



Judicial Training and research on EU crimes against environment and maritime pollution

Ciro Grandi – *University of Ferrara*

European Environmental Criminal Law

18th September 2012 - Sofia

European Environmental Criminal Law

- I. The reasons behind the close relation between European criminal law and environmental protection
- II. The establishment of EC Criminal Law competence in matter of environmental protection
- III. The EC directives on environmental protection
- IV. Further perspectives under the Treaty of Lisbon

I- European Criminal Law and Environmental Offences

Need for a European Criminal Law

1. Common interest to the Union and Member States
2. Harmonization of national criminal law is necessary for the efficient implementation of (EC) EU policy
 - Individual action by MS insufficient to counteract criminality
3. Transnational effects of the illicit conduct
4. Link with transnational organized criminality

I- European Criminal Law and Environmental Offences

1. The protection of environment is a common goal of the Union and Member States;
 - protection of human health
 - preservation of natural resources
 - preservation of landscape
- The importance of the interests affected make the use of criminal sanctions proportionate to fight the most serious illicit behavior



I- European Criminal Law and Environmental Offences

2. Connection with (EC) EU common policy

- Why is such element important?

Article 5 (Lisbon Tr. Version) TEC “1. The limits of Union competences are governed by the principle of conferral. (...)

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States”.

I- European Criminal Law and Environmental Offences

- Treaty of Rome (1957): no reference to the protection of environment.
- *However:* art. 235: If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of they objectives of the Community and this Treaty has not provided the necessary powers, the Council shall (...) take the appropriate measures.

I- European Criminal Law and Environmental Offences

- As early as in the '70ies, dozens of directives and regulations on environmental matters, on the legal basis of 235 TEC.
- E.g. Directive 75/439 EEC, on the disposal of waste oils:

“Whereas any disparity between the provisions on the disposal of waste oils already applicable or in preparation in the various Member States may create unequal conditions of competition and thus directly affect the functioning of the common market...”

I- European Criminal Law and Environmental Offences

- Treaty of Maastricht (1992) Introduction of a specific common policy in matter of environment: Title XVI TEC
- Art. 130r TEC (and following)
 1. Community policy on the environment shall contribute to pursuit of the following objectives:
 - preserving, protecting and improving the quality of the environment;
 - protecting human health;
 - prudent and rational utilization of natural resources;
 - promoting measures at international level to deal with regional or worldwide environmental problems.

(...)

I- European Criminal Law and Environmental Offences

Treaty of Amsterdam (1997)

- Art. 2 TEC (General Principles): The Community shall have as its task (...) a high level of protection and improvement of the quality of the environment
- Title XIX TEC
 - art. 174 , on “Community policy in matter of environment” (analogous to art. 130r.1 Maastricht version);
 - art. 175 The Council (...) shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 174.

I- European Criminal Law and Environmental Offences

- European Charter of Fundamental Rights (Nice, 2000)
- Chapter IV – Solidarity. Art. 37 Environmental protection:

“A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”.

- No reference to environmental protection in ECHR (1950)

I- European Criminal Law and Environmental Offences

On the different legal basis provided for by the Treaties (first art. 235 TEC, then specific provisions on the common environmental policy)

hundreds of directives and regulations have been adopted in the past decades, disciplining environmental related matters (especially waste management)

http://europa.eu/legislation_summaries/environment/

However: widespread, frequent failure to comply with EC environmental law. Statistics: over *one third* of infringement procedures handled by the Commission concerns environmental legislation (Commission report 2010)

I- European Criminal Law and Environmental Offences

2. Harmonization of national criminal law is necessary for the efficient implementation of (EC) EU policy

- When is such intervention necessary?

When individual action by MS are insufficient to counteract criminality.

- Why is such element important?



I- European Criminal Law and Environmental Offences

Principle of subsidiarity (ex art. 5.2 TEC, now art. 5.3. TEU)

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

I- European Criminal Law and Environmental Offences

3. Transnational effects of the illicit conduct

- Environmental offences provide for paradigmatic examples

E.g. : emission or introduction of toxic waste in the air or water cause threats to the environment (including human beings and fauna) beyond any national borders

I- European Criminal Law and Environmental Offences

- Disparities between national legislation display negative effects
- E.g. 1: France and Austria punish the conduct of discharge in the air of toxic radiation, while Italy does not. The conduct performed by industrial premises in northern Italy causes damages in France and Austria.
- Need for extensive harmonization of national criminal law, so as to eliminate gaps of protection.

