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**Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

on the protection of the environment through criminal law

IMPACT ASSESSMENT

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1. IDENTIFICATION OF THE PROBLEM

The Treaty on the European Community sets an obligation for the Community in Article 174 to guarantee a high level of protection of the environment through its environmental policy. In order to achieve this goal, the problem of environmental crime needs to be tackled. This constitutes a major challenge for the European Union, causing every year significant damages to the health of human beings and animals and to the quality of air, soil and water.

While evidently different tools are required to respond to the challenge of environmental crime, the following analysis examines possible options to respond through criminal law, i.e. notably through common definitions of offences and sanctions applicable to such offences.

1.1. Definition of environmental crime

The notion of environment is a very broad one and is commonly considered to encompass the complex of physical, chemical, and biotic factors that surround and act upon an organism or ecosystem. In the EC Treaty the term environment is not defined. However, it follows from Articles 174(1) and 175(2), which are the basis for Community environmental policy, that the environment covers human beings, natural resources, land use, town and country planning, waste and water.

There are various definitions of environmental crime. It can be defined as comprising acts or omissions which directly or indirectly damage the environment and which constitute a breach of legislation. The fact that the applicable environmental law in a specific situation is infringed will determine the existence of environmental crime. For example, illegal dumping of waste is prohibited by administrative law. If someone dumps waste, he breaches that provision of administrative law and, if the act is also defined as a criminal offence, commits a crime.

There is, however, also a tendency to go further and to protect the environment as such through criminal law. This means that some acts that cause particularly serious damage to the environment can be considered criminal offences independently of whether they constitute a breach of legislation or not. For example, an installation has a permit in accordance with administrative legislation. Despite complying with this permit the installation causes substantial harm to the environment or to persons by emitting certain substances. In such a case criminal responsibility can not be automatically ruled out. Depending on the circumstances of the case, such behaviour can still be considered criminal, even if no breach of administrative legislation has been determined.

At international level, environmental crime is usually defined through the conventions that lay down the rules for the protection of the environment, the most important being:

- 1973 Washington Convention on International Trade in Endangered Species of Fauna and Flora (CITES)¹
- 1987 Montreal Protocol on Substances that Deplete the Ozone Layer²

¹ <http://www.cites.org/index.html>

² http://www.unep.org/ozone/Treaties_and_Ratification/2B_montreal%20protocol.asp

- 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Other Waste and their Disposal.³

The two other areas of environmental crime, not covered by international conventions, are the following:

- Illegal, unregulated and unreported (IUU) fishing in contravention to controls imposed by various regional fisheries management organisations (RFMOs)
- Illegal logging and trade in timber when timber is harvested, transported, bought or sold in violation of national laws. Currently, only endangered species covered by the CITES Convention are protected under an international convention. No international controls over the international timber trade exist for the time being beyond CITES.

Illegal trade in wildlife, illegal trade in ozone-depleting substances and dumping, illegal transport of various kinds of hazardous waste, illegal logging and fishing are therefore traditionally recognised sectors of environmental crime at international level.

Considering the broad definition of "environment" in European law, international law, which is restricted to a few areas of concern, appears too limited in scope for the purpose of defining "environmental crime" for European environmental policy.

Since the 1970s, more than 200 directives and regulations have been adopted under Article 175 of the EC Treaty. According to the broad definition of "environment", the secondary legislation covers largely all aspects of environmental protection, including water and air, noise and chemicals, nature conservation, waste and some measures of a general nature.

On this basis, reference could be made to a list of environmental offences drawn up in preparation of the Council of Europe's Convention on the Protection of the Environment through Criminal Law by a group of experts. In the view of this group, those offences represent the greatest danger to the environment including human beings and should be considered crimes under certain conditions:

- the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water, which causes death or serious injury to any person, or creates a significant risk of causing death or serious injury to any person;
- the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water;
- the unlawful disposal, treatment, storage, transport, export or import of hazardous waste;
- the unlawful operation of a plant;

³ <http://www.basel.int/>

- the unlawful manufacture, treatment, storage, use, transport, export, import of nuclear materials, other hazardous radioactive substances or hazardous chemicals;
- the unlawful causing of noise;
- the unlawful causing of changes detrimental to natural components of a national park, nature reserve, water conservation area or other protected areas;
- the unlawful taking, damaging, killing or trading of or in protected wild flora and fauna species.

1.2. Characteristics of environmental crime

1.2.1. The nature of environmental crime

Environmental crime often affects society as a whole rather than individuals. When the environment is harmed, there is not necessarily an immediate harm to the life, health or property of specific persons. Experience has shown that in practice, where there is no direct victim, there is also often no interest of individuals to seek remediation of the damage. Also, very often the consequences of pollution appear in a different place or a long time after the polluting act has been committed.

Environmental crimes can be trade-related. That is the case for instance for the illegal shipment of hazardous waste where the huge differences of price between legal and illegal treatment of this waste favour such traffic. In the same way, the black market for ozone-depleting substances is important because illegal imports of these substances are far cheaper than chlorofluorocarbons (CFCs) that are legally recycled or obtained from limited existing stocks.

Environmental crimes can, however, also consist of acts that are not related to trade. For instance, the unauthorized discharge of pollutants into the water or the illegal dumping of waste onto or into land, the deliberate killing or destruction of endangered species of fauna and flora, the open-air incineration of hazardous materials may involve huge profits but do not involve any trade.

1.2.2. Extent and scope of environmental crime

As stated above, the concept of environmental crime is very broad and covers a large number of acts. The choice of environmental crimes covered by the present assessment is based on the most important provisions of Community environmental legislation and takes into consideration the offences considered to be the most serious by the Committee of Experts that prepared the Council of Europe's Convention on the protection of the environment through criminal law.

It is not possible to describe all areas of environmental crime in detail. The following illustrates only a few examples: The illegal trade and disposal of waste, the illegal trade in wildlife and the illegal trade in ozone depleting substances were chosen as the biggest and best documented sectors of environmental crime.

Data on environmental crime are obtained through complaints received by police forces or through reports from inspections and investigations carried out by authorities. However, the

extent of unreported environmental offences is considered extremely high. It is obviously difficult to give an estimation of a figure which is in essence a non measurable quantity. However, the estimation of this so-called “dark figure” of hidden or unrecorded crime – difference between the “reported” crime and the “real” figures - ranges from 20% to 40% and even 90% in certain cases⁴. In a survey, 85% of German prosecutors believed that the number of unreported cases of environmental crime is significantly higher than in other crime areas.⁵ This is again partly linked to the special character of environmental crime having in many cases no direct victim, which makes reports to the police by ordinary citizens rarer than in other fields of crime.

The evaluation of environmental crime can also often be biased by the way in which environmental offences are recorded. In many countries, for example, environmental crime may be recorded under “company crime”. In this case, it will be afterwards impossible to identify environmental crime as such.

UNEP estimates the worldwide earnings from illegal trade in environmentally sensitive commodities, such as ozone depleting substances, toxic chemicals, hazardous waste and endangered species at between 22 and 31 billion dollars. According to the International Crime Threat Assessment carried out by the US Government in 2000 environmental crime is one of the most profitable and fastest growing new areas of international criminal activity.⁶

The illegal treatment and shipment of waste probably represents the biggest part of environmental crime. The US Government estimates the earnings for the illicit treatment of waste worldwide at 10-12 billion dollars per year.⁷

The illegal trade in animal parts - in particular elephant, whale and hawksbill turtle parts – and endangered animal species is a very lucrative business, as well. The illegal trade in exotic birds, ivory and rhino horn, reptiles and insects, rare tigers and wild game is estimated by the US Government to earn criminal groups 6-10 billion dollars per year⁸.

UNEP estimated the worldwide illegal trade in ozone depleting substances at 20.000 to 30.000 tons⁹. The volume of illicit CFCs on the market in Europe has been estimated by industry analysts at around 6.500 and 10.000 tonnes in 1998.¹⁰ A more recent study estimates

⁴ Françoise Comte, Environmental Crime and the Police in Europe: A Panorama and Possible paths for the Future, European Environmental Law Review, Volume 15 No 7 July 2006

⁵ Umweltbundesamt, Umweltdelikte 2004, p. 25.

⁶ See International Crime Threat Assessment, available at <http://clinton4.nara.gov/WH/EOP/NSC/html/documents/pub45270/pub45270chap2.html#6>.

⁷ See International Crime Threat Assessment, available at <http://clinton4.nara.gov/WH/EOP/NSC/html/documents/pub45270/pub45270chap2.html#6>

⁸ See International Crime Threat Assessment, available at <http://clinton4.nara.gov/WH/EOP/NSC/html/documents/pub45270/pub45270chap2.html#6>

⁹ United Nations Interregional Crime and Justice Research Institute (UNICRI) – Criminal Organisations and Crimes Against the Environment. A Desktop Study, Rome, 2000

¹⁰ Environment Investigation Agency, A Crime Against Nature – The Worldwide Illegal Trade in Ozone-Depleting Substances, 1998, Chilling Facts about a Burning Issue – CFC Smuggling in the European Union, 1996

the illegal trade of CFCs at 7.000 to 14.000 tonnes a year, representing around 10-20% of legitimate trade, and with an approximate value of between 25-60 million dollars¹¹.

Illegal disposal of waste

At Community level stringent legislation on the treatment of waste has developed over the last thirty years to ensure that waste is recovered or disposed of without endangering human health or the environment. Unfortunately unscrupulous businesses take advantage of the resulting high prices for the treatment of waste and arrange for the waste to be illegally dumped at very low costs.

The case “Ecotruffa” may serve as an example for illegal waste treatment in Italy¹². In July 1998, 20,000 tonnes of potentially dangerous industrial waste were found abandoned in a small village. The environmental police started investigations by controlling the authorisations of the land owner and after 2 years of work, they finally identified a “waste business itinerary” from Milan to Naples. 27 companies with no legal existence were used to obtain false authorisation to collect, transport and store some 31,000 tonnes of waste. The total amount of money generated by these activities is estimated up to 1.5 m €.

