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## **Towards Effective Implementation of the EU Environmental Crime Directive? The Case of Illegal Waste Management and Trafficking Offences**

Ricardo Pereira\*

*The adoption of the European Union (EU) Environmental Crime Directive in 2008 marks a significant step in the European Union's process of integration. The Directive is unique in creating a supranational legal framework for harmonizing environmental criminal law. Yet there are a number of deficiencies in the Directive which may compromise its effective implementation and enforcement by the Member States. Particularly noteworthy is that the Directive does not define specific types and levels of penalties or any rules on prosecution or jurisdiction. This article analyses the main features of the illegal waste management and trafficking offences and penalties under the Environmental Crime Directive and surveys the implementation of those offences by specific EU Member States. It aims to make a broader assessment of the consistency and effectiveness of the implementation of the Directive, assessing the implications that it may have on the enforcement of environmental law in the Member States.*

### **INTRODUCTION**

The increased cost of safe waste disposal has driven an export trade to many of the world's least developed countries, where there are often gaps and weaknesses in the regulatory framework applicable to the waste disposal sector.<sup>1</sup> Illegal waste shipments are widely thought to cross national borders easily, particularly in developing countries which have few inspection systems and technologies available.<sup>2</sup> This practice of 'waste dumping' has been condemned by some nongovernmental organizations (NGOs) as amounting to 'garbage imperialism'.<sup>3</sup> This problem is exacerbated in light of the increased costs of waste disposal in developed countries.<sup>4</sup>

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<sup>1</sup> T. Fröhlich *et al.*, 'Organised Environmental Crime in the EU Member States' (2003), at 3.

<sup>2</sup> C.W. Schmidt, 'Environmental Crimes: Profiting at Earth's Expense', 112:2 *Environmental Health Perspectives* (2004), A96, at A103.

<sup>3</sup> See, e.g., K.R. Stebbins, 'Garbage Imperialism: Health Implications of Dumping Hazardous Wastes in Third World Countries', 15:1 *Medical Anthropology* (1993), 81.

<sup>4</sup> There are estimates suggesting that while in the late 1980s the average cost of safe waste disposal in an OECD country was between US\$100 and US\$2,000, in Africa it was between US\$2.50 and \$50. See G. Hayman and D. Brack, 'Workshop Report: International Environmental Crime: The Nature and Control of Environmental Black Markets' (Royal Institute of International Affairs, London 1998), at 13; see also H.-J. Albrecht, 'The Extent of Organised Environmental Crime: A European Perspective', in: F. Comte and L. Kramer (eds.), *Environmental Crime in Europe: Rules of Sanctions* (Europa Law Publishing, 2004), 91; and T. Fröhlich *et al.*, n. 1 above.

Globally it is estimated that illegal trade and dumping of hazardous waste materials has an overall value of between US\$10 and 12 billion.<sup>5</sup> From that total it is estimated that organized crime involving environmental impairment generates revenues of between US\$ 1 billion and 2 billion annually through dumping of toxic waste.<sup>6</sup>

The so-called ‘eco-mafia’ in Italy in many ways personifies the worst forms of environmental criminality in Europe. Italy’s waste disposal contracts are notoriously controlled by criminal groups. According to the Italian authorities, 11 million metric tonnes of toxic and industrial waste are deposited annually in some 2,000 illegal domestic dump sites in local waterways or in the Mediterranean. Research by the Italian environmental NGO Legambiente on Italy’s eco-mafia shows a far higher than average incidence of recorded environmental crime in the traditional mafia strongholds of Campania, Puglia, Calabria and Sicily.<sup>7</sup> Among the 1,734 waste-related infractions recorded in Italy in 2002, 39 percent were committed in those four regions.<sup>8</sup> Not only in Italy but also in other European Union (EU) Member States several studies have shown the infiltration of criminal organizations into the waste disposal sector.<sup>9</sup>

The criminal offences under Article 3(b) and (c) of the 2008 EU Environmental Crime Directive<sup>10</sup> aim to improve the implementation deficit of specific EU waste legislation,<sup>11</sup> including Regulation 1013/2006 on shipments of waste,<sup>12</sup> as well as international environmental agreements which are binding on the Union legal order, particularly the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, which was adopted by the European Community in February 1994.<sup>13</sup> Significantly, the Basel Convention contains provisions requiring States to introduce penal measures as part of their enforcement strategies, that is, a requirement that State parties take ‘appropriate measures’ to ensure the application of the agreement and *punishment* of violators thereof. Specifically, Article 4.3 of the Basel Convention states that ‘the parties consider that illegal traffic in hazardous wastes or other wastes *is criminal*’.<sup>14</sup>

Although the ‘Ban Amendment’ to the Basel Convention is not in force, the EU has introduced a ban on the export of hazardous waste to non-OECD countries under

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<sup>5</sup> Ibid. See also C. Nellemann *et al.* (eds.), *The Environmental Crime Crisis: Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources: A UNEP Rapid Response Assessment* (United Nations Environment Programme and GRID-Arendal, 2014), at 19.

<sup>6</sup> See H.-J. Albrecht, n. 4 above.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> See T. Fröhlich *et al.*, n. 1 above; and T. Fröhlich *et al.*, *Organised Environmental Crime in a Few Candidate Countries* (2003); and Europol, *Threat Assessment 2013: Environmental Crime in the EU* (Europol, 2013), at 6.

<sup>10</sup> Directive 2008/99/EC of 19 November 2008 on the Protection of the Environment through Criminal Law, [2008] OJ L328/28 (‘Environmental Crime Directive’).

<sup>11</sup> European Commission, 29th Annual Report on Monitoring the Application of EU Law (2011), COM(2012) 714.

<sup>12</sup> Regulation 1013/2006 of 14 June 2006 on Shipments of Waste, [2006] OJ L190/1, Article 2.35.

<sup>13</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal (Basel, 22 March 1989; in force 5 May 1992) (‘Basel Convention’).

<sup>14</sup> Ibid., Article 4.3 (emphasis added).

Regulation 1013/2006.<sup>15</sup> Still, there is evidence of continuous non-compliance by a number of Member States with the Regulation.<sup>16</sup> Some Member States have not effectively prevented the illegal exports of hazardous waste for disposal or recovery to developing countries. For example, trade statistics suggest that much e-waste is still shipped from the EU to Africa.<sup>17</sup> Overall, it is estimated that illegal waste trafficking amounts to roughly 20 percent of all the waste shipments in the EU.<sup>18</sup> It is thus paramount for the EU Member States to implement the waste export ban to developing countries, particularly following the notorious incident in 2006 in which Trafigura exported waste from the Netherlands, causing the injury of thousands of people and environmental damage in Côte d'Ivoire.<sup>19</sup>

This article aims to assess the consistency and effectiveness of the implementation of the 2008 EU Environmental Crime Directive,<sup>20</sup> particularly on the implementation of the waste offences under Article 3(b) and (c) of the Directive. The article begins with a discussion of the implementation measures introduced by EU Member States to transpose the waste offences under Article 3(b) and (c) of the Directive, assessing in particular whether there are significant inconsistencies in the transposition. The article moves on to discuss whether the Member States have introduced 'effective, proportionate and dissuasive' criminal penalties for the implementation of the waste offences, as required under Article 5 of the Directive. This could provide the basis for the Commission to bring infringement proceedings against specific Member States or to advance the case for further harmonisation of environmental criminal law in the EU. The article then discusses the extent to which the Directive could affect prosecutorial discretion by requiring national authorities in the Member States to apply criminal penalties for violations of environmental offences in individual cases. The article ends with concluding remarks summarizing the main findings.

## THE CRIMINALIZATION OF WASTE OFFENCES IN THE EU

Following a major inter-institutional dispute over the correct legal basis for the EU to legislate in environmental criminal matters (see the *Environmental Crimes*<sup>21</sup> and *Ship-Source Pollution* cases<sup>22</sup>), a Directive proposal was presented by the European Commission in February 2007 for the harmonization of environmental criminal law.<sup>23</sup> The Environmental Crime Directive was finally adopted unanimously by the Council

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<sup>15</sup> European Environment Agency (EEA), *Waste without Borders in the EU? Transboundary Waste Shipments of Waste* (EEA, 2009), at 5.

<sup>16</sup> See Europol, n. 9 above.

<sup>17</sup> Directive 2002/96/EC of 27 January 2003 on Waste Electrical and Electronic Equipment (WEEE), [2003] OJ L37/24; and the recast Directive 2012/19/EU of 4 July 2012 on Waste Electrical and Electronic Equipment (WEEE), [2012] OJ L197/38.

<sup>18</sup> See EnviCrimeNet, 'Report on Environmental Crime' (2016), at 16, found at: <<http://www.envicrimenet.eu/EN/images/docs/envicrimenet%20report%20on%20environmental%20crime.pdf>>; and European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), 'IMPEL-TFS Enforcement Actions II: Enforcement of EU Waste Shipment Regulation' (28 April 2011), found at: <<https://www.politieacademie.nl/kennisenonderzoek/kennis/mediatheek/PDF/81477.pdf>>.

<sup>19</sup> 'Trafigura found Guilty of Exporting Toxic Waste', *BBC News* (23 July 2010).

<sup>20</sup> Environmental Crime Directive, n. 10 above.

<sup>21</sup> ECJ, Case C-176/03, *Commission v. Council*, [2005] ECR I-7879 ('*Environmental Crimes*').

<sup>22</sup> ECJ, Case C-440/05, *Commission v. Council*, [2007] ECR I-9097 ('*Ship-Source Pollution*').

