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CHALLENGES REGARDING EUROPEAN UNION'S COMPETENCE IN HARMONIZING ENVIRONMENTAL CRIMINAL SANCTIONING

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ABSTRACT

Environmental crime is a quickly increasing field of crime that needs to be contained on the Union level in order to preserve the environment to future generations. In the past decades, the Member States have been seen to impose insufficient sanctions even though more severe sanctions may be a more effective approach to combating environmental crime. Harmonization of sanctioning carries great significance regarding cross-border collaborational as well as deterrence aspects. When Member States impose similar sanctions for similar crimes all across the European Union, mutual recognition becomes easier and safe havens for criminals cannot actualize and lure criminals to direct their illicit activities to certain Member States. The fulfillment of a Union policy would thus be uniformly ensured. However, currently, there are challenges in creating genuine harmonization on the sanctioning on environmental crime due to limitations on the Union's legislative competence. Environmental Crime Directive does not provide sufficient guidance on how to interpret the term 'effective, proportionate and dissuasive pentalties' which the Member States are obligated to ensure for environmental crime. The Union haas the competence establish only minimum rules in regard to sanctions when it is necessary for the fulfillment of a Union policy. These minimum rules, often employed as minimum maximum sanctions, may guide Member States to the right direction but they do not give riddance to the divergence of implementation measures used. New proposal to replace the Directive proposes the adoption of minimum maximum penalties to overcome the significant disparities between the Member States. However, as they are only minimum rules, Member States can introduce stricter measures and the differences persist, possibly giving rise to new problems, such as increase in punitivity.

Keywords: harmonization, competence, environmental crime, minimum maximum penalties

INTRODUCTION

According to Rapid Response Assessment conducted by UNEP and INTERPOL in 2016, after drug smuggling, counterfeiting, and human trafficking, environmental crime is the world's fourth greatest criminal activity when assessed in the light of global economic loss, excluding the economic worth of natural ecosystems.[1] Climate change has become a pressing matter to all countries around the world but the Member States of the European Union may have only little impact on the prevention of environmental crime by themselves. Purely national environmental criminal law would be inadequate in fulfilling the purpose of co-operation between the Member States regarding serious environmental crimes and the prevention of pollution.

Environmental measures aim "at improving the quality of the environment for European citizens and providing them with a high quality of life".[2] Harmonization of enviromental criminal law relies among other things on the sanctions imposed for environmental offences. For the uniform implementation of the Union policy on environment, the discrepancies in sanction levels ought to be diminished in order to enforce it more effectively.[3] This helps mutual cooperation among the Member States and prevents safe havens for criminals from existing. It could be argued that, in order to succeed, the prevention of environmental crime requires close attention and seamless transnational collaboration that can be achieved more effectively through supranational ordinance.[4] Environmental crime is increasingly transnational with often a link to international organized crime. The inconsistencies within the Member States' legislation may hinder the prosecution of environmental offences with a cross-border element and thus, environmental organzed crime can flourish.[5] Irregularities in the severity of the sanctions for environmental

[1] UNEP-INTERPOL Rapid Response Assessment. (2016). The Rise of Environmental Crime. Retrieved from https://www.cms.int/en/document/rise-environmental-crime-unep-interpol-rapid-response-assessment 1 March 2022

[2] European Commission. Implementation of Community environmental legislation. Retrieved from https://ec.europa.eu/environment/legal/implementation_en.htm 5 April 2022

[3] European Commission. European Policy Brief. (2016) Policy Brief 17: Pros and cons of harmonising criminal sanctions on environmental crime

[4] Ibid., 3.

[5] Marquès-Banqué, M. (2018). The utopia of the harmonization of legal frameworks to fight against transnational organized environmental crime. *Sustainability*, *10*(10), 3576.

offences may complicate the mutual recognition of judgements in criminal matters as well as create uncertainty about the functionality and equality of legal systems as in some Member States sanctions could end up less severe than in others. The Union's ability to fight transnational organized environmental crime demands a common legal framework.[6]

In order to be effective, environmental legislation needs a deterrence factor – penalties that make the environmental crimes unworthy to commit. If companies see that it is more cost effective to commit environmental crimes, they will not be persuaded to stop such actions.[7] The EU has taken on creating supranational criminal law by harmonizing the field of criminal law that goes beyond separate nations which begs a question of the EU's competence to do so. This is somewhat problematic as criminal law is considered as inherently national field that ought not to be interfered with unproportionately.[8] After the Lisbon Treaty, the Union's competence is extended to establishing minimum rules where it is necessary for the fulfillment of a Union policy. Additionally, harmonization of sanction levels by prescribing minimum maximum penalties, within the confines of the Union's competence, has proven inadequate in certain fields of law as the severity of sanctions still vary greatly between the Member States.[9]

The objective of this thesis is to examine whether or not the harmonization on the sanctioning on environmental crime is conducted effectively within the European Union. The hypothesis is that the harmonization on the sanctioning on environmental crime within the European Union is lacking in uniformity and it should be regulated in more extent. The focus is on imprisonment sanctions imposed on natural persons. The thesis will uncover what are the main challenges with the harmonization of environmental criminal sanctions in regard to Union competence; why harmonization is needed and how it is conducted; what is the extent of Union competence; why minimum maximum penalties may be considered problematic; how environmental penal law and Member States' national identity are related to one another as well as whether there are alternative solutions for more effective approximation of environmental criminal legislation all through the European Union. The methods used are literature review, qualitative analyses as well as holistic approach. Also comparative analyses are used in moderation.

[6] Marquès-Banqué, M. (2018). Supra nota 5, p. 5
[7] European Commission. European Policy Brief. (2016). Supra nota 3, p. 5
[8] Turner, J. I. (2012). The expressive dimension of EU criminal law. *The American Journal of Comparative Law*, *60*(2), 555-583.
[9] Satzger, H. (2019). The harmonisation of criminal sanctions in the European Union: a new approach. *Eucrim: the European Criminal Law Associations' fórum*, (2), p. 115-120.

1. Short overview on harmonization of laws within the European Union

Harmonization of law in essence aims to bring diverse legal provisions or systems closer together or to coordinate them by removing major disparities and establishing minimum criteria or standards within the European Union. Harmonization can be conducted by guiding the Member States with legislative acts, mainly directives, which they are obligated to implement as a part of their national legislation in a timely manner. Traditionally the European legislation sets out the norms and the Member States are free to choose the technique in which the norms are implemented in their respective legal system.[10] If the national measures taken to achieve the objectives of the directive are deemed insufficient, Article 260 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 228 TEC) gives the Commission competence to start an infringement action against that Member State.[11] Harmonizing of laws does not indicate unifying all legislation in its entirety in all Member States but rather achieving a specific result by creating consistency throughout the Union's diverse legal systems, to a certain extent. The objective is to eliminate major differences between national legislations and yet, allow national identities of the Member States to remain intact as obligated by article 4 of Treaty on the European Union (TEU). The prevention of and punishment for international organized environmental crime is inherently more difficult when there are differences in the legal systems of different Member States as the disparity can act as a major hindrance.[12]

The approximation of penal law also strives for equal treatment of people in all Member States. It affirms confidence towards the legal systems - fair and equal proceedings concern everyone. Even though this alone does not guarantee mutual understanding nor -trust among the Member States on 'a common sense of justice' – *ius commune* can be reached through establishing 'genuine European legal culture', among other things.[13] Also, so called 'safe havens' for criminals seize to

[10] Faure, M. (2004). European Environmental Criminal Law: Do We Really Need It. European Environmental Law Review, 13(1), 18-32.
[11] Peeters, M. (2014). Governing towards renewable energy in the EU: Competences, instruments, and procedures. *Maastricht journal of European and comparative law*, *21*(1), 39-63.
[12] Marquès-Banqué, M. (2018) Supra nota 5 p. 5
[13] Sicurella, R. (2017). Preparing the environment for the EPPO: Fostering mutual trust by improving common legal understanding and awareness of existing common legal heritage. Proposal of guidelines and model curriculum for legal training of practitioners in the PIF sector. *New Journal of European Criminal Law*, *8*(4), 497-512.

