

## EUROPEAN APPROACH TO COMBAT ENVIRONMENTAL CRIME: LEGAL AND INSTITUTIONAL ASPECTS

Libor Klimek\*

**Abstract:** *The paper deals with European legal approach to combat environmental crime. It is divided into three sections. The first section analyses its legal framework, namely the Convention on the Protection of Environment through Criminal Law of 1998, the Directive 2008/99/EC on the protection of the environment through criminal law and the Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements. The second section is focused on crimes and sanctions as defined by mentioned documents. The last third section briefly introduces European networks and agencies combating environmental crime, namely the European Network against Environmental Crime and the European Maritime Safety Agency.*

**Keywords:** *environmental crime, legal framework, crimes, sanctions, European Network against Environmental Crime, European Maritime Safety Agency*

### I. INTRODUCTION

A few decades ago the protection of the environment was not a European priority. However, it is now widely recognised that the planet Earth faces a diverse and growing range of environmental challenges. At the European territory have been adopted series of environmental legislative instruments regulating environmental issues, including environmental crime.

Environmental issues are accompanied by a recognition that ecological interdependence does not respect national boundaries and that issues previously considered to be matters of domestic concern have international implications. The implications, which may be bilateral, subregional, regional or global, can frequently only be addressed by international law and regulation.<sup>1</sup> Environmental rights has been recognised globally even as human rights, in spite of the fact their enforcement in global measure has been challenging.<sup>2</sup>

Specific efforts towards harmonisation of environmental crime occurred on late 1970s. The Council of Europe adopted the *Resolution (77) 28 on the contribution of criminal law to the protection of the environment*.<sup>3</sup> In this resolution it was stated that it was necessary to resort to criminal law as a *last resort* when other measures proved as ineffective or inappropriate.

---

\* Associate Professor, JUDr. et PhDr. mult. Libor Klimek, PhD., Dr. h. c. Associate Professor at the Faculty of Law, Matej Bel University in Banská Bystrica, Banská Bystrica, Slovak Republic; Visiting Professor at the Faculty of Law, Leipzig University, Leipzig, Germany; Attorney at Law (advocate) specialized in criminal law in Bratislava – Old Town, Slovak Republic; ORCID: <https://orcid.org/0000-0003-3826-475X>.

<sup>1</sup> SANDS, P., PEEL, J., FABRA, A., MACKENZIE, R. *Principles of International Environmental Law*. 4<sup>th</sup> edition. New York, Cambridge: Cambridge University Press, 2003, p. 4.

<sup>2</sup> SAKTOROVÁ, L. The World Court of Human Rights Feasibility Study. *Danube: Law, Economics and Social Issues Review*. 2018, Vol. 9, No. 1, p. 39.

<sup>3</sup> Resolution (77) 28 on the contribution of criminal law to the protection of the environment (Adopted by the Committee of Ministers on 28<sup>th</sup> September 1977, at the 275<sup>th</sup> meeting of the Ministers' Deputies).

The European Union sets itself the objective to work for a high level of protection and improvement of the quality of the environment. The Treaty on European Union<sup>4</sup> stipulates that “[t]he Union [...] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a *high level of protection and improvement of the quality of the environment*”<sup>5</sup> (emphasis added). Moreover, even the Preamble of the Treaty on European Union mentions the importance of the environment, namely “environmental protection.”<sup>6</sup> Indeed, in legal perspective the protection of the environment is its high priority. On the other hand, not only the Member States of the European Union share the same approach, but another non-Member States follow European approaches, for example, Ukraine<sup>7</sup> as candidate for its membership.

## 1. LEGAL FRAMEWORK

In Europe environmental criminal law has gone through a remarkable development. Its role was originally reduced to back up administrative obligations as a supplement to sectoral environmental legislation. However, over the past decades it has been developed to autonomous system, including criminal law.<sup>8</sup> The most important European legal instruments in this field are:

- the Convention on the Protection of Environment through Criminal Law of 1998,
- the Directive 2008/99/EC on the protection of the environment through criminal law and
- the Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.

### 1.1 Convention on the Protection of Environment through Criminal Law of 1998 (Adopted by the Council of Europe)

At the European level the leading international instrument regulating environmental crime is the *Convention on the Protection of Environment through Criminal Law*,<sup>9</sup> adopted

<sup>4</sup> Treaty on European Union as amended by the Treaty of Lisbon. Official Journal of the European Union, C 83/13 of 30<sup>th</sup> March 2010. Details see, for example: BLANKE, H.-J., MANGIAMELI, S. (eds.) *The Treaty on European Union (TEU): A Commentary*. Cham: Springer, 2013.

<sup>5</sup> Article 3(3) of the Treaty on European Union as amended by the Treaty of Lisbon.

<sup>6</sup> Recital 9 of the Preamble to the Treaty on European Union as amended by the Treaty of Lisbon.

<sup>7</sup> GOLOVKO, L., KUTSEVYCH, M., SEREDIUK, V., BOGDAN, O. Implementation of EU Environmental Policy in Ukraine: Directions and Perspectives. *European Journal of Sustainable Development*. 2020, Vol. 9, No. 4, pp. 191–198; LADYCHENKO, V., MELNYCHUK, O., GOLOVKO, L., BURMAK, O. Waste management at the local level in the EU and Ukraine. *European Journal of Sustainable Development*. 2020, Vol. 9, No. 1, pp. 329–338; KIDALOV, S., VITIV, V., GOLOVKO, L., LADYCHENKO, V. Legal Regulation of Waste Management in Ukraine on the Way to European Integration. *European Journal of Sustainable Development*. 2020, Vol. 9, No. 2, pp. 422–430.

<sup>8</sup> FAURE, M. The Evolution of Environmental Criminal Law in Europe: A Comparative Analysis. In: A. Farmer – M. Faure – G. M. Vagliasindi (eds.). *Environmental Crime in Europe*. Oxford, Portland: Hart Publishing, 2017, pp. 267–318. See also: FAURE, M. The Development of Environmental Criminal Law in the EU and its Member States. *Review of European Community & International Environmental Law*. 2017, Vol. 26, No. 2, pp. 139–143.

<sup>9</sup> Convention on the Protection of Environment through Criminal Law. Council of Europe, European Treaty Series No. 172 [1998], Strasbourg, 4<sup>th</sup> November 1998.

by the Council of Europe in 1998. This Convention was the first international treaty to require more broadly the criminalisation of a number of offences causing or likely to cause environmental damage.<sup>10</sup> The Convention is aimed at improving the protection of the environment at European level by using criminal law as the *solution of last resort* in order to deter and prevent conduct which is most harmful to it. It also seeks to harmonise national legislation of European States in this field.

The Convention was adopted following the adoption of the Resolution No 1 by the 17<sup>th</sup> Conference of European Ministers of Justice which took place in 1990 in Istanbul (Turkey). In 1991 the Council of Europe set up a committee of experts under the name of *Group of Specialists on the protection of the environment through criminal law*; the committee was later transformed into a traditional committee of experts. The committee decided to draft a binding international (European) treaty.

The Convention on the Protection of Environment through Criminal Law was adopted in 1998. However, the Council of Europe has not reached the minimum number of ratifications required for it to enter into force. The Convention reached a total of 14 signatures and only Estonia ratified the Convention in 2002. Since the Convention requires at least 3 ratifications of contracting States, it still has not entered into force (at the time of writing this paper).

