

## Fill in the Gaps: EU Sanctioning Requirements to Improve Member State Enforcement of EU Environmental Law

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### Abstract

The enforcement deficit in EU environmental law would stem from bad Member State governance of the autonomy they traditionally enjoy regarding the enforcement of EU law. Both the EU legislator and the European Court of Justice take steps to ‘fill in the gaps’ and develop sanctioning requirements to improve Member State enforcement of EU (environmental) law. These requirements are discussed in this article. The Eco Crime Directive 2008/99/EC and the Ship Source Pollution Directive 2005/35/EC, the latter as recently amended, deserve some particular attention. Also the novelties of the Lisbon Treaty are considered.

### Keywords

EU environmental law; Enforcement of law; Sanctions and penalties; Principle of loyal cooperation; Eco Crime Directive 2008/99/EC; Ship Source Pollution Directive 2005/35/EC

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## Introduction

1. It is well-known that the environmental law applicable in the Member States of the European Union is, for the most part, of EU origin. The influence of EU law on the substantial environmental policies of the Member States can therefore hardly be overestimated. On the enforcement level however, the sanctioning of offences against EU (environmental) law has always been primarily a task of the Member States. Environmental directives and regulations often make no mention of how they should be sanctioned or simply refer to the national law of the Member States. The EU is therefore largely dependent on the Member States for the enforcement of its environmental directives and regulations. Unfortunately, Member States generally don't seem to be doing a very good job, resulting in an *enforcement deficit* in EU environmental law.

One approach of the EU to 'fill in the gaps' and push forward Member State enforcement of EU environmental law in the desired direction can be described as *enforcement norm-setting*:<sup>1</sup> the development of instrumental requirements for enforcement measures at Member State level. Apart from soft law measures—such as guidelines, consultations and workshops—to enhance the quality of Member State enforcement, two types of hard law measures can be distinguished.<sup>2</sup> Firstly, the European Court of Justice ('*ECJ*') in its jurisdiction gradually derived some instrumental enforcement requirements from the principle of loyal cooperation laid down in Article 4(3) TEU (Chapter 1). More specifically, the sanctions that Member States prescribe for violations of EU law must be non-discriminatory (compared to the sanctioning of pure national law violations of a similar nature and importance), effective, proportionate and dissuasive. Moreover, Member States must proceed with respect to EU law violations with the same diligence as they bring to bear in implementing corresponding national laws. These requirements are binding on Member States and constitute the boundaries of their enforcement autonomy. Secondly, the EU legislator sometimes already incorporates specific sanctions in environmental

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<sup>1</sup> The term 'norm-setting' is taken from Blomberg. See *A.B. Blomberg*, European Influence on National Environmental Law Enforcement: Towards an Integrated Approach, *Review of European Administrative Law* 2008 (2), pp. 39, 61.

<sup>2</sup> The same types of measures to direct Member State enforcement of EU law are distinguished by *P.C. Adriaanse* et al., Implementatie van EU-handhavingsvoorschriften: tussen Europese regie en nationale praktijken, *RegelMaat* 2008 (5), pp. 180, 183–184.

directives and regulations that Member States subsequently have to implement in their domestic legal order (Chapter 2). Usually these specific sanctions are sectorally addressed without any reference to their (criminal or administrative) nature. Directive 2008/99/EC on the protection of the environment through criminal law<sup>3</sup> (*'Eco Crime Directive 2008/99/EC'*) and the recently amended Directive 2005/35/EC on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences<sup>4</sup> (*'Ship Source Pollution Directive 2005/35/EC'*) are, however, different in that they oblige Member States to use criminal sanctions for certain 'serious' environmental offences. Chapter 3 discusses the extent to which the EU enforcement requirements set out in the two previous chapters might affect the environmental sanctioning policies of the Member States. More specifically, the issue is raised whether sanctions for EU violations should not only be implemented in law but also in practice in case of breach. Particular attention will also be paid to the possible interference with the policy of a Member State to determine the various sanctioning competences of the environmental enforcement agencies in a centralized legislative act. I will also take a look at the changes which the entry into force of the Lisbon Treaty brings with it (Chapter 4). Finally some conclusions are drawn (Chapter 5).

2. The present article only concerns public enforcement of EU environmental legislation, *i.e.* enforcement by competent (penal or administrative) public authorities within Member States (as opposed to private enforcement by civil liability lawsuits).<sup>5</sup> The scope of this article is furthermore limited to the aspect of the sanctioning of violations, *i.e.* dealing with the situation when a violation already has been committed and the Member State concerned is aware of the violation that has been committed. The preceding aspect of monitoring compliance with EU environmental legislation through inspections, which

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<sup>3</sup> Council Directive 2008/99/EC on the protection of the environment through criminal law, OJ 2008 L 328.

<sup>4</sup> Directive 2005/35/EC on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences, OJ 2005 L 255, as amended by Directive 2009/123/EC amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ 2009 L 280.

<sup>5</sup> For a comprehensive overview of the conceptual differences between administrative, penal law and civil law enforcement of environmental violations, see for instance *M.A. Heldeweg, R.J.G.H. Seerden & K.R. Deketelaere*, Public environmental law in Europe; a comparative search for a *ius commune*, EELR 2004 (3), pp. 78, 86–88.

is also a task of the Member States under Article 4(3) TEU and can also be addressed by the EU legislator in specific environmental provisions, will not be discussed.<sup>6</sup>

3. Since the entry into force of the Lisbon Treaty on 1 December 2009 the European Union and the European Community have been merged into one single legal entity, the European Union. The Treaty on the European Community ('EC') has been amended and is now called the Treaty on the Functioning of the European Union ('TFEU'). The Treaty on European Union ('TEU') has been amended as well, but did not change name. It therefore makes no sense anymore to talk about the European Community/EC. Therefore in this article the terms 'European Union'/'EU' are used while in fact they usually correspond to the former European Community/EC. However, in a few paragraphs the old terms 'European Community'/'EC' still occur when explicit reference is made to the pre-Lisbon situation with an EC pillar and a third EU pillar (e.g. the elaboration on the infamous *battle of the pillars* between the Commission and the Council over environmental criminal law in paragraph 8).

A word also needs to be said about the use of the terms 'sanctions' and 'penalties' in this article. A sanction is understood as any aggravating measure formally imposed on a violator by a public authority (a judge or a public administration) in reaction to the violation of a legal norm the violator concerned has committed.<sup>7</sup> Sanctions can be imposed by a criminal judge (criminal sanction), a public administration (administrative sanction) or a civil judge in case of a civil liability lawsuit (civil sanction). Sanctions aimed at imposing a loss on the person concerned that goes further than remediation or when remediation is not possible, are considered punitive sanctions or penalties. Remedial sanctions aim to remediate the violation of a legal norm or the consequences thereof. Both criminal sanctions and administrative sanctions can have a punitive or remedial character (or both at the same time). Where the EU legislator or the ECJ is cited, the original wordings are displayed.

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<sup>6</sup> Concerning EU environmental inspection requirements, see *Blomberg*, *supra* note 1 at pp. 47–52 and *A.B. Blomberg*, Implementatie van Europese handhavingsverplichtingen in het Nederlandse milieurechtelijke handhavingssysteem, *Milieu en Recht* 2009 (7), pp. 404, 407–408.

<sup>7</sup> Due to this definition Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143) is not discussed in this article.

