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Study on measures other than criminal ones in cases where environmental Community law has not been respected in the EU Member States

NATIONAL REPORT AUSTRIA

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SOCIÉTÉ D'AVOCATS

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Abbreviations and Acronyms

ABGB: Allgemeines bürgerliches Gesetzbuch, *Code on General Civil Law*
Abs: Absatz, *subsection*
Art: Artikel, *article*
ArtHG: Artenhandelsgesetz, *Law on the Control of Trade in Species of Wild Flora and Fauna*
AVG: Allgemeines Verwaltungsverfahrensgesetz, *Code on General Administrative Procedure*
AWG 2002: Abfallwirtschaftsgesetz, *Code on Sustainable Waste Management*
BGBl: Bundesgesetzblatt, *Federal Law Gazette*
B-VG: Bundes-Verfassungsgesetz, *Federal-Constitutional Code*
ChemG 1996: Chemikaliengesetz 1996, *Federal law on the protection of humans and the environment from chemicals*
CKW-Anlagen-VO: CKW-Anlagen-Verordnung, *Ordinance on the limitation of Emissions of Chlorinated Organic Solutions from Chlorinated Hydrocarbon Installations*
ECvHR: *European Convention for the Protection of Human Rights and Fundamental Freedoms*
EO: Exekutionsordnung, *Code on Execution and Protection*
EvBl: Evidenzblatt der Rechtsmittelentscheidungen, *decisions of courts of appeal published in* ÖJZ (a law journal)
FAV: Feuerungsanlagenverordnung, *Ordinance for Combustion Installations*
GewO 1994: Gewerbeordnung, *Code on Trade and Industry*
GTG: Gentechnikgesetz, *Law on genetical engineering*
IUV: Industrieunfallverordnung, *Ordinance concerning further provisions on the Control of Major-Accident Hazards in industries etc*
JBl: Juristische Blätter (a law journal)
JGS: Justizgesetzsammlung, *Collection of Laws (*18/19th century*)*
KärntAWO: Kärtner Abfallwirtschaftsordnung, *Code on Sustainable Waste Management of the State of Kärnten*
KärntFischereiG: Kärtner Fischereigesetz, *Code on Fishing of the State of Kärnten*
LGBl: Landesgesetzblatt, *State Law Gazette*
LCP : Large Combustion Plants
OGH: Oberster Gerichtshof, *Supreme Court*
ÖJZ: Österreichische Juristenzeitung (a law journal)
lit: Buchstabe, *letter*
RdU: Recht der Umwelt (a law journal)
RGBl: Reichsgesetzblatt, *State Law Gazette*
StGB: Strafgesetzbuch, *Criminal Code*
StPO: Strafprozessordnung, *Criminal Procedure Code*
TirNatSchtzG: Tiroler Naturschutzgesetz, *Code on the Protection of the Environment of the State of Tyrol*
UVP-G 2000: Umweltverträglichkeitsprüfungsgesetz 2000, *Federal Code on Checking the Compliance with the Environment*
VAV: VOC-Anlagen-Verordnung, *Ordinance to Transpose Council Directive 1999/23/EC on the Limitation of Emissions with Varnishing Installations*
VfGH: Verfassungsgerichtshof, *Constitutional Court*
VStG: Verwaltungsstrafgesetz, *Code on Administrative Criminal Law*
VVG 1991: Verwaltungsvollstreckungsgesetz, *Law on the Administrative Execution*
WienerNatSchtzG: Wiener Naturschutzgesetz, *Code on the Protection of the Environment of the State of Vienna*
VfSlg: Erkenntnisse und Beschlüsse des Verfassungsgerichtshofs, Amtliche Sammlung
VwSlgNF: Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofs, Amtliche Sammlung
WRG 1959: Wasserrechtsgesetz, *Law on Water*
Z: Ziffer, *number*

Guide to the National Report

This National Report is one of the deliverables under the European Commission project *"Measures other than criminal ones in cases where environmental Community law has not been respected in the EU Member States"*. The contract was awarded to Milieu Ltd on the basis of the proposal submitted jointly by Milieu and Huglo Lepage & Associés Conseil (hereinafter Huglo Lepage) in December 2003.

The aim of the project is to provide the Commission with legal information on measures other than criminal ones, with a particular focus on administrative enforcement measures, in cases where environmental Community law has not been respected in the Member States. In addition, the project looks closely to 11 Directives and 3 Regulations dealing with areas of environmental protection where sanctions appear to be particularly appropriate, because of inherent economic incentives for violations and/or because of histories of repeated infringements. They include as follows:

- Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils
- Council Directive 75/442/EEC of 15 July 1975 on waste
- Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community
- Council Directive 79/409/EEC of 2 April 1979 on the conservation on wild birds
- Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges
- Council Directive 88/609/EEC of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants
- Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms
- Council Directive 91/689/EEC of 12 December 1991 on hazardous waste
- Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora
- Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances
- Council Directive 99/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations
- Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out the European Community (Basel Regulation)
- Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (CITES Regulation)
- Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer (ODS Regulation)

This National Report starts with an overview of the different systems in Austria to enforce environmental law, as well as the relationship among them via the analysis of a practical case study. Then it focuses on the administrative and the so-called administrative criminal law or quasi-criminal regimes, expanding on the description of the situations where administrative enforcement measures may apply, a classification and description of these administrative enforcement measures, as well as a classification of these measures by sector, and an overall picture of the administrative and judicial framework and procedure. Finally, it provides a reflection on the effectiveness of the existing administrative and quasi-criminal enforcement measures when applied in practice.

In addition, the National Report contains two Annexes. Annex I includes the completed Tables of Concordance (ToCs) for each targeted instrument ordered by sector (waste, nature protection,

chemicals and biotechnology and industrial pollution, including water). In order to better understand the contents of the ToCs the following clarifications are to be taken into account:

- Each ToC is preceded by an introduction that provides a summary of the content of the table followed by a list of the EU obligations linked to their respective administrative or/and quasi-criminal sanction in national legislation.

- In the case of LCP and VOCs Directives, as well as for ODS Regulation the Austrian system a rather a general provision which states that any infringement of the targeted instrument will be considered an offence. For this type of provisions, the term "catch-all" was used. For national legislation setting administrative measures via "catch-all" provisions, no links between specific national measures and the EC obligation existed, and therefore, as potentially any infringement of the provisions transposing the EC legal act could be an administrative offence, the table was simplified by only completing the first row. In these cases, the competent authority handling the case has discretionary power and therefore would be essential to decide whether a conduct is an offence or not. As the aim of the study was to identify the specific non-criminal measures for violations of particular provisions of the EC legal act, this solution seemed to be the most appropriate in order to avoid the impression that specific provisions existed for a violation of a particular EC obligation, when in reality that was not the case.

- In those cases when transposing legislation was enforced only through criminal law, the entire body of the ToC was deleted, as no specific non-criminal measures were available in that country for the targeted instrument.

- In the case of the EC Regulations (Basel Regulation, CITES Regulation and ODS Regulation) it was found that for many countries only a few provisions were enforced by administrative measures. Therefore, and in view of the length of the ToCs, it was decided to simplify these ToCs leaving only those rows where particular EC provisions matched specific administrative enforcement measures.

- In the case of ToCs that were neither simplified nor deleted, when the specific provision of the EC instrument did not match a specific administrative enforcement measure under national law, the expression *"no specific enforcement measure in national law"* was added. This means that there is no specific administrative enforcement measure available for that EC obligation in national law, *e.g.*, because the enforcement measure applicable for that specific provision was criminal and therefore outside the scope of this study.

- When the provisions listed in the Directives/Regulations included an obligation addressed to EU bodies or institutions or was a discretionary measure the row was shaded. Nevertheless, the national experts were requested to fill in the shaded row where specific administrative enforcement measures were found.

Finally, Annex II contains the list of the relevant national transposing/enforcing legislation with hyper links allowing electronic access to the texts, whenever publicly available in electronic form.

Introduction

The Austrian legal system divides competences for environmental protection,[1] between the "Bundesstaat" (*federation*) and the nine autonomous "Länder" (*states*).

The Federation

The competence of the *federation* for legislation and enforcement in the field of environmental protection is based on Art 10 of the "Bundes-Verfassungsgesetz"[2] (B-VG, *Federal-Constitutional Code*). This Article provides that the *federation* is competent in various matters concerning the protection of the environment, such as:

- Foreign affairs: matters relating to state treaties, including environmental treaties such as the *Convention on the Transboundary Effects of Industrial Accidents*[3] *concerning the SevesoII-Directive* (note: the *states* can conclude treaties within their competences with other (Austrian) *states*, as has been done in respect of cross-border national parks);

- Matters of civil law: similar to that relating to the law on neighbour relations and the law of damages and liability, draft laws for a special environmental law of strict liability were drafted by the party "Die Grünen" and presented to the Houses of Parliament. However, they have not been passed yet;

- Matters of criminal law: the competence to enact environmental criminal law is based on the competence to legislate on matters of criminal law in general; the states can establish criminal law within their competences to put in place more severe sanctions (fines or imprisonment). This has only been done in some instances, such as in the *state of Vienna* regarding the protection of trees[4];

- Affairs concerning trade and industry: Within this area, important environmental rules have been established in respect of all types of business (ranging from industrial plants, little restaurants to chemical factories). In addition, trading (with animals), handicraft and industrial activities (disposal of waste) must be licensed according to the "Gewerbeordnung"[5] (GewO 1994, *Code on Trade and Industry*), which provides for many administrative measures, such as revocation of permits etc;

- Forestry: in respect of the cultivation and protection of forests, including all measures relating to soil-protection, including the disposal of hidden scrap;

- Water law: Here the *federation* has extensive competence to regulate water resource management, including quality and quantity (water supply, drinking water and water for industrial purposes as well), cleaning of water and protection of groundwater;

- Matters of public health: relating to issues in context of danger to human health;

[1] Much information presented here is taken directly from *Weber, Karl*, Public Environmental Law in Austria, in *Seerden, R/Heldeweg, M (eds)*, Comparative Environmental Law in Europe, An Introduction to Public Environmental Law in the EU Member States, Antwerp 1996, 3-31.
[2] Bundes-Verfassungsgesetz (B-VG), BGBl 1930/1 (WV).
[3] BGBl III 2000/119.
[4] LGBl 1974/27, § 13 provides for imprisonment up to 6 months or fine up to 360 day rates for removing more than 20 trees without permit of the authority.
[5] BGBl 1994/194.

- Controlling air pollution: the *federation* has competence over regulation concerning private heating systems, smog-alarm powers, and to take whatever measures which are necessary to reduce air pollution when it reaches certain critical values;

- Waste management: in respect of dangerous waste, the *federation* has extensive competence. As regards non-dangerous waste, the *federation* may issue laws insofar as there is a public necessity.

The nine autonomous States

The competences of the nine autonomous states are based on the general clause provided by Art 15 Abs 1 B-VG. They hold residual power relating to the protection of environment, which includes the *conservation of nature* (landscape protection, protection of plants and animals), *regional planning* and *building law*.

Austrian environmental law is, therefore, not a codified branch of law. It is based on various federal and state statutes and ordinances concerning international, criminal, civil and administrative law, including administrative criminal law (i.e. quasi-criminal law). Because the competences in the *Federal-Constitutional Code* are formulated as '*matters*', environmental protection is a '*cross-section matter*' between the *federation* and the *states*, which makes the protection of environment a legal problem in the context of the allocation of competences.

Statutes, ordinances based on statutes, rulings, acts of immediate official command, or coercive powers against a certain person, are the sources of public law. One of the most important principles of the Austrian Constitution is the *principle of strict legality* which states as follows: '*The entire public administration may be exercised only on the basis of the laws*' (Art 18 B-VG). The existence of a formally enacted law is *conditio sine qua non* for any authoritative act. This is also one of the problems in the field of the protection of the environment; the authorities are unable to react adequately to new situations if there is no relevant law and they have no discretionary powers in accordance with this principle.

The competence for legislation and enforcement in a given field includes the competence to both legislate and enforce criminal law ("Adhäsionskompetenz"). The *federation* and the nine autonomous states have produced, within their environmental administrative statutes, a number of rules on "Verwaltungsstrafrecht" (*administrative criminal law, quasi-criminal law*). Furthermore, the *federation* provides for environmental criminal law in Chapter Seven of the "Strafgesetzbuch"[6] (StGB, *Criminal Code*).

