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# SUMMARY REPORT: ANALYSIS OF THE QUESTIONNAIRES

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## 1. The right to be tried within a reasonable time*

With its first question, the Questionnaire addresses the right to be tried within a reasonable time: after having investigated into the means that trigger an environmental procedure, it focuses on the lengthiest procedural steps and the overall length of environmental judgments. Finally it addresses the legal consequence deriving from undue delay of proceedings.

According to the available data, in all the considered Countries the opening of a file is virtually always triggered by a notice of violation. Considerable differences appear with respect to the source of the relevant notice: in some Countries it is the administrative Authority or the victim of the offence that file the report, thereby triggering further prosecution proceedings; in others, also environmental associations and citizens are entitled to file an environmental claim, demanding that the alleged wrongdoing be prosecuted.

The involvement of NGOs and citizens in the repression of environmental offences appears to vary considerably within the considered Countries. In this respect, it is worth noting that in some countries – such as England, Denmark and Hungary – the prosecutor has wide discretion as to the filing of environment charges, whereby in most of the others such charges are prosecuted *ex officio*. In this context, the UK is an interesting case, as British prosecutors enjoy virtually unlimited discretion in the decision to prosecute.

With respect to the overall length of the proceedings, the available data indicates that environmental cases are generally more complex and lengthy than 'ordinary' proceedings, though it is difficult to indicate their average duration. According to several Country reports (for instance Hungary and the UK), this has to do with the scope of

* Questions no. 1 to 3 by doc. Caliceti.

environmental crime itself, which entails considerable differences in length of the relevant proceedings. Interestingly, all Country reports, with the exception of Belgium, seem to rely on data that is not specifically targeted on environmental proceedings, but rather on criminal proceedings in general.

It is worth pointing out that the Country reports use different parameters to assess the length of criminal proceedings (by range, by length, by seriousness of the offence). It is therefore complicated to compare the available results.

The average length of environmental proceedings – from the citation to the end of the appeal judgment – is 2 to 3 years. In some Countries, prosecution and judgment take considerably longer, as in Italy (43 months, without considering the judgment before the Court of Cassation) or Denmark (51 months). Only in a minority of Countries (specifically Estonia, Finland, Norway, Germany and Sweden) do criminal proceedings in environmental matters stay within a two-year period.

All the Country reports seem to indicate that the lengthiest and most complicated procedural step in environmental prosecution is the collection of evidence during investigation. Three main factors are reported to be the cause of the delay.

Some Country reports point primarily to the complexity of the case that is being investigated, which might require extended reports by environmental experts or involve a large number of potential claimants. This is the case of Estonia, Finland and Germany.

Other Country reports suggest that the delay is due essentially to the inadequate organization of the public administrations that are involved, directly or indirectly, in the proceedings. Often times the problem relates to the lack of financial resources or available manpower for the expedient management the workload, or to a coordination deficit between administrative and criminal investigations. Interestingly, the German questionnaire suggests that prosecuting policies might lead to the inefficient allocation of the resources, by choosing to focus on relatively minor environmental wrongdoings, while leaving prosecution of serious offences with inadequate means.

One third factor that is reported to affect the length of environmental prosecution is the actual difficulty in enforcing the relevant legislation, as the interpretation of some elements of environmental offences might prove to be particularly «ambiguous». Also the need to investigate into the liability of legal persons appears to cause further delay in prosecution (as in Germany).

After having outlined the different time frames of environmental proceedings and their most problematic procedural steps, the Questionnaire investigates how these characteristics affect the right to be tried within a reasonably time Indeed, in a considerable number of Country reports, the right to be tried within a reasonable time is reported to be as a problematic issue for environmental prosecution.

This guarantee might indeed reverberate on the rights of the person harmed by the offence, as well as on the balance between the private and the public interests involved in the case.

It is pointed out that the need for the proceedings to be over within a reasonable time might impose reducing the time for investigation, with the risk of weakening the rights of the accused. On the other hand, the unreasonable length of the proceedings could affect the right of the victim to be restored, by encouraging out-of-court dispute settlements. Furthermore, the undue delay in the proceeding might paradoxically be in the defendant's best interests, since the claim might get barred by the statute of limitation, thereby frustrating prosecution altogether. Finally the undue delay of proceedings might considerably undermine the deterrent effect of criminal law, as in several legal systems it can lead to a reduction or – in case of serious and unjustifiable delay – to a complete waiver of criminal sanctions. The risk of an unreasonable length of the proceeding can be reduced in those Countries, as UK, where the prosecutor can take into account the time needed to investigate an offence in deciding if it is in public interest to prosecute.

It is worth considering that also the time between the commission of the offence (or its discovery by public Authorities) and the beginning of prosecution could be considerably long. One notable example is reported in the Belgian Country report: in the *Hamer vs Belgium* case, the ECHR stated that, even if «the length of the proceedings on the merits […] [did] not in itself appear to be unreasonable», Article 6 § 1 of the Convention had been violated because the police report recording offence dated back to almost a decade before the proceedings had concluded.

Though environmental proceeding appear to require a considerable amount of time in all the considered Countries, the consequences attached to the undue delay of criminal trials vary significantly within domestic legislations. In general, the undue delay of proceedings can entail monetary compensation, specific judicial remedies, or the reduction or waiver of criminal sanctions.

