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**Study on measures other than criminal ones in cases  
where environmental Community law has not been  
respected in a few candidate countries**

## **Summary Report**

For the European Commission (DG Environment)

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## I. Introduction

This Summary Report has been prepared under the contract awarded by the Directorate General for Environment (DG ENV) of the European Commission to develop the study entitled “Study on measures other than criminal ones in cases where environmental Community law has not been respected in a few candidate countries”.

The contract (Ref. no. B4-3040/2003/369100/MAR/A.3) was granted in December 2003 to *Jendroska Jerzmanski Bar i Wspólnicy. Prawo gospodarcze i ochrony środowiska (Jendroska Jerzmanski Bar & Partners. Environmental Lawyers)* on the basis of the proposal submitted jointly with *Environmental Management and Law Association (EMLA)*. The project team includes also *Milieu Ltd* and the national experts from the countries covered by the study.

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 five new Member States.

This project is the complement to a previous study carried out under the auspices of the European Commission related to criminal measures and covering the same group of countries. In fact, if previous studies have aimed to confirm the need for a minimum standard in the establishment and implementation of criminal penalties for environmental offences, the present study aims to evaluate the effectiveness of non-criminal sanctions as compared to criminal ones.

It was agreed during the inception meeting held in Brussels on 26 January 2004 that the study on non-criminal measures in Acceding Countries (which in the course of the project became Member States) would be co-ordinated with the study on “Measures other than criminal ones in cases where environmental Community law has not been respected in the Member States”, which was running in parallel. One of our team members, *Milieu Ltd*, was involved in the implementation of the latter study as the consortium leader.

Both studies follow a similar approach and methodology and have been developed as a joint effort of all companies under contract.

The current study focuses on 11 Directives and 3 Regulations dealing with various areas of environmental protection. These instruments provide for different measures to ensure adequate protection of the environment, which may explicitly require in certain cases a clear obligation for public authorities to establish administrative or even criminal sanctions at national level. 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

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- 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
- Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein
- Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer

The scope of the project is quite broad as it includes all non-criminal measures. The intention was to cover as many measures as possible, and therefore, not only sanctions, but also other tools and measures available in the targeted countries. The term enforcement measures provided flexibility to adapt to the diversity of the systems, but needed to be shaped to avoid duplication with other studies already carried out. For this reason, although the study intended to cover all non-criminal measures, it was agreed at the beginning of the project that the study should focus on the administrative enforcement measures.

In order to ensure comparability of the countries' reports the management team developed common methodological guidelines to be followed by national experts when undertaking their research. These methodological guidelines and tools were tested, discussed and refined following the conclusions of a team workshop in Brussels, which brought together the management team, the national experts and the European Commission Task Manager. The guidelines have been added as an Annex to the present Summary Report (Annex I).

One of the most important aims of this study was to assess the effectiveness of the administrative/quasi-criminal measures as compared to the criminal ones. Since this assessment strongly depends on more subjective points of view of the national experts, our methodology provided selected indicators and tables to gather statistical data, as well as a uniform questionnaire to guide the national experts' interviews with the enforcement authorities (Annex II).

The study is structured in a Summary Report and five individual National Reports. The National Reports follow a common structure, including an Annex containing the completed TOCs for each targeted instrument ordered by sector (waste, nature protection, chemicals and biotechnology, industrial pollution and water).

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

In the case of TOCs related to the EC Regulations (Basel Regulation, CITES Regulation and ODS Regulation), it was found that for many countries only few provisions of the Regulation were enforced by administrative measures; therefore, and having regarded the length of the TOCs, it was decided to simplify these TOCs leaving only those rows where particular EU provisions matched specific administrative enforcement measures.

Due to these simplifications, and in order to allow a better comparison among the countries and to have a clear picture of the provisions of the instrument that are enforced by administrative provisions, the blank TOCs related to the Regulations distributed among the experts have been added as an Annex to the present Summary Report (Annex III).

## II. Executive summary

The effectiveness of a sanctioning system is always a relative issue, since it is only one of several tools of prevention of environmental pollution and endangerment and may not be always the most effective one. Sanctions and measures can however be very effective tools of prevention and also of mitigation and remedying environmental harm caused by non-compliance with environmental law if they are combined with other tools.

In our survey we have made conclusions and suggestions on three levels:

- (a) the system of the environmental administrative sanctions,
- (b) individual sanctions and
- (c) the procedure of implementation and execution of the sanctions.

### ad (a)

Environmental law tries to cover, with its sanctions, an enormously wide scope of activities which harm or endanger the environment and to act in these cases quickly and simply. This large system, however, hides risks in the implementation of the sanctions: environmental officers tend to experience that sanctions for infringements of waste, water or air pollution legislation might not be in harmony. This different severity of rules might shift environmental pollution from one area to another, depending on the level of actual threats of different laws on sanctioning.

Lack of harmony between several sub-categories of environmental sanctioning rules might also result in an unrealistic total sum of sanctions and measures in cases where non-compliance concerns more than one environmental area. Sanctions which are too high in such cases might discourage the officials from the consequential use of them, unless there are possibilities of flexibility, for example suspension of the sanction or a certain level of discretion, based on multi-sided negotiations amongst the concerned authorities, the non-compliant facility, the interested municipalities and members and organisations of the public.

Another outstanding, but not too positive feature of administrative environmental sanctions is their frequent change. This causes difficulties not only to the regulated communities but also to the authorities that should use these laws. At the end of our study we offer recommendations for legislative policy changes in order to eliminate or at least mitigate these negative features of the administrative environmental sanctioning system.

On the general level we also examined the possibilities of enhancing the effectiveness of environmental law enforcement through a closer co-operation between administrative, administrative-criminal and criminal laws. We have found that there is plenty of room for developing this co-operation because of the quite different basic traits of these branches of law. While administrative law deals firstly with legal persons<sup>1</sup>, administrative-criminal and criminal law could encourage action or compliance by the concerned natural persons. While administrative law is frequently unable to trigger and/or reflect wide range social disapproval, criminal law and partly administrative-criminal law is the best tool for it. The list could be continued, and the comparison is highlighted in our study at every possible point.

### ad (b)

Examining the laws and practices of individual sanctions of environmental administrative law we have found an excessive use of fines, while the otherwise rich armament of environmental administrative

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<sup>1</sup> The Lithuanian national rapporteur offers this issue for further discussion, since natural persons are often subjects of administrative sanctions, for example of illegal hunting or fishing and also, according to the Lithuanian law officials, as natural persons, are subjects of administrative sanctions in the majority of cases of large scale industrial pollution.

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law lays idle in the overwhelming majority of the cases. Certainly, fine is a proportional sanction and simple to execute, while other available sanctions usually require the authorities to monitor their implementation, which the authorities might not have resources for.

We have found a rapidly growing tendency of elevating the level of fines in legislation and with, some hesitation, in practice, too. On the one hand this means a growing social awareness about the dangers of environmental pollution and is a response to the previous situation where the fines meant almost nothing to the non-compliant companies, since they were able to build them into their prices and such way to pass them onto the consumers. From the other side, however, an overshoot of the fines might turn against the legal institution itself; it could trigger a negative social reaction. That is why we especially have to welcome the new, flexible regulations that, together with the higher fines, allow a suspension of sanctions and overturning them if the non-compliant is willing to restore the environmental harm.

#### ad (c)

As concerns the question of implementation of environmental administrative sanctions, one of our most important findings was that environmental authorities are not alone in having a decisive role in this work. Several other administrative bodies handle, in whole or in part, cases with significant environmental elements. Lack of specialised expertise and lack of specific environmental procedural rules, in particular lack of public participation, might cause problems in such instances. However, this situation can be turned improved if the environmental authorities join into effective inter-agency co-operation with these other administrative bodies. Moreover, in some countries there is a fruitful connection between environmental inspectorates and public prosecutors' offices. These offices have in our region high prestige and effective administrative and civil lawyers; undoubtedly their regular help contributes greatly to the success of the largest environmental cases.

One area in need of development is, however, law enforcement in connection with small but frequent non-compliance cases. Our research shows that the level of tolerance in relation to such offences by environmental administrative bodies is too high, perhaps because they do not have the proper infrastructure, adequate manpower or the financial resources to run such wide-scale law enforcement programs. This is an area where co-operation with administrative-criminal law might promote the effectiveness of law enforcement, since that branch of law is specialised in small scale individual non-compliance issues and is able to handle large number of them, too.

Finally, we also examined the effects of EU environmental law harmonisation on the system and effectiveness of our administrative law enforcement. We have found that EU law inspired several new kinds of sanctions together with a new, more flexible approach concerning the procedures. These positive elements will not automatically result in better effectiveness in our countries, unless our legislators fit the new rules organically within the already existing sanctioning elements and also ensure a proper institutional and procedural background for their implementation.

The summary report follows the structure of the five national studies (Czech Republic, Hungary, Lithuania, Poland and Slovakia) as it was established at the beginning of this research and reaffirmed by the first workshop of the researchers. According to this pattern, our research has a legal dogmatic and a practical analysis. In the legal part, we first overview the existing kinds of sanctions on the territory of environmental administrative, administrative-criminal and criminal laws. Secondly we examine their mutual connections and thirdly we take a more thorough look at administrative and administrative-criminal sanctions, i.e. to the more specific topics of our present study. In the second part we try to summarise the findings of our national researchers compiled through various statistics and interviews about the practical effectiveness of the non-criminal and administrative-criminal sanctions in comparison to the criminal ones. Our summary report ends with conclusions and suggestions both based on the legal and practical experiences we have gathered during this international environmental sanctions research.

### III. Comparative overview of non-criminal sanctions

#### III.1. Types of enforcement systems

In the following table we have collected the kinds of sanctions criminal, criminal-administrative and administrative bodies of the five country use in environmental non-compliance cases. A detailed analysis of the differences amongst these sanctioning systems will be done in the following points of this chapter, especially under III.4.

A comparative table of measures against infringement of criminal and administrative rule:

	Czech Republic	Hungary	Lithuania	Poland	Slovakia
<b>Criminal sanctions</b>	<ul style="list-style-type: none"> <li>Imprisonment</li> <li>Social work duty</li> <li>Financial penalty (fine)</li> <li>Expulsion from the country</li> <li>Prohibition of residence</li> <li>Confiscation of property</li> <li>Confiscation of goods</li> <li>Prohibition of activity</li> <li>Withdrawal of honours and titles</li> </ul>	<ul style="list-style-type: none"> <li>Imprisonment</li> <li>Social work duty</li> <li>Financial penalty (fine)</li> <li>Expulsion from the country</li> <li>Prohibition of residence</li> <li>Confiscation of property</li> <li>Confiscation of goods</li> <li>Ban from a profession</li> <li>Ban from practising certain citizens' rights</li> <li>admonition</li> <li>probation</li> </ul>	<ul style="list-style-type: none"> <li>Imprisonment</li> <li>Detention</li> <li>Fine</li> <li>Deprivation of the right to be employed in a certain job or to hold a certain position</li> <li>Performance of community services</li> <li>Revocation of special licences<sup>2</sup></li> <li>removal of damage</li> <li>confiscation</li> <li>Limitation of activities of legal persons</li> </ul>	<ul style="list-style-type: none"> <li>Imprisonment</li> <li>Fine</li> <li>Ban on occupying a special position or profession</li> <li>Ban on specific economic activities</li> <li>Forfeiture</li> <li>Redress of damage</li> <li>Punitive damage payment</li> <li>Taking away benefits ensuing from the crime</li> </ul>	<ul style="list-style-type: none"> <li>Imprisonment</li> <li>Fine</li> <li>Loss of titles/badges of honour</li> <li>Loss of military rank</li> <li>Prohibition (ban) of an activity</li> <li>Forfeiture</li> <li>Expulsion</li> <li>Prohibition of staying in a certain area</li> </ul>
<b>Administrative criminal sanctions</b>	<ul style="list-style-type: none"> <li>Fine</li> <li>Forfeiture</li> <li>Prohibition of activity</li> <li>Admonition</li> </ul>	<ul style="list-style-type: none"> <li>detainment</li> <li>fine</li> <li>ban of driving</li> <li>confiscation of goods</li> <li>ban of activity</li> <li>admonition</li> </ul>			<ul style="list-style-type: none"> <li>fine</li> <li>ban of an activity for a certain period</li> <li>forfeiture of an item</li> <li>reproof</li> </ul>
<b>Administrative sanctions</b>	<ul style="list-style-type: none"> <li>Fine</li> </ul> <p>Other measures:</p> <ul style="list-style-type: none"> <li>withdrawal of permit</li> <li>confiscation of goods</li> <li>restriction and/or ceasing of harmful activity</li> </ul>	<ul style="list-style-type: none"> <li>Fine</li> </ul> <p>Other measures</p> <ul style="list-style-type: none"> <li>temporary suspension of an activity</li> <li>permanent cessation of an activity</li> <li>ordering modification of</li> </ul>	<ul style="list-style-type: none"> <li>Fine</li> </ul> <p>other measures:</p> <ul style="list-style-type: none"> <li>deprivation of licences</li> <li>deprivation of certain position</li> <li>confiscation</li> <li>warning<sup>3</sup></li> </ul>	<ul style="list-style-type: none"> <li>Fine</li> </ul> <p>Other measures:</p> <ul style="list-style-type: none"> <li>Increased fee</li> <li>Administrative reparation</li> <li>Stopping an activity</li> <li>(Revocation or limitation of a permit)<sup>4</sup></li> </ul>	<ul style="list-style-type: none"> <li>Fine</li> <li>Increased fine</li> </ul> <p>Other measures</p> <ul style="list-style-type: none"> <li>Forfeiture</li> <li>Seizure</li> <li>Blocking/detaining an item</li> <li>Ordering restoration</li> </ul>

<sup>2</sup> This sanction together with detention are criminal law ones according to the official legal standpoint in Lithuania, although in other systems they might be labelled as petty offence ones.