<sup>23</sup> Proposal for a Directive of 9 February 2007 on the Protection of the Environment through Criminal Law, COM(2007) 51 ('2007 Environmental Crime Directive Proposal').

on 24 October 2008. The Commission argued that harmonization of environmental criminal law could help improve the implementation deficit of EC environmental legislation and provide a strong deterrent against environmental crimes within the EU.<sup>24</sup> However, the provisions on the minimum levels of maximum penalties, which were present in the original directive proposal were dropped in the final text, in line with the ECJ ruling in the *Ship-Source Pollution* case.<sup>25</sup>

Most Member States have implemented the Environmental Crime Directive by either amending their existing criminal and/or environmental legislation.<sup>26</sup> The choice of implementation of the Directive under national penal codes is consistent with the legislative practice in some Member States. Indeed, long before the adoption of the Directive, many EU Member States introduced into their penal codes specific provisions on the protection of the environment.<sup>27</sup> Following the example of the German *Strafgesetzbuch* of 1980, an amendment to which introduced a chapter entitled ‘Crimes against the Environment’,<sup>28</sup> Austria (1977/1997),<sup>29</sup> Spain (1996),<sup>30</sup> Portugal (1995),<sup>31</sup> as well as Denmark, Finland, the Netherlands and Sweden have incorporated environmental offences into their penal codes.<sup>32</sup> Some Member States have partially reformed their penal codes to incorporate, among others, environmental crimes – for example Austria and Sweden – while others have undertaken total reform of their penal codes – for example Portugal, Spain and Finland.<sup>33</sup>

Following the transposition deadline of the EU Environmental Crime Directive on 26 December 2010, all Member States were required to have reformed their national laws to incorporate environmental offences and criminal penalties. Countries such as Austria<sup>34</sup> and Germany<sup>35</sup> adopted federal legislation amending their criminal codes in response. By contrast, the United Kingdom and Ireland – which do not have a

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<sup>24</sup> Ibid., recital 4.

<sup>25</sup> Compare, for example, European Parliament Committee on Legal Affairs, Report on the Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law (15 April 2008), found at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+REPORT+A6-2008-0154+0+DOC+PDF+V0//EN>>; and the several Reports of the Council Working Party on Substantive Criminal Law, e.g.: Council of the European Union, Proposal for a Directive on the Protection of the Environment through Criminal Law (10 March 2008), found at: <<http://data.consilium.europa.eu/doc/document/ST-6916-2008-INIT/en/pdf>>.

<sup>26</sup> R. Pereira, *Environmental Criminal Liability and Enforcement in European and International Law* (Brill, 2015), at 158.

<sup>27</sup> See M. Faure, ‘The Development of Environmental Criminal Law in the EU and Its Member States’, 26:2 *Review of European, Comparative and International Environmental Law* (2017).

<sup>28</sup> German Criminal Code (Strafrechtsänderungsgesetz (StSG)) of July 1980, reformed by the 31 StAG of 1 November 1994.

<sup>29</sup> Austrian Penal Code (Strafrechtsänderungsgesetz (StGB)), Federal Act of 23 January 1974, BGBl. Nr. 60/1974. See C. Ringelmann, ‘Recent Trends in Environmental Criminal Legislation’, 5:4 *European Journal of Crime, Criminal Law and Criminal Justice* (1997), 393.

<sup>30</sup> Spanish Criminal Code (Nuevo Código Penal), Law 10/1995, Articles 325-331.

<sup>31</sup> Portuguese Criminal Code (‘Código Penal’), Law Decree 48/95, Articles 278-281.

<sup>32</sup> N. de Sadeleer, ‘La Répression des Infractions en Matière de Gestion des Déchets’, in: F. Comte and L. Kramer (eds.), *Environmental Crimes in Europe: Rules of Sanctions* (Europa Law Publishing, 2004), 65.

<sup>33</sup> See C. Ringelmann, n. 29 above, at 395.

<sup>34</sup> Austrian Federal Law (Bundesgesetz), BGBl. I Nr. 130/2011.

<sup>35</sup> German Federal Law (Bundesgesetz) No. 64 (2011) Part I.

criminal code – instead amended specific pieces of national environmental legislation.  
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There are two waste offences under the Environmental Crime Directive: the illegal collection, disposal, transport or recovery of waste (Article 3(b)) and the illegal shipment of waste (Article 3(c)). As will be discussed further below, there are two main reasons for the ‘splitting’ of the waste criminal offences under the Directive. They are the fact that those offences aim to improve the enforcement of different pieces of EU environmental legislation; and the different degrees of endangerment to the environment or human health required for establishment of each of the offences. This approach to harmonization of waste offences also reflects the fact that the European Community (i.e., pre-Lisbon) was recognized to have powers to harmonize environmental criminal law only if linked to ensuring the effective implementation of EC environmental law.<sup>37</sup>

The analysis of the transposition of the illegal waste management and trafficking offences under the Environmental Crime Directive will be made, in particular, with reference to the findings of a study carried out by the consultancy Milieu, published in late 2015.<sup>38</sup>

### ***UNLAWFUL COLLECTION, TRANSPORT, RECOVERY OR DISPOSAL OF WASTE***

The waste offence under Article 3(b) of the Environmental Crime Directive aims to improve the enforcement of specific EU waste disposal and treatment directives. There are over fourteen EU waste-related directives listed in Annex A of the Environmental Crime Directive, violations of which must be criminalized by the Member States when they meet the legal threshold set in Article 3(b). This offence is more specific than under the original proposal for the Directive presented by the European Commission on February 2007.<sup>39</sup> Whereas under the latter Member States needed to criminalize the unlawful ‘treatment, including disposal and storage, transport, [export or import of waste], including hazardous waste’,<sup>40</sup> the former requires criminalization of the unlawful ‘collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care disposal sites, and including action taken as a dealer or broker (waste management)’.<sup>41</sup> Despite the deletion of ‘including hazardous waste’ in the final text of the Directive, the broader concept of ‘waste’ under Article 3(b) and 3(c) of the Directive includes also hazardous wastes. Moreover, Article 3(b) does not refer to the ‘export and import’,

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<sup>36</sup> See R. Pereira n. 26 above, at 158.

<sup>37</sup> *Ship-Source Pollution*, n. 22 above, at paragraph 66.

<sup>38</sup> See the national reports of the Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States, found at: <[http://ec.europa.eu/justice/criminal/criminal-law-policy/environmental-protection/index\\_en.htm](http://ec.europa.eu/justice/criminal/criminal-law-policy/environmental-protection/index_en.htm)>. To date, the Commission has published 25 national reports of the study. The Commission has refused to disclose the remaining three reports, as it is currently taking infringement actions against three Member States (France, Germany and Hungary). It has also refused to publish the general report pending resolution of the ongoing infraction disputes.

<sup>39</sup> See 2007 Environmental Crime Directive Proposal, n. 23 above, at 3.

<sup>40</sup> *Ibid.*, Article 3(c).

<sup>41</sup> Environmental Crime Directive, n. 10 above, Article 3(b).

because these activities are addressed in the separate offence of illegal waste shipment offence contained in Article 3(c).

The Member States have not consistently transposed the elements of the illegal waste management offence under the Directive. While some national transposition measures could be regarded as incomplete because they adopt a lower standard than required in the Directive, other national implementation measures apply higher standards than prescribed under the Directive. Indeed, several Member States did not transpose the offence under Article 3(b) to include all the operations such as ‘collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care disposal sites, and including action taken as a dealer or broker (waste management’,<sup>42</sup> but instead have transposed that provision or maintained a national law provision using broader, all-encompassing notions. For example, the Austrian implementing legislation refers to ‘waste collector’ (which it has been suggested is broader than actions of a dealer or a broker).<sup>43</sup> The Portuguese implementation legislation adopts a higher standard by also referring to the ‘storage, sorting and treatment’ of waste.<sup>44</sup> The Cypriot implementation legislation does not refer to ‘action taken as a dealer or a broker (waste management)’ but it covers more broadly ‘action[s] taken by persons during waste management’.<sup>45</sup> The Polish implementation legislation, in addition to transport and recovery, covers ‘the storage, removal (including collection) and processing of waste,’ and therefore has a more comprehensive coverage than the Directive.<sup>46</sup> Moreover, the Dutch waste crime legislation does not explicitly describe all operations mentioned in the Directive but instead refers to ‘anybody that acts or fails to act regarding waste material’,<sup>47</sup> which appears to be broader than the list of operations under Article 3(b).

In other examples, the national implementation measures could be considered to be incomplete and hence in breach of the Directive. The Estonian implementation legislation covers ‘the collection, transport, recovery and disposal of waste including activities of dealers and brokers’, but it does not explicitly cover ‘the supervision of such operations and the aftercare of disposal sites’.<sup>48</sup> The scope of Estonian legislation is thus narrower than the Directive.<sup>49</sup> Another example is the Swedish

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<sup>42</sup> Ibid.

<sup>43</sup> Milieu, ‘National Report for Austria, Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States’ (Milieu, 2015) (‘National Report for Austria’).

<sup>44</sup> Milieu, ‘National Report for Portugal, Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States’ (Milieu, 2015) (‘National Report for Portugal’).

<sup>45</sup> Milieu, ‘National Report for Cyprus, Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States’ (Milieu, 2015) (‘National Report for Cyprus’).

<sup>46</sup> Milieu, ‘National Report for Poland, Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States’ (Milieu, 2015) (‘National Report for Poland’).

<sup>47</sup> Milieu, ‘National Report for the Netherlands, Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States’ (Milieu, 2015) (‘National Report for the Netherlands’).

<sup>48</sup> Milieu, ‘National Report for Estonia, Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States’ (Milieu, 2015) (‘National Report for Estonia’).

<sup>49</sup> Under Article 6.2 of the Environmental Crime Directive, n. 10 above, the lack of supervision may be sufficient to establish the (criminal, administrative or civil) liability of legal persons.

implementing law, which could be regarded as incomplete since the ‘unlawful collection of waste’ is not covered by any criminal liability under national law.<sup>50</sup> It remains to be seen whether the Commission will regard those transposition breaches to be sufficiently serious to bring infringement proceedings against those individual Member States.

As is the case with most other offences under the Directive, the illegal waste disposal offence under Article 3(b) is a ‘concrete endangerment’ offence, as it requires that a certain minimum damage threshold is met, i.e. that it may cause or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants.<sup>51</sup> Therefore, the minimum standard is that of a concrete harm to the environment (or significant risk of causing harm) and an abstract endangerment is not sufficient to establish an offence. Since it is the administrative agency that generally establishes permissible pollution levels, concrete endangerment offences are defined by a strong interdependency between administrative law and criminal law. That is, it will generally be the administrative authorities which will set the allowable levels of waste pollution and hence what a ‘significant risk of harm’ to the environment or human health is. This suggests that there is an ‘absolute dependency’ between environmental law and administrative law.<sup>52</sup> This interdependency between administrative law and criminal law can be problematic from the perspective of assigning liability for environmental damage, leading one commentator to argue that the criminal law is inherently antithetical to environmental law.<sup>53</sup>

The use of vague notions of harm such as ‘substantial damage’ and ‘serious injury’ under the definition of the Article 3(b) offence can lead to inconsistencies in implementation.<sup>54</sup> Indeed, the actual level of environmental protection can be compromised depending on the judicial interpretation given to such terms, given that there is no definition of those terms under the Directive. Those terms would be interpreted in light of the traditions and legal system of each Member State.<sup>55</sup> It is arguable that these undefined notions may be too vague to bring fundamental changes in the levels of environmental protection and enforcement in practice.<sup>56</sup> One example of incorrect implementation is the Dutch Penal Code, which uses more restrictive terminology than the Directive by referring to damage to ‘public health’ instead of

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<sup>50</sup> Milieu, ‘National Report for Sweden, Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States’ (Milieu, 2015) (‘National Report for Sweden’).

