

**THE POSITIVE LIST APPROACH AND THE LEGALITY PRINCIPLE IN  
CRIMINAL LAW IN THE EUROPEAN UNION**

**LA ESTRATEGIA DE LAS 'LISTAS POSITIVAS' Y EL PRINCIPIO DE  
LEGALIDAD PENAL EN LA UNIÓN EUROPEA**

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**ABSTRACT:** In the context of a critical review of CITES as an instrument that deals with the trafficking of species of wildlife fauna and flora, this paper intends to analyse the legislative strategy of positive lists as an alternative to the negative lists approach used by CITES, from the perspective of criminal law. From the perspective of criminal law, it is important to analyse the problems this legislative strategy may pose when regulating crimes, or enforcing them in courts. This work focusses on a fundamental question: Could a reference to positive lists in the description of offences raise issues about constitutionality in national courts due to violation of the legality principle in criminal law? The conclusion is that, indeed, the reference to positive lists in the description of an offence could raise issues in the courts for violation of the legality principle in criminal law.

**RESUMEN:** En un contexto de revisión crítica de la CITES como instrumento para hacer frente al tráfico ilegal de especies de flora y fauna silvestres, este trabajo tiene como objeto analizar, desde la perspectiva del Derecho penal en la Unión Europea, la estrategia legislativa de las "listas positivas" como alternativa al sistema de "listas negativas" utilizado por la CITES. Desde la óptica del Derecho penal, interesa analizar los problemas que esta estrategia legislativa

puede plantear, con carácter general y más allá de este ámbito específico, ya sea en la regulación de los delitos, ya sea en la aplicación de éstos en los tribunales. En este trabajo nos centraremos en una y primera cuestión fundamental: la conformidad con el principio de legalidad penal de las remisiones normativas (directas o indirectas) a listas positivas en la descripción de los delitos. La conclusión es que, efectivamente, la referencia a listas positivas en la descripción típica de un delito podría plantear dudas en los tribunales por vulneración del principio de legalidad penal.

**RESUM:** En un context de revisió crítica de la CITES com a instrument per a fer front al tràfic il·legal d'espècies de flora i fauna silvestres, aquest treball té com a objecte analitzar, des de la perspectiva del Dret penal i de la Unió Europea, l'estratègia legislativa de les "l·listes positives" com a alternativa al sistema de "l·listes negatives" utilitzat per la CITES. Des de l'òptica del Dret penal, interessa analitzar els problemes que aquesta estratègia legislativa pot plantejar, amb caràcter general i més enllà d'aquest àmbit específic, ja sigui en la regulació dels delictes, ja sigui en l'aplicació d'aquests en els tribunals. En aquest treball ens centrarem en una i primera qüestió fonamental: la conformitat amb el principi de legalitat penal de les remissions normatives (directes o indirectes) a l·listes positives en la descripció dels delictes. La conclusió és que, efectivament, la referència a l·listes positives en la descripció típica d'un delictes podria plantejar dubtes en els tribunals per vulneració del principi de legalitat penal.

**KEYWORDS:** CITES – Illegal wildlife trade – Positive lists – Principle of legality in Criminal Law

**PALABRAS CLAVE:** CITES – Tráfico ilegal de especies silvestres – Listas positivas – Principio de legalidad penal

**PARAULES CLAU:** CITES – Tràfic il·legal d'espècies silvestres – L·listes positives – Principi de legalitat penal

**SUMMARY:** I. INTRODUCTION. II. THE ROLE OF CITES IN CRIMINAL LEGISLATION TO COMBAT THE ILLEGAL TRADE IN SPECIES OF WILD FAUNA AND FLORA. III. POSITIVE LISTS AS A STRATEGY TO REGULATE TRADE IN EXOTIC PETS. 1. Brief outline of the

benefits and advantages of positive lists. 2. Reference to the legal framework for positive lists in the European Union. IV. POSITIVE LISTS AND CRIMINAL LAW. 1. Preliminary considerations: the protection of species of wild fauna by criminal law under Directive 2008/99/EC. 2. Positive lists and the legality principle in criminal law. a) *The legality principle in the context of European criminal law*. b) *Compliance with the legality principle in criminal law by direct or indirect reference to positive lists in the description of offences*. V. CONCLUSIONS. VI. BIBLIOGRAPHY.

## I. INTRODUCTION

The global impact of the COVID-19 health crisis has been a contributory factor in increasing the perception of biodiversity loss as a real threat to the survival of the planet. Although the exact source of the pandemic has not been confirmed, the zoonotic source of the disease has revealed something that had already been highlighted on specialist forums: the close link between human health, animal health and the health of natural systems.

Approaches like One Health, EcoHealth, and Planetary Health are based on that link<sup>1</sup>. All of them call for policies to be developed and integrated measures to be adopted to confront the environmental crisis. While these three approaches are similar in that they state the need to place human and animal health in a wider ecosystem context, the concept of One Health is more widely recognised at institutional level both internationally and within the European Union (EU). The World Health Organisation (WHO), the World Organisation for Animal Health (OIE) and the Food and Agriculture Organization (FAO) of the United Nations have emphasised that the One Health approach does not just contribute towards attaining the Sustainable Development Goals (SDGs - UN), but that “The SDGs themselves reflect a One Health approach, ensuring that healthy people and animals live on a healthy planet”<sup>2</sup>.

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<sup>1</sup> Richard Horton, et al., “From public to planetary health: a manifesto”, *The Lancet*, vol. 383, no. 9920, 2014, p. 847; Sarah Whitmee et al., “Safeguarding human health in the Anthropocene epoch: report of The Rockefeller Foundation-Lancet Commission on Planetary Health”, *The Lancet*, vol. 386, no.10007, 2015, p. 1973-2028.; Nate Seltnerich, “Down to Earth: The emerging field of Planetary Health”, in *Environmental Health Perspectives*, vol. 126, no.7, July 2018, p. 072001-1; Sarah Harrison, Lucy Kivuti-Bitok, Alexandra Macmillan, Patricia Priest, “EcoHealth and One Health: A theory-focused review in response to calls for convergence”, in *Environment International*, vol.132, no. 105058, 2019, p 1-15; David Waltner-Toews, “Zoonoses, One Health and complexity: wicked problems and constructive conflict”, in *Philosophical Transactions of The Royal Society B*, vol. 372, no. 20160171, 2017, p. 1-9.

<sup>2</sup> WHO, FAO, OIE, *Taking a Multisectoral, One Health Approach: A Tripartite Guide to Addressing Zoonotic Diseases in Countries*, 2019, p.6.

From a political perspective, a number of messages contain this integrated approach. One example is the “Leader’s Pledge for Nature: United to Reverse Biodiversity Loss by 2030 for Sustainable Development”, endorsed by the leaders of over 60 countries, just before the United Nations Biodiversity Summit held on 30 September 2020. The Summit was part of preparatory work to adopt the Post-2020 Biodiversity Framework, envisaged in 2021, during the 15th Conference of the Parties (COP15) to the Convention on Biological Diversity (CBD). In turn, within the context of the EU, the EU biodiversity strategy for 2030, published in May 2020, states the EU’s desire to “enhance its support to global efforts to apply the One Health approach [...], which recognises the intrinsic connection between human health, animal health and healthy resilient nature.”<sup>3</sup>.

According to reports published in 2020 by several international organisations, such as the Intergovernmental Platform on Biodiversity and Ecosystem Services’ (IPBES) Workshop Report on Biodiversity and Pandemics, and ‘Preventing the next pandemic: Zoonotic diseases and how to break the chain of transmission’, published by the United Nation’s Environment Programme (UNEP) and the International Livestock Research Institute<sup>4</sup>, one of the consequences of biodiversity degradation is the increase in emerging infectious diseases. Both reports describe the link between biodiversity loss and the emergence of new infectious zoonotic diseases or outbreaks of other known infectious diseases. In light of extensive scientific evidence and of the most recent precedents (such as SARS in 2003, H1N1 in 2009, MERS in 2012 or the outbreak of the disease caused by the Ebola virus between 2014 and 2016), the conclusion that can be drawn is that the pandemic caused by severe acute respiratory syndrome coronavirus-2 (SARS-CoV-2) amounts to “a widely-predicted consequence of how people source food, trade animals, and alter environments”<sup>5</sup>.

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<sup>3</sup> Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: EU Biodiversity Strategy for 2030. Bringing nature back into our lives, COM(2020) 380 final, 20.5.2020.

<sup>4</sup> IPBES, *Workshop Report on Biodiversity and Pandemics*, Bonn, 2020; UNEP and the International Livestock Research Institute’s report, *Preventing the Next Pandemic: Zoonotic diseases and how to break the chain of transmission*, Nairobi, 2020. Although both reports expressly adopt the One Health approach, the second mentions that this concept is adopted as it is widely recognised by institutions. It is also considered an umbrella term for Eco Health and Planetary Health.

<sup>5</sup> UNEP and the International Livestock Research Institute, *Preventing the Next Pandemic: Zoonotic diseases and how to break the chain of transmission*, op. cit. p. 11.