Although the Member States of the Council of Europe have not expressed official reasons for not having ratified the Convention, it is possible to assess some of the reasons which may explain why the Convention has not been particularly well received. As pointed out by *Pereira*, one reason for this is that the States may regard the Convention as a threat to their sovereignty over national criminal laws – a position which however is difficult to reconcile with the fact that many of those States have ratified other conventions adopted by the Council of Europe in order to harmonise criminal law. He argues that improving the levels of environmental enforcement is not seen as a priority by those States or even that there remains a certain degree of scepticism over the effectiveness of the use of criminal law for protection of the environment.<sup>11</sup>

## 1.2 Directive 2008/99/EC on the Protection of the Environment through Criminal Law (Adopted by the European Union)

At the European Union level the leading legislative instrument harmonising environmental crime is the *Directive 2008/99/EC on the protection of the environment through criminal law*.<sup>12</sup> The Directive establishes measures relating to criminal law in order to protect the environment more effectively.<sup>13</sup> This Directive obliges Member States of the European Union to provide for criminal penalties in their national legislation in respect of serious infringements of provisions of European Union law on the protection of the environment. It defines a minimum number of serious environment-related offences and

---

<sup>10</sup> PEREIRA, R. *Environmental Criminal Liability and Enforcement in European and International Law*. Leiden, Boston: Brill, 2015, p. 18.

<sup>11</sup> PEREIRA, R. *Environmental Criminal Liability and Enforcement in European and International Law*. p. 20.

<sup>12</sup> Directive 2008/99/EC of the European Parliament and of the Council of 19<sup>th</sup> November 2008 on the protection of the environment through criminal law. Official Journal of the European Union, L 328/28, 6<sup>th</sup> December 2008.

<sup>13</sup> Article 1 of the Directive 2008/99/EC on the protection of the environment through criminal law.

requires the Member States of the European Union to provide for more dissuasive criminal penalties for this type of offence.

The Directive 2008/99/EC on the protection of the environment through criminal law is a surrogate of the Framework Decision 2003/80/JHA on the protection of the environment through criminal law,<sup>14</sup> which was annulled by the Court of Justice of the European Union. The question which begs consideration is why the Framework Decision was annulled and surrogated by the Directive.

The Framework Decision was adopted in 2003 by the Council of the European Union. It required the Member States of the European Union to provide for *criminal sanctions* in the case of the *offences against environmental law*. However, the European Commission asked the Court of Justice of the European Union to annul the Framework Decision.<sup>15</sup> In its view, the legal basis chosen – i.e. the Framework Decision adopted by the Council of the European Union (instead of a Directive adopted by the European Parliament and the Council of the European Union) – was erroneous, because the legislative enterprise in question should be undertaken in the context of the former Treaty Establishing the European Community<sup>16</sup> and not, as has had been done, on the basis of the former version of the Treaty on European Union.<sup>17</sup> As noted Advocate General *Colomer*,<sup>18</sup> behind that succinct proposition there was a far-reaching issue, which involved the powers of the Community, since, on the assumption that the protection of the natural environment in the European Union demanded concerted action in the form of the criminalisation of the most serious infringements, it was necessary to determine whether approval of the necessary co-ordinating provisions fell within the first pillar or within the third pillar of the European Union.<sup>19</sup>

The European Commission claimed that the Court of Justice should declare that the Framework Decision was unlawful and as a consequence it shall annul it. On the one

---

<sup>14</sup> Council Framework Decision 2003/80/JHA of 27<sup>th</sup> January 2003 on the protection of the environment through criminal law. Official Journal of the European Union, L 29/55 of 5<sup>th</sup> February 2003.

<sup>15</sup> Action brought on 15<sup>th</sup> April 2003 by the Commission of the European Communities against the Council of the European Union (Case C-176/03).

<sup>16</sup> Treaty Establishing the European Community as amended by the Treaty of Nice (in 2009 renamed to the Treaty on the Functioning of the European Union, i.e. Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon). Official Journal of the European Union, C 321/E/37 of 29<sup>th</sup> December 2006.

<sup>17</sup> Treaty on European Union as amended by the Treaty of Nice. Official Journal of the European Union, C 321/E/5 of 29<sup>th</sup> December 2006.

<sup>18</sup> Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 26<sup>th</sup> May 2005 – Case C-176/03 – Commission of the European Communities v Council of the European Union, para. 2.

<sup>19</sup> The Treaty on European Union in its original version of 1993 introduced the Three Pillar structure of the European Union, also known as so-called ‘Temple structure’. It affected the means for co-operation in the area of criminal law. There was introduced a new approach to integration and co-operation. In addition to economic integration and co-operation represented by the European Communities, there were introduced new areas of co-operation – a ‘common foreign and security policy’ and ‘co-operation in the field of justice and home affairs’. Thus, since 1993 the major innovation of the European Union was the Three Pillar structure, representing the *European Community pillar* consisting of traditional European community law (so called First pillar), the *Common Foreign and Security Policy pillar* (so called Second pillar) and the *Justice and Home Affairs pillar* (so called Third pillar; after the Treaty of Amsterdam – the first treaty amending the Treaty on European Union which came into force in 1999 – the Third Pillar was renamed to *Police and Judicial Co-operation in Criminal Matters*). The Treaty of Lisbon – which came into force in 2009 – did away with the former Three Pillar structure of the European Union (1993–2009) and all legislation coming within the Area of Freedom, Security and Justice, including co-operation in criminal matters has to be adopted by means of *directives*, under the ordinary legislative procedure.

hand, the European Commission unreservedly supported the objectives of the Framework Decision. On the other hand, it disputed the legal basis adopted in order to provide for the measures in question.<sup>20</sup> The European Commission argued that the measures in question were clearly matters of former Community competence. The choice of legal basis was important in this case because of the special institutional features of Title VI of the former version of the Treaty on European Union<sup>21</sup> which, among others, did not have any equivalent to the infringement procedure. The European Commission argued that the choice of legal basis of an act must be based on objective criteria that are susceptible to judicial review, as regards in particular the purpose and content of the act. Both the purpose and the content of the Framework Decision manifestly fell within the scope of Community competencies. The aim of the Framework Decision was to protect the environment by imposing penalties on infringements adversely affecting it, which corresponded to former Community competencies. The former version of the Treaty on European Union (i.e. the Treaty on European Union as amended by the Treaty of Nice) laid down the primacy of Community provisions and it was therefore not legally possible to adopt acts on the basis of that Treaty if there was Community competence to do so.

The European Commission also claimed that the Communities have competence to require the Member States to impose criminal penalties where that was necessary in order to guarantee the effect and efficacy of Community law. In that regard, the European Commission submitted, first, that according to settled case-law of the Court of Justice (see below), the Member States must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which make the penalty effective, proportionate and dissuasive. The Member States may therefore be required to provide criminal penalties for infringements of Community law. The Community measure may even itself define the types of penalties which the Member States may establish. The European Commission observed, next, that if the Community legislature considered that compliance with the rules which it laid down could be guaranteed only by the imposition of criminal penalties, it had power to require the Member States to provide for such penalties.

