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Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the European Union?

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Summary: The quest for a ‘high’ level of environmental protection¹ in the European Union (EU) is dependent on the successful implementation and enforcement of EU legislation by Member States. Thus, despite the fact that the Community did not originally have a mandate to impose the choice of instrument of implementation of Community Law on Member States, the decision of the European Court of Justice (ECJ) of 13 September 2005 (*Commission v Council C-176/03*) has finally established that while the Community does not have competence in criminal matters *per se*, the Community institutions may require Member States to introduce criminal sanctions for the protection of the environment. The ECJ has therefore annulled a Framework Decision of the Council which aimed at harmonising the criminal sanctions for protection of the environment of Member States under the third pillar of the EU, rather than the first pillar (which allows the Commission and ECJ to exercise stronger enforcement powers). These developments demonstrate that for the first time a supranational institution may be able effectively to enforce an obligation on national authorities to enact penal sanctions for environmental protection. The objective of this paper will be to discuss whether the harmonisation of environmental criminal standards may lead to better environmental protection within the EU.

I. Introduction

* PhD Candidate, University of Essex. A shorter (unpublished) version of this paper was presented at the International Graduate Legal Research Conference that took place at King’s College in London on 12-13 April 2007, and at the ATINER 4th International Conference on Law, which took place in Athens on 16-17 July 2007. I would like to thank Karen Hulme, member of my supervisory board at the University of Essex, and Donald McGuillivray, University of Kent, for their insightful comments to an earlier draft of this paper.

¹ Article 2 EC sets as one of the Community’s essential objectives “a high level of protection and improvement of the quality of the environment” (see also Article 174(2) EC). This does not mean protection of the environment at ‘the highest level’, as Member States are allowed under article 175 EC to introduce stricter standards.

The use of criminal sanctions for the protection of the environment is a very topical issue in the European Union. The European Commission asserts that the use of criminal sanctions by Member States could improve the level of enforcement of environmental regulations implementing EC environmental legislation.² The strength of criminal sanctions as a deterrent is attributable to the social stigma – publicly and in the business community - that is attached to offenders, who face criminal prosecution or conviction, and to the prospect of application of imprisonment as a sanction against those offenders. In contrast to the situation with fines, corporate offenders, who tend to commit the greatest number of environmental crimes, are not able to pass the costs of incarceration on to consumers.³ This is the basis on which the Commission has put faith in the effectiveness of criminal sanctions to deter environmental offenders in EU Member States.

Not only the Commission but also the Council and the European Parliament have supported the use of criminal sanctions for environmental protection. They share the view that approximation of environmental criminal law would allow the development of stronger cooperation among the Member States in the fight against environmental criminality, particularly in the case of environmental crimes with cross-boundary effects. They therefore support action at the European level to harmonise the criminal laws in Member States for the protection of the environment. Nevertheless, there is discord over the legal basis for this harmonisation. While the Commission, supported by the Parliament, asserts that the harmonisation of environmental criminal law is a matter to be dealt with under the first pillar of Community law (Article 175 EC under the title

² Commission Staff Working Paper, *Establishing of an Acquis on Criminal Sanctions against Environmental Offences*, Brussels, 07.02.2001, SEC (2001) 227, p. 3.

³ Imprisonment is not possible in the case of violations of administrative or civil law. But imprisonment in administrative infringement procedure is possible in countries with quasi-criminal systems (in which the administrative agency may apply repressive sanctions) e.g. Austria and Germany. *Study on Measures Other than Criminal Ones in Cases where Environmental Community Law has not been respected in the EU Member States*, Summary Report, B4-304A/2003/369724/MAR/A.3, 20 September 2004, p.14.

‘protection of the environment’), the Council (supported by several member states⁴) argues that the legal basis belongs to the third pillar of the EU, which relates to police and judicial cooperation on criminal matters (PJCC).⁵

The adoption of an instrument of harmonisation of environmental criminal law under the first pillar would have several advantages: it would have direct effect on Member States, therefore allowing individuals to rely on their EC rights despite the failure of a Member State to implement the measure⁶; for its adoption, co-decision procedure (therefore enhancing Parliament’s participation in decision-making⁷) and qualified majority voting in the Council would be applied, therefore preventing a Member State from exercising veto powers; and the Commission and ECJ would be able to exercise full enforcement powers. A third pillar instrument, on the other hand, would not have direct effect on Member States (though it would have, after the *Pupino* decision, *indirect* effect therefore requiring national courts to interpret national law in accordance with EC law)⁸; it would require unanimity in the Council with the Parliament being merely consulted (therefore with less democratic legitimacy than a first pillar instrument); and there is almost no judicial or political control of implementation by Member States.

⁴ Eleven of the then fifteen Member States intervened in support of the Council in the *Commission v Council C-176/03* case.

⁵ The Treaty of the European Union (TEU) 1993 created the second and third pillars leading to the transformation of the European Economic Community into the European Union, which is presently composed of three pillars. If the Constitutional Treaty ever come into force, the pillar structure of the EU will be abolished and the competences under the second and third pillars will be transferred to the competence of the Community (first pillar).

⁶ See Case 26/62 *Van Gend en Loos* [1963] ECR I. But due to the principle of legality (*nullum crimen sine praevia lege*), a Member State that fails to implement the directive by not criminalising the illegal activity would not be able to prosecute an individual. See Case 168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705.

⁷ The European Parliament is often regarded as the “greenest” of the EU Institutions. See Burns, C. ‘The European Parliament: The European Union’s Environmental Champion?’ in Jordan, A. (ed.), *Environmental Policy in the European Union: Actors, Institutions and Processes* (2nd ed. Earthscan 2005). However, there is an argument that since the rise of the right in the last euro-election, the European Parliament may have lost some of its ‘green’ mantle.

⁸ Case 105/03 *Criminal Proceedings against Pupino* [2005] ECR 5285. For a commentary on this decision and the consequent extension of indirect effect to third pillar measures see Fletcher, M. ‘Extending ‘Indirect Effect’ to the Third Pillar: The Significance of Pupino’, *E. L. Rev.* 30 (6) 2005.

However the problem of the legal basis for harmonisation of environmental criminal law has been finally given some clarification in a landmark decision of the ECJ on 13 September 2005⁹. In an action brought by the Commission against the legal basis of a Council Framework Decision on the protection of the environment through criminal law of January 2003¹⁰, the ECJ held that the legal basis for harmonisation should have been Article 175 EC – hence under the first pillar of Community law - as the main objective of the Council’s initiative to harmonise environmental criminal law was held to be the protection of the environment¹¹. This decision opens the way for the adoption of a more recent proposal of the Commission for a directive (February 2007) on the protection of the environment through criminal law¹² under the first pillar, which could allow the Commission and ECJ to enforce effectively the obligation on Member States to introduce criminal sanctions for environmental protection¹³.

Those developments show that for the first time a supranational institution may be able to impose an obligation on Member States to introduce criminal sanctions for the protection of the environment. Before those developments at the European Union level, the Council of Europe had adopted a Convention in 1998 on the protection of the environment

⁹ Commission v Council C-176/03 [2005] ECR I – 7879.

¹⁰ Council Framework Decision 2003/80/JHA of 27 January 2003, O.J. 05.02.2003 L029/55.

¹¹ Case 176/03 *Commission v Council* [2005] ECR I – 7879, par. 51.

¹² Proposal of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, 2007/0022 (COD) 9.2.2007, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0051en01.pdf

¹³ The Commission had adopted a proposal for a directive in March 2001 (2001/0076 COD) to pre-empt the adoption of a February 2000 initiative from Denmark for a Framework Decision of the Council on the protection of the environment through criminal law. See Comte, F. ‘Protection of the Environment through Criminal Law: Destiny of the Various European Union’s Initiatives’, in *Europe and the Environment: Legal Essays in Honour of Ludwig Kramer*, Onida, Marco e.d. 2004 p. 47. Since the Council decided to adopt the framework decision on 27 January 2003, the Commission took the decision to challenge the legal basis of that decision before the ECJ in April 2003. The February 2007 proposal for directive (2007/0022) on the protection of the environment through criminal law supersedes the 2001 proposal.

through criminal law¹⁴ but this Convention has not yet received the necessary number of ratifications for its entry into force¹⁵. The harmonisation of environmental criminal law in the EU could lead to stronger cooperation between police and judicial authorities in Member States, to the adjustment of the existing disparate approaches in Member States as far as the choice of implementation technique of EC environmental law is concerned, and to the creation of a level-playing-field to prevent some Member States from becoming ‘pollution havens’ for the dirty industries, especially in view of the two most recent EU enlargements eastwards.