In fact, (legal and illegal) wildlife trade is one of the anthropogenic activities that contributes to the degradation of habitats and to biodiversity loss. The conditions under which wildlife species are captured, raised in captivity and traded, whether for medicinal purposes, for human consumption, as pets or for other reasons, are more often than not ones that encourage the transmission of viruses and other pathogens (transport in cages, poor diet, sale at wet markets, mix of species, etc.)<sup>6</sup>. All these conditions are worse when the trade is illegal, which means, by definition, without any kind of health controls, and live animals are subject to particular stress during capture and captivity<sup>7</sup>. Criminological analysis of the illegal wildlife trade is one of the main contributions made by green criminology. In addition to challenging anthropocentrism, green criminology incorporates other types of ecocentrism-based influences (derived from ecological justice), as well as animal welfare considerations based on biocentrism that form the basis for the justice between species model<sup>8</sup>.

The ongoing discussion on the illegal wildlife trade is a live, controversial debate due to the many interests at stake and its historical and cultural roots<sup>9</sup>. But there is broad consensus about the need to intensify the fight against wildlife trafficking, especially since, as previously mentioned, the Covid-19 crisis has served to reinforce it as a global threat to biodiversity and the environment, human and animal health, economic development and security<sup>10</sup>.

It is an entirely different matter, however, to determine the best legal strategies and the approach that can or must be used to tackle the problem. In order to control illegal wildlife trade, legal strategies usually involve regulations that

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<sup>6</sup> Ibidem, p. 29-33.

<sup>7</sup> Sandra E. Baker, Russ Cain, Freya van Kesteren, Zinta A. Zommers, Neil D’Cruze, and David W. Macdonald, “Rough trade: animal welfare in the global wildlife trade”, in *BioScience* vol. 63, number 12, 2013, p. 928–938.

<sup>8</sup> Rob White, *Environmental harm: An eco-justice perspective*, Policy Press. Bristol, 2013; Ragnhild A. Sollund, *The crimes of wildlife trafficking: Issues of justice, legality and morality*, Routledge. Abingdon, Oxon, 2019; Angus Nurse, Tanya Wyatt, *Wildlife Criminology*, Bristol University Press. Bristol, 2020.

<sup>9</sup> See the historic and cultural context in Daan van Uhm, *The illegal wildlife trade: Inside the world of poachers, smugglers and traders*, Springer Nature. New York, 2016. See the interests at stake in Angus Nurse, Tanya Wyatt, *Wildlife Criminology*, cit..

<sup>10</sup> UNODC, *World Wildlife Crime Report. Trafficking in protected species*, 2020, p. 27. Available at: <<https://www.unodc.org/unodc/en/data-and-analysis/wildlife.html>> [last accessed on 29 April 2021].

prohibits trade and/or keeping of certain species, “which conforms to reactive regulatory systems otherwise known as ‘negative lists’”<sup>11</sup>.

This is the case of the main international instrument on the subject, which is the Convention on International Trade in Endangered Species on Wild Fauna and Flora (CITES), also known as the Washington Convention (adopted in 1973 and has been in force since 1975)<sup>12</sup>. CITES regulates the international trade in species of wild fauna and flora by means of a graded protection system in which a species is graded according to its classification in one of its three appendices. Appendix I lists species threatened with extinction. The international trade of these species is prohibited (although not completely prohibited and not if captive bred). Appendix II lists species that are not necessarily threatened with extinction, but that could become endangered unless strict controls are placed on their trade. Species are listed in Appendix III at the request of a Party that already regulates the trade in those species and needs the assistance of other countries to control the illegal or unsustainable trade of those species. The trade of these species is controlled by a licence system, albeit with fewer requirements than for species listed in Appendix II.

In the context of a critical review of CITES as an instrument that deals with the illegal trafficking of species of wildlife fauna and flora, this paper intends to analyse the strategy of positive lists as an alternative to the negative lists approach used by CITES in Appendix I (prohibited species), from the perspective of criminal law in the European Union. Positive list systems are defined as “regulation that permits the trade and/or private ownership of only those species that are determined as: suitable to keep in the home in terms of animal welfare; or proportionately benign in terms of human health and safety; or sustainable in terms of relevant conservation status; or consistent with environmental

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<sup>11</sup> Elaine Toland, Monica Bando, Michèle Hamers, Vanessa Cadenas, Rob Laidlaw, Albert Martínez-Silvestre and Paul van der Wielen, “Turning negatives into positives for pet trading and keeping: a review of positive lists”, in *Animals* 2020, 10(12), 2371, p. 7.

<sup>12</sup> The Convention on International Trade in Endangered Species (CITES) (adopted on 3 March 1973, in force since 1 July 1975) 993 UNTS 243.

preservation. All other species are by default prohibited from being sold or kept privately or may only be sold or kept under special permit”<sup>13</sup>.

In order to discuss this issue, the paper makes first a series of preliminary considerations about CITES’ role in criminal legislation to protect biodiversity; the proposal for a positive lists-based approach is considered in the context of the debate on the problems of pursuing the illegal trade in species of wild fauna and flora. It then sets out the main arguments used by supporters and opponents of positive lists. Focussing on EU law, it analyses the legal grounds for adopting positive lists in legislation that deals with non-criminal matters. The final section addresses the key issue of this paper: it will consider to what extent direct or indirect references to positive lists in the description of offences are compliant with the legality principle in criminal law, with a view to evaluating their viability in the courts. In other words, the question to be addressed is: Could a reference to positive lists in the description of offences raise issues about constitutionality in national courts due to violation of the legality principle in criminal law? The conclusion is that, indeed, the reference to positive lists in the description of an offence could raise issues in the courts for violation of the legality principle in criminal law.

## **II. THE ROLE OF CITES IN CRIMINAL LEGISLATION TO COMBAT THE ILLEGAL TRADE IN SPECIES OF WILD FAUNA AND FLORA**

The first point to remember when embarking on a study of CITES’ influence on criminal legislation to combat the illegal trade in species of wild fauna and flora, is that CITES is not a criminal instrument. It is an international treaty intended to protect endangered species of wild flora and fauna by *regulating* (rather than prohibiting) the international trade in specimens and any parts, derivatives or products of those species. CITES contains prohibitions and establishes obligations, but does not contain any express criminal mandate (as is the case,

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<sup>13</sup> Elaine Toland, Monica Bando, Michèle Hamers, Vanessa Cadenas, Rob Laidlaw, Albert Martínez-Silvestre and Paul van der Wielen, “Turning negatives into positives for pet trading and keeping: a review of positive lists”, cit, p. 8.

for example, of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal).<sup>14</sup>

CITES is one of a group of international treaties that only *suggest* the type of criminal sanction to refer to the penalty system the Parties should apply to punish an infringement of the obligations established in those treaties. The *suggestion* is inferred either by reference to the severity and dissuasive capacity of the penalties, or by use of the verb “penalize”. This is particularly interesting in the case of CITES. Although “penalize” is used in the English text, and “*sanctions pénales*” in the French text, the authenticated Spanish translation of CITES uses the verb “*sancionar*” (sanction), which could easily be understood to mean enforceable by means of an administrative fines system<sup>15</sup>. As one particular author also points out regarding the English verb “penalize”, the fact that the treaties do not define the word “penal”, means the Parties can decide on the type of penalties<sup>16</sup>. The influence that CITES has had in practice in criminal national legislations should not generate any confusion regarding its nature and purpose, or about procedures in relation to the national laws of countries that, ultimately, will be responsible for establishing the penalty system. As far as the EU is concerned, any evaluation of CITES’ influence on the criminal law of Member States must take into account both secondary EU legislation adopted in accordance with CITES, as well as the evolution of EU competence in criminal matters.

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<sup>14</sup> Article 4.3 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted on 22 March 1989, in force since 5 May 1992, 1673 UNTS 57), establishes: “3. The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal”. It should be noted, however, that the wording “may consider” has been the subject of debate.

<sup>15</sup> In this regard, remember that, according to Article 33.1 of the Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entry into force on 27 January 1980, 1155 UNTS 331), “When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail”. This is not so in the case of CITES, whose Article XXV merely states that the Chinese, Spanish, French, English and Russian versions are authentic, but does not provide that one of the texts shall prevail in the event of any discrepancy. Similarly, according to Article 33.4 of the Vienna Convention on the Law of Treaties, in the event of any discrepancy, “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty” shall be adopted.

<sup>16</sup> Byung-Sun Cho, “Emergence of an International Environmental Criminal Law?”, in *UCLA Journal of Environmental Law and Policy*, vol.19, 2000/2001, p. 21. “Penal” in English does not necessarily mean criminal sanctions.

With regard to secondary EU legislation, the current instrument of reference is Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein<sup>17</sup>. Article 16.2 of the Regulation provides that penalties “shall be appropriate to the nature and gravity of the infringement and shall include provisions relating to the seizure and, where appropriate, confiscation of specimens”. Therefore, the Regulation leaves the decision about the type of penalties to Member States, which is consistent with the legal framework on the EU’s competence in criminal matters in force at the time. It is also worth remembering that Regulation (EC) No 338/97 replaced Council Regulation (EEC) No 3626/82 which made no reference to penalties, despite the provisions contained in CITES. With regard to the species to which Regulation (EC) No 338/97 applies, it refers to the CITES Appendices and establishes more restrictive measures, including additional lists that also serve as negative lists of prohibited or controlled species.

