Chapter 8

Environmental Crime: assessing and enhancing EU compliance with International Environmental Law

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1. Introductory remarks.

Although there is no internationally agreed definition of "environmental crime", there is some consensus regarding three of its main characteristics. The first is the diversity of the areas involved (e.g., wildlife crime, illegal logging, pollution crime, illegal mining, waste crime and illegal, unreported and unregulated fishing); the second is its progressively transnational character (more than one country may be involved in its execution and effects, or be home to its victims or perpetrators), and the third is its frequent connection with organized crime (involving, in practice, a wide range of associated crimes).

As highlighted by the United Nations, the scale of the problem and the severity of its social, political and economic impacts "point to the need for the international community to recognize environmental crimes as serious threats to peace and sustainable development, to strengthen the environmental rule of law and adopt and implement coordinated measures to effectively combat environmental crimes".[1]

The European Union (EU) is no stranger to this issue. Data show that the EU is both one of the major waste producers in the world and one of the largest global markets for wildlife trade. These features make it an ideal setting for environmental crime.[2]

In this context, this chapter analyses the degree of the EU's compliance with international law regarding environmental crime. The analysis focuses on the use of criminal law and particularly on the criminal sanctions that may be imposed on individuals in case of non-compliance with the obligations set out in multilateral

[1] UNEP, 2018, p. VIII.
[2] UNEP 2015; TRAFFIC, 2014.

environmental agreements (MEAs). With this aim in mind, the chapter first identifies the "penal provisions" in the selected MEAs. Second, section 3 addresses the impact of Directive 2008/99/EC on the protection of the environment through criminal law.[3] Section 4 then refers briefly to the sanctions regime provided for in two other regulations that are relevant for environmental crime (the EU Timber Regulation and the EU IUU Fishing Regulation). Finally, taking into account the evolution of European criminal law, section 5 addresses areas in need of improvement if the EU, to quote the European Commission, is to "lead by example and be an effective international partner in environmental governance".[4] Due to space constraints, the enforcement of legislation on environmental crime in the EU will not be examined here.[5]

2. Multilateral Environmental Agreements (MEAs), EU law and criminal sanctions.

The first issue to be examined is the wording of MEAs with regard to sanctions. Certain authors consider that MEAs "set out clear penal prohibitions".[6] However, the wording of the options used in these MEAs suggests three different scenarios:

1) Express reference to criminal sanctions. In very few cases do MEAs expressly refer to the criminal nature of sanctions. One MEA that does is the Basel Convention, whose article 4 unequivocally establishes the criminal nature of the illicit traffic of hazardous and other waste and imposes the obligation on the parties "to take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention".[7]

[3] OJ No. L328, 6.12.2008.
[4] EU Commission Communication: EU Actions to improve environmental compliance and governance, COM(2018) 10, p. 8.
[5] Case studies were compiled as part of European Union Action to Fight Environmental Crime" (EFFACE) Research Project. EFFACE was an EU funded research project involving eleven European research institutions and think tanks. As stated on their webpage, EFFACE assessed the impacts of environmental crime as well as effective and feasible policy options for combating it from an interdisciplinary perspective, with a focus on the EU. Its findings and reports are available from http://efface.eu/ [Accessed 20 March 2020].
[6] Regarding the Basel Convention, CITES and MARPOL, Mégret, 2010, p. 19; Pereira, 2015b, pp. 130-131.
[7] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57. Of another opinion

2) Indirect reference to criminal sanctions. Most MEAs use formulas that only *suggest* the criminal nature of sanctions. This may be done via the reference to their severity and dissuasive capacity (as in the case of the MARPOL Convention, which adds that the sanctions "shall be equally severe irrespective of where the violations occur");[8] or via the use of the verb "to penalize" (as in the case of the CITES Convention or the Cartagena Protocol – although with less intensity in the latter case, since measures to penalize illegal transboundary movements of living modified organisms are to be adopted by the parties only "if appropriate").[9] As some authors stress, the fact that the treaties do not define the word "penal" gives the parties the possibility to decide on the nature of the sanctions.[10]

