

# The development of environmental criminal law in the EU and its member states

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# The Development of Environmental Criminal Law in the EU and its Member States

Michael Faure\* 

*Environmental criminal law has gone through a spectacular evolution in Europe in the past 30 years. One change concerns simply the place of environmental criminal law. In many countries provisions have now been incorporated either in a penal code or in a specific environmental statute. Moreover, in many legal systems the environment has received a more autonomous protection in the criminal law system. And finally, one can notice in many countries the introduction of a so-called toolbox approach, implying that a variety of remedies have been put in place, thus reserving the criminal law as an ultima ratio. Yet another important development relates to the fact that Europe also has taken action with respect to environmental criminal law with the Environmental Crime Directive of 2008. It is, however, striking that some of the aforementioned developments in Member States are not reflected in the Directive. Moreover, the enforcement of environmental law faces many more challenges which cannot be faced merely with a criminalization. There is a serious danger that this only leads to symbolic legislation whereby violations of environmental law are criminalized, without any guarantee of effective enforcement. There are therefore still important challenges to be met with respect to the system of environmental criminal law in Europe.*

## INTRODUCTION

Environmental criminal law has gone through a spectacular evolution in Europe in the past 30 years. In most countries, these systems of environmental criminal law started as an annex to mainly administrative laws. The criminalization was also dependent upon the scope of administrative law. Moreover, in most legal systems, countries strongly relied on criminal law; alternative remedies to handle violations of environmental law were often lacking. Data concerning the enforcement of environmental criminal law in practice showed that a large amount of environmental crime was dismissed given the limited capacity of public prosecutors. Important changes have taken place concerning the shape of environmental criminal law. One

concerns simply the place of environmental criminal law. In many countries provisions have now been incorporated either in a penal code or in a specific environmental statute.

Environmental criminal law is hence no longer merely an annex to environmental statutes of a mostly administrative law character. Moreover, in many legal systems the environment has received a more autonomous protection in the criminal law system. And finally one can notice in many countries the introduction of a so-called toolbox approach, implying that a variety of remedies (civil penalties, administrative fines, etc.) have been put in place, thus reserving the criminal law as an *ultima ratio*. Yet another important development relates to the fact that Europe also has taken action with respect to environmental criminal law through the Environmental Crime Directive of 2008. It is, however, striking that some of the aforementioned developments which could be observed in the Member States, for example, with respect to the toolbox approach, are not reflected in the Directive. The enforcement of environmental law faces many more challenges that cannot be addressed solely through criminalization. There is a serious danger that this only leads to symbolic legislation, whereby violations of environmental law are criminalized, without any guarantee that an effective enforcement will take place as well. There are therefore still important challenges to be met with respect to the system of environmental criminal law in Europe.

In this article, I will first sketch how environmental criminal law in Europe emerged and developed in the 1970s. I will then highlight that the traditional model of using criminal law to enforce environmental legislation was subject to much criticism. Next, I will show that this critique has to a large extent been incorporated by Member States, but only to a lesser extent in the European Environmental Crime Directive. The final section concludes.

## THE BEGINNING

When environmental criminal law emerged in the 1970s it was captured in environmental laws that often had a strongly administrative character, imposing, for example, an obligation upon an operator to apply for a

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permit to run a particular operation. There were three specific features of environmental criminal law in that period that are worth mentioning.

First, criminal law limited itself largely to penalizing the violation of these administrative obligations. It meant that environmental crime was not defined in an independent manner, for example, by taking into account the ecological damage caused by a particular behaviour. It was rather a system supporting the administrative management of the environment. An example can illustrate this. The Belgian (Federal) Service Water Protection Act of 1971 held that all discharge of waste water was submitted to a licence.<sup>1</sup> The Act further stipulated which administrative authority could provide the discharge permit and which conditions could be imposed in the permit. Article 41 of the Act punished *inter alia* anyone who violates the provisions of this Act or the executive orders on the basis of this Act. This example shows a strong interrelationship between administrative and criminal law. Such examples could be found in many other countries as well.<sup>2</sup>

Second, environmental criminal law did not have a very prominent place in the criminal law system. As a result of the so-called 'administrative dependence' of environmental criminal law, criminal provisions could only be found at the end of a specific administrative environmental statute. They were used to support the enforcement of administrative duties. As a consequence, it was often already complicated in many legal systems just to find the applicable criminal law provisions, as they could be spread over a wide variety of sectoral environmental laws, regulating, for example, classified installations, waste, the protection of surface water, groundwater, air, etc.