I- European Criminal Law and Environmental Offences

- Disparities between national legislation display negative effects
- E.g. 2: Spain, France and Germany prohibit certain industrial activities that produce hazardous radioactive wastes. However, France legislation only provide for lenient pecuniary sanctions.
- Therefore, the profitable business in radioactive substance shall take place in France, with lower “legal risks/costs”.
- *Forum shopping, collateral effect: distortion of competition in the internal market.*
- Need for harmonization of sanctions.

I- European Criminal Law and Environmental Offences

4. Link with transnational organized criminality

- The illicit conduct related to environmental offences (especially the illicit management of wastes) is every-day-more run by (transnational) organized crime (so called “eco-mafia”).
- Under the old version of TEU (Amsterdam) an action in this field might have as legal basis art. 31 lett. e of the Treaty:
- “Common action on judicial cooperation in criminal matters shall include: (...) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of **organised crime**, terrorism and illicit drug trafficking”.

II –EC Criminal Law competence in matter of environmental protection

- Convention on the Protection of the Environment through Criminal Law (1998 – European Council)
- First international treaty to criminalize acts causing environmental damage
- Obligation to criminalize intentional and negligent offences (e.g. discharge, emission or introduction of toxic substances in air, soil, water; management of hazardous waste...)
- Never entered into force for lack of ratification

II –EC Criminal Law competence in matter of environmental protection

- EU Commission proposal of a Directive for the protection of Environment through criminal law (COM(2001) 139 def.
- Art. 3 Member States shall ensure that the following activities are **criminal offences** (...) as far as they breach the rules of Community law protecting the environment (...): (a) the discharge of hydrocarbons, waste oils or sewage sludge into water; (b) the treatment, disposal, storage, transport, export or import of hazardous waste ...

II –EC Criminal Law competence in matter of environmental protection

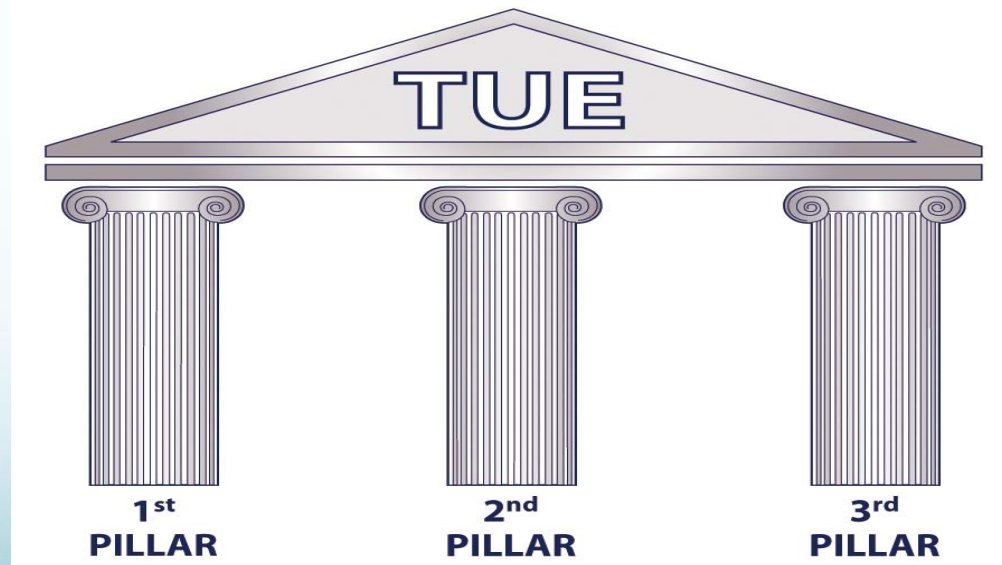
- The legal basis of such proposal was art. 175 TEC. In the Commission's view, this was the proper legal basis for the adoption of a *directive* (i.e. first pillar, community law) of *criminal law harmonization*.
- Such view contrasted with the widespread opposite view (EU Council, majority of MS, legal literature), according to which there was *no proper legal basis* in the Treaties for the adoption of a first pillar act in criminal matters (absence of EC competence in criminal matters).
- Accordingly, any initiative of national criminal law harmonization should be adopted under the EU *Third Pillar*

