

EUFJE Conference 2015

***Protection of the Environment through Criminal Law:
the Implementation and Application of the Eco-crime Directive
in the EU Member States***

BELGIAN REPORT

Prof. Dr. L. Lavrysen¹, Dr. C. Billiet² & J. Van den Berghe³

Introduction: the Belgian Federal System and Environmental Crime

Belgium is a Federal State composed of regions and communities. For environmental policy the federal state and the regions (Flemish Region, Walloon Region and the Brussels Capital Region) are at stake. In the Belgian federal system, the division of competencies works basically with exclusive competences, dividing the policy fields between the Federal State, on the one hand, and the federated entities, on the other hand. Article 6, §1, I, (land use planning), II (pollution control) and III (nature conservation) of the Special Act of 8 August 1980 on the reform of institutions (amended at various occasions) divide the environmental policy field between the Federal State and the regions. Most of the environmental competences have been attributed to the regions, but the federal level is competent for product policy, protection against ionizing radiation and the marine environment. Criminal procedure law and general criminal law is also a federal competence, with some reservations: the federated entities have the competence in their policy fields to (i) erect conducts into an offence and (ii) choose the penalties that apply out of the set of penalties provided for by the general criminal law codified in Book I of the Criminal Code. They are also formally involved, through a Co-operation Agreement, in defining the (federal) prosecution policy in their domain of competence⁴.

The transposition of the Directive 2008/99/EC in Belgium has off course strongly been determined by the division of competences between the Federal State and the three regions. At

¹ Judge Constitutional Court/Ghent University.

² Judge Environmental Enforcement Court of Flanders/Ghent University.

³ Vice-president Court of First Instance, East-Flanders/ High Council of the Judiciary.

⁴ L. LAVRYSEN, “ De ‘Zesde Staatshervorming’ en de milieubescherming”, *Tijdschrift voor Milieurecht* 2014, 282-284.

the level of both the Federal State and the regions, the transposition of the Directive happened partly by 'horizontal' enforcement law. At the **Federal level** this horizontal enforcement law is provided by *Book I of the Criminal Code*, which applies to all offences, also those of a regional nature. Within the **Flemish Region** a new environmental law enforcement system has been created in the form of *Title XVI of the Decree of 5 April 1995 concerning general provisions relating to environmental policy*, inserted by Decree of 21 December 2007 (and modified a few times since) which applies to all environmental offences within the regional competence. In the **Brussels-Capital Region**, the horizontal enforcement law consist of the Ordinance of 25 March 1999, as modified, and which is called now "*Code of 25 March 1999 concerning inspection, prevention, establishment and sanctioning of environmental offences and concerning environmental liability*" which applies to all environmental offences. In the **Walloon Region** the situation is more or less similar: horizontal enforcement law with relevance for the transposition of the Directive comprises *Part VIII of Book I of the Walloon Environmental Code*, inserted in 2008, and amended since.

Book I of the (federal) Criminal Code is very important because it regulates all general aspects of the criminal sanctioning process. All three regional enforcement legislations have opted for public law sanctioning, with a criminal as well as an administrative sanctioning track, providing i.e. an array of criminal and administrative sanctions that apply to all environmental offences and organizing the co-existence of both sanctioning tracks.

1/ Who can be held criminally liable in your country?

a/ Natural persons only or natural as well as legal persons? In the latter case: does their criminal liability extent to all types of crimes or only to very specific crimes? Also: under which circumstances can they be held criminally liable? In particular: is there a precondition requiring a conviction or particular result of a criminal proceeding against a natural person? Are the hypotheses mentioned in art. 6.1 and 6.2 of the Eco-crime Directive covered?

In 1999 the Criminal Code was amended to introduce criminal liability for legal persons, with the exception of the main public legal persons (compare with the definition of a "legal person" in art 2 (d) of the Directive). The criminal liability of legal persons is not limited to specific offences or clusters of offences but, on the contrary, has a general scope. Indeed a legal person can be convicted for all offences a natural person can be convicted for. Like natural persons, legal persons can be held criminally liable as perpetrators and as co-perpetrators, inciters, aiders and accessories. Under the Belgian Criminal Code, legal persons incur criminal liability directly as entities on their own. It is not necessary at all, as Art. 6 of the Directive presumes, to identify one or more natural persons, be it one or more leading persons or employees, who have been committing offences for the benefit of the legal person. The legal person is considered to be a reality as such. Thus, for instance, the legal person can be held criminally liable also for offences that result from a lack of proper care and supervision, throughout several organs and divisions, without a single natural person being clearly the offence's trigger. Legal persons can be

criminally liable for two types of offences: offences that have an intrinsic link with the realization of the goals or interests of the legal person; offences that, as it appears from the facts of the individual case, have been committed for the legal person. As the liability of the legal person is broader than what has been laid down in art. 6.1 and 6.2 of the Directive, the Belgian systems satisfies the Directive.