Illegal shipments of waste

Trans-boundary movements of waste are regulated at international level by the Basel Convention and at EU level by the Waste Shipment Regulation¹³. The aim is to only allow waste to be shipped to another country, if it can be ensured that it will be treated in an environmentally sound manner at the point of destination.

Recognising that the illegal shipment of waste is a serious problem faced jointly by Member States, IMPEL – the informal network of the environmental authorities of the EU Member States – carried out several projects in the last years to identify the threats posed by illegal shipments of waste and to improve the enforcement of the Waste Shipment Regulation in the EU¹⁴. The projects have yielded important information on the extent of the problem:

- Between 2004 and 2006, the second IMPEL TFS Seaport Project on international cooperation in enforcement hitting illegal waste shipments was carried out. In the framework of this project 11 Member States carried out a total of 4.198 physical checks at a total of 17 European ports. During these checks 1.103 shipments of waste were identified, of which 564 (51%) were illegal. 473 shipments of waste with infractions (43%), like missing or incomplete information, were detected. Only 6% of the waste shipments were in compliance with legislation.

¹¹ Chatham House, Environmental Investigation Agency; ODS Tracking – Feasibility Study on developing a system for mentoring the transboundary movement of controlled ozone-depleting substances between the Parties, Report produced according to the terms of reference of Decision XVII/16, September 2006

¹² Final report “Organised environmental crime in the EU Member States” Study dated 15 May 2003 for the Commission by Betreuungsgesellschaft für Umweltfragen Dr Poppe MbH Umweltgutachtorganisation in cooperation with Max-Planck Institute for Foreign and International Criminal Law Freiburg, (Germany). Case 92; See http://europa.eu.int/comm/environment/crime/organised_environmental_crime_in_member_states.pdf

¹³ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste replacing Regulation (EC) 259/93.

¹⁴ Information on the projects can be found on: http://ec.europa.eu/environment/impel/impel_tfs.htm

- At the same time, the second IMPEL TFS Verification project was carried out. This concerned the control of waste shipments (by road or rail) within Europe 'from cradle to grave', i.e. from the production of the waste to its final treatment. 12 Member States, Croatia and Switzerland participated in the project during which 1.033 inspections were carried out in 59 spots. The findings of the inspections were that 15% of all transports were waste transports 12% of which were illegal.

Illegal trade in endangered species

The international trade in wild animals and plants is regulated by the CITES Convention which aims at ensuring that trade in specimens of wild animals and plants does not threaten the survival of species. For this purpose, the Convention lays down a system of certificates and permits. The EU has implemented the Convention through EC Regulation 338/97.

Wildlife trade covers many different types of animals and plants, including, for example, live or dead animals as collectors' items, products used for Traditional East Asian Medicine (TEAMs), skins and furs, food (including caviar) and timber. Trade flows are orientated from South to North, going mainly from the less developed to more developed countries. Western Europe, and in particular the EU, is important as a market for trade in endangered species and as an intermediate destination¹⁵.

Illegal trade in endangered species is estimated, in terms of profits, as being second in importance only to drug trafficking as a global smuggling activity. Figures from the British Central Office of Information gave the following information: every year as many as 5 million wild birds, 30,000 primates, 15 million furs, 12 million orchids, 8 million cacti and countless other species are sold on the international market. Of the estimated 350 million animals and plants being traded worldwide every year, it is believed that 25% of the transactions are carried out illegally¹⁶.

The European Union is the world's largest importer of CITES specimens. Between 1996 and 2002 the EU-15 imported approximately 6 million live birds, 1.6 million live reptiles, 10 million reptile skins and almost 600 tons of sturgeon caviar. There are no data on the extent of illegal trade in the EU. It appears, however, that illegal commercial trade is closely tied to demand for legal trade and is of greatest concern in Member States with extensive legal trade.¹⁷

The following cases are examples of how such crimes are carried out and handled in different Member States:

- During the "Indiana" operation in the UK¹⁸, it was possible to uncover an important traffic in the field of illegal trade in endangered species. In August 1995, P. visited a Welsh

¹⁵ Switching Channels – Wildlife trade routes into Europe and the UK, a WWF/TRAFFIC report, December 2002

¹⁶ <http://news.bbc.co.uk/1/hi/world/74317.stm>, BBC press release 05/04/1998.

¹⁷ Draft final report 'Study on the Enforcement of EU Wildlife Trade Regulations in the EU-25', by Milieu Ltd (Belgium), September 2006

¹⁸ Final report "Organised environmental crime in the EU Member States" Study dated 15 May 2003 for the Commission by Betreuungsgesellschaft für Umweltfragen Dr Poppe MbH

Umweltgutachtorganisation in cooperation with Max-Planck Institute for Foreign and International Criminal Law Freiburg, (Germany). Case 3. See

http://europa.eu.int/comm/environment/crime/organised_environmental_crime_in_member_states.pdf

taxidermist and asked him to mount an eagle skull. P. indicated to the taxidermist that the skull had to remain hidden. The taxidermist alerted the competent authorities. The skull was seized and the police investigated P's residence. They discovered more than 700 dead animals, birds, mammals and reptiles, the majority of which were rare under the CITES Convention and CITES Regulation (Annex I). The investigation showed that P. exported CITES specimens to the United States, without licences or with licences obtained from the Belgian CITES Management Authority. When this information was given to them, the Belgian police authorities investigated the buildings used in Belgium by P. and discovered even more animals than in Wales. The case was judged in 1996. P. was condemned to 2 years in prison, an example of a severe sentence in this area.

- In 1996, the Austrian customs confiscated 436 tortoises belonging to the CITES Annex A of species threatened with extinction and 15 scorpions¹⁹. During further investigation, 759 adult tortoises and 867 young tortoises were confiscated. The investigation revealed the international implications of the traffic. Tortoises had been obtained illegally in Greece and were to be sold in the Netherlands. The value of the confiscated animals was estimated at 115,000 €. The Court sentenced two men to 8-month imprisonment, to be executed by a 3 years probation period.
- During a control made by Customs in 1999 in Paris Charles de Gaulle airport in France²⁰, a box from Madagascar was discovered, in which 206 tortoises and 31 snakes were dissimulated in a false bottom. A major number of these animals belonged to the annexes A and B of the CITES regulation. 3 persons who had come to the airport in order to collect the box were immediately arrested. The investigation revealed the existence of a second box, similar to the first one. The instigator of this fraud was condemned to 6 months of prison and to a fine of 25,531 €.
- In 1999, the German customs authorities discovered some 1.300 tarantulas, which had been concealed in a cardboard box. These were all adult animals, a large proportion of them pregnant females, whose value was estimated by experts at around 132,930 €. Due to appalling conditions, some 120 animals had already died by the time they were discovered. Further investigations revealed that the defendants were planning to register the mature animals, and in particular their expected young, with the nature conservation authorities as having been bred in captivity, so that the animals could subsequently be sold on the open market²¹.

¹⁹ Final report "Organised environmental crime in the EU Member States" Study dated 15 May 2003 for the Commission by Betreuungsgesellschaft für Umweltfragen Dr Poppe MbH Umweltgutachtorganisation in cooperation with Max-Planck Institute for Foreign and International Criminal Law Freiburg, (Germany). Case 86; See

²⁰ Final report "Organised environmental crime in the EU Member States" Study dated 15 May 2003 for the Commission by Betreuungsgesellschaft für Umweltfragen Dr Poppe MbH Umweltgutachtorganisation in cooperation with Max-Planck Institute for Foreign and International Criminal Law Freiburg, (Germany). Case 106; See

²¹ TRAFFIC Europe, Proceedings of the International Expert Workshop on the Enforcement of Wildlife Trade Controls in the EU, 5-6 November 2001, Frankfurt, Germany page 281, <http://www.traffic.org/proceedings.pdf>. TRAFFIC is the joint wildlife trade monitoring programme of WWF-World Wide Fund for Nature and IUCN-The World Conservation Union.

Illegal trade in ozone-depleting substances

The Montreal Protocol on Substances that Deplete the Ozone Layer stipulates that the production and consumption of substances that deplete the ozone layer in the stratosphere shall be phased out, with specific schedules for each of them that are different for industrialised parties compared to developing countries (principle of common but differentiated responsibilities).

Despite the full phase out of CFCs (chlorofluorocarbons) for domestic use in Industrialised Countries since January 1996, some production of these chemicals is still permitted in the EC for export to developing countries for so-called "Basic Domestic Needs". It seems that part of it is laundered for the European market. There is also evidence of illegal imports of ozone depleting substances in the EC from developing countries, which seems to be increasing as Developing Countries are approaching key phase out dates.

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The biggest case of illegal trade in ozone-depleting substances in the EU to date was the following:

- In 1997 a German enterprise imported some 1.200 tons of CFCs from China, which had been shipped via the Netherlands and Belgium by companies seated in the United Kingdom and Belgium. The company pretended that its CFCs were recycled German CFCs whose trade is legal under existing legislation. They even got a certificate of the Chamber of Commerce confirming the domestic origin. The Chamber of Commerce had not checked the information obtained by the company. Based on information received by the European Union's Anti-Fraud Unit, the national authorities were able to trace the actual origin and start criminal proceedings.²²

1.2.3. Links with organised environmental crime

Organized crime to the detriment of the environment focuses mainly on the three areas already highlighted above, the illicit trade in ozone-depleting substances, illicit hazardous waste treatment and disposal and illicit trade in endangered species.²³ But even beyond those areas, a study has found in 73% of all researched environmental crime cases the involvement of corporations or corporate-like structures.²⁴ This number involves the commitment of environmental offences both by legal businesses and by criminal organisations in the narrow sense.

²² Gallas, Andreas and Werner, Julia, Fifth International Conference on Environmental Compliance and Enforcement, Transboundary environmental crimes: German experiences.

²³ H.-J. Albrecht, "The extent of organized environmental crime", in Comte/Krämer, Environmental Crime in Europe : Rules of Sanctions, 2004, p. 74. See also Europol's Organised Crime Report of 2005.

