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"Criminalizing" environmental wrongdoings under European Union law: a proposal from the European Commission in the light of old and new challenges

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1. Introductory remarks

On December 15, 2021, the European Commission submitted a proposal [1] aimed at replacing the Directive 2008/99 on the protection of the environment through criminal law, currently in force [2].

It might firstly be noticed that this proposal is due to the adjustment of the legal and institutional framework of the Union following the Lisbon Treaty. Indeed, directive 2008/99 is based on Article 175 of the European Community Treaty (ECT) in the text following the Amsterdam Treaty reforms. This proves the undeniable need for same directive to be reassessed, at least for the aim of checking the full coherence between such legislative source and the "new" competences attributed to the Union in the meantime.

From early seventies last century, environmental policy has progressively extended its impact on various legislative areas at various levels, including at the international and Union levels [3]: in this perspective, art. 11 of the Treaty on the Functioning of the European

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[1] Of 15.12.2021 COM (2021) 851 final 2021/0422 (COD).

[2] Of 19.22.2008, O.J. 6 December 2008, L 328 p. 28.

[3] At the international level, the European Court of Human Rights case-law (ECtHR) for the implementation of environmental protection under both (or alternatively) articles 2 and 8 of the European Convention on the protection of Human rights and fundamental freedoms (ECHR) is peculiarly meaningful. For an overview, A. RIZZO, *L'affermazione di una politica ambientale dell'Unione europea. Dall'Atto unico europeo al Trattato di Lisbona,* in R. GIUFFRIDA, F. AMABILI (eds.), *La tutela dell'ambiente nel diritto*

Union (TFEU) on the integration principle is peculiarly relevant to assess the inherently "transversal" character of environmental policy objectives in the Union legal system [4]. This is also supported by current general context clearly placing the protection of the environment at the core of the international community's current purposes (on this, see also *infra* in this paper). On the other hand, sustainable development (involving as such also non-environmental policies' aims, e.g., socio-economic and health policies of a broader dimension), being a key standard for public policies at all levels, is enshrined in principles 3 and 4 of the Rio Declaration [5] and is referred to in the current Articles 3 para. 5, and 21, para. 2, d), Treaty of the European Union (TEU, in terms of the Union's relations with the rest of the world and of the Union's external action) and also in the Preamble to the Treaties [6].

According to the integration principle, the pursuit of environmental protection objectives can be extended to judicial cooperation on criminal law as well, included in Title V TFEU after the Lisbon reforms, within the Area of Freedom, Security and Justice (AFSJ). Therefore, while keeping a competence that is still shared with that of its Member States (see Article 4, n. 2 sub j TFEU), the Union can make use of some innovative competences provided for by two provisions (i.e., Articles 82 and 83 TFEU) that are aimed at defining, as we will see, significant developments for the purpose of consolidating Union legislation in the relevant sector (judicial cooperation on criminal law), also with the view of improving the pursuance of environmental protection aims. Moreover, a broad international discussion on the theme of ecocide as an international crime theoretically corresponding to genocide but understood as such to the harm or

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internazionale ed europeo, Turin, 2018, in particular under p. 38. For a meaningful judgment dealing with relevant topics, see ECtHR decision of 26 January, 2019, *Cordella et autres c. Italie*, Appl. 54414/13 and 54264/15, A. RIZZO, *La Corte di Strasburgo decide il caso Ilva, ovvero: quando la negligenza dei governi mette a rischio la salute delle persone,* in *L'effettività dei diritti alla luce della giurisprudenza della Corte europea dei diritti dell'uomo di Strasburgo*, www.diritti-cedu.unipg.it , and G. D'AVINO, *La tutela ambientale tra interessi industriali strategici e preminenti diritti fondamentali,* in A. DI STASI (ed.), *CEDU e ordinamento italiano. La giurisprudenza della Corte europea dei diritti dell'uomo e l'impatto nell'ordinamento italiano,* Padua, 2020, p. 709 ff.

[4] Under art. 6 European Community Treaty (ECT), confirmed by art. 11 Treaty on the functioning of the European Union (TFEU), through recourse to the integration principle, environmental protection objectives have been extended to various areas of Community law. According to the personal unification of the EU and the EC through the Treaty of Lisbon, this has led to concretely insert the external action of the Union (and, even if more uncertainly, the Union's common foreign and security policy, CFSP) in the area indicated by art. 11 TFEU, further strengthening sustainable development goals, as clearly indicated in the provision in question and as a consolidated and shared framework for most of the many Union's policies (including competences Area of Freedom, Security And Justice, AFSJ), *ex multis,* M. WASMEIER, *The Integration of Environmental Protection as a General Rule for Interpreting Community Law*, in *CMLR*, 2001, p. 151 ff.

[5] United Nations Conference on Environment and Development 3-14 June 1992, A/CONF.151/26 (Vol. I).

[6] As far as the Union is concerned, see under p. 5 of the Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 1 February 1993 concerning a Community program of policy and action in favour of the environment and sustainable development - Political and action program of the European Community in favour of the environment and sustainable development (O.J. C 138, 17 May 1993, in part. p. 12): *"In the report of the World Commission for the Environment and Development (Brundtland), sustainable development is defined as a development that meets current needs without compromising for future generations the ability to meet your needs*".

destruction of the natural environment, should not be forgotten. This is just to evoke the increasing care of the international community for environmental protection issues [7].

The new proposal from the Commission proves this raising awareness on the need to tackle serious environmental wrongdoings more effectively at the supranational level. It remains to be seen if national governments are ready to accept the challenge and to grant greater room for Union's action in this field.

2. Relevant context under the Union's criminal and environmental law.

Criminal law approach to environmental protection is not a "new" subject in European Union law. The European Court of Justice (ECJ, now Court of Justice of the European Union, CJEU), with a view of improving the Union's environmental policy in the time between the Single European Act and the ECT resulting from the Maastricht reforms, had already addressed the undeniable links between internal market objectives and environmental protection, often jointly pursued by relevant EC/EU legislative acts [8]. This has meant the progressive fine-tuning and expansion of environmental protection objectives as a well-defined area in the Union's legal order, ultimately leading to widen the recourse to the "legislative" procedure for the relevant acts to be adopted in this field. In the light of this "historic" European Court of Justice (ECJ) case-law, environmental policy objectives have, on many occasions, prevailed over internal market aims. At the same time, the pursuit of those same objectives has favoured an increasing implementation of the subsidiarity principle: in other words, on many occasions, a "supranational" approach has been meant as more beneficial to European citizens, thanks to a shared understanding of environmental protection aims across the different EU member states [9].

In its landmark judgment of 13 September 2005[10], the Court in Luxembourg annulled a framework decision of the European Union on environmental liability adopted

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[7] On this, A. RIZZO, *In search of Ecocide under EU Law. The international context and EU law perspectives*, in *Freedom Security and Justice European Legal Studies*, 2021, p. 163 ff., *The quest of an ecocide under EU Law. The international context and prospects under current EU treaties and law,* 2021, https://diritti-cedu.unipg.it, and *In search of Ecocide under EU Law*, 2021, in *OSORIN*, 90_item_2.pdf (osorin.it)

[8] European Court of Justice, 17 March 1993, *Commission of the European Communities v. Council of the European Communities*, case C-155/91, I-939, when the Court explicitly stated what follows (under p. 2 of the decision's summary: "*Directive 91/156 on waste has the object of ensuring the management of waste, whether its origin is industrial or domestic, in accordance with the requirements of environmental protection. Whilst it is true that waste, whether recyclable or not, is to be regarded as goods the movement of which, in accordance with Article 30 of the Treaty, must in principle not be prevented, the directive in question cannot, for all that, be regarded as implementing the free movement of such products, since, on the contrary, it implements the principle that environmental damage should as a priority be rectified at source, a principle laid down by Article 130R(2) of the Treaty as a basis for action by the Community relating to the environment. Accordingly, the directive could be validly adopted on the sole basis of Article 130s of the Treaty".*

[9] For an historical overview of those issues, see K. LENAERTS, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, Fordham International Law Journal, 1993, p. 846 ff. For an overview of progress in the environmental policies at EU level, A. RIZZO, *L'affermazione di una politica ambientale dell'Unione europea. Dall'Atto unico europeo al Trattato di Lisbona* ...p. 21.

[10] Case C-176/03, *Commission v Council*, I-7879, A. MIGNOLLI, *La Corte di giustizia torna a presidiare i confini del diritto comunitario. Osservazioni in calce alla sentenza C-176/03*, in *St. int. eur.*, 2006, p. 327, F. JACOBS,

based on Articles 29, 31 (e) and 34 (2) (b) of the European Union Treaty in the pre-Lisbon editions[11], affirming the correctness of the choice of art. 175 ECT (now art. 192 TFEU) as the legal basis for a subsequent directive. In its reasoning, the Court refers first to art. 47 of the EUT in the text preceding the Lisbon reforms, concerning the establishment of the principle of supremacy of the ECT on the EUT, for the simple reason of priority of the obligations imposed by ECT on the same parties to both treaties (and this also by way of derogation to relevant rules in the Vienna Convention on the Law of the treaties)[12]. European Commission noted that the approach followed by the Court in this case "*is a functional approach (...). The possibility for the Community legislator to provide for measures in the criminal field derives from the need to enforce Community legislation*"[13].

