therefore, a sanction is defined here as the action or reaction to (potential) non-compliance with legislation by means of a decision or a judgment of a public authority. This includes a sanction imposed by a court as action or reaction to non-compliance, such as, for example, by the criminal judiciary, upon prosecution.[43] It should be remarked in this respect that the competence of a court to impose a sanction may be a competence that is dependent on other authorities bringing the case before it. Particularly in case of the criminal judiciary, the competence to impose a sanction is a dependent competence as this competence does not exist in a specific case without the instigation of prosecution by the Public Prosecutor. This definition of a sanction imposed by a court does not include the legal review of a sanction and the confirmation or adjustment of the sanction, upon appeal, by the administrative courts or the criminal courts.

Where the EU refers to sanctions, it often uses the term 'measures' and 'penalties' in English. According to the European Council, both the term 'sanctions' and the term 'penalties' have a neutral meaning.[44] The use of the term 'penalties' does not necessarily indicate punitive sanctions or criminal instruments.[45] The terms 'sanctions', 'measures' and 'penalties' used by the European legislator and the European Court of Justice both fall within the definition adopted here for sanctions.[46]

42 De Moor-Van Vugt 2003, p. 86; Voermans 2005, p. 71; see for a more extensive discussion (in Dutch) of the terminology used by the Community for inspection or supervision in the areas of finance, customs, agricultural subsidies, Community competition law and the Services Directive; Adriaanse et al 2008, p. 112-117.

43 The criminal courts are discussed in their capacity to impose sanctions on the offender as the primary sanctioning authority, where the courts are the first to sentence an offender, including the imposition of criminal sanctions.

44 Contribution of the Council Legal Service, doc. 13694/04 JUR 427 ENER 230 of 19 October 2004; Council Declaration in doc. 16047/04 ADD 1 attached to interinstitutional dossier 2002/0132. Furthermore, compare the English 'penalty', with the French 'sanction' and German 'Sanktion', see the respective language versions of C-68/88 ECLI:EU:C:1989:339, section 24. In Dutch, the word 'straffen' is used. In this context, this refers to the reactive nature of sanctions in general, imposed as a consequence of non-compliance, and one can assume it did not serve, by its formulation, to indicate a preference for the criminal law where Union legislation is enforced by the Member States, nor only to extend to punitive instruments. Differently, De Moor-Van Vugt 2013, p. 613.

45 However, where the terms measures and penalties are used together in the same of piece of legislation, this may often be meant as distinctive. On this distinction, see De Moor-Van Vugt 2013, p. 612.

46 These terms may refer to different types of sanctions.

1.3.4 Administrative and criminal enforcement

As explained, the term public enforcement is used here to refer to administrative and criminal enforcement. In this research, the definition of administrative enforcement and criminal enforcement is as follows: administrative enforcement is the enforcement carried out by the administrative authorities by means of powers attributed and instruments provided in administrative law and according to administrative procedure; criminal enforcement is the enforcement by the criminal authorities[47] by means of powers extended through criminal law and according to criminal procedure. For each of the Member States it will be assessed how they use these terms. The words 'systems' or 'types of enforcement' will also be used to describe administrative and criminal enforcement. These definitions are intentionally very descriptive, consisting of quite a few elements (authorities, powers extended through law, and type of law governing the procedure) to be able to place also the potentially hybrid types of public enforcement that may be available in the three jurisdictions. The regulatory offences (*Ordnungswidrigkeiten*) in Germany are an example of such a hybrid. Moreover, these definitions make possible, in a certain way, the description and comparison between the three jurisdictions, by being as specific as possible about the placement of the enforcement organisation and sanctions within these areas.

At European level, several concepts are used with regard to sanctions and enforcement: administrative sanctions, administrative measures, criminal sanctions, criminal charges, sanctions of a criminal nature, and the like. The concepts of the criminal charge and sanctions of a criminal nature are distinct from the others, as these concepts specifically determine when certain safeguards apply, such as the principle of *ne bis in idem*, which are a part of the fundamental rights contained in the Charter of Fundamental Rights of the EU (Charter) and the European Convention of Human Rights (ECHR).[48] The European Court of Human Rights (ECtHR) developed the concept of the criminal charge in the context of the ECHR. The concept of sanctions of a criminal nature is the mirror image of the criminal charge and was coined by the ECJ in light of the application of the Charter.[49] The qualification of a criminal charge and that of sanctions of a criminal nature transcends the concepts of administrative sanctions and criminal sanctions. More specifically, sanctions that are labelled as

47 Authorities that are traditionally considered criminal authorities, i.e. the police, Public Prosecutor and the criminal courts.

48 For more on these fundamental rights in the Charter and the ECHR and the relationship between these two legal texts, see chapter 2, section 2.4.3.

49 ECtHR 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 ECLI:CE:ECHR:1976:0608JUD000510071, para. 81; ECtHR 8544/79 ECLI:NL:XX:1984:AC9954, para. 49; ECJ C-45/08 ECLI:EU:C:2009:505; ECJ C-489/10 ECLI:EU:C:2012:319, section 37 and onwards; ECJ C-617/10 EU:C:2013:105, para. 35. See also Andreangeli 2013 and De Moor-van Vugt 2012. The ECJ does not use the term 'criminal charge' in its conclusion on the typology of the sanction.

administrative sanctions can (also) be considered a criminal charge or a sanction of a criminal nature. A separate concept for the application of certain specific safeguards was deemed necessary to prevent these safeguards from being circumvented simply by labelling the sanctions in a certain way, specifically as administrative enforcement instead of criminal enforcement.

> The development and interpretation of the 'criminal charge' – and sanctions of a criminal nature – has been driven by the differences within the States that acceded to the ECHR and the need in light of that to find a transcendent definition to accommodate this to maintain the purpose of the provision, namely the protection of the rights of suspects.[50] The ECtHR first developed the concept of the criminal charge.[51] One of the reasons for the ECtHR to accord a broad definition to the term, looking beyond the label put upon it in domestic law, was the possibility of *Etikettenschwindel*, i.e. fraudulent labelling. The application of the provisions on human rights would then be subjected to the States' sovereign will, with ensuing discrepancies in the protection across Europe.[52] The ECtHR recognised that an overarching term needed to be found for the differences between the States to become unimportant and for the safeguards contained in article 6 of the ECHR to be applied in those instances in which the right to a fair trial might be threatened or infringed.

To determine whether a certain sanction is a criminal charge or a sanction of a criminal nature, three criteria are relevant. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur.[53]

These aspects and other human rights in relation to enforcement are further discussed in chapter 2 for the benefit of the evaluative framework and its focus on the enforcement organisation and sanctions.

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50 When there is a 'criminal charge'. Article 6 ECHR also provides for the right to a court hearing in cases dealing with civil rights and obligations, such as when a permit is revoked.

51 ECtHR 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 ECLI:CE:ECHR:1976:0608JUD000510071.

52 ECtHR 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 ECLI:CE:ECHR:1976:0608JUD000510071, para. 81; ECtHR 8544/79 ECLI:NL:XX:1984:AC9954, para. 49.

53 The term penalty is used here in the broad sense. ECJ C-489/10 ECLI:EU:C:2012:319, para. 37; ECtHR 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 ECLI:CE:ECHR:1976:0608JUD000510071, paras. 80 to 82; ECtHR 14939/03 ECLI:NL:XX:2009:BI6882, paras. 52 and 53.

1.4 Research methodology

This research consists of description – in an analytical manner for the evaluative framework and in a comparative manner in the country chapters –, comparison and evaluation. For this purpose several sources are used. Legal sources are studied and analysed for the development of the evaluative framework, the examination of the characteristics of enforcement by the Member States, and the evaluation of the performance of the Member States. The legal sources used are primary and secondary legislation and those documents attached to it, such as guidance notes to the legislation. Case law of the courts is also used, where opportune, to gain insight into the jurisdictions. Furthermore, legal academic literature (namely books, doctoral theses, research reports, and articles in journals), and policy literature are consulted to gain a better view of the legal sources and their interpretation. This literature also provides the source for the development of the evaluative framework.

It is important for a study of jurisdictions that are foreign to the researcher to gain insight not only into the legal sources mentioned above, but also into the context of the law. When the comparison takes into account the law in context, the danger of cultural bias and pigeonholing may be avoided.[54] This means that, in this research, the *raison d'ètre* for the differences and similarities will also be highlighted where possible and for that contextual factors, beyond the legal sources, will – to an extent – also be considered.[55] The context of a legal system, a legal culture and, even, a country cannot necessarily be taken out of the equation when considering the organisation and sanctions for effective enforcement. This also means that the good practices mentioned are always, first and foremost, embedded in the country in which they are found. Positive and negative aspects of the enforcement organisation and sanctions are therefore necessarily relative. The analysis and recommendations must therefore always be perceived from this viewpoint. Moreover, in light of the above, it must be emphasised here that any good practices recommended in this research are not meant as proposals for legal transplants *per se*, which would create a situation where a rule or a set of rules is transferred from one legal system and transplanted to another.[56] It is not the intention that certain characteristics of the organisation or sanctions are necessarily transplanted as such (copying and pasting them) in the legal system of another jurisdiction.[57]

54 See also Orücü & Nelken 2007, p. 1. See also Reitz 1998, who contends, at p. 622 that 'as in all fields of intellectual endeavour, a healthy scepticism about the received wisdom concerning similarities and differences and a self-critical approach towards one's own conclusions are useful tools'.

55 Orücü & Nelken 2007, p. 49.

56 For more on legal transplants, see e.g. Graziadei 2006, p. 443-444; Samuel 2014, p. 123; and chapter 8 entirely dedicated to the definition and methodology of legal transplants in Siems 2014, p. 191-221.

57 See also Legrand 2001, p. 59 and 68.

Taking the above into account, the description of England, Germany, and the Netherlands will be done in three country chapters each, which respectively address the legal system of the specific jurisdiction, the enforcement organisation within that jurisdiction, and the sanctions within that jurisdiction for the public enforcement of environmental law.

> To gain insight into the law and its context with regard to the specific jurisdictions and to better understand the available legislation and literature, I spoke to academics and practitioners at the start of my research into each of the jurisdictions. For this purpose, I spoke to academics in England, Germany and the Netherlands on administrative law, environmental law, criminal law, and enforcement. Moreover, I spoke for this purpose to practitioners of environmental enforcement in England, Germany, and the Netherlands, including those that work for the legal department of the Environment Agency in England, the *Umweltamt* of Münster and the legal department of the local authority of Münster, Nordrhein-Westfalen, Germany.

Through all the above-mentioned sources, the evaluative framework is established, the three jurisdictions that are the subject of this research are described and evaluated, and the jurisdictions are then compared to find the good practices for effective enforcement that are unique to them and an inspiration to the others.

It must be noted that due to differences in the legal context in the three Member States, the sources for this study may not necessarily be used for each country to an equal extent. The law itself will provide the most prominent source; however, it may be that in one country, the case law will reveal more about the enforcement organisation and sanctions, whereas in another country, the policy documents may provide more insight.

> Some critics of comparative law or comparative method say that one cannot compare 'apples' and 'oranges' and that solely like cases should be compared with like.[58] However, this would greatly diminish the role that comparative law can play. The comparison should not be deemed an objective in and of itself. It is an exercise in opening the eyes and mind of the lawyer and, thereby, acts as a means to research a specific object, trying to pierce through the lawyer's own preconceptions, and to establish comparative good practices in the current research. In other words, I treat the comparison as a perspective.[59]

58 On this, see also Reitz 1998, p. 625: "the real power of comparative analysis arises precisely from the fact that the process of comparing 'apples' and 'oranges' forces the comparatist to develop constructs like 'fruit'". Valcke 2014 makes a valid point when she essentially suggests that the 'comparison' of comparative law with apples and oranges and the concept of fruit is essentially void, as fruit is material and 'by definition devoid of an intrinsic conceptual framework'. See Valcke 2014, p. 22 and 27.

59 See differently, on comparative law as a method, Glanert 2012, p. 61-81; see also Adams & Griffiths 2014, p. 279-301.

The evaluative framework provides a template for the description of the law of the three jurisdictions in the country chapters. These country chapters (more or less) follow the same structure. While context is relevant to the law in the three jurisdictions, the evaluative framework is created, as much as possible, detached from references to the national context and, through that, separated from the presuppositions of the national systems so as to make the model more objective.

At the start of this chapter – in setting the scene – several aspects of the enforcement in England, Germany, and the Netherlands were described that make these jurisdictions interesting for this research.[60] In addition to this, there are other considerations with regard to these jurisdictions that are relevant for this research. Below, for the Netherlands, one additional consideration is detailed; one additional consideration is specified with regard to the choice of Germany, specifically Nordrhein-Westfalen; and two additional considerations are specified with regard to the choice of England.
With regard to the Netherlands, it must be mentioned that this is the jurisdiction the researcher originates from and her native legal system.[61] Care is taken not to apply the native legal system of the researcher as the norm to the evaluative framework, or, for that matter, to the description of the jurisdictions, good practices of these jurisdictions and recommendations following from that.[62]
With regard to Germany, the following is considered. As Germany is a federal republic, with sixteen *Bundesländer* (federation states) that each have their own legislation on enforcement in addition to the federal legislation, one federation state – Nordrhein-Westfalen – was picked. This state is considered to be the economic heart of Germany.[63] The state has a great amount of industrial activity and a high population density and, therefore, environmental protection and the enforcement of it is a particularly important matter.
England is a part of the United Kingdom of Great Britain and Northern Ireland, with Great Britain encompassing England, Wales and Scotland.[64] Within this, England and Wales form one legal jurisdiction, called English law, with the same court system, while Northern Ireland and Scotland form separate legal jurisdictions, through devolution.

> As mentioned above, it is the United Kingdom – not England – that is (currently) a Member State of the EU. In chapter 3, the implications of a departure from the EU will be further commented on. The choice to include England in this

60 See section 1.1 of this chapter.
61 The research was funded by an ASPASIA-grant of the Netherlands Organisation for Scientific Research (NWO).
62 In other words, to avoid 'capture' by the native legal system (and culture).
63 See the official website of the State Ministry for Climate Protection, Environment, Agriculture and Nature and Consumer Protection at www.umwelt.nrw.de.
64 As mentioned above, it is the United Kingdom – not England – that is (currently) a Member State of the EU. In chapter 3, the implications of a departure from the EU will be further commented on.

research was made previous to any plans of a departure of the United Kingdom from the EU. In any case, as the same organisation and sanctions are in place for the enforcement of both EU and national environmental law, the findings in this research are not devalued if and when a departure takes place.

Although England and Wales form one legal jurisdiction, increasingly, there are differences between the legal rules in the two countries, as also Wales has entered the process of devolution from 1997 onwards. As a result, the environmental law in England and in Wales is increasingly divergent.[65] Moreover, the differences between England and Wales impact, among others, the regulation of the organisation and enforcement of environmental law in the two countries. Therefore, this research only looks at the English law that applies in England; only the enforcement organisation and sanctions in England will be described.[66]

One of the aspects that often stands out with regard to the English legal system – which also applies to the whole of the United Kingdom – is that it is a common law system, as distinct from the continental European legal systems that are civil law systems. While there are characteristics of the common law system that are likely to influence the way in which enforcement and its organisation and sanctions is framed in England, in fact the organisation of enforcement and the sanctions available are based in the written law, i.e. in legislation. Therefore, the labels of common law and civil law are not relevant for this research.

1.5 Reading guide

The research is presented in three parts. The first part consists of the current chapter and the evaluative framework that is presented in chapter 2. The second part consists of the country chapters – three chapters per country – in which, respectively, an overview of the public environmental enforcement architecture, and the organisation, and the sanctions in each of the three countries are described (chapters 3 to 11 inclusive). The third part consists of the final chapter – chapter 12. This concludes the research with the answer to the central research question by analysing comparatively the good practices for an effective enforcement of environmental law in England, Germany and the Netherlands.

This research was concluded on 1 March 2019. Legal developments after this date have not been included.

65 For more on the effect of devolution on Wales see e.g. Bishop & Stallworthy 2013; Deacon 2012.

66 The influence of Brexit on English environmental law and its enforcement are discussed in chapter 3.

Chapter 2 Evaluative Framework for Effective Public Enforcement of Environmental Law

2.1 Introduction

What is an effective environmental enforcement architecture in line with EU law? To answer this research question, this chapter will present an evaluative framework for this architecture, i.e. the enforcement organisation and sanctions. When the framework is fulfilled, it is presumed that enforcement is effective from a legal perspective.[67] The framework will be defined on the basis of EU law, including the case law of the European Court of Justice and EU legislation, several opinions of the Advocates General and of the European Commission, as well as academic literature on effective enforcement.[68] The starting point of this chapter is EU law, which influences environmental enforcement by the Member States through legislation, in particular secondary EU legislation, as well as the Charter of Fundamental Rights of the European Union (CFR).[69] EU law also influences environmental enforcement through the case law of the European Court of Justice (ECJ), specifically the enforcement formula, which requires that enforcement is to be effective, dissuasive, proportionate and equivalent.[70]

Below, first, the EU legislation on environmental enforcement is explored. Second, the 'effective enforcement formula' will be described. Third, the European human rights standards as relevant to enforcement will be highlighted. As explained in chapter 1, EU law provides an abstract framework. Therefore, following this, several Opinions of the Advocates General and the European Commission are described as potential sources for the evaluative framework. Finally, the evaluative framework for effective enforcement is completed with the concept of 'tailored enforcement'. Literature on this concept is used in this research to refine the course charted in EU law on effective environmental enforcement.

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67 As has already been mentioned in chapter 1, it is not measured in practice whether enforcement is effective, i.e. achieves the intended effects. Compare also, for example, Van den Broek 2015 p. 23.

68 In this research 'academic literature' stands for books, articles, reports of research, published as part of academia or on assignment for a branch of government. It is used here as distinct from EU legislation, case law of the ECJ and ECtHR and Opinions of the Advocates General of the ECJ.

69 In the same vein as the Charter, but without being a part of EU law, is the influence upon enforcement by the European Convention on the protection of Human Rights and fundamental freedoms (ECHR).

70 There is also the influence on Member States of informal EU instruments set up or supported by the European Commission, Jans, Prechal & Widdershoven 2015, p. 267. See, for example, the minimum standards set for environmental inspections by IMPEL that were subsequently adopted by the Commission, in Recommendation 2001/331/EC of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States.

2.2 Provisions on enforcement in EU legislation

As explained previously, one of the ways the European Union influences environmental enforcement by the Member States is through its legislation. Here, the influence of secondary environmental legislation on enforcement will be highlighted. To start with, the powers of the EU to regulate enforcement through secondary legislation are described.

2.2.1 Powers of the EU to regulate enforcement by the Member States

The power of the European legislator and of the Commission to prescribe elements of enforcement in European legislation is inherent in the powers of these actors to regulate and implement the policy in legal areas of the Union. The European Court of Justice unveiled this inherence in its judgment in *Commission v. Germany*.[71] It was established there that the power to prescribe penalties was contained in the general power to establish measures in a legal area, which in that case was the area of the Common Agricultural Policy. As sanctions are intended to underpin the policy options chosen by the legislator, they are of an implementing nature.[72] A delegation of implementing powers to the Commission in general terms was then sufficient for that actor to be able to exercise this power.[73]

By extension, it is clear that the prescription of other elements of enforcement, including instruments of inspection, or aspects of the organisation is also inherent in the implementing powers extended to the European legislator and, through delegation, to the Commission. The legal basis for provisions on enforcement in European legislation is thus similar to the legal basis of that legislation. In the area of the environment, the most common legal basis can be found in the environment-specific article 192(1) TFEU, or in other specific articles in areas which relate to the environment.[74] Another such specific article is article 100(2) TFEU on establishing appropriate measures for transport by means of shipping and aviation on which the Directive on penalties for ship-source pollution is based.[75]

71 ECJ C-240/90 ECLI:EU:C:1992:408 .

72 ECJ C-240/90 ECLI:EU:C:1992:408, para. 36-39 and 41-42. Also, ECJ 25/70 ECLI:EU:C:1970:115, paragraph 6.

73 See also article 16 para. 1 TEU and article 290 TFEU.

74 For example, Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law is based upon article 192(1). Also, many other directives and regulations containing (among others) provisions on enforcement, such as the Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives. Also ECJ C-392/99 ECLI:EU:C:2003:216.

75 Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements.

Another important legal basis for legal measures – where their predominant purpose pertains to the internal market – can be found in article 114 TFEU. In fact, the ECJ has considered that the internal market provision of article 114 TFEU has legal hierarchy over the environmental protection provision of article 192 TFEU as a legal basis for measures, also in the area of environmental protection.[76]
A last resort is the possibility provided by article 352 TFEU, which only applies where the Treaty does not contain a legal basis for providing measures to achieve the Treaties' objectives. Therefore, in the area of the environment this provision is hardly ever used.
The predominant aim of the measure and its content, and not its effects, are key to determining the fitting legal basis, which are measured by examining the principles whereupon the measure is based and the ideological content of the measure.[77] When this test provides more than one potential legal basis, the most specific of those should be chosen.

In prescribing enforcement to the Member States in EU legislation, the legislator and the Commission may prescribe elements of the enforcement organisation, the enforcement type, powers, and instruments, enforcement in practice, and the safeguards to be observed by the Member States in relation to inspection and sanctioning. With respect to sanctioning, the power of the legislator and of the Commission extends to prescribing reparatory and punitive sanctions, and to administrative, civil, and criminal sanctions. Criminal enforcement was a contested area for as long as the pillar-structure of the European Union existed, as criminal matters were considered to be dealt with under the third pillar of cooperation in criminal and justice matters, as to which the Member States retained a degree of autonomy overseen by a different legislative procedure.
Article 83(2) TFEU provides the European legislator with the possibility to establish in EU Directives minimum rules on the definition of criminal offences and sanctions in areas which have previously been subject to harmonisation measures. This provision reflects the standard case law on enforcement powers, due to which measures on the topic of sanctions can only be prescribed within a legislative framework that has been set up prior to instating such measures and as part of the measures implementing this legislation.

> This means that, for environmental offences, the EU can likely adopt minimum rules with regard to the definition of criminal offences and sanctions if the approximation of criminal laws and regulations of the Member States proves

76 See ECJ C-300/89 ECLI:EU:C:1991:244.
77 See e.g. ECJ C-155/91 ECLI:EU:C:1993:98; Chalmers, Davies & Monti 2014, p. 97.

> essential to ensure the effective implementation of a EU policy in an area which has been subject to a harmonisation measure. The EU must then make policy choices as to the use of criminal law instead of, or in addition to other measures such as administrative sanctions.[78]

Where the EU adopts such rules the principle of subsidiarity must be respected. This means that legislation by the EU is only possible if the goal cannot be reached more effectively by measures at national or regional or local level.[79]
The provision has not been used yet for determining criminal sanctions for environmental protection.[80] Therefore, the actions by the legislator on the basis of this provision in the TFEU must be awaited, as well as the interpretation given by the Court of Justice in potentially arising conflicts between the Member States and the European Union when this provision is used in the area of environmental protection.

2.2.2 Substantive obligations on enforcement in European legislation

2.2.2.1 Introduction

Above, it was already mentioned which types of obligations on enforcement could be included in European legislation on environmental law, in particular Regulations and Directives. This section deals with the substance of those obligations.
Those provisions can be very general, by referring to the 'appropriate measures' to be taken, or be implicit, with the obligation to ensure the full effect of European Union law generally following from article 4(3) of the TEU, without further specifications on enforcement.[81] Some provisions refer explicitly to the enforcement formula of the Court of Justice, without further specification. However, the provisions may also contain specific obligations for the Member States – and increasingly do so – with varying degrees of detail. In substance, those specific obligations may cover four areas of or relevant to enforcement: the instruments or characteristics thereof, including the type of law used for enforcement, the enforcement organisation, the frequency or other elements of the factual exercise of enforcement, and the legal protection against the exercise of enforcement powers.[82] Within those requirements, a division

78 Communication from the Commission of 20 September 2011 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM(2011) 573 final, p. 6. This is further discussed in section 2.5.1 of this chapter.
79 Communication from the Commission of 20 September 2011 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM(2011) 573 final, p. 6.
80 It was introduced after the directives on the criminal enforcement of environmental law had gained force on a different legal basis. These directives are further discussed in section 2.5.1.
81 See further below in section 2.3.
82 See also Meeus 2008, p. 478-494.

can be made between provisions on inspection and provisions on sanctions.[83] An important aspect of these obligations, both specific and general, to be considered is the scope of discretion they allow to the Member States in their implementation or operationalisation and application.

2.2.2.2 General

As we have seen previously in this chapter, article 4(3) TEU provides in general that the Member States must ensure the full effect of European Union legislation so that its aims are guaranteed. From this article and principle follow that Regulations and Directives should be executed in time, in full and with regard for (other) primary and secondary European Union law. Moreover, with regard to Directives, it is required that implementation should be done in binding national legislation.[84] This obligation has been specified in the enforcement formula of the Court.[85]

Directives, the main instrument for European Union environmental legislation, generally leave the Member States discretion – as far as not provided otherwise – in the choice of the form and means of implementation of the obligations of result commonly prescribed in this legislative instrument.[86] The discretionary freedom of choice of the Member States is curbed by the detail of the provisions in the Directives, and the general duty to guarantee the full effect of the form and means chosen, to attain the aims of the Directive in question. As the Court of Justice has held, European Union legislative practice shows that there may be great differences in the types of obligations which Directives impose on the Member States and therefore in the results which must be achieved.

While much of European environmental law is laid down in Directives, also Regulations may contain provisions on enforcement for the Member States. Typically, Regulations bring with them obligations which are quite detailed as to the form and means as well as to the results to achieve the aims of European Union law. This will mean that generally with regard to the content of the Regulations, the Member States do not have much discretion. Moreover, Regulations are directly applicable in the Member States and may not be implemented or otherwise transposed into national law, as this would mean detaching the obligations therein from this legislative instrument.[87] However, in some cases, the enforcement provisions in the Regulations will still require some sort of operationalisation for them and the obligations they contain to fit into the Member

83 Several authors have provided examples of such provisions, see for example, by De Moor-Van Vugt 2003, p. 89-90; Blomberg 2009, p. 404-413; Meeus 2008, p. 478-494. Meeus 2008 specifically provides a very thorough inventory on sanctions. See also Meeus 2014.

84 See e.g. Prechal 2005, p. 84.

85 See further below in section 2.3.

86 Article 288 TFEU.

87 Article 288 TFEU.

State's enforcement system in a formal and practical sense. Provisions in national law designed to do just that may, for example, refer to the Regulation in national law or declare that certain national provisions are inapplicable under specific circumstances.

2.2.2.3 Inspection[88]

Where provisions on inspection are included in European legislation, these range from very general provisions to quite detailed obligations. Explicit but general provisions that are included in the text of the legislation will indicate that non-compliance must be monitored by the Member States, with only marginal directions as to how it should be carried out. Such an obligation does not mean that implementation in a general framework will suffice. The legal framework will at least have to provide that inspection is to be carried out by the competent authorities.[89]

The competent authorities may also be described in general provisions in the legislation. An example is the Regulation on the shipment of waste, which requires the Member States to designate the competent authority or authorities responsible for the implementation of the Regulation and, providing a more specific obligation, that only one single competent authority of transit shall be designated by each Member State.[90]

The obligations with regard to the inspections can also be more detailed on the issues that must at least be covered, and even in a general manner on the frequency thereof. The provisions may require, for example, not only for inspections but also for on-the-spot checks to be carried out by the Member States,[91] or for appropriate periodic inspections to be carried out.[92] An obligation as to the elements which must be covered by inspections may provide, for example, that the origin, nature, quantity and destination of the waste collected and transported must specifically be included in the inspections, or that inspections must extend to the documents, confirmation of identity and, where appropriate, physical checking of the waste.[93] Also, it is provided at what moments – at least – inspections should be carried out.[94]

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88 The definition of inspection as used in this research is explained in chapter 1.

89 See ECJ C-360/87 ECLI:EU:C:1991:86*, para. 40-41. This ECJ dealt with the failure of Italy to fulfil the obligation in article 13 of Directive 80/68* of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances which places on the authorities of the Member States a duty to monitor all the conditions laid down in authorizations which have been issued and all the effects of discharges on groundwater. Similar, ECJ C-131/88 ECLI:EU:C:1991:87.

90 Article 53 Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

91 Article 50, para. 2 Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

92 Article 34 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives. Also ECJ C-392/99 ECLI:EU:C:2003:21.

93 Article 34 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives and article 50, para. 4 Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste. With regard to these shipments even the location of inspection is suggested by the directive to the Member States, see article 50 para. 3.

94 E.g. article 6, para. 1 of Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements.

When looking towards the other end of the spectrum we can see very detailed provisions on inspection. These detailed provisions cover, among others, the conditions, which the systems of inspection must comply with, powers to be available and the frequency of inspections.

> The Seveso III Directive provides a very extensive set of such provisions. This Directive requires inspection systems to be set up to undertake planned and systematic research into the safety of installations. These inspection systems must be able to deal with the examination of technical, organisational and managerial systems provided in an installation.[95] The Directive even provides a list of three conditions the inspection by the Member States must comply with, including a programme of inspections, with at least one one-site inspection every twelve months.[96] It is even required that the Member States make provision for a power to require the operator of an installation to provide – additional – information.

Besides an indication of the minimum frequency of inspections, EU legislation may also dictate exactly how certain results – as prescribed by that legislation – must be assessed, for example with regard to the assessment of water quality.[97] However, environmental legislation does not include very many provisions of such detail as of yet.[98]
In addition to the formal European legislation containing provisions on inspection, in soft law minimum criteria on inspections have been laid down in a Recommendation, which provides preconditions for effective inspections, such as provisions on the exchange of information, the making of plans and the circumstances in which non-routine visits should be carried out.[99] While the possibility is provided in the Recommendation to propose a general Directive on the issue, the Commission prefers to incorporate requirements on inspections in sectoral legislation.[100]

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95 Article 20(2) Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC.

96 See article 20(4) of Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC.

97 Article 4 Directive 2006/7/EEC of the European Parliament and the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC indicates the number of samples that must be taken to assess the water quality.

98 De Moor-Van Vugt 2003, p. 90.

99 Recommendation 2001/331 of the European Parliament and of the Council of 4 April 2001.

100 That there is a need to lay down the criteria in formal binding legislation is already evidenced by the fact that hardly any Member States have fully implemented all aspects of the Recommendation and much disparity still exists between the Member States in the way environmental inspections are carried out: 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, para. 3.2. 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. Also Blomberg 2008, p. 47-52; Hedemann-Robinson 2007, p. 446; Lee 2005, p. 74.

2.2.2.4 Sanctions

Similar to the provisions on inspection, also provisions on sanctions in EU environmental legislation range from general provisions to quite detailed obligations. As discussed previously in this chapter, the absence of provisions on enforcement does not mean that the Member States have no obligations to adopt a framework for the benefit of reaching the aims of the legislation. A complete absence of a reference to enforcement is, in particular in recent EU legislation, not very likely. Often, at least in the preamble of the legislation a reference will be made to either article 4(3) TEU or to the general obligation of the Member States to provide and execute sanctions which fulfil the enforcement formula of effective, deterrent, proportionate and equivalent sanctions.[101]

While EU legislation may contain general references to 'appropriate measures' to be in place for non-compliance and the enforcement formula, those provisions are also often made more specific by referring to specific aims such measures are to achieve in the event of a breach.[102] Such provisions may also contain detail with regard to the priority given to those measures or their application.

European legislation has also provided specific sanctions to be imposed by the Member States for breaches of environmental law. When such sanctions are prescribed, the Member States may still have discretion with regard to the practical application of those sanctions dependent on the formulation of the obligation. Provisions may indicate that a particular sanction may or must be imposed in a specifically defined situation. The Member States have discretion in their application of a specified instrument when the word 'may' is included in such provisions, whereas the word 'shall' indicates a bound obligation for the Member States without room to apply discretion to the decision whether or not to impose that instrument.[103] Such bound obligations range from requiring a Member State to impose either instrument x or instrument y in a certain situation, thus allowing some discretion while prescribing

101 See for example paragraph 4 of the preamble to Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, and article 23 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

102 See for instance article 9 para. 2 of Directive 2000/14/EC of the European Parliament and of the Council of 8 May 2000 on the approximation of the laws of the Member States relating to the noise emission in the environment by equipment for use outdoors.

103 Compare e.g. article 19(1), paragraph 1 ('shall') and paragraph 2 ('may') of Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC. See also article 23 of Council Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy: "Member States shall determine penalties applicable to breaches of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive."

what to choose between but also determining the elements of a violation, to provisions establishing a single instrument that is to be imposed.[104] However, also in cases as last-mentioned some discretion will remain with regard to establishing whether the conditions for application, which are the elements of the violation, are present in a given case.[105]

Also very prescriptive are the increasingly used provisions that dictate the content a sanction must at least possess by specifying further elements of the enforcement formula, in particular the elements of effectiveness and deterrence. The content is, for example, specified through dictating that the economic gains must be considered when calculating the sanction, in order to make it deterrent. The manner of calculating the gains is usually left to the Member States. However, this type of provision has not been prescribed for environmental law enforcement.[106]

European Union legislation may contain references to a specific type of law for enforcement, specifically administrative or criminal instruments which ought to be part of the framework the Member States provide to give full effect to the law. Usually, where such references occur, this is done to both administrative and criminal types of enforcement.[107] So far, only two Directives have formulated the behaviour that should be established as a criminal offence by the Member States and which are to be sanctioned by means of effective, proportionate and dissuasive criminal penalties. This is the Directive on the protection of the environment through criminal law and the Directive on ship-source pollution and on the introduction of penalties for infringements.[108] While the focus of the legislation is generally sectoral

104 See for example article 16(2) (publication of names of violators) and para. 3 (penalty) of 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.

105 Although this is quite rare, the competent authority may also be required to not so much impose sanctions, but to act a certain way with respect to remedying a violation itself, see e.g. article 24.2, para. c-d of **the** Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste on what is to be done with illegal shipments of waste. See Meeus 2008, paragraph 3.2.

106 An example of such a provision is found in paragraph 38 of the preamble to Directive 2003/6 of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse): "In order to ensure that a Community framework against market abuse is sufficient, any infringement of the prohibitions or requirements laid down pursuant to this Directive will have to be promptly detected and sanctioned. To this end, sanctions should be sufficiently dissuasive and proportionate to the gravity of the infringement and to the gains realised and should be consistently applied." See also C-45/08 ECLI:EU:C:2009:505, para. 72-73.

107 These may also include reference to civil instruments, but they are not the subject of this research and are therefore not referred to here.

108 Article 3, 4 and 5 of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. But see also article 7, which does not refer to the type of enforcement; article 4, 5a, 5b and 8a of Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements. For the background to these Directives and in particular the discussion on the delimitation of competences between the Commission and the Council (i.e. the Member States), see also C-176/03 ECLI:EU:C:2005:542 and C-440/05 ECLI:EU:C:2007:625.

through addressing certain environmental issues in legislation, the Directive on the protection of the environment through criminal law shows a horizontal approach to environmental issues and their enforcement. Both aforementioned directives will be further discussed in section 2.5.1 of this chapter.

European Union legislation may also contain the explicit reference to appointing a competent authority, usually to carry out the powers for both inspection and sanctioning, and obligations to coordinate between authorities and/or exchange information if more than one authority is appointed.[109]

Finally, specific elements of legal protection may be prescribed. This does not happen very often, although a general reference to the fundamental rights, compliance with which is a general obligation of the Member States, is quite common in EU environmental legislation.[110]

2.2.2.5 Conclusion

In this section it was discussed in what areas and to what extent the Member States can encounter obligations as to the enforcement of breaches of EU environmental law. It is clear that a wide array of obligations exist in the area, with an increasing focus on the prescription of specific instruments, also in the criminal realm. The discretion of the Member States is thus curbed, although in different manners and degrees.

2.3 The European enforcement formula

2.3.1 Introduction

Since 1977, the European Court of Justice (ECJ) developed the enforcement formula for the enforcement of EU law by the Member States gradually in its case law. The basis for this formula is the principle of effectiveness.[111] This principle is connected to two (other) European principles that influence the relationship between the EU and its Member States: the principle of procedural autonomy of the Member States and the principle of Union loyalty.

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109 Here, the examples mentioned previously when discussing inspection also apply. Another example is article 18 of 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.

110 Usually formulated as that the directive or regulation 'respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights'. See e.g. the preamble of 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, para. 27. Also Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (Århus). As described in 1.3.3 of chapter 1, legal protection is not part of this research.

111 More on this in section 2.3.2.

Most importantly in EU law, Member States have procedural autonomy[112] in applying EU law. This means that the Member States are free in their choice of the appropriate means for enforcement, dependent on the detail of the provisions in the law and the general duty to guarantee that the aims of the legislation are attained in the context of enforcement.[113] The procedural autonomy of the Member States is curbed by the European principle of Union loyalty and secondary EU legislation. This principle is fundamental to the relationship between EU law and its enforcement by the Member States. The principle is enshrined in article 4, paragraph 3, TEU, which contains the positive obligation for the Member States to take all appropriate measures, general or particular, to ensure the effectiveness of EU law, and the negative obligation to refrain from measures that would jeopardize the Treaty objectives.[114] The principle applies to all authorities within the Member States, including the judiciary and local authorities.[115] The obligation for the Member States to take the appropriate measures to ensure the effective application of EU law sets a minimum standard to the exercise of procedural autonomy.

The case law on article 4, paragraph 3, TEU shows that appropriate measures entail "all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues".[116] Also, these measures must not make it practically impossible or, at the least, excessively difficult for individuals to claim rights conferred by European law.[117] This is known as the principle of effectiveness.[118] The aspects of 'appropriate measures' and 'practically impossible or excessively difficult' in the application and effectiveness of EU law were gradually developed by the Court of Justice from 1977 to 1989 into requirements to enforcement by the Member States. First, the Court of Justice specified that 'appropriate measures' also extended to sanctions by the Member States in its 1977 case *Amsterdam Bulb*, stating that:[119]

112 Or, in respect of enforcement: 'enforcement autonomy', a species of procedural autonomy. Jans, Prechal & Widdershoven 2015, p. 43.

113 For more on the detail of the provisions in EU secondary legislation, see the previous section.

114 See article 4(3), second and third indent TEU. See e.g. Chalmers, Davies & Monti 2014, p. 223.

115 E.g. ECJ 14/83 ECLI:EU:C:1984:153, para. 26 and ECJ C-8/88 ECLI:EU:C:1990:241, para. 13.

116 ECJ 14/83 ECLI:EU:C:1984:153, paragraph 15.

117 ECJ 33/76 ECLI:EU:C:1976:188, paragraph 5; ECJ 45/76 ECLI:EU:C:1976:191, paragraphs 12-16 introduced the concept of 'practically impossible'. In ECJ 199/82 ECLI:EU:C:1983:318, the entire phrase was used by the Court of Justice. See also Tridimas 2007, p. 423.

118 See also ECJ joined cases C-397/98 and C-410/98 ECLI:EU:C:2001:134, para. 85; C-255/00 ECLI:EU:C:2002:525, para. 33; C-147/01 ECLI:EU:C:2003:533, para. 103; Tridimas 2007, p. 424; Jans, Prechal & Widdershoven 2015, p. 42. Jans, Prechal & Widdershoven note that ECJ law suggests that meeting the 'lesser' requirement of 'excessively difficult' may suffice. See also ECJ C-129/00 ECLI:EU:C:2003:656; ECJ C-327/00 ECLI:EU:C:2003:109 and ECJ C-147/01 ECLI:EU:C:2003:533.

119 ECJ 50/76 ECLI:EU:C:1977:13, paragraph 32-33.

> "(…) in the absence of any provision in the Community rules providing for specific sanctions to be imposed on individuals for a failure to observe those rules, the Member States are competent to adopt such sanctions as appear to them to be appropriate."

Second, the Court expanded the concept of 'appropriate measures' to include the elements of deterrence and proportionality in 1984's *Von Colson and Kamann* case:[120]

> "Although Directive No 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connexion with the application."

Finally, the Court also included the element of equivalence in its *Greek Maize* case of 1989 and formulated its full enforcement formula:[121]

> "(…) whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws."

Post *Greek Maize*, the Court of Justice applied this enforcement formula in multiple cases, not only to sanctions, but also to inspections by the Member States and in various areas of European Union competence.[122] Moreover, the enforcement formula

120 ECJ 14/83 ECLI:EU:C:1984:153.

121 ECJ 68/88 ECLI:EU:C:1989:339, para. 23-25.

122 Of course, since three of the elements are general principles of European Union law, these would already be applicable. The Court has established through its case law how these general principles apply in the context of enforcement and the priority of the principles in that respect. After Greek maize, see, for example, ECJ C-7/90 ECLI:EU:C:1991:363; C-326/88 ECLI:EU:C:1990:291; C-29/95 ECLI:EU:C:1997:28; C-177/95 ECLI:EU:C:1997:89; Joined cases C-387/02, C-391/02 and C-403/02 ECLI:EU:C:2005:270; C-232/08 ECLI:EU:C:2009:629; C-565/12 ECLI:EU:C:2014:190; ECJ C-418/11 ECLI:EU:C:2013:588. See also Jans, Prechal & Widdershoven 2015, p. 271.

applies also where the choice of penalties by the Member States is no longer entirely in their discretion but European Union regulation has laid down particular penalties for infringement, without being exhaustive.[123]

The development of the standards in the Court's case law has amounted to their inclusion in the preamble and provisions of (environmental) Regulations and Directives, which further delineate the discretion of the Member States.[124] Moreover, the European legislator and the Commission have used to enforcement formula to specify enforcement elements and to justify the inclusion of such elements in that European secondary legislation.[125] This will now be further explored.

2.3.2 Effectiveness

European Union law requires that the Member States appoint competent authorities and that they attribute to them appropriate instruments for the enforcement of EU law.[126] The adequacy of the system thus organised by the Member States lies with its ability to ensure that the objectives of EU law are met. Directives refer to this by the phrase that the Member States should take all necessary legal and administrative measures to fulfil the obligations of the Directive.[127] More in general, the Court refers to a system of legal and administrative measures, including a system of inspection.[128] For example, where the purpose of EU rules would not be fully attained without the imposition of sanctions, Member States must ensure that they are available.[129] This seems to imply that sanctions at least should be reparatory to achieve the aim of environmental protection effectively. The above also applies to inspection.[130] Where detailed provisions on sanctions are prescribed in European legislation and discretion is left as to the other elements of enforcement, the Member States need to be aware

123 C-186/98 ECLI:EU:C:1999:376. This was a case where European Union legislation did not specifically provide any penalty for an infringement or referred for that purpose to national laws, regulations or administrative provisions.

124 On provisions in European legislation: see below section 2.2 of this chapter. In another area of law, namely the combat of EU-fraud and other illegal activities that would harm the financial interests of the European Union, the formula of the Court has been partially codified in article 325 TFEU. Apart from this article no such codification exists in the EU-Treaties.

125 The power of the legislator and Commission to do so and an explanation of the types of provisions available for environmental enforcement in legislation were set out in the previous section.

126 Tridimas 2007, p. 418-419.

127 See e.g. section 17(2) Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC: "as soon as a Member State has taken all necessary legal, administrative and practical measures to comply with this Directive, this Directive will be applicable, replacing Directive 76/160/EEC."

128 See, for example, C-304/02 ECLI:EU:C:2005:444.

129 "(..) as appear to them appropriate", paragraph 33 in ECJ 50/76 ECLI:EU:C:1977:13. Also Curtin & Mortelmans 1994, p. 449.

130 In *Commission v. France*, the Court established that France was structurally breaching its explicit Community obligations by not providing effective, proportionate and deterrent controls: C-64/88 ECLI:EU:C:1991:240, para. 35 and C-304/02 ECLI:EU:C:2005:444, para. 51-52. This was in particular in cases on structural non-compliance by the Member States with their obligations and especially where European legislation obligated the Member States explicitly to implement and apply a system of inspections. See also ECJ C-392/99 ECLI:EU:C:2003:216, para. 167.

that these specific provisions also require a comprehensive system for inspection to be created that ensures that the prescribed sanctions are imposed for the violations as provided in the legislation.[131]

The principle of effectiveness of EU law also requires that the appropriate instruments for enforcement are executed in practice.[132] The principle of effectiveness can be guaranteed only by the Member States when the enforcement put in place formally is also utilised in practice.[133] The fact that the authorities seek to verify compliance with legislation not only on paper but also in practice shows that the rules in the legislation are not purely symbolic. There must be a serious risk that offenders will be detected in the event of infringement of the rules and that sufficiently severe sanctions will be imposed on them.[134]

> Also, in the case Commission v. France (*Spanish strawberries*) the Court found that having regard to the frequency and seriousness of the incidents, the measures adopted by the French Government were manifestly inadequate to ensure freedom of intra-Community trade in agricultural products on its territory by preventing and effectively dissuading the perpetrators of the offences in question from committing and repeating them. In this case the negligence of the French authorities was considered even graver as it involved one of the fundamental freedoms of the European Union, which must at all times be safeguarded by the Member States.[135]

The Member States must beware not to influence the (perceived) likelihood of incurring a sanction by allowing rules by which the violator could avoid it.[136] The Court of Justice asserted the practical aspect of effectiveness also with regard to inspection in its judgment on the protection of sea turtles in Greece.[137] In that case, the lack of practical enforcement of these measures led to the conviction of Greece

131 ECJ 8/88 ECLI:EU:C:1990:241, para. 16 and 36-37.

132 See ECJ C-62/00 ECLI:EU:C:2002:435, para. 27 in which the Court noted that "the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures."

133 ECJ C-42/89 ECLI:EU:C:1990:285. Jans, Prechal & Widdershoven 2015, p. 275.

134 ECJ C-304/02 ECLI:EU:C:2005:444, para. 37. The Court refers to the Opinion of Advocate General Geelhoed ECLI:EU:C:2004:274, para. 39. The ECJ uses the word 'penalties' in its judgment. However, this does not mean that punitive sanctions are required. See also the term used in the other languages of the judgment, e.g. Dutch '*sancties*' and German '*Sanktionen*'.

135 ECJ C-265/95 ECLI:EU:C:1997:595, para. 52.

136 See ECJ C383/92 ECLI:EU:C:1994:234, paragraph 42: "By providing that a 'protective award' may be set off in full or in part against any amounts otherwise payable by an employer to an employee under the latter's contract of employment or in respect of breach of that contract, the United Kingdom legislation largely deprives that sanction of its practical effect and its deterrent value."

137 ECJ C-103/00 ECLI:EU:C:2002:60, paragraphs 34-40; also De Moor-Van Vugt 2003, p. 92.

for not fulfilling its obligations to establish and implement an effective system of protection as required in the Habitats Directive.[138]

The Member States must ensure and are held responsible for the execution of the European duties by their authorities under European Union law, decentralised or not.[139] Arguments of financial, administrative and practical difficulties are not an excuse for insufficient compliance with the principle of effectiveness by the Member States. This includes the opposition on the part of certain individuals, such as that by local inhabitants to the establishment of waste disposal installations, or the presence of criminal activity in a specific sector.[140]

2.3.3 Dissuasiveness

Effectiveness is often presented together with the element of dissuasiveness of sanctions, also referred to as deterrence.[141] Dissuasiveness is the only element of the formula that is not recognized as a general principle of EU law. As we have seen in *Von Colson and Kamann*, the Court determined that a sanction must in any event be adequate in relation to the damage sustained.[142] This means that the sanction should have an effect commensurate, i.e. equal, to the seriousness of the infringement.[143] Moreover, the level of the sanction must not be of a symbolic character, such as, for example, have a maximum that has not been amended in light of inflation for many years.[144] The court has also determined that economic gains realized as a result of the infringement may constitute a relevant element of a dissuasive sanction.[145] Advocate General Geelhoed has also emphasized this link of economic gains and

138 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

139 ECJ 227-230/85 ECLI:EU:C:1988:6; ECJ C-225/96 ECLI:EU:C:1997:584; ECJ C-236/99 ECLI:EU:C:2000:374.

140 See ECJ C-297/08 ECLI:EU:C:2010:115 para. 83-84; ECJ C-333/99 ECLI:EU:C:2001:73, paragraph 24; ECJ C-52/91 ECLI:EU:C:1993:225, paragraph 36; ECJ C-52/95 ECLI:EU:C:1995:432, paragraph 54; ECJ C-60/01 ECLI:EU:C:2002:383, para. 40. Also, ECJ C45/91 ECLI:EU:C:1992:164, paragraphs 20 and 21; ECJ C121/07 ECLI:EU:C:2008:695, paragraph 72. Sometimes, but still rarely, the Court has considered difficulties to exonerate the Member State from compliance in cases of *force majeure*. See e.g. ECJ 158/73 ECLI:EU:C:1974:8; ECJ 109/86 ECLI:EU:C:1987:460; ECJ 296/86 ECLI:EU:C:1988:125; ECJ C-297/08 ECLI:EU:C:2010:115.

141 Two terms are used in the English language judgments of the Court of Justice: 'deterrent' is used, which represents a warning, as well as 'dissuasive', which can be translated as discouraging or advising against. In the context of enforcement of EU law, the meaning of the two terms does not differ. In the Dutch language judgments only one term '*afschrikkend*' is used. In the German language judgments the term '*abschreckend*' is used. In Directives, most often the term 'dissuasive' is used.

142 ECJ 14/83 ECLI:EU:C:1984:153, paragraph 23.

143 ECJ C-418/00 ECLI:EU:C:2002:263, para. 65.

144 See ECJ C354/99 ECLI:EU:C:2001:550, paragraphs 42 and 47, also Opinion of the Advocate-General Geelhoed of 5 April 2001, paragraph 27. See also ECJ C383/92 ECLI:EU:C:1994:234, paragraph 42: "By providing that a 'protective award' may be set off in full or in part against any amounts otherwise payable by an employer to an employee under the latter's contract of employment or in respect of breach of that contract, the United Kingdom legislation largely deprives that sanction of its practical effect and its deterrent value."

145 C-45/08 ECLI:EU:C:2009:505, para. 72-73. See also Jans, Prechal & Widdershoven 2015, p. 277.

enforcement; enforcement is to make non-compliance 'economically unattractive'.[146] Taking into account where there are repeat offences by the offender may also enhance the dissuasive effect of a sanction.[147] Where a sanction is not pecuniary in nature, this does not necessarily mean that it is purely symbolic, specifically if it is accompanied by a sufficient degree of publicity.[148]

2.3.4 Safeguard in the enforcement formula: proportionality of enforcement

The phrase 'appropriate measures' and the enforcement formula in European Union law also encompass the principle of proportionality.[149] Proportionality has been established as an unwritten general principle of European Union law and has been quite extensively developed in the case law of the ECJ.[150] The principle bridges the instrumental requirements and the safeguard requirements with regard to enforcement.[151] It influences the choice of enforcement instruments by the Member States, while at the same time acting as a limit on that choice and the application of those instruments. Where effectiveness and deterrence are minimum requirements, the proportionality of the measure is considered its maximum.

The principle was held to be explicitly applicable to sanctions, starting from the judgment of the Court of Justice in *Von Colson and Kamann*.[152] Since it is considered a general principle of European Union law it also automatically applies to inspection and investigation.[153] With respect to sanctions, the principle requires that the sanction should be appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question.[154] Recourse must be had to the least onerous sanction.[155] Moreover, the principle requires that the weight of the sanction should be suited to the seriousness of the violation. In this respect, the Court has held that strict liability is allowed in an enforcement system.[156] However, a system of sanctions

146 See further section 2.5.2 of this chapter.
147 C-81/12 ECLI:EU:C:2013:275, para. 67.
148 C-81/12 ECLI:EU:C:2013:275, para. 68. See Jans, Prechal & Widdershoven 2015, p. 277.
149 See also Harding 1997, p. 11 and p. 13.
150 At least as far as it concerns the actions of the Member States. Its applicability to European Union authorities and the measures taken by them is laid down in article 5 TEU.
151 Also Jans, Prechal & Widdershoven 2015, p. 146.
152 ECJ 14/83 ECLI:EU:C:1984:153.
153 See ECJ joined cases 46/87 and 227/88 ECLI:EU:C:1989:337, paragraph 19. This case did not concern acts of the Member States, but dealt with an investigation conducted by the Commission in a competition law case. Also ECJ C-94/00 ECLI:EU:C:2002:603, paragraph 27.
154 See, for example, ECJ C-331/88 ECLI:EU:C:1990:391, paragraph 13: "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued." Also ECJ C-210/10 ECLI:EU:C:2012:64, para. 53.
155 ECJ C-331/88 ECLI:EU:C:1990:391, paragraph 13.
156 ECJ C-210/10 ECLI:EU:C:2012:64, para. 51-52.

providing for the imposition of a flat-rate fine for all breaches of legislation, no matter how serious would be disproportionate.[157]
The fundamental freedoms of movement form a special interest, which require a more diligent, strict balancing test of proportionality to take place, as an obstruction of those freedoms is subject to strict rules.[158]

2.3.5 Relevance to the evaluative framework of effective enforcement

The enforcement formula coined by the European Court of Justice is a focus point for the Member States as regards their obligations for providing effective enforcement. However, the formula in fact does not provide a very clear focus point. The elements of the formula remain quite abstract. What is clear is that appropriate proportionate measures ought to be taken by the Member States, specifically legal and administrative measures. Besides this, the Member States are to take into account the safeguards as provided by the Charter and also the ECHR. These will be discussed in the next section.

2.4 Fundamental rights safeguards; general principles

The abovementioned safeguard of proportionality connects the effective enforcement formula of the ECJ with the safeguards of the fundamental rights in the EU.[159] The fundamental rights apply to enforcement as a protective function.[160] The Member States must respect these rights when they apply enforcement within the scope of EU law. The European Charter of Fundamental Rights (CFREU) and the European Convention on the protection of Human Rights and fundamental freedoms (ECHR) protect the fundamental rights.[161]

2.4.1 Relationship Charter and ECHR

The Charter of Fundamental Rights of the EU has laid down human rights for the Member States and the European Union to comply with. The Charter is part of primary EU law and has the same status as the Treaties (art. 6, para. 1 TEU). Proclaimed in 2000, the Charter became legally binding on the EU and its Member States as of 1 December 2009, the day of the entry into force of the Treaty of

157 ECJ C-210/10 ECLI:EU:C:2012:64, para. 41.
158 ECJ 203/80 ECLI:EU:C:1981:261, para. 27; ECJ C-348/96 ECLI:EU:C:1999:6, para. 25; ECJ C-262/99 ECLI:EU:C:2001:407, paragraph 67; C-265/88 ECLI:EU:C:1989:632, para. 14; ECJ C-193/94 ECLI:EU:C:1996:70 ; ECJ C-29/95 ECLI:EU:C:1997:28; Tridimas 2007, p. 235. For more generally on these freedoms and the substance of these rules as to their restriction, see e.g. Barnard 2016 and Tridimas 2007, p. 234-237.
159 Jans, Prechal & Widdershoven 2015, p. 269.
160 The enforcement formula emphasises the instrumental aspect of enforcement, according to Jans, Prechal & Widdershoven 2015, p. 269.
161 See also article 6 para. 1 and 3 TEU.

Lisbon.[162] The Charter does not establish new rights, but assembles existing rights which are already applicable within the European Union as principles of EU law to make them 'more visible'.[163] These existing rights are the rights provided in the ECHR which are also recognized as principles of European Union law, and also other principles as recognized by the ECJ, whether or not on the basis of constitutions of the Member States.

The ECHR was established in 1950. The ECHR forms a body of law separate from the legal order of the European Union, to which all of its Member States have acceded. Also, when EU law and the Charter do not apply, the ECHR applies as it is not dependent on the application of EU law. As all the Member States of the European Union are also a party to the ECHR and, thus, bound by it, the ECHR constitutes the minimum standard for human rights within the EU.[164] This is reflected in article 6(3) TEU, which establishes the fundamental rights of the ECHR as general principles of the EU, and in article 52(3) of the Charter of Fundamental Rights of the EU.[165] Article 52(3) provides that where the rights of the Charter are similar to those in the ECHR they will be interpreted in line with the substance and scope of the latter. It also states that more extensive protection by the EU is possible. Article 52(3) can be taken to mean that, where certain rights overlap between the Charter and the ECHR, the substance and scope of these rights as provided in the ECHR – and through the case law of the European Court of Human Rights – provides a minimum standard for the interpretation of the rights in the Charter.[166]

In the Explanations to the Charter it is explicitly stated which Charter articles correspond to which ECHR articles. For example, article 50 of the Charter (on the principle of *ne bis in idem*) corresponds to article 4 of Protocol number 7 of the ECHR.[167] However, the ECJ has emphasized the autonomy of the EU and the Charter in respect of the ECHR. In Åkerberg Fransson, the ECJ makes explicit that article 52(3) of the Charter is intended to ensure the necessary consistency between the Charter and the ECHR, 'without thereby adversely affecting the autonomy of

162 See also Protocol no. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ 2008 C 115/313.

163 See also https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en (last visited 1 June 2019).

164 It is the intention to incorporate the ECHR formally into EU law by accession to it by the European Union, see article 6(2) TEU. This has not happened yet. See the negative opinion of the ECJ on the Draft Accession Agreement, Opinion 2/13 of the Court of 18 December 2014 ECLI:EU:C:2014:2454. See also Jans, Prechal & Widdershoven 2015, p. 157-159.

165 Following case law of the ECJ establishing this. See also ECJ C-94/00 ECLI:EU:C:2002:603, sections 23-24 and ECJ C-274/99 P ECLI:EU:C:2001:127, paragraphs 37-38; ECJ C-397/98 and C-410/98 ECLI:EU:C:2001:134, paragraph 13. See also Lock 2009, p. 375-398, at p. 376; Craig & de Burca 2015, p. 385-386; Grabenwarter & Pabel 2016, p. 27.

166 See also, for example, ECJ C-205/15 ECLI:EU:C:2016:499, paragraph 40-44.

167 Explanations relating to the Charter of Fundamental Rights 2007/C 303/02 .

European Union law and that of the Court of Justice of the European Union.'[168] The ECJ states that the ECHR does not constitute, for as long as the EU has not acceded to it, a legal instrument which has been formally incorporated into EU law, even though article 6(3) TEU confirms that fundamental rights recognised by the ECHR constitute general principles of EU law and Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR.[169] The ECJ concludes that the aforementioned means that any question as to the interpretation of rights in the Charter is to be answered in the light of the fundamental rights guaranteed by the Charter and the specific article with regard to the fundamental right concerned.[170]

2.4.2 Field of application of the Charter

The most important article of the Charter is its article 51 section 1, which establishes the field of application of the Charter. According to this article, the provisions of the Charter are addressed to the Member States 'only when they are implementing European Union law'.[171] In its judgment in Å*kerberg Fransson*, the ECJ has explained this phrase as follows: the requirement to respect EU fundamental rights is binding on the Member States 'when they act in the scope of Union law'.[172] According to the Court: "since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable." [173] This means that the applicability of EU law entails the applicability of fundamental rights guaranteed in the Charter.[174] It is therefore irrelevant, to the Court, which kind of applicability of

168 ECJ C617/10 EU:C:2013:105, para 44. Repeated in ECJ C-537/16 ECLI:EU:C:2018:193. See also ECJ C-524/15 ECLI:EU:C:2018:197, paragraph 22; ECJ C601/15 PPU EU:C:2016:84, paragraph 47; ECJ C18/16 EU:C:2017:680, paragraph 50 and the case-law cited there.

169 ECJ C617/10 EU:C:2013:105, paragraph 44; ECJ C601/15 PPU EU:C:2016:84, paragraph 45 and the case-law cited there.

170 ECJ C-537/16 ECLI:EU:C:2018:193, para. 26. See also the explicit and strongly worded opinion of Advocate-General Campos Sánchez-Bordona, 12 September 2017 in C-524/15 ECLI:EU:C:2017:667 in which the Advocate General states that it is necessary to develop an autonomous EU concept of *ne bis in idem (*enshrined in article 50 of the Charter) that is different from the concept developed in the case law of the European Court of Human Rights because "the fundamental rights recognised in the Charter must be easily understood by all and the exercise of those rights calls for a foreseeability and certainty", paragraph 73. The Advocate General states that it is sufficient for the EU to ensure that the interpretation of the same right in the Charter as in the ECHR does not disregard and exceeds the level op protection guaranteed by the ECtHR, paragraph 76. In its judgment, the ECJ did not follow these strong words of the Advocate General. It stated that the level of protection of the *ne bis in idem* principle ensured under the Charter 'is not in conflict' with that guaranteed by the ECHR, as interpreted by the ECtHR, C-524/15 ECLI:EU:C:2018:197, paragraph 62. In other words, the ECJ seeks to interpret the Charter in conformity with the ECHR.

171 See also C-617/10 EU:C:2013:105, paragraphs 17-18.

172 C-617/10 EU:C:2013:105, paragraph 20. See also the Explanations to the Charter (also referred to by the Court in paragraph 20 of the Åkerberg Fransson case), 2007/C 303/02, at C303/32.

173 C-617/10 EU:C:2013:105, paragraph 21.

174 C-617/10 EU:C:2013:105, paragraph 21.

EU law is involved.[175] This judgment has become its standard case law on the issue of the application of the Charter.[176]

In several cases decided after its judgment in Åkerberg Fransson, the Court has provided some (more) guidance on how to determine whether Member States act within the scope of European Union law.[177] In this respect, the Court has held that the concept of 'implementing Union law', as referred to in article 51 of the Charter, presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other.[178] In the *Siragusa* case – an environmental enforcement case[179] – the ECJ provided several elements to assess this, which it repeated in later judgments.[180] According to the Court, the elements to assess whether national legislation falls within the scope of EU law for the purposes of article 51(1) of the Charter involve 'inter alia':

- whether the national legislation at issue is intended to implement a provision of EU law (even though the legislation was not adopted to transpose a Directive);
- the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also
- whether there are specific rules of EU law on the matter or rules which are capable of affecting it.[181]

2.4.3 Fundamental rights in relation to enforcement in Charter and ECHR

The safeguards in the Charter and the ECHR may signify requirements as to the enforcement organisation; the powers and instruments used; the practical execution of those powers and instruments, in particular the conduct of the procedures used; the legal protection of individuals, which refers to the content of the procedures; and the decision whether or not to take enforcement action with regard to environmental protection. The majority of the fundamental rights that are relevant in respect of

175 See Van Bockel & Wattel 2013, p. 874.

176 See e.g. C-390/12 EU:C:2014:281, para. 31-34; C-117/14 EU:C:2015:60, para. 29; C-419/14 ECLI:EU:C:2015:832, para. 66; C-98/14, ECLI:EU:C:2015:386, para. 113. Also: De Vries, Bernitz, Weatherill 2015, p. 159. The judgment in Åkerberg Fransson, was, however, not met without criticism. See for a short overview: Lock 2018.

177 C-206/13 EU:C:2014:126; C-198/13 ECLI:EU:C:2014:2055; C-265/13 ECLI:EU:C:2014:187, para. 31-43.

178 C-206/13 EU:C:2014:126, para. 24, which refers to C299/95 ECLI:EU:C:1997:25, paragraph 16 and 17; also C-198/13 ECLI:EU:C:2014:2055, paragraph 34 and the judgments referred to by the ECJ in that paragraph, which were given prior to the entry into force of the Charter in ECJ 149/77 EU:C:1978:130, paragraph 29-32; C144/04 EU:C:2005:709, paragraph 75; C-265/13 ECLI:EU:C:2014:187, para. 31-43.

179 The case concerned an enforcement order requiring Mr Siragusa to dismantle work carried out in breach of a law protecting the cultural heritage and the landscape. The Court did consider that there could be a certain connection with EU environmental law since protection of the landscape – the aim of the national legislation in question – is an aspect of protection of the environment. However, when considering whether the case was within the scope of EU law, the Court found that the case was not. C-206/13 EU:C:2014:126, paragraphs 27-33.

180 See, for example, C-198/13 ECLI:EU:C:2014:2055, paragraph 37.

181 ECJ C-206/13 EU:C:2014:126, paragraph 25. See also ECJ C-309/96 EU:C:1997:631, paragraphs 21 to 23; ECJ C40/11 EU:C:2012:691, paragraph 79; ECJ C87/12 EU:C:2013:291, paragraph 41.

enforcement are in particular relevant for the exercise of the enforcement powers (procedural rights), in particular powers of inspection and the enforcement procedure itself.[182] To these rights belong:

- the right to life (article 2 Charter and article 2 ECHR), in respect of which the authorities have a duty to act to prevent a real and direct threat tot the life of people from occurring when they have knowledge of this, or should;[183]
- the right to respect for private and family life (article 7 Charter and article 8 ECHR), which is applicable to the gathering of evidence of a violation and also entails a positive duty for the Member states to protect citizens from the consequences of environmental pollution[184];
- the right to a fair trail (47(2) and (3) Charter and article 6(1) ECHR; article 48 Charter and article 6(2) and (3) ECHR), including rights of defence.

Besides these rights, a principle of proportionality of criminal offences and penalties is laid down in article 49 of the Charter, without a specific parallel in the ECHR[185]; and the principle of *ne bis in idem*, or double jeopardy is contained in both the Charter and the ECHR (article 50 Charter and article 4, Protocol VII to the ECHR).[186]

The Charter specifies in its article 37 that a high level of environmental protection and improvement of environmental quality must be integrated in the policy of the European Union and be guaranteed in accordance with the principle of sustainable development. Individuals will not be able to claim this right in proceedings before the Court of Justice or national authorities, as it is not phrased as an individualized right. Instead, the guarantee reinforces the formal commitment of the Member States in this respect when carrying out European Union law.[187]

As mentioned, most of the rights relevant to enforcement in the Charter and the ECHR pertain to the procedure for enforcement. As this is not the focus of this research, those rights are not further explored here. However, one of the other rights mentioned will be highlighted briefly, for its relevant nature to sanctioning, namely

182 The ECHR does not contain environmental rights, neither does the CFREU. See also article 11 TFEU. See extensively on the topic of environmental rights in EU law: De Sadeleer 2014, p. 94-124.

183 ECtHR 48939/99 ECLI:NL:XX:2004:AS2641 and see also e.g. Barkhuysen 2004, p. 57.

184 ECtHR 16798/90 ECLI:NL:XX:1994:AH6193.

185 The inclusion of this principle in the Charter signifies that while the principle is similar to the principle of proportionality as a part of the enforcement formula, the inclusion in the Charter extends the principle also to the concept of the criminal charge (see article 52 of the Charter and article 6 of the ECHR).

186 Of the three Member States that are the subject of this research, the Netherlands and Germany have made reservations and the UK has not made a ratification of article 4 Protocol 7 of the ECHR. Vervaele finds that article 50 CFR de facto sets aside the non-ratification of declarations or reservations, as long as the Charter applies in a domestic situation of the ne bis in idem right: Vervaele 2012, p. 134.

187 Compare article 191 TFEU and see also article 11 TFEU. Also De Sadeleer 2014, p. 94-124.

the principle of *ne bis in idem*.[188]

The principle of *ne bis in idem* provides that a person cannot be criminally prosecuted or punished twice for the same offence.[189] This is the main rule. The concept of 'criminal' in this respect, has been explained by both the European Court of Human Rights and the European Court of Justice as 'criminal charge' and 'penalties of a criminal nature' respectively.[190] This includes administrative sanctions that are considered of a criminal nature in light of the three criteria laid down in the case law of the ECtHR and the ECJ.[191]

In recent case law, the ECJ has held that an exception to the main rule of *ne bis in idem* is possible, although not necessary, in certain cases. Such an exception may be possible when there could be a duplication within a national legal system of criminal proceedings or sanctions and administrative proceedings or sanctions of a criminal nature against the same person with respect to the same acts, i.e. the material facts of the case.[192]

> The ECJ has determined that such a limitation requires a justification, subject to requirements under EU law, in particular article 52(1) of the Charter. This article states that "any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the European Union or the need to protect the rights and freedoms of others." The ECJ specified this further, stating that national legislation authorizing a duplication of proceedings and penalties of a criminal nature must satisfy the following four conditions:
>
> 1. Pursue an objective of general interest which is such as to justify a duplication of proceedings and penalties, it being necessary for those proceedings and penalties to pursue additional objectives.

188 This principle and its development by the ECJ and the ECtHR has provided a lot of food for discussion and points of contention. For example, the principle has previously seen a different interpretation in EU competition law as opposed to other areas of EU law. Moreover, the development of the principle by the ECtHR in 2016 has invited criticism even by the Advocate General of the ECJ (see the opinion of Advocate-General Campos Sánchez-Bordona ECLI:EU:C:2017:667 in C-524/15). These issues will not be further discussed here. Only some of the most recent case law of the ECJ will be highlighted. On these issues see also, for example, Vervaele 2012, p. 134; Wasmeier 2014; Lock 2018.

189 C-617/10 EU:C:2013:105; see also press release no 34/18 accompanying C-617/10, 20 March 2018. See also ECJ joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P-C-252/99 P and C-254/99 P ECLI:EU:C:2002:582, para. 59.

190 The concept of 'criminal' as explained in this manner applies to all the fundamental rights on the administration of justice in articles 47-50 Charter and articles 6 and 4, Protocol VII ECHR.

191 These concepts were detailed in chapter 1. According to the ECJ in Åkerberg Fransson C-617/10 EU:C:2013:105, the first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur.

192 ECJ C-524/15 ECLI:EU:C:2018:197; C-537/16 ECLI:EU:C:2018:193; ECJ joined cases C-596/16 and C-597/16 ECLI:EU:C:2018:192.

2. Establish clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such a duplication of proceedings and penalties.
3. Ensure that the proceedings are coordinated in order to limit to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings.
4. Ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.

The national court is to determine whether these conditions are met and that the disadvantages resulting from a duplication are not excessive for the person concerned in relation to the seriousness of the offence committed.

The ECJ states that its explanation of *ne bis in idem* in the Charter in this manner does not come into conflict with the interpretation of the ECtHR of *ne bis in idem* in the ECHR.[193]

The ECJ developed this doctrine in cases concerning sanctions for breaches of tax law and market manipulation in Italy. These topics provide objectives of general interest for the EU. It is the question whether breaches of EU environmental law would provide such an objective.

2.4.4 Relevance to the evaluative framework of effective enforcement

In any case, the principle of *ne bis in idem* and the case law of the ECJ are interesting for the evaluative framework that is presented in section 2.6 of this chapter. Several aspects highlighted above are used as inspiration for the evaluative framework to assess effective environmental enforcement. As part of the framework the possibility is assessed of the combination of sanctions in the legal systems of the three Member States in light of the limitations for reasons of proportionality and *ne bis in idem*.[194] Moreover, the coordination between criminal and administrative enforcement will also be a part of this assessment.

2.5 Other European sources on effective enforcement

When searching for the substance of the enforcement formula, the leading standard is set by the interpretation of the Court of Justice. As we have seen, however, the elements in this formula remain quite abstract. This leads to the question as to what

193 ECJ C-524/15 ECLI:EU:C:2018:197; C-537/16 ECLI:EU:C:2018:193; ECJ joined cases C-596/16 and C-597/16 ECLI:EU:C:2018:192.

194 As we will see in section 2.6.3.4 of this chapter, as part of the framework, the need for a combination of sanctions for effective enforcement will be also be assessed in the Member States. However, this aspect follows from instrumental effectiveness; not from the safeguards to enforcement.

enforcement is required in a specific case for it to be effective. To further explore this, several sources are used here. First, the European Commission's ideas on effective and dissuasive criminal enforcement are highlighted (section 5.1); second, several Opinions of the Advocates General of the European Court of Justice will be set out (section 5.2).

2.5.1 The European Commission on effectiveness and dissuasion of criminal enforcement

2.5.1.1 Introduction

It may be useful to view the ideas of the European Commission to further specify effective enforcement. Although the European Union has not deemed criminal law explicitly necessary for all enforcement of environmental law, the established rule is that in certain cases the criminal law is particularly suited to ensuring the enforcement is dissuasive and effective. This was laid down in particular in two directives for the environment; the Directive on the protection of the environment through criminal law was adopted on 19 November 2008[195] and the Directive on ship-source pollution and on the introduction of penalties for infringements was adopted on 21 October 2009.[196]

> In general, the European Commission considers several pros and cons of administrative and criminal enforcement. It considers that the efficiency of the sanction system must be considered, as well as the extent to which and the reasons why existing sanctions do not achieve the desired enforcement level. The type of sanction that is considered to be the most appropriate to reach the global objective of being effective, proportionate and dissuasive should be chosen.[197] According to the European Commission, the criminal law is to be a means of last resort (*ultima ratio*).[198]

2.5.1.2 Content of the Directives

Both Directives establish a minimum set of conducts that should be considered criminal offences throughout the European Union when the conduct is committed

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195 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. The implementation date of this Directive was 26 December 2010.

196 Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements. The implementation date of this Directive was 16 November 2010.

197 Communication from the Commission of 20 September 2011 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM(2011) 573 final, p. 6.

198 Communication from the Commission of 20 September 2011 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM(2011) 573 final, p. 6. This also fits with the requirements of necessity and subsidiarity (see section 83(2) TFEU. As will be seen below, the objective to ensure a more effective protection of the environment can, according to the Commission, not be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of the instrument, be better achieved with a Directive at Community level on criminal enforcement.

intentionally or with at least serious negligence.[199] The Directive on ship-source pollution also includes reckless conduct as the basis for a criminal offence.[200] The Directive on the protection of the environment through criminal law also considers a failure to comply with a legal duty to act as conduct within the meaning of the Directive as that type of behaviour can have the same effect as active behaviour.[201] These offences concern unlawful conduct in respect of European Union legislation, Regulations and Directives, which has been incorporated into the Annexes. This includes the infringement of a law or an administrative regulation of a Member State or a decision taken by a competent authority of the Member State that gives effect to this legislation.[202]

The Directives distinguish between the addressees of the penalties: natural persons and legal persons. The Member States are under the obligation to ensure the application of effective, proportionate and dissuasive criminal penalties to the natural persons.[203] The Member States are required to ensure the application of effective, proportionate and dissuasive administrative or criminal penalties to legal persons where the criminal offences described in the Directive are committed in the interest of the legal persons or for their benefit.[204] The Directives do not create obligations regarding the application of such penalties, or any other available system of law enforcement, in individual cases.[205] The authorities' discretion to balance the interests in specific cases, therefore, remains.[206]

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199 Article 3 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law and article 4 Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.

200 Article 4 Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.

201 Preamble, para. 6 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law..

202 Article 2 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law..

203 Article 8a of Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements; article 5 of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. NB the term 'penalties' refers to sanctions in general, not necessarily to punitive sanctions. See the different language versions of the Directives, in Dutch '*sancties*' is used; in German '*Sanktionen*'.

204 Article 8b and 8c of Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements; article 6 and 7 of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

205 Preamble, para. 10 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

206 As has been explained earlier in this chapter, the Member States also remain obliged to ensure the practical effect of the Directives.

2.5.1.3 The Commission's reasons for including criminal enforcement in the Directives

The preamble to the Directives, in particular the Directive on the protection of the environment through criminal law, gives insight into the background and purpose of the rules it contains. The text of the Impact assessment and the Notes to the Directive Proposal for the Directive on the protection of the environment through criminal law, as it was previous to its amendment as a result of the Court's case law, also provide insight.[207] This will be set out in the following.

In respect of serious environmental offences, the Commission is convinced that the harmonisation of criminal offences is the only appropriate means to enforce these offences in an effective and dissuasive manner. European Union policy on the environment must aim for a high level of protection. According to the Commission, the complete compliance with the laws for the effective protection of the environment cannot be sufficiently achieved with the existing systems of penalties of the Member States. Namely, these systems show significant discrepancies between them, not only as to the behaviours considered as criminal offences but also with regard to the levels of sanctions for environmental crime.[208] The objective to ensure a more effective protection of the environment can thus, according to the Commission, not be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of the instrument, be better achieved with a Directive at Community level.[209]

The Commission has established the following four grounds – in the preparatory documents for the Directive – to support its consideration that the criminal enforcement of certain environmental law is more effective than the enforcement that is currently in place in the systems of the Member States:

1. The imposition of criminal sanctions demonstrates a social, or, moral disapproval of a qualitatively different nature compared to administrative sanctions or a compensation mechanism under civil law.[210] Even if the ultimate level of fines might not differ between criminal and non-criminal fines, criminal law would have a much stronger deterrent effect because of this, according to the Commissions. This effect also extends to the inclusion

207 Commission Working Paper Impact Assessment to the proposal for a directive on the protection of the environment through criminal law and Notes to the Proposal for a Directive 2007(51).

208 Preamble, para. 1-3 and 14 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.; Impact Assessment to the Proposal for Directive COM 2007(51), p. 14-18. This was also established e.g. in the study ordered by the Commission and carried out by Huglo Lepage 2007.

209 Preamble, para. 14 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

210 Preamble, para. 3 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law; Explanatory Memorandum to Directive 2007(22), 14 February 2002, p. 2 and preamble, para. 3 Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.

of judgments in criminal records.[211]

2. Administrative or other financial sanctions may not be dissuasive in cases where the offenders are impecunious or, on the contrary, financially very strong. Prison penalties might be required in such cases.
3. The means of criminal investigation and prosecution (and of mutual legal assistance between Member States) are more powerful than tools of administrative or civil law and can enhance the effectiveness of those procedures.[212]
4. The Commission finds there is an additional guarantee of impartiality because investigating authorities, i.e. other authorities than those administrative authorities that have granted exploitation licences or authorisations to pollute, will be involved in a criminal investigation.[213]

The Directive on ship-source pollution and the introduction of penalties for infringements also establishes in its preamble that criminal penalties demonstrate social disapproval of a different nature than administrative sanctions and thereby strengthen compliance with the legislation on ship-source pollution in force and should be sufficiently severe to dissuade all potential polluters from any violation thereof. The Directive is aimed at further strengthening the existing system of sanctions for illicit ship-source discharges of polluting substances by the introduction of criminal penalties.[214]

2.5.1.4 Relevance to the evaluative framework of effective enforcement

As we have seen, the European Commission entertains several, some rather abstract, presumptions about the criminal law in the Member States and the effectiveness of criminal law in the abstract. It will be interesting to see in the country chapters what ideas shape the discussion on the effectiveness of criminal law and whether the abovementioned presumptions fit with the enforcement systems that are in place for environmental law in the three jurisdictions. Moreover, the Commission's vision on the impartiality of criminal investigation, due to its separation from the administrative authorities, supports the inclusion in the evaluative framework of the topic of decision-making independence and the aspect of preventing regulatory bias. See further section 2.6.2 of this chapter.

211 Commission Working Paper Impact Assessment to the proposal for a directive on the protection of the environment through criminal law and Notes to the Proposal for a Directive 2007(51), p. 18.

212 Explanatory Memorandum to the Proposal for Directive 2007(22), 14 February 2002, p. 2 and Preamble to the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law., para. 4.

213 Explanatory Memorandum to the Proposal for Directive 2007(22), 14 February 2002, p. 2.

214 Preamble, para. 3 Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.

2.5.2 The Advocates General on effectiveness and dissuasion

Since the formation of the enforcement formula by the ECJ, several Advocates General have given their opinion on the content of the formula, in particular by delving into the specifics of what would make enforcement effective and dissuasive.[215] While the Court has on occasion referred to the Opinions of the Advocates General on effectiveness and dissuasion, many of the readings by the Advocates General have not been explicitly acknowledged by the Court.[216] Here, several Opinions will be highlighted on the standards of effectiveness and dissuasion.[217] This may provide guidance for the evaluative framework for effective enforcement that is completed in section 2.6 of this chapter.

2.5.2.1 Effectiveness

In several Opinions, the late Advocate General Geelhoed describes that from the general obligation in article 4 section 3 TEU follows that the Member States take all measures necessary to ensure that Community law is applied and enforced effectively and that its full effect is achieved.[218] More specifically, this means that the Member States must have an adequate legal and administrative framework in place for the application and enforcement of European Union law. According to Geelhoed, this means that competent authorities are appointed, adequate powers and sufficient resources are made available, facilities are created to monitor compliance, sanctions are laid down in case of offences, enforcement structures are established in relation to such offences, and legal protection is ensured.[219] The elements mentioned are not surprising. However, by making them explicit in such a comprehensive manner, Geelhoed provides more detail on the architecture for the enforcement of EU law. Furthermore, Geelhoed is much clearer than the Court in the connection between inspection/supervision and sanctioning, presenting the total picture of enforcement. The necessity for both inspection and sanctioning for effective enforcement is also

215 Advocates General have also discussed proportionality and non-discrimination but less extensively than the two other elements of the enforcement formula. Moreover, the Court has acknowledged the opinion of the Advocates General on these elements.

216 The Court does sometimes refer to the Opinion of the Advocate General. See e.g. the reference to the Opinion of Advocate General Geelhoed in the Court's judgment in C-494/01 ECLI:EU:C:2005:250, para. 117.

217 This section does not intend to be exhaustive.

218 Opinion of Advocate General Geelhoed ECLI:EU:C:2004:274, para. 29, in ECJ C-304/02; Opinion of Advocate General Geelhoed ECLI:EU:C:2004:546, para. 28, in ECJ C-494/01: "it follows from both the general obligation to achieve the objective of a directive and Article 10 EC that the steps taken and machinery set in place for this purpose are effective."

219 See also ECJ C-60/05 ECLI:EU:C:2006:378, para. 39. The organisational aspect of implementation is aimed at creating the legal and administrative framework for the proper application and enforcement of the national provisions incorporating the norms contained in the Directive. This involves designating authorities competent for applying these provisions, ensuring that these authorities are endowed with adequate powers, creating facilities for monitoring compliance with these provisions, providing guarantees for legal protection, ensuring the availability of legal remedies, laying down sanctions in case of offences against these provisions and establishing enforcement structures in relation to offences.

made explicit by Advocate General Kokott, when she establishes, with regard to a directive which required the auditing of accounts and 'appropriate penalties': "the Community legislature requires Member States to ensure that they have *both* an effective preventive system of scrutiny *and* an effective punitive system of scrutiny".[220]

Advocate General Geelhoed describes the aforementioned components in his Opinion as the 'organisational aspect' of the implementation of directives. Moreover, Geelhoed reminds the Member States that where their enforcement effort is inadequate, it would be impossible to attain the objectives of the relevant European Union provisions in a more or less uniform fashion throughout the European Union.[221] Part of this enforcement effort for the Member States is to ensure the practical and structural effect of the legal and administrative framework thus put in place. Advocate General Geelhoed describes this as follows:

> "Effectiveness in this respect means that the system has both a preventive and a corrective effect in the sense that it ensures that the factual result to be obtained by the system is realised in practice, i.e. that waste is recovered, disposed of or treated in a manner which does not adversely affect human health or the environment. In addition, this objective must be secured in a structural manner. By this I mean that the level of compliance with the provisions aimed at securing these objectives is such that infringements may be considered to be merely incidental." [222]

In other words, by ensuring application in practice of the framework by the Member States, general prevention can be achieved. This involves that offenders run a credible risk of being detected and being penalised in such a way as at least to deprive them of any economic benefit accruing from their offence (the latter would also mean that the legal framework must ensure this is possible).[223] Control effort and the threat of repressive action must generate sufficient pressure to make noncompliance economically unattractive and therefore to ensure that the situation envisaged by the relevant European Union provisions is realised in practice.[224]
The relevance of the legal framework for the practical effectiveness of enforcement is emphasised by Advocate General Kokott:

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220 Opinion of Advocate-General Kokott ECLI:EU:C:2004:624, in ECJ C387/02, C391/02 and C403/02, para. 129.
221 Explicitly identified in the Opinion of Advocate General Geelhoed ECLI:EU:C:2004:274, para. 29, in ECJ C-304/02.
222 Opinion of Advocate General Geelhoed ECLI:EU:C:2004:546, para. 81, in ECJ C-494/01.
223 Opinion of Advocate General Geelhoed ECLI:EU:C:2004:546, para. 28, in ECJ C-494/01.
224 Opinion of Advocate General Geelhoed ECLI:EU:C:2004:546, para. 28, in ECJ C-494/01. See also the opinion of Advocate General Geelhoed ECLI:EU:C:2004:274, para. 29 and para. 39, in ECJ C-304/02: "control effort and the threat of repressive action must generate sufficient pressure to make non-compliance economically unattractive and therefore to ensure that the situation envisaged by the relevant provisions is realised in practice." The case underlying this judgment was that France had not complied with an earlier judgment of the ECJ on the controls specified in a regulation on the Community fisheries policy (Regulation nr. 2847/93 to introduce a regulation on control for the community fisheries policy).

> "Rules laying down penalties are *effective* where they are framed in such a way that they do not make it practically impossible or excessively difficult to impose the penalty provided for (and, therefore, to attain the objectives pursued by Community law). This follows from the principle of *effectiveness*, (…)" [225]

Advocate General Kokott focuses in several of her Opinions on the framing of the system of sanctions in the Member States. According to Kokott, a system of sanctions is to be framed in such a way as to ensure that anyone who commits an infringement fears that a sanction will be imposed on him.[226] Kokott has also said that on this aspect the criterion of dissuasiveness overlaps with that of effectiveness.[227]
Moreover, Advocate General Kokott points out the scope of the Member States' obligation of effective enforcement in the case where there are two systems of sanctions in place – administrative sanctions and criminal sanctions – for the enforcement of EU law. A combination of administrative sanctions and criminal sanctions for the enforcement of EU law is possible. However, according to Kokott,

> "It is contrary to the requirements of EU law for a Member State to have in place a national system of sanctions, drawn from a combination of administrative and criminal law provisions, on two pillars which neither individually nor jointly satisfy the criteria of being effective, proportionate and dissuasive."[228]

Moreover, account must be taken of any interaction between criminal sanctions and administrative sanctions that may adversely affect either system and, as a consequence, prevent effective enforcement by the Member States.[229]
Specifically on the dissuasive effect of sanctions, Kokott has said that, besides the fear an offender must have of a sanction being imposed, the nature and the level of the sanction must also contribute to dissuasion.[230] Advocate General Van Gerven has

225 Particularly Advocate General Kokott ECLI:EU:C:2004:624, para. 128, in joined cases ECJ C387/02, C391/02 and C403/02. Kokott refers to the Opinion of Advocate General Van Gerven in ECJ C-326/88, paragraph 8. According to Van Gerven, 'effective' means "amongst other things, that the Member States must endeavour to attain and implement the objectives of the relevant provisions of Community law".

226 Opinion of Advocate General Kokott ECLI:EU:C:2004:624, para. 108, in ECJ joined cases C387/02, C391/02 and C403/02; Opinion of Advocate General Kokott ECLI:EU:C:2015:293, para. 88, in ECJ C-105/14.

227 Opinion of Advocate General Kokott ECLI:EU:C:2004:624, para. 89, in ECJ joined cases C387/02, C391/02 and C403/02.

228 Opinion of Advocate General Kokott ECLI:EU:C:2015:293, para. 85, in ECJ C-105/14.

229 Opinion of Advocate General Kokott ECLI:EU:C:2015:293, para. 89, in ECJ C-105/14: "Thus, deficiencies in the system of criminal penalties may adversely affect the system of administrative penalties. This will be the case, for example, where the national law provides that administrative proceedings are to be stayed for the duration of ongoing criminal proceedings and, once the limitation period for criminal prosecution has expired, cannot subsequently be resumed because the infringement concerned has become time-barred in accordance with criteria laid down in administrative law, too."

230 See Opinion of Advocate General Kokott ECLI:EU:C:2004:624, point 89, in ECJ joined cases C387/02, C391/02 and C403/02.

stated that the dissuasive sanctions must be sufficiently strict, regard being had to the objectives pursued.[231] Both Advocate Generals Stix-Hackl and Advocate General Jacobs have commented on the dissuasive function of sanctions, and stated that while criminal penalties also seek to dissuade, it does not follow that every dissuasive sanction is penal.[232]

2.5.2.2 Relevance to the evaluative framework of effective enforcement

On the basis of the above-mentioned Opinions of the Advocates General of the European Court of Justice some guidance can be derived for the effective enforcement framework that will be completed in the section 2.6 of this chapter.

As we will see, the concept of the adequate legal and administrative framework supports the focus in the evaluative framework on aspects of the organisation and the sanctions. Moreover, the reference – in the case of dissuasion – to the strictness of sanctions with regard to the objectives pursued, also supports a focus in the evaluative framework on enforcement goals for assessing the effectiveness of sanctions. Also, the opinions on practical effect lead to the inclusion in the enforcement goals of the specific goal of siphoning off economic benefit. Additionally, it will be assessed whether the different systems of sanctions can be combined. And, finally, the aspect of the likelihood of the imposition of sanctions will be connected in the evaluative framework to quality and consistency of enforcement, and whether policies are in place to ensure a coherent and consistent application of effective enforcement.

2.6 Completing the framework: tailored enforcement by an expedient organisation

2.6.1 'Tailored enforcement'

As described in the previous sections, there is an increasing EU influence on enforcement. Still, EU law on enforcement remains mostly quite abstract and leaves quite a lot of discretion to the Member States on the effective enforcement of environmental law. The concept of effective enforcement therefore requires more substance to make it practicable.

In this section, the evaluative framework is therefore finalised with the guidance of the previously mentioned sources – EU law, several Opinions of the Advocates General and the European Commission – and with the addition of literature on effective enforcement.

It was described in the first part of this chapter (sections 2.2 – 2.5) that the EU, the Commission and the Advocates General have several preferences for effective

231 Opinion of Advocate General Van Gerven ECLI:EU:C:1990:291, section 8, in ECJ C-326/88.

232 Opinion of Advocate General Stix-Hackl ECLI:EU:C:2001:645 in ECJ C-210/00, referring to the Opinion of Advocate General Jacobs ECLI:EU:C:1992:237, paragraph 11, in ECJ C-240/90. See also De Moor-Van Vugt 2012, p. 13.

enforcement, which can be added onto by literature on effective enforcement. As already mentioned, for the benefit of the evaluative framework, this literature is used in this research to refine the course charted by the EU on effective environmental enforcement.
This literature contains current qualitative and quantitative empirical research as well as policy documents on effective enforcement and on good supervision. The Netherlands has a well-established literature and policy practice in discussing aspects of effective enforcement.[233] In the last couple of years, England has seen a surge in literature on (optimal) enforcement, particularly through government reviews of sanctions.[234] In Germany as well a debate on enforcement is taking place. Academic literature as far back as, at least, 1975 has signalled the enforcement deficits with regard to environmental law.[235]

To finalise the evaluative framework of effective enforcement, first, it is important to establish what a practicable concept of effective enforcement entails. Enforcement is a means to ensure compliance with legislation. In general, an effective legal and administrative framework[236] for enforcement provides an organisation and a set of instruments that protect the values and attain the goals of legislation.[237] The main goal of environmental legislation is the protection of the environment.[238]
A concept of effective enforcement addresses whether the organisation enables tit-for-tat enforcement action and whether sanctions can be made to measure.[239] Based on this concept, I formulate effective enforcement in this research as the pursuit of compliance through 'tailored enforcement'. For this purpose, tailored enforcement requires:

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233 See, for example, Blomberg & Michiels 1997; Blomberg & Michiels 1998; Blomberg 2000; Michiels 2006; Struiksma, De Ridder & Winter 2007; Van Wingerde 2012; Albers et al 2014; Michiels, Blomberg & Jurgens 2016. In connection with policy, much literature has been produced, especially since the mid 1990s in the shape of reviews and projects for improving enforcement, e.g. Commissie Michiels 1998. After the incidents in Enschede en Volendam in 2002, the project 'Professionalising enforcement' was started. Subsequent projects followed (for a full overview of the developments from 2001 until 2014 see also www.infomil.nl/onderwerpen/integrale/handhaving/ archief/procesverloop/ (last visited 1 June 2019). See also, for example, Commissie Mans, *De tijd is rijp*, Kamerstukken II 2008-2009, 22 343, nr. 201; Kamerstukken 2008-2009, 29 383, nr. 130; Kamerstukken II, 2008-2009, 29383, nr. 124, Kamerstukken II 22343, nr. 215 en nr. 236; De Ridder, Schol & Struiksma 2009; Keulen et al 2015; Keulen & Bröring 2017. See further chapter 9.

234 See for example the Hampton review 2005; the Macrory review 2006; the report *Implementing Hampton: from enforcement to compliance*, London: HM Treasury, BRE and the Cabinet Office 2006; the Rogers review 2007; which all amounted to proposals for new legislation. Also, Macrory 2014, in particular p. 9-180. This is further described in chapter 3.

235 See for example: Sparwasser, Engel & Voβkuhle 2003, p. 65, and the literature mentioned there, such as Winter 1975; Mayntz 1978; Rüther 1991; Graf 2002. Also Kim 2004; Zellmer 2005a; Zellmer 2005b; Sammüller-Gradl 2014.

236 This is a term borrowed from Advocate General Geelhoed, see section 2.5.3 of this chapter. To avoid confusion between the 'evaluative framework' and the 'legal and administrative framework', the term 'architecture' will be used to indicate the latter. See chapter 1, section 1.3.3 for the term 'architecture'.

237 Here, the term of Advocate General Geelhoed is used. According to the Merriam-Webster Dictionary, 'effective' is the actual production of or the power to produce an effect.

238 As we will see in section 2.6.3.3 of this chapter, to achieve this main goal through effective enforcement, seven enforcement goals will be distinguished.

239 See footnote 178 and 179.

a. embedding of enforcement in an expedient organisation (institutional requirements), which enables,
b. enforcement action, i.e. sanctions, moulded to the characteristics of specific (potential) non-compliance (instrumental requirements).

What requirements are then to be satisfied to fulfil this concept of effective enforcement? Below, the two categories of requirements – institutional requirements and instrumental requirements – will be set out further.[240] Procedural requirements, i.e. requirements concerning the application of powers by the authorities, are part of both of these categories. The institutional requirements cover the organisation of inspection and sanctions; the instrumental requirements cover sanctions only.

2.6.2 Institutional requirements

2.6.2.1 Introduction

The institutional requirements concern the manner in which enforcement is embedded within public enforcement authorities. Fulfilling these requirements in a structural manner, i.e. where these elements are structurally embedded in the enforcement organisation, can, moreover, contribute to an effective, expedient organisation of enforcement as far as relevant to being able to impose made-to-measure and, thereby, tit-for-tat enforcement action. Where these institutional requirements are not fulfilled, this may form an obstacle for effective enforcement action by an expedient organisation. The term 'expedient' indicates 'suitability for achieving a particular end in a given circumstance'.[241] In enforcement, this means that the organisation allows the enforcement instruments to fully achieve their effect.[242] In other words, the institutional requirements contribute to an organisation that can formulate and take effective enforcement action.

The following three institutional requirements are included in the framework applied in this research:

1. degree of independence of enforcement by the organisation;
2. specialisation of or within the organisation:
   - degree of expertise;
   - appropriate proximity to non-compliance; and,
3. cooperation and coordination between (and within) authorities.

240 As noted in chapter 1, this research does not look at the enforceability of legislation. Thus, legislative requirements will not be discussed. See on the enforceability of EU environmental legislation, e.g. Versluis 2003. Versluis even concludes that there are cases where implementation (including enforcement) of Directives complies with European norms, but the legislation is not enforceable. See also Voermans 2005, p. 80.

241 Also 'the quality or state of being suited to the end in view', as (both) defined by the Merriam-Webster Dictionary.

242 Practical aspects of the organisation, such as resources that an organisation has available, are not discussed.

These institutional requirements cover the organisation of inspection and sanctioning.[243] As will be seen below, the requirements are not absolute. This means that it is not necessary that there should be full independence, full specialisation etc. Instead it is relevant to effectiveness that the organisation possesses these elements to a certain extent to support effective enforcement.

2.6.2.2 Decision-making independence

The independence of enforcement authorities has drawn increasing attention in recent years.[244] In literature, this requirement is explained as independence from politics and the market, i.e. "the room for discretion for supervisors to take (individual) decisions without being (unduly) influenced by politics or the market".[245] At European level, directives and the European Court of Justice have established full independence from the market and from politics as a requirement for utilities and financial regulators.[246] In the area of environmental protection, 'the market' is 'the regulated', i.e. the group of actors – persons and businesses – regulated by environmental norms, including permits.[247] This is the focus of this requirement.[248]

There is no European requirement of (full) independence for environmental enforcement.[249] However, as we have seen, the aspect of independence does play a role. In addressing the benefits of the criminal enforcement of environmental law, the European Commission has emphasised the impartiality of criminal investigation due to its separation from the administrative authorities.

Literature provides additional substance and a broader scope to what the Commission has emphasised. The literature on environmental enforcement also proposes a certain level of decision-making independence of the enforcement authorities in a broader sense.[250]

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243 In part inspired by the European Commission's opinion on the effectiveness of criminal law, see section 2.5.1.

244 On independence of and within enforcement authorities, in particular environmental enforcement authorities, see e.g. Blomberg 2000; Biezeveld 2002; Biezeveld & Stoové 2012. There is also a lot of literature on the independence of 'supervisory or agency' authorities, see the report *De Kaderstellende visie op toezicht*, Kamerstukken II 2000-2001, 27 831, nr. 1. For a recent overview Van den Broek 2015, p. 48-52; see also Ottow 2015; Stouten 2012; Aelen 2014.

245 Van den Broek 2015, p. 49.

246 Article 35 section 4 Directive 2009/72/EG of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC; article 39 section 1 Richtlijn 2009/73/EG of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; ECJ C-474/08 ECLI:EU:C:2009:681; ECJ C-518/07 ECLI:EU:C:2010:125; Biezeveld & Stoové 2012, p. 19-20.

247 Here, I only focus on the regulated, not on politics.

248 Therefore, independence from politics is not discussed.

249 Biezeveld & Stoové 2012, p. 19-20.

250 See e.g. Blomberg 2000; Biezeveld 2002; Biezeveld & Stoové 2012. See also Prosser 2010 for different subcategories of independence.

Decision-making independence may be embedded in the enforcement organisation through a separation between:

a. regulation (norm setting) and administrative/criminal enforcement, including administrative inspection and criminal investigation; and,
b. inspection/investigation and administrative/criminal sanctioning.[251]

A degree of decision-making independence can benefit effective enforcement. When an enforcement authority has certain decision-making independence this may enrich the legitimacy of enforcement decisions for the regulated by enhancing objectiveness and impartiality. Decision-making independence can ensure that appropriate sanctions are chosen based on the relevant facts of the case that have been objectively ascertained. This is connected to the minimalisation or avoidance of biases (conflicts of interest) due to independence of decision-making. Two biases are relevant in this respect. These are, first, the regulatory bias, also called regulatory capture, which is relevant for the separation of regulatory functions and enforcement functions; and, second, the prosecutorial bias, which is relevant for the separation of inspection and administrative and criminal sanctioning.[252]

Regulatory bias

The regulatory bias or 'regulatory capture' describes a situation in which the regulator lets the interests of the regulated prevail over the public interests it has been appointed to protect.[253] For example, an enforcement authority lets the interests of the owner of a chemical plant that emits hazardous substances prevail over the protection of the environment that is harmed by those substances, when that authority decides to refrain from taking any measures interrupting operation of the plant. This situation is a result of social identification of the regulator – the enforcement authority – with the regulated, due to the mandatory relationship that the regulator and the regulated have, for example with regard to the permitting of activities and the supervision of open norms. Through this relationship, trust has developed between the regulator and the regulated, which may prevent the former from objectively viewing non-compliance for what it is and taking appropriate enforcement action.[254]

This means that a certain separation is necessary between the authority or that part of the authority where the norms are set, i.e. the regulatory functions, and the authority or part of the authority that pursues administrative or criminal enforcement of violations of that norm. Decision-making on enforcement within the authority ought to be based on all the facts of the case in an unbiased, objective case file. As we have

251 Separation of other aspects is also possible, for example between policymaking and enforcement. See also Prosser 2010.
252 As will be explained below, 'prosecutorial' is to be interpreted broadly as it includes administrative and criminal sanctioning.
253 Van den Broek 2015, p. 49-50; Dal Bó 2006, p. 203; Aelen 2014, p. 221-225; Jansen & Aelen 2015, p. 5-6.
254 See also, for example, Prosser 2010, p. 5-6.

seen, the European Commission also supports preventing regulatory bias, specifically by separating regulatory functions and criminal investigation.[255]

Prosecutorial bias

Prosecutorial bias indicates a situation that an alleged violation of the law is necessarily sanctioned with less than sufficient motivation or proof.[256] Although it is called prosecutorial, this type of bias may occur when the functions of inspection or investigation and sanctioning are combined.[257] This includes the imposition of sanctions by the prosecutor.[258]

More specifically, the source of prosecutorial bias can be confirmation bias.[259] This is the tendency of the enforcement authority to search for evidence that confirms rather than challenges the initial belief that a violation is likely to be found.[260] This infringes upon the rights of the regulated in the enforcement procedure, and, moreover, can lead to sanctions that are not made to measure to the circumstances of the case. It may therefore be relevant to separate inspection and investigation from sanctioning to decrease prosecutorial bias, or to provide a set of guarantees within an organisation to ensure that objective decision-making with regard to enforcement will take place.[261] In particular in case of punitive sanctions, it is important that it is structurally ensured that prosecutorial bias is avoided, through the separation of inspection and investigation from sanctioning.[262]

The Assessment

For the purpose of this research, it will be assessed if a degree of decision-making independence is embedded in the enforcement organisation through a separation between:

a. regulatory functions and administrative/criminal enforcement, including administrative inspection and criminal investigation; and,
b. inspection/investigation and administrative/criminal sanctioning.[263]

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255 See section 2.5.1 of this chapter.
256 Scordamaglia-Tousis 2013, p. 89.
257 Wils 2004, p. 214-216; Scordamaglia-Tousis 2013, p. 89.
258 The prosecutor can impose such sanctions as alternatives for prosecution. These alternatives are often also considered an act of prosecution.
259 Other sources of prosecutorial bias are hindsight bias, i.e. the enforcer's tendency to believe, with the benefit of hindsight, that efforts undertaken to prove a case were worth it so as to justify the resources, time and energy spent on investigating the case; and policy bias, i.e. the result driven desire to show high levels of enforcement activity, Wils 2004, p. 214-216; Scordamaglia-Tousis 2013, p. 90-91.
260 Wils 2004, p. 214; Scordamaglia-Tousis 2013, p. 90.
261 Scordamaglia-Tousis 2013, p. 105-107.
262 See also Michiels, Blomberg & Jurgens 2016, p. 376-377.
263 It is not assessed in this research whether there is a separation between policymaking and enforcement. The term regulation can also be used to include enforcement by the authorities; in this research I will use the terms regulation and enforcement mostly separately.

Such a separation can, for example, take the form of a functional separation at the level of the authority, i.e. separate authorities for separate functions; a separation at management level; a separation within the authority in departments, for example through the application of 'Chinese walls' whereby contact between the departments is out of the question; or a functional or personal separation between the officials responsible.[264]

In any case, a requirement of full decision-making independence, which implies a strict separation between functions, in particular with regard to regulatory functions, could be considered ineffective.[265] It is hardly beneficial for an environmental enforcement authority to be fully independent from those to which the norms that are enforced apply to, i.e. the regulated. Enforcement authorities play an important role in advising the regulated on the substance of the norms that are applicable to them, the authorities require information from the regulated to pursue enforcement, and feedback from the regulated is important for the balancing of interests as to what enforcement instruments are appropriate in a given case.[266] In the same vein, the authority or department that is in charge of regulatory functions can inform the enforcement authority or department about the regulated and the previously mentioned aspects that are relevant to enforcement, and in this way enhance the balancing of interests for enforcement.[267]

2.6.2.3 Specialisation of the enforcement organisation

Specialisation of the enforcement organisation is the term chosen in this research to indicate two aspects of the organisation:

a. the expertise within an enforcement organisation; and,
b. the proximity of an enforcement organisation to the situation of non-compliance.

The availability of a certain amount of both can benefit the effectiveness of enforcement by enhancing the ability of the enforcement authorities to choose and execute sanctions fitting to the non-compliance, the offender and balancing the interests at hand, as well as ensuring consistency of enforcement.

a. Expertise

An appropriate proximity can enable the enforcement authority/organisation to take stock of the relevant characteristics of the non-compliance and the interests concerned. An essential factor that connects proximity to the aspect of expertise is that the latter enables the enforcement organisation to recognize such characteristics,

264 See also Michiels, Blomberg & Jurgens 2016, p. 373-374.
265 Michiels, Blomberg & Jurgens 2016, p. 373-374.
266 Biezeveld & Stoové 2012, p. 27.
267 Michiels, Blomberg & Jurgens 2016, p. 373-374. Also a full separation between policy making and enforcement may likely not be effective. Crosspollination between policymaking and enforcement can be very beneficial for coming to a realistic policy and enforcement thereof. This aspect will not be further discussed.

to accord these characteristics proper weight and to balance the interests involved for the purpose of made-to-measure enforcement.[268] Moreover, expertise in the area of environmental enforcement enables an enforcement authority to conduct enforcement consistently. Choosing effective enforcement action for environmental protection therefore requires expertise in the area of the environment and in the area of enforcement. This includes technical expertise to assess compliance with operational rules, which can be quite complex, for example for the operation of chemical plants. Moreover, strategy and policy also contribute to this. Expertise will benefit the quality of enforcement by enabling appropriate and consistent enforcement action. In this respect, the factor of expertise is connected to the Opinion of the Advocate General on the likelihood that the sanctions are imposed. The Advocate General connects this to the dissuasiveness of the sanctions.

b. Proximity: level of government

Ideally, the enforcement organisation is at an appropriate proximity to the non-compliance.[269] This means that it is essential that the enforcement authorities can cover the scale of the violations as well as the scale of the consequences of the violations.[270] In this respect, scale refers to the local, regional, cross-regional or national scope of the violation and its consequences. At the same time, authorities should be sufficiently proximate to the regulated and the infringement to be able to acknowledge the characteristics of the non-compliance.[271] As mentioned before, enforcement authorities must also be sufficiently distant from the regulated to prevent conflicts of interests, such as regulatory bias.[272] In any case, the organisation should be able to ensure that the interests involved are taken into account. This element is particularly aimed at the level of government at which the administrative enforcement authorities and the criminal enforcement authorities operate, with the exception of the criminal courts.

> Although the criminal court system in each of the three jurisdictions does divide competences dependent on, for example, the geographical and the substantive scope of the offence, it cannot be said that with regard to the courts an effective proximity would exist or, more importantly, should be of influence on the adjudication.

268 Commissie Mans 2008, p. 43.
269 Commissie Mans 2008, p. 42.
270 See also Biezeveld & Stoové 2012, p. 29.
271 More on the characteristics, i.e. typology of the non-compliance, is to be found in the next section on instrumental requirements.
272 See above, section 2.6.2.2 of this chapter.

There are benefits and drawbacks to positioning the enforcement organisation at the central or at the local level of government.[273] The exercise of powers at a more central level of government in relation to the violation has the advantage that no negative or positive conflicts of competence may arise with regard to cross regional violations, i.e. violations the scope of which runs across the borders of municipalities, regions or nationwide. In this way, a uniform enforcement of comparable cross-border offences can be better guaranteed.[274]

A possible advantage of exercising the powers at a more local level can be that the specific circumstances of the violation are more visible.[275] However, there are regulated areas where proximity to the contravention does not imply a localised view, such as, for example, regarding the transregional transport of waste. The cross-border visibility necessary in this example means that the level of government involved should be regional or even central.[276]

The Assessment

The requirement of expertise is tested in this research through establishing whether the competent authority is designated as an enforcement authority and/or an authority particularly equipped for environmental protection, or whether expertise is ensured in another manner. Moreover, it will be assessed at what level of government the enforcement organisation operates in the three countries under consideration in this research and what this means for the proximity of the enforcement organisation to local circumstances.

2.6.2.4 Coordination and cooperation between enforcement authorities

Coordination and cooperation between enforcement authorities is necessary to provide effective enforcement action when more than one authority is involved in enforcement.[277] There are two reasons for the involvement of multiple authorities for enforcement: one, the organisational structure for enforcement as laid down in the law (tiered, fragmented, unified, decentralised); and, two, the need for multiple authorities to exercise their enforcement powers to achieve effective enforcement in a given situation of non-compliance. With regard to the former, coordination can benefit effective enforcement; with regard to the latter, cooperation can.

273 Commissie Mans 2008, p. 52-53.
274 Commissie Mans 2008, p. 27 and p. 43-44.
275 Commissie Mans 2008, p. 43.
276 Commissie Mans 2008, p. 42-43.
277 See also Commissie Mans 2008, p. 44-45.

a. Coordination

An unclear division of competences between authorities in the legal framework for enforcement can result in conflicts of competences. In case of such conflicts, coordination between the enforcement authorities involved is necessary.[278] Competence conflicts may impact effective enforcement, through substandard or even non-existent enforcement. Two types of competence conflicts are generally distinguished: positive and negative. A positive conflict of competences can arise when there are several authorities competent to enforce a specific violation.[279] A negative conflict of competences occurs when no authority is competent for sanctioning a particular violation.

Through coordination between the enforcement authorities involved, positive conflicts of competence can be dealt with appropriately, and negative conflicts of competence can be avoided.[280] When there is no coordination mechanisms laid down in the law, or in place in fact, a concurrence of competences may lead to a lack of any enforcement action, or the taking of such action by each of the authorities involved, leading to a disproportionate reaction or a violation of the human right of *ne bis in idem*.[281]

b. Cooperation

Cooperation between enforcement authorities may be necessary when each of them is providing a part of tailored enforcement action. This occurs when enforcement action by several authorities from different systems – administrative or criminal – is required to provide effective enforcement due to their exclusive competence to impose certain instruments, i.e. integrated enforcement.[282] When there is no cooperation mechanisms laid down in the law, or in place in fact, this may lead to a disproportionate reaction – too little or too much – or a violation of the human right of *ne bis in idem*.

The Assessment

It will be assessed in the three countries if there are coordination and cooperation mechanisms in place. To examine this aspect in the three countries, the question will be asked as to what level of government – central or local – the enforcement powers are attributed to and carried out at, and, where this will result in concurrence of

278 Commissie Mans 2008, p. 44-45; also, Michiels, Blomberg & Jurgens 2016, p. 378.

279 This can occur for example when a violation is local, but still spans the boundaries of more than one region or when both administrative and criminal or other public law authorities have parallel competence to enforce (aspects of) a violation.

280 This solution does not apply to negative competence conflicts that result from lacunae in legislation.

281 See previously, section 2.4.3 of this chapter.

282 This may lead to the concurrent or the consecutive imposition of sanctions. This will be explained further in section 2.6.3.4 of this chapter.

competences between the authorities, whether coordination and cooperation mechanisms are in place.

2.6.2.5 Other aspects

There are more aspects of the organisation that are relevant to effective enforcement, such as aspects of regulatory capacity in terms of monetary resources, for example, enabling an enforcement authority in practice to carry out its enforcement powers frequently with a sufficient number of officers. Such more quantitative aspects play an important role in the considerations that authorities may make in designing their enforcement organisation. However, these are not the subjects of this research. Moreover, as mentioned in chapter 1, effectiveness in practice of the enforcement organisation is not researched. This means that there is no empirical examination of any aspects of the organisation in this research.[283]

2.6.2.6 Conclusion

Enforcement should be embedded in an expedient organisation, which entails structural guarantees within the enforcement organisation as summarised in the table below.

Institutional requirements
- Degree of decision-making independence by the enforcement organisation
  - separation between regulatory functions and enforcement functions
  - separation between inspection or investigation and sanctioning
- Specialisation of or within the organisation
  - degree of expertise
  - appropriate proximity to non-compliance
- Coordination and Cooperation between enforcement authorities

2.6.3 Instrumental requirements

2.6.3.1 Introduction

As introduced above, the second set of requirements for tailored enforcement – that form a part of the legal and administrative framework for effective enforcement – focuses on the instruments, specifically the sanctions. In this respect, tailored enforcement requires sanctions that are moulded to the characteristics of specific (potential) non-compliance and are able to achieve the main goal of environmental protection.

283 See chapter 1, section 1.2.

This requirement operates from the viewpoint of 'different crimes have different causes, different offenders commit crimes for different reasons, and sensible prevention policies[284] should take account of those differences'.[285] To accommodate this, the three Member States should possess a varied toolbox of sanctions, which can be flexibly applied. Two elements are important to determine whether the three Member States that are the subject of this research have such a toolbox of sanctions available: the already-mentioned characteristics of the non-compliance, which I will hereafter call 'the typology' of the non-compliance, and the enforcement goals, which are linked to the main goal of environmental protection. I consider these two elements as intertwined, as the typology of non-compliance determines the enforcement goals appropriate to achieve the main goal of environmental protection through effective enforcement.

> Effectiveness can be achieved through reparatory and punitive sanctions, as both serve to attain the goal of environmental protection. For this reason, the model for effective enforcement includes enforcement goals that aim for reparation and for punishment.

When it is analysed whether the available sanctions can cover the typology of non-compliance and the enforcement goals, it will then be possible to assess whether the three Member States possess a varied toolbox of sanctions, which can be flexibly applied. Such a toolbox reflects the general and specific prevention of environmental non-compliance.

> Ideally, when striving for effective enforcement through sanctions, the enforcement authorities, first, (1) establish the typology of non-compliance; second, (2) select the enforcement goals that are appropriate for these characteristics of non-compliance; and, third, (3) select the sanctions fitting the enforcement goals, weighing the specifics of non-compliance.[286] There may be several sanctions available in the toolbox that fit a single enforcement goal. There may also be more than one sanction necessary to fit several enforcement goals. In this respect, the enforcement authorities must execute a balancing of interests in a specific case, thereby taking into account the proportionality. This process ideally takes place within the enforcement authorities that are most appropriate from the point of view of the institutional requirements.

284 One of those 'prevention policies' is enforcement.

285 I use this quote here in the broad sense, applying to all violations of environmental law, not just environmental criminal offences. Quote taken from Tonry & Farrington 1995, p. 7; see also Brisman & South 2015.

286 See also Michiels & Blomberg 1997.

2.6.3.2 Typology of non-compliance

Three categories of typology are distinguished here: the type of non-compliance; the type of damage resulting from non-compliance; and the type of offender. These categories and their content are listed in the table below.[287]

Typology of non-compliance
1. Type of non-compliance
- on-going or completed
- recurring or one-off
- long-lasting
- multitude of violations at the same time
2. Type of environmental damage, including the danger of such damage
- absent or present
- reparable or irreparable
- minor, major, or progressive
3. Type of offender
- unknown or known
- company and/or individual
- notorious (repeat) or non-regular offender

To be clear, the typology of non-compliance is not about the norm that is infringed, but about the complete picture of the non-compliance and its characteristics. In other words: it is for the enforcement authorities to take stock of what behaviour leads to what damage and by whom. Once stock is taken by the enforcement authorities, from the viewpoint of effective enforcement, ideally, the resulting picture of the typology influences the choice of the enforcement goals that can be pursued and consequently the sanction that is effective in a specific case.[288]

Type of non-compliance

Non-compliance could be on going or completed; recurring or one-off; long-lasting and a multitude of environmental violations can have occurred at the same time.

287 The explanation follows below the table.

288 Where there is discretionary power to do so.

Type of environmental damage

Environmental damage can occur as a consequence of non-compliance. For example, the dumping of hazardous waste in a nature protection area can result in contamination of the soil, which can possibly be removed and thereby repaired. Such dumping can also result in the deaths of plants and animals. This is also considered 'damage', which in this particular example cannot easily be repaired. There can also be a danger of damage. In other words, the danger of, particularly, major or irreparable damage may also require enforcement action. Damage could be absent or present. The, damage could be reparable or irreparable. Moreover, it is relevant if the damage is minor, major or progressive. There can also be a danger of major damage.

Connected to the type of environmental damage is the issue of time. It may be that urgent, immediate enforcement action by the authorities is required and/or action that will stop the violation immediately. This temporal aspect is particularly relevant to the goal of stopping an on-going contravention resulting in major or irreparable damage.

Type of offender[289]

The type of offender is also an important factor to establish exactly what type of reaction should be put into place. It could be that the offender is known or unknown, which is for example often the case where waste is dumped. In the case of an unknown offender, sanctions are necessary that are independent of the (cooperation of the) offender. The offender could be an individual or a company, or both could be identified, i.e. also individuals involved within a company (the question is whether there is liability for both).[290] It will be a benefit to the effectiveness of the enforcement toolkit where both can be sanctioned and a flexible set of instruments is available for both types of offenders.

Besides that, an offender could be notorious, which may warrant a punishment that takes into account previous or recurring behaviour. As we have seen, the ECJ has explicitly mentioned repeat offences by an offender as an aspect that may be taken into account and, thereby, may enhance the dissuasive effect of a sanction.[291] Typically in case of notorious offenders, it would be effective to be able to impose a preventive reparatory sanction.

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289 Literature and, even, policy also distinguish other types of the offender such as the rational and competent, irrational or virtuous offender. See Braithwaite 2011 at p. 486. Braithwaite introduces a pyramid that integrates restorative, deterrent and incapacitative justice in combination with an assumption of the type of actor involved: the pyramid shows restorative justice, deterrence and incapacitation in that order upwards where restorative justice considers a virtuous actor, deterrence considers a rational actor and incapacitation considers an incompetent or irrational actor. See also the Countrywide Enforcement Strategy that is in place in the Netherlands for environmental enforcement, section 11.5.1.2 of chapter 11. Determining which of these types the offender belongs to would require quite a lot of behavioural expertise of the enforcement authorities. These are not types used in this research. Moreover, these types may only be determined through the authorities qualifying the behaviour, and not through facts.

290 See for example Van Wingerde 2012 on corporate liability.

291 ECJ C-81/12 ECLI:EU:C:2013:275, para. 67.

As explained above, the typology of a specific case of non-compliance in combination with the enforcement goals that are to be pursued in light of that typology, determine the effective sanction(s). Below, the enforcement goals and their connection with the typology of the non-compliance are formulated.

2.6.3.3 Enforcement goals

As mentioned previously, the typology of the situation of non-compliance influences the enforcement goals that can be pursued and, consequently, the sanction or sanctions that are effective in a given situation. To attain the main goal of environmental protection in individual cases, seven separate enforcement goals are distinguished here. One or more of these enforcement goals may fit the typology of specific case of non-compliance with environmental law. From this follow the sanction or sanctions and the competent authority or authorities that are (to be) involved to achieve effective enforcement. In the table below the seven enforcement goals are listed.

Seven enforcement goals
a. To prevent specific non-compliance from occurring.
b. To end on-going non-compliant behaviour.
c. To (physically) repair environmental damage caused by non-compliance.
d. To prevent recurrence of non-compliance and to advance future compliance.
e. To remove benefits from non-compliance.
f. To (monetarily) compensate the consequences of non-compliance.
g. To punish non-compliance.

The enforcement goals are not exclusive; in any given situation of non-compliance multiple enforcement goals may be relevant to aim for. For example, a recurring situation of on-going non-compliance resulting in reparable as well as irreparable damage to the environment may warrant the pursuit of enforcement goals b, c, d and g. Moreover, a single sanction may be able to aim for more than one enforcement goal.

The idea of enforcement goals was introduced in the literature on enforcement in the Netherlands and England.[292] In this literature, the national context of enforcement through administrative law and/or criminal law is referred to. Here, as much as possible, such references and, thereby, the presuppositions of the national systems have been taken out of the model, to make it a more objective measure for establishing a goal-based evaluation.

292 See, for example, for early literature on the topic in the Netherlands: Blomberg & Michiels 1997, p 326-327 and in England: Macrory 2005, p. 27-35 on 'penalties principles'.

a. To prevent specific non-compliance from occurring

This enforcement goal is aimed at preventing a specific case of non-compliance.[293] The most appropriate sanctions to achieve this goal would be imposed or executed close to the exact moment non-compliance could occur. The most appropriate sanctions for this goal are not imposed after the fact. The risk of non-compliance sets this instrument apart from the instrument that aims at prevention of recurrence of non-compliance. This goal is in particular relevant to aim for in case non-compliance would result in irreparable damage, major damage that is, for example, slow to repair, or in case of damage that gets progressively worse.

b. To end on-going non-compliant behaviour

This goal is aimed at ending the non-compliant behaviour specifically. This goal can only be pursued where the non-compliant behaviour is on-going. Ending non-compliant behaviour can prevent damage from occurring. This is particularly important in case the behaviour causes irreparable damage. If this is the case, a timely sanction to end the behaviour should be available to the enforcement authorities. Besides stopping and ending active behaviour that is non-compliant with legal rules, this goal also aims to restore compliance by ensuring an offender takes action where his failure to do so leads to non-compliance. This enforcement goal is especially important, from the point of view of environmental protection, where there is damage, particularly irreparable or major damage. Where this enforcement goal is appropriate given the typology of non-compliance, the enforcement authorities should also be able to pursue this goal when the offender is absent or unknown.

This goal does not deal with the results of non-compliant behaviour upon the environment, even where the environmental norms that are infringed describe the result and not the behaviour that is leading to the infringement. The goal is not aimed at repairing possible damage caused by non-compliance, which can essentially also be a part of the non-compliance itself. This is a separate enforcement goal that will be discussed below.[294]

c. To (physically) repair environmental damage caused by non-compliance

The enforcement goal of reparation focuses on the damage, i.e. the environmental harm, caused by the non-compliant behaviour.[295] First and foremost, it should be for the company or individual that caused the damage, to remedy it, e.g. to remove the waste that was illegally dumped and clean up the soil that was harmfully influenced thereby, if necessary by enlisting the help of others, such as a cleaning company. Where a company is the offender, having it remedy the damage may increase the feeling of

293 The general and specific prevention in general by the toolbox of sanctions available to the three Member States is only the underlying aim of this and the other enforcement goals.

294 Enforcement goal (c).

295 See definition in Collins Cobuild, English dictionary for advanced learners. Damage must be distinguished from 'damages' as used as a legal term for the compensation of the consequences of non-compliance (see enforcement goal (f).

accountability for the damage and the link between the action (non-compliance) and the result (the damage that needs to be remedied).
The instrument that will aim to impose the obligation to repair existing non-permanent damage needs to be tailored to the type of damage, i.e. whether the damage is minor, major or progressive with an element of coercion to persuade the offender to comply. Where the damage is irreparable, this goal cannot be pursued. In such cases, the goal of compensation of the consequences of non-compliance and the goal of punishment are more appropriate (see below).
If it is likely that action by the offender will not take place in due time or the offender is unknown, and action cannot be awaited due to the type of damage, where it is, for example, progressive, enforcement that does not immediately impact the damage is not appropriate. The enforcement authorities themselves may be forced to take immediate action to remedy the damage in place of the offender or additionally.

d. To prevent recurrence of non-compliance and to advance future compliance

In contrast with enforcement goal (a), this goal aims to prevent the recurrence of specific non-compliance that has taken place. The goal is to prevent that (more) similar violations will take place in the future. This goal should in particular be pursued when dealing with recurring non-compliance; irreparable, major or progressive damage; and when dealing with a notorious or recidivist offender (in spite of reparable damage).

e. To remove benefits from non-compliance

This goal seeks to change the financial capital of the offender to the state it would have been in had he complied. Such benefits are cost-savings and economic gain; moreover, it may concern actual benefits and potential benefits. Its application is not limited to a specific typology. It ought to be pursued at the least where the offender is a legal person or an intentional, calculating or recidivist offender (or both).
This goal must be discerned from the goal of the reparation of damage (remedying of the consequences of non-compliance) and the goal of compensation for the damage, as it does not concern damage done, but profit made.[296] As we have seen, both the ECJ and the Advocate General support this enforcement goal for the benefit of dissuasiveness of sanctions and their practical effect.[297]

f. To (monetarily) compensate the consequences of non-compliance

This goal has the purpose of (indirect) reparation by the compensation of the consequences of non-compliance, in particular, damage to the environment that

296 See also HR 1 July 1997, ECLI:NL:HR:1997:AB7714.
297 See sections 2.3.3 and 2.5.3 of this chapter.

cannot be repaired. The difference between this goal and the goal of remedying the consequences of non-compliance is therefore found in the applicability of this goal to cases in which the results of non-compliance are irreparable. The fact that no action by the offender could remedy the consequences by returning the situation back to the state it was in before non-compliance warrants compensation. In this light, it ought to be possible for the public authorities to pursue enforcement action with the goal of the monetary compensation of environmental damage. To attain this enforcement goal the offender will have to pay for the damage done by the non-compliance.[298]

g. To punish the offender for non-compliance

In case of irreparable or major damage the offender cannot be ordered to bear the burden of the non-compliance by reparation; the damage cannot be undone. Therefore, there should be another means of imposing a burden on the offender in order to create general and specific prevention, in the shape of a punitive burden for the offender. Reparable damage may also warrant punishment, for example, in case of recidivism by a (notorious) offender.

2.6.3.4 Combinations of sanctions

As explained above, it is possible to assess whether the three Member States possess a varied toolbox of sanctions that can be flexibly applied when the typology of non-compliance and the enforcement goals are considered that can be covered by the available sanctions. It may be that more than one sanction is to be imposed, i.e. that sanctions have to be combined. This may be the case where several sanctions are necessary to fulfil the enforcement goals for one instance of non-compliance. This would lead to the concurrent imposition of sanctions, i.e. the imposition of sanctions at the same time, in parallel. Moreover, sanctions may have to be imposed consecutively for one instance of non-compliance, for example, for scaling up the enforcement action. Such scaling up may be necessary where sanctions that have been imposed are not complied with or do not otherwise have the envisioned effect on non-compliance. It may also be the case that scaling up is necessary because the typology of the non-compliance has changed – and thereby the appropriate enforcement goals and sanctions – after initial sanctions have been imposed.[299] Both in case of the concurrent and the consecutive combinations of sanctions different organisations for enforcement may be involved.

Where a choice is to be made with regard to (similar) sanctions that may be possible but belong to different toolboxes of different enforcement authorities, the characteristics of the enforcement organisation are to be a decisive factor to establish the best possible enforcement action.

298 In legal terms this compensation is often called 'damages'. However, this term can cause confusion when comparing this goal to that of the goal of remedying the consequences of non-compliance, in other words, remedying the 'damage'. The latter only applies to reparable damage.

299 For example, when, in hindsight the knowledge of the typology of non-compliance was incomplete.

As we have seen in section 2.4, the European safeguards for enforcement, in particular proportionality and *ne bis in idem*, may set limits to the combinations of sanctions described above.
As regards the instrumental requirements following from the above-described situations, the aspect of the possibilities for the sanctions to be combined, and, in the same vein, the limitations to the sanctions should also be a part of the concept of tailored enforcement. In addition, as described in section 2.6.2.4, the enforcement organisation should coordinate and cooperate to ensure appropriate proportionate effective enforcement.

2.6.3.5 The model in the hands of the authorities

The evaluative framework for tailored effective enforcement that I propose in this chapter will be used in this research to assess the enforcement of environmental law in England, Germany (NRW) and the Netherlands. The enforcement authorities can also apply this model to choose effective enforcement with regard to a specific case of non-compliance.[300] In this respect the institutional and instrumental requirements provide a model that can be used by the enforcement authorities to tailor the enforcement organisation and sanctions to specific (potential) non-compliance with environmental law.

The authorities can do this as follows. It starts with a specific case of non-compliance. As the first step, the enforcement authorities become aware of non-compliance with environmental law, or of a danger that such non-compliance will occur. Following this, when the enforcement authority or authorities want to take enforcement action, the typology of the non-compliance is to be assessed, including the type of damage and offender. The assessment of the typology of the non-compliance will lead to a set of enforcement goals that are appropriate in the specific case in light of this typology.
The typology and corresponding enforcement goals lead to certain sanctions that will be appropriate from the viewpoint of effective enforcement. These sanctions are then applied.
This process ideally takes place within the enforcement authorities that are most appropriate from the point of view of the institutional requirements for effective enforcement. It could very well be that several enforcement authorities or a different enforcement authority is appropriate.[301]

300 See also chapter 12, section 12.5.3.
301 For this, the coordination and cooperation described in section 2.6.2.4 of this chapter, are important.

2.6.3.6 Other aspects

Besides the requirements presented here for tailored effective enforcement, other factors may play a role in effectiveness. Where necessary, additions can be made to the model, for example to the typology that shapes enforcement action.[302]

Dissuasiveness

The general and specific prevention of environmental non-compliance by the sanctions toolbox was already mentioned above. This is considered in this research as dissuasive. The general and specific prevention by sanctions is part of effective enforcement. In the model of tailored enforcement, a dissuasive sanction is a sanction that can aim for specific prevention (for the offender) and general prevention (for the public).

General and specific prevention is not confined to punitive sanctions.[303] Both reparatory and punitive sanctions can aim for prevention, i.e. dissuasion, and achieve that effect. The basis for this lies in the fact that both types of sanctions have consequences for the offender. While punitive sanctions aim to inflict distress on the offender, the reparatory sanctions oblige and coerce the offender into certain behaviour, as a result of which the offender incurs a burden and, when he does not comply with the obligations, detriment.

Where the offender, for example, is ordered to repair certain environmental damage, this involves an obligation for him to make effort and costs to comply with this order. Where he does not comply, this is to his disadvantage, as he will incur the coercive fine. Therefore, unless the offender is unknown, he will not come away unscathed from any sanction. A burden serves a dissuasive/preventive purpose.

> The model of effective enforcement that is formulated in this chapter aims to apply the concept of prevention in light of objectively ascertainable aspects, and as much as possible independent from any behavioural sociology/economics. How a specific offender actually perceives the burden of a sanction – reparatory or punitive – will depend on the typology of the offender and subjective aspects of the perception of the offender himself – such as the way the offender perceives specific sanctions and types of enforcement, the likelihood of getting caught, likelihood of a sanction, and the like. For example, research has shown that some businesses feel more deterred by a high likelihood to get caught than by a high criminal fine.[304] Where one would want to add such behavioural

302 See section 2.6.3.5 of this chapter.

303 See also Jansen 2016, p. 614; see also the Opinion of Advocate General Stix-Hackl ECLI:EU:C:2001:645 in ECJ C-210/00, referring to the Opinion of Advocate General Jacobs ECLI:EU:C:1992:237, paragraph 11, in ECJ C-240/90, mentioned in section 2.5.3 of this chapter.

304 See, for example, Parker and Nielsen 2011; Van Wingerde 2012; Van Erp 2007; Van Erp 2008.

insights to the model, this can be done through expanding the typology. Then, for example, the typology of the offender could be expanded with (preferably) objectively established and applicable. behavioural insights that can be applied in practice by the enforcement organisation to ascertain, for example, whether an offender perceives a criminal sanction with regard to environmental non-compliance as a criminal stigma. However, such an expansion of the typology with such aspects of behaviour (that would then need to be ascertained in the circumstances of a given case), is not the aim of this research.

Flexible enforcement

Above, I mentioned the flexible application by the enforcement authorities of the toolbox of sanctions, as part of tailored enforcement. In this research this is explained as the flexible application of formal enforcement instruments by aiming for one or several enforcement goals by means of one or more sanctions, which includes taking into account the typology of non-compliance in choosing and formulating the sanctions. This enables made-to-measure sanctions, which encompasses effectiveness, dissuasion and proportionality and general and specific prevention.

Another way of looking at 'flexible' enforcement is to connect this to an enforcement style. The enforcement style of the authorities, which is the approach the authorities take to the regulated, is also an aspect that can influence effective enforcement in practice. The style indicates the premise the authorities operate from. In contrast to my focus in this research on the formal enforcement instruments, specifically sanctions, the enforcement style generally concerns the entirety of the enforcement response by the authorities, including informal and formal instruments and, in particular, the interplay between them. Different enforcement styles are recognized and proposed in literature, such as responsive regulation and restorative justice (Ayres & Braithwaite); the problem-solving approach (Sparrow); the deterrence style (Becker); the compliance approach (Hawkins); smart regulation (Gunningham & Grabosky); and 'really responsive regulation'.[305] The available literature also recognizes the problems of applying the somewhat theoretical frameworks on enforcement styles in practice.[306]

305 Respectively, Ayres & Braithwaite 1992; Braithwaite 2002; Braithwaite 2008. Sparrow 2000 and Sparrow 2008. Becker 1962, p. 1-13; Becker 1968, p. 169-217; also Chalfin & McCrary 2017. Hawkins 1984; Hawkins 2003. And, finally, Gunningham & Grabosky 2004. Also: Baldwin & Black 2007; Van der Heijden 2008, p. 25 and further; Braithwaite 2011; Abbot 2009.

306 See the abovementioned literature as well as, for example, Mascini 2013; Van Erp 2008, p. 9-21; Van de Bunt, Van Erp & Van Wingerde 2007, p. 391.

Other factors influencing enforcement in practice

Effective enforcement is influenced by the architecture – as defined in chapter 1 – and its potential for effective enforcement as laid down in the law, but also by other (variable) factors. Politics, for example, can prioritise or deprioritise enforcement, and influence the resources extended by government to public enforcement. Other factors are the enforceability of the legal norms on environmental protection and the possibility for citizens to ensure that the law that protects their interests is enforced by the public authorities, for example, through requesting enforcement from those public authorities, including the courts. These factors outside the enforcement architecture are not the topics of this research and will not be further discussed.

2.7 Conclusion; evaluative framework as model of tailored effective enforcement

This exploration of the evaluative framework on the basis of European law for the enforcement of European Union environmental law by the Member States has shown that there are many standards the Member States must adhere to, which, however are not quite clear. These obligations are laid down in general and specific obligations in the case law of the European Court of Justice, in European legislation, including the Charter of Fundamental Rights, and the ECHR. Obligations pertain to the enforcement organisation, the instruments, the procedure, the practical execution, and the safeguards. The evaluative framework that was completed with the additional sources of the European Commission and the Advocates General and academic literature, approaches effective enforcement through a concept of tailored enforcement, leading to requirements for the organisation and for sanctions (see the table below). These requirements will be applied to the organisation and the sanctions for administrative and criminal enforcement in each of the three Member States in the respective country chapters (chapters 3-11), as part 2 of this research. The outcome of this evaluation in the three Member States will be compared in chapter 12, as part 3 of this research. This will lead to a conclusion, whereby the research question will be answered.

Evaluative framework: model of tailored effective enforcement

Member States must provide a legal and administrative framework enabling tailored enforcement.

Institutional requirements

Enforcement should be embedded in an expedient organisation, which entails:

- A degree of decision-making independence by the enforcement organisation:
  - a separation between regulatory and enforcement functions;
  - a separation between inspection/investigation and sanctioning.
- Specialisation of or within the organisation:
  - a degree of expertise;
  - an appropriate proximity to non-compliance.
- Coordination and cooperation between enforcement authorities;

Instrumental requirements

Enforcement action should be moulded to the characteristics of specific non-compliance. For that purpose the Member States must possess a varied toolbox of sanctions, which can be flexibly applied:

- The toolbox of sanctions must accommodate the possible typology of non-compliance, more in particular:
  - the type of non-compliance;
  - the type of damage, and;
  - the type of offender.
- In light of the typology of non-compliance, the toolbox of sanctions must moreover be able to aim for specified enforcement goals:
  - to prevent specific non-compliance from occurring;
  - to end on-going non-compliant behaviour;
  - to (physically) repair environmental damage caused by non-compliance;
  - to prevent future recurrence and to promote future compliance;
  - to remove benefits from non-compliance;
  - to (monetarily) compensate the consequences of non-compliance;
  - to punish non-compliance.
- Combinations of sanctions.

PART 2
The public enforcement of environmental law in England, Germany and the Netherlands

The following nine chapters form the second part of this research. In these chapters, it is examined how the public enforcement architecture, i.e. the organisation and sanctions for the public enforcement of environmental law, in England, Germany and the Netherlands is regulated. This provides the answer to the second supportive question introduced in chapter 1.

For each of the three jurisdictions the organisation and sanctions for the protection of environmental law through administrative and criminal enforcement are described as regulated by law in the three jurisdictions (chapters 3-11). This description consists of three country chapters per jurisdiction (England, chapters 3-5; Germany, chapters 6-8, and the Netherlands, chapters 9-11).

The first country-specific chapter for each of the jurisdictions will give a general overview of the legal context of the particular Member State, describing the terminology used and the structure and substance of the systems of environmental regulation and of the public enforcement thereof. In the second country-specific chapter, the authorities competent for the public enforcement of environmental non-compliance will be described. The enforcement organisation will be evaluated in this chapter on the basis of the evaluative framework on effective enforcement that was formulated in chapter 2. In the third country-specific chapter, the sanctions that these authorities can impose for environmental non-compliance will be described and, also, evaluated in light of the evaluative framework on effective enforcement.

The jurisdictions are described quite extensively to clearly provide the context in which the public enforcement of environmental law operates and which influences enforcement. Such a description also provides a good background and, hopefully, understanding for the comparison in chapter 12.

Chapter 3 Overview of Public Enforcement of Environmental Law in England

3.1 Introduction; England as (part of) a jurisdiction; Brexit

This chapter provides an introduction to the architecture – the organisation and sanctions – in place for the enforcement of environmental law in England. The general terminology used in England for the environment and for enforcement is described, and the characteristics of the structure and the substance of the system are identified. The structure pertains to the sources of the regulation and the characteristics thereof, in particular the key environmental and enforcement acts. The substance pertains to the characteristics of the public enforcement in place for the enforcement of environmental law.

Below, first, the fact that England is one jurisdiction with Wales will be highlighted and the implications of an exit from the EU are paid attention to. Following this, the terminology used in England for environmental law and its enforcement is set out. Subsequently, the characteristics of the structure are described. For this purpose, the sources of the regulation and the characteristics thereof are described, in particular the key environmental and enforcement acts. Thereafter, the characteristics of the substance, in particular the instruments, of the enforcement architecture are identified. To do so, the types of public enforcement in place for the enforcement of environmental law will be discerned. The organisation of enforcement and the sanctions available to the organisation will be described in the next chapters (chapter 4 and chapter 5, respectively).

England: one legal jurisdiction with Wales

In chapter 1, the United Kingdom was mentioned as the Member State that is a member of the EU. It was also explained that this research focuses on England. England is a part of the United Kingdom of Great Britain and Northern Ireland, with Great Britain encompassing England, Wales and Scotland. Within this, England and Wales form one legal jurisdiction, called English law, with the same Court system, while Northern Ireland and Scotland form separate legal jurisdictions, through devolution.

Although England and Wales form one legal jurisdiction, increasingly, there are differences between the legal rules in the two countries, as Wales has entered the process of devolution from 1997 onwards. These differences impact,

among others, the (making of) legal rules on the organisation and enforcement of environmental law in the two countries. For example, devolution resulted in the creation of the National Assembly of Wales in 1999, which was accorded the power to create secondary legislation – particularly, statutory instruments – in several devolved areas, including aspects of the environment.[307] In 2007, as a result of the Government of Wales Act 2006, a next step was taken in the process of devolution, through the creation of a separate legislature in Wales, the National Assembly for Wales, as well as an executive, the Welsh Assembly Government, usually referred to as the Welsh Ministers.[308] The Assembly is empowered to make pieces of law, called 'measures', which have similar effect to an Act of Parliament.[309] Due to this Act, the Assembly of Wales gained primary legislative powers in the area of the environment, including waste, environmental pollution, and nuisances, as well as town and country planning.[310] While these legislative powers were not exclusive[311], the next step in devolution ensured that even more aspects of environmental regulation were brought in the control of the Assembly. This was due to primary law-making powers entrusted to the Assembly as a result of a referendum on 3 March 2011.[312] Most recently, the Wales Act 2017 has put in place a reserved powers model of devolution for Wales, with enhanced legislative competence, among others, for the environment.[313]

The above-described developments mean that the environmental law in England and in Wales has become increasingly divergent.[314] This includes the organisation of enforcement and the sanctions available to it. For example, the primary authority for environmental enforcement in England and Wales, the Environment Agency, had its Welsh division merged on 1 April 2013 with the Countryside Council for Wales and the Forestry Commission Wales into a single body for the environment called Natural Resources Wales.

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307 The Government of Wales Act 1998.

308 See also *Devolution Guidance Note 9: post-devolution primary legislation affecting Wales*, London: Cabinet Office 2007. Available at www.gov.uk/government/publications/devolution-guidance-notes (last visited 1 June 2019).

309 The Government of Wales Act 2006, part 4.

310 The Assembly is able to pass Measures on any matter and field listed in Schedule 5 to the 2006 Act. Also, Fisher, Lange & Scotford 2013, p. 105.

311 Much of the regulation of environmental enforcement remained addressed through acts of Parliament emanating from Westminster. Westminster is the UK government. Contrary to Wales, Scotland and Northern Ireland, England does not have a devolved government, although some regions within England are devolved, such as the Greater London Area, per the Government of Wales Act 2006, schedule 5, field 6.

312 The Government of Wales Act 2006, schedule 7 (which came into force on 5 May 2011) replaced schedule 5 following the referendum on 3 March 2011, in which electors voted in favour of primary law-making powers for the Assembly as set out in Part 4 of the Act. See *Devolution Guidance Note 18: Parliamentary and Assembly Primary Legislation affecting Wales*, London: Cabinet Office 2017. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771302/DGN_-_Parliamentary_and_Assembly_Primary_Legislation_Affacting_Wales.pdf (last visited 1 June 2019).

313 See also www.gov.uk/guidance/devolution-settlement-wales (last visited 1 June 2019).

314 See, for example, the 2016 Environment (Wales) Act. For more see also e.g. Bishop & Stallworthy 2013; Deacon 2012; Bell et al 2017, p. 109-111.

Due to this, in the following, only the enforcement organisation and sanctions in England will be described. Moreover, for textual purposes, throughout this research, England will be referred to as a 'jurisdiction'.

Implications of Brexit

As mentioned, EU and English environmental law are intertwined. This poses interesting questions when the United Kingdom (UK) leaves the EU on the basis of section 50 of the Treaty on the European Union. As the situation stands at the closing of this research, it is unclear when and how such an exit will take place. The exact implications of what is called 'Brexit' are therefore hard to predict. Assessment of its impact on the English legal system and environmental protection does take place. The bottom line of this discourse is that Brexit causes uncertainty and potential complications for environmental protection in the UK.[315] The government does have high ambitions for environmental protection after Brexit and has proposed a draft Environment Bill in October 2018.[316] The draft Environment Bill aims to strengthen environmental principles and environmental governance.[317] While the draft Bill might, to a certain extent, be able to decrease the fragmentation and the lack of overarching principles and definitions that currently characterise the system of environmental law in England, it has been vastly critised as to its content.[318]
Due to the uncertainty as to when Brexit will take place and what it will entail once it has taken place, it is not further discussed in this research.[319]

3.2 Terminology of environment and enforcement

In chapter 1, the definitions used in this research for environmental law and enforcement were introduced. While these definitions structure the description of the enforcement architecture in this research, it is interesting to take a look at what definitions exist in England for environmental law and enforcement. This provides context to the legal system.

315 See for an analysis of possible options for Brexit and its effect on environmental law, for example, Bell et al 2017, p. xvi-xxi. See also, for example, *Environmental Principles and Governance after the United Kingdom leaves the European Union* (consultation document), London: DEFRA 2018. Available at https://consult.defra.gov.uk/eu/environmental-principles-and-governance/supporting_documents/Environmental%20Principles%20and%20Governance%20after%20EU%20Exit%20%20Consultation%20Document.pdf (last visited 1 June 2018); Macrory 2018.
316 Draft Environment (Principles and Governance) Bill 2018.
317 Section 39 of the Explanatory notes to the draft Environment (Principles and Governance) Bill 2018.
318 See, for example, Fisher 2019.
319 The model for effective enforcement that was formulated in chapter 2 can contribute to the effectiveness of environmental enforcement in England with Brexit and without it.

3.2.1 Environment

In England, due to the industrialisation, already at the beginning of the 1900s laws containing pollution controls were drafted. However, these laws were made primarily for the regulation of health and safety and not for the protection of the environment, although they did have effect upon it.[320] The development of legislation aimed specifically at integral environmental protection only really started with the introduction of the Environmental Protection Act 1990 (the EPA 1990).

In England, there is no definition in the law or in academic literature of 'the environment' and 'environmental law' that is accepted generally, although there is consensus on the core topics.[321] Even though there seems to be no generally accepted definition, two statutes do provide the same definition of 'the environment': the Environment Act 1995 (EA 1995) and the Environmental Protection Act 1990 (EPA 1990). The EA 1995 defines the concept as 'all, or any, of the following media, namely, the air, water, and land (and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground)'.[322] The definition in the EA 1995 is only applicable to the Environment Agency. This is the most prominent environmental enforcement authority in England, created through this Act.[323] The definition in this Act should be interpreted in the broad sense to also include nature, or flora and fauna as part of it, considering the Environment Agency also has some duties and powers in this field.[324] This definition was copied from Part I of the Environmental Protection Act 1990 regarding Integrated Pollution Prevention and Control and Local Air Pollution Control.[325] For this Act, the definition has a broader application, as Part I applies to the Environment Agency and also to the local authorities in case of local air pollution control. The law in these Acts focuses on pollution control, although this may be interpreted quite broadly. In the Pollution Prevention and Control Act 1999, which amended the EPA 1990 Part I on several aspects, the definition of environmental pollution laid down is very comprehensive and shows a quite integrated approach, not only to the treatment of the concept of pollution but also to the concept of the environment.[326]

> According to the Act, environmental pollution means pollution of the air, water or land that may give rise to any harm. For the purposes of this definition

320 See for example the Public Health Act 1875, the Rivers Pollution Prevention Act 1876, the Alkali &c. Works Regulation Act 1906 and the Health and Safety at Work Act 1974, that replaced the former, which were based upon the best practicable means to prevent pollution. Woolley et al 2009, chapter 1 and at p. 205; Bell et al 2017, p. 18-21.

321 Bell et al 2017, p. 4-8. See also Fisher, Lange & Scotford 2013, p. 5-20.

322 Section 56(1) EA 1995.

323 See also the placement of the definition in Part I of the Act, which deals with the creation of the Environment Agency and its institutional framework.

324 See for example the duties of the Environment Agency in section 6 and 7 Environment Act 1995.

325 Section 1(2) EPA 1990.

326 See also Woolley et al 2009, p. 22-23.

> (but without prejudice to its generality) 'pollution' includes pollution caused by noise, heat or vibrations or any other kind of release of energy, and 'air' includes air within buildings and air within other natural or man-made structures above or below ground. 'Harm' means harm to the health of human beings or other living organisms; harm to the quality of the environment, including harm to the quality of the environment taken as a whole, harm to the quality of the air, water or land, and other impairment of, or interference with, the ecological systems of which any living organisms form part; offence to the senses of human beings; damage to property; or impairment of, or interference with, amenities or other legitimate uses of the environment.

This shows that also nuisances relating to the environmental media, such as noise, smell or vibrations fall within the definition of 'the environment' and 'environmental law'.

> The instrument of nuisance was initially created for public health reasons, however it is now also used in environmental protection legislation. Odour nuisance and noise nuisance are covered by the concept of 'statutory nuisance' as long as they fall within the scope of the limited list set out in section 79 of the EPA 1990. Nuisances falling outside this scope, such as vibrations, can be dealt with under the common law instrument of public nuisance. These can also be dealt with as a private nuisance, but regulatory authorities are not as such a party to this procedure. The definition of statutory nuisance is quite similar to that of public nuisance as in both cases the nuisance complained of must be prejudicial to people's health or interfere with a person's legitimate use and enjoyment of land. Moreover, in case of public nuisance, the nuisance must affect a class of people instead of solely an individual.[327]

Even so, these definitions do not show that there is a general definition that compares to the relatively broad definition used in this study, as defined in chapter 1. However, in academic literature, even though it is not made explicit generally, the topic of environmental law is acknowledged to include environmental hygiene, including waste, water quality and nature protection as well as spatial planning and building. Even though it is made explicit that pollution control and planning control primarily have different purposes – the former the control of activities that cause pollution, the latter the regulation of the use and development of land – both are acknowledged to be concerned with the protection of the environment.[328] Moreover, both are

327 See also Bell et al 2017, p. 356-372.

328 Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281; Woolley et al 2009, p. 663, also with reference to Glidewell LJ in Gateshead MBC v. Secretary of State for the Environment [1995] Env LR 37; [1995] JPL 432 at 434.

considered to be an integral part of the definition due to the interaction between pollution control and planning control.[329]

3.2.2 Enforcement

Similar to the concept of 'the environment', the concept of 'enforcement' does not have a generally applicable definition in legislation or other pieces of law in England. Academic literature does seem to roughly agree upon the scope of the subject. Also here, definition of the concept does occur in legislation, although the definition is not proclaimed generally. Also the policy and guidance of the enforcement authorities, in particular the Environment Agency, are a source.
One general observation is that in reviewing the legislation, policy and guidance applicable to environmental enforcement, the term enforcement is not only used for the total of inspection, sanctioning and prosecution, but also just for sanctioning. Therefore, it is a quite flexible term.

Several statutes, guidance documents and policy rules can be found that contain a definition in relation to enforcement. Three Acts that contain a definition of 'sanction' and/or 'enforcement action', as it is called therein, will be addressed here. These are the Regulatory Reform Act 2001 and the Regulatory Reform Act 2006 and the Regulatory Enforcement and Sanctions Act 2008.
First, the Regulatory Reform Act 2001 and its follow-up the Regulatory Reform Act 2006 will be discussed. Both Acts were drafted in the light of regulatory reform and deregulation to provide a legal basis to make provision reforming law that imposes burdens on persons in the carrying on of any activity. The Acts also apply to the enforcement of environmental legislation. This definition in the 2001 Act was really the first definition related to enforcement in a statute.[330] The 2006 Act contains the same description, but adds a referral to the carrying out of a lawful activity.[331] The Acts provide that the burdens, that the law may refer on persons, may be, among others, 'any sanction, whether criminal or otherwise, for failure to observe a restriction or to comply with a requirement or condition, which affects the carrying on of any lawful activity'.[332] The Acts also enable codes of practice to be made with respect to the enforcement of restrictions, requirements or conditions imposed upon a person through legislation.[333]

329 See also Bell et al 2017, p. 5.
330 Section 2(1)(a) Regulatory Reform Act 2001.
331 Section 1(3)(d) Regulatory Reform Act 2006.
332 Section 2(1)(a) Regulatory Reform Act 2001 and section 1(3)(d) Regulatory Reform Act 2006.
333 Section 1 and 9, Regulatory Reform Act 2001, and section 22 Regulatory Reform Act 2006.