However, according to the subsidiarity principle applied in EU law and enshrined in the Treaty¹⁶, the EU sets the standards, leaving to Member States the choice of how to implement those standards¹⁷. This has been the traditional method applied by Member States for implementation of EC law, leading one author to argue that the Commission’s proposal for a directive on the protection of the environment through criminal law is hence “non-European”¹⁸. Moreover Member States still regard criminal law as intrinsic to their sovereignty and resist the transfer of their power to legislate in this area to a supranational institution. Indeed since criminal law is the most powerful State tool to regulate individual liberties, the EU Member States are recalcitrant where matters of losing their sovereignty over their criminal laws to Brussels are concerned. It is also submitted that the third pillar on judicial co-operation on criminal matters would be the

¹⁴ Council of Europe Convention on the Protection of the Environment through Criminal Law, Strasbourg, 4.XI. 1998.

¹⁵ The Convention will enter into force after a period following the ratification of three signatory parties to the Convention. To date the only signatory party to ratify the Convention is Estonia. The Council’s (now annulled) Framework Decision was largely based on the Council of Europe 1998 Convention.

¹⁶ Article 5 EC Treaty

¹⁷ This is the method used for implementation of Directives, which are more widely used in the environmental field. Article 249 EC, al.3 reads: “a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, *but shall leave to the national authorities the choice of forms and methods*” (emphasis added).

¹⁸ Faure, Michael, ‘European Environmental Criminal Law: Do we really need it?’ [2004] EELR, p. 19.

appropriate venue for harmonisation of environmental criminal law¹⁹, though the ECJ has clearly rejected this argument.

Yet it is not only the constitutional framework of the EU that has led to criticisms of the Commission's initiative to harmonise environmental criminal law. Even though the ECJ has consistently held in its case-law interpreting Article 10 EC that Member States must introduce sanctions which are "effective, proportionate and dissuasive" for violations of EC law²⁰ and that a failure to introduce those sanctions could constitute a violation of EU law²¹, it is not at all clear whether criminal sanctions necessarily meet the requirements of dissuasiveness, effectiveness and proportionality. Therefore in order to answer the question of whether the harmonisation of environmental criminal law could improve the levels of environmental protection in the EU Member States, it is first necessary to investigate whether the application of criminal sanctions could have a positive effect on the enforcement of EC environmental law and whether civil liability or administrative sanctions could not be just as effective as, or perhaps more effective than, criminal sanctions.

Specifically, the initial section of this paper discusses the different rationales for the use of criminal sanctions in the environmental field. Secondly, the use of alternative sanctions (particularly administrative and civil ones) will be discussed. Thirdly, there is an analysis of the different approaches in the EU Member states regarding the possibility of holding corporations criminally liable. The final and concluding section will examine

¹⁹ Articles 29, 31 (e) and 34 (2) (b) pursuant to Title VI of the Treaty on European Union. It is questionable whether article 31 (e) TEU, which enables the approximation of the constituent elements of criminal acts and penalties in the fields of "*organised crime*, terrorism and illicit drug trafficking", would allow for a general competence for the harmonisation of environmental criminal law. Not all environmental offences are the product of organised crimes. See Kramer, L. 'Environment, Crime and EC Law. Case Law Analysis' *Journal of Environmental Law* [2006] Vol. 18 no.2, p. 285 and Albrecht, Hans-Jorg, 'The Extent of Environmental Crime; A European Perspective', in *Environmental Crime in Europe: Rules of Sanctions*, Comte, F. and Kramer, L. (e.d.), Europa Law Publishing, (2004).

²⁰ For the first time in Case 68/88 *Commission v Greece* ECR 1989, and reiterated in subsequent cases (e.g. C-326/88 *Hansen* ECR 1989). For a discussion of those developments prior to the ECJ decision in case 176-03, see Comte, F. "*Criminal Environmental Law and Community Competence*" [2003] *EELR* 12, p. 147.

²¹ Case 265/95 *Commission v France, Spanish Strawberries* [1997] ECR I-6959.

whether the *harmonisation* of environmental criminal law in the first pillar could improve the level of environmental protection in the European Union.

II. The use of criminal sanctions for the protection of the environment

Some commentators suggest that criminal law is not the most effective mechanism to control environmental wrongdoing²² and some even accuse it of being inherently antithetical to environmental law.²³ Yet this does not mean that there is a lack of theoretical foundation for the use of criminal law for the protection of the environment.

Any political decision to criminalize offences against the environment will invariably be based either on (1) utilitarian or (2) retributivist grounds. These are the two main pillars designing the contours of any move towards the criminalization of offences. The retributivist theory of crime and punishment holds that there is a need to introduce criminal sanctions whenever an element of moral culpability in the wrongful act can be identified (or ‘just deserts’). On the other hand, utilitarians advocate that the only rationale for introducing criminal penalties is the maximisation of society’s welfare under a cost-benefit analysis in order to improve deterrence and not simply to punish the offender for his past conduct. While the retributivist goal is to punish an offender for his or her intrinsically morally wrong behaviour (past-orientated), the utilitarian objective is to create a mechanism of punishment that enjoys efficiency in deterring the commission of future crimes (future-orientated).

²² See for example Pagh, Peter, ‘Administrative Criminal Law Systems in Europe: an Asset for the Environment?’ in *Environmental Crimes in Europe: Rules of Sanctions*, p. 163.

²³ Lazarus, Richard, ‘Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law’, [1993] 83 *Georgetown Law Journal*. He argues that three characteristics of environmental law would be incompatible with criminal law: 1) its evolutionary nature since it is based on moving-targets depending on new scientific evidence, which is incompatible with the stability necessary in criminal law 2) its aspirational quality since environmental standards (at least in the US context) are arguably set at a very high level in order to ensure at least the minimum desired level of compliance 3) its complexity and technicality, making it difficult for judges to have a good grasp of environmental legislation (pp. 2424 to 2432).

Retributive Notions

Many environmentalists defending the use of criminal sanctions for the protection of the environment base their position on retributivist grounds and not necessarily on cost-benefit analysis. After all, cargo-operators such as that of the *Prestige*, responsible for an oil-spill that caused severe damage to wildlife on the coasts of Spain and France, or the smuggler of endangered species who carelessly lets them die in transit, would surely deserve penal punishment - so long as they have the necessary mens rea²⁴ - regardless of whether or not others would be deterred from committing similar offences in the future. Indeed, as the awareness of the public in environmental issues increase, it is likely that (serious) environmental offences will not be regarded as mere regulatory offences (or '*mala prohibita*') but real crimes (*'mala in se'*)²⁵

However since the ultimate aim of environmental law is the protection of ecological resources, its role must not only be punishment for the offender's past-misconduct, but primarily that of harm prevention (deterrence).²⁶ Therefore it is on utilitarian grounds that some of the more prominent foundations for the criminalisation of environmental offences must be read in connection with, namely the welfare principle, the harm principle and deterrence.

Utilitarian Notions

According to the welfare principle, the sole basis for criminalisation would be to protect collective interests belonging to the whole community (*res communis*)²⁷. If the call for

²⁴ In the UK context, environmental offences are generally regulatory so 'strict liability' is the standard of mens rea for those offences. See *Alphacell v. Woodward* [1972] A.C. 824.

²⁵ Bell, S. and McGillivray, *Environmental Law* (6th ed. OUP 2006) p. 281.

²⁶ Retributivism and utilitarianism do not always need to be seen as antithetical: both objectives can be achieved concomitantly. In addition, rehabilitation of the offender and restoration of the natural environment are also roles played by the criminal law in the environmental field.

²⁷ Ashworth, Andrew. *Principles of Criminal Law* (5th edition OUP 2006) p.28.

criminalisation is solely based on moral grounds and falls outside the sphere of public interest (such as the criminal punishment of the adulterous wife or for those who committed bigamy) then criminal law should be put aside. Significantly, environmental protection tends to be identified as a third generation right, reflecting communal values and interests that cannot be divided or singularised. In this context, the welfare principle seems to be an important philosophical foundation for the criminalization of environmental offences.

However it is the harm principle that has been more widely debated as a possible philosophical basis for the criminalisation of environmental offences. John Stuart Mill, one of the fathers of utilitarianism, has famously written that “the only purpose for which power can be rightly exercised over any member of a civilized community, against his will, is to prevent harm to others.”²⁸ This statement is one of the earliest formulations of the harm principle, under which criminal legislation could only be introduced in order to protect others from harm. Therefore, those human acts that do not have the potential of causing harm to others (such as homosexual acts in private) could not be criminalized since any objection to them would be merely based on moral grounds. The objective of the application of the harm principle is thus to secure moral neutrality.

