10 Years of the adoption of the Directive 2008/99/EC: What have we learned?

Comparative study on the implementation of the Directive in Portugal and the Netherlands

Maria Francisca Mora Paim

Snr: 2034036

Public Law and Governance

Supervisor: Dr. Floor Fleurke

Second Reader: Dr. Han Somsen

January 2020

Table of Contents

Chapter 1: Introduction

The impacts on the environment caused by mankind can be extremely harmful, causing death or serious injuries to people and damage to the environment itself. It has been well known for some decades that human activity is responsible for these problems and also that this negative influence has cross border effects, so understandably, the solution must involve supranational legislation. The European Union (EU) aims at maintaining a high level of protection of the environment, in accordance with Article 191(2) of the Treaty on the Functioning of the European Union (TFEU)[1], and in the past 30 years has worked towards the evolution of environmental criminal law[2]. The rise in environmental offences and their effects which extend beyond the borders of the Members in which the offence is committed, and the insufficiency of the existing systems of penalties to achieve compliance with the laws for protecting the environment, concerned the Community. Thus, in 2008, after some challenges over the right basis for competence in criminal law, the EU adopted the Directive 2008/99/EC on the protection of the environment through criminal law (the Directive). The Directive sets a list of environmental offences to be criminalized by Member States that consist of acts that "breach environmental legislation and cause significant harm or risk to the environment and human health", the so-called environmental crimes[3]. The offences in question, committed intentionally or at least with serious negligence, are amongst others the discharge of materials into the air, soil or water that causes death or serious injury to any person or damage to the quality of the air, soil, water, animals or plants; trade and killing of endangered species; trade in ozone-depleting substances; illegal shipment of waste or collection and disposal of it that causes death, injury or damage to the quality of the environment; operation of a plant where dangerous activity is carried out, outside of which it causes death or serious injury to any person and damage to the quality of environment; and significant deterioration of wildlife habitats.

In order to achieve higher protection of public health and natural resources the Directive, aiming at harmonizing the highly different sanctions from each Member State and at implementing environmental law more effectively, requires more dissuasive penalties for environmentally harmful activities. The directive sets minimum rules, while at the same time allowing Members to adopt more stringent measures, as long as compatible with EU legislation.

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[1] Consolidated Version of the Treaty on the Functioning of the European Union

[2] Michael Faure, 'The Development of Environmental Criminal Law in the EU and its Member States' (2017) 26 Review of European, Comparative & International Law 139

[3] European Commission, 'Combating Environmental Crime' (*European Commission,* 2019) <http://ec.europa.eu/environment/legal/crime/index.htm> accessed 23-06-2019

The Directive harmonizes criminalization but does not harmonize the penalties, so the transposition of the Directive can be made in different ways, members can set different penalties (for example in typology and severity) and can have different approaches to verify the compliance with the Directive. These differences in implementation can, amongst other reasons, be due to the priorities and resources a country has, the interpretation of or disapproval towards the Directive, or the culture of each country on environmental matters. In this dissertation an evaluation of the implementation of the Directive 2008/99/EC will be made in two countries with different cultures over the referred environmental crimes. The two Member States chosen are the Netherlands and Portugal and the main reason for this choice is the difference between the administrative and the criminal cultures respectively of the two countries. While the Netherlands has had a culture of administrative sanctions on environment infractions, Portugal has had for a while a more criminal approach on this matter. The difference in cultures could potentially be an important differential factor in the implementation of the Directive which will be evaluated in this thesis. The choice of the two countries is also due to fact that the countries are similar in size, although not exactly the same, the two are fairly comparable within the EU member states as they both are small members, with the population of the Netherlands being around 17 million and Portugal around 10 million.

The main research question to be answered is then how have the Netherlands and Portugal implemented the Directive on the Protection of the Environment through Criminal Law, considering their past legal cultures regarding the regulation of environmental offences. Chapter 2 will discuss the reasons behind the need to criminalize the offences against the environment mentioned in the Directive and will analyse the background of the Directive, specifically the reasons for its adoption, the process and competence behind it and the changes required by it. This will be made mainly through the analysis of provisions of Treaties and relevant EU case law. Chapter 3 will shortly focus on the legal culture regarding the regulation of environmental offences and then more extensively on the implementation of the Directive by Portugal and the Netherlands. Dogmatic legal research will be conducted, especially “black letter” analysis in order to present the legal framework applicable to the transposition of the Directive and its implications in the national legislation of both countries. Import documents will be the existing national provisions, the information provided by the countries to the Commission, as well as studies on this matter. The evaluation of the implementation will be divided into 3 main requirements determined to be necessary for an optimal implementation. It will be seen that although the chosen Members satisfy two of the requirements, they do not

satisfy the requirement of having effective and dissuasive penalties as they do not provide for sufficient enforcement mechanisms. Chapter 4 will provide a comparative analysis of the two countries' implementation. Similarities and differences in the two countries' efforts to achieve the EU's goal of high environmental protection through the transposition of the Directive will be discussed as well as some reasons for the differences. Some possible solutions for the lack of effectiveness of the harmonization in environmental criminal law will be exposed, however not analysed in-depth due to time and space constraints. Finally, the conclusions, in Chapter 5 will summarize the findings.

Chapter 2: Environmental Crimes and Directive 2008/99/EC

2.1. Why was there a need to criminalize the offences covered in the Directive?

Environmental crimes are not a recent matter, since the 1970s it has been a concerning issue getting more importance as time passes. In the United States, it began with the Clean Air Act, the Clean Water Act, and the Ocean Dumping Act, implementing criminal enforcement provisions to stop polluters and to begin the journey to a criminal enforcement program[4]. In the European Union, also around the same time, environmental criminal law emerged although strongly criticized because of its exceedingly administrative character that did not protect directly and autonomously the ecological values but only penalized violations of administrative obligations.[5]

In 1984, an Environmental Investigation Agency was founded by three activists in the United Kingdom, concerned with exposing and campaigning against environmental crime all around the world. In 1990, the Intergovernmental Panel on Climate Change (IPCC) First Assessment Report and all the subsequent reports[6] brought even more attention to the anthropogenic impact on the environment and the need to find solutions to prevent further damages. In 1998, the Council of Europe adopted the Convention on the protection of the environment through criminal law[7], although it never entered into force for not reaching the three required ratifications. Over the past 30 years, a great deal of things has changed and what started as small annexes to administrative laws evolved to significant legislative reforms that took into consideration the previous critiques of absolute administrative dependence.

The European Union aims at a high level of protection of the environment, as stated in Art.191 (2) TFEU and the necessity to find a more efficient tool to protect it led to changes and to the imposition of criminal penalties for serious damages against the environment. Generally, actions against the environment, which are a growing and serious problem, are considered to have "very high profits for the perpetrators and relatively low risk of detection"[8] and very often

[4] The United States Department of Justice, 'Historical Development of Environmental Criminal Law' 2015) <https://www.justice.gov/enrd/about-division/historical-development-environmental-criminal-law> accessed 23-09-2019

[5] Faure (n 2)

[6] 1992 IPCC supplementary Report, 1995 IPCC Second Assessment Report and 2001 IPCC Third Assessment Report

[7] CETS (Council of Europe Treaty Series) No.:172, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/172>, accessed 20.10.2019

[8] European Commission (n 3). It is difficult to quantify the exact profit of environmental crimes due to low detention and lack of well-grounded statistic data, however there are some studies that put it between 18 and 28 billion Euros per year. See

have extraterritorial effects, reason why the problem needs to be tackled at European level. Environmental crimes, which can be defined as "acts that breach environmental legislation and cause significant harm or risk to the environment and human health"[9], need to be dealt with in an adequate, effective, and dissuasive way. The growing impacts and threats posed by humankind, the extension of the effects beyond the borders of each Member State and the insufficiency of the existing systems of penalties to achieve compliance with the laws for protecting the environment, concerned the Union. Thus in 2008, after some challenges over the right basis for competence in criminal law, which will be further analysed, the European Union adopted the Directive 2008/99/EC to require Member States to provide for criminal sanctions for the most severe offences.

2.2 Directive 2008/99/EC

2.2.1 Background

An institutional conflict between the Council of the European Union ("Council") and the European Commission ("Commission") over the competence to adopt measures concerning criminal law made the adoption of the Directive 2008/99/EC a controversial matter[10]. The struggle began with a Danish initiative for a Framework Decision on environmental crime in February 2000[11]. What followed was a proposal for a Directive on the protection of environment through criminal law by the Commission[12] based on Article 175 of the Treaty establishing the European Community ("TEC") while simultaneously the Council discussed the Framework Decision proposal, which then adopted in 2003[13] based on Article 31 of the Treaty on European Union (under title VI – provisions on police and judicial cooperation in criminal matters). The Commission considered the Council had chosen the wrong legal basis for Articles 1 to 7 of the Framework Decision and argued that the content and objective of the provisions were within the scope of the Community's powers as referred in Article 174 to 176 and 3(1) TEC (powers for achieving the protection of the environment). Hence, the Commission requested the European Court of Justice ("ECJ") to annul the Framework

USA Government Interagency Working Group, "The International Crime Threat Assessment, 2000", available at: <https://fas.org/irp/threat/pub45270chap2.html> and F Comte, 'Crime contre l'environnement et police en Europe : panorama et pistes d'action' (2005) 9 Revue Européenne de Droit de l'Environnement 381

[9] European Commission (n 3)

[10] Helge Elisabeth Zeitler, 'Happy end of a long saga-Agreement on the Directive for the Protection of the Environment through Criminal Law' (2008) 5 Journal for European Environmental & Planning Law 281

[11] Official Journal C 039, 11/02/2000 P. 0004 - 0007

[12] COM (2001) 139 final of 13 March 2001

[13] Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law OJ 2003 L29/55

Decision for being based on the wrong legal basis. During the proceedings of what is considered a landmark judgment[14], the European Parliament supported the Commission, while the Council was supported by 11 Member States. On the judgment of 13 September 2005[15], the ECJ, through the Grand Chamber, held that the main purpose of Articles 1 to 7 of the Framework Decision was the protection of the environment and they could have been adopted based on Article 175 TEC[16] and annulled the Framework Decision for violation of Article 47 TEU and infringement of the Community's powers. The Court ruled that although criminal law falls within the Member States' competence, it "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 lay down on environmental protection are fully effective."[17]

Following the Judgment the European Parliament noted the legal vacuum regarding the protection of the environment through criminal law, left by the decision of the Court of Justice, and called upon the Commission and the Council to fill the gap. In its resolution on the follow-up to Parliament's opinion on environmental protection[18], the European Parliament requested the Council to either re-examine the Commission's original proposal or to provide guidance for a new proposal.

