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CRIMINAL SANCTIONS IN THE FIELD OF EU ENVIRONMENTAL LAW

By Jacob Öberg

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* PhD Researcher at the European University Institute, Florence. E-mail: Jacob.Oberg@EUI.eu. Postal address: Villa Schifanoia, Via Boccaccio 121, I-50133 Firenze/Italy. An extended version of this contribution was presented at the “2nd ECLAN PhD Seminar on the EU

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1. INTRODUCTION

The debate on the use of criminal sanctions in EU environmental law enforcement is more intense now than ever. At the centre of public attention is in particular the question as to whether environmental criminals should be sent to prison. Is it morally unjust to send individual offenders to jail for a minor stealing offence, but impose a mere monetary sanction on offenders of some egregious violations that caused significant environmental harm?² Before entering this complex and contested issue, let us take a step back and have a look at the legal background of the enforcement of environmental law in the European Union.

Prior to the European Court of Justice's (CJEU, 'Court') judgment in the *Environmental Crime Case*³ it was perceived among commentators that the principle of sovereignty in conjunction with the absence of express power of the Community in the EC Treaty was an obstacle for the Community to introduce criminal sanctions to enforce Community law.⁴ The contention that criminal law is the exclusive business of the sovereign state has, however, been challenged by the latest developments in EU law, both in terms of treaty amendments⁵ and in case law of the Court. In the *Environmental Crime Case*⁶, which concerned legislation in the area of environmental policy, the Court held that, under Article 175 EC (now 192 TFEU), the Community had the power to require Member States to enact criminal law measures if such measures would be 'essential' to ensure that the rules on environmental protection are 'fully effective'.⁷ There are several questions in relation to the Court's case law and Article 175 EC:

- 1) What is meant by 'effectiveness' of Union law?
- 2) How can the Union legislator be sure that criminal sanctions are the most effective measure to enforce Union environmental law?
- 3) Does empirical evidence support the assertion that criminal sanctions are more deterrent than other sanctions?

² See Germani, R., *Environmental Law and Economics in U.S. and E.U.: A Common Ground?*, June 2004, p. 10. Available at <http://www.cefims.ac.uk/documents/research-34.pdf>.

³ See Case C- 176/03, *Commission of the European Communities v Council of the European Union*, ECR [2005], p- I-7879.

⁴ See Case C- 440/05, *Commission of the European Communities v Council of the European Union*, ECR [2007] p. I-0909., Opinion of General Advocate Mazak, para. 72; See House of Lords European Union Committee, "The Criminal Law Competence of the European Community", 42nd Report of Session 2005-2006 (28 July 2006), HL Paper 227 House of Lords, para. 13.

⁵ See Article 83(2) of the Treaty of the Functioning of the European Union.

⁶ This judgment has been analysed by *inter alia*: M. Wasmeier, and N. Twaites, "The 'battle of the pillars': does the European Community have the power to approximate national criminal laws?", *E.L. Rev.* 2004, 29(5), 613-635; C. Tobler, 'Case-note', 43 *Common Market Law Review* 835 (2006); E. Herlin-Karnell, "Commission v. Council: Some Reflections on Criminal Law in the First Pillar", *European Public Law* (2007), pp. 69-84.

⁷ See Case C-176/03, *the Commission of the European Communities v the Council of the European Union*, *supra* note 3, para. 48.

Despite these concerns, the Commission and the Community legislator have proceeded to adopt the Environmental Crime Directive on the basis of the case law referred to.⁸ In summary, the Directive requires that a minimum set of serious environmental offences be established that should be considered criminal throughout the Union when committed intentionally or with at least serious negligence⁹. These offences should be punishable by effective, proportionate and dissuasive criminal sanctions.¹⁰

The aim of this contribution is to analyse whether the adoption of the Environmental Crime Directive was an appropriate decision from a criminal policy perspective. The basic question asked in this contribution is whether the Union should enforce Union environmental law by means of criminal sanctions. In particular, this contribution examines whether criminal law measures are suitable for the enforcement of Union environmental rules and secondly if there are other measures which are equally effective.

General issues of corporate crime and what factors can explain delinquent behaviour by companies fall outside the scope of this contribution.¹¹ It is primarily focussed on how general criminological theories can be used to analyse and evaluate whether criminal sanctions are 'effective' to enforce environmental rules. A further delimitation is that the main focus will be on individual offenders and what incentives are relevant for them when contemplating to violate or comply with environmental rules. Therefore, sanctions against companies will not be examined in detail.

The first section of this paper will consider whether criminal sanctions are appropriate for the enforcement of Union environmental law. Secondly, it is considered whether criminal sanctions are 'essential' in the fight against serious environmental offences and if there are other less onerous measures which are equally effective to enforce Union environmental law. In this regard it is claimed that the EU legislator should only require an act to be criminalised if this is necessary to protect a fundamental European interest and only on the condition that all other measures have proved insufficient to safeguard this interest.¹² Finally, this contribution will summarise the findings of this examination.

⁸ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ No. L 328/28 of 06-12-2008 ('Environmental Crime Directive'); Commission Proposal of 9 February 2007, COM (2007)51 final, 2007/0022 (COD).

⁹ See Article 3 of the Environmental Crime Directive.

¹⁰ See Article 5 of the Environmental Crime Directive.

¹¹ The literature is vast. See some important contemporary examples: J. Gobert, and M. Punch., *Rethinking Corporate Crime*, (Butterworths, 2003); M.B. Clinard, and P.C. Yeager, *Corporate Crime*, (Somerset, N.J.: Transaction Publishers, 2005) S.S. Simpson, *Corporate Crime, Law, and Social Control*, (Cambridge University Press, Cambridge, 2002).

¹² See 'A Manifesto On European Criminal Policy', European Criminal Policy Initiative, <https://sites.google.com/site/eucrimpol/manifest/manifesto>. Last accessed at 18 December 2011.

2. ARE CRIMINAL SANCTIONS AN 'ESSENTIAL' MEASURE TO ENSURE 'EFFECTIVENESS' OF UNION LAW?

2.1 Are criminal sanctions against individuals suitable to ensure 'effectiveness' of Union environmental law?¹³

What are the main arguments for criminalising serious infringements of Union environmental law?¹⁴

The literature and debate on this issue is extensive and considerable. This section will focus on the core arguments of this debate. It will be examined how these arguments can be justified in the argument in favour of or against criminalisation of infringements of environmental rules.

2.1.1 Deterring effect of criminal sanctions and the rational actor model¹⁵

Firstly, and most importantly, it is submitted that criminal sanctions are defensible given their capacity to deter more than any other sanction. The deterring nature of criminal sanctions in environmental law enforcement is largely an empirical issue which implies that optimally, the answer should be based on empirical research of the effects of sanctions in the different Member States.¹⁶ It is, however, very difficult to measure whether and to what extent a specific sanction has a deterring effect and there does not seem to be any method to provide reliable answers to these important questions. In the light of this my methodological approach will be to draw conclusions based on the views of secondary sources.

But what does the concept of deterrence imply? General deterrence theories assume that would-be criminals will witness punishment of offenders, do not desire to suffer a similar fate, and will therefore reject any thoughts they might have to commit the crime in question.¹⁷ Specific deterrence is focussed on the effect of the punishment on the individual subjected to it.¹⁸ Here the idea is that if the offender has been exposed to the rigours of imprisonment, he or she will have no desire to re-offend and risk having to go back to prison.¹⁹

¹³ See Wasmeier, *supra* note 6, p. 628.

¹⁴ Regarding the purposes of criminal penalties in the US: REP. No. 225, 98th Cong., 2nd Sess. 75-76, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3258-59.

¹⁵ Joined cases C-387/02, C-391/02 and C-403/02, *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi and Marcello Dell'Utri and Others*, [2005] ECR I-03565, Opinion of Advocate General Kokott, para. 89; Clune and Lindquist, "What 'implementation' isn't: Towards a General Framework for Implementation Research", *Wisconsin Law Review*, 1981, pp. 1044- 1045; M.G Faure, 'THE IMPLEMENTATION OF THE ENVIRONMENTAL CRIME DIRECTIVES IN EUROPE', at p. 6, See http://inece.org/conference/9/papers/Faure_Netherlands_Final.pdf. Last accessed at 19 December 2011. See also A Klip, *European Criminal Law*, Intersentia, 2009, pp. 72-73.