The case-law of the Court of Justice on the Community's power to establish penalties already existed, recognising power of the Community to require the Member States to classify as criminal offences conduct which hinders achievement of the objectives laid down in the Treaty on European Union (i.e. the Treaty on European Union as amended by the Treaty of Nice) and the Treaty Establishing the European Community (i.e. the Treaty on European Union as amended by the Treaty of Nice):

The judgment in case 50-76 *Amsterdam Bulb*<sup>22</sup> asserted that, in the absence of any provision in the Community rules for the punishment of individuals who fail to observe

---

<sup>20</sup> In particular Articles 29, 31(e) and 34(2)(b) of the former version of the Treaty on European Union as amended by the Treaty of Nice (in 2009 amended by the Treaty of Lisbon). Official Journal of the European Union, C 321/E/5 of 29<sup>th</sup> December 2006.

<sup>21</sup> Title VI of the Treaty on European Union as amended by the Treaty of Nice – Articles 29-42 – regulated provisions on police and judicial co-operation in criminal matters.

<sup>22</sup> Judgment of the Court of Justice of the European Communities of 2<sup>nd</sup> February 1977 – Case 50-76 – *Amsterdam Bulb BV v Produktschap voor Siergewassen*.

those rules, the national legislatures can adopt such sanctions as appear to them to be appropriate. That assertion is based on the duty of the Member States to ensure fulfilment of their European obligations.<sup>23</sup> This case turned on three premises: (i) it is for Community law to design the penalty provisions which ensure its effectiveness; (ii) where there are none, the Member States apply such penalty measures as they see fit; and (iii) they are free to choose the methods which they consider most appropriate, even if variations are inherent in the system.

In case C-68/88 *Commission versus Greece*<sup>24</sup> – known as ‘Greek Maize’ – the Court of Justice reiterated the formulas of the judgment in case 50-76 *Amsterdam Bulb*, without specifically citing that case. It added two requirements for the legitimacy of national disciplinary measures intended to uphold Community law: (i) infringements must be penalised under procedural and substantive conditions which are analogous to those applicable to infringements of national law of a similar nature and importance; and (ii) the conditions must make the penalty effective, proportionate and dissuasive.<sup>25</sup>

The national rules entail additional protection, but, as suggested in the judgment of case 299/86 *Drexl*,<sup>26</sup> Community law set certain limits, and demands that the penalty be equivalent to that used in respect of infringements of domestic law (the principle of equal treatment or proportionality) and, furthermore, that it be effective.<sup>27</sup>

In case C-186/98 *Nunes and de Matos*<sup>28</sup> the Court of Justice was seeking to ascertain whether a Member State is entitled to classify as a criminal offence conduct harmful to the financial interests of the Community, where the Community legislation only affords it a civil penalty. The Court of Justice held that the actions available under the auspices of the Treaty Establishing the European Community<sup>29</sup> include criminal responses and stated that (i) if Community law contains no measures to ensure compliance with its provisions, the Member States have a duty to establish such measures; if it does include them, the Member States acquire a complementary role concerned with reinforcing those provisions; (ii) the choice of the type of penalty lies with the national authorities, although the penalty must be comparable with that imposed for infringements of domestic law of similar nature and importance, and must in addition be effective, appropriate and dissuasive.

In 2005, the Court of Justice of the European Union in case C-176/03 *Commission versus Council*<sup>30</sup> – by its rulings – annulled the Framework Decision 2003/80/JHA on the protection of the environment through criminal law. The Court of Justice argued that the Framework Decision 2003/80/JHA on the protection of the environment through criminal law encroached upon the powers which the former Treaty Establishing the European Com-

---

<sup>23</sup> Judgment *Amsterdam Bulb* [...], paras. 32 and 33.

<sup>24</sup> Judgment of the Court of Justice of the European Communities of 21<sup>st</sup> September 1989 – Case 68/88 – *Commission of the European Communities v Hellenic Republic*.

<sup>25</sup> Judgment *Commission versus Greece* [...], paras. 23 and 24.

<sup>26</sup> Judgment of the Court of Justice of the European Communities of 5<sup>th</sup> February 1988 – Case 299/86 – *Criminal proceedings against Rainer Drexl*.

<sup>27</sup> Judgment *Drexl* [...], para. 17.

<sup>28</sup> Judgment of the Court of Justice of the European Communities of 8<sup>th</sup> July 1999 – Case C-186/98 – *Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos*.

<sup>29</sup> Under Article 10 of the Treaty Establishing the European Community.

<sup>30</sup> Judgment of the Court of Justice of the European Communities of 13<sup>th</sup> September 2005 – Case C-176/03 – *Commission of the European Communities v Council of the European Union*.

munity conferred on the Community,<sup>31</sup> and, accordingly, the entire Framework Decision being indivisible, infringed the former Treaty on European Union.<sup>32</sup> Articles of that Framework Decision, which entail partial harmonisation of the criminal laws of the Member States of the European Union,<sup>33</sup> in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment, could have been properly adopted on the basis of Treaty Establishing the European Community in so far as, on account of both their aim and their content, their principal objective is the protection of the environment, which constituted one of the essential objectives of the Community. In this regard, while it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fell within the Community's competence, this did not, however, prevent the Community legislature, when the application of *effective, proportionate and dissuasive criminal penalties* by the competent national authorities was an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considered necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

As seen, the Court of Justice of the European Union annulled the Framework Decision 2003/80/JHA on the protection of the environment through criminal law by its judgment in case C-176/03 *Commission versus Council*. In a few months the European Commission introduced its communication on the implications of the Court's judgment.<sup>34</sup> It stated that the judgment clarifies the distribution of powers between the former first and third pillars as regards provisions of criminal law. This clarification removes any doubts about a question which had long been controversial. The Commission's aim with this Communication was to explain the conclusions to be drawn from it.

The European Commission argued that the Court of Justice refers in its analysis to the traditional criterion of the aim and content of the act in order to establish whether the legal basis is correct. In this case, the Community policy concerned is environmental protection. However, the judgment lays down principles going far beyond the case in question. The same arguments can be applied in their entirety to the other common policies and to the four freedoms (freedom of movement of persons, goods, services and capital).

The judgment makes it clear that criminal law as such did not constitute a Community policy, since Community action in criminal matters might be based only on implicit powers associated with a specific legal basis. Hence, appropriate measures of criminal law could be adopted on a Community basis only at sectoral level and only on condition that there was a clear need to combat serious shortcomings in the implementation of the Com-

---

<sup>31</sup> Under Article 175 of the Treaty Establishing the European Community.

<sup>32</sup> Namely Article 47 of the Treaty on European Union.

<sup>33</sup> Articles 1 to 7 of the Framework Decision containing definitions of key terms and provisions on offences (intentional and negligent), participation and instigation of defined conducts, penalties for natural persons, liability of legal persons and sanctions for legal persons.

<sup>34</sup> Commission of the European Communities (2005): Implications of the Court's judgment of 13<sup>th</sup> September 2005 (Case C-176/03 *Commission v Council*), Communication from the Commission to the European Parliament and the Council, COM(2005) 583 final/2. See also: SPINELLIS, D. Court of Justice of the European Communities: Judgment of 13 September 2005 (Case C-176/03, *Commission v. Council*) annulling the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law. *European Constitutional Law Review*. 2006, Vol. 2, No. 2, pp. 293–302.

munity's objectives and to provide for criminal law measures to ensure the full effectiveness of a Community policy or the proper functioning of a freedom.