In February 2007, with basis on Article 175 TEC, the Commission proposed a new Directive[19] mainly based on the annulled Framework Decision with some new elements. Due to the sensitivity of the political area, the proposal had to balance the fear that the Community was trying to harmonise Member States' criminal law with the need to change something valuable on EU level. Thus, the base for the proposal was the Framework Decision which Members had already unanimously agreed upon with some elements from the proposal of 2001 and the parliament's amendments[20]. On 21 May 2008 the Council and Parliament reached an

[14] Zeitler (n 10) p. 282;
[15] Case C–176/03 Commission v Council [2005] ECR I–7879
[16] Ibid para 51
[17] Ibid para 48
[18] European Parliament, Resolution on the follow-up to Parliament's opinion on environmental protection: combating crime, criminal offences and penalties, P6_TA (2006) 0458, 26 October 2006
[19] 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
[20] Helge Elisabeth Zeitler, 'Strengthening Environmental Protection through European Criminal Law' (2007) 4 Journal for European Environmental & Planning Law 213 p. 215

agreement and on 19 November 2008 the Directive 2008/99/EC on the protection of the environment through criminal law was formally adopted.

2.2.2 What did the Directive change and what did it require from Member States?

Aiming at eliminating differences among Member States' criminal law, the Directive 2008/99/EC sets on Article 3 harmonized definitions for nine serious offences against the environment that are to be considered criminal by the Members. This Article requires the offences to be "committed intentionally or with at least serious negligence". However, this Directive only sets minimum rules[21], so Members are allowed to adopt more stringent measures (as long as compatible with EU legislation), for example, it is possible to criminalize the offences when committed with simple negligence.

The main requirement of the majority of the offences in Article 3 is that they cause or are likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water or to animals or plants. The other offences to be criminalised are based on the action itself and not on the results, and it includes the killing, destruction, possession, taking or trading of endangered fauna and flora species (f) and (g), the illegal shipment of waste (c) and the production, importation, exportation, placing on the market or use of ozone-depleting substances (i).

Another requirement of the Directive is that the conduct is "unlawful", defined in Article 2(a) as the infringement of Community legislation, listed in Annex A and B, and of a law, an administrative regulation or a decision taken by the competent authority of Member States giving effect to the referred Community legislation. The inclusion of this annexes was not seen in the same way by the Commission and the Member States, while the former thought the annexes were unnecessary due to the risk of impunity in case some instrument was not covered, the latter were of the opinion that it would bring legal certainty and a defined scope of the Directive's application[22].

Contrary to the term "unlawful", many vague terms are not defined in the Directive, such as "substantial damage", "non-negligible quantity", "serious injury" or "significant deterioration". An agreement on the definition of these terms among the Members would be an impossible task, considering that some Members also don't define terms like these in their legal orders leaving it to their national courts. The Directive then leaves it to the Members

[21] See Recital 12 of the Directive 2008/99/EC on the protection of the environment through criminal law
[22] Zeitler (n 10) p.285 e 286

avoiding the burden of having to reach a definition accepted by all. This, however, may lead to different interpretations with the consequence of equal offences being applied differently in different Member States. Ultimately in cases of unacceptable interpretations, the Court of Justice of the European Union could intervene to maintain a minimum level of understanding within the EU.[23]

Regarding liability, the Directive sets on Article 4 that inciting, aiding and abetting the conducts of Article 3 must also be punishable as a criminal offence. Legal persons, as determined in Article 6, must also be held liable for the offences in Articles 3 and 4 if committed by persons in leading positions to their benefit (Article 6(1)) or if the lack of supervision or control by such persons has made possible for the offence to be committed. Article 6(3) ensures that natural persons that commit an Article 3 or 4 offence are not excluded from criminal proceedings when legal persons are held liable under paragraphs 1 and 2 of the referred Article.

The setting of the sanctions was the most controversial matter of the Directive proposal. The considerable differences in sanctions in Members States gave rise, in the Commission's view, to the necessity to effectively implement the legislation through the approximation of sanctions. Besides studies that confirm those differences [24], it also seemed irrelevant to agree on a list of offences and then leaving the choice of sanctions entirely to the Members. The main discussion of the controversy was exactly if an approximation of sanction levels proposed in the Directive was possible within the existing competences.[25] The proposal included minimum starting levels for maximum sanctions (prison sentences and fines) that had to be provided, and prison sentences based on mental factors and aggravating circumstances. On a Court ruling following the decision on case C-176/03, this time concerning a framework for ship-source pollution[26], the ECJ again annulled the Framework Decision, by request of the Commission. But the importance of this judgment is the Court's statement that "the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence"[27]. Accordingly, the Commission, Council, and European Parliament agreed to remove the approximation of sanction levels. Now, articles 5 and 7 only require the penalties

[23] Zeitler (n 20)
[24] Huglo Lepage & Partners, 'Study on environmental crime in the 27 Member States' <https://ec.europa.eu/environment/legal/crime/pdf/report_environmental_crime.pdf>
[25] Zeitler (n 20)
[26] Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution
[27] Case C-440/05 Commission v Council [2007] ECR I-09097 para 70

to be effective, proportionate, dissuasive, and for natural persons criminal penalties while for legal persons criminal or non-criminal penalties (as not all Members have for legal persons criminal liability).

The Directive does not regulate the criminal law's procedural part nor does it lay down measures over the powers of judges or prosecutors.

Article 8 states that Member States had until 26 December 2010, so approximately 2 years, to transpose into their national law the Directive that entered into force on the 20th day following the publication on the Official Journal of the European Union (Article 9). Article 8 also imposes Members to make reference to the Directive when adopting the measures necessary to comply with it and to communicate to the Commission the main provisions of national law adopted under the Directive.

Chapter 3: Implementation of the Environmental Crime Directive

3.1. What are the requirements for an optimal transposition?

To evaluate how the Member States have transposed the Directive into their national law, three requirements which are considered the most important demands of the Directive, are going to be analysed. After a discussion on what each of the requirements entails, the national laws of the chosen countries will be analysed to see if and to what extent the requirements are being fulfilled. The three requirements are first, whether all nine offences from Article 3 were introduced into the country's legislation. Second, following Article 6, if Members provide for legal persons' liability and also, following Article 4, liability for those who incite, aid and abet the conducts of Article 3. And third, whether the sanctions for those offences are "effective, proportionate, and dissuasive" as Articles 5 and 7 request. To analyse the fulfilment of this third requirement, especially in what concerns effectiveness, the enforcement capacity of each country will be taken into account, which includes policy, special investigation and judicial units, prosecution and other relevant aspects.

3.1.1. Incorporation of all Article 3 offences in the Criminal Code

Article 3, as stated previously, sets a list of nine offences to be criminalized by Member States in their national law. For an optimal implementation of the Directive all offences must constitute criminal offences under the country's legislation. The offences are: (a) the discharge, emission or introduction into the environment of materials or ionising radiation[28], (b) the collection, transport, recovery or disposal of waste[29], (c) the shipment of waste[30], (d) the operation of a plant in which dangerous substances or preparations are stored[31], (e) activities related nuclear materials or hazardous radioactive substances[32], (f) killing, destruction or possession of specimens of protected wild fauna and flora species[33], (g) trading of the referred specimens[34], (h) conducts that deteriorate habitats in protected sites[35] and (i) activities related to ozone-depleting substances[36].

[28] European Parliament and Council Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law [2008], OJ L 328/28, Article 3(a)
[29] Ibid Article 3(b)
[30] Ibid Article 3(c)
[31] Ibid Article 3(d)
[32] Ibid Article 3(e)
[33] Ibid Article 3(f)
[34] Ibid Article 3(g)
[35] Ibid Article 3(h)
[36] Ibid Article 3(i)

3.1.2. Liability of legal persons and accomplices

Article 6 of the Environmental Crimes Directive states that Member States should ensure that legal persons can also be held liable for the commission of the offences of Article 3 and 4. The referred Article 6 requires liability for legal persons when the offences have been committed for its benefit by anyone in a leading position within the legal person based on powers of representation, authority to make decisions or to exercise control within the legal person. Also, liability for legal persons should be ensured when the lack of supervision or control by one of the referred persons in a leading position made possible for a person, under the authority of the legal person, to commit an offences of Article 3 or 4 for the benefit of the legal person (Article 6(2)). Moreover, Article 6(3) notes that the liability of legal persons does not "exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences".

Regarding accomplices, Article 4 of the Directive requires Members to "ensure that inciting, aiding and abetting the intentional conduct referred to in Article 3 is punishable as a criminal offence".

3.1.3. "Effective, proportionate and dissuasive"

One of the reasons for the creation of the Directive was the insufficient systems of penalties for achieving compliance with the laws for environmental protection. According to Article 5, for natural persons, and Article 7 for legal persons, of the Directive, the penalties to be set by the Member States need to be "effective, proportionate and dissuasive". More than having laws that implement the Directive, it is necessary that those laws are applied following these 3 criteria. If legislation exists but it does not translate into less environmental crimes, then it is not accomplishing its purpose. Thus, it is fundamental to analyse the requirements of effectiveness and dissuasiveness in order to find if the Directive has, in fact, any concrete impacts. This analysis requires the interpretation of these three vague terms, which can be a hard endeavour. Often these concepts are left undefined in case-law, however, there are some judgements and opinions that offer some insights on the definition of the terms as well as contributes made by several environmental and economic legal scholars.