¹⁶ See K. Menninger, *The Crime of Punishment*, (Penguin, 1977).

¹⁷ See R Baldwin, (2004), "The New Punitive Regulation". *The Modern Law Review*, volume 67, pp. 372-373.

¹⁸ See R.W Adler, And C Lord, "Environmental Crimes: Raising the Stakes", *59 Geo. Wash. L. Rev.* 781 (1990-1991), p. 790; R Pereira. "Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the European Union?" (2007) 16 *European Energy and Environmental Law Review*, p. 258; R Macrory, "Regulatory justice- Making Sanctions Effective, Final Report", November 2006, p. 10. Available at <http://www.bis.gov.uk/files/file44593.pdf>; Wilson, "Re-thinking Penalties for Corporate Environmental Offenders: A View of the Law Reform Commission of Canada's Sentencing in Environmental Cases", *31 MCGILL LJ.* 313 (1986), p. 316.

¹⁹ See Gobert, *supra* note 11, pp. 217-218.

If we look at the argument of deterrence in general, it is appropriate to start with the views of the EU Member States and the Commission. In this regard, it appears that imprisonment for violations of environmental law can be found in most European countries which suggest that Member States consider prison sanctions to be appropriate environmental law enforcement.²⁰ It is the Commission's view that, even though the Union has enacted several directives for the protection of the environment, it contends that the sanctions currently in place in Member States are not sufficient to implement the Union's policy on environmental protection effectively.²¹ In this respect the Commission argues that other non-penal remedies will not have a sufficiently dissuasive effect. However, having reviewed these studies, it seems that the Commission's conclusions are based on insufficient and doubtful evidence. What the Commission is stating is merely that sanctions differ from Member State to Member State, without giving any empirical evidence that criminal sanctions are more deterring than other sanctions.²² At best, it relies on secondary evidence given by national committees on the effects of sanctions.²³

It is argued, however, by several commentators that the threat of a prison sentence will achieve better compliance with environmental law provisions than any other sanction.²⁴ The general perception is that the use of criminal law is, because of its very nature, appropriate, i.e. effective, achieving a high level of environmental protection and reinforcing environmental rules enforcement.²⁵ Supporters of criminal sanctions underline individual responsibility and argue that criminal sanctions are an effective deterrent because they can be focused directly on the individuals responsible for creating risk and causing damage to the environment.²⁶ The deterrence-based approach is argued to be particularly important in the environmental law context because of the vast potential for environmental harm when a company conducts its operations in a reckless or grossly negligent manner.²⁷

²⁰ See M Faure, and G Heine, *Criminal Enforcement of Environmental Law in the European Union*, (Kluwer Law International 2005), pp. 55-56.

²¹ See Commission Proposal, *supra* note 8.

²² See Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law-Impact Assessment, COM(2007) 51 final, SEC(2007) 161, pp. 16-18. The Impact Assessment relies on the study performed by HUGLO LEPAGE & Partners: "Study on environmental crime in the 27 Member States, Study JLS/D3/2006/05, Final Report, Executive summary", 5th of April 2007, pp. 7-16. This study does not discuss whether criminal sanctions generally have a deterrent effect.

²³ See Impact Assessment; *supra* note 22, p. 18.

²⁴ See J.-B. Auby, "Public Environmental law in France", in J.G.H. Seerden M. AA Heldeweg, and, K. R. Deketelaere. (eds), *Public Environmental Law in the European Union and the United States*, (Kluwer Law International, 2002), at p. 196; N De la Mata Barranco, "Derecho comunitario y derecho estatal en la tutela penal del ambiente", *Revista Electrónica de Ciencia Penal y Criminología*, 02-04 2000; P.M., De la Cuesta Aguado, "¿Intervención penal para la protección del medio ambiente?", *Revista penal on line* (www.geocities.com/icapda/ambiente.htm); Adler, and Lord, *supra* note 18, p. 787; Pereira, *supra* note 18, p. 258; See K. R. Deketelaere, "Public Environmental Law in Belgium", in J.G.H., Seerden, M. A. Heldeweg, and KR Deketelaere, (eds), *Public Environmental Law in the European Union and the United States*, Kluwer Law International, 2002, p. 76.

²⁵ See Case C-176/03, *Commission of the European Communities v Council of the European Union*, *supra* note 3, Opinion of Advocate General Colomer, para. 74, 84; G Hayman, and D Brack, 'International Environmental Crime, THE NATURE AND CONTROL OF ENVIRONMENTAL BLACK MARKETS', p. 37. Available at http://ec.europa.eu/environment/docum/pdf/02544_environmental_crime_workshop.pdf, p. 37; N Hawke, *Environmental Policy: Implementation and Enforcement*, (Ashgate Publishing Limited, 2002) p. 287; M. Thomas, Introduction in, P. Thomas, *Environmental Liability: 7th Residential Seminar on Environmental Law*, 9-13 June 1990, Graham and Trotman and International Bar Association, 1991, p. 213; A Gouritin, P De Hert, "Directive 2008/99/EC: A new start for criminal law in the European Community?", *ELNI Review* 1/2009, p. 29; R Mushal, "Reflections upon American Environmental Enforcement Experience as it may Relate to Post-Hampton Developments in England and Wales", *Journal of Environmental Law*, 2007, Vol 19 No 2, 201-226, pp. 210-211; Klip, *supra* note 15, p. 203;

²⁶ See S Hedman, "Expressive Functions of Criminal Sanctions in Environmental Law", *59 Geo. Wash. L. Rev.* 891 (1990-1991), p. 894; Mushal, *supra* note 25, p. 211.

²⁷ See Gobert, *supra* note 11 p. 220.

The argument that criminal sanctions are an effective tool for protecting the environment relies on empirical studies suggesting that jail terms have a self-evident general and specific deterrent impact upon corporate officials, who belong to a social group that is exquisitely sensitive to status deprivation and censure.²⁸ The popular economic deterrence model has the main assumption that potential environmental violators engage in a *rational* cost-benefit analysis when deciding whether or not to comply with environmental rules.²⁹ Criminals can thus be deterred from committing environmental offences by increasing the penalties until they outweigh the benefits of the crime.³⁰ Thus, according to this theory, a rational actor will not commit an offence if the penalty exceeds the perceived benefits from the offence discounted by the perceived likelihood for the offender of being caught and successfully prosecuted.³¹ For example, if an offender can earn 100,000 euro (A) by committing an offence and the chance of being caught is 10 % (B) and the probability of conviction (C) is 80 % the penalty must amount to 1,250,000 euro. $(A (100\,000) * B (0, 1) * C (0, 8) = \text{the optimal penalty})$ to act as an effective deterrent.³² If the penalty is lower than 1,250,000 euro, a rational actor would decide to commit the crime as his benefits would be higher than the expected costs. There is some empirical support for the assumption that companies decide to comply with environmental rules depending on a cost and benefit analysis. For example, if firms intend to dispose of waste in a legal manner or comply with environmental regulation, this will generally cost a lot of money. Consequently, there is a lot of money to be made from illegal activities infringing environmental rules³³. Nevertheless, deterrence can also be achieved by means of public condemnation and the educational function of criminal law.

2.1.2 Public condemnation and the educational function of criminal law

Secondly, it is claimed that the use of criminal sanctions can be justified on the basis of the denunciatory and educational function of criminal law. Both arguments are related to the fact that public condemnation and education may contribute to achieving general deterrence. The fact that society, by means of criminal law, describes certain behaviour as a serious offence and severely condemns offenders engaged in illegal behaviour may be a good reason for an individual to comply with the law.

These arguments are strictly speaking no economic deterrence arguments in the sense that the individual is not only contemplating costs and benefits in financial terms and the probability of being

²⁸ See Geis, G., *On White-Collar Crime*, Lexington books, 1982, p. 53; Faure and Heine, *supra* note 20, p. 58; Gobert, *supra* note 11, pp. 275-276.

²⁹ See S Wheeler, K Mann, & A Sarat, *Sitting in judgment: The Sentencing of White-Collar Criminals*, (Yale University Press, 1988) at p. 127; See Gobert, *supra* note 11, p. 220.

³⁰ See R.G. Burns, MJ Lynch, P Stretesky, *Environmental Law, Crime and Justice*, (LFB Scholarly Publishing LLC New York, 2008) at p. 107.

