



European Union Action to
Fight Environmental Crime

Directive 2008/99/EC on Environmental Crime and Directive 2009/123/EC on Ship-source Pollution

Work package 2 on “Instruments, actors, and institutions”



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Abstract

This study provides an overview of the path towards approximation of environmental criminal law of EU Member States - including the role played by the 1998 Council of Europe Convention on the protection of the environment through criminal Law - and analyses Directive 2008/99/EC on the protection of the environment through criminal law and Directive 2009/123/EC on ship-source pollution and on the introduction of penalties for infringements. On these grounds, the study provides an assessment of the main strengths and shortcomings of the legislative setting as well as some considerations on the way forward.

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LIST OF ABBREVIATIONS

EC	European Community
EU	European Union
OJ	Official Journal
TFEU	Treaty on the Functioning of the European Union

1 The approximation of environmental criminal law of EU Member States: roots and path

The issue of approximation of environmental criminal law of the European Union (EU)¹ Member States was laid down long before the Lisbon Treaty introduced the EU competences on criminal matters now provided by Article 83 of the Treaty on the Functioning of the European Union (TFEU).

The first initiative adopted in the perspective of the approximation of environmental criminal law of the EU Member States was the “Initiative of the Kingdom of Denmark with a view to adopting a Council framework Decision on combating serious environmental crime”.²

This proposal for a third pillar framework decision to be adopted by the Council on the basis of Article 31 and 34(2) of the Treaty on European Union was drafted taking the main elements of the Council of Europe Convention on the Protection of the Environment through Criminal Law, which was opened for the signature of States in Strasbourg on 4 November 1998.³

1.1 The roots of the approximation attempts: the Council of Europe Convention on the protection of the environment through criminal law

The Council of Europe Convention on the Protection of the Environment through Criminal Law (the Convention) - which is a non-self-executing treaty, holding legislative obligations for the States - never entered into force, most likely because of (among other reasons) the path towards approximation of environmental criminal law of the EU Member States to which the same Convention has indirectly contributed.⁴ Nevertheless, the Convention represents a relevant instrument precisely in providing the roots of the subsequent EU efforts towards approximation of environmental criminal law. Moreover, the Convention is significant in being the first international (regional) convention aiming at criminalising conduct which causes or is likely to cause damage to the environment:⁵ indeed, while the “paucity of international environmental criminal legislation” cannot be

¹ The reader should be aware that before the entry into force of the Lisbon Treaty, the European construction was based on different “pillars”: at that time, competences now belonging to the EU were spread between those belonging to the European Community (first pillar) and those belonging to the European Union (third pillar). The Lisbon Treaty eliminated the division into pillars. In the text, for clarity reasons normally reference to the EU only will be made. However, where necessary, references to the European Community will be made; when references to the EU concern an instrument adopted before the entry into force of the Lisbon Treaty, they should be interpreted as referring to the former third pillar.

² Initiative of the Kingdom of Denmark with a view to adopting a Council framework Decision on combating serious environmental crime, *OJ C 39, 11/02/2000, p. 4-7*.

³ Council of Europe Convention on the Protection of the Environment through Criminal Law, ETS No. 172, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/172.htm>.

⁴ The main elements of the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, *OJ L 29, 5.2.2003, p. 55-58*, were extracted from the Convention; see Anna Olga Dąbrowska, “The impact of EU on protection of the environment through criminal law in Poland” (2010), available at http://www.academia.edu/1156406/The_impact_of_European_Union_on_protection_of_the_environment_through_criminal_law_in_Poland.

⁵ See Jorge Luis Collantes, “The Convention on the Protection of the Environment through Criminal law: Legislative Obligations for the States”, available at <http://huespedes.cica.es/gimadus/collantes.html>.

neglected,⁶ the Convention demonstrates the relevance of the issue of the fight against environmental crime at the international (regional) level.

A brief overview of the main provisions of the Convention is convenient, particularly in light of the influence that, as it was already mentioned, the Convention had on the adoption of harmonising instruments of the environmental criminal law of the EU Member States.

The Convention provides for legislative obligations concerning substantive and procedural criminal law, therefore representing a harmonising mechanism of environmental criminal law of the States. In particular, with regard to substantive criminal law the Convention typifies intentional and negligent offences; the sanctions for these offences shall include imprisonment and pecuniary sanctions and may include reinstatement of the environment. Corporate liability shall also be enabled. As it concerns procedural criminal law, the Convention foresees the territorial, flag, national and *aut dedere aut judicare* principles, and it aims at facilitating the participation of the citizens in the trial (*actio popularis*) and at fostering international judicial cooperation; however, the Convention does not make reference to other debated issues such as e.g. international relapse or trans-border pollution.⁷

More in details, and with specific regard to substantive criminal law, as it concerns intentional offences Article 2 (1) of the Convention states that: “Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law:

a) the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which:

- i. causes death or serious injury to any person, or
- ii. creates a significant risk of causing death or serious injury to any person;

b) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants;

c) the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

d) the unlawful operation of a plant in which a dangerous activity is carried out and which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

e) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants, when committed intentionally”.

Article 2 (2) of the Convention also indicates that “Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law aiding or abetting the commission of any of the offences established in accordance with paragraph 1 of this article”.