The term dissuasive is often related to deterrence, the idea is that the penalties should lead potential and actual perpetrators to comply with laws. Based on a cost-benefit analysis, the benefits of the violation for perpetrators should be less than the probability of them being

caught and convicted multiplied by the sanction imposed[37]. This way violators, as rational beings with full information, will decide not to violate the law if the expected benefits are not higher than the expected consequences. With this formula we can understand that not only the severity of the sanction imposed matters but also the probability that the violators will be caught, prosecuted and the sanction will be imposed by the judge. Consequently, it is also important to evaluate the mechanisms Member States have to enforce the laws. Another insight this formula gives is that the bigger the potential benefit for the perpetrator is, the higher the penalty should be to be considered dissuasive.

Proportionality refers to the relation between the type of violation and the type and severity of the penalty, based on a gradual system of punishment. For more serious and harmful crimes there must exist a higher penalty and vice-versa. This term can be analysed in an economic view, if minor violations have very high sanctions, perpetrators would be incentivised to commit the more serious sanctions, since they would already be potentially subject to high penalties.[38]. Also the mental state of the violator should be taken into account, higher penalties should be imposed if the offence is committed with intent and lower if with negligence.

Effectiveness concerns the relation between the goals and the instruments used to accomplish those goals, the effects. The examination needed is whether a specific policy instrument can be and is in fact suited to achieve the legislator's goals. This goal should be, following the EU's aim, the high level of environmental protection. This involves *ex ante* and *ex post* elements, before the laws enter into force it is necessary to examine if the structure and design of the law are in theory capable of attaining the objective of environmental protection, and afterwards it is crucial to examine if the legislation in practice attains the objective.

The three concepts are then interrelated considering that a penalty will more likely be effective in achieving the goal of high environmental protection if it can dissuade violators from committing the offences and if the penalties are proportionate to the type and seriousness of the offence[39].

[37] This theory is based on the work of the economist Gary Becker. See Becker, G.S., "Crime and punishment: an economic approach", Journal of Political Economy, 1968

[38] Faure MG, 'Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Ship-source Pollution Directives: Questions and Challenges' (2010) European Energy and Environmental Law Review 256

[39] Weiss HT, 'EC Competence for Environmental Criminal Law' (College of Europe 2006)

As referred before, it is necessary to evaluate whether there are enforcement mechanisms in each country, as they are essential for a sanction to be considered not only effective but also dissuasive. If there is no prosecution or application of sanctions, they cannot be said to be effective in practice as they would only exist on paper. Also, if violators are aware that no penalty will be indeed set because there is no enforcement of the laws, they will not be dissuaded from committing the offences. Therefore, as a sub-requirement of the terms "effective" and "dissuasive" it is imperative that the enforcement capacity of each country is examined, as a means to verify if the laws transposing the Directive follow the 3 requirements of Articles 5 and 7. This analysis will be made through the investigation of monitoring and policy systems, prosecution and existing cases.

3.2. Portugal

3.2.1. Legal culture on environmental regulation

Environment is today a main concern in Portugal, as in most other countries. However, it wasn't always a relevant matter in the Portuguese legislation. Many reasons exist for the late development of environmental policies in the country, including the decades of dictatorship that led Portugal to one of the lowest indicators of social-economic development in Europe, the isolation from the political, economic, social and cultural realities of the western world and the weak culture of public participation.[40]

The first period of environmental law, from the beginning of the 19th century until the 60s, was mainly concerned with assuring a peaceful utilization of resources, namely water. In 1976 the Constitution of the Portuguese Republic enshrined the fundamental right to the environment, Article 66[41] stated that everyone had the right to clean and ecologically balanced environment as well as the duty to defend it, also the State had the duty to prevent pollution and promote the progressive improvement of the quality of the environment. In 1986 Portugal joins the European Economic Community, a decisive landmark in its environmental policies, which accelerated the legislative delay.[42] The transposition of the European Directives was a

[40] Bruno Ribeiro Tavares, 'O Ambiente e as Políticas Ambientais em Portugal: Contributos para uma abordagem histórica', Universidade Aberta 2013)
[41]Text of the 1976 Constitution of the Portuguese Republic available at: <https://www.parlamento.pt/Parlamento/Documents/CRP1976.pdf>
[42] V. Soromenho-Marques, "Os Desafios da Crise Global e Social do Ambiente", Metamorfoses. Entre o Colapso e o Desenvolvimento Sustentável, Mem Martins, Publicações Europa-América, 2005. Available at:

boost not only to the creation of certain laws related to the quality of water and air but also to the general interest on these matter by legislators and also by the citizens.

After many restructurations of state secretariats, commissions, national plans, and laws, in 1990 the State Secretariat of the environment is promoted to Ministry of the Environment and Natural Resources[43], increasing its importance and competences[44]. The year 1995 is marked by the conversion of attacks against nature into specific crimes[45], the environment is directly protected through the Penal Code as environmental crimes. Environment appeared as an autonomous legal-criminal protection. Although most of the environmental regulation is addressed by administrative law, a great part of the offences to be later criminalized following the Directive 2008/99/EC appeared already in the Portuguese Penal Code in 1995 as crimes. Articles 278, 279 and 280 of the Penal Code (the same Articles where today the offences are set, although less developed at that time) set criminal penalties for: damages against nature, including the elimination of specimens of protected fauna and flora and the destruction of natural habitats; pollution by any means of water, soil and air, including the pollution through the operation of plants; and the pollution with special danger to the life or physical integrity of any person and to other assets.

Before the Directive was adopted Portugal relied already upon criminal penalties to sanction some offences, committed intentionally or with negligence, as well as to sanction accomplices and in some cases legal persons. The question that will be discussed further, after the analysis of the transposition of the Directive in the two countries, is whether this previous criminal culture influenced the way Portugal implemented the Directive. Did it give an advantage compared to the Netherlands that contrarily had an administrative culture on the sanctioning of these offences?

3.2.2. Implementation requirements

After the supra analysis on what each requirement entails, the discussion now is how has Portugal tried to fulfil such requirements. A previous note to be mentioned is that although

<http://www.viriatosoromenho-marques.com/Imagens/PDFs/Desafios%20Crise%20%20Ambiental%202005.pdf>

[43] Ministério do Ambiente e dos Recursos Naturais

[44] Ramos Pinto, J. (2006). *De uma política pública de Ambiente e Educação Ambiental em Portugal a uma Estratégia Nacional de Educação Ambiental: sucessos e fracassos* in AmbientalMente Sustentable – Revista Científica Galego-Lusófona de Educação Ambiental. Corunha, Vol. 1 n.ºs 1 e 2.

[45] Decreto-Lei n.º 48/95, de 15 de Março (Decree-Law n.º 48/95 of 15 March)

the transposition was to be made before 26 December 2010, it wasn't until 15 November 2011 that Portugal made its first attempt to comply with the Directive. In a press release, 16 of June 2011[46], the European Commission gave two months for Members to transpose EU rules concerning criminal penalties against sea pollution and other environmental offences. It then stated the 10 countries, amongst which Portugal, that had failed to transpose the Directive timely. Through the Law n.º 56/2011, 15 of November[47], the Assembly of the Portuguese Republic - the main legislative body - transposed the Directive by proceeding to the 28th alteration of the Penal Code. Later in 2015, through the Law n.º 81/2015, 03 of August[48], the same legislative organ proceeded to additional changes in the Penal Code to fully transpose the Directive.

3.2.2.1 Incorporation of all Article 3 offences as criminal offences

In the Portuguese legal system, all nine offences of Article 3 of the Environmental Crime Directive were transposed to Articles 278, 279 and 280 of the Penal Code Article 278 concerns damages against the nature, transposing offences (f), (g) and (h) of Article 3 of the Directive, Article 279 concerns pollution, including offences (a) to (e) except (c) which was transposed to Article 279-A that regulates dangerous activities to the environment, and finally, Article 280 concerns pollution with special danger to human life and other important assets.

Article 278(1)(a) states that those who eliminate, destruct or capture exemplars of protected species from wild fauna or flora or eliminate exemplars of fauna or flora in significant number are punished with term of imprisonment up to 5 years. The same sanction applies for those who destruct or significantly deteriorate protected natural habitats, or unprotected natural habitats when it causes loss of protected species of wild fauna or flora or in significant numbers (Article 278(1)(b)). Article 278(3) sanctions with up to 1 year of term of imprisonment or fine up to 240 days, those that own or hold exemplars of protected specifies from wild fauna or flora, dead or alive. Number (4) of the same Article refers in what circumstances the conducts of number (3) are not punished: when the quantity of exemplars possessed is not significant and when the impact on species conservation is also not significant. The sanction for negligent conducts of number (1) is term of imprisonment up to 2 years or fine up to 360 days, and the

[46] European Commission, *Environmental crimes: Commission asks 12 Member States to implement EU rules* (European Commission 2011)
[47] Lei n.º 56/2011, de 15 de novembro de 2011 (Law nº 56/2011, of 15 November 2011
[48] Lei n.º 81/2015, de 03 de agosto de 2015 (Law n. º 81/2015, of 03 of August 2015)

negligent conducts of number (3) is fine up to 240 days. Article 278(2) of the Penal Code states that those who trade or possess with the intention to trade exemplars of protected species of wild fauna or flora, dead or alive, as well as any part or product obtained from it, is punished with term of imprisonment up to 2 years or fine up to 360 days. If the conduct is negligent the sanction is a fine up to 240 days.