³¹ S Shavell, *Foundations of Economic Analysis of Law*, (Belknap Press of Harvard University Press, 2004) 505-507; Baldwin, *supra* note 17, p. 371; Gobert, *supra* note 11, p. 215.

³² See Faure, *supra* note 15, p. 7; Gobert, *supra* note 11, p. 223.

³³ See Lord Nathan, "Enforcement-securing compliance", in *Environmental Liability: 7th Residential Seminar on Environmental Law*, 9-13th June 1990, Graham and Trotman and International Bar Association, 1991, p. 240.

caught and convicted when deciding to comply with environmental rules. The denunciatory function of criminal law assumes that individuals are also interested in avoiding the social stigma that comes with prosecution. The denunciatory effect is also achieved because individuals contemplating to violate legal rules seriously believe that the public will become aware of the violations of environmental laws either through criminal proceedings or the media. Otherwise there would be no denunciatory effect. The educational function of criminal law assumes that individuals are more likely to abide by the rules if society as a whole considers this kind of behaviour as morally unacceptable and infringements of environmental rules as serious offences; and that if a person engages in these kinds of acts, he should feel the pain of remorse.³⁴ The aforementioned economic rational actor model is therefore too simple since there are further costs associated with a penalty for the offender in terms of pressure and social stigma that come with a prosecution.³⁵

The educational function of criminal law may be important where doubt as to the moral culpability and criminality of the behaviour or conduct in question exists, which is particularly relevant in the environmental law context where a large part of society may not consider environmental crimes as 'real' crimes.³⁶ It has even been argued that if policy makers and stakeholders seek to legitimate criminal sanctions, they will ultimately have to rely on criminal law's unique capacity to express moral outrage on behalf of the increasingly large proportion of society that has adopted environmental values.³⁷

The denunciatory function of criminal law stresses that penal sanctions have a symbolic value as an ultimate remedy because they inform the general public of which offenders deserve the most severe reproach when contravening the fundamental principles of the legal system.³⁸ Similar to education, punishment can have a denunciatory function, but while education aims to inform the public of the seriousness of the offence, denunciation serves to inform the public of the offenders who deserve their censure.³⁹ The denunciatory function of criminal law and the threat of criminal proceedings can lead to a ripple effect as consumers may not wish to give their support to corporate executives who ignore the

³⁴ Regarding the expressive function of criminal law, see Professor Joel Feinberg in: "The Expressive Function of *Punishment*", in *Doing & deserving; essays in the theory of responsibility*, Princeton University Press, 1970; and R Duff, *Trials and Punishments*, (CUP, Cambridge, 1986) 235-38; Gobert, *supra* note 11, p. 216.

³⁵ See Ogus and Abbot, "Sanctions for pollution: Do we have the right regime?" in *Journal of Environmental law*, Volume 14 no 3, 2002, Oxford University Press; Baldwin, *supra* note 17, p. 371; See G Stigler, "The Optimum Enforcement of Laws", 78 *Journal of Political Economy* (1970) 526.

³⁶ See Gobert, *supra* note 11, p. 220.

³⁷ See Hedman, *supra* note 26, p. 895; "Study on measures other than criminal ones in cases where environmental Community law has not been respected in the EU Member States", Summary Report, B4-3040A/2003/369724/MAR/A.3 , 20th September 2004, prepared by Milieu Ltd. and Hugo Lepage Associates ('MS Report 2004'), p. 65.; Commission proposal, *supra* note 8, p. 1; Impact Assessment, *supra* note 22, p. 35; E Rubin, 'Just Say No to Retribution', 7 *BUFF. CRIM. L. REV.* 17, 49-54 (2003); Hyatt, "The Federal Environmental Regulatory Structure" in Clifford, M., *Environmental crime: enforcement, policy, and social responsibility*, (Jones & Bartlett Learning, 1998).

³⁸ See Case C-176/03, *Commission of the European Communities v Council of the European Union*, *supra* note 3, Opinion of Advocate General Colomer, para. 74; P Vihervuori, "Public Environmental Law in Finland", in JGH Seerden, M.A. Heldeweg, M.A., and K.R. Deketelaere, (eds), *Public Environmental Law in the European Union and the United States*, (Kluwer Law International, 2002) at p. 168; Macrory report, *supra* note 18, p.15.; MS Report 2004, *supra* note 37, p. 63; "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, - Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, Brussels", 20.9.2011 COM(2011) 573 final ('COM 2011/573'), p. 11.

³⁹ See Gobert, *supra* note 11, p. 218.

law.⁴⁰ The threat of this effect may reinforce the deterrent function of criminal law for potential environmental offenders. The denunciatory argument assumes that corporate executives place a high value on their reputation and that they consider it essential to preserve their image as law-abiding individuals. Being labelled and punished as a criminal offender will damage an executive's reputation and the threat of such denunciation may consequently prove to be a powerful device for affecting individuals' behaviour.⁴¹

The effect that criminal law may have on individual's moral consciousness is very important to achieve compliance with environmental rules in the long run. After all, as it is assumed that it is easier for individuals to follow the law if it is perceived as just and morally defensible, it is essential that infringements of environmental rules by means of 'education' and 'social condemnation' are considered as moral wrongdoings. It is only at this point that the 'law in books' matches the 'law in action' which means the law has become effective.

2.1.3 *Retrospective proportionality and retribution*

Thirdly, it is argued that proportionality and retribution require that criminal sanctions are imposed in cases of serious environmental offences. In this regard, it should be explained what the principle of retrospective proportionality and retribution imply. Retribution theories argue that the primary reason for imposing criminal sanctions is that the offender has caused harm and that he therefore deserves to be punished.⁴² Within criminal law, the principle of retrospective proportionality stipulates that the severity of punishment should be proportionate to the seriousness of the offence.⁴³ The principle is firmly established in European law.⁴⁴

The principle of retrospective proportionality (hereinafter 'proportionality') is predominantly applied when deciding on the sanction in a specific case. It implies that the nature of and harm caused by the offence, and the sanction should correspond. Stricter penalties may be used for more serious violations.⁴⁵ The severity of sanctions is based on the idea that it depends on the way in which sanctions affect the interests of citizens.⁴⁶ The seriousness of an offence is normally analysed as being the function of two (main) factors: i) the degree of harmfulness of the conduct and, ii) the extent of the actor's culpability.⁴⁷ Once the general level of repression has been decided upon and a ranking of different categories of offences (e.g. by giving them penalty scales) within the system has been

⁴⁰ *Ibid.*, pp. 236-239.

⁴¹ *Ibid.*, p. 220.

⁴² *Ibid.*, pp. 216-217.

⁴³ See P. Asp, "Two Notions of Proportionality" in *Festschrift in Honour of Raimo Lahti*, edited by K. Nuotio, (Forum Iuris, 2007) p. 207; Gobert, *supra* note 11 p. 216

⁴⁴ See Macrory, *supra* note 18, p. 10: Article 49 of the Charter of Fundamental Rights; Case C-122/78, *SA Buitoni v Fonds d'orientation et de régularisation des marchés agricoles* [1979] ECR 677, para. 20; Case C-326/88, *Anklagemyndigheden v Hansen & Soen I/S*, [1990] ECR I-02911, Opinion of Advocate General Gervin, para. 8; Klip, *supra* note 15, p. 72; Article 23 (3) of Regulation 1/2003.

⁴⁵ See Case C-104/94, *Cereol Italia Srl v Azienda Agricola Castello Sas* [1995] ECR I-929, para. 25.

⁴⁶ See A.V. Von Hirsch, *Censure and Sanctions*, (Oxford, Clarendon Press 1993), p. 15.

⁴⁷ *Ibid.*, pp. 33.

determined, the offender should receive a sentence which corresponds to the gravity of his or her offence.⁴⁸ Having looked at the application of these principles in specific cases of sanctioning it is necessary to expand the argument. In this regard, it is claimed that proportionality and retribution can be applied in a general manner to assess which offences actually deserve criminal sanctions and which offences should only be punished with administrative sanctions.