The first option is common to France and Italy. With particular reference to the Italian legal system, Law no. 89 of 2001 (the so-called "*Legge Pinto*") entitles the defendant to monetary compensation «in case the trial exceeds the average time that the law sets as 3 years for the first instance judgment, 2 years for the appeal judgment and 1 year for the judgment before the Supreme Court».

A specific judicial remedy against procedural delay is provided for in the polish legal system. As reported in the country report, the violation of defendant right can be referred to a court. The court, *ex officio* or upon demand may order that the case be discussed or that the prosecutor be taking specific action within a given time, or else that the defendant be awarded a certain amount of money.

Other Countries combine compensation and reduction of the punishment, either jointly (as in Finland), other alternatively (as in Estonia and Germany). Other legal systems, resort solely to the reduction or waiver of sanctions, in latter case declaring the defendant guilty but at the same time wavering the relevant punishment.

One interesting solution has been put forward by the Belgian Constitutional court, which has addressed the issue from a procedural perspective: according to Belgian constitutional case-law whenever «the delay damaged the rights of the defence in a severe and irreversible way, the case against the defendant will be considered non receivable».

It's worth noting that several legal systems ponder the response against procedural delay according to the severity of the encroachment of defence rights. It is the case of the UK, where a «permanent stay will only be granted where delay has caused serious identifiable prejudice such that a fair trial is impossible».

## 2. The right to a fair trial

This part of the Questionnaire starts by focusing on the implementation of environmental judgments within domestic legal systems and on the use of criminal sanctions against green crime. It later shifts to the availability of remedial sanctions within criminal proceedings and to the role played therein by civil actors and NGOs.

The analysis of the Country reports shows that in all the considered Countries punitive criminal sanctions – i.e. imprisonment, and fines (including corporate fines) – are applied to environmental offences. Monetary sanctions appear to be particularly more frequent than imprisonment in Belgium, Netherland and Finland (where only «in extreme and rare cases imprisonment has been sentenced»).

The Belgian Country report provides some interesting statistic data in this respect. Only in 10% of overall convictions upheld in environmental cases by the Court of Appeal of Gent has imposed imprisonment. At State level, an empirical research from 2007 found that more than 69% of environmental convictions only imposed monetary sanctions. This percentage is of course higher than the one recorded for criminal fines in non-environmental cases.

Interestingly, Estonia appears to go in a rather different direction: imprisonment is reported to be imposed in approximately 50% of environmental cases, even though with probation. This figure is consistent with the idea, suggested in the Estonian questionnaire, that a criminal policy based exclusively on fines or other forms of monetary sanctions is «rather ineffective in regards to specific deterrence».

As for the implementation of the judgment, one interesting problem that has been reported is the insufficient availability of prison facilities. Reportedly, in Belgium prison sentences ranging from 6 months to 3 years were only partially executed due to this deficit. The same problem is reported in Norway, as a consequence of the so-called 'one-man-one-cell policy'; convicted felons are therefore enlisted in 'waiting lists' for sentenced prisoners.

The implementation of the judgment appears to be particularly problematic in Italy, as the relatively few convictions that are not time-barred are suspended under probation (or other mechanism) or executed after a long time.

One interesting aspect emerging from the reports is the different availability of remedial sanctions for criminal judges.

Criminal judges can resort to remedial sanctions in Belgium, Denmark, France, Italy, Poland and UK. In two of these countries – specifically, in Denmark and Norway – remedial sanctions can be imposed by the Court only upon request of the prosecutor, which, in the case of Norway, acts on the behalf of the offended. A similar solution is provided for at regional level in the Brussels Capital Region, unlike what is stated in the Belgian national legislation. In the remaining countries, remedial sanctions can be imposed by the Court *ex officio*. With respect to the Italian case, the judge can order remedial sanctions only in particular cases related to water pollution, illegal waste management, illegal waste trafficking.

The case of Poland deserves a separate mention. As reported in the national report, a court can order *ex officio* compensatory damage in favour of the National Fund

of Environmental Protection. In addition, it can oblige the convicted party to restore all costs borne by the public Administration to restore the environment.

In the Netherlands remedial sanctions against environmental wrongdoings appear to be available to both a criminal court and the administrative authorities. Understandably, considering also the concerns raised by the ECHR in *Hamer* case, the possible overlapping between the criminal and the administrative sanctioning tracks is one of the problems highlighted in the Dutch national report.

In Estonia, Finland, Germany, Hungary, Sweden, remedial sanctions cannot be imposed by criminal courts. This does not of course mean that remedial sanctions cannot be imposed in those countries: the reinstatement of the environment can be imposed through administrative measures, therefore outside the criminal proceeding.

Interestingly, it seems that the reinstatement of the environment can sometimes bias the criminal proceeding. In the Finnish report, for example, it is said that «environmental authorities often try to rectify the misdeed by using administrative measures», thereby giving priority to the administrative track. In the UK, the reinstatement of the environment (which is qualified a civil sanction), «may often be sought by the prosecuting authority as an alternative to criminal sanctions». Furthermore, the reinstatement of the environment can be taken into account by the prosecutor when deciding whether to prosecute the environmental offender: indeed, when it isn't possible for the prosecuting authority to use both criminal and civil sanctions against the same wrongdoing, the reinstatement of the environment might end up taking the place of criminal sanctions.