<sup>51</sup> Environmental Crime Directive, n. 10 above, Article 3(f-g)) and Article 3(h).

<sup>52</sup> See, e.g., C. Ringelmann, n. 29 above, at 39; M. Faure and M. Visser, ‘How to Punish Environmental Pollution? Some Reflections on the Various Models of Criminalisation of Environmental Harm’, 3:4 *European Journal of Crime, Criminal Law and Criminal Justice* (1995), 316; H.-J. Albrecht and S. Leppa, ‘Criminal Law and the Environment’, in: Proceedings of the European Seminar held in Lauchhammer, Land Brandenburg, Germany (April 1992).

<sup>53</sup> R. Lazarus, ‘Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law’, 83 *Georgetown Law Journal* (1995), 2407, at 2428.

<sup>54</sup> Environmental Crime Directive, n. 10 above, Article 3(a-h).

<sup>55</sup> F. Comte, ‘Protection of the Environment through Criminal Law: Destiny of the Various European Union’s Initiatives’, in: M. Odina (ed.) *Europe and the Environment* (Europa Law Publishing, 2004), 43.

<sup>56</sup> L. Krämer, ‘Case Law Analysis: Environment, Crime and EC Law’, 18:2 *Journal of Environmental Law* (2006), 277.



‘serious injury’.<sup>57</sup> Some Member States have adopted guidelines which aim to curtail the discretion in the interpretation of those undefined notions by national authorities. One example is the national implementation by Cyprus which defines the term ‘substantial damage’ by reference to whether the damage is ‘irreversible,’ ‘partly reversible’ or ‘deemed substantial by the Court’.<sup>58</sup> Although this appears to be a particularly high threshold to define ‘substantial damage’ (given that not all ‘substantial damage’ is ‘irreversible’ or ‘partly [ir]reversible’), it illustrates how the discretion of national judges and public authorities can be limited through the adoption of national guidelines. In the UK, the Sentencing Council adopted sentencing guidelines in 2014 for the offence of ‘unauthorised or harmful deposit, treatment or disposal ... of waste’ committed by organizations or individuals.<sup>59</sup> The sentencing guidelines link the level of criminal penalties to the actual or potential harm caused by waste offences, as well as the culpability of the offender.<sup>60</sup>

As the EU Environmental Crime Directive only imposes minimum standards,<sup>61</sup> it allows Member States to adopt higher standards and criminalize even less serious activities which do not cause or are likely to cause ‘substantial damage,’ ‘serious injury’ or ‘significant deterioration’.<sup>62</sup> This suggests that Member States may adopt higher standards of environmental protection and require a lower threshold to establish liability for environmental damage than is required under Article 3(b).<sup>63</sup> Therefore, those terms do not need to be transposed literally into national law, as long as the standard adopted is equal or higher than that under the Directive (for example, the terms ‘damage’ or ‘injury’ could be transposed without the ‘substantial’ or ‘serious’ thresholds). This can be seen for example in the Irish implementation legislation according to which any person may be guilty of a criminal offence even where substantial environmental damage does not follow from the conduct.<sup>64</sup> If a Member State adopts or maintains more stringent standards than the Directive, under Article 193 of the Treaty on the Functioning of the European Union (TFEU), it is required to notify the Commission and such measures must be compatible with the Treaties.<sup>65</sup>

## ***ILLEGAL WASTE SHIPMENT***

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<sup>57</sup> See National Report for the Netherlands, n. 47 above.

<sup>58</sup> Cypriot Law 22(I)/2012, Article 5. See National Report for Cyprus, n. 45 above.

<sup>59</sup> In the context of illegal waste disposal in Northern Ireland, see C. Brennan, ‘The Enforcement of Waste Law in Northern Ireland: Deterrence, Dumping and the Dynamics of Devolution’, 28:3 *Journal of Environmental Law* (2016), 471.

<sup>60</sup> Sentencing Council, ‘Environmental Offences: Definite Guidelines’ (2014).

<sup>61</sup> This is in light of the legal basis used for the adoption of the Directive Article 192 of the Treaty on the Functioning of the European Union (Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C326/47 (‘TFEU’)). See also Environmental Crime Directive, n. 10 above, recital 12.

<sup>62</sup> Commission Staff Working Document, Accompanying Document to the Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, Impact Assessment, COM(2007) 51, SEC(2007) 161 (‘Impact Assessment’), at 35.

<sup>63</sup> Regulation 1013/2006, n. 12 above, was adopted on the basis of former Article 175 of the EC Treaty (now Article 192 TFEU, n. 61 above), thus allowing Member States to enhance those standards.

<sup>64</sup> Milieu, ‘National Report for Ireland, Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States’ (Milieu, 2015) (‘National Report for Ireland’).

<sup>65</sup> TFEU, n. 61 above, Article 193 TFEU.

The illegal waste shipment offence in Article 3(c) of the Directive aims to improve the enforcement of Regulation 1013/2006 on shipments of waste, which itself implements the EU Member States' obligations under the Basel Convention.<sup>66</sup> The illegal shipment of waste contrary to the 2006 Waste Shipment Regulation<sup>67</sup> includes the shipment carried out without the notification or consent of the competent authorities.<sup>68</sup> In 2014, amendments to the Waste Shipment Regulation<sup>69</sup> were adopted to achieve more consistent implementation throughout the EU.<sup>70</sup> By 1 January 2017, Member States needed to have established inspection plans; and these plans must include the objectives and priorities of the inspections, the geographical area covered by the inspection plans and the tasks assigned to each authority involved.<sup>71</sup>

Article 50 of the Waste Shipment Regulation requires Member States to introduce 'effective, proportionate and dissuasive' penalties for the implementation of that Regulation as well as to take specific enforcement measures against illegal waste shipment, such as 'inspections' and 'spot checks'.<sup>72</sup> Yet the Regulation itself does not require the criminalization of waste shipment offences and does not impose criminal penalties on operators. This is unsurprising, given that the Regulation was adopted in 2006 when there was still uncertainty as to the extent of the EU's criminal law powers under the first pillar. So although one of the corollaries of the direct applicability of an EU regulation is that it may affect individuals directly without the need for taking implementing measures at the national level,<sup>73</sup> the penalties (including criminal penalties) for the violation of the Regulation require transposition at the national level, in line with the principle of legality.<sup>74</sup>

Unlike the illegal waste management offence under Article 3(b), the illegal waste shipment offence under Article 3(c) of the Environmental Crime Directive is an abstract endangerment offence, so no specific level of environmental harm is required for the establishment of a criminal offence. It is one of only two abstract endangerment offences present in the Directive.<sup>75</sup> This cautious approach to criminalization of abstract endangerment offences is in line with the Council of Justice and Home Affairs' 2009 model provisions on criminal offences, which suggest that EU criminal legislation, as a general rule, should refrain from criminalizing an abstract danger.<sup>76</sup> Abstract endangered offences involve technical or formal infringements including violations of the terms of a permit (e.g., failure to

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<sup>66</sup> As discussed above, the European Communities became a party to the Basel Convention on 7 February 1994.

<sup>67</sup> Regulation 1013/2006, n. 12 above.

<sup>68</sup> Article 3(c) of the Environmental Crime Directive, n. 10 above, refers to Article 2.35 of Regulation 1013/2006, n. 12 above.

<sup>69</sup> Regulation 660/2014 of 15 May 2014 Amending Regulation (EC) No 1013/2006 on Shipments of Waste, [2014] OJ L189/135.

<sup>70</sup> C. Gerstetter *et al.*, 'Synthesis of the Research Project "European Union Action to Fight Environmental Crime"', Environmental Crime and the EU' (2016), found at: <[http://efface.eu/sites/default/files/publications/EFFACE\\_synthesis-report\\_final\\_online.pdf](http://efface.eu/sites/default/files/publications/EFFACE_synthesis-report_final_online.pdf)>, at 26.

<sup>71</sup> *Ibid.*

<sup>72</sup> Regulation 1013/2006, n. 12 above, Article 50.2.

<sup>73</sup> T. Tridimas, *The General Principles of EU Law* (Oxford University Press, 2006) at 420.

<sup>74</sup> Regulation 1013/2006, n. 12 above, Articles 2.35 and Article 50.2.

<sup>75</sup> See further R. Pereira n. 26 above. See also Environmental Crime Directive, n. 10 above, Article 3(h).

<sup>76</sup> Council of the European Union, Council Conclusions on Model Provisions Guiding the Council's Criminal Law Deliberations (30 November 2009), at paragraph 4.

supply monitoring reports to the competent authority) or carrying out an activity without a permit (which need not cause any environmental damage).<sup>77</sup> The mere violation of the permit, or carrying out the activity without one, is sufficient for the commission of the offence. This is why abstract endangerment offences are sometimes called ‘formal offences’: they incriminate conduct which is potentially dangerous, independently of the result or likelihood of the result.<sup>78</sup> Those offences generally aim to protect the interests of the administrative authority in the proper enforcement of environmental law (the environment being protected indirectly).<sup>79</sup> Yet although the main rationale behind these offences is to serve the interests of the administration in controlling the industrial activity, there is a presumption that an intolerable endangerment to the environment has occurred.<sup>80</sup> Thus in potentially serious cases of abstract endangerment to the environment, the economic activity carried out without a permit may constitute not only an administrative infringement, but also a crime.<sup>81</sup>

It is questionable whether the Environmental Crime Directive should have criminalized an abstract endangerment such as in the case of illegal waste shipment. In particular, the Council of Justice and Home Affairs’ 2009 model provisions suggest that only exceptionally such offences should be criminalized in EU criminal law instruments.<sup>82</sup> Moreover, the (annulled) 2003 Council Framework Decision on environmental crime did not aim to criminalize illegal waste shipment as an abstract endangerment, although it criminalized the ‘import and export’ of waste linked to a specific level of environmental damage.<sup>83</sup> Still, a strong case for criminalization of illegal waste shipment at the EU level can be made on the basis of the transnational impacts of this offence (including the trafficking of hazardous wastes to developing countries) and to give effect to the Basel Convention’s enforcement provisions requiring the criminalization and punishment of such offences.<sup>84</sup> Moreover, illegal waste shipment is regarded as a particularly serious offence by the enforcement authorities of some Member States and EU criminal law cooperation bodies.<sup>85</sup>

Another area in which there are discrepancies in implementation of the Environmental Crime Directive relates to the requirement under Article 3(c) for criminalization of waste shipment in ‘non-negligible’ quantities. Some Member States, like Portugal,

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<sup>77</sup> Milieu and Huglo Lepage ‘Summary Report: Study on Measures other than Criminal Ones in Cases where Environmental Community Law has not been Respected in the EU Member States’ (2004) (‘Study on Non-criminal Measures’), at <[http://ec.europa.eu/environment/legal/crime/pdf/report\\_environmental\\_crime.pdf](http://ec.europa.eu/environment/legal/crime/pdf/report_environmental_crime.pdf)>, at 21.

