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SUMMARY REPORT: ANALYSIS OF THE QUESTIONNAIRES

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1. Methodology

The EUFJE has provided the Department of criminal law of the University of Trento with the answers to a questionnaire concerning the implementation of Directive 2008/99/CE (hereinafter, the «***Directive***») within national legal systems. The questionnaire had been drafted by the EUFJE Board and given to the members of the Association. It includes more than 50 questions, covering both the way the Directive has been implemented and, more in general, the way the environment is protected in each European country. The EUFJE has asked the University of Trento to perform a comparative analysis of the results of the questionnaire, outlining similarities, discrepancies and general tendencies. Fifteen EUFJE members [1] (hereinafter, the «***MSs***») have filled the questionnaire. Their answers are the basis of the following report.

Although the answers available do not concern all the EUFJE members, the collected data covers a significant portion of Europe, both in terms of population and territory[2]. In this respect, the information analysed in this research appears to be significant and it can be regarded as being a reliable picture of the quality and quantity of prosecution and punishment of environmental offenses in the European legal system.

The questionnaire is divided into 8 main points. The structure and the type of the questions contained therein vary significantly, ranging from open-ended questions, which allow wide and discursive answers, to yes/no questions. The MSs

[1] They are Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, the Netherlands, Norway, Poland, Slovakia, Sweden and the UK.

[2] The answers refer to a total amount of approximately 395 million European inhabitants, therefore about 78% of the population of the EU (508,191,116 inhabitants). They refer to a territory of 3,413,403 km², therefore more than 75% of the European territory (4,326,253 km²). Please notice that Norway is included in the survey. Data refers to the 2015 Eurostat survey, available at: http://ec.europa.eu/eurostat/tgm/table.do?tab=table&language=en&pcode=tps00001.

have filled the questionnaires in very different ways: some answers are analytical while others are more comprehensive and span through different parts of the questionnaire. It is also worth noting that several questions could be – and have been – subject to different interpretations; as a result, the answers provided do not always match and cannot be compared easily. For all these reasons, the information provided – though significant and interesting – cannot be regarded as being scientifically accurate under all circumstances. This, of course, has deeply affected the way this research was conducted.

With the aim of following the indications coming from the EUFJE, in this research no information was used other than the one contained in the questionnaires that have been filled. The answers have not been interpolated with data coming from scientific literature and/or other sources. In this way, it has been possible to focus on the singularities of each legal system, and to try and understand what lied «beyond» the given answer. This has also ensured a neutral approach toward each question, for it prevented the available data from being «bended» according to the expected answers.

All the information contained in the questionnaires has been divided into several sub-categories and arranged into a double-entry table, in order to perform horizontal (State by State) or vertical (question by question) analysis. The answers have been associated with different colours, each of which represents a different level of protection (whether theoretical or practical) of the environment. The result was a series of clear and comprehensible pictures describing in a visual manner the protection of the environment in Europe. Where such method of analysis has not been possible (open-ended questions), the research has nevertheless showed interesting similarities, discrepancies, and sometimes true eccentricities.

Though a neutral approach was maintained, the research was not limited to numerical analysis: the obtained results have been critically assessed, especially in light of the general objectives of Directive 2008/99/CE. Indeed, the available data shows us not only how the Directive was implemented, but also – and (maybe) more importantly – if criminal law represents an effective instrument to counter environmental crime, if and how much do European countries use to criminal law, and why do (or do they not) do so. This contribution seemed appropriate and suitable to the context of the EUFJE Conference: the aim of this research is to foster

the debate on the evolution of environmental law and on its translation into law in action.

2. Findings

2.1. Who can be held criminally liable in your country?

With reference to the scope of criminal liability in member States, the findings show substantial differences among legal systems, both with reference to the extension of liability and to the law-making technique adopted by legislators.

Germany, Italy and Sweden are the only countries, which do not provide for criminal liability of legal persons and instead resort exclusively to administrative sanctions. It is worth pointing out that the administrative nature of corporate liability is questioned by a large part of the Italian scholarship. Among the countries that extend criminal liability to corporations, there is no clear pattern on the relevant law-making technique: some legislators have opted for a general liability clause, others for clauses concerning specific offenses; the latter option is deployed also in the countries that opted for administrative liability.