With regard to provisions to protect biodiversity contained in EU criminal legislation, 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 transformed the situation radically<sup>18</sup>. Pursuant to Article 5 of Directive 2008/99/EC, Member States must classify and punish “by effective, proportionate and dissuasive criminal penalties” a series of criminal offences, when they are “unlawful” (thus it uses a mechanism whereby an offence needs to be completed with another law or regulation). Such offences include crimes against wildlife. According to the Directive, “unlawful” means infringing EU legislation stated in the Annexes of the Directive, or a law, a Member State regulation or a decision adopted by a competent authority of a Member State that enforces said legislation. This is relevant because the regulations listed in the Annexes include Council Regulation (EC) No 338/97. Directive 2008/99/EC is thus confirmation that EU criminal law contains an express mandate for biodiversity protection<sup>19</sup>.

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<sup>17</sup> Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, DOUE No. L61, 3.3.1997. Regulation 338/97 replaced Council Regulation (EEC) No 3626/82, DOUE No. L 384, 31.12.1982.

<sup>18</sup> DOUE No. L328, 6.12.2008.

<sup>19</sup> In addition to other influential legislation in the area of biodiversity protection, Directive 2008/99/EC is particularly relevant with regard to the Convention on Biological Diversity (adopted on 5 June 1992 and in force since 29 December 1993, 1760 UNTS 79) and, within the scope of the Council of Europe, with regard to the Convention on the conservation of European wildlife and

Therefore, any current analysis of CITES' influence on the criminal regulation in the EU of the trade in species of wild flora and fauna must start by analysing the connection between CITES, Council Regulation (EC) No 338/97, Directive 2008/99/EC and the criminal legislation of Member States. That is not to say that CITES and EU regulations had no influence on Member States' criminal legislation prior to Directive 2008/99/EC, but that Member States had a greater degree of flexibility at the time. Therefore, it is important to bear in mind that at the time of writing, the European Commission is conducting an evaluation and review of Directive 2008/99/EC. The aim of the review is to improve aspects of the Directive where shortcomings and inadequacies have been identified<sup>20</sup>. So, together with other measures, the intention is to extend its scope of application (for example, in the illegal trade of timber). It also intends to improve the legislative drafting technique used for describing crimes (in particular, to avoid the use of undefined concepts, as well as reviewing the practice of referring to the Directive's annexes to incorporate the customary "unlawful" conduct). The Commission has also announced that the legal basis for the revised Directive will be Article 83(2) of the Treaty on the Functioning of the European Union (TFEU). This will facilitate improved harmonisation of penalties across the EU, as it will be possible to establish frameworks for minimum and maximum penalties<sup>21</sup>. It is also worth mentioning that Directive 2008/99/EC precedes the Treaty of Lisbon<sup>22</sup>,

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natural habitats, also known as the Berne Convention (adopted on 19 September 1979 and in force since 1 June 1982, ETS No. 104). Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (DOUE No. L206, 22.7.1992) and Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (DOUE No. L20, 26.1.2010) are both laws arising from the Berne Convention and the Convention on Biological Diversity that are applicable to the EU. Both the directives and the Conventions only refer to "appropriate or necessary measures", without express reference to penalties. By including the Habitats Directive and the Wild Birds Directive in the annex of Directive 2008/99/EC, what was a weak European and international mandate was transformed, albeit indirectly, into a mandate for protection under criminal law. For a detailed review, see Maria Marquès-Banquè, "Environmental Crime. Assessing and enhancing EU compliance with international environmental law", in Mar Campins Eritja (ed.), *The European Union and Global Environmental Protection. Transforming Influence into Action*, Routledge. New York, 2021, p. 132-148.

<sup>20</sup> The results of the first public stakeholder consultation, held at the end of 2019, are available on the European Commission's website: <[https://ec.europa.eu/info/news/evaluation-environmental-crime-directive-2020-nov-05\\_en](https://ec.europa.eu/info/news/evaluation-environmental-crime-directive-2020-nov-05_en)> [last accessed on 29 April 2021].

<sup>21</sup> The legal basis was published in the Commission Work Programme 2021, COM(2020) 690 final.

<sup>22</sup> As known, the Treaty of Lisbon amended the Treaty on European Union and the Treaty establishing the European Community. It was signed by the EU member states on 13 December 2007 and entered into force on 1 December 2009 (OJ C 306, 17.12.2007).

which meant this was not possible at the time, leading to significant disparities between Member States<sup>23</sup>.

It remains to be seen however, what the true extent of the evaluation of the Directive is, and whether (together with the revised EU Action Plan against Wildlife Trafficking) it will succeed in resolving some of the problems experienced with preventing and pursuing these crimes, which in some cases are linked to organised crime<sup>24</sup>.

A criminological analysis of the trafficking of species of wild flora and fauna falls outside the scope of this paper. Likewise, it cannot evaluate the implementation of CITES in the legislation of countries that are party to the Convention, or problems with its implementation from a law enforcement perspective<sup>25</sup>. Furthermore, this paper does not intend to analyse EU policy with regard to the trade in species of wild flora and fauna<sup>26</sup>. The purpose of this paper, which, as mentioned previously, relates to a very specific legal matter, is to evaluate, from

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<sup>23</sup> Giovanni F. Perilongo, Emanuele Corn, "The ecocrime directive and its translation into legal practice", in *New Journal of European Criminal Law*, vol. 8, no. 2, 2017, p. 236–255; Maria Marques-Banque, "The utopia of the harmonization of legal frameworks to fight against transnational organized environmental crime", in *Sustainability*, 10(10) 3576, 2018; Ieva Marija Ragaišytė, "Challenges in harmonising and implementing the environmental crime Directive", in *Teisė-Vilnius University Press*, vol. 118, 2021, p. 130-144; European Commission, *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*, SWD (2020) 259 final, Part 1, p. 29-32.

<sup>24</sup> On 21 November 2016, UN General Assembly acknowledged environmental crimes as a kind of transnational organised crime for the first time (Resolution 71/19: Cooperation between the United Nations and the International Criminal Police Organization (INTERPOL)). Nevertheless, it is important to bear in mind the different "levels of organisation" in wildlife trafficking (Tanya Wyatt, Daan van Uhm, Angus Nurse, "Differentiating criminal networks in the illegal wildlife trade: organized, corporate and disorganized crime", in *Trends in Organized Crime*, vol. 23, 2020, p. 350-366), or the differences between these crimes and other areas of organised crime (Peter Reuter, Davin O'Regan, "Smuggling wildlife in the Americas: scale, methods, and links to other organised crimes", in *Global Crime*, vol. 18, no. 2, 2017, p. 77- 99).

<sup>25</sup> For an exhaustive analysis of implementing CITES, see Tanya Wyatt, *Is CITES protecting wildlife? Assessing implementation and compliance*, Routledge, New York, 2021. At the time of writing, the work has not been published. Unfortunately, therefore, it has not been possible to study its contents in detail. The author conveyed the main results in a seminar "Does CITES protect wildlife?", organised by the *University of Edinburgh Criminology Reading Group*, on 9 April 2021.

<sup>26</sup> On this point, see Teresa Fajardo del Castillo, "The European Union's Approach in the Fight against Wildlife Trafficking: Challenges Ahead", in *Journal of International Wildlife Law & Policy*, vol. 19, no. 1, 2016, p. 1-21; Stephan Sina, Christiane Gerstetter, Lucas Porsch, Ennid Roberts, Lucy O' Smith, Katharina Klaas, Teresa Fajardo, *Wildlife crime*, European Parliament, Brussels, 2016; Ludwig Krämer, "Forty Years of EU Measures to Fight Wildlife Crime", in *Journal of International Wildlife Law & Policy*, vol. 22, no. 4, 2019, p. 305-331.

a criminal law perspective, the implications of using positive lists as alternative to the negative lists system used by CITES.

The interest in this subject derives from the (natural) limits imposed on CITES to confront the issue of illegal trade in species of wild flora and fauna. The suggestion for positive lists arises specifically within the context of the regulation of the trade in exotic pets. The demand for these types of pets is one of the factors driving the legal and illegal wildlife trade, and the EU is one of its principal destination markets<sup>27</sup>. According to Directive 2008/99/EC, it is currently a criminal offence to trade in specimens of protected wild flora and fauna species, or parts or derivatives thereof. By way of clarification of what is meant by protected wild flora and fauna species, as well as including the Regulation in its Annex, the definitions in Article 2 of the Directive expressly state that for the purpose of this offence, “‘protected wild fauna and flora species’ are [...] those listed in Annex A or B to Council Regulation (EC) No 338/97”. As previously indicated, both CITES and Council Regulation (EC) No 338/97 use the system of negative lists, insofar as they are lists of species whose trade is prohibited or controlled.