3) Indirect reference to sanctions. Finally, some MEAs only refer to the obligation of the parties to adopt "adequate measures" to guarantee compliance with the obligations derived from the agreements. Of course, such measures may be sanctioning measures and may be criminal in nature, but it is important to note that, in principle, parties have greater flexibility in deciding their strategy. This is the case, for example, of the Rotterdam Convention (which, unlike CITES, in specifying the measures to be adopted does not expressly suggest sanctions),[11] of the Stockholm Convention (which refers generically to the "legal and administrative measures" necessary to eliminate the production or limit the import or export of certain chemicals),[12] of the Montreal Protocol (to which the provisions of the Vienna Convention apply, i.e., the application of "appropriate legislative or administrative measures" to control, limit, reduce or prevent certain activities, without expressly referring to "sanctions"),[13] of the

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Mitsilegas et al., 2015, p. 85: "The wording of Article 4(3) does not impose a clear obligation to make illegal traffic criminal, as it simply says that parties 'consider' it to be criminal".

[8] International Convention for the Prevention of Pollution from Ships (MARPOL) (adopted 17 February 1978, entered into force 2 October 1983) 1340 UNTS 61), 1341 UNTS 3.

[9] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243; Cartagena Protocol on Biosafety to the Convention on Biological Diversity (adopted 29 January 2000, entered into force 11 September 2003) 2226 UNTS 208.

[10] Cho, 2000/2001, p. 21.

[11] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (adopted 10 September 1998, entered into force 24 February 2004) 2244 UNTS 337.

[12] Stockholm Convention on Persistent Organic Pollutants (adopted 22 May 2001, entered into force 17 May 2004) 2256 UNTS 119.

[13] Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3.

Convention on Biological Diversity (which refers to the obligation of the parties to "develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations")[14] and the Bern Convention of the Council of Europe (which refers to the obligation of taking "appropriate and necessary legislative and administrative measures" in several different articles).[15]

The second issue to be considered is the series of limitations deriving from the evolution of European criminal law and from the relationship between EU law and international law. The regulations regarding the prevention of pollution of the marine environment from ships serve as an example in both cases.

As is known, this issue was regulated in 1973 by the MARPOL International Convention, which came into force in 1983 after the signing of the Protocol of the same name in 1978. This international agreement imposes the obligation of the parties to provide for penalties "adequate in severity to discourage violations of the present Convention", which have been interpreted as criminal sanctions. At EU level, the issue was regulated by Directive 2005/35/EC of the European Parliament and of the Council on ship-source pollution and on the introduction of penalties for infringements.[16] In its recital number 3, the Directive referred to the need to harmonize the application of the MARPOL Convention in the member states, since significant differences could be observed in the practices of member states relating to the imposition of penalties for discharges of polluting substances from ships. As supplementary regulations, in recital 6 the Directive referred to the detailed rules on crimes and sanctions established in Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution.[17] However, this Council Framework Decision was annulled by the European Court of Justice in October 2007.[18] In order to fill the legal vacuum following the judgment, the European

[14] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79).
[15] Council of Europe: Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 September 1979, entered into force 01 June 1982) ETS No. 104.
[16] OJ No. L255, 30.9.2005.
[17] OJ No. L255, 30.9.2005.
[18] Case C-440/05, Commission of the European Communities v Council of the European Union, 23.10.2007. ECLI:EU:C:2007:625.

Parliament and of the Council passed Directive 2009/123/EC of 21 October 2009.[19] In its first recital, Directive 2009/123/ EC repeats that its objective is "to approximate the definition of ship-source pollution offences committed by natural or legal persons, the scope of their liability and the criminal nature of penalties that can be imposed for such criminal offences by natural persons".

Let us see how this case illustrates some of the difficulties that have arisen in the EU's compliance with international environmental law. Firstly, we must refer to the EU's competences in criminal matters prior to the Lisbon Treaty. The Council Framework Decision 2005/667/JHA was annulled after the ECJ judgement of 13 September 2005, which resolved a serious institutional conflict between the European Commission and the Council of the European Union in the field of environmental crime.[20] The ECJ clarified the distribution of competences in criminal matters between the then first pillar (also called "community pillar" and made up of the constituent treaties), and the third pillar (related to police and judicial cooperation in criminal matters). In summary, the judgment affirmed the possibility of obliging member states to foresee criminal sanctions within the framework of the first pillar, when this is necessary to guarantee the effectiveness of community law. This relevant judgment resulted in the annulment of Council Framework Decision 2003/80/JHA of 27 January 2003, on the protection of the environment through criminal law[21] and impacted on the Council Framework Decision 2005/667/JAI on pollution from ships, causing its subsequent annulment.[22]

