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Fight Environmental Crime

Fighting Environmental Crime in France: A Country Report

Work package 2 on "Instruments, actors, and institutions"

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DISCLAIMER

Abstract

In France environmental protection has gained a constitutional status following the adoption of the Environmental Charter in 2005. The relevance of the environment also results from the Criminal Code, which in Article 410-1 lists "the balance of natural resources and environment" among the "fundamental interests of the Nation". Although the environment is invested with a superior social interest, the French Criminal Code does not foresee any provision expressly punishing environmental damage or pollution.

The main source of French environmental law is the Environmental Code, which introduces rules applicable to the different environmental components and contains provisions punishing the infringement of the above mentioned rules with criminal sanctions. With the exception of few cases directly punishing environmental pollution, these provisions are mostly dependent on the administrative rules and consist in failing to comply with a court ruling or, more often, in failing to comply with an administrative decision or an administrative regulation. All the environmental offences provided for by the French legislation can be applied to the natural persons as well as to the legal ones.

The Environmental Code has been modified by the Ordinance No. 34 of 11 January 2012. The Ordinance has established a set of common provisions on criminal sanctions and police controls applicable to all the offences provided for by the Environmental Code. The Ordinance has significantly modified the system of the "*polices de l'environnement*" in order to ensure greater consistency and effectiveness of the juridical framework relevant for the investigation and detection of environmental violations.

In France administrative sanctions also play a key role in the field of environmental protection, with a recent legislative activism which has led to the multiplication of administrative sanctions concerning the protection of the environment and human health.

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LIST OF ABBREVIATIONS

BO	Bulletin Officiel
Cass. Civ.	Cour de Cassation Chambre Civile
Cass. Crim.	Cour de Cassation Chambre Criminelle
CC	Criminal Code
CCP	Code of Criminal Procedure
Cons. Const.	Conseil Constitutionel
DHR	Declaration of Human Rights and the Citizen of 1789
EAW	European Arrest Warrant
ELD	Environmental Liability Directive
Env. Code	Environmental Code
EU	European Union
JORF	Journal officiel de la République française
NGO	Non-governmental organisation
OCLAESP	Office central de lutte contre les atteintes à l'environnement et à la santé publique
ODS	Ozone-Depleting Substances
Para.	Paragraph

1 Introduction

France responded at an early stage to social pressures on the need to ensure protection of the environment from industrialisation and urban development, setting up institutions with special responsibility for pollution control and natural resources management.

Like other European Union (EU) Member States, French environmental policy has been influenced by the EU. The main priorities of the French environmental strategy are efficient natural resource management; enhancement of urban environmental quality; and protection of nature and landscapes. As a consequence, current environmental issues concern pollution from agriculture and transport, air quality in major cities, expansion of the network of protected areas and protection of coastal areas.[1] The Ministry of Ecology, Sustainable Development and Energy is the main body responsible for developing environmental policy and drafting environmental legislation.

The French Environmental Charter, which was promulgated by Law No. 205 of 1st March 2005 and having constitutional standing, protects the right to a clean environment.[2] French environmental law is therefore invested with a superior social interest. In accordance to its Constitutional status, the environment should benefit from a reinforced penal protection; however, the Environmental Charter does not provide for any criminal sanctions for environmental infringements and seems to be expression of a more restorative than repressive approach.[3]

The main source of the French environmental law is the Environmental Code, which foresees the main legal (*Partie législative*) and regulatory (*Partie réglementaire*) texts. The legislative part has been adopted in 2003; the regulatory part was developed through different steps during the decade that followed the publication of the Code.

Regarding the structure of the Code, the first book contains common provisions on environmental law. The following books concern the different environmental components and their protection: physical environments (water and air); natural spaces; flora and fauna; and the prevention of pollution, risks and nuisances. Books VI and VII deal with environmental law enforcement in New Caledonia, French Polynesia, Wallis and Futuna Islands, French Southern and Antarctic Territories, and Mayotte, as well as in Antarctic. The regulatory part follows the same structure of the legislative part.

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[1] For more information on the French environmental policy, see Michael Prieur, *Droit de l'environnment* (Paris: Dalloz, 2011), 31 ff.

[2] The so-called *Loi Barnier* of 2 February 1995 had firstly recognised the right to environment in the French legal order. The Article 1 of the *Loi Barnier*, now contained in Article L 11-2 Env. Code, states that "laws and regulations organise the individual's right to a healthy environment". In 2004 the creation of an autonomous text (*Charte 'adossée' à la Constituion*) was considered the most appropriate option to give constitutional status to the right to the environment. On the process of recognition of the right to the environment, see Vincent Rebeyrol, *L'affirmation d'un 'droit à l'environnement' et la réparation des dommages environnementaux* (Paris: Defrénois, 2010), 31 ff.; Agathe Van Lang, "L'enracinement constitutionnel de la responsabilité environnementale", in *La responsabilité environnementale. Prévention, imputation, reparation* (Paris: Dalloz, 2009), 45 ff.

[3] Veronique Jaworski, "La Charte constitutionelle de l'environnement face au droit penal", *Revue juridique de l'environnement* (2005): 177.

The Environmental Code also contains criminal provisions related to the different environmental elements. According to academics[4] and practitioners (police[5], barrister[6] and prosecutor[7]), the codification of environmental law did not achieve the goal of systemising environmental criminal provisions which, at present, are still spread across different codes (e.g., *Code de l'environnement*, *Code Rural*, *Code de la Santé publique*, *Code de l'urbanisme*, *Code forestier*, etc.).

The Ordinance No. 34 of 11 January 2012, which came into force in July 2013, operates a reform of criminal law aimed to harmonising the legal provisions related to the discovery and proof of infringements, on the one hand, and the penalties to be applied, on the other.[8]

In France high level approach to environmental crime is based on different levels of government; it relies upon cooperation between public authorities and private stakeholders and makes use of several instruments, such as regulations, economic instruments, planning and voluntary measures.

According to the Report "*Criminalité et délinquance constatée en France – Année 2012*"[9] in 2012 the police and gendarmerie units reported to the judicial authority a total number of 2.569 cases of environmental offences ('*atteinte à l'environnement*'). It is worth to mention that the total number has decreased of – 15,24 % with respect to 2011.

Practitioners (police) highlight that in France, 3.562.310 cases have been reported in all areas of crime in 2013.[10] Concerning the environmental crimes, 7.008 cases have been reported, representing merely the 0,20 % of the overall criminality in France during this period of time. If we look at the 'solved crime' rate, 5.773 cases were solved, representing over 82% of all cases reported (37% for all areas of criminality).

2 Definition of environment

In the French system the environment includes "natural areas, resources and habitats, sites and landscapes, air quality, animal and plant species, and the biological diversity and balance to which they contribute", as set out under Article L 110-1 of the Environmental Code (Env. Code), which states that these elements "are part of the common heritage of the Nation". It also affirms that "their protection, enhancement, restoration, rehabilitation and management are of general interest and contribute to the objective of sustainable development which aims to satisfy the development needs and protect the health of current generations without compromising the ability of future generations to meet their own needs" and lists the principles inspiring all these activities (such as the precautionary principle; the principle of

[4] Laure Bertrand, "Les sources internes: des lois de protection de la nature à la Charte constitutionelle de l'environnement", in *Leçons de Droit de l'Environnement*, ed. Manuel Gros (Paris: Ellièpses, 2013), 31 ff.

[5] Interview with representatives of *Office central de lutte contre les atteintes à l'environnement et à la santé publique* (OCLAESP) of 22 August 2014.

[6] Interview with French barrister of 25 August 2014.

[7] Interview with French prosecutor of 25 August 2014.

[8] Ordonnance No. 2012-34 du 11 Janvier 2012 portant simplification, réforme et harmonisation des dispositions de police administrative et de police judiciaire du code de l'environnement, in *JORF No. 0010 of 12 January 2012, 564 ff.*

[9] This report is available at http://www.ladocumentationfrancaise.fr/rapports-publics/134000490/.

[10] Interview with representatives of OCLAESP of 22 August 2014.

preventive and corrective action of damage to the environment; the polluter pays principle and the principle of public participation, as recently modified by the Law No. 1460 of 27 December 2012).

The relevance of the environment also results from the Criminal Code (CC), which in Article 410-1 lists "the balance of natural resources and environment" among the "fundamental interests of the Nation", and from the Environmental Charter, which defines the environment as "common heritage of humanity", considering its safeguarding "a goal to be pursued in the same way as the other fundamental interests of the Nation".

3 Definition of environmental crime/environmental offence

The French legal order lacks any criminal law provision specifically aimed at defining environmental crime.

In the Criminal Code the only felony (*crime*)[11] related to environmental protection is the "Ecologic terrorism", set out under Article 421-2, which punishes by twenty years' criminal imprisonment and a fine of €350,000 "the introduction into the atmosphere, on the ground, in the soil, in foodstuff or its ingredients, or in waters, including territorial waters, of any substance liable to imperil human or animal health or the natural environment (…), where it is committed intentionally in connection with an individual or collective undertaking aimed to seriously disturb public order through intimidation or terror". This provision was introduced primarily as a response to the fear of a terrorist movement using chemical or radioactive substances.[12]

Beside the above mentioned Article 421-2 CC which is very limited in scope, the French Criminal Code does not foresee any provision expressly punishing environmental damage or pollution; nevertheless, the Criminal Code contains various provisions which, although not directly connected to the protection of ecological values, can be used where a damage to the environment occurs (for instance, Article 223-1 related to endangering other persons;[13] Articles 221-6 and 222-19 concerning involuntary offences against life or physical integrity of the person).

The Environmental Code introduces rules applicable to the different environmental components and contains provisions punishing the infringement of the above mentioned rules with criminal sanctions. Except few cases that directly punish environmental pollution (for instance, Article L 216-6 concerning water pollution or Article L 432-2 concerning protection of farmed fish and their habitat), these provisions are mostly accessory to the administrative rules and consist in failing to comply with a court ruling or, more often, in failing to comply with an administrative decision or an administrative regulation. Moreover, it is worth underlining that non-compliance with administrative laws is usually considered as a petty offence, while non-compliance with judicial or administrative decisions is considered as a misdemeanour.

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[11] On the distinction between felonies, misdemeanors or petty offences, see below, 4. The references in footnotes always refer to the number of the chapters.

[12] Agathe Van Lang, *Droit de l'environnement* (Paris: Presses Universitaires de France, 2011), 498.

[13] As it concerns environmental damages, Article 223-1 CC can be used only where the direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability is caused by the "manifestly deliberate violation of a specific obligation of safety or prudence imposed by any law or regulation". On this provisions, see 5.

The French literature has often criticised the structure of environmental criminal provisions because of the strong administrative dependence of criminal law.[14] Thereby, several attempts to introducing the concept of "environmental crime" into the French legal system have been made. For instance, in the 1970s Mireille Delmas-Marty proposed the creation of a general environmental crime, committed by anyone who, "without any justification of social interest, by negligence or for profit, carries out an action whose effect is to modify the ecological balance in a serious and irreversible way, or to impact human health or animal life, causing essential alteration of soil, air or water".[15]

In 2008 Corinne Lepage, president of the environmentalist movement "Cap 21" and former Minister of Environment, proposed the introduction into Article 521-1 CC of the general offence of "*délinquance écologique*", consisting of:

- the release, discharge, emission or introduction, with knowledge of risk, of substances such as hazardous waste, oils, waste oils or sludges, or any substance likely to endanger human or animal health or natural environment, in the atmosphere, on the ground, in the soil, in foodstuff or its ingredients, or waters, including those of the territorial sea;

- the illegal treatment, disposal, storage, transport, export or import of hazardous waste;

- the possession, taking, damaging, processing, killing or illicit trades of living organisms or parts of these;

- the significant deterioration of a protected habitat;

- the noise subject to specific regulations;

- the trade in Ozone-Depleting Substances (ODS);

- the offences involving the use of classified facilities;

- the use of unauthorised chemical and organic products or non-compliance with authorised standards or licensing requirements, conditions of production, operation, use, or experimental research of these products.[16]

According to the "*Rapport Lepage*", this criminal conduct would have had to be punished by 3 years' imprisonment and a fine of €150,000 and by the specific additional penalty of restoration of polluted sites (for legal persons under conditions set out in Article 121-2 CC). Sanctions are increased to five years' imprisonment and €300,000 of fine where the offence has caused a damage to the physical integrity of the person or to human health which results in a total inability to work for more than three months, or a partial temporary inability of more than 10%, or a permanent disability, or an irreversible degradation of air, water, fauna and flora.

In addition, the "*Rapport Lepage*" proposes the introduction of the offence of "*rétention d'information en matière environnementale*", defined as the act of providing with intent and awareness of risk, inaccurate or incomplete data or information, or the retention of data or information regarding any substance dangerous for human or animal health or the environment, regarding disposal, emissions or introductions, or regarding the evidence of the lack of dangerousness of such substances.[17]

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[14] See Véronique Jaworski, "L'état du droit pénal de l'environnement français: entre forces et faiblesses", *Les Cahiers de Droit* (2009): 902; Geneviève Giudicelli-Delage, "Le droit pénal français de l'environnement. Modèles de protection", in *La riforma delle parte speciale del diritto penale. Verso la costruzione di modelli comuni a livello europeo*, ed. Michele Papa (Turin: Giappichelli, 2005), 69.

[15] Prieur, *Droit de l'environnement*, 1035.

[16] Mission Lepage, rapport final, I phase, February 2008, 59 ff., available at http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/084000490/0000.pdf. In November 2007 Jean-Louis Borloo, Minister for Ecology, Development and Sustainable Management, had appointed Corinne Lepage to a mission concerning environmental governance, in view of the French Presidency of the European Union in the second half of 2008.

[17] Mission Lepage, rapport final, I phase, February 2008, 30.

Practitioners (police[18] and barrister[19]) highlight that there are deficits concerning the provisions on environmental crime. For example, the lack of a "soil pollution" offence has, as a consequence, that the pollution of soil can only be prosecuted in connection to water pollution or similar offences. In addition, the system of penalties for environmental crime is weak, with relatively low penalties in many cases. According to the practitioners (barrister) the level of sanctions has not a dissuasive effect; moreover, sanctions for environmental crime are not proportionate compared to sanctions for other categories of crime. In practice, in order to have an adequate criminal sanction, it is necessary to get on to offences against property or offences against persons. The penalties also influence the available investigation tools, since some special investigative techniques are allowed only in cases of penalties higher than those provided for environmental crimes.

4 Substantive criminal law principles

4.1 Legality Principle

Article 111-3 CC provides for the principle *nullum crimen, nulla poena sine lege penali*: "No one may be punished for a felony or for a misdemeanour whose ingredients are not defined by law, nor for a petty offence whose ingredients are not defined by a regulation.

No one may be punished by a penalty, which is not provided for by the law, if the offence is a felony or a misdemeanour, or by a regulation, if the offence is a petty offence".[20]

Law provides for felony (*crime*) and misdemeanour (*délit*); the regulation provides for petty offence (*contravention*). The allocation of competences between the Parliament and the Government is established under Articles 34 and 37 of the Constitution.

The judiciary cannot create criminal law. Judges' powers are limited by strict interpretation (Article 111-4 CC) and analogy is prohibited.

Article 112-1 CC establishes the principle *nullum crimen nulla poena sine praevia lege penali*: "Conduct is punishable only where it constituted a criminal offence at the time when it took place.

Only those penalties legally applicable at the same date may be imposed.

However, new provisions are applicable to offences committed before their coming into force and which have not led to a *res judicata* conviction, when they are less severe than the previous provisions".

Concerning the duties of criminalisation arising from the EU directives, only national laws or regulations – transposing the directives - shall determine the rules concerning the introduction of new criminal offences and provide for criminal sanctions.

With regard to environmental criminal law, the legislator often only states that the violation of a certain rule, generally of regulatory nature, entails certain criminal sanctions. Thus, many environmental offences are defined by reference to regulations.[21]

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[18] Interview with representatives of OCLAESP of 22 August 2014.

[19] Interview with French barrister of 25 August 2014.

[20] See, also, Article 8 of the Declaration of Human Rights and the Citizen of 1789 (DHR), which is recalled in the Preamble of the French Constitution; its value is equal to the Constitution.

[21] See Amané Gogorza, "Le droit pénal de l'environnement", *Droit Pénal* (4), 2013, 2; Dominique Guihal, *Droit repressif de l'environnement* (Paris: Economica, 2008), 114; Van Lang, *Droit de l'environnement*, 489.

Such a kind of incrimination technique has been validated by the Constitutional Council (*Conseil Constitutionnel*), who stated that no constitutional principles prevents the legislator to criminalise the violation of an obligation not arising from the law.[22] Even if this legislative technique complies with the constitutional principles, there are some concerns with regard to the principle of accessibility of the criminal provision and predictability of the criminal sanction.[23]

4.2 Necessity of criminal law

According to Article 8 of the Declaration of Human Rights and the Citizen of 1789 (DHR), recalled by the Preamble of the French Constitution, "The Law must prescribe only the punishments that are strictly and evidently necessary (…)".

The most severe penalties are in principle of criminal nature, but this hierarchy is not absolute: administrative fines for tax, customs or competition law can achieve significantly higher levels (and therefore deterrent effects) than the most common criminal fines. In any case, it is the nature of the public authority empowered to impose a sanction - the judge or an administrative authority - which seems to be the criterion for distinguishing between relevant administrative sanctions and criminal penalties.[24]

4.3 Causality

In order to establish the causation between a conduct (criminal law act) and a result, judges apply three main tests of causation:[25] the *Equivalence theory* (cause is the one representing a *condicio sine qua non* of the result); the *Proximate cause theory* (cause is a condition which is the primary cause of a criminal offence); the *Adequate cause theory (*cause is a condition which significantly increases the objective probability of the result).

4.4 Mens rea rules

Article 121-3 CC establishes that:

"There is no felony or misdemeanour in the absence of an intent to commit it.

However, the deliberate endangering of others is a misdemeanour where the law so provides.

A misdemeanour also exists, where the law so provides, in cases of recklessness, negligence, or failure to observe an obligation of due care or precaution imposed by any law or regulation, where it is established that the offender has failed to show normal diligence, taking into consideration where appropriate the nature of his role or functions, of his capacities and powers and of the means then available to him.

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[22] Cons. Const., 10 November 1982, No. 82-145.

[23] See Gogorza, "Le droit pénal de l'environnement", 2.

[24] See *Guide de legistique*, para. 5.2.6, available at www.legifrance.gouv.fr.

[25] See Jean Pradel, *Manuel de Procédure Pénale* (Paris: Cujas, 2000), 189 ff.

In the case as referred to in the above paragraph, natural persons who have not directly contributed to causing the damage, but who have created or contributed to create the situation which allowed the damage to happen who failed to take steps enabling it to be avoided, are criminally liable where it is shown that they have broken a duty of care or precaution laid down by law or regulation in a manifestly deliberate manner, or have committed a specified piece of misconduct which exposed another person to a particularly serious risk of which they must have been aware.