Controversially, Joel Feinberg argues that the harm principle does not apply in the case of environmental pollution since, as an accumulative harm, it is impossible to determine the degree of contribution of each polluter for the harm²⁹. To illustrate his proposition, he argues that it would be impossible to individualise the degree of contribution of each motor vehicle for the air pollution caused by the discharge of carbon dioxide from its turbines. It then becomes impossible to assign responsibility to each offender.

²⁸ J. S. Mill, *On Liberty*, Ch. 5, quoted in Ashworth, A. *Principles of Criminal Law*, (4th ed. OUP 2003) p. 32.

²⁹ Feinberg, Joel. *The Moral Limits of the Criminal Law: Harm to Others* (OUP USA 1984) p. 227.

Another approach would be to regard the responsibility in such cases as shared and independent of the identification of specific offenders.³⁰ Also, many jurisdictions appear to have circumvented any limitations to the harm principle by recognising types of endangerment offences which are independent of actual harm as long as there is potential for harm. In contrast to ‘real crimes’, which relate to the commission of, or attempt to commit, a real harm, regulatory crimes are abstract endangerment offences that require the mere potential of causing harm³¹. Therefore, the breach of pollution emission standards by industrial enterprises could be a regulatory crime regardless of whether or not any real harm to the environment has occurred.³²

Criminal sanctions and deterrence

Since for utilitarianism the main goal of the criminal law is deterrence, this paper will turn to the discussion of the deterrent effects of criminal sanctions. There are two forms of deterrence: specific deterrence, which applies to individual offenders; and general deterrence, which applies to the general public. Hence the objectives of deterrence policies are twofold: to stop the individual offender from committing further crimes (either by fear of punishment or by incapacitation in the case of incarceration), or to prevent the general public from committing crimes after the exemplary punishment system has been introduced and applied. The existence of deterrence arising from the introduction of criminal punishment has been proved in more recent criminological studies, particularly in those carried out in the context of drink driving or the use of seatbelt in private cars³³.

³⁰ The Law Reform Commission of Canada has embraced this view. The Law Reform Commission of Canada, "Sentencing in Environmental Cases" (1986).

³¹ Rowan-Robinson J., Watchman P., and Barker C., *Crime and Regulation: A Study of the Enforcement of Regulatory Codes* (T&T Clark 1990), p. 205.

³² Wells, Celia. *Corporations and Criminal Responsibility*, Oxford (2001). "health and safety offences (...) do not refer to the result which the unguarded machine might endanger, they prohibit the failure to guard" p. 5.

³³ Von Hirsch, Andrew. *Criminal Deterrence and Sentence Severity: an Analysis of Recent Research*. Oxford: Hart, 2000 p. 47. But no conclusive studies have been able to prove marginal deterrence, that is, how much *extra* deterrence is achieved by increasing the certainty (e.g. improving policing) or

However, in a study commissioned by the European Commission on the criminal enforcement of environmental law in the EU Member States³⁴ it was found, based on the answers to a questionnaire sent to national experts, that from the strict point of view of deterrence, administrative sanctions would seem to work as effectively as criminal ones. Since fines are the sanctions most often applied either by the administrative agencies or courts for environmental offences in the EU, it could be argued that:

“other things being equal, (...) if only monetary sanctions were to be imposed, administrative sanctions could do as good a job as criminal sanctions and probably at more speedily and at lower cost, since usually the procedural requirements in administrative legal procedures are lower than in the criminal procedure”.³⁵

Even though criminal fines are reported to be more commonly applied in criminal proceedings relating to environmental offences, one must look beyond the sanctions that are actually applied in practice. Unlike civil and administrative law, the arsenal of sanctions available in criminal law may include the threat of incarceration, which provides a strong incentive for compliance with environmental regulations. In that regard, the new proposal of the Commission for a directive of February 2007 on the protection of the environment through criminal law substantially improves the text of a previous proposal of March 2001 in so far as it attaches specific criminal sanctions to be applied by Member States for serious breaches of EC environmental law. Unlike the 2001 proposal which contained a general, non-specific provision on sanctions stating that

severity (sentencing levels) of punishment, though current research does indicate that there are consistent and significant negative correlations between likelihood of conviction and crime rates.

³⁴ *Criminal Enforcement of Environmental Law in the European Union*, IMPEL Network, Report by Michael Faure and Gunter Heine, Metro, July 2000 (this study only applied to the EU15 countries). Since a great part of the activities involving environmental pollution are also socially useful, the objective sought by law is not total deterrence but optimal deterrence. For the environmental criminal enforcement in the Czech Republic, Hungary, Lithuania, Poland and Slovakia, see *Study on Criminal Penalties in a Few Candidate Countries' Environmental Law*, Final Report, October 2003, available at http://ec.europa.eu/environment/crime/pdf/criminal_pen_voll.pdf

³⁵ Ibid p .82.

Member States must in serious cases of violations of EC environmental law (referred to in article 3 of the proposal) introduce the sanction of imprisonment³⁶, the new proposal requires Member States to attach the sanction of imprisonment (with specific terms of imprisonment) to those serious cases of violation specified in the directive³⁷. However, the Commission's interpretation of the ECJ decision in case 176-03 may have been too wide³⁸. Even though the ECJ recognised that the Community has a limited competence in criminal matters (that is, to require Member States to introduce criminal sanctions against serious violations of environmental law), it has fallen short of creating an EC competence to create specific offences or to attach specific sanctions to those offences³⁹, and a final answer as to whether the Community has the power to do so will be pending until the ECJ decision in the *Ship-Source Pollution* case⁴⁰, in which the Commission, following the ECJ decision in Case 176/03, challenges the legal basis of a Framework Decision of the Council of July 2005 to strengthen the criminal-law for the enforcement of the law against ship-source pollution adopted under the third pillar⁴¹. That said, it is difficult to imagine how the Community would be able to ensure that the criminal sanctions applied by Member States are "effective, dissuasive and proportionate", if a certain level-playing field in relation to the level of those sanctions is not established at the Community level.

³⁶ 2001/0076 (COD) article 4, a).

³⁷ 2007/0022 (COD) article 5.

³⁸ See Communication from the Commission to the European Parliament and Council on the Implications of the Court's judgement of 13 September 2005 (Case C-176/03 Commission v Council) COM (2005) 583. The Commission holds that "... *the judgement lays down principles going far beyond the case in question. The same arguments can be applied in their entirety to the other common policies and to the four freedoms (freedom of movement of persons, goods, services and capital)* (paragraph 6) This approach is followed in Advocate General Mazák's opinion in Case-440/05 (pending), see in particular points 97 and 98.

³⁹ See 42nd Report of Session 2005-06, European Union Committee, House of Lords, "*The Criminal Law Competence of the European Community: Report with Evidence*" 28 July 2006.

⁴⁰ Case C-440/05 (pending). The ECJ ruled in paragraph 53 of the 176-03 case that "the entire framework decision, *being indivisible*, infringes Article 47 EU as it encroaches on the powers which Article 175 EC confers on the Community" (emphasis added). Therefore the Court was cautious to point out that not all areas covered by the Framework Decision (possibly including the competence to create specific offences and penalties) belong to the first pillar.

⁴¹ Framework Decision 2005/667/JHA of 12 July 2005 adopted under Title VI of the TEU.

Yet in his opinion in Case-440/05 delivered on 28 June 2007, Advocate General Mazák is of the view that the establishment of specific offences and penalties would be better achieved by the Member States themselves (either acting individually or jointly under the inter-governmental, or third pillar, level) in order to maintain the coherence of each national penal system.⁴²

The following section will continue to examine the role of deterrence in criminal law in connection with its role in relation to other types of sanctions, particularly civil and administrative ones.

III. The use of alternative sanctions to the protection of the environment through criminal law

The European Commission argues in its proposal for a directive that only criminal sanctions would have the desired deterrent effect for the effective enforcement of EC environmental law⁴³. This view is not shared by some commentators who argue that civil liability and administrative sanctions could provide a similar degree of deterrence to criminal sanctions, and at lower costs to society.⁴⁴

It is argued that the costs pertinent to criminal proceedings and investigation and the high evidentiary burden in criminal cases suggests that criminal law would not be the most effective way to combat environmental crimes. Unlike in the UK, where administrative agencies do not generally have sanctioning powers⁴⁵, many other European countries

⁴² See points 103 to 113. In point 108 he also cites the subsidiarity principle in support of this argument. His view is in line with that of Advocate General Ruiz-Jarabo Colomer in Case 176/03, points 83 to 87, but this issue was however not examined by the ECJ in that case. Their view is not in line with the approach taken by the Constitutional Treaty which allows the Community to establish specific offences and penalties to ensure the effective implementation of a Union policy [Article III-271 (2)].