Let aside such differences, the preconditions for corporate liability – be it criminal or administrative – appear to be homogeneous. In order for corporations to be held liable, the relevant offense has to be perpetrated in their interest, under their control, or in connection with their activity. In all countries, corporate liability does not depend on the conviction of a natural person, and is instead autonomous and direct. This shows that environmental offenses committed by or on behalf of legal persons are punished in all MSs, and that corporation are held liable. Accordingly, when asked about the implementation of Article 6 of the Directive 2008/99/CE, all MSs answered positively and few countries mentioned only minor shortcomings.

Among the MSs there is no meaningful difference in the punishment of persons inciting, aiding and abetting the perpetrator of a crime, who are held criminally liable in all MSs.

2.2. Are the Art. 3 offences criminal offences in your country?

According to the information provided, there are no substantial gaps in the transposition of the Directive 2008/99/CE, at least with reference to the conducts that are regulated therein. Minor shortcomings have been outlined in few countries, such as Hungary, Sweden or Belgium (for example, under Belgian regional law,

certain conducts regulated by the Directive are not qualified as criminal offenses). Other countries have pointed out that the Directive has been properly implemented, though the national provisions appear to be more lenient and/or less accurate in the description of certain conducts.

In general, the collected data clearly shows that all conducts disciplined in the Directive are punished also under national implementing law. This is not an unbiased conclusion: since the offense disciplined by the Directive range from minor crimes to extremely serious offenses, we would expect these different levels of criminal harm to be reflected in the national sanctioning frameworks. As discussed in the following paragraphs, the findings of the research do no seem to support this conclusion.

2.3. How were the Art. 3 offences implemented?

Question nr. 3 deals with the technical choices made by the various MSs while implementing the Directive. According to the information provided, there is no clear pattern as to where legislators have implemented supranational law, whether into the Penal Code, into complementary environmental legislation or into both; nor is it possible to clearly asses if they have chosen for a copy/paste technique or have instead regulated the offenses using different wording.

Where the answers of the MSs show interesting differences is in the implementation of the circumstances that Article 3 requires, in order for the offense to have criminal relevance. According to the Directive, environmental violations are qualified as criminal offenses only insofar as they seriously affect (or are likely to seriously affect) human health or the natural environment. Only half of the MSs have implemented such requirements, either in all or in most cases. The other half has dropped them, either by simply deleting them (*e.g.* Hungary) or by requiring mere «*negative effects*» on the environment (*e.g.* Germany); in all such countries, the environmental impact of unlawful conducts is taken into account while deciding *how much* to punish (*i.e.* the amount of sanctions), but it does not seem to be decisive when deciding *if* to punish. This aspect does not have mere theoretical relevance, since it affects the scope of the offenses, their clarity and foreseeability, as well as the effectiveness of prosecution. In this respect, it should be noticed that only three MSs regard these requirements as being an obstacle when conducting a criminal case. Interestingly, the reasons why these requirements do or do not represent an obstacle to prosecution or judgment vary significantly form country to country, and cover

formal and substantial aspects of criminal law (*e.g. lex certa* principle, exhaustiveness of criminal law, causality, evidence, etc..).

2.4. What about the availability of criminal sanctions to punish environmental offences?

Question n. 4 of the Questionnaire concerns the sanctions that environmental offenders can *in theory* be subject to. Where all MSs punish environmental offenses by both imprisonment and criminal fines, we find notable discrepancies in the amount of the inflicted punishments. In most countries prison sentences range from 5 to 10 years maximum, and only in two countries can imprison exceed 15 years. This means that – within the considered countries – environmental offenses can be punished by prison sentences as different as 5 years or less (in Norway) or 20 years or more (in Hungary). The levels of criminal fines are equally diverse: though it has not always been possible to discern between fines directed against physical persons or legal persons, the available data shows that monetary sanctions range from about 20,000,000€ (even for physical persons, as in Belgium) to less than 1,000,000€ (even for legal persons). The only sanction (be it criminal, preventive or anticipatory) that appears to be present in all MSs is the confiscation of illegal benefits.

According to the information provided, there are significant differences also in the availability of remedial criminal sanctions. While in most countries specific obligations can be imposed in the sole context of probation, only 6 countries allow criminal judges to directly issue remedial orders to convicted offenders. Some of these countries have disciplined far-reaching remedial sanctions, imposing to the offender anything from waste removal, to the performance of adjustment works, up to the reestablishment of the pre-existing environmental conditions.