<sup>3</sup> The sanctions above the line are determined by the Code of Administrative Offences, while the others are determined by Law on the State Control of Environmental Protection. See the Lithuanian national report, Page 56 of the Interim Report.

<sup>4</sup> Theoretically, under the Polish jurisprudence, it might not be counted as a sanction, since this simply follows from the principle that an authority which grants a permit and lays down its conditions may also revoke or limit

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	Czech Republic	Hungary	Lithuania	Poland	Slovakia
	<ul style="list-style-type: none"> <li>prohibition of an activity</li> <li>refusal to grant a specific document</li> <li>restoration of the state of the environment or carrying out an alternative measure</li> </ul>	<ul style="list-style-type: none"> <li>an activity</li> <li>ordering introduction of protective or preventive measures</li> <li>ordering restoration of the previous state of environment</li> <li>warning to comply with the requirements</li> </ul>	<ul style="list-style-type: none"> <li>closure of a facility</li> <li>limitation of an activity</li> <li>ordering restoration of the state of the environment</li> <li>ordering compensation of damages caused to the environment</li> </ul>		

**Evaluation:**

An important addition to the administrative part of the above table is that the sanctions included are groups of sanctions rather than individual ones. This way we can conclude that the system of sanctions in administrative law is much more variable<sup>5</sup> and flexible than under the other two branches of law. A further difference is that while criminal and administrative criminal sanctions are naturally focused on punishment of past actions, administrative sanctions, dealing mostly with continuous actions, pay much attention to future prevention of further damages. Finally, since the subjects of administrative sanctions are mostly legal persons, there is much less emphasis on moral elements compared to the criminal and administrative-criminal sanctions. All of these issues will be analysed in detail in the following points of this chapter.

**III.2. Cumulation between the different systems of sanctions**

The researchers of the five countries have analysed their national legislations from the viewpoint of possibilities of cumulation of criminal, administrative-criminal, administrative and civil law sanctions.

Summarising table of possibilities of concurrence of different liability regimes:

	administrative-criminal					criminal					civil				
	Cz	Hu	Lt	Pl	Slo	C	H	L	P	Sl	C	H	L	P	Sl
						z	u	T	l	o	z	u	T	l	o
<b>Administrative</b>	-	+			-	+	+	-	+	+	+	+	+	+	+
<b>Administrative-criminal</b>						-	-			-	+	+			+
<b>Criminal</b>	-	-			-						+	+	+	+	+

Legend:

(+) - Liability regimes can be accumulated

(-) - Liability regimes cannot be accumulated

**Blank fields** - comparison not applicable, *i.a.* due to the fact administrative-criminal regime does not exist in a given country.

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the permit where the entity fails to meet these conditions. A sanction might come, however, if the entity fails to stop or modify its activity after these decisions. See the Polish national report at Page 73 of the Interim Report.

<sup>5</sup> The Lithuanian national rapporteur offers this issue for further discussion, since, for example in Lithuania, the new criminal law regulations provide more variable sanctions than the Code of Administrative Offences.

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### ***Differences in positioning of quasi criminal rules***

There are differences in classifying of administrative-criminal (quasi-criminal or petty offence) law between the national reports according to the historically accepted views of jurisprudence in the given countries. For instance, administrative sanctions issued from the Code of Administrative Offences of Lithuania are similar to quasi-criminal sanctions in other countries (e.g. only natural persons are liable, intention or negligence is required), yet the qualification of these sanctions is clearly administrative according to the generally accepted views in Lithuania.

Yet another situation can be seen in Poland. A branch of law, an outside viewer might say administrative-criminal one, is solidly encompassed by the jurisprudence into the system of criminal law, although these petty offence (misdemeanour) cases are heard by administrative bodies under certain circumstances.

### ***Interaction with other branches of law***

Although it falls out of the scope of the present project, we shortly refer to the fact that other branches of law, like labour law, might also play an important role in ensuring compliance with environmental laws and regulations. The Polish national report mentions labour law as bringing a new kind of liability, i.e. liability based on duty imposed on employees by the Labour Code<sup>6</sup>. Apart from this, sporadic references were made by the national researchers about co-operation with other fields of law, namely customs regulations, public health and consumer protection regulations, too, but this list is far from being exhaustive.

### ***Evaluation:***

As we are going to see in the next point from a more detailed comparative analysis of administrative, administrative-criminal and criminal sanctioning systems, there are serious differences between their targets, mechanisms, effects etc.. If one branch of law is weaker or limited in scope in one area (for example, it is ill suited to dealing with legal persons, or can be time consuming), another branch will be more appropriate in that respect. It seems to be plausible then that in such situations these legal tools should be used cumulatively in order to achieve the highest level of effectiveness. Unfortunately, as can be seen from the above table, in the majority of the examined countries, legislation does not make this cumulation possible. Only the civil law tools, targeting material damage or risk of damage can be used without further restrictions alongside the other three. While it is quite understandable that criminal and administrative criminal tools cannot be used together (in order to avoid duplication of very similar nature of legal consequences for one deed against one person) it is more difficult to accept that certain regulations prevent or seriously hinder the co-operation of administrative law with administrative criminal law and even administrative law with criminal law.

## **III.3. Unification vs. fragmentation of the sanction elements in the environmental administrative law**

Harmony between the elements of sanctioning system (factual basis of sanctioning, subjects of sanctioning, procedural rules, the sanctions themselves etc.) is important not only in respect of the relationship between administrative, administrative-criminal, criminal and several other laws, but also within the sanctioning system of the environmental administrative law too.

### ***Diversity of environmental administrative sanctions***

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<sup>6</sup> See the Polish national report on Page 68, Paragraph 2 in the Inception Report.

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In our region the most typical solution is that environmental administrative sanctions are regulated by several environmental administrative laws, like Act on Environmental Impact Assessment, Act on Integrated Pollution Prevention and Control, Act on Water, Act on Waste Management etc.<sup>7</sup> This is natural, since environmental law develops gradually and so sanctions and other measures are also developed in accordance with the needs of the new regulations. However, the different, non-harmonised level of sanctions together with different institutional and procedural arrangements for the various environmental areas might easily lead to a situation where operators shift environmental pollution to that environmental area where the sanctions are most lenient. For example, if the sanctions for surface water pollution are lighter, operators might decide to change their technologies in order to produce less water pollution at the price of more pollution emitted into the air or to the soil.

### ***Diversity of administrative-criminal sanctions***

In some countries even the quasi-criminal sanctions are set out diversely in several legal acts, like the Act on Waste Management and the Act on Nature and Landscape and therefore not just in the General Act on Misdemeanours and petty criminal offences. In case of a conflict, usually the special acts prevail<sup>8</sup>. According to the regulations of other countries, however, for instance the petty offence law in Hungary, there is a comprehensive set of environmental petty offences in the Petty Offences Code, and the legislative practice is that any new offences created by new environmental legislations shall be inserted into this Code<sup>9</sup>.

### ***Diversity of procedural rules***

As concerns the procedure of establishing sanctions, there are also ways to derogate from the rules of the general administrative code in several countries. In the Czech Republic, for instance, such important questions like the time limit for bringing proceedings after the breach has been committed, or after the breach has been discovered, or the rules relating to imposing the fine, might be decided by laws other than the General Administrative Code<sup>10</sup>. In Poland, the majority of the procedural issues are settled by the general law (Code of Administrative Procedure) but still there are some procedural provisions in various environmental acts, too<sup>11</sup>.

In Slovakia, the main issues of administrative procedure are regulated by the Act on Administrative Procedure, while some procedural issues are regulated in certain environmental regulations, such as the Act on Nature and Landscape Protection or the Waste Management Act<sup>12</sup>. Special rules exist, for instance, in the waste management law even for such a general administrative issue as the positive conflict between authorities' competences<sup>13</sup>. It is important to add that where there is an internal conflict between general and special environmental laws, the special regulation prevails<sup>14</sup>.

### ***The effect of EU environmental law harmonisation on fragmentation***

Some have claimed that the present fragmented system of EU environmental law might shift the Member States towards developing even more fragmented regulations. However, the national regulations seemingly counteract to this tendency, as the Czech national report says, „administrative

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<sup>7</sup> See for instance the Czech national report on page 5, paragraph 2 of the Interim Report.

<sup>8</sup> See the Czech national report on pages 6-7 of the Interim Report or the Slovak national report on page 96, Paragraph 3 of the Interim Report.

<sup>9</sup> See the Hungarian national report on page 35 of the Interim Report.

<sup>10</sup> See the Czech national report on Page 7, last paragraph, in the Interim Report.

<sup>11</sup> See the Polish national report on Page 69, Paragraph 2, in the Interim Report

<sup>12</sup> See the Slovakian national report on Page 99 of the Interim Report.

<sup>13</sup> See the Slovakian national report on Page 105

of the Interim Report.

<sup>14</sup> See the Slovakian national report on Page 104 of the Interim Report.

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enforcement measures are concentrated in specific environmental acts which cover usually more than one implemented piece of EC environmental legislation”<sup>15</sup>.

**Evaluation**

While the diversity of substantial environmental rules for sanctions is harmful, development of specific administrative procedural rules for environmental protection might be a positive process that serves the specific needs of environmental administrative law better than the general rule. It might be premature to say, but these two facts of the development of our recent environmental laws might give rise to the possibility of new middle level<sup>16</sup> codices that unify the substantive rules on sanctions (and possibly on other issues, too), with a collection of the specific procedural rules belonging to these substantive rules. Such a unified law on environmental sanctioning would enable the environmental authorities to perform more effective law enforcement.<sup>17</sup>

**III.4. Comparative analysis of the administrative sanctions**

Although in the present project there was a strong emphasis on the non-criminal (i.e. mostly administrative and administrative-criminal) measures, we should keep in mind that the overall purpose of this concerted international effort was to compare the legal and practical sides and efficiency of administrative and criminal environmental law enforcement. Hence, even during the detailed analysis of the non-criminal measures we kept some elements of legal comparison with the criminal measures. As we go on trait by trait, we need to realise that there are dramatic differences both in circumstances and conditions of the administrative and criminal environmental law enforcement and the results they produce.

We have seen in Part I/1 that environmental administrative law has the longest list of the possible legal consequences of non-compliance compared to criminal law and to administrative-criminal law. Here we offer a deeper analysis of further differences between the three branches of law.

Table of comparison of different environmental sanctioning systems:

	<b>Criminal law</b>	<b>Petty offence law/administrative criminal law</b>	<b>Administrative law</b>
<b>(a) institutional arrangements</b>	simple institutional arrangement	simple institutional arrangement with some additional elements	highly diverse institutional arrangement

<sup>15</sup> See the Czech national report on Paragraph 4, Page 10 of the Interim Report.

<sup>16</sup> Lower level than the general administrative procedural and general environmental protection codices (usually parliamentary acts) but higher than the detailed administrative regulations of protections of individual environmental media (usually by decrees of ministers). Such a middle level codex could be typically regulated by governmental decrees.

<sup>17</sup> Some national researchers asked for clarification of the content of these possible unified laws on environmental sanctioning and possibly of other procedural rules of environmental protection. According to a Hungarian study (EMLA 2002-2003, for the Hungarian Ministry of Environment and Water Management) specific needs of environmental protection might need specific procedural rules, for instance in the following fields: definition of the persons subject to the procedure, requirements of the content of the request to start the procedure, rules of preliminary permits, co-authority participation, expert participation, public participation and participation of the concerned municipalities, content of the decision, like special conditions necessary for environmental protection such as requirement of experimental operation, monitoring, etc., special rules of modification of the decision, for instance in case of changes in the status of the environment or in case of starting other environmentally significant activities in the area, expiration of the decision, cost, injunctive relief and several other specific rules for a more effective environmental administrative procedure.

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<b>(b) number of offences described in the law</b>	5-10	20-30	150-200
<b>(c) applicability to legal persons and natural persons</b>	natural persons only, legal persons exceptionally and only as a secondary responsibility	mainly natural persons only, but legal persons, too, under certain circumstances	natural and legal persons as well + groups without legal personality under certain conditions
<b>(d) the basis of responsibility</b>	substantial and formal (procedural) infringements of law	substantial and formal (procedural) infringements of law	substantial and formal (procedural) infringements of law and of the decisions of the administrative bodies
<b>(e) discretion in selecting the cases</b>	no discretion + some latent (not revealed) cases	no discretion + more latent cases	some level of <sup>18</sup> discretion
<b>(f) discretion in defining the type of the sanction and the extent of it</b>	consideration of wide range of objective and subjective circumstances is required	consideration of some objective and subjective circumstances is required	consideration of certain circumstances is allowed in some cases, while in the majority of the cases there is no discretion
<b>(g) procedural rules</b>	high level of guarantees, no exemptions	high level of guarantees, no exemptions	diverse procedural rules
<b>(h) level of liability required for imposing the sanction</b>	fault based (negligence only when act allows it)	fault based (negligence in every case when law does not exclude it)	objective (strict) liability with few possibilities to consider the circumstances of the subject of the case
<b>(i) implementation of the decision</b>	every decision is implemented	every decision is implemented	there is no ex officio implementation in every cases
<b>(j) cost of the procedure</b>	main rule: every cost is born by the perpetrator (except the State's indirect costs)	main rule: every cost is born by the perpetrator (except the State's indirect costs)	the State bears some costs, parties bear their own costs; while the court remedy process could be very costly
<b>(k) duration of the procedure</b>	30-60 days police preparation, only with formal enlengthening process; the	30-60 days; the court phase (if it takes place) is not strictly regulated; expedited (ticketing) process is	30-60 days for both administrative stages, with less formal guarantees; the court phase is

<sup>18</sup> A remark from the Polish national researchers: in the Polish sanctioning system there is a huge level of discretion in selecting the criminal cases, while in fact there is no discretion in starting administrative cases where non-compliance takes place.