Art. 5(2) of the Criminal Code limits the possibility to *convict* a legal person jointly with one or more natural persons who are perpetrators, aiders, inciters or accessories in one hypothesis: 'When a legal person is held liable exclusively because of the conduct of an identified natural person, only the person having committed the gravest fault can be condemned. If the identified natural person committed the fault *knowingly and willingly*, he can be condemned together with the legal person.' In practice this provision incites prosecutors to prosecute legal persons systematically together with one or more identified natural persons. Case law also demonstrates that the application of the exclusion rule is in practice non-existent since natural persons who are guilty systematically satisfy the "knowingly and willingly" condition that permits to condemn both the natural and the legal person.

b/ What about persons inciting, aiding and abetting the actual perpetrators of a crime?

The relevant provisions in this respect are the articles 66 and 67 of the Criminal Code.

' Art. 66. *Are punished as perpetrators of a crime or offence:*

they who have perpetrated the crime or offence or have cooperated directly to it;

they who by any act have given such help for the perpetration that the crime or offence couldn't have been committed without their support;

they who, by gifts, promises, threats, abuse of authority or power, criminal plotting or cunning, have directly provoked the crime or offence;

they who, or by words spoken in public gatherings of places, or by any writing, print, image or symbol, billposted, distributed or sold, offered for sale or publicly exposed, have directly provoked the fact, notwithstanding the penalties the law provides for they who incite to crimes or offences, even if that inciting remained without consequences.'

'Art. 67 *As accessories to a crime or offence are punished:*

they who have given instructions to commit the crime or offence;

they who have provided weapons, tools or any other means that has served for the crime of offence, knowing that they would serve there-fore;

they who, other than in the case ruled by Article 66, al. 3, knowingly have helped or supported the perpetrator or perpetrators in deeds that have prepared, eased or completed the crime or offence.'

The link between general and special criminal law, including environmental criminal law, is organized by Art. 100 of the Criminal Code. As regards *federal* special criminal law, this article requires *an explicit provision for the Art. 66 and 67 to apply*. This explicit mention is present in all federal acts relevant to the Directive. For regional criminal legislation, these provisions apply automatically, safe explicit derogation (Art. 11 Special Act of 8 August 1980).

2/ *Are the Art. 3 offences criminal offences in your country?*

Do you know about gaps in the transposition of Art. 3 of the directive (e.g.: not always serious negligence criminalized, one of the Art. 3 offences only partially transposed)?

As far we can see Art. 3 offences are indeed qualified as criminal offences in the various relevant federal and regional legislations, often in a broader way than the Directive requires. It seems that only the offences provided for in the Art. 3(c)⁵, Art. 3(g)⁶ and Art. 3(i), *as the Walloon Region is concerned*, have not yet been qualified as criminal offences. Although the Walloon Regional Legislation has introduced penal sanctions for breaches of some EU Regulations (e.g. the Reach Regulation and the Fluorinated Greenhouse Gases Regulation (old version)) it has omitted to do so for the Waste Shipment and CITES Regulations (as far as the regional aspects of the latter are concerned).

The transposition of art. 3,h) seems not to be complete in all its aspects as the Federal legislation to protect the Marine Environment is concerned.

3/ *How were the Art. 3 offences implemented?*

a/ Only in the criminal code, only as parts of environmental laws or combining both ways?

b/ Did the legislator choose for a “copy paste” or not?

c/ All but one of the Art. 3 offences are defined by specific circumstances, notably specific results or risks of results that need to be fulfilled:

- Four conducts need to be considered a criminal offence if “[causing] or (..) likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants” (art. 3.a, 3b, 3.d and 3.e)
- Four other conducts need only to be considered a criminal offence when involving a *non-negligible quantity / a non-negligible impact* (art. 3.c, 3.f, 3.g) or causing a “significant” deterioration.

Are those requirements present in your law? Or were they dropped when the legislator implemented the directive?

How do you feel as a judge about them? Would they hamper you when conducting a criminal case or could you rather easily cope with them?

⁵ “the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;”

⁶ “trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;”

The Art. 3 offences are implemented by various federal and regional environmental laws in combination with the general provisions of Book I of the Criminal Code. Most of the time there has not been a copy and paste. The legal provisions are in general broader in scope than those defined in Art. 3 of the Directive. The federal as well as the regional legislations often go further than required and transpose the Directive without referring to the condition that the breaches of EU law or transposing legislation are “unlawful and committed intentionally or with at least serious negligence”. *Dolus generalis* - the requirement to have acted ‘knowingly and willingly’ – is sufficient. This means that one has committed the illegal conduct as such knowingly and willingly; it isn’t required to have, on the more, been knowing and willing the illegal character of the conduct. The absence of guilt will be accepted by the criminal courts in very few hypotheses labeled as ‘grounds of exclusion of guilt’: irresistible constraint, and insurmountable erring or ignorance.

The transposition of the conducts listed in Art. 3 of the Directive often is broader than the Directive requires, without referring to the specific circumstances. This is also the case for the Brussels legislation transposing Art. 3(a) and, partially, 3(d) as the transpositions combine a transposition without the restrictive qualification with a transposition with the restrictive qualification, the former being punished less severely than the latter. If there is a transposition of the restrictive condition it most of the time is a literal one. For none of those literal transpositions a definition has been added to precise the vague notions. To our knowledge, case law interpreting the vague notions does not exist yet.