With respect to the involvement of NGOs in the prosecution of environmental offences, the analysis of the questionnaires indicates that the considered Countries may be divided into three groups.

On the one side are those Countries (in particular, Denmark, Estonia, Netherlands, Hungary, Norway, Sweden, Finland, Belgium and Germany), in which the procedural rules appear to make no distinction between NGOs and other parties. In these legal systems, NGOs can participate to a criminal proceeding as a civil party «if they (or rather [one of their] members) are victims of crime» or if «the unlawful action affected e.g. property held by the organization», though they «would not be regarded as representatives of the environment» (Finnish report). With specific reference to Denmark, for example, the Danish Anglers Association was allowed to participate as a

damaged party to a criminal proceeding concerning the unlawful pollution of a river that had caused massive death of fish, and it was granted monetary compensation for restocking: indeed, the Association had suffered monetary damage for the unlawful conduct and was therefore recognized as a party in the relevant proceeding.

Even though NGOs do not seem to play an incisive role in the criminal proceeding itself, in several countries (as in Sweden, Estonia, the Netherlands and Hungary) they are granted the power to demand authorities to take action. As reported in the Belgian national report, NGOs can «start the criminal proceedings» and can also claim for both remedial action and for material and moral damages; furthermore, the Belgian constitutional court has stated that the amount of the damages cannot be merely symbolic.

In a second group of Countries, NGOs are granted a particular *status* within criminal proceedings. As reported for example in the Polish questionnaire, «the request to participate in the proceeding should be justified with the need of protection of social interest or important individual interest according to the NGO's statute». Even if there isn't any legal presumption, «the access to criminal proceedings is easy because the court allows the NGO's to participate in criminal proceedings always when it lies in the interest of justice».

At last, France and Italy belong to a third group, in which NGOs within criminal proceedings are only granted the powers of the civil party. As a consequence, the are not recognised any direct interest in demanding the opening of a criminal file or an administrative procedure; in the former they are regarded as victims of the unlawful behaviour, whereas in the latter they are considered as mere stakeholders. Therefore, as reported in the Italian questionnaire, they improve citizen participation in the public decisional process.

## 3. The right to be presumed innocent

This part of the Questionnaire initially investigates into the basic principles of evidence in criminal proceedings within the various domestic legal systems. It later addresses the impact of the presumption of innocence on prosecution, on the assessment of guilt and facts and on the sanctioning decisions.

As for the first part of the question, relating to the basic principles of evidence in criminal law, the analysis of the questionnaires indicates that Member States share a large number of common principles with respect to evidence in criminal law.

The means of proof appear to be free in most of the considered Countries, though a few questionnaires indicate some sort of restriction. Reportedly, in Germany the means of proof «that may be relevant for the question of guilt or the sentence» are restricted. The country reports of Hungary and in Netherlands provide a lists of admissible means of proof, although the former also states that the «main rule is that using evidence to prove the truth is free».

Throughout the Countries considered, the rights of the accused must always be safeguarded. Notwithstanding the free nature of the means of proof, all Country reports clarify that the collection of evidence must never undermine «the honour and dignity of the persons, nor endanger their life or health or cause unjustified proprietary damage» (Estonia), nor shall it compromise «the moral liberty of a person» (Italy), or «human dignity, or personality rights» (Hungary).

In all of the considered Member States, the presumption of innocence implies that criminal liability must be proven «beyond reasonable doubt» and that the burden of proof lies with the prosecutorial authorities; therefore, any uncertainty regarding the accusation or the alleged unlawful conduct «benefits and advantages the accused» (*in dubio pro reo*). Furthermore, some country reports stress that the collection of evidence must be performed *ex officio*, and therefore «the collecting and presenting of evidence is an important task of the authorities» (Hungary).

It is also worth pointing out that criminal investigations in environmental matters seem to rely on a common set of means of proof, specifically police reports, witness and expert statements and technical reports. In particular technical reports drafted by experts are a distinctive trait of environmental prosecution.

Apart from these similarities, some interesting differences between criminal justice systems do appear. Some Country reports suggest that certain types of evidence are accorded particular probative value. In Belgium, for example, «the legislator nearly always confers a special probative value to notices of violation drawn by specialised inspectorates»; such notices have *prima facie* probative value until proven otherwise. This is a clear exception to the principle of discretionary appraisal of evidence, which appears to be widely recognized in the considered Member States. Similarly in the Netherlands,

police reports or oral statements can be grounds for conviction, even in the absence of other corroborating evidence. This rule derogates the general rule according to which the conviction must be substantiated by several means of proof.

With respect to evidence in environmental cases, the Country reports outline three main problems.

The first one directly concerns the proof of the facts representing the environmental wrongdoing. The evaluation of environmental damages is generally more complex than in other cases and, as stated in the Italian report, «the more complex the investigation, the harder it is to show results efficiently and clearly in a trial». As noted in the Estonian report, it is particularly difficult «to collect exhaustive evidence in cases, where the danger to health or environment is not imminent and the possible damage may occur during a longer period of time». Furthermore, to ascertain «significant damage [or risk thereof] to specific elements of the environment» has proven to be a particularly difficult task.