Article 279(2) of the Penal Code states that those who cause substantial damages to the quality of air, water, soil, or to fauna or flora, by proceeding (a) to the discharge, emission or introduction of ionising materials and ionising radiations into the atmosphere, soil or water; (b) operations of collection, transport, storage, sorting, treatment, recovery and disposal of waste, including the aftercare of disposal sites, as well as activities by traders and intermediaries; (c) to the operation of facilities where dangerous activities are carried out or where dangerous substances and mixtures are stored or used, and (d) to the production, treatment, handling, use, holding, storage, transportation, import, export or elimination of nuclear materials or other dangerous radioactive substances; are punished with term of imprisonment up to 5 years. If this harm to environmental legal interests instead of intentional is negligent then the term of imprisonment is up to 2 years and fine up to 360 days (Article 279(4)). Further on (3) of the same Article, the intentional creation of danger to environmental legal interests is punished with term of imprisonment up to 3 years and fine up to 600 days. If this danger is created with negligence, the term of imprisonment lowers to up to 1 year and a fine up to 240 days (Article 279(5)).

Article 279-A (1) sanctions with term of imprisonment of up to 3 years or fine up to 600 days, those who proceed to the transfer of waste, when such activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, and is made in non-negligible quantities, whether it consists in one single shipment or several shipments apparently linked. Article 279-A(3) states that in negligent cases the sanctions are term of imprisonment up to 1 year or a fine. Article 279-A(2) sanctions with term of imprisonment up to 1 year or fine up to 240 days those who produce, import, export, place on the market or use ozone-depleting substances. The same conduct is sanctioned with term of imprisonment up to 6 months or fine up to 120 days if practised negligently (Article 279-A (3)).

Finally, Article 280 states that the sanctions for the conducts of Article 279 that create danger to life or physical integrity are: (a) term of imprisonment from 1 to 8 years if committed with intent and (b) up to 6 years if negligent.

Regarding the difference between intentional and negligent conducts, Article 14 and 15 of the Portuguese Penal Code[49]. define these two terms. In the Portuguese legal system the word used for intentional is "dolo" which could also be translated to wilful misconduct. Article 14 states that whoever, representing an act that constitutes a type of crime, carries it on, with the purpose of accomplishing it, acts with intent. Also acts with intent a person that represents the accomplishment of an act that constitutes a type of crime as a necessary consequence of his conduct. Article 15 states that a person acts with negligence when not behaving with the care to which, according to the circumstances, is obliged and is capable of, and (a) represents as possible the accomplishment of an act that constitutes a type of crime, but acts without accepting the accomplishment, or (b) does not even represent the possibility of the accomplishment of that act.

A fine up to a certain number of days ('pena de multa' in Portuguese) is a fine which each day corresponds to an amount to be paid that is set by a judge and varies according to the financial and economic situation of the person convicted[50]

3.2.2.2. Liability for legal persons and for accomplices

The Portuguese Penal code, as a general rule, states that only singular persons can be susceptible of criminal liability (Article 11(1)), however, Article 11(2) makes an exception for crimes provided in, amongst others, Articles 278, 279 and 280. The same Article requires that those determined crimes are committed in the name and interest of the collective person[51] by people who have a leading position in it or by people who act under the authority of such persons who violated their duties of vigilance and control. The following paragraphs of the Article establish the definition of people in leading positions as the people who have authority to exercise control of the activity of the legal person and that the liability of the collective person does not exclude the liability for natural persons. Furthermore, the Article states that

[49] Decreto-Lei n.º48/95, de 15 de Março (Decree Law n.º48/95, of 15 March). Available in English from Article 1 to 130 at: <https://www.verbojuridico.net/download/portuguesepenalcode.pdf>
[50] Ibid Article 47
[51] Correspondent of legal person in Portuguese

the responsibility of the collective person is excluded when the person who committed the offences acted against express orders or instructions from those in charge.

Regarding liability for accomplices, Article 4 of the Directive states that Member States must ensure that those who incite, aid and abet the conducts referred in Article 3, are to be criminally punished. The general rules of the Portuguese Penal Code, specifically Article 27, punish those who, intentionally and by any means, give material or moral assistance to the commission of an unlawful act by others. The sanctions applicable to the accomplice are the same as the ones set for the author of the crime, especially attenuated. Article 73 of the Penal Code then states how the especially attenuated sanctions are determined, the maximum term of imprisonment and of the fine is reduced by 1/3 (Article 73(1)(a) and (c)). Also, Article 73(1)(d) states that if the maximum term of imprisonment is not higher than 3 years, the sanction can be substituted by a fine.

3.2.2.3. "Effective, proportionate and dissuasive" criminal sanctions

As stated before, it is a difficult task to evaluate the effectiveness, proportionality and dissuasiveness of sanctions, however, a study based on the previous insights on the meaning of the three terms will be conducted to discover if Portugal is complying with this requirement.

The effectiveness of penalties is especially challenging to assess, the existence of less environmental crimes, which is the goal to reach with the sanctions, can have different reasons. It can be that the penalties are in fact suitable and lead to fewer crimes being committed, but it can also be that few enforcement mechanisms, few investigative and prosecuting teams and the difficulty in discovering these crimes, leads to the wrongful idea of fewer crimes existing, as will be discussed below on the enforcement capacity.

Regarding proportionality in the Portuguese legal system, there is an escalation of penalties according to the severity and harm of the crime and the mental state of the criminal. The penalties are lower when the crime is committed with negligence rather than intent and also, they are higher when the offence causes special danger for human life and physical integrity. For example, the crime of emission of ionizing materials and radiations is punished with term of imprisonment of up to 2 years if the conduct is negligent, up to 5 years if intentional, up to 6 years if there is a negligent creation of danger for human life or from 1 to 8 years if there is an intentional creation of danger for human life. Within the Portuguese legal

system, it then seems to exist proportionality when referring to a gradual system of punishment that makes distinctions on the sanctions according to the elements of the offences. What will later be discussed is whether there is proportionality between Portugal's sanctions and the sanctions from other Members, specifically the Netherlands.

Concerning the criteria of proportionate and dissuasive penalties, the already referred law of 2015 that added some missing elements of the Directive[52], also changed the sanctions to be imposed. In an attempt to make the commission of crimes less attractive, by lowering the difference between the expected gains and the expected consequences, the law increased the number of years of the terms of imprisonment as well as the fines. This increment was also due to the idea that the sanctions previously applied were not totally correspondent to the severity of the crimes.[53]

The previous sanctions of term of imprisonment up to 3 years or up to 600 days of fine (Articles 278(1), 279 (1) and (2)) were increased to up to 5 years and the term of fine abolished. The sanction of Article 279(3) of term of imprisonment up to 2 years or fine of up to 360 days was increased to up 3 years or up to 600 days of fine. The sanctions of term of imprisonment of up to 1 year or fine of up to 240 days (Article 278(2) and 279(4)) were increased to term of imprisonment to up to 2 years or fine of up to 360 days. The sanctions of term of imprisonment up to 6 months or fine of up to 120 days (Article 278(3) and 279(5)) were increased to up to 1 year of term of imprisonment or up to 240 days of fine. The sanction of up to 120 days of fine of Article 278(6) was increased to up to 240 days of fine. Finally, Article 280 regarding pollution with special danger for life or physical integrity of any person, the sanction for the negligent creation of such danger was increased from up to 5 to up to 6 years of term of imprisonment.

This alterations in sanctions had consequences regarding the punishment of the attempt to commit these crimes. According to Article 23 of the Penal Code, the attempt to commit a crime, which the sanction for the consummated crime would be higher than 3 years of term of imprisonment, is also punishable. With the increase from up to 3 to up to 5 years in some of the cases, the attempt to commit those crimes can also be punished. Articles 22 to 25 further regulate the sanctions for attempts. This can be seen as an improvement on the requirement of

[52] Lei nº 81/215 (n 48)
[53] Newsletter n.4, Helena C. Tomaz advogados, 6 July 2017, available at: <https://helenactomaz.com/noticias/?lang=en/>

dissuasiveness as non-consummation of the crime can still lead to the application of sanctions creating a further disincentive for the commission of crimes.

Turning now to the enforcement capacity, Members must enforce the laws for the Directive to have any real significance. The main body responsible for the combat against environmental crimes is the Portuguese Republican National Guard (GNR)[54], characterized in its Organic Law[55] as a military security force, consisting of military personnel organized into a special corps of troops. GNR has a specialised body on environmental law enforcement called SEPNA/GNR (service for the protection of nature and environment[56]) which is in charge of ensuring the compliance with the legal and regulatory provisions relating to the conservation and protection of nature and the environment, water resources, soil, animals, forest and other resources provided for in environmental legislation. Amongst other tasks, SEPNA oversees waste and dangerous substances operators, protected areas and species, the compliance with hunting and fishing laws and takes samples of the water and soil for analysis. Furthermore, this body is also responsible for the investigation of these environmental crimes, for the detention of the violators and the conduct of judicial inquiries by military personnel with specialization in the areas of environment and criminal investigation.

The public security police (PSP)[57] has a generic competence in ensuring the compliance with environmental legislation, however, SEPNA was constituted as the environmental police with special powers over these matters and so it is the body competent to act first-hand on the entire country[58]. Responsible for these cases at administrative level and for supporting prosecution services in criminal investigations is the IGAMAOT[59], the General Inspection for Agriculture, Sea, Environment and Spatial Planning. IGAMAOT is also responsible for maintaining an updated online database with all of the reported information by other bodies whose action relates to environmental crimes. To facilitate joint action between all bodies, the IGAMAOT has cooperation agreements with PSP[60], the Directorate-General for the Territory[61],

[54] Guarda Nacional Republicana
[55] Lei n. º 63/2007, de 6 de novembro.(Law n.º 63/2007, 6 November), Article 1(1).
[56] Serviço de Proteção da Natureza e Ambiente
[57] Polícia de Segurança Pública
[58] Portaria n.º 798/2006, 11 de agosto
[59] Inspeção-Geral da Agricultura, do Mar, do Ambiente e do Ordenamento do Território
[60] Available at: <https://www.igamaot.gov.pt/wp-content/uploads/Protocolo_IGAOT_PSP.pdf>
[61] Direção-Geral do Território. Available at: <https://www.igamaot.gov.pt/wp-content/uploads/Protocolo_IGAMAOT_DGT.pdf>

the Financial Institute for Regional Development[62], the Attorney General's Office[63], the Environmental Fund[64] and the National Representation on IMPEL[65].