In general judges will find them uneasy and cautious when they have to deal with such vague notions because of the *lex certa* principle applicable in criminal matters. The notions will be construed rather narrowly by them and a thorough investigation of the facts will be done to decide if the behaviour falls within or outside the qualification, this being a thin line.

4/ What about the availability of criminal sanctions to punish environmental offences?

a/ Do the principal criminal sanctions include fines as well as imprisonment?

What are the legal minimum (if applicable in your national system) and maximum levels of fines and prison sentences?

What impact does it have on sanction levels if the crime is committed by an organized criminal group?

b/ Is forfeiture of illegal benefits possible?

c/ Can criminal judges also impose remedial sanctions, for instance order the removal of waste, the closure of an illegal facility?

a) In Belgium we must apply a correction factor for inflation as criminal fines are concerned. The fine levels found in the legislation have to be multiplied with this correction factor. For offences committed since 1 January 2012, the multiplication factor is 6. If, for instance, the court inflicts the offender a fine of EUR 200, the offender will have to pay EUR 200 x 6 = EUR 1,200.

Table: Natural persons: prison sentences and fines (EUR)⁷

Art. 3	Belgium			
	Federal State	Flemish Region	Brussels-Capital Region	Walloon Region
(a)				
Prison sentence	8 days – 10 years*	1 month – 5 years*	8 days – 3 years*	8 days – 3 year*
Fine (x6)	250 – 7,000,000*	100 – 500,000*	0.6445 – 75,000*	100 – 1,000,000*
(b)				
Prison sentence	N/A	1 month – 5 years*	1 month – 5 years*	8 days – 3 year
Fine (x6)		100 – 500,000*	25 – 100,000*	100 – 1,000,000
(c)				<gap>
Prison sentence	8 days – 3 years*	1 month – 5 years*	1 month – 5 years*	8 days – 3 year
Fine (x6)	40 – 8,000,000*	100 – 500,000*	125 – 100,000*	100 – 1,000,000
(d)				
Prison sentence	N/V	1 month – 2 years	3 months – 5 years*	8 days – 3 years*
Fine (x6)		100 – 250,000	250 – 100,000*	100 – 1,000,000*
(e)				
Prison sentence	3 months – 2 years	N/A	N/A	N/A
Fine	1,000 – 1,000,000			

⁷ For Legal Persons, imprisonment is replaced by a fine according to the rules contained in Art. 41bis of Criminal Code. Other sanctions that can be applied on legal persons in some circumstances are: the dissolution of the legal person, temporary or definitive closure, temporary or definitive withdrawing of some rights, publication of the verdict.

(f)				
Prison sentence	/	1 month – 5 years*	1 month – 2 years	8 days – 6 months
Fine (x6)	500 – 100,000	100 – 500,000*	25 – 25,000	100 – 100,000
(g)				
Prison sentence	15 days – 5 years*	1 month – 5 years*	1 month – 2 years	<gap>
Fine (x6)	25 – 50,000*	100 – 500,000*	25 – 25,000	
(h)				
Prison sentence	/	1 month – 5 years*	3 months – 3 years	8 days – 6 months
Fine (x6)	500 – 100,000	100 – 500,000*	250 – 75,000	100 – 100,000
(i)				<gap>
Prison sentence	8 days – 3 years*	1 month – 2 years	1 month – 2 years	8 days – 3 years*
Fine (x6)	52 – 4,000,000*	100 – 250,000	25 – 25,000	100 – 1,000,000*

In cases of organized crime an additional offence is applicable (Art. 323ter of the Criminal Code). Depending on the role of the person who is considered to be a member of such an organization, the sanctions provided for vary between 1 and 3 years imprisonment and fines from 100 to 5,000 EUR (ordinary member), over 5 to 10 years imprisonment and fines of 500 to 100,000 EUR (active members), to 10 to 15 years imprisonment and fines of 1.000 to 200, 000 (leaders).

b) Book I of the Criminal Code provides some additional criminal sanctions. Additional criminal sanctions that can be imposed to *natural as well as legal persons* are the following ones: confiscation and forfeiture of crime-related instrumentalities; forfeiture of illegal benefits; order to re-establish the original situation. Environmental crime is one of the crime areas where the forfeiture of illegal benefits, introduced in 1990, has become relatively well used. The sanction is considered by the Supreme Court as being punitive because the legal provisions that create it do not limit the forfeiture to net benefits.

c) In the federal and regional legislation remedial sanctions are provided for, with different layouts according to the specific legislation. The additional sanctions provided for in the Flemish Region by The Decree of 5 April 1995 (DABM) e.g. can be imposed to sanction all breaches of the environmental legislation covered. The additional DABM-sanctions are the following ones:

Art. 16.6.4 DABM: waste removal (order to do it or to pay the removal by public authorities); mandatory sanction whenever waste has been abandoned illegally; Art. 16.6.5 DABM: plant closure for security reasons, for a span of time determined by the court; Art. 16.6.6 DABM: order to re-establish the original situation, to stop an illegal use, to realize adjustment works. We can find similar provisions in the legislations of the other regions.