A third feature of this traditional approach towards environmental crime was that there was a strong reliance on criminal law as an enforcement instrument. In many European Member States, such as Belgium, France and the United Kingdom (UK), criminal law was the only mechanism that could be used to enforce (administrative) environmental law. Alternative mechanisms that could equally aim at deterrence, such as, for example, administrative fines, were often not available (although there were a few noteworthy exceptions, such as Germany, which had a system of administrative offences to which administrative fines were applicable).<sup>3</sup> At this early stage of the development of

environmental criminal law, alternative sanctions, such as, for example, administrative fines or civil sanctions, were not available in most Member States.

## CRITIQUE

Those three key features of environmental criminal law in many Member States were strongly criticized.<sup>4</sup> The critique was of a theoretical as well as of an empirical nature. The critique on the administrative dependence of the criminal law was that ecological values were not directly protected through criminal law. A consequence could be that there could be a case of serious endangerment of the environment or even pollution, but if it did not at the same time constitute a violation of an administrative obligation, intervention by the criminal law would be impossible. But the reverse was true as well: there could be cases where administrative obligations were violated as a result of which the criminal law would automatically be applicable, without any regard for the question whether this violation also caused serious danger or harm to the environment. In short, the problem with this (absolute) administrative dependence of environmental criminal law was that ecological values were not protected in an autonomous, independent manner. It seemed that criminal law was only used to back up the correct functioning of the administrative law system.<sup>5</sup> The criticism of this absolute administrative dependence of criminal law was especially formulated in German criminal law by Günter Heine, who showed that criminal law should not under all circumstances be limited to supporting administrative decisions, but that there are, depending upon the gravity of the endangerment of the environment, also ways to provide a more independent protection by the criminal law to the environment.<sup>6</sup> These ideas were very influential and led, for example, to a Recommendation by the 1994 Conference of the Association Internationale de Droit Pénal (AIDP) to provide a more autonomous

<sup>4</sup> This criticism came especially from scholars working at the Max Planck Institute for Foreign and International Criminal Law at Freiburg im Breisgau (Germany) where a project 'Environmental Protection through Criminal Law?' was executed. A good summary of the criticisms is provided in an opinion written by Heine and Meinberg for the German Lawyers Association in 1988. See G. Heine and V. Meinberg, *Empfehlen sich Änderungen im strafrechtlichen Umweltschutz, insbesondere in Verbindung mit dem Verwaltungsrecht? Gutachten für den 57. Deutschen Juristentag* (Beck, 1988).

<sup>5</sup> See M. Prabhu, 'General Report. English Version', *International Review of Penal Law* (1994), 699.

<sup>6</sup> See, e.g., G. Heine, 'Aspekte des Umweltstrafrechts im Internationalen Vergleich', *Goldammer's Archiv für Strafrecht* (1986), 67; and G. Heine, 'Zur Rolle des Strafrechtlichen Umweltschutzes', 101:3 *Zeitschrift für die Gesamte Strafrechtswissenschaften* (1989), 722; G. Heine, 'Die Verwaltungsakzessorität im Deutschen Umweltstrafrecht unter Berücksichtigung des Österreichischen Rechts: Aktuelle Probleme und Reformüberlegungen', *Österreichische Juristen Zeitung* (1991), 370.

<sup>1</sup> Surface Water Protection Act of 26 March 1971, *Moniteur Belge*, 1 May 1971.

<sup>2</sup> See, e.g., S.F. Mandiberg and M.G. Faure, 'A Graduated Punishment Approach to Environmental Crimes: Beyond Vindication of Administrative Authority in the United States and Europe', 34:2 *Columbia Journal of Environmental Law* (2009), 447, at 453.