²⁴ Betreuungsgesellschaft für Umweltfragen, Dr Poppe mbH Umweltgutachterorganisation, Study carried out for the European Commission, 'Organised environmental crime in the EU Member States', 2003, Executive summary, p. III, http://ec.europa.eu/environment/crime/pdf/organised_member_states.pdf

The threat posed by organised crime to the Member States of the European Union is pointed out in more detail in a proposal of the European Commission presented in January 2005 for a Council Framework Decision on the Fight against Organised Crime.²⁵

The Task Force on Organised Crime in the Baltic Sea Region²⁶ reacted to the obvious links between environmental and organized crime by initiating in 2001 a project to counter environmental crime, first in the framework of an ad-hoc working group, later as an Expert Group.

However, the level of involvement of "criminal organisations" in the narrow sense in environmental crime is difficult to determine, mainly because it has been a low priority for law enforcement authorities in some Member States and, as a result, there has been limited intelligence available.

IMPEL, the informal European Network for the Implementation and Enforcement of Environmental Law, in the framework of its Transfrontier Shipment of Waste Threat Assessment Project Report, of 2005 sent a questionnaire to Member States: Out of the ten Member States that answered to the questionnaire, six were of the opinion that there was some link between illegal waste trafficking and a broad range of other crimes, the most common being money laundering. There is no clear picture of the extent to which organised groups are involved in the illegal transboundary shipment of waste.

Specific data is only available on the extent of organised environmental crime in Italy. The business potential of the eco-mafia in Italy is estimated at around 22 billion €. In 2005, 18,8 million tonnes of waste disappeared in Italy, which is equivalent to a mountain with a base of 3 hectares and a height of 1.880 meters²⁷. The organisational structure of the criminal networks usually tends to be very simple, with a maximum of three or four people at the core of the organisation, the availability of manpower for ad-hoc tasks and a large network of links with various professionals or firms²⁸. Those small, informal and loosely structured networks are becoming a more common form of organised crime than traditional 'mafia style' models.

1.3. Underlying causes of environmental crime

1.3.1. High profits

Environmental crimes are normally carried out with the intention of making a profit, either from selling a product or from avoiding certain costs. As can be seen in the previous chapter, big profits can be made from environmental crime. This is mainly based on the fact that in the last thirty years more and more stringent legislation for the protection of the environment has been enacted. This has led to increased costs of complying with legislation and has created a more profitable market for illegal activities.

A good example is the illegal trade in waste which allows for very high profits. The generation of waste has been steadily increasing in the last years. At the same time stricter

²⁵ COM (2005) 6 final

²⁶ <http://www.balticseatactaskforce.fi/intermin/hankkeet/balticseatactaskforce/home.nsf/pages/indexeng>

²⁷ Rapporto Eco-Mafia 2006 – Legambiente

²⁸ Gruppo Abele-Nomos, Legambiente, GEPEC-EC, with the support of the Falcone Programme of the European Commission, DG Justice and Home Affairs, 'The illegal trafficking in hazardous waste in Italy and Spain', October 2003

legislation on waste management has been enacted. The resulting high costs of treating waste have helped create a lucrative market for illegal trafficking and treatment of waste. For instance, it is estimated that, in the late 1980s, ‘the average cost of disposal of one ton of hazardous waste in an OECD country was between US\$ 100 and \$2000 while in Africa it was between US\$2.50 and \$50’²⁹. Nowadays, the incineration of 1 ton of hazardous waste in an incinerator in Germany costs between 100€ and 400 € and in the Netherlands around 115€, which makes it much cheaper to opt for illegal dumping in the EU or in third countries.

With regard to ozone-depleting substances, the ban of their production and use in the EU has led to the emergence of an illegal market. The motivation to acquire ozone-depleting substances illegally is not so much the avoidance of the costs of alternative substances, but the costs related to the conversion of the equipment to the new substances.

Strict legislation for the protection of endangered species has limited trade in animals and plants. At the same time, many species are becoming rarer. For both reasons, prices for endangered species have risen and profits of illegal trade in those species have grown.

1.3.2. Growing international trade

As the volume of international trade is growing, so is the amount of illegal trade in environmentally sensitive commodities.

In the case of waste, it is becoming more and more common that advantage is taken of the growing legal trade in recyclable wastes, such as scrap metals, to mix the recyclable waste with other waste or to falsely declare toxic waste that is destined for dumping as recyclable waste or even as a product. Most of these wastes are shipped to countries in Eastern Europe, Asia and Africa, where disposal costs and enforcement of environmental regulations are lower.

Another factor that influences illegal trade is the growth in tourism. As more people travel, they become more acquainted with certain animals and plants. The demand for such species thus grows. Also the high number of travellers makes it more difficult to control what they import.

The growing use of internet is also perceived by many authorities as contributing to the increase in illegal trade in endangered species³⁰.

1.3.3. Low risk of detection

Offenders of environmental crime face a low risk of detection. This is partly linked to insufficient resources for the prosecution of environmental crime in the Member States. But another reason is the relatively low level of sanctions in some Member States. The low level of sanctions often also has an impact on the investigation methods available to the law enforcement authorities.

²⁹ «International Environmental Crime – The nature and control of environmental black markets» Workshop supported by the European Commission. Report by Gavin Hayman and Duncan Brack., Royal Institute of International Affairs, 2002. See http://europa.eu.int/comm/environment/crime/env_crime_workshop.pdf

³⁰ Milieu Ltd, Orbicon Consulting, ViSKon Aps, Study on the enforcement of the EU Wildlife Trade Regulations in the EU-25, Draft Final Report, September 2006

For example, in Finland the use of technical surveillance requires that the investigation is linked to a crime with a maximum sanction of at least 6 months imprisonment. In Portugal, the interception of mail is allowed for crimes punishable with imprisonment for a term exceeding 3 years.

This link between a certain sanction threshold and specific investigation techniques also and in particular hinders cooperation between the Member States in the investigations of environmental crime which has, as discussed further below, in the majority of cases cross-border implications.

The following two examples may illustrate this:

In Austria, mutual legal assistance for the interception, recording and tracing of telecommunication requires, amongst other things, that it is likely that this measure will be beneficial to the clearing up of an intentionally committed offence punishable by imprisonment for a term exceeding twelve months.

On the level of European judicial cooperation, the issuing of a European Arrest Warrant is only possible (unless the sentence has already been passed) for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months. Issuing a European Arrest Warrant without the condition of dual criminality in the issuing and executing state, which is possible for "environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties", requires that the underlying offence is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum of at least three years. The same system is followed in the new Framework Decision on the European Evidence Warrant. Current Member States legislation would not meet this three-year threshold in most cases and therefore the dual criminality test would apply. This creates difficulties because the discrepancies are currently significant between the legislation of Member States which in addition also still often recur to administrative sanctions.

1.3.4. Insufficient sanctions

The Commission has analysed the sanctions established in the Member States for breaches of environmental legislation.

This analysis leads to the following conclusions:

While all Member States have some kind of sanctions in force for offences against the rules laid down for the protection of the environment, both on the basis of Community law or on purely national environmental protection legislation, there are large differences in Member States' legislation as to which behaviours damaging the environment are considered criminal offences. For example, Portugal considers wildlife trade offences, however severe, never as crimes while all other Member States do, at least in particularly serious cases. Greece and Spain do not have any criminal penalties for the illegal shipment of waste.

There are also large differences in the levels of sanctions for environmental crimes in place in the Member States. The following tables on trade in endangered species and illegal shipment of waste illustrate this further:

Example 1: Regulation (EC) 338/97 on the protection of species of wild fauna and flora³¹

Article 16 of this Regulation provides as follows:

1. Member States shall take appropriate measures to ensure the imposition of sanctions for at least the following infringements of this Regulation (...).

The text lists 13 different possible infringements to the Regulation. For sanctioning these infringements, Member States provide for the following criminal sanctions³²:

State	Fine	Imprisonment
Austria	1.453 – 36.340€	Up to 2 years
Belgium	1.000-50.000€	From 6 months to 5 years
Cyprus	Up to ca. 17.500€	Up to 3 years
Czech Republic	- Natural persons: up to 6.250€ - Legal persons: up to 46.875€ (Act on Trade in Endangered Species) resp. 156260€ (Criminal Code)	Up to 8 years
Denmark	No limitation stated by law, amount determined in Court by the judge.	Up to 1 year
Estonia	Up to 65.000€	Up to 5 years
Finland	16 to 9.500€	Up to 2 years (6 years in severe cases)
France	up to 9.000€	Up to 6 months (Environmental Code) Up to 3 years (10 years in exceptional circumstances) (Customs Code)
Germany	Up to 50,000€	Up to 5 years
Greece	587 (3000 under Customs Code) -14.674€	From 1 month to 2 years
Hungary	20-4.000€	Up to 5 years
Ireland	up to ca. 63,500€	up to 2 years

³¹ Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein; Official Journal L 061, 03/03/1997 p.1

³² Data based on the study conducted for the European Commission by TRAFFIC Europe, 'Implementation of Article 16 Council Regulation (EC) No. 338/97 in the 25 Member States of the European Union', final draft report, 20 June 2006

Italy	From 1.003€ to 103,290€	3 months to 1 year (2 years for second offences)
Latvia	15-14.4000 €	Up to 5 years
Lithuania	Up to 9.250€	Up to 8 years
Luxembourg	From 62,5 € to 25,000€	From 8 days to 6 months
Malta	465-4.967€	From 1 month to 2 years
The Netherlands	-Natural person: up to 45,000€ -Legal person: up to 450,000€	Up to 6 years
Poland	From 5,20€ to 1293€	Up to 5 years
Portugal	- Natural persons: 75-2.494€ - Legal persons: 450-29.928€	n.a.
Slovakia	- Natural persons: 12,50 -7.150€ - Legal persons: 250-24.000€	up to 8 years
Slovenia	- Natural persons: 83-20.800 € - Legal persons: 4.160-41.600€	Up to 3 years (in exceptional cases 5 years)
Spain	Up to 41.265€	6 months to 2 years
Sweden	Variable	Up to 6 years
United Kingdom	up to 5000€	up to 7 years

Example 2: Regulation (EC) 1013/2006 on shipments of waste

Pursuant to Article 26 (5) of the old Waste Shipment Regulation (EC) 259/93 Member States had to take appropriate legal action to prohibit and punish illegal traffic.