> With regard to such codes of practice the 2001 Act provides an explicit definition of 'enforcement action', which does not return in the 2006 Act. While the core part of that definition is the same as set out above referring to a sanction, the definition is made more specific, as it specifies that in relation to the grant or renewal of licences concerning a restriction, requirement or condition enforcement action 'will include any refusal to grant, renew or vary a licence, the imposition of any condition on the grant or the renewal of a licence and any variation or revocation of a licence'.[334] This is a very broad definition. The definition is preceded by the indication that it has limited application, as it only applies to that section and the subsequent one, also on the same topic. Even so, this definition has extended to codes of practice made by the Ministers of the Crown, which thus also extends to codes of practice made for the enforcement of environmental law.[335]

Second, the Regulatory Enforcement and Sanctions Act 2008 also contains a definition of 'enforcement action'. Although it is provided that the definition is reserved for occasions of coordination between regulatory authorities, reading through the sections of the Act on this topic shows that this definition may very well be used more generally.[336] The definition provided in the Act differs from that adopted for the – just discussed – statutes on regulatory reform in its formulation, adding more detail in places, and leaving other detail out. According to the Regulatory Enforcement and Sanctions Act 2008, enforcement is:

a. any action which relates to securing compliance in the event of breach (or putative breach) of a restriction, requirement or condition;
b. any action taken with a view to or in connection with the imposition of any sanction (criminal or otherwise) in respect of an act or omission; and,
c. any action taken with a view to or in connection with the pursuit of any remedy conferred by an enactment in respect of an act or omission.[337]

This definition is thus also quite broad, and emphasises other elements in its formulation compared to the definition in the Regulatory Reform Acts, discussed above, such as the conditions of imposition of the sanction and the reference to a remedy.
Where legislation is not explicit, the content of the concept of enforcement can also be deduced from the structure of the statutes that contain provisions on enforcement. This provides that enforcement at least consists of inspection, administrative and criminal sanctioning and prosecution.

334 Section 9(5) Regulatory Reform Act 2001.
335 The 2006 Act does not reiterate this definition, save in a proposed amendment. It may be assumed that, by proposing this definition as an amendment, it is considered to also apply for the purpose of the 2006 Act.
336 Part 2 of the Regulatory Enforcement and Sanctions Act 2008.
337 Section 28(5) of the Regulatory Enforcement and Sanctions Act.

> The inspection powers in section 14 PPC Act 1999 and section 19 Wildlife and Countryside Act 1981 are both presented under the caption 'Enforcement'. Other inspection provisions (or their captions) refer to enforcement, such as section 169 Water Resources Act 1991 'powers of entry for enforcement purposes', which is similar to sections 196A-196C of the TCPA 1990 'rights of entry for enforcement purposes'. The latter provision can be found in the part of the Act titled 'Enforcement'. And, finally in the EA 1995 where the powers of entry are deemed to belong to the enforcement authorities and persons authorised by them (section 108).

Not only legislation may be a source, guidance and policy may even more so indicate the exact scope of the powers of the enforcement authorities. Both guidance and policy commonly have a limited application, although the boundaries of the application may still be quite wide, e.g. with regard to the Environment Agency, which has a great number of powers in the environmental arena. Also here it is shown that – at least in the formulation of enforcement in policies of the various enforcement authorities – no singular definition is used across the board. For example, the Environment Agency´s Enforcement and Sanctions Policy provides that enforcement may range from providing advice and guidance[338], serving notices through to prosecution, or any combination that best achieves the desired outcome.[339]

This definition is broad as it includes advice and guidance to the regulated. This broad definition conforms to the law, as it is a statutory duty of the enforcement authorities to provide advice and guidance.[340] It also includes warnings.

In terms of action upon the commission of an offence, the Environment Agency states that in such a case it will issue some form of sanction as well as any other preventative or remedial action taken to protect the environment and people. The Enforcement and Sanctions Guidance 2015 of the Environment Agency – since repealed – defines a sanction as 'an enforcement requirement (such as a notice), a binding legal agreement or even a penalty applied by us or a court.' [341] The Environment Agency considers – for the purposes of its Guidance – that anything beyond the provision of advice and guidance or a warning is considered to be a sanction, either civil or criminal.[342]

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338 This is called 'compliance assistance' in this context. Outside this context, advice and guidance also take place.

339 Environment Agency's Enforcement and Sanctions Policy (2018), section 7, available at www.gov.uk/ government/ publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

340 Since September 2010, see section 27 Regulatory Enforcement and Sanctions Act 2008.

341 Environment Agency's old Enforcement and Sanctions Guidance that was withdrawn on 11 April 2018 was much more extensive on this issue than the Environment Agency Enforcement and Sanctions Policy that followed it. For the former: www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-statement. For the latter: www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy. Last visited 1 June 2019.

342 Environment Agency's old Enforcement and Sanctions Guidance, p. 1, available at: www.gov.uk/ government/ publications/environment-agency-enforcement-and-sanctions-statement (last visited 1 June 2019).

3.3 Characteristics of the system: structure

3.3.1 Role of common law

In chapter 1, it was mentioned that one of the distinctive aspects of the English legal system in comparison to Germany and the Netherlands, is that it is a common law system. It was also specified that in England, this characteristic does not presently seem to have much impact on the way the environmental law is created. The major powers of environmental protection are laid down in legislation – also called statutory instruments. The common law plays a subsidiary role. There is relatively little common judge-made environmental law in England.[343] However, judge-made law did play an important role in the early development of aspects of environmental protection, establishing liability. This role has been taken over in a more consistent manner by the legislator, although several common causes of action, such as private and public nuisance, remain.[344]

> With regard to the question of whether the development of the law – in particular the development of liability in common law in respect of environmental pollution – is a matter for the courts or for Parliament, in respect of environmental protection, the House of Lords itself established that "(…) given that so much well-informed and carefully structured legislation in now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so".[345]

3.3.2 Characteristics of environmental enforcement regulation

Legislation on the protection of the environment in England used to be sectoral, piecemeal and fragmented. This has developed into legal rules that are more integrated and planned, although elements of sectorality remain prominent.[346] Moreover, the legal rules that regulate environmental enforcement can be found in different types of legislation, making it layered/tiered. Also, the legal rules are generally broadly framed and phrased. This will be further described in the following.

343 In particular when compared to areas like tort. See Jones 1999, p. 579: 'common law (the judge-made law)'.

344 Other causes of action for common law liability are the rule in Rylands v Fletcher, which created a tort of strict liability; negligence; trespass; and liability for breach of contractual or property rights. See chapter 16 of Woolley et al 2009.

345 Lord Goff in the leading judgment in Cambridge Water Co. v Eastern Counties Leather plc [1993] Env LR 105; [1994] 2 AC 264 at 305. This approach was affirmed in Transco v Stockport MBC [2003] UKHL 61; [2004] 2 AC 1 at 9-10, per Lord Bingham; Bell et al 2017, p. 35-36; also Woolley et al 2009, p. 746.

346 See also Scotford & Robinson 2013, p. 383-409.

3.3.2.1 Sectoral; piecemeal; fragmented

There is no unified, uniform environmental statute in England, nor is there a single Act providing a comprehensive regulation of enforcement. The environmental legislation in place – primary, secondary and tertiary legislation alike – has developed in a piecemeal fashion to match a growing awareness of environmental risks, as well as increasing European obligations. The root of this may lie with the problem-oriented approach inherent in the common law system.[347] The manner, in which this system developed in its early days, by the courts on a case-by-case basis, led to a pragmatic, gradual and fragmented approach to law. This approach was subsequently also followed by the legislator.[348] However, the approach has now become more integrated and planned. Through the years, environmental protection has become more concentrated in a smaller number of seven main environmental statutes.[349] Even so, statutes and other types of regulation still generally have quite a narrow subject field, as they do not cover very many areas of the environment at the same time.[350] The legislation in place deals with a sector of the environment, such as planning or water resources, or regulates types of problems for the environment, such as pollution control. Due to this, the legislation can be characterized as quite sectoral.

The enforcement of environmental law is generally regulated in the legislation dealing with the different aspects and areas of the environment and/or with authorities competent for the environment. There are exceptions to this as the law applicable to the Environment Agency, in particular the Environment Act 1995, and also more recent Acts, in particular the Regulatory Enforcement and Sanctions Act 2008, do contain enforcement provisions with a more broad to general application. Even so, the provisions are (still) typically reserved for specific authorities.[351] Consequently, the entire system of powers, instruments and authorities for the enforcement of environmental law is quite fragmented.

The piecemeal approach to the regulation of the environment was also long reflected in the organisation established for the enforcement thereof. The field of regulatory authorities in the environmental arena, especially in the area of pollution control, was very dense and fragmented. However, with the concentration of the legislation, also new authorities were created, amalgamating many others. In particular, the institution of the Environment Agency in 1995 was the start of a tendency to amalgamate the regulatory organisation within areas of environmental law into a unified body.

347 Slapper & Kelly 2017, p. 3 and McLeod 2005, p. 29.
348 Kimber 1999, p. 89-90; also Wolf & Stanley 2013, p. 29.
349 Bell et al 2017, p. 24. More on this below in section 3.4.2.
350 Although the extent to which they do cover more than one topic varies.
351 In this case the Environment Agency and Natural England, respectively.

Moreover, in 2006, the previously existing authorities competent in the area of nature were amalgamated into a body, similar to the Environment Agency, called Natural England.[352]

The organisation is, however, not sectoral. The authorities in place commonly cover more than one area of the environmental arena.

The piecemeal fashion of the development of environmental law has increasingly been replaced by a more 'planned approach' to environmental protection, instigated by government, and less by individual members of Parliament.[353] Moreover, integration, or, at least coherence has become a more important aspect of the regulation of environmental protection.[354] An example of this is the conception of the environmental permitting regime, gaining force on 6 April 2008.[355] Environmental permitting is a risk-based regime to regulate business activities that could impact the environment and human health. The environmental permitting regime, first, replaced the pollution prevention and control (PPC) permits and the waste management licences, and second, did away with the separate water discharge consents, groundwater permits and radioactive substances registrations and authorisations on 6 April 2010.[356] Separate permits were brought together into one environmental permit, although the instrument currently serves more as a wrapper around the different permits and licences. Still, there are common procedures for appeals, changes and transfers with regard to the environmental permit. There are general enforcement provisions for the environmental permit. However, the enforcement provisions provided in the specific environmental statutes may still be applicable.

An environmental permit can be regulated by different regulators, including enforcement, for that part of the permit that belongs to their remit. The regulator may be changed, however, on request of a regulator or of, for example, the operator of an installation, through a direction from the Secretary of State.[357] This direction can apply to a specific regulated facility or for a particular class of regulated facility.[358] This means, for example, that a local authority can exercise the Environment Agency's functions in relation to an installation or mobile plant.

352 Through the Natural England and Rural Communities Act 2006.

353 Bell et al 2017, p. 25.

354 See also Woolley et al 2009, p. 22-23.

355 This was due to the Environmental Permitting (England and Wales) Regulations 2010, based upon the PPC Act 1999, section 2, with the purpose to implement a big list of European Directives, among which the IPPC Directive (2008/1/EC); Habitats Directive (92/43/EC); Waste Framework Directive (2006/12/EC); Water Framework Directive (2000/60/EC); Environmental Liability Directive (2004/35/EC); and the Bathing Water Directive (2006/7/EC).

356 With the coming into force of the Environmental Permitting (England and Wales) Regulations 2010.

357 Section 33 Environmental Permit Regulations 2010.

358 See also, *Environmental Permitting Guidance: Core Guidance*, London: Defra 2013, p. 17-18. Available at www.gov.uk/government/publications/environmental-permitting-guidance-core-guidance--2 (last visited 1 June 2019).

3.3.2.2 Tiered and broad legislation

The substantive environmental law is mainly laid down in legislation emanating from central government. This can be primary, secondary, and tertiary legislation.[359] The major powers for environmental protection and the enforcement thereof are contained in statutes (Acts of Parliament), which are primary legislation. This category of law is approved by both chambers of the United Kingdom parliament – the House of Commons and the House of Lords – and formally agreed to by the reigning monarch through Royal Assent.[360]

A common characteristic of environmental regulation is that it is tiered, which means that it is layered, consisting of several (types of) legal rules – primary, secondary, and tertiary legislation mentioned above – that supplement each other. This is quite similar to the system of environmental law in the Netherlands. The cause of the tiered regulation is mainly that much of the environmental legislation in statutes is broadly phrased to allow wide discretion to the regulatory authorities in the exercise of their powers.[361] Consequently, detailed secondary legislation, and tertiary legislation is often necessary to specify what the law is.

The term 'statutory instruments' is used for pieces of secondary legislation – such as regulations and orders – as the power to adopt them is conferred in the primary statutes they support, generally to the appropriate Secretary of State.[362] This type of legislation is also often called 'delegated legislation'.[363] The legislation supplements primary legislation, with provisions providing rules required for its operation.[364] Byelaws are also delegated legislation of which the establishing power is conferred upon local authorities and other regulatory bodies – such as the Environment Agency – through Acts of Parliament, such as the Water Resources Act 1991. Essentially, byelaws are local legislation, dealing with local issues. Moreover, these byelaws may be enforced.[365]

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359 Bell et al 2017, p. 98-102.

360 See also www.parliament.uk, tabs 'how Parliament works' and 'making laws' (last visited 1 June 2019).

361 Bell et al 2017, p. 102-103.

362 The Secretary of State acts under the delegated authority of Parliament.

363 Although this category is sometimes extended also to tertiary legislation. Delegation is the grant of authority to a person to act on behalf of one or more others, for agreed purposes. For a discussion of delegation and its advantages and disadvantages see Slapper & Kelly 2017, p. 71-75; McEldowney 2016, p. 161-163. It should be noted that the term delegation is not similar to the Dutch term *delegatie*.

364 The procedure for establishment of statutory instruments is dependent on the type. Regulations are generally approved by both Houses of Parliament. An Order is made by the Crown and members of the Privy Council. A bye-law is confirmed by a government minister. See www.parliament.uk, tab 'Bills & legislation' (last visited 1 June 2019).

365 The Water Resources Act 1991 contains the power for the Environment Agency to make byelaws in section 210 and Schedule 25 and 26 of the Water Resources Act 1991. The Act itself contains enforcement provisions for non-compliance with the byelaw. See e.g. the Countryside Rights of Way Act 2000, which confers the power to make byelaws on the National Park Authority and the local authorities in section 17.

These instruments may provide more detail to broad provisions of primary legislation, also on enforcement, such as in the Environmental civil sanctions order (England) 2010,[366] or on technical matters, e.g. through the definition of categories of installations under IPPC.[367] Also, standards may be detailed or set, e.g. for air quality in the Air Quality Limit Values Regulations 2003. Often, provision is made on procedural matters, such as on appeals against enforcement action. Interestingly, secondary legislation, in particular regulations, is often used to amend primary legislation.[368]

Finally, secondary legislation, in particular regulations, is the general instrument used for implementing European environmental legislation into domestic law.[369] Examples are the Control of Trade in Endangered Species (Enforcement) (Amendment) Regulations 2007 for the implementation of CITES; and the Pollution Prevention and Control (England and Wales) Regulations 2000 for the implementation of the IPPC Directive, which was later included along many other obligations from Directives in the Environmental Permitting (England and Wales) Regulations 2007 and 2010.[370]

Secondary legislation is legally binding and may, therefore, in principle comply with the obligations for implementation of the European Union. However, they must be able to guarantee the full application of the Directive in a sufficiently clear and precise manner.[371]

> The Court of Justice of the EU has specifically denounced the implementation of the Habitats Directive by the United Kingdom, due to the fact that the regulation used was framed broadly. This was not in line with European requirements for the implementation of Directives. The legislation relied upon by the United Kingdom was so general that it does not give effect to the Habitats Directive with sufficient precision and clarity to satisfy fully the demands of legal certainty. Furthermore, it also does not establish a precise legal framework in the area concerned, such as to ensure the full and complete application of the Directive or allow harmonised and effective implementation of the rules it lays down.[372] The United Kingdom argued that the most appropriate way

366 Although orders may be limited on this topic, see section 6 and 7 of the Legislative and Regulatory Reform Act 2006.

367 See also www.parliament.uk, tab 'Parliamentary business' (last visited 1 June 2019).

368 See, e.g. the Environmental Permitting Regulations 2016, which amends and even repeals provisions of the Environmental Protection Act 1990 and the Water Resources Act 1991, among others (Schedule 26 and 28).

369 Section 2(2) European Communities Act 1972 c. 68. By the Regulatory Reform Act 2006 this section was amended to not only allow implementation by regulations, but also by orders, rules or schemes. See section 27 RRA 2006 and the Explanatory notes thereto, para. 142.

370 Now replaced by the Environmental Permitting (England and Wales) Regulations 2018, which amends the Environmental Permitting (England and Wales) Regulations 2016.

371 ECJ C-6/04 ECLI:EU:C:2005:626, paragraph 21.

372 EJC C-6/04 ECLI:EU:C:2005:626, paragraph 27.

> of implementing the Habitats Directive is to confer specific powers on nature conservation bodies and to impose on them the general duty to exercise their functions so as to secure compliance with the requirements of that Directive. The Court did not uphold this argument. First of all, the existence of national rules may only render transposition by specific legislative or regulatory measures superfluous if those rules actually ensure the full application of the Directive in question by the national authorities. Secondly, faithful transposition becomes particularly important in the context of the Habitats Directive. With regard to this Directive the Member States are under a particular duty to ensure that their legislation intended to transpose that Directive is clear and precise, including with regard to the fundamental surveillance and monitoring obligations.

Tertiary legislation[373] supplements primary and secondary legislation and is very often used to do so. There are many forms of tertiary legislation, such as guidance – a very prominent type – and directives, codes of conduct, codes of practice, guidelines, circulars and other rules.[374] Such rules may emanate from central government, for example in the form of guidance to an Act of Parliament[375], or from regulatory authorities, such as the local authorities or the Environment Agency.[376]
Tertiary legislation is very widely used in the environmental and enforcement law of England, as to which five purposes can be distinguished in literature.[377] First, guidance or (other) rules can serve as an aid to the interpretation of statutory provisions, to set out definitions in a non-legalistic language, for example in a circular.[378] Second, guidance or (other) rules can serve as a more flexible form of informal guidance or rule, such as codes of practice or broad strategic documents such as the national strategy on air quality.[379] Third, guidance or (other) rules can also serve as statements of regulatory agency policy and practice. These can be used in relation to other agencies carrying out overlapping functions, such as the Environment Agency's

373 Dependent on the manner in which this legislation is made – through an explicit basis in primary or secondary legislation or without a formal basis – this legislation has legal force (or not). This legislation is also called quasi-legislation. See Bell et al 2017, p. 102.
374 McEldowney 2016, p. 163; Parpworth 2018, p. 191.
375 See e.g. *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, available at https://webarchive.nationalarchives.gov.uk/20100408112429/http://www.berr.gov.uk/Policies/better-regulation/improving-regulatory-delivery/implementing-principles-of-better-regulation/regulatory-enforcement-and-sanctions-bill (last visited 1 June 2019); *Civil sanctions for environmental offences: guidance to regulators*, London: DEFRA 2010, available at https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf (last visited 1 June 2019).
376 See the Environment Agency's Enforcement and Sanctions policy and its Offence response options document (2018), available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).
377 As taken from Bell et al 2017, p. 100-102.
378 Bell et al 2017, p. 101.
379 Bell et al 2017, p. 101.

Policy and Practice document on the protection of groundwater when determining planning applications.[380] Fourth, tertiary legislation can also serve as a way of structuring discretion and promoting consistency and transparency in decision-making. An example of this is the Environment Agency's Enforcement and sanctions policy and Offence response options document.[381] Through such legislation, a degree of consistency in the exercise of enforcement discretion should be ensured across the country.[382] Finally, the purpose of providing rules and guidance on procedure or other technical matters, where there is a need to provide information and practical guidance in non-legalistic language can be distinguished.[383] Considering these purposes, tertiary legislation will commonly contain procedural and not substantive provisions.[384]

Considering the above, to get a view of the system of environmental protection and enforcement, it is therefore necessary to refer to each of the various pieces of primary, secondary and tertiary legislation that have been drafted for the different areas of the environment. Below, this legislation will be explored further.

3.3.3 Specifics: the key legislation for environmental protection and its enforcement

As indicated previously, the provisions for environmental enforcement are largely contained in the environmental statutes themselves and in secondary legislation on the same topic. Both the powers for inspection, administrative sanctioning, prosecution and criminal sanctioning by the authority concerned acting as prosecuting authority are generally laid down in the sectoral legislation, or in legislation on the specific authority that is competent. While the secondary legislation will not be discussed here in detail, the main environmental statutes and their content will be presented here. The exception to the rule of fragmented enforcement provisions is a relatively recent statute on civil sanctions applicable in general to all enforcement of legal rules. This statute will be highlighted here also as part of a section exploring the key legislation on enforcement. First, however, we turn to the key legislation on environmental protection.

380 Bell et al 2017, p. 101.
381 Bell et al 2017, p. 101. Another example is the Code for Crown Prosecutors, which has a statutory basis (section 10 of the Prosecution of Offences Act 1985). The Code gives guidance to prosecutors on the general principles to be applied when making decisions on prosecutions. Available at www.cps.gov.uk/publication/code-crown-prosecutors (last visited 1 June 2019).
382 Bell et al 2017, p. 101.
383 Bell et al 2017, p. 101.
384 Bell et al 2017, p. 102.

3.3.3.1 The key legislation on environmental protection

The main statutes relevant for the environmental protection nearly all have their origin in the 1990s, which was a period of consolidation and modernisation of the statutory regimes in England.[385] The decade after that signified many amendments and continuing consolidation of the environmental protection regimes, the organisation and the instruments. The current decade (the 2010s) will have to prove whether the theory and practice are sufficiently attuned to one another and provide for regulatory effectiveness. Here, the main statutes, that are rooted in 1990 and onwards, with the exception of the Wildlife and Countryside Act 1981, are described.

For the purpose of this research, the relevant main environmental acts in England are:

- the Environmental Protection Act 1990 (EPA 1990)[386]
- the Environment Act 1995 (EA 1995)
- the Pollution Prevention and Control Act 1999 (PPC Act 1999)
- the Town and Country Planning Act 1990 (TCPA 1990)
- the Water Resources Act 1991 (WRA 1991)
- the Wildlife and Countryside Act 1981 (W&CA 1981)
- the Natural Environment and Rural Communities Act 2006 (NERCA 2006).[387]

These statutes are at the core of the environmental regulation in the areas of IPPC/PPC; waste; planning control; water pollution; and wildlife and nature protection. Moreover, an important role is played by the secondary legislation regarding the environmental permit as well as that with regard to environmental damage.[388]

All of the Acts provide a broad framework. This means that for a correct view of the system it is necessary to refer to each of the various pieces of legislation which establish powers in a certain area, and in the sets of regulations and the guidance and other rules which supplement the terms of primary and secondary legislation.

It is not meant to present a full picture here of all the legislation relevant to the environment and the enforcement thereof. For England this would entail a large framework of statutes and secondary legislation that would go beyond the purpose of this section. For example, there are many separate pieces of legislation, dealing with

385 Woolley et al 2009, p. 28.

386 In England, the year that legislation comes into force is always added to the title of the legislation. This, however, does not necessitate that all provisions in the legislation enter into force in the same year. It may also be that the entire piece of legislation gains force at a later date. However, this rarely occurs. The reference to a date in a title for legislation does also occur in the Netherlands, see for example the Politiewet 1992, but is not a standard practice, nor is it in Germany.

387 The Water Industry Act 1991 is also often mentioned as one of the key environmental Acts, but will not be discussed here, as it focuses more on sewerage services, trade effluent, and the supply of water and not on the control of water pollution and water quality.

388 These are the Environmental Permit Regulations 2010 and the Environmental Damage (Prevention and Remediation) Regulations 2015, respectively.

individual issues, such as pesticides. Also, much secondary legislation is in place on all kinds of topics from procedural to material. Neither will be discussed in this section in great detail and only where necessary. However, in discussing the organisation and instruments for enforcement in the following chapters, such legislation will be referred to where relevant, although it is never the intention to provide a complete and detailed picture of the regulation of every single issue within the environmental arena and their enforcement.

As indicated above, there exists no general statute on environmental protection in England, nor do the statutes named above provide a full regulation in relation to the relevant subject matter. The legislation can be characterised as sectoral and fragmented. Some Acts do cover a broader range of sectors within the environmental arena. Two Acts in particular provide this: the Environmental Protection Act 1990 (EPA 1990) and the Environment Act 1995 (EA 1995). Both statutes contain provisions on a variety of issues. While the EPA 1990 has the control of pollution as its central focus, the EA 1995 largely deals with a single regulatory authority: the Environment Agency. As indicated above, there have been many amendments in the decades after the coming into force of, in particular, the EPA 1990. This was influenced by progression in terms of the awareness of environmental risks, the change in regulatory approaches and influence from the European environmental law.[389]

The Environmental Protection Act 1990 covers a broad range of areas of the environment in the light of pollution control and was the first act to bring these areas together.[390] It provides for regulation on integrated pollution control (IPC) and local air pollution control (LAPC); waste management; contaminated land[391]; statutory nuisances; litter; and genetically modified organisms. When it first gained force, this Act was in many ways unique as it pushed forward the idea of integrated pollution control, which was different from its predecessors. Around the same time this idea was also developed – in a slightly different form – in the EU, leading to the Directive on integrated pollution prevention and control (IPPC Directive).[392]
The EPA 1990 has seen many amendments to the pollution control regime since its coming into force, primarily through secondary legislation. The regime of integrated pollution control (IPC) and local air pollution control (LAPC) was repealed and replaced with the IPPC Regime in the Pollution Prevention and Control Act 1999

389 Bell et al 2017, p. 21-37.
390 Woolley et al 2009, even calls it 'as close to codification of environmental law as the law of England and Wales has got' at p. 28.
391 This area was added through an amendment in the Environment Act 1995.
392 Directive 96/61/EC Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

(PPC Act 1999). This Act enables provision to be made for or in connection with implementing the IPPC Directive.[393] The implementation of a European Directive through the PPC Act 1999, which is primary legislation, instead of through Regulations, is contrary to the usual practice of the government.[394] The PPC Act also regulates other activities, outside the ambit of the IPPC Directive, that are capable of causing any environmental pollution.

> The PPC Act 1999 divides regulated installations into three different categories: Part A(1) installations which have the greatest potential to impact on the environment; part A(2) installations which are less polluting than Part A(1) but have the potential to pollute more than one environmental medium; and part B installations which tend to only emit pollutants to the air.[395] The distinction in categories is important, as Part A(1) processes/installations are regulated by a different regulatory authority, the Environment Agency, than the other two categories, which are regulated by local authorities.

The PPC Act 1999 was supplemented by secondary legislation, the PPC Regulations 2000. These regulations provide more substantive provisions as – common to environmental legislation – most of the provisions in the PPC Act are very broadly framed. The PPC Act 1999 also provided a legal basis for Regulations to be made amending the system.[396] Making use of this provision, in 2007, the regulation of integrated pollution control, local air pollution control and waste management in the EPA 1990 and the PPC Act 1999 and its Regulations was amended by the creation of the concept of the environmental permit in a new set of Regulations on environmental permitting.[397]

The 2007 Regulations brought the figure of the environmental permit into effect by putting permits for pollution prevention and control and waste management licenses together in one permit in April 2008. Common procedures for appeals, changes and transfers are applicable to this environmental permit. However, the division of competences – now with regard to topics within one permit – remains. This means that different authorities may be competent for different parts of the environmental permit. The Regulations also transposed and incorporated several European Directives.

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393 Directive 96/61/EC Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

394 The reason for this lies also in the consideration to make some changes to the way the existing regime regulated operations. Thornton & Beckwith 2004, p. 112.

395 Thornton & Beckwith 2004, p. 117.

396 In section 2 and Schedule 1 of the PPC Act 1999.

397 Environmental Permitting (England and Wales) Regulations 2010, now the Environmental Permitting (England and Wales) Regulations 2018. The Pollution Prevention and Control Regulations and the amendments thereto were all revoked, see Schedule 22 of the 2007 Regulations.

In subsequent years, more terrain was claimed for the environmental permit, extending the process of integration to other areas of environmental protection. On April 6, 2010 the environmental permit came to also cover what previously were water discharge consents, groundwater permits and radioactive substances registrations and authorisations with the coming into force of the Environmental Permitting (England and Wales) Regulations 2010.[398] Moreover, these Regulations transposed and incorporated eighteen European Directives that impose obligations to be delivered through permits or capable of being delivered through permits, such as the IPPC Directive.[399]

The EPA 1990, the Water Resources Act, and the EP Regulations 2010 all confer provisions for the enforcement of the environmental permit or its components to the local authorities and the Environment Agency for the enforcement of the environmental permit.[400] This overview of the field of pollution control shows that it has been quite a dynamic field over the past twenty years.

The other Act with a broad range, as already mentioned above, is the Environment Act 1995 (EA 1995). This Act was in fact a big step forward in countering the fragmentation of the organisation for environmental protection. The Act created the Environment Agency, which is the most prominent regulator and, thereby, the most prominent enforcement authority in the environmental arena.[401] The Environment Agency carries out functions related to waste regulation, water pollution and water resources, radioactive substances, air quality, and most aspects of integrated pollution control. The EA 1995 sets out the principal aim and duties of the Agency. These and the content of the other legal rules on the Environment Agency will be discussed further in the next chapter.

The other main environmental legislation is (truly) sector specific. The Town and Country Planning Act 1990 (TCPA 1990) deals with building permits and planning. The Wildlife and Countryside Act 1981 consists of two parts. Part I concerns the protection of wildlife, part II deals with nature conservation. The Countryside and Rights of Way Act 2000 also significantly amended this Act – and the organisation of the competent authorities. Moreover, in October 2006, a new organisation named Natural England was introduced in the Natural Environment and Rural Communities Act 2006[402] to carry out the regulatory functions with regard to the protection of

398 The regulations came into force on 6 April 2010. They have been amended several times, see the Environmental Permitting (England and Wales) Regulations 2018.

399 See section 3 of the EP Regulations 2010 for a list. Some of these are re-transposed, as they already had been transposed in the 2007 Regulations.

400 The Environment Agency has given out a guidance to make sense of this set of powers, see the *Environmental Permitting (England and Wales) Regulations 2010, Regulatory Guidance Series No 11: enforcement powers*, London: Environment Agency 2010, available at www.gov.uk/government/publications/rgn-11-enforcement-powers (last visited 1 June 2019).

401 More on this in the next chapter. The Act also introduced the Scottish Environment Protection Agency.

402 And also amended the Wildlife and Countryside Act 1981.

wildlife and nature conservation previously in the hands of English Nature and several other authorities.
As discussed earlier in this chapter, in 2005 the United Kingdom was obligated by judgment of the European Court of Justice to change its Conservation (Natural Habitats) Regulations 1994, which transposed the species protection required by the EU Habitats Directive. On 1 April 2010, the Conservation of Habitats and Species Regulations 2010 entirely replaced these 1994 Regulations (as amended).
The water environment also has its own regime, contained in several statutes.[403] The Water Resources Act 1991 contains most of the regulation regarding water pollution and water resources, although the Water Act 2003 has revised the latter topic.[404]

There is a piece of secondary legislation that straddles both categories of environment and enforcement presented here. The Environmental Damage Regulations 2009 implement the European Liability Directive into English law. It is a piece of legislation on the environment, as well as on the enforcement of non-compliance. Even so, it draws across the areas of the environment to present a regime of prevention and remediation of environmental damage. The Regulations apply to operators that cause an imminent threat of, or actual environmental damage to natural resources. These resources are protected species and natural habitats, or a site of special scientific interest; surface water or groundwater; and/or land.[405] The Regulations deal with all kinds of damage, included that permitted by licences or permits extended from the regulatory authorities. It is therefore not necessarily the case that the activities causing damage are the result of a breach of law. However, in practice, often this is in fact the case.[406]

3.3.3.2 The key legislation on enforcement

As indicated previously, statutes detailing in general all enforcement powers of the regulatory authorities are absent and provisions on enforcement are to be found in each of the environmental statutes. There is no general criminal law Act that penalises breaches of environmental regulation and provides all the legal rules for criminal enforcement. However, there is an single Act that is dedicated only to specific enforcement powers – civil sanctions – for regulatory authorities: the Regulatory Enforcement and Sanctions Act 2008. The administrative authorities may impose such civil sanctions. The majority of these sanctions require a standard of proof to be imposed that is similar to the criminal standard.[407]
The Act consists of four parts. In its Part 3, the Act provides the enabling power for the legislator to provide regulatory authorities with an extended toolkit of civil sanctions

403 Woolley et al 2009, p. 29.
404 The Water Industry Act of 1991 and 1999 provides the law on water supply and sewerage. In this research I leave this (sub)area of environmental protection aside.
405 Regulation 4 of the Environmental Damage Regulations (England) 2009.
406 Burnett-Hall & Jones 2012, p. 258.
407 Regulatory Enforcement and Sanctions Act 2008, section 42(2): "where the regulator is satisfied beyond reasonable doubt that the person has committed a relevant offence."

as (temporary) alternatives to criminal enforcement. These sanctions are intended to be a more proportionate and flexible response to cases of regulatory non-compliance normally dealt with in the criminal courts.[408] In particular, the extended toolkit will allow regulators to remove the financial benefit gained by businesses that deliberately seek an advantage through non-compliance with their regulatory obligations while helping to secure increased compliance.

Besides these substantive provisions on specific enforcement instruments, the Act also covers three other issues in its Part 1, 2 and 4. Part 1 establishes the Local Better Regulation Office (LBRO), giving it statutory powers to promote adherence to the principles of better regulation amongst local authorities, and greater co-ordination between them and central government. The principles of better regulation were formulated through a government review: the Hampton Review.[409] The principles were laid down in 2006 in the Legislative and Regulatory Reform Act 2006. According to section 2(3) of this Act, regulatory activities should be carried out in a way that is transparent, accountable, proportionate and consistent. Moreover, regulatory activities should be targeted only at cases in which action is needed. The LRBO is intended to bring financial benefits to businesses through increased clarity and guidance to local authorities, helping them work together to keep the burdens of regulation on compliant business to a minimum.[410]

Part 2 seeks to secure co-ordination and consistency of regulatory enforcement by local authorities by establishing a Primary Authority scheme. It is the intention that businesses operating in more than one local authority area that choose to have a Primary Authority Partnership will benefit from improved consistency of advice and enforcement across local authority trading standards, environmental health, licensing and fire and rescue services.[411]

The last part, part 4, creates a duty that requires regulators to review their functions, not to impose unnecessary burdens, and – unless disproportionate or impracticable – to remove burdens that are found to be unnecessary.[412]

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408 *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, p. 7. Available at https://webarchive.nationalarchives.gov.uk/20100408112429/http://www.berr.gov.uk/Policies/better-regulation/improving-regulatory-delivery/implementing-principles-of-better-regulation/regulatory-enforcement-and-sanctions-bill (last visited 1 June 2019).

409 More on this in the next section of this chapter.

410 *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, p. 6. Available at https://webarchive.nationalarchives.gov.uk/20100408112429/http://www.berr.gov.uk/Policies/better-regulation/improving-regulatory-delivery/implementing-principles-of-better-regulation/regulatory-enforcement-and-sanctions-bill (last visited 1 June 2019).

411 *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, p. 6. Available at https://webarchive.nationalarchives.gov.uk/20100408112429/http://www.berr.gov.uk/Policies/better-regulation/improving-regulatory-delivery/implementing-principles-of-better-regulation/regulatory-enforcement-and-sanctions-bill (last visited 1 June 2019).

412 *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, p. 7. Available at https://webarchive.nationalarchives.gov.uk/20100408112429/http://www.berr.gov.uk/Policies/better-regulation/improving-regulatory-delivery/implementing-principles-of-better-regulation/regulatory-enforcement-and-sanctions-bill (last visited 1 June 2019).

The Act received Royal Assent on 21 July 2008, where parts 1, 3 and 4 commenced on 1 October 2008 and Part 2 commenced on 6 April 2009. Although the Act came into force officially, before the administrative authorities could exercise the new civil powers of part 3, first, the conferral of the powers to impose these sanctions had to be laid down specifically for the Environment Agency and Natural England.[413] For England this was done in the Environmental Civil Sanctions (England) Order 2010 and the Environmental Sanctions (Miscellaneous Amendments) Regulations 2010, which gained force on 6 April 2010.

Second, according to the primary statute, the powers can only be put into force by a regulatory authority when the application thereof has been published by the authority in a Guidance.[414] Both Natural England and the Environment Agency have such Guidance. Both have a quite detailed new set of documents which all seek to inform the regulated and guide its own enforcement officers in practice.[415]

3.4 Characteristics of the system: substance

3.4.1 Introduction

In England, there exist three sets of sanctions belonging to two types of public enforcement of environmental law: administrative enforcement and criminal enforcement. Administrative enforcement consists of a varied toolbox of two sets of sanctions: administrative sanctions – notices – and (administrative) civil sanctions – a hybrid type of sanctions.[416] Criminal enforcement includes prosecution and alternatives to prosecution.

In England, nearly all cases of non-compliance with environmental legislation are also criminal offences.[417] In other words, the system of environmental protection in England is underpinned by the imposition of criminal liability.[418] Also, where administrative notices imposed as administrative enforcement are not complied with, this is also often a criminal offence. This means that very many cases of non-compliance can be criminally enforced. This has been criticised in several governmental reviews of the enforcement of environmental protection. These will now be further discussed.

413 Regulatory Enforcement and Sanctions Act 2008, section 36.

414 Regulatory Enforcement and Sanctions Act 2008, section 64.

415 Natural England's compliance and enforcement position, enforcement guidance and six annexes (2011), available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england and the Environment Agency Enforcement and sanctions policy, including three annexes; and Offence response options document (2018), available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy. Last visited 1 June 2019. More on the substance of these documents, see chapter 4 and 5.

416 These will be discussed in chapter 5.

417 One of the exceptions to this is a breach of planning control. Acting without or in breach of a condition in a planning permit is not a criminal offence; only administrative notices can be imposed in case of such a contravention, section 171A(1)-(2) Town and Country Planning Act 1990. However, when those – as many other – administrative notices are not complied with, this is a criminal offence for which prosecution can follow.

418 See Abbot 2005, p. 69.

3.4.2 Reviews of environmental enforcement: signalled problems and developments

3.4.2.1 Good regulation initiatives

The effectiveness of the enforcement organisation and instruments has been an important feature of the discussion in England in recent years. A discussion on environmental enforcement has been part of a much broader debate on regulatory reform. Following from this debate are quite a few Better Regulation initiatives, including important changes to the regulation and structure of enforcement.[419]

One of these initiatives was the formulation of five principles of good regulation.[420] These principles were first published in 1998, and implemented by the regulatory authorities in their policy. These principles were first laid down in (binding) primary legislation in the Legislative and Regulatory Reform Act 2006 (LRRA 2006).[421] Specifically, this Act provided that certain regulatory activities should be carried out in a way that is transparent, accountable, proportionate, consistent, and should be targeted only at cases in which action is needed.[422] However, the duty to have regard to these principles is subject to any other legal requirement, such as a statutory duty or a requirement of European law, which will take priority over the duty to have regard to the principles.[423] The Environment Agency – which is the primary environmental regulator in England – has added substantive effectiveness, cost-effectiveness (for government, regulators and the regulated), coherence, fairness, practicability and effective stakeholder involvement to the list of principles it adheres to.[424]

Specifically on enforcement, the Legislative and Regulatory reform Act 2006 implemented to a large extent recommendations made by what was named 'the Hampton review' carried out in 2005.[425] The twenty-five recommendations made by this review promoted an effective inspection and enforcement based on risk assessment and the use of resources, as well as the reduction of the number of national regulators still present.[426] Among the recommendations are:

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419 These initiatives are handled by the Better Regulation Executive that is part of the Department of Business, Innovation and Skills.

420 First laid down specifically for enforcement in the report *The Enforcement Concordat: the principles of good enforcement – policy and procedures*, London: Cabinet Office 1998; then set out by the Better Regulation Task Force in the report *The principles of Good Regulation*, London: Cabinet Office 2000; and followed by the report *Regulation – less is more: reducing burdens, improving outcomes*, London: Cabinet Office 2005. Available at www.brc.gov.uk (last visited 1 June 2019).

421 This Act came into force in January 2007 as the successor to the Regulatory Reform Act 2001, which in particular provided a fast-track procedure for the amendment of regulations through Regulatory Reform Orders. In the 2007 Act, such orders are now named Legislative Reform Orders and may amend primary legislation.

422 Section 21 of the LRRA 2006. Moreover, the regulatory activities that fall under the principles are to be specified in an Order and include enforcement (section 24 of the LRRA 2006).

423 Section 21(3) LRRA 2006.

424 See the report *Delivering for the Environment: A 21st Century Approach to Regulation*, London: Environment Agency 2003; Woolley et al 2009, p. 67.

425 The Hampton review, Hampton 2005.

426 See report *Implementing Hampton: from enforcement to compliance*, London: HM Treasury, BRE and the Cabinet Office 2006; Macrory 2006a (the Macrory review).

- comprehensive risk assessment should be the foundation of all regulators' enforcement programmes;
- there should be no inspections without a reason; and,
- resources released from unnecessary inspections should be redirected toward advice to improve compliance.[427]

Specifically for local authorities, the Hampton review put forward generally that local regulatory services are often hindered by the diffuse and complex structure of local regulation, including difficulties arising from the lack of effective priority setting from the centre, and the lack of effective central and local co-ordination.[428] According to the review, this aspect requires more attention within environmental enforcement. Subsequently, in 2007, the Rogers Review specifically examined the local authorities to improve local authority enforcement.[429] This resulted in the establishment of several national enforcement priorities at local level, which include air quality. Other priorities do not connect directly to environmental protection.[430]

> The recommendations from Hampton and those of Rogers are to be realised through or with assistance from the Local Better Regulation Office (LBRO). This Office was established in July 2008 with the coming into force of the Regulatory Enforcement and Sanctions Act 2008. The Act gives the LBRO powers, among others, to start a 'primary authority' scheme to coordinate regulatory enforcement.[431]

The Hampton review also recommended further review and evaluations, in particular of regulators' penalty regimes. Developments in environmental enforcement were spurred on by the subsequent comprehensive review of the enforcement of environmental regulation: the Macrory review.[432]
The problems established by that review were condensed into six points:

1. The current design of environmental enforcement is not based on a full understanding of the varying attitudes and motivations of operators.
2. Sentencing in environmental cases does not generally achieve all of the key purposes of enforcement – criminal sanctions are therefore inadequate.
3. Inadequate sanctions are undermining the impact of regulation.

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427 Hampton 2005 (the Hampton review).
428 Hampton 2005 (the Hampton review), p. 71 and further.
429 Rogers 2007 (the Rogers review).
430 Rogers 2007 (the Rogers review); also Hodges 2015.
431 Section 22 and further of the Regulatory Enforcement and Sanctions Act 2008. More on this in the next chapter.
432 The Macrory review was launched by the Government, specifically the DEFRA in September 2005 and produced three documents, with the final report published in November 2006: Macrory 2005 (discussion paper); Macrory 2006a (consultation document); Macrory 2006b (final report).

4. Many regulators do not have explicit environmental enforcement policies.
5. Regulators do not have all the right sanctions to match the varying seriousness of non-compliance, or to recognise the differing operator behaviour which leads to it – proportionality in enforcement is too weak.
6. The available data on enforcement cannot tell us what is being achieved.[433]

3.4.2.2 Issues of criminal enforcement

Overview

The Macrory review also focussed specifically on criminal enforcement. For a major part, the issues of criminal enforcement followed from the focus on criminal sanctions in the enforcement system and the deficiencies in the criminal organisation and sanctions in place. As a result of these deficiencies, the criminal stigma extending from criminal sanctions was considered low.

> William Wilson has put forward that 'Those looking for purpose or design in the way that English law has come to use the criminal law to enforce environmental statutes may look in vain. It has grown up that way piecemeal, and out of habit as much as by design. But the almost exclusive reliance on the criminal law is not without consequences.'[434]

The issues of criminal enforcement are summarised in the Macrory review in four points:

- The manner in which the criminal offences are formulated relating to regulatory non-compliance.
- The use made of the criminal sanctions in sentencing by the criminal courts.
- The use made of the tool of criminal prosecution by the regulators.
- The balance between the criminal sanctions and the remaining instruments in the toolbox of the regulators.[435]

These points will now be highlighted further.

433 *Review of enforcement in environmental regulation; report of conclusions*, London: DEFRA 2006, p. 3. Available at: https://webarchive.nationalarchives.gov.uk/20081106065522/http://www.defra.gov.uk/environment/enforcement/pdf/enforcereview-report.pdf (last visited 1 June 2019).

434 Wilson 1999, p. 110; Watson 2005, p. 4.

435 Macrory 2006b (the Macrory review), p. 29-31.

The formulation of criminal offences: criminal liability

In England, five categories of criminal offences may be distinguished:

a. causing or knowingly permitting pollution, which is widely drafted and applicable to both licence holders and non-licensed dischargers;
b. breach of licence/permit conditions;
c. breach of statutory duty, such as the duty of care as established in environmental statutes, e.g. with regard to waste;
d. non-compliance with administrative notices; and, since April 2010, also civil non-monetary sanctions issued by the regulator; and,
e. personal liability of senior company officers who consent or connive in the commission of an offence by their company, or to which such commission can be attributed.[436]

One of the categories that stands out in the above list is that there are criminal offences that actually penalise an offender who does not conform to a compliance order from the regulatory authority.[437] This has been criticised as it has been considered to effectively decriminalise the criminal law as the offence is linked only indirectly to environmental harm, directly only to an administrative process.[438] Most importantly, its use would trivialize the criminal stigma that is attached to a contravention being a crime.

Besides this, also the type of criminal liability of environmental offences has been criticised. The criminal liability of environmental offences is generally of the strict liability type. This means that criminal environmental provisions generally do not contain a reference to shades of a mental element of culpability, or, *mens rea*; the regulatory authority, which prosecutes for environmental criminal offences, does not need to establish that the offender knew that what he was doing was wrong and would lead to the present result.[439] Therefore, intent, recklessness, knowledge and negligence are no prerequisite for being held guilty of environmental offences.[440] Instead, the phrasing of the provisions that lay down the offences holds no reference to how the offences were committed; stating simply that it is an offence to contravene a certain provision. However, there are offences as to which the scope of liability does require a subjective element, in particular where the provisions contain the terms 'cause or knowingly permit' an offence.[441] Moreover, the defence of exercising due

436 Wolf & Stanley 2013, p. 45. See further chapter 5.
437 In the words of Bell et al 2017, p. 270: "ignoring the dictates of the regulatory body".
438 Bell et al 2017, p. 270-271.
439 Wolf & Stanley 2013, p. 45.
440 There is no commonly accepted definition of strict liability, although often, the definition in Ormerod & Laird 2018, p. 110-113; Abbot 2009, p. 123; Burnett-Hall & Jones 2012, p. 117.
441 See for example section 1(5C) Wildlife and Countryside Act 1981 or section 85(1) Water Resources Act 1991; also Abbot 2005, p. 69.

diligence, which is laid down in waste legislation, is a form of *mens rea*, which may prevent the conviction for a strict liability offence committed without fault.[442] Also, an admission of guilt by an offender is considered as a possible mitigating factor for the authorities when determining a sanction and its level.

One could consider that the characteristic of strict liability highlights the seriousness of environmental harm, as no extra subjective elements are necessary to prove the criminal offence. In the Court of Appeal case of Environment Agency v Milford Haven Port Authority, Lord Bingham CJ noted that:

> "Parliament creates an offence of strict liability because it regards the doing or not doing of a particular thing as itself so undesirable as to merit the imposition of criminal punishment on anyone who does or does not do that thing irrespective of that party's knowledge, state of mind, belief or intention." [443]

Therefore, the strict liability of the offences is quite deliberate to re-enforce the seriousness of the offence and the potential to cause long-term and irreparable harm.[444]

> Also in the case law, the courts have determined that strict liability does not infringe a defendant's right to a fair trial under Article 6 of the European Convention on Human Rights, nor give rise to any incompatibility with the presumption of innocence guaranteed by Article 6(3) ECHR.[445]

While the offender may therefore more easily be considered to fulfil the elements of the offences, the extent of blameworthiness is an element that should still be considered to determine the sentence. This extent is dependent on the presence of any mitigating or aggravating circumstances.[446]

The legislator has applied strict liability almost entirely across the board of environmental offences. It is in place for minor 'technical' environmental offences, as well as for offences that need to be prohibited in the public interest.[447] This 'wholesale' use of strict liability[448] has been pointed out to have great disadvantages.[449] It has

442 Woods & Macrory 2003, paragraph 2.7, p. 9; Abbot 2009, p. 123.

443 Environment Agency v Milford Haven Port Authority (The Sea Empress) [2000] 2 Cr App R (S) 423.

444 See also Abbot 2004; *Costing the Earth: guidance for sentencers*, London: Magistrates' Association 2009, p. 11-12, available at www.magistrates-association.org.uk/sites/magistrates-association.org.uk/files/Costing%20the%20Earth%20-%201%20January%202010.pdf (last visited 1 June 2019).

445 Burnett-Hall & Jones 2012, p. 118.

446 See *Environmental offences: definitive guideline*, London: Sentencing Council 2014, available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_ web1.pdf (last visited 1 June 2019); *Costing the Earth: guidance for sentencers*, London: Magistrates' Association 2009, p. 11-12, available at www.magistrates-association.org.uk/sites/magistrates-association.org.uk/files/Costing%20the%20 Earth%20-%201%20 January%202010.pdf (last visited 1 June 2019).

447 Woods & Macrory 2003, section 2.8, p. 9.

448 Woods & Macrory 2003, section 2.8, p. 9.

449 Also Woods & Macrory 2003, paragraph 8-9; for a short overview see Abbot 2005, p. 70-71; also Hilson 2000; Abbot 2009.

been considered that offences with strict liability are not 'real criminal' offences due to the lack of subjective elements and therefore erode the concept of the criminal offence.[450] This has been responded to in the case of R v Anglian Water Services; a case involving significant water pollution from a sewage discharge. Lord Justice Scott Baker put forward in that case that:

> "We would not categorise breaches of section 85(3) [of the Water Resources Act 1991] of the nature that occurred in this case as being of a non-criminal character, albeit the offence is one of strict liability. The environment in which we live is a precious heritage and it is incumbent on the present generation to preserve it for the future (…) Parliament has imposed on people like the appellant a heavy burden to do everything possible to ensure that they do not cause pollution." [451]

Opponents of strict liability have suggested the introduction of *mens rea* in the provisions which penalize criminal offences possibly in combination with the introduction of more administrative instruments to enlarge the toolbox available to regulators, so as to give the criminal instruments a true 'hitting power'.[452] Several solutions to the flaws of the criminal enforcement of environmental law were actually introduced. For more on those solutions, see chapter 4, section 4.1 (organisation) and chapter 5, section 5.1 (sanctions).

Other issues of criminal enforcement

The criminal stigma of convictions was also considered low, as environmental cases had not been penalized sufficiently high in the criminal courts. The lack of body to the criminal sanctions had meant that even though a criminal sanction was considered having societal stigma[453] attached to it, little stigmatic effect extended from it. In other words, the aim to prevent non-compliance was not achieved through the use of criminal law for enforcement due to the lack of a penalty that fit the crime and its consequences.[454]

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450 See also *Costing the Earth, Guidance for sentencers*, London: Magistrates' Association 2009, p. 2 and p. 9, which speaks of 'the now outdated assertion that environmental crimes are not real crimes due to their strict liability nature'.

451 R v Anglian Water Services [2003] EWCA 2243; [2004] Env LR 10; *Costing the Earth: Guidance for sentencers*, London: Magistrates' Association 2009, p. 11-12.

452 Abbot 2005; Woods & Macrory 2003, paragraph 2.2 and 2.6; Wilson 1999. Lees 2015 extensively discusses another aspect of the formulation of environmental criminal offences. In her book, she describes the current interpretation of environmental criminal offences by the criminal courts and proposes a primarily linguistic approach to improve legal certainty.

453 Also called 'moral culpability', see *Sentencing for Wildlife and Conservation Offences*, annex to *Costing the Earth: Guidance for sentencers*, London: Magistrates' Association 2009.

454 This was in fact established in the early 2000s, through a review commissioned by the Government, resulting in the report by DuPont & Zakkour 2003, as well as in *The House of Commons Environmental Audit Committee Sixth Report, Environmental crime and the courts*, London: the Stationery Office 2004. Available at https://publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/126/126.pdf (last visited 1 June 2019).

A court case that presents an illustration of this is *R v James, James and James & Gilbert Gardens.*[455] This case concerned the dumping of thousands of tons of waste in 18 separate offences between 1999 and 2000. The individuals concerned were fined £750 and the company £80 despite the fact that they received over £85 000 in tipping fees. The Agency received nothing towards its £25 000 cost of mounting the case. Moreover, where the Crown Court imposes a particularly high fine (as it may), this has often been decreased on appeal.[456]

The most common explanation as to why fines are so low has been that the Magistrates will only hear an environmental case on average once in seven years.[457] The other cases heard by these lay judges concern theft and burglary, and therefore it is difficult for them to know how to value environmental crime as 'real' crime.[458]
Moreover, when looking at the behaviour of the regulatory authorities in bringing prosecutions for criminal offences this reveals that prosecutions were quite an exception.[459] This may have been caused by the evidential test (that is still applied) that requires that prosecution can only be brought when all collected evidence points to a clear conviction of the crime. However, this may also have been because recourse was taken in particular to other than formal action, in overreliance on other instruments than sanctions.[460]

3.4.2.3 Solutions

The above shows that despite the fact that criminal enforcement seemed to all be present in the system, this premise was not realised by the enforcement authorities involved. In any case, it was recognized in the Macrory review that criminal prosecution might not be, in all circumstances, the most appropriate sanction to ensure that non-compliance is addressed, any damage caused is remedied or behaviour is changed.[461] While solutions were proposed in the review to amend the criminal enforcement system – which will be further discussed in the next two chapters – it was also concluded in light of the above that the available tools on the administrative

455 See Abbot 2005, p. 76 who refers to Cardiff Crown Court, 16-26 September 2002, unreported.
456 For example in the Sea Empress case, discussed previously in this chapter.
457 Information presented by the Environment Agency in oral evidence given to the Environmental Audit Committee: *The House of Commons Environmental Audit Committee Sixth Report, Environmental crime and the courts*, London: the Stationery Office 2004, available at https://publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/126/126.pdf (last visited 1 June 2019); Abbot 2005, p. 76.
458 The House of Commons Environmental Audit Committee Sixth Report, Environmental crime and the courts, London: the Stationery Office 2004, paragraph 13. Available at https://publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/126/126.pdf (last visited 1 June 2019).
459 Abbot 2009, p. 112.
460 Ogus & Abbot 2002. And the reply to this by Navarro & Stott 2002, Environment Agency lawyers who described the article of Ogus and Abbot as 'provocative' and defended the Agency's record. Moreover, Abbot 2009, p. 112; also Woolley et al 2009, p. 70.
461 See the documents of the Macrory review: Macrory 2005, 2006a and 2006b, in particular section E9 in Macrory 2006b.

side of the sanctioning spectrum did not provide sufficient variation and flexibility. The Macrory review formulated several solutions to these problems. One of those was the formulation of six penalty principles (what a sanction should do) and seven characteristics (what a regulator should do, such as enforce in a transparent manner and take follow-up enforcement actions where appropriate).[462] The penalty principles are further discussed in section 5.1 of chapter 5.

As a result of this, several changes were made. The Macrory review would, in particular, lay the basis for the Act on regulatory enforcement and sanctions: the Regulatory Enforcement and Sanctions Act 2008. The specific changes with regard to the enforcement organisation and sanctions for environmental non-compliance will be discussed in chapter 4 and chapter 5, respectively. With regard to these changes, it is clear that also the focus in the relationship between administrative and criminal enforcement has shifted to a certain extent. This will be further explored in chapter 5.

3.5 Conclusion

This chapter has given an overview of the structure and substance of environmental protection legislation and the public enforcement thereof in England. Characteristics are the broad and tiered legislation on environmental enforcement and the increasingly planned and integrated approach to law and its organisation for the benefit of coherence. Both administrative and criminal enforcement are available for the protection of the environment. It was found that the enforcement of environmental law has been the subject of criticism and discussions on how to increase effective enforcement. Themes of improvement have looked primarily at the sanctions toolboxes for administrative and criminal enforcement.

The following two chapters look more closely at the organisation and the sanctions available in the context of the systems of enforcement available for environmental non-compliance, including the solutions implemented to increase the effectiveness of environmental enforcement in England. Chapter 4 will describe the enforcement organisation; chapter 5 will survey the toolboxes of sanctions available to the administrative and criminal enforcement authorities.

462 See Macrory 2005, 2006a and 2006b.

Chapter 4 Organisation of Public Enforcement of Environmental Law in England

4.1 Overview; characteristics and developments with regard to the enforcement organisation

4.1.1 Overview

It was described in the previous chapter that in England there are several types of public enforcement of non-compliance with environmental law: administrative enforcement, including civil sanctions – which can be regarded as a separate system –, and criminal enforcement. In this chapter, the main authorities that are competent for this administrative and criminal enforcement of environmental law are described. The main authorities in England that are relevant in this respect are the Environment Agency, Natural England, which are central government bodies, and the Local Authorities. These authorities are also known as regulatory authorities.[463] The police and the Crown Prosecution Service are the main authorities for the specific enforcement of wildlife offences.[464] The criminal courts are the main authorities involved in the criminal enforcement of all environmental law. The authorities are listed in the table below.[465]

The main authorities for the public enforcement of environmental law

- Central government bodies
  - Environment Agency
  - Natural England (Nature Conservancy Council)
- Local Authorities
- Police
- Crown Prosecution Service
- Criminal courts

463 A regulatory authority is a body, which is attributed the regulatory task of licensing/permitting of activities and enforcing regulation – in other words, a body that executes a regulatory function. See the definition of the regulatory function of an authority in section 32(2) Legislative and Regulatory Reform Act 2006: "a function under any enactment of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to any activity; or a function which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which under or by virtue of any enactment relate to any activity".

464 As will be described later, Natural England also has a certain competence for non-compliance involving wildlife protection. Besides this, Natural England can support the police in the inspection of wildlife offences where it does not have full competence. These are offences that are separate from the non-compliance involving wildlife protection previously mentioned. See further section 4.2.2.3.

465 Note that EU law is enforced by the same organisation as national law.

First, in this section, the characteristics of the enforcement organisation and the developments impacting that organisation are described; second, the regulatory/administrative authorities are described (4.2); third, separate attention is given to the investigation and prosecution of wildlife offences (4.3); fourth, the criminal courts are highlighted (4.4); next, the coordination and cooperation between the enforcement authorities is described (4.5); following that, the organisation is evaluated in light of the evaluative framework set out in chapter 2 (4.6); the chapter ends with the findings of the evaluation (4.7).

4.1.2 Characteristics of the enforcement organisation

Here, the characteristics of the organisation for the public enforcement of environmental law in England are described. An interesting aspect of the enforcement organisation in England is that there is no strict organisational division in the authorities that may impose administrative sanctions, civil sanctions and those that prosecute criminal offences and impose alternatives to criminal sanctions.[466] Nearly all administrative authorities that are in charge of administrative enforcement are also prosecuting authorities: they have the power to institute criminal proceedings in case of non-compliance with environmental law and may often also do so when administrative enforcement instruments are not complied with.[467]

With regard to the characteristics of the enforcement organisation, there is an interesting contrast between these administrative authorities – the main environmental regulators and prosecuting authorities – and the criminal judiciary that imposes criminal sanctions for environmental offences. Developments impacting the organisation have primarily taken place with regard to these regulators/prosecuting authorities; developments pertaining to criminal enforcement have not so much impacted the organisation, but have instead focussed on the substance of the criminal procedure, in particular sentencing.[468] Below, both are highlighted.

4.1.3 Developments with regard to the regulatory authorities

The theme of institutional coherence and centralisation runs through the history of the main environmental regulators. Over the years, the organisation of public environmental enforcement in England has developed from very sectoral and fragmented to more institutionally coherent and centralised.[469] Existing decentralised sectoral authorities have been amalgamated into regulatory authorities with a reach that covers more than one area of environmental protection. In particular, central

466 And contrary to e.g. the Netherlands.

467 The exception to this is the prosecution of wildlife offences, which is done by the Crown Prosecution Service. This will be discussed further in section 4.3 of this chapter.

468 The developments impacting sentencing are discussed in the next chapter on sanctions.

469 Bell et al 2017, p. 113.

government bodies have been instituted for this benefit, resulting in an increasing administrative centralisation.[470] Many different authorities were amalgamated into the Environment Agency in 1995 and the competent authorities for wildlife and nature conservation were joined and streamlined through the creation of Natural England in 2006. As a consequence, the number of authorities involved in the enforcement of environmental protection has decreased from the creation of the Environment Agency in 1995 onwards and institutional coherence has increased.
Even so, decentralisation also remains one of the characteristics of the administration in England.[471] The local authorities play a role with regard to several areas of environmental protection and their enforcement.

> When looking at the relevant legislation for the competence of these authorities, the manner in which the authorities are referred to in specific statutes or sectors of the environmental arena retains a certain specificity and variety. For example, the local authorities are referred to as 'local authority air pollution control (LAAPC)' for the purpose of the regulation and enforcement of installations controlled for air emissions, also called Part B operations under the EPA 1990. The local authorities are also called the 'local planning authority' for the benefit of the regulation and enforcement of the Town and Country Planning Act 1990 and the Planning Act 2008. The Environment Agency is also the 'waste regulation authority' for the purposes of the Environment Protection Act 1990 (s. 30).

One of the developments of the (enforcement) organisation of the local authorities was the introduction of the Primary Authority scheme in light of the Better Regulation push referred to in the chapter 3. The Primary Authority scheme consists of a set of rules to secure cooperation and coordination of the exercise of powers between local regulatory authorities where more than one authority is competent, in particular where businesses operate in more than one local authority area.[472] It aims to increase coherence and consistency. This and other instruments for cooperation and coordination are further discussed in section 4.6.4 below.

4.1.4 Developments with regard to the criminal courts

There was a lot of criticism on the sentencing by the courts, especially with regard to the low fines imposed.[473] With regard to the Magistrates' court one of the problems

470 Bell et al 2017, p. 112.
471 Bell et al 2017, p. 112.
472 *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, p. 6. Available at https://webarchive.nationalarchives.gov.uk/+/http:/www.berr.gov.uk/files/file47135.pdf (last visited 1 June 2019).
473 *Costing the Earth, Guidance for sentencers*, London: Magistrates' Association 2009. Available at www.magistrates-association.org.uk/sites/magistrates-association.org.uk/files/Costing%20the%20Earth%20-%201%20January%202010.pdf (last visited 1 June 2019).

seemed to be that it is not possible for the lay Magistrates to build up any expertise in this specific area, as on average they adjudicate an environmental case once every seven years.[474] Furthermore, it may be difficult for the lay justices to understand the impact of, for example, small spillages of solvent on a local environment or habitat.[475] The consequence was that they don't use their powers of sentencing to the maximum. However, the lack of expertise on environmental cases was also seen as a cause for low sentences in the Crown Courts, where a professional judge deals with sentencing.[476] Previous allocation of environmental cases to a certain judge has not been considered in allocating new cases within the courts.

As indicated above, the developments in reaction to these findings on low sentences did not have impact on the organisation itself. A type of consolidation of environmental cases with certain Magistrates' Courts had been proposed in order to focus cases where possible in certain locations, to enhance expertise.[477] Improved training of Magistrates was also recommended.[478] The former was not implemented. Moreover, it was proposed to establish an exclusive court that solely deals with environmental cases to bring the expertise to establish the appropriate sentence for offenders of sufficient level.[479] However, the focus of this debate in the 2000s instead shifted to a debate and the creation of a specialist environmental tribunal for the judicial review of appeals against administrative enforcement decisions.[480]

To increase the expertise and sensitivity of the courts to the impact of violations on the environment, guidelines were introduced and the limits to the competence of the Magistrates' Court in terms of fines were removed, as well as statutory limits for certain environmental offences raised.[481]

4.2 Regulatory authorities: administrative enforcement and criminal prosecution authorities

4.2.1 Overview

In England, several regulatory administrative authorities at different levels of government may be in charge of the administrative enforcement of non-compliance with environmental law. As explained previously, these regulatory authorities are also the prosecuting authorities for environmental offences in their field of competence. The main regulatory authorities for environmental non-compliance are

474 Abbot 2005. The organisation of the Magistrates' Court is further discussed in section 4.5 below.
475 Macrory 2014, p. 50-52.
476 See also section 4.5 of this chapter.
477 Macrory 2014, p. 51.
478 Royal Commission on Environmental Pollution, *Environmental Planning 23rd Report*, London: Stationery Office 2002.
479 Grant 2000; Carnwath 1989; Macrory & Woods 2003.
480 This is the First-Tier Tribunal. As appeal is not included in this research, this is not further discussed.
481 The substance of these developments is further discussed in the next chapter.

the Environment Agency, and Natural England, at central government level, and the local authorities, at local government level.[482] These are further discussed below.

4.2.2 The Environment Agency and Natural England

4.2.2.1 Introduction

The Environment Agency and Natural England are competent to enforce most public environmental law in England.[483] They are central government authorities that are non-departmental public bodies (NDPB's).[484] NDPB's are semi-governmental authorities – also called quasi-autonomous non-governmental organisations[485] – which have been appointed with a regulatory or public administrative task by central government. The NDPB's are not part of a governmental department. They are quasi-autonomous in the sense that they operate at arm's length from government.[486] The Environment Agency and Natural England are, however, responsible to the Secretary of State of the relevant Government Department. The most important department is the Department for Environment, Food and Rural Affairs (DEFRA). The Secretary of State is, in turn, responsible to Parliament for the activities of the NDPB's. Moreover, the Secretary of State may provide (statutory) guidance to the bodies.[487]

Besides the qualification as NDPB, the Environment Agency and Natural England are a corporate body.[488] This means that an authority is an independent legal entity with its own legal rights and responsibilities. It also means that the authority can take public decisions and the persons belonging to the authority may take decisions that are considered decisions of the authority.

482 Smaller more specific central government bodies are the Drinking Water Inspectorate and sewerage undertakers. See Bell et al 2017, p. 120.

483 Secretaries of State have some residual enforcement powers. For example, the Secretary of State for DEFRA has the power to enforce the polluter pays principle with regard to damage at the continental shelf or in the sea.

484 Other public bodies are non-ministerial government departments, such as the Crown Prosecution Service, which will be discussed in section 4.3. Within the category of NDPB's several types are distinguished, namely advisory NDPB's; executive NDPB's; tribunal NDPB's; and independent monitoring boards. The Environment Agency and Natural England are executive NDPB's. See e.g. Cabinet Office, *Public bodies. Guidance,* London: Stationery Office 2018, available at www.gov.uk/guidance/public-bodies-reform (last visited 1 June 2019).

485 Often referred to in short as 'quango's', see e.g. Cabinet Office, *Opening up quangos. A Consultation Paper*, London: Stationery Office 1997. Available at www.gov.uk/guidance/public-bodies-reform (last visited 1 June 2019).

486 See e.g. Cabinet Office, *Public bodies. Guidance,* London: Stationery Office 2018, available at www.gov.uk/guidance/public-bodies-reform (last visited 1 June 2019). These bodies are defined as a body that has a role in the processes of national government, but is not a government department or part of one, and which accordingly operates to a greater or lesser extent at arm's length from Ministers. In this report it is also considered that the NDPB classification is not a legal classification but an administrative one. See also Cabinet Office, *Opening up quangos. A Consultation Paper*, London: Stationery Office 1997. Available at www.gov.uk/guidance/public-bodies-reform (last visited 1 June 2019). The term 'NDPB' derives from the report by Pliatzky 1980. See Heringa & Verhey 2003, p. 26.

487 NDPB's are quite comparable to the Dutch zbo (*zelfstandig bestuursorgaan*).

488 This also applies to the local authorities. See, for the Environment Agency, section 1(1) Environment Act 1995.

The Environment Agency and Natural England have played an important role in the creation of institutional coherence in environmental regulation and brought with it the administrative centralisation of environmental enforcement.[489] However, there has also been criticism, focusing, for example, on the cost of maintaining the authorities. Such criticism is mainly brought forward in obligatory triennial reviews of the regulatory authorities by central government. A review of 2010 considered whether authorities should be maintained, amalgamated or struck. It was considered that the Environment Agency and Natural England should remain in place.[490] However, significant cutbacks were made to the budget of the agencies. To support the organisation in dealing with these cutbacks, much reorganisation was done, including striking the regional management tier of the authorities. The number of regional offices was thereby reduced. To counter this, the local tier was strengthened. Natural England, for example, appointed fourteen new area managers to oversee the local areas.

The 2013 triennial review also concluded that the Environment Agency and Natural England should remain in place, as separate authorities. It was considered that a merger of the two authorities would lead to a significant loss of quality in services and ability to deliver core tasks.[491] The review did recommend that the authorities work together more as well as use each other's resources. This has meant, for example, that the offices in place are in many places shared between the Environment Agency and Natural England.[492]

4.2.2.2 Environment Agency

The Environment Agency (EA) was created on April 1, 1996 by the Environment Act 1995. The creation of the Agency amalgamated more than 80 separate authorities and over 9000 staff.[493] These authorities were competent in the areas of municipal waste disposal[494]; water pollution[495]; and industrial emissions.[496] The aim of the creation of

489 See also Bell et al 2017, p. 25-26.

490 Arm's Length Body Review of 2010, see DEFRA, *Triennial Review of the Environment Agency and Natural England*, London: DEFRA 2013, pages 12, 16 and 33. Available at: www.gov.uk/government/publications/triennial-review-of-the-environment-agency-ea-and-natural-england-ne.

491 DEFRA, *Triennial Review of the Environment Agency and Natural England*, London: DEFRA 2013. Available at: www.gov.uk/government/publications/triennial-review-of-the-environment-agency-ea-and-natural-england-ne. Also Bell et al 2017, p. 119.

492 Fisher 2013. Whilst the two bodies will remain as separate bodies, various functions will be more closely integrated, including planning and land management functions, and internal processes will be shared or harmonised.

493 House of Lords, Select Committee on Constitution, session 2003-2004, *Minutes of Evidence. Memorandum submitted by the Environment Agency*. Available at https://publications.parliament.uk/pa/cm200304/cmselect/cmenvfru/121/3110502.htm (last visited 1 June 2019).

494 Municipal waste disposal was enforced locally by 83 Waste Regulation Authorities that were part of the local authorities.

495 The National Rivers Authority.

496 The regulation of Integrated Pollution Control (IPC), the predecessor to Integrated Pollution Prevention and Control (IPPC), was enforced by Her Majesty's Inspectorate of Pollution.

a unified body was to centralise the issuing of permits and the enforcement for a large part of environmental law. The institution of the Environment Agency is the prime example (and the start) of a tendency to amalgamate and centralise the regulatory organisation within areas of environmental protection into a unified body.

Competence

The Environment Agency has a very broad remit across several sectoral areas of environmental protection. The EA is competent for the issuing and enforcement of environmental permits, which includes the control of pollution prevention PPC (A(1) Operations), waste management, water discharges, groundwater permits and radioactive substances. For the enforcement of waste regulation, the EA is referred to as the competent waste regulation authority. Further belonging to the EA's competence to regulate and enforce are the major contaminated land sites and flood control.[497] Moreover, with regard to environmental damage, the EA is competent to act in case of damage to water, sites for which the Environment Agency has granted a permit, including the environmental permit, damage to protected species and natural habitats, including all Sites of Special Scientific Interest.[498] Also, the Environment Agency is the regulator in the area of carbon emissions, and carries out the application and enforcement of the obligations from the European Directive on this topic.[499]
Moreover, in England the Environment Agency also participates together with, among others, the Health and Safety Executive in the competent authority (CA) for the Control of Major Accident Hazards (COMAH).[500] The CA for COMAH administers accident prevention with respect to those industrial installations that could cause major accidents, which is mainly the chemical industry.[501] For each installation in England the Health and Safety Executive works together with the Environment Agency.[502]

Organisational structure

The powers of the EA are formally conferred on the Board of Directors of eight to fifteen members.[503] The Board consists of eight to fifteen members of whom the

497 The enforcement of flood control usually takes place through pursuit of fly tipping of waste into rivers and streams. Due to several incidents of severe flooding this task of the Environment Agency is currently under great scrutiny.

498 Section 10-12 Environmental Damage Regulations 2009; Burnett-Hall & Jones 2012, p. 259. With regard to its competences in the area of water, the EA has this power also with regard to taking remediation measures where the permits have been extended by the Local Authorities. See the Environmental Damage (Prevention and Remediation) Regulations 2009: Guidance for England and Wales, DEFRA, November 2009, p. 23, figure 3.1.

499 The Directive is implemented through secondary legislation. See the Greenhouse Gas Emissions Data and National Implementation Measures Regulations 2009 and the Greenhouse Gas Emissions Trading Scheme Regulations 2005.

500 See also www.hse.gov.uk/comah/authorityindex.htm (last visited 1 June 2019).

501 Under the EU Seveso II Directive (Council Directive 96/82/EC known as the Seveso II Directive, as amended by Directive 2003/105/EC). This Directive is implemented in the Control of Major Accident Hazards Regulations 1999 (which was amended by the Control of Major Accident Hazards (Amendment) Regulations 2005).

502 Understanding COMAH: what to expect from the Competent Authority (2013). See also www.hse.gov.uk/ comah/ca-guides.htm#enforcement (last visited 1 June 2019).

503 Section 1(1) EA 1995.

Minister appoints three, and the Secretary of State appoints the others.[504] The Board can delegate its powers by general or special authorisation to its Chief Executive and staff.[505] This means that they can carry out the powers in name of the Board of Directors.[506]

The Chief Executive is the head of staff and a member of the Board. More importantly, the Chief Executive is accountable to the Secretary of State for Environment, Food and Rural Affairs. The accountability of (the Chief Executive of) the Agency to the Secretary of State extends to its day-to-day operations in England. The Secretary of State in turn is accountable to Parliament for the activities of the Environment Agency and its expenditure.[507] The Secretary of State has many responsibilities in that respect. The Secretary of State appoints the majority of the Environment Agency Board of Directors; provides statutory guidance on the overall policy on the environment and sustainable development; sets objectives for the functions of the Environment Agency and approves of the budget of the EA and its regulatory regimes.[508] The Environment Agency itself has no direct public accountability.[509]

The EA has a central core, with a head office split between Bristol and London, where the Chief Executive and Directors are based. At the head office, national policy is set for the Environment Agency, on the basis of the statutory guidance of the Secretary of State and with input from consultees. Moreover, the head office is responsible for making sure the policies are carried out consistently across the country, taking into account the environmental, social and economic differences in each region.[510] The Environment Agency, and also Natural England, exercises its powers in England through a division into three areas, with fourteen area offices in total.[511] The area offices exercise the powers of the Agency day-to-day at local level and take action adapted to the local circumstances, within the boundaries of the general policy formulated at central level.[512] Emergencies and incidents are also responded to at this level, except for the major incidents mentioned above.

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504 Section 1(2) EA 1995.

505 More on this in the next section of this chapter.

506 Schedule 1, section 6 EA 1995.

507 See the Management Statement issued to the Environment Agency by the Secretary of State for Environment, Food and Rural Affairs and the Welsh Assembly Government (DEFRA in partnership with the Welsh Assembly Government), dated July 2002, p. 9.

508 See, respectively, article 1(2) EA 1995; the Statutory Guidance on the Environment Agency's objectives and contributions to sustainable development dated December 2002 and section 4(2)-(3) EA 1995; and the Management Statement issued by the Secretary of State for Environment, Food and Rural Affairs and the Welsh Assembly Government (DEFRA in partnership with the Welsh Assembly Government), dated July 2002, p. 9.

509 Bell et al 2017, p. 122.

510 The organisational structure of the Environment Agency is set out at www.gov.uk/government/ publications/ environment-agency-organisation-structure-chart (last visited 1 June 2019).

511 Since its foundation the regional division the EA has followed has changed several times. The current division applies from 2016. The three regions are North and East, South East, and West.

512 The regional organisational structure of the Environment Agency is set out at www.gov.uk/ government/publications/ environment-agency-area-and-region-operational-locations (last visited 1 June 2019).

Dependent on the type of enforcement action considered, this is supervised within the authority by specialists, area managers, chief officers, lawyers and the Head of Legal Services of the Agency.

To clarify the use of enforcement instruments the EA has in place policy documents. According to the RES 2008 and the Environmental Civil Sanctions Order the competent regulators must publish detailed guidance about their use of civil sanctions and, more generally, how offences will be enforced.[513] Moreover, the RES 2008 and the Order both contain quite detailed obligations as to what these documents must contain. As a result, policy documents underpin the exercise of functions by the enforcement officers to ensure a degree of consistency between the different areas and local offices. The policy is made at central level, at head office of the regulatory authority, whereas the case-by-case application of, among others, the enforcement functions of the authorities takes place by offices situated in the local areas. Moreover, these local offices can provide feedback to the central office on aspects of the policy. The Environment Agency (EA) makes use of several policy documents that lay out in detail what the Environment Agency aims for. This set consists of the Enforcement and Sanctions policy, three annexes to it on Environment Agency's approach to the application of civil sanctions and the enforcement of specific regulations, and the Offence Response Options document.[514]

The EA maintains committees of expertise consisting of stakeholders, which advise the agency on environmental protection (Environment Protection Advisory Committees), fisheries (Fisheries Advisory Committees), and flooding (regional and local Flood Defence Committees).[515] Local authorities can also take place in these committees. The Environment Agency is a statutory consultee in relation to certain decisions on environmental issues made by other bodies, such as for example permits for pollution and planning decisions by local authorities that affect flood risk zones.[516]

In the table below the scope of action of the Environment Agency for environmental enforcement is shown.

513 Section 63(2)(a) and 64 of the Regulatory Enforcement and Sanctions Act 2008 and section 11 of the Environmental Civil Sanctions (England) Order 2010.

514 Available at: www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

515 See sections 11-19 EA 1995.

516 See www.gov.uk/guidance/local-planning-authorities-get-environmental-advice (last visited 1 June 2019); Bell et al 2017, p. 723.

Scope of action of the Environment Agency for environmental enforcement

- Environmental permits: Pollution prevention and significant industrial activities (A1)
- Air quality
- Waste management
- Water discharges
- Groundwater permits
- Radioactive substances
- Waste regulation authority
- Major contaminated land sites
- Flood control (through pursuit of fly-tipping of waste into rivers and streams)
- Major accident hazards
- Environmental damage
  - damage to water
  - damage to protected species and natural habitats, water SSSI's[517]
- Permit sites
- Carbon emissions

4.2.2.3 Natural England

Natural England is a central government agency and unified body much like the Environment Agency. It has competence in the area of habitat and wildlife protection, conservation and landscape management in England. Natural England is also referred to as the Nature Conservancy Council.[518] It has been in place since 1 October 2006, as the amalgamation of English Nature and the Countryside Agency for England.[519] Previously, English Nature regulated habitat protection and conservation as well as wildlife, and the Countryside Agency for England covered habitat protection, conservation and landscape management.[520]

517 Reg. 11 the Environmental Damage (Prevention and Remediation) Regulations 2009.

518 Usually, the title of Nature Conservancy Council is referred to in the plural, and also includes the regulator for Wales, the Countryside council for Wales. The Act instating the Nature Conservancy Councils was the EPA 1990, section 128 and further.

519 See the Lord Haskins Report 2003; also within Natural England were united the environment activities part of the Rural Development Service (a part of DEFRA); and the Countryside Agency's Landscape, Access and Recreation division. The remaining parts of the Countryside Agency have been re-launched under the name Commission for the Rural Communities. These are not relevant to enforcement

520 English Nature received its powers through the Natural Environment & Rural Communities Act 2006. The Countryside Agency itself is only a recent incarnation of the Countryside Commission in 1999. It did not have any enforcement powers in the environmental arena. It functioned until 1 October 2006.

The phrasing of the Natural Environment & Rural Communities Act 2006, by which Natural England was created, is modelled after the Environment Act 1995 as far as it concerns the creation and institutional framework of the authority. Through this, Natural England is organised in a similar way as the Environment Agency. As a Non-Departmental Public Body Natural England has a Board that has corporate responsibility for ensuring that the authority fulfils the aims and objectives set by the Secretary of State.[521] Natural England will have to follow or take account of guidance established by the Secretary of State for DEFRA, and is responsible to him.[522] The main roles of the Board are to establish Natural England's strategy, approve direction and review performance of the organisation. The Executive Board consists of the Chief Executive and four Executive Directors. The purpose of the Board is to assist the Chief Executive in discharging his responsibilities as delegated to him by the Board. The Executive Board provides overall strategic leadership to the organisation, in setting plans, reviewing performance and ensuring resources are allocated accordingly.[523]

Section 2(1) of the Environment Act 1995 sets out Natural England's general purpose, which is to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development. To fulfil this purpose, Natural England has regulatory powers, duties and functions – also for enforcement – in the areas of nature protection, species (wildlife) and habitat protection, including protected areas such as Sites of Special Scientific Interest, agricultural work that affects uncultivated land or semi-natural areas[524] and open access to protected areas.[525] With regard to environmental damage, Natural England has enforcement competences specifically for damage to protected species and natural habitats on land and in water, and damage to other flora and fauna on a Special Site of Scientific Interest.[526] As Nature Conservancy Council, Natural England is in charge of designating Sites of Special Scientific Interest and

521 From Appendix Three "Governance and management arrangements" to the *Corporate Plan 2014-2019*, London: Natural England 2014, p. 26. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/300746/ne-corporate-plan-2014-2019.pdf (last visited 1 June 2019).

522 Section 15 and Schedule 5, section 25 Natural Environment and Rural Communities Act 2006.

523 From Appendix Three "Governance and management arrangements" to the *Corporate Plan 2014-2019*, London: Natural England 2014, p. 26. Available at
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/300746/ne-corporate-plan-2014-2019.pdf (last visited 1 June 2019).

524 Also heather and grass burning.

525 See also www.gov.uk/government/organisations/natural-england (last visited 1 June 2019).

526 Also with regard to the power of remediation with regard to permits given out by the Local authorities. Section 10-12 Environmental Damage Regulations 2009, in particular Reg. 11 the Environmental Damage (Prevention and Remediation) Regulations 2009. Burnett-Hall & Jones 2012, p. 259.

National Nature Reserves.[527] Natural England is statutory consultee in relation to certain decisions on environmental issues made by other bodies, such as permits for pollution and planning decisions by local authorities that may impact wildlife and protected areas.[528] Natural England also works with, and supports, other enforcement agencies, e.g. in the prevention, detection and enforcement of wildlife crime. To ensure cooperation in this respect Memoranda of Understanding are in place. More on these and other instruments of coordination and cooperation in section 4.6.4 of this chapter.

Similar to the Environment Agency, Natural England is organised with a central head office, based in York, as well as area offices and area managers to oversee these offices. The Board and the Executive are located at the central Head Office; the area offices are based in fourteen areas in England.[529] A Director of Operations at central level heads the area offices. There are two Directors of Operations for the North and the South respectively, that each head seven area offices.[530] Regional level service takes place through Area Teams, which cover separate areas through the region or specific topics.[531] A Director approves the civil sanctions that are served by Natural England, in consultation with reviewing lawyers.[532] Moreover, proceedings leading to criminal sanctions cannot be started without the approval of the Director.[533]
As with the Environment Agency, according to the requirements of the law, Natural England makes use of several policy documents that lay out in detail what the authority will do in case of the enforcement of non-compliance.[534] These documents consist of the compliance and enforcement position, enforcement guidance, and six annexes to that guidance, consisting of explanations of offences, sanctions, a summary table and example incidents.[535]

527 Natural England is referred to as the Nature Conservancy Council in the statutes attributing the competences in these areas.
528 See www.gov.uk/guidance/local-planning-authorities-get-environmental-advice (last visited 1 June 2019).
529 See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/550194 / Natural-England-offices.pdf (last visited 1 June 2019).
530 State as of December 2018, see www.gov.uk/government/uploads/system/uploads/attachment_data/ file/444354/ne-management-arrangement-chart.pdf (last visited 1 June 2019).
531 An example of the latter is the Business Delivery and Land Management Team. Within the teams covering geographical areas topics, such as land and sea management and planning are assigned to different persons.
532 Natural England's Enforcement Guidance (2011), section 2.3. Available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019).
533 Natural England's Enforcement Guidance (2011), section 2.3. Available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019).
534 Section 63(2)(a) and 64 of the Regulatory Enforcement and Sanctions Act 2008 and section 11 of the Environmental Civil Sanctions (England) Order 2010.
535 All available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england#natural-englands-compliance-and-enforcement-position (last visited 1 June 2019).

The table below details the scope of action for environmental enforcement of Natural England.

Scope of action of Natural England for environmental enforcement
• Nature protection
• Species (wildlife) and habitat protection
• Landscape protection
• Environmental damage to protected species and natural habitats, SSSI's; on land and marine areas

4.2.3 Local regulatory authorities

4.2.3.1 Structure of the organisation

At the level of local government, local authorities are attributed regulation and enforcement powers for environmental legislation. Several important functions of environmental protection are carried out at local government level.[536] The local authority can be considered as one body with different functions. These functions, and the powers to carry these out in the environmental arena are attributed to the local authorities in primary statutes.[537] The local authorities have corporate status, similar to the NDPB's of central government. As explained previously, this means that the acts of individual officers of the authority that are exercised in name of that authority will become the acts of the local authority. This also means that an authority is an independent legal entity with its own legal rights and responsibilities.[538]

> Three main types of local authority – or councils – are distinguished.[539] These types have no impact on the environmental responsibilities of the local authorities; these are similar for all local authorities. In other words, these types refer to a distinction between local authorities on the basis of territory, not on the basis of their function. Statutes usually specify the type of 'local authority' they refer to. The types of local authority are as follows. One, in metropolitan areas, such as the area of and around Birmingham, there is a single-tier system with metropolitan district councils; second, in non-metropolitan areas there is a two-tier system, with county councils and district councils with different but overlapping (and equal) powers, e.g. in the area of town and country planning.

536 Woolley et al 2009, p. 46.
537 The appointment of officers to carry out the tasks and duties of the local authorities will be discussed in section 4.2.3.2 of this chapter.
538 Malcolm & Pointing 2011, p. 11. Local Government Act 1972, section 3.2.
539 Local Government Act 1982 and Local Government Act 2000; Bell et al 2017, p. 128-129.

> Within this system, county councils have powers in the areas of 'development control'[540] with regard to county matters including waste disposal, among others; district councils have responsibility for general 'development control' and environmental health.[541] London also has a two-tier system. The Greater London Authority was introduced, with an Assembly and the Mayor as the executive, while the London boroughs are local authorities for 32 separate parts of London.[542] Third, another single-tier system consists of the unitary authorities, which replicate the powers of the metropolitan district councils. These are quite common.

At local government level, the local authorities have competence in the areas of environmental permitting for less significant operations in the area of pollution prevention and control (Part A(2), previously also PPC) and local air pollution control with regard to installations controlled solely because of their air emissions (Part B operations)[543], planning control, statutory nuisances, including noise control, contaminated land[544], and environmental habitat protection.[545] The remit of the local authorities also includes waste control (fly-tipping).[546] With regard to environmental damages, the local authorities are competent in cases of damage to land for remediation and in case no permits exists. Moreover, the local authorities have competence for the enforcement with regard to permits they have given out for the prevention of damage to water and land and to species and habitats on the land and in water.[547] In the areas of local air pollution and planning, the local authorities are referred to as the Local Authority Air Pollution Control (LAAPC) and Local Planning Authority (LPA). These are not separate bodies within the local authority. These labels indicate a capacity, i.e. the local authority acting in its capacity of LAAPC or LPA.

Local authorities receive statutory guidance from the Secretary of State and informal guidance from DEFRA on specific issues of environmental protection.[548] Moreover, local authorities are to act in accordance with central guidance and advice from the central government authorities (the Environment Agency and Natural England).[549]

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540 For a definition of 'development control' see 55(3)(b) Town and Country Planning Act 1990: "development means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land." See also Bell et al 2017, p. 709.

541 Schedule 1 Town and Country Planning Act 1990 and Bell et al 2017, p. 128-129 and 709.

542 Greater London Authority Act 1999; Greater London Authority Act 2007; Burnett-Hall & Jones 2012, p. 274.

543 Environment Act 1995; Clean Air Act 1993 and Environmental Permitting (England and Wales) Regulations 2009.

544 Part 2A of the EPA 1990.

545 Section 79-85 EPA 1990 (statutory nuisance); (contaminated land); see also the table on p. 120 of Bell et al 2017.

546 Together with the Environment Agency; EPA 1990.

547 Section 10-11 Environmental Damages Regulations 2009; Water Industry Act 1991.

548 See e.g. the non-statutory guidance from DEFRA to the local authorities on the application of Part 2A of the EPA 1990 to contaminated land.

549 See also Bell 2017, p. 110-111

While the authorities mentioned above may provide alternate criminal sanctions and instigate criminal proceedings through prosecution, the criminal courts are the sole entity that will formally adjudicate in such proceedings. The courts can convict the offender(s) for a criminal offence and in sentencing impose a variety of criminal sanctions upon the offender.

The table below details the scope of action of the local authorities for environmental enforcement.

Scope of action of the local authorities for environmental enforcement
• Environmental permits for pollution prevention and control of less significant operations (A(2))
• Local Authority Air Pollution Control (LAAPC) (installations controlled for air emissions: Part B operations)
• Local Planning Authority (LPA)
• Contaminated land
• Statutory nuisances, including noise
• Environmental habitat protection
• Environmental damage
- damage to land (with no permit)[550]
- damage to water and land (with a permit)
- damage to species and habitats on the land and in water

4.2.3.2 The attribution of enforcement powers to the regulatory authorities

Above, the areas of competence of the regulatory authorities – Environment Agency, Natural England and the local authorities – for environmental protection were described. Here, the attribution of enforcement powers will be highlighted. The specific enforcement powers – inspection powers and sanctions – the regulatory authorities have in relation to the areas of environmental protection they are competent in, are laid down in the same specific legislation establishing the competence in those areas.[551] As explained in chapter 3, this legislation forms a patchwork of provisions for the sectoral areas of environmental protection and authorities and their specific powers and duties.[552]

550 Reg. 11 the Environmental Damage (Prevention and Remediation) Regulations 2015.
551 As described in chapter 3, section 3.4.2.2.
552 See also Reid & Ross 2012, p. 171.

As explained previously, the regulatory authorities of central government are competent for inspection and the imposition of administrative sanctions, administrative civil sanctions and criminal prosecution and its alternatives for environmental non-compliance. The local authorities are competent for inspections and the imposition of administrative sanctions and criminal prosecution and its alternatives. Below, first, the attribution of the powers to control/inspect compliance is described and, second, the attribution of powers to impose administrative sanctions, civil sanctions, and criminal prosecution and its alternatives are set out.

Attribution of powers for inspection

As a rule, the regulatory authorities competent for regulating and exercising enforcement and sanctioning in a certain area of environmental protection in England, are in charge of controlling compliance with environmental law, or, in other words, the inspection. The regulatory authorities will have the power to authorise a person to carry out powers of inspection for a certain purpose in their areas of competence.[553]

> English law does not employ a clear distinction between powers to be exercised before and after a suspicion of a criminal offence has occurred, or into powers exercised with or without the intention to impose a criminal sanction. The powers in both phases are generally the same, while the safeguards that must be adhered to change according to whether there is a suspicion of a criminal offence or not.[554] In this sense, the terminology used in England does not clarify the scope of the powers used. Instead, the term inspection is used in the broad sense or the purposes for which the powers may be used are indicated in legislation. This does not mean that safeguards do not apply. Extra safeguards apply once there is a suspicion of a criminal offence. The intention of collecting evidence specifically with a view to prosecution does bring with it the obligation to give a caution and the duty of disclosure in the investigation, which means that the investigation is to pursue all lines of enquiry, whether these point towards or away from the suspect.[555] To provide a clear framework as to how and when the powers of investigation should be exercised in light of the extra safeguards that apply, internal guidance is provided.[556]

553 Besides this, the Secretary of State may play a role.

554 The only limit on the scope of powers conferred exists in the case of constables for wildlife protection. A constable can only exercise powers of inspection when he suspects with reasonable cause that any person is committing or has committed an offence against wildlife protection (section 19(1) W&CA 1981). This provision also illustrates that the term of investigation is not commonly used in environmental legislation.

555 See section 23 of the Criminal Procedure and Investigations Act 1996 and the Crown Prosecution Service Disclosure Manual December 2018, p. 6, available at www.cps.gov.uk/sites/default/files/documents/legal_guidance/ Disclosure-Manual-December-2018.pdf. There is also a duty of disclosure for the prosecutor, see further below.

556 For example in internal guidance on investigations, see the Environment Agency's National Investigations Manual (2005).

As pollution control covers a large area of the environmental arena in terms of protection, the Environment Act 1995 provides the most general regulation on inspection powers and their attribution.[557] By virtue of section 108 EA 1995, the power to authorise inspection officers is conferred on the authorities that have general competences in the area of pollution control: the Environment Agency; the local authority; the waste collection authority; and the Secretary of State.[558]

Outside the area of pollution control, there are specific provisions in the corresponding statutes as to the authorisation and the powers of officers of the regulatory authorities in the areas of planning control (TCPA 1990); wildlife and nature protection (W&CA 1981); statutory nuisances (EPA 1990) and water (Water Resources Act 1991). In the Water Resources Act 1991 it is indicated for every single inspection power which authorities may appoint the inspectors for the application thereof: the Environment Agency or the Minister of DEFRA.[559] In planning control, the local authority in its capacity as local planning authority can authorise inspectors for enforcement. Moreover, the Secretary of State has a certain residual competence to appoint inspection officers in specific cases, such as for example in case of planning control.[560]

For nature protection[561], Natural England is generally competent to appoint officers for inspection.[562] The Secretary of State has a power to authorise for inspection in certain cases, such as for the purpose of (giving of and) compliance with a prohibitive order on agricultural operations on moor and heath, or a limestone protection order, as well as with regard to pesticides inspection in England.[563] With regard to inspection for limestone protection, the country or local planning authority can also authorise inspectors.[564] Moreover, also the National Park authority and the Minister of DEFRA are competent in authorising inspectors to ascertain (the giving of and) compliance with a prohibitive order on agricultural operations on moor and heath.[565] For statutory nuisances, the local authorities are competent to authorise officers for the inspection areas and complaints.[566]

Administrative sanctioning competence

The administrative sanctioning powers are formally attributed by means of central government instruments to the regulatory authorities described in the previous

557 IPPC; PPC; waste; and water and including the environmental permit.
558 See section 4.2 of this chapter for a description of these authorities.
559 Section 169 Water Resources Act 1991.
560 Section 196A(2) TCPA 1990.
561 In the Wildlife and Countryside Act 1981 a distinction is made in wildlife (part I) and nature protection (part II).
562 Section 51(2) W&CA 1981.
563 Under sections 51(1)(m) W&CA 1981nd section 44(2) NE&RC Act 2006. The provision speaks of "the Ministers". According to section 52 this means not only the Secretary of State, but also the Minister of Agriculture, Fisheries and Food, now the Minister of the Department of Environment, Food and Rural Activities for England.
564 Under sections 51(1)(l) and section 34(6) W&CA 1981.
565 Section 51(1)(m) and 51(2)(c) W&CA 1981.
566 Section 79 EPA 1990.

section of this chapter. The instrument commonly used for this is primary legislation. Increasing use has been made of secondary regulation to detail the powers of the authorities. However, exceptions are made to this rule of using primary legislation and instead secondary legislation, such as Regulations or Orders are used. One such exception is formed by the Environmental Permitting Regulations 2016, which confers administrative sanctioning powers on the Environment Agency and the Local Authorities for new industrial plants or processes.[567] These Regulations were made by the Secretary of State on the basis of the primary statute, which conferred to him the power to establish enforcement provisions in secondary legislation.[568]
The authorities delegate[569] the sanctioning powers conferred in statutes and secondary legislation to its staff. The application of the sanctioning powers takes place by individual officers, commonly referred to as 'enforcement officers'. They exercise these powers in the name of the authority. The acts of the individual officers can become the acts of the authority due to the fact that the agencies and the local authorities are in statutes held to have corporate status.[570]

Civil sanctioning competence

The power to impose civil sanctions is for now only conferred upon two regulatory authorities namely the central government agencies the Environment Agency and Natural England.[571] This power is conferred upon these authorities in the Environmental Civil Sanctions (England) Order 2010. Through this Order, these authorities possess the power to impose (certain) civil sanctions for several offences formulated in the Wildlife and Countryside Act 1981; the Environmental Protection Act 1990; the Water Resources Act 1991; the Water Industry Act 1991; the Environment Act 1995; and the Water Act 2003.[572]

Criminal prosecution and alternatives by the regulatory authorities

The most important power of criminal enforcement that the regulatory authorities – EA, NE and the local authorities – have is the power to institute criminal proceedings, or to impose alternatives to this prosecution. This power is described in each of the statutes governing the specific area of environmental protection, the statutes covering

567 See section 36 and 37.
568 The Secretary of State has laid down these powers in secondary legislation in accordance with the power conferred to him by statute, in this case section 2(1) and Schedule 1(14)-(18) of the PPC Act 1999.
569 It must be noted that the term 'delegation of powers' is not directly translatable to Dutch as *delegatie*. The meaning of the English term is most comparable to the Dutch *mandaat*, which indicates the carrying out of powers in name of the authority, and the German *abordnen*.
570 Malcolm & Pointing 2011, p. 11. See, for example, section 1(1) EA 1995 for the Environment Agency; section 2 Local Government Act 1972 for England.
571 Section 2 Environmental Civil Sanctions (England) Order 2010. The legislation came in force on 6 April 2010 in England. The Government will consider possible proposals to make civil sanctions available for use by Local Authorities.
572 See Schedule 5 of the Environmental Civil Sanctions (England) Order 2010.

the powers of the authorities that regulate it or both. The Environment Agency is conferred a very broad power 'to institute proceedings' in England.[573] Natural England is appointed the prosecuting authority in the acts both acts concerning nature protection.[574] For the purpose of prosecution, both the Environment Agency and Natural England can authorise someone, even if that person is not a barrister or solicitor, usually a member of its staff.[575] The Environment Agency; the local authorities and English Nature have prosecutors on their staff for this purpose.[576]
The Local Authorities are also conferred a general power to institute criminal proceedings where they consider it expedient for the promotion or protection of the interests of the inhabitants of their area.[577] The Local Authorities rely on this power for their prosecution of environmental permits offences; local air pollution; waste and water pollution offences; as well as planning offences.[578] Furthermore, the Local Authorities are conferred a specific power to prosecute in case of wildlife offences committed within their area.[579]

As explained, decision-making on the enforcement action to be taken, including the decision that a criminal sanction will be appropriate and, therefore, to instigate criminal prosecution, takes place within each of the regulatory authorities. The Enforcement guidance of Natural England specifies that the approval of the Director is necessary to commence prosecution.[580] The Environment Agency's policy specifies that – for the purpose of fair decision-making – it adheres to the principle that the decision to prosecute must be taken independently of the investigator. In the Environment Agency decision-making process on enforcement action, for example, there are separate roles for officers subject to separate line management. For example, for the Environment Agency, the decision whether to instigate prosecution is subject to the consideration and approval of two different officers on two different aspects.[581]
The approval must be based on:

- the senior operational manager's decision there is justification to prosecute or caution following the investigation;

573 Section 37(1) EA 1995.
574 Section 28P(10) – 27A W&CA 1981 and section 12 of the Natural Environment and Rural Communities Act 2006.
575 See, for example, section 114 (4) EPA 1990 and section 12(2) of the Natural Environment and Rural Communities Act 2006.
576 See also e.g. the Explanatory Notes to the Natural Environment and Rural Communities Bill (NERC), clause 12.
577 Section 222 Local Government Act 1972.
578 The latter used to only be the case when an administrative notice is not complied with as the contravention of planning control itself, such as the absence of a development notice was not considered a criminal offence. With regard to large infrastructural projects, this is now the case according to section 160 the Planning Act 2008.
579 Section 25(2) W&CA 1981.
580 Natural England Enforcement Guidance (December 2011), section 2.3.
581 The officers have been delegated this authority by the Board of the Environment Agency by means of the Non-Financial Scheme of Delegation.

- the senior lawyer's review of the case file and decision that the proposed prosecution or caution meets the test laid down in the Code for Crown Prosecutors.[582] Both of these roles have separate line management.[583]

The Environment Agency's policy also specifies that as an enforcement authority, it is fully independent from others. The policy states:

> "Our power to prosecute is set out in law and is controlled by our board. When we decide to prosecute we are not influenced by a government department or minister or any third party. It is an independent decision." [584]

When a prosecution is brought, the prosecutor for the enforcement authority is under the obligation to disclose to the accused evidence that may undermine the case for the prosecution against the accused or assist the case for the accused, i.e. exculpatory material.[585] This duty for the prosecutor is triggered where a suspect pleads not guilty in Magistrates' Court or where a case is brought before the Crown Court.[586] For the benefit of fulfilling this obligation, the Environment Agency, for example, has in place a disclosure officer overseeing, in particular, the disclosure of material collected during the investigation of major environmental cases with a significant volume of unused material. Such a disclosure officer is the person responsible for examining material retained by the police during the investigation; revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it, and certifying that he has done this; and disclosing material to the accused at the request of the prosecutor.[587] If the prosecutor has failed his disclosure obligation, the defence may make an application to stay proceedings due to an abuse of process, the court may exclude evidence, or an appeal may be succesful.[588]

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582 More on the substance of this test in the 2018 *Code for crown prosecutors* of the Crown Prosecution Service, see the next chapter on sanctions.

583 Environment Agency's Enforcement and Sanctions Policy (2018), section 7.4.1, available at www.gov.uk/ government/ publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

584 Environment Agency's Enforcement and Sanctions Policy (2018), section 7.4.1, available at www.gov.uk/ government/ publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

585 Section 1 and 3 of the Criminal Procedure and Investigations Act 1996 and Crown Prosecution Service, *Disclosure Manual* (2018), which is the legal guidance on disclosure of the Crown Prosecution Service, available at www.cps.gov.uk/sites/default/files/documents/legal_guidance/Disclosure-Manual-December-2018.pdf.

586 See section 3 of the Criminal Procedure and Investigations Act 1996 and the legal guidance on disclosure of the Crown Prosecution Service, *Disclosure Manual* (2018), p. 5, available at www.cps.gov.uk/sites/ default/files/documents/ legal_guidance/Disclosure-Manual-December-2018.pdf.

587 Ministry of Justice, *Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice*, p. 4. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf.

588 Crown Prosecution Service, *Disclosure Manual* (2018), p. 5-6, available at www.cps.gov.uk/sites/default/ files/ documents/legal_guidance/Disclosure-Manual-December-2018.pdf.

4.3 The investigation and prosecution of wildlife offences

A separate section is appropriate for wildlife offences, as the organisation and the enforcement – in particular the criminal investigation and prosecution – is different from other environmental offences. Wildlife offences include poaching, killing or disturbing protected species or damaging their breeding and resting places, and illegally trading in endangered species.
No administrative enforcement is possible for wildlife offences. Only criminal enforcement takes place. The police conduct the criminal investigation; the Crown Prosecution Service instigates criminal prosecution in the criminal courts or imposes alternatives to criminal prosecution on offenders for wildlife offences. Both authorities are discussed below.

Police
In England, the police – also referred to as constables – are responsible for the criminal investigation of most wildlife offences, specifically offences against protected species.[589] The police may assist officers of Natural England, where their resources allow, in areas of wildlife protection involving breaches of species licenses issues by Natural England, damage involving Sites of Special Scientific Interest and animals under the Wildlife Incidents Investigations Scheme.[590] In turn, officers of Natural England may assist the police, where their resources allow. For the purpose of the application of the powers for wildlife offences, there needs to be reasonable cause that any person is committing or has committed an offence.[591]

There is no single national police force. The police authorities involved in wildlife crime are mainly the territorial police forces. There are 39 such police forces in England.[592] Most police authorities have appointed a designated Wildlife Crime Officer that is involved in investigations and that will keep contact with the Public Prosecutor, i.e. the Crown Prosecution Service (CPS), for the purpose of enforcement.[593] The police is to reveal relevant collected material to the prosecutor.[594] Usually, this Public Prosecutor will have the function of Wildlife Coordinator, responsible for the

589 Such as dictated in the CITES Directive. See, for example, section 19 of the Wildlife and Countryside Act 1981.
590 A memorandum of understanding on the prevention, investigation and enforcement of wildlife crime between Natural England, Natural Resources Body for Wales, the Crown Prosecution Service and the National Police Chiefs' Council 2015. Available at www.nwcu.police.uk/wp-content/uploads/2015/11/MoU_Signed_Final_Document.pdf (last visited 1 June 2019).
591 Section 19 W&CA 1981.
592 Numbers available at www.police.uk/forces/ (last visited 1 June 2019).
593 Crown Prosecution Service, *Wildlife offences: legal guidance*. Available at www.cps.gov.uk/legal-guidance/wildlife-offences (last visited 1 June 2019).
594 The Crown Prosecution Service has a duty to disclose this evidence to the defence.

prosecution of wildlife offences in a specific geographic area.[595] The Wildlife Crime Officers of the police may be a part of a specialised unit focusing on wildlife crime within the local police authority.
While the police authorities generally involved with wildlife offences are regionally structured, there is also a national police crime unit that assists the local police authorities in wildlife investigations. This is the National Wildlife Crime Unit (NWCU). The NWCU has a UK wide remit for wildlife crime to prevent and detect wildlife crime. It gathers intelligence on national and international wildlife crime and also provides analytical and investigative support to the Police. It sets enforcement priorities at a national level for wildlife protection. The NWCU may also coordinate enforcement activity.[596]

The police authorities are also supported by the Partnership for Action against Wildlife crime (PAW). This is a multi-agency partnership that consists of, among others, several government departments, regulatory authorities, the Crown Prosecution Service and the National Wildlife Crime Unit. It facilitates the exchange of information, experience, specialist knowledge and expertise on wildlife enforcement related topics between all the agencies involved.[597]
The general authorisation and powers of police constables for wildlife inspection is laid down in the Wildlife and Countryside Act 1981. The Secretary of State for England provides this authorisation.[598] The Secretary of State is also empowered to authorise police constables where it concerns specific cases such as the sale or possession of wild birds.[599]

Crown Prosecution Service
The Crown Prosecution Service (CPS) is the general national service for prosecution in England and Wales. It is responsible for the prosecution of many criminal offences on behalf of the state. With regard to environmental protection, the CPS only has enforcement powers with respect to the wildlife offences.

> These competences of the CPS overlap to a certain extent with those of Natural England. As described, a Memorandum of understanding is in place between Natural England, the non-departmental body competent for Wales, and the Crown Prosecution Service to aid the overlap. The principal Act for which the CPS has prosecution authority is the Wildlife and Countryside Act 1981.

595 See below, in the next section.
596 See www.nwcu.police.uk (last visited 1 June 2019).
597 See www.defra.gov.uk/paw (last visited 1 June 2019).
598 Section 18A W&CA 1981, as amended by the NE&RC 2006.
599 Section 6(9) and s. 7(6) W&CA 1981. The Secretary of State can authorise persons to enter and inspect premises

The Food and Environment Protection Act 1985 (FEPA), the Wild Mammals (Protection) Act 1996 (WMPA), the Protection of Badgers Act 1992 (PBA), the Deer Act 1992 (DA), The Pest Act 1954, and the Poisons Act 1972 are all of relevance. Besides this there is also domestic legislation that has been passed in compliance with the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) that is within the realm of the CPS.

The CPS can prosecute such offences or propose or impose alternatives to criminal prosecution.[600] The CPS is also involved in providing charging decisions to the police and is responsible for the majority of the asset recovery on the basis of the Proceeds of Crime Act after confiscation orders have been imposed by the criminal courts.

The CPS is a national organisation structured into fourteen regional areas across England and Wales.[601] At the head of the organisation is the Director of Public Prosecutions, who e.g. issues the Code for Crown Prosecutors.[602] A Chief Crown Prosecutor leads each geographical area. The CPS operates locally through the regional offices located within these groups. Each of these regional offices corresponds to a single police force area, with one for London.[603] Most CPS Areas have a wildlife coordinator. This coordinator is responsible for the prosecution of wildlife cases in that specific area.[604] The CPS is distanced from and independent of the police but will work closely with the police, specifically the Wildlife Crime Officer if there is one at the police force.[605] The CPS advises the police on the additional information or evidence that would support a court case and could lead to a successful prosecution (pre-charge advice).[606] Contrary to most other prosecutors, the CPS does not have powers to order or to direct investigations.
Once the CPS receives a wildlife prosecution file from the police, it will then take the decision whether or not to charge the suspect and, if so, for what offence to charge.[607] The CPS does this independently from the police. In deciding whether or not to charge the suspect, the CPS will consider whether there is enough – admissible – evidence to prove the offence and if prosecution rests in the public interest according to the

600 As explained previously, prosecution is discussed here as part of the enforcement toolbox.
601 A fifteenth area is called CPS Direct and provides 24/7 charging decisions.
602 Crown Prosecution Service, *Code for crown prosecutors* 2018. Available at www.cps.gov.uk/ publications/code_for_ crown_prosecutors/ (last visited 1 June 2019).
603 See also the website for the Crown Prosecution Service: http://www.cps.gov.uk.
604 Crown Prosecution Service, *Wildlife offences: legal guidance*. Available at www.cps.gov.uk/legal-guidance/wildlife-offences (last visited 1 June 2019).
605 See Crown Prosecution Service, *Code for crown prosecutors* 2018, p. 2. Available at www.cps.gov.uk/publications/ code_for_crown_prosecutors/ (last visited 1 June 2019); also Woolley et al 2009, p. 70.
606 See www.cps.gov.uk/about-cps (last visited 1 June 2019).
607 Under the Statutory Charging Scheme laid down in the Criminal Justice Act 2003.

Code for Crown Prosecutors.[608] The Code for Crown Prosecutors gives guidance to all prosecutors on the general principles to be applied when making decisions about prosecutions.[609] The Code also applies to other prosecutors besides the CPS.[610] The Code will be further described in the next chapter.
The CPS will then prepare cases for prosecution and present those cases in court. As described previously, the prosecutor has the duty to disclose exculpatory material collected by the police in the course of an investigation to the defence where a suspect pleads not guilty in Magistrates' Court or where a case is brought before the Crown Court.[611]
The CPS is an independent prosecuting authority and government ministers have no influence over its decision-making. The work of the CPS is overseen by an Attorney General who answers for the CPS's performance and conduct in Parliament.

4.4 The criminal courts

The criminal courts have an important role in environmental protection. As explained previously, nearly all non-compliance with environmental law is a criminal offence. Moreover, most non-compliance with administrative enforcement, in particular non-compliance with statutory notices, is a criminal offence. Therefore, where administrative enforcement instruments are imposed and this does not lead to compliance, the regulator may consider prosecuting the offender for the original offence, prosecuting the offender for non-compliance with administrative enforcement or both.[612] When prosecution is instigated for a criminal offence and a conviction follows by the criminal courts, these courts can impose a set of criminal sanctions upon the convicted offender.

> The power of the criminal courts to impose certain sanctions for environmental offences is extended in several pieces of law.[613] Firstly, powers follow from the statutes that contain a general regulation of criminal sentencing and criminal procedure. Secondly, powers are conferred in the individual pieces of environmental legislation, in each statute covering an area of the environmental arena.

608 Similar to the regulatory authorities. As explained in the next chapter, the regulatory authorities must also abide by the Code for Crown Prosecutors.
609 On the basis of section 10 of the Prosecution of Offences Act 1985.
610 Crown Prosecution Service, *Code for crown prosecutors* 2018. Available at www.cps.gov.uk/publications/ code_for_ crown_prosecutors/ (last visited 1 June 2019).
611 See section 3 of the Criminal Procedure and Investigations Act 1996 and the legal guidance on disclosure of the Crown Prosecution Service, *Disclosure Manual* (2018), p. 5, available at www.cps.gov.uk/sites/default/files/ documents/ legal_guidance/Disclosure-Manual-December-2018.pdf.
612 In chapter 5 this will be further detailed.
613 See also section 1.3.3 of chapter 1 on the criminal courts and their dependent competence to impose sanctions.

The criminal courts involved in imposing sanctions for criminal offences are the Magistrates' Courts and the Crown Courts.[614] There are about 330 Magistrates' Courts in England and Wales; the Crown Courts sit in 77 locations in England and Wales.[615]

The Magistrates' Court is the least superior court in the criminal court system and the most common court in which environmental offences are tried. Almost all criminal cases start in Magistrates' Court. This Court is composed of two or three magistrates or a district judge. Magistrates are lay people (also called Justices of the Peace) that have volunteered to sit on the court and have received training to do so. A justices' clerk legally advises them. A district judge is a professionally trained full-time member of the judiciary.

The Crown Court normally has a jury of lay people, which determines the guilt of the offender, as well as a judge that decides the sentence.[616] Which of these two courts is involved, depends on the specification in legislation how the offence is to be tried and on the considerations of the Magistrates' Court – upon request from the Prosecutor – on the allocation of cases. A criminal offence can be qualified in legislation as a summary offence, as an indictable offence or as an offence that is triable either way. A summary offence is an offence that is to be tried in the Magistrates´ Court. An indictable offence is an offence to be tried in the Crown Court.[617] Most environmental offences are established in legislation to be triable either way. This means that prosecution for these offences can be brought either before the Magistrates' Court or before the Crown Court. Also, it is possible to bring a case before the Magistrates' Court for adjudication, but for the sentencing part refer to the Crown Court.

Examples of summary offences are:
- Section 1 Control of Pollution (Amendment) Act 1989: transporting controlled waste without registering: triable summarily only;
- Section 80 Environmental Protection Act 1990: breach of an abatement notice;
- Section 1 to 13 of the Wildlife and Countryside Act 1981: wildlife offences;
- Section 90 Water Resources Act 1991.

Examples of indictable offences are:
- Offences committed by corporate bodies, e.g. s. 41 Environmental Permitting (England and Wales) Regulations 2010.

614 With appeals at the Queen's Bench Division of the High Court of Justice or the criminal division of the Court of Appeal. See the next section.
615 See www.judiciary.uk/you-and-the-judiciary/going-to-court/magistrates-court/ (last visited 1 June 2019).
616 On the jury, see schedule 33 of the Criminal Justice Act 2003.
617 Where a statute creates an offence without qualification of how it is to be tried, it is automatically an indictable offence.

Before March 2015, the distinction between these courts was that in the Crown Court there was no limit to the fine that could be imposed, whereas the fine in the Magistrates´ Court was limited to a maximum of £5000 or, common for environmental offences, a higher specified amount.[618] From 12 March 2015, this cap has been removed and a fine that can be imposed in Magistrates´ Court is now unlimited.[619] This change was the result of a review by government of sentencing policy to ensure that this policy is "effective in deterring crime, protecting the public, punishing offenders and cutting reoffending".[620] The reason that this change to the limit of the fine in the Magistrates' Court was made is that the government considered that financial penalties are an effective punishment as long as they are set at an appropriate level.[621]

> The government believes that there are persuasive arguments in favour of using financial penalties for many offenders before turning to other sanctions. The provisions in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 support this aim by encouraging greater use of the fine in the Magistrates' courts. The Government also wants to remove elements of the law that unhelpfully fetter courts' discretion and believes that the court which has heard all the evidence and all the facts about the offence and the offender is in the best position to make a just decision over sentencing. The provisions in the Act remove the upper limit to magistrates' powers when imposing fines for both summary and either way offences.[622]

The prosecutor may choose to make an application to the Magistrates' Court for a case that is triable either way to be heard in the Crown Court. The decision to make such an application is based on the nature of the offence and what the regulator wants in terms of punishment. The Magistrates' Court will decide through allocation

618 Such as £20 000 for violation of section 85 of the Water Resources Act 1991 (for the offence of allowing poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters).

619 Through section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015. The exception is that for fines that were capped at a lesser amount than £5000 this cap remains in place. Translated to the fine level of which 5 exist, offences that were subject to a maximum fine of level 5 on the standard scale (£5000), will now be punishable by an unlimited fine. Offences that are subject to a maximum fine that is lower than that or by reference to levels 1 to 4 on the standard scale – which ranges from £200 – £2500 will not be subject to an unlimited fine.

620 See Cabinet Office, *The Coalition: our programme for government*, London: Cabinet Office 2010. Available at: www.gov.uk/government/publications/the-coalition-our-programme-for-government (last visited 1 June 2019); Explanatory notes to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, available at www.legislation.gov.uk/ukpga/2012/10/notes#f00008 (last visited 1 June 2019).

621 Ministry of Justice, *Breaking the cycle: effective punishment, rehabilitation and punishment of offenders*, London: Ministry of Justice 2010, p. 61-62 (consultation paper). Available at http://webarchive.nationalarchives.gov.uk/ 20120119200607/ http:/www.justice.gov.uk/consultations/docs/breaking-the-cycle.pdf (last visited 1 June 2019).

622 This excerpt is from the Equality impact assessment to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, available at www.justice.gov.uk/downloads/legislation/bills-acts/legal-aid-sentencing/fines-eia.pdf (last visited 1 June 2019).

in which court a triable either way offence should be tried: the Magistrates' or the Crown Court. According to the Allocation Guideline from the Sentencing Council, triable either way offences should in general be tried in the Magistrates' Court, unless it is likely that the court's sentencing powers will be insufficient.[623] In spite of the fact that the level of the fines that can be considered is indefinite in both Courts, there are still differences in the length of the custodial sentence that may be imposed, and in the different sentences that can be imposed.

The Magistrates' Court can impose a custodial sentence with a maximum of twelve months, while the maximum sentence that can be imposed in the Crown Court is life imprisonment – where the offence justifies it.[624] It should be noted that the Magistrates' Court, if it deems it necessary, can refer the case before it to the Crown court for sentencing.[625] From enforcement perspective, it is interesting that the confiscation order can only be imposed by the Crown Court.[626]

The Magistrates' Court and Crown court are not specialised in environmental crime. In fact, there do not exist specialised courts for criminal environmental cases in England. A proposal for an environmental court was shelved indefinitely.[627] As explained previously, the lack of specialisation of the courts was considered problematic as it was deemed one of the causes of the low sentences imposed by the criminal courts.[628] The organisation of the judiciary did not change, however. To support sentencing in the Magistrates' and Crown Courts and to secure appropriate proportionate criminal sanctions in spite of the lack of specialisation, specific sentencing guidelines for environmental offences were developed for the courts.[629] Besides this, as mentioned, the maximum level of criminal fines in the Magistrates' Courts was removed and the level of several statutory offences was raised. The substance of these sentencing guidelines and these other developments are further discussed in chapter 5 on the sanctions available to the authorities in England.

The table below gives an overview of the environmental enforcement competence of all the enforcement authorities discussed in this chapter.

623 Sentencing Council, *Allocation definitive guideline* 2016, available at www.sentencingcouncil.org.uk/wp-content/uploads/Allocation_Guideline_2015.pdf (last visited 1 June 2019).
624 Section 154 and further of the Criminal Justice Act 2003.
625 See section 19 Magistrates' Court Act 1980.
626 Section 70 Proceeds of Crime Act 2002.
627 Neither do they exist specifically for administrative issues in environmental enforcement cases, although the creation of the First-tier Tribunal and Upper-tier Tribunal for appeals cases has brought a degree of specialisation.
628 See also chapter 5.
629 Sentencing Council, *Environmental offences: definitive guideline* 2014, available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf (last visited 1 June 2019).

Overview: Environmental Enforcement Competence			
Authority	**Administrative 'regular' enforcement**	**Administrative civil sanctions**	**Criminal enforcement**
Environment Agency	Yes	Yes	Investigation and prosecution
Natural England	Yes	Yes	Investigation and prosecution
Local authorities	Yes	Yes	Investigation and prosecution
Police	No	No	Investigation of wildlife offences
Crown Prosecution Service	No	No	Prosecution of wildlife offences
Criminal Courts	No	No	Sanctioning of all environmental offences

4.5 Coordination and cooperation between the enforcement authorities

4.5.1 Introduction

As was described in this chapter, hardly any conflict of competences occurs between the enforcement authorities in England, despite the fragmentation of environmental legislation.[630] The reason for this is the limited number of authorities involved in the enforcement of environmental law since the amalgamation of authorities in the central Environment Agency, the creation of Natural England, and the way these authorities, the local authorities and others have been accorded specific roles in legislation.

In spite of this, still, several enforcement authorities can be competent simultaneously with regard to a business or an individual. This may concern either the same authorities in cross regional cases or different authorities, for example, where a business has contravened an environmental permit – for which the Environment Agency is competent – and it has also breached a building regulation – for which the local authorities are competent.

630 As described in the previous chapter, environmental protection legislation also contains provisions on its enforcement.

There are several mechanisms available to the enforcement authorities in England to support and solve possible conflicts of competences. For the coordination of enforcement between regulatory authorities, these are, for local authorities in particular, two mechanisms introduced with the Better regulation push, described in the previous chapter. These two mechanisms are the Local Better Regulation Office, and the Primary authority scheme that was designed in light of the Better Regulation push, described in the previous chapter. For the cooperation between enforcement authorities, including other authorities than regulatory authorities, memoranda of understanding are in place. These are highlighted in the following.

4.5.2 Coordination between regulatory authorities

Local Better Regulation Office

The Local Better Regulation Office is a statutory body that was established under the Regulatory Enforcement and Sanctions Act 2008. It promotes consistency in regulatory enforcement by local authorities. It will also give guidance in respect of regulatory service; ensure that local authorities comply with this guidance; encourage best practice and innovative approaches to the provision of local authority regulatory services; give advice to ministers; and review and revise a list of national enforcement priorities for local authority regulatory services.

Primary Authority scheme: local authorities competence

The Primary Authority scheme, also created on the basis of the Regulatory Enforcement and Sanctions Act 2008, has been designed to improve consistency of enforcement for those businesses that carry out activities across two or more local authority boundaries. A primary authority is the local authority that is appointed as the partner to the business. The idea is that a business only has one authority to rely on for advice and regulation, specifically on compliance and enforcement where more than one local authority is competent. Where a business – or collective of businesses – has a primary authority relationship, any other local authority must contact the primary authority before taking enforcement action against that business. The primary authority provides tailor-made advice to the business to support compliance – Primary Authority Advice – which other local regulators must respect.[631] Moreover, the primary authority may create inspection plans to improve compliance. The primary authority will provide information about the business to the authority considering enforcement. The primary authority helps direct the efforts of the authority considering enforcement to improve regulatory efficiencies. This is

631 Section 22 and further of the Regulatory Enforcement and Sanctions Act 2008.

called Primary Authority Advice to Local Authorities.[632] The authority considering enforcement must follow inspection plans and this Primary Authority Advice to Local Authorities. The primary authority can block any enforcement action from being taken against a business that is following Primary Authority Advice.[633] Primary authorities are entitled to recover any costs of the partnership from the business involved.

The Primary Authority Register supports the operation of the Primary Authority scheme. Among other aspects, this Register records all the primary authority partnerships between businesses and local authorities, the Primary Authority Advice to the businesses, inspection plans, and the Primary Authority Advice to Local Authorities.[634]

The scheme is considered to have many benefits for businesses, regulators, and citizens. While businesses gain greater clarity on how to comply, the benefits of the scheme for regulators are described as, among other aspects, providing greater clarity over where responsibility lies; improving the consistency of local regulation and target resources on high-risk areas; and developing staff expertise.[635] These benefits carry over to citizens as they are considered to be better protected as businesses find it easier to comply with legislation; and to be at reduced risk as local authorities better understand the businesses they regulate and are able to target resources on high-risk areas.[636]

As the scheme has proved a success, the threshold for businesses to participate in it – limited to those covering several local authority areas – was lowered in 2017 and the scheme opened to all businesses.[637] This enabled smaller businesses to also participate. In 2017, 17,000 partnerships were in place. The prognosis is that 250,000 businesses will participate in the scheme by 2020.[638]

4.5.3 Cooperation between enforcement authorities

For the cooperation between the enforcement authorities, memoranda of understanding play an important role in England. Memoranda of understanding are

632 See www.gov.uk/guidance/primary-authority-a-guide-for-enforcement-officers (last visited 1 June 2019).

633 Enforcement action is defined in section 5 of the Co-ordination of Regulatory Enforcement Regulations 2017 and includes administrative notices, administrative civil sanctions, and criminal proceedings. Explanatory Memorandum to the Co-ordination of Regulatory Enforcement Regulations 2017, p. 1 and 3. See also www.gov.uk/guidance/primary-authority-a-guide-for-enforcement-officers (last visited 1 June 2019).

634 The register is available at https://primary-authority.beis.gov.uk/par (last visited 1 June 2019).

635 See, for example, www.gov.uk/guidance/local-regulation-primary-authority#what-are-the-benefits-of-primary-authority (last visited 1 June 2019).

636 These benefits are described at www.gov.uk/guidance/local-regulation-primary-authority#what-are-the-benefits-of-primary-authority (last visited 1 June 2019).

637 See the Enterprise Act 2016.

638 Explanatory Memorandum to the Co-ordination of Regulatory Enforcement Regulations 2017, p. 2.

agreements that bind the authorities that have signed them to cooperate in issues that concern them.[639] Such memoranda set out the areas of responsibility for all authorities competent in the same area of environmental protection. The memoranda can also ensure the consultation of authorities that are not necessarily competent, but are stakeholders with regard to certain environmental non-compliance, for example where they regulate different activities at a certain site. Memoranda of understanding between authorities can streamline the exercise of powers by them and provide consistency to this.

A memorandum of understanding is drafted, agreed upon and signed by all the authorities concerned. An example is the Memorandum between the Crown Prosecution Service, Natural England and the Chief Wildlife Police Officers. In it, it is described what the areas of responsibility are of each of the authorities. The Memorandum contains, for example, the following provision:

> *"Joint action on SSSI and species offences*
> 8.1 Where an incident occurs which breaches both the SSSI and species legislation in England, a decision will be made by NE, local Police and the CPS, as to whether a joint investigation and prosecution is undertaken."[640]

4.6 Evaluation of the organisation for the public enforcement of environmental law

4.6.1 Introduction

In this section the evaluative framework formulated in chapter 2 will be applied to the enforcement organisation in England. The organisational aspects are described from the perspective of the institutional requirements. These are – in short – the independence and separation of specific functions, their specialisation, and the coordination and cooperation mechanisms.

England does not have one single authority dealing with all enforcement with respect to all of the environmental law in force, although the Environment Agency comes quite close. As we have seen in this chapter, environmental enforcement is mainly organised in centralised regulatory authorities – the Environment Agency and Natural England – that also have local offices. In comparison, local authorities have significantly less competences for environmental protection. As described in this

639 In that sense, these memoranda of understanding seem comparable to the Dutch *bestuursovereenkomsten*.

640 A memorandum of understanding on the prevention, investigation and enforcement of wildlife crime between Natural England, Natural Resources Body for Wales, the Crown Prosecution Service and the National Police Chiefs' Council 2015. Available at www.nwcu.police.uk/wp-content/uploads/2015/11/MoU_Signed_Final_Document.pdf (last visited 1 June 2019).

chapter, one prominent characteristic of the environmental enforcement organisation in England is that the enforcement action the regulatory authorities can take covers inspection, investigation, the imposition of sanctions, as well as the prosecution of violations. Also the criminal courts play an important role in criminal environmental enforcement. Besides this, a much smaller role is reserved for the police and the Crown Prosecution Service for the investigation and prosecution of wildlife offences.

Below, aspects of the organisation are discussed to establish whether the public enforcement of environmental law in England may be able to fulfil the institutional requirements formulated in chapter 2. As explained in chapter 2, the following elements are assessed (as outlined in the table below).

Institutional requirements

- A degree of decision-making independence of the organisation
  - separation between regulatory and enforcement functions
  - separation between inspection/investigation and sanctioning
- Specialisation
  - degree of expertise
  - appropriate proximity (level of government)
- Coordination and cooperation between enforcement authorities

4.6.2 Decision-making independence of the organisation

4.6.2.1 Introduction

There are no legal rules or guidelines that require decision-making independence within the authorities competent for environmental enforcement in England. This means that no requirements exist for the public authorities to separate regulatory functions and enforcement functions within the same authority; also, no requirements exist to separate the inspection of non-compliance, the investigation of offences and the imposition of sanctions within the same authority. This means that it is not required in England to make any provision within the enforcement authorities to avoid regulatory bias or prosecutorial bias, which are described in chapter 2. However, in spite of this, a certain separation is realised within the organisation of several enforcement authorities. Below, this is further described for the two types of separation and the enforcement authorities that it concerns.

4.6.2.2 Separation of regulatory functions and enforcement functions

In England, the enforcement powers are attributed to the public authorities that also have the power to give out permits and perform other regulatory functions. More specifically, it is typical for the organisation in England that the authority that is competent to give out permits and to impose administrative sanctions is also inspector, criminal investigator and prosecuting authority for most environmental offences.

As stated, a separation within the authorities between the regulatory functions and enforcement functions is not legally required. While this is a drawback, commonly, there is, in fact, a certain separation between regulatory functions and enforcement functions, for example in departments within the authorities. This is, however, not guaranteed, especially in smaller local governmental authorities. There, issues of scale seem to play a role.

The only structural separation between regulatory functions and enforcement functions in separate authorities is in place for nature protection, where the police, the Public Prosecutor, and criminal courts, deal with the investigation and prosecution and sanctioning of wildlife offences, respectively.

The central government agencies have a centralised enforcement policy, which means that local economic considerations that could put pressure on effective enforcement can be less influential on enforcement.

4.6.2.3 Separation inspection/investigation and sanctioning

Introduction

As stated, there is no statutorily required separation between inspection and investigation and sanctioning in England for environmental protection. The same authorities generally carry out inspection and investigation and administrative sanctioning, as well as criminal prosecution.[641] Criminal sanctioning is generally reserved for the criminal courts, except where the prosecutor imposes sanctions itself, as alternatives to prosecution. As previously mentioned, the exception to this is the investigation, prosecution and sentencing of wildlife offences. A different authority – respectively, the police, the Crown Prosecution Service, and the criminal courts – carries out each of these functions.[642]

Besides this, a certain separation does occur within the organisation of several regulatory authorities, in different ways. Below, this is further described for the central government authorities and the local authorities.

641 Criminal sanctions are generally imposed by the criminal courts. Note that the prosecuting authority can impose sanctions as alternatives to prosecution. See further chapter 5 on sanctions.

642 The exception to this rule is where the Crown Prosecution Service imposes sanctions as alternatives to prosecution.

Central government authorities

A lack of statutory requirements for the separation of different enforcement functions has not resulted in a lack of consciousness within the central government agencies – the Environment Agency and Natural England – with regard to the need to avoid prosecutorial bias and fair decision-making in that respect. As described previously, a requirement of separation between investigation and decision-making on whether to instigate prosecution is, for example, laid down in the Environment Agency's Enforcement and sanctions policy. Moreover, Natural England's policy also specifies that two different individuals are to consider whether or not to prosecute. This means that, also in Natural England's local offices, a personal separation commonly takes place between officers that inspect and investigate and the persons responsible for taking the (final) decision on prosecution. Moreover, both central government agencies have officials within a centralised legal department that review and advise on possible enforcement action, and (usually) others that conduct the prosecution of criminal offences. Moreover, there is the obligation to disclose exculpatory evidence to the accused in case of the investigation and prosecution of (most) criminal offences. Therefore, the central government agencies have several mechanisms to avoid bias within their organisation.

Local authorities

Within the local authorities, generally a separation occurs either in departments or officials that are competent with regard to environmental protection as opposed to other issues, or with respect to enforcement tasks and (other) regulatory tasks of the administration.[643] This means that within these authorities usually no separation exists between officials appointed for inspection and officials attributed sanctioning tasks. In fact, it is common that the officials appointed for inspection and investigation, are also attributed the task of imposing sanctions for the non-compliance and prosecution. The obligation to disclose exculpatory evidence to the defence in case of (most) criminal offences, provides a counterweight to the influence of prosecutorial bias. However, this obligation does not exist when the local authorities do not pursue criminal offences through investigation and prosecution. When this is the case, there is no counterweight to the potential influence of prosecutorial bias by this lack of separation within the enforcement organisation of the local authorities. It can benefit effective enforcement by the local authorities to implement such a separation.

643 See above.

4.6.3 Specialisation

4.6.3.1 Expertise

The legislator in England has ensured significant expertise in environmental enforcement by designating two central government authorities specifically for environmental protection and enforcement. This is a great benefit to effective enforcement, and, as part of that, guaranteeing expertise in environmental enforcement. The other authorities designated for environmental enforcement are also in charge of tasks in other areas of law. Expertise is not a requirement laid down in the law. However, it turns out that the expertise of these authorities can also be guaranteed to a certain extent. This is further discussed below.

Central government authorities

The broad remit of the central government authorities for environmental protection and enforcement is a great benefit to effective enforcement. As described, the Environment Agency and Natural England together are in charge of the majority of environmental protection legislation and, in addition, have a broad remit with regard to enforcement. This means that expertise can be guaranteed for the enforcement of most areas of environmental protection, including inspection, investigation, imposition of administrative sanctions, and criminal prosecution, including the imposition of sanctions as alternatives to prosecution.[644] The Environment Agency stands out in this respect, as it has the broadest scope of competence for environmental protection.

Local authorities

The local authorities commonly organise themselves so that there is specialisation either in a regulatory area (environmental protection or other) or in type of powers (enforcement or other). This means that there commonly is at least some expertise. This is beneficial to effective enforcement. However, the lack of expertise of environmental protection and enforcement combined is a disadvantage. Mechanisms by means of which such expertise is built to a certain extent among the local authorities are the coordination mechanisms that are provided by law – the Local Regulation Office and the Primary Authority Scheme. In spite of this, effective enforcement by the local authorities could benefit from providing a specific structure within the organisation to create and develop specific environmental enforcement expertise.

644 More on this in the next chapter.

Police

As established previously in this chapter, the police in England are only competent to investigate wildlife offences. For this purpose, it is common that the police authorities have appointed a Wildlife Crime Officer to conduct investigations and keep in contact with the Crown Prosecution Service on the enforcement. This is beneficial to ensuring expertise with regard to the pursuit of wildlife offences. This expertise is strengthened by the fact that several police authorities have a specialised unit focusing on wildlife crime.

Such expertise of the police authorities is, moreover, supported by the specifically designated National Wildlife Crime Unit and through the Partnership for Action against wildlife crime. Through this, the expertise of the police on the topic of wildlife offences is supported and ensured.

The drawback to this is that specialised aspects of the police are not established by law, nor is there an obligation of expertise laid down in the law. This can impact the consistency of the expertise provided.

Crown Prosecution Service

As described, in the area of environmental protection the Crown Prosecution Service only plays a role with regard to the enforcement of wildlife offences. The Crown Prosecution Service can guarantee expertise in most of its regional areas, as there usually is a wildlife coordinator within these areas that has been designated for the prosecution of wildlife offences.

Moreover, the Crown Prosecution Service takes its enforcement decision on the basis of the file of evidence assembled by the police authorities. This means that prosecutor is aided by the benefits of the expertise that the police authorities have. The expertise of the Crown Prosecution Service's wildlife coordinators will ensure that the information assembled by the police experts, can be valued appropriately.

The wildlife coordinators are not assigned this position by law, or guaranteed in all the regional areas the Crown Prosecution Service covers. This is a disadvantage to the consistency of this expertise. However, where wildlife coordinators are present, which is common, a degree of expertise for the prosecution of wildlife offences is ensured.

Criminal courts

As described, the criminal courts in England are not specialised in environmental crime. There are also no other specific organisational structures within the courts to ensure expertise. This is a disadvantage for effective enforcement.

As described in this chapter, the lack of knowledge in the criminal courts on environmental offences has been considered a reason for the lack of effective sentences. The 'solution' to introduce sentencing guidelines drafted specifically for such offences, leads to an increase in the awareness of the courts of the sentencing possibilities and

needs of environmental offences. It can be considered that this is not sufficient to guaranteeing a degree of expertise as it does not provide a structural guarantee within the organisation, which would be most appropriate to build, develop and maintain expertise.[645] Moreover, the sentencing guidelines do not provide tools for the criminal courts to value, for example, the technical evidence that often accompanies cases on environmental pollution.

Even so, the sentencing guidelines have a certain formal status, which every court must follow. Therefore, these guidelines do promote a consistency of sentencing, and can provide the courts with knowledge that would normally be acquired through experience. Even so, while the guidelines can be beneficial to effective enforcement, the criminal courts may also benefit from more structural guarantees, i.e. guarantees built into the organisation itself, for ensuring that cases are adjudicated before courts with expertise.

4.6.3.2 Appropriate proximity: level of government

In England, there are no explicit requirements in legal or other binding rules to include local circumstances in the decision-making by the regulatory or other authorities. However, through the design of several of the enforcement authorities, in particular the central government authorities, the legislator has ensured that there can be an appropriate proximity. In that respect, the level of government is not so relevant to these authorities and the assessment of their proximity to the non-compliance. Also the other competent enforcement authorities can achieve certain proximity.[646] This is further discussed below.

Central government authorities

In spite of being central authorities, the Environment Agency and Natural England have quite close proximity to the regulated as they have area offices which oversee specific regions in England. This means the central agencies have quite a local reach and awareness. These central agencies each operate as one agency, at central government level, with a centralised enforcement policy. However, the enforcement can be tailored to the specific case at hand through the local area offices. To exercise the centralised enforcement policy, the area offices have the discretion to provide enforcement that is formulated for the local circumstances in the specific case. These aspects can greatly benefit effective enforcement. The centralised level and policy provide consistency, whereas the local area offices are able to uncover and assess relevant local circumstances that are important to decision-making on enforcement action in a specific case.

645 In the next chapter, the guidelines are further discussed.

646 As explained in chapter 2, the criminal courts are not evaluated in light of the requirement of proximity.

Local authorities
The local authorities obviously have proximity to the violations that fall within their scope of competence. The proximity of these authorities can ensure that information on local circumstances relevant for enforcement is uncovered. The fact that the enforcement authorities can rely on such information is a benefit to effective enforcement. It allows these authorities to select appropriate enforcement action by allowing a good view of the typology of the non-compliance and a choice of the appropriate sanction on the basis of this typology.

Police
As the police authorities commonly in charge of the investigation of wildlife offences are regionally organised, this geographical scope of competence will make it likely there will be an appropriate proximity to non-compliance. This is a benefit to effective enforcement.

Crown Prosecution Service
The offices of the Crown Prosecution Service correspond to the areas of the territorial police authorities. Due to this, what has been described above for proximity also applies to the Crown Prosecution Service. Moreover, as stated previously, the Crown Prosecution Service takes its enforcement decision on the basis of the file of evidence assembled by the police authorities. This means that prosecutor is aided by the benefits of proximity that the police authorities have.

4.6.4 Coordination and cooperation between enforcement authorities
As was described in this chapter, conflicts of competences do not occur often between the enforcement authorities in England.[647] This is a benefit of the environmental enforcement organisation in England. Still, several enforcement authorities can be competent simultaneously with regard to a business or an individual.
It was described previously in this chapter that there are several mechanisms in England to ensure the coordination and cooperation between the enforcement authorities in such cases. It is a benefit of these mechanisms that they bind the authorities, either through statutory rules, or through other binding rules. Due to this, these mechanisms provide strong guarantees that there is coordination and cooperation between enforcement authorities, where this is necessary. Moreover, these mechanisms ensure a structural and consistent coordination and cooperation. Considering the substance of these mechanisms, coordination and cooperation is, moreover, ensured from the outset by clarifying the competences and building relationships between authorities before conflicts arise. This is further detailed below.

647 As described in the previous chapter, environmental protection legislation also contains provisions on its enforcement.

Coordination between regulatory authorities

For the purpose of coordination between the local authorities, the Local Regulation Office and the Primary authority scheme both provide mechanisms appropriate to ensure consistency of enforcement. The Local Regulation Office is able to promote the consistency of enforcement by the local authorities, which coordinates and thereby benefits enforcement.

The Primary Authority scheme aims to improve and maintain compliance by businesses and to streamline enforcement. It intends to solve up front any problems that may be caused by concurrent competence of local authorities with regard to the same business. While participation in the scheme is voluntary for the businesses, the rules laid down in the law ensure that the local authorities are bound once the businesses participate in the scheme. This is emphasised by the fact that the Primary Authority can block any enforcement action taken by another local authority where it is inconsistent with previously given Primary Authority advice.[648]

The coordination between authorities through the Primary Authority scheme moreover enables consistency of enforcement. This benefit to enforcement is further supported by the fact that the partnerships between the Primary Authorities and businesses, including all documents drawn up for this purpose, are transparently laid down in the Primary Authority Register, which is publicly accessible.

Cooperation between enforcement authorities

Memoranda of understanding enable cooperation between all enforcement authorities, such as the Environment Agency and the police. It is beneficial to ensuring cooperation between enforcement authorities that these policy documents bind those authorities that have signed them. As such memoranda specifically focus on areas of simultaneous competences of different authorities, they are able to consistently support a clear communication between enforcement authorities of actions to be taken. Another benefit is that the memoranda are drawn up previous to such cases of simultaneous competences occurring.

4.7 Findings

In this chapter it was described that the regulatory authorities in England play an important role in the public enforcement of environmental non-compliance. The regulatory authorities have a broad remit for enforcement. They are in charge of the administrative enforcement of environmental non-compliance, which entails the competence to inspect and to impose administrative (civil) sanctions. Moreover, the

648 This scheme will likely not lead to prosecutorial bias as the relationship between the businesses and the authority is based on the aim to increase compliance with the law and ensure that enforcement is effective in increasing compliance.

regulatory authorities are competent to investigate and prosecute environmental non-compliance that is a criminal offence. For that purpose, the regulatory authorities are called prosecuting authorities. With regard to the regulatory authorities that are competent, one of the central government authorities – the Environment Agency – enforces the majority of environmental law. In this chapter it was also described that the police, and the Public Prosecutor play a small role for the enforcement, in particular, of wildlife offences. The criminal courts play an important role in the enforcement of all environmental criminal offences.

Several positive aspects as well as disadvantages of the enforcement organisation in England were noted in the analysis in the previous section, in relation to the institutional requirements for effective enforcement formulated in chapter 2. What stands out from the analysis is that, in England, the public enforcement organisation as a whole is quite able to fulfil the institutional requirements for an effective enforcement. There are some fundamental differences, however, in the manner and extent to which these institutional requirements are fulfilled. Also, not all enforcement authorities can fulfil all the requirements.

The aspects that stand out most prominently from the analysis are set out below.

- As described, the central government authorities, and in particular the Environment Agency, have an important role in environmental enforcement. Their broad remit in enforcement means that the positive aspects of these authorities have a broad reach. As described, the legislator has created these authorities specifically for environmental protection, including its enforcement. Moreover, these authorities are organised as a centralised authority, with a centralised policy and local offices that can adjust this policy to the circumstances of the case. Specific positive aspects are, therefore, that expertise and proximity, in particular, are structurally guaranteed within the central government authorities, i.e. implemented into the structure of the organisation, and inherent in binding rules.
- These characteristics are beneficial to effective enforcement, as they provide a consistent guarantee that the institutional requirements of expertise and proximity are fulfilled. Because of their broad remit for enforcement, and, in the case of the Environment Agency, also the broad remit with regard to environmental protection, these characteristics apply to a broad range of environmental enforcement. This broad scope is also beneficial to effective enforcement.
- One of the important differences between these central government authorities and the other enforcement authorities lies in whether or not these requirements can be structurally guaranteed, i.e. implemented into the structure of the organisation, which would benefit consistency with regard to these requirements. The central government authorities, i.e. the Environment Agency and Natural England, can generally provide more such guarantees than the other enforcement authorities.

Moreover, these structural guarantees often follow from the legal rules instating these central government authorities. These authorities therefore stand out from the other enforcement authorities.

- Many of the other enforcement authorities cannot guarantee that the institutional requirements are met within their organisation in the same manner as within the central government authorities. This is a disadvantage of these authorities in light of effective enforcement. Although this cannot be guaranteed consistently, several of these authorities can still provide for the fulfilment of these requirements to a certain extent. This, therefore, can (still) benefit effective enforcement. In this respect, the designation of specific specialised wildlife crime officers within the police, and wildlife coordinators within the Crown Prosecution Service for the investigation and the prosecution of wildlife offences, respectively, stands out in the positive sense. Such designation provides a more consistent basis for expertise than, for example, simple allocation of cases to experts on a case-by-case basis.
- The local authorities in particular seem weaker in ensuring the institutional requirements are met within their organisation. This is a disadvantage of these authorities. However, there are two coordination mechanisms in place that could provide a counterweight to this. Law regulates these coordination mechanisms in the shape of the Local Regulation Office and the Primary Authority Scheme. These mechanisms not only stimulate effective enforcement by the local authorities, through enabling consistency of enforcement, their influence also extends to building expertise on environmental enforcement in the hands of the local authorities. These coordination mechanisms, therefore, stand out in the positive sense.
- The coordination mechanisms mentioned above are connected to streamlining any potential conflicts of competences. The mechanisms are beneficial to effective enforcement by the local authorities. It is a positive aspect of the environmental enforcement organisation in England that hardly any such conflicts of competences occur. Moreover, the available mechanism for cooperation – Memoranda of Understanding – is also an interesting instrument to ensure effective enforcement by binding enforcement authorities to agreements made before conflicts occur.

Notwithstanding the positive aspects, the enforcement authorities in England would benefit from the introduction of certain elements for the purpose of effective enforcement.

- It would be a benefit to effective enforcement to introduce more constructive guarantees with regard to the institutional requirements.
- In particular, it would be a benefit to the courts to enable the creation and building of expertise within the organisation. This could, at the least, take place through allocation. Preferably, this allocation is made structural by creating chambers

within the courts to hear such cases where expertise can be created, developed and maintained.
- Also, it would benefit an effective enforcement organisation of the local authorities to avoid prosecutorial bias. For that purpose, a clear separation within the local authorities between inspection and the imposition of sanctions ought to be introduced. Where such bias is not avoided, this may impact the choice of sanctions by the authorities.

As described in chapter 2, an effective enforcement organisation can exercise its effectiveness in particular when it is provided with effective sanctions. The sanctions that could (potentially) be chosen by the enforcement authorities and their potential for effectiveness are discussed in the next chapter.

Chapter 5 Sanctions for Public Enforcement of Environmental Law in England

5.1 Overview; characteristics and developments with regard to the sanctions toolbox

5.1.1 Overview

In this chapter it is described and discussed what sanctions are available to the authorities described in the previous chapter. As remarked previously, a lot of development has taken place in England as to the system of enforcement. This has meant that now three systems of sanctions can be discerned for the public enforcement of environmental law: administrative sanctions, civil sanctions – which are also administrative sanctions but of a different type – and criminal sanctions.

In England, criminal judiciary-imposed sanctions are available in case of (nearly) all violations of environmental law. As explained previously, the regulatory authorities that may impose administrative and civil sanctions also have the power to institute criminal proceedings. The institution of proceedings is part of the set of instruments that the administrative authorities can exercise in reaction to environmental non-compliance. The administrative authorities have discretion to decide on the use of the administrative sanctions – in the shape of administrative notices – civil sanctions or criminal prosecution.[649] While this chapter focuses on the characteristics of the available administrative, civil and criminal sanctions, it will also survey this power to institute criminal proceedings in the context of the possibilities to finalise proceedings through alternatives to prosecution.[650]

Below, the characteristics of the sanctions available to the authorities for public enforcement will be set out. The sanctions are discussed in three sets. First, the administrative sanctions are described (5.2). Second, the civil sanctions in the hands of the regulatory authorities are described (5.3). Third, the criminal sanctions will be set out (5.4). Prosecution and alternatives to it are discussed in the same section as the criminal sanctions. Following this, the possibility for a combination of these sanctions is assessed (5.5). The chapter closes with the evaluation of the sanctions on the basis of the evaluative framework that was presented in chapter 2 (5.6) and the findings (5.7).

649 *Civil sanctions for environmental offences: guidance to regulators*, London: DEFRA 2010, p. 5. Available at https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf (last visited 1 June 2019).

650 Environment Agency's old Enforcement and Sanctions Guidance, p. 7 (withdrawn and replaced with other policy documents on 11 April 2018), available at: www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-statement. Last visited 1 June 2019.

Before proceeding to this, however, two aspects that pertain to the sanctions are described below in this section. First, a short overview is given of several interesting changes in the sanctions toolbox of the administrative and criminal authorities. Second, the aspect of the addressee of a sanction is described.