exist as all Member States have similar sanctions to one another.[14] In short, a safe haven is created when, considering the sanctions, it is obviously more beneficial to commit a crime in a Member State with more lenient sanctions compared to another. This has actualized in Romania after 2017 when it failed to comply with the Regulation on fluorinated greenhouse gases and did not impose any criminal sanctions for non-compliance thereof, making it a Member State with more lenient sanctions compared to others.[15] Besides preventing serious infringements in the European Union, common practices also simplify and ease cross-border co-operation as well as mutual recognition of court decisions between the Member States. Mutual recognition was established as one of the core principles of the integration of European Union criminal policy already in 1999 Tampere European Council.[16]

1.1. The background of harmonizing criminal law and criminal sanctioning

Initially, in 1992, the Maastricht Treaty (Treaty on European Union, TEU) separated the activities of the European Union into three distinct pillars.[17] The objective of the third pillar was to enhance cooperation among the Member States regarding internal security but it did not provide the Union with authority to enact substantive criminal law legislation. The Union was capable to 'adopt joint positions, joint actions and draw up conventions' only in areas of grave international crime - matters of common interest.[18] The objective of 'a high level of safety within an area of freedom, security and justice' and the means to execute it were codified in the TEU after the Amsterdam Treaty was signed in 1997. Closer cooperation was needed to achive this level and the Amsterdam Treaty gave EU the competence to approximate the Member State's rules on criminal matters to a certain degree. After that, in the realms of organized crime, terrorism, and illegal drug trafficking, legislation setting minimum rules pertaining to the constituent components of criminal offences and punishments was allowed as prescribed by Article 31(e) TEU. This was done by adopting various framework decisions. The duty to utilize directives for the harmonization of national criminal legislation qualified the transition to the 'Community method'.[19]

[14] Poliisi. Environmental Crime Report 2019. Finnish Environmental Crime Monitoring Group 26 July 2019
[15] European Environmental Bureau: Implement for Life, Crime and Punishment, March 2020
[16] Öberg, J. (2020). Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure. *European Constitutional Law Review*.
[17] Bomberg, E., Peterson, J., & Corbett, R. (Eds.). (2012). *The European Union: how does it work?*. Oxford University Press.
[18] Udvarhelyi, B. (2015). Criminal law competences of the European Union before and after the Treaty of Lisbon. *European Integration Studies*, *11*(1), 46-59.
[19] Peers, S. (2011). Mission accomplished? EU Justice and Home Affairs law after the Treaty of Lisbon. *Common market law review*, *48*(3)

Politically sensitive criminal law is considered a fundamental part of all of the Member States' national identity and sovereignty and it is not to be interfered with on delicate basis. Over the recent years, since the Framework Decision 2008/947/JHA, the involvement of the European Union has increased when it comes to transnational co-operation regarding offences associated with the aforementioned third pillar.[20] The third pillar was namely abandoned as all pillars were merged into one institutional structure when the Treaty of Lisbon established the veritable legal personality of the European Union. It stood for merely a field of enhanced reciprocal collaboration in the field of justice and home affairs which still leaves the majority of the criminal justice system to be viewed as something distinctly regional.[21]

As criminal law is often seen as a field of law governed predominantly by the national legislature and very little external control is deemed welcome. However, it is a 'field of intensified mutual co-operation'.[22] The European Union uses its competence regarding offences that may have serious international impact. The Framework Decision of 2008 sought to approximate the Member States' probation sanctions regarding crimes such as human trafficking, drug crimes and terrorism through minimum rules in order to enforce mutual recognition through confidence in all administrative territories.[23] These minimum rules often consider the maximum penalties which are discussed in more extent in the third chapter of this thesis.

1.2. The current extent of European Union's competence

The institutions of the Union are to adopt regulations, directives, decisions, recommendations, and opinions in order to exercise its powers, as set forth in Article 288 TFEU. On judicial cooperation in criminal matters, Article 82(2) TFEU grants the European Union competence to harmonize a part of each Member State's criminal procedure. It allows the harmonization to go only to the extent that is 'necessary to facilitate mutual recognition of judgements and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension'. This

[20] Morgenstern, C. (2009). European Initiatives for Harmonisation and Minimum Standards in the Field of Community Sanctions and Measures. *European Journal of Probation*, Vol. 1, p. 137.
[21] Ibid., 20
[22] Ibid., 20
[23] Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, 27 November 2008

paragraph limits the Union's legal capacity to interfere with domestic penal codes to the situations in which action is required to ensure the enhancement of mutual recognition and thus, it may constitute as a limitation of legislative action of the European Union.[24] A suggestion of presenting more concrete grounds for further harmonization to advance collective trust among the different judiciaries has emerged in the recent judicial discussion.[25] This need may be detected in the irregularities of national courts' procedures – if the 'instruments of mutual recognition' are disregarded in the national court, the European Union may use its competence to reinforce the principle.[26]

After the Treaty of Lisbon entered into force in 2009, the full legal personality of the European Union and the competence to harmonize criminal law to a certain extent among the Member States were reinforced through Articles 83(1) and (2) of the TFEU.[27] The first paragraph allows European Union to 'establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from nature or impact of such offences or from special need to combat them on common basis', following a list of the crimes considered serious. Among these crimes are terrorism and trafficking in human beings.

According to the second paragraph, in harmonized fields, regarding crimes not aforementioned in the previous paragraph, the European Union has the same competence given that it is 'essential' to guarantee the effectiveness of Union policy in practice. Also, the policy area must have been subjected to harmonization measures in advance. The Union's competence to take action when it is necessary in order to guarantee fulfilment of its policies was established in the case law[28] of the Court of Justice (CJEU) in *Environmental Crimes Case*.[29] Article 83(2) TFEU codified the principle of effectiveness, displayed often in the CJEU case law, into EU legislation. It implies to EU policies being fully implemented and enforced across the Union. It is important to note that Article 83 TFEU extends the European Union's competence to establishing only minimum rules

[24] Öberg, J. (2020) Supra nota 16 p. 8
[25] Öberg, J. (2020) Supra nota 16 p. 8
[26] Öberg, J. (2015) 'Subsidiarity and EU Procedural Criminal Law', *European Criminal Law Review*. p. 19
[27] Csonka, P., & Landwehr, O. (2019). 10 years after Lisbon. How "lisbonised" Is the substantive criminal law in the EU?. *Eucrim: The European Criminal Law Associations' forum*, (4), p. 261-267.
[28] Miglietti, M. (2014). The first exercise of Article 83(2) TFEU under review: an assessment of the essential need of introducing criminal sanctions. *New Journal of European Criminal Law*, Vol. 5, p. 6.
[29] Court Decision, 13.9.2005, Environmental Crimes, C-176/03, ECLI:EU:C:2005:542

by means of directives which makes full harmonization of criminal sanctions impossible.[30] Thus, the Member States are free to introduce stricter rules within the confines set forth in Article 49 (3) of the Charter of Fundamental Rights of the EU. The severity of a penalty shall not be disproportionate to the offence in question.

1.2.1. Possible incompatibility of criminal law in Member States

Sanctions are frequently required to be effective, proportionate and dissuasive. It is the so-called obligation of efficacy which the chapter 2.3.1. will explain in further detail in. This obligation can prove domestic penal law to be somewhat inadequate or incompatible with the Community law.[31] A shared perception of justice among the Member States does not sufficiently provide particular level of sanctions for certain crimes. These situations require either the neutralization or enhancement of national penal law. Neutralization insinuates that a national judge can discover incompatibility and thus refuse to apply national regulations regarding penalties as the Community law has primacy over national law.[32] ECJ has emphasized in *Costa v ENEL* that community law must have a steady executory force that does not give in to any Member States' internal legislation because it would jeopardize reaching the treaty goals.[33] Strictly domestic matters may not be influenced by Community law since its application usually requires a cross-border dispute. However, this is not absolute as can be understood from matters regarding i.e. consumer protection. Under 258 TFEU (ex Article 226 EC Treaty), the Member States with insufficient penal law can be required by the Commission to fulfil its obligations if a case is brought against it. If the attempt is unsuccessful and determined as such by the Court of Justice, Article 260 TFEU (ex Article 228 EC Treaty) requires the Member State to 'take the necessary measures to comply with the judgement of the Court of Justice' or possibly even impose a penalty payment.[34]

Respect to the Member States' national identity in the form of unique legal systems and traditions was reinforced as the European Commission published a Communication in 2011 stating that criminal law generally reflects 'basic values, customs and choices of any given society'.[35]

[30] Kettunen, H. (2014) EU Criminal policy at a crossroads between effectiveness and traditional restraints for the use of Criminal Law. *New Journal European Criminal Law*, 5, 301–326
[31] Delmas-Marty, M. (1998). The European Union and Penal Law. *European Law Journal*, Vol. 4, p.90.
[32] Ibid., 31.
[33] Court decision summary, 15.7.1964, Costa v. ENEL, C-6-64, ECLI:EU:C:1964:66, point 3.
[34] Delmas-Marty, M. (1998) Supra nota 31 p. 11
[35] European Commission COM (2011)573 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions), 20 September 2011

Nonetheless, this increases the need for a coherent criminal law within the European Union.[36] The current approach of the European Union in convergence of penal law rather means intervention through interfering with the national legal system whilst Article 82(2) TFEU provides that the diversity in the legal traditions and systems of the Member States must be taken into consideration in the imposed rules.

