

## Comparative remarks

### § 1. Introduction

In this chapter some comparative remarks will be made on the basis of the contributions in the previous chapters. The reason for making these remarks is to give more insight into the main developments in public environmental law in the EU Member States and to determine whether these developments are in tune with one another or whether they are clearly divergent. It would, of course, be most interesting to discuss the backgrounds of possible common practices and indeed of differences in the legal approach to (certain) environmental problems. As already mentioned in the introductory remarks to this book, it is not the purpose of this comparative chapter to make an extensive analysis of all the possible similarities and differences in the field of public environmental law of the various EU Member States. In the first place, we think that it is almost impossible for anybody to give such an overall analysis. To fully understand the public environmental law of a country it is absolutely necessary to have full information and knowledge about the historical, political and social context in which this system of environmental law is incorporated. It is not easy to have this information and knowledge for one's own country, let alone for more than ten other countries. So we leave the 'real comparison' to the readers of this book. They can make their 'in depth' comparisons on those topics they are most interested and specialized in. Secondly, as is also indicated in the introductory remarks, this book is meant as a starter for subsequent discussions and further writings. At this moment we do not want to give this process of further and deeper elaboration too strong a direction by overemphasizing the comparative aspects. A third reason for the absence of detailed comparison is that, although we tried to create reasonably compatible contributions by giving the framework and making comments on the draft contributions, this compatibility has not always been achieved. Of course, this is logical in the light of the fact that we are dealing with many countries, many authors with different backgrounds, different approaches, different timetables, etc. Further study of legislation, case law and the comments and proposals by academic writers would be necessary. This clearly goes beyond the scope of this book, which is meant as a stepping stone towards one or more of those studies.

The main question here will be whether it can be said that we are witnessing the rise of a *ius commune* in environmental law. For these reasons there can be no presentation of

an overall comprehensive comparative analysis of public environmental law in the various EU Member States. We can only make some summarizing comparative remarks (by pointing out the most remarkable similarities and discrepancies) related to the most central items of public environmental law that are addressed in the various contributions. In the following paragraphs, the framework for the contributions will also be the framework for making these comparative remarks. In this respect, the enumeration of countries (whether or not between brackets) in the comparative remarks is merely done as an illustration and is not necessarily meant to be exhaustive.

## § 2. Comparative Remarks

### A. THE CONSTITUTIONAL LEGAL SYSTEM

The cornerstones of each EU Member State are the ideals of democracy, the rule of law, respect for human rights and judicial review. In all Member States these ideals have been laid down in a written *constitution*, except in the United Kingdom where these ideals are rooted in actual constitutional practice and in common law. The exact ways in which democracy, the rule of law, respect for human rights and judicial review are upheld can differ in many ways. All Member States apply the model of a representative democracy as the basis for the legislative process. An important point of difference is that in some Member States the 'sovereignty of parliament' rules out judicial control of legislation – for instance in Denmark, the United Kingdom and the Netherlands – whereas in other cases – for instance in Austria, Belgium, Germany, Ireland, Italy and Spain – there is room for judicial control of legislation through a constitutional court. The existence of a *constitutional court* is in some cases – such as Austria and Germany – linked to a more federal state structure – the constitutional court serves as a remedy against the usurpation of power by central government and also as a safeguard that decentralized legislative authorities will comply with constitutional arrangements and general legal principles. In all Member States there is some form of *decentralization* although there is a considerable difference in the amount of legislative (and executive) powers bestowed upon decentralized authorities. In the case of Denmark and Ireland, for instance, the contributions make it clear that central government dominates. In other cases, like the United Kingdom and the Netherlands, central government guidelines seem to play an important role in that decentralized authorities have to take account of these guidelines.

As far as the *executive* branch of government is concerned there is democratic control by bodies of representatives and in addition in many cases executive decisions can only be taken on the basis of a procedure which offers the opportunity for public participation. What is also interesting to note is that in many countries there are functional and to some degree independent administrative authorities that play an important regulatory part – for instance in Ireland where the Environmental Protection Agency issues licences, and in Greece where the Environmental Agency is responsible for setting some quality standards. Some other contributions also mention similar institutions, though mainly with advisory or supervisory tasks.

One of the interesting questions under the heading of the constitutional framework concerns whether there is a trend towards more centralized public environmental law, par-

ticularly under the influence of EU directives, the need for technical expertise in environmental regulation and the need to avoid economic disparities. Although in some Member States environmental regulation is – as was stated above – a centralized affair, decentralized authorities still seem to play an important role, although it is not always clear whether these authorities have much discretion in the matter of their competences.