<sup>78</sup> S. Dandachi, ‘Convention sur la Protection de L’Environnement,’ 28:3 *Revue Juridique de L’Environnement* (2003), 281, at 284.

<sup>79</sup> See M. Faure and M. Visser, n. 52 above, at 320.

<sup>80</sup> See Study on Non-criminal Measures’, n. 77 above, at 20.

<sup>81</sup> *Ibid.*, at 21.

<sup>82</sup> Council Conclusions on Model Provisions Guiding the Council’s Criminal Law Deliberations, n. 76 above, at paragraph 4. See also the Convention on the Protection of the Environment through Criminal Law (Strasbourg, 4 November 1998; not yet in force), Article 4(a-e). For a comparative analysis of the Council of Europe Convention and the Environmental Crime Directive, see R. Pereira, ‘The External Dimensions of the EU Legislative Initiative to Combat Environmental Crime’, 19 *Spanish Yearbook of International Law* (2016), 251.

<sup>83</sup> Framework Decision 2003/80/JHA of 5 February 2003 on the Protection of the Environment through Criminal Law, [2003] OJ L29/55, Article 2(c).

<sup>84</sup> Basel Convention, n. 13 above, Article 4.3-4.

<sup>85</sup> See, e.g., Europol, n. 9 above; and National Report for Poland, n. 46 above.

introduced the requirement of criminalization of waste shipments with reference to the quantitative element ('non-negligible quantity') and thus reproduced the wording of Article 3(c).<sup>86</sup> Yet even when literally transposing the wording of Article 3(c), the national implementation laws of the Member States in general do not specify how 'non-negligible quantity' is to be determined. This means that this concept must be determined by national judges and public authorities on a case-by-case basis. The effect is that the national enforcement authorities in some Member States will be more tolerant regarding illegal waste shipment in negligible quantities than others.

In other instances, the national implementation legislation of some Member States has adopted a broader scope than the Directive by also criminalizing the shipment of waste in 'negligible quantities'. For example, the Irish law transposing the Waste Shipment Regulation provides for criminal sanctions without transposition of the condition that the shipment be undertaken in a non-negligible quantity, which means that under Irish law a person could be prosecuted for illegal shipment of waste in negligible quantities.<sup>87</sup> Similarly, neither the Cypriot, Polish or Swedish implementation laws refer to waste shipment in a specified quantity, and hence waste shipment in negligible quantities could be subject to criminal penalties in those Member States.<sup>88</sup>

Those national implementation measures are not in breach of the Environmental Crime Directive, as it only imposes minimum standards, thus leaving discretion to the Member States regarding the choice of criminalizing waste shipment in negligible quantities.<sup>89</sup> Alternatively, it could be argued that the Directive has direct effect on Member States,<sup>90</sup> and therefore that it allows individuals to rely on their rights under the Directive, potentially providing the basis for a defence for waste shipment operators and others facing criminal prosecutions for illegal waste shipment in negligible quantities. This question may be put before the Court of Justice of the EU (CJEU) to clarify whether the 'attenuating circumstances' for certain offences in the Directive – such as the 'non-negligible quantity' of waste shipment in Article 3(c) – could entail direct effects. These 'attenuating circumstances' could be claimed by defendants in criminal proceedings raising the retroactivity of the more beneficial Union criminal legislation. Indeed, the CJEU has shown willingness to foster application of the principle of retroactivity of the more beneficial EU legislation in the legal systems of the Member States.<sup>91</sup> Yet it would be difficult for waste shipment operators to argue that that qualifying element provides a specific right to individuals or corporations, given that the Directive creates minimum standards only, allowing the Member States to go beyond the EU standards. Moreover, since the obligations under the Directive are aimed at the Member States to create criminal offences and to introduce 'effective, proportionate and dissuasive' penalties which are connected to

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<sup>86</sup> See National Report for Portugal, n. 44 above.

<sup>87</sup> See National Report for Ireland, n. 64 above. Yet the Irish national law expert has noted that 'it is perhaps unlikely that a prosecutor would prosecute in that context'. *Ibid.*, at 21.

<sup>88</sup> See National Report for Poland, n. 46 above; National Report for Sweden, n. 50 above; and National Report for Cyprus, n. 45 above.

<sup>89</sup> See TFEU, n. 61 above, Article 192; see also Environmental Crime Directive, n. 10 above, recital 12.

<sup>90</sup> ECJ, Cases C-26/62 *Van Gend en Loos*, [1963] ECLI:EU:C:1963:1; C-91/92 *Paola Faccine Dori*, [1994] ECLI:EU:C:1994:292; C-38/77 *Enka*, [1997] ECLI:EU:C:1977:190; C-190/87 *Moorman*, [1987] ECLI:EU:C:1993:206.

<sup>91</sup> ECJ, Cases C-358/93 and C-416/93, *Bordessa* [1995] ECLI:EU:C:1995:54.

existing rights and obligations under EU environmental law, it would be difficult for illegal waste shipment operators or criminal organizations to establish that the Directive creates any additional rights to individuals or that it entails direct effects.<sup>92</sup>

## **TOWARDS ‘EFFECTIVE, PROPORTIONATE AND DISSUASIVE’ CRIMINAL PENALTIES FOR ENVIRONMENTAL OFFENCES IN THE EU?**

The Environmental Crime Directive requires Member States to introduce ‘effective, proportionate and dissuasive’ criminal penalties, but it does not prescribe specific types and levels of criminal penalties.<sup>93</sup> This can be explained by the fact that the *Ship-Source Pollution* ruling had denied the (then) European Community the power to prescribe specific types and levels of criminal penalties.<sup>94</sup> As will be discussed in this and the subsequent section, this is a significant limitation that could compromise the effective implementation of the Directive in the Member States. This section aims to assess the extent to which significant differences remain as regards the choice of types and levels of criminal penalties for the waste offences in the Member States following the adoption of the Directive.

Prior to the adoption of the Environmental Crime Directive in 2008, a study on environmental crime in the EU-27 Member States<sup>95</sup> suggested that there were considerable differences as regards the types and levels of penalties for the specific offences envisaged in the 2007 Directive proposal. As regards the offence of illegal waste shipment, some Member States provided for a prison sanction for this offence only where the act concerned hazardous waste<sup>96</sup> and/or only if it led to environmental damage.<sup>97</sup> When environmental damage was caused, the prison penalty could be high (up to 7-8 years).<sup>98</sup> The lowest prison sentence for this offence was applied in Luxembourg (from eight days to six months). As regards legal persons, the study suggested that there were significant differences regarding the maximum levels of fines applied. The lowest criminal fines for this offence were applied in Portugal and Bulgaria<sup>99</sup> and the highest were present in Ireland and Estonia.<sup>100</sup> Other Member States only applied administrative penalties<sup>101</sup> or no fine at all.<sup>102</sup>

After the adoption of the Directive and its transposition deadline ended in 26 December 2010, important differences remained as regards the choices of types and levels of criminal penalties applied for transposition of the waste offences in the directive. As regards the illegal waste management offence in Article 3(b), the Spanish transposition legislation imposes upon natural persons a sanction of

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<sup>92</sup> See also R. Pereira n. 26 above, at 159-160. See, e.g., ECJ, Case C-168/95 *Criminal Proceedings against Luciano Arcaro*, [1996] ECLI:EU:C:1996:363, at paragraph 37.

<sup>93</sup> Environmental Crime Directive, n. 10 above, Article 6.

<sup>94</sup> *Ship-Source Pollution*, n. 22 above, at paragraph 70.

<sup>95</sup> See Study on Non-criminal Measures’, n. 77 above.

<sup>96</sup> Czech Republic, Estonia and Latvia. Ibid.

<sup>97</sup> Greece, Spain, Hungary, Latvia, Lithuania, Poland, Slovakia. Ibid.

<sup>98</sup> Ibid., at 10.

<sup>99</sup> Maximum of €3,000 and €5000 respectively. Ibid.

<sup>100</sup> Maximum of €15,000,000 and €16,000,000. Ibid.

<sup>101</sup> Austria, Czech Republic, Germany, Spain, Sweden. Austria has the lowest maximum fine (€7,270). Ibid.

<sup>102</sup> Luxembourg, Poland, Slovenia and Spain. Ibid.

imprisonment between one and two years.<sup>103</sup> The Polish implementation of Article 3(b) applies a sanction of deprivation of liberty for a term between three months and five years, when the offence committed intentionally; and a fine or a sanction of restriction of freedom or sanction of deprivation of liberty for a term up to two years, for the offence committed unintentionally.<sup>104</sup> In Sweden, the criminal sanctions that apply to natural persons for the offence under Article 3(b) are a fine or term of imprisonment not exceeding two years; and if the offence is serious, a term of imprisonment between six months and six years.<sup>105</sup> The Swedish maximum fine for natural persons for all offences described in Article 3 of the Directive is €17,250, although higher levels of maximum criminal fines (of 10,000,000 Swedish Kronor (SEK), or around €1million) are foreseen for legal persons.<sup>106</sup>

The criminal penalties introduced by the Member States for implementation of the illegal waste shipment offence under Article 3(c) of the Directive are generally lower than for the illegal waste disposal offence under Article 3(b), which reflects the fact that the waste shipment offence is an abstract endangerment offence. The Estonian legislation implementing the Directive<sup>107</sup> criminalizes the illegal transboundary waste shipment ‘in significant quantities’ with an (unspecified) pecuniary penalty for legal persons or up to one year of imprisonment for individuals.<sup>108</sup> The Austrian implementing legislation<sup>109</sup> criminalizes illegal waste shipments ‘in large quantities’ by up to one year imprisonment or a fine of up to 360 daily rates<sup>110</sup> (a lower penalty applies to grossly negligent offences).<sup>111</sup> The Swedish implementation legislation applies a fine or term of imprisonment not exceeding two years for the same offence.  
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Since the Directive only adopts minimum standards, it was to be expected that there would be a degree of variation in the choices of types and levels of criminal penalties. Therefore, the inconsistencies in implementation of the directive may not in themselves be a sufficient basis for the Commission to institute Article 258 TFEU infringement proceedings or to establish a case for further harmonization of environmental criminal law in the EU.