The principle of proportionality is codified in the first paragraph of Article 5 TEU providing that the actions of the Union must remain in the confines of what is considered necessary for the fulfilment of the objectives of the Treaties. The Union shall act only if and insofar as the proposed action's objectives cannot be effectively implemented by the Member States, according to the principle of subsidiarity, in areas that do not lie within its exclusive competence. This principle is set forth in the same Article. 'The principle of subsidiary requires the application of mechanisms which allow a certain degree of choice for a level of protection.'[37] The environment has been recognized as a matter of shared competences between states and the EU under article 4(2) of the Lisbon Treaty and it is a field previously subjected to harmonization measures as required by Article 83(2) TFEU.

[36] Nuotio, K. (2020). A Legitimacy-based approach to EU criminal law: Maybe we are getting there, after all. *New Journal of European Criminal Law*, Vol 11, p. 23-24, 30-31, 35-36
[37] Ziegler, A. R. (1993). The harmonization of European environmental law and diverging national measures.

2. Harmonizing environmental criminal law and criminal sanctioning in the European Union

Environmental crime has risen to become the world's fourth most lucrative illicit enterprise, generating up to $258 billion every year.[38] It is one of the most dangerous types of criminal activity since it ultimately poses a threat to humanity's fundamental existence and yet it keeps increasing 5-7% annually around the world.[39] Environmental crime has a negative influence on flora, fauna, water, air, soil, habitats as well as people's physical health and well-being in Europe and across the world, resulting in increased pollution, animal deterioration, biodiversity loss, and ecological imbalance.[40] It cuts across national and regional boundaries. It decreases the economic feasibility of enterprises that invest in often expensive efforts to meet environmental norms and obligations. Transnational organized crime groups and networks are regularly involved in environmental crime constituting a security threat to the European Union. Illicit wildlife trafficking, for example, can be used to fund terrorism and related activities.[41] Often environmental crime does not have a direct victim which might sometimes make the recognition and prosecution of the crime more difficult.[42] Because of these peculiarities, environmental crimes have a much higher percentage of unreported cases than other types of crimes, which may extent even up to 90% in certain types of offences.[43]

Environmental policy of the European Union is codified in Articles 11 and 191-193 of the TFEU (ex Articles 174-176 EC Treaty) and Article 3(3) of the TEU. The policy aims at preserving and protecting the quality and sensible utilization of natural resources found in Europe as well as the health and well-being of all people living in the confines of the Union. Over 200 directives and regulations have been approved under Article 175 of the EC Treaty since the 1970s[44] with a goal

[38] UNEP-INTERPOL Rapid Response Assessment (2016). Supra nota 1 p. 2
[39] European Commission. Proposal COM (2021)851 for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law and Replacing Directive 2008/99/EC, 15 December 2021
[40] European Commission. Press corner. (2021). European Green Deal: Commission proposes to strengthen the protection of the environment through criminal law. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6744 , 29 April 2022
[41] European Environmental Bureau. Supra nota 15 p. 8
[42] Impact Assessment accompanying the proposal to the Environmental Crime Directive, COM (2007) 51: final SEC (2007) 161
[43] Comte, F., (2006). 'Environmental Crime and the Police in Europe: A Panorama and Possible Paths for Future Action', *European Energy and Environmental Law Review*, Issue 7, pp. 190-231,
[44] Impact Assessment. Supra nota 42, p. 13

of, for example, enhancing the improvement of pollution-free air and water, safeguarding natural ecosystems, and assisting enterprises in moving toward increased sustainability. The Union is devoted to achieving a high degree of environmental protection and quality enhancement and the manifestation of any environmental crime must be addressed in order to ensure the fulfillment of the policy.

Generally acts and omissions damaging the environment, either directly or indirectly, have been categorized together as environmental crime.[45] However, a specific definition of environmental crime is not explicitly universally agreed upon.[46] Article 3 of the Directive 2008/99/EC on the Protection of the Environment through Criminal Law determines nine conducts constituting a criminal offence, when unlawful and committed intentionally or with at least serious negligence, and indicates that these conducts are to be criminally sanctioned in the Member States. These conducts include i.e. causing substantial damage to air, soil, water, animals, plants or people by discharging materials or radiation as well as doing so by collecting, transporting, recovering or disposing of waste. Relevant definitions are also derived from the categorisations used by Europol, Interpol and the United Nations Environment Programme.[47] The Commission describes environmental crimes as violations of applicable legal obligations that might result in considerable harm or risk to the environment or human health, and which are or can be prosecuted under criminal law.[48]

2.1. Background of EU environmental policy and the harmonization of environmental criminal law

When the Treaty of Rome (later: Treaty establishing the European Community, EC Treaty) was signed in 1957 and the European Economic Community (EEC) was established, the founding Treaties had no independent reference to the environment and the protection thereof.[49] Throughout the years, new interests, including environmental protection, have arisen beside the economic ones and become somewhat interwened, too. From the seventies till present time, the amount of evidence on ’uncontrolled exploitation of natural resources’, pollution of water and air in addition

[45] European Environmental Bureau. Supra nota 15 p. 8
[46] White, R. (2013). *Crimes against nature: Environmental criminology and ecological justice*. Willan.
[47] Report on Eurojust’s Casework on Environmental Crime. (2021) Publication ID 2021/0002
[48] European Commission. Combating Environmental Crime. Retrieved from https://ec.europa.eu/environment/legal/crime/ 5 April 2022
[49] Grafeneder, S. (2014) Liability in Terms of an International Environmental Disaster A comparison between the United States of America and the European Union. JKU Europe Working Paper Nr. 1

to waste disposal issues and many other problems has increased significantly.[50] Community environmental policy was established in the early 1970's after the first United Nations Conference on the Environment held in Stockholm when the first environmental regulations were introduced.[51] Ensuring fair competition and avoiding 'race-to-the-bottom' pressure were the initial reasons for enacting common environmental legislation among the Member States.[52] As the European Union has progressed from a strictly economic community towards further coalescence, more regulation has proven necessary.

It is important to keep in mind that EU is a political and economic union where the four freedoms – free movement of goods, services, capital and persons – are highly regarded. The free movement of goods was hampered by differing environmental requirements for products, and a consistent standards were needed also to ensure fair competition.[53] The general prohibition of national "measures having equivalent effect to quantitative restrictions to trade" can, however, be diverged from under the light of Article 36 of TFEU for the protection of health and life of humans, animals or plants. Public morality, -policy or -security can function as the basis of restrictions for 'imports, exports and goods in transit'. National environmental measures can be introduced under the application of that Article in the European Court's case law and the rule of reason, that they are non-discriminatory, and proportionate as well as justified for environmental protection. Rule of reason, recognized explicitly in *Cassis de Dijon* case,[54] is also referred as imperative requirements. They differ slightly from the derogations set forth in Article 36 for 'rule of reason can only justify indistinctly applicable measures'.[55] The idea of these derogations was that if environmental standards were to be harmonized, obstacles to trade would be then be diminished and both interests would be served.[56] However, environmental crimes can of course be also completely unrelated to trade.