There is no petty offence in the event of force majeure".

In 1999 the *Conseil Constitutionnel* recognised constitutional relevance to the principle of culpability.[26] In particular, the *Conseil* affirmed that "a person is punishable only for his own act", based on Article 8 DHR establishing the principle of legality and on Article 9 DHR on the presumption of innocence. Moreover, the *Conseil*, in the same decision, clarified that "the definition of a criminal offence shall include, in addition to the material element of the offence, the moral element, intentional or unintentional".

4.5 Party to the offences rules

According to Article 121-4 CC "The perpetrator of an offence is the person who:

1° commits the criminally prohibited act;

2° attempts to commit a felony or, in the cases provided for by law, a misdemeanour".

Article 121-6 CC establishes that "The accomplice to the offence, in the meaning of article 121-7, is punishable as a perpetrator".

Article 121-7 CC establishes that "The accomplice to a felony or a misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or commission.

Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice".

4.6 Criminal sanctions

In the French criminal system, three types of criminal sanctions exist: *peines principales* (major penalties), *peines alternatives* (alternative penalties) and *peines complémentaires* (additional penalties).

The major penalties applicable to natural persons for the commission of a felony are the *réclusion criminelle* (criminal imprisonment) and the *détention criminelle* (criminal detention) which is the penalty provided for some violations of the fundamental interests of the Nation. The minimum period for a fixed term of criminal imprisonment or criminal detention is ten years (Article 131-1 CC). The maximum penalties are respectively criminal imprisonment for life or life criminal detention.

The penalties of criminal imprisonment or criminal detention do not preclude the imposition of a fine and of one or more of the additional penalties set out under article 131-10 (Article 131-2 CC).

The major penalties applicable to natural persons for the commission of misdemeanours are: *emprisonnement* (imprisonment); *contrainte pénale*; *amende* (fine); *jour-amende* (day-fine); *stage de citoyenneté* (citizenship course); *travail d'intérêt général* (community service); *peines privatives ou*

[26] Cons. Cost., 16 June 1999, decision No. 99-411.

restrictives de droits (penalties entailing a forfeiture or restriction of rights); *peines complémentaires* (additional penalties); *sanction-réparation* (reparation penalty) (Article 131-3 CC).

The only penalty for petty offences is a fine. Depending on the amount of the fine, petty offences are divided into five classes, according to Article 131-13 CC: "Petty offences are offences which by law are punished with a fine not in excess of €3,000.

The amount of a fine is as follows:

1° a maximum of €38 for petty offences of the first class;

2° a maximum of €150 for petty offences of the second class;

3° a maximum of €450 for petty offences of the third class;

4° a maximum of €750 for petty offences of the fourth class;

5° a maximum of €1,500 for petty offences of the fifth class; an amount which may be increased to €3,000 in the case of a persistent offender where the regulation so provides, except where the law provides that repetition of a petty offence constitutes a misdemeanour".

The alternative penalties may be imposed instead of other penalties and are provided for by Article 131-6 to Article 131-9 CC. In particular, according to Article 131-6 where a misdemeanour is punishable by a prison sentence, the court may impose one or more of the penalties listed therein, entailing forfeiture or restriction of rights, instead of the prison term (e.g. suspension or cancellation of a driving licence, confiscation of the thing which was used in or was intended for the commission of the offence, or of the thing which is the product of it, etc.). For misdemeanours which are punishable only by a fine, the penalty of forfeiture or restriction of rights enumerated under article 131-6 may also be imposed instead of the fine (Article 131-7 CC).

The additional penalties are imposed for felonies or misdemeanours in addition to other penalties where the law so provides and are listed in Articles 131-10 and 131-11 CC (e.g. penalty entailing prohibition, forfeiture, incapacity or withdrawal of a right, the impounding or confiscation of a thing, the compulsory closure of an establishment, etc.).

The additional penalties aim to stop the situation which has been caused, to repair the damage and to prevent the reiteration of the facts.

It is worth to note that the above mentioned additional penalties often apply to environmental crimes. In addition to these general additional penalties, specific additional penalties are provided for by the Environmental Code. In particular, according to Article L 173-7 Env. Code, physical persons convicted of offences under the Code shall also be liable for the following additional penalties:

1° the public notice ('*affichage*') and dissemination of the sentence, in accordance with Article 131-35 of the Criminal Code;

2° the confiscation of the thing which was used or intended for the commission of the offence, or the thing which is the direct or indirect product of the offence, in accordance with Article 131-21 of the Criminal Code;

3° the immobilisation, for a period not exceeding one year, of the vehicle, vessel, boat or aircraft used by the convicted to commit the offence, if he is the owner;

4° the prohibition to perform the profession in the exercise of which the offence was committed, for a period not exceeding five years, in accordance with Articles 131-27 to 131-29 of the Criminal Code.

As it concerns the penalties for legal persons, Article 131-37 CC establishes that penalties for felonies and misdemeanours incurred by legal persons are the *amende* (fine) and, in the cases set out by law, the penalties enumerated under Article 131-39; as it concerns misdemeanours, the *sanction-réparation* (reparation penalty) is also foreseen. Article 131-39 CC states that "Where a law so provides against a legal person, a felony or misdemeanour may be punished by one or more of the following penalties:

1° dissolution, where the legal person was created to commit a felony, or, where the felony or misdemeanour is one which carries a sentence of imprisonment of three years or more, where it was diverted from its objects in order to commit them;

2° prohibition to exercise, directly or indirectly one or more social or professional activity, either permanently or for a period of up to five years;

3° placement under judicial supervision for a period of up to five years;

4° permanent closure or closure for up to five years of the establishment, or one or more of the establishments, of the enterprise that was used to commit the offences in question;

5° disqualification from public tenders, either permanently or for a period of up to five years or more;

6° prohibition, either permanently or for a period of up to five years, to conduct a public offering of securities or to admit securities to trading on a regulated market;

7° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a period of up to five years;

8° confiscation under the conditions and procedures set out by Article 131-21;

9° posting a public notice of the decision or disseminating the decision in the written press or using any form of communication to the public by electronic means;

(...)

12° prohibition for a period of up to five years, to receive any public aid granted by the State, local governments, their institutions or groups as well as any financial assistance provided by a private person charged with a public service mission.

The additional penalty of confiscation has always to be applied for the felonies and misdemeanours punished by imprisonment for a period exceeding one year, with the exception of press offences.

The penalties under 1° and 3° above do not apply to those public bodies which may incur criminal liability. Nor do they apply to political parties or associations, or to unions. The penalty under 1° does not apply to institutions representing workers".

4.7 Liability of legal persons

According to Article 121-2 CC "Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in Articles 121-4 and 121-7.

However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions.

The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of Article 121-3".

5 Substantive environmental criminal law

5.1 Air pollution

In the French legal system the emission of pollutant substances into the air is set out under Article L 226-9 Env. Code, which rules that when an industrial, commercial, agricultural or services firm emits pollutant substances constituting atmospheric pollution, as defined by Article L 220-2, in violation of a formal notice

pronounced in application of Articles L 171-7 or L171-8, the operator is punished by two years' imprisonment and a fine of €75,000.

Atmospheric pollution is defined by Article L 220-2 (as modified by the Law No. 788 of 12 July 2010) as the direct or indirect introduction into, or the presence in the atmosphere and closed spaces, of chemical, biological or physical substances having detrimental consequences likely to put human health in danger, to damage biological resources and ecosystems, to influence climate change, to damage material goods, or to result in olfactory nuisance".

Article L 226-9 Env. Code is a misdemeanour aimed to protect the air and the atmosphere as specific components of the environment (Title II, Book II Env. Code). The author of the crime is the operator (*exploitant*) of an industrial, commercial, agricultural or services firm. The criminal conduct refers only to the emission (this notion includes introduction of pollutant materials, listed in Article 3 of Directive 2008/99/EC).

The emission of pollutant substances into air is not punished *per se* by Article L 226-9: it is punished only when is realised in violation of a formal notice pronounced by an administrative authority in application of Articles L 171-7 or L 171-8 Env. Code.

It is worth underlining that Article L 226-9 Env. Code has been modified by the Ordinance No. 34 of 11 January 2012; the latter has increased the penalty originally provided (which was six months' imprisonment and a fine of €7,500), in order to ensure compliance with the standard of "effective, proportionate and dissuasive criminal penalties" established by Directive 2008/99/EC.[27]

The general provisions on exclusion of liability and mitigating circumstances (Articles 122-1 to 122-8 CC) might apply. In the practice, administrative permission (Article 122-4 CC) and mistake of law (Article 122-3 CC), which are both causes of exclusion of liability, are most often raised with regard to this offence.

5.2 Water pollution

As it concerns water protection, Article L 216-6 Env. Code (as modified by the Ordinance No. 34 of 11 January 2012) states that the act of directly or indirectly disposing of, discharging in or letting flow into surface, groundwater and seawater within the limits of territorial boundaries, one or more substances of any kind whose actions or reactions cause, even if only temporarily, harmful effects on health or damage to fauna and flora, with the exception of damage referred to in Articles L 218-73 and L 432-2 Env. Code, or significant modifications to the normal regimen of water supply or limitations in the use of bathing waters, is punishable by two years' imprisonment and a fine of €75,000. When the discharge is authorised by decree, the provisions are applicable only if the prescriptions of the aforementioned decree are not respected.

The court may also oblige the convicted person to restore the aquatic environment in accordance with the procedure set out in Article L 173-9 Env. Code.

These same penalties and measures are applicable in the event of discharge or abandonment of waste in large quantities in surface or groundwater or in seawater within the boundaries of territorial limits, on beaches or in coastal areas.[28] These provisions are not applied to discharges from ships at sea.[29]

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[27] Véronique Jaworski , "Le volet pénal de l'ordonnance n° 2012-34 du 11 janvier 2012", *Revue juridique de l'environnement* (2013): 221-236.

[28] The act of letting flow 49 used tires into an irrigation canal falls under the offence set out in Article L 216-6, para. 3 (Court of Appeal Toulouse, 25 August 1999, No. 751, Stoll).

[29] On this provision see Roselyne Nérac-Croisier, *Sauvegarde de l'environnement et droit pénal* (Paris: L'Harmattan, 2005), 172.

The crime provided for in Article L 216-6 Env. Code is a misdemeanour. The author of the crime can be anyone. Concerning the protected legal interest, Article L 216-6 Env. Code protects water and aquatic environments (Title I, Book II Env. Code) as well as human health. As it concerns the criminal conduct, Article L 216-6 Env. Code distinguishes two different offences punished by the same sanction: the first one is the offence of water pollution; the second one is the offence of discharge or abandonment of waste in large quantities in waters. The interpretation of the notion "in large quantities" is problematic.[30] Concerning the *mens rea*, Article L 216-6 Env. Code punishes intentional and unintentional conduct.[31] The annual number of convictions for this offence was 50 in 2006 and 2008; it decreased to just 42 in 2010.[32]

It is important to stress that Article L 216-6 Env. Code directly punishes the damage to the environment.

This model of criminalising environmental damage is also used by Article L 432-2 Env. Code that punishes by two years' imprisonment and a fine of €18,000 the "act of discharging, tipping or letting flow into the waters mentioned in Article L 431-3, directly or indirectly, substances whose action or reaction has killed fish or damaged their nutrition, reproduction of food value". The annual number of convictions for this crime ranged between 150 and 110 in the years 1998-2000; it fell to 30 in 2010.[33]

Article L 432-2 Env. Code was originally intended to protect fish from poaching. However, it has been later used by the Court of Cassation as an instrument against the pollution of surface waters; indeed, industry owners can be prosecuted for water pollution on the grounds of this provision.[34]

The general provisions on exclusion of liability and mitigating circumstances (Articles 122-1 to 122-8 CC) might apply. In the practice, administrative permission (Article 122-4 CC) and mistake of law (Article 122-3 CC), which are both causes of exclusion of liability, are most often raised with regard to this offence.

5.3 Waste

Criminal provisions concerning waste are provided for in Article L 541-46 Env. Code; Ordinance No. 34 of the 11 January 2012 has modified this Article in order to ensure compliance with Directive 2008/99/EC. This Article establishes that:

"I. - It is punished by two years' imprisonment and a fine of €75,000, any act of:

1° Refusing to provide the administration with the information described in Article L 541-9 or providing false information;

2° Ignoring the stipulations of I, VII and VIII of Article L 541-10 or Article L 541-10-7;

3° Refusing to provide the administration with the information described in Article L 541-7 or providing false information, or deliberately putting oneself in a position where it is materially impossible to provide this information;

4° Abandoning, depositing or having deposited, under conditions contrary to the provisions of this Chapter, waste;

5° Carrying out the collection, transport of or brokerage or trading of waste without fulfilling the prescriptions for the application of Article L 541-8 and its enactments;

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[30] For more details, see Nérac-Croisier, *Sauvegarde de l'environnement*, 172.

[31] Cass. Crim., 16 January 2007, No. 3-86.502.

[32] Intervention de Dominique Guihal, in *Conseil d'Etat. Droits et débats. Enjeux juridiques de l'environnement* (Paris: La Documentation Française, 2014), 194.

[33] Guihal, in *Conseil d'Etat. Droits et débats*, 194.

[34] David Deharbe, *Les installations classées pour la protection de l'environnement. Classement, régimes juridiques et contentieux des ICPE* (Paris: LexisNexis Litec, 2007), para. 740.

6° Transmitting or having transmitted waste to anyone other than the operator of an approved facility, in ignorance of Article L 541-22;

7° Disposing of waste in the sense of Article L 541-1-1 without holding the approval provided for in Article L 541-22;

8° Disposing of waste, in the sense of Article L 541-1-1, without fulfilling the prescriptions concerning the characteristics, quantities, technical and financial conditions for handling the waste and the treatment processes used, set in application of Articles L 541-2, L 541-2-1, L 541-7-2; L 541-21-1 and L 541-22;

9° Ignoring the prescriptions of Articles L 541-30-1 and L 541-31;

10° (Abrogated)

11° a) Carrying out or having carried out a transfer of waste without notification to French or foreigner competent authorities or without preliminary consent of these authorities when notification and consent are necessary;

b) Carrying out or having carried out a transfer of waste when the authorisation of the competent authorities involved is achieved by fraud;

c) Carrying out or having carried out a transfer of waste when this transfer is not followed by the movement document provided by Article 4 of the Regulation (CE) No. 1013/2006 of the European Parliament and Council of 14 June 2006 on shipments of waste;

d) Carrying out or having carried out a transfer of waste when the producer, the addressee or the final installation of waste are not those mentioned in the notification or movement document provided by Article 4 of the above-mentioned Regulation;

e) Carrying out or having carried out a transfer of waste of different nature than indicated in notification or movement documents provided by Article 4 of the above-mentioned Regulation, or regarding a significantly higher quantity of waste;

f) Carrying out or having carried out a transfer of waste that has been validated or eliminated without fulfilling the European or international legislation;

g) Exporting waste without fulfilling the dispositions of Articles 34, 36, 39 and 40 of the above mentioned Regulation;

h) Importation waste without fulfilling the dispositions of Articles 41 and 43 of the above mentioned Regulation;

i) Carrying out a mixing of waste during the transfer without fulfilling Article 19 of the above mentioned Regulation;

j) Violation of a formal notice based on Article L 541-42 ;

12° Ignoring the obligations regarding information provided for by Article L 343-3 of the *Code des Ports Maritimes*;

13° Violation of provisions introduced in application of Article 7 of the Regulation (CE) No. 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC;

14° Violation of dispositions provided for by Article 1 of the Regulation (CE) No. 1102/2008 of the European Parliament and of the Council of 22 October 2008 on the banning of exports of metallic mercury and certain mercury compounds and mixtures and the safe storage of metallic mercury.

II. - In case of conviction for the offences referred to 4°, 6° and 8° of I, the court may order under penalty, the rehabilitation of places damaged by the waste which have not been treated under conditions provided by the law.

III. - In case of conviction for the offences referred to 7° and 8° of I, the court may also order the temporary or permanent closure of the facility and prohibit its operator to exercise the activity of disposer or retriever.

IV. - In case of conviction for the offences referred to 6°, 7°, 8° and 11° of I and committed with the aid of a vehicle, the court may also order the suspension of the driving licence for a period not exceeding five years.

V. - In case of conviction for the offences referred to 11° of I, the court may also order the prohibition, according to the procedure set out in Article 131-27 CC, to participate to a cross-border shipment of waste as the notifier or person responsible for a transfer, according to the Regulation (CE) No. 1013/2006 of the European Parliament and Council of 14 June 2006 on shipments of waste.

VI (Abrogated)

VII. – The penalty mentioned at I is seven years' imprisonment and a fine of €150,000 when the offence is committed in organised gang, according to Article 132-71 of the Criminal Code".

The general provisions on exclusion of liability and mitigating circumstances (Articles 122-1 to 122-8 CC) might apply. In the practice, administrative permission (Article 122-4 CC) and mistake of law (Article 122-3 CC), which are both causes of exclusion of liability, are most often raised with regard to this offence.

It is worth to recall that the Criminal Code provides for a petty offence under Article R 632-1 (as modified by the Decree No. 671 of 8 June 2010), which punishes by the fine provided for the petty offences of the second class[35] "the act of depositing, abandoning, discharging or letting flow into a public or private space, with the exception of the locations specifically indicated by the competent administrative authority, refuses, waste, excrements, materials, unhealthy liquids or other object of any nature, including the fact of urinating in a public place, when these acts are not carried out by the person having the propriety of the place or with his authorisation". It is worth to underline that this offence does not directly concern the environment, as it is included in Book VI, Chapter II, Title III of the Criminal Code, providing for petty offences against property. The author of this offence can be anyone. According to general principles (Article 121-3, para. 5 CC),[36] this petty offence does not require intention or negligence.

5.4 Nuclear Materials

As it concerns nuclear materials, Article L 596-27 Env. Code has been introduced by the Ordinance No. 6 of 5 January 2012, in order to ensure compliance with Directive 2008/99/EC. This Article rules that:

"I. - It is punishable by three years' imprisonment and a fine of €15,000 any act of:

1° Creation or exploitation of a basic nuclear installation without the authorisation provided for in Articles L 593-7, L 593-14, L 593-25 and L 593-30;

2° Exploitation of a basic nuclear installation mentioned in Article L 593-35 without having made the declaration provided for by this article within the established deadline;

3° Continuing in the exploitation of a basic nuclear installation in violation of an administrative measure or a judicial decision to stop or suspend it.

II. - It is punishable by two years' imprisonment and a fine of €75,000 any act of:
1° Exploitation of a basic nuclear installation without compliance with a formal notice, issued by an administrative authority, to respect of a prescription;

2° Non compliance with the decision establishing the conditions of restoration of the site, adopted pursuant to Article L 593-26 and L 593-27 or Article L 596-22.