It should be outlined that remedial measures are a characterizing feature of environmental law: the environment is by definition a common good, so its damage inevitably affects a large number of people. That the damage be remedied is therefore crucial for the well-being of the entire community and that such a remedy be legally enforceable is vital for the legal system. The fact that remedial sanctions are so unevenly available throughout European criminal law systems can be considered a fundamental flaw in the protection of the environment *through criminal law*: it increases – instead of lowering – the risk of double track (*i.e.* administrative and criminal)

protection, hindering the overall effectiveness of the sanctioning system and the achievement of its ultimate goal, the protection of the environment.

2.5. What about the actual use of criminal sanctions to punish environmental offences?

Question nr. 5 is aimed at investigating the actual use of criminal law in the protection of the environment. Though it is not possible to precisely assess whether environmental crimes are frequently sanctioned or not (and what is their relevant percentage on the total amount of convictions/prosecutions), it appears that only 7 MSs consider the effectiveness of their justice system in the field of environmental crime to be globally satisfying[3].

As for the types of criminal offenses that are brought before criminal courts, the available data does not lead to unambiguous conclusions: unlawful handling of waste seems to be the most common environmental offense; notably, most of the common violations are «minor» offenses in comparison to other environmental crimes regulated by the Directive.

With reference to the sanctions that are imposed in practice, prison seems to be used extensively but it is almost automatically suspended under probation. Unsurprisingly, in the questionnaires in which the length of prison sentences is precisely mentioned, incarcerations range from an average of 6/7 month to a maximum of 2 years. As to criminal fines, few MSs provided a clear indication on the average amount of monetary sanctions. Their answers have shown that criminal fines for natural persons generally amount to 5,000€ and that they rarely exceed 10,000€. This data clearly indicates that prison sentences are often modest and virtually never served in their entirety, and that monetary sanctions (for natural persons) are on

[3] Please notice that this data is extracted from questions n. 5/a («*Are environmental offences brought to criminal courts? Does this happen rather often or only exceptionally?*[…]») and 5/c («*What is, to your opinion, the main reason why environmental offences would not reach a criminal court?*») of the Questionnaire.
The diversity of the available answers suggested us to analyse the results from a different perspective. Most questionnaires outline shortcomings in the contrast to environmental crime; very often, this has almost no correlation with the level of implementation of the Directive, with the specialisation of courts and prosecution or with their effectiveness when dealing with environmental cases. The answers are ultimately influenced by what each Justice considers appropriate in order to achieve higher environmental protection.
In this respect, the results reflect the following question: «*Do you feel that more should be done in the field of environmental criminal law and prosecution? Do you feel that your domestic criminal justice system is satisfying in this respect?*» The wording and the sense of this question are considerably «far» from that of the Questionnaire. Nevertheless, we believe they give a reasonably comprehensive and faithful description of the available results.

average quite low[4]. This conclusion is all the more surprising, when we consider that the Directive has been implemented by all MSs and therefore that very serious environmental offenses are – or at least should be – punished (as environmental offenses) by domestic criminal law. Notably, the only sanction that is always present both in theory and in practice in all MSs is the confiscation of illegal benefits.

Finally, while mentioning the reasons why an environmental offense would not reach a criminal court, MSs have given disparate explanations. Many MSs denounce the lack of specialisation of law enforcement agencies and prosecutors, as well as the lack of resources for the contrast to environmental crime; others outline that most environmental cases are dismissed, either for the lack of evidence on the alleged crime or simply for the modesty of the committed violation. Some answers, though not common to all MSs, appear to be particularly interesting. For example, some countries have underlined that corporations, when faced with an environmental charge, prefer settling before the trial begins, in order to avoid negative publicity. Only one country (Slovakia) has listed, among other reasons, high levels of corruption, while three countries have said that low levels of criminal sentencing is a sign that preventive inspections and environmental law enforcement are effective. Interestingly, no MS has mentioned the need for more criminal law and/or for higher criminal sanctions.

2.6. As to structure of prosecuting environmental crime?

With reference to the functioning of the criminal justice system, the available data shows that specialisation in environmental matters is far rarer in criminal courts than it is prosecution offices: while only three countries have «green courts», more than double have «green prosecutors». Notably, only three countries have both, while seven (*i.e.* almost half of the States included in the research) do not have either.

It is interesting to notice that, according to the answers provided, the fact that MSs do (or do not) consider their environmental criminal justice system to be

[4] Please notice that the severity of criminal sanctions ultimately depends on the maximums and minimums available for the concerned offense in the concerned country. For example, a four-year prison sentence is low in a country where the maximum is fifteen, but is high in a country where the maximum is five. Vice versa, a two-year prison sentence could be considered high in a country where the minimum prison sentence is two months, and it could be regarded as low in a country where the minimum is two years.
As stressed in the introductory Paragraph, the available data is not easily comparable, and this is particularly true for the amounts of criminal sanctions. Nevertheless, we do believe that such information – event though not scientifically accurate under all circumstances – can help outlining general tendencies.

satisfying is not related to the specialisation of courts and/or of prosecution offices in their respective legal systems .