### B. LEGAL BASIS

In some EU Member States, such as Belgium, Finland, Austria, the Netherlands, Portugal, Greece, Germany and Spain, there is a clear basis for environmental regulation in the written constitution. In those countries this constitutional provision can be regarded as imposing a duty on the state (i.e. the governmental bodies of the state) to take regulatory action to protect and improve the environment. As far as could be deduced from the contributions, there does not seem to be an opportunity in any of these countries for individuals or groups of citizens to start a judicial action against a government authority in order to have this authority take regulatory action to benefit the environment. Thus it seems that the constitutional duty to protect and improve the environment is primarily (if not exclusively) a basic social right. Yet the contributions from Austria and the Netherlands seem to suggest that there might be a claim for citizens if the government, for instance through deregulation, drastically lowered the level of environmental protection. It is also interesting to see that other constitutional provisions can have a great influence on how government is expected to weigh the environmental interest. Some authors, for instance from Austria and Italy, mention basic property rights that can stand in the way of government intervention on behalf of the environment – entailing at least the duty to fully compensate breaches of property rights. By contrast, some contributions, as for instance in the case of Italy, point to constitutionally protected rights such as the protection of the natural heritage and the protection of health. It is in an extension to these rights that some governments find a title for environmental regulation.

It goes without saying that courts can play an important role in interpreting and indeed in laying down an environmental basic right. In Ireland, for example, in the case of *Ryan v. Attorney General* the Constitutional Court held that every citizen has a right to bodily integrity and this principle was subsequently extended by the High Court to condemn an act or *omission* of the executive which, without justification, would expose the health of a person to risk or danger.

Finally, one should ask whether it is important to have an explicit or implicit legal basis for environmental regulation. For instance, in the case of the United Kingdom there does not seem to be an explicit need for such a basis simply because the concept of the 'sovereignty of parliament' suffices, and indeed lack of a specific legal basis has not stopped any of the other Member States from introducing environmental regulation.

In all of the contributions mention is made of the leading environmental principles. In some cases, as for instance in the Italian draft proposal for a framework law for the environment, explicit reference is made to the principles of Article 130R EC Treaty. Indeed, in most cases there is a strong similarity between these EC principles and the national principles. In most cases there is a legal basis for these principles – they are mentioned or applied in general or sectoral environmental statutes. The Swedish Environ-

mental Protection Act, for instance, names the precautionary principle, the 'polluter pays' principle is mentioned in Article 29 of the Greek environmental framework law and the principle of Best Available Techniques (BAT) can be found in Finland's Water Act and Air Pollution Act. Nevertheless, these principles are generally considered to be guidelines for policy making, rather than legal principles such as principles of natural justice or proper administration. In the case of Austria, however, the author refers to the fact that the Constitutional Court has in one case acknowledged the precautionary principle as an 'element' of environmental law. It would require further research to find out whether perhaps in this case as well as in other cases there is more to the environmental principles than meets the eye. Then again some principles, such as the precautionary principle, are more easily connected to legal concepts, such as liability or the burden of proof, whereas other principles, such as preventive action or the integration principle, primarily express certain goals and are of a more political nature.

After the legal basis for government action, the framework mentions the possibility of a statutory or perhaps even constitutional provision entailing a *duty of care* towards the environment from the individual citizen. Section 14 of Finland's Constitution offers an example by laying down a general responsibility of *all* towards nature, the environment and the cultural heritage. More specific and clearly binding is Article 22 of Belgium's Flemish Regional Environmental Decree stating that anyone who undertakes classified work must, regardless of the permit granted, always take the necessary measures to avoid damage, nuisance and serious accidents, and, in case of an accident, limit the consequences. In this case the duty of care provision is clearly enforceable, but limited to those members of the public who undertake classified work. In the Dutch Environmental Management Act, Article 1.1a has a broader range: all citizens have a duty of care towards the environment, both in avoiding harm altogether and in limiting the consequences if harm is done. Because the provision is aimed at every member of the public and the wording of this duty is relatively vague, the legislation stipulated that penal enforcement is excluded - only administrative and civil law sanctions are allowed for. As editors we expected to find more similar general duty of care provisions throughout the countries of the EU. The fact that we found only a few may be explained by two factors. On the one hand, some of the contributions, such as the Austrian one, clearly state that there is no general duty of care but that within specific sectoral statutes there are specific duties of care laid on a particular group (of, for instance, exploitants or permitholders) and with regard to specific kinds of environmental pollution or damage. The matter of legal certainty for the public is often more adequately served by such a specific arrangement. On the other hand, it might be that provisions for civil liability are considered (more than) adequate to serve the purpose of a duty of care provision. Thus there would be no need for further, general provisions. Further research into these kinds of general provisions would be a worthwhile project.