It is claimed that proportionality requires that serious *mala in se* breaches of environmental rules committed intentionally call for serious penalties.⁴⁹ For certain infringements of environmental rules considered particularly grave, an administrative sanction may not be a sufficiently strong response.⁵⁰ It would be morally unacceptable if an administrative sanction were used for a serious environmental offence with the same damaging effects for society and human beings in terms of violating personal space and personal freedom, such as the more classic crimes of fraud, theft or violence against the bodily integrity, offences which as a rule are subject to criminal sanctions.⁵¹ Furthermore, on moral grounds, it is submitted that a person ought not to receive punishment which is disproportionately small compared to the culpability of the conduct being punished.⁵² Thus, one could argue that a punishment consisting of a sharp warning for intentionally dumping 100,000 tonnes of oil in the sea is disproportionate (in absolute terms) to the gravity of the offence.⁵³ There is also a link between culpability-based punishment and the moral credibility of the criminal justice system. Proportionality in punishment and criminalisation gives the system moral credibility, and therefore helps criminal law to function as an authoritative statement of social norms.⁵⁴

In summary, on moral grounds it would simply be unfair and irrational if serious environmental offences committed intentionally were only subject to administrative sanctions. Serious environmental offences are a threat to society and cause serious damages to human beings and nature.⁵⁵ These interests are legally recognised as important for society. Consequently, proportionality requires that individuals responsible for such offences are subject to severe sanctions such as imprisonment. This conclusion is also consistent with the views of the EU legislator and the Court that sanctions should be ‘effective, proportionate and dissuasive’.

2.1.4 Criminal procedural tools

⁴⁸ See Asp, *supra* note 43, p. 216; Case C-240/90, *Federal Republic of Germany v. Commission of the European Communities*, [1992] ECR I-05383, Opinion of Advocate General Jacobs, para. 11.

⁴⁹ See Mushal, *supra* note 25, p. 212.

⁵⁰ See COM 2011/573, *supra* note 38, p. 11.

⁵¹ See A Ashworth, *Principles of Criminal Law*, (OUP 2006), at p. 88; Burns, *supra* note 30, p. 127.

⁵² See L Crocker., “The Upper Limit of Just Punishment”, 41 *EMORY L.J.* (1992) 1059, p. 1060.

⁵³ See Asp, *supra* note 43, p. 217.

⁵⁴ See P.H. Robinson & J Darley, “The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best”, 91 *GEO. L.J.* 949 (2003), pp. 457-58.

⁵⁵ See Burns, *supra* note 30, p. 121.

Fourthly, the use of criminal sanctions as a deterrent against some of the more serious forms of environmental crime has been widely accepted and is at the centre of the attempts of law enforcement organisations to get more serious resources assigned to tackle environmental crimes.⁵⁶ Criminal law provides procedural tools for investigation and prosecution which are more powerful than the tools of administrative or civil law and can thus ensure the effectiveness of these procedures.⁵⁷ Criminal procedure allows finding evidence (through investigation) and is therefore capable of identifying the polluter responsible. Furthermore, in most cases it enables victims to get redress and there is no risk for bargaining procedures/regulatory capture as is the case with administrative sanctions.⁵⁸ Finally, criminal proceedings are public and have thus a deterrent effect. Therefore, the positive benefits of stronger enforcement tools also argue in favour of the introduction of criminal sanctions for serious environmental offences.

2.1.5 *Arguments against criminal sanctions and the rational actor model*

Despite the benefits raised above in relation to criminal sanctions used to enforce of environmental regulations, there is no general agreement that criminal law is the most effective tool to achieve compliance with environmental law provisions.⁵⁹ Explaining why people abide by the law even if the probability of being caught and convicted is insignificant, is the big challenge which goes against the explanatory force of the rational actor model⁶⁰. Commentators have recently suggested that the rational actor model employs an overly simplistic view of individual decision-making, suggesting that potential offenders do not know the law, do not make rational choices, or do not outweigh an expected cost of a violation against the expected gain.⁶¹ It is even questioned whether the deterrence model is possible to maintain as it is argued that the threat of a sanction is not relevant for individuals who decide to abide by the law.⁶² Furthermore, the deterrence model has been questioned on moral neo-Kantian grounds arguing that the punishment of one offender is used as an example for other offenders. The individual is being used as a means to an end rather than being treated as an individual in his/her own right.⁶³

The US experience suggests that the rational polluter model does not match up with the realities of environmental regulations since pollution is a product of a company's expectations and the US

⁵⁶ See Hayman and Brack, *supra* note 25, p. 24.

⁵⁷ See Commission proposal, *supra* note 8, p. 1; Gouritin, *supra* note 25, p. 27.

⁵⁸ See Gobert, *supra* note 11, p. 222.

⁵⁹ See Lord Nathan, *supra* note 33, p. 239; J.G.H., Seerden, M.A., Heldeweg, and K.R. Deketelaere, "Comparative remarks", in J.G.H. Seerden, M. A. Heldeweg, and K. R. Deketelaere (eds), *Public Environmental Law in the European Union and the United States*, (Kluwer Law International, 2002), at p. 579; Adler and Lord, *supra* note 18, p. 781; C Kimber, "Public Environmental Law in Ireland" in J.G.H., Seerden, M.A. Heldeweg, M.A. and K.R. Deketelaere, (eds), *Public Environmental Law in the European Union and the United States*, Kluwer Law International, 2002, p. 272; Wilson, *supra* note 18, p. 314.

⁶⁰ See D Spence, "The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law", 89 CAL. L. REV. 917 (2001), p. 983.

⁶¹ See R.A. Kagan, R.A. and J.T. Scholz, "The Criminology of the Corporation and Regulatory Enforcement Strategies" in K. Hawkins and J. Thomas (eds), *Enforcing Regulation* Kluwer-Nijhoff, 1984; G.P. Waldo and T.G. Chiricos, "Perceived Penal Sanction and Self-Reported Criminality: A Neglected Approach to Deterrence Research" (1972) 19 *Social Problems* 522-540; Baldwin, *supra* note 17, p. 369.

⁶² See Robinson and Darley, *supra* note 54, 951; Hayman and Brack, *supra* note 25, p. 30.

⁶³ See Gobert, *supra* note 11, p. 218.

environmental regulations are extraordinarily complex.⁶⁴ In this regard, empirical evidence suggests that the complexities of the law are such that nearly half of all corporate environmental managers have reported that their single most time-consuming duty is determining whether their facilities are in compliance.⁶⁵ Supplementary to these studies, some other evidence suggests that corporate managers do comply with environmental regulations regardless of the scale of the expected sanctions if they do not. This is inconsistent with the rational actor model since it makes little sense according to this model for companies to devote considerable resources to securing good environmental performance, including adopting programmes that are intended to go beyond what the law requires, as many companies have, according to the evidence.

The argument is that it is not unreasonable for managers, in some cases, to decide not to engage in environmental violations even if, from a strict financial cost-benefit analysis, it would be a rational thing to do. A manager may find himself in a difficult financial or mental state where he is more susceptible to breaching environmental rules since this can raise his career prospects, despite a very high perceived probability of being caught and a serious risk of being convicted for unlawful behaviour.⁶⁶ If the threat of being punished is not a reason to observe the law, why would people comply with regulatory obligations? It has been argued that people comply with regulatory obligations for reasons unrelated to deterrence.⁶⁷ One of these refers to the individual's sense of duty to obey the law in general.⁶⁸ It is argued that most people obey the law because they are responding to an internalised moral belief that a particular activity is wrong. Even if engaging in environmental violations could increase the profit of the company (and therefore the career possibilities of the manager) and the perceived probability of being caught is low, the manager may still decide not to engage in unlawful behaviour because of a moral conviction that this is condemnable.⁶⁹ It is also argued that social pressure, market conditions and criminogenic company cultures are relevant factors which affect the individual's decision of whether or not to engage in illegal activities damaging the environment. Companies often create their own internal pressures entailing that employees are expected to perform according to standards and failure to meet those standards may result in dismissal. This is particularly the case in situations in which employees are under pressure to build a plant on time and within budget. This pressure is real and immediate compared to the risk of criminal

⁶⁴ See Spence, *supra* note 60, pp. 919-926.

⁶⁵ *Ibid.*, p. 931.

⁶⁶ See A. Von Hirsch, A.J. Ashworth and J. Robert (eds.), *Principled Sentencing: Readings on Theory and Policy* (Hart, 2009) pp. 45-46; J.W. Coleman, "Motivation and Opportunity: Understanding the Causes of White-Collar Crimes", in G. Geis, R.F. Meier and L.M. Salinger (eds.), *White-Collar-Crime. Classic and Contemporary Views*, 3rd edition (New York, Free Press, 1994), p. 292; Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford University Press, 1992) p. 24.