5/ What about the actual use of criminal sanctions to punish environmental offences?

a/ Are environmental offences brought to criminal courts? Does this happen rather often or only exceptionally? What kind of cases reach the court?

b/ What are the penalties inflicted to convicted offenders?

i) Is imprisonment used and, if yes, also without probation? If so, what is the length of the inflicted prison sentences? Please indicate to which category of offences under Article 3 your reply refers.

ii) How high are the fines that are imposed in practice? Is forfeiture of illegal benefits used as an additional monetary sanction?

iii) Do criminal courts also impose remedial sanctions?

c/ What is, to your opinion, the main reason why environmental offences would not reach a criminal court? Not enough inspections? Practical difficulties to prosecute environmental offences successfully (e.g. lack of training or specialization, lack of time, lack of financial resources, difficulties of proof, unclear criminal law)? Is there a tradition to rather sanction such offences with administrative sanctions? Or are environmental rules simply not, or nearly not, enforced?

Please provide, if available, empirical data of summaries of interesting cases that illustrate your answer.

a) Figures regarding the Flemish Region for the period 1993-2002 (prior to the broad introduction of the administrative fining option) show that around 60% of the environmental cases were dismissed, half of which being technical dismissals (primarily for lack of evidence for the offence or the inability to identify the perpetrator) and the other half opportunity dismissals (often because the situation was remedied). Only around 8% of the cases were settled out of court (transaction). The fraction of cases in which it was decided to prosecute and which were brought before the criminal court came to around 5%.⁸ More recent data (2005 and 2009) show an increase in the sanctioning level, resulting from a decrease in the number of opportunity dismissals by around 10%, an amount that corresponds to the fraction of referral decisions to the administrative authority for administrative fining; an increase in the number of out-of-court settlements, in particular cases involving legal entities, to 12-14%; last but not least, an increase

⁸ C.M. BILLIET, S. ROUSSEAU, A. BALCAEN, R. MEEUS, K. STYNS, G. DE MEYER, T. VANDER BEKEN & L. LAVRYSEN, "Milieucriminaliteit in handen van strafrechters en beboetingsambtenaren: feiten uit Vlaanderen en Brussel", *Milieu & Recht* 2009, 342 – 349.

in the number of decisions to prosecute to around 8%⁹. As prosecution of environmental offences happens rather more often in the Flemish Region than elsewhere in the country, the point to remember is that *prosecution levels are very low, on average for the country probably 3 to 5%*¹⁰. In recent years, the various legislations provide for the possibility to impose administrative fines or propose an administrative transaction, in case the public prosecutor decide not to prosecute. In May 2000, the Council of Prosecutors-General approved a (non-binding) memorandum identifying the environmental offences that rate priority in the prosecution policy. The prioritized offences are essentially those that have, or might have, serious consequences for public health and the environment, have an organized crime character, are committed in a professional context, or concern the operation of a facility or activity without the required environmental permits¹¹. This memorandum was replaced by a "Prioritization Note of 2012 concerning prosecution of environmental cases in the Flemish region" for that region, that has been approved by the Flemish High Council of Environmental Enforcement¹², the Council of Prosecutors-General and signed by the federal Minister of Justice and the Flemish Environment Minister.

According to the most recent available data there were in 2013 38.495 environmental inspections in the Flemish Region. In 14.319 of those inspections (37 %) an infringement was found. In around 11 % of those cases no further action was taken. In another 11 % of those cases an "advice in view to comply" (*raadgeving*) was given, in 33 % an "order to comply" (*aanmaning*) was given. In less than 1 % a report of finding an administrative violation (*verslag van vaststelling*), that can trigger the administrative fining process, was established, while in around 20 % of the cases a report of the offence (*proces-verbaal*) was drafted, that can trigger the criminal sanctioning track. In the same year 4.621 cases were registered with the public prosecutors offices, dealing with the Flemish Region. Around 16 % of the cases are about nature protection, while the same number had to do with emissions to air, water, soil or noise, around 20 % are related to problems with the environmental permit, 44 % with waste and 4 % with manure. The majority (55 %) of the cases are dismissed, be it for opportunity reasons (going down from 35 to 16 % in the period 2009-2013), on technical grounds (35 à 39 %) or for other reasons (25 à 50 %). In this last category we find a growing number of cases that were sent to the administrative sanctioning division (*Afdeling Milieuhandhaving, Milieuschade en*

⁹ C.M. BILLIET, S. ROUSSEAU, R. MEEUS & A. BALCAEN, "Minnelijke schikkingen voor milieumisdrijven in Vlaanderen", *Panopticon* 2010, 78 – 84; C.M. BILLIET, T. BLONDIAU & S. ROUSSEAU, "Punishing environmental crimes: An empirical study from lower courts to the court of appeal", *Regulation & Governance* 2013, 3.