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	prosecutor and court phase is not strictly regulated	available	not strictly regulated
<b>(1) relation between the time of the procedure and the applied law</b>	they apply the laws in force at the time of perpetration	they apply the laws in force at the time of perpetration	they can apply the laws in force at the time of decision, too

*Ad (a) Institutional arrangements in general*

Examples of institutional diversity

Environmental administrative sanctions are implemented by a highly diverse system of authorities, from the municipality level administration, through special environmental authorities, to authorities having only some relationship with environmental protection, like public health, local sanitation authorities, fire departments etc. In addition to that horizontal division, on vertical level general administrative/civil law courts have jurisdiction for supervision of environmental administrative decisions. In some cases these courts also have certain roles in enforcement of the administrative measures<sup>19</sup>.

The Czech list of public administration bodies that are involved in implementation of administrative enforcement measures is a good example of the breadth of officers entitled to impose sanctions on environmental polluters<sup>20</sup>:

- environmental inspectorates (and superior level bodies, including the Ministry of Environment)
- administration for protected landscape and national parks
- nature guards
- trade inspectorate
- custom authorities
- municipal authorities (local, local with extended power and regional)
- police

Another good example of the very diverse arrangement of authorities is the Polish system of environmental authorities. In this example the vertical diversion is also to be seen:

- the mayor of the town or city (Wojt)
- the head of the district (Starost)
- the head of the regional governmental administration (Voivode)
- environmental inspectorates
- state fire services
- sanitary inspectors
- minister of environment

An important feature of the Polish system is that regulatory functions (permitting) are institutionally separated from the controlling ones (and from applying fines). This means that the two main areas of the sanctioning system of fines and other measures do not fall under the responsibility of one single authority according to the Polish laws.

<sup>19</sup> For instance in the Czech Republic, under certain circumstances. See Page 6, paragraph 4 in the Interim Report.

<sup>20</sup> See the Czech national report on Pages 11-12 of the Interim Report

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In Lithuania, apart from the environmental authorities; food and veterinarian inspectors, traffic controllers, customs officials and other authorities are also entitled to impose small sanctions on non-compliant persons in certain environmental protection cases<sup>21</sup>.

#### Possible shortcomings of the diversity

Diversity in the institutional arrangement might have its shortcomings, too. As the Hungarian national study points out, the municipality clerk is usually the general first level administrative body in the administrative law enforcement systems. This authority in Hungary is responsible for approximately 500 types of cases, including public services law, land use, construction permitting and control, local environmental protection, local taxation and public sanitation issues<sup>22</sup>. No one could expect these municipality clerks or their staff to have special expertise in the decentralised environmental protection cases they handle, in other words, the diverse institutional arrangement means that there is inevitably a lack of specialised environmental legal and practical knowledge among the officials dealing with environmental cases<sup>23</sup>.

#### Institutional arrangements with another kind of integration

The effect of the environmental integration principle is highly noticeable in the list. This principle is where authorities, which are not *sensu stricto* environmental authorities, shall integrate environmental viewpoints into their own decisions. This principle has led to even stronger integration in some instances: some kinds of authorities are now institutionally unified with the environmental administration, like today in the Hungarian water management sector<sup>24</sup>. However, these organisational solutions often turn out not be solid enough, environmental administration is sometimes brought together with other branches of administration, like physical planning and/or construction (from the set of the responsibilities of the ministry dealing with economics), forestry, fishery (from the set of the responsibilities of the ministry dealing with agriculture), or even youth (from the set of the responsibilities of the ministry dealing with social issues).

#### Joint assignments

Another feature of flexibility of the environmental administrative law is that, under certain conditions, one type of sanction for one specific infringement of law can be applied by various administrative bodies. For instance, in Poland, where there has been infringement of certain solid waste landfill regulations, both the environmental protection inspector and the sanitary inspector are entitled to impose sanctions on the operator<sup>25</sup>.

#### Evaluation

As we have seen, integration of environmental administrative tasks on institutional level could be realised by two, basically opposite, options: integration of environmental tasks into the scope of assignments of non-environmental authorities, or integration of non-environmental (but closely linked) tasks into the scope of assignment of environmental authorities. Joint assignments might mean a rare third solution. The first and more frequently used solution might raise anxiety from the side of environmental protection, since the institutional interests and professional views of the non-environmental authorities often contradict the environmental approach. If the social acceptance and the professional prestige of the environmental administration grows steadily in the future, there will be

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<sup>21</sup> See the Lithuanian national report on Page 61 of the Interim Report.

<sup>22</sup> See the Hungarian national report on its Page 4 of the Final Draft.

<sup>23</sup> The comment of the Czech national rapporteur: It is probably a more general problem for the lower level administrative tiers to cover whatever particular delegated powers with enough professionals, at least considering the situation in the Czech Republic.

<sup>24</sup> See the Hungarian national report on its page in the Final Draft.

<sup>25</sup> See the Polish national report on Page 82 of the Interim Report.

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more and more cases when the environmental authorities are entitled to decide such non-environmental issues that are highly important for environmental protection, such as some mining, construction, agricultural administration, forestry or fishery cases.

#### ***Ad (b) Number of offences described in the law***

According to a survey done by the Supreme Court of the Slovak Republic, there are approximately two hundred laws that constitute legal basis for administrative infringements. The Slovakian researcher herself considers this system very fragmented in professional terms<sup>26</sup>. The other four countries share this situation. This is again a very important feature of the environmental administrative law compared to the other two branches of law (*i.e.* criminal and administrative criminal). Environmental administrative bodies keep an eye on almost all of the types of environmentally significant business and other mass level operations.

This arrangement, at least in principle, opens the possibility of developing and executing large scale national and even international strategies of coping with environmental, public health and other connected problems. Unfortunately, at the time being, national level administrative planning organisations seldom strive to consult with the local level administrative offices about their experiences with environmental law implementation.

#### ***Ad (c) Applicability to legal persons and natural persons***

While criminal law and administrative criminal law are primarily tailored to handle cases of non-compliant natural persons, administrative law deals mainly with legal persons<sup>27</sup>. This basic difference vastly determines the possibilities for interaction between these laws. While criminal law is a lengthy, overspecialised branch of law, administrative-criminal (quasi criminal) sanctions deserve much better attention from both of the side of legislators and administrative legal enforcers.

#### Who is the most effective target person in administrative-criminal law?

An important question is which natural person should be responsible within the hierarchy of a company: the executives or those carrying out their orders? Some laws are clear in this respect, for instance the Slovakian law, on the basis of the old concepts of *culpa in eligendo* or *custodiendo* has decided to emphasise the responsibility of the person who commanded an illegal act, rather than for the responsibility of the person who followed the command<sup>28</sup>. A similar rationale can be found behind the other Slovakian legal stipulation that administrative criminal law holds liable those natural persons who acted or should have been acted in the name of the legal person, unless the action (omission) was taken as a result of a command<sup>29</sup>.

#### Exemptions from the main rules

Although environmental administrative sanctions address first of all legal persons, they can be applied to natural persons, too, under certain circumstances. The Slovakian law, for instance, clearly stipulates that natural persons will be liable for administrative non-compliance if they are entrepreneurs.

There is an interesting and important combining of the responsibility of legal and natural persons according to the Code of Administrative Offences in Lithuania. Although legal persons are not

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<sup>26</sup> See the Slovakian national report on Page 96, Paragraph 5 of the Interim Report.

<sup>27</sup> See footnote 1.

<sup>28</sup> See the Slovakian national report on Page 94, Paragraph 5 of the Interim Report.

<sup>29</sup> See the Slovakian national report on Page 95, Paragraph 7 of the Interim Report.

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considered liable, administrative liability is accorded to „officials” who represent (and bear responsibility for) a whole entity he/she manages or a municipality he/she leads. The legal definition of official is: a person who has the right to exercise public administration functions or who implements organisational and management executive power within a public institution, an enterprise or another organisation. Moreover, the liability of officials when they (their organisation) violate environmental protection rules is stricter than the sanctions applied to other natural persons<sup>30</sup>.

### Evaluation

Personal liability, even if it is much lower in the given cases than the liability of the legal person (for instance the fine against the company is at the level of millions, while the fine against certain responsible employees is just at the level of hundreds of Euros) might be an important disincentive for environmental wrongdoers. This way the combination of the responsibility of the legal person and of certain employees can be considered a vital condition of effectiveness of environmental law enforcement as a whole.

#### ***Ad (d) The basis of responsibility***

Situations in which administrative enforcement measures can be taken might be substantive or procedural in nature. In the first category we might mention<sup>31</sup>:

- using the elements of the environment above the limit of social standards<sup>32</sup>
- endangering the elements of the environment
- causing harm to the environment

In the procedural type of infringements of environmental law we can mention:

- failing to prepare the proper documentation on the use of environment as a resource
- failing to provide data on the use of environment
- failing to pay fees for using the environment as a resource
- running an activity in a way different from the requirements of laws and decisions of the authorities
- running an activity without permit

Some of these acts are specifically described in laws, while others have only an open ended description („catch all” provision) such as „causing harm to the environment”.

In relation to risk to the environment we must add that under administrative environmental law such a hazard shall not necessary be in all cases direct, major or inevitable, usually any form of increased risk of an industrial accident is sufficient<sup>33</sup>. This issue leads us toward the topic of discretionary power of the environmental administrative authorities that is an indispensable element of ensuring flexibility of the measures of this branch of law.

#### ***Ad (e) Discretion in selecting the cases***

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<sup>30</sup> See the Lithuanian national report on Page 55 of the Interim Report.

<sup>31</sup> See for instance the Hungarian national report on page 5 of the Draft Final Report.

<sup>32</sup> There is a floating border between sanctions and simple legal consequences not even requiring an illegal act from the side of the client. See for instance the Polish national report on Page 72 of the Interim Report: „the sanction called „administrative reparation” may be imposed where someone causes an adverse impact on the environment even if it is not illegal”.

<sup>33</sup> See the Polish national report on Page 80 of the Inception Report.

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Discretion is afforded in two main aspects of administrative environmental law cases: firstly, the right to decide if in certain cases proceedings should be initiated, and secondly, the discretionary right to determine the type and extent of the sanction. Stemming from the large extent of differences in the procedural principles and in the professional preparedness of the officials hearing the cases, criminal (administrative-criminal) and administrative law gives just the opposite answers to these questions, as can be seen from the table at the beginning of this chapter.

#### Gradual law enforcement

A typical arrangement of the discretionary power of the administrative bodies in selection of the cases is gradual law enforcement. In some cases the law prescribes an order to implement several sanctions. A certain time order of the measures might be logical and might be stipulated by dispositive (i.e. allowing discretionary power to the authority) regulations. For instance in Poland, ordering certain measures to perform specific activities or to alter specific installations or equipment within a deadline ought to be prior to the more stringent sanction to stop the operation of certain polluting facilities<sup>34</sup>.

In some countries, like Lithuania and Poland, several environmental laws require the authorities to issue a warning in writing to the persons that violate environmental law before application of substantial sanctions. These letters or warnings do not mean that the authority shall enter into negotiations with the non-compliant actors, but certainly creates room for a dialogue with it, and, as such, they might be „precursors” of discretionary decisions on starting a sanctioning procedure or refraining from it.

#### Sanctions against repeated or continuous non-compliance

A specific case of discretion relates to decisions to repeat certain sanctions in certain situations. One of the most dramatic differences between administrative sanctions and sanctions in the other two examined branches of law is that administrative sanctions usually can be applied more than once for the same breach of law. A continuous breach of law is the typical example of when the administrative body can decide on repetition of certain sanctions (mostly fines) if it seems to be necessary for stopping the non-compliant act or status. In addition, repetition of sanctions is usually possible at the execution phase of the environmental administrative processes.

#### Evaluation

The discretionary power of the administrative bodies to decide if it is necessary to start an administrative case certainly has much to do with the basic nature and aims of the administrative process. The basic task of administrative law is effectively and continuously organise the life of society, at least in those fields of life where the intervention of the State is useful and accepted. That is why the administration has the right to put together „priority lists”, in other words, to focus its scarce resources on the most important issues. There are several legal consequences of this basic arrangement of administrative law, for instance the general lack of legal force of the decisions<sup>35</sup>. These considerations are valid in connection with administrative sanctioning, too, although some specific principles, like fair and equitable process, proportionality (much more strongly influencing other, strictly sanctioning branches of law as criminal and administrative-criminal laws are) have a certain level of influence on that part of administrative law. A systematic mapping out of the effects of this interplay is a promising new field of researching the effectiveness factors of administrative law.

#### *Ad (f) Discretion in defining the extent of the measures*

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<sup>34</sup> See the Polish national report on Pages 77-78 of the Interim Report.

<sup>35</sup> A remark from the Polish researchers: while in selection of the cases there is really no legal force, in the substantial decision on the sanction there is.

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In the majority of cases the kind and amount of the sanction is predetermined, for instance in the Polish two stage fining procedure a „running” fine is determined (a fine calculated for one day non-compliance) which is converted to a „combined fine”, that is the product of multiplying the running fine by the number of days (hours) of non-compliance<sup>36</sup>.