In the point of view of subject matter, in addition to environmental protection the Court's reasoning can therefore be applied to all Community policies and freedoms which involve binding legislation with which criminal penalties should be associated in order to ensure their effectiveness. The Court makes no distinction according to the nature of the criminal law measures. Its approach is functional. The basis on which the Community legislature may provide for measures of criminal law is the necessity to ensure that Community rules and regulations are complied with.

As seen, the Directive 2008/99/EC on the protection of the environment through criminal law, which these days is the leading legislative instrument harmonising environmental crime in the European Union, was not original legislation on protection of the environment through criminal law. Comparing its objective and provisions to the objective and provisions of the Framework Decision 2003/80/JHA on the protection of the environment through criminal law, in principle, one can conclude that they are almost identical.

### 1.3 Directive 2005/35/EC on Ship-source Pollution and on the Introduction of Penalties for Infringements (Adopted by the European Union)

The fight against intentional or seriously negligent ship-source pollution constitutes one of the priorities of the European Union in the area of environmental crime. Following the shipwreck of the tanker *Prestige*<sup>35</sup> in 2002 the conclusions of the Copenhagen European Council<sup>36</sup> of December 2002 and the statement of the Justice and Home Affairs Council<sup>37</sup> of December 2002, in particular, express the determination of the European Union to adopt the measures needed to avoid recurrence of such damage.

Besides the Directive 2008/99/EC on the protection of the environment through criminal law, the European Union adopted also the *Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements*<sup>38</sup> (hereinafter "Directive 2005/35/EC on ship-source pollution"). The purpose of the Directive is to incorporate international standards for ship-source pollution into European Union law and to ensure that persons responsible for discharges of polluting substances are subject to adequate

---

<sup>35</sup> Details including photographs see, for example: Learn from the past: *Prestige* sinking, one of the worst oil spills in Europe. In: *safety4sea.com* [online]. 13. 11. 2018 [2019-09-09]. Available at: <<https://safety4sea.com/cm-learn-from-the-past-prestige-sinking-one-of-the-worst-oil-spills-in-europe/>>; or *Prestige* oil tanker disaster crew acquitted in Spain. In: *bbc.com* [online]. 13. 11. 2013 [2019-09-09]. Available at: <<https://www.bbc.com/news/world-europe-24930976>>.

<sup>36</sup> Council of the European Union (2002): Copenhagen European Council 12<sup>th</sup> and 13<sup>th</sup> December 2002, Presidency Conclusions, 15917/02.

<sup>37</sup> 2477<sup>th</sup> Council meeting – Justice and Home Affairs, Brussels, 19<sup>th</sup> December 2002.

<sup>38</sup> Directive 2005/35/EC of the European Parliament and of the Council of 7<sup>th</sup> September 2005 on ship-source pollution and on the introduction of penalties for infringements as amended by the Directive 2009/123/EC. Official Journal of the European Union, L 255/11 of 30<sup>th</sup> September 2005. The Directive 2009/123/EC amended the Directive 2005/35/EC on ship-source pollution in order to improve rules on ship-source pollution and to ensure that those responsible for discharges of polluting substances are subject to adequate penalties. It requires the member States of the European Union to introduce rules on the liability of legal persons under private law such as companies. See: Ship-source pollution and criminal penalties. In: *eur-lex.europa.eu* [online]. 25. 4. 2016 [2019-09-09]. Available at: <<https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32005L0035>>.

penalties, including criminal penalties, in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships. However, the Directive does not prevent Member States of the European Union from taking more stringent measures against ship-source pollution in conformity with international law.<sup>39</sup>

Measures of a dissuasive nature form an integral part of the European Union maritime safety policy, as they ensure a link between the responsibility of each of the parties involved in the transport of polluting goods by sea and their exposure to penalties. In order to achieve effective protection of the environment there was a need for effective, dissuasive and proportionate penalties. To that end it was essential to approximate, by way of the proper legal instruments, existing legal provisions, in particular on the precise definition of the infringement in question, the cases of exemption and minimum rules for penalties, and on liability and jurisdiction.

It should be noted that the Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements is supplemented, as regards criminal offences and penalties (as well as other provisions) by the Framework Decision 2005/667/JHA to strengthen the criminal law framework for the enforcement of the law against ship-source pollution<sup>40</sup> (hereinafter “Framework Decision 2005/667/JHA on ship-source pollution”).

## 2. DEFINITION OF CRIMES AND SANCTIONS

### 2.1 Requirements of the Convention on the Protection of Environment through Criminal Law of 1998

#### *Criminal Offences*

Even though the preamble to the Convention on the Protection of Environment through Criminal Law states first that “the prevention of the impairment of the environment must be achieved primarily through *other measures*”<sup>41</sup> (emphasis added), it subsequently recognises the need for criminalisation of the most serious environmental offences stating that “environmental violations having serious consequences must be established as *criminal offences* subject to appropriate sanctions”<sup>42</sup> (emphasis added).

The Convention on the Protection of Environment through Criminal Law of 1998 obliges contracting States to introduce specific provisions into their criminal law or to modify existing provisions in this field. It establishes as *criminal offences* a number of acts committed intentionally or through negligence where they cause or are likely to cause lasting damage to the quality of the air, soil, water, animals or plants, or result in the death of or serious injury to any person.

First of all, the Convention covers the most serious environmental offences which, whether by an act or an omission, are committed *intentionally*. States as contracted

<sup>39</sup> Article 1(1)(2) of the Directive 2005/35/EC on ship-source pollution.

<sup>40</sup> Council Framework Decision 2005/667/JHA of 12<sup>th</sup> July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution. Official Journal of the European Union, L 255/164, 30<sup>th</sup> September 2005.

<sup>41</sup> Recital 7 of the Preamble to the Convention on the Protection of Environment through Criminal Law.

<sup>42</sup> Recital 8 of the Preamble to the Convention on the Protection of Environment through Criminal Law.

parties of the Convention shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law, when committed *intentionally*:<sup>43</sup>

- 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,
- 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,
- 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,
- 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,
- 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.

As seen, the Convention contains specific environmental offences with an emphasis on the protection of environmental media, i.e. of the air, the soil and water, but also including the protection of human beings, protected monuments, other protected objects, property, animals and plants from environmental dangers. The first two offences are pollution offences, the latter ones primarily cover pre-stages where the illegal handling of dangerous installations and of specific dangerous substances (radio-active substances, hazardous waste) is likely to cause death or serious injury to persons or damage to the environment.

Moreover, States 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 above-mentioned offences.

As far as *negligent offences* are concerned, States shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law, when committed with negligence, the above-mentioned offences.<sup>44</sup> Indeed, if in relation to one, several or even all substantial elements (objective elements) of the above-mentioned offences the mental element of intention is missing, but negligence can be established, the responsibility shall apply.

Second, the scope of the Convention is extended to a wide range of environment-related illegal behaviours, namely *other criminal offences or administrative offences*. States shall adopt such appropriate measures as may be necessary to establish as criminal of-

<sup>43</sup> Article 2(1) of the Convention on the Protection of Environment through Criminal Law. In-depth-analysis of all acts see: Explanatory Report to the Convention on the Protection of Environment through Criminal Law. Strasbourg, 4<sup>th</sup> November 1998, pp. 3 et seq.