⁶⁷ See Hayman and Brack, *supra* note 25, p. 30.

⁶⁸ See J.T. Scholz, & N Pinney, "Duty, Fear and Tax Compliance: The Heuristic Basis of Citizenship Behavior", 39 Am. J. POL. Sci. 490 (1995), p. 491.

⁶⁹ D. Weisburd, E. Waring and E. Chayet, "Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes, *Criminology*, 33, Issue 4: 1995, p. 587.

prosecution which is rather remote. Thus, the primary pressure is to perform even at the risk of committing an offence.⁷⁰

People and companies observe the rules, not because they fear formal criminal sanctions, but rather because they have internalised society's norms or are otherwise constrained by informal social control.⁷¹ Similarly, regardless of whether business people believe in environmental values or not, they may comply because they see themselves as law-abiding individuals. The company's and the individual's pecuniary incentive to violate the law must overcome values like environmental concern and 'law-abidingness' to cause actual noncompliance.⁷² As a result, there are inherent limits to what criminal law can achieve in terms of compliance.⁷³ The urge to comply with a norm may also be triggered by the awareness of the adverse consequences to others of violation of the norm and an ascription of personal responsibility for causing or preventing consequences.⁷⁴ Another reason for complying with the law is trust, according to which individuals who have faith in the government and their fellow citizens will more likely comply with the law than those who do not. Motivation to comply with the law based on a sense of duty and trust in government implies that a violation of that trust may undermine compliance. Thus, if a system of laws imposes costs and penalties on citizens in ways that seem irrational or unfair, it will undermine its own effectiveness and in the end its survival.⁷⁵ It in this context that Spence's argument should be perceived; complexity of environmental regulations undermines deterrence and environmental law is very often neither clear nor understandable.⁷⁶ Criminal sanctions should therefore not be used as a safety net for public education to fill in where the government has failed to live up to its civic educational obligations.⁷⁷

Summing up, it may be assumed that the rational actor model applies if we are dealing with a 'bad person', or more accurately an amoral person who will only obey the law if the consequences are more beneficial to him if he does than if he does not. Good people, who follow the law out of a sense of moral obligation, do not need sanctions to comply with regulations.⁷⁸ Furthermore, the deterrence model also assumes that future potential offenders perceive a reasonable probability of being

⁷⁰ See Wilson, *supra* note 18, p. 324.

⁷¹ See J.C. Jr. Coffee, "Does 'Unlawful' Mean 'Criminal'? Reflections on the Disappearing Tort/Crime Distinction in American Law", in L. Orland, ed., *Corporate Crime and White-Collar Crime: An anthology* (Anderson Publishing, 1995.), p. 53; MP Vandenberg, "Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance", 22 *STAN. ENVTL. L.J.* 55, (2003), p. 73; Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct", 90 *YALE, L.J.* 1, (1980), p. 66.

⁷² See Spence, *supra* note 60, p. 970.

⁷³ See H Packer, *The Limits of the Criminal Sanction*, (Stanford University Press, 1968); Baldwin, *supra* note 17, pp. 378-379; Gobert, *supra* note 11, p. 215.

⁷⁴ See Spence, *supra* note 60, p. 970.

⁷⁵ See Burns, *supra* note 30, p. 131; Cohen, "Sentencing the Environmental Criminal" in M Clifford, ed., *Environmental crime: enforcement, policy, and social responsibility*, (Jones & Bartlett Learning 1998); Gobert, *supra* note 11, p. 229.

⁷⁶ See Spence, *supra* note 60, p. 984.

⁷⁷ See Hedman, *supra* note 26, p. 899; Burns, *supra* note 30 p. 132; L.W. Milbrath, *Environmentalists: Vanguard for a New Society*, State University of New York Press, 1984, p. 21-65; Baldwin, *supra* note 17, p. 372

⁷⁸ See O.W. Holmes, "The path of the law", 10 *Harv LR* 457.

condemned. If enforcement is weak and prosecution and the imposition of high prison sentences is rare, criminal sanctions will not deter individuals from breaching environmental rules.⁷⁹

2.1.6 Intermediate conclusions on the suitability of criminal sanctions for the enforcement of environmental rules

Despite empirical evidence that the relevance of deterrence for the individual's decision to comply with environmental rules is doubtful, it is still argued that the threat of severe criminal sanctions may play a significant role for individuals and companies when making the decision to comply with environmental rules, particularly if imprisonment is one of the relevant and probable sanctions.⁸⁰ It is suggested that incarceration is considered by corporate executives to be a most serious sanction, especially in the white-collar area.⁸¹ In the event of particularly serious violations of environmental rules, commentators generally agree that imprisonment is the most effective deterrent in cases of deliberate, calculated crimes fuelled by greed or the pursuit of power.⁸² Since society is not only constituted of 'good people' willing to follow the rules by their own sense of duty, it is necessary to give these 'bad people', who rationally contemplate breaking the law for the pursuit of their own personal profits, some disincentives.⁸³ It is therefore more appropriate to design the enforcement system by addressing these individuals rather than the individuals who abide by the law regardless of the threat of sanctions. Furthermore, it is questionable whether the empirical evidence points to the conclusion that environmental law enforcement is so weak that the threat of criminal sanctions has no impact on the potential environmental offender's decision to infringe environmental regulation. As long as the threat of the criminal sanction has any effect on the individual's decision to comply with the law, the deterrence argument seems to be a relevant justification for the imposition of criminal sanctions. In addition, the neo-Kantian criticism may not be so relevant if the justification for punishment lies in its capacity to achieve moral justice. Whereas it is argued that the proportionality principle requires that serious environmental offences are subject to imprisonment, it seems clear that individuals being punished are not treated as a means to an end but rather as an end in themselves.

In conclusion, based on the arguments of general and specific deterrence, the unique capacity of criminal sanctions to express moral outrage, the strong procedural devices for criminal investigation and the argument relating to moral justice and proportionality, it appears that the arguments for the suitability of criminal sanctions are stronger than the argument against, which rely on the speculative

⁷⁹ See Burns, *supra* note 30, pp. 137-138; M.M. O'Hear, "Sentencing the green-collar offender: punishment, culpability, and environmental crime", *Journal of Criminal Law and Criminology*, 2004, Vol. 95, No. 1, 133, at Tables 2 and 3; Gobert, *supra* note 11, p. 223, 276.

⁸⁰ See "Study on measures other than criminal ones in cases where environmental Community law has not been respected in a few candidate countries", Summary Report, carried out by Jendroska Jerzmanski Bar & Partners. Environmental Lawyers in co-operation with Environmental Management and Law Association (EMLA) and Milieu Ltd under contract to the European Commission's Environment Directorate, Contract no. B4-3040/2003/369100/MAR/A.3, 30 September 2004 (Candidate Countries' Report), p. 40. Available at http://ec.europa.eu/environment/legal/crime/pdf/cd_summary_report.pdf.

⁸¹ See Hedman, *supra* note 26, p. 895; Baldwin, *supra* note 17, p. 373;

⁸² See *United States v. Paterno*, 375 F. Supp. 647, 649 (S.D.N.Y.), *cert. denied*, 419 U.S. 1106 (1974); Gobert, *supra* note 12, p. 278.

⁸³ A. Von Hirsch, A.E. Bottoms, E. Burney and P.O. Wikström, "Deterrent Sentencing as a Crime Prevention Strategy", in A. Von Hirsch, A. J. Ashworth and J. Robert (eds.), *Principled Sentencing: Readings on Theory and Policy*, (Hart, 2009), p. 60;

nature of the deterrent effects of criminal sanctions and general objections to the explanatory force of the rational actor model as a credible explanation of corporate crimes. In addition, the evidence from secondary literature referred to in this contribution and the official documents from the Member States and the Commission also support the conclusion that criminal sanctions are suitable for the enforcement of EU environmental law.

Nevertheless, whereas penal sanctions should only be used as an ultimate remedy when all other measures have proven to be insufficient to achieve effective enforcement of environmental law provisions, we have to discuss whether personal fines or other administrative sanctions are just as effective as criminal law in the enforcement of Union environmental law.⁸⁴

2.2 Are there alternative sanctions which are as effective as criminal sanctions to achieve compliance with EU environmental rules?