This system, however, leaves protection gaps where underregulated or unregulated species are concerned. Underregulated species includes any species that is protected in its country of origin but not listed in any of CITES’ Appendices. These species are stolen from their native habitat and introduced into the European market where they can be traded lawfully<sup>28</sup>. Unregulated species include those that are not considered by laws, regulations or treaties either at the national or international level. In this regard, it is important to bear in mind that CITES covers only around 39,000 species of flora and fauna out of the eight to nine million living organisms thought to make up life on Earth. Recently

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<sup>27</sup> Daan van Uhm, "Illegal Wildlife Trade to the EU and Harms to the World", in Toine Spapens, Rob White, Wim Huisman (eds.), *Environmental Crime in Transnational Context*, Routledge, New York, 2016, p. 43-66. See also Ragnhild Sollund, Jennifer Maher, *The Illegal Wildlife Trade. A Case Study report on the Illegal Wildlife Trade in the United Kingdom, Norway, Colombia and Brazil, A study compiled as part of the EFFACE project*. University of Oslo and University of South Wales, 2015.

<sup>28</sup> According to “Pro Wildlife”, almost 75% of reptile species and over 80% amphibian species found on the European exotic pet market are not listed in CITES. See the three “Stolen Wildlife” reports that deal with this issue, published in 2014, 2016 and 2020 on the organisation’s website (<https://www.prowildlife.de/>), as well as the article by the same authors, Sandra Altherr and Katharina Lameter, “The Rush for the Rare: Reptiles and Amphibians in the European Pet Trade”, in *Animals* 2020, 10(11), 2085.

described wildlife species are extremely vulnerable to exploitation. Cases have been described in which specimens of a new species were available on the exotic pet market just three months after their discovery<sup>29</sup>.

A number of solutions at a regulatory level have been proposed to address these gaps, strengthen mechanisms to combat illegal trade in wildlife species and prevent future pandemics. The Global Initiative to End Wildlife Crime has proposed a protocol on wildlife trafficking to the United Nations Convention against Transnational Organized Crime (UNTOC). In addition, taking the One Health approach, this same organization has proposed the revision of CITES to include the public and animal health perspective in the regulation of the international trade in endangered species of wildlife flora and fauna<sup>30</sup>. Other organisations have proposed express legislative instruments to specifically address any protection gaps where the trade in exotic pets is concerned, such as EU approval of a law comparable to the Lacey Act in the United States (under which any trade in species involving a violation of a national or foreign law is pursued), or adoption of a positive lists system (that would restrict trade, or at least holding, to species that are expressly authorised)<sup>31</sup>.

These types of strategies require subsequent legal analysis to determine how a specific law would work within a particular legal system and its legislation. The purpose of this paper is, as already mentioned, to consider the extent to which the positive lists approach complies with the legality principle in criminal law in the EU.

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<sup>29</sup> Sandra Altherr and Katharina Lameter, "The Rush for the Rare: Reptiles and Amphibians in the European Pet Trade", op. cit., p. 6.

<sup>30</sup> The text of both proposals are available on the Global Initiative to End Wildlife Crime website: <https://endwildlifecrime.org/#section3> [last accessed on 29 April 2021].

<sup>31</sup> In its recent report, "Pro Wildlife" insists on the need to approve an "EU Lacey Act". The organisation considers the measure adopted by the EU, which consists of including more species in Appendix III of CITES, is complex, slow and insufficient (see Sandra Altherr and Katharina Lameter, *Stolen Wildlife III – The EU, a main hub and destination for illegally caught exotic pets*, Pro Wildlife. Munich, 2020). With regard to the problem of unlawfulness at source and the potential issues an "EU Lacey Act" could pose for courts, see María Marquès-Banqué, "Problemas de persecución del tráfico internacional de fauna silvestre: la ilicitud solo en origen", in María Luisa Cuerda Arnau (ed.) and Juan José Periago Morant (co-ord.), *De animales y normas. Protección animal y derecho sancionador*, Tirant lo Blanch. Valencia, 2021, p. 225-255.

### **III. POSITIVE LISTS AS A STRATEGY TO REGULATE TRADE IN EXOTIC PETS**

#### **1. Brief outline of the benefits and advantages of positive lists**

As the authors of a recent comprehensive analysis of the use of positive lists in EU, United States and Canadian legislation regulating the international trade of exotic pets have stated, there is nothing innovative about the use of positive lists in law. Positive lists appear in one form or another in regulations governing a number of business sectors and they are widely accepted as a manifestation of the precautionary principle<sup>32</sup>.

From a theoretical point of view it is worth mentioning that the different types of risks in the trade of exotic pets mean the benefits of a system based on positive lists can be considered from an anthropocentric stance, as well as from a biocentric and ecocentric perspective. An anthropocentric analysis will focus on the benefits that such a system can provide for preventing future public health risks. In the case of biocentrism, the benefits are analysed from an animal health and welfare perspective (focusing thus in the individual protection that all human and non-human animals deserve). An ecocentric analysis will instead evaluate the potential positive effects of this system from the point of view of the protection of ecosystems, either in the species' country of origin, or in the destination country (bear in mind that one of the risks of trade in wildlife species is the spread of invasive species). Each of these philosophical and moral standpoints (and their different variants) provides equally relevant arguments that justify the need for complex legislative intervention. In fact, this is a characteristic of the integrated One Health approach, i.e. it favours solutions that can be defended from very different theoretical standpoints.

Focussing on the legal perspective, organisations that defend positive lists essentially point out three advantages of a scenario in which current legislation –

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<sup>32</sup> Elaine Toland, Monica Bando, Michèle Hamers, Vanessa Cadenas, Rob Laidlaw, Albert Martínez-Silvestre and Paul van der Wielen, "Turning negatives into positives for pet trading and keeping: a review of positive lists", cit., p. 20.

based on a negative lists system – exists alongside nationally-adopted positive lists that are used as a supplementary strategy<sup>33</sup>.

The first advantage, to which the other two are linked, is greater legal certainty. The advantage is considered from the perspective of the civil law system in relation to the subjective dimension of the concept of legal certainty (legal certainty or the possibility of knowing the law). From the perspective of common-law based systems, the advantage extends to the same idea of “maximum certainty” as a fundamental component of the rule of law. In fact, it is argued that this legislative technique can help to make laws that apply to all agents involved in the trade of exotic pets, including society in general, as the end recipient, more accessible and predictable. If we add to this the fact that these organisations think that procedures for reviewing and updating the CITES Appendices are slow and complex, then the fact that it is easier to update a positive list is seen as another advantage. In addition to the fact that it is easier to update a national law than an international instrument, those who advocate positive lists also think they would be less exposed to lobbies who campaign against restrictions on wildlife trade. It is claimed that extending a negative list as part of an updating process would, by its nature, face greater opposition than extending a positive list.

Finally, when it comes to combatting the illegal trade in species of wild flora and fauna, organisations that defend positive lists suggest, as a third advantage, that they make border controls easier. Those who advocate positive lists think that it would be much simpler and involve fewer resources to check whether a specimen of a species belongs to an authorised species than to a prohibited species<sup>34</sup>.

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<sup>33</sup> The advantages of positive lists are pointed out, very significantly, by organisations such as AAP Animal Advocacy and Protection and Eurogroup for Animals (see *Think Positive. Why Europe needs 'positive lists' to regulate the sale and keeping of exotic animals as pets*, (no date), disponible at: <<https://www.aap.nl/uploads/inline-files/171101%20THINK%20POSITIVE%20BROCHURE%202017%202.pdf>> [last accessed on 29 April 2021]). See also the event with the same title organised by these groups and the European parliamentary group, “The Intergroup for the Welfare & Conservation of Animals”, on 27 February 2017, in the European Parliament (available at: <<https://www.youtube.com/watch?v=HwG03wROrBI>> [last accessed on 29 April 2021]). Prior to this, Sofie De Volder, Staci McLennan, Véronique Schmit, *Analysis of national legislation related to the keeping and sale of exotic pets in Europe*, Eurogroup for Animals. Brussels, 2013.

<sup>34</sup> Arguing for the opposite: Jennifer Maher and Ragnhild Sollund, “Wildlife trafficking: Harms and Victimization”, in Ragnhild Sollund, Christoph H. Stefes, Anna Rita Germani (eds.), *Fighting Environmental Crime in Europe and Beyond*. Palgrave Studies in Green Criminology, Palgrave Macmillan. London, 2016, p. 116-118. See also Jennifer Maher, Ragnhild Sollund. “Law enforcement of the illegal wildlife trafficking: a comparative strengths, weaknesses, opportunities and threats analysis of the UK and Norway”, in *Journal of Trafficking, Organized Crime and*

Added to this, as previously highlighted, the positive lists system is considered to be an approach that makes it is possible to effectively implement the precautionary principle<sup>35</sup>.

Nevertheless, it is important to point out that to obtain any conclusive results as to the real impact of positive lists, it is required a wider application as a legislative strategy and empirical research.