From the point of view of the approximation of criminal sanctions, it should be noted that Council Framework Decision 2005/667/JHA obliged member states to provide for effective, proportionate and dissuasive criminal sanctions in their national legislation. It also specified the typology and level of sanctions, establishing minimum and maximum limits in relation to custodial sentences and even in relation to the fines to be imposed on legal persons (although in this case, it left the member states the power to decide the

[19] Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ No. L280, 27.10.2009.
[20] Case C-176/03, Commission of the European Communities v Council of the European Union, 13.09.2005. ECLI:EU:C:2005:542.
[21] OJ No. L29, 5.2.2003.
[22] Symeonidou-Kastanidou, 2009; Pigrau and Campins, 2008; Mitsilegas, Fitzmaurice and Fasoli, 2016, pp. 279-283; Pereira, 2015b, pp. 24-36 and 186-198.

criminal or administrative nature thereof). On the basis of the European legal framework then in force, the ECJ considered that the setting of the typology and level of sanctions was in excess of the Community's criminal powers. As a consequence, Directive 2009/123/EC, currently in force, only imposes the obligation to adopt the necessary measures to guarantee that the offences referred to in Articles 4 and 5 of the Directive are considered criminal offences and are punishable by effective, proportionate and dissuasive sanctions.

Considering that the Directive sets out the obligation to provide for criminal sanctions, it might be concluded that it formally complies with the MARPOL Convention. However, as will be examined below in relation to other European regulations, the degree of flexibility available to member states when defining sanctions leads to significant disparities between them and compromises the effective protection of the environment. Thus, it will be particularly interesting to assess the room for improvement existing since the entry into force of the Lisbon Treaty.

Secondly, the regulations on pollution from ships also illustrate the difficulties arising from the relationship between EU law and international law. As Pereira recalls, the ECJ had the opportunity to rule on the compatibility of Directive 2005/35/EC and international law in the so-called Intertanko case.[23,24] Despite the express reference of the Directive to the MARPOL Convention, the Court refused to analyse the legality of the Directive in the light of the Convention. The Court declared that this was not possible since the Community, by itself, was not a signatory party to the Convention, even though the member states were. As Pereira continues to point out, it is especially relevant that the Court did not examine the compatibility of the Directive with the Convention on the Law of the Sea (UNCLOS). In this case, although the European Community was a signatory of the Convention, the Court considered that UNCLOS had no direct effect on the European legal order, as it did not aim to confer rights on individuals or legal persons such as shipping companies. The conclusion reached by this author, relevant to the subject at hand here, is that the Intertanko judgment suggests a desire for caution on the part of the Court when assessing the legality of secondary

[23] Pereira, 2015a, p. 265.
[24] Case C-308/06, International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport, 03.062008. ECLI:EU:C:2008:312.

European legislation on environmental crime, in the light of the MEAs, "in order to maintain the delicate balance between international law and the law of the European Union and preserve the position of the EU when negotiating and adopting such international agreements".[25]

3. Directive 2008/99/EC on the protection of the environment through criminal law

Taking the above considerations into account, this section examines to what extent the EU currently complies with the sanctions regime set out in the MEAs, and the role of Directive 2008/99/EC on the protection of the environment through criminal law.

Directive 2008/99/EC, passed after the 2005 annulment of EU Council Framework Decision 2003/80/JHA, aims to address the rise in environmental offences with transboundary effects, in a context of non-complete compliance with the laws for the protection of the environment. Article 3 of Directive 2008/99/EC describes nine serious conducts that member states should consider criminal in their national legislation, when they are unlawful and are committed intentionally or, at least, by serious negligence. For the purposes of this Directive, "unlawful" is understood to be an infringement of Community legislation specified in the Annexes to the Directive, or of a law, an administrative regulation of a member state or a decision taken by a competent authority of a member state that gives effect to the abovementioned Community legislation. Article 4 sets out that member states shall ensure that inciting, aiding and abetting the intentional conduct referred to in Article 3 is punishable as a criminal offence. As regards sanctions, Article 5 sets out that member states shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties. When it comes to the liability of legal persons, sanctions must be effective, proportionate and dissuasive, leaving member states to decide whether the offences are criminal or administrative in nature.[26]