<sup>44</sup> Article 3(1) of the Convention on the Protection of Environment through Criminal Law.

fences or administrative offences, liable to sanctions or other measures under its domestic law, when committed *intentionally* or with *negligence*:<sup>45</sup>

- the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water,
- the unlawful causing of noise,
- the unlawful disposal, treatment, storage, transport, export or import of waste,
- the unlawful operation of a plant,
- the unlawful manufacture, treatment, use, transport, export or import of nuclear materials, other radioactive substances or hazardous chemicals,
- the unlawful causing of changes detrimental to natural components of a national park, nature reserve, water conservation area or other protected areas,
- the unlawful possession, taking, damaging, killing or trading of or in protected wild flora and fauna species.

As regards liability, in legal perspective many kinds of legal liability are known.<sup>46</sup> The Convention defines the concept of *criminal liability* of natural persons as well as legal persons. Indeed, under the Convention States 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 has been committed by their organs or by members thereof or by another representative. On the other hand, corporate criminal liability does not exclude criminal proceedings against a natural person. It should be noted that, in general, that criminal liability of legal persons in some European States was challenging step. For example, in Slovakia it was implemented into national criminal justice system in 2016 after strong resistance – as one of the last European states.<sup>47</sup> As regards Lithuania, there is still no common approach whether implementation of criminal liability of legal persons was step forwards or not<sup>48</sup> – including introduction of new criminal sanctions.<sup>49</sup>

### **Sanctions for Offences**

The Convention defines serious environmental offences which should be made punishable under criminal law (see above). It obliges explicitly the States to provide for criminal sanctions in their criminal laws (see below).

<sup>45</sup> Article 4 of the Convention on the Protection of Environment through Criminal Law. In-depth-analysis of all acts see: Explanatory Report to the Convention on the Protection of Environment through Criminal Law. Strasbourg, 4<sup>th</sup> November 1998, pp. 6 et seq.

<sup>46</sup> ŠRAMEL, B., HORVÁTH, P., MACHYNIÁK, J. Peculiarities of Prosecution and Indictment of the President of the Slovak Republic: Is Current Legal Regulation Really Sufficient? *Social Sciences*. 2019, Vol. 8, No. 3, p. 1.

<sup>47</sup> MEDELSKÝ, J. *Zákon o trestnej zodpovednosti právnických osôb a o zmene a doplnení niektorých zákonov: Veľký komentár*. Žilina: Eurokódex, 2021, p. 21; MEDELSKÝ, J. Výkon trestov uložených právnickej osobe. In: Veronika Marková (ed.). *Aktuálne otázky trestného práva v teórii a praxi. Zborník príspevkov z 10. ročníka interdisciplinárnej celoštátnej vedeckej konferencie s medzinárodnou účasťou*. Bratislava: Akadémia Policajného zboru v Bratislave, 2022, p. 166.

<sup>48</sup> ŠVEDAS, G. *European Union Criminal Law and its Influence on the Institutes of the General Part of Lithuanian Criminal Law*. Alphen aan den Rijn: Kluwer Law International B.V., 2022. ŠVEDAS, G. (ed.) *Lithuanian Legal System Under the Influence of European Union Law*. Vilnius: Vilniaus universiteto leidykla, 2014, pp. 147 et seq.; ŠVEDAS, G., ABRAMAVIČIUS, A. Tendencies and Problematical Aspects of Criminal Liability of a Legal Person in Lithuania. In: G. Švedas – D. Murauskas (eds.). *Legal Developments During 30 Years of Lithuanian Independence: Overview of Legal Accomplishments and Challenges in Lithuania*. Cham: Springer, 2021, pp. 299 et seq.

<sup>49</sup> LEVON, J. Baudžiavimo poveikio priemonių nevykdymo atidėjus baismės vykdymą teisiniai padariniai. *Teisė*. 2012, Vol., No. 84, pp. 97 et seq.

States shall adopt such appropriate measures as may be necessary to enable it to make the offences, established in accordance with the Convention, punishable by *criminal sanctions* which take into account the serious nature of these offences. The sanctions available shall include *imprisonment* and *pecuniary sanctions*, and even may include *reinstatement of the environment*.<sup>50</sup>

Further, the Convention defines *confiscation measures*. States 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.<sup>51</sup> It must be examined in view of the background of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime<sup>52</sup> of 1990. This Convention is based on the idea that confiscation of the proceeds is one of the effective methods in combating crime. Taking into account that quite a number of environmental offences are committed either directly to gain illegal profits, for example, illegal transportation and dumping of waste, or indirectly to save expenses, it is clear that measures resulting in the deprivation of property related to or gained by the offence should, in principle, be available in this field too.

Furthermore, the Convention defines *reinstatement of the environment*. This sanction is explicitly indicated as a possibly suitable measure to be imposed as a consequence of an environmental offence. The Conventions states that any State may declare that it will provide for reinstatement of the environment according to the following rules:<sup>53</sup>

the competent authority may order the reinstatement of the environment in relation to an offence established in accordance with this Convention. Such an order may be made subject to certain conditions;

where an order for the reinstatement of the environment has not been complied with, the competent authority may, in accordance with domestic law, make it executable at the expense of the person subject to the order or that person may be liable to other criminal sanctions instead of or in addition to it.

There are legal systems in which the liability for environmental (or comparable) offences is a sufficient condition for a judicial or administrative decision to order the offender to take the necessary steps to repair the damage caused to environmental interests or to create a situation which approaches the environmental conditions prior to the offence. Measures aiming at this effect are valuable from different points of view. On the one hand, this kind of reaction to an offence has a positive value, because it is not merely a retributive reflection of disapproval of the offence. On the other hand, its positive value consists of the improvement of the environmental conditions that were damaged by the forbidden act.

---

<sup>50</sup> Article 6 of the Convention on the Protection of Environment through Criminal Law.

<sup>51</sup> Article 7(1) of the Convention on the Protection of Environment through Criminal Law.

<sup>52</sup> Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Council of Europe, European Treaty Series No. 141 [1990], Strasbourg, 8<sup>th</sup> November 1990. It should not be mistaken with the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. Council of Europe, European Treaty Series No. 198 [2005], Warsaw, 16<sup>th</sup> May 2005.

<sup>53</sup> Article 8(a)(b) of the Convention on the Protection of Environment through Criminal Law.

## 2.2 Requirements of the Directive 2008/99/EC on the Protection of the Environment through Criminal Law

### *Criminal Offences*

The Directive 2008/99/EC on the protection of the environment through criminal law establishes a set of serious environmental offences that should be considered as criminal offences. It stipulates that the Member States of the European Union shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed *intentionally* or with at least *serious negligence*.<sup>54</sup>

- 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,
- the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care 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,
- the shipment of waste, where this activity falls within the scope of the Regulation (EC) No. 1013/2006 on shipments of waste<sup>55</sup> and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked,
- 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,
- 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,
- 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,
- 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,
- any conduct which causes the significant deterioration of a habitat within a protected site,

<sup>54</sup> Article 3 of the Directive 2008/99/EC on the protection of the environment through criminal law.