## 1. The General Sanctioning Requirements of the Member States

4. Member States initially enjoyed very wide discretion in the sanctioning of EU law offences. The ECJ simply inferred from the principle of loyal cooperation currently laid down in Article 4(3) TEU the competence of Member States ‘to choose the measures which they consider appropriate, including sanctions which may even be criminal in nature’.<sup>8</sup> The ECJ did not postulate any explicit restriction to the Member States’ sanctioning competence. As of the *von Colson & Kamann*<sup>9</sup> and *Harz*<sup>10</sup> Cases, however, the ECJ started elaborating instrumental criteria delimiting Member States’ discretion, culminating in the milestone *Greek Maize*<sup>11</sup> Case. The ECJ now clearly states that where EU legislation ‘does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, [Article 4(3) TEU]<sup>12</sup> requires the Member States to take all measures necessary to guarantee the application and effectiveness of [EU] law’.<sup>13</sup> And for that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of EU law ‘are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive’.<sup>14</sup> The ECJ has since then repeated the *Greek Maize* case law several times in other cases, both concerning directives and regulations, which is therefore now well rooted in the EU *acquis*.<sup>15</sup> One could speak of *general sanctioning requirements* incumbent

<sup>8</sup> See Case 50/76, *Amsterdam Bulb BV v Produktschap voor Siergewassen* [1977] ECR I 37, para. 32.

<sup>9</sup> Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR I 891.

<sup>10</sup> Case 79/83, *Dorit Harz v Deutsche Tradax GmbH* [1984] ECR I 921.

<sup>11</sup> Case 68/88, *Commission of the European Communities v Hellenic Republic* [1989] ECR 2965.

<sup>12</sup> With regard to EU environmental legislation, Article 192(4) TFEU offers a supplementary legal ground for the general sanctioning requirements of the Member States. Article 192(4) TFEU states that ‘[w]ithout prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environment policy’.

<sup>13</sup> *Greek Maize* Case, para. 23.

<sup>14</sup> *Greek Maize* Case, para. 24.

<sup>15</sup> See *int.al.* Case C-326/88, *Anklagemyndigheden v Hansen & Soen I/S* [1990] ECR I-2911 and (applied to environmental law) *Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95,*

on the Member States.<sup>16</sup> Since all powers (legislative, executive and judicial) within Member States are held by Article 4(3) TEU, both the environmental legislator in his legislative task and the environmental enforcers with sanctioning competences in their enforcement task have to comply with the general sanctioning requirements.

5. It is clear that Member States' autonomy regarding the sanctioning of EU law violations is no longer close to absolute, but instrumentally restricted. In principle the choice of sanctions for EU law violations still rests with the Member States, yet this competence is delimited by the requirements of non-discrimination (compared to the sanctioning of pure national law violations of a similar nature and importance), effectiveness, proportionality and deterrence.

The principle of equivalence or non-discrimination, a fundamental principle of EU law and under the general enforcement requirements also referred to as the assimilation principle,<sup>17</sup> is based on the assumption that Member States take care of their own legal order and its effectiveness in practice.<sup>18</sup> What Member States consider good enough for themselves, should be good enough for the EU as well, or should at least constitute the minimum standard regarding EU law provisions. The principle works both upwards and downwards: EU legislation should be enforced neither more softly nor more strictly than pure

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Criminal proceedings against Sandro Gallotti, Roberto Censi, Giuseppe Salmaggi, Salvatore Pasquire, Massimo Zappone, Francesco Segna and others, Cesare Cervetti, Mario Gasbarri, Isidoro Narducci and Fulvio Smaldone [1996] ECR I-4345. See also Council Resolution on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market, OJ 1995 C 188 and Council Resolution on the drafting, implementation and enforcement of Community environmental law, OJ 1997 C 321.

<sup>16</sup> Concerning the general sanctioning requirements of the Member States in general, see *C. Harding*, Member State Enforcement of European Community Measures: The Chimera of 'Effective' Enforcement, MJ 1997 (4), p. 5 and *M. Böse*, The Obligation of Member States to Penalise Infringements of Community Law: From Greek Maize to French Farmers, *Revue des Affaires Européennes—Law & European Affairs* 2001–2002 (1), p. 103. For a review of the general sanctioning requirements of the Member States with regard to EU environmental law in particular, see *R. Meeus*, De basishandhavingplicht van de lidstaten van de Europese Unie in het communautair milieurecht, *Tijdschrift voor Milieurecht* 2007 (5), p. 311 and *Blomberg*, *supra* note 1 at pp. 43–47.

<sup>17</sup> See for instance *H.G. Sevenster*, Criminal law and EC law, *CML Rev* 1992 (29), pp. 29, 34 and 51.

<sup>18</sup> *Böse*, *supra* note 16 at p. 106.

national provisions of a similar nature and importance. This concerns not only the sanctions themselves, but also the modalities of the proceedings that apply when a violation is prosecuted.<sup>19</sup> The principle of equivalence can limit the sanctioning autonomy of the Member States to a significant extent. The clear choice made by a Member State for criminal sanctions with regard to certain national legislation would require the use of criminal sanctions for analogous EU legislation as well. Yet the instrumental value of the principle is restricted. It does not guarantee an adequate enforcement of EU legislation when Member States do not enforce national legislation effectively either. Furthermore, the principle of equivalence only requires equivalent enforcement of EU legislation compared to enforcement of pure national law ‘*of a similar nature and importance*’. Hence, in so far as similar national legislation is lacking, the principle of equivalence does not produce any effect. Therefore it is clear that the principle of equivalence in itself cannot guarantee an adequate enforcement of EU legislation.

The sanctions that Member States introduce to implement EU legislation must also be proportionate. This is not surprising since the principle of proportionality is one of the fundamental principles of EU law.<sup>20</sup> With regard to penalties, Article 49(3) EU Charter of Fundamental Freedoms clarifies that ‘*[t]he severity of penalties must not be disproportionate to the criminal offence.*’ It offers important legal protection for persons: it prevents Member States from applying sanctions that go further than is necessary to achieve the EU goals at stake and therefore marks out the boundaries of the principles of effectiveness and deterrence. Nevertheless, the principle of proportionality also works both upwards and downwards: both too severe and too soft sanctions would be disproportionate. The principle of proportionality requires that a measure (e.g. a sanction) must be appropriate and necessary to achieve its objectives.<sup>21</sup>

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<sup>19</sup> Concerning the procedural aspect, the ECJ has subsequently stated that it is for the domestic legal system of each Member State to determine the procedural conditions governing EU law actions, but that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. See Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5 and Case 54/81, *Firma Wilhelm Fromme v Bundesanstalt für landwirtschaftliche Marktordnung* [1982] ECR 1449, para. 6.

<sup>20</sup> See Article 5(4) TEU which states that ‘*[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*’.

<sup>21</sup> *T. Tridimas*, *The General Principles of EU Law*, 2006, p. 139.

A measure is appropriate when it is suitable, *i.e.* reasonably likely, to achieve its objectives (the test of suitability). A measure is necessary when there are no other less restrictive means capable of producing the same result (the least restrictive alternative test). It has been said that the principle of proportionality also entails a third test: it should be established that the measure does not have an excessive impact on the applicant's interests, even if there are no less restrictive means available (proportionality *stricto sensu*).<sup>22</sup> The ECJ does not refrain from actually examining whether the sanctions introduced by a Member State for EU law violations are proportionate or not.<sup>23</sup> Taking into account the restricting nature of penalties one could say that the principle of proportionality acquires particular importance to punitive sanctions, but the principle also applies to remedial sanctions.<sup>24</sup> Yet the application of the principle of proportionality does not always lead to one obvious outcome. There can be diverse policy objectives involved making the proportionality test(s) more complex.<sup>25</sup> Neither is there a national equivalent with which to compare the sanction(s), as is the case under the principle of equivalence. The least restrictive alternative test and the assessment of proportionality *stricto sensu* in particular leave Member States an inevitable margin of discretion.

The requirement that the sanctions prescribed by Member States must be dissuasive is another guarantee for an adequate Member State enforcement of EU legislation. The requirement of deterrence forces Member States to introduce sufficiently severe sanctions for EU law violations. The ECJ in its jurisdiction already considered Member State sanctions for EU law violations not to be sufficiently dissuasive.<sup>26</sup> The requirement of deterrence presumably requires that sanctions must have both individual and general dissuasive effects.<sup>27</sup> Individual

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<sup>22</sup> *Id.* at p. 139.