The analysis will focus on the MEAs referred to above (except for the already mentioned MARPOL Convention), classified according to their degree of "criminalization". In Table 1, each of the MEAs can be compared with the sanctions

[25] Pereira, 2015a, p. 267; Mitsilegas, Fitzmaurice and Fasoli, 2016, pp. 288-291.
[26] See the reasons in Pereira, 2015b, pp. 267-273.

regime set out in the most relevant secondary European legislation. The third column shows whether there is a specific offence in Directive 2008/99/EC and whether the related European legislation was included in the annex (as mentioned above, this is relevant to the interpretation of the term "unlawful").

MEAs with express reference to criminal sanctions		
	Sanctions in EU legislation	*Directive 2008/99/EC*
Basel Convention	effective, proportionate and dissuasive[27]	Offence art. 3c) Legislation in Annex
MEAs with indirect reference to criminal sanctions		
	Sanctions in EU legislation	*Directive 2008/99/EC*
CITES	appropriate to the nature and gravity of the infringement[28]	Offence art. 3g) Legislation in Annex
Cartagena Protocol (Convention on Biological Diversity)	effective, proportionate and dissuasive[29]	Annex: Only Directive 2001/18/EC.
MEAs with indirect reference to sanctions		
	Sanctions in EU legislation	*Directive 2008/99/EC*
Rotterdam Convention	effective, proportionate and dissuasive[30]	Regulation in force passed after the Directive. Annex: absence of the previous legislation regarding the export and import of dangerous chemical products
Stockholm Convention	effective, proportionate and dissuasive[31]	Offences art. 3b) and d) Regulation in force passed after the Directive. Annex: previous legislation with same provision regarding sanctions

[27] Art. 50 Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ No. L190, 12.7.2006.
[28] Art. 16.2 Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, OJ No. L61, 3.3.1997.
[29] Art. 33 Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, OJ No. L106, 17.04.2001, and art. 18 Regulation (EC) No 1946/2003 of the European Parliament and of the Council of 15 July 2003 on transboundary movements of genetically modified organisms, OJ No. L287, 5.11.2003.
[30] Art. 28 Regulation (EC) No 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals (recast), OJ No. L201, 27.7.2012.
[31] Art. 14 Regulation (EC) No 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants (recast), OJ No. L169, 25.6.2019.

Montreal Protocol (Viena Convention)	effective, proportionate and dissuasive[32]	Offence art. 3i) Regulation in force passed after the Directive. Annex: previous legislation with same provision regarding sanctions
Convention on Biological Diversity	No mention of sanctions, only of appropriate or necessary measures[33]	Offences art. 3f) and 3h) Annex: Birds Directive and Habitats Directive
Bern Convention (Council of Europe)	No mention of sanctions, only of appropriate or necessary measures [34]	Offences art. 3f) and 3h) Annex: Birds Directive and Habitats Directive

Table 1: MEAs, sanctions and Directive 2008/99/EC

Table 1 shows that European environmental legislation does not set out express criminal provisions even in the clearest case of the "international obligation of criminalization" (Basel Convention). In most cases, and due to the limitations noted above, the current European legislation opts for the formula "effective, proportionate and dissuasive sanctions", widely used since the "Greek maize" case, which leaves States members the decision about the nature of the sanctions to apply to member states .[35]

Directive 2008/99/EC therefore had a direct impact on the criminalization of non-compliance with MEAs, by obliging member states to use criminal law to strengthen compliance with the related European environmental legislation. The impact is especially relevant in cases in which the sanctions in the international and European mandates were particularly weak (e.g., in the Convention on Biological Diversity and the Bern Convention). The Directive defines specific crimes related to the protection of flora, fauna and habitats, and even extends its protection to include serious negligence.

[32] Art. 29 Regulation (EC) No 1005/2009 of the European Parliament and of the Council of 16 September 2009 on substances that deplete the ozone layer (recast), OJ No. L286, 31.10.2009.
[33] Art. 6.2 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ No. L206, 22.7.1992; Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ No. L20, 26.1.2010.
[34] Ibídem.
[35] Case C-68/88, Commission of the European Communities v Hellenic Republic, 21.09.1989. ECLI:EU:C:1989:339.