¹⁰ See also M.G. FAURE & K. SVATIKOVA, "Criminal or administrative law to protect the environment? Evidence from Western Europe", *Journal of Environmental Law* 2012, vol. 24(2), 253 – 286

¹¹ C.M. BILLIET, T. BLONDIAU & S. ROUSSEAU, "Punishing environmental crimes: An empirical study from lower courts to the court of appeal", *Regulation & Governance* 2013, 3.

¹² See for the role of this body: M. FAURE & A. STAS, "The Flemish High Council of Environmental Enforcement; the role of an environmental enforcement network in a new coordinated environment enforcement landscape within the Flemish Region, 2009-2014" in M. FAURE, P. DE SMEDT & A. STAS, *Environmental Enforcement Networks. Concepts, Implementation and Effectiveness*, Edward Elgar, 2015, 490-509.

Crisisbeheer van het Departement Leefmilieu, Natuur en Energie)(AMMC) for imposing an alternative administrative sanction (fine) (27 % in 2013, with great variations between the different public prosecutors offices). In around 65 % of the cases AMMC imposed an administrative fine and in 20 % an administrative transaction. In 8 % of the cases there has been an appeal before the Environmental Enforcement Court¹³

b) The following data concern fines inflicted in 2003 - 2007 in the judicial resort of the Court of Appeal of Ghent, a judicial resort with two provincial courts of first instance, consisting of 7 divisions (Bruges, Dendermonde, Ghent, Ieper, Kortrijk, Oudenaarde, Furnes). They are based on the full environmental case load of those years. The fine levels are the fines *after* multiplication with the “additional decimes”.

Fines: what convicted offenders have to pay (additional decimes incorporated in the fine levels)

Fines (euro)	First instance			Appeal		
	Total	Legal persons	Individuals	Total	Legal persons	Individuals
Minimum	130	275	130	250	496	250
Average	5 559	14 569	3 787	8 110	10 733	7 061
Maximum	550 000	550 000	500 000	74 368	50 000	74 368

Source: C.M. BILLIET, S. ROUSSEAU, A. BALCAEN, R. MEEUS, K. STYNS, G. DE MEYER, T. VANDER BEKEN & L. LAVRYSEN, “Milieurechtshandhaving: een databestand voor onderzoek naar de penale en bestuurlijke sanctioneringspraktijk”, *Tijdschrift voor Milieurecht* 2009, 146.

Practice indicates that referral of execution of prison sentences is much used in environmental crime cases.¹⁴ It also is used next to severe effective penalties, a use that embodies strongly its preventive function at the individual level.¹⁵ Effective prison sentences are rare, but not inexistent. See e.g. the case discussed in the Appendix.

As a complement to fines, the possibility of a *forfeiture of illegal benefits* matters. In Belgian criminal law, the forfeiture of illegal benefits has been designed as a *penalty* (vs. monetary remedial sanction). Analysis of the case law learns (1) that the penalty is used with regard to

¹³ VHRM, *Milieuhandhavingsrapport 2013. 5 jaar Milieuhandhavingsdecreet*, p. 104- 195.

¹⁴ C.M. BILLIET, T. BLONDIAU & S. ROUSSEAU, “Milieucriminaliteit in het beleid van de strafrechter: bestraffen tussen Haus en Brundtland”, *Rechtskundig Weekblad* 2010-11, 916 – 919, 921-922, 928-929.

¹⁵ *Ibid.*

environmental crime and (2) that judges accept the idea that crime cannot benefit financially the offender – when forfeiting illegal benefits they easily go far beyond average fine levels.¹⁶

Remedial sanctions are provided by general criminal law but mostly by the federal and regional environmental legislation. In the judicial resort of the Court of Appeal of Ghent, public prosecutors, when requesting such sanction, more and more often additionally ask for penalty payments that would sanction non-execution of the sanction within a term determined by the judgment (for instance EUR 200 per day delay)¹⁷. Insofar the remedial sanction is a situational sanction that requires action of the public authorities, followed by a recovery of the cost of that remedial action with the offender, practice complains about problems with pre-financing and money recovery. In cases where both types of sanctions can be used, remedial orders completed by penalty payments have the preference.

c) Environmental law enforcement is far from the highest priority, not for the prosecutor's office, nor for the judiciary. What is needed is a law based structure for specialized entities within de prosecution and courts and with minimum staff numbers.

6/ As to structure of prosecuting environmental crime

Are prosecution and/or court procedure for environmental crimes concentrated on specialized prosecution offices/ courts or specialized sections within prosecution offices/courts?

The inflow of cases into the criminal system happens at the level of the divisions of the judicial districts, where we also find the courts of first instance. Belgium has since the judicial reform of 2014, 12 judicial districts (containing 27 divisions, the former districts) each with its public prosecutor's office and court of first instance. In appeal the country has five judicial districts, each with its attorney-general's office and its court of appeal: Antwerp, Brussels-Bruxelles, Ghent, Liège and Mons. At the top of the judicial structure is the Supreme Court, which handles appeals in cassation only. In the courts one finds only informal specialization in environmental law, based on a division of tasks. Such informal specialization exists in four out of five of the Belgian courts of appeal, which have informal 'green' chambers. The same is true, but to a far lesser extent, in the courts of first instance, although the judicial reform of 2014 has made it formally possible to create specialized environmental chambers, which was one of the aims of the reform.