⁴³ Explanatory Memorandum, 2007/0022 (COD) p.2.

⁴⁴ See for example Pagh, above n. 22.

⁴⁵ In his advice to the British government in relation to corporate regulatory non-compliance, Richard Macrory called for sanctioning powers to be given to regulators in the case of non serious violations,

apply administrative sanctions in the environmental field (e.g. the Netherlands mainly applies administrative sanctions).

Administrative and Civil v. Criminal Sanctions

The main regulatory body in Member States in the environmental field – e.g. the Environment Agency - has the technical expertise to investigate and, when appropriate, to bring an administrative action or prosecution for alleged breaches of environmental law. This technical expertise is lacking in the courts. The range of sanctions that can be applied by those regulatory bodies, which includes the revocation of licences to operate, the payment of very high fines, or the shutdown of an installation, can arguably be as powerful a deterrent as criminal sanctions. The revocation of a licence to operate or the shutdown of an installation, in particular, are extremely serious and are equivalent to the corporate ‘death sentence’. Some of those sanctions are criminal (repressive) in nature and are sometimes called quasi-criminal sanctions (*Ordnungswidrigkeiten*)⁴⁶. The agencies may apply those sanctions themselves without the need of recourse to a court, the rules of administrative procedure are simplified and the case can thus be handled more speedily and effectively. As regards civil law many jurisdictions accept the application of *punitive* damages in civil cases which can effectively raise the damage awards to a level that could even drive corporations out of business.⁴⁷ Therefore the effective application of both administrative and civil sanctions would seem sufficient to ensure compliance with environmental regulations without the need for criminal sanctions. This is one of the reasons for some Member States, especially those that have been applying a more flexible

instead of heavy reliance on criminal prosecutions which is the current practice. Macrory, R. “Regulatory Justice: Making Sanctions Effective” Final Report, November 2006. available at http://www.cabinetoffice.gov.uk/regulation/documents/pdf/macrory_penalties.pdf hereinafter ‘Macrory Report’.

⁴⁶ Austria and Germany for example apply those “repressive fines” in their legal systems. Even though those countries do not recognise the criminal liability of corporations, they may apply those repressive sanctions against them.

⁴⁷ See Cohen, A. Mark, ‘Criminal Law: Environmental Crime and Punishment: :Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes’ [1992] 82 Journal of Criminal Law & Criminology.

approach to the enforcement of environmental regulations (such as the Netherlands), to remain recalcitrant where environmental criminal law is concerned⁴⁸.

However, it must be remembered that the ECJ developed a threefold requirement for sanctions: they must be “dissuasive, effective, and proportionate”⁴⁹. Even though, as has been argued, administrative and civil law could be effective and, possibly even, dissuasive enough, one must take account of the requirement that sanctions must be proportional to the offence. Severe *administrative* sanctions, for example the revocation of licences to operate, the payment of very high fines, or the shutdown of an installation, could be challenged on this basis⁵⁰. The European Court of Human Rights (ECtHR) held that in such cases the sanction could be considered *criminal* in nature and would therefore require the procedural guarantees of Article 6 ECHR⁵¹. The Court applies the following criteria when deciding whether a sanction is “criminal in nature”: 1) Does the text defining the offence belong to criminal law? 2) the nature of the offence 3) the nature and severity of the penalty that the person concerned risked incurring, having regard to the object and nature of Article 6⁵². The ECtHR is thus prepared to consider certain

⁴⁸ *Study on Measures other than Criminal Ones in Cases where Environmental Community law has not been respected in the EU Member States*, Summary Report. September 2004. On the other hand, in the UK, Ireland and Denmark the administrative agencies do not have the power to apply sanctions, so infringements of environmental regulations are adjudicated by a criminal court. Available at: http://ec.europa.eu/environment/crime/pdf/ms_summary_report.pdf

⁴⁹ See for example *Commission v Greece* C-68/88 ECR 1989 and *C-326/88 Hansen* ECR 1989.

⁵⁰ In the UK the Environment Agency has not very frequently sought to apply those serious sanctions for environmental offences. Regarding waste management licences, there were only 37 revocations between 1996-2003 and in some cases the revocation was because the licence holder had ceased to exist or failed to pay fees. Bell, S. and McGuillivray, D., above n. 25, p. 305.

⁵¹ *Öztürk v. Germany* (Application no. 8544/79), European Court of Human Rights, 1984, available at echr.coe.int. The Court stated that “if the Contracting States were able at their discretion, by classifying an offence as “regulatory” instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7), the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention”. (Par. 49) See also “Study on Measures other than Criminal Ones in Cases where Environmental Community Law has not been Respected in the EU Member States”, above n. 48, p. 14.

⁵² *Engel and others v the Netherlands* [1976] ECHR, paragraph 82. This test was replicated in the *Öztürk* case, *supra*.

regulatory or disciplinary offences as “criminal in nature” depending on the seriousness of the offence and the nature or severity of the sanction applicable. Therefore the decriminalisation of certain types of serious environmental offences, or the application of heavy penalties under the administrative procedural law of the states members of the Council of Europe, could be held to contravene Article 6 of the Convention⁵³. It is clear that the Court wishes to strike a balance between effectively applying administrative sanctions on the one hand, and the need of observing the rules of fair trial, the rule of law and other procedural guarantees of the accused on the other.

Another fundamental aspect of administrative law, which sets it in contrast with criminal or civil law, is that there is no separation between the authorities entitled to issue administrative permits or licences, and the enforcement and sanctioning roles. Therefore the authority that issues the permit or licence (executive powers) is the same as the one responsible for adjudication of disputes, which raises questions regarding the impartiality of those authorities. What is more, the authority who investigates environmental crimes is also the one that applies the penalties.⁵⁴ A corollary of this lack of separation of powers is that the regulatory agencies can become ‘captured by’ the industries they intend to regulate⁵⁵. Corruption remains a very relevant issue.

Criminal law has an additional procedural guarantee which is the possibility of public participation in court proceedings⁵⁶. That is not the case in the administrative and civil law systems which involve proceedings closed to the public. Closed proceedings lack the

⁵³ See paragraph 49 of *Öztürk*, above n. 51, where the Court stated that “*The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line, but it does not follow that the classification thus made by the States is decisive for the purposes of the Convention.*”

⁵⁴ “Study on Measures other than Criminal Ones in Cases where Environmental Community Law has not been Respected in the EU Member States”, above n. 48, p. 52.

⁵⁵ Lee, M.. *EU Environmental Law: Challenges, Change and Decision-Making*, Hart Publishing, (2005) p. 53.

⁵⁶ “Study on Measures other than Criminal Ones Environmental Community Law has not been Respected in the EU Member States”, above n. 48, p. 58.

necessary transparency that would be required in cases of serious breaches of environmental law and where the defendants may face heavy penalties. This has an additional shortcoming in the case of corporations, which are particularly sensitive to naming and shaming, since closed proceedings could diminish their incentive for compliance. Indeed, the stigma of the offender, one crucial element in the deterrence theory, is absent when the public is not able to participate in the proceedings.⁵⁷

As regards civil law the main criticism is that it depends on the injured parties to bring a claim for compensation, therefore leaving the environment as such unprotected. A polluted atmosphere or a dead fish does not have standing to bring court cases – it requires sympathetic individual humans or typically, charities, to act⁵⁸. Not in all legal systems civil law allows the use of the public apparatus for the investigation of an offence in relation to a claim for monetary compensation. Therefore civil law alone is not effective in deterring offenders.⁵⁹

For all the reasons alluded to above it is suggested that criminal sanctions are necessary in the environmental field. Not necessarily because criminal sanctions are more effective or dissuasive than civil or administrative ones, but because in the case of *serious* breaches of environmental law, the response of the state must be to impose a *serious* sanction (in line with the “fair labelling” principle⁶⁰). The application of this serious sanction calls for

⁵⁷ Yet in the UK context, Richard Macrory argued in relation to the stigma of criminal sanctions that “*Criminal convictions for regulatory non-compliance have lost their stigma, as in some industries, being prosecuted is regarded as part of the business cycle. This may be because both strict liability offences committed by legitimate business, and the deliberate flouting of the law by rogues is prosecuted in the same manner with little differentiation between these two types of offender*” above ‘Macrory Report’ n. 45, p. 16.

⁵⁸ The 1998 Aarhus Convention is considered a champion in relation to establishing a right to access to justice in national courts to non-state actors in environmental matters.