## **2. Reference to the legal framework for positive lists in the European Union**

As Toland et al. illustrate, the system mainly used by current legislation on the trade in exotic pets, in international law, as well as in the USA, Canada and the UE legislation, is the negative lists system<sup>36</sup>.

In the EU, Member State legislation regulates holding companion animals, while EU laws control transporting them across borders. Rather than analysing the legal framework for the pet trade in the EU (which would require analysis of EU law and international law), this paper considers to what extent positive lists are, or could be used, to influence criminal law.

With regard to EU legislation on this subject, the study of a positive list from one of its annexes reveals diverging opinions. In addition to the abovementioned Council Regulation (EC) No 338/97, which enforces CITES, Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species is relevant, as are the Habitats Directive and the Wild Birds Directive, both of which, in turn, enforce the Convention on the conservation of European wildlife and natural habitats (the Bern Convention)<sup>37</sup>. The discrepancy arises with some of the annexes in the Bern Convention, the Habitats Directive and the Wild Birds Directive. While Krämer expressly refers to the use of positive lists in the Wild Birds Directive, Toland et al. do not mention positive lists in this Directive

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*Security*, vol. 2, no. 1, 2016, p. 82-99, where the authors argue it is a strength in terms of law enforcement that exotic reptile trade was banned.

<sup>35</sup> This point of view is particularly highlighted in Elaine Toland, Monica Bando, Michèle Hamers, Vanessa Cadenas, Rob Laidlaw, Albert Martínez-Silvestre and Paul van der Wielen, "Turning negatives into positives for pet trading and keeping: a review of positive lists", op. cit., p.20.

<sup>36</sup> *Ibidem*, p. 10-11.

<sup>37</sup> See full references in footnote 19.

and argue that, strictly speaking, some of the annexes in the Habitats Directive and the Bern Convention constitute positive lists<sup>38</sup>.

With regard to the national laws of Member States, where it falls within their remit to do so, at the present time a number of Member States have already introduced positive lists for certain species: Belgium (the first Member State to approve a positive list), Luxemburg, the Netherlands, Malta, Croatia and Cyprus, as well as Norway as a non-Member State of the EU<sup>39</sup>. As far as compliance with EU law is concerned, the approval of national positive lists has not been without controversy. So it is worth considering under what circumstances the dispute arose and how it was resolved by the Court of Justice of the European Union (CJEU), and thus clarify the legal basis for national positive lists in the EU.

The CJEU's most relevant judgement on the subject is known informally as the *Andibel* judgement of 19 June 2008<sup>40</sup>.

In 2001, to implement the Belgian law on animal protection and welfare, Belgium passed a Royal Decree establishing a positive list of mammals that could be held. The Royal Decree was challenged by the "Nationale Raad van Dierenwkers en Liefhebbers VZW" (National Council of Animal Breeders and Animal Lovers) and *Andibel VZW* (a non-profit association grouping together traders in the bird and pet sales sector). In the context of the two appeals for annulment of the regulation brought by these organisations, the "Raad van State" (National Council) requested a preliminary judgement before the CJEU. The subject matter of its application was the interpretation of Article 30 EC (now Article 36 of the TFEU) and of Council Regulation (EC) No 338/97<sup>41</sup>. To be exact, it asked whether the Belgian prohibition on importing animals for trade from other EU member countries unless they are included on a positive list, despite the fact that they are

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<sup>38</sup> Ludwig Krämer, "Forty Years of EU Measures to Fight Wildlife Crime", *op. cit.*, p. 307.

<sup>39</sup> See Elaine Toland, Monica Bando, Michèle Hamers, Vanessa Cadenas, Rob Laidlaw, Albert Martínez-silvestre and Paul van der Wielen, "Turning negatives into positives for pet trading and keeping: a review of positive lists", *op. cit.*, p.11-15.

<sup>40</sup> Case C-219/07 *Nationale Raad van Dierenwkers en Liefhebbers VZW and Andibel VZW against Belgische Staat*, 19 June 2008, ECLI:EU:C:2008:353.

<sup>41</sup> Article 36 TFEU (ex Article 30 EC): "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

not prohibited under Council Regulation (EC) No 338/97, was compliant with former Article 30 EC. The question was raised, therefore, from an intracommunity trade perspective.

The CJEU found that the positive lists were compatible with EU law. The judgment states firstly that the CJEU had previously held that Member States may adopt more restrictive measures in this regard<sup>42</sup>. This is a reference to a more general provision in Article 176 EC (now Article 193 TFEU)<sup>43</sup> which is specifically alluded to in the preamble to Council Regulation (EC) No 338/97<sup>44</sup>. After stating that the Belgian Royal Decree qualifies as a more stringent protective measure, the judgment focusses its examination on whether the positive list does actually constitute an obstacle to intracommunity trade within the meaning of Article 28 EC (now Article 34 TFEU)<sup>45</sup>.

In this sense, the CJEU upholds the arguments of the Belgian government because it takes the view that although the positive list obstructs intracommunity trade, it pursues a legitimate objective, namely animal welfare. From a One Health perspective, other criteria to be taken into account when drawing up a positive list are of particular interest. Authorised animals must not pose any risk to either human health or constitute an ecological threat. In this regard, the judgment mentions the fact CJEU case law has consistently held that restrictions on the free movement of goods for imperative requirements such as protecting the environment are justified. With regard to the proportionality principle, it also states that “the fact that one Member State imposes less stringent rules than another Member State does not mean that the latter’s rules are disproportionate”<sup>46</sup>.

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<sup>42</sup> Case C-510/99 Judgment of 23 October 2001, *Tridon* ECLI:EU:C:2001:559.

<sup>43</sup> Article 193 (ex Article 176 EC): “The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission”.

<sup>44</sup> Council Regulation (EC) No 338/97: “(3) Whereas the provisions of this Regulation do not prejudice any stricter measures which may be taken or maintained by Member States, in compliance with the Treaty, in particular with regard to the holding of specimens of species covered by this Regulation”.

<sup>45</sup> Article 34 TFEU (ex Article 28 EC): “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”.

<sup>46</sup> Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW against Belgische Staat*, 19 June 2008, ECLI:EU:C:2008:353, no. 31.

Finally, the Court acknowledges that national positive lists of authorised species is compliant with community law, provided certain requirements are met. First, the drawing up of such a list must be based on objective and non-discriminatory criteria (in the context of trade: not intended to favour indigenous species of the Member State approving the list). Second, the legislation must make provision for a swift and easily accessible procedure that allows interested parties to have new species included on the list. Interested parties must be able to appeal, if applicable, any reasoned decision that refuses an application for a species to be included. Third, competent administrative authorities can refuse an application for a species to be included only if holding the species constitutes a real threat to animal welfare, or poses a genuine risk for human health or to the environment. It is important to mention in this regard, that the judgment states “Where it proves impossible to determine with certainty the existence or extent of the risk envisaged because of the insufficiency, inconclusiveness or imprecision of the results of the studies conducted, but the likelihood of real harm to human or animal health or to the environment persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.”<sup>47</sup>

The debate on wildlife trade generated by the Covid-19 pandemic and the progressive institutional affirmation of a One Health approach, now reinforce the approach in the Andibel judgment and at the same time they weaken traditional arguments used by those who oppose positive lists.

As far as positive lists are concerned, and in the context of the discussion of the EU Action Plan against Wildlife Trafficking 2016-2020, it is worth remembering that, the European Pet Organization - EPO (which brings together national pet trade associations) published a position paper in which it explains the main reasons why it opposes the introduction of positive lists<sup>48</sup>. The organisation alleged that reducing the number of species that could be traded could have consequences such as losing conservation expertise, a negative impact on people’s health and on the economy, lack of engagement with and understanding

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<sup>47</sup> Ibidem, no. 38.

<sup>48</sup> EPO, *EPO position on positive lists of animals that can be trade*, 2012. Available at: <https://www.europets.org/activities> [last accessed on 29 April 2021]. One of the criticisms that can be made about this organisation’s stance is that does not distinguish between exotic and non-exotic pets.

of Nature by society or an increase in illegal trade. It provides no concrete references to scientific studies to back up these hypotheses. It is also worth noting that its focus was anthropocentric, because it placed more importance on the positive effect on people's health and economic interests than on animal welfare, despite evidence about the effect of (legal and illegal) trade on those animals' welfare. Similarly, the reference to rights of ownership that could be affected if a positive list system is approved were noticeably anthropocentric, as was its defence of cultural reasons or what is mean for people "to be able to access nature".

More recently, in response to the debate generated by the pandemic, EPO has published an open letter with other organisations, in which they state that they believe an opportunistic campaign is being operated; they reiterate their arguments and stress that they believe that the solution lies in sustainable, legal trade and the effective prosecution of illegal trade, rather than bans<sup>49</sup>.

It seems the European Commission also shares this stance at the moment. This is apparent from the response to the question posed by the Member of the European Parliament, Niels Fuglsang, in April 2020<sup>50</sup>. The Danish Euro MP asked the European Commission whether, due to the pandemic, it was proposing to approve an EU positive list of species commonly traded as pets, banning the trade of any species not included on it.