Article 50 of the new Regulation, which repeals the old regulation and will apply from 12 July 2007, states: 'Member States shall lay down rules on penalties applicable for infringement of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties must be effective, proportionate and dissuasive'.

Currently, the old EU-15 Member States apply the following criminal sanctions for illegal shipments of waste³³:

³³ Data based on the study conducted for the European Commission by Huglo-Lepage&Associés, 15/09/2003, Criminal penalties in EU member States' environmental law

<u>Member State</u>	<u>Fine</u>	<u>Imprisonment</u>
Austria	€ 2 to 360 daily rates (misdemeanour)	1 day – 2 years
Belgium	€ 2,5 – 125.000 (Walloon region) € 2,5 – 62.500 (Brussels region) € 2,48 – 247.893,52 (Flanders region)	8 days- 5 years (Walloon region) 1 month - 1 year (Brussels region) 1 month - 5 years (Flanders region)
Denmark	No limitation	Up to 2 years
Finland	Unspecified (natural person) € 850 – 850.000 (legal person)	Up to 6 years
France	1-2 times the value of the object	Up to 3 years
Germany	Up to 50.000 € or yearly income	Up to 2 years
Greece	No criminal penalties	
Ireland	Summary conviction : Up to around € 1.905 Indictment : up to around € 12.700.000	Summary conviction: up to 1 year Indictment: up to 10 years
Italy	€ 31.195 – 519.913	Up to 2 years
Luxembourg	€ 251 – 125.000	8 days – 6 months
The Netherlands	Up to € 45.000 max (natural person) Up to € 450.000 (legal person)	Up to 6 years
Portugal	€ 997,6– 2.493,99 (natural person) Up to € 2.992,70 (legal person)	1 – 3 years or daily fine up to 600 days
Spain	No criminal penalties	
Sweden	Unspecified	Up to 6 years
United Kingdom	England, Wales and Scotland: Summary conviction up to statutory maximum (currently around € 7.300); Indictment: unlimited Northern Ireland: Summary conviction: up to around € 2.920; Indictment: unlimited Gibraltar: Summary conviction: up to around € 1.460	England, Wales, Scotland and Northern Ireland: Indictment: up to 2 years.

The tables show the significant differences in the national criminal law systems. Regarding the trade in endangered species, the factor between the lowest (Poland: 1293 Euro) and the

highest (Netherlands: 450.000 Euro) defined maximum fine is 348.³⁴ Maximum prison sentences differ between 6 months (Luxemburg) and 8 years (Lithuania, Czech Republic, Slovakia).

From the national examples, it also appears that some countries put the focus on high fines and not on the prison sentences. That is the case for Belgium where the fines are very high while the level of the imprisonment sanction can be considered as low, compared to other countries. Some countries appear as being more severe than others: that is the case for the United Kingdom, The Netherlands and Federal Republic of Germany where the fines are high and where the judge can sentence up to between 5 and 7 years of imprisonment.

The example of waste shipment also shows big differences in the levels of sanctions. While there are no criminal sanctions in some Member States, there are no upper limits for fines in other Member States. Maximum prison sentences range from 6 months to 6 years.

The tables furthermore show that some Member States have sanction levels that are so low that their deterrent effect must be doubted. This may be partly related not only to the general differences in the national criminal law systems, but also to a different level of awareness for environmental crime in the various Member States. The true nature of the damage done through environmental crimes and the huge margins of profit gained by offenders are rarely calculated in the fines that are applied to their offences.

The insufficiency of existing Member States penalties has been mentioned by experts on wildlife trade several times.³⁵ For the trade in endangered species Polish law for example provides for a maximum fine of 1293 Euros. Even if they are caught, perpetrators can in such cases consider the penalties as costs of doing business. A fine of a few thousand Euros for smuggling rare birds can easily be regarded as insignificant costs of doing business for a criminal organisation taking into account the high market prices and the low risk of detection.

As stated by the House of Commons Environmental Industries Commission in its evidence for a report on corporate environmental crime: “Low fines send the wrong message in trying to create a culture where environmental compliance is taken seriously by industry. [...] Companies too often find it more economical to pay a fine than to properly address their environmental performance [...] current fines for environmental offences are both too low and inconsistent [...] they need to be dramatically raised to have a real economic impact and deter companies from polluting the environment”³⁶

The fact that some Member States only apply administrative sanctions to environmental offences has also consequences even if the ultimate level of fines might not differ between criminal and non-criminal ones. Criminal law has a much stronger deterrent effect because of the moral disapproval that is connected to it and the inclusion of judgments in criminal records. Moreover, if offences are not prosecuted in criminal proceedings, this limits the investigation techniques that are available to the police.

³⁴ "Implementation of Article 16, Council Regulation (EC) No. 338/97, in the 25 Member States of the European Union, Study by TRAFFIC Europe, Draft Report of June 2006.

³⁵ Marceil Yeater, CITES Secretariat, 'Beyond Seizure: Prosecuting CITES Offenders', International Expert Workshop on the Enforcement of Wildlife Trade Controls in Central and Eastern Europe, available at http://ec.europa.eu/environment/crime/pdf/proceedings_en.pdf

³⁶ House of Commons' Environmental Audits Committee: Second Report on Corporate Environmental Crime 2004-2005, p. 22

1.4. Effects of environmental crime

Environmental crimes can cause significant harm to the environment in the EU and in third countries. Environmental pollution does not know any borders. Pollution of air or water in one country can easily travel to another country. The Sandoz accident of 1986 where fire fighting water contaminated with mercury and chemicals polluted the Rhine in Switzerland, Germany and France as well as the cyanide spill accident in Baia Mare in Romania of 1999 that polluted the Tiszla river in Hungary and affected other countries downstream of the Danube are just two drastic examples that show the cross-border effects of pollution.

In a study on organised environmental crime, 71% of the researched cases had cross-border implications.³⁷

In the Community's common market there are no borders and goods can move freely. Thus, goods that are illegally imported into one Member State can be sold in any other Member State. Also, illegal goods can move from one Member State to another to be exported out of the Community. Therefore, illegal trade concerns the whole Community. This fact has been acknowledged, for example, in the fact that Europol's mandate was extended to environmental crime with effect from 1 January 2002.

The cross border effects of environmental crime can be seen clearly in the example of illegal shipments of waste. Reports show that while some illegal waste produced by EU countries stays within Europe, developing countries such as Africa and Asia are also a frequent destination. Multiple transit stops (known as *port hopping*) within Europe are considered as a tactic used by offenders to cover their tracks and make identification and tracking of illegal shipments difficult³⁸.

The transboundary nature of environmental crime can also be seen clearly in the case described above on the illegal import of ozone depleting substances from China in which five Member States were involved.

Finally, environmental crime also has a global dimension as it can undermine the implementation of international environment policy (e.g. the phase-out of certain substances, ban on dumping of hazardous waste in developing countries).

Environmental crimes affect the economic viability of lawful businesses who do comply with existing environmental legislation through lost income. Economic operators have made investments into new technology for the implementation of Community environmental legislation, for instance in new waste treatment and pollution abatement systems or new equipment that does not use ozone-depleting substances. They are put at a disadvantage compared to companies or individuals throughout the Community who do not comply with those rules. There is no data on the total compliance costs incurred by companies. Taking the example of waste, the disadvantages for complying companies vis-à-vis non-complying companies are, however, very clear: legally disposing of a tonne of hazardous waste in an incinerator costs between 100€ and 400 € in Germany for instance, while illegal dumping it costs nothing except for the costs of the transport of the waste. The estimated business

³⁷ "Organised environmental crime in the EU Member States", 2003, available at http://ec.europa.eu/environment/crime/pdf/organised_member_states.pdf, Summary, p. III.

³⁸ IMPEL TFS Threat Assessment Project: The illegal shipment of waste among IMPEL Member States, Project Report, available at <http://ec.europa.eu/environment/impel/workgroups.htm#4>

potential of the eco-mafia in Italy of € 22 billion also gives an indication of the harmful effects illegal activities can have on legal businesses.

Illegal trade can also lead to reductions of legal trade. For instance, illegal trade in caviar is so high, that this year the CITES Secretariat did not publish any caviar quota for the Caspian Sea, which amounts to a de facto ban.

1.5. What has been done so far?

The problem of environmental crime has been discussed in international and European fora for many years.

Already in 1990 the UN General Assembly adopted a resolution calling upon Member States to promote the protection of the environment through criminal law³⁹. In the following years several meetings were held on international environmental crime that called for more international cooperation.

In 1998 the Council of Europe adopted the Convention on the Protection of the Environment through Criminal Law⁴⁰.

The G8 Group embarked on a law enforcement project focused on environmental crime in March 1999. In a declaration, the G8 called on states to recognize the serious threats posed by environmental crimes, to review their domestic legislation and enforcement policies, with a view to strengthening them where necessary and to provide effective international cooperation to combat these crimes.

Following these international actions, the European Union decided that there was a need for action at European level. The European Council held in Tampere on 15/16 October 1999 asked for efforts to agree "on common definitions, incriminations and sanctions" to be focused in the first step on a limited number of crime sectors with particular relevance, including environmental crime.

In February 2000, the Kingdom of Denmark presented an initiative for a Framework Decision on combating serious environmental crime.

The Justice and Home Affairs Council agreed on 28 September 2000 that an *acquis* on environmental offences should be established.

On 13 March 2001, the Commission adopted a proposal for a Directive on the Protection of the Environment through Criminal Law. The purpose of the proposed directive was to ensure a more effective application of Community legislation on the protection of the environment by establishing throughout the Community a minimum set of offences. The European Parliament adopted its first reading report on the proposal on 8 April 2002. On 30 September 2002 the Commission adopted an amended proposal including several of the amendments proposed by the European Parliament.

