

Crimes against Environment in Albania and the European Union's Approach to the Protection of Environment through Criminal Law

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Abstract

The protection of environment is of particular importance for Albania in its integration process to the European Union (EU), which considers it to be one of the “essential objectives of the Community” as highlighted in the case-law of the European Court of Justice. Taking into consideration the requirements of the specific EU directives on the protection of environment through criminal law, one of the expected legal reforms in the approximation process will be the adaption of the Albanian substantive environmental criminal law to the requirements of the Environmental Crime Directives. The need for aligning the Albanian criminal law with these directives has been highlighted by the Commission in the 2014 Progress Report on Albania. This paper examines the Albanian substantive environmental criminal law and its application in practice in the last ten years, aiming to identify the main challenges it faces in the context of the required transposition of EU Environmental Crime Directives, while also making suggestions on how to better respond to these issues. For this purpose, the paper will also refer to the experience of other countries with the implementation process in this field, highlighting the main problems encountered and the impacts of the Environmental Crime Directives transposition.

Keywords: Crimes against the environment, Albania, Environmental Crime Directives, EU.

1. Introduction

The EU is considered to be “a major global force in pushing for tighter environmental standards” (Environment and Climate Change, 2015), having the environmental protection as “one of its aims” since 1972 (Asser Dossiers). In forty years, it has adopted more than two hundred legislative measures which cover “all environmental sectors, including water, air, nature, waste, noise, and chemicals, and others which deal with cross-cutting issues such as environmental impact assessment, access to environmental information, public participation in environmental decision-making and liability for environmental damage” (European

Commission's DG Environment website). The EU measures have influenced "almost all aspects of national environmental law" of the Member States (Asser Dossiers).

In Albania, which has been granted the candidate status in June 2014, all Environmental Protection laws since 1993 have asserted the protection of environment from pollution and damage as a "national priority". The legislative framework on environmental protection has developed into a wide legal framework with a variety of sources comprising: the Constitution, the Framework Law on environmental protection, sectorial laws, bylaws, the Criminal Code, and international environmental treaties in which Albania is a Party (Petrela, 2009: 135-140). Basic principles in the field of environmental protection have been elevated to constitutional rank. Environmental protection provisions have not been codified or introduced as part of a single law, as besides the Framework Law on Environmental Protection, there are several laws which cover specific sectors or components of environmental protection such as air, water, forests, waste management, etc. Similar to other European countries, the new legislation that has been adopted in Albania since the early 1990s has also aimed at adapting the national legislation to the requirements of the various international treaties which the legislator has adhered to or ratified.

In its efforts to align national legislation with the EU environmental *acquis*, Albania has constantly revised its environmental legislation. The new Framework Law adopted in 2011 has been part of a wide legal reform which was undertaken by the Ministry of Environment in June 2011 with the aim of providing the necessary legal basis for the transposition of all EU directives in the field of environmental protection (Parliamentary Document, 2011).

Nevertheless, "lack of implementation of the environmental legislation" remains a "major problem" in Albania, as it has been continuously highlighted in the EU Progress Reports on Albania from 2012 to the latest report of 2014, in which the Commission has concluded that "significant further efforts are needed in all areas to strengthen administrative capacity and to ensure proper implementation and enforcement of legislation and its further alignment with the *acquis*." This is of particular importance, taking into consideration that degradation of the environment from human activity is a phenomenon of "huge concern" in Albania and has been currently classified among the five "first level" risks in the latest National Security Strategy (2014), which are considered to have the highest priority due to the high probability of manifestation and serious consequences for the security of the Republic of Albania (National Security Strategy, 2014: Annex C).

The importance of an effective implementation of environmental law, especially when there have been “many cases of severe non-observance of Community environmental law” in the EU Member States, has led the EU to consider the adoption of new directives on the protection of the environment through criminal law, which would “support the implementation and enforcement of Community environmental legislation” (European Commission’s DG Environment). For the first time, these directives specifically address the issue of environmental crime at the EU level, following the example of the Council of Europe (CoE) Convention on the protection of the environment through criminal law of 1998 (European Treaty Series, No. 172), which has been the first initiative at European level to “criminalize conduct that is harmful to the environment or human health” (Mullier, 2010:97). Taking into consideration the fact that the CoE Convention of 1998 has not yet entered into force, the relevant subsequent developments in the EU in this field represent a very important step toward developing the so-called “European environmental criminal law” (Faure, 2011:369).

As highlighted by the Commission in the accompanying document to its proposal for a Directive on the protection of the environment through criminal law, there was a need for tackling environmental crime, which constituted “a major challenge” for the EU, taking into consideration the main characteristics and effects of environmental crime, such as the very broadness of the concept, the cross border effects and the global dimension of environmental crimes, etc. (Commission of the European Communities, 2007b: 4, 6-19).

Albania has not yet transposed the Environmental Crime Directives into its legislation, although since 2010 the Commission has explicitly highlighted the need for a “more effective system for prosecuting breaches of environmental law [...], including new legislation targeting specific offences, proportionate and dissuasive sanctions, an effective enforcement system and proper prosecution.” (European Commission, 2010:106). While in the latest Progress Report of 2014, the Commission explicitly refers to the Environmental Crime Directives and the need for aligning the national legislation with this part of the *acquis* (European Commission, 2014:56).

This paper examines the Albanian substantive environmental criminal law and its application in practice during 2004-2014, with the aim of identifying the main challenges it faces in the context of the required transposition of EU Environmental Crime Directives into the national law, while also making suggestions on how to better respond to these issues in the Albania’s efforts towards aligning its legislation to that of the EU. For this purpose, the paper will also

refer to the experience of other countries with the implementation process in this field, highlighting the main problems encountered and the impacts of the transposition of the Environmental Crime Directives into the national law.