Environmental criminal law seeks to ensure the effective fulfillment of the environmental policy of the European Union. It goes beyond the administrative and civil law which used to be the sole

[50] Albrecht, H. J. (1994). Environmental Criminal Laws and Environmental Crimes in Europe-Problems and Prospects. *Eur. J. Crime Crim. L. & Crim Just.*, *2*, 168.
[51] Hey, C. (2007). III. EU Environmental Policies: A short history of the policy strategies. *EU Environmental Policy Handbook*.
[52] Kelemen, R. D. (2010). Globalizing European union environmental policy. *Journal of European Public Policy*, *17*(3), 335-349.
[53] Hey, C. (2007). Supra nota 51 p. 15
[54] Court Decision, C-120/78, Cassis de Dijon
[55] Barón Escámez, S., (2006). Restrictions to the free movement of goods. The protection of the environment as a mandatory requirement in the ECJ case law. *University of Lund*
[56] Ziegler, A. R. (1993). Supra nota 37 p. 12

instruments used to protect the environment. Member States were required to criminalize certain conducts that caused or were likely to cause 'lasting damage to the quality of the air, soil, water, animals, or plants, or resulted in the death or serious injury of any person', whether committed intentionally or through negligence, after the Council of Europe adopted the Convention on the Protection of the Environment through Criminal Law in 1998.[57] A year later, in Tampere, the European Council proposed that 'efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance', as a starting step. This also considered the field of environmental crime.[58]

In 2001, a proposal for a Directive on the Protection of the Environment through Criminal Law was adopted by the Commission to overcome the defiencies of national legislations and to ensure that environmental legislation in the EU was applied more effectively.[59] The purpose, as set forth in the proposal's first Article is to enable a more effective execution of Community's environmental law by creating a minimum set of criminal offences across the Community. The Council did not accept this proposal and as a counter move, in 2003, the Council adopted a Framework Decision 2003/80/JHA on the protection of the environment through criminal law.[60] However, that Decision was in turn questioned by the Commission and it was annulled in 2005 by the European Court of Justice (ECJ) in *Environmental Crimes Case* on the grounds of faulty legal basis – the Council founded the Decision on Articles 29, 31(e) and 34(2)(b) TEU instead of 175(1) EC Treaty, [61] making it contrary to Article 47 EU. The case affirmed that criminal law and criminal procedural norms are not included in the Community's sphere of competence and yet, this 'does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective'.[62]

[57] Council Document. 4.XI.1998. Convention on the Protection of the Environment through Criminal Law
[58] European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, Retrieved from https://www.refworld.org/docid/3ef2d2264.html 5 April 2022
[59] European Commission. Proposal COM (2001)139 for a Directive on the Protection of the Environment through Criminal Law, 15 March 2001
[60] Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, 27 January 2003
[61] Court Decision, 13.9.2005, Environmental Crimes, C-176/03, ECLI:EU:C:2005:542
[62] Court Decision, 13.9.2005, Environmental Crimes, C-176/03, ECLI:EU:C:2005:542, paragraph 48

In 2005, a Communication was adopted by the Commission stating that the need for the measures provided by criminal law would be assessed individually in every case.[63] The EU's criminal policy tools were examined in order to clarify the division between the first and third pillars. Also, legal action was taken against the Council to overturn the Framework Decision criminalizing ship-source pollution. The European Parliament responded to the Communication and judgment on the *Environmental Crimes Case* by adopting a resolution stating that in some circumstances, it is necessary to go into further detail about the actions to be taken by Member States, regarding the type of conduct considered as infringement as well as the type of applicable penalties.[64]

2.1.1. Ship-Source Pollution excluding the type and severity of sanctions from the Community's sphere of competence

Before the Environmental Crime Directive of 2008, the Directive 2005/35/EC was passed in 2005 on ship-source pollution and criminal penalties. The Directive was intended as a tool to approximate the Member State's criminal law regarding ship-source pollution. Under Article 80(2) of the EC Treaty, the directive was enacted to safeguard the EC's common transport policy. If done deliberately, recklessly, or as a result of gross negligence, the discharges of oil or other noxious chemicals from ships must be considered an infringement and penalized appropriately according to this Directive. Framework Decision 2005/667/JHA sets out the applicable criminal penalties to the offences described in the aforementioned Ship-Source Pollution Directive. The Decision was based on Articles 31(1)(e) and 34(2)(b) of the Treaty on European Union and it supplements the Directive by defining the criminal penalty regime that applies to conduct that is specified as an offence in the Directive. This is evident from recitals 6 and 8 of the Directive and recital 4 of the Decision. It obligates the Member States to impose effective, dissuasive and proportionate sanctions, following the prejudicate of the CJEU.

The European Union has tried to create coherence by approximating penalties in all Member States through "minimum maximum penalties" in relation to certain crime types, including ship-source pollution. This stands for specifying a certain minimum maxima for penalties – what the maximum penalties are to be at least – which are made available for national judges. As already explained, this competence now, after the Lisbon Treaty, arises from Article 83 TFEU allowing the Union to

[63] European Commission. Communication COM (2005)583, on the implications of the Court's judgment of 13 September 2005 (case C-176/03 Commission v Council), 23 November 2005
[64] European Parliament, Resolution of the consequences of the judgment of the Court of 13 September 2005, 8 May 2006

set out minimum rules concerning serious crimes that have transborder qualities or otherwise in a harmonized field when it is necessary for achieving the EU's objectives effectively. The Framework Decision includes such minimum maximum penalty ranges, i.e., specifying that in serious cases, offences specified in the Ship-source Pollution Directive are to be penalized by a maximum sentence of at least between one and three years of imprisonment. Other penalties include fines and prohibition from participating in a controlled activity.

The Commission sought annulment of the aforementioned Framework Decision in 2007 in the *Ship-Source Pollution Case* C-440/05. It claimed that the contents of the Decision should have been included in the Directive, which was based on Article 80(2) of the EC Treaty, and the Commission argued that the Article reflected the scope more accordingly. From the Commission's viewpoint, the Council had breached Article 47 EU when adopting the Decision. The CJEU annulled the Framework Decision but refrained from accepting that Article 80(2) EC should or could have been the basis for it as a Community measure. In accordance with the reasoning of the Advocate General, the CJEU deemed that the Article might serve as the foundation for legislative measures necessitating the criminalization of certain conduct, but not for laws establishing the sort of criminal penalty that Member States would be obligated to apply.[65]

According to the judgment, when effective, appropriate, and dissuasive criminal penalties are an essential tool for fighting significant environmental offenses, the Community legislative may obligate the Member States to enact such penalties in order to guarantee that the regulations it puts down in that sector are completely effective.[66] Both, *Ship-source pollution* case (C-440/05) and *Environmental Crimes Case* (C-176/03) can be seen to suggest that, compared to the Community, the Member States are better equipped to interpret and implement the contents of effective, proportionate and dissuasive sanctions in their particular legal systems, as stipulated by the Advocate-General.[67] However, being outside the sphere of competence of the Community, Articles 4 and 6 of the Decision dealing with the type and severity of the sanctions were deemed invalid.[68] As Articles 4 and 6 were linked substantially to many other Articles of the Decision, it was annulled in its entirety. In addition, the Court makes a reference to the annulled Council Framework Decision 2003/80/JHA, due to the significant similarity of the provisions of the two Decisions

[65] Opinion of Advocate General, delivered on 20 November 2007
[66] Court Decision, 23.10.2007, Ship-Source Pollution, C-440/05, ECLI:EU:C:2007:625, paragraph 66
[67] Cases C-176/03, Commission v Council (2005); Opinion of Advocate-General, delivered on 26 May 2005, paragraphs 83- 87 (Environmental Crime) and C-440/05, Commission v Council (2007); Opinion of Advocate-General, delivered on 28 June 2007, paragraph 103 et seq. (Ship Source Pollution)
[68] Court Decision, 23.10.2007, Ship-Source Pollution, C-440/05, ECLI:EU:C:2007:625, paragraph 70

regarding the Member States' right for deliberation on individual cases.[69] As a result, the case further confined the Community's criminal sanctioning competence to the simple criminalization of specific offenses on a national level, rather than minimum criminal punishment criteria as stipulated in the *Environmental Crimes Case*.[70] Excluding the type and severity of sanctions from the sphere of Community competence led to the reviewing of the Commission Proposal of 2007 for the directive on the protection of the environment through criminal law.