2.7. What about the availability of administrative sanctions to punish environmental offences?

The last part of the questionnaire is dedicated to the availability and use of administrative law for the contrast to environmental crime. This is a crucial aspect for the correct understanding of criminal justice systems, as criminal and administrative sanctions are often complementary to one another. Question n. 7 concerns the availability of criminal sanctions.

With reference to environmental violations, in all MSs it is possible to punish environmental offenses by administrative fines. According to the information provided, only two countries seem to allow the use of both administrative and criminal fines in the punishment of an environmental violation[5]. In the other MSs this is not possible, either for the application of the *ne bis in idem* principle, or for the priority that is accorded (*ex lege* or *de facto*) to criminal sanctions during investigation and prosecution.

The answers provided show disparate legal maximums of administrative fines: monetary sanctions rarely exceed 100,000€, even though they reach up to 1,000,000€ in some countries. Significantly, all MSs allow administrative authorities to issue remedial sanctions, and in some legal systems they are virtually the only sanctions environmental Authorities can resort to[6]. In all considered countries, remedial administrative sanctions can oblige the offender to do almost anything, form the interruption of any harmful activity, to the removal of waste and/or the remediation of the environmental damage. In all legal systems, these measure are assisted by penalty fees, in case the offender fails to comply with the relevant obligations; administrative authorities can also carry out the necessary activity themselves, at the expenses and risk of the offender.

[5] France and Hungary. From the answers provided in the Hungarian questionnaire, it cannot be clearly assessed whether this possibility extends to all administrative sanctions or only to non-monetary administrative sanctions.
In France the overall amount of the two sanctions shall not exceed the maximum amount of the higher of the two fines (Proportionality Principle). This means that the concurrent application of administrative and criminal fines does not lead to a higher sanction than the one that would result from the application of only one type of fine.

[6] As in the case of Denmark, where the environmental Authority – «*with very few exceptions*» – is not provided the power to issue administrative fines.

The available data shows that some MSs have developed alternative dispute resolution systems for administrative violations. Some of these mechanisms specifically target environmental offenses, whereas others have a general scope. Interestingly, in some MSs, alternative dispute resolution systems are on the very boundary between criminal and administrative law. Clear examples of this are the French «*transaction pénale*»[7] and the discipline of Articles 318-*bis* to 318-*octies* of the Italian Environmental Code.

2.8. What about the actual use of administrative sanctions against environmental offences?

According to the information provided, punishment of environmental offenses by administrative law is very frequent. It has not been possible to have a clear indication on the type of offenses that are most commonly punished; nevertheless, MSs often refer to «minor» or «formal» offenses.

It is worth noting that, while all questionnaires say that the offenses are subject to a combination of administrative sanctions, some legal systems seem to prefer monetary administrative sanctions while other focus almost exclusively on remedial administrative sanctions (and penalty fees). This aspect is crucial, for it indicates that in certain countries the distinction between the criminal and the administrative sanctioning system – at least with reference to monetary sanctions – is blurred.

As to the amount of the inflicted fees, the available data does not give precise indications. The average amount of administrative fees seems to be quite low in most MSs, ranging from 3,000 € to 5,000€ and rarely exceeding 15,000€.

3. Conclusions

The findings of the research reflect the complexity of environmental criminal law and the challenges (and paradoxes) that European and national legislators face when trying to protect the environmental through criminal law.

[7] The administrative authority and the person charged of a criminal environmental offense can agree that the latter be paying a certain fee and be remediating the environmental damage his/her unlawful conduct has caused. The Public Prosecutor shall validate the agreement. Upon validation, the payment of the fee and the performance of the remedial activity extinguish the crime and all criminal consequences of the relevant offense.

Some of the answers given by the MSs seem contradictory. The Directive appears to have been fully implemented in all countries; therefore, serious environmental offenses are punishable under domestic criminal law. Prison and fines, even though their maximums and minimums change significantly throughout Europe, are always available against environmental crime, and so is confiscation of illegal benefits. Liability (be it administrative or criminal in nature) extends to legal persons, and in all countries it does not depend on the conviction of a physical person. In this respect, no country has even mentioned the need for more criminal law or higher criminal sanctions, and yet prosecution of environmental offenses is considered unsatisfactory in more than half of the concerned States. The offenses that seem to reach criminal courts are minor and formal violations. Both prison sentences and criminal fines are often times modest, and they can be suspended under probation or be extinguished through alternative dispute resolution mechanisms.