IGAMAOT and GNR created a special line called Environment and Territory SOS Line[66] to facilitate reports of violations against environmental legislation by any person, which can also be done through the websites of both GNR and IGAMAOT. However, this line is mostly used for offences against pets and not for the crimes provided in the Directive[67]

In what concerns the prosecution of these crimes, there are no special courts nor special judges related to the environment. The Portuguese Constitution[68] in its Article 209(4) forbids the creation of new courts with exclusive competence to judge certain categories of crimes, so the cases follow the normal rules of any other crime in the criminal section of the judicial courts[69]. Environmental crimes are public crimes ('crimes públicos' in Portuguese) which means they do not need a denouncement or complaint by an individual, as soon as the Public Ministry is aware of the possible existence of a crime it can start investigating and working towards the discovery of the truth and ultimately make an accusation against the alleged violator if sufficient evidence exists. However, the Public Ministry is not obliged to make an accusation nor even to investigate the cases, it has the legitimacy to promote the criminal procedure[70] but it is not mandatory that it does. If no sufficient evidence exist or if for any other reason the Public Ministry doesn't consider the process should proceed then nothing can be done because there is no process without the Public Ministry.

Concluding the enforcement capacity, that is the base for the effectiveness requirement, it can be noted that GNR has many tasks, programs and initiatives to fight environmental

[62] Instituto Financeiro para o Desenvolvimento Regional, available at: <https://www.igamaot.gov.pt/wp-content/uploads/Protocolo_IGAMAOT_ADC-1.pdf>
[63] Procuradoria-Geral da República, available at: <https://www.igamaot.gov.pt/wp-content/uploads/Protocolo-PGR-IGAMAOT_Fev-2015.pdf>
[64] Fundo Ambiental, available at: <https://www.igamaot.gov.pt/wp-content/uploads/Protocolo_Fundo-Ambiental.pdf>
[65] Representação Nacional da Rede IMPEL, available in English at: <https://www.igamaot.gov.pt/wp-content/uploads/Protocolo_Rede_Nacional_IMPEL_EN-1.pdf>. The 2nd Addendum to this protocol was signed by the GNR General Commandant joining the SEPNA/GNR to the IMPEL national network, available at: <https://www.igamaot.gov.pt/wp-content/uploads/Protocolo_RedeNacionalImpel2--Aditamento_2019.pdf>
[66] Linha SOS Ambiente e Território
[67] https://www.publico.pt/2014/03/16/sociedade/noticia/linha-sos-ambiente-recebeu-2600-denuncias-num-ano-1628510
[68] Constituicão da República Portuguesa. Available in English at: <https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf>
[69] Other than Judicial Courts there is in the Portuguese system, the Constitutional Court, Administrative Courts and the Court of Auditors. For more information on the organization of the Portuguese judicial system see: <https://beta.e-justice.europa.eu/16/EN/national_justice_systems?PORTUGAL&member=1>
[70] Article 48 Criminal Procedure Code

crimes, however, the yearly decrease of GNR agents and consequently of SEPNA agents, which was already low, around 400 agents for the entire country[71], makes the discovery and investigation of such crimes slower and more difficult. The fact that no special courts exist also means the prosecution of the crimes will be prolonged as the Portuguese justice is already slow[72] and environmental crimes will be subjects to the same long periods of delay. Furthermore, as the Public Ministry is not obliged to initiate proceedings there isn´t even the guarantee that the cases will be investigated.

In sum, the Portuguese legal framework seems to be able to comply with the 3 requirements on paper, as there is a gradual system of penalties that takes into account the different elements of the offence, making it proportional, and there are in place several mechanisms suited to accomplish the goal of high environmental protection which would translate in the penalties being effective and dissuasive. However, in practice, the real outcome is not the same. When it comes to enforcement, to make the penalties actually effective and dissuasive, not enough is being done. There is a low number of agents responsible for discovering, investigating and prosecuting these crimes, turning the probability of violators being caught and prosecuted incredibly lower than the expected benefits of the crime. In addiction few condemnations exist and those that have been pronounced were given low sanctions as a suspended term of imprisonment or low fines to legal persons[73]. This consequently decreases the dissuasiveness and effectiveness of the penalties as the criminals, knowing there is little chance to be caught, will not feel dissuaded and will continue to commit the crimes.

3.3. Netherlands

3.3.1. Legal culture on environmental regulation

The Netherlands has been regulating environmental protection for a long time, as early as 1875 the Nuisance Act (Hinderwet) was introduced, followed by some other acts on marine oil pollution, on pesticides and herbicides (Bestrijdingsmiddelenwet), on nuclear energy and

[71] https://www.dn.pt/portugal/gnr-tem-defice-de-3500-efetivos-militares-8519310.html
[72] https://algarvedailynews.com/news/4676-initial-report-on-portugal-s-justice-system-makes-depressing-reading
[73] LIFE-ENPE, 'Environmental Prosecution Report: Tackling Environmental Crime In Europe' (Environment Agency 2017) <https://www.environmentalprosecutors.eu/sites/default/files/document/Cap%20and%20Gap%20report_FINAL_Print.pdf> accessed 25 November 2019.

many others. In the 1960s and 1970s, the legislation started to compartmentalize the environment into different elements, water, soil and air, and so different Act for each element came into force. In 1983 with the revision of the Constitution Article 21 brought the basis for the involvement of the government in environmental law, laid down as the duty of care aimed at the inhabitation of the land and the protection and improvement of the environment. Later, in 1993 the Environmental Management Act (Wet Milieubeheer) was introduced, which became the main environmental Act and in 1994 the General Administrative Law Act (Algemene Wet Bestuursrecht) which regulates the administrative enforcement and offers administrative sanctions[74]. This Act offers a wide variety of administrative measures to enforce the laws, such as an order to put an end to the violation subject to remedial measures to stop the non-compliance (bestuursdwang) or an order to put an end to a violation subject to a penalty for non-compliance (dwangsom). General administrative enforcement mechanisms are used to ensure compliance with many regulations such as those concerning waste, air and water pollution, land contamination. Besides the administrative sanctions contained in this Act, the Netherlands also possesses different sanctions present in the Dutch criminal code and the Economic Offences Act which however are only applied to the most serious violations.

3.3.2. Implementation requirements

We now turn to the Netherlands and how the requirements for the optimal transposition have been fulfilled. The Minister of Security and Justice stated that with effect from 26 December 2010, the day on which the Directive had to be implemented, it could be regarded as implemented through existing regulations. The Minister took the position that Dutch legislation already complied with the requirements of the Directive and even mentioned that some regulations went beyond the Directive's requirements.

3.3.2.1. Incorporation of all Article 3 offences as criminal offences

In the Dutch legal system, the nine offences from Article 3 of the Environmental Crimes Directive are transposed in many different Articles and Acts, for example, the Criminal Code (Wetboek van Strafrecht), the Economic Offences Act (Wet op de Economische Delicten), the

[74] René Seerden and Michiel Heldeweg, 'Public Environmental Law In The Netherlands', *Public environmental law in the European Union and the United States: a comparative analysis* (Kluwer Law International 2002)

Soil Protection Act (Wet bodembescherming), the Environmental Management Act (Wet milieubeheer), the Water Act (Waterwet) and others that will be analysed. The main possible criminal sanctions are stated in Article 9 of the Dutch Criminal code, imprisonment (determined prison sentence or sentence for life[75]), detention, community service and a fine. Six different categories of fines are then distinguished in Article 23. Besides the Criminal Code, the Economic Offences Act has a penalty system of its own destined for economic offences. Article 6 states the penalties to be applied in the different cases, (imprisonment, community service or a fine) and Article 7 the secondary penalties.

The first offence required to be criminalised is related to the introduction of materials and ionising radiations into the environment. Under articles 161 and 176 of the Dutch criminal code the deliberative or negligent exposure of persons, animals, plants or goods to ionizing rays or radioactive substances and the introduction of substances into the environment is subject to between 1 and 2 years of imprisonment or a fine of the fourth category. The remaining prohibited conducts are spread across different acts, such as the Soil Protection Act and the Water Act. Such acts are essentially dedicated to establishing rules of conduct regarding activities that may lead to the occurrence of the initial offence as defined by the Directive. Those rules range from procedural permissions to delegation of regulations to the relevant authorities to straight prohibitions, for example, the use of certain fertilizers or the transport of dangerous goods inside residential areas. These prohibitions are considered economic offences under Article 1a of the Economic Offences Act and are punished under Article 6(1)1º with up to 6 years of imprisonment, community service or fine of the fifth category if considered a felony ('misdrijf') or detention up to 1 year, community service or fine of the fourth category if considered a misdemeanour ('overtreding'). A special emphasis is required to the possible punishment of violations of the Nuclear Energy Act (Kernenergiewet). Under article 80, if any intentional conduct results in serious damage to persons, goods or to the environment, the responsible may face imprisonment up to 12 or a fine of the fifth category, or imprisonment for life or up to 30 years or a fine if the action results in the death of a person.

Some acts related to waste management are also under the scope of the Directive and are transposed in the Environmental Protection Act (Wet bodembescherming) and the Dangerous Goods Transport Act (Wet vervoer gevaarlijke stoffen). The former is mainly concerned with waste management strategies and the most common evasions to such rules,

[75] Artikel 10 van de Wetboek van Strafrecht

such as improper disposal or non-licensed service providers. The Dangerous Goods Transport Act is related to the threatening consequences that may occur if certain materials, mainly chemicals, are released into the environment causing the effects predicted under the article. Under this offence, are the prohibition of waste disposal outside of a licensed establishment (Article 10.2 Wet bodembescherming), mixing hazardous waste with any other waste considered particularly dangerous by the relevant authorities (Article 10:54 of the same act) and the obligation of registration and certification of any undertaking wanting to engage in waste management activities, among others. As an example of the importance of waste management and its inherent risks, under article 4.3 of the Environmental Protection Act, the competent Minister is required to establish a waste management plan that should be reviewed at least every six years and should follow a hierarchy starting with use prevention and ending with safe removal. Reuse and recycling are some of the included stages. The sanctions follow the same as supra, Article 1a and 6 of the Economic Offences Act.