A similar, even more detailed „sentencing guideline” can be found in most of the Hungarian environmental administrative laws. As will be shown from the Hungarian national research in the Chapter I.5 on Fines below, the authorities are bound to a series of very sophisticated, determined factors relating to the fine, such as the precisely defined areas of particular environmental importance or sensitivity, the quality and the quantity of the amounts of the materials in question, etc.

Systems with stronger discretion rights

In the Polish law on protection of the marine environment the sanctions are relative, i.e. the legislator leaves to the competent authorities the freedom to set the level of fines within the limits laid down by statute.

A discretionary right to decide on the necessity of a certain sanction could be vital for environmental protection under certain circumstances. If the legislator determined closing down a facility as a mandatory sanction, there would be cases when closing down a facility which used dangerous substances might in itself endanger the environment and public health<sup>37</sup>.

Evaluation

As time goes on and the personnel of the environmental administrative bodies develop higher level legal and professional expertise, these above mentioned cases with stronger discretionary rights might become the norm rather than exemptions as they are now.. This way, a more flexible and maybe more effective administrative environmental law enforcement might evolve.

***Ad (h)<sup>38</sup> Level of liability required for imposing the sanction***

A specific instance where there is a lack of discretionary power in determining the sanctions is strict liability. This is one of the main differences between the environmental criminal and the environmental administrative sanctioning systems, and is a basic point of difference between environmental administrative and administrative-criminal sanctions. As the Czech national report says: „Administrative-criminal sanctions are imposed on the basis of the fault of the perpetrator and specifically upon negligent fault, unless an act expressly states that intentional fault is required. The imposition of administrative sanctions is based on strict liability, i.e. they are imposed upon a breach of law, regardless of whether it was the perpetrator’s fault or not.”<sup>39</sup>

Naturally this feature of the environmental administrative sanctioning system is closely connected to its focus on legal persons as operators of larger scale economic activities that could significantly harm or endanger the environment. Where this is a large company, the legislator holds the management unconditionally liable for failure to organise the company structure in a way that could prevent violations of environmental law (double check mechanisms, combination of human control mechanisms with electronic, computerised ones etc.).

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<sup>36</sup> See the Polish national report on pages 74-75 of the Interim Report.

<sup>37</sup> See the Polish national report that raises this point in connection with the entitlements of the Voivodhip Environmental Inspector on page 80 of the Inception Report.

<sup>38</sup> For explanation connected to Point (g) see Chapter III.3.

<sup>39</sup> See Page 4 of the Czech part of the Draft Final Report.

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### ***Ad (i) Implementation of the decisions***

While in criminal and administrative-criminal law cases the execution of the decision by the court (or by other law enforcement bodies) is ensured, a meaningful portion of administrative decisions remain unenforced. The administrative bodies have much simpler internal structure, they usually do not have specialised departments that would ensure a precise, exhaustive implementation of the administrative decisions.

#### The system of coercive measures for the implementation of administrative decisions

Implementation of administrative fines causes far fewer difficulties than implementation of the other kinds of sanctions. Fines can usually be almost automatically deducted from the bank account of the obliged persons (similarly to the execution of tax revenues), while implementation of other measures might require more work from the administrative body. According to the Hungarian administrative procedural law, for instance, there are several ways of ensuring compliance with a decision of the authority ordering specific action from the client:

- entitlement of an adversary party or other persons to carry out the prescribed activity on the account and at the risk of the obliged party
- ordering the payment of the monetary equivalent of the prescribed activity by the obliged party
- imposing an execution fine on the obliged party that could be repeated in several times until the party complies with the decision
- asking for the assistance of the police in order to force the obliged party to comply.

There is a special emphasis on the topic in Polish law, as there is a specific act on enforcing the administrative decisions in a coercive manner; the Act on the Administrative Execution Procedure<sup>40</sup>.

#### Evaluation

Difficulties in actual implementation might be one of the most decisive factors behind the scarce use of administrative sanctions and measures other than fines. In order to be able to fully use the large number of possible legal tools of administrative law, governments should concentrate far more resources on developing an administrative law enforcement infrastructure. Another possible solution to this problem is a closer co-operation between the several branches of law: disobeying the administrative decisions might represent in certain cases criminal or administrative-criminal offence. Naturally, this solution has limited scope: in cases where a legal entity as a whole acts against the administrative decision (being counter-interested in its whole structure) it would be extremely difficult to solve the problem through personal level responsibility.

### ***Ad (j) Cost of the procedure***

The issue of cost of the procedure should be examined from two sides: from the side of the wrongdoer and from the side of other citizens and groups that would try to solve serious environmental problems by demanding sanctions against non-compliance according to several branches of law. Naturally, regulations on cost of the procedure are less lenient towards the perpetrators in criminal and petty offence laws than in administrative law. However, if we examine the issue of the cost of the procedure from the viewpoints of a third person who represents environmental interests and wants to reproach, remedy etc. an environmentally harmful situation, the criminal (or petty offence) procedure would be usually much cheaper than an administrative legal one. In the administrative process such a citizen might have more rights to actively participate in the whole process, but this would probably cost him

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<sup>40</sup> See the Polish national report on page 86.

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more. For instance in the Hungarian law there are several environmentally significant regulations in which the party that initiates a case must pay a high amount of due<sup>41 42</sup>.

### The cost of the legal remedies

The court revision of a second level administrative decision might also be costly for the parties. Legislators seemingly try to discourage their citizens from using this second legal remedy, let alone the further appeals processes that are usually called exceptional. The losing party pays the costs of the victor, even if it is an authority, while in some countries the State can claim even more expenses<sup>43</sup>.

A table of costs of several levels of administrative procedure:

	<b>first instance</b>	<b>second instance</b>	<b>administrative court</b>
<b>Czech Republic</b>	parties' own cost, cost out of the own fault of the parties	parties' own cost, cost out of the own fault of the parties	costs of evidences, costs of the winning party
<b>Hungary</b>	different dues and fees*	different dues and fees	60 EUR, costs of evidences, costs of the winning party
<b>Lithuania</b>	all costs (witnesses, experts, interpreters) are covered by the State Budget – but parties bear their own costs	all costs (witnesses, experts, interpreters) are covered by the State Budget – but parties bear their own costs	all costs (witnesses, experts, interpreters) are covered by the State Budget – but parties bear their own costs
<b>Poland</b>	costs resulting from the own fault or incurred in the interest of request of the client and hasn't resulted from the obligations of the authorities.	costs resulting from the own fault or incurred in the interest of request of the client and hasn't resulted from the obligations of the authorities.	court fee + expenses (with exemptions) + costs of own participation. Costs of the winning party paid only by the government if it loses, if it wins -the losing party pays only own expenses.
<b>Slovakia</b>	the cost is borne by the State, the costs incurred by the participant + the costs originated by fault of them shall be borne by the participant	the cost is borne by the State, the costs incurred by the participant + the costs originated by fault of them shall be borne by the participant	judicial fees are between 25 and 50 EURO + the losing party shall pay the expenses of the winning party, <i>if the court decides so</i>

\*The Hungarian national report concentrated on the other party, i.e. on those who seek to impose sanctions on non-compliant operators in order to solve environmental problems.

<sup>41</sup> See the Hungarian national report on page 10 of the Draft Final Report.

<sup>42</sup> A remark from the Polish researchers: In Poland, however, it is rather cheap option. Court fees in cases before administrative courts are very limited, and if the government wins, it can not claim its costs from the party that challenged the decision at court, while if the government loses, it is ordered to pay the expenses of the winning party.

<sup>43</sup> See for instance the Czech national report on Page 29 of the Interim Report.

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Evaluation

We have to clearly differentiate the cost of administrative legal procedures in cases of non-compliant persons or organisations, and cases where those persons or organisations are genuinely pro-environmental and demand the authorities to impose sanctions in order to solve environmental problems. The procedure for public interest claimants should cost much less and should be encouraged by support and capacity building<sup>44</sup> to further act in public interest.

The court revision of administrative decisions seems to be very costly in many cases. It is natural, from one point of view that states do not wish to encourage their citizens and organisations to apply for third or even fourth instances of legal remedies. On the other hand, administrative decisions do need regular court revision. Administrative bodies usually cannot afford to hire large number of highly trained and specialised lawyers. Courts need to direct the administrative legal practice by giving regular interpretation of administrative laws. Courts also have to ensure the harmony and unity of the legal practice throughout the whole country. Any policy than that aims at diminishing the number of administrative court revision cases seems to be harmful in this respect.

***Ad (k) Timeliness***

Timeliness is a key issue in environmental law enforcement, especially when the measurement to implement is not a fine but some actual behaviour the perpetrator shall do in favour of the environment. In order to make the whole process quicker, the majority of the examined laws (except Hungary) does not even attach a suspending force to the court remedy, and even before that, the first (or the second) instance authority can declare decision immediately executable, not considering an appealing against it.

A summary of the several regulations of the five countries on timing of the administrative process:

	<b>first instance</b>	<b>second instance</b>	<b>administrative court</b>
<b>Czech Republic</b>	30 days + another 30 days in the especially complex cases + the second level authority has the power to decide on further extension as appropriate	30 days + another 30 days in the especially complex cases + the second level authority has the power to decide on further extension as appropriate	no specific time limits
<b>Hungary</b>	30 days + another 30 days upon the decision of the head of the administrative unit	30 days + another 30 days upon the decision of the head of the administrative unit	no specific time limits

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<sup>44</sup> Capacity building is a key element of public participation: according to several stipulations of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, especially Article 3 and several parts of Article 5, governments are responsible for informing the members and organisations of the public about the possible ways of participation as well as about the substance and significance of the environmental issues. Capacity building has other large groups of issues, too, like institutional support of NGOs, procedural support of participation and prohibition of penalisation and harassment of participants.

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<b>Lithuania</b>	within 15 days after an official report or a complaint is received (in exceptionally complicated cases within 6 months)	within 20 days after an appeal is received	the first hearing shall be within 15 days after the court received the official report or a complaint
<b>Poland</b>	without unjustified delay, 30 days + another 30 days in the especially complicated cases	without unjustified delay, 30 days + another 30 days in the especially complicated cases	no specific time limits
<b>Slovakia</b>	30 days + 30 days for the very complicated cases + the superior body may further prolong the period	30 days + 30 days for the very complicated cases + the superior body may further prolong the period	no specific provision on the time frames, but the parties have the right to submit an action because of undue delay

### Preliminary measures

Preliminary measures are one of the most important factors of the timeliness of the administrative procedure. Once there is a legal possibility to order temporary injunction of an activity or to bring similar measures, time will work for the environment and not against it. It is possible in all of the examined countries (but not everywhere is generally used in the practice) to order preliminary measures. The most precisely developed system seems to be in Slovakia, where the general administrative procedural law allows the authorities, before the end of the procedure, to:

- impose measures on the clients to do something to refrain from something or to let something be done
- order safeguarding certain items that are important as evidence or could be confiscated or destroyed at the end of the process
- impose certain restoration measures

### Evaluation

As we have seen from the above table, administrative bodies in many countries have a high level of discretion determining the necessary time for finishing a certain administrative case. There do not seem to be special rules for sanctions and other measures in the case of non-compliance, either. This situation seems to be counter-effective. Sanctions and measures are necessary when there are infringements of law, and so, *per definitionem* that there is a serious threat to the legal order and to the protected legal interest. It seems to be logical then that in the future development of administrative environmental law, legislators will consider expedited processes for sanctioning type of cases.

There are historically no specific time limits for the court procedures in our region. This situation is very difficult to change, although neither an early execution of a decision that is argued against at a court, nor waiting for a year long or more for the decision of the court to finish the case seem to be a satisfying solution at present<sup>45</sup>.

<sup>45</sup> A remark from the Polish researchers: the general fact that there is no specific time limit for the courts (and there are long delays in courts in our region) works clearly in favour of using administrative sanctions vs. criminal ones! Bearing in mind the lack of suspensory effect of challenging enforcement decisions at court (which the author of the summary considers to be a general feature in our countries) the administrative sanctions are imposed timely, as opposed to criminal ones!

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### ***Ad (l) Relation between the time of the procedure and the applied law***

Many environmental administrative laws contain references in their closing (miscellaneous) parts that they shall be applied to all of cases in process. That means that there are cases in which the new regulation is to be used not considering the laws those were in force at the time the authorities started their procedures. This setting is closely related to the previously mentioned fact that usually there is no legal force in the administrative decisions: in the majority of the cases there is an opportunity for the authority to stop a case and start a new one under the same circumstances. That is why the legislator is seldom scrupulous about passing administrative laws with a some retroactive effect. Naturally the old principles of *nullum crimen sine lege* and *nulla poena sine lege* would exclude the same in case of criminal law and also in case of administrative-criminal law.

## **III.5. Fine**

Legal and practical analyses both support a clear conclusion that fines are by far the most frequently imposed sanction in the five examined countries' environmental administrative laws. Fines are a pure punishment of an infringement of law, thus, it is, at the first glance, one of the most typical „end of pipe” approaches of the recent environmental regulations.

### ***Possible reasons of overwhelming use of fine as sanction***

In the earlier points we have had already some suggestions on the possible reasons of the fact that fines give the overwhelming majority of the environmental administrative sanctions. Here we suggest some further considerations. A fine is generally considered proportionate, fitting best to the imagined growing grades of seriousness of administrative, administrative-criminal and criminal sanctions. The other sanctions might be too serious for the everyday considerations: even a temporary closing down of a facility might mean a loss of millions of EUROS for the operator. This could be one of the possible reasons of the administrators' inclination not to use these kinds of sanctions.