As it concerns negligent offences, Article 3 (1) of the Convention states that “Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offence under its domestic law, when committed with negligence, the offences enumerated in Article 2, paragraph 1 a to e”.

Article 4 of the Convention establishes that, insofar as these are not covered by the provisions of Article 2 (intentional offences) and Article 3 (negligent offences), each Party “shall adopt such appropriate measures as may be necessary to establish as criminal offences or administrative offences, liable to sanctions or other measures under its domestic law, when committed intentionally or with negligence:

a) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water;

b) the unlawful causing of noise;

c) the unlawful disposal, treatment, storage, transport, export or import of waste;

d) the unlawful operation of a plant;

⁶ Frédéric Mégret, “The Problem of an International Criminal Law of the Environment”, *Columbia Journal of Environmental Law* (2010): 200.

⁷ See Collantes, “The Convention on the Protection of the Environment through Criminal law: Legislative Obligations for the States”.

- e) the unlawful manufacture, treatment, use, transport, export or import of nuclear materials, other radioactive substances or hazardous chemicals;
- f) the unlawful causing of changes detrimental to natural components of a national park, nature reserve, water conservation area or other protected areas;
- g) the unlawful possession, taking, damaging, killing or trading of or in protected wild flora and fauna species”.

As it concerns sanctions, Article 6 of the Convention states that “Each Party shall adopt, in accordance with the relevant international instruments, such appropriate measures as may be necessary to enable it to make the offences established in accordance with Articles 2 and 3 punishable by criminal sanctions which take into account the serious nature of these offences. The sanction available shall include imprisonment and pecuniary sanctions and may include reinstatement of the environment”. With specific regard to confiscation, Article 7 (1) of the Convention establishes that each Party shall adopt such appropriate measures as may be necessary to enable it to confiscate instrumentalities and proceeds, or property the value of which corresponds to such proceeds, in respect of intentional offences (Article 2) and negligent offences (Article 3).

Finally, the provisions on corporate liability should be recalled. In particular, Article 9 (1) of the Convention states that “Each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in Articles 2 or 3 has been committed by their organs or by members thereof or by another representative”. The Convention does not oblige States to introducing corporate criminal liability, but it indicates that corporate liability can be required through criminal law or administrative law. Moreover, Article 9 (2) specifies that “Corporate liability under paragraph 1 of this article shall not exclude criminal proceedings against a natural person”.

In sum, the Convention typifies risk misconducts, but, in doing so, seems however to recognise the use of criminal law as a last resort (i.e. the *ultima ratio* principle) both by the selection of the conduct to be criminally punished and in the Preamble, where it is claimed that “whilst the prevention of the impairment of the environment must be achieved primarily through other measures, criminal law has an important part to play in protecting the environment”.⁸ As it concerns sanctions, it is worth to underline that the Convention explicitly requires that criminal sanctions for the most serious offences shall include imprisonment and pecuniary sanctions, and that confiscation of the proceeds of crimes should also be enabled.

Convergences and divergences between the content of the Convention and the content of the instruments on approximation of environmental criminal law of the EU Member States will be evident after these instruments will be analysed.

1.2 The path towards the adoption of the approximation instruments

Within the Treaty on European Union, the Council adopted the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law; the Council also adopted the Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution⁹ (supplementing Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements).¹⁰

⁸ See Collantes, “The Convention on the Protection of the Environment through Criminal law: Legislative Obligations for the States”.

⁹ Council 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, *OJ L 255, 30.9.2005, p. 164–167*.

¹⁰ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, *OJ L 255, 30.9.2005, p. 11–21*.

Nevertheless, according to the opinion of the European Commission, shared by part of the legal scholars,¹¹ the European Community (EC) had the power to impose obligations concerning the harmonisation of the criminal provisions of the Member States, provided that it was necessary for the purpose of achieving the Community objectives, in an area where the Treaties granted the Community specific powers; such obligations found their legal basis in the provisions which permitted the action of the Community in a specific area. Following this point of view, the European Commission in 2001 introduced a proposal for a Directive on the protection of the environment through criminal law;¹² the proposal laid down minimum rules on penalties for environmental offences in accordance with Article 175 of the Treaty establishing the European Community.

These different approaches to the issue of harmonisation of criminal law created an institutional friction (not limited to the environmental sector) between the European institutions; the issue, before the entry into force of the Lisbon Treaty, found a solution in two judgments of the EC Court of Justice.

With the judgment of 13 September 2005 in case C-176/03 *Commission v Council*,¹³ concerning the Framework Decision 2003/80/JHA on protection of the environment through criminal law, the Court of Justice recognised the power for the Community to harmonise the criminal provisions of the Member States “where it is necessary in order to ensure the effectiveness of Community law”. According to the Court of Justice, the condition for such an intervention is that the measure adopted should be “necessary in order to ensure that the rules which it lays down on environmental protection are fully effective” (in the case at stake the measure was “essential (...) for combating serious environmental offences”). Consequently, the Court of Justice stated that the Framework Decision 2003/80/JHA, in encroaching on the competence which Article 175 EC attributed to the Community, infringed Article 47 of the Treaty on European Union and must therefore be annulled.