The national provisions corresponding to the offence (c) of the Directive is Article 10.60 of the Environmental Management Act which states the prohibition to commit acts referred in Article 2(35) of the EC Waste Shipment Regulation[76]. The penalties for the commission of the prohibited acts follow the sanctions for offence (b), Article 6(1)1º.

The fourth offence under the Directive is about the operations of plants in which dangerous goods or substances are stored or used in cases where such goods are at least likely to cause considerable damages to the environment. The established legal framework for such operations is set under the Environmental Protection Act. This act stipulates that any activity which effects may represent adverse consequences for the environment, including animals and persons, should be subject to specific and appropriate regulation. Such regulations need to take into account the existing state of the environment prior to the start of the activity in question, preventive measures to address potential risks and the economic consequences of such risks becoming real (Article 8:40). If any suspicion arises that activity's effects will represent a higher risk than what is considered to be the acceptable risk level, prohibitions or any constraints may be imposed on the causes of such risks (Article 9.2.2.1). As the previous offences, any violation of rules passed under the mentioned provisions of the Environmental

[76] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipment of waste

Protection Act is considered economic offences (under article 1a) and subject to the above-mentioned punishment set under article 6 of the Economic Offences Act.

Articles 15 and 29 of the Nuclear Energy Act relate to the offence (e) of the Directive as they prohibit without a permit a facility where nuclear energy and materials are manufactured, processed, stored or released and also prohibit the preparation, transport and possession, disposal, import and export of radioactive substances. Article 80 of the same Act sanctions with imprisonment of up to 12 years or a fine of the fifth category the person guilty of an intentional act contrary to Article 15 that results in a threat to serious bodily injury to another person or damage to goods or the environment. If the intentional act results in the death of a person, the guilty person is sanctioned with life imprisonment or a temporary custodial sentence up to 30 years or a fifth category fine. Under the Economic Offences Act, the punishment follows the same conditions as supra mentioned, Article 1a and Article 6(1)1º.

The Flora and Fauna Act and the Nature Conservation Act 1998 regulated the conducts referred in Article 3 (f), (g) and (h) of the Environmental Crimes Directive. In 2017 these Acts were replaced by the Nature Protection Act that now regulates the protection of natural areas, species and forests. Chapters 2 (Natura 2000 sites) and 3 (species) of this new Act deal with the protection of habitats and species, prohibiting the killing, capture, sale, transport for sale, trade and possession of birds, animals and plants listed in several documents (Habitats Directive, Bern Convention, Birds Directive) and the damage and destruction of breeding sites or resting places of animals. The sanctions follow Article 1a and 6(1)1º of the Economic Offences Act.

The last offence under the Environmental Crimes Directive concerns the use of any ozone-depleting substances. At the initial stage of transposition, the offence was set under article 3 of the now repealed Environment Management Decree ozone layer degrading substances (Besluit ozonlaagafbrekende stoffen milieubeheer). The article was kept under the same number on the new decision for the implementation of the Regulation nº 1005/2009 on substances that deplete the ozone layer[77]. This decision follows the approval of a new European regulation specifically dedicated to ozone-depleting substances, restricting the scope of the initial offence considerably. Nevertheless, article 3 of both laws states that it is forbidden to

[77] Besluit van 31 mei 2011, houdende regels ten behoeve van de uitvoering van verordening (EG) nr. 1005/2009 van het Europees Parlement en de Raad van de Europese Unie van 16 september 2009 betreffende ozonlaagafbrekende stoffen (herschikking) (PbEU L 286) (Uitvoeringsbesluit EG-verordening ozonlaagafbrekende stoffen)

engage in any act of the entire supply chain of certain substances – identified by the European legislator in the regulation. Lastly, under article 1a of the Economic Offences Act, the violation of any of the applicable rules regarding ozone-depleting substances or others which are forbidden under article 9.2.2.1 of the Environmental Protection Act are considered to be economic offences. The punishment is decided according to article 6 of the former Act.

3.3.2.2. Liability for legal persons and for accomplices

Regarding the requirement to ensure legal persons can be held liable for the offences of Article 3 and 4 of the Directive, the Dutch Criminal Code sets on Article 51 that criminal offences can be committed by both natural and legal persons. The same article states that criminal proceedings may be instituted and the punishments and measures prescribed by law can be imposed on the legal person and/or on the persons who ordered the commission of the offence and the persons who actually directed the unlawful act. The fines, when imposed, can be increased for legal persons and there can also be accessory sanctions namely confiscation of certain objects, placing the undertaking under judicial supervision or the cessation of the undertaking up to 1 year.

As to inciting, aiding and abetting, required by Article 4 of the Directive to be punishable as a criminal offence, Articles 48 and 49 of the Criminal Code set the conditions for the punishments. Article 48 states the persons who that shall be criminally liable as accomplices: any person who intentionally aids and abets the commission of serious offences and any person who intentionally provides the opportunity, means or information for the commission of the serious offence. Article 52 states that complicity in minor offences is not punishable. To determine the penalties for the accomplices Article 49 states that the maximum of the principal punishment prescribed for the offence is to be reduced by one third and no more than 20 years of term of imprisonment should be imposed in case the sentence for the offence is life imprisonment. The same Article states that the additional punishments for complicity are the same as for the serious offence and also that only the acts that were intentionally promoted or facilitated by the accomplice and their consequences shall be taken into account.

3.3.2.3. "Effective, proportionate and dissuasive"

As discussed before the three terms are not only related to each other but also with the enforcement capacity a country has to discover, investigate and prosecute the offenders. Especially the requirement of effectiveness and to some extent of dissuasiveness depends on how a country is able to enforce the existing legislation. Investigation and judicial units will be analysed bellow to understand if the Netherlands is complying with the requirements from Article 5 and 7 of the Directive.

A study in 2017[78] exposed concerns regarding the level of fines in the Netherlands. The country was considered as potentially compliant with the requirement of having legislation effective, proportionate and dissuasive, however, it was stated that higher fines would improve the compliance. As of January 1, 2020, the fines prescribed in Article 23 of the Criminal code have been increased. This can be seen as an improvement towards more proportional sanctions, considering the high impacts and gains these offences can have and also towards a set of penalties more dissuasive. Also concerning the proportionality requirement, it can be observed that the Dutch legal system has an escalation of penalties according to the severity, harm and mental state of the offender. Higher penalties are set if the action results in the death of any person. The attempt and preparation of a crime can also be punished following Articles 45 and 46 of the Criminal Code which adds to a good dissuasive legal system. The offender is aware that the non-consummation of the crime can still lead to penalties and may feel less attracted to commit the offence.

Turning now to the sub-requirement of the effectiveness requirement, the enforcement capacity, it will be discussed how the Netherlands is enforcing the legislation that was supra analysed. Local, regional and national authorities are responsible for the enforcement of environmental law, but for detection of environmental crimes committed under the Economic Offences Act and Criminal Code, the responsible are the general investigative officers and special investigative officers. There are police officers in Regional Units and the Central Unit of the National Police entrusted with the task of investigating cases involving environmental crimes. Investigations by the Police of these offences are operated under the direction of the National Public Prosecutor's Office for financial, economic and environmental offences (Functioneel Parket, FP). This body is responsible for the investigation and prosecution of

[78] LIFE-ENPE, 'Environmental Prosecution Report: Tackling Environmental Crime In Europe' (Environment Agency 2017) <https://www.environmentalprosecutors.eu/sites/default/files/document/Cap%20and%20Gap%20report_FINAL_Print.pdf> accessed 25 November 2019.

criminal cases and for this purpose exercises authority over special investigative services of the Human Environment and Transport Inspectorate (Inspectie Leefomgeving en Transport, ILT) and the Netherlands Food and Consumer Product Safety Authority (Nederlandse Voedsel- en Waren Autoriteit, NVWA). This specialised judicial unit, the FP, is present in Zwolle, Den Bosch, Rotterdam, the Hague and Amsterdam. The Strategic Environmental Chamber (Strategische Milieukamer, SMK) is a coordinating body created due to the complexity of the involvement of different ministries, investigative services and inspection services, and its purpose is to set priorities and policy in the approach to environmental crimes.[79] There are also special investigative officers dedicated to the enforcement of environmental law operating under the authority of municipalities and provinces and other local bodies, as the DCMR Environmental Protection Agency which operated in Rijnmond[80].

In the same lines as the Public Ministry in Portugal, the Dutch Prosecutor has the discretion to choose which cases will be prosecuted. He is responsible to bring criminal cases to the court and then set the parameters of court proceedings.[81] Cooperating with the police and other investigative services, he leads the investigations and supervises the execution of sentences, prison and community service sentences, and fines to be paid. The second division (tweede afdeeling) of the Code of Criminal Procedure (Wetboek van Strafvordering) sets the tasks of prosecutors.

Via the Centraal Meldput Nederland website[82], which attracts 40,000 visitors per month, it is possible to anonymously report environmental crimes.

In 2017, director Wilfried Koomen made a shocking documentary named Beerput Nederland, reporting the decades of tolerated environmental crime in the Netherlands. The documentary shows the unwillingness of the government to tackle these crimes adequately as politicians and monitoring bodies turn a blind eye or even sabotage the attempts to investigate and prosecute companies and other offenders, especially in the field of illegal waste disposal. On a more recent note, in 2019, in a large-scale environmental inspection in the Arnhem region,

[79] Ministerie van Infrastructuur en Waterstaat - Inspectie van Leefomgeving en Transport, 'Dutch Environmental Monitoring And Enforcement Information Sheet In A Nutshell' (2017) <https://www.ilent.nl/documenten/publicaties/2017/2/7/informationsheet-dutch-environmental-monitoring-and-enforcement-in-a-nutshell> accessed 28 November 2019.
[80] Eurojust, 'Strategic Project On Environmental Crime - Report' (Eurojust 2014) <https://op.europa.eu/en/publication-detail/-/publication/40e14d2b-9f08-11e5-8781-01aa75ed71a1/language-en> accessed 28 November 2019.
[81] Henk van de Bunt and Jean-Louis van Gelder, 'The Dutch Prosecution Service' (2012) 41 Crime and Justice <https://research.utwente.nl/en/publications/the-dutch-prosecution-service> accessed 15 December 2019
[82] Meld.Nl | Centraal Meldpunt Nederland' (*Meld.nl*, 2020) <https://meld.nl/> accessed 30 December 2019

39 violations were found including the dumping of waste. Four people received an official report, but no arrests were made[83].