The below lists the relevant Federal and State law (procedural law is federal law only, but applies when enforcing state law as well):

- Federal and state administrative statutes and ordinances on the protection of the environment (including special enforcement measures concerning only singular statutes and ordinances) and federal and state administrative criminal law (quasi-criminal law) to enforce environmental law. Offences and sanctions are set out in the same administrative statutes or ordinances;

- Federal criminal law (StGB - *Criminal Code*);

- Federal civil law (the main relevant provisions being set out in the "Allgemeines bürgerliches Gesetzbuch"[7] (ABGB - *Code on General Civil Law*);

[6] BGBl 1974/60.
[7] JGS 1811/946.

The following Federal procedural law is applicable in federal and state administrative and administrative criminal cases, as well and in criminal cases:

- "Allgemeines Verwaltungsverfahrensgesetz 1991"[8] (AVG - *Code on General Administrative Procedure*), which sets out provisions relating to procedure and general (non quasi-criminal) measures to (re)establish lawful situations environmental cases;

- "Verwaltungsstrafgesetz 1991"[9] (VStG - *Code on Administrative Criminal Law*), which lays down the provisions concerning the general rules of administrative criminal law (quasi-criminal law), including general rules on sanctions and the rules of administrative criminal procedure;

- Strafprozessordnung[10] (StPO – *Criminal Procedure Code*), containing provisions regarding the procedure in criminal cases.

1. Type of enforcement systems and relationship among different types of environmental liability

Environmental law is enforced with a mix of different legal measures which complement each other.

Environmental protection by administration

- *Measures of planning* (country planning by the communes, planning the conservation of nature as of protected territories, forestry planning, water supply planning, traffic planning, no planning concerning industrial pollution) concerning, for example, the protection of habitats or the control of major-accident hazards involving dangerous substances (in certain zones certain measures are prohibited);
- *Measures of administrative policing* by way of orders, prohibitions and authorizations, which are issued by the authorities mainly to prevent dangers or to control dangerous behaviour. However, these measures of administrative policing can be '*reactions*' as well, if the offender is issued an order of restitution with respect to a situation, which, for example, does not require the offender's intentional or negligent behaviour (as in civil law), but only an infringement of the law;
- *Taxation* (on electric power, gas, on exploitation of natural resources, such as relating to skiing slopes) of certain behaviour is a third measure. If the tax is high enough, this is a rather effective measure to steer human behaviour.

Besides these measures, environmental law is enforced by administrative criminal law, as well, which is within an old Austrian tradition but not common in other European countries. It imposes mainly fines as sanction for infringements of administrative environmental law and in respect of the refusal to obey administrative orders, such as orders to re-establish lawful situations. Administrative criminal law on the one hand, has the same goals as criminal law, namely to prevent breaches of environmental law by building up legal consciousness and fear in (potential) offenders; on the other hand, it aims at the enforcement of administrative measures.

The main differences between administrative criminal law and criminal law are as follows:

[8] AVG BGBl 1991/51.
[9] VStG BGBl 1991/52.
[10] BGBl 1975/631.

Fines (up to approximately 37,000 Euro) are not as high as in criminal law (up to 117,720 Euro) and imprisonment is limited to 6 weeks (up to 3 years in environmental criminal cases). On the other side, fines and imprisonment cannot be (partially or fully) suspended in administrative criminal law and, other than in criminal law, such sanctions must be cumulated with respect to each single act or omission.

In administrative criminal law negligence is sufficient always, if intent is not demanded in particular by special law. In criminal law it is just the other way: Intent is demanded always, if negligence is not declared sufficient in particular as it is always in environmental criminal law. And in administrative criminal law the offender must substantiate to the authority (no full proof required) that he did not act or omit intentionally or negligently, if not the endangering or injuring of somebody or something, but the simple non-compliance with administrative law is declared punishable by law. Otherwise he is regarded guilty[11]. In criminal law, full proof of guilt is always required.

In administrative criminal law, only natural persons, but not legal entities are liable. In criminal law, it is very likely that corporations will be liable from the beginning of 2005. The representatives of legal entities are liable, but the natural persons can and they must, if the competent authority[12] or a statute[13] so requires, in order securing criminal liability, engage another natural person to be responsible for observing administrative law ("verantwortlicher Beauftragter", *responsible representative*). The legal entity is only liable for a pecuniary fine imposed upon the (responsible) representative[14]. Some statutes also provide for liability for *culpa in eligendo or custodiendo*[15] *- for choosing unable staff or insufficient supervision of the staff.*

Unlike in criminal law, administrative criminal sanctions are not registered in a record. This is one of the reasons why administrative criminal law is not regarded as defamatory as criminal law.

If an infringement of environmental law is punishable under the provisions of administrative criminal law and criminal law, then the more severe criminal law applies first according to many statutes and ordinances and double punishment is prohibited in accordance with Art 4 Protocol Nr. 7 European Convention of Human Rights and Fundamental Freedoms (ECvHR). If the authority realises that the facts constitute a non-administrative crime, then it must not start the administrative criminal procedure or must stop it, and must report the facts immediately to the public prosecutor, who will then commence a criminal procedure at the criminal court. If the authority would punish the offender in such a case, punishment by court for the same facts would be excluded, which happens in rare cases.

Environmental protection by Criminal Law

Austrian law provides for the following crimes against the environment**:**

- *Intentional impairment of the environment* (§ 180 StGB): imprisonment up to 3 years or a fine up to 360 day rates – and for *Negligent impairment of the environment* (§ 181 StGB): imprisonment up to 1 year or a fine up to 360 day rates;

- *Intentionally endangering the environment by treatment of and clearing away waste* (§ 181b StGB): imprisonment up to 2 years or a fine up to 360 day rates - and for *Negligently*

[11] § 5 Abs 1 VStG.
[12] § 9 Abs 1 – 6 VStG.
[13] § 26 AWG 2002.
[14] § 9 Abs 7 VStG.
[15] § 137 Abs 5 WRG 1959, § 370 Abs 4 GewO 1994.

endangering the environment by treatment of waste (§ 181c StGB): imprisonment up to 6 months or pecuniary fine up to 360 day rates;

- *Intentionally endangering of the environment by the operation of installations* (§ 181d StGB): imprisonment up to 2 years or a fine up to 360 day rates;

- *Other (intentionally) endangering of flora and fauna* (§ 182 StGB): imprisonment up to 2 years or fine up to 360 day rates; and *Negligently endangering flora and fauna* (§ 183 StGB): imprisonment up to 6 months or a fine up to 360 day rates.

- *Intentional transfer, buying, selling, exhibiting, stocking or other use of species contrary to Regulation (EC) No 338/97* (§ 8 ArtHG[16], *Law on the Control of Trade in Species of Wild Flora and Fauna*): imprisonment up to 2 years or fine up to 360 day rates.

Intentional and negligent impairment of the environment (§§ 180, 181 StGB) requires, *inter alia*, that the pollution or impairment causes an abstract risk caused by a dangerous act to life or health of a large number of human beings (10 or more persons) ("potenzielles Gefährdungsdelikt"). If the life or health of a single person is endangered by pollution under '*special dangerous circumstances*' (i.e. where the risk to life or health is very high), then the act is punishable as "Gefährdung der körperlichen Sicherheit" (§ 89 StGB, *endangering of physical security*) resulting in imprisonment of up to 3 months or a fine up to 180 day rates ("konkretes Gefährdungsdelikt"). If a person is hurt or killed negligently, then the act is punishable as "Fahrlässige Körperverletzung" (§ 88 Abs 1 – 4 StGB, *negligent physical injury*) resulting in imprisonment of up to 2 years or fine up to 360 day rates; or as "Fahrlässige Tötung (unter besonders gefährlichen Verhältnissen)" (§§ 80, 81 StGB; *manslaughter through negligence (under especially dangerous circumstances*) resulting in imprisonment of up to 3 years.

There are no special criminal penalties in environmental law, just the ordinary penalties. All crimes against the environment are punishable by imprisonment for differing amounts of time up to 3 years (minimum imprisonment is one day).

Pecuniary fines in criminal law are calculated by a day-rate system ("Tagessatzsystem"). The minimum fine is 2 day rates[17] (which is the equivalent of one day of alternative penalty for imprisonment for non-payment[18], which can last to a maximum of 180 days in every case here). The maximum fine which may be imposed is a 360 day rate, which is provided for by all crimes against the environment. One single day rate ranges from 2 Euro up to 327 Euro[19]. This means that the fines which are imposed range between 4 Euros to 117,720 Euro. The single day rate is calculated as follows: The offender's net income per month is divided by 30 and such an amount is subtracted, which leaves the offender with income on the subsistence level of approximately 20 Euro a day.

In respect of *second* re-offences, the maximum fine, as well as the maximum prison sentence, can be exceeded by fifty percent[20]. This means that a court will, in the worst case, impose on an offender a fine of up to 176,580 Euro and a prison sentence up to 4.5 years. The penalty amount is determined by the guilt of the offender and by the extent to which he caused the negative effects. All fines and prison terms up to two years can be fully[21] or partially[22] suspended, and the offender can be put on probation,

[16] BGBl I 1998/33.
[17] § 19 Abs 1 StGB.
[18] § 19 Abs 3 StGB.
[19] § 19 Abs 2 StGB.
[20] § 39 Abs 1 StGB.
[21] § 43 StGB.
[22] §§ 43a, 44 StGB.

which is the most common outcome of an environmental criminal case. For example, in the year 2000 all three persons convicted for *Intentional impairment of the environment* were punished with fully suspended fines in the range of 727 to 817 Euro; whereas, ten out of the thirteen convicted persons for *negligent impairment of the environment* were punished with (fully or partially) suspended fines in the range of 1,817 to 3,634 Euro, and two of them received fully suspended prison sentences, and only one person was punished with an unsuspended fine.

In criminal law, forfeiture of objects, equipment and of products of a crime (*instrumenta et producta sceleris*) is a general rule (§ 26 StGB). § 8 ArtHG orders, in particular, forfeiture of species and equipment used. Compensation is obligatory if forfeiture is impossible (§ 10 ArtHG).

Austria still adheres to the principle *societas delinquere non potest*: only natural persons are liable. A draft bill for corporate liability in criminal law (not in administrative criminal law) has already passed the "Minsterrat" (*assembly of federal ministers*). It is very likely that *societas delinquere potest* will apply to corporations from the beginning of the year 2005.

Environmental protection by Civil Law

Austrian environmental law is mostly based on public law. However, civil law plays an important role in the field of liability and in context of the law relating to interests of neighbours. However, as is the case to some extent in administrative civil law, everyone can take action on the basis of civil law. This includes the *federation*, the *states*, and the *communes*, and means that State bodies can exercise public duties with instruments of civil law (*e.g.* grants for purification plants, measures for the disposal of scrap, public services and state companies).

- Civil liability: a natural person or a legal entity is civilly liable for injurious conduct, if an injury or damage was caused unlawfully. The liable party will then be subject to an order for restitution or, if this is impossible, for monetary compensation.[23] Most environmental administrative laws also provides for restitution. There is no need for the administrative authorities to seek assistance from the courts, as they themselves can issue an order to be served on the offender or other liable person. The obligation of restitution under administrative law is independent from the obligation under civil law and does not require intentional or negligent behaviour of the offender (as is the case under civil law).

  Only in criminal procedure (but not in administrative criminal procedure), certain persons (mostly victims) who claim compensation for damages may join the procedure (§ 47 StPO). If it does not require too much effort, the criminal court must also take into account evidence in order to decide on a case of civil liability, which derived from the crime (§ 366 StPO). In practice, most cases are referred to the civil courts as, even the simple cases, the judges of criminal courts are not willing to decide on civil law cases.

  Current law concerning civil liability (law of damages) is a rather ineffective measure to protect the environment because the plaintiff must prove the fault (negligence or intent) of the defendant (a plausible presumption of damage is not enough). Obtaining evidence in cases of pollution is difficult and expensive. Furthermore, complicated civil actions deter many injured persons from taking legal action. An action for civil liability must be filed at the civil courts.

  For many years there have been discussions about a special law on strict liability for environmental damage which goes beyond damage caused to natural persons and property. It also includes special titles for measures of restitution, rules concerning the reversal of the

[23] §§ 1323f ABGB.

burden of proof, obligations to provide information, actions by associations, duties to insure, and limits to liability.