The following judgment of the Court of Justice of 23 October 2007 in case C-440/05 *Commission v Council*,¹⁴ concerning the Framework Decision 2005/667/JHA on ship-source pollution, reaffirmed the conclusions of the previous decision, stating that the Community legislature may have the power to require Member States “to apply criminal penalties to certain forms of conduct”. However, the Court decided that “the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence. It follows that the Community legislature may not adopt provisions such as Articles 4 and 6 of Framework Decision 2005/667, since those articles relate to the type and level of the applicable criminal penalties”. Consequently, the Court of Justice stated that the Framework Decision 2005/667/JHA, in encroaching on the competence which Article 80(2) EC attributed to the Community, infringed Article 47 of the Treaty on European Union and must therefore be annulled.

Following the view expressed by the Court of Justice in the judgment of 13 September 2005, on 9 February 2007 the Commission introduced a new proposal for a Directive on the protection of the environment through criminal law,¹⁵ which led to the enactment of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.¹⁶

¹¹ See already, among others, Giovanni Grasso, *Comunità europee e diritto penale* (Milan: Giuffrè, 1989), 192 ff.; Stefano Manacorda, “L’efficacia espansiva del diritto comunitario sul diritto penale”, *Foro italiano* V (1995): 66 ff.

¹² Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, 15 March 2001, COM/2001/139 final, *OJ C 180E*, 26.6.2001, p. 238–243.

¹³ Court of Justice (Grand Chamber), 13 September 2005, C-176/03, *Commission of the European Communities v Council of the European Union*, *European Court Reports 2005 I-07879*.

¹⁴ Court of Justice (Grand Chamber), 23 October 2007, C-440/05, *Commission of the European Communities v Council of the European Union*, *European Court Reports 2007 I-09097*.

¹⁵ Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, 9 February 2007, COM(2007) 51 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007PC0051&from=EN>.

¹⁶ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, *OJ L 328*, 6.12.2008, p. 28–37. On this path, with specific regard to

Even before the entry into force of the Lisbon Treaty explicitly introduced shared competences in criminal matters of the European Union, the environmental sector had therefore been subject of the first Community Directive of harmonisation of criminal legislation of the Member States, namely Directive 2008/99/EC.¹⁷

Also Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements,¹⁸ although having as a legal basis Article 80 (2) EC Treaty (concerning the Community policy on the theme of transport, now Article 100 TFEU),¹⁹ has clear and decisive links with the environmental protection sector.²⁰

Both directives and the institutional path leading to their adoption confirm the relevance of the fight against environmental crime in the EU action.²¹ In fact, environmental crime is a threat to environmental, social and economic sustainability and it affects key commitments and strategies of the European Union, including the Europe 2020 Strategy.

Directive 2008/99/EC, Directive 2009/123/EC and the provisions on the EU competences in criminal matters introduced by the Lisbon Treaty therefore represent new instruments and opportunities for increasing the effectiveness of EU measures against environmental crime through harmonisation and co-ordination; of course, the effectiveness of these instruments and of the related opportunities depend on several critical factors – among them, the current lack of relevant information on costs, impacts and causes of environmental crime in the EU.

In this context, the potential relevance of the above mentioned instruments on harmonisation of environmental criminal law of EU Member States is evident. As noticed Michael Faure in 2010 with regard to Directive 2008/99/EC and Directive 2009/123/EC, “For some Member States which already had elaborate environmental criminal law provisions, the directives will probably not change a great deal and implementation should be relatively easy. However, for those Member States which did not have elaborate environmental criminal law provisions, the Directives may bring important changes. Those Member States will have substantial work implementing them”.²² Correlatively, the analysis of the above mentioned directives is also relevant in the perspective of the opportunities for a further EU intervention on environmental crime, now allowed by Article 83 TFEU.

the environmental field, see Grazia Maria Vagliasindi, “Gli strumenti di contrasto alla criminalità ambientale: realtà e prospettive”, *Diritto e politiche dell’Unione europea* (2008): 54 ff.; Grazia Maria Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona: verso un nuovo volto del diritto penale ambientale italiano”, *Diritto del commercio internazionale* 24 (2010): 451 ff. In a general perspective, see Marcin Rozmus, Ilona Topa and Marika Walczak, “Harmonisation of Criminal Law in the EU legislation – The current status and the impact of the Treaty of Lisbon”, *Themis* (2010): 1 ff., available at <http://www.ejtn.eu/PageFiles/3002/THEMIS%20written%20paper%20-%20Poland%201.pdf>.

¹⁷ See Grazia Maria Vagliasindi, “The European Harmonisation in the Sector of Protection of the Environment through Criminal Law: The Results Achieved and Further Needs for Intervention”, *The New Journal of European Criminal Law* 3 (2012): 321.

¹⁸ Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, *OJ L 280*, 27.10.2009, p. 52–55.

¹⁹ Article 80 (2) TEC granted the Community the power to promote environmental protection with regard to “measures to improve transport safety” and “any other appropriate provisions” in the field of maritime transport.

²⁰ See Vagliasindi, “The European Harmonisation in the Sector of Protection of the Environment through Criminal Law”, 321.

²¹ See Vagliasindi, “The European Harmonisation in the Sector of Protection of the Environment through Criminal Law”, 321.