The European Commission's negative response was based on a number of reasons<sup>51</sup>. It contended that the introduction of a positive list would involve "a systemic change both in EU and international law (CITES)". Furthermore, it considers current international and EU law on public health and animal welfare is sufficient to prevent the spread of zoonotic diseases through the movement of live animals, including wild animals, and their products. In this regard, it referred to the Regulation (EU) 2016/429 of the European Parliament and of the Council

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<sup>49</sup> EPO et al., *An open letter to national and international governing bodies regarding NGO calls to end live animal trade in response to the Covid-19 pandemic*, 2020. Available at: <<https://www.europets.org/news/global-pet-trade-writes-open-letter-in-response-to-calls-to-ban-wildlife-trade>> [last accessed on 29 April 2021].

<sup>50</sup> Available at: [https://www.europarl.europa.eu/doceo/document/P-9-2020-002424\\_EN.html](https://www.europarl.europa.eu/doceo/document/P-9-2020-002424_EN.html) [last accessed on 29 April 2021].

<sup>51</sup> Available at: <[https://www.europarl.europa.eu/doceo/document/P-9-2020-002424\\_EN.html](https://www.europarl.europa.eu/doceo/document/P-9-2020-002424_EN.html)> [last accessed on 29 April 2021].

on animal health, applicable from 21 April 2021, “which will allow a more systematic One Health approach and rapid reaction to existing or emerging health problems in or arising from wild animals, as defined in that Law.” It also thought existing policies and legislation regarding the risks posed by international trade to the conservation of endangered species are adequate, and referred to its desire to increase the fight against illegal wildlife trade “in the framework of the new EU Biodiversity Strategy for 2030”.

As mentioned above, it is not the purpose of this paper to analyse EU policy and law on the trade in species of wild flora and fauna. Nevertheless, it is worth noting that leading experts have questioned the EU’s stance on wildlife protection. For instance, after conducting an exhaustive and highly critical analysis of measures adopted over the last 40 years, Krämer concluded in 2019 that the EU lacks transparency, coherence and any real desire to enforce wildlife protection provisions. In his opinion, the measures adopted by the EU create an overall impression of monitoring wildlife crimes, rather than combating them. Nevertheless, he also noted that responsibility lies not only with the EU, but also with Member States, that use EU measures as an excuse for their passivity<sup>52</sup>.

We will have to wait for the revised EU Action Plan against Wildlife Trafficking, details of other measures announced in the framework of the EU Biodiversity Strategy for 2030, the impact of the entry into force of Regulation (EU) 2016/429 on animal health and, lastly, for EU environmental law experts’ evaluation of all these factors, to find out whether there has been any significant change to EU policy or the policies of Member States in this area<sup>53</sup>.

#### **IV. POSITIVE LISTS AND CRIMINAL LAW**

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<sup>52</sup> Ludwig Krämer, “Forty Years of EU Measures to Fight Wildlife Crime”, op. cit., p. 330-331.

<sup>53</sup> With regard to the impact that the entry into force of Regulation (EU) 2016/429 has had on animal health, it is worth pointing out that this law can definitely be influential in this area. In Italy, for example, among the criteria and principles for implementing the European Regulation that are established in the “*Legge di Delegazione Europea 2019-2020*” (approved by the Italian Senate on 20 April 2021), it is stated that the Government will have to: “q) Establish new restrictive measures for animal trading, supported by an adequate and effective penalties system, a specific ban on importing, keeping and trading in wild and exotic fauna, also to reduce outbreaks of zoonosis, and introduce criminal laws intended to punish trading in protected species”. The scope to be given to the ban remains to be seen. It is difficult to believe it will be a generic ban.

Aside from other possible considerations in other contexts about the use of positive lists as a strategy for dealing with the trade in wildlife species, one of the interesting aspects to consider from the perspective of criminal law is predicting and evaluating the problems this legislative technique may pose either when it comes to regulating wildlife-related offences, or how they are enforced by courts. We will focus on a fundamental question: to what extent direct or indirect references to positive lists in legislation comply with the legality principal in criminal law in the description of the offences. Bear in mind that we will evaluate whether positive lists are a viable alternative in the EU to the negative lists system referred to in CITES, from the perspective of criminal law.

### **1. Preliminary considerations: the protection of species of wild fauna by criminal law under Directive 2008/99/EC**

As mentioned above, Directive 2008/99/EC is the legal instrument that imposes obligations on Member States to protect biodiversity through criminal law. According to Article 3 of Directive 2008/99/EC, Member States must impose criminal sanctions for the following conduct relating to trade in wildlife species:

“(f) 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;

(g) 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;”

It is worth remembering that Directive 2008/99/EC expressly provides that for the purposes of Article 3 (f) and 3 (g), “‘wild fauna and flora species’ are [...] those listed in Annex A or B to Council Regulation (EC) No 338/97”.

Therefore, under Directive 2008/99/EC, “protected wild fauna and flora species” are the subject matter of the offence. Introduction of the ‘insignificance principle’ (*de minimis* principle) in both crimes affirms the need to protect biodiversity through criminal law using a strictly conservationist approach (the focus is on the

diversity of species). Thus, Directive 2008/99/EC makes no criminal provision for the three diversity levels<sup>54</sup>. This limitation is consistent with European and international legislation on the protection of species and, ultimately, with the criminal law principle of *ultima ratio* or ‘minimum intervention’. As far as the need to design policies and adopt measures that comprehensively address biodiversity loss and the climate emergency is concerned, however, the evaluation of legislation in this field deserves a more critical opinion.

The points discussed thus far indicate that the current scenario regarding the adoption of positive lists in national legislation by the different EU Member States is divided into two groups. The first comprises Member States that have not adopted national positive lists, and just use negative lists in line with European and international regulations. The second group includes Member States that have adopted national positive lists which operate alongside European and international regulations. In addition to these two scenarios, it would be interesting to consider another hypothetical scenario, albeit an unlikely one in the short term, namely, the proposal to approve an EU positive list.

The first scenario is the system in force in the majority of Member States. Under this system, the subject of the offence are the protected species, which must be identified by referring to negative lists contained in regulations that deal with non-criminal matters. This is the system established under CITES, Council Regulation (EC) No 338/97 and Directive 2008/99/EC. As far as the legislative technique is concerned, this kind of reference (to “protected species” for the regulatory element of the definition) does not raise any issues with regard to compliance with the basic principles of criminal law (although other aspects of the description of these offences may pose problems, such as the use of undefined legal concepts, the practice of referring to regulations that deal with non-criminal matters, as is the case here, does not).

Nor would the second scenario that applies in some Member States pose any problems as far as the legislative technique used to describe the offence is concerned. Note that in the particular scenario discussed here, the offence

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<sup>54</sup> In this regard, it is important to remember that Article 2 of the Convention on Biological Diversity refers to three dimensions or levels: genetic diversity within each species, between species and diversity of ecosystems.

continues to refer to “protected species”. The description of the offence in national legislation has not changed and the wording used is the same as in Directive 2008/99/EC. This could raise issues when it comes to applying the law to the offence, insofar as it would have to be determined whether any species not included on the positive list is considered a “protected species”. This already raises potential issues in terms of the legality principle. The issues arising in the second scenario are greater in the third scenario which considers the hypothetical approval of an EU positive list and the hypothetical rewording of the description of the offences. The following section considers why.

## 2. Positive lists and the legality principle in criminal law

### a) *The legality principle in the European context*

It is widely known that the legality principle is one of the basic principles emanating from the Age of Enlightenment. We owe the format of the legality principle in criminal law as the limit of the state's “*ius puniendi*”, to liberal thought and the protection of basic rights. This is derived from the formation of a set of formal and material legal guarantees (*lex scripta*, written or statutory law, *lex certa*, the requirement for a clear definition of offences, *lex stricta*, strict interpretation, and *lex praevia*, no crime without a pre-existing law) which are the guiding principles that underpin the criminal justice systems of European civil law systems.

While we are certainly a long way from being about to talk about a common criminal justice culture in the EU due to the different legal traditions of its Member States, we are still continually constructing the fundamental principles of EU criminal law, a process that has derived renewed impetus from the Treaty of Lisbon<sup>55</sup>. Together with the European Court of Human Rights (ECHR) and the CJEU, EU academics play a fundamental role in the task of comparing, analysing and extracting from national legal systems, the shared values and legal principles that emanate from the spirit of the Age of Enlightenment.

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<sup>55</sup> For all, Rosaria Sicurella, “La creación de una cultura penal europea: en la confianza confiamos”, in Rosaria Sicurella, Valsamis Mitsilegas, Raphaële Parizot, Analisa Lucifora (eds.), *Principios generales del Derecho penal en la Unión Europea*, BOE. Madrid, 2020, p. 27-51.

In this regard, the fundamental principles of a European criminal policy are set down in institutional documents (for example, the European Parliament resolution of 22 May 2012 on an EU approach to criminal law<sup>56</sup>), and in academic articles, such as “A Manifesto on European Criminal Policy”, an initiative by a group of criminal law scholars<sup>57</sup>. This was preceded by an academic debate in the EU that has continued over the last two decades, and which, given its scope, it is not possible to comment on in this paper.