### ***A floating border between sanctions and legal consequences of legal use of environment***

The Polish law differentiates between fines for the violation of the rules for the use of environment according to the conditions set out in the permit, and increased fees for any use of the environment without a permit required by law. The latter creates a bridge towards ordinary fees for legal use of the environment (that themselves cannot be considered as a sanction), since the fee is calculated based on the normal fee but with specific multipliers.

### ***Complexity of the system of environmental fines***

The Hungarian case study gives us a good insight to the nature of fine as a leading type of environmental administrative sanctions. The case study all the five national researchers dealt with was about a chemical company that illegally opened a new hazardous waste landfill on its real estate and thus caused serious underground and surface water contamination. According to the Hungarian national rapporteur, the non compliant company in such case is in a very serious situation:

- Apart from the serious financial consequences of performing an additional environmental audit and
- the costs of restoring the old landfill,
- they have to pay a cumulated hazardous waste fine both for the hazardous waste handling activity without a permit (720 EUR times the tons of illegally deposited waste, times other possible multiplying factors depending on the quality of the waste) and

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- for the contamination the waste actually caused (1920 EUR again times the tons of illegally deposited waste, times other possible multiplying factors depending on the quality of the waste).
- As concerns the water pollution there are the direct costs of remedying (fact finding, the necessary technical intervention and the post-intervention control measures), plus
- the underground water protection fine: 8 EUR times factor of the sensitivity of the concerned territory (1-3), times the vertical factor (10-100), times the kilograms (!) of waste, times the quality multiplier (5-10) means that for one kilogram hazardous waste in an average case 5000 EUR per kilogram<sup>46</sup>.
- In addition to all of these financial burdens on the legal persons, the responsible natural persons face a water pollution petty offence fine up to 400 EUR and
- for breaching the rules of permit, according to the rules of the general environmental petty offence, an additional fine up to 600 EUR.

We can conclude that the multiplicity of financial sanctions the non-compliant company has to encounter might not contribute to the efficiency of the sanctioning system. If they are all mandatory – as they are in the most systems – the total burden will be too onerous on the company.

### ***Suspension of execution of fines***

Another important solution from Poland is that conditional suspension of execution of increased fees or administrative fines is possible. If the perpetrator complies with the decision to eliminate the reasons for the sanction, the increased fee or fine is repealed or at least reduced by the amount that the perpetrator's own resources were expended<sup>47 48</sup>.

### ***Where does the money go?***

In connection with the fines, it is important to ask where the amount of money paid by the non-compliant clients goes? According to the Hungarian law it partly goes to the National Environmental and Water Management Fund and partly the environmental funds of the concerned municipalities receive it. In Poland the whole sum goes to the Environmental Protection and Water Management fund of the local municipalities. In the Czech Republic the fines imposed by the environmental inspectorates represent an income of the State Environmental Fund, while in some cases 50 % of the paid fine goes to the concerned municipalities<sup>49</sup>.

### ***Evaluation***

Data shows that the system of environmental sanctions and measures is not a balanced one, fines have an exaggerated role, so much that it might conflict with the requirements of effectiveness of the sanctioning system.. Within the system of several environmental fines seemingly there is also a lack of planned and harmonised co-operation between the legal consequences of non-compliance and the regulations of several elements of the environment. Although several sanctions are established by separate laws, legislators should pay attention to their joint effects on the regulated legal subjects. Such harmonisation work could be done in a medium level environmental procedural code mentioned earlier in Chapter I.3.

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<sup>46</sup> According to the interviews done by the Hungarian country researcher the exaggerated amount of the underground water pollution fine causes a rebound effect in the practice: environmental inspectorates are quite hesitant to expose such an unrealistically high amount on any client.

<sup>47</sup> See the Polish national report on Page 73 of the Interim Report.

<sup>48</sup> Suspension of the administrative procedure itself is possible under the Czech law and not only in case of fine but in case of other sanctions, too. See Point 1.2.3. of the Amended Czech National Report.

<sup>49</sup> See Point 1.2.3. of the Amended Czech National Report.

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Even if the present system of fines might not be fully developed and perfect in the five examined Central European countries, fines still can be an effective threat to prevent operators infringing environmental laws. Most of the countries are over the phase of initial development of environmental law where the sums of the imposed fines were so low so as to only be called symbolic rather than having any deterrent effect. There are also, new, innovative solutions that can change the original „end of pipe” nature of this kind of sanction, i. e. suspension of fine that could strongly encourage the operators to remedy the environmental harm they caused and to prevent future ones.

### III.6. General principles behind the administrative environmental law sanctions

Principles behind administrative environmental law enforcement can be divided into two main groups: the principles of general legality of administrative procedures and principles more directly connected to environmental protection.

Table of general and special environmental procedural principles in the five countries:

<b>general administrative procedural principles connected to sanctioning</b>	<b>special environmental principles important for sanctioning</b>
enforcement measures can be imposed only <i>on the basis of specific obligations</i> prescribed by law or regulatory decision ( <i>legality principle</i> )	<i>polluter pays principle</i>
enforcement measures can be applied only <i>by the competent authority</i> entitled by the relevant laws	<i>gradual raise</i> of the sanction, in order to make a foreseeable system of legal consequences
enforcement measures can be imposed only within a <i>limited time period</i>	<i>negotiations</i> with the non-compliant in order to reach a better compliance in the future
enforcement measures shall be <i>proportional</i> with the weight of infringement, i.e. amongst others, the consequences, length, extent, repetition of infringement, remedying or mitigation of the damage	<i>conditional sanctions</i> , in order to force the non-compliant operators to restore, remedy etc. the harm they caused or to prevent future harm
<i>ex officio principle</i> (both for starting the case and for revealing the facts, these might be called separately the <i>principle of material truth</i> and the <i>investigation principle</i> )	<i>effective, proportional and dissuasive</i> sanctions
<i>active participation of the parties</i>	
<i>a timely process</i> (expedition)	
<i>hearing principle</i> is the right of the client to propose evidences and the duty of it to provide evidences	
<i>right to search the documents</i>	
<i>right to be instructed</i> (about the content of substantial laws, procedural rights, especially the right for legal remedies)	
obligation to consider <i>public interest</i> and the interest of the citizens	
a <i>written form</i> of the decision	
<i>right to have a reasoned decision</i> (that is reasonable and objective)	
<i>right to have legal remedies</i> , two instances, <i>a court control</i> on administrative decisions	
<i>the principle of gradual enforcement</i>	

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<i>the finality principle</i>	
<i>economic procedure</i> with no unnecessary expenses	
ensuring <i>unity of the legal practice</i> , i.e. there should not be unreasoned differences in deciding similar cases	
<i>public participation principle</i> , informing the public throughout the whole process	

### ***Specific environmental administrative law principles***

Because of a general constitutional stipulation, the *polluter pays principle* is accepted in Poland as a basic principle of environmental law enforcement, too<sup>50</sup>. This principle has serious substantive and procedural legal consequences in practice. For instance, the cost of the whole administrative process shall be borne by the party whose illegal pollution has been proven during the process.

The Hungarian national researcher gave voice to his conviction that even European Court of Justice should define some basic principles specifically for the environmental law enforcement, such as *effective, proportional and dissuasive*, as they are consequently used in the EU secondary environmental legislation, but without a precise description<sup>51</sup>.

### ***Importance of the EU law harmonisation***

EU environmental law harmonisation (including, as we have just seen, considerations of the European Court of Justice) brings some new principles into environmental procedural law such as: gradual enforcement, foreseeable measures, obligation of the operators to put together compliance plans etc.

### ***An interplay between the general and specific principles***

Some general administrative procedural principles are especially important for environmental protection. These are, the public participation principle because of the priority role of the public in environmental law enforcement, and also the principles of legality, officiality and finality, because environmental law as a relatively new branch of administrative law with new procedural rules and still developing (also frequently changing) institutional background could hope from these principles a certain solidification of its effectiveness.

### ***Evaluation***

Legal principles ensure a coherent regulation and interpretation within a branch of law. Having a system of principles means that a given branch of law is matured for codification, and can further develop its legal and institutional infrastructure effectively. General administrative principles can be found in all of the five examined countries' laws with small variability. The scarcity of specific principles for the environmental procedures, however, is outstanding. This seems to be an indicator of a less developed, not yet coherent enough system of the environmental branch of administrative law. EU environmental law harmonisation could be a hub for changes: first because of new, creative procedural principles, secondly by offering a unique occasion to restructure the national systems of environmental law.

## **III.7. Is there a different pattern of administrative sanctions concerning the protection of different environmental media?**

<sup>50</sup> See the Polish national report on Page 67 of the Interim Report.

<sup>51</sup> See Page 27 of the Hungarian Draft Final Report.

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As a continuation of the idea raised at the end of the previous point, we can give closer scrutiny to the issue of what kind of new sanctions the EU environmental legal harmonisation has inspired in our laws and, in detail, if there are any differences between the sanctions accorded to protect several subgroups of environmental administrative law.

*A survey of the types of sanctions EU environmental law harmonisation brings*

In the Czech regulation (similar to the other countries, too, since all five countries went through the same environmental EU law harmonisation process), in several of the Directives only one sanction is possible: fines in different amount for legal and natural persons. However, there are directives that prescribe further types of sanctions:

In connection with infringements of rules of the Directive 259/93/EEC, there is a possibility

- to order carrying out of measures in order to remove the consequences of a breach of law
- to order restoration of the environment to its prior state or carrying out of an alternative measure
- to withdraw a permit
- to suspend temporarily or prohibit an activity

In connection with Directive 79/409/EEC and 92/43/EEC there are also additional measures possible:

- to restrict and/or cease harmful activity until the cause and consequences of that activity are removed
- confiscation of illegally kept specially protected plant or animal species
- confiscation of specially protected plant or animal species protected under international treaties if the person who keeps them cannot prove their origin or their trading is restricted or prohibited under international treaties

In connection with Council Regulation 338/97/EC the following measures are possible:

- refusal to grant a CITES document for import, export etc.
- retaining a specimen
- confiscation of a specimen
- confiscation of a controlled skin (fur)

Under Directive 90/219/EEC there is a possibility:

- to suspend or prohibit of use of a GMO or genetic products
- to oblige carrying out of remedial action within a time limit
- to carry out remedial measures at the expense of the perpetrator

Under Council Regulation 2037/2000/EC:

- to oblige carrying out of measures aimed at removing the deficient situation
- to cancel permits to handle controlled substances and products
- to oblige the harmless destruction, recycling or regeneration of controlled substances
- to cancel the relevant permit to handle these substances

Under Directive 96/82/EC:

- to prohibit use of an establishment or installation or the parts thereof

Under Directive 99/13/EC:

- to order carrying out of remedial measures
- restriction or prohibition of stationary resource operation

Under Council Directives 76/464/EEC and 83/513/EEC:

- to order removal of deficiencies and the causes of the breach of law

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- to change or cancel an issued permit
- to suspend a production or other activity

***More differentiated sanctioning system for waste management and nature protection laws and possible reasons***

A slightly different approach was used by the Hungarian national report<sup>52</sup>, which grouped the Directives according to the protected elements (regulated factors) of the environment. This way of presenting the data highlights that while all the types of environmental regulations for the elements and factors contain both fine and other measures, waste management law and nature protection law shows a richer variation of the types of sanctions. In case of waste management regulations, the possible means of non-compliance are so numerous that the law seemingly followed the specialities of the regulated object very closely and formed numerous of sanctioning. In the case of nature protection, there is a much longer history of legislation and enforcement, and this could possibly explain of why several kinds of sanctions and measures against non-compliance have been developed.

***Evaluation***

The question arises, how far the new member countries are prepared to actually use these new measures in their existing systems that almost exclusively have been relying on fines. EU Directives require effective enforcement that would lead to use of a much wider circle of measures than the Czech example has shown above. Introduction (gradual introduction) of these new kinds of measures would require a total restructuring of institutional arrangements, processes and also attitudes of the administrative officers in these countries.

**III.8. Public participation in environmental administrative law enforcement**

No one doubts that effective public participation is one of the key conditions to success of the work of environmental administration. A fairly advanced form of ensuring public participation in environmental decision-making is giving full-fledged standing at least to the public organisations that were founded specially for environmental protection purposes.

***A general definition of the cases where public participation can have place***

In Hungary environmental NGOs can have standing in all cases where the environmental inspectorate was involved in the decision-making process<sup>53</sup>. The form of involvement can be not only a decision making status but the so called „co-authority” status, where the decision-making authority asks the opinion of the co-authority in those respects of the case that belong to that authority. The co-authority status is a meaningful consultation status, because the opinion of the co-authority binds the decision-making body.

***Mixed systems of direct and indirect participation***

According to Polish law, NGOs can initiate the process of public prosecutor or the ombudsman, and they can also initiate the sanctioning proceedings on their own and have the right to participate in the proceedings, supposing their statutory goals overlap with the subject of the case. If the administrative body refuses to initiate the proceedings or to allow the NGO to participate, the NGO can lodge a complaint to the second level administrative body and if this complaint is dismissed, to the court. In

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<sup>52</sup> See the Hungarian national report on Page 8-9 of the Final Draft.

<sup>53</sup> According to the Administrative Legal Unity Decision of the Hungarian Supreme Court No. 1/2004.

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such a case the NGO will have the rights of a party<sup>54</sup>. Also in Poland NGOs might have a role of plaintiff in civil cases in which an illegal act threatens the environment as common good<sup>55</sup>.