In a later case [14], the Court underlined the difference between the detection of the competence of the European Community to establish the criminal aspects of environmental protection and the competence of same Community to establish the kinds and levels of related penalties (according to the relevant substantive and procedural criminal law) applicable in cases of breaches of environmental rules, since this last competence was clearly not ascribable to the European Community before the Lisbon reforms. Awareness that the same objectives of the EU treaties could (or should) be pursued (also) by means of criminal law tools has finally been achieved with the Lisbon reforms. Indeed, current Article 82 TFEU, on the one hand, aims to improve mutual trust specifically on criminal procedural law matters [15]. Pursuant to para. 2 of the same

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The Role of the European Court of Justice in the Protection of the Environment, in *Journal of Environmental Law,* 2006, p. 185; R. PEREIRA, *Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the European Union?,* in *Energy and Environmental Law Review*, 2007, p. 254 ss.

[11] Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ L 29, 5.2.2003, p. 55). Mentioned treaty's provisions were related to the implementation of the Justice and Home Affairs (JHA) policy, before the Lisbon's reforms (see now under Title V, article 67 ff., Area of Freedom Security and Justice).

[12] European Court of Justice, 12 May 1998, case C-170/96, *Commission v. Council,* I-2763 and R. MASTROIANNI, *Commentary on Art. 47 EUT,* in A. Tizzano (ed.), *Trattati dell'Unione europea e della Comunità europea*, Milan, 2004, p. 167 ff.

[13] See COM (2005) 583 final, Communication from the Commission to the European Parliament and the Council on the consequences of the (abovementioned) Court's judgment of 13 September 2005. Indeed, ever since the *Simmenthal* case (of 9 March 1978, 106/77, 1871) the Court of the European communities evidenced the need that EC law obligations (when stemming from an EC directly applicable acts, e.g., a regulation) be implemented at the national level also by means of criminal law acts (C. AMALFITANO, *Commentary to art. 83 TFEU,* in A. Tizzano (ed.), *Trattati dell'Unione europea,* 2014, p. 905 ff.).

[14] Court of justice 23 October 2007, case C-440/05, *Commission v. Council*, ECLI:EU:C:2007:625, *ex multis* L. SCHIANO DI PEPE, *Competenze comunitarie e reati ambientali: il "caso" dell'inquinamento provocato da navi,* in P. Fois (ed.), *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente,* Naples, 2007, p. 463.

[15] See under Art. 82, paragraph 1, TFEU , embracing definition of rules for the recognition of national judgments, the resolution of jurisdictional conflicts, support for training of the judiciaries, facilitating cooperation between national authorities including the cross-border execution of relevant national judgments, see R. ADAM, A. TIZZANO (eds.), *Manuale di diritto dell'Unione europea,* Turin, 2020, p. 578 ff., with specific reference to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (O.J. 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (O.J. 2009 L 81, p. 24), and

provision, legislative harmonization is selected as a tool fit to ensure same mutual trust between national legal systems in the same sector (criminal procedural law)[16]. Under same provision, mutual trust objectives are gained mainly by means of Union's legislative sources (directives), as such particularly suited for the harmonization of national legislations on mentioned topics [17].

Art. 83 TFEU, on its side, exemplifies more visibly a feasible disjunction, under some conditions, between the Union's competence and the national ones, with regards, on the one hand, to the definition of crimes with cross-border characters and effects (para. 1), and, on the other, the possibility for the Union as such to identify offenses in order to "*ensure the effective implementation of a Union policy*" in a sector that has been subjected to harmonization at same Union's level (para. 2). The Lisbon reforms have in fact foreseen the fundamental characters of a crime with "cross-border" effects, to be prosecuted as such across various Member States' borders (see art. 83 n. 1 TFEU) [18]. In addition, under art. 83 n. 2 TFEU, a criminal behaviour can fall under Union's competences if it's fit to harm specific Union's interests, when such interests are already pursued by means of a legislative tool of the same Union, aimed at harmonising national legislations on the same subject [19].

L. DANIELE, *Diritto del mercato unico europeo e dello spazio di libertà, sicurezza e giustizia,* Milan, 2021, pp. 509 ff. and 521 ff.

[16] Harmonization in this field concerns the criminal procedural law issues listed under letters a), b), d) (exchange of evidence among national judiciaries, protection of the main procedural rights of individuals, additional specific elements of criminal procedural law assessed under a Council's decision); the same paragraph, under c), refers to the need that same mutual trust aims be achieved through legislative approximation on the protection of victims of crime.

[17] For an overview, more recently, M. KATTUNEN, *Legitimizing European Criminal Law,* Turin, 2020, specifically at pp. 139 ff. and relevant literature.

[18] Under art. 83 n. 1 TFEU, the following legislative acts have been adopted at EU level: Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, O.J. L 101, 15.4.2011, 1; Directive 2011/92/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, O.J. L 335, 17.12.2011, 1; Directive 2013/40/EU of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, O.J. L 218, 14.8.2013, 8; Directive 2014/62/EU of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, O.J. L 151, 21.5.2014, 1; Directive 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, O.J. L 88, 31.3.2017, 6; Directive 2017/2103 of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of 'drug' and repealing Council Decision 2005/387/JHA, O.J. L 305, 21.11.2017, 12; Directive 2018/1673 of 23 October 2018 on combating money laundering by criminal law, O.J. L 284, 12.11.2018, 22; Directive 2019/713 of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, O.J. L 123, 10.5.2019, 18. Finally, it is wise to notice that Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (O.J. L 127, 29.4.2014, 39) was based on both Art. 82(2) and Art. 83(1) TFEU (L. DANIELE, *Diritto del mercato unico europeo e dello spazio di libertà, sicurezza e giustizia,* Milan, 2021, p. 514 ff.).

[19] Under art. 83 (2) TFUE, the following acts have been adopted: Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), O.J. L 173, 12.6.2014, p. 179 and Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, O.J. L 198, 28.7.2017, p. 29. Prior the Lisbon Treaty, while Directive 2008/99/EC on the

In this context, one should consider separately directive 2017/1371 of 5 July 2017 on the fight against fraud affecting the Union's financial interests by means of criminal law[20], bearing in mind the lack of any mention , in such legislative source, to art. 325 TFEU as the appropriate legal basis specifically aimed at the protection of the Union's financial interests (in fact, the same directive's proposal initially submitted by the European Commission was based on the same art. 325 TFEU) [21]: this was due to the strong position by national governments in the Council in support of keeping any Union's legislative act dealing with issues of criminal law connected to aims of judicial cooperation (such as those pursued under art. 83 TFEU), no matter if other objectives of the same act might have higher relevance in the light of more specific treaties' provisions (such as mentioned article 325 TFEU [22]). It can incidentally be noticed that, oddly enough, such a position seems (considering the many improvements in the meanwhile achieved on those matters) less progressive than that adopted "historically" by the European Court of Justice in the "Greek mays" case [23] : on that occasion, though amply before the Maastricht reforms, that Court clearly specified, on the one hand, the three main characters of national sanctions with criminal law character (effective, proportionate and dissuasive) to be applied for the achievement of European communities' objectives (protection of the EC financial interests, in this case); on the other hand, in that same decision, the Court established the so called "assimilation" criterion, according to which the financial interests of the Union are assimilated to national ones, and, therefore, Member States must protect such interests by the same means they would use to protect their own financial interests. Again, account taken of mentioned "Greek mays" decision, the lack of truly restrictive supranational obligations on the substance of related penalties (due both to the lack of such obligations in treaties' provisions and to the kind of the relevant legislative source, i.e., a directive) was surpassed through the establishment of the general features (be effective, proportionate, and dissuasive) of such sanctions, to be respected in any case at the national level. At the same time, one should not underrate the progress achieved in the relevant field, considering the wording and content of current articles 310 and 325 TFEU: this worsens our opinion on the position taken by national governments when they agreed to adopt Directive 2017/1371 based on a provision (art. 83 TFEU) not directly attached to the aims clearly pursued by art. 325 TFEU [24].

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protection of the environment through criminal law was entirely based on European Community Treaty (ECT) provision on EC environmental policy (art. 175), Directive 2009/123/EC on ship-source pollution and on the introduction of penalties for infringement was based on both Art. 175 ECT (on environmental policy) and Art. 80(2) ECT (dealing with EC transport policy), see abovementioned Court of justice 23 Oct. 2007, case C-440/05, *Commission v. Council,* ECLI:EU:C:2007:62.

[20] O.J. L 198, 28.7.2017, p. 29, mentioned above.