¹⁶ C.M. BILLIET & S. ROUSSEAU, "Milieucriminaliteit : verbeurdverklaring van wederrechtelijk verworven vermogensvoordelen in cijfers", *Tijdschrift voor Strafrecht* 2012, 195 – 205; C.M. BILLIET & S. ROUSSEAU, "Milieucriminaliteit: waardering van wederrechtelijk verworven vermogensvoordelen", *Rechtskundig Weekblad* 2012-13, 482-499.

¹⁷ C.M. BILLIET en N. BROECKHOVEN, "De Milieustrafrechter en toekomstbeveiliging: praktijkprofiel van het exploitatieverbod", *Nullum Crimen* 2011, 1011-126. In the period 2003-2006 in the judicial districts of Ghent and Dendermonde together 34 interdictions to operate were issued by criminal judges.

As prosecution is concerned there has been created an “Expertise Network Environment” within the Public Prosecutors Offices. The co-ordination has been entrusted to the Prosecutor General with the Court of Appeal of Brussels. The Network has been set up to co-ordinate actions with regard to federal or common issues (e.g. transit and export of waste in ports); the promotion and diffusion of expertise within the various public prosecution offices, to support prosecutors dealing with environmental cases; provide advice, ex officio or upon request and to develop international contacts¹⁸. In the period before the judicial reform of 2014, an operational co-operation has been already created between different prosecution offices of different districts (this are now divisions of the new enlarged districts). Especially in the jurisdiction of the Court of Appeal of Ghent this has been the case. The more complicated environmental cases from the whole province have been entrusted to respectively the public prosecution office of Kortrijk for the province of West- Flanders (the actual Kortrijk Division of the Public prosecution office of West Flanders) and to the public prosecution office of Ghent for the province of East- Flanders (the actual Ghent Division of the Public prosecution office of East Flanders) so that specialization in environmental and planning law cases is possible within those divisions. Similar initiatives are taken in the jurisdiction of the Court of Appeal of Antwerp¹⁹.

7/ What about the availability of administrative sanctions to punish environmental offences?

By ‘administrative sanction’ we mean sanctions imposed by an administrative body, an administration.

a/ Is it possible in your country to punish environmental offences by administrative fines?

If so,

- i) could they be applied alongside criminal sanctions or only instead of them and at which point in the procedure has a decision to be made which “route” to follow;
- ii) what are the legal minimum and maximum of those administrative fines;
- iii) which are the administrative bodies who can inflict such fines?

b/ Which administrations can impose remedial sanctions to end environmental offences and remediate to the damages they caused?

And which are the remedial sanctions they can impose? Can they give remedial orders? Can they themselves clean-up the damages and oblige the offender to pay the bill? Can they order to stop an illegal conduct? Can they suspend permits until the cause of the pollution of offence was remediated? ...

For a long time the array of administrative sanctions that could be used in Belgium to counter environmental offences consisted of remedial sanctions only. Around the end of the former century, this state of affairs started to change. In 1999, the Parliament of the Brussels-Capital Region was the first to adopt an ordinance that introduced an administrative fining system designed to punish breaches of the whole regional environmental legislation. In a time span of

¹⁸ <http://www.om-mp.be/page/2191/1/leefmilieu.html>

¹⁹ J. DE CLERCQ, “Parketsamenwerkingsverbanden inzake milieu en stedenbouw in het rechtsgebied van het hof van beroep te Gent”, *Tijdschrift voor Milieurecht* 2012, 244-256; W. HAELEWYN, “Criminal offence policy with respect to combating environmental offences in Belgium”, IGO/IFJ, *Investigation, prosecution and judgment of environmental crimes*, Durbuy, 2011, 63-67

ten years all other parliaments followed, as well as the federal legislator for the main environmental legislation for which he is competent. Alongside this evolution, another monetary sanctioning instrument came up: the administrative transaction. The administrative transaction is not a sanction because it operates by agreement: the administration makes a proposal to pay a given sum because of a given environmental offence and the offender is free to accept and pay it or to refuse to do so.

The law, including the case law of the Constitutional Court, is opposed to the combination of a punitive administrative sanction with a punitive criminal sanction. To avoid cumulating both types of proceedings and sanctions, priority rules exist. The most common arrangement is that criminal prosecution gets the priority. The notice of violation goes to the public prosecutor's office first. He is given a time window (one, three or six months) to decide whether he will handle the file within the criminal track (prosecution, but also criminal transaction or opportunity dismissal or technical dismissal). If he does not opt for this, the file goes to the fining administration, which starting from that moment becomes in that specific file legally competent to fine. This is the model we find in the Flemish Region, the Brussels-Capital Region, the Walloon Region and the federal legislation regarding ionizing radiation. With regard to the administrative transactions, we find that same organization of the co-existence, with the competence of the administration to propose a transaction arising only once the public prosecutor has decided not to handle the case in the criminal track. In some administrative transaction systems, another model of co-existence appears. Basically, it gives transaction the priority and sends the file to the criminal track only if and when the transaction proposal has been refused / not paid. We find this scheme in the Walloon transaction system and in the federal Product Policy Act (transactions for less serious offences).

