

# Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States

**Contract No**  
**JUST/2011/JPEN/PR/1029/A4**

Final Report  
March 2013  
(update May 2014)



This Report has been prepared by Milieu Ltd. under Contract No JUST/2011/JPEN/PR/1029/A4 with the European Commission, DG Justice.

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## ABBREVIATIONS

BCR	Brussels-Capital Region
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
EU	European Union
E&W	England and Wales (UK)
Fed	Federal level (Belgium)
FL	Flanders (Belgium)
IPPC Directive	Directive on Integrated Pollution Prevention and Control
JHA	Justice and Home Affairs
NI	Northern Ireland (UK)
ODS	Ozone Depleting Substances
TFEU	Treaty on the Functioning of the European Union
UK	The United Kingdom
WR	Walloon Region (Belgium)



## EXECUTIVE SUMMARY

The European Commission is placing increased emphasis on implementation and effective enforcement of its framework of environmental legislation. Criminal law has come to be viewed as necessary for deterring particularly serious environmentally harmful acts and for promoting compliance with environmental regulations. Directive 2008/99/EC on the protection of the environment through criminal law ('the Directive', 'Directive 2008/99/EC'), adopted on 19 November 2008, was the first EU Directive to contain provisions with regard to criminal law.

The purpose of this study was to analyse the conformity of national transposing measures with Directive 2008/99/EC. Based on the national studies an overall comparative assessment between Member States is presented in this report, indicating the main outcomes of the analysis conducted in the Member States. This horizontal report has been finalised in March 2013. The present version is a revised one which includes the Croatian national study which has been completed in April 2014. This revised version is dated May 2014.

Directive 2008/99/EC defines nine conducts that should be qualified as offences when committed unlawfully and intentionally or at least with <sup>1</sup>serious negligence. It requires Member States to ensure that legal persons can be held liable for the commission of these offences. Member States must set criminal sanctions that are effective, proportionate and dissuasive. However, the sanctions for legal persons while required to be effective, proportionate and dissuasive need not be criminal sanctions. The deadline for transposition by Member States was 26 December 2010.

### *Overall Approach to the Transposition of Directive 2008/99/EC*

Out of 28 Member States, eight countries have not deemed necessary to amend existing legislation to transpose the Directive. Among those countries which modified their legislation, thirteen amended it significantly or adopted a specific act, while seven introduced only limited amendments, and relied principally on existing legislation. As a rule, there is no direct correlation between the lack of amendments and the quality of the transposition in these countries.

The national approaches to the transposition of Directive 2008/99/EC vary greatly from one Member State to another reflecting the differences in national legal traditions and contexts. Some Member States transpose the Directive through their framework criminal act or through a combination of their framework criminal act and sectoral legislation. Several Member States have transposed through environmental legislation (their framework environmental law and/or sectoral legislation). Finally, the remaining Member States have adopted a single act which transposes the Directive in a quasi-literal manner and usually without amending the existing legislation.

Two countries fall outside this typology, Romania and Bulgaria. Romania has chosen a unique approach where transposition is done through the Criminal Code and other legislation, as completed by a specific act. In Bulgaria, along with the Criminal Code, the legislation on administrative violations and sanctions is relevant as there is no criminal sanction for legal persons.

The only countries where the method of transposition had an impact on the conformity of the national legislation are Romania and Slovakia. Romania has adopted an additional legal act to complete rather than amend the existing legislation for the purpose of transposition. This results in overlaps and in problems in terms of legal predictability and uncertainty, as different legal acts apply in parallel without the necessary guidance on which rule should be applied in which context. On this basis, the

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<sup>1</sup> For Croatia, the deadline for transposition was the date of accession i.e. 1<sup>st</sup> July 2013.

overall transposition has been assessed as ambiguous. A comparable situation occurs in Slovakia in relation to the transposition of some of the Article 3 offences, which may be covered by a general catch-all provision on endangering and damaging the environment and at the same time by other provisions of the Criminal Code, which provide for more specific offences without reference to the danger or damage caused to the environment. There is no clear rule in the law and no consensus among the practitioners as to which provisions would apply to the corresponding conducts described in the Directive, although the sanctions attached to the catch-all provision or to the other relevant provisions are set at different levels.

### *Transposition of 'unlawful'*

All Member States have reflected the notion of 'unlawful'. This is done when the offences are set in framework criminal law through general references to breaches of legislation in general. When transposing the Directive in sectoral legislation, the offences are defined as breaches of the enforceable obligations set by each of the EU legal acts listed in the annexes to the Directive, and, consequently, in the corresponding transposing national acts.

Particular mention should be made in relation to the Regulations included in the annexes to the Directive, as some conformity issues, related to the specific nature of this EU instrument, have been identified:

- In Wallonia (Belgium), the provisions necessary to sanction breaches of the Regulations have not been adopted, resulting in gaps in transposition.
- In Ireland, the transposition of Article 3(i) has been assessed as incomplete, as sanctions are attached only to a limited number of the key obligation of Regulation (EC) No. 1005/2009.
- In Poland, the national legislation transposes all of the conducts listed by Article 3(i) and makes a direct cross-reference to Regulation (EC) No. 1005/2009, but it does not quote Article 22 on recovery and destruction of controlled substances.
- In Latvia, there is no explicit criminal liability for the shipment of waste where it falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006. This has resulted in incomplete transposition of Article 3(c).
- In the Czech Republic, the transposing legislation does not provide for criminal liability in all cases of illegal activities specified under Articles 2(35) of Regulation (EC) No 1013/2006. The transposition is therefore incomplete.

### ***Key provisions relating to offences***

#### *General issues*

The legislation of several Member States is incomplete as it only covers intentional conduct and not negligent conduct. This problem was identified in:

- Czech legislation in regard to the offences stipulated in Articles 3(e) and 3(i) of the Directive.
- Estonia in regard to the offences stipulated in Articles 3(c), 3(d), 3(e) and 3(i) of the Directive.
- Croatia in regard to the offences stipulated in Article 3(c).
- Lithuania in regard to the offences stipulated in Article 3(c).
- Spain in regard to the offences stipulated in Articles 3(e), (f), (g), (h) and (i).
- Slovakia in regard to the offences stipulated in Articles 3(c), 3(f), 3(g), and 3(h). Ambiguous transposition was also considered in the context of Articles 3(b) and 3(e), as it is arguable whether the general provisions of the Criminal Code on harm to the environment when committed by negligence or sector-specific provisions, which do not cover negligence, would apply.

In Germany, the transposing legislation provides that the criminal offences contained in Articles 3(f) and 3(g) of the Directive will be sanctioned if committed intentionally or if the offender ‘negligently fails to realise that the fauna or flora was protected’, which is slightly different from situations where the offender negligently acts as described under Article 3(f) and (g). This is considered a minor instance of incorrect transposition.

In its Articles 3(a), (b), (d) and (e), the Directive requires criminal liability in case of actual damage, but also in case of endangerment to health or the environment. Quite a few issues have arisen from the transposition of these elements, as follows:

- The absence of reference to endangerment or actual damage was considered as a broader transposition of the Directive. However, it implies that the potential or actual damage may not be properly reflected in the level of penalties set in the legislation and which punish merely non-compliance.
- In several Member States, only an actual damage leads to criminal liability for some of the conducts defined by the Directive. This situation has usually been assessed as incomplete transposition. This is the case in Germany (Article 3(a)), and Latvia (Articles 3(a), (b), (d) and (e)). Besides, in Slovakia, it was found that there was incomplete transposition due to the insufficient coverage of situations of harm to health foreseen in Articles 3(a), (b), (d) and (e) of the Directive.
- The conducts described in Articles 3(c) and (f) to (i) do not require an endangerment or harm to health or the environment to constitute a crime. Nevertheless, these are considered a condition to trigger criminal liability in some cases in a few Member States, resulting in incorrect transposition of Article 3(i) in Latvia and Slovakia and Article 3(h) in Portugal.

Finally, the way the national transposing legislation reflects some of the ‘vague notions’ used in Directive 2008/99/EC, namely the concepts of ‘substantial damage’, ‘(non-) negligible quantity and impact’, and ‘significant deterioration’ has also raised some conformity issues:

- In Bulgaria, the national provision transposing Article 3(c) excludes minor cases of unlawful waste shipment, which can be equated with a ‘non-negligible quantity’. However, the Bulgarian legislation does not state whether the shipment is undertaken once or in several shipments which appear to be linked, hence the transposition is considered as incomplete.
- Spain on the other hand, refers to ‘a significant amount of waste’ rather than ‘non-negligible quantity’ as per Article 3(c). A significant amount of waste cannot be considered equivalent to a non-negligible quantity. The approach taken by Spain was considered ambiguous.
- In Hungary, in relation to Article 3(f) and (g), exceptions are linked to the financial value of the specimens concerned by the unlawful activity and not to their quantity and to the impact of the conduct on the conservation status of the species, leading to a lack of clarity and an assessment of a minor instance of ambiguous transposition.

### *Article 3 offences*

Seven Member States have transposed all provisions of Article 3 effectively. The main common issues of conformity identified when analysing the transposition of Article 3 by the other Member States are as follows:

- Article 3(a): in several countries (France, Ireland, Italy) where the Directive is transposed through sectoral legislation, the transposition is deemed incomplete as not all key offences are subject to criminal sanctions (see the annex to the Table of Concordance of the relevant country studies) while in Denmark and Portugal, instances of incomplete transposition are linked to the discharge, emission or introduction of ionising radiation into the environment.

- Article 3(b): in Estonia and Latvia, the supervision of waste management operations and the aftercare of disposal sites are not covered. In Latvia, this is also the case for action taken as a dealer or a broker.
- Article 3(f): in Belgium – Federal level, Germany, Latvia and Spain, there is no criminal liability for the possession of specimens of protected species. In addition, the Latvian legislation does not cover the taking of specimens of protected species while, in Spain, killing is not clearly included in the relevant conduct for specimens of protected wild fauna species.
- Article 3(g): in Austria and Poland, legislation does not mention parts or derivatives at all while in Spain, derivatives are not covered.
- Article 3(i): no other common conformity issues have been identified other than those covered above under general issues.
- Article 3(c), (d), (e) and (h): while the national studies revealed several instances of incomplete or incorrect transposition in various Member States, these are all different and no common features have been identified.

No conformity issue has been identified in relation to Article 4 on inciting, aiding and abetting.

Article 6 of Directive 2008/99/EC provides for the liability of legal persons in relation to the offences described in the Directive. Several cases of incomplete or incorrect transposition have been identified. In relation to Article 6(1), which sets the general rules for holding liable legal persons, a few conformity problems have been identified in Hungary, Italy, Luxembourg and Slovenia, in relation in particular to the definition of a natural person in a leading position within the legal person.

Article 6(2) requires legal persons to be held liable ‘where the lack of supervision or control [by a person with a leading position] has made possible the commission of an offence’. In Bulgaria, the transposing article only refers to the possibility to hold a worker or employee liable, but without mention of the lack of supervision or control of a person with a leading position. In France and Luxembourg, there is no mention in the law that legal persons are liable where the infraction was committed due to a lack of supervision or control. However, other provisions (France) or case law (Luxembourg) reflects this requirement but the transposition is considered as ambiguous given the lack of legal certainty.

Pursuant to Article 6(3), ‘liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles 3 and 4’. Hungarian and Polish transposing legislation require a natural person to be previously punished thereby limiting the scope of application of the Directive’s provision. Transposition was therefore assessed as incorrect.

## ***Sanctions***

### *Comparative overview*

A comparison of minimum and maximum sanctions set in the legislation shows, on the whole, significant disparities across Member States as to the level, range and way of setting sanctions, and this regarding sanctions for natural persons and for legal persons. In only two Member States, Denmark for all offences and the UK in case of conviction on indictment, there is no minimum or maximum set for fines, therefore giving a lot of discretion to the courts.

In several Member States (Austria, Czech Republic, Estonia, Finland, Germany, Hungary, Portugal, Slovenia and Spain) the fines are based on daily units, where the legislation fix a minimum and a maximum number of daily units and a minimum and maximum level for one daily unit, leaving to the judge’s discretion the setting of the amount of the daily unit and the number of units depending on the circumstances of the case and the socio-economic situation of the offender. Some national criminal systems are even linking the level of the daily unit to the offender’s income e.g. Slovenia. In only one

case, namely Italy in relation to Article 3(i), the maximum amount of the fine depends on value of the substances used for production purposes, imported or placed on the market.

With regard to natural persons and imprisonment sanctions, the maximum level prescribed by national legislation ranges from life imprisonment to a few months, and even in certain cases, no imprisonment sanctions are provided for. This is the case in Latvia for Article 3(d), in Belgium for Article 3(f) and 3(h) (federal level), in Sweden also for Article 3(h) and in the UK in relation to Article 3(i).

Only four countries (Cyprus, Denmark, Greece and Malta) do not differentiate the sanctions depending on the conduct, while in the other countries, the level of sanctions – both imprisonment and fines – is differentiated according to the conduct considered. There are no obvious common trends across all Member States as to which conduct would be liable to the highest sanction. The majority of Member States also systematically distinguish between intent and negligence, setting higher sanctions for the former.

In five Member States (Cyprus, Denmark, Greece, Ireland, the UK), the same level of fines applies to both natural and legal persons. In the remaining Member States, the fines are differentiated, with higher ones potentially applicable to legal persons, although sometimes, the level of the fines set for legal persons are linked to those set for natural persons. In some Member States, the level of the fines for legal persons may be linked to the cost of the damage or the financial benefit. The maximum level of fines for legal persons varies drastically from one Member State to another, from EUR 50,000 in Luxembourg for Article 3(e) offences to unlimited amount in Denmark and the UK (for all criminal offences).

The sanctions are also usually adapted according to the mitigating and aggravating circumstances set in legislation or typically applied in case-law. Aggravating and mitigating circumstances are generally linked to the degree of the offender's liability, his/her motivation, the seriousness of the damage or injury caused by the offence, the circumstances in which the offence was committed, the offender's past behaviour and conduct after committing the offence, the offender's personal and financial circumstances, the benefits expected or gained through the offence.

Finally, accessory criminal sanctions and measures often apply in addition to fines and imprisonment. Some of these additional sanctions can represent a heavy financial burden such as the rehabilitation of the premises or the forfeiture of illegal benefits. Similarly to fines and imprisonment, these other sanctions can be of a punitive nature, while they may have also a remedial function.

#### *The criteria of effectiveness, proportionality and dissuasiveness*

Sanctions applied against environmental offences must be effective, proportionate and dissuasive, both for natural and legal persons, pursuant to Articles 5 and 7 of the Directive. One of the main means used to assess the effectiveness, proportionality and dissuasiveness of the sanctions was to compare those to benchmarks at EU and national level. With regard to benchmarks at EU level, due consideration was given to both the annulled Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law and the annulled Council Framework Decision 2005/667/JHA to strengthen the criminal law framework for the enforcement of the law against ship-source pollution. With regard to national benchmarks, the analysis considered sanctions set pursuant to national criminal law for offences that can be considered similar or comparable to the conduct covered by the Directive. In relation to the criteria of proportionality, consideration was also given to whether the national system adopts a graduated punishment approach, and the extent to which differentiated penalties are set depending on the seriousness of the offence.

As a result of these comparisons, it was concluded to non-conformity in seven countries (Belgium, Estonia, France, Ireland, Italy, Luxembourg and Romania) in the case of Article 5 of the Directive,

and in nine countries (Austria, Belgium, France, Hungary, Ireland, Italy, Luxembourg, Romania and Sweden) for Article 7.

In addition, transposition in some Member States is considered as ambiguous, in view of the low level of sanctions across Member States. Such instances include:

- In relation to Article 5, those countries, which do not impose imprisonment sanctions for specific offences other than the ones which are linked to homicide or serious injury (Belgium (Federal level), Finland, Sweden and UK) and the ones with fines below 100,000 euros (Bulgaria, France, Italy, Latvia, Lithuania, the Netherlands, Romania and Sweden).
- In relation to Article 7, those countries where fines for legal persons are for some or all Article 3 offences below the benchmark of EUR 750,000 – 1,500,000 set in the annulled Framework Decision 2005/667/JHA, namely Austria, Bulgaria, Cyprus, Greece, France, Ireland, Italy, Luxembourg, Romania and Slovenia.

### *Comparative assessment of sanctions for natural persons*

Imprisonment is a key tool in terms of dissuasiveness and effectiveness of sanctions. Even though usually used as a mean of last resort and for the most severe cases by the courts, deprivation of liberty is recognised as having a strong deterrent effect on potential offenders. In the above-mentioned instances where no imprisonment sanction has been foreseen, transposition of Article 5 is assessed as ambiguous. The only exception is Latvia, which does not foresee imprisonment sanctions in its transposing legislation for Article 3(d), as more severe sanctions are anyway available under general provisions on homicide.

Given the variety of situations covered by the Directive and of their potential consequences, it is difficult to determine on a general basis what level of imprisonment should be considered as effective, proportionate and dissuasive to enforce the requirements of Directive 2008/99/EC.

At least Articles 3(a), (b), (d) and (e), which potentially involve death and serious injuries, as well as significant damage to the environment, would constitute serious cases. In addition to the one year benchmark provided by the annulled Council Framework Decision 2003/80/JHA, it should be recalled that the annulled Council Framework Decision 2005/667/JHA sets a maximum of at least between five and ten years imprisonment where the offence intentionally committed has caused environmental damage and the death or serious injury of persons.

In all Member States, the maximum penalty foreseen for Article 3(a) and (b) involves a maximum imprisonment of at least two years. For Articles 3(d) (Seveso operations) and (e) (nuclear materials), a maximum of only one year is set in Estonia and Ireland for Article 3(d) and in Luxembourg for Article 3(e)). In Latvia and Luxembourg for Article 3(d)) the sanction is even lower with respectively, no imprisonment and up to 6 months of imprisonment only.

The sanctions in Luxembourg are also particularly low (maximum of 6 months) in relation to waste shipment (Article 3(c)). In addition to the sole fine foreseen in the UK, four Member States (Austria, Czech Republic, Portugal and Estonia) apply a one year maximum penalty for ODS related crimes (Article 3(i)). Finally, for nature protection offences (Articles 3 (f), (g) and (h)), the maximum penalty often falls below one year of imprisonment in Belgium (a fine to three months at federal level for 3(g) and no imprisonment for 3(f) and (g), max six months in Wallonia for 3(f) and (h) and no sanction for 3(g)), in Italy (six months for 3(f)), in Sweden (no imprisonment for 3(h)) and in the UK (six months for 3(f) and no imprisonment for 3(i)). In Luxembourg, all three conducts are sanctioned with up to six months imprisonment.

Many other factors need to be taken into account to assess the effectiveness, proportionality and dissuasiveness of sanctions, considering the national legal framework and circumstances. For this

reason, the study does not generally conclude to ambiguous transposition in these cases and relies on the specific assessment of national experts, with the exception of cases where there is no imprisonment sanction at all, as mentioned above.

The same variety observed in terms of levels of imprisonment sanctions can be seen with regard to the level of fines. Maximum fines range from a few thousand euros to several millions euros. Where minimum levels are set, the range of possible sanctions also fluctuates across Member States from a few thousand to millions of euros. This has a direct influence on the ability of the court to reflect the seriousness of the offence and other circumstances specific to a given case, hence to impose not only dissuasive but also proportionate fines.

The annulled Council Framework Decisions do not provide any benchmark with regard to the level of fines imposed on natural persons. By way of comparing across countries, one could conclude that a maximum fine below EUR 100,000 is unlikely to meet the criteria of dissuasiveness. EUR 100,000 is considered as a modest threshold far below the average fine. This is the case in France for Article 3(c), 3(e), 3(f), 3(h) and 3(i) offences; Italy for all offences with the exception of Article 3(g) and (i) offences; and Bulgaria, Lithuania, Latvia, the Netherlands, Romania and Sweden for all Article 3 offences. In such cases, transposition is assessed as ambiguous.

#### *Comparative assessment of sanctions for legal persons*

Apart from the cases identified in the national studies, for several countries, the maximum level of sanctions for legal persons appear well below the benchmark of EUR 1,500,000 set in the annulled Framework Decision 2005/667/JHA, for the most serious cases, including at least the intentionally committed offences. As mentioned above, the implementation is considered as ambiguous in these cases. This is a preoccupying conclusion, which suggests that environmental crimes are still not considered seriously enough, in relation to legal persons. Besides, as mentioned above, the maximum level of fines varies drastically from one Member State to another, from a few thousand euros to unlimited amount, showing that, in some countries, legal persons are liable to far higher fines than in others.

#### *Conclusion*

These sanctions should not be considered in isolation and ensuring effective, proportionate and dissuasive sanctions also involves other factors such the array of accessory sanctions, the use of aggravating and mitigating circumstances, the possibility of combining criminal sanctions with administrative ones, in particular remedial sanctions.

Significance variations in the levels of sanctions for both natural and legal persons have been observed across Member States. In many countries, the levels of sanctions used as benchmarks are not met for imprisonment and fines, natural and legal persons. This suggests that environmental crimes are still not considered seriously enough despite a wide recognition of their potential gravity, organised nature and international dimension that calls for relatively high sanctions.

As underlined by the 2011 Commission Communication on EU criminal policy, ‘it is not the primary goal of an EU-wide approximation to increase the respective sanction levels applicable in the Member States but rather to reduce the degree of variation between the national systems and to ensure that the requirements of "effective, proportionate and dissuasive" sanctions are indeed met in all Member States’. This objective can be achieved in the field of environmental crime by setting minimum levels of sanctions at EU level. Given the importance of accessory sanctions, it would also be worth considering the definition of a minimum set of such measures at EU level.



# 1 Introduction

## 1.1 Background and context

The European Commission is placing an increased emphasis on implementation and effective enforcement of its framework of environmental legislation. Criminal law has come to be viewed as necessary for deterring particularly serious environmentally harmful acts and for promoting compliance with environmental regulations. Directive 2008/99/EC on the protection of the environment through criminal law ('the Directive', 'Directive 2008/99/EC'), adopted on 19 November 2008, was the first EU Directive to contain provisions with regard to criminal law. The years leading up to its adoption were marked by long and often heated discussions among the EU institutions and the Member States concerning the role of criminal law in enforcement of EU obligations and the appropriate legal basis for the EU to act in this area.

The debate hinged on whether an EU legal act setting in place criminal law provisions in certain areas of environmental protection should be in the third pillar (unanimous vote, no European Parliament co-decision power, limited control by the European Court of Justice) or in the first pillar (majority vote, EP co-decision, control by the ECJ). In 2001, the Commission had put forward a proposal for a Directive on the protection of the environment through criminal law, with the first pillar as the legal basis. In 2003, the European Council countered this by adopting a Framework Decision in the same area, but with the third pillar as the legal basis.

In its 2005 judgment,<sup>2</sup> the ECJ agreed with the Commission and annulled the Council Framework Decision. In its decision, the ECJ noted that *'neither criminal law nor the rules of criminal procedure fall within the Community's competence'*. Nonetheless, the Community legislator has competence *'when the application of effective, proportionate and dissuasive criminal penalties by the competent authorities is an essential measure for combating serious environmental offences'*.

On the basis of this ruling, in 2007 the Commission put forward a second proposal for a Directive in this area, with the first pillar (in particular, Article 175 of the EC Treaty) as the legal basis. Shortly thereafter, a second ruling by the ECJ<sup>3</sup> with respect to a Council Framework Decision to tackle ship-source pollution via the application of criminal law confirmed that the first pillar was the proper legal basis for such legislation. However, the ECJ restricted the scope in which the EU legislator could act, by ruling that the quantum of sanctions – that is, the type and level of criminal penalties – remained an area where the third pillar still applied. On the basis of this ruling, the Commission modified its proposal by dropping the draft provisions setting the quantum of criminal penalties. Directive 2008/99/EC was then adopted, and Member States were left with the discretion to determine the type and level of the criminal sanctions that they would apply in this area.

The Lisbon Treaty has now clarified the issue of EU competence with respect to criminal law. Article 83(2) of the TFEU expressly enables the EU legislator to adopt Directives establishing *'minimum rules with regard to the definition of criminal offences and sanctions in the area concerned'* if this *'proves essential to ensure effective implementation of a Union policy in an area which has been subject to harmonisation measures'*.

## 1.2 Directive 2008/99/EC

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<sup>2</sup> 13 September 2005, Case C- 176/03 Commission v. Council [2005] ECR I-7879.

<sup>3</sup> 23 October 2007, Case C-440/05 Commission v. Council [2007] ECR I-9097.

Recital 5 of Directive 2008/99/EC highlights the need for more dissuasive penalties for environmentally harmful activities, in order to achieve effective protection of the environment. Accordingly, the Directive obliges Member States to provide for criminal penalties in their national legislation for certain serious infringements of EU law on protection of the environment.

Article 2 of the Directive defines as ‘unlawful’ any infringements of the EU acts listed in the Directive’s Annexes A and B, or any infringements of a Member State law, administrative regulation or decision taken by one of its competent authorities to give effect to the EU acts listed in the aforementioned annexes.

The Directive then defines what is to be considered a criminal offence throughout the EU, ‘*when unlawful and committed intentionally or with at least serious negligence*’, by listing in its Article 3 nine types of conduct. Four of the conducts:

- (a) discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water,
- (b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management),
- (d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used,
- (e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances

are deemed to warrant criminal penalties if they cause or are likely to cause ‘death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants.’ Conduct can therefore be considered criminal even if harm does not actually occur.

Two of the types of conduct:

- (f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species,
- (g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof

are qualified by an exception: ‘except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species’.

The remaining three types of conduct are as follows:

- (c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;
- (h) any conduct which causes the significant deterioration of a habitat within a protected site;<sup>4</sup>
- (i) the production, importation, exportation, placing on the market or use of ozone-depleting substances.

Other important provisions of the Directive include Article 4, which requires Member States to consider inciting, aiding and abetting any intentional Article 3 conduct as a criminal offence, and Article 6, which requires Member States to ensure that legal persons can be held liable for the commission of an Article 3 or Article 4 offence. Article 5 requires Member States to ensure that Article 3 and Article 4 offences are punishable by criminal penalties that are effective, proportionate

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<sup>4</sup> ‘Habitat within a protected site’ is defined in relation to Directive 79/409/EEC on wild birds and Directive 92/43/EEC on habitats.

and dissuasive. However, the penalties for legal persons held liable under Article 6 – while required to be effective, proportionate and dissuasive – need not be criminal sanctions, perhaps due to the fact that some Member States' legal orders do not provide for such a possibility (e.g. Bulgaria, Latvia).

### **1.3 Objective of the study**

The purpose of this study was to analyse the conformity of national transposing measures with Directive 2008/99/EC.

The Commission, as guardian of the Treaty, needs to know if Member States are properly implementing the EU requirements in their territories. In addition to the requirement of timely transposition, the national implementing measures must also be completely and correctly transposed. This is where the process of conformity checking comes in.

The different national studies also serve as a basis for analysing the effectiveness of the Member States' implementation as well as to assess whether the legislation should be improved. This horizontal report has been finalised in March 2013. The present version is a revised one which includes the Croatian national study which has been completed in April 2014. This revised version is dated May 2014.

### **1.4 Methodology**

#### **1.4.1 The different steps of the study**

The methodology of this study relied on five main steps.

##### **Step 1: Inception phase**

During the Inception phase, Milieu immediately commenced an initial literature review for the preparation of methodological guidelines, templates and questionnaires for the country studies. Draft guidelines, conformity study, questionnaires and country study templates were prepared prior to the initial start-up meeting with the Project Steering Group from the European Commission. These were discussed and agreed with the European Commission prior to issue to the national experts.

##### **Step 2: Drafting of the country studies and legal analysis by national experts**

The next step in the methodology was for the national experts to begin the substantive research for the Project. This involved the following key steps:

- Legislative and literature research at Member State level;
- Completion of the Table of Concordance and the Table on Sanctions;
- Interviews with national practitioners, primarily prosecutors and judges; and
- Drafting of the National Reports.

### **Step 3: Quality assurance by the Milieu Team**

All outputs from the national experts were quality assured by the Quality Assurance Team at Milieu in order to ensure a common depth of analysis across the work submitted by the different national experts. This step was therefore carried out both following submission of the Table of Concordance and following submission of the National Reports. The Quality Assurance Team reviewed both documents for any inconsistencies or gaps and for the clarity of the explanations where problems were identified. Any comments from the Quality Assurance Team on the national reports were returned to the national experts for further clarification. In some cases, this process was repeated until the Milieu team were satisfied with the results.

The National Reports were submitted to the Commission in two different phases. Fourteen reports were prepared under Phase 1 and submitted in June 2012 to the Commission. The thirteen remaining reports prepared under Phase 2 were submitted to the Commission in November 2012.

The quality assurance process was repeated following revisions made to the Tables of Concordance and the National Reports following receipt of comments from the Member States and the Commission (step 4 below).

### **Step 4: Receipt of comments from Member States and the Commission**

The Tables of Concordance and the National Reports were sent to the responsible ministry, or state department in each Member State for comments. In addition, the relevant Counsellor for Justice and Home Affairs (JHA) within the Council of the European Union responsible for criminal matters was contacted regarding the Phase 2 studies and certain Phase 1 studies for which a response had not been received from the relevant ministries. A period of three weeks was provided for comments. Those contacted were asked to assist in the study by providing Milieu with comments and/or additional information on the National Report prepared for each respective country. In particular, those contacted were requested to look into the content of the Table of Concordance and provide additional information, if relevant.

Following receipt of feedback/comments in writing from the Member States, these were discussed in coordination with the national experts, and any necessary changes were made to the Tables of Concordance and National Reports. The process of quality assurance outlined in Step 3 above was also repeated following the updating of reports to take into account comments from the Member States as well as any comments received from the Commission.

### **Step 5: Synthesis of the findings**

The final step in the methodology consisted in the drafting of the synthesis analysis, including an overall comparative assessment between Member States. This is presented mainly in comparative tables indicating the main outcomes of the analysis conducted in the Member States.

This report presents the results of the comparative analysis and sets out the main findings on the legal frameworks and analysis of transposition of the Directive in the EU-28.

#### **1.4.2 Selection of key EU acts and associated obligations**

Directive 2008/99/EC requires Member States to provide for criminal penalties in their national legislation for certain serious infringements of EU law on the protection of the environment.

Article 2 of the Directive defines as ‘unlawful’ any infringements of the EU acts listed in the Directive’s Annexes A and B or of national transposing measures of the listed EU acts. The relevant EU acts are listed but the Directive does not specify any particular provisions or enforceable

obligations. The Directive defines what is to be considered a criminal offence throughout the EU, *'when unlawful and committed intentionally or with at least serious negligence'*, by listing in its Article 3 nine types of conduct.

Some Member States have transposed the Directive through provisions in all sectoral laws which transpose the EU legal acts listed in Annexes A and B to Directive 2008/99/EC. This means that the offences and the corresponding sanctions are set for each of the enforceable obligations of each of the legal acts listed in the Annexes spread across a large number of pieces of national legislation. For example, the UK has notified not less than 290 acts as transposing measures. It was not possible within the time limits of the project to review each and every relevant provisions of the transposing legislation for all acts listed in the Annexes to the Directive. For this reason, Milieu proposed a tailored approach to the conformity checking study for such cases.

Where criminal sanctions are established in sectoral legal acts, which typically transpose individual acts or set sanctions for EU regulations listed in Annexes A and B of the Directive, ideally, the expert would have considered each particular provision of each relevant sectoral legal act in order to assess whether all the conducts set by Article 3 are effectively covered. However, as mentioned above, this would have entailed an extensive analysis, which was not possible within the resource and time constraints of the project. Besides, the objective of the project is not to analyse the transposition of all legal acts listed in the annexes. Therefore, Milieu proposed to focus the assessment on key enforceable obligations of selected Directives, which are seen as indicators of conformity. The assessment was then carried out primarily by examining whether or not infringing the selected key obligations is subject to criminal sanctions when the offence is committed intentionally or with serious negligence and all the other conditions set in the relevant sub-paragraph of Article 3 are fulfilled. The conclusions drawn were reflected in the assessment of Article 2(a) and the relevant sub-paragraph of Article 3, although in this case, there was not any quotation of all relevant provisions in the Table of Concordance itself, but only reference to the analysis carried out in the Annex to the Table of Concordance.

The main criteria used to select the key EU acts and associated obligations were the following:

- The act has direct relevance to the offences determined in Article 3: for example, Regulation (EC) No 1005/2009 on substances that deplete the ozone layer in relation to Article 3(i).
- The key obligations set by the act are placed on individuals rather than on competent authorities: for example, most of the obligations set forth by Directive 2008/50/EC on ambient air and cleaner air for Europe are placed on the Member States and, therefore, this Directive has not been selected.
- The infringement of the obligation can potentially lead to an offence as defined in Article 3. For example, it is unlikely that infringing the requirements set forth by directives dealing with the emission of pollutants from engines used in vehicles would lead to air emissions causing or likely to cause death or serious injury or substantial damage to the quality of air. A similar approach has been followed as regard the obligations themselves e.g. a requirement to provide certain information has not been included.
- The obligations as set by the EU act have been simplified in order to capture what constitutes the main requirement e.g., in relation to the Directive on Integrated Pollution Prevention and Control (the IPPC Directive), obligation to comply with regulatory or permit conditions rather than considering the details of such conditions (please see Annex I).
- The acts and obligations selected should allow to cover all the offences set forth by Article 3, that is all the sub-paragraphs.