As far as the environmental legal framework is concerned one should note that in some Member States, like Germany and the Netherlands, there is a *General Administrative Law Code* that is binding for administrative acts that concern the environment, especially when it concerns taking a decision on a request for a permit or for administrative en-

forcement. In some contributions, such as the Danish and Finnish ones, mention is made of specific statutes that lay down general arrangements for certain administrative activities, such as the processing of administrative cases (for instance, with regard to the right to be heard). In other contributions explicit reference is made to principles of natural justice and proper administration which government authorities have to abide by. One could well imagine that it depends on the basic premises of constitutional and administrative law whether or not the codification of such principles is allowed for. If there is a trend towards more general administrative statutory arrangements, then it seems that we are still on the very brink of that development.

There does, however, seem to be a trend towards *general environmental codes*. If we take for instance Denmark, Ireland, Portugal, Greece and the Netherlands, then we find that each of these countries has some form of a general Environmental Act. In some other countries, such as Germany, Italy, Sweden and Finland, one can point to initiatives sometimes even draft proposals for such a code. The main reasons for making or trying to make such a code would be to synchronize procedures, create more uniformity in procedures and standards so as to promote legal certainty, to lessen the administrative burden and, last but not least, to promote integrated preventive measures. In many contributions remarks are made on the fragmentation of environmental legislation so as to underline the need for a general environmental law code. The EC draft proposal on IPPC (Integrated Prevention Pollution and Control) will surely add to the trend of introducing such codes, and will also increase the similarities between them. Before we reach the stage of truly compatible environmental law codes throughout the European Union, we shall see three systems of environmental legislation: strictly sectoral regulation; sectoral legislation along with general regulation for the procedures of specific environmental acts (e.g. licences); general environmental legislation (not only procedural) with additional sectoral statutes. As this distinction shows, we shall probably never witness a situation in which all the environmental statutory provisions of a country are brought together in one environmental code. The subject matter of environmental problems, as well as the dynamics of technological, scientific and politic change and specific economic interests (such as exist today in the area of nuclear energy and genetic research industries) rule out such a situation - unless our idea of a code is itself divided into relatively separate parts.

### C. LEGAL INSTRUMENTS

It is clear from the contributions that there is a trend towards *indirect regulation and self-regulation*. Almost all of the authors mention taxation, subsidies and tradeable emission rights, as well as gentlemen's agreements and contracts (between government and industry) as alternative instruments to the more unilateral direct regulation. It goes beyond the scope of this comparison to expand on the various forms of alternative regulation, but it would surely be a worthwhile project to investigate along which lines and to what extent these types of regulation are pushed and indeed applied. With that one could also expect to see, as indeed one does in reading the various contributions to this book, that some of the euphorics on alternative regulation have died down. It has become increasingly clear

that indirect regulation and self-regulation suffer from drawbacks that will in many cases be outweighed by the advantages of direct regulation.

For the time being direct regulation clearly dominates the regulatory spectrum and therefore some general comparative remarks will be presented here on the main instruments of direct regulation, such as planning, quality standards, permit systems, general emission rules and environmental impact assessment.

*Planning* has clearly become one of the main instruments of environmental law, forming – so it seems – a bridge between policy articulation and regulation. In many cases planning resembles the setting of policy guidelines, such as in the United Kingdom, with the so-called Planning Policy Guidance documents. In most cases environmental plans or programmes are not in themselves binding, as for instance in Finland, where many existing plans are not linked in any way to permits, though their content can be a basis for further regulation and must be taken into account for instance when a decision has to be taken on a request for a permit. In the Netherlands the Environmental Management Act explicitly states that the competent authority has to take account of its environmental plan when deciding upon a request for a permit.

When we say that environmental planning has become one of the main instruments, then it must be stressed that in some EU Member States urban or physical planning has a more important impact on environmental regulation, for example in Ireland where local government plans mainly concern 'land-use management'. In other countries, such as Denmark and the Netherlands, urban planning is very important in addition to specific forms of environmental planning. In the Dutch situation the relationship between the two types of planning crystallizes in the so-called system of 'leap-frogging': a practice of consecutive mutual adjustments of environmental and urban plans. In Austria, in a similar way, the competent authority has to pay due regard to environmental aspects in urban planning activities. Whether an urban planning system alone could suffice for environmental purposes is a question that cannot be decided on the basis of this book's contributions alone and would need further study. It goes without saying that environmental developments are closely linked with urban planning and much will also depend on how the concept 'urban' is interpreted.