2.2.1 General remarks on alternative sanctions

Under the current enforcement regime on a Union level, there is a directive on environmental liability, hereafter referred to as the ELD⁸⁵. This directive establishes a framework for environmental liability based on the "polluter pays" principle, with a view to preventing and remedying environmental damage.⁸⁶ The liability scheme applies to certain specified occupational activities and to other activities in cases where the operator is at fault, whether this fault is caused by negligence or not.⁸⁷ The purpose of this directive is to help deter breaches of environmental standards and contribute to the achievement of objectives and the application of Community environmental policy in this area.⁸⁸ Civil liability sanctions are, however, argued to be insufficient in order to deter companies and individuals from breaching the environmental rules.⁸⁹ Furthermore, the current Union liability regime is directed against the operator. The operator is in essence not always an individual but a company that can disburse liability claims as business costs or forward them to consumers when setting their prices.⁹⁰ In addition, the individuals responsible for the offence are unlikely to be punished by the company and can therefore not be deterred by a liability regime as the one established by the ELD.

⁸⁴ See J.G.H. Seerden, M.A., Heldeweg, "Public Environmental law in the Netherlands", in J.G.H. Seerden, M.A., Heldeweg, and K.R., Deketelaere, (eds), *Public Environmental Law in the European Union and the United States*, (Kluwer Law International, 2002) p. 390.; M.A. Vagués, "Public Environmental law in Spain" in J.G.H. Seerden, M.A. Heldeweg, and K.R. Deketelaere, (eds), *Public Environmental Law in the European Union and the United States*, (Kluwer Law International, 2002), p. 430, 436; M.P. McDermott, 'Occupational Disqualification of Corporate Executives: An Innovative Condition of Probation', 73 J. Crim. L. & Criminology 604 1982, p. 609.

⁸⁵ See Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage ('ELD'), *OJ L 143*, 30.4.2004, p. 56–75.

⁸⁶ See Article 1 of the ELD.

⁸⁷ See Articles 6-8 and Recital 8 of the ELD; See Germani, *supra* note 2, pp. 9-10 regarding efficiency of a fault-based regime or strict liability regime.

⁸⁸ See Recital 1 and 2 of the ELD.

⁸⁹ See Adler and Lord, *supra* note 18, pp.789-790; Pereira, *supra* note 18, pp. 260-261.

⁹⁰ See Article 2(6) of ELD.

There are however several other sanctions in the field of environmental law which can be effective to ensure compliance, such as enforcement undertakings, fines, revocation schemes, divestiture, restorative justice, publicity orders, rehabilitation orders, remedial orders, mandatory compliance orders, taxes, profit orders and community service orders (environmental clean-up programmes).⁹¹ It is argued by some commentators that some of these administrative penalties can be an effective way of ensuring regulatory compliance.⁹² In this respect, commentators often stress the ‘efficiency’ benefits of imposing administrative instead of criminal sanctions. Criminal proceedings are viewed as more complicated than administrative or civil proceedings, and not really appropriate for enforcement of regulatory provisions.⁹³ Many administrative sanctions such as administrative fines, revocations schemes and divestiture can be applied out-of-court and the procedural rules associated with these sanctions are less complicated. Thus, the proceedings will be simpler, speedier and less costly than criminal proceedings.⁹⁴

Considering all alternative sanctions in detail would lead us too far in this Contribution, but the most frequent and important corporate sanction will be looked at: the corporate fine. The following arguments and objections against corporate fines, however, apply to most administrative sanctions, *inter alia* divestiture, closure, taxes, and rehabilitation and remediation orders.

2.2.2 *Are corporate fines equally effective as criminal sanctions in the enforcement of EU environmental law?*

Even if corporate fines are, at this stage, not envisaged to enforce Union environmental law, this is probably the most important sanction Member States use in the enforcement of their domestic environmental law. Let us therefore discuss the benefits and disadvantages of imposing corporate fines for environmental law infringements.

Fines are a very flexible tool and are considered particularly appropriate for environmental offences when the main offender is a legal person. Very high fines for large corporations are appealing, especially when deterrence theories are considered, since they represent a serious threat to the economic prosperity of a company.⁹⁵ Because corporate behaviour is economically motivated, penalties applied to polluting activities increase the internal costs and reduce the incentive to pollute.⁹⁶ A fine is also a relatively cost-free sanction to administer. The expense involved in collecting a fine

⁹¹ See generally regarding alternative sanctions in the field of environmental law enforcement: Macrory report, *supra* note 18, pp. 36-86; Mushal, *supra* note 25 pp. 214-222; Burns, *supra* note 30, pp. 103-106; Gobert, *supra* note 11, 221-245.

⁹² See Macrory report, *supra* note 18, p. 42.

⁹³ See Kovel, “A Case for Civil Penalties: Air Pollution Control”, 46 *Journal of Urban Law*, p. 153, 1969; See also COM 2011/573, *supra* note 38, p. 11.

⁹⁴ See Wilson, *supra* note 18, p. 313; Pereira, *supra* note 18, p. 259; Burns, *supra* note 30, p. 136.

⁹⁵ See Faure and Heine, *supra* note 20, p. 77; Case C-240/90, *Federal Republic of Germany v. Commission of the European Communities*, *supra* note 48, Opinion of Advocate General Jacobs, para. 11; Gobert, *supra* note 11, p. 223.

⁹⁶ See Burns, *supra* note 30, p. 102; Germani, *supra* note 2, p. 1.

will be minimal and whatever administrative costs are incurred can be charged to the offender.⁹⁷ Fines can also be used to compensate victims or provide restitution. If left with their own civil remedies, victims of environmental offences may be too weak to pursue their claims against companies with superior financial resources.⁹⁸

However, unless the financial penalty is of the right amount according to the rational actor model, it may be that small financial penalties can easily be absorbed by large companies and become part of doing business, for example, by treating them like overhead costs with limited impact on the day-to-day decision-making on compliance.⁹⁹ The principal problem with fines is that companies can pass the financial cost on to third parties such as shareholders, employees, creditors and customers, and defer responsibility from company management.¹⁰⁰ For many companies the cost of paying fines for environmental regulation violations is therefore cheaper than the cost of complying with the rules.¹⁰¹ Shareholders experience losses resulting from fines through decrease of the share value and reduced future dividends. The cost of a fine also spills over to consumers through price increases for the companies' goods and services, and to employees through adverse effects on wages and staffing.¹⁰² Whether the fine is borne by the owner or by the customers depends on the market power of the corporation. If the company has substantive market power, the customer will pay; if not, the owners will pay.¹⁰³

But is this argument against corporate fines also relevant in the companies where shareholders take action and force the company to comply by exercising their shareholders' rights? The problem for shareholders is that the interests of individual shareholders are likely to be so diffuse that the fines levied in environmental cases would not provoke them to take action. Furthermore, the attitude of shareholders in practically all but very closely held corporations is one of inactiveness. As long as dividends are paid and there is a reasonable expectation of profits, the shareholders will be satisfied notwithstanding a few criminal convictions. The alternative to passing the fine on to shareholders is to pass it on to customers assuming that the company possesses sufficient market power.¹⁰⁴ A company with market dominance only needs to include the penalty in its production cost with the result that prices increased to the degree necessary to recover the loss. Consequently, the company loses very little and consumers bear the burden.¹⁰⁵ As such, the deterrent effect on the corporation will be minimal or non-existent.

⁹⁷ See Gobert, *supra* note 11, p. 221.

⁹⁸ *Ibid.*, p. 222.

⁹⁹ See Candidate Countries Report, *supra* note 81, p. 6, 20; Hayman and Brack *supra* note 25, p. 16.; Adler and Lord, *supra* note 18; p. 811; Gobert, *supra* note 11, p. 223, 233.

¹⁰⁰ See D. Thornburgh, "Criminal Enforcement of Environmental Laws-A National Priority", 59 *Geo. Wash. L. Rev.* 775 (1990-1991), p. 775; Wilson, *supra* note 18, p. 215, 218; Pereira, *supra* note 18, p. 254; Burns, *supra* note 30, p. 103; Gobert, *supra* note 11, p. 215, 231.

¹⁰¹ See Burns, *supra* note 30, p. 103; Gobert, *supra* note 11, p. 228.