2. Criminal offences against environment in Albania: legal framework and criminal sanctions in practice

2.1. Legal framework and main characteristics of environmental criminal offences

As already mentioned above, one of the sources of the Albanian environmental law is the Criminal Code (CC). Criminal offences against environment in Albania can be found only in the CC. In addition, in the new CC, which was adopted in the early 1990s (Law no.7895/1995) in the context of the first Framework Law on environmental protection (1993), the legislator has introduced, for the first time, a separate chapter on the criminal offences against environment. Besides crucial changes to the offence of “environmental pollution”, which in the previous criminal code (1977) was classified as a misdemeanor against public health, the specific chapter in the Special Part of the CC of 1995 (Chapter IV) includes other offences which have previously been considered as economic offences, such as illegal fishing or the unlawful cutting of forests. However, there are a few offences which are often considered as environmental criminal offences, but are currently punishable under more general provisions in other chapters of the CC, such as the unlawful import and export of ozone-depleting substances which is covered by the more general crime of smuggling of prohibited goods (article 171) as their import and export has been explicitly prohibited (Council of Ministers Decision no. 453/2005), or the breach of rules on radioactive substances and trafficking of such substances (articles 282 and 282/a).

The types of offences that are currently provided for in the specific chapter on the criminal offences against environment (articles 201-207) include the following:

- (1) air pollution (basic offence and an aggravated form);
- (2) transportation of toxic waste (basic offence and an aggravated form);
- (3) water pollution (basic offence and an aggravated form);
- (4) prohibited fishing (basic offence and an aggravated form);
- (5) unlawful cutting of forests;

(6) cutting decoration and fruit trees (basic offence and an aggravated form);

(7) destruction of forests and forest environment by fire (basic offence and two aggravated forms);

(8) destruction due to negligence of forests and forest environment by fire (basic offence and an aggravated form);

(9) breach of quarantine for plants and animals.

According to the International Association of Penal Law, which since its first specific resolutions on the protection of the environment through penal law in 1979 has highlighted the necessity to extend protection to other values, besides water, air and soil, the term “environment” means: “all components of the earth, both abiotic and biotic, and includes air and all layers of the atmosphere, water, land, including soil and mineral resources, flora and fauna, and all ecological inter-relations among these components” (De La Cuesta, 2009:150). In this regard, the scope of the special chapter in the CC is rather limited as it does not establish offences in relation to some of the aspects of environmental protection through criminal law, such as soil pollution, while it provides limited protection of fauna and flora.

It is worth noting that in the CC of 1995, except for the offence of breach of quarantine for plants and animals, the result of serious danger or harm to human health and life is not required as a condition for punibility for the offences against environment. These consequences have been defined as aggravated circumstances in specific offences, such as air pollution, water pollution, transportation of toxic waste and forest fires. However, the CC is still limited in relation to the aggravating circumstances, which at the moment mainly relate to human life and health, except for the new additions on forest fires, which for the first time include elements that are directly related to the damage to the environment.

Some of the environmental criminal offences include only actions, while others include both actions and omissions. In relation to the mental element, except for a few offences that can only be committed intentionally, the majority of the environmental criminal offences are punishable when committed intentionally or with negligence, therefore in this aspect the criminal provisions of Chapter IV have a wide scope, as it is not limited in relation to the category of fault.

In twenty years from its adoption, only a few substantial changes have been made to the CC in relation to environmental criminal offences, although the need for a reform in this field has been highlighted since 2001 in the National Action Plan on Environment, in which the CC was included in a list of laws that should have been amended in three years. As mentioned above, in the last four years, it has been the Commission who has explicitly mentioned this issue. In the meantime, since March 2014 there have been efforts to present a draft of amendments to the CC aiming to achieve the required alignment with the EU Directives (Gordiani and Bocari, 2014: Annex III), which is still a work in progress. However, in the latest Draft Strategy and the respective Action Plan on the reform in the Justice System of Albania, these amendments have been planned for 2016 as part of a review of the entire CC (Parliamentary Special Commission on the Reform in the Justice System, 2015a:25 and 2015b:40).

Although in 2001, in the context of the adoption of the new Constitution, the legislator has added a new provision on the tasks of the criminal legislation in which the environment has been explicitly mentioned among other key legal interests or values to be protected, the only case when it has amended the special chapter on environmental offences has been in 2008, by adding new specific offences on the destruction of forests and forest environment by fire.

However, it should be noted that the additions of 2008 represent important developments in this field, not only because they were aimed to tackle the problem of the increasing damage to the environment due to the widespread fires in forests, which had been caused intentionally or due to negligence (Explanatory Report to the Draft Law on amendments to the CC, 2008:14), but they have also introduced new concepts which focus directly on the environment, such as the aggravating circumstances of causing “serious damage over an extended period of time on the environment or protected areas”.

In addition, the new crimes of 2008 have been the first environmental crimes to be punished by a cumulative sanction (imprisonment and fine), reaching a maximum of five to fifteen years of imprisonment and a fine of one to two million Lek (1 Euro~ 140 Lek) for the most aggravated form of crime which causes serious damage over an extended period of time on the environment or protected areas. The tendency to establish severe penalties for these specific crimes has been reinforced by the amendments of 2013, in the context of the adaption of the whole special part of the CC to the latest case law of the Constitutional Court, which had resulted in the repeal of the basic provision on cumulative sanctions (last paragraph of article 29 of the CC, repealed by Decision of the Constitutional Court no 47, of 26 July 2012). As a

consequence, intentional forest fire is the environmental crime with the highest penalty under the Albanian legislation in force, reaching a maximum of twenty years imprisonment for its most aggravated form.

The new criminal provisions on forests protection have also introduced for the first time in chapter IV the idea of providing for different sanctions depending on the category of fault, i.e. intention and negligence. Therefore, forest fires are the only environmental crimes that have different levels of penalty for their intentional and negligent forms. This approach, which focuses on differentiating crimes according to the mental-state element, has been considered as a possible way towards establishing a more “graduated punishment system” for environmental offences (Mandiberg and Faure, 2008: 494).