III. - It is punishable by one years' imprisonment and a fine of €30,000 the transport of radioactive substances without the authorisation or approval mentioned in Article L 595-2, or in violation of their prescriptions.

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[35] See *supra*, 4.

[36] See Jean Pradel, *Manuel de Droit Pénal Général* (Paris: Editions Cujas, 2004), 471 ff.

IV. - It is punishable by one years' imprisonment and a fine of €15,000, when committed by the operator of a basic nuclear installation, the act of:

1° Refusing, after having been requested, to communicate to the administrative authority information related to the nuclear security, according to Article L 596-5;

2° Interference with controls carried out in application of Articles L 596-1 to L 596-13; L 596-24 and L 596-25.

V. — It is punishable by one years' imprisonment and a fine of €15,000, the operator of a basic nuclear installation or the person responsible for a transport of radioactive substances, who omits to make the declarations of an incident or accident provided by Article L 591-5.

VI. — It is punishable by a fine of €7,500, the operator of a basic nuclear installation who does not compile the annual document requested by Article L 121-15, within the six months after the end of the year under consideration, who creates obstacles in making it available to the public or gives false information".

The offences listed in Article 541-46 are misdemeanours. General rules on *mens rea* apply.

The general provisions on exclusion of liability and mitigating circumstances (Articles 122-1 to 122-8 CC) might apply. In the practice, administrative permission (Article 122-4 CC) and mistake of law (Article 122-3 CC), which are both causes of exclusion of liability, are most often raised with regard to these offences.

5.5 Protected Species

As it concerns protected species and their habitats, according to Article L 415-3 Env. Code (as modified by the Ordinance No. 34 of 11 January 2012) "it is punishable by one year' imprisonment and a fine of €15,000:

1° Any act in violation of the prohibitions provided for by the provisions of Article L 411-1 and the regulations provided in Article L 411-2:

a) interference with the conservation of a non-domestic animal species, other than intentional disturbances;

b) interference with the conservation of non-cultivated plant species;

c) interference with the conservation of natural habitats;

d) destruction, alteration or degradation of sites of geological interest, in particular natural or artificial underground cavities, including the removal, destruction or degradation of fossils, minerals and concretions from these sites.

The attempt of infractions referred from a) to d) is punished by the same penalties.

2° The wilful introduction into the natural environment, transport, peddling, use, putting up for sale, sale or purchase of an animal or plant species in violation of the provisions of Article L 411-3 or the regulations and individual decisions for its application;

3° Any act of producing, holding, transferring, using, transporting, introducing, importing, exporting or re-exporting all or part of the animals or plants in violation of the provisions of Article L 412-1 or the regulations and individual decisions for its application;

4° The running of a business, premises or any other establishment breeding, selling, hiring or transporting non-domestic animal species, or of any other establishment destined to present live specimens of fauna to the public, without holding the certificate of competence as provided in Article L 413-2;

5° The opening or operation of such an establishment in violation of the provisions of Article L 413-3 or the regulations and individual decisions for its application".

When the infractions described in 1° and 2° are committed within a national park or a natural reserve, the fine is doubled.

It is worth to underline that in order to ensure compliance with Directive 2008/99/EC, the Ordinance No. 34 of 2012 has increased the range of sanctions from six months' imprisonment and a fine of €9,000 to one year's imprisonment and a fine of €15,000.

When the offences referred to in 1°, 2° and 3° of this Article are committed by an organised group, as defined by Article 132-71 CC, the penalty is seven years' imprisonment and a fine of €150,000 (Article L 415-6 Env. Code, introduced by the Law No. 619 of 16 July 2013).

Each conduct which could cause interference with the conservation of protected animal or plant species is therefore taken into account by the French legislation.[37]

It is worth mentioning that in the French legal system, the "protected species" are "non-domestic animal species" or "non-cultivated plant species" (according to the definitions set out under Article R 411-5 Env. Code), which are of specific scientific interest or when the necessity to protect the natural heritage justifies their conservation (Article L 411-1 Env. Code).

According to Article L 411-2 (as modified by the Ordinance No. 714 of 5 August 2013), a decree of the *Conseil d'Etat* may establish (among others) an exemption to the prohibitions referred to in 1°, 2° and 3° of Article L 411-1, on the condition that there is no other satisfactory solution and that the exemption does not adversely affect the maintenance, in a favourable state of conservation, of the populations of species concerned in their natural area of distribution in the following cases:

a) In the interest of protecting the wild fauna and flora and the conservation of natural habitats;

b) To prevent large scale damage, notably to the crops, livestock, forests, fisheries, waters and other forms of property;

c) In the interest of public health and safety or for other imperative reasons of major public interest, including those of a social or economic nature, and for reasons including primordial beneficial consequences for the environment;

d) For the purposes of research and education, of restocking and reintroduction of these species and for the reproduction operations required for these purposes, including the artificial propagation of plants;

e) To allow, under strictly controlled conditions, in a selective manner and within a limited extent, the taking or holding of a limited and specified number of certain specimens.

The general provisions on exclusion of liability and mitigating circumstances (Articles 122-1 to 122-8 CC) might apply. In the practice, administrative permission (Article 122-4 CC) and mistake of law (Article 122-3 CC), which are both causes of exclusion of liability, are most often raised with regard to this offence. In few case, legitimate defence (Article 122-5 CC) and state of necessity (Article 122-7 CC) could apply.[38] In this regard, Article L 427-9 Env. Code establishes that, in case of wild animals causing damage to a property, every owner or farmer can evict or destroy the wild animals (except the "*sanglier*" and the "*grands gibiers*"), using firearms.

5.6 Ozone-depleting substances

[37] See Véronique Jaworski, "La protection pénale de la biodiversité, in *Biodiversité et évolution du droit de la protection de la nature: réflexion prospective*, *Revue Juridique de l'Environnement - special issue* (2008): 39.

[38] Guihal, *Droit repressif de l'environnement*, 225 ff.; Benaboud Anouar, "La responsabilité pénal", in *Droit de l'environnement*, ed. Jean-Pierre Desideri (Paris: Sup'Foucher, 2010), fiche 76, para. 4.

With regard to ozone-depleting substances (ODS), Article L 521-21 Env. Code (as modified by the Ordinance No. 34 of 11 January 2012) punishes by two years' imprisonment and a fine of €75,000 the following acts:

1° Knowingly providing incorrect information likely to bring about, for the substance under consideration or the preparations containing it, or for the manufactured products or the equipment containing it, prescriptions that are less restrictive than those to which they should have been subject; or concealing known information;

2° Not respecting the measures of prohibition or the instructions decreed in accordance with Article L 521-6;

3° Not fulfilling within the specified time limit the obligations prescribed by the summons stipulated in Article L 521-17.

4° Produce or import without recording a substance, alone or in a mixture or aimed to be released in a product according to the Regulation No. 1907/2006, under normal or reasonably foreseeable conditions of use, subjected to registration in violation of title II of Regulation (EC) No. 1907/2006;

5° For the producer or importer, obtaining or attempting to obtain the granting of a substance registration number by misrepresentation or any other fraudulent means;

6° Manufacture, import, keep for sale or free distribution, offer for sale, sell, distribute for free or use, without the authorization decision, a substance as such or in a mixture or product, in violation of title VII of Regulation (EC) No. 1907/2006;

7° Manufacture, import, keep for sale or free distribution, offer for sale, sell, distribute for free or use substances, mixtures or products in breach of the restrictions imposed by Title VIII of Regulation (EC) No. 1907/2006;

8° For a downstream user, having failed to communicate to the European Chemicals Agency the information specified in Article 38 of Regulation (EC) No. 1907/2006 in accordance with this Article;

9° Not respecting prohibitions or prescriptions issued in application of Regulation (EC) No. 1005/2009, (EC) No. 689/2008, (EC) No. 850/2004 and (EC) No. 842/2006;

10° Import, keep for sale or free distribution, offer for sale, sell or distribute for free a substance or a mixture without previous classification in accordance to the requirements of Article 4, paras. 1 and 3 of Regulation (EC) No. 1272/2008;

11° Import, keep for sale or free distribution, offer for sale, sell or distribute for free a substance or mixture classified as hazardous without prior labelling and packaging in accordance to the requirements of Article 4, para. 4, and Article 29, para. 3 of Regulation (EC) No. 1272/2008".

In addition, it is punishable by three months' imprisonment and a fine of €20,000 any act of:

1° Not give to the recipient of a substance or a mixture a safety data sheet and its annexes, prepared and updated in accordance with the requirements laid down in Article 31 of Regulation (EC) No. 1907/2006;

2° For the producer or the importer, having failed to communicate to the European Chemicals Agency the information specified in Article 40 of Regulation (EC) No. 1272/2008 as provided in this Article".

The general provisions on exclusion of liability and mitigating circumstances (Articles 122-1 to 122-8 CC) might apply. In the practice, administrative permission (Article 122-4 CC) and mistake of law (Article 122-3 CC), which are both causes of exclusion of liability, are most often raised with regard to this offence.

5.7 Ship-source pollution

As it concerns pollution of the sea by ships, Article L 218-11 Env. Code rules that it is punishable by a fine of €50,000 the master of a ship who is guilty of ejecting pollutant substance in violation of the provisions of

Regulations 15 and 34 of Annex I of the Marpol Convention on the controls of discharge of oil, or in violation of the provisions of Regulation 13 of Annex II of the Marpol Convention on the control of discharges of residues of noxious liquid substances carried in bulk. In case of recidivism the penalties are increased to one year of imprisonment and a fine of €100.000.

The provisions banning the discharge of oil into the sea are aimed to protect the marine environment; they are imposed on the master of ships, who should exercise a direct influence on their subordinates to stop the banned discharge; moreover, the master of the ship has to prove the diligence used for this purpose.[39]

The offence of oil discharge into the sea by ships has a positive impact in practice (as confirmed by practitioners, like police[40], barrister[41] and prosecutor[42]): cooperation between the involved public authorities and public prosecutors works very well; the sentences are between €300,000 and €800,000 and convictions are never annulled.[43]

According to Article 218-14 Env. Code, it is punishable by seven years' imprisonment and a fine of €1,000,000 the act, committed by the master of a ship, of letting flow into the sea harmful substances carried in packaged form in violation of provisions of Regulation 7 of the Annex III of the Marpol Convention.

According to Article 218-15 Env. Code, it is punishable by one year's imprisonment and a fine of €200,000 the act, committed by the master of a ship, of committing the infringements of the provisions of the Regulation 8 of Annex IV, of Regulations 3, 4 and 5 of Annex V and of Regulations 12, 13, 14, 16 and 18 of Annex VI of the Marpol Convention.

These penalties apply either to the ship owner, or the operator or the legal representative or *de facto* director in the case of a legal entity, or to any person other than the master exercising, either in law or in fact, power of control or direction in the management or use of the ship, when the owner, the operator or the person has brought about a discharge carried out in violation of Articles from L 218-11 to L 218-17 and L 218-19 or has not taken the necessary steps in order to avoid it (Article 218-18 Env. Code).

According to Article L 218-19, it is punishable by a fine of €4,000 the fact of a master causing, by imprudence, negligence or failure to observe the laws and regulations, a discharge of a pollutant substance.

It is punishable by the same penalty the fact of a master causing, by imprudence, negligence or failure to observe the laws and regulations, an accident at sea, as defined by the Convention of 29 November 1969 on intervention on the high seas in case of accident, causing or being able to cause hydrocarbon pollution, or the fact of failing to take the necessary steps to avoid it, when the accident has caused a water pollution.

Increased penalties apply when the accident at sea directly or indirectly originates from the clearly deliberate violation of a particular safety or prudence obligation imposed by the law or the regulations, or from a gross negligence which exposed the environment to a particular serious risk that the author could not ignore.

According to article L 218-30 Env. Code, the ship which was used to commit one of the offences defined in Articles L 218-11 to L 218-19 may be immobilised following a decision by the Public Prosecutor or the investigating judge. This immobilisation is carried out at the expense of the ship owner. At any time, the competent authority may order that the immobilisation be lifted if a guarantee is paid, the amount of which is fixed and the terms and conditions defined by the same authority.

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[39] Cass. Crim., 18 March 2008, *Revue juridique de l'environnement*, 2009, 519.

[40] Interview with representatives of OCLAESP of 22 August 2014.

[41] Interview with French barrister of 25 August 2014.

[42] Interview with French prosecutor of 25 August 2014.

[43] Guihal, in *Conseil d'Etat. Droits et débats*, 194.

The general provisions on exclusion of liability and mitigating circumstances (Articles 122-1 to 122-8 CC) might apply. In the practice, administrative permission (Article 122-4 CC) and mistake of law (Article 122-3 CC), which are both causes of exclusion of liability, are most often raised with regard to this offence.

5.8 General criminal provisions

Beyond the specific criminal penalties provided for the breaches of the provisions of the Environmental Code, some general criminal provisions might be applied as a tool to prosecute cases of damage to the environment.

This is the case for the misdemeanour of *endangering other persons* ("*mise en danger d'autrui*"),[44] provided for in Article 223-1 CC, committed through the direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any law or regulation. This offence is punished by one year's imprisonment and a fine of €15,000.

According to some commentators, Article 223-1 CC can be interpreted as providing criminal sanction for non-compliance with the precautionary principle.[45]

The Criminal Chamber of the Court of Cassation gave an interpretation of Article 223-1 CC compatible with its application to environmental cases.[46] In particular, the decision concerned a case of massive pollution of water and soil by discharges of lead, arsenic and cadmium by a factory recycling batteries and metal residues, located 500 meters from the centre of a village. The Court of Cassation has considered that the trial judge in pronouncing an acquittal despite having noted that the plant was very close to the village centre and in front of a playground, which had to be closed because of the contamination of the soil, on the one hand, and that lead, arsenic and cadmium favoured renal cancer, on the other hand, had disregarded the meaning and scope of Article 223-1 CC. Indeed, according to the Court of Cassation, 'immediate risk' does not mean instantaneous risk,[47] therefore being compatible with the progressive poisoning by exposure to a pollutant.

Article 223-1 CC has been also applied for workers exposed to asbestos.[48]

5.9 Other environmental criminal law provisions

[44] See Paul Chaumont, "Rapport de la Cour de Cassation de France sur le droit pénal de l'environnement", http://www.ahjucaf.org/Rapport-de-la-Cour-de-cassation-de.html, 2; Guihal, *Droit répressif de l'environnement*, 189; Van Lang, *Droit de l'environnement*, 492.

[45] Prieur, *Droit de l'environnement*, 1037.

[46] Cass. crim., 30.10.2007, pourvoi No. 06-89365, in Bulletin No. 261.

[47] Dominique Guihal, "Le droit penal de l'environnement peut-il être efficace?", in *Mélanges en l'honneur du professor Jacques-Henri Robert* (Paris: Lexis Nexis, 2012), 331.

[48] Douai, 6 March 2008, commented by Laurent Neyret, *Environnement et Développement Durable* (2008): 28.

Book V of the Environmental Code on "Prevention of pollution, risks and nuisances" contains several provisions related to other criminal offences against the environment established throughout the Code. Among these, special attention is given to classified facilities (Article 173-1, together with Articles L 512-1, L 512-7 Env. Code, and Article L 514-11 Env. Code), genetically modified organisms (from Article L 536-3 to 536-5 Env. Code) and noise abatement (Article 173-1, together with Articles L 571-2 and L 571-6 Env. Code).

Classified facilities and protection of the environment

According to Article L 511-1 Env. Code the provisions on classified facilities apply to factories, workshops, depots, work sites and, in general, to all facilities operated or owned by any public or private person or entity, which might present hazards or drawbacks for the convenience of the neighbourhood, or for public health and safety, agriculture, protection of nature and the environment, rational use of energy, conservation of sites and monuments or elements of the archaeological heritage.

Under Article L 511-2 Env. Code, the facilities concerned by Article L 511-1 are those contained in the list of classified facilities set out by a decree of the *Conseil d'Etat*, issued on the basis of a report from the Minister responsible for classified facilities, following the opinion of the Higher Council for classified facilities. The above mentioned decree defines the facilities as being subject to authorisation or to declaration, according to the gravity of the hazards or drawbacks their operation might present.

Article L 173-1 Env. Code provides for a penalty of one year's imprisonment and a fine of €75,000 for committing, without authorisation, registration, licensing, approval or certification referred to in Articles (…) L 512-1, L 512-7 required for any act, activity, operation, installation or structure, the act of:

1° commit such acts or carry out that activity;

2° carry out or perform this operation;

3° exploit this facility or work;

4° establish or participate in the establishment of such a facility or such a work.

Article L 512-1 Env. Code requires an administrative authorisation for the facilities which may present serious hazards or drawbacks to the interests referred to in Article L 511-1. This authorisation may be granted only if these hazards or drawbacks can be prevented by measures indicated by the Prefect.

Article L 512-7 Env. Code provides for a simplified authorisation, namely a registration, for the facilities which may present serious hazards or drawbacks to the interests referred to in Article L. 511-1, when the hazards or drawbacks, given the characteristics of the facilities and their potential impact can, in principle, be prevented by complying with the general requirements laid down by the Minister responsible for classified facilities.

The offences provided for in Article L 173-1 Env. Code are misdemeanours; the criminal conduct consists in exploiting the facility without the requested authorisation and the *mens rea* is intent.

Article 173-3 Env. Code provides for more severe penalties when the infringements have seriously endangered the health or safety of persons or caused substantial degradation of fauna and flora, or of the quality of air, soil and water.

According to Article L 514-11 Env. Code the failure to comply with the formal notice issued under Article L 512-19[49] is punishable by two years' imprisonment and a fine of €150,000. The failure to comply with the first paragraph of Article L 516-2[50] is punished by six months' imprisonment and a fine of €75,000.

[49] Article 512-19 Env. Code establishes that "When a facility has not been operated for three consecutive years, the Prefect may serve formal notice to the operator requiring to definitively stop the facility".

The offences are misdemeanours; the criminal conduct consists in failure to comply with the formal notice issued by the Prefect and the *mens rea* is intent.

Genetically modified organisms

According to Article L 536-3 Env. Code, the act of exploiting a facility which uses genetically modified organisms for research, development, teaching or industrial production without the authorisation required under Article L 532-3, or infringing the technical requirements requested for the approval, is punishable by one year's imprisonment and of a fine of €75,000.

The act of exploiting a facilities which uses genetically modified organisms for research, development, teaching or industrial production in violation of the requirements imposed under 2° of Article L 532-5 or in violation of a suspension or withdrawal of approval under 3° or 4° of Article L 532-5 is punishable by two years' imprisonment and of a fine of €150,000.