However, Directive 2008/99/EC also has its shortcomings. The most significant gap concerns the Rotterdam Convention. The Directive does not include an offence that specifically refers to the export and import of dangerous chemical products; nor does it include, in the annex, the relevant European legislation on the matter that was in force at the time of its approval. With regard to the Cartagena Protocol, there is also a striking gap: the annex to the Directive omits Regulation (EC) nº. 1946/2003 regarding the transboundary movement of genetically modified organisms.

However, when assessing the impact of Directive 2008/99/EC, it is important to underline that it has been subject to significant criticism both for substantive reasons (the use of criminal law in this area) and for formal reasons (for example, the legislative technique used to describe the offences).[36] To these criticisms, it is worth adding the results of the analysis of its implementation in the national legislations of EU member states. In this respect, with regard to criminal penalties, the main conclusion that emerges from a comparison of its implementation by member states is that, although a high degree of compliance is observed in terms of the use of criminal law, there are significant disparities in relation to the type and severity of the penalties.[37] This finding, which might be seen as a deficit of proportionality between member states, is, however, the consequence of another problem regarding the approximation of criminal sanctions in the European Union: the principle of proportionality must operate, in the first instance, in the context of each national criminal justice system.

4. The protection of the environment through criminal law in the EU, beyond Directives 2008/99/EC and 2009/123/EC.

Directives 2008/99/EC and 2009/123/EC set out, for the first time, the obligation to use criminal law to protect the environment. However, the protection of the environment through criminal law in the EU is not limited to these directives; there are other EU regulations that indirectly open the door to the use of criminal sanctions in areas of special environmental relevance, in which the EU, as an important destination market, should play a leading role in terms of international responsibility. Here I will refer very briefly to the sanctions regime for two of these regulations: the European Timber

[36] Faure, 2017b), pp. 346-349; Vagliasindi, 2012; Faure, 2011.
[37] Maria Marques-Banque, 2018; Perilongo, Corn, 2017; Pereira, 2017.

Regulation (EUTR)[38] and the European Regulation on Illegal, Unreported and Unregulated Fishing (IUU).[39]

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 (henceforth, EUTR), was adopted in the framework of the European Union Program for Forest Law Enforcement, Governance and Trade (FLEGT).[40] The scale of the problem of deforestation and its relationship with climate change and the loss of biodiversity led the EU to develop specific action to tackle illegal logging and the trade associated with this practice.

To this end, the EUTR set out a series of obligations for operators who commercialize timber and timber products, including the prohibition of placing illegally harvested timber or timber products deriving from such timber on the EU market. Regarding sanctions, it set out the obligation of the member states to provide for "effective, proportionate and dissuasive" penalties in case of non-compliance with the prohibitions, including the corresponding fine, the seizure of the timber and the suspension of the authorization to trade.

The comparative analysis of the implementation of the EU Timber Regulation in the 28 member states (the UK being included at the time of the analysis) and Norway reveals, once again, significant differences. member states opted mainly for a combination of criminal and administrative sanctions (13 member states and Norway), or for administrative sanctions (11 member states).[41] Only two established only criminal sanctions. When provided, the maximum custodial sentences range from one month to six years, being between one and three years in most member states.[42] Regarding fines

[38] Council 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, OJ No. L295, 12.11.2010.
[39] Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, OJ No. L286, 29.10.2008.
[40] EU Commission Communication: Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan, COM(2003) 25.
[41] For two Member States (Denmark and the Republic of Croatia), additional information was requested but no response was obtained.
[42] Maria Marques-Banque, 2019. The study was finalized in 2019.

(criminal or administrative), the minimum fine is 14 euros and there is no limit on the maximum . The highest fines are those imposed for placing illegally harvested timber and timber products on the EU market.[43] Significantly, in 2018, the European Parliament asked the European Commission to extend the scope of Directive 2008/99/EC to include illegal timber logging.[44]

As regards the European Regulation on Illegal, Unreported and Unregulated Fishing (IUU), its article 44 obliges member states "to ensure that a natural person having committed or a legal person held liable for a serious infringement is punishable by effective, proportionate and dissuasive *administrative* sanctions". In order to guarantee the dissuasive nature of the sanctions and to seek greater harmonization, it regulates the corresponding fine, suggests minimum amounts, and lays down that "in applying these sanctions the member states shall also take into account the value of the prejudice to the fishing resources and the marine environment concerned". The same article 44 establishes in the last paragraph: "Member States may also, or alternatively, use effective, proportionate and dissuasive *criminal* sanctions".