<sup>3</sup> See M. Faure and G. Heine, *Environmental Criminal Law in the European Union. Documentation of the Main Provisions with Introductions* (Max Planck Institute for Foreign and International Criminal Law, 2000), at 9–13.

protection of the environment, stating: 'Where offences against the environment are subject to criminal sanctions, their key elements should be specified in legislation and not left to be determined by subordinate delegated authorities.'<sup>7</sup>

There was equally criticism of the fact that environmental criminal provisions often did not receive a very prominent place in the criminal law system, but were merely put at the end of a variety of sectoral environmental laws with an administrative nature. This rather scattered nature of the provisions made enforcement more difficult, as it was not easy for prosecutors (and judges) to find the contents of environmental criminal law. But scholars equally held that the fact that environmental crime provisions could not be found in the Criminal Code or in other key legislation had another consequence. Many practitioners would consider that environmental crimes would not be as serious since they were merely contained in specific legislation. As a result, there was a fear that environmental criminal law would not be taken seriously by enforcers (prosecutors and judges) who would primarily focus on prosecuting provisions in core criminal law.<sup>8</sup> Again, this criticism was taken seriously since the AIDP 1994 Conference held in Recommendation 21 that: 'Core crimes against the environment, that is crimes that are *sui generis* and do not depend on other laws for their content, should be specified in national penal codes.'<sup>9</sup>

A third critique was geared towards the over-reliance on criminal law as the only enforcement tool. Especially criminologists, but also law and economics scholars, held that criminal law should be considered as an instrument of last resort, a so-called *ultimum remedium*, that should only be employed by the legislator when other instruments (more particularly civil penalties or administrative sanctions) would have failed. Ayres and Braithwaite presented their famous enforcement pyramid, arguing for a restricted use of criminal law, only to be applied on the top of the pyramid when all other instruments would have failed.<sup>10</sup> Law and economics scholarship also pleaded in favour of a more restrictive application of the criminal law for reasons of cost-effectiveness.<sup>11</sup> This scholarship argued that the criminal law system with its high threshold of proof and

severe sanctions will inherently be relatively costly.<sup>12</sup> As a result, prosecutors may tend to use their scarce resources by only focusing on the gravest violations and to dismiss the others. Empirical evidence also supported the fact that in many jurisdictions an overwhelming part of all environmental crimes were simply not prosecuted but dismissed.<sup>13</sup> It was therefore argued that the criminal law should only be reserved for those grave cases where other remedies would not suffice to provide deterrence. The large dismissal rates would otherwise lead to underdeterrence. This scholarship therefore pleaded in favour of complementing environmental criminal law with a system of civil or administrative penalties, allowing the imposition of fines on violators.<sup>14</sup> This therefore led to a plea in favour of a toolbox approach, suggesting a more limited role for criminal law and a greater role for alternatives such as systems of administrative fines.<sup>15</sup> The rationale for this toolbox approach was especially grounded in the empirical finding that criminal sanctions were rarely imposed in practice. This underscored the need to have other, alternative systems supplementing criminal law.

## MEMBER STATES LEARNED THE LESSONS

There have been rather spectacular changes in environmental criminal law in many European Member States over the past 30 years. The criticisms of the way in which environmental criminal law was originally formulated have seemingly been heard in many Member States, leading to important legislative reforms. Examples of important changes can be provided for the three specific features of traditional environmental criminal law and for the related critiques.

Starting with the recommendation of providing a more autonomous protection of the environment through criminal law, one can indeed notice reforms whereby criminal law no longer (only) punishes the violation of administrative duties. This system of an absolute administrative dependence has been abandoned in many legal systems, making room for a more autonomous protection of the environment through criminal law. For example, in some cases provisions were

<sup>7</sup> Recommendations of the XVth International Congress on Penal Law, Recommendation 22, reproduced in: 66:1-2 *International Review of Penal Law* (1995), 52.

<sup>8</sup> K. Tiedemann, *Die Neuordnung des Umweltstrafrechts: Gutachtliche Stellungnahme zu dem Entwurf eines Sechzehnten Strafrechtsänderungsgesetzes (Gesetz zur Bekämpfung der Umweltkriminalität)* (De Gruyter, 1980), at 18.

<sup>9</sup> Recommendations of the XVth International Congress on Penal Law, n. 7 above, Recommendation 21.

<sup>10</sup> I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

<sup>11</sup> A. Ogus, 'Enforcing Regulation: Do We Need the Criminal Law?', in: H. Sjögren and G. Skogh (eds.), *New Perspectives on Economic Crime* (Edward Elgar, 2004), 42, at 42-46.