⁵⁹ But see Dir 2004/35 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage [2004] OJ L 143/56. The new Environmental Civil Liability Directive represents a move away from an emphasis on monetary compensation, to preventive or remedial action aimed at rectifying actual or threatened environmental damage, and from private enforcement to the enforcement role placed on competent authorities. See Hedemann-Robinson, M. *Enforcement of European Union Environmental Law: Legal Issues and Challenges*, Routledge-Cavendish, 2006, p.514.

⁶⁰ See Ashworth, above n. 28, p. 88.

all the necessary procedural guarantees to the defendant to be present, which are generally lacking in the case of civil and administrative procedures. Clearly this does not necessarily mean better protection for the environment. Therefore it is necessary that all sanctions (criminal, administrative and civil) are applied in the environmental field and only serious violations should be criminalised - criminal law as a *ultimum remedium*. As was put in the IMPEL Network Report:

*“The central question is not so much whether a legal system should choose either for administrative or criminal law protection of the environment, but more like how a correct balance between the two systems can be struck.”*⁶¹

This approach ensures that prosecutions are not trivialised and the role of the criminal law as a *threat system*⁶² is maintained. If the main role of criminal law in the environmental field is deterrence, that aspect may be worth the cost of using less efficient criminal prosecutions⁶³. In this sense, the Commission’s proposal for a directive is correct in only envisaging criminal sanctions for the more serious breaches of environmental law committed intentionally or with serious negligence, yet reserving to Member States the option of adopting stricter standards (e.g. strict liability).

IV. Corporate Criminal Liability in the EU Member States

One of the areas in which Member States have significantly divergent approaches is in regard to the possibility of holding corporations themselves criminally liable, as opposed to their directors, managers and employees. Since corporations are the main polluters and

⁶¹ IMPEL Network Report, above n. 34, p. 85.

⁶² See van den Haag, Ernest, ‘The Criminal law as a Threat System’, [1982] *The Journal of Criminal Law & Criminology* vol. 73 n 2.

⁶³ The Commission also considers that the higher costs involved in criminal prosecutions than in administrative ones is not itself a disadvantage, since there may be fewer violations of environmental law and therefore fewer proceedings because of the deterrent effect of criminal sanctions. See Commission Staff Working Document, *Accompanying document to the proposal for a Directive on the Protection of the Environment through Criminal Law: Impact Assessment*, COM (2007) 51 SEC (2007) 161, hereinafter “2007 Directive Impact Assessment” p. 31.

are, in fact, responsible for the majority of environmental crimes,⁶⁴ the issue of corporate criminal liability is a crucial one to consider.

Denmark, Finland, the Netherlands and the United Kingdom are familiar with the criminal liability of corporate entities⁶⁵. The reasoning behind the defence of the value of corporate criminal liability is primarily twofold: one reason is pragmatic, since the work of the prosecution is facilitated by not having to single out the individuals responsible for the crime inside the corporation or to prove their *mens rea* – the sanction is applied against the corporation itself⁶⁶. The other reason would be that crimes committed by company directors and employees should be attributed to the corporation as a whole, since generally there must have been an element of organisational or systematic failure⁶⁷ to prevent the crime from happening in the first place. It thus requires that companies introduce preventive mechanisms to control and prevent violations of criminal law.

Nevertheless the corporation clearly has “no body to kick or soul to damn”⁶⁸ and only in legal fiction it would be possible to hold corporations criminally liable, so it was not until the 1970s that the House of Lords famously developed the *identification theory*⁶⁹ (or “alter ego” theory) in the *Tesco Supermarkets* case.⁷⁰ In this case, the House of Lords held that only high ranking corporate officials (“the directing mind” of the company) could trigger the criminal liability of the corporation as whole. The legal principle

⁶⁴ Situ, Y. and Emmons, D., *Environmental Crime: The Criminal Justice System’s Role in Protecting the Environment* (Thousand Oaks: Sage, 2000) p.4. Yet they point out that certain industries are more likely to commit environmental crimes, for example oil companies and the chemical and petrochemical industries.

⁶⁵ IMPEL Network Report, above n. 34, p. 15.

⁶⁶ Dine, J. and Koutsias, M. *Company Law* (6th ed. Palgrave 2007) p. 40.

⁶⁷ F McAuley and J. P. McCutcheon, *Criminal Liability*, Dublin (2000) p. 379.

⁶⁸ Coffee, John, “‘No Soul to Damn: No Body to Kick’: an Unscandalized Inquiry into the Problem of Corporate Punishment” [1981] *Michigan Law Review*, 79 at 386.

⁶⁹ The identification theory was “created” by the opinion of Viscount Haldane in *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC.

⁷⁰ *Tesco Supermarkets Ltd v Natrass* (1972) AC 153.

developed had the effect of equating the actions of the company's top officials to actions of the company itself, since "the state of mind of these managers is the state of mind of the company and should be treated by law as such."⁷¹

The approach of the House of Lords was however quite restrictive. It was held that only the conduct of the "board of directors, the managing director and perhaps other superior officers" could trigger corporate liability⁷². This has become known as the "controlling officer" test, and it can be criticised for the prosecutorial difficulties involved in achieving a successful conviction of companies – indeed, it will entail a great deal of effort for the prosecution to investigate the degree of fault that may be attributed to senior managers, especially given that their actions are not normally under the supervision of others⁷³. This problem is further complicated, as Coffee points out, since "in the modern decentralised firm, with operations spanning continents and a range of markets, decisions about whether or not to obey the criminal law may be made at all levels"⁷⁴. Coffee also argues that the identification theory is particularly unhelpful in triggering the liability of corporations in relation to environmental crimes, pointing out that in modern firms with decentralised decision-making, the decision to commit environmental offences occurs principally at the *middle to lower* management levels⁷⁵. In fact, corporate directors tend to decentralise or delegate decision-making to lower management levels specifically in order to prevent themselves, as well as the corporation, from being subjected to criminal prosecution. Yet Coffee's argument may not apply in the case of environmentally-sensitive industries (for example the pulp or waste transport industries) where decisions that directly affect the environment are frequently made at the higher managerial levels.

⁷¹ *HL Bolton (Engineering) Co. Ltd v T.J Graham & Sons Ltd*. [1957] 1QB 159 at 172.

⁷² *Tesco Supermarkets*, above n. 70.

⁷³ Slapper, Gary and Tombs, Steve. *Corporate Crimes* (Longman, 1999) p. 31.

⁷⁴ John Coffee, "Corporate Criminal Liability: an Introduction and Comparative Survey" in *Criminal Responsibility of Legal and Collective Entities*, Max Planck Institute, 1999 pgs. 16/17.

⁷⁵ "chief executive officers simply are not organisationally positioned to make fast-paced decisions as to whether to pollute local streams or gateways, or release pollutants into the air, or otherwise environmental rules or regulations" Ibid.

In continental Europe, while the Netherlands followed the UK's approach in 1976, Finland did not recognise the criminal liability of corporations until 1995. France has started to apply corporate criminal sanctions since 1994⁷⁶ with the reform of its Napoleonic Criminal Code, though its initial approach was only to allow the liability of corporations if each criminal provision explicitly stated that it applied to corporations. The more modern approach is to consider a corporation criminally liable if an element of organisational or systematic failure of the corporation can be identified, regardless of the attribution of individual fault⁷⁷. This alternative overcomes some of the evidentiary difficulties of the English "controlling officer" test.

The other EU countries surveyed by the Commission adhere to the principle of "*societas delinquere non potest*" but, as mentioned above, they have established other forms of sanctioning enterprises. For example Austria has since 1987 adopted a special provision in its penal code that enables the application of criminal sanctions against legal persons: confiscating illegal profits⁷⁸. In its turn, Sweden applies a corporate fine as an extra sanction, which can be imposed on *legal persons* in the case of a crime with gross violation of entrepreneurial duties⁷⁹. In Germany, corporations may be compelled to pay administrative fines (*Geldbussen*) if there is a breach of certain administrative regulations (*Ordnungswidrigkeiten*). This system of administrative criminal law is also applied by other EU countries, such as Portugal and Austria.

Both the previous March 2001 and the more recent February 2007 Commission proposals for a directive on the protection of the environment through criminal law fall short of envisaging a mandatory requirement on Member States to introduce criminal sanctions

⁷⁶ French *Nouveau Code Pénal* (1994).

⁷⁷ In Australia, the concept of a "corporate culture" that instigates the commission of crimes may trigger the criminal liability of corporations. See Coffee, above n. 74.

⁷⁸ IMPEL Network Report, above n. 34, p. 15.