A second concern has been raised with respect to the negligence of the authorities involved in the investigation. For example, the «mismanagement of environmental inspectors» can cause a delay in the proceeding according to the Danish questionnaire. In the Italian questionnaire it is said that «sampling and analysis can be inadmissible [before a criminal court] due to noncompliance with good practices or [violation of] fundamental rights of defence».

A third problem concerns the costs and the time needed for acquiring experts appraisals: indeed, evidence "may be too difficult, time-consuming or costly to obtain" (Norwegian report) as the dispatch «of samples to the national forensic institute may take too much time and sometimes be too expensive» (Sweden and Germany).

With reference to the impact of the presumption of innocence on prosecution policies, according to available data, such principle does not represent a major obstacle for prosecution in environmental cases. Only the Belgian and Danish reports, though emphasizing the importance of such principle for the domestic and supranational legal orders, outline some difficulties: the former suggests that the presumption of innocence creates a negative bias in the prosecuted case-load, as prosecutors focus «on the offences that are easy to prove», which green crimes are clearly not. The latter holds that the presumption of innocence can bias the degree of guilt which is possible to prove.

As for the trial phase, the analysis of the questionnaires indicates that the presumption of innocence does not have an overly restrictive impact on the assessment of facts and guilt. Only two questionnaires appear to take a different position. According to the Swedish report, proceedings on environmental offences require a high level of technical competence, the frequent lack of which increases the difficulties in evaluating the facts. As result, the presumption of innocence is more frequently invoked and applied in environmental crime cases than it is in other criminal proceedings, leading to the acquittal of the accused. The Danish report stresses instead the bias that such principle can generate on the degree of guilt that is proved in court: reportedly, «in almost all environmental cases» the offender is found guilty for negligence or gross negligence, for it is not possible prove the intentional nature of his/her unlawful act. By affecting the form of liability, the presumption of innocence also indirectly affects the sanctioning levels.

Interestingly, the other considered Countries do not regard the potential impact of this principle on the assessment of guilt as problematic.

In this respect, it is worth pointing out that the degree of guilt generally required in the conviction for environmental offences ranges from negligence (as in Belgium and Finland) to strictly liability (as in the UK). Against this background it might be contended that, where intention is not required, judges tend to focus on the unlawfulness of the conduct rather than on the culpability of the offender, thereby partially overlooking the impact of the presumption of innocence on the assessment of guilt. Furthermore, several Country reports mention the use of legal presumptions insofar as they does not encroach upon ECHR jurisprudence; such means of proof might 'circumvent' the presumption of innocence,.

Finally the Country reports don't raise any specific concern as for the impact of the presumption of innocence on the sanctioning decision. The only exception is the Danish report, where – as mentioned earlier – it is stressed that the presumption of innocence might interfere with the sanctioning levels by affecting the level of guilt that is possible to prove in court.

The analysis of the national reports allows us to draw some preliminary conclusions.

In the first place, the restoration for the unreasonable length of the proceeding results, in most of the considered Countries, in a general weakening of the sanction

imposed to the offender. The reduction of the deterrence effect of penalties reverberates on the concrete standard of environmental protection.

Considering that a thorough and comprehensive investigation is necessary (also) in the interest of the defendant and tanking into account that investigation is the most time-consuming phase of environmental proceedings, the balancing between individual right and public interest should be arranged, perhaps, in a different way.

Secondly, in a great number of Countries the role played by NGOs and civil actors in preventing and prosecuting environmental offences has grown in importance. This trend does not only seem to take place in those countries where NGOs are entitled to be a civil party in the criminal proceeding: even if the NGOs can contribute to a proactive protection of the environment, sometimes they seem to be taking the place of public authorities. Against this background, it is hard to say whether this tendency is the result of the declining role of the State or whether instead it derives from the growing ability of the state in involving the civil society.

At last, with respect to the legal instruments that may be used for environmental protection, criminal law does not seem to appear as the most appropriate means to achieve such goal. If the priority is to avoid environmental damages, criminal law is useful only if it is really dissuasive. Nevertheless, as the Country reports show, the deterrent effect of criminal sanctions is undermined by the difficulty in implementing environmental judgments, by the limitation period and by the right to be tried in a reasonable time. In this respect, administrative sanctions, both on physical and lega persons, appear to be better suited to prevent environmental damages. Clearly, the line separating administrative and criminal sanctions is rather thin and might be subject to discussion, both at national and international level. Nevertheless, the choice of administrative sanctions may be the best way to follow.

## 4. The privilege against self-incrimination*

This question begins by analysing the existence and the scope of self-monitoring and -reporting obligations within national environmental jurisdictions. It then investigates into the possible difficulties caused by the privilege of self-incrimination on environmental prosecution and judgment.

* Questions no. 4 to 6 by doc. Corn and Mr. Perilongo.

With the only exception of Italy, all the considered Countries to a greater or lesser extent resort to self-monitoring and to reporting obligations. It is worth noting that the choice of self-monitoring does not seem to reverberate on the type of sanction (criminal vs administrative) chosen to punish the perspective offender, as the answers to the question no. 2 suggest.