- Government Liability: The *federation*, *states*, *districts*, *communes* and any other public law corporation and institutions are liable for any damage caused by persons acting in execution of the laws by illegal behaviour (Art 23 B-VG). According to the *Supreme Court*, failure to perform the duty of control creates liability. This means that an injured person can claim damages from the state, if supervision has been neglected by the authorities.

- Protection against emissions by neighbour: according to § 364 ABGB, an owner of land may forbid his neighbour to emit at a higher level than is locally customary. If the emission escapes from an approved industrial plant and if limits for emissions set by the authority (these limits can allow higher emissions than locally customary) are not exceeded, this action is not possible. Therefore, § 364 ABGB is restricted to cases in which no permit application was made or the permission was exceeded.

Summary

In case of breach of environmental law, administrative, administrative criminal and civil procedures are cumulated, with the exception that civil actions can be filed in a criminal procedure by a damaged victim of the crime. Usually, this person is referred to the civil courts. An administrative sanction, such as an order for the restitution towards a lawful situation; a civil sanction, such an order to compensate a damaged person; and an administrative criminal or a criminal sanction, such as a fine for having established the unlawful situation, can be cumulated as well. However, double punishment under administrative criminal law and under criminal law is prohibited.

2. Administrative enforcement measures

2.1. Introduction

Austria accepts principles, such as the polluter pays principle, the precautionary principle and the security principle[24]. But the Austrian legal system has no basic duties requiring beneficial behaviour towards the environment. Some statutes prescribe general duties to keep the environment clean and to treat it carefully, such as §§ 30, 30a, 30c "Wasserrechtsgesetz"[25] (WRG 1959 - *Law on Water*) concerning the aquatic environment. The authorities must obey these duties as well, but these provisions cannot be extended to formulate a general basic duty.

The most relevant statutes where administrative measures can be found, aside from WRG 1959, are the GewO 1994 (*Code on Trade and Industry*) and, concerning waste, the "Abfallwirtschaftsgesetz"[26] (AWG 2002 - *Code on Sustainable Waste Management*). GewO 1994 is applicable to all types of business, trading, handicraft and industrial activities, which can pose a danger to the environment. Another important source of administrative law is the AVG (*Code on General Administrative Procedure*), which not only lays down the provisions for procedure, but also for general measures to (re)establish lawful situations applying in environmental cases as well. Administrative enforcement measures are, therefore, not included in a single code.

The competent authorities to carry out the administrative jurisdiction are

[24] The state has the duty to take necessary measures to secure life and health of the inhabitants.
[25] BGBl 1959/215.
[26] BGBl I 2002/102.

- Federal Administration
- State Administration
- Administration of the Communes

The Federal Administration

The "Bundesregierung" which consists of the federal ministers (*federal government*) heads the central administration. The administration is centralized as follows: (a) *direct federal administration*, being the federal administration constituted of hierarchically organized authorities, each subordinate to a specific federal minister (concerning criminal law, tax law, customs etc); or (b) as is characteristic for environmental law as well, by way of *indirect federal administration*, under which the executive power of the *federation* is exercised by the "Landeshauptmann" (*Prime Minister of the State*) and the authorities subordinated to him. The *Prime Minister of the State* is bound by the instructions of the federal government.

The State Administration

The administration of the states is exercised by special authorities of the states or by the same authorities exercising the *indirect federal administration*, which are the "Amt der Landesregierung" (*office of the state government*) and "Bezirkshauptmannschaften" (*offices of the districts*). At the head of the state administration is the "Landesregierung" (*state government* consisting of the *state ministers*).

The Administration of the Communes

The "Gemeinden" (*communes*) have, to some extent, the right to self-government. Some powers are delegated to them by the *federation* or by the *state*, which they then exercise in compliance with the instructions of the *federation* or *state*. For cooperative solutions on an inter-communal level on specific issues, such as waste disposal, sewage disposal or drinking water supply, the *communes* can, and do, merge into "Gemeindeverbände" (*associations of communes*).

These competent authorities are vested with police powers to enforce any measure. If necessary, they may use the help of police. These authorities also carry out controls and impose the administrative sanctions.

Environmental protection by the administration is mainly done by way of "Verwaltungspolizei" (*administrative policing*) which describes the use of administrative measures which protect against dangers posed to humans and the environment, such as orders, prohibitions or authorizations. Such "Verwaltungspolizei" includes the following:

- *Permits*: All the key environmental laws provide that the competent authorities grant permits in respect of the construction or modification of industrial plants, which have an effect on human health or the environment. Failing such a permit, the construction or the operation of a plant is prohibited. Following the permit application, the competent authority will start the formal administrative procedure (according to the AVG and special rules laid down in the specific environmental laws), which provides the basis upon which permit applications are accepted or rejected. The system of permits operates according to the *cumulative system*, whereby various laws provide for different (environmental) permits and there is no rule to co-ordinate the different procedures. Therefore, only specific dangers are subject to the procedure. The system of permits is part of the police power. '*Police*' in Austria means all measures to prevent harms to anybody. Furthermore, this is the aim of a permit, which shall be issued only if the authority is convinced that the business will be run according to environmental law and that all precautionary measures are undertaken.

- *Subsequent prescription*: Periodical inspections of (old) industrial plants are mandatory according to environmental law. If such old plants do not comply with given (new) laws or if people are endangered by their operations, although they have observed the relevant regulations, the competent authority can subsequently enact additional regulations to make the plant secure or to ensure its compliance to new laws (§ 76 ff GewO 1994). For *res iudicata permitted* plants, this is only possible if it is '*economically justifiable*', as was decided by the *Constitutional Court* in a leading case.[27]

- *Controls*: the competent authorities control compliance with environmental laws. Managers of industrial plants must provide information to the competent authorities and the latter have specific powers to inspect the plants. Many laws authorize the authorities to conduct searches, to enter land or industrial plants, to inspect machines and documents. The owners or managers of plants are obliged to provide information to the competent authorities. In addition, periodical controls must take place to monitor compliance with environmental standards (see for example § 75 AWG 2002).

2.2. Classification and description of the situations in which administrative enforcement measures can be taken

Administrative enforcement measures must be taken where the law so provides for given situations. As the administrative authorities and courts are strictly bound by the law, they have no discretionary powers to take in account the seriousness of the breach or the personal circumstances of the offender.

Officials of the competent authorities who knowingly omit to take measures according to the law or who knowingly act against the law commit the crime of "Amtsmissbrauch" (§ 302 StGB; *abuse of office*), and must be punished with imprisonment from 6 months to 5 years. Negligently omitting or acting or omitting or acting with *dolus eventualis* only can lead to disciplinary measures, such as a formal warning to the loss of the job. If an authority does not have enough means to take all necessary measures, for example not enough staff, then the most important measures to prevent damage to the environment should be taken; the less important measures may be postponed or even omitted (*ultra posse nemo tenetur*). However, it is possible that the competent authorities in the field of environmental law sometimes prefer the less urgent and less important measures because they can be carried out more easily.

Unfortunately, there is no empirical data available concerning the situations in which measures are taken and what the measures are. Administrative measures are set out in Section 1.2.3.

2.3. Classification and description of administrative enforcement measures

Most administrative enforcement measures are purely administrative because they do not depend on the offender's negligence or intent and they are not defamatory (which is a characteristic of administrative criminal or criminal sanctions). On the other hand, since the Age of the Enlightenment, (administrative) criminal sanctions, such as fines and imprisonment, are supposed to be aimed mainly at the prevention of future illegal behaviour and damages, a feature shared with administrative measures. An administrative criminal fine, which is, for example, applied in context of non-compliance with an order to reinstate a situation, supports and, therefore, enforces an administrative measure.

[27] VfGH 14. 10. 1993, B 1633/92.

Thus, the author has chosen to classify the measures and sanctions in a formal manner. If a measure is imposed on the offender in an administrative procedure, then it is an enforcement measure - all the following administrative enforcement measures can be accumulated -. If it is imposed in an administrative-criminal or a criminal procedure, then the measure is an administrative-criminal or criminal sanction. If one would classify all these measures and sanctions by the effects they have on offenders of environmental law, then one could term them all as '*hybrid*'.

Breaches of environmental law can lead to the following administrative enforcement measures:

- Interdiction of illegal activity (§ 73 AWG 2002, for example).
- Request to act legally within a certain time period (§ 73 AWG 2002, for example).
- Request to take appropriate measures to avoid further damages (§ 73 AWG 2002, for example).
- Request for restoration (§ 62 AWG 2002, § 360 GewO 1994, for example).
- Request for reposition (§ 62 AWG 2002, § 360 GewO 1994, for example)
- Withdrawal of the entitlement (suspension of rights): If the manager breaches (environmental) law, some laws provide for the (temporary) withdrawal of the entitlement to run an establishment if it is feared that the law will be breached again (§ 87 Abs 1 Z 1, 3, 4 GewO 1994, § 31 Abs 2 Z 5 AWG 2002, § 27 Abs 4 WRG 1959, for example)
- Closure of (parts of) the establishment: The authority must close down (parts of) the establishment in accordance with special provisions, for example if requests for acting legally within the stated time period are not obeyed (the coercive character is evident, but the main aim is to prevent further infringements) (§ 360 Abs 1 Z 1 GewO 1994 and § 62 Abs 2 AWG 2002, for example) or to ban dangers posed to the life or health of humans or property, or nuisance to neighbours, according to the extent of the endangering or nuisance (§ 360 Abs 4 GewO 1994).
- Reorganization Measures: If an industrial plant, in accordance with the GewO 1994 causes danger or nuisance to its neighbours, it may be subject to supplementary obligations (§ 77 GewO 1994, § 62 AWG 2002, § 21a WRG 1959). If this measure is unsuccessful, the competent authority may request the plant to present a reorganization plan. If this plan offers reasonable prospects of success, this must be proved by the authority by way of a formal decision, which must grant an adequate period of time for the reorganization. If the reorganization does not take place in accordance with the order, the plant may be closed down, or a measure may be imposed which is proportional to the seriousness of the violation of the relevant environmental law.

Temporary or provisional measures

- Substitute Acts: If a party does not remedy the situation in accordance with a given order, the competent authority may undertake, by itself or through a third person, to remedy the situation at the infringer's expense (§ 360 GewO 1994, § 73 AWG 2002, § 31 WRG 1959). However, the infringer must be given a last warning and time-limit within which to remedy the situation according to § 4 Abs 1 Verwaltungsvollstreckungsgesetz[28] (VVG 1991 - *law on the administrative execution*).

[28] BGBl 1991/53.

- Acts of Immediate Official Command or Coercive Power against a Person (§ 7 VVG 1991): These measures must be provided for by a specific law. They enable authorities to react towards unexpected dangers without the need to meet complicated or lengthy procedures, and it enables them to seize objects provisionally, to terminate operations of a plant, or to hand out restraining orders (§ 360 Abs 2 GewO 1994, § 122 WRG 1959 for example). Usually, they are in force temporarily, upon which they are either confirmed or revoked by way of an ordinary administrative procedure. *Measures of compulsion by the police* to avert serious dangers can be ordered by the competent authority without any formal proceedings (§ 360 GewO 1994, § 62 AWG 2002, § 138 WRG 1959, for example).

- Temporary injunctions can be issued by a ruling in summary proceedings, in which the necessary measure is ordered, if the danger does not require acts of immediate command or coercive power against a person (§ 360 GewO 1994, § 62 AWG 2002 or §§ 31, 122 WRG 1959, for example).

Coercive measures

- Coercive fines and coercive imprisonment: such measures include orders to act or omit to act, as contained in a ruling of a competent authority and which cannot be performed by a third person, but by the offender himself only, where fines up to 730 Euro, or imprisonment up to 4 weeks, are imposed (§ 5 VVG 1991). These sanctions are not administrative criminal sanctions.

Fines or imprisonment up to 2 weeks for not obeying requests to re-establish lawful situations, for example (§ 367 Abs 1 Z 27 and § 368 GewO 1994), can be imposed in administrative criminal procedures only (see Section 1.3).

2.4. Summary of administrative enforcement measures by sectors for targeted EU legal act

Waste[29]

The *Federal Code on Sustainable Waste Management 2002* (AWG 2002) is the main legal act concerning waste. It applies not only to hazardous and non-hazardous waste, but to waste oils as well. The aim of this law is to avoid, as much as possible, dangers to humans, animals, plants, and emissions and the encroachment of the countryside. Several Ordinances based on AWG 2002, such as the *Ordinance on Combustion of Waste* ("Abfallverbrennungsverordnung")[30]and the *Ordinance on a Listing of Waste* ("Abfallverzeichnisverordnung")[31] provide further regulations, mainly details as regards limits on emissions. Alongside this, the nine autonomous states have enacted within their competence waste management laws as well, dealing mainly with non-hazardous waste.