According to different studies[84], the Netherlands although possessing a wide range of sanctions, mostly use monetary penalties, and rarely the highest sanctions are imposed for environmental crimes. The possibility of settlement outside the courtroom, which many corporations tend to do, and the fact that those who order the offences rarely end up imprisoned or even sentenced to community service, is unlikely to change the offender's behaviour.[85]

In sum, the Dutch legal system seems to comply with the effective, proportionate and dissuasive requirement on paper, especially after the increase of the fines to be applied, however in practice, the same cannot be said to be happening. The little or even non-enforcement of the existing penalties does not comply with the dissuasive and effective requirement.

[83] 'Tientallen Milieudelicten Ontdekt Bij Grote Controle In Regio Arnhem' (*Gelderlander.nl*, 2019) <https://www.gelderlander.nl/arnhem/tientallen-milieudelicten-ontdekt-bij-grote-controle-in-regio-arnhem~af21ad76/> accessed 17 December 2019.

[84] Núria Torres Rosell and Maria Marquès Banqué, 'Study On The Implementation Of Directive 2008/99/EC On The Protection Of The Environment Through Criminal Law' (Centre d'Estudis de Dret ambiental de Tarragona - Universitat Rovira i Virgili 2016) <https://www.eufje.org/images/docPDF/Study-on-the-implementation-of-Directive-2008_99_ENEC_SEO_BirdLife_May2016.pdf> accessed 16 November 2019; and LIFE-ENPE, 'Sanctioning Environmental Crime (WG4) - Prosecution And Judicial Practices - Interim Report' (LIFE-ENPE 2018) <https://www.environmentalprosecutors.eu/sites/default/files/document/LIFE-ENPE_WG4_InterimReport_FINAL.pdf> accessed 27 November 2019.

[85] Toine Spapens, Rob White and Marieke Kluin, *Environmental Crime And Its Victims: Perspectives Within Green Criminology* (1st edn, Routledge 2017).

Chapter 4: Analysis and Comparison of the implementation

After the analysis on how Portugal and the Netherlands are implementing the Environmental Crimes Directive, according to the 3 requirements that were previously determined as necessary for an optimal implementation (incorporation of all the offences, liability for legal persons and accomplices and effective, proportionate and dissuasive penalties), we are now going to look at the similarities and differences between the two countries. An analysis will be made of the efforts each country is making to comply with the Directive and achieve the EU's goal of high protection of the environment. More than restating what the countries are doing it will be seen how different the implementation of a Directive can be in different Members and also if the culture behind each country on environmental law (criminal or administrative) makes any important changes on how the two countries transposed and implement the directive.

Starting with the first requirement, that all the offences are transposed into the country's legal systems, we have seen that both Portugal and the Netherlands fulfil this requirement, however, in very different ways. Portugal transposed directly to the Penal Code, almost word by word in some cases, the Directive's prohibitions. The Articles chosen for this transposition were the Articles that already mentioned environmental crimes and more specifically that already mentioned some of the offences to be criminalized. The Portuguese legal system in 3 articles of the Penal Code (278, 279 and 280) joins all the 9 offences without further developing any of them beyond the letter of the Directive. On the contrary, the Netherlands, stating that it already had sufficient legislation to comply with the Directive, has the offences scattered in different Acts and different Articles, even one single offence is in some cases regulated by different Acts. This distribution over different laws makes it more difficult to have a clear perception of the prohibited actions and its sanctions and consequently its compliance with the Directive. But on the other hand, a different organization of the offences, in pieces of legislation that deal with similar matters (not present in the Directive) might translate in a more complete regulation and easier application of the Directive's offences in conjunction with other extra prohibitions the country has in place to further protect the environment.

The second requirement relates to the liability of legal persons and any person who incites, aids and abets the commission of the conducts of Article 3 of the Directive. These two sub-requirements are generally already present in most country's criminal law for many types of crimes, which is what happens with the environmental crimes in question. Both countries

have provisions that punish accomplices for the commission of these crimes, with reduced penalties, and legal person when the offence is committed in its benefit, with increased penalties as the possibility of severe damages and also of profits is higher than if committed by a single person.

The third requirement is the most difficult to evaluate as it was demonstrated before. The effectiveness, proportionality and dissuasiveness are not requisites that can be found only by looking at the written legislation of each country. It requires also an analysis of how the legislation is being applied, enforced and the offenders prosecuted. Starting with the proportionality sub-requirement, it was seen that within each legal system the penalties were considered proportional as the legislation established a gradual system of penalties that sanctions with higher imprisonment terms and fines the most damaging and threatening crimes. The question now is if, when comparing the two penalty systems, they can still be deemed to be proportional. Most offences are sanctioned with imprisonment up to 5 years in Portugal and 6 in the Netherlands which can be considered as similar, however, in the Netherlands, there are offences whose sanctions are much higher, with imprisonment for life or up to 30 years, contrary to Portugal where the maximum penalty that can be applied is up to 8 years of imprisonment. In these cases, where the difference is considerable it is necessary to think if higher penalties are in fact more proportional or just too excessive considering the offence in question. As discussed before, from an economic point of view, if the probability of the violators being caught and prosecuted is low then the sanctions imposed should be higher to counteract the low enforcement. In this case, as found before, the enforcement in both countries is very low, so higher sanctions must be imposed, especially in crimes where the profits and also the damages to the environment are higher. Offences related to nuclear and radioactive substances are extremely dangerous, in an overall view of the EU Members, 15 countries (including the Netherlands) have much higher penalties than Portugal (from up to 8 years of imprisonment to imprisonment for life)[86]. Thus, it seems that the Netherlands has more suited and proportional sanctions than Portugal, not only considering the danger and devastating consequences that the activities can cause but also in relation with the low enforcement that requires higher penalties. However, for some offences, namely those who have sanctions up to 6 years may not be high enough to be considered proportional and also dissuasive and effective.

[86] Rosell and Banqué (n 84)

Countries such as Greece and Malta have much higher penalties for those offences (up to 20 years or imprisonment for life)[87].

The dissuasive requirement entails the idea of deterrence, sanctions are considered dissuasive if they lead potential perpetrators to comply with the law. Dissuasiveness and effectiveness need to be seen in conjunction because only effective sanctions can dissuade potential offenders from committing the crimes. Consequently, the enforcement capacity of a country is necessary to make a sanction effective, if legislation exists but is never or rarely applied, then it is not effective and thus not dissuasive. Regarding the discovery and investigation of environmental crimes, both countries have special police units dedicated to this task. In Portugal there is a number of agents within the military security force exclusively dedicated to this task (SEPNA/GNR) and in the Netherlands police officers in regional units and in the central unit as well as special investigative officers under the authority of municipalities and provinces. It is known that environment crimes besides having the possibility of causing severe damages in the environment, are very difficult to be discovered and attributed to the offenders, so it is important to have a proximity policing. To increase the probability of catching violators, both before and after the consummation of the crime, it is important to have local police, on the field, with knowledge on the territory, always aware and on the look for possible crimes. This is what happens in the Netherlands with police officers from municipalities and provinces dedicated to environmental crimes being closer to not only the population but the possible violations. In Portugal, the agents dedicated to fighting this type of crimes exist in a low number compared with the size of the country and number of violations and so they are in constant movement inside the country going after the crimes when and where they are committed. Other agents such as the PSP are also invested with the power to investigate such crimes but as they only have a generic competence, environmental crimes are seen as victimless[88] and they have other priorities, environmental crimes end up being neglected.

Some of the main problems in the implementation of the Directive arise when we discuss prosecution. Being environmental crimes and its offenders so difficult to discover, the only possibility for more effective and dissuasive penalties would lie on high sanctions being applied to those caught. Remembering the cost-benefit analysis, the base for the deterrence

[87] Ibid
[88] 'Environmental Crimes' (*Unicri.it*, 2020) <http://www.unicri.it/topics/environmental/> accessed 29 December 2019.

evaluation[89], if the probability of criminals being caught is low then the sanctions must be high to counterbalance the expected benefits from the crime and thus dissuade people from committing the offences. Nevertheless, this is not the situation in which we are currently living, the prosecution is still not enough to make the existing legislation effective or dissuasive, in both countries. The first problem is the fact that environmental crimes are still often seen as victimless crimes and so they are put very low in the rack of priorities of law enforcement[90], also criminal procedures are complex and costly and so prosecutors tend to use the existing resources to more important cases. The second common problem is the fact that there is no obligation to pursue environmental crimes, the Dutch Prosecutor and the Portuguese Public Ministry have the discretion to choose which cases are going to be prosecuted and so for many different reasons they might not want or be able to prosecute as many cases as it would be desirable (ultimately the prosecution of all of them). The main reason for low prosecution numbers is the lack of manpower and technical means to investigate and make an accusation in all cases, in Portugal in some major cases against big companies there happens to be one single prosecutor on one side and a team of 20 lawyers on the other.[91] The third problem is the seeming unwillingness of judges to apply the higher penalties, in the Netherlands fines are the most common sanction, and in Portugal term of imprisonment lower than 1 year can be substituted for a fine and/or a probation period, so even when there is the application of a sanction of imprisonment considering that some of the possible sanctions are as low as up to 2 years, the offender is rarely sentenced to effective imprisonment time. Although the damages made by man in the environment are a much-talked topic, the truth is that environmental crimes are still not high enough in the priorities of law enforcement, prosecutors, judges and the public in general. This lack of importance given to these offences leads to slow developments and little improvements of the existing legislation, mechanisms to monitor and investigate crimes and prosecution.