In the Slovakian environmental law the Environmental Impact Assessment Act and the Act on Genetically Modified Organisms grants a full-fledged standing to environmental NGOs, while other laws such as Act on Petition Right and Act on Complaints and Act on the Municipalities ensure the right of NGOs to denunciate infringements of environmental laws. This position also gives some participatory rights to the public interest organisations, although this falls short of full-fledged standing. Finally, Slovakian regulations on the Public Prosecutors and the Ombudsman also establish procedures for NGOs to denunciate environmental non-compliance issues.

### ***Institutionalised co-operation between the authorities and the members of the public***

Governments have a strong tendency to try to institutionalise their connections with NGOs and with those who are willing and able to spend their time and energy on public purposes in connection with environmental protection. In Lithuania, for instance, there are cca. 4000 so called assistant inspectors, who are non-officials from the general public who take part in the field work of the official inspectors<sup>56</sup>.

### ***Evaluation***

Public participation in environmental administrative law enforcement has generally two forms: the first is public actions against the administration either because of granting the permit or because of omission of measures against pollution and legal actions against the investors/polluters. The second form of public participation in environmental law enforcement is starting administrative processes and litigations by NGOs against polluters.

A newer form of public participation is direct co-operation with the administrative bodies in environmental law implementation, joint actions with them and even private prosecution. A common trait of these new forms of participation is that the members and organisations of the public gain more and more independence in their actions from the activity of the administrative bodies.

Our present study shows that there are no specific public participation rules yet in our administrative environmental laws for public participation in environmental law enforcement. Until this happens, only the general public participation regulations apply to this territory of law.

## **III.9. Comparison with civil law sanctions**

Although it fell outside of the main goals of our project to study civil law enforcement in details, for the sake of giving a holistic picture, national researchers briefly addressed this field of law, too. In fact, no other branch of law covered by the study can effectively deal with reimbursement of material damages in environmental enforcement cases. Even so, civil law has serious problems in addressing environmental protection goals, since this branch of law is historically bound to the will of the parties connected directly to certain material interests in the cases. In a large portion of environmental protection cases, contrary to the typical civil law cases, there is no such natural or legal person who could be directly connected to the object of the case, or, just the opposite, there are so many of such persons that it is difficult to choose some of them and entitle to sue for this joint interest.

### ***Representing the common interest***

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<sup>54</sup> See the Polish national report on Page 86 of the Interim Report.

<sup>55</sup> See the Polish national report on Page 32 of the Draft Final Report.

<sup>56</sup> See Page 21 of the Lithuanian Draft Final Report.

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A new development in our civil laws tries to address these above mentioned shortcomings by giving standing to environmental non-governmental organisations or to public organisations such as prosecutors, in order to find proper plaintiffs for environmental pollution cases. There is not enough room within the limits of the present project to discuss this question in detail, we have to fall back on mentioning one good example of interplay between environmental protection administrative bodies and the civil law departments of the public prosecutors' offices and some further examples of innovative ways to enforce environmental civil law.

According to an agreement concluded in the mid nineties between the General Attorney of Hungary and the Chief Environmental Inspector, the 12 regional inspectorates notify the respective civil law departments of the national prosecutors about the most significant environmental pollution cases. Taking these notifications as a basis, the Hungarian county prosecutors initiate dozens of successful civil law litigations in every year<sup>57</sup>.

The Lithuanian legal system entitles officials from the Ministry of Environment (in practice the environmental protection inspectors themselves) to sue for damages caused by environmental pollution in cases when the damage has been done to the interests of the State<sup>58</sup>. This right is also active when there is no one person who has had his or her direct material interests harmed by the pollution, and so no-one who can bring the case directly.

In Poland if pollution threatens a common good, the civil law claim for taking preventive measures and ceasing the activity causing the threat may be filed by the State Treasury, by the unit of a local/regional administration and even by an environmental organisation<sup>59</sup>.

#### ***Request for damage paying in procedures other than civil law one***

An important procedural link between civil liability and other forms of environmental legal liabilities is that in certain cases there is a possibility for the victims of environmental crimes to demand the material harm the polluter caused. While this usually takes place in criminal or in petty offence law, in the Slovakian law, the procedural possibility to demand payment of damages is provided even in the administrative-criminal law, too<sup>60</sup>.

#### ***Constitutional background of civil law liability for environmental protection***

In the legal system of the new democracies of the Central European Region legislators usually put less stress on the responsibility side of ownership rights. Therefore the warning from Article 20 of the constitution of the Slovak Republic that states that „ownership places obligations on the owner”<sup>61</sup> is very timely. The Czech Charter of Human Rights and Freedoms in it Article 11, Paragraph (3) stipulates: “Ownership is binding. It shall not be misused to the detriment of the rights of others or against legally protected public interests. Its exercise shall not cause damage to human health, nature and the environment beyond the statutory limits”.

#### ***Evaluation***

Legislators work on designing the future development of environmental administrative law, of environmental criminal or of environmental administrative-criminal law shall pay attention to the related civil law enforcement tools, too. One of the main areas of interplay with civil law is that

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<sup>57</sup> See the second part of the Hungarian national report, page 25, last paragraph.

<sup>58</sup> See the Lithuanian national report on page 53 of the Inception Report.

<sup>59</sup> See the Polish national report on page 32 of the Draft Final Report.

<sup>60</sup> See the Slovakian national report, last paragraph on Page 97 in the Inception Report.

<sup>61</sup> See the Slovakian national report last paragraph on Page 96 in the Interim Report.

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environmental protection administrative authorities support civil law prosecutors or members and organisations of the public in initiating actions against polluters that infringe environmental administrative law and cause serious harm. An other example of an even closer relationship between these branches of law is that legislators entitle criminal and even administrative-criminal bodies to deal with certain limited civil law issues, in order to ensure the fullest possible remedies of the results of environmental non-compliance. It is a question of future development, if this process could further go towards the direction of environmental administrative law.

### **III.10. The role of prosecutors and ombudsmen in environmental enforcement**

In almost all of the examined Central European countries we have found the signs of activity of the institutions of prosecutors (public attorneys) and parliamentary ombudsmen in environmental law enforcement.

The ombudsmen in Lithuania not only investigate citizens' complaints against administrative officials or persons exercising administrative functions and issue petitions to the Administrative Courts based on the complaints, but also mediate disputes between citizens and administrative bodies.

According to the Slovakian law (and also according to the similar Hungarian regulations) an administrative legal complaint coming from the public prosecutor may change the forum dealing with the given administrative case. This means a special legal remedy, within which the first instance authority shall forward the complaint of the prosecutor to its superior body if it does not agree with the legal arguments and the proposals of the prosecutor. The Ombudsman in Slovakia seems to have narrower entitlements both on substantive and procedural level: he/she deals only with matters that directly concern fundamental constitutional rights and freedoms of natural or legal persons and can only submit a proposal to the competent body for modification of a decision. However, the professional prestige and the possibility of ensuring wide social publicity for certain cases ensures a widespread acceptance of the Ombudsperson<sup>62</sup>.

In addition to these, according to the Hungarian law prosecutors can directly sue the environmental administrative bodies if they refuse to accept the objections issued to them about the legal problems of the decisions of these authorities<sup>63</sup>.

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<sup>62</sup> See the Slovakian national report, last paragraph on Page 106 in the Inception Report.

<sup>63</sup> See the Hungarian national report, on Page 18 of the Draft Final Report.

## **IV. Analysis of the effectiveness (including the experiences of case studies)**

### **IV.1. Lessons learned from the case studies**

Case studies clearly modelled two kinds of parallels in the environmental administrative sanctioning system of the examined countries. We have introduced already the results of the Hungarian case study in Point I. 5. as an example on multiplicity of sanctions of financial type that creates a situation in which the accurate implementation of all the related laws could result in an unbearable financial burden on the non-compliant company. Here we introduce another case study, the Polish one, which is a typical example of multiplicity of the authorities taking part in the process of imposing all the necessary sanctions in such a complex case as our case study is<sup>64</sup>.

#### *Parallel processes of authorities*

In Poland the imaginary non-compliant company faces the following administrative sanctions imposed by the following authorities:

- an increased fee – by the Marshall (head of the self government in the region) of the Voivodship;
- an order to limit the impact on the environment and restore the state of the environment – by the Voivode (head of the governmental administration in the region) or the Starost (head of the district self government) as environmental authorities;
- in case of non-compliance with the permit conditions, stopping the operation – by the Voivodship Inspector for Environmental Protection;
- withdrawal of the permit – again by the Voivode or the Starost and
- an order to remove the waste – by the Wojt (head of the local government).

Questions arise whether this wide variation of authorities could impose on the non-compliant company a set of concerted sanctions or if there are certain unnecessary parallel efforts. Moreover, if there are elements of discretionary power (like in stopping the installation), the negotiation efforts of the authorities should also be harmonised. That could be an almost insoluble task if the authorities taking place in the process are so numerous and represent three different levels of administration.

#### *Evaluation*

Although both kinds of repetition in environmental law enforcement we have discussed in connection with the Hungarian and the Polish case studies are the results of certain historical developments, and as such both might have compelling arguments for their maintenance, the future reorganisation of sanctioning systems (maybe in connection with law harmonisation with a new wave of EU legislation on environmental sanctioning systems, if not earlier) might streamline their processes and merge certain elements.

### **IV.2. Comparative statistical data on environmental law enforcement**

The five national researchers have carried out a thorough survey of data, using several sources ranging from the national statistical bulletins through the internal registers of prosecutors' offices, police, environmental and other authorities, to estimations drawn from interviews with experienced officers.

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<sup>64</sup> See the description of our case study in the methodology chapter at the end of the Inception Report.

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### *Statistical considerations*

Since there are only few extreme values in the last five years data in the examined countries, the average figure is useful information about the number of administrative, administrative-criminal and criminal sanctions. In case of some countries, however, data shows a dynamic growth - still we have decided to operate with the average number, since we do not want to examine the internal dynamics of development of environmental administrative sanctioning, rather we focus on the comparison to the other two examined branches of law.

Having data for five years also allows us to use average numbers, even if there are some trends and changes in the several years, the average will still remain a good depiction of the main features of administrative environmental law.

### *Average annual number of cases finalised with sanctions in the last 5 years*

	Administrative	Administrative-criminal	Criminal
Czech Republic	1.206 fines/290 other measures	145	15
Hungary	536 altogether	49.789	146
Lithuania	16.617*altogether		19
Poland	3007 fines / 24 stopping of activity		70 1242**
Slovakia	663 fines/226 orders of restoration	requested data from the authorities has not arrived yet	requested data from the authorities has not arrived yet

\*Ticketing and other administrative sanctions are calculated together here.

\*\* Ticketing which according to the Polish law belongs to criminal law.

### *Evaluation*

Data shows that administrative and administrative-criminal measures are taken at least 10 times more than criminal sanctions for environmental non-compliance. This is a very basic fact with a series of reasons behind it, some of them obvious, others are waiting for deeper, more focused analysis. Basic differences between the scopes of regulations should be one of the first reasons to be mentioned. While environmental administrative law has the ambition to cover all the reasonable targets of environmental protection to control with legal tools, criminal law (and administrative-criminal law to a less extent) focuses only on the most dangerous non-compliance, committed by natural persons with different levels of liability. In the case of administrative-criminal law the high number of cases is explained first of all by ticketing processes and by other similar processes against private persons liable for lower level non-compliance. Administrative-criminal law from this angle might be a key branch of law in coping with small and medium level environmental pollution, which is an old unsolved problem of environmental law enforcement.

### *Typical sanctions*

	Administrative	Administrative-criminal	Criminal
Czech Republic	fine: 5774 EUR (35.3 % of the average)	159*	conditional imprisonment

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	annual GDP/person)		
Hungary	fine: 5200 EUR (94,8 % of the average annual GDP/person)	36.2 EUR	fine
Lithuania	fine: 45 EUR** (1 % of the average annual GDP/person)		
Poland	108.336 EUR** (1274,5 % of the average annual GDP/person)		
Slovakia	requested data from the authorities has not arrived yet		

\*This number is based only on the data from the environmental inspectorates that handle the smaller part of environmental administrative-criminal cases

\*\*Small amount ticketing represents a greater part of the total.

\*\*\* Statistically not totally correct result because of the extremely high value of waste management fines of the year 2003, where the number of cases were not high enough to produce a representative data. An other addition to the correct interpretation of this data is that roughly one third of the fines imposed is going to be conditionally deferred and than partly or wholly forgiven.

### ***Evaluation***

As concerns the reasons why fines are almost exclusively used as sanctions in environmental law, we refer back to Point 5 of the previous chapter. The amount of the fines shows a wide difference between the countries, ranging from barely 1 percent of the 5 years average annual per capita income to 1274.5 percent of it. It seems to us plausible that the latter data from the new Polish regulations represents the real trend in the development of our environmental sanctioning systems, since it is a clear answer to the lack of effectiveness of environmental sanctions in the last couple of decades. Such amount cannot already have been built into the prices and pass over to the consumers, the subjects of law need to change their strategies towards an unconditional environmental compliance.

### ***Average length of the procedures***

	Administrative	Administrative-criminal	Criminal
Czech Republic	2-3 months (including second instance)	1-2 months	8.8 + 21.2 = 30 months (first and second instance)
Hungary	2-8 months (including second instance)	1-2 months	12-18 months
Lithuania	less than a month*		
Poland	1,5 + 1,5-2 months (first and second instance)		8-9 + 8 months (first and second instance)
Slovakia	1-2 months		

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\*The Lithuanian data contain a large portion of ticketing cases where imposing the fine occurs immediately, while the legal remedy that is applied in cca. 50 % of the cases shall happen within 15 days.