<sup>55</sup> Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14<sup>th</sup> June 2006 on shipments of waste. Official Journal of the European Union, L 190/1, 12<sup>th</sup> July 2006. The Regulation establishes procedures and control regimes for the shipment of waste, depending on the origin, destination and route of the shipment, the type of waste shipped and the type of treatment to be applied to the waste at its destination (Article 1(1) of the Regulation).

- the production, importation, exportation, placing on the market or use of ozone-depleting substances.

In addition, the act of inciting or aiding or abetting a person to above-mentioned offence(s) may also lead to criminal liability.

As seen, some offences contain relatively vague terms such as *substantial damage* or *serious injury*. However, those terms are not defined. Their appraisal is left to each State to interpret in the light of its traditions and legal system.

As regards liability, the Directive 2008/99/EC on the protection of the environment through criminal law defines the concept of *criminal liability* of natural persons as well as legal persons. Indeed, the Directive takes into account also corporate criminal liability. It stipulates that the Member States of the European Union shall ensure that legal persons can be held liable for above-mentioned offences 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: (i) a power of representation of the legal person; (ii) an authority to take decisions on behalf of the legal person; or (iii) an authority to exercise control within the legal person. The Member States of the European Union shall also ensure that legal persons can be held liable where the lack of supervision or control, by such a person, has made possible the commission of an offence for the benefit of the legal person by a person under its authority. However, the liability of legal persons shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the above-mentioned offences.<sup>56</sup>

### ***Sanctions for Offences***

The Convention defines serious environmental offences which should be made punishable under criminal law (see above). It obliges explicitly the States to provide for criminal sanctions in their criminal laws (see below).

For all serious environmental offences criminal sanctions were not in force in all Member States of the European Union. The European Commission in its Proposal for the Directive 2008/99/EC on the protection of the environment through criminal law that only criminal penalties will have a sufficiently dissuasive effect for several reasons:<sup>57</sup>

First, the imposition of criminal sanctions demonstrates a social disapproval of a qualitatively different nature compared to administrative sanctions or a compensation mechanism under civil law.

Second, administrative or other financial sanctions may not be dissuasive in cases where the offenders are impecunious or, on the contrary, financially very strong. Prison penalties might be required in such cases.

Furthermore, the means of criminal investigation and prosecution (and of mutual legal assistance between Member States) are more powerful than tools of administrative or civil law and can enhance the effectiveness of those procedures.

---

<sup>56</sup> Article 6(1) of the Directive 2008/99/EC on the protection of the environment through criminal law.

<sup>57</sup> Commission of the European Communities (2007): Proposal for a Directive of the European parliament and of the Council on the protection of the environment through criminal law, COM(2007) 51 final, pp. 1 and 2.

Finally, there is an additional guarantee of impartiality because investigating authorities, i.e. other authorities, than those administrative authorities that have granted exploitation licences or authorisations to pollute will be involved in a criminal investigation.

The Directive 2008/99/EC on the protection of the environment through criminal law stipulates, as regards sanctions for natural persons, that the Member States of the European Union shall ensure that the above-mentioned offences are punishable by effective, proportionate and dissuasive criminal penalties.<sup>58</sup> As regards sanctions against legal persons, the Directive – again – repeats that the Member States shall ensure that legal persons held liable is punishable by *effective, proportionate and dissuasive penalties*.<sup>59</sup> On the one hand, the Directive obliges the Member States of the European Union to provide for criminal penalties in their national legislation in respect of serious environmental crime. On the other hand, it regulates no details regarding such penalties.

### 2.3 Requirements of the Directive 2005/35/EC on Ship-source Pollution and on the Introduction of Penalties for Infringements

#### ***Criminal Offences***

The Directive 2005/35/EC on ship-source pollution shall apply, in accordance with international law, to discharges of polluting substances in:<sup>60</sup>

- the internal waters, including ports, of a Member State of the European Union, in so far as the regime of *Marpol*<sup>61</sup> is applicable,
- the territorial sea of a Member State of the European Union,
- straits used for international navigation subject to the regime of transit passage, as laid down in Part III, section 2, of the Convention on the Law of the Sea<sup>62</sup> of 1982 (adopted by the United Nations), to the extent that a Member State of the European Union exercises jurisdiction over such straits,
- the exclusive economic zone or equivalent zone of a Member State of the European Union, established in accordance with international law, and
- the high seas;
- in addition, the Directive shall apply to discharges of polluting substances from any ship, irrespective of its flag, with the exception of any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service.

The Directive 2005/35/EC on ship-source pollution establishes as *criminal offence* ship-source discharges of polluting substances committed with intent, recklessly or with serious negligence. It stipulates that the Member States shall of the European Union ensure that *ship-source discharges of polluting substances*, including minor cases of such dis-

<sup>58</sup> Article 5 of the Directive 2008/99/EC on the protection of the environment through criminal law.

<sup>59</sup> Article 7 of the Directive 2008/99/EC on the protection of the environment through criminal law.

<sup>60</sup> Article 3(1)(2) of the Directive 2005/35/EC on ship-source pollution.

<sup>61</sup> The regime called *Marpol*, also known as *Marpol 73/78*, is short for *maritime pollution*. It is represented by the International Convention for the Prevention of Pollution from Ships of 1973 and its Protocol of 1978; these years are reflected in the attribute *73/78*.

<sup>62</sup> Convention on the Physical Protection of Nuclear Material. United Nations. Vienna and New York, 3<sup>rd</sup> March 1980.

charges, into any of above-mentioned areas are regarded as *infringements* if committed with intent, recklessly or with serious negligence. The Member States shall ensure that any natural person or legal person having committed an infringement within this meaning can be held liable therefor.<sup>63</sup> The Directive adds that Member States shall ensure that *infringements* within this meaning are regarded as *criminal offences*.

In addition, the act of inciting or aiding or abetting a person to above-mentioned offence(s) may also lead to criminal liability.

As seen, the ship-source discharges of polluting substances is defined as criminal offence, including minor cases. However, the Directive shall not apply to minor cases where the act committed does not cause deterioration in the quality of water. On the other hand, repeated minor cases that do not individually but in conjunction result in deterioration in the quality of water shall be regarded as a criminal offence, if committed with intent, recklessly or with serious negligence.<sup>64</sup>

In this issue the Directive 2005/35/EC on ship-source pollution is supplemented by the Framework Decision 2005/667/JHA on ship-source pollution, which stipulates that the Member States of the European Union shall ensure that an infringement within the meaning of the Directive 2005/35/EC on ship-source pollution shall be regarded as a criminal offence<sup>65</sup> (including act of inciting or aiding or abetting a person to discharge a polluting substance).

As regards liability, the Directive 2005/35/EC on ship-source pollution defines the concept of *criminal liability* of natural persons as well as legal persons. Indeed, the Directive takes into account also corporate criminal liability. It stipulates that the Member States of the European Union shall ensure that legal persons can be held liable 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 legal person, and who has a leading position within the structure of the legal person, based on: (i) a power of representation of the legal person; (ii) authority to take decisions on behalf of the legal person; or (iii) authority to exercise control within the legal person. The Member State shall also ensure that a legal person can be held liable where lack of supervision or control by a natural person has made the commission of a criminal offence possible for the benefit of that legal person by a natural person under its authority. However, the liability of a legal person shall not exclude criminal proceedings against natural persons involved as perpetrators, inciters or accessories in above-mentioned criminal offences.<sup>66</sup>

### ***Sanctions for Offences***

The Directive 2005/35/EC on ship-source pollution defines offence which should be made punishable under criminal law (see above). It obliges explicitly the States to provide for criminal sanctions in their criminal laws (see below).