In this case, it has not been possible to conduct a comparative analysis of the implementation of the IUU Regulation in member states. The IUU Regulation obliges member states to report to the European Commission on the application of the Regulation, and the European Commission to present a report every three years to the European Parliament and the Council. However, this information has not been made public, thus making it difficult to analyse the dissuasive, effective and proportionate nature of the sanctions in this field.

However, the terms of the public consultation on Directive 2008/99/EC carried out by the European Commission in late 2019 are indicative: "Currently, breaches of EU fisheries legislation are generally not criminalized. Do you find it justified and coherent that breaches of fisheries legislation should be criminalized?" Without offering a comprehensive analysis of all the member states, the few existing comparative studies

[43] UNEP-WCMC, 2018.
[44] European Parliament: Resolution of 11 September 2018 on transparent and accountable management of natural resources in developing countries: the case of forests (2018/2003(INI)), P8_TA (2018)0333, n84.

on sanctions on IUU fishing in the EU confirm the low level of criminalization in this area, as well as significant differences between the member states regarding the amounts imposed as fines.[45]

Moreover, despite the efforts of the Food and Agriculture Organization of the United Nations (FAO) to tackle IUU fishing,[46] the lack of a comprehensive approach to fisheries crimes operates as an aggravating factor. As Stølsvik highlights, despite the progressive international recognition of IUU fishing as transnational organized crime, "no single international organization has a mandate to cover both fisheries management issues and crime in the fisheries sector".[47]

5. A proposal to enable the EU to reinforce its position within the international environmental regime.

In European criminal law, some authors have stressed the need to strengthen the EU's external dimension in environmental crime. For Vervaele, in addition to protecting common interests European criminal policy must be based on common values such as the prohibition of the death penalty or torture. This author also suggests that the EU should consider the protection of Mother Earth and the environment as a legitimating common value for European criminal justice[48].

As regards environmental crime, the analysis carried out in this chapter points to two ways in which the political influence of the EU could be reinforced and its regulatory power over international environmental governance strengthened. The first refers to actions affecting EU criminal law which have an impact on compliance with international environmental law. The second refers to the external dimension of the EU, not only as a recipient of international legislation but as a key political actor in its drafting and negotiation.

[45] European Parliament. Directorate-General for Internal Policies. Policy Department B: Structural and Cohesion Policies, 2014, p. 46. As a case study, particularly interesting is the judgment of the Spanish Supreme Court no. 5654 of 23 December 2016 (ECLI:ES:TS:2016:5654) on a case of illegal fishing in international marine waters. See an analysis in Oanta, 2019 and in Pons Ràfols, 2017.
[46] Pereira, 2015b, p. 254.
[47] Stølsvik, 2019, p. 127.
[48] Vervaele, 2019, p. 10.

The implementation of the European legislation analysed so far suggests the presence of major gaps and a low level of harmonization of sanctions in relation to environmental crimes, which has a negative impact on the effective protection of the environment and compliance with international law. Therefore, it is particularly important to establish whether there is room for improvement.

The main action to consider is the one most debated by scholars: the revision of Directive 2008/99/EC, which, at the time of writing, is under evaluation by the European Commission.

Since the coming into force of the Lisbon Treaty in 2009, there have been two ways of establishing minimum criminal rules using Directives.[49] The first, foreseen in Article 83(1) of the Treaty on the Functioning of the European Union (TFEU),[50] was already present in the Treaty of Amsterdam (1997) and corresponds to what is known as "security criminalization". This concerns the possibility that the European Parliament and the Council may establish minimum rules regarding the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. The TFEU provides an appraised list of crimes (terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime), albeit with an open clause that allows the addition of other criminal areas.

Article 83.2 TFEU refers to "functional criminalization". The result of a long evolution, this article reflects the jurisprudence deriving from the institutional conflict in the field of environmental crimes. It provides for the possibility of using Directives to establish minimum rules with regard to the definition of criminal offences and sanctions, when the approximation of the laws and regulations of member states in criminal matters is essential to ensure the effective implementation of an EU policy in an area that has been subject to harmonization measures.