In a number of Member States with environmental planning there are sectoral plans (or programmes) next to one (or more) general or overall environmental plans. Apart from programmes that give a broad description of 'the state of the environment', as for instance in Italy, more general environmental plans often limit themselves to offering a framework for targets to be met in the next few years and setting general guidelines for the overall effective reduction in pollution and proposing incentives and suggestions as to the use of specific instruments. Thus the Portuguese National Plan for Environmental Policy lays down strategic guidelines for further environmental regulation, and the Italian central government issues a (three-year) Action Programme on Environmental Protection. In Denmark there are several more strategic plans that concern the environment, such as in the area of energy-production and technological development. It stands to reason that these more strategic plans are not, or only very loosely, legally binding. By way of an exception, parts of the general environmental plans for Belgium's Flemish Region can be explicitly binding for particular authorities, although on the whole these plans are

strictly indicative. Finally it must be mentioned that sometimes, as in the Dutch situation, after a general environmental plan on the national level, there are also general plans on the decentralized level of the provinces and – optionally – on the municipal level.

Sectoral environmental plans still seem to dominate the policy- and regulatory process. Germany, for instance, has no overall comprehensive environmental plans, but a wide variety of sectoral plans (on air pollution control, noise reduction, water resources management, sewage disposal, waste management, landscape and forests). Sectoral plans seem to be especially important in the areas of water quantity and quality (for instance in Austria, Belgium and Spain) and the disposal of waste, where plans tend to be rather more of a programmatic nature, in the sense that more precise and strict standards are set. These plans can indeed be legally binding, like the water supply plan in Austria and the waste plan in Belgium's Flemish Region. However, in Denmark regional and local sectoral plans seem to be totally non-binding.

On the whole, it can be said that planning has become a major instrument of environmental law that is here to stay. Next to plans or reports giving a general overview of the state of the environment, comprehensive plans stating general policy targets are being used throughout the EU Member States as the main regulatory incentives.

*Quality standards* are also becoming increasingly important. Though difficult by nature of the technical and scientific complexity of environmental problems, more and more standards are being set. In fact one could say that setting criteria for environmental quality is the core issue of environmental law. From these standards one can determine what levels of emissions into the environment are permissible. When speaking of quality standards, we are concerned with general standards. Almost all of the environmental statutes offer general quality standards. Often these standards are formulated in rather vague terms, like the environmental principles mentioned above. Standards like avoiding harm to the public health, or applying the Best Available Techniques (Not Entailing Excessive Costs, BATNEEC) are quite often applied. In Germany the Federal Constitutional Court upheld that these vague legal terms are 'constitutional' and no infringement of legal certainty. In Sweden, after many years in which only the BAT-standard was referred to, more precise, numerical quality standards have recently been introduced. This is where it has become apparent that EU directives have given a thrust to the effort of setting this type of numerical standards.

In the contributions we found many distinctions in terms of various types of quality standards. In the contributions on Belgium and the Netherlands a distinction is made between three types of quality standards according to the degree of their bindingness: limit values may not be exceeded at any time, directional values should be complied with unless the competent authority has very good reasons not to, whilst target values are more or less the expression of an aspiration (and sometimes 'wishful thinking'). We were unable to trace the same distinction in other contributions but assume that other countries apply a similar variety of types. Another distinction was that between general quality standards and specific standards that apply only to a certain area. In the Greek, Italian, Portuguese and Austrian contributions we saw that there were particular arrangements either for the protection of well-preserved areas (protection zones) or for the improvement of areas that have suffered from severe environmental damage (rehabilitation

zones). For the protection or improvement of these areas quality standards are essential, either to make it clear that the high environmental quality that exists is preserved or that the poor environmental quality will be improved by lessening the burden of detrimental emissions. What we also found is that quality standards mainly concern the quality of air and of water.

Finally on this issue, some contributions referred to the need for technical expertise and the role that independent agencies play in setting this type of standard. Often independent organizations give their advice in the matter. In some cases special agencies actually set the standards themselves – for example in Sweden where the Environmental Protection Agency sets its own quality standards, the downside of that being that these standards are not binding (though maybe they do have to be accounted for).

The *permit system* is still a dominant instrument in environmental law throughout all of the EU Member States. Although it is clear from the various contributions that on the one hand the use of general rules for emissions and on the other hand the duty to notify and/or register is increasing, the desire for an explicit weighing of interests in the face of a specific case (i.e. a specific industrial activity in a specific place) is still overbearing. There are many different permit systems, and to make a full comparison of all types and particularities goes beyond the scope of this book. A few elements and trends will be pointed out briefly.