---

<sup>63</sup> Article 4(1)(2) of the Directive 2005/35/EC on ship-source pollution. Of course, there are exceptions too. Exceptions to the ban on discharges of polluting substances may be applied where human safety or that of the ship is in danger.

<sup>64</sup> Article 5a(2)(3) of the Directive 2005/35/EC on ship-source pollution.

<sup>65</sup> Article 2(1) of the Framework Decision 2005/667/JHA on ship-source pollution.

<sup>66</sup> Article 8b of the Directive 2005/35/EC on ship-source pollution. Similarly regulated in Article 5 of the Framework Decision 2005/667/JHA on ship-source pollution.

The Directive 2005/35/EC on ship-source pollution generally requires that the Member States of the European Union shall ensure that infringements within above-mentioned meaning are punishable by *effective, proportionate and dissuasive penalties*<sup>67</sup> (emphasis added). As regards sanctions for natural persons, the Directive repeats that the Member States shall ensure that the above-mentioned offences are punishable by effective, proportionate and dissuasive criminal penalties.<sup>68</sup> As regards sanctions against legal persons, the Directive – again – repeats that the Member States shall ensure that a legal person held liable is punishable by effective, proportionate and dissuasive penalties.<sup>69</sup>

As seen, the Directive 2005/35/EC on ship-source pollution does not define sanctions with details on type, etc., similarly to the Directive 2008/99/EC on the protection of the environment through criminal law. While the Directive 2008/99/EC is not supplemented by any legislative document defining sanctions in detail, the Directive 2005/35/EC is supplemented by the Framework Decision 2005/667/JHA on ship-source pollution, which contains special provisions on sanctions.

As regards natural persons, the Framework Decision 2005/667/JHA on ship-source pollution stipulates that:<sup>70</sup>

The offence shall be punishable – again – by effective, proportionate and dissuasive criminal penalties which shall include, at least for serious cases, criminal penalties of a maximum of at least between one and three years of *imprisonment* (however, in minor cases, where the act committed does not cause a deterioration of the quality of the water, the States may provide for penalties of a different type). In addition, the criminal penalties may be accompanied by *other penalties or measures*, in particular fines, or the disqualification for a natural person from engaging in an activity requiring official authorisation or approval, or founding, managing or directing a company or a foundation, where the facts having led to his/her conviction show an obvious risk that the same kind of criminal activity may be pursued again.

The intentionally committed offence shall be punishable by a maximum of at least between five and ten years of imprisonment where the offence caused *significant and widespread damage* to water quality, to animal or vegetable species or to parts of them and the death or serious injury of persons.

The intentionally committed offence shall be punishable by a maximum of at least between two and five years of imprisonment where:<sup>71</sup>

- the offence caused *significant and widespread damage* to water quality, to animal or vegetable species or to parts of them; or
- the offence was committed within a *criminal organisation* within the meaning of the Framework Decision 2008/841/JHA on the fight against organised crime,<sup>72</sup> irrespective of the level of the penalty referred to in that Framework Decision.

---

<sup>67</sup> Article 8 of the Directive 2005/35/EC on ship-source pollution.

<sup>68</sup> Article 8a of the Directive 2005/35/EC on ship-source pollution.

<sup>69</sup> Article 8c of the Directive 2005/35/EC on ship-source pollution.

<sup>70</sup> Article 4 of the Framework Decision 2005/667/JHA on ship-source pollution.

<sup>71</sup> Article 4(5) of the Framework Decision 2005/667/JHA on ship-source pollution.

<sup>72</sup> Council Framework Decision 2008/841/JHA of 24<sup>th</sup> October 2008 on the fight against organised crime. Official Journal of the European Union, L 300/42 of 11<sup>th</sup> November 2008.

The offence, when committed with *serious negligence*, shall be punishable by a maximum of at least between two and five years of imprisonment where the offence caused *significant and widespread damage* to water quality, to animal or vegetable species or to parts of them and the death or serious injury of persons.

The offence, when committed with *serious negligence*, shall be punishable by a maximum of at least between one and three years of imprisonment where the offence caused *significant and widespread damage* to water quality, to animal or vegetable species or to parts of them.

As regards legal persons, the Framework Decision 2005/667/JHA on ship-source pollution stipulates that the Member States of the European Union shall ensure that a legal person held liable is punishable by – again – effective, proportionate and dissuasive penalties. The penalties:<sup>73</sup>

- shall include criminal or non-criminal *fin*es, which, at least for cases where the legal person is held liable for offence, are: (i) of a maximum of at least between EUR 150 000 and EUR 300 000; and (ii) of a maximum of at least between EUR 750 000 and EUR 1 500 000 in the most serious cases.
- may, for all cases, include *penalties other than fines*, such as:
  - exclusion from entitlement to public benefits or aid,
  - temporary or permanent disqualification from engaging in commercial activities,
  - placing under judicial supervision,
  - a judicial winding-up order, or
  - the obligation to adopt specific measures in order to eliminate the consequences of the offence which led to the liability of the legal person.

### 3. EUROPEAN NETWORKS AND AGENCIES COMBATING ENVIRONMENTAL CRIME

Protection of the environment is in the interest of European networks and agencies, namely the *European Network against Environmental Crime* and the *European Maritime Safety Agency*.

The *European Network against Environmental Crime* (ENEC) aims to improve the implementation and application of the Directive 2008/99/EC on the protection of the environment through criminal law. Its objective is the fight against environmental crime, facilitating the exchange of information and the experience of legal and other practitioners in working to prevent or prosecute this type of crime.<sup>74</sup> The Network connects 26 European States (at the time of writing this paper).

The *European Maritime Safety Agency* (EMSA) is an agency of the European Union as a major source of support to the European Commission and the Member States of the European Union in the field of maritime safety and prevention of pollution from ships. Its objective is to ensure a high, uniform and effective level of maritime safety, maritime

<sup>73</sup> Article 6(1) of the Framework Decision 2005/667/JHA on ship-source pollution.

<sup>74</sup> Objectives. In: *European Network against Environmental Crime* [online]. [2023-01-19]. Available at: <<https://lawyersfornature.org/objectives/>>.

security, prevention of, and response to, pollution caused by ships as well as response to marine pollution caused by oil and gas installations. Its legal basis is the Regulation (EC) No 1406/2002 on the European Maritime Safety Agency.<sup>75</sup>

Last decade new dimensions of judicial co-operation in criminal matters have been introduced.<sup>76</sup> In 2017 was established the *European Public Prosecutor's Office* (also known as “EPPO”)<sup>77</sup> as an institution of the EU. It was established from the Eurojust,<sup>78</sup> i.e. the European Union Agency for Criminal Justice Cooperation. The idea of its establishment traces back to year 1994.<sup>79</sup> These days, it is responsible for investigating, prosecuting and bringing to judgment crimes against the financial interests of the EU. These include several types of fraud, VAT fraud with damages above 10 million Euro, money laundering, corruption, etc.<sup>80</sup> It should be added that one of the most important attributes of the European Public Prosecutor's Office is its independence. Its independence allows to actually carry out its mission, regardless the individual interests of the parties concerned and regardless the government's political objectives.<sup>81</sup> The competence of the European Public Prosecutor's Office concerns exclusively the protection of the financial interests of the EU.<sup>82</sup> However, the legislator of the EU can extend its competence. Under the Treaty on the Functioning of the EU<sup>83</sup> the European Council may “to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension”<sup>84</sup> (emphasis added). The European Public Prosecutor's Office, theoretically, could be competent to prosecute other serious criminal offences, for example, terrorism and crimes against the environment. As regards against the environment, top political leaders and members of European Parliament have in-

---

<sup>75</sup> Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27<sup>th</sup> June 2002 establishing a European Maritime Safety Agency as amended by the Regulation (EU) 2016/1625. Official Journal of the European Communities, L 208/1 of 5. August 2002. In: *European Maritime Safety Agency* [online]. [2023-01-19]. Available at: <<http://www.emsa.europa.eu>>.