When deciding which type of sanctions to use, European legal systems seem to follow essentially two opposite paradigms: Germany, with its tradition of severe administrative sanctions, and the UK, which resorts predominantly to criminal sanctions. Such typological difference should though not be emphasized, as environmental sanctions generally target corporations, rather than physical persons, and generally consist of monetary sanctions; furthermore, in several European Countries, administrative measures against legal persons can be considerably more detrimental than the average monetary criminal sanction. For this reason, the choice between administrative or criminal sanctions does not in itself reflect the importance attached to monitoring obligations, as self-reporting is understood as critically important – and therefore guaranteed through the use of severe (administrative or criminal) sanctions – in all Member States.

From this perspective, the choice of the Italian legislator might appear less extravagant than anticipated. In particular after the latest reform of environmental offences, Italy has provided for particularly harsh criminal sanctions against whoever obstructs or interferes with environmental controls or monitoring activities, or alters their results. The difference – a rather crucial one in terms of criminal policy – is that such activities ought to be performed by public Authorities only; nevertheless, the end result, in terms of sanctioning response against wrongdoings in the field of environmental controls, can be considered in line with the approach of the other Member States. It might be contended that the self-monitoring system ensures a higher rate of compliance with environmental standards, though there is no available data in the questionnaires to support such statement.

On the basis of the available data, there doesn't seem to be a shared opinion on the impact of self-monitoring on environmental prosecution nor on the potential conflict between the latter and the privilege against self-incrimination. This might indicate that the two are not necessarily correlated. More probably, the data available to the drafters of the Country reports is too scarce to allow definite conclusions on such relationship.

In this respect, it is worth pointing out that the questions raised by self-monitoring are especially intertwined with the type of evidence that can be used before criminal courts; question no. 3.1. and question n. 4.1 of the Questionnaire are thus closely linked. Not only do reporting obligations conflict with the privilege against self-incrimination in the sense that they risk forcing the offender to report his/her own wrongdoings; they also pose the problem of whether such self-reports can be later used within criminal proceedings. In other words, the first set of problems comes from the obligation of the perspective offender to trigger a criminal investigation against him/herself; a second and different set of questions derives from the possibility for the prosecuting Authorities to use (not only the findings of the investigation, but also) self-reports against the offender in court.

A clear proof of what is here being discussed comes from the Country report of the Netherlands: at question no. 3.1 it is possible to read that «the most common means of proof in an environmental case are the own statement of the suspect»; question no. 4.2 is answered by stressing the «thin line» that separates administrative inspections and criminal investigation and at the same time by stating that the offender is «informed of his right in regard to self-incrimination» only during an inspection in a criminal investigation; furthermore, the «evidence gathered during an administrative inspection can be used in an criminal investigation».

## 5. The protection against double jeopardy

The issue of double jeopardy is tackled from a wide perspective. The Questionnaire starts by asking in general whether national courts have confronted this issue. It then goes into detail, by investigating into the existence of controversial «grey areas» and, more in particular, into the issue of mandatory cuts in the income support to farmers provided under EU law.

From the answers provided, it clearly appears that double jeopardy in environmental matters is a question of concern and debate in all of the considered Member States. Notably, most of the case-law discussed in the available country reports does not specifically concern environmental crimes, but rather tax offences. In our understanding, this has to do with the debate arisen among supranational courts on this subject and the resulting sensitivity of European judges towards the issue. Apart from the attention that is said to be devoted to double jeopardy by national practitioners, the

Country reports have provided very discursive and disparate answers, that are considerably difficult to compare.

One striking aspect of the overall answers is a sort of 'conceptual misalignment' between country reports. The justices have adopted two legitimate but rather different perspectives on the issue of double jeopardy. On the one hand, some Country reports discuss the prohibition of punishing the perpetrator with the *same type* of sanction, thereby focusing on the issue of punishing the offender "twice" within the same sanctioning track (it is, for example, the case of Germany). This generally leads to discussing the difference between the *idem jus*, *i.e.* the normative description of the unlawful act, and the *idem factum*, *i.e.* the actual fact that has been committed. In other words, the question at stake is to understand when punishment – whatever its nature my be – is inflicted twice. On the other hand, several Country reports discuss the possibility that one person be subject to two *different types* of sanction (that is administrative vs criminal) for the same conduct. This means, apart from the conceptual definition of the "idem element", to debate the opportunity or legitimacy of having two sanctions, different in nature and function, punishing the same conduct. These aspects are both paramount for the question of double jeopardy, but are different and have to be taken into careful consideration when reading the answers to the Questionnaire.

It is worth pointing out that such differences are also important when analysing the statutory law that specifically addresses this question. While some national legislators (as, for example, in Sweden, Germany and Italy) have tried to regulate the issue of *ne bis in idem*, the relevant case-law has not always followed a coherent path and the most "difficult cases" are still subject to discussion. In other words, even where normative filters have been set forth, to separate the wheat from the chaff remains a complicated task.

That being said, all Country reports stress the importance of the *ne bis in idem* principle within their domestic legal systems, though the available case-law is not conclusive as to the scope of the relevant principle. Where the issue of double jeopardy has been raised before national courts, the violation of the principle has been discarded on the basis of two recurrent arguments: either the relevant criminal sanctions punish two "different conducts", or the concurrent application of administrative and criminal sanctions for the "same conduct" is legitimate under national (and supranational) legislation.