¹⁰² See Macrory report, *supra* note 18, p. 58.

¹⁰³ See Wilson, *supra* note 18, p. 218.

¹⁰⁴ See Gobert, *supra* note 11, p. 231.

¹⁰⁵ See Burns, *supra* note 30, p. 103.

The remaining option then to achieve deterrence is to impose very high fines which outweigh any potential benefits the offender would have with a high cost of compliance and low detection and conviction rates.¹⁰⁶ According to the model applied above, sanctions should therefore be a multiple of the potential benefit to the criminal to outweigh the low detection and conviction rate. Otherwise the rational calculating offender would prefer to breach environmental rules since breaching environmental rules is very cost-effective for corporations as they can externalise pollution costs.¹⁰⁷

If the fine imposed is so high that it is capable of threatening the company's survival, regardless of whether or not the company holds a dominant position, it will be a strong deterrent. There are nevertheless problems with such high fines. Firstly, it is questionable whether courts are ready to impose such fines.¹⁰⁸ Secondly, too high fines may lead to more bankruptcies which will result in more costs for society than the benefits of imposing the fine justify.¹⁰⁹ High fines for company with less market power may lead to workers being made redundant which implies hardship for the innocent workers and costs for the state which has to pay more unemployment benefits.¹¹⁰ Thus, if the fine exceeds the offender's assets, it will not be an effective deterrent.¹¹¹ Thirdly, if a company is singled out for an offence committed by several other companies and is condemned to pay a very high fine, this may be contrary to the notion of 'just deserts' assuming that the other companies guilty of the same offence are not prosecuted.¹¹² Finally, and most importantly, the crucial issue with corporate fines is that they are not addressed to the individuals actually committing the offense. Environmental violations simply do not happen without human actions and it is therefore necessary to deter individuals by threatening them directly with sanctions if they violate environmental rules.¹¹³ I therefore disagree with the views held by some commentators that 'serious environmental crimes' are usually corporate crimes in the sense that their explanation is essentially based on deviant corporate cultures.¹¹⁴ Individuals often have other incentives than the company giving them a reason to break the law when it can lead to personal benefits or when they are under pressure to maximise profits.¹¹⁵ In this regard, it is assumed that companies do not have internal penalty systems for individuals which infringe environmental regulation or that such penalty systems are not in any case deterrent when

¹⁰⁶ See Faure and Heine, *supra* note 20, p. 78.

¹⁰⁷ See Faure and Heine, *supra* note 20, p. 57; Burns, *supra* note 30, p. 107.

¹⁰⁸ See Macrory report, *supra* note 18, p. 14, 16; *Environmental Crime and the Court*, House of Commons Environmental Audit Committee Sixth Report, 2004. Reference Introduction paragraph 15. Available at www.publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/126/12604.htm.

¹⁰⁹ See Adler and Lord, *supra* note 18, p. 842; Macrory report, *supra* note 18, p. 58; Report candidate countries, *supra* note 81, pp. 23-24; Gobert, *supra* note 11, p. 223.

¹¹⁰ See Gobert, *supra* note 11 p. 231-232.

¹¹¹ See Gobert, *supra* note 11 p. 228.

¹¹² See Gobert, *supra* note 11, p. 223, 228-229.

¹¹³ See Address by United States Att'y Gen. Benjamin R. Civiletti, University of Michigan Law School Senior Day Ceremony (May 17, 1980), at 14-15; Gobert, *supra* note 11, p. 282.

¹¹⁴ See Faure and Heine, *supra* note 20, pp. 87-89; Baldwin, *supra* note 17, pp. 369-370; Gobert, *supra* note 11, pp. 242-245, 253.

¹¹⁵ See Spence, *supra* note 60, pp. 970-971.; G.J. Miller, *Managerial Dilemmas: The Political Economy of Hierarchy (Political Economy of Institutions and Decisions*, CUP, 1993; Bower, "On the Amoral Organization", in R. Marris, ed., *The Corporate Society*, 178, 197 (Macmillan, London, 1974); Gobert, *supra* note 11, p. 258, 282.

individuals contemplates breaching environmental rules.¹¹⁶ Since individuals are ultimately responsible for infringing environmental rules, it is essential to introduce individual personal sanctions.¹¹⁷ It is unlikely that corporate fines, regardless of their amount, will be effective to ensure compliance with environmental regulation.¹¹⁸ Therefore, sanctions need to be directed against individuals to achieve sufficient deterrence.¹¹⁹

2.2.3 *Are individual administrative or civil fines equally effective as criminal sanctions, particularly imprisonment, in the enforcement of Union environmental law?*

If corporate fines do not sufficiently deter companies from breaching environmental rules, is it possible to use individual fines to ensure compliance with environmental rules effectively? There are several objections to using individual fines to implement environmental rules effectively. Firstly, it is recognised that individuals are sometimes indemnified by the company if they are subject to fines.¹²⁰ Furthermore, fines may be too low to deter individuals.¹²¹ The evidence indicates that the usual arrangement is to reward management fidelity to what is perceived to be in the company's interests given that companies are normally not willing to penalise individual action with the purpose of creating profits for the company or if they acted with the consent of higher executives.¹²² Even if individuals are not rewarded and if they breach internal company rules, a fine in itself is unlikely to be a deterrent if individuals receive individual incentives to make substantive profits (bonuses, higher salaries, career opportunities) by breaching environmental regulation. Secondly, as argued above, prison terms are said to be an especially effective sanction in attempting to control the behaviour of corporate officials, who belong to a social group that is particularly sensitive to status deprivation and censure.¹²³ The reason for this is that a prison term cannot, in contrast with a fine, be passed on to customers. Neither can the individual be reimbursed for the psychological and social harm caused by a prison sentence. It is thus claimed that individuals perceive the threat of a prison sanction as more serious than a fine when contemplating whether to engage in serious violations of environmental regulations. Consequently, it seems that individual fines do not seem to fulfil the *Greek Maize* criteria of being 'proportionate, effective and dissuasive'.¹²⁴

¹¹⁶ See J.C. Coffee., "Corporate crime and punishment. A non-Chicago view of the economics of criminal sanctions", *American Criminal Law Review*, 1980 p. 467; Gobert, *supra* note 11, p. 274

¹¹⁷ See Report Candidate Countries, *supra* note 81 p. 16; "Criminal Penalties in EU Member States' Environmental Law", Coordinated by Prof. Dr. Michael G. Faure LL.M. and Prof. Dr. Günter Heine, Maastricht European Institute for Transnational Legal Research Maastricht, 4 October 2002, p. 244. Available at http://ec.europa.eu/environment/legal/crime/pdf/criminal_penalties1.pdf.

¹¹⁸ See Adler and Lord, *supra* note 18, p. 831

¹¹⁹ See Note, "Decision-making Models and the Control of Corporate Crime", 85 *YALE L.J.* 1091, 1129 (1976); "Developments in the Law-Corporate Crime. Regulating Corporate Behavior Through Criminal Sanctions", 92 *HARV. L. REV.* 1227, 1261 (1979); McDermott, *supra* note 85, p. 611; Coffee, *supra* note 117, pp. 469-70.

¹²⁰ See McDermott; *supra* note 85, p. 614; Gobert, *supra* note 11, p. 273

¹²¹ See Gobert, *supra* note 11, p. 275

¹²² *Ibid.*, pp. 273-274.

¹²³ See O'Hear, *supra* note 79, p. 145; Macrory report, *supra* note 18, p. 47.

¹²⁴ See Klip, *supra* note 15, p.295.