II –EC Criminal Law competence in matter of environmental protection

- Treaty of Maastricht - Amsterdam

The TEU contains 3 pillars (Greek Temple):

- 1st pillar = Treaty European Community
- 2nd pillar = Common For. Sec. Polic. (Title V TEU)
- 3rd pillar = Police and Judicial Coop.in Crim. Matters(Title VI TEU)



II –EC Criminal Law competence in matter of environmental protection

Article 31 TUE Common action on judicial cooperation in criminal matters shall include: ...

- (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

Art. 34 TEU (...) Acting unanimously (...) the Council may: ...

- (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States.

II –EC Criminal Law competence in matter of environmental protection

- EU Council adopted a Framework Decision on the protection of the environment through criminal law (FD 2003/80), based on *arts. 31(e) and 34 (b) TEU (third pillar)*.
- **Art. 2 Intentional offences:** Each Member State shall take the necessary measures to establish as criminal offences under its domestic law: a) the discharge, emission or introduction of a quantity of substances in water, soil, air; (...); c) unlawful disposal, treatment, storage, transport, export or import of waste (...). List of conduct analogous the Commission proposal of a Directive.
- Art. 5: MS take the necessary measures to ensure that the prohibited conduct are punished by effective, proportionate and dissuasive penalties, involving deprivation of liberty which can give rise to extradition

II –EC Criminal Law competence in matter of environmental protection

The Commission brought before the ECJ an action for annulment against the Council FD 2003/80: *Case 176-03, Commission v. Council, (dec. 13 September 2005)*.

- crucial question: distribution of competences for the adoption of a European instrument for the approximation of national criminal laws
- conflicts of legal bases between the first pillar (EC-directive) and third pillar (EU- framework decision)
- arts. 29: the provision of the third pillar shall not prejudice the competence of the Community under the third pillar; art. 47 TEU nothing in this Treaty shall affect the Treaties establishing the European Communities.

II –EC Criminal Law competence in matter of environmental protection

- *Why is it so significant to establish a first pillar competence instead of a third pillar competence? (directive instead of a framework decision)*

Fundamental reasons:

- Directive are adopted with the rule of majority, FD with unanimity (reluctant MS can stop the procedure);
- Under the third pillar there was no infringement procedure (failure to comply with a FD could not be adequately punished)

Therefore: FD, after all, did not affect the State's monopoly over criminal law.

II –EC Criminal Law competence in matter of environmental protection

- *Commission reasoning (ECJ 13 september 2005 § 15)*

Although the Community legislature does not have a general competence in criminal matters, the Community legislature itself is competent under Article 175 EC to require the Member States to prescribe criminal penalties for infringements of Community environmental legislation if that is *a necessary means of ensuring that the legislation is effective.*

The harmonization of national criminal laws, in particular of the constituent elements of environmental offences to which criminal penalties attach, is designed to be an aid to the Community policy in question (environmental policy, art. 174 ss TEC)

II –EC Criminal Law competence in matter of environmental protection

- *Council reasoning (ECJ 13 september 2005 § 26-27)*
- On the basis of the Treaties, the Community does not have power to require the MS to impose criminal penalties in respect of the conduct covered by the framework decision.
- Given the considerable significance of criminal law for the sovereignty of the Member States, there are no grounds for accepting that this power can have been implicitly transferred to the Community at the time when specific substantive competences, such as those exercised under Article 175 EC, were conferred on it.

II –EC Criminal Law competence in matter of environmental protection

- *ECJ (13 September 2005, § 47-48) shares Commission's view*
- *As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence*
- *However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.*
- Annulment of the whole FD as adopted on a wrong legal basis.
- **Consequences** : establishment of EC competence in criminal matters.