With the addition of the new crimes in 2008, most of the criminal provisions of Chapter IV provide for crimes. The specific offences that continue to be classified only as misdemeanors are prohibited fishing, unlawful cutting of forests, cutting decoration and fruit trees, and breach of quarantine for plants and animals. It is worth noting that the classification of an offence as a crime or a misdemeanor influences the application of several important institutes of the criminal law, e.g. the attempt is punishable only for crimes, the possibility of applying an additional fine is provided only for certain crimes, the period of limitation is shorter in the case of misdemeanors (maximum three years), etc.

The principal penalties for environmental criminal offences include fines and imprisonment. For the majority of the offences, imprisonment is the only applicable penalty, including a case of misdemeanor (the aggravated form of cutting decoration and fruit trees). On the other hand, there are also cases of misdemeanors which are punishable only by a fine (the basic offence of cutting decoration and fruit trees, and the breach of quarantine for plants and animals).

Fines are applicable only for offences that are classified as misdemeanors. Regarding the level of fines, they have not been specified for each offence, therefore the “general” minimum and maximum levels set forth in the General Part of the CC for misdemeanors (50.000 - 3.000.000 Lek) will also apply for each environmental offence. In case the punishment applied by the court is imprisonment, there is the option of applying one of the alternatives to imprisonment, but only if the specific requirements set forth in the General Part have been met in the given case.

In addition to the principal penalty, the court may decide to apply one or more of the supplementary penalties, in accordance with the requirements set forth in the General Part of the CC. These penalties include: the confiscation of the instrumentalities and proceeds of the criminal offence, which is a penalty that is mandatorily imposed by the court, the obligation to publish the court decision, and deprivation of certain rights, such as the right to perform public functions, the right to perform a certain profession or activity, the right to hold leading positions within the legal persons, etc. Some of these types of penalties have been explicitly recommended in relation to environmental crimes, based upon their “expected preventive effect” in this field (Council of Europe, Explanatory Report; International Meeting of Experts, 1994:24-25).

Albania has also recognized the criminal liability of legal persons (article 45 of the CC) and has provided for the respective penalties in the specific law “On the criminal liability of legal persons” (Law No.9754/2007). According to this law, the criminal liability of legal persons is not restricted to certain types of criminal offences, and does not exclude the criminal liability of the natural persons who have been perpetrators or accomplices in the same criminal offence. Legal persons are criminally liable only for criminal offences which have been committed in their name or for their benefit by their organs and representatives, by a person who is under the authority of their organs and representatives, or due to lack of control or supervision by the organs and representatives of the legal person.

The specific system of penalties established in Law No.9754/2007, which has been adapted to the specific nature of the legal person, consists of two main categories, similar to those provided for in the CC for natural persons: the principal and supplementary penalties. The principal penalties include fines and the compulsory dissolution of the legal person. Referring to the levels of fine set forth in article 11 of the Law, which are based upon the type of the committed criminal offence and on the limits of the respective imprisonment penalty provided for the crimes in the CC, the amount of fine range 300.000 - 1.000.000 Lek for misdemeanors and 500.000- 50.000.000 Lek for crimes. Except for the maximum level of fine for misdemeanors, which rather surprisingly is three times lower than the maximum level of fine set forth in the CC for natural persons (3.000.000 Lek), all other amounts of fines have been set forth 5-6 times higher than fines for natural persons. For instance, referring to the respective penalty provided for in the CC for the basic offence of air pollution (a misdemeanor), the fine for a legal person ranges 300.000 - 1.000.000 Lek, while for the basic offence of water pollution (a crime) it ranges from 500.000 to 5.000.000 Lek. When the criminal offence has caused serious

consequences, the court imposes the most severe penalty (compulsory dissolution), which may even be imposed when the offence has been committed more than once or in other aggravating circumstances, as stipulated by article 12 of Law No.9754/2007.

It should be noted that in respect of the aim of effective environmental protection and while considering it a priority, the legislator has provided for the possibility of imposing the supplementary penalty of “placing the legal person under monitored management” whenever the imposition of compulsory dissolution is considered to have serious consequences on the protection of environment, due to the economic and social circumstances related to the type, size and place the activity of the legal person is carried out.

Other supplementary penalties that may be imposed by the court in addition to the principal penalty include: closing one or more activities/structures of the legal person, deprivation of the right to get or use licenses, authorizations, concessions or subsidies, denial of the right to exercise one or more activities/operations, the obligation to publish the court decision, etc. It is worth noting that the law on criminal liability of legal persons does not preclude the imposition and enforcement of administrative punitive measures by tax administration and other bodies of the public administration, in accordance with applicable legislation.

2.2 Criminal sanctions in practice (2004-2014)

The statistics on sentenced criminal offences against the environment (Table 1) show that in the last ten years there has been mostly a downward trend in the number of environmental criminal offences. After an increase in the years 2008-2009, there has been again a downward trend, reaching the lowest number of cases per year in 2013 (less than 50 cases). Finally, for the third time in this ten-year period, there has been an upward trend in 2014, although at a slow rate.

Table 1 Convictions for environmental criminal offences during 2004-2014

Criminal offence against environment	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Air pollution	6	0	0	0	4	16	3	0	0	0	7

Transportation of toxic waste	0	0	0	0	0	0	0	0	0	0	0
Water pollution	0	0	0	0	0	0	0	0	0	2	1
Prohibited fishing	14	5	6	7	20	14	13	8	14	8	6
Unlawful cutting of forests	307	173	141	56	111	116	117	101	73	26	39
Cutting decoration and fruit trees	4	0	0	0	2	3	0	5	2	1	3
Destruction of forests and forest environment by fire	-	-	-	-	-	0	0	0	0	1	0
Destruction due to negligence of forests and forest environment by fire	-	-	-	-	-	0	0	1	0	2	0
Breach of quarantine for plants and animals	0	0	0	0	0	0	0	0	0	2	0
Total	331	178	147	63	137	149	133	115	89	42	56

Source: Statistical Yearbooks of the Ministry of Justice, 2004-2014.