<sup>12</sup> M.G. Faure, A. Ogus and N. Philipsen, 'Curbing Consumer Financial Losses: The Economics of Regulatory Enforcement', 31:2 *Law & Policy* (2009), 161, at 178-181.

<sup>13</sup> M.G. Faure and K. Svatikova, 'Criminal or Administrative Law to Protect the Environment?', 24:2 *Journal of Environmental Law* (2010), 253.

<sup>14</sup> A. Ogus and C. Abbot, 'Sanctions for Pollution: Do We Have the Right Regime?', 14:3 *Journal of Environmental Law* (2002), 283.

<sup>15</sup> This is in some literature also referred to as 'sanction mapping'. See, e.g., G. Pink and M. Marshall, 'Sanction Mapping: A Tool for Fine-Tuning Environmental Regulatory Strategies', in: M. de Bree and H. Ruessink (eds.), *Innovating Environmental Compliance Assurance* (INECE, 2015), 85.

introduced punishing unlawful emissions. The unlawfulness could then still consist of a violation of administrative obligations, but could also be interpreted in a broader manner. This meant that the criminal liability was no longer solely attached to a violation of administrative obligations (which is sometimes referred to as absolute administrative dependence). As a consequence, even in the absence of specific administrative obligations an emission could still be considered unlawful and therefore lead to criminal liability. In other cases, truly autonomous environmental crimes were introduced for instances of serious pollution. Examples of both these developments can be found in Member States' legislation. For example, in the Criminal Code of Portugal, new criminal law provisions target *inter alia* concrete endangerment of the environment and serious pollution.<sup>16</sup> And in new provisions in the Criminal Code in Spain unlawful emissions as well as the engagement in environmentally dangerous activities, and not just administrative disobedience, is punished. The provisions in the Criminal Code in Spain punish the endangerment of ecological values and focus more on the concrete endangerment of the environment.<sup>17</sup> Also in Sweden and France changes took place, as a result of which environmental protection through criminal law is taking place in a more independent way, that is, not only in the case of a violation of administrative duties. For example, in France Article 421.2 was added in the Criminal Code, specifying the crime of 'ecological terrorism'.<sup>18</sup> In most of those examples, there still is a relationship between the formulation of environmental crime and administrative law. The major change compared to the old system, however, is that criminal behaviour no longer only consists of a violation of administrative duties. The criminal provisions focus more on the resulting endangerment or harm to the environment rather than merely on administrative disobedience.

Concerning the second element, the place of environmental criminal law, important changes have also taken place. These consist on the one hand of an incorporation of environmental crime into the Criminal Code and on the other hand of general codifications of environmental law, equally incorporating environmental

criminal law. Countries like Germany and the Netherlands already had incorporated criminal provisions in their Criminal Codes in the 1980s. Germany introduced environmental criminal law provisions in 1980,<sup>19</sup> followed by the Netherlands (1989),<sup>20</sup> Finland (1995), Portugal (1995) and Spain (1995). In other countries, criminal provisions were incorporated into a code or special environmental law, aiming at the integration of environmental law. That was the case in the UK (1990), Denmark (1991), Ireland (1992) and Sweden (1998). Also in the three regions that in Belgium had competences with respect to environmental law, environmental criminal law became integrated in environmental enforcement decrees and ordinances.<sup>21</sup> These integration efforts had to deal with the problem that previously, criminal provisions were scattered over a large variety of different regulations and therefore difficult to find.

Examples can also be provided of a trend towards an increasing use of the toolbox approach, mentioned above, implying that criminal law would no longer be the only available remedy in case of a violation of environmental regulations. Germany and Austria already had models allowing particular violations to be exclusively dealt with through administrative penal law. The same model was also introduced in Portugal. Major changes also took place in the UK, where the criticism that was formulated on the enforcement regime in the law and economics literature was taken up by Richard Macrory, who carried out a wide-ranging review of regulatory enforcement regimes for the UK Cabinet Office. He advocated a reduced reliance on criminal law and a greater use of administrative penalties.<sup>22</sup> His recommendations were implemented with the Regulatory Enforcement and Sanctions Act (2008) which gave particular agencies (like the Environment Agency) the power to impose civil sanctions (being in fact monetary penalties).<sup>23</sup> Similar changes equally took place in the various regions in Belgium. To an important extent a

<sup>19</sup> They are incorporated in Section 29 of the German Code, at paragraphs 324ff., under the title '*Straftaten gegen die Umwelt*' (crimes against the environment). For comments, see G. Heine, 'Allemagne. Crimes against the Environment', 65 *Revue Internationale de Droit Pénal* (1994), 731, at 733.