An administrative proceeding is dramatically lengthened if there is a court review in the case. Experiences show in Hungary and Poland that this could mean even in an average case that proceedings could last 1-1.5 years. Yet, we decided not to include this data in the main table, for several reasons. A relatively small percentage (1-3 %) of the cases go to the judicial stage, and the court proceeding does not have a suspending force on the practical enforcement of the second instance administrative decision in some countries<sup>65</sup>.

### ***Evaluation***

Criminal cases take 2-3 times longer than the administrative sanctioning cases. This is again a very important difference, if we consider that while in criminal cases the facts are simple, in an administrative case the authorities have to deal with usually very complex situations. However, the complex institutional system (police - prosecutor - judge - executing departments) and the necessary procedural guarantees make the criminal procedures much longer than the administrative one. Length of proceedings is a very important factor in effectiveness. It is a further consideration, since for the majority of the persons charged with environmental crimes the fact that they have to undergo such a long process and have to be under a pending case in criminal proceedings is a very serious consequence

### **IV.3. Deterrent effect, recidivism**

Recidivism or, with more exact terminology, repeated or continuous breach of environmental administrative law, is very difficult to capture with statistical tools. The national researchers and their interviewees were therefore quite reluctant to make estimations.

#### ***The role of the high amounts of fines***

According to the Hungarian national research, based on interviews with environmental administrative officials, recidivism in administrative cases is not more than 5 %, considering the number of violations. The interviewees argue that recently the fines are so high that it is almost impossible to build them into the price of any products or services, so the old practice of repeated or continuous non-compliance with environmental administrative law is fading away<sup>66</sup>. However, we might add that in terms of volume of pollution the above mentioned 5 % might be higher, if we take into consideration such notorious large polluters as, for example, the regional sewage treatment facilities.

The Polish example of a very strong deterrent effect of fines should be also mentioned here. As we have seen from the table in the previous point, the amount of fees the Polish environmental authorities imposed in quite numerous cases is so high that may represent a serious threat to the economic prosperity of a company. This fine is non-negotiable, although there is a possibility to defer the imposed fine if the operator undertakes to eliminate the reasons for which the administrative fines were imposed and can be repealed or at least reduced by the amount the entities own resources were expended on this task. According to a calculation made by one of the district environmental inspectorates, one unit of deferred fine generates 15 units for pro-ecological projects carried out in facilities subject to fine.

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<sup>65</sup> For instance in Poland less than 1 % of the environmental administrative cases go to the court, while the lawsuit has no suspending effect on the implementation of the second instance decision. Actually, these two facts might have a strong legal-sociological interrelationship. See Page 37 of the Polish Draft Final Report.

<sup>66</sup> See the Hungarian national report on page 24 of the Hungarian part of the Draft Final Report.

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It is therefore unsurprising that in Poland, where recidivism is not a problem in practice anymore; there are not even rules that would ensure a stricter set of legal consequences in case of repeated or continuous non-compliance<sup>67</sup>. In other countries, like Lithuania, recidivists receive gradually higher fees according to the laws and practice<sup>68</sup>.

### ***Evaluation***

The most typical subjects of environmental administrative non-compliance cases are companies, and it is natural according to the rules of the market that the main and practically sole factor that determines their behaviour is financial reasonableness. If environmental pollution is economically lucrative, the companies will pollute, otherwise they sooner or later disappear from the market. If not, they stop polluting within a very short time. This very short and simple reasoning makes one important thing clear: the high amount of fines is not enough in itself, a full coverage (in time and in territory) monitoring system and a consequential sanctioning policy from the legislators and administrative bodies are further indispensable conditions of effectiveness.

Naturally, we also shall keep in mind that even if we have an effective fining system, this can mostly only punish pollution and environmental harms that already have happened. The bulk of the efforts of the environmental law enforcement should go to prevention - sanctions and even fines might equally well serve this goal, too.

## **IV.4. Level of tolerance, possibility to negotiate with the non-compliant**

Even if the officiality principle is adopted by the administrative procedural laws of all of five countries, administrative processes in practice frequently allow room for negotiations with the violators.

### ***Negotiation and timeliness***

Operators of facilities have opportunities in many cases to have personal discussions or correspondence with the officials of environmental authorities during the procedure and even before it. The Hungarian national researcher draws our attention to the interrelation between this negotiation element and the timeliness of the administrative procedure: partly negotiated decisions might seriously decrease the number of legal remedies, and this can lead to the length of proceedings diminishing significantly, also taking into consideration the fact that legal remedies represent the most time consuming part of the process<sup>69</sup>.

Procedural possibilities for negotiations

As concerns the procedural possibilities of negotiations, even without special entitlements of laws, the authorities might in many cases have room for discretionary decisions in the following questions:

- the amount of fine within the limits laid down by the law
- grace time for compliance
- prolonged deadline for paying financial sanctions
- gradual payment (usually according to the rules of general administrative procedural law)<sup>70 71</sup>

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<sup>67</sup> See Page 38 of the Polish Draft Final Report.

<sup>68</sup> See Page 23 of the Lithuanian Draft Final Report.

<sup>69</sup> See Page 25 of the Hungarian part of the Draft Final Report.

<sup>70</sup> See Page 25 of the Hungarian part of the Draft Final Report.

<sup>71</sup> See also Page 23 of the Lithuanian Draft Final Report.

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***Warning letters before the procedure for actual sanctions start***

Warning both formally as a kind of a measure in the administrative or petty offence law<sup>72</sup> and, in some cases, informally, might be the legally and politically acceptable way of tolerance towards non-compliance from the side of the authorities. If the non-compliant behaviour stops immediately after the warning, it would be a waste of the scarce resources of the authority to continue the process, unless there were already serious consequences of the non-compliance.

***Evaluation***

Modern environmental laws give more room for discretionary power to administrative officials, which allow greater opportunities for negotiations with representatives of the non-compliant companies. These negotiations should always be formal, since informal negotiations can raise negative feelings from the other members of the regulated communities. Detailed rules of negotiations should also contain the requirements of involving third parties, like interested municipalities, local communities and NGOs.

## **IV.5. Social disapproval**

As environmental problems are more and more concrete, for instance as the loss of forest plots becomes a clearly visible, rapid process<sup>73</sup>, social disapproval of environmental pollution and of non-compliance with environmental law is significantly growing. This creates more room for institutional development of environmental law enforcement and a more stringent enforcement policy wherever the operators of polluting facilities fail to follow the rules of environmental law voluntarily, and this provokes a negative social reaction, usually from directly concerned local communities and from specialised environmental NGOs.

***An uneven social disapproval***

Direct or at least indirect endangerment of public health might generate strong social disapproval against violators of environmental law. However, as one of the national researchers observes, small scale violations that concern directly certain local communities and a couple of the largest scale violations that happened to receive attention of the national press might trigger off strong social disapproval, while the bulk of the middle scale breaches of environmental law remain untouched by any social reflection<sup>74</sup>. Other researchers stress that while the level of environmental awareness is growing, people tend to insist on the strictest measures against facilities in their vicinity only (which is often stigmatised in an unjust way by the rest of the society as the NIMBY syndrome), but they tend to be much more lenient if their economic interests (labour, local taxes etc.) are concerned<sup>75</sup>.

***Evaluation***

Social disapproval could be a strong disincentive of environmental non-compliance, but as we have seen from the national reports, there is a lot more to be done to raise environmental awareness in our societies. It is partly a matter of environmental education, but certain rules in the administrative sanctioning system could also do a lot for triggering a more meaningful and stronger social disapproval. Public participation rules should be tailored in a way that enables participation of wider circles of the public, not only those who are locally concerned (and in many cases economically

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<sup>72</sup> See Page 23 of the Lithuanian Draft Final Report

<sup>73</sup> See also Page 24 of the Lithuanian Draft Final Report

<sup>74</sup> See Page 25 of the Hungarian part of the Draft Final Report.

<sup>75</sup> See Page 38 of the Polish Draft Final Report.

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interested in the investment or further operation of the polluting facilities). Capacity building rules, like regular training and active information dissemination should be also parts of an effective public participation regulation.

#### **IV.6. Inter-agency communication**

There are several good examples of regular inter-agency co-operation between the environmental authorities and other administrative bodies, like municipal authorities, police, fire brigades, trade inspectorates, labour security inspectors and public health services<sup>76</sup>. However, the most developed and institutionalised co-operation of the environmental authorities in the region seems to take place with the customs offices and with several departments of the public prosecutors' offices.

##### ***Co-operation between the environmental authorities and the customs offices***

Several national researchers reported on a almost continuous co-operation between the environmental, or nature protection authorities and the customs authorities. This co-operation is almost demanded by the rules and the practice of hazardous waste shipping and the rules of international trade of protected species.

In Hungary the nature conservation directorates regularly give training to customs guards on issues of illegal traffic of protected species and also the staff of the nature conservation authorities are open to give expert opinions in individual cases handled by the customs authorities.

##### ***Co-operation between the environmental authorities and the prosecutors***

Public attorneys in the former communist countries have more diverse specialisation than in the majority of the Western countries. Apart from the criminal law divisions, the Central and Eastern European prosecutors' offices have strong administrative and civil law divisions, too.

As referred to earlier, the Non-Criminal Deputy of the Hungarian General Attorney and the Chief Environmental Inspector concluded an agreement in the mid-nineties, according to which the inspectorates regularly notify the county prosecutors' offices on the most outstanding environmental pollution cases. This simple agreement has led to a series of very successful civil law environmental cases in which the highly respected county civil law prosecutors forced many polluters to take serious measures against their infringement of environmental law. This has happened through civil law litigation or through the operators separately agreeing with the prosecutors to take the necessary steps even before the trial.

In Lithuania there is also a close co-operation between the prosecutors and the environmental inspectorates. Here we have examples about criminal prosecutors' action that is initiated by the environmental authorities. In addition to that, inspectorates help the criminal law prosecutors with provision of evidence and expert opinions.

##### ***Evaluation***

A more practical implementation of the integration principle would require an increase in regular, intensive and institutionalised co-operation between the environmental authorities and their authority partners with certain environmentally related responsibilities. The above examples show that such co-operation can dramatically increase the effectiveness of the concerned authorities. In such co-operation the environmental authorities can offer their professional expertise and monitoring data,

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<sup>76</sup> See for instance Page 58 of the the Czech Draft Final Report.

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while the other types of authorities contribute to the success of law enforcement with their effective direct enforcement tools.

#### **IV.7. Summary of the practical experiences on the main effectiveness factors in a table**

While in Chapter III.4 we compared the legal regulations of environmental administrative (administrative-criminal and criminal) law enforcement tools of the five examined countries, here we are going to analyse the practical experiences of these countries in the implementation of environmental law.

In their national studies the researchers made conclusions on their practical experiences (statistics, interviews etc.) on the factors that help and on the factors that hinder the effectiveness of administrative law, administrative-criminal law and criminal law enforcement of environmental protection rules.

Table of factors that support effectiveness:

<b>Administrative law</b>	<b>Administrative-criminal law</b>	<b>Criminal law</b>
less time consuming	less time consuming, with the possibility of expedited minor cases (ticketing)	more guarantees (more procedural stages, more specialised, higher level authorities involved, more mandatory procedural steps)
simpler process	simpler process with more guarantees	more guarantees
no need to evaluate complex liability issues (objective liability)		no tolerance (discretion) in selecting the cases <sup>77</sup>
stronger specialisation, more environmental expertise and knowledge about the locations		better legal expertise, unity of legal practice
wider coverage of situations significant for environmental protection		
more involvement of local authorities		
public participation		
at least two grades more cases	at least one grades more cases	
	personal motivations	bigger deterrent force
		greater social prestige
		the laws are more stable in time

Table of factors hindering effectiveness:

<sup>77</sup> See Footnote 18 on the Polish reservation to this statement.

Administrative law	Administrative-criminal law	Criminal law
		problems in proving causal chain and the required level of liability <sup>78</sup>
		lenient approach from the police and prosecutors, mild decisions by the courts
	might block co-operation with the facility	might block co-operation with the facility
high tolerance towards the minor infringements (that might sum up, however, to significant results)		

### ***Evaluation***

The list of advantages of the administrative environmental law processes seems to be very long, while there was only one negative trait mentioned by the authors. However, it is clear that there is still plenty of room for further amendments to the effectiveness of the administrative environmental law enforcement. A more stringent application of some of the procedural principles would help a lot, for instance the finality principle which would force a more result oriented approach from the authorities, who currently often strive to manage the case (finalise the file) rather than solving the underlying environmental problem. Also, with greater application of the principle of public participation, environmental administration would be able to achieve much deeper social impact with its activities.

In comparison to administrative law, environmental criminal law might be able to solve a much smaller portion of environmental problems. However, further amendment of the environmental criminal law tools might mean a large and prestigious contribution to the effectiveness of the administrative efforts. We have to take into consideration that the companies' will is formed and implemented by natural persons, in such way their personal concerns, criminal law appeals to, might play an enormous role in the decision-making processes within the companies.

Finally, administrative-criminal law seems to be a good middle solution in terms of its capacities to handle far more cases than criminal law and still targeting direct personal interests. A specific niche for administrative-criminal law might be for the small and medium level non-compliance cases where the general performance of administrative law is especially weak.

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<sup>78</sup> In Poland, for example, only the 16 % of the initiated environmental criminal cases ends with a sanction. See Page 38 of the Polish Draft Final Report and the tables beforehand.