In relation to the specific types of environmental criminal offences, the statistical data show that in most of the court cases, the offence committed has been a misdemeanor, including mainly the unlawful cutting of forests, followed by the misdemeanors of prohibited fishing, air pollution (basic offence), and cutting of decoration and fruit trees. Regarding the category of crimes, in ten years there has been no court case concerning the crime of toxic waste transportation, and only a few cases in the last two years concerning the crimes of water pollution and air pollution (aggravated form).

It should be noted the low number of court cases in relation to the new forest fire crimes, comprising only 4 cases in the last six years from the entry into force of the respective amendments to the CC, although there has been an increase of these crimes in practice and a high number of cases have been registered by the prosecutor office. According to the statistics of the General Prosecutor, only in 2011, which has been the year with the highest number of registered cases regarding forest fires (73 cases of intentional crimes and 14 cases of negligent crimes), in the majority of cases (65 cases regarding intentional crimes and 6 cases regarding negligent crimes) the investigation has been suspended due to the unknown identity of the offender.

Only a few cases on the misdemeanor of unlawful cutting of forests have reached the Criminal Division of the Supreme Court.

Regarding the type of punishment that has been applied by courts, fines are the most frequently used criminal sanction for environmental criminal offences (Table 2).

Table 2 Types of penalties applied to convicted offenders during 2004-2014

Year	Type of penalty	
	Fine	Imprisonment
2004	236	95
2005	140	38

2006	125	22
2007	54	9
2008	117	20
2009	145	4
2010	119	14
2011	100	15
2012	80	9
2013	32	10
2014	37	19
Total	1185	255

Source: Statistical Yearbooks of the Ministry of Justice, 2004-2014.

The data in Table 2 show that in 82.3 % of the cases, the offender has been punished by a fine. This is also related to the type of committed offence, which as mentioned above, in most court cases has been a misdemeanor, although there are misdemeanors for which the legislator has also provided for the penalty of imprisonment, as a sentencing option, e.g. although the misdemeanor of unlawful cutting of forests is punishable by a fine or up to one year of imprisonment, only in 17% of the cases an imprisonment penalty has been applied.

3. The European Union's approach to the protection of environment through criminal law

A decade after the adoption of the CoE Convention on the Protection of the Environment through Criminal Law, the EU institutions have adopted the so-called Environmental Crime Directives, namely the 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 (PECL Directive), followed by Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements. Although the preparatory work, which was based upon the CoE Convention, had started in 2000, (European Commission's DG Environment

website), it took a few years to have the Environmental Crime Directives due to an institutional conflict between the EU Commission and the Council on the “the appropriate legal instrument by which to require Member States to introduce sanctions of a criminal nature at national level in the case of offences detrimental to the Environment”, which was finally resolved with the help of the EU Court of Justice (ECJ) through its “landmark decisions” in two cases of 2005 and 2007 (Paragraph 15 of the Judgment in Case C-176/03; Faure, 2010:120). In the first case of 2005, the ECJ held:

it is common ground that protection of the environment constitutes one of the essential objectives of the Community ... 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 [...]

As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence [...]

However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective. (paragraphs 41, 47 and 48 of the Judgment in Case C-176/03)

In this context, aiming at ensuring “a more effective protection of the environment”, the PECL Directive establishes criminal law measures, thus, for the first time, it obliges the Member States “to provide for criminal penalties in their national legislation in respect of serious infringements of provisions of Community law on the protection of the environment”. In the accompanying document to the proposal for the PECL Directive, the Commission had observed that at that time the Member States legislation on environmental crime differed “enormously”, thus giving rise to the risk of the so-called “safe-havens” for perpetrators who could “profit from the differences in national laws by committing offences in those Member States with the least efficient legislation and the lowest sanctions” (Commission of the European Communities, 2007b: 38).

It should be noted that PECL Directive provides only for “minimum rules” and the Member States “are free to adopt or maintain more stringent measures regarding the effective criminal law protection of the environment” which must be compatible with the Treaty establishing the European Community (recital 12 in the preamble). According to the Commission, the directive “is flexible enough that it can be adapted to the different legal systems and traditions in the Member States” (Commission of the European Communities, 2007b:39). Therefore, “a full harmonization” in this area cannot be expected due to this limitation to “minimum rules”, which in fact is a characteristic of all EU criminal law directives (European Commission, 2011: 5,7).

The specific offences that should constitute criminal offences in all EU Member States are listed in article 3 of the PECL Directive, complemented by article 4 on the ancillary conduct of inciting, aiding and abetting the intentional conduct referred to in the previous article.

Each definition of the nine offences set out in article 3 requires the unlawfulness of the act/omission and the mental element of intent or at least serious negligence. According to the definition set out in article 2(a) of the Directive, the term “unlawful” means infringing the European Community legislation listed in Annex A to the Directive, the legislation adopted pursuant to the Euratom Treaty listed in Annex B, or the Member States legislation giving effect to the Community legislation listed in the annexes. Unlike the CoE Convention (1998) and the Commission proposal for a Directive (2007), the PECL Directive does not provide for any “autonomous offence”.

The scope of the criminal offences, which are defined in provisions (a) to (i) of article 3 of the PECL Directive, include specific unlawful conducts related to the pollution of air, soil or water, waste management, shipment of waste, the operation of a plant where a dangerous activity is carried out, the handling of nuclear materials or other hazardous radioactive substances, specimens of protected wild fauna or flora species, habitats within a protected site, and specific activities related to the ozone-depleting substances.