II –EC Criminal Law competence in matter of environmental protection

ECJ, 23 Oct. 2007, C-440/05, *Commission v Council* :

- action for annulment introduced by the Commission against the Council FD 2005/667 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution ; analogous conflict of competences between pillars

- ECJ recalls the findings and reasoning of judgment of 13 sept. 2005 and concludes for the annulment of the FD for breach of art. 29, 47 TEU, art. 80 TEC (the latter being the proper legal basis)

II –EC Criminal Law competence in matter of environmental protection

ECJ, 23 Oct. 2007, C-440/05, *Commission v Council* :

- FD 2005/667 is “designed to ensure the efficacy of the rules adopted in the field of maritime safety, non-compliance with which may have serious environmental consequences, by requiring MS to apply criminal penalties to certain forms of conduct”;
- therefore “those articles must be regarded as being essentially aimed at improving maritime safety, as well as environmental protection, and could have been validly adopted on the basis of Article 80(2) TEC” (common policy on transport). (§ 69)

However:

- “the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence” (§ 70); therefore, type and level of sanctions still matter of 3rd pillar.

III - EC criminal law directives on environmental protection

- DIRECTIVE 2008/99/EC on the protection of the environment through criminal law (first directive of criminal law harmonization)

Art. 3 “Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence:

- (a) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, **which causes or is likely to cause death or serious injury to any person or substantial damage** to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- (b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management), **which causes or is likely to cause death or serious injury to any person or substantial damage** to the quality of air, the quality of soil or the quality of water, or to animals or plants;

III - EC criminal law directives on environmental protection

- (d) the operation of a plant in which a dangerous activity is carried out, or dangerous substance are processed; (e) the production, processing, handling, use, etc. of nuclear materials;
- killing, destruction, taking, trading of specimen of protected wild flora or fauna species *except for cases where the conduct concerns a negligible quantity (f, g).*
- any conduct which causes the significant deterioration of a habitat within a protected site (h).
- Many provisions include a **damage or concrete danger-clause**. The conduct shall be punished if “*causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants*”.

III - EC criminal law directives on environmental protection

- Art. 5: Penalties: MS “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” (no indication of type and level of criminal sanctions).
- The original Commission proposal (COM(2007)51 def.) provided at art. 5 for three different level of criminal sanctions (imprisonment 1-3 years; 2-5 yrs; 5-10yrs) according to the gravity of the offence.
- Following ECJ decision of 2007, the proposal was amended, since, according to the Court, the determination of the type and level of criminal sanctions was still matter of third pillar (FD).
- *Therefore, main weak point of Dir. 2008/99: **lack of harmonization of sanctions system.***
- Art. 6-7: Liability and penalties for legal persons, where the offence was committed for their benefit by a representative

III - EC criminal law directives on environmental protection

- DIRECTIVE 123/2009, amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (ideally replaces FD 2005/667, annulled by ECJ decision of 2007).
- Art. 4 FD 2005/667 as amended : MS shall ensure that ship-source discharges of polluting substances (...) are regarded as infringements if committed with intent, recklessly or with serious negligence.
- Art. 5a “MS shall ensure that infringements within the meaning of Articles 4 (...) are regarded as criminal offences (...)
- Art. 8a “Each MS shall take the necessary measures to ensure that the offences referred to in Article 5a (...) are punishable by effective, proportionate and dissuasive criminal penalties.
- Again: no harmonization of type and level of sanctions.

III - EC criminal law directives on environmental protection

- *Implementation of Directive in MS. Dissimilarities.*
- E.G. Italy, art. 733bisCC: Whoever (...) destroys a habitat within a protected site or otherwise deteriorates it by compromising his conservation status, shall be punished with imprisonment of up to 18months and a fine of not less than 3. 000 E.
- Art. 201 Croatian new CC: 1) Whoever (...) destroys or causes significant deterioration of a habitat of protected species of animals, plants or fungi, (...), shall be punished by imprisonment up to 1 year. (2) Whoever commits the criminal offence from paragraph 1 of this Article towards a habitat, or a breeding area, area in which cubs are being raised, migration area, area of hibernation of a strictly protected wild species of animals, plants or fungi, shall be punished by imprisonment for a period from 6 months up to 5 years.
- *Need for further harmonization of sanctions.*

III - EC criminal law directives on environmental protection

- Further problematical issue: the undeterminate clauses
- concrete damage clause: conduct punishable if causes or is likely to cause death or *serious* injury to any person or *substantial* damage to air, soil... (art. 3 lett. a,b, d);
- conduct not-punishable if concerns a *negligible* quantity of waste (lett. c) or specimens of flora and fauna (lett. f, g);
- Punishable any conduct which causes the *significant* deterioration of a habitat within a protected site;
- What is “serious, substantial, negligible, significant”?