The Council did not discuss the Commission's proposal, but instead opted for harmonisation of the matter under the third pillar, i.e. the provisions of the EU Treaty on police and judicial

³⁹ Resolution 45/424, 14 December 1990

⁴⁰ <http://conventions.coe.int>, CETS No 172

cooperation in criminal matters. Framework Decision 2003/80/JHA on the protection of the environment through criminal law was adopted by the Council on 27 January 2003.

The European Court of Justice annulled this Framework Decision in its judgment of 13 September 2005 (C-176/03) for infringing Article 47 EU, holding that on account of both their aim and content Articles 1-7 of that Framework Decision had as their main purpose the protection of the environment and should have been properly adopted on the basis of Article 175 EC.

On 30 November 2005, the Commission adopted a Communication outlining its views on the consequences of the judgment for existing legislation and pending proposals. In this Communication, the Commission announced it would draw the legislative consequences and that it would determine on a case by case basis whether criminal law measures were necessary in a particular field. These measures may include the principle of resorting to criminal penalties, the definition of the offence and, where appropriate, the nature and level of the criminal penalties applicable, or other aspects relating to criminal law.

The consequences of the judgment and the Communication were discussed in the Justice and Home Affairs Council in January 2006. The European Parliament adopted a resolution in June 2006 in which it welcomed the judgment and agreed that it could be in certain cases appropriate to specifically state in a directive what type of conduct should incur criminal charges and/or what type of penalties should be applied.⁴¹

1.6. Does the EU have the right to act?

In accordance with Article 10 EC Treaty, Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community, including the Community's environmental policy. Such measures must include, if necessary, effective, dissuasive and proportionate sanctions in order to enforce obligations arising under this policy. Some directives even contain the explicit obligation for Member States to take dissuasive, proportionate and effective sanctions.

There is, however, no Community provision expressly providing for criminal sanctions. Such an obligation would ensure that existing Community legislation on the protection of the environment is applied in the same way throughout the Community.

Currently, offenders in the great number of cases with cross-border implications profit from the differences in national laws by committing offences in those Member States with the most lenient legislation and the lowest sanctions. Their possibility to find safe havens is facilitated by the free movement of goods and the abolition of border controls in the Schengen area. The consequence is that the environment in the Member States with the weakest sanctions will suffer particularly serious consequences, while from these Member States the goods can easily be transported to other Member States and be sold anywhere in the Community, thus putting in danger the environment all over the Community.

These cross-border implications of environmental crime imply that a sole action by a Member State is not sufficient and therefore action at Community level is required.

⁴¹ European Parliament, Resolution of the consequences of the judgment of the Court of 13 September 2005, 8.5.2006

The need to act at European level has been stated in several EU policy documents, such as the conclusions of the European Council in Tampere 1999, and has been implemented already in 2003 by the unanimously adopted annulled Framework Decision of the Council on the Protection of the Environment through Criminal Law.

1.7. How would the problem evolve if the current approach were continued?

As already mentioned above, the dark figure of environmental crime is particularly high and data in this field particularly unreliable. It is therefore very difficult to predict the general development of environmental crime in the next years.

However, the current practice of Member States, as analyzed above, shows that the national legislations do not always provide for an adequate response to the problem of environmental crime. There are no indications that Member States consider changing their current approach in national legislation.

It can furthermore be assumed that the factors encouraging the growth of environmental crime, stringent legislation in the EU on the protection of the environment and the growth of international and intra-Community trade, will continue to exist.

2. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

The Commission has launched a number of studies to compare the criminal and administrative penalties in the Member States' environmental law. The Commission also launched studies on the extent of organised environmental crime. The studies are published on the Commission's environmental crime website:
<http://ec.europa.eu/environment/crime/index.htm>

The problem of environmental crime has been discussed among experts and the public at several events in the last years:

In November 2003 the Commission organised the public conference 'Environmental Crime in Europe – Rules of Sanctions'. Presentations at the conference concerned the problems related to environmental crime, the sanction systems in different countries and the future of environmental criminal law in Europe.

A workshop on the nature and control of environmental black markets was held at the Royal Institute of International Affairs in London in May 2002 with the support of the Commission.

INTERPOL held its 5th International Conference on Environmental Crime in June 2005, aiming at enhancing international efforts to fight environmental crime⁴².

INECE, a global network of compliance and enforcement practitioners, has held many international conferences dealing also with environmental crime⁴³.

Several expert meetings have been held specifically on the issue of illegal trade in endangered species:

⁴² <http://interpol.org/Public/EnvironmentalCrime/Default.asp>

⁴³ <http://inece.org/index.html>

- Expert meetings under the CITES Convention concerning the prevention of illegal trade in endangered species (see CITES website: <http://www.cites.org/index.html>)
- TRAFFIC International Expert Workshop on the enforcement of wildlife trade controls in the EU, November 2001, Frankfurt and in Eastern Central Europe, 3-4 June 2004, Budapest.
- The Commission hosted an international workshop to combat illegal trade in caviar in June 2006⁴⁴.
- Meeting of the UN Economic and Social Council Commission on Crime Prevention and Criminal Justice (see report of the Secretary General under http://ec.europa.eu/environment/crime/pdf/wild_en.pdf).

The IMPEL Network (the European network of the implementation of environmental law) has carried out several projects of cooperation between Member States on the prevention of illegal shipments of waste⁴⁵.

3. OBJECTIVES

3.1. General Objective - More effective protection of the environment

Based on the findings on the increase of environmental crime, notably such with cross-border implications, and the insufficiency of many of the current national legislation, any action taken by the European Community tries to achieve the overarching objective of a high-level of environmental protection in the entire EU territory, as provided in Article 2 of the EC Treaty.

As the European Court of Justice pointed out in its judgment of 13 September 2005: “It is common ground that protection of the environment constitutes one of the essential objectives of the Community (see Case 240/83 *ADBHU* [1985] ECR 531, paragraph 13, Case 302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 8, Case C-213/96 *Outokumpu* [1998] ECR I-1777, paragraph 32). In that regard, Article 2 EC states that the Community has as its task to promote ‘a high level of protection and improvement of the quality of the environment’ and, to that end, Article 3(1)(l) EC provides for the establishment of a ‘policy in the sphere of the environment’. Furthermore, in the words of Article 6 EC ‘[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities’, a provision which emphasises the fundamental nature of that objective and its extension across the range of those policies and activities.”

3.2. Specific Objective - Strengthen compliance with EC environmental policy

Community environmental law has existed for around 30 years and today there are more than 200 directives and regulations in force in the environmental field.

Although the responsibility for implementation of EC environmental law lies primarily with the Member States, it is an essential task for the Commission, as guardian of the Treaty, to

⁴⁴ http://ec.europa.eu/environment/cites/home_en.htm

⁴⁵ http://ec.europa.eu/environment/impel/impel_tfs.htm

ensure the full application, enforcement and implementation of all existing Community environmental legislation. This is a strategic priority under the 6th Environment Action Programme.

In order to improve compliance with existing legislation on EU level or in the Member States providing for an efficient protection of the environment, action regarding environmental crime would complement and add an important tool to other measures that have been adopted on EU level in the last years, such as the Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. The Directive on Environmental Liability focuses on the physical prevention and remedying of environmental damage; it does not aim at sanctioning the responsible operator and any financial liability resulting from the Directive is linked to measures of prevention and remediation of the environment actually taken. Such liability rules are in principle of a civil or administrative nature. Criminal sanctions are of a different character in that they primarily aim at sanctioning a past illegal behaviour and preventing the repetition of the same illegal behaviour in the future. Admittedly, there may be some connection between the two instruments since civil and administrative liability may have some deterrent effect while criminal courts may sometimes enjoin the wrongdoer to make good the damage he caused. Whatever it may be, the fact that criminal law may entail jail sentence makes it in any case essentially different than civil or administrative law.

3.3. Specific Objective: Ensure a level playing field for individuals and businesses and avoid safe-havens for criminals in the Community

Currently, businesses who do not respect the rules of Community on the protection of the environment face significantly different consequences for such behaviour, depending on in which Member State they are operating. Businesses established in certain Member States with low criminalization and sanction thresholds have a competitive advantage because they can violate certain rules without the fear that the costs of fines and other criminal sanctions they would have to face exceed their profits as they would do for competitors in Member States with a stricter environmental criminal law regime. A minimum degree of harmonization can ensure fair competition. At the same time it avoids that criminals profit from the differences in rules by focusing their criminal activities on those Member States with the most lenient criminal law regime.

4. POLICY OPTIONS

The following chapter presents the policy options which were considered to tackle the problems identified.

One option, the full harmonisation, was discarded at an early stage and will not be analysed further in the document. This was based on the following reasons: The competence of the Community to legislate on criminal law is limited to what is necessary for the efficient implementation of the Community's environmental policy. National criminal law systems are still strongly influenced by the respective values of society and traditions in each Member State. Ignoring this background entirely and proposing to impose an entirely uniform system of sanctions applicable in all Member States, would not only be politically unfeasible but also go beyond the necessary and be disproportionate.

4.1. Broad Policy Option 1: No action on EC level

Under this option, the Commission would not propose any action against environmental crime at Community level. Member States would continue to define individually their provisions on environmental crime, taking into consideration their basic obligation to ensure the proper implementation of the Community policy on the protection of the environment on national level.

4.2. Broad Policy Option 2: Encourage cooperation between Member States

Under this option, cooperation between the Member States would be encouraged on a voluntary basis. The Commission would organise workshops or meetings of relevant authorities in the Member States to exchange knowledge on the different environmental crime laws in order to initiate and improve cooperation between Member States in the fight against environmental crime.

4.3. Broad policy Option 3: Set minimum regulatory standards

Under this broad policy option, the Commission would present a proposal for legislation on the protection of the environment through criminal law. The adequate legislative instrument would be one that obliges Member States to accept certain goals but leaves them flexibility for the implementation into their national laws and the right to take or keep measures that go beyond the proposed EC standard.