²² Michael Faure, “The Implementation of the Environmental Crime Directives in Europe”, (2011): 361, available at http://inece.org/conference/9/proceedings/41_Faure.pdf, 361; in the same sense, see Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona”, 454.

2 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law

Directive 2008/99/EC aims to eliminate the differences among criminal laws of the Member States by which effect is given to the environmental protection requirements arising from Community law.

Such harmonisation is considered to be necessary by the European institutions because of the rise in environmental offences and their effects, which increasingly extend beyond the borders of the States in which the offences are committed: such offences pose a threat to the environment and therefore call for an appropriate response.²³

According to the Preamble of Directive 2008/99/EC, experience had shown that the existing systems of penalties had not been sufficient to achieve complete compliance with the laws for the protection of the environment: such compliance should therefore be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.²⁴

The Preamble of the Directive 2008/99/EC also stresses that common rules on criminal offences make it possible to use effective methods of investigation and assistance within and between Member States.²⁵

On these grounds, and based on Article 175 TCE (now Article 192 TFEU), Directive 2008/99/EC requires Member States to consider crime, and to punish with effective, proportionate and dissuasive criminal sanctions, conduct specifically listed in Article 3, when this conduct is unlawful and it is committed intentionally or with at least serious negligence.

It has to be recalled that, according to Article 2 of the directive, a conduct is considered unlawful when it integrates a violation of the EC legislation listed in Annex A of the directive, or, with regard to activities covered by the Euratom Treaty, of the legislation adopted pursuant to the Euratom Treaty and listed in Annex B of the directive or, finally, of a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the just mentioned Community legislation.

As it concerns the conduct covered by Directive 2008/99/EC, Article 3 requires Member States to ensure that it constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence, a list of conduct concerning core elements of the concept of environment (air, soil, water, fauna, flora) and related industrial or economic activities.

In particular, the obligation of criminalisation concerns:

1. the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes 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;

²³ Whereas 2 of Directive 2008/99/EC.

²⁴ Whereas 3 of Directive 2008/99/EC.

²⁵ Whereas 4 of Directive 2008/99/EC.

2. the collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management), which causes 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;
3. the shipment of waste, where this activity falls within the scope of Article 2 (35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;
4. the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes 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;
5. the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes 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;
6. the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
7. trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
8. any conduct which causes the significant deterioration of a habitat within a protected site; it has to be underlined that, according to Article 2 (c) of the Directive, “habitat within a protected site” means any habitat of species for which an area is classified as a special protection area pursuant to Article 4 (1) or (2) of Directive 79/409/EEC, or any natural habitat or a habitat of species for which a site is designated as a special area of conservation pursuant to Article 4 (4) of Directive 92/43/EEC;
9. the production, importation, exportation, placing on the market or use of ozone-depleting substances.

Directive 2008/99/EC mainly requires Member States to criminalise conduct “which causes 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”.

The conduct covered by the directive mostly has a serious harmfulness against the environment as a protected interest, because of its nature and effects;²⁶ see, for instance, “the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes 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 animal or plants”. As noticed by Michael Faure, “The first part of the provision (discharging or emitting or introducing a quantity of materials into air, soil or water) seems to punish the concrete endangerment of the environment. However, the second part provides specific conditions: the emission must cause or be likely to cause death or serious injury to any person, or, cause substantial damage to the quality of air, soil, water, animals or plants would be caused. The first condition focuses on human health and the latter focuses on the environment. This criminal provision is therefore aimed both at activities which cause damage (concrete harm) or emissions (endangerment)”.²⁷

²⁶ See Vagliasindi, “The European Harmonisation in the Sector of Protection of the Environment through Criminal Law”, 323 ff.

²⁷ Faure, “The Implementation of the Environmental Crime Directives in Europe”, 362.

In some cases, Directive 2008/99/EC requires Member States to criminalise conduct which is not based on the occurrence of a concrete exposure to danger of the protected interest;²⁸ however, in some of these cases additional requirements are foreseen: for example, as it concerns the illicit shipment of waste (Article 3 (c)), the Directive requests the provision of efficient, proportionate and dissuasive criminal penalties if such activity “is undertaken in a not-negligible quantity”.²⁹

Directive 2008/99/EC restricts the obligations of criminalisation, as defined previously, only to intentionally committed conduct or to conduct committed with at least serious negligence.³⁰

On the other hand, on the basis of Article 4, even inciting, aiding and abetting the intentional conduct referred to in Article 3 must be criminally punished.

As it concerns penalties, Article 5 of the directive requires Member States to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties.

Following the judgment of the Court of Justice of 23 October 2007 in case C-440/05 - where, as it has already been recalled, the Court of Justice stated that, in contrast to the establishment of the obligation for Member States to criminally sanctioning certain conduct, determining the type and level of sanctions, was not within the competence of the Community – Directive 2008/99/EC does not contain provisions concerning the nature of the criminal sanctions, the minimum levels of maximum sanctions for violations committed with aggravating circumstances, the same aggravating circumstances (and in particular those relating to environmental violations committed by criminal organisations) and the accessory sanctions; these provisions were on the contrary contained in the original proposal of 9 February 2007.³¹

Articles 6 and 7 of Directive 2008/99/EC deal with the fundamental issue of liability of legal persons for environmental crimes.