In order to select the EU acts and associated obligations, Milieu has prepared an updated list of all EU legal acts listed in Annexes A and B.<sup>5</sup> Legal acts, which have been repealed since the adoption of Directive 2008/99/EC, are not included. It should be noted that some of the legal acts listed will be repealed shortly. For example, several Directives are repealed by the Industrial Emission Directive, with effect from January 2013 or later for some acts and provisions. In such cases, the list includes the acts which are not yet repealed.

Table 1 includes the updated list of the EU acts listed in Annexes A and B, and which of the subparagraphs of Article 3 they primarily corresponds to. The acts which have been selected are highlighted in blue.

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<sup>5</sup> This is in line with the principle that references to the repealed act shall be construed as references to the new act. This principle is, as a rule, integrated in the new act repealing the previous one.

**Table 1 Selected EU acts and related Article 3 offences**

EU legislation listed in Annex A	Art.3 related offence
Directive 70/220/EC on the approximation of the laws of the Member States on measures to be taken against air pollution by emissions from motor vehicles	a
Council Directive 72/306/EEC of 2 August 1972 on the approximation of the laws of the Member States relating to the measures to be taken against the emission of pollutants from diesel engines for use in vehicles	a
Council Directive 77/537/EEC of 28 June 1977 on the approximation of the laws of the Member States relating to the measures to be taken against the emission of pollutants from diesel engines for use in wheeled agricultural or forestry tractors	a
Directive 78/176/EEC on waste from the titanium dioxide industry	b
Council Directive 86/278/EEC of 12 June 1986 on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture	a, b
Council Directive 87/217/EEC of 19 March 1987 on the prevention and reduction of environmental pollution by asbestos	a, b
Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment	a, b
Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources	a
Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora	f, g, h
Council Directive 92/112/EEC of 15 December 1992 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry	b, d
Directive 94/25/EEC of the European Parliament and of the Council of 16 June 1994 on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft: the provisions amended by Directive 2003/44/EC	a, h
European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste	b, a
European Parliament and Council Directive 94/63/EC of 20 December 1994 on the control of volatile organic compounds (VOC) emissions resulting from the storage of petrol and its distribution from terminals to service stations	a
Council Directive 96/59/EC of 16 September 1996 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls (PCB/PCT)	b
Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances	d
Directive 97/68/EC of the European Parliament and of the Council of 16 December 1997 on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery	a
Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein	g
Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market	a, b
Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels	a
Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption	a
Directive 1999/13/EC on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations - new IPPC Directive 2010/75/EU	a
Directive 1999/30/EC relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air	a
Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste	b
Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels	a

EU legislation listed in Annex A	Art.3 related offence
Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end of life vehicles	b, a
Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy	a
<i>Directive 2000/76/EC on the incineration of waste - new IPPC Directive 2010/75/EU</i>	a
Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms	a
<i>Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants - new IPPC Directive 2010/75/EU</i>	a
Directive 2002/95/EC on the restriction of the use of certain hazardous substances in electrical and electronic equipment	a
Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE)	b
Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air	a
Regulation (EC) No 648/2004 of the European Parliament and of the Council of 31 March 2004 on detergents	a
Regulation (EC) No 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants	a, b
Directive 2005/55 on the approximation of the laws of the Member States relating to the measures to be taken against the emission of gaseous and particulate pollutants from compression-ignition engines for use in vehicles, and the emission of gaseous pollutants from positive-ignition engines fuelled with natural gas or liquefied gas for use in vehicles	a
Directive 2005/78/EC implementing Directive 2005/55/EC on the approximation of the laws of the Member States relating to the measures to be taken against the emission of gaseous and particulate pollutants from compression-ignition engines for use in vehicles, and the emission of gaseous pollutants from positive-ignition engines fuelled with natural gas or liquefied gas for use in vehicles and amending Annexes I, II, III, IV and VI thereto	a
Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC	a
Directive 2006/11/EC of the European Parliament and of the Council of 15 February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community	a
Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries	b, d
Directive 2006/40/EC of the European Parliament and of the Council of 17 May 2006 relating to emissions from air conditioning systems in motor vehicles	a, i
Directive 2006/44/EC of the European Parliament and of the Council of 6 September 2006 on the quality of fresh waters needing protection or improvement in order to support fish life	a
Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators	b
Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration	a
Regulation (EC) No 842/2006 of the European Parliament and of the Council of 17 May 2006 on certain fluorinated greenhouse gases	a, i
Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste	c
Regulation (EC) No 1907/2006 concerning the Registration, Authorisation and Restriction of Chemicals (REACH) Note: REACH repeals Directive 76/769/EC, which was included in the Annex (would relate only to provisions on restrictions).	a

<b>EU legislation listed in Annex A</b>	<b>Art.3 related offence</b>
Commission Regulation (EC) No 1418/2007 of 29 November 2007 concerning the export for recovery of certain waste listed in Annex III or IIIA to Regulation (EC) No 1013/2006 of the European Parliament and of the Council to certain countries to which the OECD Decision on the control of trans-boundary movements of wastes does not apply	c
Directive 2008/1/EC concerning integrated pollution prevention and control	a
Directive 2008/50/EC on ambient air quality and cleaner air for Europe	a, i
Directive 2008/68/EC on the inland transport of dangerous goods	a
Directive 2008/98/EC on waste and repealing certain Directives	b
Directive 2008/105/EC on environmental quality standards in the field of water policy	a
Directive 2009/41/EC on the contained use of genetically modified micro-organisms	a
Directive 2009/147/EC on the conservation of wild birds	f, g
Regulation (EC) No 1005/2009 on substances that deplete the ozone layer	i
Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market	a, b
<b>EU legislation listed in Annex B</b>	<b>Art.3 related offence</b>
Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation	e
Council Directive 2003/122/Euratom of 22 December 2003 on the control of high-activity sealed radioactive sources and orphan sources	e
Council Directive 2006/117/Euratom of 20 November 2006 on the supervision and control of shipments of radioactive waste and spent fuel	e

If offences and corresponding sanctions were set in sectoral legislation, an Annex was added to the Table of Concordance including a selection of key obligations for all selected Directives and Regulations. Reference was made to these tables to identify the main obligations with which non-compliance constitute unlawful conduct, which should then be considered as an offence under Article 3.

If Article 3 of the Directive was transposed in the country within general provisions of the Criminal Code or other general legislation such as the Environmental Code for both natural and legal persons, the experts were asked to fill in the general Table of Concordance, and not the tables of the Annex to the Table of Concordance.

For the assessment of conformity for each provision of Article 3, as discussed with the Commission, it was considered that **scaled assessment** would be useful in cases where the transposition has been done through sectoral legislation only and key obligations are criminalised while other obligations are not.

Therefore, whenever a provision identified in Annex I was not transposed, it was agreed that it should lead to incomplete transposition. Nevertheless, the issue of incomplete transposition could be considered as ‘minor’ when non-compliance with the provisions concerned, although included in Annex I, was considered as very unlikely to lead to a criminal offence in the sense of the Directive. This would be based on the nature of the obligations and the seriousness of the offence, and was assessed on a case-by-case basis by the national experts. The experts were asked to explain clearly the reasons and the criteria to assess instances of incomplete transposition as minor.

For instance, in the case of France, and in relation to Article 3(a) of the Directive, Article 21 of the Biocides Directive 98/8/EEC (requiring a summary datasheet), and Article 6 of Directive 2001/18 on GMO (requiring notification of release) are transposed in a way that does not provide for criminal liability. However, it is arguable that infringing these obligations as such is not likely to lead to the harm and danger described in Article 3(a) of Directive 2008/99/EC. The key provisions of these Directives have been transposed in a way that provides for criminal liability. Therefore, the fact that these specific provisions do not provide for criminal liability is considered to be a minor instance of non-transposition.

## 2 Transposition of Directive 2008/99/EC in the EU-27

### 2.1 Comparative analysis of national approaches to the transposition of Directive 2008/99/EC

Out of 28 Member States, eight countries (Denmark, France, Ireland, Latvia, Luxembourg, the Netherlands, Sweden and the UK) have not deemed necessary to amend existing legislation to transpose the Directive. Among those countries which modified their legislation, thirteen (Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Germany, Greece, Hungary, Lithuania, Malta, Poland and Portugal ) amended it significantly or adopted a specific act, while seven (Belgium, Finland, Italy, Romania, Slovakia, Slovenia and Spain) introduced only limited amendments, and relied principally on existing legislation. As a rule, there is no direct correlation between the lack of amendments and the quality of the transposition in these countries.

#### 2.1.1 Typology of national approaches to the transposition

The national approaches to the transposition of Directive 2008/99/EC vary greatly from one Member State to another.

The description of the main approaches followed by Member States for transposition of the Directive is structured around different categories, corresponding to where, in the legal national framework, the Directive was transposed, and in particular where the definition of unlawful (Article 2(a)) and Article 3 setting the offences were transposed. In addition, the rules on criminal liability for legal persons, when set through a specific act, were also considered. The categories identified are as follows:

- *Transposition through Criminal Code:* The conducts described in Article 3 of the Directive and the corresponding sanctions are set in the framework criminal act, in most cases the Criminal Code. In such cases, sectoral environmental legislation may transpose some requirements of the Directive, namely the definitions set out by Article 2(b) and (c).
- *Transposition through the Criminal Code and other legislation:* In such cases, the Directive is transposed principally through the provisions of the Criminal Code, although some offences are covered by sectoral legislation.
- *Transposition through environmental legislation:* This category groups the Member States which have transposed the Directive through their environmental legislation while the framework criminal act is only relevant as far as it provides for general rules of criminal law, e.g. provisions on inciting, aiding and abetting or intent and negligence. Two different situations may occur depending on the structure of the environmental legislation, namely the existence of an overarching environmental act:
  - The sub-category *Transposition through framework environmental law and sectoral legislation* covers countries which have opted to set the offences with the broadest scope (in particular those falling under Article 3(a), (b), (d)) and the relevant sanctions in framework environmental legislation, e.g. the Environmental Code or Environmental Protection Act. Other more specific offences, e.g. those related to the shipment of waste, nuclear materials or ozone depleting substances are set in specific sectoral acts.
  - In the absence of framework environmental legislation, the approach falls under the sub-category *Transposition through sectoral legislation*, whereby the offences and corresponding sanctions are set in all relevant sectoral legislation.

- *Transposition through a specific act:* In such instances, the Member State has adopted a single act which transposes the Directive in a quasi-literal manner and usually without amending the existing legislation.

Two countries fall outside this typology, Romania and Bulgaria, as explained after the table.

Table 2 gives an overview as to the way Member States have followed to transpose the Directive. It also indicates whether a Member State has deemed that existing legislation was sufficient to transpose the Directive without amendments or additions.

**Table 2 National Approach to Transposition**

MS	National approach
AT	<u>Transposition through the Criminal Code and other legislation</u> – The Criminal Code is the main transposing legislation. Other transposing legislation includes the Trade of Species Act, which transposes Article 3(g) of the Directive and the Act on Corporate Liability which provides for criminal liability of legal persons. The Criminal Code was amended in order to transpose the Directive.
BE	<u>Transposition through framework environmental law and sectoral legislation</u> – Criminal procedural and substantive law are a Federal competence. The offences and specific sanctions are set out in environmental legislation at Federal and regional level depending on the distribution of competences. <i>Federal Level:</i> Offences and sanctions are set, within the realm of Federal competence, by sectoral legislation e.g. the Federal legislation on waste transfer. <i>Flemish Region:</i> The Decree concerning general provisions relating to environmental policy is the main transposing act and, similarly to the Directive, applies in relation to all Flemish environmental legislation, including the laws and regulations transposing Annex A. <i>Brussels-Capital Region:</i> The transposition is done primarily through sectoral legislation, which sets requirements and the corresponding sanctions. <i>Walloon Region:</i> Similarly to the Brussels-Capital Region, the Walloon Region has transposed the Directive in its competences through sectoral rules, set out in sectoral legislation or the Environmental Code.
BG	<u>Transposition through the Criminal Code and legislation on administrative sanctions</u> – The Criminal Code, as amended, sets out all offences and sanctions. An amendment to the Law on Administrative Violations and Sanctions provided for the possibility to impose fines on legal persons, who acquired a benefit by any of a number of offences, including environmental offences.
CY	<u>Transposition through a specific act</u> – The Law on the Protection of Environment through Criminal law transposes the Directive in a literal way, describing the relevant conducts as per the Directive and corresponding sanctions, while the Annex to the law provides a list of the relevant legislation, the infringement of which constitutes an unlawful conduct in accordance with the Directive.
CZ	<u>Transposition through the Criminal Code</u> – The Directive is transposed principally through a specific act which amends the Criminal Code. The Act on Criminal Liability of Legal Persons extends the application of these rules to legal persons.
DE	<u>Transposition through the Criminal Code and other legislation</u> – A chapter on the environment of the Criminal Code transposes most of the offences listed in the Directive. The Federal Criminal Code, as well as the Federal Hunting Act and the Federal Nature Conservation Act were amended to transpose the Directive for nature protection related offences.
DK	<u>Transposition through framework environmental law and sectoral legislation</u> – Denmark relied on existing legislation for transposition. Several of the criminal offences under the Directive and corresponding sanctions are established by the Environmental Protection Act, while some are set forth directly in relevant sectoral legislation. The conditions for criminal liability for legal persons are set out in the Criminal Code to which the environmental legislation refers.
EE	<u>Transposition through the Criminal Code</u> – The Criminal Code was amended in order to transpose the Directive.
EL	<u>Transposition through a specific act</u> – The Law on the Protection of the Environment through Criminal law transposes the Directive in a literal way, describing the relevant conducts as per the Directive and corresponding sanctions, while the Annex to the law provides a list of the relevant legislation, the infringement of which constitutes an unlawful conduct in accordance with the Directive. Greece has also amended its framework legislation on environment to harmonise the sanctions with the new specific act.

<b>ES</b>	<u>Transposition through the Criminal Code</u> – The Criminal Code is the main transposing act. It had to be slightly amended in order to complete transposition. Reference to infringement of relevant legal requirements (‘in violation of the law’) reflects the definition of unlawful. Some of the conducts are offences as such without reference to unlawfulness.
<b>FI</b>	<u>Transposition through the Criminal Code</u> – Finland relied principally on existing legislation for transposition. Environmental crimes are regulated in the Criminal Code in the chapter on environmental crimes and partially in chapters on crimes against public health and crimes endangering health. <i>Åland</i> : Environmental law falls in the domain of provincial legislative power. The Criminal Code of Finland generally does not apply although there are some exceptions (health, biotechnology and safety, radiation or nuclear energy). The provisions on offences and sanctions of the Directive are transposed in sectoral provincial (for matters falling under Åland competence) and Finnish legislation.
<b>FR</b>	<u>Transposition through framework environmental law and sectoral legislation</u> – France relied on existing legislation for transposition. The Environmental Code transposes most offences and sanctions contained in the Directive.
<b>HR</b>	<u>Transposition through the Criminal Code</u> – The Criminal Act is the main transposing instrument, whereas the provisions of the Act on the Responsibility of Legal Persons for the Criminal Offences regulate the criminal liability of legal persons
<b>HU</b>	<u>Transposition through the Criminal Code</u> – The Criminal Code was amended in order to transpose the Directive. Most of the relevant offence provisions are so-called framework offence provisions, which means that the courts should consider them together with the relevant environment sectoral legislation.
<b>IE</b>	<u>Transposition through sectoral legislation</u> – Each individual act which transposes the legislation listed in Annexes A and B of the Directive contains offence and sanction provisions relevant to the specific conduct covered. The majority of the sectoral laws transposing the Directive were already in force and did not need to be amended.
<b>IT</b>	<u>Transposition through the Criminal Code and other legislation</u> - For conducts covered by Article 3(a), transposition is done through already existing sectoral legislation. For the other conducts, offences and sanctions are set by the Criminal Code and sectoral legislation, as amended by the legislative decree adopted to transpose the Directive. The infringements are punishable under criminal law regardless of the damage or endangerment caused.
<b>LT</b>	<u>Transposition through the Criminal Code</u> – The Criminal Law has been amended to transpose the Directive and is the main transposing act. It defines the conducts in a similar way to Article 3 of the Directive, through a catch-all provision which refers to breaches of environmental legislation.
<b>LV</b>	<u>Transposition through the Criminal Code</u> – Latvia relied on existing legislation for transposition. The Criminal Law is the main transposing act and defines the conducts in a similar way to Article 3 of the Directive. Reference to infringement of relevant legal requirements (‘in violation of the law’) reflects the definition of unlawful. Some of the conducts are offences as such without reference to an unlawful conduct.
<b>LU</b>	<u>Transposition through sectoral legislation</u> – The legislation reflecting the requirements of the Directive already existed prior to the adoption of the Directive. Each individual act which transposes the legislation listed in Annexes A and B of the Directive contains offence and sanction provisions relevant to the specific conduct covered. The infringements are punishable under criminal law regardless of the damage or endangerment caused.
<b>MT</b>	<u>Transposition through a specific act</u> – A specific act introduces a new chapter in the Laws of Malta, which transposes the Directive in a literal way, describing the relevant conducts as per the Directive and corresponding sanctions. Direct reference is made to the Annexes to the Directive and the laws, regulations, and decisions that give effect to the listed EU legislation.
<b>NL</b>	<u>Transposition through the Criminal Code and other legislation</u> - The Netherlands relied on existing legislation for transposition. Under the existing legislation, two types of environmental criminal clauses exist: (1) the Criminal Code, which includes environmental crimes for unlawfully polluting land, air or water in case of an impact on public health or life threats; and (2) the Act on Economic Offences, which defines the unlawful violation of environmental sectoral norms and regulations as an economic crime and sets corresponding sanctions.
<b>PL</b>	<u>Transposition through the Criminal Code</u> – The Directive was transposed by several catch-all provisions included in the Criminal Code (Chapter on the Offences against the Environment) and sectoral legislation for some of the conducts relating to nature protection and ODS. A single act amended the Criminal Code and the relevant sectoral legislation to transpose the Directive.
<b>PT</b>	<u>Transposition through the Criminal Code</u> – The Criminal Code has been amended to transpose the Directive and is the main transposing act. It defines the conducts in a similar way to Article 3 of the

	Directive. Reference to infringement of relevant legal requirements reflects the definition of unlawful.
<b>RO</b>	<u>Transposition through the Criminal Code and other legislation, as completed by a specific act</u> – Offences are defined in the sectoral environmental legislation and the Criminal Code. To transpose the Directive, a specific law completed (but did not amend) the existing legal framework. This specific law defines unlawfulness by direct reference to the Annexes to the Directive and the laws, regulations, and decisions that give effect to the listed EU legislation.
<b>SK</b>	<u>Transposition through the Criminal Code</u> – The Criminal Code is the main transposing act. Only new provisions on the liability of legal persons have been introduced to transpose the Directive. Sectoral environmental legislation is covered through reference to infringement of relevant legal requirements.
<b>SI</b>	<u>Transposition through the Criminal Code</u> – The Criminal Code is the main transposing act. It had to be slightly amended in order to complete transposition. Criminal offences as prescribed by the Criminal Code may only be committed by natural persons, unless specifically prescribed by the Liability of Legal Persons for Criminal Offences Act. Reference to infringement of relevant legal requirements reflects the definition of unlawful.
<b>SE</b>	<u>Transposition through framework environmental law and sectoral legislation</u> - Sweden relied on existing legislation for transposition. Most of the criminal offences are listed in the Environmental Code, while some are set forth directly in relevant sectoral legislation, which in most cases refer to the Code for the levels of sanctions. It is also possible to impose sanctions for environmental offences pursuant to the Criminal Code, if the sanctions under the Criminal Code are at least the same or stricter.
<b>UK</b>	<u>Transposition through sectoral legislation</u> – Each individual act which transposes the legislation listed in Annexes A and B of the Directive contains offence and sanction provisions relevant to the specific conduct covered. The majority of the sectoral laws which transpose the Directive were already in force and did not need to be amended.

Only two countries do not fall under any of the categories identified. Romania has chosen a unique approach where transposition is done through the Criminal Code and other legislation, as completed by a specific act (see Section 2.1.2 for more details). In Bulgaria, along with the Criminal Code, the legislation on administrative violations and sanctions is relevant as there is no criminal sanction for legal persons (see Section 3.4 on legal persons).

The differences between the approaches chosen by the Member States for the transposition of the Directive are primarily linked to differences in national legal traditions and contexts. All these approaches are valid and would not as such influence legal conformity with some exceptions, as discussed in Section 2.1.2. However, the merits of the different approaches should be considered in the light of the spirit of the Directive and potential implementation issues. These aspects are further analysed in Section 2.1.3.

## 2.1.2 Impact of the approach to transposition on conformity

Some trends in the effectiveness of transposition have been identified in relation to the method used by the Member States for transposition (amendments or not or the type of approach to transposition).

### *Transposition through the Criminal Act*

Transposition through the Criminal Code is the main approach in the EU, applied by 12 Member States (Croatia, Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia and Spain). Such an approach would facilitate implementation as provisions on environmental crimes are fully integrated in the criminal framework act, which will give them more visibility. Besides, it implies that prosecutors and judges will not have to refer to multiple and sometimes not well-known environmental laws and regulations.

### *Transposition through environmental legislation*

Four Member States (Belgium, Denmark, France and Sweden ) proceeded in such a way through their framework environmental law and sectoral acts, while three countries (Ireland, Luxembourg and the

UK) transposed the Directive through a significant number of sectoral acts. For example, the UK notified not less than 290 acts. This piecemeal transposition makes the effective implementation of the Directive more problematic in the sense that the offences are more difficult to identify for not specialised practitioners.

On the other hand, the corresponding sanctions would be, as a rule, more tailored to the specific offences, and hence potentially more proportionate. The levels of sanctions are differentiated depending on the seriousness of the infringed provision. For example, in relation to Directive 98/8/EC on the placing of biocidal products on the market, a breach of the prohibition to place a biocide on the market can lead to one to three years imprisonment and/or a fine of EUR 10,000 to 50,000. In contrast, the infringement of a provision relating to packaging or labelling would lead to three to six months of imprisonment and/or a fine of EUR 250 to 2,500.

Finally, in general, under such an approach, there is often no transposition of the effect required by the provisions of Article 3, i.e. harm or endangerment when relevant. Persons are guilty of a criminal offence even where that effect does not follow or was not likely to have followed from their conduct. In this sense, the national legislation is broader than what is required by Directive 2008/99/EC.

#### *Transposition through the Criminal Code and other legislation*

As mentioned above, this category includes countries where the Criminal Code is the main transposing act although other legal acts are also relevant (Austria, Germany, Italy and the Netherlands). In such cases, the general remarks on transposition through the Criminal Code and transposition through environmental legislation apply. In Austria and Germany, the Directive is transposed principally through the provisions of the Criminal Code, while other legislation is relevant but only in relation to a limited number of specific offences, e.g. nature protection related offences (Article 3(f), (g) and (h)) and offences concerning ozone depleting substances (Article 3(i)).

The two remaining countries have a particular approach. Italy has taken a hybrid approach whereby the transposition is ensured through on one hand already existing sectoral legislation and on the other hand through the Criminal Code and sectoral legislation as specially amended. The Netherlands has not adopted or amended any existing legislation to transpose the Directive, but relies primarily on (1) the Penal Code, which includes environmental crimes for unlawfully polluting land, air or water in case of an impact on public health or life threats; and (2) the Act on Economic Offences, which defines the unlawful violation of environmental sectoral norms and regulations as an economic crime. The latter has grouped all the different environmental sector laws of which an unlawful violation is considered an economic crime in one single article (Article 1(a)). It does not materially define the conduct or the norms; those are found in the respective environmental sector laws, which transpose the different EU Directives mentioned the Annexes of Directive 2008/99/EC.

#### *Transposition through a specific act*

Only three Member States (Cyprus, Greece and Malta) have adopted a single act to transpose the Directive. This approach is explained by the fact that these Member States have chosen to transpose in a quasi-literal manner. This technique ensures that transposition is in full conformity. However, these new rules are not fully integrated into the existing system and thus there is a danger that they will not be applied due to lack of knowledge. There is a risk that the specific act will not be applied to the relevant conduct which would rather be qualified under general criminal law. This is particularly true in relation to conducts causing death or serious injury. Conversely, some argue that this approach is safer and more comprehensive, especially compared to an approach relying on sectoral legislation. In addition, the adoption of a single specific act can be justified by the will to give a particular status to environmental crimes.

### *Other methods of transposition*

Romania has adopted an additional legal act, the Law on the Prevention and Sanctioning of Certain Acts Regarding Environmental Degradation, to complete rather than amend the existing legislation for the purpose of transposition. As a consequence, the transposing provisions setting offences and corresponding sanctions are included in a range of legal acts, namely the new Law, the Criminal Code, the framework environmental legislation (the Ordinance on the Protection of the Environment) and environmental sectoral acts. Several of these provisions may apply to the same conduct. Without any rules on which provision should be applied in which context, this results in overlaps and, as a consequence, in problems in terms of legal predictability and uncertainty<sup>6</sup>, as different legal acts apply in parallel. On this basis, the overall transposition has been assessed as ambiguous.

A comparable situation occurs in Slovakia in relation to the transposition of some of the Article 3 offences. In these cases, the offence may be covered by a general catch-all provision on endangering and damaging the environment and at the same time by other provisions of the Criminal Code, which provide for more specific offences without reference to the danger or damage caused to the environment, e.g. for breach of water and air protection regulations. There is no clear rule in the law and no consensus among the practitioners as to which provisions would apply to the corresponding conducts described in the Directive, whereas the sanctions attached to the catch-all provision or to the other relevant provisions are set at different levels.

## **2.2 The notion of unlawfulness**

The approach chosen has a direct link to Article 2(a), which sets out the definition of unlawful, as follows:

‘unlawful’ means infringing:

- (i) the legislation adopted pursuant to the EC Treaty and listed in Annex A; or
- (ii) with regard to activities covered by the Euratom Treaty, the legislation adopted pursuant to the Euratom Treaty and listed in Annex B; or
- (iii) a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to in (i) or (ii);

### *Annexes A and B*

Under Article 2(a) on the definition of ‘**unlawful**’, each national studies provides a general comment on the way the Directive is transposed, and Annexes A and B are reflected in national law, as well as the conducts that are covered as potential offences. As this constitutes a general statement setting the scene of the method of transposition in each country, no assessment as to the conformity of transposition (effective/incorrect or incomplete) was provided for this particular provision.

As mentioned above, while some Member States have chosen to transpose the Directive through the provisions of the Criminal Code, others have relied on sectoral legislation, which sets criminal penalties for infringement to key obligations set forth by the EU legal acts listed in Annexes A and B of the Directive. In such cases, the level of the penalties is set by reference to the Criminal Code or

<sup>6</sup> The Romanian Constitutional Court ruled a law as violating the Constitution and the ECHR in cases where the criminal text is not correlated with the provisions incorporated by reference therein; where there is uncertainty as to the nature and extent of the sanctions that may be enforced by a court of law; where conducts resulting in the same dangerous outcome are subject to different criminal sanctions (*Constitutional Court of Romania, Decision no. 903 of 6 July 2010*).

directly in the sectoral legislation. Some Member States have followed a mixed approach. For example, Austria has transposed all the offences and corresponding sanctions in the Criminal Code, by amending the latter in 2011, with the exception of the Article 3(g) offences transposed through the Federal Act on Trade of Species, adopted in 2009.

When a Member State has transposed the Directive through sectoral legislation, the offences will be defined as breaches of the enforceable obligations set by each of the EU legal acts listed in the annexes to the Directive, and, consequently, in the corresponding transposing national acts. The study did not involve checking in detail the conformity of the transposition of each legal instrument listed in Annexes A and B to the Directive, but rather evaluated whether criminal sanctions have been set in case of breach of the key enforceable obligations.

When Member States have transposed the Directive through their criminal law, they would often include some wording referring to infringement of relevant legal requirements e.g. ‘in violation of the law’, ‘in breach of regulations’, etc. A typical example would be Slovenia, where all criminal offences are prescribed in the Criminal Code and where the legislator used the expression ‘in breach of regulations’. The legislator did not define this expression. Unlike the Directive, the Criminal Code does not enumerate the relevant EU legislation (or corresponding national laws), but it simply uses the term ‘unlawful’ or ‘in breach of regulations’ as one of the elements of a particular offence without further defining them. The expression ‘in breach of regulations’ also covers the acts made in breach of administrative decisions, if these are based on these sector-specific regulations. The transposing Articles in the current version came into force in Slovenia only in May 2012, so there is no case-law based on them yet. However, similar offences against the environment had been prescribed in Slovenian criminal law before - since 1994. They used the same indirect and abstract method to determine the term ‘unlawful’. The Supreme Court case-law has long-established the rule that in every criminal procedure for the crimes against the environment, a breach of a particular environmental law or regulation must be identified and claimed by the prosecutor; an environmental crime can only be committed by infringing on the particular environmental law or regulation, and not by acting contrary to other legislation. If such provision of environmental law is not identified, the infringement is not a crime against the environment.<sup>7</sup> This Supreme Court Case law made the practical application of the term unlawful more specific and clearer.

Romania is the only country which chose to make direct reference to the annexes to the Directive. The Romanian transposing law uses the expression ‘in violation of the applicable legal provisions in the field’. The concept of ‘legal provisions in the field’ includes both primary and secondary environmental legislation applicable on the territory of Romania, in its entirety and thus covers not only the legislation listed in Annexes A and B, but also laws, administrative regulations and decisions in the sense of Article 2(iii) of the Directive.

#### *Sanctions related to EU Regulations*

Particular mention should be made in relation to the Regulations included in the Annex A to the Directive having in mind they are of direct application. In particular, some offences listed in Article 3 are embedded into Regulations: Article 3(c) is linked to Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste; Article 3(g) to Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, and Article 3(i) in relation to Regulation (EC) No 1005/2009 on substances that deplete the ozone layer.<sup>8</sup>

<sup>7</sup> See the judgements of the Supreme Court nr.I IPS 96/2000 and I Ips 19/2006. See more in in Florjančič, D., *Kazniva dejanja zoper okolje, prostor in naravne dobrine v KZ-1 (po noveli KZ-1B)*, Pravna praksa, p. 17-20, September 2012.

<sup>8</sup> Other regulations are also relevant, e.g. Regulation (EC) No 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants with regard to Article 3(a) and (b). See Table 1 for a full overview.

Regulations apply directly in the Member States, but to be able to punish a breach of a rule set out in a Regulation, the Member States have to provide criminal provisions stating that such breach is an offence and setting forth the corresponding sanction.

In Wallonia (Belgium), no provisions necessary to sanction breaches of the pertinent Regulations have been adopted, resulting in gaps in transposition. In relation to Article 3(i), the Irish legislator chose to transpose Regulation (EC) No 1005/2009, but did not attach criminal offences to all of the Regulation's key obligations. Accordingly, transposition is considered incomplete.

In Poland, the national legislation transposes all of the conducts listed by Article 3(i) and makes a direct cross-reference to Regulation (EC) No 1005/2009. The articles quoted relate to all prohibitions set by Regulation (EC) 1005/2009. However, it does not quote Article 22 on recovery and destruction of controlled substances. This leads to incomplete transposition as non-compliance with this provision should be considered as a conduct constituting a criminal offence pursuant to the conditions set by the Directive.

In Latvia, there is no explicit criminal liability for the shipment of waste where it falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006. The transposing legislation provides criminal liability for the violation of provisions concerning importation of hazardous waste into Latvia or the transit traffic of hazardous waste without referring directly to Regulation (EC) No 1013/2006. This has resulted in incomplete transposition. In the Czech Republic, the transposing legislation does not provide for criminal liability in all cases of illegal activities specified under Articles 2(35) of Regulation (EC) No 1013/2006. The transposition is therefore incomplete.

### 3 Key provisions relating to offences

The analysis in Section 3 of this report is organised around three sub-sections which correspond to each of the provisions of the Directive relevant in relation to offences (Articles 3, 4 and 5). In addition, an introductory section identifies and analyses some cross-cutting issues considered key for the understanding of all offence-related provisions of the Directive and their transposition in the Member States. Section 3 is therefore organised as follows:

<i>Section of the Report</i>	<i>Provision of the Directive analysed</i>
Section 3.1 <i>Cross-cutting issues</i>	
Section 3.1.1 <i>Intent and negligence</i>	Article 3, chapeau
Section 3.1.2 <i>Danger and endangerment</i>	Article 3(a), (b), (d) and (e)
Section 3.1.3 <i>Vague notions</i>	Article 3(a) to (h)
Section 3.2 <i>Article 3 offences</i>	Article 3(a) to (i)
Section 3.3 <i>Inciting, aiding and abetting</i>	Article 4
Section 3.4 <i>Liability of legal persons</i>	Article 6

#### 3.1 Cross-cutting issues

##### 3.1.1 Intent and negligence

###### *Understanding of intent and negligence*

For a crime to exist, both *actus reus* and *mens rea* must be present. National law or case-law will define the level of willingness required to constitute a crime, and with regard to the mental element, the terminology used, and more importantly, the definition of the concepts of intent and negligence, differ from one Member State to another, according to the criminal legal traditions of each country.