[49] Mitsilegas, 2014; Miglietti, 2014; Pereira, 2015b, pp. 202-206.
[50] OJ No. C326, 26.10.2012.

These options have already been used in other areas. Based on Article 83(1) or 83(2) TFEU, Directives have already been approved which, for certain cases, establish maximum penalties of deprivation of liberty of at least five or ten years (trafficking in human beings) and four years (money laundering and fraud affecting the financial interests of the EU).[51] It should be noted that, with regard to harmonization, scholars have already underlined the limited effect of establishing a minimum for maximum penalties but not for minimum penalties. However, this last option, theoretically possible under Article 83 TFEU, is still far from being fully accepted by member states, despite the arguments put forward in its favour (namely, its greater deterrent effect, the prevention of forum shopping and greater use of international cooperation mechanisms).[52]

Therefore, the possibility exists of revising the Directive and intensifying the protection of the environment through criminal law. The revision of the Directive would have benefits, such as the possibility of: 1) including or reinforcing areas of transnational environmental crime that are not yet present or are insufficiently addressed (for example, illegal timber logging and trading, IUU fishing, crime related to the Rotterdam Convention and to the Cartagena Protocol); 2) improving the legislative technique used in the description of offences; and 3) reformulating the sanctions framework, especially in relation to organized environmental crime. In this context, it should be remembered that although a full harmonization of sanctions will never be possible on the basis of art. 83 TFEU, establishing minimum levels for maximum penalties has a direct effect on the applicability of the United Nations Convention against Transnational Organized Crime (UNTOC). UNTOC applies only to "serious crimes" as defined in article 2 of the Convention – that is, offences punishable by a maximum deprivation of liberty of at least four years, or a more serious penalty).[53]

[51] On the basis of art. 83(1) TFUE, the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ No. L101, 15.4.2011 and the Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, OJ No. L284, 12.11.2018. On the basis of art. 83(2) TFUE, Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017on the fight against fraud to the Union's financial interests by means of criminal law, OJ No. L198, 28.7.2017.
[52] De Bondt, Miettinen, 2015; De Bondt, 2014; Pereira, 2015b, pp. 279-280.
[53] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

The revision of the Directive is also an opportunity to consider the Council of Europe Convention on the Protection of the Environment through criminal law (not in force).[54] Provisions establishing more stringent protection could be considered in order to improve the Directive.[55] However, it is important to differentiate between cases in which the use of criminal law is justified (such as transnational organized environmental crime), and cases in which sanctions of a different nature could be equally effective, dissuasive and proportionate. But for this – we should also stress – the EU must establish mechanisms to make the relevant information on the use of environmental sanctions readily available.

It is still important to underline that a greater use of criminal law can only be regarded as an improvement, if we accept that criminal law is the best strategy for the effective protection of the environment. In the criminal law literature, however, for many reasons that cannot be discussed in depth here, there is no consensus regarding the priority use of criminal law or regarding the criminal nature of sanctions as if they were the only actions with dissuasive capacity in this area. Thus, while some authors advocate extending Directive 2008/99/EC based on the legal framework deriving from the Lisbon Treaty,[56] others warn of the risk of overcriminalization in the environmental field, because of the existence of "too much harmonization that is too detailed".[57] Consistent with the European Parliament Resolution of 22 May 2012 on an EU approach to criminal law,[58] scholars insist on the need to use criminal law only as a last resort and to explore alternatives to criminal sanctions (in what is known as the "toolbox approach").[59] Likewise, in order to make better-founded proposals for the sanctions regime, scholars stress the need for more criminological studies, studies carried out from the perspective of the economic analysis of the law and, again, the need for a greater systematization and access to empirical data regarding the enforcement of environmental crimes.[60]

[54] Council of Europe: Convention on the Protection of the Environment through Criminal Law (adopted 4 November 1998, not into fore) ETS No. 172.
[55] See an analysis of the Convention of the Council of Europe and a comparison with the Directive 2008/99/EC in Pereira, 2015a.
[56] Vagliasindi, 2012, p. 330.
[57] Vervaele, 2019, p. 11.
[58] P7_TA (2012)0208.
[59] Faure, 2017a; Pereira, 2015b, pp. 89-90, 281-288, 292-317; Faure, Svatikova, 2012; Faure, 2004.
[60] Faure, 2017b, pp. 338-342; Perilongo, Corn, 2017, p. 250.