<sup>23</sup> See for instance Case C-29/95, Eckehard Pastoors and Trans-Cap GmbH v Belgian State [1997] ECR I-285 and Case C-262/99, Paraskevas Louloudakis v Elliniko Dimosio [2001] ECR I-5547.

<sup>24</sup> *Tridimas*, *supra* note 21 at p. 169.

<sup>25</sup> *Harding*, *supra* note 16 at p. 16.

<sup>26</sup> See for instance Case C-383/92, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland [1994] ECR I-2479; Case C-382/92, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland [1994] ECR I-2435 and Case C-354/99, Commission of the European Communities v Ireland [2001] ECR I-7657. In Case C-354/99, however, the principle of equivalence was not complied with either.

<sup>27</sup> See also *N. Hækkerup*, Controls and Sanctions in the EU law, 2001, p. 174.

dissuasive effect concerns deterrence towards a particular offender: he should be prevented from committing other violations in the future. General dissuasive effect, on the other hand, refers to prevention in a broad sense, towards everybody, including persons who have not yet committed an offence. The desired severity of the sanctions largely depends on the importance of the violated EU law provision(s) and the severity/scale of the violation. Even though punitive sanctions are more likely to have a dissuasive effect, remedial sanctions should not automatically be ruled out. And even though the principle of deterrence could make the use of criminal sanctions close to inevitable in certain cases (e.g. organized environmental crime such as waste trafficking), much will depend on the level of the sanctions. Criminal fines of some hundreds or even thousands of euros are not likely to deter well-organized criminal organizations. This raises the difficulty of the measurement of deterrence in general. Apart from methodological problems, it is not always sure whether a lower rate of offending can be entirely attributed to the impact of certain sanctions.<sup>28</sup>

Lastly, the sanctions Member States introduce must be effective. The precise meaning of this requirement is not entirely clear. It appears to be very closely linked to the requirement of deterrence. Some authors therefore discuss both requirements together.<sup>29</sup> In his opinion on the *Hansen & Soen*<sup>30</sup> Case, Advocate General Van Gerven states that the requirement of an effective sanction means ‘amongst other things, that the Member States must endeavor to attain and implement the objectives of the relevant provisions of [EU] law’.<sup>31</sup> In other words, the sanction should produce a real effect and should not remain a dead letter.<sup>32</sup> The requirement of effectiveness seems therefore closely related to the obligation of results to which Member States are held under Article 288, para 3 TFEU. As a result, effective enforcement of EU environmental law seems to require remediation enforcement at the very least.<sup>33</sup>

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<sup>28</sup>) *Harding*, *supra* note 16 at p. 18.

<sup>29</sup>) See *J.H. Jans* et al., *Europeanisation of Public Law*, 2007, pp. 212–213. Some authors consider both the requirements of effectiveness and deterrence as being part of a general ‘principle of effectiveness’. See *Böse*, *supra* note 16 at pp. 107–108.

<sup>30</sup>) Case C-326/88, *Anklagemyndigheden v Hansen & Soen I/S* [1990] ECR I-2911.

<sup>31</sup>) Opinion of Advocate General Van Gerven in Case C-326/88, *Anklagemyndigheden v Hansen & Soen I/S* [1990] ECR I-2911, para. 8.

<sup>32</sup>) *M. Poelemans*, *La sanction dans l’ordre juridique communautaire. Contribution à l’étude du système répressif de l’Union européenne*, 2004, p. 273.

<sup>33</sup>) See *Meeus*, *supra* note 16 at pp. 337–338 and *Blomberg*, *supra* note 1 at p. 44.

In conclusion, one could say that the requirement of proportionality especially (but not solely) expresses the concern of legal protection ('not too hard, but not too soft either'), while the requirements of effectiveness and deterrence guarantee the sufficiently pressing character of the Member States' sanctions ('hard enough'), and that the non-discrimination requirement is somewhere in between, although leaning more towards the requirements of effectiveness and deterrence ('not softer but neither harder than similar national law violations'). One should not forget either that these requirements are inextricably linked.<sup>34</sup> The requirement of deterrence, for instance, automatically raises the issue of proportionality. Even though in some cases the application of these requirements may to a large extent restrict Member States' freedom of choice, these requirements still express concepts that need to be interpreted *in concreto*, leaving Member States an inevitable margin of discretion. The requirements of non-discrimination and proportionality, both being fundamental principles of law in the EU legal order, must of course be interpreted in the light of the case law of the ECJ regarding these principles. The requirements of deterrence and certainly effectiveness are somewhat vaguer. Blomberg points out that this vagueness affects the practicality of the general sanctioning requirements: they would mainly play a role in judging—retrospectively—that a persisting violation apparently lacked deterrent and effective enforcement measures, but would fail in guiding Member States in advance in establishing deterrent and effective enforcement mechanisms.<sup>35</sup>

6. Finally, one should not forget that the sanctions Member States provide for EU law violations must also meet generally binding protective requirements, *i.e.* the fundamental rights, the fundamental principles of EU law and the fundamental EU freedoms.<sup>36</sup> In addition to this, reference here must also be made to the case law of the ECJ with regard to the (unlawful) inverse vertical direct effect of directives.<sup>37</sup> A Member State cannot rely on a directive, which has not been properly transposed in national law, against an individual.<sup>38</sup> In the context of criminal proceedings, the ECJ has repeatedly stated '*that a*

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<sup>34</sup> *Harding*, *supra* note 16 at p. 13.

<sup>35</sup> *Bomberg*, *supra* note 1 at pp. 46, 47 and 61.

<sup>36</sup> See also *Jans et al.*, *supra* note 29 at pp. 213–220. Under the Lisbon Treaty the Charter of Fundamental Rights of the European Union has the same legal value as the TEU and the TFEU (Article 6(1), § 1 TEU).

<sup>37</sup> *Id.* at pp. 213–214.

<sup>38</sup> Case 148/78, *Criminal proceedings against Tullio Ratti* [1979] ECR 1629, para. 22;

*directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive*'.<sup>39</sup> The ECJ based these decisions on the principles of legal certainty and non-retroactivity. This means that a directive that has not been properly transposed, cannot be enforced by criminal law means. In its *Rolex* Case the ECJ applied the same restriction to the enforcement of regulations by criminal law means. The ECJ acknowledged that a regulation by its very nature does not require any national implementing measures, but the regulation in question empowered Member States to adopt penalties for infringements, thereby making it possible to transpose to the present case the Court's reasoning in respect of directives.<sup>40</sup> Although the ECJ has not yet ruled on this matter, it can be assumed that this restriction also applies to the enforcement by means of punitive administrative sanctions.<sup>41</sup>

## 2. Specific Sanctioning Requirements in Environmental Directives and Regulations

7. Sometimes the EU legislator himself sets out provisions in environmental directives and regulations which concern the sanctioning of violations thereof. These provisions can, in a general way, oblige Member States to determine the sanctions applicable to breaches of the directive or regulation and to take all necessary measures for their implementation, stating that the sanctions determined must be effective, proportionate and dissuasive. In essence, such provisions do nothing more than resuming the general sanctioning requirements under Article 4(3) TEU with regard to the directive or regulation in question. They remind Member States of the general sanctioning requirements to which they are held under Article 4(3) TEU. Sometimes, however, environmental directives and regulations contain specific sanctioning provisions that envisage

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Case 8/81, *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53, para. 24; and Case 152/84, *M.H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723, para. 47.

<sup>39</sup> Case 80/86, *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 3969, para. 13 and Case C-168/95, *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705, para. 37.