According to Article L 536-4 Env. Code is punishable by one year's imprisonment and a fine of €75,000 the act of, without the required authorisation:

1° practicing a deliberate dissemination of genetically modified organisms, or a combination of genetically modified organisms, for any purposes other than placing on the market;

2 ° placing on the market a product consisting of or containing genetically modified organisms.

According to Article L 536-5 Env. Code, the failure to comply with a suspension, withdrawal, prohibition or impounding measure in application of Articles L 533-3-1, L 533-8, L 535-5 or L 535-6 is punishable by two years' imprisonment and a fine of €150,000.

The fact of pursuing a deliberate dissemination or placing on the market without complying with a decision of formal notice made under paragraph I of Article L 535-5 is punishable by six months' imprisonment and a fine of €75,000.

All the above listed offences are misdemeanours.

Noise abatement

Article L 173-1 Env. Code provides for a penalty of one year's imprisonment and a fine of €75,000 for committing, without authorisation, registration, licensing, approval or certification referred to in Articles (…) L 571-2[51], L 571-6[52] required for any act, activity, operation, installation or structure, the act of:

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[50] Article L 516-2 is related to the technical and financial capacities of a facility and empower the Prefect to impose giving or reviewing the financial guarantees.

[51] Article L 571-2 establishes that "(…), decrees approved by the *Conseil d'Etat*, issued after an opinion has been given by the National Council for Noise, define, for objects able to cause great noise disturbance and for all systems intended to reduce noise emissions:
1° The stipulations relating to acceptable noise levels, conditions of use, methods of noise measurement, marking of objects and systems and the terms by which the public is informed;
2° The rules applicable to manufacture, importation and placing on the market;
3° The procedures for approval and certification of their compliance with the stipulations relating to acceptable noise levels;
4° The conditions of issue and withdrawal by the administrative authority of the approval by the organisations charged with issuing approvals and certifications;

1° commit such acts or carry out that activity;

2° carry out or perform this operation;

3° exploit this facility or work;

4° establish or participate in the establishment of such a facility or such a work.

The penalty for the offences related to noise emission of objects (Article L 571-2) and to noisy activities (Article L 571-6) is two years' imprisonment and a fine of €100,000 for the infringement of a decision of opposition or of a measure of withdrawal of approval or certification referred to in Article L 571-2 or L 571-6 or of a measure of formal notice issued by the administrative authority according to Article L 171-7 or Article L 171-8.

The offences are misdemeanours. The criminal conduct related to noise emission of objects able to cause great noise disturbance, consists in the manufacture, import or sale of these objects or materials without approval or certification required. The offence is relatively broad in scope and it might involve as authors three categories of professionals: manufacturers, importers and sellers.

The *mens rea* is intent.

Article 173-3 Env. Code provides for more severe penalties when the infringements have seriously endangered the health or safety of persons or caused substantial degradation of fauna and flora, or of the quality of air, soil and water.

Finally, according to Article 222-12 CC the conduct of disturbance by noise which aims to disturb the peace of others is punished by a penalty of one year's imprisonment and a fine of €15,000.

6 Substantive criminal law on public servants liability in relation to environmental crimes/offences

In France, there are no specific provisions on the liability of public servants for environmental crimes. However, general provisions on criminal liability of public servants may apply. In addition, liability of public servants might be affirmed according to the general principles (e.g. parties to the offences, etc.).

5° The conditions under which the administrative authority may check or get checked by organisations, at the expense of the holder, the compliance of the objects and systems with the stipulations mentioned in 1° of the present Article".

[52] Article L 571-6 establishes that "(…) noisy activities exercised by public or private companies, establishments, centres of activity or facilities, be they temporary or permanent, which do not feature in the list of classified facilities for the protection of the environment, may be subject to general stipulations or, when they are able, by the noise they cause, to present hazards or cause the disturbance mentioned in Article L 571-1, to authorisation.
(…) The list of the activities subject to authorisation is defined in a list of noisy activities established by a Conseil d'Etat decree issued after hearing the opinion of the National Council for Noise.
The general stipulations referred to in the first paragraph and the stipulations imposed on activities subject to authorisation specify the prevention, development or sound insulation measures applicable to the said activities, the conditions governing their distance from dwellings and the conditions in which technical inspections are conducted (…)".

Article 441-5 CC states that a person holding public authority or discharging a public service mission whilst acting in the exercise of his office, who fraudulently procures for another person a document delivered by a public body for the purpose of establishing a right, an identity or capacity, or the grant of an authorisation is punished by seven years' imprisonment and a fine of €100,000.

Article 432-10 CC establishes that "Any acceptance, request or order to pay as public duties, contributions, taxes or impositions of any sum known not to be due, or known to exceed what is due, committed by a person holding public authority or discharging a public service mission is punished by five years' imprisonment and a fine of €500,000 which can increased to the double of the proceeds stemming of the offence.

The same penalties apply to the granting by such persons, in any form and for any reason, of any exoneration or exemption from dues, contributions taxes or impositions in breach of statutory or regulatory rules.

Attempt to commit the misdemeanours referred to under the present Article is subject to the same penalties".

Article 432-11 CC on passive corruption and trafficking influence by person holding public office establishes that "The direct or indirect request or acceptance without right and at any time of offers, promises, donations, gifts or advantages, when done by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate, is punished by ten years' imprisonment and a fine of €1,000,000, which can increased to the double of the proceeds stemming of the offence, committed either for himself or another person:

1° to carry out or having carried out, to abstain or having abstained from carrying out an act relating to his office, duty, or mandate, or facilitated by his office, duty or mandate;

2° to abuse or having abused his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision".

Article 432-14 CC on offences against free and equal access in respect of public tenders and public service delegations establishes that "It is punished by two years' imprisonment and a fine of €200,000, which can increased to the double of the proceeds stemming of the offence, the fact committed by any person holding public authority or discharging a public service mission or holding a public electoral mandate or acting as a representative, administrator or agent of the State, territorial bodies, public corporations, mixed economy companies of national interest discharging a public service mission and local mixed economy companies, or any person acting on behalf of any of the above mentioned bodies, of obtaining or attempting to obtain for others an unjustified advantage by an act breaching the statutory or regulatory provisions designed to ensure freedom of access and equality for candidates in respect of tenders for public service and delegated public services".

The issue concerning the criminal liability of politicians, and especially of mayors, became more and more relevant in relation to environmental criminal law; this could be explained by the fact that many offences are directly related to local public services: distribution of drinking water, disposal of household waste management, sanitation services. The mayor is responsible in case of violations resulting from failure to comply with laws protecting the environment: dumps managed by a municipality, using an incinerator polluting the atmosphere or pollution of waterways. Between 1993 and 1995, nine mayors were sentenced on the basis of Article L 232-2 of the Rural Code (now Article L 432-2 Env. Code) because of wastewater treatment or discharge from a municipal landfill causing pollution.[53] The pressure of politicians led the legislator to enact legislative amendments aiming to better tailor the conditions of criminal liability with regard to the above mentioned cases (as well as to other cases).[54]

[53] See Dominique Guihal, "La responsabilité pénale des élus locaux en matière d'environnement", *Revue française de droit administratif*, 1996, 535 ff.

[54] See Law No. 393 of 13 May 1996 and Law No. 647 of 10 July 2000.

7 Substantive criminal law on organised crime

Articles L 415-6 and L 541-46 Env. Code provide for an aggravation of the penalties when the conduct described therein is committed by an organised group (*bande organisée*), as defined in Article 132-71 CC, according to which an organised group is "any group formed or association established with a view to the preparation of one or more criminal offences, preparation marked by one or more material actions".

In particular, according to Article L 415-6 Env. Code, the realisation in an organised manner of the conduct described in Article L 415-3, 1°, 2° and 3°, affecting non-domestic animal species, non-cultivated plant species and their habitats, is subject to seven years' imprisonment and a fine of €150,000 (ordinary cases are punishable by one year's imprisonment and a fine of €15,000). It is worth mentioning that Article L 415-6 Env. Code has been recently introduced by the Law No. 619 of 16 July 2013 "containing various provisions to conform to the law of the European Union in the field of sustainable development", in order to enhance the fight against trafficking of protected animal and plant species committed in an organised manner.

Article L 541-46 Env. Code related to waste also provides for a more severe penalty (seven years' imprisonment and a fine of €150,000) when the conduct committed by an organised group, while the ordinary hypotheses are punishable by two years' imprisonment and a fine of €75,000 euro.

Moreover, the reference to Article 132-71 CC gives the possibility to apply Articles 706-73 and followings of the Code of Criminal Procedure (CCP) concerning the procedures applicable to the inquiry, prosecution, investigation and trial of organised crime felonies.

It has to be stressed that the French legislation does not give a comprehensive and unitary definition of organised crime, but, in the above mentioned Article 706-73 CCP, lists all the offences falling within the system of prosecution of organised crime; among these offences only para. 19°, which was introduced by the Law No. 1029 of 15 November 2013, indirectly concerns environmental crime as it refers to the misdemeanour of unauthorised exploitation of a mine associated with environmental harm committed by an organised group when this conduct is linked to one of the offences listed in paras. 1° to 17° of the same Article.

However, Article 706-74 CCP rules that, where the law so provides, the procedure indicated therein is applicable to "felonies and misdemeanours committed by organised groups, other than those which come under Article 706-73" and "to misdemeanours of participation in a criminal association under the second paragraph of Article 450-1 of the Criminal Code, other than those which come under 15° of Article 706-73 of the present Code".

8 General criminal law influencing the effectiveness of environmental criminal law: sanctions in practice

The statute of limitation of the public prosecution[55] is provided for in Articles 7, 8, 9 of the Code of Criminal Procedure.[56]

With regards to felonies, Article 7 CCP establishes that "(…) prosecution in felony cases is time-barred by the passing of ten years from the day of the commission of the felony if, during this period, no step in investigation or prosecution was taken.

Where such steps were taken, it is time-barred only after the passing of ten years starting from the last step taken.

This applies even in respect of those persons who would not have been affected by this investigation or prosecution step. (…)".

Article 8 CCP, with regards to misdemeanour, states that "For misdemeanours, the prosecution limitation period is three complete years; it operates according to the distinctions set out in the previous article. (…)".

Article 9 CCP establishes that "For petty offences, the public prosecution limitation period is one complete year; it operates according to the distinctions set out in Article 7".

According to the principle of individualisation of criminal punishment, the judge has a wide discretion in determining the sanction. Moreover, the judge is granted with the authority for the execution of the punishment he had pronounced. The court therefore determines the type of sanction (within those indicated in the criminal provision), the quantum of the penalty (within the maximum of penalty indicated in the criminal provision),[57] and to some extent, the execution of the penalty;[58] as for the latter, the judge may decide on the form of the execution, determining if part of the sentence will run under the security regime (with the consequence that measures aiming at replacing detention could not apply; see Articles 132-23 and 221-3, para. 2 CC) or, on the contrary, if suspension of execution thanks to e.g. suspension with probation will be granted.

Articles 132-24 ff. CC on "Personalisation of penalties" provide for some measures of suspension of the execution: semi-detention, external placement and placement under electronic surveillance; division of penalties; ordinary suspension; suspension with probation; suspension with the obligation to perform community service work; exemption and deferment of penalties.

The ordinary suspension applies both to natural persons and legal persons.

With regard to natural persons, Article 132-30, para. 1 CC establishes that "An ordinary suspension may only be granted to a natural person in respect of a felony or misdemeanour where the defendant has not been sentenced to a custodial sentence for an ordinary felony or misdemeanour in the five years prior to that offence". Article 132-33, para. 1 establishes that "Ordinary suspension may not be granted to a natural person for a penalty for a petty offence where the defendant was sentenced to a custodial sentence for an ordinary felony or misdemeanour in the five years prior to the offence".

Article 132-31 CC establishes that "Ordinary suspension is applicable to natural persons for custodial sentences not exceeding five years, for a fine or day-fine, for the penalties entailing forfeiture or restriction of rights enumerated under Article 131-6 other than confiscation, and for the additional penalties enumerated under Article 131-1 other than confiscation, or for the mandatory closure of an establishment and public notice of the sentence.

An ordinary suspension may only be granted for a custodial sentence where the defendant was sentenced to a penalty other than criminal or ordinary imprisonment during the period set out under Article 132-30.

A court may decide that the suspension of the custodial sentence is granted in part only and for a period, subject to a maximum of five years, which it determines".

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[55] See Pradel, *Manuel de Procédure Pénale Général*, 189 ff.

[56] The Criminal Code provides for the limitation of the penalty, when a certain time has elapsed since the conviction (from Article 133-2 to Article 133-6 CC).

[57] It has to be recalled that the French criminal legislation provides only for the maximum level of penalties.

[58] See Pradel, *Manuel de Droit Pénal Général*, 577 ff.

Article 132-34, para. 1 CC states that "Ordinary suspension is applicable to natural persons for the penalties entailing forfeiture or restriction of rights enumerated under Article 131-14 other than confiscation, for the additional penalties enumerated under 1°, 2° and 4° of Article 131-16, as well as for the additional penalty set out by the first paragraph of Article 131-17. It is also applicable to fines imposed for petty offences of the fifth class".

With regard to legal person, Article 132-30, para. 2 CC states that "A suspended sentence may only be granted to a legal person where it has not been sentenced to a fine in excess of €60,000 for an ordinary felony or misdemeanour within the same period". Article 132-33, para. 2 CC states that "An ordinary suspension may only be granted to a legal person where it has not been sentenced to a fine of more than €15,000 for an ordinary felony or misdemeanour within the same period".

Article 132-32 CC establishes that "An ordinary suspension is applicable to legal persons in respect of fines and for the penalties enumerated in 2° [prohibition to exercise a professional activity], 5° [disqualification from public tenders], 6° [prohibition to make a public appeal for funds] and 7° [prohibition to draw cheques and to use payment cards] of Article 131-39". Article 132-34, para. 2 CC establishes that "Ordinary suspension is applicable to legal persons for prohibition to draw cheques or to use payment cards under articles 131-42 and 131-43. It is also applicable to fines imposed for petty offences of the fifth class".

In general, an ordinary suspension has as a consequence that "A sentence imposed for felony or a misdemeanour which has been suspended is deemed non-existent where the convicted person who has benefited from a suspension has not within a period of five years of that sentence committed any ordinary felony or misdemeanour leading to an immediate sentence entailing the revocation of the suspension" (Article 132-35 CC).

The suspension with probation applies only to natural persons.

The Criminal Code does not provide for any limit to the granting of a suspension with probation concerning the 'criminal past' of the person.[59]

Article 132-41 CC establishes that "Suspension with probation is applicable to sentences of imprisonment imposed for a period of five years, for an ordinary felony or misdemeanour. When the person is in a condition of recidivism, it is applicable to sentences of imprisonment imposed for a period of ten years. (…)

The criminal court cannot pronounce the suspension with probation for a person who has been sentenced twice with application of suspension with probation for the same or similar offences, under Articles 132-16 to 132-16-4 and being in a condition of recidivism (…)".

Article 132-42 CC establishes that "A criminal court shall determine the length of the probation order, which must be at least twelve months and may not exceed three years.

It may decide this suspension will only apply to part of a custodial sentence, the length of which it shall determine".

Under Article 132-59 CC "An exemption from penalty may be granted where it appears that the reintegration of the guilty party has been achieved, that the damage caused has been made good and that the public disturbance generated by the offence has ceased.

A court granting an exemption from penalty may rule that its decision shall not be registered in the criminal records.

Exemption from penalty does not extend to payment of the costs of the proceedings".

According to Articles 132-60 ff. CC a court may defer sentence. The court may pronounce an ordinary deferment (Article 132-60 to Article 132-62 CC); a deferment with probation (Article 132-63 to Article 132-65 CC); a deferment with injunction (Article 132-66 to Article 132-70 CC).

As it concerns ordinary deferment, Article 132-60 CC establishes that "A court may defer sentence where it appears that the reintegration of the guilty party is in the process of being achieved, that the damage

[59] See Pradel, *Manuel de Droit Pénal Général*, 625. On the contrary, as already indicated, the 'criminal past' of the person is of great importance for the ordinary suspension.

caused is in the process of being repaired, and where the public disturbance generated by the offence will cease.

In this case, it determines in its decision the date when it will pronounce sentence.

A deferment may only be ordered where the defendant, in the case of a natural person, or his representative, in the case of a legal person, is present at the hearing".

At the reconvened hearing, the court may either exempt the defendant from penalty, or impose the penalty set out by law, or further defer the pronouncement of sentence pursuant to the conditions and according to the terms set out under Article 132-60 (Article 132-61 CC).

As it concerns deferment with probation, Article 132-63 CC states that **"**Where a defendant who is a natural person is present at the hearing, a court may defer sentence pursuant to the conditions and according to the terms as set out under Article 132-60 by placing him under probation for a term which shall not exceed a year.

Such a decision is enforceable provisionally".

Deferments with probation follow the probation regime as set out under Article 132-43 to Article 132-46 (Article 132-64 CC).

At the reconvened hearing the court may, taking into account the offender's behaviour, either exempt him from penalty, or pass sentence as set out by law, or further defer sentence pursuant to the conditions and according to the terms of Article 132-63 (Article 132-65 CC).

As it concerns deferment with injunction, Article 132-66 CC establishes that "In the cases provided for by laws or regulations which sanction the violation of specific obligations, a court deferring sentence may give the convicted physical or legal person an injunction to observe one or more prescriptions provided by the laws or regulations concerned.

The court decrees a time-limit for the enforcement of these prescriptions".

At the adjourned hearing the court may either exempt the guilty party from any penalty or impose the penalties set out under the law or regulation, when the prescriptions enumerated by the injunction have been executed within the period determined. Where the prescriptions have been executed belatedly, the court calculates if need be the amount of the coercive fine and imposes the penalties set out under the law or regulation. Where the prescriptions were not observed, the court calculates if need be the amount of the coercive fine, imposes the penalties and may in addition order the execution of these prescriptions to be prosecuted at the convicted person's expense pursuant to the conditions laid down by the law or regulation (Article 132-69 PC).

Article L 173-9 Env. Code establishes that "The provisions of Articles 132-66 to 132-70 of the Criminal Code on the deferment with an injunction shall apply to natural and legal persons in case of a conviction for an offence under this Code.

The court may order a fine of not more than €3,000 per day of delay".

The above considered, a sentence to one year imprisonment could mean in France suspension, exemption from penalty or deferment.