Still considering the first way in which the EU could strengthen its political influence, and as a consequence of the compliance deficit observed in this area, attention has been drawn to the importance of the instruments adopted within the framework of the Area of Freedom, Security and Justice to facilitate cooperation in criminal matters. Some of these instruments (such as the European arrest warrant, the European investigation order and the Eurojust and Europol agencies) are essential for the effective implementation of Directives 2008/99/EC and 2009/123/EC.[61] In this regard, a coordinated EU strategy on environmental crime must bear in mind that the applicability of most of these instruments depends on the establishment of minimum requirements of seriousness of the offences.[62] As pointed out in the literature, in the future the EU should also consider extending the powers of the European Public Prosecutor's Office to include serious environmental crime with cross-border effects[63].

Turning now to the second way in which it might extend its influence, the EU should have a leadership role, at least, in an area in which there is a greater consensus on the need for coordinated and global action: transnational organized environmental crime.[64] As highlighted in the framework of the EFFACE research project, "environmental crime should be considered a serious crime when it comes to organized crime and should also be considered a crime determining other serious crimes such as money laundering and corruption".[65]

The measures suggested above are the ones that have an impact on the criminal sanctions framework of the EU member states, which is the focus of this chapter. Thus, with regard to the external dimension of EU action to fight against environmental crime, it should be noted that international law scholars have analysed the issue and formulated policy recommendations addressing governance and enforcement.[66]

[61] Pereira, 2017, pp. 161-162; Vervaele, 2019, p. 12; Mitsilegas, Giuffrida, 2017.
[62] De Bondt, 2014, pp. 155-156.
[63] Di Francesco Maesa, 2018; De Angelis, 2019.
[64] On 21 November 2016, the United Nations General Assembly recognized, for the first time, environmental crime as a type of transnational organized crime. See United Nations General Assembly, Resolution 71/19 on the Cooperation between the United Nations and INTERPOL, A/RES/71/19.
[65] Fajardo, 2016, p. 30.
[66] Fajardo, 2016; Cardesa-Salzmann, 2016.

Along with intensifying international coordination and cooperation mechanisms, more direct EU action has also been called for with regard to the possibility of adopting an additional protocol to the United Nations Convention against transnational organized crime.[67] It is also essential to intensify the role of customs in the fight against transnational environmental crime and to increase international cooperation in this area, particularly in relation to the MEAs covered by the Green Customs Initiative (among others, CITES, the Basel Convention, the Montreal Protocol, the Stockholm Convention, the Rotterdam Convention and the Cartagena Protocol).[68]

6. Final remarks

This chapter has addressed the EU's compliance with international environmental law regarding the protection of the environment through criminal law and the action that the EU might take in order to improve its implementation at regulatory level.

The analysis of a set of relevant MEAs and of the related European legislation shows the impact of Directives 2008/99/EC and 2009/123/EC on the criminalization of non-compliance with MEAs. This impact is especially relevant in cases in which the international and European mandates are particularly weak in terms of the imposition of sanctions.

However, with regard to environmental crime, the EU can do more. Along with the possible revision of Directive 2008/99/EC, whose complexity and limitations derive from the evolution of European criminal law and from the scholarly debate on the subject, there is an urgent need to take regulatory measures to overcome the deficit of enforcement in this area. This will require a comprehensive vision of the impact of the sanctions regime on the instruments adopted within the framework of the Area of Freedom, Security and Justice in order to facilitate cooperation in criminal matters.

[67] Global Initiative Against Transnational Organized Crime, 2015; of the same opinion Vervaele, 2019, p. 14.

[68] "The Green Customs Initiative is a partnership of international organisations and secretariats that cooperate to enhance the capacity of customs and other relevant border enforcement personnel to deal with trade in 'environmentally-sensitive items'" (Green Customs, p. 1). Its legal basis is the Decision 21/27 of the UNEP Governing Council on Compliance with and enforcement of multilateral environmental agreements.

The external dimension of the EU should also be emphasized in the fight against transnational organized environmental crime, either by promoting the process of negotiation and approval of international legislation in this regard, or by intensifying legislative mechanisms for international cooperation. Special attention must be paid to the key role of customs in preventing the import and export from the EU of products whose illegal trade has serious global, environmental, political, economic and social impacts.

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