Yet a case can be made that the inconsistencies in implementation of the offences and penalties under the Directive would allow certain Member States to become ‘pollution havens’ due to lax environmental regulation and enforcement.<sup>113</sup> The Commission

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<sup>103</sup> Milieu, ‘National Report for Spain, Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States’ (2015).

<sup>104</sup> National Report for Poland n. 46 above.

<sup>105</sup> National Report for Sweden, n. 50 above.

<sup>106</sup> Ibid.

<sup>107</sup> Estonian Penal Code (Karistusseadustik) RT I (2001), as amended by RT I (2011), in force on 21 March 2011.

<sup>108</sup> Ibid., at § 368.1-2.

<sup>109</sup> Austrian Federal Law, n. 34 above.

<sup>110</sup> The level of payment in relation to one daily unit depends on various circumstances, for instance the income of the perpetrator, obligations to dependents and others. Pursuant to § 19.2 of the Austrian Penal Code, n. 29 above, one daily unit is minimum €4 and maximum €5,000. See National Report for Austria, n. 43 above.

<sup>111</sup> Ibid.

<sup>112</sup> National Report for Sweden, n. 50 above.

<sup>113</sup> See also M. Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (Routledge, 2007), at 517.

suggests that the diversity of national penal systems allows criminals to select the system that is regarded as least effective and use it as a safe haven.<sup>114</sup> The existing legal diversity between legal systems could thus constitute a ‘weapon’ in the hands of criminals. Modern technical means of communications allow criminals to choose at a distance where to commit certain types of offences according to the standard of incrimination and level of penalties.<sup>115</sup>

The Commission also links the types of offences and penalties to internal market integration, arguing that differences in national sanctions may impact on the costs of non-compliance with environmental regulations and hence distort competition.<sup>116</sup> It is suggested that penalties that vary in nature (administrative or criminal) or severity (fine or imprisonment) can create distortions in the application of the underlying rules and even distort competition.<sup>117</sup> Moreover, the Commission suggests that businesses established in certain Member States with low levels of criminalization and penalties are placed in a competitive advantage in relation to their competitors based in other Member States with more stringent liability regimes, as they may violate certain rules without risking the costs of fines or other criminal sanctions.<sup>118</sup>

Although, in general, it appears to be correct to suggest that the creation of a level playing field could erase certain distortions in competition connected to the lax enforcement of environmental law in some Member States, it would be difficult to support market integration alone as a justification for criminalization and harmonization of criminal penalties in the EU member states. The Court of Justice emphasized in the *Tobacco Advertising* case that the EU could not rely on the need to eliminate distortions of competition in the tobacco advertisement or sale sectors for adoption of that measure, since the lawfulness of a Directive based on Article 114 TFEU is dependent on whether the distortions of competition which the measure purports to eliminate are *appreciable*.<sup>119</sup> Moreover, existing studies have suggested that stringent environmental regulations have played a small role in management decisions to allocate firms across countries.<sup>120</sup> This may be explained by the fact that environmental investments are only a small fraction of the total costs of production for most firms other than the heavily polluting ones.<sup>121</sup> The literature on the harmonization of European private law has also criticized harmonization as a technical process devoted to market-making for the disregard of the rich and deep historical roots of the national laws subject to its influence.<sup>122</sup>

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<sup>114</sup> Communication from the Commission to the Council and the European Parliament of 2 June 2004, Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations, COM(2004) 401.

<sup>115</sup> Council of the European Union, Presidency Conclusions, Tampere European Council (15-16 October 1999), found at: <[http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)>, at paragraph 5.

<sup>116</sup> See, e.g., ECJ, Cases C-300/89, *Commission v. Council* (*Titanium Dioxide*), [1991] ECLI:EU:C:1991:244, at paragraph 15; and C-350/92, *Spain v. Council*, [1995] ECLI:EU:C:1995:237, at paragraph 32. See also TFEU, n. 61 above, Articles 3.1(b) and 6.

<sup>117</sup> G. Corstens and J. Pradel, *European Criminal Law* (Kluwer Law International, 2002), at 514.

<sup>118</sup> See Impact Assessment, n. 62 above, at 24.

<sup>119</sup> ECJ, Case C-376/98, *Germany v. Parliament and Council*, [2000] ECLI:EU:C:2000:544, at paragraph 107.

<sup>120</sup> K. Palmer, W.E. Oates, and P. Portney. ‘Tightening Environmental Standards: The Benefit-Cost or the No-Cost Paradigm?’, 9:4 *Journal of Economic Perspectives* (1995), 119, at 130.

<sup>121</sup> *Ibid.*

<sup>122</sup> See, e.g., P. Legrand, ‘On the Unbearable Localness of the Law: Academic Fallacies and Unreasonable Observations,’ 10:1 *European Review of Private Law* (2003), 61, at 66.

A stronger argument could be raised to suggest that the differences in types and levels of criminal penalties in the Member States could have a significant impact on their deterrent effects.<sup>123</sup> However, there are no conclusive criminological studies proving the existence of ‘marginal’ deterrence, that is, how much *extra* deterrence is achieved by increasing the severity of penalties by adjusting penalty levels. Indeed, while the existence of deterrence arising from the introduction of criminal penalties has been tested and confirmed in criminological studies (which is expected to be achieved through the criminalization of environmental offences as required under the Environmental Crime Directive),<sup>124</sup> there is no evidence that manipulating penalty levels necessarily lead to higher deterrent effects.<sup>125</sup>

Another argument to support the case for more stringent environmental criminal penalties is the TFEU requirement that the level of environmental protection in the EU must be ‘high’.<sup>126</sup> Yet it must be noted that the CJEU has consistently held, when defining the meaning and extent of the adjective ‘high’ level of environmental protection, that it is for the Member States themselves to decide which level of environmental protection they consider to be appropriate, taking into account the requirements of the free movements of goods.<sup>127</sup>

The national reports accompanying the 2015 Milieu study have referred to a range of criteria to determine the overall effectiveness of the criminal penalties adopted for implementation of the Directive. Some of the criteria most commonly applied aimed to compare the penalties for environmental offences with the penalties for other (national) crimes;<sup>128</sup> the national minimum wage;<sup>129</sup> the range of penalties available to the national authorities (imprisonment, fines, probation, community services, etc.);<sup>130</sup> and the equivalence between penalties applicable to legal persons with the penalties for natural persons.<sup>131</sup> But the criterion most commonly applied in the national reports was to contrast those penalties with the penalties foreseen under Article 6 of the Framework Decision 2003/80/JHA on environmental crimes, which was annulled by the Court of Justice on 13 September 2005.<sup>132</sup> Unlike the later Commission 2007 Environmental Crime Directive proposal, that Framework Decision did not prescribe detailed levels of criminal penalties for specific environmental offences. Article 5 of Framework Decision 2003/80/JHA required Member States to introduce the penalty of imprisonment ‘in serious cases’ which ‘must give rise to extradition’,<sup>133</sup> and that

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<sup>123</sup> See further C. Abott, *Enforcing Pollution Control Regulation: Strengthening Sanctions and Improving Deterrence* (Hart, 2009), at 17.

<sup>124</sup> Particularly in those carried out in the context of drink driving or the use of seatbelt in private cars. See, e.g., A. von Hirsch, *Criminal Deterrence and Sentence Severity: an Analysis of Recent Research* (Oxford University Press, 2000) at 47.

<sup>125</sup> *Ibid.*

<sup>126</sup> TFEU, n. 61 above, Article 191.2.

<sup>127</sup> A. Ziegler, *Trade and Environmental Law in the European Community* (Oxford University Press, 1996), at 84.

<sup>128</sup> See, e.g., National Report for Cyprus, n. 45 above.

<sup>129</sup> See, e.g., Milieu, ‘National Report for Bulgaria, Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States’ (2015) (‘National Report for Bulgaria’). See also National Report for Spain, n. 103 above.

<sup>130</sup> See, e.g., National Report for Spain, n. 103 above.

<sup>131</sup> See, e.g., National Report for Cyprus, n. 45 above.

<sup>132</sup> *Environmental Crimes*, n. 21 above.

<sup>133</sup> See Framework Decision 2003/80/JHA, n. 83 above, Article 5.1.



this penalty ‘may be accompanied’ by other measures.<sup>134</sup> More specific types (but not levels) of penalties are foreseen under the Framework Decision for legal persons, which might have been however of a criminal or non-criminal nature – in recognition of the divergent legal traditions in the Member States regarding the attribution of criminal liability to corporations.<sup>135</sup> In addition, some Member States’ national law experts referred to the types and levels of penalties under the (annulled) Framework Decision 2005/667/JHA on shipping pollution.<sup>136</sup> Although this Framework Decision related to the specific offence of shipping pollution, it foresaw more detailed types and levels of (prison) sentences based on the culpability of the offender and the environmental damage caused by the offence.<sup>137</sup>

The Spanish national law report noted that the Spanish national transposition measure complies with the benchmarks set in Decision 2005/667/JHA.<sup>138</sup> Likewise, the Polish national law expert noted that the majority of offences covered by the Directive are subject to a sanction of imprisonment and that the penalty maximum is over one year as was required by the annulled Framework Decision 2003/80/JHA.<sup>139</sup> In a similar vein, the Swedish and Dutch national law experts suggested that the sanctions set out by the annulled Council Framework Decision 2003/80/JHA correspond to those set out by their national laws.<sup>140</sup>

It is perhaps surprising that most Member States’ national law experts used the 2003 Framework Decision on environmental crime as a benchmark to define the effectiveness of the national implementation measures, as that initiative only foresaw very limited harmonization of types and levels of penalties. Moreover, although the Framework Decision on shipping pollution foresaw more detailed harmonization of types of criminal penalties and levels of prison sentences, that initiative related specifically to shipping pollution crimes. Therefore, perhaps a more reliable benchmark to define the effectiveness of national criminal penalties is found in the 2007 Environmental Crime Directive proposal which foresaw not only detailed types, but also detailed levels of penalties, including financial penalties applicable to legal persons, for specific offences. Indeed, the original 2007 Environmental Crime Directive proposal aimed at correcting the disparate approaches in the Member States as regards the constitutive elements and level of sanctions applicable for environmental offences. That proposal followed broadly the conclusions of the European Council meeting in Tampere 1999,<sup>141</sup> in which the Council decided to follow a four-tier system of penalty levels for EU criminal law.<sup>142</sup>

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<sup>134</sup> *Ibid.*, Article 5.2.