<sup>20</sup> See C. Waling *et al.*, 'Crimes against the Environment', 65 *International Review of Penal Law* (1994), 1065, at 1080–1082.

<sup>21</sup> See, e.g., M.G. Faure and A. Stas, 'The Flemish High Council of Environmental Enforcement: The Role of an Environmental Enforcement Network in a New Coordinated Environmental Enforcement Landscape within the Flemish Region 2009–2014', in: M. Faure, P. Desmedt and A. Stas (eds.), *Environmental Enforcement Networks. Concept, Implementation and Effectiveness* (Edward Elgar, 2015), 490.

<sup>22</sup> R.B. Macrory, *Regulatory Justice: Making Sanctions Effective. Final Report* (2006), found at: <<http://web.archive.nationalarchives.gov.uk/20121212135622/http://www.bis.gov.uk/files/file44593.pdf>>.

<sup>23</sup> Regulatory Enforcement and Sanctions Act 2008 (commencement No. 2) Order 2009, SI 2009/550 and Environmental Civil Sanctions (England) Order 2010, SI 2010/1157. See further M.G. Faure and K. Svatikova, n. 13 above, at 266–271.

<sup>16</sup> See M.G. Faure and G. Heine, n. 3 above, at 283.

<sup>17</sup> *Ibid.*, at 293–294.

<sup>18</sup> Article 421.2 of the French Penal Code reads: 'The introduction into the atmosphere, on the ground, in the soil, in food stuff or its ingredients, or in waters, including territorial waters, of any substance liable to imperil human or animal health or the natural environment, is an act of terrorism where it is committed intentionally in connection with an individual or collective undertaking, whose aim is to seriously disturb public order through intimidation or terror.' See the Penal Code of France, found at: <<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719>>. On this provision, see also D. Guihal, *Droit Répressif de l'Environnement*, 2nd edn (Economica, 2000), at 541 and M. Prieur, *Le Droit de l'Environnement*, 4th edn (Dalloz, 2001), at 857–858. There is, however, criticism on the specific formulation of this crime as its scope of application is relatively limited.

decriminalization took place, allowing specific regulatory offences to be handled with administrative fines. Crimes would still be forwarded to the public prosecutor, but the prosecutor can decide to forward the case to an administrative agency which can impose an administrative fine.

## THE CRITIQUE NOT INCORPORATED IN EUROPEAN ENVIRONMENTAL CRIMINAL LAW

### CRIMINAL LAW AS A REACTION TO AN IMPLEMENTATION DEFICIT

Another major change in the past 30 years consists of the fact that when environmental criminal law was originally developed in the Member States, Europe played no role whatsoever as far as harmonization of criminal law was concerned. There was, however, an important body of environmental law that had been developed, largely as a remedy for transboundary pollution problems.<sup>24</sup>

Common environmental standards could avoid Member States from getting involved in a race to the bottom towards ever lower standards of environmental protection. Notwithstanding the increasing volume of environmental directives and regulations, the European Commission could at the beginning of this century only notice that there was a serious problem with the implementation of environmental law at the Member State level, an implementation and enforcement deficit. Changes in the treaties and developments in the case law of the (then) European Union (EU) Court of Justice all had the goal of forcing Member States to better implement the environmental *acquis*. The *Francovich* case created the possibility to hold Member States liable for damage resulting from the lack of implementation of directives;<sup>25</sup> the case law also imposed a duty on Member States to effectively enforce national legislation implementing (environmental) directives.<sup>26</sup> The Commission brought a large number of cases before the Court of Justice for lack of implementation of (many environmental) directives, and the Court increasingly used the (new) possibility to impose a penalty payment upon those Member States that consistently failed to implement. However, notwithstanding those developments the implementation deficit persisted. It is *inter alia* within that framework that at the beginning of this century a variety of initiatives were taken to push

<sup>24</sup> See R. Revesz, 'Federalism and Environmental Regulation: An Overview', in: R. Revesz, P. Sands and R. Stewart (eds.), *Environmental Law: The Economy and Sustainable Development* (Cambridge University Press, 2000), 37.