[21] COM (2012) 363 fin.

[22] On this, see P. CSONKA & O. LANDWEHL, *10 Years after Lisbon How "Lisbonised" Is the Substantive Criminal Law in the EU?,* in *Eurocrim*, 2019, n. 4, p. 261ff. Moreover, it might be interesting to observe that all mentioned legislative acts have not been opposed by means of the *emergency break* foreseen under art. 83 (3) TFEU (on this see also *infra*).

[23] Court of justice, 21 Sept. 1989, case 68/88, I-2965.

[24] In this context one should not forget that the so-called *Taricco saga* (see *infra* in this chapter) dealt with the implementation under the relevant Italian criminal legislation (to be understood under relevant Constitutional provisions such as art. 25 para. 2 It. Const.) of mentioned art. 325 TFEU (see first of all the order of the Italian Constitutional Court n. 24 of 2017 on which see doctrinal writings available at the web

In the context above, subsidiarity is a particularly relevant principle for the Union's action in this field [25]. Indeed, compared to the past, Lisbon treaty reforms, and in particular current article 83 TFEU, are aimed at disconnecting, even if always under an *ultima ratio* approach, Union's law finalities from the national ones, whenever such goals require, for the sake of effectiveness, recourse to criminal law tools. Then, under the Lisbon reforms, Art. 83, paragraph 2, TFEU, in particular, highlights how the possibility for the Union to adopt directives establishing minimum measures aimed at defining crimes and related sanctions arises only if this proves to be "essential" for the effective implementation of a Union policy in an area under legislative harmonization. In this case, a legislative act (directive) of the Union aimed at governing topics with a criminal law meaning can be adopted through the same legislative procedure (ordinary or special) followed to implement the legislative source aimed at harmonizing the relevant sector (e.g., the various kinds of "ecological" crimes listed in the directive 2008/99 [26], see *infra,* corresponding to issues of environmental protection pursued at the Union's level by means of *parallel* acts based on the relevant TFEU rules on environmental protection). Some interpretative problems (and an even political debate), however, might arise from the need to verify the truly "essential" character of a legal source dealing with criminal law matters in order to "effectively implement" a policy of the Union (although provided that such a policy has been already implemented by means of harmonization at Union's level) [27].

In order to further emphasize the sensitiveness of those issues under the Lisbon reforms, one should not forget the *emergency brake* and an *accelerator* mechanism foreseen under articles 82 para. 3, and 83 para. 3 TFEU. The high significance (both legal and institutional) of those subjects is proven in particular by the mentioned *emergency brake* – that is, the chance for a Member State to oppose a draft legislative act that would "affect fundamental aspects of its criminal justice system", submitting the question to the European Council – for which a specific declaration (n. 26) [28] has been adopted in order to allow the Council of the Union to intervene (for the aim of holding just "*a full discussion*") in cases where one Member State chooses to opt-out a directive to be adopted according to the mentioned TFEU's provisions. Under same declaration, any Member State has the chance to ask the Commission to examine the situation under art. 116 TFEU (that is to say, with the chance of adopting a directive aimed at eliminating distortions of

address www.giurcost.org). On this see among many others, L.S. ROSSI, *Come risolvere la questione Taricco senza far leva sull'art. 4 n. 2 TUE?*, in *SIDI Blog*, www.sidiblog.org, 2017).

[25] European Commission, '*Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*', COM (2011) 573 fin.

[26] Of 6 December 2008, OJ L 328, 6.12.2008, p. 28.

[27] In general, L. SALAZAR, *Commentary to articles 82, 83 and 84 TFEU,* in C. CURTI GIALDINO (ed.), *Codice dell'Unione europea, operativo,* 2012, p. 918 ff., S. PEERS, *Mission accomplished. EU Justice and Home Affairs Law after the Treaty of Lisbon,* in *CMLR*, 2013, p. 661, C. AMALFITANO, *Commentary to articles 82, 83 TFEU,* in A. Tizzano (ed.), *Trattati dell'Unione europea,* Milan, 2014, p. 870 ff.

[28] Consolidated version of the Treaty on the Functioning of the European Union, "*A. Declarations concerning provisions of the treaties. 26. Declaration on non-participation by a Member State in a measure based on Title V of Part Three of the Treaty on the Functioning of the European Union*", O.J. C 202, 7 June 2016, p. 346.

competition created by the differences among member states' legislative frameworks[29]). Moreover, the same art. 83 para. 3 TFEU allows nine member States, notwithstanding and in the light of the activation of the mentioned emergency break, to enact a strengthened cooperation proceeding in accordance with art. 20 TEU and 329, para. 1, TFEU [30].

It is also wise to recall that the scope of Union's action on criminal law has always been different from that of other areas of Union's legislation. Leaving aside the issue of Member States' duty to transpose in their own legislation a directive, this kind of source, to which the Union makes particular recourse in the area of criminal law, is fit to force the member states to achieve the same directive's goals. Another question relates to the need to assess which, among the provisions of a Union legislative act (directive), could have direct effects in Member States' legal systems, for example in cases where the provision (or the provisions) of the directive can grant or improving individual rights or interests not foreseen or not protected under a corresponding national legislation[31]. On the contrary, the provisions of a Union's directive aimed at improving cooperation between Member States on criminal law cannot be invoked by national authorities or the judiciary to limit individual rights [32].

Under another perspective, the *Pupino* case[33] has been particularly clear in indicating that one of the main Union legislation's goals in the criminal law area is to increase and deepening, as far as possible, the protection of victims of crimes. In the Union Court's view, although the Union did not have exclusive competence in the relevant field, priority should have been conferred to the framework decision's provisions on the position of victims in criminal proceedings: to this end, it resorted to the "sincere cooperation" criterion, currently foreseen at art 4 para. 3 TEU[34].

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[29] On this provision, see *ex multis* A. ARENA, *Commentary to art. 116,* in A. Tizzano (ed.), *Trattati dell'Unione europea,* Milan, 2014, at p. 1274.

[30] On this tool (strengthened cooperation), in general, M. CONDINANZI, *L'Unione europea tra integrazione e differenziazione,* in *Federalismi*, n. 5, 2015.

[31] Court of justice, 19 November 1991, *Francovich* joined cases C-6/90 and C-9/90, I-5357, see *ex multis* P. DE PASQUALE & F. FERRARO (eds.), *G. TESAURO, Manuale di diritto dell'Unione europea,* Napoli, 2021, p. 256.

[32] Court of justice 11 June 1987, case 14/86, *Pretore di Salò,* 2545, Court of justice 8 Oct. 1986, case 80/86, *Kolpinghuis Nijmegen BV,* 3969, P. CRAIG, G. DE BURCA, *EU Law. Text, cases and materials,* Oxford, 2010, p. 85. J RIDEAU, *Droit Institutionnel de l'Union Européenne,* Paris, 2010, p. 197, E. CANNIZZARO, *Il diritto dell'integrazione europea,* Turin, 2020, p. 141, R. ADAM & A. TIZZANO, *Manuale di diritto dell'Unione europea,* Turin, 2021, p. 182, U. VILLANI, *Istituzioni di diritto dell'Unione europea,* Bari, 2020, p. 313.

[33] Court of justice 16 June 2005, case C-105/03, I-5285. C. LEBECK, *Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino*, in *German Law Journal,* 2007, p. 501 ff., E. HERLIN-KARNELL, *In the Wake of Pupino, Advocaten voor de Wereld and Dell'Orto,* in *German Law Journal*, 2007, p. 1147 ff.

[34] In fact, in accordance to that principle (previously foreseen at art. 5 EEC Treaty), the Court of Justice has frequently enhanced the content and the effects of obligations that for same EU Member States result from relevant EU law sources, especially when same content and same effects cannot be clearly inferred from related provisions of that sources. In the Court's words (in the *Pupino* judgment above): "*It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation - requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under European Union law - were not binding also in the area of police and*

In addition to the general principles of EU law, such as mentioned duty of sincere cooperation and subsidiarity principle, judicial cooperation in civil and criminal matters raises many questions relating to the protection of human rights, in particular when it comes considering the position of those accused or convicted of a crime[35]. Indeed, the main purpose of the European Arrest Warrant (EAW)[36] is that of improving an effective prosecution through member states borders and inside the Union of the crimes listed in the same Framework decision establishing the EAW itself. The CJEU has acknowledged the chance for the Union's law to restrict some prerogatives enjoyed by individuals under national legislation, if such a limitation is aimed at improving the cooperation among judiciaries as it is pursued by the EAW itself[37]. In that case, the CJEU expressly examined the compatibility of the EAW system with fundamental rights, particularly in the light of the right to an effective judicial remedy and the right to fair trial set out in Articles 47 and 48(2) of the Charter of fundamental rights of the European Union (CFREU). In the CJEU's view, the right of an accused individual to appear in person at his/her trial is not absolute but, to some extent, can be disregarded. The Court further stated that the

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judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions". In conclusion, though concerning a specific source of EU law aimed at protecting particularly fragile individuals (such as the victims of crimes), the cited case gives us a sufficiently clear example of the role played by the Union's Court on those issues, explaining the juridical path that, though under some conditions, leads at giving precedence to the Union's aims and legislation over the national ones. For other similar cases, see Court of justice decisions of 3 May 2007, *Advocaten voor de Wereld VZW,* case C-303/05, ECLI:EU:C:2007:26; 28 June 2007*, Dell'Orto*, case C-467/05, ECLI:EU:C:2007:395; 12 July 2012, *Giovanardi,* case C-79/11, ECLI:EU:C:2012:448 and, more recently, of 16 July 2020, *Presidenza del Consiglio dei ministri (Italian government) v. BV,* case C-129/19, ECLI:EU:C:2020:566.