5.1.2 Changes in the sanctions toolbox

The developments described in chapter 3 have led to changes of and within the sanctions toolbox available for administrative enforcement and criminal enforcement. One theme can be seen for sanctions as relevant for (more) effective environmental enforcement in England: the strengthening of the sanctions' toolbox. For this purpose, for one, the penalty principles formulated in the Macrory review have been an important influence on the enforcement by the regulatory authorities.[651] According to the Macrory review, the six penalties principles entail that a sanction should:

1. aim to change the behaviour of the offender;
2. aim to eliminate any financial gain or benefit from non-compliance;
3. be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
4. be proportionate to the nature of the offence and the harm caused;
5. aim to restore the harm caused by regulatory non-compliance, where appropriate; and,
6. aim to deter future non-compliance.

For administrative enforcement the sanctions toolbox has been strengthened along the lines of these principles through the addition of civil sanctions to the toolbox for the administrative authorities. For criminal enforcement, development can be seen in the way, specifically, the toolbox of criminal enforcement can and is to be used. These changes will be highlighted in short, in the following.

5.1.3 Developments in administrative enforcement

The administrative sanctions, in essence, are considered to provide alternatives to the immediate use of criminal prosecution and criminal sanctions. However, as became clear in the governmental reviews of enforcement described in chapter 3, the toolbox of administrative sanctions was deficient. A new set of sanctions was formulated that the administrative authorities may impose; these are called civil sanctions, to emphasise that these are non-criminal sanctions, available to the administrative

651 See Macrory 2014, p. 25.

authorities.[652] The sanctions were introduced for environmental enforcement by the Environment Agency in 2011 and for Natural England in 2012.

This set of sanctions was introduced to fill in the gaps in the existing alternatives to prosecution and criminal sanctions, and to extend further the sanctioning possibilities for the regulatory authorities. The sanctions were introduced to add more tools that were also more appropriate and more flexible to the box of instruments available for environmental enforcement.[653] Through the introduction of civil sanctions, the regulatory authorities came to possess several punitive sanctions, as well as several other sanctions that aim specifically at reparation. According to the Explanatory Memorandum, civil sanctions in particular provide a proportionate alternative to prosecution for businesses and other persons who significantly fail to comply with environmental regulation despite having a good general approach to compliance.[654]

The set of civil sanctions provides a separate system of sanctions in the hands of the administrative authorities, as alternatives to prosecution.[655] The standard of proof for the imposition of civil sanctions is hybrid within the set of sanctions, in the sense that for certain sanctions the same standard of proof as in criminal cases applies. This entails that the regulators must be satisfied beyond a reasonable doubt that an offence has been committed.[656] For other civil sanctions – the enforcement undertaking and the stop notice, explained later – another standard of proof applies. This standard of proof entails, for the enforcement undertaking, that the regulator has reasonable grounds to suspect that the person has committed an offence. For the stop notice, the standard of proof entails that the regulator is to reasonably believe that the activity has carried on, or is likely to be carried on, by that person and involves or is likely to involve the commission of an offence (for which a stop notice may be imposed), or there is a significant risk of serious harm to human health or the environment.[657]

652 *Civil sanctions for environmental offences: guidance to regulators*, London: DEFRA 2010, p. 3. Available at https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf (last visited 1 June 2019). See also Macrory & Woods 2003, p. 11.

653 *Civil sanctions for environmental offences: guidance to regulators*, London: DEFRA 2010, p. 3. Available at https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf (last visited 1 June 2019).

654 Explanatory Memorandum to the Environmental Civil Sanctions (England) Order 2010 and Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations 2010, para. 2.3.

655 *Civil sanctions for environmental offences: guidance to regulators*, London: DEFRA 2010, for example at p. 37. Available at https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf (last visited 1 June 2019).

656 This applies to the use of a compliance notice, restoration notice, variable monetary penalty or a fixed monetary penalty. These instruments will be described below, in section 5.3.

657 *Civil sanctions for environmental offences: guidance to regulators*, London: DEFRA 2010, p. 10. Available at https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf (last visited 1 June 2019).

> One other aspect in which the civil sanctions differ from the other 'regular' administrative sanctions – the administrative notices – is that appeal takes place through the First-Tier Tribunal. This administrative court was created in 2008 and has a specialised chamber – the General Regulatory Chamber – since 2010 for appeals against civil sanctions that have been imposed for environmental non-compliance.[658]

The civil sanctions are further described in a separate section (5.3).

5.1.4 Developments in criminal enforcement

For criminal enforcement, the toolbox of criminal sanctions was strengthened in several ways to try to reflect the seriousness of environmental offences in the sanctions, in particular in the criminal fines that can be imposed.[659] As mentioned in chapter 3, the sentences that the criminal courts imposed, and, in particular, the low level of most commonly imposed fines, were deemed to be a problem, for one, for maintaining the credibility and stigma of criminal enforcement. The sanctions that were imposed were considered too low and to not reflect the harm done to the environment and not to take into account the profits the offender was able to make through non-compliance. Furthermore, because of the low level of sanctions repeat offenders were considered to receive inadequate punishment.[660] The low level of sentences were attributed to several aspects of the criminal enforcement system, among which, the lack of experience of the judiciary with environmental offences and their consequences; the aspect of strict liability of the environmental offences – discussed in chapter 3 – and the technical aspect of some of the consequences of environmental offences.[661]

Several steps were taken to address the issue. The subject of these steps was the sentencing by the criminal courts, in particular the statutory limits on the competence of the criminal courts, the levels of the fines available for sentencing, and the consistency of sentencing.

First, in the 1990s, the limits on the sentencing competence of the Magistrates' court were raised. Subsequently, in 2015, the limits on the sentencing competence of the Magistrates' Court for summary offences – many of the environmental offences – were removed. This meant that the fine cap of £5000 was removed.[662]

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658 Section 3 Tribunals, Courts and Enforcement Act 2007 and section 10 the Environmental Civil Sanctions (England) Order 2010.

659 Bell et al 2017, p. 293.

660 Macrory 2014. See also Bell et al 2017, p. 292-295.

661 Dupont & Zakkour 2003, p. 44; De Prez 2000; also, Bell et al 2017, p. 293.

662 Through section 85 of the Legal Aid, Sentencing and Punishment Act 2012 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on summary conviction) Regulations 2015.

> As explained previously, in England there are three types of offences: summary offences, indictable offences, and offences triable either way. These types of offences also relate to the competence of the Magistrates' Court and the Crown Court. Summary offences are generally tried in Magistrates' Court, as opposed to indictable offences, which are generally heard before the Crown Court. Summary offences are generally less serious offences, and are tried before a judge. Indictable offences are generally more serious offences, and are tried before a jury. Offences that are triable either way can be tried either in the Magistrates' Court or the Crown Court.[663]

Second, the maximum levels of the fines for specific offences were raised. The fines for pollution control offences were raised from £2000 to £20 000 in the 1990s.[664] Moreover, with the introduction of the Environmental Permitting regime – as described in chapter 3 – the maximum fine for breach was increased to £50 000 in 2016.

Third, a sentencing guideline was introduced for environmental offences, and, accorded a certain formal status, to increase consistency of sentencing the offences. The guideline was further supplemented with case law from the Court of appeal on fining very large organisations. The sentencing guideline will be further described in section 5.4.3 of this chapter. The sentencing guideline is, moreover, based on a set of purposes established for sentencing in the Criminal Justice Act 2003. These purposes of sentencing are:

- the punishment of offenders;
- the reduction of crime (including its reduction by deterrence);
- the reform and rehabilitation of offenders;
- the protection of the public; and,
- the making of reparation by offenders to persons affected by their offences.[665]

5.1.5 Addressee of a sanction: the offender

An important aspect in the applicability of public law sanctions is the addressee of the sanction, i.e. the offender that may be imposed a sanction. This aspect is highlighted in this section, as, in England, the concept of the addressee of the sanction is similar for administrative, civil and criminal sanctions as generally the reaction to non-compliance is based upon finding an environmental offence according to the specific environmental statutes. Moreover, as explained in chapter 3, most environmental

663 Schedule 1 Magistrates' Court Act 1980.
664 Through the Environmental Protection Act 1990, see Bell et al 2017, p. 293.
665 Section 142 Criminal Justice Act 2003.

offences are strict liability, hence not containing a reference to culpability. Even so, the aspect of culpability may be relevant to the type of sanction imposed and its level.[666] Where deviation is possible for individual sanctions, this will be discussed in the specific sections for these sanctions below.

In England, generally, sanctions can be imposed on both natural persons and legal persons, although especially the latter is also dependent on the nature of the offence.[667] Moreover, generally, directors and managers can be prosecuted individually in certain circumstances. Sanctions can be imposed on any director, manager, secretary, or other similar officer of a corporate body, i.e. legal person, personally if non-compliance is committed with their consent or connivance, or is attributable to their neglect. This is established in many environmental statutes. An example of this is section 157 of the Environment Protection Act 1990, which reads:

> " Offences by bodies corporate
>
> (1) Where an offence under any provision of this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> (2) Where the affairs of a body corporate are managed by its members, subsection (1) above shall apply in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate."[668]

This personal liability can be established where an offence is committed by the legal person, and, there has been consent, connivance, or neglect by the individual concerned. The individual is to have sufficient status – existence and scope of authority within the legal person – to be personally liable.[669] This personal liability does not apply where sanctions can be imposed on an individual as principal violator.[670] Sanctions can also be imposed on multiple natural persons: the person that committed the non-compliance, and, also, the person that has allowed the non-compliance to be committed through their act or default.[671]

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666 See further below, section 5.5.3.

667 It is also important whether the actions of employees of the legal person can be seen as the 'controlling mind' of the company. See, for example, National Rivers Authority v Alfred McAlpine Homes East Ltd [1994] Env LR 198; [1994] 4 All ER 286; in contrast, R. v St. Regis Paper Co Ltd [2011] EWCA Crim 2527; Bell et al 2017, p. 277.

668 See also, for example, section 217 of the Water Resources Act 1991; regulation 41 of the Environment Permitting (England and Wales) Regulations 2016; section 331 of the Town and Country Planning Act 1990. Also, Bell et al 2017, p. 278-279.

669 See, for example, Woodhouse v Walsall Metropolitan Borough Council [1994] Env LR 30; Bell et al 2017, p. 279.

670 Bell et al 2017, p. 279.

671 See, for example, section 38(6) of the Environmental Permit (England and Wales) Regulations 2016.

5.1.6 The regulator's sanctioning decision

As explained in the previous chapter, the administrative authority is also the prosecuting authority.[672] This means that one and the same authority decides on the use of administrative sanctions, civil sanctions and the instigation of prosecution. The considerations for the use of these sanctions[673] are detailed in the authority's enforcement policy and guidance.[674] As described previously, in England, the regulatory authorities are required by law to publish this enforcement policy and guidance.[675] This means that the considerations of these authorities for taking sanctioning decisions are quite transparent. Here, the general considerations of the authorities are highlighted. In section 5.4.2 below, the considerations for the instigation of prosecution by the authorities are further described.

When the administrative authorities consider the appropriate enforcement action, they generally aim to follow the penalty principles as set out in the Macrory review.[676] These were described in section 5.1 of this chapter.[677] In addition, for example, the Environment Agency's Enforcement and Sanctions Policy emphasises its outcome-focused enforcement. The environmental outcomes are divided in four general types:

a. To stop offending – aim to stop an illegal activity from continuing/occurring.
b. To restore and/or remediate – aim to put right environmental harm and/or damage.
c. To bring under regulatory control – aim to bring an illegal activity into compliance with the law.
d. To punish and/or deter – to punish an offender and/or deter future offending by the offender and others.

672 With the exception of wildlife offences.

673 As described in section 5.5.2, prosecution is called 'a sanction' in the Environment Agency's old Enforcement and Sanctions Guidance, p. 7 (withdrawn and replaced with other policy documents on 11 April 2018), available at: www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-statement. Last visited 1 June 2019.

674 See, for example, the enforcement policy and guidance documents of Natural England, available at: www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england#natural-englands-compliance-and-enforcement-position, and the enforcement policy and guidance documents of the Environment Agency, available at: www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy. Last visited 1 June 2019.

675 See the RES Act 2008.

676 See the Macrory review 2006, in particular R.B. Macrory, *Regulatory Justice: Making Sanctions Effective* (final report), London: DEFRA 2006, p. 35; also, for example, the Environment Agency's Enforcement and Sanctions Policy (2018), section 4, available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

677 See also, Natural England's Enforcement Guidance (2011), section 5.6, available at www.gov.uk/guidance/ enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019); the Environment Agency's Enforcement and Sanctions Policy (2018), section 4, available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

In considering how to achieve the penalty principles and environmental outcomes, potential and actual harm and culpability are considered.[678] More specifically, the Policy of the Environment Agency states that the authority takes enforcement decisions by considering all the individual facts and circumstances of the (potential) breach or offence.[679] The evidence is tested and the public interest factors are weighed up.
The public interest factors taken into account in deciding to take enforcement action are:

- the intent and the foreseeability;
- the environmental effect;
- the nature of the offence or breach;
- financial implications;
- the deterrent effect;
- the previous history and repeat offending;
- the attitude of the offender; personal circumstances.[680]

The principles and outcomes of enforcement may be achieved by the regulatory authorities by means of one or more of administrative sanctions, including civil sanctions and/or criminal prosecution. These will now be discussed in the next sections.

5.2 Administrative sanctions: notices

5.2.1 Introduction

As is clear from the previous, there have been changes and additions to the sanctioning landscape for environmental enforcement in recent years. In this section the sanctions available to the administrative authorities for environmental non-compliance that are not civil sanctions will be described.[681]
The most common administrative sanction is the notice (or order), which exists with many names. In essence, the notice is a vessel for an array of obligations that the administrative authorities may impose on those in non-compliance or those that

678 Natural England's Enforcement Guidance (2011), section 5.21. Available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019).
679 Environment Agency's Enforcement and Sanctions policy (2018), section 8.2. Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).
680 Environment Agency's Enforcement and Sanctions policy (2018), section 8.2. Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019). Natural England refers to the public interest factors outlined in the Code for Crown Prosecutors. See Natural England's Enforcement Guidance (2011), section 5.22. Available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019).
681 Specifically the non-compliance with the environmental statutes mentioned in chapter 3.

have control over non-compliance – both individuals and legal persons. A whole array of obligations may be contained in a notice. Among these are: the obligation to do something or to refrain from doing something, the order to suspend or revoke a licence or permit, and the order to recover the expenses when the authority itself remedies the harm caused by the contravention at hand.[682]

As explained previously, non-compliance with environmental law is considered a criminal offence in nearly every area of environmental regulation. Moreover, non-compliance with the administrative notices is also a criminal offence and can be sanctioned separately.[683]

An administrative notice, which reacts or anticipates a breach of environmental regulation, is a sanction and part of enforcement as defined in chapter 1. There also exist notices that assist an order by the authorities, for example by announcing the obligation to discontinue the use of land, or notices containing an obligation where there has not been any non-compliance with legislation or anticipation of one. The action of the authorities does not have the purpose of establishing compliance with legislation. Instead, for example, the discontinuance orders mentioned are ordered when the local authorities decide that it is expedient to do so in the interest of the proper planning of their area, including the interests of amenity.[684]

Overview of administrative sanctions

Administrative notice: one type, different substance. Generally consisting of the following:

- to do or refrain from doing something
- suspension or revocation of a licence/permit
- recovery of expenses upon remedial action by the authority

5.2.2 The substance of administrative notices

5.2.2.1 Overview

An array of administrative[685] notices can be issued, as can be seen in the box below. The administrative notices are specific for the areas of environmental protection. These notices are essentially similar in substance. They may aim to stop certain action or to instigate certain action, thereby ending non-compliance or repairing it. They

682 Huglo Lepage 2004b, p. 12.

683 See, for example, section 38(2) Environmental Permit (England and Wales) Regulations 2016, which states that it is an offence not to comply with the conditions in an environmental permit. Section 38(3) of the same regulations describes that it is an offence not to comply with the requirements of an enforcement notice, a prohibition notice, a suspension notice, etc. See also Macrory 2014, p. 12. See also section 80 Water Resources Act 1991. For more on this, see section 5.6 of this chapter.

684 Section 102 TCPA 1990. See also for example the drought order in the Water Resources Act 1991, section 73 and further.

685 Woolley et al 2009, p. 58-59.

may also aim to revoke a licence or permit or suspend it. They may also aim to recover expenses made by the administrative authorities when they have taken remedial action themselves. In determining the notice that is most appropriate, the circumstances of the non-compliance must be considered by the competent authority.[686]
The integrative system introduced by the Environmental Permit Regulations means that it contains many enforcement provisions that have quite a broad application. also, the Environmental Damage Regulations contain several enforcement provisions with a broad application.[687] Moreover, the separate statutes regulating, for example, water pollution, may still contain sanctions that the competent authorities can impose. This means that there may be more than one notice that can be imposed and that the competent authority must choose between them. Similar notices are not to be combined.

Below the different administrative notices for enforcement of environmental law are listed in the table and, consecutively, described.

686 See Environment Agency, Regulatory Guidance Series No 11: enforcement powers. Environmental Permitting Regulations (England and Wales) 2010, April 2010, para. 6.9-6.12.

687 The full name of these regulations is the Environmental Damage (Prevention and Remediation) (England) Regulations 2015.

Overview of administrative notices for enforcement of environmental law[688]			
Area of environmental protection	**Type of instrument**	**Legislation**	**Competent authority**
Environmental permit	- Enforcement notice	Reg 36 EPR 2016	EA/LA
	- Suspension notice	Reg. 37 EPR 2016	EA/LA
	- Revocation notice	Reg. 22 EPR 2016	EA/LA
	- Prevention notice	Reg. 13(2) EDR 2015	EA/LA
	- Remediation notice	Reg. 20(2) EDR 2015	EA/LA
Statutory nuisances[689]	- Abatement notice	s. 80 EPA 1990	LA
Planning contravention	- Enforcement notice	s. 172; 173 TCPA 1990	LPA
		s. 182 TCPA 1990	Sec. of State
	- Stop notice	s. 183 TCPA 1990	LPA
		s. 185 TCPA 1990	Sec. of State
	- Breach of condition notice	s. 187A TCPA 1990	LPA
	- Temporary Stop notice	s. 171E TCPA 1990	LPA
	- Revocation notice	s. 97 TCPA 1990	LPA
Waste	- Enforcement notice	s. 42(5) EPA 1990; reg. 36 EPR 2016	EA
	- Prevention notice	reg. 13(2) EDR 2015	EA
	- Remediation notice	reg. 20(2) EDR 2015	EA
Water pollution	- Consent regarding deposits & vegetation in rivers: Enforcement notice	s. 90B(3) WRA 1991	EA
	- Anti-pollution works notice	s. 161A(1) WRA 1991	EA
	- Revocation notice	s. 52 WRA 1991	EA
	- Prohibition notice	schedule 22(9) EPR 2016	EA
			EA
	- Prevention notice	reg. 13(2) EDR 2015	EA
	- Remediation notice	reg. 20(2) EDR 2015	EA
Wildlife protection	- no administrative sanctions	–	–
Nature protection	- Management notice	s. 28K W&CA 1981	Natural Eng.
	- Prevention notice	reg. 13(2) EDR 2015	Natural Eng.
	- Remediation notice	reg. 20(2) EDR 2015	Natural Eng.
	- Revocation notice	s. 16 W&CA 1981	Natural Eng.
All	- Notice of authority action and cost recovery	s. 8 Environmental Sanctions (England) Order 2010; s. 15 EDR 2015	All

688 Notices of intent must be issued for each of the notices, unless prevention needs to be immediate.
689 Section 79(1) EPA 1990.

5.2.2.2 The enforcement notice

The most common administrative notice is the enforcement notice. The notice by this name can be imposed in relation to offences concerning environmental permits, for IPPC/LAAPC; PPC; waste; water pollution[690], as well as for planning contraventions.[691] In most cases, if informal requests for compliance with a condition have not worked or are not appropriate, this may be the first tool used in requiring compliance with a permit.[692]

Most administrative notices only come into effect a minimum of twenty-eight days after serving a notice of intent of imposing the administrative notice to the (potential) offender or upon the site. However, the notices that require immediate action do not follow this general rule.

A competent authority may serve an enforcement notice where an operator has contravened, is contravening or is likely to contravene conditions of an environmental permit or other license or permit. This means this notice can be imposed preventively, before a violation occurs.[693]

The notice will have to specify the matters constituting the contravention or the matters making it likely that the contravention will arise; the steps that must be taken to remedy the contravention or, to remedy the matters making it likely that the contravention will arise; and the period within which those steps must be taken. The remedial obligations may include the obligation to remedy the effects of pollution caused by the contravention.[694] Sometimes, the legal provisions as to this notice provide more insight into the considerations the competent authority is to make with regard to it and its contents. For example, in case of a breach of planning control the local planning authority can issue an enforcement notice when it considers it expedient to do so having regard to material considerations such as the provisions of a development plan (172(1)(b) TCPA 1990). However, none specify what the foundation should be to determine the time frame allowed to come into compliance. The substance of the remedial obligations in the enforcement notice can be tailored

690 With regard to the breach of consents regarding deposits and vegetation in rivers.

691 Section 36 Environmental Permitting (England and Wales) Regulations 2016; section 13-14 EPA 1990; formerly section 24 PPC Regulations 2000; Environment Agency, *Regulatory Guidance Series No 11: enforcement powers. Environmental Permitting Regulations (England and Wales) 2010*, April 2010, par. 3.32. If the pollution results from waste deposited outside the terms of the permit section 59 EPA may also be used as this requires the person depositing or knowingly causing or knowingly permitting the deposit to undertake the work. Similarly section 161A of the Water Resources Act 1991 (WRA) may be used by the competent authority to require the person who caused or knowingly permitted polluting matter to enter controlled waters to undertake work to prevent, remove or remedy pollution.

692 Environment Agency, Regulatory Guidance Series No 11: enforcement powers, Environmental Permitting Regulations (England and Wales) 2010, April 2010, par. 3.16.

693 For the preventive application of the enforcement notice, a serious risk needs to be present, see Environment Agency, Regulatory Guidance Series No 11: enforcement powers. Environmental Permitting Regulations (England and Wales) 2010, April 2010, par. 3.32.

694 See e.g. section 36(3)(b) Environmental Permitting (England and Wales) Regulations 2016; formerly also in section 24 of the PPC Regulations 2000.

specifically to the circumstances of the case. Not many environmental statutes provide more detail as to the specific remedial obligations, which may be contained in an enforcement notice. Within the purpose of remedying the situation, many obligations may therefore be formulated. The TCPA 1990 does give examples of such steps for the purposes of remedying the breach or remedying any injury to an amenity, which has been caused by the breach (s. 173(5) and (4) TCPA 1990). To this end, an enforcement notice may, for example, require the alteration or removal of any buildings or works; the carrying out of any building or other operations; any activity on the land not to be carried on except to the extent specified in the notice; or the contour of a deposit of refuse or waste materials on land to be modified by altering the gradient or gradients of its sides. Furthermore, and quite far-going, is the possibility to oblige the violator to also construct a building that is as similar as possible to the demolished building by enforcement notice in respect of a breach of planning control.[695]

Very similar to the purpose of the enforcement notice is the notice to obtain a permit. This notice is also remedial as to the non-compliance as it attempts to repair a situation in which there is a breach of the law, namely discharges in absence of a permit. The notice requires the person concerned to apply for one. This notice is applicable to a person who is carrying out, or intends to carry out an activity on or in the ground that might lead to the discharge of pollutants to groundwater, or trade or sewage effluent into non-freshwaters requiring them to hold a permit.[696]

5.2.2.3 The prevention notice

We have seen above that, in England, an enforcement notice may be imposed to prevent non-compliance. The authorities also have powers specifically aimed at preventing environmental damage.[697] This specifically applies to damage through non-compliance with an environmental permit, damage to water, a site of specific scientific interest, a protected species or natural habitat, or land.[698]

In case of an imminent threat of environmental damage and when the operator of an activity that may cause this does not fulfil his duty of prevention, the enforcing authority may serve a notice on that operator. This notice will specify the measures required to prevent the damage and will require the operator to take those measures, or measures equivalent, within a certain period of time. In the case of damage to water or species and habitats, these measures include not only 'primary' remediation (for

695 S. 173(6)-(7) TCPA 1990.

696 Schedule 22, paragraph 10 and schedule 21, paragraph 5 Environmental Permitting (England and Wales) Regulations 2016.

697 See section 13(2) Environmental Damage (Prevention and Remediation) Regulations 2015.

698 Section 6 Environmental Damage (Prevention and Remediation) Regulations 2015.

example, cleaning up the contaminated site), but also complementary remediation (cleaning up an alternative site if the damaged site cannot be fully restored), and compensatory remediation (carrying out other measures to provide alternative natural resources to compensate for the time during which the damaged site remains in its damaged state). The operator has to agree appropriate measures with the regulator and pay for them to be undertaken.

Moreover, the authorities may impose a notice to prevent further environmental damage, where an activity has caused environmental damage, or has caused such damage that may result in environmental damage.[699] The failure to comply with the notice is a criminal offence.[700]

5.2.2.4 The remediation notice

While an enforcement notice will provide obligations as to the remediation of non-compliance, a separate notice, called the remediation notice, specifically focuses on the remediation of the damage or pollution. With regard to the remediation of environmental damage, the Environmental Damage Regulations 2015 provides a set of remediation notices.[701] If an authority finds that there is environmental damage and the responsible operator's activity is the cause of the damage, this operator will have the liability to remediate. To this end, the operator must submit proposals, as required by the remediation notice, within a time specified by the enforcing authority, for measures that will achieve the remediation of the environmental damage. Three types of remediation may be proposed: primary, complementary and compensatory remediation.[702]

Primary remediation is any remedial measure that returns the damaged natural resources or impaired services to, or towards, the state that would have existed if the damage had not occurred.[703] Complementary remediation is any remedial measure taken in relation to natural resources or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources or impaired services to the state that would have existed if the damage had not occurred.[704] Compensatory remediation must be provided additionally to compensate for interim losses of natural resources or services that occur from the date

699 Section 14 Environmental Damage (Prevention and Remediation) Regulations 2015.

700 Section 13 Environmental Damage (Prevention and Remediation) Regulations 2015.

701 See section 20(2) Environmental Damage (Prevention and Remediation) Regulations 2015.

702 Section 4-5, Schedule 4 Environmental Damage (Prevention and Remediation) Regulations 2015.

703 *Environmental Damage (Prevention and Remediation) Regulations: Guidance for England and Wales*, London: DEFRA 2009, p. 73-74. Available at www.gov.uk/government/publications/environmental-damage-prevention-and-remediation-regulations-2009-guidance-for-england-and-wales (last visited 1 June 2019).

704 *Environmental Damage (Prevention and Remediation) Regulations: Guidance for England and Wales*, London: DEFRA 2009, p. 74-77. Available at www.gov.uk/government/publications/environmental-damage-prevention-and-remediation-regulations-2009-guidance-for-england-and-wales (last visited 1 June 2019).

of damage until remediation has achieved its objective.[705] This, however, does not include financial compensation. Natural recovery is a permitted form of remediation in appropriate cases.

5.2.2.5 The suspension notice and revocation notice

Two sanctions exist that apply specifically where permits or licences have been breached. If the regulator considers that the operation of a regulated facility under an environmental permit or licence involves a risk of serious pollution, it may serve a suspension notice on the operator.[706] The notice will specify the steps that must be taken by the operator to remove the risk. In the meantime, the environmental permit ceases to have effect to the extent stated in the notice. The suspension is not geared towards risk that has come and passed, but purely at on-going risk.[707] This means that, in essence, the notice can be imposed preventively, i.e. before that risk materialises as actual damage.

While the suspension is temporary, the revocation of a permit or licence is permanent. As a sanction upon non-compliance a revocation notice may be served on the operator of a facility by the regulators, revoking a permit in whole or in part.[708] The description of this competence is generally a very broad one, stating that the enforcement authority has this power and, with regard to the environmental permit, that the offender may be required to take steps to relieve the risk of pollution. This sanction is not only formulated broadly, but is also conferred broadly for environmental permits, and for licences for water pollution control, planning control and nature protection.[709] All environmental enforcement authorities have one or both of these powers.

Suspension and revocation of permits or licenses are regarded as rather heavyweight enforcement options, which are only likely to be used in the face of persistent non-compliance.[710] In England these specific sanctioning powers will generally only be used after a criminal prosecution and conviction of the offender.[711]

705 *Environmental Damage (Prevention and Remediation) Regulations: Guidance for England and Wales*, London: DEFRA 2009, p. 73-77 and p. 79-80. Available at www.gov.uk/government/publications/environmental-damage-prevention-and-remediation-regulations-2009-guidance-for-england-and-wales (last visited 1 June 2019).

706 Section 37 Environmental Permitting (England and Wales) Regulations 2016. This power applies whether or not the manner of operating the regulated facility that involves the risk is subject to or contravenes an environmental permit condition. For the purpose of this research only the situation involving non-compliance is considered relevant.

707 As can be drawn from the provision that the notice must specify the operator 'to remove the risk'.

708 Section 22 and 23 Environmental Permitting (England and Wales) Regulations 2016.

709 Section 37 Environmental Permitting (England and Wales) Regulations 2016, section 52(1) WRA 1991 and Schedule 10, paragraph 7(2)(a); S. 97 TCPA 1990; and section 16(5)(d) W&CA 1981.

710 Wolf & Stanley 2013, p. 300.

711 See, for example, the Environment Agency Enforcement and Sanctions policy (2018), section 7.4.6. Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019). Of course, when the offence is acting without a licence, this sanction cannot be used.

5.2.2.6 The notice of authority action and cost recovery

As referred to above, the authority itself may also take the action described in a notice to an offender. This may be done where the offender does not take action following a notice or where action cannot be awaited. Authority remedial action is possible where obligations exist for the offender to prevent environmental damage or pollution, as well as with respect to the remediation of such damage or pollution (see below). This includes non-compliance in the area of nature protection, non-compliance by acting without a permit, or non-compliance with a condition in a permit.

The administrative authority itself may take steps to prevent environmental damage due to the operation of a regulated facility under an environmental permit. The regulator itself may also take action to prevent or prevent further environmental damage when there is an emergency; the operator cannot be ascertained or if the operator fails to comply with the notice.[712] Moreover, also the Environmental Permitting Regulations 2016 provide for the possibility for the regulator to arrange for steps to be taken to remove the risk of serious pollution with regard to that operation.[713] The administrative authority must notify the operator of its intention to take these steps.

In taking care of remediation, the competent authority may itself come into action and notify the operator of a business that the authority itself will take steps to remediate damage or pollution. In case of environmental damage, falling within the Environmental Damage Regulations 2015, the enforcing authority itself may carry out any reasonable works to remediate. This may be the case at any time if a responsible operator cannot be identified; if a responsible operator fails to comply with a remediation notice, whether or not an appeal is pending, or, if the responsible operator is not required to remediate under these Regulations.[714] In case of the environmental permit, regulation 57 of the Environmental Permitting Regulations 2016 provides the power to do works (or to arrange for works to be done on the behalf of the authority) where the operation of a regulated facility under a permit involves a risk of serious pollution; and if the commission of certain offences causes pollution. Also in case of the other remediation notices mentioned above on waste, controlled waters pollution and contaminated land, the authority may step in to take the action itself.

The costs for the action by the administrative authority may be recovered from the offender, through a charging notice. Previous to the authority taking action, unless there is an emergency, it must notify the offender.[715] This power is conferred on the EA; the local authorities, also with respect to planning; and English Nature.[716]

712 Section 15 Environmental Damage (Prevention and Remediation) Regulations 2015.
713 Section 57 Environmental Permitting (England and Wales) Regulations 2016.
714 Section 23 Environmental Damage (Prevention and Remediation) Regulations 2015.
715 See for example, s. 78P EPA 1990.
716 See, among others, s. 27 EPA 1990, section 161 WRA, section 106(6) TCPA 1990 and section 178 TCPA 1990. See also section 31(6) W&CA 1981 for the power to remediate where a court order is not complied with.

5.2.2.7 Other notices

Quite a few other notices exist, in specific areas of environmental protection, which do not necessarily differ a great deal from the more broadly applicable notices described above. However, besides their smaller ambit, these notices have quite specific names, which clearly indicate what obligations the notice contains and what steps should be taken to comply with them. Highlighted below are the stop notice, the breach of conditions notice, the management notice, the prohibition notice, the works notice, the abatement notice, and the landfill closure notice.

Planning control

In planning control, besides the enforcement notice and the revocation notice, two specific types of notices exist. When the enforcement notice has not yet taken effect, a stop notice can supplement it. Where the local planning authority or the Secretary of State consider it expedient that a relevant activity should cease before the expiry of the period for compliance with an enforcement notice, they may at the time of serving the enforcement notice or afterwards serve a stop notice (183 and 185 TCPA 1990). This notice will prohibit the carrying out of that activity on the land the enforcement notice relates to, or on any part of that land. The stop notice will come into effect three days after it is served. Non-compliance with a stop notice is an offence triable either way (s. 187 TCPA 1990).

Even more preventive to environmental damage is the power of the local planning authority to serve a temporary stop notice (s. 171E TCPA 1990). This notice may be served when the local planning authority thinks there has been a breach of planning control and it is expedient that the activity, or any part of it, that constitutes the breach is stopped immediately. Therefore, in this situation the stop notice is served prior to any enforcement or other notices. The notice has effect from the moment it is displayed on the site for a period of twenty-eight days or less (s. 171(5)-(6) TCPA 1990). Non-compliance with a temporary stop notice is also triable either way (s. 171G TCPA 1990). The stop notice comes into effect a minimum of three days after it is served (184(3) TCPA); the temporary stop notice has effect from the moment it is displayed on the site of the potential contravention.

Where a planning permission for the development of land has been granted subject to conditions regulating the use of the land, the breach of condition notice may contain a broad range of obligations for the offender. According to s. 187A TCPA 1990, it shall specify the steps that the authority considers ought to be taken, or the activities which the authority considers ought to cease to secure compliance with the conditions specified in the notice. The person charged with the offence may defend himself by proving that he had taken all reasonable measures to comply with the conditions, or that he is no longer

in control of the land. Non-compliance with this notice is a summary offence that can be fined up to £1000.[717]

Nature protection

In nature protection, an instrument by the name of the enforcement notice does not exist. Instead, the notice will refer to the management scheme established for the protection of land of special interest. The regulator, Natural England, can serve a management notice where an owner or occupier of land is not giving effect to a management scheme, and as a result any flora, fauna, or geological or physiographical features by reason of which the land is of special interest are being inadequately conserved or restored.[718]

The notice may require work to be done on the land or such other things to ensure that the land is managed in accordance with the management scheme (s. 28K(3)-(4) W&CA 1981).

It is a specific statutory condition that a management notice may only be served when the authority is convinced that it is unable to conclude an agreement on reasonable terms with the owner or occupier as to the management of the land in accordance with the management scheme. Therefore, the law explicitly provides here that primary action should first focus on cooperation and conciliation.

If the obligations laid down in the notice have not been fulfilled within the time period determined by the authorities, they themselves may take action to bring the land in accordance with the management scheme. Non-compliance with a management notice allows the competent authority to enter the land and carry out the work or do the other things and recover from the owner any expenses incurred by doing this (s. 28K(7) W&CA). Otherwise, nature protection relies on criminal sanctions, which wildlife protection, in fact, relies on entirely.[719]

Water protection

A prohibition notice[720] serves to prohibit the activity, which causes or will cause discharges to groundwater as a result of an activity covered by an environmental permit that may lead to such a discharge.[721] Similarly evident is the content of the anti-pollution works notice, which can be imposed in the case of the pollution of

717 Non-compliance with the notice can be sentenced at a level 3. See the sentencing scale in section 37(2) of the Criminal Justice Act 1983. See also www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/fines-and-financial-orders/approach-to-the-assessment-of-fines-2/9-maximum-fines/ (last visited 1 June 2019).

718 Section 28K Wildlife and Countryside Act 1981.

719 More on this below in section 5.4.2 and further.

720 Although according to some authors, it is not the purpose of the prohibition notice to sanction violations. Faure & Heine 2000, p. 345. However, when looking in the regulation of the prohibition notice and its use, it becomes clear that it will generally be used as action to a violation.

721 Schedule 22, para. 9 EP Regulations 2010; for IPPC/LAAPC contraventions a more broad power was extended in s. 14 EPA 1990.

waters. This notice can require the carrying out of works or operations with the purpose of removing or disposing of the matter.[722] However, what the name does not convey is that the notice may also require remediation or mitigation of any pollution caused by its presence in the waters; or, so far as it is reasonably practicable to do so, restoration of the waters to their state immediately before the matter became present in the waters.

Statutory nuisance

An abatement notice is aimed at statutory nuisance, for which the local authority is competent. Through such a notice, the local authority may require the abatement of a noise or other nuisance, or to prohibit or restrict its occurrence or recurrence. Also, the execution of works to abate, prohibit or restrict may be required (s. 80 EPA 1990). Moreover, the landfill closure notice carries with it the obligation to close down the facility.[723]

5.2.2.8 Non-compliance with administrative notices

When the sanctions that have been described above are not complied with, this is generally considered to be a criminal offence, separate from the original offence of non-compliance with environmental law. Therefore, it is possible to prosecute not only for the original offence but also for the non-compliance with the administrative sanctions imposed by the regulator. Moreover, for both, also civil sanctions can be imposed.

5.3 Hybrid: administrative civil sanctions

5.3.1 Introduction

Through the introduction of civil sanctions, several improvements in the scope and type of the sanctions available to the administrative authorities were made. For one, the civil sanctions provide certain different reparatory sanctions than until then available as alternatives for offences, in particular, the stop notice in case of waste deposits (section 33(6) EPA 1990). Second, civil sanctions provide sanctions for the non-compliance with the administrative notices described in the previous section. Previously, commonly, only criminal enforcement was open to the enforcement of notices.[724] Third, several civil sanctions provide punitive alternatives to criminal prosecution, which the regulatory authority itself can impose when previous

722 Section 161A(1) Water Resources Act 1991, amended by the Water Resources Act 1991 (Amendment) (England and Wales) Regulations 2009. See also the Anti-pollution works notice Regulations 1999.

723 See, e.g. also the Environmental Permitting Regulations (England and Wales) 2016; Environment Agency, *Regulatory Guidance Series No 11: enforcement powers. Environmental Permitting Regulations (England and Wales) 2010*, April 2010, par. 4.1.

724 Typically all civil sanctions are declared applicable. See for example section 80(1) and (2) of the Water Resources Act 1991, which deal with enforcement of a drought order.

(reparatory) enforcement notices have not been complied with. In the civil sanctions system, the punitive monetary civil sanctions are referred to as penalties.[725]

> Besides this, certain civil sanctions can also be imposed to establish compliance with obligations in the sphere of enforcement, such as the obligation not to intentionally obstruct an authorised person in the exercise of his powers or duties.[726]

According to guidance, civil sanctions should aim to:
- get individuals or companies back into compliance;
- remove risks and prevent harm from occurring or continuing;
- ensure damage is restored, restitution is provided to local communities and that the polluter pays;
- level the playing field, removing financial benefit and ensuring proportionality to the offence, harm and the facts of the case;
- deter non-compliance, and encourage behaviour change, future compliance and reductions in future risks;
- secure better results or same results at lower cost;
- avoid 'unintended consequences'.[727]

The civil sanctions can be imposed upon any natural person or legal person that causes or has allowed the offence including, for example, businesses, landowners, and individuals.
The civil sanctions brought together in the Regulatory Enforcement and Sanctions Act 2009 are presented in the Act in four types: fixed monetary penalties, discretionary requirements, stop notices and enforcement undertakings. Within the category of the discretionary requirements fall three separate instruments, as to which the regulatory authority has discretion in establishing its substance.[728] These are the variable monetary penalty, the compliance notice and the restoration notice.

725 Such punitive monetary sanctions are referred to as fines in the criminal law in England, and in the other country chapters, where they are available in those jurisdictions. Moreover, penalties may be used as a term to indicate sanctions in general.
726 Section 110(1) Environment Act 1995.
727 *Civil sanctions for environmental offences: guidance to regulators*, London: DEFRA 2010, p. 9. Available at https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf (last visited 1 June 2019).
728 See section 42 of the RES Act 2008.

Types of administrative civil sanctions

a. Fixed monetary penalty
b. Discretionary requirements
   - variable monetary penalty
   - compliance notice
   - restoration notice
c. Stop notices
d. Enforcement undertakings

While the RES Act 2008 provides general rules on civil sanctions, the power to impose each and any of them must be conferred upon regulatory authorities by secondary legislation. Moreover, this secondary legislation will determine which civil sanctions may be imposed for which offences.[729] This means that, as with the administrative notices, not all civil sanctions that are described below can be imposed for every environmental offence. The Environmental Civil Sanctions Order 2010 is the instrument through which the sanctions are currently implemented in the enforcement system for environmental offences.
As discussed in the previous chapter, only the Environment Agency and Natural England are currently competent to impose the sanctions prescribed in the RES Act 2008.[730]

Below, the civil sanctions are further discussed in three sections: first, the penalties are discussed; second, the notices are described; and, third, the enforcement undertakings are highlighted. After that, the combinations of civil sanctions are described, and it is discussed what happens when any of the civil sanctions is not complied with.

5.3.2 Two penalties

As indicated above, the RES Act 2008 introduced two types of penalties: the fixed monetary penalty and the variable monetary penalty.[731]

729 The Environmental Civil Sanctions (England) Order 2010 declares which civil sanctions may be applied for which offences in primary legislation. The Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations 2010 amends several pieces of secondary legislation, more precisely regulations, with sections as to which civil sanctions may be applied for which offences.

730 The local authorities already possess powers to impose fixed penalty notices under the Clean Neighbourhoods and Environment Act 2005 to improve the local environment. Under this Act the local authorities can deal with, for example, noise from dwellings and litter through fixed penalty notices. See also DEFRA's Local environmental enforcement – Guidance on the use of fixed penalty notices, 2007.

731 As explained previously, in England the punitive monetary sanctions are called penalties. In the other countries, these are referred to as fines.

The fixed monetary penalty

In environmental enforcement, the fixed monetary penalty is available only for a set of four wildlife offences, in particular with regard to sites of special scientific interest, and eight offences as to water resources, such as the breach of a drought order.

A fixed monetary penalty (FMP) is a requirement for an offender to pay to a regulator a penalty of a prescribed amount (s. 39 RES Act 2009). Fixed monetary penalties are fines for relatively low fixed amounts that are to be used in respect of low level, minor instances of regulatory noncompliance.[732] The level of fixed monetary penalties has been set at £100 for an individual and £300 for corporate bodies in secondary legislation.[733] Moreover, where the relevant offence is triable summarily and punishable on summary conviction by a fine, the amount of the fixed monetary penalty may not exceed the maximum amount of that fine. This is irrespective of whether or not the offence is triable on indictment, and whether or not it is also punishable by a term of imprisonment. Where a regulator proposes to impose a fixed monetary penalty on a person, a notice of intent must be served upon the person. As with the administrative notices, this notice of intent is a standard requirement for civil sanctions except for the stop notice and the enforcement undertaking. This notice of intent will offer the addressee the opportunity to discharge his or her liability in respect of the fixed monetary penalty by payment of a prescribed sum.[734] The relatively low level is said to reflect the significant reputational impact expected from the publicly recorded use of a fixed monetary penalty.[735] Fixed penalty notices have been introduced to enable regulators, in suitable cases, to enforce less serious offences in a more proportionate way than a prosecution. These notices can remove the stigma of a criminal record and could be used for offences such as not maintaining appropriate records.[736]

In the notice it is described what is proposed, detailing among others, the grounds for the proposal and the period within which the liability may be discharged. This period should not be more than 28 days from the day of receipt of the notice of intent. During this period no criminal proceedings may be instituted against the person. Also, if the person discharges the liability through payment of the sum, it would be double jeopardy for that person to be convicted of the offence. If the person does not so discharge liability, the regulator may at the end of a period of 28 days decide to impose the fixed monetary penalty through a final notice. This notice may only be posed where the person is liable to be convicted of the relevant offence.[737] The final notice must include information as

732 *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, p. 31. Available at https://webarchive.nationalarchives.gov.uk/+/http:/www.berr.gov.uk/files/file47135.pdf (last visited 1 June 2019).

733 Section 1 of Schedule 1 of the Environmental Civil Sanctions Order 2010.

734 This sum must be less than or equal to the amount of the penalty.

735 More on this below.

736 *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, p. 31. Available at https://webarchive.nationalarchives.gov.uk/+/http:/www.berr.gov.uk/files/file47135.pdf (last visited 1 June 2019).

737 There also may be other circumstances in which the regulator may not decide to impose a fixed monetary penalty, see section 39 para. 4 RES Act 2008.

to, among others the consequences of non-payment, how payment may be made and the period within payment must be made. Appeal is open to the final notice; against the notice of intent representations and objections may be made.[738]

The variable monetary penalty

The variable monetary penalty (VMP) is filed in the category of discretionary requirements, as it is up to the regulator to establish the amount of the penalty. The penalty is variable so that the regulator will be able to set it at a level that removes any financial gain from committing the offence and takes account of factors such as the gravity of the failure and the history of compliance.[739] In any event the amount of a variable monetary penalty must not exceed £250 000. Before serving a notice relating to a variable monetary penalty the regulator may require the person to provide such information as is reasonable to establish the amount of any financial benefit arising as a result of the offence.[740] Again, the sanctioning process must start by serving a notice of intent upon the person as to whom the regulator suspects beyond a reasonable doubt that he or she is guilty of the relevant offence and would be liable to be convicted for it.[741] At the end of the period of 28 days, the regulator must decide to impose the penalty.[742]

While, as mentioned, the fixed monetary penalty is relatively scarce, the variable monetary penalty is available for all the environmental offences for which any or all civil sanctions may be imposed. The variable monetary penalty is to be used as a flexible response to more serious non-compliance offences. The instrument may be used especially where the imposition of a financial penalty may change offender behaviour and deter others.

> For example, the Environment Agency considers the VMP may be used for non-compliance when:
> - there is evidence of negligence or mismanagement;
> - there is environmental impact;
> - to remove identifiable financial gain or savings as a result of the breach;
> - it is not in the public interest to prosecute.[743]

738 Section 40, para. 2 and 6 RES Act 2008.

739 *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, p. 35. Available at https://webarchive.nationalarchives.gov.uk/+/http:/www.berr.gov.uk/files/file47135.pdf (last visited 1 June 2019).

740 Schedule 2 of the Environmental Civil Sanctions Order (England) 2010.

741 Section 43(2) and 43(4) RES Act 2008.

742 The compliance notice or the restoration notice.

743 Annex 1: RES Act - the Environment Agency's approach to applying civil sanctions and accepting enforcement undertakings of the Environment Agency's Enforcement and Sanctions Policy (2018). Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

The variable monetary penalty may be combined with the two other discretionary requirements, namely the compliance notice or the restoration notice. This may be applied, for example, to cases where there has been significant environmental damage requiring restoration, but the imposition of a penalty is also appropriate. The variable monetary penalty will also be used to remove identifiable financial benefit that is the result of the non-compliance. Moreover, the variable monetary penalty will be used in cases where there is evidence of negligence and mismanagement, but this is not sufficient to warrant prosecution.[744]

Variable monetary penalties have to be calculated individually for each offence. Where more than one offence is committed, a separate VMP may be imposed at the same time for each offence.[745] The regulator must do so on the basis of three components: the financial benefit component, the deterrent component, and the deduction component.[746] The financial benefit component aims to remove any benefit from the offence, including avoided costs, operating savings, and any gain made as a result of the offence. The deterrent component depends, among several factors, on the type of cases and whether they are characterised by financial benefit.[747] The deduction component aims to reduce the penalty because of costs made by the offender.[748] For example, any compensation paid by the offender will be deducted from the penalty.

An important aspect of establishing the level of the VMP is the size of the organisation (by turnover or equivalent), or the financial circumstances of the individual. This is relevant out of the need for the penalty to have a real economic impact. Also, it indicates the offender's ability to pay.[749] The total payment under any single VMP may not exceed £250 000.

744 Annex 1: RES Act - the Environment Agency's approach to applying civil sanctions and accepting enforcement undertakings of the Environment Agency's Enforcement and Sanctions Policy (2018). Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

745 Where e.g. each year of non-compliance with a registration requirement will count as one offence.

746 See Environment Agency's Enforcement and Sanctions Policy (2018), Annex 1: RES Act - the Environment Agency's approach to applying civil sanctions and accepting enforcement undertakings, available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019); and Natural England's Compliance and enforcement position (2011), Annex 2, available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019).

747 For more see Environment Agency's Enforcement and Sanctions Policy (2018), Annex 1, available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019); and Natural England's Compliance and enforcement position (2011), Annex 2, available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019).

748 For more see Environment Agency's Enforcement and Sanctions Policy (2018), Annex 1, available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019); and Natural England's Compliance and enforcement position (2011), Annex 2, available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019).

749 Annex 1: RES Act - the Environment Agency's approach to applying civil sanctions and accepting enforcement undertakings of the Environment Agency's Enforcement and Sanctions Policy (2018), section 2. Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

In its policy on how to calculate a variable monetary penalty, the Environment Agency explicitly refers to the sentencing guideline for environmental offences that was formulated in 2014 for the criminal courts.[750]

5.3.3 Three notices

Three notices are distinguished as civil sanctions in the RES Act 2008. These are the compliance notice and the restoration notice, which both belong to the category of discretionary requirements, and the stop notice, which is a category of its own. Besides this, as could already be seen, there are notices that serve to notify the subjects of the sanctions of the obligations imminent upon them. These notices have been created in order to address situations not capable of being dealt with by the notices described in the previous section. The civil sanctions notices are meant to complement these notices.[751]

The compliance notice requires specified steps within a stated period of time to secure that an offence does not continue or will not happen again.[752] A compliance requirement can be used to secure that a business take the steps needed to bring itself back into compliance, for example, by making good an unsafe piece of equipment, changing a process or providing training.
The restoration notice requires specific steps to be taken within a specified period of time to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed. A restoration requirement can be used to ensure that a business deals with the consequences of the offence, for example, by cleaning up the area contaminated as a result of the offence, or reimbursing customers' money. Its objective is to get the environmental harm or damage put right.[753] A restoration notice will not be appropriate where a notice to undertake remediation is served under the Environmental Damage Regulations.[754]

The imposition of these notices follows the same procedure as the penalties described above, which includes the notice of intent and the final notice. However, as mentioned, the compliance notice or the restoration notice may also be brought into the final notice, when the regulator decides against a variable monetary penalty, or

750 Annex 1: RES Act - the Environment Agency's approach to applying civil sanctions and accepting enforcement undertakings of the Environment Agency's Enforcement and Sanctions Policy (2018), section 2. Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

751 See Environment Agency's old Enforcement and Sanctions Guidance, p. 7. Withdrawn 11 April 2018. Available at: www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-statement. Last visited 1 June 2019.

752 Section 42(3) RES Act 2008; schedule 2 of the Environmental Sanctions Order 2010 (England), Schedule 2.

753 Environment Agency's Enforcement and Sanctions Policy (2018), section 7.3.4. Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

754 *Civil sanctions for environmental offences: the short guide*, London: DEFRA 2010, p. 4. Available at www.envirotrain.co.uk/wp-content/uploads/2010/09/DEFRA-Civil-Sanction-Guidance-Short.pdf (last visited 1 June 2019).

vice versa.[755] This follows from the fact that the three belong to the same category of discretionary requirements, which may be used singularly or in combination with each other.

The notices, as the other discretionary requirements, the variable monetary penalty, should generally be used as a response to mid to high level examples of regulatory non-compliance. Discretionary requirements are also aimed at addressing offences where a greater degree of flexibility may be required in order to sanction the offence appropriately. This sanction may be more suitable in more complex cases of non-compliance where there are a number of different effects or consequences that need addressing.[756] The regulator will therefore be able to tailor the sanctions imposed to deal with the different consequences of the offence in the most suitable way. In this way, the discretionary requirements will give regulators a flexible set of powers that enables them to achieve a constructive enforcement outcome that remedies the consequences of an offence.[757]

The stop notices are a separate category of civil sanctions. Slightly different requirements apply to the imposition of such notices, as they are designed to prevent an activity or planned activity causing serious harm or a significant risk of serious harm to the environment or human health. Specifically, stop notices are meant to prevent a person from carrying on an activity described in the notice until that person has taken the steps outlined in the notice to come back into compliance. The stop notice is a single notice to honour its preventive purpose. In other words, no notice of intent need be imposed previous to and followed by a final notice. In contrast to the other civil sanctions, it is also possible to prosecute for the original criminal offence even if a stop notice has been imposed and complied with.
A stop notice may only be served when the addressee thereof is carrying on the activity, the regulator reasonably believes that that activity as carried on by that person is causing, or presents a significant risk of causing, serious harm to human health, or the environment, including animals and plants. Moreover, the regulator must reasonably believe that the activity as carried on by that person involves or is likely to involve the commission of an offence. Alternatively, a stop notice may be served where it is likely that the addressee will carry on the activity resulting in serious harm, or that there is a significant risk that this will happen, and that this will

755 Section 43(2)(c) RES Act 2008.

756 *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, p. 35. Available at https://webarchive.nationalarchives.gov.uk/+/http:/www.berr.gov.uk/files/file47135.pdf (last visited 1 June 2019).

757 *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, p. 35. Available at https://webarchive.nationalarchives.gov.uk/+/http:/www.berr.gov.uk/files/file47135.pdf (last visited 1 June 2019). Also, Natural England's Enforcement Guidance, pt. 5.3, available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019).

likely involve the commission of an offence by that person.[758] Where the regulator finds that the steps in the stop notice have been taken a completion certificate will be extended.
A stop notice has been made available to the environmental regulators in many cases, often together with the other notices. However, stop notices are not available for the offences singled out for the civil sanctions' realm in the Environment Act 1995. This also applies to the other notices.

5.3.4 Two enforcement undertakings

An enforcement undertaking is different from the civil sanctions described above. An undertaking is an instrument not served upon an offender by the administrative authority but, in fact, presented to the administrative authority by the offender. The authority is to accept it, or not. In essence, an enforcement undertaking is an offer by an offender with regard to the non-compliance. There are two types of enforcement undertakings: the 'regular' enforcement undertaking and the third party enforcement undertaking. The enforcement undertaking may contain a variety of obligations in writing as determined by the offender himself to take action within a stated period of time. The enforcement undertaking must specify that steps are taken to ensure that non-compliance does not continue or recur; to secure that the position is restored, as far as possible, to what it would have been if the offence had not been committed; to compensate, either financially or otherwise, any person affected by the offence (the third party undertaking). Where the restoration of the harm arising from the offence is not possible, the undertaking must, instead, secure equivalent benefit or improvement to the environment. In practice, the latter means that companies and individuals may make payments for environmental offences to environmental charities and projects.[759]
The administrative authority may accept an enforcement undertaking from a person in a case where the regulator has reasonable grounds to suspect that the person has committed an offence as designated for the imposition of civil sanctions, including the acceptance of such an undertaking.[760]
The enforcement undertaking must specify the period within which the action must be completed, although adjustment of the term is possible.[761] With regard to an enforcement undertaking purely consisting of a third-party compensatory commitment, different rules exist, in particular with regard to the action taken

758 Schedule 3 of the Environmental Sanctions Order 2010 (England).
759 See, for example, the press release of the Environment Agency of 23 November 2018 stating that 2.2 million pounds in payments have been made by means of enforcement undertakings: www.gov.uk/government/news/environmental-charities-receive-over-22-million-from-businesses-which-broke-environmental-laws.
760 Schedule 4 of the Environmental Sanctions Order 2010 (England).
761 Schedule 4(2) of the Environmental Sanctions Order 2010 (England).

when the offender is not in compliance.[762] In any case, a third party enforcement undertaking can only be offered in a situation where an offender has already received a notice of intent to serve a variable monetary penalty, a compliance notice or a restoration notice.[763]

The possibility of the enforcement undertaking as part of the system of civil sanctions is relevant, as an offender may offer an enforcement undertaking to the regulator after a notice of intent of one of the other sanctions described here has been given. Moreover, when the administrative authority accepts an enforcement undertaking this impacts the power of this authority to impose any fixed monetary penalty, variable monetary penalty, compliance notice or restoration notice in respect of that offence. The authority may not impose these sanctions once it has accepted the undertaking. Also, if a third party enforcement undertaking for compensation of affected third parties is accepted from a person who has been served a notice of intent regarding a variable monetary penalty, the regulator must take it into account in determining the penalty's level.[764] Moreover, if the regulator has accepted an enforcement undertaking, and the person has complied with its contents, no criminal conviction for the offence, as to which the undertaking has been made, may follow.

This instrument has become available from April 6, 2015 for non-compliance that the Environment Agency and Natural England deal with. The enforcement undertaking is available to offenders for several cases of non-compliance with wildlife regulation[765]; offences with regard to water resources management[766] and with regard to environmental permitting.[767]

5.3.5 Secondary notice: enforcement cost recovery notice

A regulator may serve a notice on a person on whom a variable monetary penalty notice, compliance notice, restoration notice or stop notice has been served requiring that person to pay the costs incurred by the regulator in relation to the imposition

762 See section 5.3.5 below.

763 As it is too limited to solely accept a third party enforcement undertaking without the existence of any other commitments or obligations to restore or comply with the law. Environment Agency's Enforcement and Sanctions Policy (2018), Annex 1: RES Act - the Environment Agency's approach to applying civil sanctions and accepting enforcement undertakings, section 4. Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

764 Schedule 2(4) of the Environmental Sanctions Order 2010 (England).

765 For example, with regard to non-compliance with sections 28P(1), (2), (3), (5), (5A), (6) and (6A) of the Wildlife and Countryside Act 1981 and section 3 and 10(8) of the Protection of Badgers Act 1992. See Schedule 5 to the Environmental civil sanctions (England) Order 2010.

766 For example, with regard to non-compliance with sections 24(4)(a) and (b), 25(2)(a) and (b) and 80(1) and (2) of the Water Act 1990. See Schedule 5 to the Environmental civil sanctions (England) Order 2010.

767 These powers are conferred by schedule 23A to the Environmental Permitting (England and Wales) Regulations 2010 by means of the Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2015.

of that notice up to the time of its imposition. Such costs include investigation costs and administration costs.[768] The regulator cannot recover costs for fixed monetary penalties or enforcement undertakings. An enforcement cost recovery notice will generally be served at the time the civil sanctions is imposed.

5.3.6 'Specialist' non-RES civil sanctions

Outside of the RES Act 2008, within the area of environmental law, there already exist a few schemes that impose specific civil sanctions for specific offences. These are the specialist regimes of civil sanctions.[769] The most prominent is the scheme as prescribed by the European Emissions Trading Directive, which requires civil monetary penalties to be available and imposed in relation to non-compliance with limits set upon emissions. For England, the implementing regulations set out various civil penalties for non-compliance with emissions' limits.[770]

5.3.7 Concurrent imposition of civil sanctions

Besides the secondary notice described above, some of the – primary – civil sanctions may be combined – concurrently – where this is necessary given the circumstances of a case and several civil sanctions are available for the non-compliance.[771] This is specifically the case for the discretionary requirements. There are also certain combinations of civil sanctions that are not allowed. A fixed monetary penalty – including the notice of intent to impose that penalty[772] – cannot be combined with any other civil sanction.[773] A variable monetary penalty can be combined with other civil sanctions, and usually is, in particular with the compliance notice, recovery notice and/or stop notice.[774] The variable monetary penalty cannot be combined with an enforcement undertaking. In fact the enforcement undertaking cannot be combined with any other civil sanction in terms of their concurrent imposition. As we will see below, civil sanctions may follow when the enforcement undertaking is not complied with (consecutive imposition). The compliance notice and recovery notice can be combined with the variable monetary penalty, any of the other notices – including the stop notice.[775]

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768 Section 8 Environmental Sanctions (England) Order 2010.

769 See for example the Enforcement guidance of Natural England (2011), pt. 5.4 and Annexes 2 and 4 to the Guidance. Available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019).

770 See section 6 of the Greenhouse Gas Emissions Data and National Implementation Measures Regulations 2009 and section 39 and further of the Greenhouse Gas Emissions Trading Scheme Regulations 2005.

771 Not all civil sanctions are available for all environmental non-compliance.

772 This includes when the person has discharged liability for a fixed monetary penalty following service of a notice of intent to impose that penalty.

773 Section 5 of the Environmental Sanctions Order 2010 (England).

774 These discretionary requirements cannot be imposed on a person on more than one occasion in relation to the same act or omission, see section 42 RES Act 2008.

775 See Natural England's Enforcement Guidance (2011), annex 2, p. 1. Available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019).

5.3.8 Non-compliance with civil sanctions: consecutive imposition of sanctions

There are several enforcement options for the administrative authorities if civil sanctions are not complied with. These are the imposition of a non-compliance penalty by the administrative authorities; the prosecution of the non-compliance with the original offence or the civil sanction; the imposition of other civil sanctions; or a court order to recover unpaid penalties. However, these options are not available for all civil sanctions. In fact, the enforcement process differs from sanction to sanction. This is described below.

Monetary civil sanctions

In case of non-compliance with monetary civil sanctions no prosecution for the original offence that led to the imposition of these sanctions may follow for reasons of double jeopardy.[776] Instead, unpaid monetary civil sanctions will be recovered on order of a court.[777]

This applies to the following penalties/notice:

- the variable monetary penalty;
- the fixed monetary penalty;
- the enforcement cost recovery notice; and,
- the non-compliance penalty notice (explained below).

Enforcement undertaking

In case of non-compliance with an enforcement undertaking, it is important to assess whether there has been partial compliance. In such a case, the period allowed for the enforcement undertaking may be extended. In any case, other civil sanctions may be imposed for non-compliance with the enforcement undertaking, in particular a variable monetary penalty notice, compliance notice or restoration notice. Another option is that a criminal prosecution is instigated for the original offence, i.e. the offence that originally led to the enforcement undertaking.

Recovery notices, compliance notice and third party undertaking

In case of non-compliance with the recovery notice and the compliance notice and the third party undertaking, a distinction must be made between if these have been combined with a variable monetary penalty or not.[778]

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776 Schedule 1 and 2 of the Environmental Sanctions Order 2010 (England). Also *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, p. 33. Available at https://webarchive.nationalarchives.gov.uk/+ / http:/www.berr.gov.uk/files/file47135.pdf (last visited 1 June 2019).

777 Section 6 of the Environmental Sanctions Order 2010 (England).

778 Schedule 2 Environmental Civil Sanctions (England) Order 2010.

Where the notices and the third party undertaking have been imposed without a variable monetary penalty, two options exist. Normally, prosecution will follow for the original offence.[779] Instead, a non-compliance penalty notice may be imposed, for non-compliance with the notices or the third party undertaking.[780] The administrative authority imposes this non-compliance penalty notice. The amount of the penalty must be a percentage of the costs of fulfilling the remaining requirements of the notice or third party enforcement undertaking.[781] This percentage, as determined by the administrative authority, must have regard to all the circumstances of the case. If the failure to comply is deliberate then the percentage is likely to be greater. If the failure arises because of facts and circumstances beyond the offender's control then the percentage will be smaller.[782] If appropriate, this percentage may even be a hundred percent.[783] The period in which payment must be done will not be less than 28 days. If the requirements of the compliance notice or restoration notice are complied with or a third party enforcement undertaking is fulfilled before the time set for payment of the non-compliance penalty, the penalty is not payable.[784] The amount of a non-compliance penalty may be reduced if its imposition led to prompt and comprehensive proposals for compliance with the terms of the original notice.[785] As explained above, the non-compliance penalty is recovered by court order. As the notices and the undertaking that were not complied with remain in place, the original offence may still be prosecuted.[786] This is also the case when the non-compliance penalty is paid.

Where the notices and the third party undertaking have been imposed in combination with a variable monetary penalty, the latter will block prosecution for the original offence entirely. This means that the immunity from prosecution that the variable monetary penalty gives, also extends to notices.[787] Instead, a non-compliance penalty can be imposed. The notices and the third party undertaking remain in force.

779 Section 44(3)(c) RES Act 2008.

780 Section 45 RES Act 2008 and section 7(1) of the Environmental Civil Sanctions (England) Order 2010.

781 Environment Agency's Enforcement and Sanctions Policy (2018). Available at www.gov.uk/government/ publications/ environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

782 Environment Agency's Enforcement and Sanctions Policy (2018). Available at www.gov.uk/government/ publications/ environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

783 Section 7(3) of the Environmental Civil Sanctions (England) Order 2010.

784 Environment Agency's Enforcement and Sanctions Policy (2018). Available at www.gov.uk/government/ publications/ environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

785 Environment Agency's Enforcement and Sanctions Policy (2018). Available at www.gov.uk/government/ publications/ environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

786 *Civil sanctions for environmental offences: guidance to regulators*, London: DEFRA 2010, p. 40. Available at https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf (last visited 1 June 2019).

787 *Civil sanctions for environmental offences: guidance to regulators*, London: DEFRA 2010, p. 40. Available at https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf (last visited 1 June 2019).

Stop notice

In case of non-compliance with stop notices, criminal prosecution can follow for this non-compliance as this in itself is an offence.[788] The person that does not comply with the notice is guilty of an offence and liable on summary conviction, to a fine not exceeding £20 000, or imprisonment for a term not exceeding twelve months, or both; or on conviction on indictment, to imprisonment for a term not exceeding two years, or a fine, or both.[789] Unpaid enforcement cost recovery notices can be pursued as a debt in the courts.[790] No prosecution for the original offence may be brought.

5.4 Criminal sanctions

5.4.1 Introduction; the range of criminal sanctions and factors of influence on the choice of sanction

As explained previously, in England, (nearly) all environmental non-compliance is also a criminal offence. In addition, (nearly) all non-compliance with administrative notices is a criminal offence. Also, the non-compliance with certain civil sanctions is a criminal offence.

Criminal offences are described in environmental legislation, as well as, for example, in the legislation on sanctions, such as the RES Act 2008. For a criminal sanction to be imposed by the criminal courts for an environmental offence, the administrative authorities must instigate prosecution.

5.4.2 Prosecution and alternative(s)

Prosecution decision

Prosecution has been referred to as 'the sanction of prosecution'.[791] Prosecution is now considered as last resort, to be considered in particular for the serious environmental offences.[792] As indicated previously, in the area of the environment it is generally the regulatory authorities that may decide whether or not to prosecute criminal offences

788 Schedule 3 Environmental Civil Sanctions (England) Order 2010 and Natural England's Enforcement Guidance, pt. 5.3, available at www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019).

789 Schedule 3 Environmental Civil Sanctions (England) Order 2010.

790 *Civil sanctions for environmental offences: guidance to regulators*, London: DEFRA 2010, p. 41. Available at https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf (last visited 1 June 2019).

791 Environment Agency's Enforcement and Sanctions Policy (2018). Available at www.gov.uk/government/ publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

792 Environment Agency's Enforcement and Sanctions Policy (2018), section 7.4, available at www.gov.uk/ government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019); Natural England's Enforcement Guidance (2011), section 5.20 and 5.22, available at www.gov.uk/ guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england (last visited 1 June 2019).

in the area of the environment regulated by them, with the exception of wildlife offences, which are prosecuted by the Crown Prosecution Service itself. As explained in the previous chapter, the wildlife offences belong to the prosecution competence of England's Crown Prosecution Service.

The Environment Agency, the local authorities, and Natural England all have the right to bring proceedings in criminal court as prosecuting authorities.[793] It is these authorities that have the discretion to decide whether or not a criminal sanction is appropriate, and whether to prosecute for all non-compliance or only a part of it.[794]

> The Environment Agency, for example, has stated that it will normally consider prosecution, subject to public interest factors, if an offence is serious. Features that make an offence serious are:
> - when it has been intentional, reckless, negligent or involves outright criminal activity;
> - when it has caused serious harm (or has the potential) to the environment or to people; or,
> - when the offender has committed large scale and protracted non-compliance with regulatory provisions;
> - when the offender has failed to comply with a stop notice.[795]

Importantly, in particular serious offences are recognized for prosecution, while due to the underpinning of the criminal law with regard to environmental non-compliance, many different type of cases should in theory be viable for criminal sanctions. Other considerations of the authorities in making the enforcement decision have been detailed in sections 5.1 and further above.

Once the authority decides a criminal sanction would be appropriate for it to pursue for the non-compliance, it must assess the case in accordance with the requirements of the Code for Crown Prosecutors before commencing a prosecution.[796] The Code for Crown Prosecutors applies to all prosecution decisions and to all authorities competent to make a prosecution decision. This Code has a statutory basis.[797] It

793 Section 37(1) EA 1995; section 222 LGA 1972; section 37(1) EA 1995; section 25(2) W&CA 1981; section 28P(10) W&CA 1981 and section 12 NERC 2006.

794 In case of the central government agencies, this decision is usually taken by the legal department.

795 Environment Agency's Enforcement and Sanctions Policy (2018), section 8.2.1. Available at www.gov.uk/ government/ publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

796 Available at www.cps.gov.uk/publications/code_for_crown_prosecutors/. Last accessed 1 June 2019. See also Environment Agency's Enforcement and Sanctions Policy (2018), section 5.1. Available at www.gov.uk/government/ publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

797 This Code was drafted on the basis of section 10 of the Prosecution of Offences Act 1985.

contains provisions detailing the requirements for deciding to bring a prosecution for serious offences. The Code for Crown Prosecutors sets out a 'full code test', which consists of two stages: the evidential stage and the public interest stage.[798] The evidential stage sets out the first requirement for prosecution: there must be sufficient evidence. This means that the evidence provides a realistic prospect that prosecution will result in a conviction.[799] To this end, it is considered whether the evidence can be used in court and its reliability.[800] Where the evidence passes this assessment, the authority must assess if it is in the public interest to bring the case to trial.

A decision to prosecute can only be taken when the evidential test for bringing the prosecution is satisfied before proceedings are instituted. Once the evidential stage is passed, the public interest stage must be completed. This means that a proper consideration should be given to public interest factors. The public interest factors that can affect this decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender. There are several factors that may be distinguished that may play a role in the consideration of prosecution. These are grouped in four categories: the offence, the offender, impact, and possible wider consequences. Public interest factors may be: the foreseeability of the offence; the intent of the offender; the environmental effect of the offence; the nature of the offence; and the significant potential long-term effect of the offence.[801] The importance of each public interest factor may vary on a case-by-case basis.[802]
However, no matter how serious the breach or the harm that follows from it, if the evidence is not sufficient to provide a realistic prospect of conviction then it would be improper to commence or continue with a prosecution. Once both stages are passed, the authority must decide whether the circumstances of the case warrant prosecution, or an alternative.[803] Where the authority considers prosecution warranted, and an

798 Crown Prosecution Service, *Code for crown prosecutors* (2018), p. 8-9. Available at www.cps.gov.uk/publications/code_for_crown_prosecutors/ (last visited 1 June 2019).

799 See also, for example, Environment Agency's Enforcement and Sanctions Policy (2018), section 7.4.4. Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

800 Crown Prosecution Service, *Code for crown prosecutors* (2018), p. 8-9. Available at www.cps.gov.uk/publications/code_for_crown_prosecutors/ (last visited 1 June 2019). This includes disclosure considerations, particularly the consideration whether there is any other material, which is not part of the evidence in the case that might affect the strength of the evidence, Crown Prosecution Service, *Disclosure manual* (2018), p. 3 and p. 9. Available at www.cps.gov.uk/sites/default/files/documents/legal_guidance/Disclosure-Manual-December-2018.pdf.

801 *Civil sanctions for environmental offences: guidance to regulators*, London: DEFRA 2010, p. 37-38. Available at https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf (last visited 1 June 2019). See also the Crown Prosecution Service, *Wildlife offences: legal guidance*. Available at: www.cps.gov.uk/legal-guidance/wildlife-offences. Last accessed 1 June 2019.

802 *Civil sanctions for environmental offences: guidance to regulators*, London: DEFRA 2010, p. 36. Available at https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf (last visited 1 June 2019).

803 Environment Agency's Enforcement and Sanctions Policy (2018). Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

offence is triable either way, the authority can make an application to the Magistrates' Court for the case to be heard in the Crown Court. Whether it will make this application depends on the nature of the offence and what the regulator wants in terms of punishment.

Alternative to prosecution: formal caution

The administrative authorities may decide not to instigate prosecution for an environmental offence but decide to impose a formal caution instead.[804] The formal caution is the written acceptance by an offender that he has committed an offence and may only be used where a prosecution could properly have been brought.[805] The prosecuting authority offers the caution to the offender that may or may not accept it. The formal caution cannot be found in legislation, but is described, for example, in the Enforcement and Sanctions Policy of the Environment Agency. Moreover, where it is imposed, it is formally recorded. This policy also contains the rules that have been developed on the application of these instruments. The formal caution is deemed a criminal sanction, extended by the administrative authority as prosecuting authority.[806] It may be weighed in sentencing further (repeat) offences. Even so, it should not be equalled to a criminal conviction.[807] Formal cautions are intended to be a specific deterrent to an offender and are suitable for cases where, although a prosecution could be initiated, and should be able to be instigated, other factors mitigate against this. A formal caution is intended to encourage behavioural change and prevent further offending.[808]

5.4.3 Criminal sanctions by criminal courts

The criminal courts have several sanctions available when convicting an offender for environmental offences.

These sanctions are:

- custodial sentences
- fines
- orders, and
- discharge.

804 This instrument should not be confused with the caution that ought to be given to a suspect of a criminal offence to inform him that he is to be questioned in relation to the suspicion of a criminal offence.

805 Environment Agency's Enforcement and Sanctions Policy (2018), section 7.4.3. Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019). In that light, the formal caution should be seen as the equivalent to the decision to prosecute. See Malcolm & Pointing 2011, p. 232.

806 Environment Agency's Enforcement and Sanctions Policy (2018), section 7.4.3. Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

807 Crown Prosecution Service, *Code for crown prosecutors* (2018), p. 20. Available at www.cps.gov.uk/publications/code_for_crown_prosecutors/. Last accessed 1 June 2019.

808 See also Environment Agency's old Enforcement and Sanctions Guidance, p. 13. Withdrawn and replaced with other policy documents on 11 April 2018), available at: www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-statement. Last visited 1 June 2019.

The level and content of these sanctions is determined by statutes that contain a general regulation of criminal sentencing and criminal procedure, as well as by the relevant statutes covering an area of environmental protection. Moreover, the level of the sanctions is also impacted by the criminal court the case is brought before by the prosecuting authority. As explained in the previous chapter, the Magistrates' Court and the Crown Court differ in that respect. In addition, the use of these sanctions has been prescribed more specifically in a sentencing guideline for environmental offences that has now gained a certain formal status. The criminal sanctions and the sentencing guideline are discussed consecutively below.

Custodial sentences

Custodial sentences – imprisonment – are reserved for the most serious offences, where such offences are so serious that neither a fine alone nor a community sentence can be justified.[809] A custodial sentence may also be imposed where the court believes it is necessary to protect the public, for example, where an environmental offence leads to damage to human health. The length of the sentence is dependent on the seriousness of the offence and the maximum statutory penalty for the offence.[810]

Magistrates' courts have the power to pass custodial sentences of up to 12 months in total; the Crown court can impose such a sentence of up to five years.[811] Although this power is not commonly used for environmental offences, it is on the increase, in particular for waste offences.[812]

In environmental law, it is quite common that custodial sentences of up to two years awarded by the Crown court are suspended, which means that the offender must fulfil certain requirements, for example, stay away from somewhere or carry out certain work in the community, and the sentence of imprisonment will not take effect unless the prisoner commits another imprisonable offence during a certain period of time.[813]

The Court of Appeal has identified factors for the purpose of sentencing an offender to imprisonment for an environmental offence in an individual case.[814]

Among these are:

- repeated or blatant offences
- offences committed in a public place
- offences committed in circumstances under which the public had been exposed to hazardous substances.

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809 Section 152(2) of the Criminal Justice Act 2003.

810 See www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/custodial-sentences/.

811 Section 154 Criminal Justice Act 2003. See also Environment Agency's Enforcement and Prosecutions Policy, paragraph 26. Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

812 Faure & Heine 2002, p. 137-138. Bell et al 2017.

813 Faure & Heine 2002, p. 138. See also www.gov.uk/types-of-prison-sentence/suspended-prison-sentences and www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/suspended-sentences/ (last visited 1 June 2019).

814 R. v O'Brien and Enkel [2000] Env LR 156; Bell et al 2017, p. 293.

Moreover, the Court of Appeal has considered that first time offenders, a guilty plea by these offenders, and the lack of lasting environmental damage may not justify a custodial sentence.[815]

Fines

Fines are deemed the most generally appropriate sentence upon conviction of an environmental criminal offence for natural persons and legal persons.[816] The fine must reflect the seriousness of the offence. The court must also take into account the financial circumstances of the offender.[817] Moreover, the fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence. In particular, it should not be cheaper to offend than to take the appropriate precautions.[818]

As explained at the beginning of this chapter, there was much criticism in England on the level of fines imposed.[819] To address this concern for the levels of sentence for environmental offences, several steps were taken to make higher and more consistent fines by the courts possible. For this purpose, the maximum of the fines was amended and a sentencing guideline for environmental offences was formulated. The particularities for establishing the fine – and the other possible sentences – are specified in the guideline and are discussed further below.

Orders

Orders can be imposed in addition to or separate from fines. When orders are imposed in addition to other sentences, these are called ancillary orders.[820] There are a variety of orders available to the criminal courts. Some orders are aimed at redressing the harm caused by an offender, such as compensation orders and remediation orders. Others aim to prevent future re-offending, including the disqualification of director order. Among the orders are also the confiscation of benefits of crime order; confiscation of other goods order; remediation order; and community order. Such orders are

815 R. v O'Brien and Enkel [2000] Env LR 156; Bell et al 2017, p. 293.

816 See *Environmental offences: definitive guideline*, London: Sentencing Council 2014, p. 6 (organisations) and 19 (individuals): "a fine will normally be the most appropriate disposal". Available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf (last visited 1 June 2019). Also, previously, *Costing the Earth: guidance for sentencers*, London: Magistrates' Association 2009, p. 17, available at www.magistrates-association.org.uk/sites/magistrates-association.org.uk/files/Costing%20the%20Earth%20-%201%20January%202010.pdf (last visited 1 June 2019). In practice, the majority of corporate and individual prosecutions will result in a fine, Abbot 2005, p. 75; Dupont & Zakkour 2003.

817 Section 164 Criminal Justice Act 2003.

818 See *Environmental offences: definitive guideline*, London: Sentencing Council 2014, p. 6 (organisations) and 19 (individuals): "a fine will normally be the most appropriate disposal". Available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf (last visited 1 June 2019).

819 See also, for example, The House of Commons Environmental Audit Committee Sixth Report, Environmental crime and the courts, London: the Stationery Office 2004. Available at
https://publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/126/126.pdf (last visited 1 June 2019).

820 See also, for example, www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/ancillary-orders/.

often based in the general acts on criminal procedure and sanctions, although where similar powers are specifically mentioned in the specific environmental legislation, these should be considered additionally.[821] It is the duty of the prosecutor to apply for ancillary orders in all appropriate cases.[822] The courts may also of their own discretion consider orders to be imposed when sentencing a defendant for a criminal offence. According to the sentencing guideline established in 2014, compensation and confiscation must always be considered when sentencing.[823]

The criminal courts can impose a compensation order as an alternative or in addition to a fine.[824] In fact, a compensation order can either be an ancillary order or a sentence in its own right. A prosecutor or the court of its own motion may raise the issue of compensation. As is the case for fines, there is no upper limit to compensation ordered by the Crown Court. Where a defendant is ordered to pay a fine as well as compensation, and is unable to pay both, the compensation order should be given preference by the court, although a fine may still be imposed.[825]
The Crown Court can exercise a power to make a confiscation order as to the proceeds of crime that have come to the benefit of the offender.[826] No such power exists for the Magistrates' court.[827] The order will generally be of an amount equal to the offender's benefit from the conduct concerned. The court must take this order into account when imposing a fine or a compensation order.[828] A power of confiscation is also available for goods used in the commission of environmental offences. This order is called a deprivation order and may be executed by both the Magistrates' Court and the Crown Court.[829]
Under environmental legislation the courts also have the power to order remediation to be carried out. This is an important power with regard to environmental protection, as it orders the offender to repair the consequences of his actions, including the damage, and bring the situation back to the way it was before he committed the offence.[830]

821 See e.g. the Powers of Criminal Courts (Sentencing) Act 2000 and the Criminal Justice Act 2003, and section 33A Environmental Protection Act 1990.
822 Crown Prosecution Service, *Code for crown prosecutors* (2018), p. 27. Available at www.cps.gov.uk/publications/ code_for_crown_prosecutors/. Last accessed 1 June 2019.
823 See sentencing step 1 and 2 of the *Environmental offences: definitive guideline*, London: Sentencing Council 2014. Available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf (last visited 1 June 2019).
824 Section 130 Powers of Criminal Courts (Sentencing) Act 2000; Faure & Heine 2002, p. 138; Abbot, (2005), p. 78.
825 Section 130(12) Powers of Criminal Courts (Sentencing) Act 2000; Malcolm and Pointing 2011, p. 243.
826 Section 6 and further Proceeds of Crime Act 2002.
827 As we have seen, this does not mean that in the Magistrates' Court the confiscation is not possible in another manner: it is the obligation of the courts to ensure that benefits of the crime are removed and that this should be reflected in any combination of fine and compensation order where a confiscation order is not possible. See Environmental Offences Definitive Guideline (2014), p. 12 and 21 (individuals).
828 Section 13 Proceeds of Crime Act 2002.
829 Section 143 of the Powers of Criminal Courts (Sentencing) Act 2000.
830 Section 26 EPA 1990 and s. 31 W&CA.

Community orders sanction the offender to fulfil one or more requirements, over a period of time.[831] These are, for example, a specified number of hours of unpaid work for the benefit of the community, a prohibited activity requirement, an activity requirement for a certain number of hours, a curfew requirement or an exclusion order.[832] The court must impose at least one requirement for the purpose of punishment, or combine the community order with a fine, or both.[833] This instrument is increasingly used in environmental enforcement, especially since 2009, although previous to that it was quite rare.[834]

Finally, the criminal courts are conferred the power to make an order for the defendant to reimburse the prosecutor for the costs made for the prosecution. This includes the costs and expenses incurred during the investigation of the offence, as long as it is just and reasonable.[835] The Environment Agency has declared it as its policy to always seek to recover the costs made for prosecution.[836] The discretion of the courts in this respect is broad.

The choice of a sanction by the criminal courts

At the basis of the choice of the most appropriate sanction are five statutory purposes of sentencing that the Criminal Justice Act 2003 explicitly sets out. These purposes dictate that any court dealing with an offender in respect of an offence must have regard to:

- the punishment of offenders;
- the reduction of crime (including its prevention by deterrence);
- the reform and rehabilitation of offenders;
- the protection of the public; and,
- the making of reparation by offenders to persons affected by their offences.[837]

831 See *Environmental offences: definitive guideline*, London: Sentencing Council 2014, p. 24. Available at www.sentencingcouncil.org.uk/wpcontent/uploads/Final_Environmental_Offences_Definitive_Guideline_web1. (last visited 1 June 2019). See also the Sentencing Council's community orders table, at www.sentencingcouncil.org.uk/droppable/item/community-orders-table/.

832 Section 177 Criminal Justice Act 2003; *Environmental offences: definitive guideline*, London: Sentencing Council 2014, p. 24, available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf (last visited 1 June 2019).

833 Section 177 Criminal Justice Act 2003. See also *Environmental offences: definitive guideline*, London: Sentencing Council 2014, p. 24. Available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf (last visited 1 June 2019).

834 Dupont & Zakour 2003. See also *Environmental offences: definitive guideline*, London: Sentencing Council 2014, p. 19. Available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf (last visited 1 June 2019).

835 Section 18(1) Prosecution of Offences Act 1985 and see e.g. section 33A Environmental Protection Act 1990. Powers in the specific environmental legislation are in addition to the power to make an order under the Prosecution of Offences Act 1985. See also *Environmental offences: definitive guideline*, London: Sentencing Council 2014. Available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1. pdf (last visited 1 June 2019)

836 The courts generally split the sentence into investigation costs and defence costs.

837 Section 142 Criminal Justice Act 2003.

Which purposes are applied in an individual case is for the courts to determine. A court is required to pass a sentence that is commensurate with the seriousness of the offence.[838] Two parameters determine the seriousness of an offence: the extent to which the offender is culpable in committing the offence and the harm caused or risked by the offence.[839] Previous convictions may be considered to determine the seriousness of the current offence.[840] One of the aspects in considering the level of the fine is the turnover of a legal person, or the weekly income of persons.[841]

Some environmental statutes contain a specific indication as to how the level of a sanction, in particular a fine, should be decided upon. For example, section 28P(9) W&CA 1981 holds that the court shall in particular have regard to any financial benefit that has accrued or appears likely to accrue to the convicted offender in consequence of the offence.

One of the developments in England noted at the beginning of this chapter for criminal enforcement, was the introduction of a sentencing guideline for environmental offences to address the levels of the sanctions imposed by the criminal courts, in particular the Magistrates' courts.

> First, the Sentencing Advisory Panel prepared a set of sentencing guidelines for environmental offences for the Court of Appeal to accept. However, the Court rejected this advice for the benefit of maintaining a case-by-case approach to sentencing.[842] After that, certain guidance for sentencing followed, for example, the 2009 Costing the earth – sentencing guidelines for Magistrates by the Magistrates' Association.

In 2014, the Sentencing Council produced a definitive sentencing guideline for environmental offences.[843] The Coroners and Justice Act 2009 gives a certain formal status to this guideline, as it establishes that every court must, in sentencing an offender, follow any sentencing guideline relevant.[844] The Court of Appeal subsequently endorsed the guideline.[845] Besides this, and in particular as far as the specific guideline does not provide substance, the more general Magistrates' Court and Crown Court sentencing guidelines apply.[846]

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838 Section 142 Criminal Justice Act 2003.

839 Section 143 Criminal Justice Act 2003.

840 Section 143(2) Criminal Justice Act 2003.

841 See below, step 4 of the *Environmental offences: definitive guideline*, London: Sentencing Council 2014. Available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1. pdf (last visited 1 June 2019).

842 R. v Yorkshire Water Services Ltd [2002] Env LR 18; R. v Anglian Water Services Ltd [2004] Env LR 10.

843 See *Environmental offences: definitive guideline*, London: Sentencing Council 2014. Available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf (last visited 1 June 2019).

844 Section 125(1) Coroners and Justice Act 2009.

845 See R. v Thames Water Utilities [2015] Env LR 36.

846 These are available at www.sentencingcouncil.org.uk/publications/item/environmental-offences-definitive-guideline/ (last visited 1 June 2019).

> The 2014 sentencing guideline applies to non-compliance with requirements of an environmental permit; the operation of a regulated facility; or where someone causes or knowingly allows a water discharge activity or groundwater activity, as well as the unauthorised or harmful deposit, treatment, or disposal of waste.[847] However, the sentencing guideline explicitly describes that it can also be referred to for sentencing other environmental offences.[848] Moreover, as mentioned previously, the Environment Agency uses the sentencing guideline to calculate a variable monetary penalty for administrative non-compliance.

For environmental sentences, the sentencing purposes that are considered to have preference are the reduction and prevention by deterrence, the protection of the public and the reparation.

The sentencing guideline of 2014 differentiates between the sentencing of organisations, i.e. legal persons that have committed an offence, and individuals. For organisations, twelve sentencing steps are described, with a focus on sanctions that (may) have a financial impact: the compensation or confiscation order and, in particular, the fine. For individuals, also twelve sentencing steps are described. The fine is considered the most appropriate response. However, the courts must first consider making a compensation order and/or a confiscation order must be considered first – previous to considering a fine. In any case, the financial gain or cost saved from the crime should be reflected in the sentence.[849] This means that the courts must ensure that the combination of financial orders (compensation, confiscation if appropriate and the fine) removes any economic benefit derived from the commission of the offence, including avoided costs, operation savings, and any gain made as a direct result of the offence.[850]

> The sentencing guideline determines that economic benefit will not always be an identifiable feature of a case. Even in cases where there may be very little obvious gain, the guideline considers that there may be some avoidance of cost. Any costs avoided will be considered as economic benefit. Moreover, the guideline states that where it is not possible to calculate or estimate the economic benefit,

847 Regulations 12 and 38(1), (2) and (3) of the Environment Permitting Regulations 2010 and section 33 EPA 1990.

848 See *Environmental offences: definitive guideline*, London: Sentencing Council 2014, p. 14. Available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf (last visited 1 June 2019).

849 See *Environmental offences: definitive guideline*, London: Sentencing Council 2014, p. 12 (organisations) and p. 19 (individuals). Available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf (last visited 1 June 2019). Also, previously, *Costing the Earth, Guidance for sentencers*, London: Magistrates' Association 2009, p. 17. Available at www.magistrates-association.org.uk/sites/magistrates-association.org.uk/files/Costing%20the%20Earth%20-%201%20January%202010.pdf (last visited 1 June 2019).

850 *Environmental offences: definitive guideline*, London: Sentencing Council 2014, p. 12 (organisations) and p. 21 (individuals).

> the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.[851]

As described, most environmental offences are strict liability. In sentencing such offences, the courts must – according to the guideline – consider the culpability of the offender.[852] The twelve sentencing steps are as follows:

1. Compensation
2. Confiscation (only in Crown Court)
3. Determining the offence category (4 culpability categories and 4 categories of harm factors)
4. Starting points for level of the sentence and category range (with tables in reference to the size of the organisation and its turnover, or the weekly income of persons, and dependent on the offence category as determined in step 3)
5. Ensuring removal of economic benefit (the amount of economic benefit must be added to the fine arrived at in step 4; where a confiscation order is also extended, double recovery must be avoided)
6. Considering other factors that may warrant adjustment of the fine (for organisations, there is a step before this, considering the proportionality of the fine to the means of the offender)
7. Considering other factors leading to reduction, such as assistance to the prosecutor
8. Reduction of the sentence for guilty pleas[853]
9. Ancillary orders
10. Totality principle (where a sentence has already been given or there are multiple offences)
11. Reasons
12. Only for sentencing of individuals: consideration for time spent on bail.

The steps 5 to 12 are for the court to take a step back and to review whether the sentence as a whole meets the objectives of punishment, deterrence and removal of gain derived through the commission of the offence. As a result, the court may increase or reduced the proposed fine.

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851 *Environmental offences: definitive guideline*, London: Sentencing Council 2014, p. 12 (organisations) and p. 21 (individuals).

852 *Environmental offences: definitive guideline*, London: Sentencing Council 2014, p. 5 (organisations) and p. 17 (individuals). Available at www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_ Guideline_web1.pdf (last visited 1 June 2019).

853 Section 144 Criminal Justice Act 2003.

Discharge

Instead of applying the abovementioned criminal sanctions, the courts also have the option to give a conditional or an absolute discharge to the offender.[854] This means that the offender is held guilty of a criminal offence – there is a conviction – but that the court is of the opinion that it would be inexpedient to inflict punishment. It can then discharge the offender absolutely, or subject to the condition that the person convicted does not commit an offence during a period of time, maximum three years.[855]

5.5 Cumulation of sanctions: concurrent and consecutive imposition

Considering that there are three sets of sanctions in England that may be used for the enforcement of (certain) non-compliance of environmental law, the question is whether these sanctions may be imposed at the same time (concurrently) or through a consecutive application of sanctions, for example for the purpose of a follow-up sanction when the enforcement goal was not reached by means of the previous sanction imposed and/or non-compliance has not occurred, in other words by scaling-up sanctioning. This section discusses this: in one word indicated as the cumulation of sanctions.

As is clear from the previous description of the sanctions, including prosecution, the regulatory authorities aim to choose the best possible sanction given the circumstances. It is important that any enforcement action is appropriate, i.e. proportionate to the circumstances of the case. This is laid down in policy documents related to enforcement. The proportionality can be tested by the courts, as is the case for the principles of Wednesbury reasonableness.[856] This is why the authorities are to consider the penalty principles and outcomes to be aimed for with the enforcement action, including the aspect of the seriousness of the offence and the culpability of the offender – even when not required in the breached environmental norm. Public interest factors also play a role, and the criminal law is, in particular, considered for serious criminal offences in this respect.[857]

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854 Section 12 Powers of Criminal Courts (Sentencing) Act 2000.

855 Section 12 Powers of Criminal Courts (Sentencing) Act 2000.

856 McEldowney 2016, p. 505; see also the Human Rights Act 1998 which incorporates the human rights of the ECHR.

857 For this purpose, the Environment Agency will consider a single enforcement response in case of a number of compliance failures from the same or related incidents, per its Enforcement and Sanctions Policy (2018): "where a number of compliance failures have occurred from the same or related incidents, where it is possible and correct to do so, we will assess all of those failures and try to take a single enforcement response. Our response will match the overall level of offending." Available at www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

Consecutive and concurrent imposition of sanctions of different systems

Follow-up sanctions are often explicitly described in environmental legislation, as the non-compliance with administrative sanctions may also be a separate criminal offence, which can also be pursued with administrative sanctions and prosecution.

In any case, punitive sanctions may not be pursued twice for the same offence as this would amount to double jeopardy.[858] This aspect of double jeopardy has become important for the regulatory authorities to observe with the introduction of the punitive civil sanctions into their sanctions' toolbox. This rule has impact on the civil sanctions, specifically the fixed monetary penalty and the variable monetary penalty, barring their concurrent or consecutive imposition, and their combination with criminal sanctions.[859] This also includes the criminal prosecution by the regulatory authorities as prosecuting authorities. However, the rule of double jeopardy does not have the same impact on the concurrent imposition of criminal sanctions, within a single criminal prosecution, as, for example, the concurrent imposition of criminal sanctions, such as the fine and imprisonment is allowed. The imposition of sanctions of the same system is further highlighted further below.

Consecutive and concurrent imposition of sanctions of the same system

The concurrent imposition of sanctions of the same system was previously discussed in this chapter as well as the consecutive application of such sanctions, in particular, in case of non-compliance with previously imposed sanctions (section 5.2.2 and 5.3.7 of this chapter). Condensed, this can be described as follows.

Administrative notices may be combined concurrently and may be imposed consecutively, as far as this is appropriate given the circumstances of the case. Civil sanctions – as explained in section 5.3.7 above – may be combined concurrently and imposed consecutively in certain circumstances, and as long as there is no penalty that has previously been imposed for the same non-compliance. Criminal sanctions may be imposed concurrently, including fines and imprisonment, as long as this possibility is described in the environmental statutes.[860]

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858 Schedule 1 and 2 of the Environmental Sanctions Order 2010 (England). Also *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act*, London: BERR 2008, p. 33. Available at https://webarchive.nationalarchives.gov.uk/+ / http:/www.berr.gov.uk/files/file47135.pdf (last visited 1 June 2019).

A claim of double jeopardy is made through the plea of *autrefois* acquit or *autrefois* convict. See also the principle of *ne bis in idem* described in chapter 2.

859 The Environment Agency's Enforcement and Sanctions Policy (2018) does state that 'it is not normally possible to combine criminal and civil sanctions for the same type of offence unless legislation specifically allows it. We will consider all the circumstances very carefully if we do want to combine sanctions.' Available at www.gov.uk/ government/ publications/environment-agency-enforcement-and-sanctions-policy (last visited 1 June 2019).

860 Also, where it concerns multiple offences, both concurrent and consecutive sentences for the different offences are possible. See for example the Magistrates' general sentencing guidelines: *Offences taken into consideration and totality: a definitive guideline*, London: Sentencing Council 2012, p. 6-8. Available at www.sentencingcouncil.org.uk/wp-content/ uploads/Definitive_guideline_TICs__totality_Final_web.pdf (last visited 1 June 2019).

Moreover, as is clear from the sentencing guideline for environmental offences, a compensation order, confiscation order and fine may all be imposed concurrently, as long as it remains appropriate and double recovery of the benefits of non-compliance is avoided. The consecutive imposition of criminal sanctions is not possible, although this will be possible where a sanction (a discharge) has been imposed conditionally and the conditions are breached.

5.6 Evaluation: flexibility and variation in the enforcement toolbox

In this section the evaluative framework formulated in chapter 2 will be applied to the sanctions available for the public enforcement of non-compliance with environmental law in England. Here, the sanctions are evaluated from the perspective of the instrumental requirements. This evaluation will discuss the ability of the available toolboxes of sanctions to aim for the enforcement goals, keeping in mind the possible typology of the non-compliance, its consequences and the offender.[861] The typology and the enforcement goals are outlined in the table below, followed by the evaluation.

Instrumental requirements	
What is the typology of non-compliance?	**What enforcement goals fit the typology of non-compliance?**
1. The type of non-compliance - on-going or completed - recurring or one-off - long-lasting - multitude of violations at the same time 2. The type of environmental damage (also involving issues of time), including the danger of such damage occurring - absent or present - reparable or irreparable - minor, major, or progressive 3. The type of offender - unknown or known - company and/or individual - notorious (repeat) or non-regular offender	a. To prevent specific non-compliance b. To end non-compliant behaviour c. To repair environmental damage due to non-compliance d. To prevent recurrence/to advance future compliance; e. To remove benefits from non-compliance f. To compensate the consequences of non-compliance g. To punish non-compliance

861 See chapter 2, section 2.6.3 for the table detailing this relationship.

a. To prevent specific non-compliance from occurring

There are several administrative sanctions in England – administrative notices, specifically – that can aim to prevent environmental non-compliance from occurring. These are administrative sanctions that aim to prevent non-compliant behaviour, which includes causing damage, and sanctions that aim specifically to prevent environmental damage as a result of non-compliance, while non-compliance may already be taking place. An example of the former is the enforcement notice, which focuses on preventing non-compliance with the environmental permit. Other notices focus on the latter, i.e. the threat or risk of damage; these are the prevention notice, remediation notice, stop notices, suspension notice and revocation notice.

Several of these notices have disadvantages because they do not apply immediately, as they require a notice of intent first (enforcement notice and remediation notice), or are suspended upon appeal (revocation notice).[862] These notices are, therefore, not appropriate where the prevention of non-compliance requires urgent immediate action, for example, when irreparable damage is about to occur.

Several of the notices mentioned previously, however, do have immediate effect, as these notices do not require a notice of intent and are not suspended upon appeal. These are the prevention notice and the suspension notice for environmental permits, the temporary stop notice for planning control, and the civil sanctions stop notice for water and waste protection and certain species licence breaches.

Interestingly, as mentioned, England has the possibility of enforcement through the preventive imposition and effectuation of the revocation or suspension of the permit. The revocation and suspension are aimed in particular at removing the risk of serious pollution. The effect of the notice is immediate, as the permit ceases to authorise the operation of a business, as far as described for the purpose of removing the risk of pollution. However, the revocation is suspended when appeal is lodged. The preventive suspension could therefore, in particular, be a made-to-measure instrument in case of the risk of significant pollution, in particular where this is irreparable or major. However, considering that these are heavyweight sanctions, in practice, as described previously in this chapter, these sanctions are usually only applied after criminal prosecution, where a risk of damage continues to exist.

All the notices require the offender to do something (or to stop doing something). Where there is particular urgency for immediate action, and action by the offender cannot be awaited, this urgency can only be appropriately met in England by the sanction of direct action through authority remediation (substitute action by the administrative authorities), with cost recovery (when possible). This sanction also

862 As will be remarked under enforcement goal (b), it is also a disadvantage that when notices are not complied with, a second decision is required to enforce this non-compliance.

provides a solution, in particular, where the offender cannot be found, or cannot be found in time to prevent non-compliance and its consequences. This sanction is, therefore, an asset to the toolbox of the administrative authorities.

There are no criminal sanctions that can be imposed preventively. However, as previously described, environmental non-compliance in England nearly always is a criminal offence while also administrative non-compliance. This means that although criminal offences cannot be prevented (or halted as soon as possible after commencing) through imposing certain criminal sanctions, the administrative non-compliance that is part of the criminal offence can be addressed preventively by the regulatory authorities in the manner described above.

b. To end on-going non-compliant behaviour

Administrative sanctions are available in England to end on-going environmental non-compliance, i.e. to put a stop to non-compliant behaviour once an authority has uncovered it. For this purpose, several administrative notices are available, such as the enforcement notice, the prohibition notice, and the compliance notice, which are quite broadly applicable to environmental protection, and also the stop notices, for planning control, water and waste protection and certain species licence breaches; and the abatement notice in case of statutory nuisance.

As described, in most cases, non-compliance with the notices is a separate criminal offence. However, it is a disadvantage of these administrative notices that a separate decision containing a sanction is required to enforce the obligation that they contain, when they are not complied with. Moreover, where this separate decision to enforce the notice concerns a fining decision (such as a civil sanctions penalty), the forfeited sum contained therein can only be claimed, once more, by separate decision or through court action. This means that action by the regulatory authorities to end non-compliant behaviour through the imposition of a notice can be quite lengthy and can require quite a lot of authority action, including inspection. This is a disadvantage to effective enforcement.

In terms of the available administrative sanctions, the enforcement undertaking is a particularly interesting instrument as the offender himself proposes to the regulatory authority to, for example, end non-compliant behaviour. The enforcement undertaking is a very flexible instrument as the offender can tailor it to the specific typology of the non-compliance. Moreover, this particular sanction implies a willing/cooperative offender, which likely makes achieving compliance easier. The regulatory authority remains in charge in the sense that it is to accept a proposal for the sanction of the undertaking to take effect.

When action (or stopping certain action) by the offender to end on-going non-compliant behaviour cannot be awaited, e.g. in case of major or irreparable damage caused or where there are third party complainants, the regulatory authority may take remedial action itself to bring the situation in compliance.

As mentioned, criminal sanctions can aim to end non-compliant behaviour where these are imposed to enforce non-compliance with the administrative notices mentioned above. There are no criminal sanctions with the specific aim to end non-compliant behaviour. To pursue this aim therefore, administrative sanctions ought to be used. The power of the criminal courts to sentence an offender to forfeiture (confiscation) of goods used in the commission of an environmental offence, can lead in practice to the end of the offence, particularly where it concerns the possession of wildlife. However, this is not an immediate measure as forfeiture can only be ordered in a criminal sentence at the conclusion of criminal proceedings. This is a disadvantage to effective enforcement.

c. To physically repair the damage caused by non-compliance

There are several administrative notices and criminal sanctions available to the enforcement authorities in England to pursue the goal of reparation of the (reparable) damage caused by non-compliance.

In England, there are (again) several administrative notices are available to pursue this aim, such as the enforcement notice, the remediation notice, and the restoration notice. As explained above, the disadvantage to these notices in the light of effective enforcement is the fact that several decisions are required to truly enforce the obligations contained in the notice. The available administrative sanction of remedial action by the regulatory authority is appropriate for timely reparation of damage that is progressive or major. Also, a willing/cooperative offender can offer an enforcement undertaking to the regulatory authority with this type of condition.

As part of the criminal sanctions toolbox, the regulatory authorities – as prosecuting authorities – or the Crown Prosecution Service – in case of wildlife offences – may request an ancillary order of remediation in court proceedings when prosecuting the environmental offence. The criminal courts can order this remediation as part of the criminal sentence for environmental offences.

d. To prevent recurrence of non-compliance and to advance future compliance

There are several administrative sanctions, and criminal sanctions available to pursue the goal to prevent recurrence and ensure future compliance. Among the administrative sanctions that may be appropriate to pursue this enforcement goal is the compliance notice, which requires the offender to take steps within a certain time

period to ensure that an offence does not happen again. When the non-compliance occurs in the operation of an installation, an available permit can be suspended or revoked to prevent further operation of that installation and thereby also future non-compliance. Suspension and revocation are very heavyweight sanctions and, therefore, only particularly appropriate where it concerns notorious, recidivist offenders and in case of major, progressive, or irreparable damage. The scope of these sanctions is limited in application since they only cover situations involving environmental permits. Besides this, the stop notices for planning control, water and waste protection and certain species licence breaches, also aim to prevent recurrence and further offending.

In case of a willing offender, an enforcement undertaking can also be offered by the willing/cooperative offender to pursue this enforcement goal. The undertaking must for that purpose specify the steps taken to ensure that non-compliance does not recur. The regulatory authority will review if these steps are appropriate to do so, before accepting the undertaking.

As part of the criminal sanctions toolbox, regulatory authorities – as prosecuting authorities – or the Crown Prosecution Service – in case of wildlife offences – can give a formal caution as alternative to prosecution. This sanction is specifically aimed to prevent further offending while not prosecuting the original offence. Where further offences occur, the previously given formal caution can be weighed in sentencing. This sanction is dependent on a willing/cooperative offender, as he must admit the offence and consent to be cautioned. This also limits its applicability where the offender does not want to cooperate.

As part of the criminal sentence for environmental offences, the criminal court can order the disqualification of the director of a business, which specifically aims to prevent recurrence. This sanction is heavyweight, and would in particular be appropriate in case of notorious, recidivist offenders. Another heavyweight sanction that the criminal courts can impose for this aim is the suspended custodial sentence, which means that a sentence of imprisonment does not take effect unless the offender commits another imprisonable offence during a certain period of time.

On the other end of this spectrum, is the power of the criminal court to order the conditional discharge of the offender where it considers any sentence too disproportionate. This means that there is a conviction of the offender but that the court discharges de offender, subject to the condition that he does not commit an offence during a period of time, with a maximum of three years. This instrument, therefore, aims to prevent further offences by this particular offender. The criminal courts therefore, do not have a very wide range of sanctions available to pursue this enforcement goal.

e. To remove benefits from non-compliance

Nearly every (monetary) sanction available for environmental enforcement in England aims to remove cost benefits, and also, explicitly, cost savings resulting from non-compliance. These sanctions are, in particular, the administrative civil penalties and the criminal sentences.

The introduction of the administrative civil sanctions for environmental offences has made it possible for the central government regulatory authorities to pursue this goal. There is no separate sanction available to the regulatory authorities that is solely aimed at the removal of cost savings or cost benefits from non-compliance. Instead, this removal is part of the administrative civil penalty. Specifically, the amount of the variable monetary penalty can include the removal of economic benefits – including cost savings – as a result of the offence (as long as it does not exceed the maximum penalty). The availability of this sanction for the regulatory authorities and the fact that it includes all benefits, including savings, is positive for these authorities to achieve effective enforcement.

The criminal courts are very well equipped to pursue this enforcement goal. It stands out from the sentencing guideline for environmental offences, that the criminal courts (Crown courts) not only have the separate confiscation order available to pursue this enforcement goal; also, the confiscation of benefits and savings is one of the primary aims of sentencing environmental offences. This enforcement goal is therefore prioritised for environmental offences in England. Moreover, this means that where there is no separate confiscation order made, the confiscation is to be a part of the criminal fine that is imposed as a sentence for environmental offences. It is interesting that the guideline states in this respect that it should not be cheaper to offend, than to comply. This is a strong guiding principle that benefits effective enforcement. Therefore, this enforcement goal plays an important role in the enforcement of environmental offences in England.

f. To (monetarily) compensate the consequences of non-compliance

This goal may be pursued through administrative sanctions and a criminal sanction. A compensatory remediation notice is one such administrative sanction. It explicitly covers natural compensation and not financial compensation. This is interesting as it aims to offer compensation to the environment directly. Where reparation is not possible, the compensation can be carried out elsewhere, for the benefit of the environment. This sanction is therefore quite flexible. The willing/cooperative offender can offer the regulatory authority a third party enforcement undertaking, which will specifically contain a compensatory commitment. Interestingly, the regulatory authorities will take any compensation paid by the offender into account (as a financial burden upon the offender) when calculating a variable monetary penalty.

Including such a sanction in a criminal procedure is appropriate as the environmental offences that are dealt within such a procedure often deal with major or irreparable damage. In the sentencing guideline for environmental criminal offences, the compensation of damage caused by non-compliance is explicitly mentioned as particularly appropriate for environmental offences. Indeed, the guideline provides that a compensation order is to be primarily considered when the criminal courts sentence environmental offences.
Interestingly, the compensation order can contain the obligation for the offender to donate a (considerable) sum of money to environmental protection organisations. The payment of compensation can, therefore, be very specifically and quite directly earmarked for the protection of the environment. As the protection of the environment is the goal of effective enforcement, this sanction stands out as particularly effective.

g. To punish the offender for non-compliance

Punitive sanctions available in England consist of penalties (fines), which are part of both the toolbox of administrative civil sanctions and criminal sanctions, and imprisonment, which is unique to the criminal sanctions toolbox. The introduction of the administrative civil sanctions for environmental offences has made it possible for the central government regulatory authorities to pursue this goal, independent of the criminal courts. The local regulatory authorities do not have penalties, or other punitive sanctions, available to them (yet) as part of their administrative sanctions toolbox for environmental protection. This may be a disadvantage to the flexibility of the toolbox of the local authorities. However, they can still choose a route towards punitive sanctions by starting criminal proceedings as prosecuting authorities.

The way the fines – including the civil sanctions variable monetary penalties – are calculated by the regulatory authorities and the criminal courts, for administrative and criminal enforcement, is notable from the point of view of effective enforcement, and, specifically, the aim to fit sanctions to the specific typology of non-compliance in a given case. This positive aspect lies in the fact that the level of the fines is related to the income of the offender, both where this concerns organisations and individuals. This is a positive aspect from the perspective of effective enforcement, as it ensures that the penalty is tailored to the offender in combination with the need for the penalty to have a real economic impact on him.
Another interesting aspect of the calculation of fines for environmental non-compliance by the regulatory authorities and the criminal courts is that the fines may reflect more than the aim of punishment. Specifically, the fines are also required to include the removal of benefits (profits and savings) as a result of the non-compliance, which is a reparatory goal. Therefore, the fines are not solely punitive but rather a hybrid between the different types of goals. This means this sanction is a very varied instrument in itself.

Imprisonment is the most heavyweight sanction available in England for individuals. It is also the sanction that is the most specifically connected to a single type of offender: not a company (legal person), but an individual (natural person). Even though a company cannot be imprisoned, it is a positive aspect that this sanction can still play a role in the criminal prosecution and sentencing of offences committed by a business in England. Notably, the directors of a business can be held severally responsible for non-compliance and can, therefore, be imposed a sentence of imprisonment.

5.7 Findings

In this chapter the three systems of sanctions were described that are available to the administrative and criminal authorities in England for the public enforcement of environmental law. It was described that a lot of development has taken place in England to strengthen, in particular, the sanctions toolbox available for environmental enforcement. Several results of this development are important for the ability of this toolbox to fulfil the instrumental requirements that were formulated in chapter 2. Changes and additions have resulted in a quite flexible and varied sanctions' toolbox for the public enforcement of environmental law. This has been positive for effective enforcement. The introduction of administrative civil sanctions, and particularly the penalties are one of the most important additions this set of sanctions provides for environmental enforcement by the central government regulatory authorities. Although not all regulatory authorities can impose all administrative civil sanctions, these sanctions have provided an addition to the toolbox in the hands of the regulatory authorities, creating more variety for these authorities.
Several positive aspects as well as disadvantages of the sanctions available to the authorities for the public enforcement of environmental law in England were noted in the analysis in the previous section, in relation to the instrumental requirements for effective enforcement formulated in chapter 2. What stands out from the analysis is that the enforcement authorities in England have a quite varied toolbox of sanctions that is adjustable to the typology of non-compliance. This toolbox is quite able to fulfil the instrumental requirements for an effective enforcement. There are some differences, however, in the manner and extent to which these instrumental requirements can be fulfilled. Also, a combination between administrative and criminal sanctions may be necessary to aim for the enforcement goals appropriate for a given situation of non-compliance. Several more general aspects that stand out in terms of effective enforcement are set out below.

- As described, the strengthening of the sanctions toolbox for environmental non-compliance has been a specific focus that has led to several developments in England. The introduction of penalty principles and purposes for sentencing, in

particular, has lead the way to a more specific focus by the enforcement authorities on applying sanctions that are appropriate for specific cases of environmental non-compliance.

- It stands out that the penalties principles, described in section 5.1, overlap with the enforcement goals formulated in chapter 2, where they describe the aim to eliminate financial gain or benefit from non-compliance; aim to restore the harm caused by regulatory non-compliance. Moreover, the aim that a sanction is to be responsive and consider what is appropriate for the particular offender and regulatory issue is comparable to the underlying purpose of the enforcement goals, as described in chapter 2.
- The sentencing purposes and, more particular, the sentencing guideline that was introduced to support more effective sentencing of environmental offences by the criminal courts, emphasise the need for punishment and reparation. The sentencing guideline requires the criminal courts to impose sanctions that can fulfil three primary aims of sentencing environmental offences: two reparatory aims – compensation and confiscation – and the aim of punishment. This is a benefit to effective enforcement, as the criminal courts are obliged to provide a broad enforcement response to environmental offences that is appropriate for the circumstances of environmental non-compliance.
- The enforcement authorities can aim for the enforcement goals either by means of administrative sanctions, including civil sanctions, criminal sanctions or both.
- In summary, the regulatory authorities generally have available to them a rather broad and flexible sanctions toolbox to pursue all of the enforcement goals. This includes administrative civil sanctions and a criminal sanction as alternative to prosecution. It stands out that by introducing administrative civil sanctions it has become possible for the regulatory authorities to aim to punish non-compliance, and to remove cost benefits and cost savings (as part of the civil penalties).
- A caveat to this is that the local authorities cannot impose administrative civil sanctions. This means that the local authorities cannot aim for the goal of punishment or the goal of removal of cost benefits and cost savings.
- The criminal courts have available to them a quite broad and flexible sanctions toolbox, which can be used to aim to repair; to prevent recurrence of non-compliance or to advance future compliance; to compensate; to remove cost benefits and savings (confiscation); and, to punish. The goal to end on-going non-compliant behaviour can be reached in practice for wildlife offences, but not generally or immediately. Therefore, the enforcement goals to prevent non-compliance, and to end on-going non-compliant behaviour cannot be generally aimed for by means of the available criminal sanctions for environmental non-compliance. This is a disadvantage, in particular for the goal to end on-going non-compliant behaviour. The sanctions toolbox is not as varied as the toolbox

available to the regulatory authorities. The available sanctions do seem fitting for serious offences, as intended.
- Therefore, although, as described, many enforcement goals can be aimed for by both administrative sanctions and criminal sanctions, there are differences in the variation and flexibility of the available sanctions, also in light of the typology of non-compliance (including the damage and the offender). Moreover, there remain significant differences (beside the procedure). The toolbox of administrative sanctions is set apart from the toolbox of criminal sanctions by the possibility of the former to prevent non-compliance from happening at all under certain conditions, and the possibility of a broadly applicable sanction to put an end to non-compliance. As described, the criminal sanctions are in particular intended for serious environmental offences. Moreover, the toolbox of criminal sanctions is set apart from the toolbox of administrative sanctions, in particular, by the level of the fines that can be imposed, and the possibility of imprisonment.

While the above-mentioned aspects are promising for effective enforcement, several positive aspects and disadvantages were also noted in the analysis with regard to the ability of specific sanctions to fit the enforcement goals and the type of non-compliance, damage, and offender appropriately. Most prominent with regard to the specific sanctions available for environmental enforcement are the following aspects:

- The administrative notices (also called administrative orders) stand out as the common sanction for the administrative enforcement of environmental non-compliance in England. A broad range of administrative notices is available to the regulatory authorities, which can be tailored to the specific typology of the case. This is a benefit to effective enforcement. The analysis has shown that notices are available to prevent non-compliance; to end on-going non-compliant behaviour; to repair environmental damage; and to prevent recurrence of non-compliance. The administrative notice is a very appropriate instrument to impose obligations on an offender, whether it is a business or an individual. However, as mentioned, an important disadvantage of these notices to effective enforcement is that they are generally not appropriate for immediate enforcement. Moreover, an even more prominent disadvantage is that when the offender does not comply with the obligations contained therein, another decision is necessary to threaten the offender with a sanction for this non-compliance.
- The administrative sanctions toolbox provides some variation, which means that the regulatory authorities have available other sanctions to circumvent to a certain extent the disadvantage of notices for immediate enforcement. This includes notices that can be imposed immediately. However, the disadvantage of the lack of an immediate threat of a specific sanction for non-compliance with the notices is not taken away.

- It is stands out that in England there are two sanctions that involve an offender that is cooperative to achieve compliance, which is beneficial to effective enforcement. The formal caution by the prosecuting authorities can aim for prevention of future non-compliance but to do so is to be accepted by the offender. Most beneficial in this respect is the (third party) enforcement undertaking as part of the toolbox of administrative civil sanctions. This sanction is entirely dependent on an offender that aims for compliance, as it is entirely proposed by the offender, and is very flexible as it can aim to end on-going non-compliant behaviour; the repair damage; to prevent recurrence; and, to compensate.
- A compensatory remediation notice is one such administrative sanction. It explicitly covers natural compensation and not financial compensation. This is interesting as it aims to offer compensation to the environment directly.
- As mentioned, a particularly positive aspect of the penalties/fines, which can be imposed by the central government regulatory authorities and the criminal courts, is the need for it – as expressed in policy in England – to have a real economic impact upon the offender. To ensure this, as described, the level of the fine is related to the size of the organisation and its turnover, or the weekly income of persons.
- It is notable from the perspective of effective enforcement that the sentencing guideline for environmental offences states that it should not be cheaper to offend, than to be in compliance with environmental law. This motto is not only to be adhered to by the criminal courts, but also relevant to the central government regulatory authorities sanctioning non-compliance, which also refer to the guideline. In the same vein it stands out that the confiscation of benefits from non-compliance also includes cost savings and is to be a part of the civil sanctions variable monetary penalty and of any criminal sentence. This is a strong signal to any offender, but particularly a calculating offender, that a sanction is intended to have effect.
- The broadness of recovery of the costs made by the enforcement authorities is another aspect that stands out positively and is particularly interesting from the point of view of 'resources management' for enforcement in England. In particular, the authorities can recover the costs from an offender for the substitute action by the regulatory authority, and also the costs made for the investigation and prosecution of the case before the criminal court.

In spite of the positive aspects, considering the disadvantages mentioned previously, the public law sanctions' toolbox for non-compliance in England would benefit from the introduction of certain elements for the purpose of effective enforcement.

- In connection to what has been described above, it would be a benefit to immediately threaten a specific sanction when imposing an administrative notice;

- Increase the toolbox of the criminal courts to be able to broadly end non-compliance during criminal proceedings.

The aspects mentioned above offer important contributions to an effective public enforcement of environmental law in England. In chapter 12, it will be discussed how England's enforcement organisation and sanctions compare to the other two jurisdictions with regard to their potential for effective enforcement.

Chapter 6 Overview of Public Enforcement of Environmental Law in Nordrhein-Westfalen, Germany

6.1 Introduction

This chapter provides an introduction to the architecture that is in place for the enforcement of environmental law in Germany. As explained in chapter 1, this system has interesting elements, in particular that of the three types of enforcement available, which includes a separate system of punitive non-criminal enforcement. While this was a prominent element that stood out in the quick-scan of the three jurisdictions chosen for this study, also other elements deserve to be highlighted as characteristics of the environmental enforcement architecture in Germany.

The study of the architecture in place in Germany focusses upon the state of Nordrhein-Westfalen (NRW).[863] This state handles the majority of the industrial activity of Germany and also has the highest population density of the country.[864] Therefore, environmental protection and the enforcement thereof is a particularly important matter in this State.

Below, first, the general terminology used for the environment and its enforcement is set out (6.2). Following this is a description of the characteristics of the structure. For this purpose, the sources of the regulation and the characteristics thereof are studied, in particular the key environmental and enforcement acts (6.3). Thereafter, the characteristics of the substance of the enforcement architecture are identified (6.4). This pertains to the types of public enforcement in place for the enforcement of environmental law. The chapter ends with a conclusion (6.5).

6.2 Terminology of environment and enforcement

In Germany, as in the Netherlands and England, there is not a single exclusive definition of 'the environment' or 'environmental law', although a generally accepted interpretation can be discerned. The concept of 'enforcement' may also be interpreted in several manners.

863 Also referred to in English as North Rhine-Westphalia.

864 Nordrhein-Westfalen is considered to be the economic heart of Germany. According to the official website of the State Ministry for the Climate protection, Environment, Agriculture and Nature and Consumer Protection www.umwelt.nrw.de (last visited 1 June 2019), there are eighteen million people living on 34.000 square kilometres.

6.2.1 Environment

The concept of that which should be protected as the environment, or, *Umwelt* can be interpreted broadly, restrictively or moderately.[865] The broad interpretation views the environment as not only the natural environment but also the social, cultural and political institutions.[866] This is not the interpretation used in the legal arena.[867] Two interpretations have in fact been used there. A restrictive approach used to be common. According to this approach, 'the environment' was understood as the environmental media of soil, air and water, the biosphere and their relations to each other and to people.[868] However, this interpretation is no longer the common interpretation in legal circles. Nowadays, nearly all the legal definitions assume a broader interpretation of the concept *Umwelt* that can be classified as moderate.[869]

This interpretation can be recognized in the Federal Immissions Control Act (*Bundesimmissionsschutzgesetz*)[870] and the Environmental Impact Assessment Act (*Gesetz über die Umweltverträglichkeitsprüfung*). In the area of pollution control, the Federal Immissions Control Act is established as pertaining to immissions affecting people, animals and plants, soil, water and the atmosphere, as well items of culturally significant and other material goods.[871] The Environmental Impact Assessment Act specifies similarly that the environment is people, animals and plants, soil, water, air, the climate and landscape as well as cultural and other material goods, including the interaction between them.[872] This concept of the environment is applied generally in most modern environmental legislation.[873] Also the Criminal Code, which contains specific environmental criminal offences, only refers to effects of certain action or inaction upon the elements already mentioned above: water, soil, air, people, animals and plants.

Academic books covering environmental law do not generally include town and country planning and building law as an area falling within the concept of the environment.[874] However, this area of law is recognized as relevant to the environment.[875]

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865 Sparwasser, Engel & Voßkuhle 2003, §1; Kloepfer 2016, §1, margin number 14 and further; Hoppe, Beckmann & Kauch 2000, §1, margin number 1 and further; Sparwasser, Engel & Voßkuhle 2003, § 1, margin number 7; Koch, Hofmann & Reese 2018; Schmidt, Kahl & Gärditz 2017. See also Kloepfer 2016, p. 16-19, which discusses *extensiver Umweltbegriff*, *restriktiver Umweltbegriff*, *normative Umweltbegriffe* and, even, the necessity of a *Modifikation des restriktiven Umweltbegriffs*.

866 Kloepfer 2016, § 1, margin number 15.

867 Kloepfer 2016, § 1, margin number 16: *Im juristischen Raum*.

868 Kloepfer 2016, § 1, margin number 16; Sparwasser, Engel & Voßkuhle 2003, § 1, margin number 6.

869 Kloepfer 2016, § 1, margin number 17.

870 This Act also covers emissions, see section 11.3.2.

871 Section 3(2) BImSchG.

872 Section 2(1) UVPG, nr. 1-4.

873 Section 2(1) UVPG, nr. 1-4. Sparwasser, Engel & Voßkuhle 2003 refer explicitly to the interpretation in the UVPG at § 1, margin number 7, page 5 and footnote 10 on that page.

874 *Raumplanung, Raumordnung, Bauplanung* and *Bauordnung*. Public building law, in particular *Bauordnungsrecht*, is most relevant here as it is *Gefahrenabwehrrecht*. It gives provisions on buildings (*bauliche Anlagen*) and their establishment, use of land, change, and removal. See Kloepfer 2016, § 10, margin number 2-6 and Hoppe, Bönker & Grotefels 2010, § 1 margin number 7. Also, for example Hoppe, Beckmann & Kauch 2000; Storm 2015; Schlemminger & Martens 2004; Sparwasser, Engel & Voßkuhle 2003; Kotulla 2017.

875 It is called *Nachbargebiet or Umweltrelevante Regelungen*. Sparwasser, Engel & Voßkuhle 2003, § 1, margin number 29; Kloepfer 2016, § 1, margin number 61 and § 10. Where Bell et al 2017 conclude that this area is so relevant to the environment that it forms part of its core, this does not seem to be the general conclusion in German literature. However, Kloepfer 2016 contains a chapter on *Umweltbelange in der Raumplanung*: environmental interests in spatial planning.

However, when adopting the concept of environmental law as *Querschnittsrecht*, or cross-sectional law, as proposed by several authors, planning and building law should also be seen as environmental law. According to this concept, even legislation that does not have environmental protection as its primary goal can be counted as a part of the environmental law because it is in such a way connected to the environment that it will play a secondary role in the protection of the environment. The (primary) environmental legislation will also cover areas already covered by other legislation, but from a different starting point. For example, the legislation on planning and building will overlap with the legislation designed to protect nature and other areas of the environment.[876] This means that in many areas outside the core environmental law, the environmental importance can be seen; not only are environmental issues connected, also many other issues are connected to the environment.

6.2.2 Enforcement

With regard to enforcement in Germany, the terms *Vollzug* and *Vollstreckung* are used. Both terms can be translated into English as 'execution' and 'enforcement', which does not provide sufficient clarity on their meaning as the terms are often used together to indicate different aspects of enforcement. However, when looking at the context of the environmental and enforcement statutes in which they are used, it becomes clear that *Vollzug* should be interpreted as broader than *Vollstreckung*. Used in relation to legal rules, *Vollzug* is aimed at the execution of these rules, including its (administrative) enforcement, and supervision. In the environmental statutes, the term is used for execution, or solely for enforcement.

> For example, in the Federal Waste Act, the term *Vollzug* occurs once, referring to exceptional cases of enforcement by the federal army.[877] In the State Waste Act, *Vollzug* is prominently featured as a separate section of the Act, focussing on the enforcement, including the supervision, of the Act.[878] The broader interpretation of *Vollzug* can be found in the State Immissions Protection Act (*'Der Vollzug des Bundes-Immissionsschutzgesetzes und der zu seiner Durchführung erlassenen Rechtsverordnungen')* and furthermore in the Building Code (*'Vollzug dieses Gesetzbuchs erforderliche Massnahmen')*.[879]

876 See in particular section 4c Baugesetzbuch: "Die Gemeinden überwachen die erheblichen Umweltauswirkungen, die auf Grund der Durchführung der Bauleitpläne eintreten, um insbesondere unvorhergesehene nachteilige Auswirkungen frühzeitig zu ermitteln und in der Lage zu sein, geeignete Maßnahmen zur Abhilfe zu ergreifen. Sie nutzen dabei die im Umweltbericht nach Nummer 3 Buchstabe b der Anlage 1 zu diesem Gesetzbuch angegebenen Überwachungsmaßnahmen und die Informationen der Behörden nach § 4 Abs. 3."

877 Section 58 Bundesabfallgesetz.

878 Section 34-42a Landesabfallgesetz.

879 Section 14 LandesImmissionsschutzgesetz.

Making or issuing an administrative decision (*Verwaltungsakt*) which forms the legal basis or title for factual enforcement qualifies as *Vollzug von Regelungen*.[880] The administrative decision specifies the obligations of those that are in contravention of the rules. The term *Vollzug* includes or assumes the administrative *Vollstreckung* with regard to the administrative decision and its obligations, which in this context is the application of means of coercion to ensure compliance.[881] In other words, this concerns the factual enforcement. In the area of criminal offences, however, both the terms *Strafvollstreckung* and *Vollzug* are used to indicate the execution of legal judgments and orders imposed by a criminal court.[882] To indicate the prosecution and sanctioning of both criminal and regulatory offences, the terms prosecution (*Verfolgung)* and punishment (*Ahndung)* are used.[883]
When the term *Vollzug* is used in reference to European legislation, this commonly represents the broad interpretation of the term, indicating the implementation of European legislation, in particular of directives, into German national law. Occasionally, however, the term is used to indicate the enforcement of the legislation as part of the implementation.

6.3 Characteristics of the system: structure

6.3.1 Outline

Two prominent characteristics of the legal system for environmental protection and its enforcement in Germany are its fragmentation and sectorality. This is caused in particular by two aspects of the legal system. For one, the source of regulation, including the norms that are to be enforced, may be the Federation or the States, or both. The latter – a dual legislative competence of the Federation and the States – is usually the case in environmental law. Due to this, the relevant legislation is tiered, i.e. layered, also because the law has been laid down in different types of legislation.[884] Second, the legislation emanating from these two sources is very sectoral; individually addressing the environmental media, such as nature or water, the substances which may provide specific danger, such as genetically modified organisms or waste, and, moreover, the specific instruments of environmental protection, such as environmental

880 The term administrative decision is used here as comparable to the English term that serves to distinguish this instrument from informal administrative action. However, in using this term one must take note that the importance of this instrument in the three countries differs (in the Netherlands, this instrument is at the core of administrative law) as well as procedural requirements for the legal validity of this instrument (e.g. in the Netherlands to qualify administrative action as an administrative decision, it should be in writing, unless there is great urgency (article 1:3 GALA). This is not a requirement to the German Verwaltungsakt (§ 35 LandesVerwaltungsVerfahrensgesetz Nordrhein-Westfalen).
881 See the Verwaltungsvollstreckungsgesetz Nordrhein-Westfalen.
882 See e.g. the seventh book of the Code of Criminal Procedure (*Strafprozesordnung)* and the Criminal Execution Act (*Strafvollzugsgesetz*) on the execution of the sanction of imprisonment.
883 See e.g. section 35 and further Ordnungswidrigkeitengesetz and section 104a Strafgesetzbuch.
884 This will be discussed further below.

auditing or environmental impact assessment.[885] The pieces of legislation on enforcement are commonly contained in the specific environmental acts, as well as in general acts on the types of enforcement and on enforcement procedures. Moreover, this legislation is supplemented by administrative provisions on, in particular, the authorities for enforcement.[886] Therefore, in the regulation of enforcement there is less sectorality, but the fragmentation remains an important characteristic, among others, through the different sources of legislation and the different topics of the legislation involved. These characteristics will now be further examined.

6.3.2 Sources of legislation: the Federation and the States

Germany is a federal state. Inherent in this system is the division of power between the Federation (*Bund*) and the States (*Länder*). Environmental law and enforcement are regulated at both levels in several types of legislation. The Constitution (*Grundgesetz*) sets out the areas of competence for the Federation and the States.[887] The general rule in the division of competences is laid down in article 30 of the Constitution. Here it is stated that the exercise of federal competences and the implementation of federal duties is the business of the States, unless the Constitution states or allows differently. The legislative competence is in principle in the hands of the States as far as the Constitution has not conferred this power on the Federation (article 70 section 1). However, as follows from the consecutive articles in the Constitution, the Federation has legislative competence in quite a few areas. Moreover, in principle, the rule is that where federal legislation has been drafted, it takes precedence over legislation made by the States (article 31 Constitution).

The legislative competence of the Federation is divided into the areas of exclusive competence (*ausschließliche Gesetzgebung*) and concurrent competence (*konkurrierende Gesetzgebung*). The States have concurrent legislative competence, which they share with the Federation. Moreover, they have the competence to regulate the organisational structure of the authorities and administrative procedure for the application of legislation of Federal and/or of State origin as their own business (*als Eigene Angelegenheit*).[888]

In the areas of exclusive competence of the Federation, the States only have the power to make legislation where and in as far as they are explicitly empowered to

885 See also Schmidt, Kahl & Gärditz 2017, p. 2.

886 For more on the characteristics of the regulation of the enforcement organisation, see the next chapter.

887 Literally translated, the term *Grundgesetz* is Basic Law. After World War two there was much hesitation to call the newly drafted piece of legislation a constitution, or, *Verfassung*, due to the totalitarian and authoritarian regime that ruled Germany in the period just preceding it. Therefore, the piece was called the basic law. However, to avoid confusion and as it has the status within Germany as do that what are called constitutions in other countries, here, it will be referred to as 'the Constitution', Foster & Sule 2010, p. 50.

888 Section 83 and 84(1) Grundgesetz.

do so in a federal statute (article 71 Constitution). The exclusive competence of the Federation does not directly pertain to the area of the environment. The field of concurrent competence counts a great deal of environmental topics. In this field the States are competent to legislate as long and as far as the Federation has not used its legislative competence.[889] Concurrent legislative competence exists, as far as relevant for environmental protection, in the areas of waste management, air pollution, noise abatement, nature and countryside protection, town and country planning, and water management.[890] Moreover, it also includes the areas of fisheries, the protection of coasts, genetically modified organisms, the soil, animal protection, hunting and the economy.[891] Additionally, the Federation and the states may both draft legislation where this is necessary in the area of criminal law, including the area of regulatory offences (*Ordnungswidrigkeiten*).[892]

The Federation has made extensive use of its concurrent competence to enact Statutes on flora and fauna protection (*BundesNaturschutzGesetz*), waste management (*Krw-/Abfallgesetz*), environmental pollution/IPPC (*Bundesimmissionsschutzgesetz*) and building (*Baugesetzbuch)*. Moreover, a Criminal Code (*Strafgesetzbuch*), a Code of Criminal Procedure (*Strafprozeßordnungssgesetz*) and a Code on Regulatory Offences (*Ordnungswidrigkeitengesetz*) have been made on the basis of this competence.
However, even if the Federation has used its legislative competence in a certain environmental area, or with regard to a certain topic, in spite of or in absence of state regulation, the States may still make legislation on that area or topic. There are two possibilities for the States to do so. In fact, as the Federation, also the States have used their concurrent competence in the area of the environment quite extensively, with – at least – acts on the topics of nature protection, immissions, waste management, water management and spatial planning and building, as well as on regulatory offences.[893]

First, it may be that the Federation has not provided a full regulation of the area. This leaves the States' power to legislate on those areas intact. This may follow implicitly from the content of the federal acts, or the Federal Acts may explicitly refer to certain powers that the States will have as well as their power to make further reaching legislation, such as is the case for example in the Federal Nature Protection Act.[894]

889 'Nicht durch Gesetz Gebrauch gemacht hat'; article 72 section 1 Constitution.
890 Respectively article 74 section 1 number 24, 31 and 32 of the Constitution.
891 Section 74(3) nrs. 11, 17, 18, 20, 26, 28 and 30 of the Constitution. Also, Schmidt, Kahl & Gärditz 2017, p. 94.
892 Article 74 section 1 number 1 of the Constitution. As will be explained later, the regulatory offences are considered a part of criminal enforcement.
893 The interplay between federal and state legislation is discussed in where the concurrent competence has been used by both the federation and the states will be dealt with where necessary in the next chapters on inspection and sanctions.
894 See e.g. section 66(1) and (5) of the Federal Nature Protection Act.

Second, the States have a power of derogation with regard to certain explicitly provided topics.[895] This power means that the States may still provide derogatory legislation, despite previous legislation of the Federation, on several topics, bar the elements or issues considered to be *Abweichungsfesten Kernen*, which are core elements which may not be deviated from. The rule presents discretion for the States to make legislation in many areas of the environment. More specifically, the discretion exists with regard to the protection of nature and the countryside (although the general principles of nature and wildlife belong to the core elements), the area of town and country planning and that of water management.[896]
However, the derogated legislation made through this power does not have absolute force as the rule applies that the most recent law will replace the older law, no matter of what origin. The power to make derogatory legislation stays intact, which means that where a Federal act has replaced derogatory legislation by the States, they can replace it through new derogatory legislation.[897] Moreover, it may be stipulated by federal law that an existing federal regulation is replaced by legislation of the states where regulation by a uniform, federal Act applicable across all states is no longer necessary (article 72 section 4).

The competence for the Federation to legislate on topics already covered by state legislation also extends to the competence of the States to regulate the organisation of the authorities and administrative procedure involved in the application of legislation.[898] The administrative procedure in this respect refers not to the procedure of legal protection against decisions of the administration, but to the procedure involving administrative action. This competence is in principle in the hands of the States for the application of both federal and state legislation.[899]
However, where it concerns federal legislation, there are a few pieces of law which may dictate the States' administrative procedure. In particular, the general and federal Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) provides rules for the States when they are applying federal legislation.[900] Moreover, the federal environmental legislation itself may contain provisions on its application, which may be different from the existing law in the states. However, the States once again have the possibility

895 Section 72(3) Grundgesetz. This power was introduced as part of the Federalism reform (*Föderalismusreform*), in force from September 1, 2006. See the Gesetz zur Änderung des Grundgesetzes vom 28. August 2006, Bundesgesetzblatt Jahrgang 2006 Teil I Nr. 41, Ausgegeben zu Bonn am 31. August 2006.
896 Section 72(3) Grundgesetz. With regard to water management, excluded from the power of derogation are issues with regard to material or constructions.
897 See also Schmidt, Kahl & Gärditz 2017, p. 95-96.
898 Although Federal legislation may not transfer duties of communities or unions of communities, s. 84(2) Constitution.
899 Section 83 and 84(1) Grundgesetz.
900 More on this in section 6.3.6 below.

to depart from this.[901] In any case, the Federation may provide general administrative provisions, which provide further detail on the application of the legislation.[902] The State Administrative Procedure Act (*Landesverwaltungsverfahrensgesetz)* of Nordrhein-Westfalen deals with the administrative procedure where it concerns the state administration applying state legislation. The organisation, its characteristics and its competences will be dealt with in more detail in the next chapter.

Generally, the implementation of European legislation in Germany follows the above-mentioned allocation of legislative competences between the Federal government and the States.[903] When the Federation takes the responsibility for implementation only one federal transposition act is necessary, although the States may take individual and secondary implementation measures.[904] European Directives may also be implemented by the Federation, which has done so in many instances already to guarantee a uniform approach throughout the German legal system.

6.3.3 Tiered legislation

In the German legal system, the term *Gesetz* is used in two different senses. In Germany, as in the Netherlands, a distinction can be made with regard to formal legislation and, what is called, material legislation. Formal legislation (*Gesetz im formellen Sinn*) refers to statutes in the narrow sense, which is a form of law which has been enacted through a parliamentary process. It is called 'formal' to indicate that a particular procedure has been followed resulting in the specific form of law.[905] In other words, it concerns acts of parliament. Both statutes made by the Federation and statutes by the States fall into this category. Material legislation (*Gesetz im materiellen Sinn*) is a broader category. It can include any form of law which has been enacted by an authority competent to do so.[906] Besides statutes, the category also includes secondary general legislation. These are the *Rechtsverordnungen* (regulations) and *Satzungen* (bye-laws) of general application issued by legal persons under public law.[907]

The environmental law in Germany has been laid down in formal and material legislation of both the Federation and/or the States. The focus is on laying down the environmental norms and the enforcement in formal legislation, i.e. in parliamentary statutes. The federal government, ministers, and governments of the States can be attributed the power by Parliament to make statutory orders, or, regulations

901 But not from the general Federal Administrative Procedure Act.
902 Verwaltungsvorschriften.
903 OECD 2010, p. 141-142.
904 OECD 2010, p. 142.
905 Foster & Sule 2010, p. 37.
906 Foster & Sule 2010, p. 37.
907 Foster & Sule 2010, p. 37 and p. 251.

(*Rechtsverordnungen;* section 80 Constitution). Statutory orders/regulations are important in Germany as the statutes phrased in quite general terms will require more specific legislation to further concretise the legal rules.[908] The power to make statutory orders has to be attributed in formal legislation. Where this formal legislation provides for the possibility to pass this power on, the actual passing should be done by statutory ordinance.[909] Often, these instruments are used to implement amendments to statutes. Also statutory orders are used to implement European environment law.[910]
Potentially, statutory orders are a flexible instrument. However, there is a loss of flexibility where approval from the *Bundesrat*[911] is necessary in matters relating to the competences of the States, for example where it concerns the enforcement of federal statutes.[912]
Satzungen, or bye-laws are at the lowest level of legal norms.[913] They are considered secondary legislation if they are of general application. The power to make these rules is provided by federal or state statute, and quite often extended for environmental protection, for example, for regulating and enforcing waste water, or with regard to town and country planning development plans.[914]

Verwaltungsvorschriften are administrative provisions which provide guidelines for the decisions of authorities.[915] According to case law, these are administrative provisions that concretise statutory provisions.[916] These guidelines can, for example, contain further technical details on the exercise of statutes and orders in the form of Technical Instructions (*Technische Anleitungen*). Examples are the *Technische Anleitung Luft* (*TA-Luft*)[917] regarding air quality, *TA-Lärm* on noise pollution, and *TA Abfall* on waste disposal. These administrative provisions fully bind the administrative authorities. However, according to the principles of general administrative law, they cannot

908 See also Storm 2015, p. 32, marginnumber 68; Schlemminger & Martens 2004, p. 31.
909 Section 80 Abs. 1 Grundgesetz.
910 See e.g. Verordnung zur Umsetzung der Richtlinie 96/61/EG über die integrierte Vermeidung und Verminderung der Umweltverschmutzung - IVU-Richtlinie - im Wasserrecht (IVU-VO Wasser), 16 April 2004.
911 The Federal Council.
912 See section 80 Abs. 2 Grundgesetz.
913 Foster & Sule 2010, p. 252.
914 See section 161a of the Landeswassergesetz NRW: "In den Abwassersatzungen der Gemeinden kann geregelt werden, daß vorsätzliche oder fahrlässige Zuwiderhandlungen mit Geldbußen bis zu fünfzigtausend Euro geahndet werde" and section 10 Bundes Baugesetzbuch.
915 The competence of the Federation to make such provisions for the organisation and administrative procedure in the States when executing federal or state law is laid down in article 84(2) of the Constitution.
916 Schlemminger & Martens 2004, p. 33; BverwG, DVBl. 1986, 190, 196.
917 This specific technical Instruction is very recognisable through the judgments of the European Court of Justice of the same name (C-59/89 and C-361/88) which held that the implementation of directives that aim to provide rights for individuals must be done in provisions as to which the binding force is without doubt. See also Van de Gronden 1998, p. 59.

directly bind the operator of an installation.[918] Moreover, the provisions cannot be relied on by third parties. The ECJ has therefore disapproved of the use of these instruments to implement EU environmental law.[919]

Other forms of administrative rules are *Anordnungen*, *Runderlasse*, or *Richtlinien*, which can basically be translated as orders or directions. An example of these are the federal guidelines on the criminal procedure and the regulatory fines procedure and the order which provides a catalogue of fines for the punishment of regulatory offences in environmental law.[920]
Even though this type of rules does not have externally binding force, the rules do bind the administration internally. Moreover, the guidelines are fully subject to judicial review by the courts. In certain cases the rules may even produce external effect where there is a strong adopted practice on the basis of such guidelines. Even so, and although in Germany arguments are presented to admit administrative rules as an implementation instrument[921], the European Court of Justice has strengthened and continues to strengthen the tendency towards *Verrechtlichung*, which is the legal codification of obligations towards the environment in statutes and by regulations (*Rechtsverordnungen*).[922]
The tiers of the legal system therefore need to be recognized to gain a complete understanding of the substance of the environmental law and its enforcement. However, the main powers lie within the formal legislation, or, the statutes on the environmental law and on enforcement. To these we will now turn.

6.3.4 The development of environmental law: fragmented and sectoral

As in the Netherlands and England, environmental legislation did not develop in a uniform way. The main focus of the first environmental legislation was the removal of individual nuisances.[923] From the 1960s on this focus has expanded. Many environmental statutes now exist, besides provisions on the environment in statutes on other topics, such as construction law or technical safety law.[924]

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918 Schlemminger & Martens 2004, p. 33.
919 Council Directive 80/779/EEC of 15 July 1980 on air quality limit values for sulphur dioxide and suspended particulates; case ECJ, C-59/89 and C-361/88, Commission v. Germany.
920 Respectively, the Federal 'Richtlinien für das Straf- und Bussgeldverfahren', available at www.verwaltungsvorschriften-im-internet.de and the 'Bußgeldkatalog zur Ahndung von Ordnungswidrigkeiten im Bereich des Umweltschutze Bußgeldkatalog Umwelt.' RundErlass des Ministeriums für Umwelt und Naturschutz, Landwirtschaft und Verbraucherschutz v. 2.1.2002 - I - 3/406.51.00.
921 BverwGE, 55, 250 et seq.; Schlemminger & Martens 2004, p. 33; Storm 2015, p. 32-33. One argument is that the rules can be equated to a so called preliminary expert report. Furthermore, it is stated that the competence of the administration to specify norms, which can be assessed judicially for arbitrariness, can be derived from the division of powers for the purpose of investigation and evaluation of risks.
922 Storm 2015, p. 32-33.
923 Schlemminger & Martens 2004, p. 25.
924 Schlemminger & Martens 2004, p. 25.

After this timid beginning the development of environmental legislation strengthened from 1970 onwards. In the development of environmental legislation from this point four phases may be discerned. The first 'legislative' phase ran from 1970 to 1980.[925] It was a period in which the statutes were developed in reaction to the situations occurring that were impacting the environment.[926] The German Constitution was changed to include a Federal legislative competence in environmental law and many of the environmental statutes were created in this period.[927] Among them is the legislation in the core areas this research looks at, or, at least, their predecessors: the Waste (Removal) Act, which was the predecessor to the current Waste Act, the Federal Immissions Act, the Water Resources Act, and the Federal Nature Protection Act. Also, in this period environmental offences were introduced into the Criminal Code.

From 1980 to 1986 a phase that focused not on legislative but on administration took place, called the administrative phase.[928] In this phase, non-statutory concretization took place of the many environmental statutes drafted in the first legislative phase, by the drafting of statutory instruments, such as regulations, and through the enforcement thereof.
At the end of the 1980s a second legislative phase took place.[929] The catalyst for this second phase were the environmental disasters in Basel and Chernobyl in 1986 and the unification of Germany in 1990. Also the international and European developments in the area of environmental protection made it apparent that environmental legislation needed to be improved and expanded.[930] The trends in this second legislative phase, which continued until 2006, concern to a great extent the compression and refinement of environmental legislation, which includes the integration of sectoral legislation and the unification to solve discrepancies in this legislation. Moreover, there are trends to develop strategies to influence behaviour to protect the environment, such as economic incentives and self-regulation of businesses and to adopt a unifying approach to national, supranational and international environmental law.[931] With the federalism reform of September 2006 environmental law in Germany entered a new phase, that is also called the third legislative phase.[932] This phase continues to this day. The trend that has been the most prominent throughout all the phases described is that of the integration, compression and refinement of environmental legislation into an Environmental Code (*Umweltgesetzbuch*). In the third legislative phase this topic was finalised.

925 Storm 2015, p. 36.
926 Storm 2015, p. 36-38.
927 See Storm 2015, p. 36-38 for an overview.
928 Storm 2015, p. 38, no. 71-72.
929 Storm 2015, p. 38-40.
930 Storm 2015, p. 38-39.
931 Storm 2015, p. 34-36 and p. 45.
932 Storm 2015, p. 40-41.

The idea of a single Environmental Code has been discussed from as early on as 1976 when the federal government ordered research into the codification of environmental law. Since that time, the idea of such a code gained prominence, especially in academic circles, as an instrument to take on the fragmentation and sectorality of the existing legislation. In the 1990s this resulted in several drafts of an Environmental Code, for example a draft by academics and upon instigation of the government. These drafts primarily failed as the constitutional legislative competence did not match the proposed codification in one Code of many areas of environmental legislation.[933] This in particular was the case with regard to the first prominent proposal for the Code. This proposal of a first part of an Environmental Code was prepared and revised, ready for enactment by a commission of experts in 1997.[934] The Ministry of Justice and the Ministry of the Interior both had serious constitutional doubts with regard to the proposal as the Federation only had framework competence in the sphere of nature protection and landscape care, and water management.[935]

The federalism reform of 2006 created renewed possibilities for the Environmental Code with its shift in the relationship – and legislative competences – between the Federation and the States. Even though the Federation gained competences in the area of the environment, this did not mean that an Environmental Code was uncontroversial. There was still no full competence for all areas of environmental legislation for the Federation. In 2007, a new draft was presented by a group of experts to the government. This draft was – after numerous changes – accepted as a formal legislative proposal at the end of 2008. However, as political priorities changed, the draft ran aground in 2009.[936] To save some of the content of the Code, four individual acts were created respectively amended in 2010, among which the Federal Nature Act and the Water Management Act.[937] These will be discussed further below. Therefore, no Environmental Code is expected in the foreseeable future.

6.3.5 Specifics: the key legislation for the environment and its enforcement

6.3.5.1 The key legislation on environmental protection

There is no general statute comprehensively regulating the protection of the environment in Germany. In Germany, environmental law is indicated as cross-sectional (*Querschnittsrecht*), which means that since many areas of law and life have

933 Schmidt, Kahl & Gärditz 2017, p. 3-4.
934 See the translated version Environmental Code (*Umweltgesetzbuch* – UGB) Draft, Duncker & Humboldt Berlin 1998.
935 Schlemminger & Martens 2004, p. 27.
936 Schmidt, Kahl & Gärditz 2017, p. 8.
937 As part of the Neuordnung des Umweltrechts 2010; Schmidt, Kahl & Gärditz 2017, p. 8; Storm 2015, p. 40. See also www.umweltbundesamt.de/themen/nachhaltigkeit-strategien-internationales/umweltrecht/bessere-umweltrechtsetzung/umweltgesetzbuch#textpart-3 (last visited 1 June 2019).

environmental aspects, environmental law can be found in many parts of the legal system, not only in the specialised environmental statutes.[938] In spite of a similar basis structure, the environmental statutes still lack homogeneity in respect of, for example, the procedures for licensing and approval.
The specific environmental legislation is set up sectorally, relating to separate areas of the environmental arena. Pollution control with regard to immissions (IPPC) and with regard to waste are regulated in separate statutes. This is notable, as in the Netherlands and England, there is one statute on pollution control, including waste management. Besides this, there are separate statutes in the areas of water protection; nature protection; and spatial planning in Germany.

Above it was described that many of the provisions for environmental enforcement can be found in the myriad of specific environmental statutes and other legislation. This legislation has extended both from the Federation and/or the States. Primarily formal legislation has been used to lay down the environmental norms, as well as its enforcement.