<sup>25</sup> CJEU, Case C-6/90, *Francovich and others v. Italian Republic*, [1990] ECLI:EU:C:1991:428.

<sup>26</sup> See further J. Jans and H. Vedder, *European Environmental Law after Lisbon*, 4th edn (Europa Law, 2012), at 163–170.

Member States to use criminal law to enforce legislation transposing environmental directives.<sup>27</sup> However, at the time the general idea was that the European legislator lacked the competence to force Member States towards introducing criminal sanctions in their implementing legislation. But in a well-known decision of the Court of Justice of the EU of 13 September 2005 in case C-176/03<sup>28</sup> the Court held that although:

as a general rule neither criminal law nor the rules of criminal procedure fall within community competence ... the last mentioned finding does not prevent the community legislature, when the application of effective, proportionate and dissuasive penalties by the competent national authorities is an essential measure for combatting serious environmental offences, from taking measures which relate to the criminal law of the Member State which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

This case law allowed the creation of the Environmental Crime Directive (2008/99)<sup>29</sup> and a related Directive with respect to ship-source pollution (2009/123).<sup>30</sup>

The core of the Environmental Crime Directive is that its Article 5 holds that 'Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties'.<sup>31</sup>

### A DIRECTIVE WITH A LIMITED SCOPE

When one views the structure of the Directive one can ask the question to what extent it has taken into account the criticism that was formulated in the literature regarding on the one hand the need for a more independent, autonomous formulation of environmental criminal law and on the other hand the trend towards a 'toolbox' approach, not just focusing merely on enforcement through the criminal law. It seems that those recommendations were not followed in the Directive.<sup>32</sup> Article 3 of the Directive holds that the measures shall

<sup>27</sup> See, e.g., F. Comte, 'Criminal Environmental Law and Community Competence', 12:5 *European Environmental Law Review* (2003), 147; F. Comte, 'Environmental Crime and the Police in Europe: A Panorama and Possible Paths for Future Action', 15:7 *European Environmental Law Review* (2006), 190; and M. Hedemann-Robinson, 'The Emergence of European Union Environmental Criminal Law: A Quest for Solid Foundations', 16:3 *Environmental Liability* (2008), 71.

<sup>28</sup> CJEU, Case C-176/03, *Commission of the European Communities v Council of the European Union*, [2005] ECLI:EU:C:2005:542.

<sup>29</sup> Directive 2008/99/EC of 19 November 2008 on the Protection of the Environment through Criminal Law, [2008] OJ L328/28 ('Environmental Crime Directive').

<sup>30</sup> Directive 2009/123/EC of 21 October 2009 Amending Directive 2005/35/EC on Ship-Source Pollution and on the Introduction of Penalties for Infringements, [2009] OJ L280/52.

<sup>31</sup> Environmental Crime Directive, n. 29 above, Article 5.

<sup>32</sup> M.G. Faure, 'The Environmental Crime Directive 2008/99/EC', 1 *European Journal of Consumer Law* (2011), 193.

ensure that particular conducts will constitute a criminal offence 'when unlawful and committed intentionally or at least with serious negligence'.<sup>33</sup>

Article 2 defines unlawfulness as meaning an act which violates:

the legislation adopted pursuant to the EC treaty and listed in annex A; or with regards to activities covered by the Euratom Treaty, the legislation adopted pursuant to the Euratom Treaty and listed in annex B; or a law, and administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the community legislation referred to in (i) or (ii).<sup>34</sup>

The provision refers to either a violation of the European environmental directives or a violation of domestic (usually administrative) environmental law, implementing European environmental directives. There is no role for autonomous, independent crimes whereby the criminal law could be applied even in the absence of a violation of administrative obligations.