<sup>40</sup> Case C-60/02, *Criminal proceedings against X* [2004] ECR I-651, paras. 61–62. In practice most regulations require Member States to implement enforcement measures.

<sup>41</sup> *Jans et al.*, *supra* note 29 at p. 83.

a specific violation and determine how to deal with this violation.<sup>42</sup> In these cases it is still up to the Member States to apply the prescribed sanctions in their domestic legal order, but the EU legislator has already to a greater or lesser extent determined the type and scope of the applicable sanctions. These sanctioning requirements incumbent on the Member States I call *specific sanctioning requirements*.<sup>43</sup> They do not necessarily exclude the application of the general sanctioning requirements; this would only be the case when the EU legislator exhaustively lists the sanctions Member States may impose.<sup>44</sup> Obviously when Member States apply the specific sanctions prescribed in directives and regulations, the same protective requirements have to be complied with as under the general sanctioning requirements.<sup>45</sup> An example of a specific sanctioning requirement is the obligation of the competent authorities of the Member States under the Groundwater Directive 80/68/EEC<sup>46</sup> to withdraw an authorization, if necessary, should the conditions laid down in the authorization not be complied with.<sup>47</sup>

8. Initially, however, it was unclear whether the (former) EC legislator was actually competent to provide for (punitive) sanctions in EC directives and regulations. After all, the enforcement of EU law traditionally is a prerogative of the Member States and the EC Treaty did not offer an express legal ground for (punitive) sanctions in EC directives and regulations. Therefore Case C-240/90<sup>48</sup> was a milestone case since the ECJ acknowledged for the first time the competence of the EC legislator to determine (punitive) administrative sanctions in secondary EC law.<sup>49</sup>

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<sup>42</sup> C.M. Billiet, Bestuurlijke sanctiëring van milieurecht. Wetgeving en praktijk, 2008, p. 225.

<sup>43</sup> See R. Meeus, Specifieke sanctieverplichtingen in het Europees milieurecht: een zorg voor onze wetgever en handhavers?, Milieu en Recht 2008 (8), p. 478; Blomberg, *supra* note 1 at pp. 52–55 and Blomberg, *supra* note 6 at p. 404.

<sup>44</sup> Case C-186/98, Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos [1999] ECR I-4883, para. 12.

<sup>45</sup> See para. 6.

<sup>46</sup> Council Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances, OJ 1980 L 20.

<sup>47</sup> Article 12(2) Directive.

<sup>48</sup> Case C-240/90, Federal Republic of Germany v Commission of the European Communities [1992] ECR I-5383.

<sup>49</sup> Despite the fact that the ECJ refrained from explicitly acknowledging the punitive character of the administrative sanctions in question, they clearly go further than the mere remediation of the damage.

Still the question remained unanswered whether the EC legislator could also provide for criminal sanctions in EC directives and regulations. Presumed necessary by the EC legislator for a dissuasive environmental law enforcement, this was subject to controversy since most of the Member States were (and still are) reluctant to transfer to the EU their most powerful tool to regulate individual liberties (*ius puniendi*). Member States considered the third EU pillar (former Title VI TEU, Police and Judicial Cooperation in Criminal Matters)<sup>50</sup> as the proper legal path for EU measures in criminal matters. This had to do with the differences between the first EU pillar (the EC pillar) and the third EU pillar: EC interference in the national criminal law of the Member States was more intrusive than interference from the third EU pillar.<sup>51</sup> Moreover, the EU was not free to choose between the first and the third EU pillars: an instrument could only be adopted under Title VI TEU where there was no EC competence for doing so.<sup>52</sup> Eventually, after an unparalleled institutional quarrel between the European Commission and the Council about the proper legal instrument (an EC directive based on old Article 175 EC on environmental protection<sup>53</sup> versus a framework decision based on old Title VI TEU on organized crime)<sup>54</sup> for a legislative act concerning criminal environmental law, the ECJ settled the matter in its *Environmental Crime*<sup>55</sup> Case, another landmark judgment. The

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<sup>50</sup> Currently judicial cooperation in criminal matters and police cooperation are determined in Chapters 4 (Articles 82–86) and 5 (Articles 87–89) of Title V TFEU.

<sup>51</sup> The main differences concerned the almost exclusive right of initiative of the European Commission under the EC pillar (*versus* a shared right of initiative between the European Commission and the Member States under the third EU pillar), a stronger European Parliament under the EC pillar (co-decision procedure), stronger enforcement powers of the European Commission and the ECJ under the EC pillar, qualified majority voting (as a general but not absolute rule) under the EC pillar (*versus* unanimity under the third EU pillar), and the direct effect of EC directives (*versus* framework decisions which could not have direct effect). Yet the ECJ decided in its milestone *Pupino* Case that framework decisions under the third EU pillar had indirect effect, requiring national courts to interpret national law in accordance with framework decisions (Case C-105/03, Criminal proceedings against Maria Pupino [2005] ECR I-5285). See also *M. Wasmeier and N. Thwaites*, The ‘battle of the pillars’: does the European Community have the power to approximate national criminal laws?, *EL Rev* 2004 (29), pp. 613, 615 and *R. Pereira*, Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the European Union?, *EELR* 2007 (10), pp. 254, 255.

<sup>52</sup> Old Articles 29 and 47 TEU expressed the clear primacy of EC law and competence over Title VI TEU.

<sup>53</sup> Currently Article 192 TFEU.

<sup>54</sup> Currently Title V TFEU.

<sup>55</sup> Case C-176/03, *Commission of the European Communities v Council of the European*

ECJ decided that although as a general rule neither criminal law nor the rules of criminal procedure fell within EC competence, this ‘*does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective*’.<sup>56</sup> There could be no more doubt (at least not in the domain of environmental law) that the EC legislator was competent to take measures concerning the criminal law of the Member States when it considered those measures necessary in order to make its substantive (environmental) provisions fully effective.

Yet doubts remained concerning the ‘breadth’ (whether the EC had criminal law competence in relation to matters other than the environment) and the ‘depth’ (whether the EC had competence to harmonize not only criminal offences, but also criminal sanctions) of the EC criminal competence.<sup>57</sup> After all, the decision of the ECJ in the *Environmental Crime* Case only related to old Article 175 EC on environmental protection, and the ECJ failed to clarify whether the EC legislator was also competent to determine the type (e.g. monetary or custodial) and the level (e.g. €1,000 or €10,000) of the criminal sanctions at EC level. The European Commission, confident after the *Environmental Crime* ruling, soon had to adjust its ambitious aspirations. In the *Ship Source Pollution*<sup>58</sup> Case the ECJ had to settle another quarrel between the European Commission and the Council over the proper legal ground for criminal law measures with regard to environmental protection in sea transport (old Article 80(2) EC on sea and air transport<sup>59</sup> versus old Title VI TEU on organized crime).<sup>60</sup> The ECJ confirmed the *Environmental Crime* ruling with regard to measures concerning environmental protection in sea transport (old Article 80(2) EC), but clarified that the determination of the type and level

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Union [2005] ECR I-7879.

<sup>56</sup> *Environmental Crime* Case, para. 48.

<sup>57</sup> The terms ‘breadth’ and ‘depth’ are taken from Advocate General Mazák in his Opinion in the *Ship Source Pollution* Case (Opinion of Advocate General Mazák in Case C-440/05, *Commission of the European Communities v Council of the European Union* [2007] ECR I-9097, paras. 78, 91 and 103).

<sup>58</sup> Case C-440/05, *Commission of the European Communities v Council of the European Union* [2007] ECR I-9097.

<sup>59</sup> Currently Article 100 TFEU.

<sup>60</sup> Currently Title V TFEU.

of the criminal sanctions to be applied did not fall within the EC sphere of competence.<sup>61</sup> In conclusion, the EC legislator was competent to determine criminal offences if necessary for effective environmental protection, not to determine the type and level of the criminal sanctions.