2.2. Directive 2008/99/EC on environmental protection through criminal law

The Directive 2008/99/EC on environmental protection through criminal law was adopted in 2008 as a reaction to the higher degree of social criticism on environmental distress. There was, and still is, a need to respond to environmental matters through criminal law, as way less had been achieved under the previously existing administrative and civil law.[71] According to the third recital, Environmental Crime Directive is needed to overcome the insufficiency of existing penalty systems when it comes to accomplishing total compliance with legislation safeguarding the environment. As environmental criminality increasingly often includes cross-border characteristics[72], a mechanism was needed to deal with the rise all across the EU in order to safeguard the environment.[73] According to the 2007 Impact Assessment accompanying the proposal to the Environmental Crime Directive, the insufficiency of sanctions across the Member States displayed in relation to various different offences. For example, at the time, the Member States were obliged to 'take appropriate legal action to prohibit and punish illegal traffic' in accordance with Article 26 (5) of the old Waste Shipment Regulation (EC) 259/93. The criminal penalties in the form of imprisonment ranged from no sentence at all to a maximum sentence of six years in prison,[74] presenting a very concrete issue in the uniformity of sanction levels on environmental crime within the European Union. Similar obligations for Member States to impose

[69] Court Decision, 23.10.2007, Ship-Source Pollution, C-440/05, ECLI:EU:C:2007:625, paragraph 35
[70] Hedemann-Robinson, M. (2008). The EU and Environmental Crime: The Impact of the ECJ's Judgment on Framework Decision 2005/667 on Ship-Source Pollution. *Journal of environmental law*, 20(2), 279-292.
[71] European Commission Staff Working Document Evaluation of the 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 (Environmental Crime Directive)
[72] Poliisi. Supra nota 14 p. 8
[73] Impact Assessment. Supra nota 42, p. 13
[74] Impact Assessment. Supra nota 42, p. 13

criminal penalties applied for different types of environmental crimes, for example illegal trade of wildlife.[75]

Currently, according to the Commission, the Environmental Crime Directive is the primary binding instrument in the EU in the field[76] and it determines the importance of criminal law in the preservation of the environment. The minimum requirements for penalties imposed for substantial environmental harm intends to uphold the objective of ensuring high degree of environmental protection all across the European Union.[77] The basis for the adoption of the Directive was founded on Article 175 of the EC treaty (now Article 192 TFEU). As established before, in general, neither criminal law nor criminal procedure norms are under the jurisdiction of the European Union and it does not have the competence to impose specific criminal sanctions that ought to be implemented in the Member States' legislation. However, where full compliance with Community laws in a policy area under its jurisdiction is required, it is conceivable, as the ECJ case law in the 2000's has demonstrated.[78]

The proposal of 2007 for the Environmental Crime Directive originally included minimum rules for criminal sanctions 'that should apply in the most serious cases when the offence causes a particularly serious result or is committed under aggravating circumstances'.[79] The suggested minimum maximum penalty levels were overturned later in the same year by the CJEU ruling on *Ship-Source Pollution* case excluding the type and level of the criminal penalties from the Community's sphere of competence.[80] Now instead, besides defining the most serious environmental crimes, the Environmental Crime Directive's objective is to uphold uniform standards for criminal penalties. Article 5 of the Environmental Crime Directive lays out the principles upon which the sanctions ought to be founded. These principles are effectiveness, proportionality and dissuasiveness[81] - the obligation of efficacy. The Article obligates Member States to take the necessary measures to ensure penalties upholding the principles, without explicitly mentioning what exactly is required for the fulfillment thereof. Thus, the harmonization of sanctions by the means of minimum sanctions or -levels was not included in the Directive.

[75] Impact Assessment. Supra nota 42, p. 13
[76] European Commission. Press corner. (2021). Supra nota 40, p. 13
[77] Poliisi. Supra nota 14 p. 8
[78] Court Decision, 13.9.2005, Environmental Crimes, C-176/03, ECLI:EU:C:2005:542, paragraph 48
[79] European Commission. Proposal COM (2007)51 for a directive on the protection of the environment through criminal law, 9 February 2007
[80] Court Decision, 23.10.2007, Ship-Source Pollution, C-440/05, ECLI:EU:C:2007:625, paragraph 70
[81] Kazić, E. (2018). The Role of Criminal Law in Preservation of Environment Reviewed Through Directive 2008/99/EC with Reference on the State in Bosnia and Herzegovina. *The Book of Abstracts*.

Despite the inability of the EU to impose specific sanctions, the approximation of the sanction levels still remained an objective.[82]

The Member States were given two years, until 26th of December 2010, for the implementation of the Directive's contents into the national legislation. However, when the legal implementation of the Environmental Crime Directive was studied by the contractor Milieu, it identified flaws with the Directive's implementation in 23 Member States, including sanction levels that were potentially not sustaining the legislation's intended deterrence factor, even after five years since the adoption of the Directive.[83] The study led the Commission to make informal contact with the Member States, resulting in 18 of them amending their legislation.[84] Despite the difficulties in the beginning, the current level and correctness of the implementation of the Directive across the Member States is generally up to standard.

2.3. Challenges with harmonization of sanctioning on environmental crime

The challenges with harmonization of sanctioning on environmental crime is not solely dependent on the successful implementation of the Union regulations. Even successful implementation of a certain directive may lead to various different results depending on the approach taken in each Member State. Rather, the problems derive from the vagueness of the wording of the Environmental Crime Directive as well as the lack of specific minimum and maximum sanctioning levels. This relates to questions on how far does the Union's competence extend. There are also difficulties in reaching uniform definition for the environmental criminal offences and legal persons' liability but this thesis focuses on the severity of criminal sanctions on environmental crime in the form of imprisonment for natural persons.

An Evaluation on the Environmental Crime Directive was conducted in 2020 revealing significant differences in the severity of maximum prison sanctions for natural persons, despite the general correctness of the implementation.[85] The correctness of the implementation of the Directive is not to be mistaken with uniform level of the sanctions in all Member States. The Directive can be

[82] European Commission Staff Working Document Evaluation. Supra nota 71 p. 19
[83] Milieu, 'Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States'. Retrieved from https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/evaluation-environmental-crime-directive_en 12 April 2022
[84] European Commission Staff Working Document Evaluation. Supra nota 71 p. 19
[85] European Commission Staff Working Document Evaluation. Supra nota 71 p. 19

correctly implemented even if the interpretation on the meaning of, i.e., effective, proportionate and dissuasive differs from one Member State to another. According to the findings, only a low amount of environmental cases proceed to successful prosecution and yet punishments are insufficient to act as a deterrence, and cross-border cooperation is lacking.[86] There was identified a significant lack of dissuasiveness and effectiveness of the sanctions imposed for environmental offences.

2.3.1. The vagueness of 'effective, proportionate and dissuasive sanctions'

In its entirety, Article 83(2) TFEU is very vague in language. It leaves significant room for interpretation on what may be considered 'essential to ensure effective implementation of Union policies'. In 1989, before European Union had formal competence in criminal matters, CJEU stated in *Greek Maize Case* that if the Community does not provide with specific regulations on sanctioning for an infringement, the Member States are obligated to take measures by themselves in the form of 'effective, proportionate and dissuasive sanctions'.[87] The obligation of efficacy was thus introduced by the CJEU and has since then been used extensively, even when the interpretation thereof is the responsibility of the Member States and the Court merely provides some direction.[88] In relation to certain types of offences this obligation can be deemed sufficient in forming such sanctions in the Member States.[89] However, all of these requirements are indistinct and thus complicate Member States' obligation to fulfil European Union's objectives regarding sufficient sanctions especially in more complex fields of crime.