Similar to the PECL Directive, Directive 2009/123/EC on ship-source pollution defines the infringements that should be regarded as criminal offences in all Member States, complemented by the ancillary acts of inciting, aiding and abetting such offences committed with intent. Based upon article 4 and 5a of the Directive, while also referring to the exceptions provided for in article 5, the infringements that should be regarded as criminal offences if committed with intent, recklessly or with serious negligence, include “ship-source discharges

of polluting substances, including minor cases of such discharges” and also the “[r]epeated minor cases that do not individually but in conjunction result in deterioration in the quality of water”.

According to Mandiberg and Faure (2008:511) “it is desirable to provide a full spectrum of environmental crimes and to take a graduated approach to punishing the threat or reality of environmental harm”. In the context of an earlier article by Faure and Visser (1995), they have proposed a modified scheme of four models of environmental crimes “based on the extent to which a statute focuses on interests other than adherence to administrative authority”, which include the Abstract Endangerment, Concrete Endangerment, Concrete Harm, and Serious Environmental Pollution models (Mandiberg and Faure, 2008: 452, 469, 480).

Referring to the serious environmental criminal offences that are defined in the Environmental Crime Directives, while the offence in the Directive 2009/123/EC is classified as a concrete endangerment crime, in its variation of “presumed endangerment” (Faure, 2011:365), the definitions in the PECL Directive include elements that pertain to different models of environmental crimes. According to Faure (2011), except for one of the offences which “seems to be relatively easy to classify” (the significant deterioration of a habitat within a protected site, which is a “concrete harm” crime), all other definitions are “rather difficult to classify”. Specifically, “[i]ncluding both phrases “likely to cause” and “causes” is about punishing not only concrete harm but also the risk of concrete harm”, therefore in many cases the requirements included in the formulation of the provision make the crime “either a concrete endangerment crime or a concrete harm crime depending on whether the endangerment (likely to cause) or concrete harm (causes) is required” (Faure, 2011:363-364). As mentioned above, the PECL Directive does not provide for any “autonomous” offence.

In relation to the penalties for the environmental criminal offences, in accordance with the above mentioned case law of the ECJ, both Directives do not contain obligations on the type and level of penalties to be applied, but only require Member States to introduce penalties that are “effective, proportionate and dissuasive”. While both Directives define the conditions for liability of legal persons, neither of them requires penalties to be criminal in nature, as not all Member States recognize the criminal liability of legal persons in their national law (Commission of the European Communities, 2007a:8). In the Proposal for a Directive in 2007, the Commission had also included two specific articles on the sanctions to be applied to natural persons and legal persons, in which it had established a minimum level for the maximum

penalties to be applied for the offences referred to in article 3 (imprisonment for natural persons and fines for legal persons), and also specific proposals on the types of supplementary penalties or measures that could be applied.

In relation to the requirement of the Directives for “effective, proportionate and dissuasive” penalties, which is a notion that derives from the case law of the ECJ (Faure, 2011:365), the Commission has given the following explanation in its Communication of 2011 on the EU Criminal Policy:

“Effectiveness requires that the sanction is suitable to achieve the desired goal, i.e. observance of the rules; proportionality requires that the sanction must be commensurate with the gravity of the conduct and its effects and must not exceed what is necessary to achieve the aim; and dissuasiveness requires that the sanctions constitute an adequate deterrent for potential future perpetrators.” (European Commission, 2011:9)

4. National experiences with the implementation of the Environmental Crime Directives

Although both Environmental Crime Directives should have been implemented in the Member States’ national legislation before the end of 2010, many Member States have failed to respect this deadline (European Commission-Press Release, 2011). According to Faure (2011:361), many Member States have been indeed “struggling with either the implementation itself, or with the reporting requirements to the EU Commission on the way the Directives have been implemented” in the national legislation.

One of the aspects of the Environmental Crimes Directives that has been subject to “increasing attention during the implementation process” is the use of “vague notions” in both directives, such as “substantial damage”, “dangerous activities”, or “significant deterioration” (Faure, 2010:120-123). Nevertheless, according to Faure (2010:169) there are a few other sources that could be called upon by Member States when implementing these vague notions, as this may be helpful in the endeavor to “on the one hand better satisfy the *lex certa* principle and on the other hand also provide the harmonising effect desired by the European Commission”.

Depending on how elaborate their environmental criminal law was before the enactment of the Environmental Crime Directives, it was expected that Member States would have different experiences in implementing them:

“For some Member States which already had elaborate environmental criminal law provisions, the directives will probably not change a great deal and implementation should be relatively easy. However, for those Member States which did not have elaborate environmental criminal law provisions, the Directives may bring important changes. Those Member States will have substantial work implementing them.” (Faure, 2011:360-361)

The differences in the implementation process are also influenced by the structure of the legal framework in the field of environmental crimes, which would require changes in several pieces of legislation in those countries where environmental criminal offences have not been sanctioned only in their CC.

Referring to the communications of Member States on the national implementing measures concerning the Environmental Crime Directives (NIM by Member State, 2015), there have been cases in which these directives have been regarded as already implemented by pre-existing legislation.

France is the only Member State that has considered there was (then) no need for national execution measures. In France, almost all environmental criminal offences have been sanctioned outside the CC, while the majority of the environmental protection provisions has been codified in an “Environmental Code”, which has specific provisions on environmental criminal offences, such as air pollution, water pollution, waste-related offences, specific offences in the field of genetically modified organisms, and hunting offences. These offences are punishable by cumulative sanctions (imprisonment and fine), e.g. the pollution offences are punishable by two years imprisonment and a fine of 75.000 Euro.

The Netherlands also has regarded PECL Directive as already implemented by pre-existing legislation, which mainly consists of the sectoral environmental laws in conjunction with the Act on Economic Offences, while also including the CC in the case of “common hazardous environmental infringements” (Overheid.nl, 2010a). Almost the same applied to Directive 2009/123/EC, as the offences were already sanctioned in the Act on Economic Offences and the CC (Overheid.nl, 2010b).