In relation to intent, several Member States (Austria, Bulgaria, Croatia, Czech Republic, Estonia, Germany, Hungary, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia and Slovenia) foresee at least two types of intent. Their designations differ, but they can be grouped as:

- Direct intent (*dolus directus*): the offender knows the potential outcome of his/her conduct, and knowingly creates the circumstances of commission of an offence and wants the consequences; and
- *Dolus eventualis*: the offender foresees the risk inherent in his/her conduct, and accepts or takes for granted the possibility of this occurring.

In the context of environmental crimes, most cases will involve *dolus eventualis* rather than direct intent, as the conduct or omission that is capable of creating environmental harm is in general not committed *per se*, but rather in the context of an activity that has no criminal relevance.

Austria, Estonia, Germany and Portugal have three types of intent. In Austria<sup>9</sup> and Estonia,<sup>10</sup> intent can be *dolus directus*, *dolus eventualis* or deliberate conduct. In Estonia, a person is deemed to have committed an act with *deliberate intent* if the person intentionally wanted to create circumstances which belong to the necessary elements of an offence and was aware that such circumstances would occur or if s/he at least admitted the occurrence of such circumstances. A person is also deemed to have committed an act with deliberate intent if the person assumed that the circumstances which constituted the necessary elements of an offence were an essential prerequisite for the achievement of

<sup>9</sup> See National Report for Austria, p.19.

<sup>10</sup> See National Report for Estonia, p.19.

the aim. According to German law<sup>11</sup> as interpreted by the national courts, intent may be of three different types: *dolus directus* of the first degree, *dolus directus* of the second degree, and *dolus eventualis*.<sup>12</sup> Offenders meet the conditions of *dolus directus* of the first degree if they want to commit the offence;<sup>13</sup> and of the second degree if they know that they are committing the offence.<sup>14</sup> In Portugal, the Criminal Code sets three levels of intention, which are malice in fact, malice without heed to the consequences and malice in law (*dolus eventualis*).

In relation to negligence, most countries have two types of negligence. Again, definitions differ from Member State to Member State, but they can be generally grouped as:

- Serious or conscious negligence: in cases where the offender foresees the possible consequences of his conduct, but carelessly trusts in their non-occurrence; and
- Simple or unconscious negligence: the offender does not foresee the consequences of his/her acts, because omits to pay the attention or exercises the circumspection that may be expected from him/her.

Article 3 of the Directive requires Member States to consider as a criminal offence unlawful conducts, 'when committed intentionally or with at least serious negligence'. There is a whole array of different approaches across the Member States regarding the transposition of these elements. But in essence, there are two main issues in relation to this obligation. Firstly, some Member States go further than the Directive by including simple negligence and strict liability. Secondly, and more importantly, some Member States fall short of the obligations by not criminalising negligent conducts.

#### *Use of intent and negligence for the transposition of Directive 2008/99/EC*

Ireland, Italy and the United Kingdom provide for strict liability. There, the illegal conduct as such is constituent of a criminal offence, regardless of the intent and negligence of the perpetrator. In the case of Ireland, the fact that the offences constitute regulatory offences gave rise to some hesitations in the case-law as to the necessity to prove *mens rea*. It seems that, even though it is not a constituent element of the criminal offence, the degree of knowledge would be considered by the courts when sentencing. In Italy, either conducts covered by the Directive are considered 'abstract endangerment' offences,<sup>15</sup> and thus do not rely on intent or negligence, or they are '*contravvenzioni*' where a mere negligence ('*colpa*') is sufficient to constitute a crime. In the United Kingdom, in some cases, the relevant offence provision uses the wording 'no person shall cause or knowingly permit' a certain act, breach of which constitutes an offence. The courts have taken a broad approach to the question of whether a person 'caused' a certain act, as a result of which there is no need to show that a person knew about the activity or intended it. However, for someone to have knowingly permitted a certain activity, a person (or company) must know about it, and can therefore include cases where a person is aware of a polluting incident but failed to take steps to stop the pollution.

In all other countries, intent or negligence needs to be proven. However, in a few Member States (Cyprus,<sup>16</sup> France, Latvia, Luxembourg and Sweden), there is no distinction made in the law between situations where the offences described in Article 3 were committed with intent or by negligence. Practically, this means that a conduct will be condemned under the same provision in the law, without differentiating intentional and negligent conducts. In France, Latvia and Luxembourg, intent and negligence are not even mentioned when describing the conducts of the Directive, as it is a general

<sup>11</sup> See National Report for Germany, p.16.

<sup>12</sup> See Fischer, Thomas; *Legal Commentary to the German Criminal Code*, 59 edition (2012), § 15 paragraphs 6 and the following.

<sup>13</sup> Federal Court of Justice, official collection of judgements, no 18, p. 151.

<sup>14</sup> Federal Court of Justice, *New Journal on Criminal Law – Overview of judgements of the criminal courts (Neue Strafrechtszeitung (NStZ) – RR)*, 2006, pages 174 and 175.

<sup>15</sup> See Section 3.1.2 below.

<sup>16</sup> For Articles 3(a), (b), (c), (d), (e), (f) and (h).

principle in criminal law that a crime can be constituted by intent or by negligence. In the case of Luxembourg, the Criminal Code does not provide any definition or interpretations, nor does it explicitly require these conditions. Where no distinction is made in the law, the range of sanctions provided in the transposing legislation is the same regardless of intent or negligence, but the degree of intent will be taken into account by the judge on a case-by-case basis, firstly to consider whether an offence constitutes a crime (e.g., in Luxembourg, when the conduct of the person is absolutely involuntary due to an error of fact that would have been by a reasonable person under the same circumstances) and secondly, to adjust the level of sanction.

In the remaining Member States (Austria, Bulgaria, Croatia, Czech Republic, Estonia, Greece, Hungary, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain, Finland, Germany, Malta and Poland), the offences are differentiated depending on whether the conduct is intentional, seriously negligent or negligent. In most cases, as a rule of general criminal law, intent has to be proven to constitute a crime, and the cases where negligence (serious or simple) is sufficient have to be explicitly mentioned in the law. In these cases, negligence would usually be punished through a reduced sentence.

Some Member States (Austria, Cyprus, Czech Republic, Denmark, Spain) require at least serious negligence for certain criminal offences to trigger criminal liability, as per the Directive. For others (Bulgaria, Belgium, France, Germany in a few cases, Greece, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia), unconscious or simple negligence is sufficient. In Finland and Hungary, simple negligence and serious negligence are both condemned and give rise to different levels of sanctions.

A specific case as to how intent and negligence are articulated in national law is worth mentioning with regard to Denmark, where intent and serious negligence (although for certain crimes simple negligence is sufficient) are sanctioned by sectoral legislation, while ‘serious environmental offences’, for which intent is required, are sanctioned under the Criminal Code.

#### *Transposition issues related to intent and negligence*

The legislation of several Member States is incomplete as it only covers intentional conduct and not negligent conduct. This problem was identified in:

- Croatia in relation to the offence stipulated in Article (c).
- Czech legislation in regard to the offences stipulated in Articles 3(e) and 3(i) of the Directive.
- Estonia in regard to the offences stipulated in Articles 3(c), 3(d), 3(e) and 3(i) of the Directive.
- Lithuania in regard to the offences stipulated in Article 3(c).
- Spain in regard to the offences stipulated in Articles 3(e), (f), (g), (h) and (i).
- Slovakia in regard to the offences stipulated in Articles 3(c), 3(f), 3(g), and 3(h). Ambiguous transposition was also considered in the context of Articles 3(b) and 3(e), as it is arguable whether the general provisions of the Criminal Code on harm to the environment when committed by negligence (Article 301) would apply, or if it would rather be the more sector-specific provisions (Articles 302 and 298), which do not cover negligence, that would be considered applicable in the situations described in Articles 3(b) and 3(e).

In Germany, the transposing legislation provides that the criminal offences contained in Articles 3(f) and 3(g) of the Directive will be sanctioned if committed intentionally or if the offender ‘negligently fails to realise that the fauna or flora was protected’, which is slightly different from situations where the offender negligently acts as described under Article 3(f) and (g). This is considered a minor instance of incorrect transposition.

### 3.1.2 Endangerment / damage

In its Articles 3(a), (b), (d) and (e), the Directive requires criminal liability in case of actual damage ('causes death or serious injury [...] or substantial damage' to the environment), but also in case of endangerment to health or the environment ('is likely to cause').

Quite a few issues have arisen from the transposition of these elements, and in particular of the endangerment element.

#### *Abstract vs. concrete endangerment*

A few countries make a distinction based on the concepts of 'abstract' and 'concrete' endangerment. A typical example is Italy, as illustrated in the box below.

- *Damage crimes* are those for which it is necessary not only to establish the conduct, the event and the causal link, but also when it is proven that the good protected by the norm has been harmed.
- *Danger crimes* are those for which it is necessary to establish the conduct, the event and the causal link, but it is not necessary to show that there has been a damage to the good protected by the norm.
  - *Concrete danger crimes* are those in which the judge must ascertain, for liability to arise, that the danger has actually arisen
  - *Abstract danger crimes* are those in which the danger is assumed to exist in the conduct (and therefore does not need to be proven), but the accused person is allowed to prove the contrary.

Another example is Germany, which goes further in the categorisation of offences.

- Offences entailing actual harm (*Verletzungsdelikte*): conducts that actually harm human beings or the environment.
- Offences entailing a concrete danger (*konkrete Gefährdungsdelikte*): conducts that are a concrete danger to human beings or the environment, i.e., human beings or the environment are not actually harmed but where it can be only considered as a coincidence that the actual harm did not occur when observing the situation from the ex-post perspective.<sup>17</sup>
- Offences entailing an increased abstract danger (*besondere Gefährdungsdelikte*): conducts that bear an increased abstract danger to human beings or the environment because of the way they are committed or because of the instruments used for their commission.
- Offences entailing an abstract danger (*abstrakte Gefährdungsdelikte*): conducts without requiring any concrete or increased abstract danger entailed by them, punished because such actions could easily turn into a concrete danger to human beings or the environment (e.g., breach of the conditions of a permit).

The definition of 'abstract' and 'concrete' endangerment has proven to be a problematic issue for this study. There is no definition of these concepts at EU level, and in the absence of a common understanding of these notions among Member States, the terms 'abstract' and 'concrete' have been kept in the studies only where they were acknowledged and defined notions in the legislation of the country. In other countries, only the term 'endangerment' (is likely to cause) were used along with 'actual damage' (causes).

#### *Absence of reference to endangerment or actual damage*

In such cases, there would be typically no reference to the damage or endangerment caused or likely to be caused. The conduct, e.g. non-compliance with permit conditions or other requirements, will be

<sup>17</sup> Federal Court of Justice, judgement, Weekly Law Journal (neue juristische Wochenschrift), 1995, pages 3131 and the following; Fischer, commentary to the Criminal Code, § 315b StGB, para. 18))

subject to criminal sanctions regardless of whether or not there is endangerment or actual damage. These cases correspond to the ‘abstract endangerment’ described above.

Such situation occurs for most or all conducts in Italy (all offences apart from offences contained in Article 3(f) and (h)),<sup>18</sup> in Luxembourg (all cases),<sup>19</sup> in Ireland (all cases)<sup>20</sup> and in the UK (all cases)<sup>21</sup>. It also occurs for a few conducts in other countries, e.g. Hungary, Latvia and the Netherlands. This approach was considered in this study as a broader transposition of the Directive. However, it should be noted that this makes an assessment necessary whether the potential or actual damage can be properly reflected in the level of penalties set in the legislation. Although the transposition has been assessed as effective, this approach raises some doubts as to whether or not the objective of the Directive, in particular in terms of proportionality of sanctions, is achieved.

#### *Incomplete transposition of the endangerment element*

In several Member States, only an actual damage leads to criminal liability for some of the conducts mentioned in this sub-section 3.1.2. This situation has usually been assessed as incomplete transposition. This is the case in Germany (Article 3(a)) and Latvia (Articles 3(a), (b), (d) and (e)).

Besides, in Slovakia, the transposition was assessed as incomplete due to the insufficient coverage of situations of harm to health foreseen in Articles 3(a), (b), (d) and (e) of the Directive. Indeed, whereas a conduct which would actually ‘cause death or serious injury’ would be covered with the general criminal offences of homicide and voluntary injuries provided for in the Criminal Code, the endangerment of human health, i.e., situations where the conduct would be ‘likely to cause death or serious injury’ would not be covered by general criminal law provisions.

#### *Additional requirements of damage*

Inversely to the situation described above, the conducts described in Articles 3(c) and (f) to (i) do not require an endangerment or harm to health or the environment to constitute a crime. Nevertheless, substantial harm is considered a condition to trigger criminal liability in some cases in two Member States. This situation has resulted in two instances of incorrect transposition:

- In relation to Article 3(i) in Latvia and Slovakia, where criminal liability is provided for cases of production importation, exportation or use of ozone-depleting substances only if substantial harm is caused;
- For the transposition of Article 3(h) in Portugal, since the national provisions, in order for a certain conduct to be qualified as criminal, requires it to cause significant deterioration and losses in protected species, which is not required under the Directive.

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<sup>18</sup> For more information please see Section 2.1 of the National Report for Italy.

<sup>19</sup> For more information please see Section 3.1 of the National Report for Luxembourg.

<sup>20</sup> For more information please see Section 3.1 of the National Report for Ireland.

<sup>21</sup> For more information please see Section 3.1 of the National Report for UK.

### 3.1.3 Vague notions

Directive 2008/99/EC uses in its wording a number of concepts which are not defined, and give rise to certain questions of interpretation. These have been designated in the literature as ‘vague notions’.<sup>22</sup> The use of such notions can be problematic to the extent that it may affect legal certainty, which is one of the key principles of criminal law. The analysis focuses on the concepts of ‘substantial damage’, ‘(non-) negligible quantity and impact’, and ‘significant deterioration’ used in the Directive.<sup>23</sup> The different ways each of these concepts has been transposed in the Member States is analysed below, and have usually been considered in accordance with the Directive, unless said otherwise in the analysis. There are two main reasons for this. First of all, the reference to vague, undefined, notions leaves Member States with a considerable margin of appreciation. Secondly, many Member States have opted to implement in a broader manner by not referring to these conditions, *i.e.* by criminalizing any harm or damage instead of only substantial damage.

#### *Substantial damage*

This notion is used in Article 3(a), (b), (d) and (e), which all require criminal liability if the conducts they describe ‘cause or are likely to cause [...] substantial damage to the quality of air, the quality of soil, or the quality of water, or to animals or plants’.

This expression has been reflected differently in the Member States. However, some common features can be observed in the criteria retained for the qualification of damage as substantial. These are:

- The monetary value of the damage;
- The duration (lasting harm)<sup>24</sup> and the irreversibility of the damage;
- The wide impact or intensity of the damage.

Whereas some countries sanctioned the simple violation of the law without requiring a negative impact on health or the environment, thus without referring to a substantial damage, others used an identical or comparable wording, such as ‘significant damage’ (e.g., Estonia, Lithuania) or ‘significant harm’ (e.g., Denmark) or ‘substantial harm’ (e.g., Latvia). In this regard, the translation of the original text into English may not necessarily reflect the nuances in the wording chosen by the Member States. In Slovenia, confusion even arose from the official Slovenian version of the Directive, which refers to ‘actual damage’ instead of ‘substantial damage’. As a result, the Slovenian equivalent of ‘actual damage’ was used throughout the transposing legislation instead of ‘substantial damage’.

While the majority of countries rely on case-law to interpret these terms, others have provided legal definitions, or criteria to take into consideration when assessing the damage. This is the case in the Czech Republic, Cyprus, Finland, Latvia, Portugal and Slovakia.

Due to its literal transposition approach, Cyprus used all vague notions of the Directive. However, the transposing act also provides for a full definition of ‘substantial damage’, which relies mostly to the irreversibility or partial reversibility of the damage, and the appreciation of the Court.<sup>25</sup> Latvia, in its procedural law, defines ‘substantial harm’ as caused not only in case of financial harm, but also if other interests and rights protected by law are threatened, if such threat is significant. In Portugal, the Criminal Code assesses substantial damage according to the significance and the lasting harm to

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<sup>22</sup> See in particular M Faure, *Vague Notions in Environmental Criminal Law*, Metro, September 2010, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1988933](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988933) (accessed on 14 February 2013).

<sup>23</sup> No major issue has been identified in relation to the other vague notions used in the Directive, *i.e.*, ‘dangerous activity’, ‘dangerous substances’.

<sup>24</sup> This wording reflects the wording of the Council of Europe Convention on the Protection of the Environment through Criminal Law, which refers to ‘lasting deterioration’.

<sup>25</sup> See National report for Cyprus, p. 15.

persons or the environment, the dissemination of microorganism or substance harmful to the body or health of persons, the significant impact on the conservation of species or habitats and the significant harm to the quality or the state of an environmental component.<sup>26</sup> In Finland, the Criminal Code sets criteria directly in the relevant provision, where the offence of ‘aggravated impairment of the Environment’<sup>27</sup> refers to situations where the damage caused is ‘especially serious, with regard to the long duration, wide effect and other circumstances’<sup>28</sup>.

The Czech and Slovak systems refer to the monetary value of the damage to assess whether it is substantial or not. The Czech Criminal Code classifies ‘damages’ (‘not negligible’, ‘not small’, ‘larger’, ‘substantial’ and ‘large-scale’ damage) according to the value of the case (calculated based on the benefit of the crime, the costs for remediating the environmental damage, the value of items and other assets damaged). A ‘substantial’ damage, as per the Directive, corresponds to a damage amounting to at least CZK 500,000 (EUR 20,000). Similarly, the Slovak Criminal law differentiates the damage caused into four categories: small, large, substantial and large-scale damage, in the Criminal Code, which are also based on monetary value. Creating a danger of a ‘small environmental damage’ is sufficient to be criminally liable in case of intent, whereas the environmental damage has to be ‘large’ to be criminally liable in case of negligence. Small damage means more than EUR 266, whereas large damage means at least EUR 2,660. Damage combines environmental harm and the damage caused to property (including the costs of restoring the environment to its original state). The degree of harm or the amount of damage shall be determined also taking account of the value of such things as defined by law. Where the amount of damage or the degree of harm cannot be determined by applying any of these criteria, or where there are serious reasons to doubt the accuracy of the amount of damage or the degree of harm thus determined, damage shall be established on the basis of a professional opinion or a certificate issued by a legal entity whose competence or line of activity offers a guarantee of objective determination of damage or harm; otherwise, the amount of damage shall be determined on the basis of an expert opinion.

Case-law and doctrine<sup>29</sup> have also provided elements of explanation in Austria, Germany and Lithuania. In Austria, ‘substantial damage’ is transposed by a reference to ‘long lasting deterioration of the status of water, soil and air’. According to the preparatory documents to the transposing law, the term shall be interpreted in a wide sense, meaning that the duration is considered in conjunction with the intensity of the impairment. Furthermore the ‘substantial damage to animals and plants’ is transposed by a ‘risk for the stock of animals or plants in a significant amount’ and ‘significant damage to the stock of the animals or plants’. The preparatory documents state that the ecological importance of the stock of animals or plants for the interaction in nature,<sup>30</sup> the intensity, the manner of impairment and the degree of ability for disruption as well as the uniqueness of the stock of animals and plants shall be taken into account. In Germany, the Criminal Code, in relation to the pollution of air, refers to the notion of ‘permanent damage’, which is defined by case-law as a pollution that occurs at a significant scale and for a long period of time.<sup>31</sup>

In Lithuania, the Criminal Code refers to ‘substantial damage to air, soil, water, animals or plants’ and to ‘serious consequences to the environment’, without defining them. However, leading judges of the courts have developed a commentary of the Criminal Code, which contains a general interpretation of the notion of ‘significant damage’. It states that ‘when deciding whether damage caused to fauna, flora as well as other consequences to the environment are significant or non-significant, the amount of

<sup>26</sup> See National report for Portugal, p. 22-23.

<sup>27</sup> Penal Code, Chapter 48, Section 2.

<sup>28</sup> See National report for Finland, p.20.

<sup>29</sup> In this situation however, the interpretations given are not binding, meaning that other interpretations could be upheld by the courts.

<sup>30</sup> Legislative Material 349/ME XXII GP, p 23 as well as Judgment of the OGH 130s 68/91.

<sup>31</sup> Higher Regional Court Zweibrücken, New Weekly Law Journal (Neue Juristische Wochenschrift), 1992, p. 2841.

material losses, also non-material value of natural objects, [...] the extent of the damage, possibility to restore what has been destroyed, injured, and so on must be taken into account'.<sup>32</sup>

Finally, in Croatia, the Criminal Act envisages more stringent sanctions depending on the seriousness of the crime: the more serious the consequences, the more stringent the sanctions. Such serious consequences include “causing serious injury to one or more persons”; “death of one or more persons”; “major accident”; “changes caused by pollution, which can not be remedied for a longer period of time”.

#### *Non-negligible quantity*

This notion is used in Article 3(c) in relation to the shipment of waste, which shall be ‘undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked’.

Most Member States (18) did not reflect this limitation (Belgium (Federal, Flanders) Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, the Netherlands, Luxembourg, Poland, Portugal, Romania, Sweden and the UK). In terms of conformity, the transposing measures are thus broader than the requirements of the Directive, as they enable to trigger criminal liability regardless of the quantity of waste concerned. In practical terms however, in most countries, the quantitative element would be taken into account to decide whether the offence is serious enough to be prosecuted, with criteria set on a case by case basis.

Other jurisdictions (Belgium-Brussels, Croatia, Estonia, Greece, Malta, Slovenia ) used a similar wording to that of the Directive, without any further definition, and did not provide for interpretation in case-law. Spain on the other hand, refers to ‘a significant amount of waste’. A significant amount of waste cannot be considered equivalent to a non-negligible quantity. A ‘significant amount’ is also a vague concept, and the question of how much waste renders a conduct criminal is left to the interpretation of the judge, as illustrated in a judgment by the Regional Court of Avila,<sup>33</sup> in which it was held that the interpretation of concepts such as ‘shipment of waste’ in ‘significant quantities’ must be made in the light of the applicable laws and regulations. The approach taken by Spain was considered ambiguous.

Some countries have transposed that element of the Directive in a different manner. Lithuania is the only country which actually provided a quantitative threshold, set at 50 tons. Setting quantitative thresholds has the advantage to give some certainty by specifying what should be meant by ‘negligible quantity’. However, it may be too rigid as 49 thousands kilos could be considered in certain cases as a non-negligible quantity. The expert considered this threshold as fulfilling the criterion of non-negligible quantity set by law. In contrast, in Austria, whereas reference is made to a non-negligible quantity of waste, in the context of shipment of *dangerous* waste, it is considered that any quantity would count as ‘non-negligible’. Bulgaria does not refer to a non-negligible quantity, but instead to ‘a minor case’. A ‘minor case’ is when the committed crime, in view of the absence or the insignificance of the harmful consequences, or in view of other mitigating circumstances, represents a lower level of social danger as compared with the common cases of crime of the respective kind. This focuses more on the seriousness of the impacts than on the volume or quantity of waste involved. If the quantity of a given specimen or the impact of a conduct should be considered as negligible is to be decided during the court proceedings based on an expert opinion. This approach does not rely on the notion of negligible quantity/negligible impact, but was considered to be in line with the Directive, just like the approaches in Lithuania and Austria. However, it should be noted that, in the case of Bulgaria, the national provision does not refer to whether the shipment should be undertaken once or in several shipments which appear to be linked, hence the transposition is considered as incomplete.

<sup>32</sup> Commentary of the Criminal Code of the Republic of Lithuania of 2010, Tom III, p.378.

<sup>33</sup> Auto 139/2011 of 22 of July.

### *Negligible quantity and negligible impact*

These concepts are used in Articles 3(f) and 3(g) of the Directive, which provide for an exception to criminal liability ‘where the conduct concerns a negligible quantity of [...] specimens [of protected of wild fauna and flora species] and has a negligible impact on the conservation status of the species’.

A few countries (e.g., Croatia, Denmark, Ireland, Spain, UK) did not reflect this exception. This means that these countries would in theory require criminal liability regardless of the quantity and impact concerned. However, in most cases, in practice, small quantities and negligible impact would not lead to criminal charges, even though they are theoretically covered by law.

On the same line, in Bulgaria and Sweden, instead of referring to negligible quantity and impact, the legislation refers to minor conducts. The situation in Bulgaria was described above. In Sweden also, the Environmental Code allows for exceptions for cases where the conduct is deemed as ‘minor’. An act is considered minor if it appears to be insignificant with respect to the interest that is intended to be protected by the penal provision. According to the Supreme Court,<sup>34</sup> the interest referred to in the law must be of particular importance. However, the interest cannot be decisive without taking other aspects into consideration. Furthermore, there are certain conducts relating to species protection that are more serious than others; e.g. selling for profit is more serious than selling without profit, or trading with animals which have been hunted would be more serious than trading with animals that have died naturally.

Hungary and Slovakia refer to the financial implications of the conduct and the monetary value of the specimens. In Slovakia, the national legislation requires prohibited conducts to concern specimens of protected wild fauna and flora species on a large scale in order to hold someone criminally liable. Conducts on a large scale shall be assessed by the same criteria, as damage on a large scale is assessed (EUR 2,666). In Hungary, pursuant to Article 281 of the Criminal Code, exceptions are linked to the financial value of the specimens concerned by the unlawful activity and not to their quantity and to the impact of the conduct on the conservation status of the species. In comparing the financial value of protected species and species under increased protection, in average the value of one specimen of a species which is under protection is at least ten times less than the value of a specimen of a species under increased protection. This suggests that at least ten specimens would need to be concerned by the criminal conduct in order to be punishable under the Criminal Code. Besides, it is not entirely clear whether or not this would constitute a negligible quantity, the second condition set by Article 3(f) to the exemption, i.e. a negligible impact on the conservation status of the species is not covered. The latter approach was considered arguable, and was assessed as a minor instance of ambiguous transposition.

Regarding more specifically negligible quantity, only two countries have provided numbers. In Austria, in the context of Article 3(g), one specimen or the quantity of up to 1 kg shall be considered as negligible. In the Czech Republic, less than 25 species is considered a negligible quantity. However, in both cases, the impact is also taken into account to mitigate these numbers. For instance, in the Czech Republic, one specimen is sufficient for the most endangered species (listed in Annex A to Regulation EC No 338/97). These approaches are considered to be in line with the Directive.

In relation to the non-negligible impact, some countries have provided additional elements of explanation. For instance, the French legislation refers to the impact of the pollution and the damage caused. Lithuania refers to the absence of major damage, whereas in Poland, the damage shall not be significant.

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<sup>34</sup> In May 2012, the Swedish Supreme Court adjudicated for the first time on a case regarding the issue when a species protection offence can be considered as minor (case no B 3272-10).

Cyprus provides for a definition of the concepts of negligible quantity and impact, which takes into account: (1) the number of protected species of flora and fauna that have been damaged by the conduct being too small or negligible in relation to the total number of the protected species that existed before the commission of the offence and (2) the extent of the impact of such an offence being so small that it does not change the conditions of conservation of the species.

### *Significant deterioration*

Article 3(h) makes a criminal offence conducts which cause ‘a significant deterioration of a habitat within a protected site’. Whereas the second element of the conduct (‘habitat within a protected site’) is defined in Article 2(c) of the Directive, the first ‘significant deterioration’ is not.

Most countries have used the same term as the Directive’s provision. However, some have used a different terminology. For instance, Austria and Estonia referred respectively to ‘damages’ and a ‘significant damage’. According to the Austrian preparatory materials, damage covers any damage beyond contamination, which is broader than required under the Directive. Ireland mentions a ‘significant effect on a site or integrity of a site’.

Quite a few countries refer to the destruction of the protected habitat. Bulgaria, Lithuania and the UK cover destruction and damage. In addition to these two elements, Poland also considers the ‘significant reduction of the national quality of the protected area’ as a criterion to assess deterioration. Similarly, the Czech Republic adds that damaging or destroying shall result in ‘the protection of such a natural area not [being] justified anymore or the reasons for its protection [being] greatly weakened’. Here, the damage or destruction to habitats is not sufficient, as it is necessary that the offender caused such a serious consequence that their protection has either completely lost its meaning, or at least has been significantly reduced. This approach has been considered in line with the Directive.

Finally, in Croatia, the term ‘significant deterioration’ is used similarly to the Directive but more severe penalties are foreseen if significant damage has occurred as a result of the offence covered by Article 3(h). Significant damage can be ‘serious bodily injury of one or more persons’; ‘death of one or more persons’; ‘major accident’; ‘changes caused by pollution cannot be remedied for a longer period of time’.

### *Concluding remarks*

In most countries, it has not been possible to identify case-law on the interpretation of vague notions, despite the methodology in place for this study.<sup>35</sup> One explanation is that, in general, case-law on environmental crimes is very scarce. According to most national experts, not many conducts have led to prosecution as environmental crime in their countries, either because no such conducts were identified, or because the illegal conducts identified would rather fall under administrative law, as they would not be considered serious enough to constitute a crime. It was also explained that many Member States have not implemented these conditions at all. If these notions were introduced in the legal system, this has taken place only recently (and as a result of the implementation of European law requirements, including Directive 2008/99/EC), and have not given rise to jurisprudence yet. For instance, in Portugal, quite a few of the vague concepts used for the transposition of the Directive are quite new in the national legal system, and have therefore not yet been interpreted by the courts.

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<sup>35</sup> National experts have been expressly required to look for case-law, in particular for the interpretation of vague notions. This request was made in the template and in the guidelines provided by Milieu Ltd. In addition, interviews have been carried out in all countries with practitioners, who were also asked for such case-law.

### 3.2 Article 3 Offences

Article 3 defines different conducts, which when unlawful and committed intentionally or with at least serious negligence constitute a criminal offence.

Table 3 provides an overview of the overall assessment of the transposition of Article 3 of the Directive. The references used to assess the conformity are the followings:

1. **Literal transposition:** when the words of the transposing provision are the same or almost exactly the same as the words used in the Directive. While literal transposition is quite frequent in case of rather technical or detailed provisions, e.g. setting requirements to industry (and this approach would often be used by some Member States for the transposition of environmental directives), the subject matter itself of Directive 2008/99/EC, criminal sanctions, makes it unlikely that Member States would chose to transpose in a literal fashion. This is the case only in those Member States which have transposed the Directive in a specific act i.e. Cyprus, Greece and Malta, although in the case of Cyprus, in some instances, the transposition is not fully literal.
2. **Effective transposition:** when the words or sentence construction used to transpose are different from the Directive but the objective is achieved by the transposition.
3. **Incomplete transposition:** when transposition is partial. This would cover, for example, the case where some of the elements of the conduct are not covered by the national transposing legislation.
4. **Gap in transposition:** when the Directive provision is not transposed at all. This is a very rare case in relation to the transposition of Directive 2008/99/EC. Only two instances of gap in transposition have been identified in Belgium and Denmark. In Belgium, it relates to Article 3(g). However, given the Belgian constitutional context (division of competences between the Federal level and the regions), the gap only relates to the trade in 'indigenous' CITES species, which falls under regional competence. Denmark did not set criminal liability in relation to the conduct described in Article 3(e).
5. **Incorrect transposition:** when transposition is deemed wrong. For example, when the national legislation includes an additional condition for a conduct to be considered as a criminal offence, e.g. Latvia provides criminal liability in case of the production, importation, exportation, placing on the market or use of ozone-depleting substances, only if such conduct causes a substantial damage, a condition which is not set forth by the Directive.
6. **Ambiguous transposition:** when the national provision wording could allow for different interpretations in line with the Directive requirement or not. In other words, the terms used could lead to the incorrect application of the Directive's requirements. Alternatively, transposition has been deemed ambiguous when the legal framework, even though transposing the elements of the Directive, does so in a manner that does not sufficiently ensure legal clarity and certainty. Examples have been identified in relation to the overall approach for transposition. This is the case for Slovakia and Romania as explained in Section 2.1.2.

Finally, in some cases, when transposition is assessed as not in conformity with the Directive (incorrect, incomplete or ambiguous), but this is not considered as a serious case, the national expert qualified as 'minor' the relevant instance of incorrect or incomplete transposition. For example, in relation to Article 3(b), the German legislation only includes such measures that can endanger 'populations of animals'. The term 'populations' used by the national legislation is broader than the term 'animals' used by the Directive. However, as if interpreted in the light of the Directive, the term 'populations of animals' in most cases can be considered compliant with the Directive, this issue is

only considered minor conformity problem. In Table 3, the qualification of the transposition is followed by (M), e.g. incorrect (M) to signal that it is a minor issue of conformity.