First of all it is clear that there is a trend towards Integrated Prevention Pollution and Control (IPPC). In an increasing number of Member States different kinds of pollution from various sources are dealt with in one statute under one permit system (for instance in Denmark, Ireland and the Netherlands). Thus different environmental hazards can be analysed in simultaneously and preventive pollution control can be made effective in a programme of provisions that are closely and effectively locked together. However, there are still individual cases or environmental dangers that need a specific approach, for instance for hazardous waste – as the Portuguese contribution shows.

Public participation has clearly become a cornerstone of the permit system in the Member States, although there are differences in the categories of people who can participate (only those with a specific 'subjective interest' as in Germany or 'every citizen' (United Kingdom and the Netherlands)).

Another point of difference is that of the competent authorities for issuing permits. Whether these authorities are placed on a more central or decentralized level of government or are independent from political control (a special agency) or, apparently, combine administrative and judicial activities is almost impossible to unravel, let alone describe in detail. Many of the differences in the division of competences – again – seem to be linked to the particular constitutional and administrative law framework of the Member State in question. Historical developments and geographical circumstances (consider the (former) water boards in Finland and Sweden) seem to play a predominant role.

*Environmental Impact Assessment* has been introduced in all of the EU Member States, mostly on the basis of the EU Directive 85/337. In fact, as is stated in the German contribution, the idea of having environmental impact assessments (in short EIA) follows from the precautionary principle; before a project can get its 'go ahead', the possible environ-

mental impact thereof has to be described and evaluated. In all of the EU Member States the initiators of a project that is listed as a compulsory EIA project have to produce an impact report prior to engaging in the activity. The obligation to make a report containing an environmental impact assessment has – in all EU Member States – been integrated within existing general or sectoral statutes. In most cases the obligation is linked to the request for a permit; exceptionally, for instance in the Netherlands, the list of projects for which an EIA is required also includes specific forms of large-scale urban and energy planning.

As far as these contributions show, the obligation to produce an EIA rests with the initiator. The Belgian contribution specifies that according to Flemish regulations the initiator has to choose experts from a list of recognized specialists, who then produce the EIA. Whether such a system is also practised elsewhere is unclear. It is, however, clear that most Member States have a provision whereby, for every project to be assessed, specific instructions are set out as a guideline for the make-up of the EIA.

Impact assessment also involves public participation; in some cases, as in the United Kingdom and the Netherlands, any member of the public can enter into the procedure. In the case of Finland, it depends on whether a significant number of people is likely to be effected; if this is the case then a wider range of parties can participate.

Quite a few authors mention special agencies that are involved in the assessment procedure. Both Italy and the Netherlands have special committees for the EIA, and in Finland and Belgium the Regional Environmental Centre and the Flemish Environmental Authority have a particular stake in the procedure. It seems that the role of most of these agencies is to offer either instructions (guidelines) for the EIA beforehand, or to give an expert opinion on the content of an EIA.

As to the content of the report, all the contributions show that the project has to be described, and the possible environmental effects have to be stated as well as the measures that are contemplated in order to prevent or limit these effects. The contributions on Belgium, Finland and the Netherlands also mention that alternatives have to be included in the report. These alternatives could include considerations as to the location of the project. In the Danish contribution it is suggested that the location does not play as important a role as perhaps it should, because the competent authorities operate on a regional basis.

Finally it is clear from the contributions that – as far as we could deduce – the approval of an EIA is always distinguished from the decision on the request for a permit at hand. In the German contribution reference is made to the problem of standards: the EIA itself is based on ecological standards whilst the decision on the relevant project rests on standards that include other interests. The question is to what extent the decision is influenced by the standards used in the report.

#### D. ADMINISTRATIVE PROCEDURES, ADMINISTRATIVE APPEALS AND JUDICIAL REVIEW CONCERNING ENVIRONMENTAL PERMITS

Public environmental law is often laid down in copious sectoral legislation (for instance dealing with air, water or soil pollution, noise, etc.). The sectoral *permit procedures* often differ from one piece of sectoral legislation to another. Examples of this sectoral approach are to be found in Spain, the United Kingdom, Ireland and Germany. In coun-

tries in which activities basically require a more integrated environmental licence, other environmental permits are sometimes also required (for instance, waterpollution or water extraction permits in Belgium, Finland, Sweden), whereas building permits are generally necessary. Some national legislation deals with co-ordinated procedural provisions. Some national legislation even goes further. In Germany, for instance, the building permit can be incorporated into the environmental permit.