[35] In this context, one should not forget abovementioned *Taricco saga,* dealing with implementation of art. 325 TFEU on the protection of the Union's financial interests, Court of justice 8 September 2015, case C-105/14, *Taricco,* ECLI:EU:C:2015:555 and subsequent *revirement* under Court of justice, 5 December 2017, case C-42/17*, M.A.S. e M.B,* ECLI:EU:C:2017:936): *ex multis* C. AMALFITANO, *Da un'impunità di fatto ad un'imprescrittibilità di fatto della frode in materia di imposta sul valore aggiunto?*, in *Quaderni di SIDI Blog*, 2, 2015 p. 561; P. MORI, *Taricco II o del primato della Carta dei diritti fondamentali e delle tradizioni costituzionali comuni agli Stati membri,* in *DUE*, Osservatorio*,* Dec. 2017; R. MASTROIANNI, *La Corte costituzionale si rivolge alla Corte di giustizia in tema di "controlimiti": è vero dialogo?* in Federalismi*,* 2017, p. 2; L. GRADONI, *Il dialogo fra corti, per finta,* in *Quaderni SIDIBlog,* 2018, p. 5; D. GALLO, *La primazia del primato sull'efficacia (diretta?) nel diritto UE nella vicenda Taricco,* in *Quaderni SIDIBlog,* 2018, p. 48.

[36] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (O.J. 2002 L 190, p. 1).

[37] Court of justice 26 February 2013, C-399/11, *Melloni,* ECLI:EU:C:2013:107; P. MORI, *Autonomia e primato della Carta dei diritti dell'Unione europea,* in G. Nesi & P. Gargiulo (eds.), *Luigi Ferrari Bravo. Il diritto internazionale come professione,* 2015, p. 169 ff. The Court of justice clarified that "*once a person convicted in absentia was aware, in due time, of the scheduled trial and was informed that a decision could be handed down if he did not appear for the trial or, being aware of the scheduled trial, gave a mandate to a legal counsellor to defend him at the trial, the executing judicial authority is required to surrender that person, with the result that it cannot make that surrender subject to there being an opportunity for a retrial of the case at which he is present in the issuing Member State*". Under Italian procedural law it is impossible to appeal against judgments *in absentia*: consequently, Mr. Melloni, who should have been rendered by the Spanish judiciaries to the Italian ones via an EAW adopted by the Spanish authorities, requested that the execution of the EAW be made conditional upon Italy's guaranteeing the possibility of appealing against that judgment.

objective of the Framework Decision on judgments *in absentia* was to enhance procedural rights whilst improving mutual recognition of judicial decisions between Member States. The main criticism on this decision lays on the fact that the Court compared some general requirements of Union's institutional framework – such as mutual trust between different national procedural systems and mutual recognition of decisions between different Member States' authorities/judiciaries (inspiring as such the EAW mechanism) – with some core procedural rights enshrined in the CFREU [38]. This rests among one of the crucial and most controversial aspects of current Union's law and integration process, also in the perspective of strengthening environmental protection in the Union's legal system: indeed, it should be envisaged the chance to include an environmental crime among criminal acts for which all existing procedural means such as the EAW shall be of essential support for an effective prosecution of the same crimes across the Union[39].

3. Criminal law liability for infringement of environmental standards. The approach under directive 2008/99

Directive 2008/99 requires that some common minimum standards be respected in the Union with the view of increasing effectiveness of investigations and prosecution of relevant crimes across the Member States: for this, the directive aims at improving mutual assistance and strengthening police and judicial cooperation between Member States.

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[38] This aspect has been re-examined and clarified further by the same Court in Luxembourg in a subsequent case, when, specifically on the *mutual trust* principle, the Court had the chance to clarify what follows: "*... the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained* (…)*",* Opinion 2/13 of 18 December 2014, *accession of the EU to the ECHR*, ECLI:EU:C:2014:2454, at 191. Court of justice 15 October 2019, C-128/18, *Dorobantu,* ECLI:EU:C:2019:857 has dealt more in detail with the conditions allowing a review of a decision enacting the EAW across different EU member States (*ex multis,* N. LAZZERINI, *Gli obblighi in materia di protezione dei diritti fondamentali come limite all'esecuzione del mandato di arresto europeo: la sentenza Aranyosi e Căldăraru,* in *DUDI*, 2016, p. 445 ff.; S. MONTALDO, *A New Crack in the Wall of Mutual Recognition and Mutual Trust: Ne Bis in Idem and the Notion of Final Decision Determining the Merits of the Case*, in *EP*, 2016, p. 1183 ff.; V. CARLINO, G. MILANI, *To trust or not to trust? Fiducia e diritti fondamentali in tema di mandato d'arresto europeo e sistema comune di asilo,* in *Freedom Security and Justice European Legal Studies*, 2019, p. 64 ff.

[39] On mutual trust in the AFSJ (inspired on the mutual recognition principle, as a general device of the internal market, e.g., Court of justice, 20 February 1979, C-120/78, *Rewe-Zentral,* 649), see *ex multis* C. AMALFITANO, *Mandato d'arresto europeo: reciproco riconoscimento vs. diritti fondamentali? Note a margine delle sentenze Radu e Melloni della Corte di giustizia,* in *Diritto penale contemporaneo*, (dirittopenaleuomo.org); K. LENAERTS, *The Principle of Mutual Recognition in the Area of freedom, Security and Justice,* il Diritto dell'Unione europea, 2015, p. 525 ff.; P. MENGOZZI, *L'applicazione del principio di mutua fiducia e il suo bilanciamento con il rispetto dei diritti fondamentali in relazione allo spazio di libertà, sicurezza e giustizia,* in *Freedom Security and Justice European Legal Studies,* 2017, 2, p. 1 ff.; E. PISTOIA, *Lo status del principio di mutua fiducia nell'ordinamento dell'Unione secondo la giurisprudenza della Corte di giustizia. Qual è l'intruso,* in *Freedom Security and Justice European Legal Studies*, 2017, 3, p. 26 ff.; L. PANELLA, *Mandato di arresto europeo e protezione dei diritti umani: problemi irrisolti e "incoraggianti" sviluppi giurisprudenziali,* in *Freedom Security and Justice European Legal Studies,* 2017, 3 p. 5; F. MAIANI, A. MIGLIONICO, *One principle to rule them all? Anatomy of mutual trust in the law of the Area of Freedom, Security and Justice,* in *CMLR*, 2020, p. 7; S.A. BLOK, T. VAN DEN BRINK, *The Impact on National Sovereignty of Mutual Recognition in the AFSJ. Case-Study of the European Arrest Warrant,* in *German Law Review*, 2021, p. 45; L.S. ROSSI, *Fiducia reciproca e mandato d'arresto europeo. Il "salto nel buio e la rete di protezione,* in *Freedom Security and Justice European Legal Studies,* 2021, p. 1.

To achieve these goals, the Directive moves along two lines: on the one hand, it specifies a series of "illicit" conducts to be penalized and, on the other, it presents legal persons' "criminal liability". Therefore, the directive provides a criminal liability as such, leaving no room for choice to the recipient States, regardless of the criminal law system where the same Directive should be transposed and implemented. In this perspective, the problem has arisen of compatibility between the criminal liability of legal persons and the criminal systems – such as the Italian one – that follow the *societas delinquere non potest* principle (e.g., the Italian Constitution under art. 27 first paragraph).

In the light of above general criteria, with the view that conducts pursued by the directive are apt to integrate a criminal offense, under current directive 2008/99, the coexistence of the following three main elements is required: ***a)*** the conduct infringed Union's legislation referred to in Annexes A[40] and B[41] of the same directive; ***b)*** the

[40] **Annex A:** *a)* discharge, emission or introduction of a quantity of materials or ionizing 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)* collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; *c)* shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked; *d)* operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; *e)* production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; *f)* 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; *h)* any conduct which causes the significant deterioration of a habitat within a protected site; *i)* production, importation, exportation, placing on the market or use of ozone-depleting substance.