Thus, being the enforcement capacity of the two countries very low, the sanctions cannot be said to fulfil the requirement of effective and consequently they are also not considered dissuasive. The two countries have the offences transposed in legislation in

[89] Becker (n 37)
[90] EnviCrimeNet - Environmental Crime Network, 'Report On Environmental Crime' (EnviCrimeNet - Environmental Crime Network 2016) <http://www.envicrimenet.eu/images/docs/envicrimenet%20report%20on%20environmental%20crime.pdf> accessed 13 November 2019.
[91] 'Queixas De Corrupção São Arquivadas Em 94% Dos Casos' (*Publico*, 2019) <https://www.publico.pt/2019/07/06/sociedade/noticia/queixas-corrupcao-sao-arquivadas-94-casos-1878985> accessed 22 December 2019.

different ways and have different organizations of police units dedicated to monitoring and investigating environmental crimes, however, when it comes to the prosecution and conviction the two suffer from the same problem, low numbers of cases prosecuted and low penalties imposed.

Some general solutions for the referred problems that have been debated in the literature concern the harmonization of penalties and the addition of administrative and also complementary sanctions to better tackle environmental crimes. These ideas will not be analysed in-depth due to the time and space constraints of this dissertation, nonetheless, they are worthy of being mentioned as they can mean important and effective changes. Regarding the harmonization, there has been some discussion as to whether the EU should fully harmonize the set of penalties in the Member States, the opportunity that is now given by the Lisbon Treaty. On the one hand, it could set higher penalties according to the actual damages of the crimes, but on the other hand, it would not solve the problem of low numbers of prosecution unless higher sanctions would change the prosecutors' way of thinking about the importance of these crimes[92]. One main possible solution that has been argued in the literature is that criminal law might not be the most effective way of fighting environmental crimes, or at least not a pure criminal system. Studies show that overcriminalization can lead to a big percentage of violations not being prosecuted[93], due to the high costs, complexity and lack of resources and personnel criminal procedures suffer from. Although criminal prosecution is appropriate for serious crimes, the low probability of detection, prosecution and conviction makes the deterrence value very limited.[94] Therefore a better strategy to fight environmental offences may be a system of criminal and administrative sanctions. Also important would be the imposition of complementary sanctions as the restoration of the inflicted environmental harm, to make mandatory the obligation of perpetrators to undo its wrongs.

One other point to be mentioned is the different legal pasts of the two countries. Independently of the previous approaches on environmental offences, the Directive required

[92] EFACE - European Union Action to Fight Environmental Crime, 'Workshop On 'Environmental Crime In The EU: Is There A Need For Further Harmonisation?' - Repor' (EFACE 2015) <https://efface.eu/sites/default/files/publications/EFFACE_D.7.2.%20Report%20on%20improving%20the%20role%20of%20the%20criminal%20justice%20system_TheHague_0.pdf> accessed 4 December 2019

[93] Michael G. Fare & Katarina Svatikova, "Enforcement of Environmental Law in the Flemish Region", 19(2) European Energy and Environmental Law Review, 2010, 60-79

[94] Michael G. Fare & Katarina Svatikova, "Criminal or Administrative Law to Protect the Environment? Evidence from Western-Europe", Journal of Environmental Law, Vol. 24(2), 2012, 253-286

Members to use criminal law in the mentioned violations. It is argued that this demand came against the usual administrative fining systems that most legislations had[95]. For several Members this was a sharp contrast to the trend of using administrative fines that was gaining more importance, which brings the question of whether this major change, of relying on criminal law so strongly, diminishes the probability of more proportional and effective sanctions and consequently dissuasive. Countries with a long history of administrative sanctioning as the primary way of protecting the environment already developed their systems and have experienced administrative bodies in place to implement the necessary sanctions, in addition, costs of administrative procedures are lower than criminal procedures and also standard of proof are lower (meaning that offenders could be more easily sanctioned but also meaning higher probability of errors), which could translate in more offenders being sanctioned[96]. For countries already with a culture of criminal law for the protection of the environment and in the specific case of this thesis, for the protection of the environment against the specific offences of the Directive, the same development of the system happens. Prosecutors and judges in these countries, already having experience in prosecuting and judging environmental crimes, should be better prepared to deal with these offences. On the contrary, countries with a culture of administrative sanctions have to provide training for judges to judge over crimes they are not familiar with. However, is this a true obstacle for countries more used to sanction offences through administrative penalties? Do countries with a criminal culture on the sanctioning of these offences have an advantage that translates into more convictions or higher penalties imposed? Although only two countries were analysed and so the insights should not be generalised, it seems that no difference is visible regarding the conviction of offenders. Both countries, with different cultures, struggle with prosecuting and convicting enough violators and imposing higher penalties. This, as seen, has many different reasons, such as lack of resources, persons, low priority and unwillingness of attributing sufficient importance to these offences.

[95] Faure (n 94)
[96] Tiffany Bergin and Emanuela Orlando, *Forging A Socio-Legal Approach To Environmental Harms* (1st edn, Routledge 2018).

Chapter 5: Conclusion

The high protection of the environment as a goal of the European Union brought many unsuccessful attempts to create a harmonized Directive criminalising what are considered serious and severe offences against the environment. An institutional fight between the Council and the Commission over the competence to adopt measures concerning criminal law for the protection of the environment made the adoption of the Directive 2008/99/EC a difficult and controversial matter. After several attempts, the Environmental Crimes Directive was adopted in 2008 requiring members to criminalise 9 offences, to ensure accomplices and legal persons were also held liable and to ensure sanctions are effective proportional and dissuasive.

We have seen how two different Members, Portugal and the Netherlands, have implemented the Directive and the efforts they are doing to achieve the EU's goal. Portugal transposed the offences of Article 3 of the Directive, directly to the Criminal Code, while the Netherlands considered to already have sufficient legislation to cover all aspects of the Directive. An analysis on the implementation was made following three requirements that were considered the necessary requisites for optimal implementation: that all offences are incorporated in the countries' national legislation; that accomplices and legal persons can be held liable; and that the sanctions to be imposed are effective, proportional and dissuasive. In what concerns the first requirement it was seen that the two countries fulfilled the necessary requisites, although in different ways, While Portugal transposed almost word by word the offences to the Articles of the criminal code that already criminalised some of the violations, the Netherlands, already having the necessary legislation, have it separated in many different Acts, making its analysis quite complex. As to the second requirement, it was seen also that the two countries comply with what the Directive demands, liability for legal persons and for those who incite, aid and abet is already a usual feature most countries have present in their legislation.

The third requirement was the hardest to evaluate, the Directive requires that Members ensure the sanctions imposed were effective, proportionate and dissuasive, however without saying what those terms mean. Following some studies and opinions by scholars, it was determined what was considered to be effective, proportional and dissuasive. Proportional required a gradual system of penalties according to the damages caused, the intention of the perpetrator and the seriousness of the crime, dissuasive, related to the term deterrence implied that the sanctions would stop potential offenders from committing the crime and effectiveness,

concerning the relationship between the instruments used and the goals to be achieved, requires that less environmental crimes are committed and the achievement of the EU's goal of high environmental protection. The three terms interrelate and so needed to be seen in conjunction. Proportionality was considered to exist within each legal system, however when compared with each other and with other EU countries, Portugal was seen to have lower penalties that might not correspond with the severity of the offences, and also the Netherlands in some offences has penalties that can be considered low in comparison with other Member States. As to effective and dissuasive, the two terms were seen connected with the sub-requirement of enforcement capacity. Without enforcement, capacity sanctions are merely on paper and cannot be considered to be effective or dissuasive.

It was seen that both countries have specialized police units to deal with environmental crimes however in Portugal there is no proximity policing and the number of these special agents is very low considering the number of offences being committed. Furthermore, it was seen that one of the major problems for non-enforcement relates to prosecution. The Portuguese Public Ministry and the Dutch Prosecutor both have the discretion to choose which cases will be prosecuted, there is no obligation to prosecute environmental crimes. Due to the low priority these cases have (for example for still being seen as victimless crimes), the lack of resources and personnel, and the difficulty of discovering and gathering enough evidence, the number of prosecuted cases is low. Adding to this situation there is also the problem of the low sanctions imposed, the Netherlands still relies strongly only on fines and Portugal in fines and low imprisonment terms that can be substituted by fines.

Thus, it was determined that neither Portugal nor the Netherlands complies with effective and dissuasive sanctions, as they do not lead to higher numbers of deterrence nor achieve the goal of high environmental protection.

Regarding the past legal cultures of the two countries and its influence on the implementation of the Directive, fewer insights than hoped can be taken from this study and generalised conclusions cannot be made as only two countries were analysed and consequently, the differences and similarities can have different reasons. Nevertheless, the study still provides important information on the shortcuts of the two countries. The data collected with this study show that independently of the criminal or administrative cultures neither country is being able to comply with the Directive, mainly due to the low importance and priority these crimes are attributed and not due to lack of experience of the judges or other bodies involved.

As to the *effet utile* of the Directive, it seems that it does not achieve the expected goals of high environmental protection. Although most countries have transposed the Directive on paper, it does not translate to practice. The low detection, prosecution, and penalties imposed on these crimes remove the meaning of the Directive. In practice there are no changes, especially considering that in Portugal there was simply a literal transposition of the Directive and the Netherlands did not even enact any legislative change as it already had sufficient legislation to comply with the Directive.

Finally, solutions for this low enforcement must start with a change in the mentality of people over the importance and damaging consequences environmental crimes can have. Harmonization of sanctions can be a way of improving the proportionality requirement, as all Members would have the same penalties set according to experts' opinions, however, this is not without disadvantages, for example the different impact a determined penalty can have on different countries (the same fine can be much more burdening for citizens of poorer countries). Regarding the increase of deterrence, the introduction of administrative and complementary sanctions could be a possibility.

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