In several countries one can see a shift towards more uniform administrative procedures for handing out sectoral environmental administrative permits (Finland). In places where basically only one integrated environmental licence is required there is logically only one administrative procedure for this licence (Belgium). There are countries in which an even more general administrative procedural law exists for the establishment of all administrative acts (for instance, in Germany, Austria, the Netherlands and Portugal). However, one can say that in this case environmental legislation often holds specific (additional) provisions.

Whether or not the procedures for environmental administrative acts are laid down in the various sectoral environmental acts, in one integrated environmental act or in legislation dealing with a general administrative procedure for administrative decisions, one can see similar elements in them: such as the duty of authorities to give notice (to inform the public) of applications for environmental licences, the duty of authorities to give environmental information, and the opportunities for public participation prior to the administrative decision by the authorities. Sometimes one can really speak of an *actio popularis* where everybody is allowed to make objections against, for instance, the draft issue of an environmental licence (Netherlands). Sometimes, however, even in this early phase in the administrative procedure one has to have a kind of personal interest or to be affected by the project in order to make objections (Italy). In that case, the opportunities for environmental organizations to participate in administrative licensing, especially when acting in the interest of more general environmental values, obviously are less or absent. Although in the last ten to twenty years rights for general public participation in this respect may be said to have increased – this is certainly so for activities for which an EIA procedure has to be followed – the consolidation of these participation rights does not always seem obvious (see the German contribution).

Apart from public participation, in most countries legal provisions exist concerning advisory agencies, time limits for objections and appeals, etc.

Concerning *administrative control* within environmental law, in several countries systems of administrative appeals exist against the (final) environmental decisions of administrative bodies. There are many differences between these various appeal systems. Sometimes, there is only one appeal possible to a hierarchic higher authority. Sometimes, two or three appeal authorities of this kind exist (Austria). Sometimes an appeal can be addressed to a more independent agency (United Kingdom, Denmark, Ireland). Some permits are not handed out by decentralized authorities but by politically more independent agencies. For instance, in Sweden there is such a body for 'water' permits. This almost resembles a court. Another approach is that within the United Kingdom. There the EPA issues IPC draft licences and the appeal against these has to be lodged with the EPA itself.

Whether or not it concerns a hierarchic higher authority or a more independent appeal agency the legality as well as the merits of the decision are questioned. This may imply that the licence issued by the administrative authority is being replaced by the decision of the appeal body.

In some countries, if the statutory appeal is not used the right for judicial review is lost (Belgium). An existing appeal is not compulsory for judicial review in Greece and in, for instance, Denmark an appeal is a not compulsory preliminary to court action unless this is otherwise stated. In the United Kingdom only the applicant for the licence has some limited possibilities of appealing. In other countries, the range of those who can appeal is, sometimes according to the sectoral legislation, broader. Environmental groups or associations can appeal in, for instance, Belgium and Ireland.

In some countries an administrative appeal to a hierarchic higher authority or a more independent board is not available. For instance, in the Netherlands there is a general opportunity to make objections against an administrative act to the authority that made the act. However, where environmental licensing is concerned, in the Netherlands a direct judicial review against the licence can even be launched. In Portugal, a system of making objections to the licensing authority itself is also available. In Finland more and more access to truly administrative courts appears instead of that to appeal boards. In the near future this will also be the case in Sweden.

In almost every EU Member State individuals (within certain time-limits) can ask for *judicial review* against administrative acts (from the licensing authority or the appeal instance) like the issuance of environmental permits. Italy seems to be an exception in this respect: no right of access is recognized for citizens before the administrative courts, but certain approved environmental organizations have the right. In other countries, there is also a right of access for environmental organizations although in general some interest has to be proved. It is often up to the courts whether or not they take a generous attitude towards the granting of access to organizations. In Portugal there seems to be an (overall) *actio popularis* whenever there is an infringement against public health, environmental degradation, lowering of the quality of life or degradation of the cultural heritage.

In most EU Member States there are administrative courts that deal with environmental administrative decisions. In Ireland, the United Kingdom and Denmark there are no administrative courts and judicial review has to be sought in the ordinary courts. Sometimes we see that there is only one administrative court (in the first and only instance: Greece, Belgium, Netherlands). Sometimes we see that there are more administrative courts (Germany).