Federation
As in 2006, several rules on the division of competences between the Federation and the States were changed, and as the proposal for a single Environmental Code has been abandoned, many of the federal acts on the environment have been relatively recently amended or entirely replaced. The majority of these renewals have come into force in their new form in 2010. The aim of these changes was generally to amend the constitutional basis of the acts and, for some acts more than others, to modernise and simplify the substance of the acts to encourage less fragmentation. However, this does not change the list of acts that have long been considered as part of the core of the environmental law in Germany.

The core environmental law can be found in the following nine statutes:
- Federal Immission Control Act (*BImSchG – Bundesimmissionsschutzgesetz*)
- Federal Nature Protection Act (*BNatSchG – Bundesnaturschutzgesetz*)
- Water Resources Act (*WHG – Wasser Haushaltgesetz*)
- Circular Economy and Waste Act (*KrW-/AbfG – Kreislaufwirtschafts- und Abfallgesetz*)
- Federal Soil Protection Act (*BbodSchG – Bundesbodenschutzgesetz*)
- Building Code (*Baugesetzbuch*)
- Spatial Planning Act (*ROG – Raumordnungsgesetz*)
- Greenhouse gas and Emissions Trade Act (*TEHG – Treibhausgas-EmissionsHandelsgesetz*)
- Environmental Damage Act (*Umweltschadengesetz*).

938 See e.g. Sparwasser, Engel & Voßkuhle 2003, p. 11; Kloepfer 2016, section 1; Schlemminger & Martens 2004, p. 27.

The sectorality of the environmental law still remains, as these acts cover specific areas of the environmental arena. The Federal Immission Control Act aims to protect people, animals, vegetation, land, water and the atmosphere, goods of cultural significance and other material goods from harmful influences on the environment (*schädlichen Umwelteinwirkungen*). Immissions are harmful influences including air pollution, noise, vibrations, light, heat, and radiation upon people, animals and plants, soil and water, the atmosphere as well as cultural goods and the like. Emissions are specified as the above mentioned harmful influences originating from an installation.[939] The Act furthermore aims to promote an integrated prevention and reduction of harmful influences in permits due to emissions in air, water and soil, to achieve a high level of protection of the environment. Furthermore, the aim is to protect the environment and to prevent it from danger, significant disadvantage or significant burden.[940]
The Water Management Act aims to protect water resources in a sustainable and integrated manner, as a part of nature, a basis of life for humans, nature and wildlife and a useful good. It applies in respect of surface, coastal and ground water. This Act was salvaged from the failed proposal for an Environmental Code in 2009. In comparison to the formerly existing Water Management Act, the 'new' Act attempts to textually streamline the provisions it contains, modernise certain aspects and to prevent through its content that the States will make or need to make comprehensive legislation, as this will cause legal fragmentation.[941]
The Circular Economy and Waste Act aims to stimulate the circular economy for the benefit of the natural resources and to ensure the removal of waste in harmony with the environment. This aim is also applied to the prevention and processing of waste.
The 'new' Federal Nature Protection Act, as it was supposed to have been contained in the Environmental Code, has not changed much compared to the previously existing Federal Nature Act. There is no increased integration with other areas of environmental protection. However, the aim of the act has changed. The Act aims to provide a comprehensive regime to protect the natural environment and landscape, although the states may provide their own legislation by derogation.[942] It is designed to protect the natural environment and landscape and contains rules in respect of countryside planning, the designation of protected areas, national and nature parks and the protection of specific animals and plants. For this purpose, many of the existing State legislation on nature protection was considered and consolidated into the Act.[943]

939 Section 3(1) and (2) BundesimmissionsGesetz.
940 Section 1 BundesimmissionsGesetz.
941 Schmidt, Kahl & Gärditz 2017, p. 201-202.
942 Section 39 and section 72(2) Bundesnaturgesetz.
943 Schmidt, Kahl & Gärditz 2017, p. 283.

The Federal Building Code regulates building works, while dictating the environmental protection interests to be considered therein. The Code determines that its task is to prepare and to direct the building use and other use of ground in the communities.[944] It provides requirements to building, restricted to sites for which a development plan has been approved by the local authorities under local bye-laws and other general requirements to permits and building.[945] The Spatial Planning Act partly implements several European Directives on environmental protection, including the Habitats and Birds Directives. The Act explicitly refers to the State spatial planning acts which are in force and the interplay between this federal act and those state acts.
The Greenhouse Gas and Emissions Trade Act provides the implementation to the European Directive on Emissions Trading, including a provision of 'naming and shaming' and a regulation of penalties for regulatory offences involving the emissions permit. The Environmental Damage Act, which gained force in 2007, implements the European Liability Directive into German law. This Act introduces a public law liability regime for ecological damage, which includes preventive and remediation powers, both for the owners of companies as well as the administrative authorities. It stands independently from a route towards private law liability through the Private Law Act or the Environmental Liability Act.[946]

Nordrhein-Westfalen

Where the States have the power to do so they may make legislation supplementing, concretising or replacing Federal legislation.[947] For nearly all federal environmental acts mentioned above, State legislation on the same topic exists in Nordrhein-Westfalen. This means that the content and aims of the federal law differs from that of the state law; that the Federation has not provided for an exhaustive regime and/or the Federal Act needs further concretisation. As provided earlier in this chapter, in concurrent competence, the States have competence unless the Federation has made legislation on the topic. However, the acts may also supplement each other. Both occur with regard to the environmental acts in the States.

Mirroring the list of acts mentioned above, but then for the State of Nordrhein-Westfalen, the following list of core acts for environmental protection can be made:

- State Immission Control Act (*Landesimmissionsschutzgesetz*)
- State Landscape Act (*Landeslandschaftsgesetz*), replaced end of 2016 by the State Nature Protection Act (*Landesnaturschutzgesetz*)[948]

944 Section 1 Baugesetzbuch.
945 Also Foster & Sule 2010, p. 291.
946 Schmidt, Kahl & Gärditz 2017, p. 44.
947 Although this may misrepresent the intention of the federalism reform of 2006, which aimed to give States the priority over the Federation, the factual result is described here. Moreover, the power referred to implies the concurrent competence of the States. It does not pertain to their exclusive competence.
948 See www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument?typ=P&Id=MMV16/3043&quelle=alle&wm=1&action=anzeigen (last visited 1 June 2019).

- State Water Act (*Landeswassergesetz*)
- State Waste Act (*Landesabfallgesetz*)
- State Soil Protection Act (*Landesbodenschutzgesetz*)
- State Planning Act (*Landesplanungsgesetz*)[949]
- State Building Ordinance/Regulation (*Landesbauordnung*).

These pieces of legislation cover roughly the same terrain as their Federal counter parts. The interplay between the federal and state acts in specific cases will be discussed, where necessary, when the specific provisions relevant for the enforcement of environmental protection are examined in the next chapters.

6.3.5.2 The key enforcement Acts

Due to the division of legislative competences between the Federation and the States and the law-making that has taken place by them, as with environmental law, many Acts are also involved with its enforcement.

Federation

The Federation has made the following main enforcement acts:

- Criminal Code (*Strafgesetzbuch*)
- Code of Criminal Procedure (*Strafprozeßordnung*)
- Federal Regulatory Offences Act (*Bundesordnungswidrigkeitengesetz*)
- Administrative Procedure Act (*Verwaltungsverfahrensgesetz*).

In the Criminal Code the penalisations for criminal offences are laid down, including environmental criminal offences, and more general provisions on the elements of criminal offences and of the possible sanctions in general. The procedure for the investigation and prosecution of crimes, including the imposition of criminal sanctions is laid down in the Code of Criminal Procedure. The Federal Regulatory Offences Act determines all elements of the enforcement of regulatory offences, including the procedure for the enforcement and rules on the cooperation between the administrative and the criminal authorities. The Federation has provided its own legislation on the procedure for the administration in its Administrative Procedure Act. This Act is to be followed by the state administration when they carry out federal legislation.

949 Full name is: *Gesetz zur Neufassung des Landesplanungsgesetz NRW*.

The penalisations of environmental contraventions are laid down in the federal environmental statutes. The contraventions that have not been criminalised, which are dealt with by the administration, may be addressed by the federation in its environmental legislation, although the enforcement of such contraventions fall for the most part outside its general Administrative Procedure Act. The States exercise the Administrative Procedure Act on order of the Federation.[950]

Nordrhein-Westfalen

The main enforcement legislation in the states is:

- Administrative Enforcement Act (*Verwaltungsvollstreckungsgesetz NRW*)
- Administrative Procedure Act (*Verwaltungsverfahrensgesetz NRW*)
- Police Act (*Polizeigesetz NRW*)
- Police Organisation Act (*Polizeiorganisationsgesetz NRW*)
- Regulatory Authorities Act (*Ordnungsbehördengesetz NRW*).

Nordrhein-Westfalen has covered the enforcement by the administrative authorities of non-criminal administrative contraventions, through its Administrative Enforcement Act.[951] This Act is supplemented by the more general rules of the Administrative Procedure Act. Moreover, powers of the administrative authorities with regard to administrative non-criminal contraventions are laid down in the Police Act. This Act does not provide penalisations but lays down powers of inspection and sanctions for contraventions of administrative legislation. The Police Organisation Act and the Regulatory Authorities Act moreover regulate the enforcement of averting danger (*Gefahrenabwehr*).

All the above-mentioned Acts do not contain a description of non-compliance with legislation. These penalisations can be found in the environmental legislation itself. There is no specific statute on the enforcement of regulatory offences that is similar to the Act that exists at federal level. However, the state environmental legislation may contain penalisations of certain non-compliance as regulatory offences. For criminal offences and the environment, the states do not have in place rules on the penalisation, nor of the enforcement and procedure. Again, this primarily exists in Federal legislation.

The State Organisation Act (*Landesorganisationsgesetz)* of Nordrhein-Westfalen dictates the general organisation of the administration, including that of the administrative enforcement authorities. However, this act is not listed above as other acts are more important where it concerns the enforcement of environmental law. The acts on the organisation of the regulatory authorities – these are the administrative

950 *Ausfuhrung in auftrag des Bundes*.

951 The administrative authorities are regulatory authorities. In the following these terms are used interchangeably.

authorities[952] – and the police organisation contain more important provisions for environmental enforcement.

6.4 Characteristics of the system: substance

6.4.1 Introduction

The German system for the public enforcement of environmental law is quite broad. There exist three types of enforcement with their own provisions on the organisation and separate sanctions. These are the enforcement of, in particular, administrative decisions[953] (*Verwaltungsvollstreckung*) through police and regulatory law (*Polizei- und Ordnungsrecht*); the enforcement of administrative regulatory offences through administrative criminal law (*Vollzug von Ordnungswidrigkeiten*); and the enforcement of criminal offences through criminal law (*Vollzug von Straftaten*).

> In advance on the discussion in the next chapter, it is interesting to note from the viewpoint of the enforcement organisation that these systems are enforced by the administrative authorities and the police for *Verwaltungsvollstreckung*, and the regulatory offences; and the criminal authorities, including the police, for criminal offences.[954]

These three systems have been based, respectively, on the notion of averting danger (*Gefahrenabwehr*), administrative wrongdoing (*Verwaltungsunrecht*), and social-ethical wrongdoing (*Sozial-ethisches Unrecht*). The three systems are also defined as administrative preventive enforcement, administrative repressive enforcement and criminal repressive enforcement.[955] In the next sections, the characteristics of these three systems are further explored. The table below provides an overview of the systems for the public enforcement of environmental law in Nordrhein-Westfalen, Germany.

The public enforcement of environmental law in NRW, Germany	
• Administrative non-compliance *Gefahrenabwehr*	*Verwaltungsvollstreckung* (*Polizei- und Ordnungsrecht*)
• Regulatory offences *Ordnungswidrigkeiten*	*Vollzug*
• Criminal offences *Straftäte*	*Vollzug*

952 These terms can be used interchangeably when dealing with the enforcement of environmental law.
953 As used to apply the broad norms in legislation.
954 This will be further described in the next chapter.
955 Sina 2015, p. 15.

6.4.2 The prevention of danger: *Gefahrenabwehr*

The environment is regulated by the administrative authorities through general and specific rules.[956] Specific rules that are imposed upon the regulated (one-way) are laid down in administrative decisions (*Verwaltungsakte*).[957] Administrative decisions, such as licences or permits, are available to these authorities in light of the regulation of the risks to the environment and for the protection against these risks.[958] This means that administrative decisions are used to curb the dangers that may come with e.g. exploiting a business in processing dangerous waste. This risk regulation aims for the precaution against danger, or, in German, *Gefahrenvorsorge* or *Gefahrenvorbeugung*. This is not yet enforcement.

> The system of *Gefahrenabwehr* itself is very broad as two types of danger are covered by it. The two types of danger covered by *Gefahrenabwehr* are abstract danger and concrete danger. Abstract danger is a danger that has a probability of occurrence on the basis of general experience as to a general set of facts and circumstances. This type of danger is also called 'pre-preventive'.[959] Concrete danger is not a more likely type of danger, but is considered to exist on the basis of facts and circumstances, as to which time and place is clear or can be established.[960] The difference between these two types of danger is the establishment of the risk: on the basis of a large amount of cases, respectively, in a specific case.[961]

If the instruments used are not complied with by the regulated, this means that the risk or danger for the environment ensuing from action or inaction subjected to those instruments is no longer directed or contained. Therefore, in case of non-compliance the risk or danger for the environment becomes more or quite likely. This prompts the enforcement competence and the powers of the administrative authorities in the area of *Gefahrenabwehr*, which can be translated as the prevention of danger.[962]
It is called 'preventive', as opposed to the 'repressive' label that is placed upon the prosecution and sanctions for the administrative regulatory offences and criminal offences – which will be discussed in the next sections. Even when the danger has

956 General rules are *Rechtsverordnungen* and *Satzungen*; specific one-way rules are *Verwaltungsakte* and *sonstiger rechterhebliche Willenserklärungen*; two-sided specific rules are *Verwaltungsverträge*. See the diagramme on p. 188 of Maurer 2017. Besides this, the environment is also regulated by norms contained in, for example, the environmental statutes.
957 See further chapter 3 of Maurer 2017.
958 Knemeyer 2007, p. 43-44.
959 Knemeyer 2007, p. 54.
960 Knemeyer 2007, p. 68.
961 Gusy 2017, p. 62.
962 See e.g. Gusy 2017, p. 62.

already set in, due to non-compliance, the enforcement in the area of *Gefahrenabwehr* is still called 'preventive'.
The system of *Gefahrenabwehr* cannot reach its goals fully without the exercise of *Verwaltungsvollstreckung*. This enforcement of the obligations following from public environmental regulation by administrative coercion, or *Verwaltungszwang*, is part of the system of averting danger established in police and regulatory law (*Polizei- und Ordnungsrecht*) of the States. *Verwaltungsvollstreckung* will be further discussed in chapter 8.

6.4.3 Administrative criminal law: regulatory offences

As can also be seen in the Netherlands and in England, it has become more common for the administrative authorities to be competent to impose sanctions with a punitive goal for a specific type of offences: the environmental regulatory offences (*Ordnungswidrigkeiten*). However, the typical aspect of the German system is that this competence has been established as a separate area of law that must be distinguished from administrative preventive enforcement and from criminal enforcement, in particular in respect of its safeguards and procedural provisions.[963] As will be explained below, the regulatory offences system borrows elements from both administrative enforcement and criminal enforcement with regard its organisation and sanctions.
A regulatory offence is a breach of the law, whether culpable or not, which fulfils the elements of an offence (*actus reus*) as provided in legal provisions and which can be sanctioned with a monetary fine. This definition is laid down in the Regulatory Offences Act (*Ordnungswidrigkeitengesetz*).[964]

The system of regulatory offences was introduced in Germany in the middle of the twentieth century. Regulatory offences (*Ordnungswidrigkeiten*) were created as an alternative to criminal offences. The aim was to limit the amount of criminal offences so that the criminal law would only apply to those cases as to which it was truly necessary. The criminal sanctions were to only apply in cases as to which the most severe reaction by the public authorities was appropriate and necessary, as *ultima ratio*.[965] This necessity was deemed absent where there was no ethical condemnation of the non-compliance with public legal orders or prohibitions – the presence of which would require the label of a criminal offence – and the protection of legal rights could be dealt with by the administration.[966] The ethical condemnation is derived from the type of wrongdoing through the breach of public legal norms.

963 This will be further explored below and in the next chapters. Interestingly, there are authors that classify regulatory offences as criminal law in the broad sense (while the European Court of Human Rights has classified it as punitive administrative law, but not as criminal law); see Kloepfer & Heger 2014, p. 2, no. 2.
964 Section 1 Ordnungswidrigkeitengesetz.
965 See, for example, Sina 2015, p. 15. More on this necessity principle in the next section.
966 Göhler 2017, p. 1.

Criminal offences result in socio-ethical wrongdoing, whereas regulatory offences provide administrative wrongdoing. This means that the wrongdoing caused by regulatory offences is much weaker than that of criminal offences.[967] Accordingly, breaches of the law penalised as regulatory offences were considered not as grave as those penalised as criminal offences. This distinction in types of wrongdoing is the basis of the development of a separate regulatory offences regime, outside the criminal law.

> At the time of the conception of the Criminal Code of 1871, the code had contained as criminal offences all the contraventions that were governed by governmental sanctions. This is because the distinction between criminal and administrative punishable non-compliance (*Ordnungsrecht*) was considered impossible to make clearly. This distinction had been debated since the middle ages, according to the notes of the German Criminal Code of 1871.[968] Shortly after the coming into force of that Criminal Code, it no longer became possible to include all contraventions as criminal offences.[969]

Already at the beginning of the 1900s, the first reform efforts to protect the criminal law from misuse and devaluation were started. First in the proposal in 1936, many contraventions were unloaded from the Criminal Code that were to be assembled in a regulatory criminal code (*Ordnungsstrafgesetzbuch)*.[970] With the coming into focus of the first Regulatory Offences Act in 1952 the separation between regulatory and criminal offences was completed.
The administrative authorities were appointed as competent for the exercise of enforcement powers for regulatory offences to truly show the separation between the two types of offences. For the purpose of regulatory offences the authorities were named prosecuting authorities (*Verfolgungsbehörden*).[971]
The separation was considered strict at first. However, since 1952 the coordination between the two types of offences has been made possible, e.g. by making provision for the fact that an instance of non-compliance can be a regulatory offence and a criminal offence.

967 Also, Mitsch 2005, p. 151.
968 '..ist von den Rechtsschulen des Mittelalters bis herab zu unserer Zeit … der Versuch gemacht worden, die Grenzlinie zwischen dem kriminellen und polizeilich Strafbaren zu finden. Auch in der neuesten Zeit ist es nicht gelungen, jenen, die Juristen in Verzweiflung setzenden Unterschied mit Sicherheit und Gleichmässigheit durchzuführen.', Göhler 2017, p. 1.
969 See Göhler 2017, p. 1.
970 Mitsch 2018, p. 1, number 11 and further.
971 See further chapter 7 and 8.

> This was implemented with the revision of the act in 1968 at which point also an important decriminalisation of traffic legislation took place.[972] Much of the elements of the current Regulatory Offences Act were laid down in this 1968 incarnation. Further revisions took place in 1974, 1986 and 1998.[973]

The current Regulatory Offences Act contains general and procedural provisions on these offences. The penalisation of contraventions as regulatory offences is generally provided in the specific (environmental) statutes, although the Regulatory Offences Act does contain a few that could not be placed within one of the special acts.[974] The development through the years of the Regulatory Offences Act and the framework of regulatory offences provisions in the area-specific statutes was spurred on by the strong growth of statutory orders and prohibitions, which were connected to administrative justice. The enforcement of many areas of law, including that of environmental protection, was moved from the Criminal Code to regulatory offences regulation by the legislator through classifying contraventions as regulatory offences in specific statutes, such as the environmental statutes. The system of regulatory offences comes into play where the legislator has specified in the specific statutes, such as the environmental statutes, that specific instances of non-compliance are such offences.

This strong growth also garnered criticism. As was the case with regard to the Criminal Code, it was considered that the scope of the Regulatory Offences Act had become too large.[975] It was considered that, as a result, this has lead to the erosion of the basis of the distinction between criminal offences and regulatory offences, of the different types of wrongdoing and the difference in the gravity of breaches of the law.[976] Regulatory offences do not necessarily only concern the lowest stage of wrongdoing, whereas there are criminal actions which may not have such a strong punishability.[977] This can also, in part, be contributed to the characteristics of the current criminal law, which commonly penalises environmental offences, among others, as abstract endangerment – behavioural – offences.[978]

In any case, there are limits the legislator has to take into account in its assessment of the regulation of breaches of the law. In any case, the basic principle that the criminal law is *ultima ratio* has been strengthened by the development of the regulatory offences law. This also means that the criminal law is subsidiary to other types of

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972 The European Court of Human Rights' case Özturk dealt with the regulatory traffic offences as decriminalised by the Act and developed from that its case law on the punitive character of non-criminal sanctions. See ECtHR 8544/79, Özturk v. Germany [21 February 1984] ECLI:NL:XX:1984:AC9954.

973 See further Göhler 2017, p. 4.

974 Such as a contravention due to the giving of a false name.

975 See Göhler 2017, p. 5.

976 Mitsch 2005, p. 18.

977 Ostendorf 2001; Mitsch 2005, p. 19, his footnote 38; Bundesverfassungsgericht 45, 272 (290).

978 More on this in chapter 8.

enforcement, including that of regulatory offences. Furthermore, principles apply to the choice of criminal penalisation, in particular, necessity and proportionality. It is even considered that in the assessment of criminal versus other enforcement, the legislator will weigh pragmatic issues, such as the simpler procedure of monetary offences or the expertise of administrative authorities.[979] For example, the rationale of the legislator behind the move of the decriminalisation of traffic offences was the effective functioning of the courts and relieving the individual of the burden a criminal prosecution would bring with it.[980]

The law on regulatory offences is positioned close to the criminal law and has adopted many of its standards. Some of the provisions of the Criminal Code are either directly or indirectly applicable to regulatory offences. Moreover, many of the general provisions on the elements of the regulatory offences in the Regulatory Offences Act are in fact identical to provisions in the general part of the Criminal Code.

> Moreover, the provisions with regard to the legal protection contained in criminal law, is directly applicable to the legal protection of the regulated upon whom a regulatory penalty has been imposed. Appeals against the regulatory fine are to be made before the criminal courts and not the administrative courts.

This means that although the regulatory offences have been taken out of the criminal law, many of its former elements still apply, even if this is via another set of rules. Therefore, the regulatory offences (and its enforcement) are a hybrid.
Differences between regulatory offences and criminal offences lie in the range of sanctions available, the terminology of the available sanctions, the authorities that are competent to pursue the offences, and the discretion of the authorities with regard to the exercise of their competence in this respect.
First, the regulatory offences' sanctions consist of just one primary instrument: the pecuniary fine. Second, while the sanctions for criminal offences also include the obligation for the offender to pay a monetary sum, quite similar to that for the regulatory offences, this is called a monetary punishment (*Geldstrafe)*, instead of a monetary fine (*Geldbusse)*.
Third, as was already mentioned, regulatory offences are pursued by the administrative authorities, which are then referred to as prosecuting authorities (*Verfolgungsbehörden*). In contrast, the Public Prosecutor (*Staatsanwalt*) and the criminal courts pursue the criminal offences.[981]

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979 Jescheck & Weigend 2013, section 7 V 3 b. Also Mitsch 2005, p. 20.
980 ECtHR 8544/79, Özturk v. Germany [21 February 1984] ECLI:NL:XX:1984:AC9954, consideration 52.
981 The organisation, including, for example, the tasks of the police for environmental enforcement, is further described in the next chapter.

Lastly, with regard to regulatory offences, the authorities may consider to impose a sanction ('*kann geahndet werden*'), whereas the penalisations of criminal offences require punishment of the offences ('*wird bestraft').* Therefore, despite the fact that regulatory offences are regulated by standards which also apply to criminal law, this does not apply to the principle of mandatory prosecution as is prevalent with regard to criminal offences (*Legalitätsprinzip*). Instead, a principle of discretionary prosecution (*Opportunitätsprinzip*) is applicable to regulatory offences.[982]
The result of the creation of this 'alternative' system of enforcement is that the regulatory authorities have available to them two separate systems of enforcement.[983] The enforcement instruments available through these two systems each have their own character: the *Gefahrenabwehr* instruments are reparatory; sanctions for regulatory offences primarily punitive.

6.4.4 The enforcement of criminal offences

The criminal enforcement is the third type of enforcement in Germany. Criminal offences are described in the Criminal Code (*Strafgesetzbuch*) and in the different environmental laws. The former are described as primary criminal law, or *Kernstrafrecht*; the latter as secondary criminal law, or *Nebenstrafrech*t.[984] Environmental criminal law emanating from Europe is generally implemented in secondary criminal law.[985]

6.4.4.1 The development of environmental criminal law

The Criminal Code (*Strafgesetzbuch*) contains the penalisations of a set of environmental contraventions as criminal offences. Until 1980, the Criminal Code did not contain any environmental offences descriptions. This changed as a result of a set of incidents involving the environment, which took place during the 1970s and 1980s, such as a toxic waste scandal in Germany that was uncovered in 1974. Extremely toxic industrial waste had been deposited at household waste plants in four federal states for many years, causing cyanide toxins to flow into the ground water, severely damaging the environment and endangering the life and health of people. At that time, the public prosecutor held that not much could be done with criminal

982 This will be further explained in chapter 8.
983 As we will see in the next chapter on the organisation of environmental enforcement, criminal enforcement is in the hands of the State Public Prosecutor (not the administrative authorities) and the criminal courts. The combination of the two system of enforcement by the administrative authorities is further discussed in chapter 8 on sanctions.
984 Kloepfer & Heger 2014, p. 4-9; Sina 2015 describes that Germany has a sophisticated set of rules regarding environmental crimes, consisting mainly of a chapter on offences against the environment in the Criminal Code (primary criminal law, *Kernstraftrecht*), and of various environmental offences spread over different environmental laws (secondary criminal law, *Nebenstrafrecht*).
985 It was proposed to implement them within the Criminal Code, in other words in primary criminal law, however, the government has decided not to do so. It is considered by Kloepfer & Heger 2014 that generally the fact that European criminal law is implemented in the secondary criminal law will not detract from the *effet utile* of the European law as long as it is enforced similarly to the primary criminal law. See Kloepfer & Heger 2014, no. 20-21, p. 8-9.

enforcement.[986] In the media describing the scandal, it could be seen that at the time everyone was very aware of the limitations of the absence of environmental criminal offences.

The legislator would also acknowledge that civil and administrative environmental protection was not sufficient for the severe cases.[987] As mentioned in the previous section, conduct is penalized as a criminal offence if this is considered necessary, by the legislature, as the only means with which to protect society against that conduct in an adequate way (*Strafbedürftigkeit*).[988] As a result, provisions on environmental criminal offences were formulated. These were first included in the main environmental statutes. However, as the relationship between these different statutes was difficult and caused discrepancies, the environmental offences were finally incorporated into the Criminal Code in 1980.[989]

This incorporation served the concentration of criminal offences and their harmonisation. Moreover, it aimed to communicate the value of environment protection and the social-damage of acts breaching the protection, to strengthen the outward impact, or, effectiveness of its criminal protection.[990] Unfortunately, these aims were not reached as the provisions establishing the environmental offences were deemed too complicated – too technical – to enforce. A reform in 1994 did not fully remedy this.[991]

> The amendments to the Criminal Code of 1980 and 1994 supplemented and amended the Criminal Code by making provision for the punishment of the pollution of water, soil and air, noise and waste pollution, the operation of installations without a license and the handling of hazardous waste without a license and for serious environmental offences in the Criminal Code. In chapter 8, the penalization of environmental criminal offences in the Criminal Code and in the different environmental laws will be further examined.

6.4.4.2 The crisis of environmental criminal law

Much has been said and written in academic literature in Germany about the state and status of German environmental criminal law.

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986 See Der Spiegel 1974, nr. 44: the article cited the Public prosecutor saying that '*strafrechtlich nicht allzuviel raus kommt*'.
987 Knaut 2005, p. 16.
988 Jescheck & Weigend 2013, p. 50; Sammüller-Gradl 2014, p. 30-35.
989 Through the *Gesetz zur Bekämpfung der Umweltkriminalität* (the Act to Combat Environmental Crime) of 28 March 1980 *(Federal Law Gazette, BGBl I, page 373)*
990 Knaut 2005, p. 17.
991 Reform of 27 June 1994 *(Federal Law Gazette, BGBl. I, page 1994);* Knaut 2005, p. 17.

> There has been a significant decrease in the interest in the topic of environmental criminal law, not only of the enforcement but also in academic literature from the 2000s onwards.[992] However, since 2012 several books on environmental criminal law have appeared once more, among others, on the implementation of the Directive on Environmental Criminal Law in German law.[993] However, the fundamental criticism of the environmental criminal law has remained the same throughout the years, as presented here.

The German environmental criminal law has been the subject of much criticism since its inception, in particular ever since the incorporation of environmental offences in the Criminal Code.[994] This criticism pertains to what is called the crisis of the environmental criminal law (*die Krise des Umweltstrafrechts*).[995] This will now be further described.

There are two elements of the environmental criminal law that are generally considered to contribute to this crisis – the first is structural and rather dogmatic; the second emanates from practice.
The first element that is termed a structural weakness is the rather dogmatic issue of the administrative dependency (*Verwaltungsakzessorietät*) of the environmental criminal offences.[996] The environmental criminal offences are most commonly formulated as abstract endangerment provisions. This means that the provisions deem certain behaviour an offence, rather than penalise the result of certain action. This behaviour is commonly administratively dependent, or, in other words, consists of non-compliance with administrative norms – orders or prohibitions in legislation or administrative decisions – which thereby results in a criminal offence. This means that the protection offered by the criminal enforcement extends not directly to the environment, but to the protection of the administrative norms. The critics put forward that this therefore means that the administration, which is in charge of making such orders and prohibitions on the basis of environmental legislation, in essence is able to determine the scope of the environmental criminal offences by its action or inaction.[997] In this aspect lies also a danger of the authorities and industry being entangled and thereby closer than comfortable for administrative decision-making.[998]

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992 See Pfohl 2012, at p. 308; Saliger 2012, p. 1 and further.
993 See e.g. Saliger 2012; Saliger 2015; Kloepfer & Heger 2014; Kloepfer & Heger 2015. The implementation of this Directive has created a caesure in the discussion on environmental criminal law in Germany through the fact that it shows that all Member States will have to adhere to European criminal law. This means that such law for environmental cases is not merely a prototype, that penalisations are Europeanised and that the focus returns on environmental criminal law, Saliger 2015, p. 9-10. The discussion flared up in particular due to the discussion in the Constitutional Court of the compatibility of this European Directive with the German Constitution.
994 Kloepfer & Heger 2014, p. 47.
995 See, for example, Prittwitz 1993; Kim 2004.
996 See, for example, Saliger 2015, p. 16.
997 Kim 2004, p. 150.
998 Kim 2004, p. 150.

Moreover, it is considered that the administrative norms may also be unnecessarily complicated and difficult to understand.[999] This carries through in the penalisations in criminal law and thereby makes it hard to prosecute and adjudicate. This is the case, moreover, since many of the norms are also technically complex. Connected to this is the lack of expertise with the criminal courts, which is also connected to the second element that contributes to the crisis of environmental law.

The second element contributing to the crisis of environmental criminal law is considered its biggest problem. This is the symbolic functioning of the environmental criminal law. This element refers to the lack of application of criminal enforcement for environmental offences. As some authors note, environmental criminal enforcement may be out of fashion.[1000] This element of the symbolic functioning of the environmental criminal law is also called the enforcement deficit (*Vollzugsdefizit)*.[1001] This will be now be explored.

6.4.4.3 Enforcement deficit

Recent statistics on criminal prosecution show that the amount of prosecutions and sanctioning environmental criminal offences has been declining. It is considered that the criminal law may not be able to live up to the expectations of what it can achieve. Some of the reasons for this are the low probability of detection, low prosecution rates, low sentences, the lack of the possibility to impose criminal sanctions on legal persons, and the fact that the criminal environmental law requires specific expertise.[1002] Several of these aspects are discussed further below.

First, the probability of detection and establishing a contravention is considered not to be very high.[1003] In Germany, it is considered that the enforcement deficit is, among others, caused by a significant decrease in work force for investigations as well as a clear lack of quality in terms of knowledge of environmental offences within the police authorities.[1004]
Moreover, it is considered that a low probability of detection is caused by a lack of knowledge (*Wissendefizit*) by the criminal authorities, including the investigators and the prosecutor.[1005] This in spite of the fact that the investigation and prosecution of criminal offences is a duty in Germany on the basis of what is called the legality

999 Pfohl 2012, p. 311.
1000 See for example Pfohl 2015, p. 79.
1001 Sina 2015, p. 12; Saliger 2012, p. 60-61.
1002 Kloepfer & Heger 2014, p. 145 and further.
1003 See e.g. Kloepfer & Heger 2014, p. 79; Schwinge 1995, p. 5; Knaut 2005, p. 122. The detection percentage was 76 percent in 1996 and went down to 56.7 percent in 1998. Also *Eisenberg,* Kriminologie, section 47, nr. 58.
1004 Pfohl 2015, p. 79.
1005 Kloepfer & Heger 2014, p. 47.

principle.[1006] In fact, it is considered that the administrative authorities are more likely to have knowledge of contraventions that may be offences. There is, in fact, a duty for the administrative authorities to give a case to the State Public Prosecutor when an administrative regulatory offence is a criminal offence.[1007] It has been proposed since the 1980s, and currently still, to expand this notification duty to all of environmental law, where it concerns intermediately grave or grave offences.[1008]

> The solution that is proposed is that the administrative authorities are imposed a notification duty (*Anzeigepflicht*), so that breaches of law that are intermediately grave or grave offences are obligatorily notified to the criminal authorities.[1009] Besides the proximity of the administrative authorities to offences, it is also considered that these authorities are in particular appropriate to engage in finding offences due to the just mentioned administrative dependency. Administrative authorities will, so it is stated, have better knowledge which behaviour that may cause environmental damage is actually warranted due to permits or other administrative instruments issued, that allow such behaviour.[1010] It is considered that administrative authorities have a head start with regard to information on offences. In fact, there is already a notification duty for administrative authorities for a small area within environmental protection, namely for issues involving nuclear substances.[1011] However, this solution has not (yet) been accepted by the legislator.

Second, the fact that prosecution and criminal sentencing does not take place very often is deemed to impact the environmental criminal law, and in particular its preventative effect.[1012] Indeed, statistics on crime and criminal prosecution show that criminal proceedings have strongly decreased since the 2000s.[1013] There have not been a great many criminal cases on environmental offences since the incorporation of these offences in the Criminal Code. Convictions happen only in a small number of cases,

1006 This principle is laid down in the Criminal Code (section 152 StPO) and will be further discussed in the next chapter.
1007 As established in section 41(1) *Ordnungswidrigkeitengesetz*.. Kloepfer & Heger 2014, p. 47.
1008 Knaut 2005, p. 94-95; Kloepfer & Heger 2014, p. 46-48. It seems, however, that the administrative authorities do not regularly refer cases of criminal offences – that are not also administrative regulatory offences – to the appropriate criminal authorities. It seems that the administrative authorities only account for less than a quarter of the referrals to the criminal prosecutors. Numbers from the 1990s at least show a 25 percent rate of referrals by administrative authorities and a 42 percent rate of individuals, see Knaut 2005, p. 95; Kaiser 1996, section 75, no. 8. Also Klupfel 2016.
1009 See Kloepfer & Heger 2014, p. 47-48; Knaut 2005, p. 94-97.
1010 Kloepfer & Heger 2014, p. 47.
1011 Knaut 2005, p. 95; Kloepfer & Heger 2014, p. 47.
1012 Kloepfer & Heger 2014, p. 79.
1013 See Tröltzsch, Gerstetter & Mederake 2018; Klüpfel 2016; Sina 2015, p. 11; Kloepfer & Heger 2014, p. 79; Pfohl 2012, with tables on the number of proceedings at p. 308 and p. 312-313.

and when this happens the sanctions imposed are commonly very low.[1014] Recently, in particular in environmental waste law there have been several big criminal procedures resulting in imprisonment of longer than two years, which is rare for environmental criminal proceedings.[1015] However, these cases seem the exception. Moreover, third, the industrial large scale polluters were not commonly punished.[1016] Connected to this is the lack of a possibility to hold legal persons criminally liable for criminal offences in Germany.

> Supporters of criminal liability for legal persons point to the fact that in many Member States legal persons can be held criminally liable, and therefore, bringing this concept into German criminal law would Europeanise and increase harmony between the systems in the Member States. Also, supporters bring forward that criminal liability for legal persons will have a strong preventive effect.[1017] Others contest the idea that a sanction for a legal person can have preventive effect as a sanction will generally be a pecuniary fine and therefore can simply be calculated into the books as a cost factor in the business of the legal person. Moreover, opponents point to the tension between criminal sanctions for a legal person, the requirement of guilt and the motivation of criminal sanctions for private persons.[1018]

The above-mentioned aspects will be further discussed in the context of the public enforcement organisation and the sanctions available to it, in the next two chapters.

6.5 Conclusion

This chapter has aimed to give insight into several important aspects of the structure and substance of environmental protection regulation in Nordrhein-Westfalen, Germany, and the public enforcement thereof. As can be seen, the legislation for environmental protection and enforcement is quite fragmented and layered, with both federal and state legislation as important sources of the system of environmental enforcement. Three systems of enforcement exist for the protection of the environment. There has been much criticism of the enforcement, particularly the criminal enforcement of environmental law. This system of enforcement has been deemed to have a crisis and an enforcement deficit. The next two chapters will examine in more detail the organisation and the sanctions available for the public enforcement of environmental

1014 Tröltzsch, Gerstetter & Mederake 2018; Klüpfel 2016.
1015 Pfohl 2015, p. 79.
1016 Kim 2004, p. 153. This circumstance is also referred to as the alibi-function of environmental criminal law.
1017 Kloepfer & Heger 2015, p. 23-24; Kloepfer & Heger 2014, p. 53-58.
1018 Saliger 2015, p. 24.

non-compliance. chapter 7 will focus on the enforcement organisation; chapter 8 will look at the sanctions available to this organisation.

Chapter 7 Organisation of Public Enforcement of Environmental Law in Nordrhein-Westfalen, Germany

7.1 Overview; characteristics of the enforcement organisation

7.1.1 Overview

As described in the previous chapter, there are three types of public enforcement of environmental law in Nordrhein-Westfalen, Germany: administrative preventive enforcement; administrative repressive enforcement (regulatory offences); and, criminal repressive enforcement (criminal offences). The main authorities in Germany that are relevant in this respect are the regulatory authorities (*Ordnungsbehörden*); the police authorities (*Polizeibehörden*); the Public Prosecutor (*Staatsanwaltschaft*); and, the criminal courts (*Strafgerichte*).

> The regulatory authorities are administrative authorities (*Verwaltungsbehörden*). Moreover, as will be explained later, these authorities are also called prosecuting authorities (*Verfolgungsbehörden*), where they are in charge of the enforcement of regulatory offences.[1019] Below, this will be further explained.

Administrative preventive enforcement and administrative repressive enforcement are both in the hands of the regulatory authorities. Criminal repressive enforcement is in the hands of the criminal authorities, specifically the Public Prosecutor and the criminal courts. The police authorities play a role in all three types of enforcement. These main authorities for the public enforcement of environmental law in NRW, Germany are listed in the table below.[1020]

Main authorities for the public enforcement of environmental law

- Regulatory authorities (*Ordnungsbehörden*)
- Police authorities (*Polizeibehörden*)
- Public Prosecutor (*Staatsanwaltschaft*)
- Criminal courts (*Strafgerichte*)

In this chapter, these main authorities are further described. First, in this section, the characteristics of the enforcement organisation are described. After this, the authorities and their enforcement competence are described in separate sections. First, the regulatory authorities are described (7.2), followed by the police authorities

1019 See, for example, § 35 section 1 and section 2 of the Federal *Ordnungswidrigkeitengesetz*.
1020 Note that EU law and national law are enforced by the same organisation.

(7.3). Next, the Public Prosecutor (7.4) and the criminal courts are described (7.5). Following that, the coordination and cooperation between the enforcement authorities is further described (7.6). Finally, the organisation is evaluated in light of the evaluative framework set out in chapter 2 (7.7). The chapter closes with the findings of that evaluation (7.8).

7.1.2 Characteristics of the enforcement organisation

Several characteristics can be discerned with regard to the competent authorities for environmental enforcement that specifically pertain to the regulatory authorities, impacting their effectiveness.[1021] This applies both to their capacity as authorities for administrative 'preventive' enforcement (*Gefahrenabwehr)*, and as prosecuting authorities for regulatory offences.[1022]

> Also with regard to the criminal enforcement organisation certain aspects pertaining to the organisation impact its effectiveness. These aspects primarily concern practical aspects. In particular, recent criticism is that there seems to be a lack of qualified staff as well as technical and financial resources. According to studies, the decrease in reported environmental crimes – the number of environmental investigations, prosecutions, and convictions – corresponds to a decrease in funding for environmental investigations undertaken by authorities.[1023]

The key characteristic is the fragmentation (*Zersplitterung*) of the organisation and, consequently, a lack of transparency of the organisation and its competences for environmental enforcement.[1024] A characteristic that, in a certain way, counters this fragmentation and lack of transparency is the broad remit of the competent authorities across the several types of enforcement possible in Germany. These characteristics will now be consecutively explained further. These two characteristics and their constitutive elements are visualised in the following table. Its substance is further discussed below.

1021 That applies both to their capacity as authorities for administrative 'preventive' enforcement (*Gefahrenabwehr)*, and as prosecuting authorities for regulatory offences.

1022 See in this section below.

1023 Klüpfel 2016; Knoepfler & Heger 2014; Knoepfler & Heger 2015; Sina 2015. These practical aspects are not further discussed here.

1024 See also Bauer et al 2007, p. 119.

Characteristics of the organisation

- Fragmentation of the organisation
  - Legislation appointing the organisation is tiered and sectoral
    - federal and state
    - formal and material environmental legislation
  - The administration is tiered and decentralised
- The broad remit of competence of the enforcement authorities

7.1.2.1 Fragmentation of the organisation

The fragmentation of the organisation is contributed to, first, by the layers of the legislation in which the organisation is appointed as competent for the area of environmental protection and enforcement, and, second, through the manner in which the administration of environmental enforcement is organised on paper.[1025]

Legislation appointing the organisation is tiered and sectoral

As to the first element, the tiers in the legislation are the result of the following.[1026] Firstly, the regulation of the organisation for enforcement may emanate from the federation and from the state. Secondly, although there are several statutes pertaining generally to the authorities that are competent for environmental enforcement, the appointment of these authorities can most commonly be found in the different, sectoral pieces of legislation on environmental protection. Moreover, the appointment of the authorities takes place in both formal as well as material environmental legislation, from statutes to orders. The sectorality of the environmental legislation also in part influences the number of authorities that seem involved at first sight, as the environmental statutes quite often refer to authorities by a name which is specific to their role for that statute. Commonly, the authorities declared competent in this manner incorporate several different sector-specific roles (with corresponding names) in one organisation, and, thus, are also competent for other environmental – and other – tasks. Even so, none of the competent authorities were or are competent for all environmental legislation.

Administration is tiered and decentralised

The tiered organisation is the second element that contributes to a certain fragmentation of that organisation. These tiers are apparent in the fact that the organisation is competent at different levels of the State of Nordrhein-Westfalen; from local to central state government. The decentralisation will be explored in further

1025 The general characteristics of the system of environmental law and enforcement were explained in the previous chapter.
1026 As has already been discussed in the previous chapter.

detail in section 7.2.1 of this chapter. Previous to 2007, the types of authorities could roughly be distinguished in specialised authorities for environmental enforcement – environment agencies[1027] – and authorities with broader tasks, also covering many other aspects of public administration, at different levels of the administrative organisation. The specialised authorities were considered to contribute to a high quality of environmental enforcement and its effectiveness and were seen as an example in other German States.[1028]

In spite of these positive aspects, the expediency of the organisation as a whole was not considered high. This was due to the fact that, for the same case or person/business, it was possible that nearly twenty authorities were competent at the same time.[1029] Moreover, where it did not concern the same case or person/business, still many authorities had separate tasks in the environmental arena, and the distinction between their tasks was considered unnatural.[1030] Therefore, different authorities and types of authorities are in place, at different levels of the State and for different environmental areas. These characteristics of the organisation have contributed to a lack of transparency of the organisation and its competences, not only for the regulated but also for the regulators themselves.

Since 2007, a large reform of the administrative organisation for environmental protection (*Umweltverwaltung*) has aimed to increase the transparency and effectiveness of the organisation. One of the developments as a result of this reform was the abolishment of the specialised authorities. The enforcement that was previously the domain of these specialised authorities was put in the hands of the 'regular' administration. This will be further described in section 7.2.3 below.

7.1.2.2 The broad remit of the enforcement authorities

Besides these characteristics, another was mentioned above, namely the important characteristic of the broad remit of several authorities for environmental enforcement. The regulatory authorities and criminal authorities both have access to several types of public enforcement for environmental protection. The regulatory authorities have available to them two different types of enforcement: *Gefahrenabwehr*, and the enforcement of regulatory offences. The former is aimed at reparation; the latter is aimed at punishment.[1031]

The police authorities are not only conferred enforcement tasks with regard to

1027 *Staatliche Umweltämter*.

1028 Bauer et al 2007, p. 117-118.

1029 Bauer et al 2007, p. 114 and further.

1030 For example, the technical environmental protection and the 'green' environmental protection were in separate hands, the same was the case with regard to certain environmental permits and the enforcement of these permits. Bauer et al 2007, p. 114 a.f.

1031 For the characteristics of regulatory offences, see also the previous chapter.

Gefahrenabwehr, but also with respect to regulatory offences, and criminal offences. Moreover, the Public Prosecutor and the criminal courts, which primarily deal with the enforcement of criminal offences, may also enforce regulatory offences in specific cases. Below, the characteristics of the environmental enforcement authorities, and their remit will be further described.

7.2 Regulatory authorities; prosecuting authorities

7.2.1 Overview

As mentioned, in Nordrhein-Westfalen, Germany, regulatory authorities (*Ordnungsbehörden*) are in charge of the enforcement with regard to environmental protection through (reparatory) instruments for the aversion of danger (*Gefahrenabwehr*).[1032] These regulatory authorities – which are administrative authorities (*Verwaltungsbehörden*) – are also the primary authorities to prosecute and impose (punitive) sanctions for regulatory offences.[1033] This will be explained further below.

Decentralised administration

To make sense of the decentralised administrative organisation in Nordrhein-Westfalen, and, specifically, to understand which authorities are attributed the competences in the area of environmental enforcement, the following must be kept in mind.

For environmental protection in Nordrhein-Westfalen, the general administrative organisation has three tiers. All three tiers have a certain competence for the enforcement of environmental law. The State Department for Nature, Environment and Consumer Protection (*Landesamt für Natur, Umwelt und Verbraucherschutz*) is considered the competent 'highest' environmental protection authority (*oberste Umweltschutzbehörde*).[1034] This Department has some enforcement (rest)competence, but is not the main authority for the enforcement of environmental law.

The provincial governments of Nordrhein-Westfalen (*Bezirksregierungen*) have a broader enforcement competence.[1035] These provincial governments are the higher state environmental protection authorities (*obere Umweltschutzbehörden)*.[1036]

1032 Section 1(1) *Ordnungsbehördengesetz NRW*.

1033 Section 36(1) *Ordnungswidrigkeitengesetz*.

1034 Section 1(2) *Zuständigkeitsverordnung Umwelt NRW*. In the general Act on the State Organisation of NRW, from which the Zuständigkeitsverordnung Umwelt NRW deviates, the State Department is considered a higher state authority, section 6 *Landesorganisationsgesetz*.

1035 More on the specific enforcement competence of the provincial governments in section 7.2.2 of this chapter.

1036 Section 1(2) *Zuständigkeitsverordnung Umwelt NRW*; although the general Act on State Organisation of Nordrhein-Westfalen distinguishes the *Bezirksregierungen* as the middle state authorities (*Landesmittelbehörden*), section 7-8 Landesorganisationsgesetz. The Zuständigkeitsverordnung Umwelt NRW deviates from this Act.

> It must be noted that the term provinces, used above to indicate certain administrative authorities in Nordrhein-Westfalen must be differentiated from, for example, the provinces in the Netherlands, the administration of which has been democratically chosen.

There are five provincial governments in Nordrhein-Westfalen.[1037] The provinces consist of local entities of different make up, which are commonly described as *Kommunen*. They are the bottom tier of the State organisation for environmental protection: the lower environmental protection authorities (*untere Umweltschutzbehörden*).[1038] To these authorities belong the districts (*Kreise*), and the independent cities (*Kreisfreie Städte)*, which are cities that form independent administrations within a province, instead of belonging to a district.[1039]
There are 31 districts, and 22 independent cities in Nordrhein-Westfalen.[1040] The districts and independent cities are generally indicated as the district regulatory authorities (*Kreisordnungsbehörden*).[1041] These districts and independent cities have core competence for environmental enforcement – both for *Gefahrenabwehr*, and the enforcement of regulatory offences.[1042]
The districts are formed by alliances of municipalities and cities (*Gemeinden* and *Städte*).[1043] The municipalities are sub-entities of the districts and are the most local entities.[1044] These municipalities may obtain tasks and competences conferred upon the districts when the former are of significant scale, in terms of their number of inhabitants.[1045]

> It must be noted here that the authorities that are called municipalities above are not similar to the municipalities that exist in the Netherlands. They are generally much smaller. There are 396 such municipalities in Nordrhein-Westfalen.[1046]

1037 These are Arnsberg, Detmold, Düsseldorf, Köln and Münster.
1038 Although there is one more special authority, namely the mountain authority (*Bergbehörde*), which is formed by the provincial government of Arnsberg; section 1(2) Zuständigkeitsverordnung Umwelt NRW. See for the reference to 1(2) of the Zuständigkeitsverordnung and the Kommunen: www.umwelt.nrw.de/ministerium-verwaltung/aufbau-und-aufgaben/zustaendigkeiten-umweltverwaltung/ (last visited 1 June 2019).
1039 See section 1(2) of the *Zuständigkeitsverordnung Umwelt NRW*. There are thirty *Kreise* and twenty-two *Kreisfreie Städte* in Nordrhein-Westfalen. Falling outside these categories is the city-region of Aachen. This city-region is usually equated to *Kreise*.
1040 This is the situation as of 1 June 2019.
1041 See also section 3 *Ordnungsbehördengesetz Nordrhein-Westfalen* and Annex 2B II *Zuständigkeitsverordnung Umwelt NRW*.
1042 More on the specific enforcement competence of the districts and independent cities in section 7.2.2 of this chapter.
1043 Section 1(2) *Kreisordnung Nordrhein-Westfalen.*
1044 As explained above, the State Regulatory Authorities Act refers to these *Gemeinden* and *Städte* as local regulatory authorities (*örtliche Ordnungsbehörden*), see section 3(1) of the *Ordnungsbehördengesetz Nordrhein-Westfalen*.
1045 The municipalities that are viable for this are the large district cities, *Großen kreisangehörigen Städte* and the middle large district cities, *Mittleren kreisangehörigen Städte*. They are appointed as such upon request of automatically when they exceed the amount of 50 000 or 60 000, or 20 000 or 25 000 inhabitants respectively for a period of three consecutive reference dates. See section 4 *Gemeindeordnung NRW*.
1046 This number includes the cities that are similar to municipalities.

These municipalities can therefore exercise certain powers in the area of environmental protection, including enforcement.[1047] They are appointed, for example, as building supervision authorities in the State Building Regulation.[1048] Besides this, all municipalities have a (small) role where the authorities for specific areas of environmental protection and enforcement in Nordrhein-Westfalen, mentioned above, are not competent.[1049] In those cases, the municipalities are called local regulatory authorities (*örtliche Ordnungsbehörden*).[1050]

> In principle, the municipalities are the core institutions of local government and the lowest level of the administration. These local authorities are awarded a right to self-government through their democratically chosen bodies. This right has been laid down in the Federal Constitution and in the State Constitution of Nordrhein-Westfalen.[1051] The municipalities have what could be called rest competence in the area of environmental enforcement.

In the table below an overview is given of the different regulatory authorities that are competent for environmental enforcement – administrative enforcement, including the enforcement of regulatory offences – in Nordrhein-Westfalen, Germany.

Administrative authorities competent for environmental enforcement in NRW[1052]

- State department for Nature, Environment and Consumer Protection (*oberste Umweltschutzbehörde*)
- Provincial governments (*obere Umweltschutzbehörden*)
- Districts and independent cities (*untere Umweltschutzbehörden*)
- Municipalities (including cities, as *örtliche Ordnungsbehörden*).

Overview of the attribution of competences

The competence of the regulatory authorities for environmental protection is laid down in the general Regulatory Authorities Act NRW (*Ordnungsbehördengesetz NRW*),[1053] in connection with the environmental statutes, and the Statutory Order on the Competences for Environment of Nordrhein-Westfalen (*Zuständigkeitsverordnung Umwelt NRW*).

1047 According to section 3(1) and section 5 *Ordnungsbehördengesetz NRW.*
1048 Section 60(1) and 62 *Landesbauordnung*.
1049 See e.g. Annex II to the *Zuständigkeitsverordnung Umwelt NRW*.
1050 According to section 3(1) and section 5 *Ordnungsbehördengesetz NRW*.
1051 Section 28(2)(2) *Grundgesetz* and section 78(1) *Landesverfassungsgesetz Nordrhein-Westfalen*.
1052 As we will see below, this enforcement includes administrative enforcement and the enforcement of regulatory offences.
1053 Section 1(1) dictates that *Gefahrenabwehr* is in the hands of the *Ordnungsbehörden*, or regulatory authorities.

The competence of the regulatory authorities for the prosecution and sanctioning of regulatory offences is based on the Federal Regulatory Offences Act (*Ordnungswidrigkeitengesetz*), connected with the environmental statutes, and the Statutory Order on the Competences for Environment of Nordrhein-Westfalen (*Zuständigkeitsverordnung Umwelt NRW*).[1054]

> The Order covers most areas of environmental protection, except for the areas of spatial planning and building and nature protection – including species and habitats protection. For the competence in those areas, the layered environmental legislation provides the specifics. For nature protection, the attribution of competences for environmental enforcement is more or less similar to that in the Order. The districts and district free cities (*Kreise und Kreisfreie Städte*) are generally competent as the lower nature protection authorities.[1055]

Importantly, the Statutory Order has priority over the general Regulatory Authorities Act NRW, as the latter determines that its attribution of competences to specific authorities only applies where other laws and regulations do not do this. Therefore, for environmental enforcement, the Statutory Order is the prime source of attribution of competences to the regulatory authorities. At several important points, the Statutory Order deviates from that Act.[1056]

> For example, the Regulatory Authorities Act determines in sections 1 and 3 that the local regulatory authorities (*örtliche Ordnungsbehörden*), i.e. the municipalities and cities, are competent for *Gefahrenabwehr*. In deviation from this, the Statutory Order on the Competences for the Environment specifies that in principle the authorities that are hierarchically above these local regulatory authorities – namely, the districts and district free cities – are competent.[1057]

The authorities that are appointed as competent for environmental enforcement are named differently in each of the pieces of environmental legislation. These specific names indicate specifically the duties and powers of the authorities for a specific environmental sector or purpose.

1054 See section 7 of the *Zuständigkeitsverordnung Umwelt NRW*. The Federal Regulatory Offences Act (*Ordnungwidrigkeitengesetz*) confers the primary competence to prosecute and punish regulatory offences on the administrative authorities (*Verwaltungsbehörden*, § 35 section 1 and section 2). The general term 'administrative authorities' is used to distinguish this type of authorities from the judicial bodies: the Public Prosecutor and the criminal courts.

1055 See, for example, section 2(1) of the Nature Protection Act (*Naturschutzgesetz NRW).*

1056 As allowed by section 1(2) of the *Ordnungsbehördengesetz NRW.*

1057 Section 1(3) of the Statutory Order refers to the *untere Umweltschutzbehörden,* which are (per section 1(2)(3) the districts and independent cities, whereas the State Act refers to the local regulatory authorities, which are the *Gemeinden* and *Städte*, which are competent according to section 3(1) of the Regulatory Authorities Act NRW.

The regulatory authorities are referred to, for example, as the permit authority (*Genehmigungsbehörde*)[1058]; the water management authority (*Gewässeraufsichtsbehörde*)[1059]; the building supervision authority (*Bauaufsichtsbehörde*)[1060]; and the waste management authority (*Abfallwirtschaftsbehörde*).[1061] The Statutory Order refers to the administrative authorities as environmental protection authority (*Umweltschutzbehörde*).[1062]

Moreover, usually, for environmental protection, the authorities are considered *Sonderbehörden*, which can be translated as special regulatory authorities, as they have a specific task of *Gefahrenabwehr* for this area.[1063]

As will be explained in section 7.2.3 on the reform of the administrative organisation for environmental protection, the previously existing independent environment agencies have been abolished. These were the only authorities separate and independent from the regular administration. Other authorities with names specifying their function – as seen in the examples mentioned above – are not independent, but are 'regular' administrative authorities labelled as specific authorities.

The competences of the regulatory authorities are now discussed further.

7.2.2 Enforcement competence of the regulatory authorities

Verwaltungsvollstreckung; Gefahrenabwehr

As previously described, administrative decisions, such as licences or permits, are part of what is called risk regulation by the regulatory authorities with regard to the environment. This risk regulation is commonly called the precaution against danger (*Gefahrenvorsorge* or *Gefahrenvorbeugung*). When the regulatory decisions are not complied with by the regulated, this means that this danger becomes likely (*Abwehr konkreter Gefahr*). This prompts the competence of the regulatory authorities in the area of *Gefahrenabwehr*, or prevention of danger.[1064] As mentioned in the

1058 Section 8a *Bundesimmissionsschutzgesetz*.
1059 Section 101 *Bundeswasserhaushaltsgesetz*. See also *Wasserbehörde*, section 19 of that Act.
1060 Section 60 *LandesBauordnung*.
1061 Section 34 *LandesabfallGesetz*.
1062 Section 1 *Zuständigkeitsverordnung Umwelt NRW*.
1063 Section 12(1) *Ordnungsbehördengesetz NRW* and see e.g. section 14(3) *Landesimmissionsschutzgesetz*; Gusy 2017, nr. 67-70. However, previous to the reform of 2007 whereby the environment agencies were usurped by the provincial governments, these environment agencies were considered *Sonderbehörden* and not as authorities that were part of the 'regular' administration, see Bauer et al 2007, p. 114-117.
1064 See e.g. Gusy 2017, nr. 110.

previous chapter, the specific instruments that the authorities may impose are called administrative enforcement (*Verwaltungsvollstreckung).* These are further discussed in the next chapter.
The main rule of competence for *Gefahrenabwehr* is that the regulatory authorities that can take administrative decisions in the area of environmental protection, such as licences, are also competent for their enforcement. As described, these authorities are, in general, the districts and independent cities.[1065] However, for installations, and for all aspects of waste management, soil protection and water protection related to these installations, the provincial governments (*Bezirksregierungen*) are the competent authority.[1066]

> Also to this rule, exceptions exist. Commonly, for installations, these exceptions indicate competences for the districts and independent cities (the lower environmental authorities), the municipalities as *örtliche Ordnungsbehörden* or, the highest environmental authority (the State Department).[1067]

The authorities appoint one of their officers to inspect the compliance with environmental law, including administrative decisions. Often, the officers appointed for the administrative inspection of non-compliance are also competent to investigate regulatory offences.[1068] The officers of the regulatory authorities that carry out inspection tasks and the officers that impose sanctions may be the same; moreover, these officers will generally have some expertise in the area of the environment, as commonly the department of environmental permits and licences is also in charge of their enforcement.
The police authorities may also be competent for inspection (and investigation). However, the primary competence in this respect lies with the regulatory authorities, with the police as a back-up authority in case of great urgency or where the regulatory authorities do not have the resources to act. For more on the competences of the police authorities, see section 7.3 below.

Regulatory offences
As described, the regulatory authorities are also the primary enforcement authorities in the area of environmental regulatory offences (*Ordnungswidrigkeiten*). This includes the investigation, prosecution, and sanctioning of these offences.[1069] As mentioned, the regulatory authorities are called prosecuting authorities (*Verfolgungsbehörden*) in connection to regulatory offences. In spite of the term prosecution, therefore, these

1065 Section 1(3) of the *Zuständigkeitsverordnung Umwelt NRW*.
1066 Section 2(1) Zu*ständigkeitsverordnung Umwelt NRW*.
1067 See further the *Zuständigkeitsverordnung Umwelt NRW*.
1068 Göhler 2017, § 59, margin number 3. See further below.
1069 See Section 7 *Zuständigkeitsverordnung Umwelt NRW.* See also section 35 of the *Ordnungswidrigkeitengesetz*; section 31 *Ordnungsbehördengesetz NRW*; Göhler 2017, § 35, margin number 4.

authorities have the primary competence to impose sanctions for regulatory offences.[1070] The competence to investigate regulatory offences is inherent in the competence to prosecute them.[1071] Investigative proceedings start as soon as the competent regulatory authority takes a measure that is clearly aimed to act against someone in a repressive manner, also when the suspect is still unknown.[1072] This happens at the discretion of the administrative authority.

The authorities appoint one of their officers to investigate these offences. Often, the officers appointed for the administrative inspection of non-compliance that is also a regulatory offence are also competent to investigate these offences.[1073] The officials thus appointed carry out the investigation in name of the competent authority. The investigative officers may also prepare a decision to initiate a regulatory offences procedure after the investigative procedure has been closed.[1074] Having regard to the responsibility of taking such a decision, the authority will generally confer this responsibility to the head of the authority, his deputy or a specially qualified higher official.[1075]

The organisation of the competences within the authorities

In the law establishing the above-mentioned competences of the authorities, no formal requirement is laid down to separate the establishment of norms by the regulatory authorities, i.e. regulatory functions, for example in the form of permits, and the enforcement by these administrative authorities. Also no formal, statutory distinction is made with regard to the exercise of the powers for the supervision and sanctioning of *Gefahrenabwehr*, or the investigation, prosecution and sanctioning of regulatory offences. By law therefore, the exercise of the enforcement powers of the regulatory authorities may all be in one hand.

The law does make provision for certain regulatory authorities to make departments within their organisation with specific tasks.[1076] In view of this, most local authorities have organised their tasks in such a way that there is a specific department for environmental protection, with separate units within this department for specific environmental topics, such as nature protection, immissions protection, and waste management.[1077] Such a department commonly includes the enforcement by the regulatory authorities.

1070 As will be described later, the criminal authorities may under certain circumstances impose sanctions for regulatory offences.

1071 Section 35 of the *Ordnungswidrigkeitengesetz*; Göhler 2017, § 35, margin number 4.

1072 Tekst und Kommentar StPO, Einleitung, margin number 60.

1073 Göhler 2017, § 59, margin number 3.

1074 Obesten LandesGericht Düsseldorf Verk.Mitt. 1971, 80; OLG Zweibrüicken VRS 40, 458, Göhler 2017, § 59, margin number 3.

1075 Obesten LandesGericht Düsseldorf Verk.Mitt. 1971, 80; OLG Zweibrüicken VRS 40, 458, Göhler 2017, § 59, margin number 3.

1076 *Dezernate*, see, for example, section 8(4) of the *Landesorganisationsgesetz NRW* for the provincial governments.

1077 See, for example, the organisation of environmental protection in the *Bezirksregierung Münster*, available at www.bezreg-muenster.de/de/wir_ueber_uns/organisation/abteilungen_5/index.html (last visited 1 June 2019).

7.2.3 Detail: reform of the competent administrative authorities

As explained previously, a reform of the administrative authorities has taken place in Nordrhein-Westfalen, for the benefit of the transparency of the (enforcement) organisation and, also, for financial reasons.[1078] This reform was connected to the fragmentation of the legislation appointing administrative authorities for environmental protection, including enforcement. This will be further described in the following.

Until 2007, the primary lower authorities for environmental protection, including enforcement, were the State Environment Agencies (*Staatliche Umweltämter*).[1079] These agencies were independent special authorities, which were organisationally independent from the local or district administration. Geographically, the area of competence of the agencies covered the area of the provinces. However, these agencies did not have full competence in the area of environmental protection and its enforcement. This meant that concurrence of competences existed between these agencies, the districts, the independent cities and the provincial governments. This concurrence was the result – as explained previously – of the fragmentation of the legislation governing the administrative competences of the authorities in relation to environmental protection. This fragmentation also led to a lack of transparency on the competences in certain areas of environmental protection.[1080] The fragmentation of legislation, the resulting concurrence of competences and the lack of clarity for the regulated and for the regulators themselves on those competences lead to the ineffectiveness of environmental protection in Nordrhein-Westfalen.

To counter this, the organisational structure of the environmental protection and enforcement in Nordrhein-Westfalen was the subject of reform operations from 2006 onwards.[1081] This reform highlighted the priority for more transparency and less bureaucracy through the redevelopment of the structure of the administration. The approach to the reforms has aimed to straighten out and increase the transparency of the competent authorities, through (further) decentralising the environmental protection duties and competences.

1078 Sachverständigenrat für Umweltfragen, *Umweltverwaltungen unter Reformdruck: Herausforderungen, Strategien, und Perspektiven. Sondergutachten,* Berlin: Erich Schmidt Verlag 2007. Available at www.umweltrat.de/SharedDocs/Downloads/DE/02_Sondergutachten/2004_2008/2007_SG_Umweltverwaltungen_unter_Reformdruck_Buch.html (last visited 1 June 2019); see also Sina 2015, p. 63.

1079 Section 9(1)-(2) of the *Landesorganisationsgesetz NRW*, previous to the amendment by the *Gesetz zur Straffung der Behördenstruktur in Nordrhein-Westfalen (*Ausgabe 2006 Nr. 38 vom 29.12.2006 Seite 619 bis 634), gaining force on 1 January 2007.

1080 Bauer et al 2007, p. 109 and further. Also, Sachverständigenrat für Umweltfragen, *Umweltverwaltungen unter Reformdruck: Herausforderungen, Strategien, und Perspektiven. Sondergutachten,* Berlin: Erich Schmidt Verlag 2007. Available at www.umweltrat.de/SharedDocs/Downloads/DE/02_Sondergutachten/2004_2008/2007_SG_Umweltverwaltungen_unter_Reformdruck_Buch.html (last visited 1 June 2019).

1081 See description of the history of these reforms in Nordrhein-Westfalen: Bauer et al 2007, p. 116-119.

Starting at the end of 2006, the specialist administration of State Environmental Agencies that was in place was reformed into a more general administration in a sizeable reform of the administration organisation in Nordrhein-Westfalen. At the end of 2006, the government of Nordrhein-Westfalen approved an Act for the streamlining of the structure of the authorities.[1082] This Act can be considered the first step in the reform of the administrative organisation in Nordrhein-Westfalen.
As mentioned, the administrative organisation in place for environmental protection until then existed of a large set of administrative entities, many of which were specialised in areas of environmental protection. These specialised entities, the State Environmental Agencies, were independent authorities, which were solely specialised in the area of environmental protection, including enforcement. This specialised administration was amended per January 2007 so that the existing ten State Environment Agencies were absorbed into the five provincial governments (*Bezirksregierungen*).[1083]

The second step of the reform took place in January 2008, as a result of the coming into force of the Act on the Municipalisation of the tasks of environmental law.[1084] This Act effectuated a new Regulation on the Competences for Environmental Protection for Nordrhein-Westfalen.[1085] In this Regulation the competences for application and enforcement of environmental law are mainly conferred upon the lower environment authorities, namely the districts (*Kreise*) and cities not belonging to districts (*Kreisfreien Städte*).[1086] This has meant that these authorities have gained a lot of new powers, for example in the area of immissions protection. In this specific area, the local authorities have gained the competence over about seventy percent of the installations that fall under immissions law, with the remaining thirty percent covered by the provincial authorities (*Bezirksregierungen*).[1087] The responsibilities of the districts and the municipalities in the area of waste management and of the municipalities in the area of wastewater remain the same.[1088]

1082 *Gesetz zur Straffung der Behördenstruktur in Nordrhein-Westfalen* (Ausgabe 2006 Nr. 38 vom 29.12.2006 Seite 619 bis 634); *Zweites Gesetz zur Straffung der Behördenstruktur in Nordrhein-Westfalen* (01.01.2008; Ausgabe vom 30 Oktober 2007 GV. NRW. S. 482; SGV. NRW. 113).

1083 The provision that ensures this specifically for the State Environment Agencies is section 6 of the *Gesetz zur Eingliederung von Landesoberbehörden, Unteren Landesbehörden und Einrichtungen des Landes*, which is introduced by article 1 of the *Gesetz zur Straffung der Behördenstruktur in Nordrhein-Westfalen* (Ausgabe 2006 Nr. 38 vom 29.12.2006 Seite 619 bis 634). See also Pickenäcker 2007, for example at p. 8.

1084 *Gesetz zur Kommunalisierung von Aufgaben des Umweltrechts*, approved on 7 December 2007, in force from 1 January 2008.

1085 *Zuständigkeitsverordnung Umwelt NRW*.

1086 Section 1(3) *Zuständigkeitsverordnung Umwelt NRW*.

1087 Numbers at www.kommunen.nrw/informationen/mitteilungen/datenbank/detailansicht/dokument/strukturreform-gesetz-in-kraft.html (last visited 1 June 2019).

1088 Section 1(4) *Zuständigkeitsverordnung Umwelt NRW*.

An important element of the development to decrease institutional fragmentation was the introduction of the *Zaunprinzip*, which can be translated as the principle of fencing-off. This principle means that where more than one authority is competent with regard to different pieces of law but with regard to the same object, a single authority will execute these competences.[1089] This principle applies specifically to industrial installations.[1090] It supposes a virtual fence around the installations within which most environmental interests for that installation are in the hands of just one administrative authority.[1091] In the case of the fencing-off principle, the provincial governments (*Bezirksregierungen*) are competent to enforce the environmental law pertaining to installations as a whole, unless provided otherwise.[1092] Specifically, the provincial governments are the competent authority for installations and for all aspects of waste management, soil protection and water protection relating to these installations.[1093]

A third step in the reform that was proposed for 2012 at the latest was to fuse the five provincial governments with the larger local authorities. The aim was to achieve three regional districts (*dreier Regionalkreise*).[1094] This step was not realised, as there were many objections against it. One of these objections was a fear that this would create administrative authorities that would be too centralised.

7.2.4 Principles that apply to the exercise of sanctioning powers by the regulatory authorities

Several principles govern the enforcement by the regulatory authorities, both in the area of averting danger (*Gefahrenabwehr)* and regulatory offences. These are the principle of discretionary action, and the principle of proportionality.

Principle of discretionary action

The main principle that governs the discretion of the regulatory authorities with regard to enforcement is the *Opportunitätsprinzip*, i.e. the principle of discretionary action. Generally this principle is translated into English as the principle of discretionary prosecution. However, the principle is not limited to prosecution. It is applicable both to administrative decisions in the area of averting danger (*Gefahrenabwehr*)

1089 See section 15 *Gesetz zur Kommunalisierung von Aufgaben des Umweltrechts NRW*.
1090 Section 2(1)-(3) *Zuständigkeitsverordnung Umwelt NRW*.
1091 See Begründung zu Art. 15 des Gesetzes zur Kommunalisierung von Aufgaben des Umweltrechts – Seite 199 der Landtagsdrucksache 14/4973; www.bezreg-muenster.de/zentralablage/dokumente/umwelt_und_natur/grundwasser/Zaunprinzip.pdf (last visited 1 June 2019).
1092 Section 2(1) *Zuständigkeitsverordnung Umwelt NRW*.
1093 Section 2(1) *Zuständigkeitsverordnung Umwelt NRW*.
1094 Bauer et al 2007, p. 116.

and to the prosecution of regulatory offences by the administrative authorities.[1095] According to this principle, it lies within the dutiful discretion of the authorities to decide whether or not to take enforcement measures.
In the area of averting danger, this principle is shown in the formulation of the competences of in the Regulatory Authorities Act of Nordrhein-Westfalen.

> According to paragraph 14, section 1, of the Regulatory Authorities Act the authorities can take the necessary measures for the benefit of averting danger. This also applies to enforcement for *Gefahrenabwehr* by the police.[1096] The principle is even more explicitly stated in paragraph 16 of the Regulatory Authorities Act, which simply states that the authorities will take their measures in dutiful discretion (*pflichtgemäßen Ermessen*).[1097] For regulatory offences, the principle is laid down in section 47 of the Regulatory Offences Act.

Therefore, legislation shows that the regulatory authorities have a power and not an obligation to pursue enforcement. The regulatory authorities should make use of their discretion by motivating their decision in light of necessity.[1098]
The fact that the principle of discretionary prosecution also applies to the regulatory authorities when prosecuting regulatory offences is quite interesting.[1099] As mentioned, many of the principles of criminal law apply to the regulatory authorities when prosecuting (and sanctioning) regulatory offences. The main principle governing the Public Prosecutor's discretion as to the institution of criminal proceedings is the principle of mandatory prosecution (*Legalitätsprinzip*). This principle limits the discretion of the Prosecutor to forego prosecution where a case is clear.[1100] Such a limit to the discretion of the regulatory authorities as prosecuting authorities does, therefore, not exist in case of regulatory offences.

Principle of proportionality

The principle of proportionality (*Verhaltnigsmäßigkeitsprinzip*) applies to enforcement decisions by the authorities. Its basis lies in the rule of law principle as laid down in the German Constitution.[1101] The Regulatory Authorities Act explicitly prescribes that any action by the authorities is to fulfil this principle of proportionality. Where there are more possible and suitable measures available, the authorities must take those measures that prejudice the individual and the general public the least.[1102]

1095 Wolffgang, Hendricks & Mertz 2011, Rn. 301.
1096 Section 8(1) of the Police Act.
1097 Compare the use of the same words in section 47 of the *Ordnungswidrigkeitengesetz*.
1098 See Wolffgang, Hendricks & Mertz 2011, Rn. 301; Dannecker & Steinz 2001, p. 133, § 8 Abs. 9.
1099 Section 47 OWiG; Kloepfer 2004, p. 567, § 7, Abs. 80 (*Opportunitätsgrundsatz*), and Mitsch 2004, p. 221-222, para. 23.
1100 This principle will be further discussed below.
1101 Article 20 section 3 of the *Grundgesetz*.
1102 Subsection 15 of section 1 Regulatory Authorities Act.

Part of the proportionality principle is the prohibition of excess (*Übermaßverbot*). The Regulatory Authorities Act describes that the measure imposed must be in proportion to the goal strived for. This also means that a measure is only admissible until the goal is attained or it turns out that the goal cannot be reached.[1103]

7.3 Police authorities

7.3.1 Overview

There is a separation between the regulatory authorities and the police authorities (*Polizeibehörden*) in Nordrhein-Westfalen. Therefore, the police authorities are a separate entity, with its own tasks.

> In several other states in Germany, a unity principle is in place with regard to the police authorities and the regulatory authorities, which means that the authorities are one. Historically, also in Nordrhein-Westfalen, the police authorities and the regulatory authorities were one. Now the division between these authorities and their competences is strict.[1104]

The police authorities have a role with regard to all types of environmental enforcement, specifically with regard to the phases of inspection and investigation of non-compliance, for *Gefahrenabwehr*, regulatory offences and criminal offences. With regard to all types of non-compliance, the police authorities in Nordrhein-Westfalen are competent to protect public order, to act in case of imminent danger (*Gefahr im Verzug*); to take urgent measures where the authorities do not have the means to act in a timely manner; and, to prevent non-compliance, including offences, from taking place. The competences of the police authorities are further detailed below. Even though this seems a lot, the police authorities have relatively limited tasks in case of *Gefahrenabwehr*, enforcement support of other authorities, and the prevention of criminal offences.[1105]

The police authorities are organised as separate regional authorities (*Kreispolizeibehörden*), each with its own geographical competence. There are 47 police headquarters in total. There is also a State criminal police office (*Landeskriminalamt*). In this office, a separate department was created in 2004, specifically for cases involving environmental crime and fraud. This department is especially aimed at serious environmental crime, as well as cross-regional investigations.[1106]

1103 Subsection 2 of section 15 Regulatory Authorities Act Nordrhein-Westfalen; section 2 Police Act.
1104 According to the *Trennprinzip*, see Gusy 2017, p. 33, number 70.
1105 See Wolffgang, Hendricks & Mertz 2011, p. 14-15.
1106 See https://lka.polizei.nrw/artikel/umweltkriminalitaet (last visited 1 June 2019); Sina 2015, p. 55.

Besides the specialisation that exists within the State criminal police office, the other police authorities do not necessarily have a specific unit that is specialised in environmental enforcement. However, such cases regarding environmental protection do tend to be assigned to the people in the police authorities that have some experience in the area. There are no statutory requirements of specialisation or quality control, or specific organisational structures that provide for a consistent specialisation within the police authorities.
Officials of the police may be designated by legislation as investigators of the Public Prosecutor.[1107] This type of officer can exercise more powers than 'regular' police officials.[1108] These officials have more powers to give orders than police officers that have not been appointed.[1109] The police officers may order the 'regular' police officials to carry out the measures.

7.3.2 Competences

The police and Gefahrenabwehr

As indicated above, the police authorities are competent for *Gefahrenabwehr*.[1110] With the regulatory authorities in place as the central authority for the enforcement of non-compliance with environmental law, including regulatory offences, the competence of the police authorities for *Gefahrenabwehr*, specifically, is limited to acting where there is great urgency or where the regulatory authorities do not have the means to act.[1111] In doing so, the police must keep in mind that measures taken are proportionate.[1112]

> According to the administrative guidelines on this topic, the police may only act if, from their point of view, the competent regulatory authority cannot act or cannot act in time. This is especially the case if the regulatory authority is missing the required powers, the means of enforcing a measure – for example for direct coercion, the required knowledge is missing, or, the regulatory authority cannot be reached in time.[1113]

1107 In accordance with § 152(2) *Gerichtsverfassungsgesetz*. See for Nordrhein-Westfalen: *Landesverordnung Verordnung über die Ermittlungspersonen der Staatsanwaltschaft* vom 30. April 1996 (GV. NRW. S. 180).
1108 The terminology used to be *Hilfsbeamte*, i.e. assistant official, but this was amended in 2005 to *Ermittlungsperson*, i.e. investigative person.
1109 These are the order to search the suspect, or his body, the search of someone that is not a suspect, the confiscation and the search of premises; Beck'scher Online-Kommentar STPo mit RiStBV und MiStra, Verlag C.H. Beck 2018, GVG, § 152, marginnumber 1.
1110 Section 10 and 11 of the State Police Organisation Act (*Polizeiorganisationsgesetz NRW*).
1111 As is explicitly determined in § 1(1) *Polizeigesetz NRW*.
1112 Section 2 and 3 *Polizeigesetz NRW* .
1113 Section 1 *Verwaltungsvorschrift zur Durchführung des Ordnungsbehördengesetzes NRW*. See also Gusy 2017, marginnumber 70.

The police and regulatory offences: investigation

The police authorities may give enforcement assistance to the administrative authorities in the investigation of regulatory offences. In doing so, they act as the investigative body at the mandate of the administrative authorities.[1114] When inspecting the compliance of the regulated with environmental legislation, the police authorities may find hints of a regulatory offence or a criminal offence. The police authorities may signal and investigate both kinds of offences, at their own initiative.[1115] Once the investigation is completed, the police will send their files on the investigation to the authority that is competent for deciding on prosecution of the offence.[1116]

The police and criminal offences: investigation

The police authorities carry out the investigation into criminal offences. They collect the evidence and send the file thereof to the prosecutor.

> Also other authorities are competent to investigate environmental criminal offences. Among them are the Public Prosecutor, and the District Court. However, in practice, it is the police that carry out these tasks.[1117]

The Public Prosecutor can give the police orders as to their investigation.[1118] The police authorities may also involve the Public Prosecutor to ascertain that investigations comply with legal requirements on evidence gathering. The police authorities may also aid the Public Prosecutor in assembling evidence for a criminal trial.

The police have an independent duty to investigate where there is a suspicion of a criminal offence.[1119] This not only applies to the police acting independently – where they have found a clue that raises a suspicion of a crime – but also when the police are requested or ordered to action by the Public Prosecutor's Office.[1120] However, even where the police act independently, the Public Prosecutor remains in charge of the preliminary investigation procedure.[1121] Therefore, where the police start an investigation upon a suspicion of a crime, they must inform the Public Prosecutor of this.

1114 Göhler 2017, § 53, marginnumber 4 and 20; Mitsch 2005, p. 252.
1115 Section 53 OWiG.
1116 Section 53(1) OWiG.
1117 Sina 2015, p. 521.
1118 Section 161 *StrafProzessOrdnung* and section 152 *Gerichtsverfassungsgesetz*. Foster & Sule 2010, p. 346.
1119 § 163 *StrafProzessOrdnung*.
1120 § 161 section 2 *StrafProzessOrdnung*.
1121 Beck'scher Online-Kommentar STPo mit RiStBV und MiStra, Verlag C.H. Beck 2018, Einleitung, margin number 41; § 163, margin number 1.

7.4 The Public Prosecutor

7.4.1 Overview

There are several types of prosecutor for the enforcement of environmental law. In particular, the distinction between the types can be made through the type of enforcement that is pursued. As mentioned previously, when administrative authorities pursue regulatory offences, including their investigation, these authorities are in fact called prosecuting authorities, and sanctioning action taken for regulatory offences is referred to as prosecution.[1122]

Besides the administrative authorities as prosecuting authorities, the Public Prosecutor (*Staatsanwalt)* is competent for the enforcement of environmental law. The Public Prosecutor has three tasks: the investigation of criminal offences, the prosecution of criminal offences, and the execution of decisions of the criminal courts.[1123]

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

The Public Prosecutor's office (*Staatsanwaltschaft*) is an executive authority but also, like the courts, an independent authority administering the law. In particular, it must also investigate and assess facts that tend to exculpate a suspect or the accused.[1124] It is thus considered a strictly neutral institution, and not a party to the case in a criminal trial. There are nineteen Public Prosecutor's offices in Nordrhein-Westfalen.

Special environmental departments within each of the Public Prosecutor's offices do exist. In the Public Prosecutor's office in large cities, environmental cases are commonly grouped together or specific individual prosecutors will take on all environmental cases. For example, within the Public Prosecutor's office of the city of Düsseldorf, it is determined that specific divisions of the office will deal with environmental offences.[1125] However, it is not standardised that the Public Prosecutor is to be specialised in environmental cases.

7.4.2 Competences

The Public Prosecutor and criminal offences: investigation and prosecution

The Public Prosecutor is in charge of the preliminary investigation procedure for criminal offences[1126] and can give the police advice or orders as to their investigation.[1127]

1122 Section 35 *Bundes Ordnungswidrigkeitengesetz*.

1123 Sections 141 and further of the *GerichtsVerfassungsGesetz*.

1124 § 160(2) S*trafProzessOrdnung*.

1125 See e.g. the annual plan of task division (*Geschäftsverteilungsplan*) of the Public Prosecutor's Office of Düsseldorf at www.sta-duesseldorf.nrw.de/aufgaben/geschaeftsverteilung/index.php (last visited 1 June 2019); Sina 2015, p. 54.

1126 Section 161 *StrafProzessOrdnung* and section 152 *Gerichtsverfassungsgesetz*.

1127 This follows from sections 160 to 162 of *StrafProzessOrdnung*. In German, the position of the Public Prosecutor is referred to as *Herrin des Vorverfahrens* (literally: 'Mistress of the preliminary procedure').

The Public Prosecutor is under a duty to start an investigation as soon as there is a suspicion that a crime has been committed (§ 160 Code of Criminal Procedure).[1128] Usually, the police conduct their own investigation, and the Public Prosecutor may conduct further investigations once the police have transferred the case to him.[1129]

To exercise certain (invasive) criminal investigative measures, the Public Prosecutor must apply for a judicial order. For these occasions, the district court acts as investigative judge to decides whether or not the order will be granted.[1130] The Public Prosecutor finalises the investigation by charging the suspect and prosecuting the case before the criminal courts.[1131]

Investigative proceedings start as soon as the Public Prosecutor, or a police officer takes a measure that is clearly aimed to act against someone in a repressive manner, also when the suspect is still unknown.[1132] This happens at the discretion of the Public Prosecutor.

The Public Prosecutor and regulatory offences: taking over investigation and prosecution

The Public Prosecutor may also be competent to investigate and prosecute regulatory offences instead of the regulatory authorities as prosecuting authorities.[1133] The Public Prosecutor may take over the case from the regulatory authorities when there is a connection between the administrative offence and the criminal offence.[1134] Such a connection exists where an administrative offence has been committed alongside a criminal offence, or where the offence has a dual character and is both a regulatory and a criminal offence.[1135] Specifically, the administrative authority that is also prosecuting authority must give a case to the Public Prosecutor when it finds signs that non-compliance may (also) concern a criminal offence.[1136] Moreover, where the police investigate a criminal offence and find a connection with a regulatory offence, the police will also send the file of its investigation of the regulatory offence to the Public Prosecutor.[1137] This rule shows the precedence of criminal offences over regulatory offences.[1138]

1128 *Verfolgungszwang*; more general § 152 section 2 *StrafProzessOrdnung*. This is explained further below.
1129 Sina 2015, p. 54.
1130 See § 162. Where cases are under the jurisdiction of the highest regional court as the court of first instance, this court is investigative judge, see § 169 StPO, also § 21e *Gerichtsverfassungsgesetz*.
1131 Sections 141 and further of the *Gerichtsverfassungsgesetz*.
1132 Beck'scher Online-Kommentar STPo mit RiStBV und MiStra, Verlag C.H. Beck 2018, Einleitung, margin number 60.
1133 Section 42 *Ordnungswidrigkeitengesetz*.
1134 Section 42 *Ordnungswidrigkeitengesetz*.
1135 Section 42(1) *Ordnungswidrigkeitengesetz*.
1136 Section 41(1) *Ordnungswidrigkeitengesetz*.
1137 Section 53(1) *Ordnungswidrigkeitengesetz*.
1138 This precedence is also apparent when it concerns the possibility to prosecute and sanction criminal offences where prosecution and sanctions for regulatory offences have already occurred. See further on this, chapter 8, section 8.5.3.

There are certain limits to the possibility for the Public Prosecutor to take over the case from the regulatory authorities as prosecuting authorities. The remit to take over the investigation for the regulatory offence only extends as far as it falls within the remit of the criminal offence.[1139] Moreover, the Public Prosecutor will only take over an investigation of a regulatory offence from an administrative authority when this would be expedient to the investigation or for reaching the prosecution decision. Other reasons for the adoption by the Public Prosecutor of an investigation and prosecution of regulatory offences would be the acceleration of the procedure.[1140] However, when the Public Prosecutor decides not to follow up on the criminal offence, he must return the case to the regulatory authority.[1141]
The state government has issued administrative guidelines on the cooperation between the administrative authorities and the Public Prosecutor's offices concerning environmental offences. These will be discussed below in section 7.6.

Principle of mandatory prosecution

As mentioned previously, for criminal offences, the Public Prosecutor must adhere to the *Legalitätsprinzip*, which is most commonly called the principle of mandatory prosecution (*Verfolgungszwang)*.[1142] According to this principle, the Public Prosecutor has an obligation to start investigative proceedings when such indications exist that a criminal offence has been committed.[1143] There is no discretionary room in such cases.
Moreover, it is stipulated in the law that when the investigations give sufficient cause to institute legal action, the Public Prosecutor will (have to) institute such action.[1144] However, this does not mean that once investigative proceedings have been started on the basis of indications that a criminal offence has been committed, a prosecution must then always follow.[1145] There are additional requirements for the Public Prosecutor before an obligation to prosecute kicks in. The Public Prosecutor will (have to) drop the case if there is no sufficient cause to institute legal action.

1139 Section 40 *Ordnungswidrigkeitengesetz*.
1140 Section 42 section 2 *Ordnungswidrigkeitengesetz*.
1141 Section 41(2) *Ordnungswidrigkeitengesetz*.
1142 Section 152 StPO.
1143 Franzheim & Pfohl 2001, p. 236; see also § 163 StPO with the obligation for the police authorities.
1144 Section 170 StPO: "(1) Bieten die Ermittlungen genügenden Anlaß zur Erhebung der öffentlichen Klage, so erhebt die Staatsanwaltschaft sie durch Einreichung einer Anklageschrift bei dem zuständigen Gericht. (2) Andernfalls stellt die Staatsanwaltschaft das Verfahren ein. Hiervon setzt sie den Beschuldigten in Kenntnis, wenn er als solcher vernommen worden ist oder ein Haftbefehl gegen ihn erlassen war; dasselbe gilt, wenn er um einen Bescheid gebeten hat oder wenn ein besonderes Interesse an der Bekanntgabe ersichtlich ist."
1145 As is assumed in the report of Huglo Lepage 2004a, p. 38.

7.5 Criminal courts

7.5.1 Overview

The criminal courts (*Strafgerichte*) have the competence to adjudicate the criminal procedure against environmental offences, and impose sanctions on its offenders.[1146] The courts can also be competent to sanction administrative offences which coincide with the criminal offences or when those subjected to a sanction for regulatory offences appeal against it.[1147] The criminal courts have a tiered system. Relevant for the criminal enforcement of environmental offences are the local district courts (*Amtsgerichten*) and the State Courts (*Landgerichten*).[1148]

Local district courts

The local district courts are competent as court of first instance to adjudicate proceedings for criminal offences and impose sanctions of a maximum of four years imprisonment. A single judge (*Strafrichter*) deals with cases that concern minor offences, or misdemeanours as to which the expected punishment, if proven, is not higher than two years imprisonment.[1149] Where the prosecutor seeks imprisonment of a length between two and four years, the case can be tried before a specialist criminal chamber of the local court. This Chamber consists of a professional judge and two lay judges (*Schöffengericht*).[1150] Environmental cases are assigned to specific locations of the local district courts. It is determined in the regulation on competences of the courts in Nordrhein-Westfalen that the local district courts that reside in the districts of the State Courts are specifically competent for environmental cases.[1151]

State courts

The State courts are competent at first instance to hear the prosecution for criminal offences as to which more than four years imprisonment can be imposed.[1152] Moreover, these courts are competent where it concerns an intentional criminal environmental offence that resulted in death.[1153] Criminal chambers (*Strafkammern*) within these courts hear the criminal cases.[1154] The chambers can adjudicate in a small

1146 In the Act on Criminal Procedure (*Strafprozeßordnung*).
1147 See e.g. section 45 *Ordnungswidrigkeitengesetz*.
1148 There are also the Higher State courts (*Oberlandesgerichten*) and the highest court (*Bundesgerichtshof*), which deal with appeals. Section 12 *Gerichtsverfassungsgesetz*.
1149 Section 22 and 25 *Gerichtsverfassungsgesetz*.
1150 Section 28-29 *Gerichtsverfassungsgesetz*.
1151 Section 10 (*Konzentration der Umweltstrafsachen*), Verordnung über die Zuständigkeit der Amtsgerichte des Landes Nordrhein-Westfalen in Umweltstrafsachen und in Bußgeldverfahren wegen Umweltordnungswidrigkeiten gegen Erwachsene.
1152 § 24 section 1 number 2 and § 74 section 1 *Gerichtsverfassungsgesetz* .
1153 *§ 74 section 2 number 26 Gerichtsverfassungsgesetz*.
1154 Section 60 *Gerichtsverfassungsgesetz*. See also section 74c III, 74d *Gerichtsverfassungsgesetz*; Kloepfer & Heger 2014, p. 152, nr. 417.

or a large form. The large chamber – consisting of three professional judges and two lay judges – tries the serious criminal offences at first instance, in particular where environmental offences have resulted in death; the small chamber – consisting of one professional judge and two lay judges – hears appeals from the local courts.[1155] There is a tendency at the State Court level to establish specialised divisions within the criminal chambers to hear such cases.[1156] There is, however, no requirement that the criminal chambers are to be exclusive to environmental cases, or to be specialised in environmental cases to a certain extent.[1157]

7.5.2 Competences

The courts and regulatory offences: sanctions

The criminal courts have a secondary competence with respect to administrative offences. The criminal division of the district court is competent to adjudicate administrative offences where the Public Prosecutor has made use of his competence to take over the prosecution of the administrative offence in proceedings for a connected criminal offence.[1158] The courts can also impose sanctions for regulatory offences where these coincide with criminal offences, where the Public Prosecutor brings both before the court.[1159] The criminal division of the district court is also competent in case of regulatory offences where appeal has been lodged against a regulatory penalty decision, in retrial (*Wiederaufnahmeverfahren*), ancillary proceedings (*Nachverfahren*), and in criminal proceedings if the court decides to also adjudicate the matter from the viewpoint of the regulatory offence.[1160]

The courts and criminal offences: investigation and sanctions

As explained above, the district and state criminal courts are conferred the power to impose criminal sanctions for environmental criminal offences in the Code of Criminal Procedure (*StrafprozessOrdnung*). There is a limited competence for, specifically, the district courts for the investigation of criminal offences. As mentioned previously, a district court can give a court order – as investigative judge – upon request of the Public Prosecutor so that certain officers of the Public Prosecutor or the police authorities may

1155 Section 74(26) and section 76 *Gerichtsverfassungsgesetz*. Where the *Strafkammer* deals with a case that has resulted in death, it is called a *Schwurgericht*, see section 74 *Gerichtsverfassungsgesetz*.
1156 Saliger, 2012, nr. 520; Kloepfer & Heger 2014, p. 151-152, see also Sina 2015, p. 53.
1157 See e.g. NRW Landesgericht Düsseldorf, Geschäftsverteilung at www.vg-koeln.nrw.de/aufgaben/geschaeftsverteilung/Rechtssachen/2016/index.php (last visited 1 June 2019); Saliger 2012, marginnumber 520.
1158 Section 45 OWiG.
1159 Section 45 OWiG.
1160 Section 71 and 82 OWiG.

apply specific powers of investigation.[1161] With the agreement of the Public Prosecutor, the criminal courts may decide not to continue a criminal procedure.

7.6 Coordination and cooperation between enforcement authorities

As previously mentioned, it may occur that several enforcement authorities are competent at the same time for environmental enforcement. A distinction can be made according to the type of authorities that are involved. For one, it may be that several regulatory authorities at the same or at different levels of government are competent. As explained in chapter 2, in such cases, coordination of competences is necessary. Secondly, there may be several types of authorities that are competent for environmental enforcement as the same time. An example, that is most important for enforcement, is the possibility of the concurrent competence of the regulatory authorities and the (general) Public Prosecutor – and, by extension, the criminal courts. In such cases, cooperation between enforcement authorities may be necessary.

> As remarked previously, the police authorities may also be competent in the area of *Gefahrenabwehr* and the investigation of regulatory offences. However, there will likely not be concurrence of the same competences between these authorities, as the police have competence where the regulatory authorities generally do not.[1162]

Both aspects will be discussed below.

Coordination between regulatory authorities

As explained, it may occur that several regulatory authorities at the same or at different levels of the administration are competent for environmental enforcement. Legislation provides rules to deal with such concurrence of competences. According to these provisions, generally, the regulatory authority that finds or establishes a contravention of a specific piece of law first, is the one competent. The authority that is competent according to this 'first come, first serve' priority rule is regarded as having just as much expertise in that area as the other competent authorities.[1163] The authorities do seem to recognise the importance of working together on this and the contacts on this between the authorities are frequent. Of course, this is also caused by the fact that the problem of concurrent competence frequently occurs.

1161 See section 162 *Strafprozessordnung* (*Ermittlungsrichter*). Where cases are under the jurisdiction of the highest regional court as the court of first instance, this court is investigative judge, see section 169 *Strafprozessordnung*; also section 21e *Gerichtsverfassungsgesetz*. Rather similar to the Dutch *rechter-commissaris*.

1162 Therefore, this is not further discussed.

1163 See for example, section 6 *Zuständigkeitsverordnung Umwelt NRW*.

As mentioned previously, where more than one regulatory authority is competent for the enforcement of different pieces of law but with regard to the same object, a single authority will execute these competences according to the *Zaunprinzip*, i.e. the principle of fencing-off.[1164] This principle applies specifically to industrial installations.[1165] According to the principle, the provincial governments (*Bezirksregierungen*) are competent to enforce the environmental law pertaining to installations as a whole, unless provided otherwise.[1166]
Moreover, where more than one authority is competent, the law has provided a role for what is called a supervisory authority (*Aufsichtsbehörde*). This supervisory authority is an administrative authority that is positioned at a higher level of the state administration than the authorities it supervises. It may decide which authority is to be the competent authority in cases of concurrent competences.[1167]

Cooperation between the regulatory authorities and the Public Prosecutor

It may be that the regulatory authorities discover indications of a criminal offence when inspecting non-compliance with environmental law and investigating (and prosecuting and sanctioning) regulatory offences.
A case of non-compliance can involve both a regulatory offence and a criminal offence at the same time. When non-compliance is both a regulatory and a criminal offence, the criminal procedure has primacy.[1168] If indications of this are found, the regulatory authorities are required to hand over the case they have been inspecting to the Public Prosecutor for investigation, and (possibly) prosecution, (possibly) followed by sanctions by the criminal courts.[1169] For the cooperation with the Public Prosecutor, administrative guidelines have been put in place.
The manner, in which non-compliance may qualify as a regulatory offence and as a criminal offence can vary. First, it is possible that the same act or lack of action by an offender is considered both a regulatory offence and a criminal offence. It is then considered that there is a same procedural act or fact that qualifies as both.[1170]

> An example of this 'duality' is provided in § 18 of the *Landesimmissionsschutzgesetz NRW*. In this State Immissions Protection Act, it is set out that those acts that are regulatory offences under § 17(1)(a) or (i) of the Act are criminal offences where a person intentionally commits these acts and thereby endangers the life or health of another or foreign property of significant value, or, when a

1164 See section 15 *Gesetz zur Kommunalisierung von Aufgaben des Umweltrechts NRW*. See also section 7.2.3 above.
1165 Section 2(1)-(3) *Zuständigkeitsverordnung Umwelt NRW*.
1166 Section 2(1) *Zuständigkeitsverordnung Umwelt NRW*.
1167 Section 7 and 9 *Ordnungsbehördengesetz NRW*.
1168 Section 21(1) *Ordnungswidrigkeitengesetz*.
1169 Section 41(1) StPO and section 35 *Ordnungswidrigkeitengesetz*. Also Schlemminger & Martens 2004, p. 222.
1170 Section 40 *Ordnungswidrigkeitengesetz*.

> person causes such risks to life and health or property by negligence. In the former case, the person will be punished with imprisonment of two years maximum or a criminal fine; in the latter case, the person will be punished with imprisonment up to one year or a criminal fine. Another example is the Federal Nature Protection Act (*Bundesnaturschutzgesetz*), which establishes criminal penalisations and sanctions in § 71 by reference to the regulatory offences established elsewhere in the Act and adding the element of intent.

Second, it is possible that there is (at least) a connection between a regulatory offence and a criminal offence on the basis of the facts of the case.[1171] Instead of overlapping, the regulatory offence and criminal offence exist side by side.
While the regulatory authorities generally conduct the procedure for regulatory offences in Nordrhein-Westfalen, the Public Prosecutor can take over the procedure from the administrative authority at any moment up until the taking of the administrative fining decision. The key to this is that sole competence to prosecute criminal proceedings lies with the Public Prosecutor. This therefore means that when a criminal offence is connected to a regulatory offence, the Public Prosecutor will be able to prosecute the latter when also pursuing the former.[1172]
The Public Prosecutor will only take over the prosecution from the administrative authority when this appears to accelerate or simplify the process or because of the factual connection, or because of other reasons that are relevant to the investigation or the decision.[1173]

Federal ministerial guidelines further describe what factors are relevant with respect to the Public Prosecutor taking over the prosecution by the administrative authority.[1174] The States have adopted the guidelines. The guidelines provide more detail to the conditions and factors involved in the regulatory procedure and the criminal procedure. They are meant primarily for the Public Prosecutor (*Staatsanwalt*).[1175]

> The preamble to the guidelines describes its scope as follows: "The guidelines are primarily intended for the Public Prosecutor. However, some evidence also aimed at the judiciary. To the extent that these references do not affect the nature of the execution of their official business, it is up to the judges to consider them. The rest of the guidelines contain principles that can be of importance to

1171 Sachliche Zusammenhang, § 42 *Ordnungswidrigkeitengesetz*.
1172 Section 40 *Ordnungswidrigkeitengesetz*.
1173 Section 42(2) *Ordnungswidrigkeitengesetz*.
1174 *Richtlinien für das Strafverfahren und das Bußgeldverfahren* (RiStBV); see also Keulen et al 2015, p. 162.
1175 They do contain some principles that are aimed at or relevant to the courts. As described in the preamble (*Einführung*) of the *Richtlinien für das Strafverfahren und das Bußgeldverfahren* (Guidelines on the criminal proceedings and the proceedings for a regulatory fine).

the judiciary. The guidelines can only give instructions for the rule, because of the diversity of life. The prosecutor must therefore examine independently and responsibly in any criminal case, which measures are necessary. Deviation from the guidelines is possible due to the particularity of each case."[1176]

According to the guidelines, the Public Prosecutor will not take over cases from an administrative authority with regard to special legislation that does not belong to his expertise or when there are other doubts about the expediency of taking over the case.[1177] The Public Prosecutor will generally discuss this with the competent administrative authority.
In any case, when there are indications of a criminal offence, the regulatory authority that is in principle competent to prosecute the regulatory offence has to give the case to the Public Prosecutor to investigate and decide whether or not to prosecute.[1178] Reversely, the Public Prosecutor will have to give the administrative authority the case to prosecute a regulatory offence, when a criminal procedure has been started and there are indications of a (separate) regulatory offence.[1179] The Public Prosecutor will retain competence on the criminal offence. In practice, the Public Prosecutor does not make much use of this power to take over a case as it brings with it an extra workload.[1180]

7.7 Evaluation: institutional aspects

7.7.1 Introduction

In this section the evaluative framework formulated in chapter 2 is applied to the enforcement organisation for the public enforcement of environmental law in Nordrhein-Westfalen, Germany.
Here, the organisational aspects are described from the perspective of the institutional requirements. These are – in short – the independence and separation of specific functions, their specialisation, and the coordination and cooperation mechanisms (see also the table below).
In NRW, Germany there is no single authority dealing with all enforcement with respect to all of the environmental law in force. As we have seen in the current chapter, the enforcement organisation for administrative enforcement and the enforcement of regulatory offences in the shape of the regulatory authorities is tiered and decentralised. The organisation for the enforcement of criminal offences ranges from semi-local to more centralised. Both have quite a broad remit, as the regulatory

1176 As described in the preamble of the *Richtlinien für das Strafverfahren und das Bußgeldverfahren*.
1177 Guideline 277(2) *Richtlinien für das Strafverfahren und das Bußgeldverfahren*.
1178 Section 41 *Ordnungswidrigkeitengesetz*.
1179 Section 43 *Ordnungswidrigkeitengesetz*.
1180 Keulen et al 2015, p. 162-163.

offences may primarily be enforced by the regulatory authorities, but also by the authorities competent for criminal offences. Moreover, the police may play a role for all three types of non-compliance; its primary role is the investigation of criminal offences, but besides this it also investigates regulatory offences and can deal with administrative non-compliance.
Below, aspects of the enforcement organisation will be discussed. As explained in chapter 2, the following aspects are assessed (as outlined in the table below):

Institutional requirements

- A degree of decision-making independence of the organisation
  - separation between regulatory and enforcement functions
  - separation between inspection/investigation and sanctioning
- Specialisation of or within the organisation
  - degree of expertise
  - appropriate proximity (level of government)
- Coordination and cooperation between enforcement authorities

7.7.2 Decision-making independence of the organisation

7.7.2.1 Introduction

There are no legal rules or guidelines that require decision-making independence within the authorities competent for environmental enforcement in NRW, Germany. This means that no requirements exist for the public authorities to separate regulatory functions and enforcement functions within the same authority; also, no requirements exist to separate the inspection of non-compliance, the investigation of offences and the imposition of sanctions within the same authority. This means that it is not required to make any provision within the enforcement authorities to avoid regulatory bias or prosecutorial bias, which are described in chapter 2. However, in spite of this, a certain separation is realised within the organisation of several enforcement authorities. Below, this is further described for the two types of separation and the enforcement authorities that it concerns.

7.7.2.2 Separation of regulatory functions and enforcement functions

In NRW, Germany, regulatory functions and enforcement functions are combined within the same regulatory authorities. The authority that gives out permits and imposes administrative notices is inspector, investigator, prosecuting authority of regulatory offences and sanctions authority. There are no legal rules or guidelines that require a separation between these functions. This is clearly a disadvantage to avoiding regulatory

bias in a consistent structural manner within the regulatory authorities. However, it is a positive aspect that it may be that within the regulatory authorities these roles are separated in a functional manner, through a separation between the functions of officials. Such a functional separation may also provide a certain consistency to separation within the organisation. It may also be that the roles are separated within the regulatory authorities at a personal level, through an *ad hoc* separation between the individuals that are in charge.

7.7.2.3 Separation inspection/investigation and sanctioning

Regulatory authorities

As stated, there is no requirement in the law or in other rules in NRW, Germany to separate the inspection of non-compliance from sanctioning by and within the regulatory authorities. Due to the lack of such a requirement and an – apparent – lack of attention for the need for a certain separation, within the regulatory authorities often no structural, functional or personal separation exists between officials appointed for inspection and officials attributed the competence to sanction administrative non-compliance. These officers are usually part of the same department and may also be the same person. However, as is described directly below, for regulatory offences there does exist a certain separation between investigative officers and officers in charge of decision-making on the imposition of sanctions.

Investigative officers

This lack of separation also extends to the investigation and sanctioning of regulatory offences by and within regulatory authorities, as the officers appointed for the administrative inspection of non-compliance that is also a regulatory offence are also competent to investigate these offences.[1181] Moreover, these officers may also prepare a decision to initialise a regulatory offences procedure after the investigative procedure has been closed. However, a functional separation is often implemented with regard to taking this decision, as the responsibility for the decision is generally conferred on a higher official within the regulatory authorities. In this manner, prosecutorial bias is avoided to a certain extent.

As remarked, an organisational separation between investigation and sanctioning occurs where the police authorities are involved in investigating regulatory offences and criminal offences, as prosecution and sanctioning is entirely in the hands of different authorities. However, this organisational separation may not occur fully where the police officials are appointed as investigative officers of the Public Prosecutor, or where the Public Prosecutor gives directions to the police on the content of the file of evidence required to prosecute the case.

1181 Göhler 2017, § 59, marginnumber 3.

Public Prosecutor

When the Public Prosecutor conducts the investigation, there is no strict separation within the organisation between, at least, the decision-making on investigation and prosecution, including the imposition of sanctions as an alternative to prosecution. A counter-weight to the possibility of prosecutorial bias, as described in chapter 2, may be that the Public Prosecutor is under a legal duty to investigate and assess all the facts of the case, including facts that tend to exculpate a suspect or the accused.[1182]

7.7.3 Specialisation

7.7.3.1 Expertise

There are no statutory requirements of expertise or quality control for the enforcement authorities in NRW, Germany. There may be certain organisational structures that provide for a consistent specialisation within the enforcement authorities for the benefit of effective enforcement. What those structures are depends on the specific authorities. Most common is that expertise on environmental protection or on enforcement is bundled within the authority in a separate department. Also, the expertise of individuals within the authority is used and further developed through assigning them cases on the same issues. Both have benefits for building and maintaining expertise within the enforcement organisation.

Separate departments are commonly available in the authorities for administrative enforcement and the enforcement of regulatory offences; the state criminal police office; the Public Prosecutor's offices; and the criminal courts. Therefore, although there are no formal requirements to create, build and maintain expertise within the enforcement authorities, several of these authorities provide organisation structures to do so consistently.

It is a drawback that the allocation of cases to individuals with expertise within the regional police and the local district courts does not structurally ensure expertise or support it within the enforcement organisation. However, it does create benefits of expertise where no other possibilities for creating, building and maintaining expertise – due to, for example, the small scale of the specific authority – exist. Below, the possibility of expertise in the enforcement authorities is summarised.

Regulatory authorities

As stated, it is beneficial to the expertise of the enforcement organisation where there is a separate department within the authorities where expertise can be created and built. The authorities that are competent for administrative enforcement and the enforcement of regulatory offences are part of the regular administration of the State

1182 See section 2.6.2.2 of chapter 2.

and therefore have different tasks including environmental protection. Within those authorities a certain concentration of expertise does generally take place in the shape of departments specifically for environmental protection, which usually include enforcement.

Police

Within the police there is specialisation in the State criminal police office in the shape of a specialised department for cases including serious and cross-regional environmental crime. This is beneficial to creating, building and maintaining expertise.

Within the 'regular' regional police authorities there are no specific organisational structures that provide for consistent expertise. However, a degree of expertise is provided as, most commonly, cases are put in the hands of officers with some experience in environmental protection. While this provides a certain support to enforcement with expertise, as this happens, *ad hoc*, without the implementation of expertise within the structure of the organisation, is a disadvantage to the consistent guarantee of expertise for the benefit of effective enforcement.

Public Prosecutor

Within the Public Prosecutor's offices, expertise is developed primarily in the large cities through separate departments or by allocating the cases to the same individuals. In the other offices, this may not happen. Here, it seems that the scale of the organisation in particular impacts the creation, developing and maintaining expertise.

Criminal courts

The criminal courts that hear serious environmental offences (State courts) have an organisational specialisation in the sense that there are specialised divisions within the criminal chambers of these courts to hear such cases. In the criminal courts that hear cases involving less serious environmental offences (local district courts), expertise may be built in practice by assigning environmental cases to the same judges or juries.

7.7.3.2 Appropriate proximity: level of government

In NRW, Germany there are no requirements as to the proximity any of the enforcement authorities ought to have to the non-compliance. It is not explicitly required that the authorities weigh local circumstances in enforcement decisions. The level of government the authorities operate at does provide certain proximity for the benefit of an effective enforcement. For that purpose, a local reach of the enforcement authorities – as apparent in several enforcement authorities in NRW, Germany – can fulfil this requirement of appropriate proximity. This is further described below.

Regulatory authorities

There are no explicit requirements in legal or other binding rules to include local circumstances in the decision-making by the regulatory authorities in NRW, Germany. In NRW there is proximity of the regulatory authorities to the local circumstances through the fact that the administration is decentralised and the core competence for environmental enforcement lies with the districts and independent cities. This applies to the competence for administrative enforcement and the enforcement of regulatory offences, as the regulatory authorities are in charge of both types of enforcement.

Besides this, as we have seen, the provincial governments are competent for installations and issues concerning installations and their enforcement, including waste management, soil protection and water protection regarding to these installations. There is a (slight) drawback of the level this enforcement organisation operates at in relation to the ability of these authorities to fulfil the institutional requirement of proximity to the circumstances of the non-compliance. It may be more difficult for these authorities to take stock of all the relevant local circumstances involving the installations. Circumstances that are particularly local, including local interests, surrounding the functioning of these installations may not be as visible or may be less apparent to these authorities as it would to the authorities with a more local scope. On the other hand, the position of these authorities at a higher level in the administration – with a larger geographical remit than the local authorities – is quite appropriate for the scope of most of the issues concerning the installations, to provide the overview needed to take appropriate enforcement action, and may also curb the fragmentation that may otherwise occur if several local authorities were involved.

Investigative officers

While the above-mentioned also applies to inspection, there may be more aspects involved when assessing the proximity of the officers that may be in charge of the investigation of environmental offences.

In NRW, Germany, the officers charged with the investigation of regulatory offences are part of the local police or part of the competent administrative authorities. As the core competence for enforcement lies with the local districts and independent cities, this allows proximity to the local circumstances for these officers. This applies moreover to the investigation of criminal offences, for which the local police are also competent. The proximity of these investigative officers can ensure the collection and inclusion of information on local circumstances relevant for enforcement in the investigative files that are used by the authorities competent for enforcement, i.e. the administrative authorities for regulatory offences and the public prosecutor for criminal offences.

Public Prosecutor

The Public Prosecutor for criminal offences has offices that are more locally situated than the provincial governments but less local than the districts and independent cities. Moreover, the Public Prosecutor can give the local police orders as to their investigation into criminal offences, including involving them to assess certain evidence for a criminal prosecution. Also through this, the Public Prosecutor can take stock of relevant local circumstances to the non-compliance.

7.7.4 Coordination and cooperation between the enforcement authorities

As was described in this chapter, an important theme of the organisation and its lack of effectiveness/expediency in NRW, Germany is the fragmentation of the regulatory authorities.[1183] Due to this, coordination of competences where several authorities are competent – at the same or at different levels of the administration – may be necessary. Another theme that was mentioned is the broad remit of the authorities; the administrative authorities with regard to administrative non-compliance and regulatory offences, and the criminal authorities with regard to criminal offences and regulatory offences. With regard to this, cooperation between enforcement authorities may be necessary.

The law in NRW, Germany provides several structural mechanisms that deal with the coordination of competences and cooperation between enforcement authorities.

Coordination of competences

As mentioned, there are three mechanisms provided in the law that ensure a structural coordination of competences where several authorities are competent. These mechanisms cover many cases where the coordination of competences may be required and counter the possible conflicts that are inherent in the German system of enforcement competences.

The first such mechanism ensures that in case of a multitude of competent administrative authorities at the same or at different levels of the administration, only one authority remains competent through the 'first come, first serve' rule. As this rule considers that the first competent administrative authority that discovers non-compliance is considered has just as much expertise as other concurrently competent administrative authorities, handing over a case from one authority to another – possibly resulting in a loss of information or priority – is avoided.

A second mechanism, the fencing-off principle, provides a structural mechanism for decreasing the fragmentation by bringing together, among others, the enforcement of most aspects environmental issues concerning installations in the hands of the provincial governments.

1183 See section 7.1.2 of this chapter.

A third mechanism seems to provide a back up to the above, as a supervisory authority can also step in to decide on conflicts of competences between the administrative authorities.
All three mechanisms provide a good counterweight to the fragmentation created by the legislation in which the environmental enforcement organisation is appointed and the tiered and decentralised administration.

Cooperation between enforcement authorities
As described above, the broad remit of the administrative authorities and criminal authorities, which allows both to be competent for the enforcement of regulatory offences, requires these authorities to cooperate. The Federal guidelines that are in place to ensure this cooperation bind the authorities internally and are fully subject to judicial review. This ensures that the authorities observe the rules. Moreover, the main rule in these guidelines is straightforward as the decision-making is placed entirely in the hands of the Public Prosecutor.
Also this mechanism provides a good counterweight to the issues involved in the broad (and shared) remit of the enforcement authorities.

7.8 Findings

In this chapter it was described that regulatory authorities in NRW, Germany are in charge of *Gefahrenabwehr* for environmental non-compliance, which entails the competence to inspect and to impose (reparatory) sanctions. Moreover, the regulatory authorities are competent to investigate and impose (punitive) sanctions for environmental non-compliance that is a regulatory offence. For that purpose, they are called prosecuting authorities. This organisation is characterised by fragmentation, firstly, due to the legislation appointing it, which is generally tiered and sectoral, and, secondly, due to the tiers and decentralisation of the regulatory authorities.
In this chapter it was also described that the police, the Public Prosecutor, and the criminal courts play an important role in the enforcement of environmental law, primarily in the enforcement of criminal offences. As mentioned, an interesting characteristic of all mentioned authorities is their broad remit for the public enforcement of environmental non-compliance. The regulatory authorities are the primary competent authority for administrative non-compliance and regulatory offences. The Public Prosecutor and the criminal courts are the primary competent authorities for criminal offences, and may also enforce regulatory offences. The police have tasks for all three types of non-compliance.

Several positive aspects as well as disadvantages of the enforcement organisation in NRW, Germany were noted in the analysis in the previous section of this chapter, in relation to the institutional requirements for effective enforcement formulated in chapter 2.

The aspects that stand out most prominently from the analysis are set out below.

- What stands out is that the law does not pose many requirements for the public enforcement organisation in NRW, Germany. This also applies to most of the institutional requirements. It is not laid down in the law that the environmental enforcement organisation is to have in place decision-making independence, or specialisation. There are also no other binding rules to ensure that these requirements are met by the organisation. These are important disadvantages to guaranteeing the consistency of the enforcement organisation.
- In spite of this, as described in the analysis, the requirements can still be guaranteed to a certain extent within the organisation of several enforcement authorities. There are several ways in which the enforcement organisation in NRW, Germany is, in fact, able to fulfil the institutional requirements to a certain extent. A positive aspect of the enforcement organisation in this respect is the functional or *ad hoc* personal separation that may occur within the regulatory authorities, with regard to the separation of regulatory functions and enforcement functions and the separation in case of regulatory offences between investigation and the responsibility for taking an enforcement decision. This aspect enables the regulatory authorities to avoid regulatory and prosecutorial bias to a certain extent. This is a benefit to effective enforcement. However, this separation is not structurally embedded nor consistently available in all competent authorities for all types of separation discussed. This means that while there is a positive aspect, decision-making independence can be better guaranteed. How this can be done is suggested in the recommendations below.
- Another positive aspect is that structural guarantees, i.e. aspects that have been implemented in the structure of the organisation, exist in the shape of separate departments within the regulatory authorities, state criminal police office, public prosecutor's offices and criminal courts. These provide a degree of expertise to environmental enforcement, in spite of the lack of legal obligations to do so. However, issues of scale may impact whether these structural guarantees exist within all of these authorities. Where these departments are not available, and cases are allocated to individuals with expertise on the topic, it is a disadvantage to the consistency that this happens in an *ad hoc* manner. Such a manner does not ensure expertise as fully and consistently as preferred from the point of view of effective enforcement.

- The exception to the previously described lack of legal obligations for the enforcement organisation in NRW, Germany is the coordination and cooperation between the enforcement authorities. This provides a prominent positive aspect of the enforcement organisation, in particular because it softens a significant disadvantage. As described, the possible occurrence of competence conflicts between the regulatory authorities, and between these authorities and the criminal authorities, including the courts, is very high. This is a great weakness of the enforcement organisation in NRW, Germany from the perspective of effective enforcement. While it would be a benefit to clarify the root of this weakness through, for example, less fragmented legislation, a counterweight to this weakness lies in the four mechanisms of coordination and cooperation between enforcement authorities laid down in the law for dealing with these potential competence conflicts. These mechanisms provide structural solutions to these disadvantages of the system, as the rules are provided in the law, emphasise a clear solution, and provide consistency to the way competence conflicts may be solved among the enforcement authorities. This is beneficial to effective enforcement.

Notwithstanding the positive aspects, the enforcement authorities in Germany would benefit from the introduction of certain elements for the purpose of effective enforcement.

- In particular, the enforcement authorities would benefit from making *ad hoc*, i.e. case-by-case, arrangements for providing independence, expertise, and proximity into structural guarantees because of the consistency this would provide for effective enforcement.
- Such structural guarantees could come in the shape of, among others,
  - specific legal rules on decision-making independence or a consistently and structurally embedded separation within the organisation of the enforcement authorities between regulatory and enforcement functions and between inspection/investigation and sanctioning;
  - a separate department on environmental enforcement for building expertise within an authority; and,
  - a requirement to consider local circumstances in decision-making to ensure the benefits of proximity are carried over to authorities that are not so locally positioned.

As described in chapter 2, an effective enforcement organisation can exercise its effectiveness in particular when it is provided with effective sanctions. The sanctions that could (potentially) be chosen by the enforcement authorities and their potential for effectiveness are discussed in the next chapter.

Chapter 8 Sanctions for Public Enforcement of Environmental Law in Nordrhein-Westfalen, Germany

8.1 Introduction; addressee of a sanction

8.1.1 Introduction

In this chapter, it is described what sanctions are available to the enforcement organisation described in the previous chapter. As described in chapter 6, there are three systems of enforcement in Nordrhein-Westfalen, Germany for the non-compliance with environmental law: administrative preventive enforcement (*Gefahrenabwehr*)[1184]; the enforcement of regulatory offences (administrative repressive enforcement)[1185] and the enforcement of criminal offences (criminal repressive enforcement).[1186] As described, one of the characteristics that stands out – and which was an early development – with regard to the sanctions toolbox in Germany is the availability of this administrative repressive enforcement in the shape of a hybrid system of regulatory offences for which the regulatory authorities prosecute and impose sanctions.

In Germany, non-compliance with environmental law is an administrative contravention and, very often, also a regulatory offence, and, possibly, also a criminal offence. Environmental non-compliance can therefore be sanctioned on the basis of the three sets of sanctions, one exercised by the administrative authorities for non-compliance with environmental law, one also exercised by the administrative authorities (as prosecuting authorities) for regulatory offences, and one exercised by the criminal authorities for criminal environmental offences, respectively.

In the following, the sanctions are discussed. First, the sanctions for administrative preventive enforcement are described (8.2). Second, the sanctions available for administrative repressive enforcement – regulatory offences – are discussed (8.3). Third, the criminal sanctions are highlighted (8.4). Following this, the possibility for a combination of any of those sanctions is assessed (8.5). The chapter closes with the evaluation of the sanctions on the basis of the evaluative framework that was presented in chapter 2 (8.6) and the findings of that evaluation (8.7).

1184 Verwaltungsvollstreckung.
1185 Vollzug von Ordnungswidrigkeiten.
1186 Vollzug von Straftaten.

Before proceeding to this, however, one aspect that pertains to the available system of enforcement of environmental law is described in this section below. This aspect is the addressee of a sanction. This aspect is interesting to highlight here, as, in Germany, there is an important difference with regard to this aspect between the three systems available for enforcement.

8.1.2 Addressee of a sanction

In Germany, there is an important difference between administrative preventive and administrative repressive enforcement, on the one hand, and criminal enforcement, on the other hand, in relation to the possibility to impose a sanction on a legal person.

While administrative preventive and administrative repressive enforcement allow the imposition of sanctions on legal persons, in German criminal law, the principle of personal culpability has the consequence that only natural persons can be liable for criminal offences. No criminal sanctions can be imposed on legal persons (*societas delinquere non potest)*.

> For regulatory offences, legal entities may be imposed sanctions according to section 30 of the Administrative Offences Act (*Verbandsgeldbuße*).

It is possible in criminal law to ascribe the actions by a legal entity to a natural person, under certain circumstances.[1187] In terms of the natural persons within a legal person – a business – that can be imposed sanctions, the rules are quite broad. Within a business, there are three categories of natural persons that can be held criminally liable for the activities.[1188] These are:

a. persons in leadership positions, such as directors, due to their authority with regard to the organisation;
b. employees that have been delegated these responsibilities; and,
c. employees that have personally committed the criminal offence.[1189]

The introduction of criminal liability for legal persons has been a topic of discussion that received renewed attention in 2013, when Nordrhein-Westfalen presented a draft law on this topic.[1190] In 2018, the federal government promised concrete steps

1187 Section 14 *Strafgesetzbuch*.
1188 As described in Sina 2015, p. 18-19.
1189 Sina 2015, p. 19; Saliger 2012, section 162-170.
1190 *Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden* (2013), Available at: www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMI16-127.pdf (last visited 1 June 2019).

based, among others, on this draft law.[1191] As of 1 February 2019, no steps have yet been taken.

8.2 Sanctions for *Gefahrenabwehr*

8.2.1 Overview

The sanctions for *Gefahrenabwehr* are contained in general Federal and State Acts, as well as in specific environmental statutes. The general Acts are the Police Act, the Regulatory Authorities Act and the Administrative Enforcement Act.[1192] Moreover, specific environmental statutes may also contain sanctions for specific cases of non-compliance. Such special regulatory law takes precedence over the general legislation, as far as it regulates similar issues. The provisions in the general law provide rest-powers where these are not made available in the specific statutes.

> The Police Act and the Regulatory Authorities Act both contain a comprehensive clause, or all-in provision, conferring a very general power to take the necessary measures to avert danger to the police and the regulatory authorities (§ 8 section 1 Police Act; § 14 section 1 Regulatory Authorities Act). These provisions are hardly ever used as the specific powers in the general regulatory law and the general and specific powers in the special regulatory acts prevail over it.[1193]

Where the provisions in the specific statutes are intended to be conclusive (*abschließend*), the powers in the general acts don't come into play at all.[1194] This could be the case where the provision(s) in the specific statute detail(s) very specific requirements to the set of circumstances (*tatbestandlichen Voraussetzungen*), e.g. that a direct danger is apparent, or where it seems the system of measures created in the special act is meant to be comprehensive and the legal consequences of the system could be undermined by providing the basis for powers elsewhere.[1195] However, it is not easy to assess whether provisions are conclusive as lacunae in the specific statutes may have been intended by the legislator for the purpose of flexibility or could simply be legislative oversight.[1196]

1191 Koalitionsvertrag, number 126, available at: https://dynamic.faz.net/download/2018/koalitionsvertrag.pdf (last visited 1 June 2019); Kölner Entwurf eines Verbandssanktionengesetzes, available at www.jpstrafrecht.jura.uni-koeln.de/sites/iss_juniorprof/Projekte/Koelner_Entwurf_eines_Verbandssanktionengesetzes__2017.pdf (last visited 1 June 2019). See also www.htwg-konstanz.de/fileadmin/pub/ou/cbci/Publikationen/ Unternehmensstrafrecht3.pdf and www.beissenhirtz.com/en/coalition-agreement-on-criminal-law-for-enterprises/ (last visited 1 June 2019).

1192 See section 6.3.6.2 of chapter 6.

1193 Knemeyer 2007, margin number 154.

1194 Knemeyer 2007, § 17, margin number 148; Kingreen & Poscher 2018, § 5, margin number 22-25.

1195 Kingreen & Poscher 2018, § 5, margin number 23-24.

1196 Kingreen & Poscher 2018, § 5, margin number 24.

Besides this distinction in sanctions in general and specific acts, a distinction can be made in general and specific sanctioning powers within those acts. The sanctions and the powers to impose them can be distinguished in general sanctioning powers and specific sanctioning powers attributed in the general Acts on police and administrative authorities, and general and specific powers for certain areas of the environment, attributed in the specific environmental statutes. When establishing what powers an authority has in a certain area, first the specific statutes must be checked. If there are no specific powers the general powers in those statutes come into play. Thereafter, the same must be done for the general statutes. The effect of a general power or statute is blocked by the existence of specific powers (*Sperrwirkung*).[1197]

Below it will be described what sanctions, general and specific, the general and specific statutes that are relevant to environmental protection contain. First, the sanctions are described that are attributed to the administrative (and police) authorities in the general Acts mentioned above. Secondly, specific sanctions that are attributed to the administrative (and police) authorities for certain areas of environmental protection in the environmental statutes will be detailed. These areas are pollution control (emissions); water protection; nature protection and spatial planning. These will be discussed consecutively.

8.2.2 Sanctions in general *Gefahrenabwehr*

8.2.2.1 Overview

The sanctions in general *Gefahrenabwehr* consist of the enforceable administrative decision containing an obligation directed at aspects of or related to the non-compliance; and the 'secondary' administrative coercion of this administrative decision[1198] in the shape of substitute action (*Ersatzvornahme*); the coercive fine (*Zwangsgeld*); and the instrument of immediate force (*Unmittelbaren Zwang*). These instruments come into play when an administrative decision is not complied with. Besides these sanctions, the enforcement authorities also have available the power to avert danger through administrative physical action (*Verwaltungsrealakte*).[1199] This action is considered factual action by the authorities, as it lacks legal effect

1197 Knemeyer 2007, margin number 157.

1198 Generally indicated as '*Verwaltungszwang*'.

1199 It should be noted that it is debated in German literature whether the application of substitute action and the instrument of immediate force are such administrative physical action (*Verwaltungsrealakte*) or administrative decisions, as one could consider the application of the instruments an administrative decisions aimed at toleration ('*gerichtet auf Duldung*'). However, most commonly these instruments are defined as administrative physical action: Wolffgang, Hendricks & Mertz 2011, *§ 548, p. 156 and* the literature mentioned there.

(*Regelungsqualität*).[1200] Immediate enforcement (*Sofortvollzug)* is a modality of application of the above-mentioned instruments. This will be further described below.

In the following table, an overview is given of the above-mentioned administrative sanctions in general *Gefahrenabwehr.*

Overview of administrative sanctions in general *Gefahrenabwehr*
- The enforceable administrative decision containing an obligation
- The 'secondary' administrative coercion of the administrative decision by:
  - substitute action (*Ersatzvornahme*)
  - the coercive fine (*Zwangsgeld*)
  - the instrument of immediate force (*Unmittelbaren Zwang*)
- Immediate enforcement (*Sofortvollzug*)

8.2.2.2 The enforceable administrative decision

The most common power to sanction contraventions of environmental legislation is the power to issue an administrative decision (*Verwaltungsakt*) containing an obligation for the offender to act; to tolerate; or to refrain from certain action. This power is aimed at ensuring compliance in first instance, i.e. after the initial non-compliance or danger thereof.
An administrative decision is defined as an administrative measure regulating a specific individual case that aims to have direct external legal effect.[1201] An administrative decision is only enforceable where an obligation has been specified in the act, detailing action, toleration or inaction, in other words: an order or a ban, to the person that is the addressee of the decision.[1202] The administrative decision thereby makes a legal obligation specific.[1203] A permit itself is generally not considered to be an enforceable administrative decision.[1204] Where the permit however does contain specific rules that concretise the permit individually, these rules may be enforceable and will therefore provide an enforcement title to the authorities; otherwise, further

1200 See also the diagramme on p. 188 of Maurer 2017, in which *Rechtsakte* ('legal acts') are distinguished from *Realakte* ('physical acts'). Above, I have translated the latter as physical action. Administrative decisions (*Verwaltungsakte*) are part of the category of 'legal acts'. This administrative physical action will not be further described.
1201 *§ 35 Administrative Procedure Act NRW (Verwaltungsverfahrensgesetz NRW)* 'Verwaltungsakt ist jede Verfügung, Entscheidung oder andere hoheitliche Maßnahme, die eine Behörde zur Regelung eines Einzelfalles auf dem Gebiet des öffentlichen Rechts trifft und die auf unmittelbare Rechtswirkung nach außen gerichtet ist'.
1202 § 54 and 55 section 1 Administrative Enforcement Act NRW (*Verwaltungsvollstreckungsgesetz NRW*); § 50 Police Act.
1203 Gusy 2017, § 438.
1204 Gusy 2017, § 438.

concretisation of the obligations in the permit is necessary for it to be enforceable.[1205] Therefore, even if the rules that are not complied with already relate to a specific individual case, it is necessary that the legal obligation following from these rules is made concrete by explicitly connecting the obligation to the person charged.
The obligations contained in the administrative decision may be quite extensive. The administrative decision may include the revocation of a permit or the prohibition to operate an installation and obligations to prevent or remediate environmental damage. Therefore, for example, the administrative decision may require an offender to end non-compliant behaviour or to repair certain physical damage resulting from the damage, such as cleaning up a stream polluted by a discharge of dirty firewater. The administrative decision may also prohibit the operation of an installation pending compliance with an administrative decision. The decision is notified to the offender to allow him to repair the non-compliance.

> The instrument of the enforceable administrative decision is a 'dependent sanction', i.e. a sanction that is dependent on (but not necessarily attached to) other enforcement instruments for its execution. It can be compared with the instrument that is called the *enkele last* in the Netherlands – an independent order – and with the notice in England, as far as these are the reaction to non-compliance with the law.[1206]

8.2.2.3 Administrative coercion of decisions

8.2.2.3.1 Types of administrative coercion

An enforceable administrative decision provides the title for what is called the second level of administrative enforcement (*Verwaltungsvollstreckung*).[1207] At this level, the obligations in environmental law and in the enforceable administrative decision are enforced through what is called administrative coercion (*Verwaltungszwang*). Administrative coercion is regulated in the Federal Administrative Enforcement Act (*Verwaltungsvollstreckungsgesetz*) and in the Administrative Enforcement Act NRW.[1208] To enforce an administrative decision containing an obligation in the area of *Gefahrenabwehr*, the administrative authorities have several instruments available – called coercive instruments (*Zwangsmittel*).[1209] The instruments that can be exercised for administrative coercion are:

a. substitute action by the authority (*Ersatzvornahme*);

1205 The Netherlands has a similar regulation in building: to concretise the obligations in a housing permit for example, an order for residential improvement is used.
1206 See further chapter 5 and chapter 9.
1207 See e.g. Kugelmann 2012, § 81, p. 20.
1208 § 55 and further *Verwaltungsvollstreckungsgesetz NRW*.
1209 Kingreen & Poscher 2018, § 24, margin number 1. When the police exercise their powers this way, this is termed police coercion (*polizeilichem Zwang*).

b. coercive fine (*Zwangsgeld*);
c. immediate force (including coercive eviction for regulatory measures) (*Unmittelbarer Zwang* and *Zwangsraümung*).[1210]

Separate from this is what is called immediate enforcement (*Sofortvollzug*).

a. Substitute action by the authority

Substitute action by the authority (*Ersatzvornahme*) is the execution of an obligation by the enforcement authority itself or by a third party on order of the authority at the cost of the offender.[1211] Only obligations to act are considered suitable for this kind of administrative coercion. This means that this instrument is not available to enforce obligations to tolerate or to refrain from certain action.

The foreseeable costs must be indicated in the decision threatening the use of substitute action.[1212] Interestingly, it can be determined in the decision that the offender must pay the foreseen costs ahead of the substitute performance.

b. Coercive fine

The coercive fine (*Zwangsgeld*) does not in itself bring about the legally correct situation, but instead attempts to coerce the offender into compliance through the psychological pressure of a duty to pay.[1213] In that sense, it is a fine aimed at reparation. In principle, this instrument can be used to enforce obligations that can be carried out by others, as well as non-transferable obligations. However, in practice, substitute action is often considered preferable to the administrative coercive fine.[1214] The rule of reasonableness may block the use of the coercive fine as this instrument does not end the contravention itself and it is assumed that the instrument of substitute performance is a far more effective measure to ensure compliance.[1215] The coercive fine will be stipulated at a minimum of ten Euros and at a maximum of 100 000 Euros.[1216] The level of the coercive fine is connected to case specific circumstances, as it is determined in the law that the coercive fine is to be connected with the considerations the offender may have for non-compliance; the assessment of the level of the fine should also take into account the economic interest of the offender in not complying with the rules.[1217] A time limit for payment should be provided when the coercive fine is fixed.[1218] The coercive fine may be imposed

1210 § 55 *Polizeigesetz NRW*; § 62 and § 62a *Verwaltungsvollstreckungsgesetz NRW*.
1211 § 59 *Verwaltungsvollstreckungsgesetz NRW*; § 52 *Polizeigesetz NRW*.
1212 § 63 *Verwaltungsvollstreckungsgesetz NRW*.
1213 § 53 PolG NRW; § 60 *Verwaltungsvollstreckungsgesetz NRW*.
1214 Gusy 2017, margin number 443; Kingreen & Poscher 2018, § 24, margin number 11-12.
1215 Kingreen & Poscher 2018, § 24, margin number 11-12.
1216 § 60 section 1 *Verwaltungsvollstreckungsgesetz NRW*.
1217 § 60 section 1 *Verwaltungsvollstreckungsgesetz NRW*.
1218 § 60 section 2 *Verwaltungsvollstreckungsgesetz NRW*.

repetitiously until compliance is reached. Moreover, the level of the fine can be increased until compliance is achieved.[1219] The fine cannot be recovered when the offender has in the mean time complied with the obligation(s) described in the administrative decision.[1220] The coercive fine is deemed a coercive means to enforce future behaviour.[1221]

The coercive fine is not considered to have a repressive nature and can therefore also be applied alongside the administrative regulatory fine for regulatory offences and the criminal fine for criminal offences.[1222] This is considered not to infringe on the principle of *ne bis in idem*, in the form it specified in article 103 section 3 of the German Constitution.[1223]

The monetary claim on the offender through the forfeiture of the coercive fine is collected by means of coercive force, more specifically, the instrument of recovery of monetary claims.[1224] If the coercive fine is not collectable from the offender, the enforcement authority can request the administrative court to order coercive detention where this has been brought to the attention of the offender with the threat of the coercive fine or afterwards.[1225] The detention has a minimum of one day; a maximum of two weeks.

c. Immediate force

The enforcement authority may apply the sanction of immediate force (*Unmittelbarer Zwang*) when the other coercive instruments don't come into consideration based on the characteristics of the non-compliance, they are unsuccessful, or they are not proportionate.[1226] Immediate force entails the use of physical influence, also with weapons, on people or objects. The police can provide aid when the administrative authority does not have the necessary personnel.[1227]

The instrument of immediate force is the last resort of administrative enforcement. This also means that its use, and especially the use of weapons must be limited as much as possible.[1228] The offender may be subject to coercive eviction (*Zwangsraümung*) if

1219 § 60 section 1 *Verwaltungsvollstreckungsgesetz NRW*.
1220 Maurer 2017, § 20, margin number 15, p. 516.
1221 Maurer 2017, § 20, margin number 15, p. 516.
1222 Kingreen & Poscher 2018, § 24, margin number 13 and Maurer 2017, § 20, margin number 15, p. 516.
1223 That section reads: "*Niemand darf wegen derselben Tat auf Grund der allgemeinen Strafgesetze mehrmals bestraft werden*", which can be translated as 'nobody may be punished more than once because of the same act on the basis of the general criminal statutes'; Kingreen & Poscher 2018, § 24, margin number 13. See further section 8.5 of this chapter.
1224 Beitreibung von Geldforderungen, § 60 *Verwaltungsvollstreckungsgesetz NRW* and § 53 *Polizeigesetz NRW*.
1225 *Ersatzzwangshaft*, § 61 *Verwaltungsvollstreckungsgesetz NRW*; § 54 *Polizeigesetz NRW*.
1226 § 55 PolG NRW; § 62 *Verwaltungsvollstreckungsgesetz NRW*.
1227 § 68 *Verwaltungsvollstreckungsgesetz NRW*.
1228 Gusy 2017, margin number 446; Kingreen & Poscher 2018, § 24, margin number 14-17.

the obligation concerns objects that cannot be moved, or a space or ship.[1229] This means that the offender loses possession of those objects.

8.2.2.3.2 The application of administrative coercion

Administrative coercion can take place through phased action (*gestreckten Verfahren*) or through enforcement before the enforceable administrative decision has gained force (*sofortigen Vollzug)*.[1230] In exercising administrative enforcement in a phased manner, administrative coercion follows several stages: the threat (*Androhung*) of coercive sanctions, the fixation (*Festsetzung*) of the coercive sanction, and the application (*Anwendung*) of the coercive sanction.

First, it must be established that there is an enforceable administrative decision (*Verwaltungsakt*), which has full effect.[1231] Second, the threat of coercive measures must be made.[1232] This threat may have already been included in the primary administrative decision containing the order but if this is not the case a separate administrative decision must be made.[1233] The threat is considered an administrative decision.[1234] The threat must be made in writing and must be served on the offender.[1235]

Where it concerns an obligation to act, the decision establishing the threat of coercive measures must contain a time limit within which the offender must achieve compliance. It is established that such a deadline is not necessary for obligations to tolerate or to refrain from certain action, as, apparently, for these obligations no preparation is required.[1236] However, one could imagine that an obligation to refrain from certain action, in other words to stop doing something, may in fact take certain preparation.[1237]

The threat must indicate the coercive instruments that will be executed if the offender sustains the non-compliance. The exact nature and method of the exercise of immediate force need not be specified.[1238] Where the application of more than one coercive instrument is threatened, the order of implementation must be specified.[1239] In case the threat regards substitute action by the authority, it must specify the foreseen

1229 § 62a *Verwaltungsvollstreckungsgesetz NRW*.
1230 Section 80 *Verwaltungsvollstreckungsgesetz NRW*; and section 55(2) *Verwaltungsvollstreckungsgesetz NRW* and section 50(2) *Polizeigesetz NRW*.
1231 § 55 section 1 *Verwaltungsvollstreckungsgesetz NRW*; § 50 section 1 *Polizeigesetz NRW*.
1232 *Androhung*; § 63 section 1 *Verwaltungsvollstreckungsgesetz NRW*; § 56 section 1 *Polizeigesetz NRW*.
1233 Wolffgang, Hendricks & Mertz 2011, margin number 548.
1234 As we shall see in the further description, the threat may already be included in the primary enforceable administrative decision.
1235 § 63 section 6 *Verwaltungsvollstreckungsgesetz NRW*.
1236 § 63 section 1 *Verwaltungsvollstreckungsgesetz NRW*; § 56 section 1 *Polizeigesetz NRW*.
1237 See further the comparative analysis in chapter 12.
1238 Kingreen & Poscher 2018, § 24, margin number 24.
1239 § 63 section 3 *Verwaltungsvollstreckungsgesetz NRW*.

costs.[1240] Where the threat concerns a coercive fine, its level must be given.[1241] This stage can be passed over when the circumstances don't allow it, especially when the urgent execution of the coercion is necessary to avert a present danger.
Third, when the obligation is not complied with within the time limit set in the threat, the enforcement authority will have to fix the coercive instrument;[1242] this is the internally binding declaration that the threat has been unsuccessful and that the coercive instrument can be applied as from that moment.[1243] In other words, this is the declaration to execute the coercive instrument. This stage is not necessary where the obligations are enforced through immediate enforcement. Other instruments than those fixed, may not be applied.

> The external effect of this declaration is controversial. It is held that an external legal effect should at least be assumed in respect of the coercive fine.[1244] It seems that this declaration is obligatory for the authority internally, as a precondition for it to execute a specific coercive instrument.

Finally, the authorities apply the coercive sanctions (*Anwendung*).[1245] This means that the substitute performance will be exercised and a cost recovery order sent to the offender, or that the coercive fine that has been forfeited will be recovered (*Beitreibung*).[1246]

> With regard to the application of the sanctions, it should be noted that it is debated in German literature whether the application of substitute action and the instrument of immediate force are administrative physical action (*Verwaltungsrealakte*) or administrative decisions. One could consider the application of the instruments an administrative decision aimed at toleration ('*gerichtet auf Duldung*'). However, most commonly these instruments are defined as administrative physical action.[1247] That the application of the coercive fine is an administrative decision is not debated.

At this stage, there may be cases in which practical execution is not necessary, specifically when the obligations in the foregoing administrative decisions have been complied with. While this is obvious for the substitute performance, also in the case

1240 § 63 section 4 *Verwaltungsvollstreckungsgesetz NRW*.
1241 § 63 section 5 *Verwaltungsvollstreckungsgesetz NRW*.
1242 *Festsetzung*; § 64 *Verwaltungsvollstreckungsgesetz NRW*.
1243 Gusy 2017, margin number 452.
1244 BVerwGE 49, 169f; limiting this is OVG Koblenz, NVwZ 1985, 201; Gusy 2017, margin number 452.
1245 Gusy 2017, margin number 452.
1246 § 60(3) *Verwaltungsvollstreckungsgesetz NRW* and 53(3) *Polizeigesetz NRW*.
1247 Wolffgang, Hendricks & Mertz 2011, *§ 548, p. 156 and* the literature mentioned there.

of the coercive fine the relevant statute dictates that recovery will not occur when the obligations are complied with. Even so, recovery is a statutory obligation when an offender does not comply with an obligation to allow or undergo a certain action and the threat of a coercive fine was in fact aimed at that obligation.[1248]

8.2.2.3.3 Immediate enforcement

Besides the above, there are situations that require immediate enforcement without a preceding enforceable administrative decision (*Sofortvollzug*).[1249] Specifically, enforcement without an administrative decision aims to prevent an unlawful act that constitutes a criminal or regulatory offence, or to avert an imminent danger.
Immediate enforcement can take place without a preceding enforceable administrative decision, when this is necessary to avert present danger. This necessity involves that preventing this danger could not have been achieved through the acceleration of the phased process of administrative coercion, as described above.[1250] Moreover, a danger is considered present, where the damaging event has commenced or where it is very highly probable that the damaging event is immediately imminent in the near future so that immediate intervention is required.[1251] Finally, it is required that an administrative decision would have been possible, had there not been present danger.

8.2.3 Sanctions in the specific environmental statutes

There are several general and specific sanctions in the specific environmental statutes. Examples are the sanctions for emissions protection; water protection; building and spatial planning; and environmental damage. These are highlighted in short, below.

Emissions protection

There are several sanctioning powers in emissions protection that are specifically established in the Federal Immissions Protection Act. These are the general competence to give orders (*Anordnungen*) in relation to installations that may or may not require a permit, and the specific sanctions (which can also be formulated as an order) to prohibit the operation of an installation; to revoke the permit of an installation; the order to close down an installation; and the order the abatement of situations that are not in compliance.[1252]

1248 § 63(3) *Verwaltungsvollstreckungsgesetz NRW*. See Gusy 2017, margin number 444.
1249 § 55 section 2 *Verwaltungsvollstreckungsgesetz NRW*; § 50 section 2 *Polizeigesetz NRW* (see also § 64 VwVG). *Sofortvollzug* is also called *unmittelbaren Ausführung*, although in some States a distinction is made between the two terms, see Gusy 2017, § 440-441 and footnote 21.
1250 Wolffgang, Hendricks & Mertz 2011, p. 155.
1251 § 55 section 2 *Verwaltungsvollstreckungsgesetz NRW*; § 50 section 2 *Polizeigesetz NRW*; also, Wolffgang, Hendricks & Mertz 2011, p. 155.
1252 Sections 19, 20 and 21 *BundesImissionsschutzgesetz*.

> A general competence to give orders after a permit for an installation has been issued is laid down in § 17 Federal Immissions Protection Act. The corresponding general competence for installations that do not require a permit is laid down in § 24 Federal Immissions Protection Act.[1253]

Interestingly, the power to prohibit the continued operation of an installation subject to licensing requirements also extends to the case if the operator or the person in charge of the operation can be deemed unreliable in observing the legal provisions concerning the protection against harmful effects on the environment. The prohibition can only be ordered where the unreliability is supported by proven facts and if this is advisable in the interest of the public good.[1254]

> This is the case where the offender has previously committed a violation of a duty of considerable weight, or recurring violations of less weight, when the plurality of the offences show a tendency to not comply with environmental protection regulation. Furthermore, the offender can be deemed unreliable through reasons of insufficient expertise, or defective financial means.[1255]

Where the prohibition concerns the operator of the installation, he may be allowed to let the installation continue operation run by a different person 'who guarantees the proper operation of the installation'.[1256] This measure lightens the impact that the prohibition would have on the operation of the installation when its operator would not be able to continue due to a prohibition against his person.
The authorities can impose and execute the above orders – the prohibition to operate an installation when the operator can be deemed unreliable, the order to close down the installation, or the revocation of a permit or licence – preventively, in the sense that these sanctions may be executed when it is still uncertain non-compliance will occur, when occurrence would result in extensive irreparable damage. Moreover, when the offender continues operation in spite of the prohibition, it can be enforced through means of administrative coercion.[1257]

Water protection

The Federal Water Management Act does not contain a general power to make orders. Instead, the revocation of a licence or consent (*Widerruf*) is made explicitly possible. A licence to use a body of water may be revoked, completely or in part, if the operator

1253 *Untersagung*; § 20 section 1 *BundesImissionsschutzgesetz*.
1254 *Wohl der Allgemeinheit*; § 20 section 3.
1255 Kotulla 2017, § 20, margin number 60.
1256 *Stellvertretererlaubnis*, § 20 section 3 (sentence 2 and 3). See also Kotulla 2017, § 20, margin number 65.
1257 See Jarass 2017, § 20, margin number 17; Kotulla 2017, § 20, margin number 29.

repeatedly uses the water considerably in excess of the limits of his licence, or has failed to fulfil conditions or meet requirements that have been imposed, in spite of a warning.[1258]

> In each of the environmental statutes where the power of revocation is granted, this power is only granted in a limited number of cases (it is stated in the provisions: '*may only be revoked when* (…)').

Building/spatial planning

With regard to spatial planning, specific sanctions are described in the State Building Code of Nordrhein-Westfalen (*Landesbauordnung NRW*). More specifically, a general power is conferred on the building authorities to set requirements (*Anforderungen*) for the purpose of averting danger or nuisances for the general public or for those that make use of a building.[1259] It is not specified in the Code what specific measures may be taken. This means that the general power conferred in § 61 forms the basis for measures such as the suspension of building works, the abatement of nuisances resulting from building, or the order to tear down a building.[1260] The general power may also include physical action (*Verwaltungsrealakte*), by the administrative authorities themselves.[1261]

Environmental damage

To prevent ecological harm, the Environmental Damage Act (*Umweltschadengesetz*) contains sanctions the administrative authorities may impose to oblige persons concerned to take preventative and remediation measures. The Act, which transposes the Environmental Liability Directive, is applicable when sectoral law is absent.[1262] The Environmental Damage Act sets general obligations for persons involved in relation to environmental damage to ecological systems. These are the obligation to notify the competent authority of danger to the environment or environmental harm (in § 4); a duty of *Gefahrenabwehr* for persons involved, which means they are to take, without delay, the measures necessary to take away the danger of environmental damage (in § 5); and the duty to remediate the damage. The administrative authorities can oblige the person in charge to provide all necessary information and data on any imminent danger of environmental damage to be submitted in suspected cases of such an imminent threat or damage that has occurred and, furthermore, impose

1258 § 12 *Wasserhaushaltsgesetz*. See also 19c(2).
1259 § 61 section 2.
1260 Knemeyer 2007, § 44, margin number 487-488.
1261 Wolffgang, Hendricks & Mertz 2011, margin number 467.
1262 For example, the Act does not apply to ecological damage to specific protected species and areas (§ 19(2) and (3) BNatSchG).

the obligation upon this person to take the necessary preventive measures or the necessary damage control and remedial measures.[1263] The person that is obligated to take remedial measures must submit these to the competent authority for approval, unless the competent authority has already taken the necessary measures itself.[1264]

Waste management

Similar to pollution control in the BImSchG, in the area of waste management there is a general provision conferring the competence to make enforceable administrative decisions *(Vollstreckbare Verwaltungsakte)* in individual cases which are necessary for the implementation of the Act and the statutory instruments based on it.[1265]
This power is curbed by the standard of purpose contained in section 1 of the Act, stating that it is the purpose of the Act to promote the circular economy in order to conserve natural resources and ensure the environmentally compatible disposal of waste. Other than this general provision the Act does not contain powers of enforcement. However, the State Waste Act (*Landesabfallgesetz NRW*) specifies in section 35 that as far as this hasn't been prescribed the competent authority is authorised to make the necessary orders to ensure compliance with, among others, the Federal Waste Management Act and the State Waste Act. The heading above the section states it is a power of intervention (*Eingriffsbefugniss*). No other sanctioning powers are conferred on the competent authorities in these Waste Acts.