[29] Council Directive of 16 June 1975 on the disposal of waste oils (75/439/EEC, as amended by Council Directive 87/101/EEC and Council Directive 91/692/EEC) ; Council Directive of 15 July 1975 on waste (75/442/EEC, as amended by Council Directive 91/156/EEC, as amended by Council Directive 91/156/EEC) ; Council Directive of 12 December 1991 on hazardous waste (91/689/EEC, as amended by 94/31/EC and Council Regulation No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community.
[30] BGBl II 2002/389.
[31] BGBl II 2003/570.

Administrative measures are permits, subsequent prescriptions and controls as described in Section 1.2.1 and the relevant enforcement measures (aside from those mentioned in Sector 1.2.2) are as follows:

- Restoration and reposition is mandatory (§ 62 AWG 2002 and § 360 GewO 1994, if the establishment is run in accordance with the rules of the *Code on Trade and Industry*).

- Obligatory closure of the establishment in case of not acting legally within certain time limits (§ 62 AWG 2002 and § 360 GewO 1994, if the establishment is run in accordance with the rules of the *Code on Trade and Industry*), as well as the revocation of a permit if the manager repeatedly violates given environmental laws (§ 31 AWG 2002 and § 87 GewO 1994, if the establishment is run in accordance with the rules of the *Code on Trade and Industry*).

- Temporary injunctions to act legally within a certain time limit must be issued where an establishment is operating illegally and endangering the environment (§ 62 AWG 2002 and § 360 GewO 1994 if the establishment is run in accordance with the rules of the *Code on Trade and Industry*).

Nature Protection

The protection of nature falls mainly within the competence of the nine autonomous states.

Only some of the nine autonomous states transposed the Council Directive on the conservation of wild birds into national law mainly by rather uniform *Codes for the Protection of the Environment*, and by *Hunting Codes*. The most comprehensive law is the *Code for the Protection of the Environment* of the State of Burgenland.[32]

Administrative measures are permits and controls as described in Section 1.2.1 and the enforcement measures (aside from those mentioned in Section 1.2.2) are as follows:

- In context of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (as amended by 85/411//EEC, 91/244/EEC and 94/24/EC): Restoration and reposition is mandatory and temporary injunctions must be issued by the competent authority if a party does not comply with a request (§ 55 *Code for the Protection of the Environment* of the State of Burgenland).

The conservation of natural habitats does not only fall within the competence of the nine autonomous states, but under UVP-G-2000[33] (*Federal Code on Checking the Compliance with the Environment*) concerning procedural law to check compliance with environment, GewO 1994 and AWG 2002 concerning procedural rules we have some federal law as well. All nine autonomous states had to adopt old laws to transform the main issues of the *Council Directive on the conservation of natural habitats and of wild fauna and flora* into national law mainly by *Codes for the Protection of the Environment* and to some extent by *Hunting Codes* and by *Fishing Codes*. There are no less than 27 different statutes and several Ordinances which are based upon these 27 statutes. In some states, *Codes on Environmental Planning* apply as well.

Administrative measures are permits, subsequent prescriptions and controls as described in Section 1.2.1 and the enforcement measures (aside from those mentioned in Section 1.2.2) are as follows:

[32] Burgenländisches LGBl 1991/27.
[33] BGBl 1993/697.

- In context of Council Directive (92/43/EEC) of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora: Restoration and reposition is mandatory (§ 360 GewO 1994 if running an establishment under the rules of the *Code on Trade and Industry*). Obligatory closure of establishment when not acting legally within a certain time limit (§ 360 GewO 1994 if the establishment is run under the rules of the *Code on Trade and Industry*), as well as the revocation of the permit, if the manager repeatedly violates the given environmental law (§ 87 GewO 1994 if the establishment is run under the rules of the *Code on Trade and Industry*). Restoration and reposition is mandatory (§§ 14, 15a, 36 TirNatSchtzG[34] - *Tyrolean Statute on the Protection of the Environment*) and temporary injunctions must be issued by the competent authority if a party does not comply with a request.

The Council Regulation on the protection of species of wild fauna and flora by regulating trade therein is enforced by the *Federal law on the control of trade in species of wild flora and fauna* (ArtHG)[35] and the *Ordinance on the declaration of species*[36] based on ArtHG.

Administrative measures are permits and controls as described in Section 1.2.1 and the enforcement measures (aside from those mentioned in Section 1.2.2) are as follows:

- In context of Council Regulation No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein: Obligatory closure of establishment when not acting legally within a certain time limit (if the establishment is run under the rules of the *Code on Trade and Industry* (§ 360 GewO 1994), as well as the revocation of permit, if the manager repeatedly violates the law (§ 87 GewO 1994). Temporary injunctions to act legally within a certain time limit must be issued in cases of illegally running the establishment (§ 360 GewO 1994 if the establishment is run under the rules of the *Code on Trade and Industry*). To achieve the goals of the Regulation, the competent authority and an entitled expert-witness are authorized to enter and inspect property and buildings in case of suspicion of violation of the Regulation; to stop means of transportation; to open and inspect containers and means of transportation; and to carry out checks (§ 7 Abs 1 ArtHG).

Industrial Pollution

Council Directive of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants (88/609/EEC) is transposed by the *Ordinance for Combustion Installations* (FAV)[37], which is based on § 82 Abs 1 GewO 1994, which itself applies, too.

Council Directive of 9 December 1996 on the control of major-accident hazards involving dangerous substances (96/82/EC) is transposed mainly by Section 8a GewO 1994 (§§ 84a to 84h GewO 1994) concerning trade and industries and the *Ordinance concerning further provisions on the control of major-accident hazards in industries etc* IUV[38] (which is based on § 84d GewO 1994). In addition, the *State Codes on the Control of major-accident hazards*, *State Emergency Service Codes* and *State Codes on Area Planning* apply as well.

Council Directive of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations (1999/13/EC) is transposed by the *Ordinance to Transpose Council Directive 1999/23/EC on the Limitation of Emissions with*

[34] LGBl 1998/78.
[35] BGBl I 1998/33.
[36] BGBl II 1998/321.
[37] BGBl 1997/331.
[38] BGBl II 2002/354.

Varnishing Installations (VAV)[39] and the *Ordinance about the Limitation of Emissions of Chlorinated Organic Solutions from Chlorinated Hydrocarbon Installations* (CKW-Anlagen-VO)[40], both based on GewO 1994, which applies as well.

Administrative measures are permits, subsequent prescriptions and controls as described in Section 1.2.1 and the enforcement measures (aside from those mentioned in 1.2.2) are as follows:

- Restoration and reposition is mandatory (§ 360 GewO 1994)
- Closure of establishment in case of not acting legally within a certain time limit is obligatory (§ 360 GewO 1994)
- The revocation of permit, if the manager violates the environmental law repeatedly (§ 87 GewO 1994).

Temporary injunctions to act legally within a certain time limit must be issued in case of illegally running the establishment and endangering the environment (§ 360 GewO 1994).

Chemicals and Biotechnology

The Council Regulation No 2037/2000 of 1 February 1993 of 29 June 2000 on substances that deplete the ozone layer is enforced by *Federal law on the protection of humans and the environment from chemicals* (ChemG 1996)[41]. The Council Directive of 23 April 1990 on the contained use of genetically modified micro-organisms (90/219/EEC), as amended, is transposed by the *Federal law to govern operations with genetically modified organisms, release and marketing of genetically modified organisms and genetic analyses and therapy on humans* (GTG)[42] and by the *Ordinance on the Security for operations with genetically modified organisms in contained systems*[43], by WRG 1959, the *Ordinance on the restriction of emissions of waste water during operations with genetically modified organisms*[44] and the *Ordinance on indirect discharge of waste water into canalisations*[45], GewO 1994 applies if the establishment is run under its rules.

Administrative measures are permits, subsequent prescriptions and controls as described in Section 1.2.1 and the enforcement measures (aside from those mentioned in Section 1.2.2.) as follows:

- Obligatory closure of establishment when not acting legally within certain time limits if the establishment is run under the rules of the *Code on Trade and Industry* (§ 360 GewO 1994), as well as the revocation of permit, if the manager repeatedly violates the given environmental law (§ 87 GewO 1994).
- Temporary injunctions to act legally within a certain time limit must be issued in cases of illegally running the establishment (§ 360 GewO 1994 if the establishment is run under the rules of the *Code on Trade and Industry*).

[39] BGBl II 2002/301.
[40] BGBl 1994/865.
[41] BGBl I 1997/53.
[42] BGBl 1994/510.
[43] BGBl II 2002/431.
[44] BGBl II 1997/350.
[45] BGBl 1998/222.

Water

Council Directive of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (76/464/EEC, as amended by Council Directive 91/692/EEC) and the Council Directive of 26 September 1983 on limit values and quality objectives for cadmium discharges (83/513/EEC, as amended by Council Directive 91/692/EEC) are transposed by the *Federal Law on Water* (WRG 1959) and many Ordinances based on § 33b Abs 3, 4, 5 and 7 and on § 33c Abs 1 WRG 1959, which set the limits for the emissions, as by the *General Ordinance on Emission of Waste Water*.[46]

Administrative measures are permits, subsequent prescriptions and controls as described in Section 1.2.1 and the enforcement measures (aside from those mentioned in Section 1.2.2) as follows:

- Restoration and reposition is mandatory (§ 31 Abs 2, Abs 4 WRG 1959 and § 138 WRG 1959) independent of duties to compensate for damages in accordance with civil law and independently from punishment if public interest or the person affected so requires.

- Closure of establishment in case of not acting legally within a certain time limit is obligatory according to § 360 GewO 1994, if the establishment is run under the rules of the *Code on Trade and Industry*

- Revocation of permit, if the manger repeatedly violates the environmental law according to § 87 GewO 1994, if the establishment is run under the rules of the *Code on Trade and Industry*

The costs of inspection, in particular costs for expert witnesses, must be borne by owner of the establishment if an administrative criminal procedure is initiated and leads to punishment (§ 75 Abs 3 AWG 2002).

Temporary injunctions to act legally within certain time must be issued where there is a violation of the provisions of WRG 1959 (according to §§ 31 Abs 3, Abs 4 and § 138 WRG 1959 and § 360 GewO 1994 if the establishment is run under the rules of the *Code on Trade and Industry*).

Measures of compulsion by the police, without any formal proceedings, to avert danger posed on the life and health of people or the environment are possible at the cost of the actor or owner of the land (§ 138 Abs 3, 4 WRG 1959).

2.5. Overview of the administrative judicial framework and procedure

The Procedure before the Administration

The general rules for the administrative procedure (in federal or state cases) are laid down in AVG. Specific environmental laws sometimes provide for modifications, such as § 356 GewO 1994 relating to oral proceeding, or § 108 WRG 1959 relating to preliminary examination. In addition, in accordance with UVP-G 2002[47], concerning industrial law only (restricted to very huge industrial plants, highways and railroads) and meeting requirements under IPPC, the AVG system is not applicable.

[46] BGBl 1996/186.
[47] Bundesgesetz über die Prüfung der Umweltverträglichkeit (Umweltverträglichkeitsprüfungsgesetz 2000 – UVP-G 2000 – *Code on Compliance with the Environment*), BGBl 1993/697.

AVG does not provide who is party to a specific procedure. This is regulated by specific (environmental) law under which usually, the applicant, neighbours and other persons affected directly by the project, have the right to receive complete information about all the relevant facts; to assert objections; to issue a ruling; to file an appeal; and to commence proceedings before the *Constitutional* or *Administrative Court*. "Umweltanwälte" (*environmental wardens, ombudsmen*) have been established by state law in all *states*. They are party to *state* and to some *federal* (§ 42 AWG 2002, § 19 UVP-G) administrative procedures concerning the environment. They appear in defence of nature. Persons, who are affected *indirectly,* are termed *involved persons*. Such persons may only participate in the procedure and assist in ascertaining the facts.