Such a proposal could contain the following specific policy options:

4.3.1. Definition of criminal offences in the field of environment

Defining the activities that should be considered criminal offences forms the basis of the application of criminal sanctions. The large differences between the Member States in this regard are one of the underlying causes of environmental crime.

The choice regarding the definitions of which offences should be harmonized would be based on the list agreed on unanimously by the Member States in the annulled Framework Decision 2003/80/JHA. This list was based on the work done in the framework of the drafting of the 1998 Council of Europe Convention which had selected the most serious environmental offences based on the work of an expert committee and on submitted reports by scientific consultants.

In addition to the list of offences of the annulled Framework Decision the offence "significant deterioration of a protected habitat" would be included, forming part also of the Council of Europe Convention and constituting a particularly serious environmental crime. Another additional more specific offence would refer to new Community legislation on illegal shipments of waste.

There are several options how the definition of offences could be approximated at Community level:

Specific option 1: Common definitions based purely on infringement of administrative law

This approach would consist in defining certain breaches of environmental legislation as environmental crimes regardless of whether this breach caused negative effects on the

environment or persons in an individual case. This approach was the one chosen in the Commission's proposal of 2001.

Specific option 2: Common definitions based on the infringement of administrative law and negative effects of the behaviour on persons or the environment

This approach would consist in defining particularly serious breaches of environmental legislation as criminal offences, if they caused or are likely to cause significant negative effects on the environment or persons, regardless of whether they constitute a breach of legislation (autonomous offences). In addition, some breaches of environmental legislation would be defined as criminal offences without the condition that they cause or are likely to cause significant damages to persons or the environment, because these breaches are considered as a danger in themselves. This corresponds to the approach followed by the annulled Council Framework Decision 2003/80/JHA and also by the 1998 Council of Europe Convention.

4.3.2. Approximation of the Scope of Liability

Harmonizing the definition of serious offences is without effect without also harmonising the scope of persons which can be held liable for their commission.

Specific option 1: Requiring and defining liability for natural persons only

Under this option, the liability of natural persons as main perpetrators, participants or instigators would be made compulsory in order to ensure that also behaviour limited to aiding and abetting the main offender does not rule out liability.

Specific option 2: Requiring and defining liability also for companies and those acting on their behalf

This option consists in obliging Member States to ensure that companies can also be held liable for environmental crimes and that this liability does not exclude the individual liability of those acting on behalf of the legal person. Furthermore the conditions for the liability of legal persons would be defined, in particular, under which conditions the behaviour of a natural person is imputable to the legal person. This approach was followed in the Council Framework Decision 2003/80/JHA.

Currently, some Member States limit the liability of legal persons to administrative law. For example, German criminal law allows for (partly severe) administrative fines on legal persons (Ordnungswidrigkeitenrecht) while not acknowledging the criminal liability of legal persons in the strict sense. The Commission has always respected those differences in the legal traditions and would therefore leave it open, as in other proposals, whether the sanctions applicable to legal persons would be of a criminal or non-criminal character.

4.3.3. Approximation of penalties

As shown above, the above mentioned differences in the sanction regimes of the Member States create difficulties for judicial cooperation, entail the risk of safe havens for perpetrators and create unequal competition conditions for businesses.

The proposal for a directive could provide for a certain level of approximation of the criminal penalties in place in the Member States.

Specific option 1: General clause for penalties

This option would oblige Member States to ensure that environmental crimes are subject to 'proportionate, dissuasive and effective' sanctions, including criminal sanctions for natural persons and deprivation of liberty for serious cases. Apart from these general obligations, it would be up to Member States to define the level of sanctions. This approach was followed in the Commission's proposal of 2001.

Specific option 2: Minimum levels of penalties only for natural persons

The proposal for a directive would define minimum level of penalties for serious cases of environmental crime. Such minimum level of penalties would be set in the form of minimum imprisonment sentences for natural persons. This approach was chosen to a limited degree in the annulled Framework Decision at least for serious cases, where for natural persons "deprivation of liberty which can give rise to extradition" (corresponding to a minimum sentence of one year) was required.

Specific option 3: Minimum levels of penalties also for legal persons

This option would apply a parallel three-step system as in specific option 6 to legal persons and to require that Member States foresee certain levels of minimum maximum fines for offences committed by legal persons under aggravated circumstances.

Taking into consideration that not all legal systems in the Member States acknowledge the criminal liability of legal persons, it would be left to Member States whether they apply criminal or non-criminal fines.

Specific Option 4: Defining the aggravating circumstances for which penalties would be approximated

Instead of approximating sanctions for "serious cases" and leaving to Member States to define this term further, it could be defined on Community level which cases are considered "serious". The definition could focus on two factors. On the one hand, it should take into consideration the particular seriousness of the result of an environmental crime, death or serious injury of a person or substantial damage to air, soil, water, animals or plants. On the other hand, the particular role of organized crime, discussed above, should be considered by making the perpetration of an environmental crime within the framework of a criminal organisation an aggravated case.

5. IMPACT OF OPTIONS

The following chapter analyses the impacts of the options and sub-options described in chapter 4.

5.1. Impact on the Protection of the Environment

One of the underlying causes of environmental crime are the differences between the national legal orders in the Member States (see above) regarding the definition of offences, the scope of liability and the applicable sanctions.

5.1.1. Impact of Broad Policy Option 1

As there is no indication that without European action Member States would approximate their systems in any of those areas, these causes could not be tackled.

5.1.2. Impact of Broad Policy Option 2

Encouraging better cooperation between Member States and providing training and other awareness-raising activities could lead to an improvement of awareness amongst public authorities, investigators, prosecutor and judges but also amongst citizens. It could be expected, for example, that judges make better use of the sanctions available to them under the current national legislation.

5.1.3. Impact of Broad Policy Option 3

An approximation of the above mentioned features should reduce the potential gains from crime by ensuring that throughout the Community there is a minimum standard for the definition of environmental offences and of levels of penalties. The objective is to improve the law enforcement capacity in the Member States. As explained above, it is generally thought that the criminal prosecution system is more powerful than the administrative system.

An improved protection of the environment also requires a high level of public awareness. A European regime for the most serious forms of environmental crime can raise this public awareness, both amongst business and citizens, for the significant damages caused by these crimes and the price to be paid by the public for the destruction of public goods. It gives a signal of political agreement about the importance of the topic on European level.

The approximation of sanctions and the scope of liability would in many Member States lead to raising the current sanction levels and partly of the scope of liability, notably with regard to legal persons. This is expected to have a deterrent effect on offenders, in particular because it would ensure that the liability of a legal person does not rule out the personal criminal liability of its officers so that they can not hide behind an alleged bankruptcy of the legal person.

Any approximation would be a minimum standard, so that no Member States with a higher level of sanctions or broader definitions of offences or an extended scope of liability would be forced to lower its own standards.

5.2. Impact on police and judicial cooperation

As shown above, the current discrepancies in the definition of environmental crimes and the applicable sanctions cause problems with regard to police and judicial cooperation, either because the required sanction thresholds are often not met in Member States and/or because the "dual criminality" requirement raises difficulties due to differences in definition.

5.2.1. Impact of Broad Policy Option 1

The mentioned difficulties would continue to exist if no action was taken on EC level. It is not to be expected that Member States significantly raise their sanction levels or approximate the definitions of environmental crimes further without binding obligations on EC level.

5.2.2. Impact of Broad Policy Option 2

Encouraging better cooperation between Member States and provide training and other awareness-raising activities could lead to an improvement of contacts between public authorities, investigators, prosecutor and judges and therefore lead to more cooperation in practice.

5.2.3. Impact of Broad Policy Option 3

Action on EC level will improve the cooperation between the competent authorities for the investigation, prosecution and judgment of offences against the environment. The approximation of minimum maximum penalties that will imply in some Member States an increase of the level of sanctions will provide the authorities with additional important investigation tools. Judicial cooperation will be facilitated as well through a minimum set of common definitions of offences and a harmonized understanding of the scope of liability.

The application of the "ne bis in idem" principle will also be facilitated: Citizens do no longer run the risk of double convictions under administrative and criminal law for core environmental crimes if they are considered as such crimes in all Member States.

5.3. Impact on businesses

As shown above, environmental crimes can also affect the economic viability of lawful businesses that do comply with environmental legislation. These businesses have made investments into new technology that the non-complying competitors have not made. This can lead to a loss of income for complying businesses.

5.3.1. Impact of Broad Policy Options 1 and 2

This situation would remain unchanged in case of non-action by the Community or only limited encouragement of voluntary cooperation and awareness-raising. None of these activities would tackle the problem of unfair competition conditions.

5.3.2. Impact of Broad Policy Option 3

Action by the EC involving extending the scope of liability and approximating the definitions of offences and the level of sanctions will not create any additional costs for economic operators, as it does not create any new obligations, but only serves to improve the application of existing rules.

Only for businesses that commit environmental crimes it could lead to lower profits, fines, imprisonment of staff or even the cessation of activities potentially being ordered by the courts.

When all companies follow the rules, there is no competitive disadvantage of doing so. In general complying with environmental legislation is good for the competitiveness of businesses. The OECD reports 'evidence for the traditional economic view that current regulatory requirements constraint an organisation's financial opportunities.... However, these opportunities were recaptured if the facility took steps to reduce its impacts to the natural

environment. That is, companies that improved their environmental performance experienced a greater net probability of earning positive profits between 3-34%.⁴⁶

Eliminating the illegal options on the market will encourage more investments in legal businesses. It will also lead to the creation of more jobs in the legal businesses. For instance, if the option of illegally dumping waste becomes too risky and costly, investing in modern state of the art waste treatment becomes more viable. Or, if it becomes too difficult to illegally import CFCs for use in old equipment, new equipment that works on alternative substances would need to be purchased. At the same time, the benefit will be that businesses that respect the rules and often have already made significant investments to be able to comply with the strict existing rules are protected through tougher sanctions for those of their competitors who gain an unfair advantage by not complying.