[41] **Annex B** lists EU legislation adopted based on the Euratom Treaty, the violation of which constitutes an unlawful act pursuant to mentioned Article 2, letter a), point ii). Euratom, formerly EAEC, also assumes exclusive competence, with respect to the Member States, regarding controls concerning the prohibition of diverting the use of nuclear materials from the civil purposes to which they are intended by the Member States themselves. Rules on nuclear safety are contained in Chapter 3 of Title II of the Euratom Treaty. Articles 30 to 39 of this Treaty, in particular, define various concepts largely transferred to a detailed discipline: among these, Art. 30 Euratom on "minimum standards" (basic standards) requires the presence of maximum permitted doses compatible with an adequate level of wholesomeness, the maximum permitted levels of exposure to contamination, the fundamental principles concerning the health of workers and the community. Directive 2013/59/Euratom of 5 December 2013 establishing basic safety standards relating to protection against the dangers deriving from exposure to ionizing radiation, and repealing Directives 89/618 / Euratom, 90/641 / Euratom, 96/29 / Euratom, 97/43/ Euratom and 2003/122 / Euratom (OJEU of 17 January 2014, L 13). As regards the regulations concerning the ban on the marketing of radioactive products, see Reg. 3954/87 (which established the maximum admissible levels of radioactivity for food products and for animal feeds in case of abnormal levels of radioactivity following a nuclear accident or in

psychological element is necessary for the completion of the crime, as such corresponding to a wilful misconduct or to negligence in the form of gross negligence; ***c)*** the acts must cause damage or determine a concrete danger.

The directive is consequently not addressed to "mere danger" crimes, but to crimes of concrete danger or damage, with the punishment extended (pursuant to article 4 of current Directive's wording) to anyone who takes part to the commission of that crime by way of instigation, aiding and abetting, and attempt. Under art. 6 of current directive's content, legal entities/corporations can be held responsible for the unlawful conduct (as set out in the directive) committed "to their advantage" by individuals who hold top positions within the same legal person, and, more precisely: "by any person who holds a prominent position within the legal person, individually or as part of an organ of the legal person, by virtue of: *a)* the power of representation of the legal person, *b)* the power to take decisions on behalf of the legal person, or *c)* the power to exercise control within the legal person" [42].

Following the Directive's approach and reasoning, a responsibility (to which a Member State must attach specific criminal law significance) occurs also when there is a lack of surveillance or control by those indicated above, such as to allow the commission of a crime by a person put under authority. Therefore, a liability of an "active" kind can be affirmed for individuals in top positions, but the directive also foresees a "non-active" causality arising where the legal entity achieves an advantage from the criminal act indicated by the directive. Obviously, the legal person's responsibility does not prevent criminal action against individuals who may take part in many ways in the commission of the crime.

The core provision of the Directive rests in the general requirement (art. 5) that measures at the national level be effective, proportionate and dissuasive for the aim of fighting the different kinds of crimes listed therein. It must be firstly highlighted the lack, in the Union system, of any reference to the social aim of the criminal legislation as such, that is to say, the general criminal legislation's aim of "educating" criminals in the attempt of granting their social reintegration (art. 27 para. 3 Italian Constitution). Secondly, the lack of any specification (and the lack of any attribution of competence to the Union's institutions for that aim) on the true character of the related penalties (e.g., by indicating a minimum level of the highest penalty) was, in the 2008 directive's framework , based on the need to preserve a principle of *coherence* between the several legislations of EU member States, beside the still less developed institutional framework surrounding the Union's competence in the relevant field. It should not be forgotten, anyway, that the wide terminology employed in the same directive's current edition is consistent with the

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any other case of radioactive emergency, O.J, 30 December 1987, L 371), see Court of justice, case C-70/88, *European Parliament v. Council*, I-4529, s. c. "*Chernobyl II"*.

[42] Under art. 2 of the directive a legal person is "any legal entity possessing this status under the applicable national law, with the exception of States or public institutions exercising public powers and public international organizations". As is known, the definition of a "company" under Union's law on the right of establishment (art. 49 TFEU) refers to legislation of the State where such entities have been firstly established (see under art. 54 TFEU), though conceding the chance for legal entities to create secondary establishment in another Union's member State provided that in such a case the same legal entity has a permanent presence in that second State and that it pursues "genuine economic activity" there ("secondary" establishment criterion, see Court of justice 9 March 1999, C-212/97, *Centros,* I-1459).

general approach followed by the Union on criminal law matters ever since the Maastricht reforms. In fact, as already mentioned, the legal and institutional framework preceding the Lisbon Treaty did not favour the possibility for the Union to interfere with national competences in order to determine the sanctions and the related procedural means aimed at preventing and at condemning relevant environmental crimes [43].

Still, even in the same new legislative framework after the Lisbon's reforms, an act from the Union must be considered as "required" (see art. 82 para. 2 TFEU) or "essential" (art. 83 para. 2 TFEU), alternatively, when such an act is aimed at "aiding" mutual recognition of decisions or police cooperation for crimes with a trans-boundary dimension, and where the need arises to confer full efficacy to an already existing Union's legislation (such as that related to the protection of the environment) by means of legislative harmonization at the supranational level. Some relevant studies on the implementation of directive 2008/99 at the national level have however blamed the relatively strict margin of manoeuvre for the Union in this area. It has been proved, inter alia, that, though implementing the same directive, Member States keep significant differences among them, due to the "*undefined legal terms included in the definitions of the criminal offences, combined with the leeway given to Member States when it comes to the liability of legal persons"*[44]. For this reason, the same Commission has stressed the need for a common understanding of what a criminal conduct means for the sake of the same directive's aims and with the view of improving judicial cooperation across the Union.

Also, several general principles (e.g., precautionary principle and polluter pays principle, so-called PPP) are well established and shared under both international and Union law. In some cases, a debate between the General Court of the Union and the same CJEU has proved how such criteria could improve environmental protection at the level of the same Union: thereby, the need for a balance between the Aarhus Convention's provisions[45] and the EU Regulation 1367/2006 [46] was raised by the Court of first instance (now, General Court of the Union) with reference to the possibility of reading art. 10 of the Regulation (restricting the review of individual decisions concerning the right for associations to access environmental information) in the light of broader art. 9 para. 3 of the Convention [47]. Later, the Court of Justice of the EU rejected such broader reading

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[43] C. AMALFITANO, *Commentary to article 83 TFEU,* in A. Tizzano (ed.), *Trattati dell'Unione europea,* 2014, in part. under p. 906.

[44] European Commission Staff Working Document of 28.10.2020, SEC (2020) 373 final – SWD (2020) 260 final, at page 43.

[45] in part., on Article 9(3) according to which "*(...) members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"*. Convention of 25 June 1998, on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters "(ECE/CEP/43, 25 June 1998, United Nations Economic Commission for Europe).

[46] Regulation (EC) no. 1367/2006 of the European Parliament and of the Council, of 6 September 2006, on the application to Community institutions and bodies of the provisions of the Aarhus Convention on access to information, public participation in decision-making processes and access to justice in environmental matters (O.J. 25 September 2006 n. L 264) aimed at regulating the three pillars of the Aarhus Convention (access to information, participation in decisions-making, access to justice).

[47] General court 14 July 2012, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v. European Commission*, T-396/09, ECLI:EU:T:2012:30.

from the lower judge[48]. However, against such a defensive reading of the CJEU, the Aarhus Convention Compliance Committee (ACCC) has clarified that the Union legislative framework must comply with the relevant international law obligations stemming from the Aahrus rules [49]. This proves, on the one hand, an increased awareness and readiness at both the international and the Union levels to improve environmental protection under mentioned general standards, and, on the other hand, the need to carefully consider if a stronger defence of such standards by means of, e.g., a strict liability, or even a true criminal liability, under the same Union's law would meet enough support at the level of each single government and political actor involved in the Union's decision-making process.

Even if the Union might make some progress, also thanks to the outcome of the political debate in the European Parliament (EP), the following specificities of the current Union competence for the definition of environmental crime should be considered, in accordance with the relevant treaty's provisions: ***a)*** under article 83 TFEU, the EP and the Council are put on an equal footing according to the legislative procedure applicable in this case, even though, under para. 2 of the same provision, the relevant act can be adopted also with the same legislative procedure (ordinary or special) followed to adopt the related harmonized act for which a criminal law tool at the Union's level would be required[50]: in both circumstances, as a general criterion, relevant views from

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[48] Court of justice 13 January 2015, cases C-401/12 P, C-402/12 P, C-403/12, *Council and Others v. Vereniging Milieudefensie and Others*, ECLI:EU:C:2015, stating that article 9 Aarhus Convention *"(…) does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals and therefore does not meet those conditions. It follows that that provision cannot be relied on before the EU judicature for the purposes of assessing the legality of [Article 10(1)] of Regulation No 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies";* see R. MASTROIANNI, *I limiti all'accesso del giudice dell'Unione per l'impugnazione di atti confliggenti con accordi internazionali: una nuova "fortress Europe"?,* in A. Tizzano (ed.), *Verso i 60 anni dai trattati di Roma. Stato e prospettive dell'Unione europea,* Torino, 2016, p. 179 ff.; N. NOTARO & M. PAGANO, *The Interplay of International and EU Environmental Law,* in I. Govaere & S. Garben (eds.), *The Interface between EU and International Law,* Oxford, 2019, p. 151 ff.