## V. Conclusions, suggestions

### V.1. The main conclusions

As we can conclude from the description of the legal (Chapter III.4) and practical (Chapter IV.7) traits of environmental law enforcement tools, environmental administrative law and environmental criminal law have very different sanctioning systems that, on one hand make their comparative analysis very difficult, but on the other hand offer a series of possibilities to combine these sanctions in order to mutually contribute to each other's effectiveness. We are convinced that a deeper analysis and a better understanding of the similarities and differences of these legal branches take us closer to a better design of their co-operation.

In this point we try to shortly summarise the most important conclusions that our national researchers made, while in point 3 we are going to give a more exhaustive list of conclusions together with some suggestions. We have selected here the most important conclusions regarding the general nature of administrative procedure, the most frequent type of sanctions, public participation and EU law harmonisation as the most important outside factors of effectiveness.

#### *Administrative law has the ambition of covering the whole issue in a simpler and quicker way*

While criminal law deals only with the most serious infringements of the legal order, administrative law does the „piece-meal work“, i.e. it deals with a much larger variety of infractions with the ambition to cover all the possible fields of protection of the environment<sup>79</sup>.

At the same time, administrative proceedings are much simpler and quicker than the criminal one. Although that is a very important effectiveness factor, we still might not be in the position to conclude that administrative proceedings are unequivocally more effective than the criminal law processes. One thing is for sure: the fact that the number of cases handled via administrative law is one hundred times more than the number of criminal law cases, together with the already mentioned factors, makes administrative law the leading tool in the hands of our Governments to cope with environmental non-compliance.

While the process is simpler, substantive administrative law is much more complicated, much more adapting itself to the richness of life of environmental protection – this is a further trait that is strongly connected to the original goal of the administrative environmental protection law to cover the whole range of the problems. However, the simplicity of the criminal law might be closer to the common sense of the public, while the sophisticated environmental administrative regulations are very difficult for them to follow.

#### *Fines have a leading role in administrative sanctioning*

Fines are applied in the overwhelming majority of administrative sanctioning cases; the other measures are applied extremely rarely. The possible reasons are that execution of a decision that contains fine is much simpler than that of the other measures and that fines are the incentive that best fits the logic of economic decision-making at the polluting companies.

A new development in the regulation of environmental protection administrative fines is that the amount of fines has been growing very high in order to ensure that companies will select compliance

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<sup>79</sup> See Page 59 of the Czech Draft Final Report.

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instead of continuous or repeated infringement of environmental laws, while they build the sum of the fines into their prices and shift the financial burden to their consumers.

### ***Co-operation with other authorities and with the public as key issues of effectiveness***

We have found some good examples of inter-agency co-operation that ensured a multidisciplinary approach of environmental non-compliance cases. Co-operation between environmental authorities and other administrative authorities has led not only to a wider scope of professional handling of the same case, but also to the use of several branches of law.

Public participation is also an important precondition of the effective law enforcement. While in the territory of historically formed, rigid criminal laws there is very little room for substantial participation of persons other than the directly interested ones, environmental administrative law pioneers in introducing better solutions of public involvement. As social disapproval of environmental wrongdoing is growing, local communities, members and organisations of the public are increasingly willing to spend time and effort on helping administrative bodies to reveal all of the non-compliance cases and to apply a fair and proportional sanction in them.

### ***Evaluation***

Effectiveness is not only a practical matter. We usually cannot say that there is a good quality of law with poor enforcement – in such cases we must suspect serious faults in the legal regulation, too. In other words, a solid, well structured legal regulation of sanctions<sup>80</sup> and other measures, together with the necessary stipulations of the laws on the institutional (and budgetary!) background of law enforcement, and also with a high quality and detailed regulation of the processes of the whole range of implementation, represent the legal preconditions of an effective practice.

Legislators should not apply administrative sanctioning against newer negative social tendencies if they cannot ensure the proper legal infrastructure is in place to make sanctioning really effective. They also should realise that sanctions other than fines might be much more effective in preventing and remedying environmental pollution, while the strong deterrent effect of fines should also be maintained and developed further. Inter-agency co-operation should be supported by developing the institutional and procedural background to make it almost automatic, not only a possible initiative of creative and able officials. Public participation is again a social phenomenon that might not function well without a solid legislative background: participation rights and responsibilities of the members and organisations of the public should be regulated in detail and guarantees should be given that the administrative bodies will harness the results of participation instead of trying to avoid and neglect it.

Finally, EU law harmonisation offers a unique opportunity to the legislators of our region to restructure our environmental protection administrative laws, maintaining the effective elements of the organically developed old structures but repealing those that cannot respond to the new standards. Meanwhile they should create a less fragmented system of administrative sanctions in order to prevent parallel efforts and ensure that sanctions are harmonised and focussed on effectiveness.

## **V.2. The main suggestions**

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<sup>80</sup> A sanctioning system is well structured when it has a good balance between the several kinds of sanctions; it has no contradictions in the processes and sanctions of several kinds of non-compliance. Additional elements of a well structured sanctioning system are such basic principles as proportionality and fairness.

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Similarly to the previous point we have collected only the most important, general suggestions here. The majority of the main suggestions are naturally more or less parallel to the main conclusions we have made in the previous point.

#### ***A more harmonised, unified system of administrative sanctions***

A disaggregated, scattered system of administrative sanctions might result in environmental pollution always shifting to the area where the sanctions are most lenient at a given time. This situation might be prevented if the sanctioning rules of the different environmental areas are harmonised at least in a way that avoids large discrepancies and/or a unified legislation developed within the environmental administrative law that gives similar concern to all of infringements of environmental law, notwithstanding which environmental branch is in question.

#### ***Further development of the regulation of sanctions***

The conclusions in the previous point suggested that in our administrative sanctioning systems sanctions other than fines should receive more attention. However, there is room for innovative solutions within the legal institution of fines, too, that can make it more effective. As we have described earlier, in Poland there is the, frequently used, legal possibility to defer fines as economic incentive and remit even the highest amount of fines if the non-compliant company obeys the laws and regulations, fulfils the conditions of restoring the caused harm and makes all the necessary measures to prevent future ones.

#### ***Develop inter-agency co-operation***

Mutual communication and exchange between the officers of criminal and administrative law enforcement systems could enhance the effectiveness of both sides<sup>81</sup>. Naturally, legislative and procedural frames of this co-operation should be created, too, but, as our examples of the strong working relations of different bodies in the previous part of our study prove, these organisations could find the ways of effective co-operation even without such a detailed legal background.

As we have described earlier, in Hungary there is a good practice of co-operation of environmental inspectorates and the civil law branches of public prosecutors' offices. Civil law activities of public prosecutors are triggered off by collateral letters sent by administrative bodies in the most outstanding environmental non-compliance cases. Practice says that this co-operation is very fruitful and the huge professional experience and prestige of the civil law prosecutors encourages the non-compliant companies to undersign civil law memoranda of understandings in which they undertake actions to amend the consequences of their past infringements of environmental administrative law. Naturally, in cases of court proceedings, civil law prosecutors can also win these cases with a high level of efficiency.

#### ***The importance of monitoring and feed-back on implementation***

A key issue of the success of administrative environmental law enforcement is feed-back from the actual implementation of the sanctions and measures<sup>82</sup>. Until the administrative offices have no time and manpower to control the actual implementation of their decisions, the effectiveness of the sanctions and measures they impose on the non-compliant operators will remain very low. Naturally, public participation in the whole environmental decision-making process could be a high value in this feed-back work.

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<sup>81</sup> See page 25 of the Lithuanian Draft Final Report.

<sup>82</sup> See page 61 of the Czech Draft Final Report.

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### *A more effective handling of smaller scale non-compliance*

Smaller polluters may sometimes remain unpunished, because inspectors with their scarce resources focus primarily on the bigger polluters<sup>83</sup>. A greater stress on petty offence (or equivalent) laws could offer a solution to this. Petty offence law has a long history in our laws and it has also a well built out institutional system with several guards and field inspectors who are detecting infringements of laws on the streets, on the arable fields, in forests, in national reserves, at lakes and rivers etc. Petty offence authorities usually have developed good long lasting (sometimes even institutionalised) contacts with NGOs and local communities that help them use the citizens' „thousands of eyes and ears” to detect a good portion of even the most numerous and widespread offences. Petty offence law, as the Lithuanian national researcher points out, is much simpler and more concrete than both the administrative and the criminal law<sup>84</sup> – people tend to understand better the legal situation described in the petty offence code and can more easily accommodate their behaviour to it.

### *Using the occasions of EU law harmonisation offers*

Deregulation and stability of environmental laws are also important factors of compliance<sup>85</sup>. As the bulk of the EU environmental law harmonisation work is finished in our countries, it is time to bring these new rules together with the organically developed older national environmental protection rules. Performing this task offers a unique possibility to eliminate complicated, parallel regulations from our environmental laws. A simpler, clearer set of laws – especially if it rests upon a wide professional and public consultation – might have a much longer life than the present environmental regulations that usually must undergo several amendments in every year.

## **V.3. Detailed suggestions on problems with effectiveness of environmental law enforcement**

Apart from the conclusions and suggestions our country researchers have made, there are several other problems that were raised indirectly in the texts of the country researches and we can therefore make some proposals of how to solve these additional problems.

### *Participation of non-environmental authorities in the environmental cases*

#### Problem

A diverse institutional arrangement by which the legislator frequently entitles authorities other than environmental ones to deal with certain environmental measurement cases or with parts of them results in a situation where significant environmental issues are decided without specialised environmental legal and practical knowledge.

#### Suggestion

Environmental issues are very broad; no one can prevent other authorities having rights to decide on important environmental issues. However, one of the most important tasks of the specialised environmental authorities should be the cross-sectoral exchange. Environmental authorities should form the proper infrastructure that enables them to hold regular trainings for the concerned officials of

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<sup>83</sup> See Page 39 of the Polish Draft Final Report.

<sup>84</sup> Smaller polluters may sometimes remain not punished, because inspectors with their scarcer resources focus primarily on the bigger polluters.

<sup>85</sup> See page 61 of the Czech Draft Final Report.

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relevant authorities; they should issue professional guidelines and maintain possibilities for “hot-line” consultation in individual cases.

***Laws on environmental administrative sanctions are too frequently changed***

Problem

Environmental administrative legislation in general and legislation on sanctions and measures change very frequently. This makes it difficult for the regulated community to accommodate themselves to the legal requirements and creates an additional, unnecessary cause of non-compliance. The frequent legal changes also make impossible the long term solid compliance planning on the side of the operators. The frequent legal changes also make the work of the law enforcement units of the environmental administrative authorities difficult.

Suggestion

Legislative policy of the ministries responsible for environmental protection in our countries should be changed. There should be longer and better preparation phases for both the conceptual and the textual legal drafting with wider professional and public discussions. In professional circles both the opinions of the academia and of the representatives of law enforcement administrative bodies should be listened to. Legal procedural guarantees should be developed against small, individual changes and for the collection of all amendment proposals in a longer time period.

***Lack of use of sanctions other than fines***

Problem

While fines are a frequently used sanction in environmental administrative law, other sanctions and measures seem to stay as formal regulations without meaningful practical implementation.

Suggestion

One of the main reasons of neglecting sanctions other than fines in practice in environmental administrative law seems to be that, while the enforcement of a fine is almost automatic, the enforcement of other sanctions and measures often requires a large amount of additional work by the authorities. Creation of special units responsible for monitoring the compliance with these sanctions and measures might be one solution on the institutional development side. In addition, a legal solution for enhancing the compliance with specific sanctioning decisions of the administrative bodies could be to provide support from criminal law and administrative-criminal law. This support would mean first of all identifying non-compliance of responsible company managers with non-fine sanctions as a crime or petty offence.

The problem, however, should be examined from the other side, too. Lack of proper implementation of these kinds of sanctions might mean an important warning to the legislators: they should carefully determine the institutional and procedural conditions of every new kind of non-fine measures or refrain from introducing them.

***Lack of implementation of serious sanctions***

Problem

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National researchers reported that there was a tendency for certain administrative sanctions not to be regularly used in practice because their consequences are considered to be too severe by both the officials of the administrative bodies and the regulated community. If a cumulated fine or other sanction for a serious infringement of an environmental legal rule would in practice result in the total eradication of a company, the hesitation of the officers can be understandable.

#### Suggestion

The problem raises first of all the necessity of careful internal harmonisation of the system of administrative sanctions in order to avoid parallel sanctioning and disproportionate punishments. However, the political, professional and general public needs to realise that in certain cases the activity of certain factories is so harmful to the environment that the only acceptable solution is the full and final discontinuation of their operation. In addition to that, a closer co-operation of administrative and criminal law might be of assistance here. Severe individual sanctions in criminal law and administrative-criminal law in a part of the cases might help to settle down environmental non-compliance cases without fully stopping the activity of the facilities. However, legislators and authorities need to avoid situations where the owners of a company can sacrifice one or two of their managers and still continue the environmentally harmful activities.

#### *Diversity of environmental administrative procedural rules*

##### Problem

Under Point III.4 we have analysed the diversity of environmental administrative procedural rules and have found that in order to solve the specific environmental substantive cases, the legislators usually create procedural laws which are specific in comparison to the general administrative procedural rules. If this process continues, implementation of certain specific environmental rules becomes more and more difficult for the authorities.

##### Suggestion

As a first step, harmonisation of these specific environmental procedural rules seems to be necessary. Even if legislative changes are not readily possible, the governmental bodies responsible for forming environmental law implementation policies should establish guidelines for the first and second instance environmental authorities on that issue. A more perceptive, long-term solution to the problem may be, however, a further legislative response: establishment a middle level, specific environmental procedural code.