⁷⁹ *Ibid.*

against corporations⁸⁰. So the Commission would allow Member States to retain their restrictive approaches if otherwise they would need to bring about fundamental changes to their legal system.⁸¹ One commentator suggested that this shows that the Commission may lack faith in the use of criminal sanctions.⁸² It is certainly true that it has not yet been proved that *corporate* criminal liability (as opposed to holding the corporation's managers, employees or shareholders themselves criminally liable)⁸³ could not be just as effective as - or more effective than - criminal law in controlling corporate behaviour. It is also contended that other systems for sanctioning corporations, for example civil law, might be more effective than criminal law.⁸⁴ Yet if the Commission aims to consistently harmonise environmental criminal law in Member States such disparate approaches in relation to corporate liability would also need to be approximated.⁸⁵

This problem is partially circumvented with the new proposal for a directive which foresees specific levels of fines (not necessarily criminal) for serious environmental offences committed by corporations. However, as suggested there are some practical implications should one Member State decide to introduce an *administrative* €1.500.000 fine and another a *criminal* €1.500.000 fine⁸⁶ for the same offence, for example. Since

⁸⁰ Those proposals followed the same approach of the Council of Europe Convention on the Protection of the Environment through Criminal Law, article 9, par. 3.

⁸¹ Explanatory Memorandum, COM (2007) 0022, p. 8.

⁸² Faure, M., above n. 18, p. 23.

⁸³ *Individualists* argue that criminal sanctions provide a strong deterrent if applied against the company's managers, employees or shareholders, rather than the corporation itself.

⁸⁴ See Khanna, 'Corporate Criminal Liability: What purpose does it serve?' [1996] Harvard Law Review 1109, 477. He argues that *civil* corporate liability would be more effective than criminal.

⁸⁵ For a different view see Martin Hedemman-Robinson, who argues that the individual criminal liability of the company's directors, managers and employees would provide sufficient deterrent. *Enforcement of European Union Environmental Law: Legal Issues and Challenges*, Routledge-Cavendish, 2006.

⁸⁶ In order to be effective fines must be calculated taking into account the seriousness of the offence and the likelihood of detection. The maximum fine envisaged in the February 2007 proposal for a directive for certain environmental crimes committed intentionally and that causes death or serious injury of a person is €1.500.000. It is generally recognised that low fines are applied by the courts in environmental cases. Even though over-deterrence through very heavy could be seen as counter-productive in the case of socially and economically useful activities, fines must be to a high level that cannot be simply a cost of doing business. As shown in the 'Macrory Report', the largest fine handed

very high fines might potentially drive corporations out of business, this would call for stronger procedural guarantees than are found in administrative procedure. This problem is further complicated by the fact that the grounds for judicial review of administrative decisions can be very limited in some jurisdictions, which means that the defendant might not ultimately have access to a Court and to all the procedural guarantees available in Court proceedings⁸⁷. Yet it is likely that all things being equal corporations would still prefer an administrative fine (despite the lower procedural guarantees of the administrative procedure) than a criminal one, due to the stronger stigma and higher publicity attached to a criminal prosecution, not to mention the corporate power to 'influence' administrative decisions. Therefore the implementation by Member States of Article 7 of the new proposal for a directive will not necessarily mean that sanctions against corporations would be evenly applied or that they will have similar deterrent effects, for similar environmental crimes within the EU.

If the Commission wishes to take the problem of corporate environmental crimes seriously, criminal sanctions would need to be imposed on corporations themselves. This is not to rule out the possibility of also holding the corporation's managers, employees and shareholders criminally liable. Yet the difficulties in identifying who the agents responsible for the crime are, and the tendency of corporations to harbour those agents or to conceal the crime, means that prosecutions might not be effective unless the corporation itself is held responsible. Thus, in order to ensure the effective application of criminal sanctions in the corporate context, the EU Member States could be required to recognise the criminal responsibility of corporations and that the identification of an element of organisational or systemic failure in the corporation would be sufficient to trigger its criminal liability, regardless of the individual fault of any of its managers or

down for a health and safety offence in the UK was £15 million. Even though it was high in absolute terms, it represented five percent of after-tax profits and less than one per cent of annual revenues of the company. See above n. 45, p.21.

⁸⁷ In the UK the grounds for judicial review of administrative decisions are a) illegality b) irrationality and c) procedural impropriety. Procedural impropriety would not seem to cover the lower procedural guarantees in administrative procedure if the authorities acted within the limits permitted by law. *Judicial Review: A Short Guide to Claims in the Administrative Court*, House of Commons, Research Paper 0644, 2006, available at <http://www.parliament.uk/commons/lib/research/rp2006/rp06-044.pdf>

employees⁸⁸. But since many EU member states still do not apply criminal sanctions against corporations, it is understandable that the Commission is hesitant to push Member States to adopt such radical reforms.

V. Could the harmonisation of environmental criminal law improve the levels of environmental protection in the EU?⁸⁹

The ECJ decision of 13 September 2005 in Case 176/03 has finally established that even though the Community does not have competence in criminal matters as such, the Community institutions may require Member States to introduce criminal sanctions in the implementation of EC environmental legislation⁹⁰. This is in line with the case-law of the ECJ establishing that Member States must introduce sanctions which are dissuasive,

⁸⁸ The US applies a system of vicarious liability and an act by an employee may trigger the criminal liability of the corporation.

⁸⁹ Even though the focus of this paper is on the European Union context, there is a scope for the harmonisation of environmental criminal law at the international level. Several international conventions on the protection of the environment contain “penal clauses” (e.g. Basel and CITES), but there are obvious difficulties in securing the enforcement of those obligations under those international conventions. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, 1990, the importance of introducing criminal sanctions for the protection of the environment was highlighted in Resolution 45/121 of 14 December 1990. Also article 26 of the 1954 International Law Commission’s (ILC) Draft Code of Offences Against Peace and Security of Mankind deals with environmental crimes; article 19 (3) (d) adds that “*a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment*” could constitute an international crime, such as “*massive pollution of the atmosphere and the high seas.*” Some commentators have then argued that international environmental crimes (sometimes referred to as ‘ecocide’) must be introduced to the Rome Statute as part of the International Criminal Court’s jurisdiction. See e.g. Mark Gray, ‘The International Crime of Ecocide’ (1996) California Western International Law Journal 26.

⁹⁰ Commission v Council C-176/03 [2005] ECR I – 7879, paragraphs 47 and 48. Despite the Commission’s wide interpretation of the ECJ decision, most Member States have only been prepared to accept its application to the environmental field. In its November 2005 Communication, the Commission inferred from the judgement a general competence to harmonise criminal law in many other EU policy-areas, and has been of the position that at least other eleven first and third pillar instruments have been adopted under the wrong legal basis (*Communication from the Commission to the European Parliament and the Council on the implications of the Court’s judgment of 13 September 2005*, Brussels COM (2005) 583. Even though a final answer to this question is expected to be answered by the ECJ in the *Ship-Source Pollution* case, it would be difficult to argue against Community competence in criminal matters at least in the case of the other “essential objectives” of the Community set out in articles 2 and 3 EC. The Commission’s position on this point was held to be correct by Advocate General Mazák in Case-440/05 (pending), see in particular points 97 and 98.

effective and proportionate⁹¹. The Court has therefore annulled a framework decision of the Council on the protection of the environment through criminal law under the third pillar. As a consequence of that judgment the Commission has adopted a new proposal for a directive on the protection of the environment through criminal law under the first pillar in February 2007⁹². Even though after this ruling it is clear that the Community has a limited competence in criminal matters - that is, in so far as requiring Member States to introduce criminal sanctions for the protection of the environment in the EU Member States⁹³ - it remains to be seen whether the Council and Parliament will finally adopt, under the co-decision procedure⁹⁴, the Commission's proposal. It is also possible that this proposal for a directive will not survive the ECJ's ruling in the *Ship-Source Pollution* case⁹⁵, in which the Court is expected to rule on the question of whether the Community has competence to establish specific criminal offences or penalties⁹⁶.

Nevertheless, it is not only the institutional aspects of the Community's competence in criminal matters which are the cause of controversy. A further point of controversy has already been discussed, that is, whether criminal sanctions are effective or necessary in the environmental field. A second controversial question to be answered is whether the *harmonisation* of those environmental criminal sanctions could lead to the improvement of environmental protection in the EU. In the Report of an International Meeting of

⁹¹ See footnote 20 above.

⁹² 2007/0022 (COD).

⁹³ The March 2001 proposal for a directive referred to an annex of several pieces of EC environmental legislations for which Member States would need to introduce criminal sanctions in their legal systems. The February 2007 proposal, following of the same approach of the 1998 Council of Europe Convention and the Council's annulled 2003 Framework Decision, establishes specific environmental offences which are not necessarily violations of EC environmental law, but violations of national environmental law.