The purpose of Community action would be also to improve the enforcement and application of existing Community environmental legislation. An improved application of Community environmental legislation will protect complying businesses from their competitors inside and outside the EC that try to evade the application of legislation in order to save costs. It will also improve the confidence of third countries businesses in the quality of products from the EU.

5.4. Impact on public authorities

5.4.1. Impact of Broad Policy Options 1

If no action is taken on Community level, there would be no impact on public authorities unless unexpected major reforms of the norms on environmental crime in the legal system of a Member State will occur.

5.4.2. Impact of Broad Policy Option 2

Awareness-raising activities conducted by the Commission on a voluntary basis would only involve very limited costs for public authorities, e.g. for participation in meetings and workshops. The benefit would be the improvement of contacts between public authorities from different Member States. It is, however, not expected to lead to big changes to the differences in criminal sanctions throughout the Community.

5.4.3. Impact of Broad Policy Option 3

It is to be expected that investigations will be facilitated through better international cooperation and additional investigation techniques if sanction levels are raised and the definitions of offences approximated. This could imply for public authorities that there could be additional costs through an increased number of criminal proceedings. On the other hand, the deterrent effect of higher sanctions and a higher level of awareness of environmental crime could lead to fewer cases too. Cost savings can also be achieved by avoiding the need to clean up the pollution caused by criminal activities if the deterrent effect will be reached as expected.

The following table summarizes the impacts of the different options and sub-options:

⁴⁶ 'Does a Facility's Environmental Performance Predict its Financial Performance?', OECD, ENV/EPOC/WPNEP(2005)11

+ = slight positive impact

++ = strong positive impact

- = slight negative impact

+/- = no impact or positive and negative impacts counterbalance each other

OPTIONS	IMPACTS			
	Protection of the environment	Police and Judicial Cooperation	Costs/benefits for businesses	Costs/benefits for public authorities
1. No action on EC level	+/- No improvement	+/- No improvement	+/- No additional costs/benefits	+/- No additional costs/benefits
2. EC measures on a voluntary basis	+ Slight improvement through better knowledge and awareness of authorities	+ Slight improvement through better knowledge and awareness of authorities	+/- No additional costs. Limited benefits possible through better enforcement of legislation due to better knowledge of authorities.	+/- Low costs of participation in meetings and workshops. Improvement of contacts between authorities of the different Member States
3. Propose directive				
3.1. Harmonize definition of serious environmental offences				
<i>purely linked to administrative law</i>	+ Common definitions are the basis for approximating the penalties, thus they are the first step to ensure better protection of the environment	+ Improvement through common definition of crimes	+ No additional costs Benefits from achievement of equal competition conditions.	+/- Potentially higher costs of more criminal proceedings in some MS, or on the contrary fewer proceedings because of deterrent effect.

	Simple definition, but does not necessarily target the most serious offences.			
<i>linked to administrative law and effects on the environment or persons</i>	<p>++</p> <p>Common definitions are the basis for approximating the penalties, thus the first step to ensure better protection of the environment.</p> <p>Autonomous offences (independent from breach of administrative law) can raise awareness on the seriousness of environmental crimes</p> <p>Linking the offences to the effects on the environment or human health helps target the most serious cases.</p>	<p>++</p> <p>Strong improvement through common definition of crimes; dual criminality requirement easier met</p>	<p>+</p> <p>No additional costs</p> <p>Benefits from achievement of equal competition conditions</p>	<p>+/-</p> <p>Potentially higher costs of more criminal proceedings in some MS, or on the contrary fewer proceedings because of deterrent effect</p>
3.2. Harmonizing definitions of scope of liability			.	
<i>for natural persons only</i>	<p>+</p> <p>Improvement through clarification of the scope of liability, facilitating investigations and prosecutions</p>	<p>+</p> <p>Improvement through clarification of the scope of liability; dual criminality requirement easier met</p>	<p>-</p> <p>No additional costs for business violating environmental rules; but unfair competition/costs for those who obey to the rules</p>	<p>+/-</p> <p>Potentially higher costs of more criminal proceedings in some MS, or on the contrary fewer proceedings because of deterrent effect</p>

<i>for both natural and legal persons</i>	++ Strong improvement through clarification of the scope liability also of legal persons, the main offenders, facilitating investigations and prosecutions	++ Strong improvement through clarification of the scope liability also of legal persons, the main offenders; dual criminality requirement easier met	++ Potentially additional costs for businesses violating environmental rules but significant benefits through achieving fair competition for those who obey the rules.	+/- Potentially higher costs of more criminal proceedings in some MS, or on the contrary fewer proceedings because of deterrent effect
3.3. Approximation of penalties				
<i>General clause and minimum of one year imprisonment for serious offences committed by natural persons</i>	+ Not likely to significantly change the status quo, as this obligation can be interpreted in very different ways by Member States	+ Some improvement; would open certain cooperation mechanisms with 1-year-sanction-threshold	+/- No additional costs for businesses not respecting the rules. No benefit through achievement of fair competition conditions	+/- Not possible to predict due to the different interpretations of the obligations that Member States can have.
<i>Minimum maximum levels of penalties for defined serious case or natural persons only</i>	+ Would raise levels of penalties in many Member States, would prevent perpetrators from finding safe havens in the Community, thus ensuring a better protection of the environment	+ Improvement; higher sanction thresholds would open additional cooperation mechanisms for offences committed by natural persons	+/- No additional costs for businesses not respecting the rules; no benefit through achievement of fair competition conditions	+ Potentially lower costs due to fewer proceedings because of deterrent effect

<i>Minimum maximum levels of penalties for defined serious cases also for legal persons</i>	++ Would raise levels of penalties in many Member States, would prevent perpetrators from finding safe havens in the Community, thus ensuring a better protection of the environment	++ Strong improvement; higher sanction thresholds would open additional cooperation mechanisms for offences committed also by the main offenders, legal persons	++ No additional costs, except for fines that have to be paid by companies that commit crimes. Strong benefit through achievement of fair competition conditions	+ Potentially lower costs due to fewer proceedings because of deterrent effect
<i>Definition of Aggravated Circumstances</i>	++ Would limit differing interpretations in the Member States, thus ensuring harmonious interpretation of the directive in all Member States contributing to a better protection of the environment	++ Would limit differing interpretations in the Member States, thus facilitating cooperation	+/- No additional costs/benefits	+/- No additional costs/benefits

6. COMPARISON OF POLICY OPTIONS

6.1. Preferable broad policy option: Action by the EC legislature

The first and second broad policy options rely on Member States harmonising their national laws on a voluntary and individual basis without any legislative action on EU level. This approach does not seem adequate to achieve the objectives of better and equal protection of the environment throughout the Community, deterrence of potential offenders and improved judicial cooperation between Member States. As submitted above, chances are minimal that Member States change and approximate their national legislation to a degree that would change the status quo which is – as shown above – unsatisfactory.

The adoption of all specific measures (harmonization of the most serious environmental offences, a harmonization of the liability of legal persons for those offences and an approximation of the penalties applicable to natural and legal persons if those offences are committed under aggravating circumstances) promises significant progress with a view to obtaining the above mentioned objectives for the reasons analyzed above.

Just taking one or two of those measures would not have the same positive effect as they are most efficient in their combination: The harmonization of offences is not suitable for achieving the objectives if it is not accompanied by a measure ensuring that the consequences of infringing upon those provisions are similar throughout the EU. To the same extent, a different scope of liability of legal persons, the main perpetrators of environmental crimes, is required to give the harmonization of offences and the approximation of penalties an optimal effect.

Therefore, all three measures should be included in a legislative instrument to be adopted by the Community legislator.

A directive based on Article 175 of the EC Treaty is the only appropriate legal instrument in this case.

In its judgment of 13 September 2005 the European Court of Justice annulled the Framework Decision 2003/80/JHA. The court stated that Articles 1-7 of the Decision could properly have been adopted under Article 175 of the EC Treaty due to their content and aim. It follows from this judgment that the adoption of a Framework Decision on these elements is not possible. The additional elements can only be harmonised through a first pillar instrument. Thus, all the measures related to criminal law that are considered necessary must be included in the proposal for a directive. As the aim is to set minimum standards only and not to harmonise national criminal laws, a regulation is not the appropriate legal instrument.

For the purpose of improving compliance with the goals of the EC environmental policy, the choice of a directive also has certain advantages: national courts may refer cases to the European Court of Justice for a preliminary ruling on the interpretation of the directive or on compatibility of national legislation with the directive. The Commission has the right to bring infringement proceedings against Member States for failure to correctly implement the directive. And finally, the democratic participation of the European citizens is strengthened as a directive will be adopted through the co-decision procedure, i.e. only with the approval of the European Parliament.

6.2. Preferable sub-options

6.2.1. Harmonizing the definition of serious environmental offences

The preferable sub-option is to define a list of the most serious environmental crimes which are to be considered criminal offences on Community level.

A common understanding of the criminal character of certain environmental offences is not only the basis for a possible approximation of sanction levels but also has the advantage of facilitating mutual judicial assistance.

Criminal law, as the "last resort", deals only with the most serious infringements of the legal order, while administrative law tackles a much larger variety of infractions with the ambition to cover all the possible fields of protection of the environment. However, various international instruments show the common understanding that for serious environmental crimes the weapon of criminal law is indispensable. Both the Basel Convention on the Shipment of Hazardous Waste and the Convention on the International Trade in Endangered

Species (CITES) ask, for example, the contracting parties to provide for criminal sanctions for breach of the conventions' provisions.⁴⁷

Criminal prosecution and investigation as well as the assistance between Member States in criminal matters are in some cases more powerful than the means of administrative or civil law. Assuring that those serious offences are considered as criminal offences throughout the Community and not purely as administrative infringements has a greater dissuasive effect on potential future offenders. This is mainly due to the greater social stigma linked to a criminal penalty and particularly given the growing range of innovative sanctions which might be imposed. Finally, the possibility of terms of imprisonment for individuals, especially officers of corporations, is a very powerful deterrent in cases where financial sanctions may not be dissuasive because the offenders are impecunious or, on the contrary, financially very strong. For the suspect, criminal procedures offer better guarantees for a fair proceeding than administrative procedures.