9. A systematic analysis of the applicable EU environmental legislation (horizontal acts, water protection, air pollution, climate change, ozone layer protection, waste, dangerous substances, noise pollution and green energy acts)<sup>62</sup> has made it clear that different types of specific sanctioning requirements occur in EU environmental law. I distinguish five different types:<sup>63</sup>

1. Specific sanctioning requirements aimed at the remediation of the situation (e.g. an obligation to take back waste when transported illegally);
2. Specific sanctioning requirements that hit the offender in his rights (e.g. the withdrawal of an authorization when the conditions are not met);
3. Specific sanctioning requirements that leave Member States the choice between the two previous ones (e.g. a suspension of discharge when the authorization conditions are not met);
4. A monetary specific sanctioning requirement under the Emissions Trading Directive 2003/87/EC;<sup>64</sup> and
5. A naming and shaming specific sanctioning requirement under the Emissions Trading Directive 2003/87/EC.<sup>65</sup>

All of the revealed specific sanctioning requirements are established in sectoral EU environmental acts and therefore have a sectorally limited scope. Most of them belong to the first type of specific sanctioning requirements—those aimed at the remediation of the situation—and therefore have a remedial character.<sup>66</sup> None of them have an explicitly determined (criminal or administra-

<sup>61</sup> Ship Source Pollution Case, para. 70.

<sup>62</sup> Nature protection laws like Directive 2009/147/EC on the conservation of wild birds (OJ 2010 L 20), Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206) and Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (OJ 1997 L 61), are not implied.

<sup>63</sup> See *Meeus, supra* note 43 at pp. 483–493.

<sup>64</sup> Council Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275. See Article 16(3)-16(4) Directive.

<sup>65</sup> Article 16(2) Directive.

<sup>66</sup> See *Meeus, supra* note 43 at pp. 485–488 and *Blomberg, supra* note 1 at p. 53.

tive) nature, thereby in principle leaving open both implementation paths to the Member States.<sup>67</sup> The margin of discretion that is left to the Member States depends on the wording used by the EU legislator, ranging from a wide margin of discretion (e.g. ‘*can*’ competences to sanction) to an almost complete absence of discretion (e.g. a precisely fixed fine).<sup>68</sup> Sector-specific sanctioning requirements occur rather occasionally in EU environmental law and seem to be set at random. The IPPC Directive 2008/1/EC<sup>69</sup> for instance, which includes important permit requirements, does not contain any specific sanctioning requirement. The majority of environmental directives and regulations do not contain specific sanctioning requirements and therefore on the enforcement level are governed mainly by the general sanctioning requirements (leaving Member States more discretion).

10. After the determination of the EC criminal competence and the ‘depth’ thereof in the *Environmental Crime* and *Ship Source Pollution* Cases, the (now third) European Commission proposal for a directive on the protection of the environment through criminal law was finally adopted by the European Parliament and the Council on 19 November 2008. The Eco Crime Directive 2008/99/EC<sup>70</sup> was the first EC directive in the EC/EU history to contain provisions with regard to criminal law. More specifically, Member States have to ensure that nine defined conducts constitute a criminal offence, when unlawful and committed intentionally or with at least serious negligence.<sup>71</sup> Thus a criminal offence in the sense of the Directive requires three constitutive elements: (1) a material element (the conduct), (2) a moral element (intention

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<sup>67</sup> Some of the specific sanctioning requirements however have an implicit administrative nature, since they concern sanctions that are traditionally adopted in administrative enforcement law (e.g. the withdrawal of authorizations) or because the EU legislator has put the competence to deliver an authorization and the competence to impose a sanction in the hands of the same (administrative) body.

<sup>68</sup> Article 16(3)-16(4) Emissions Trading Directive 2003/87/EC.

<sup>69</sup> Directive 2008/1/EC concerning integrated pollution prevention and control, OJ 2008 L 24.

<sup>70</sup> The directive came into force on 26 December 2008 (Article 9). Member States shall take the necessary implementation measures before 26 December 2010 (Article 8). For an extensive review of the directive, see *H.E. Zeitler*, Happy end of a long saga—Agreement on the Directive for the Protection of the Environment through Criminal Law, JEEPL 2008 (5.3–4), p. 281 and *A. Gouritin and P. De Hert*, Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law: A new start for criminal law in the European Community?, *elni* 2009 (1), p. 22.

<sup>71</sup> Article 3 Directive.

or serious negligence), and (3) a legal element (unlawfulness). Three conducts relate to the protection of biodiversity,<sup>72</sup> two conducts to waste,<sup>73</sup> one conduct to dangerous activities and substances,<sup>74</sup> one conduct to nuclear materials,<sup>75</sup> one conduct to ozone-depleting substances,<sup>76</sup> and finally one general conduct concerns the discharge, emission or introduction of a quantity of materials or ionizing radiation into air, soil or water.<sup>77</sup> All conducts require a severity threshold to be exceeded in order to constitute a criminal offence,<sup>78</sup> except the conduct relating to ozone-depleting substances.<sup>79</sup> The required moral element (*mens rea*) is intent or at least serious negligence.<sup>80</sup> The Directive does not define intent and serious negligence, leaving this to the discretion of the Member States. The ECJ, however, referred to serious negligence as ‘*entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation*’.<sup>81</sup> To be unlawful, a conduct must infringe the legislation listed in the Annexes or a law, an administrative regulation of a Member State or a decision taken

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<sup>72)</sup> Article 3, (f), (g) and (h) Directive.

<sup>73)</sup> Article 3, (b) and (c) Directive.

<sup>74)</sup> Article 3, (d) Directive.

<sup>75)</sup> Article 3, (e) Directive.

<sup>76)</sup> Article 3, (i) Directive.

<sup>77)</sup> Article 3, (a) Directive.

<sup>78)</sup> In four cases the conduct only constitutes a criminal offence when it ‘*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*’ (Article 3, (a), (b), (d) and (e) Directive). Two conducts constitute a criminal offence, ‘*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*’ (Article 3, (f) and (g) Directive). Article 3, (h) Directive criminalizes any conduct which causes ‘*significant deterioration*’ of a habitat within a protected site. Lastly, the unlawful shipment of waste only constitutes a criminal offence when it is undertaken in a ‘*non-negligible quantity*’ (Article 3, (c) Directive). The vagueness of the severity thresholds may spell troubles for the Member States when implementing the Directive. What has to be understood under serious injury, substantial damage, significant deterioration and a negligible quantity or impact? Leaving the interpretation of these thresholds to the Member States might jeopardise the goal of the Directive, *i.e.* the harmonisation of the most serious environmental crimes within the EU.

<sup>79)</sup> Article 3, (i) Directive.

<sup>80)</sup> Article 3 Directive.

<sup>81)</sup> See Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057, para. 77.

by a competent authority of a Member State that gives effect to the EU legislation referred to in the Annexes.<sup>82</sup> Also inciting, aiding and abetting the intentional conduct referred to in Article 3 must be made punishable as a criminal offence.<sup>83</sup> In accordance with the *Ship Source Pollution* Case the Directive does not determine the type or level of the criminal sanctions concerned; it is left up to the Member States to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties.<sup>84</sup> Under certain conditions legal persons<sup>85</sup> can also be held liable for offences referred to in Articles 3 and 4.<sup>86</sup> Legal persons held liable under the Directive must be punishable by effective, proportionate and dissuasive penalties.<sup>87</sup> Consequently, the Directive leaves the choice of the nature of the sanctions for legal persons (criminal or administrative) up to the Member States. The reason for this is that the EU did not want to oblige Member States to introduce the criminal liability of legal persons where this is not yet foreseen in their legal order.<sup>88</sup>

11. The EU legislator also took the occasion to amend the Ship Source Pollution Directive 2005 / 35/EC.<sup>89</sup> This was done by Directive 2009 / 123/EC of

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<sup>82</sup> Article 2, (a) Directive. The consequence of the annex approach is that the EU legislator deciding on new environmental legislation will have to decide whether it is appropriate or not to add the new instrument to the annex. Where necessary, Article 3 Directive should be amended (Directive, Preamble, recital 15). Since the references to the directives and regulations in the Annexes are dynamic, also future changes in the listed legislation are covered. See also *Zeitler*, *supra* note 70 at p. 286.