[49] See UN Economic and Social Council, Economic Commission for Europe, ECE/MP. PP/2/Add.8 2 April 2004, Decision I/7 Review of compliance adopted at the first meeting of the Parties held in Lucca, Italy, on 21-23 October 2002 establishing the ACCC. More recently, see *Findings and recommendations of the compliance committee with regard to communication ACCC/C/2008/32 concerning compliance by the European Union,* adopted by the ACCC on 17 March 2017, ACCC/C/2008/32 (EU). All data and documents available here: Compliance Committee | UNECE. See also the Council of the European Union decision (EU) 2017/1346 of 17 July 2017, *on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention as regards compliance case ACCC/C/2008/32,* O.J. L 186 of 19 July 2017, p. 15.

[50] On this, it is wise to recall that art. 83 n .2 TFEU is drafted differently from art. 83 n.1 TFEU. While this last provision makes explicit reference to the ordinary legislative procedure, art. 83 para. 2 TFEU applies a "parallel" criterion in the light of which the legislative act (directive) will be adopted following the same legislative procedure (ordinary or special) followed for the adoption of the relevant act that reached the harmonization of the relevant substantial sector for which a criminal legislation is required. Considering the wide range of acts and areas of environmental protection covered by the 2008/99 directive, it seems quite reasonable and institutional caring the choice from the Commission of following the ordinary legislative procedure in this case (and considering how the same directive, in its current edition, had been adopted under the "co-decision" procedure, corresponding to the current ordinary legislative procedure, see articles 251 para. 1 ECT and art. 294 TFEU).

governments, expressed in the Council, will have a definite function in the legislative proceeding; ***b)*** the Council, in the scenario under indent above, will adopt its decisions under the majority voting criterion [51] : this is obviously of some support to a shift proceeding in the same Council; ***c)*** same art. 83 TFEU foresees the chance for a member State of the Union to make recourse to an *emergency break*: in a worst-case scenario, this might lead to a substantial stalemate and negative outcome of the legislative proceeding as a whole. Under same art. 83 TFEU it is anyway foreseen the chance for some member States to initiate a strengthened cooperation on the topics of same legislative act that had not been approved in the Council: in this case, as already mentioned, if at least nine member states are in favor, the same cooperation might be considered as automatically authorized [52].

It should then be accurately pondered if at least the mentioned number of national governments (and related political representatives in the EP) would be ready to make recourse to a strengthened cooperation whenever an emergency brake proceeding had been successfully activated. For this, a selection should be made between, on one hand, a Union's act on *ecocide* inspired to a broader standard – such as the one indicated by the same International Court of Justice Advisory Opinion on the *Legality of The Use by a State of Nuclear Weapons* [53] – and, on the other hand, a Union's criminal act inspired to a strict liability criterion: the choice essentially depends on several factors, including the recent suggestions from the Commission supporting a review of same directive 2008/99 with the aim of reaching a common understanding on what a crime for environmental abuses (different from ecocide?) is or should be at the same Union level [54].

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[51] Indeed, it seems appropriate to underline that, in particular on environmental legislation, pursuant to art. 192 para. 1 TFEU, the ordinary legislative procedure is *lex generalis*, while, pursuant to art. 192 para. 2 TFEU, the special legislative procedure shall apply to some specific aspects of environmental policies (e.g., environmental issues involving energy policy objectives). This implies that, for the cases falling under this paragraph, the EP must be involved in order to express solely its opinion on the proposed legislative act previously adopted by the Council. However, as already mentioned above, the choice from the Commission to apply, in the case of the directive on environmental crimes, the "ordinary" legislative procedure is consistent also with the fact that both the current directive 2008/99 and the same new proposal under discussion, are aimed at qualifying as crimes several kinds of acts, with a diversified number of corresponding purposes to be pursued.

[52] M. CONDINANZI, *L'Unione europea tra integrazione e differenziazione,* in *Federalismi*, 5, 2015, p. 18 ff.

[53] Advisory Opinion of 8 July 1996, *Legality of The Use by a State of Nuclear Weapons,* ICJ Reports 1996 when the ICJ affirmed a triple obligation for the State: 1) a *general obligation* to protect the environment against "widespread, long-term and severe" environmental damages, 2) a general ban to make recourse to methods and means of warfare apt at causing same abovementioned kind of damages, 3) a general ban to make recourse to same methods under previous point 2 by way of reprisals. See also ICJ Judgment of 25 September 1997, ICJ Reports 1997 s.c. *Gabčíkovo-Nagymaros* case. See also Judgment of 20 April 2010, *Pulp Mills on the River Uruguay,* ICJ Rep. 2010 p. 14. For some, the latter decision lacks consideration of pre-emptive aims pursued under the precautionary principle, particularly relevant in cases of envi"ronmental damages with trans-boundary character. For an overview on those and other relevant cases (with a specific focus on the environmental protection issues), see F. FRANCIONI, *Realism, Utopia and the Future of International Environmental Law,* European University Institute *Working Paper*, 11, 2012, F. FRANCIONI, C. BAKKER, *The Evolution of the Global Environmental System. Trends and Prospects in the EU and the US,* in F. Francioni & C. Bakker (eds.), *The EU, the US and the Global Climate Governance,* New York, 2016, pp. 15 and 31.

[54] On this, let us refer to A. RIZZO, *In search of Ecocide under EU Law. The international context and EU law perspectives*, in *Freedom Security and Justice European Legal Studies*, 2021, p. 163.

While the reasoning above is aimed at grounding the still vague terminology employed in the current directive 2008/99 and with the view to assessing the relevant penalties' characters, it must be reckoned the fairly limited room left to the supranational level for the aim of compelling the Member States in an area (criminal law) that is apt as such to restrict some basic individual rights now affirmed in the same Charter of the fundamental rights of the European Union under the "Justice" chapter (e.g., Art. 49 dealing with legality and proportionality of crimes and penalties). This is among the reasons why in 2012 a group of experts [55] has been engaged to monitor the implementation via criminal law of some relevant Union's objectives, including, *inter alia,* the protection of the Union's financial interests (e.g., art. 325 TFEU): in this communication the Commission has acknowledged that the recourse to criminal law tools for the achievement of some relevant Union law objectives is not always required. Reference to the mentioned characters of the penalties foreseen under EU legislation ("effective, proportionate and dissuasive", beside the need to comply with general principles of proportionality and subsidiarity) is now a standard clause in the area of Union's criminal law.

4. The "new" approach under the Commission's proposal 2021

The deadline for transposition of the Environmental Crime Directive into each Union member state's legal system was fixed on December 26, 2010, in order that each of those States could align its own legislative framework account taken of any potential or effective additional constraint stemming from same directive. In the meanwhile, some member states, such as Germany, had already adopted (before the same entry into force of 2008 directive) federal legislation amending their criminal laws with an environmental protection meaning[56]. However, again with specific regard to Germany, Directive 2008/99 was implemented in 2011. It seems wise to remind that, at that time, a lively debate concerned the entry into force of the Lisbon Treaty, with specific reference, inter alia, to judicial cooperation in criminal matters, and in the light of the restrictive German Constitutional Court reading on the Union competence in that field [57].

On the concrete effects of the 2008 directive, one should not underestimate how the concept of 'waste' in Articles 3(b) and 3(c) of current text comprises shipment of several kinds of wastes, but Article 3(c) specifically addresses import and export of particularly hazardous wastes only[58], giving rise to a well-defined and specific kind of criminal

[55] Commission Decision of 21 February 2012 on setting up the expert group on EU criminal policy, O.J. C 53, of 23.2.2012, p. 9.

[56] German Criminal Code (Strafrechtsanderungsgesetz (StSG)) of July 1980, reformed by the 31 StAG of 1 November 1994.

[57] This is the well-known "*Lissabon-Urteil*", BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 -, paras. 1-421, https://www.bundesverfassungsgericht.de/e/es20090630_2bve000208en.html , see in part. under para. 252 ff. ("*Particularly sensitive for the ability of a constitutional State to democratically shape itself are decisions on substantive and formal criminal law …"*). On this, see, with further details, S. SINA, *Fighting Environmental Crime in Germany: A Country Report*, Study in the framework of the EFFACE research project, Berlin: Ecologic Institute, 2015 ff.