In our understanding, these apparently contradictory results show us that crimes against the environment are rarely prosecuted or punished *as such*. Even though certain environmental offenses can *in theory* be subject to severe punishment, this occurs *in practice* only when – and almost only *because* of the fact that – they are part of an organised crime or they harm physical persons; this means that environmental offenses are prosecuted as organised or financial crimes, or as crimes against life and individual safety, and that their impact on the environment is often times neglected (or at least it is not the focus of incrimination). Though the Directive could help changing the approach of domestic criminal justice systems, at the moment environmental crime seems to be seldom prosecuted for the impact is has (or it might have) on the environment.

This conclusion sheds new light on the conditions that the Directive sets forth in the description of the unlawful conducts (Question 3/c): the fact that environmental offenses shall cause – or be likely to cause – death or serious injury to a person clashes against the fact that, when this happens, they are no longer regarded as environmental offenses. In other words, an environmental violation is either not harmful enough to the environment to be regarded as a criminal offense under European law, or too harmful to human life (or to the public order) to be regarded as a «mere» environmental offense under domestic criminal law. The indication of a «harmfulness threshold» is by all means reasonable and justified by the risk of

punishing through criminal law offenses that only theoretically affect the environment: the use of criminal law must indeed be always scrutinised under the lens of the *extrema ratio* principle. Nevertheless, (for the moment) the implementation of the Directive has had the only effect of hardening of the available criminal sanctions against environmental crime, while this research shows that MSs are not missing high sanctions but rather a «culture» of environmental crime prosecution. This might explain why no MS has stressed the need for more criminal law and yet most countries consider their environmental criminal justice system to be globally unsatisfying.

The findings suggest that the only time when environmental crime is brought before criminal courts is when minor offenses are committed. Notably, this is true regardless of the fact that the domestic implementing legislation has kept or dropped the circumstances mentioned in Article 3 of the Directive. This result appears to be particularly significant: even where domestic criminal law could punish with high sanctions offenses that do not affect the environment substantially, this does not happen and only low sanctions are inflicted in practice.

The fact that criminal justice systems mostly deal with «small crime» and therefore issue «small criminal sanctions» raises another set of problems: in fact, this tendency blurs the difference between criminal and administrative sanctions, ultimately questioning the need for criminal response in environmental matters. In practice, administrative fines are often higher than criminal fines, and therefore more detrimental to – and intimidating for – the potential offender. According to most questionnaires, administrative sanctions are even more effective than criminal sanctions, as many countries adopt the *solve et repete* principle (*i.e.* the «pay first, litigate later» principle) and administrative violations are frequently no-fault offenses. In addition, environmental authorities can resort to a vast array of remedial and non-remedial sanctions, which give a much more comprehensive response against environmental crime.

In order to cope with the expansion of criminal law and to compensate the length and complexity of the criminal justice system, some national legislators have «administratised» their domestic environmental criminal law, by giving to criminal judges the possibility of using remedial sanctions (the recently approved Italian Law n. 68/2015 is an example of this tendency). The available data concerning the use of criminal sanctions seems to suggest that criminal remedial orders are, at the moment,

the only effective criminal punishment against environmental offenses. This outcome is though paradoxical, if we consider that remedial sanctions have always been available under administrative law and that the whole idea behind Directive 2008/99/CE is that administrative sanctions did not provide enough protection to the environment.

As stressed above, remedial orders are indeed a crucial feature of environmental law, and are vital for its effectiveness. The results of this research suggest that their availability as administrative sanctions or as criminal sanctions is a question of law, which does not *per se* affect the intensity of environmental protection. Undoubtedly the European sanctioning system appears particularly scattered: in this respect, whatever the choice between one type of sanction or the other, the establishment of a homogenous remedial sanctioning system is of the outmost importance in order to ensure higher standard of protection for the environment.

In conclusion, the findings of this research show that an extensive use of criminal law in environmental matters does not necessarily translate into a more effective protection of the environment: substantive criminal law does not in itself ensure effective criminal prosecution and/or judgment. The implementation of the Directive has hardened the criminal response in theory but has not led to higher punishments in practice. Whether this has to do with law enforcement or with the very choice of using criminal law to protect the environment is up for discussion.