CHAPTER 6

The Harmonisation of Substantive Environmental Criminal Law and Penalties

6.1 Introduction

As has been seen in the previous chapters, the harmonisation of EU environmental criminal law has taken place under the supranational level following the ECJ Environmental Crimes and Ship-Source Pollution rulings. In this respect, the adoption of the Environmental Crimes Directive on 24 October 2008 marks a significant step in the Union's process of integration, given that for the first time a 'criminal law' measure was adopted under the former 'first pillar'. But the Directive, which was adopted exactly one year after the Ship-Source Pollution ruling, necessarily does not define specific types and levels of penalties or any rules on prosecution or jurisdiction, since the ECJ either ruled out the Community competence in the area – in the case of penalties – or did not clarify whether such competence exists – in the case of rules on police and judicial cooperation.

The objective of this chapter is to assess the methods applied for harmonisation of substantive environmental criminal law adopted under the European Union and the Council of Europe instruments on environmental crime. Moreover, this chapter analyses the extent to which those instruments aim to implement specific international environmental agreements. Specifically, this chapter assesses the specific provisions of those instruments and discusses the legal implications of the different models of harmonisation of environmental criminal law standards in the following areas: criminal offences (including inchoate offences); complicity; corporate criminal liability; jurisdictional and prosecutorial rules; and criminal penalties.

6.2 Criminal Offences

6.2.1 The Classification of Offences

The principal classification of criminal offences in the national legal systems of the EU Member States is according to their gravity. In the UK there are three categories of offences: indictable-only offences (more serious offences), summary offences (minor offences) and triable-either-way offences. Also in France,
Belgium, Greece and Luxembourg there are three categories of offences: serious crimes (crimes), major offences (délit) and minor offences (contraventions). Austria, Germany and Italy have only recognized traditionally two categories of offences according to their gravity: serious offences (Verbrechen/delitti) and other (minor) offences (Vergehen/contravenzioni). The classification of the offences according to their gravity may determine the maximum punishment which may be imposed and under which national court the offence is tried.

The environmental crime directive and shipping directive (as amended in 2009) require Member States to consider certain violation of environmental law as ‘criminal offences’. Even though those Directives do not impose any particular classification of offences on Member States, a purposive or teleological reading of those instruments appears to indicate that the Commission (as well as the Council and the Parliament) considers the offences contained therein to be particularly serious and hence that they should be considered indictable/serious crimes, or at least ‘major offences’ in countries with a tripartite classification. Yet since those Directives do not impose a minimum level of penalties on Member States, they are left with considerable discretion on how to classify those offences under national law, so long as they are considered ‘criminal’. The creation of quasi-criminal offences does not satisfy the requirements of those Directives, as that would defeat many of the purposes envisaged by the Commission when proposing those measures and they are not strictly speaking criminal offences.

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1 Summary of Replies to the Questionnaire on the Approximation of Sanctions (9402/1/01 DROIPEP 50 REV 1) 5 October 2001 at 3–4.
2 For example, in Ireland summary offences are punishable by a maximum of 1 year imprisonment and or a fine of up to EUR 3000. Ibid.
3 For example, in England and Wales summary offences are tried in the magistrate’s court and indictable offences in the Crown Court.
4 See Article 3 of the environmental crime directive; and Article 5 (a) of the ship-source pollution directive.
5 As was discussed in Chapter 2, the European Court of Human Rights applies an autonomous definition of criminal offences.
6 For example, Germany and Austria have a well-established system of administrative criminal sanctions (Ordnungswidrigkeiten). As was discussed in Chapter 2, quasi-criminal sanctions represent a hybrid system of enforcement which lies in between administrative and criminal law. See also, Milieu & Huglo Lepage ‘Summary Report: Study on Measures other than Criminal Ones in Cases where Environmental Community Law has not been Respected in the EU Member States’, 20 September 2004, at 52. (B4-3040A/2003/369724/MAR/A.3).
7 The Commission argues that the criminal law secures an extra guarantee of impartiality and secures the better cooperation between the Member States to deal with cross-border environmental crimes. See further, Chapter 7.