The Commission's proposal for a directive on the protection of the environment through criminal law of 2001 had the objective of establishing a minimum set of environmental offences throughout the Community.

The approach chosen in the 2001 directive proposal for the definition of offences raises certain difficulties as offences were defined as infringements of secondary Community legislation for the protection of the environment, listed in an Annex. This entails a strong accessory link with administrative law which raises technical difficulties due to the constant amendments and modifications of secondary legislation. It is also considered as offering too little flexibility for the legal systems of some Member States.

The preferred option is to provide more specific definitions of environmental offences than the Framework Decision, while still ensuring sufficient flexibility to avoid unnecessary changes to national legal systems. This corresponds to specific option 2 discussed above. The definition of offences would also be adapted to the new developments in EU environment legislation since the adoption of the Commission's original proposal (e.g. regarding the shipment of waste). Following the model of the Council of Europe Convention it would include an autonomous offence (the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes death or serious injury to a person) which could not be justified by compliance with environmental administrative law, while creating a link to the administrative law for the other offences – in those cases, the behaviour would have to be "unlawful".

6.2.2. Defining the scope of liability of both for natural and legal persons

The preferable sub-option is to define the scope of liability of both natural and legal persons. Considering the fact that the big majority of environmental crimes are committed by legal persons, there is no justification for limiting the definitions of liability on Community level to natural persons. Member States' traditions are taken into consideration by not requiring criminal liability in the strict sense. However, it will facilitate mutual legal assistance if the conditions under which the action of a natural person may be imputed to a legal person are harmonized throughout the Community.

⁴⁷ See Article 4 (3) of the Basel Convention and Article VIII (1) of CITES.

6.2.3. *Approximation of penalties*

It has been shown above that the approximation of the level of sanctions is necessary in order to efficiently tackle environmental crime. The annulled Framework Decision only contained a minimum approximation of "deprivation of liberty which can give rise to extradition" for serious cases. This means a minimum threshold of one year. No approximation was foreseen for legal persons.

The preferred option is to establish a general obligation to ensure that the offences are punishable by effective, proportionate and dissuasive penalties, as was provided in the Framework Decision.

In addition more detailed minimum levels of penalties applicable to natural and legal persons would be established. In the Framework Decision, the approximation was limited to natural persons, whereas there was no approximation envisaged for legal persons. There is no objective reason for this differentiation, in particular taking into account the important role legal persons play as offenders of environmental crimes.

In March 2002, the Justice and Home Affairs Council agreed in its conclusions on a four-level system of penalty levels to be used in cases of approximation of penalties, from penalties of a maximum between 1 and 3 years, between 2 and 5 years, between 5 and 10 years to at least ten years of imprisonment.

The new proposal would be based on the first three of those agreed levels, depending on the seriousness of the underlying circumstances of the offence. In order to respect the rule that the legislation of Community law shall not go beyond the necessary, these three levels will apply only to offences committed under aggravating circumstances, while leaving the sanctions applicable to "simple" offences to the Member States that only have to respect the general requirement of effective, proportionate and dissuasive sanctions.

The new proposal would apply a similar three-step system for legal persons. As there are no Council conclusions on the amounts of fines to apply, the proposal would take inspiration from another instrument in the field of environmental protection, unanimously adopted by the Member States, i.e. Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution of 12 July 2005. In this Framework Decision, two levels are foreseen, a fine of a maximum of at least between 150.000 and 300.000 Euros and of at least between 750.000 and 1.500.000 Euros.

These levels would be adapted in two ways while sticking to the same maximum threshold: First, in order to provide for a parallelism between the sanctions for natural and legal persons, a third level would be introduced. Second, the first level of fines in the Framework Decision on Ship-Source Pollution (150.000 to 300.000 Euros) applies to offences not committed under any aggravated circumstances. In contrast, as described above for natural persons, the new proposal would suggest approximation for aggravated circumstances. Therefore, the proposed three levels would focus – as in special option 6 – on offences committed under aggravating circumstances and would start with a higher level. The three levels would be fines between a maximum of at least between 300.000 and 500.000 Euros, between 500.000 and 750.000 Euros and between 750.000 and 1.500.000 Euros, depending on the seriousness of the aggravating circumstances.

The limitation of the approximation of sanctions to "serious cases", as in the annulled Framework Decision, leaves a very wide scope of discretion to the Member States what they consider to be such "serious" cases. The consequence may be that ultimately no approximation is achieved and in practice the significant differences between the sanction levels in the Member States will continue to exist. Therefore, the sub-option of a common definition of what constitutes such a serious case, a particularly serious result or the perpetration of the offence in the framework of a criminal organization, is favoured.

For this purpose, the pure existence of approximated offences and penalties will evidently not be sufficient but will need to be accompanied by the efficient application of the available sanctions and by information and education of the public. At the same time, law enforcement and judicial authorities will need to be further trained in order to understand the scope of offences and the scope of available sanctions.

6.3. Why the action is in line with the subsidiarity and proportionality principles

The principle of *subsidiarity* requires in this context that the Community may only harmonise criminal law where the high level of environmental protection stipulated in Article 174 (2) TEU cannot be sufficiently achieved by the Member States and can therefore be better achieved on Community level.

The current legislation in the Member States on environmental crime differs enormously. This means that the European environmental policy is not implemented in the same way throughout the Community. The objective of ensuring a minimum standard of environmental protection throughout the Community is thus not achieved.

Furthermore, international conventions set obligations that have to be implemented by the Community. For instance, the Community has ratified the ban of exporting hazardous waste to developing countries adopted under the Basel Convention. The Community implemented the ban in its Waste Shipment Regulation. The Community thus also has an obligation towards third countries to ensure that the ban is adequately enforced. The Community also has an obligation towards the world to help prevent the illegal trade and use of ozone depleting substances which affects the global environment.

Perpetrators can profit from the differences in national laws by committing offences in those Member States with the least efficient legislation and the lowest sanctions. Such a search for safe havens is facilitated by the free movement of goods and the abolition of border controls amongst the Schengen States, which for example make customs controls for illicit trade in endangered species impossible.

Therefore, action on EU level aiming at harmonizing the criminalization of certain serious environmental crimes and approximating the legislation on sanctions applicable for natural and legal persons is necessary.

The need for action on EU level is further confirmed by the unanimous adoption of the (meanwhile annulled) Framework Decision 2003/80/JHA, in which the Council agreed that "Environmental Offences are a problem jointly faced by Member States which should therefore take concerted action to protect the environment under criminal law".⁴⁸

⁴⁸ Annulled Framework Decision 2003/80/JHA, Recital 3.

In accordance with the principle of *proportionality* the Community may not go beyond what is necessary to achieve the desired high level of environmental protection.

The current proposal only sets a minimum standard that can be achieved by all Member States, while at the same time allowing Member States to go beyond this minimum standard if they wish. The proposal is flexible enough that it can be adapted to the different legal systems and traditions in the Member States. No Member State will be forced to make radical changes to its legal system.

The proposed approach only tackles the most serious forms of environmental crime and establishes an obligation to impose criminal sanctions. It takes into consideration that not every breach of an administrative provision requires criminal sanctioning, and that criminal law should always be considered as a "last resort". Criminal law is one essential, but not the exclusive tool in the fight for efficient environmental protection. It complements other tools such as the civil liability for environmental damages, administrative sanction regimes, or better information rights for citizens in environmental issues.

Therefore, the proposal focuses on those offences which cause or are likely to cause a particularly serious result (death or serious injury of a person, substantial damage to the quality of air, soil, water, animals or plants). Only in few cases, such a result is not a constitutive element of the offence, the reason being that in those cases (trade in or use of ozone-depleting substances, trade in endangered species and illegal shipment of waste) a result or even the likelihood of a result is nearly impossible to prove, either because they show in third countries or because the effects will appear long-term and on a cumulative basis.

The proposed approximation of sanctions indicates a frame of minimum maximum penalties, leaving Member States the option to still take the general sanction policy in their national criminal system and their particular priorities into consideration. Furthermore, the proposed approach in the form of a directive leaves for a sufficiently broad discretion in its application by the prosecutors and judges in the Member States, taking into account the traditions and national legal systems in the different Member States. It will not regulate matters of investigation or prosecution. Therefore, the authorities of the Member States remain free to decide whether all offences must be prosecuted or whether criminal penalties may not be imposed in minor cases or where the environmental damage is insignificant. In such cases, they could also choose to apply administrative sanctions.

Under current Member States legislation, there is often a lack of clear criteria to impute criminal illegal acts of an individual to a corporation.⁴⁹ At the same time, it becomes more and more difficult to identify a natural person in complex corporate structures who may be criminally held responsible for the offence.⁵⁰ Therefore, the proposal (as previous legislative instruments adopted in the EU, including the annulled Framework Decision) will provide for a list of criteria determining the liability of a legal person for acts of individuals. However, the proposal will respect the tradition of some Member States not to hold legal persons criminally liable despite an international trend for corporate criminal liability. Therefore, it will be left to the Member States to decide whether they impose criminal or non-criminal fines on legal persons.

⁴⁹ Impel Network, "Criminal Enforcement of Environmental Law in the European Union", 2000, p 88.

⁵⁰ See Explanatory Memorandum to Art. 9 of the Council of Europe Convention on the Protection of the Environment through Criminal Law.

7. MONITORING AND EVALUATION

As a first step the Commission will assess whether the transposition measures submitted by the Member States are in compliance with the directive. Secondly, the proposal obliges Member States to submit a report on the implementation of the directive every three years. The Commission will produce regular reports on the basis of this information, aiming to evaluate how the directive is being applied in the Member States and to identify possible problems of implementation or the need for amendments to the directive.

In addition, the Commission will work towards collecting comparable and reliable statistics on environmental crimes in the Member States. For this purpose an expert group will be established, with the task of defining the information needs.