[58] Indeed, this provision refers to art. 2 (35) of regulation 1013/2006 on shipment of wastes (O.J., L 190 of 12.7.2006, p. 1), relating specifically to "illegal shipment" as particularly serious cases of shipment of related wastes.

behavior. This pre-defined approach at the Union's level, though making recourse to a broad wording, has met an extremely differentiated implementation at the Member states' levels. As an example, in spite of the more strict requirement from the Directive on the need to have a detailed list of "waste management" activities potentially entailing crimes (in fact, under art. 3 b of the directive, reference should be made to several kinds of criminal acts, that is to say, collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care disposal sites, and including action taken as a dealer or broker), the Austrian legislator preferred recourse to a wider wording such as 'waste collector' as an all-encompassing concept potentially including more specific actions like those put forward by, e.g., "a dealer or a broker" [59].

Another stark example of the diversity in approaches at the national levels in implementing the 2008 directive is also given by the manner into which, e.g., Italy has implemented fight to crimes indicated under art. 3(f) (crimes perpetrated by means of hunting activities) with very low fines (not more than 4000 euros) or maximum prison sentence (no higher than 6 months, while trafficking in wild or protected animal species under art. 3 g) of current 2008/99 Directive should be sanctioned with a maxim level sanction of 200.000 Euros and a maximum imprisonment sanction of 2 years[60]).

Even more evidently, discrepancies between Union's Member States relate to legal persons' (companies) criminal liability. In this context, apart from more general already mentioned issues under the relevant Italian constitutional rules confirming the "personal" character of criminal law liability (as such not attributable to legal entities), some have stressed the inconsistencies related to the need that a crime, in order to be attributable to a legal person, should be committed wilfully (and directly) for the benefit of that same legal entity, while most criminal acts in the relevant area (protection of the environment) are committed at fault or under a negligent conduct, mainly when concerning corporations' activities[61]. Moreover, under current Italian criminal code following the wide reforms under legislative decree n. 68 of 2015[62], some have raised criticisms on the reference, in that source, to the overly indistinct term "*abusività*", concerning as such the relevant criminal behaviour's feature: according to this doctrinal view, such wording is inconsistent with the fact that, under Italian criminal law, environmental crimes are meant as "harm" crimes, that is to say, crimes that must be considered with reference to their

[59] R. PEREIRA, *Towards Effective Implementation of the EU Environmental Crime Directive? The Case of Illegal Waste Management and Trafficking Offences*, Review of European, Comparative and International Environmental Law, 2017, pp. 147-162, open access document downloaded from ORCA (Online Research@Cardiff), Cardiff University's institutional repository: http://orca.cf.ac.uk/101755/ .

[60] European Commission SWD (2020) 259 fin., 28.10.2020, tables 7 and 8 at pp. 31, 32.

[61] L. SIRACUSA, *L'attuazione della direttiva europea sulla tutela dell'ambiente tramite il diritto penale*, Microsoft Word - Siracusa_intervento conv_ROMA_AIDP_It_2011 (dirittopenaleuomo.org).

[62] For the relevant Italian legislation, see art. 25-*undecies* legislative decree 7 July 2011, n. 121, reforming previous legislative decree 8 June 2001 n. 231 and transposing mentioned Directive 2008/99. Through subsequent legislative decree n. 68 of 2015, several Italian criminal code provisions have been inserted such as, inter alia, 452 bis (environmental harm), art. 452 quater (environmental disaster), 452 sexies (association for environmental criminal intent or behaviours, so called *ecomafie*), 452 octies (trafficking of radioactive materials.

concrete negative outcomes on the related goods to be protected, while abusiveness refers to a much wider character of one criminal act [63].

Under another point of view, according to the Italian legislative decree 8 June 2001 n. 231 as reformed, approach of Italy specifically to the legal persons' criminal liability for environmental crimes is inspired to the same precautionary criterion internationally accepted in order to bring interested stakeholders (and potential infringers of same relevant legislation on environmental requirements for enterprises) under compliance with these requirements: for this reason, one should not underestimate the standardisation of best practices specifically referred to preventive aims (Best Available Techniques, *BAT* tools) applicable in the private sector, such as the ISO 14001 [64].

In this context, the European Parliament has more recently stressed the high relevance of legal persons in the context of the fight against environmental crimes: in particular, the EP has emphasized the need that legislative tools on environmental protection in the broadest sense be equipped with the view of covering the several kinds of responsibilities potentially or in fact pending on corporations. Because of this, the EP recalls, inter alia, that "(…) *the Environmental liability directive (ELD) might be aligned with civil liability legislation for corporate boards in cases where a causal link can be established between a corporate board's action or failure to act and environmental damage as defined in the same ELD, including where such damage results from polluting activities carried out to maximise the profit of the company and increase the bonuses of its member*"[65].

The too wide margin left by the 2008 directive was also emphasized by the lack of any monitoring activity by means of infringement proceedings enacted by the European Commission. However, this has inevitably led to recent criticisms by the Brussels executive on the aforementioned strong fragmentation in the implementation of the directive at national level. In the same new directive proposal, the Commission (see at page 6) recalls how organised crime had increased its criminal behaviours specifically in the area of illegal trafficking of waste. The same Commission also submits several references to most recent studies and reports, including some from the Court of auditors of the Union on the use of CAP (common agricultural policy) funds in the light of sustainable water use in agriculture, proving the still poor effectiveness of

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[63] While the parliamentary works in Italy used a more precise, but less concise, wording, e.g., "*violazione di disposizioni legislative, regolamentari o amministrative specificamente poste a tutela dell'ambiente e la cui inosservanza costituisce di per sé illecito amministrativo o penale*" (transl. *violation of laws, regulations or administrative provisions specifically aimed at protecting the environment and failure to comply with which constitutes in itself an administrative or criminal offense).* On those specific critical remarks, C. MELZI D'ERIL, *L'inquinamento ambientale a tre anni dall'entrata in vigore,* in *Diritto penale contemporaneo*, 2018 pp. 35-56 in part. at p. 42.

[64] E. BIRRITTERI, *La responsabilità da reati ambientali degli enti collettivi: profili dogmatici e tecniche di prevenzione,* in *Diritto penale contemporaneo*, n. 1, 2021, pp. 290 ff., (see in part. at p. 303).

[65] P9_TA (2021)0259 *Liability of companies for environmental damage European Parliament resolution of 20 May 2021 on the liability of companies for environmental damage* (2020/2027(INI)) at 41. See Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage OJ L 143 of 30.4.2004, p. 5. Specifically, on ELD, see recently A. RIZZO*, In search of Ecocide under EU Law. The international context and EU law perspectives*, *Freedom Security and Justice European Legal Studies*, 2021, at p. 186 and relevant quoted literature.

administrative sanctions for environmental protection. On the "preventive" side of the protection in question, the same Commission stresses the lack of effective sanctions to developers who do not implement impact assessment procedures in accordance with relevant EU legislation[66]. In the sense of the precautionary meaning of environmental protection, the Commission recalls that the relevant legislation of the Union on Industrial emissions, including those with high risk for human health, involve aims of both strict environmental and human health protection, whose breach is apt at putting severely at stake vast areas and populations across and even beyond Union's borders.

In the light of the above criticisms, the Commission has submitted some alternatives regarding, inter alia, the listing of criminal behaviours and types of sanctions to be attached to such criminal behaviours under same directive's scope (on this, some comments are provided in our concluding remarks in this paper).

With regards to the listing of the relevant behaviours, the new Commission proposal provides for an "autonomous" definition of such behaviours and refers to sectoral legislation in general terms, removing relevant annexes (see above). Acting this way, the Commission aims at launching a true Union's competence specifically on crimes infringing the Union's interests (art. 83 n. 2 TFEU, the specific legal basis proposed in order to amend directive 2008/99).

In this context, one should not forget, as already mentioned, the strict application of the subsidiarity principle in the relevant field of judicial cooperation on criminal law. Under due consideration of subsidiarity, reflections are suggested on the different approach followed under Union law by comparison with the national approaches on those matters. Indeed, the intrinsic character of Union's competence on criminal law (both substantial and procedural) makes subsidiarity peculiarly relevant.

The effort on the way to the abovementioned disconnection under subsidiarity principle is particularly proved in the proposal of a new directive, whose article 3 n. 1 identifies a list of "crimes" committed under a wilful conduct. Serious negligence (art. 3 n. 2) shall be considered not for all of the many criminal acts listed therein. For instance, under the proposed directive, some acts give rise to an only strict criminal liability when dealing with killing, destruction etc. of wild fauna specimen (art. 3 n. 1, l)) or for acts causing deterioration of habitat (art. 3 n. 1, o)): consequently, the proposed directive, in such cases, only addresses a wilful act by an offender under the meaning of previous art. 3 n. 1.

For some of the many criminal acts, the proposal admits a series of elements potentially weakening their criminal content (the baseline condition of the affected environment or the intrinsic character of the damage e.g., if long-lasting, severe or reversible, see art. 3 para. 3): again, peculiar gravity qualifies acts against wild fauna (exception made for acts concerning the "introduction or spread of invasive alien species of Union concern" under art. 3 n. 1, p)) and, in such cases, none of those "moderating" elements are applicable.