To sum up, it appears that fines, based on the predominant view in legal and economic literature, cannot be an equally effective sanction as imprisonment to achieve compliance.¹²⁵

2.2.4 *Are disqualification orders equally effective as criminal sanctions, in particular imprisonment, to ensure compliance with environmental regulation?*¹²⁶

Commentators have suggested disqualification orders as an alternative to imprisonment in cases of serious environmental offences.¹²⁷ Disqualification orders are intended to penalise a corporate executive or manager who has been convicted of an environmental offence in furtherance of the business of the company. Disqualification, imposed as a probation condition, bars an individual from exercising his managerial functions which bears a direct relationship to the conduct constituting the offence, for a limited period of time, or from forming a new company.¹²⁸ It is argued that disqualification orders have strong deterrent effects as few directors wish to see their careers paths so rudely short-circuited or their reputation tarnished in this serious manner.¹²⁹

In this respect, the nature of the disqualification sanctions reveals apparent similarities with criminal sanctions. Firstly, as is the case with criminal sanctions, it communicates moral stigma and societal disapproval. Secondly, the loss of career opportunities is to a certain extent a cost that cannot be reimbursed by the company. The removal from an important position in the company may entail both social and psychological harm that is not easily reimbursable. If fines are being indemnified, the executive's fear of losing his position or the damage to his good reputation is the main deterrent for executives contemplating to disregard environmental regulation. It is also argued that in the business world disqualification is perceived to be effective punishment and not a harmless sanction.¹³⁰

Nevertheless, there are at least three arguments against the effectiveness of disqualification orders. Firstly, if the executive is close to his retirement, it is likely that he will be reimbursed unless he acted against company rules.¹³¹ Given that he will only suffer a few years of lost income, receive a golden parachute and given that his reputation may be relatively secure, it is unlikely that disqualification will have any deterrent effect on the offender.¹³² Secondly, even if he acts against company rules, or is not approaching his retirement, the fear of disqualification is marginal compared to the potential benefits

¹²⁵ See J.M., Strock, "Environmental Criminal Enforcement Priorities for the 1990s", 59 *Geo. Wash. L. Rev.*, 1990-1991, p. 922; "Criminal Enforcement of Environmental Law Seeks Deterrence Amid Need for Increased Coordination, Training, Public Awareness", 17 *Env't Rep.* (BNA) 800, 801 (Sept. 26, 1986), p. 801.

¹²⁶ See Faure and Heine, *supra* note 20, pp. 66-68.

¹²⁷ See M. Green, R. Nader, and J. Seligman, *Taming the Giant Corporation- How the Largest Corporations Control Our Lives.*, pp. 249- 50 (WW Norton Co., 1976); C. Stone, *Where the Law Ends: The Social Control of Corporate Behavior*, 193, (Harper and Row, 1975); J. Braithwaite, J. and G. Geis, "On Theory and Action For Corporate Crime Control", 28 *Crime and Delinquency* 292, 1982, pp. 305-07; MS Report 2002, *supra* note 118, p. 224.

¹²⁸ See McDermott, *supra* note 85, pp. 605, 626-630, 636-637. See UK legislation: Company Directors Disqualification Act of 1986. A UK disqualification order can extend up to 15 years.

¹²⁹ See Gobert, *supra* note 11, p. 278.

¹³⁰ See *Reform of the Federal Criminal Laws: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 1788 (1972) (statement of the National Assoc. of Manufacturers), 1651, 1654.

¹³¹ See Gobert, *supra* note 11, p. 273.

¹³² See Gobert, *supra* note 11, p. 279.

in terms of higher bonuses, salaries and career advantages which he can obtain if he does violate environmental regulation. It is more likely that the threat of a prison term carrying a strong social stigma and depriving the corporate official of his or her liberty is a stronger deterrent than disqualification.¹³³ Finally, the likelihood of a disqualification order being imposed may from the offending executive's position seem rather remote given the low probability of being caught and convicted.¹³⁴

But could the effectiveness problem not be overcome if one simultaneously imposes financial sanctions and trading prohibitions against individuals? These combined sanctions would both deter middle managers and people in leading position in the company. Nevertheless, it is still argued that the threat of a criminal sanction, particularly imprisonment, is more dissuasive than these combined sanctions because deprivation of liberty and criminal labelling carries stronger social stigma than any other sanction. Furthermore, deprivation of liberty entails more severe social and mental consequences than both disqualification order and individual fines. To sum up, it seems that imprisonment may be a stronger deterrent than disqualification and fines, whether or not combined, if the aim is to ensure that EU environmental rules are fully effective.

3. CONCLUSIONS ON WHETHER THE UNION SHOULD IMPOSE CRIMINAL SANCTIONS TO ENFORCE UNION ENVIRONMENTAL LAW

This contribution mainly intended to examine the pros and cons of criminal sanctions thoroughly. Firstly, it was claimed that criminal sanctions can be defended on an empirical basis as an 'effective measure' to enforce EU environmental law. It was contended that imprisonment is the most effective deterrent in cases of deliberate, calculated serious environmental crimes committed in pursuit of power. Whereas society is not only constituted of 'good people' willing to follow the rules by their own sense of duty, strong disincentives are necessary for the 'bad people' who rationally and deceitfully contemplate breaking the law driven by personal greed. Based on the arguments on general and specific deterrence, on the symbolic value of criminal sanctions and stronger procedural devices for criminal investigation, and on the arguments on moral justice and proportionality, it was concluded that the arguments in favour of criminal sanctions were stronger than the argument against.

It was then considered whether there are alternative less onerous sanctions which are equally effective to achieve compliance with environmental rules. Firstly, it was submitted that corporate fines do not have sufficient deterrent effect to ensure compliance with environmental rules. The reason for this is that they are generally too low to pose a serious threat when companies and individuals are considering breaching environmental rules. Secondly, even if they would be sufficiently high to

¹³³ See W.P.J. Wils., *The Optimal Enforcement of EC Antitrust law*, (Kluwer Law International, 2002), at p. 222

¹³⁴ See Gobert, *supra* note 11, p. 279.

provide an optimal deterrent it is likely that very high fines may result in the company going bankrupt which would cost society more than it would gain with the fine. Finally, corporate fines are not addressed to the individuals who are actually responsible for the committal of the offence. It was therefore concluded that it is necessary to impose individual sanctions to enforce environmental rules effectively.

Then, the pros and cons of the two most important deterrent individual sanctions - apart from criminal sanctions - were considered: personal civil/administrative fines and trading prohibitions. Several objections were raised, however, against individual administrative/civil fines to implementing environmental rules effectively. Firstly, it was recognised that individuals can be indemnified by the company if they are subjected to a fine. Secondly, prison sanctions are argued to be a more deterring than fines to control the behaviour of corporate officials since a prison sentence cannot, contrary to fines, be passed on to customers. With respect to trading prohibitions, there were also several doubts as to their effectiveness. Firstly, if the executive is approaching his retirement he is likely to be reimbursed unless he has acted against company rules. Secondly, even if an executive acts against company rules or is not close to retirement, the fear of disqualification is marginal compared to the potential benefits in terms of higher bonuses, salaries and career advantages which the executive can obtain if he violates environmental regulation. It is more likely that the threat of a prison term carrying a strong social stigma and depriving the corporate official of his or her liberty is a stronger deterrent than disqualification. A comparison between individual fines and trading prohibitions on the one hand and criminal sanctions on the other hand, therefore demonstrated that criminal sanctions, including imprisonment, are more dissuasive in nature because prison sentence is the only sanction that cannot be passed on to customers, shareholders or other third parties. The primary advantage of a criminal sanction in terms of deterrent effects is associated with the fact that the individual cannot be reimbursed for the psychological and social harm caused by a prison sentence. To sum up, it was concluded that criminal sanctions, in particular imprisonment, was a stronger deterrent than disqualification orders and personal fines, even if the latter sanctions were to be combined, if the aim is to ensure fully effective EU environmental rules.

In terms of efficiency, it seems that if EU criminal law considers moral justice, accountability and deterrence as primary values for the design of penalties, it is necessary to accept that there will be some efficiency losses when criminal sanctions are imposed. The efficiency benefits associated with effective and severe administrative sanctions such as fines and trading prohibitions may be lost given that these sanctions are likely to be considered as criminal sanctions, contrary to the assertions of the author, in the meaning of Article 6 of the European Convention of Human Rights.¹³⁵ Finally, given that the justification for criminal sanctions in the field of environmental law enforcement also lies in

¹³⁵ See *Société Stenuit v. France*, Decision of the Commission of Human Rights of 27 February 1992, A/232-A; judgment of the ECtHR of 23 November 2006. *Jussila v. Finland*, App. n° 73053. EU law however (Article 23(5) of Regulation 1/2003) explicitly provides that competition law fines should not be considered as a criminal sanction.

its capacity to achieve moral justice and given that proportionality in the design of penalties in the field of environmental law enforcement require that serious environmental offences are subject to imprisonment, the neo-Kantian criticism that individuals are treated as a means to an end when criminal sanctions are imposed as deterrent, was rebutted.