9 Responsibility of corporations and collective entities for environmental crimes

The French legal system was among the first European continental systems to introduce and regulate, by the Criminal Code of 1994, the topic of criminal responsibility of legal persons. At the beginning, this responsibility was limited to the cases expressly provided for by laws or regulations (*responsabilité spéciale*); after the Law No. 204 of 9 March 2004, known as *Loi Perben II*, it was extended to any offence. In the case of facts committed prior to the *Loi Perben II*, it is necessary to verify whether a legal text specifically provided criminal liability for legal persons. If it is not the case, legal persons cannot be prosecuted; in particular, it is the case of provisions concerning the protection of fauna and flora (Article L 415-3 Env. Code), parks and reserves (Article L 332-25 Env. Code), advertising (Article L 581-34 Env. Code), circulation of vehicles in natural spaces (Decree No. 92-258 of 20 March 1992).[60]

According to Article 121-2 CC, legal persons, with the exception of the State, are criminally liable for the offences committed, on their account, by their organs or representatives.[61] The Court of Cassation has admitted the uselessness of identifying the offender as a presumption of representation applies (therefore exempting from verifying if the offender is an organ or a representative of the legal person);[62] this solution entails an extension of the scope of criminal liability of legal persons.

The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of Article 121-3. A limitation is provided for local public authorities and their associations; they can incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions.

Foreigner legal persons incur criminal liability before the French courts.[63]

Therefore, natural persons as well as legal persons can be held responsible for all the environmental crimes provided for by the French law. It is worth stressing that the French legal system complies with Article 6 of Directive 2008/99/EC and with Directive 2009/123/EC because all the environmental infractions provided for by the French law can be applied to the natural persons as well as to the legal ones.

The Criminal Code itself expressly provides that legal persons can be criminally liable for some infractions relevant to the environment, such as Articles 422-5 CC (terrorism), 322-17 CC (destructions, defacement and damage) and R 635-8 CC (desertion of wrecks and vehicles). Also other provisions included in the Criminal Code but unrelated to the environmental protection can lead to prosecution against legal persons in the case of aggression to the environment, like Article 223-1 (punishing the direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any law or regulation) and Articles 221-6, 222-19 and 222-20 (concerning homicide and involuntary offences against the physical integrity of the person).[64]

Also in the Environmental Code there are some provisions that expressly provide for criminal responsibility of legal persons, referring to conditions and penalties fixed in the Criminal Code. For instance, Article L 218-24 Env. Code rules that legal persons declared criminally liable of infractions provided for by Article L 218-11 to Article L 218-19 Env. Code related to pollutant discharges from ships are punishable, in addition to the fine under conditions set out under Article 131-38 CC, also by posting a public notice of the decision or disseminating the decision in the written press or using any form of communication to the public by electronic means.

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[60] Guihal, *Droit repressif de l'environnement*, 210.

[61] On the notions of organs and representatives, see Nérac-Croisier, *Sauvegarde de l'environnement et droit pénal*, 103.

[62] Cass. Crim. 1 December 2009, *Dalloz* 2010, 1663.

[63] Cass. Crim. 23 November 2004, *Bulletin Criminel* No. 292.

[64] See Emmanuel Daoud – Clarisse Le Corre, "La responsabilité pénale des personnes morales en droit de l'environnement, 2013", available at *www.vigo-avocats.com*

As it concerns sanctions, Article 131-37 CC establishes that penalties for felonies and misdemeanours incurred by legal persons are the *amende* (fine) and, in the cases set out by law, the penalties enumerated under Article 131-39 CC; as it concerns misdemeanours, the *sanction-réparation* (reparation penalty) is also foreseen. Article 131-39 CC states that "Where a law so provides against a legal person, a felony or misdemeanour may be punished by one or more of the following penalties:

1° dissolution, where the legal person was created to commit a felony, or, where the felony or misdemeanour is one which carries a sentence of imprisonment of three years or more, where it was diverted from its objects in order to commit them;

2° prohibition to exercise, directly or indirectly one or more social or professional activity, either permanently or for a period of up to five years;

3° placement under judicial supervision for a period of up to five years;

4° permanent closure or closure for up to five years of the establishment, or one or more of the establishments, of the enterprise that was used to commit the offences in question;

5° disqualification from public tenders, either permanently or for a period of up to five years or more;

6° prohibition, either permanently or for a period of up to five years, to conduct a public offering of securities or to admit securities to trading on a regulated market;

7° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a period of up to five years;

8° confiscation under the conditions and procedures set out by Article 131-21;

9° posting a public notice of the decision or disseminating the decision in the written press or using any form of communication to the public by electronic means;

(...)

12° prohibition for a period of up to five years, to receive any public aid granted by the State, local governments, their institutions or groups as well as any financial assistance provided by a private person charged with a public service mission.

The additional penalty of confiscation has always to be applied for the felonies and misdemeanours punished by imprisonment for a period exceeding one year, with the exception of press offences.

The penalties under 1° and 3° above do not apply to those public bodies which may incur criminal liability. Nor do they apply to political parties or associations, or to unions. The penalty under 1° does not apply to institutions representing workers".

According to Article 131-38 of the Criminal Code, "the maximum amount of a fine applicable to legal persons is five times the amount which is applicable to natural persons by the law sanctioning the offence. Where this is an offence for which no provision is made for a fine to be paid by natural persons, the fine incurred by legal persons is €1,000,000".

The Criminal Code and the Environmental Code contain specific provisions on sanctions for crimes concerning the environment when committed by legal persons, such as Article 322-17 CC (destructions, defacement and damage) or R 635-8 CC (desertion of wrecks and vehicles).

With regard to the rules that can lead to a diminished sanction, Article L 173-12 Env. Code (introduced by the Ordinance No. 34 of 11 January 2012) provides that the administrative authority can, before the exercise of the public action, do a transaction with physical and moral persons on the prosecution of the crimes provided for by the Code. The proposal of transaction by the administration – that must be accepted by the author of the infraction and must be approved by the Public Prosecutor – is made taking into account the circumstances and the seriousness of infraction, the personality of its author and his resources and charges. It fixes the transactional fine that the author will have to pay, the amount of which can't exceed the third of the amount of the fine provided for, and, if it is the case, the author's obligations, in

order to stop the infraction, avoid its renewal, repair the damage or restore the place. It also fixes the deadline for payment and execution of obligations.[65]

Concerning the execution of penalties in the perspective of the protection of the environment, legal persons (as well as physical persons) can benefit from two measures. First of all, according to Article 132-59 CC, "the judge can grant an exemption from penalty where it appears that the reintegration of the guilty party has been achieved, the damage caused has been made good and that the public disturbance generated by the offence has ceased. A court granting an exemption from penalty may rule that its decision shall not be registered in the criminal records. Exemption from penalty does not extend to payment of the costs of the proceedings".

According to Article 132-60 CC, "a court may defer sentence where it appears that the reintegration of the guilty party is in the process of being achieved, that the damage caused is in the process of being repaired, and where the public disturbance generated by the offence will cease. In this case, it determines in its decision the date when it will pronounce sentence. A deferment may only be ordered where the representative of a legal person is present at the hearing". There are different types of deferment: ordinary deferment (Article 132-60 to Article 132-62 CC, granted also without an environmental law that expressly provides for it), deferment with probation (Article 132-63 to 132-65 CC, where a defendant who is a natural person is present at the hearing), and deferment with injunction (Article 132-66 to Article 132-70 CC; in the cases provided for by laws or regulations which sanction the violation of specific obligations, a court deferring sentence may give the convicted physical or legal person an injunction to observe one or more prescriptions provided by the laws or regulations concerned. This measure was introduced for the first time by the Act No. 85-661 of the 3 July 1985 on classified facilities).

10 General procedural provisions

In the French legal system, the principle of prosecutorial discretion applies. Indeed, the public prosecutor may decide to close the case or to prosecute it.

According to Article 40-1 CCP, "When the district prosecutor with territorial jurisdiction considers that facts brought to his attention in accordance with the provisions of Article 40 constitute an offence committed by a person whose identity and domicile are known, and for which there is no legal provision blocking the implementation of a public prosecution, he decides if it is appropriate:
1° to initiate a prosecution;
2° or to implement alternative proceedings to a prosecution, in accordance with the provisions of Articles 41-1 or 41-2;
3° or to close the case without taking any further action, where the particular circumstances linked to the commission of the offence justify this".

Obviously, the principle of prosecutorial discretion also applies to environmental crime; in this field, it limits the prosecution of environmental crimes, where many cases are dismissed by the public prosecutor, maybe because of the disproportion between the intellectual resources necessary for a full knowledge of a complex legislation and the low level of sanctions in the case of misdemeanours.[66]

[65] On practical application of transaction, see *Conseil d'Etat. Droits et débats*, 196 ff.

[66] Prieur, *Droit de l'environnement*, 1027; Van Lang, *Droit de l'environnement*, 492.

11 Procedural provisions on environmental crimes

With regard to procedural rules, a first peculiarity concerns authorities in charge of judicial investigations.

According to Article 15 CCP, "the judicial police includes the judicial police officers; the judicial police agents and assistant judicial police agents; the civil servants and agents to whom the law assigns certain judicial police functions". Within the latter, the environmental inspectors (*inspecteurs de l'environnement*) provided for in Article L 172-1 Env. Code should be recalled. This Article was introduced by the Ordinance No. 4 of 11 January 2012 which, in order to improve the effectiveness of police controls and sanctions, has simplified and harmonised the provisions of the Environmental Code related to administrative police and judicial police (on the *inspecteurs de l'environnement* see also 12).

The innovations introduced by the Ordinance No. 4 of 2012 also concern the transaction that, according to Article L 173-12 Env. Code, has been extended to all the infractions provided for by the Environmental Code (with the exceptions provided for by the same article).[67] As previously mentioned (see 9), Article L 173-12 Env. Code rules that before public prosecution has been exercised, the administrative authority can propose a transaction that must be accepted by the author of infraction and approved by the district prosecutor. The transaction takes into account the circumstances and the seriousness of infraction, the personality of its author and his resources and charges. The administrative authority fixes the transactional fine that the author will have to pay (whose amount cannot exceed the third of the amount of the fine provided for) and, if it is the case, certain obligations against the author, in order to stop the infraction, avoid its renewal, repair the damage or restore the place. It also fixes the deadline for payment and execution of obligations. The public prosecution will be barred when the author of the infraction has accomplished these obligations.

Another measure which can influence the punishment of an environmental offence is the mediation between the offender and the victim, provided for by Article 41-1 5° CCP, when such a measure is likely to secure reparation for the damage suffered by the victim, or to put an end to the disturbance resulting from the offence or to contribute to the reintegration of the offender. In these cases, the district prosecutor may, directly or by using as an intermediary a judicial police officer, or a delegate or mediator working for the district prosecutor, put in train, with the consent of the parties, mediation.

Moreover, in the field of environmental criminal offences it is also possible to apply for plea bargaining (*comparution sur reconnaissance préalable de culpabilité*, Article 495-7 ff. CCP), particularly since Law No. 1862 of 13 December 2011 has extended this procedure to all misdemeanours, whatever penalty is provided for, except for voluntary and involuntary offences against the physical integrity of the person and sexual assaults, where they are punished by a prison sentence exceeding five years, and for other offences expressly provided for by Article 495-16 CCP (i.e., offences against forests and offences related to hunting or fishing).

In general, in the French legal order plea bargaining is composed of two different phases: the first related to the proposal of a penalty by the district prosecutor to the author who has admitted the fact of which he is accused; the second related to the homologation of this penalty by the president of the court or the appointed judge. The prosecutor is free to opt for this measure; he can take this decision by his own initiative or following the request of the party concerned or his advocate. Where the penalty suggested is a prison sentence, its duration may not exceed either a year or half of the prison sentence applicable to the offence. The prosecutor may suggest that it be suspended in part or in whole. He may also suggest that this sentence be subject to the measures of adaptation listed in Article 712-6 CCP (external placement, placement under electronic surveillance, semi-detention, dividing or suspending a sentence). Where the

[67] For more details, see Amané Gogorza, "Le droit pénal de l'environnement", 4.

penalty of a fine is proposed, its amount may not exceed the amount of the fine applicable to the offence and it may be accompanied by a suspension.

According to general provisions (see 10), the opportunity principle applies also to environmental crimes.

Concerning the gathering of evidence in the field of environmental crimes, it is worth to mention a general trend to facilitate it.[68] It clearly appears in the sector of illegal discharges of oil at sea, where, in practice, the material element of the offence is established on the basis of the findings by the agents, which are supported by the aerial view of the sea (photos, radar images, etc.). In this regard, the Court of Appeal of Rennes has considered that the proof of the material element of discharge of oil at sea does not necessarily require the samples, but it can result from direct observations by the agents supported by photos.[69] Practitioners (prosecutor)[70] highlight the great utility of this approach.

12 Procedural provisions - actors and institutions mentioned in legal texts

Courts

The French criminal proceeding is mainly inquisitorial in nature, even if it also includes some adversarial elements in order to reach a balance between the rights of the defence, the rights of the victim and those of the society. The standard for a criminal conviction is the proof "beyond any reasonable doubt". Any doubt should benefit the defendant. Under the French procedural system, it is up to the discretionary judgment of the competent courts to determine the value of the evidence submitted.

Concerning the structure of the judiciary, for the first instance of jurisdiction different courts deal with the different offences:

- Assise court (*Cour d'assises*) deals with felonies (*crimes*);

- Criminal court (*Tribunal correctionnel*) is competent for misdemeanors (*délits*);

- Police court (*Tribunal de police*) deals with petty offences (*contraventions*).

The Court of Appeal (*Court d'Appel*) is the court of second instance.[71]

The Court of Cassation (*Cour de Cassation*) is the highest Court in the French judicial system. This Court does not judge on the facts but is responsible for ensuring compliance with the rules of law applied by the lower courts.

In the French legal system, there are no judges specifically in charge for environmental crime; the judges who deal with environmental crime also deal with other crimes. However, according to Article L 218-29 Env. Code, introduced by the Law of 3 May 2001, supplemented by Decree No. 196 of 11 February 2002 and Law of 9 March 2004, special courts for polluting discharges from ships and pollution of sea by

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[68] David Chilstein, "L'efficacité du droit pénal de l'environnement", in *L'efficacité du droit de l'environnement. Mise en œuvre et sanctions*, ed. Olivera Boskovic (Paris: Dalloz, 2010), 79.

[69] Court of Appeal Rennes, 19 September 1996, *Droit Maritime Français* No. 567 January 1997, 100 ff.

[70] Interview with French prosecutor of 25 August 2014.

[71] Since 1st January 2001 decisions of Assise Court can be appealed before another Assise Court composed of three professional judges and twelve jurors.

hydrocarbons were created. At present, criminal courts specialised in maritime space exist: the High Court of Le Havre for the North Channel area, the High Court of Brest for the Atlantic zone and the High Court of Marseille for the Mediterranean area. The High Court of Paris is competent for the most complex cases, for offences committed in the exclusive economic zone (EEZ) and on the high seas for vessels flying French flag.[72]

Moreover, within the courts of Paris and Marseille, there are specialised sections, with prosecutors, investigative judges and judges responsible for examining the most important cases on public health (*Pôles de santé publique*). Practitioners (police)[73] underline that when there is an obvious link between environmental and public health crime, the case would be investigated under the responsibility of a judge specialised in the public health area.

All the courts with specialised teams of judges and prosecutors work with dedicated police units as the *Office central de lutte contre les atteintes à l'environnement et à la santé publique* (OCLAESP).

The *Conseil Constitutionnel* excluded that offences under the Environmenal Code could fall in the competence of the *Tribunal correctionnel* in its composition including citizens, because of the specialised nature of environmental criminal law which requires specialised knowledge and skills.[74]

Public Prosecutor's Office

The Public Prosecutor supervises the criminal investigations department (*police judiciaire*). Investigations are conducted by various police departments which must immediately inform the Public Prosecutor of the commission of offences. The Public Prosecutor's Office has the competence to decide on the charges; the Prosecutor may decide to close the case or to prosecute, according to the principle of prosecutorial discretion (see 10).

The Public Prosecutor's Office has a hierarchical organisation. The Public Prosecutor is responsible for the implementation of governmental criminal policy, for the control of judicial police activities and criminal investigations and for the trial.

With regard to the burden of proof, according to the principle of the presumption of innocence the burden of proof is in general on the Public Prosecutor; the burden of proof can be on the victim when he or she claims damages. The Public Prosecutor – who collects elements of proof both in favour of the prosecution and in favour of the defence - must produce evidence that the offence was committed and the person being prosecuted was involved.

Concerning environmental crime, it is worth to mention the circular of the Ministry of Justice of 23 May 2005 to the prosecutors, which established the appointment of one prosecutor in charge of the environmental crime department.[75]

Police

[72] Guihal, *Droit repressif de l'environnement*, 377; Olivier Saumon, "La spécialisation en matière de pollution par les navires: le point de vue du praticien", in *Le droit pénal de la mer*, ed. Annie Cudennec (Rennes, Presses Universitaires de Rennes, 2006), 111.

[73] Interview with representatives of OCLAESP of 22 August 2014.

[74] Cons. Const., 4 August 2011, No. 635, para. 14.

[75] Circular "Orientations de politique pénale en matière d'environnement", available at http://www.justice.gouv.fr/bulletin-officiel/98-04-dacg-e.pdf.

In the French system, OCLAESP is a specialised inter-institutional unit created in 2004, as a service of judicial police with a national competence, which is in charge of investigations of environmental crime, public health crimes and doping. OCLAESP's responsibilities exclude matters which fall within the specific competence of the central office against the illegal trade in drugs, and the central office against the illegal trade in arms, munitions, explosives and nuclear products.

The task of OCLAESP is to conduct and coordinate criminal investigations, to observe and analyse the most typical behaviour of offenders, to centralise information, to participate in training and information exchange, and to handle international requests for assistance (Europol, Interpol) relating to the areas of crime it covers. In cases involving organised crime, OCLAESP may draw on special investigation powers. OCLAESP is often consulted on the draft law proposals in environmental matters by the Legislative Committee of the Parliament.

OCLAESP is composed of:

- a command unit;

- an investigation division, including 3 groups, which involves staff members in charge of coordination and cooperation in criminal investigations;

- an environment group, which deals with issues related to pollution, wildlife protection and illegal waste trafficking;

- a public health group, which handles medical and paramedical criminal behaviours and deals also with infringements concerning sanitary and/or food safety and anti-doping;

- an overseas group, which concentrates on major environmental and sanitary issues occurring in French-controlled overseas territories and communities;

- an intelligence and international cooperation division, which is dedicated to intelligence gathering;

- an international relations group, which relays at international level the office's action;

- a support and evaluation group, which analyses cases brought to the office and is in charge of judicial implementation of intelligence and information;

- a documentation, analysis and training group, which performs strategic analyses (e.g. prepares statistics and the annual activity report; manages the network of investigators and of local referents to crimes against the environment and public health).

Practitioners (police)[76] highlight the added value of the multidisciplinary approach of OCLAESP, since it allows the *Gendarmerie Nationale*'s investigators to work closely with four technical advisers: a member of the National Agency for Hunting and Wildlife; a member of the Sports Ministry; a pharmacist or public health inspector from the Public Health Ministry and a member of the Ministry of the Environment.