<sup>83</sup> Article 4 Directive.

<sup>84</sup> Article 5 Directive.

<sup>85</sup> A legal person is defined as ‘any legal entity having such status under the applicable national law, except for states or public bodies exercising state authority and public international organizations’ (Article 2(d) Directive).

<sup>86</sup> Article 6(1) Directive. The article also concerns the liability of legal persons when an offence in the sense of Article 3 or 4 is due to a lack of supervision or control by the natural person having a leading position within the legal person (Article 6(2) Directive) and the aggregation of liabilities between legal and natural persons (Article 6(3) Directive).

<sup>87</sup> Article 7 Directive.

<sup>88</sup> See Commission Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, COM (2007) 51 final, 9 February 2007. This proposal was the second European Commission proposal for a directive on this matter. See also *Gouritin and De Hert*, *supra* note 70 at p. 26.

<sup>89</sup> The original Ship Source Pollution Directive 2005 / 35/EC entered into force on 1 October 2005 (Article 17 Directive). Member States had to take the necessary implementation measures by 1 March 2007 (Article 16 Directive). In a decision of 9 July 2009 the

21 October 2009 amending Directive 2005 / 35/EC on ship-source pollution and on the introduction of penalties for infringements.<sup>90</sup> The words ‘*including criminal penalties*’ were added to the title and the purpose of the Directive, indicating what the amendment was all about: imposing the use of criminal sanctions for ship-source pollution offences. The criminalized conduct (material element) concerns ship-source discharges of polluting substances into any of the areas referred to in Article 3(1) Directive.<sup>91</sup> Minor cases, where the act committed does not cause deterioration in the quality of water, do not constitute criminal offences in the sense of the Directive (severity threshold).<sup>92</sup> Repeated minor cases, however, that do not individually but in conjunction result in deterioration in the quality of water, constitute a criminal offence, if committed with intent, recklessly or with serious negligence.<sup>93</sup> The applicable moral element (*mens rea*) for discharging polluting substances in the areas concerned, is intent, recklessly or serious negligence.<sup>94</sup> The discharging of polluting substances does not have to be unlawful (legal element), as is the case for criminal offences under the Eco Crime Directive 2008 / 99/EC. Article 5(1)

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ECJ condemned the United Kingdom of Great Britain and Northern Ireland for failing to introduce penalties for ship-source pollution in the sense of the Ship Source Pollution Directive 2005 / 35/EC. See Case C-557/08, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland [2009] <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0557:EN:HTML>>.

<sup>90</sup> OJ 2009 L 280. The Amending Directive entered into force on 16 November 2009 (Article 3 Amending Directive). Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 16 November 2010 (Article 2 Amending Directive).

<sup>91</sup> Articles 4(1) and 5a(1) Directive. Article 3(1) Directive refers to the following areas:

‘(a) the internal waters, including ports, of a Member State, in so far as the *Marpol regime* is applicable;

(b) the territorial sea of a Member State;

(c) straits used for international navigation subject to the regime of transit passage, as laid down in Part III, section 2, of the 1982 United Nations Convention on the Law of the Sea, to the extent that a Member State exercises jurisdiction over such straits;

(d) the exclusive economic zone or equivalent zone of a Member State, established in accordance with international law; and

(e) the high seas’.

<sup>92</sup> Article 5a(2) Directive.

<sup>93</sup> Article 5a(3) Directive.

<sup>94</sup> Articles 4(1) and 5a(3) Directive. Intent, recklessly and serious negligence are not defined. For serious negligence, see Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057, para. 77.

Directive, however, states that a discharge of polluting substances into the areas concerned, shall not be regarded as an offence, ‘*if it satisfies the conditions set out in Annex I, Regulations 15, 34, 4.1 or 4.3 or in Annex II, Regulations 13, 3.1.1 or 3.1.3 of Marpol 73/78*’. Such a discharge shall neither be regarded as an offence for the owner, the master or the crew, ‘*if it satisfies the conditions set out in Annex I, Regulation 4.2 or in Annex II, Regulation 3.1.2 of Marpol 73/78*’.<sup>95</sup> Also any act of inciting, or aiding and abetting an offence committed with intent and referred to in Article 5a(1) and (3), is punishable as a criminal offence.<sup>96</sup> Again in accordance with the *Ship Source Pollution Case* the Directive does not determine the type or level of the criminal sanctions concerned; the Directive leaves it up to the Member States to ensure that the offences referred to in Articles 5a(1) and 5(b) are punishable by effective, proportionate and dissuasive criminal penalties.<sup>97</sup> Also under the amended Ship Source Pollution Directive 2005 / 35/EC legal persons<sup>98</sup> can, under certain conditions, be held liable for the offences referred to in Articles 5a(1), 5a(3) and 5b.<sup>99</sup> Legal persons held liable pursuant to Article 8b Directive, must be made punishable by effective, proportionate and dissuasive penalties.<sup>100</sup> Thus, neither under the Ship Source Pollution Directive 2005 / 35/EC, the liability of legal persons has to be of a criminal nature.

### 3. The Impact of the EU Enforcement Requirements on the Environmental Sanctioning Policies of the Member States

12. The discussed EU enforcement requirements raise the controversial issue whether they require Member States not only to foresee but also to apply sanc-

<sup>95</sup>) Article 5(2) Directive.

<sup>96</sup>) Article 5b Directive.

<sup>97</sup>) Article 8a Directive.

<sup>98</sup>) A legal person in the sense of the Directive is ‘*any legal entity in possession of such status under applicable national law, other than States themselves or public bodies in the exercise of State authority or public international organisations*’ (Article 2(5) Directive). Regardless the slightly different wording, this definition is identical to the one of legal persons under the Eco Crime Directive 2008 / 99/EC.

<sup>99</sup>) Article 8b(1) Directive. The article also concerns the liability of legal persons when an offence in the sense of Articles 5a(1), 5a(3) and 5b is due to a lack of supervision or control by the natural person having a leading position within the legal person (Article 8b(2) Directive) and the aggregation of liabilities between legal and natural persons (Article 8b(3) Directive).

<sup>100</sup>) Article 8c Directive.

tions in practice. In the *Spanish Strawberries*<sup>101</sup> Case, the ECJ clearly held that a failure to prosecute a violation of EU law could constitute a breach of Article 4(3) TEU and a Member State can be challenged before the ECJ for its failure to prosecute. Moreover, the ECJ upholds a fairly strict case law relating to EU environmental law provisions that require Member States to obtain precise and specific results after a certain period.<sup>102</sup> Neither do there seem to be significant possibilities for Member States to be exempted from their obligations under Article 4(3) TEU.<sup>103</sup> The ECJ case law therefore leaves Member States little choice but to ensure that such precise substantive environmental requirements are not only properly transposed into their domestic legal order but also

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<sup>101</sup>) Case C-265/95, *Commission of the European Communities v French Republic* [1997] ECR I-6959.