III - EC criminal law directives on environmental protection

- Wide margin of discretion for national legislators and much more for **national judges: risk of further disparities of protection.**
- E.g. Shipping of negligible quantity of waste is not to punish pursuant art. 3 lett. c Directive 2008/99
- Some national legislation (i.e. art. 353, lett. d. Bulgarian CC) provide for such an exception; other legislation, such as the Italian one, does not.
- Anyway: such discretion left to MS reflects the mechanism of the harmonization through directives, that only provide for minimum common standards.

III - EC criminal law directives on environmental protection

- What happens if a MS does not properly implement the provisions of the Directive, i.e. it does not meet the minimum standard of protection required?
- E.g.: most of the criminal sanctions provided for by Italian legislation for environmental offences are deemed too lenient (short terms of imprisonment, low amount of pecuniary sanctions, short terms of statute limitation “*prescrizione*”).
- The duty on national judges of interpreting *where possibile* national legislation in conformity with EU law cannot lead to results *contra legem* (or analogy) in *malam partem* (ECJ – Berlusconi 2005)

III - EC criminal law directives on environmental protection

- At EU level: *Infringement procedure* (Arts. 226 ss. TEC; now arts. 258 ss. TFEU)
 - If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion (...).
 - If the State concerned does not comply with the opinion of the Commission, the latter may bring the matter before the ECJ.
 - If the ECJ finds that a MS has failed to fulfil an obligation under the Treaty, the MS shall be required to take the necessary measures to comply with the judgment of the Court of Justice.
 - If the ECJ finds that the MS concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.
- At national level (Italian system): if national judge finds a conforming interpretation impossible, a question of constitutional legitimacy shall be lodged before the Constitutional Court (art. 117 Cost.)

IV – Further perspectives under Lisbon Treaty

Relevant provisions of the Treaty of Lisbon (2009)

- *One single institutional framework in the EU: abolition of pillars.*
- *Art. 6 TEU on the role of fundamental rights in the EU legal system:*
 - ✓ *Eur. Charter of Fundamental Rights is incorporated in the EU primary law (art. 6.1)*
 - ✓ *EU accedes to the ECHR (still ongoing process)*
 - ✓ *Fundamental rights under ECHR and Constitutional traditions of MS are general principle of EU law*
- *Title V, Area of Freedom Security and Justice*

Art. 67 TFEU: 1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

IV – Further perspectives under Lisbon Treaty

- Environmental protection
- Art. 3.3 TEU : “The Union shall (...) work for the sustainable development of Europe based on (...) a high level of protection and improvement of the quality of the environment”
- Article 4 TFEU: (...) 2. Shared competence between the Union and the Member States applies in the following principal areas: ... (e) environment.

I- European Criminal Law and Environmental Offences

Treaty of Lisbon (2009)

- Title XX, Environment arts. 191 and following
- Art. 191: Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment, protecting human health (...)
- No significant changes to the provisions of Amsterdam Treaty in this respect.

IV – Further perspectives under Lisbon Treaty

- **Title V, Chapter 4 (Judicial cooperation in criminal matters)**

- **Art. 83 directives of criminal law harmonization** (minimum rules with regard to the definition of criminal offences and sanctions) :

1. in 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 (terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking (...))

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures.

IV – Further perspectives under Lisbon Treaty

- Environmental protection is not mentioned in the list under art. 83 para. 1 (even though it may fall under the broad concept of “organized crime”).
- Legislative initiative for the adoption of directives aimed at further harmonization of national criminal law in matter of environmental protection may well be based under art. 83 para. 2, whenever (in line with the reasoning of ECJ 2005) the approximation of criminal laws and regulations of the Member States (in matter of environmental protection) proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures (i.e. environmental law).
- Special need for further harmonization of *type and level of sanctions*.