The administrative procedure starts either when an application is filed, or when the competent authority itself has to begin the procedure if measures must be taken. If necessary, the authority must start a procedure without any delay. Everyone, including individuals and Non-Governmental Organizations, has the right to report breaches of environmental law, upon which the competent authority is obliged to commence action. From that point onwards, the 6 months time limit to complete the procedure (in every instance) commences. Within this time limit, a decision must be handed out if this is *objectively possible*. Otherwise the competence transfers to the higher authority if a party applies for this to occur. If the competent authority does not act within reasonable time, the individual or Non-Governmental Organization (not being a party to the procedure) may only report the omission to the hierarchically higher competent authority and ask for a remedy. Alternatively, they may report the omission, which can be punishable as a crime of *abuse of office* (§ 302 StGB), to the public prosecutor. There is no *actio popularis*.

The *investigation process* lies in the hands of the competent authority. The competent authority must itself elucidate the whole truth. The competent authority does not depend upon motions to take evidence by the parties ("Inquistionsprinzip"), and it can freely evaluate the evidence. Administrative procedures and administrative criminal procedures are linked, which means that evidence gained in one of the procedures may be used in the other. However, in administrative criminal procedures *in dubio pro reo* is a rule which does not apply in administrative procedure. *Expert witnesses* play a key role in environmental cases, because jurists are often unable to take a measured view of the complex problems of natural sciences or medicine.

The instance of appeal may repeat the investigation or complete it within the appellate procedure. It can judge the case in a completely different manner. Unfortunately there is no data available how long it takes to obtain a decision at the 1st or 2nd instance. However, it is very likely that in most cases the 6 months time limit is not exceeded.

The suspending effect of an appeal can be excluded by the authority if it is necessary '*in the public interest*' (§ 64 Abs 2 AVG). Interim measures, other than temporary injunctions (see Section 1.2.3), which can be executed immediately (§ 8 VVG), cannot be imposed.

The Competent Authorities

The competent authority of first instance usually is the "Bezirksverwaltungsbehörde" (*district administration office* with comprehensive competences in matters of the *federation* and *states* and subordinated to the *Prime Minister*, in *federal*, and to the *state government*, in the *state* cases), which may be the *offices of the districts* in the countryside or the *municipalities* in "Statutarstädten"[48]. In addition, it is sometimes possible to lodge an additional appeal to the *federal* minister. In matters against the exercise of immediate official command and coercive power towards a certain person, appeals are referred before the "Unabhängige Verwaltungssenate" (*Independent Administration*

[48] i.e. towns with more than 20,000 inhabitants and with their own town law.

Tribunals). Appeals against administrative procedures according to UVP-G are heard before a specific "Umweltsenat" (*environment tribunal*).

To ensure the legality of legislation and public federal or state administration, Austria has two courts:

(i) The "Verfassungsgerichtshof" (*Constitutional Court*), which decides the legality of federal or state laws and ordinances based on these laws. They do not decide on the illegality of court judgments. In Austria, protection of human rights is offered only by the *European Court of Human Rights*;

(ii) The "Verwaltungsgerichtshof" (*Administrative Court*), which decides the legality of "Bescheide" (rulings and decisions); it offers protection in cases where the decision-making duties of administrative authorities have been breached.

3. Administrative criminal measures (administrative criminal sanctions)

3.1. Introduction

In Austria, public law provides for administrative criminal law (fines, imprisonment up to 6 weeks and forfeiture of objects) as a means to react to an infringement of environmental law. It also backs up enforcement measures: where there is non-compliance with a request of the authority to re-establish a lawful situation, this is an administrative criminal offence and will usually be sanctioned with fines.

The general rules of administrative criminal law and the rules of administrative criminal procedure are set out in the "Verwaltungsstrafgesetz" (VStG, *Administrative Criminal Code*), which is applicable in federal and state administrative criminal cases, as well. The offences and the sanctions are set out in the specific laws and ordinances, not in one single code.

3.2. Classification and description of the situations in which administrative criminal enforcement measures can be taken

Any punishable offence reported to the authority must be prosecuted, if administrative criminal law applies. In administrative criminal law the authorities are strictly bound by the law, they have no discretionary powers to take in account the seriousness of the breach or the personal circumstances of the offender. The authority has to *refrain from punishment* without further proceedings only if the degree of culpability is minor and if the effects of the act are minor ("Absehen von der Strafe"; § 21 Abs 1 VStG). However, the offender must be formally warned if necessary to prevent re-offending. As will be discussed in Section 1.5.2, *refraining from punishment* is the outcome of an administrative criminal procedure in the range from 12 % to 20 %.

3.3. Classification and description of administrative criminal enforcement measures

In Austria the "Verwaltungsübertretungen" (*administrative criminal offences*) are not classified in different categories. Unfortunately, only little information could be obtained as regards to administrative criminal law, which means that it is not possible to comment as to whether the offences are more of a technical or material nature.

The below provides a general overview of the different types of administrative criminal enforcement measures:

- Pecuniary fines: The penalties imposed in administrative criminal law are mainly pecuniary fines which are lump-sums (other than in criminal law with a day-rate system). All the federal or state statutes provide for them. The minimum fine for an *administrative criminal offence* is 7 Euro[49], if not stated otherwise in § 71 Abs 1 Z 5 ChemG 1996 (360 Euro minimum) or in § 79 Abs 1 AWG 2002, if the offence is committed during a commercial or industrial activity (3,620 Euro minimum). Pecuniary fines under administrative criminal law have fixed maxima, higher maxima are provided for aggravating circumstances, such as in § 43 Tiroler Naturschutzgesetz, or for re-offending, such as in § 71 Abs 1 Z 5 ChemG 1996 (100 % increase in both cases). So in the field of environmental administrative criminal law, there are pecuniary fines ranging from 7 Euro up to 36,500 Euro at most (under criminal law the amounts are: 4 Euro up to 117,720 Euro at most), and up to 36,500 Euro for first re-offending[50] (under criminal law, the maximum is 176,590 Euro for second re-offending). Confiscation of profits is possible, if the given administrative law provides for this in particular, as is the case in § 80 Abs 3 AWG 2002.

- Imprisonment: The sanction of imprisonment (minimum 12 hours) is provided for only by a few administrative statutes and never exceeds 6 weeks[51]. Imprisonment as a sanction must be imposed only to prevent re-offending, but not (other than in criminal law) to prevent others from committing offences[52]. As an alternative penalty for non-payment of a fine, it is possible to impose a prison sentence (usually 2 weeks, and in one case extended from a minimum of 4 days up to 6 weeks[53]) if this is not expressly excluded by a single administrative law[54], as has been done twice in Kärnten[55].

Contrary to criminal law, pecuniary sentences or prison sentences cannot be (partially) suspended and, again contrary to criminal law, a fine or imprisonment is imposed for each single act or omission, which means the sentences must be accumulated ("Kumulationsprinzip") [56]: This can lead to very high fines.

- Deprivation of profits which the offender obtained (or anyone else, who obtained the profit and knew about the offence), if provided for in particular legislation (for example, such as by § 80 Abs 3 AWG 2002).

- Forfeiture of objects: Other than in criminal law, where forfeiture of objects, equipment and products of crime (*instrumenta et producta sceleris*) is a general rule, forfeiture of an object (including packaging) must be specifically provided (as, for example, in § 73 ChemG 1996) if the owner is not able to prove that there will be no further risk from this object in the future. Only according to § 10 ArthG compensation is possible and obligatory if forfeiture of an object is impossible.

[49] § 13 VStG; "Organstrafverfügung", *tickets* may be less.
[50] § 49 WienerNatSchtzG.
[51] § 12 Abs 1 VStG.
[52] § 11 VStG.
[53] § 194 Burgenländisches Jagdgesetz.
[54] § 16 VStG.
[55] § 101 KärntAWO, § 63 KärntFischereiG.
[56] § 22 Abs 1 VStG.

3.4. Summary of administrative criminal enforcement measures by sectors for targeted EU legal act

Waste[57]

The federal administrative criminal provision (§ 79 AWG 2002) declares no less than 60 different infringements punishable with very detailed specifications.

According to § 79 AWG 2002 pecuniary fines range from 7 Euro to 36,340 Euro (minimum fine of 3,630 Euro for commercial or industrial activity in waste business). Imprisonment up to 2 weeks for not paying the fine is mandatory.

The nine State codes provide for further punishable offences with fines in the range of 7 Euro up to 36,340 Euro. The *Code on Sustainable Waste Management of the State of Steiermark* ("Steiermärkisches Abfallwirtschaftsgesetz 1990")[58] even provides for imprisonment up to 6 weeks as a sanction, and imprisonment for not paying the fine usually up to 2 weeks; Salzburg provides for imprisonment up to 4 weeks; and Vienna up to 6 weeks.

Aside from the managing director, the holder of a permit is punishable if he tolerates the offence deliberately or if he neglected his duties by choosing the managing director (§ 80 Abs 2 AWG 2002). Confiscation of profits to deprive the offender of profits, or profits obtained by anyone else who knew about the offence, is possible (§ 80 Abs 3 AWG 2002).

All Federal or State Codes do not permit double punishment. The more severe (federal or state) criminal law excludes the less severe (federal or state) criminal law. But sanctions can be accumulated under the more severe federal or state law if several infringements occurred.

Costs of inspection, in particular costs for expert witnesses, must be borne by the owner of the establishment if an administrative criminal procedure is initiated and leads to punishment (§ 75 Abs 3 AWG 2002).

Nature Protection

With respect to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (as amended by 85/411//EEC, 91/244/EEC and 94/24/EC): Burgenland provides for administrative criminal sanctions in § 78 BglNatSchtzG and § 194 BgldJagdG as follows:

- Fines of 7 Euro to 3,600 Euro (7 Euro to 7,200 Euro in case of aggravating circumstances);
- Imprisonment of up to 2 (respectively 4) days up to 6 weeks for non-payment of the fine;
- Attempts are punishable;
- All arms used to hunt and game must be forfeited;
- Permits, which enabled the breach of the law, may be withdrawn (§ 78 Abs 6 BglNatSchtzG).

The following is an overview of the administrative criminal sanctions in the other states, which are mainly pecuniary fines (maxima): In Vienna and Oberösterreich (35,000 Euro), Salzburg and Tyrol

[57] Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (as amended by Council Directive 87/101/EEC and Council Directive 91/692/EEC) ; Council Directive 75/442/EEC of 15 July 1975 on waste (as amended by Council Directive 91/156/EEC, as amended by Council Directive 91/156/EEC) ; Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (as amended by 94/31/EC); and Council Regulation No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community.
[58] LGBl 1991/5.

(36,500 Euro) and are no less than five times higher than in Kärnten (7,260 Euro). Salzburg even provides for prison sentences up to 6 weeks (see § 12 Abs 1 VStG maximum 6 weeks; the legal text in the Salzburgian statute with maximum 8 weeks is obsolete). Burgenland, Niederösterreich und Vienna extend the usual imprisonment (up to 2 weeks) for not paying a fine up to 6 weeks (in Burgenland even with a minimum of 4 days). This is a sanction which is expressly excluded in Kärnten.

With respect to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora: The provision of 43 TirNatSchtzG declares many infringements punishable.

- The imposable fine is: 7 Euro to 18,200 Euro (aggravating circumstances: 7 Euro to 36,400 Euro), for re-offending: 7 Euro to 36,400 Euro;
- Imprisonment for non-payment of fine: up to 2 weeks;
- Attempts are punishable;
- Aggravating circumstances allow forfeiture of caught animals or other objects.

The administrative criminal sanctions in other states are exactly the same as set out in the Council Directive on the conservation of wild birds (see above).

In context of Regulation No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein: § 9 Abs 1 ArtHG declares several infringements punishable as *administrative criminal offences*.

- Fines range from 730 Euro to 36,340 Euro;
- Imprisonment is up to 2 weeks for not paying the fine;
- Attempts are punishable (§ 9 Abs 2 ArtHG);
- The competent authority must not refrain from punishment without further proceedings, if the degree of culpability is minor and the damage is minor, § 21 VStG is excluded (§ 9 Abs 3 ArtHG); a fine must always be imposed.
- Forfeiture of species and equipment used (§ 9 Abs 1 Abs 6 ArtHG) and compensation is obligatory if forfeiture is impossible (§ 10 ArtHG).

§ 8 ArtHG declares punishable only international infringements such as transfer of species contrary to Regulation Art 4, 5; or transfer of species contrary to an order issued according to Art 4 to 7 or 11; and buying, selling, exhibiting, stocking or other use of species contrary to Art 8 a crime (imprisonment up to 2 years or fine up to 360 day rates). Deliberately producing a false or using a false permit (§ 293 StGB; imprisonment up to 1 year) and deliberately falsification or alteration of a permit or using a falsified or altered permit (§§ 223, 224 StGB; imprisonment up to 2 years) are crimes as well.