<sup>102</sup>) See for instance Case C-60/01 in which the French Republic was condemned because several waste incinerators did not meet the precise combustion requirements imposed by two waste incineration directives (Case C-60/01, *Commission of the European Communities v French Republic* [2002] ECR I-5679). Another striking example is Case C-494/01, *Commission of the European Communities v Ireland* [2005] ECR I-3331. Here the ECJ stated that the obligation of waste disposal and waste recovery undertakings or establishments to hold a permit, an obligation formulated under the Directive 75/442/EEC on waste (OJ 1975 L 194) in clear and unequivocal terms to achieve a certain result, is only complied with ‘if, in addition to the correct transposition of the provisions into domestic law, the operators concerned have the permit required’. The ECJ goes on to say that ‘Member States therefore have the task of making sure that the permit system set up is actually applied and complied with, in particular by conducting appropriate checks for that purpose and ensuring that operations carried out without a permit are actually brought to an end and punished’. Both cases are an example of the *GAP-approach* of the Commission: several complaints and/or cases of non-compliance, usually bad application cases, are bundled up and taken into one single infringement procedure to prove that a Member State is responsible for—in the words of the Commission—‘general and persistent infringements’ of EU law. See *Blomberg, supra* note 1 at p. 66. It is also noticeable that when a permit in which emission standards are laid down, is made compulsory, Member States cannot choose to implement a declaratory scheme (Case C-381/07, *Association nationale pour la protection des eaux et rivières—TOS v Ministère de l’Écologie, du Développement et de l’Aménagement durables* [2008] ECR I-8281).

<sup>103</sup>) In the *Blackpool* Case the ECJ stated that the United Kingdom had not succeeded in establishing the existence of an absolute physical impossibility to carry out the obligations imposed by Directive 76/160/EEC concerning the quality of bathing water (Case C-56/90, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1993] ECR I-4109). Hereby the ECJ seemed to suggest that the establishment of the existence of an absolute physical impossibility could exempt a Member State from its obligations under EU environmental law. Until now however no Member State has succeeded in proving this. Subsequently in the *Schmidberger* Case the ECJ

that they are achieved in the field, if necessary by taking appropriate enforcement measures. The ultimate goal of any enforcement action should therefore always be the fulfillment of the environmental obligations of result at stake. This entails in any case the obligation to start up an enforcement procedure when a violation of an EU environmental law provision has been reported. This procedure must be managed in a fairly strict way, leading to the decision to impose a sanction when soft enforcement measures (such as warnings) do not produce the desired effects.<sup>104</sup> Where the EU legislator does not specify which sanction should be applied, the sanction must in any case be equivalent, proportionate, deterrent and effective. This entails a sanction that is suitable to produce the effects in practice which EU law requires. Clearly this could raise doubts as to whether Member States with a criminal procedure governed by the opportunity principle, under which there is no obligation to prosecute, can fully maintain this principle. However, with regard to the Eco Crime Directive 2008/99/EC and the Ship Source Pollution Directive 2005/35/EC in particular, it should be mentioned that the Preambles of these directives state that the directives do not create obligations regarding the application of the criminal sanctions, or any other available system of law enforcement, in individual cases.<sup>105</sup>

13. The presence of specific sanctioning requirements in EU environmental law might in some cases affect the environmental policy of a Member State to determine the various sanctioning competences of the environmental enforcement agencies in a centralized legislative act. Such a policy has the advantage that all the possible sanctions which may be imposed for various environmental offences can be found in one single legislative act. The recent Flemish Environmental Enforcement Decree<sup>106</sup> for instance makes a distinction between environmental crimes and environmental violations, by which

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accepted for the first time that a Member State was entitled to consider that an outright ban on a demonstration obstructing the free movement of goods, would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public (Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich [2003] ECR I-5659). It seems, however, to have been quite an exceptional case, and the possibilities for referring to this case law in cases concerning EU environmental law seem rather limited.

<sup>104</sup>) *Billiet, supra* note 42 at p. 237.

<sup>105</sup>) Eco Crime Directive 2008/99/EC, Preamble, recital 10 and Directive 2009/123/EC amending the Ship Source Pollution Directive 2005/35/EC, Preamble, recital 8.

<sup>106</sup>) Flemish Decree of 21 December 2007, M.B. 29 February 2008.

the former in the first place can be sanctioned with criminal sanctions (unless the public prosecutor decides not to prosecute, in which case an alternative administrative fine may be imposed), while the latter can only be sanctioned with exclusive administrative fines.<sup>107</sup> Both alternative and exclusive administrative fines can be imposed together with an administrative forfeiture of illegally acquired benefits. The Flemish Government has subsequently made the Flemish Environmental Enforcement Decree applicable to a whole range of substantial environmental provisions in various legislative and executive acts (which often implement EU environmental law provisions), thus determining the offences involving environmental violations (as opposed to environmental crimes).<sup>108</sup> Such efforts by Member States to centralize and harmonize the sanctions which the competent environmental enforcement agencies may impose for various environmental offences could be affected by the use of specific sanctioning requirements in environmental directives and regulations. Depending on the specificity of the character of these EU law provisions, it is very well possible that they require specific implementation measures by Member States in the sense that the existing sanctioning competences do not constitute a sufficient implementation. A general competence to sanction—or ‘can’ competence to sanction—would for instance not suffice to implement a specific sanction with a compulsory character regarding its application.<sup>109</sup> Where the EU legislator provides for criminal environmental offences (as in the Eco Crime Directive 2008/99/EC and the Ship Source Pollution Directive 2005/35/EC), EU influence is even more outspoken, since Member States are then obliged to implement criminal sanctions.

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<sup>107</sup>) For both environmental crimes and environmental violations, however, so-called ‘administrative measures’ may be imposed. These actually involve sanctions such as the order to stop or execute certain types of conduct, the sealing of certain goods and the entire or partial closure of an installation.

<sup>108</sup>) Executive Decree of the Flemish Government of 12 December 2008, M.B. 10 February 2009.

<sup>109</sup>) See for instance Article 4(6), (a)-(b) Directive 91/414/EEC concerning the placing of plant protection products on the market (OJ 1991 L 230), stating that ‘*an authorization shall be cancelled if it is established that: (a) the requirements for obtaining the authorization are not or are no longer satisfied; (b) false or misleading particulars were supplied concerning the facts on the basis of which the authorization was granted*’. A general competence to withdraw the authorization on the grounds concerned does not seem a sufficient transposition. The transposing provision must also ‘translate’ the compulsory character of the specific sanction. See *Blomberg*, *supra* note 6 at p. 410.

However, EU legislative influence on the environmental sanctioning policies of the Member States does not seem to be all that vigorous. As stated before, only occasionally environmental directives and regulations contain specific sanctioning requirements. Moreover, most specific sanctioning requirements have a rather discretionary character—as opposed to a compulsory character—and might therefore be sufficiently implemented by generally determined sanctioning competences.<sup>110</sup> As regards the Eco Crime Directive 2008/99/EC, the obligation to introduce criminal sanctions is limited to nine defined conducts. Moreover, all of these conducts only constitute a criminal offence when committed unlawfully and intentionally or with at least serious negligence.<sup>111</sup> And for all of these conducts except one, criminal liability is made dependent on a severity threshold being exceeded. The Ship Source Pollution Directive 2005/35/EC as well has a limited scope. It only concerns ship-source pollution offences in designated areas, when committed with intent, recklessly or with serious negligence.<sup>112</sup> And implementing criminal sanctions is not compulsory for minor discharges, where it does not cause deterioration in the quality of water.<sup>113</sup> Yet deterrence and effectiveness of any sanction, including criminal ones, depend to a great extent on the type and level thereof. A € 100 fine for an illegal waste transport is clearly not a deterrent and effective fine, whether it is criminal or administrative. Yet this is exactly what is lacking in the Eco Crime Directive 2008/99/EC and the Ship Source Pollution Directive 2005/35/EC as a consequence of the *Ship Source Pollution* Case. Consequently it is hard to imagine how these directives will effectively raise the level playing field of the Member States with regard to the sanctioning of the defined conducts.<sup>114</sup> Of course the criminal sanctions which Member States must establish under both directives need to be effective, proportionate and dissuasive, but this is a

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<sup>110</sup> See *Meeus*, *supra* note 43 at p. 484 and *Blomberg*, *supra* note 6 at p. 410.