#### *Assessment of broader vs. stricter transposition*

With regard to this Directive, and the specific area of law that is criminal law, the term ‘broader’ was preferred to ‘more stringent’ or ‘stricter’ for the assessment in certain cases. Since omitting limitations of offence definitions renders more activities criminal, this broadens the scope of criminal sanctions but should not be considered as more stringent as such. When the scope of transposition was considered ‘broader’ for the reasons explained above, the transposition was assessed as ‘effective’.

The term ‘broader’ was favoured in cases where **the extent of the damage** was not explicitly mentioned in the legislation. This is for instance that case when the legislation refers to ‘damage to the environment’ or ‘damage to health’ instead of ‘substantial damage’ or ‘death or serious injury’ required in the Directive. This is also the case when the legislation does not refer to the limitations of ‘non-negligible quantity’ used in Article 3 (c), and of ‘negligible quantity’ and ‘negligible impact’ of Article 3 (f) and (g). Similarly, for Article 3 (d), when national law does not refer to damage ‘outside the plant’, it is assumed that damages are covered both outside and inside the plant, which makes the scope of the national legislation broader.

By contrast, it should be noted in the context of Article 3(c) on shipment of waste that whenever the national provision referred to the non-negligible quantity, the lack of reference to the execution of a shipment ‘in a single shipment or in several shipments which appear to be linked’ was considered as an instance of incomplete transposition.

As previously explained, it was also decided to assess as broader when the **reference to actual damage or endangerment** in the transposing provisions of Article 3(a), (b), (d) and (e) is lacking. Thus, when the national legislation provides for criminal liability without requiring that the offence ‘causes or is likely to cause’ an impairment of human health or the environment, it is considered ‘broader’, as criminal liability would apply regardless of the actual or potential damage. Nevertheless, in this case, the experts were asked to check whether the absence of gradation in the types and levels of sanctions available between cases where there is just a violation of legal requirements and cases where this violation resulted in endangerment lead to problems as to the effectiveness, proportionality and dissuasiveness of the offences (e.g. when the level of a fine is obviously too low in case of damage).

Table 3 on next page provides for an overview of the level of conformity of the legislation transposing the requirements of the Directive. It indicates the instances of non-conformity by conduct described in Article 3, using a **red background** where it was concluded to be incomplete or incorrect transposition, and an **orange background** for ambiguous transposition and minor compliance issues.

**Table 3 Overall Assessment of Conformity - Article 3**

MS	Art.3(a)	Art.3(b)	Art.3(c)	Art.3(d)	Art.3(e)	Art.3(f)	Art.3(g)	Art.3(h)	Art.3(i)
AT	Effective	Effective	Effective	Effective	Effective	Effective	Ambiguous	Effective	Effective
BE	<b>Fed:</b> Effective <b>FL:</b> Effective <b>WR:</b> Effective <b>BCR :</b> Effective	<b>Fed:</b> N/A <b>FL:</b> Effective <b>WR:</b> Effective <b>BCR :</b> Effective	<b>Fed:</b> Effective <b>FL:</b> Effective <b>WR:</b> Incomplete <b>BCR:</b> Effective	<b>Fed:</b> N/A <b>FL:</b> Effective <b>WR:</b> Effective <b>BCR:</b> Effective	<b>Fed:</b> Effective <b>FL:</b> N/A <b>WR:</b> N/A <b>BCR :</b> N/A	<b>Fed:</b> Incomplete <b>FL:</b> Effective <b>WR:</b> Effective <b>BCR :</b> Effective	<b>Fed:</b> Effective <b>FL:</b> Effective <b>WR:</b> Gap <b>BCR:</b> Effective	<b>Fed:</b> Incomplete <b>FL:</b> Effective <b>WR:</b> Effective <b>BCR :</b> Effective	<b>Fed:</b> Effective <b>FL:</b> Effective <b>WR:</b> Incomplete <b>BCR:</b> Effective
BG	Effective	Effective	Incomplete	Effective	Incomplete	Effective	Effective	Effective	Effective
CY	Effective	Effective	Effective	Literal	Literal	Literal	Literal	Literal	Literal
CZ	Effective	Effective	Incomplete	Effective	Incomplete	Effective	Effective	Effective	Incomplete & incorrect
DE	Incomplete	Incorrect (M)	Effective	Effective	Effective	Incorrect (M)	Incorrect (M)	Effective	Effective
DK	Incomplete	Effective	Effective	Effective	Gap	Effective	Effective	Effective	Effective
EE	Effective	Incorrect	Incomplete	Incomplete	Incomplete & incorrect	Incorrect	Incorrect	Effective	Incomplete
EL	Literal	Literal	Literal	Literal	Literal	Literal	Literal	Literal	Literal
ES	Effective	Effective	Ambiguous	Effective	Incomplete	Ambiguous & Incomplete	Ambiguous & Incomplete	Incomplete	Incomplete
FI	<b>Finland:</b> Effective <b>Åland:</b> Effective	<b>Finland:</b> Effective <b>Åland:</b> Effective	<b>Finland:</b> Effective <b>Åland:</b> Effective	<b>Finland:</b> Effective <b>Åland:</b> Effective	<b>Finland:</b> Effective <b>Åland:</b> Effective	<b>Finland:</b> Effective <b>Åland:</b> Effective	<b>Finland:</b> Effective <b>Åland:</b> Effective	<b>Finland:</b> Effective <b>Åland:</b> Effective	<b>Finland:</b> Effective <b>Åland:</b> Effective
FR	Incomplete	Incomplete	Effective	Effective	Incomplete (M)	Effective	Effective	Effective	Effective
HR	Effective	Effective	Incomplete	Effective	Effective	Effective	Effective	Effective	Effective
HU	Ambiguous	Effective	Effective	Ambiguous	Incomplete	Incomplete and ambiguous	Incomplete and ambiguous	Incomplete	Effective
IE	Incomplete	Effective	Effective	Effective	Effective	Incomplete	Incomplete	Incomplete	Incomplete
IT	Incomplete	Effective	Effective	Effective	Effective	Effective	Incomplete	Effective	Effective
LT	Effective	Effective	Incomplete	Effective	Effective	Effective	Effective	Effective	Effective
LV	Incomplete	Incomplete	Incomplete & incorrect	Incomplete	Incomplete	Incomplete	Effective	Effective	Incomplete & incorrect
LU	Effective	Effective	Effective	Effective	Effective	Effective	Effective	Effective	Effective
MT	Literal	Literal	Literal	Literal	Literal	Literal	Literal	Literal	Literal
NL	Effective	Effective	Effective	Effective	Effective	Effective	Effective	Effective	Effective
PL	Effective	Effective	Effective	Incomplete	Effective	Effective	Incomplete	Effective	Incomplete
PT	Incomplete	Effective	Effective	Incomplete	Effective	Effective	Effective	Incorrect	Effective
RO	Ambiguous	Ambiguous	Ambiguous	Ambiguous	Ambiguous	Ambiguous	Effective	Effective	Effective
SK	Incomplete	Ambiguous & incomplete	Ambiguous & incomplete	Ambiguous & incomplete	Ambiguous & incomplete	Incomplete	Incomplete	Incomplete	Incorrect
SI	Effective	Incomplete (M)	Effective	Effective	Effective	Effective	Effective	Effective	Effective
SE	Effective	Incomplete	Effective	Effective	Effective	Effective	Effective	Effective	Effective
UK	Effective	Effective	Effective	Effective	Effective	Effective	Effective	Effective	Effective

Seven Member States have transposed all provisions of Article 3 effectively. Three of these Member States, Cyprus, Greece and Malta, transposed in a literal or quasi-literal fashion. The other four Member States are Finland, Luxembourg, the Netherlands and the UK.

This section describes the main issues of conformity identified when analysing the transposition of Article 3 by the other Member States. It focuses on the conformity issues that are common to several Member States. Each of the conducts set forth by Article 3 is considered in turn. The instances of ambiguous transposition which are linked to the overall lack of legal clarity and certainty of the legislation are described in Section 2.1.2. Some other general instances of incomplete or incorrect transposition, which relates to several conducts set in Article 3(a) to (i), are described in other relevant sections, namely Section 3.1.1 on intent and negligence and Section 3.1.2 on the notions of damage and endangerment.

### 3.2.1 Article 3(a)

(a) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants

In several countries where the Directive is transposed through sectoral legislation, that is where the offences are provided for in various environment-related acts or through different provisions of a framework environmental legislation, the transposition of Article 3(a) is deemed incomplete as not all key offences are subject to criminal sanctions. This is the case in France where, for example, the breach of several key requirements of Directive 87/217/EEC on asbestos (e.g., Article 4 on Compliance with concentration limits for air emissions or Articles 7 and 8 prohibiting significant environmental pollution by asbestos fibres or dust) is not subject to criminal sanctions. Similarly, Ireland has not set criminal sanctions for some key enforceable provisions of some Directives relevant to the conduct describe in Article 3(a). In addition, some key provisions for other Directives have not been transposed. It should be noted that this remark relates for both France and Ireland to a limited number of key obligations as, in general, the key provisions of the relevant Directives have been transposed in a way that provides for criminal offences. The same remarks apply to Italy where Article 3(a) has not been specially ‘transposed’ as such since offences covering together the same scope as that of the Directive were deemed in existence in the Italian legal system already before the Directive was enacted. However, the Italian legislation does not set corresponding criminal sanctions for all key provisions of the Directives listed in the Annexes to Directive 2008/99/EC. For example, no sanctions are provided for the violation of Directive 87/217/EEC on pollution by asbestos.

In two countries, Denmark and Portugal, instances of incomplete transposition are linked to the discharge, emission or introduction of ionising radiation into the environment. In Denmark, the transposing legislation, the Environmental Protection Act, fails to make discharge, emission or introduction of ionising radiation into the environment a criminal offence. In Portugal, only materials which are ionising are covered by the Portuguese law, but not ionising radiation as such.

### 3.2.2 Article 3(b)

(b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants

In two countries, the transposition was assessed as incomplete because of a narrower scope of the offences as introduced in national law. In Estonia and Latvia, the supervision of waste management

operations and the aftercare of disposal sites are not covered. In Latvia, this is also the case for action taken as a dealer or a broker.

In several countries (e.g. Hungary and the Netherlands), waste management activities are covered in a broad manner (e.g. in Hungary, some conducts contained in the Directive that are not explicitly mentioned in the transposing legislation (e.g. supervision of waste operation) are understood to be covered by Article 281/A(b) of the Hungarian Criminal Code, which refers to the ‘catch-all’ conduct of ‘other illegal activities’). The transposition is assessed as effective. However, it can also be considered that such an approach leads to a lack of legal clarity/certainty and it would have been more effective to clearly spell out, as does the Directive, that the supervision of such operations and the aftercare of disposal sites, as well as actions taken as a dealer or a broker are covered rather than using a broad formulation.

### 3.2.3 Article 3(c)

(c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (1) and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked

Several problems of conformity have been identified in assessing Article 3(c), which relate to offences linked to non-compliance with Regulation (EC) No 1013/2006 on shipments of waste and the fact that the quantitative element of the conduct is not covered as explained respectively in Section 2.2 and Section 3.1.3.

In addition, Slovakia has transposed the Directive through amendments to the Criminal Code, waste-related offences are covered under a very broad provision on ‘Unauthorised handling of waste’, which does not refer to Regulation (EC) No 1013/2006 and does not make direct reference to the illegal shipment of waste as a criminal offence. Whether or not the illegal shipment of waste can be covered under the criminal offence of ‘Unauthorised handling of waste’ as handling of waste (i.e. waste management) includes also the transport of waste, is subject to extensive interpretation. Hence, transposition is considered as ambiguous.

### 3.2.4 Article 3(d)

(d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants

In relation to Article 3(d) which sets offences in relation to the operation of so-called ‘Seveso installations’, there is no common conformity issues that could be highlighted. However, several countries have transposed this provision in an incomplete manner. The reasons vary:

- In Portugal, the transposing legislation only covers the operation of a plant in which dangerous substances are stored or used and does not refer to ‘preparations’ as per the Directive. The two terms ‘substances’ and ‘preparations’ have a different meaning under EU legislation and, therefore, this constitutes an instance of incomplete transposition.
- The transposition by Poland is considered as incomplete because this conduct is covered through a general provision on polluting the environment (i.e. transposing primarily Article 3(a)), with higher sanctions in case such an offence is committed in relation with the operation of a plant and an activity subject to permit (this would cover a Seveso plant). By using this approach, the Polish legislation covers only damage or endangerment from substances. In

addition, as is the case with the use of broad catch-all provision, the link with Seveso plants is not clear enough.

- Finally in Latvia, the provision of the Criminal Law covers very partially the conduct described in Article 3(d), as it is restricted to operation of facilities, if such are not equipped with equipment and systems necessary for treatment and for collection of hazardous substances and dust, or if they are not in a condition suitable for operation. Therefore, the scope is defined in relation to the poor state of the installation and not the presence of hazardous substances and preparations and the carrying out of dangerous activities. In addition, the national legislation provides only for criminal liability when an actual damage is caused and does not cover endangerment.

### 3.2.5 Article 3(e)

(e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants

While the national studies revealed several instances of incomplete or incorrect transposition in various Member States (Bulgaria, Denmark, Estonia, France, Hungary, Latvia, Romania and Slovakia), these are all different and no common features have been identified.

As an example, in Bulgaria, the transposition is considered incomplete because the national legislation does not cover explicitly the acts of handling, use and storage despite the efforts to substitute these terms (i.e. handling or use) with other terms (acquisition). In Denmark, there is a gap in transposition as the Danish legislation fails to make the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants a criminal offence.

### 3.2.6 Article 3(f)

(f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species

Article 3(f) conducts relates to damage to protected wild fauna or flora species. It should be read together with the definition of ‘protected wild fauna and flora species’ as set out by Article 2(b). In relation to Article 3(f), the definition refers to specific annexes of the Habitats and the Birds Directives, respectively to Annex IV and to Annex I.

In some Member States (Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Italy, Luxemburg, Malta, Romania, Sweden and United Kingdom), the transposition of the definition is made mostly in the primary transposing legislation (including cross references made in the definition which refers to another transposing act). In other Member States (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Netherlands, Poland, Portugal, Slovakia, Slovenia and Spain) the primary transposing legislation (mostly the Criminal Code) does not contain the definition as such. However, the definition is transposed in respective national legislation transposing Habitats and Birds Directives, and it is the obligation of the competent courts to read the provisions of the main transposing legislation (e.g. Criminal Code) together with other relevant legislation.

In several Member States (Belgium – Federal level, Germany, Latvia, Spain), there is no criminal liability for the possession of specimens of protected species.<sup>36</sup> In addition, the Latvian legislation does not cover the taking of specimens of protected species while, in Spain, killing is not clearly included in the relevant conduct for specimens of protected wild fauna species.

### 3.2.7 Article 3(g)

(g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species

Article 3(g) relates to conducts in non-compliance with the Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (the CITES Regulation).

The only conformity issue that is common to several countries relates to the coverage of parts and derivatives. Both Austria and Poland transposing legislation do not mention parts or derivatives at all, while in Spain Article 334 only refers to ‘restos’ which can be accurately translated as both parts and residues. Hence, derivatives would not seem to be covered by the national provision. The Spanish version of the Directive indeed refers to ‘partes or derivados’, hence this different wording changes the scope of the provision.

### 3.2.8 Article 3(h)

(h) any conduct which causes the significant deterioration of a habitat within a protected site

The definition of ‘habitat within a protected site’ is set forth in Article 2(c) by reference to the Habitats and Birds Directives. It covers areas classified as a special protection area pursuant to the Birds Directive and special area of conservation designated pursuant to the Habitats Directive. The same remarks on the transposition of the definition made in relation to Article 3(f) apply.

While the national studies revealed several instances of incomplete or incorrect transposition in various Member States, these are all different and no common features have been identified. One of the most important cases of non-compliance relates to Portugal where for a certain conduct to be considered as a criminal offence it needs to cause significant deterioration and losses in protected species. This cumulatively set condition (significant deterioration and losses in protected species), makes transposition of this provision incorrect.

### 3.2.9 Article 3(i)

(i) the production, importation, exportation, placing on the market or use of ozone-depleting substances

Article 3(i) covers conducts in breach of principally Regulation (EC) No 1005/2009 on substances that deplete the ozone layer.

As mentioned previously, in Latvia and Slovakia, the transposition is considered incorrect as both countries set an additional condition to criminal liability, the occurrence of a damage caused by the illegal conduct. In Latvia, substantial harm to the environment, human health or property or economic interests is required. In Slovakia, the existence of a substantial damage to air quality triggers criminal liability. In addition, in the Czech Republic, it is the requirement that the conduct concerns the

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<sup>36</sup> Note that in Germany, this relates only to fauna specimens.

production, import, export, placing on the market and use of ozone depleting substances ‘not to a small extent’.

### 3.3 Inciting, aiding and abetting

Article 4 of the Directive requires Member States to ensure that inciting, aiding and abetting the intentional conduct referred to in Article 3 is punishable as a criminal offence. All Member States have transposed this provision effectively. Although the approaches to transposition and the terminology used differ, some common grounds can be identified for the majority of Member States.

#### *Definition and scope of inciting, aiding and abetting*

Several national reports contain definitions of inciting, aiding and abetting:

- In Finland, incitement is defined as an act committed by ‘a person who intentionally persuades another person to commit an intentional offence or to make a punishable attempt of such an act’. Abetting, which comprises also aiding, is defined as an act by a ‘person who, before or during the commission of an offence, intentionally furthers the commission by another of an intentional act or of its punishable attempt, through advice, action or otherwise’.
- In the Netherlands, inciting is defined as inciting through gifts, promises, abuse of power, violence, threat, or deception or by providing opportunity, means or information.
- In Slovakia, abetting may be carried out through organising the criminal offence, instigating someone to commit the criminal offence, hiring someone to commit the criminal offence. Aiding someone to commit the criminal offence means removing the obstacles, providing an advice, strengthening the determination, making a promise of assistance after the commission of the crime.
- In Slovenia, aiding and abetting includes counselling or instructing the perpetrator on how to carry out the criminal offence; providing the perpetrator with instruments for criminal offence or removing the obstacles for the committing of criminal offence; a priori promises to conceal the perpetrator’s criminal offence, the perpetrator, the instruments with which the offence will be committed, traces of criminal offence, objects gained through the committing of criminal offence or proceeds of criminal offence.

Not all Member States make a distinction between the concepts of inciting, aiding and abetting. For example, in Bulgaria, Estonia and Poland, inciting and abetting are considered the same thing, while in Croatia, Finland and Slovenia, there is no difference between aiding and abetting and the same term is used for both.

In France and Luxembourg, aiding and abetting are considered as complicity. In Latvia, there are three types of accomplices: the organiser (a person who has organised or directed the commission of a criminal offence), the instigator (a person who has induced another person to commit a criminal offence) and the abettor (a person who knowingly has promoted the commission of a criminal offence, providing advice, direction, or means, or removing impediments for the commission of such, as well as a person who has previously promised to conceal the perpetrator or joint participant, the instrumentalities or means for committing the criminal offence, trail of the criminal offence or the objects acquired by criminal means or has previously promised to acquire or to sell these objects). In the Netherlands, inciting, aiding and abetting are included in another relevant act and broadened to include those participating in the conduct outside the Netherlands. The Czech Criminal Code also considers other the forms of criminal conspiracy such as the encouragement of a criminal offence, the approval of a criminal offence, favouritism, the failure to prevent a criminal offence, or the failure to report a criminal offence.

In Portugal, the criminal system distinguishes between immediate authorship (execution of the offence by the agent himself), mediate authorship (execution by representation of another – ‘inciting’), instigation (‘inciting’ with intent) and complicity (moral or material aiding – ‘aiding and abetting’).

#### *Transposition of the Article 4 requirements*

In most cases, the Criminal Code of the Member States transposes Article 4 of the Directive. The relevant provision would usually be part of the general provision of the Criminal Code and be applicable to environmental crimes. This is the case in Austria, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Latvia, Lithuania, Germany, Hungary, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Spain. In other Member States (Belgium, Denmark, France, Greece, Luxembourg, Malta, Romania, Sweden), in which the main transposing act is not the Criminal Code, provisions on inciting, aiding and abetting contained therein, are applicable in regards to the transposition of the Directive. In Cyprus, inciting and aiding and abetting are regulated in the specific transposing act.

Article 4 of the Directive only requires that Member States ensure that inciting, aiding and abetting the *intentional* conduct referred to in Article 3 is punishable as a criminal offence. Many Member States limit these forms of liability to intentional offences or otherwise serious offences. For example, in Sweden, inciting, aiding and abetting are only sanctioned if the sanction foreseen for the criminal offence in question is imprisonment. Finally, a few Member States (Denmark, Italy and Romania) go beyond the requirements of the Directive by letting negligence suffice for the criminal liability of inciters, aiders and abettors.

In Ireland, any person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender. This covers indictable offences, which includes offences that can be prosecuted on indictment even though they are being prosecuted summarily, it only allows for trial on indictment. On the other hand, the Petty Sessions Act provides that ‘[...] every Person who shall aid, abet, counsel, or procure the Commission of any Offence which is or shall be punishable on Summary Conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal Offender or before or after his Conviction, and shall be liable, on Conviction, to the same Forfeiture and Punishment to which such principal Offender shall be by Law liable.’ As for the UK, in England and Wales, it is an offence to aid, abet, counsel or procure an offence. In England, Wales and Northern Ireland, it is an offence to encourage or assist an offence whether or not the offence is actually committed. In Scotland, it is an offence to be ‘art and part’ with another in the commission of an offence and this has been extended to statutory offences. Also, a number of sectoral transposing acts contain indirect provisions on inciting, aiding and abetting.

The Italian Criminal Code contains detailed and specific provisions on inciting, aiding and abetting. Public incitement to commit a criminal offence (regardless of whether it was committed or not) is sanctioned while incitement is not if it is not followed by the crime.

In the majority of countries (Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, Latvia, Lithuania, Germany, Greece, Poland, Romania, Slovakia and Slovenia) inciters and aiders and abettors are sanctioned in the same way as the perpetrator of a criminal offence. In Spain, inducing the commission of a criminal offence is sanctioned in the same way as being a perpetrator, while aiding and abetting generally carry lower sanctions. Conversely, in Slovakia, inciting is sanctioned in most cases less stringently than being a perpetrator. On the other hand, more stringent criminal sanction can be rendered for abetting. In certain Member States (Austria, Denmark, Cyprus, Czech Republic, Slovakia), an attempt to incite, aid and abet is sanctioned in the same way as carried out offences while in others (Slovenia), it is sanctioned less stringently.

### 3.4 Liability for legal persons

Article 6 of Directive 2008/99/EC provides for the liability of legal persons in relation to the offences described in the Directive. The concept of legal person is defined in Article 2(d) of the Directive as ‘any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations’. Even though criminal liability of legal persons has been introduced only very recently in a few countries (e.g. Croatia, Luxembourg and Lithuania), the definition has been properly transposed in all Member States.

Due to the different legal traditions in the Member States with regard to legal persons however, the Directive does not require criminal liability for legal persons, but only demands that these persons ‘can be held liable’. A few Member States impose sanctions under other regimes than the criminal law regime. Legal persons cannot be held criminally liable in Bulgaria and Latvia. In Bulgaria, the administrative law was amended in 2011 to provide for administrative sanctions for legal persons, including for environmental offences, whereas in Latvia, legal persons can be imposed coercive measures. In Germany, legal persons can be held liable under the Quasi-Criminal Offences Act. The criminal court can impose a quasi-criminal fine on a legal person for the commission of a criminal or a quasi-criminal offence by an organ or representative.

In Spain, the possibility of holding legal persons criminally responsible for environmental crimes did not exist prior to the transposition of Directive 2008/99/EC, and a new provision was incorporated in the Criminal Code to comply with the Directive, and explicitly provides for the criminal liability of legal persons in all the circumstances provided by Article 6. This new provision was however placed in the general, and not in the activities-related part of the Criminal Code. As a consequence, some of the sanctions it provides were not associated to specific conducts, as it is required under Spanish law. It follows that those conducts (i.e., those of Article 3(e), 3(f), 3(g) and 3(h)), when carried out by legal persons, cannot lead to the imposition of criminal sanctions, but only to administrative sanctions.

**Article 6(1)** requires Member States to ensure that legal persons can be held liable for the offences defined in the Directive ‘where such offences have been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as a part of an organ of the legal person, based on:

- (a) a power of representation,
- (b) an authority to take decisions on behalf of the legal person; or
- (c) an authority to exercise control within the legal person.’

This requirement led to a few conformity problems in four countries, namely Hungary, Italy, Luxembourg and Slovenia.

In Hungary, the law conditions the liability of a legal person to the intentional conduct of a natural person. That approach was considered too restrictive to ensure conformity. In addition, transposition was assessed as incomplete in relation to Article 6(1)(b) as the transposing provision identifies the relevant persons by listing the different positions rather than in a generic way, and does not refer to the members of the supreme body of legal persons (a supreme body consists of members/shareholders of the legal person and is responsible for adopting strategic/fundamental decisions).

In Italy, legal persons cannot be held liable for many of the offences covered by Articles 3(a), all of the offences covered by Article 3(d) and almost all of the offences covered by Article 3(e). Transposition was for this reason considered incomplete.

In Luxembourg, similarly to Spain, criminal liability of legal persons was introduced in the law only very recently (2010). Before the entry into force of this law, only the managers of legal persons could be held criminally liable. The Criminal Code now provides that criminal offences committed in the

name and in the interest of a legal person by one or more of the entity's legal representatives, or one or more of its legal or de facto directors, on behalf of and for the benefit of the entity, can lead to the criminal liability of legal persons. The legislation does not specify that the offender must commit this offence based on the situations of Article 6(1)(a) to (c). These requirements could however be considered to be covered by Article 34 of the Criminal Code that requires that the criminal offence is committed in the name or in the interest of a legal person. Furthermore, 'entity's legal representatives and legal or de facto directors' can be considered to have such power and authority. The transposition was thus assessed as ambiguous.

In Lithuania also, until the adoption of the Liability of Legal Persons for Criminal Offences Act of 2001, criminal liability could not be imposed on legal persons. This act transposes the requirements of Article 6 of the Directive. As for Luxembourg, it nevertheless omits points (a) to (c) of Article 6(1) and thus does not define the basis for a leading position of the natural person within the legal person. This was considered a minor issue with limited practical effect as such legal basis can be derived from the sector-specific laws governing corporations and other types of legal persons.

**Article 6(2)** requires legal persons to be held liable 'where the lack of supervision or control [by a person with a leading position] has made possible the commission of an offence [...] for the benefit of the legal person by a person under its authority'.

This requirement has been fully reflected in the national law of all countries except for France, Bulgaria and Luxembourg. Bulgaria transposed this provision only in part. The transposing article indeed refers to the possibility to hold a worker or employee liable, but does not specify that the lack of supervision or control of a person with a leading position would have made possible the committing of the offence and that the committing of the offence should be for the benefit of the legal person.

In France, there is no mention in the law that legal persons are liable where the infraction was committed due to a lack of supervision or control. However, the Criminal Code provides for a broad understanding of the liability of organs and representatives, and courts have also ruled that the liability of the legal person is upheld when the damage results from a breach of the rules that the representative of the company was supposed to enforce.

In Luxembourg, the transposing provision does not mention that legal persons can be held liable because of the lack of supervision or control by a person with a leading position within the legal person. It can however be considered as falling under the concept of negligence that was developed and further defined by the jurisprudence of the Court of Luxembourg. As it mainly relies on jurisprudence, the transposition is nevertheless considered ambiguous.

Pursuant to **Article 6(3)**, 'liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles 3 and 4.' This provision has been fully transposed in all Member States, except for Hungary and Poland, to the extent that the transposing legislation states that criminal measures can be imposed against legal persons if either criminal sanctions or reprimand or probation were imposed against a natural person as a perpetrator. This Article implies that the liability of legal persons does not exclude the possibility of criminal proceedings against natural persons as perpetrators, inciters or accessories. As a breach of law is sufficient to establish the criminal liability of a legal person under the Directive, the condition set out in the Hungarian and Polish transposing legislation to require previously a natural person to be punished limits the scope of application of the Directive's provision. Transposition was therefore assessed as incorrect.

## 4 Sanctions

This section provides a comparative analysis as to how Member States have transposed Article 5 and Article 7 of the Directive. While Article 5 requires that Article 3 offences be subject to criminal sanctions when committed by a natural person, Article 7 requires the setting of sanctions in case a legal person is held liable of committing one of these offences, without specifying the nature of the sanction. Therefore, the sanction can be of criminal, quasi-criminal or administrative nature. As mentioned above, in Bulgaria and Latvia, legal persons cannot be held criminally liable and are only subject to administrative fines. In Germany, legal persons are subject to quasi-criminal sanctions. All other Member States have provided for the possibility to sanction legal persons under criminal law.

### *Article 5*

#### **Penalties**

Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties.

### *Article 7*

#### **Penalties for legal persons**

Member States shall take the necessary measures to ensure that legal persons held liable pursuant to Article 6 are punishable by effective, proportionate and dissuasive penalties.

After a comparative overview of the fine and imprisonment sanctions set forth by the Member States for Article 3 offences, the present section also describes the available criminal sanctions other than fines and imprisonment (e.g. remedial sanctions), which apply to the respective offences and mitigating and aggravating circumstances set in legislation or typically applied in case-law. On this basis, the report examines whether or not the sanctions provided for by national legislation can be considered as effective, dissuasive and proportionate as required by the Directive.

### 4.1 Comparative overview of sanctions

Tables 4 and 5 provide a comparison of the criminal sanctions set by the Member States for each of the offences of Article 3 for natural persons. The tables depict minimum and maximum imprisonment sentences and fines foreseen for negligence and intent (in case such a distinction is made in the transposing national legislation) per Member State and per criminal offence as stipulated in the Directive. Table 4 presents the information in relation to the conducts described in Article 3(a) to (e), while Table 5 provides the same information for Article 3(f) to (i). This analysis is complemented by Tables 6 and 7 which present a comparative overview of the maximum levels of fines and imprisonment for each Article 3 offence. Finally, Table 8 compares sanctions applicable to legal persons across the 27 Member States. The values presented in Tables 4, 5, 6, 7 and 8 intend to reflect the highest penalties available for each type of penalty (imprisonment and fines). For that reason the values presented for each type of penalty in relation to each offence do not necessarily correspond to the one and same situation (e.g. the maximum imprisonment can be for death, while the maximum fine is for endangerment of the environment). The tables present the penalties for offences as close as possible to those described in the Directive and thus do not include special aggravating or mitigating circumstances such as recidivism, minor cases, large-scale damages, or occurrence in protected areas.

The tables do not indicate whether a certain criminal offence, as stipulated in the Directive, is effectively transposed in the national legislation (this is covered in section 3.2) nor does it indicate accessory criminal sanctions and administrative sanctions (this is explained in section 4.2).

**Table 4 Sanctions for conducts set by Article 3(a) to (e) applicable to natural persons**

	Article 3(a)	Article 3(b)	Article 3(c)	Article 3(d)	Article 3(e)
<b>AT</b> <sup>37</sup>	<u>Intent</u> - up to life imprisonment - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000) <u>Negligence</u> - up to 5 years - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000)	<u>Intent</u> - up to life imprisonment - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000) <u>Negligence</u> - up to 5 years - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000)	<u>Intent</u> - up to 1 year - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000) <u>Negligence</u> - up to 1 year - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000)	<u>Intent</u> - up to life imprisonment - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000) <u>Negligence</u> - up to 5 years - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000)	<u>Intent</u> - up to life imprisonment - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000) <u>Negligence</u> - up to 5 years - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000)
<b>BE</b> <sup>38</sup>	Partial regional competence	Partial regional competence	Partial regional competence	Partial regional competence	Federal competence
<b>FED</b>	<u>Intent</u> - 10 days – 10 years - a fine (EUR 6,000 – EUR 42,000,000) <u>Negligence</u> - 8 days – 1 year - a fine (EUR 250 – EUR 30,000,000)	N/A <sup>39</sup>	<u>Intent and Negligence</u> - 8 days – 3 years - a fine (EUR 240 – EUR 24,000,000)	N/A	<u>Intent and Negligence</u> - 3 months – 2 years - a fine (EUR 6,000 – EUR 6,000,000)
<b>FL</b>	<u>Intent</u> - 1 month – 5 years; - fine (EUR 600 – EUR 3,000,000) <u>Negligence</u> - 1 month – 3 years; - fine (EUR 600 – EUR 2,100,000)	<u>Intent</u> - 1 month – 5 years; - fine (EUR 600 – EUR 3,000,000) <u>Negligence</u> - 1 month – 3 years; - fine (EUR 600 – EUR 2,100,000)	<u>Intent</u> - 1 month – 5 years; - fine (EUR 600 – EUR 3,000,000) <u>Negligence</u> - 1 month – 3 years; - fine (EUR 600 – EUR 2,100,000)	<u>Intent and Negligence</u> - 1 month – 2 years; - fine (EUR 600 – EUR 1,500,000)	N/A
<b>WR</b>	<u>Intent and negligence</u> - 8 days – 3 years;	<u>Intent and negligence</u> - 8 days – 3 years;	<u>Intent and negligence</u> - 8 days – 3 years;	<u>Intent and negligence</u> - 8 days – 3 years;	N/A

<sup>37</sup> The court decides on a number of daily units. One daily fine unit spans between EUR 4 and EUR 5 000.