Industrial pollution

With respect to Council Directive of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants (88/609/EEC); and Council Directive of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations (1999/13/EC), the following applies:

The federal administrative criminal provision § 367 Z 25 GewO 1994 is a catch-all provision and declares punishable all acts or omissions against the rules of Ordinances based on § 82 Abs 1 GewO 1994, such as the *Ordinance for Combustion Installations* (concerning CD 88/609/EEC) or the *Ordinance to Transpose Council Directive 1999/23/EC on the Limitation of Emissions with Varnishing Installations* and the *Ordinance about the Limitation of Emissions of Chlorinated Organic Solutions from Chlorinated Hydrocarbon Installations* (concerning CD 1999/13/EC) as follows:

- Pecuniary fine from 7 to 2.180 Euro;
- Imprisonment up to 2 weeks for not paying the fine is mandatory.

If the enterprise is leased or if a manager is installed, and if the leasing or the installation of the manager is notified to the authority and permitted by the authority, then the leaseholder or the manager only are punishable (§ 370 Abs 1, 2 GewO 1994). The entrepreneur is punishable aside from the manager if he tolerates the act deliberately or if he neglected his duties by electing the manager (§ 370 Abs 3, 4 GewO 1994).

With respect to Council Directive of 9 December 1996 on the control of major-accident hazards involving dangerous substances (96/82/EC), the following applies:

The federal administrative criminal provisions concerning SevesoII can be found in §§ 366, 367, 368 GewO 1994, the State administrative criminal provisions are set out in the State codes on the control of major-accident hazards and the emergency service codes which provide for fines from 7 up to 3.600 Euro. The newer *state codes on the control of major-accident hazards* and *the state emergency service codes* provide for even higher fines, such as the *Code on Measures to manage emergencies and to establish crisis management of the State of Vienna* (Wiener Katastrophenhilfe- und Krisenmanagementgesetz[59]), which prescribes:

- Fines from 7 up to 10,000 Euro;
- Imprisonment up to 2 weeks for not paying the fine is mandatory.

If the enterprise is leased or if a manager is installed, and if the leasing or the installation of the manager is notified to the authority and permitted by the authority, then the leaseholder or the manager only are punishable (§ 370 Abs 1, 2 GewO 1994). The entrepreneur is punishable aside from the manager if he tolerates the act deliberately or if he neglected his duties by electing the manager (§ 370 Abs 3, 4 GewO 1994).

Chemicals and Biotechnology[60]

§ 71 ChemG 1996 provides as follows:

- Pecuniary fines for several infringements of ChemG (concerning substances that deplete the ozone layer) from 360 Euro to 14,530 Euro, and up to 29,070 Euro in case of re-offending;
- Non-payment of a fine is punishable with imprisonment up to 2 weeks;
- Attempts are punishable;
- Confiscation of substances is mandatory.

§ 109 GentechnikG (concerning genetically modified micro-organisms) provides for administrative criminal sanctions for infringements of GentechnikG, as follows:

- Fines range from 7 Euro to 7,260 Euro;
- Imprisonment for not paying the fine up to 2 weeks.

[59] LGBl 2003/60.
[60] Regulation No 2037/2000 of 1 February 1993 of 29 June 2000 on substances that deplete the ozone layer and Council Directive of 23 April 1990 on the contained use of genetically modified micro-organisms (90/219/EEC, as amended).

Water

With respect to Council Directive of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (76/464/EEC, as amended by Council Directive 91/692/EEC); and Council Directive of 26 September 1983 on limit values and quality objectives for cadmium discharges (83/513/EEC, as amended by Council Directive 91/692/EEC), the following applies:

§ 137 AWG 2002 declares punishable all forms of unauthorized and unlawful discharging of (dangerous) substances into the aquatic environment, and provides:

- Pecuniary fines from 7 Euro up to 36.340 Euro;
- Imprisonment for not paying a fine is extended to 6 weeks.

If a punishable act occurs in a water installation, the owner and the manager of that installation are punishable aside and independent of the punishment of the offender, if they knew that act or omission will happen, or if they neglected their duties to supervise the installation or the supervision personnel, or their duties in choosing the supervision personnel (§ 137 Abs 5 WRG 1959).

3.5. Overview of the administrative criminal judicial framework and procedure

A few preliminary comments are as follows:

- It is possible to initiate the administrative criminal procedure without having initiated the administrative procedure;
- These two procedures must both run in parallel;
- The administrative procedure is more immediate and allows for precautionary and preventive measures, whereas the administrative criminal procedure allows only for imposing an administrative-criminal sanction;
- There are no interim measures in administrative criminal procedure. The only interim measure available is the confiscation of objects which are probably forfeited as a sanction for the criminal act. However, this is a rather rare sanction under administrative criminal law and is not of importance concerning the administrative measures;
- The competent authority does not have other powers of investigation in an administrative criminal procedure than it has in an administrative procedure unless so provided in special laws, which, however, do not apply in the field of environmental administrative criminal law. Neither house searches nor telephone tapping, for example, is possible. Only temporary detention to identify a suspect or to prevent further administrative criminal behaviour is possible (§ 35 VStG).

The Administrative Criminal Procedure

The administrative criminal procedure starts either when the breach of environmental law is noticed by the competent authority which is obliged to start it (§ 25 Abs 1 VStG) or when a breach is reported to the competent authority by another authority, such as the police, or by an individual, NGO or the Ombudsman. In fact, only few not directly affected private persons report environmental offences. As with administrative procedures the omission of starting an administrative criminal procedure can constitute the crime of *abuse of office* (§ 302 StGB). If the competent authority does not act (within reasonable time), an individual, for example, may report the omission to the hierarchically higher competent authority and request a remedy or report the *abuse of office* to the public prosecutor.

Administrative procedures and administrative criminal procedures run in parallel, they do not depend on each other. An administrative criminal procedure can be started before the administrative procedure, which occurs often due to the rather short limitation periods for administrative criminal offences. An administrative criminal procedure must be initiated within 6 months from the act or omission and must be completed within three years. If not, punishment is excluded (§ 31 Abs 2, 3 VStG).

Administrative procedures and administrative criminal procedures are linked. Evidence gained in one of the procedures may be used in the other. However, in administrative criminal procedures *in dubio pro reo* is a rule which does not apply in administrative procedure.

The Competent Authorities

Administrative criminal offences are not prosecuted by public prosecutors as in criminal law, but by the same authority competent for the administrative procedures (see above Section 1.2.5). Unlike courts, these authorities are dependent and must obey directives issued by the *state government* (state administrative law) or the *prime ministers of state* or by the *federal ministers* (federal administrative law), even in administrative criminal cases. Appeals against their decisions are possible before the court-like "Unabhängige Verwaltungssenate"[61] (*Independent Administrative Tribunals*). Finally, when grave sanctions have been imposed, appeals can be made before the "Verwaltungsgerichtshof" (*Administrative Court*), which is a court with independent judges.

4. Case-study

Company A produces chemical products at a facility situated within the territory of local authority X. Company A owns the premises on which the facility is located. The activity of the facility is subject to a permit granted by local authority X. Hazardous waste is a by-product of the industrial activity. The permit for the facility requires that the hazardous waste must be disposed of without harm to the environment. It allows Company A to use an on-site landfill for depositing this hazardous waste.

However, an unexpected increase in demand for its product led to an increase in production and more hazardous waste, which filled up the landfill. In an emergency move and without getting permission from local authority X, Company A drilled a deep hole in the ground of its premises in order to deposit the hazardous waste. The hazardous waste deposited underground has now contaminated the underlying groundwater and this contamination has spread to the property of a neighbouring farm, polluting the farm's well. The contamination is now spreading towards the neighbouring river.

Administrative Measures

As the facility is approved in this case-study, the provisions of GewO 1994 (*Code on Trade and Industry*) apply. Furthermore, because hazardous waste is disposed of, the AWG 2002 applies, and as ground water is affected, the WRG 1959 is applicable, as well. According to these three codes, the competent authority must order the re-establishment of the lawful situation.

The competent authority must issue a temporary injunction to re-establish a lawful situation. In particular, they must serve the order on the manager/owner of the facility to remove the hazardous waste immediately from the hole. If the manager/owner does not obey this order, the competent authority itself (or a third person) must - as pollution of the environment is continuing - carry out the order at the cost of the owner of the facility. If there is a danger, that the activity of depositing

[61] § 51 VStG.

hazardous waste in the hole will be continued, the closure of the facility is possible (§ 360 GewO 1994, § 62 AWG 2002, § 122 WRG 1959).

Private persons, such as the neighbour, do not have the right to question the permit or to take legal action against the competent authority's omission to act. They can only inform the authority, to which the competent authority is subordinate. Alternatively, they can report to the public prosecutor, the omission, which is punishable as a crime ("Amtsmissbrauch" according to § 302 StGB - *abuse of office*).

Administrative criminal measures

Filling the hazardous waste in the hole is at least an administrative criminal offence according to § 79 Abs 1 Z 1 AWG 2002 and must be punished with a fine between 730 Euro to 36,340 Euro. Imprisonment: the natural person found guilty for the act and imposed with the fine, up to 2 weeks for not paying the fine is mandatory.

Criminal Law measures

If a '*large area*' (which according to the *Supreme Court* is not necessarily more than a '*square kilometer*', but more than a '*few square meters*', such as a pond of '*2300 square meters'*)[62] of groundwater was polluted, or if the expenditure for the removal of the pollution exceeds 40,000 Euro, then an individual person or individual person(s) working for Company X have committed the crime of *Intentional impairment of the environment* (§ 180 Abs 1 or Abs 2 StGB, imprisonment up to 3 years or a fine up to 360 day rates). Currently, under Austrian law, companies cannot be held to have committed crimes. The offender(s) is (are) are punished only according to the Criminal Code, as this more severe law must be applied first.

The competent authority must then report the case to the public prosecutor and stop the administrative criminal procedure.

The neighbour

According to § 102 Abs 1 lit b WRG 1959, the neighbour is only party[63] to the administrative procedure, when a facility such as this is established. Thereafter, he is no longer a party and he has no right to file actions or appeal against decisions of the competent authority omitting actions or acting against the law and his interests. He may only report the offence to the competent authority as any private person and hope that the authority will act. Furthermore, he may report omissions to the superior authority or even the public prosecutor, to prosecute the officials for *abuse of office* according to § 302 StGB (*Criminal Code*).

His property is damaged on the basis that the groundwater belongs to the owner of the soil (§ 3 Abs 1 lit a WRG), and because his well is polluted. He can ask for compensation for his expenses to obtain unpolluted water from elsewhere. If he is not compensated voluntarily, he will have to file an action at the civil court against the offender, or at the criminal court, to which he is party if he claims compensation (§ 47 StPO). The criminal court must also take in account evidence to decide about civil liability, if doing so does not take to much effort (§ 366 StPO). In practice, such plaintiffs are almost always referred to the civil courts.

If the public prosecutor decides (he will not inform about his reasons) not to prosecute the offender for the crime, the neighbour, being a person claiming compensation for the damage to his property, could

[62] EvBl 1992/78, JBl 1992, 728.
[63] VwGH 2. 10. 1997, VwSlgNF 14756 A = ÖJZ 1998, 758 = RdU 1999/160 = ZfVB 1999/422; 10. 6. 1999, RdU 2000/2.

file a "Subsidiaranklage" (§ 48 StPO; *subsidiary prosecution*). If the defendant is not found guilty, the neighbour then risks having to bear the costs of the criminal procedure, as well as the costs of the expert-witnesses and of the defence. He has no right to appeal. This is, therefore, not an advisable route of action.

However, civil law provides the neighbour a rather good means to stop the pollution if the competent authority does not act. The neighbour may file a temporary injunction against the owner of the facility to omit further pollutions according to § 381 EO,[64] which is issued usually within a week and can be executed immediately even if the owner of the facility appeals the injunction.