Also, the suggestions concerning the toolbox approach have apparently not been heard by the drafters of the Directive. Recital 3 of the Environmental Crime Directive explicitly holds that criminal penalties 'demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law'.<sup>35</sup> As a consequence, Article 5 prescribes that specific violations need to be regarded as *criminal* offences in the national legislation implementing the Directive. The Environmental Crime Directive thus does not mention administrative penalties at all. This is striking and regrettable from a theoretical perspective (an over-reliance on criminal law and no attention at all for alternatives); it is also striking that the Environmental Crime Directive gives priority to criminal law whereas I just sketched that within Member States a trend could be discovered whereby equally attention is paid to alternative methods of enforcing environmental regulation. As such, given the focus of the Directive (on environmental crimes), it is unsurprising that the Directive only deals with criminalization as the only tool to remedy environmental harm. But it is precisely that focus on criminal law as the only instrument to remedy environmental harm that is problematic. A directive with a wider focus, also on other instruments, could better fit in the recent literature that advocated the toolbox approach and could have appropriately restricted the role of criminal law.

## NO SOLUTION FOR THE IMPLEMENTATION DEFICIT

Probably even more problematic is the fact that the mere criminalization of environmental harm (forced by Directive 2008/99) does not solve the implementation deficit. The problem is that today a Member State could still opt to transpose particular directives in its national law; it could equally follow the duty to incorporate criminal sanctions in its domestic legislation, but that Member State could also do very little or nothing concerning the effective enforcement of the domestic legislation implementing the environmental *acquis*. The problem is not so much that the applicable sanctions in Member States are different, but that the mere decision to criminalize has no influence either on decisions of public prosecutors to dismiss particular cases of environmental crime, or on the discretionary powers of the judge to choose the applicable sanction. More fundamental is the problem that Europe does not, as does the United States, have an Environmental Protection Agency which would have enforcement powers to verify, for example, environmental quality (or more simply, effective compliance with the environmental *acquis*) in the Member States. With a bit of exaggeration one can hold that the only thing which is effectively controlled is whether Member States on paper correctly transpose environmental directives. Sure, one can point at a formal obligation of Member States not only to transpose, but also to enforce the domestic legislation transposing EU law.<sup>36</sup> And one can fortunately also notice that the evaluation studies checking compliance by the Member States now increasingly also verify whether Member States courts do indeed impose effective, dissuasive and proportionate sanctions as required by the Environmental Crime Directive. For example, the evaluation carried out for the European Commission by the consultancy Milieu opined that Sweden did not correctly implement the Environmental Crime Directive, as sanctions that are in practice imposed for corporate environmental crime are too low and can therefore not be considered as being effective, proportionate and dissuasive.<sup>37</sup> But the major problem is that essential information to check effective compliance, such as the amount of classified installations that have to be inspected, the number of available inspectors, the number of violations and the result of those inspections, is lacking completely. Data collection in this respect is problematic at the Member State level. And even if Member States do collect this data, it is not adequately passed on to the European Commission. There is a legislative document

<sup>36</sup> See J. Jans and H. Vedder, n. 26 above, at 163–170.

<sup>37</sup> Milieu, 'Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States' (2015), found at: <[http://ec.europa.eu/justice/criminal/files/environment/nr\\_se\\_redacted\\_en.pdf](http://ec.europa.eu/justice/criminal/files/environment/nr_se_redacted_en.pdf)>, at 13.

<sup>33</sup> Environmental Crime Directive, n. 29 above, Article 3.

<sup>34</sup> *Ibid.*, Article 2.

<sup>35</sup> *Ibid.*, recital 3.

which could to an important extent deal with this problem, namely, Recommendation 2001/331,<sup>38</sup> which provides for minimum criteria for environmental inspections in the Member States. This document prescribes in detail how environmental inspections should be carried out, how site visits should take place and that specific plans for environmental inspections need to be developed. Moreover, it equally holds that Member States should report data *inter alia* on staffing, details of the environmental inspections carried out, an evaluation of the success or failure of the plans for inspections, etc. As such, this is an excellent document, but it is in practice barely communicated to the Commission.<sup>39</sup> But again, in addition to this information, formal written reports as required by the Recommendation cannot be found.

What should happen is that this recommendation should be transposed into a binding document. It seems, however, that within the current anti-European spirit it is not very likely that such a document, which would likely be felt by Member States as imposing more administrative reporting duties upon them will become binding. But a consequence of the current situation is that it is (unfortunately not only theoretically, but also in practice) possible that specific Member States could engage into a race to the bottom, meaning that they would still formally implement the environmental *acquis*, but for the remainder do very little to enforce the domestic legislation transposing EU law.<sup>40</sup> This dangerous tendency can only be countered by organizing a harmonized and effective system of data collection on monitoring and inspections in Member States.