It is worth noting that, according to the results of the Country reports, national judges appear to pay less attention to the formal nature of the sanctions than to their overall effect. In other words, apart from the type of sanctions that are being deployed, considerable scrutiny is carried out as to the way the sanctions as a whole affect the perpetrator (and the environment). Indeed, with respect to the environment, there seems to be a general tendency towards remedial sanctions, whatever their nature may be: *ne bis in idem* never seems to obstruct redressing the environmental damage, that appears to be the absolute priority when fighting against green offences.

Some Country reports provide interesting examples of the complexity of the *ne bis in idem* within national legal systems. In the case of Germany, for example, according to statutory law a criminal sanction should always be preferred over a concurrent administrative sanction; the latter can be applied only in case the criminal penalty is not imposed. Nevertheless, mandatory cuts in the income support to farmers can be applied together with criminal sanctions and at the same time they «might be taken into account when determining» the amount of the relevant penalty (as in Denmark).

Sweden seems to be following a rather opposite path. Though no significant case of double jeopardy in environmental matters had been discussed, in 2007 the Swedish legislator stated that criminal sanctions shall not apply in case «environmental sanction charges» – that is, we believe, administrative sanctions – are applicable to the wrongful conduct. In our understating, a convincing explanation for this choice might be found with the severity of criminal sanctions applicable to environmental wrongdoings: as discussed in the 2015 EUFJE Summary Report, administrative sanctions might prove to be considerably more detrimental for the offender than criminal sanctions and more efficient for the protection of the environment overall. Indeed, with reference to income tax against farmers, the reports clearly states that such measures «will generally (by the farmers) be regarded as a much more severe "punishment" than a [criminal] penalty»

One final, very interesting, example is provided by France. The issue of double jeopardy seems to be addressed through the lens of proportionality. Indeed, according to the established case-law of the *Cour de cassation*, the concurrent application of criminal and administrative sanctions is not in breach of national and supranational legislation «*sous réserve que le montant global des amendes susceptibles d'être prononcées ne dépasse pas le plafond de la sanctions encourue la plus élevée , dès lors que ce cumul garantissait précisément la sanction effective, proportionnée et dissuasive , exigée par le droit de l'Union pour assurer la réalisation des objectifs*

*poursuivis par une directive communautaire ( en cette espèce la directive n° 2003/6/CE du 28 janvier 2003 : assurer l'intégrité des marchés financiers communautaires)*». By taking such approach, the French magistrates seem to partially discount the nature of the applicable sanction(s), the legitimacy of the concurrent application of different types of sanctions, as well as the time of their infliction; what matters is the overall intensity of the sanctioning response against the perpetrator. This solution though comes with a cost, as it seems to provide public Authorities with great discretion as to the type of sanction to be applied, thereby considerably affecting the foreseeability of sanctioning response against environmental offences.

## 6. The right to proportionate sanctions

This part of the Questionnaire asks whether the judges have ever noticed excessively severe sanctions in environmental cases and it later investigates into the national punishing practices, especially in light of the Recommendation no. R(92)17 of the Committee of Ministers of the Council of Europe.

According to all Country reports, virtually no case has ever entailed the infliction of disproportionate penalties in environmental proceedings. Actually some reports reveal just about the opposite, as in France, where sanctions are reportedly too low, or in Germany, where in 2012 only 30 cases led to prison sentences and only 4 of these convictions were not suspended under probation. This conclusion is supported by the findings of the 2015 EUFJE Summary Report, which show that even where severe sanctions for environmental offences are available in theory, relatively modest sanctions seem to be applied in practice.

Only the UK shows an opposite trend, as the Country reports indicates four recent cases that were punished with very severe monetary sanctions. In particular in *R. v Thames Water Utilities Ltd.* [2015] EWCA Crim 960 – a £250,000 fine was upheld. Notably, the court held that in appropriate circumstances a fine may be imposed of 100 % of pre-tax net profit, even where it is over £100m.

It is worth pointing out that disproportion of applicable sanctions may derive from the objective harshness of the penalty, as well as from its *subjective* harshness, that is its severity with respect to certain conditions of the perpetrator. In this respect, interesting suggestions can be found in several Country reports.

For example, the French report shows concern for the use of sanctions that have irreversible effects on the environmental or on the perpetrator and therefore cannot be balanced, such as demolitions, interdictions from certain activities or confiscations.

The Finnish report indicates a recent case where the issue of subjective proportionality has been raised and discussed in Court. In particular, the offender had committed an environmental crime by operating a one man's company and had been sentenced with a fine; in addition to that, a fine was inflicted to his company he owned. The Court held that the total punishment was too severe.

The Belgian report goes into greater detail, by indicating two strands of case-law according to which the penalty imposed were considered too severe: on the one hand, the administrative fining of offenders with limited financial means; on the other hand, the forfeiture of illegal benefits by criminal courts where the benefit consists in illegal income (as opposed to avoided or delayed costs) generated by the exploitation of a plant without environmental permit.

These indications do not contradict the assumption that, except in very few cases, the right to proportionate penalties is respected in environmental matters. Arguably, this would be true even if the amount of the applicable penalties were raised.

The answers to Question no. 6.3 do not seem to provide significant additional information. In general, the financial conditions of the offender are taken into consideration in all Member States when deciding the amount of the applicable penalties. Several Country reports provide discursive answers, though it is frequently agreed that «the economic capacity of the offender has in some case influence, but the fact that the fine will bring the offender to bankruptcy is not in itself a defence» (Danish report).