In 2012, the Office dealt with several investigations related to the management of hazardous waste, pollution and recycling of end of life vehicles, the protection of fauna and flora and traffic of plant protection products.

In particular, in 2012, the Office dealt with:

- 14 inquiries relating to the management of hazardous waste (some of which with an international dimension), in cooperation with the territorial services of judicial police;

- 6 inquiries concerning illegal trafficking of protected species, in cooperation with local investigation authorities;

[76] Interview with representatives of OCLAESP of 22 August 2014.

- 3 inquiries on traffic of counterfeit plant protection products, in cooperation with the *Brigade nationale d'enquêtes vétérinaires et phytosanitaires* (BNEVP).[77]

OCLAESP is considered by practitioners (prosecutor)[78] as a best practice, which could be exported to other European countries.

The Ordinance No. 34 of 11 January 2012 on simplification, reform and harmonisation of provisions of administrative police and judicial police of the Environmental Code created a new Title VII in Book 1 of the Code (Articles L 171-1 to L 174-1 Env. Code), which establishes a set of common repressive provisions applicable, without exception, to all areas covered by the Environmental Code. The reform entered into force on 1st July 2013; the three new chapters forming the Title VII become the place of uniform rules on criminal penalties and police controls applicable to all offences of the Environmental Code.[79]

The Ordinance has intensely modified the system of the "*polices de l'environnement*" in order to ensure greater consistency and to improve the juridical framework; indeed, before the reform of 2012, the organisation of the "*polices de l'environnement*" was very heteroclite. In general, the aim of the Ordinance is to sanction efficiently environmental criminality, to achieve a better adequacy and clarification, to harmonise legal proceedings relating to the investigation and detection of infringements and the penalties to be applied.[80]

Article 172-1 Env. Code provides for the environmental inspectors (*inspecteurs de l'environnement*, see 11). This article states that "In addition to the judicial police officers and agents and the other public agents specially authorised by this Code, shall be entitled to investigate [«*rechercher*»] and detect [«*constater*»] infringements of the provisions of this Code and its implementing texts and of the Criminal Code provisions related to the abandonment of garbage, waste, materials and other objects, the officials and public agents employed in the services of the State responsible for the implementation of these provisions, or the national office for hunting and wildlife, the national office for water and aquatic environments, the national parks and the marine protected areas agency ".

Powers of judicial police have therefore been granted to the *inspecteurs de l'environnement* whose operations are carried out under the direction of the district prosecutor (Article 12 CCP).

The *inspecteurs de l'environnement* exercise powers under the conditions and within the limits laid down by the Environmental Code (Article 28 CCP and Article L 172-4 Env. Code); where a judicial investigation began, the *inspecteurs* carry out the duties delegated by the judicial investigation authorities (Article 14 CCP).

Moreover, the *inspecteurs de l'environnement* are obliged to inform the district prosecutor of the offence within 5 days from discovering and to transmit to the prosecutor any relevant information, official reports or documents (Article 40 CCP and Article L 172-16 Env. Code).

Together with the new category of environmental inspectors, other officials specifically authorised by the Code of the Environment coexist: Agents of nature reserves, Coast guards, Rangers, Agents of the National Forests, Customs officers, for which specific authorisations are maintained[81] (see, for example, Articles L 216-3, L 362-5, L 415-1, L 428-20, L 437-1 Env. Code).

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[77] L'activité des offices centraux de la police judiciaire de la Gendarmerie nationale, Direction générale de la Gendarmerie nationale (DGGN), INHESJ / ONDRP – Rapport 2013 available at http://www.inhesj.fr/sites/default/files/files/ondrp_ra-2013/02_DII_Offices_centraux_GN_1.pdf, p. 7 ff.

[78] Interview with French prosecutor of 25 August 2014.

[79] For a comment on the reform (and the gaps still existing) see Jaworski, "Le volet pénal", 221-236.

[80] Jaworski, "Le volet penal", 221.

[81] See Jaworski, "Le volet penal", 227.

The ordinance No. 34 of 11 January 2012 increases the material and territorial competence of the inspectors, together with the specific judicial guarantees for natural and legal persons. Section 2 in Chapter II of Title VII of the Environmental Code provides for the "Investigative operations and detection of offences" (Articles L 172-4 to L 172-17).

Article L 172-4 Env. Code states that "Officials and agents of the State and local authorities and their public institutions empowered to investigate and report infringements of the provisions of this Code and its implementing texts exercise their powers in accordance with this section.

The assistant judicial police agents mentioned in Article 21 of the Code of Criminal Procedure[82] are entitled to investigate and detect violations of this code under the conditions set by the other books of this Code. They perform these tasks within the limits and in the manner prescribed by the Code of Criminal Procedure".

According to Article L 172-5 Env. Code, officials and agents mentioned in Article L 172-4 investigate and detect the offences under the Code wherever they are committed. However, before accessing in some professionals buildings, vehicles, boats, etc., they are required to inform the prosecutor, who may oppose.

Article L 172-6 Env. Code states that when seeking animals, plants or minerals, or their parts and products, taken in violation of the provisions of Chapter I of Title III of Book III, Chapters I and II of Title I and Title II and Title III of Book IV, officials and employees mentioned in Article L 172-4 may access all the places where they have been transported.

However, they can enter homes or part of premises for residential use only with the consent of the occupant expressed in accordance with Article L 172-5 or, failing such a consent, with the permission of the liberty and custody judge of the competent High Court.

According to Article L 172-8 Env. Code "The officials and assistants mentioned in Article L 172-4 may collect on request or on the spot, statements of any person who may provide useful elements to their findings. They compile an official report. The person that was heard may read the record, make observations and sign it (…)".

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[82] Article 21 CCP establishes that "The following persons are assistant judicial police agents:
1° civil servants belonging to the active services of the national police who do not fulfill the conditions set down by Article 20;
1° bis: volunteers serving in the capacity of military personnel within the and military personnel serving under the operational reserve of the national *gendarmerie* failing to meet the requirements of Article 20-1;
1° ter: assistant security officers referred to in Article 36 of the Law No. 73 of 21 January 1995 on orientation in relation to security;
1° quater: agents of the Paris surveillance;
1° quinquies: (repealed);
1° sexies: members of the Civil Reserve National Police who do not fulfill the conditions laid down in Article 20-1;
2° municipal police agents;
3° The rural police, when acting for the exercise of powers established in the last paragraph of Article L 2213-18 of the general code of local authorities.
Their task is:
- to assist judicial police officers in the performance of their duties,
- to report to their superiors any felony, misdemeanour or petty offence of which they have knowledge;
- to establish the existence of violations of the criminal law, in accordance with the orders given by their superiors, and to collect any information aimed at identifying the perpetrators of such offences, all this within the framework and pursuant to the formalities set out by the applicable organic or special laws;
- to note by the means of official reports petty offences against the Traffic Code, listed by Decree of the *Conseil d'Etat*. In compiling an official report of an offence, judicial police officers may also officially receive any observations made by the offender".

Under Article L 172-10 Env. Code the officials and assistants may, in the exercise of their duties, be required by the prosecutor, the investigating judge and the police officers. The officials and assistants are empowered to directly request the police to investigate and detect infringements of the provisions of the Environmental Code and its implementing texts.

According to Article L 172-11 Env. Code, the officials and assistants are empowered to request communication, make copies or to seize documents of any kind related to the purpose of control and necessary to fulfilling their mission. They can also consult any document necessary to the fulfilment of their mission in any public administration, institution and organisation under the control of the State and local authorities.

According to Article L 172-12 Env. Code, "The officials and employees mentioned in Article L 172-4 can:

1 Seize the object of the offence, including animals and plants, or parts and products obtained from these, minerals, arms and ammunitions, instruments and equipment used to commit the offence or being intended to be used to commit the offence;

2 Seize boats, cars and other vehicles used by the perpetrators to commit the offence, to get to the place where the offence was committed or away from it, or to transport the object of the offence.

They compile an official report mentioning the seizures.

These provisions do not apply when objects or devices have been consigned pursuant to Article L 172-15.

Transportation, maintenance and custody costs of the seized items are on the offender.

Animals or plants seized may be returned to the environment where they were taken or in a medium compatible with their biological requirements".

Article 172-13 Env. Code states that officials and assistants may destroy dead or non-viable plants and animals when seized. The liberty and custody judge of the High Court having territorial jurisdiction may order, by a motivated decision on the request of the prosecutor, the destruction of instruments and banned or prohibited devices. The order authorising the destruction is notified to the public prosecutor and to the offender. This order is executed notwithstanding opposition or appeal. The destruction is recorded in an official report.

According to Article L 172-14, officials and assistants may collect or order to collect samples for analysis or testing. These samples are placed under seal.

Within the perimeter of a facility, the person in charge or, if he is not present, his representative is informed that he may attend the collection. The absence of the person in charge does not preclude the collection. The samples are collected at least in double specimen and submitted to a laboratory for analysis. One specimen is kept for the second-inspection ("*contre-expertise*").

The defendant or his representative is notified that he may carry out at his own expenses the analysis of a sample. The defendant communicates the decision within five days following the date on which the results of the laboratory analysis were brought to his attention. After this moment, the sample can be eliminated.

Whether the perpetrator was not identified at the time of sampling, the agent can decides if a second analysis is needed to ascertain the truth. Otherwise, the sample kept for the second-inspection is destroyed within the time specified by the prosecutor.

According to Article L 172-16 Env. Code, infringements of the provisions of the Environmental Code and its implementing texts are recorded in an official report which shall be considered as *prima facie* evidence unless rebutted ("*font foi jusqu'à preuve contraire*"). The official reports shall be sent to the prosecutor within five days after the report was filed. A copy of the official reports shall be sent, within the same period, to the competent administrative authority.

A decree of the *Conseil d'Etat* shall determine the conditions of application of this chapter (Article L 172-17 Env. Code).

Article L 173-4 Env. Code states that hindering the functions performed by officials and agents authorised to carry out administrative controls or research and detection of offences under this Code is punishable by six months' imprisonment and a fine of €15,000.

Article L 173-9 Env. Code establishes that "The provisions of Articles 132-66 to 132-70 of the Criminal Code on the deferment with an injunction shall apply to natural and legal persons in case of a conviction for an offence under this Code. The court may order a fine of not more than €3,000 per day of delay".

Article L 173-11 Env. Code establishes that "The prosecutor, by a law enforcement officer, may affix the seals on the facilities, structures, objects or devices used for work, operations, equipments or activities kept operating in breach of a measure taken on the basis of 1° of Article L 173-5 or Article L 173-8.

The magistrate may order the release of the consignation measure at any time".

A transaction (Article L 173-12 Env. Code) may take place (see 13).

NGOs

Concerning the role of NGOs, according to Article L 142-2 Env. Code "The approved associations mentioned in Article L 141-2[83] may exercise the rights recognised as those of the civil party with regard to acts which directly or indirectly damage the collective interests that they defend and which constitute an infringement of the legislative provisions relating to the protection of nature and the environment, to the improvement of the living environment, to the protection of water, air, soils, sites and landscapes, to town planning, or those whose purpose is to fight against pollution and nuisance, nuclear safety and protection from radiation, business practices and misleading advertisements or advertisements which are likely to be deceptive, when these practices and advertisements include environmental information and the texts adopted to implement them.

This right is also granted, under the same conditions, to the associations which have been lawfully declared for at least five years at the date of the acts and which, by their charter, propose the safeguarding of all or part of the interests described in Article L 211-1, in relation to the acts constituting an infringement of the provisions relating to water, or the interests described in Article L 511-1, in relation to the acts constituting an infringement of the provisions relating to classified facilities".[84]

In addition to this possibility, Article L 142-3 Env. Code provides for an "*action en réparation conjointe*",[85] stating that "When, in the cases mentioned in Article L 142-2, several identified persons have suffered individual damages caused by the act of a single person and having a common origin, any association approved under Article L 141-1 may, if it has been appointed by at least two of the persons concerned, may act for reparation before any tribunal on behalf of these persons.

The appointment cannot be solicited. It must be given in writing by each person concerned.

Any person who has given his or her agreement for an action to be brought before a criminal court is considered, in this case, as exercising the rights recognised as those of the civil party, in accordance with the Code of Criminal Procedure. However, the notifications are addressed to the association.

The association which brings a legal action in accordance with the provisions of the previous paragraphs may claim for damages before the investigating judge, or the tribunal having jurisdiction over the headquarters of the enterprise implicated or, failing this, over the place of the first infringement".

With regard to administrative proceedings, the environmental protection associations may bring proceedings before the administrative tribunals for any grievance relating to environmental protection (Article L 142-1 Env. Code).

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[83] This Article provides for an administrative approval procedure for those environmental protection association which have been exercising their activities for at least three years. These associations are known as "Approved environmental protection associations" ("*associations agréées de protection de l'environnement*").

[84] Guihal, *Droit repressif de l'environnement*, 63 ff.

[85] See Prieur, *Droit de l'environnement*, 1032.

Local authorities and their associations can exercise the rights recognised to the civil party with regard to acts which directly or indirectly damage the territory in which they exercise their powers and constituting an infringement of laws related to the protection of nature and the environment and the texts implementing them (Article L 142-4 Env. Code).

Procedural provisions on organised crime

The French legislation does not explicitly define the concept of "organised crime" (see 7). However, Law No. 204 of 9 March 2004 (*Loi Perben II*) adapting justice to the evolution of crime, provides for a procedure applicable to organised crime; the Law No. 204 introduced in the Code of Criminal Procedure Articles 706-73 and 706-74 indicating the offences to which this procedure applies. Article 706-73 CCP lists all the offences falling within the system of prosecution of organised crime; among these offences only para. 19° indirectly concerns environmental crime as it refers to the misdemeanour of unauthorised exploitation of a mine associated with environmental harm committed by an organised group when this conduct is linked to one of the offences listed in paras. 1° to 17° of the same Article.

However, Article 706-74 CCP rules that, where the law so provides, the procedure concerning organised crime is applicable to "felonies and misdemeanours committed by organised groups, other than those which come under Article 706-73" and "to misdemeanours of participation in a criminal association under the second paragraph of Article 450-1 of the Criminal Code, other than those which come under 15° of Article 706-73 of the present Code".

The procedure applicable to the inquiry, prosecution, investigation and trial of these felonies and misdemeanours is subject to the provisions of Title XXV, Book IV, CCP.

In particular, Title XXV, Book IV, CCP provides for judicial bodies specialised in the fight against organised crime, with a wider territorial jurisdiction than the other judicial bodies working on 'common' crime, in order to reduce the risks arising from the fragmentation of prosecutions of and investigations on crimes (Articles 706-75 to 706-78 CCP).

As it concerns the specific competences and methods of investigation, the Code of Criminal Procedure (Articles 706-80 to 706-105) provides for a special regime for surveillance, infiltration, custody, searches, wire-tapping and measures to freeze property.

Cooperation with other institutions

Concerning the cooperation with EU States, a key role is played by the European Arrest Warrant (EAW),[86] which is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

France implemented the Framework Decision 2002/584/JHA on EAW by the Law No. 204 of 9 March 2004. In particular, Article 695-23 CCP establishes that an EAW is executed without the 'double criminality limit' when the subject-matter of the accusation is punished, under the law of the issuing Member State, by a custodial sentence of exceeding three years' imprisonment or a custodial safety measure of a similar duration and falling within one of the categories of criminal offences listed by the same Article, which includes, among other categories, "felonies and misdemeanours against the environment including illegal trafficking in endangered animal species and endangered plant species and varieties".

[86] Council Framework Decision of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). *OJ L 190 18.07.2002, 1 ff.*

In the EU framework, France provides for other instruments of judicial cooperation, such as the setting up of Joint Investigation Teams[87] (Articles 695-2 to 695-3 CCP), the participation to Eurojust through its national representatives (Articles 695-4 to 695-9 CCP), the issue and execution of orders freezing property or evidence under the Framework Decision 2003/577/JHA[88] (Articles 695-9-1 to 695-9-30), and on simplifying the exchange of information and intelligence between law enforcement authorities under the Framework Decision 2006/960/JHA[89] (Articles 695-9-31 and 695-9-32 CCP). France ratified the EU Convention of 29 May 2000 relating to judicial assistance in criminal matters between the Member States of the European Union.

Concerning police cooperation, France participates to relevant EU and International institution such as Europol and Interpol.

France is a Party of many other European Conventions (Council of Europe), such as the European Convention on mutual assistance in criminal matters (Strasbourg, 20 April 1959), or Bilateral or International Agreements which contain provisions establishing specific procedures for judicial and police cooperation in criminal matters.[90]

13 Administrative environmental offences: instruments

In France administrative sanctions are frequently used in the field of environmental protection, with a recent legislative activism which has led to the multiplication of administrative sanctions concerning the protection of the environment and health.[91]

The Ordinance No. 34 of 11 January 2012 "on simplification, harmonisation and reform of the provisions of administrative police and judicial police of the Environmental Code" marks a relevant development for the environmental administrative offences system, introducing a Title VII related to "Common provisions on controls and sanctions" into the Book I of the Environmental Code.

The first chapter of this new Title ("Administrative controls and administrative police measures") aims to harmonise the conditions for administrative controls regarding site visits, seizures, taking of evidence and declarations, police requisitions. In particular, the first section sets out the conditions for access to facilities, operations, objects, devices and activities concerned. It also provides that, when access is denied, the access may be authorised by the judge of custody and freedom (Article L 171-2 Env. Code).

The second section concerns the administrative measures and sanctions (Articles L 171-6 to L 171-12 Env. Code). The imposition of any administrative sanction must be preceded by a formal notice issued by the

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[87] Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams. *OJ L 162, 20.6.2002, 1–3*.

[88] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence. *OJ L 196, 2.8.2003, 45-55.*

[89] Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Uniono. *OJ L 386, 29.12.2006, 89-100.*

[90] With regard to cooperation between national administrative authorities and criminal authorities, see 14.

[91] Laurent Fonbaustier, "(L'efficacité de) la police administrative en matière environnementale", in *L'efficacitè du droit de l'environnement. Mise en oeuvre et sanctions*, ed. Olivera Boskovic (Paris: Dalloz, 2010), 115.

competent administrative authority ordering to comply with the applicable obligations within a certain deadline (Articles L 171-7 and L 171-8 Env. Code). If, upon expiry of such a deadline, the operator has not complied with an order imposing to undertake works or operations, the administrative authority may:

- oblige the operator to deposit a sum corresponding to the amount of the work to be carried out;

- enforce the required measures *ex officio* and at the expense of the operator;

- order the suspension of the operation of the facilities and related activities until the imposed obligations have been fulfilled, and take the necessary provisional measures;

- order the payment of a pecuniary sanction of up to €15,000 and a daily pecuniary sanction of up to €1,500 applicable from the notification of the decision imposing the daily fine and until the previously imposed obligations have been fulfilled.