In the table below, the sanctions are detailed that are available to the regulatory authorities for the specific areas of environmental protection.

1263 § 7 *Umweltschadengesetz*.
1264 § 8 *Umweltschadengesetz*.
1265 § 21 Krw-/AbfallG.

Sanctions available for the specific areas of environmental protection	
Area of environmental protection	**Sanction (administrative decision)**
• All	- order aimed at non-compliance
• Emissions protection	- order aimed at non-compliance (general power) - order to close down an installation - revocation of a licence - prohibition of all or part of an operation of an installation (pending compliance)
• Waste management	- order aimed at non-compliance (general power)
• Water protection	- revocation of a licence or consent
• Nature protection	- order for abatement of a nuisance
• Building and spatial planning	- order aimed at non-compliance (general power), including order to tear down a building; suspension of building works; abatement of nuisances
• Environmental damage	- obligation to take preventative measures - obligation to take remedial measures
• All	- administrative coercion to enforce the above-mentioned administrative decisions: substitute action, coercive fine, and immediate force

8.3 Sanctions for regulatory offences

8.3.1 Introduction

As explained in chapter 6, non-compliance with environmental law may be a regulatory offence. In such a case, the regulatory authorities have available the means of the administrative sanctions in *Gefahrenabwehr* and the prosecution and sanctioning by means of regulatory sanctions.

> For example, the non-compliance with the prohibition of operating a company without a permit, laid down in the Federal Immissions Control Act, can be dealt with through *Gefahrenabwehr*, and is also a regulatory offence that can be punished with a regulatory fine.[1266]

1266 See § 62(1)(1) *BundesImissionsschutzgesetz*.

Below, first the concept of the administrative regulatory offence is further explained (8.3.2). Subsequently, the regulatory sanctions that are possible for environmental regulatory offences are discussed (8.3.3).

8.3.2 The concept of the regulatory offence

In Germany, the repressive system most commonly used for sanctioning environmental offences is the system of (administrative) regulatory offences (*Ordnungswidrigkeitenrecht*). A regulatory offence (*Ordnungswidrigkeit*) is defined by statute as an unlawful and, when required, culpable[1267] act that fulfils elements of an offence penalised with a monetary fine (*Geldbuße*; § 1 Administrative Offences Act). The penalisation of specific administrative offences takes place in the specific environmental statutes of the federation and the states. The penalisation of the administrative offences in Nordrhein-Westfalen is described in the following table.

Penalisation of regulatory offences in environmental acts	
Immissions protection	§ 62 BImSchG § 17 LImSchG
Waste management	§ 61 Krw-/AbfG § 44 Landesabfallgesetz
Nature and landscape protection	§ 65 BNatSchG § 69 and 70 Landeslandschaftsgesetz § 77 and 78 Landesnaturschutzgesetz
Water protection	§ 41 WHG § 161 and 161a Landeswassergesetz
Spatial protection	§ 84 Landesbauordnung

Administrative offences must and can be distinguished from criminal offences. From a formal point of view, the definition of an administrative offence clearly specifies that it is penalised with a fine, literally a monetary penalty (*Geldbuße*). For criminal offences also a (monetary) fine (*Geldstrafe*) can be imposed. The regulatory monetary sanction has a repressive character. It is however not a punishment like the truly criminal offences. Administrative offences legislation aims in the first place to enforce certain provisions or a certain state of the environment. Therefore, the goal is not retaliation for compensation of a social-ethical debt. According to the Federal Constitutional Court (*Bundesverfassungsgericht*) social-ethical debt is restricted to the

1267 The element of culpability needs only to be fulfilled when this is required in the provision that penalises the offence, see paragraph 1 section 2 *Ordnungswidrigkeitengesetz*.

criminal law.[1268] The administrative offences deal with administrative wrongdoing (*Verwaltungsunrecht*), i.e. breaches of administrative law provisions the moral connotations of which are below the threshold of criminal unlawfulness.[1269] They are said to be 'ethically-neutral'.[1270] Generally, these offences have a lower intensity and a lower degree of danger than criminal ones. For this reason, they have been kept out of the true criminal law.

Also, from a substantive point of view, regulatory and criminal offences can be distinguished in a quantitative manner. In administrative offences law the penalisation most commonly prescribes abstract endangerment offences (*Tätigkeitsdelikte*), i.e. a certain type of action is penalised regardless of its consequences, such as the action of discharge of toxic fluids from a company into a neighbouring stream. This is more common than concrete endangerment offences, i.e. where it is an offence only when a certain type of result occurs (*Erfolgsdelikte*), when humans are taken ill by the discharge.[1271] The latter tends to occur much more often in the penalisation of criminal offences than with regard to administrative regulatory offences. However, for German environmental offences, also the penalisation of criminal environmental offences tends to generally rely on abstract endangerment.[1272]

> The formulation of offences in this manner can be compared to the strict liability offences which are common in the penalisation of criminal environmental offences in England, as well as the formulation of abstract endangerment offences common in the Dutch Economic Offences Act for environmental crimes, although that Act contains a provision which indicates a higher sanction if the crime is committed with intent (See chapter 8 and chapter 5).[1273]

As explained previously, the penalisation of the administrative offences is laid down in each of the specific federal environmental statutes and, additionally, in the specific environmental acts of the states. This penalisation also determines how the offences are sanctioned and what the maximum punishment is.

1268 Karlsruher Kommentar 2000, p. 22, Einleitung nr. 93.
1269 Franzheim & Pfohl 2001, margin number 486 and further; Schlemminger & Martens 2004, p. 208.
1270 See (also) Woods & Macrory 2003, section 4.6.
1271 See for the Netherlands, for example, Kamerstukken II, 2004-2005, 30 037, nr. 3, p. 2.
1272 Hoppe, Beckmann & Kauch 2000, § 13, margin number 13.
1273 The Dutch common criminal environmental offences generally contain an element of *mens rea*. This means that these offences can be considered as concrete endangerment offences.

8.3.3 The regulatory fine

Overview

The prosecuting authorities[1274] can impose the regulatory fine as the main sanction for regulatory offences. Secondary sanctions, which may be imposed in addition to the fine, are the confiscation of objects and the forfeiture of a monetary sum of the value of assets obtained as a result of the non-compliance.

> As set out in chapter 3 on England, the term penalty was conventionally seen as a form of punishment under criminal law. Now, especially where it is used as distinct from the word 'fine', the term penalty signifies an instrument with a broader connotation and can be used to denote a sanction imposed on a party as a consequence of an offence or a regulatory breach. The use of the term therefore is not any longer confined to criminal enforcement. The term 'fine' is now used to indicate a truly monetary punishment, a penalty, imposed in criminal court.[1275] Applied to the translation of the punishment of *Geldbuße* in case of an administrative offence versus the punishment with a *Geldstrafe* of a criminal offence, the former must be translated as an administrative fine; the latter as a criminal fine.

The level of the fine

The Regulatory Offences Act stipulates a minimum fine of five Euros and a maximum of a thousand Euros. The federal environmental statutes on pollution control (emissions), waste, water, and nature all establish a maximum administrative penalty of 10 000 Euros for violation of obligations that are related to supervision, such as the requirement of notification, the obligation to give information, or the obligation to aid the supervision by the authorities.[1276]

A higher maximum of 50 000 Euros is set for violation of the obligation to have a permit and related offences. This is stipulated in the Federal Acts for immissions protection, waste, water protection and nature protection.[1277] The exception is the area of spatial planning and building. The Federal Building Code provides three maxima: a maximum of 500 Euros for giving the wrong information to the authority; a maximum of 10 000 Euros for acting in violation of the building plan; and a

1274 As explained previously, although the regulatory authorities are called prosecuting authorities when they deal with the enforcement of regulatory offences, this term does not illustrate the full competence of the authorities for these offences, as they are also the primary authority for imposing sanctions.

1275 Chapter 10; Woods & Macrory 2003, p. 10.

1276 See § 62 section 2 BImmSchG; § 61 section 2 Krw-/AbfG, § 41 section 1 sub 7 WHG, § 65 section 2 sub 1a, sub 2-3, sub 5-8; section 3 sub 2 and sub 4 BNatSchG.

1277 In § 62 section 3 BImSchG, § 61 section 3 Krw-/AbfG, § 41 section 2 WHG, § 65 section 5 BNatSchG.

maximum of 25 000 Euros for acting without a permit.[1278]
The state regulation in these areas shows more differentiation. The State Immissions Act sets a maximum of 5000 Euros for non-compliance with statutory instruments and such; and an upper limit of 1000 Euros for more minor administrative offences such as not giving entry to buildings or premises. In the other areas discussed here, including building law, an upper limit of 50 000 Euros is laid down.[1279] Besides this upper limit, the State Building Code of NRW also sets the maximum of 250 000 Euros for building without or not in conformity with a permit.[1280] This seems quite a hefty amount compared with the other areas of the environmental arena where similar offences are penalised with much lower penalties. It is the question whether this maximum penalty is actually imposed often.

Establishing the fine

The assessment of the appropriate fine is guided by administrative rules laid down in the catalogue of fines (*Bußgeldkatalog*).[1281] Each of the states in Germany has its own catalogue, drawn up by its own Ministry that is in charge of the environment. This means that fines for regulatory offences may vary from State to State. The rules laid down in the catalogue bind the administrative authority internally.[1282] The rules do not bind the court when it establishes a penalty after an objection has been lodged (§ 71 OWiG), or where the criminal court imposes a penalty for an administrative offence in a criminal procedure (§ 82 OWiG). To the judiciary, the rules serve as an orientation aid or recommendation. However, the court must motivate where it departs from the rules, particularly where the case before it does resemble a situation described in those rules.[1283]
The level of the fine is influenced by the importance of the regulatory offence and the injustice the offence brings with it and by the accusation of the offender, i.e. the guilt (or negligence) of the offender. To ensure that sanctions are imposed that are made-to-measure to the specific situation, the level of the administrative penalty may be adjusted.[1284]
The economic circumstances of the offender will also be taken into account, although this is generally not necessary when it concerns very minor offences.[1285] Notably, it is specified in the Administrative Offences Act that the fine should exceed the financial benefit the offender has obtained from the regulatory offence. If the statutory maximum of the fine would not suffice for that purpose, the law determines that the maximum may be exceeded for this purpose.[1286]

1278 § 213 section 2 *Baugesetzbuch*.
1279 § 123 *LandesWassergesetz*; § 44 *Landesabfallgesetz*; § 71 *Landschaftsgesetz*; § 84 *Landesbauordnung*.
1280 § 84 section 3 *Landesbauordnung*.
1281 *Bußgeldkatalog Umwelt NRW*, available (together with the catalogues of the other States) at https://umwelt.bussgeldkatalog.org/. Last visited 1 June 2019.
1282 Göhler 2017, § 17, margin number 32; Mitsch 2018, § 15, margin number 13.
1283 Mitsch 2018, § 15, margin number 13; Schall, NStZ 1986, 1 (2); Schall, NStZ 1986, 464 (465).
1284 Section 17 *Ordnungswidrigkeitengesetz*.
1285 § 17 section 3 *Ordnungswidrigkeitengesetz* .
1286 § 17 section 4 *Ordnungswidrigkeitengesetz*.

Execution of the decision

The penalty decision is only executed through a recovery procedure (*Beitreibung*) when it seems that the offender will try to avoid paying the fine.[1287] The authority may order that the enforcement of the decision will not take place when it is shown that the offender cannot pay the fine for the foreseeable future.[1288] When the offender does not pay the fine after the time limit of two weeks has passed, the fine can be enforced through coercive detention (*Erzwingungshaft*).[1289] The court, at the request of the enforcement authority or *ex officio*, can order this when the penalty has not been paid; the party concerned has not indicated any reasons to explain this; he/she has been notified; and no circumstances are known that would explain an inability to pay.[1290]

8.3.4 Secondary sanctions

Several 'secondary sanctions' (*Nebenfolgen*) may be imposed for regulatory offences in addition to the regulatory fine, specifically the confiscation of objects and the forfeiture of a monetary sum of the value of assets obtained as a result of the non-compliance.

The 'secondary' sanction of confiscation of objects (*Einziehung*)[1291] is conferred on the enforcement authorities in § 62 of the Federal Waste Management Act; § 67 of the Federal Nature Protection Act; § 71(2) of the State Countryside Act; and § 84(4) of the State Building Code.[1292] The confiscation concerns items related to the regulatory offence, or objects that were used or to be used in the commission or preparation of the offence. Where there are no objects to be confiscated from the offender, instead the worth of the object(s) can be forfeited.[1293] The regulatory fine and the confiscation or forfeiture are laid down in one decision (*Bußgeldbescheid*).[1294]

8.3.5 Alternatives to the regulatory fine

The regulatory authorities also have at their disposal, alternatives to the administrative fine. Instead of an administrative fine, a warning can be given to the offender, or the forfeiture can be ordered of a monetary sum.[1295]

1287 § 95 section 1 *Ordnungswidrigkeitengesetz*.
1288 § 95 section 2 *Ordnungswidrigkeitengesetz* .
1289 § 96 *Ordnungswidrigkeitengesetz* .
1290 *§ 96 section 1 Ordnungswidrigkeitengesetz* . See Göhler 2017, § 96.
1291 § 87 *Ordnungswidrigkeitengesetz*.
1292 Confiscation also has a general regulation in the Administrative Offences Act, which may apply, see sections 22 to 29 *Ordnungswidrigkeitengesetz*.
1293 § 25 *Ordnungswidrigkeitengesetz*.
1294 *§ 65 Ordnungswidrigkeitengesetz*. To execute a confiscation or forfeiture decision, an independent decision is taken: section 87 *Ordnungswidrigkeitengesetz*.
1295 § 56 section 1, and § 29a *Ordnungswidrigkeitengesetz*, § 87 *Ordnungswidrigkeitengesetz* respectively.

Warning
Where the administrative offence is minor, a warning can be given together with *Verwarnungsgeld*, which is a warning fine in the amount between 5 and 55 Euros. A warning without a fine is also possible.[1296] The warning is laid down in a certificate (*Bescheinigung*).[1297] The offender should agree with receiving the warning.
The warning fine should be paid immediately or within a time period no longer than a week, otherwise the warning does not have legal force. With legal force, the warning takes away the right to prosecute that offence.

Forfeiture of a monetary sum
The other alternative to the regulatory penalty is the forfeiture of a monetary sum (*Anordnung des Verfalls*).[1298] The authority may order the forfeiture of a monetary sum where the offender has gained from the violation and a regulatory penalty is not imposed. The level of the forfeiture will resemble the value of gains obtained by the offender by committing the offence. Only the forfeiture of a monetary sum is possible in a regulatory sanctions procedure, not of items or rights. As the forfeiture and the administrative fine are quite similar, forfeiture is not possible where a regulatory fine has been ordered.[1299]

Regulatory offences and criminal offences intertwined
As explained, regulatory offences and criminal offences can be intertwined. This means that the regulatory authorities give the case to the Public Prosecutor for (possible) prosecution [or alternatives to prosecution], and, (possibly) the imposition of criminal sanctions by the criminal courts. In the next section, the prosecution of offences by the Public prosecutor and the imposition of sanctions by the criminal courts are described. There, it will also be further discussed how the courts adjudicate regulatory offences that have been prosecuted by the Public Prosecutor instead of the regulatory authorities as prosecuting authorities.

8.4 Sanctions for criminal offences

8.4.1 Introduction: the criminalisation of environmental non-compliance
Criminal sanctions for environmental criminal offences that the criminal authorities may impose are contained in the Criminal Code (*Strafgesetzbuch*). As described in chapter 6, since 1980 this Code contains a chapter that contains the penalisation of environmental criminal offences.[1300] As the offences are contained in the general

1296 § 56 section 1 *Ordnungswidrigkeitengesetz*.
1297 § 56 section 3 *Ordnungswidrigkeitengesetz*.
1298 § 29a and § 87 *Ordnungswidrigkeitengesetz*.
1299 § 30 section 5 *Ordnungswidrigkeitengesetz*; § 87 *Ordnungswidrigkeitengesetz* .
1300 Section 29, paragraphs 324-330d of the *Strafgesetzbuch*.

Criminal Code, the sanctions provided in the general part of that Code may be imposed. Moreover, the specific environmental statutes may contain penalisations and specific sanctions.[1301] For example, the Federal Nature Protection Act contains provisions on sanctions of imprisonment and confiscation for specific criminal offences established in that act.[1302]
Besides the penalisations in the Criminal Code, the environmental statutes themselves may contain penalisations. The level and type of sanction is specified for each of the offences in these penalisations. For the most part, the penalisations of environmental criminal offences are abstract endangerment crimes that hold a specific type of action punishable rather than a specific result.[1303]
There are also several instances where the danger that the offence brings, is specifically formulated in the law. These are concrete endangerment offences.

> This is for example the case in § 330 section 1 of the Criminal Code, that penalises section 324 to 329 of the Code with a higher sanction where the violations would cause the death or at least the peril of death for other people, or severe damage to their health, or where it would bring many people into danger to their health. A few provisions do penalise a specific result (objective result crime; see § 324; 329 section 3; 330 number 1).

Environmental criminal law is regarded as ultima ratio in Germany. This means that the criminal law is used as last resort for the authorities and in particular for severe cases of environmental non-compliance.[1304] As mentioned in chapter 6, in practice, environmental crimes are scarcely prosecuted and hardly result in a conviction.

8.4.2 Criminal sanctions by the criminal courts

The set of criminal sanctions that the criminal courts may impose, consist of primary sanctions and measures, which can be imposed in addition to the primary sanctions. The primary sanctions are:

- imprisonment (*Freiheitsstrafen*); and,
- criminal fines (*Geldstrafen*).

In addition, measures may be imposed, which are:

- the prohibition to work in the same profession (*Berufsverbot*); and,

1301 This is also called secondary criminal law (*Nebenstrafrecht*). Rengeling 2001, p. 132; also Hoppe, Beckmann & Kauch 2000. § 66 BNatSchG 2002; §59 LuftVG; §39 PflSchG, §17 TierSchG, §74 TierSG.
1302 In § 66, § 67 and § 71 BNatSchG. See also, for example, § 59 LuftVG; § 39 PflSchG, § 17 TierSchG, § 74 TierSG. See also the State Immissions Protection Act and the State Countryside Act both also contain special provisions on criminal offences (§ 18 and § 72 respectively).
1303 See § 326-328, 329 section 1 and 2 of the *Strafgesetzbuch*. Hoppe, Beckmann & Kauch 2000, § 13, margin number 13.
1304 Sparwasser et al 2003, p. 10; Franzheim & Pfohl 2001, p. 29 and further.

- siphoning off of profits from the offence:
    - confiscation of objects (*Einziehung Gegenstände*);
    - forfeiture (*Anordnung des Verfalls*).

Imprisonment

For environmental offences, the Criminal Code most commonly allows imprisonment of up to three years for violation of the obligation 'to have permission', such as a permit or a licence.[1305] The maximum goes up to five years for environmental offences that involve violation of the obligation to have permission and also causing environmental damage, as well as for environmental offences that involve non-compliance with certain obligations of species protection.[1306] Other than that, imprisonment for a time period of up to ten years may be imposed with regard to more serious environmental offences.[1307]

> Such offences are deemed serious because of, for example, irreparable damage, such as the fact that a water body has been damaged in such a way that it cannot be cleaned up without extraordinary effort or over a long period of time, or the lasting damage to animals or plants that are threatened with extinction. Moreover it is also considered serious where the offender has acted out of pursuit of profit.[1308]

The court may order that the prison sentence is suspended in case a sentence of no more than a year is imposed and it is expected that the offender will not commit another crime.[1309] This suspension may be lifted when the offender commits an offence during the suspension term.

Criminal fine

The criminal fine is presented as the alternative to imprisonment in all the provisions that penalise environmental criminal offences. The criminal fine is calculated by establishing day rates on the basis of the daily net income the offender receives or could have received.[1310] The general minimum to the fine is five day rates. If not otherwise stipulated, the maximum is 360 full day rates. The day rate has a maximum of 30 000 Euros, which means that, in total, a maximum of 10,8 million Euros may be imposed.[1311]

1305 § 327 section 2 Criminal Code for emissions protection; § 327 section 2 Criminal code for waste management; § 304 Criminal Code for the protection of monuments of nature against damage or disturbance.

1306 See for example, section 324 for water; section 325 section 1 and 2 for emissions protection; section 326 for waste management; and section 329 of the Strafgesetzbuch for emissions, damages to nature, water as well as building; and section 66 of the Federal Nature Protection Act.

1307 See section 324-328 of the *Strafgesetzbuch*.

1308 Section 330 *Strafgesetzbuch*.

1309 Section 56 *Strafgesetzbuch*.

1310 Kloepfer & Heger 2014, p. 59.

1311 Section 40(2) *Strafgesetzbuch*.

The criminal court establishes the level of the daily rates of the penalty taking into account the personal and economic circumstances of the offender.[1312] The court may decide to give the offender relief of payment by allowing him a stipulated period of time or the possibility to pay in instalments, if the personal and economic circumstances of the offender give rise to this.[1313] Interestingly, the criminal fine can be imposed together with imprisonment, where the offender has enriched himself by the offence or tries to enrich himself and the court also considers it otherwise appropriate taking into account the offender's personal and economic circumstances.[1314]
Where the criminal fine cannot be recovered, it may be replaced with imprisonment (*Ersatzfreiheitsstrafe*). The term of incarceration is similar to the amount of day rates counted for the fine, with a minimum of one day.[1315]

Confiscation of objects
The confiscation of objects (*Einziehung*) can be imposed as a measure in case of many environmental offences.[1316] As it is a measure, it can be imposed in addition to the primary sanctions of imprisonment and the criminal fine.

> This sanction can be imposed in the case of the offence concerning waste management (§ 326); operating installations without a permit (§ 327); handling radioactive or other dangerous substances in an unlawful manner (§ 328); and endangering areas requiring protection (§ 329).[1317]

The confiscation concerns objects that have been produced by the offence or that have been used to commit the offence or to prepare it. The confiscation also extends to objects that are not the property of the offender but of someone who is entitled to the items or owns them, when that person has at least negligently allowed that the item or the right was used as the means or the object to commit the offence or for its preparation; or that the person acquired the objects immorally.

Forfeiture
The court also has the power to order the measure of forfeiture (*Verfall*) if the offender has gained something from the offence.[1318] This measure is seldom imposed, however.[1319] The forfeiture applies to benefits derived from the offence. It can also

1312 Section 40(2) *Strafgesetzbuch*.
1313 Section 42 *Strafgesetzbuch*.
1314 Section 41 *Strafgesetzbuch*.
1315 Section 43 *Strafgesetzbuch*.
1316 Section 330c *Strafgesetzbuch*.
1317 See also section 67 of the Federal Nature Protection Act.
1318 Section 73-76a *Strafgesetzbuch*.
1319 See Kloepfer & Heger 2014, p. 61.

extend to items gained by the sale of an object gained from the offence.[1320] When forfeiture is not possible, because of the state of the object, or another reason, the court can order the forfeiture of a monetary sum that reflects the value of the benefit gained from the offence. This can also be ordered when the forfeiture of the object itself does not provide the entire benefit gained (from it) by the offender. The court may estimate this amount.
The law determines that forfeiture should not be ordered when this would be unreasonably severe for the offender, for example, when the value of the benefit is no longer available in the property of the offender.[1321] If this is the case, the court may ease the terms of payment.

Prohibition to practice a profession or business
The court may also, as a measure, prohibit the offender to practice his profession or business (*Berufsverbot*).[1322] This prohibition can be temporary and last from one to five years. The court makes a consideration of the offence and the offender – in particular whether there is a danger that considerable offences of significant proportion will ensue when the offender can continue to exercise his profession or his business.
An indefinite prohibition can also be imposed by the court when it expects that the statutory maximum of five years is not sufficient to avert the danger posed by the offender.[1323] The prohibition can be suspended when the danger of committing offences by the offender no longer exists.[1324] This suspension is only possible after the prohibition has been in force for a year. The prohibition can come back into force when the offender commits another offence.

Sentencing principles for the criminal courts
The Criminal Code provides principles of sentencing.[1325] The criminal courts are to follow these principles to determine the appropriate criminal sanctions in a given case. First of all, the principles state that the guilt of the offender is the basis for the attribution of the penalty. In sentencing, the criminal courts are to consider the effects to are to be expected from the punishment for the future life of the offender in society.[1326] Moreover, when sentencing, the court is to weigh the circumstances that speak for and against the offender against each other. In particular, these are:
- the motivations and objectives of the offender;
- the attitude and intention of the offender;

1320 Section 73 section 2 *Strafgesetzbuch*.
1321 Section 73c *Strafgesetzbuch*.
1322 Section 70-70b *Strafgesetzbuch*.
1323 Section 70 *Strafgesetzbuch*.
1324 Section 70a *Strafgesetzbuch*.
1325 Section 46 *Strafgesetzbuch*.
1326 Section 46(1) *Strafgesetzbuch*.

- the extent of non-compliance;
- the nature of the offence and its effects;
- the past life of the offender;
- the personal and economic circumstances of the offender; and,
- the behaviour of the offender after the offence, especially his effort to make good the damage.[1327]

Sanctions by the criminal courts for regulatory offences

Where a regulatory offence is adjudicated in criminal proceedings (together with a criminal offence), the court may sentence the offence as a regulatory offence with the adjoining possibilities for sanctions.[1328] This means that, where it does not impose a criminal sanction, the court can impose a regulatory fine according to the rules of the Regulatory Offences Act. The possibilities of combinations of sanctions, including those of *Gefahrenabwehr* will be detailed in section 8.5 of this chapter.

When a court is adjudicating administrative regulatory proceedings, the court is not limited to judging the offence as such. It may also sentence the offence on the basis of a criminal statute as a criminal offence.

8.4.3 Criminal sanctions by the Public Prosecutor

The Public Prosecutor prosecutes criminal offences in criminal court, whereupon the court may impose a sanction upon an offender. The Public Prosecutor also may impose certain sanctions as an alternative to prosecution in case of misdemeanours (*Vergehen*); nearly all environmental criminal offences are such misdemeanours. More specifically, the Public Prosecutor may (temporarily) abandon prosecution with conditions for the offender of compensation.[1329] The Public Prosecutor may only do this, with the agreement of the court that would have adjudicated the case against the criminal offence and the agreement of the offender. Moreover, the conditions that the Public Prosecutor imposes must suit to cover the public interest that would otherwise be served with prosecution. Among the conditions the Public Prosecutor may impose are the compensation for the damage caused by the offence, and the payment of a lump sum of money to a charitable institution. It is quite a popular instrument, also with offenders.[1330]

The Public Prosecutor will set a time period within which the offender must comply with the conditions it has imposed, with a maximum of six months. If the offender fulfils the conditions that have been set, the offence can no longer be prosecuted. With approval of the Public Prosecutor, also the criminal court may take a decision to (temporarily) cede prosecution, under conditions as described above.[1331]

1327 Section 46(2) *Strafgesetzbuch*.
1328 § 82 section 1 OWiG; see also § 21(2) OWIG.
1329 § 153a section 1 numbers 1 to 3 Strafprozessordnung. See also Foster & Sule 2010, p. 342.
1330 Saliger 2012, para. 540; see also Sina 2017, p. 108.
1331 Section 153a *Strafprozessordnung*.

8.5 Cumulation of sanctions: concurrent and consecutive imposition

8.5.1 Introduction

Considering that in Germany there are three sets of sanctions that may be deployed for the enforcement of (certain) non-compliance of environmental law, the question is whether these sanctions may be imposed at the same time (concurrently/simultaneously).[1332] Also, it is the question whether these sanctions may be imposed consecutively, for example for the purpose of a follow-up sanction when the enforcement goal was not reached by means of the previous sanction imposed or non-compliance has not occurred, in other words by scaling-up sanctioning. This section discusses these aspects.

8.5.2 Concurrent imposition of sanctions

Concurrent imposition of sanctions of the same enforcement system

Simultaneous imposition of (different) sanctions available in *Gefahrenabwehr*, regulatory sanctions, and criminal sanctions can be possible, as long as the competent authorities weight the proportionality of the enforcement action. Enforcement action must not result in a disadvantage that would be disproportionate to the goal pursued.[1333] It also means that a measure – or a set of measures – is only admissible until the goal is attained or it turns out that the goal cannot be reached. Moreover, the subsidiarity of enforcement action must be taken in to account by the authorities. This means that where more than one measure is possible and appropriate in a certain case, the measure that will likely have the least adverse effect on the individual and the community is to be chosen.[1334] Therefore, the competent authorities are to carefully weigh whether concurrent imposition of sanctions is really necessary.

Concurrent imposition of Gefahrenabwehr and other sanctions

The concurrent imposition of sanctions is possible with regard to sanctions for *Gefahrenabwehr* and regulatory sanctions; as well as with regard to sanctions for *Gefahrenabwehr* and criminal sanctions. The possibility of concurrence of *Gefahrenabwehr* and regulatory sanctions is important for effective enforcement, as the administrative authorities are in charge of both and will be able combine reparatory and punitive sanctions to achieve a complementary enforcement reaction, where appropriate.

1332 For one instance of non-compliance, sanctions of *Gefahrenabwehr* may be applied concurrently or consecutively with sanctions for administrative offences or sanctions for criminal offences, or both.

1333 *Verhältnismäßigkeit*.

1334 See section 2 *Polizeigesetz NRW*; section 15 *Ordnungsbehördengesetz NRW*; BVerfG NJW 86, 767, 769, Tekst&Kommentar Stpo 2006, Einleitung, marginnumber 20.

Concurrent imposition of regulatory and criminal sanctions

Regulatory sanctions and criminal sanctions cannot be imposed simultaneously. When non-compliance can be prosecuted as a regulatory offence and also as a criminal offence or where the procedures for regulatory sanctions and criminal sanctions for an offence are started in parallel, it is the rule that the criminal law has priority (*Vorrang des Strafverfahrens*). A criminal sanction usurps the possibility to impose a regulatory sanction if the violation in question was both a criminal offence and a regulatory offence. When non-compliance is a criminal offence and also involves a regulatory offence with regard to other aspects of the violation, sanctions for regulatory offences and sanctions for criminal offences may be ordered at the same time. As explained in the previous chapter, the Public Prosecutor will be able to take over the case and decide whether both offences will be pursued or not. Where both are pursued, the Public Prosecutor will prosecute both and a criminal court will decide on the sanctions for both the criminal offence and the regulatory offence.

8.5.3 Consecutive imposition of sanctions

Consecutive imposition of sanctions of the same enforcement system

Consecutive sanctions for *Gefahrenabwehr* may be imposed; the administrative coercive fine, the substitute action and the immediate force can all be imposed consecutively with regard to one single instance of non-compliance as long as the non-compliance has not ended, and the obligations in the enforceable administrative decision have not been complied with.

If the regulatory fining decision has become legally effective, or if the court has rendered a final decision on the offence as a regulatory offence or as a criminal offence, the same offence can no longer be prosecuted as a regulatory offence.[1335] Therefore, consecutive regulatory sanctions are not possible for the same non-compliance. This is called the barrier function (*Sperrwirkung*) of the legally confirmed regulatory sanction.[1336] Consecutive criminal sanctions are similarly impossible.

The basis for this is the principle of *ne bis in idem*, or double jeopardy that is specified in § 103 section 3 of the German Constitution.[1337] That section reads '*niemand darf wegen derselben Tat auf Grund der allgemeinen Strafgesetze mehrmals bestraft werden*'. This can be translated as 'nobody may be punished more than once because of the same act on the basis of the general criminal statutes'. In other words, this provision lays down the constitutional right not to be punished twice for the same offence.[1338] As will be seen below, the application of this principle has certain limitations, as it does not fully apply to all punitive sanctions or procedure for punitive sanctions.

1335 Section 84(1) and (2) OWiG.
1336 Section 84(1) OWiG.
1337 Also Kingreen & Poscher 2018, § 24, margin number 13.
1338 It is generally considered that within this right is also contained the prohibition of a second trial after a defendant has been acquitted, Von Münch & Kunig 2012.

Consecutive imposition of sanctions from different enforcement systems

A sanction for *Gefahrenabwehr* does not prevent the consecutive imposition of an administrative regulatory sanction or a criminal sanction for the same non-compliance that is also a regulatory or criminal offence or vice versa (or a procedure for either or both).

With regard to the consecutive imposition of sanctions of the other two sanctioning systems the picture is different. In that regard, a consecutive or preceding criminal procedure and sanction will always have priority over a procedure and sanction for a regulatory offence by the administrative authorities as prosecuting authorities. Specifically, a regulatory fine imposed by an administrative authority does not prevent a consecutive criminal procedure and sanction for the same non-compliance.

In fact, even where a regulatory fining decision is irrevocable, where the regulatory authorities have imposed it, it can and will be withdrawn when a criminal sanction is imposed for the same act of non-compliance.[1339] The reasoning behind this is that the regulatory authorities that impose a regulatory sanction – even though they are called the prosecuting authorities for this purpose – are not competent to legally decide on the criminal punishability of non-compliance.[1340] Therefore, while the decision of the regulatory authorities prevents a new regulatory sanction for the same non-compliance, it does not have that effect on possible criminal sanctions. In other words, a regulatory sanctioning decision by the administrative authorities does not block any prosecution of criminal offences on the basis of the same non-compliance. This means that if a penalty decision has been issued, but the offender is later sentenced in criminal proceedings for the same act, the penalty decision will be set aside.[1341] A regulatory fine that has been already paid will then be taken into account in the criminal sanction. The amount paid will be subtracted from a criminal penalty, any monetary secondary criminal sanctions, or from the costs of the criminal proceedings.

A previously imposed regulatory sanction by the regulatory authorities is also set aside, when the specifications of the court in its decision – for example that certain aspects of non-compliance have not been committed by the offender stand in the way of a penalty decision, even where no sentence is imposed in the criminal proceedings. A previous regulatory sanction will only block the prosecution and sanctioning of non-compliance as a criminal offence where the regulatory sanction has been established or confirmed by a court.[1342] This is the case either where the Public Prosecutor has

1339 § 86 OWiG. As is apparent from this description, in Germany the fact that proceedings are started for a second time does not fall within the realm of the principle of *ne bis in idem*. See also § 81 and § 82 OWiG.

1340 Klesczewski 2016, p. 228.

1341 As is apparent from this description, in Germany the fact that proceedings are started for a second time does not fall within the realm of the principle of *ne bis in idem*.

1342 § 84 section 2 OWiG. See also Keulen et al 2015, p. 167.

taken over de proceedings and the criminal court has decided to impose a regulatory sanction, or where an appeal was brought against the regulatory fining decision and the court has confirmed it on appeal.

8.6 Evaluation: flexibility and variation in the enforcement toolbox

In the following the evaluative framework formulated in chapter 2 will be applied to the sanctions available for the public enforcement of non-compliance with environmental law in Nordrhein-Westfalen, Germany. Here, the sanctions are evaluated from the perspective of the instrumental requirements. This evaluation will discuss the ability of the available toolboxes of sanctions to aim for the enforcement goals, keeping in mind the possible typology of the non-compliance, its consequences and the offender.[1343] The available toolboxes are those for *Gefahrenabwehr*, regulatory offences and criminal offences. The typology and the enforcement goals are outlined in the table below.

Instrumental requirements	
What is the typology of non-compliance?	**What enforcement goals fit the typology of non-compliance?**
1. The type of non-compliance - on-going or completed - recurring or one-off - long-lasting - multitude of violations at the same time 2. The type of environmental damage (also involving issues of time), including the danger of such damage occurring - absent or present - reparable or irreparable - minor, major, or progressive 3. The type of offender - unknown or known - company and/or individual - notorious (repeat) or non-regular offender	a. To prevent non-compliance b. To end on-going non-compliant behaviour c. To repair environmental damage due to non-compliance d. To prevent recurrence/to advance future compliance; e. To remove benefits from non-compliance f. To compensate the consequences of non-compliance g. To punish non-compliance

1343 See chapter 2, section 2.6.3 for the table detailing this relationship.

a. To prevent specific non-compliance from occurring

There are several administrative sanctions to prevent specific non-compliance from occurring in the hands of the administrative authorities, for all types of non-compliance, damage and offenders. The task of preventive action formulated in German administrative preventive law (*Gefahrenabwehr*) expressly provides for the possibility to impose certain administrative decisions preventively. In that light, it is possible in Nordrhein-Westfalen, Germany to impose an administrative decision preventively, to execute this decision preventively, and to enforce without a preceding administrative decision where this is necessary in case of present danger. This danger includes the danger of regulatory offences and criminal offences. This means, therefore, that the sanction is broadly applicable for the benefit of this enforcement aim. This is very positive in light of effective enforcement, as the sanction can also aim to prevent non-compliance in case of, for example, irreparable damage leading to a criminal offence. Importantly, one of the requirements for the enforcement without a preceding administrative decision is that the regulatory authorities could have taken a legitimate administrative decision, had there been time.

Moreover, orders to close down an installation, or to suspend or revoke a licence can, for example, be imposed preventively in specific cases of non-compliance. These sanctions can moreover be executed preventively even if it is still uncertain non-compliance will occur, when the occurrence would result in extensive irreparable damage. This is very positive in light of effective enforcement.

b. To end on-going non-compliant behaviour

The sanctions available to the regulatory authorities to end on-going non-compliance, once an authority has uncovered it, are to a varying extent able to aim for ending on-going non-compliance. The administrative authorities may try to coerce an offender into compliance with an administrative decision containing an obligation to end non-compliant behaviour, which will lead to the forfeiture of coercive fines when the obligation is not complied with. The administrative decision may also prohibit the operation of an installation pending compliance with an administrative decision. However, the administrative decision with an obligation has disadvantages in light of effective enforcement. As described, the instrument of the administrative decision is a 'dependent sanction', i.e. a sanction that is dependent on (but not necessarily attached to) other enforcement instruments for its execution. Only when the obligation in the (primary) administrative decision is not complied with, will administrative coercion be available to end on-going non-compliant behaviour with environmental law. Moreover, administrative coercion – in the shape of a coercive fine, substitute coercive action by the authority, or what is called immediate enforcement – is necessary to enforce non-compliance with the administrative decision containing the obligation for the offender. This means that the offender is (only) threatened

with, for example, a coercive fine once there is non-compliance with the primary administrative decision containing the obligation to do (or not do) something. This dependency of the primary administrative decision on other, successive sanctions to enforce it is a disadvantage to effective enforcement.
Moreover, a specific disadvantage to effective enforcement of the coercive fine is that it can no longer be collected if the offender complies with the obligation in the preceding administrative decision after all, even after it has been established that the offender is to pay a forfeited fine. This is another important drawback to this instrument in terms of effectiveness, as it does not show the offender that there are risks to postponing compliance with the administrative decision to which it is attached. Moreover, it devalues the threat posed by the forfeiture and collection of the coercive fines.
One of the other sanctions available as administrative coercion, the substitute coercive action by the regulatory authorities, does have positive aspects. One of the positive aspects of the instrument of substitute action by the regulatory authorities in NRW, Germany – also from the perspective of available enforcement resources – is that the (budgeted) costs of this type of administrative coercion may be recovered from the offender before the authorities take substitute action.

c. To (physically) repair the damage caused by non-compliance

As explained in chapter 2, the instrument that the administrative authorities use to aim for remediation of existing non-permanent damage needs to be tailored to the type of damage, i.e. whether the damage is minor, major or progressive. In the toolbox for *Gefahrenabwehr*, the administrative decision containing an obligation to repair the situation is appropriate for this aim. The characteristics of the administrative decision containing an obligation are such that it can be tailored to the situation at hand.
As stated above, this administrative decision, however, has its disadvantages as a 'secondary' sanction – such as a coercive fine, substitute action by the regulatory authority, or immediate force – is necessary when the decision is not complied with. For the enforcement goal of the reparation of damage the administrative decision is less suitable, in particular for situations with progressively worsening reparable damage, as the decision in itself does not provide an immediate threat of action or immediate action.
There are no sanctions that aim to repair environmental damage in the sanctions toolbox for regulatory offences specifically. This is a disadvantage. However, as described, administrative non-compliance is commonly a regulatory offence. This means that the regulatory authorities can use the sanctions to repair environmental damage for the administrative non-compliance. As they are competent for both the administrative non-compliance and the regulatory offence, the regulatory authorities

must then not solely pursue the regulatory offence where reparation of environmental damage is necessary (and possible).

The same applies to criminal offences. Also there, no sanctions are part of the toolbox that aim to physically repair the environmental damage. This is a disadvantage. A counterweight to this is that the regulatory authorities can impose sanctions to achieve this enforcement goal where, and as far as, administrative non-compliance is part of the criminal offence. However, this also means that different enforcement authorities are involved, with the regulatory authorities, on the one hand, and the Public Prosecutor and the criminal courts, on the other. The monetary compensation of environmental damage is a sanction that can be imposed by the Public Prosecutor and the criminal courts. This sanction is discussed below under (f).

d. To prevent recurrence of non-compliance and to advance future compliance

The administrative authorities in NRW, Germany can aim specifically for the goal to prevent recurrence of the non-compliance that has taken place and to advance future compliance through an administrative decision to revoke or suspend a licence or permit. These sanctions are obviously limited in the sense that they are only appropriate in cases where a licence or permit are available. Moreover, the sanctions will not factually prevent non-compliance from recurring.

The toolbox of sanctions for regulatory offences contains two sanctions that can aim for this enforcement goal for the regulatory authorities: the warning with a fine, which is the threat of punishment in case of further non-compliance, and also the warning without a fine. In both cases there is – at first instance – no prosecution. The warning is dependent on (the agreement of) a willing/cooperative offender. Where the regulatory authorities do want to pursue prosecution of the regulatory offences and sanction them, the available administrative sanctions would have to be applied to ensure that this enforcement goal can be aimed for.

The toolbox of sanctions for criminal offences also provides for the possibility to aim for this enforcement goal, particularly through the prohibition to work in the same profession. Moreover, the criminal courts can impose a conditional sentence, under the condition that no further offence is committed. The sentence will be carried out once an offence is committed again. This, therefore, provides a threat and a stick with regard to recurrence and further non-compliance.

e. To remove benefits from non-compliance

The removal of economic benefits, including cost savings, from the non-compliance is quite widely available as part of the sanctions for environmental non-compliance in NRW, Germany. This is positive in light of the effective enforcement of environmental non-compliance.

Firstly, in NRW, Germany it is a statutory obligation to include the economic benefits, including cost savings and economic gain, in the administrative coercive fine when the obligation in an administrative decision is not complied with. Moreover, it is also a statutory obligation that the regulatory fine for regulatory offences exceeds the economic benefits that the offender may have had. Moreover, the regulatory authorities may order the forfeiture of a monetary sum as an alternative to the regulatory fine in case of regulatory offences.

Also the criminal courts can impose a sanction on an offender that can aim for this enforcement goal in the shape of the forfeiture of the benefits derived from an offence. Moreover, it is a sentencing consideration for the criminal courts to impose both imprisonment and a criminal fine, where the offender has enriched himself.

f. To (monetarily) compensate the consequences of non-compliance

The compensation of the consequences of non-compliance, specifically environmental damage, is (only) a part of the conditional suspension of prosecution by the Public Prosecutor or the criminal courts. For criminal offences, the Public Prosecutor and the criminal courts can suspend prosecution and allow the offender a time period to fulfil specific obligations of monetary compensation in relation to the criminal offence. This can also include the payment of a monetary sum to charity. This sanction is dependent on a willing/cooperative offender.

Other than that, there are no sanctions that can aim for compensation in the toolbox of the criminal courts for criminal offences. Also, there are no sanctions that can aim for compensation in the hands of the regulatory authorities for administrative non-compliance or regulatory offences.

g. To punish the offender for non-compliance

Both the regulatory authorities – as prosecuting authorities – and the criminal authorities, especially the criminal courts, can impose punitive sanctions. The regulatory authorities can impose regulatory fines for a broad range of environmental regulatory offences. The regulatory fines have predetermined categories, within which the administrative authorities have discretion to determine the level. Specifically, the level of the fine takes into account the proceeds the offence brings with it for the offender, as the fine must amount to more than the financial benefit the offender has obtained from the offence.

In Germany, as in England and the Netherlands, the most common criminal punitive sanctions that the criminal courts may impose are criminal fines and imprisonment.[1344] The criminal fine is moulded to the specific economic circumstances of the offender, as it is calculated on the basis of the daily net income the offender receives or could have received. This direct connection to the income of the offender is a positive aspect in light of effective enforcement.
The usability of the criminal sanctions is limited by the fact that criminal sanctions cannot be imposed on legal persons. This limitation is a disadvantage to effective enforcement, in particular where the typology of the non-compliance and damage require a (heavy) punitive sanction. Although regulatory fines can be imposed on legal persons, the maximum level of those fines is quite low (with the exception of building, which allows a fine of 250 000 Euros). However, where non-compliance is attributed to a company it is possible to hold the directors of the company severally criminally liable and impose criminal sanctions on them. This provides a certain counterweight to this disadvantage.

8.7 Findings

In this chapter the three systems of sanctions were described that are available to the enforcement authorities for the public enforcement of environmental law in Nordrhein-Westfalen, Germany. These three systems of sanctions have quite a lot of potential from the viewpoint of effective enforcement.
Several positive aspects as well as disadvantages of the sanctions available to the enforcement authorities for the public enforcement of environmental law were noted in the analysis in the previous section, in relation to the instrumental requirements for effective enforcement formulated in chapter 2. What stands out from the analysis is that the systems of sanctions as a whole provide for a quite adjustable enforcement response to (potential) non-compliance. A combination between the three systems of sanctions may be necessary to be able to aim for the enforcement goals appropriate for a given situation of non-compliance.

Several more general aspects following from the analysis that stand out in terms of effective enforcement are set out below.

- The sets of sanctions in the hands of the regulatory authorities for administrative non-compliance can aim for nearly all of the enforcement goals. There are no options to aim at the compensation of the damage through the administrative sanctions toolbox. The other enforcement goals can be aimed for to a varying extent with the available sanctions. The sanctions for administrative non-compliance are

1344 Kloepfer & Heger 2014, p. 58-59.

quite flexible, which is appropriate when considering the potential typology of non-compliance (including the types of damage, and offender).

- The set of sanctions for regulatory offences, which is, as we have seen, also in the hands of the regulatory authorities, can aim for a much more limited set of enforcement goals, specifically the prevention of future recurrence of non-compliance and to advance compliance, the removal of economic benefits, and the punishment of the offender for non-compliance. Therefore, there are no sanctions in the toolbox for regulatory offences that can aim for the end of the non-compliant behaviour, the reparation of the consequences of the non-compliance, and the compensation of consequences of the non-compliance.
- The set of sanctions for criminal offences can aim for nearly the same enforcement goals as the toolbox for regulatory offences – but with other, primarily more severe sanctions. Moreover, the sanctions can aim to compensate the consequences of non-compliance, albeit in a limited manner. There are no sanctions in the toolbox for criminal offences to end non-compliant behaviour, and to repair the consequences of non-compliance.
- For the enforcement goals of ending non-compliance and repairing environmental damage, which cannot be reached with the sanctions toolbox of regulatory offences and criminal offences, a combination with administrative sanctions and – in case of criminal offences – cooperation between the regulatory authorities and criminal authorities would be appropriate to achieve effective enforcement where the type of non-compliance, damage and offender requires it.
- There is still a difference between administrative and criminal enforcement (besides the procedure followed). A difference can be seen in particular in the fact that punitive sanctions are available for the offences. The difference between the enforcement of regulatory offences and criminal offences lies in the variety of sanctions, with the criminal sanctions better able to provide variation. Where similar sanctions exist – in particular the fine – these are set apart by the fact that the maximum level is much higher for criminal offences and the calculation of the fine is strongly related to achieving economic impact on the offender specifically, by taking the net income of the offender as a basis. Moreover, the pursuit of criminal offences is considered a last resort for the enforcement authorities, in particular for severe cases of environmental non-compliance.
- As explained, a significant drawback to the usability of the sanctions for criminal offences is the fact that they cannot be imposed upon legal persons. While the sanctions for regulatory offences can be imposed upon legal persons, these fine are much lower. The fact that the range of sanctions for criminal offences can be imposed upon directors of the businesses provides a certain counterweight to this disadvantage.

While the above-mentioned aspects are promising for effective enforcement, several positive aspects and disadvantages were also noted in the analysis with regard to the ability of specific sanctions to fit the enforcement goals and the type of non-compliance, damage, and offender appropriately.

Most prominent with regard to the specific sanctions available for environmental enforcement are the following aspects:

- The administrative decision containing an obligation for the offender stands out as a broadly applicable sanction in NRW, Germany for the benefit of effective enforcement. This administrative decision can contain several obligations with regard to the non-compliance, including its prevention, reparation, end, and the prevention of future non-compliance.
- It stands out in the positive sense for effective enforcement that the application of this sanction for the prevention of non-compliance is broad, as it can be used to prevent administrative non-compliance, regulatory offences, and criminal offences from occurring. Moreover, it cannot only be imposed preventively, but also executed preventively to prevent specific non-compliance from occurring.
- As described, the administrative decision has several important disadvantages that may impact effective enforcement. Outside of its application for the purpose of prevention of non-compliance, it is not an immediate sanction in the sense that the follow-up sanction – usually a coercive fine or substitute action by the authority – for the specific non-compliance is threatened in the decision imposing the obligation. Moreover, the threat posed by a coercive fine is devalued by the fact that forfeited fines cannot be recovered where the obligation is complied with by the offender even after the time period for compliance has passed. These disadvantages are not offset by the other characteristics of the administrative decision, or of other sanctions that are available to the regulatory authorities for administrative non-compliance.
- As a set of sanctions, the toolbox of sanctions for administrative non-compliance has the possibility to scale up the enforcement response in line with the non-compliance, in particular through imposing different, more invasive sanctions – such as the suspension or revocation of a permit. As mentioned, the preventive suspension or revocation of a licence even if it is still uncertain that non-compliance will occur stands out for the benefit of preventing non-compliance from occurring.
- It stands out specifically as positive for effective enforcement, from the point of view resources management, that the authorities may recover future costs of substitute action before this takes place.
- The conditional sanction that is available to both the Public Prosecutor as an alternative to prosecution, and to the criminal courts, requires a cooperative offender. It is a positive aspect that the offender can be obliged to pay a monetary sum to compensate for environmental damage. The broadness of this obligation is

emphasised through the aspect that this monetary sum can be paid as compensation to a charity.

In spite of the positive aspects, considering the disadvantages mentioned previously, the public law sanctions' toolbox for non-compliance in NRW, Germany would benefit from the introduction of certain elements for the purpose of effective enforcement.

- In connection to what has been described above, it would be a benefit to immediately threaten a specific made-to-measure sanction when imposing an administrative obligation in an enforceable administrative decision;
- Include legal persons as addressee of (punitive) criminal sanctions;
- Include measures to end non-compliant behaviour and to repair the consequences of non-compliance in the toolbox of criminal sanctions;
- Include compensation of environmental damage in the set of non-conditional sanctions for all environmental non-compliance.

The aspects mentioned above offer important contributions to an effective public enforcement of environmental law in NRW, Germany. In chapter 12, it will be discussed how the enforcement organisation and sanctions compare to the other two jurisdictions with regard to their potential for effective enforcement.

Chapter 9 Overview of Public Enforcement of Environmental Law in the Netherlands

9.1 Introduction

This chapter gives an introduction to the organisation and the instruments, i.e. the architecture, in place for the public enforcement of environmental law in the Netherlands. There are several interesting characteristics to this architecture. One of the most prominent characteristics of the system and its elements is the integration of and within the systems of law. Underlying this central aspect is the prominence of considerations of effectiveness and expediency in the formulation of legislation, policy and practice. These and other characteristics will be further explored below.
Below, first, the terminology used in the Netherlands for environmental law and its enforcement is set out (9.2). Following this is a description of the characteristics of the structure of the legal system for environmental protection and enforcement (9.3). For this purpose, the sources of the regulation and the characteristics thereof are studied, in particular the key environmental and enforcement acts. Thereafter, the characteristics of the substance, in particular the instruments, of the enforcement architecture are identified (9.4). To do so, the types of public enforcement in place for the enforcement of environmental law will be discerned. The chapter ends with a conclusion (9.5).

9.2 Terminology of environment and enforcement

Although the definition of the term 'environment' in 'environmental law' may vary in scope from broad to narrow, a generally accepted interpretation can be discerned. This also applies to the term enforcement.

Environment
In Dutch, the terms *milieu* and *omgeving* both translate to the English term 'environment'. To view which Dutch term would be most comparable to fit the concept of the 'environment' in 'environmental law', as introduced in chapter 1, it will be set out below how the terms *milieu* and *omgeving* are used in respect of the areas the law covers in the Netherlands.[1345]
The scope of protection offered by environmental law differs dependent on the term used, and even where a single term is used. The law on *milieu*, referred to as

1345 In chapter 1 environmental law was described as the law that aims to protect life, including human life, and the living environment from human activities that may impact or be hazardous to it.

milieurecht can have a broad or a narrow scope. While there is no agreement on the proper framing of this concept, the existence of different interpretations of the concept is generally accepted. The law pertaining to *milieu* in a narrow sense is the law that concerns environmental hygiene, also called the prevention of pollution caused by potentially harmful activities.[1346] This relates to pollution prevention and control, waste, and water quality, and also includes nuisances. The law on planning and building and the law on nature protection are not included in this definition. The Environmental Management Act (*Wet Milieubeheer)* covers this narrow scope. The interpretation of the concept in a broad sense adds the conservation of nature and water law[1347] to the narrow definition. However, the law on planning and building remains excluded from the reach of the term *milieu*.

The law on *omgeving*, or *omgevingsrecht* includes *milieurecht* in the broad sense, and, additionally, spatial planning and building law.[1348] This broad interpretation matches the concept of environmental law as used in this research as covering the environmental media of air, water, and land, including nature, or flora and fauna. A future Act, the Environment Act (*Omgevingswet*), covers all these areas.[1349]

The term *omgevingsrecht* and its broad conception of the realm of environmental protection has only come into use relatively recently.[1350] The expansion of the concept of the environment was caused by the increasing awareness from the 1990s onwards of the interrelationship between the different areas of the environmental realm. The consequent trend towards harmonisation and integration of environmental law also contained the idea of external integration, which suggests that the interest of the environment should also be considered in other policy areas.[1351] As this development pushed the use of the term *omgevingsrecht*, this term is often used to indicate the context of the interrelationship and the harmonisation between the different areas of law.[1352] While this can be seen as a narrow use of the term, the broad use would then refer to the use of the term as an umbrella concept to indicate the different areas of the environmental arena as a whole.[1353]

Enforcement

With regard to enforcement, in the Netherlands the term *handhaving* is used. Also here, broad and narrow interpretations of the term can be distinguished. In the

1346 See, for example, Seerden & Heldeweg 2002, p. 341.
1347 Van Rijswick & Havekes 2012, p. 88.
1348 See Boeve & Groothuijse 2019, p. 3-4 and p. 7-13. Agriculture is often also included in the broad definition, although this topic is usually not discussed in monographs on environmental law.
1349 See further section 9.3.2.2 of this chapter.
1350 See, among others, Michiels 2001; Driessen, Michiels & Molenaar 2001.
1351 External integration is a principle of law in international and European environmental law (see for example, principle 4 of the Rio Declaration and article 6 EC Treaty). In the Netherlands this is mainly a policy principle: Michiels 2001, p. 3-4; Dhondt & Uylenburg 2000, p. 120-127.
1352 Michiels 2001, p. 4.
1353 Michiels 2001, p. 4.

narrow interpretation, the term solely refers to the imposition of sanctions for non-compliance, whereas the broad interpretation considers inspection and investigation as equal components of the concept.[1354] The giving of advice to potential offenders may also be considered a part of the interpretation at its broadest, although it does not nearly receive as much attention – at least not in legislation – as the other elements mentioned.[1355] All these interpretations are used in academia and practice. However, the broad interpretation is most prevalently adopted in the legislation on the topic of enforcement. Both in the specific environmental statutes, as in the general regulation of enforcement, it is clear that inspection, investigation and sanctioning fall within its scope as these topics are generally discussed in a separate chapter of the statutes entitled 'enforcement'.[1356]

Although not contained in legislation, there are generally accepted definitions of administrative inspection of the compliance with the law and of criminal investigation. The phase of administrative inspection of compliance is referred to as *toezicht*.[1357] *Opsporing* is the Dutch term for the investigation of criminal offences.[1358] The term investigation is used to indicate research done to clarify a criminal offence and/or to prepare the imposition of a punitive sanction.[1359] The main difference between inspection and investigation is that, for criminal investigation, a reasonable presumption (*redelijk vermoeden*) that a suspect committed a criminal offence is required.[1360]

> In section 9.4 of this chapter, economic criminal offences and common criminal offences and their regulation are introduced. The investigative officers charged with the investigation on the basis of the Economic Offences Act can, in fact, carry out the powers granted in that Act even if there is no reasonable presumption or a suspect yet.[1361] Sufficient is that the interest of investigation (*belang van de opsporing*) requires it, which means that it is sufficient where there are indications that there is non-compliance with rules as punishable

1354 See also Michiels 1995, p. 12.
1355 See e.g. in: Michiels 2013, p. 21.
1356 See, for example, the chapter on enforcement in the General Administrative Act (chapter 5) and, similarly, the chapter on enforcement in the General Provisions Environment Act (chapter 5).
1357 See section 5:11 and further of the General Administrative Law Act. Also, Daalder, De Groot & Van Breugel 1998, p. 335; Jansen 1999, p. 9; Blomberg 2013, p. 33. The term *toezicht* is also used to indicate the hierarchical supervision by superior administrative authorities of lower authorities, called *interbestuurlijk toezicht*. This type of *toezicht* will not be discussed further.
1358 See section 17 and further of the Economic Offences Act (*Wet Economische Delicten*) and section 148 and further of the Code of Criminal Procedure (*Wetboek van Strafvordering*).
1359 See also Corstens/Borgers & Kooijmans 2018, p. 241.
1360 See section 27 of the Code of Criminal Procedure.
1361 See sections 18 - 23 of the Economic Offences Act and section 52 et sequitur of the Code of Criminal Procedure.

by the Economic Offences Act.[1362] Therefore, the investigative powers in the Economic Offences Act have a wider scope than those included for common criminal offences in the Code of Criminal Procedure.

Sanctions (*sancties*) are considered to be a reaction to or in certain cases in anticipation of non-compliance. Administrative authorities impose administrative sanctions (*bestuurlijke sancties*) on the basis of administrative law. An administrative sanction is commonly described – in law and literature – as the imposition or revocation of an obligation or a right being withheld by an administrative authority because of non-compliance with an administrative norm, laid down in public law.[1363] Importantly for the practice of the administrative authorities, the General Administrative Law Act provides that the sole order to perform certain actions is not an administrative sanction.[1364] This definition fits the definition as used in this research. The imposition of sanctions is referred to as *sanctieoplegging*. For administrative enforcement, the imposition of sanctions should be distinguished from the execution of sanctions (*sanctieuitvoering*) that – at least for administrative enforcement – generally requires a separate decision of the administrative authority.[1365] Criminal authorities impose criminal sanctions (*strafrechtelijke sancties*) on the basis of criminal law.

9.3 Characteristics of the system: structure

There are two prominent characteristics of the structure of the legal system for environmental protection and its enforcement in the Netherlands: first, the stacking or tiering of the legislation, specifically in terms of the hierarchy of the legal norms for environmental protection. This means that general provisions exist as to the powers and the organisation of enforcement, laid down in general acts on administrative and criminal enforcement. These provisions are commonly declared applicable to the environment in specific legislation on the topic. Moreover, more specific provisions on the topic within this specific legislation may deviate from these general provisions. The second prominent characteristic of the structure of the legal system is the integration of the legal rules: the (procedural) integration of the legal rules on environmental protection, and the integration through harmonization and unification of the legal rules on enforcement. They will now be further discussed.

1362 See case HR 9 March 1993, LJN ZC9268, *NJ* 1993, 633 reiterated, for example, in HR 25 June 2013 ECLI:NL:HR:2013:3.

1363 See section 5:2 sub 1(a) General Administrative Law Act; Michiels, Blomberg & Jurgens 2016, p. 4; Van Wijk, Konijnenbelt & Van Male 2014, p. 439-440.

1364 Section 5:2(2) General Administrative Law Act.

1365 See also Rogier 2013, p. 82 and 85-86.

9.3.1 Tiered legislation for environmental protection

The competences and instruments for enforcement are regulated in the Netherlands in a complex of general and specific statutes and lower legislation. This layered or tiered structure is a key characteristic of the legislation on environmental protection and its enforcement.[1366] This tiering of the norms and powers is apparent in two relationships: one, between the formal legislation and the material legislation and other rules on environmental enforcement, when viewed from a formal hierarchical perspective, and, two, between the scope of the norms and powers in the general statutes and the sectoral statutes, when viewed from a substantive perspective. Both relationships and perspectives are relevant for gaining a full view of the system of environmental enforcement in the Netherlands.

Hierarchy of legislation

In the Netherlands, the term *wet en regelgeving* is generally used to indicate statutes and other legal rules. These can be categorised as formal and material legislation.[1367] In this context, the term *wet* (statute) indicates a statute in the formal sense, i.e. which has been made by the Government and the two houses of Parliament (*Staten-Generaal*).[1368] The Government consists of the Queen and the ministers (*ministers*) including the prime minister.[1369] The basis for environmental protection and enforcement is laid down in such formal legislation. The Acts put in place for this purpose commonly provide, at least, the general characteristics of the legal framework. While formal legislation is called 'formal' due to the use of a formal criterion relating to the manner in which it was established, 'material legislation' is categorised on the basis of its substance. The term *regelgeving* (rules or regulations) refers to material legislation, which is legislation that contains provisions, such as orders or prohibitions, which bind citizens. Formal legislation provides a basis to establish material legislation, but can also be considered itself to be material legislation dependent on whether the requirement as to its substance is fulfilled. For environmental enforcement, material legislation that (further) fills in the details of the formal legislation is commonly required.

At the level of central government, material legislation (also) exists in the form of an Order in Council or a Ministerial regulation. An Order in Council (*Algemene Maatregel van Bestuur*) is made through a Royal Decree by the Queen and one or more ministers.[1370] Local material legislation (in *medebewind* and in autonomy) may

1366 This is, in fact, a characteristic of Dutch administrative law in general.
1367 *Wetgeving in formele zin*, and, *wetgeving in materiële zin*, respectively.
1368 Article 81 of the Dutch Constitution.
1369 Article 42 sub 1 of the Dutch Constitution.
1370 Article 124 sub 1 Constitution, see also article 105 sub 1 Province Act, article 108 sub 1 Municipality Act and article 56 sub 1 Regional Water Authority Act.

take the form of general regulations[1371] by the provincial councils[1372]; the municipal councils[1373]; or the councils of regional water authorities.[1374]
Besides the types of legislation mentioned above, there is also a category of policy rules (*beleidsregels)* made to structure the exercise in practice of the powers conferred upon the authorities. The authorities themselves or the minister (*Minister*) that these authorities resort under may make such policy rules. In the area of environmental enforcement, it is in fact a legal obligation for the administrative authorities to have a policy in place for each of the phases of enforcement, including a determination of priorities when deciding upon enforcement and its potential instruments, and the obligation to confer with the criminal (prosecution) authorities on the topic.[1375] This obligation came into force in September 2005 as one of the steps to improve the professionalism in environmental enforcement by the authorities and has been further strengthened in the General Provisions Environmental Law Act and the Decision Environmental Law.[1376]

For criminal enforcement, the head of the Public Prosecutions Department[1377] is competent by law to establish directions to detail the use to be made of the enforcement powers available for environmental crimes. Ministers that the enforcement authorities resort under can facilitate the exercise of legislation by creating policy rules, in documents such as circulars.[1378] These are intended to bind the authority they address, not the citizens as to whom the rules do not have external legal force. Where these policy documents address the exercise of powers by the administrative authorities these mainly concern the area of permitting, not that of administrative enforcement. Previous to 2014, in the directions on environmental enforcement addressed to the public prosecutor his priorities in enforcement, including the approach to simple or more grave breaches of environmental law, a priority listing of criminal breaches to be pursued, and the relationship with

1371 In Dutch *verordeningen*. They can be called byelaws, but, for example, McEldowney 2016 also uses the term 'regulations' for comparable instruments in England. In contrast to English byelaws, the Dutch Regulations do not create criminal offences.
1372 *Provinciale staten*; article 127 Constitution.
1373 *Gemeenteraad*; article 127 Constitution.
1374 *Waterschapsbestuur*. Usually the general council, re section 56 in connection with section 77 of the Regional Water Authority Act. Article 134 of the Constitution also mentions 'other public bodies', however, as these do not have significance in the field of the environment, I will not discuss them.
1375 As mentioned above, this duty was introduced, first, in the Decision on Quality Requirements to enforcement and then transplanted to the Decision Environmental Law (*Besluit Omgevingsrecht*), once the more integral General Provisions Environmental Law Act came into force.
1376 This was done, among others, by the 2016 Act on Permitting, Inspection and Enforcement (*Wet Vergunningverlening, toezicht en handhaving*). More on this in section 9.4.
1377 The Head of the Public Prosecutions Department is the *College van Procureurs-Generaal* on the basis of section 130 para. 4 Act on Judicial Organisation.
1378 In Dutch: *aanwijzing*, or, *richtlijn*.

administrative enforcement are set out.[1379] From June 2014, the Countrywide Enforcement Strategy (*Landelijke Handhavingstrategie*) for the environment has replaced these authority specific directions.[1380] This strategy was developed by or in cooperation with most of the stakeholders in environmental enforcement in the Netherlands, among whom, the Public Prosecutor's Office, the consultation bodies of the provinces (IPO) and the municipalities (VNG), the union for the regional water authorities (UvW), the Ministry for Infrastructure and Environment, its Inspection for the Environment and Transport (ILT), the police and the association of environment offices (Omgevingsdienst NL).[1381] The provinces, municipalities and environment offices have adopted the Countrywide Enforcement Strategy. There is also a specific strategy for environment offices specialised in installations dealing with hazardous chemicals (*BRZO-inrichtingen*).[1382] Moreover, the regional water authorities (*waterschappen*) have also adopted the Countrywide Enforcement Strategy. Also the Public Prosecutors Office and the police have adopted the strategy. When competent authorities adopt the Countrywide Enforcement Strategy, it takes the place of the authorities' own sanctioning strategy and may also take part of their inspection strategy. The content of the Strategy will be further discussed in the chapter on sanctions (chapter 11).

The scope of application of legislation

The second tiered relationship that should be recognized with regard to the Dutch legislation on environmental enforcement is that between the statutes with a general, broad scope (with generally applicable legal provisions) and those with a specific scope (with legal provisions with a more limited, specific application). The tiering of legislation is most common in administrative enforcement, where the provisions in the General Administrative Law Act (GALA) are explicitly held applicable, supplemented or amended by legislation specific to the environment, such as the General Provisions Environmental Law Act (GPELA), which itself is supplemented by lower regulation. In this lower regulation (further) details are set out, for example on the quality of the organisation and the exercise of its powers. An example of this lower regulation is the Decision Environmental Law (*Besluit Omgevingsrecht*), a piece of secondary legislation.[1383]

1379 See, for example, the Direction Enforcement Environmental Law (*Aanwijzing Handhaving Milieurecht* 2010A004), Stcrt. 2010, 2953, rescinded since 2014.

1380 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014). Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

1381 See the *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014). Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

1382 *Landelijke handhavingsstrategie Besluit risico's zware ongevallen 1999*, available at https://brzoplus.nl/aanpak/ handreiking/ (last visited 1 June 2019); Sturm et al 2015, p. 39. See the next chapter on the specialisation of environment offices.

1383 In the next chapter, the Decision Environmental Law (*Besluit Omgevingsrecht*) and the criteria contained in it on the quality of the organisation are further described.

This relationship between general and specific statutes is not hierarchical unless a conflict occurs between them. For example, the General Administrative Law Act's provisions on enforcement are intended to be generally applicable to the entire body of administrative law. However, the statutes that regulate an area of administrative law more specifically, including the statutes on the environment, may contain derogations from the general provisions in the General Administrative Law Act or supplement them. When deviation occurs in the specific statutes, this may bring about a conflict since the General Administrative Law Act and the specific statutes have the same status as formal legislation. To solve this conflict, the *lex specialis* rule applies. This means that the derogatory provisions in the specific environmental statutes supersede those in the general statute.[1384]

Administrative enforcement is regulated both in general statutes on the administrative authorities as well as, more specifically, in environmental legislation. Criminal enforcement is primarily regulated in general statutes containing the penalisations of the environmental crimes, with (very) few exceptions in environmental legislation. While formal legislation containing provisions with a general scope is applicable regardless of the topic the authorities are dealing with, formal legislation containing general provisions on administrative enforcement powers are only applicable when specifically and explicitly attributed to an enforcement authority in specific (formal) legislation. The General Administrative Law Act (GALA) contains provisions detailing administrative enforcement powers. These provisions may be deviated from or be supplemented by the specific environmental statutes. However, the GALA does not grant the powers it describes, in other words, it does not grant the competence to utilise those powers to specific authorities. This is done in the organic laws (*organieke wetten*) of the lower regulatory authorities, i.e. in the Provincial Act, the Municipal Act and the Regional Water Authority Act, and in the environmental statutes.[1385] The attribution of competences in the specific environmental statutes is regulated in the statute containing general environmental provisions (General Provisions Environmental Law Act), in the specific environmental statutes and in lower legislation.

For the criminal enforcement of environmental law, the characteristic of a tiered scope is present in the legislation but less prominently than for administrative enforcement. The main sanctioning authorities and their powers described in the general Criminal Code and the Economic Offences Act are applicable through the penalisations of

1384 *Lex specialis derogat legi generali*.

1385 Article 122 of the Provincial Act; article 125 of the Municipality Act; and article 61 of the Regional Water Authority Act.

environmental non-compliance within these statutes. The specific environmental statutes rarely deviate from or supplement them. Both the general Criminal Code and the Economic Offences Act contain penalisations of environmental non-compliance and the powers of criminal authorities, including their attribution, for which also the Code of Criminal Procedure is relevant. However, on occasion, specific environmental acts (or lower regulation) do deviate or supplement these criminal enforcement statutes with provisions on powers specific to environmental law.[1386] Moreover, the norms that are penalised in the Economic Offences Act, and in part, in the form of penalisations in the Criminal Code are laid down in part in the specific environmental statutes. This 'administrative accessoriness' will be discussed further in chapter 11. Also the attribution of competences to certain persons takes place in lower legislation. This means that to gain a complete view of the regulation of environmental enforcement a chain of pieces of legislation should still be followed to the most specific rules available, including lower regulation.

The modernisation, integration and harmonisation of provisions for enforcement cannot only be seen in environmental law but also in the regulation of enforcement in general, as part of the movement to professionalising enforcement. This will be the topic of the next section.

9.3.2 Integration of legal rules on environmental enforcement

As mentioned above, the second prominent characteristic of the structure of the legal system is that the legal rules on environmental protection are (procedurally) integrated, and that the legal rules on enforcement are integrated through harmonization and unification. The development of the legislation from sectoral and fragmented towards integrated and specialised rules has seen several catalysts. The catalysts and the development as a result of this will be described in the next two sections of this chapter.

9.3.2.1 Catalysts

Since the beginning of the twenty-first century, the increased awareness of enforcement deficit(s) greatly contributed to the past, present, and on-going development of administrative and criminal enforcement regulation, organisation and instruments in the Netherlands. Already in the 1980s, the enforcement of environmental law was found to have its weaknesses. In particular, administrative enforcement practice was considered too focussed upon negotiating with the regulated and considering their economic interests in enforcement decision-making.[1387]

1386 This primarily relates to competence provisions for the investigation of offences.

1387 See e.g. Aalders 1980; Aalders, Korrel & Uylenburg 1987; Van Wermeskerken 1987; see also Van de Peppel 2006, p. 163.

In the 1990s the debate on enforcement became more systematised through a great deal of reviews of the environmental enforcement system.[1388] Especially the analysis that flaws in the enforcement in general led to great enforcement deficits drew administrative and political attention.[1389] In this context, the concept of the enforcement deficit is defined as the lack of (a desire to take) enforcement action by an authority where it is capable of action, or as the lack of capability to take action, while there is a desire to take action.[1390] The reviews conducted also formulated elements of effective enforcement to fix the issues of the administrative and criminal enforcement systems in place.[1391] The proposed elements can be grouped into three themes, aimed at curbing enforcement deficits:

- The improvement of the enforcement instruments, in particular sanctions, and their use.
- The development of a strategy with regard to the division of roles between the administrative enforcement authorities and the Public Prosecutions Office.
- The improvement of the mutual cooperation between the administrative enforcement authorities.[1392]

However, the solutions offered in the literature at that time were not (immediately) very successful in practice. The lack of effectiveness of such policies could perhaps be attributed, among other factors, to the fact that criminal enforcement was considered an *ultimum remedium* (*ultima ratio*) instrument; the emphasis in enforcement was – already then – on administrative powers and instruments.

The interest in enforcement in general and in solutions to the weaknesses in enforcement in particular was given a new impulse in the year 2000, which saw two disasters that lead to the loss of human lives due to the non-compliance with environmental permits and lacunae in the enforcement thereof.[1393] These disasters

1388 See, for example, Hoitink & Michiels 1993; Van der Linden 1996; Bareman 1996. See Michiels & Blomberg 1997; Blomberg & Michiels 1998.

1389 Commissie bestuursrechtelijke en privaatrechtelijke handhaving (Commissie Michiels) 1998; also Van de Peppel 2006, p. 164. For the deficits in criminal enforcement, see e.g. Kamerstukken II, 1992-1993, 23196, nr. 3, p. 9-10.

1390 Commissie bestuursrechtelijke en privaatrechtelijke handhaving (Commissie Michiels) 1998, p. 35-36; see also Michiels 2013, p. 163.

1391 See Michiels & Blomberg 1997; Blomberg & Michiels 1998; Commissie bestuursrechtelijke en privaatrechtelijke handhaving (Commissie Michiels) 1998. See also e.g. in the realm of policies attempting to provide solutions: Openbaar Ministerie, *Leidraad Milieu. Leidraad voor de strafrechtelijke handhaving van het milieurecht*, Den Haag 1994, available at http://publicaties.minienm.nl/documenten/leidraad-milieu-leidraad-voor-de-strafrechtelijke-handhaving-van-het-milieurecht (last visited 1 June 2019); Openbaar Ministerie, *De pioniersfase voorbij. Plan van Aanpak Milieu*, Den Haag 1995; Blomberg 2007, p. 181.

1392 Kamerstukken II, 1996-1997, 22343, nr. 28; Kamerstukken II, 1996-1997, 25085, nr. 2; also Blomberg 2007, p. 181-196.

1393 As concluded in the reports on these disasters: Kamerstukken II 2000-2001, 27157, nr. 18 (Commissie Onderzoek Vuurwerkramp, *De vuurwerkramp Eindrapport*); Kamerstukken II 2000-2001, 27575, nr. 4 (Commissie Onderzoek Cafébrand Nieuwjaarsnacht 2001, *Cafébrand Nieuwjaarsnacht Eindrapport*).

were the explosion of a fireworks factory located in a residential neighbourhood in the city of Enschede and the raging fire in a café in the city of Volendam on New Year's eve as a result of flammable decorations. During the subsequent years, which saw other (lethal) accidents related to environmental non-compliance[1394], the solutions sought and the developments in lieu of the improvement of enforcement and fixing the enforcement deficits broadened from the three themes mentioned above to *include* also the following four themes:[1395]

- The integration of the legislation to decrease the fragmentation thereof.
- The integration of the organisation of enforcement to decrease fragmentation thereof.
- The specialisation of the organisation with an eye to establishing expertise and priority in environmental enforcement.
- The (further or re-) development of the relationship between the administrative and the criminal authorities and instruments for enforcement.[1396]

Several parallel and consecutive projects were set up over the course of the 2000s and further into the 2010s, all aimed at making the enforcement of environmental law more effective with regard to the themes mentioned above.[1397] As a result, several changes were made, starting with the sources of the enforcement system, i.e. the legislation governing the system, its organisation and its instruments.

The development towards the effective enforcement of environmental law both in theory and in practice continues to receive impulses; one, through the review of the changes made so far, which advised more reform,[1398] and, second, due to several new incidents occurring that involved a lack of effective enforcement. These incidents mostly involved installations, more specifically industrial plants dealing with hazardous substances. There was the example of a large fire that occurred, and which burned down (most of) a hazardous chemicals company (Chemie-Pack) in the town of Moerdijk in January 2011. The public review of this situation brought to light inadequate local enforcement of the continuous violation of the

1394 For example, in 2003, two people died in Maastricht as the balcony of their recently built apartment collapsed due to non-compliance with building regulations.

1395 This means a total of seven topical themes with regard to environmental enforcement.

1396 Kamerstukken II 2000-2001, 27664, nr. 1 (nota *Met recht verantwoordelijk*); Commissie Onderzoek Vuurwerkramp, *De vuurwerkramp Eindrapport*, Kamerstukken II 2000-2001, 27157, nr. 18; Commissie Onderzoek Cafébrand Nieuwjaarsnacht 2001, *Cafébrand Nieuwjaarsnacht Eindrapport*, Kamerstukken II 2000-2001, 27575, nr. 4; Delsman 2002; Kamerstukken II 2003-2004, 22343, nr. 82; Commissie Mans 2008.

1397 For a full overview of the developments from 2001 until 2014 see also www.infomil.nl/onderwerpen/integrale/handhaving/archief/procesverloop/ (last 1 June 2019).

1398 See e.g. De Ridder, Schol & Struiksma 2009; Kamerstukken 2008-2009, 22 343, nr. 236; Commissie Mans 2008 and connected to this: Kamerstukken 2008-2009, 29 383, nr. 130; Kamerstukken II, 2008-2009, 29383, nr. 124; Kamerstukken II 22343, nr. 215. A programme aimed at creating specialised environment offices ran from 2009 until 2013 (programme *Uitvoering met ambitie*). See, for example, www.uitvoeringmetambitie.nl (last visited 1 June 2019).

terms of its environmental permit.[1399] Just previous to that, it was established that the industrial plant of Thermphos in the province of Zeeland, one of the largest producers of phosphorus in the world, was emitting high amounts of potentially hazardous substances. The public review of this situation concluded that the province of Zeeland had been too cooperative with regard to the plant, not taking enforcement action or too little enforcement action.[1400]

A very similar situation occurred in the summer of 2012 in Rotterdam. Under the pressure of several enforcement authorities, Odfjell Terminals Rotterdam was closed down. The authorities exerted this pressure because Odfjell had not complied with a large amount of obligations laid down in the law and in its environmental permit for a very long time.[1401] As with regard to the other incidents mentioned, also the situation of Odfjell and the behaviour of the enforcement authorities were subsequently evaluated.

> In the Odfjell case, the Research Council concluded that, in terms of enforcement, the lacunae were a weak attitude of the authorities, namely little or non-effective sanctions; too little inspections and too much systematic supervision, i.e. the evaluation and monitoring of the internal quality systems and processes within companies (*systeemtoezicht*).[1402] Also there was a great lack of cooperation between the enforcement authorities. The authorities only started acting properly as enforcement authorities and working together when social commotion occurred as a result of large-scale incidents, such as the release of large amounts of the cancerous butane and benzene in 2011.[1403] The Research Council pointed out that the cause of this lack of proper enforcement was the fragmentation of enforcement, the fact that enforcement did not take place through sanctioning but through inspection on the basis of negotiations between the authorities and the company, and the inadequate control of the facts behind the paper files.[1404]

The evaluation made clear that many of the seven themes mentioned previously were still very topical. The developments and changes made in pursuit of the themes

1399 See Onderzoeksraad voor Veiligheid, *Brand bij Chemie-Pack te Moerdijk, 5 Januari 2011*, Den Haag 2012. Available at www.onderzoeksraad.nl/nl/page/3438/explosies-mspo2-shell-moerdijk (last visited 1 June 2019).

1400 Mans et al 2011, conclusion 1, p. 62; see also Biezeveld & Stoové 2011, p. 9.

1401 See Onderzoeksraad voor Veiligheid, *Veiligheid Odfjell Terminals Rotterdam periode 2000-2012*, Den Haag 2013, available at www.onderzoeksraad.nl/nl/page/1998/veiligheid-odfjell-terminals-rotterdam-periode-2000---2012 (last visited 1 June 2019).

1402 See also Helderman & Honingh 2016.

1403 Onderzoeksraad voor Veiligheid, *Veiligheid Odfjell Terminals Rotterdam periode 2000-2012*, Den Haag 2013, available at www.onderzoeksraad.nl/nl/page/1998/veiligheid-odfjell-terminals-rotterdam-periode-2000---2012 (last visited 1 June 2019); Michiels, Blomberg & Jurgens 2016, p. 371.

1404 Onderzoeksraad voor Veiligheid, *Veiligheid Odfjell Terminals Rotterdam periode 2000-2012*, Den Haag 2013, p. 9, available at www.onderzoeksraad.nl/nl/page/1998/veiligheid-odfjell-terminals-rotterdam-periode-2000---2012 (last visited 1 June 2019); Michiels, Blomberg & Jurgens 2016, p. 371-372.

mentioned will be highlighted hereafter in the description of the structure and substance of environmental enforcement. In this chapter mainly the changes to the legal sources of the enforcement system – the harmonisation and integration of legislation on enforcement – are highlighted. The developments and change impacting upon the enforcement organisation and the sanctions are discussed in the next two chapters (chapter 10 and chapter 11, respectively).

9.3.2.2 Development towards integrated and harmonised legislation

9.3.2.2.1 Introduction

As described previously, one of the flaws considered to impede effective enforcement and to exacerbate enforcement deficits in the Netherlands is the fragmentation and sectorality of and/or brought about by the legislation on environmental enforcement. Thus, it can be seen as important that the legislation on the environment and its enforcement over the past years has developed in a strong trend towards integration and harmonisation. This strong continuing development can be seen both in the area of the legislation on the environment, including environmental enforcement, as well as in the area of enforcement generally. Within these areas, integration to decrease the fragmentation has taken place with regard to the legislative structure, as well as with regard to the organisational structure of environmental enforcement. Moreover, the integration concerns the substance of the legislation of environmental enforcement, more specifically the powers, the instruments and the norms set out for the authorities.

> The term 'integration' is used here in the sense of a decrease of fragmentation and sectorality. The term has also been used in combination with 'enforcement' to describe a flexible and fluid combination of administrative and criminal enforcement instruments. This has been proposed in academic literature as a format to achieve effective enforcement and was described in outline in adopted strategic nation-wide policy documents.[1405] However, the concept has not yet gained widespread practice as these strategic documents were not or hardly adhered to.

The sectoral environmental acts formerly provided several provisions on enforcement in deviation of or addition to the general provisions on enforcement in the General Administrative Law Act. The integration has led to two developments in two different

1405 Blomberg 2001; and e.g. Bestuurlijk Landelijk Overleg Milieuhandhaving, *Landelijke strategie milieuhandhaving: sanctiestrategie*, Rijswijk 2004, available at www.infomil.nl/publish/pages/57274/landelijkesanctiestrategie.pdf (last visited 1 June 2019).

areas. One, the sectoral provisions that deviate or supplement provisions in the environmental sectoral acts have been brought together in one single environmental act. Second, the set of general provisions on enforcement in the General Administrative Law Act has been expanded.
Although currently there is no single statute that regulates all of the protection of the environment in the Netherlands entirely, the sectorality has been greatly reduced, in particular in recent years. And with the Environment Act (*Omgevingswet*), which may come into force in 2021, a push towards true integration is being made.[1406] As will be seen below, this development first started within the sub-sectors of environmental pollution, spatial planning and housing, water and nature. It then continued and still continues on towards coordination and integration of these sectors into one sector: the environment as a whole. Included in this development – in its wake – is the integration, coordination and harmonisation of the enforcement structure, powers, instruments and norms as far as this was regulated in the specific environmental legislation.

9.3.2.2.2 Historical development of environmental legislation

Similar to Germany and England, environmental legislation in the Netherlands developed as the awareness of the need to protect the environment increased. The first legislation at the end of the 19th century was centred on the protection from nuisance and industrial pollution. At the beginning of the 20th century also in the areas of housing, water, and nature protection sectoral pieces of legislation were established. During the 20th century, in particular in its second half, the legislation and the aspects within its reach were further developed. In the 21st century, the integration of this legislation has become a principal theme of development.
The general characteristic of this legislation is that at its conception it was very sectoral, i.e. focussed on a certain environmental compartment or a specific form of environmental burden. Creating a system of sectoral environmental legislation instead of a general environmental act was a conscious, pragmatic choice by the legislator due to the sense of urgency to create rules of protection. It was feared that creating a general environmental act covering all types of environmental pollution would take too much time.[1407] However, the sectorality of the system meant that the legal system for environmental protection thus created was quite fragmented and lacked in transparency. These faults were found to warrant a harmonisation and coordination of the existing legislation.
Below the most significant developments in the area of environmental legislation are described in four parts:

1406 It is still quite uncertain when exactly this act will come into force.
1407 Kamerstukken II 1971-1972, 11 906, nr. 2, p. 11 (*Urgentienota milieuhygiëne*).

a. the first act on environmental protection;
b. the environmental statutes from 1990 to 2010;
c. the environmental statutes from 2010 to the present day; and,
d. the Environment Act, which is the future environmental statute.

a. The first act on environmental protection

The first act dealing with an aspect of environmental protection was established in 1875 and focussed on nuisance and pollution from industrial installations. For the purpose of harmonisation and coordination, already in 1979, an Act containing general provisions on environmental pollution control (*Wet algemene bepalingen milieuhygiëne*) was formulated. This Act harmonised the procedural rules for the giving off of permits, the enforcement of permits and the legal protection so that each of the sectoral permits would be given off and repealed in a similar way.[1408] With this Act a trend towards further harmonisation and coordination started, and through the years after that, several more harmonising provisions were added to the Act, e.g. on the coercive fine and environmental impact assessment.

b. The environmental statutes from 1990 to 2010

In the 1990s, the approach towards harmonisation was broadened to also include substantial harmonisation. As a result the Act was replaced by a new Act that is still applicable today: the Environmental Management Act (*Wet milieubeheer*, hereafter: EMA). Substantial harmonisation and in some areas even integration was achieved by the establishment of this Act in 1993. The Act integrated a large number of sectoral environmental acts on the pollution of the environment (air and soil) and (noise) nuisances.[1409] An example of this is the integration of six separate, sectoral pollution permits into a single Environmental Management permit. Over the years, many provisions have been added to the Act or amended, e.g. to lay down enforcement quality requirements, or to establish in national law the European obligations with regard to emissions trading and environmental liability. Especially in the area of enforcement the Act has had a broad integrative reach. Before the coming into force of the General Provisions Environmental Law Act in October 2010[1410], the EMA's chapter 18 on enforcement contained the most integrated set of provisions specific to environmental enforcement, in which many of the improvements to the substance of enforcement were first adopted. The provisions in this chapter 18 namely also applied to the enforcement of other sectoral statutes on pollution such as water pollution. The integrative reach of the EMA has not increased with the coming into force of the General Provisions Environmental Law Act, which has adopted this role.

1408 Beijen 2015, p. 55.
1409 Boeve & Groothuijse 2019, p. 8.
1410 More on the General Provisions Environmental Law Act below.

The first act for spatial planning and building was established at the beginning of the twentieth century, to deal with improvement to the social housing. This Act was split and expanded into two acts in 1965, an act on housing (*Woningwet*) and an act on spatial planning (*Wet op de Ruimtelijke Ordening*). Especially with regard to spatial planning, more and more procedural rules on (new) instruments were over time stacked on top of one another. To combat this, the Act was renewed as the Act on spatial planning (*Wet ruimtelijke ordening*) in 2008.[1411] The housing act still remains a separate statute as it also addresses non-environmental aspects, such as (social) housing. Therefore, in this area, the sectors only integrated to an extent, with the development of coordination to clarify the legal rules only taking place as to the subject of spatial planning.

In the area of water, many different sectoral Acts existed from early on. Besides an organic act detailing the organisation and duties of the regional water authorities (the Regional Water Authority Act, *Waterschapswet*), several acts have detailed different aspects of water quality and water quantity.[1412] One of these was the Act on Pollution of Surface Waters, which aimed to control and prevent the pollution of surface waters.[1413] It regulated through permits the discharge of waste products, polluting substances or damaging substances into the surface water.[1414] For enforcement, the provisions in the enforcement chapter of the Environmental Management Act were applicable.[1415] The integral approach within this area focussed not only on bringing together the sectoral instruments into a planning system, but also focussed increasingly on the interconnection with other sectors of the environmental arena other than water protection. In 2008, the Water Act (*Waterwet*) harmonised the sectoral acts into one, with the exception of the Regional Water Authority Act, and modernised it to also comply with the European obligations.[1416]

In nature protection, two separate areas of protection were distinguished in Dutch legislation: that of the protection of areas and that of the protection of animals and plants, with corresponding Acts, the Act on Nature Protection 1998 (*Natuurbeschermingswet 1998*) and the Flora and Fauna Act (*Flora en faunawet*). For the protection of areas, there was not much fragmentation of legal rules. However, in the sector of animals and plants protection there was. The legislation in that area was developed from early on in the 20th century onwards in a very piecemeal fashion. In 2002, the Act on Flora and Fauna (*Flora- en faunawet*) created some harmonisation. However, the act was quite complex, with prohibitory orders and exemptions aimed

1411 Critics contend, however, that the purpose of creating the new spatial planning act (*Wet op de ruimtelijke ordening*), which was procedural harmonisation, was not reached. Boeve & Groothuijse 2019, p. 10.

1412 I use the term 'regional' here as there can also be national water authorities, which are not included in this act.

1413 Van Rijswick & Havekes 2012, p. 90-91.

1414 Article 1 sub 1 of the Act on pollution of surface waters (*Wet Verontreiniging Oppervlaktewateren*).

1415 Article 30 of the Act on pollution of surface waters (*Wet Verontreiniging Oppervlaktewateren*).

1416 Van Rijswick & Havekes 2012, p. 108-110.

at protecting the individual instead of populations.[1417] On 1 January 2017, the Act on Nature Protection (*Wet Natuurbescherming*) integrated both aforementioned acts on nature protection into one.

c. The environmental statutes from 2010 to the present day

From 2010, legislative steps were taken towards integration and harmonisation of environmental law in a single Act. Two legislative developments should be noted in this respect: the General Provisions Environmental Law Act and the proposal on an Environment Act. On 1 October 2010 the General Provisions Environmental Law Act (*Wet algemene bepalingen omgevingsrecht)* came into force. The Act was instigated due to the great many systems in existence for the giving of permits or licences required for activities that impact upon the physical environment. It was deemed desirable to bring these systems together to make it possible that all environmental aspects of the activities can be considered in a coherent manner, resulting in one procedure and one decision.[1418] Twenty-five permitting regimes were brought together in the Act. The Act integrated and harmonised many procedural provisions on permits into a regulation of a single environmental permit.[1419] With regard to the substantive provisions there was no unification, as the normative frameworks of the different acts applicable to the environmental permit have not been unified. The sectoral acts remain important, in particular for activities that do not require an environmental permit, but also as they may contain provisions that diverge from the general provisions in the Act.

Although the Act does not cover all the areas within the environmental arena, many of the provisions on permits, competent authorities and enforcement in the aforementioned legislation have been integrated and harmonised in this Act. However, the Act does not provide a harmonised single evaluative framework to establish the permit. Behind the façade of the environmental permit the evaluative frameworks of the four areas still exist. As lamented by many academic commentators, the legislator did not choose to integrate the evaluative frameworks for the permit. Moreover, in effect, the 'other' environmental Acts described above are not yet superfluous in the presence of this more general, integrated environmental act. The Acts in fact remain of great importance as increasing use is made of general rules instead of permit requirements to regulate environmental sectors.[1420]

1417 Boeve & Groothuijse 2019, p. 13.

1418 See Kamerstukken II 2006/07, 30844, nr. 3, p. 1.

1419 Boeve & Groothuijse 2019, p. 8.

1420 See e.g. Regeling algemene regels voor inrichtingen milieubeheer, *Staatscourant* 16 november 2007, nr. 223, p. 11. The use made of these rules seem to maintain or even increase sectorality in the environmental arena, as those general rules are laid down in Orders in Council, for specific sectors and sub-sectors.

The impact of the General Provisions Environmental Law Act on the integration of legislation on administrative environmental enforcement is more substantial than its above-described effect on permitting regimes. The scope of the provisions on administrative enforcement in the Act does not solely extend to the environmental permit, like the other provisions in the Act, but is broader. In fact, the Act provides the prime regulation for the enforcement of (nearly all) environmental protection norms.[1421] Besides the protection of areas of the environment that fall within the regulation of the environmental permit, the enforcement provisions also apply to regulated areas of the environment outside that realm, such as for the enforcement of general rules or other regulatory instruments for the protection of flora and fauna, natural areas, soil, air, environmental health, spatial planning, water and housing.[1422] There are some – very specific – regulatory instruments that fall outside the scope of the enforcement provisions of the GPELA. Therefore, an eye must be kept on the specific environmental statutes as well.[1423] Most of the content of chapter 18 on enforcement in the Environmental Management Act, mentioned above, was transplanted to the enforcement chapter of the General Provisions Environmental Law Act.

Although with the Act General Provisions Environmental Law a step was taken towards integration en harmonisation, the continuing existence of sectoral acts mean that environmental law is currently still fragmented. As the above-mentioned Acts show, separate legislation is still in place for environmental hygiene, nature protection, spatial planning and water management. In the summer of 2015, the Dutch House of Representatives (*Tweede Kamer*) accepted the proposal for one general statute to regulate the protection of all areas of the environment in the Netherlands: the Environment Act (*Omgevingswet*). This Act is to be a single integrated act replacing in whole or in part all the acts on areas of the environment.[1424] According to the Explanatory Memorandum to the legislative proposal, it is intended that with the Act a movement is set in motion.[1425] According to the Explanatory Memorandum, the dispersion of the environmental legislation in place as described above leads to coordination problems and diminishes the usability and recognisability for the users. Although improvements have been made in de past years, there is a lack of

1421 The specific Acts can still provide a derogation or supplement to the integrated rules in the General Provisions Environmental Law Act.

1422 Section 5.1 Wet algemene bepalingen omgevingsrecht.

1423 See further also the next chapters on organisation and sanctions, respectively.

1424 The intention to propose an Environment Act which fully integrates all of the environmental rules was already expressed at central government level by the responsible Minister in *Beleidsbrief Eenvoudig beter* of 28 June 2011 and e.g. also apparent in the report *Waarom een nieuwe Omgevingswet: Schets omgevingsrechtelijke problemen*, Kamerstukken II 2011-2012, 33118, nr. 1, annex I.

1425 Kamerstukken II 2013-2014, 33962, nr. 3, p. 20.

transparency and coherence in current environmental law.[1426] The Environment Act aims to bundle most of the existing environmental law in one single Act, with one coherent system of planning, decision-making and procedures. This also includes a clear system of enforcement. This should simplify environmental law and make procedures faster.[1427]

d. Future environmental statute: the Environment Act

On 22 March 2016, the Environment Act was enacted by the consent of the Dutch Parliament.[1428] Despite its enactment, the Act has not yet come into force, as the Act is not yet complete. From the foreseen 23 chapters of the Environment Act only fourteen contained substance when it was put before the two houses of the Dutch Parliament. Therefore, the exact substance of the Act is not yet clear, despite it being put before Parliament. The Environment Act will gain substance through supplementing acts (*aanvullingswetten*) that are to also pass through both houses of Parliament the Environment Act and through administrative decrees (*algemene maatregelen van bestuur*), among others. It is proposed that the Act gains force in 2021.

The Act signifies the start of the revision of the entire body of environmental law currently in place. Twenty-six existing statutes on aspects of the environment will be amalgamated. The number of administrative decrees, containing secondary legislation, will be brought back from 120 to four. The aim is to create a single permit for all permit-obligatory aspects of the environment. This is a continuance of the direction set in with the General Provisions Environmental Law Act, which, as we have seen, first embraced the single permit rule, as well as the aim to simplify the competence rules, the procedures and ensure more consistency and transparency, also with respect to enforcement, throughout the environmental arena. Ultimately, the goal of the Environment Act is to increase the quality of the environment.[1429]

In terms of enforcement, the Environment Act does not fundamentally change environmental enforcement. The structure and substance of the chapter on enforcement in the Environment Act is for the most part derived from the enforcement chapter in the General Provisions Environmental Law Act, with large parts of the enforcement chapter in the General Provisions Environmental Law Act are transferred to the Environment Act.[1430]

1426 Kamerstukken II 2013-2014, 33962, nr. 3, p. 6.
1427 Kamerstukken II 2013-2014, 33962, nr. 3, p. 6.
1428 The *Tweede Kamer* of Parliament gave its consent to the Environment Act on 1 July 2015; the *Eerste Kamer* of Parliament consented on 22 March 2016.
1429 Kamerstukken II 2013-2014, 33962, nr. 3.
1430 See chapter 18 of the *Omgevingswet*.

9.3.2.2.3 Integration of general enforcement legislation

Since January 1998, chapter five of the General Administrative Law Act (GALA) contains provisions on the enforcement powers of the administration.[1431] These enforcement powers concern supervision/inspection and administrative sanctioning. The GALA provides general provisions on these powers. As described previously, the GALA provides a definition of non-compliance: behaviour in conflict with a rule laid down by or pursuant to law.[1432] This includes conflict with statutory provisions, provisions in lower legislation as well as provisions in permits.

Before the General Administrative Law Act was introduced in 1994 there did not exist a codification of general administrative law. Administrative law in statutes only concerned specific areas of administrative law, such as the care for the environment. General administrative law was laid down in case law and consisted of the general principles of proper administration and some principles of natural justice.[1433]

Slightly similar to the integrative development that can be seen in environmental legislation, there has been an integrative development in the General Administrative Law Act as a fourth amendment came into force on 1 December 2009 aimed to strengthen administrative enforcement.[1434] To achieve this, the system of administrative enforcement has been strengthened by simplifying and codifying the existing law, for example by providing definitions for the main instruments of enforcement and by laying down the concepts of preventative and partial enforcement, which had previously developed in case law.[1435] Moreover, the general provisions on the instruments were expanded with rules on administrative penalties (*bestuurlijke boete*), which were previously only provided in the specific sectoral acts that attributed the power to the administrative authorities.[1436] However, the General Administrative Law Act does not provide the competence to authorities to utilise the powers described therein. The attribution of competences to use the powers in the GALA (and in other statutes) takes place in specific environmental statutes and in the organic acts on the authorities concerned.

The integration and harmonisation of the norms and enforcement rules laid down in administrative environmental law has not had a substantial effect on criminal law enforcement.[1437] Neither has the impulse for further harmonisation of general administrative enforcement rules carried across to the rules on criminal enforcement.

1431 Through the Third Amendment of the General Administrative Law Act, *Derde Tranche Awb*, Stb. 1996, 333.

1432 Section 5:1 sub 1 General Administrative Law Act.

1433 Seerden & Heldeweg 2002, p. 346.

1434 Kamerstukken II 2003-2004, 29702, nr. 3, p. 74.

1435 See the General Administrative Law Act (*Algemene wet bestuursrecht*), chapter 5.

1436 This addition of general rules on administrative penalties does not yet mean that the penalties are now part of the general toolkit for all administrative enforcement across the environmental arena.

1437 Except for the fact that the catalogue of penalisations in the Economic Offences Act now also refers to the Act General Provisions Environmental Law.

These rules are not so fragmented to warrant this development. The statutes governing environmental enforcement provide a quite harmonised regulation of criminal enforcement.[1438] In the next section it will be explained which legislation can be signified as the key legislation for the enforcement of environmental non-compliance.

9.3.3 Specifics: the key legislation for environmental protection and its enforcement

The key legislation on environmental protection

As explained above, significant characteristics of the legislation on the environment are its development towards integration and harmonisation from sectorality, as well as the tiered format, in scope as well as in detail. This development and its format is still on-going as the General Provisions Environmental Law Act is not all comprehensive and the Environment Act is planned for 2021. Another important characteristic of this legislation is that it has all either been significantly amended or been brought into force over the past few years through the influence of obligations in European environmental law, but also through developments in the area of enforcement. To provide a picture of the context of the current and next chapters on the Netherlands a short summary of the subject of the key environmental Acts will be given here.

The key environmental acts in the Netherlands are:

- the General Provisions Environmental Law Act (*Wet algemene bepalingen omgevingsrecht*)
- the Environment Management Act (*Wet milieubeheer*)
- the Water Act (*Waterwet*)
- the Act on Nature Protection (*Wet Natuurbescherming*)
- the Spatial Planning Act (*Wet ruimtelijke ordening*)
- the Housing Act (*Woningwet*).

In the near to distant future the following Act will come into force and replace some or all of the aforementioned statutes: Environment Act (*Omgevingswet*), replacing all of the above mentioned statutes (possibly) in 2021.

1438 These are primarily the Criminal Code, the Code of Criminal Procedure and the Economic Offences Act. See further below, in the next section.

These Acts regulate the areas of pollution control; waste; different types of nuisances; water pollution; wildlife and nature protection and planning and building control. The General Provisions Environmental Law Act regulates the single environmental permit and its enforcement. This environmental permit covers the protection of the environment, spatial planning, building and nature from physical damage. It does not cover all areas of the environment. However, permits, licences and exemptions that have not been integrated into the environmental permit may still be attached to the permit, when two such instruments are required for an activity, one of which is an environmental permit.[1439]

The Environment Management Act (*Wet milieubeheer*) now regulates several issues: pollution, waste, and nuisances.[1440] The Environmental Management Act covers many aspects of pollution control, and includes the appointment of the emissions control body for the implementation, including the enforcement, of the Emissions Directive.[1441] Besides this, the Act contains quite a few provisions to implement European Directives. More recently, the Directives on Environmental Liability and Environmental Damage were implemented.[1442]
Besides these topics, the Act also covers – on account of the names of its chapters – environmental quality standards, environmental impact assessment, licences for installations, general rules, the implementation of the SEVESO-Directive on dangerous waste[1443], environmental reporting, procedures for licences and exemptions, coordination of licences, financial provisions, trade in emissions rights, provisions regarding special circumstances such as calamities, enforcement, transparency of environmental information, appeal to the administrative court, and provisions on miscellaneous subjects. Whereas the enforcement chapter in the Environmental Management Act used to be referred to by many of the sectoral statutes for the powers and duties described therein, this role has now been taken up by the chapter on enforcement in the Act on General Provisions Environmental Law.
The current Water Act (*Waterwet*), in place from 2008, has streamlined and modernised the previously existing legal instruments, including the permits on the discharge of waste products, polluting substances or damaging substances into the

1439 Boeve & Groothuijse 2019, p. 159.
1440 Although for some nuisances, there are also separate acts such as the *Wet Geluidhinder*. However, in enforcement, the former act holds many provisions of the enforcement chapter in the Environmental Management Act applicable (article 148 Wet Geluidhinder).
1441 Section 2.2.
1442 In title 17.2 and title 15.4 of the Environment Management Act respectively.
1443 Most recently Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC.

surface water.[1444] Its primary aim is an effective and efficient approach of integral water management.[1445]
As explained in the previous section of this chapter, nature protection has also seen a recent integration of the rules into one Act.

As mentioned previously, there were two acts that regulated nature protection, one for flora and fauna protection (*Flora- en faunawet*) and one for area protection (*Natuurbeschermingwet 1998*). The Flora en Fauna Act (*Flora- en faunawet*) was a framework act on the protection of animals and plants. Furthermore, the Act implemented provisions on species protection laid down in the EU Directive on the conservation of wild birds[1446] (the Birds Directive) and the EU Directive on the conservation of natural habitats and wild flora and fauna[1447] (the Habitat Directive). The Nature Protection Act 1998 (*Natuurbeschermingswet 1998*) also implemented the Birds and Habitat Directives through the provision to appoint areas as special nature protection for the purpose of these directives. Both of these Acts were replaced on 1 January 2017 by a single Act on Nature Protection (*Wet Natuurbescherming*). This Act has brought about a change in the competent authority: the provinces are now the single competent authority, for both area protection and species protection. There are currently two acts that regulate planning and building control, respectively. The Act (on) Spatial Planning (*Wet ruimtelijke ordening*), in its new form in place from July 2008, regulates town and country planning through instruments such as permits and spatial plans. Moreover, the Housing Act (*Woningwet*) regulates building control. The content of the Environment Act was already discussed in the previous section of this chapter.

The key enforcement legislation
For the regulation of public environmental law enforcement, the Dutch legal system has in place provisions in the general acts on the administration and on criminal enforcement that set out the substance and scope of the enforcement powers as well as the procedure and principles that are to be adhered to. The appointment of the competent authorities for administrative enforcement is not only done generally in the organic acts of each of these authorities (Municipal Act, Province Act and Regional Water Authority Act) but also specifically for environmental enforcement in the environmental statutes.[1448] The specific environmental statutes also contain

1444 As previously laid down in the Act on the pollution of surface waters (*Wet verontreiniging oppervlaktewateren*).
1445 See the preamble of the Water act (*Waterwet*).
1446 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.
1447 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.
1448 The Municipality Act, the Provincial Act and the Regional Water Authority Act may supplement the environmental statutes.

the normative provisions that dictate when non-compliance occurs.[1449] Although the environmental statutes do not describe criminal offences, as this is solely done in the acts on economic and common criminal offences, the penalisation of economic offences refers to the administrative norms contained in these statutes. In this manner, also this criminal act and the administrative statutes are closely connected.
As described previously, the provisions on administrative enforcement are contained within the General Administrative Law Act, the General Provisions Environmental Law Act and the specific environmental statutes. For the provisions on criminal enforcement of economic offences, the pathway to gain a full view of the legal system leads past the Economic Offences Act, the General Provisions Environmental Law Act and the specific environmental statutes, as well as the Code of Criminal Procedure. The general, or, common offences are systematised through the Criminal Code and the Code on Criminal Procedure.

The relevant acts on the enforcement instruments are the following:
- the General Administrative Law Act (*Algemene wet bestuursrecht*)
- the Economic Offences Act (*Wet Economische Delicten*)
- the Criminal Code (*Wetboek van Strafrecht*)
- the Code on Criminal procedure (*Wetboek van Strafvordering*).

Three general acts cover the types of enforcement that may be available to the public authorities. The General Administrative Law Act (GALA) provides a general regulation of, in particular, the general powers which the administrative authorities may exercise. It does not confer these powers upon these authorities. chapter five of the Act is dedicated in its entirety to the topic of enforcement. The Act contains imperative provisions, which apply to all action taken by the administrative authorities, including enforcement, and provisions that only apply when deemed explicitly applicable in the special statutes.[1450] The provisions on enforcement are imperative, albeit that the specific statutes may provide complementary or deviating provisions on enforcement.
Recent changes were made to the enforcement chapter – among others – of the General Provisions Environmental Law Act by means of the amendment act on Permitting, Inspection and Enforcement (*Vergunningverlening, Toezicht en Handhaving*).[1451] The amendments to the enforcement proposed in this amendment Act were the result of the fire at the hazardous materials plant Chemie-Pack in 2011 and the enforcement problems in case of Odfjell Rotterdam that were discovered in 2013, already

1449 For example, it is prohibited to act in breach of a permit, section 18.18 Environmental Management Act.
1450 For example, with respect to the shortened administrative decision-making procedure.
1451 Kamerstukken II 2013-2014, 33 872, nr. 2.

mentioned earlier in this chapter.[1452] Moreover, their substance was also informed by the 2014 evaluation of the environment offices put in place as part of the reform of the organisation, which will be discussed in the next chapter.[1453] The amendments that have, due to this, been implemented in the General Provisions Environmental Law Act aim to bring structural solutions to the problems recognised in several reviews of environmental law and enforcement: to limit fragmentation of executive tasks; to improve knowledge and expertise in executive organisations; to improve information exchange and cooperation between the administrative authorities, the police and the Public Prosecutor's Office; and to strengthen the administrative control with regard to the quality of the execution of tasks by the administrative authorities.[1454]
The Economic Offences Act includes the penalisation of environmental offences, confers the powers upon the criminal authorities, including powers of investigation and procedural powers as to the legal protection. The Criminal Code provides the penalisation of several environmental criminal offences as well as the appointment of the authorities in charge of pursuing these offences. The procedural provisions as to the criminal offences are found in the Code of Criminal Procedure.

Other than these acts, also the organic acts on the administrative authorities are relevant to environmental enforcement as they provide the basic competence for administrative enforcement, when appointed as competent authority in the specific environmental acts. The organic acts are the Municipal Act (*Gemeentewet*), the Provincial Act (*Provinciewet*), and the Regional Water Authority Act (*Waterschapswet*).

9.4 Characteristics of the system: substance

The Dutch system of environmental enforcement by the public authorities provides two types of enforcement: administrative enforcement and criminal enforcement, with the criminal enforcement subdivided into enforcement of environmental economic offences and of environmental common offences.
The scrutiny by politics and academia of the administrative and criminal enforcement systems over, particularly, the past twenty years as described above, was also directed at the instruments in place for enforcement. As mentioned previously, the themes highlighted in this respect relate to the improvement of the enforcement instruments and the development of the relationship between administrative and criminal enforcement. The latter was also an important theme with respect to the organisation of environmental enforcement, which will be discussed in the next chapter.

1452 Kamerstukken II 2013-2014, 33 872, nr. 3.
1453 Through an interim evaluation of the executive environment offices of 15 September 2014: Commissie Wolfsen, *Vertrouwen, Tempo en Helderheid*, Den Haag: Vereniging Nederlandse Gemeenten 2014. Available at www.vng.nl (last visited 1 June 2019).
1454 Kamerstukken II 2013-2014, 33 872, nr. 3.

9.4.1 The systems of instruments for enforcement and their relationship

In the Netherlands, the administrative environmental enforcement aims at non-compliance with administrative standards on the environment as laid down in Dutch administrative statutes, regulations and other pieces of regulation of the environment, including instruments such as permits. The criminalisation of environmental violations is found in the Economic Offences Act (*Wet Economische Delicten*), the Criminal Code (*Wetboek van Strafrecht*), as well as in specific environmental statutes. Criminal enforcement is in place to enforce two different types of environmental offences: the economic offences (*economische delicten*), and the general or common criminal offences (*strafbare feiten* or *commune delicten*). These types of offences are not only different in name, but also in enforcement, with regard to the interests protected, and (the scope of) the enforcement powers of the competent criminal authorities. Different criminal statutes cover the two types of environmental criminal offences; the Criminal Code covers the common or general environmental offences, whereas the Economic Offences Act represents the economic environmental offences. The common or general criminal environmental offences, aim to protect public health, including the lives of humans, and are described and penalised in the Criminal Code.[1455] To these environmental offences belong both abstract endangerment offences, which prohibit an act which may cause potential damage, as well as concrete endangerment offences, which criminalise a certain consequence occurring. One of the elements of both of these types of common criminal offences is *mens rea*. These offences either refer to the intention of the offender to pollute in non-compliance with the law, or to attributing the pollution to his guilt. The common criminal offences are not often prosecuted as they contain quite a few elements, especially this element of *mens rea*, which have been found difficult to prove. This was (already) recognised in 1993.[1456] As a result, the criminal enforcement focus instead came to lie upon the system of economic offences laid down in the Economic Offences Act as the primary system for the criminal enforcement of environmental offences. No *mens rea* is required for the fulfilment of these offences, although when an offence takes place with intent, the offence is deemed a crime (*misdrijf*) instead of a criminal misdemeanour (*strafrechtelijke overtreding*).[1457] Besides this, the powers, specifically those for the investigation of economic offences are broader and can be utilised at an earlier stage under the Economic Offences Act than for common offences under the Criminal Code.

1455 In particular in section 173a and 173b of the Criminal Code.

1456 Kamerstukken II 1992-1993, 23196, nr. 3, p. 2. See also the report that explored whether the formulation of the environmental offences should be amended and how: Faure, De Roos & Visser 2001.

1457 As will be seen in chapter 11 on sanctions in the Netherlands, the maximum of the criminal sanctions that may be imposed for crimes is (significantly) higher than for misdemeanours.

The offences laid down in the Economic Offences Act aim to protect the environment from action or inaction that has a direct harmful effect on the environment, or a serious and direct threat of detriment to the environment.[1458] The environmental offences in the Economic Offences Act can be characterised as abstract endangerment offences, criminalising the violation of a command or prohibition laid down in administrative law independently of the consequences for the environment in practice. Specifically from 1994 onwards the Economic Offences Act has systematised and expanded the listing of the environmental offences contained therein and now includes many environmental offences. Importantly, the Economic Offences Act is a framework law, in the sense that the substance of its offences consists of the criminalisation of the violation of norms laid down in administrative statutes, i.e. primary legislation. This administrative accessoriness means that it is necessary to refer to the administrative law – specifically the environmental statutes, orders in council and obligations in permits – for the substance of the penalisation, such as the permit and its conditions.[1459] As a consequence, the administrative and the criminal authorities are both competent for administrative enforcement and criminal enforcement, respectively, for nearly all environmental non-compliance.[1460]

For the enforcement of environmental non-compliance, administrative enforcement commonly has priority. Although administrative enforcement has a very strong position in the enforcement of environmental non-compliance, criminal enforcement is currently not considered as *ultima ratio*. In the Netherlands, the criminal enforcement of environmental law is considered to have a place beside administrative enforcement of environmental law, with each its own function. This – to which the concept of integrated enforcement is connected – was made explicit in the policy documents of the administrative authorities and the Public Prosecutor's office from around 2000 and onwards.[1461] The concept of integrated enforcement refers to a flexible use of both administrative and criminal instruments with regard to the same instance of non-compliance; in other words, administrative and criminal sanctions are all part of one toolkit that is considered for the reaction to a single environmental non-compliance, in spite of the fact that different enforcement authorities are

1458 The inclusion of the aspect of threat in the penalisations has been criticised, see e.g. Koopmans 2007, p. 63 and further; also Gritter, Knigge & Kwakman 2005.

1459 Another aspect of this administrative accessoriness is the fact that the presence of a permit – an administrative instrument – has a legalising effect on the criminal offence. This is also the case in England. This aspect will not be discussed further.

1460 This aspect of the potential for the combination of sanctions will be discussed further in chapter 11, section 11.5.2.

1461 See e.g. Landelijk Overleg Milieuhandhaving, *Landelijke strategie milieuhandhaving. Sanctiestrategie als bedoeld in criterium 2.3. van de Professionalisering van de Milieuhandhaving*, Den Haag: 2004; Aanwijzing handhaving milieurecht 2010; *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014). Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

involved.[1462] This means, as will be discussed in the next chapter on the organisation, that cooperation between administrative and criminal enforcement authorities is paramount for effective enforcement. As will be set out, to facilitate this in terms of the organisation, there are, for example, administrative agreements in place, with supplements for the criminal authorities as a basis for the (organisational) cooperation between administrative authorities and criminal authorities.[1463]

The general approach of the administrative authorities to integrated enforcement was first established in a countrywide sanctioning strategy on environmental enforcement, drawn up in 2004 by the nation-wide informal administrative consultation structure on environmental enforcement.[1464] This strategy was formulated as a result of the statutory obligations set for the authorities by the programme on professionalising enforcement, instigated in 2002.[1465] This programme aimed in particular at enforcement by the local authorities. The countrywide strategy has more or less been translated into the policy rules of each of the competent administrative authorities.[1466] As referred to previously, in 2014, the new Countrywide Enforcement Strategy was conceived for administrative and criminal enforcement of environmental law. More on this in chapters 10 and 11.

9.4.2 Use of discretion by the administrative authorities: the principle duty to enforce and explicit non-enforcement[1467]

The principle duty to enforce

It is interesting from the point of view of the use of discretion by the administrative authorities that in the Netherlands there exist a principle duty to enforce in case of non-compliance (*beginselplicht tot handhaving*). Moreover, it is also possible for the administrative authorities to take an explicit decision to not enforce, albeit to a limited extent under specific circumstances.

> Legal protection is open to the decision not to enforce for third parties, specifically both the rejection of a request for enforcement and the decision to condone (i.e. an explicit decision *not* to enforce) are appealable. Note that this section is not about a duty to have principles of enforcement, but rather about a

1462 See Blomberg 2000.
1463 See further chapter 10.
1464 Landelijk Overleg Milieuhandhaving, *Landelijke strategie milieuhandhaving. Sanctiestrategie als bedoeld in criterium 2.3. van de Professionalisering van de Milieuhandhaving*, Den Haag: 2004.
1465 These obligations are laid down formally in the Environment Management Act and in the General Provisions Environmental Law Act.
1466 For more on this see chapter 10.
1467 Parts of this section were previously published as Essens & Verhoeven 2011, p. 163-183.

principle duty to enforce, in the sense of a basic starting point that enforcement must be pursued. The contents of this duty will be further explained in this section.

By establishing the principle duty to enforce, the administrative judiciary has specified and (thereby) narrowed the scope of the policy discretion of the administrative authorities with regard to the exercise of administrative enforcement powers.[1468]
The administrative authority will balance the interests involved in an administrative enforcement decision previous to establishing it.[1469] In general, the powers of sanctioning are framed to allow the administrative authorities policy discretion with regard to this balancing of interests and the outcome thereof. Initially, the Administrative Adjudication Division of the Council of State accepted this policy discretion as a competence and not as an obligation. The interests in the balance were shown in case law to be the interest of enforcement, in particular the prevention of precedents, and the interest of the offender in non-enforcement. The latter's interest was exemplified by the examination of the possibility to legalise the illegal situation.[1470] Over the years, the courts re-evaluated these equally considered interests and a ground rule of enforcement was established. Also, the interests of third parties were increasingly considered relevant factors for enforcement.[1471]

From 1997 on, the courts established that enforcement should be the general rule, unless legalisation was possible, which should be discarded if this would harm third party interests. If third parties have explicitly requested enforcement, the administrative authorities can only under special circumstances abstain from action, thus, making the room to not enforce even smaller than in the absence of third party requests.[1472] This shows that, through the case law on enforcement, a dialogue was established between the administrative authorities and third parties.
Next, the courts established the formula of the principle duty for enforcement. Although the elements of the formula were already coined in previous case law, at least partially from 1997 onwards, the composite formula of the principle duty to enforce and its exceptions was established in 2004.[1473] This formula provides that, considering

1468 This discretion has not only been restrained by the case law of the administrative courts through the principle duty of enforcement, but is also reduced where it concerns the enforcement of rules of European origin, emanating from the European Union legislator.
1469 On the basis of one of the general principles of administrative law, as laid down in art. 3:4 of the General Administrative Law Act.
1470 See ABRvS 25 September 1990 ECLI:NL:RVS:1990:AN1988.
1471 See for example ABRvS 22 September 1997 ECLI:NL:RVS:1997:AE3617, in which it was considered 'the interest of enforcement of the zoning plan, and thereby the interests of third parties'.
1472 ABRvS 2 February 1998 ECLI:NL:RVS:1998:ZF3176; ABRvS 17 August 1999 ECLI:NL:RVS:1999:AA3753.
1473 See ABRvS 22 September 1997, *JB* 1997/269; ABRvS 2 February 1998 ECLI:NL:RVS:1998:ZF3176.

the general importance that is served with enforcement, the administrative authority competent to employ enforcement action[1474] in case of breach of a legal provision shall have to utilise this competence as a rule.[1475] Only special circumstances can allow the administrative authority not to. This can be the case where there is a concrete outlook on legalisation of the illegal situation.[1476] More on the explicit decision not to enforce that is required in such a case, see below.

The courts have also reflected on the way enforcement policies relate to the principle duty of enforcement. The courts accept policies that establish enforcement priorities of the administrative authorities, although the administrative authorities must make an individual decision when a (relevant) third party requests enforcement.[1477] Moreover, policies that establish that certain minor non-compliance that occurs for the first time is enforced through warnings and not immediate sanctions are also allowed, as long as recurrent non-compliance is sanctioned.[1478]

Through this case law, the courts have delineated the space for the administrative authorities to balance the interests involved in enforcement, determined the weight of the interests involved, and standardised the outcome thereof.

Originally, the formula was phrased in cases regarding non-compliance with legislation on environmental hygiene and spatial planning.[1479] Through the years, the formula has also found its way to other areas of the environmental arena, such as the enforcement of water and nature protection and outside that arena, such as with regard to the enforcement of legislation on development, road traffic control, housing, telecommunications, competition law and media.[1480]

Explicit decision to not enforce

The administrative authority may decide not to enforce where enforcement is in fact possible, called '*gedogen*' (condoning) in Dutch. Parallel to the specification by the courts of the framework for enforcement, the Dutch legislator developed a framework for explicit non-enforcement by the administrative authorities. Only

1474 The first incarnation of the formula contained reference to the two most general reparatory sanctions, namely the coercive force and the coercive fine, which were the only sanctions provided for the administrative authorities in chapter 5 of the General Administrative Law Act at that moment. In later referrals to the formula these sanctions were often replaced by more general terms, such as the reference to 'the administrative authority that is competent to act in cases of breach of a legal provision', or to 'the authority that is competent to repair or end the non-compliance'. Often, also, general reference is made to 'enforcement action', or to the specific sanction in the case at hand. Therefore, the formula is not limited to the application of those instruments referred to in its first incarnation.

1475 This specific formula was established on ABRvS 30 June 2004 ECLI:NL:RVS:2004:AP4646.

1476 In the original formula, it was also mentioned that enforcement action can be so disproportionate in relation to the interests served by it, that action in that specific situation should be forgone, ABRvS 30 June 2004 ECLI:NL:RVS:2004:AP4646.

1477 ABRvS 4 June 2014 ECLI:NL:RVS:2014:1982.

1478 ABRvS 5 October 2011 ECLI:NL:RVS:2014:1982; Michiels, Blomberg & Jurgens 2016, p. 203.

1479 See ABRvS 30 June 2004 ECLI:NL:RVS:2004:AP4646; ABRvS 18 August 2004 ECLI:NL:RVS:2004:AQ7441.

1480 See e.g. CBb 20 August 2010, ECLI:NL:CBB:2010:BN4700 and CBb 15 June 2011, ECLI:NL:CBB:2011:BQ8708.

such explicit non-enforcement laid down in an administrative decision – and in very specific circumstances – is allowed as a deviation of the principle duty to enforce by the administrative authorities.

> These rules on explicit non-enforcement do not apply to the criminal authorities and the criminal enforcement of non-compliance. Moreover, an administrative decision stipulating non-enforcement does not influence the possibility for the criminal authorities to enforce.[1481] The criminal courts may consider the fact that non-compliance is explicitly allowed by the administrative authorities as relevant to the level of the sentence.[1482]

The situation of non-compliance that is not enforced should be temporary, with the non-compliance ending in the foreseeable future, or the concrete view to legalisation of the non-compliance (*concreet zicht op legalisering*), for example by licensing a situation so that it is in fact allowed.[1483]

> Obviously, there can be what may be called un-considered non-enforcement, which would be the case if the administrative authority does not have any knowledge about the non-compliance or if it does know about the non-compliance but does not act at all, i.e. without consideration of the interests involved. The latter is also referred to as 'condoning' as opposed to 'qualified condoning', which implies that the interests involved in enforcement are weighed up and an explicit decision is established wherein the conditions for non-enforcement are laid down.

The requirements with which the decision not to enforce must comply have been formulated in case law and in policy documents. The decision must mention its (restricted) duration.[1484] This term should be as short as possible and should be related to the time needed to create the circumstances in which the illegal action can be ended.[1485] Furthermore, conditions must be imposed in the decision to temporarily regulate the unlawful situation in a reasonable way and by doing so sufficiently restrict the possible damage, for example to the environment or inconvenience for

1481 See also Michiels, Blomberg & Jurgens 2016, p. 218-220.
1482 Michiels, Blomberg & Jurgens 2016, p. 219-220.
1483 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 7. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019); also Staatsblad 2010, 143 (*Toelichting Besluit Omgevingsrecht*), p. 107-108; Kamerstukken II 1996-1997, 25 085, nr. 2 (kabinetsnota *Grenzen aan gedogen*). Explicit non-enforcement in the area of environmental management law is further described in Kamerstukken II 1991–1992, 22 343, nr. 2 (*gezamenlijk beleidskader gedogen*); Kamerstukken II 2003-2004, 22 343, nr. 82.
1484 ABRvS 15 November 1993, ECLI:NL:RVS:1993:AN3592; Delsman 2002, p. 26.
1485 Delsman 2002, p. 26; ABRvS 16 February 2000 ECLI:NL:RVS:2000:AN6401.

the neighbours. By imposing conditions on non-enforcement, the administrative authorities can still do as much justice as possible to the interests that are protected by the norm that has been contravened. If legalisation is possible, in principle the same conditions may be imposed upon the activities as those that would be applicable in a legal situation.[1486] Nevertheless, this does not mean that the declaration of acquiescence can be put on a par with a licence. A declaration of acquiescence is only a commitment not to act in an enforcing way. This exception to enforcement by a concrete view on legalisation of the non-compliance is not compulsory. This means that enforcement may still be pursued where there is such a view, but the authorities may decide not to.

9.5 Conclusion

In this chapter a global insight was given in the most important aspects of the structure and substance of the Dutch environmental regulation and the public enforcement thereof. It was found that there have been significant catalysts for change in environmental law and enforcement. These catalysts have led to a delineation of themes of improvement of the legislation on environmental protection and enforcement, the enforcement organisation, and sanctions. Considerations of effectiveness and expediency in the formulation of legislation, policy and practice on environmental protection and enforcement are at the core of these themes of improvement. Following from this, several developments have taken place with impact on environmental protection and enforcement. As a result, the integration of and within the systems of law has become one of the most prominent characteristics of the system and its elements. Legislation on environmental protection and on enforcement has been integrated and harmonised.
The enforcement organisation and the sanctions have also seen important developments to increase effectiveness. Both administrative and criminal enforcement are available for the protection of the environment. In their relationship, criminal enforcement has developed from *ultima ratio* to complementary to administrative law and vice versa. The following two chapters look more closely at the organisation and the sanctions available in the context of the systems of enforcement available for environmental non-compliance. chapter 10 will describe the enforcement organisation; chapter 11 will survey administrative and criminal sanctioning.

1486 This is possible in case of legalisation by means of granting a licence.

Chapter 10 Organisation of Public Enforcement of Environmental Law in the Netherlands

10.1 Introduction; overview; characteristics and developments with regard to the enforcement organisation

10.1.1 Introduction

As described in the previous chapter, there are two types of public enforcement in the Netherlands: administrative enforcement and criminal enforcement.[1487] The main authorities competent for these types of enforcement are the administrative authorities (*bestuursorganen*); the police; the Public Prosecutor; and the criminal courts.[1488] The table below lists these authorities.[1489]

Main authorities for the public enforcement of environmental law

- Administrative authorities (*bestuursorganen*)
  - local government
  - central government
- Police (*politie*)
- The Functional Office of the Public Prosecutor (*Functional Parket van het Openbaar Ministerie*)
- Criminal courts (criminal judiciary: *strafrechter*).

In this chapter, the organisation of this enforcement is described. The enforcement organisation is described in two parts: first, the organisation of administrative enforcement is described. Several aspects of this organisation are discussed. The level of government at which the enforcement competence is laid down is described (10.2). After that, it is described specifically where the enforcement competence for inspection and sanctioning is laid down, including the solutions to increase the quality of the administrative enforcement organisation (10.3). Second, the organisation of criminal enforcement is described (10.4). The organisation and

1487 Although, as we will see below, hybrids exist that carry characteristics of both systems.

1488 There are many other actors for very specialised aspects of environmental law, such as the Dutch Food and Produce Authority (*Nederlandse Voedsel- en Warenautoriteit*), a public body that, for example, also enforces certain legal rules on the protection of endangered species. The Public Prosecutor can, in fact, also be considered an administrative authority in the sense of the General Administrative Law Act (section 1:1). However, here, the Public Prosecutor is not gathered under the category of administrative authorities.

1489 As mentioned in chapter 1, legal protection is not discussed in this research. This means, for example, that the administrative courts are not mentioned in this table. Also, the higher criminal courts that may review appeals against criminal sanctions imposed by the lower criminal courts are not included in the description.

competence for criminal investigation is discussed separately from the organisation and competence for prosecution and sanctioning. Following this, the coordination and cooperation between the enforcement authorities is described (10.5). Then, the evaluative framework that was formulated in chapter 2 is applied to the enforcement organisation (10.6). The chapter closes with a summary of the findings (10.7).

Before proceeding to this, however, below more context is provided. First, an overview of the administrative and criminal enforcement organisation is given. Moreover, the issues of the administrative enforcement organisation and the criminal enforcement organisation and the solutions are highlighted.

10.1.2 Overview of the enforcement organisation

Above, the main authorities competent for the public enforcement of environmental law in the Netherlands were listed. It should be noted that there is a slight overlap in the authorities that are competent for administrative enforcement and criminal enforcement. This is due to the fact that some administrative authorities may impose a hybrid sanction that has elements of criminal enforcement: the administrative criminal decision. Apart from this, the authorities can be considered separate: for administrative enforcement, the administrative authorities are competent; for criminal enforcement, the police, Public Prosecutor's Office and criminal courts are competent. This hybrid sanction falls mostly within the definition of criminal enforcement but is applied by administrative authorities. The characteristics of this instrument and its placement with regard to administrative enforcement and criminal enforcement will be addressed in more detail in the next chapter.

While separate authorities are competent, in the Netherlands this does not mean that these authorities do their work entirely separately or do not have any business with each other. In fact, there is cooperation and coordination between the authorities. This is due, for one, to the introduction of punitive, formerly criminal powers in administrative law, and, second, to the fact that a special investigative officer (*buitengewoon opsporingsambtenaar*) can be competent for administrative enforcement as well as criminal enforcement. Third, the signalled necessity of administrative and criminal enforcement authorities to work together to provide an effective enforcement response requires cooperation and coordination between the authorities. More on this in section 10.6 of this chapter.

10.1.3 Characteristics of the enforcement organisation

Both the administrative organisation and the criminal organisation have seen several developments over the years with the aim of strengthening effective enforcement. These developments have led to a certain integration of the administrative competences, while the tiered or levelled aspect of the administrative organisation remains; a certain specialisation of the administrative organisation and the criminal organisation; the prioritisation of environmental enforcement within both types of organisation; and the cooperation in the administrative organisation and cooperation and coordination between the administrative and the criminal organisation.

The relationship between the administrative organisation and the criminal organisation of the enforcement of environmental law is important, as the non-compliance with administrative norms is often also an (economic) criminal offence. Therefore, often both the criminal and the administrative enforcement authorities are competent with regard to a single instance of non-compliance.

These characteristics of the enforcement organisation are listed in the table below.

Characteristics of the enforcement organisation

- Tiered or levelled administrative organisation
- Integration of the administrative organisation
- Specialisation of the administrative and criminal organisation
- Prioritisation of environmental enforcement within the organisation
- Coordination and cooperation between administrative authorities and with the criminal authorities

At the core of these developments to strengthen effective enforcement were two important problems of effectiveness that the organisation of both administrative enforcement and criminal enforcement had in common: one, the lack of priority given to environmental enforcement, and, two, the lack of cooperation between the criminal and the administrative authorities.[1490] Besides this, there were issues more specific to the organisation of administrative enforcement and criminal enforcement, respectively.

With regard to the organisation for administrative enforcement, the fragmentation of the administrative organisation as a result of the tiers of that organisation, and also the fact that competences of the authorities can be parallel, sectoral or both contributed to the lack of priority, a lack of specialisation, and a lack of consistency of enforcement responses. With regard to the organisation for criminal enforcement, issues were the lack of priority given to environmental enforcement; the position of

1490 These problems were signalled from the early 1990s onwards.

the criminal law as an enforcement tool. Relevant to both the administrative and the criminal enforcement organisation were the lack of cooperation between the criminal authorities and the administrative authorities.[1491] The background and solutions to these issues are set out below.

10.1.4 Issues of the administrative enforcement organisation

For the administrative enforcement organisation, its fragmentation – in terms of the fragmentation of the sources of its system, organisation and instruments – has long been one of its key characteristics.[1492] This fragmentation was, in part, due to the fragmented character of the environmental regulation that conferred the competences upon the authorities, and, in part, due to the fact that the decentralised authorities are most commonly in charge of the exercise in practice of the powers of enforcement. The attribution of competences to the administrative authorities specifically for environmental enforcement was dispersed in fragmented legislation, making it difficult to oversee clearly which authority was competent in what instance. The fact that the decentralised authorities are most commonly in charge of the exercise, in practice, of the powers of enforcement means there are a large number of authorities competent. As the Netherlands are a decentralized unitary state, administrative powers are divided between the level of central government and the decentralised level of local government, which consists of the provinces, the regional water authorities and the municipalities.[1493] While the primacy of legislative and executive powers rests in principle with central government, the decentralised authorities are commonly attributed the task of the exercise of the executive powers, which includes the exercise of enforcement powers.[1494] Previously, in environmental law, often more than one authority was competent for the enforcement of one aspect or more of non-compliance – dependent on the legislation breached and the geographical occurrence of non-compliance, although these authorities were not necessarily all simultaneously competent. In a review of environmental enforcement – one of many – in 2008 the fragmentation of the organisation was highlighted as a significant problem for effective enforcement.[1495] At the time, with twelve provinces, 443 municipalities and twenty-seven regional water authorities[1496], each competent for its own region

1491 Kamerstukken II 2006–2007, 22 343, nr. 171, p. 3; De Ridder, Schol & Struiksma 2009. Also Programma Uitvoering met Ambitie/Programma Versterking strafrechtelijke milieuhandhaving, *Notitie verkenning verhouding en afstemming bestuur – Openbaar Ministerie, Bouwstenen voor een gemeenschappelijke visie*, 2011, p. 8, available at www.politieacademie.nl/kennisenonderzoek/kennis/mediatheek/PDF/82307.pdf (last visited 1 June 2019); Commissie Mans 2008, p. 8.

1492 See section 9.3.2.1 of the previous chapter.

1493 See chapter 7 of the Dutch Constitution (*Grondwet*). Also Kortman 2016, p. 73.

1494 Central government is the Crown and Parliament or the Crown and individual members or the Cabinet of Secretaries (*ministers*).

1495 Commissie Mans 2008, p. 8.

1496 Per 1 January 2018, these numbers are twelve provinces, 380 municipalities and 21 regional water authorities. In the past years, the number of municipalities and regional water authorities has declined; compare for example the number of 443 municipalities mentioned in the report of the Commissie Mans 2008, p. 31.

and including the occasional competence of central government authorities for environmental enforcement, a little fewer than 500 administrative authorities were involved in environmental enforcement.[1497] In the review of 2008, the fragmentation of the organisation was considered problematic as it influenced the priority given to environmental enforcement, also due to the fact that resources were not bundled and expertise was difficult to build up; moreover, the fragmentation negatively affected the consistency of enforcement responses to similar non-compliance by different but similar authorities.[1498] Below, this will be discussed further.

10.1.5 Issues of the criminal enforcement organisation

The organisational structure of criminal enforcement suffered less from fragmentation or the effects thereof than that of administrative enforcement. The problems signalled with regard to the criminal enforcement organisation – the police, the Public Prosecutor's Office and the criminal courts – mainly concerned the lack of priority given to environmental enforcement, the position of the criminal law as an enforcement tool, and the lack of cooperation and coordination between the criminal and the administrative authorities, including the exchange of information and the choice and consistency of enforcement responses to non-compliance.[1499]

10.1.6 Solutions

Several solutions were implemented in recent years in the Dutch organisation for the administrative and criminal enforcement of environmental law to the problems set out above. This has re-shaped the enforcement organisation and created conditions for a more expedient/effective enforcement organisation. The administrative enforcement organisation became more integrated; cooperation between administrative enforcement authorities was enhanced; the relationship between the administrative and criminal authorities was strengthened; and both the administrative and criminal enforcement organisation were specialised in favour of expertise and priority to be given to environmental enforcement. These solutions to these problems are listed in the table below.

1497 Commissie Mans 2008, p. 31.

1498 This was in spite of the efforts to curb these issues previously. Commissie Mans 2008, p. 31.

1499 The exchange of information is called *informatiehuishouding*, see De Ridder, Schol & Struiksma 2009, p. 2; Kamerstukken II 2013-2014 33872, nr. 3, p. 5 and 21-30. Also, Kamerstukken II 2006–2007, 22 343, nr. 171, p. 3; Programma Uitvoering met Ambitie/Programma Versterking strafrechtelijke milieuhandhaving, *Notitie verkenning verhouding en afstemming bestuur – Openbaar Ministerie, Bouwstenen voor een gemeenschappelijke visie*, 2011, p. 8, available at www.politieacademie.nl/kennisenonderzoek/kennis/mediatheek/PDF/82307.pdf (last visited 1 June 2019).

Implemented solutions to signalled problems of the enforcement organisation

- Integration of the administrative enforcement organisation
- Enhanced cooperation between the administrative enforcement authorities
- Strengthened relationship between the administrative and the criminal enforcement authorities
- Specialisation of the administrative and the criminal enforcement organisation

In the 2008 review, mentioned above, it was proposed that competences and authorities should be integrated, and cooperation between the authorities augmented.[1500] One of the steps taken towards this integration was the creation of the General Provisions Environmental Law Act described in the previous chapter. Through this Act an important statutory move was made towards the integration of the organisation, partly fuelled by the aim to improve the transparency of the organisation,.

In its reaction to the myriad of reviews and proposals that were done prior to November 2008, central government identified three (remaining) main points of improvement after the introduction of the General Provisions Environmental Law Act:[1501] (1) the quality of the execution of tasks of permitting, inspection and enforcement; (2) improving the coordination between criminal and administrative law; and (3) the division of competences between administrative authorities (and inter-administrative supervision and administrative pressure).[1502]

For the benefit of the administrative enforcement organisation as a whole, quality criteria were developed for the tasks of permitting, inspection and enforcement. These were developed informally, and formally laid down in the General Provisions Environmental Law Act, Orders in Council and the Countrywide Enforcement Strategy (*Landelijke Handhavingstrategie*).[1503]

The development to upscale the enforcement organisation and build up expertise and increase cooperation through the introduction of regional executive offices amounted to the creation of a countrywide system of environment offices. This development towards the environment offices aims also to improve the cooperation and communication between the administrative enforcement authorities and the criminal enforcement authorities.[1504]

1500 Commissie Mans 2008, p. 42-45.

1501 See, for example, Kamerstukken II 2008-2009, 22343, nr. 215.

1502 The latter two will not be explored here.

1503 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014). Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019). More on this in section 10.3.4.2 of this chapter.

1504 Commissie Mans 2008, p. 46-47.

The theme of cooperation and coordination between the enforcement authorities is not of recent years, but has been emphasised since the beginning of the 1990s as a continuous theme for the organisation of environmental enforcement. In particular since 1997, this theme has been one of the focus points of improving effective enforcement.[1505] Continuous efforts have been made to improve the enforcement on this theme. The General Provisions Environmental Law Act and its connected Decision on environmental law require the administrative authorities to coordinate their enforcement policy with the criminal authorities and to include in that policy a strategy for the coordination of sanctions with those authorities. Quite recently, the Countrywide Enforcement Strategy was introduced, integrating administrative and criminal enforcement responses in one document, including a heat chart or graph, with which all enforcement partners will start working (on a voluntary, but not optional basis). Also, a combined enforcement strategy was created, at the instigation of the association of provinces, for installations dealing with hazardous matter (*BRZO*).[1506] For the benefit of information exchange a system called *Inspectieview Milieu* has been made available and several enforcement organisations become connected to it, including the environment offices, the Public Prosecutor and the police.

> The requirement to exchange information concerning installations, also with the criminal authorities, is laid down in section 5.8 of the GPELA and section 7.8 and further of the Decision Environmental Law (*Besluit Omgevingsrecht*). However, although the Public Prosecutor's Office and the Chief of Police are to be connected, the requirement to exchange information does not apply to the criminal authorities on the basis of this legislation.

The cooperation or at the least the communication between the entities responsible on their respective roles and strategies is necessary considering that often both criminal and administrative enforcement authorities may be competent with regard to a single instance of non-compliance, as the non-compliance with administrative norms is often also an (economic) criminal offence.
Developments in recent years to increase the priority given to environmental criminal enforcement measures are, most prominently, the creation of specialised environmental police teams[1507] and a semi-specialised Public Prosecutor's Office. These developments will be further described in this chapter. Below, first, the authorities are consecutively described.

1505 Kamerstukken II 1996-1997, 22 343, nr. 29.
1506 *Landelijke handhavingstrategie Besluit risico's zware ongevallen 1999*, available at https://brzoplus.nl/aanpak/handreiking/ (last visited 1 June 2019).
1507 It will be highlighted later that this specialisation of police teams has now been semi-turned back.

10.2 Administrative authorities: local and central government

Overview

In the Netherlands, several administrative authorities at different levels of government may be in charge of the administrative enforcement of environmental non-compliance. Three government levels exist in the Netherlands: central government and the provinces and the municipalities, which are indicated as 'local government'. The administrative authorities of the provinces and the municipalities and the *Minister* of the relevant Departments of central government[1508] in particular are the relevant authorities for the administrative enforcement of environmental law. Besides this, 'functional' local government can also be distinguished, in the shape of the regional water authorities (*waterschappen*) – specialised local administrative authorities with specific (functional) competence in the area of water management.[1509] At the level of local government, environment offices (*omgevingsdiensten*) have been created as executive offices for cooperation between the different local authorities for the benefit of enforcement, as one of the solutions to counter-act the problems arising due to the fragmentation of the enforcement organisation (more on this below). At the level of central government there are national inspectorates, such as the Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport*), and several specialised national agencies, such as the Dutch Emissions authority (*Nederlandse Emissieautoriteit*). While the administration of government as described above is considered tiered or levelled, these levels are in fact deemed equal.[1510] The main authorities for administrative enforcement are listed in the table below.

1508 Also an administrative authority (see section 1:1 *Algemene wet bestuursrecht*).

1509 Also called functional decentralisation, as opposed to territorial decentralisation which concerns bodies that may also be termed general administrative bodies – such as provinces and municipalities – that have general responsibility. See e.g. Nehmelman 2014, p. 137.

1510 While it is considered that all the authorities/levels are equal layers of the Dutch state establishment, with their own tasks and responsibilities, there is a certain hierarchical inter-administrative supervision in place between the layers of government. Central government supervises provinces and municipalities in the manner in which they execute their tasks and responsibilities and the provinces supervise municipalities and the regional water authorities on these aspects of their administration. See also Kamerstukken II 2013-2014 33962, nr. 3, p. 6; Kamerstukken II 2006-2007 30800 VII, nr. 22, annex; Backes & Van der Woude 2013, p. 241.

Main authorities for administrative enforcement

- Administrative authorities of local government:[1511]
  - Municipalities (*gemeenten*)
  - Regional water authorities (*waterschappen*)
  - Provinces (*provincies*)
  - Environment offices (*omgevingsdiensten)*
- Administrative authorities of central government:
  - *Minister* of the Department of Infrastructure and Water Management and the Department of Economics, Agriculture and Innovation
  - Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport*)
  - Specialised national agencies, such as the Dutch Emissions authority (*Nederlandse Emissieautoriteit*)

10.2.1 Local government: municipalities, regional water authorities, provinces and environment offices

10.2.1.1 Municipalities and provinces

Municipalities and provinces are the core authorities involved in the enforcement of environmental law. In the Netherlands, there currently are 380 municipalities[1512] and 12 provinces. While it has already been explained what role the municipalities and provinces may have in the decentralised regime of Dutch government, several aspects of the organisation of these decentralised authorities will be highlighted here, in particular the duties of care of the administrative authorities for the organisation of enforcement. The administrative authorities have several duties of care with regard to enforcement.[1513]

In the law, certain aspects of the structure of the organisation are determined through these duties of care regarding enforcement. In particular, the administrative authorities are to take care of a certain degree of independence within their organisation and the organisation of the environment offices. More in particular it is prescribed that persons charged with the preparation of decisions upon environmental permit requests or other specific decisions are not to be responsible for the inspection upon compliance with regard to rules pertaining to installations, and are not be responsible for the preparation and execution of administrative sanctions with regard to installations.[1514] Moreover, the authorities are to take care that a person that has

1511 It must be noted here that, according to section 1:1 of the General Administrative Law Act, the correct legal manner of referring to the administrative authority – the decision-making body – of the relevant authorities is to the administration of the municipalities (usually Mayor and Aldermen), the provinces (commonly the Provincial Executive), and the regional water authorities (usually the daily board).

1512 As of January 1, 2018, with an extra 3 public bodies that are governed like municipalities.

1513 See also section 10.3.1 below.

1514 Section 7.4(2)(b) of the *Besluit omgevingsrecht*.

been appointed as an inspection officer under the GPELA (section 5.10 and 5.11) is not continually responsible for the inspection of non-compliance with regard to the same installation.[1515] More on these and other quality criteria with regard to the organisation in section 10.3.4 of this chapter. These aspects also apply to the environment offices, which will be highlighted below. The municipalities and provinces that instate the environment offices must ensure that the above-mentioned duties of care are complied with within the organisation of those offices.[1516]

10.2.1.2 Regional water authorities

There are primarily two authorities competent in the area of water: central government and the regional water authorities (*waterschappen*). Regional water authorities are public bodies that aim to ensure what is called the water management care (*waterstaatkundige verzorging*) of a specific area.[1517] To pursue that aim, specific tasks are accorded to the regional water authorities – making them functional decentralised bodies. These tasks are the care for the water system, specifically flood protection and regional water management and the treatment of urban wastewater.[1518] These tasks are further specified and powers to carry out these tasks are accorded through the Water Act and the Regional Water Authority Act.[1519]

Currently there are 23 regional water authorities in the Netherlands. The regional water authorities are (partly) democratically elected. The Dutch people and specific stakeholders democratically elect the regional water authority, more specifically its general assembly.[1520] An executive assembly (daily board) that is elected from the general assembly may take enforcement decisions, among others.[1521] A chairman that is appointed by Dutch central government sits at the head of both assemblies.[1522] This chairman may also take enforcement decisions – among others – instead of the executive assembly, in cases of urgent or imminent danger.[1523]

The enforcement of the permit and the other rules in the Water Act is regulated through the uniform regulation of enforcement powers and competences in the GPELA, in spite of the fact that the water permit is not part of the environmental permit.

1515 Section 7.4(2)(c) of the *Besluit omgevingsrecht*.
1516 Section 7.4 of the *Besluit omgevingsrecht*, introduced in 2010. See also section 10.5 of the ministerial decree *Regeling omgevingsrecht*.
1517 Section 1 of the Regional Water Authority Act.
1518 Section 1(2) of the Regional Water Authority Act.
1519 With a certain basis in section 133 of the Dutch Constitution.
1520 Section 12 of the Regional Water Authority Act.
1521 Section 61(2) Regional Water Authority Act.
1522 Section 10 Regional Water Authority Act.
1523 Section 61(3) Regional Water Authority Act.

10.2.1.3 Executive environment offices

10.2.1.3.1 History of the creation of the environment offices

Environment offices (*omgevingsdiensten*) currently play an important role in the enforcement of environmental law. The nation-wide creation of these offices is a relatively recent development in the interest of an expedient and effective execution and enforcement of the environmental law, to improve the cooperation between and coordination of the enforcement authorities and to combat the fragmentation of the enforcement organisation. Countrywide, regional executive offices (*regionale uitvoeringsdiensten*) were systematically created as environmental offices for the exercise of environmental competences, including the enforcement powers, of the local authorities across the Netherlands. This systematic creation of the environment offices was a difficult process, among others, because the municipalities in particular, were concerned they would lose their independence.[1524] The development towards these environment offices took place as follows. From the 1970s and 1980s onwards, several cooperation bodies were put in place for the enforcement of (certain) environmental rules.[1525] An example is the office created in the 1970s and 1980s in North South-Holland (*Dienst Centraal Milieubeheer Rijnmond*) in which the provinces and municipalities cooperated. The province and municipalities participating in these offices transferred their executive powers in the area of environmental enforcement to these public bodies, while retaining the final decision-making powers.[1526] Although the example of this public body showed that such bodies could benefit the priority for enforcement given by the authorities and the expertise of those involved in enforcement, not many local authorities participated in such professional cooperation.