In the **Flemish Region** exclusive administrative fines, for purely administrative breaches of environmental law, range between 0 and 50.000 (x 6) EUR, while alternative administrative fines (in case of non-prosecution of environmental offences through the criminal track) can go up to 250.000 (x 6) EUR in the very worst case. We do not have figures about the fines imposed in practice²⁰. In the **Brussels Capital Region** the alternative administrative fines range between 00 en 62.500 EUR, and in case of concurrence of different offences, 125.000 EUR. In the **Walloon Region** the administrative fines range from 50 to 100.000 EUR depending of the category of offences concerned, doubled in case of repetition of an offence within a period of 3 years. The multiplier factor is not applicable in both Regions. On the **Federal level**, the administrative fines range between 400 and 100.00 EUR in the Act on Ionizing Radiation, between 26 (x 6) and 350.000 (x 6) EUR in the Product Policy Act and between 26 (x 6) and 50.000 (x 6) EUR (max. 100.000 (x6) in case of concurrence of different offences) in the CITES Act.

²⁰ See for the general criteria the AMMC is applying:

<http://www.lne.be/themas/handhaving/beboetingsbeleid/algemene-criteria-voor-het-beboetingsbeleid>

The administrative fines are imposed by the relevant administrations. In the Flemish Region this power is nearly in its totality²¹ concentrated with the AMMC, in the Brussels Capital Region with the BIM/IBGE or the Waste Agency and in the Walloon Region this competencies are reserved to the management of various competent administrations (Art. R 114 Walloon Environmental Code).

The remedial sanctions essentially are situational sanctions, which act within the factual situation that resulted from the offence, and right-depriving sanctions, which interfere with the rights a person was given in appliance of the environmental law, most typically permits and other authorizations to operate a plant, business or activity. The situational sanctions have two basic forms: (i) an order to the offender to undertake some remedial action (cessation order, clean-up order, ...) and (ii) a decision that remedial action will be undertaken by or on behalf of the administration (for instance cleaning up or reinstating the original situation), all costs to pay by the offender. The right-depriving sanctions are the suspension and withdrawal of a permit. One single remedial monetary sanction existed. It was part of the Flemish legislation: the administrative forfeiture of nett-benefits generated by the offence (vs. the punitive criminal forfeiture of illegal benefits, where costs do not have to be deducted). Since 31 January 2014 this monetary sanction is punitive too: costs do not have to be deducted anymore.

In the **Flemish Region** those measures can be imposed by the competent environmental inspectors, the Governor of the Province or the Mayor of the Municipality or their substitutes. A similar situation can be found in the other regions.

8/ What about the actual use of administrative sanctions against environmental offences?

a/ Are environmental offences sanctioned by administrative authorities? Does this happen rather often or only exceptionally? In what kind of cases?

b/ What are the administrative sanctions that are used in practice?

Is fining used? How high are the fines that are imposed in practice?

Are remedial sanctions used frequently, are rather seldom? Are they effective?

According to the relevant statistics the AMMC in the Flemish Region received in the period 2009-2013 6.140 files from the various public prosecutors offices. In the same period 3.587 cases were closed, resulting in 2.436 administrative fines imposed. In 706 cases there was no fine imposed and in 134 cases the AMMC proved not to be competent for the case. In 464 cases an administrative transaction was proposed of which 318 cases were concluded successfully. On top of that 170 minor cases of exclusive administrative fines for administrative breaches were treated. The Flemish Manure Administration imposed in the same period 3.093 administrative fines²². There are no data available on the amount of the imposed administrative fines.

²¹ Some other administrations have indeed also such a competence in relation to environmental taxes and breaches of manure legislation e.g.

²² VHRM, *Milieuhandhavingsrapport 2013. 5 jaar Milieuhandhavingsdecreet*, p. 177-195

In the Brussels Capital Region there are data for the period 2004-2006. The average fine was 3.628 EUR, with a minimum of 62,50 EUR and a maximum of 102.915 EUR. For natural persons the average was much lower (672 EUR) compared to legal persons (4.477 EUR) and the average for violation of noise standards by aircraft was much higher (10.244,50 EUR) than for other violations (3.628 EUR)²³.

In the Flemish Region in the period 2010-2013 349 to 656 remedial sanctions per year have been imposed. Half of them are order to remediate the situation, orders to stop an illegal conduct account for 20 %. Often there is a combination of various sanctions. *Ex officio* clean-up is relatively rare (4 % of the cases). 8 % of the sanctions were imposed on request of third parties. In 9 % of the cases the orders were not executed on time. If that means that this was the case for the remaining 91 %, we can say that the sanctions are relatively effective. The number of administrative appeals is also modest (7 % of the cases), with a limited success rate²⁴.