Interaction among jurisdiction

There would be interaction between the administrative and administrative criminal procedure in that the same competent authority could also use evidence, which was obtained in the administrative procedure, in the administrative criminal procedure. Of course, different rules of evidence have to be obeyed: in *dubio pro reo* is a rule, which applies in administrative criminal procedure as well. In this case, the offender is not required to substantiate to the authority that he did not act intentionally or negligently. In this case, not only simple non-compliance with administrative law is punishable, but the endangering or injuring of the environment is, too. Nevertheless, two different procedures would have to take place. The decision under one procedure does not affect the measures adopted under the other. All authorities and courts must base their decisions on the facts they found and do not depend on the decision of the others.

If the crime of *Intentional impairment of the environment* under § 180 Abs 1 or 2 StGB was committed, then the same would happen. However, the court could not use the evidence gained in the administrative or administrative criminal procedure. The court must take evidence itself.

Except in the case of the administrative (criminal) procedure, in criminal procedure the neighbour could join the procedure and ask the criminal court to decide upon his claim for compensation for the damages caused by the pollution of his well. Most likely he would be referred to the civil court.

Accumulation and Effectiveness of the actions

The following actions must be cumulated: Administrative procedure, administrative criminal or criminal procedure and civil procedure, if the criminal court does not decide on civil law.

Administrative procedure is effective. Civil procedure can be effective in this rather simple (with respect to evidence) case, if the owner of the plant is not impoverished in the meantime. It is effective as regards the temporary injunction against the owner of the facility to omit further pollution. Administrative criminal and criminal procedures are expected to be effective, but to what extent (to society or to the defendant), is still difficult to assess.

[64] Gesetz vom 27. Mai 1896, über das Exekutions- und Sicherungsverfahren (Executionsordnung), RGBl 1896/79.

5. Effectiveness of non-criminal measures in relation to criminal measures

5.1. Comparative statistics on administrative, quasi-criminal and criminal procedures

Administrative procedures

No available data could be located as regards administrative procedures with the exception of inspections and controls. Due to the lack of such information, it cannot be said how many searches, measures of compulsion without formal proceedings to avert dangers, temporary injunctions, substitute acts, withdrawals of entitlements, closures of the establishments and reorganization measures take place in administrative procedures, and what is the length of a typical administrative procedure to impose all these measures. Experts of the federal and state administration expressed the opinion that these measures are effective and issued within reasonable time.

As shown by the report on Austria to the Commission according to the Recommendation 2001/331/EC, Vienna, April 2003, - all data concern the year 2002 and almost all data are not evidence based but estimated - there are (estimated) 3300 installations to be inspected by 620 inspection personnel (10 to 30 % or 60 to 180 personnel available for controls) and 290 auxiliary personnel (10 to 30 % or 30 to 90 personnel available for controls). Only regional and sub regional inspection plans exist concerning the environment and/or sewage plants in the States of Vienna, Salzburg and Tyrol. Up to the year 2002 routine environmental inspections were carried out only concerning communal sewage plants.

1001 site visits were accomplished, the percentage of visits per controlled installations: 10 % (VOC installations), 25 % (metal industry), 30 % (other industries and installations), 33 % (waste treatment), 50 % (mineral and chemical industries), 70 % (energy and Seveso installations) and 75 % (communal sewage plants). The time periods till all installations are inspected are between 1 to 3 years (communal sewage plants and Seveso installations), 2 to 4 years (energy, metal and chemical industries), 3 to 5 years (mineral industry and waste treatment) and 4 to 6 years (VOC installations and other industries and installations). Estimated relation between routine and non-routine inspections is: 4:5 (VOC installations), 1:1 (metal and chemical industries and other industries and installations), 4:3 (mineral industry), 3:1 (energy industry), 4:1 (communal sewage plants) and 5:1 (waste management and Seveso installations).

The outcome of the inspections is that only very few installations could be found without any permit - in this case the authority asks the entrepreneur to file for the necessary permit immediately, '*otherwise administrative criminal procedures'* or measures to establish the lawful situation are initiated (report page 10): This is a remarkable statement, because it is in contradiction with principle of strict legality concerning the prosecution of administrative criminal offences. In rare cases installations are changed before obtaining the necessary permission - the entrepreneur is then asked to file for the permit immediately, which is done almost always. Sometimes breaches of singular conditions on permits could be found, most of them minimal faults. These faults are reported to the entrepreneur and he is ordered to re-establish the lawful situation. Serious faults, which are very rare, are answered by administrative criminal procedures and - in case of danger for the life of man or for the environment - by the necessary temporary administrative measures. In the State of Salzburg approximately 120 controls of waste management sites lead to 5 '*reports*' (about administrative criminal offences, about criminal offences or about non criminal breaches of environmental law, is not clear) and at 38 controls of sewage plants 2 '*infringements*' were detected.

107 requests to restoration or reposition and 7 temporary or provisional or coercive measures were issued as result of serious complaints, accidents, incidents and occurrences of non-compliance in the year 2002 - actually more, because not in all States figures were available -.

Administrative criminal procedures

There is no available data on how many administrative criminal procedures are initiated, or about the lengths of these procedures and about their outcome.

A questionnaire was sent to almost all the competent authorities in Austria. Of these, 23 answered (some of) the questions included in the questionnaire. Fortunately, all the *offices of the districts* of the *State of Vorarlberg* sent detailed information. On the basis of the information obtained from the State of Vorarlberg, the author projects the situation in Austria. However, it is acknowledged that this will be a rather imperfect attempt to obtain a realistic picture, because the data from the State of Vorarlberg is not necessarily representative for the rest of Austria. Thus, the below information should be considered *cum grano salis*.

Criminal procedures

In criminal law there is detailed information about cases which are registered by the police[65], persons who were convicted by the courts, as well as about sanctioning[66], and about criminal procedures.

5.2. Evaluation of effectiveness according to the selected indicators

Level of the fines and other sanctions imposed

The following information has been obtained by way of answers obtained to questionnaires sent to various competent authorities, the data obtained concerns the year 2003. With respect to administrative criminal cases, the following applied

- Typical fines imposed were: for Waste: 50 Euro to 15,500 Euro (median: 500 Euro); Water: 100 Euro to 2,000 Euro (median: 350 Euro); Air pollution: 40 Euro to 1,000 Euro (median: 200 Euro); Genetically modified organisms: no cases; Birds/habitats: 270 Euro to 3,000 Euro (median: 500 Euro)

- Minimum /maximum fines: for Waste: 50 to 36,000 Euro; Water: 50 to 14,220 Euro; Air pollution: 50 Euro to 2,000, Euro; Genetically modified organisms: no cases; Birds/habitats: 200 Euro to 4,000 Euro.

- Imprisonment: There was no sanction of imprisonment as a primary sanction, only in cases of non-payment of fines (imprisonment imposed in the range of a few days).

As regards criminal cases (in the year 2000), the below only deals with the two most common crimes against the environment (covering 90 % of all crimes against the environment): *Intentional impairment of the environment* (§ 180 StGB) and *Negligent impairment of the environment* (§ 181 StGB). The following measures were applied:

Intentional impairment of the environment:

- Typical fines: all three persons who were convicted obtained fully suspended fines in the range of 727 Euro to 817 Euro;

[65] Data from „Bericht der Bundesregierung über die innere Sicherheit in Österreich“ 1990 to 2002 and „Polizeiliche Kriminalstatistik“ 1990 to 2002, ed. by Bundesministerium für Inneres.
[66] Data from „Gerichtliche Kriminalstatistik“ 1990 to 2002, ed. by Österreichisches Statistisches Zentralamt or STATISTIK AUSTRIA.

- Imprisonment: No prison sentences were imposed; imprisonment for not paying a fine is mandatory (2 day rates = 1 day in prison).

Negligent impairment of the environment:

- Typical fines: 11 out of the 13 persons who were convicted were fined (5 were fully suspended, 1 was unsuspended, and 5 partially suspended) in the range of 1,817 Euro to 3,634 Euro.
- Imprisonment: Two persons obtained prison sentences (both in the range of 1 to 3 months, both fully suspended).

The effectiveness of administrative criminal law is doubted very often, some experts of the administration and environmentalists think that more criminal law and more severe criminal sanctions could prevent infringements of environmental law much better. The author does not agree with that idea. As shown below, the low level of sanctioning did not lead to an increase of environmental crimes within the last years, in the contrary. This shows that the sanctions are effective. It is evidence based that more severe sanctions do not prevent offences better than less severe sanctions as long as the chance to be prosecuted for an infringement is rather low, which occurs with environmental offences because these offences are victimless crimes and even *members of Green Parties* lost a lot of enthusiasm to report on environmental crimes. So not the sanctioning - the law would allow much higher fines and longer prison terms - is the problem, but the low enforcement is due to less reports and to the lack of personnel to carry out controls and inspections.

The length of the proceedings

With respect to administrative criminal cases (according to the answers to the questionnaire), the following applies:

- procedures end in the 1st instance after: 2 weeks to 12 months (median: 4 months);
- procedures end in the 2nd instance after: 6 to 30 months (median: 12 months);
- procedures end if an appeal to the *Administrative Court* within: 12 to 36 months (median: 36 months);
- procedures ending in the 1st instance: 50 % to 87 % (median: 80 %) of all cases;
- procedures ending in the 2nd instance: 13 % to 50 % (median: 19 %) of all cases;
- procedures ending with an appeal to the *Administrative Court*: 0 % to 5 % (median: 1 %).

Accordingly, the most common administrative criminal procedure ends after 4 months in the 1st instance, which is within reasonable time.

Furthermore, with respect to criminal cases (in 1995), the following applies:

- According to *Wegscheider/Sokoloff*[67], in 1995, 468 crimes against the environment were reported to the public prosecutors, and 29 of these (or 6 %) were referred to the courts.
- Average length of the procedure at the public prosecutor without referral to the courts is 2 weeks (median: 13 days). 30 % of all cases were settled in favour of the offender within 1 day, another 17 % within a week.

- If the case is referred to the court the length of the procedure is almost 1 year (median: 312 days). 20 % of the 29 cases are settled within 3 months, 33 % within 6 months, 66 % within 1 year, 83 % within 2 years, 17 % last more than 2 years.

[67]) Analyse von bei den österreichischen Staatsanwaltschaften angefallenen Verfahren, RdU 2003/72

- In 80% of the cases reviewed, the court procedures end in the 1st instance; and 20 % end at the 2nd instance.

- The most common end of a criminal procedure is either a settlement in favour of the offender by the public prosecutor within 2 weeks (80 %) - this short time is very good - or a conviction/acquittal within 1 year (6 %) in the 1st instance - this is rather long, but unavoidable due to the need of expert-witnesses - (in the rest of the cases, i.e. representing 14 % of all cases, could not be settled because, for example, no suspect could be found).

Type of violation pursued through criminal and administrative criminal jurisdictions

Infractions of technical requirements are always administrative criminal offences only. Whereas, material infractions can be administrative criminal or criminal offences. The difference is in the law: The more severe infractions concerning the risk to the health or life of more human beings, to the environment over a larger area or to the costs of removal of the impairment are criminal offences, the less severe are administrative criminal ones.

If, for example, the offender (negligently or intentionally) discharges dangerous waste into the aquatic environment, he at least commits an administrative criminal offence under § 137 WRG 1959 (fine: 7 Euro up to 36,340 Euro) and must be prosecuted by the competent authority. If he, by doing so, causes an abstract risk to life or health of a '*large number*' of human beings (10 or more) or to any kind of flora or fauna over a '*large area*' (for example a pond of 2,300 square meters) or if expenditure is necessary for the removal of the impairment, which exceeds 40,000 Euro, then he commits the crime of *Intentional* or *Negligent Impairment of the environment* (§ 180, § 181 StGB - imprisonment up to 3 years/1 year or fine 2 up to 360 daily rates, which can be 4 Euro up to 117,720 Euro): This misdemeanor must be prosecuted by the public prosecutor and, if after his investigations a conviction is more likely than an acquittal, referred to the court.

To declare infractions of technical requirements administrative criminal offences only and to distinguish between administrative criminal offences and criminal offences according to the effects of the offence is reasonable.

There is no discretionary power of the authorities or the public prosecutors to refer a case to an administrative authority or to a court.