Essentially effectiveness indicates that the imposed penalty ought to carry out the objectives of the regulated field, although the means of measuring it are not explicated.[90] In regard to fulfilling the objectives of the environmental policy of the EU, effectiveness of the sanctions must play a multifaceted part in environmental protection. Effective sanctions on environmental crime will uphold the principles of prevention and rectifying at source as well as act in the character of deterrence for both the public and the offender.[91] The latter is also supported by a German

[86] European Commission. Press corner. (2021). Supra nota 39, p. 13
[87] Court decision, 21.9.1989, Greek Maize, C-68/88, ECLI:EU:C:1989:339, paragraph 24.
[88] Nuotio, K. (2020). Supra nota 36, p. 12
[89] Satzger, H. (2019). Supra nota 9, p. 6
[90] Nuotio, K. (2020) Supra nota 36, p. 12
[91] European Environmental Bureau. Supra nota 15 p. 9

empirical study stating that deterrence effect increases when there is a probability of more severe sanctioning in the form of imprisonment.[92]

Proportionality means that the severity of the sanction is not too moderate nor too strict compared to the infringement in question. It can mean two different things; act-proportionality or means-end-proportionality. The first one implies that the severity of the infringement is in accordance with the sanction and the latter relates more to the effectiveness.[93] Proportionality in environmental crime takes into account the liability of the offender, significance of the offence as well as the actual occurred damage to the environment and the well-being of humans. The proportionality of sanctions is not merely viewed on the EU level but within the Country specific legal systems – real proportionality requires that the sanctions do not go beyond or under what is appropriate within the cultural transmission of criminal values.[94] The factors of effectiveness and proportionality are closely associated with dissuasiveness, as both reduce the potential perpetrators' willingness to commit offences.[95] Dissuasiveness in regard to environmental crimes considers both the offender as well as any potential perpetrators. Often with environmental crime, the incentive to commit infringements is the opportunity of economic gain. When it comes to sanctions, removing this gain does not suffice solely but there is a need for a punishment for the offence, too.[96] Even if the foundations are same across the EU, it is difficult to apply this formula similarly in all of the Member States as the means are not clearly specified.

The Environmental Crime Directive continued to uphold these principles despite the vagueness thereof. The European Green Deal, adopted by the Commission in 2019, calls for stronger implementation and enforcement of environmental regulations, arguing that without them, the deal's goals will be compromised.[97] The European Green Deal especially criticizes the Environmental Crime Directive and proposed a review of the Directive in 2019. One of the problems with the Directive is the ambiguity it provides for interpreting the contents of 'effective, appropriate, and dissuasive sanctions,' as well as the judges' low awareness of how to apply them in practice.

[92] Almer, C., & Goeschl, T. (2010). Environmental Crime and Punishment: Empirical Evidence from the German Penal Code. *Land Economics*, 86(4), 707–726.
[93] Nuotio, K (2020). Supra nota 36, p. 12
[94] European Environmental Bureau. Supra nota 15 p. 8
[95] Nuotio, K. (2020). Supra nota 36 p. 12
[96] European Environmental Bureau. Supra nota 15 p. 8
[97] European Commission Communication COM (2019)640 The European Green Deal, 11 December 2019

2.3.2. Differences in maximum sanctions in different Member States

In 2007, the Impact assessment accomplanying the proposal for the Environmental Crime Directive had noted significant disparities across EU Member States when it comes to criminalizing environmental offenses, and the existing sanctions were frequently viewed as being overly light. This was seen to incentivize criminals to relocate their operations to Member States with the weakest law enforcement systems, obstructing judicial cooperation between them and essentially leading to the actualization of safe havens for criminals.[98] After the adoption of the Environmental Crime Directive, it appears that the implementation of increased sentencing levels in some of the Member States did not result in a harmonization of sanction levels, but rather created more discrepancies.[99] The Evaluation identified that in several Member States the imposed sentences were lower and did not fall within the minimum maximum sanction level that was intended in the 2007 proposal for the Environmental Crime Directive.[100]

One of the crimes specified in the Environmental Crime Directive is in Article 3(b). It provides that when 'unlawful and committed intentionally or with at least serious negligence -- 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' constitutes a criminal offence. This offense is punishable in the Member States with varied levels of maximum penalties in the form of deprivation of liberty, with the lowest maximum sanction being 2 years in the Czech Republic and the highest being life in prison in Malta. Additionally, there exist maximum levels of 3 years, 5 years, 6 years, 8 years, 10 years, 12 years, 15 years, and 20 years in between these maximum levels for the exactly same crime.[101] In accordance to the reasoning of the Impact Assessment, there is definitely more incentive to commit illegal waste trafficking in Czech Republic than in a Member State where the maximum level of prison sanction is significantly higher.[102] When there are recognizable differences in the level of control, the various levels of severity in sanctions may be displayed by switching the trafficking route used. Countries with a reputation for more lenient punishments might become safe havens for, among

[98] Impact Assessment. Supra nota 42, p. 13
[99] European Commission Staff Working Document Evaluation. Supra nota 71 p. 19
[100] European Commission Staff Working Document Evaluation. Supra nota 71 p. 19
[101] European Commission Staff Working Document Evaluation. Supra nota 71 p. 19
[102] Impact Assessment. Supra nota 42, p. 13

other possibilities, illicit waste trafficking where there is a lesser chance of facing a severe prison sanction.[103]

[103] Poliisi. Supra nota 14 p. 8

3. Options to create further coherence in the severity of sanctioning on environmental crime

It is clear that the obligation to ensure 'efficient, proportionate and dissuasive penalties' has not been sufficient in creating coherence in the sanctions among the Member States. Despite the level of correctness of the implementation of the Environmental Crime Directive, there are significant differences in the maximum sanctions for environmental crime imposed in the Member States and adequate harmonization thereof is yet to be achieved. The problems lie within the confines set for the Union for the protection of subsidiarity and proportionality principles. Within these limitations, the Union can impose minimum rules within the meaning of Article 83 TFEU, which allow the Member States to use discretion. Especially in regard to the vague obligation of efficacy, the interpretations can differ from one Member State to another.[104] This is because a national legal system may view sanctions of certain severity as being dissuasive whereas the same level would be too lenient in an another State. Currently, the Commission is working towards introducing minimum maximum sanctions in order to get riddance of these disparities, but the approach is not quite as unproblematic as one would hope. In chapter 3.2. and 3.3. the proposal and its problematics will be discussed in further extent.

3.1. Minimum maximum penalties and -penalty levels

Previously, the European Union has tried to create coherence by approximating penalties in all Member States through "minimum maximum penalties" or "- penalty levels", in relation to i.e. fraud.[105] This stands for specifying a certain minimum maxima for penalties which are made available for national judges if the offence in question is applicable to the European Union.[106] As already explained, this competence arises from article 83 TFEU allowing the Union to set out minimum rules concerning serious crimes that have transborder qualities or otherwise in a harmonized field when it is necessary for achieving EU's objectives.

[104] European Commission Staff Working Document Evaluation. Supra nota 71 p. 19
[105] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law
[106] Satzger, H. (2019). Supra nota 9, p. 6

In 2002, European Council (EC) adopted a document and categorized minimum maximum penalty levels into four as an attempt to present gradation of severity of offences; maximum sanctions of at least 1-3 years, 2-5 years, 5-10 years and 10 years minimum.[107] Rather than merely imposing a minimum maximum penalty, which is likely to be exceeded when the Member State sees fit, establishing a minimum maximum penalty level sets forth a particular range within which the maximum punishment is advised to be implemented. Practically this means that criminal legislation will provide that a particular offence carries a potential maximum sentence of, for example, at least between two and five years in prison. In accordance with Declaration 8 to the Amsterdam Treaty, 'the provisions of Article K.3(e) of the TEU shall not have the consequence of obliging a Member State whose legal system does not provide for minimum sentences to adopt them'. Thus, passed sentences do not have to fall within the aforementioned ranges[108] but it is more likely than with mere minimum maximum penalties since there is more room for deliberation. The Member States are still allowed to exceed these minimum levels if they want to, and due to that possibility, they are still considered as a minimum rules within the meaning of Article 83 TFEU. This does not give riddance of the discrepancy in the severity of sanctioning between the Member States since they are able to impose own absolute minimum and maximum sanctions as long as the latter is the equivalent or over the imposed minimum maximum penalty. As the Member States can also determine maximum sanctions exceeding the minimum maximum penalties, the whole purpose of harmonization is somewhat undermined – the severity of sanctions still remain versatile throughout the European Union.