<sup>111</sup> The inciting, aiding and abetting of the defined conducts, however, is only punishable as a criminal offence under the Eco Crime Directive 2008/99/EC, when committed intentionally (Article 4 Directive).

<sup>112</sup> The inciting, aiding and abetting of an offence referred to in Article 5a(1) and (3) Ship Source Pollution Directive 2005/35/EC, however, is only punishable as a criminal offence under the Directive when committed intentionally (Article 5b Directive).

<sup>113</sup> However, repeated minor cases that do not individually but in conjunction result in deterioration in the quality of water shall be regarded as a criminal offence, if committed with intent, recklessly or with serious negligence (Article 5a(3) Ship Source Pollution Directive 2005/35/EC).

<sup>114</sup> See also *Pereira*, *supra* note 51 at p. 259.

general obligation under Article 4(3) TEU, so what is their added value? None of the directives force Member States to impose criminal sanctions on legal persons, whereas it is precisely legal persons who play a leading role in serious environmental crime.<sup>115</sup> None of the directives oblige Member States to apply criminal sanctions in individual cases,<sup>116</sup> nor exclude other types of liability next to criminal liability.<sup>117</sup> Finally, the Eco Crime Directive 2008/99/EC only provides for minimum rules, leaving Member States free to adopt or maintain more stringent measures.<sup>118</sup>

Concluding, the EU legislator, by creating both directives, has given Member States a clear push towards a criminal settlement of ‘serious’ environmental crimes, which will undoubtedly have to be reflected in the environmental enforcement practices of the Member States.<sup>119</sup> But altogether it seems that the impact of the Eco Crime Directive 2008/99/EC and the Ship Source Pollution Directive 2005/35/EC will be limited. There seems to be enough discretion left for Member State enforcers in individual cases.<sup>120</sup> Member States

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<sup>115</sup> The Impact Assessment accompanying the second European Commission proposal for a directive on environmental criminal law refers to a study in 2003 which found that in 73 % of all researched environmental crime cases corporations or corporate-like structures were involved. See Commission accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law—Impact Assessment, SEC (2007) 160, 9 February 2007. For similar critical remarks on this matter, see *M. Faure*, European Environmental Criminal Law: Do we really need it?, EELR 2004 (1), pp. 18, 23 and *Pereira*, *supra* note 51 at pp. 261–263.

<sup>116</sup> Eco Crime Directive 2008/99/EC, Preamble, recital 10 and Directive 2009/123/EC amending the Ship Source Pollution Directive 2005/35/EC, Preamble, recital 8. Blomberg, however, rightly argues that structural shortcomings in practice—she mentions the complete absent or very rare use in practice of criminal sanctions for the criminalized conducts concerned in combination with insufficiently effective administrative enforcement measures—could lead to a breach of the Eco Crime Directive 2008/99/EC. See *Blomberg*, *supra* note 6 at p. 412.

<sup>117</sup> Eco Crime Directive 2008/99/EC, Preamble, recital 11 and Directive 2009/123/EC amending the Ship Source Pollution Directive 2005/35/EC, Preamble, recital 11. The latter also mentions international law.

<sup>118</sup> Eco Crime Directive 2008/99/EC, Preamble, recital 12. Recital 12 expresses the general rule under Article 193 TFEU: ‘*The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.*’

<sup>119</sup> *Blomberg*, *supra* note 1 at pp. 58–59 and *Blomberg*, *supra* note 6 at pp. 411–412.

<sup>120</sup> See also *Blomberg*, *supra* note 1 at p. 60.

will of course have to criminalize the envisaged conducts when this is not yet the case, but this does not rule out an administrative-orientated enforcement policy.<sup>121</sup>

#### 4. Does the Lisbon Treaty Change Anything?

14. On the whole, the entry into force of the Lisbon Treaty on 1 December 2009 does not bring that many changes to EU environmental policy.<sup>122</sup> On the enforcement level, however, some changes are certainly worth mentioning.<sup>123</sup> Article 83(2) TFEU now states that, '[i]f the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned'. Apparently the EU now does have the competence to determine the type and level of criminal sanctions in directives, in contrast with the (former) criminal competence of the EC. Yet this is restricted by the competence of each Member State to suspend the ordinary legislative procedure and refer the draft directive in question to the European Council when it considers that the draft directive would affect fundamental aspects of its criminal justice system.<sup>124</sup> The European Council then has four months to reach a negotiated solution, after which the draft directive is sent back to the Council to be voted upon. Should no consensus be reached in the European Council, the possibility exists for at least nine Member States to establish enhanced cooperation on the basis of the draft directive concerned. The possibility for Member States to use this emergency brake procedure amounts to a step back compared to the pre-Lisbon situation, since no such procedure existed within the environment and transport titles of the former EC Treaty.

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<sup>121</sup> See also *Blomberg*, *supra* note 1 at p. 58.

<sup>122</sup> For a comprehensive review of the (little) changes the Lisbon Treaty produces for EU environmental policy, see *W.T. Douma & H.H.B. Vedder*, *Het Verdrag van Lissabon en het Europees milieubeleid*, SEW 2009 (2), p. 62.

<sup>123</sup> See also *S. Peers*, *The European Community's criminal law competence: The plot thickens*, *EL Rev* 2008 (33), pp. 399, 409 and *Douma & Vedder*, *supra* note 122 at p. 64.

<sup>124</sup> Article 83(3) TFEU.

## 5. Conclusion

15. Over the years European norm-setting for an adequate Member State enforcement of EU environmental law has increased, first in ECJ case law and later also in environmental directives and regulations. The ECJ and the EU legislator seem to try to fill in the gaps caused by Member States not adequately observing their obligation to achieve the prescribed environmental results. As a result, it is now beyond dispute that the sanctions Member States (have to) implement must comply with certain instrumental requirements (*Greek Maize Case*) and that the EU legislator has the competence to determine criminal environmental offences in directives (*Environmental Crime Case* and, since 1 December 2009, Article 83(2) TFEU). Before the entry into force of the Lisbon Treaty, the EC made use of its criminal competence in environmental matters by adopting the Eco Crime Directive 2008/99/EC and amending the Ship Source Pollution Directive 2005/35/EC. Yet the ECJ had clarified that the type and level of criminal sanctions could not be determined at EC level (*Ship Source Pollution Case*). Hence the ECJ had clearly drawn the line to EC proceedings in this matter. As a result, the Eco Crime Directive 2008/99/EC and the (amended) Ship Source Pollution Directive 2005/35/EC do not specify the type and level of the criminal sanctions Member States have to introduce. The entry into force of the Lisbon Treaty however no longer seems to prevent the approximation of the type and level of criminal sanctions in environmental directives, but at the same time provides each Member State with an important emergency brake.

16. However, the discussed EU sanctioning requirements are deficient. Blomberg points out that the vague general enforcement requirements—more specifically the requirements of deterrence and effectiveness—mainly offer *ex post*-guidance in determining whether a Member State had—or had not—taken adequate enforcement measures, rather than *ex ante*-guidance in determining adequate enforcement measures in advance. Subsequently, specific sanctioning requirements occur only occasionally in sectoral environmental directives and regulations, and seem to be set at random. The Eco Crime Directive 2008/99/EC imposes criminal sanctioning requirements that are not limited to one environmental sector, but does not approximate the type and the level of the criminal sanctions and does not impose criminal liability on legal persons. The same is true for the (amended) Ship Source Pollution Directive 2005/35/EC that imposes criminal sanctions for ship-source discharges of polluting substances in designated areas. Thus one might doubt

whether, with regard to the sanctioning of violations, the current EU sanctioning requirements suffice to correct the enforcement deficit in environmental law.