Conclusion

According to the projection of the data provided by the *offices of the districts* of the *State of Vorarlberg* on Austria, 2,205 administrative criminal procedures would have been initiated in 2003, as follows:

- 882 concerning waste (40 %)
- 720 concerning water and (33 %)
- 603 concerning the pollution of air (27 %)
- 0 concerning genetically modified organisms (0 %; very realistic, as all authorities reported none)
- 0 concerning birds/habitats (0 %; this projection is not necessarily realistic, as other authorities reported very few)

The final result of an administrative criminal procedure would, according to this projection be:

- No sanction (21 %)
- A formal warning, refraining from imposing a punishment according to § 21 VStG (12 %)

- An unsuspended fine (67 %)
- Imprisonment as a primary sanction (0 %)
- Imprisonment for not paying the fine (mandatory with almost all fines, but only a few days)

According to the answers in the questionnaire, the final result of administrative criminal procedures is:

- No sanction: in the range of 0 % to 50 % of the cases reviewed (median: 20 %). The author considers that the formal warning, which is a sanction according to § 21 VStG, is regarded by the authorities which answered the questionnaire, as '*no sanction*'
- Unsuspended fine: in the range of 50 % to 100 % (median: 80 %)
- Imprisonment as primary sanction: in not a single case (0 %)
- Imprisonment for not paying the fine: mandatory with almost all fines, but only a few days

The below tables (*Fig.1* and *Fig.2*) set out the information on criminal law

Fig.1. Intentional impairment of the environment (§ 180 StGB; imprisonment up to 3 years or pecuniary fine up to 360 daily rates)

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Cases registered by police	132	217	165	112	92	96	127	81	64	43	34	31	Not available
Convicted	12	8	14	19	9	7	8	6	5	2	3	4	2

Fig.2. Negligent impairment of the environment (§ 181 StGB; imprisonment up to 1 year or pecuniary fine up to 360 daily rates)

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Cases registered by police	229	684	293	209	208	135	189	163	114	139	111	103	Not available
Convicted	26	35	33	37	12	11	14	24	15	18	13	2	3

According to *Wegscheider/Sokoloff*[68], in 1995, 468 crimes against the environment were reported to the public prosecutors. 80 % of these cases were settled by the public prosecutor in favour of the offender and only 6 % were referred to the courts. The remainder (14 %) were not settled within this year due, for example, to the lack of a suspect.

The criminal procedures in 1995 resulted in the following:

- Settlement in favor of the offender (no prosecution) by public prosecutor (80 %)
- Conviction by court (3,7 %)
- Acquittal by court (2,4 %)
- Undecided (14 %)

Since 2001, a set of measures of *diversion* can avoid procedures and sentences. The idea of *diversion* (away from the courts) refers to the negative effects that court procedures and sentences can have: If a

[68] Analyse von bei den österreichischen Staatsanwaltschaften angefallenen Verfahren, RdU 2003/72

suspected person takes part in a court procedure and even more if this person is sentenced by a court it is unavoidable to label that person as '*criminal*' which can cause dissocial behaviour in the future because humans intend to behave according to the expectations of others. That idea is the result of criminological research in the Fifties of the last century known as the '*labelling approach*' to dissocial behaviour: We all commit more or less (severe) crimes, but '*criminals*' caught by police and sentenced by courts do not behave like we do who are not caught by police and who are not sanctioned. They do not feel responsible for others; they do not care about having work etc. because as '*criminals*' they are not supposed to do so. Up to 2001 in Austria approx. 70.000 convictions happened a year, since 2001 we only have 40.000. All environmental crimes fit into the new framework as set out in §§ 90a StPO, such as *paying a sum*, which shall not be regarded as a fine, or *community service*. It appears that the only two convictions in 2001 and the three convictions in 2002 for *negligent impairment of the environment*, which is an outstandingly low figure compared to the years before, is the result of these measures of *diversion*. The measures of *diversion* are likely to become the usual reaction to this crime. Due to *diversion* in 2002 only 1.9 % of the cases reported to the police ended with the conviction for *negligent impairment of the environment*, in 1995 that rate was four times higher (8.2 %).

Although figures concerning *intentional* and *negligent impairment of the environment* are very low, we can see a trend: Both, cases reported to police and convicted persons, are on a significant and constant decline since 1990. Is there less crime? Is there less investigation by police and other authorities? Are there fewer reports by private persons to the police? We do not know. But what we can say: Not one single unsuspended prison sentence has been handed out for these two and the other crimes against environment between 1990 and 2002 and most common sanctions are (partially/totally) suspended pecuniary fines in the range of 60 up to 180 daily rates (between 727 and 3.634 Euro) or totally suspended prison sentences in the range of 1 to 3 months. We can say that sanctioning on such a rather low level did not lead to an increase of environmental crimes.

It is obvious that there is a communication problem between the authorities and the public prosecutors. If only 6 % of cases reported to the prosecutors are referred to the courts and if 80 % are settled in favour of the offender within a rather short time, then authorities should be better trained in criminal law to avoid reports of cases to the public prosecutor on which criminal law does not apply. On the other side it could be possible that public prosecutors do not like to prosecute environmental crimes because they are complicated, expensive and time consuming and because the suspects as entrepreneurs, public servants or politicians are more able to lodge complaints against the prosecution than in other cases.

Recidivism

With respect to administrative criminal cases (according to the answers to my questionnaire), the authorities reported recidivism (not based on evidence) in the range of 0 % to 30 % over a period of 5 years (median: 5 %). Two authorities reported that either rarely, or 1% to 5%, of offenders include imposed fines as '*costs of their activity*'. On the other hand, some experts believe that fines are included as costs of activity to '*some extent*'.

With respect to criminal cases (from 1990 to 2002), data is available in context of recidivism of convicted persons: 4 % of the persons convicted of *intentional* or *negligent impairment of the environment* have been convicted before, however, this may not necessarily be a relapse of a crime against the environment.

Forum Shopping

Forum shopping is not possible in Austria. The competences between administrative authorities and courts are fixed by law.

Possibility to negotiate between administrative authorities (plea bargaining)

Both administrative authorities and the courts are strictly bound to the law ('*principle of strict legality*'). There is no room for negotiations between the authorities or courts with the violator. Plea bargaining, for example, is regarded to be a crime of *abuse of the office* (§ 302 StGB).

With one exception, all the authorities, who replied to the questionnaires, stated that no negotiations take place with the offender. In some cases, the '*formal warning*' (according to § 21 VStG) can be a result of negotiations. However, this is legal in administrative criminal cases as negotiations are to settle a criminal case within the framework of *diversion*.

One authority reported that they make '*deals*' in minor cases in order to give the offender '*the chance*' to restore the lawful situation so that he can avoid sanctions. According to this authority, this shortens the proceedings and is useful to avoid recidivism. The author is convinced that 'deals' occur in Austria, however, that this is difficult for authorities to discuss due to the threat of being pursued for the crime of *abuse of office*.

Inclusion of the condemnation into the 'cahier' or publication of the condemnation

Only information about a conviction in a criminal case is registered. Information about the registered conviction is given to private persons such as for example WWF. The reason behind this is that in case that for example the WWF is going to engage a person as a local director the WWF does not want to engage persons who committed crimes against the environment. However this information to private persons will take place only if the convicted is sentenced to imprisonment (for not paying the fine) for more than 3 months, which hardly ever occurs in the field of environmental criminal cases. This restriction does not apply to authorities pursuing criminal offences. Sanctions imposed by administrative (criminal) authorities must not be registered.

There is no publication of the condemnation, either in criminal or in administrative criminal cases in our field.

Level of Tolerance for Certain Types of Infractions

There is '*zero tolerance*' for any infraction in accordance with the '*principle of legality*' and according to the questionnaire answers obtained from the authorities.

Refraining from punishment, if the degree of culpability is minor and if no or only little damage occurred in administrative criminal cases (according to § 21 VSt) or in criminal cases (according to § 42 StGB) and *diversion* (*paying a sum*, which shall not be regarded as a fine, *community service*) can prevent convictions in criminal cases.

Level of Social Disapproval

The authorities believe that the level of social disapproval for being sanctioned for an administrative criminal offence against environment is at level '3' (median) on a scale from '1' to '5' (the questionnaire ranks '1' as very low; and '5' as very high disapproval), which in the opinion of the author is rather high: He believes that social disapproval is lower in public opinion. Social disapproval in case of convictions by courts for crimes against the environment is believed to be higher. However, no empirical proof is available to support this argument.

6. Conclusions and recommendations

Environmental law and the enforcement of the law in Austria are not bad at all. However, the below provides some further comments on the problems and challenges, which are faced by the Austrian environmental law and enforcement system:

- Strict legal binding on the administration means inflexibility, because authorities are unable to react adequately to new situations if there is no relevant law applying to the new situation. Nevertheless, the author supports strict legal binding on the administration in order to make live predictable for citizens (which includes proceedings)

- There are problems connected to revoking valid permits relating to the criteria '*only when economically justifiable*'. If an old facility does not comply with new law, subsequent prescriptions resulting from additional regulations (to be met within a transition period) should always be possible if there is a serious danger to the environment or human beings.

- Various laws provide for different (environmental) permits and there is no rule to co-ordinate the different procedures. This means that only specific dangers posed to the environment are subject to each single permit procedure. If the system of permits operates according to the *cumulative system* as it does in Austria there is the need to co-ordinate the different procedures in which all the dangers with all their cumulative negative effects can be taken into consideration adequately.

- Various activities which cause environmental damage are not subject to (administrative) criminal prosecution. If an incompetent or an administration under too great a strain (overloaded with work for example) or unable to know all that tremendous amount of relevant administrative law permits an activity that humiliates the environment then this activity is not subject to administrative criminal or criminal prosecution because with a permit of the competent authority, and may the permit be against the law, the activity does not constitute an administrative criminal or a criminal offence. Nevertheless, strict legal binding of administrative criminal law and criminal to the system of permits is needed in order to make '*life*' predictable for the citizens, especially to avoid administrative criminal or even criminal prosecution of citizens who obtained permits by the competent authority. It is recommended that the officials of the authorities are better trained and that environmental laws are drafted as simply as possible.

- There is a shortage of staff to exercise control and inspections. This means that there must be more well-trained people to carry out controls and inspections. Let us say it with *Lenin words*: '*Confidence is good, control is better*'.

- There are obvious communication problems between authorities on the one side that believe a violation to be a crime and report this to the public prosecutor who on the other side decides that this is not a crime and settles the case in favour of the offender in 80 % of the cases reported within short time (47 % of the cases within one week): Therefore authorities should get better training in criminal law to avoid unsubstantiated reports to public prosecutors. Public prosecutors should be encouraged to prosecute more cases. It is common sense that public prosecutors prefer simple cases like shoplifting committed by suspects belonging to the lower classes to complicated, lengthy procedures against suspects belonging to the middle or upper classes with more abilities to lodge complaints against the prosecution. The Federal Minister of Justice should encourage the prosecutors to prosecute more as he is doing for example with drugs related crimes.

Preventive administrative measures appear to be much better than repressive administrative criminal or criminal sanctions. This view is based on the understanding that administrative criminal and criminal sanctions are to some extent deterrents, even in the case of small fines (if the law is executed regularly). The threat of very serious sanctions is not regarded by the author to be a better deterrent if there is a low probability that offences will be prosecuted and sanctioned. Thus, it is recommended that the temptation be resisted to develop more severe sanctions if given offences cannot be, or are not, prosecuted regularly.

It should be borne in mind that offences against the environment very often do not directly hurt natural individuals, which means that only few offences against the environment are reported to the authorities by private persons. The '*penal industry*' therefore relies on reports by the authorities itself, which means that control and inspections by the authorities must be increased. Furthermore, control and inspections are regarded as a means to increase environmental awareness which is regarded a better motivation to encourage lawful behaviour, than the presence of administrative-criminal or criminal law: if someone develops environmental awareness it is very much likely that he will develop an environmental lifestyle and will not infringe environmental law; the concept of '*threats*' by sanctions is from the 18th century when a human being was supposed to be a '*homo oeconomicus*' who in every situation of his life will vote for his advantage: he will act legally only to avoid sanctions; this concept is wrong, people are not that simple and people do not act economically always; but people do act according their lifestyle.

On the other side not everyone will develop environmental awareness or not everyone will always act legally according to his awareness, so we need administrative measures, administrative criminal and criminal sanctions as well and we need inspections and controls to enable the prosecution of the offenders - if infringements are not prosecuted regularly then there is always the danger of what *Emile Durkheim* called '*anomie*', a state where norms (expectations on behaviours) are confused, unclear or not present, which leads to deviant behaviour even with people who have developed environmental awareness and environmental lifestyle before. Therefore we need both: Awareness and prosecution of offences enabled by controls and inspections to build and keep up the awareness by as many people as possible.

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