It has to be recalled that, according to Article 2 (d) of the directive, “legal person” means any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations; this is the ‘standard definition’ of legal person within the EC/EU documents.

In particular, Article 6 requires Member States to ensure that legal persons can be held liable for offences referred to in Articles 3 and 4 where such offences have been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person, based on a power of representation of the legal person, an authority to take decisions on behalf of the legal person or an authority to exercise control within the legal person. Member States also have to ensure that legal persons can be held liable where the lack of supervision or control, by a person having a leading position, has made possible the commission of an offence referred to in Articles 3 and 4 for the benefit of the legal person by a person under its authority.

In order to avoid any unwanted decrease of the strength of the legal instruments for fighting environmental crimes, Article 6 (3) clarifies that the liability of legal persons shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles 3 and 4.

As it concerns sanctions for the legal persons, Article 7 of the directive requires Member States to take the necessary measures to ensure that legal persons held liable pursuant to Article 6 are punishable by effective, proportionate and dissuasive penalties.

The Directive had to be implemented by the European Member States by 26 December 2010.

²⁸ Faure, “The Implementation of the Environmental Crime Directives in Europe”, 363.

²⁹ Vagliasindi, “The European Harmonisation in the Sector of Protection of the Environment through Criminal Law”, 324 f.

³⁰ Vagliasindi, “The European Harmonisation in the Sector of Protection of the Environment through Criminal Law”, 324; Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona”, 485.

³¹ See Vagliasindi, “The European Harmonisation in the Sector of Protection of the Environment through Criminal Law”, 327; Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona”, 455 and 466 ff.

3 Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements

The sinking of the ‘Prestige’ in November 2002 and of the ‘Erika’ in December 1999, along with the significant number of illegal discharges of waste and residues from ships in the European seas led to the enactment of Directive 2005/35/EC on ship-source pollution.³²

As maritime pollution typically has a cross-border dimension,³³ Directive 2005/35/EC defines those ship-source discharges of oil and noxious liquid substances which Member States have to regard as infringements when committed with intent, recklessly or as a result of serious negligence.

According to Directive 2005/35/EC, an offence is committed if the discharging of polluting substances is carried out in internal waters of a Member State, territorial waters of a Member State, straits used for international navigation, the Exclusive Economic Zone (EEZ) of a Member State or on the high seas; moreover, these rules apply to any ship regardless of its flag.

Directive 2005/35/EC addresses the punitive side of non-compliance with the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973/78 (as amended), the standards and provides that any intentional or seriously negligent infringements of those standards shall be effectively dealt with by the EU Member States.³⁴

The cross-border dimension of maritime pollution is probably the ground that leads part of the legal scholars to affirm the need of harmonisation of the penalties for infringements; in this perspective, it has been stressed that “The implementation of the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973/78, as amended shows discrepancies among Member States and thus there is a need to harmonise its implementation at Community level, in particular the practice of Member States relating to imposition of penalties for discharges of polluting substances differs significantly”.³⁵

It has to be recalled that the Council Framework Decision 2005/667/JHA of 12 July 2005 had been adopted in order to ensure the effectiveness of Directive 2005/35/EC by defining a common framework of criminal penalties applicable to conduct constituting an offence as defined in the directive. In particular, the framework decision required the Member States to take measures to ensure that infringements were subject to “effective, proportionate and dissuasive” criminal sanctions and that these measures were also applicable to the ship owner, the cargo owner, the charterer and the classification society; as it concerns these criminal penalties, they included

³²“EU Ship-Source Pollution Legislation Developments”, available at <http://www.steamshipmutual.com/publications/Articles/EUPollution1207.html>.

³³ Axel Luttenberger, “Criminal penalties for ship-source pollution in the environmental legislation”, (2010): 1, available at http://www.researchgate.net/publication/253649917_CRIMINAL_PENALTIES_FOR_SHIP-SOURCE_POLLUTION_IN_THE_ENVIRONMENTAL_LEGISLATION/file/5046351fa19aa675ac.pdf.

³⁴ Luttenberger, “Criminal penalties for ship-source pollution in the environmental legislation”, 2.

³⁵ Luttenberger, “Criminal penalties for ship-source pollution in the environmental legislation”, 6.

imprisonment for the most serious offences and fines for less serious ones, as well as disqualification from performing a regulated activity; the framework decision also provided for liability of legal entity and applicable sanctions.

As it has already been recalled, the European Commission brought a case to the EC Court of Justice on the validity of the Framework Decision (case C-440/05). The Court of Justice on 23 October 2007 confirmed that when the application of effective, proportionate and dissuasive criminal penalties by competent national authorities is an essential measure, the Community legislature may require Member States to introduce criminal penalties in order to ensure that the rules which it lays down in that field are fully effective; however, the Court of Justice ruled that the Community was not competent to legislate as to the type and level of criminal penalties. Therefore, the Court of Justice stated that the Framework Decision 2005/667/JHA, in encroaching on the competence which Article 80(2) EC attributed to the Community, infringed Article 47 TUE and must therefore be annulled.