<sup>76</sup> FUNTA, R., ONDRIA, P. Data Protection in Law Enforcement and Judicial Cooperation in Criminal Matters. *Tal-Tech Journal of European Studies*. 2021, Vol. 11, No. 2, pp. 148–166.

<sup>77</sup> Council Regulation (EU) 2017/1939 of 12<sup>th</sup> October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. Official Journal of the European Union, L 283/1, 31 October 2017. Details see: BACHMAIER WINTER, L. *The European Public Prosecutor's Office: The Challenges Ahead*. Cham: Springer, 2018.

<sup>78</sup> Article 86(1) of the Treaty on the Functioning of the European Union.

<sup>79</sup> KOŘÍNEK, Š. Evropský veřejný žalobce. *Acta Universitatis Carolinae – Iuridica*. 2019, Vol. 65, No. 4, p. 10.

<sup>80</sup> Mission and tasks. In: *European Public Prosecutor's Office* [online]. [2023-01-07]. Available at: <<https://www.epppo.europa.eu/en/mission-and-tasks>>.

<sup>81</sup> ŠRAMEL, B. Possibilities of Strengthening the Independence of the Public Prosecutor's Office of the Slovak Republic: A System of Appointment of the Prosecutor General to the Office as a Key Element? *Social Sciences*. 2022, Vol. 11, No. 8, p. 1.

<sup>82</sup> MICHALOV, L. Ochrana fondov Európskej únie normami trestného práva. In: A. Krunková – S. Farkašová (eds.). *Právo fondov EÚ v teórii a praxi*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2020, p. 76; MICHALOV, L. Poškodený a škoda pri trestnom čine poškodzovanie finančných záujmov Európskej únie. In: Sergej Romža (ed.). *Druhé košické dni trestného práva: Poškodený trestným činom a obeť trestných činov, možnosti posilňovania ich procesných oprávnení. Zborník vedeckých príspevkov z interdisciplinárnej celoštátnej vedeckej konferencie s medzinárodnou účasťou*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2018, p. 268.

<sup>83</sup> Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon. Official Journal of the European Union, C 321/E/37 of 29<sup>th</sup> December 2006. See: BLANKE, H.-J. – MANGIAMELI, S. (eds.). *Treaty on the Functioning of the European Union: A Commentary*. Cham: Springer, 2021.

<sup>84</sup> Article 86(4) of the Treaty on the Functioning of the European Union.

troduced this idea.<sup>85</sup> No legislative proposal to extend its competence has been introduced so far. The question which begs consideration is whether European Public Prosecutor's Office has the potential to offer additional value in related matters.

Last, but not least, it should be noted that, as pointed out by *Vaško*, international coordination in the fight against organised crime must be as flexible, resourceful, adaptable and “sophisticated” as the activities of criminal groups, including the area of environmental crime. *Joint investigation teams* are also one of the effective tools to combat this kind of crime.<sup>86</sup> In the process of proving environmental crime, especially with an international element, it is desirable to accept non-traditional (modern) means of evidence, such as satellite images.<sup>87</sup>

## CONCLUSION

At the European level the leading international instrument regulating environmental crime is the *Convention on the Protection of Environment through Criminal Law*, adopted by the Council of Europe in 1998. This Convention was the first international treaty to require more broadly the criminalisation of a number of offences causing or likely to cause environmental damage. The Convention is aimed at improving the protection of the environment at European level by using criminal law as the *solution of last resort* in order to deter and prevent conduct which is most harmful to it. It also seeks to harmonise national legislation of European States in this field. Even though the preamble to the Convention states first that “the prevention of the impairment of the environment must be achieved primarily through *other measures*”, it subsequently recognises the need for criminalisation of the most serious environmental offences stating that “environmental violations having serious consequences must be established as *criminal offences* subject to appropriate sanctions.” The Convention obliges contracting States to introduce specific provisions into their criminal law or to modify existing provisions in this field. It establishes as *criminal offences* a number of acts committed intentionally or through negligence.

At the European Union level the leading legislative instrument harmonising environmental crime is the *Directive 2008/99/EC on the protection of the environment through criminal law*. The Directive establishes measures relating to criminal law in order to protect the environment more effectively. This Directive obliges Member States of the European Union to provide for criminal penalties in their national legislation in respect of serious infringements of provisions of European Union law on the protection of the environment. It defines a minimum number of serious environment-related offences and requires the Member States of the European Union to provide for more dissuasive criminal

<sup>85</sup> GUILLOT, L. MEPs want EU public prosecutor to tackle green crimes. In: *politico.eu* [online]. 17. 6. 2022 [2023-01-07]. Available at: <<https://www.politico.eu/article/meps-want-eu-public-prosecutor-to-tackle-green-crimes-timber-trade-wildlife-trafficking/>>; WAHL, T. EP Demands Extension of EPPO Mandate to Environmental Offences. In: *eucrim.eu* [online]. 6. 7. 2021 [2023-01-07]. Available at: <<https://eucrim.eu/news/ep-demands-extension-of-ep-po-mandate-to-environmental-offences/>>.

<sup>86</sup> VAŠKO, A. *Spoločné vyšetrovacie tímy – efektívny nástroj medzinárodnej spolupráce na úseku boja proti nelegálnej migrácii. Banskobystrické zámocké dni práva. Zborník zo 4. ročníka medzinárodnej vedeckej konferencie na tému “Strategické determinanty kreovania právnych noriem.”* Banská Bystrica: Belianum, 2019, p. 54.

<sup>87</sup> VAŠKO, A. *Spravodajské informácie v trestnom konaní.* Prague: Leges, 2021, p. 124.

penalties for this type of offence. The Directive establishes a set of serious environmental offences that should be considered as criminal offences.

The European Union adopted also the *Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements*. The purpose of the Directive is to incorporate international standards for ship-source pollution into European Union law and to ensure that persons responsible for discharges of polluting substances are subject to adequate penalties, including criminal penalties, in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships. However, the Directive does not prevent Member States of the European Union from taking more stringent measures against ship-source pollution in conformity with international law. The Directive is supplemented by rules on criminal offences and penalties as well as other provisions by the Framework Decision 2005/667/JHA on ship-source pollution.

At the same time, protection of the environment is in the interest of European networks and agencies, namely the European Network against Environmental Crime and the European Maritime Safety Agency and in the future – possibly – the European Public Prosecutor's Office.