Since the adoption of the Council document, the concept of minimum maximum penalty levels has not fulfilled its purpose in approximating national legislations into certain levels of criminal sanctions.[109] They have proven to be relatively irrelevant considering the approximation of sanctioning since more often judgements in criminal cases concern minimum sentences which the Member States are allowed to enact by themselves.[110] This implies that no matter how well harmonized the maximum penalties were across the European Union, there would still be divergence as one Member States could impose fines as minimum sanction and another Member State imprisonment as minimum sanction for the same crime. This is evident from, for example,

[107] Council document 9141/02, 27 May 2002
[108] Miettinen, S. (2013). *Routledge research in European Union Law*: *Criminal Law and Policy in the European Union*. USA and Canada: Routledge, p.139-140
[109] Satzger, H. (2019). Supra nota 9, p. 6
[110] Satzger, H. (2019). Supra nota 9, p. 6

the EU Timber Regulation.[111] Out of the 27 Member States, prison sentences could be applied in only 17, whereas criminal fines were available in 16, with a wide variety of fine amounts.[112] Fines and prison sanctions are overlapping in some Member States. In addition to the criminal sanctions, there are options to rely on administrative fines and seizures as well as suspension of trade, too, in a number of Member States. Such inconsistencies in the level of imposed sanctions may create a disadvantage to the operators complying with the EU Regulation and lower the deterrence effect if the sanctions imposed are virtually inadequate.[113]

When minimum maximum penalties have been utilized in fields other than environmental crime, additional concerns have developed in addition to the aforementioned. The use of such penalties may, for example, result in the increase of punitivity regarding certain crime in some Member States. For instance, in Greece the minimum sanction for felony is five years; acquiring a minimum maximum penalty of six years would create too narrow penalty scale and so adopting a higher maximum of ten years gives national court more discretion when it comes to sentencing.[114] This generates further inconsistency between the severity of penalties in the Member States as some other Member States are able to set the maximum penalty as six years. Imposing minimum maximum penalty levels for environmental crime would give Member States more discretion and, potentially, improve harmonization within the constraints outlined above. However, it still might lead to increased punitivity if a Member State is forced to impose a maximum sentence at the higher end of the range. Additionally, these problems arising from the minimum maximum penalties may disrupt the 'proportionality of national penal concepts' and interfere with the Member States' penal traditions.[115]

3.1.1. Introducing the category model

As already discussed, creating coherence in penal law among the Member States of the European Union by the means of determining minimum maximum penalties has proven ineffective. Criminal sanctions' more comprehensive harmonization by the means of directives is troublesome as the Union cannot legally impose specific binding minimum or maximum penalties or ranges that could

[111] European Commission Proposal (2021) Supra nota 39 p. 13
[112] European Commission Staff Working Document Fitness Check on Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation) and on Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community (FLEGT Regulation) 17.11.2021 SWD (2021) 328 final
[113] European Commission Proposal (2021) Supra nota 39 p. 13
[114] Satzger, H. (2019). Supra nota 9, p. 6
[115] Satzger, H. (2019). Supra nota 9, p. 6

not be exceeded by the Member States.[116] Within the meaning of Article 83 TFEU, only minimum harmonization is allowed, which is why appointing a specific minimum or -maximum to abide is not included in the Union competence (*de lege lata*).[117] Although the Article does not exclude the imposition of minimum penalties, the concomitant impact of judicial discretion limitation is either unclear or at the very least incompatible with the legal systems of several Member States, including Denmark and France.[118]Additionally, despite the competence allocated by the aforementioned Article, criminal law is a part of Member States' national identity that is to be protected to a certain extent as stipulated by Article 4 (2) in TEU and interfering domestic legal system in the form of strict requirements for sanctioning could be considered a breach of the Treaty.

An alternative approach to the issue has been introduced by European Criminal Policy Initiative (ECPI) as the so-called category model. Its objective is to preserve consistency of Member States' internal penal law as well as to support European Union legislators' attempt in efficient harmonization.[119] Category model is based on relative comparability which entails creating a hierarchy of infringements by categorizing criminal offences on EU level, based on their severity and then assimilating domestic penal system into these categories.[120] Both subsidiarity and proportionality principles are therefore taken into consideration. However, specification of the sanctions within the categories are left to the Member States rather than the European Union.[121] Hence, the Member States would not lose their self-determination and are able to preserve a coherent sanction system. In principle, it could be possible to merge already existing sanctions into the category model based on EU provided criteria.

By letting the Member States fill the categories mostly by themselves in accordance with provided guidelines, relative comparability approach would not interfere with the domestic sanctioning system in great extent. It would keep national identities intact and yet, it would play a part in advancing the shared European policies.[122] The criminal laws would continue to remain as a part of domestic legislation as they still origin from EU directives and are implemented by national legislature by means deemed fit by the Member States. In the future, as the offences within the

[116] Grafeneder, S. (2014). Supra nota 49, p. 14
[117] Satzger, H. (2019). Supra nota 9, p. 6
[118] Satzger, H. (2019). Supra nota 9, p. 6
[119] Satzger, H. (2019). Supra nota 9, p. 6
[120] Nuotio, K (2020). Supra nota 36, p. 12
[121] Satzger, H. (2019). Supra nota 9, p. 6
[122] Nuotio, K (2020). Supra nota 36, p. 12

categories would be, to a certain degree, equivalent from one Member State to another, European Union law could be advanced through the consistency of domestic sanctioning systems.[123]

In the application of category model, the Member States would not get unlimited freedom regarding filling the categories. Due to article 258 of TFEU, if a case was brought against a Member State, they could be obligated to explain how their categorisation represents reason and coherence if the Commission contemplates whether the Member State has fulfilled its obligations. Providing guidelines on EU level for the requirements of offences considering all of the categories would be beneficial in creating coherent system. Relative comparability could make transnational co-operation and mutual recognition more efficient as penalties can be compared more logically.

3.2. Commission proposal of 2021 to replace the Environmental Crime Directive suggesting the introduction of minimum maximum penalties

Very recently, in December 2021, the Commission adopted a proposal for a directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC.[124] Alongside with the proposal, the European Parliament and the Council passed a Communication[125] explaining the proposal's policy goals. The proposal presents six objectives, one of which is 'ensuring effective, dissuasive and proportionate sanction types and levels for environmental crime'. The legal basis of the proposal is founded on Article 83(2) TFEU, and as established before, the competence to set minimum rules regarding criminal sanctions to obey actualizes when it is necessary for effective enforcement of a Union policy and the field in question has previously been subjected to harmonization measures.

The push for the new proposal was initiated by the European Green Deal and it is essential in fulfilling a key commitment thereof – making the environmental protection more effective.[126] According to the Deal, in order to combat environmental crime, the Commission advocates for increased efforts by the Union and its Member States, and the international community through the European Climate Pact.[127] In addition to other measures, by requiring Member States to pursue

[123] Nuotio, K (2020). Supra nota 36, p. 12
[124] European Commission proposal (2021) Supra nota 35, p. 14
[125] European Commission Communication COM (2021) 814 to the European Parliament and the Council on stepping up the fight against environmental crime, 14 December 2021
[126] European Commission. Press corner. (2021). Supra nota 40, p. 13
[127] European Commission Communication. Supra nota 97, p. 23

a certain set of minimum maximum sanctions for infringing the environmental law, the proposal aims to increase the effectiveness of environmental protection. In order to achieve the objective of increasing the availability of effective, proportionate, and dissuasive sanction types and levels in the field of environmental crime, the proposal suggests that the Member States adopt certain minimum maximum penalties.[128] These are distinct from the minimum maximum penalty levels which were previously rejected in the adoption of the Environmental Crime Directive, considering the initial Commission proposal of 2007. The new proposal also includes 'aggravating circumstances and accessory sanctions' as well as earning-linked fines or ones connected to the illegal profit obtained. Also, a categorisation by the severity of the offences is proposed to be made within these specific sanction levels.