⁹⁴ Legislative measures under article 175 require co-decision procedure, giving the Parliament stronger powers in decision-making. The co-decision procedure was introduced by the TEU and the procedure was simplified under the Treaty of Amsterdam 1999.

⁹⁵ Case C-440/05 (pending).

⁹⁶ See the House of Lords 42nd Report of Session 2005-06, European Union Committee, "The Criminal Law Competence of the European Community: Report with Evidence" 28 July 2006.

Experts on the use of criminal sanctions for the protection of the environment (domestically, regionally and internationally) that took place in Portland, Oregon, United States in March 1994⁹⁷, the advantages of regionalisation of criminal sanctions for the protection of the environment were found to be:

- a) the likelihood of being able to reach agreement on common definitions of the elements of the offences
- b) the greater deterrent effect in relation to transboundary conduct
- c) the contribution towards achieving greater consistency in legal provisions; and
- d) the existence of regional extradition and mutual assistance in criminal matters arrangements which could contribute to effective investigation and prosecution

Point a) implies that it is easier to achieve harmonisation at the regional than at the international level, where agreement on the common definitions of the elements of the offences is less likely to be found. Points b) and c) are closely related: if there is greater consistency among the legal provisions of the Member States, it will be more difficult for eco-criminals to cross borders and remain unaffected. Point d) is extremely important in so far as it relates to the effective investigation and prosecution of crimes, but this is a matter that can be properly dealt with under the third pillar (intergovernmental) of the European Union⁹⁸

The Commission itself identifies two main advantages it claims may ensue from the *harmonisation* of environmental criminal law under the first pillar: 1) the improvement of

⁹⁷ The Report can be found in the website of the International Centre for Criminal Law Reform & Criminal Justice Policy at the University of British Columbia at the following link: <http://www.icclr.law.ubc.ca/Publications/Reports/Portland2.PDF>

⁹⁸ The Commission acknowledges that certain matters, such as extradition agreements, still belong to the third pillar competence. See for example the Commission's 2003 proposal for a Framework Decision on ship-source pollution, which the Commission adopted to complement its proposal for a directive on ship-source pollution. See Comte, F. 'Protection of the Environment through Criminal Law: Destiny of the Various European Union's Initiatives' in *Europe and the Environment* ed. Marco Odina (2004) p. 43.

the implementation deficit of EC environmental law 2) the creation of a level-playing field which would prevent some countries from becoming ‘environmental crime havens’.

The implementation deficit of EC environmental law

According to Article 1 of the 2007 Proposal for a Directive, the purpose of the directive is to ensure a more effective application of Community law on the protection of the environment. The lack of satisfactory implementation of EU environmental law was one of the facts that triggered the Commission’s proposal. In the explanatory memorandum it states that:

*“Experience has shown that the sanctions currently established by the member states are not always sufficient to achieve full compliance with Community law. Not all member states provide for criminal sanctions against the most serious breaches of Community law protecting the environment”.*⁹⁹

Françoise Comte points out that in 2001, complaints for infringements of EC environmental law amounted to over a third of the total number of complaints and infringement cases that the Commission handles each year.¹⁰⁰ The Fourth Annual Survey on the implementation and enforcement of Community environmental law (2002)¹⁰¹ also shows that in 2002 complaints for breaches of environmental law accounted for over one third of all infringement cases investigated by the Commission.¹⁰² As a result of those complaints, the Commission brought 65 cases against Member States before the Court and issued 137 reasoned opinions (on the basis of Article 226 EC). Even though it is very

⁹⁹ Explanatory Memorandum, *Proposal for a Directive on the Protection of the Environment through Criminal Law*, 2007/0022 (COD).

¹⁰⁰ Comte, F. ‘Protection of the Environment through Criminal Law: Destiny of the Various European Union’s Initiatives’ in *Europe and the Environment* ed. Marco Odina (2004) p. 43.

¹⁰¹ Commission Staff Working Paper, SEC 2003 804.

¹⁰² The 6th Annual Survey on the Implementation and Enforcement of Community Environmental Law (Dec 2004) also shows this consistent pattern of one third of all complaints accounting for breaches of EC environmental law. See Martin Hedemman-Robinson, above n. 85, p. 42.

difficult to find reliable figures on the extent of environmental crime in the EU, given that those activities are generally prohibited and clandestine, the actual extent of environmental crimes must be very high¹⁰³.

The Commission relies heavily on third parties to bring complaints to its attention (e.g. injured parties, NGOs). The Commission must institute proceedings before the ECJ under the Article 226 procedure against the Member State for its failure to implement EC environmental law, rather than the individual polluter. This indirect application of sanctions to offenders is arguably not very effective to ensure compliance with EC environmental law¹⁰⁴. But the procedure introduced under Article 228 EC by the 1992 Maastricht Treaty, which allows the Commission to seek financial penalties against Member States that fail to comply with an Article 226 judgement, can indeed be a strong incentive for compliance.¹⁰⁵ On the other hand, the Commission has discretion as to whether to institute proceedings under articles 226 and 228 EC.¹⁰⁶

It is not clear whether Member States are required under the Commission's proposals for a directive not only to introduce but also to *apply* criminal sanctions for serious violations of EC environmental law¹⁰⁷. This has obvious implications to the implementation of the directive. Commenting on the March 2001 proposal, Michael Faure argued that it does not leave room for states to apply sanctions other than criminal ones for the crimes listed

¹⁰³ For a discussion on the figures and extent of environmental crimes in Europe see Comte, F., 'Environmental Crime and the Police in Europe: A Panorama and Possible Paths for Future Action' [2006] EELR 190.

¹⁰⁴ See Lee, above n. 55, p.55.

¹⁰⁵ See Case 304/02 of 12 July 2005, in which the European Court of Justice (ECJ) ordered France to pay an unprecedented sum of € 20 million and a periodic 6-month penalty of € 57,761,250 running from that day, for failing to comply with a 1991 Court ruling on serious failings in its enforcement of fisheries rules.

¹⁰⁶ Davies, P. *European Union Environmental Law: an Introduction to Key Selected Issues*, Ashgate (2004) p. 83. Member States may bring infringement procedure under article 227 EC against other Member States for their failure to implement EC environmental law, but this procedure is rarely used in practice due to political reasons.

¹⁰⁷ The Council of Europe Convention on the Protection of the Environment through Criminal Law allows Member States to *apply* sanctions other than criminal ones for violations of the environmental offences established in the Convention.

in article 3¹⁰⁸. It is argued that the *raison d'être* of the proposed directive must be to force Member States to introduce and *apply* criminal sanctions, and a more differentiated approach applying both criminal and administrative sanctions would not be possible. Also Corstens asserts that the 2001 Commission's proposal left no room for Member States to deal with offences committed intentionally or with serious negligence by means other than the criminal law¹⁰⁹. According to Maria Lee, such an approach "*would be a major step back for environmental law, flying in the face of decades of research on the flexibility of effective law enforcement*"¹¹⁰ and could "*ultimately (...) be corrosive of the stigmatising power of the criminal law*"¹¹¹ However she points out that "*sole reliance on criminal law is probably not a necessary interpretation of the Commission's proposal, and is certainly nowhere stated.*"¹¹² The February 2007 proposal for a directive states that "Member States shall ensure that the commission of the offences referred to in Articles 3 and 4 is *punishable* by effective, proportionate and dissuasive criminal sanctions"¹¹³ (emphasis added), which seems to allow flexible implementation by Member States as regards the choice of applying either administrative or criminal sanctions in each particular case¹¹⁴.

Another potential problem that may arise from the implementation of the Commission's proposal for a directive is the existing variations of the criminal procedure laws and legal enforcement practices in Member States. Many Member States are still governed by the opportunity principle and there is no duty to prosecute (e.g. Belgium, the UK and the

¹⁰⁸ Faure, Michael, above n. 17, p.27.

¹⁰⁹ Corstens, G.J.M., 'Criminal law in the first pillar?' (2003) European Journal of Crime, Criminal Law and Criminal Justice, p. 137.

¹¹⁰ Lee, above n. p. 72.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ 2007/0022 (COD), art 5 par. 1.

¹¹⁴ In most EU Member States the cumulative application of administrative and criminal sanctions is forbidden as a violation of the principle of *non bis in idem*.

Netherlands).¹¹⁵ In those countries, the prosecution may decide to be tolerant of minor technical breaches of environmental law or, where the chances of securing a conviction are low, it could be decided that it is not realistic or practical to bring a prosecution¹¹⁶. It could be argued that the discretion as to whether to prosecute may diminish levels of compliance with environmental regulations if prosecutions are rare. However the ECJ has consistently held that a failure to prosecute a violation of Community law could constitute a breach of Article 10 EC and a Member State can be challenged before the Court for its failure to prosecute¹¹⁷. Moreover, in some EU Member States individuals may not bring a prosecution (e.g. Portugal, Germany), which could mean weaker enforcement in those states.