<sup>38</sup> Fines are corrected for inflation by so-called “additional decimes”. For example, the court inflicts to X fine of EUR 200. X will have to pay 1,100 (X x 5.5) If the offence was committed at the latest on 31 December 2011, and 1,200 (X x 6) if the offence was committed on 1 January 2012. The fines in the table above have been multiplied by the current additional decimes value – that is 6.

<sup>39</sup> N/A is used for cases where the corresponding jurisdiction is not competent to set a criminal sanction.

	Article 3(a)	Article 3(b)	Article 3(c)	Article 3(d)	Article 3(e)
<b>BR</b>	- fine (EUR 600 – EUR 6,000,000) <u>Intent and Negligence</u> - 8 days – 3 years - fine (EUR 150 – EUR 450,000)	- fine (EUR 600 – EUR 6,000,000) <u>Intent and Negligence</u> - 1 month – 5 years - fine (EUR 150 – EUR 600,000)	- fine (EUR 600 – EUR 6,000,000) <u>Intent and Negligence</u> - 1 month – 5 years - fine (EUR 150 – EUR 600,000)	- fine (EUR 600 – EUR 6,000,000) <u>Intent and Negligence</u> - 3 months – 5 years - fine (EUR 1,500 – EUR 600,000)	N/A
<b>BG</b>	<u>Intent</u> - 1 - 20 years - a fine (EUR 2,500 – EUR 25,000) <u>Negligence</u> - up to 3 years - a fine (EUR 1,000 – EUR 10,000)	<u>Intent</u> - 1 - 20 years - a fine (EUR 50 – EUR 25,000) <u>Negligence</u> - up to 3 years - a fine (EUR 1,500 – EUR 7,500)	<u>Intent</u> - up to 4 years - a fine (EUR 1,000 – EUR 2,500) <u>Negligence</u> - up to 2 years	<u>Intent</u> - up to 15 years - a fine (EUR 1,000 – EUR 15,000) <u>Negligence</u> up to 2 years	<u>Intent</u> - 1 - 15 years - a fine (EUR 5,000 – EUR 10,000) <u>Negligence</u> up to 3 years
<b>CY</b>	<u>Intent and Negligence</u> - up to 10 years - a fine (up to EUR 500,000)	<u>Intent and Negligence</u> - up to 10 years - a fine (up to EUR 500,000)	<u>Intent and Negligence</u> - up to 10 years - a fine (up to EUR 500,000)	<u>Intent and Negligence</u> - up to 10 years - a fine (up to EUR 500,000)	<u>Intent and Negligence</u> - up to 10 years - a fine (up to EUR 500,000)
<b>CZ<sup>40</sup></b>	<u>Intent</u> - up to 3 years - a fine (EUR 80- EUR 1.460.000) <u>Negligence</u> up to 6 months	<u>Intent and Negligence</u> - up to 2 years - a fine (EUR 80- EUR 1.460.000)	<u>Intent and Negligence</u> - up to 1 year - a fine (EUR 80- EUR 1.460.000)	<u>Intent:</u> - up to 3 years - a fine (EUR 80- EUR 1.460.000) <u>Negligence:</u> up to 6 months	<u>Intent</u> - 1 - 16 years - a fine (EUR 80- EUR 1.460.000)
<b>DE</b>	<u>Intent</u> - up to 15 years - a fine (EUR 5 – EUR 10,800,000) <u>Negligence</u> - up to 3 years - a fine (EUR 5 – EUR 10,800,000)	<u>Intent</u> - up to 15 years - a fine (EUR 5 – EUR 10,800,000) <u>Negligence</u> - up to 3 years - a fine (EUR 5 – EUR 10,800,000)	<u>Intent</u> - up to 15 years - a fine (EUR 5 – EUR 10,800,000) <u>Negligence</u> - up to 3 years - a fine (EUR 5 – EUR 10,800,000)	<u>Intent</u> - up to 15 years - a fine (EUR 5 – EUR 10,800,000) <u>Negligence</u> - up to 3 years - a fine (EUR 5 – EUR 10,800,000)	<u>Intent</u> - up to 15 years - a fine (EUR 5 – EUR 10,800,000) <u>Negligence</u> - up to 3 years - a fine (EUR 5 – EUR 10,800,000)
<b>DK<sup>41</sup></b>	<u>Intent</u>	<u>Intent</u>	<u>Intent</u>	<u>Intent</u>	No sanction available

<sup>40</sup> A monetary penalty can be imposed but only where the offender sought to secure or secured for themselves or for another person any material benefit by committing an intentional criminal offence. The penalty is based on daily rates. The total number of daily rates imposed shall be at least 20 and at most 730 full daily rates. A daily rate amounts to at least EUR 4 and at most EUR 2,000 per day, leading to a maximum fine of EUR 1,460,000.

	Article 3(a)	Article 3(b)	Article 3(c)	Article 3(d)	Article 3(e)
	- up to 2 years - a fine <u>Negligence</u> a fine	- up to 2 years - a fine <u>Negligence</u> a fine	- up to 2 years - a fine <u>Negligence</u> a fine	- up to 2 years - a fine <u>Negligence</u> a fine	
EE <sup>42</sup>	<u>Intent</u> - up to 5 years - a fine <u>Negligence</u> - up to 3 years - a fine	<u>Intent</u> - up to 5 years - a fine <u>Negligence</u> - up to 3 years - a fine	<u>Intent</u> - up to 1 year - a fine	<u>Intent</u> - up to 1 year - a fine	<u>Intent</u> - up to 5 years - a fine
EL	<u>Intent</u> - up to 20 years - a fine (EUR 3,000 – 500,000) <u>Negligence</u> - up to 5 years - a fine (up to EUR 150,000)	<u>Intent</u> - up to 20 years - a fine (EUR 3,000 – 500,000) <u>Negligence</u> - up to 5 years - a fine (up to EUR 150,000)	<u>Intent</u> - up to 20 years - a fine (EUR 3,000 – 500,000) <u>Negligence</u> - up to 5 years - a fine (up to EUR 150,000)	<u>Intent</u> - up to 20 years - a fine (EUR 3,000 – 500,000) <u>Negligence</u> - up to 5 years - a fine (up to EUR 150,000)	<u>Intent</u> - up to 20 years - a fine (EUR 3,000 – 500,000) <u>Negligence</u> - up to 5 years - a fine (up to EUR 150,000)
ES <sup>43</sup>	<u>Intent</u> 6 – 12 years <u>Negligence</u> 3 – 6 years	<u>Intent</u> 1 – 2 years <u>Negligence</u> 6 months – 1 year	<u>Intent</u> 1 – 2 years <u>Negligence</u> 6 months – 1 year	<u>Intent</u> - 1- 2 years - a fine (10 to 14 months- i.e. EUR 600 – 168,000) <u>Negligence</u> - 6 months – 1 year - a fine (5 to 10 months- i.e. EUR 300 – 120,000)	<u>Intent</u> 1 – 5 years -
FI <sup>44</sup>	<u>Intent</u> - up to 6 years - a fine <u>Negligence</u> - up to 1 year - a fine Åland	<u>Intent</u> - up to 6 years - a fine <u>Negligence</u> - up to 1 year - a fine Åland	<u>Intent and Negligence</u> - a fine Åland <u>Intent and Negligence</u> Fine	<u>Intent</u> - up to 6 years - a fine <u>Negligence</u> - up to 1 year - a fine Åland	<u>Intent</u> - up to 6 years - a fine <u>Negligence</u> - up to 1 year - a fine Åland

<sup>41</sup> There is no minimum or maximum level of fines prescribed by law.

<sup>42</sup> The fine is calculated by the court on the basis of the average daily income of the convicted offender and imposed in 30 to 500 daily rates.

<sup>43</sup> The fine is expressed in daily units. The monetary fine per day varies from EUR 2 to 400 for natural persons.

<sup>44</sup> The fine is determined as a number (1 to 120) of fixed day fines, depending on the economic and social situation of the offender. One sixtieth of the average monthly income of the person fined, less the taxes and fees defined by a Decree and a fixed deduction for basic consumption, is deemed to be a reasonable amount of a day fine.

	Article 3(a)	Article 3(b)	Article 3(c)	Article 3(d)	Article 3(e)
	<u>Intent and negligence</u> - up to 4 years - a fine	<u>Intent and Negligence</u> - up to 2 years - a fine		<u>Intent and Negligence</u> - up to 2 years - a fine	<u>Intent and negligence</u> - up to 4 years - a fine
<b>FR</b>	<u>Intent and Negligence</u> - up to 3 years - a fine (up to EUR 150,000)	<u>Intent and Negligence</u> - up to 3 years - a fine (up to EUR 150,000)	<u>Intent and Negligence</u> - 2 years - a fine (EUR 75,000)	<u>Intent and Negligence</u> - up to 3 years - a fine (up to EUR 150,000)	<u>Intent and Negligence</u> - up to 2 years - a fine (up to EUR 75,000)
<b>HR</b> <sup>45</sup>	<u>Intent</u> - 6 months to 15 years and/or a fine <u>Negligence</u> - up to 8 years and/or a fine	<u>Intent</u> - 6 months to 15 years and/or a fine <u>Negligence</u> - up to 8 years and/or a fine	<u>Intent</u> - Up to 15 years and/or a fine	<u>Intent</u> - 6 months to 15 years and/or a fine <u>Negligence</u> - up to 8 years and/or a fine	<u>Intent</u> - 6 months to 15 years and/or a fine <u>Negligence</u> - up to 8 years and/or a fine
<b>HU</b> <sup>46</sup>	<u>Intent</u> - up to 20 years - a fine (EUR 264 - EUR 380,106) <u>Negligence</u> - up to 7 years - a fine (EUR 264 - EUR 380,106)	<u>Intent</u> - up to 18 years - a fine (EUR 264 - EUR 380,106) <u>Negligence</u> - up to 6 years - a fine (EUR 264 - EUR 380,106)	<u>Intent</u> - up to 3 years - a fine (EUR 264 - EUR 380,106) <u>Negligence</u> - up to 1 years - a fine (EUR 264 - EUR 380,106)	<u>Intent</u> - up to 20 years - a fine (EUR 264 - EUR 380,106) <u>Negligence</u> - up to 7 years - a fine (EUR 264 - EUR 380,106)	<u>Intent</u> - up to 20 years - a fine (EUR 264 - EUR 380,106) <u>Negligence</u> - up to 7 years - a fine (EUR 264 - EUR 380,106)
<b>IE</b>	<u>Conviction on indictment</u> - up to 5 years - a fine (up to EUR 15,000,000) <u>Summary conviction</u> - up to 12 months - a fine (up to EUR 3,000)	<u>Conviction on indictment</u> - up to 5 years - a fine (up to EUR 15,000,000) <u>Summary conviction</u> - up to 12 months - a fine (up to EUR 3,000)	<u>Conviction on indictment</u> - up to 3 years - a fine (up to EUR 500,000) <u>Summary conviction</u> - up to 3 months - a fine (up to EUR 3,000)	<u>Summary conviction</u> - up to 12 months - a fine (up to EUR 3,000)	<u>Conviction on indictment</u> - up to 3 years - a fine (up to EUR 500,000) <u>Summary conviction</u> - up to 3 months - a fine (up to EUR 5,000)
<b>IT</b>	<u>Intent and Negligence</u> - up to 3 years - a fine (up to EUR 51,700)	<u>Intent and Negligence</u> - 3 months – 3 years - a fine (EUR 2,600 - EUR 52,000)	<u>Intent and Negligence</u> - up to 6 years - a fine (EUR 1,550 - EUR 26,000)	<u>Intent and Negligence</u> - up to 3 years	<u>Intent and Negligence</u> - up to 8 years - a fine (EUR 516.46 - EUR 51,645.63)
<b>LT</b>	<u>Intent and Negligence</u> - up to 10 years	<u>Intent and Negligence</u> - up to 6 years	<u>Intent</u> - up to 3 years	<u>Intent and Negligence</u> - up to 6 years	<u>Intent and Negligence</u> - up to 10 years

<sup>45</sup> The fine must be between 30 and 360 daily incomes, except for criminal offences committed for personal gain when the maximum fine may amount to 500 daily incomes.

<sup>46</sup> The fine is minimum 30 daily units and maximum 540. The amount of the daily unit depends on the perpetrator's financial and personal circumstances, but should be at least EUR 8.8 and not more than EUR 703.9. Fines can only be imposed instead of imprisonment, if the length of imprisonment foreseen by the relevant offence provision does not exceed 3 years. The sanctions included in the table are the minima and maxima for damage to/endangerment of the environment.

	Article 3(a)	Article 3(b)	Article 3(c)	Article 3(d)	Article 3(e)
	- a fine (up to EUR 37,650)	- a fine (up to EUR 37,650)	- a fine (up to EUR 37,650)	- a fine (up to EUR 37,650)	- a fine (up to EUR 56,475)
<b>LU</b>	<u>Intent and Negligence</u> - 8 days - 5 years - a fine (EUR 251 – EUR 750,000)	<u>Intent and Negligence</u> - 8 days - 5 years - a fine (EUR 251 – EUR 750,000)	<u>Intent and Negligence</u> - 8 days - 6 months - a fine (EUR 251 – EUR 100,000)	<u>Intent and Negligence</u> - 8 days - 6 months - a fine (EUR 251 – EUR 125,000)	<u>Intent and Negligence</u> - 8 days - 1 year - a fine (EUR 251 – EUR 25,000)
<b>LV<sup>47</sup></b>	<u>Intent and Negligence</u> - up to 4 years - a fine (up to 200 times the minimum monthly wage - EUR 56,914)	<u>Intent and Negligence</u> - up to 4 years - a fine (up to 150 times the minimum monthly wage - EUR 42,686)	<u>Intent and Negligence</u> - up to 5 years - a fine (up to 200 times the minimum monthly wage - EUR 56,914)	<u>Intent and Negligence</u> Fine (up to 100 times the minimum monthly wage - EUR 28,457)	<u>Intent and Negligence</u> - up to 5 years - a fine (up to 200 times the minimum monthly wage - EUR 56,914)
<b>MT</b>	<u>Intent</u> - up to life imprisonment - a fine (EUR 12,000 - EUR 2,500,000) <u>Negligence</u> - up to 6 years - a fine (up to EUR 11,647)	<u>Intent</u> - up to life imprisonment - a fine (EUR 12,000 - EUR 2,500,000) <u>Negligence</u> - up to 6 years - a fine (up to EUR 11,647)	<u>Intent</u> - up to life imprisonment - a fine (EUR 12,000 - EUR 2,500,000) <u>Negligence</u> - up to 6 years - a fine (up to EUR 11,647)	<u>Intent</u> - up to life imprisonment - a fine (EUR 12,000 - EUR 2,500,000) <u>Negligence</u> - up to 6 years - a fine (up to EUR 11,647)	<u>Intent</u> - up to life imprisonment - a fine (EUR 12,000 - EUR 2,500,000) <u>Negligence</u> - up to 6 years - a fine (up to EUR 11,647)
<b>NL</b>	<u>Intent</u> - up to life imprisonment - a fine (up to EUR 78,000) <u>Negligence</u> - up to 2 years - a fine (up to EUR 19,500)	<u>Intent</u> - up to 6 years - a fine (up to EUR 78,000) <u>Negligence</u> - up to 1 year - fine (up to EUR 19,500)	<u>Intent</u> - up to 6 years - a fine (up to EUR 78,000) <u>Negligence</u> - up to 1 year - fine (EUR 19,500)	<u>Intent</u> - up to 6 years - a fine (up to EUR 78,000) <u>Negligence</u> - up to 1 year - fine (up to EUR 19,500)	<u>Intent</u> - up to 12 years - a fine (up to EUR 78,000) <u>Negligence</u> - up to 1 year - fine (up to EUR 19,500)
<b>PL</b>	<u>Intent</u> 3 months - 8 years <u>Negligence</u> - up to 3 years - a fine (EUR 25 - EUR 175,000)	<u>Intent</u> 3 months - 5 years <u>Negligence</u> - up to 2 years - a fine (EUR 25 - EUR 175,000)	<u>Intent</u> 3 months - 5 years <u>Negligence</u> - up to 2 years - a fine (EUR 25 - EUR 175,000)	<u>Intent</u> 6 months to 8 years <u>Negligence</u> - up to 3 years - a fine (EUR 25 - EUR 175,000)	<u>Intent</u> 3 months - 5 years <u>Negligence</u> - up to 2 years - a fine (EUR 25 - EUR 175,000)
<b>PT<sup>48</sup></b>	<u>Intent</u> - 1 - 128 months - a fine (10 - 600 days, i.e. (EUR 50 – EUR 300,000)	<u>Intent</u> - 1 - 128 months - a fine (10 - 600 days, i.e. (EUR 50 – EUR 300,000)	<u>Intent</u> - 1 month – 3 years - a fine (10 - 600 days, i.e. (EUR 50 – EUR 300,000)	<u>Intent</u> - 1 - 128 months - a fine (10 - 600 days, i.e. (EUR 50 – EUR 300,000)	<u>Intent</u> - 1 - 128 months - a fine (10 - 600 days, i.e. (EUR 50 – EUR 300,000)

<sup>47</sup> Fines are expressed as a minimum monthly wages which usually changes every year.

<sup>48</sup> The daily fine unit is set by the court and ranges between EUR 5 – EUR 500.

	Article 3(a)	Article 3(b)	Article 3(c)	Article 3(d)	Article 3(e)
	<u>Negligence</u> - 1 - 80 months - a fine (10 - 240 days, i.e. EUR 50 – EUR 120,000)	<u>Negligence</u> - 1 - 80 months - a fine (10 - 240 days, i.e. EUR 50 – EUR 120,000)	<u>Negligence</u> - 1 month - 1 year - a fine (10 - 360 days, i.e. EUR 50 – EUR 180,000)	<u>Negligence</u> - 1 - 80 months - a fine (10 - 240 days, i.e. EUR 50 – EUR 120,000)	<u>Negligence</u> - 1 - 80 months - a fine (10 - 240 days, i.e. EUR 50 – EUR 120,000)
RO	<u>Intent</u> - one month – life imprisonment - a fine (EUR 67 – EUR 22,200) <u>Negligence</u> - one month– 12 year - a fine (EUR 67 – EUR 15,550)	<u>Intent</u> - one month – life imprisonment - a fine (EUR 8,890 – EUR 22,200) <u>Negligence</u> - one month – 12 year - a fine (EUR 8,890 – EUR 15,550)	<u>Intent</u> 2 years – 15 years <u>Negligence</u> - 1 year – 7.5 years - a fine (EUR 111 – EUR 6,600)	<u>Intent</u> - 3 months – 5 years - a fine (EUR 67 – EUR 13,300) <u>Negligence</u> - 3 months – 2.5 years - a fine (EUR 67 – EUR 15,550)	<u>Intent</u> - 3 months – life imprisonment - a fine (EUR 67 – EUR 3,300) <u>Negligence</u> - 18 months – 10 years - a fine (EUR 8,890 – EUR 15,550)
SE	<u>Intent</u> up to 6 years or a fine (up to EUR 17,250) <u>Negligence</u> Up to 2 years or a fine (up to EUR 17,250)	<u>Intent</u> up to 6 years or a fine (up to EUR 17,250) <u>Negligence</u> Up to 2 years or a fine (up to EUR 17,250)	<u>Intent and Negligence</u> up to 2 years or a fine (up to EUR 17,250)	<u>Intent and Negligence</u> up to 2 years or a fine (up to EUR 17,250)	<u>Intent and Negligence</u> up to 2 years or a fine (up to EUR 17,250)
SI <sup>49</sup>	<u>Intent</u> 30 days – 12 years and a fine <u>Negligence</u> 30 days – 2 years or a fine	<u>Intent</u> 30 days – 12 years and a fine <u>Negligence</u> 30 days – 2 years or a fine	<u>Intent</u> 30 days – 12 years and a fine <u>Negligence</u> 30 days – 2 years or a fine	<u>Intent</u> 30 days – 12 years and a fine <u>Negligence</u> 30 days – 2 years or a fine	<u>Intent</u> 30 days – 8 years and a fine <u>Negligence</u> 6 months – 3 years
SK <sup>50</sup>	<u>Intent</u> up to 10 years or a fine (EUR 160 and EUR 331,930 ) <u>Negligence</u> up to 8 years	<u>Intent</u> up to 8 years or a fine (EUR 160 and EUR 331,930 )	<u>Intent</u> up to 8 years or a fine (EUR 160 and EUR 331,930 )	<u>Intent</u> up to 10 years or a fine (EUR 160 and EUR 331,930 ) <u>Negligence</u> up to 8 years	<u>Intent</u> 1 year - life imprisonment or a fine (EUR 160 and EUR 331,930 )
UK <sup>51</sup>	<u>Conviction on indictment</u> - up to 5 years - unlimited fine <u>Summary conviction</u> - 6 - 12 months	<u>Conviction on indictment</u> - up to 5 years - unlimited fine <u>Summary conviction</u> - 6 - 12 months	<u>Conviction on indictment</u> - up to 2 years - unlimited fine <u>Summary conviction</u> - up to 3 months	<u>Conviction on indictment</u> - up to 2 years - unlimited fine <u>Summary conviction</u> - up to 12 months (6 months in	<u>Conviction on indictment</u> - up to 5 years - unlimited fine <u>Summary conviction</u> - up to 12 months (E&W); 6

<sup>49</sup> The fine imposed must be an amount of between 30 and 360 times the daily wage of the perpetrator.

<sup>50</sup> The court may impose a fine between EUR 160 and EUR 331,930 on the offender of an intentional criminal offence whereby he gained or tried to gain material benefit.

<sup>51</sup> Summary convictions and convictions on indictment are selected for less serious and more serious cases respectively.

	<b>Article 3(a)</b>	<b>Article 3(b)</b>	<b>Article 3(c)</b>	<b>Article 3(d)</b>	<b>Article 3(e)</b>
	- fine (up to EUR 57,527, EUR 46,000 and EUR 34,507 in E&W, Scotland and NI respectively)	- fine (up to EUR 57,527(E&W and NI) and EUR 46,000 (Scotland))	- fine (up to EUR 5,750)	NI - fine (up to EUR 22,997)	months (Scotland and NI) - fine (up to EUR 57 527 (E&W); EUR 22 997 (Scotland and NI)

**Table 5 Sanctions for conducts set by Article 3(f) to (i) applicable to natural persons**

	<b>Article 3(f)</b>	<b>Article 3(g)</b>	<b>Article 3(h)</b>	<b>Article 3(i)</b>
<b>AT</b> <sup>52</sup>	<u>Intent</u> - up to 2 years - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000) <u>Negligence</u> - up to 1 year - a fine (up to 360 daily units)	<u>Intent</u> - up to 2 years - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000) <u>Negligence</u> - up to 1 year - a fine (up to 360 daily units)	<u>Intent</u> - up to 2 years - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000) <u>Negligence</u> - up to 1 year - fine (up to 360 daily units)	<u>Intent</u> - up to 1 year - a fine (up to 360 daily units i.e. EUR 1,440 – EUR 1,800,000) <u>Negligence</u> - up to 6 months - a fine (up to 360 daily units)
<b>BE</b> <sup>53</sup>	Partial regional competence	Partial regional competence	Partial regional competence	Partial regional competence
<b>FED</b>	<u>Intent and Negligence</u> Fine (EUR 3,000 – EUR 600,000)	<u>Intent and Negligence</u> - 15 days – 3 months - fine (EUR 150 – EUR 12,000)	<u>Intent and Negligence</u> Fine (EUR 3,000 – EUR 600,000)	<u>Intent and Negligence</u> - 8 days – 3 years - fine (EUR 312 – EUR 24,000,000)
<b>FL</b>	<u>Intent</u> - 1 month – 5 years; - fine (EUR 600 – EUR 3,000,000) <u>Negligence</u> - 1 month – 3 years; - fine (EUR 600 – EUR 2,100,000)	<u>Intent</u> - 1 month – 5 years; - fine (EUR 600 – EUR 3,000,000) <u>Negligence</u> - 1 month – 3 years; - fine (EUR 600 – EUR 2,10,000)	<u>Intent</u> - 1 month – 5 years; - fine (EUR 600 – EUR 3,000,000) <u>Negligence</u> - 1 month – 3 years; - fine (EUR 600 – EUR 2,100,000)	<u>Intent and Negligence</u> - 1 month – 2 years; - fine (EUR 600 – EUR 1,500,000)
<b>WR</b>	<u>Intent and Negligence</u> - 8 days – 6 months - fine (EUR 600 – EUR 600,000)	No criminal sanction	<u>Intent and Negligence</u> - 8 days – 6 months - a fine (EUR 600 – EUR 600,000)	<u>Intent and negligence</u> - 8 days – 3 years - fine (EUR 600 – EUR 6,000,000)
<b>BR</b>	<u>Intent and Negligence</u> - 1 month – 24 months - fine (EUR 150 – EUR 150,000)	<u>Intent and Negligence</u> - 1 month – 24 months - fine (EUR 150 – EUR 150,000)	<u>Intent and Negligence</u> - 1 month – 3 years - fine (EUR 150 – EUR 450,000)	<u>Intent and Negligence</u> - 1 month – 24 months - fine (EUR 150 – EUR 150,000)
<b>BG</b>	<u>Intent</u> - up to 5 years - a fine (EUR 1,000 – EUR 10,000) <u>Negligence</u> Fine (EUR 500 – EUR 2,500)	<u>Intent</u> - up to 5 years - a fine (EUR 1,000 – EUR 10,000) <u>Negligence</u> Fine (EUR 500 – EUR 2,500)	<u>Intent</u> - up to 3 years - a fine (EUR 1,000 – EUR 5,000) <u>Negligence</u> Fine (EUR 500 – EUR 2,500)	<u>Intent</u> - up to 4 years - a fine (EUR 500 – EUR 2,500) <u>Negligence</u> up to 1 year
<b>CY</b>	<u>Intent and Negligence</u> - up to 10 years	<u>Intent and Negligence</u> - up to 10 years	<u>Intent and Negligence</u> - up to 10 years	<u>Intent and Negligence</u> - up to 10 years

<sup>52</sup> The court decides on a number of daily units. One daily fine unit spans between EUR 4 and EUR 5 000.

<sup>53</sup> Fines are corrected for inflation by so-called “additional decimes”. For example, the court inflicts to X fine of EUR 200. X will have to pay 1,100 (X x 5.5) If the offence was committed at the latest on 31 December 2011, and 1,200 (X x 6) if the offence was committed on 1 January 2012. The fines in the table above have been multiplied by the current additional decimes value – that is 6.

	Article 3(f)	Article 3(g)	Article 3(h)	Article 3(i)
	- a fine (up to EUR 500,000)	- a fine (up to EUR 500,000)	- a fine (up to EUR 500,000)	- a fine (up to EUR 500,000)
<b>CZ</b> <sup>54</sup>	<u>Intent</u> - up to 3 years - a fine (EUR 80- EUR 1.460.000) <u>Negligence</u> _up to 1 year	<u>Intent</u> _ up to 3 years - a fine (EUR 80- EUR 1.460.000) <u>Negligence</u> up to 1 year	<u>Intent and Negligence</u> - up to 3 years - fine (EUR 80- EUR 1.460.000)	<u>Intent</u> - up to 1 year - a fine (EUR 80- EUR 1.460.000)
<b>DE</b>	<u>Intent</u> - up to 5 years - a fine (EUR 5 – EUR 10,800,000) <u>Negligence</u> - up to 1 year - a fine (EUR 5 – EUR 10,800,000)	<u>Intent</u> - up to 5 years - a fine (EUR 5 – EUR 10,800,000) <u>Negligence</u> - up to 2 years - a fine (EUR 5 – EUR 10,800,000)	<u>Intent</u> - up to 15 years - a fine (EUR 5 – EUR 10,800,000) <u>Negligence</u> - up to 3 years - a fine (EUR 5 – EUR 10,800,000)	<u>Intent</u> - up to 5 years - a fine (EUR 5 – EUR 10,800,000) <u>Negligence</u> - up to 2 years - a fine (EUR 5 – EUR 10,800,000)
<b>DK</b> <sup>55</sup>	<u>Intent</u> -up to 1 year - a fine <u>Negligence</u> a fine	<u>Intent</u> - up to 1 year - a fine <u>Negligence</u> a fine	<u>Intent</u> - up to 1 year - a fine <u>Negligence</u> a fine	<u>Intent</u> _ up to 2 years - a fine <u>Negligence</u> a fine
<b>EE</b> <sup>56</sup>	<u>Intent</u> - up to 5 years - a fine <u>Negligence</u> - up to 1 year - a fine	<u>Intent</u> - up to 5 years - a fine <u>Negligence</u> - up to 1 year - a fine	<u>Intent</u> - up to 5 years - a fine <u>Negligence</u> - up to 1 year - a fine	<u>Intent</u> - up to 1 year - a fine
<b>EL</b>	<u>Intent</u> - up to 20 years - a fine (EUR 3,000 – 500,000) <u>Negligence</u> - up to 5 years - a fine (up to EUR 150,000)	<u>Intent</u> - up to 20 years - a fine (EUR 3,000 – 500,000) <u>Negligence</u> - up to 5 years - a fine (up to EUR 150,000)	<u>Intent</u> - up to 20 years - a fine (EUR 3,000 – 500,000) <u>Negligence</u> - up to 5 years - a fine (up to EUR 150,000)	<u>Intent</u> - up to 20 years - a fine (EUR 3,000– 500,000) <u>Negligence</u> - up to 5 years - a fine (up to EUR 150,000)

<sup>54</sup> A monetary penalty can be imposed but only where the offender sought to secure or secured for themselves or for another person any material benefit by committing an intentional criminal offence. The penalty is based on daily rates. The total number of daily rates imposed shall be at least 20 and at most 730 full daily rates. A daily rate amounts to at least EUR 4 and at most EUR 2,000 per day, leading to a maximum fine of EUR 1.460.000.

<sup>55</sup> There is no minimum or maximum level of fines prescribed by law.

<sup>56</sup> The fine is calculated by the court on the basis of the average daily income of the convicted offender and imposed in 30 to 500 daily rates.

	Article 3(f)	Article 3(g)	Article 3(h)	Article 3(i)
<b>ES</b> <sup>57</sup>	<u>Intent</u> - 4 months – 2 years - a fine (8-24 months i.e. EUR 480 – EUR 288,000)	<u>Intent</u> - 4 months – 2 years - a fine (8-24 months i.e. EUR 480 – EUR 288,000)	<u>Intent</u> - 4 months – 2 years - a fine (8-24 months i.e. EUR 480 – EUR 288,000)	<u>Intent</u> - 6 months – 3 years - a fine (12-24 months i.e. EUR 720 – EUR 288,000)
<b>FI</b> <sup>58</sup>	<u>Intent and Negligence</u> - up to 2 years - a fine <b>Åland</b> <u>Intent and Negligence</u> - up to 2 years - a fine	<u>Intent and Negligence</u> - up to 2 years - a fine <b>Åland</b> <u>Intent and Negligence</u> - up to 2 years - a fine	<u>Intent and Negligence</u> - up to 2 years - a fine <b>Åland</b> <u>Intent and Negligence</u> - up to 2 years - a fine	<u>Intent and Negligence:</u> - up to 2 years - a fine <b>Åland</b> <u>Intent and Negligence</u> - up to 2 years - a fine
<b>FR</b>	<u>Intent and Negligence</u> - up to 2 years - a fine (up to EUR 30,000)	<u>Intent and Negligence</u> - up to 2 years - a fine (up to EUR 100,000)	<u>Intent and Negligence</u> - up to 2 years - a fine (up to EUR 75,000)	<u>Intent and Negligence</u> - up to 2 years - a fine (EUR 75,000)
<b>HR</b> <sup>59</sup>	<u>Intent</u> - 6 months to 8 years and/or a fine <u>Negligence</u> - up to 3 years and/or a fine	<u>Intent</u> - 6 months to 8 years and/or a fine <u>Negligence</u> - up to 3 years and/or a fine	<u>Intent</u> - 6 months to 8 years and/or a fine <u>Negligence</u> - up to 3 years and/or a fine	<u>Intent</u> - up to 3 years and/or a fine <u>Negligence</u> - up to 1 year and/or a fine
<b>HU</b> <sup>60</sup>	<u>Intent</u> - up to 3 years - a fine (EUR 264 up to 380,106) <u>Negligence</u> - up to 2 years - a fine (EUR 264 up to 380,106)	<u>Intent</u> - up to 3 years - a fine (EUR 264 up to 380,106) <u>Negligence</u> - up to 2 years - a fine (EUR 264 up to 380,106)	<u>Intent</u> - up to 3 years - a fine (EUR 264 up to 380,106) <u>Negligence</u> - up to 2 years - a fine (EUR 264 up to 380,106)	<u>Intent</u> - up to 3 years - a fine (EUR 264 up to 380,106) <u>Negligence</u> - up to 1 year - a fine (EUR 264 up to 380,106)
<b>IE</b>	<u>Conviction on indictment</u> - up to 3 years - a fine (up to EUR 500,000) <u>Summary conviction</u> - up to 6 months	<u>Conviction on indictment</u> - up to 2 years - a fine (up to EUR 63,486.90) <u>Summary conviction</u> - up to 12 months	<u>Conviction on indictment</u> - up to 3 years - a fine (up to EUR 500,000) <u>Summary conviction</u> - up to 6 months	<u>Conviction on indictment</u> - up to 3 years - a fine (up to EUR 500,000) <u>Summary conviction</u> - up to 12 months

<sup>57</sup> The fine is expressed on number of days, with each day carrying with it a monetary fine. The monetary fine per day varies from EUR 2 to 400 for natural persons.