In Italy, the implementation of the Environmental Crime Directives has required amendments in the pre-existing legislation, which includes the so-called “Environmental Code” (*Testo Unico Ambientale*), sectoral laws and the CC (Ramacci, 2009: 9,27). While failing to respect

the transposition deadline, the Italian legislator has enacted a single legislative decree for the implementation of both Directives (Decreto Legislativo 7 luglio 2011, n. 121). Additions to the CC include only misdemeanors concerning offences against the protected wild fauna or flora species and the habitats within a protected site.

In Germany, which like Italy has failed to respect the transposition deadline, the legislator has introduced a few amendments in the environmental criminal law in December 2011 (Bundesanzeiger verlag, 2011), as it had found that the German environmental criminal law “already corresponded substantially” to the requirements of the PECL Directive, and changes were required “only in some parts” of the legislation (BT-Drs17-5391, 2011:10). These amendments have been made to the CC and three specific federal environmental statutes on nature conservation, hunting, and waste shipment. Since the substantive reform of 1980, the German environmental criminal law consists mainly of a special chapter in the CC, while some criminal provisions are still part of various specific environmental laws (Schlemminger and Martens (eds.), 2004:205; Sina, 2014:34).

Although requiring only “limited changes” in the national legislation, the transposition of the PECL Directive is considered to have had “some important general impacts”, which include “an increased dependency of environmental criminal law on administrative law, and an even larger criminalisation of environmentally harmful behavior” (Sina, 2014:34-35). Regarding the Directive 2009/123/EC, according to the German legislator there has been no need for changes in the German environmental criminal law as the relevant offences were already criminalized in the CC through the offence of “water pollution” (BT-Drs17-5391, 2011:15).

In chapter 29 of the Special Part of the Criminal Code, the German legislator has provided for three specific pollution offences for water, soil and air, while also including other offences related to hazardous waste, causing of noise, vibrations and non-ionising radiation, the operation of certain facilities, the handling of radioactive substances, dangerous substances and goods, and certain offences that endanger protected areas. In addition to establishing different sanctions for each offence based upon the type of fault (intention or negligence), the special chapter on offences against the environment includes a specific provision on “aggravated cases of environmental offences” (Section 330), which provides for more severe penalties in cases when intentional offences have been committed in certain aggravated circumstances that include not only danger or harm to human health or life, but also damages to the environment, such as permanent or lasting damages to water, soil or a protected area, or permanent damage

to species of animals or plants that are under threat of extinction. These aggravated offences are punishable by imprisonment with a maximum of ten years. Although the German environmental criminal law is characterized by an “administrative accessoriness” of environmental offences, the CC comprises one exception to this administrative link (Schlemminger and Martens (eds.), 2004:206), which is related to seriously endangerment of human health or life by releasing poisons (section 330a). Except for the especially serious cases, which are sanctioned by imprisonment, all environmental offences are sanctioned by imprisonment or fine, and these penalties have not been changed in the context of the PECL Directive transposition.

The newest EU Member State, Croatia, has transposed both Environmental Crime Directives through the enactment of its new Criminal Code in 2011, in force from 1 January 2013, thus respecting the transposition deadline (01.07.2013). Similar to Germany, the Croatian CC has had a specific chapter on criminal offences against the environment since the previous CC of 1997. On the other hand, the 2011 reform has led to “significant changes” in relation to environmental crimes, such as the introduction of several new offences, modernization of specific pre-existing offences, and more severe penalties for most offences (Carević, 2012:11-15). In relation to almost all of the offences defined in the Environmental Crime Directives, the Croatian legislator has introduced new criminal offences (e.g. the emission of polluting substances from a sailable object, endangerment of the ozone layer, etc.), while the other provisions of the EU Directives have been implemented through the amended pre-existing offences, e.g. environmental pollution, endangerment of environment by waste disposal, endangerment of environment by a production facility, etc. (Carević, 2012:15). The Croatian CC provides for one pollution offence, the “environmental pollution” offence, which is punishable by imprisonment even in its form of abstract endangerment. The special chapter includes also the offences of poaching of animals and fish, torture or killing of animals, handling and trade of harmful animal drugs, veterinary malpractice, unlawful introduction of wild species or Genetically Modified Organisms into the environment, devastation of forests, change of the flow of water, unlawful exploitation of mineral resources, unlawful construction.

Similar to the German CC, chapter XX of the Croatian CC has a specific provision on the most severe crimes against the environment, which provides for the most severe penalty for environmental crimes in Croatia reaching the maximum of fifteen years of imprisonment. In the new CC, all environmental criminal offences are punishable by imprisonment, while there has also been a tendency to increase the periods of imprisonment for many offences. In most

cases, the conduct is punishable even when committed with negligence, while different levels of penalties have been provided for each category of fault (intent and negligence) in specific provisions of the respective articles.

In a general overview of the state of implementation of the PECL Directive throughout the EU, according to a recent study commissioned by the Commission “many Member States have not yet fully implemented the Directive, in particular due to the incomplete criminalisation of environmental crimes”, while there are still differences in “the severity of sanctions” throughout the EU. (Blomsma and Wagner, 2014:81)

5. Conclusions

In its way to full EU membership, Albania has to adapt its legislation to the complex environmental *acquis*, including the Environmental Crime Directives. While taking into consideration the *ultima ratio* principle, the necessary reform in the field of environmental criminal law in Albania should be comprehensive in order to guarantee the effective enforcement of the new environmental protection legislation that has transposed several parts of the EU environmental *acquis*.