We mentioned that on appeal the legality as well as the merits of the administrative decision are at stake. In court proceedings generally only the legality is checked. This almost necessarily leads to more restrictive competences for the courts. A decision is more likely to be quashed than replaced by a decision of the court itself. This being the case it is not impossible that administrative courts exercise quite strong judicial control (Germany), for instance in the light of constitutional provisions (Greece).

In some countries judicial review suspends the administrative act (Finland). In other countries one has to ask for suspension of the respective administrative act (Belgium, Netherlands). Other variations are possible. In this respect, it is quite appropriate to

mention that in Greece suspension of a provision that protects the environment is not possible.

#### E. ENFORCEMENT (UNDER ADMINISTRATIVE LAW IN RELATION TO PRIVATE AND PENAL LAW) OF ENVIRONMENTAL LAW

In each of the EU Member States legislation is available concerning the *administrative enforcement* of administrative environmental law. When the environmental law is laid down in sectoral acts there are sectoral differences as to the possible enforcement measures that may be taken when the environmental provisions have been violated (Austria). The most important instruments of administrative enforcement are fines, the withdrawal of licences, and the power to remedy the results of illegal activities and recoup the expenses thereof.

Powers of administrative enforcement are often related to the authority to grant licences (Ireland and the Netherlands). Sometimes enforcement is in the hands of authorities or agencies that do not necessarily have the license authority (Finland, Belgium). It should be added that there are also supervisory environmental agencies with inspection tasks (Italy).

It has to be said that having the power of enforcement does not necessarily mean that it is actually used in practice. Sometimes there is some reluctance to do that because of the economic consequences. However, in general judicial review is possible if the enforcement bodies do not take action in case of violation of environmental legislation and administrative acts like permits.

One can see that in many EU Member States legislation has appeared giving compensation for environmental damage in general or in relation to more specific environmental damage or risk of damage. *Private environmental law enforcement* is first of all general tort law. Concerning private law liability there is obviously a shift from fault (subjective) liability to a more strict (objective) liability. In this respect it is interesting to mention Greece as an example where there had formerly been a kind of strict liability in cases against the state and public corporate bodies, which is now also applicable between individuals.

A serious breach in the use of property may well lead to liability and a duty of financial compensation for the damage. It becomes more difficult to start a successful private legal action if there is no breach of subjective rights like property. What are the possibilities in the case of environmental pollution that affects the normal enjoyment of living and the protection of, for instance, the birds in the sky? Can the state alone claim compensation (see Italy) or can environmental organizations and even individuals do so? In countries where a clean and healthy environment is a strong constitutional right (either written or unwritten, explicitly or implicitly), the latter is more probable than in countries where such constitutional support is lacking.

An important question regarding private law liability is whether one can escape liability when acting in accordance with a valid environmental administrative licence. In penal law such licences almost always have a legalizing effect (see below). In private law this is not necessarily the case. Sometimes it is laid down in legislation, sometimes it is based on case law. Although there are differences in the legal or judicial approach to this problem,

in most countries it can be said that the licence in general has no absolute force. Denmark seems to be an exception. There, acting in conformity with a licence seems to grant exemption from fault-based liability. In most of the cases in which polluting or damaging activities occur in conformity with a licence, we believe the amount of damage seems to be the key element in addressing the question of liability. Unreasonable damage certainly has to be compensated. However, a prohibition on a damaging activity for which a valid licence exists is in most countries not possible.

The question of compensation is sometimes linked to the licensing (see, for instance, Finland with reference to the Water Act). However, even where administrative courts deal with the proceedings of licensing, civil law proceedings often have to be started to get financial compensation from the polluter.

Private law liability is primarily something between individuals. However, there is an increasing trend to use private law for the state. In some countries there is even a kind of administrative private law (Austria). Examples of this include preventive and clean-up actions, recoupment of expenses in cases of illegal pollution, and also the conclusion of agreements (instead of using legislation or administrative acts).

It is often assumed that penal law is the *ultimum remedium* where it concerns the *penal enforcement* of the law against those who commit environmental offences. This may be the case, for instance, in Sweden where negotiation in the first instance is the preferred means of enforcement over penal sanctions. Enforcement under penal law is certainly not always the *ultimum remedium*, and penal law enforcement does not lead directly to the lessening or avoidance of environmental pollution. In the United Kingdom, for instance, there is greater willingness to prosecute. Here private persons as well as administrative authorities can directly initiate criminal proceedings (see also Spain). And in Belgium penal procedures can be based on complaints by persons pretending to be injured by environmental crimes. In criminal proceedings there are also opportunities for individuals (and environmental organizations) to ask for financial compensation for damage suffered (Portugal, Italy). In this respect it is interesting to add that Portuguese prosecutors can enter any type of lawsuit where environmental interests are at stake, and that in Spain specialized prosecution offices exist to prosecute environmental offences. This illustrates the fact that enforcement through penal law, especially in recent years, has become more important and is not the *ultimum remedium* anymore.