<sup>135</sup> *Ibid.*, Article 7.

<sup>136</sup> Framework Decision 2005/667/JHA of 12 July 2005 to Strengthen the Criminal-Law Framework for the Enforcement of the Law against Ship-Source Pollution, [2005] OJ L255/164 (annulled by the ECJ on 23 October 2007).

<sup>137</sup> *Ibid.*, Article 4.

<sup>138</sup> National Report for Spain, n. 103 above.

<sup>139</sup> National Report for Poland, n. 46 above.

<sup>140</sup> National Report for Sweden, n. 50 above; National Report for the Netherlands, n. 47 above.

<sup>141</sup> See Presidency Conclusions, n. 115 above, at paragraph 48.

<sup>142</sup> The European Council agreed on minimum maximum sanctions from one to 10 year imprisonment on 27 May 2002. See Council of the European Union, Council Conclusions on the Approach to Apply Regarding the Approximation of Penalties (27 May 2002).

Most Member States interpreted the requirement under Article 5 of the Environmental Crime Framework Decision that the offence must give rise to extradition to be ‘a maximum of at least one year imprisonment’, which is a reference to the legal threshold set under the 2002 Framework Decision on the European Arrest Warrant (EAW).<sup>143</sup> Indeed, even though the EAW is based on the principle of mutual recognition (or ‘mutual trust’ in the European legal space), the issuing of an EAW is only possible (unless the sentence has already been passed)<sup>144</sup> for acts punishable in the issuing Member State by a custodial sentence or a detention order of at least 12 months. Therefore, as long as all Member States have criminalized specific environmental offences (as required under the Environmental Crime Directive) and the issuing State has implemented the offence with a maximum of at least one year imprisonment, the operation of the EAW will not be impaired.<sup>145</sup> This suggests that the national environmental criminal penalties might be regarded to be effective if they meet the ‘maximum of at least one year imprisonment’ threshold, at least from the perspective of EU criminal-law cooperation. However, a barrier to the operation of the EAW (and other mutual recognition instruments) would remain if a Member State implements the Directive with a custodial sentence or a detention order of less than 12 months or with pecuniary penalties only. Although there is some evidence of the usefulness of the EAW in environmental cases in practice,<sup>146</sup> it has been suggested that the EAW has not been used frequently in the context of environmental crime.<sup>147</sup> It is thus questionable whether the ‘maximum of at least one year imprisonment’ is indeed an appropriate benchmark to assess the effectiveness of the penalties implementing the Environmental Crime Directive.

It could be argued that a system of minimum levels of *minimum penalties* (allowing Member States to introduce higher levels of minimum penalties) would be more effective in achieving a level playing field than a system of minimum levels of maximum sanctions as envisaged in the 2002 Council conclusions on penalties.<sup>148</sup> Yet not all Member States recognize a system of minimum penalties within their penal systems,<sup>149</sup> and a system of minimum levels of minimum penalties was discarded by the Member States.<sup>150</sup> Therefore, even if a future proposal based on Article 83.2 TFEU establishes a level playing field detailing criminal penalties for environmental

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<sup>143</sup> Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender of Procedures between Member States, [2002] OJ L190/1 (‘EAW Framework Decision’).

<sup>144</sup> In this case, the threshold is at least four months.

<sup>145</sup> See further R. Pereira n. 26 above.

<sup>146</sup> The EAW was used for the first time in the United Kingdom by the Environment Agency in a case involving illegal waste dumping in which the defendant had flown to Ireland. As a result of a three-year investigation codenamed ‘Operation Huron’, the Environment Agency found that between January 2003 and June 2004, the two defendants had masterminded an elaborate operation in London and Essex of illegally dumping over 14,600 tonnes of waste – equivalent to around 750 lorry loads – on at least 15 different sites. See ‘Waste Dumping Masterminds Jailed’, *Edie.net* (13 June 2008), found at: <<https://www.edie.net/news/5/Waste-dumping-masterminds-jailed/14828/>>.

<sup>147</sup> Eurojust, ‘Strategic Project on Environmental Crime Report’ (November, 2014).

<sup>148</sup> See Council Conclusions on the Approach to Apply Regarding the Approximation of Penalties, n. 142 above.

<sup>149</sup> See the responses to a questionnaire of the Working Group on Substantive Criminal Law: Council of the European Union, Summary of Replies to the Questionnaire on the Approximation of Sanctions (5 October 2001), found at: <<http://data.consilium.europa.eu/doc/document/ST-12531-2001-INIT/en/pdf>>. See also A. Weyembergh, *L’Harmonisation des Legislations: Condition de l’Espace Penal Européen et Reveleateur de ses Tensions* (Institut d’Etudes Européennes, 2004), at 110.

<sup>150</sup> See E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, 2002), at 250.

crimes in the EU, there would still be significant variations in the actual sentences applied by the judicial authorities of the Member States, as the instrument of harmonization would only establish minimum levels of maximum penalties.<sup>151</sup> The Commission itself considers the approximation of minimum levels of maximum sanctions favoured by the Council in adopted Framework Decisions to be insufficient,<sup>152</sup> but it acknowledges that the standardization of all criminal penalties in the European Union is ‘neither desirable nor legally feasible’, and that the Member States’ criminal law systems ‘have their own internal coherence, and amending individual rules without regard for the overall picture would risk generating distortions’.<sup>153</sup> Moreover, the concerns of some Member States and two Advocate Generals expressed in the *Environmental Crimes*<sup>154</sup> and *Ship-Source Pollution* cases<sup>155</sup> regarding the consistency and coherence of the Member States’ internal penal systems need to be given due consideration if the Commission is to propose a new EU legislative proposal aimed at harmonizing criminal penalties for environmental offences based on Article 83.2 TFEU.

It is also paramount that a future amendment to the Environmental Crime Directive is consistent with the principles of necessity, proportionality and effectiveness of EU law.<sup>156</sup> This would require the Commission to demonstrate that the penalties introduced by the Member States for implementation of the Directive fail to comply with the ‘effectiveness, proportionality and dissuasive’ requirement under Article 6 of the Directive, and, arguably, also that those breaches could not be corrected through bringing Article 258 TFEU infringement actions against individual non-complying Member States.

## **TOWARDS EFFECTIVE ENFORCEMENT OF CRIMINAL PENALTIES FOR ENVIRONMENTAL OFFENCES IN THE MEMBER STATES?**

It is generally assumed that improvements in enforcement would also lead to a higher degree of deterrence of the underlying rules. If the levels of compliance increase after the introduction of a sanction (which may be proven by the stabilization of prosecutorial activities or the decrease of reported crimes), it could be argued that the sanction is effective. On the other hand, increasing policing will generally lead to higher numbers of crimes being detected and possibly more prosecutions, which could equally be used to support an argument that the system is effective. Still, there are no criminological studies proving conclusively how much *extra* deterrence is achieved by increasing the certainty of punishment (e.g. by improving policing),

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<sup>151</sup> Although this is not expressly stated in the TFEU, n. 61 above, Article 83.1 or 83.2, it is expected that EU criminal law instruments will continue to follow the Council’s 2002 conclusions on penalties post-Lisbon.

<sup>152</sup> See European Commission, Green Paper of 30 April 2004 on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in the European Union, COM(2004) 334, at 7.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Environmental Crimes*, n. 21 above, Opinion of Advocate General Colomer delivered on 26 May 2005, at paragraphs 83-87.

<sup>155</sup> *Ship-Source Pollution*, n. 22 above, Opinion of Advocate General Mazak delivered on 28 June 2007, at paragraph 103ff.

<sup>156</sup> *Environmental Crimes*, n. 21 above, at paragraph 46; *Ship-Source Pollution*, n. 22 above, at paragraph 67; ECJ Joined Cases C-46 and C-48/93, *Brasserie du Pêcheur, ex p Factortame Ltd*, [1996] ECLI:EU:C:1996:79 (*Brasserie du Pêcheur*), at paragraph 95.

though current research does indicate that there are consistent and significant negative correlations between likelihood of conviction and crime rates.<sup>157</sup>

Prior to the adoption of Environmental Crime Directive, statistical data reported to the Commission by the Member States showed a growing number of illegal waste shipments.<sup>158</sup> Yet according to a 2009 European Environment Agency report, it is not clear whether this represents a real increase in illegal shipments or is due to better monitoring.<sup>159</sup> When assessing the overall effectiveness of the national measures implementing the Directive, several national law experts have noted that there was lack of statistical data on environmental law enforcement and the application of penalties in practice. For example, the Bulgarian national law expert noted that ‘Article 83a [of the Bulgarian implementation legislation] is still quite new and there is no case-law on its application in relation to environmental crimes’.<sup>160</sup> The Cypriot national law expert noted that ‘[t]aking into consideration that the transposing legislation entered into force very recently, on 23 March 2012, Cypriot Courts have not prosecuted criminal cases related to violations of the provisions of this law’<sup>161</sup> and ‘thus [it is] difficult to assess the effectiveness, proportionality and dissuasiveness of the sanctions applied for natural persons’.<sup>162</sup>

Moreover, some national law experts in the Milieu study have identified a number of deficiencies in environmental (criminal) law enforcement in practice. For example, it was suggested that the Swedish judges are reluctant to impose severe sentences for environmental crimes as they are not considered as equally serious as other types of crimes, such as economic crimes or tax evasion.<sup>163</sup> Furthermore, the Polish national law expert stressed that ‘the implementation of the transposing provisions in practice is poor’ and that ‘out of the numerous environmental cases notified to the prosecutor’s office (mainly concerning illegal transboundary shipment of waste notified by relevant administrative authorities), only very few of them go to the criminal court’.<sup>164</sup> As regards the prosecution of legal persons it was noted that in Poland ‘the main problem with the effectiveness of the legal person’s liability is that the LCEA [Liability of Collective Entities Act] is not used in practice’.<sup>165</sup> The Estonian national law expert suggested that ‘the imposition of administrative sanctions clearly prevails’<sup>166</sup> and that the ‘general tendency of Estonian criminal policy is to make little use of criminal sanctions, as these are considered *ultima ratio* and are therefore applied only in exceptional cases’.<sup>167</sup> The Spanish national law expert presented a more detailed (and equally disappointing) account of enforcement practices based on the 2010

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<sup>157</sup> See A. Von Hirsch, n. 124 above, at 47.