In contrast to the administrative environmental legislation, the CC has mainly the same content since 20 years ago when the legislator introduced for the first time a special chapter on criminal offences against environment, which is limited to certain environmental crimes and misdemeanors that in most cases omit important fields of protection and specific elements that focus directly on the environment. As the relevant criminal provisions have not been scattered in different pieces of environmental legislation, at first sight the legal reform will be easier as it will concentrate in one single law (CC). On the other hand, it is important to note that there is a need for coordination between the CC and the relevant administrative environmental protection laws and bylaws which have been further aligned to the EU *acquis* during these years and have also provided for many new administrative contraventions that in part should be made criminal with the expected reform in the criminal legislation. Therefore, the transposition of the EU Directives into the Albanian legislation will require “substantial work”, as it does not simply mean “copy/pasting” their text, which is considered to be an inadequate method for “proper transposition” of a Directive (Capeta, 2010:10).

One of the main challenges for the Albanian legislator will be the adoption of “effective, dissuasive and proportionate” penalties for the new and/or amended environmental criminal

offences, taking into account the problems associated with the adaption of the type and level of penalties for specific offences in the existing legislation. In this regard, another challenge will be the adoption of different models of environmental crimes and differentiation among them to reflect the different degrees of seriousness and also the category of fault element in the cases when the offence is punishable when committed with either intent or negligence. The penalties should also be adapted to both the latest changes in chapter IV of the Special Part concerning the new forest fires crimes, and the changes in the whole system of penalties in the General Part of the CC. It is also recommended that in establishing the level of penalties for each offence, the legislator takes in consideration the effect they would have in the respective levels of the penalties that may be applied to a legal person held responsible in accordance with the specific law of 2007, which does not limit the criminal liability of legal persons to specific offences, therefore allowing its application to all future new offences against the environment. Although the CoE Convention and the Proposal for the Directive on the protection of environment through criminal law are not legal binding instruments, they may well be used as a point of reference in relation to the type and level of penalties.

The different experiences of a few Member States in the implementation of the Environmental Crimes Directives have shown that there have been difficulties in respecting the transposition deadline, even in those countries that had already an “elaborate” environmental criminal law. In Member States where amendments in law have been necessary, the transposition of Environmental Crime Directives has resulted in further enlargement of the criminalization of environmental offences and increased complexity of environmental criminal law, for example in the case of Germany and Croatia. In the latter case, there has also been a tendency to severe sanctions, providing for an imprisonment penalty only, while also increasing the periods of imprisonment for many offences.

In addition to the legislative reform, its application into practice will be a challenge in Albania. With a few exceptions, during the last ten years there has been a downward trend in the number of court cases on environmental criminal offences, while their majority concern misdemeanors and the most frequently used criminal sanction is fine. Very few cases have reached the Supreme Court so far.

The courts are expected to have an important role in the interpretation of the future new provisions, especially concerning the new “vague notions” of the EU Directives, although it is recommended that, whenever possible, the legislator itself provide in the law the definitions or

guiding criterion to interpret these notions, following the example of some EU Member States (see Faure 2010:166).

In this context, the whole process of aligning the national legislation to that of the EU is expected to bring important novelties, the long-awaited modernization of environmental criminal law and an increased role of criminal law in the protection of the environment in Albania, which will then require also further efforts in training of prosecutors and judges and awareness raising, as it has already begun in recent years with the help of the EU and in the context of some useful professional networks (European Commission 2012:62; REC Albania). These developments will hopefully contribute in ensuring a more effective environmental protection in Albania.

References

- ASSER Institute. Dossiers. *European Environmental Law after Lisbon: an introduction*. http://www.asser.nl/default.aspx?site_id=7&level1=12219&level2=14663. Accessed 10 July 2015.
- Blomsma, J., and Wagner, H. (2014). In: Strategic Project on Environmental Crime, Eurojust Report, pp.80-81. Available at <http://www.eurojust.europa.eu/>. Accessed on 15 June 2015.
- BT-Drs 17-5391 (2011). Deutscher Bundestag. Available at <http://dipbt.bundestag.de/dip21/btd/17/053/1705391.pdf> Accessed on 25 August 2015.
- Bundesanzeiger verlag (2011). http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl111s2557.pdf. Accessed on 25 August 2015.
- Capeta, T. (2010). *Harmonisation of national legislation with the *acquis communautaire**. Report presented in the UNIDEM CAMPUS Trieste Seminar “The quality of law”, 14-17 June 2010, Italy. Venice Commission. CDL-UDT(2010)017. Available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UDT\(2010\)017-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UDT(2010)017-e) Accessed on 30 August 2015.
- Carević, M. (2012). *Judicial Training and Research on EU crimes against environment and maritime pollution: Report for the Republic of Croatia*. JUDT- Judicial Training. Available at <http://www.judt.unisalento.it/wp-content/uploads/2012/03/REPORT-CROATIA.pdf> Accessed on 26 August 2015.
- Commission of the European Communities (2007a). *Proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law*. 2007/0022 (COD). Brussels, 9.2.2007.
- Commission of the European Communities (2007b). Commission Staff Working Document - Accompanying the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law- Impact assessment. SEC (2007) 160. Brussels, 9 February 2007.
- Council of Europe Convention on the protection of the environment through criminal law of 1998. European Treaty Series, No. 172.

Council of Europe, *Explanatory Report* to the Convention on the protection of the environment through criminal Law. Available at <http://conventions.coe.int/Treaty/EN/Reports/Html/172.htm>

Criminal Code of Albania (Law Nr.7895/1995, as amended).

Criminal Code of Croatia (2011). Available at http://www.unodc.org/res/cld/document/hrv/2004/croatia_criminal_code_html/Croatia_Criminal_Code_2011_CRO.pdf

Criminal Code of Germany, as amended. Available at http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf. Accessed on 15 August 2015.

De La Cuesta, J.L. (ed.) (2009) *Resolutions of the Congresses of the AIDP/IAPL (1926-2004)*. Toulouse: Éditions érès. Retrieved from <http://www.penal.org/IMG/pdf/NEP21anglais.pdf>. Accessed 23.05.2012.