The need to fill the regulatory gap created by the decision of the Court of Justice of 23 October 2007, has led the European legislator to enact Directive 2009/123/EC, amending Directive 2005/35/EC.³⁶

As it had been noticed with regard to the proposal stage, “The new Directive is an important improvement on the protection of the environment through criminal law and it is signal that the Community does not tolerate safe havens for offenders who severely damage natural resources. What’s more it seeks to promote the integration into Community policy of a high level of environmental protection in accordance with the principle of sustainable development”.³⁷

Directive 2009/123/EC requires Member States to ensure that are considered infringements and are regarded as criminal offences ship-source discharges of polluting substances if committed with intent, recklessly or with serious negligence, and to take the necessary measures to ensure that the natural or legal persons (including cargo owners and classification societies) committing the offence can be held liable.

The polluting substances included in Directive 2009/123/EC are the same as those of Directive 2005/35/EC, which comply with the Annexes to the MARPOL convention. They are hydrocarbons (petroleum in any form, including crude oil, fuel oil, sludge, oil refuse and refined products), mixtures thereof, and noxious liquid substances carried in bulk; the noxious liquid substances carried in bulk, if discharged into the sea from tank cleaning operations, present a hazard (ranging from slight to severe) to marine resources or to human health or cause harm to amenities or other legitimate uses of the sea.³⁸ The directive applies to discharges of polluting substances from all ships, including hydrofoils, hovercrafts, submersibles, etc. The concept of “discharge” to be regarded as a criminal offence includes minor spills when these are committed with intent, recklessly or by serious negligence and they produce a deterioration of water quality, as well as when repeated minor cases do not individually but in conjunction result in a deterioration of water quality and are committed with intent, recklessly or by serious negligence.

The directive also requires that any act of inciting, aiding or abetting an offence committed with intent and referred to in the directive is punishable as a criminal offence.

Member States are required to take the necessary measures to ensure that infringements under the directive are punishable by “effective, proportionate and dissuasive” criminal penalties (Article 8): in line with the European Court of Justice judgment of October 2007, ruling that determining type and levels of criminal sanctions was not within Community competence, Directive 2009/123/EC does not set common levels of sanctions.

Member States also have to ensure that legal persons can be held responsible for the above mentioned criminal offences committed for their benefit by any natural person acting either individually or as part of an organ of the

³⁶ Francesca Pellegrino, “The introduction of penalties for ship-source pollution in community law: recent developments”, *European Transport/Trasporti Europei* 48 (2011): 106.

³⁷ Luttenberger, “Criminal penalties for ship-source pollution in the environmental legislation”, 4 f.

³⁸ Pellegrino, “The introduction of penalties for ship-source pollution in community law: recent developments”, 106.

legal person, who has a leading position within the legal person. Moreover, Member States are required to ensure that a legal person can be held liable where lack of supervision or control, by a natural person having a leading position, has made possible the commission of the criminal offence for the benefit of that legal person by a natural person under its authority.

Under the directive, the liability of a legal person does not exclude criminal proceedings against natural persons who are involved as perpetrators, inciters or accessories in the criminal offences.

It has to be underlined that Directive 2009/123/EC is without prejudice to other compensation systems for damage caused by ship-source pollution under European, national or international law.³⁹

The Directive had to be implemented by the European Member States by 16 November 2010.

4 Evaluation

It is first of all worth to underline the fact that the first initiative on approximation of environmental criminal law of the EU Member States finds its roots in the content of the Council of Europe Convention on the Protection of the Environment through Criminal Law; the similarity between the provisions of the Convention and the provision of Directive 2008/899/EC on environmental crime as it concerns the conduct to be criminalised should also be mentioned. This shows a substantial convergence at the international regional level and EU level as it concerns considering as an appropriate measure the establishment of obligations of criminalisation in environmental criminal matter. In addition, it is worth to underline the fact that the duties of criminalisation imposed by Directive 2008/99/EC encompass conduct considered under the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES) and the Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal (Basel convention) as long as the general requirements set up in the directive are met (unlawfulness and intention or serious negligence); at the same time, and with the same limits, conduct considered under the MARPOL convention should constitute a crime in the EU Member States under directive 2009/123/EC. These considerations are relevant, as the “need to protect the environment more effectively through a transversal and holistic approach” has been underlined by legal scholars and practitioners, who however do not disregard the importance to assure that the existing monitoring and implementation mechanisms of active European conventions receive sufficient funding.⁴⁰ Furthermore, the adoption of Directive 2008/99/EC and Directive 2009/123/EC might give new input to the international community for the future development of international instruments on environmental crime.⁴¹

The provisions of Directive 2008/99/EC and Directive 2008/99/EC which seem to have resulted more relevant in terms of impact on the legal systems of the EU Member States are those on liability of legal persons. The fact that the directives did not require the sanctions for legal persons to be criminal penalties should be positively evaluated. This approach, which is the general approach followed by all EU instruments imposing Member States to introduce forms of liability of legal entities, seems to have facilitated the introduction of a form of corporate liability for environmental crime in those legal systems, like Italy, where the admissibility of a truly criminal liability of legal entities is constitutionally controversial. With regard to Italy, the provisions under consideration constituted the decisive input for extending the regime of liability of legal persons and collective entities to (listed) environmental crimes; although this liability is named as “administrative”, according to the majority of the opinions it is criminal in

³⁹ Pellegrino, “The introduction of penalties for ship-source pollution in community law: recent developments”, 106.