## CONCLUDING REMARKS

Environmental criminal law, both in the Member States and in the EU, has gone through a remarkable development over the past decades. Environmental criminal law has changed from a system where its role was

originally reduced to back up administrative obligations as a supplement to sectoral environmental legislation, towards more autonomous provisions with a more prominent place in either criminal codes or special environmental statutes. Moreover, based on empirical research showing that large amounts of criminal cases were dismissed, many countries have introduced a toolbox approach, providing for other remedies as an alternative to the criminal law, thus allowing criminal law to play its role as *ultimum remedium*. Environmental criminal law in that sense has grown up.

The EU has rightly shown great concern with the implementation of the environmental *acquis*, resulting from the need for a collaboration between the EU level (fixing the standards) and the Member State level (responsible for enforcement). It is against that backdrop that the Environmental Crime Directive was drafted. However, merely forcing Member States to criminalize environmental harm may only lead to window dressing and symbolic legislation. The first-best solution to the problem would be to award enforcement powers to the European Environment Agency or a similar agency that would be allowed to verify outcomes of the implementation of the Directive, that is, actual improvement of environmental quality in the Member States. Unfortunately, within the current anti-Europe atmosphere it is not very likely that this is going to happen soon. It is for that reason understandable that as a second-best solution other remedies are sought, for example, forcing Member States not only to correctly transpose environmental directives, but also to threaten the violation of implementing legislation with effective, proportionate and dissuasive sanctions. It is also a positive development that nowadays the verification of implementation not only entails checking whether formal sanctions within the Member States can be considered as effective, proportionate and dissuasive, but that implementation studies also verify sanctions that are imposed in practice. However, the problem remains that without data on effective enforcement of environmental law in the Member States, a mere formal duty to provide for criminal sanctions in legislation will not necessarily change that much on the ground. This problem illustrates the crisis in European environmental law. Member States could in theory hide behind the formal implementation of European environmental legislation without providing any information on how this legislation is enforced in practice. Information on sanctions imposed may be one step, but this is largely insufficient as long as data, for example, on total enforcement capacity and enforcement strategies are lacking. It seems clear that this lack of data may jeopardize one of the central goals of European environmental law, namely, the prevention of a race to the bottom between Member States. More formal harmonization (e.g., of criminal sanctions, which is now also possible after the Lisbon Treaty) will probably only lead to more symbolic legislation without clear effects on improving

<sup>38</sup> Recommendation of 4 April 2001 Providing for Minimum Criteria for Environmental Inspections in the Member States, [2001] OJ 118/41.

<sup>39</sup> On the website of the Commission one cannot find formal written reports regarding the implementation of Recommendation 2001/331, as required by the Recommendation. There is some guidance on the implementation and some instructions (e.g., on [http://europa.eu/legislation\\_summaries/environment/general\\_provisions/L2808\\_en.htm](http://europa.eu/legislation_summaries/environment/general_provisions/L2808_en.htm)) and there is guidance by the EU network for the implementation and enforcement of environmental law (IMPEL) on point VIII of the Recommendation. See IMPEL Guidance on Point VIII of the Recommendation of the European Parliament and the Council of 4 April 2001 Providing for Minimum Criteria for Environmental Inspections in the Member States (2001/331/EC).

<sup>40</sup> It was argued that especially after the EU enlargement to the east (in 2004) there was a serious danger that the industry in the EU (benefitting from enlargement) would lobby in favour of a lenient enforcement of directives. See M.G. Faure and J.S. Johnston, 'The Law and Economics of Environmental Federalism: Europe and the United States Compared', 27:3 *Virginia Environmental Law Journal* (2009), 205.

environmental quality. A much more effective tool would be the imposition of a duty on Member States to provide verifiable information on effective enforcement. The Recommendation of 2001 providing for minimum criteria for environmental inspections in the Member States is in that respect an important tool. If Member States really take European environmental law seriously, they should stop their opposition against attempts to change that Recommendation into a binding directive. And if that were a step too far as far as political feasibility is concerned, it remains important to think about adequate second-best solutions which allow the European Commission to obtain more accurate information on the real and actual enforcement of environmental directives in practice. That seems to be a crucial step to transform all those symbolic steps taken so far into an effective harmonization of environmental quality in Europe.

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