<sup>158</sup> See EEA, n. 15 above, at 4.

<sup>159</sup> Ibid.

<sup>160</sup> See National Report for Bulgaria, n. 129 above, at 30.

<sup>161</sup> See National Report for Cyprus, n. 45 above, at 19.

<sup>162</sup> Ibid.

<sup>163</sup> See National Report for Sweden, n. 50 above.

<sup>164</sup> See National Report for Poland, n. 46 above, at 29.

<sup>165</sup> Ibid., at 32. See Polish Liability of Collective Entities for Acts Prohibited under a Threat of a Punishment Act (OJ 197, item 1661 as amended).

<sup>166</sup> See National Report for Estonia, n. 48 above.

<sup>167</sup> Ibid.

annual report of the office of the State prosecutor responsible for environmental crimes.<sup>168</sup>

Could the Environmental Crime Directive address those deficiencies in the *application* of criminal penalties for environmental offences in the Member States? Prior to the adoption of the Directive, there was academic debate on whether Member States were required under the original directive proposals not only to introduce criminal sanctions for serious violations of EC environmental law, but also to apply them in individual cases.<sup>169</sup> The 2007 Environmental Crime Directive proposal stated 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’,<sup>170</sup> which seemed to allow for flexible implementation by Member States regarding the choice of applying either administrative or criminal sanctions in individual cases. This provision was maintained in the final text of the Directive,<sup>171</sup> although without specifying the types and levels of penalties. Recital 10 of the Directive makes it clear that ‘[the] Directive creates no obligations regarding the *application* of [criminal penalties], or any other available system of law enforcement, in individual cases’.<sup>172</sup> Thus this should leave no further doubt as to the discretionary enforcement powers left to the national authorities in the Member States in individual cases.

This flexibility of enforcement in individual cases recognized under the Directive has obvious implications for its implementation, and is connected to the question of prosecutorial discretion in bringing prosecutions for environmental offences. Most EU Member States are governed by the ‘opportunity principle’, and there is no duty to prosecute (e.g., Belgium, the Netherlands and the United Kingdom).<sup>173</sup> The prosecution in those countries may decide to be tolerant of minor technical breaches of environmental law or when the chances of securing a conviction are low, decide that it is not realistic to bring a prosecution.<sup>174</sup> It could be argued that the discretion as to whether to prosecute may diminish the deterrent levels of the criminal law, and could ultimately affect the levels of compliance with environmental regulations if prosecutions are rare. Yet this discretion may be limited in some Member States

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<sup>168</sup> ‘[B]etween 2009 and 2010, there were a total of 6539 cases having to do broadly with environmental protection that led to the initiation of investigations by the state prosecutor. In the same two years, 10,788 judicial proceedings were initiated. Of those, only 1,294 led to a conviction, and 526 to the acquittal of the accused.’ National Report for Spain, n. 103 above, at 28.

<sup>169</sup> See M. Faure, ‘European Environmental Criminal Law: Do We Really Need It?’, 13:1 *European Energy and Environmental Law Review* (2004), 18; and G. Corstens, ‘Criminal Law in the First Pillar?’ 11:1 *European Journal of Crime, Criminal Law and Criminal Justice* (2003), 131, at 137, who argued that the original proposals required the application of criminal sanctions in individual cases. But see M. Lee, *EU Environmental Law, Governance and Decision-Making* (Hart, 2005), who argued that the original proposals did not necessarily require the application of criminal sanctions in individual cases. See also R. Pereira, ‘Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the European Union?’, 16:10 *European Environmental Law Review* (2007), 254.

<sup>170</sup> 2007 Environmental Crime Directive Proposal, n. 23 above, Article 5.1 (emphasis added).

<sup>171</sup> Environmental Crime Directive, n. 10 above, Article 5.

<sup>172</sup> *Ibid.*, recital 10 (emphasis added).

<sup>173</sup> M. Faure, and G. Heine, *Criminal Enforcement of Environmental Law in the European Union* (Kluwer, 2005).

<sup>174</sup> *Ibid.*, at 82.

which allow the victim to bring an appeal against a decision of the public prosecutor not to prosecute.<sup>175</sup>

Moreover, the ‘compliance strategy’ applied by some environmental agencies in the Member States may be too weak to provide sufficient deterrent against environmental crimes. Indeed, the strategy of offering companies ‘two carrots before showing the stick’ has only marginal deterrent effect since all a polluter risks after detection is that it will have to make the investments (e.g., on abatement technology) it was required to make anyway.<sup>176</sup> It has been suggested that in some EU Member States there is a tendency for the authorities to negotiate with the perpetrator for too long before the administrative sanction is actually applied.<sup>177</sup> It is further suggested that a decision to bring infringement proceedings is often subject to considerations of political, economic or social interests. Thus, the negotiations between the administration and industry can be excessively long and the administrative law enforcement is more with the view of achieving compliance than on sanctioning with a deterrence perspective.

The deterrent effects of criminal sanctions could be substantially impaired by these flexible approaches to environmental enforcement, even if they could ultimately lead to more immediate benefits to the environment through the company’s compliance, for instance if the company is compelled to invest in abatement technology or to restore the environmental damage.<sup>178</sup> Yet even though the prosecution and enforcement agencies may apply compliance strategies before deciding whether or not to prosecute in some Member States, the practice in some jurisdictions appears to show that the prosecution may have limited discretionary powers to use administrative penalties when individuals and companies clearly breach a criminal rule.<sup>179</sup> Moreover, in some countries the administrative agencies are under a legal duty to inform the prosecutor about serious cases of pollution amounting to a crime.<sup>180</sup> This certainly curtails the degree of discretion of the administrative authorities. However, the possibility of negotiation is not exclusive to the administrative procedure and plea bargaining is commonly accepted in the criminal procedures of some Member States.<sup>181</sup> Another example of flexible prosecutorial law enforcement is the deferred prosecution agreement implemented by the Serious Fraud Office and Crown Prosecution Service in the UK.<sup>182</sup>

Notwithstanding the fact the Environmental Crime Directive allows for flexibility in national law enforcement in practice, the CJEU has consistently held that the failure to prosecute a violation of Union law could constitute a breach of the principle of loyal cooperation enshrined in Article 4.3 of the TEU<sup>183</sup> and that a Member State can

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<sup>175</sup> *Ibid.*, at 51.

<sup>176</sup> R. Pereira, ‘Compliance and Enforcement in International, European and National Environmental Law’, in: K. Makuch and R. Pereira (eds.), *Environmental and Energy Law* (Wiley-Blackwell, 2012), 574; and R. Pereira, n. 26 above.

<sup>177</sup> See, e.g., the Dutch report in M. Faure and G. Heine, n. 173 above, at 53.

<sup>178</sup> *Ibid.*, at 66.

<sup>179</sup> See Study on Non-Criminal Penalties, n. 77 above, at 57; and R. Pereira, n. 26 above.

<sup>180</sup> For example, Germany and Belgium. See M. Faure and G. Heine, n. 173 above, at 65.

<sup>181</sup> N. Garoupa and F. Stephen, ‘Why Plea-Bargaining Fails to Achieve Results in So Many Criminal Justice Systems: A New Framework for Assessment’, 15:3 *Maastricht Journal of European and Comparative Law* (2008), 323.

<sup>182</sup> Schedule 17 of the Crime and Courts Act 2013.

<sup>183</sup> Consolidated Version of the Treaty of the European Union, [2012] OJ C326/13.

be challenged before the Court for its failure to prosecute.<sup>184</sup> Indeed, the court has condemned in several instances a Member State's failure to prosecute violations of EU law as amounting to a violation of the loyal cooperation principle. For instance, in *Spanish Strawberries*, the Court noted that 'only a very small number of the persons who participated in those serious breaches of public order has been identified and prosecuted'.<sup>185</sup>

Hence it would not be inconsistent with the Court's own case law interpreting the loyal cooperation principle enshrined in Article 4.3 TEU, to suggest that the Member States are required not only to introduce, but also to apply 'effective, proportionate and dissuasive' sanctions for the non-compliance with the EU Environmental Crime Directive.<sup>186</sup>

Yet one must be cautious when interpreting those CJEU judgments dealing primarily with internal market integration as the basis for a broader interpretation of the loyal cooperation principle and for requiring Member States to prosecute environmental offences in individual cases. Indeed, the abovementioned cases were decided in light of the well-established principles of internal market integration, particularly non-discrimination and market access, but also the fundamental principle of effectiveness of EU law. Although in the more recent *Taricco* case<sup>187</sup> the CJEU ruled that Member States must criminalize Value Added Tax fraud on the basis of the principle of loyal cooperation,<sup>188</sup> this decision recognizes that Member States may apply penalties of a non-criminal nature in individual cases and hence it does not override national prosecutorial discretion.<sup>189</sup> Still, it is possible that the CJEU will eventually come to find that a Member State's failure to prosecute an environmental offence breaches the principle of loyal cooperation, for instance in the event that transboundary damage is caused by an action or inaction of an operator in a Member State; or if a Member State fails to cooperate with the authorities in another Member State investigating such transboundary environmental offences; or if the Commission and the CJEU regard the persistent failure by a Member State to apply criminal penalties for serious violations of EU environmental law to amount to a breach of the principles of effectiveness and primacy of EU law.<sup>190</sup>

Given those complexities and considerable differences in approaches to criminal law and environmental law enforcement in the Member States, it is understandable that the EU institutions aimed to leave a margin of discretion to Member States regarding the choice of penalties (criminal or administrative) to apply in individual cases. However, the overall effectiveness of the implementation of Directive can be significantly compromised by this flexibility in enforcement, given that ultimately the effectiveness, dissuasiveness and proportionality of the penalties available to the national authorities will depend on how they are applied in practice. It is submitted that the Environmental Crime Directive could have established a mechanism which

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<sup>184</sup> ECJ, Case C-265/95, *Commission v. France (Spanish Strawberries)*, [1997] ECLI:EU:C:1997:595.