## 7. The right to respect for private and family life*

7.1. *Preliminary remarks: methods and scope of the analysis* – The last three questions of the Questionnaire focus on the role played within adjudication on environmental matters by certain fundamental rights, such as the right to protection to private and family life, and the right to life. The comparative analysis concerns the impact that international and supranational standards (ECHR, EU Charter), as implemented within the respective case-law (ECtHR and the EU Court of Justice), have at the national level.

* Questions no. 7 to 9 by doc. Pulice and doc. Penasa.

The analysis has followed two main trajectories, according to the Questionnaire's outcomes. On the one hand, it has addressed the influence of such principles on both the regulatory and the adjudicatory dimension, in order to understand the scope of their possible effect on national legal systems. On the other hand, it has evaluated the practical impact on both dimensions, regulatory and adjudicatory, thereby outlining a three-step scale: null impact, indirect impact and direct impact.

Though the analysis has been as rigorous as possible, it is worth pointing out that in many cases it has been challenging to draw a clear line between these three different impacts. This is mainly due to the fact that the concept of «impact» itself depends on a number of multifaceted issues and can therefore be assessed differently according to:

- the *status* of the mentioned supranational and international documents;
- the national models of the framework for environmental protection;
- the national models of constitutional adjudication;
- the sources of law or the case-law on which the influence of a given principle has been considered;
- the scope of the concept of impact adopted in the Country reports.

Moreover, there is no uniformity in the national reports as to several issues, such as the mentioned international and supranational documents (not all of them have been considered by all Authors; the ICCPR, for instance, has never been directly mentioned), the national framework and the type of jurisdiction considered, or the reasons behind a given level of influence or behind a null impact.

7.2 *The right to respect for private and family life* – This question is divided essentially into two parts: the Questionnaire starts by addressing the impact of the right to respect for private and family life on domestic environmental adjudication and it later asks if – and in which cases – judges might be willing to refer to it in environmental proceedings.

As far as the impact of the common layer of guarantees and rights offered by the ECHR and the EU-Charter is concerned, we can distinguish between: no impact – direct impact – indirect impact. Against this background, it is worth pointing out that:

a) a null impact of the right to respect for private and family life on national legal systems is hardly conceivable, as both the ECHR and the EU-Charter, depending on their respective legal *status*, have an influence at the national level (either because of the obligation to interpret national law in conformity with

supranational legislation, or because such Convention are directly binding for the States, when they act within their scope).

b) the fact that no examples from the case-law are reported in the various Country reports does not mean that the right to respect for private and family life has no influence on domestic legal systems. National standards may indeed offer an equivalent or even higher protection.

c) it is important to take into consideration the reasons why this principle is not applied in environmental adjudication: because this principle is considered irrelevant as such in environmental adjudication, because the are no cases involving such a right, because the parties do not invoke it, or because the judge decides not to apply it in spite of the reference made by the parties,?

d) accordingly, some preliminary remarks are needed to properly address these issues as well as those concerning the impact of the common layer of guarantees and rights offered by the ECHR and the EU-Charter on environmental adjudication. In particular, the analysis must take into consideration the differences between the models of constitutional adjudication, the distinction between the impact of these principles on constitutional adjudication and that on criminal case-law, and the differences deriving from the *status* of the mentioned supranational and international documents

Furthermore, a proper comparative analysis of the role played by the right to respect for private and family life in environmental adjudication also requires understanding the relationship between the right to a healthy environment and other fundamental rights, such as the right to health. Does the right to a healthy environment exist as such on an autonomous basis or is it included in the scope of other rights?

As to the impact of the principle concerned and/or of the provisions included in the ECHR and in the EU Charter, the following distinction can be made:

1) ***No impact***. In Norway and Denmark the right is not (or is reported not to be) considered by national courts. It is though worth pointing our that, according to the Danish Country report, the reference to such right would be advisable in support of environmental adjudication, provided that the same conclusion could not be reached based in Danish Environmental legislation.

2) ***Indirect impact***. In the majority of the considered Countries, the right and/or the relevant provisions of the mentioned international and supranational

instruments serve as an interpretative aid for judges – i.e. as part of a set of fundamental principles used by courts in environmental case-law (Italy, France, Sweden, Estonia, Finland, Hungary, Germany, the Netherlands, UK). In this context, Belgium represents an interesting case, as the right provided for by Article 8 of the ECHR appears to have both a direct and indirect impact.

3) ***Direct (decisive) impact***. In Finland, Hungary and Belgium the right appears to be used directly as a legal reference by judges. In some Countries, references to this right can be made, when no national act appears to provide the corresponding type or level of protection (France), or alternatively through a direct reference to the ECtHR case-law within constitutional adjudication or criminal case-law (Belgium).

**8. Right to life.**

As with the previous question, the Questionnaire initially investigates into the impact of the right to life on domestic environmental adjudication, and then asks if – and in which cases – judges might be willing to refer to it in environmental proceedings.

Also with reference to this set of rights some preliminary remarks are necessary to address, from a comparative perspective, the impact of this fundamental right on environmental adjudication, as well as that of the common layer of guarantees offered by the ECHR and the EU-Charter.