At this juncture, it is worth mentioning briefly the fact that proceedings that comply to some extent with the legality principal in criminal law must be conducted in accordance with Article 7.1 of the European Convention on Human Rights and its interpretation by the ECHR. It is known that the legality principle is acknowledged by Article 7.1 of the European Convention on Human Rights, even though the wording and interpretation by the ECHR does not entirely follow European tradition. As Correcher observes, some of the traditional elements of the legality principle have been softened somewhat for the European legal culture “to enable traditional features of common law to be incorporated as this principle is developed within the common law system”<sup>58</sup>. The main aspect that has been softened concerns the *lex scripta* principle (the requirement for crimes to be set out formally in statute law). The ECHR has allowed a wider interpretation of the word “law”, to mean “system of rules”, thus incorporating case law. However, “the ECHR has established that irrespective of the scope (national or international), format (statute or non-statute), or source (legislation or case law) of the law that is said to apply, any law that defines a offence must be ‘foreseeable’”<sup>59</sup>.

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<sup>56</sup> European Parliament resolution of 22 May 2012 on an EU approach to criminal law, P7\_TA (2012) 0208.

<sup>57</sup> European Criminal Policy Initiative, “A Manifesto on European Criminal Policy”, 2009. Available at <<http://www.crimpol.eu/manifesto/>> [last accessed on 29 April 2021]. Updated version published in *European Criminal Law Review*, núm.1, 2011, p. 86-103.

<sup>58</sup> Jorge Correcher Mira, *Principio de legalidad penal: ley formal vs law in action*, Tirant lo Blanch. Valencia, 2018, p. 533. In this regard, see also, Rosaria Sicurella, “La creación de una cultura penal europea: en la confianza confiamos”, op. cit., p. 44. For differences in the format of the legality principle in European civil law and common law, see also Christina Peristeridou, *The Principle of Legality in European Criminal Law*, Intersentia. Cambridge, 2015, p. 65-128.

<sup>59</sup> Francisco Salvador de la Fuente Cardona, “De Kononov a Vasiliauskas y el principio de legalidad penal a la luz del Convenio Europeo de Derechos Humanos: o por qué acierta en su análisis el voto particular del juez Pinto de Alburquerque en el asunto Ilmseher c. Alemania”, in *Revista Electrónica de Estudios Penales y de la Seguridad*, no. 7 (special), 2021, p. 7. The meaning of the concept of “foreseeability” raises a different question. ECHR case law on this subject also shows differences and tensions between European civil law and common law as regards understanding what is meant by the legality principle in each system. See Rosaria

The role of the CJEU in interpreting the legality principle in criminal law has been strengthened through the Treaty of Lisbon, which conferred a binding effect on the EU Charter of Fundamental Rights (with the exception of the United Kingdom and Poland). However, as noted by academic opinion, based on its exhaustive analysis of the case law of both courts, it remains to be seen to what extent the CJEU will embrace ECHR case law or develop standards that are stricter than the minimum standards established by the ECHR<sup>60</sup>.

Focussing on potential issues relating to legislative technique that may result from references to positive lists in criminal law, the *lex certa* principle (the requirement for a clear definition of offences) is of particular interest. It is well known that the *lex certa* guarantee, a mandate to provide a precise definition of an offence, requires criminal laws to be drafted as clearly and concisely as possible to ensure their meaning is conveyed with the greatest possible degree of certainty to those at whom the law is directed. Thus it is linked to the idea of legal certainty, whose purpose is both to prevent the arbitrariness of public authorities in the use of legislative and judicial system, and to encourage citizens to comply with the law (the subject of the predictability or foreseeability of law as a condition for exercising their personal autonomy).

To the extent that the proposal made here is that the hypothetical alternative wording of legislation on wildlife crimes should comply with the legality principle, it is worth bearing in mind that one of the most common and justified criticisms directed at Directive 2008/99/EC concerns the legislative technique that is used<sup>61</sup>. Critical observations based on the use of vague concepts such as “negligible quantity” or “substantial damage” (the latter is referred to pollution offences), have

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Sicurella and Martina Costa, “El principio de legalidad”, in Rosaria Sicurella, Valsamis Mitsilegas, Raphaële Parizot, Analisa Lucifora (eds.), *Principios generales del Derecho penal en la Unión Europea*, BOE. Madrid, 2020, p. 53-95.

<sup>60</sup> Mikhel Timmerman, *Legality in Europe: On the Principle Nullum Crimen, Nulla Poena Sine Lege in EU law and Under the ECHR*, Intersentia. Cambridge, 2018.

<sup>61</sup> For all, Michael Faure, “Vague notions in environmental criminal law (part 1)”, in *Environmental Liability*, vol. 4, 2010, p. 119-133; and Michael Faure, “Vague notions in environmental criminal law (part 2)”, *Environmental Liability*, vol. 5, 2010, p. 163-170. The author points to the Council of Europe Convention on the Protection of Environment through Criminal Law of 1998 (ETS no 172, 4 November 1998), which did into come into force, as the possible source of the legislative technique used in Directive 2008/99/EC. See a comparative analysis of Directive 2008/99/EC and the Council of Europe Convention in Ricardo M. Pereira, “The external dimensions of the EU legislative initiatives to combat environmental crime”, in *Spanish Yearbook of International Law*, vol.19, 2015, p. 251-268.

finally been acknowledged in evaluation reports on the Directive and constitute one of the improvement challenges envisaged when the Directive is revised. The reason for mentioning this is purely to highlight that the analysis of criminal offences from the perspective of the *lex certa* guarantee is a central theme in European criminal law. Any alternative wording of offences that compromised or eased the requirement for precision would most certainly be subject to critical analysis.

*b) Compliance with the legality principle in criminal law by direct or indirect reference to positive lists in the description of offences*

In view of the above, the question that must be asked is: Could a reference to positive lists *in the description of offences* raise issues about constitutionality in national courts due to violation of the legality principle in criminal law? The likely answer is ‘yes’.

In fact, this is not a hypothetical scenario. The question was already addressed by the Spanish Constitutional Court in 2012 when it declared that Article 335 of the Spanish Criminal Code was unconstitutional since it violated the legality principle. Although the judgement arose in connection with a regulation on hunting and fishing, rather than the wildlife trade, it is nevertheless relevant as it concerns the reference to positive lists in the description of the crime.

The Spanish Constitutional Court’s judgement, together with academic opinion’s prior and subsequent debate about Article 335 of the Spanish Criminal Code, is interesting from a EU perspective, in that the arguments put forward come from the EU criminal law culture (under development) referred to above. This type of constitutional dispute could arise in the future in another country. With this in mind, and particularly relevant, it is worth mentioning the intense debate prompted by the well-known Taricco case brought before the CJEU and the Italian *Corte Costituzionale* concerning a discrepancy about the legality principle<sup>62</sup>.

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<sup>62</sup> There is an extensive bibliography on the “Taricco saga”. By way of a summary, see Matteo Bonelli, “The *Taricco* saga and the consolidation of judicial dialogue in the European Union: CJEU, C-105/14 *Ivo Taricco and others*, ECLI:EU:C:2015:555; and C-42/17 *M.A.S., M.B.*, ECLI:EU:C:2017:936 Italian Constitutional Court, Order no. 24/2017”, in *Maastricht Journal of*

Let us consider how the matter concerning Article 335 of the Spanish Criminal Code was dealt with before the Spanish Constitutional Court and the arguments used.

The Spanish Constitutional Court's judgment no. 101/2012 of 8 May determined a matter raised in a preliminary ruling concerning Article 335 of the Spanish Criminal Code<sup>63</sup>. Article 335 of the Spanish Criminal Code deals with offences against flora and fauna, specifically, as already stated, those involving hunting and fishing. When the matter was raised in the preliminary ruling, the wording of Article 335 of the Spanish Criminal Code approved in 1995 was as follows:

“Anyone who hunts or fishes species other than those specified in the previous article, and the hunting and fishing of those species is not expressly authorised by specific regulations on that subject matter, will be punished with a fine from four to eight months”.

Later (but before the Constitutional Court's judgment), Organic Law 15/2003, of 25 November, amended the wording of Article 335 of the Criminal Code, and the punishment stated in its first paragraph was as follows:

“Anyone who hunts or fishes species other than those specified in the previous article, when this is expressly prohibited by specific regulations on the hunting and fishing of those species, will be punished with a fine from eight to twelve months and barred from exercising the right to hunt or fish from two to five years”.

Note that in the original wording, it was a punishable offence to hunt or fish any species that, while not classified as endangered or at risk of extinction (species mentioned in the previous article referred to), were not expressly authorised by specific regulations on that subject matter (that is, species not referred to in Royal Decree 1095/1989, of 8 September, or in autonomous community laws, which states species that can be hunted or fished and establishes rules to protect them). However, following the amendment to the Criminal Code in 2003, the offence related to species that were not protected by any specific regulation (the

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*European and Comparative Law*, vol. 25, no. 3, 2018, p. 357–373. See also the excellent monograph by *New Journal of European Criminal Law*, vol. 9, no. 1, 2018.