<sup>185</sup> *Ibid.*, at paragraphs 50-52.

<sup>186</sup> ECJ, Case C-68/88, *Commission v. Hellenic Republic*, [1989] ECLI:EU:C:1989:339.

<sup>187</sup> CJEU, Case C-105/14, *Criminal Proceedings against Ivo Taricco and Others*, [2015] ECLI:EU:C:2015:555 ('*Taricco*').

<sup>188</sup> See T. Timmerman, 'Balancing Effective Criminal Sanctions with Effective Fundamental Rights Protection in Cases of VAT-fraud: *Taricco*' 53:3 *Common Market Law Review* (2016), 779.

<sup>189</sup> *Taricco*, n. 187 above, at paragraph 39.

<sup>190</sup> On the principle of effectiveness see, e.g., *Brasserie du Pêcheur*, n. 156 above, at paragraph 95.

reduced the level of discretion left to the national authorities in the Member States, for example by requiring the application of criminal sanctions in the event of a sufficiently ‘serious’ and ‘clear’ breach of an offence established in the directive, or in the event of repeated breaches of the environmental offences under the Directive.<sup>191</sup> This would contribute to the effectiveness and dissuasiveness of the penalties introduced for implementation of the Directive, whilst simultaneously allowing room for flexibility as regards the choice of penalties to apply in individual cases (thus in line with the principles of subsidiarity and proportionality). Moreover, if such an initiative aimed at reducing the discretion of national authorities were to be adopted, it should be without prejudice of other (soft law) initiatives aimed at increasing awareness and cooperation of judges and public authorities in the context of environmental offences.<sup>192</sup> This should include EU-wide sentencing and enforcement guidelines aimed at ensuring more consistent implementation of environmental law in the EU.<sup>193</sup> In fact, it is possible that the requirement for ‘effective, proportionate and dissuasive’ penalties under the Environmental Crime Directive may influence the level of penalties actually applied by the national courts, as evidenced by the recent decision of the Dutch court of first instance of Zeeland-West-Brabant, which sentenced an offender to a prison sentence of twelve months for violations of Article 2.35 of the Waste Shipment Regulation,<sup>194</sup> with reference to the ‘effectiveness, proportionate and dissuasive’ criteria and the principle of loyal cooperation.<sup>195</sup>

It is particularly problematic that the Environmental Crime Directive does not contain a requirement for regular review of its operation and implementation (in contrast with other EU environmental legislation, such as the Environmental Liability Directive).<sup>196</sup> A regular review process would have enabled more effective oversight by the Commission of the application of criminal penalties in practice by individual Member States. This limitation of the Directive may reflect the fact that the Directorate-General (DG) Environment of the European Commission does not appear to be playing a primary role in overseeing the implementation of the directive, but instead the DG JUST (despite the fact that the directive was originally adopted by the DG Environment). Therefore, the potential for [intra-]institutional frictions in coordinating the oversight of implementation of the Directive is real.

The application of environmental criminal penalties by the Member States is also dependent on the operation of specific EU criminal law instruments adopted under the Area of Freedom, Security and Justice aimed at facilitating inter-State cooperation in

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<sup>191</sup> One example that illustrates how this could be implemented is Directive 2009/123/EC of 21 October 2009 Amending Directive 2005/35/EC on Ship-source Pollution and on the Introduction of Penalties for Infringements, [2009] OJ L280/52, Article 5.(a)(3), requiring the criminalization of ‘repeated minor breaches’.

<sup>192</sup> See, e.g., the European Network for Prosecutors for the Environment (ENPE), (<<https://www.environmentalprosecutors.eu>>), the European Union Forum of Judges for the Environment (EUFJE) (<<http://www.eufje.org/index.php/en/>>), and the Network for the Implementation and Enforcement of EU Environmental Law (IMPEL) (<<https://www.impel.eu>>).

<sup>193</sup> As proposed by C. Gerstetter *et al.*, n. 70 above.

<sup>194</sup> Regulation 1013/2006, n. 12 above.

<sup>195</sup> Rechtbank Zeeland-West-Brabant, ECLI:NL:RBZWB:2017:288 (24 January 2017). See also ENPE, ‘ENPE Newsletter – Issue 4’ (2017), found at: <[https://www.environmentalprosecutors.eu/sites/default/files/document/ENPE%20newsletter%204th%20edition%20June%202017%20FINAL\\_0.pdf](https://www.environmentalprosecutors.eu/sites/default/files/document/ENPE%20newsletter%204th%20edition%20June%202017%20FINAL_0.pdf)>.

<sup>196</sup> Directive 2004/35 of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, [2004] OJ L143/56.



criminal matters, in particular the 2014 Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime,<sup>197</sup> the 2002 European Arrest Warrant Framework Decision,<sup>198</sup> the 2008 EU Framework Decision on Organised Crime<sup>199</sup> and the 2009 Framework Decision on Conflicts of Jurisdiction.<sup>200</sup> The lack of coordination between the EU enforcement bodies and the national judicial and police authorities is a significant problem facing Eurojust and Europol<sup>201</sup> in countering waste trafficking and management infringements.<sup>202</sup> Moreover, the effectiveness of the initiatives adopted by Europol and Eurojust is ultimately limited given that those agencies do not have the power to bring prosecutions or start criminal investigations in the Member States, instead playing the role of coordinating the actions of national authorities. In this regard, one important initiative was launched in 2011, entitled ‘EnviCrimeNet’, which collaborates with Europol with the objective to provide an informal platform for countering environmental-related crimes, including through the improvement of exchange of information and the gathering of criminal intelligence; training officers and exchanging best practices.<sup>203</sup>

## CONCLUSIONS

The EU Environmental Crime Directive succeeds in providing a ‘framework’ for environmental criminal law enforcement in the Member States. It is to be expected that the Directive will contribute towards enhancing the deterrent effects of the national system of sanctions for environmental offences. Yet an assessment of the national implementation of the waste offences under the Directive shows important inconsistencies in the implementation. However, those inconsistencies may not in themselves be sufficient to establish the necessity and proportionality of a future instrument harmonizing environmental criminal penalties given that the Directive only adopts minimum standards. Moreover, since the maintenance or introduction of stricter standards is permissible for a legislative measure adopted under Article 192 TFEU, the Member States will not have to transpose literally the criminal offences under the Directive so long as the standard adopted is equal or higher than those under the Directive. It is encouraging that, in comparison with the situation following the adoption of the Council 2003 Framework Decision on environmental crime,<sup>204</sup> there is a notable improvement in the implementation of environmental criminal offences and penalties in the Member States. And although the Article 258 TFEU infringement proceedings against specific Member States for non-compliance with the Directive are still ongoing,<sup>205</sup> it remains to be seen whether enforcement proceedings will be

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<sup>197</sup> Directive 2014/42/EU of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, [2014] OJ L 127/39.

<sup>198</sup> EAW Framework Decision, n. 143 above.

<sup>199</sup> Framework Decision of 24 October 2008 on the Fight against Organised Crime, [2008] OJ L300/42.

<sup>200</sup> Framework Decision 2009/948/JHA of 30 November 2009 on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings, [2009] OJ L328/42.

<sup>201</sup> V. Mitsilegas and F. Giuffrida, *The Role of EU Agencies in Fighting Transnational Environmental Crime: New Challenges for Eurojust and Europol* (Brill, 2017).

<sup>202</sup> See Europol, n. 9 above; Eurojust, n. 147 above; EEA, n. 15 above, at 5.

<sup>203</sup> See Council of the European Union, Draft Council Resolution on the Creation of an Informal Network for Countering Environmental Crime – ‘EnviCrimeNet’ (20 May 2011), found at: <<http://data.consilium.europa.eu/doc/document/ST-10291-2011-INIT/en/pdf>>.

<sup>204</sup> Annulled by the Court of Justice on 13 September 2005 in *Environmental Crimes*, n. 21 above.

<sup>205</sup> The Commission has released reasoned opinions in June 2011 for eight Member States (Cyprus, the Czech Republic, Germany, Greece, Lithuania, Malta, Portugal and Slovenia); and subsequently to Austria, Finland, and the United Kingdom in October 2011 for failing to transpose the Environmental

brought by the Commission before the CJEU against Member States for failure to implement the Directive with ‘effective, proportionate and dissuasive’ penalties, despite their criminal nature.

It is clear that the inconsistencies in transposition of the Environmental Crime Directive may not be the biggest challenge facing the implementation of the Directive; this ultimately will be its application in practice by the national authorities. It appears that the current levels of harmonization under the Directive are insufficient to ensure the effective enforcement of environmental law. Indeed, there is a risk that without further action the Directive may come to be regarded as another example of ‘reactive’ legislation aimed to show that ‘something has been done’, rather than necessarily bringing fruitful changes to the enforcement practice in the Member States. Moreover, the effectiveness of the implementation of the Directive depends on a range of other factors beyond the transposition of criminal offences and penalties. In particular, it will depend on the effectiveness of specific EU criminal law instruments adopted under the Area of Freedom, Security and Justice.

Since the environmental criminal offences transposed into national law will also constitute administrative infringements based on violations of EU environmental law, it is paramount that additional measures to foster the cooperation between the administrative and judicial authorities are introduced by the Member States to enhance the effective implementation and enforcement of the Directive. Yet the fact that the Directive, at present, does not harmonize criminal penalties – and the possibility that some Member States may resist the adoption of an eventual legislative proposal aimed at harmonizing criminal penalties– suggests that significant variations are likely to persist regarding the implementation and enforcement of environmental criminal law in the EU.

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Crime Directive correctly by the December 2010 deadline. See European Commission, ‘Environmental Crimes: Commission Continues Legal Action against Member States’, Press Release (27 October 2011). The Commission later dropped the cases brought against Italy and Romania. *Ibid.* In March 2012, the Commission brought infringement proceedings against Cyprus, but subsequently dropped the cases against Greece and Finland who have communicated complete transposition of the Directive. See European Commission, ‘Environmental Crimes: Commission Takes Cyprus to Court for Failing to Transpose EU Rules’, Press Release (22 March 2012). The infringement proceedings against Germany, France and Hungary are still ongoing.