⁴⁰ See Bernard Marquet, “Speaking notes at the UNICRI-UNEP Conference on Environmental Crime - Current and Emerging Threats held in Rome on 29-30 October 2012”.

⁴¹ See Marquet, “Speaking notes at the UNICRI-UNEP Conference on Environmental Crime”.

nature and it however allows to overcome what was considered one of the main cause of effectiveness of the Italian normative system against environmental crime.⁴² In Spain, where the general regime of corporate liability was quite unclear,⁴³ the need to conform with the requirements set out by the directives brought to the introduction into the Criminal Code of a regime of criminal liability of legal persons not only for environmental crimes, but also for several other crimes (still constituting a *numerus clausus*).⁴⁴

This said, it is worth to recall the fact that Directive 2008/99/EC and Directive 2009/123/EC impose an obligation on Members States to introduce criminal penalties with regard to the conduct listed therein, but as far as the sanctions are concerned the directives do not contain any binding indication concerning the type (custodial or pecuniary) and level of the criminal sanctions to be introduced, providing only that Member States shall take the necessary measures to ensure that the offences are punishable by “effective, proportionate and dissuasive criminal penalties”.

This is a consequence of the ‘constitutional framework’ under which the directives have been enacted. Following the judgement of the Court of Justice of 23 October 2007 in case C-440/05 Commission v Council (stating that the determination of the type and level of the criminal penalties to be applied did not fall within the Community’s sphere of competence), Directive 2008/99/EC does not contain the provisions on type and level of the criminal penalties as well as on aggravating circumstances, including those for organised environmental crime, which on the contrary were foreseen in the original proposal of 9 February 2007.

Part of the legal scholars has regarded as unsatisfactory an harmonisation which is limited to point out the behaviours to be criminally punished, without giving indications on the type and level of the criminal sanctions.⁴⁵

In fact, a further EU intervention concerning the approximation of criminal sanctions for environmental crimes within the EU Member States might result to be appropriate, in light of the frequent transnational nature of environmental crime (as such nature implies that the effects of environmental crime might be produced in different Member States) as well as in light of the involvement of organised crime (and its transnational *modus operandi*) in committing serious environmental crimes and of the role of corporations (as this might create the risk of a jurisdiction shopping); in addition, other interests, such as competition, might be endangered by the commission of corporate environmental crimes, as the lack of compliance with environmental administrative regulations which is to be criminally punished under Directive 2008/99/EC, results in cost saving for the un-complying company and therefore in an alteration of the competition.⁴⁶

5 The way forward

Article 83 TFEU might play an important role in the development of further EU instruments for the protection of the environment through criminal law. The harmonisation of the type and level of the criminal sanctions is now permitted on the basis of Article 83 (2) TFEU (on the one hand the environment is a legal interest of supranational

⁴² See Grazia Maria Vagliasindi, “Liability of Legal Persons and Collective Entities for Environmental Crimes in Italian Law”, *Eu crim* (2012): 131 ff.

⁴³ See Silvina Bacigalupo, “Las consecuencias accesorias aplicables a las personas jurídicas” in *Curso de Derecho penal economico*, ed. Enrique Bacigalupo (Madrid: Marcial Pons, 2005): 105 ff.

⁴⁴ See Grazia Maria Vagliasindi, *Attività d’impresa e criminalità ambientale. La responsabilità degli enti collettivi* (Catania: Torre, 2012), 24 and 133 ff.

⁴⁵ See, among others, Giovanni Grasso, “Relazione Introduttiva”, in *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, ed. Giovanni Grasso and Rosaria Sicurella (Milan: Giuffrè, 2008): 22 ff.

⁴⁶ Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona”, 467 ff.

importance, and, on the other hand, it has been subject to several interventions of harmonisation).⁴⁷ Moreover, Article 83 (1) TFEU could permit to introduce provisions in order to better tackle environmental crimes committed by (or with the involvement of) organised crime⁴⁸.

For the above mentioned reasons (see *supra*, 4), this can be considered as an added value in terms of enhancing the protection of the environment.

In particular, the harmonisation of criminal sanctions for environmental crimes might certainly produce a positive impact in countries, like Italy, where the characteristics of the provisions on environmental crimes (e.g. being misdemeanours) often produce a negative effect on the judicial enforcement of those provisions in light of overall features of the criminal law system (e.g. short prescriptive periods),⁴⁹ causing a lack of effectiveness in environmental protection.

Moreover, if, following an evaluation undertaken in conformity with the principles which should guide the choices of criminalisation⁵⁰ (e.g. principle of proportion) a maximum of at least three years imprisonment will be foreseen for the most serious environmental crimes, mutual assistance instruments could be used, which might strengthen the tools against environmental crimes which are often transnational in nature. In addition, the provision of a maximum of at least four years imprisonment for the most serious environmental crimes would let these crimes to fall under the scope of the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime⁵¹.

However, it should not be underestimated that the enactment, on the basis of Article 83 TFEU, of a further approximation instrument concerning the type and level of the criminal penalties for the conduct listed by directive 2008/99/EC and 2009/123/EC as well as the aggravating circumstances for environmental crimes committed within or with the involvement of criminal organisation, might incur in several obstacles.