Article 5 of the proposal prescribes a prison sentence of at least ten years for a natural person, if the crime committed is mentioned in Article 3 and causes or is likely to cause death or serious injury to any person. In the third and fourth paragraph of Article 5, the proposal also differentiates the severity of ten different offences by allocating them into two specified minimum maximas when they do not cause or are likely to cause deatch or serious injury to any person – maximum penalties of at least six years and at least four years. In total, the first paragraph of Article 3 of the proposal identifies 18 environmental crimes, excluding inciting, aiding and abetting set forth in Article 4. The Commission justifies its reasoning for the introduction by stating that more dissuasive sanctioning, closer cross-border cooperation as well as more effective investigation of environmental crimes would all be enhanced through better harmonized criminal sanctioning.[129]

3.3. The degree of harmonization of criminal sanctioning on environmental crime in the future

It is likely in the light of the competences awarded to the Union through the Lisbon Treaty that the Commission proposal of 2021 with minimum maximum penalties will be accepted and adopted. This is in contrast to the proposals of 2001 and 2007, which were either fully or partially rejected due to a lack of competence to establish minimum rules considering the type and severity of sanctions. If it is adopted as such, it is reasonable to expect some improvement regarding the level of harmonization on the severity of sanctions on environmental crime as the common ground for

[128] European Commission Proposal (2021) Supra nota 39 p. 13
[129] European Commission Proposal (2021) Supra nota 39 p. 13

sanctions would not be based merely on the obligation of efficacy. However, comprehensive harmonization is not likely to be achieved. It has been shown previously in regard to other criminal legislation that minimum maximum sanctions might not create actual coherence[130] among the Member States as they are minimum rules within the meaning of Article 83(2) of TFEU considering only maximum sanctions which can be exceeded by the Member States. As previously stated, harmonization through minimum maximum sanctions has been rather ineffectual since in most countries, criminal cases more frequently consider minimum sanctions rather than the maximum punishment.[131] Instead of properly harmonizing the level of sanctions, minimum maximum penalties rather have potential of creating new problems, such as an increase in punitivity in some Member States. Specious harmonization does not help in the prevention of environmental crime nor the uniform prosecution of offenders across the European Union.

Harmonization of the severity of sanctions for environmental crime across the European Union through adopting directives allows more respect and discretion for the Member States' own penal systems and thus, upholds the protection of the Member States' national identity established by the Treaty on the European Union. However, directives setting forth minimum rules considering sanctions do not suffice as a foundation for efficiently harmonized law and the enforcement of Union policies.[132] As indicated above, the current Environmental Crime Directive does not establish specific guidelines for sanctions – it offers only the vague obligation of efficacy which plays a great part in the insufficiency of current level of harmonization.[133] If the Commission proposal of 2021 for replacing the Environmental Crime Directive is adopted, it still does not guarantee a uniform level of sanctions even if the directive was implemented correctly in all Member States. This derives from i.e. the necessity to have enough range between the minimum and maximum sanctions imposed in a Member State.

Insufficient harmonization in the field, among other things, hinders the fight against international organized crime committing environmental offences.[134] To prevent this, the Union should come up with a way to harmonize the field more comprehensively than what can, and has been, achieved through directives. However, more aggressive measures would be outside the current sphere of Union competence. Unlike directives, which set forth the objectives to be achieved that need to

[130] Satzger, H. (2019). Supra nota 9, p. 6
[131] Satzger, H. (2019). Supra nota 9, p. 6
[132] Marquès-Banqué, M. (2018) Supra nota 5 p. 6
[133] European Commission Staff Working Document Evaluation. Supra nota 71 p. 19
[134] Marquès-Banqué, M. (2018) Supra nota 5 p. 6

implemented in the national legislation in a way that the Member State deems fit, regulations are binding legislative acts and will enter into force as such on a set date.[135] A regulation, to be adopted as such in all Member States, establishing certain minimum- as well as maximum prison sanctions for all environmental crimes would certainly make the sanction levels more uniform all across the European Union. To illustrate, for example, a minimum sanction of one year and a maximum of six years in prison could be adopted 'as is' for waste trafficing. However, this approach is not in accordance with the current legislative competences of the Union. It would violate Article 83(2) of TFEU and the Treaty would have to be amended in order to make the solution plausible. It would also undermine the national identity of the Member States within the meaning of Article 4 of TEU. The competence would have to be widely broadened and it is unlikely that the Member States would agree to such reduction of their domestic competences in criminal law.

Nonetheless, in order to preserve the environment and create a uniform deterrence effect, increase mutual recognition and prevent safe havens from actualizing, this possibility could be explored by the Union.

[135] *Types of legislation.* European Union official website. Retrieved from https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en 1 May 2022

CONCLUSION

Environmental protection is a relatively new policy field within the European Union but the importance thereof has increased immensely in the past decades. Environmental crime increases annually and is now the fourth most lucrative illicit enterprises. In order to hinder climate change and the increase of environmental crime, the offences must be properly prosecuted all across the European Union. It is critical to achieve the policy goal of environmental protection as well as eliminating safe havens for criminals by establishing a common basis for the severity of sanctions for environmental crime in all Member States. The sanctions act as a punishment for the offender as well as a deterrence for the greater public helping in the prevention of environmental crime. If the sanctions are not harmonized across the European Union, there is strong likelyhood of the criminal activities focusing in specific Member States where the sanctions are less severe. It is evident that it becomes more appealing to commit crimes where the maximum sanction is clearly lower than elsewhere. Harmonization enhances mutual recognition and cross-boarder cooperation, too.

The Union's legislative competence is limited to establishing minimum rules concerning the definition of criminal offences and sanctions when it in essential in safeguarding the effective fulfillment of a Union policy given that it is a field already subjected to harmonization measures, as established by Article 83(2) TFEU. The Union has used this competence in imposing minimum maximum penalties that can be exceeded if a Member State sees it fit. However, in relation to other fields of crime than environmental, minimum maximum sanctions have been disappointing in fulfilling the purpose of harmonizing of the severity of sanctions.[136] Currently, the Directive 2008/99/EC of the protection of environment through criminal law prescribes that sanctions for environmental crimes must be effective, proportionate and dissuasive. The obligation of efficacy has been used for decades since the late 1980's and yet, it still remains vague, and the interpretation thereof varies between different Member States. No guidance is given to the Member States for

[136] Satzger, H. (2019). Supra nota 9, p. 6

the interpretation of the term 'effective, dissuasive and proportionate penalties' which has lead to irregularities in sanction levels in the national legal systems.[137]

An evaluation was conducted on the level of harmonization and the severity of sanctions after the Directive came into force and it shows that the maximum sanctions differ greatly from one Member State to another. Based on the findings of the Evaluation on the Environmental Crime Directive, the Commission has adopted a proposal for a directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC. The proposal for the new directive, among other objectives, attempts to ensure effective, proportionate and dissuasive sanction types and levels for environmental crime. The Commission intends to do so by suggesting the adoption of minimum maximum sanctions of 4, 6 and 10 years in relation to certain crimes.[138]

In the light of previous challenges with attaining a level of harmonization by the means of minimum maximum sanctions, it could be argued that this approach will not achieve genuine harmonization of sanctions on environmental crime. It is likely that the disparities would be decreased compared to the current situation. However, genuine harmonization is not likely to be achieved by the means of minimum rules as the Member States are free to impose stricter sanctions if they deem that appropriate to their respective legal system. For example, it seems implausible that Czech Republic and Malta would end up with the same level of maximum sanctions for waste trafficking if i.e. a minimum maximum penalty of 6 years was adopted. The Czech Republic could be anticipated to stay at the set minimum maxima whereas in Malta, regarding its legal system, that would likely be considered way too lenient and maximum sanction could be imposed higher.

Considering that the EU is a party to the Paris Agreement and that the NDC's made by the EU should achive a 55% reduction of GHG's by 2030,[139] implementing a regulation on the sanctioning on environmental crime would benefit to control the unaccounted emissions that come from criminal waste management and burning of waste, for example. It is important to remember that this kind of regulation would be beneficial for all Member States in regard to the protection of the environment and might not hinder the States' own competence too much if a plan was made between the bodies of the EU and the Member States.

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[137] European Commission Staff Working Document Evaluation. Supra nota 71 p. 19
[138] European Commission Proposal (2021) Supra nota 39 p. 13
[139] Valtioneuvosto. Press release (2021). *EU's Fit for 55 legislative climate package seeks to tighten renewable energy and energy-efficiency targets.* Retrieved from https://valtioneuvosto.fi/-/1410877/eu-n-fit-for-55-ilmastopaketti-tiukentaisi-uusiutuvan-energian-ja-energiatehokkuuden-tavoitteita?languageId=en_US 3 May 2022

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