The positive evaluation of these existing cooperation offices – in terms of establishing expertise – and the lack of impulse for the local authorities to participate in these offices, in spite of their positive aspects, led the Commission that conducted the environmental enforcement review in 2008 to propose making environment executive offices compulsory across the Netherlands.[1527] The evaluation considered that due to the fragmentation of the authorities the lack of cooperation by authorities in such offices formed a barrier for professionalizing enforcement, providing sufficient critical mass for the benefit of ensuring manpower and expertise, and handling regional or supraregional enforcement issues.[1528] Environment executive offices were

1524 Michiels, Blomberg & Jurgens 2016, p. 380.
1525 Examples are the offices in North South-Holland (*Dienst Centraal Milieubeheer Rijnmond*), South South-Holland (*Milieudienst Zuid-Holland Zuid*) and West-Brabant (*Milieudienst West-Brabant*) in which (regions of) provinces and municipalities cooperated.
1526 Decision-making powers could also be transferred upon a public body.
1527 Commissie Mans 2008, p. 8-9.
1528 Kamerstukken II 2013-2014, 33 872, nr. 3, p. 3.

seen as the solution to scale up the 500 local authorities involved in environmental administrative enforcement to better fit the scope of the more complex cases of environmental non-compliance and to guarantee that expertise was created within an enforcement organisation.[1529]

Although the obligatory character of the offices did not survive the deliberations between central government and the local authorities in 2009, especially upon the objection of the municipalities, still an agreement was reached in which the usefulness and necessity of offices exercising the enforcement powers was recognized.[1530] It is important to note here that with the codification of many of the aspects of the environment offices in Dutch law in 2016 and 2017, an obligation to create environment offices is now in fact included in the GPELA.[1531] Rules on the environment offices, which, among others, establish the legal obligation of the environment offices for environmental protection, have been implemented in 2016 in the General Provisions Environmental Law Act (section 5.3 up to and including 5.9 GPELA), as well as in the Decision Environmental Law.[1532] A basic package of executive tasks ('*basistakenpakket*') was agreed upon on 1 June 2011.[1533] A deadline for the creation of the regional executive offices throughout the Netherlands was set on January 1, 2013.[1534] However, many authorities did not meet the deadline and the creation of the offices continued through to 2014.

Legislation specifies since 2016[1535] that the geographical scope of the environment offices is to follow the scope of one or more of the safety regions,[1536] which are the twenty-six (former) geographical regions of the police in the Netherlands.[1537] Also part of these safety regions, or circles of municipalities within those regions, are

1529 Commissie Mans 2008, p. 6.

1530 See Kamerstukken II 2008-2009 29383, nr. 130.

1531 Section 5.3 GPELA.

1532 Through the Act on Permitting, Inspection and Enforcement (*Wet Vergunningverlening, Toezicht en Handhaving*) the package of tasks of the environment offices that were part of the package deal of 2009 was 'codified' in 2016. These legal rules have gained force on 14 April 2016, 'codifying' several aspects of the basic package of powers/competences agreed upon in 2009 by the associations representing the provinces (IPO) and the municipalities (VNG) and central government.

1533 See Kamerstukken II 2013-2014, 33872, nr. 3, p. 17.

1534 Kamerstukken II 2008-2009, 29383, nr. 130. For the implementation of the package deal the programme *Programma Uitvoering met Ambitie* (PUmA) was created.

1535 As is clear from the above history, the countrywide creation of environment offices was a bottom-up process, with many agreements between the parties concerned and only recently the laying down in the law of rules pertaining to the offices.

1536 *Veiligheidsregio's*, see section 8 of the Act on safety regions (*Wet veiligheidsregio's*). The environment offices of Flevoland and Gooi- en Vechtstreek both cover more than one safety region. See also Kamerstukken II 2013-2014, 33872, nr. 3, p. 18.

1537 Section 5.3(1) and (2) of the GPELA.

allowed,[1538] but are, however, considered exceptions to the rule.[1539] Currently, a total of twenty-nine environment offices are in place.[1540] Generally, it is the municipalities and the provinces that participate in the environment offices. As mentioned previously, they are, in fact, obligated to do so.[1541] Although the regional water authorities have not been primarily involved in the creation of the regional executive offices for environmental enforcement, their involvement is not excluded.[1542] In fact there are two regional water authorities that each participate in an environment office. Moreover, several regional water authorities have concluded cooperation agreements with environment offices for cooperation in the area of, among others, indirect discharges, for which the municipalities also have competences[1543], installations dealing with dangerous substances, and general coordination of the tasks with regard to the environment.[1544] In the absence of cooperation agreements, there exists informal cooperation at operational level (between employees of the environment office and the employees of the regional water authorities) and at strategic management level. This type of cooperation is quite ad hoc and would benefit from formalisation.

10.2.1.3.2 Legal framework of the environment offices

The main format for the environment offices is the joint regulation (*gemeenschappelijke regeling*). The legal framework of the structure of the environment offices is laid down in the Joint Regulations Act (*Wet Gemeenschappelijke Regelingen*).[1545] This Act, originating in 1984, provides several voluntary and compulsory models of regional executive offices for formalizing cooperation between local administrative authorities of similar or different level – provinces, municipalities and regional water authorities – and between the local authorities and central government. The regional executive offices are public bodies, created through administrative agreements (*bestuursovereenkomsten*), to which the administrative authorities instigating the agreements transfer their powers, partly or entirely.[1546] The creation of a public body is the most far-reaching form of cooperation in the Joint Regulations Act, as it has

1538 This is, for example, the case in the safety region of Hollands Midden, where more than one environment agency is in place. See also Kamerstukken II, 2013-2014, 33872, nr. 3, p. 18.

1539 There was a difficulty in achieving consensus between provinces and different municipalities. Due to this, previous to 2016, often the scope of the geographical regions of the provinces was also often followed when creating the environment offices. Kamerstukken II 2008-2009, 29383, nr. 130; see also Michiels 2009, nr. 3, p. 69-76; Kamerstukken II 2011-2012, 31 953, nr. 41. See e.g. Regionale Uitvoeringsdienst Utrecht.

1540 Numbers at www.omgevingsdienst.nl (last visited 1 June 2019).

1541 Section 5.3 GPELA.

1542 Their involvement is even recommended; Kamerstukken II 2011-2012, 22343, nr. 270; Kamerstukken II 2010-2011, 31953, nr. 41.

1543 These are discharges not directly on the surface water or in the soil, but indirectly for example through a sewage system. See for the competences in this respect the Activity Decision (*Activiteitenbesluit*). It is quite common that these competences have been mandated to the environment offices. See e.g. Kamerstukken I 2013-2014, T00998.

1544 See *Visiedocument Waterschappen en regionale omgevingsdiensten*, 25 June 2014, at www.uvw.nl/waterschappen-leggen-visie-op-omgevingsdiensten-vast/ (last visited 1 June 2019).

1545 Section 8(1) and 52(1) of the Wet Gemeenschappelijke Regelingen; see section 5.3 GPELA.

1546 Section 8 Wet Gemeenschappelijke Regelingen; section 5.3(3) of the GPELA.

legal personality and as such is entitled to perform legal acts independently and employ its own employees.

> Besides the model of (compulsory) cooperation mentioned above (public bodies), there are three other models of cooperation, which may be put in place on the basis of the Joint Regulations Act, many of which have previously been used for environmental enforcement. In the first of these models, the authorities cooperating extend all their powers to one of them to exercise; in the second of these models, which the Act leaves room for but does not make explicit, the authorities cooperate in an informal agreement with each other. An example of this model of cooperation in practice is seen in the nation-wide informal consultation structure on environmental enforcement in which all authorities competent for environmental enforcement are represented, including the criminal authorities, to discuss enforcement policies and strategies (*Landelijk Strategisch Overleg*).[1547] The third possibility, the communal body is comparable to the public body, but only reserved for special circumstances.[1548]

10.2.1.3.3 Functions of the environment offices

The environment offices are to fulfil an aim connected to the interests of the provinces, municipalities and regional water authorities and other participants – dependent on which of these authorities are involved in the administrative agreement. The offices will have executive tasks as described by law, specifically the basic package of executive tasks; be transferred other executive tasks and powers via mandate by the participating authorities; and have an independent specific sanctioning power for a limited area of competence. These aspects are further discussed below. Mandate means that each of the participating authorities may allow the environment offices to act in their name of that participating authority.[1549] With a few exceptions most powers of regulation and government can be mandated to the public bodies, including powers for giving off permits and enforcement powers.

> The legislator deems it important from the viewpoint of administrative and political responsibility and accountability that the competent authority (municipalities, provinces and possibly regional water authorities) should remain responsible for the competences and powers on enforcement. Therefore,

1547 Formerly, this was the *Landelijk Overleg Milieuhandhaving (LOM)*. The Commissie Mans 2008 concluded that this consultation structure has not been successful since its inception, at p. 7. It was therefore replaced by the *Landelijk Strategisch Overleg*.

1548 See section 8 WGR.

1549 See for example the following mandate decision and its explanation for the environment office in Utrecht: Besluit van het college van gedeputeerde staten van 18 april 2017, nr. 81AA9346, inhoudende de verlening van mandaat, machtiging en volmachtaan de directeur van de Omgevingsdienst Noordzeekanaalgebied (Besluitmandaat, machtiging en volmacht OD NZKG 2017 provincie Utrecht), Provinciaal Blad, 12 mei 2017, nr. 2091.

only mandate of competences and powers and not delegation thereof is allowed. The legislator considers it, in fact, undesirable to allow delegation of powers to an environment office.[1550]

10.2.1.3.4 The basis package of executive tasks

The participating authorities have transferred at least a basic package of executive tasks to the environment offices. This package includes executive powers for the enforcement of environmental management law, particularly with regard to installations, including powers of inspection.[1551] The participating authorities retain their final decision-making powers. This basic package of executive tasks (*basistakenpakket*) was agreed upon on 1 June 2011 as a package deal.[1552] This package was laid down in law in 2016 and 2017 with amendments to the GPELA and the Decision Environmental Law (*Besluit Omgevingsrecht*).[1553] The basic package lists the executive tasks the environment offices must carry out in the area of the preparation of certain permits or rules, inspection on the compliance with certain permits or rules, and the preparation of enforcement decisions related to certain permits or rules.[1554]

There were several considerations to making these executive tasks part of a basic package. It was considered necessary for the adequacy of their exercise that these specific competences were part of the minimum tasks of the environment offices. It was considered that it would benefit the regional approach to inspection and enforcement in cooperation with all concerned parties.[1555] The executive tasks concern complex aspects of the environment for which specific knowledge and expertise are necessary; certain activities that do not take place in an installation but are not geographically bound; certain activities with supra-local effects, such as the discharge of hazardous emissions; or activities that are part of a chain of different competent authorities, or for which a uniform approach by all authorities is important for a level playing field in the Netherlands.[1556]

As part of the basic package of executive tasks, sanctioning powers are to be accorded to the environment offices in the areas of environmental hygiene, in particular IPPC-installations and installations with dangerous substances, waste and dangerous

1550 See Kamerstukken II 2013-2014, 33872, nr. 3, p. 20; also Commissie Mans 2008, p. 52-53.
1551 See the General Provisions Environmental Law Act and section 7.1 Besluit omgevingsrecht.
1552 Available at www.omgevingsdienst.nl as version 2.3 (last visited 1 June 2019); see also Kamerstukken II 2013-2014, 33872, nr. 3, p. 17. Previously, in 2009 there also was a basic package established. Due to changes in legislation and competence of the authorities a new version of the package was established.
1553 For a transposition table for the items in the package deal of 2011 to the content in the *Besluit Omgevingsrecht* see Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, p. 49-51.
1554 See section 7.1(a) to (d) of the *Besluit omgevingsrecht*.
1555 Kamerstukken II 2013-2014, 33872, nr. 3, p. 17.
1556 Kamerstukken II 2013-2014, 33872, nr. 3, p. 17.

waste and spatial planning.[1557] Of the twenty-nine environment offices in place, there are six environment offices specialised in issues concerning hazardous matter, specifically installations dealing with hazardous matter (*BRZO*) and IPPC15 category 4 installations. These specialised offices are called the *BRZO-omgevingsdiensten*.[1558]
It is not part of the basic package of the environment office to take a formal decision for administrative enforcement. This power belongs to the competent authority, i.e. the competent municipality or province. The power to take a formal decision can be exercised by the environment office through mandate of that power to the director of the office.[1559] This means that the director can take a formal decision in name of the competent authority. The competent authorities remain responsible for the quality of the tasks carried out by the environment offices. This means that when mandate is given, the mandate giver (the authority that has the initial power to take a formal decision) remains responsible for the decisions taken by the environment office in its name.[1560] Mandate of power is the option the legislator prefers for environment offices.[1561] The mandate will benefit the purpose of more tough and independent action, particularly against those companies that are important in terms of public safety.[1562] When there is no mandate, which is not very likely any longer given the preference of the legislator in 2016, the environment offices are deemed to prepare the decisions of the competent authority. That authority will then formally take the decision. When it deviates from the prepared decision by the environment office, it must report this to the democratic body within the competent authority, specifically the municipal council (*gemeenteraad*) or the provincial *provinciale staten*. Generally, the authorities do not deviate.

10.2.1.3.5 Other mandates

The choice of mandates – other than those for the basic package – is for each of the authorities involved in the environment offices. The basic package of tasks can be expanded for each environment office upon agreement of all the authorities involved. In fact, there has been a great diversity between the remit and scope of

1557 See section 7.1(c) and (d) of the *Besluit omgevingsrecht*.
1558 These companies fall within the scope of the SEVESO-Directive, as well as of the IPPC-Directive (category 4, chemical industrial companies), see Kamerstukken II 2013-2014, 33 872, nr. 3, p. 6. These have received a statutory basis in section 5.3(4) of the GPELA and section 7.1(3) and Annex V of the Decision Environmental Law. The environment offices thus assigned these tasks are the *Omgevingsdienst Groningen*; *Omgevingsdienst Regio Nijmegen*; *Omgevingsdienst Noordzeekanaalgebied*; *DCMR Milieudienst Rijnmond*; *Omgevingsdienst Midden- en West Brabant*; *RUD Zuid Limburg*. These competences are assigned to the environment offices by the provinces, per the *Besluit Omgevingsrecht*.
1559 Section 10:1 General Administrative Law Act; see also Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, p. 49. In any case, the power to take a decision in mandate may not be executed when it concerns an appeal decision (see section 10.3(3) of the General Administrative Law Act).
1560 Specifically this responsibility lies with the Gedeputeerde Staten of the provinces, and Mayor and Aldermen of the municipalities.
1561 See Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, p. 12.
1562 See Kamerstukken II, 2015-2016, 33118, nr. 32, annex 777966, p. 49.

the environment offices in place.[1563] Some offices are only concerned with the area of environmental hygiene (emissions and immissions and the like); other offices deal with a broader range of environmental protection, and there is no uniform set of authorities that participate in the offices.[1564]

The basic package seems to not have changed the lack of uniformity as of yet. However, the codification of that deal in legislation, supported by the quality norms that are introduced in that legislation should be able to abolish negative points with regard to uniformity.[1565]

10.2.1.3.6 Independent power to impose an administrative criminal decision

Besides these mandates, the environment offices – specifically the directors of these offices – can impose an administrative criminal decision on an offender in the area of environmental offences on waste, dangerous waste, transportation of waste, effluents and such.[1566] The province is the competent authority for these environmental offences. However, this is a direct competence for the directors of the environment offices, without mandate or the need for mandate.[1567]
The reason for giving the directors of the environment offices such a direct competence was to limit the number of authorities competent for the administrative criminal decision to keep things practical and transparent for the Public Prosecutor. As will be explained in the next chapter, where the administrative criminal decision is further discussed, the Public Prosecutor is in charge of prosecution when the offender appeals against the decision.[1568]

This independent power of the directors of the environment offices has been criticised for a lack of democratic legitimacy.[1569] Indeed, while there are elections for all the participating administrative authorities to an environment office – the regional water authorities, the municipalities and, through a tiered system, the provinces – the director of an environment office is appointed.[1570]

1563 Kamerstukken II 2016-2017 33118, nr. 96, p. 3.
1564 Goeting 2015; Michiels, Blomberg & Jurgens 2016, p. 280.
1565 See Sturm et al 2015; Michiels, Blomberg & Jurgens 2016, p. 381.
1566 Section 4.2a Besluit OM-afdoening; section 257ba of the Act on Criminal Procedure. The policy concerning the use of this power is laid down in the circular *Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten*, Staatscourant, 27 April 2012, nr. 8342. The power to impose a criminal decision will be further discussed in the next chapter.
1567 The provinces cannot impose an administrative criminal decision, where an environment office exists. As environment offices exist throughout the Netherlands, the provinces, effectively, do not have a competence to impose an administrative criminal decision. See *Richtlijn Bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (artikel 257ba Sv)*, section 2.1b, footnote 2.
1568 See Blomberg 2017, p. 84.
1569 See Blomberg 2015, p. 47 and 52; Blomberg 2017, p. 84.
1570 The regional water authorities also have this competence for the enforcement of specific criminal offences.

10.2.1.3.7 Structure of the environment offices

The public bodies thus created as environment offices have a daily board and a general board. The general board is the head of the public body; a Chairman presides over both. Both boards consist of representatives of the participating administrative authorities.[1571] The environment offices are funded by the participating authorities, which also provide input on the offices' policies. In fact, the administrative authorities participating in an environment office are, as part of the general board of that office, together responsible for a uniform policy for executing powers and enforcement, also with respect to the supraregional enforcement policy.[1572] This policy is to be laid down in documents that specify the goals the environment office is to achieve. It is to be coordinated with other administrative authorities and with the criminal authorities. In particular, the enforcement policy needs to be established bij the administrative authorities in accordance with the Public Prosecutor's office.[1573]

The environment offices do not have a standard organisation format in terms of the set-up of the departments. Permitting and enforcement may be assigned to the same department, or to separate departments. The quality criteria set several standards – to be adhered to by the municipalities and provinces that have created the environment office – for how permitting and enforcement are carried out by specific employees of the environment offices, specifically in terms of the independence of the employees from the regulated parties.

10.2.2 Central government authorities in charge of administrative environmental enforcement

10.2.2.1 Minister

The *Minister* of the central government department in charge of the environmental area concerned is generally competent where the non-compliance surpasses provincial boundaries geographically or in terms of environmental consequences. The ministerial departments involved in the environmental arena have in recent years changed quite often, in name and responsibility. Currently, these are the Ministry of Economic Affairs and Climate Policy; the Ministry of Agriculture, Nature and Food Quality; the Ministry of General Affairs; and the Ministry of Infrastructure and Water Management.[1574] In the Netherlands, the powers are conferred on the responsible *Minister* for that area as well as simultaneously to the *Minister* of General

1571 See sections 8 to 27 of the Wet Gemeenschappelijke Regelingen.
1572 Section 7.2(3) of the *Besluit omgevingsrecht*.
1573 Section 7.2(2) of the *Besluit omgevingsrecht*.
1574 The names of the departments and their responsibilities change quite often, in particular after governmental elections. See also www.government.nl/ministries (last visited 1 June 2019). For criminal enforcement, the Ministry of Justice and Security is relevant. This Ministry is not further discussed in this section.

Affairs. The powers of the *Minister* are often mandated to the Inspector-General of the Environment and Transport Inspectorate.

10.2.2.2 Environment and Transport Inspectorate

The Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport*, 'ILT' in short) is a specialised agency at central government level that may carry out the regulatory and enforcement tasks of central government in the area of the environment, among others. The Inspectorate is competent for the enforcement of the statutes in which and to the extent that the Ministers of the Ministry of Infrastructure and Water Management and the Ministry of General Affairs have been appointed the primary competent authority. It is competent in the areas of building, spatial planning and pollution control, including the protection of drinking water, the regulation of genetically modified organisms and the nation-wide transport of dangerous substances (and certain types of IPPC-installations), but also in the area of water pollution.

For environmental cases, the Inspectorate was first created as the 'VROM-Inspectorate' on January 1, 2002 to provide more 'vigour' (*daadkracht*) to environmental enforcement, i.e. to strengthen enforcement, by amalgamating four previously existing central government inspectorates into one.[1575] Therefore, even though the Inspectorate has been renewed several times, it can rely on the years of experience accumulated in each of the former inspectorates. The Inspectorate has powers to inspect and investigate compliance; powers to sanction non-compliance; and powers to supervise lower authorities in the implementation of the rules set out by its Ministry. These powers are conferred on the Inspectorate in environmental statutes and material legislation, as well as through mandate from the responsible *Minister* to the Inspector-General as the head of the Inspectorate. The focus of the enforcement powers is on instances of non-compliance with a broader scope than the provinces, geographically or in terms of the concerns at stake. Although the Inspectorate is an administrative agency, it has the power to conduct a criminal investigation into environmental offences through its Information and Investigations service (*Inlichtingen- en Opsporingsdienst*). These investigations are conducted under the authority of the Public Prosecutor's Office.

10.2.2.3 Specialised national agencies

There are several agencies at the level of central government that deal with very specialised aspects of environmental law. The Dutch Emissions authority (*Nederlandse Emmissieautoriteit*) is an agency of central government that is the competent authority and supervising body for emissions trading in the Netherlands. It is also the competent body and supervising body for the legal rules on renewable

1575 The Inspectorate on Spatial Planning; the Inspectorate on Public Housing; the Inspectorate on Environmental Health and the Criminal investigation department.

energy.[1576] The authority was created on 1 January 2005 as a result of the European Emissions Trading Directive.[1577] The Ministry of Infrastructure and Water Management, in conjunction with the Ministry of Economic Affairs and Climate Policy, is responsible for developing the relevant policy, which is implemented and executed by the authority. It has the status of a departmental agency. On 1 January 2012, the executive board of the authority became a non-departmental public body. This means that the executive board performs government duties and that it takes decisions independently from politics. The executive board takes decisions, such as those pertaining to enforcement.[1578]

10.3 The enforcement competence of the administrative authorities

10.3.1 General structure of enforcement competence attribution

The enforcement competence of the administrative authorities is quite complex and, therefore, requires separate attention in this section. For the full picture of the organisation of the enforcement competence of the administrative authorities, several Statutes need to be consulted. As explained in the previous chapter, the General Administrative Law Act sets out general provisions on the powers for inspection and several administrative enforcement sanctions. According to this Act, the competence to apply these powers and to impose these sanctions only exists as far as it has been granted by or according to the law. The competence requires a legal basis.[1579]

The legal basis for the administrative enforcement competence is granted in the General Provisions Environmental Law Act (GPELA) and the other environmental statutes. Additionally the organic statutes of the administrative authorities, including the regional water authorities, determine the competence and part of the sanctioning powers.[1580] The environmental statutes – and legal rules based on them – determine which administrative authority is competent. What this authority may do when it is competent is determined in the organic acts of the decentralised authorities[1581] – on sanctions – and, in addition to the organic acts, in the environmental statutes on both the topic of appointing supervision inspectors and sanctions.

The competence for the administrative enforcement of environmental law is conferred

1576 From 2011; according to www.emissionsauthority.nl (last visited 1 June 2019).

1577 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.

1578 According to www.emissionsauthority.nl (last visited 1 June 2019).

1579 Section 5:4 General Administrative Law Act.

1580 The Environment Management Act, the Act on Nature Protection, the Housing Act, the Water Act, and the Act on spatial planning.

1581 Section 121 Province Act, section 125 Municipal Act and section 61 Regional Water Authority Act (*Waterschapswet*) determine that the provinces, municipalities and regional water authorities, respectively, have the power to impose the sanction of the administrative coercion.

upon several administrative authorities in the General Provisions Environmental Law Act (and in several sectoral environmental statutes) in the form of a duty of care (*zorgplicht*) accorded to the 'competent authority' (*bevoegd gezag*).[1582] This duty of care is established for the environmental permit, the general rules on environment, in case of waste, and with regard to nature protection.[1583]

> For example, section 5.2 sub 1 of the General Provisions Environmental Law Act reads:
> The competent authority has the task: (a) to ensure the administrative enforcement of the rules that are applicable on the basis of the relevant laws to those who carry out the project in question.

In the Netherlands, the power to enforce environmental legislation is generally connected to the power to issue licences or other regulatory instruments, such as general rules. According to the General Provisions Environmental Law Act (*Wet Algemene Bepalingen Omgevingsrecht*), the 'competent authority' is the administrative authority that is competent to take a decision with regard to an environmental permit.[1584] Therefore, the administrative authorities are generally appointed for enforcement in parallel to their competence to regulate the environment through the issuing of licences or other regulatory instruments, such as general rules.[1585] Most sectoral environmental statutes declare the provision on the duty of care and the appointment of administrative authorities in the GPELA, section 5.2, in whole or in part applicable, or contain their own duty of care provision.[1586] The competent authority may be the executive of the municipality (Mayor and Aldermen),[1587] province (*Gedeputeerde Staten*), central government (*Minister* or central government agencies), or regional water authority (*waterschapsbestuur*).[1588]

> Also the name of the authority these decision-making authorities or 'competent authorities' belong to will be used hereafter, but it must be remembered that the actor that is competent to take the enforcement decision is in fact not the municipality, but generally Mayor and Aldermen representing the municipality (and only the Mayor in case for example of public order). This is

1582 Section 5.2 sub 1 General Provisions Environmental Law Act, section 8.1 of the Water Act and section 18.2 and 18.2a of the Environment Management Act. The provisions on the duty of care for enforcement are also held applicable in most other environmental statutes.

1583 Section 5.2 General Provisions Environmental Law Act; 18.2 Environment Management Act; 18.8 Environment Management Act; 8.7 Housing Act.

1584 Section 1.1(1) General Provisions Environmental Law Act.

1585 Section 5.2 in connection with 2.4 of the General Provisions Environmental Law Act.

1586 Section 7.1(1)-(2) Spatial Planning Act; 8.6 Water Act, only to chapter 5 and 6 and section 10.1 Water Act.

1587 And the Mayor by himself in case, for example, of public order.

1588 Section 1.1(1) General Provisions Environmental Law Act; section 2.4 General Provisions Environmental Law Act; chapter 3 of the Decision environmental law (*Besluit omgevingsrecht*); section 8.1 and 1.1 of the Water Act in conjunction with section 61 of the Regional Water Authority Act.

similar for the regional water authorities (the daily board commonly takes the enforcement decisions), the provinces (the provincial executive generally takes the enforcement decision) and so on.

The enforcement powers generally lie with the municipalities, and, more exceptionally, with the regional water authorities, provinces and central government bodies or agencies. Which of these authorities is competent, and which level of the administration is competent are not determined by hierarchy, but through the subsidiarity principle. This principle means that the competence should be in the hands of the most able public authority. Generally, this is the most local public authority that would be expedient and effective to the topic. This is laid down in section 115(2) of the Province Act (*Provinciewet*) and section 117(2) of the Municipality Act (*Gemeentewet*).[1589] Connected to this is the norm that applies to – among others – the administration for the protection of the environment in the Netherlands: to decentralise competence where this is possible, and to only centralise competence where this is necessary (*decentraal wat kan, centraal wat moet*).[1590] In the practice of environmental enforcement, this means that the primacy lies with the municipalities. From the enforcement point of view, it is considered that municipalities are the primary governmental authority for these issues as the distance between its residents and the government is smallest.[1591] In the GPELA it is laid down that the primacy lies with the municipalities as 'competent authority'.[1592] The enforcement chapter in the GPELA has a scope that is not limited to the environmental permit for which the Act provides a specific regulation. In its section 5.1, the enforcement chapter of the Act is held applicable also to several sectoral environmental acts and the regulatory instruments contained therein, as far as these acts determine this. Among these acts are the Nature Protection Act[1593]; the Environmental Management Act; the Act on Spatial Planning, the Water Act, the Housing Act and the Acts on Soil Protection, Noise Nuisance and Air Pollution. In these acts the competence rules of the GPELA are for the most part adopted. Still, the 'competent authority' may be filled in differently in these acts. Exceptions to the competence of the enforcement organisation and its powers may be and are laid down in the specific environmental statutes.[1594] For example, the competence for water protection is laid down with the

1589 For example, section 117 Municipality Act describes, according to the header, the relationship of the municipalities with central government and the provinces. Section 115 in the Province Act is comparable.

1590 See Kamerstukken I 2007-2008 30844 nr. D, p. 5 and further.

1591 See Commissie Mans 2008, p. 52.

1592 See section 2.4 and section 5.2 of the General Provisions Environmental Law Act (Wet Algemene Bepalingen Omgevingsrecht). This establishment of competences is further elaborated on in the Decision Environmental Law (*Besluit omgevingsrecht*). As a result of this decision that was aimed at simplifying competences, the competent authority of, in particular, many installations was moved from the provinces to the municipalities. See also Kamerstukken II, 2013-2014, 33872, nr. 3, p. 4; Goeting 2015.

1593 This Act has taken the place of the Flora- and Fauna Act and the Nature Protection Act 1998 from 1 January 2017.

1594 See section 5.1 General Provisions Environmental Law Act.

regional water authorities for most regional water works; and central government for larger bodies of water. Both will carry out many of the powers of enforcement in the realm of water protection (on the basis of section 1.1, chapter 6, 3.1 and 3.2 of the Water Act). For nature and habitats protection, the competence for enforcement primarily lies with the provinces, and, more exceptionally, central government.

Moreover, the General Provisions Environmental Law Act provides as a rule – that extends to enforcement – that there is to be one single competent authority that pursues the regulation, including the enforcement, of all environmental aspects of the non-compliance with a regulatory instrument.[1595] As we have seen, in principle, this authority is the executive of the Municipality – Mayor and Aldermen (*Burgemeester en Wethouders*). However, there are exceptions to this, which primarily occur when the environmental consequences or concerns extend[1596] beyond municipal borders to the provinces or central governmental level, as provided by specific legislation, or when these consequences are very specific to warrant functional competences. In cases of provincial or national interest only the provinces and the *Minister*, respectively, will have competence.[1597] This is for example the case where it concerns installations dealing with dangerous substances (*BRZO-inrichtingen*). Then, the provinces or the *Minister* for the concerned central government department become the single competent authority.[1598] The functional competence lies with the regional water authorities.

In principle, once an authority is competent it generally remains competent, unless the project expands to such an extent that a higher authority – the Provinces, or the Minister – becomes competent.[1599] The transfer of the competence to that higher authority is, however, blocked where the originally competent authority has already imposed an enforcement decision for as long as that authority needs to effectuate the sanction imposed.[1600]

> It has already been explained that, in terms of competences, we have seen that the environment offices that were just discussed execute powers of the municipalities

1595 Kamerstukken II 2006-2007 30844, nr. 3, p. 24.
1596 Also in the non-geographical sense.
1597 It is laid down in the Decision Environmental Law (*Besluit Omgevingsrecht*) – chapter 3 – when such cases arise; see also Boeve & Groothuijse 2019, p. 160-162.
1598 Section 2.4 General Provisions Environmental Law Act. With regard to water management, the rule on whether central government or the regional water authorities will be the competent body is laid down in section 6.17 of the Water Act.
1599 Section 2.4(5) General Provisions Environmental Law Act; see also Annex I to the *Besluit Omgevingsrecht*.
1600 Section 5.2(2) General Provisions Environmental Law Act; Kamerstukken II 2006-2007, 30884, nr. 3, p. 132. This section is also declared applicable in several sectoral environmental statutes to their own competence provisions, see section 92(2) Housing Act; section 18.2(2) Environment Management Act; section 8.6 Water Act.

and provinces and even regional water authorities that are accorded to them. These offices, or their daily board, cannot be deemed 'competent authority' for the administrative enforcement as such, but play a very significant role in administrative enforcement nonetheless. Below, it will be set out what the remit is of the administrative authorities for the specific aspects of the administrative enforcement of environmental law.

As we have seen above, several rules – laid down in the General Provisions Environmental Law Act – determine the competence of the administrative authorities for enforcement: the connection of the power to enforce with regulatory competences and the primacy of the municipality. These rules have a broad scope due to the fact that the enforcement chapter of this Act is deemed applicable for the enforcement of many of the sectoral environmental statutes. Through these competence rules, the General Provisions Environmental Law Act has attempted to increase the transparency and decrease the fragmentation of the authorities competent for enforcement. The Environment Act that may enter into force in 2021 will further pursue this for the entire environmental law, including, for example, the Nature Protection Act.

The primary competence of each of the administrative authorities, as described here, is detailed in the table below.

The administrative authorities and their primary competence[1601]

• Municipality	- all environmental protection (with exceptions below)
• Provinces	- nature and habitats protection
• Regional water authorities	- water protection (regional water works)
• Central government	- water protection (larger bodies of water) - emissions protection.

Hereafter, the specific competence of each of the administrative authorities for the appointment of officers for inspection and the imposition of sanctions for environmental non-compliance is detailed.

10.3.2 The inspection competence of the administrative authorities

Inspection officers are appointed on the basis of the environmental statutes and lower regulation (section 5:11 General Administrative Law Act).[1602] The General

1601 Primary competence does not exclude competence in other areas, see further below (including the table of sanctioning competences).

1602 Inspection includes monitoring, which is also called supervision.

Provisions Environmental Law Act (*Wet algemene bepalingen omgevingsrecht*) provides the rule on environmental protection, with deviations from this rule in certain specific environmental statutes.[1603] According to the GPELA, inspection officers are appointed by the *Minister* of General Affairs, the provincial executive (*Gedeputeerde Staten*), Mayor and Aldermen (*Burgemeester en Wethouders*) of the municipality, or other administrative authorities that are entrusted with the execution of the statute concerned.[1604] The *Minister* can decide that only the inspectors appointed by him will be competent for enforcement of certain cases or categories of situations with regard to environmental law.[1605]

Interestingly, inspection officers may also be appointed for another type of enforcement. It is determined in the GPELA that officers that have been appointed for the investigation of economic criminal offences[1606] are also competent for inspection (section 5.12). Several of the specific sectoral environmental acts determine that the officers appointed by the Minister of the Justice Department for the investigation of economic criminal offences on the basis of those environmental acts may also be appointed as officers for the inspection of non-compliance with those acts.[1607] Therefore, there are officers, also called special investigative officers (*buitengewone opsporingsambtenaren*), that in fact have a role in two types of environmental enforcement: the inspection as part of administrative enforcement, and the investigation as part of criminal enforcement.[1608] Due to this, these officers serve as a linking pin between the administrative authorities and the Public Prosecutor and the police.[1609] The Functional Office of the Public Prosecutor supervises the investigation by the special investigative officers.

The officers thus appointed may be in charge of the inspection of all or some of the environmental statutes named in section 5.1 of the GPELA. These are, among others, the GPELA itself; the Act on Nature protection[1610]; the Act on Noise Nuisance; the Act on air pollution; the Environment Management Act; the Act on spatial planning; the Water Act and the Housing Act.[1611] Importantly, if the appointed inspection officers work for an environment office, their competence is generally limited to the statutes that fall within that office's remit.[1612]

1603 The General Administrative Law Act also provides the rule with regard to the competences of the inspection officers, with deviations in certain specific environmental statutes.
1604 Section 5.10(1) and (3) of the GPELA.
1605 Section 5.10(4) GPELA.
1606 By the Minister of the Justice Department on the basis of section 142 of the Act on Criminal Procedure.
1607 See section 7.1(1)(b) of the Act on Nature Protection (*Wet Natuurbescherming*).
1608 Special investigative officers fall under the policy rules *Beleidsregels buitengewoon opsporingsambtenaar,* Staatscourant 18 June 2015, nr. 16504, see in particular its chapter 7 for rules in the realm of environmental protection.
1609 See Beleidsregels buitengewoon opsporingsambtenaar (Staatscourant 18 June 2015, nr. 16504), p. 13.
1610 Section 7.1 of the Act on Nature Protection (*Wet Natuurbescherming*).
1611 See section 9.4 of the previous chapter.
1612 As explained previously, there is much diversity in the remit of the environment offices in the Netherlands.

Some of these aforementioned Acts, however, provide a deviation from the general rule with regard to the competence to appoint inspection officers. With section 5.10 GPELA as the general regulation of the appointment of inspection officers for environmental protection, deviations can be found, among others, in the Act on Nature protection (*Wet Natuurbescherming*), the Environment Management Act (*Wet Milieubeheer*) and the Water Act (*Waterwet*). For the Act on Nature Protection, the deviation concerns the competence of the *Minister* of the Department of Agriculture, Nature and Food Quality, and the provincial executive.[1613] The Act also determines explicitly that the officers that have been appointed for the investigation of economic criminal offences by the *Minister* of the Justice Department are also competent for the inspection of the Act on Nature Protection.[1614]

While most of the Environment Management Act falls within the general regulation of the GPELA, specifically for the enforcement of emissions trading rules there are several deviating provisions in the former, also with regard to the supervision of non-compliance. Section 18.4 of the Environment Management Act determines that for the inspection of emissions trading the *Minister* will appoint officers by decision. The Water Act also provides a deviation from the general rule, with the *Minister* competent to appoint supervision officers, as well as the executive of the regional water authorities.[1615]
It is possible that an officer or officers of more than one administrative authority is or are competent for supervision of environmental legislation. This was a conscious choice by the legislator. The legislator considered that it may be necessary in certain circumstances to have concurrence of competences, for example when it is yet unclear which authority is generally competent to take care of enforcement or when provinces prefer to work together with the municipalities for certain required expertise, such as building supervision.[1616] In practice, concurrence does not often lead to impassiveness of the authorities, as the supervision officers are commonly aware of the possibility of concurrence and engage with each other to divide responsibilities.
In general, the inspection officers are part of the competent authority, either of the regional water authorities, municipalities, provinces, environment offices or a central government agency, such as the Dutch Emissions Authority or the Inspectorate for Environment and Transport. They are appointed as a category (by naming the service or department to which the officers belong), by function (by naming the title of the function) or personally by name.[1617]

1613 Section 7.1 *Wet Natuurbescherming*.
1614 Section 7.1(1)(b) *Wet Natuurbescherming*.
1615 Section 8.3(1) and (4) Water Act. The latter is 'the administrative authority that has been appointed to execute the Water Act' in section 8.3(4) Water Act; see section 3.2 of the Water Act in connection with section 2(2) of the Regional Authority Act.
1616 Kamerstukken II 2006-2007, 30844, nr. 3, p. 54-56; Boeve & Groothuijse 2019, p. 394.
1617 Such as the appointment by the daily board of the regional water authority of several employees of the department of enforcement, including the department manager for supervision, see for example in *Bekendmaking aanwijzing toezichthouders Waterschap Drents Overijsselse Delta*.

The competence of the inspectors that work at an environmental office is 'geographically' limited to the region or circle for which the environment office has been created. However, it is possible for the *Minister* to increase the scope of the competence of the supervision officers for categories of activities that occur outside of the reach of the specific environment office (section 5.11 GPELA). This has not yet occurred.

Within these administrative authorities, the inspection officers will generally be part of the enforcement department, or the department aimed at the protection of the environment (and planning).
As mentioned before, the quality criteria developed for enforcement and the exercise of other competences, such as permitting competence, set certain requirements to the organisational structure of the administrative authorities or at least to the use of officers. This is further discussed in section 10.3.4 of this chapter.

10.3.3 Administrative sanctioning competence

The competence of the administrative authorities to impose sanctions to carry out their duty of care for enforcement is conferred in the organic acts of the decentralised authorities.[1618] In the organic acts only the competence to impose the sanction of the order subject to administrative coercion (*last onder bestuursdwang*) is mentioned. However, this competence also includes the sanction of the order subject to a coercive fine (*last onder dwangsom*; per section 5:32(1) General Administrative Law Act). In addition to this, a competence to impose other sanctions, such as, most commonly, the revocation of a permit (*intrekking van een vergunning*) is conferred upon specific administrative authorities in the environmental statutes, i.e. the General Provisions Environmental Law Act and the other sectoral environmental acts.[1619] More limited is the scope of application of the competence to impose the administrative fine (*bestuurlijke boete*) and the administrative criminal decision (*bestuurlijke strafbeschikking*), which are also conferred upon specific administrative authorities in this manner.

The most commonly competent municipality – as per the general rule of the GPELA -, more specifically, Mayor and Aldermen of the municipality are exclusively competent to impose sanctions for non-compliance with the environmental permit, and for nature and flora and fauna protection, where activities require permission that is connected to the environmental permit.[1620] The municipality is also competent for

1618 The Province Act, the Municipal Act and the Regional Water Authority Act. The organic acts fulfil the requirement laid down in section 5:4(1) General Administrative Law Act, that the competence to sanction requires a legal basis.
1619 See section 5.19 GPELA; article 5.1 GPELA; article 8.4 Water Act; and 16.20c EMA.
1620 Section 5.2 and 2.4 General Provision Environmental Law Act.

issues concerning spatial planning and building.[1621] The municipality is furthermore competent to sanction non-compliance with regard to certain installations that fall outside the IPPC-Directive, waste – including dangerous waste -, effluent (industrial water).[1622]

The provincial executive (*Gedeputeerde Staten*) is competent for the environmental permit with regard to areas in which the provincial interest is at stake.[1623] Where activities of an installation exceed the boundaries of municipalities, an environmental permit is given and enforced by the provincial executive. This is, for example, the case with respect to Part I IPPC-installations – the chemical industry – and also with regard to installations to which the legal rules on dangerous substances apply.[1624] Also the provincial executive is competent for certain cases with regard to dangerous waste. Moreover, the provincial executive is the primarily competent authority in the area of nature protection, including the European obligations in the Habitats Directive and the endangered flora and fauna (CITES) and with regard to areas of natural heritage.[1625] It also has (enforcement) competence in the area of water with regard to the extraction of large amounts of ground water and drinking water.[1626]

The executive of the regional water authorities, the daily board, has the competence to sanction non-compliance with the water permit and with other provisions in water regulations.[1627] They also have sanctioning powers in the area of waste and dangerous waste.[1628] Moreover, the regional water authorities are competent to impose an administrative criminal sanction for environmental offences, where it concerns offences of the byelaws by the regional water authorities and waste offences concerning water.[1629]

The *Minister* of the Department of General Affairs is competent for the environmental permit with regard to areas in which a general interest is at stake.[1630] With regard to installations, this is for example the case where it concerns areas for military purposes.[1631] Moreover, the Minister has sanctioning powers in the areas

1621 Section 7.1(1) Act Spatial Planning (explicit appointment of Mayor and Aldermen) and section 92 in connection with section 1(1) Housing Act in connection with section 1.1(1) of the GPELA (in principle Mayor and Aldermen, however parallel to the competence for the environmental permit).

1622 Section 2.4 and 5.2 General Provisions Environmental Law Act; 18.2a and 18.2d Environment Management Act; 6.4 Water Act; 7.1(1) Spatial Planning Act; 92(1) Housing Act.

1623 3.1(b) Besluit omgevingsrecht.

1624 For the latter, compare the Seveso Directive. In Dutch such installations are indicated as BRZO-installations. Section 3.3 Besluit omgevingsrecht (including IPPC Part I, category 4 installations).

1625 Section 7.2 (1) Act on Nature Protection. The competence for nature protection and area/habitats protection is strictly for the provinces from 1 January 2017, through the new Nature Protection Act. This limits fragmentation that may be caused by the decentralisation of competences and powers.

1626 See e.g. section 18.2a and 18.2c Environment Management Act; section 8.1(2) in connection with 6.4 Water Act.

1627 Section 8.1 Water Act

1628 Section 18.2a Environment Management Act.

1629 See section 3.1 Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv).

1630 Section 3.2(b) *Besluit Omgevingsrecht*.

1631 Section 3.3(2), (3) and (4) *Besluit omgevingsrecht*.

of Part 1 IPPC-installations (C)[1632], dangerous waste and the keeping of dangerous substances[1633], the water permit and spatial planning when there is a national interest at stake.[1634] The *Minister* of the Department of Agriculture, Nature and Food Quality has competence in the area of nature protection with regard to endangered flora and fauna (CITES).[1635] Also, with regard to CITES, customs has competence to impose an administrative criminal decision.[1636]
The Environment and Transport Inspectorate, as agency of the Ministry of Infrastructure and Water Management, has sanctioning powers when the *Minister* has mandated these to them in the areas in which he is competent.

In the table below the specific competence to impose administrative sanctions for the protection of the environment of the authorities, described above, is detailed.

1632 Section 3.3(2) *Besluit Omgevingsrecht*.
1633 Section 3.3(2) and 2.2(a) *Besluit Omgevingsrecht* and section 10.48 Environment Management Act.
1634 Section 18.1a(4), 18.2a, 18.2b and 18.2i Environment Management Act; Section 8.4(1), 6.2 and 6.5 Water Act; section 3.2(a) *Besluit Omgevingsrecht* and section 3.28 Act on Spatial Planning.
1635 Section 7.2(2) Act on Nature Protection (*Wet natuurbescherming)*.
1636 Section 2.1(g) Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv).

Specific competences of the authorities to impose administrative sanctions		
Authority	**Area of environmental protection**	**Administrative sanctions[1637]**
Municipality	- environmental permit[1638] - spatial planning and building[1639] - installations outside the IPPC-directive - (dangerous) waste[1640] - effluent (industrial water into public sewers)[1641]	- administrative order subject to administrative coercion[1642] - administrative order subject to a coercive fine - revocation of an advantageous decision[1643]
Municipality	- building aspect of environmental permit	- administrative order subject to administrative coercion[1644] - administrative order subject to a coercive fine - revocation of an advantageous decision[1645] - administrative fine[1646]
Provinces	- environmental permit with provincial interest (Part I IPPC and BRZO) - (dangerous) waste[1647] - nature protection - ground water and drinking water[1648]	- administrative order subject to administrative coercion[1649] - administrative order subject to a coercive fine - revocation of an advantageous decision[1650]
Regional water authorities	- water permit (regional water works) - water regulations - water-related (dangerous) waste	- administrative order subject to administrative coercion[1651] - administrative order subject to a coercive fine - revocation of an advantageous decision[1652]

1637 The sanctions listed apply to all areas of environmental protection listed in the adjacent cell.
1638 Section 5.2 GPELA.
1639 Section 7.1 Act on Spatial Planning (*Wet Ruimtelijke Ordening*).
1640 Section 18.2d Environment Management Act (duty of care).
1641 Section 5.1 GPELA.
1642 Section 5.1 GPELA in conjunction with the specific statutes on the topic; for transport of waste: section 18.2(4) EMA.
1643 Section 5.19 GPELA.
1644 Section 5.1 and 5.2 GPELA in conjunction with the Housing Act (*Woningwet*).
1645 Section 5.19 GPELA in conjunction with the Housing Act (*Woningwet*).
1646 Section 92a Housing Act (*Woningwet*).
1647 Duty of care in section 18.2c Environment Management Act.
1648 Section 8.1(2) and 6.4 of the Water Act deals the duty of care to the provinces.
1649 For the environmental permit, section 5.1 GPELA in conjunction with the Decision Environmental Law, for nature protection, section 7.2(1) Act on Nature Protection; for water protection, section 8.1(2) and 6.4 of the Water Act in conjunction with section 60 of the Regional Water Authority Act; for waste, section 18.2c EMA (duty of care).
1650 Section 5.1 GPELA; for ground water and drinking water: section 8.4 Water Act.
1651 Section 8.1 Water Act in conjunction with section 1.1(1) and section 3.2 of the Water Act and section 2.2 of the Regional Water Authority Act.
1652 Section 8.4 Water Act.

Regional water authorities	- environmental offences (byelaws of regional water authorities and waste offences concerning water)	- administrative criminal decision[1653]
Minister (Dept. of General Affairs and Dept. of Infrastructure and Water Mgmt.)	- environmental permit with general interest, Part I IPPC and BRZO - (dangerous) waste[1654] - spatial planning with national interest[1655] - water permit (large bodies of water)	- administrative order subject to administrative coercion[1656] - administrative order subject to a coercive fine - revocation of an advantageous decision[1657]
Minister (Dept of Agriculture, Nature and Food Quality)	- nature protection	- administrative order subject to administrative coercion: order to return[1658] - administrative order subject to a coercive fine - administrative fine[1659]
Emissions authority	- emissions permit	- revocation of an advantageous decision[1660]
Emissions authority	- emissions trading	- administrative monetary fine[1661]
Regional environment offices	- basic package: environmental hygiene, in particular IPPC-installations and installations with dangerous substances, (dangerous) waste and spatial planning[1662]	Via municipalities and provinces: - administrative order subject to administrative coercion - administrative order subject to a coercive fine - revocation of an advantageous decision
Regional environment offices	Environmental offences: - waste - nature protection	Independently: - administrative criminal decision[1663]
Customs	- CITES/endangered species offences	- administrative criminal decision[1664]

1653 Section 257ba of the Code of Criminal Procedure in conjunction with section 4.2(b) the Decision on settlement by the Public Prosecutor (*Besluit OM-afdoening*) and the Circular *(Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv)*.

1654 A duty of care is accorded to him in 18.2b Environment Management Act.

1655 Section 7.1(2) Act on Spatial Planning in conjunction with the GPELA.

1656 For the environmental permit, see section 5.15 GPELA; for waste, see section 18.8 EMA in conjunction with section 5.15 GPELA; for spatial planning, see section 7.1(3) Act on Spatial Planning in conjunction with 5.15 GPELA; section 8.5 Water Act.

1657 Section 5.19 GPELA; section 8.4 Water Act.

1658 Section 7.2(2) and 7.4 Act on Nature Protection.

1659 Section 7.6(2) Act on Nature Protection and, also, the Decision on Nature Protection.

1660 Section 16.20c Environment Management Act.

1661 Section 18.16e of the Environment Management Act.

1662 Section 7.1 Besluit Omgevingsrecht (Decision Environmental Law).

1663 By the director of the environment office. Section 257ba of the Code of Criminal Procedure in conjunction with section 4.2(a) of the Decision on settlement by the Public Prosecutor (*Besluit OM-afdoening*) and section 2.1(a) of the Circular *(Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv)*.

1664 Section 2.1(g) of the Circular (Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv).

10.3.4 Solutions to increase the quality of the administrative enforcement organisation

The theme of improving the quality of administrative enforcement by professionalising the enforcement organisation has already been touched upon in this chapter. This professionalization has in part been laid down statutorily in the enforcement chapter of the General Provisions Environmental Law Act.[1665] Sections 5.3 up to and including 5.9 of the GPELA contain provisions on the topic of improvement of the quality of the execution/implementation and enforcement and the cooperation between administrative authorities and with the criminal authorities on enforcement.[1666]
The professionalisation as laid down in these sections of the GPELA entails the following requirements:

- The creation of environment offices for the purpose of expedient en effective enforcement.[1667]
- The duty to make rules by regulation for the execution of tasks by the provinces and municipalities.[1668]
- The duty of care for good quality of execution and enforcement, also for other areas than solely installations.[1669]
- The duty to order an bi-annual evaluation of the expediency of the aforementioned regulation and the exercise of the duty of care by the administrative authorities.[1670]
- A legal basis for an Order in Council that lays down requirements to the enforcement organisation, for the benefit of expedient execution and enforcement, rules on the programmatic and strategic execution and enforcement, setting of priorities and the cooperation between authorities.[1671]
- The duty to exchange information, also with criminal enforcement authorities.[1672]
- The duty for the provinces to have regular meetings on the administrative and criminal enforcement and to take a coordinating role therein.[1673]

Below, the quality standards for the enforcement organisation as a means of professionalising the application of enforcement powers by the administrative authorities – on the basis of section 5.3 and section 5.4 GPELA – will be further discussed.

1665 Some of these aspects were laid down previously in the Environment Management Act.
1666 This is the title of section 5.2, which contains the sections mentioned.
1667 Section 5.3 GPELA.
1668 Section 5.4 GPELA. More on this below.
1669 Section 5.5 GPELA.
1670 Section 5.6 GPELA.
1671 Section 5.7 GPELA. More on this below.
1672 Section 5.8 GPELA.
1673 Section 5.9 GPELA.

10.3.4.1 The application of enforcement powers by the administrative authorities: quality standards for the enforcement organisation

From 2002 onwards, quality standards specifically for the administrative enforcement organisation were established in the Netherlands. These were first informally created. The process criteria, which are the minimum requirements for the organisation to ensure the quality of the exercise of enforcement powers, were from 2002 onwards formally laid down in two consecutive Orders in Council.[1674] Also, standards with regard to the organisation of the manpower were laid down in a model regulation (*modelverordening*), which forms a template for local regulations to be adopted (and adhered to) by the provinces and municipalities in the Netherlands. These will be discussed consecutively below.

10.3.4.2 The process criteria

History and formal basis of the process criteria

Quality standards were first formulated in the early stages of the 2002-2005 project titled Professionalisation of environmental enforcement (*Professionalisering van de Milieuhandhaving*), set up at the beginning of the twenty-first century to take concrete steps to improve the administrative enforcement of environmental law.[1675] The project started in January 2002 with administrative agreements between the most important authorities in the field of administrative enforcement, led by the departments of central government and the representatives of the decentralised administrative authorities.[1676] The project measured the quality and the substance of environmental enforcement by administrative authorities nationwide. Quality standards were agreed upon in November 2002.[1677]

> Nineteen quality standards were formulated, aimed at four enforcement processes: goals and conditions, strategies and procedure, execution and evaluation. The quality standards were part of the push for the professionalization of the enforcement of environmental protection through the formulation and implementation of programmed enforcement (*programmatisch handhaven*).[1678] Programmed enforcement is a method that aims to help administrative

1674 More on this below.

1675 See Kamerstukken II 2000-2001 27664, nr. 2.

1676 These were the Ministry of Spatial Planning, Housing and Environment; the Ministry for Traffic and Water, as it was called then, and which joined later; the Union for Dutch municipalities; the Interprovincial consultation body; and the Union of regional water authorities.

1677 Kamerstukken II 2003-2004 29285, nr. 3, annex (report *Kwaliteitscriteria - Doe je voordeel met het oordeel*).

1678 Kamerstukken II 2003-2004 29285, nr. 3, annex (report Kwaliteitscriteria - Doe je voordeel met het oordeel); see Besluit van 21 april 2017 tot wijziging van het Besluit Omgevingsrecht (verbetering vergunningverlening, toezicht en handhaving), Stb 2017, 193, p. 15.

> authorities that have an enforcement task to utilise the available capacity/ manpower in an effective manner and to increase the compliance with the law.[1679]

The aim of the project was that all administrative authorities dealing with the enforcement of environmental law – in particular environmental hygiene and water protection – would comply with the agreed quality standards by January 1, 2005.[1680] Changes to the organisation were to be postponed until the result of this project would become clear. It was held that there would only be reason to change the organisation of the enforcement where the authorities would not succeed in complying with these quality standards.[1681]
As it turned out, the fulfilment of the standards by the authorities greatly improved between 2002 and 2005.[1682] However, it was felt that legally binding norms were required to maintain the standards, as well as that amendments to the fragmented organisation of enforcement were necessary. As a result, the quality standards were then laid down in a formal regulatory instrument so as to provide a legislative basis for quality requirements for the authorities involved in enforcement and the communication between these authorities, also including the authorities in charge of the criminal enforcement.[1683] The quality standards were first formally laid down in 2005 in an Order in Council on the basis of section 18.3 of the Environment Management Act.[1684]
Since October 2010, the quality standards were moved to the Decision Environmental Law (*Besluit Omgevingsrecht*) connected to the enforcement chapter of the General Provisions Environmental Law Act, in particular section 5.7 of that Act. The Regulation Environmental Law (*Regeling Omgevingsrecht*) expands on the Decision. Due to their incorporation in the framework of the General Provisions Environmental Law Act, the quality criteria now have a broad scope of application, as they are now

1679 Kamerstukken II 2003-2004 29285, nr. 3, annex (report Kwaliteitscriteria - Doe je voordeel met het oordeel); see also Programmatisch handhaven. Gids voor gemeenten, waterschappen en provincies, Utrecht: CCV, p. 9. Available at https://hetccv.nl/fileadmin//Bestanden/Bestellen/Algemeen/programmatisch_handhaven_gemeenten.pdf (last visited 1 June 2019).

1680 The quality criteria also took account of the Recommendation on minimum criteria for environmental inspections by the Member States of the European Parliament and the Council of 4 April 2001 (2001/331/EG; pbEG 27.4.2001 L 118/41).

1681 See, for example, the report *Eindmeting professionalisering milieuhandhaving* Den Haag: VROM 2004. Available at http://publicaties.minienm.nl/documenten/eindmeting-professionalisering-milieuhandhaving (last visited 1 June 2019).

1682 See, for example, the report *Eindmeting professionalisering milieuhandhaving* Den Haag: VROM 2004, p. 7 and further. Available at http://publicaties.minienm.nl/documenten/eindmeting-professionalisering-milieuhandhaving (last visited 1 June 2019).

1683 Per the statute *Wet Handhavingsstructuur*, which amended the Environment Management Act.

1684 Section 4 of the Besluit Kwaliteitseisen Handhaving Milieubeheer, Staatsblad 2005, 428, connected to the statute Wet handhavingsstructuur.

applicable to the environmental permit.[1685] Moreover, as a result of this, the Decision applies to the GPELA and the statutes named in section 5.1 of the GPELA, as far as they have declared applicable sections 5.3 up to and including 5.9 of that Act. This means the Decision also applies to – among others – the Environment Management Act,[1686] the Act on Spatial Planning,[1687] the Water Act,[1688] the Building Act,[1689] and the Nature protection Act.[1690] This also means that the Decision applies to all administrative authorities, i.e. the municipalities, the provinces and the regional water authorities.[1691]

The Decision Environmental Law was amended in 2016-2017, among others, so that the quality standards not only extend to enforcement but now also apply to the permitting and execution of powers by the authorities.[1692] The Decision Environmental Law has also incorporated the process criteria contained in the document 'Quality criteria 2.1' (*Kwaliteitscriteria 2.1*), which is a 'follow up' to the first document establishing quality criteria in 2002.[1693] The associations of the decentralised authorities and central government in 2012 established this follow up document. It was also the basis for the criteria with regard to organising manpower with an adequate education level, which has led to the model regulation that will be described below. A consultation for a new set of quality criteria is to be concluded in 2019.[1694]

The substance of the process criteria

The Decision Environmental Law contains quality standards to establish a professional enforcement[1695] process in the field of the environment for all authorities of local government: the provinces, municipalities and regional water authorities and central

1685 Section 5.3 General Provisions Environmental Law Act. The content of the Order in Council Decision Quality requirements enforcement of Environment Management (*Besluit Kwaliteitseisen Handhaving Milieubeheer*) was transferred to the Order in Council Environmental Law (*Besluit Omgevingsrecht*), broadening the scope of the environmental permit. See also Staatsblad 2010, 143, p. 111. This Order in Council was amended: *Besluit van 21 april 2017 tot wijziging van het Besluit Omgevingsrecht (verbetering vergunningverlening, toezicht en handhaving)*, Staatsblad 2017, 193, p. 15.

1686 Section 18.1a Environment Management Act (*Wet milieubeheer*).

1687 Section 7.1(3) Act on Spatial Planning (*Wet ruimtelijke ordening*).

1688 Section 8.6 Water Act (*Waterwet*), for section 5.7 and 5.8 GPELA, which include the Decision Environmental Law.

1689 Section 92(2) Building Act (*Woningwet*).

1690 Section 5.1 GPELA.

1691 See also Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, p. 75, where it is detailed that both the provinces and the regional water authorities complied with the quality criteria of the predecessor to the Decision Environmental Law in 2006.

1692 By means of the Act on Permitting, Inspection and Enforcement (*Wet Vergunningverlening, tenuitvoerlegging en handhaving*).

1693 See *Kwaliteitscriteria 2.1*, 7 September 2012 available at www.infomil.nl/publish/pages/75656/ kwaliteitscriteria _2_1.pdf (last visited 1 June 2019).

1694 For the current status see www.infomil.nl/onderwerpen/integrale/wet-algemene/vth-0/ (last visited 1 June 2019).

1695 And permitting and implementation.

government. The quality standards also apply to the organisation of the environment offices. The municipalities and provinces that have put the offices in place have the duty to ensure that the offices are organised in such a way as to comply with these quality criteria.

The process criteria are distinguished in six groups in the Decision, namely:

a. the formulation of an implementation/execution and enforcement policy (*uitvoerings- en handhavingsbeleid*);
b. the development of an implementation/executive programme (*uitvoeringsprogramma*);
c. the creation of an objective enforcement organisation (*uitvoeringsorganisatie*);
d. securing the resources (*borging van middelen)*;
e. the monitoring of the results and the progress of achieving the targets and the exercise of the implementation programme (*monitoring)*; and,
f. the reporting (*rapportage*) on the results to the democratic entities of the decentralised authorities.

The process criteria on enforcement will now be described further, with a focus on the criteria listed under a to c, which are most relevant for the purpose of this research. The process criteria d, e and f are discussed together in one section below.

a The formulation of an implementation/execution and enforcement policy

The process criteria on enforcement will now be described further. The first process criterion is that the authority upon which the duty of care for enforcement is conferred is required to establish an enforcement policy.[1696] This is to be a uniform policy, where it concerns the environment offices.[1697] This policy is to be based upon an analysis conducted by the authority concerned of the potential problems that may occur with regard to the compliance with the legal rules as to which it is competent.[1698] The enforcement policy should provide the enforcement goals that the authority (or environment office) will aim for in enforcement and the actions it will take to achieve these aims. More specifically, the enforcement policy should provide a prioritization of enforcement responses and a methodology for establishing whether the enforcement goals are achieved.[1699]

1696 Section 7.2 sub 1 Besluit Omgevingsrecht.
1697 Section 7.2 sub 2 Besluit Omgevingsrecht.
1698 Section 7.2 sub 5 Besluit Omgevingsrecht.
1699 Section 7.2 sub 6 Besluit Omgevingsrecht.

Moreover, the enforcement policy should give insight into the strategy of the authority with regard to inspection and sanctioning.[1700] With regard to inspections, the strategy is to give insight into the manner in which inspections are carried out to reach the enforcement goals and the manner in which the findings as a result of inspections are reported and acted upon, with attention for the type (*de aard*) of non-compliance found. The strategy is to detail the preparation and execution of periodic or incidental inspection visits on location, the control frequencies for carrying out routine inspections, the manner of incidental visits as a result of complaints, incidents or accidents, and the inspection measures taken to control compliance with the different environmental norms.[1701]
As part of the enforcement strategy, the administrative authority is also to have a sanction strategy – also named an intervention strategy.[1702] The strategy should provide insight in the imposition and execution of administrative sanctions, including explicit non-enforcement where this is appropriate, as well as the time limits that are applied to the imposition and execution thereof in cases of common non-compliance and the gravity of the sanctions with regard to common non-compliance.[1703]
The starting point to the sanction strategy – as described in the Explanatory notes to the Decision – is that contraventions should be met with a sanction fitting to the type of non-compliance, and that sanctions should be more stringent when contraventions continue or when they are repeated.[1704] Also, the enforcement policy should give insight into the agreements made between the administrative authorities and with the authorities entrusted with criminal enforcement about the cooperation with regard to enforcement tasks and the coordination thereof.[1705]

It is a 'best efforts' obligation (*inspanningsverplichting*) for the administrative authorities to coordinate enforcement with each other, on the one hand, and, on the other, with the criminal authorities. Firstly, the administrative authorities should coordinate their enforcement policy with each other. It has not been determined in the Decision Environmental Law which authorities are those involved authorities. This depends on the question what administrative authorities may be or are touched by the policy of the administrative authority, for example where they cooperate to execute or implement the policy or inspection.[1706] An example of this is the environment offices. According to the explanatory notes, the administrative authority should also ensure that its enforcement policy with regard to the environmental permit and the other

1700 Section 7.2 sub 7(c) and (d) *Besluit Omgevingsrecht*.
1701 See Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, p. 107.
1702 Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, p. 108.
1703 More on the legal concept of explicit non-enforcement in section 9.5.2 of the previous chapter.
1704 Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, p. 108. Chapter 5 of the General Administrative Law Act sets several factors that need to be taken into account in determining a proper reaction to contraventions.
1705 Section 7.2 sub 7(a) *Besluit Omgevingsrecht*. See also section 5.7(1)(b) GPELA.
1706 Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, p. 106.

involved environmental statutes is coordinated with its enforcement policy in other fields of its competence. Furthermore, within the organisation of the administrative authorities good coordination should be in place between the enforcers and the permitters/licensors.[1707]
The strategy should also provide insight into the coordination between administrative enforcement and criminal enforcement by the Public Prosecutor, the police, and the special investigative officers (*buitengewone opsporingsambtenaren*) that are employed by the administrative authority.[1708] For this, it is important that attention is paid to the type of non-compliance found. As explained previously, nearly all contraventions of environmental law are also criminal offences. The explanatory notes to the Decision explain more on the relation between administrative enforcement and criminal enforcement and both types of sanctions. The available administrative sanctions particularly aim for ending or repairing the contravention in part or in whole, and reparation of the situation. The available criminal sanctions aim, in particular, to punish the offender and take away his illegally gained profits or benefit. Both aim for prevention or discouragement of non-compliance. It is considered in the explanatory notes, that when there are contraventions of the environmental permit or of the other rules in the GPELA or associated environmental statutes nearly all these aspects may be relevant. The enforcement action against non-compliance should therefore be teamwork by the administration and the Public Prosecutor.
The sanction strategy should provide which type of enforcement is most effective for which situation. This will also mean that in some cases there should be room for a customized made-to-measure reaction. For example, it is considered that it may be possible that both reparatory and punitive sanctions are necessary to repair the damage done by the contravention and to punish the offender. The sanction strategy is to regulate the demarcation between the Public Prosecutor, the police and the special investigative officers and their process.[1709]
Finally, the strategy of the authority is to also give insight into the manner in which the administrative authorities deal with non-compliance committed by administrative authorities or other governmental authorities.[1710]

The Countrywide Enforcement Strategy (*Landelijk Handhavingstrategie*), created in 2014, has an important influence on the creation by the decentralised administrative authorities of their regional/local enforcement strategy and on its substance, in particular the uniformity thereof. While, as we have just seen, it is an obligation for the administrative authorities to have an enforcement strategy, and for them to coordinate it with other administrative authorities and the criminal authorities,

1707 Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, p. 106.
1708 Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, p. 108.
1709 See also Kamerstukken I 2008-2009, 31700 VI, D.
1710 Section 7.2 sub 7(b)-(e) *Besluit Omgevingsrecht*; see also section 10.3 Regulation Environmental Law *(Regeling Omgevingsrecht)*.

the establishment of the countrywide enforcement strategy was not a statutory obligation.[1711] It was a voluntary but united effort of the Association of Provinces and the Public Prosecutor's Office in particular. The countrywide enforcement strategy standardizes actions by the administrative authorities and the criminal authorities and is linked closely with the process criteria, providing support to the requirement for the administrative authorities to have an enforcement strategy by harmonizing how authorities react to findings as a result of inspection.[1712] Even though it was voluntary, many administrative authorities have committed to it. For example, in practice nearly all of the provinces have adopted it as their policy or as a part of their own policy; all environment offices operate on the basis of the countrywide enforcement strategy.[1713] The substance of this strategy will be further discussed in the next chapter on sanctions in the Netherlands (chapter 11).

b. The development of an implementation/executive programme

As the second group of process criteria, the Decision established that the enforcement policy should be detailed further in an executive programme, which should yearly indicate which enforcement activities will be carried out by the authority.[1714] Also here, it is required that the administrative authorities coordinate with the authorities in charge of criminal enforcement.[1715]

c. The creation of an objective enforcement organisation

Third, the organisation of the authority should be designed in such a manner that an adequate and appropriate execution of the enforcement (and implementation) policy and the executive programme are guaranteed.[1716] The capacity must be quantitatively and qualitatively sufficient. The administrative authorities have the explicit task, according to the Decision Environmental Law, to create such an infrastructure of/within their organisation that the required enforcement policy is executed well, and the required implementation programmes are guaranteed. This also applies to the organisation of the environment offices created by the municipalities and provinces. As explained previously, the municipalities and provinces have the duty to ensure that the environment office is organized in such a way as to comply with these quality criteria.[1717]

1711 Instead, the establishment of a countrywide enforcement strategy was incorporated into the Quality Criteria 2.1.

1712 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 2. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

1713 State of affairs in June 2017, according to the evaluation by Berenschot, *Bewust van kwaliteit: onderzoek naar de invulling van de artikelen 5.4 en 5.5 uit de wet VTH* 2018, p. 18 in Kamerstukken II 2016-2017 33118, annex to nr. 96.

1714 Section 7.3 *Besluit omgevingsrecht* (Decision Environmental Law).

1715 Section 7.3 sub 2 *Besluit omgevingsrecht*; see also section 10.4 Regulation Environmental Law (*Regeling Omgevingsrecht*).

1716 Section 7.4 *Besluit omgevingsrecht*; see also section 10.5 Regulation Environmental Law (*Regeling Omgevingsrecht*).

1717 See also section 5.3 GPELA.

As part of the quality standards it is considered that the objectivity of enforcement is an important principle of professional enforcement.[1718] The Decision dictates that there is to be a division between the officers of the authority that prepare and grant environmental permits or other regulatory instruments, and the officers in charge of the enforcement of these instruments.[1719] Specifically, the Decision states that the persons tasked with the preparation of decisions on licensing/environmental permits are not to be in charge of the inspection of non-compliance with regard to installations, and they are not to be in charge of the preparation and execution of administrative sanctions with regard to an installation.[1720] The separation between enforcement and permitting in relation to the environment (environmental management) must at least be at personal level. A file-level separation (*scheiding op dossierniveau*), which entails an *ad hoc* separation dependent on which officer has previously been involved with a specific case, i.e. a file, is not considered to provide sufficient safeguards for the objective execution of enforcement.[1721] This separation applies personally to the officers that are involved, whether they are technically, financially or legally educated. This means that someone who is in charge of enforcement cannot write permits.[1722] The separation does not apply to technical, financial or legal specialists who make an ad hoc contribution to licensing or enforcement.

The objectivity of enforcement is also propagated by requiring the circulation of employees. Specifically it is determined that officers appointed for the inspection of non-compliance – by the Minister and the decentralised administrative authorities, including the environment offices – should not be continuously in charge with regard to the same installation.[1723] This is to avoid that within the fixed enforcement relationship between an entrepreneur/business and an inspection officer close links are developed and maintained between the establishment and government organisation.[1724] In chapter 2, this was touched upon as the risk of regulatory capture. The ratio of the division of functions at the personal level expressed in the explanatory notes of the Decision Environmental Law was (a) the objectivity of enforcement and, (b) that licensing and enforcement are both separate professions (*een vak apart*), for which different knowledge and skills and attitudes are required, which are not by definition united in one person. Moreover, (c) it was considered that such division of functions was also necessary because it had been found in previous reviews that in functions combining enforcement with permitting or licensing, enforcement

1718 Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, at section 7.4 b and c.
1719 Section 7.4b and c of the Besluit Omgevingsrecht; see also Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, at section 7.4 b and c.
1720 Section 7.4b and c of the Besluit Omgevingsrecht; see also Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, at section 7.4 b and c.
1721 Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, at section 7.4 b and c.
1722 Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, at section 7.4 b and c.
1723 Section 7.4, subsection 2, point (c) *Besluit omgevingsrecht*.
1724 Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, at section 7.4 b and c.

appeared to be systematically given too low priority. In the case of low available capacity, in a combination of enforcement and licensing, it was considered in the Explanatory Notes that enforcement often does not come first, because there are no statutory terms (time limits) for the enforcement of an enforcement instrument and there are statutory time limits to licensing.[1725]
The requirement of the personal division between enforcement and other functions within an administrative organisation has actually already been in place formally since 2005, when it was laid down in the predecessor to the Decision Environmental Law, the Order in Council Decision Quality requirements enforcement of Environment Management (*Besluit Kwaliteitseisen Handhaving Milieubeheer*). Previous to that, the division was also a part of the quality criteria introduced (informally) in 2002 that were to be implemented by the administrative authorities by 1 January 2005.[1726]

The 2005 Order in Council, including the aspect of the personal functional division, was evaluated in 2008. By that time, this mandatory personal division between officers deciding upon permits and officers tasked with inspection and (other) enforcement had been formally introduced in the organisation of all decentralised administrative authorities with enforcement tasks. The evaluation found that the authorities had embraced the importance of functional division in practice. The personal functional division had been implemented in all authorities concerned. Within small authorities, however, the obligation had created some bottlenecks in terms of the availability of qualified officers. The solutions to this, as found by the authorities themselves, were the cooperation in the regional environment offices, or the employment of external expertise.[1727] The evaluation considered that the bottlenecks were resolvable and that the requirement of personal functional division should be maintained. The evaluation also advised to implement the personal functional division between enforcement officers and those officers drafting up policies, within the administrative authorities.[1728]
The requirement of circulation of enforcement officers[1729] was also evaluated. It was found that in practice, enforcement officers are circulated every two to four years. The obligatory circulation had disadvantages in terms of time and effort. The requirement of the personal functional division made it more difficult to comply with the requirements of the circulation of enforcement officers. Small authorities did not have sufficient scale to easily circulate their officers. As a solution to this,

1725 Kamerstukken II 2015-2016, 33118, nr. 32, annex 777966, at section 7.4 b and c. In the process criteria in the Decision it is now required to specify also the time limits an authority will adhere to in enforcement.
1726 See *Kwaliteitscriteria 2.1*, 7 September 2012, p. 12, available at www.infomil.nl/publish/pages/75656/kwaliteitscriteria_2_1.pdf (last visited 1 June 2019).
1727 Neerhof & Van der Woerd 2008, p. 43-44.
1728 Neerhof & Van der Woerd 2008, p. 43-44.
1729 Section 7.4, subsection 1, point (c) *Besluit omgevingsrecht*.

some provincial governments exerted pressure to cooperate regionally.[1730] The results of the evaluation meant that this third group of process criteria was maintained. The creation of the environment offices took care of the issues of scale paired with the requirements to the infrastructure within the organisation tasked with enforcement and permitting, as mentioned previously.[1731]
In summary, therefore, within the enforcement organisation of the administrative authorities there should be a division between the officials that are in charge of norm setting and policy-making and the officials in charge of enforcement.

In addition to the above requirements for the benefit of the independence of the organisation, which apply to all administrative authorities for all enforcement, there are also certain requirements for the organisation of inspection/investigation and the imposition of certain sanctions for specific administrative authorities. These requirements are connected to the imposition of punitive sanctions, i.e. the administrative fine and the administrative criminal fine, for the benefit of legal protection where these punitive sanctions are higher than 340 Euros.[1732] This threshold is nearly always reached where these sanctions can be imposed for environmental non-compliance.
The General Administrative Law Act determines that within the authorities that can impose an administrative fine, the official that has drawn up the report of the non-compliance must be different from the official that has the mandate to impose such a fine.[1733] This is a personal separation, but not necessarily a functional separation.[1734] As described in section 10.3.3 of this chapter, a limited number of authorities is competent to impose the administrative fine for a limited number of areas of environmental protection. The requirement of separation therefore (only) applies to the emissions authority, the *Minister* of the Department of Economy, Agriculture and Innovation for specific cases of nature protection, and the municipality for building errors.
Moreover, the law determines that where specific authorities impose an administrative criminal decision that surpasses the threshold of 340 Euros, the investigation and the imposition of the sanction should be separated.[1735] Moreover, the official that

1730 Neerhof & Van der Woerd 2008, p. 44.
1731 And again in the quality criteria created in 2012. See *Kwaliteitscriteria 2.1*, 7 September 2012, available at www.infomil.nl/publish/pages/75656/kwaliteitscriteria_2_1.pdf (last visited 1 June 2019).
1732 The Circular (*Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (257ba, tweede lid Sv)* mentions that the legislator has drawn a comparable threshold for the competence of investigative officers to impose a fine for a criminal offence on the basis of section 257b of the Code of Criminal Procedure. This competence of the investigative officers can be exercised for fines up to 350 Euros. See footnote 3 of the *Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (257ba, tweede lid Sv)*.
1733 Section 10.3(4) in connection with 5:53(1) of the General Administrative Law Act.
1734 According to CRvB 19 November 2014 ECLI:NL:CRVB:2014:3806, it is allowed that these officers are part of the same department and have the same job title.
1735 Note that the Circular (*Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten* (257ba, tweede lid Sv) mentions that it applies the same threshold as the law provides for the administrative fine, i.e. above 340 Euros, but mentions the threshold is a fine of 340 Euros and above.

has been mandated the power to impose the sanction must fulfil a managerial or coordinating function in the field of enforcement and must have sufficient expertise to be able to assess the proposals of investigative officers to impose the administrative criminal decision on legality, effectiveness and proportionality.[1736]

If in a specific case the official that has been mandated the power to impose the sanction is (also) a special or general investigative officer, this circumstance need not stand in the way of mandating, provided that he himself is not in charge of the investigation of criminal offences by virtue of his job description. This offers, if desired, scope to mandate the power to impose the sanction to someone who is in charge of the coordination of special investigative officers on the basis of his criminal-law knowledge and experience, but who is no longer active in investigative practice.[1737]

As described previously, the regional water authorities, the director of the environment offices, and customs can impose the administrative criminal decision for specific cases of non-compliance with environmental law. Therefore, the requirements mentioned above have a limited scope.

d-f. Securing the resources, monitoring, and reporting on the results[1738]

As the fourth group of process criteria in the Decision Environmental Law, it is established that the administrative authority should ensure that the necessary financial resources and personnel are guaranteed in the budget to be able to achieve the enforcement goals and to put the executive programme into practice (*borging van middelen*).[1739] As the fifth group of criteria, the achievement of these goals and the execution of the executive programme should be monitored automatically,[1740] and, sixth, the results of the fifth group of criteria must be reported upon to the democratic entities of the decentralised authorities (the municipal council and the *Provinciale Staten*, respectively) and evaluated yearly.[1741]

Due to the standards thus set for environmental enforcement, not only the transparency of the intentions of the regulator towards the regulated are made more clear, also the authorities themselves are required to give appropriate priority to the embedding of environmental enforcement within their organisation.

1736 Section 2.2 *Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten* (257ba, tweede lid Sv).
1737 Section 2.2 *Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten* (257ba, tweede lid Sv).
1738 In this section the process criteria indicated as d, e and f above are described.
1739 Section 7.5 *Besluit omgevingsrecht* (Decision Environmental Law).
1740 Section 7.6 *Besluit omgevingsrecht* (Decision Environmental Law); see also section 10.6 Regulation Environmental Law (*Regeling Omgevingsrecht*).
1741 Section 7.7 *Besluit omgevingsrecht* (Decision Environmental Law).

10.3.4.3 The model regulation

Quality requirements for the availability and expertise of the organisation entasked with enforcement – in short, organising manpower for that purpose – are laid down in a model regulation (*modelverordening)*, formulated by the associations of provinces and municipalities in 2015, on the basis of section 5.4 of the GPELA.[1742] The model regulation incorporates the requirements in the aforementioned document Quality criteria 2.1 (*Kwaliteitscriteria 2.1*) on organising manpower with an adequate education level.[1743] The model also specifies the requirement for the administrative authorities in section 7.2 of the Decision Environmental Law to formulate an (implementation and) enforcement policy in which goals are formulated for implementation and enforcement.

The model regulation is a template for local regulations to be adopted by the provinces and municipalities in the Netherlands. It applies to the exercise of enforcement on the basis of the GPELA; it also applies voluntarily to other tasks to which the enforcement chapter of the GPELA applies.[1744] The intention of the model regulation is to achieve and maintain a countrywide level of quality.

10.3.4.4 Compliance with the quality criteria

The evaluation of the implementation of the quality criteria, both the process criteria and the model regulation, has provided that all authorities have implemented the process criteria; many authorities have drafted a regulation conform the model provided, in particular all the provinces. The process within the municipalities seems slower.[1745]

As stated previously, the municipalities (in particular Mayor and Aldermen) and provinces (in particular *Gedeputeerde Staten*) are the addressees of the quality criteria and the duty of care in respect of them. This means that, also in case of the environment offices carrying out tasks of these authorities, these authorities as competent authorities remain responsible for a proper implementation of the quality criteria.[1746] As explained, there is the duty at the level of the administrative authority itself to report to the democratic entities of the authorities (the municipal council and the *Provinciale Staten*, respectively) and the yearly evaluation.[1747] Moreover, this means that the provinces have the responsibility to oversee that the municipalities

1742 Available at https://vng.nl/files/vng/brieven/2015/attachments/20150707_bijlage_modelverordening-kwaliteit-vergunningverlening-toezicht-en-handhaving-omgevingswet.doc (last visited 1 June 2019).

1743 Section 5 of the *Modelverordening*, available at https://vng.nl/files/vng/brieven/2015/attachments/20150707_bijlage_modelverordening-kwaliteit-vergunningverlening-toezicht-en-handhaving-omgevingswet.doc (last visited 1 June 2019).

1744 Besluit van 21 april 2017 tot wijziging van het Besluit Omgevingsrecht (verbetering vergunningverlening, toezicht en handhaving), Staatsblad 2017, 193, p. 15.

1745 See the evaluation by Berenschot, *Bewust van kwaliteit: onderzoek naar de invulling van de artikelen 5.4 en 5.5 uit de wet VTH* 2018, p. 18 in Kamerstukken II 2016-2017 33118, annex to nr. 96.

1746 Kamerstukken II 2013-2014, 33872, nr. 3, p. 19.

1747 Section 7.7 *Besluit omgevingsrecht* (Decision Environmental Law).

take responsibility for the fulfilment of the quality criteria, also by the environment office they may have in common. Similarly, central government is to oversee that the provinces take the same responsibility.[1748] When responsibility is not taken, the provinces, respectively, central government may fulfil it in the place of the authorities, in the framework of the rules on task neglect (*taakverwaarlozingsregeling*).[1749]

10.4 The criminal enforcement authorities

The authorities that are generally competent for the criminal enforcement of environmental law are the police, the Public Prosecutor's Office, specifically the Functional Office of the Public Prosecutor, and the criminal courts. It is an interesting aspect in terms of the organisation of the police and the Public Prosecutor in particular that they are under national direction, although that has not limited a certain specialisation.[1750]

The organisation of the criminal authorities and their competence is not as complex as the organisation of the administrative authorities. The police are competent to investigate, which special investigative officers can also do; the Public Prosecutor is competent to prosecute, and may also impose certain criminal sanctions; the criminal courts are competent to adjudicate the criminal procedure against environmental offences instigated by the Public Prosecutor and to impose criminal sanctions on offenders in such a procedure.[1751] The authorities competent for criminal enforcement are listed in the table below.

Competent authorities for the criminal enforcement of environmental law

- Police (*politie*) and special investigative officers (*buitengewone opsporingsambtenaren*)
- Public Prosecutor (*Officier van Justitie*), part of the Functional Office of the Public Prosecutor (*Functioneel Parket van het Openbaar Ministerie)*
- Criminal courts

10.4.1 *Police*

The police are competent to investigate criminal environmental offences under supervision of the Public Prosecutor's Office, specifically the Functional Office of the Public Prosecutor (see below). For the benefit of creating expertise in the area of environmental offences, which often concern highly technical non-compliance issues, from 2005 onwards, specialised police teams were created within the police

1748 Kamerstukken II 2013-2014, 33872, nr. 3, p. 19.

1749 See e.g. section 124 and 135 Municipalities Act. This will not be discussed further.

1750 See also Michiels, Blomberg & Jurgens 2016, p. 385.

1751 Due to this, the competences of investigation, prosecution and sentencing will be discussed below in the sections dealing with each authority, therefore in a different manner than previously in this chapter the competence of the administrative authorities.

organisation.[1752] In those years, the police organisation developed from twenty-five police corps' to a nationwide single organisation with ten regional (environmental) teams.
In 2005, twenty-five regional environmental police teams and six interregional environmental police teams were established.[1753] The regional teams investigated offences of local or regional nature, whereas the interregional teams focused upon crime which supersedes the geographical or complexity scope of the regional teams, for example in case of the trade in endangered animals and plants.[1754] However, mostly the police acted in this time period as a supplement to the special investigative officers that reside with the administrative authorities.

> These special investigative officers (*buitengewone opsporingsambtenaren*, 'boa' in short) may exercise investigative powers supervised by the Public Prosecutor's Office. As they are commonly also endowed with administrative inspection powers, these officers have an interesting position from the point of view of the different safeguards that apply to the administrative and the criminal procedure respectively.

From 2013 onwards, the National Police was created, which aimed to centralise all police tasks in one nation-wide body. This meant that the interregional teams were abolished and all tasks, except for those requiring special expertise were laid down within the one central authority. Ten regional police teams are part of the new structure for the special expertise. As environmental enforcement is still considered to require special expertise, these ten regional police teams have environmental teams (*milieupolitie*) that pick up environmental enforcement, and there is also one countrywide environmental criminal investigation department.[1755] As part of the regional police teams, some police officers will also be specialised as animal police officers (*Dierenpolitie*) to protect animals, including endangered flora and fauna, from human intervention.[1756]
The regional and interregional police teams (*milieupolitie*) are generally also included in the administrative contracts entered into by the administrative authorities competent for environmental enforcement on the basis of the *Wet Gemeenschappelijke Regelingen* to ensure proper cooperation between the authorities. The police teams focus generally on those criminal offences that have a rather serious impact and those with a grave impact on the environment.[1757]

1752 Specialisation of the police was considered an important asset to professionalised effective enforcement of environmental law, see, for example, Commissie Mans 2008, p. 36-37.
1753 Kamerstukken II, 2003-2004, 22343, nr. 91..
1754 Biezeveld 2006, p. 236; the specialisation of the criminal environmental enforcement, including the police environmental teams was evaluated in 2009, see De Ridder, Schol & Struiksma 2009, chapter 4 and chapter 5.
1755 Landman & Morée 2016 provide a comprehensive overview of the development of the police environmental investigation task in the Netherlands – and its four stages – from the 1950s until 2016 at p. 139-156.
1756 See also Janssen 2016, p. 157-165.
1757 In Dutch, these types of offences are commonly referred to as *middelzware criminaliteit* and *zware criminaliteit.*

Competence for investigation

Investigative officers are in charge of the investigation of offences with regard to the environmental acts on the basis of the Code of Criminal Procedure (*Wetboek van Strafvordering*), on the basis of the Economic Offences Act (*Wet economische* delicten) and – as far as the latter is not applicable – on the basis of the special environmental acts themselves.

The Code of Criminal Procedure contains a general provision, on the basis of which the following officers are in charge of the investigation of environmental common criminal offences[1758]: the public prosecutors; officers of the police; and the investigative officers of the central government special investigative service that is the *Inspectie Leefomgeving en Transport* (ILT).[1759] These officers are also competent to investigate economic environmental offences, according to the Economic Offences Act.[1760] In addition, specific officers appointed by the *Minister* of Justice, may investigate economic environmental offences.[1761] Moreover, also the officers of the tax and customs administration are competent regarding customs.[1762] In the practice of environmental law they will be brought into action especially in case of offences concerning import or export (as for example in case of the Act on Nature Protection and CITES).[1763] The officers of the last two categories are special investigative officer (*buitengewoon opsporingsambtenaar*).[1764]

Besides this, investigative officers can be appointed on the basis of the GPELA or other environmental acts. These officers are also considered special investigative officers.[1765] This means that they only have specific competences and not a general investigative competence for all economic of common criminal offences. So these investigative officers are empowered to investigate criminal offences pursuant to the EOA, the Criminal Code or the special environmental acts for which they have been appointed.

The most wide-reaching provision with regard to the appointment of investigative officers in the special environmental statutes, pertaining to most environmental law, is contained in the GPELA. According to the Act, the *Minister* for the Department of Safety and Justice *(Veiligheid en Justitie*) can appoint the inspection officers that are in charge of inspection for administrative enforcement of the environmental statutes also for the investigation of criminal offences.[1766] This means that, besides the above-mentioned officers, also the officers called special investigative officers (*buitengewone*

1758 And other common criminal offences, see section 141 Code of Criminal Procedure.
1759 Section 141 Code of Criminal Procedure.
1760 Section 17 EOA.
1761 Section 17(1)(2) EOA
1762 Section 17(1)(3) EOA.
1763 Convention on International Trade in Endangered Species of Wild Fauna and Flora.
1764 See article 142(1) of the statute *Wetboek van Strafvordering*.
1765 On the basis of section 142(1)(c) of the Code of Criminal Procedure.
1766 Conform section 5:12(1) in conjunction with section 5:10 of the GPELA.

opsporingsambtenaren) are competent. Similar provisions to this section of the GPELA are contained in several sectoral environmental statutes.
There are several rules with regard to the officers appointed for the investigation of environmental offences. The basic principle dictating these rules is that investigation is a government task. This means that special investigative officers must be gainfully employed by a public legal person or by a private legal person who is and will stay for 100 % in the hands of the government. The deed of special investigative officer can be granted individually or by categorical decision.

10.4.2 Public Prosecutor's Office (*Openbaar Ministerie*)

The Public Prosecutor's Office is first and foremost in charge of leading the investigation, and pursuing the prosecution of environmental (and other) offences in criminal court or imposing sanctions as alternatives to prosecution.[1767] The Public Prosecutor is also in charge of the execution of the decisions made by the judge or by himself (article 553 Code of Criminal Procedure).
For environmental offences, a semi-specialised, functional Public Prosecutor's Office was established on January 1, 2003 (*Functioneel Parket*).[1768] This Functional Office of the Public Prosecutor was created as a result of the observation that there was a lack of expertise and priority in criminal enforcement. At its inception it only coordinated the investigations carried out by the Information and Investigations service (*Inlichtingen- en Opsporingsdienst*) of the central government inspectorate.[1769] However, since 2005, the Functional Office also coordinates the investigations by the special investigative officers with the other administrative authorities, and those carried out by the regional and interregional environmental police teams. There are about twenty-five environment public prosecutors. They provide coordination to the police from four regional enforcement units and one central unit. Although there are thus several units, this does not imply fragmentation as the Public Prosecutors at the Functional Office have a nationwide competence.[1770] The Functional Office does not solely deal with environmental offences, but also with cases of fraud and the like, as these offences often go hand in hand.
At the head of the Public Prosecutors Office sits the Colleges of attorneys general (*College van procureurs-generaal*), which determines that nationwide investigation and prosecution policy.[1771] As was already described above, the countrywide

1767 Sections 149, 167, and 242 of the *Wetboek van Strafvordering*. Similar to Germany, the Public Prosecutor's Office in the Netherlands is in fact considered an administrative authority. The General Administrative Law Act does not apply to actions of this Office in the realm of the investigation and prosecution of criminal acts, as well as the execution of criminal decisions (article 1:6 General Administrative Law Act).
1768 See also 137a of the statute Wet op de rechterlijke organisatie.
1769 Currently this is the Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport*).
1770 Biezeveld 2006, p. 234.
1771 Section 130, subsection 4 of the *Wet op de rechterlijke organisatie*, in conjunction with the directive *Aanwijzing kader voor strafvordering en OM-afdoeningen*. Available at www.om.nl/@88217/aanwijzing-kader-0/ (last visited 1 June 2019).

enforcement strategy that was formulated in 2014 by the association of provinces and the Public Prosecutor's Office has provided a uniform intervention strategy also for environmental offences.[1772]

Competence of the public prosecutor

When the public prosecutor has become aware of a criminal offence whose prosecution he is charged with, he is to initiate the necessary criminal investigation.[1773] The public prosecutor is responsible for compiling the procedural documents during the investigation. These procedural documents include all documents that may reasonably be relevant to the decisions to be taken by the court.[1774] This, therefore, means that the public prosecutor is required to also include documents that may provide exculpatory evidence.

If, as a result of the investigation, the public prosecutor is of the opinion that prosecution must take place, by issuing a criminal decision or otherwise, it will proceed as soon as possible.[1775] The public prosecutor is not required to prosecute if it is not in the common interest to do so.[1776]

The competence for issuing a criminal decision, among others, is part of a trend. The Public Prosecutor's Office has increasingly gained certain sanctioning powers for relatively simple environmental cases, to relieve some of the burden upon the criminal courts and enhance the efficiency of the criminal instruments. The Public Prosecutor may impose these sanctions without intervention of a judge.

> This applies to the provisional measures ex article 28 of the AEO and the obligations (conditions) that can be imposed in case of extra-judicial settlement. The Public Prosecutor can also impose a criminal decision without intervention of a judge for all environmental offences that are a misdemeanor (*overtreding*) or a crime (*misdrijf*) that has the possibility of a maximum of six years imprisonment.[1777] These sanctions are further described in chapter 11.

The Public Prosecutor also supervises the imposition by the administrative authorities of an administrative criminal decision and takes over the case where a suspect does not agree with that decision. The administrative authorities are to follow the policy and instructions of the Public Prosecutor's Office for that purpose. This will be further detailed in the next chapter (section 11.3).

1772 For more on this policy, see the next chapter on sanctions.
1773 Section 149 Wetboek van Strafvordering.
1774 Section 149a Wetboek van Strafvordering.
1775 Section 167, and 242 Wetboek van Strafvordering.
1776 Section 167(2) Wetboek van Strafvordering.
1777 Section 257a of the Code of Criminal Procedure in conjunction with section 3.1 of the Decision on settlement by the Public Prosecutor (*Besluit OM-afdoening*) and the Circular (*Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv*).

10.4.3 Criminal courts

The criminal courts are competent to adjudicate cases for economic environmental offences and commune environmental offences in a criminal procedure that is instigated by the Public Prosecutor.[1778] In such a procedure, the courts are competent to impose sanctions. The courts involved are the district courts (*rechtbanken*); the high courts (*Hof/Hoven*); and the High Council (*Hoge Raad*). The district courts and the high courts may impose sanctions upon an offender; the high council will only consider points of law (not fact). Although there are no specialised environmental courts in the Netherlands, in practice the courts will assign cases to judges with some experience in environmental enforcement.

According to the law, the economic offences are to be adjudicated by the economic chambers of the district courts.[1779] There are economic single judge divisions as well as full bench divisions. In practice, most of the economic environmental offences are adjudicated in the economic single judge division, also called the economic police magistrate (*economische politierechter*).[1780]

> In 2012, it was established that not every district court in the court department of Leeuwarden had created economic chambers. The question was put before the higher court of Leeuwarden whether this fact ought to lead to a declaration of incompetence of the court that adjudicated the case in first instance.[1781] The higher court emphasised the reason for this requirement in the law that, in principle, economic offences are to be adjudicated by judges that have specific expertise with regard to these cases.[1782] The higher court also considered that it is insufficient to give a general directive that all judges of the criminal sector at the court are also part of the economic chambers.[1783] The High Council considered that it is in any case necessary that economic chambers are established also where the specific expertise required by law can be ensured in fact.[1784] As a result of the case law, the council for the administration of justice (*Raad voor de rechtspraak*) requested all courts to check that economic chambers have been established, to prevent potential incompetence of the criminal courts in case of economic offences.[1785]

1778 Article 113(1) of the Dutch Constitution (*Grondwet)*.
1779 Section 38 Economic Offences Act; section 52 of the *Wet op de rechterlijke organisatie*.
1780 Cleiren, Crijns & Verpalen 2018, p. 2696.
1781 Hof Leeuwarden 29 March 2012 ECLI:NL:GHLEE:2012:BW0172; Doorenbos 2015, p. 146.
1782 Hof Leeuwarden 27 April 2012 ECLI:NL:GHLEE:2012:BW4626; Doorenbos 2015, p. 146.
1783 Hof Leeuwarden 19 June 2012 ECLI:NL:GHLEE:2012:BW8759; Doorenbos 2015, p. 146.
1784 Hoge Raad 7 April 2015 ECLI:NL:HR:2015:892; Cleiren, Crijns & Verpalen 2018, p. 2696.
1785 Doorenbos 2015, p. 146; Kamerstukken II 2011-2012 29279, nr. 145.

Appeal against the sentences of the economic chambers of the courts may be instituted before the economic chambers of the Courts of Appeal (article 52 AEO). (Appeal in) cassation may be instituted before the High Council.

Competence of the criminal courts

The absolute competence of the judiciary is determined in the Judicial Organisation Act and in the special acts. For the criminal environmental offences in the Criminal Code, the Act on Criminal Procedure provides the basis for competency. The Economic Offences Act contains its own regulation regarding the absolute competence of the authorities in the criminal enforcement realm. In pursuance of article 38 of this Act, taking cognizance of economic offences in first instance is exclusively entrusted to the district court (*rechtbanken*). This applies to economic offences that are crimes (indictable offences), as well as to economic offences that are qualified as violations/ misdemeanours.

It may be the case that someone is charged with an environmental economic criminal offence and a general criminal offence, such as fraud. In that case the economic chambers/divisions of the court are still authorized to try cases regarding criminal offences that are not economic offences upon the conditions that the court must be authorized to take cognizance of those criminal offences, that those criminal offences are committed in connection with one or more economic offences and that those criminal offences are charged simultaneously with one or more of those economic offences (article 39(1) of the Economic Offences Act). Also the general criminal judge (the ordinary criminal chamber of the district court) is empowered in cases in which economic misdemeanours as well as criminal offences that are not economic misdemeanours have been committed and are charged together (39(2) of the Economic Offences Act).

The special provisions in article 367 up to and including 381 of the Code of Criminal Procedure (*Wetboek van Strafvordering*), and the provision in article 398(2) of the Code of Criminal Procedure, regarding trial representation at the district court, are applicable *mutatis mutandis* to trials adjudicated by the economic police magistrate (article 48 AEO). This means that the economic police magistrate is not empowered to impose a prison sentence of more than one year (article 369(1) Code of Criminal Procedure) and that he shall refer the case to an economic full bench division of the court if the imposition of such a penalty is indicated (see article 39 AEO). The police magistrate will also refer the case if he believes that the case is too complex.[1786]

1786 Cleiren, Crijns & Verpalen 2018, p. 930.

10.5 Coordination and cooperation between the enforcement authorities

10.5.1 Introduction

As is described in this chapter, an important theme of the organisation was the lack of cooperation between the administrative authorities and of the administrative authorities with the criminal authorities. Several developments that have taken place enabled improved cooperation between the authorities, ranging from the improvement of the law containing the competences of the authorities; requirements laid down in legal rules; the creation of the environment offices, and other forums for cooperation between the authorities. The contribution of these developments to coordination and cooperation specifically is discussed below.

10.5.2 Coordination between administrative authorities

There have been several developments that have enhanced the coordination between the administrative authorities for environmental enforcement. First and foremost, the problem of coordination between the administrative authorities has diminished due to the creation of (several) amalgamating environmental statutes, as a result of which the division of competences between the administrative authorities has become much more clear in the Netherlands. This means that hardly any conflicts of competences will occur in the Netherlands, and, where any conflicts would occur in practice, these can be cleared up with the law in hand.

Second, as mentioned previously, there is a legal 'best efforts' obligation for the administrative authorities to coordinate enforcement with each other as part of the process criteria laid down in the Decision Environmental Law.[1787] In addition, third, there is a legal obligation for the administrative authorities to have an enforcement policy in place, as described previously in this chapter.[1788] This legal obligation also extends to the environment offices, as all authorities that take part in an environment office are to take care to establish a uniform enforcement policy for the office.[1789] In this respect, the authorities are to cooperate in establishing such a policy. This also facilitates coordination between the administrative authorities.[1790] The environment offices have institutionalized cooperation through the increased connection between the administrative authorities in this forum. The evaluation of the environment offices has shown that it has become easier to coordinate enforcement between the administrative authorities, due to the scaling up of the administrative authorities, as the offices act as a forum where the enforcement action of these authorities is prepared.

1787 See also section 10.3.4.2 in this chapter. As is mentioned below, this statutory obligation also extends to the coordination with the criminal authorities.

1788 As part of the process criteria in the Decision Environmental Law (*Besluit Omgevingsrecht*).

1789 Section 7.2(2) Decision Environmental Law (*Besluit Omgevingsrecht*).

1790 This also facilitates cooperation between the administrative authorities and the criminal authorities.

10.5.3 Cooperation between enforcement authorities

The cooperation between the administrative authorities and the criminal authorities, specifically the police and the Public Prosecutor, for environmental enforcement has also been enhanced. Some of the developments mentioned above for the coordination between the administrative enforcement authorities, have also enhanced the cooperation between the administrative and the criminal authorities. Other developments focus specifically on the cooperation between administrative and criminal enforcement authorities.

First, the legal 'best efforts' obligation mentioned above for the administrative authorities to coordinate enforcement, also extends to coordination with the criminal authorities.[1791] Second, the enforcement policy that the administrative authorities are to have in place for the environment offices is to be established in accordance with the Public Prosecutor.[1792] Third, as previously described, in 2014 the administrative authorities and the Public Prosecutor's Office formulated the countrywide enforcement strategy (*Landelijke Handhavingstrategie*) for administrative and criminal enforcement.[1793] A countrywide enforcement strategy for administrative and criminal enforcement of installations dealing with hazardous matter (*Landelijke Handhavingstrategie BRZO-inrichtingen*) was already in place.[1794]

Moreover, two consultation mechanisms (or forums) at national level, which serve to bring together the administrative and criminal authorities, aim to enable cooperation and to ensure policy making with a connection between administrative and criminal enforcement. A third consultation mechanism (or forum) brings together the police and the Public Prosecutor. The first mechanism, the Strategic Environment Chamber (*Strategische milieukamer*), put in place from 2012 onwards, consists of the Functional Office of the Public Prosecutor, the inspectors-general of several independent administrative agencies[1795], the National Police, a representative of the environment offices and the administrative competent authorities.[1796] The Chamber determines the countrywide priorities for environmental criminal enforcement, including criminal investigation, and the coordination of the criminal enforcement with administrative enforcement. This includes the focus points for environmental investigation by the police (*Nationale Intelligence Agenda Milieu*).[1797]

1791 As is mentioned below, this statutory obligation also extends to the coordination with the criminal authorities.

1792 Section 5.7 GPELA and section 7.2(2) of the Decision Environmental Law.

1793 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014). Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

1794 Since 2012. *Landelijke handhavingstrategie Besluit risico's zware ongevallen 1999*, available at https://brzoplus.nl/aanpak/handreiking/ (last visited 1 June 2019). The national information system called *Inspectieview Milieu* is not further described here, as it is unclear what the extent of the content shared in this information system is.

1795 Such as the Inspectie Leefomgeving en Transport.

1796 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 14. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

1797 Landman & Morée 2016, p. 149-150.

Both administrative authorities and criminal authorities participate in the second mechanism, the Administrative Environment Consultation (*Bestuurlijk Omgevingsberaad*). This is a centralised administrative consultation about the system of permitting and enforcement, led by the Minister of Infrastructure and Water Management. This consultation aims to attune the different tasks and responsibilities to each other. Participants in the consultation are the Minister of Safety and Justice, the Public Prosecutor's Office, three representatives of the environment offices and representatives of the competent administrative authorities.[1798] The third mechanism is the National Environment Information Consultation (*Landelijk Milieuinformatie Overleg*), which brings together the police and the Public Prosecutor to discuss potential cases regularly.[1799]

10.6 Evaluation: institutional aspects

10.6.1 Introduction

In this section the evaluative framework that was formulated in chapter 2 will be applied to the enforcement organisation in the Netherlands. Here, the organisational aspects are described from the perspective of the institutional requirements. These are – in short – the independence and separation of specific functions, their specialisation, and the coordination and cooperation mechanisms (see also the table below).

As described in the current chapter, the enforcement organisation has become increasingly transparent as regards its regulation in the law. For administrative enforcement, the organisation is primarily local (decentralized) and specialised. For criminal enforcement, the organisation is semi-local to centralised, with an attempt to specialisation that has been subject to reforms and budget cuts. An organisational separation between administrative and criminal sanctioning is in place, although this is not the case with regard to the special investigative officers that may contribute to inspection for administrative non-compliance and investigation for criminal non-compliance.

Below, aspects of the organisation will be discussed. As explained in chapter 2, the following aspects are assessed (as outlined in the table below):

1798 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 13. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

1799 Landman & Morée 2016, p. 150-151.

Institutional requirements

- A degree of decision-making independence of the organisation
  - separation between regulatory and enforcement functions
  - separation between inspection/investigation and sanctioning
- Specialisation of or within the organisation
  - degree of expertise
  - appropriate proximity (level of government)
- Coordination and cooperation between enforcement authorities

10.6.2 Decision-making independence of the organisation

10.6.2.1 Introduction

In this chapter it was seen that in the Netherlands strong guarantees have been put in place to ensure the independence of environmental enforcement within the administrative organisation, including that of the environment offices, with formal legal bases and accountability rules in place. This has been implemented in the enforcement organisation of the administrative authorities. Potential issues of scale, which can obstruct independence within an enforcement organisation, are considered solvable, and have in fact been solved in particular through the creation of the environment offices.

10.6.2.2 Separation regulatory functions and enforcement

In the Netherlands, the enforcement powers are attributed to the public authorities that also have the power to give out permits and perform other regulatory functions. There is a strong awareness – with the legislator – of the pitfalls of combining regulatory functions with enforcement functions in terms of possible regulatory capture. This is clear in the fact that an obligation to separate these functions is laid down in the law, and further prescribed in informal quality criteria. This separation in person – the functions need not necessarily be different – is to be pursued by all administrative authorities that are tasked with the enforcement in particular of legal rules pertaining to installations. The evaluation of this requirement has shown that all decentralised administrative authorities that are tasked with enforcement pursue this separation. This awareness is, moreover, apparent in the requirement that a person that has been appointed as an inspection officer under the General Provisions Environmental Law Act is not to be continually responsible for the inspection of non-compliance with regard to the same installation.

The fact that these obligations are laid down in the law and apply to all administrative authorities for environmental enforcement provides a strong guarantee of consistency for the benefit of effective enforcement. The creation of the environment offices has

provided a strong guarantee that issues of scale that could occur with the smaller municipalities, for example, do not stand in the way of achieving the guarantees of independence in administrative enforcement.

10.6.2.3 Separation inspection/investigation and sanctioning

Administrative authorities

In the Netherlands, the administrative authorities are not required to ensure the separation between inspection and sanctioning functions in case of sanctions that are not punitive sanctions.[1800] It is quite common in practice that separate enforcement officers deal with inspection and with sanctioning, respectively, within the administrative authorities or within the environment offices.

The separation is only required where it concerns the imposition of the administrative fine or the administrative criminal decision, above a threshold of 340 Euros. Although the level of nearly all these sanctions surpasses this threshold, this separation requirement has a limited application as the competence to impose the administrative fine or the administrative criminal decision is limited.[1801] Even so, the rules require a structural separation within the administrative authorities between the officials that have been mandated the power to impose the sanction and the officials that are in charge of the inspection/investigation. As this requirement is laid down in binding rules, i.e. the law for the administrative fine, and binding policy rules with external effect for the administrative criminal decision, this ensures strong guarantees against prosecutorial bias and consistency for the benefit of effective enforcement.

Besides this, a separation occurs between investigation and prosecution, where the administrative authorities employ inspection officers that are also appointed for the investigation of criminal offences (the special investigative officers).[1802] Where the investigative officers find criminal offences for which the criminal authorities can impose sanctions, they hand over the case to the Public Prosecutor. This is a positive aspect for avoiding prosecutorial bias.

Criminal authorities

Within the Public Prosecutor's Office, the officials dealing with overseeing the investigation by the police and the prosecution of offences may also propose a criminal sanction, as alternative to prosecution, and oversee its execution. This has been criticised as uncalled for function cumulation. Prosecutorial bias may occur due

1800 I.e. reparatory sanctions, which are sanctions that aim to repair a contravention, such as the order subject to administrative coercion or the order subject to a coercive fine.

1801 For more on this see the next chapter on sanctions.

1802 The Dutch administrative authorities are not also prosecuting authorities of environmental criminal offences.

to this cumulation. There is a specific legal obligation that provides a guarantee against prosecutorial bias, as the law requires the Public Prosecutor to include exculpatory evidence in the criminal file he puts together. As it is a legal obligation, the Public Prosecutor can be called out on a lack of exculpatory evidence in court, and a case can be considered inadmissible because of it. In other words, the Public Prosecutor can be held accountable. Therefore, this legal obligation and its enforceability provide a guarantee against bias.

10.6.3 Specialisation

10.6.3.1 Expertise

In the Netherlands there is no single authority dealing with all enforcement with respect to all of the environmental law in force. Moreover, nearly all enforcement authorities are also in charge of tasks in other areas of law. However, for the benefit of effective enforcement, developments have ensured specialisation. These benefits are highlighted below.

Administrative authorities

The administrative authorities that are competent for environmental enforcement are not necessarily specialised as they are part of the regular administration. Although enforcement is considered one of the core tasks of the administration, the authorities are not solely competent for this purpose. However, the environment offices that have been put in place by the provinces and municipalities provide expertise for the enforcement of environmental protection. This specialist organisation will generally prepare the sanctioning decisions before a less specialised municipality or province takes the final decision to impose the sanctions. In a few cases of environmental non-compliance, this specialist organisation has independent powers to sanction environmental non-compliance.

The development of the environment offices in the Netherlands has brought several benefits for building expertise for enforcement. Even though the offices are executive and have no power to sign most enforcement decisions, their institution has been an improvement in terms of assembling the expertise with regard to environmental enforcement in one place. Moreover, it is a good practice that expertise – including education and funding of specific enforcement officers – is deemed a quality criterion in the Netherlands, which is laid down in the law and statutory regulations that bind the administrative authorities, and also applies to the environment offices. By laying down such a criterion in legal rules, such an element is to be structurally implemented and the authorities are accountable. This also enhances the consistency of the enforcement organisation for the benefit of effective enforcement.

Criminal authorities

a. Police
The Dutch police, who cover most of the investigation into the more serious environmental criminal offences, also provide structural specialisation, i.e. specialisation implemented within the structure of the organisation. There are environmental teams as part of the ten regional police teams and an environmental criminal investigation department as part of the national police. These structural guarantees are beneficial to effective enforcement by the police.

b. Public Prosecutor
The Dutch Public Prosecutor is semi-specialised in environmental criminal cases, as the Functional Office, which has environmental crime as one of its focus points, handles such cases. This specialisation is therefore structurally guaranteed within the organisation. This is beneficial to ensuring expertise for effective enforcement.

c. Criminal courts
The Dutch criminal courts are required by law to hear economic criminal offences in special economic chambers. These cases include environmental economic offences. As described, the courts can be held accountable for (not) providing such chambers with specialised judges. This is a very strong guarantee for ensuring that there is expertise when environmental cases are heard before these courts.

10.6.3.2 Appropriate proximity: level of government

Administrative authorities
In the Netherlands, there is proximity of the administrative enforcement authorities to the local circumstances through the fact that the municipalities have primacy for the administrative enforcement of environmental law. Moreover, the regional environmental executive offices are required by law to take into account the local circumstances when preparing a sanctioning decision for the municipalities. The criteria on the enforcement organisation and enforcement policies are laid down in the law and, for example, in the countrywide enforcement strategy are beneficial as they provide consistency in this decentralised enforcement.

Investigative officers
The special investigative officers that investigate non-compliance that warrants a punitive sanction are stationed as officers with the local authorities, thus ensuring proximity. Where the police are involved in investigation, the investigative officers are part of ten regional police teams, ensuring a relative proximity to the non-compliance. This is beneficial to effective enforcement.

Public Prosecutor

The Dutch Public Prosecutor relies on the information gathered by the more local police, as well as the investigative officers stationed with the local authorities. Moreover, cooperation between the administrative authorities and the Public Prosecutor is arranged, among others, as part of the countrywide enforcement strategy, on choosing enforcement for specific non-compliance. Also, the administrative authorities are required to relay relevant information to the Public Prosecutor. This is beneficial for effective enforcement by the Public Prosecutor, as the Public Prosecutor will be able to gain knowledge on relevant (local) circumstances of non-compliance through the police and the administrative authorities.

10.6.4 Coordination and cooperation between the enforcement authorities

As described previously in this chapter, conflicts of competences hardly occur anymore between the enforcement authorities, in particular administrative authorities, in the Netherlands.[1803] This is a benefit of the environmental enforcement organisation in the Netherlands; in particular of the way it is regulated in the law.

In addition to this, as described, there are several mechanisms in place for the coordination between administrative authorities and the cooperation between all enforcement authorities on environmental enforcement. These mechanisms compel and enhance the coordination and cooperation between the enforcement authorities. Through these mechanisms the effectiveness of this enforcement is, therefore, further supported. This is further detailed below.

Coordination between administrative authorities

The mechanisms in place for the coordination between the administrative enforcement authorities consist, primarily, of legal obligations. There are legal obligations for the administrative enforcement authorities to coordinate with other authorities, to have in place an enforcement policy, and to cooperate with other administrative authorities on the enforcement policy of the environment offices.

It is a benefit of these mechanisms that they bind the authorities, through the fact that they are laid down in legal rules. Due to this, these mechanisms provide strong guarantees that there is a standardised coordination between administrative authorities, and ensure a structural and consistent coordination. Considering the substance of these mechanisms, coordination is, moreover, ensured from the outset by building relationships between authorities before enforcement takes place. As mentioned, connected to this, the creation of the environment offices in the Netherlands has enabled and enhanced the coordination between the administrative authorities. These are positive aspects of the environmental enforcement organisation in the Netherlands.

1803 As described in the previous chapter, environmental protection legislation also contains provisions on its enforcement.

Cooperation between enforcement authorities

There are also good mechanisms in place for the cooperation between the administrative enforcement authorities and the criminal authorities, as well as between the criminal authorities themselves. The legal obligations for the administrative authorities to make best efforts for coordination, and to draw up an enforcement policy, also require the administrative authorities to seek coordination with the criminal authorities and their cooperation of the criminal authorities.

Unfortunately, there is no requirement in the law for the criminal authorities to participate where the administrative authorities approach them or to seek such coordination and cooperation. Therefore, the law with respect to these requirements does not bind the criminal authorities to cooperate. There are, however, other mechanisms that do ensure that participation and cooperation of the criminal authorities with the administrative authorities. One such type of mechanism that is the result of cooperation, and, moreover, stimulates such cooperation for environmental enforcement is the cooperated enforcement strategies that are the countrywide enforcement strategy *(Landelijke Handhavingsstrategie*) drawn up by the administrative authorities and the Public Prosecutor's Office, and the countrywide enforcement strategy for installations dealing with hazardous matter (*BRZO-inrichtingen*).

Moreover, the consultation mechanisms – the Strategic Environment Chamber, the Administrative Environment Deliberation, and the National Environment Information Consultation – bring together the enforcement authorities. These mechanisms do ensure a structural coordination between the authorities and therefore are able to provide a benefit to effective enforcement.

The cooperation or at the least the communication between the entities responsible on their respective roles and strategies is necessary considering – as explained previously – often both criminal and administrative enforcement authorities may be competent with regard to a single instance of non-compliance, as the non-compliance with administrative norms is often also an (economic) criminal offence.

It is a benefit of these mechanisms that they bind the authorities, in particular through legal rules. Due to this, these mechanisms provide strong guarantees that there is a standardized coordination and cooperation between enforcement authorities, and a structural and consistent coordination and cooperation is ensured. Considering the substance of these mechanisms, coordination and cooperation is, moreover, ensured from the outset by building relationships between authorities before enforcement takes place.

10.7 Findings

This chapter described and evaluated the organisation of the administrative and criminal authorities for the public enforcement of environmental law in the Netherlands. In this section a summary of findings from the evaluation is presented. The lack of priority previously given to environmental enforcement and the lack of cooperation between the criminal authorities and the administrative authorities triggered several changes with regard to the enforcement organisation in the Netherlands. These developments have strengthened the enforcement organisation in terms of its ability to fulfil the institutional requirements for effective enforcement that were formulated in chapter 2 and discussed above. Several positive aspects and disadvantages of the current public enforcement organisation in the Netherlands were noted. What stands out from the analysis is that, in the Netherlands the public enforcement organisation as a whole is very able to fulfil the institutional requirements for effective enforcement. The aspects that stand out most prominently from the analysis are set out below.

Aspects that are general to the whole enforcement organisation are as follows:

- Many aspects of the organisation are laid down in legal rules or in policy rules that are binding upon the authorities. Specifically, legal rules determine (a certain level of) decision-making independence of the enforcement organisation; the expertise within the enforcement organisation; and the coordination and cooperation between enforcement authorities. This, therefore, covers nearly all the institutional requirements for effective enforcement formulated in chapter 2.
- There are many structural guarantees, i.e. aspects that have been implemented in the structure of the organisation to enable effective enforcement. Such structural guarantees provide a great benefit to enforcement as they provide consistency to the organisation as standardised elements of the enforcement by that organisation. These are strong guarantees.
- Considering the way the enforcement organisation, and in particular the competence of the administrative authorities, is regulated by the law, it is not likely that there will be many competence conflicts. The law has intended to be clear and transparent for this purpose.

Specific aspects of the enforcement organisation that stand out with regard to effective enforcement are as follows:

- Among the legal obligations are the personal and functional separation between regulatory tasks and enforcement tasks within the authorities, and the personal separation for a specific category of punitive sanctions, between inspection and the imposition of these sanctions. These structural guarantees contribute to effective enforcement.

- The creation of the environment offices has provided an extra dimension to the administrative enforcement organisation. Issues of scale that have impacted the administrative authorities, for example, blocking expertise building, have been solved through the creation of environment offices. One of the positive aspects that is practicable in administrative enforcement because of the creation of the environment offices is the legal requirement to not have the same inspection officer in charge of the same business for too long. This stands out as a positive aspect for avoiding regulatory capture, which benefits effective enforcement.
- Also the other quality standards laid down in legal rules – the process criteria – are better guaranteed by the environment offices than by the administrative authorities individually, such as, for example, the requirement of sufficient resources for enforcement. Moreover, the environment offices can fulfil the requirement of sufficient expertise for the imposition of the administrative criminal decision. These aspects also support effective enforcement.
- As mentioned previously, there are several mechanisms that further support the strengths of the enforcement organisation, through providing obligations for, in particular, the administrative authorities to coordinate and cooperate on enforcement. These mechanisms stand out, as they support effective enforcement.
- It is a disadvantage that the criminal authorities are not obligated to participate in coordination and cooperation on enforcement with the administrative authorities by law. The need for such coordination and cooperation likely occurs quite often considering the fact that in the Netherlands administrative non-compliance is often also a criminal (economic) offence. The creation of such an obligation would, therefore, be a benefit to effective enforcement.
- The mutual countrywide enforcement strategy for environmental non-compliance could soften this disadvantage to a certain extent. Also the consultation bodies that bring together to administrative and criminal authorities can provide a certain counterweight to this disadvantage. As a forum of consultation and exchange of information between the enforcement authorities, these bodies may give a certain support and benefit to effective enforcement.
- The legal obligation for the Public Prosecutor laid down in the law to include exculpatory evidence in the file of evidence provides a certain guarantee against prosecutorial bias. It is, in particular, a benefit that the Public Prosecutor is accountable in court where he does not comply with this obligation. This obligation, therefore, stands out as beneficial to avoiding bias, and supports effective enforcement in that respect.

Notwithstanding the positive aspects, the enforcement authorities in the Netherlands would benefit from the introduction of certain elements for the purpose of effective enforcement. An element that stands out, in connection to what has been described above, is the following:

- It would benefit effective enforcement to require that the coordination and cooperation on enforcement between the administrative authorities and the criminal authorities is mutual.

As described in chapter 2, an effective enforcement organisation can exercise its effectiveness in particular when it is provided with effective sanctions. The sanctions that could (potentially) be chosen by the enforcement authorities and their potential for effectiveness are discussed in the next chapter.

Chapter 11 Sanctions for Public Enforcement of Environmental Law in the Netherlands

11.1 Introduction; developments with regard to the sanctions toolbox; addressee of a sanction

11.1.1 Introduction

In this chapter, it is described what sanctions are available to the enforcement organisation described in the previous chapter. As described previously, there are two types of enforcement in the Netherlands: administrative enforcement and criminal enforcement.[1804] Besides this, also a sanction exists for the enforcement of environmental law – the administrative criminal decision – that is a hybrid of administrative and criminal enforcement. This sanction is in the hands of the administrative authorities.[1805]

In the Netherlands, non-compliance with environmental law is an administrative contravention and, very often, also a criminal offence, specifically an economic criminal offence, and possibly also a common criminal offence. Environmental non-compliance can therefore be sanctioned on the basis of three sets of sanctions, one exercised by the administrative authorities for non-compliance with environmental law, the other two exercised by the criminal authorities for economic environmental offences and common criminal environmental offences, respectively.

In this chapter, the sanctions are discussed as follows. First, the administrative sanctions are described (11.2). This includes the administrative fine, a punitive administrative sanction in the hands of the administrative authorities. Second, the specific sanction of the administrative criminal decision that is a hybrid of administrative and criminal enforcement is discussed separately (11.3). Third, the criminal sanctions are highlighted (11.4). As the sanctions for economic environmental offences and common criminal environmental offences are quite similar, these will be discussed together in that section. Following this, the possibility for a combination of administrative sanctions and criminal sanctions for non-compliance is assessed. In doing so, also the relationship between the administrative and the criminal enforcement of environmental law is addressed (11.5). The chapter closes with the evaluation of the sanctions on the basis of the evaluative framework that was presented in chapter 2 (11.6) and findings (11.7).

1804 See chapter 9, section 9.5.
1805 The sanction will be further discussed below in this section.

Before proceeding to this, however, two aspects that pertain to administrative and criminal sanctions are described below in this section. First, a short overview is given of several interesting changes in the sanctions toolbox of the administrative and criminal authorities. Second, the aspect of the addressee of a sanction is described. In the Netherlands, this is a common concept for administrative and criminal enforcement. This aspect is interesting to highlight here, as it provides a very clear and broad scope to the applicability of the sanctions that will be described in this chapter.

11.1.2 Changes in the sanctions toolbox

The catalysts and developments described in chapter 9 have spurred on changes of and within the sanctions toolbox available for administrative enforcement and criminal enforcement. Two themes can be recognized for sanctions as relevant for (more) effective environmental enforcement in the Netherlands: the improvement of the sanctions' toolbox, and their use, and the redevelopment of the relationship between administrative and criminal enforcement. These themes follow especially from the changes in the toolbox of the administration and the toolbox of the Public Prosecutor. These changes will be highlighted in short, in the following.[1806]

With regard to the administrative sanctions, the existing instruments in the hands of the administrative authorities were focussed upon reparation of the environment. In fact, in the Netherlands, according to the Countrywide Enforcement Strategy, administrative enforcement action is focussed mainly on the reparation of the situation at hand and criminal enforcement action mainly on punishing the offender and taking away illegal gains.[1807] However, this meant that the administration did not have in its toolbox sanctions for situations in which the environmental damage was permanent and could not be repaired. Although the criminal authorities could deal with this, this presented a limit to the reaction administrative authorities could give to non-compliance, and cooperative challenges with the criminal authorities as well as a burden on them where non-compliance required both reparatory and punitive sanctions. As a result, options to introduce punitive sanctions into administrative enforcement were investigated, including the option of introducing the administrative fine (*bestuurlijke boete*) for the enforcement of environmental law. In spite of the attention given to the administrative fine as the potential solution to the enforcement deficit during the 1990s, the administrative fine was not introduced

1806 The themes and development impacting the organisation for enforcement are described in chapter 10 on the enforcement organisation in the Netherlands.

1807 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 6. Available at https://www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

on a broad scale for the enforcement of environmental law.[1808] Only in recent years it was introduced in several specific areas of environmental protection, primarily in relation to European obligations, in particular emissions trading and the protection of endangered species against trade, as well as, separate from European obligations, in case of non-compliance with building regulations.[1809]

While the administrative fine was investigated as a potential instrument for environmental enforcement only theoretically, in 2000, a pilot for the instrument of the administrative transaction (*bestuurlijke transactie*) was started, whereby the administrative authorities could offer a transaction to avoid prosecution for certain criminal offences. The transaction was almost directly derived from the Code of Criminal Procedure, which meant that the General Administrative Law Act did not apply to it. Although the pilot was extended year after year and the reviews were positive, the instrument was replaced in 2012 by the administrative criminal decision (*bestuurlijke strafbeschikking*). This instrument goes one step further than the transaction, as it is an act of prosecution, instead of an act to avoid prosecution.[1810]

The administrative criminal decision for the environment was instigated by the need, established in 2008, to rearrange the role of the administration and the Public Prosecutor in environmental enforcement.[1811] It was considered a bottleneck that the administrative authorities could not impose punitive sanctions for simple offences, which would warrant independent action by the administration by their nature and from the viewpoint of the division of tasks between the administration and the Public Prosecutor.[1812] Due to the establishment of the regional executive environment offices (described in the previous chapter) the expected increase in professionality and expertise of these organisations led to the belief that the administration could come to possess a criminal instrument which would allow the criminal actors to focus upon serious environmental crimes.[1813]

Both the administrative fine and the administrative criminal decision fulfil the definition of 'administrative sanction' contained in the GALA: an administrative sanction (*bestuurlijke sanctie*) is an obligation imposed or a claim remitted by an administrative authority due to a contravention.[1814] However, there is an important contrast between the two punitive sanctions in the hands of the administrative authorities. The administrative fine completely fulfils the definition of administrative enforcement in chapter 1, i.e. administrative enforcement is carried out by administrative authorities by means of powers attributed and instruments provided

1808 See Mein 2016, p. 43-100; also, for example, Michiels 1994; Jurgens & Michiels 1997.
1809 In section 11.2.4 below, the instrument of the administrative fine is further described.
1810 The sanctions will be further described in section 11.2.4 and 11.3 below.
1811 See Commissie Mans 2008, p. 46-47 and p. 56-57.
1812 See Commissie Mans 2008, p. 41-42.
1813 Kamerstukken II 2008-2009, 29 383, 130; *Nota van toelichting. Wijziging Besluit OM-afdoening* (Staatsblad 2012, 150).
1814 In Dutch: 'Een door een bestuursorgaan wegens een overtreding opgelegde verplichting of onthouden aanspraak.'

in administrative law and according to administrative procedure. The administrative criminal decision (*bestuurlijke strafbeschikking*) that is in the hands of the administrative authorities is actually considered criminal enforcement in the hands of the administration.[1815] Therefore, the sanction is essentially a hybrid that does not fall within either of the definitions of administrative enforcement or criminal enforcement explained in chapter 1, section 1.3. However, because the instrument derives most of its characteristics from the criminal law, it fits best in the definition of criminal enforcement, i.e. criminal enforcement is applied by criminal authorities by means of powers extended through criminal law and according to criminal procedure. While the administrative authorities are not criminal authorities, the criminal power to impose the administrative criminal decision is extended through the Code of Criminal Procedure and the sanction is applied and appealed according to criminal procedure.[1816] Below, the administrative criminal decision will be discussed separately, as hybrid, in section 11.3.

For criminal enforcement, the sanctions in the hands of the criminal enforcement authorities also developed. The Public Prosecutor has become, for environmental enforcement, a stronger independent enforcer beside the judiciary, with an expanded toolbox to sanction environmental offences. The power to offer a transaction had been conferred upon the Public Prosecutor and the police in 1994 to realize more tit-for-tat enforcement. In 2008, the set of independent criminal sanctions of the Public Prosecutor was expanded to include the criminal decision, which finalised a non-consensual penalty for criminal offences without a criminal trial.[1817] For the administrative criminal decision by the administrative authorities, the Public Prosecutor plays an important supervisory role.[1818] As a result, also the relationship between administrative and criminal law has become more important. This relationship is further described in section 11.4 of this chapter.

11.1.3 Addressee of a sanction: the offender

An important aspect in the applicability of administrative and criminal sanctions is the addressee of the sanction, i.e. the offender that may be imposed a sanction.

1815 See e.g. *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019); *Kwaliteitscriteria 2.1*, 7 september 2012, p. 12, available at www.infomil.nl/publish/pages/75656/kwaliteitscriteria_2_1.pdf (last visited 1 June 2019); also Keulen 2016, p. 16.

1816 It is interesting in this respect that the administrative authorities are considered criminal authorities in England and Germany where they prosecute and impose criminal sanctions, respectively. The administrative criminal decision is not the same as the German regulatory fine, as the latter has its own set of criminal procedural rules that apply to every aspect of the imposition of this sanction. By its content, however, these sanctions are quite similar as both are monetary sanctions.

1817 Section 257a Code of Criminal Procedure.

1818 More on this below in section 11.4.

This aspect is highlighted in this section, as, in the Netherlands, the concept of the addressee of the sanction is quite similar for administrative and criminal sanctions. Where deviation is possible for individual sanctions, this will be discussed in the specific sections for these sanctions below.

In the Netherlands, the concept of the addressee of the sanction – the offender – is quite similar for administrative enforcement and for criminal enforcement.[1819] Natural persons and legal persons can commit non-compliance, including criminal offences.[1820] The concept of the offender is broad. This means that the addressee of the legal norm that has been breached is only the starting point for assessing the offender. The concept of the addressee is also not necessarily restricted to only the natural or legal persons that physically committed the non-compliance. An offender may also be those natural or legal persons that have participated in committing non-compliance (*medeplegen*), and also those natural or legal persons that may be deemed responsible for the non-compliance.[1821] This also includes persons that ordered the activities that led to non-compliance, but did not carry them out, or persons that were competent and able to prevent non-compliance, but that accepted the likelihood (*aanmerkelijke kans*) that non-compliance would occur (*feitelijk leidinggever*).[1822] Where the addressee of the norm that has been breached is a legal person, the above means that sanctions may be imposed on, and criminal prosecution may be instigated against:

a. the legal person;
b. the legal person and also persons that ordered the activities or that were competent and able to prevent non-compliance; or,
c. solely the persons that ordered the activities or that were competent and able to prevent non-compliance.[1823]

Moreover, even where the addressee of the legal norm that has been breached is a natural person, a legal person may be imposed a sanction for this non-compliance, where the activities that have caused non-compliance have taken place within the realm of the legal person.[1824]

Moreover, where the addressee of the legal norm that has been breached is a natural person, a sanction may be imposed on a legal person for this non-compliance, or a criminal prosecution instigated against such a person, where the activities that have

1819 For crimes, culpability is commonly required. See further below, section 11.4.2.

1820 Section 5:1(2) and (3) General Administrative Law Act and section 51 of the Criminal Code.

1821 Section 5:1(2) General Administrative Law Act, see also ABRvS 4 May 2015 ECLI:NL:RVS:2015:288; ABRvS 3 July 2002 ECLI:NL:RVS:2002:AE4856; ABRvS 23 March 2005 ECLI:NL:RVS:2005:AT1966; ABRvS 7 November 2001 ECLI:NL:RVS:2001:AD5810.

1822 Section 5:1(3) General Administrative Law Act in conjunction with section 51(2) and (3) of the Criminal Code. See ABRvS 20 April 2016 ECLI:NL:RVS:2016:1065; HR 26 April 2016 ECLI:NL:HR:2016:733.

1823 Section 51(2) Criminal Code; see also section 2.9 *Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv)*, for the administrative criminal decision.

1824 See HR 21 October 2003, ECLI:NL:HR:2003:AF7938; CBb 3 June 2014, ECLI:NL:CBB:2014:200.

caused non-compliance have taken place within the realm of the legal person.[1825] In addition, for criminal enforcement, the culpability of the offender is commonly required for crimes – as opposed to violations – to instigate a criminal prosecution and impose criminal sanctions upon natural or legal persons. This will be further explained in section 11.4.2 below.

11.2 Administrative sanctions

11.2.1 Introduction/definitions

In this section the sanctions that the administrative authorities can impose – as administrative enforcement – for non-compliance with environmental law will be described.[1826] The General Administrative Law Act defines an administrative sanction (*bestuurlijke sanctie*) as an obligation imposed or a claim remitted by an administrative authority due to a contravention.[1827] For the enforcement of environmental law to which this research relates[1828], the toolbox of the administrative authorities contains the following administrative sanctions: the order subject to administrative coercion (*last onder bestuursdwang*), the order subject to a coercive fine (*last onder dwangsom*), the revocation of an advantageous decision (*intrekking van een begunstigende beschikking*), and the administrative fine (*bestuurlijke boete*).[1829]

Some of these sanctions are specific to a certain environmental statute or non-compliance, others have a more general application to environmental non-compliance. The orders subject to administrative coercion or a coercive fine have the broadest application across the environmental arena. The order to return or release and the administrative fine have the most limited application. Both types of order decisions and the instrument of revocation are most commonly attributed to the competent authorities for environmental enforcement.

The orders subject to administrative coercion or a coercive fine and the administrative fine have a general regulation in the GALA. This includes the definition of their nature, a definition of each instrument, and rules on their imposition, execution and preventive or combined application. The other sanctions do not have a general regulation in the GALA, but are regulated in the environmental acts themselves. The sanctions will now be further described.

1825 See HR 21 October 2003, ECLI:NL:HR:2003:AF7938.

1826 Specifically the environmental statutes mentioned in chapter 9.

1827 In Dutch: 'Een door een bestuursorgaan wegens een overtreding opgelegde verplichting of onthouden aanspraak.'

1828 Listed in chapter 9, section 9.4.

1829 As explained in section 11.1, the administrative authorities can also impose the hybrid administrative criminal decision; this sanction is discussed in a separate section.

The set of sanctions available to the administrative authorities for the enforcement of environmental law consists of primarily reparatory sanctions. According to the GALA, reparatory sanctions aim to entirely or partly counteract or put an end to non-compliance, prevent repetition of non-compliance, or take away or limit the consequences of non-compliance.[1830] As mentioned, the past ten years have seen the addition of punitive sanctions to the toolbox of the administrative authorities, instigated by European obligations and the call for effective enforcement. The GALA defines punitive sanctions as administrative sanctions that aim to impose a burden upon the offender.[1831]
In the table below an overview is given of the administrative sanctions that are available for the enforcement of non-compliance with environmental law.

Overview of administrative sanctions

- The order subject to administrative coercion
- The order subject to a coercive fine
- The revocation of an advantageous decision
- The administrative fine[1832]

11.2.2 The orders subject to administrative coercion or a coercive fine

The order subject to administrative coercion and the order subject to a coercive fine are the general enforcement instruments that may nearly always be imposed for non-compliance with environmental law. The substantive (and harmonised) regulation of these two sanctions in the General Administrative Law Act establishes that these instruments are administrative reparatory sanctions. These two sanctions are closely connected.

11.2.2.1 The order subject to administrative coercion

Substance of the decision

The order subject to administrative coercion (*last onder bestuursdwang*) is a reparatory sanction consisting of, one, an order to entirely or partly repair non-compliance, and, where the order is not (timely) executed, two, the power of the administrative authority to execute the order by physical action.[1833] The order may require the offender to put an end to non-compliance, prevent its repetition and/or remedy or limit its consequences.[1834]

1830 Section 5:2(1)(b) General Administrative Law Act.
1831 Section 5:2(1)(c) General Administrative Law Act; previous to the fourth amendment to the General Administrative Law Act, which implemented this definition and the regulation of the administrative fine in the General Administrative Law Act in 2009, there was extensive case law on the topic, which also referred to the concept of individual (financial) disadvantage, see e.g. ABRvS 27 March 2002 ECLI:NL:RVS:2002:AE0721.
1832 As explained in section 11.1, the administrative authorities can also impose the hybrid administrative criminal decision; this sanction is discussed in a separate section.
1833 Section 5:21 General Administrative Law Act.
1834 Per its qualification as a reparatory sanction, as can be seen in the definition laid down in section 5:2(1)(b) General Administrative Law Act.

The order must mention the non-compliance and the legal rules that have been breached. The order must clearly specify unconditionally what the offender must do. The principle of legal certainty plays an important role in the formulation of the order. It dictates, for example, that the order may not be used to specify an open norm, such as a duty of care (*zorgplicht*).[1835] As explained in chapter 9, enforcement is (only) possible where the activities or lack thereof are an unequivocal (*onmiskenbaar*) breach of the duty of care.[1836] As duties of care are increasingly used, this aspect is especially important for the administrative authorities to keep an eye on, in particular when such duties of care have not (yet) been made more specific with made-to-measure rules. This also means that it needs to be clear to the addressee of the norm what constitutes non-compliance, before a sanction is imposed. Moreover, also where the norm is clear, the order needs to be as specific as possible.
The decision that imposes the order upon the offender normally includes a time limit within which the offender must comply with the order.[1837] This time limit must be reasonable to allow the offender to comply with the order. However, the time limit must not be so generous that it can in fact be seen as a decision not to enforce in practice. In case of (some) urgency, the authority may grant a (very) short compliance term, even for one day. Exceptions to setting a compliance term are discussed below.
The decision is to be notified to the offender, to those with legal rights to the use of the object with respect to which the administrative coercion will be applied – typically the owner – and to those that have requested enforcement action from the administrative authority, through sending them the decision or by handing it to them, or in another appropriate manner.[1838] The order subject to administrative coercion may be complied with by any actor that is capable of doing so.

Options for application of this sanction

As described above, the 'regular' order subject to administrative coercion consists of a decision containing an order and a compliance term imposed when non-compliance has occurred. In urgent cases or where an offender cannot be found, other options of application of this sanction exist.
In urgent cases, where non-compliance takes place and is about to cause serious environmental damage, to prevent environmental disaster a decision to apply administrative coercion may be made without an order, but still be notified to the persons concerned (section 5:31(1) Gala). However, it may be that the situation of non-compliance is so urgent that notification cannot be awaited and immediate action is necessary. In such cases of particular urgency, it is possible to apply administrative

1835 See chapter 9, section 9.3.2.2.
1836 ABRvS 10 August 2011 ECLI:NL:RVS:2011:BR4631.
1837 Section 5:24(2) General Administrative Law Act.
1838 Section 5:24(3) and section 3:41(2) General Administrative Law Act.

coercion without a decision laying down the order, the notification of the persons concerned, or a time limit.[1839]An example of such an urgent case was the incident concerning a large fire at Chemie-Pack, an industrial plant dealing with hazardous substances, described in chapter 9, section 9.3.2.1. The water used to extinguish the fire was heavily contaminated and flowing into nearby ditches. The regional water authority took the decision to apply administrative force immediately, without allowing the company itself time to rectify the situation. To prevent an environmental disaster from occurring as a result of the discharge of the heavily contaminated fire extinguishing water into the surface waters that was already happening, the regional water authority immediately started cleaning up.[1840]

> In the situation of Chemie-Pack, criminal prosecution followed for endangering the environment in this way. The director and two managers of the company were sentenced to community service and a temporary prohibition to engage in their profession for the non-compliance with the permit rules.[1841]

Moreover, where non-compliance has not yet occurred but a threat of non-compliance is apparent (*dreiging van klaarblijkelijk gevaar*), a decision containing an order subject to administrative coercion can be imposed, or administrative coercion applied.[1842] The rules for the preventive decision-making and preventive application of the sanction were first developed in case law and have been laid down in the GALA since 2009. A threat of serious damage need not be apparent.[1843] An apparent threat of non-compliance is deemed present where it can be established that it is to a large extent likely (*grote mate van waarschijnlijkheid*) that non-compliance will occur.[1844] This is the case, for example because of a newspaper announcement of a black market, when there is a fire and it is likely that polluted fire extinguishing water is on the road about to flow into the sewer,[1845] or when it is to be assumed that there will

1839 Section 5:31(3) General Administrative Law Act.

1840 See Rechtbank Breda, 21 April 2011 ECLI:NL:RBBRE:2011:BQ2058.

1841 See Gerechtshof Breda, 22 April 2016 ECLI:NL:GHSHE:2016:1593, ECLI:NL:GHSHE:2016:1594, ECLI:NL:GHSHE:2016:1596 and ECLI:NL:GHSHE:2016:1597. See for the full legal dossier pertaining to Chemie-Pack www.rechtspraak.nl/Uitspraken-en-nieuws/Bekende-rechtszaken/Chemie-pack (last visited 1 June 2019).

1842 Section 5:7 General Administrative Law Act. Note this is different from what is called 'preventing the repetition of non-compliance' as one of the aspects of an administrative reparatory sanction in section 5:2(1)(b) General Administrative Law Act. See also Borman & De Poorter 2017, p. 417.

1843 Kamerstukken II 2003-2004, 29702, nr. 3, p, 90.

1844 ABRvS 24 May 1995 ECLI:NL:RVS:1995:AN4430.

1845 ABRvS 29 September 2000 ECLI:NL:RVS:2000:AH6942. This is a different case than the Chemie-Pack case mentioned previously. In this case, the water from extinguishing a burning truck loaded with agricultural pesticides had landed on the road and would likely flow into the sewer. To prevent this from happening, the administrative authority took immediate action and blocked all openings to the sewer on the road. After taking this action, the authority claimed the costs from the owner of the truck. The court assessed that this was a situation that the preventive application of administrative coercion had been appropriate.

be no voluntary compliance, for example when the history of the persons involved shows that with regard to previously imposed sanctions (on the subject of the same contravention) neither previous warnings nor the compliance term had any effect. The latter can occur, for example, where a permit has been or is to be revoked due to the behaviour of the permit holder in running an installation. This revocation may then be combined or followed up with a preventive order subject to administrative coercion. Another possible combination with an eye to prevention for the future is the 'regular' order subject to administrative coercion with the preventive order subject to a coercive fine with regard to future non-compliance.[1846]
Therefore, besides the 'regular' or the preventive order subject to administrative coercion, consisting of a decision containing an order and a term, it is possible for the administrative authorities to impose a decision to apply administrative coercion without an order or a term, or to engage in administrative coercion without a decision preceding it.

The application of administrative coercion
When the order is not complied with, the authorities may – without the need for a separate executive decision – proceed to taking physical action to repair the non-compliance. This physical action can, for example, consist of the authorities demolishing an illegally built construction, removing illegally dumped waste or shutting down an establishment. The authorities may for this purpose employ a third party, for example a building contractor to break down illegal constructions. To apply administrative coercion the administrative authority disposes of a number of powers. These are the powers to enter any place, to seal certain spaces, as well as the powers to confiscate, store and/or sell, and destroy certain goods.
To prevent non-compliance from continuing or repeating, the administrative authority may place buildings, sites and anything in or on them under seal.[1847] This includes, for example, the machines that have contributed to the non-compliance. Breaking a seal is a crime punishable pursuant to section 199 of the Criminal Code.[1848] The authorities may also temporarily close down activities or vehicles, until non-compliance has been remedied and there is compliance.[1849]
The power to apply administrative coercion also includes a competence for the authority to confiscate and store goods susceptible thereto if this is necessary for the purposes of coercive action.[1850] Goods are tangible objects subject to human

1846 For more on the preventive order subject to a coercive fine, see the next section.
1847 Section 5:28 General Administrative Law Act.
1848 Borman & De Poorter 2017, p. 472.
1849 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 16. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).
1850 Section 5:29 General Administrative Law Act.

control.[1851] These are for example the materials left over from the demolition by the authority of an illegal construction, illegally stored waste material or the sound equipment with which noise regulations are violated.[1852]
The administrative authority shall arrange for the safekeeping of the stored goods. The task of safekeeping implies the duty to take reasonable measures to maintain the stored goods and to take care of livestock taken away.[1853] The confiscated goods are to be returned to the person entitled to them upon payment of the costs of administrative coercion – if the entitled person is the offender – or upon the payment of the costs of safekeeping.[1854]

Recovery of costs

As a rule, the offender is to pay the costs of the administrative enforcement action taken by the administrative authority, including the costs for the preparation of this action made after the time limit to fulfil the order has passed.[1855] This is irrespective of culpability of the offender. Costs for the preparation pertain, for example, to the costs of the officers of the authority negotiating with contractors on the best contract for tearing down an illegally built construction. This means that even if the order is finally complied with, where preparatory costs have already been made, after the time limit to fulfil the order has passed, these may still be recovered. The General Provisions Environmental Law Act explicitly provides that the costs made for managing waste with respect to which has been acted in breach of the Act or the Environment Management Act can be claimed from the person that carries the civil liability, or the person that receives monetary gains due to this management.[1856]
The fact that the costs will be recovered and the extent to which this will be the case must be stated explicitly in the decision containing the administrative enforcement order subject to coercion.[1857] The rule is that the costs will be recovered. However, the administration is not obligated to recover the costs of administrative coercion. It can exceptionally pay the costs itself, for example, when the offender cannot pay the costs due to bankruptcy, or when the offender cannot be traced.[1858] It may also be that the offender cannot reasonably be required to bear the costs entirely or at all. This will be the case where the general interest is to such an extent involved in the decision to take coercive action that the costs should not be claimed from the offender.[1859] This will occur, for example, where an illegal situation is not attributable to an offender

1851 Section 3:2 *Burgerlijk Wetboek* (Civil Code).
1852 Borman & De Poorter 2017, p. 472-473; Blomberg 2000, p. 94.
1853 Kamerstukken II 1994-1995 23 700, nr. 5, p. 78.
1854 Section 5:29 sub 5 General Administrative Law Act.
1855 Section 5:25 General Administrative Law Act.
1856 Section 5.26 General Provisions Environmental Law Act.
1857 Section 5:25(2) General Administrative Law Act.
1858 ARRvS 23 August 1983 ECLI:NL:RVS:1983:AM7259; Blomberg 2000, p. 95.
1859 Borman & De Poorter 2017, p.464-465.

and the general interest of public health requires that it be ended. However, this will rarely occur. Moreover, attributability of the illegal situation to the offender is not a requisite for the exercise by the administrative authority of the power to recover the costs. The level of the costs may also play a role in the decision whether or not it is reasonable to recover the costs entirely.[1860]
The recovery of the enforcement costs does not follow automatically from the decision containing the order subject to administrative coercion and the explicit mention therein of the fact that the costs will be recovered. The level of the costs that have been made will have to be calculated by the administrative authority and laid down in a separate decision, which, as all administrative decisions, may be appealed against.[1861]
The retrieval of the costs is further regulated by the general rules on forfeiture of monetary sums in the GALA (section 4:85 and further).
Generally, a period of six weeks is allowed for the payment of the costs laid down in the decision, although more time may be allowed to the offender. If the costs are not paid, the administrative authority will prompt the offender to pay, leaving him another two weeks to do so. After that, the authority may recover the costs by means of a writ of execution (*dwangbevel*).[1862] This writ provides an executorial title, which means that no special permission of the civil court is necessary for the recovery of the costs.[1863]

Competence

The power to impose an order subject to administrative coercion is generally conferred upon the decentralised administrative authorities – the provinces, the municipalities and the regional water authorities – in their organic acts.[1864] The authorities may use the power to give an order subject to administrative coercion to exercise their duties of care for enforcement.[1865] Ministers of the government departments relevant to the environment commonly exercise this instrument where they are declared competent for the enforcement of environmental non-compliance, which is the case for nature protection, flora and fauna protection, the transportation of waste, and water.[1866]

1860 See for example, ABRvS 31 July 1995 ECLI:NL:RVS:1995:AN5241.
1861 Section 5:25 sub 6 General Administrative Law Act.
1862 Section 5:10 General Administrative Law Act and section 4:114 General Administrative Law Act.
1863 Section 4:116 General Administrative Law Act.
1864 Section 125 Municipality Act, section 122 Province Act and section 61 Regional Water Authority Act. As will be seen below, the duty of care for enforcement also implies the power to give an order subject to a coercive fine.
1865 These duties of care are laid down in section 5.2 General Provisions Environmental Law Act; section 18.2 Environment Management Act; section 18.8 Environment Management Act; section 8.7 Housing Act.
1866 Section 5.15 General Provisions Environmental Law Act; section 7.2 Act on Nature Protection; section 8.5 Water Act; and section 18.1a(4) Environment Management Act.

Specific forms of administrative coercion

The legal rules on environmental protection contain a few rare substantive provisions on specific forms of administrative coercion.[1867] The return and release are both sanctions that can be used specifically – by the *Minister* (Secretary) of the Ministry of Economics, Agriculture and Infrastructure – as a reaction to violations of provisions of the Act on Nature Protection that aim to protect exotic and indigenous protected species of animals and plants.[1868] Return is action taken by an administrative authority in which plants or animals or products of plants or animals that are brought into Dutch territory in conflict with legal rules, are sent back to the country of export or origin, or to any other place outside The Netherlands which is appropriate for the species and in accordance with the goals of the Convention on international trade in endangered species of wild fauna and flora (CITES). Release is action taken by an administrative authority, in which living animals, belonging to a protected indigenous species, are released in their natural environment. The statutory regulation of return and release does not contain any specific conditions for these sanctions. It does make explicit some of the 'procedural' elements, as also provided in the general regulation of administrative coercion in the Gala. In particular the statutory regulation provides explicitly that the costs of the return or release may be claimed from the persons involved, to facilitate the execution of these instruments, and that the authorities concerned have the instrument of writ of execution at its disposal to recover the costs of return and release plus the costs incurred in connection with the collection.[1869]

Moreover, section 5.17 of the General Provisions Environmental Law Act provides that an order subject to administrative coercion or a coercive fine may contain the order to halt the building, use or tearing down of a structure or that arrangements are made including the tearing down of a structure to prevent or end danger for health or safety.

11.2.2.2 The order subject to a coercive fine

Substance of the decision

The order subject to a coercive fine (*last onder dwangsom*) consists of, one, an order to partly or entirely repair non-compliance, and, two, of an obligation to pay a fine if the order is not or not timely executed.[1870] As this instrument is considered a reparatory sanction, per the definition in the GALA the order may contain the obligation(s) to entirely or partly counteract/remedy or put an end to non-compliance, prevent repetition of non-compliance, or take away or limit the consequences of non-

1867 Kamerstukken II 2001-2002 28 020, nr. 3, p. 7.
1868 Section 7.4 Act on Nature Protection.
1869 Section 7.4 Act on Nature Protection.
1870 Section 5:31d General Administrative Law Act.

compliance.[1871] While the order must be aimed at stopping the non-compliance where it is still going on, the order may not require more than is reasonable to prevent the repetition of the non-compliance.[1872]
The content of the order is to be related to the legal rules that have been violated. The order must aim at direct reparation of the non-compliance. This means that when an installation is in business without the required permit, it is not sufficient to require the offender to request a permit to legalise the situation, as this does not end the non-compliance.