We see that in many countries legal entities as well as natural persons can be prosecuted where criminal environmental offences have taken place (the Netherlands, Finland). However, the authorities themselves cannot always be prosecuted (the Netherlands). Sometimes, the authorities can be prosecuted if they act like individuals and harm the environment (Denmark). In some other countries under certain circumstances officials can be prosecuted (Germany and Spain) and there can be criminal responsibility for administrative bodies who neglect their duties to control (Austria). Sometimes legal entities cannot be prosecuted (Germany). For instance, in Belgium environmental coordinators within firms can be prosecuted, as can company directors, managers, etc. For this situation see also Germany and Greece.

Penal environmental law can be found in the general Penal Codes as well as in the sectoral environmental acts themselves. Especially in the latter case penal environmental law

relies heavily on administrative environmental law. Sometimes this causes problems (Germany, the Netherlands and Spain). In this context the Portuguese tendency to save penal environmental law for serious offences and to use administrative environmental law for less serious situations is perhaps relevant (see also the Spanish contribution). In this respect, it is also illustrative that in some countries fining for environmental offences is allowed within the administrative environmental law as well as within the criminal environmental law (Spain). In that case administrative authorities mainly do the fining and not the penal courts (Austria).

The last interesting issue that we want to mention here is whether there should be a kind of strict criminal liability (see, for instance, the United Kingdom) or whether criminal offences can only be successfully prosecuted in cases where there is some gradation of *dolus* or *culpa* (most countries).

### § 3. Towards a *ius commune* in Environmental law?

As we said in our introduction to this chapter, it is quite impossible to make a real comparison between the public environmental law of the various EU Member States solely on the basis of this book's contributions. It does, however, seem possible to see that there are many similar features and trends and that indeed these similarities are increasing. The acceptance of basic environmental rights, the duty of government to protect and improve the environment, environmental principles, the use of certain instruments – like planning, permits, quality standards and impact assessment – the opportunities for public participation, judicial review, all of these elements, though often different in their precise content or shape, have so much in common that we feel that one can indeed speak of a *ius commune* in environmental law. It is also clear that EC regulation plays an important role in this trend to greater uniformity in public environmental law – impact assessment and quality standards are examples of this. When there are differences, as for instance in the organization of courts, the procedures for legal review and the state's organization in terms of federalism or decentralization, these differences often relate to historical and sometimes geographical circumstances.

We hope that this book, through its contributions on public environmental law in EU Member States, will not only function as a basis for greater insight but also as a stimulus to possibly greater harmony and thus more effective environmental protection throughout the European Union.

We want to end this chapter by indicating the most important trends and developments in public environmental law in the EU Member States.

- In most countries environmental law meets the definition made in the introduction to this book: prevention of pollution. There are countries in which local and regional land-use planning play a very important part in the protection of the environment. Sometimes the same applies for the conservation of nature.
- Environmental protection or the promotion of a clean and healthy environment have increasingly been adopted within the constitutions of the Member States.

- In many countries important legislation has resulted from the implementation of EC law, such as that governing the procedure for environmental impact assessments, the duty to supply information regarding environmental data, and important parts of waste and water legislation. This supranational dimension leads, of course, to more similarities in the legislation of the various countries.
- The international dimension of national environmental law has increased, for instance, by the implementation of international treaties, principles like sustainable development, the results of the Rio Conference, and so on.
- Principles (precautionary, polluter pays, BATNEEC, etc.) seem to be more important as bases for environmental law. However, their implementation in actual licences is not very clear.
- Public participation rights and actual public participation have increased especially in EIA projects.
- Local authorities often have only executive powers. Central state bodies are the only important legal powers.
- Concerning environmental licensing there is a shift towards more integrated licences instead of several sectoral licences. This reduces problems previously encountered between the various competent authorities and gives more uniformity in administrative procedures. Especially in unitary states some kind of general environmental codes have appeared.
- As well as integrated licences, integrated environmental plans are becoming more important.
- There is move towards more market-based instruments like taxes and agreements. Although public environmental legislation (with many direct legal instruments) has increased over the last ten to twenty years one can see tendencies towards deregulation and self-regulation.
- Where administrative environmental legislation is well developed there is a greater chance that administrative enforcement is in fact taking place.
- Private environmental law and penal environmental law are of growing importance with regard to the enforcement of environmental law.