The Environmental Code provides for specific environmental administrative offences. Following the Ordinance No. 34 of 2012, these offences concern classified facilities and waste.

As it concerns facilities, operators of industrial sites that perform an activity listed in the classified facilities legislation must comply with such a legislation. Non-compliance may consist in failing to comply with the conditions imposed on the operator of a classified facility as well as from operating a classified facility without the required declaration or authorisation. In case of non-compliance, there are different types of administrative sanctions, such as the obligation to deposit an amount of money, the enforcement *ex officio* of the required measures, the suspension of the operation of the facility, the closure or suppression of the facility (the latter is applied where the facilities operate without the required declaration or authorisation). These sanctions are implemented by the Prefect and must be in all the cases preceded by a formal notice (Articles L 514-4 ff. Env. Code).

As it concerns waste, Article L 541-3 Env. Code (as modified by the Ordinance No. 34 of 11 January 2012) rules that in cases where waste is abandoned, deposited or treated contrary to the prescriptions of the Environmental Code and of the rules for its application, the competent authority notifies the waste producer or holder of the facts alleged against him and of the applicable sanctions; the authority, after having informed the waste producer or holder about the opportunity to submit written or oral observations within one month, may give a formal notice to perform the operations necessary to comply with the concerned regulation within a specified time limit. If the person at stake does not comply with this obligation within this time limit, the authority, by a decision indicating the means and the time limits for appealing the same decision, may:

- oblige the waste producer or holder to deposit a sum covering the amount of the works to be carried out;

- enforce the required measures *ex officio* at the expense of the operator;

- order the suspension of the operation of the facilities and related activities until the imposed obligations have been fulfilled, and take the necessary provisional measures;

- order the payment of a daily pecuniary sanction of up to €1,500 euro applicable from a date established by the decision and until the imposed obligations have been fulfilled;

- order the payment of a pecuniary sanction of up to €150,000; the decision establishes the time limit for the payment and its conditions.

Article L 541-3 Env. Code also states that, in case of emergency, the competent authority establishes the appropriate measures in order to prevent serious and imminent danger to health, public safety or the environment.

As it concerns cross-border shipment of waste, Article L 541-41 Env. Code rules that "in the case provided for by Article 22 of the Regulation (EC) No. 1013/2006, where the shipment cannot be completed in the term, the competent authority requires the notifier, designated in accordance to Article 2.15 of this Regulation, to take back or treat waste within a period compatible with that provided by this Regulation". In the case of illegal shipment under Article 24 of the Regulation mentioned above, the authority orders the notifier (in case of export) or the addressee (in case of import) to take back or treat waste within a period compatible with that provided by the Regulation. Article L 541-41 Env. Code also states that, where the

presence of waste from a shipment that cannot be completed in the term or an illegal shipment is discovered, the Prefect of the interested department orders the notifier and other interested actors to proceed, within an established time limit, with the temporary storage of waste according to the conditions provided for by Titles I and IV of Book V.

Other administrative sanctions are expressly listed in Articles 521-17 to 521-20 Env. Code concerning the control of chemical products, and in Articles L 535-1 ff. Env. Code regarding GMOs.

Practitioners (police)[92] highlight that in France, the aim of the enforcement of environmental protection law is in most cases based on a 'second chance policy'. That is to say that, e.g. if a company commits an offence, the competent administrative authority will give the offender the opportunity, under an administrative procedure, to repair the damage which have been caused; in this case, no penal prosecution will occur. Therefore, there are two steps concerning the enforcement: an initial administrative procedure and, only if this does not achieve the expected results, a penal procedure.

14 The role of administrative authorities

The French system of administrative authorities playing a role in the environmental matter is based on a central authority, the Ministry of Ecology, Sustainable Development and Energy, and on territorial authorities, i.e. the Regional and Interregional Directorates[93] and the Departmental and Inter-departmental Directorates.[94]

Moreover, the Environmental Inspectors , in addition to their role as judicial police, play also key role in carrying out administrative controls.

The administrative courts are the responsible authorities for the administrative litigation.[95]

With regard to the administrative jurisdiction, the organisation of the administrative courts does not foresee specialised chambers for environmental cases. The cases related to the environment are addressed by 'generalist judges', which are also responsible for other cases. However, the environmental cases are often assigned to one or exceptionally two chambers of an administrative court, so that in this sense, there is a *de facto* form of specialisation.[96]

In environmental matters, in many case the administrative litigation is of 'full jurisdiction' ('*pleine jurisdiction*'), that is to say that the administrative court has a power to amend the administrative decision, or to substitute the decision with a new one. The Environmental Code mentions the full jurisdiction with regard to the decisions on the approval of associations of environmental protection, on classified facilities for the protection of the environment, or on sanctions that can be imposed by the administrative authority

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[92] Questionnaire answered by an OCLAESP representative.

[93] Regional Directorates of Environment, Planning and Housing (DREALs); Interregional Directorates of the sea (DIRMs); Directorate of Security of Interregional Civil Aviation and Services of Civial Aviation overseas; Regional operational Centres of Controls and rescue on the sea (CROSSs); Centres of technical studies on equipment (CETEs).

[94] Departmental Directorates of territories (DDTs) and Departmental Directorates of territories and of the sea (DDTMs); Interdepartmental Directorates of the infrastructure (DIRs) and the other specific territorial services.

[95] Prieur, *Droit de l'environnement*, 1042 ff.

[96] See "Le juge administratif et le droit de l'environnement - Rapport du Conseil d'Etat de France", Congrès de Carthagena (2013) de l'Association Internationale des Hautes Juridictions Administratives, available at http://www.aihja.org/images/users/114/files/Congres_de_Carthagene_-_Rapport_de_la_France_2013-FRANCE-FR.pdf, 9-10.

in many fields (water, air and atmosphere, etc.). In general, the administrative courts do not have an independent power of imposing sanctions, but they decide on the sanctions that have been adopted by the administrative authority.[97]

Administrative decisions enforcing environmental legislation are mainly adopted by the Prefect of the region, who may, for example, issue formal notice (e.g. Articles L 171-6 and L 514-5 Env. Code, concerning classified facilities), or order the payment of an administrative fine (Article L 171-8).[98]

Title VII of Book I Env. Code on "Common provisions on controls and sanctions", introduced by the Ordinance No. 34 of 11 January 2012, lays down the conditions for control on facilities, structures, works, operations, objects, devices and activities governed by the Environmental Code and the sanctions applicable in case of non-compliance with or infringement of the requirements under the Code. It has to be underlined that specific provisions on controls and sanctions, contained in other Titles of Book I and in other Books of the Code, may derogate from these common provisions or supplement them (Article L 170-1 Env. Code).

Article L 171-1 Env. Code establishes that "Official and agents responsible for the controls provided for in Article L 170-1 have access:

1° to closed spaces and spaces containing facilities, structures, works, equipments, operations, objects, devices and activities subject to the provisions of this Code, excluding homes or part of premises for residential use. They can enter these places between 8.00 a.m. and 20.00 p.m., and outside these hours when the activities of production, manufacture, processing, use, packaging, storage, deposit, transport or marketing mentioned by this Code are carried out;

2° to other places, at any time, where activities subject to the provisions of this Code are carried out or may be carried out;

3° to vehicles, ships, boats, skiffs and aircrafts used in a professional capacity for the possession, transportation, storage and marketing of animals, plants or any other material that could constitute an infringement of the provisions of this Code.

II. - Officials and agents responsible for the controls may access homes and part of the premises of residential use in the presence of the occupant and with his consent".

When access to the above mentioned places is denied or when the set out conditions are not met, visits may be authorised by order of the liberty and custody judge of the High Court within whose jurisdiction the premises are situated (Article 171-2 Env. Code).

Under Article L 171-3 "Officials and agents responsible for controls may request communications and make copies of documents related to the object of control and which are necessary to fulfilling their mission, regardless to the supporting means of the document and in any hands they are. They cannot take the original documents, if not after having drafted a list that will be countersigned by the holder. The original documents are given back within one month after the control. When documents are in electronic form, officials and agents have access to software and data. They can order this data to be transcripted by any appropriate means in documents that can be directly used for control purposes".

Officials and agents responsible for controls may collect on request or on the spot any information and evidence which is necessary to fulfil their mission (Article L 171-4 Env. Code).

According to Article L 171-6 Env. Code, when an agent responsible for controls addresses to the competent administrative authorities a report on acts of infringement of relevant provisions under the Code, related to a facility, structure, works, equipments, operation, object, device or activity, the agent shall transmit a copy of it to the concerned person, who can make observations to the administrative authority.

During the administrative controls the administrative authorities may detect criminal offences. The *Circulaire* of 19 July 2013[99] provides for clarifications on how to deal with this situation.

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[97] *Ibidem*.

[98] See "Circulaire du 19 Juillet 2013 relative à la mise en œuvre des polices administratives et pénales en matière d'installation classées pour la protection de l'environnement", in *BO 10 August 2013, 818, 821*.

In particular, the *Circulaire* clarifies that when a felony or a misdemeanour does not fall under the competence of the environmental inspector, he has a duty to inform the public prosecutor and to transmit the relevant documentation, pursuant to Article 40 CCP. When a petty offence does not fall under the competence of the environmental inspector, there is no obligation for the inspector to report this type of offence, even if this offence may nevertheless be subject of an information addressed to the concerned services according to Article L 172-9 Env. Code. When offence falls under the competence of the environmental inspector, the shift to criminal prosecution - even if the visit had started as an administrative control - is widely accepted by the jurisprudences;[100] however, the judge sets out compulsory conditions to be met: the administrative control is not intended to be a 'roundabout way' of entering the premises and detect anything that requires other (different) forms of authorisation.[101]

According to Article L 172-16 Env. Code, infringements of the provisions of the Environmental Code and its implementing texts are recorded in official reports which shall be considered as *prima facie* evidence unless rebutted ("*font foi jusqu'à preuve contraire*"). The official reports shall be sent within five days after being filed, to the prosecutor. A copy of the official reports shall be sent, within the same time limit, to the competent administrative authority (the Prefect).

As it concerns the relationship between the control authorities and the prosecutors in the case of a formal report has been transmitted, the inspector and the Prefect answer requests from the prosecutor for further information. During the criminal proceedings the presence of an inspector may be required to provide evidence on the facts.[102]

A transaction may take place. Article L 173-12 provides that the administrative authority can, before the exercise of the public action, do a transaction with physical and moral persons on the prosecution of the crimes provided for by the Code. The proposal of transaction by the administration – that must be accepted by the author of the infraction and must be approved by the Public Prosecutor – is made taking into account the circumstances and the seriousness of infraction, the personality of its author and his resources and charges. It fixes the transactional fine that the author will have to pay, the amount of which can't exceed the third of the amount of the fine provided for, and, if it is the case, the author's obligations, in order to stop the infraction, avoid its renewal, repair the damage or restore the place. It also fixes the deadline for payment and execution of obligations.

Practitioners (police)[103] highlight that there is a good level of cooperation among the authorities involved in the fight against environmental crime. Environmental enforcement is based both on a pro-active monitoring and ex-post enforcement. Indeed, administrative authorisation procedures are in force in many areas of environmental protection. Therefore, the administrative authorities could monitor a lot of companies that might commit offences in the field of environmental crime.

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[99] "Circulaire du 19 Juillet relative à la mise en œuvre des polices administratives et pénales en matière d'installation classées pour la protection de l'environnement", 824.

[100] See Court of Cassation, Criminal Chamber, 26 April 2000, case No. 98-87869.

[101] "Circulaire du 19 Juillet relative à la mise en œuvre des polices administratives et pénales en matière d'installation classées pour la protection de l'environnement", 824.

[102] "Circulaire du 19 Juillet relative à la mise en œuvre des polices administratives et pénales en matière d'installation classées pour la protection de l'environnement", 825-826.

[103] Questionnaire answered by an OCLAESP representative.

15 Implementation of Environmental Liability Directive and links between environmental liability and responsibility for environmental crimes

15.1 Implementation of Directive 2004/35/EC

Directive 2004/35/EC on environmental liability (ELD) has been implemented by amendments to the Environmental Code, by the Law No. 757 of 1st August 2008,[104] the Decree No. 468 of 23 April 2009[105] and the Ordinance No. 34 of 11 January 2012.

Part of the implementing provisions textually transposes the ELD rules; here those rules which are not just a textual transposition of the ELD rules will be highlighted.

The competent authority is the Prefect, which is a decentralised governmental authority with its headquarters in the capital of each department. Depending on the case,[106] competence lies with the Prefect of the department where the damage occurred or with the Prefect of the department where the operator who has damaged the environment has its headquarters (Article R 162-2 Env. Code).

The most relevant difference between the French legislation on environmental liability and those of the other EU countries concerns the notion of damage. While in the other linguistic versions of the ELD, the damage has to be "significant", the French version of the ELD requires that damage to be "*grave*". The same word is used in the implementing national provisions (Article L 161-1 Env. Code): this implies that only in few cases, when there are important consequences, the damage will have to be repaired. The intensity of the damage required by the French legislation can probably contribute to explaining the fact that no event of environmental damage is recorded in the French Government report communicated in 2013 to the European Commission. The assessment of the gravity of the damage - or imminent threat of such damage - is regulated not only for habitat and species (as in the Annex I of the ELD and in Article R 161-3 Env. Code) but also for land and water: the presence of land damage – or threat of land damage - shall be assessed taking into account the characteristics and the features (not the "functions" as in the Annex II of the ELD)[107] of the soil and the type and concentration of the contaminants, their risk and the possibility of their dispersion (Article R 161-1 Env. Code.); the presence of water damage - or threat of water damage - shall be assessed in relation of the ecological, chemical and/or quantitative status and/or ecological potential, according to the methods and criteria determined by the *arrêtés* (under Article R 212-18 Env. Code) which also establish the rules for the assessment of water bodies.

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[104] Marcel Sousse, "De la responsabilité environnementale", *Environnement*, 11 (2008): 9 ff.; Roxana Family and Anne-Sophie Barthez (eds.), "Responsabilité environnementale des entreprises", *Environnement*, 6 (2009): 8 ff.

[105] See Philippe Billet, "Clefs de lecture du nouveau régime de responsabilité environnementale. À propos de décret n. 2009-468 relatif à la prévention et à la réparation de certains dommages causés à l'environnement", *La Semaine Juridique – Editions Enterprise et affaires* (2009): 33 ff.

[106] Billet, "Clefs de lecture du nouveau régime de responsabilité environnementale", 35.

[107] Billet, "Clefs de lecture du nouveau régime de responsabilité environnementale", 34.

As in the ELD, the liable person is the one who operates or controls an occupational activity listed as environmentally relevant in Article R 162-1 Env. Code: in this case, the Prefect does not need to prove the negligence or fault of the operator, but only the causal link between the activity and the damage (Article L 162-1 Env. Code). If the damage to protected habitats or species is caused by an occupational activity not included in the list of Article 162-1 Env. Code, the Prefect has to prove the negligence or fault of the operator. Operator is also who "actually" controls the activity; it is debated whether this rule entails liability of the parent company.[108]

When a damage – or a threat of damage – has occurred, the operator has to inform the competent Prefect (Article L 162-13 Env. Code); also environmental associations or other interested person shall be entitled to inform the Prefect about the damage or the threat of damage and to request the Prefect to take action.[109] Preventive and remedial measures are regulated in the same way as in the ELD. In case of land damage, Article R 162-9 Env. Code provides for measures to remove all risks of health damage, consistent with the land use planning documents in force at the time when the damage occurred or, in the lack of such documents, with the function of the land. In case of water or biodiversity damaged, three kinds of remedial measures are foreseen: primary, complementary and compensative remediation. The Prefect, after a consultation with the environmental associations and the interested persons (Article R 162-12 Env. Code), has to request an opinion to the Departmental Committee of environment, health and technological risks and, in case of biodiversity damage, also to the Departmental Committee of nature, landscape and sites (Article R 162-13 Env. Code); within three months from the beginning of the procedure, the Prefect establishes the measures with a substantiated order (Article L 162-11 and Article R 162-14 Env. Code.), which shall be notified to the operator and to the owners of the lands on which the operator must carry out the remedial measures and shall be deposited at the town hall of the involved municipalities (Articles R 162-16 and R 162-17). If the operator does not inform the Prefect about the damage or the threat of damage or does not comply with the order of the Prefect to carry out the remedial measures, the fine for the petty offences of the fifth class is applied (Article R 163-1 Env. Code).

As it concerns privately owned lands, if the owner of the polluted land does not reach an agreement with the operator, the latter may apply for an authorisation to carry out remedial measures in the property of others (Article L 162-5 Env. Code). The Prefect may also facilitate the execution of the remedial works by setting easements or by a declaration of public interest of the environmental works (Article L 162-12 Env. Code).

If the operator does not carry out the remedial measures, the Prefect may order the operator to deposit a sum corresponding to the amount of money needed to carry out the measures; the Prefect may also perform the remedial measures directly, using the sum made available by the operator, and may impose a pecuniary sanction of up to €15,000 and a daily pecuniary sanction of up to €1,500 (Articles L 162-14 and 171-8 Env. Code). The Prefect may perform directly the measures also in the case where the liable person is unknown; in addition, when the liable person is unknown and urgency occurs, also other subjects, such as local communities, environmental associations, trade unions, or owners of the damaged lands may perform the remedial measures (Articles L 162-15 and 162-16 Env. Code).

When there are several liable operators, each of them bears a proportionate share of liability in relation to its own contribution to the damage (Article L 162-18 Env. Code). The operator may recover the costs of preventive and repair measures when he may invoke the mandatory defences (Article L 162-22 Env. Code) or, among the optional defences, the state of the art defence, but not the permit defence (Article L 162-23

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[108] François-Guy Trébulle, "La loi du 1er août 2008 relative à la responsabilité environnementale et le droit privé", *Bulletin du Droit de l'Environnement Industriel* (2008): 40; Charley Hannoun, "La responsabilité environnementale des société-mères", *Environnement* (2009): 33 ff.; Elisabeth Terzic, "De la responsabilité environnementale au sein d'un groupe de sociétés", *Droit de l'environnement* (2011): 179 ff.

[109] Béatrice Parance, "L'action des associations de protection de l'environnement et de collectivités territoriales dans la responsabilité environnementale", *Environnement* (2009): 21 ff.

Env. Code): in the French legislation, indeed, these defences appear to be defences to costs and not defences to liability.

The limitation of the scope of liability only to the "*grave*" damage seems to entail only symbolic changes on the French national legislation.

It should be also underlined that even before the implementation of the ELD, courts had already granted compensation for the environmental damage ("*prejudice écologique pur*"). In the "*Erika case*"[110] local communities and environmental associations brought an action to require this kind of damage and the action was upheld. In the same case, the civil chamber of the Court of Cassation also affirmed a rule of ("semi" strict) liability derived from the European principle of waste detention[111] as interpreted by the European Court of Justice.