²³ C.M. BILLIET, S. ROUSSEAU, A. BALCAEN, R. MEEUS, K. STYNS, G. DE MEYER, T. VANDER BEKEN & L. LAVRYSEN, "Milieurechtshandhaving: een databestand voor onderzoek naar de penale en bestuurlijke sanctioneringspraktijk", *Tijdschrift voor Milieurecht* 2009, 149.

²⁴ VHRM, *Milieuhandhavingsrapport 2013. 5 jaar Milieuhandhavingsdecreet*, p. 122-130.

Appendix

Correctional Court, Ghent, 27 June 2014²⁵

Court of Appeal Ghent, 7 May 2015

Openbaar Ministerie, Vzw Vogelbescherming Vlaanderen & Bouwbedrijf Everaert Bvba v. H.v.T, A.C. & E.v.T.

On 27 June 2014, the Criminal Court of First Instance of East Flanders (Ghent division) in Belgium pronounced judgement in an important case of illegal trade in protected and endangered birds. The case is the result of a long and extensive judicial inquiry, including international legal cooperation between Belgium, the United Kingdom, Spain, France, Germany, Austria and The Netherlands. Four defendants have been found guilty of forgery of breeder's declarations and CITES-certificates regarding birds (of prey) listed in Annex A of the EU CITES-regulation 338/97 (which implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora within the European Union). Eggs and chicks of the birds, mainly birds of prey, were stolen from the wild among others in the south of France or Spain, and handed over to collaborators responsible for hatching out. The young birds were then hand-reared and ringed. Through forging of rings and breeder's declarations, the defendants obtained CITES-certificates for captive-born and bred species, which allowed them to commercialize the birds in spite of the general prohibition with respect to Annex A species.

The birds species included among others Egyptian Vulture (*Neophron percopterus*), African Fish Eagle (*Haliaeetus vocifer*), Imperial Eagle (*Aquila heliaca*), Bald eagle (*Haliaeetus leucocephalus*), Bonelli's Eagle (*Aquila fasciata*), Golden Eagle (*Aquila chrysaetos*), Booted Eagle (*Hieraetus pennatus*), several falcon species such as Peregrine (*Falco peregrines*), Merlin (*Falco columbarius*), Hobby (*Falco subbuteo*), Red-footed Falcon (*Falco vespertinus*), Lesser Kestrel (*Falco naumanni*), Black-winged Kite (*Elanus caeruleus*), Red Kite (*Milvus milvus*), Black Kite (*Milvus migrans*) but also Spoonbill (*Platalea leucorodia*), Great Bustard (*Otis tarda*), Great Grey Owl (*Strix laponica*), Snowy Owl (*Nyctea scandiaca*), Short-eared Owl (*Asio flammeus*).

The four defendants were also found guilty of participating in a criminal organisation with international branches in Spain, the United Kingdom, Austria, Germany, France and The Netherlands. The purpose of this criminal organisation was the withdrawal of protected bird species from their habitats, obtaining forged CITES-certificates and finally, marketing the birds. Typical of the criminal organisation was a clear hierarchy and division of tasks, the use of (police) officials and the creation of an animal zoo to obtain credibility and access to the market. The

²⁵ *Tijdschrift voor Milieurecht*, 2014, 330-367.

defendants were also convicted of fraud regarding CITES export permits, the failure to keep a CITES-register and the use of illegal traps and nets.

The birds of prey commerce was extremely profitable. Bonelli's Eagles (*Aquila fasciata*) were sold for 10.000 euro, Bald Eagle (*Haliaeetus leucocephalus*) for 5.000 euro, African Fish Eagle (*Haliaeetus vocifer*) for 6.000 euro and Booted Eagle (*Hieraetus pennatus*) for 5.000 euro.

The leading defendant and his wife were convicted of the laundering of the profits through a contractors company. The court underlined that international trade in endangered plant- and animal species has approached a scale and lucrativity comparable to international drugs and arms trafficking. The defendants took advantage of the lack of political priority and thus enforcement of the CITES-regulations. In the decision the courts stresses that the defendants committed a direct and irreversible assault on biodiversity. For profit, the defendants seriously undermined national and international efforts to preserve and protect these already vulnerable bird species.

The four defendants were sentenced to 4 years (1 year suspended), 2 years (1 year suspended), 18 months (suspended) and 1 year (suspended). The court also imposed fines of 90.000 euro, 30.000 euro and 12.000 euro. The court confiscated 835.800 euro of illegal gains of the trade (including real estate). All seized birds were confiscated and entrusted to the Belgian CITES-authority.

The Bird Protection Organisation was recognised as civil party, but as its main claimed damages were considered as pure moral, only a symbolic 1 euro compensation for moral damages was awarded.

The Court of Appeal of Ghent has in its judgement of 7 May 2015, given *in absentia* of the main defendants, confirmed the judgment of the Court of First Instance, except on one aspect. The Court found that the Bird Protection Organisation was entitled to the full compensation of its moral damages. The Court judged that those moral damages could be assessed *ex aequo et bono* to be € 15.000. So the total damages to pay to the Bird Protection Organisation have been increased from € 251 to € 15.250.