First of all, there is no uniformity among national reports as to the differences between the application of this right as such and the application of international and EU provisions, nor is there a common pattern as to the reference made to constitutional or ordinary jurisdiction concerning environmental cases. In most cases, the ECHR and the EU Charter are not even mentioned, so sometimes it is hard to understand whether the relevant answer concerns the right to life as provided for by national law or the provisions included in these Charters.

Moreover, it is crucial to consider the practical scope of such right and its possible autonomous role in environmental adjudication, as well as its relation, if any, with other fundamental rights in shaping the national framework for environmental protection.

Provided that both the ECHR and the EU-Charter (depending on their legal *status*) have an influence on domestic legal systems and that therefore a completely null impact is hardly conceivable, it is possible to outline a common trend: on the one hand, the right

to life is granted in all the considered Countries regardless of the role played by the abovementioned international and supranational Charters; on the other hand, this fundamental right is usually applied in the most serious cases concerning environmental matters.

In particular, in environmental matters the right to life is considered as part of the set of fundamental principles but it is rarely used in a direct and autonomous way as the main legal reference; it acts rather as an «underlying background» for both the ruling and adjudication at the national level and as a concurring reason. The comparative analysis of the national reports shows that the reasons behind this common general trend may differ and are usually linked to the existence of a national framework for environmental protection, which makes it unnecessary to direct refer to that right as protected at the international or supranational level; other reasons may be the role played by other fundamental rights in the protection of similar situations, or the existence of a wide margin of appreciation for national legislators in defining the scope of this right and in coping with the resulting supranational obligations.

From a regulatory perspective, the following key-issues should be emphasised:

a) the right to life can have an impact on national legislation, as it may be explicitly embedded in some provisions or be at the basis of some environmental crimes (Italy, France).
b) this right serves as a basis for the environmental legislation as a whole, and plays a role in the issuing of permits (Sweden).
c) in some Countries, the right to life as such has not yet played a crucial role on environmental adjudication, due to the existence of specific national instruments regulating environmental matters (Germany, Sweden, Hungary) or because it is used together with other fundamental rights (right to physical integrity in Germany; Estonia).
d) the right to life can also be referred to together with other rights, maintaining an important role in the most severe cases (together with the right to health, it is considered at basis of some environmental offences, Italy and Estonia).

From the case-law perspective, the analysis has implemented the three-step scale of the level of impact produced on the national adjudicatory systems (ordinary and constitutional). The following remarks can be made:

a) a distinction must be drawn between Countries where the right to life is reported to have no impact on environmental adjudication (though, the Country reports do not give additional indication of the reasons thereof or of the existence of cases dealing with this right, in which the court has decided not apply the relevant provisions: Denmark, Norway, Hungary), and those where no environmental case, in which the right to life has been referred to, is known (as in the Country report of Estonia and Belgium)

b) in some Countries a judicial decision can be also based on right to life in particularly serious cases (as in the case of UK, Finland and Belgium)

c) in other Countries the reported case-law shows a direct link between certain crimes and right to life (France) or that the danger for life is specifically taken into consideration (Italy)

d) according some national courts, the duty to protect the right to life lies with the Legislator. There is therefore a margin of discretion and courts may intervene only in the most severe cases (Germany)

e) according to some Country reports, the right to life can be used as a support in environmental adjudication in the most serious cases (e.g. Italy; Estonia, Poland, Hungary, the Netherland)

f) the right to life has to be taken into account, when examining environmental cases, but its impact is limited and can be usually only the «underlying background for the rulings of the national legislator» (Germany).

## 9. The right to environmental protection (Art. 37 of the Charter of Fundamental Rights of the EU)

The last question of the Questionnaire asks whether the right to environmental protection is considered to have an impact on environmental adjudication and whether it should only impact the sanctioning level, i.e. the choice and level of sanctions.

Also with reference to this question, there are differences between the Country reports as to the sources of law considered and as to the case-law mentioned. It is worth pointing out that, unlike the previous questions, this part of the Questionnaire focuses exclusively on the impact of Article 37 of the EU Charter of Fundamental Rights.

One common trend worth underlining is that, in all the analysed Country reports, Article 37 does not appear to act as direct legal parameter within constitutional adjudication, as it has not yet gained sufficient legal relevance, when compared with the legal standards provided for by EU secondary law (directives, regulations) and by national standards (constitutional or statutory law).

As to environmental protection under art. 37 EU Charter, the following general observations can be made from the comparative analysis:

a) in Norway, Estonia, Hungary and Germany the principles and provisions included in the ECHR and in the EU Charter with respect to the right to environmental protection are not applied directly, for the relevant protection is already ensured under national law (at the constitutional or at the statute level);
b) some Country reports underline the need to use criminal law and criminal punishment only as *extrema ratio* (Finland and Italy)
c) some Country reports point out the importance of the EU standard of protection and of the principle of precaution (France and Sweden).
d) in many cases the binding nature of Article 37 of the EU Charter has been questioned, in particular for the wide margin of appreciation it leaves to the Member States, thereby establishing a principle that is too vague to be directly binding (Denmark, Estonia, Germany, Hungary, Belgium)
e) an indirect impact (meaning that the principle is directly referred to by the national case-law, though not only in the criminal field) is explicitly underlined by the UK report. Although the principle is not directly applicable to the facts of the mentioned cases, this remark nevertheless shows the potential of Article 37.