Unlike the order subject to administrative coercion, the order subject to a coercive fine can only be addressed to the offender, including the person responsible for the contravention.[1873] However, it is not a condition that the offender can be blamed for non-compliance. Generally, it is considered that the offender will be capable of fulfilling the order as the owner of the object as to which the order pertains. The offender may not be imposed the order where he is incapable of fulfilling it.[1874] Even when the offender is no longer the owner of the object to which the order pertains, he may still be deemed capable to fulfil the order where the factual possibility of fulfilling the order is still present.[1875]
A compliance period is formulated for the offender to fulfil an obligation to end non-compliance or prevent further non-compliance.[1876] For the prevention of the repetition of non-compliance no compliance period needs to be allowed, although it is considered that it may be reasonable to do so.[1877]
As with regard to the order subject to administrative coercion, the order subject to a coercive fine may also be imposed preventively in case there is an apparent threat of non-compliance.[1878] For example, the preventive order subject to a coercive fine with regard to future non-compliance is often combined with the order subject to administrative coercion.[1879] A preventive coercive fine without an order is not possible.

1871 Section 5:2(1)(b) General Administrative Law Act.
1872 See e.g. ABRvS (vz.) 24 October 2007 ECLI:NL:RVS:2007:BB6790; ABRvS (vz.) 15 September 2008 ECLI:NL:RVS:2008:BF2123.
1873 Section 5:32(1) General Administrative Law Act.
1874 See e.g. ABRvS 23 March 2005 ECLI:NL:RVS:2005:AT1966; ABRvS 4 September 2002 ECLI:NL:RVS:2002:AE7213; also Kamerstukken II 2005-2006, 29 702, nr. 7, p. 31; Boeve & Groothuijse 2019, p. 400.
1875 For example, the offender was still considered factually capable of fulfilling an order with respect to an object of which he no longer was the owner, as his father in law had become the legal owner. See ABRvS 4 September 2002 ECLI:NL:RVS:2002:AE7213.
1876 Section 5:32a(2) General Administrative Law Act.
1877 Kamerstukken II, 1993-1994, 23 700, nr. 3, p. 163.
1878 Section 5:7 General Administrative Law Act.
1879 Kamerstukken II 1993-1994, 23 700, nr. 3, p. 133.

Forfeiture

When the order is not or not timely executed the offender forfeits a coercive fine payable to the legal entity to which the administrative authority belongs. The coercive fine is forfeited by law, as a consequence of non-compliance with the order subject to a coercive fine. The type and level of the coercive fine are laid down in the decision establishing the order.[1880] The level of the fine should be proportionate to the interest breached and its intended effect.[1881] This intended effect means that the level of the forfeited fine may be related to the financial gain that can be achieved through continuing or repeating the non-compliance.[1882] However, neither the financial circumstances of the offender, nor the financial gain already achieved through non-compliance may play a role in determining the level of the coercive fine.[1883] If the order is complied with after all, no further forfeiture will occur. The forfeiture can be fixed as a lump sum, as a sum payable per unit of time for the duration of non-compliance with the order or for each violation of the order.[1884] The authority will establish the maximum monetary amount as to which, once reached, no fine will be further forfeited.

As soon as a coercive fine is forfeited, it can be claimed. The offender is to pay the fine within six weeks of forfeiture.[1885] However, a recovery decision is necessary for the authority to claim the forfeited sums officially.[1886] In this decision, the amount of the fine forfeited and the basis for forfeiture are indicated. Once this decision has been taken, the authority may prompt the offender to pay, leaving him another two weeks to do so. After that, the authority may claim the forfeited sums by means of a writ of execution (*dwangbevel*).[1887]

If it is permanently or temporarily impossible for the offender to perform all or part of the order the administrative authority may, at the offender's request, revoke the order, suspend its term of validity or reduce the coercive fine.[1888] This is meant for cases of *force majeure*[1889] in the first place, but besides this, other circumstances can also be considered.[1890] Moreover, the administrative authority that has issued the order subject to a coercive fine may, at the offender's request, revoke the order if the

1880 The bandwidths of the amounts generally imposed for specific cases of non-compliance can be found in the policy rules of some administrative authorities, see, for example, the policy rules of the Dutch Emissions authority *Beleidsregels Nederlandse emissieautoriteit handhaving handel in emissierechten 2016* BWBR0038504.
1881 Section 5:32b(3) General Administrative Law Act.
1882 ABRvS 10 May 2006 ECLI:NL:RVS:2006:AX0732
1883 ABRvS 10 May 2006 ECLI:NL:RVS:2006:AX0732; ABRvS (Vz.) 13 March 1996 ECLI:NL:RVS:1996:AN5198.
1884 Section 5:32b General Administrative Law Act.
1885 Section 5:33 General Administrative Law Act.
1886 Section 5:37 General Administrative Law Act.
1887 Section 5:10 General Administrative Law Act.
1888 Section 5:34(1) General Administrative Law Act.
1889 '*Overmacht*' in Dutch.
1890 Kamerstukken II 1994-1995 23700, nr. 5, p. 82.

individual decision has been in effect for a year without the fine being forfeited.[1891] In principle, the competent authority can, *ex officio* or at request, decide to revoke the order already within the year.
The power to collect forfeited sums lapses a year after the date on which they are forfeited.[1892] The lapse of the power can be interrupted, although this is not explicitly mentioned in the provision of law concerning the order subject to a coercive fine. Interruption can be achieved by a writ of execution, but also in a more informal way, among other things, by means of every action with regard to which the administrative authority lays claim to the forfeited sum (in a notification or a letter of reminder), after which the term of a year starts to run again.[1893]
When the maximum forfeited amount of the fine has been reached and the intended effect has not been achieved, the administrative authority may impose another order subject to a coercive fine or an order subject to administrative coercion. When another order subject to a coercive fine is imposed, the order can then be formulated differently. An order formulated differently is in any case necessary when the authority wants to impose a higher coercive fine. Moreover, once the maximum amount of the coercive fine has been reached, or when the order subject to a coercive fine is revoked the administrative authority may decide to impose an order subject to administrative coercion.[1894] The sanctions, however, may not be imposed in a parallel manner.

Competence
Where an administrative authority is conferred the competence to impose an order subject to administrative coercion (*last onder bestuursdwang*), it can in its place impose an order subject to a coercive fine (*last onder dwangsom*) upon the offender.[1895] In other words, the order subject to a coercive fine is the alternative to the order subject to coercive action, although the sanctions may be imposed concurrently in specific cases.[1896] On occasion, the power to impose an order subject to a coercive fine is conferred independently upon the administrative authorities by law; in the legislation relevant here, the singular example of this is its conferral upon the Board of the Dutch Emissions authority.[1897]

Choosing between administrative coercion or a coercive fine
Where the administrative authority has the choice between the order subject to administrative coercion and the order subject to a coercive fine, the discretionary

1891 Section 5:34(2) General Administrative Law Act.
1892 Section 5:35 General Administrative Law Act.
1893 Section 4:110 General Administrative Law Act; Kamerstukken II 2003-2004, 29702, nr. 3, p. 114.
1894 ABRvS 19 May 2003, AB 2003, 140, JB 2003/100.
1895 Section 5:32 General Administrative Law Act.
1896 See below.
1897 Section 18.6a Environment Management Act.

room of the authority to choose between these sanctions is limited by the interest involved. The order subject to a coercive fine may not be chosen if the interest involved does not allow the presence of the risk that non-compliance will continue or recur in spite of the order.[1898] This would in particular be the case with regard to serious environmental non-compliance. In particular if in such a case the order subject to administrative coercion would be an appropriate alternative, this instrument must be applied.[1899]

11.2.2.3 The revocation of an advantageous decision

Scope of application

The revocation of an advantageous decision (*intrekking van een begunstigende beschikking*) is a sanction attributed to the administrative authorities for environmental non-compliance, specifically for the enforcement of permits – the environmental permit, the water permit and the emissions permit.[1900] The sanction includes the partial revocation, i.e. the suspension of an decision. The revocation is a very heavy sanction and is not imposed as a sanction often.[1901] The sanction is regulated in the specific environmental statutes – where the power to impose the sanction is also conferred – and through the case law of the administrative courts. The sanction does not have a general regulation in the General Administrative Law Act.

The competent administrative authorities may partially revoke (suspend) or entirely revoke an environmental permit or water permit or exemption if there is non-compliance with the permit or exemption, the conditions and limits thereof have not been or are not complied with, the general rules connected to the permit or exemption are not complied with, or the legal rules surrounding the permit are not complied with.[1902] Moreover, a permit can be revoked preventively, in part or as a whole, where there is serious danger that it will be used for criminal activities.[1903]

> In case of emissions permits, this sanction has specific rules of application. An emissions permit may be revoked where an administrative fine has been imposed on the same person twice for a similar violation within a period of four years.[1904]

1898 Section 5:32(2) General Administrative Law Act.

1899 Kamerstukken II 1994-1995, 23 700, nr. 5, p. 81.

1900 See section 5.19 General Provisions Environmental Law Act (most likely Mayor and Aldermen for the municipality), section 8.4 Water Act (for a water permit to bring substances into surface water: General board of the regional water authority in case of regional waters and, for other cases, the Minister (Secretary); for a permit for extracting groundwater: the Provincial Executive) and section 18.17 Environment Management Act (Emissions authority).

1901 See, for example, also Blomberg 2000, p. 107-110.

1902 See section 5.19(1)(b)-(d) and (3) General Provisions Environmental Law Act and section 8.4 Water Act.

1903 Section 5.19(4) General Provisions Environmental Law Act.

1904 Section 18.17 Environment Management Act.

As described in chapter 9, the development towards general rules means that there are less individualized rules in permits. With regard to those general rules there is no competence for the administrative authorities to revoke those rules or to revoke made-to-measure rules that may be made to specify those general rules.

Substance of the revocation decision

The statutory regulation of the revocation of an advantageous decision contains the requirement that the competent authority proceeds to revocation only after the person involved has been given the opportunity, delineated as a period of time, to bring his behaviour in compliance with the law.[1905] The period of time allowed for this is thus given prior to the administrative authority taking a sanctioning decision on revocation. This is in contrast with the compliance term in the decision concerning the orders of administrative coercion and the coercive fine, which does form part of these sanctioning decisions.

When the term has expired the competent authority can decide to revoke the advantageous decision. As soon as the (decision of) revocation comes into effect, any action on the basis of the revoked decision loses its basis. From that moment on the activities formerly allowed under the revoked advantageous decision are forbidden. Revocation of the permit of an installation, for example, will then lead to all activities carried out by that installation being illegal. It is clear that this instrument is a very heavy sanction.

Combination with other administrative sanctions

When the holder of an advantageous decision still does not end his activities at that moment, the administrative authority can intervene by means of administrative coercion.[1906] The revocation can, in fact, be combined with a preventive order subject to administrative coercion or a preventive order subject to a coercive fine, so that the administrative authority may apply coercion or a coercive fine once the advantageous decision is revoked.[1907] This commonly happens when the competent authority expects the person in charge.[1908]

1905 Section 5.19(3) General Provisions Environmental Law Act and section 5.4(2) Water Act.

1906 Where revocation does not succeed in putting a stop to non-compliance, an order subject to a coercive fine will likely not be very effective or efficient.

1907 See for example ABRvS 24 May 1995 ECLI:NL:RVS:1995:AN4430.

1908 ABRvS 24 May 1995 ECLI:NL:RVS:1995:AN4430.

11.2.3 The administrative fine

There are also two sanctions of a very different kind that may be imposed by the administrative authorities for environmental enforcement.[1909] These are the punitive sanctions that are the administrative fine (*bestuurlijke boete*) and the administrative criminal decision (*bestuurlijke strafbeschikking*). The latter will be discussed in a separate section, as a hybrid sanction that has elements of administrative and of criminal sanctions. The administrative fine is discussed next.

Definition of administrative fine

The administrative fine is defined in the GALA as a punitive sanction that contains an unconditional obligation to pay a monetary sum.[1910] Due to its nature, the administrative fine may be imposed together with an order subject to a coercive fine.[1911] As a rule, to impose a fine, the offender must be culpable with regard to the non-compliance.[1912] However, when it concerns non-compliance with the obligations to hand in emissions rights, the authority is obliged to impose the administrative fine irrespective of attributability.[1913]

Before the administrative authority takes the decision imposing the administrative fine, it must first send a report of the circumstances of non-compliance at issue to the persons concerned. They are allowed to put forward their views on it.[1914] The decision imposing the administrative fine will establish the amount of the administrative fine. In determining the fine, the authority must weigh the seriousness of the violation and the extent to which this is attributable to the offender, including the circumstances of the violation.[1915] The specific statutes according the power to impose the administrative fine to a specific authority provide more directions on the level of the fine and the factors impacting it.

1909 The character of the revocation or suspension of a permit as reparatory or punitive has been a point of discussion, see Michiels, Blomberg & Jurgens 2016, p. 138-143. Michiels, Blomberg & Jurgens 2016 provide a set of factors on the basis of the case law of the Dutch administrative court, literature and the case law of the ECHR that are of importance for deciding in a given case whether the instrument is to be qualified as reparatory or punitive. The Dutch Council of State has – on occasion – deemed the revocation a reparatory sanction. The Cationwide Enforcement Policy categorises the revocation or suspension of a permit a punitive administrative sanction, see *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 16. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

1910 Section 5:40(1) General Administrative Law Act. Until the summer of 2009, the General Administrative Law Act did not provide general provisions on the administrative fine. Up till then the administrative fine was only mentioned in specific legislation attributing this instrument to specific administrative authorities, see for example art. 18.16a of the Environment Management Act.

1911 Section 18.16a(3) Environment Management Act.

1912 Section 5:41 General Administrative Law Act.

1913 Section 18.16(a)(2) Environment Management Act.

1914 Section 18.16g Environment Management Act.

1915 Section 5:46(2) General Administrative Law Act. For this purpose policy rules have been formulated, which specify the method of establishing the fine and provide bandwidths for the fine for specific non-compliance (9 December 2008).

Remit of administrative fine in environmental protection

In spite of the attention given to the administrative fine as potential solution to the enforcement deficit, the administrative fine has not been introduced on a broad scale for the enforcement of environmental law. The power to impose an administrative fine has been introduced in recent years into the realm of environmental protection primarily in relation to European obligations, in particular emissions trading and the protection of endangered species against trade, as well as, separate from European obligations, in case of non-compliance with building regulations. More specifically, a power to impose an administrative fine is part of the Dutch Environment Management Act for non-compliance with obligations in relation to emissions trading, i.e. for the Netherlands to comply with a European obligation for the implementation of the Emissions Trading Directive. The board of the Emissions Authority exercises this power.[1916] An administrative fine may also be imposed for non-compliance with certain obligations in relation to the trade in endangered animals (CITES), on the basis of the Act on Nature Protection.[1917] In such cases, the Secretary of State for the environment (Minister) will impose the fine. Finally, a power to impose an administrative fine has been awarded to the competent authority for the Housing Act (*Woningwet*).[1918] This competent authority is in principle the mayor and aldermen of the municipality. In specific cases, the competent authority may be *Gedeputeerde Staten* of the Province, or the Minister.[1919] The non-compliance that can be punished with an administrative fine is not also an economic environmental offence.

The Dutch General Administrative Law Act provides the general regulation of the administrative fine, from which several provisions in the specific regulation of this instrument may deviate or may be more specific. As mentioned previously, for emissions permits, for example, the regulation in the Environment Management Act determines that where an administrative fine has been imposed on the same person twice for a similar violation within a period of four years, his permit may be revoked.[1920] The regulation in the Environment Management Act, moreover, provides for an obligation of communication by the administrative authority with the Public Prosecutor's Office, where non-compliance is also an offence and the seriousness of the non-compliance or the circumstances give rise to it.[1921]

1916 See section 18.16(a)-(r) and 18.17 Environment Management Act.
1917 Section 7.6 Act on Nature Protection and section 4.1 Decision Nature Protection (*Besluit Natuurbescherming*).
1918 Section 92a Housing Act. For more on the concept of 'competent authority', see the previous chapter.
1919 Section 92a Housing Act, in connection with section 1b and section 1 Housing Act and section 1.1(1) and section 2.4 of the General Provisions Environmental Law Act.
1920 Section 18.17 Environment Management Act.
1921 Section 18.16d Environment Management Act.

Level of the administrative fine

As explained previously, the specific statutes according the power to impose the administrative fine also provide detail on the amount of the fine and the factors impacting it. It is determined in the Environment Management Act that the administrative fine for emissions protection will amount to a maximum of 450 000 Euros for each violation, or, a maximum of ten percent of the turnover of an undertaking in the year preceding the fine decision, if this turnover is higher than 4 500 000 Euros.[1922] Where it concerns non-compliance with the obligations to hand in emissions rights, the administrative fine may not be lowered due to special circumstances of the violator.[1923]

With regard to nature protection and housing regulations, the level of the administrative fine has been attached to the categories of criminal fines, as established in section 23 of the Criminal Code (*Wetboek van Strafrecht*).[1924] Moreover, the Act on Nature Protection and its Decision on Nature Protection make the maximum level of the fine dependent on the type of offender; natural persons may be imposed a much lower fine than legal persons.[1925] The Housing Act makes the maximum level of the administrative fine dependent on the possible threat of the violation to habitability, health or safety.[1926]

11.2.4 Overview of the administrative sanctions in the environmental arena

In the table below an overview is presented of the administrative sanctions in the environmental arena by sanction, area of environmental protection, administrative authority and legal basis.

1922 Section 18.16e Environment Management Act.

1923 See Beleidsregels Nederlandse emissieautoriteit handhaving handel in emissierechten 2016. This seems contrary to section 5:46(2) General Administrative Law Act.

1924 See further section 11.4.3 of this chapter.

1925 The maximum level of the fine for natural persons is 415 Euros (as established in the Criminal Code since 2018); the maximum level of the fine for legal persons is 4150 Euros, as determined in section 7.6(4) of the Act on Nature Protection. The Decision Nature Protection determines that the maximum of a first administrative fine is in to be 50% of the amounts mentioned above (section 4.1). The fine will be the full amount if the violation by the offender has occurred within five years that an administrative fine has become final for a similar violation, i.e. in case of a repeat offender.

1926 Where these threats exist a maximum of 20 750 Euros may be imposed (as established in the Criminal Code since 2018); otherwise, a maximum of 8300 Euros may be imposed. See section 92a Housing Act and section 23, subsection 4 of the Criminal Code.

Overview of the administrative sanctions in the environmental arena			
Sanction[1927]	**Area of environmental protection**	**Administrative authority**	**Legal basis**
Administrative order subject to administrative coercion	All	- Environment offices (municipalities; provinces) - Minister	Duty of care for enforcement[1928]
Administrative order subject to a coercive fine	All	- Environment offices (municipalities; provinces) - Minister	Duty of care for enforcement
Revocation of an advantageous decision	- Environmental permit	- Municipality	- GPELA
	- Water permit	- Regional water authority; Minister; Province	- Water Act
	- Emissions permit	- Emissions authority	- Environment Management Act
Administrative fine	- Emissions trading	- Emissions authority	- Environment Management Act
	- Trade in endangered animals	- Minister	- Act on Nature Protection
	- Housing regulations	- Municipality; province; Minister	- Housing Act

11.3 The hybrid: the administrative criminal decision

As explained previously, the administrative criminal decision (*bestuurlijke strafbeschikking*) is a hybrid, as the sanction is firmly rooted in the criminal law and criminal procedural rules apply, e.g. appeals to the decision are dealt with through the criminal procedural system. The administrative fine – discussed above – is fully immersed in administrative law. Even so, there are several similarities between the administrative criminal decision and the administrative fine. Both are punitive instruments in the hands of the administrative authorities. Neither of these sanctions has a general application for environmental enforcement, nor can they be applied to

1927 The sanctions and their characteristics are described in the next chapter.
1928 See chapter 10.

the same violations. Both sanctions have only relatively recently been added to the set of instruments of the administrative authorities.
As explained at the start of this chapter, the administrative criminal decision is a hybrid of two enforcement systems. Even though the administrative criminal decision fulfils the definition of an administrative sanction as provided in the GALA, and in chapter 1 of this book, this punitive instrument is also, in part, a criminal sanction in the hands of the administration. First, its legal basis and the policy rules for its application are laid down in criminal law; second, the Public Prosecutor supervises, from a distance, the application of the power by the administrative authorities, and can repeal an administrative criminal decision; and, third, the legal protection against the criminal administrative decision takes place through the criminal legal system, in the criminal courts.[1929] Thus, as its name implies, the instrument is a hybrid of two enforcement systems.

Substance of the administrative criminal decision
The administrative criminal decision was introduced for environmental offences on May 1, 2012. It is a decision – containing a fine – offered by the administrative authorities to an offender. The sanction can be seen an act of prosecution, without the involvement of a court.[1930] It is a sanction that may be imposed by the administrative authorities for certain categories of environmental criminal offences, under certain conditions.[1931] These offences are generally considered to be of minor seriousness or a simple nature, to form a relatively limited breach of statutorily protected interests, to not be interpreted in multiple ways, and to prove without the need for much investigation.[1932] To sanction these types of offences decisively, the instrument of the criminal decision was put in the hands of the administrative authorities.[1933]

The legislator has derived the power of the administrative authorities to impose the sanction from the power of the Public Prosecutor to impose a criminal decision.[1934] The administrative criminal decision is in fact quite similar to the criminal decision offered by the Public Prosecutor.

1929 As opposed to the legal protection against an administrative fine, which takes place via administrative procedural law. An important difference between the administrative criminal decision and the administrative fine is that the administrative authorities punish acts that are criminal offences by imposing the administrative criminal decision, whereas the administrative fine is aimed at administrative non-compliance. Even so, we have already seen that nearly all administrative non-compliance is an offence.
1930 Kamerstukken II 2004-2005, 29849, nr. 3, p. 1.
1931 Offences formulated in the rules on the administrative criminal decision. See below.
1932 *Besluit OM-afdoening*, 27 April 2012, (Staatsblad 2012, 150), *Nota van toelichting*, p 36. See also, Michiels, Blomberg & Jurgens 2016, p. 121.
1933 *Besluit OM-afdoening*, 27 April 2012, (Staatsblad 2012, 150), *Nota van toelichting*, p. 36; *Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv)*, p. 7.
1934 In section 257a Code of Criminal Procedure.

However, the administrative authorities may use this power independently from the Public Prosecutor.[1935] The administrative authority decides independently from the criminal actors on the use of this instrument. The decision provides an executorial title, without the need for a judge to be involved. The Public Prosecutor does supervise the application of the instrument in general, as far as the legality of the decisions and the observation of the boundaries of the power by the administrative authorities are concerned. The Public Prosecutor can also amend or repeal the administrative criminal decision in case of objection by the offender. By doing so, the case will not be brought before the criminal courts.[1936]

The rules on the administrative criminal decision and its application are laid down in section 257ba of the Code of Criminal Procedure in conjunction with a Decision (*Besluit OM-afdoening*) and a Circular (*Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv)*.[1937] The Decision and the Circular that is based upon it contain annexes in which the categories of offences that are covered by the instrument are set out and the fines that can be imposed.[1938] The administrative criminal decision is available for, firstly, misdemeanours (*overtredingen*) and crimes (*misdrijven*) in environmental law (*milieufeiten*).[1939] The substantive scope covers, among others, waste, discharges, extractions and damage to protected species. For these offences, the regional environment offices may impose the administrative criminal decision – independent of municipalities and provinces.[1940] Secondly, the administrative criminal decision is available for violations with regard to the byelaws of regional water authorities (*keurfeiten*).[1941] For these offences, the regional water authorities impose the decision.[1942]

The administrative criminal decision replaced the administrative criminal transaction, which was added in 2000 to the set of sanctions available to certain administrative authorities to improve enforcement, through pilot projects.[1943] From 2000 till 2012, the pilot projects were extended in time and expanded in scope.[1944] The administrative transaction was in essence the transaction power of the criminal authorities in

1935 Section 257ba Code of Criminal Procedure and section 4.2 *Besluit OM-afdoening*.
1936 Section 257e and 257f Code of Criminal Procedure.
1937 The power in the Code of Criminal Procedure was introduced May 1, 2008; the amendment of the Decision on settlement by the Public Prosecutor to introduce the administrative criminal decision on April 27, 2012 (Stb. *2012, 150*).
1938 Annex II *Besluit OM-afdoening; Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv)*.
1939 For more on the distinction between violations and crimes, see section 11.4.2 below.
1940 Formally, the director of the regional environment office has the competence to do so.
1941 These are included as a separate category of misdemeanours, as the definition of 'environment' for the purpose of the administrative criminal decision excludes byelaws of regional water authorities.
1942 Formally, the daily board (*dagelijks bestuur*) of the regional water authorities has this competence.
1943 See the *Richtlijn voor strafvordering bestuurlijke transactie milieudelicten*, Stcrt. 2010, nr. 19120.
1944 See e.g. Blomberg, Verberk and Michiels 2002.

the hands of the administration.[1945] The most important difference between the administrative criminal decision and the administrative criminal transaction is that through a transaction the prosecution was avoided, whereas a decision can be seen as an act of prosecution.[1946] Moreover, the administrative authorities – several provinces and municipalities – could impose several conditions for the transaction, such as, a monetary sum to prevent criminal prosecution of a maximum amount of 1200 Euros and reparatory obligations, not exceeding the amount of 1200 Euros.[1947] Where the conditions in the proposal of an administrative transaction were not fulfilled within a time limit accorded for it, generally six weeks for the payment, the competent administrative authority could send the report finding a contravention to the Public Prosecutor. The Public Prosecutor could then commence prosecution.

Level of the fine in the administrative criminal decision

Annex II to the Decision sets out the offences and categorises whether the penalisation is aimed at a natural person, a legal person or both.[1948] The relevance of this distinction lies therein that the amount of the fine for the same offence will generally be higher for legal persons than for natural persons. The administrative authorities may impose fines, by means of the administrative criminal decision, that may amount to a maximum of 2000 Euros for natural persons and 10 000 Euros for legal persons. The level of the fines is fixed for each of the offences. The Annexes to the Circular provide the fixed monetary sums that are to be imposed by means of the decision for each of these offences for natural persons and legal persons. In establishing the fixed amount of the penalties in the Circular, the common criminal fine for these offences as imposed by a criminal court or offered through a criminal transaction by the Public Prosecutor was considered as a reference. The fixed character means that when the level of a fine is not appropriate considering the circumstances of the case, the administrative authorities cannot balance the fine, for example, by decreasing the amount. When this is the case, the administrative authorities send the report of the offence to the Functional Prosecutor's Office to be dealt with.[1949]

Application of the sanction

Attributability of the offence to a natural or legal person is an important condition for imposing an administrative criminal decision. The natural or legal person must

1945 On the basis of section 74 Criminal Code in conjunction with section 37 Economic Offences Act and the Transaction decision environmental offences (*Transactiebesluit milieudelicten)* and section 85 Regional Water Authority act.

1946 Kamerstukken II 2004-2005, 29849, nr. 3, p. 1; Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv), p. 1.

1947 Section 5 Transaction decision environmental offences (*Transactiebesluit milieudelicten*).

1948 Bijlage II Besluit OM-afdoening.

1949 The Public Prosecutor may issue a criminal decision of his own that can contain a criminal fine. The level of the fine is up to the Public Prosecutor to establish as long as it is not higher than the statutorily established maximum. See in this chapter, further below. See *Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten* (art. 257ba, tweede lid, Sv), section 2.5.

have committed the offence.[1950] Because of its criminal nature, the administrative criminal decision is imposed after an criminal investigation by special investigation officers (*bijzonder opsporingsambtenaar)* that work for the administrative authority. These officers make a condensed report of the offence or offences they find for which the administrative criminal decision can be imposed. This report includes the mentioned of the attributability of the offence to a natural or legal person and whether the offence may have been committed intentionally or not.[1951] This report is the notification of the fine.[1952] This report is sent directly to the Central Judicial Bureau of Collections (*Centraal Justitieel Incasso Bureau*). This is the automated system, also used by the police, for collecting criminal decisions. This Bureau subsequently sends the administrative criminal decision, including a payment slip to collect the fine, to the offender.[1953] Therefore, as opposed to, for example, the administrative fine, the administrative authorities do not collect the fine. If the suspect does not agree with the decision given, he can oppose it through *verzet* with the Public Prosecutor.[1954] The Public Prosecutor will then bring the case before the criminal court, unless he repeals or amends the decision.[1955] This will lead to the case being brought before a court fully.[1956]

Limits to the application of the sanction

The administrative authorities have discretion in deciding which offences and under which circumstances the Public Prosecutor and the Circular will use the instrument, within the boundaries of the Decision on settlement. Several limits are set to the power to impose the administrative criminal decision. The Decision on settlement by the Public Prosecutor lists several circumstances where the administrative criminal decision may not be imposed by the administrative authority. Among these are the following circumstances:

- more than one environmental criminal offence is established for which criminal decision can be imposed, which leads to a combined fine of more than 2000 Euros for a natural person and 10 000 Euros for a legal person;
- there are indications that the benefits from the offence are higher than 5000 Euros; or,
- the criminal offence has led to the death or serious harm/damage to persons, animals or plants, or threatens to do so.[1957]

1950 See Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv), p. 12-13.
1951 Besluit OM-afdoening, 27 April 2012, (Staatsblad 2012, 150), Nota van toelichting; Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv).
1952 If the criminal offence(s) found by the investigative officer does not fall within the ambit of the administrative criminal decision, it makes an extended report, which it sends directly to the Public Prosecutor.
1953 See the Besluit tenuitvoerlegging geldboeten.
1954 Section 257e Code of Criminal Procedure.
1955 Section 257e and 257f Code of Criminal Procedure.
1956 Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv), p. 1.
1957 Section 4.4 Besluit OM-afdoening.

Moreover, there are contra-indications for applying the instrument, laid down in the Circular. These contra-indications are formulated to further delineate the administrative and criminal enforcement domains. This is necessary to account for the possibility that the offences in Annex II due to specific circumstances can no longer be considered of a simple nature due to the seriousness of the offence in light of the interests protected by the legislation breached. In such cases, the ratio behind the instrument in the hands of the administrative authorities ceases. According to the Circular, if such circumstances occur it is desirable that the Public Prosecutor or the criminal judiciary deals with it.[1958]
In case of the contra-indications, the case must be handed to the Public Prosecutor. The contra-indications are grouped into three groups, which must be checked after the establishment of an environmental offence; only group two is applicable to offences in relation to byelaws of the regional water authorities. The first group is a list of circumstances which would increase the evidentiary burden, or indicate a serious breach of protected interests, in particular where it concerns significant damage to the environment as may be indicated by the likely costs of remedying the situation; the second group is a list of circumstances which indicate a significantly calculating or a fraudulent disposition of the offender, for example where there is collusion with other environmental offences for which no administrative criminal decision may be imposed, or with serious commune offences, such as fraud or bribery, or where enforcement has taken place at least three times within a period of five years. The third group refers to those offences in the Annex that do not refer to a distinction in the fine for intent or for misdemeanour. If there is no or insufficient evidence that an economic offence has been committed with intent, the case should be dealt with by the Public Prosecutor.[1959] Besides these limits there are the more general boundaries to the exercise of the punitive instrument, in particular proportionality, cautioning the offender, and *ne bis in idem*. With regard to the latter and the possible combination of sanctions, the administrative criminal decision may be combined with reparatory sanctions, such as the order subject to a coercive fine, or the order subject to administrative coercion. Generally, the administrative authority is expected to impose a reparatory sanction besides an administrative criminal decision where the offence continues and the consequences of the offences can be repaired.[1960] For more on *ne bis in idem* and the combination of sanctions, see section 11.5.2 of this chapter.

In spite of these limits, the Circular provides explicitly that the administrative authorities must take into account the principle duty on enforcement in making use of their discretion (see chapter 9, section 9.5.2). Moreover, where the offence

1958 Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv), p. 6-7.
1959 Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv), p. 7.
1960 Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv), p. 12.

concerns a European provision by origin, the Circular recalls the obligations of the Netherlands as Member States, mentioning what it calls the goal-oriented enforcement duty (*doelgebonden handhavingsplicht*) on the basis of the Treaty on the Functioning of the EU that is to be complied with.[1961]
To summarise the above, the table below lists the competent administrative authority and the area of environmental protection this sanction can be applied to.

Administrative authority	**Area of environmental protection**
Regional environment offices	Violations and crimes in waste and nature protection
Regional water authorities	Violations: discharges and extractions

11.4 Criminal sanctions

11.4.1 Introduction: the criminalisation of environmental non-compliance

As explained previously, in the Netherlands environmental criminal law consists of economic criminal law and common criminal law. This law, and the sanctions that are provided in it, is based in the Economic Offences Act (*Wet Economische Delicten*) and the Criminal Code (*Wetboek van Strafrecht*) and the Code of Criminal Procedure (*Wetboek van Strafvordering*), and related legislation and/or regulations. These statutes also contain the criminalization of environmental violations as economic criminal offences and common criminal offences.[1962]
The violation of many provisions in the environmental statutes cannot only be classified as administrative non-compliance – and enforced with administrative sanctions – but also as an economic criminal offence, which can be enforced with criminal sanctions on the basis of the Economic Offences Act.[1963] As explained previously, to find out what the material norm is that lays at the basis of holding a person or a company criminally responsible, one will have to look at the provisions in the environmental statutes (the administrative dependency of the criminal law).[1964] The provisions in the environmental statutes set the norms, and provisions in the Economic Offences Act

1961 Richtlijn bestuurlijke strafbeschikkingsbevoegdheid milieu- en keurfeiten (art. 257ba, tweede lid, Sv), p. 6.
1962 Several environmental acts used to contain some provisions stipulating non-compliance with certain prohibitions in these acts as a criminal offence and the sanction for this. These provisions have, however, been scrapped. Either the criminal enforcement of the prohibitions has been brought within the realm of the Economic Offences Act, or the enforcement by means of administrative fine has been made possible, see for example section 105 of the Building Act (*Woningwet*).
1963 The reason these are called 'economic' criminal offences lies in the history of the Economic Offences Act. When it came into force in 1951, the Act was originally aimed at providing enforcement of a limited number of statutes with an economic character. Since then, the enforcement of many other statutes has been brought within the realm of the Economic Offences Act, among which many non-economic ones.
1964 In Dutch *de administratieve afhankelijkheid van het strafrecht*, comparable to the German *Verwaltungsakzessorietät*. The Dutch term is in fact a translation of the German. See e.g. Faure 1991, p. 93.

criminalise these norms. The Economic Offences Act criminalises the violations of specific provisions in law and regulations pursuant to many environmental statutes, including those presented in chapter 9 as the core statutes of Dutch environmental law discussed in this research:

- the General Provisions Environmental Law Act
- the Environment Management Act
- the Water Act
- the Act on Nature Protection
- the Spatial Planning Act
- the Housing Act.

The Environment Act (*Omgevingswet*) will be included in the Economic Offences Act in the future.

Economic offences are determined in section 1 and 1a of the Economic Offences Act. The subsections to section 1 and 1a, in combination with the fact that the offence is either a misdemeanor (*overtreding*) or a crime (*misdrijf*), determine what type of sanction is imposed and the maximum level thereof.[1965]

> The economic environmental offences fall (for the most part) into section 1 (subsection 3) and into section 1a (subsections 1, 2 and 3) of the Economic Offences Act.

While economic offences penalise the non-compliance with rules in primary and secondary legislation, certain behaviour (*abstracte gevaarzetting*) or certain consequences of behaviour (*concrete gevaarzetting*) may (also) be defined as common criminal offences. Such common criminal offences are laid down in the Criminal Code or in specific environmental statutes.[1966] Specifically for the environment, section 173a and 173b of the Criminal Code criminalise the pollution of soil, air or surface water, and section 172 and 173 concern the poisoning of drinking water. Also, section 161quater and 161quinquies of the Criminal Code criminalise behaviour involving radioactive radiation; section 429 criminalises the creation of the risk of fires in forests, heaths and the like (sub 3) and the addition of any kind of product to surface waters possibly causing harm to the normal use of those waters (sub 4). In the Regional Water Authority Act, non-compliance with the rules (*keur*) of a regional water authority regulating the protection of water is considered an offence, more specifically a violation.[1967]

1965 See section 6 and 7 of the Economic Offences Act, which list the primary penalties and supplementary penalties, respectively.

1966 The latter has become very rare.

1967 Section 81 Regional Water Authority Act.

Aside from these, common criminal offences that are not (directly) related to environmental issues can be involved when an environmental offence is committed, such as forgery or fraud (section 225 Criminal Code).

11.4.2 Range of sanctions/factors influencing criminal sanctions

The criminal sanctions that can be imposed for economic and common criminal environmental offences consist of:

a. primary penalties (*hoofdstraffen*)[1968]
b. supplementary penalties (*bijkomende straffen*)[1969]
c. measures (*maatregelen*).[1970]

The distinction between penalties (*straffen*) and measures (*maatregelen*) is made on the basis of the nature of the sanctions. Penalties aim at inflicting harm, punishing the offender. On the contrary, measures have a reparatory character as they aim at restoring the situation of non-compliance.[1971] In both economic criminal law and common criminal law, penalties – both primary and supplementary – and measures may be imposed exclusively[1972] and also together and even cumulatively with other primary and supplementary penalties or measures.[1973] While penalties can only be imposed when it has been determined that the fact and the offender are punishable (*strafbaar*), some measures can also be imposed despite acquittal, as long as the criminal offence is found by the court to exist.[1974]

Certain elements of criminal offences are relevant to the type of primary penalties imposed and the level thereof, in particular, whether the offence is a violation or a crime, and the type of *mens rea*. As referred to previously, Dutch criminal offences are distinguished in misdemeanors (*overtredingen*) and crimes (*misdrijven*).[1975] Misdemeanors are – generally – light criminal offences that are dealt with by the cantonal court (*kantonrechter*); crimes are more severe criminal offences that are dealt with by the lower court (*rechtbank*). Besides the difference in the type and level of the primary penalties imposed for these offences, and the difference in the court treating the offences, there is also an important difference with regard to the registration of the sanctions imposed for these offences. In case of most misdemeanors no such

1968 Section 6 Economic Offences Act; section 9 subsection 1 sub a Criminal Code.
1969 Section 7 Economic Offences Act; section 9 subsection 1 sub b Criminal Code.
1970 Section 8 Economic Offences Act; section 36a and following Criminal Code.
1971 See e.g. Cleiren, Crijns & Verpalen 2018, p. 2645.
1972 This means that a primary penalty, a supplementary penalty or a measure can be solely imposed. For economic offences, see Kamerstukken II 1977-1978, 15012, nr. 3, p. 38, 58; Keulen 1995, p. 200.
1973 Section 6(2) Economic Offences Act and section 9(5) Criminal Code.
1974 Section 351 Code of Criminal Procedure, section 9a, and section 36a and further Criminal Code. More on this below.
1975 This is the translation used here; an alternative translation may be violations for *overtredingen* and indictable offences for *misdrijven*.

registration will occur; crimes are always registered.
The common criminal environmental offences are – generally – crimes. With regard to these offences, the type of *mens rea* (intent or guilt and unlawfulness) determines the level of the sanction. Economic criminal environmental offences may be misdemeanors or crimes. With regard to economic environmental offences, generally the offences that involve criminal intent are considered crimes.
The supplementary penalties and measures can be imposed irrespective of whether the offence is a misdemeanor or a crime. Dutch criminal offences – and their criminalisation – involve criminal intent (*opzet*) or guilt (*schuld*) and unlawfulness of behaviour (*wederrechtelijkheid*).

> As explained previously, the economic environmental offences generally fall into section 1, subsection 3 and into section 1a, subsection 1, 2 and 3 of the Economic Offences Act. This means that these economic offences may be crimes on the condition that they have been committed deliberately, i.e. with intent; in so far as these economic offences are not crimes, they are misdemeanors (section 2(1) Economic Offences Act). This applies to the offences referred to in section 1, section 2, and section 1a, subsection 1 and 2 of the Economic Offences Act. Several economic offences are 'only' misdemeanors (section 2(4) Economic Offences Act). These are the economic offences referred to in section 1a, subsection 3 of the Economic Offences Act.

11.4.3 The specific criminal sanctions for environmental offences

In this section I will discuss the criminal sanctions – the primary penalties, the supplementary penalties and the measures – available to the competent authorities for violations of environmental law. As explained in the previous chapter, the criminal courts and also the Public Prosecutor's Office may impose sanctions for criminal offences.[1976] These will be discussed in consecutive order in the following.
The Economic Offences Act has a range of sanctions for environmental offences that are quite similar to the range of sanctions available in the Criminal Code. In the following table the penalties and measures that are available to the authorities for sanctioning economic criminal environmental offences – based on the Economic Offences Act – and those applicable to the common criminal environmental offences – based on the Code of Criminal Procedure and the Criminal Code – are set out.

1976 As we have seen in section 11.3 of this chapter, for a small number of offences – misdemeanours – also the administrative authorities, specifically the regional environment offices and the regional water authorities can impose the sanction of the administrative criminal decision.

In the table below a detailed overview is given of the criminal sanctions that are available for environmental offences.

Overview of criminal sanctions for environmental offences				
Category	**Sanctions**	**Economic criminal offences**	**Common criminal offences**	**Authority**
Primary penalties	Administrative criminal decision[1977]	yes	yes	Administrative authority
	Public Prosecutor's criminal decision[1978]	yes	yes	Public Prosecutor
	Extra-judicial settlement	yes	yes[1979]	Public Prosecutor
	Conditional/provisional nolle prosequi decision (sepot)	yes	yes	Public Prosecutor
	Imprisonment (max. 6 years)	yes	yes	Criminal court
	Detention (max. 1 year)	yes	yes	Criminal court
	Criminal fine	yes	yes	Public Prosecutor[1980]; Criminal court
Supplementary penalties	Forfeiture	yes	yes	
	Closedown of a legal entity	yes	no	
	Deprival of rights or advantages	yes	yes	Criminal court
	Publication of the judicial decision	yes	yes	

1977 The placement of this sanction in this table shows that this instrument is criminal in its nature.

1978 The placement of this sanction in the category of primary penalties does not cover the entire breadth of the instrument. The Public Prosecutor's criminal decision can contain a varied substance of sanctions, among which primary penalties (fine), supplementary penalties, and measures.

1979 The extra-judicial settlement (with conditions) is not available for those common environmental offences that are crimes for which imprisonment of more than six years is possible.

1980 The Public Prosecutor can impose this sanction as part of the criminal decision and the extra-judicial settlement.

Measures	Dispossession of illegally obtained advantage	yes	yes	
	Withdrawal of goods from circulation	yes	yes	Public Prosecutor[1981];
	Obligation to restore	yes	yes (conditionally)	Criminal court
	Compensation of damage	yes	yes (also conditionally)	
Measures	Placing under guardianship of a legal entity	yes	no	Criminal court
Provisional measures	Order to - abstain from certain actions - to take care of storage and conservation	yes	no	Public Prosecutor; Criminal court
Provisional measures	- close down of enterprise - placing under guardianship - deprival of rights or withdrawal of advantages	yes	no	Criminal court

11.4.4 Criminal sanctions by the criminal courts

11.4.4.1 Primary penalties

The primary penalties a criminal court may impose for environmental offences, both economic and common, are imprisonment; detention; or a criminal fine. It is also possible to replace either of the above with a community service (*taakstraf*).[1982] Moreover, in case of imprisonment and detention, a criminal fine may replace them.[1983] The criminal statutes determine the maximum level (in terms of duration) of these sanctions.

1981 The Public Prosecutor can impose these sanctions as part of the criminal decision and the extra-judicial settlement (with the exception of the obligation to restore).

1982 Section 6(1) of the Economic Offences Act and section 9(1)(a)(3) and 9(2) Criminal Code.

1983 Section 9(3) Criminal Code.

11.4.4.2 Sanctions involving deprivation of liberty: imprisonment and detention

Imprisonment (*gevangenisstraf*) can be imposed in case of crimes; misdemeanors can be punished with detention (*hechtenis*). The longest term of imprisonment that can be issued for economic environmental crimes is six years.[1984] The longest term of detention is one year.[1985]

> As explained previously, there are different categories of economic offences, which determine the level of the sanctions. For crimes, either a maximum imprisonment term of six years, two years, or four years (in case the offender has made it a habit to commit the crime that has a maximum of two years) applies.[1986] Detention may be imposed in case of economic offences that are misdemeanors, with a maximum duration of one year, or six months.[1987]

The maximum of six years imprisonment applies to several crimes pursuant to, among others, the Water Act, the General Provisions Environmental Law Act, the Environment Management Act and the Nature Protection Act (section 1a, sub 1 Economic Offences Act). The maximum of one year applies to several violations of particular regulations laid down by or pursuant to, among others, the Water Act, the General Provisions Environmental Law Act, the Environment Management Act and the Nature Protection Act (section 1a, sub 1 Economic Offences Act).

For common criminal offences, the level of the sanctions varies according to the offence and the presence of intent (*opzet*) or guilt (*schuld*) of the offender. For example, for the pollution of soil, air or surface water as criminalised in section 173a of the Criminal Code imprisonment of a maximum of twelve years or fifteen years is possible when the behaviour was intentional and it has, respectively, the effect of danger to public health or personal health, or the endangerment of personal health and the loss of life.[1988] When someone is at fault for the pollution – without intent, but with guilt – a maximum imprisonment of a year for endangerment of public health or personal health, and a maximum imprisonment of two years for the endangerment of personal health and the loss of life.[1989] Detention is a sanction that can be imposed, for example, for the common criminal offence of violation of the regulation of the regional water authority, as mentioned previously. A maximum detention of three months may then be imposed.[1990]

1984 Section 6(1)(1) and (2) Economic Offences Act.
1985 Section 6(1)(4)-(5) Economic Offences Act.
1986 Section 6(1)(1)-(3) Economic Offences Act.
1987 Section 6(1)(4)-(5) Economic Offences Act.
1988 Section 173a Criminal Code.
1989 Section 173b Criminal Code.
1990 Section 81(1) Regional Water Authority Act.

Given their nature sanctions involving deprivation of liberty can only be imposed on natural persons. Environmental offences are, in fact, often committed by legal entities, i.e. companies with for example an environmental permit. As explained previously, these sanctions can, however, be imposed on the persons who are criminally responsible as instructing party or factual leader, such as members of the management board.[1991] This can have a serious impact on the company. Due to its gravity, the option of deprivation of liberty is barely used in practice, such a preventive impact is lacking.

Criminal fine

Instead of imprisonment or detention, a criminal fine (*geldboete*)[1992] can be imposed for both economic environmental offences and common environmental offences. The maximum level of the fine is indicated in Euro's by reference to one of the six fining categories established in section 23 of the Criminal Code in the penalisations of the offences in the Economic Offences Act, the Criminal Code and specific statutes.[1993] These levels are adjusted once every two years.[1994]

Section 23(4) dictates the following maximum levels of the criminal fines:

- First category: € 415
- Second category: € 4150
- Third category: € 8300
- Fourth category: € 20 750
- Fifth category: € 83 000
- Sixth category: € 830 000

The fourth and fifth categories of the fines are most common for economic environmental offences. This means that the maximum of 83 000 Euros is the highest possible criminal fine (fifth category). This maximum applies to several crimes of particular regulations laid down by or pursuant to, among others, the Water Act, the General Provisions Environmental Law Act, the Environment Management Act and the Act on Nature Protection (section 1a, sub 1 Economic Offences Act). Other economic environmental offences, both crimes and misdemeanors, can be penalised with a criminal fine of 20 750 Euros (fourth category).

1991 Blomberg 2000, p. 156.
1992 This term is also translated as criminal penalty or monetary fine. See e.g. Seerden 2018; Jansen 2013.
1993 Section 23(4) Criminal Code.
1994 Section 23(9) Criminal Code, the last time was 1 January 2018.

For common environmental offences, there is variation according to the offence and the presence of intent or guilt of the offender. For example, for the pollution of soil, air or surface water a maximum criminal fine of the fifth category (83 000 Euros) is possible when the behaviour was intentional and it has, respectively, the effect of danger to public health or personal health, or the endangerment of personal health and the loss of life.[1995] When someone is at fault for the pollution – without intent, but with guilt – a maximum criminal fine of the fourth category is possible (20 750 Euros), also for the endangerment of personal health and the loss of life.[1996] The common criminal offence of violation of the regulation of the regional water authority, as mentioned previously, has a maximum criminal fine of the second category (4150 Euros).[1997]

At the time of the realisation of the Economic Offences Act the legislator stated that when punishing economic offences, the offender must lose his profit.[1998] However, the criminal fines are not specifically calculated on the basis of the profit made by the offender. The Economic Offences Act does contain a provision that connects the level of the criminal fine to the level of the value of the goods involved in the economic offence. This provision states that if the value of the goods with which or in respect of which the economic offence has been committed or which has been obtained in whole or in part by means of the economic offence is higher than the fourth part of the maximum fine that may be imposed, a fine may be imposed of the higher category.[1999] In any case, when the level of the criminal sanctions for economic offences and common criminal offences is determined, one of the aspects that must be weighed is the profit made by the offender as a result of the offence.
Besides this, the Criminal Code contains a provision through which the criminal fine may also be 'upgraded' to a higher category in case of a legal entity.[2000] This provision is applicable to both economic criminal offences and common criminal offences. This provision states that in the case of conviction of a legal person, where the possible criminal fine does not provide appropriate punishment (*passende bestraffing*), a fine may be imposed with a maximum of the next higher category.
The criminal fine is considered punishment and therefore intends to inflict harm to the offender with respect to his assets. This in contrast with the withdrawal of wrongly obtained advantage pursuant to section 8(a) of the Economic Offences Act, which is a measure and hence aims at repairing/restoring. The criminal fine can be

1995 Section 173a Criminal Code.
1996 Section 173b Criminal Code.
1997 Section 81(1) Regional Water Authority Act.
1998 Kamerstukken II 1947-1948, 603, nr. 3, p. 15.
1999 Section 6(1) of the Economic Offences Act.
2000 Section 23(7) of the Criminal Code.

imposed for example on private persons who, in violation of the Act on Nature Protection, pick plants that belong to a protected indigenous species of plants. Beside this, the pecuniary fine is appropriate to penalize offences committed by companies when for example they do not comply with the prohibition of dumping waste outside the establishment (section 10.2 Environment Management Act). Because of the possibility to raise the criminal fine, it is also suited for penalizing severe environmental crime, for example when huge amounts of noxious substances are discharged into surface waters without a permit (section 1 Surface Water Pollution Act (*Wet Verontreiniging Oppervlaktewateren*).

11.4.4.3 Supplementary penalties

The supplementary penalties (*bijkomende straffen*) a criminal court may impose are:

- forfeiture
- closedown of a legal entity
- deprival of rights or advantages
- publication of the judicial decision.

These supplementary penalties may be imposed either together with primary penalties, together with other supplementary penalties or independently thereof.[2001]

Forfeiture

Forfeiture (*verbeurdverklaring*) is possible of goods and property rights that are completely or partially acquired by means of the criminal offence, with the help of which the offence has been committed or that are otherwise directly related to the offence, including those that belong to the company of the convicted as far as it is related to the offence.[2002] Forfeiture related to environmental offences is usually of objects, such as, for example, the sound system with which the noise standards have repeatedly been exceeded or the truck used for illegal dumping.[2003] But also sums of money can be forfeited, for example the money obtained by a merchant when trading in indigenous or exotic endangered species of animals (in violation of the Nature Protection Act).

Temporarily closing down a business

The business that has committed the economic offence can be closed down completely or partially (*stillegging van de onderneming*) for a maximum of one year.[2004] Closing

2001 Section 6(2) of the Economic Offences Act and section 9(5) Criminal Code.

2002 Section 7 sub d and e Economic Offences Act and section 33a subsection 4 Criminal Code. Property rights are rights that are transferable, either separately or together with another right, or that tend to provide material advantage to the entitled person, or that are obtained in exchange for reinforced material advantage or the prospect of it (section 3:6 of the Dutch Civil Code).

2003 Blomberg 2000, p. 157-158.

2004 Section 7 sub c Economic Offences Act.

down a business is a very drastic punishment. This sanction is considered ideal for those offenders that seem to believe that non-compliance with legal rules is not abnormal and that being caught for that non-compliance belongs to the normal business risks, i.e. something that can be taken into account in their business calculations.[2005]
When the Economic Offences Act was created, this sanction was qualified in the legislative history as *ultima ratio*, or *ultimum remedium*. It was considered by the legislator that where possible, a less drastic punishment or measure may suffice and that options of less drastic sanctions are the deprival of certain rights, the withdrawal of certain advantages, and the placing under guardianship of the convicted offender's enterprise.[2006]
This company sanction is particularly relevant for offences in the field of, among others, the General Provisions Environmental Law Act, the Environment Management Act, the Water Act, and the Nature Protection Act, as the norms in these acts are most often involve actions or omissions of legal entities. Closing down an enterprise is appropriate if companies systematically act in violation of the aforementioned acts. This is for example the case if the injunction to trade in protected indigenous or exotic species of plants or animals is systematically violated, or in case of systematic violations of environmental law without any authorization or permit, or if (key) rules in an authorization or permit are systematically not complied with.[2007] This sanction is not available for common environmental offences.

Deprival of rights and withdrawal of advantages
The criminal court can impose the supplementary fine of complete or partial deprival of rights (*ontzetting van rechten*). There are two lists of rights contained in the law to which this sanction may apply, both of which can be imposed for economic environmental offences.[2008] Firstly, the Economic Offences Act refers to certain rights mentioned in the Criminal Code. In the field of environmental offences the deprival of the right to exercise certain occupations is the most relevant.[2009] It can have the consequence that is comparable to the closedown of the enterprise. As a rule, the sanction is only imposed for the occupation in which the offence has been committed. Moreover, often recidivism is required. As far as known, this sanction is however rarely used, due to its radical character.[2010]
The second list of rights in the law contains rights or advantages that can or have been awarded to the legal entity by government.[2011] The legal entity may be completely or

2005 Kamerstukken II 1947-1948, 603, nr. 3, p. 13.
2006 Kamerstukken II 1948-1949, 603, nr. 5, p. 50-51.
2007 Blomberg 2000, p. 160.
2008 Section 7 sub a and f Economic Offences Act; section 28 subsection 1, sub 1, 2, 4 and 5 of the Criminal Code.
2009 Section 28(1)(5) Criminal Code.
2010 Kamerstukken II 2009-2010, 32123 VI, nr. 85; Cleiren, Crijns & Verpalen 2018, p. 2640-2641.
2011 Section 7 sub f Economic Offences Act.

partially deprived of such rights, or advantages completely or partially withdrawn. This sanction can, for example, be imposed with regard to import or export rights of a company in case of offences regarding the Nature Protection Act. In practice, the deprival has been imposed very rarely.[2012]

If the criminal court has imposed this sanction, the offender continues to possess the right or advantage, such as a licence or dispensation, but is forbidden from using it for a maximum period of two years.[2013] Using it would result in a separate economic offence.[2014]

Publication of the judicial decision

Also a supplementary penalty for economic environmental offences and common environmental offences is the sanction of publication of the judicial decision (*publicatie van de rechterlijke beslissing*).[2015] The criminal court may impose this penalty, for example, by ordering the publication of an extract of the sentence in a regional or national newspaper. In any case, the qualification and the motivation for the conviction, including the sentence, must be included in the publication. Furthermore, hanging an extract of the conviction on the outside of the premises of the legal entity can also be considered.[2016] This sanction is particularly suited in cases in which third parties, such as neighbours or consumers are the victims of the offence. In the (environmental) criminal practice, the sanction has barely any significance – notwithstanding the preventive effect it can have. In fact, it is never imposed although occasionally requested by the Public Prosecutor.[2017] In general, it is considered that the standard publication of the criminal conviction and sentence does not warrant a separate order to the offender to publish.

11.4.4.4 Penalties with conditions

The criminal court may impose the primary penalties – among which the criminal fine – and supplementary penalties conditionally in part or as a whole for common criminal environmental offences.[2018] This means that while the court imposes these penalties, they are not executed (immediately). Instead a probation period is set.[2019] Moreover,

2012 Kamerstukken II 1947-1948, 603, nr. 3, p. 14; Blomberg & Michiels 1997, p. 269; Blomberg 2000, p. 161; Keulen 1995, p. 196-197; Oudijk 1991, p. 386.

2013 Only the administrative authority that has given out the licence or dispensation is empowered to withdraw the licence or the dispensation, as a sanction. See also section 11.2.2.3 of this chapter for the revocation of an advantageous decision.

2014 Section 33 Economic Offences Act; Cleiren, Crijns & Verpalen 2018, p. 2643.

2015 Section 7(g) Economic Offences Act and section 9(1)(b)(3) Criminal Code. See also, e.g. section 81 of the Water Act, which explicitly mentions this penalty.

2016 Hollander 1952, p. 73; Doorenbos 2003, p. 2190; Cleiren, Crijns & Verpalen 2018, p. 2643.

2017 See e.g. Hendriks & Wöretshofer 2002, p. 182

2018 Section 14a Criminal Code.

2019 Section 14b Criminal Code.

the court may attach special conditions (*bijzondere voorwaarden*), particularly with a reparatory nature, to this probation.[2020] If the offender does not comply with these conditions, the penalties will be executed.[2021] There are special conditions detailed in the Criminal Code, which may be useful in case of environmental offences. Such conditions are, for example, the complete or partial compensation for the damage caused by the criminal offence; complete or partial reparation of damage caused by the criminal offence; and the guarantee deposit to be determined by the judge.[2022] A conditional sanction and its special conditions can be used to influence the behaviour of the convicted offender.[2023]

Complete or partial compensation of the damage caused by the criminal offence

The court can link the special condition that the offender must completely or partially compensate the damage caused by the criminal offence to the imposition of a conditional penalty.[2024] The judge also determines the term within which this compensation must have been paid. The Public Prosecutor can also link this condition to an extra judicial settlement (transaction).[2025] The advantage of imposing an obligation to compensate for damage in this form is that the sum due by the offender, unlike in case of a (conditional) criminal fine, is to the direct benefit of what has been damaged. If the damage is irreparable, as is the case with discharges or picking plants or destroying nests of animals belonging to a protected indigenous species of plants or animals, the utilization of the compensation must be as close as possible to repair/restoration.[2026]

Complete or partial reparation of the damage caused by the criminal offence

The court can attach the condition to completely or partially repair the material damage due to the criminal offence, to a conditional penalty for a common criminal offence.[2027] This condition can be imposed when the convict cannot repair the damage within due time, but is able and willing to repair the damage at all. The aim of the condition is to restore the situation to the state it was in previous to the criminal offence as much as possible.[2028]

2020 Section 14c Criminal Code.
2021 Section 14c subsection 2 in conjunction with 14a of the Criminal Code.
2022 Respectively, section 14c, subsection 1-4 of the Criminal Code. See also, the other possible conditions – less relevant to environmental offences – in section 14c, subsection 5-14 of the Criminal Code.
2023 Cleiren, Crijns & Verpalen 2018, p. 135.
2024 Section 14a in conjunction with 14c(2) sub 1 Criminal Code.
2025 Section 74(2) sub e Criminal Code. See for more on this further below.
2026 Blomberg 2000, p. 166.
2027 Section 14(c)(2) of the Criminal Code.
2028 Cleiren, Crijns & Verpalen 2018, p. 142.

Guarantee deposit to be determined by the judge

The judge can also set as a special condition – as far as important in the case of environmental offences – that the offender has to pay a guarantee deposit to be determined by the judge.[2029] This deposit is maximally equal to the difference between the maximum fine that can be imposed for the criminal offence and the actual imposed fine.

11.4.4.5 Measures

The measures (*maatregelen)* a criminal court may impose are:

- withdrawal of goods from circulation;
- dispossession of illegally obtained advantage;
- compensation of damage to the victim;

and, solely for economic offences:

- placing under guardianship of a legal entity;
- obligation to restore (reparatory measures).

Moreover, as provisional measures for immediate action while awaiting trial for economic offences, the criminal court may impose:

- the order to abstain from certain actions;
- the order to take care of storage and conservation;
- close down of the enterprise;
- placing under guardianship; and,
- deprival of rights or withdrawal of advantages.[2030]

As explained previously, several measures can be imposed despite an acquittal, when the criminal court has found a criminal offence to exist.[2031] Of particular interest here is that this is possible for the measure of withdrawal from circulation of objects that have been confiscated. See further below.

Withdrawal of goods from circulation

The withdrawal of goods from circulation (*onttrekking aan het verkeer*) may be imposed as a measure for economic environmental offences and common environmental offences.[2032] This measure is in particular suitable to be used for the withdrawal from circulation of plants or products derived from plants, or of animals or eggs, nests or products derived from animals, belonging to a protected indigenous or exotic species of plants or animals which are traded in violation of the injunction to trade.[2033]

2029 Section 8 sub a Economic Offences Act in conjunction with 14c subsection 2 sub 3 Criminal Code.
2030 The provisional measures are discussed below in section 11.5.6 for the criminal court.
2031 Section 351 Code of Criminal Procedure; section 36a and further Criminal Code; Cleiren, Crijns & Verpalen 2018, p. 241.
2032 Section 8 sub a Economic Offences Act; section 36b and section 36d Criminal Code.
2033 See section 7.4 and 7.5 Nature Protection Act; section 117 Code of Criminal Procedure.

The withdrawal measure can be imposed by a judgment in which someone is convicted for a criminal offence, in which it is determined that no punishment will be imposed, or in which it is established that a criminal offence has been committed notwithstanding discharge or immunity from legal proceedings.[2034] Moreover, the Public Prosecutor may request it. Then it is imposed through a separate judicial decision.[2035] The withdrawal measure can be imposed together with penalties and with other measures (section 36b(3) Criminal Code). Unlike the measure of withdrawal of wrongly obtained advantage, the measure of withdrawal from circulation can be imposed if no conviction follows, as long as it is established in the acquittal that a criminal offence has taken place.[2036]

Dispossession of illegally obtained advantage (ontnemingsmaatregel)

The criminal courts may impose on the person that has been convicted for an environmental criminal offence the obligation to pay an amount of money to the State in order to deprive him of an illegally obtained advantage (*ontneming van wederrechtelijk verkregen voordeel*). This instrument is imposed by means of a separate judicial procedure and decision, upon request by the Public Prosecutor, within two years after the conviction in first instance.[2037] The convicted person must have obtained advantage by means of the criminal offence or from its benefits or by means of similar offences or other offences that are subject to a criminal fine of the fifth category, with regard to which there is sufficient evidence that they are committed by him (section 36e subsection 2 Criminal Code).

Costs saved are also considered illegally obtained gains from non-compliance.[2038] This type of gains are for example at issue where, contrary to rules in a permit[2039], no environmentally sound equipment is put in place, such as a specific or additional filter in the chimney of a waste combustion installation to comply with the norms on emissions laid down in the permit, or machines in an installation are not converted to comply with noise standards laid down in the licence.

> The court can only deduce the estimation of the value of the advantage in money, as referred to in section 36e of the Criminal Code, from the contents of lawful evidence (section 511f Code of Criminal Procedure).

2034 Section 36b(1) sub 1, 2 and 3 Criminal Code.
2035 Section 36b(1) sub 4 Criminal Code in conjunction with section 552 Code of Criminal Procedure.
2036 Section 36b(1)(2) and (3) Criminal Code.
2037 Section 8 sub a Economic Offences Act and section 36e Criminal Code and section 511b subsection 1 Code of Criminal Procedure.
2038 Section 36e(5) Criminal Code; Kamerstukken II 1989-1990, 21504, nr. 3, p. 16; HR 13 June 2017 ECLI:NL:HR:2017:1080.
2039 Which can be penalised pursuant to section 18.18 Environment Management Act.

The measure to deprive the offender of illegal gains is considered by the legislator as entirely aimed at the reparation of the situation into its financially lawful state. It is not aimed at imposing a burden upon the offender on the basis of the nature of the offence and his behaviour and guilt.[2040]

Compensation of damage measure

In case of a judicial decision in which someone is convicted for an economic environmental offence or a common environmental offence, an obligation to pay a sum of money to the State on behalf of the victim may also be imposed by the court.[2041] This measure is not often imposed in case of environmental offences, as in case of non-compliance with environmental legal rules there usually is no individualised victim. Moreover, it is not easy to demonstrate and enumerate environmental damage and the liability for it.[2042]

Placing under guardianship of the enterprise

Less drastic than the (supplementary) sanction of closing down a business is the measure of placing the enterprise under guardianship (*onderbewindstelling*), which can be applied for economic environmental offences by the criminal court.[2043] The legislator has introduced this measure for situations where it is unacceptable that a certain person continues to lead a company, while it may be considered economically or socially inappropriate to close that company.[2044] This measure can, for example, be imposed to sanction offences committed inside of a waste incineration plant. Closing down the enterprise may lead to the storage of noxious substances inside the plant, resulting in high impact consequences for the environment and for the public health. Moreover, waste cannot be processed anymore, which can also have implications for the environment and for public health. Therefore, in such a case the placing under guardianship is a more appropriate measure. Another example is an installation producing medicines that is continuously leaking hazardous materials into its natural surroundings.

This measure can be imposed for a maximum duration of three years in case of crimes and two years in case of misdemeanors.[2045] It may also be imposed provisionally, i.e. while the proceedings before the criminal court are on-going. When this measure is imposed, an executive director is appointed.[2046] The decision to place an enterprise

2040 Kamerstukken II 1989-1990, 21504, nr. 3, p. 7 and further.
2041 On the basis of section 8 subsection 1 sub a Economic Offences Act in conjunction with section 36f of the Criminal Code.
2042 Blomberg 2000, p. 165.
2043 Section 8 sub b, and section 29 Economic Offences Act.
2044 Kamerstukken II 1948-1949, 603, nr. 5, p. 50-51.
2045 In pursuance of section 8 sub b Economic Offences Act.
2046 Section 10(1) and 11(1) Economic Offences Act.

under guardianship is made public in the Dutch government gazette (*Staatscourant*) and advertised in one or more newspapers to be designated by the judge. Moreover, the decision is recorded in the register of companies.[2047]

Obligation to restore in due form

The criminal court may impose the obligation upon the convicted of an economic offence to carry out what has unlawfully been omitted, to undo what has unlawfully been carried out and to carry out activities to make up for it *(reparatio in integrum*).[2048] This measure is purely aimed at reparation. The convicted himself has to restore the situation in due form. Within the scope of this measure, the offender can for example be obliged to remove illegally dumped waste or to clean up polluted soil as a result of a waste offence. This measure shows similarities with the administrative sanction of the order subject to a coercive fine. This administrative sanction also aims to remove the illegality, to repair in due form, or to restore at the expense of the offender.

11.4.4.6 Provisional measures by the court

The criminal court that adjudicates an economic environmental offence, can order provisional measures (*voorlopige maatregelen*) previous to its adjudication of the case in court, when there are serious objections against the offender and, in addition, the interests that are protected by the legal rules that are not complied with, require immediate intervention.[2049] More specifically, the court can order an offender to abstain from certain actions and to take care of storage and conservation.[2050] Furthermore, the court can also order complete or partial closedown of the suspect's enterprise, placing under guardianship of that enterprise, and complete or partial deprival of certain rights or complete or partial withdrawal of certain advantages.[2051] The imposition of a provisional measure by the court where the case is tried must take place prior to the proceedings in court, on demand of the Public Prosecutor or on recommendation of the examining magistrate in charge of the preliminary inquiry. If the case is tried at the hearing, the court can also order a provisional measure *ex officio* (section 29 subsection 1 Economic Offences Act). The court where the case is tried can once prolong, modify or cancel the orders for a period of maximum six months. The court can do this ex officio, on recommendation of the examining magistrate in charge of the preliminary inquiry, and on demand of the Public Prosecutor. As regards the modification or cancelation of the orders, the court can also do this on request of

2047 In application of what is determined by virtue of the Register of Companies Act 1996; section 11 subsection 2 Economic Offences Act.
2048 Section 8 sub c of the Economic Offences Act.
2049 Section 29 Economic Offences Act.
2050 Section 29 subsection 1 sub d and e Economic Offences Act.
2051 Section 29 subsection 1 sub a, b and c Economic Offences Act.

the suspect, who is always heard (section 29 subsection 3 Economic Offences Act). The provisional measures lose their effect after six months and remain into force at the most until the final judicial decision in the case in which they have been issued, has become irrevocable (section 29 subsection 3 Economic Offences Act).

11.4.5 Criminal sanctions by the Public Prosecutor

The Public Prosecutor prosecutes criminal offences in criminal court, whereupon the court may impose a sanction upon an offender/convict. However, the Public Prosecutor has the statutory option to prosecute without bringing a case to court by taking a criminal decision (*strafbeschikking*). Also it has the option to order provisional measures to be taken by an offender, while prosecution takes place.

The criminal decision

The criminal decision imposed by the Public Prosecutor is considered an act of prosecution and actually similar to a conviction by a criminal court.[2052] The basis for the criminal decision power of the Public Prosecutor is section 257a of the Code of Criminal Procedure. The Public Prosecutor may impose a criminal decision upon an offender[2053] when he establishes that a misdemeanour (*overtreding*) or a crime (*misdrijf*) has been committed that is penalised by law with a prison sentence of no more than six years.[2054] The criminal decision by the Public Prosecutor may be imposed for economic environmental offences and for common criminal environmental offences. As part of the criminal decision, the Public Prosecutor may impose several penalties and measures. These are listed in the table below.

2052 *Aanwijzing OM-strafbeschikking*, Staatscourant 2018 67767, section 3.
2053 In the Code of Criminal Procedure only the term suspect is used in conjunction with this instrument.
2054 Section 257a sub 1 of the Code of Criminal Procedure.

Content of a criminal decision

A criminal decision may impose:
- a community service of maximum of 180 hours
- a criminal fine
- the withdrawal of goods from circulation (*onttrekking aan het verkeer*)[2055]
- the obligation to pay a sum of money to the State on behalf of the victim as compensation (*schadevergoedingsmaatregel*)
- the withdrawal of the right to drive for a maximum of six months.[2056]

Instructions (*aanwijzingen*) that may be imposed as part of a criminal decision:
- to resign objects that have been confiscated
- payment to the state of a monetary sum or the cession of objects for the benefit of partial or entire dispossession of illegally gained benefits (*ontneming*)
- other instructions concerning the behaviour of the offender, which he has to comply with during a probation period of a year maximum[2057]
- for economic environmental offences only: the instruction for the offender to carry out what has unlawfully been omitted, to undo what has unlawfully been carried out and to carry out performances to make up for it *(reparatio in integrum*)[2058]

In case of the community service, the withdrawal of the right to drive and instructions pertaining to the behaviour of the offender, such content may only be put into a criminal decision when the offender has stated his willingness to adhere to it when heard by the Public Prosecutor.[2059] This is not the case for the other possible content of the criminal decision.

There are several conditions for the use of this instrument by the Public Prosecutor, that are quite similar to those set for the administrative criminal decision that the administrative authorities may impose. A criminal decision may only be imposed when there is sufficient evidence of the offence(s). Previous to imposing the decision the guilt of the offender must be ascertained: the suspect must have committed the offence. If there are doubts about the guilt of the offender, a criminal decision may not be imposed.[2060] Moreover, where there are grounds for an exception of guilt of the offender, a criminal decision may not be imposed either. In other words, the criminal

2055 Section 36b(5) of the Criminal Code.
2056 Section 257a sub 2 of the Code of Criminal Procedure.
2057 Section 257a sub 3 of the Code of Criminal Procedure. This has not yet been implemented, according to the *Aanwijzing OM-strafbeschikking*, Staatscourant 2018 67767.
2058 Section 36 of the Economic Offences Act.
2059 *Aanwijzing OM-strafbeschikking*, Staatscourant 2018 67767, section 3.2.
2060 *Aanwijzing OM-strafbeschikking*, Staatscourant 2018 67767, section 3.1.

decision is based upon the determination of guilt. When an offender does not object to this, the criminal decision is considered to have established his guilt. There may be contra-indications for imposing a criminal decision, of which the fact that there is a sanction already in place concerning the dispossession of illegally gained benefits, is the most relevant.[2061]

If the offender does not agree with the criminal decision, he may object to it (*verzet*). This will mean that the Public Prosecutor will first reassess the case. On the basis of this reassessment a criminal decision may be revoked or amended by the Public Prosecutor, with agreement of the court, or the offender may be called to appear in court for 'normal' criminal proceedings.[2062] Also if the substance of the decision is not complied with and execution fails, a prosecution in a criminal court will follow.[2063]

The extra-judicial settlement

The Public Prosecutor can impose conditions previous to the start of the court case, to prevent prosecution for most economic and common environmental offences. This is also called the transaction competence of the Public Prosecutor (*transactie*). This is possible for all economic environmental offences.[2064] When the conditions in the transaction proposal are complied with, the Public Prosecutor may no longer prosecute.[2065] The suspect is not obliged to accept a transaction proposal. The conditions that can be set are enumerated in subsection 2 of section 74 of the Criminal Code. In practice, it is most common to set the condition of paying a sum of money to the State of, at the most, the maximum of the pecuniary fine that can be imposed for the offence.[2066] Other conditions are the payment to the state of a monetary sum for the benefit of partial or entire dispossession of illegally gained benefits (*ontneming*), and the compensation of the damage caused by the offence.[2067]

Provisional measures by the Public Prosecutor

As long as the court proceedings for a criminal offence have not begun, but prosecution has been instigated, the Public Prosecutor has several possibilities to impose provisional measures (*voorwaardelijke maatregelen*) on the offender connected to the prosecuted offence. Provisional measures can be imposed in cases of economic environmental offences if serious objections have been raised against the suspect and

2061 *Aanwijzing OM-strafbeschikking*, Staatscourant 2018 67767, annexes 1A and 1B.
2062 Section 257e(9) of the Code of Criminal Procedure; *Aanwijzing OM-strafbeschikking*, Staatscourant 2018 67767, section 4.
2063 Section 257e Code of Criminal Procedure.
2064 Section 74 Criminal Code in conjunction with section 6 subsection 1 sub 1 Economic Offences Act.
2065 Section 74 subsection 1 Criminal Code.
2066 See also Blomberg 2000, p. 172.
2067 Section 74 subsection 2(d) and (e) Criminal Code.

if the interests that are protected by the (in all likelihood) violated regulation require an immediate intervention.[2068] A strong suspicion of an offence is sufficient to assume serious objections against an offender.[2069] It is thus not required that it is proven that the suspect has actually committed the offence and therefore also can actually be convicted. It is not acceptable to intervene immediately if it is clear that the suspect is not culpable for the offence, for example, because of *force majeure*. However, the Public Prosecutor is not obliged to conduct an extensive investigation.[2070]
As the substance of the provisional measures, the Public Prosecutor may order the suspect to (a) abstain from certain actions, usually not to commit the same offence again, and/or (b) to take care of storage and conservation on the spot of the objects indicated in the order that are susceptible to confiscation.[2071] The latter may be appropriate, for example, when it concerns animals (Act on Nature Protection) or dangerous substances (Environment Management Act).[2072]

The measures by the Public Prosecutor may not be similar to those provisional measures by the court as referred to in section 29 sub a, b or c Economic Offences Act. The application of those provisional measures (closing down, placing under guardianship, deprival of rights or withdrawal of advantages) is reserved for the criminal judiciary.[2073]

The execution of provisional measures
The orders for provisional measures are immediately executable (section 31 Economic Offences Act).[2074] Non-compliance with the provisional measure results in an independent criminal offence, namely an offence within the meaning of section 33 of the Economic Offences Act. Even if the reason to impose a provisional measure is no longer valid, it remains against the law to violate the provisional measure as long as it has not been withdrawn, modified or if it is not effective anymore due to the course of time.[2075]

Decision of nolle prosequi: provisional nolle prosequi
Once the Public Prosecutor instigates prosecution, the case is to be concluded through a judgment by the criminal courts. The Public Prosecutor can consider the chances of succeeding in obtaining a judgment with sanctions, and the accompanying guilty verdict, in deciding whether or not to instigate prosecution. The discretion

2068 Section 28 of the Act Economic Offences.
2069 See HR 14 September 1981 ECLI:NL:PHR:1981:AD6343.
2070 Blomberg 2000, p. 169.
2071 Section 28 Economic Offences Act.
2072 See section 94 Code of Criminal Procedure and sections 33a and 36b Criminal Code.
2073 Kamerstukken II 1947-1948, 603, nr. 3, p. 25.
2074 In contrast with the main rule in section 557 Code of Criminal Procedure.
2075 This was already evident in HR 8 December 1992 ECLI:NL:PHR:1992:AC0664.

of the Public Prosecutor in this respect is called the principle of opportunity, or expediency.[2076] It follows from this principle that the Public Prosecutor is not obliged per se to proceed to criminal prosecution. On the basis of this principle, the Public Prosecutor may take the decision not to prosecute further (*sepot*, or, *nolle prosequi*) or may decide provisionally not to prosecute further (*voorwaardelijke sepot*). The Public Prosecutor can link conditions to dropping a case.[2077]

11.5 Cumulation of sanctions: concurrent and consecutive imposition

In this section it is explored whether more than one sanction may be imposed per contravention/instance of non-compliance in the Netherlands, cumulation of sanctions. There is cumulation of sanctions in those situations in which more than one sanction is imposed and applied concurrently (simultaneously) or consecutively for a single instance of non-compliance.[2078] In this chapter, it was already mentioned when more than one administrative sanction could be imposed, and when more than one criminal sanction could be imposed. This section describes the cumulation of administrative and criminal sanctions.

As nearly all environmental non-compliance can be enforced through administrative and criminal law – what is also called a dual sanctions system (*duaal sanctiestelsel*) – the possibility for cumulation between these types of enforcement is very high in the Netherlands. As a result, several statutory provisions have been created in Dutch law that standardize cumulation of administrative sanctions. Also, policy has been created to streamline the imposition of sanctions. These will be described in the following, starting with the relationship between the administrative and the criminal enforcement of environmental law.

11.5.1 The relationship between the administrative and the criminal enforcement of environmental law

11.5.1.1 From ultima ratio to complementary

Due to the described developments in the sets of sanctions available to the authorities the boundaries between the administrative sanctions and criminal sanctions have become more fluent. A punitive sanction is now in the hands of the administrative authorities, but also a criminal sanction has been introduced into the hands of administrative authorities.

2076 Which can also be seen as a general form of *nolle prosequi*. See section 167 subsection 2 of the Code of Criminal Procedure (for lack of evidence) and section 242 subsection 2 of the Code of Criminal Procedure (for reasons of policy).
2077 Section 167, section 242 and section 244-245 Code of Criminal Procedure.
2078 See also Michiels, Blomberg & Jurgens 2016, p. 250; Blomberg 2000, p. 193.

This raises the question how the relationship is between administrative and criminal enforcement, and, in light of the developments in the instrumental toolbox, specifically the relationship between administrative punitive sanctions and criminal (punitive) sanctions. For this purpose, several indicators were formulated from 1988 onwards on the choice between criminal enforcement and administrative enforcement.

The criminal enforcement of environmental law was long considered as the *ultima ratio* instrument (in the Netherlands generally referred to as *ultimum remedium*). However, in 1999 the viewpoint of criminal enforcement as *ultima ratio* was departed from. This was determined in, among other things, the Public Prosecutor's Environment Strategy 1999 (*Strategie Milieu*).[2079] The Environmental Strategy 1999 clearly draws the attention to the role of the Public Prosecutor in the enforcement of environmental law. The Strategy explicitly states that criminal law is no longer to be seen as *ultima ratio* regarding environmental law; administrative and criminal enforcement are to exist side-by-side, each with its own function.[2080] The basic principle must be that actions of the competent administrative authority and of the competent criminal authority, separately and combined, are directed towards safeguarding a fair level of compliance and restricting the consequences of offences as much as possible – each acting within the framework of its own task and responsibility.[2081]
It was at this point in time an integral approach to the enforcement of environmental law was introduced (*integrale handhaving*). According to this approach, effective enforcement is deemed possible only if there is an integral approach to the enforcement issues. Principally this integral enforcement of environmental law was to be realised at the level of the provinces and regional co-operation between the concerned authorities on the basis of the Joint Regulations Act.[2082] In order to strengthen collaborative enforcement, all provinces drew up administrative agreements provided with a criminal complement containing conventions between the Public Prosecutor and the police. Moreover, the collaboration between the administrative authorities and the criminal authorities was the subject of tripartite consultations between the police, the Public Prosecutor's Office, and the municipal authorities.

Pursuant to the Environment Strategy 1999, the objectives of the criminal enforcement of environmental law were the consolidation of a norm in consideration of the interests to be protected and the reparation or limitation of the damage

2079 *Strategie Milieu* 1999; parts of it can also be found in the directive *Aanwijzing handhaving milieurecht*, Staatscourant 1999, 119 and its subsequent incarnations until 2014; See also Blomberg & Michiels 1997, p. 107-109; Kamerstukken II 1998-1999 22343, nr. 44.
2080 *Strategie Milieu* 1999, p. 2.
2081 *Strategie Milieu* 1999, p. 2.
2082 Kamerstukken II 1996-1997, 22343, nr. 29.

inflicted on them. To attain these objectives criminal law would have to be used principally against offences of key provisions (*kernbepalingen*) within environmental law, unless the offence was not committed deliberately, an obvious incident and of limited extent. A directive on environmental enforcement[2083] and a directive on the enforcement of the Act on Flora- and Fauna[2084] indicated what these key provisions were. In case of violation of other provisions than the key provisions, for example of regulations on the basis of the Act on Spatial Planning and the Housing Act, applying criminal enforcement was normally not considered expedient, unless there were particularly relevant circumstances from the point of view of criminal enforcement. These circumstances were, among other things, the direct deterioration of the environment or public health, or the threat thereto; a calculated or dishonest attitude of the offender; or high probability that inaction against the offence would result in a large-scale escalation.
The most recent Countrywide Enforcement Strategy (*Landelijke Handhavingsstrategie*) has defined – from 2014 onwards – the current relationship between administrative and criminal enforcement. This will now be discussed.

11.5.1.2 The Countrywide Enforcement Strategy

Principles of the Strategy
Already discussed in the previous chapter, the Countrywide Enforcement Strategy (*Landelijke Handhavingstrategie*) was created in 2014. The Countrywide Enforcement Strategy connects the administrative enforcement, specifically sanctions, with the criminal enforcement of environmental law. It aims for uniformity and similarity of enforcement responses through administrative and/or criminal enforcement in similar cases. It aims to thereby create a level playing field for the natural persons or legal persons to which a norm applies, through similar action by enforcement authorities.
The Countrywide Enforcement Strategy (*Landelijke Handhavingstrategie*) is a document for all the enforcement authorities – both administrative and criminal – to unify the choice of interventions and to ensure the application occurs in a similar manner; that similar action is taken in similar situations. The 'action' is sanctioning through the administrative set of sanctions, the criminal set of sanctions or both.[2085] Thereby, the Strategy integrates administrative and criminal enforcement responses in one document, on a voluntary, but not optional basis.
The Countrywide Enforcement Strategy specifies that it is the aim to strengthen

2083 *Aanwijzing handhaving milieurecht*, Staatscourant 1999, 119, with several incarnations since then until 2014.
2084 *Richtlijn voor Strafvordering Flora- en Faunawet*, Staatscourant 2002, 121.
2085 The Countrywide Enforcement Strategy does not deal with inspection as such in terms of priorities, ways to conduct inspections and the like.

effective enforcement by mutually coordinated and effective action of all the authorities that have a role in the enforcement of environmental law. This aim is pursued, by, among others, making agreements on the synchronisation of national and regional priorities and the most effective approach to this through administrative and/or criminal enforcement.[2086]

Five concepts underlie the Strategy. These concepts are also common to the basis of the most recent legislative push for increasing the quality of enforcement.[2087] They are as follows:

- the independence of enforcement authorities;
- the professionality and expertise, including national consultation;
- the reliability of enforcement action, with regard to offenders in regard to the similar treatment of similar situations, and with regard towards society, that enforcement takes place;
- the simplicity of enforcement action, an appropriate intervention for each finding of non-compliance;
- the communality in enforcement action; of consultation, coordination and enforcement action.[2088]

Substance of the Strategy

The Strategy incorporates the principle duty of enforcement for the administrative authorities but leaves room for them to decide not to enforce, in Dutch also called '*gedogen*'.[2089] There is a national framework that standardizes this explicit non-enforcement by the administrative authorities.[2090] In short, the situation of non-compliance should be temporary, with the non-compliance ending in the foreseeable future, or the legalisation of the non-compliance, for example by licensing a situation so that it is in fact allowed. Such an explicit decision not to enforce, does not take away the possibility of criminal enforcement.[2091]

The Countrywide Enforcement Strategy provides a roadmap of five steps – a step-by-step plan – for realising its vision (see above). At the core of this step-by-step plan is the intervention matrix (*interventiematrix*). This matrix provides on its horizontal axis on a scale of A to D the behaviour of the offender. As the four incremental steps on this

2086 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 1. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

2087 *Kwaliteitscriteria 2.1*, 7 September 2012, p. 39, available at www.infomil.nl/publish/pages/75656/kwaliteitscriteria_2_1.pdf (last visited 1 June 2019).

2088 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 5-6. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

2089 For criminal enforcement, a decision not to enforce is considered part of the discretionary power of the Public Prosecutor, also demarcated with the term principle of opportunity (*opportuniteitsbeginsel*).

2090 See also section 9.5.2 of chapter 9.

2091 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 7. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

scale are distinguished: (A) benevolent behaviour (*goedwillend*), i.e. unintentional or proactive; (B) behaviour that is considered by the offender as should be possible (*moet kunnen*), i.e. indifferent; (C) calculating behaviour, i.e. intentionally obstructive and/or taking the risk; (D) intentional and structural, or criminal behaviour, i.e. fraud, money laundering. On the vertical axis of the intervention matrix it is provided on a scale of 1 to 4 the (potential) consequences of non-compliance: (1) nearly zero; (2) limited consequences; (3) relevant consequences; (4) significant, threatening and/or irreversible consequences. Administrative enforcement and criminal enforcement are types of enforcement.
One type or both types of enforcement are assigned to the 16 boxes that interconnect the two axes.[2092] Each of these boxes contains a specified intervention: 'administrative reparatory', 'administrative punitive', and 'criminal', or a combination.
The sanctions that are in the hands of the administrative authorities are specified at instrument level; however, for the sanctions or action in the hands of the Public Prosecutor, no specification is given apart from the letters PV, which stands for *proces-verbaal*, which is the report of the criminal charge.

> The Countrywide Enforcement Strategy lists the following interventions. Several actions placed under the header of 'administrative reparation' can also be seen as informal enforcement. These are – in any case for the purpose of this research – part of the preparatory phase to enforcement and not enforcement itself. Moreover, these actions are not laid down as such in an administrative decision, and, as such, appealable by the addressees of this decision. Also, not all of the interventions listed below are available for all cases of non-compliance with environmental law:[2093]
>
> ***Administrative reparation***
> - Approach/information (*aanspreken/informeren*)
> - Warning (*waarschuwen*)
> - Administrative conversation (*bestuurlijk gesprek*)
> - Increased supervision (*verscherpt toezicht*)
> - Order subject to coercive fine (*last onder dwangsom*)
> - Order subject to administrative coercion (*last onder bestuursdwang*)
> - Temporary shutting down (*tijdelijk stilleggen*)
>
> ***Administrative punitive***
> - Administrative fine (*bestuurlijke boete*)

2092 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 7. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

2093 For example, as described previously, the administrative fine and the administrative criminal decision have a limited scope of application.

- Suspension or revocation of permit/licence (*schorsen of intrekken vergunning, certificaat of erkenning*)
- Prohibition to exploit/closure (*exploitatieverbod/sluiting*)

Criminal

- Administrative criminal decision (*bestuurlijke strafbeschikking*)
- Report of criminal charge (*proces-verbaal*).

To assign a type or both types of enforcement to the 16 boxes of the matrix, three types of reaction are considered: (1) light segments for which administrative enforcement is appropriate; (2) middle segments for which administrative, administrative and criminal, or solely criminal enforcement is appropriate. It is considered that criminal action is especially appropriate where there are (more) aggravating aspects, such as financial benefits gained; and (3) heavy segments for which criminal action is in any case appropriate, while in many cases also administrative action is appropriate.[2094]

As mentioned above, the Countrywide Enforcement Strategy provides a roadmap of five steps. The first step is for the enforcement officer to decide on the basis of the findings of inspection – when these indicate non-compliance – what part of the intervention matrix these findings should be positioned in. The Countrywide Enforcement Strategy directs that this is to be done by:

- assessing the consequences of the found non-compliance for the environment, nature, water, safety, health and/or relevance (i.e. the vertical axis described above); and, then,
- characterising the addressee of the legal rules that have been breached (i.e. the horizontal axis described above).[2095]

Secondly, the enforcement officer will have to decide whether there are aggravating or alleviating circumstances, that are to be considered in deciding whether administrative and/or criminal enforcement is most appropriate. The Countrywide Enforcement Strategy considers that the more aggravating circumstances are available, the better reasons to enforce both through administrative and through criminal law.

2094 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 7. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

2095 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 7. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

The Strategy determines seven aspects as aggravating circumstances:

1. financial gains (profit or savings) as a result or the goal of non-compliance;
2. the status of the offender; whether the offender has an example function;
3. when a financial sanction in all likelihood will not have effect, i.e. when an administrative fine cannot be collected or has already been calculated into the (business) costs by the offender;
4. the combination with other offences;
5. the cooperation of expert third-parties, that had knowledge of the non-compliance;
6. norm authorisation, i.e. the goal of enforcement is then to bring attention to the importance of the norm that has been contravened. The Strategy considers that criminal enforcement takes place also to confirm or enforce norms to protect the interests that underlie them;
7. the discovery of the truth, i.e. when administrative enforcement does not contain the tools to discover the truth, criminal enforcement has more extensive tools that may be able to.[2096]

On the basis of the two steps described above, the Enforcement Strategy prescribes that, as the third step, the enforcement officer is to decide whether consultation on the application of administrative and/or criminal law is necessary.[2097] Administrative enforcement officers need to actively consult with the police and the Public Prosecutor and the other way around. The Enforcement Strategy explicitly describes this as a two-way street, with the aim of a well considered application of administrative law, administrative and criminal law or solely criminal law. The Enforcement Strategy dictates that for certain situations of non-compliance discussion on the application of administrative and/or criminal law is always necessary.[2098] The Strategy considers that discussion may also be useful when the enforcement officer deems the non-compliance not very severe, but has also signalled the existence of one or more aggravating circumstances. No discussion is necessary when an administrative criminal decision will be imposed.

The fourth step is the application of the intervention matrix. The principle laid down in the Countrywide Enforcement Strategy is that the start of the intervention is as light as possible by aiming for reparation, with subsequent swift reaction with heavier

2096 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 9. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

2097 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 9. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

2098 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 10. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

interventions, if compliance fails to occur.[2099] This means that the intervention matrix needs to be actively consulted throughout the process previous to and during whatever enforcement that has been chosen; enforcement is seen as a fluid and ongoing process.
The Strategy described that the time allowed for compliance once the intervention has started is to be immediate or as short as possible in case of behavioural rules that have been breached; it is to be related to the urgency of the situation in other cases: the more urgent, the shorter the time allowed for compliance, taking into account technical and organisational possibilities.
The last, fifth, step of the Strategy is that the steps and decisions taken by the enforcement authorities are to be laid down verifiably and transparently according to the procedures and systems of these authorities.[2100]

11.5.2 Cumulation of sanctions: concurrent and consecutive imposition

Considering that in the Netherlands, there are three sets of sanctions that may be deployed for the enforcement of (certain) non-compliance of environmental law[2101], the question is whether these sanctions may be imposed at the same time (concurrently/simultaneously) or through a consecutive application of sanctions, for example for the purpose of a follow-up sanction when the enforcement goal was not reached by means of the previous sanction imposed and/or non-compliance has not occurred, in other words by scaling-up sanctioning. This section discusses these aspects; together, these aspects are called the cumulation of sanctions.

As is clear from the above-mentioned substance of the Dutch National Enforcement Strategy, it is explicitly possible in the Netherlands, and even an explicit choice in the Strategy and its intervention matrix to use several types of administrative enforcement, as well as administrative and criminal enforcement both for sanctioning non-compliance with environmental law. The cumulation of sanctions in this way is in principle allowed in the Netherlands, unless there is a statutory regulation that excludes it. The norm of *una via* may limit this. This norm specifically relates to the choice between different sanctioning systems – having chosen one way for enforcement, the other way is closed; the nature of the sanction is irrelevant.[2102]

2099 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 10. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).
2100 *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 12. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).
2101 These three sets of sanctions can be imposed for administrative non-compliance, economic criminal offences and common criminal offences. Considering that not all administrative non-compliance will be a common criminal environmental offence, I use the term 'may' here. It is evident from the fore going that two systems of sanctions, the administrative and the economic criminal, will at any time be available for environmental non-compliance.
2102 See also Blomberg 2001.

However, no *una-via* regulation applies to the enforcement of the environmental statutes which my research studies.[2103] Certain principles and norms do limit to a certain extent this cumulation of sanctions/enforcement. In particular, these are the principle of proportionality and, also flowing from the principle of proportionality, the principle of *ne bis in idem*.

The principle of proportionality – enshrined in section 3:4 subsection 2 of the GALA – requires that the adverse consequences of a decision for one or more interested parties may not be disproportionate to the goals to be served by the decision. This means there should be a reasonable object – means relationship between the damaged interests and the interests intended to be served by the enforcement instrument used.[2104]

In the Netherlands, the *ne bis in idem* principle is enveloped in section 5:43 and 5:44 GALA and section 68 of the Criminal Code.[2105] The Dutch principle of *ne bis in idem* entails the prohibition to punish someone twice for the same non-compliance (*dezelfde overtreding*). The core concept of the same non-compliance entails the legal circumstances of the case and the factual circumstances of the case, specifically the behaviour leading to non-compliance that may be punished twice. In this respect, the classification of the non-compliance and the protected interests and the coherence of the behaviour are relevant.[2106]

> An aspect that has come up due to the broadness of the concept of the addressee, is whether the *ne bis in idem* principle prevents a legal person and a natural person that was competent and able to prevent specific non-compliance from occurring (*feitelijk leidinggever*), and who is 100% share holder of this legal person, from both being punished for the same non-compliance. The Court has determined that this is not the case, because the legal person and this natural person are independent carriers of rights and duties and they cannot be equated for that purpose. However, where this leads to the same person being affected in his property twice, the principle of proportionality may require that the level of the punishments are adjusted.[2107]

2103 *Una via* is not considered a principle like *ne bis in idem*. See Michiels, Blomberg & Jurgens 2016, p. 249-250; also Blomberg 2001.

2104 Borman & De Poorter 2017, p. 97-100.

2105 The Netherlands did not sign the Protocol of the ECHR that implemented the *ne bis in idem* principle. The 'international' principle is however applicable through section 14 subsection 7 of the IVBPR (with a reservation). Moreover, the Netherlands does interpret the national expressions of the *ne bis in idem* principle in section 68 of the Criminal Code and section 5:44 of the General Administrative Law Act in line with the case law of the ECHR. See Michiels, Blomberg & Jurgens 2016, p. 260-261; De Hullu 2018, p. 536-553; HR 1 May 2011 ECLI:NL:RVS:2017:225.

2106 See HR 1 May 2011 ECLI:NL:RVS:2017:225.

2107 See CBb 25 January 2017 ECLI:NL:CBB:2017:14, consideration 6.1; HR 19 March 2002, ECLI:NL:2002:AD7004.

The *ne bis in idem* principle has also been laid down in anti cumulation rules for specific sanctions. Also, other rules in legal provisions may limit the concurrent or consecutive application of sanctions. These will now be discussed for the cumulation of administrative sanctions, of criminal sanctions and of administrative and criminal sanctions together.

Cumulation of administrative sanctions

Section 5:8 of the General Administrative Law Act determines that when two or more legal rules have been contravened, an administrative sanction may be imposed for the contravention of each separate legal rule. With regard to one and the same contravention, the generally formulated principle of proportionality in section 3:4 subsection 2 GALA applies to the cumulation of administrative sanctions. This also applies to the cumulation of sanctions.

This principle of proportionality also applies – instead of section 5:8 GALA – where action or inaction has caused two or more legal rules to be contravened that protect interests that are so closely connected that it can be said to be only one contravention. The legislator has deemed that in such a case the effects of section 5:8 GALA would be undesirable.[2108]

Moreover, section 5:6 of the General Administrative Law Act contains a prohibition to take a decision containing a reparatory sanction while another decision containing a reparatory sanction is still in force for the same non-compliance.[2109] The effect of the first reparatory sanction should be awaited, before a second reparatory sanction is imposed.[2110] This means a consecutive reparatory sanction may be imposed, when the first reparatory sanction has been repealed or lost effect. For a coercive fine, this will be the case, also, when the maximum amount of the fine has been forfeited. However, in certain cases it may be possible, according to the GALA, to impose an order subject to a coercive fine to prevent repetition on top of an order subject to administrative coercion. Namely, the GALA has made it possible to impose such a sanction preventively (section 5:7 GALA).[2111] This prohibition is for now only applicable to the order subject to administrative coercion and the order subject to the coercive fine.[2112] This means that there is no prohibition of concurrent imposition and application with regard to other administrative sanctions.

2108 Kamerstukken II, 2003-2004, 29702, nr. 3, p. 90-92.
2109 In Dutch this is also called '*samenloop*', see e.g. Michiels, Blomberg & Jurgens 2016, p. 255.
2110 Michiels, Blomberg & Jurgens 2016, p. 254.
2111 Kamerstukken II, 1993-1994, 23 700, nr. 3, p. 133. It is noted by Michiels, Blomberg & Jurgens 2016 that case law does not always follow the opinion of the legislator on this point, at p. 255-256.
2112 Section 5:3 of the General Administrative Law Act.

The cumulation of the administrative fine – a punitive instrument – with other administrative sanctions is not prohibited. This means it is possible to concurrently impose an administrative fine and reparatory administrative sanctions or consecutively impose reparatory administrative sanctions and then a fine, or the other way around.[2113] The proportionality principle is applicable to this combination, in particular with regard to the imposition of the administrative fine.[2114] Section 5:46 subsection 2 of the GALA formulates an application of the principle of proportionality for the administrative fine. It determines that unless the level of the fine has been determined by a legal rule, the administrative authority is to attune the administrative fine with the severity of the non-compliance and the extent to which it can be blamed upon the offender. The administrative authority is to take account where necessary of the circumstances under which the non-compliance was committed. This includes sanctions already imposed for the non-compliance.
Moreover, section 5:43 of the General Administrative Law Act prohibits the imposition of two or more administrative fines for the same non-compliance (*dezelfde overtreding*); this section contains the principle of *ne bis in idem*, formulated specifically for the administrative fine. This prohibition applies to any imposition of two or more administrative fines to the same non-compliance, either by the same authority, or by different authorities.

Considering the above, this means the following for the concurrent and the consecutive imposition of administrative sanctions:

- Concurrent imposition: there may be no concurrent order subject to administrative coercion and order subject to a coercive fine. There may be no concurrent administrative fines. Other concurrence is possible, as long as the principle of proportionality is taken into account.
- Consecutive imposition: all reparatory administrative sanctions may be imposed consecutively, as long as the principle of proportionality is taken into account. The administrative fine may not be imposed consecutively.

Cumulation of criminal sanctions

It is possible to impose several criminal sanctions concurrently for the same offence. As stated previously in this chapter, both for economic criminal offences and common criminal offences primary penalties may be imposed together with supplementary penalties and measures. Also more than one primary penalty, supplementary penalty and measure may be imposed. Supplementary penalties can be imposed separately

2113 As the administrative fine and the administrative criminal decision cannot be imposed for the same non-compliance, a cumulation between these sanctions is not at issue.

2114 See section 3:4(2) of the General Administrative Law Act – for other administrative sanctions – and section 5:46(2) of the General Administrative Law Act for the administrative fine. Also Michiels, Blomberg & Jurgens 2016, p. 257.

as well as together with primary penalties and with other supplementary penalties and/or measures. Also, measures can be imposed separately as well as together with penalties and/or other measures.[2115]
The *ne bis in idem* principle laid down in section 68 of the Criminal Code determines – as described above – that nobody can be prosecuted twice for the same criminal offence (*ne bis in idem*, section 68 Criminal Code).[2116] For criminal sanctions, it is important to note that this principle applies to the criminal procedure. As we shall see below, this is different for the combination of punitive administrative and criminal sanctions in the Netherlands. This means that the criminal decision, including the administrative criminal decision, as an act of prosecution, cannot be combined with a concurrent or consecutive criminal procedure.[2117]

Sections 55 to 63 of the Criminal Code contain provisions in case of cumulation of criminal offences. These determine what happens in case a certain action or inaction falls – in terms of penalization – within more than one criminal provision. The legal rules prescribe that only one criminal provision may be applied where more are applicable, specifically the provision that contains the highest primary sanction, or the provision that is most specific.[2118]
In case of more than one instance of non-compliance resulting in a crime (*misdrijf*) that could have been committed separately, the maximum sanction is the total of the highest sanctions allowed for the criminal offences, where the type of sanction is the same; in case of incarceration, the total may not be more than one third above the highest maximum. Where the type of sanction is not the same, each of the sanctions available may be imposed; again, in case of incarceration, the total may not be more than one third above the highest maximum.[2119] The provisions also provide rules for the combination of incarceration with other sanctions, the combination of supplementary penalties and the combination of measures.[2120] In case of more than one instance of non-compliance resulting in a misdemeanour (*overtreding*) and a crime (*misdrijf*) or more than one misdemeanour (*overtreding*), that could have been committed separately, for each misdemeanour, a sanction may be imposed without reduction for cumulation.[2121]

2115 Section 36b subsection 3 (withdrawal) and 36f subsection 3 (compensation of damage) of the Criminal Code determine that measures can cumulate with penalties and other measures for common criminal offences. A similar provision is laid down for sanctions for economic criminal offences in section 9 of the Economic Offences Act. Having said that, logic is also important: a measure to withdraw from circulation and a measure to deprive cannot likely be combined).
2116 This can be considered also as an appearance of the principle of proportionality. See also, e.g. Jansen 2002, section 3.4.
2117 Section 255a(1) Code of Criminal Procedure. See also, for example, ABRvS 1 May 2017 ECLI:NL:RVS:2017:225.
2118 Section 55 and 56 Criminal Code.
2119 Section 57 and 58 Criminal Code.
2120 See section 59 to 60a Criminal Code.
2121 Section 62 Criminal Code.

Considering the above, this means the following for the concurrent and the consecutive imposition of criminal sanctions.

- Concurrent imposition: criminal sanctions may be imposed concurrently. This includes punitive criminal sanctions; these may be imposed simultaneously. However, the same sanction may not be imposed simultaneously.
- Consecutive imposition: consecutive imposition of criminal sanctions can only be possible if the consecutive criminal procedure is not aimed at the same criminal offence.

Cumulation of administrative and criminal sanctions

The combination of administrative reparatory sanctions and criminal sanctions as an enforcement response is not prohibited. The principle of proportionality can pose limits to this combination. In case of criminal punitive sanctions, this principle will generally mean that the administrative reparatory sanctions that are imposed will have to be considered when the criminal punitive sanctions are imposed.[2122]

> The combination of the administrative criminal decision with reparatory sanctions imposed by the administrative authorities is considered complementary enforcement.[2123]

In case of cumulation of administrative reparatory and criminal reparatory sanctions, either side must take into account proportionality.[2124]

A prohibitory limit is in place in the case of the cumulation of two punitive sanctions, particularly the administrative fine with an administrative criminal decision or either with a criminal procedure. Then the *ne bis in idem* principle comes into play.[2125] For the combination of the administrative fine and a criminal prosecution, including an (administrative) criminal decision, the General Administrative Law Act prohibits that a fine is imposed once a criminal prosecution is instigated for the same action or inaction.[2126] More specifically, the GALA requires that the action or inaction that is both punishable with an administrative fine and a criminal offence must be submitted

2122 Michiels, Blomberg & Jurgens 2016, p. 257; HR 20 March 2007 ECLI:NL:HR:2007:AZ7078. Also Blomberg 2001, p. 138-147.

2123 See, *Richtlijn Bestuurlijke Strafbeschikking milieu- en keurfeiten (art. 257ba, tweede lid, Sv)*, point 4.

2124 Michiels, Blomberg & Jurgens 2016 consider that in doing so, the administrative authority will need to be aware of its own responsibility and the scope of its own sanctions, which entail that it can take action itself, while the criminal authorities cannot, at p. 258.

2125 Section 5:44 General Administrative Law Act; section 68 Criminal Code.

2126 Section 5:44 subsection 1 General Administrative Law Act.

to the Public Prosecutor.[2127] The criminal procedure will take precedence over the administrative fine – meaning that no administrative fine will be imposed and instead a criminal procedure started, unless the Public Prosecutor has communicated to the offender that no criminal prosecution will be started, or, the administrative authority has not heard anything from the Public Prosecutor for thirteen weeks.[2128] The other way around, it is no longer possible to instigate a criminal prosecution where an administrative fine has been imposed upon an offender, or the administrative authority has told the offender that no administrative fine will be imposed.[2129] The only exception to the above is that when the Public Prosecutor is required – as a result of a complaint of third parties – by the court to instigate prosecution. Then, the administrative fine will expire, and paid fines will have to be paid back by the administrative authority.[2130]

As stated previously, the administrative criminal decision is considered a criminal prosecution, which will therefore block any other criminal prosecution from happening, and the other way around.[2131] As per the Countrywide Enforcement Strategy, in case of situations that an administrative criminal decision is imposed, no coordination with the Public Prosecutor's Office is considered necessary.[2132]

The Countrywide Enforcement Strategy provides more information on the administrative and criminal sanctions that may be considered appropriate in certain situations of non-compliance, which may include combinations of these sanctions.[2133] For the most severe cases[2134] in the matrix, it is considered that on the side of the administrative sanctions, there are the sanctions of temporary suspension/closing down of a business, and the order subject to administrative coercion or a coercive fine – considered reparatory in the policy – and the sanctions of permanent closing down of a business and the suspension or revocation of a permit – considered punitive in

2127 Unless it is determined by a legal rule or agreed with the Public Prosecutor's Office that this is not necessary. As we have seen in the Countrywide Enforcement Strategy, consultation with the Public Prosecutor is deemed necessary. See also *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 10. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

2128 Section 5:44 subsection 3 General Administrative Law Act.

2129 Section 243 subsection 2 Code of Criminal Procedure.

2130 Section 5:47 General Administrative Law Act; section 12i Code of Criminal Procedure; section 74b subsection 1 Criminal Code; Michiels, Blomberg & Jurgens 2016, p. 261.

2131 Section 255a(1) Code of Criminal Procedure. See also, for example, ABRvS 1 May 2017 ECLI:NL:RVS:2017:225.

2132 Criminal action by the Public Prosecutor is not deemed necessary in those cases that the administrative criminal decision is available. See also *Landelijke Handhavingstrategie: een passende interventie bij iedere bevinding*, version 1.7 (24 April 2014), p. 10. Available at www.infomil.nl/onderwerpen/integrale/handhaving/landelijke/ (last visited 1 June 2019).

2133 As long as the proportionality thereof (and all the above mentioned on cumulation) is considered.

2134 These are the cases where the possible consequences of non-compliance are of significance, or they are significant, threatening and/or irreparable and the behaviour of the offender is either calculating or intentional and structural or less severe, the behaviour is indifferent.

the policy or, instead, the administrative fine. On the side of the criminal sanctions for these cases, there are the administrative criminal decision or the prosecution by the Public Prosecutor.

Considering the above, this means the following for the concurrent and the consecutive imposition of administrative sanctions and criminal sanctions.

- Concurrent imposition: there may be concurrence in case of administrative reparatory sanctions and criminal sanctions. There may not be concurrence in case of administrative punitive sanctions and criminal sanctions.
- Consecutive imposition: there may be consecutive imposition in case of administrative reparatory sanctions and criminal sanctions. There may not be consecutive imposition in case of administrative punitive sanctions and criminal sanctions.

11.6 Evaluation: flexibility and variation in the enforcement toolbox

In this section the evaluative framework formulated in chapter 2 will be applied to the sanctions available for the public enforcement of non-compliance with environmental law in the Netherlands. Here, the sanctions are evaluated from the perspective of the instrumental requirements. This evaluation will discuss the ability of the available toolboxes of sanctions to aim for the enforcement goals, keeping in mind the possible typology of the non-compliance, its consequences and the offender.[2135] An important aspect of the enforcement in the Netherlands is that contraventions of environmental law can be enforced both through administrative law and through criminal law, mostly economic criminal law. The typology and the enforcement goals are outlined in the table below:

2135 See chapter 2, section 2.6.3 for the table detailing this relationship.

Instrumental requirements	
What is the typology of non-compliance?	**What enforcement goals fit the typology of non-compliance?**
1. The type of non-compliance - on-going or completed - recurring or one-off - long-lasting - multitude of violations at the same time 2. The type of environmental damage (also involving issues of time), including the danger of such damage occurring - absent or present - reparable or irreparable - minor, major, or progressive 3. The type of offender - unknown or known - company and/or individual - notorious (repeat) or non-regular offender	a. To prevent non-compliance b. To end on-going non-compliant behaviour c. To repair environmental damage due to non-compliance d. To prevent recurrence/to advance future compliance; e. To remove benefits from non-compliance f. To compensate the consequences of non-compliance g. To punish non-compliance

a. To prevent specific non-compliance from occurring

Two *administrative* sanctions can aim to prevent specific non-compliance from occurring at all in the Netherlands. The order subject to administrative coercion and the order subject to a coercive fine can both be imposed where non-compliance has not yet occurred, when there is an apparent threat of non-compliance, i.e. where it is very likely that non-compliance will occur. The sanction with the possibility of the most immediate active impact is (the order subject to) administrative coercion. This sanction can be moulded best to the typology of the non-compliance, damage and offender, especially if this typology requires immediate action, as substitute action can even be taken by the authorities without allowing the (potential) offender a period of time to fulfil an obligation in an order, without notifying that offender that substitute action will take place, or without giving an order at all.

As described, most administrative non-compliance is also an economic criminal offence. Therefore, the administrative sanctions that can aim to prevent of administrative non-compliance can play a role to prevent the economic offence related to that non-compliance.

Besides this, it is also possible to tailor the order subject to a coercive fine to prevent recurrence of the non-compliance that has occurred previously. Recurrence of

non-compliance is a separate enforcement goal that is further discussed below (as enforcement goal (d).
In the toolbox of *criminal* sanctions, there are no sanctions that can be imposed to prevent specific non-compliance from occurring at all. There are several sanctions in the toolbox for economic criminal offences that aim to prevent further harm to the interests that have been previously harmed by an offender. As these sanctions aim in particular to prevent further non-compliance, in particular the recurrence of non-compliance, these sanctions are discussed below, under (d).

b. To end on-going non-compliant behaviour

Several administrative sanctions and criminal sanctions are available to end on-going non-compliant behaviour once an authority has uncovered it. A distinction can be made in sanctions that factually end on-going non-compliance, by the authority factually intervening, and sanctions that can be specifically aimed at stimulating the offender to end on-going non-compliant behaviour. A third category would be sanctions that aim for a preventive effect, also on on-going non-compliance, generally, or that may be able to accomplish this through the threat of their imposition. This category will not be further discussed.
Several administrative sanctions are to a varying extent aimed and able to end a contravention, either factually by physical intervention or by containing specific obligations to do so. There is a difference between the various sanctions, though, in how a contravention is ended and this may impact how timely the contravention is ended. Which of these administrative sanctions is most appropriate for achieving this enforcement goal also depends on the modalities of the non-compliance; in particular whether there is major, progressive and/or irreparable damage and interests of third parties are involved. Several administrative sanctions may physically end the non-compliance (administrative coercion, return and release), for others the administrative authority is less actively interventionist (order subject to a coercive fine). When action (or stopping certain action) by the offender cannot be awaited, e.g. in case of major or irreparable damage caused or the involvement of third party complainants, the administrative authority may take remedial action itself through administrative coercion to bring the situation in compliance. A contravention that is sanctioned without physical (actual) intervention of the administration may take longer to be ended than when the administrative authority itself acts physically against the contravention. However, the instrument of the order subject to a coercive fine is flexible, allowing a time limit to be set that is appropriate for ending the non-compliance, and in certain circumstances, allowing this time limit to be foregone.

The *criminal* sanctions do not necessarily have the primary aim to end on-going non-compliant behaviour, as the primary aim of most of these sanctions is to punish non-compliance that has taken place. However, as already mentioned, the provisional measures that the Public Prosecutor or the criminal court can order during criminal proceedings may also be able to stop an ongoing offence, when immediate intervention is required. The sanction of closing down an enterprise that is only available for economic offences can be imposed provisionally and can also put an immediate end to an economic criminal offence. However, this sanction can only achieve its aim if it affects objects that are part of the offence, such as for example machines with which a noise standard is transgressed. The other criminal sanctions in the sanctions toolbox do not put a factual (physical) end to the criminal offence. The provisional measures are only available for economic criminal offences, and not for common criminal offences.
The limited application of the provisional measures therefore means that if circumstances require immediacy during criminal proceedings for common criminal offences, administrative sanctions that can aim for this enforcement goal would have to be imposed for the benefit of effective enforcement.
Where a criminal conviction and sentence can be awaited, criminal sanctions that can aim for this enforcement goal are, for example, the forfeiture and the withdrawal of objects from circulation. These sanctions can put an end to a criminal offence when the mere possession of those objects – such as endangered flora or fauna – constitutes the offence. Moreover, a specific obligation to end a common criminal offence can be part of the conditions attached to a conditional sanction, imposed by a court or by the Public Prosecutor.

c. To (physically) repair the environmental damage caused by non-compliance

Both administrative sanctions and also several criminal sanctions are available to the authorities in the Netherlands to pursue the goal of (physical) reparation of damage caused by non-compliance.
As for the administrative sanctions, the order subject to administrative coercion, return and release as well as the order subject to a coercive fine are suitable to achieve this enforcement goal. The goal is taken care of by the offender or by the administrative authority itself, with recovery of the costs.
An instrument that may meet this goal, as part of the set of criminal sanctions, is available to both the criminal court and to the Public Prosecutor. The criminal court may issue an obligation to restore (reparatory measures) as a sanction for economic offences. Also the Public Prosecutor can order the offender to repair – to carry out what has unlawfully been omitted, to undo what has unlawfully been carried out and to carry out performances to make up for it – as part of his instructions in a criminal decision for an economic environmental offence. For common criminal offences,

the application of an obligation to restore is limited as it only may be part of the conditions extended by the criminal court to a conditional sanction. There are no sanctions that allow the criminal authorities to repair the damage themselves while recovering the costs from the offender.

d. To prevent recurrence of non-compliance and to advance future compliance

Both administrative sanctions and criminal sanctions are available to pursue the goal to prevent recurrence of the non-compliance that has taken place and to advance future compliance.

As for the *administrative* sanctions, both the order subject to a coercive fine and the order subject to administrative coercion can be specifically tailored to pursue this enforcement goal, particularly taking into account the behaviour of the offender, and the case of (potential) recidivism. The revocation of a permit for non-compliance, may be combined with preventive administrative coercion or a preventive order subject to a coercive fine, to ensure that once a permit is revoked, the once permitted activities do not continue or recur. This means that these sanctions can be imposed preventively to prevent further non-compliance, i.e. a repetition of non-compliance in the future. This ensures the effectiveness of the revocation for the interests it deems to protect. Interestingly from the point of view of effective enforcement, the effect of these sanctions is immediate once non-compliance recurs, as there is no need to allow a compliance period.

According to the General Administrative Law Act, all administrative reparatory sanctions may aim to prevent a repetition of the violation. Therefore, also the other reparatory sanctions offer possibilities to achieve this enforcement goal. The Environment Management Act states this possibility explicitly for the instrument of revocation: it establishes that where an administrative fine has been imposed on the same person twice for a similar violation within a period of four years, his emissions permit may be revoked.[2136]

There are several provisional *criminal* sanctions that can aim to prevent further harm to the interests that have already been harmed by the offender. The Public Prosecutor or the criminal court can impose these sanctions in case of economic criminal offences, while awaiting trial for an offence that has already been committed. The most immediate of these sanctions is the possibility for the Public Prosecutor to order an offender to abstain from certain actions, as this order can be extended if there is a strong suspicion that the offender committed the offence and immediate intervention is required. The criminal court may also do this, and can order even further reaching measures, such as a plant to be closed down, or placed under guardianship. There is a

2136 By section 18.17 Environment Management Act.

threshold to these sanctions, however, as there must be serious objections against the offender and, in addition, the interests that are protected by the legal rules that are not complied with, require immediate intervention.
In contrast with the administrative sanction of administrative coercion, the provisional sanctions will not mean immediate *factual* interception to prevent an offence from occurring. However, violating an order that is part of a provisional sanction is a serious crime. No such preventive measures are possible for common criminal offences.

In principle, the other criminal sanctions imposed by the Public Prosecutor the criminal courts focus on offences that have been committed and not on the repetition of these offences in the future (besides the obvious general and specific preventive effect they aim to achieve and may achieve). Nevertheless, some criminal sanctions, such as, for example, the deprivation of certain rights and advantages have a persistent effect, as the offender cannot exercise those rights anymore, and thereby aim to also prevent recurrence. The closing down or the placing under guardianship of an enterprise will also have a persistent effect and can therefore result in the prevention of possible future offences. These sanctions are in the hands of the criminal court; the Public Prosecutor also has such sanctions available as part of the criminal decision. However, most of these are only available for economic criminal offences.
The Public Prosecutor may impose behavioural instructions on the offender as part of a criminal decision for economic and common criminal offences, albeit these may only last for a maximum of a year. However, these sanctions do not physically prevent that the same offence will be committed again, as can be the case in administrative enforcement.

e. To remove benefits from non-compliance

Within the set of administrative sanctions there is no possibility to take away unlawfully gained advantage through an instrument that has this aim as its sole purpose. Nevertheless, when setting the level of the coercive fine, the advantage to be gained by the unlawful situation continuing can be taken into account by the administrative authority. This may lead (indirectly) to siphoning off certain benefits from non-compliance.
Interestingly, the application of the administrative criminal decision is limited in respect of the level of illegally received benefits. The administrative authorities may not impose a criminal decision where there are indications that the illegally received benefits are higher than 5000 Euros. In such cases, criminal enforcement by the criminal authorities is considered more appropriate by the legislator. The amount of the benefit is, however, not included in the level of the administrative criminal decision.

The possibility to recover the costs for the execution of administrative coercion, and the return and release from the offender could, in a way, be seen as the removal of cost savings and cost benefit from non-compliance: the costs and benefits saved by not taking action to remedy compliance are siphoned off from the offender.

For both economic criminal offences and common criminal offences, there are quite a large number of criminal measures that can remove benefit, including cost savings, of an offence in different manners. Both the criminal court and the Public Prosecutor can pursue this aim with sanctions for both types of offences. From the perspective of effective enforcement these are positive aspects of the criminal sanctions toolbox.
The most specific sanction is the measure to dispossess illegally obtained advantage from a convicted offender. Other measures are, for example, the measures of withdrawal of goods from circulation and the deprivation of wrongly obtained advantage specifically aim at the profit made by the offence. Moreover, as described, the criminal fine for economic and common criminal offences will weigh the profit made by the offender as a result of the offence. In addition, the criminal fine for economic criminal offences can be explicitly linked to the benefits of non-compliance, as it can be upgraded to a higher fine level category where the proportion of illegally obtained benefits as to the maximum of the fine would not be appropriate. However, the criminal fine will not necessarily reflect the exact profit made in the level of the fine.

f. To (monetarily) compensate the consequences of non-compliance

The (monetary) compensation for the consequences of non-compliance is only possible within the set of criminal sanctions for economic criminal offences and common criminal offences. The set of criminal sanctions contains specific sanctions aimed at the compensation of the damage caused for both the criminal court and the Public Prosecutor's Office, i.e. the compensation with regard to the victim and the complete or partial compensation for the damage caused by the criminal offence. Both can be imposed by the Public Prosecutor's Office and the criminal court.
There is no sanction to aim for compensation in the set of administrative sanctions. While the gravity of the sanctions may be related to the consequences of non-compliance, the sanctions are not supposed to convey a specific monetary compensation. This is a disadvantage to effective enforcement. When the administrative authorities would consider it appropriate to impose a compensation obligation on the offender, criminal enforcement, in particular sanctions for economic offences, would be required.[2137]

2137 Note that victims of environmental non-compliance can seek compensation by bringing a civil action in the civil courts.

g. To punish the offender for non-compliance

There are two sanctions in the hands of the administrative authorities that can aim to punish the offender – the administrative fine and the administrative criminal decision. These punitive administrative sanctions in the Netherlands are (relatively) recent. Their introduction has strengthened the sanctions toolbox of the administrative authorities. However, these sanctions are limited in scope as they are specific to certain areas of environmental protection: the administrative fine can be imposed for specific non-compliance in the areas of emissions trading, trade in endangered animals and housing regulations; the administrative criminal decision can be imposed for specific non-compliance in the areas of waste, discharge, extractions, as well as for nature protection offences and misdemeanours.

This means that outside of these areas there are no sanctions in the hands of the administrative authorities to punish the offender for non-compliance. To pursue this enforcement goal in other areas, criminal sanctions need to be applied, for example, in case of irreparable damage by a recidivist offender caused by non-compliance with an environmental permit.

The administrative fine and administrative criminal decision can be adjusted to the type of offender, including whether it is a legal person or a natural person, or, in case of nature protection, a recidivist. The maximum of the administrative fine is only related to the turnover of the legal person as a maximum for emissions protection. Beyond that, these sanctions are not very adjustable. The level is fixed and related to that of similar criminal fines.

The criminal authorities have several punitive sanctions available. The criminal authorities are able to pursue this enforcement goal, for example, by means of the Public Prosecutor's criminal decision, and through the sanctions the criminal courts may impose, such as the criminal fine, and imprisonment.

Imprisonment is the most heavyweight sanction available in the Netherlands for individuals. It is also the sanction that is the most specifically connected to a single type of offender: not a company (legal person), but an individual (natural person). Even though a company cannot be imprisoned, it is a positive aspect that this sanction can still play a role in the criminal prosecution and sentencing of offences committed by a legal person in the Netherlands. Notably, the directors of a business can be held severally responsible for non-compliance and can, therefore, be imposed a sentence of imprisonment.

11.7 Findings

This chapter described the systems of sanctions that are available to the administrative and criminal authorities in the Netherlands for the enforcement of environmental law.

As described, environmental non-compliance can be enforced on the basis of three sets of sanctions, one exercised by the administrative authorities for non-compliance with environmental law, the other two exercised by the criminal authorities for economic environmental offences and common criminal environmental offences, respectively.
Several positive aspects as well as disadvantages of the sanctions available to the authorities for the public enforcement of environmental law in the Netherlands were noted in the analysis in the previous section, in relation to the instrumental requirements for effective enforcement formulated in chapter 2.
What stands out from the analysis is that the enforcement authorities in the Netherlands have a quite varied and flexible toolbox of sanctions that is generally adjustable to the typology of non-compliance. This toolbox is quite able to fulfil the instrumental requirements for an effective enforcement. The toolbox in the hands of the administrative authorities has in recent years become more varied through the addition of punitive sanctions. The toolbox in the hands of the criminal authorities has also gained more variation through the addition of sanctions in the hands of the Public Prosecutor.

There are some differences, however, in the manner and extent to which these instrumental requirements can be fulfilled. Also, a combination between administrative and criminal sanctions may be necessary to provide for to be able to aim for the enforcement goals appropriate for a given situation of non-compliance. Several more general aspects that stand out from the analysis in terms of effective enforcement are set out below.

- The set of sanctions in the hands of the administrative authorities can aim for nearly all of the enforcement goals. The possibility to aim for the goal of the removal of benefits from the non-compliance is limited; and there are no options to aim for compensation of the damage through the administrative sanctions toolbox. All the other enforcement goals can be aimed for with several available sanctions.
- The sanctions available to the administrative authorities are flexible, which is appropriate when considering the potential typology of non-compliance (including the types of damage, and offender). Interestingly, although there are not that many sanctions in terms of number – compared to for example the penalties and measures available in the criminal set of sanctions – the sanctions that are available are very versatile. The quite recent introduction of the administrative criminal decision, has in that respect, created a bridge between administrative and criminal enforcement. For more severe cases, for example where the damage cannot be repaired or is significant, the offender is notorious, e.g. a recidivist or intentionally careless, and/or when it concerns a case of recurring non-compliance, the possibility to aim for an administrative fine also is a recent addition.

- As a set of sanctions, the toolbox of administrative sanctions has the possibility to scale up the enforcement response in line with the non-compliance, either through adjusting the administrative order subject to a coercive fine, or administrative coercion, or through imposing different, more invasive sanctions – such as revocation of a permit, or a punitive administrative fine. This is also explicitly laid down in the Countrywide Enforcement Strategy.
- The Countrywide Enforcement Strategy, moreover, shows that administrative enforcement and criminal enforcement are treated as integrated and complementary in the Netherlands.
- The set of criminal sanctions for criminal offences contains quite a few sanctions, which can be imposed by the criminal courts, in a court procedure instigated by the Public Prosecutor, or which can be imposed by the Public Prosecutor itself to broadly aim for the prevention of recurrence of non-compliance and furthering compliance; the removal of benefits; the compensation of damage; and the punishment of non-compliance. Moreover, the enforcement goals of prevention of non-compliance; ending non-compliance; and reparation of the consequences of non-compliance can be aimed for, albeit in a more limited manner.
- In particular with regard to common criminal offences, these goals – prevention, ending and reparation – cannot be met, or only be met under limited circumstances. For those offences and relevant enforcement goals, an enforcement approach through administrative sanctions or via the route of economic criminal offences would be appropriate to achieve effective enforcement where the type of non-compliance, damage and offender requires it.
- As a set of instruments, the criminal sanctions, in particular those available for economic offences, are quite flexible, with many types of sanctions that can be imposed to fit the circumstances of the non-compliance. The fact that the criminal courts and the Public Prosecutor can impose both reparatory sanctions and punitive sanctions stands out. The primary penalties in the toolbox of criminal sanctions are quite flexible, with the criminal decision of the Public Prosecutor, and imprisonment and the criminal fine all individually adjustable to the gravity of the offence.
- There is still a difference between administrative and criminal enforcement (besides the procedure followed), although in case of the administrative criminal decision, the procedure is a criminal one, where an offender does not agree. A difference can be seen in particular in the remit of the punitive sanctions that the administrative authorities can impose – which is limited – compared to the broad remit of the Public Prosecutor and the criminal courts to impose punitive sanctions for environmental non-compliance. Moreover, the level and gravity of these sanctions, and exclusivity of certain sanctions – in particular, the separate sanction to remove the benefits of the non-compliance, compensation, and imprisonment –

still sets the toolboxes available to the administrative authorities and the criminal authorities apart from each other. The toolbox of criminal sanctions is generally reserved for the more serious non-compliance that is an offence.

While the above-mentioned aspects are promising for effective enforcement, several positive aspects and disadvantages were also noted in the analysis with regard to the ability of specific sanctions to fit the enforcement goals and the type of non-compliance, damage, and offender appropriately. Most prominent with regard to the specific sanctions available for environmental enforcement are the following aspects:

- The order subject to a coercive fine stands out among the sanctions in the hands of the administrative authorities, as it is a particularly flexible and multi-applicable instrument. Moreover, the threat of a coercive fine is immediate, in the first decision imposing the order.
- As described, there are several reparatory sanctions available to the criminal authorities to ensure environmental protection during criminal proceedings, for example, by obliging the offender to end on-going non-compliant behaviour or to repair environmental damage, which would be fitting, for example, in case of progressive damage. It is a disadvantage that these sanctions are not available for common criminal offences. This is counteracted by the fact that the administrative authorities can impose instruments that can aim for these enforcement goals. This may, therefore, require cooperation between the administrative and criminal authorities. As described in the previous chapter, the Countrywide Enforcement Strategy, and the (other) coordination mechanisms, provide good mechanisms for such cooperation between the enforcement authorities.
- The fact that the Public Prosecutor can aim for both reparatory and punitive enforcement goals, specifically with the sanction of the criminal decision is another positive aspect that stands out. This means that both the Public Prosecutor and the criminal courts possess sanctions to broadly aim for effective enforcement.
- A detailed above, it is a disadvantage in light of effective enforcement that the administrative authorities do not have an instrument to fully remove economic benefits, including savings, from an offender for the period preceding an administrative sanction. It is clear that in the Netherlands this is considered to be a sanction that belongs to the criminal authorities (compare the threshold for the administration to impose an administrative criminal decision, which is in part related to benefits, and the conditions described in the Countrywide Enforcement Strategy). This disadvantage is not (fully) offset by the fact that the administrative authorities may consider future economic benefits for the level of the coercive fine, or take account of economic benefits when determining the level of the limitedly applicable administrative fine. This also applies to compensation.

In spite of the positive aspects, considering the disadvantages mentioned previously, the public law sanctions' toolbox for non-compliance in the Netherlands could benefit, in light of effective enforcement, from the introduction of certain elements.

- The toolbox of administrative sanctions would benefit from incorporating (or strengthening) the removal of economic benefits, including savings, calculated from the start of non-compliance, in the level of the administrative fine and the administrative criminal decision.
- The toolbox of criminal sanctions would benefit from introducing also for common criminal offences the possibility to take interim measures to end (or repair) non-compliance.

The aspects mentioned above offer important contributions to an effective public enforcement of environmental law in the Netherlands. In chapter 12, it will be discussed how the enforcement organisation and sanctions in the Netherlands compare to the other two jurisdictions with regard to their potential for effective enforcement.

PART 3

Chapter 12 Evaluation and Conclusion

12.1 Introduction

As we have seen in chapter 2, European law sets several standards that the public environmental enforcement in the Member States must adhere to. As these standards remain quite vague, the concept of 'tailored enforcement' is used in this research to further specify requirements for an effective enforcement of environmental law. In general, tailored enforcement requires that the organisation ought to be able to provide tit-for-tat enforcement actions and that sanctions can be made-to-measure. For this purpose, tailored enforcement requires embedding enforcement in an expedient organisation (institutional requirements), which enables sanctions that are moulded to the characteristics of specific (potential) non-compliance (instrumental requirements).
In the country chapters it was analysed how each of the three Member States' public enforcement architecture provides in the possibilities to fulfil the institutional requirements and the instrumental requirements that follow from this concept of tailored enforcement.[2138] The characteristics of the enforcement authorities were evaluated, the perfections and imperfections of the sanctions in achieving the enforcement goals were established and the necessity of combinations of sanctions and the cooperation between enforcement authorities in that light was assessed.

In the following, the central question of this research is answered. This means that it will be reviewed comparatively what the good practices are in the three jurisdictions for achieving the institutional and instrumental requirements for effective enforcement. The aspects that are identified as good practices stand out positively in light of the model for tailored effective enforcement and most positively in the comparison between the jurisdictions. This is, in a sense, necessarily relative because of this comparison. These good practices do not necessarily indicate the optimal effective enforcement architecture in an objective sense. The model for tailored enforcement provides the blueprint for such an optimal effective enforcement architecture.
While the connotation of the term 'good practices' may suggest actual practices are identified, the term is used here to indicate the legal systematic side of enforcement, as indicated in the requirements for an effective enforcement of environmental law set out in chapter 2.[2139] This means that good conditions or guarantees are identified that exist

2138 For England: see section 4.6 of chapter 4 and section 5.6 of chapter 5; for Germany: see section 7.7 of chapter 7 and section 8.6 of chapter 8; and, for the Netherlands, see section 10.5 of chapter 10 and section 11.6 of chapter 11.
2139 These are also repeated below in section 12.3.

within the enforcement architecture, i.e. the organisation and sanctions, as laid down in the law, from the viewpoint of the evaluative framework of tailored effective enforcement formulated in chapter 2.[2140]
It requires emphasis that any good practices recommended here are not meant as proposals for legal transplants by which certain characteristics of the organisation or sanctions would be implemented as such – simply copying and pasting them – in the legal system of another jurisdiction.[2141] As remarked in chapter 1, the context of a legal system, and a legal culture as well as a social culture cannot necessarily be taken out of the equation when considering the organisation and sanctions for effective enforcement. The good practices mentioned below are always, first and foremost, embedded in the country in which they are found. Positive and negative aspects of the enforcement organisation and sanctions are therefore necessarily relative. The analysis, good practices and recommendations must therefore always be perceived from this viewpoint. The good practices illustrate the shape(s) that the enforcement organisation and sanctions can take to provide tailored effective enforcement according to the requirements formulated in chapter 2. They provide inspiration to the other jurisdictions on how to (better) provide for tailored effective enforcement according to these requirements.

As a background to the evaluation of the enforcement organisation and sanctions and the good practices and recommendations that follow from it in this chapter (presented in section 12.3 and 12.4), it is first set out below how the available public enforcement systems in England, Germany and the Netherlands compare in structure and substance. For that purpose, a picture of the enforcement systems is presented, the characteristics of the enforcement organisation discussed and a common theme described (section 12.2). The chapter concludes with a reflection on the EU-approach of effective environmental enforcement from the viewpoint of the developments and good practices in England, Germany, and the Netherlands (section 12.5).

12.2 Picture of public enforcement in England, Germany and the Netherlands

12.2.1 Enforcement systems: administrative enforcement, criminal enforcement, and hybrids

For the public enforcement of environmental law, the enforcement authorities in all three countries can at least dispose of administrative enforcement and criminal

2140 As explained previously in chapter 2, section 2.6.3.5, the results that the enforcement architecture achieves in practice are influenced not only by the architecture and its potential for effective enforcement as laid down in the law, but also by several variable factors, such as politics that prioritise or deprioritise enforcement, and influence the resources extended by government to public enforcement. Such variable factors that influence the achievement of effective enforcement in actual practice are not the topics of this research.
2141 See, for example, Legrand 2001, p. 59-61; Siems 2014, p. 196.

enforcement for the public enforcement of environmental law. There are, however, different hybrid systems and, as the case may be, hybrid sanctions that are unique to their respective jurisdictions. These are hybrid in the sense that the sanctions are generally a type of combination between administrative enforcement and criminal enforcement. The sanctions generally originate from criminal enforcement *stricto sensu* and common criminal offences and have been extended or redrafted for other offences, and/or put in the hands of other criminal or administrative authorities. Considering the specific characteristics of each of the different hybrid systems and sanctions, no single categorisation of all the hybrids – as predominantly administrative or predominantly criminal enforcement – seems appropriate.

- ***England***

Environmental enforcement in England was primarily nearly exclusively focused on criminal enforcement. This is – still – clear from the drafting of the systems. Criminal law enforcement underpins (nearly) all the contraventions, including non-compliance with administrative enforcement notices. However, the focus of sanctioning has shifted more to administrative law as a means of dealing with the lack of impact the criminal law is struggling with; criminal law is increasingly considered particularly appropriate for the more serious environmental offences. The Regulatory Enforcement and Sanctions Act, which generally established a package of civil sanctions, has strengthened the toolbox of administrative enforcement with reparatory and punitive sanctions for reacting to all offences, including those of non-compliance with previous administrative sanctions. The civil sanctions are not meant to be a separate type of enforcement for separate offences even though the sanctions are a hybrid between administrative and criminal enforcement; while the sanctions are placed in the toolbox of administrative enforcement of the administrative authorities, several aspects of these sanctions are borrowed from criminal law. There are no similar sanctions in the Netherlands or Germany. The toolbox of civil sanctions in England has a varied standard of proof dependent on the civil sanction, with some of these sanctions requiring a criminal standard of proof; legal protection against a civil sanctions decision takes place through a separate set of administrative courts.

Also in England, the prosecuting authority can impose sanctions as alternatives to prosecution. In contrast with the Netherlands but quite similar to Germany, this prosecuting authority is in fact the administrative enforcement authority – or regulatory authority – also competent to impose other administrative sanctions (more on this below). For the purpose of environmental enforcement, the administrative enforcement authority is labelled prosecuting authority and made to follow criminal procedure while acting as such.

While also in England the core of the administrative enforcement is ending the environmental non-compliance and the reparation of its damage, the introduction

of the civil sanctions have meant that punitive sanctions are now in the hands of the administrative authorities. In turn, reparatory sanctions are also in the hands of the criminal authorities, i.e. the criminal courts and the prosecuting authorities.

- ***Nordrhein Westfalen, Germany***

In Germany, three systems are recognised for the public enforcement of environmental law. The authorities have at their disposal administrative preventive law (also 'administrative reparative law' or *Gefahrenabwehr*), administrative punitive law ('administrative criminal law' or 'repressive law'), and criminal law. The administrative punitive law is a separate system of regulatory offences that can be viewed as a hybrid system. No reparatory sanctions are available for these regulatory offences within this system.[2142] While the system operates according to its own rules, these rules are rooted in the criminal law. The administrative authorities that can impose administrative reparatory sanctions for non-compliance are named 'prosecuting authorities' in case of regulatory offences. The German administrative authorities can only impose punitive sanctions when non-compliance is such a regulatory offence. The emphasis in environmental enforcement is generally on the application of this administrative punitive law enforcement system, on its own or together with the other two available enforcement systems in Germany. There is no system similar to it in the Netherlands or England.[2143]

- ***The Netherlands***

In the Netherlands, there are two systems of public enforcement: the administrative enforcement and the criminal enforcement. The latter can be distinguished in enforcement with regard to economic offences on the basis of the Economic Offences Act and enforcement of commune criminal offences on the basis of the general Criminal Act. These offences and the sanctions are both criminal but have distinctive features. Almost all administrative environmental contraventions are also economic offences. The preference in enforcement practice in the Netherlands is to use administrative law sanctions for instances of non-compliance with environmental law. Ending the environmental non-compliance and the reparation of its damage is at the core of this system. Criminal law enforcement used to only be imposed as *ultimum remedium*. The criminal law has increasingly become viewed as a toolbox that is complementary to the administrative sanctions. Moreover, the criminal sanctions in the Netherlands are not solely punitive; also reparatory sanctions can be imposed for (certain) criminal offences. The administrative and criminal authorities have set out a National Enforcement Strategy on the integrated application of administrative and

2142 Within the administrative reparative law, no punitive sanctions are available.
2143 Although similarities exist. See also above and below on the systems and sanctions in the Netherlands and England.

criminal enforcement. The Public Prosecutor also plays an important role therein, not only as head of the investigation and instigator of a criminal procedure, but now also with the power to impose punitive and reparatory criminal sanctions.
In the Netherlands, there is no overall hybrid legal system of enforcement, but there are punitive sanctions that have been taken from the criminal enforcement system and introduced into the administrative enforcement toolbox for the administrative authorities. One of those sanctions is certainly a hybrid sanction: the administrative criminal decision is still very much rooted in the criminal law, as criminal norms influence the application of this sanction by the administrative authorities and an appeal follows criminal procedure.

12.2.2 Characteristics of the enforcement organisation

The organisation in the three countries is comparable in that it is diverse: authorities at all levels of government can potentially be competent for the public enforcement of environmental law. One common aspect is that in none of the countries a single authority exists for the administrative and criminal enforcement of all environmental law, or for each of these types of enforcement separately. Also, in all three countries the administrative enforcement powers are attributed to the same authorities that have the power to give out permits or set other standards to regulate the environment.
As we have seen, the organisation of the public enforcement of environmental law in Germany is very decentralised. Competences are distributed between the Federation, the States of the Federation and, within those States, between a multitude of different municipalities, districts and communities. In England, the administrative and criminal enforcement powers for environmental non-compliance are attributed to either central government agencies (Environment Agency, Natural England) or local government authorities. Of the central agencies, the Environment Agency has the most comprehensive task.
In the Netherlands, the administrative enforcement competence is primarily linked to the power to give out permits. Dependent on this, the powers are attributed primarily to the municipalities, and to the regional water authorities for the functional matters. The provinces and central government agencies and the Secretary of the relevant government departments have certain specific and residual tasks. However, this decentralisation is different from that in Germany, as, in spite of the decentralisation to the local authorities, the environment offices that operate at regional level will generally prepare enforcement decisions with regard to environmental law in the strict sense[2144] for these authorities, provinces and regional water authorities.[2145]

2144 See also chapter 10, section 10.2.1.
2145 The director of an environment office even has a power to impose the sanction of the administrative criminal decision for limited cases of environmental non-compliance.

For criminal enforcement, there is more commonality between the countries in the sense that the traditional criminal authorities are labelled and competent: in all countries these are the police, the Public Prosecutor and the criminal courts. However, labels of traditional criminal authorities are accorded in the sense that, as mentioned, the administrative authorities are also involved in criminal enforcement in England and Germany, as prosecuting authorities. Moreover, in addition or instead of the involvement of the police for the investigation of (some) criminal offences, officers that pursue criminal investigation are or may be positioned with the administrative authorities, also in the Netherlands.

12.2.3 Common theme

It was already noted in chapter 1 that the enforcement of environmental law in the three Member States has seen a move away from criminal enforcement and towards a strengthening of administrative enforcement. As established, the existence of certain forms of hybrid enforcement is a common aspect – to a greater or lesser extent – among the three jurisdictions. In addition, several other common aspects of the organisation and sanctions available for public enforcement show that there is a common theme when the three jurisdictions are compared. This theme is that the (seemingly) traditional dichotomy between administrative enforcement and criminal enforcement is increasingly becoming less clear-cut.

Traditionally, administrative enforcement and criminal enforcement are distinguished as separate systems through the character of their goals and through the authorities involved in sanctioning non-compliance and the procedural guarantees. Administrative enforcement has the goal to repair, either of the damage done or in a preventive sense for the future. Criminal enforcement aims at punishment; the offender, instead of the offence, is the primary focus. The main authorities involved in sanctioning non-compliance are the administrative authorities and the criminal courts respectively.

Currently, in the three countries one can see that these aspects are present. The core of the administrative enforcement systems for environmental protection in all three countries consists of sanctions that aim to repair for the benefit of the environment. The most common and versatile reparatory administrative sanction that can be imposed by the administrative authorities in all three countries is the reparation by means of a notice or an order. The core of the criminal enforcement systems for environmental protection consists of punitive sanctions imposed by the criminal courts, with imprisonment and the criminal penalty as common primary criminal sanctions in all three jurisdictions.

However, these aspects are not necessarily as solely distinctive or are no longer as distinctive, due to other aspects that the administrative and criminal enforcement systems have come to retain in all three countries. Although, as described, the

traditional characteristics mentioned above are still in place at the heart of each of the enforcement systems, there is a more fluid relationship and interchange of characteristics between administrative enforcement and criminal enforcement in the three jurisdictions. The prime reason for this lies in the sanctioning powers (competences) that are accorded by law to specific authorities for administrative enforcement and criminal enforcement. Above several of the aspects of the systems that illustrate this common theme were already described. Here these aspects are bundled and, where necessary, further elaborated. Below, first, it is described how the common theme can be seen in the organisation for the enforcement of environmental non-compliance; second, this theme is connected to the sanctions available in the three countries.

The enforcement organisation

Two common aspects of the enforcement organisation in the three jurisdictions are illustrative of the above-mentioned common theme: first, the Public Prosecutor as sanctioning authority and, second, the administrative authorities as prosecuting authorities. Neither the Public Prosecutor nor the administrative authorities belong to the authorities traditionally or commonly competent for sanctioning criminal offences. These aspects will now be further discussed.

A first illustration that the organisation has become more fluid in terms of the characteristics of administrative enforcement and criminal enforcement can be seen within the criminal enforcement organisation. Whereas the criminal courts are the traditional authority to impose criminal sanctions, the Public Prosecutor has (gained) independent criminal sanctioning powers in all three jurisdictions.[2146] This role is gaining even more importance for enforcement by the ability of the Public Prosecutor not only to propose punitive alternatives to prosecution, but also by the power to attach conditions of reparation to such sanctions in England and the Netherlands, and conditions of compensation such as in Germany.

> To sum up, in the Netherlands the Public Prosecutor has statutory powers to propose an extra-judicial settlement and a criminal decision. In Germany, the Public Prosecutor has a power quite similar to a conditional criminal decision. In England, a formal conditional caution was introduced relatively recently, with two other non-statutory instruments – the simple formal caution and the formal warning – already in place for the Public Prosecutor.

2146 In the case of the Public Prosecutor, one can qualify alternatives to prosecution as sanctioning as the instruments fit into the definition of sanction that has been adopted for this research: the alternatives are a reaction to a contravention (a criminal offence), which has impact on the rights of the individual or company (it burdens the individual either by reparatory obligations or through imposing punitive restrictions). Furthermore, if the instruments are complied with, prosecution for the original offence is ruled out. As set out in chapter 1, the Public Prosecutor can be considered an administrative authority (at least according to Dutch law). However, he is traditionally regarded as a criminal authority, together with the police and the criminal courts.

A second illustration of the theme this research has found, is that England and Germany have in common that the administrative authorities that have administrative enforcement powers, such as the municipalities, also have enforcement powers and, when exercising those powers, are considered prosecuting authorities (hereafter: prosecutor).[2147] In that role, these administrative authorities therefore can prosecute offences. In addition, these authorities can – as prosecutor – also impose criminal sanctions, as alternatives to prosecution in England, or sanctions for criminal regulatory offences, such as in Germany. In the role of prosecutor, the administrative authorities must follow the criminal procedural rules for enforcement. In the Netherlands this is not the case in general, as the administrative authorities do not function formally as a public prosecutor. There, a different authority is competent for the pursuit of criminal offences – through prosecution or criminal sanctions – than the administrative authorities that can impose administrative sanctions.[2148] However, the organisation for the administrative criminal decision does show some resemblance to the situation in England and Germany.

Sanctions

The first common aspect of the sanctions that illustrates the spillover between administrative and criminal enforcement in the three jurisdictions is that punitive sanctions that have been introduced into the hands of the administrative authorities. The second common aspect that is also illustrative of the common theme mentioned above is the availability of reparatory sanctions for criminal enforcement. These two common aspects of the available sanctions in the three jurisdictions show that the system/type of enforcement does not necessarily predict the content of the sanctions available in those systems and their ability to provide tailored enforcement. These two common aspects are now further discussed.

First, the spillover between administrative enforcement and criminal enforcement in the three jurisdictions is evidenced through the addition of punitive sanctions from the criminal realm, in particular monetary penalties, to the enforcement toolbox of the administrative authorities. Punitive sanctions were introduced where there were none before (GE[2149]; ENG; and NL); criminal law sanctions were put in the hands of administrative authorities (GE; NL); and alternatives to criminal law were created for responding to offences (ENG; GE).[2150]

2147 As explained previously, the regulatory authorities are named 'prosecuting authorities' in legislation in both England and Germany.

2148 As mentioned previously, even so, in Dutch administrative law, the Public Prosecutor is – technically – also an administrative authority. However, this is not relevant for the enforcement division of tasks as mentioned here.

2149 As can be seen, Germany is mentioned in this list by describing that administrative authorities have gained these powers, as part of the enforcement of regulatory offences. As previously described, in that system, the administrative authorities are called Public Prosecutor and are, as such, part of the criminal authorities and engage in criminal enforcement.

2150 The themes described are not each exclusive. For example, the administrative penalties/monetary fines in England were introduced where there were none before and created as alternatives to criminal law.

> In Germany punitive sanctions were introduced as an alternative to the criminal law as a separate system of regulatory offences. In the Netherlands, administrative monetary fines were introduced, as well as the administrative criminal decision, which is a criminal law instrument. In England, civil non-criminal sanctions – including administrative monetary penalties – were created for the administrative authorities as alternatives to criminal law responses to offences, including non-compliance with administrative notices or orders. The aspects of the punitive sanctions that are primarily different among the three countries are the placement of the instruments in the enforcement system or its procedural characteristics. These aspects also affect the placement – within administrative or criminal enforcement – in the evaluation.

In Germany, the administrative authorities can only impose punitive sanctions as prosecuting authority for regulatory offences; in England and the Netherlands the administrative authorities can impose punitive sanctions for the administrative enforcement of environmental non-compliance.[2151] As previously mentioned, hybrid sanctions, and – in England and in Germany – a hybrid enforcement system, were created to accommodate this for administrative authorities.[2152]

Second, the encroachment of punitive sanctions in administrative enforcement and/or in the hands of the administrative authorities is more recent, at least, in the Netherlands and England, than the reverse, i.e. the influx or presence of reparatory powers in criminal law enforcement in the three jurisdictions. The latter is apparent and firmly established for criminal enforcement in the Netherlands and England, but not for Germany.

> In the Netherlands, this is particularly apparent in the Economic Offences Act. In this Act, powers are laid down for the criminal court and the Public Prosecutor to order the reparation of the situation to its lawful state, in other words, to end on-going non-compliant behaviour and/or repair its damage to the environment. Also the criminal courts in England have recourse to reparatory orders. They may impose a compensation order or a remediation order to be carried out under environmental legislation. In both cases, the instruments can be imposed independently or together with punitive criminal sanctions. Germany is the odd one out in this respect, as the criminal courts cannot order reparatory measures. In Germany, only the administrative

2151 Although the scope of the Dutch administrative authorities to do so is smaller than the scope of the administrative authorities that have this power in England.

2152 Note that in German, for this purpose the administrative authorities are called prosecuting authorities.

authorities have recourse to reparatory instruments – in the administrative preventive enforcement – to correct damaging consequences of contraventions.

12.2.4 Position of the common theme in the evaluation

The Member States have attempted to strengthen the propensity of the public enforcement authorities to provide effective enforcement of environmental law by broadening the enforcement architecture, i.e. the enforcement organisation and the sanctions available to it. It follows from the common theme described above for the organisation and its sanctions that the three jurisdictions, and specifically its enforcement authorities for the public enforcement of environmental law, have become able to aim for a multitude of enforcement goals appropriate for a broad typology of non-compliance, its consequences and offenders. This raises the question as to how the three jurisdictions compare and, in particular, what good practices are available. As we have seen, this is the central question to this research. To this, we now turn.

12.3 Comparative evaluation: good practices of effective enforcement and recommendations

12.3.1 Introduction

Effective enforcement is tailored enforcement. The concept of tailored enforcement has been made practicable in this research by means of institutional requirements and instrumental requirements. Below, good practices for the effective public enforcement of environmental law are uncovered through a comparative evaluation of the enforcement organisation and sanctions in Nordrhein-Westfalen in Germany, England and the Netherlands.

