Project Summary 2007

The research project studies the enforcement of environmental law, more specifically the enforcement practices in the criminal and administrative sanctioning tracks.

Enforcement is one of the essential duties of the state. It is the cornerstone of every legislative policy: legislation is ineffective without enforcement. Practical examples show how elementary this is. Speed limits are pointless if no checks are carried out and no penalties are imposed; the spectacular decrease in illicit waste dumping in the streets of Brussels is attributable to the thousands of administrative fines that have been imposed and collected there since 2000; action taken by the Antwerp public prosecutor's office in 1985 forced Dutch and German toxic waste dumpers to transfer their activities to the south of the country; the total lack of enforcement in that part of the country soon (in 1990) resulted in 8,800 illegal dumping sites (the toxic waste site in Mellery being a sad eye-catching example) (Morrens, 1990); the fireworks disaster in Enschede and the pub fire in Volendam are partly due to inadequate enforcement; moonlighting thrives if there is no labor inspection, etc.

In Flanders, enforcement activities against environmental offences started in the mid-eighties of the last century, first in the criminal track (with the exemplary action taken by the Antwerp public prosecutor's office), and a few years later in the administrative track (driven by the creation of a Flemish Environmental Inspectorate).

In the few decades in which we have known a development of environmental law enforcement, the sanctioning options have evolved accordingly. The range of instruments available to the courts and the administrative authorities to control environmental crime has changed significantly thanks to the introduction of new instruments (e.g. the forfeiture of illegal benefits in 1990). Also, there has been a radical extension of the applications of existing instruments, partly due to the introduction of criminal liability of legal persons in 1999.
Consequently, we observe a convergence of the sanctioning instruments of the criminal courts and the administrative authorities (e.g. first experiments with administrative fines).

A typical feature of all sanctioning instruments is the high level of discretion which the law grants to the enforcers. A simple example is the setting of a fine within the range of 550 to 55,000,000 euros that is provided for by the law (Waste Decree). Due to this ample degree of discretion, the use made in practice of the available instruments is at least as crucial to the enforcement outcome as the choices which the legislator has made and has translated into legislation. So far, the use that the prosecutors, the courts and the administrative authorities make of the instruments the law gives them to combat environmental crime has not (prosecutors and administrative authorities) or only fragmentarily (courts) been investigated. This is especially the case for the way in which prosecutors, courts and administrative authorities put into practice the wide margins of discretion they have been given.

As the debate on the instruments at the legislative level has matured (see for instance the new Flemish Enforcement Decree), the development of the range of instruments available to the criminal sanctioning track and the administrative authorities has now reached a crucial point, with socially significant opportunities as well as risks of undesirable developments.
(1) A major challenge ensuing from the developments in the legislation is that the Flemish environmental administrations will have to learn to use instruments, mainly punitive ones, with which they have no experience whatsoever, whereas criminal courts do have it. For the sake of

environmental policy, and citizens' confidence in this policy, it is necessary that this learning process unfolds swiftly and thoroughly.
(2) Since we are observing a convergence between the instruments of the criminal sanctioning track and of the administrative authorities, there is a real risk of the development of enforcement practices where similar instruments are used in different ways -- where, for instance, the same offences are fined much less heavily by criminal court judges than by administrative authorities, or where, for instance, the criminal courts and the administrative authorities, when imposing identical penalties, have a different policy depending on whom is punished. This would be a most undesirable development since it runs against the principle of equality before the law and undermines citizens' confidence (industries and individuals) in the rule of law.
(3) With regard to the innovation in sanctioning options referred to above, a practice has been build up over the last five to fifteen years. Thus, this precise moment, where the consistency of enforcement is at stake and where one of the key enforcement actors is due to embark on an important learning process, is a good time to start an investigation into the way the various instruments are used. Such an investigation represents an ideal opportunity to improve environmental law enforcement, as regards both legislation and use of instruments.

The research project offers a positive response to the challenges facing environmental law enforcement: it makes it possible to use the opportunities being offered and to avert the undesirable developments.
(1) With regard to the use of sanctioning instruments, the project brings together all the knowledge that is currently lacking and is needed to optimize legislation and practice. Crucial in this respect is the construction of a database covering the whole sanctioning pathway within both the criminal and the administrative sanctioning tracks: from official reports of violation to the decision to enforce the execution of a sanction, encompassing discretionary dismissal or tacit toleration and the decision to impose a sanction. The data collection procedures have been designed in such a way that discrete choice moments can be described and analyzed (using quantitative analysis techniques, among others).
(2) We can find out, starting from the database and a study of the relevant legal and economic framework, whether there are ways to optimize the current use of the different sanctioning tools and whether certain aspects of current practice call for adjustments in the legislation.
(3) At the same time, we can lay the foundations for the development of a public (criminal and administrative) environmental law enforcement that is internally consistent and is at least able to opt in a conscious and well-considered manner for a differentiated policy implementation.
(4) At the same time, we can lay the foundations for the learning process which the environmental administrative authorities will have to go through on how to use various new instruments that are already known to the criminal sanctioning track.

It is a multidisciplinary research project. The interdisciplinarity between law on the one hand and economics and law and economics on the other is essential to the investigation (description and analysis) of the discrete choices that are made in the use of the different sanctioning instruments (such as quantitative analysis methods). The conventional legal research methodology is inadequate in this respect.

The convergence of administrative and criminal law enforcement and the social challenges that accompany it are not typical of environmental policy. A general trend can be discerned in this respect in the most diverse policy areas and at all levels of government, from the federal level (e.g. the Act of 5 February 1999 on the quality of agricultural products, which has instituted five new administrative fining systems in the areas of agriculture, public health and animal welfare) to the local level (e.g. municipal nuisance penalties) (see also a decree of 2004

introducing a uniform administrative fining system to enforce Flemish regulations in matters of social law) (e.g. Put, 2005). These trends and challenges also manifest themselves in other countries, in environmental policy (e.g. Faure and Heine, 2005) (see for instance Comte, 2005, for the underlying deficiencies in practical knowledge) as well as other policy areas (see, for instance, the case-law of the European Court of Human Rights in the area of administrative fines).
Hence a very wide range of potential applications of the research outcomes (see also the various expert opinions).

F. **Comte**, "*Crime contre l'environnement et police en Europe: panorama et pistes d'action*", Revue européenne de droit de l'environnement, 2005, 381-447; M. **Faure** and G. **Heine**, *Criminal Enforcement of Environmental Law in the European Union*, The Hague, Kluwer Law International, 2005, 181 p., e.g. 65; P. Morrens, De golf en de zwemmer. Bedenkingen bij de leefmilieuproblematiek, Antwerpen, Standaard Uitgeverij, 1990, 136 p.; J. **Put**, "Naar een kaderwet administratieve sancties", *Rechtskundig Weekblad*, 2005 – 2006, 321-336.