First of all, criminal law is still perceived as a core element of national sovereignty; therefore, although the approximation of sanctions for environmental crime (e.g. establishing minimum level of maximum criminal penalties) would in any case be adopted in the form of a directive, as such needing the intervention of national legislator and not being of direct effect, a further EU intervention imposing Member States to limit their freedom in assessing the gravity of a criminal behaviour (also in comparison to the overall choices on penalties for crimes different from the ones considered by the eventual approximation instrument) might be perceived as a violation of the national prerogatives, and this particularly in those countries, like Germany, whose institutions clearly stressed that criminal law ultimately remains a core domain of the Member States⁵² at the time of implementation of Directive 2008/99/EC.

Moreover, in those countries where a well developed environmental culture together with a good level of enforcement of administrative environmental provisions and an overall criminal justice system assuring the effectiveness of the application of criminal sanctions to the perpetrators of the offences lead to see as questionable the use of high criminal

⁴⁷ Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona”, 456 ff.

⁴⁸ Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona”, 464 ff.

⁴⁹ Vagliasindi, “The European Harmonisation in the Sector of Protection of the Environment through Criminal Law”, 328 f.

⁵⁰ On these principles see “The Manifesto on European Criminal Policy”, *Zeitschrift Für Internationale Strafrechts Dogmatik* 12 (2009): 707-716.

⁵¹ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, *OJ L* 300, 11-11-2008, p. 42-45.

⁵² See in particular the judgment of the Federal Constitutional Court of 30 June 2009, BVerfGE 123, 267; see Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona”, 465.

penalties for environmental crimes⁵³, the harmonisation of criminal sanctions for environmental crimes might be perceived as lacking utility and therefore be difficult to agree.

6 Summary

The issue of the approximation of environmental criminal law of the EU Member States was laid down long before the Lisbon Treaty introduced the EU competences on criminal matters. The 2000 “Initiative of the Kingdom of Denmark with a view to adopting a Council framework Decision on combating serious environmental crime” was drafted taking the main elements of the 1998 Council of Europe Convention on the protection of the environment through criminal law; the Convention never entered into force, but it nevertheless represents a relevant instrument precisely in providing the roots of the subsequent EU efforts towards approximation of environmental criminal law.

As it concerns these efforts, the intense institutional debate on the correct legal basis for the introduction of measures aiming at harmonising national legislations on environmental crime before the entry into force of the Lisbon Treaty, was solved by the Court of Justice with two judgments (13 September 2005 and 23 October 2007) affirming that the Community had the power to harmonise the criminal provisions of the Member States where “necessary in order to ensure that the rules which it lays down on environmental protection are fully effective” and “essential (...) for combating serious environmental offences”; however, according to the judgment of 23 October 2007, the determination of the type and level of the criminal penalties to be applied did not fall within the Community’s sphere of competence.

On these grounds, Directive 2008/99/EC was enacted, aiming at eliminating the differences among criminal laws of the Member States with which effect is given to the environmental protection requirements arising from Community law. Directive 2008/99/EC requires Member States to consider crime the conduct specifically listed in Article 3, when this conduct is unlawful and it is committed intentionally or with at least serious negligence; the conduct listed in Article 3 concerns core elements of the concept of environment (air, soil, water, fauna, flora) and related industrial or economic activities. Following the judgment of the Court of Justice of 23 October 2007, the directive does not contain provisions on type or levels of criminal sanctions. Articles 6 and 7 of the directive require Member States to ensure that legal persons can be held liable for offences referred to in Articles 3 and 4 committed for their benefit and to ensure that legal persons held liable are punishable by effective, proportionate and dissuasive sanctions.

The need to fill the regulatory gap created by the decision of the Court of Justice of October 2007 (Case C-440/05), which annulled the Framework Decision 2005/667/JHA, has led the European legislator to enact Directive 2009/123/EC, amending Directive 2005/35/EC. Directive 2009/123/EC requires Member States to ensure that are considered infringements and are regarded as criminal offences ship-source discharges of polluting substances if committed with intent, recklessly or with serious negligence, and to take the necessary measures to ensure that the natural or legal persons (including cargo owners and classification societies) committing the offence can be held liable. In line with the judgment of the Court of Justice of 23 October 2007, Directive 2009/123/EC does not set common levels of criminal penalties.

A further EU intervention concerning the approximation of the type and level of criminal sanctions for environmental crimes might result an appropriate measure, in light of the frequent transnational nature of environmental crime as well as in light of the involvement of organised crime and of the role of corporations in the commission of environmental crimes.

However, it should not be underestimated that the enactment, on the basis of Article 83 TFEU, of a further approximation instrument concerning the type and level of the criminal penalties for the conduct listed by

⁵³ See, with reference to the Scandinavian countries, Elina Pirjatanniemi, “Desperately Seeking Reason - New Directions for European Environmental Criminal Law”, *Scandinavian Studies in Law* 54 (2009): 409 ff.

directive 2008/99/EC and 2008/99/EC as well as the aggravating circumstances for environmental crimes committed within or with the involvement of criminal organisation, might incur in several obstacles, as it might be perceived by some Member States as a violation of the national prerogatives or as lacking of utility.

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