The good practices are followed by recommendations. Several recommendations are made with regard to good practices the jurisdictions could benefit from to solve lacunae or to strengthen aspects of their enforcement architecture in light of effective enforcement. First, this will be done for the enforcement organisation and the institutional requirements (section 12.3.2); second, this will be done for the sanctions and the instrumental requirements (section 12.3.3).

12.3.2 Effective enforcement: institutional requirements

12.3.2.1 Introduction

The institutional requirements concern the manner in which enforcement is embedded within public enforcement authorities. Fulfilling these requirements in a structural manner, i.e. where these elements are structurally embedded in the

enforcement organisation, can contribute to an effective, expedient organisation of enforcement as far as relevant to being able to impose made-to-measure and, thereby, tit-for-tat enforcement action. In other words, these requirements contribute to an organisation that can formulate and take effective enforcement action. These are the decision-making independence between or within the enforcement authorities in respect of regulatory and enforcement functions; the specialisation of and within the enforcement authorities; and the coordination and cooperation between enforcement authorities.

Below, the three jurisdictions are compared and the aspects signalled that stand out from the comparison as good practices of the authorities involved in the public enforcement of environmental law. In addition, specific recommendations are described. To reiterate, the institutional requirements, formulated in chapter 2, are set out in the table below.

Institutional requirements

Enforcement should be embedded in an expedient organisation, which entails structural guarantees within the enforcement organisation of:

- Degree of decision-making independence of the enforcement organisation
  - separation between regulatory and enforcement functions
  - separation between inspection/investigation and sanctioning
- Specialisation of or within the organisation
  - degree of expertise
  - appropriate proximity (level of government)
- Coordination and cooperation between enforcement authorities

In the country chapters, points of praise and critique were put forward with regard to the enforcement authorities on their potential to fulfil the institutional requirements mentioned above. In the following, it will be discussed which enforcement organisation in the three countries provides good practices for each of these requirements separately.

12.3.2.2 Decision-making independence

As explained in chapter 2, a certain amount of decision-making independence of the enforcement organisation can benefit effective, expedient enforcement. Specifically, this research looks at the decision-making independence of the enforcement organisation in the shape of a separation of certain functions between enforcement authorities and/or within an enforcement authority. This separation is required as the

combination of functions may lead to bias of the enforcement authorities. Where such bias is not avoided, this may impact the choice of enforcement, including sanctions, by the authorities. For that purpose, in the country chapters, it was assessed whether a degree of decision-making independence is embedded in the enforcement organisation through a) a separation between regulatory functions and enforcement functions; and b) between inspection/investigation and sanctioning.[2153]

a) Comparison - separation of regulatory functions and enforcement functions

A complete separation between regulatory functions – in the shape of environmental standard-setting by the administrative authorities – and *administrative* enforcement functions by assigning these functions to different authorities does not occur in the three countries. All enforcement authorities in the three countries also engage in standard-setting besides their enforcement functions, for example in the shape of permits with regard to activities that impact the environment. In all three countries, the enforcement powers are attributed to the authorities that also have the power to give out permits or set other standards for the environment. There is, however, a certain extent of separation within the authorities between the different functions.

In this respect, the Netherlands seems to provide a good guarantee compared to the other countries, in spite of the fact that the enforcement competence is primarily linked by law to the power to give out permits. Specifically, the Netherlands provides a good guarantee because it is a requirement laid down in the law – thus ensured in a structural manner – to have a separation within the administrative authorities between the regulatory functions and the enforcement functions for environmental management law.[2154] The enforcement functions are therefore exercised without the influence of the relationship created through the exercise of regulatory functions.[2155] Moreover, a requirement laid down in the law creates awareness within the enforcement organisation of the necessity of unbiased enforcement. This is **a good practice**. Even though the law does not require it, the Dutch administrative authorities have also factually implemented such a separation for the enforcement of other environmental law.

> As remarked in chapter 10, in the Netherlands the separation between regulatory and enforcement functions has become less relevant as the norms by means of which the regulation takes place have become (more) general norms. This means that the regulatory officials of the administrative authorities are not as involved

2153 As mentioned in chapter 2, the separation between politics and/or policymaking and enforcement is not discussed. For the assessment in the country chapters, see chapter 4, section 4.6.2; chapter 7, section 7.7.2; chapter 10, section 10.5.2.
2154 This covers installations and such. See chapter 10, section 10.3.4.2 and section 10.5.2.2.
2155 See chapter 2, section 2.6.2.2.

with the regulated as previously, when individual permits where established. England and Germany seem to have less development in this direction.

In England and Nordrhein-Westfalen, Germany the authorities that are competent for administrative enforcement also may issue permits, or set other standards for environmental regulation. Therefore, as in the Netherlands, the functions are united within one and the same authority. In England and Germany, the separation of the regulatory functions and administrative enforcement functions depends on practice, and is not required by the law, which therefore means these countries seem to be less able to provide a guarantee on this aspect – in terms of a structural guarantee of separation – than the Netherlands. Also, in these two jurisdictions no internal or external (binding) policy exists requiring a structural separation between these functions within the administrative authorities competent for environmental enforcement.[2156] However, the departments within the organisation of the Environment Agency are in practice generally divided into permitting and enforcement, with a further distinction within that department between administrative enforcement and criminal enforcement. In Germany, such a distinction between functions within the authorities may occur, sometimes within the same department as it may be common to accord both permitting and enforcement functions to one department within the authorities.[2157]

In England, the organisation of the central government bodies, such as the Environment Agency, provides a benefit for the decision-making independence with regard to enforcement. Due to the fact that these central government bodies have a centralised enforcement policy, local economic considerations, which could otherwise put pressure on effective enforcement, in particular where non-compliance would require heavy sanctions, can be less influential on enforcement.[2158] This is **a good practice**.

Comparing the three jurisdictions, it stands out that the Netherlands have a legal rule in place that a person that has been appointed as an inspection officer is not to be continually responsible for the inspection of non-compliance with regard to the same installation. This is beneficial to preventing bias and thus for effective enforcement. This, therefore, is **a good practice**.

2156 See chapter 4, section 4.6.2.2, and chapter 7, section 7.7.2.2.

2157 This includes the prosecution of regulatory offences.

2158 Such local economic considerations may be, for example, the interest of local employment, which would be directly impacted in case of the closure of an installation.

In England, the separation between regulatory functions and *criminal* enforcement functions that lie with the Prosecutor and investigative authorities provides a similar picture as for its administrative enforcement described above, i.e. the (lack of) separation. As with administrative enforcement, a separation between regulatory functions and criminal enforcement functions depends on practice, and has not been ensured through legal rules. Also, no internal or external policy exists requiring separation.
The strongest, most structural separation between regulatory functions, carried out by the administrative authorities, and criminal enforcement functions of the Public Prosecutor and the investigative authorities occurs in the Netherlands. There, the Public Prosecutor is, as a separate authority, entirely separated from the administrative authorities that regulate the environment. As we have seen, two different types of officials can be in charge of investigation: the police and investigative officers that may also have a role in inspection. In the case of the latter, considering what has been stated above, in the Netherlands also the investigative functions are separated from the regulatory functions.[2159] Moreover, Dutch law specifically requires a separation of regulatory functions and enforcement functions within the administrative authorities where it concerns the imposition of an administrative criminal sanction by the administrative authorities under supervision of the Public Prosecutor. This is **a good practice**. Also on this aspect the organisation in the Netherlands seems to have better conditions in light of effective enforcement than England and Germany (NRW).
In all three jurisdictions there is a separation of powers between regulatory functions and the criminal courts and the criminal enforcement functions it exercises.[2160]

b) Comparison - separation inspection/investigation and sanctioning

Of the three countries, the Netherlands in particular has good guarantees with regard to the separation of inspection and sanctioning within the *administrative* enforcement organisation. This benefits effective enforcement and, therefore, can be considered **a good practice**. Even so, this separation only occurs explicitly when the administrative authority imposes a punitive sanction, specifically the administrative fine. A separation requirement at the personal level between inspection and sanctioning officers is enshrined in the law for this instrument. Besides this, a separation in fact takes place with regard to the environment offices, as these authorities generally prepare the enforcement decision, and the municipalities, provinces or regional water authorities take the decision. The administrative authorities in England and Germany (NRW)

2159 Keep in mind that the control of those investigative officers is in the hands of the police and the Public Prosecutor, in spite of the fact that these officers may also belong to the administrative authority for inspection.
2160 Conform the separation of powers (*trias politica*) between the judiciary, the legislator and the executive.

are not formally legally required to apply a separation within the organisation. No requirement to separate is laid down in the law, or in external or internal policy or guidelines. This also applies to Germany (NRW) where the administrative authorities as prosecuting authorities investigate and impose sanctions for regulatory offences.

Personal separation is common in the three jurisdictions. The question is if a personal separation is sufficient to prevent bias against an offender. A factual separation may provide some limit to such bias, however, as remarked in the evaluations in the country chapters, it is not a structural organisational guarantee as it happens *ad hoc* on a case-by-case basis. This may be different where the law requires such a separation, as this will provide a stronger basis for its necessity, as described above as a good practice in the Netherlands. Moreover, such a basis may perhaps incite more structural solutions within an enforcement organisation to provide a stronger protection to such bias.
The possibility to ensure separation that goes beyond *ad hoc* personal separation on a case-by-case basis also depends on the size of the authorities. Where authorities are small, it may be more difficult in light of limited resources to structurally guarantee separation in the enforcement organisation through, for example, the creation of separate functions. In the Netherlands, the environment offices were introduced, in part, to circumvent issues related to the size of, in particular, the municipalities. This can, therefore, also be seen as **a good practice** to enable that separation is structurally guaranteed within an enforcement authority.

There are no legal rules specifically prescribing a separation of criminal investigation and *criminal* sanctioning by the Public Prosecutor in any of the three jurisdictions. It seems that such a separation is difficult. In many cases the Public Prosecutor is connected to the investigative officers. Some forms of functional and/or personal separation do exist. Where the investigative officers and the Prosecutor belong to the same authority, as is the case in England, these will be different officials, thus providing a personal separation.[2161]

> This also applies to the Netherlands, where it concerns the imposition of the administrative criminal decision by the administrative authorities, which has quite a narrow scope.[2162] Moreover, in the Netherlands, the investigative officers are under the supervision of the police and the Public Prosecutor.

2161 Note that in Germany, this is only the case for regulatory offences.
2162 As explained in chapter 11, this sanction is a hybrid but contains a lot of elements of the criminal sanctions.

In Germany, the State Public Prosecutor may be in charge of the investigation of criminal offences (and sometimes also regulatory offences), although usually the police take an independent role. In the Netherlands, the Public Prosecutor is responsible for the investigation by the investigative officers, including the police, in case of environmental criminal offences. The Public Prosecutor can impose sanctions for certain environmental offences, as alternatives to prosecution in Germany, the Netherlands, and (to a much lesser extent) in England.
Both in Germany and the Netherlands, there is a legally enforceable obligation that exculpatory material is to be included by the Public Prosecutor in the prosecution file. In England, the Public Prosecutor has a legal obligation to disclose such evidence to the defence, where a defendant makes a plea of not guilty in Magistrates' Court and where the case is brought before the Crown Court. In all three countries, this obligation can be considered **a good practice** with respect to preventing prosecutorial bias.[2163]

In all three countries for several areas of environmental protection, there is a separation between investigation and criminal sanctioning by the criminal courts by virtue of the fact that the authorities/officers that conduct criminal investigation and the criminal courts are separate entities. The criminal courts have the fullest decision-making independence of all the enforcement authorities. This is, first and foremost, guaranteed by the constitution and the rule of law in the three jurisdictions. Considering the separation of powers (*trias politica*) that exists in all three jurisdictions, the criminal courts – the judiciary – are positioned separately from the executive and the legislator. This means that regulatory functions do not belong to the functions of the criminal courts. Besides this, there is also a strict separation of investigation and criminal sanctioning by the courts, which fits the European rights to an impartial judiciary when it concerns sanctions of a criminal nature as implemented in all three jurisdictions. In fact, the criminal courts review the application of investigative powers and provide a balance in this way of the government's monopoly or prerogative on the use of force.
The criminal courts have full independence to convict or acquit an offender, and – limited only by the law – with regard to the sanctions imposed and their level or severity, as well as the motivation thereof. Even so, the court is held to the limits of the indictment of the Public Prosecutor in terms of the offences that it can convict an offender of and impose sanctions for.

2163 See also chapter 2, section 2.6.2.2.

- **Good practices and recommendations decision-making independence**

The comparison of the three jurisdictions on the potential of their enforcement organisation for decision-making independence provides several good practices for the benefit of effective enforcement. The good practices and their jurisdictions of origin are as follows:

Good practices on decision-making independence

- Structural guarantees are provided through establishing obligations in the law (NL).
  - To separate regulatory and enforcement functions.
  - To separate inspection and administrative (including punitive) sanctioning.
- A legal rule is in place that a person that has been appointed as an inspection officer is not to be continually responsible for the inspection of non-compliance with regard to the same installation (NL).
- Environment offices can provide a certain scale to the enforcement organisation to make structural separation possible within the organisation without resources' limits to separation (NL).
- A centralised enforcement policy for the central government bodies provides decision-making independence from local economic interests (ENG).
- There is a legally enforceable obligation for the Public Prosecutor to ensure that exculpatory evidence is assembled in the file used for prosecution (and sanctioning) (GE; NL; ENG).

Considering the good practices in the jurisdictions mentioned above, and what has been remarked above about the enforcement organisation in the other jurisdictions, recommendations can be made. This does not necessarily mean that the enforcement organisation does not suffice in light of the institutional requirement and effective enforcement. The recommendations aim to strengthen effective enforcement with regard to the requirement of decision-making independence in these other jurisdictions. It may also be that the jurisdictions lack independence. Both of these perspectives – the fact that the organisation could be strengthened, or that the organisation is sub-optimal – have been described above. These good practices lead to the following recommendations for specific jurisdictions to consider:

Recommendations on decision-making independence

- Introduce a clear separation within the local authorities between inspection and investigation and the imposition of sanctions and prosecution in England.
- Create administrative enforcement authorities of sufficient scale where a structural separation cannot be guaranteed within the enforcement authorities due to lack of resources in Germany.
- Establish separation requirements in binding rules for the authorities in Germany and in England.

12.3.2.3 Specialisation

Introduction

Specialisation is the term chosen in this research to indicate two aspects of the organisation: (a) a degree of expertise within an organisation; and (b) an appropriate proximity of an organisation to the situation of non-compliance. The availability of a degree of expertise and proximity can benefit the effectiveness of enforcement.

Through a degree of expertise in enforcement and/or environmental protection, the organisation is moreover supported in choosing effective sanctions in a given situation, as it can attach appropriate value – in terms of effective enforcement for environmental protection – to the characteristics/specifics of the non-compliance, the offender and of the relevant interests. Through an appropriate proximity of the organisation to the situation of non-compliance, the organisation is aware of the characteristics of the non-compliance, of the offender and of the relevant interests at play, allowing it to choose the effective enforcement instrument(s).

Which countries provide the comparative good practices on these aspects? England seems to have the most specialist architecture for enforcement with good practices, from the viewpoints of proximity and expertise. However, also the other two jurisdictions provide good practices with regard to this requirement.[2164] Below, this is further detailed.

a) Comparison - degree of expertise

As proposed in chapter 2, a degree of expertise by or within an enforcement authority/organisation is highly preferable for that organisation to be able to signal specifically the characteristics (typology) of a given situation of non-compliance and to be able

2164 For the assessment in the country chapters, see chapter 4, section 4.6.3; chapter 7, section 7.7.3; chapter 10, section 10.5.3.

to provide made-to-measure enforcement action.[2165] Expertise means theoretical and practical knowledge of specific areas of the law, of policy or of enforcement. For environmental enforcement, relevant are expertise on enforcement or parts thereof, expertise on environmental protection or areas thereof, legal expertise and/or technical expertise in these areas and the like.
Moreover, expertise may also lead to existing enforcement policies being understood and followed by the enforcement authorities, thereby achieving consistency of enforcement in practice. Such policies will gain more effectiveness in practice when implemented by officers of that organisation that have some expertise, and thereby are able to understand when and how that policy is to be put into practice. Vice versa, enforcement policies may contribute to a degree of expertise within an organisation.

There is not one type of expertise in each of the countries, but several, which can be categorised in different ways.[2166] None of the countries has a single authority in charge of all environmental enforcement, i.e. dealing with both the administrative and criminal enforcement of all areas of environmental protection. It follows from the assessment of the general organisation of enforcement in the country chapters that several kinds of expertise by the enforcement authorities can be recognised. One can categorise the authorities in the three countries according to their scope of competence within the environmental arena:

> Some authorities are competent specifically for certain areas of the environmental arena, such as nature protection (Natural England) or water protection (the Dutch regional water authorities); other authorities cover a much larger part of the environmental arena, (Environment Agency); and even others also have competences outside the environmental arena, while achieving a functional field of competence (the Dutch Functional Public Prosecutor's Office in the Netherlands) or more general with regard to all general tasks of the administration (municipalities, provinces, i.e. the regional and local administrative authorities in the Netherlands and Germany). The existence of specialised departments in the area of environmental protection and/or enforcement within administrative authorities, such as municipalities and provinces, which also have many other administrative tasks, as opposed to the specialised authorities, can also depend on the resources available.

2165 This also includes the courts.
2166 For the assessment in the country chapters, see chapter 4, section 4.6.3; chapter 7, section 7.7.3; chapter 10, section 10.5.3.

One can categorise the authorities according to their scope of competence with regard to the phases of enforcement:

> Most authorities take care of both inspection and sanctioning. Of those authorities, many are also dealing with giving off permits besides enforcement (the Dutch environment agencies and the regional and local administrative authorities – municipalities and provinces and regional water authorities in the Netherlands; the regulatory authorities, including, for example, the Environment Agency, in England; the regulatory authorities in NRW, Germany). The authorities purely aimed at enforcement are the criminal authorities (such as the Dutch Functional Office of the Public Prosecutor, the Crown Prosecution Service in England (for wildlife offences), and the German State Public Prosecutor (for criminal offences). For investigation most commonly authorities are solely entrusted with this task (the police for wildlife in England, the police in Germany and the police in the Netherlands).[2167]

Or, one can categorise the authorities on the basis of their scope of competence with regard to types of enforcement:

> Some authorities deal only with administrative enforcement, or aspects of it (all Dutch administrative authorities); other authorities deal with criminal enforcement or aspects of it (the Public Prosecutor and the criminal judiciary in the Netherlands, Germany and England); even others deal with both administrative enforcement and a part of the criminal enforcement process, specifically the prosecution of criminal offences (all administrative authorities in England, including the municipalities) or the prosecution and sanctioning of regulatory offences (the administrative authorities in Germany that are for that purpose called prosecuting authorities).

Besides the above, there is also the expertise that is in place within these authorities in the areas of the inspection; investigation; prosecution; and sanctioning of environmental non-compliance. To these also belong the technical and legal expertise that may be available within such areas.

Below, the expertise of the enforcement authorities will be compared for good practices in the three jurisdictions. This will be done for the administrative enforcement authorities, including the inspection officers and officers that impose sanctions[2168]

2167 Often an authority involved with prosecution and/or sanctioning supervises these actors. In all three countries this is done by the Public Prosecutor(s).

2168 As remarked earlier, there is no separate authority for inspection officers in any of the countries; the administrative authorities to which they belong are compared in general. Although the Public Prosecutor can be deemed an administrative authority or even is an administrative authority, in this research, the Public Prosecutor is considered a criminal authority, due to its position in the criminal enforcement.

and for the criminal enforcement authorities, including the officers competent for criminal investigation, the public prosecutor, and the criminal court.

Administrative authorities

Of the organisation in the three countries, the organisation of the Environment Agency in England has present the most types of specialisation, which include its role as administrative enforcement authority, but also, as will be discussed further below, as criminal prosecutor imposing sanctions. It stands out among the authorities in charge of enforcement, as the Environment Agency can bring expertise in all aspects of the organisation: by its broad scope of competence within the environmental arena, within the phases of enforcement and with regard to the types of enforcement. This can be seen in that it is both fully in charge of administrative sanctioning and inspection.[2169] The expertise is fully structurally guaranteed. This is **a good practice**.

Not as specialised as the Environment Agency but still able to provide quite good guarantees of specialisation for administrative enforcement are the environment offices established in the Netherlands that inspect, investigate and prepare certain administrative sanctioning decisions – without necessarily taking those decisions – and in specific cases impose an administrative sanction. Even though the offices are mainly executive and only have the power to sign enforcement decisions in exceptional cases, their institution has been an improvement in terms of assembling the expertise with regard to environmental enforcement in one place. This is **a good practice**.

Moreover, it stands out that expertise is deemed a quality criterion in the Netherlands, laid down in statutory regulation that must be fulfilled by the administrative authorities, and which also applies to the environment offices. This is **a good practice**. By laying down such a criterion in statutory regulations or the law, such an element is to be structurally implemented within the enforcement organisation and the authorities are accountable for this implementation.

In Germany (NRW), there are no structural guarantees similar to those in England and the Netherlands for the expertise of the administrative authorities that carry out administrative enforcement. There is no specialist organisation as bodies of the general administration carry out these powers for environmental enforcement. The administrative authorities also focus on other tasks besides environmental enforcement. However, the specific municipality or province in charge will generally

2169 Below it will be further discussed that this is also the case with regard to investigation as well as criminal prosecution and sanctioning by the Prosecutor in its area of environmental competence.

have a department for environmental issues, which commonly also includes enforcement. Therefore a certain structural expertise is available within these local authorities. This, however, does not necessarily stand out as a good practice in comparison to the available expertise in the other two jurisdictions.

Investigative officers

As we have seen in the country chapters and the previous analysis on proximity, in England and Germany (NRW), the investigative officers may be part of the administrative authorities. Besides this, also the police may be involved in Germany (NRW). In the Netherlands, the police are in charge of investigation into criminal offences. Moreover, investigative officers that are under supervision of the police and the Public Prosecutor may be a part of the administrative authorities. Where this is the case, these investigative officers can achieve expertise similarly as described above for the administrative authorities, including the environment offices. This is **a good practice**.

Where the police investigate criminal environmental offences in the three jurisdictions, the situation in the Netherlands provides a good practice. The Dutch police, who cover most of the investigation into criminal offences with a quite heavy or significantly heavy impact on the environment are also quite specialised. There are environmental teams as part of the ten regional police teams and an environmental criminal investigation department as part of the national police. This is **a good practice**.

In England, most investigation into environmental criminal offences takes place by investigative officers positioned with the administrative authorities. As with regard to the investigative officers that are positioned with the administrative authorities in the Netherlands, expertise is similar as described above for the administrative authorities in England. This means that the investigative officers in England likely have the most expertise where they are generally part of entirely specialised central government agencies, which is often the case. This is **a good practice**.

For the police in England, that are only in charge of wildlife protection, a degree of expertise is available as nearly all police forces have appointed a specific wildlife crime officer, designated for this purpose. This enables expertise to grow through practice. Moreover, seemingly similar to the Netherlands, also in England there is a national police crime unit. In England this organisation only deals with wildlife crime, setting enforcement priorities and coordinating enforcement activity. These are **good practices**.

The police in Germany (NRW) may be specialised at the personal level for environmental offences. Environmental cases tend to be put into the hands of the officers that have some experience in the area. Expertise is, however not structurally ensured or supported through statutory requirements of specialisation or quality control, or specific organisational structures that provide for a consistent specialisation within the police authorities. Besides this, the state criminal police office in Germany (NRW) that deals with serious environmental crime and cross-regional investigations does have a specialised department designated for environmental criminal offences. This is **a good practice**.

(Public) Prosecutor

As with the administrative authorities and administrative enforcement, the fact that the organisation of the Environment Agency in England includes the function of criminal prosecutor is a good practice. The findings with regard to administrative enforcement can be reiterated here: the Environment Agency stands out among the authorities in charge of enforcement, as it can bring expertise in environmental enforcement in all aspects of the organisation: by its broad scope of competence within the environmental arena, within the phases of enforcement and with regard to the types of enforcement. This can be seen in that it is both fully in charge of criminal investigation and prosecution of environmental offences, and, in some cases, can impose sanctions as alternatives for prosecution.[2170] This benefits effective environmental enforcement to a great extent, and, therefore, is **a good practice**.

Second to the Environment Agency as the most specialised prosecutor is the Dutch Public Prosecutor for environmental cases. The Functional Office this Public Prosecutor belongs to is semi-specialised, as it deals with several offences that are often closely related, among which environmental cases, public health offences and fraud. In the Netherlands, the environmental protection and enforcement expertise thus assembled can be utilised for the prosecution and the imposition of criminal sanctions for environmental offences by the Public Prosecutor. Rather comparable to this is the Crown Prosecution Service for wildlife offences in England, which commonly provides expertise through appointed wildlife coordinators.

The investigation and prosecution of regulatory offences in Nordrhein-Westfalen is in the hands of administrative authorities that are not solely focussed on environmental protection. However, through the available organisational division within the authorities of tasks relating to enforcement, environmental protection or – most common – a combination of the two, certain knowledge is assembled as to dealing

2170 Below it will be further discussed that this is also the case with regard to investigation as well as criminal prosecution and sanctioning by the prosecutor in its area of environmental competence.

with the prosecution and sanctioning of environmental regulatory offences. The Public Prosecutor in Nordrhein-Westfalen also has a degree of expertise through separate departments in the large cities or by allocating the cases to the same individuals with regard to environmental criminal offences.
This may also be the case in England regarding where the local authorities – with their wide remit in terms of areas of competence – have prosecution powers. These are not commonly structurally specialised, but specialisation for environmental cases in departments may exist.

Criminal courts
The expertise of the prosecutor may aid the criminal courts in making their assessment of a case brought before them by the prosecutor, and formulating expedient and effective made-to-measure sanctions in a criminal procedure when the court involved is susceptible to it.
In Germany (NRW), the criminal courts that adjudicate serious environmental offences (State courts) possess specialised divisions within the criminal chambers to hear such cases. This is, comparatively, **a good practice**.
In the Netherlands, economic chambers adjudicate economic criminal offences, including environmental economic offences. Besides this, in Germany and in the Netherlands, a degree of expertise within the courts is created in practice by assigning environmental cases to judges or juries that have a practice – even if it is limited – of hearing and sentencing such cases. However, this is not guaranteed.
Germany and the Netherlands stand out in comparison to England, as such allocation of cases does not regularly occur in England. There, embedding specialisation in the structure of the judiciary was discussed in the form of creating a separate environmental court. This was not put in practice. Therefore, there are no structural guarantees for ensuring that cases are adjudicated before courts with expertise. Instead, in England for the purpose of expertise a formal sentencing guideline was introduced for most environmental crimes. This guideline may benefit effective enforcement as they provide a certain consistency to environmental sentencing and are able to create a degree of expertise without the experience. It acts as a certain counterweight. This can, therefore, be **a good practice** where structural guarantees within an enforcement organisation do not exist. In spite of this, experience is indispensable to evaluate the evidence

- **Good practices and recommendations expertise**

The comparison of the three jurisdictions on the potential of their enforcement organisation for expertise provides several good practices for the benefit of effective enforcement. The good practices and their jurisdictions of origin are indicated below.

Good practices on expertise

- Enforcement authority with focus on environmental protection and enforcement (ENG; NL).
- Internal quality enhancement through process criteria (NL) and guidelines (ENG).
- For investigation: officers as part of a specialised authority with a broad remit (ENG) or in specialised teams (NL).
- Public Prosecutor: officers as part of a specialised authority with a broad remit (ENG) or in specialised teams (NL).
- Criminal courts: specialised chambers (NL; GE); allocation to increase expertise (NL; GE); sentencing guideline (ENG).

Considering the good practices in the jurisdictions mentioned above, and what has been remarked above about the enforcement organisation in the other jurisdictions, recommendations can be made. This does not necessarily mean that the enforcement organisation does not suffice in light of the institutional requirement and effective enforcement. The recommendations aim to strengthen effective enforcement with regard to requirement of expertise in these other jurisdictions. It may also be that the jurisdictions lack independence. Both of these perspectives – the fact that the organisation could be strengthened, or that the organisation is sub-optimal – have been described above. These good practices lead to the following recommendations that may be considered by the jurisdictions indicated:

Recommendations on expertise

- Introduce constructive guarantees – required by the law or in binding guidelines – for expertise within the administrative enforcement authorities in Germany.
- Introduce constructive guarantees – required by the law or in binding guidelines – for expertise within the criminal courts in England. This could, at the least, take place through allocation. Preferably, this allocation is made structural by creating chambers within the courts to hear such cases where expertise can be created, developed and maintained.

b) Comparison - appropriate proximity: level of government

As explained in chapter 2, the aspect of proximity is focused on the level of government at which the enforcement authorities for administrative and criminal enforcement operate. Ideally, the enforcement authorities operate at an appropriate proximity: they cover the scale of the violations and its consequences, are sufficiently proximate to the regulated and the violation to assess their characteristics and are able to ensure that the interests involved are taken into account. The goal of proximity is to serve the possibility of enforcement tailored to the circumstances of the case. Moreover, a sufficient distance must be in place from the regulated to prevent conflicts of interest of the enforcement authorities. In addition, a certain distance can ensure a certain consistency of enforcement action, i.e. enforcement action that is tailored to the specific case at hand but without arbitrariness. A centralised organisation and enforcement policies[2171] may enhance effective enforcement by providing a certain structure for consistency in the balancing of interests within an enforcement organisation or between enforcement authorities.

It follows from the country chapters that the level of government that the enforcement authorities operate at varies within and across the three jurisdictions. Some enforcement authorities operate at arm's length of central government, such as the Environment Agency and Natural England in England. This also applies to some of the specialised Dutch enforcement authorities, although these have a much smaller scope of operation than in England, such as the Dutch Emissions Authority.[2172] There are also enforcement authorities in the three jurisdictions that operate at regional, provincial, district, or municipal level or at more than one of these levels.
Below, the level of government of the administrative enforcement authorities is compared for good practices in the three jurisdictions. As there is no separate authority for inspection officers in neither of the countries, the administrative authorities to which they belong are compared in general.[2173] Also below, the level of government of the criminal enforcement authorities is compared for good practices. This includes the investigative officers and the Public Prosecutor. Although the criminal courts are not evaluated from this viewpoint, the relation between the Public Prosecutor and the criminal courts with regard to this aspect is touched upon below.[2174]

2171 Please note, I do not evaluate the policies themselves in this research.
2172 This also applies, for example, to the Environment and Transport Inspectorate. See chapter 10, section 10.2.2.
2173 Although the Public Prosecutor can be deemed an administrative authority, in this research, the Public Prosecutor is considered a criminal authority, due to its position in the criminal enforcement.
2174 It was explained in chapter 2 that the criminal court system is not surveyed from the viewpoint of proximity.

Administrative authorities

When viewing the level of government and the proximity of the authorities that are competent for administrative enforcement, the Environment Agency in England is **a good practice** for an appropriate proximity for effective enforcement. It operates as one agency at central government level, with an enforcement policy established at that level, and has regional and local offices, so that enforcement can be tailored to the specific case at hand. In this way, the priorities and considerations for the application of sanctions are set at central level, while the exercise at a more local level serves an appropriate enforcement response in specific cases.

The Netherlands also has **a good practice** with regard to the element of proximity and administrative enforcement, although not quite similar to the good practice in England. An effective proximity of the administrative enforcement authorities to the local circumstances is ensured through the fact that the municipalities have primacy for the administrative enforcement of environmental law. Moreover, the environmental offices are required to take into account the local circumstances when preparing a sanctioning decision for the municipalities. This benefits effective enforcement. These offices are at an appropriate proximity as they have a certain distance due to their structural organisation. They are also able to tailor the enforcement to the specific case at hand. The lack of a centralised organisation as in England is countered in the Netherlands – so to speak – by the criteria on the enforcement organisation and its policies laid down in the law. For example, all authorities that participate in an environment office are required by law to establish a common enforcement policy for this office. The lack of a centralised organisation is also balanced by policies with a wide scope, such as the countrywide enforcement policy.

The organisation of administrative enforcement in Germany (NRW) does allow for proximity to local circumstances due to the fact that the local authorities are the primary enforcement authorities. The provincial authorities, which are competent for the enforcement of legal rules concerning installations, can provide a certain consistency by operating at a more regional instead of local scope. This may be appropriate with regard to the issues concerning these installations. However, the German organisation could benefit from the above-mentioned good practices and the traits of the above-mentioned authorities in England and the Netherlands in respect to their proximity, including the aspects of centralisation as well as the local aspects of the organisation and the structures enhancing the consistency of enforcement, for example through enforcement policies, that is present with regard to these authorities.

Investigative officers

The proximity of the investigative officers to the non-compliance is quite similar in the three countries. In England, these officers are part of the regional offices of the centralised enforcement agency (Environment Agency and Natural England) and

part of the local police (for wildlife offences). In Germany, the investigative officers are part of the local enforcement authorities (for regulatory offences) or the local police. In the Netherlands, the special investigative officers are proximate to the non-compliance when the local authorities are competent, as the officers are stationed with the local authorities. Moreover, where the police are involved in the investigation of those criminal offences that have a rather serious impact or grave impact on the environment in the Netherlands, the investigative officers are part of ten regional police teams, ensuring a relative proximity to the non-compliance. It seems, however, that the police in England and Germany are more local than in the Netherlands, where the locality of the police has been ceded for the purposes of a certain amount of centralisation. However, as explained above, a certain centralisation may not be problematic from the viewpoint of consistency. With regard to the investigative officers, the three jurisdictions all can provide proximity quite well according to the evaluative framework; there is no distinctive good practice when comparing the three jurisdictions (or bad practice, for that matter). Therefore, all three jurisdictions provide **a good practice**.

(Public) Prosecutor [2175]

In all countries, the information assembled by the investigative officers informs the prosecutor. Therefore, the prosecutors can take prosecution (and sanctioning) decisions on the basis of information assembled by officers that have been proximate to the non-compliance. Besides this, the prosecutor himself can – independently of the characteristics of the investigative officers and the information provided to it – be assessed on good practice in terms of its proximity to the non-compliance. This provides the following result.

The prosecutors in both Germany (NRW) and England score high on their proximity to the non-compliance. In Germany, the prosecutor can be quite proximate to the local circumstances of the non-compliance, as the local administrative authorities are (also) the prosecuting authorities when pursuing regulatory offences. The Public Prosecutor for criminal offences in Germany also has local offices, and is thereby rather proximate to the non-compliance. In England, prosecution by the Environment Agency is rooted in a centralised organisation. However, the information on the non-compliance will be available through the regional and local offices that the Environment Agency has and the fact that at these levels, as was just noted above, officers assemble the information on the non-compliance, including the criminal offences. Also, in England, the local

2175 As explained previously, to indicate all the authorities that may prosecute offences in the three jurisdictions the term prosecutor is used in this chapter. This term therefore includes the administrative/regulatory authorities as prosecuting authorities in England and Germany, the Crown Prosecution Service in England, and the Public Prosecutor in the Netherlands, and, also, Germany.

authorities have some powers to act as prosecutor. The Crown Prosecution Service (for wildlife offences) is as proximate as the local police. Therefore, there is a certain similarity between Germany and England with regard to the effective proximity of the prosecutor, which benefits effective enforcement. Both have **good practices** in this regard. Between the two jurisdictions, there is no arrangement that would qualify as contributing most to an effective proximity for the benefit of effective enforcement.

In contrast, the prosecutor is never part of the local authorities in the Netherlands. However, this does not necessarily mean that the Netherlands does not have a good practice in the sense that no knowledge of the specific circumstances is available for the prosecution. The special investigative officers that are stationed with the local authorities and the regional police, as described above, gather information on criminal offences for the Public Prosecutor. Moreover, the Dutch Public Prosecutor has arrangements with the administrative authorities, among others as part of the countrywide enforcement strategy, on choosing enforcement for specific non-compliance. These are also **good practices** as, through this, the Public Prosecutor will also be able to gain knowledge on the circumstances of non-compliance, in particular, those serious criminal offences it may consider for prosecution. With regard to the prosecutor, the three jurisdictions all can provide proximity quite well according to the evaluative framework.

Criminal courts

Where the (Public) Prosecutor is able to assemble relevant information about the non-compliance as discussed above, it can inform the criminal courts through the criminal case file. Obviously, also the defense of the suspect may assemble such information. This, therefore, means that, in any case, with regard to this aspect, at least, the ability of the criminal courts to gain knowledge of the context and details of the non-compliance is supported by the ability of the Public Prosecutor – and the investigative authorities – to do so.[2176] As analysed above, all three jurisdictions provide more or less appropriate proximity in this respect.

- **Good practices and recommendations proximity**

The comparison of the three jurisdictions on the potential of their enforcement organisation for proximity provides several good practices for the benefit of effective enforcement. The good practices and their jurisdictions of origin are indicated below. As described, the good practices consist of the shapes that a proximate enforcement organisation can take. These good practices are the following:

2176 On the ability of the criminal courts to value and balance this information, see the next section below on expertise.

Good practices on a proximate enforcement organisation

- A centralised organisation with regional offices operating with a centralised policy and room for local distinction (ENG).
- Local authorities with primacy for enforcement (NL; GE).
- A legal requirement to incorporate local circumstances in enforcement decisions (NL).
- Centralised and coordinated enforcement policies for the enforcement authorities, including the environment offices (NL).
- Investigative officers are part of the administrative authorities (ENG; NL) or the local police (ENG; GE), or part of the regional police with a more centralised organisation and guidance (NL).
- A prosecutor close to the relevant circumstances through local offices, as part of the administrative authorities (ENG; DE), informed by proximate investigative officers (ENG; GE; NL).

The good practices lead to the following recommendation that can be considered by the jurisdiction indicated:

Recommendation on a proximate enforcement organisation

- Strengthen the consistency of the proximate enforcement in Germany by coordinating enforcement policies.

12.3.2.4 Competence conflicts and competence benefits: coordination and cooperation

Cooperation and coordination between enforcement authorities have been proved necessary to provide effective enforcement action when several authorities are involved. As explained in chapter 2, there may be several reasons for the involvement of multiple authorities for enforcement. One, the organisational structure for enforcement as laid down in the law (tiered, fragmented, unified, decentralised); and, two, multiple authorities are required to exercise their enforcement powers to fulfil the appropriate enforcement goals in a given situation. With regard to the former, coordination can benefit effective enforcement; with regard to the latter, cooperation can. Below, it will be described what the good practices are where coordination or cooperation is necessary for effective enforcement.[2177]

2177 For the assessment in the country chapters, see chapter 4, section 4.6.4; chapter 7, section 7.7.4; chapter 10, section 10.5.4.

12.3.2.4.1 Coordination between the same enforcement authorities

As explained in chapter 2, overlapping competences (positive competence conflicts) or a lack of competent authorities (negative competence conflicts) should be avoided. It can be seen in the three countries that such conflicts can occur in particular with regard to the competences of the administrative authorities, although the likelihood in England or the Netherlands is less than in Germany. The competences for Dutch environmental enforcement are most transparent and clearly provided in the law. This is **a good practice**. Germany (NRW) could benefit from this good practice of providing clear competences in the law for environmental protection and its enforcement.

To avoid conflicts of competences becoming a problem for effective enforcement, England, Germany and the Netherlands rely on co-ordination mechanisms to avoid and streamline competency conflicts. All three jurisdictions have available legal rules for the priority.
The mechanisms in the Netherlands are laid down in the law and bind the authorities involved. This provides structural guarantees for to ability to coordinate between the same enforcement authorities. The mechanisms – including the Primary Authority Register – available in England also provide strong guarantees for the coordination between the local authorities.

In Germany (NRW), there may be a greater likelihood of competence conflicts due to the fragmented legislation on enforcement competences. This can be detrimental to effective enforcement and this means that this is, in fact, a comparative bad practice in Germany when compared to England and the Netherlands. However, a counterweight to this fragmentation and resulting conflicts of competences between administrative authorities is provided in Germany through three coordination mechanisms provided in legal rules. In case of a conflict of competences, these coordination mechanisms provide a structural aid to solving the conflict. As mentioned above, there is a legal rule establishing priority, with the other jurisdictions possessing similar rules. Also, the fencing off principle brings together the enforcement of most aspects of environmental issues concerning installations in the hands of one competent authority. In addition, in Germany (NRW) a statutory supervisory authority can solve conflicts of competences between administrative authorities. This availability of multiple structural coordination mechanisms in case of competence conflicts is **a good practice**, where the legislation itself does not provide transparent and clear competences.

Therefore, in all three jurisdictions coordination mechanisms are in place that provide good practices for the benefit of effective enforcement. Comparatively, the coordination mechanisms in Germany (NRW) stand out the most, and will be most necessary.

- **Good practices and recommendations coordination**

The description and comparison above provide several good practices that can be discerned when the three jurisdictions are compared for the coordination between enforcement authorities for the benefit of effective enforcement. The good practices and their jurisdictions of origin are indicated below. These good practices are:

Good practices on coordination
- Clear enforcement competences laid down in the law (NL).
- Statutory supervisory authority to exclusively address cases of competence conflicts (GE).
- Multiple structural coordination mechanisms in place, where the legislation itself does not provide transparent and clear competences (GE).

A common good practice is:
- Legal rules for the priority of competences in case of conflicts (ENG; NL; GE).

Considering the good practices in the jurisdictions mentioned above, and what has been remarked above about the enforcement organisation in the other jurisdictions, a recommendation can be made. The good practices lead to the following recommendation that may be considered by the jurisdiction indicated:

Recommendation on coordination
- Increase the transparency of the legislation on the competent authorities for environmental enforcement in Germany.

12.3.2.4.2 Cooperation between different enforcement authorities

We have seen in the country chapters that effective enforcement to aim for the appropriate enforcement goals in a given situation of non-compliance may require that different authorities apply their sanctions, often involving different types of enforcement.[2178] Where effective enforcement requires several enforcement authorities to impose sanctions, cooperation between these authorities is key.

2178 This is also referred to as integral enforcement.

Such cooperation will have to take place when different administrative authorities are to impose different sanctions from the viewpoint of aiming for effective enforcement, and, for the same reason, between the administrative authorities and the Public Prosecutor. While the criminal courts in the three jurisdictions may consider previously imposed punitive sanctions when imposing criminal sanctions, they do not cooperate with the other authorities on enforcement.

In comparison, the Netherlands in particular provides several good practices. Several requirements on cooperation are contained in the law, strengthening the relationship between the enforcement authorities in a structural manner. Moreover, the Dutch countrywide enforcement strategy stipulates the situations (typology) of non-compliance and the corresponding possible enforcement action that require cooperation between administrative and criminal enforcement authorities, specifically the Public Prosecutor. Such a strategy supports the cooperation between the authorities. Additionally, the existence of two consultation bodies, in which the administrative and criminal authorities are brought together, ensures policy making on environmental enforcement with a connection between administrative and criminal enforcement. Therefore, the Netherlands in particular, provides good conditions for cooperation between the competent enforcement authorities. Therefore, these are **good practices**. Even so, although the administrative enforcement authorities are required by law to cooperate with the criminal authorities, such an obligation does not exist for the public prosecutor. Therefore, there is still something to be gained.

In Germany, specific provision is made in the law and in administrative guidelines, specifically on how the cooperation between the Public Prosecutor and the administrative authorities must take place, where there are regulatory offences and criminal offences. These types of offences require two different prosecutors – the local administrative authorities as prosecuting authorities and the Public Prosecutor – unless the latter takes over the case. Where there are two different prosecutors, the Public Prosecutor is in charge of taking the decisions on this cooperation. This is **a good practice**.

In England there is no cooperation requirement in the law. However, the mechanisms in place are binding on the authorities involved. Policy documents are provided – memoranda on cooperation in case of simultaneous competence of different authorities – and aid clear communication up front between the authorities on enforcement action that is to be taken. This is **a good practice**.
Therefore, the Netherlands, England, and Germany all provide benefits for effective enforcement with regard to the cooperation between the enforcement authorities. Comparatively, in particular the Netherlands stands out, as the coordination is both procedural and substantive.

- **Good practices and recommendations cooperation**

The description and comparison above provide several good practices that can be discerned when the three jurisdictions are compared for the cooperation between enforcement authorities for the benefit of effective enforcement. The good practices and their jurisdictions of origin are indicated below. These good practices are:

Good practices on cooperation
- Statutory obligations for the administrative authorities to cooperate with other enforcement authorities, including the criminal authorities (NL).
- A joint enforcement strategy between the administrative and criminal enforcement authorities (NL).
- Policy making on enforcement in cooperation between the competent administrative enforcement authorities (ENG; NL).
- Cooperation between the Public Prosecutor and the administrative authorities is laid down in the law and binding guidelines (GE).

Considering the good practices in the jurisdictions mentioned above, and what has been remarked above about the enforcement organisation in the other jurisdictions, recommendations can be made. This does not necessarily mean that the enforcement organisation does not suffice in light of the institutional requirement and effective enforcement.

The recommendations aim to strengthen effective enforcement with regard to requirement of coordination in these other jurisdictions. Both of these perspectives – the fact that the organisation could be strengthened, or that the organisation is sub-optimal – have been described above. These good practices leads to the following recommendations that may be considered by the jurisdictions indicated:

Recommendations on cooperation
- Require that the coordination and cooperation on enforcement between the administrative authorities and the criminal authorities is mutual in the Netherlands.
- Lay down a requirement of cooperation between the administrative authorities and between the administrative and criminal authorities in the law in England and Germany (also where there are no conflicts of competences).

12.3.3 Effective enforcement: instrumental requirements

12.3.3.1 Introduction

As explained in chapter 2, enforcement action should be moulded to the characteristics of specific non-compliance. For that purpose the Member States must possess a varied toolbox of sanctions, which can be flexibly applied. Such a toolbox reflects the general and specific prevention of environmental non-compliance. In the country chapters, it was assessed whether the three countries possess such a toolbox of sanctions that can be flexibly applied by considering the typology of non-compliance and the enforcement goals that can be covered by the available sanctions. By analysing the sanctions in the three countries for their ability to fulfil the enforcement goals in light of possible typology of non-compliance, the effectiveness of those sanctions was assessed.[2179] As we have seen in that analysis, several sanctions may be available that fit a single enforcement goal; and one sanction may fit several enforcement goals.

> An example of a sanction that can fulfil several enforcement goals, as we will see later, is the Dutch administrative order subject to a coercive fine. This instrument can be made use of to order the offender to repair on-going non-compliance, to repair the damage of non-compliance and to refrain from further or recurring non-compliance – three separate enforcement goals. Another example is the Germany regulatory fine, which incorporates the siphoning off of profits.

In this section, it is discussed what the good practices are, in comparison, in terms of the most effective sanctions in the three jurisdictions for each of the enforcement goals. Below, the good practices and recommendations are described for administrative environmental enforcement and criminal environmental enforcement consecutively for each of the enforcement goals formulated in chapter 2. Within the system of criminal enforcement, only the Netherlands makes the distinction in sanctions for two types of criminal offences: economic offences and commune criminal offences. Where necessary, these will be discussed separately. Besides the administrative and criminal enforcement systems, as has been observed previously, there also exist hybrid sanctions for the public enforcement of environmental law in each of the three jurisdictions. In Germany and England, these hybrid sanctions are part of a system of sanctions that has been laid down in the law and that is separate from the other sanctions that the enforcement authorities can impose. In the Netherlands, there is a single sanction – the administrative criminal decision – that is a hybrid between administrative and criminal enforcement.

The two systems of sanctions that exist in Germany and England, respectively, are

2179 For the assessment in the country chapters, see chapter 5, section 5.6; chapter 8, section 8.6; chapter 11, section 11.6.

unique to these jurisdictions. As we have seen, these are the regulatory offences system in Germany and the civil sanctions system in England. As hybrids, there is no exactly comparable system in the other jurisdictions. This also means that the systems cannot necessarily be clearly defined as either administrative enforcement or criminal enforcement. The sanctions available in both systems are only available to administrative authorities that also impose the (other) administrative sanctions. English administrative civil sanctions have elements of both administrative and criminal law, and are in the hands of the administrative authorities as such.[2180] Where an offender objects to a civil sanction, appeal takes place through specific administrative courts.

In the case of the regulatory offences system in Germany, the administrative authorities may impose the regulatory sanctions and are considered prosecuting authorities for that purpose. This system operates according to its own rules that adhere closely to criminal law, but with significant differences.[2181] Besides the regulatory fine, there are also additional sanctions available – called secondary sanctions – and sanctions for the regulatory offence that are alternatives to its prosecution; these sanctions for regulatory offences mirror similar criminal sanctions for criminal offences. Where an offender objects to a regulatory sanction, the courts will address this objection, allowing the administrative authorities to defend its regulatory sanctions decision. The public prosecutor may also play a role in those proceedings.

As described previously, the Netherlands has the hybrid administrative criminal decision as a sanction for the enforcement of specific environmental non-compliance by the administrative enforcement authorities. There is a similarity between this sanction and the sanctions for regulatory offences in Germany in the fact that many aspects of this sanction are rooted in the criminal law. Differences are that the Dutch administrative criminal decision is the sole sanction that has been provided to the administrative authorities by the criminal law in this manner, those authorities are not considered prosecuting authorities when they impose that sanction, and do not play a role in the criminal proceedings that follow when an offender objects to the sanction. Moreover, the scope of competence of the administrative authorities to impose the administrative criminal decision is currently very limited.
The hybrid sanctions in the three jurisdictions are discussed below, together with the administrative sanctions and criminal sanctions.

2180 These civil sanctions are separate from the other administrative sanctions that the administrative authorities can impose, among others, because of these elements of the criminal law.

2181 An example of such a significant difference is the fact that the administrative authorities are to prosecute and sanction regulatory offences according to the principle of opportunity, allowing discretion to those authorities whether or not to do so; the criminal public prosecutor is to adhere to the principle of mandatory prosecution.

In the table below the instrumental requirements – formulated in chapter 2 – are set out, comprising of the enforcement goals together with the typology of non-compliance for which these goals are particularly fitting to achieve effective enforcement. This does not preclude that other elements of the typology will require certain enforcement goals to be achieved for effective enforcement.

Instrumental requirements

A. To prevent specific non-compliance from occurring
this enforcement goal is in particular appropriate in case of:
- irreparable damage
- major damage
- progressive damage.

B. To end on-going non-compliant behaviour
this enforcement goal is in particular appropriate in case of:
- on-going non-compliance
- damage, in particular irreparable or major damage
- should also be possible where offender is absent.

C. To (physically) repair environmental damage by non-compliance
this enforcement goal is in particular appropriate in case of:
- only in case of reparable damage
- should also be possible where offender is absent.

D. To prevent recurrence of non-compliance; to advance future compliance
this enforcement goal is in particular appropriate in case of:
- recurring non-compliance
- irreparable, major or progressive damage
- notorious or recidivist offender.

E. To remove benefits from non-compliance
this enforcement goal is in particular appropriate in case of:
- offender is a legal person
- notorious or recidivist offender.

F. To (monetarily) compensate the consequences of non-compliance
this enforcement goal is in particular appropriate in case of:
- where irreparable damage is quantifiable.

G. To punish the offender for non-compliance
this enforcement goal is in particular appropriate in case of:
- irreparable damage
- reparable major damage by a recidivist offender

The evaluation assesses if the enforcement goals can be reached by means of the available sanctions in the jurisdictions that are appropriate in light of the typology of non-compliance (including the type of non-compliance; damage; and offender). This includes

the assessment whether it is possible to combine sanctions to reach these enforcement goals for a specific case of non-compliance.

Caveat

All three jurisdictions are described in the evaluations in their respective country chapters on sanctions as doing quite well, in particular with regard to the instrumental requirements and their potential to aim for enforcement goals fitting to a certain typology of non-compliance for the benefit of effective enforcement. Below, it may seem that specific jurisdictions do not perform well where they do not feature often in the good practices, and where they feature often in the recommendations for the benefit of effective enforcement. However, this does not necessarily mean that the sanctions for environmental enforcement in these jurisdictions do not suffice in light of effective enforcement, as is also evidenced by the evaluation and findings in the respective country chapters on sanctions.[2182] More often, it is the case that aspects of one jurisdiction stand out more, in comparison to the others, for the benefit of effective enforcement, even though the other jurisdictions can provide appropriate sanctions in that light.[2183] In that respect, in particular, Germany (NRW) seems to be the jurisdiction regularly left out of the good practices. In light of the above, it must be kept in mind, therefore, that most often the recommendations consider that the German systems of sanctions can be made (even) better than they currently are, taking the good practices in the other jurisdictions as illustration and inspiration for tailored effective enforcement according to the requirements formulated in chapter 2.[2184]

Below, the good practices and recommendations are described for each of the enforcement goals formulated in chapter 2.

A. To prevent specific non-compliance from occurring

> The most appropriate sanctions to achieve this goal will be aimed at imposing or even executing a sanction close to the exact moment that non-compliance occurs. The sanctions are not imposed after the fact. The risk that non-compliance may occur sets this instrument apart from the instrument that aims at prevention of recurrence of specific non-compliance.
>
> Typology: this enforcement goal is especially appropriate in case of non-reparable damage, major damage (that is, for example, slow to repair), or in case of damage that gets progressively worse.

2182 Respectively, chapter 5, 8, and 11.

2183 It may also be that two jurisdictions stand out more in comparison to the third jurisdiction.

2184 A general caveat that has been described at the start of this chapter is that the good practices and recommendations are in particular formulated for the consideration of the jurisdictions they emanate from. See section 12.1 of this chapter.

The country chapters describe that the *administrative* authorities in all three jurisdictions possess sanctions that can be imposed before non-compliance occurs. England provides sanctions – administrative notices and authority remediation – in its administrative toolbox that may be imposed and applied preventively when there is a risk of serious pollution.[2185] In the Netherlands and Germany (NRW), such sanctions can also be imposed and applied preventively if there is an apparent threat of non-compliance (NL), i.e. when there is near certainty that non-compliance will occur, or where there is a present danger of non-compliance (GE), i.e. where it is very highly probable that non-compliance is immediately imminent.[2186] The Dutch and German sanctions seem to have a broader scope compared to the sanctions available for this enforcement goal in England as they do not necessarily require a risk of serious pollution. The administrative authorities in the Netherlands and Germany can also step in, for example, to prevent less serious pollution that can still cause harm to the environment. This is **a good practice**.
It must be noted, however, that the requirements related to the likelihood of non-compliant behaviour, including the absence of action required by legal rules, in the Netherlands and in Germany do set a very high standard for when a sanction can be applied for the purpose of this enforcement goal.
In any case, the fact that these sanctions can be imposed and applied preventively in all three jurisdictions is a great benefit to effective enforcement. Moreover, the fact that these sanctions also include the preventive application of coercive substitute action by the administrative authorities in all three jurisdictions means non-compliance can be physically prevented. This is an important instrument in the toolbox of sanctions for environmental enforcement in the jurisdictions in light of effective enforcement.

Besides the above, England and Germany have the possibility to suspend or revoke a permit preventively, which the Netherlands lacks. This sanction is connected to preventing a risk of serious pollution (ENG) and extensive irreparable damage (GE). This is **a good practice.**
With regard to this sanction, England has the broadest application, as also major damage can be addressed through this sanction. Proportionality should always be kept in mind, though, especially considering the fact that the suspension or revocation of a permit is such a heavy sanction.[2187] The preventive suspension or revocation of

2185 In England, the stop notices in planning control (that do not require a risk) are generally combined with other enforcement orders and aim primarily to end non-compliant behaviour.

2186 See chapter 8, section 8.7.1(a) and chapter 11, section 11.6.1(a). In the Netherlands, these sanctions are the order subject to a coercive fine, and the order subject to administrative coercion; in Germany (NRW), these sanctions are the enforceable administrative decision containing an order/obligation, and administrative coercion.

2187 In England, it is also considered to be a heavy sanction. See also the reference in chapter 5 to suspension and revocation of a permit as sanctions that are (only) imposed after a criminal conviction, when all else has failed. See chapter 5, section 5.2.2.

a permit could be an asset to the system in the Netherlands to prevent major and irreparable environmental damage.
There are no sanctions in the toolboxes available for *criminal* enforcement in any of the three jurisdictions that can be imposed to prevent a criminal offence before any such non-compliance occurs.[2188] As the criminal authorities do not have any sanctions available to do so, this means that the administrative authorities may apply preventive administrative enforcement, as described above, to prevent non-compliance that may (also) lead to a criminal offence from occurring. This is possible in all three jurisdictions as, often, administrative non-compliance is commonly also a criminal offence (ENG), an economic criminal offence (NL), or specific provision has been made that the administrative authorities can take action to prevent non-compliance that may also be a regulatory or a criminal offence from occurring.
Once criminal prosecution has been instigated against non-compliance, only the criminal authorities in the Netherlands have available sanctions that may prevent non-compliance from occurring during the proceedings. These sanctions do not prevent the non-compliance that is the subject of those criminal proceedings, but can aim to prevent recurrence of non-compliance. This is further discussed as enforcement goal (D).

• Good practices and recommendations to prevent non-compliance

The comparison of the three jurisdictions above on the potential of their sanctions to aim for the enforcement goal of preventing non-compliance provides several good practices for the benefit of effective enforcement. The good practices and their jurisdictions of origin are indicated below.
These good practices are:

Good practices on preventing non-compliance

- The preventive imposition and application of sanctions, including substitute action by the administrative authorities where there is an apparent threat of non-compliance (NL) or a present danger of non-compliance (GE).
- The preventive suspension or revocation of a permit in case of a danger of serious pollution (ENG) and irreparable pollution (GE).

Considering the good practices in the jurisdictions mentioned above, and what has been remarked above about the available sanctions in the other jurisdictions that do

2188 Beyond the deterrence of sanctions that have previously been imposed for such offences (on other offenders). As explained in chapter 2, the effect of preventing non-compliance from occurring is not discussed here. As a side note: in the country chapters on Germany, it was described that the police authorities have the prevention of criminal offences as one of their tasks. The instruments available for this task are, however, not sanctions.

not have them, recommendations can be made. This does not necessarily mean that the sanctions that are already available in the jurisdictions do not suffice in light of effective enforcement. The recommendations aim to strengthen effective enforcement with regard to this enforcement goal in these other jurisdictions. It may also be that the jurisdictions do not possess sanctions to aim for the enforcement goal. Both of these perspectives – the fact that sanctions could be strengthened, or that sanctions are not available – have been described above.

These good practices lead to the following recommendations that may be considered by the jurisdictions indicated:

Recommendations on preventing non-compliance

- Introduce the preventive suspension and revocation of a permit in case of serious pollution in the Netherlands.
- Introduce the possibility to apply a preventive sanction more broadly, also for cases that do not necessarily involve a risk of serious pollution in England.

B. To end on-going non-compliant behaviour

The goal of putting a stop to non-compliant behaviour aims to restore compliance with regard to that behaviour. It does not aim to end non-compliance that is environmental damage itself, as the reparation of environmental damage of non-compliance is a separate enforcement goal (see goal C). Putting an end to an offender causing that environmental damage is what this enforcement goal aims for. Besides stopping and ending active behaviour that is non-compliant with legal rules, this goal also aims to restore compliance by ensuring an offender takes action where his failure to do so leads to non-compliance.

Typology: this enforcement goal should at least by pursued when it is
- Obviously appropriate in case of on-going non-compliance.
- Especially important where in case of damage, particularly irreparable or major damage.
- Important factor that an instrument is available in case the offender is absent.

It can be seen that several sanctions to end on-going non-compliant behaviour exist in all three Member States studied, in particular administrative sanctions available to the administrative authorities in near similar forms.

The most appropriate *administrative* sanction to do so in the toolboxes of the three countries seems to be the administrative decision containing an obligation for the

offender. This instrument is also called an enforceable administrative decision (GE), an administrative notice (ENG), or order (NL). The order subject to a coercive fine that is part of the administrative toolbox in the Netherlands seems particularly appropriate in light of effective enforcement. We have seen that in all three jurisdictions the administrative decision or notice containing an obligation or order requires two steps to become specific with regard to the exact level of a (coercive) fine or other sanction that the offender will incur. In England and Germany (NRW), the enforcement of the obligation in an administrative decision is dependent on a separate fining decision by the administrative authorities for the enforcement of its non-compliance (GE and ENG), or criminal enforcement action – as non-compliance with an administrative order is also a separate criminal offence – and therefore another enforcement procedure (ENG).[2189] The German administrative decision may include a reference that coercive measures can be taken, but not the threat of the specific coercive measure that will be imposed upon non-compliance.

In contrast, the Dutch order and the potential coercive fine are imposed within one decision. This means that a coercive fine that is specific to the circumstances of the non-compliance is threatened with the order for the offender to do something (or to refrain from doing something). Therefore, the (potential) level of the coercive fine when the order is not complied with is part of the decision imposing the order. Its forfeiture is automatic upon non-compliance with the order. In the Netherlands, a separate recovery decision is needed to formally establish and claim the forfeited sums.[2190] In Germany (NRW) and England, to claim the forfeited sums, another decision or court action is required. In contrast with the German coercive fine, in particular, forfeited Dutch coercive fines can still be collected after the order has been complied with, thus providing a strong signal to the offender that there are risks to postponing compliance with the order.[2191]

The Dutch order subject to a coercive fine, therefore, immediately threatens the offender with the consequences of not complying with the order given. This Dutch sanction, therefore, is **a good practice** in comparison with the other two jurisdictions.

In addition, it is a benefit to effective enforcement that, in all three jurisdictions, the time allowed to the offender for ensuring compliance with the order can

2189 It can be considered that the fact that non-compliance with the administrative order in England is often also a criminal offence may provide the administrative order with some teeth. However, the threat that the administrative order may be pursued as a criminal offence is made in the law, and not in the order that is sent to the offender himself.

2190 And where third parties request forfeiture.

2191 In Germany (NRW) forfeited coercive fines cannot be collected, as it is assumed there that this would make these sanctions punitive in nature. As is clear, this is not the vision of, at least, the Dutch order subject to a coercive fine. However, the reparatory nature of the latter coercive fine extends from the reparatory nature of the order. Therefore, it would be a benefit that in Germany the enforceable administrative decision would also immediately contain the threat of a specific made-to-measure coercive fine. See also further below.

be severely limited when appropriate, with an eye on the situation of the non-compliance and its consequences. This can timely put pressure on the offender to comply with the obligation.
An administrative decision containing an obligation for the offender – such as the Dutch order subject to a coercive fine – is, however, not appropriate if the interest involved does not allow the risk that non-compliance will continue or recur in spite of the order. For example, in case of environmental non-compliance resulting in serious, or non-reparable damage, or both, the order subject to administrative coercion involving substitute action by the administrative authority will be a more appropriate instrument. Moreover, there may be situations in which those in non-compliance cannot be served a notice, for example in case of an untraceable offender. Where this is the case and the non-compliance needs to be ended relatively quickly due to the damage to the environment, it should be possible for the authorities themselves to act to correct the contravention. An example is where toxic waste has been dumped in nature areas – which usually means the offender is untraceable – and the waste is polluting soil and ground water, with the accompanying consequences for the environment.[2192] All three jurisdictions provide for this instrument as a part of their administrative toolbox of sanctions. This is **a common good practice**.

From the point of view of the interest of the environment, the sanction of substitute coercive action by the administration has true benefits as a backup to other, indirect reparatory sanctions, to avoid irreparable damage to the environment. This instrument of substitute action by the administration does have, at least, one significant disadvantage in England and the Netherlands, considering that the administrative authorities must take substitute action and pay for this reparation itself and are only afterwards able to reclaim these costs from the offender, if he is ever found. In Germany, this disadvantage does not exist, as the costs can be claimed up front from the offender, if he is known. This is **a good practice**.

In terms of *criminal* sanctions that may aim to fulfil this goal, only in the Netherlands it is possible to impose sanctions that can timely end non-compliant behaviour without having to wait for a conviction by the court in criminal proceedings. Both the criminal court and the Public Prosecutor may impose measures to end on-going non-compliant behaviour that is an economic offence during the criminal procedure, if there are serious objections against the suspect and the interests that are protected by the legal provisions that have allegedly been breached require immediate intervention. These sanctions are particularly appropriate because they provide a

2192 This is a very topical issue in the Netherlands, where dumping of highly toxic waste of illegal hard drugs laboratories in nature areas (and even in residential areas) is increasingly common.

means to prevent the situation of non-compliance from getting worse pending a criminal trial. Therefore, these sanctions provide **a good practice**.

As part of a criminal sanction upon conviction, it is **a common good practice** that all three countries provide the possibility for the criminal courts to order the confiscation of objects involved in the non-compliance, which can aim to end non-compliant behaviour where these objects are involved in the non-compliance. This is also a possible sanction in Germany (NRW), in case of regulatory offences. This is interesting, as the application of this regulatory sanction has a lower threshold, as the administrative authorities impose this sanction.
In the other jurisdictions, and in case of common criminal offences in the Netherlands, the administrative toolbox of the authorities is more appropriate to attain this goal during the criminal procedure. Besides the above-described good practice in the hands of the Dutch criminal authorities, non-criminal sanctions would then have to be relied upon to attain this goal when action to end non-compliant behaviour cannot be awaited until the criminal procedure is finished. In all three countries, this combination of criminal prosecution and an administrative reparatory sanction can generally be made.[2193] This is, therefore, **a common good practice**.

Moreover, in all three countries, cooperation to ensure such a combination when necessary is available. It is of course the same authorities that prosecute[2194] and impose administrative sanctions in England and Germany, although this may involve different officials. In the Netherlands, the countrywide enforcement strategy and the legal rules in the General Provisions Environmental Law Act prescribe that consultation takes place between the administrative authorities and the Public Prosecutor.[2195]

• Good practices and recommendations to end non-compliant behaviour

The comparison of the three jurisdictions above on the potential of their sanctions to aim for the enforcement goal of ending non-compliant behaviour provides several good practices for the benefit of effective enforcement. The good practices and their jurisdictions of origin are indicated below. These good practices are:

2193 See further on the topic of possibilities of combining sanctions, section 12.4.3 of this chapter.
2194 In Germany this is the case for regulatory offences, where 'prosecution' includes sanctioning by the public prosecutor/ administrative authorities.
2195 As mentioned in the analysis of the cooperation between the enforcement authorities in section 12.3.2.4 of this chapter.

Good practices on ending non-compliant behaviour

- The Dutch order subject to a coercive fine (NL).
- The recovery of costs of substitute action previous to such action by the authorities (GE).
- Provisional measures imposed during the criminal procedure by the Public Prosecutor and the criminal court (NL).

Good practices common to all three jurisdictions are:

- Coercive substitute action by the administrative authorities (ENG; GE; NL).
- The confiscation of goods (ENG; GE; NL).

Considering the good practices in the jurisdictions mentioned above, and what has been remarked above about the available sanctions in the other jurisdictions that do not have them, recommendations can be made. This does not necessarily mean that the sanctions that are already available in the jurisdictions do not suffice in light of effective enforcement. The recommendations aim to strengthen effective enforcement with regard to this enforcement goal in these other jurisdictions. It may also be that the jurisdictions do not possess sanctions to aim for the enforcement goal. Both of these perspectives – the fact that sanctions could be strengthened, or that sanctions are not available – have been described above. In that light, the following recommendations can be considered:

Recommendations on ending non-compliant behaviour

- Make it possible to recover forfeited fines after non-compliance with an order, where the order has been complied with outside of term in Germany (NRW)
- Include the threat of a specific made-to-measure sanction in the administrative decision containing the obligation for the offender in England and in Germany (NRW)
- Make it possible to recover the costs of substitute action preventively where an offender is known in England and the Netherlands
- Make it possible for the public prosecutor and criminal courts to order the end of non-compliance while criminal proceedings are underway in England and in Germany;
- Make it possible for common criminal offences to order provisional measures to be taken by an offender while criminal proceedings are underway to protect the environment in the Netherlands.

C. To (physically) repair the environmental damage caused by non-compliance

The instrument that will aim to impose the obligation to repair existing non-permanent damage needs to be tailored to the type of damage, i.e. whether the damage is minor, major or progressive with an element of coercion to persuade the offender to comply.

Typology:
- Only appropriate in case of reparable damage. For all typology of non-compliance, damage (besides irreparable damage), and offender.
- Important that also an instrument is available that repairs the consequences of non-compliance when an offender is absent.

For this purpose, again, within the available administrative enforcement systems in the three countries, the instrument of the Dutch administrative reparatory coercive fine in the hands of the administrative authorities is in particular appropriate. This multi-facetted instrument can also be used to impose the obligation to remedy the damage. As explained above, the coercive fine is most appropriate when compared with the available administrative sanctions in the other two countries, as it provides the most comprehensive procedure without dependency on other procedures or sanctions. It is therefore also, in comparison, **a good practice** for this enforcement goal. The (maximum) fine that is forfeited when the imposed obligation is not complied with should aim to reflect the value of the interest breached by non-compliance and the intended effect of the sanction. This means that this fine should not – only – be based on the costs involved in cleaning up the damage and the non-compliance[2196], but that it should look beyond that for the sake of coercion.

An instrument that is unique to the Netherlands and its *criminal* enforcement toolbox for environmental protection is the sanction to repair the damage of an economic criminal offence. As was already mentioned, in case a criminal procedure is on-going both the Dutch Public Prosecutor and the criminal court have the power to impose provisional sanctions with regard to non-compliance. With provisional sanctions these authorities can aim to prevent damage from becoming worse, and may, in that respect, also order reparation in case of progressive damage.[2197] This is **a good practice**.

2196 This was provided in Vz. RvS 5 June 2001 due to the fact that the law provides that the coercive fine should be based on the gravity of the interest damaged and the requirement of the intended purpose. This leads to a certain optimum and should not be decided by the total cost of cleaning-up.

2197 Provided, as described previously, the conditions are met that there ought to be serious objections against the suspect and that the interests that are protected by the legal provisions that have allegedly been breached require immediate intervention. This power also pops up with regard to the goal to end on-going non-compliant behaviour and the goal to prevent recurrence of the non-compliance as the power may be tailored to those goals.

Besides these sanctions, in the Netherlands and in England, the criminal courts may order reparation as a sanction upon conviction, which is **a good practice**. Germany is the odd one out in this respect, as the criminal courts cannot order reparatory measures. This is a disadvantage to effective enforcement. However, there, the Public Prosecutor may impose reparatory sanctions as an alternative to prosecution.

Germany and England may benefit from the introduction of a sanction to repair environmental damage in their criminal enforcement toolbox for when the criminal procedure is on-going for criminal offences, including German regulatory offences. Moreover, the possibility to impose such sanctions during criminal proceedings for the common criminal offences may also be appropriate in the Netherlands.
However, the lack of such provisional criminal sanctions in England and Germany, and for common criminal sanctions in the Netherlands, can be counteracted by the sanctions in the hands of the administrative authorities to pursue the reparation of environmental damage by the offender. This is actually quite easy in England and in Germany (NRW), as the authority that can impose the administrative reparatory sanctions is also prosecutor, and therefore, in essence, already possesses such provisional sanctions. This applies to Germany (NRW) with regard to regulatory offences. For criminal offences in Germany and the common criminal sanctions in the Netherlands, cooperation between the administrative authorities and the criminal authorities would be required.[2198] Therefore, with regard to these offences, the introduction of provisional criminal sanctions can in particular be a benefit.

Currently, to fulfil this goal of reparation where the criminal procedure is on-going and action to repair, for example, due to progressive damage cannot be awaited, the administrative toolbox ought to then be applied by the administrative authorities in England, Germany and in the Netherlands for environmental non-compliance that is also a common criminal offence.[2199]

- **Good practices and recommendations to (physically) repair the environmental damage caused by non-compliance**

The comparison of the three jurisdictions above on the potential of their sanctions to aim for the enforcement goal of reparation of the environmental damage caused by non-compliance provides several good practices for the benefit of effective enforcement. The good practices and their jurisdictions of origin are indicated below. These good practices are:

2198 See also the analysis of the cooperation mechanisms in these jurisdictions in light of effective enforcement in this chapter, section 12.3.2.4.
2199 See further the discussion of the previous enforcement goal.

Good practices on the reparation of environmental damage caused by non-compliance

- The Dutch order subject to a coercive fine (NL).
- Provisional measures during criminal proceedings for the Public Prosecutor and criminal court (NL).
- The criminal courts may order reparation of environmental damage as a sanction upon conviction (ENG; NL).

A common good practice is:

- The instrument of substitute action by the administration (NL; GE; ENG).

Considering the good practices in the jurisdictions mentioned above, and what has been remarked above about the available sanctions in the other jurisdictions that do not have them, recommendations can be made. This does not necessarily mean that the sanctions that are already available in the jurisdictions do not suffice in light of effective enforcement. The recommendations aim to strengthen effective enforcement with regard to this enforcement goal in these other jurisdictions. It may also be that the jurisdictions do not possess sanctions to aim for the enforcement goal. Both of these perspectives – the fact that sanctions could be strengthened, or that sanctions are not available – have been described above.
In that light, the following recommendations may be considered by the jurisdictions indicated:

Recommendations on the reparation of environmental damage caused by non-compliance

- Include the threat of a specific made-to-measure sanction in the administrative decision containing an obligation for an offender in England and Germany (NRW).
- Introduce provisional criminal sanctions for common criminal offences in the Netherlands, and for criminal offences in Germany (NRW).
- Enable the criminal courts to impose the obligation on an offender (in a criminal sentence) to repair environmental damage in Germany (NRW).

D. To prevent recurrence of non-compliance and to advance future compliance

In all cases, there should have already been non-compliance. Typology: This type of goal is in particular important to be aimed for where it concerns notorious, recidivist offenders, in spite of reparable damage, or in case of irreparable damage. - especially important in case of non-reparable or major and progressive damage - especially important in case of recurring non-compliance - especially important in case of a recidivist offender

In terms of *administrative* sanctions, the order subject to a coercive fine – already mentioned frequently above – can be a very appropriate instrument for such situations, as it can also aim for the prevention of recurrence of the non-compliance. As explained previously, the administrative reparatory coercive fine in the format available in the Netherlands is preferable – as **a good practice** – over the similar sanctions available in Germany and England. The reason, as mentioned previously, is its more direct specifically tailored coercive format, which allows the fine to be threatened together with the order, putting into concrete terms for the offender what will happen in case he does not comply with the order.

If the non-compliance occurs in the operation of an installation, where a permit is available, it can be revoked or suspended to prevent further operation of that installation and thereby also further contraventions. All three jurisdictions possess this sanction. This sanction is **a common good practice** for the benefit of this enforcement goal that is common to all three jurisdictions. Although the law generally does not limit the imposition of these sanctions, the three jurisdictions generally use this sanction to aim for preventing recurrence of non-compliance in case of persistent non-compliance.[2200] In a sense, the sanction is seen as *ultima ratio* with regard to the aim of preventing recurrence of non-compliance.

As part of *criminal* enforcement, in each of the three jurisdictions the condition not to commit again can be imposed explicitly by the criminal court as (part of) a criminal sentence, and also as part of the sanctions that the Public Prosecutor can impose instead of a criminal prosecution. The fact that both of these criminal authorities can aim for this enforcement goal is a benefit to effective enforcement. It is **a good practice**.

2200 In England, even, the sanction is generally only used after a criminal prosecution and conviction of the offender.

There are other sanctions available in the toolbox in the three jurisdictions that aim to prevent recurrence by addressing the director of the business, for example, such as the prohibition by the criminal courts for an offender to practice a profession or a business. These are **good practices** common to all three jurisdictions. Moreover, in England and the Netherlands, also sanctions can be imposed on the legal person that can, more indirectly, aim to prevent recurrence, such as the forfeiture of certain goods from within a business that are connected to the previous offence, or, even closing down a business temporarily. As legal persons cannot be imposed criminal sanctions in Germany, such sanctions are not possible there.

The Dutch Public Prosecutor and criminal courts can also pursue the aim to prevent recurrence of non-compliance while the criminal proceedings for previously committed economic environmental offences take place, by imposing provisional measures, subject to strict conditions.[2201] This is a good practice to avoid recurrence of the offence where immediate intervention is required when a criminal sentence cannot be awaited.
The toolbox for criminal enforcement in England and Germany, and that for common criminal offences in the Netherlands, may also benefit from such sanctions so that a criminal sentence does not need to be awaited. Besides this, of course, the above-mentioned sanctions that the administrative authorities have available for this enforcement goal could also be used to fulfil this aim.[2202]

- **Good practices and recommendations to prevent recurrence of non-compliance and to advance future compliance**

The comparison of the three jurisdictions above on the potential of their sanctions to aim for the enforcement goal of preventing the recurrence of non-compliance provides several good practices for the benefit of effective enforcement. The good practices and their jurisdictions of origin are indicated below. These good practices are:

2201 Provided, as described previously, the conditions are met that there ought to be serious objections against the suspect and that the interests that are protected by the legal provisions that have allegedly been breached require immediate intervention.

2202 For example, in cooperation with the authorities which possess the criminal enforcement toolbox.

Good practices to prevent recurrence of non-compliance and to advance future compliance

- The immediate threat of a specific made-to-measure coercive fine as part of the administrative decision containing an obligation for an offender in relation to non-compliance (the order subject to a coercive fine in NL);
- Provisional measures to prevent recurrence of non-compliance while criminal proceedings are on-going (NL).

Common good practices are:
- the sanction to suspend or revoke a permit (ENG; GE; NL);
- sanctions that prohibit an offender to practice a profession or business (ENG; GE; NL).

Considering the good practices in the jurisdictions mentioned above, and what has been remarked above about the available sanctions in the other jurisdictions that do not have them, recommendations can be made. This does not necessarily mean that the sanctions that are already available in the jurisdictions do not suffice in light of effective enforcement. The recommendations aim to strengthen effective enforcement with regard to this enforcement goal in these other jurisdictions. It may also be that the jurisdictions do not possess sanctions to aim for the enforcement goal. Both of these perspectives – the fact that sanctions could be strengthened, or that sanctions are not available – have been described above. In that light, the following recommendation can be considered:

Recommendation to prevent recurrence of non-compliance and to advance future compliance

- Allow the made-to-measure administrative fine to be threatened together with an administrative decision containing an obligation for an offender, putting into concrete terms for the offender what will happen in case of non-compliance, in England and Germany.

E. To remove benefits from non-compliance

This goal must be discerned from the goal of the reparation of damage and the goal of compensation of the damage in case it cannot be repaired. The goal in itself indicates the appropriate instrument is a sanction that siphons off any costs saved or profits made by non-compliance from the offender. Such a sanction may be part of another sanction, such as a fine.

Typology: This enforcement goal is appropriate for all typology of non-compliance, damage and offender. It ought to at the least be pursued where the offender is a legal person and/or intentional, calculating or recidivist offender.

In all three countries, to a varying extent, a sanction is available to remove benefits (costs savings and economic gains) from non-compliance in the toolboxes that administrative authorities and criminal authorities have available. The sanction is either a separate instrument, or part of the calculation of fines. A separate sanction is primarily available in criminal enforcement.

In Germany (NRW) both the administrative authorities and the criminal authorities can impose a sanction to aim for this enforcement goal. The sanction to remove benefits, including savings, from the offender is available in the criminal enforcement toolbox for criminal offences as a separate sanction. Also, it is a statutory obligation to include the benefits of an offence in the amount of the fine for regulatory offences; a separate sanction to remove benefits can also be imposed as a secondary sanction for regulatory offences. Moreover, in Germany, it is a statutory obligation to include benefits in the level of the administrative reparatory fine (*Zwangsgeld*) that is imposed when an administrative order is not complied with. This is **a good practice**.

England also provides good conditions to aim for this goal. The administrative authorities and the criminal authorities both can aim for this enforcement goal. It stands out that in England there is a broad toolbox of sanctions available to both the administrative and the criminal authorities. It is available as a separate sanction – in the shape of a confiscation order imposed by the criminal courts. If no confiscation order is imposed, any benefits that the offender may have are to be a part of a criminal fine imposed by the criminal courts. This is **a good practice**. This also applies to civil monetary penalties that are imposed by the administrative authorities; the removal of any benefits from the offender is to be a part of those penalties.[2203] The fact that the administrative authorities can (also) aim for this goal is **a good practice**.

2203 See chapter 5, section 5.3.2 and section 5.6.

Moreover, it is a positive aspect that removing the benefits of non-compliance from the offender has been established as one of the penalties principles in England and one of the three aims of sentencing criminal environmental offences that is to be achieved in any case by the criminal courts. As described in chapter 5 on the sanctions in England, the sentencing guideline that aims to ensure that the criminal courts impose higher sentences for environmental offences, determine that it should not be cheaper to offend than for the offender to take the appropriate precautions for environmental protection. This means that the enforcement goal of the removal of benefits, including savings, from an offender is held to a high regard for effective enforcement in England and is guaranteed in its principles. This is **a good practice**.

The potential of the sanctions toolbox in the Netherlands to aim for this enforcement goal is not as strong as in the two jurisdictions described above. In the positive sense, the specific sanction of siphoning off benefits from the non-compliance can be imposed by the criminal courts as a secondary sanction to a criminal conviction. Moreover, in determining the level of criminal sanctions, including criminal fines, the benefits of the offence are to be considered. This includes the possibility to increase the level of fines for economic criminal offences where the proportion of illegally obtained benefits as to the maximum of the fine would not be appropriate. Within the toolbox of administrative sanctions, the enforcement goal cannot be aimed for in the same way as the criminal courts, or as in Germany (NRW) and England. Although the administrative order subject to a coercive fine may also relate to the financial benefit of non-compliance, the level of this coercive fine may only be aligned with the financial benefit that can be achieved in the future when the administrative order is not complied with. The benefit obtained by the offender is not included in the level of the administrative fine and the administrative criminal decision. Obtained benefits do block the use of the administrative criminal decision by the administrative authorities. This rule shows that in the Netherlands, it is preferred that primarily the criminal courts (and not necessarily the administrative authorities) can remove obtained benefits, including savings. It is a disadvantage to effective enforcement that the Dutch administrative authorities do not possess a similar instrument.

• Good practices and recommendations to remove benefits from non-compliance

The comparison of the three jurisdictions above on the potential of their sanctions to aim for the enforcement goal of removing the benefits of non-compliance provides several good practices for the benefit of effective enforcement. The good practices and their jurisdictions of origin are indicated below. These good practices are:

Good practices on removing benefits from non-compliance

- The presence of a sanction to siphon off benefits available for administrative authorities and criminal authorities (GE; ENG).
- The alignment of the level of fines with benefits as laid down in the law (GE)
- The principle that it should not be cheaper to offend than for the offender to take the appropriate precautions for environmental protection (ENG).
- The penalty aim that removal of benefits should be a standard part of sentencing criminal offences (ENG).

Considering the good practices in the jurisdictions mentioned above, and what has been remarked above about the available sanctions in the other jurisdictions that do not have them, recommendations can be made. This does not necessarily mean that the sanctions that are already available in the jurisdictions do not suffice in light of effective enforcement. The recommendations aim to strengthen effective enforcement with regard to this enforcement goal in these other jurisdictions. It may also be that the jurisdictions do not possess sanctions to aim for the enforcement goal. Both of these perspectives – the fact that sanctions could be strengthened, or that sanctions are not available – have been described above. In that light, the following recommendations may be considered by the jurisdictions indicated:

Recommendations on removing benefits of non-compliance for specific jurisdictions to consider

- Introduce the removal of benefits as one of the principles of sentencing environmental offences in the Netherlands.
- Introduce the possibility to remove benefits into the hands of the administrative authorities in the Netherlands, at least for the authorities that can impose punitive sanctions.
- Adopt, at least as a guideline, the English rule that it should not be cheaper to offend than to comply in Germany and the Netherlands.

F. To (monetarily) compensate the consequences of non-compliance

Also here, the goal in itself gives its name to the appropriate instrument, namely, the sanction that obliges the offender to pay the damage caused by the breach of environmental law.

Typology: This goal is in any case appropriate where the typology concerns irreparable damage that is quantifiable.

It is not possible for the administrative authorities to impose monetary compensation measures in any of the three jurisdictions. This is a disadvantage to effective enforcement.[2204] The criminal authorities in the three jurisdictions can impose a sanction that aims for the compensation of environmental damage.
It is possible to impose a specific instrument that solely aims to compensate the damage of non-compliance in a criminal procedure by the courts in the Netherlands and in England. In England, the offender can be obliged by the criminal court to pay an amount of compensation to organisations aimed at environmental protection, in particular where the offender has caused irreparable damage. This is **a good practice**.
In Germany, the Public Prosecutor and the criminal courts can impose a similar compensation measure, but only as an alternative to prosecution.
In the Netherlands, also the Public Prosecutor and the criminal courts can order compensation. In fact, the Public Prosecutor can impose this instrument pending a criminal trial. This is **a good practice**. This possibility may be useful, and would be so in the other two countries, for the benefit of the environment.

- **Good practices and recommendations to (monetarily) compensate the consequences of non-compliance**

The comparison of the three jurisdictions above on the potential of their sanctions to aim for the enforcement goal of the monetary compensation of damage caused by non-compliance provides several good practices for the benefit of effective enforcement. The good practices and their jurisdictions of origin are indicated below. These good practices are:

Good practices on the monetary compensation of damage

- The monetary compensation imposed by the criminal courts as part of a criminal sentence (EN; NL)
- The obligation of the offender to pay the monetary compensation to environmental protection organisations for the benefit of the environment (ENG; GE)
- The sanction of compensation imposed by the Public Prosecutor pending a criminal trial (NL), and by the Public Prosecutor or the criminal courts as a condition to stop prosecution or criminal proceedings (GE).

2204 It is considered as part of effective enforcement, that it ought to be possible for the authorities to impose compensation as a public enforcement sanction for environmental damage. Although, it may be possible in all three countries to obtain compensation through a civil procedure, it is the question if who can start such a procedure where the claimant would be 'the environment'. As explained in chapter 2, this is the reason why the compensation of environmental damage ordered by the public enforcement authorities is important for effective enforcement.

Considering the good practices in the jurisdictions mentioned above, and what has been remarked above about the available sanctions in the other jurisdictions that do not have them, recommendations can be made. This does not necessarily mean that the sanctions that are already available in the jurisdictions do not suffice in light of effective enforcement. The recommendations aim to strengthen effective enforcement with regard to this enforcement goal in these other jurisdictions. It may also be that the jurisdictions do not possess sanctions to aim for the enforcement goal. Both of these perspectives – the fact that sanctions could be strengthened, or that sanctions are not available – have been described above. In that light, the following recommendations may be considered by the jurisdictions indicated:

Recommendations on the monetary compensation of damage

- Introduce the monetary compensation for environmental protection in administrative enforcement in the Netherlands.
- Include the possibility to donate monetary compensation to environmental protection organisations in the Netherlands.
- Increase the scope of the sanction of compensation as a criminal sanction in Germany.

G. To punish the offender for non-compliance

Once more, the goal in itself indicates the instrument: a sanction that aims to punish the offender for non-compliance.

Typology: This goal is in any case appropriate where the typology concerns the following damage or offender:
- (potentially) irreparable or major damage
- a recidivist offender.

There are many similarities in the three countries in terms of the punitive sanctions available. In all three countries, similar punitive sanctions are available for the *administrative* authorities or have relatively recently become available to them. These available punitive sanctions are monetary sanctions. The competence of the administrative authorities to impose such sanctions is not the same in all three jurisdictions, however. In the Netherlands and England, the power to impose administrative monetary sanctions was relatively recently introduced for

the administrative authorities. The areas of environmental protection that can be protected by means of an administrative fine in the two jurisdictions are limited, although the areas of environmental protection for the benefit of which fines can be imposed in England is much broader, comparatively, than in the Netherlands. In the Netherlands, the possibility to aim for this goal with punitive sanctions by the administrative authorities is very limited.[2205]

In Germany (NRW), the competence of the administrative authorities – as prosecuting authorities – to impose regulatory fines for regulatory offences is very broad. All these punitive sanctions in the hands of the administrative authorities in the three jurisdictions – also where they are prosecuting authorities – can be imposed on legal persons and individuals. This is **a general good practice**.

In all three countries, punitive sanctions are also available to the *criminal* authorities for criminal enforcement. In England and Germany (NRW), only the courts can impose the punitive sanctions for criminal offences, in a criminal procedure instigated by the Public Prosecutor. In the Netherlands, also the Public Prosecutor may impose punitive sanctions for criminal offences.
In England and the Netherlands, criminal sanctions can be imposed on natural persons, including directors of companies, and legal persons. This is **a good practice**.

In Germany (NRW), the sanctions for criminal offences can only be imposed on natural persons, including directors of companies and employees responsible for the non-compliance, but not on legal persons; this contrasts with the fact that for regulatory offences sanctions can be imposed on both natural persons and legal persons. The fact that sanctions for criminal offences cannot be imposed on legal persons is a disadvantage to effective enforcement in Germany (NRW). The (maximum) level of criminal fines is generally higher than of regulatory fines; moreover, it may be difficult to make a case against a director of a company; it may also be that a specific criminal offence requires a multi-facetted enforcement response by imposing sanctions on both natural persons involved and a legal person. German criminal law would benefit from the introduction of a criminal liability of legal persons.

For very serious environmental crimes, imprisonment will be the most appropriate sanction for situations of notorious, recidivist offenders or very serious environmental crimes, often with irreparable damage. Imprisonment is indeed offered in all three countries, as part of the criminal set of sanctions, imposed by a criminal court for

2205 In contrast to this limited competence, the Dutch criminal authorities can impose punitive sanctions, including fines, for nearly all administrative non-compliance with environmental law, as nearly all of this non-compliance is also an economic criminal offence.

individuals who have committed offences or, in case the non-compliance is attributed to a company, by imposing sanctions on responsible directors or employees of the company. This is **a general good practice** that is particularly appropriate when the offence has resulted in major irreparable damage, including endangering and affecting human life and notorious offenders.

In all three countries, the administrative monetary sanctions and the criminal fine are related to the gravity of the non-compliance, the consequences of non-compliance and the interests involved. The level of the fine is generally based on categories that have been established beforehand in legislation, with some room for a case-by-case application.

Moreover, all three jurisdictions provide a certain connection to the economic benefit of the offence. As mentioned previously, the criminal fine imposed by the criminal courts in Germany (NRW) and England (also) aims to siphon off the benefits of the offence for the offender and therefore is to specifically incorporate such benefits into the level of the fine if no such independent sanction has been imposed; the criminal fine imposed by the criminal courts in the Netherlands considers the benefits of the offence for the offender to establish the level of the criminal sanction. In England, the criminal fine is moreover related to the turnover of the legal person, or the income of the offender where this is a natural person. This is **a good practice** for the benefit of effective enforcement to ensure that the fine has an economic impact on the offender. This would also be a benefit to fines in Germany (NRW) and the Netherlands, in light of effective enforcement.

- **Good practices and recommendations to punish the offender for non-compliance**

The comparison of the three jurisdictions above on the potential of their sanctions to aim for the enforcement goal of punishment of the offender for non-compliance provides several good practices for the benefit of effective enforcement. The good practices and their jurisdictions of origin are indicated below. These good practices are:

Good practices on punishment of the offender for non-compliance

- The calculation of fines to include the benefits of the offence (ENG; GE).
- Ensuring the economic impact of a fine by basing it on the turnover of the legal person and the income of the natural person (ENG).
- The applicability of criminal punitive sanctions to both legal persons and natural persons (NL; ENG).

Common good practices in the three jurisdictions are:

- Punitive (hybrid) sanctions that can be imposed by the administrative authorities (ENG; GE; NL)
- The possibility to impose administrative and criminal punitive sanctions on directors and employees that have been involved with non-compliance (ENG; GE; NL)
- A certain variety of criminal punitive sanctions, including fines and imprisonment (ENG; GE; NL).

Considering the good practices in the jurisdictions mentioned above, and what has been remarked above about the available sanctions in the other jurisdictions that do not have them, recommendations can be made. This does not necessarily mean that the sanctions that are already available in the jurisdictions do not suffice in light of effective enforcement. The recommendations aim to strengthen effective enforcement with regard to this enforcement goal in these other jurisdictions. It may also be that the jurisdictions do not possess sanctions to aim for the enforcement goal. Both of these perspectives – the fact that sanctions could be strengthened, or that sanctions are not available – have been described above. In that light, the following recommendations can be considered:

Recommendations on punishment of the offender for non-compliance

- Introduce criminal sanctions for legal persons in Germany (NRW).
- Include in the level of the fine the benefit from the offence, if this benefit is not removed through a separate sanction in the Netherlands.
- Base the fine on the turnover or income of the offender for the benefit of economic impact in the Netherlands and Germany (NRW).

12.3.4 Combinations of sanctions

It was explained in chapter 2 that combinations of sanctions may be necessary to attain the appropriate (effective) enforcement goals for a certain typology of non-compliance. A distinction was made between the combination of sanctions for an instance of non-compliance in the shape of concurrent imposition, i.e. the imposition of more than one sanction at the same moment for one instance of non-compliance, and the

consecutive imposition of sanctions, for example for scaling up between different types of sanctioning systems. As we have seen in the previous section, the former may occur, for example, where more than one sanction is necessary to fulfil the enforcement goals appropriate to achieve effective enforcement in a specific case of non-compliance. The latter also involves the possibilities for the three jurisdictions to act when imposed sanctions are not complied with or do not have the envisioned effect on compliance. The combination of sanctions may result in more than one enforcement authority involved in imposing sanctions for a specific instance (typology) of non-compliance.
We have seen in the country chapters and the analysis there that combinations may have to be made for the benefit of effective enforcement. For example, where sanctions of the different sanctions systems have to be combined. This has also been signalled in this chapter.

There are quite a few similarities between the three countries on the possibilities and the limits to combining the sanctions they have available for the enforcement of environmental law. There are also some notable differences.

Concurrent imposition of sanctions
In each of the three countries there are certain limits to the concurrent imposition of sanctions from the same enforcement system, and to the concurrent imposition of sanctions from different enforcement systems in each of the three countries. These limits are laid down in legislation in the three countries. This is **a good practice**. Among these limits is the principle of proportionality, which is, for instance, laid down in legislation in the Netherlands.[2206] Administrative reparatory sanctions may be combined concurrently, for example, except for the order subject to administrative coercion (substitute action by the authority) and the order subject to a coercive fine and as long as the proportionality of this combination regarding the non-compliance is weighed. Moreover, the principle of proportionality may, for example, limit the combination of administrative reparatory sanctions and criminal sanctions. When these are imposed concurrently, both administrative and criminal authorities are to have regard to the proportionality of their response in relation to the other.
In case of criminal punitive sanctions, this Dutch principle of proportionality will generally mean that the administrative reparatory sanctions that are imposed will have to be considered when criminal punitive sanctions are imposed.[2207] In case of the cumulation of administrative reparatory and criminal reparatory sanctions, every sanctioning authority involved must take into account proportionality.

2206 See section 11.5.2 of chapter 11.
2207 See section 11.5.2 of chapter 11.

It can be seen in the country chapters that the three countries studied have a similar principle that applies to enforcement. In Germany and the Netherlands this principle has been codified in their respective national statutes. In the German Constitution, a principle of proportionality is laid down as part of its rule of law principle. It is further specified with respect to regulatory authorities, the police and in its Regulatory Offences Act. In the Netherlands, the principle is part of its general principles of good governance, and is laid down in the General Administrative Law Act. This act also contains specific indications of the principle with respect to the exercise of instruments for supervision and administrative sanctioning. The principle is also laid down in the Police Act – applicable to investigative measures – and is also applicable to the judicial authorities as part of unwritten principles of law explicitly deemed applicable through case law.[2208] In England the principle of proportionality is laid down in policy documents specifically related to enforcement. However, policy documents in principle do not have legal force unless the duty exists to take account of rules in policy documents. This duty can be enforced judicially. Aside from this, proportionality can be tested by the courts, which implies that the authorities must adhere to the principle in their actions.[2209] Therefore, the principle of proportionality as it is known as a general Union principle, has a basis in and forms part of each of the three Member States' national systems.

In England and in Germany, the administrative authorities can in principle utilise more than one sanctions system or toolbox for deciding on enforcement action themselves, as they are also prosecuting authorities. The administrative authorities will be able to choose the most effective and appropriate system and/or combinations of systems for enforcement, based on the facts of the case at hand. In fact, the enforcement policy of the Environment Agency in England provides that when an offence occurs it is important that the overall effect of the actions the Agency takes, is considered.[2210] This includes possible actions through administrative sanctions, including civil sanctions, and criminal prosecution and sanctions (as alternatives to prosecution).[2211] This is **a good practice** from the viewpoint of effective enforcement. Through considering the overall effect, also the limitations that are in place or should be placed on certain enforcement can be guaranteed.

In Germany (NRW), the scope of their prosecuting competence is limited, and, rather similar to the Netherlands, the administrative authorities cannot consider all available sanctions for enforcement, as the prosecution of criminal offences does not

2208 See Corstens/Borgers & Kooijmans 2018, p. 67-69.
2209 See section 5.5 of chapter 5.
2210 See section 5.5 of chapter 5.
2211 However, it does not apply to the enforcement of wildlife offences.

belong to their competence. The cooperation mechanisms that are in place between the administrative and criminal authorities – as we have seen in section 12.3.2.4 of this chapter – provide a certain strategic position of the Public Prosecutor on enforcement decision-making. The Public Prosecutor holds a strategic position in considering whether non-compliance should be pursued as a regulatory offence, a criminal offence or both. The Public Prosecutor can include the legal limitations and possibilities of enforcement in this enforcement decision-making. This is beneficial to effective enforcement. Importantly though, this relates to the (mainly) punitive sanctions available for regulatory offences and criminal offences. An important part of enforcement – the reparatory sanctions of *Gefahrenabwehr* – is not included in the Public Prosecutor's considerations. The overall effect of all enforcement action is therefore not considered.[2212]

In the Netherlands, the Dutch Countrywide Enforcement Strategy – and the other policies and mechanisms on enforcement cooperation mentioned in section 12.3.2.4 of this chapter – serves to streamline, in a sense, the decision-making on environmental enforcement by the administrative and criminal enforcement authorities.[2213] This is **a good practice**, which can serve, among others, also to keep an eye on the legal limits to combining sanctions.
In England, the combination of civil sanctions and criminal sanctions is only allowed when this is specifically allowed by legislation.[2214] In Germany, the concurrent imposition of sanctions is possible with regard to sanctions for *Gefahrenabwehr*, which are solely reparatory, and regulatory sanctions, which are mainly punitive; as well as with regard to sanctions for *Gefahrenabwehr* and criminal sanctions. With regard to the possibility for the concurrent imposition of *Gefahrenabwehr* and regulatory sanctions, the administrative authority is in charge of both and will be able choose the most effective and appropriate system and procedure for enforcement, based on the facts of the case at hand.

One of the rules that the three countries have in common is that punitive sanctions of a different system than criminal sanctions may not be combined with these criminal sanctions. In Germany, the criminal law has priority over regulatory sanctions, which are mainly punitive. When non-compliance can be (or has been) prosecuted as a regulatory offence and a criminal offence or where the procedures for regulatory sanctions and criminal sanctions are started in parallel, it is the rule that the criminal offence and sanctions have priority. The criminal authorities can take over the case

2212 See section 8.5.2 of chapter 8.
2213 See section 11.5.2 of chapter 11.
2214 That applies to civil sanctions that are not punitive sanctions. Other civil sanctions can only be combined with criminal sanctions where this is specifically allowed by legislation.

of the regulatory offence and impose regulatory sanctions in criminal proceedings.
In the Netherlands, the criminal law, including the Public Prosecutor's criminal decision, has priority over the administrative fine. Where non-compliance is both punishable with an administrative fine and also a criminal offence, the case must be submitted to the Public Prosecutor to decide whether he wants to pursue enforcement. It is prohibited that a fine is imposed once a criminal prosecution is instigated for the same action or inaction.[2215] However, and in contrast to Germany, the converse is also true, as it is generally no longer possible to instigate a criminal prosecution where an administrative fine has been imposed upon an offender, or the administrative authority notified the offender that no administrative fine would be imposed. Exceptions are possible, but rare.[2216] The same rules apply to the administrative criminal decision, which is considered an act of prosecution, although no coordination with the Public Prosecutor is required.
In England, criminal enforcement may not be combined with civil punitive sanctions. There is, however, no priority rule for criminal law. In fact, once civil punitive sanctions have been imposed – specifically the variable and the fixed monetary penalty – the original offence can no longer be prosecuted in criminal court.[2217]

Consecutive imposition of sanctions

For the consecutive imposition of sanctions, a punitive character generally stands in the way of another punitive or a criminal sanction. In all three countries there is a prohibition for double prosecution for the same instance of non-compliance (*ne bis vexari*). In this respect, England and the Netherlands are similar in their *ne bis* rule: no double prosecution for the same act; with a punitive character of an administrative sanction equated to a prosecution, including the civil punitive sanctions in England and the administrative criminal decision in the Netherlands.[2218]
Germany has an interesting variation or, rather, exception to this rule. A punitive sanction of a regulatory authority does not have the same effect as the non-appealable judgment or decision by a court to impose a regulatory sanction.[2219] The latter has the result that the non-compliance can no longer be prosecuted as a criminal offence. The former can be set aside – also after the decision to impose the punitive sanction has been imposed or even paid – quite simply by starting subsequent criminal

2215 Section 5:44 subsection 1 of the Dutch General Administrative Law Act.
2216 Section 243 subsection 2 of the Dutch Code of Criminal Procedure.
2217 The term penalty as used in England for certain civil sanctions is similar to the term fine that is also used in this research for the same type of instrument, i.e. a monetary punishment.
2218 Both are in fact deemed alternatives to prosecution. See section 5.5 of chapter 5 (in England this is called double jeopardy) and section 11.5.2 of chapter 11.
2219 The reason is that the regulatory authority is not considered competent to legally decide on the criminal punishability of non-compliance. See chapter 8, section 8.5.3.

proceedings.[2220] The blocking effect of the principle of *ne bis in idem* is therefore limited in Germany where it concerns fining decisions imposed by the regulatory authorities.
With regard to the consecutive imposition of sanctions of a reparatory character,[2221] or the imposition of punitive sanctions after reparatory sanctions are imposed, or the other way around, such combinations of sanctions are possible, albeit within the limits set by the legislation in the countries. However, in England and the Netherlands, as the *ne bis* rule's focal point is the prosecution, also a consecutive combination of administrative punitive sanctions and criminal reparatory sanctions – after all, only imposed after criminal prosecution – is prohibited.

• Good practices and recommendations on combinations of sanctions

The description and comparison above provide several good practices that can be discerned when the three jurisdictions are compared for the possibility of the concurrent and consecutive imposition of sanctions for the benefit of effective enforcement. These show that in all three jurisdictions many combinations between sanctions can be made, where this is necessary to aim for several enforcement goals that fit the typology of a specific situation of non-compliance. The limits are also laid down clearly in the legal rules concerning the concurrent and consecutive imposition of the sanctions in all three jurisdictions. These legal rules and the limits and possibilities they allow, are further supported by the organisation of environmental enforcement, particularly in England, and by enforcement policies on the enforcement considerations within and between the enforcement authorities (ENG; NL). Therefore, the good practices are:

2220 There are no specific requirements for this. In the Netherlands, it is provided in the law that it is also possible to set aside a punitive sanction that has been imposed by an administrative authority but it is not similar; there is a much higher threshold than in Germany and it happens rarely. See chapter 11, section 11.5.2.

2221 This may, for example, occur where administrative coercion is applied after an administrative order fails to impact non-compliance in the manner intended.

Good practices on combinations of sanctions

- An enforcement organisation in which a full consideration of enforcement action can be possible (ENG).
- Enforcement policies on the enforcement considerations within and between the enforcement authorities (ENG; NL).
- The Countrywide Enforcement Strategy that involves the different enforcement authorities in combining all types of public enforcement and to keep an eye on the possibilities and limits laid down in the law (NL).

Common good practices, which the three jurisdictions share, are:

- (many) Combinations between sanctions can be made (ENG; GE; NL).
- The limits to combining sanctions are laid down clearly in the law (ENG; GE; NL).

As a recommendation the following could be considered:

Recommendation on combinations of sanctions

- Introduce (general) strategy documents on enforcement action as a whole, including administrative, regulatory and criminal enforcement in Germany

12.4 Findings

Above, the good practices and recommendations were established that follow from the comparison of the enforcement architecture in the three jurisdictions in light of the model for tailored effective enforcement formulated in chapter 2. This has shown the following more general points:

- The research shows that in each of the jurisdictions effective enforcement can to a considerable extent be aimed for by the organisation and sanctions toolboxes in place for the enforcement of environmental law.
- There is variation between the jurisdictions, especially in the enforcement organisation. The good practices show that many institutional aspects of the enforcement organisation in the three jurisdictions are reasonably effective from the perspective of the institutional requirements in the model. With regard to the instrumental aspects, the good practices show that, in particular, many reparatory sanctions exist in the jurisdictions for the enforcement of environmental law, which is positive from the perspective of effectiveness.
- There is potential for effective enforcement, where appropriate, by combining administrative and criminal enforcement and hybrids, i.e. by viewing enforcement as complementary. Gaps in one of the toolboxes can often be remedied through the sanctions available in one of the other available toolboxes, within the legal

limits for the combination of sanctions. An important point of attention in that regard is that the coordination and cooperation between different enforcement authorities – as the case may be – is guaranteed.
- Connected to this is that the three jurisdictions benefit in terms of effective enforcement from viewing enforcement as integral, i.e. as one process. The potential for this is provided in the Netherlands by virtue of its countrywide enforcement strategy, which looks at both administrative and criminal enforcement; this also happens in England and Germany, as far as several types of enforcement are in the hands of the same authorities.
- There are gaps impacting effective enforcement in the enforcement organisation and sanctions in the three jurisdictions that require attention. Improvements can also be made. In the evaluations in the country chapters and in the current chapter, these gaps and improvements were signalled. In general, more structural guarantees are necessary to be able to provide an effective enforcement organisation across the board of all (institutional) aspects of the public enforcement of environmental law in the three jurisdictions. In general, with regard to sanctions, the toolboxes can be strengthened to increase the possibility of (relatively) timely reparatory enforcement.[2222]
- The good practices show that the three jurisdictions can take inspiration from each other in terms of improving their enforcement authorities and the available sanctions to (better) match the requirements for effective enforcement, thereby improving effective enforcement.
- The three jurisdictions have shown that a focus on institutional quality requirements for the enforcement organisation and on instrumental quality requirements in the shape of the typology of non-compliance and enforcement goals for sanctions can be used to map the potential for the effective public enforcement of environmental law and to compare it between jurisdictions.
- The good practices and recommendations can also be applied to other jurisdictions as examples on how to fulfil the requirements of a tailored effective enforcement model and how to improve their enforcement. In this respect, also the EU institutions can play a role. This is discussed in the next section.

12.5 The European Union and effective enforcement

12.5.1 Introduction

Several baseline conditions for the goal of 'tailored' effective enforcement were formulated in the evaluative framework in the shape of a model of institutional and

2222 Examples are the preventive enforcement and the enforcement through notices, but also the removal of economic benefits and monetary compensation.

instrumental requirements.[2223] These are based on EU law and documents of EU authorities – including Advocates-General – on effective enforcement, and empirical and theoretical literature on effective enforcement. The application of the model of requirements is shown in the evaluation and findings in the country chapters and in the developments, comparative good practices and recommendations described and formulated in the previous sections of this chapter.

The question is how these developments and the experiences in the three jurisdictions with regard to effective enforcement relate to the EU developments on the effective enforcement of environmental law. These developments were described quite extensively in chapter 1 and 2. They are described summarily below (12.5.2). Consecutively, the EU developments are reflected upon in light of the developments and the application of the model of tailored effective enforcement in the three jurisdictions that resulted in the good practices and recommendations that were described in the previous sections of this chapter.[2224] This bottom-up reflection results in recommendations that can support the EU institutions to take the next step in the development of the effective enforcement of environmental law in the European Union (12.5.3). In this manner, enforcement can be professionalised for the benefit of the effective enforcement of environmental law by and in the Member States. The EU institutions can act as catalysts in this respect, and they can provide guidance on this to the Member States. The manner, in which the EU institutions could do so for the future development of effective enforcement, is described in section 12.5.4. This section, and the chapter, is finalised by a conclusion (12.5.5).

12.5.2 EU developments on effective enforcement

As described in chapters 1 and 2, EU law has influenced the enforcement of EU law by the Member States in certain ways. The ECJ originated the effective enforcement formula.[2225] While, from this formula no preferences for a certain type of enforcement follow, the EU legislator has prescribed more specifically certain requirements for the enforcement organisation, inspections, and sanctions for environmental protection.[2226] Several requirements lean towards the use by the Member States of administrative enforcement, such as, in particular, the revocation of a permit.

However, a specific type of enforcement (or a specific goal of enforcement) had not been specifically indicated in EU legislation until the 2008 directive on the protection of the environment through criminal law and the 2009 directive on ship-

2223 See also the table at the end of chapter 2, and in this chapter.
2224 See sections 2.2 and 2.4 of this chapter.
2225 See section 2.3 of chapter 2.
2226 See section 2.2.2 of chapter 2.

source pollution and on the introduction of penalties for infringements.[2227] With these directives, the EU showed that it preferred the criminal law for the enforcement of specific environmental offences. These directives formulated the behaviour that should be established as a criminal offence by the Member States and which is to be sanctioned by means of criminal penalties (punitive sanctions). The directives require the Member States to establish criminal penalties for serious environmental offences to 'strengthen' compliance more effectively, 'as existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment'.[2228]

The three jurisdictions that were described in this research made this EU legislation their own, without significant changes in their legal systems. After the directives that focused on the protection of the environment through criminal enforcement gained force and were implemented in the Member States, the development at EU level of the effective enforcement of environmental law quieted down.

> Section 83(2) TFEU, which was introduced post-Lisbon, i.e. after the directives mentioned above gained force, provides the competence for the EU legislator to establish in Union directives minimum rules on the definition of criminal offences and sanctions in areas which have previously been subject to harmonisation measures. One of the aspects for the application of this section is that EU legislation on this basis is only possible if the goal cannot be reached more effectively by measures at national or regional or local level. This lack of effectiveness at national level or lower was the consideration for the EU legislator to require criminal penalties in the two directives mentioned previously.[2229]

In this respect, the European Commission has considered that is to be analysed whether measures other than criminal law measures, e.g. sanction regimes of administrative or civil nature, could not sufficiently ensure the policy implementation and whether criminal law could address the problems more effectively. This will require a thorough analysis in the Impact Assessments preceding any legislative proposal, including for

2227 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJL 328/28, 6 December 2006; and Directive 2009/123/EC of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ 280/52 of 27 October 2009. See also chapter 2, section 2.5.1.

2228 Preamble, para. 14 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law; and preamble, para. 3 Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements. See also chapter 2, section 2.5.1.

2229 Preamble, para. 14 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. See also chapter 2, section 2.5.1.

instance and depending on the specificities of the policy area concerned, an assessment of whether Member States' sanction regimes achieve the desired result and difficulties faced by national authorities implementing EU law on the ground.[2230]

12.5.3 Reflections on the EU-approach and the three jurisdictions: gap between the EU and the Member States

The developments in the EU and the developments in the three jurisdictions are not in parallel with each other. In fact, there is a certain gap between these developments. Primarily, this gap is due to what has been described as the common theme of the developments in the three jurisdictions and the findings as a result of the application of the model for tailored effective enforcement to the three jurisdictions. As described previously, this common theme is that the dichotomy between administrative enforcement and criminal enforcement in the three jurisdictions is becoming increasingly less clear-cut. This can be characterised as fluidity. As described, this fluidity extends to both the enforcement organisation – where authorities have become competent to impose sanctions that are not the traditional authorities – and the sanctions for environmental non-compliance – where administrative authorities can impose punitive sanctions, and criminal authorities can impose reparatory sanctions.[2231] In the evaluation of the three jurisdictions, it has become clear that this fluidity is tied to effective enforcement.

This is not in parallel to the focus on criminal enforcement that has been the most recent development in EU law for the effective enforcement of environmental law.[2232] While this development was also motivated by political discussion, the European Commission described the purpose of effective enforcement as catalyst for the two specific directives requiring criminal enforcement for certain environmental offences.[2233] These are divergent developments, or the EU is lagging behind at least in respect of the developments in the three jurisdictions in light of effective enforcement.

In the following, several points of attention with regard to which there is a specific gap between the developments in the EU and the three jurisdictions will be discussed with regard to which the potential of effective enforcement can be (further) unlocked

2230 Communication from the Commission of 20 September 2011 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM(2011) 573 final, p. 6.

2231 See section 12.2 of this chapter.

2232 'Recent' meaning 2008 and 2009. No significant developments of the effective enforcement of EU environmental law have occurred since then. See chapter 2, section 2.2.2.

2233 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJL 328/28, 6 December 2006; and Directive 2009/123/EC of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ 280/52 of 27 October 2009.

at EU level. Four points of attention are distinguished. With regard to each point, first, the EU approach is described. Second, relevant findings in the three jurisdictions are described in light of the specific point. Third, a recommendation is made with a specific suggestion for the direction the development of effective enforcement could take at EU level. The recommendations draw from the model for tailored effective enforcement formulated in chapter 2, and its application in the three jurisdictions. The points of attention are as follows:

Point of attention #1

- The development of the concept of effective enforcement of environmental law at EU level has been abstract on what effective enforcement entails, and rather fragmented where the EU legislator has prescribed specific aspects of enforcement for the Member States. The most specific recent focus has been on prescribing the criminal enforcement for certain offences.[2234]
- The evaluation of the three jurisdictions has shown that effective enforcement can be strived for through complementary enforcement, i.e. a combination of the different systems of public enforcement and their sanctions. Moreover, it has shown that effective enforcement can be aimed for through viewing public enforcement as integrated, i.e. as a process in which both administrative and criminal enforcement and authorities can participate. In addition, the model and its application in the three jurisdictions provide that complementary, and integrated enforcement is to be supported by coordinating and cooperative enforcement authorities.[2235]
- This means for the EU legislator that the most effective enforcement organisation and sanctions are not necessarily achieved through describing a specific type or system of public enforcement for environmental non-compliance (administrative enforcement or criminal enforcement).

Recommendation

- A recommendation for the EU institutions in light of the above is mentioned below at point 2, as both points are connected.

2234 As stated previously, 'recent' is relative, as these developments date from 2008 and 2009. However, since then there have not been significant developments of the effective enforcement of environmental law at EU level.

2235 This will be discussed further below.

Point of attention #2

- Moreover, the findings in the three jurisdictions show that where the EU legislator describes a specific type or system of public enforcement this does not necessarily provide a clear direction as to what that entails. Specifically relevant, in this respect, are the directives requiring the criminal enforcement of certain environmental offences[2236] and the common theme that was described previously with regard to the enforcement organisation and the sanctions it can impose.
- The directives on the criminal enforcement of environmental law focus on criminal offences and criminal penalties (presumably) established by 'traditional' criminal authorities, i.e. the criminal courts. Since the introduction of these directives, no notable developments have taken place at EU level for the effective enforcement of environmental law. The common theme of the three jurisdictions shows that criminal enforcement is not any longer singularly the realm of the criminal courts, but that punitive sanctions have come into the hands of the Public Prosecutor, and the administrative authorities. In other words, the concept of criminal enforcement is not unequivocal as to which authorities are to be involved. Moreover, these authorities bring different characteristics to enforcement, which can influence effective enforcement.[2237]
- This also applies to the sanctions for environmental non-compliance. The three jurisdictions show that where the EU legislator prescribes criminal enforcement, or another type of public enforcement for that matter, or criminal penalties, as it has done in its directives, this does not necessarily clarify what they should do in terms of enforcement. Specifically, this is relevant because the criminal authorities can impose reparatory sanctions (in England and the Netherlands; not in Germany), the administrative authorities can impose punitive sanctions, and hybrid systems and sanctions for the enforcement of environmental law exist in the three jurisdictions.

At EU level it has also been recognised in general that clarity may be required. In 2011, the European Commission considered that with regard to section 83(2) TFEU it will be necessary to gather factual evidence and launch further discussions about "important legal issues with a view to ensuring an efficient implementation of EU legislation into the national criminal law systems of Member States. This includes for example:

2236 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJL 328/28, 6 December 2006; and Directive 2009/123/EC of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ 280/52 of 27 October 2009.

2237 I will come back to this point and its connection to quality requirements for the enforcement organisation below.

- the relationship between criminal and non-criminal sanction systems; and,
- the interpretation of criminal law notions regularly used in EU legislation, such as the notion of "effective, proportionate and dissuasive sanctions", "minor cases" or "aiding and abetting."[2238]

Recommendation

- In light of point 1 and point 2, it is recommended that the EU does not aim to prescribe a specific system of enforcement, such as criminal enforcement, where it further develops the concept of effective enforcement. It is recommended that development at EU level rather approaches the concept of effective enforcement as system-independent. System independence in this respect entails that effective enforcement is not (by definition) connected to a specific system of enforcement (administrative or criminal). Moreover, such a concept should also encompass the enforcement organisation, with high importance for coordination, and cooperation between enforcement authorities. This supports an appropriate joint complimentary application of sanctions by these authorities where this is necessary for the benefit of effective enforcement. Both aspects will be discussed further below.

Point of attention #3

- It is notable that at EU level there seems to be no significant attention for the possibilities of reparatory sanctions for the effective enforcement of environmental law in the Member States. In contrast, the model of tailored effective enforcement considers the protection of the environment its ultimate goal and, therefore, entails six reparatory enforcement goals, of a total of seven, as potential aims of made-to-measure sanctions.[2239] The reparatory enforcement goals show the six different sides reparation can take, dependent on the type of the non-compliance, damage, and offender.

  To reiterate, these six reparatory enforcement goals are:

  a. to prevent specific non-compliance from occurring;
  b. to end on-going non-compliant behaviour;
  c. to (physically) repair the damage of non-compliance;
  d. to prevent recurrence of non-compliance and to advance future compliance;
  e. to remove benefits from non-compliance;
  f. to (monetarily) compensate the consequences of non-compliance.[2240]

2238 Communication from the Commission of 20 September 2011 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM(2011) 573 final. See also chapter 2, section 2.5.1.

2239 As described extensively in chapter 2, section 2.6.3.3. See also section 12.3.3 of this chapter.

2240 As described, the seventh enforcement goal is a punitive goal: to punish the offender for non-compliance.

- Moreover, the application of the model to the three jurisdictions, and the good practices that follow from this, show that the reparatory sanctions are at the core of effective enforcement for the protection of the environment in these Member States. Reparatory sanctions can be imposed as part of administrative enforcement, by administrative authorities; as part of criminal enforcement, the Public Prosecutor and the criminal courts can impose reparatory sanctions, although exceptions exist.[2241]

Recommendation

- Where the EU further develops the concept of effective enforcement, it can be recommended that the EU legislator operationalises the concept of effective enforcement by directing its focus also to the possibilities of reparatory sanctions to achieve effective enforcement.

Point of attention #4

- The development of the concept of effective enforcement of environmental law at EU level does not involve much attention for quality standards for the enforcement organisation. The model for effective enforcement and the developments in the three jurisdictions suggest that more attention than currently given at EU level is warranted.
- Firstly, these show that for effective enforcement it is (considered) essential that there is an appropriate enforcement organisation that is able to choose the appropriate sanction(s).[2242]
- Secondly, as stated above, complementary enforcement for the benefit of effective enforcement also may entail coordination and cooperation between the enforcement authorities.
- Thirdly, as also previously described, the common theme shows that also other public authorities than the 'traditional' enforcement authorities can sanction environmental non-compliance. As mentioned, this means that these authorities may bring different characteristics to enforcement, which can influence effective enforcement. Standards can provide a common basic level of quality to all authorities involved in enforcement.

2241 The recommendations in the previous section of this chapter show where certain jurisdictions fall short of providing (appropriate) reparatory sanctions.

2242 See, for example, the developments to strengthen effective enforcement in the Netherlands, which involved the specialisation of the administrative organisation into environment offices as well as the introduction of punitive (criminal) sanctions into the hands of the administrative authorities. See also chapter 10, section 10.1.

Recommendation

- It is recommended that the concept of effective enforcement can be further operationalised by the EU in the shape of quality standards/requirements for the enforcement organisation that promote its ability to choose the appropriate sanctions for the benefit of effective enforcement.

Superordinate recommendation: tailored effective enforcement

The gaps described above can be met by the EU institutions through adopting the concept of tailored effective enforcement, formulated as a model of requirements for the public enforcement organisation and sanctions in chapter 2.[2243] This model can close the gaps between the EU approach and the developments in the three jurisdictions, and provide a more flexible and supportive approach to effective enforcement.

> As described in chapter 2, this model is partly based on the development of the concept of effective enforcement by EU institutions.[2244] In that respect, the model is not a total departure from aspects recognised at EU level as relevant to effective enforcement.

The model for tailored effective enforcement can do so as it provides that effective enforcement is a system-independent, typology-oriented, goal-oriented tailored enforcement by a consistent, and cooperative enforcement organisation that has a certain decision-making independence and specialisation.[2245] It aims for an effective enforcement organisation to make a balanced choice for sanctions appropriate for a specific case of non-compliance.

- The system-independence of the model signifies that the focus of effective enforcement is not on a specific enforcement system or type of enforcement, such as criminal or administrative enforcement.
- Instead, the model considers the typology of non-compliance, including the type of damage and offender, as a core aspect of mapping effective enforcement by the enforcement authorities.
- Moreover, the goal orientation of the model shows that specifying what enforcement goal is appropriate to be aimed for, in relation to the typology of non-

2243 See section 2.6 of chapter 2 and section 12.1 and 12.3 of this chapter. To reiterate the outline of this model: tailored enforcement requires embedding enforcement in an expedient organisation (institutional requirements), which enables, enforcement action, i.e. sanctions moulded to the characteristics of specific (potential) non-compliance (instrumental requirements).

2244 See in particular, chapter 2, sections 2.3 and 2.4.

2245 Organisation is meant, where necessary, as plural as it may include several enforcement authorities.

compliance, supports effective enforcement. Moreover, among the seven goals, six are reparatory and one is punitive, which means that the reparatory sanctions and the ultimate goal of environmental protection are supported.
- The typology-orientation and goal-orientation of the model ensure that enforcement action is tailored.
- The model also supports the assessment of the full potential of the public enforcement toolbox for environmental non-compliance in the three jurisdictions. It therefore also provides room for the conclusion that these jurisdictions can, among others, provide effective enforcement through complimentary use of the available sanctions. The view of enforcement as a process, i.e. as integral enforcement, is therefore also reflected in the model.
- As mentioned above, the enforcement organisation also needs to be included in the concept of effective enforcement. For the benefit of effective enforcement, quality standards can support the ability of all enforcement authorities to choose effective sanctions. A complementary, integrated enforcement may require coordination and cooperation between the authorities; requirements of consistency, independence, and specialisation further support effective enforcement.

12.5.4 Future development of effective enforcement in the EU

The EU institutions can act as catalysts for concrete developments in the Member States on effective enforcement, and the EU institutions can give guidance to the Member States as to what effective enforcement is. Moreover, the Member States themselves can do this in the same or similar ways towards their enforcement authorities, independently from the EU institutions. Below, some of the ways in which the EU could operationalise effective enforcement are described. Connected to the superordinate recommendation in the previous section of this chapter, the starting point for this operationalisation could be the model of tailored effective enforcement.

The application of the concept of tailored effective enforcement (as a model) in this research has shown its functions as an evaluative tool, a comparative tool, and as a basis for recommendations on effective enforcement. It can, moreover, be used as a tool for selecting effective tailored enforcement in a specific case by the enforcement authorities, and as inspiration.

Several of the ways the concept can be used at EU level and by the Member States are listed and explained further in random, non-preferential order below. The concept can be used as:

a. a model for the review of the public enforcement architecture in the Member States;
b. a tool to formulate specific aspects of enforcement in legislation for the Member States;
c. a model of requirements for effective enforcement, which the Member States apply;
d. guidelines or directions for the benefit of effective enforcement in the Member States;
e. food for thought to further develop effective enforcement.

These potential uses at EU level and by the Member States are now further highlighted.

a. Model for review of the Member States

First, the EU institutions can use the model to test the compliance of the Member States' public enforcement architecture with the effective enforcement formula when they deal with EU environmental legislation.[2246] When the EU chooses to use the model for this purpose, it should also introduce this model to the Member States as its reference framework, for example, in a guidance document.

The Member States can use the model – independent from the EU institutions – to test the effectiveness of the public enforcement architecture they themselves have available and to look at possible improvements to (better) achieve effectiveness. This could create a certain voluntary convergence.

b. Tool to formulate specific aspects of effective enforcement

Second, the model can be used when the EU legislator wants to prescribe specific aspects of the enforcement organisation or sanctions in EU legislation directed at the Member States. The EU can use the model as a tool to determine what enforcement would be appropriate or what organisation or typology and enforcement goals could be appropriate for non-compliance generally or specifically. The EU can also use the model to explain the choices that it lays down in EU legislation. The national legislator in the Member States can do the same thing.

c. Model of requirements for the Member States

Also, third, the EU institutions could use aspects of the model (or the model entirely) in EU secondary legislation. Including enforcement goals in, for example, EU directives

2246 For example for the purpose of establishing whether a Member State has implemented EU legislation, and/or in preparation for a Commission procedure on the basis of article 258 TFEU.

would allow the EU to provide a (reviewable) interpretation of the concept of effective enforcement and, simultaneously, provide a tool and a certain room for the Member States to choose the most appropriate sanctions. Moreover, including the institutional requirements as parameters – of governance – for the enforcement organisation in EU legislation can also support effective enforcement in the Member States.

> As described in chapter 2, there is EU legislation in place that dictates the characteristics of sanctions that Member States are to provide in their legal systems for environmental protection, such as reparation and restoration.[2247] The use of this type of indication of the sanctions in EU legislation can be expanded according to the model. Moreover, the description could be made more specific. As mentioned, the typology of the non-compliance, i.e. the types of non-compliance, types of damage, and types of offender that sanctions should be able to apply to, and the enforcement goals that are consequently appropriate for this typology ought to be considered as well as included.

The institutional requirements can be used as governance guidelines for the enforcement authorities in the EU Member States.
The Member States can also themselves incorporate the model or aspects of it in their legal system. The enforcement authorities in the Member States can adopt the model to apply it to individual cases of non-compliance with environmental law for the benefit of effective enforcement. The model, and in particular its institutional requirements and its instrumental requirements, acts as a mechanism for the enforcement authorities to choose the appropriate enforcement organisation and sanctions for the benefit of tailored effective enforcement in a specific case of non-compliance. How the authorities can do this, was described in chapter 2, section 2.6.3.5. The enforcement authorities assess the typology of non-compliance and the appropriate enforcement goals in this respect. This leads to sanctions for non-compliance and, possibly, also to another involved enforcement authority.

Where a choice is to be made with regard to (similar) sanctions that may be possible but belong to different toolboxes of different enforcement authorities, the characteristics of the enforcement organisation may be a decisive factor to establish the best possible enforcement action. Obviously, this model is a certain simplification, as other factors may play a role. This was recognised in chapter 2, section 2.6.3.6. It was already mentioned there that, where necessary, additions can be made to the model, for example to the typology that shapes enforcement action.[2248]

2247 See section 2.2.2 of chapter 2.
2248 See section 2.6.3.5 of chapter 2.

d. Guidance for the Member States emanating from EU institutions

Moreover, fourth, the EU institutions could generally introduce the model as a suggested tool for the effective enforcement by the Member States. It is clear from this research that several Member States go through developments with a view to increasing the effectiveness of the enforcement of environmental law. The EU can provide direction in these developments.

e. Food for thought on effective enforcement

Fifth, instead of testing, prescribing or guiding, the EU can, at the least, utilise the model, and the good practices and recommendations that follow from it, to further develop its thoughts on effective enforcement and build from it towards its own operationalisation of effective enforcement. This applies both to the EU institutions and to the Member States themselves.

12.5.5 Conclusion

This research has shown that the operationalisation of the concept of effective enforcement in a model for tailored effective enforcement, and its application in the three Member States lead to good practices and recommendations that allow the EU institutions and the Member States to take the next step in the development of the effective enforcement of environmental law in the EU. In this manner, enforcement can be professionalised for the benefit of the effective enforcement of environmental law by and in the Member States.

The EU institutions can act as catalysts in this respect, and can provide guidance on this. Also the Member States can professionalise the effectiveness of their enforcement by utilising the model without nudging by the EU institutions. In that way, spontaneous harmonisation and convergence – that is already happening now – may gain a broader reach within the Member States and provide an even stronger signal to the EU (in a bottom up manner) of the concept of tailored effective enforcement and its application.

In any case, the EU institutions ought to seek a balance between ensuring that the Member States have effective enforcement available for the enforcement of environmental law and leaving the Member States discretion to arrange their enforcement in a manner that best fits the circumstances inherent in their national traditions and the developments noted in this research.

The key is that the European legislator is to be aware of positive developments in the Member States on effective enforcement, takes these developments as a signal, and guides them into a concept of effective enforcement that uplifts environmental protection.

In doing so, the European legislator should not impose mandatory system-specific obligations on the Member States as this seems a rigid view of the possibilities of the Member States to provide and improve effective enforcement.

In sum, considering the common theme described in this chapter, there has been convergence between the jurisdictions on certain aspects of enforcement that are important for effective enforcement. Therefore, spontaneous horizontal harmonisation between the Member States on certain aspects of effective enforcement is an option. The EU can aid the Member States by providing the parameters to effective enforcement that are formed by the institutional and instrumental requirements of tailored enforcement as introduced in this research. The similarities found in the approach of the three jurisdictions that have been the subject of this research give reason for the European legislator to listen to the Member States. With the model formulated in this research and findings of the application of the model, the EU institutions and the Member States can take the next step towards professionalising the public enforcement of environmental law and unlocking the potential of effective enforcement in the Member States. The Member States can serve therein as a mirror to Europe.

Samenvatting

Hierna wordt een aantal punten uit het onderzoek kort samengevat. Deze samenvatting geeft het onderzoek niet volledig weer, maar is een uiterst gecomprimeerde versie van de hiervoor opgenomen Engelstalige tekst van het onderzoek.

1. Situatieschets en hoofdvraag

Handhaving is van zeer groot belang om de integriteit van de wet te handhaven en de waarden te waarborgen die de wet beoogt te beschermen. Het Europees Hof van Justitie (EHvJ) heeft bepaald dat de handhaving van Europees recht door de lidstaten effectief, afschrikkend, evenredig en non-discriminatoir moet zijn. Het is evenwel (nog) onduidelijk wat deze elementen betekenen voor de handhavingsorganisatie en de sancties van de lidstaten. De Europese wetgever heeft deze effectieve handhavingsformule van het EHvJ geconcretiseerd, voornamelijk in richtlijnen ten aanzien van het omgevingsrecht, zoals de richtlijn inzake de bescherming van het milieu door middel van het strafrecht. Deze richtlijn schreef als eerste een specifiek type handhaving voor – strafrechtelijke handhaving – voor specifieke milieuovertredingen. Met deze richtlijn beoogde de EU de naleving in de lidstaten te versterken omdat zij bestaande sanctiesystemen niet toereikend achtte.
Zowel Engeland, Duitsland en Nederland erkenden reeds tekortkomingen in de strafrechtelijke handhaving van het omgevingsrecht in hun landen. Reeds voordat de EU zich richtte op het voorschrijven van strafrechtelijke handhaving, onderzochten deze landen al de mogelijkheden om hun publiekrechtelijke handhavingsorganisatie en sancties – hierna ook 'de handhavingsarchitectuur' – effectiever te maken. In de drie landen richtte de focus bij het verbeteren van de handhaving van het omgevingsrecht zich met name op het versterken van de bestuursrechtelijke handhavingsorganisatie en sancties.
De verplichtingen die voortvloeien uit het Europese recht voor de lidstaten en de aandacht op het niveau van de EU en in Engeland, Duitsland en Nederland voor effectieve handhaving leiden tot de hoofdvraag van dit onderzoek:

> **Wat zijn, in vergelijking, de *good practices* voor de handhavingsorganisatie en sancties in Engeland, Duitsland en Nederland voor een effectieve handhaving van het omgevingsrecht?**

De beantwoording van de hoofdvraag in dit onderzoek bestaat uit de volgende onderdelen.
In hoofdstuk 2 is een model geformuleerd voor effectieve 'handhaving op maat' op basis van Europese en nationale bronnen.
In hoofdstuk 3 tot en met 11 zijn de bestuursrechtelijke en strafrechtelijke organisatie en sancties voor de handhaving van het omgevingsrecht in Engeland, Duitsland en Nederland geanalyseerd en is getoetst hoe de publiekrechtelijke handhavingsarchitectuur in de drie landen voldoet aan het toetsingskader/model voor effectieve 'handhaving op maat' dat is geformuleerd in hoofdstuk 2. Daartoe is de handhavingsarchitectuur in elk van de landen beschreven in drie hoofdstukken. Ten eerste is beschreven wat de algemene kenmerken zijn van het rechtssysteem voor de handhaving van het omgevingsrecht (hoofdstuk 3, 6 en 9). Ten tweede is de handhavingsorganisatie beschreven en geëvalueerd in het licht van het model voor effectieve 'handhaving op maat' (hoofdstuk 4, 7 en 10). Ten derde zijn de sancties voor de bestuursrechtelijke en strafrechtelijke handhaving van het omgevingsrecht in kaart gebracht en geëvalueerd in het licht van het model voor effectieve 'handhaving op maat' (hoofdstuk 5, 8 en 11).
In hoofdstuk 12 zijn de handhavingsorganisatie en de sancties in de drie landen met elkaar vergeleken. Aan de hand van deze vergelijking zijn de *good practices* in de drie landen en aanbevelingen aan de drie landen in het licht van effectieve 'handhaving op maat' geformuleerd. Vervolgens zijn de verschillen tussen de bevindingen in de drie landen en de ontwikkelingen op het niveau van de Europese Unie in het kader van effectieve handhaving in kaart gebracht. Op basis hiervan is beschreven op welke wijzen de EU en de lidstaten het in hoofdstuk 2 ontwikkelde model van effectieve 'handhaving op maat' door de EU en de lidstaten kunnen gebruiken met het oog op de verbetering van hun handhavingsarchitectuur. Ten slotte zijn aanbevelingen gedaan aan de Europese Unie voor de (mogelijke) verdere ontwikkeling van (eisen voor de) effectieve handhaving (zie hoofdstuk 12).

Hierna worden achtereenvolgens de begrippen handhaving en omgevingsrecht, het model voor effectieve handhaving, de algemene bevindingen op grond van de evaluatie en de vergelijking van de lidstaten en de rol van de Europese Unie en de lidstaten in het kader van de effectieve handhaving van het omgevingsrecht in zeer gecomprimeerde vorm besproken.

2. De begrippen handhaving en omgevingsrecht

Dit onderzoek richt zich op de publiekrechtelijke handhaving. In dit onderzoek wordt publiekrechtelijke handhaving gezien als de bestuursrechtelijke of strafrechtelijke actie of reactie van de overheid met betrekking tot niet-naleving van de wet door individuen of rechtspersonen. De reikwijdte van de handhaving

is de formele handhaving, dat wil zeggen de actie of reactie van de overheid die bestaat uit administratieve inspectie, strafrechtelijk onderzoek en het opleggen van administratieve en strafrechtelijke sancties, zoals vastgelegd in de wet. De focus in dit onderzoek ligt op de organisatie van alle publiekrechtelijke handhavingsfasen volgens deze definitie, d.w.z. de organisatie van inspectie en onderzoek en het opleggen van bestuursrechtelijke en strafrechtelijke sancties, en op de sancties zelf.
Het omgevingsrecht wordt ten behoeve van dit onderzoek gedefinieerd als de wettelijke regels die erop zijn gericht het leven, met inbegrip van mensenlevens, en de leefomgeving te beschermen tegen legale en illegale menselijke activiteiten die er een negatieve invloed op kunnen hebben of daarvoor een bron van gevaar zouden kunnen zijn.

3. Toetsingskader/model voor effectieve handhaving

Om eisen voor een effectieve handhaving van het omgevingsrecht te specificeren is in hoofdstuk 2 van dit onderzoek een model geformuleerd voor 'handhaving op maat'. Handhaving op maat betekent dat de handhavingsorganisatie lik-op-stuk handhaving kan bieden en dat sancties op maat kunnen worden gemaakt. Voor dit doel vereist handhaving op maat de inbedding van handhaving in een doelmatige organisatie (institutionele eisen), die het mogelijk maakt om ten aanzien van een specifieke (potentiële) overtreding sancties te kiezen die passen bij de kenmerken daarvan (instrumentele eisen). Het model voor effectieve handhaving op maat kan handhavingsinstanties helpen bij de keuze ten aanzien van een specifieke overtreding voor het type handhaving, de meest geschikte handhavingsorganisatie en effectieve sancties.
In dit onderzoek zijn de institutionele eisen en instrumentele eisen geformuleerd voor de publiekrechtelijke organisatie en sancties met het oog op een effectieve handhaving van het omgevingsrecht. Deze eisen zijn als volgt.

(a) Institutionele eisen: eisen aan de handhavingsorganisatie

Effectieve handhaving veronderstelt een effectieve handhavingsorganisatie. In het model voor effectieve handhaving op maat heb ik daarvoor eisen ontwikkeld. Deze eisen zijn als volgt:

- Een zekere onafhankelijkheid bij het nemen van beslissingen door de handhavingsorganisatie in de vorm van:
  - scheiding tussen regelgeving en handhaving;
  - scheiding tussen inspectie/opsporing en sanctionering.
- Specialisatie van of binnen de organisatie in de vorm van:
  - mate van deskundigheid;
  - gepaste nabijheid tot een specifieke overtreding (niveau van de overheid).

• Coördinatie en samenwerking tussen handhavingsinstanties.

Om goed te voldoen aan deze eisen dienen bovengenoemde elementen structureel te worden ingebed in de handhavingsorganisatie.

(b) Instrumentele eisen: eisen aan de handhavingsinstrumenten (sancties)
Het is van belang dat beschikbare sancties passend zijn voor een specifieke overtreding van het omgevingsrecht. Daartoe dienen sancties te passen bij de typologie van de overtreding en bij de handhavingsdoelen die geschikt zijn voor de overtreding.

De typologie van de overtreding ziet op de kenmerken van de specifieke overtreding. Deze kenmerken kunnen bepalen welke sancties passend zijn. Tot deze kenmerken behoren (i) het type overtreding, (ii) het type omgevingsschade en (iii) het type dader.

Typologie van de overtreding
(i) het type overtreding
- vindt nog plaats of is voltooid
- terugkerend of eenmalig
- langdurig
- meerdere schendingen tegelijkertijd

(ii) het type omgevingsschade, inclusief het gevaar dat dergelijke schade zich voordoet
- afwezig of aanwezig
- herstelbaar of onherstelbaar
- klein, groot of progressief

(iii) het type dader
- onbekend of bekend
- rechtspersoon en/of individu
- notoire overtreder (recidive) of niet-reguliere dader.

In samenhang met de typologie kunnen één of meer van de volgende zeven handhavingsdoelen passend zijn voor de sanctionering van een specifieke overtreding van het omgevingsrecht.

Handhavingsdoelen
a. Voorkomen van een specifieke overtreding.
b. Beëindigen van niet-nalevend gedrag.
c. Herstellen van schade aan de omgeving als gevolg van een overtreding.
d. Voorkomen van herhaling en het bevorderen van toekomstige naleving.
e. Afromen van voordelen/winsten van een overtreding.
f. Financieel compenseren van de gevolgen van een overtreding.
g. Bestraffen van de overtreding.

Wanneer de typologie van de overtreding en de handhavingsdoelen door een handhavingsinstantie zijn bepaald, kan deze instantie een keuze maken voor op maat gemaakte effectieve sancties voor een specifieke overtreding.

4. Toepassing van het model voor een effectieve 'handhaving op maat'

Het model voor effectieve 'handhaving op maat' is in dit onderzoek toegepast door te evalueren hoe de handhavingsorganisatie en sancties in Engeland, Duitsland en Nederland de bovengenoemde institutionele en instrumentele eisen vervullen (zie hoofdstuk 12). Hieruit volgt of en in welke mate de handhavingsorganisatie en sancties voldoen aan deze eisen. Ook volgt hieruit op welke punten verbeteringen van de handhavingsorganisatie en sancties mogelijk zijn aan de hand van dat model.

De vergelijking tussen de drie landen levert specifieke *good practices* op die tevens (kunnen) dienen ter inspiratie voor de andere landen ter verbetering van hun handhavingsorganisatie en sancties. Deze *good practices* zien op elk van de institutionele en instrumentele eisen.
Ook zijn er algemene bevindingen gedaan over de handhaving op maat in de drie landen. Een aantal van de in hoofdstuk 12 gesignaleerde algemene bevindingen zijn hierna verkort weergegeven.[2249]

- Uit het onderzoek volgt dat effectieve handhaving van het omgevingsrecht in elk van de drie onderzochte landen in belangrijk mate kan worden nagestreefd door de publiekrechtelijke handhavingsorganisatie en de beschikbare sancties. In alle drie de landen is er echter ruimte voor verbetering.
- Er zijn hiaten in de handhavingsorganisatie en sancties die invloed hebben op de effectieve handhaving in de drie landen. In het algemeen zijn meer structurele garanties nodig voor een effectieve handhavingsorganisatie in de drie landen, zoals het inbedden van expertise binnen de handhavingsorganisatie in Duitsland en Engeland. Wat betreft de sancties kunnen de beschikbare gereedschapskisten in de drie landen, onder andere, worden versterkt met breder inzetbare sancties die (relatief) tijdig omgevingsschade kunnen herstellen.
- De effectiviteit van de handhaving in de drie landen is sterk wanneer handhaving als integraal wordt beschouwd, oftewel als één proces. In Nederland gebeurt dit in de vorm van de landelijke handhavingsstrategie, die zowel bestuursrechtelijke als strafrechtelijke handhaving omvat; in Engeland en Duitsland wordt de handhaving als één proces gezien voor zover verschillende soorten handhaving in handen zijn van dezelfde instanties, hetgeen vaak voorkomt.

2249 Voor specifieke good practices en aanbevelingen zie paragraaf 12.3 van hoofdstuk 12.

- Er is potentieel voor effectieve handhaving in de drie landen door de beschikbare typen publiekrechtelijke handhaving te combineren, dat wil zeggen door de handhaving als complementair te beschouwen en sancties van verschillende typen handhaving te combineren. Een belangrijk aandachtspunt bij het combineren op deze wijze is dat coördinatie en samenwerking tussen de verschillende betrokken handhavingsinstanties wordt gewaarborgd. In dat licht dient de samenwerking tussen de bestuursrechtelijke en strafrechtelijke handhavingsinstanties in de drie landen te worden verbeterd, onder meer door de samenwerking tussen deze instanties als een verplichting te zien.

5. De ontwikkeling van effectieve handhaving in de drie landen en de Europese Unie

Uit dit onderzoek volgt dat de ontwikkelingen op EU-niveau enerzijds, en de ontwikkelingen in Engeland, Duitsland en Nederland, anderzijds niet parallel lopen aan elkaar. In feite is er een zekere kloof tussen de ontwikkelingen op EU-niveau en de ontwikkelingen in deze lidstaten.
In de eerste plaats is deze kloof zichtbaar in de ontwikkelingen die de drie landen gemeenschappelijk hebben en de bevindingen die volgen uit de toepassing van het model voor op maat gemaakte effectieve handhaving in de drie landen. De gemeenschappelijke ontwikkeling is dat het onderscheid tussen bestuursrechtelijke handhaving en strafrechtelijke handhaving in de drie landen steeds minder duidelijk wordt. Dit vervagend onderscheid sterkt zich uit tot zowel de handhavingsorganisatie - waar ook niet-traditionele strafrechtelijke instanties bevoegd zijn geworden om sancties op te leggen die uit het strafrecht komen - als de sancties voor overtredingen van het omgevingsrecht - waar bestuursorganen bestraffende sancties kunnen opleggen en strafrechtelijke handhavingsinstanties herstellende sancties kunnen opleggen.
Deze ontwikkelingen lopen niet parallel aan de meest recente ontwikkeling in EU-regelgeving met het oog op de effectieve handhaving van het omgevingsrecht, namelijk de focus op strafrechtelijke handhaving. Dit betekent dat de ontwikkelingen in de drie onderzochte lidstaten en de ontwikkelingen op het niveau van de EU instellingen uiteenlopen en dat de EU op zijn minst achter loopt bij de ontwikkelingen in de drie landen wat effectieve handhaving betreft.

Uit dit onderzoek blijkt dat de operationalisering van het concept van effectieve handhaving in een model voor effectieve 'handhaving op maat' en de toepassing ervan in de drie lidstaten leiden tot *good practices* en aanbevelingen die de EU-instellingen en de lidstaten in staat stellen de volgende stap te zetten in de ontwikkeling van de effectieve handhaving van het omgevingsrecht in de EU. Op

deze manier kan de handhaving worden geprofessionaliseerd met het oog op de effectieve(re) handhaving van het omgevingsrecht door en in de lidstaten.
De EU-instellingen kunnen in dit opzicht als katalysator fungeren en kunnen hierover advies of handvatten geven aan alle lidstaten, en in het bijzonder aan die lidstaten die op het terrein van de effectieve handhaving nog de nodige stappen hebben te zetten. Ook kunnen zij de handhaving in de lidstaten toetsen en de lidstaten vergelijken aan de hand van het model, overeenkomstig de wijze waarop het model is toegepast in dit onderzoek. De uitkomsten van deze toetsing en de vergelijking daarvan kunnen de EU-instellingen een goed beeld geven van de effectiviteit van de handhaving in de lidstaten en de punten waarop verbeteringen mogelijk zijn, ook waar de lidstaten al een zekere effectieve handhaving bieden.
Ook kunnen de lidstaten zelf de effectiviteit van hun handhaving professionaliseren door het model te gebruiken voor op maat gemaakte effectieve handhaving in concrete gevallen. Op die manier kunnen spontane harmonisatie en convergentie - die nu al plaats vindt - een breder bereik binnen de lidstaten krijgen en een nog sterker signaal aan de EU geven (vanuit de lidstaten) over het concept van effectieve handhaving op maat en de toepassing ervan dat de EU vervolgens kan gebruiken voor het verder ontwikkelen van het concept effectieve handhaving op EU-niveau.
In elk geval moeten de EU-instellingen een evenwicht zoeken tussen het eisen van garanties dat de lidstaten effectieve handhaving beschikbaar hebben voor de handhaving van het omgevingsrecht en het bieden van vrijheid aan de lidstaten om hun handhaving op een manier te regelen die het beste past bij de omstandigheden die inherent zijn aan hun nationale wetgeving, tradities en de ontwikkelingen die reeds daarbinnen plaatsvinden. Daarbij dient de Europese wetgever geen verplichtingen op te leggen aan de lidstaten om een specifiek handhavingssysteem toe te passen of daarop eenzijdig te focussen, omdat dit juist een beperking lijkt te zijn op de mogelijkheden van de lidstaten om effectieve handhaving te bieden en te verbeteren.

Met het model voor een effectieve handhaving op maat en de vergelijking en bevindingen die voortvloeien uit de toepassing van het model in dit onderzoek, kunnen de EU-instellingen en de lidstaten een volgende stap zetten bij de professionalisering van de publiekrechtelijke handhaving van het omgevingsrecht. Daarmee kunnen zij het potentieel ontsluiten van effectieve handhaving door de lidstaten. De lidstaten kunnen daarin dienen als een spiegel voor Europa.

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"Het kan de berg niet schelen langs welke weg je hem beklimt" (Japans gezegde)

Het schrijven van een proefschrift kan worden vergeleken met de beklimming van een hoge, grillig gevormde berg. Om naar de top te komen moet je over hoge heuvels, door dalen en langs vertakkingen en zijpaden. De bewegwijzering is af en toe onduidelijk, je komt af en toe een afgrond tegen, je moet over diepe kloven en langs steile stukken omhoog zonder plek om je te zekeren. De top van de berg doemt af en toe op uit de mist.
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Curriculum vitae

Oda Frederike Essens was born in 1979 in Groningen, the Netherlands. She graduated from high school (gymnasium) in 1997, having received part of her high school education in Toronto, Canada from 1992 to 1994. In 1997, Oda started studying law at Utrecht University. At the same time, Oda also took up history studies at the same university.

In 2002, Oda received her Dutch law degree from Utrecht University, with two specialisations: Administrative and Constitutional Law, and European law. Oda also received a propadeuse degree in History of International Relations.

After completing her studies, Oda started working as a researcher at the Centre for Environmental law and policy/NILOS of Utrecht University, with a focus on the enforcement of environmental law. The research was funded by a grant from the NWO/ASPASIA funding programme. In the context of this research she spent several months as a visiting researcher at Cambridge University in England and also at the University of Muenster in Germany for comparative research into the enforcement of environmental law.

From 2007 to 2011, Oda worked as university lecturer/researcher in economic public law (including competition law) at Utrecht University. While at Utrecht University, Oda taught several courses on enforcement law, comparative constitutional law, administrative law, European law and competition law. She has (co)authored a number of articles published in various (inter)national books and academic journals on the enforcement of environmental law and on judicial reasoning in administrative law and competition law; she also edited several books on economic public law.

In 2011, Oda switched from academia to practice and started working at the Dutch Authority for Consumers and Markets (ACM, formerly the Dutch Competition Authority). In 2013, she received a diploma in European Competition Law from King's College London. As senior legal counsel at ACM, Oda has worked on competition law cases and, currently, works on (appeals) cases involving the regulation and enforcement with regard to the post, telecoms, transport and energy sectors in the Netherlands.