<sup>58</sup> The fine is determined as a number (1 to 120) of fixed day fines, depending on the economic and social situation of the offender. One sixtieth of the average monthly income of the person fined, less the taxes and fees defined by a Decree and a fixed deduction for basic consumption, is deemed to be a reasonable amount of a day fine.

<sup>59</sup> The fine must be between 30 and 360 daily incomes, except for criminal offences committed for personal gain when the maximum fine may amount to 500 daily incomes.

<sup>60</sup> The fine is minimum 30 daily units and maximum 540. The amount of the daily unit depends on the perpetrator's financial and personal circumstances, but should be at least EUR 8.8 and not more than EUR 703.9. Fines can only be imposed instead of imprisonment, if the length of imprisonment foreseen by the relevant offence provision does not exceed 3 years.

	<b>Article 3(f)</b>	<b>Article 3(g)</b>	<b>Article 3(h)</b>	<b>Article 3(i)</b>
	- a fine (up to EUR 5,000)	- a fine (up to EUR 1,904.61)	- a fine (up to EUR 5,000)	- a fine (up to EUR 5,000)
<b>IT</b>	<u>Intent and Negligence</u> - 1 – 6 months - a fine (up to EUR 4,000)	<u>Intent and Negligence</u> - 3 months – 1 year - a fine (EUR 3,000 - EUR 103,291.27)	<u>Intent and Negligence</u> - up to 18 months - a fine (of min. EUR 3,000)	<u>Intent and Negligence</u> - up to 2 years - a fine (up to 3 times the value of the substances used for production purposes, imported or placed on the market)
<b>LT</b>	<u>Intent</u> - up to 4 years - fine (up to EUR 37,650)	<u>Intent</u> - up to 4 years - fine (up to EUR 37,650)	<u>Intent and Negligence</u> - up to 5 years - a fine (up to EUR 37,650)	<u>Intent</u> - up to 2 years - a fine (up to EUR 18,825)
<b>LU</b>	<u>Intent and Negligence</u> - 8 days - 6 months - a fine (EUR 251 – EUR 750,000)	<u>Intent and Negligence</u> - 8 days - 6 months - a fine (EUR 251 – EUR 750,000)	<u>Intent and Negligence</u> - 8 days - 6 months - a fine (EUR 251 – EUR 750,000)	<u>Intent and Negligence</u> - 1 year - 3 years - a fine (EUR 251 – EUR 500,000)
<b>LV<sup>61</sup></b>	<u>Intent and Negligence</u> - up to 5 years - a fine (up to 200 times the minimum monthly wage - EUR 56,914)	<u>Intent and Negligence</u> - up to 2 years - a fine (up to 100 times the minimum monthly wage - EUR 28,457)	<u>Intent and Negligence</u> - up to 5 years - a fine (up to 200 times the minimum monthly wage - EUR 56,914)	<u>Intent and Negligence</u> - up to 4 years - a fine (up to 200 times the minimum monthly wage - EUR 56,914)
<b>MT</b>	<u>Intent</u> up to life imprisonment and/or a fine (EUR 12,000 - EUR 2,500,000) <u>Negligence</u> up to 6 years or a fine (up to EUR 11,646.87)	<u>Intent</u> up to life imprisonment and/or a fine (EUR 12,000 - EUR 2,500,000) <u>Negligence</u> up to 6 years or a fine (up to EUR 11,646.87)	<u>Intent</u> up to life imprisonment and/or a fine (EUR 12,000 - EUR 2,500,000) <u>Negligence</u> up to 6 years or a fine (up to EUR 11,646.87)	<u>Intent</u> up to life imprisonment and/or a fine (EUR 12,000 - EUR 2,500,000) <u>Negligence</u> up to 6 years or a fine (up to EUR 11,646.87)
<b>NL</b>	<u>Intent</u> - up to 6 years - a fine (EUR 78,000) <u>Negligence</u> - up to 1 year - fine (EUR 19,500)	<u>Intent</u> - up to 6 years - fine (EUR 78,000) <u>Negligence</u> - up to 1 year - fine (EUR 19,500)	<u>Intent</u> - up to 6 years - a fine (EUR 78,000) <u>Negligence</u> - up to 1 year - fine (EUR 19,500)	<u>Intent</u> - up to 6 years - a fine (EUR 78,000) <u>Negligence</u> - up to 1 year - fine (EUR 19,500)
<b>PL</b>	<u>Intent</u> - up to 5 years - a fine (EUR 25 - EUR 175,000) <u>Negligence</u> - up to 2 years	<u>Intent</u> - 3 months to 5 years - a fine (EUR 25 - EUR 175,000) <u>Negligence</u> - up to 2 years	<u>Intent</u> - up to 2 years - a fine (EUR 25 - EUR 175,000) <u>Negligence</u> fine (EUR 25 - EUR 175,000)	<u>Intent</u> - up to 2 years - a fine (EUR 25 - EUR 175,000) <u>Negligence</u> A fine (EUR 25 - EUR 175,000)

<sup>61</sup> Fines are expressed as a minimum monthly wages which usually changes every year.

	Article 3(f)	Article 3(g)	Article 3(h)	Article 3(i)
	- a fine (EUR 25 - EUR 175,000)	- a fine (EUR 25 - EUR 175,000)		
<b>PT</b> <sup>62</sup>	<u>Intent</u> - 1 month – 3 years - a fine (10 - 600 days, i.e. EUR 50 – EUR 300,000) <u>Negligence</u> - 1 month - 1 year - a fine (10 - 360 days, i.e. EUR 50 – EUR 180,000)	<u>Intent</u> - 1 month – 1 year - a fine (10 - 240 days, i.e. EUR 50 – EUR 120,000) <u>Negligence</u> fine (10 - 120 days, i.e. EUR 50 – EUR 60,000)	<u>Intent</u> - 1 month – 3 years - a fine (10 - 600 days, i.e. EUR 50 – EUR 300,000) <u>Negligence</u> - 1 month - 1 year - a fine (10 - 360 days, i.e. EUR 50 – EUR 180,000)	<u>Intent</u> - 1 month – 1 year - a fine (10 - 240 days, i.e. EUR 50 – EUR 120,000) <u>Negligence</u> - 1 – 6 months - a fine (10 - 120 days, i.e. EUR 50 – EUR 60,000)
<b>RO</b>	<u>Intent</u> - 3 months – 10 years - a fine (EUR 1,111 – EUR 22,200) <u>Negligence</u> - 1.5 months – 2 years - a fine (EUR 67 – EUR 3,300)	<u>Intent</u> - 3 months – 20 years - a fine (EUR 67 – EUR 13,300) <u>Negligence</u> - 1.5 months – 6 months - a fine (EUR 667 – EUR 3,300)	<u>Intent</u> - 3 months – 10 years - a fine (EUR 6,600 – EUR 13,300) <u>Negligence</u> fine (EUR 67 – EUR 3,300)	<u>Intent</u> : 6 months – 3 years <u>Negligence</u> : 3 months – 1.5 years
<b>SE</b>	<u>Intent</u> - up to 6 years - a fine (up to EUR 17,250) <u>Negligence</u> - up to 2 years - a fine (up to EUR 17,250)	<u>Intent</u> - up to 4 years - a fine (up to EUR 17,250) <u>Negligence</u> - up to 2 years - a fine (up to EUR 17,250)	<u>Intent and Negligence</u> fine (up to EUR 17,250)	<u>Intent and Negligence</u> - up to 2 years - a fine (up to EUR 17,250)
<b>SI</b> <sup>63</sup>	<u>Intent</u> - 30 days – 3 years - a fine <u>Negligence</u> 6 months – 3 years	<u>Intent</u> - 30 days – 5 years - a fine <u>Negligence</u> 6 months – 3 years	<u>Intent</u> - 30 days – 8 years - a fine <u>Negligence</u> - up to 3 years - a fine	<u>Intent</u> - 30 days – 5 years - a fine <u>Negligence</u> - up to 2 years - a fine
<b>SK</b> <sup>64</sup>	<u>Intent</u> up to 2 years or a fine (EUR 160 and EUR 331,930 )	<u>Intent</u> 6 months - 3 years or a fine (EUR 160 and EUR 331,930 )	<u>Intent</u> up to 2 years or a fine (EUR 160 and EUR 331,930 )	<u>Intent</u> 1 - 8 years or a fine (EUR 160 and EUR 331,930 ) <u>Negligence</u> 6 months - 5 years

<sup>62</sup> The daily fine unit is set by the court and ranges between EUR 5 – EUR 500.

<sup>63</sup> The fine imposed must be an amount of between 30 and 360 times the daily wage of the perpetrator.

<sup>64</sup> The court may impose a fine between EUR 160 and EUR 331,930 on the offender of an intentional criminal offence whereby he gained or tried to gain material benefit.

	Article 3(f)	Article 3(g)	Article 3(h)	Article 3(i)
UK <sup>65</sup>	<u>Conviction on indictment</u> Unlimited fine <u>Summary conviction</u> - up to 6 months - a fine (up to EUR 5,750)	<u>Conviction on indictment</u> - up to 5 years - unlimited fine <u>Summary conviction</u> - up to 6 months - fine (up to EUR 5,750)	<u>Conviction on indictment</u> - up to 2 years - unlimited fine <u>Summary conviction</u> - up to 12 months - fine (up to EUR 22, 997)	<u>Conviction on indictment</u> Unlimited fine <u>Summary conviction</u> Fine (up to EUR 5,750)

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<sup>65</sup> Summary convictions and convictions on indictment are selected for less serious and more serious cases respectively.

It should be noted up-front that considering only minimum and maximum sanctions as done in the table above, although it allows a certain degree of comparison is also over-simplifying and this for different reasons.

Firstly, sanctions – imprisonment and fines – are looked at in isolation without taking into account other accessory criminal sanctions and the existence of aggravating and mitigating circumstances, which facilitate the adoption of sanctions which are proportionate, in particular to the seriousness of the damage caused or likely to be caused. These aspects are analysed in Sections 4.2 and 4.3. Another important factor is the practical implementation of sanctions. In some countries, the sanctions actually decided by the courts would typically stay in a far narrower range than the one set forth by legislation.

Secondly, for some countries (e.g. Hungary and Slovakia), a separate set of articles regulates the criminal offences when they result in human death or serious injury to any persons, while offences resulting in endangerment of or damage to the environment are regulated separately and do not cover health damage. In such cases, the sanction may be set in combination depending on the results of the offence. Therefore, ideally, the sanctions should be described depending on the results of the offence in addition to intent and negligence. The situation can be further complicated by the fact that the relevant provisions distinguish between different types of damage.

Hungary is a striking example. If environment damage/endangerment is considered (not homicide or serious injury), Article 280 of the Criminal Code is the main provision. It is a broad catch-all provision, which punishes conducts causing or likely to cause environmental damage. The level of the sanction is differentiated in accordance with *mens rea*, but also depending on the seriousness of the result (endangerment or damage to the extent that the environment original state could be restored, endangerment or damage to the extent that the environment original state could not be restored), with less severe sanctions in case of endangerment and when the environment can be restored. In relation to Article 3(b) conducts, the main transposing provision is Article 281/A of the Criminal Code, which qualifies as an offence unlawful waste management, regardless of environmental damage. However, in case of environmental damage, this provision will apply in combination with Article 280 of the Criminal Code. To further consider health damage, the sheer number of possible combinations depending on the type of offence, the results, the mental element, the seriousness of the damage can be considerable. Therefore, when describing the minima and maxima set for each of Article 3 offences in Hungary, we have chosen to refer to the sanctions provided for by the main provision e.g. Article 281/A in relation to Article 3(b) conduct in combination with Article 280 i.e. the conduct has resulted in an environmental damage/endangerment. However, with regard to Article 3(c) conduct on waste shipments, as the Directive does not set a condition of damage or endangerment and that the conduct is covered by the same Article 281/A of the Criminal Code, the sanctions are defined as those of Article 281/A without combining them with the sanctions set forth by Article 280.

Notwithstanding the limitations to the analysis described above, the comparison of sanctions shows that, on the whole, there are still significant disparities across Member States as to the level, range and way of setting sanctions.

#### *The level and range of sanctions*

The level of sanctions varies to a significant extent from one Member State to another.

Table 6 below reflects the maximum fine that can be imposed on natural persons. A first glance shows a great disparity between the maxima imposed in the different countries, more than between different conducts in a same country. The term 'Not Applicable (N/A)' is used in relation to Belgium when a particular jurisdiction is not competent to set a criminal sanction. When the legislation does not provide for criminal fines, the expression 'no fine' is used. The term 'gap' is used when there is a gap in the transposition of the relevant provision of Article 3, and hence, no sanction due to the lack of an offence.

To nuance this, a few elements should be kept in mind:

- As explained above, these maxima do not reflect all the subtleties of the system in place in each country according to the exact conduct sanctioned and its seriousness.
- In addition, some legal systems in place, such as the ‘unlimited fine’ under conviction by indictment in the UK do not reflect the actual level of fine that would be imposed by the judge in practice.<sup>66</sup>
- Finally, it should be noted that the table reflects the level of fines in the Member States (converted into Euros when the country is using another currency), without adjustment with regard to the value of money and the purchasing power parity in the different countries.

**Table 6 Maximum levels of fines applicable to natural persons (Euros)**

	Article 3(a)	Article 3(b)	Article 3(c)	Article 3(d)	Article 3(e)	Article 3(f)	Article 3(g)	Article 3(h)	Article 3(i)
<b>AT</b>	1,800,000	1,800,000	1,800,000	1,800,000	1,800,000	1,800,000	1,800,000	1,800,000	1,800,000
<b>BE</b>									
<b>FED</b>	42,000,000	N/A	24,000,000	N/A	12,000,000	600,000	12,000	600,000	24,000,000
<b>FL</b>	3,000,000	3,000,000	3,000,000	1,500,000	N/A	3,000,000	3,000,000	3,000,000	1,500,000
<b>WR</b>	6,000,000	6,000,000	6,000,000	6,000,000	N/A	600,000	Gap	600,000	6,000,000
<b>BR</b>	450,000	600,000	600,000	600,000	N/A	150,000	150,000	450,000	450,000
<b>BG</b>	25,000	25,000	2,500	15,000	10,000	10,000	10,000	5,000	2,500
<b>CY</b>	500,000	500,000	500,000	500,000	500,000	500,000	500,000	500,000	500,000
<b>CZ<sup>67</sup></b>	1,460,000	1,460,000	1,460,000	1,460,000	1,460,000	1,460,000	1,460,000	1,460,000	1,460,000
<b>DE</b>	10,800,000	10,800,000	10,800,000	10,800,000	10,800,000	10,800,000	10,800,000	10,800,000	10,800,000
<b>DK</b>	No minima or maxima fine levels are set by law.								
<b>EE</b>	The level of the fine is linked to the offender's income.								
<b>EL</b>	500,000	500,000	500,000	500,000	500,000	500,000	500,000	500,000	500,000
<b>ES</b>	No fine	No fine	No fine	168,000	No fine	288,000	288,000	288,000	288,000
<b>FI</b>	The level of the fine is linked to the offender's income.								
<b>FR</b>	150,000	150,000	75,000	150,000	75,000	150,000	300,000	150,000	75,000
<b>HR</b>	The level of the fine is linked to the offender's income								
<b>HU</b>	380,106	380,106	380,106	380,106	380,106	380,106	380,106	380,106	380,106
<b>IE</b>	15,000,000	15,000,000	500,000	3,000	500,000	500,000	63,486	500,000	500,000
<b>IT</b>	51,700	52,000	26,000	No fine	51,643	4,000	1,030,291	from 3,000	See below
<b>LT</b>	37,650	37,650	37,650	37,650	56,745	37,650	37,650	37,650	18,825
<b>LU</b>	750,000	750,000	100,000	125,000	25,000	750,000	750,000	750,000	500,000
<b>LV</b>	56,914	42,686	56,914	28,457	56,914	56,914	28,457	56,914	56,914
<b>MT</b>	2,500,000	2,500,000	2,500,000	2,500,000	2,500,000	2,500,000	2,500,000	2,500,000	2,500,000
<b>NL</b>	78,000	78,000	78,000	78,000	78,000	78,000	78,000	78,000	78,000
<b>PL</b>	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000
<b>PT</b>	300,000	300,000	300,000	300,000	300,000	300,000	120,000	300,000	120,000
<b>RO</b>	22,200	22,200	6,600	15,550	15,550	22,200	13,300	13,300	No fine.
<b>SE</b>	17,250	17,250	17,250	17,250	17,250	17,250	17,250	17,250	17,250
<b>SI</b>	The level of the fine is linked to the offender's income.								
<b>SK</b>	331,930	331,930	331,930	331,930	331,930	331,930	331,930	331,930	331,930
<b>UK</b>	No minima or maxima fine levels are set by law.								

In spite of these elements, some important disparities exist between Member States. For instance, the fines that can be imposed in Bulgaria, Sweden, Lithuania or Romania are relatively insignificant (below EUR 50,000) compared to the very high fines available in Belgium- Wallonia, Germany, Ireland (for some offences) and the UK (above EUR 10 million). Interestingly, disparities can even be observed between the different regions in Belgium, with for a same conduct a maximum conviction of EUR 450,000 in the Brussels-Capital region and EUR 6,000,000 in Wallonia.

<sup>66</sup> For example, please see sub-section titled ‘sanctions imposed in practice’ in section 3.2 of the UK National Report.

<sup>67</sup> A monetary penalty is imposed only where the offender sought to secure or secured for themselves or for another person any material benefit for intentional crimes.

With regard to imprisonment in general, the same disparities exist. Maximum imprisonment sanctions range from life imprisonment to a few months, and even in certain cases, no imprisonment sanctions are provided for. For example foreseen sentence for criminal offence contained in Article 3(d) of the Directive in Malta is up to life imprisonment while in Latvia it is a fine. Other cases in which only fine is foreseen are Belgium for Article 3(f) and 3(h) (federal level), Sweden also for Article 3(h) and the UK in relation to Article 3(i).

Similarly to Table 6, Table 7 gives an overview of maximum imprisonment sanctions for each of the Article 3 offences across Member States. It also uses the term 'Not Applicable (N/A)' in relation to Belgium when a particular jurisdiction is not competent to set a criminal sanction. When the legislation does not provide for imprisonment, the expression 'none' is used. The term 'gap' is used when there is a gap in the transposition of the relevant provision of Article 3, and hence, no sanction due to the lack of an offence.

**Table 7 Maximum levels of imprisonment applicable to natural persons**

	Article 3(a)	Article 3(b)	Article 3(c)	Article 3(d)	Article 3(e)	Article 3(f)	Article 3(g)	Article 3(h)	Article 3(i)
<b>AT</b>	Life	Life	1 year	Life	Life	3 years	3 years	3 years	1 year
<b>BE</b>									
<b>FED</b>	10 years	N/A	3 years	N/A	10 years	None	3 months	None	3 years
<b>FL</b>	5 years	5 years	5 years	2 years	N/A	5 years	5 years	5 years	2 years
<b>WR</b>	3 years	3 years	3 years	3 years	N/A	6 months	Gap	6 months	3 years
<b>BR</b>	3 years	5 years	5 years	5 years	N/A	2 years	2 years	3 years	2 years
<b>BG</b>	20 years	20 years	4 years	15 years	15 years	5 years	5 years	3 years	4 years
<b>CY</b>	10 years	10 years	10 years	10 years	10 years	10 years	10 years	10 years	10 years
<b>CZ</b>	3 years	2 years	1 year	3 years	16 years	3 years	3 years	3 years	1 year
<b>DE</b>	15 years	15 years	15 years	15 years	15 years	5 years	5 years	15 years	5 years
<b>DK</b>	2 years	2 years	2 years	2 years	Gap	1 year	1 years	1 year	2 years
<b>EE</b>	5 years	5 years	1 year	1 year	5 years	5 years	5 years	5 years	1 year
<b>EL</b>	20 years	20 years	20 years	20 years	20 years	20 years	20 years	20 years	20 years
<b>ES</b>	12 years	2 years	2 years	2 years	5 years	2 years	2 years	2 years	3 years
<b>FI</b>	6 years	6 years	None	6 years	10 years	2 years	2 years	2 years	2 years
<b>FR</b>	3 years	3 years	2 years	3 years	2 years	2 years	2 years	2 years	2 years
<b>HR</b>	15 years	15 years	15 years	15 years	15 years	8 years	8 years	8 years	3 years
<b>HU</b>	20 years	18 years	3 years	20 years	20 years	3 years	3 years	3 years	3 years
<b>IE</b>	5 years	5 years	3 years	1 year	3 years	3 years	2 years	3 years	3 years
<b>IT</b>	3 years	3 years	6 years	3 years	8 years	6 months	1 year	18 months	2 years
<b>LT</b>	10 years	6 years	3 years	6 years	10 years	4 years	4 years	5 years	2 years
<b>LU</b>	5 years	5 years	6 months	6 months	1 year	6 months	6 months	6 months	3 years
<b>LV</b>	4 years	4 years	5 years	None	5 years	5 years	2 years	5 years	4 years
<b>MT</b>	Life	Life	Life	Life	Life	Life	Life	Life	Life
<b>NL</b>	Life	6 years	6 years	6 years	12 years	6 years	6 years	6 years	6 years
<b>PL</b>	8 years	5 years	5 years	8 years	5 years	5 years	5 years	2 years	2 years
<b>PT</b>	10,67 years	10,67 years	3 years	10,67 years	10,67 years	3 years	1 year	3 years	1 year
<b>RO</b>	Life	Life	15 years	5 years	Life	10 years	20 years	10 years	1.5 years
<b>SE</b>	6 years	6 years	2 years	2 years	2 years	6 years	4 years	None	2 years
<b>SI</b>	12 years	12 years	12 years	12 years	8 years	3 years	5 years	8 years	5 years
<b>SK</b>	10 years	8 years	8 years	10 years	Life	2 years	3 years	2 years	8 years
<b>UK</b>	5 years	5 years	2 years	2 years	5 years	6 months	5 years	2 years	None

### *Differences in the way of setting fines*

The Member States follow different approaches to define the level of fines. In some cases, both minima and maxima are defined e.g. Croatia, Luxembourg and Portugal. However, in many countries, the legislation provides for a maximum without indicating a minimum. In only two Member States, Denmark for all offences and the UK in case of conviction on indictment, there is no minimum or maximum set for fines, therefore giving a lot of discretion to the courts.

A practice common to several Member States is the calculation of the fines on the basis of daily units. This is the case in Austria, Czech Republic, Estonia, Germany, Finland, Hungary, Portugal, Slovenia and Spain. The legislation would as a rule fix a minimum and a maximum number of daily units and a minimum and maximum level for one daily unit, leaving to the judge's discretion the setting of the amount of the daily unit and the number of units depending on the circumstances of the case and the socio-economic situation of the offender. Some national criminal systems are even linking the level of the daily unit to the offender's income e.g. in Estonia the daily unit is based on the average daily income of the offender and the court should impose a sanction between 30 to 500 daily units. In Croatia, Finland and Slovenia, the level of the daily unit is also linked to personal income, and the legislation provides for a minimum and a maximum number of daily units.

Finally, in Latvia, the maximum fine is expressed as a multiple of the minimum monthly wage, which would be adapted on a yearly basis. This allows reflecting the economic situation of the country. This is also the case in Belgium, which operates a unique system whereby the level of fines as set in the legislation is corrected for inflation by so-called 'additional decimes'. Each so much in a while, this correction factor is adapted to the cost of daily life. The correction factor equals for offences committed until 31/12/2011: x5.5 and for offences committed since 01/01/2012: x6.

In only one case, namely Italy in relation to the illegal handling of ozone depleting substances (Article 3(i)), the amount of the fine depends on the value of the substances used for production purposes, imported or placed on the market.

### *Differentiation according to the conducts*

Only three countries (Cyprus, Greece and Malta) do not differentiate the sanctions depending on the conduct. It is interesting to note that these countries are those which have transposed the Directive in a quasi-literal way through a specific act. The assessment of effectiveness, proportionality and dissuasiveness in these countries has been carried out on the basis of national benchmarks (comparison with sanctions available in other sectors of national law) and EU benchmarks (annulled Council decisions). The assessment showed that, despite the fact that these countries do not differentiate the sanctions depending on the conduct, the sanctions are considered effective, proportionate and dissuasive. This can be mainly explained by reference to the high maximum penalties that these Member States have set for all types of conduct. However, there are specific problems linked to transposition through a specific act. As explained in section 2.1.3, the creation of a separate act may hamper integration into the criminal legal justice system. As a result, the legislation risks not being applied.

In the other countries, the level of sanctions – both imprisonment and fines – is differentiated according to the conduct considered. There are no obvious common trends across all Member States as to which conduct would be liable to the highest sanction. If one looks at the maximum imprisonment sanctions, the highest sanction is often set for Article 3(a), (b) and (e) conducts, while Article 3(g) and (i) conducts are often liable to less severe sanctions. This may reflect the possible seriousness of the potential damage attached to these offences although it is not clear why, for example, Article 3(g) offences, which relate to international trade of protected species under CITES should be considered as less serious. This may be explained by the fact that it is not linked to possible harm to human health, although, as noted by the Belgian expert, this is one of the main areas of *organised international*

*environmental crime*. Similarly, breaches of the ODS Regulation cannot cause directly a person's death or serious injury.

*Differentiation according to the mental element of the offence*

Sixteen Member States (Austria, Bulgaria, Croatia, Denmark, Estonia, Germany, Greece, Hungary, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain) systematically distinguish between intent and negligence, setting higher sanctions for the former. As explained in section 3.1.1., seven of them (Belgium (Brussels-Capital Region), Cyprus, France, Italy, Latvia, Lithuania and Luxembourg) do not make any differentiation depending on the *mens rea*.

**Table 8 Sanctions applicable to legal persons**

MS	3(a)	3(b)	3(c)	3(d)	3(e)	3(f)	3(g)	3(h)	3(i)
<b>AT</b>	The sanctions for legal persons correlate to the respective length of imprisonment set for natural persons, with a fine of minimum 40 daily units (corresponding to an imprisonment of up to 1 year) to a maximum of 180 daily units (corresponding to a lifelong imprisonment). One daily fine spans between EUR 50 and 10,000. If the corporation is non-profit oriented, serves humanitarian or church purposes the daily unit shall amount to at least EUR 2 and maximum EUR 500.								
	up to 180 daily units, i.e. EUR 1,800,000	up to 180 daily units, i.e. EUR 1,800,000	up to 55 daily units, i.e. EUR 550,000	up to 180 daily units, i.e. EUR 1,800,000	up to 180 daily units, i.e. EUR 1,800,000	up to 70 daily units, i.e. EUR 700,000	up to 100 daily units, i.e. EUR 1,000,000	up to 70 daily units, i.e. EUR 700,000	up to 55 daily units, i.e. EUR 550,000
<b>BE</b>	The numbers sometimes summarise data: when the transposition of one same Art. 3 offence happened through several federal or regional offences sanctioned by fines with different minima and maxima, the table only mentions the lowest minimum and the highest maximum fine that applies to legal persons. This situation is coded by adding an * to the penalty levels. The fine levels have been multiplied with the current 'opdecimenen' (now x6).								
<i>Fed</i>	EUR 3,000 – 84,000,000*	N/A	EUR 3,000 – 48,000,000 *	N/A	EUR 1,500 – 12,000,000	EUR 3,000 – 600,000	EUR 1,500 – 36,000*	EUR 3,000 – 600,000	EUR 3,000 – 48,000,000
<i>FL</i>	EUR 3,000 – 6,000,000*	EUR 3,000 – 6,000,000*	EUR 3,000 – 6,000,000*	EUR 53,000 – 3,000,000	N/A	EUR 3,000 – 6,000,000*	EUR 3,000 – 6,000,000*	EUR 3,000 – 6,000,000*	EUR 3,000 – 3,000,000
<i>WR</i>	EUR 3,000 – 120,000,000	EUR 3,000 – 120,000,000	Gap EUR 3,000 – 120,000,000	EUR 3,000 – 120,000,000	N/A	EUR 3,000 – 1,200,000	Gap	EUR 3,000 – 1,200,000	Gap EUR 3,000 – 120,000,000
<i>BR</i>	EUR 3,000 – 900,000*	EUR 3,000 – 1200,000*	EUR 3,000 – 1200,000*	EUR 9,000 – 1200,000*	N/A	EUR 3,000 – 300,000	EUR 3,000 – 300,000	EUR 9,000 – 900,000	EUR 3,000 – 300,000
<b>BG</b>	Legal persons are not criminally liable for these offences								
	up to EUR 500,000 <sup>68</sup>	up to EUR 500,000 <sup>56</sup>	up to EUR 500,000 <sup>56</sup>	up to EUR 500,000 <sup>56</sup>	up to EUR 500,000 <sup>56</sup>	up to EUR 500,000 <sup>56</sup>	up to EUR 500,000 <sup>56</sup>	up to EUR 500,000 <sup>56</sup>	up to EUR 500,000 <sup>56</sup>
<b>CY</b>	Same as for natural persons: up to EUR 500,000								
<b>CZ</b>	Fine is imposed in terms of daily rates, the total number of which shall be at least 20 and at most 730 full daily rates. A daily rate shall amount to at least EUR 40 and at most EUR 80,000 per day. Hence, fines can theoretically range from EUR 800 to 58,400,000. Daily rates are determined by the court on the basis of various preconditions.								
<b>DE</b>	Quasi-criminal fines up to EUR 1,000,000 (intent) and up to EUR 500,000 (negligence)								
<b>DK</b>	Fines applicable for natural persons are applicable for legal persons - Unlimited								
<b>EE</b>	EUR 3,200 to 16,000,000								
<b>EL</b>	Same as for natural persons: EUR 3,000 to 500,000 (intent) – up to EUR 150,000 (negligence)								
<b>ES</b>	The fine is expressed on number of days, with each day carrying with it a monetary fine. The monetary fine per day varies from EUR 30 to 5,000 for legal persons.								
	1 – 5 years (up to EUR	3 months – 3 years (up to	3 months – 3 years (up to	3 months – 3 years (up to	Only administrative	Only administrative	Only administrative	Only administrative	1 to 3 years (up to EUR

<sup>68</sup> but not less than the equivalent of the benefit when it is of financial nature, or if the benefit is not of purely financial nature or its size can not be determined, a penalty of EUR 2,500 to 50,000. These are established in the Law on Administrative Violations and Sanctions. Other sanctions are provided for in sectoral legislation and are, as a rule, less severe.