[66] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance O.J. L 124 of 25.4.2014, p. 1.

According to art. 3 n. 4 of the new proposal, Member States shall have a duty to make it clear that some specific elements (e.g., the kind of activity to be performed and the related authorisations required to perform it) are considered for the sake of assessing the scale of dangerousness of an activity. This requirement means that no legislative source, be it national or supranational, can give criminal significance to an activity without a clear reasoning for such a qualification.

On the same direction of granting "lawfulness" to the qualification of an act as a crime, the proposal requires that Member States specify, at least for some acts (e.g., timber production made from illegally harvested woods, if not of a negligible quantity, art. 3 n. 1, n)), some elements such as the number of items harmed, the likely excessing relevant thresholds, values or other mandatory parameters, the cost of restoration of the related damages (art. 3 n. 5).

Under article 4, the proposed directive requires that any attempt to commit most of the acts under art. 3 n.1 be prosecuted as a crime under national legislations: this provision mirrors the definition of crimes committed (even just) neglectfully under art. 3 n. 2.

As far as penalties are concerned, the proposal follows the concept of current directive 2008/99, that is to say, the need that penalties be effective, proportionate and dissuasive. However, by comparison with the text currently in force, the new proposal goes further with additional obligations on Member States, such as the duty to specify the minimum of the major (maxima) sanction applicable to the relevant crimes: this lack of precision is consistent with the extent of Union's competence under art. 83 n. 2 TFEU, considering how the same Union lacks "full" harmonization capacity in particular as far as the content of related criminal penalties is concerned [67].

As far as legal persons are concerned, the proposed directive imposes liability for both persons with "leading positions" within the same legal person and the company as such (art 6). Keeping previous wide wording, the same proposal goes however further in requiring certain thresholds for fines related to the different kinds of crimes listed under article 3 n. 1 (art. 7). This might be of interest for criminal law scholars, as it indeed deepens Union legislation's scope in the direction of addressing specifically national legislators on the way of defining the basic relevant penalties' requirements that should not be infringed at the national level. Moreover, this supports the depiction of an autonomous Union's competence in this area of criminal law, in compliance with same art. 83 n. 2 TFEU aims.

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[67] P. ASP, *The substantive criminal law competence of the EU,* Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet, 2012, in part. pp. 125-126. For a more evolutionary reading, H. SETZGER, *The Harmonisation of Criminal Sanctions in the European Union. A New Approach*, in *Eucrim*, 2019, n. 2, p. 115, see under p. 118: "*Although the Member States are granted a wide "filling discretion", their leeway is not without limits. Whenever a specific legal act aiming at the harmonisation of criminal sanctions is implemented, the Court of Justice of the EU retains a certain degree of control power if the European Commission triggers infringement proceedings according to Art. 258 TFEU".* Last mentioned provision relates notoriously to infringement proceedings that the European Commission is entitled to enact for cases where any Union member State infringes Union law obligations. It seems quite reasonable to believe that, among other goals, current Commission's legislative proposal aims at enhancing the monitoring on the national authorities' discretion in the transposition/implementation of same directive, and in particular for those directive's provisions related to the characters of mentioned criminal penalties (also in accordance with general Court of justice approach on this, see judgment of 13 Sept. 2006, case C-176/03, I-7879, and notwithstanding the stricter wording in current treaty's text).

Comparable "integration" aims stem from the provision (art. 11) related to limitation periods for both investigative and enforcement activities of national authorities and judiciaries.

Even more interestingly, but in coherence with the new "Union-centric" approach under article 83 n. 2 TFEU, the proposed directive foresees (art. 12 n. 2) that each Member State informs the Commission whenever it aims at extending its jurisdiction for crimes committed in a different member State, when such crimes *a)* are committed for the benefit of legal persons established in that same requiring Member State, *b)* are committed against any national of the same demanding Member State, *c)* have caused severe risks for the environment of the demanding State. Moreover, the same provision foresees that in such situations Eurojust[68] be invested of the case, for the sake of a cooperative context involving more than one Member State each time that an environmental crime has extra-boundaries characters and effects.

5. Concluding remarks

As already mentioned, the new Commission's proposal on protection of environment through criminal law is consistent with "new" legal basis (art. 83 para. 2 TFEU): this basically meets the need for the current legislative tool (directive 2008/99) to be brought into line with the Lisbon's reforms.

However, the Commission spends some pages of its proposal to clarify several available options before submitting the same proposal. The main explanation refers (page 11) to the objective mentioned at n. 1, i.e., the need that effectiveness of investigations and prosecutions of relevant crimes throughout the Union be improved by updating the scope of the same directive in the light of the most recent developments in environmental policy (the European Green Deal is mentioned in this case [69]). Among the options submitted for the attainment of this aim, the Commission has chosen as the most suitable option (under 1b, see at page 12 of the proposal) to refer to relevant sectoral legislation in general terms and to refine the definition of what constitutes environmental crime in a specific provision in the same directive (art. 3, above). This is not particularly surprising, if we read once more the proposal under the lens of art. 83 TFEU and in the light, above all, of a "reverse" subsidiarity principle, apt at "disconnecting" the Union's competence from the strict margin of manoeuvre fixed in the static list of shared competences under article 4 TFEU. Besides, recourse to such legal basis has been so far successful in many areas of the Union's legislation (as mentioned above) when the Union has made recourse alternatively to art. 83 para. 1 and to art. 83 para. 2 TFEU, without meeting any obstacles such as the possible recourse to an emergency break by a national government in accordance with art. 83 para. 3 TFEU. This is also favoured by the characterization of a progressive competence of the Union in an area of law (environmental protection) particularly developed in substantial terms, including the wideness and variety of material aspects of this Union's policy, as such particularly invasive of national competences, though if such competence is still formally "shared" with that of its Member States. However, as we have already mentioned, even by comparison with art. 83 para. 1 TFEU,

[68] Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust) (O.J. L 295, 21.11.2018, p. 138).

[69] COM (2019) 640 fin., of 11.12.2019.

art. 83 para. 2 TFEU aims more directly at going beyond the need to tackle crimes with cross-border characters. This provision, in fact, aims to sanction the crimes whose fight is connected to the protection of specific objectives pursued and governed by means of relevant legislative harmonization tools of the Union. While this certainly explains the present proposal, it remains arguable if this will be automatically approved at both institutional and governmental levels [70], considering the high sensitiveness of some aspects listed under the revised art. 3 in the Commission's proposal (see above). At the same time, as we have already mentioned, those aims are already particularly felt also at the national level, as the current Italian legislation dealing with (specifically) legal persons' criminal liability for environmental abuses sufficiently proves.

Implementation of this policy and of the related legislative tools might certainly give rise, in the future, to several discussions and doubtful cases, also in terms of comparing environmental protection aims with the protection of relevant individual rights. On the one hand, the objectives of protecting the environment and human health are undoubtedly inherent in the various acts referred to in current Directive 2008/99, while, on the other, the numerous individual rights connected to substantive and procedural criminal law have at least same importance, as already mentioned with reference, for example, to the abundant doctrinal and juridical debate at national level in the Taricco saga (although relevant case-law is specifically concerned with the protection of the financial interests of the Union pursuant to Article 325 TFEU). At any rate, it would be difficult to deny the many similarities, in broad terms, between art. 83 TFEU and art. 325 TFEU, considering how both provisions aim at establishing a supranational regulatory framework for the safeguard of specific Union interests, and considering how such provisions may have numerous implications on national competences as well as on the related individual rights involved (even just potentially) by their material scope [71].

Key-words: Environmental protection – Area of freedom security and justice – Judicial cooperation on Criminal law – Environmental crimes – ecocide

[70] As explained above, the Commission, under art. 83 para. 2 TFEU, has chosen the "ordinary" legislative procedure in this case. This is consistent with current directive 2008/99 to be amended (considering that such directive has been adopted under the co-decision procedure). In addition, the "ordinary" legislative procedure has been chosen in the light of the high number of connected legislative acts adopted on the substantial "harmonized" areas by the same Union and for which, following same art. 83 para. 2 TFEU wording, a legislative act aimed at regulating the criminal law aspects of that relevant material framework must be adopted.

[71] Indeed, while art. 325 TFEU specifies its own substantive goals (the protection of the Union's financial interests), art. 83 TFEU, at its second para., doesn't. The last provision, however, is sufficiently clear in referring to cases where harmonization has been achieved in an area that must subsequently be enhanced also by means of criminal law tools of the Union. This may lead to the conclusion that the two provisions pursue a comparable objective, namely, to promote the achievement of the Union's goals by way of, alternatively, the relevant provisions of the Treaty (such as Article 325 TFEU), or through acts foreseeing specific crimes for the full protection of some goods for which legislative harmonization tools exist already at the Union's level (art. 83 n. 2 TFEU).