The right of local communities and environmental associations to take action for environmental damage, also in civil cases,[112] is now recognised in the Environmental Code when these entities suffered a damage to their collective interest (Articles L 142-2 and L 142-4 Env. Code);[113] nevertheless, it is not clear whether the implementation of the ELD is likely to take the environmental damage outside the scope of the civil liability or whether the courts will continue to recognise the role of civil liability whenever the environmental damage is outside the scope of environmental liability (for example, because the environmental damage is not "*grave*").[114]

A draft bill to amend the Civil Code in order to introduce a general action for environmental damage has been approved by the Senate on 16 May 2013,[115] and the report "*Pour la reparation du prejudice écologique*" (delivered by a research group coordinated by Professor Jègouzo) has been published on 17 September 2013 by the French Minister of Justice.[116] These initiatives intend to fill the gaps in the environmental protection left by the implementation of the ELD;[117] they aim at recognising to a plurality of

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[110] Court of Appeal Paris, 30 March 2010, R.G. No. 08\02278 ; Cass. Crim. 25 September 2012, No. 10-82938. See Mathilde Boutonnet, "L'Erika, une vraie–fausse reconnaissance du préjudice écologique", *Environnement et Développement Durable* (2013):19 ff.

[111] Cass. Civ. 17 December 2008, No. 04\12315, commented by Rolland, in *Bulletin Joly Sociétés*, Avril 2009, 366 ff.

[112] Cass. Civ., 7 December 2006, No. 05-20.297

[113] Parance, "L'action des associations de protection de l'environnement", 23 ff.

[114] Trébulle, "La loi du 1er août 2008 relative à la responsabilité environnementale", 39 ff.; Anne Guégan, "La place de la responsabilité civile aprés la loi de 1 août 2008", *Environnement* (2009): 14 ff.; Parance, "L'action des associations de protection de l'environnement", 23 ff.; Gilles J. Martin, "Les effets de la responsabilité environnementale: de la réparation primaire à la réparation compensatoire", *Environnement* (2009): 29 ff.

[115] The draft bill foresees the introduction of the following provisions: "*Toute personne qui cause un dommage à l'environnement est tenue de le réparer*" (Article 1386-19 Code Civil); "*La réparation du dommage à l'environnement s'effectue prioritairement en nature. Lorsque la réparation en nature n'est pas possible, la réparation se traduit par une compensation financière versée à l'Etat ou à un organisme désigné par lui et affectée, dans des conditions prévues par un décret en Conseil d'Etat, à la protection de l'environnement*" (Article 1386-20 Code Civil); "*Les dépenses exposées pour prévenir la réalisation imminente d'un dommage, en éviter l'aggravation, ou en réduire les conséquences, peuvent donner lieu au versement de dommages et intérêts, dès lors qu'elles ont été utilement engagées*" (Article 1386-21 Code Civil).

[116] Available at *www.justice.gouv.fr/art_pix/1_rapport_prejudice_ecologique_20130914.pdf*.

[117] François-Guy Trébulle, "Quelle prise en compte pour le préjudice écologique après l'Erika?", *Environnement et Développement Durable* (2013): 19 ff.; Mireille Bacache, "Quelle réparation pour le préjudice écologique?", *Environnement et Développement Durable* (2013): 26 ff.; Philippe Billet, "Préjudice écologique: les principales propositions du rapport Jégouzo", *Environnement et Développement Durable* (2013): 3 ff.; Béatrice Parance, "Du rapport Jégouzo relatif à la réparation du préjudice écologique", *Gazette du Palais* (2013): 5 ff.; Marthe Lucas,

persons the right to bring action to claim compensation for environmental damage, as well as at ensuring that the funds collected are intended for the repair of the environment.

15.2 Links between environmental liability and criminal liability

The French legal system foresees criminal law provisions in relation to the issue of environmental liability.

A criminal sanction is provided for by Article R 163-1 Env. Code which, as already mentioned, rules that, if the operator does not inform the Prefect about the damage or the threat of the damage or does not respect the order issued by the Prefect to carry out the remedial measures, he receives a fine for offences of the fifth class.

Moreover, when the infringements of environmental regulations has caused an environmental damage – with a serious injury of health or safety of persons or a substantial damage to fauna and flora or to the quality of air, soil and water – there are significant criminal penalties: depending on cases, imprisonment from two to five years and a fine of up to €300,000 (Article L 173-3 Env. Code). Legal persons may incur significant fines and other penalties when environmental crimes are committed by their organs or representatives (Article L 173-8 Env. Code).

The criminal court can also order an injunction to oblige the operator to restore the environment to its baseline condition (Article L 173-5 Env. Code).

16 Summary

Substantive environmental criminal law

In the French legal system the notion of "environment" includes "natural areas, resources and habitats, sites and landscapes, air quality, animal and plant species, and the biological diversity and balance to which they contribute", as set out under Article L 110-1 of the Environmental Code (Env. Code).

The environment is conceived as a new human right which should benefit from a reinforced penal protection.

The French legal order lacks any criminal law provision specifically aimed at defining the concept of "environmental crime".

In the Criminal Code (CC) the only felony (*crime*) related to environmental protection is the "Ecologic terrorism", set out under Article 421-2. Beside the above mentioned Article 421-2 CC which is very limited in scope, the French Criminal Code does not foresee any provision expressly punishing environmental damage or pollution; nevertheless, the Criminal Code contains various provisions which, although not

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"Préjudice écologique et responsabilité. Pour l'introduction légale du préjudice écologique dans le droit de la responsabilité administrative", *Environnement et Développement Durable* (2014): 11 ff.; see also "Dossier special "Mieux réparer de dommage environmental" Réflexions autour du rapport de la Commission environnement du Club des Juristes", *Environnement et Développement Durable* (2012): 8 ff.

directly connected to the protection of ecological values, can be used where a damage to the environment occurs (for instance, Article 223-1 related to endangering other persons; Articles 221-6 and 222-19 concerning involuntary offences against life or physical integrity of the person).

The Environmental Code introduces rules applicable to the different environmental components and contains provisions punishing the infringement of the above mentioned rules with criminal sanctions. With the exception of few cases that directly punish environmental pollution (for instance, Article L 216-6 concerning water pollution or Article L 432-2 concerning protection of farmed fish and their habitat), these provisions are mostly accessory to the administrative rules and consist in failing to comply with a court ruling or, more often, in failing to comply with an administrative decision or an administrative regulation. Moreover, it is worth underlining that non-compliance with administrative laws is usually considered as a petty offence, while non-compliance with judicial or administrative decisions is considered as a misdemeanour.

The French literature has often criticised the structure of the environmental criminal provisions because of the strong administrative dependence of criminal law.

Practitioners (police and barrister) highlight that there are deficits concerning the provisions on environmental crime. For example, the lack of a "soil pollution" offence has, as a consequence, that the pollution of soil can only be prosecuted in connection to water pollution or similar offences. In addition, the system of penalties for environmental crime is weak, with relatively low penalties in many cases. According to the practitioners (barrister) the level of sanctions has not a dissuasive effect; moreover, sanctions for environmental crimes are not proportionate compared to sanctions for other categories of crime. In practice, in order to have an adequate criminal sanction, it is necessary to get on to offences against property or offences against persons. The penalties also influence the available investigation tools, since some special investigative techniques are allowed only in cases of penalties higher than those provided for environmental crimes.

In the French legal system the criminal conduct listed in Directive 2008/99/EC and Directive 2009/123/EC is included in different chapters of the Environmental Code according as it affects air, soil, water, waste, etc.

Public servants liability in relation to environmental crimes

In France, there are no specific provisions on the liability of public servants for environmental crimes. However, general provisions on criminal liability of public servants may apply. In addition, liability of public servants might be affirmed according to the general principles (e.g., parties to the offences, etc.).

The issue concerning the criminal liability of politicians, and especially of mayors, became more and more relevant in relation to environmental criminal law; this could be explained by the fact that many offences are directly related to local public services: distribution of drinking water, disposal of household waste management, sanitation services. The mayor is responsible in case of violations resulting from failure to comply with laws protecting the environment: dumps managed by a municipality, using an incinerator polluting the atmosphere or pollution of waterways.

Organised crime and environmental crime

Articles L 415-6 and L 541-46 Env. Code provide for an aggravation of the penalties when the conducts described therein is committed by an organised group (*bande organisée*), as defined in Article 132-71 CC.

It has to be stressed that the French legislator does not give a comprehensive and unitary definition of organised crime, but, in the Article 706-73 Code of Criminal Procedure (CCP), lists all the offences falling within the system of prosecution of organised crime; among these offences only para. 19° indirectly

concerns environmental crime as it refers to the misdemeanour of unauthorised exploitation of a mine associated with environmental harm committed by an organised group when this conduct is linked to one of the offences listed in paras. 1° to 17° of the same Article.

However, Article 706-74 CCP rules that, where the law so provides, the procedure concerning organised crime is applicable to "felonies and misdemeanours committed by organised groups, other than those which come under Article 706-73" and "to misdemeanours of participation in a criminal association under the second paragraph of Article 450-1 of the Criminal Code, other than those which come under 15° of Article 706-73 of the present Code".

Responsibility of corporations and legal entities

The French legal system was among the first European continental systems to introduce and regulate, by the Criminal Code of 1994, the topic of criminal responsibility of legal persons. At the beginning, this responsibility was limited to the cases expressly provided for by laws or regulations (*responsabilité spéciale*); after the Law No. 204 of 9 March 2004, known as *Loi Perben II*, it was extended to any offence. Therefore, corporations and legal entities can be held responsible for all the environmental crimes provided for by the French legislation.

It is worth stressing that the French legal system complies with Article 6 of Directive 2008/99/EC and with Directive 2009/123/EC because all the environmental infractions provided for by the French law can be applied to the natural persons as well as to the legal ones.

Procedural provisions on environmental crimes – actors and institutions mentioned in legal texts

Courts

The French criminal proceeding is mainly inquisitorial in nature, even if it also includes some adversarial elements, in order to reach a balance between the rights of the defence, the rights of the victim and those of the society.

Concerning the structure of the judiciary, for the first instance of jurisdiction different courts deal with the different offences:

- Assise court (*Cour d'assises*) deals with felonies (*crimes*);

- Criminal court (*Tribunal correctionnel*) is competent for misdemeanors (*délits*);

- Police court (*Tribunal de police*) deals with petty offences (*contraventions*).

The Court of Appeal (*Court d'Appel*) is the court of second instance.

The Court of Cassation (*Cour de Cassation*) is the highest Court in the French judicial system. This Court does not judge on the facts but is responsible for ensuring compliance with the rules of law applied by the lower courts.

In the French legal system, there are no judges specifically in charge for environmental crime; the judges who deal with environmental crime also deal with other crimes. However, according to Article L 218-29 Env. Code, special courts for polluting discharges from ships and pollution of sea by hydrocarbons were created. At present, criminal courts specialised in maritime space exist: the High Court of Le Havre for the North Channel area, the High Court of Brest for the Atlantic zone and the High Court of Marseille for the

Mediterranean area. The High Court of Paris is competent for the most complex cases, for offences committed in the exclusive economic zone (EEZ) and on the high seas for vessels flying French flag.

Moreover, within the courts of Paris and Marseille, there are specialised sections, with prosecutors, investigative judges and judges responsible for examining the most important cases on public health (*Pôles de santé publique*). Practitioners (police) underline that when there is an obvious link between environmental and public health crime, the case would be investigated under the responsibility of a judge specialised in the public health area.

All the courts with specialised teams of judges and prosecutors work with dedicated police units as the *Office central de lutte contre les atteintes à l'environnement et à la santé publique* (OCLAESP).

Public Prosecutor's Office

The Public Prosecutor supervises the criminal investigations department (*police judiciaire*). Investigations are conducted by various police departments which must immediately inform the Public Prosecutor of the commission of offences. The Public Prosecutor's Office has the competence to decide on the charges; the Prosecutor may decide to close the case or to prosecute, according to the principle of prosecutorial discretion.

The Public Prosecutor's Office has a hierarchical organisation. The Public Prosecutor is responsible for the implementation of governmental criminal policy, for the control of judicial police activities and criminal investigations and for the trial.

Police

In French system, OCLAESP is a specialised inter-institutional unit created in 2004, as a service of judicial police with a national competence, which is in charge of investigations of environmental crime, public health crimes and doping. The task of OCLAESP is to conduct and coordinate criminal investigations, to observe and analyse the most typical behaviour of offenders, to centralise information, to participate in training and information exchange, and to handle international requests for assistance (Europol, Interpol) relating to the areas of crime it covers. Moreover, in cases involving organised crime, OCLAESP may draw on special investigation powers.

In 2012, the Office dealt with several investigations related to the management of hazardous waste, pollution and recycling of end of life vehicles, the protection of fauna and flora and traffic of plant protection products.

Practitioners (police) highlight the added value of the multidisciplinary approach of OCLAESP, since it allows the *Gendarmerie Nationale*'s investigators to work closely with experts from e.g. the Ministry of the Environment, the Ministry of Public Health, the Wildlife Agency. OCLAESP is considered by practitioners (prosecutor) as a best practice, which could be exported to other European countries.

The Ordinance No. 34 of 11 January 2012 introduced into Article L 172-1 Env. Code the *inspecteurs de l'environnement*, which are entitled to investigate ("*rechercher*") and detect ("*constater*") infringements of the provisions of the Environmental Code and its implementing texts as well as of the Criminal Code provisions relevant for environment protection.

Powers of judicial police have therefore been granted to the *inspecteurs de l'environnement* whose operations are carried out under the direction of the district prosecutor.

The *inspecteurs de l'environnement* exercise powers under the conditions and within the limits laid down by the Environmental Code; where a judicial investigation began, the *inspecteurs* carry out the duties delegated by the judicial investigation authorities.

Administrative environmental offences and administrative authorities

In France administrative sanctions are frequently used in the field of environmental protection, with a recent legislative activism which has led to the multiplication of administrative sanctions concerning the protection of the environment and health.

The French system of administrative authorities playing a role in the environmental matter is based on a central authority, the Ministry of Ecology, Sustainable Development and Energy, and on territorial authorities, i.e. the Regional and Interregional Directorates and the Departmental and Inter-departmental Directorates.

The Prefects of the departments (and sometimes of the regions) control environmental compliance. They can impose administrative sanctions and suspend operators when they do not comply with their environmental duties.

Practitioners (police) highlight that in France, the aim of the enforcement of environmental protection law is in most cases based on a 'second chance policy'. That is to say that, e.g. if a company commits an offence, the competent administrative authority will give the offender the opportunity, under an administrative procedure, to repair the damage which have been caused; in this case, no penal prosecution will occur. Therefore, there are two steps concerning the enforcement: an initial administrative procedure and, only if it does not achieve the expected results, a penal procedure.

Concerning cooperation, practitioners (police) highlight that there is a good level of cooperation among authorities involved in the fight against environmental crime. Environmental enforcement is based both on a pro-active monitoring and ex-post enforcement. Indeed, there are administrative authorisation procedures in force in many areas of environmental protection. Therefore, the administrative authorities could monitor a lot of companies that might commit offences in the field of environmental crime.

Implementation of Environmental Liability Directive and environmental crime

Directive 2004/35/EC on environmental liability (ELD) has been implemented by amendments to the Environmental Code, by the Law No. 757 of 1st August 2008, the Decree No. 468 of 23 April 2009 and the Ordinance No. 34 of 11 January 2012.

The most relevant difference between the French legislation on environmental liability and those of the other EU countries concerns the notion of damage. While in the other linguistic versions of the ELD, the damage has to be "significant", the French version of the ELD requires that damage to be "*grave*". The same word is used in the implementing national provisions (Article L 161-1 Env. Code): this implies that only in few cases, when there are important consequences, the damage will have to be repaired. The intensity of the damage required by the French legislation can probably contribute to explaining the fact that no event of environmental damage is recorded in the French Government report communicated in 2013 to the European Commission.

In light of the limitation of the scope of liability only to the "*grave*" damage, the implementation of the ELD seems to have brought mostly symbolic changes to the French national legislation. It should be also underlined that even before the implementation of the ELD, courts had already granted compensation for the environmental damage ("*prejudice écologique pur*"). It is not clear whether the implementation of the ELD is likely to take the environmental damage outside the scope of the civil liability or whether the courts will continue to recognise the role of civil liability whenever the environmental damage is outside the scope of environmental liability (for example, because the environmental damage is not "*grave*") .

A draft bill to amend the Civil Code in order to introduce a general action for environmental damage has been approved by the Senate and the report "*Pour la reparation du prejudice écologique*" has been published by the French Minister of Justice. These initiatives intend to fill the gaps in the environmental protection left by the implementation of the ELD; they aim at recognising to a plurality of persons the right to bring action to claim compensation for environmental damage, as well as at ensuring that the funds collected are intended for the repair of the environment.

The French legal system foresees criminal law provisions in relation to the issue of environmental liability.

A criminal sanction is provided for by Article R 163-1 Env. Code which, as already mentioned, rules that, if the operator does not inform the Prefect about the damage or the threat of the damage or does not respect the order issued by the Prefect to carry out the remedial measures, he receives a fine for offences of the fifth class.

Moreover, when the infringements of environmental regulations has caused an environmental damage – with a serious injury of health or safety of persons or a substantial damage to fauna and flora or to the quality of air, soil and water – there are significant criminal penalties: depending on cases, imprisonment from two to five years and a fine of up to €300,000 (Article L 173-3 Env. Code). Legal persons may incur significant fines and other penalties when environmental crimes are committed by their organs or representatives (Article L 173-8 Env. Code).

Shortcomings and recommendations

Practitioners (police, barrister and prosecutor) highlight some deficits concerning both the regulatory level and the enforcement level. Concerning the regulatory level, they stress that environmental criminal law is characterised by complex and very extensive legislation, spread across several Codes (e.g., *Code de l'environnement*, *Code Rural*, *Code de la Santé publique*, *Code de l'urbanisme*, *Code forestier*, etc). The possibility of knowledge and comprehension of the environmental legislation is seriously hindered by its fragmentary character.

As far as certain offences are concerned (such as pollution and illegal exploitation of classified facilities) penalties still remain too low.

The lack of dedicated judges may hamper the enforcement of environmental law; indeed, specialisation is considered to be a key element to improve the efficiency of the fight against environmental crime.

The lack of expertise as well as the lack of resources and the lack of awareness concerning the importance of environmental crimes is considered as the main reason of the shortcomings concerning the enforcement of environmental criminal law. Given the high technical nature of environmental matters and the complexity of the legislative framework, practitioners (police, barrister and prosecutor) call for the introduction of specific training for judges and prosecutors.

The strengthening of police forces is essential to allow an efficient fight against environmental crime. However, it is worth to mention that without truly deterrent criminal sanctions, any law enforcement efforts risk to remain vain.

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