There are presently a number of initiatives by the Council under the third pillar envisaging the approximation of Member States' law in specific areas of criminal procedure¹¹⁸. Since under the Constitutional Treaty the pillar structure of the European Union would be abolished, approximation of both substantive and procedural criminal law would be at the Community level (article III-270 and III-271 CT).¹¹⁹ But it would certainly entail a great effort on the part of the Commission if it wished to approximate all the aspects of Member States' criminal procedure that could affect the proper implementation of EC environmental (criminal) law.¹²⁰

¹¹⁵ IMPEL Network Report, above n. 33, p.60.

¹¹⁶ Op. cit. p. 86. This prerogative of the prosecution may be limited in some jurisdictions e.g. in Belgium a circular of the attorneys general provides that dismissals of serious violations of environmental law could not take place for opportunistic reasons.

¹¹⁷ Case C-265/95, *Spanish Strawberries*.

¹¹⁸ E.g. Framework Decision on the Standing of Victims in Criminal Proceedings, O.J. 2001, L 82/1 and Framework Decision on confiscation of crime-related proceeds, instrumentalities and property, O.J. 2005, L. 2005. See Weyembergh, A. 'Approximation of Criminal Laws, The Constitutional Treaty and the Hague Programme' in *Common Market Law Review* 42 2005 p.1569.

¹¹⁹ Treaty Establishing a Constitution for Europe (OJ 2004 C 310/1).

¹²⁰ There are many other documented difficulties faced by the Commission in ensuring that EC environmental law is properly implemented by Member States, for example the sharing of competence between the central government and the regions, which means that the Commission does not have to deal with only one piece of legislation but several ones. See Davies, above n. 106, p. 68.

The creation of a level-playing field

The approximation of the different approaches in Member States regarding environmental crimes is seen by the Commission as an advantage as it could provide a deterrent against transboundary crimes¹²¹. Many of the EU-15 Member States have introduced into their penal codes specific provisions on the protection of the environment: following the example of the German *Strafgesetzbuch* of 1980, Austria, Denmark, Finland, the Netherlands, Sweden and, more recently, Spain and Portugal have incorporated environmental offences into their penal codes.¹²²

However several studies¹²³ provide some evidence of the disparate approaches in relation to the constitutive elements and penalties applicable for environmental offences in all EU Member States.¹²⁴ As exemplified by Françoise Comte, a waste collector who knowingly and unlawfully disposed of waste oils into a wild forest, Member States have implemented Directive 75/439/CEE of the Council on waste oils in a completely different fashion. Under Portuguese Law, there would be a maximum fine of €2500; under Italian Law, a maximum fine of €10000 (or 4 times higher); and under French Law, the maximum applicable fine would be €75000, or 30 times higher. In its turn Belgian law applies for the same offence a maximum of 1 year imprisonment, whereas under Finnish Law a maximum of 6 years imprisonment is applied, and under Greek Law the maximum penalty is of 10 years imprisonment.¹²⁵

¹²¹ Explanatory Memorandum, Proposal for a Directive on the Protection of the Environment through Criminal Law, 2007/0022 (COD) p.3.

¹²² de Sadeleer, N. 'La Repression des Infractions en Matiere de Gestion de Dechets' in *Environmental Crimes in Europe: Rules of Sanctions*, ed. by Françoise Comte and Ludwig Kramer (2004).

¹²³ Particularly those organised by the Max Planck Institute and the Institute METRO (Maastricht European Institute for Transnational Legal Research), those of the group Hugle-Lepage, and those of the Unity of Comparative Law under the supervision of M Delmas-Marty.

¹²⁴ Bayle, M. 'Systems of Sanctions in the Field of Environmental Criminality', in *Environmental Crimes in Europe: Rules of Sanctions* (2004) p. 53.

¹²⁵ Comte, F. 'Crime Environnemental en Europe – Regles de Sanctions: Introduction Generale' in *Environmental Crimes in Europe: Rules of Sanctions* (2004) p. 9.

In its impact assessment accompanying the February 2007 proposal for a directive on the protection of the environment through criminal law,¹²⁶ the Commission shows the disparity in the choice of sanctions in Member States implementing the EC Regulation on the protection of species of wild fauna and flora¹²⁷ and EC Regulation 1013/2006 on shipments of waste. Regarding the trade in endangered species, the factor between the lowest defined maximum fine applied in Poland (€1.293) and the highest in the Netherlands (€450.000) is 348, and maximum prison sentences differ between 6 months in Luxembourg and 8 years in Lithuania, the Czech Republic and Slovakia¹²⁸.

The February 2007 proposal for a directive could correct the disparate approaches from Member States as regards the constitutive elements and level of sanctions applicable for environmental offences. It specifies levels of sanctions to be applied for specific offences¹²⁹. However, it remains to be seen from the outcome of the *Ship-Source Pollution* case whether the ECJ will consider that the Community has indeed the power to define specific criminal offences and the level of penalties. If the ECJ decides that the EC does have power in those areas, harmonisation could become a strong tool for preventing certain Member States from becoming pollution havens due to lax environmental

¹²⁶ Commission Staff Working Document, *Accompanying document to the proposal for a Directive on the Protection of the Environment through Criminal Law: Impact Assessment*, COM (2007) 51 SEC (2007) 161, p. 3.

¹²⁷ Council Regulation (EC) No. 338/97, Official Journal L 061.

¹²⁸ '2007 Directive Impact Assessment' above n.126, p. 17.

¹²⁹ Following the ECJ decision in case 176-03, some Member States stated that they would only be ready to accept "minimum maximum" penalties, that is, they may apply in practice lower sanctions than the threshold levels established by the EC.

regulation,¹³⁰ especially in view of the two most recent enlargements of the EU eastwards (May 2004 and January 2007)¹³¹

Also, on the level of judicial cooperation, harmonisation would facilitate the use of the European Arrest Warrant (EAW). Even though the EAW is based on the principle of mutual recognition (or ‘mutual trust’ in the European space) and therefore does not require ‘double criminality’ in the issuing and executing states¹³², the issuing of an EAW is only possible (unless the sentence has already been passed) for acts punishable in the issuing state by a custodial sentence or a detention order of at least twelve months. In the case of environmental crime, issuing the EAW without the condition of dual criminality requires that the offence is punishable in the issuing Member State for a maximum of at least three years imprisonment. The successful operation of the European Arrest Warrant, as well as other more recent similar developments in the area of European judicial and police cooperation in criminal matters (e.g. the European Evidence Warrant), could arguably be weakened by the present disparate sanctions presently adopted by Member States for implementation of EC environmental law.¹³³

VI. Conclusion

The harmonisation of environmental criminal law in the EU, as proposed by the Commission in its 2007 directive, could be a positive step forward to ensure that Member

¹³⁰ Even though according to the Law & Economics literature there does not seem to be a strong correlation between environmental regulation and business location generally (unlike taxes and wages), in the case of the highly polluting industries or those with high environmental costs this correlation is stronger (e.g. the pulp and petrochemical industries). See e.g. X Xu, ‘Do stringent environmental regulations reduce the international competitiveness of environmentally sensitive goods? A global perspective’ 27 *World Development* 1999, p. 1216.

¹³¹ Yet as pointed out by Martin Hedemann-Robinson, “intention” and “gross negligence”, for example, are not state-of-the-art concepts and there would be variations in the way the national Courts will apply them. Above n. 85, p. 517.

¹³² See Alegre S. and Leaf, M. ‘Mutual Recognition in European Judicial Cooperation: A Step too Far too Soon? Case Study – The European Arrest Warrant’, *European Law Journal*, (2004) 10.

¹³³ ‘2007 Directive Impact Assessment’, above n. 126, p. 14.

States criminalise serious breaches of EC environmental law. In this vein, it is suggested that criminal sanctions are necessary in cases of serious violations of environmental law. In that sense the Commission's initiative is correct in only requiring serious environmental violations to be criminalised. It was further suggested that if political difficulties could be circumvented, the Commission could have gone further to require Member States to introduce criminal sanctions against corporations.

As regards the prospects for harmonisation of environmental law it is far from clear whether it will improve the implementation deficit of EC environmental law. Even though the enforcement mechanisms available to the Commission under Article 226 EC to ensure compliance are arguably deficient, they are certainly much stronger than most other supranational institutions ever held to date. Therefore, it can be expected that the proposal to harmonise environmental criminal law under the first pillar may lead to positive results, even though the existing procedural criminal law and legal enforcement practices in Member States may still be an impediment to effective compliance.