<b>MS</b>	<b>3(a)</b>	<b>3(b)</b>	<b>3(c)</b>	<b>3(d)</b>	<b>3(e)</b>	<b>3(f)</b>	<b>3(g)</b>	<b>3(h)</b>	<b>3(i)</b>
	9,000,000)	EUR 5,400,000) or 2 to 4 times the value of the damage caused	EUR 5,400,000) or 2 to 4 times the value of the damage caused	EUR 5,400,000) or 2 to 4 times the value of the damage caused	finest up to EUR 30,000,000	finest from EUR 500 to 2,000,000	finest from EUR 500 to 2,000,000	finest from EUR 500 to 2,000,000	5,475,000) or 2 to 4 times the value of the total damage
<b>FI</b>	EUR 850 to 850,000								
<b>FR</b>	up to EUR 750,000	up to EUR 750,000	up to EUR 375,000	up to EUR 750,000	up to EUR 375,000	up to EUR 150,000	up to EUR 500,000	up to EUR 375,000	up to EUR 375,000
<b>HR</b>	EUR 1,966 to 1,966,100	EUR 1,966 to 1,966,100	EUR 1,966 to 1,966,100	EUR 1,966 to 1,966,100	EUR 1,966 to 1,966,100	EUR 1,966 to 1,572,800	EUR 1,966 to 1,572,800	EUR 1,966 to 1,572,800	EUR 655 to 1,310,374
<b>HU</b>	The maximum level of fine is three times the financial benefit gained or aimed to be gained, but at least 500,000 HUF (EUR 1,737)								
<b>IE</b>	Fines applicable for natural persons are applicable for legal persons.								
	Up to EUR 3,000 (summary) – up to EUR 15,000,000 (indictment)	Up to EUR 3,000 (summary) – up to EUR 15,000,000 (indictment)	Up to EUR 3,000 (summary) – up to EUR 500,000 (indictment)	Up to EUR 3,000 (summary)	Up to EUR 5,000 (summary) – up to EUR 500,000 (indictment)	Up to EUR 5,000 (summary) – up to EUR 500,000 (indictment)	Up to EUR 1,904 (summary) – up to EUR 63,487 (indictment)	Up to EUR 5,000 (summary) – up to EUR 500,000 (indictment)	Up to EUR 5,000 (summary) – up to EUR 500,000 (indictment)
<b>IT</b>	One quota is between EUR 258 and EUR 1,549								
	150 – 300 quotas (up to EUR 464,700)	up to 300 quotas (up to EUR 464,700)	150 – 500 quotas (up to EUR 774 ,500)	No sanction available	400 – 800 quotas (up to EUR 1,239 ,200)	up to 250 quotas (up to EUR 387,250)	up to 250 quotas (up to EUR 387,250)	150 - 250 quotas (up to EUR 387,250)	150 - 250 quotas (up to EUR 387,250)
<b>LT</b>	Up to EUR 1,882,530								
<b>LU</b>	up to EUR 3,000,000	up to EUR 1,500,000	up to EUR 200,000	up to EUR 250,000	up to EUR 50,000	up to EUR 1,500,000	up to EUR 1,500,000	up to EUR 1,500,000	up to EUR 1,000,000
<b>LV</b>	There are no criminal sanctions provided for legal persons. But, where the criminal offence has been done for the benefit and interests of legal person, coercive measures may be imposed on that legal person, including ‘monetary levies’, which is a fine of not less than 1,000 times and not more than 10,000 times the minimum monthly wage. Based on 2012 level, the ‘monetary levies’ range from EUR 284,570 to 2,845,700.								
<b>MT</b>	A fine of EUR 11,647 to 2,329,373								
<b>NL</b>	Pursuant to the Act on Economic Offences, fine up to EUR 780,000. Pursuant to the Penal Code, legal persons can be subject to higher fines, i.e. one category higher than for natural persons. Currently, these levels of the six categories vary from EUR 390 (Category 1) to EUR 780 000 (Category 6).								
<b>PL</b>	Fine between EUR 250 and 1,250,000, but not higher than 3% of the yearly income of the entity								
<b>PT</b>	The daily fine unit is set by the court, between EUR 100 and 10,000.								
	10 -1280 days (up to EUR 12,800,000)	10 -1280 days (up to EUR 12,800,000)	10 – 600 days (up to EUR 6,000,000)	10 -1280 days (up to EUR 12,800,000)	10 -1280 days (up to EUR 12,800,000)	10 – 600 days (up to EUR 6,000,000)	10 – 240 days (up to EUR 2,400,000)	10 – 600 days (up to EUR 6,000,000)	10 – 240 days (up to EUR 2,400,000)

<b>MS</b>	<b>3(a)</b>	<b>3(b)</b>	<b>3(c)</b>	<b>3(d)</b>	<b>3(e)</b>	<b>3(f)</b>	<b>3(g)</b>	<b>3(h)</b>	<b>3(i)</b>
<b>RO</b>	EUR 1,118 – EUR 201,298	EUR 1,118 – EUR 201,298	EUR 1,118 – EUR 201,298	EUR 1,118 – EUR 134,198	EUR 1,118 – EUR 201,298	EUR 1,118 – EUR 134,198	EUR 1,118 – EUR 201,298	EUR 1,118 – EUR 134,198	EUR 1,118 – EUR 134,198
<b>SE</b>	A fine of EUR 550 to 1,100,000								
<b>SI</b>	For the offences for which the prescribed punishment for a natural person is under three years of imprisonment, the maximum fine is EUR 500,000. For the offences for which the prescribed punishment for a natural person is over three years, only the minimum fine of EUR 50,000 is prescribed for the legal person, which means that the maximum amount may reach EUR 1,000,000.								
<b>SK</b>	Confiscation of a sum of money between EUR 800 to 1,660,000								
<b>UK</b>	Same as for natural persons								
	Unlimited on indictment								

### *Sanctions applicable to legal persons*

In five Member States (Cyprus, Denmark, Greece, Ireland, the UK) the same level of fines applies to both natural and legal persons.

In the remaining Member States, the fines are differentiated, with higher ones potentially applicable to legal persons. Sometimes, the level of the fines set for legal persons is linked to that set for natural persons. This is for example the case in Austria where the maximum fine for the legal persons corresponds to the maximum length of imprisonment set in case the offence is committed by a natural person, with a fine of minimum 40 daily units (corresponding to an imprisonment of up to one year) to a maximum of 180 daily units (corresponding to a lifelong imprisonment). Similarly, in Croatia the amount of the fines for legal persons depends on the maximum prison sentence that can be imposed to a natural person for a similar offence, distinguishing between maximum imprisonment sentences of one, five, 10 or 15 years. Another example is Slovenia. For the offences for which the prescribed punishment for a natural person is under three years of imprisonment, the maximum fine is EUR 500,000 for a legal person. When the prescribed punishment for a natural person is over three years, the maximum amount of the fine for a legal person may reach EUR 1,000,000. In the Czech Republic, the fines are calculated on the basis of daily rates. While a daily rate amounts to at least EUR 4 and at most EUR 2,000 per day for natural persons, it ranges between EUR 40 and EUR 80,000 for legal persons.

In some Member States, the level of the fines may be linked to the cost of the damage or the financial benefit. For example, in Spain, offences under Article 3(b), (c), (d) and (i) are prescribed in two ways – as minimum and maximum amount but also as two to four times the cost of the total damage caused. In Hungary, the maximum level of fine is three times the financial benefit gained or aimed to be gained, but at least EUR 1,737.

In Poland, the fine is limited in function of the revenues of the legal person as the sanction cannot be higher than 3% of the yearly income of the entity.

Finally, the maximum level of fines varies drastically from one Member State to another, from EUR 50,000 in Luxembourg for Article 3(e) offences to an unlimited amount in Denmark and the UK in case of conviction on indictment (for all criminal offences). The maximum level of fine sometimes varies significantly depending on the offence considered within one Member State. This is the case in 10 Member States (including the UK in case of summary conviction). For example, Austria distinguishes between Article 3(a), (b), (d), (e) for the top end with maximum applicable fine of 180 daily units, while Article 3(c) and (i) are at the low end with a maximum applicable fine of 55 daily units. Article 3(g) offences have a maximum fine of 100 daily units. For the remaining offences (Article 3(f) and 3(h)), the maximum fine is 55 daily units. Differences are also logically observed in countries where sanctions are set in sectoral legislation.

## **4.2 Other accessory criminal sanctions**

Accessory criminal sanctions group a number of criminal sanctions and measures which apply in addition to fines and imprisonment. Some of these additional sanctions can represent a heavy financial burden such as the rehabilitation of the premises or the forfeiture of illegal benefits. While fines and imprisonment are clearly of a punitive nature, these other sanctions may have also a remedial function. Remedial sanctions are of particular importance to ensure the effectiveness of the sanctioning system. A typical remedial sanction, which is however found in a limited number of countries, is the obligation to repair the damage caused (Belgium in some cases, Cyprus, France, Luxembourg and Poland).

Several Member States do not provide for such sanctions. However, the criminal sanctions must then be seen together with the possibility to impose administrative sanctions of a remedial nature in

addition to the criminal sanctions. For example, in Portugal, if a certain conduct is covered by an administrative offence, an administrative sanction shall be applied which can be combined with accessory criminal sanctions. The Danish legislation provides for the use of both administrative enforcement measures and criminal sanctions in conjunction. Regulatory guidance, including the Environmental Protection Agency's guidelines on enforcement of the Environmental Protection Act<sup>69</sup> and the Instructions from the Director of public prosecutions concerning judicial procedures for environmental infringement, advises the use of either and/or both where it is considered proportionate under the circumstances<sup>70</sup>. Administrative measures will thus be used with the option to resort to criminal prosecution where e.g. operators have breached their permit conditions or where administrative procedures are not complied with. In Ireland and in the UK, the vast array of administrative enforcement measures primarily of remedial nature compensates for the lack of accessory criminal sanctions. However, this is not the case in all 27 Member States. In Italy for instance, administrative sanctions exist alongside (but are not cumulative with) criminal sanctions. This means that a single conduct cannot be punished with both a criminal and an administrative sanction. The system of administrative sanctions was indeed established (by Law n. 689/81) in order to de-criminalize certain conducts which were considered, until that point, as misdemeanours.

Confiscation of items used for committing the offence and forfeiture of illegal benefits are very common in many Member States (e.g. Austria, Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Luxembourg, the Netherlands, Poland, Romania, Slovenia and Sweden). Some countries further specify this type of sanctions. For example, in Denmark, the Environmental Protection Act prescribes that where profits cannot be confiscated e.g. because the profit cannot be documented or determined, this shall be considered when evaluating the level of the fine, including the possibility to impose additional fines.

Another type of sanction which is often provided for by national legislation is the revocation of various permits such as industrial permits or hunting licenses (e.g. Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Greece, Lithuania, Malta, the Netherlands, Slovenia, Spain). The temporary or permanent closure of industrial installations is also met in several national legal orders (e.g. Austria, France, the Netherlands, Malta, Portugal, Romania and Spain), as well as winding up the legal person (e.g. Croatia, Denmark, Hungary, Luxembourg, Malta, Slovenia and Spain).

Other accessory criminal sanctions which are found in several countries include prohibition of performance of public contracts, participation in public tenders, receiving grants and subsidies (e.g. Croatia, Czech Republic, France, Greece, Luxembourg, Poland, Portugal, Romania and Spain). Confiscation of property is also a rather common accessory sanction (e.g. Croatia, Lithuania). For natural persons, several countries provide for the prohibition to exercise a professional activity, generally in specific cases (e.g. Croatia, France, Italy, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Spain).

The publication of the judgment, as a rule at the offender's expense (e.g. Czech Republic, France, Greece, the Netherlands, Poland, Portugal and Romania) is also used in some countries as an additional measure and is seen as very effective. Bad publicity has a strong deterrent effect, in particular vis-à-vis legal persons. This is shown for example by the up-take of the so-called fixed penalty procedure (*bødeforlæg*) in Denmark. The majority of environmental offences are settled now through this procedure, whereby the prosecution service in a fixed penalty notice can propose that the

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<sup>69</sup> It is available in Danish only on the web site of the Danish EPA.

<http://www2.mst.dk/udgiv/publikationer/2005/87-7614-833-5/pdf/87-7614-834-3.pdf>. The title in Danish is "Miljøstyrelsens vejledning nr 6/2005 om vejledning om håndhævelse af miljøbeskyttelsesloven" (last accessed 23 February 2013).

<sup>70</sup> Only available in Danish "Rigsadvokatens meddelse nr. 8/2008 om behandlingen af miljøstraffesager" at the web site of the Director of public prosecutions: [http://www.rigsadvokaten.dk/media/RM\\_8-2008.pdf](http://www.rigsadvokaten.dk/media/RM_8-2008.pdf) (last accessed 23 February 2013).

matter be settled without trial. The procedure is applicable to natural and legal persons. It is a prerequisite for the simplified procedure that the defendant plead guilty of the offence, agrees that the matter be settled with payment of the fine set out in the fixed penalty notice and that the fine is paid within the deadline set out in the fixed penalty notice. Fines sentences issued through fixed penalty procedure are not made public. According to interviewed practitioners, one of the main incentives for the offender to accept a fixed penalty notice is that it avoids bad publicity should the criminal case otherwise be deferred to the Court. The same remark has been made in Sweden, where a prosecutor noted that publicity has a real deterrent effect, underlying that Swedish companies are very sensitive to publicity when it comes to environmental offences as this constitutes bad will in Sweden.

### 4.3 Aggravating and mitigating circumstances

There are general and special aggravating and mitigating circumstances. General ones are applicable to all criminal offences, not only environmental ones, and are usually the same for natural and legal persons in most of the cases. Most Member States have such general provisions typically within their Criminal Code and which sets out a list of aggravating and mitigating factors. Aggravating and mitigating circumstances can also be included in the relevant provisions in relation to specific offences. In some other Member States (Bulgaria, Belgium, Ireland, the Netherlands and the UK), aggravating and mitigating circumstances are determined through case law rather than in legislation. For those Member States where they are set in legislation, the level of detail and the number of aggravating and mitigating circumstances can vary greatly. In particular in most Eastern countries and Italy, the circumstances are numerous and quite specific.

Aggravating and mitigating circumstances are generally linked to the degree of the offender's liability, his/her motivation, the seriousness of the damage or injury caused by the offence, the circumstances in which the offence was committed, the offender's past behaviour and conduct after committing the offence, the offender's personal and financial circumstances, the benefits expected or gained through the offence.

Amongst the most commonly used aggravating circumstances are:

- Seriousness of the damage, which can be estimated according to various criteria e.g. the value of the item damaged in Bulgaria, Czech Republic, the irreversibility of the damage (France, Germany, Hungary), the duration and scale of the damage (Spain). Many Member States set higher sanctions for actual damage than for endangerment. In several countries, the fact that criminal offence results in homicide and/or serious injury can also be considered as an aggravating circumstance, which can be further differentiated depending on the number of dead or injured persons, the seriousness of the caused injury. This is to be compared to countries where harm to persons would be typically condemned under general provisions, e.g. Hungary as described in section 4.1, and where the offence will be subject to cumulative sanctions.
- Achieved economic advantage (Denmark, Greece, the Netherlands and Poland).
- Offence committed in an organised group/association (Czech Republic, Latvia, Lithuania and Romania).
- Offence committed taking advantage of or in connection with the exercise of a profession (Croatia, Denmark, Estonia, Italy, Latvia and Slovakia).

A particular note should be made in relation to recidivism. While many experts have considered that it constitutes an aggravating circumstance, it may also be seen as a specific case characteristic, that is one of the elements used to characterise the offence itself and corresponding sanctions rather than one aggravating circumstances amongst others (see for example Belgium).<sup>71</sup>

<sup>71</sup> See National Report for Belgium, p.29.

Mitigating circumstances sometimes mirror the aggravating circumstances e.g. cooperative behaviour versus lack of cooperation of the offender. Typical mitigating circumstances include:

- Voluntary action to stop the offence or remediate to /limit its polluting consequences (Austria, Belgium, Croatia, Estonia, Italy, Lithuania, Poland, Portugal, Romania, Slovakia).
- Cooperative behaviour (Austria, Bulgaria, Czech Republic, Estonia, Germany, Greece, Italy, Latvia, Lithuania, Poland, Romania, Slovakia) e.g. the offender has spontaneously reported his/her illegal conduct to the authorities, the offender has cooperated with the authorities.
- Low danger of the conduct (Bulgaria, Greece, Italy).
- Motivation (Austria, Bulgaria, Croatia, Czech Republic, Estonia, Italy, Latvia).
- Personal situation of the offender e.g. low income (Bulgaria, Lithuania), state of distress (Croatia, Czech Republic, Lithuania, Slovakia), difficult personal situation (Estonia, Latvia), pregnancy (Latvia), diminished legal capacity (Lithuania), socio-economic status (the Netherlands).
- Length of time elapsed since the offence (Austria, Bulgaria, the Netherlands).

Some Member States have different set of aggravating and mitigating circumstances for legal persons. With regard to legal persons, the most commonly met are the amount of the benefits obtained from the offence and the seriousness of the damage caused, while mitigating circumstances would typically include cooperative behaviour and remediation of damage.

In addition to general aggravating and mitigating circumstances, some countries provide for aggravating and mitigating circumstances that are applicable to individual criminal offence and are generally embedded in the relevant provisions of the law. Examples of such specific circumstances are as follows:

- In Belgium, at the Federal level, criminal offence in regards to ionising radiation will be more severely sentenced if committed in times of war. In the Brussels-Capital Region, in relation to Article 3(f), (g) and (h), aggravating circumstances include instances when the offence was committed during the reproductive season of the animal or by a custom-house employee, a forest guard, or an environmental inspector.
- In France, for criminal offences stipulated in Article 3(f), 3(g), 3(h), the fact that the offence took place in a national park, is an aggravating circumstance.
- In Germany, in case the criminal offences stipulated in articles 3(f) and 3(g) are committed on a habitual or commercial basis, the imposed sentence will be more severe.
- In Sweden, in relation to Article 3(f) and (g), and for offences committed by natural persons, the seriousness of the offence is evaluated with regard to the species concerned i.e. if the conduct relates to a species that is particularly endangered, rare or otherwise worthy of protection, the sanction will be more severe. The same applies if the act has been part of a crime carried out systematically and over a long period of time, on a large scale or for profit.

The application of aggravating and mitigating circumstances constitute an important element to ensure the proportionality and the deterrent effect of sanctions. The consideration of these circumstances allows adapting the severity of the sanction to the seriousness of the damage caused or to the particular situation or attitude of the offender. The setting of higher penalties in case of recidivism or aggravating circumstances have a dissuasive effect.

#### **4.4 Overall assessment of effectiveness, proportionality and dissuasiveness**

Sanctions applied against environmental offences must be effective, proportionate and dissuasive, both for natural and legal persons, pursuant to Articles 5 and 7 of the Directive. This section provides an overall assessment of effectiveness, proportionality and dissuasiveness of the sanctions set forth by

Member States in their transposing legislation. The first sub-section briefly describes the three criteria and possible benchmarks to assess whether or not the sanctions set by national legislation comply with these criteria. The second sub-section evaluates how Member States transposition actually ensures conformity (or not) with this requirement.

#### **4.4.1 The criteria of effectiveness, proportionality and dissuasiveness: general remarks**

The criteria of effectiveness, proportionality and dissuasiveness are still vague notions. They are not defined by EU legislation and the case law of the Court of Justice of the European Union is rather limited on this topic.

In the Greek Maize Case,<sup>72</sup> the Court ruled that while the choice of penalties remains within their discretion, Member States must ensure that infringements are penalised under conditions, both procedural and substantive, which, in any case, make the penalty effective, proportionate and dissuasive.

With regard to the principle of proportionality, the CJEU has consistently held that, in order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it.<sup>73</sup>

In another case, the Court specified the notion of dissuasiveness looking specifically at the procedural aspects rather than the penalty itself (e.g. time period between the date of control and the initiating of the sanctioning procedure, number of fines actually paid).<sup>74</sup> Based on literature and case law, the three criteria can be defined as follows:

*Effectiveness:* penalties are capable of ensuring compliance with EU law and achieved the desired objective  
*Proportionality:* penalties adequately reflect the gravity of the violation and do not go beyond what is necessary to achieve the desired objective  
*Dissuasiveness:* penalties have a deterrent effect on an offender, who should be prevented from repeating the offence, and on other potential offenders, who should be prevented from committing the said offence.

Effectiveness of a sanction should be examined also in light of the function of the penalty set, for which there can be said to be three main functions:

- 1) Deterrence (dissuasion)
- 2) Prevention of future harm
- 3) Restoration of harm that occurred in the past

Effectiveness therefore requires that the penalty furthers the overall aim of the legislation, in this case to reach a high level of protection of the environment. The effectiveness of a penalty will therefore depend upon its ability to create specific and general deterrence, which is closely related to the requirement of dissuasiveness. However, the penalty should also aim at restoration of harm and

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<sup>72</sup> 21 September 1989, Case 68/88 Commission v. Hellenic Republic [1989] ECR I-2965.

<sup>73</sup> 16 March 2006, Case C-94/05, Emsland-Stärke GmbH v Landwirtschaftskammer Hannover [2006] ECR I-2619; 9 November 1995, Case C-426/93, Federal Republic of Germany v. Council of the European Union [1995] ECR I-3723 and 14 July 2005, Case C-26/00, Kingdom of the Netherlands v. Commission [2005] ECR I-6527.

<sup>74</sup> 22 December 2008 Case C-189/07, Commission v. Kingdom of Spain.

equally aim at the prevention of future harm. These functions are therefore important as indicators of the effectiveness of a particular environmental criminal penalty system.

With regard to the dissuasiveness of a penalty, sanctions should be of such a type and magnitude that the expected costs are higher than expected benefits to the offender, which would thus make the sanction both effective and dissuasive.

In considering the proportionality requirement, one has to look at what the particular interests are which are protected by the specific crime. For example, a crime may only protect administrative interests, in which case it would be considered to be less serious than a crime which protects ecological values. At the other end of the scale, certain crimes will seek to protect human interests (human health or life) and are therefore considered the most serious crimes. By comparing the seriousness of the offences, this can then be reflected in the levels of the penalties set.

### *Benchmark*

One of the main means used to assess the effectiveness, proportionality and dissuasiveness of the sanctions was to compare those to benchmarks both at EU and national level.

With regard to benchmarks at EU level, due consideration was given to both the annulled Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law and the annulled Council Framework Decision 2005/667/JHA to strengthen the criminal law framework for the enforcement of the law against ship-source pollution.<sup>75</sup> Framework Decision 2003/80/JHA was adopted by the Council following a proposal for a Directive on the protection of the environment through criminal law, put forward by the Commission in 2001. Framework Decision 2003/80/JHA established environmental offences in a quite similar way to Directive 2008/99/EC. The second Council Framework Decision 2005/667/JHA was introduced at the same time as Directive 2005/35/EC, in order to harmonise the levels of criminal penalties to be provided by the various Member States under the Directive. The Decision set types and level of sanctions for ship-source discharges of polluting substances if committed with intent, recklessly or with serious negligence.

The EUCJ annulled Framework Decision 2003/80/JHA in a 2005 judgment,<sup>76</sup> noting that “*neither criminal law nor the rules of criminal procedure fall within the Community’s competence*” but that, nonetheless, the Community legislator has competence “*when the application of effective, proportionate and dissuasive criminal penalties by the competent authorities is an essential measure for combating serious environmental offences*”. In 2007, the EUCJ annulled the second Framework Decision,<sup>77</sup> ruling that its articles on the definition of the criminal offence and the nature of the penalties violated Article 47 of the EU Treaty by encroaching upon the powers of the Community. However, both Framework Decisions, which had been adopted unanimously by all Member States, can nevertheless be used as a benchmark at the EU level, upon which to assess the effectiveness, proportionality and dissuasiveness of the sanctions set out in national legislation.

Table 9 presents the sanctions provided by both Decisions.

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<sup>75</sup> 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, OJ L 255/164, 30.9.2005

<sup>76</sup> 13 September 2005, Case C- 176/03 Commission v. Council [2005] ECR I-7879.

<sup>77</sup> 23 October 2007, Case C-440/05 Commission v. Council [2007] ECR I-9097.

**Table 9 Sanctions set by the annulled Council Framework Decisions**

	<b>Natural persons</b>	<b>Legal persons</b>
Annulled Council Framework Decision 2003/80/JHA	At least in serious cases, penalties involving deprivation of liberty which can give rise to extradition (one year). <sup>78</sup>	None
Annulled Council Framework Decision 2005/667/JHA	<p>Maximum of at least between <b>1 and 3 years of imprisonment</b> (serious cases). In minor cases, where the act committed does not cause a deterioration of the quality of the water, <b>penalties of a different type</b> may be provided.</p> <p><i>Intentional offences:</i></p> <p>(i) Maximum of at least between <b>5 and 10 years of imprisonment</b> where the offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them and the death or serious injury of persons.</p> <p>(ii) Maximum of at least between <b>2 and 5 years of imprisonment</b> where the offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them or was committed within the framework of a criminal organisation.</p> <p><i>Serious negligence:</i></p> <p>(i) Maximum of at least between <b>2 and 5 years of imprisonment</b> where the offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them and the death or serious injury of persons.</p> <p>(ii) Maximum of at least between <b>1 and 3 years of imprisonment</b> where the offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them.</p>	<p>Criminal or non-criminal fines, which, at least are:</p> <p>(i) of a maximum of at least between <b>EUR 150,000 and EUR 300,000</b>;</p> <p>(ii) of a maximum of at least between <b>EUR 750,000 and EUR 1,500,000</b> in the most serious cases, including at least the intentionally committed offences.</p> <p>MSs may apply a system whereby the fine is proportionate to the turnover of the legal person, to the financial advantage achieved or envisaged by the commission of the offence, or to any other value indicating the financial situation of the legal person, provided that such system allows for maximum fines, which are at least equivalent to the ones above.</p>

Framework Decision 2005/667/JHA set out maximum terms of imprisonment that should apply to natural persons, and maximum levels of fines that should apply to legal persons for each of the offences set out, using a graduated approach by setting different maximum levels depending on whether the offences was a serious case, minor case, intentional offence or committed with serious negligence. In contrast, Framework Decision 2003/80/JHA only sets a minimum level of imprisonment (one year) without distinguishing in function of the seriousness of the offence and does not establish a minimum or maximum level of fines for natural or legal persons.

It should also be noted that the Framework Decisions recommended other penalties or measures for both natural and legal persons. For natural persons, criminal penalties may be accompanied by other penalties or measures such as a fine, or the disqualification for a natural person from engaging in an activity requiring official authorisation or approval, or founding, managing or directing a company or a foundation, where the facts having led to his or her conviction show an obvious risk that the same kind of criminal activity may be pursued.

<sup>78</sup> One year is the usual minimum requirement under extradition/surrender instruments (see e.g. Article 1 of the Framework Decision 2002/584 on the European Arrest Warrant and previously the 1996 Convention on extradition between Member States of the EU).

For legal persons, penalties may, for all cases, include penalties other than fines, such as:

- Exclusion from entitlement to public benefits or aid;
- Temporary or permanent disqualification from engaging in industrial or commercial activities;
- Placing under judicial supervision;
- A judicial winding up order;
- An obligation to adopt specific measures in order to eliminate the consequences of the offence.

With regard to national benchmarks, the analysis considered sanctions set pursuant to national criminal law for offences that can be considered similar or comparable to the conduct covered by the Directive. These included economic crimes, homicide, forest fires, etc. See the National Reports for more details.

#### *Other elements of the assessment*

In relation to the criteria of proportionality, consideration was also given to whether the national system adopts a graduated punishment approach, and the extent to which differentiated penalties are set depending on the seriousness of the offence. In relation to the graduation of punishment, it is important that the range between minima and maxima levels is sufficiently large to allow the judge to fine-tune the actual sentence according to the circumstances of the case.

In the context of this evaluation study, the analysis of three criteria of proportionality, effectiveness and dissuasiveness was based on the information collected on the expert and primarily consisted in an assessment of the sanctions available in national legislation. This did not involve a comprehensive assessment of how the sanctions are implemented in practice. When publically available, the experts also looked at relevant case-law. In addition, a limited number of interviews with practitioners allowed to gather information from those who are involved in the process and who can comment on whether the levels of a particular penalty for a given offence are seen or not as dissuasive in comparison to other penalties for comparable offences.

#### **4.4.2 Overall assessment**

As explained in the previous section, the assessment of effectiveness, proportionality and dissuasiveness by country has been made on the basis of national benchmarks (comparison with sanctions available in other sectors of national law) and EU benchmarks (annulled Council decisions), as well as the national context in general, but also other factors such as the availability and type of other sanctions than imprisonment and fines, procedural aspects, etc. As a result of these comparisons, the national experts concluded to non-conformity in seven countries (Belgium, Estonia, France, Ireland, Italy, Luxembourg and Romania) in the case of Article 5 of the Directive, and in nine countries (Austria, Belgium, France, Hungary, Ireland, Italy, Luxembourg, Romania and Sweden) for Article 7.

The present section simply presents the conclusions reached as to effectiveness, proportionality and dissuasiveness of penalties in each individual Member State and does not intend to discuss them in details. We invite the reader to consult the national reports annexed to this report for further information on these conclusions. It rather aims at providing an overview of the convergences and differences in the approaches taken among Member States, along with an overall comparative assessment of how the Member States have reflected the requirement to set proportionate, dissuasive and effective sanctions. The comparative assessment suggested that transposition in some additional Member States should be considered as ambiguous, in view of the average level of sanctions across Member States.

The five tables presented in Section 4.1 on the Overview of sanctions form the basis of the analysis carried out in this section. They provide for an indication of the variations observed from one country to another in the level of fines and imprisonment foreseen for the conducts listed in the Directive. To a certain extent, they also demonstrate the discrepancies in what is considered effective, proportionate and dissuasive in each Member State in the light of the individual assessments made at national level. It should however be kept in mind when looking at these tables, and when reading the analysis produced in this section, that, given the very broad scope of the Directive, and the variety of the situations it intends to cover, and in the light of the differences in the national legal traditions when it comes to criminal law, the comparison can only be very partial. Besides, it does not reflect the actual implementation and use of the maximum levels foreseen by law, which also play a key role for the assessment of the effectiveness of sanctions.

As the tables, the analysis distinguishes between the levels of imprisonment and the level of fines for all conducts described in Article 3 of the Directive.

### ***Sanctions applicable to natural persons (Article 5)***

Firstly, we provide a summary of all cases for which the national experts have concluded to non-conformity of the transposition of Article 5. In other words, they assessed that the national legislation did not provide effective, proportionate and dissuasive sanctions, within the national context. Secondly, the report examines the sanctions set at national level in a comparative way across Member States. Based on this comparison, the study has identified additional cases where because certain levels of sanctions are not reflected in legislation, transposition is considered as ambiguous despite a positive assessment by the national expert.

#### ***Identified conformity issues***

In several instances, the national studies have concluded to non-conformity of the transposition of Article 5, as follows.

In **Belgium**, at the *Federal level*, the expert has identified a too narrow focus on punitive sanctions. Also at the Federal level, in relation to Article 3(g), there is a specific problem of legislative quality with the criminal punitive sanctions (penalties) enforcing the CITES-regulation, because of the existence of two penalty-sets, one with very low penalties provided by the Law on Nature Conservation and another one provided by the Law approving CITES, that appear to apply equally. In view of the principle that the most lenient sanction should be applied, one can wonder if the dissuasive dimension of the sanction apparatus is met for this EU legislation. Therefore, it is concluded to *incorrect* transposition of Article 5 at the Federal level.

Finally, it is not clear if the administrative transaction system of the *Walloon Region* allows for a proper transposition of the full range of offences covered by Article 3 of the Directive. The reason for this lies with the priority rule that organises its co-existence with criminal sanctioning, as the administrative transaction can cut off access to the criminal track for the offences it applies to. Hence, transposition is assessed as *ambiguous*.

In **Estonia**, Sanctions established for natural persons are not considered severe enough in the Estonian context. When comparing the sanctions set for offences covered by the Directive with those set for other offences (e.g., economic offences such as tax fraud, or falsification of identity documents), causing a significant, long-lasting, or irreparable damage to the environment is not punished as severely as other crimes that would not necessarily have large consequences (e.g., illegal transaction with goods, falsification, or tax fraud). More generally, the sanctions for environmental crimes under Estonian law are modest, to the extent that the Penal Code systematically classifies environmental crimes as second-degree offences (less than five years imprisonment) due to recent modifications in the Penal Code, that are less punitive for infractions related to public interest related issues, such as the

environment. In addition, environmental offences are very rarely prosecuted in practice. This is due to the fact that sanctioning of environmental infractions through administrative law clearly prevails, and to difficulties to collect evidence of significant or serious damage. On this basis, the transposition has been assessed as *incorrect*.

In **France**, the range of sanctions provided in the new Ordinance, which will enter into force in July 2013, seems to meet the criteria of effectiveness, proportionality and dissuasiveness on the whole. On the other hand, some problems in the new legal framework may already be observed. Even though an actual damage is more severely punished in certain cases, it may not be the case for other situations, leading to a ‘two speed’ situation, where stricter sanctions are in place in case of actual damage for some provisions of the Environmental Code, and not for other offences provided in other parts of the Environmental Code or in other pieces of environmental legislation. Regarding the offences of Article 3 not covered by the new Ordinance, the sanctions relating to Article 3(f) regarding the protection of fauna and flora (in most cases, one year imprisonment and a fine of EUR 15,000 and up to two years and a fine of maximum EUR 30,000 for some conducts) are significantly lower than the sanctions applicable in other sectors, except where a fire causes damage to fauna and flora, which is considered a felony. In addition, even though the most serious offences are usually classified as misdemeanours and entail imprisonment, the vast majority of environmental offences are petty offences, subject to a fine of up to EUR 1,500. For all these reasons, transposition is deemed *incorrect*.

In **Ireland**, the Irish courts consider proportionality to be the most fundamental principle in sentencing. In addition, the sanctions available under the relevant legislation are in principle capable of being effective and dissuasive. However, it should be noted, in relation to Articles 3(a), (b) and (d), that only summary prosecution<sup>79</sup> is available under the transposing instruments for Directive 96/82/EC on the control of major-accident hazards involving dangerous substances and for Directive 98/8/EC concerning the placing of biocidal products on the market. As such, the maximum fines are EUR 3,000 and EUR 5,000 respectively. These are not considered to amount to effective and dissuasive sanctions and transposition of Article 5 is considered as *incorrect*.

In **Italy**, apart from one exception, all offences are considered as ‘*contravvenzioni*’. This means that, unlike in case of crimes (‘*delitti*’), for which sanctions are imprisonment up to life and heavy fines, whereas for misdemeanours they consist only in imprisonment no longer than three years and lighter fines. In addition, for many types of misdemeanours, the Italian Criminal Code provides for the possibility to reduce the fine to one third of it (for misdemeanours for which only fines are foreseen) or to pay half of the maximum of the fine provided (for misdemeanours for which also imprisonment is foreseen) before the final ruling. This means that the already light fines can be further reduced. For all these reasons, the system does not foresee ‘effective, proportionate and dissuasive criminal penalties’ and transposition is assessed as *incorrect*.

