CHAPTER 5

The Competence to Harmonise Environmental Criminal Law in the European Union

5.1 Introduction

In the European Union setting, environmental criminal law could fall into two major policy fields of activity. One of them is the EU policy on the environment which has been supranational particularly since the incorporation of the environmental title into the EC Treaty, and therefore fell in what was previously known as the ‘Community method’ (or ‘first pillar’). On the other hand, a considerable majority of the Member States had argued that there was already a specific forum for cooperation in criminal matters – the so-called third pillar created in 1993 by the Treaty on the European Union (TEU, 1993) – and which therefore provided the correct legal basis for harmonisation of environmental criminal law. So before the ratification of the Lisbon Treaty in December 2009, the Member States appeared to regard co-operation in criminal matters (including legislative harmonisation) as belonging to the third pillar of the EU, being intergovernmental and hence lacking supranational controls.

Therefore, the question of deciding the correct legal basis for a measure harmonising environmental criminal law has permeated the debate on the criminal law powers of the Community/Union under the former Treaty structure of the EU. The outcome of the ECJ decisions in the Environmental Crimes (2005) and Ship-Source Pollution (2007) cases is that important limits have been set to the EC/EU competence in criminal matters, delineating the key features of the directive on environmental crimes adopted in October 20081 and the ship-source pollution directive (2005/2009).2

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This chapter focuses on the question of the competence and mandate of the European Union to harmonise the environmental criminal laws of the EU Member States, in light of the limits of this competence as defined by the jurisprudence of the European Court of Justice. Moreover, it assesses the legal implications of the ratification of the Lisbon Treaty in 2009 to future attempts to harmonise environmental criminal law in the EU; and the extent to which the application and evolution of the general principles of law and EU law (including legality, effectiveness, subsidiarity and proportionality) will limit the power of the EU to adopt environmental crime legislation in future.

5.2 The Competence of the European Union in the Environmental Law Field

The classical dichotomy between environmental and social interests on one side, and economic and trade interests on the other, has been the subject of controversy in both the European Community (‘EC’) and on wider international levels and, not surprisingly, produced the most important body of jurisprudential authority relating to the protection of the environment. Historically the EU maintained an essentially economic-centred policy when the original six Member States signed to the Treaty of Rome in 1957 and formed the European Economic Community (EEC). However, the EEC was not merely another free trade agreement: it had profound political significance. But the first, most attainable objective behind the European integration project then was clearly economic – the establishment of a common market harbouring the free movement of goods, persons, services and capital. The Community has since progressively shifted from a traditionally economic to a more social-orientated policy-making, resulting in fundamental changes – more precisely after the Single European Act (‘SEA’) in 1987 and the Treaty of the European Union (‘TEU’) in 1993 – which would act as a catalyst for the transformation of the Community’s role, as put by one author, ‘from bastion of free trade to van-

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5 Ibid.
6 Ibid.