<sup>63</sup> Constitutional Court judgment no. 101/2012 of 8 May which determined the matter of unconstitutionality 4246/2001, brought by Granada's Criminal Court no. 6.

reference to the previous article where these species are mentioned is kept), but which it was expressly forbidden to hunt or fish (that is, a reference to additional negative lists of species or even violation of other aspects of national or autonomous community laws on hunting or fishing).

The court that brought the matter before the Constitutional Court for a preliminary ruling, raised the question of the potential unconstitutionality of Article 335 due to violation of the principle of legal certainty and the legality principle in criminal law (Articles 9.3 and 25.1 of the Spanish Constitution). From a formal perspective, it was considered that Article 335 did not meet constitutionality requirements where reference to Spanish administrative legislation were concerned. These requirements were established by the Constitutional Court in its judgment no. 127/1990 of 5 July 1990. It is widely known that the constitutionality requirements for criminal laws that define the punishment by reference to another law are: a) the reference to regulations must be express and must be justified on the basis of the protected legal asset, b) the definition of the criminal offence must contain both the punishment and the fundamental aspects of the prohibition, and c) the requirement for legal certainty must be satisfied.

The Constitutional Court took the view that the wording of Article 335 (i.e. the reference to positive lists) did not actually contain the fundamental aspects of the prohibition “since the decision about species that are not expressly authorised is to be made entirely by reference to specific regulations on hunting without the need for further clarification. Strictly speaking therefore, it is the Government, not Parliament, who, by referring to regulatory provisions, specifically, those relating to lists of game species, ends up freely defining the crime in a completely independent manner that is not subject to the law”.

Furthermore, it considered that the certainty requirement was not satisfied “since it is not possible to identify the criminal conduct described from the aforementioned criminal precept, even when considered together with the specific administrative legislation or regulatory provisions that are referred to, with the sufficient degree of precision that is required”. In the Court’s opinion, as the Supreme Court had held previously, “classifying as a criminal offence all types of hunting that are not expressly authorised, even if they are not expressly banned

either, creates too much scope for legal uncertainty, which is incompatible with the aforementioned constitutional requirement for certainty”<sup>64</sup>.

Although the Constitutional Court’s judgment overruled the State Prosecutor’s Office and the Government Legal Department’s opinion, the fact is that the original wording of Article 335 had been widely criticised by academic opinion. According to criminal law academic opinion, the formula of the original Article 335 meant that criminal law was excessively subordinate to administrative law. It also found it unacceptable for the rule of law to consider that a particular conduct constitutes a criminal offence because it is not expressly authorised (we should not forget that the principle of legal certainty and the legality principle rest on the liberal ideal of freedom and autonomy of the individual, and the well-known maxim states the opposite: “anything that is not expressly forbidden is authorised”). As a consequence, the criteria that were drafted for a restrictive interpretation of the definition of a criminal offence were also adopted into case law, just at the time when the question arose regarding the potential unconstitutionality of Article 335<sup>65</sup>.

It is worth pointing out that the restrictive interpretation focussed on the interpretation of what was meant by “and the hunting and fishing of those species is not expressly authorised by specific regulations on that subject matter”, in the sense that the reference is limited to species that can be hunted or fished and not to other conditions regarding time or form established in hunting or fishing legislation. In this interpretation, for example, the definition of the offence excluded hunting or fishing an “authorised” species during the closed season. With time, however, it is clear that questions remain regarding the interpretation of whether punishment can be imposed in such cases, despite the amended wording of the description of the crime<sup>66</sup>. In this case therefore, the risk of a broad

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<sup>64</sup> Supreme Court judgment no. 1302/1999, of 8 February 2000.

<sup>65</sup> See the doctrinal and case law debate in Ángela Matallín, *Delitos relativos a la protección de la biodiversidad*, Tirant lo Blanch. Valencia, 2013, p. 116 and ss.; Pastora García Álvarez and Carmen López Peregrín, “Los delitos contra la flora, la fauna y los animales domésticos. Análisis doctrinal y jurisprudencial, con referencia a la reforma introducida por la LO 5/2010, de 22 de junio”, in *Revista Electrónica de Ciencia Penal y Criminología*, no. 15-11, 2013, p. 11:24 and ss.. Prior to the Constitutional Court judgment, see Esther Hava García, *La protección penal de los animales*, Tirant lo Blanch. Valencia, 2009, p. 75 and ss.

<sup>66</sup> This matter is dealt with by the much more recent judgment issued by the Supreme Court, no. 570/2020, of 3 November 2020 [ECLI:ES:TS:2020:3566], which consolidates the opinion about restrictive interpretation.

interpretation was not so much due to the reference to positive lists (expressly authorised species), but to the addition of “by specific regulations on that subject matter”.

Although the Constitutional Court’s judgment was largely well-received by academic opinion, the fact is, as Matallín already highlighted, the legal grounds on which it is based do not include reasoning that, from the perspective of the legality principle in criminal law, enables any substantial differences to be accentuated between the legislative technique used by the original wording of Article 335 and that of the later reform in 2003<sup>67</sup>. Moreover, the judgment is somewhat brief.

In fact, the most interesting opinion regarding this judgment issued by the Constitutional Court, is not strictly related to the reference to legislation that deals with non-criminal matters, but to the structure of the definition of the offence. According to the Court – which also accepted the assessment of academic opinion - the lack of any clear definition of the fundamental elements of the prohibition was more pronounced due to the fact that, unlike other offences relating to the protection of flora and fauna, the description of this particular offence did not state the further specific requirement to harm or place in danger the protected asset (i.e. wildlife, according to the Constitutional Court), which would enable the Court to determine the type of conduct that deserved criminal punishment from that which did not. Therefore, this also alludes to other classic questions that arise in criminal law namely, punishment for mere administrative infractions, the principle of *ultima ratio* (minimum intervention), and the principle of the fragmented nature of criminal law and the requirement in Spanish criminal law whereby only conduct that harms or places in danger an asset that is eligible for, deserves or needs protection under criminal law is a punishable offence.

All this leads us to think that, if a legal dispute arises over whether an alleged European or national offence involving a reference to positive lists complies with the legality principle, the court would take a very critical stance when considering any aspects that might bring into question in one way or another, not just the legality principle, but the set of guiding principles of criminal law.

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<sup>67</sup> Ángela Matallín, *Delitos relativos a la protección de la biodiversidad*, op. cit., p. 125-127.

## V. CONCLUSIONS

This paper has considered whether direct or indirect references to positive lists in the description of crimes that are contained in regulations comply with the legality principle in criminal law, with a view to evaluating the implications in the field of criminal law of an alternative system to the one used by CITES and rules for its implementation in the EU.

The proposal for approval of positive lists arises specifically in the context of the international trade in exotic pets. Having established the potential approval of national positive lists in the EU, three possible scenarios exist could apply to the wildlife crimes set out in Directive 2008/99/EC.

The first scenario relates to Member States that have not approved the adoption of national positive lists. In these cases, issues regarding the legality principle as far as these crimes are concerned, derive, when applicable, from the description of the offences in Directive 2008/99/EC (such as the use of undefined concepts), which is currently being revised by the European Commission.

The second and third scenarios relate to potential issues directly related to positive lists concerning the legality principle. It is suggested that the third scenario (alternative wording of offences concerning authorised species) would probably lead to the alleged violation of the legality principle in criminal law in the courts, in view of its legal and political significance and the implementation of the principle by the ECHR, the CJEU and academic opinion. In the second scenario (approval of national positive lists without amending the wording of the offences that have been drafted in accordance with Directive 2008/99/EC), any resulting dispute, although based on the same grounds, would be more subtle. In practice, this would not involve comparing the legislative technique used in the offence with the legality principle (regardless of any other potential flaws that exist, as already mentioned), but with the potential interpretation derived from applying the technique. Accordingly, in the case of a species that is neither banned (in terms of CITES and rules for its implementation), nor authorised (in terms of a possible national or European positive list), the issue would involve interpreting what should be understood by “protected species” (always by reference to the current wording of the offences stated in Directive 2008/99/EC and provided it is

reproduced by Member States in their criminal legislation). If the conclusion reached were that any species is understood to be a protected species unless it is expressly authorised, the dispute would arise in the same terms as those applicable to the third scenario.

In this regard, we should highlight once again, that the fundamental legal and political significance of the legality principle calls for a very critical examination of any wording or interpretation of the offences that, in practice, results in the view that anything not expressly authorised is banned. To avoid such an interpretation, if these offences continue to refer to protected species, it is essential that they retain the mandatory reference to violation of regulations that deal with non-criminal matters (a point under review in the context of the revision of Directive 2008/99/EC). Only then would it mean the interpretation of the term “protected species” is not associated with the approval of an indirect generic ban. While this would not solve the problem completely, the issue would be transferred to other aspects, such as the nature and rank of the regulations that deal with non-criminal matters. But that, together with any other issue that tends to raise the question of the suitability of these offences to the different guiding principles of criminal law, is another matter entirely.

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