In **Luxembourg**, in a few cases, criminal sanctions for the breach of the transposing provisions of the EU legal acts listed in Annexes A and B to Directive 2008/99/EC can lead to five years imprisonment and fines up to EUR 750,000. Nevertheless, for some conducts, the sanctions foreseen are much lower e.g. imprisonment up to six months for Article 3(c), (d), (f), (g) and (h) offences. While these low penalties are balanced with a high level of fines, this is not the case for Article 3(c) where the maximum fine is only EUR 100,000 and Article 3(e) where it is EUR 25,000 only. Besides, only abstract endangerment offences (no impairment of health or the environment required) are punished in relation to the conducts described in Article 3(a), (b), (d) and (e). While the sanctions foreseen for Article 3(a), (b) and (c) are probably high enough to address in a proportionate manner a situation

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<sup>79</sup> In summary prosecution, the choice of charge in most cases is decided by Garda (police) officer. Summary offences are tried before a District Court judge sitting alone. Sentence is issued after hearing defense and prosecution. More information on summary prosecution is available at the following link: [http://www.dppireland.ie/filestore/documents/Guidelines for Prosecutors \(Revised Oct07\) ENGLISH1.pdf](http://www.dppireland.ie/filestore/documents/Guidelines%20for%20Prosecutors%20(Revised%20Oct07)%20ENGLISH1.pdf), (accessed on 15 February 2013).

where a significant damage would occur, this is not necessarily the case for the conducts of Article 3(e), where the maximum fine is very low, and imprisonment is of only one year. This is not stringent enough to fulfil the criteria of dissuasiveness considering the potential health and environmental damages the offences involving nuclear materials can cause. Therefore, it is considered that the sanctions provided by Luxembourg, in particular for Article 3(c) and (e) are not effective, proportionate and dissuasive. Transposition is therefore considered *incorrect*.

In **Romania**, because of the legislative technique used for transposition, there are instances where it is impossible to determine the applicable punishment in a specific case. This represents a breach of the principle of legality and predictability. The Constitutional Court of Romania held in its case law that the failure to correlate the level of criminal punishments in various criminal laws impairs constitutional due-process safeguards (*Constitutional Court of Romania, Decision no. 903 of 6 July 2010*). In addition, the proportionality rule is not observed in all situations, as environmental offences described in the Criminal Code resulting in actual damage are sometimes subject to less severe punishments than the same endangerment offences described in sector-specific environmental legislation. Under Article 3(a), at least on one occasion the Romanian legislation sanctions endangerment in Law 101/2011 (Article 5) more severely than concrete harm when substantial (irreversible) damage to the environment had been caused (Article 217 para.1 of Criminal Code). Also, when offences under Article 3(d) of the Directive are perpetrated by negligence, offences related to potential endangerment in Law 101/2011 (Article 10 in relation to Article 5) are sanctioned more severely than offences of actual damage in the Criminal Code (Article 184 and 219 paras.1 and 2).

As a general rule, the criminal sanctions set forth by national law are not aimed at the restoration of harm caused, but at deterrence. However, the court is under an obligation “to order the restoration of the *status quo ante*, prior to the perpetration of the offence”, a notion that is not fully compatible with the specifics of environmental law. As environmental damage is often irreversible, the court should have the legal possibility to order specific remedial action to be taken by the perpetrator when enforcing a specific criminal punishment to ensure effectiveness. In administrative procedures, the administration has the right to enforce specific environmental obligations upon the administrative offender, including restoration of the harm caused, within a specific term. Very few criminal decisions have been identified for the purpose of this study, and in those that have, the Romanian courts enforced rather low criminal fines or a minimum imprisonment term replaced by judicial probation.

For all these reasons, transposition of Article 5 is assessed as *incorrect*.

After reviewing the conformity problems identified in the national reports, imprisonment and financial sanctions are considered in turn, across Member States and in relation to the benchmarks of the annulled Council Framework Decisions and the basis of a comparative analysis across Member States.

#### *Comparative assessment of the level of imprisonment for natural persons*

Imprisonment is a key tool in terms of dissuasiveness of sanctions. Even though usually used as a mean of last resort and for the most severe cases by the courts, deprivation of liberty is recognised as having a strong deterrent effect on potential offenders. An overview of imprisonment sanctions across Member States in relation to each of the offences set by the Directive is provided in Table 7 of Section 4.1.

Imprisonment can be imposed in most cases in the Member States. This is however not the case for the following conducts:

- Article 3(c) in Finland
- Article 3(f) in Belgium (federal level)
- Article 3(h) in Belgium (federal level) and Sweden
- Article 3(i) in the UK,

where only a fine is foreseen. In these instances, it is doubtful that the criterion of dissuasiveness is met. In cases where the Member State does not provide at all for imprisonment, transposition is therefore assessed to be ambiguous. The only exception is Latvia for Article 3(d) as more severe sanctions are anyway available under general provisions on homicide.

Life imprisonment can in theory be imposed in the context of environmental crimes in Austria, the Netherlands, Romania, Slovakia for one or several conducts, and for all Article 3 conducts pursuant to Maltese legislation (in case of death).

As explained above, given the variety of situations covered by the Directive and differences in the nature and the extent of their potential consequences, it is difficult to determine on a general basis what level of imprisonment should be considered as effective, proportionate and dissuasive to enforce the requirements of Directive 2008/99/EC. The annulled Council Framework Decision 2003/80/JHA may however be a starting point. The Decision sets as a minimum one year of imprisonment in serious cases. It is difficult to assess what can be considered as a 'serious case' in the sense of the annulled Decision in the context of Directive 2008/99/EC; and this minimum has been ensured in most cases in the Member States for all Article 3 conducts.

It can however be assumed that at least Articles 3(a), (b), (d) and (e), which potentially involve death and serious injuries, as well as significant damage to the environment, would constitute serious cases. In addition, for these conducts, annulled Council Framework Decision 2005/667/JHA may also be a useful benchmark, as it refers to a maximum of at least between five and ten years imprisonment where the intentional offence having caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them and the death or serious injury of persons; and a maximum of at least between two and five years of imprisonment where the intentional offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them.

In all Member States, the maximum penalty foreseen for Article 3(a) and (b) involve imprisonment of for the lowest maximum two years (for 3(a) in Denmark, for (b) in Czech Republic, Denmark and Spain) and at the highest life imprisonment in Austria, Malta, the Netherlands (only for (a)) and Romania. For Articles 3(d) (Seveso operations) and (e) (nuclear materials), the minimum of one year is also ensured in most countries (with at the lowest one year in Estonia and Ireland for Article 3(d), one year in Luxembourg for Article 3(e)). The exceptions are Latvia and Luxembourg, in case of the operation of a dangerous plant with significant consequences (i.e., Article 3(d)) with respectively no imprisonment and 6 months imprisonment only. This is not considered as high enough to ensure a deterrent effect.

The maximum imprisonment is also usually above one year for crimes related to waste shipment (Article 3(c)) and Ozone Depleting Substances (ODS) (Article 3(i)). However, the sanctions in Luxembourg are particularly low in relation to waste shipment (6 months). For the offence provided under Article 3(i), apart from the UK, which foresees solely a fine and no imprisonment sanction (see above), Austria, Czech Republic, Estonia and Portugal apply the one year minimum for ODS related crimes. Overall, the sanctions for these types of offences are not as high as for endangerment related offences.

Finally, nature protection offences (Articles 3 (f), (g) and (h)) can in most cases lead to imprisonment of at least two years, and, apart from life sentence in Malta, to 20 years in Greece and Romania, only for 3(g) in the latest case. Against this trend, imprisonment does not reach one year in Belgium (fifteen days to three months at federal level for 3(g) and no imprisonment for 3(f) and (h), six months in Wallonia for 3(f) and (h) and no sanction for 3(g)), in Italy (six months for 3(f)), in Sweden (no imprisonment for 3(h)) and in the UK (six months for 3(f) and no imprisonment for 3(i)). In Luxembourg, all three conducts are sanctioned with up to six months imprisonment.

The difficulty to assess on a general basis what level of imprisonment should be considered as effective, proportionate and dissuasive is exacerbated in relation to Article 3(a), (b), (d) and (e) where the definition of the offence includes actual or risk of human death or serious injury. In case that involved death or serious injury, the far more severe sanctions of homicide or inflicting bodily injury may also apply. The availability of these classic criminal offences explains why Latvia has not foreseen imprisonment sanctions in its transposing provisions for Article 3(d). For this reason, Latvia has been considered to have transposed effectively even though imprisonment sanctions are absent. As noted before, many other factors need to be taken into account, such as the national legal framework and circumstances. For this reason, the study does not conclude to ambiguous transposition and rely on national experts' assessment. Nevertheless, it is important to flag these discrepancies, as they are below the benchmark of the annulled Framework Decision 2003/80/JHA.

#### *Comparative assessment of the level of fine for natural persons*

The same variety observed in terms of levels of imprisonment sanctions can be seen with regard to the level of fines. Maximum fines range from a few thousands euros to several millions euros (see Section 4.1 and Table 6). When minima and maxima levels are set, the range of possible sanctions also fluctuates across Member States in a similar way, from thousands to millions of euros. This has a direct influence on the ability of the court to reflect the seriousness of the offence and other circumstances specific to a given case, hence to impose not only dissuasive but also proportionate fines.

The annulled Council Framework Decisions do not provide any benchmark with regard to the level of fines imposed on natural persons.<sup>80</sup> By way of comparing across countries and in the light of the ranges of fines provided by all Member States, one could reasonably conclude that a maximum fine below EUR 100,000 is unlikely to meet the criteria of dissuasiveness. This is of course a rather arbitrary criterion but it appears as a modest threshold as it is still far below the average sanction, which ranges from approximately EUR 825,000 to 1,600,000 depending on the offence, across Member States.<sup>81</sup> Because of this rather conservative way of defining such a threshold and considering the potentially very high cost of some environmental damage (not even talking about human death), the study concludes to ambiguous transposition of Article 5 when the levels of financial fines set in national legislation do not reach this threshold of EUR 100,000. This is the case in:

- Bulgaria in general and in particular for Article 3(c) offences,
- France for all offences except Article 3(a), 3(b), 3(d) and 3(g) offences,
- Italy for all offences with the exception of Article 3(g) and (i) offences,
- Latvia, Lithuania, the Netherlands, Romania and Sweden for all Article 3 offences.

In all countries, the level of fines may differ from the maximum amount indicated in Table 6, section 4.1. Many of the Member States provide for calculation methods to adapt the amount of the fine according to the circumstances of each case. In particular, in quite a few countries (Austria, Czech Republic, Estonia, Finland, Germany, Hungary, Portugal, Slovenia and Spain), the fine is calculated on the basis of daily fines or daily units, the value of which are fixed by the judge in each individual case (as explained under section 4.1). Belgium applies so-called 'opdecimenen', which correct fine levels for inflation. This approach maintains through time a match between fine levels in the legislation and reality. Such mechanisms contribute significantly to both the proportionality and the effectiveness of the sanctions as it is tailored to each situation.

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<sup>80</sup> For legal persons, annulled Framework Decision 2005/667 requires a minimum maximum penalty of at least EUR 150,000. For intentional offences, the minimum maximum fine is set at 750,000. See table 9.

<sup>81</sup> This is calculated not taking into account countries where there is no fine or no maxima.

## ***Sanctions applicable to legal persons (Article 7)***

### ***Identified conformity issues***

Several national studies have concluded that the sanctions applicable to legal persons were not fulfilling the criteria of proportionality, dissuasiveness and effectiveness, as follows:

In **Austria**, the transposing legislation provides that if an entity is sentenced to a fine of not more than 70 daily units, the fine shall be conditionally remitted by fixing a probationary period, if it is assumed that this will be sufficient to keep the entity from committing further offences and there is no need to enforce the payment of the fine in order to counteract commission of offences. Under the same conditions, the law foresees the possibility of dropping charges ('diversion'), where the public prosecutor shall abandon prosecution of a prosecuted entity on grounds of responsibility for a criminal offence if the entity makes good the damage caused by the offence and eliminates other consequences of the offence and gives immediate evidence thereof. The existence of such mitigating factors may appear to weaken the sanctioning system in place in the country.

In addition, daily rates are assessed based on the income situation and financial performance of the company, but are principally determined by yearly proceeds. Therefore, there are doubts whether the law provides for effective, proportionate and dissuasive criminal sanctions for legal persons in cases where the legal person may not have generated profits over the relevant period remains. Consequently, it is questionable whether current sanctions for legal persons in Austria meet the criteria of Article 7. Therefore, transposition is assessed as *ambiguous*.

In **Belgium**, the same remarks made in relation to sanctions set for natural persons apply. At the *Federal level*, there is a too narrow focus on punitive sanctions. Even for legal persons, a general possibility of remedial action through well designed competences (administrative, but also criminal) to give remedial orders to stop the offence, remediate to its consequences and/or avoid its repetition in the future is missing. In relation to Article 3(g), there is a specific problem of legislative quality with the criminal punitive sanctions (penalties) enforcing the CITES-regulation. Therefore, it is concluded to *incorrect transposition* of Article 7 at the Federal level. In the Walloon Region, the transaction system and its impact on the punishability of Article 3(d) conducts forms a case of *ambiguous conformity*.

One conformity issue is specific to Article 7. In *Brussels-Capital Region*, the fines set for legal persons regarding Article 3(g) conducts - maximum EUR 300,000 (50,000 x6) - is considered too low as international trade of specimens (or parts of those) of CITES-species is one of the main areas of *organized international environmental crime*, even if considering the additional sanction of forfeiture of illegal benefits exists. Indeed, practice learns that the use of that sanction is not always possible or easy, certainly in an international crime context. Thus, maximum fine levels giving the possibility to impose a fine that takes off all gains should be guaranteed by the law as a punishment option. Because, additionally, the administrative fining system of the region does not offer a worthy alternative (maximum administrative fine of EUR 125,000) this transposition is considered to be *incorrect*.

In **France**, the level of fines applicable, as well as the broad range of complementary measures, seems to provide the judge with the necessary instruments to adapt the sanctions to the specificity of each case. Sanctions such as the closure of an establishment may have a strong deterrent effect. However, as explained above in relation to sanctions applicable to natural persons (Article 5), the sanctions are much lower for some offences than for others (e.g. Article 3(f)), and concrete danger does not result in higher sanctions for all of the infringements covered by the Directive. This is considered as impairing the requirement of proportionality of sanctions. Therefore, the transposition is assessed as *incorrect*.

In **Hungary**, the 2001 Act on criminal measures applicable to legal persons sets forth the maximum level of fine as three times the financial benefit gained or aimed to be gained, but at least 500,000

HUF (EUR 1,737). This link to the financial benefit gained or likely to be gained by the legal person, rather than to the damage caused by the offence makes the dissuasiveness of the sanction questionable. Although the courts may impose other sanctions, in addition to or instead of fines, transposition is assessed as *ambiguous*.

In **Italy**, the amount of the fines applicable to legal persons ranges from 150 to 800 quotas, i.e. a fine for up to EUR 1,239,200. For many offences, the maximum is either 300 quotas, i.e. EUR 464,700 or 250 quotas i.e. EUR 387,250. Compared to the EU benchmarks, these fines appear too low, since the amounts provided concern already the intentionally committed offences and they are, for the most part, not above EUR 464,700. Transposition is, therefore, considered as *incorrect*.

In **Ireland**, the provisions transposing Article 3(a) and (b) (relating to Directive 98/8/EC only) and Article 3(d) allow for only summary conviction, and the maximum sanction is EUR 3,000. This is not considered to be dissuasive enough. Transposition is therefore assessed as *incorrect*.

In **Luxembourg**, the judge can apply a wide range of different sanctions that he/she can tailor based on each specific case. In particular, the Criminal Code imposes fines to legal persons. For most of them, these fines are in line with the benchmarks of annulled Council Framework Decision 2005/667/JHA. They are however lower for the conducts described in **Article 3(c), (d) and (e)**. This seems to show that the absence of specific sanctions in case of potential or actual impairment of health or the environment under Luxembourg law has an impact on the proportionality of sanctions in some cases. Indeed, whereas the fines are high enough to address the most serious cases for Article 3(a) (EUR 3,000,000) and (b) (EUR 1,500,000), the fines for the offences of Article 3(d) (EUR 250 000) and (e) (EUR 50 000) would probably be too low in case of significant damage. Based on the level of fines available in the law, the criminal sanctions for legal persons are not considered proportionate, dissuasive and effective for the conducts of Article 3(c), (d) and (e). Transposition is therefore *incorrect*.

In **Romania**, the levels of criminal fines applicable to legal entities are rather low, and well below the benchmarks provided in the annulled Council Framework Decision 2005/667/JHA of at least EUR 750,000 for intentional offences. From this standpoint, the sanctions foreseen for legal persons are ineffective. Furthermore, there is no correlation between the level of the applicable fines and the turnover or revenues obtained from the damaging behaviour. In practice, breaches of environmental legislation are often qualified as contraventions, and there is a tendency to qualify illicit behaviours in the environmental field as administrative breaches, rather than initiate more expensive and time-consuming criminal investigation. Dissuasiveness is therefore not ensured. Besides, in theory, deterrence could be obtained by enforcement of complementary punishments applicable to legal entities, which are highly severe, in that they may lead to the very termination of legal personality. However, their enforcement is not mandatory for the judge in case of environmental offences, and no landmark judicial decisions that may be used as an example when dealing with similar environmental offences perpetrated by legal entities were identified. For these reasons, Article 7 is considered *incorrectly* transposed.

In **Sweden**, prosecutors have the right to impose summary fines in the maximum amount of EUR 55,000 while the maximum amount for corporate fines imposed by the courts is 1,100,000. These levels are not considered high enough by practitioners to have a deterrent effect on large business corporations. This is also below the maximum of EUR 1,500,000 set by the annulled Council Framework Decision 2005/667/JHA for the most serious cases. Furthermore, the amounts are set with regard to type of crime and not the size of the company. When compared to other areas within which legal persons are most often subject to criminal liability, such as tax law, sanctions imposed for economic or tax crimes are much more severe than for environmental crime. Therefore, transposition is assessed as *incorrect*.

### *Comparative assessment of the level of fine for legal persons*

Apart from these cases identified in the national studies, for several countries, the maximum level of sanctions for legal persons, either criminal or administrative, appear to fall below the benchmark of EUR 750,000 - 1,500,000 set in the annulled Framework Decision 2005/667/JHA, for the most serious cases, including at least the intentionally committed offences.

This is the case in the following countries:

- Austria in relation to Article 3(c), (f), (h) and (i) offences,
- Bulgaria for all Article 3 offences,
- Croatia for Article 3 (i) offences
- Cyprus for all Article 3 offences,
- Greece for all Article 3 offences,
- France in relation to Article 3(c) and (e) to (i) offences,
- Ireland in relation to all offences, except Article 3(a) and (b) offences,
- Italy for all Article 3 offences with the exception of Article 3(c) and this in addition to the fact that no sanction is set in relation to Article 3(d) offences,
- Luxembourg for Article 3(c), (d) and (e),
- Romania for all Article 3 offences,
- Slovenia for Article 3(f) offences.

This is a preoccupying conclusion, which suggests that environmental crimes are still not considered seriously enough, in relation to legal persons. Besides, as mentioned above, the maximum level of fines varies drastically from one Member State to another, from a few thousands euros to unlimited amount, showing that, in some countries, legal persons are liable to far higher fines than in others. On the other hand, in the overall assessment of dissuasiveness of the sanctions for legal persons, the amount of the fine must be seen in light of the (low) national minimum wage, the (relatively small) turnover and type of companies in a country and the actual fines imposed, i.e. close to the national maximum. Taking into account these aspects, national experts may have concluded that the fines foreseen for legal persons were indeed dissuasive.

Another important consideration is the fact that in some countries, administrative sanctions can also be imposed on legal persons for the same offence. A striking example is Greece where when the criminal sanction is limited to a maximum of EUR 500,000, additional administrative sanctions of up to EUR 2,000,000 can be imposed. However, this raises questions as to the effectiveness of criminal sanctions which are significantly lower than the administrative sanctions for the same offence.

Finally, it should also be noted that even the benchmarks set by the annulled Framework Decision 2005/667/JHA could be seen as not dissuasive enough in very serious environmental crimes, considering the value of human life in case where the offence can lead to homicide or the value of the environmental goods impacted. The cost of preventing pollution is also of importance. Abatement equipment for seriously polluting plants can have a huge cost. If applying the Becker logic, that it is the decision to commit or not the offence is based on an evaluation of the costs to comply versus the costs of not-compliance, the costs of not-compliance being based on the chance of punishment multiply by the penalty that could be inflicted, these levels may easily be considered as too low if meant to be maximum levels for legal persons for the most severe environmental crimes. Such considerations explain that some national experts have assessed even relatively high (in comparison with other countries) level of fines as not dissuasive enough. This is the case in particular in Sweden and Brussels Capital Region (Belgium).

## ***Concluding remarks***

Sanctions of imprisonment and fines should not be considered in isolation and ensuring effective, proportionate and dissuasive sanctions also involves other factors such as the array of accessory sanctions, the use of aggravating and mitigating circumstances, the possibility of combining criminal sanctions with administrative ones, in particular remedial sanctions.

As stated by the Commission in its 2010 Communication on reinforcing sanctioning regimes in the financial services sector, ‘Whether sanctions meet these requirements [effectiveness, proportionality and dissuasiveness] depends on a number of factors, such as the nature and level of the sanctions provided for by law, the institutional and procedural settings governing their application, the effective detection of infringements and the actual application of the sanctions provided for by law.’<sup>82</sup> While this study is more focused on the levels of sanctions in the context of Directive 2008/99/EC, it should be noted that for assessing whether sanctions are effective, proportionate and dissuasive or not, the whole sanctioning regime has to be considered, and the other elements of the sanctioning regime may not be ignored.

In this regard, an obstacle to a proper assessment of sanctioning regime in Member States is the general lack of information on how the existing sanctions are applied in practice, due to the fact that the Directive is still in the early days of implementation and that, in many Member States, there is no case law to-date relating to the transposing legislation. Several national experts have mentioned that offences are often imposed at the lower end of the legal spectrum.

### *Need for a minimum level playing field*

A significance variance in the levels of fines and imprisonment for both natural and legal persons has been observed across Member States. In many countries, the levels of sanctions used as benchmark are not met for natural and/or legal persons. This suggests that environmental crimes are still not considered seriously enough despite a wide recognition of their potential gravity, organised nature and international dimension that would require the possibility to set relatively high sanctions.

As underlined by the Commission in its Communication on EU criminal policy, ‘it is not the primary goal of an EU-wide approximation to increase the respective sanction levels applicable in the Member States but rather to reduce the degree of variation between the national systems and to ensure that the requirements of “effective, proportionate and dissuasive” sanctions are indeed met in all Member States’.<sup>83</sup> This objective can be achieved in the field of environmental crime by setting minimum levels of sanctions at EU level under Article 83(2) of the TFEU, which expressly enables the EU legislator to adopt Directives establishing “*minimum rules with regard to the definition of criminal offences and sanctions in the area concerned*” if this “*proves essential to ensure effective implementation of a Union policy in an area which has been subject to harmonisation measures*”.

It can also be argued that a proper transposition and application of the Directive could ensure that this objective is met. However, while enforcing and promoting the existing instrument is recommended, especially with regard to the Member States for which the most important instances of incorrect transposition have been identified (no imprisonment, very low level of fines), the possibility of establishing minimum levels of sanctions should also be considered, as a way to set a level-playing field across the EU.

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<sup>82</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Reinforcing sanctioning regimes in the financial services sector*, COM(2010)716 final.

<sup>83</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM(2011) 573 final

Given the importance of accessory sanctions, it would also be worth considering the definition of a minimum set of such measures at EU level. The accessory sanctions can prove very valuable in ensuring dissuasiveness. Of particular relevance in this regard is the forfeiture of benefits in order to confiscate all illegal gains as a punitive sanction. The inclusion of the forfeiture of illegal benefits in the minimum set of criminal sanctions for environmental crimes could make a significant difference in this respect. Ultimately, a monetary sanction is a monetary sanction and there are strong indications in theoretical literature as well as empirical work that judges somehow more easily take off gains that should not have been there than inflict high fines.<sup>84</sup> It also allows imposing sanctions proportionate to the financial advantage achieved or envisaged by the commission of the offence. In addition, the provisions of the annulled Council Framework Decision 2005/667/JHA also suggest that systems put in place by Member States in relation to legal persons could also ensure that ‘the fine is proportionate to the turnover of the legal person [...] or to any other value indicating the financial situation of the legal person, provided that such system allows for maximum fines, which are at least equivalent’ to those set in the Decision. Such systems are exceptionally provided for in Member States legislation although the courts would generally consider the financial situation of the legal persons when setting the fine.

Other effective accessory criminal sanctions are the confiscation of items used for committing the offence, the temporary or permanent closure of industrial installations, the prohibition of performance of public contracts and participation in public tenders, the prohibition of receiving grants and subsidies, and, for natural persons, ban to exercise certain professions. Finally, publicity of the court decision at the expense of the offender is also generally seen as an effective deterrent sanction. It is an efficient tool to stigmatise the criminal behaviour of the legal person and reinforce the expression of the social disapproval conveyed through criminal sanctions.

Such a minimum set of sanctions should also provide for both punitive and remedial sanctions. While punitive sanctions such as fines and imprisonment can, if sufficiently high, have a strong deterrent effect and express social disapproval of the illegal conduct, it is also important to ensure the effectiveness of the sanctions in view of their restorative function, and the inclusion of remedial sanctions, primarily the possibility to order restoring the environment to its previous state or temporary suspension of activity, in a set of minimum sanctions could ensure a proper more effective mix.

Another consideration which is important when setting accessory criminal sanctions is the means it takes to make sanctions effective in practice. Confiscation of a truck that was used to transport waste seems rather easy, but it will need to be stocked for a while, and later auctioned or destroyed in which case destruction should be paid for. The closure of installations may be difficult to implement if the offender is not willing to comply. In contrast, publication of the court decision does not involve any specific cost or trouble. The prohibition to participate in public tenders, contracts, to apply for subsidies, grants, for some months or years, however, is really easy to enforce and not costly at all, at least not for the public finances. This aspect of feasibility, workability, should be borne in mind when selecting a set of accessory sanctions.

#### *Linkage with sectoral requirements and complementary administrative sanctions*

The linkage with requirements set in sectoral environmental legislation is provided for in Directive 2008/99/EC through the definition of unlawful and the listing of relevant legislation in Annexes A and B. However, this link is not always clear and this study has necessitated identifying key enforceable

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<sup>84</sup> Theoretical work: R. Bowles, M. Faure and N. Garoupa, “Forfeiture of illegal gain: an economic perspective”, Oxford Journal of Legal Studies Vol. 25/2 (2005), (275); Empirical: C.M. Billiet and S. Rousseau, “Milieucriminaliteit: verbeurdverklaring van wederrechtelijk verworven vermogensvoordelen in cijfers”, T. Strafr. 2012/5, (195) 200 – 202.

obligations of the acts listed in the Annexes to assess transposition in sectoral legislation in the Member States which have followed such an approach.

In this regard, particular attention should be paid to Recital 15 which states that *‘whenever subsequent legislation on environmental matters is adopted, it should specify where appropriate that this Directive will apply. Where necessary, Article 3 should be amended’*. So far, no reference has been made to the applicability of Directive 2008/99/EC in any of the environmental law act adopted after the entry into force of the Directive. For instance, the 2009 Carbon Capture and Storage Directive<sup>85</sup> does not contain any reference to Directive 2008/99/EC. This should be addressed. A cross-reference to Directive 2008/99/EC precisely defining which key obligations within the relevant Directive/Regulation should be sanctioned in accordance with the requirements of Directive 2008/99/EC could be an interesting way to ensure the effectiveness of the Directive.

Also important when considering a sanctioning regime as a whole and not only criminal sanctions for the most serious cases, is the potential definition of sanctions, generally more of an administrative nature, in sectoral environmental legislation. A sectoral approach i.e. through provisions included in individual environmental directives may ensure sanctions which are better tailored to each specific type of conduct. There are several cases where EU environmental regulations and directives set sanctions, which in general apply in case of infringement of just one or a few specific requirements. As a rule, such sanctions have an implicit administrative nature and the vast majority of them aim at remedial action.<sup>86</sup> For example, the newly adopted Directive 2012/18/EU of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC (the so-called Seveso III Directive) provides for prohibiting the use of an establishment, installation or storage facility ‘where the measures taken by the operator for the prevention and mitigation of major accidents are seriously deficient’, taking into account non-compliance with the prescriptions of an inspection report. The Seveso III Directive also includes the standard provision, which places on Member States an obligation to determine effective, proportionate and dissuasive penalties applicable to infringements of the national provisions adopted pursuant to the Directive. Such penalties may be of administrative or criminal nature. Even though very relevant, such provision does not refer to Directive 2008/99/EC, whereas the latter requires, under its Article 3(d), criminal sanctions if the operation of a Seveso plant causes or is likely to cause ‘death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants’. One may wonder if the absence of such reference does not to some extent undermine the place given to Directive 2008/99/EC in the EU environmental legal framework.

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<sup>85</sup> Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006, OJ L140 of 5 June 2009, p.114.

<sup>86</sup> Research project ‘*Environmental Law Enforcement: a Comparison of Practice in the Criminal and the Administrative Tracks*’, <http://www.environmental-lawforce.be/EN/> (last accessed 21 March 2013)

## 5 Conclusion

All Member States have transposed the Directive albeit eight countries have not deemed necessary to amend existing legislation to do so. Among those countries which modified their legislation, twelve amended it significantly or adopted a specific act, while seven introduced only limited amendments, and relied principally on existing legislation.

The main conformity issues identified through the analysis of the national legislation relate to:

- Setting of sanctions for in relation to offences linked to EU Regulations, namely Article 3(c) and 3(i);
- The Directive defines nine conducts that should be qualified as offences when committed unlawfully and intentionally or at least with serious negligence. Several Member States cover only intentional commission and not serious negligence for some offences;
- In several Member States, only an actual damage leads to criminal liability for some of the conducts defined by the Directive as also covering endangerment (Article 3(a), (b) and (d)).
- Conversely, while the conducts described in Article 3(c) and (f) to (i) do not require an endangerment or harm to health or the environment to constitute a crime, these are considered a condition to trigger criminal liability in some cases, resulting in incorrect transposition;
- Finally, the way the national transposing legislation reflects some of the ‘vague notions’ used in Directive 2008/99/EC, namely the concepts of “(non-) negligible quantity (and impact)” in relation to Article 3(c), (f) and (g) and ‘significant deterioration’ with regard to Article 3 (h) has also raised some conformity issues.

The other main common issues of conformity identified when analysing the transposition of Article 3 offences are as follows:

- Article 3(a): in several countries, where the Directive is transposed through sectoral legislation, the transposition is deemed incomplete as not all key offences are subject to criminal sanctions while, in others, instances of incomplete transposition are due to the fact that the discharge, emission or introduction of ionising radiation into the environment are not fully covered.
- Article 3(b): legislation in several Member States does not cover the supervision of waste management operations and the aftercare of disposal sites, and sometimes, action taken as a dealer or a broker.
- Article 3(f): some Member States have not provided for criminal liability for the possession of specimens of protected species.
- Article 3(g): parts and derivatives are not always included in the definition of the offence.

Article 6 of Directive 2008/99/EC provides for the liability of legal persons in relation to the offences described in the Directive. Several cases of incomplete or incorrect transposition have been identified, in particular in relation to the definition of a natural person in a leading position within the legal person and liability in case of lack of supervision or control.

Sanctions applied against environmental offences must be effective, proportionate and dissuasive, both for natural and legal persons, pursuant to Articles 5 and 7 of the Directive. Significant variations in the levels of sanctions for both natural and legal persons have been observed across Member States. In many countries, the levels of sanctions used as benchmark are not met for imprisonment and fines, natural and legal persons. In particular, some Member States have not provided for imprisonment sanctions for some of the Article 3 offences. The levels of fines are very low in some countries compared to EU level benchmarks but also in view of the maximum amounts of fines set by other Member States. This is especially true in relation to sanctions applicable to offences committed by

legal persons. This suggests that environmental crimes are still not always considered seriously enough despite a wide recognition of their potential gravity, organised nature and international dimension that calls for relatively high sanctions.

As underlined by the Commission in its 2011 Communication on EU criminal policy, 'it is not the primary goal of an EU-wide approximation to increase the respective sanction levels applicable in the Member States but rather to reduce the degree of variation between the national systems and to ensure that the requirements of "effective, proportionate and dissuasive" sanctions are indeed met in all Member States'. This objective can be achieved in the field of environmental crime by setting minimum levels of sanctions at EU level. Given their importance of accessory sanctions, it would also be worth considering the definition of a minimum set of such measures at EU level.

## **Annex I**

### **National Reports**