Decreto Legislativo 7 luglio 2011, n.121 “Attuazione della direttiva 2008/99/CE sulla tutela penale dell’ambiente, nonché della direttiva 2009/123/CE che modifica la direttiva 2005/35/CE relativa all’inquinamento provocato dalle navi e all’introduzione di sanzioni per violazioni.” GU n. 177 dell’1-8-2011. Available at <http://www.altalex.com/documents/leggi/2011/08/22/tutela-penale-dell-ambiente-introdotti-nuovi-reati>.

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. OJL 328, 06.12.2008, p.28-37.

Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements. OJL 280, 27.10.2009, p.52–55.

ECJ. Judgment of 13 September 2005 in Case C-176/03, *Commission v. Council*, European Court Reports 2005, page I-07879

ECJ. Judgment of 23 October 2007 in Case C-440/05, *Commission v. Council*, European Court Reports 2007, page I-09097.

Environment and Climate Change (2015). Summaries of EU legislation available at http://eur-lex.europa.eu/%20summary/chapter/environment.html?root_default=SUM_1_CODED=20

European Commission (2010). *Analytical Report accompanying the Communication from the Commission to the European Parliament and the Council ‘Commission Opinion on Albania’s application for membership of the European Union’*, Brussels, 09/11/2010, SEC (2010) 1335.

European Commission (2011). *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, 20/09/2011. COM(2011) 573 final.

European Commission (2012). *Albania 2012 Progress Report accompanying the document Communication from the Commission to the European Parliament and the Council ‘Enlargement Strategy and Main Challenges 2012-2013’*, Brussels, 10/10/2012, SWD(2012) 334 final.

European Commission (2014). *Albania 2014 Progress Report accompanying the document Communication from the Commission to the European Parliament, the Council, the*

European Economic and Social Committee and the Committee of the Regions 'Enlargement Strategy and Main Challenges 2014-2015', Brussels, 08/10/2014, SWD(2014) 304 final.

European Commission- Press Release (2011). *Environmental crimes: Commission asks 12 Member States to implement EU rules*, 16 June. Available at http://europa.eu/rapid/press-release_IP-11-739_en.htm, Accessed 25.08.2015.

European Commission's DG Environment website: <http://ec.europa.eu/environment/>

Explanatory Report to the Draft Law (2008) "On some addendums and changes in Law No. 7895, of 27 January 1995 "Criminal Code of the Republic of Albania", as amended". Retrieved from www.justice.gov.al Accessed 01/11/2009.

Faure, M.G. (2010). Vague notions in environmental criminal law. *Environmental Liability* 4, Lawtext Publishing Limited, pp. 119-133 (Part I) and pp. 163-170 (Part II). Available at <http://ssrn.com/abstract=1988933>

Faure, M.G. (2011). *The implementation of the environmental crime directives in Europe*. In: J.Gerardu *et al* (eds.) Proceedings of the Ninth International Conference on Environmental Compliance and Enforcement; 20-24 June, Whistler, British Columbia, Canada: INECE, pp.360-371. Available at <http://inece.org/conference/9/proceedings/Proceedings9thINECEConference.pdf>. Accessed 15/08/2015.

French Environmental Code. Available at <http://www.legifrance.gouv.fr/Traductions/English/Legifrance-translations>

General Prosecutor of Albania (2011). *Report on the status of criminality*.

Gordiani, G., Bocari, B. (2014). Working paper: *analysis and action plan for the implementation of the Albanian Criminal Code as compared to Directive 2008/99/EC on the protection of the environment through criminal law. Draft*. SELEA Project Report. Retrieved from <http://selea.al>. Accessed on 23.04.2014.

International Meeting of Experts (1994) *on the use of criminal sanctions in the protection of the environment; internationally, domestically and regionally*. Report. Portland, Oregon, USA, 19-23 March. Available at <http://www.icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Portland2.PDF> Accessed 15.07.2015.

Mandiberg, S.F., Faure, M.G. (2008). A graduated punishment approach to environmental crimes: Beyond vindication of administrative authority in the United States and Europe. *Columbia Journal of Environmental Law*, 34(2): 447-511.

Ministry of Justice, *Statistical Yearbooks* of the years 2004-2014.

Mullier, E. (2010). The emergence of criminal competence to enforce EC Environmental Law: Directive 2008/99 in the context of the case-Law of the European Court of Justice, *Cambridge Student Law Review*, 6(1): 94-116.

National Security Strategy (2014), adopted by Law No. 103 of 31.7.2014, Official Journal of the Republic of Albania No.137 of 1 September 2014, p.6287.

NIM by Member State (2015). Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1443295740471&uri=CELEX:32008L0099> regarding PECL Directive and <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1443295942089&uri=CELEX:32009L0123> regarding Directive 2009/123/EC.

- Overheid.nl, 2010a. <https://zoek.officielebekendmakingen.nl/stcrt-2010-19612.html>
- Overheid.nl, 2010b. <https://zoek.officielebekendmakingen.nl/stcrt-2010-17463.html>
- Parliamentary Document (2011). Minutes of the meeting held on 6 June. Commission on European Integration. Parliament of Albania.
- Parliamentary Special Commission on the Reform in the Justice System (2015a). *Draft Strategy on the reform in the Justice System of Albania*. 24 July 2015.
- Parliamentary Special Commission on the Reform in the Justice System (2015b). *Action Plan on the reform in the Justice System of Albania*.
- Petrela, I. (2009) Tipare të përgjithshme dhe tendenca të së drejtës ndërkombëtare dhe asaj shqiptare për mjedisin. *Studime Juridike* 2: 122-147.
- Ramacci, L. (2009). *Diritto penale dell'ambiente*. Seconda edizione. CEDAM. Padova, Italia.
- REC (Regional Environmental Center), Country Office for Albania. <http://albania.rec.org/lajme/49/krimi%20mjedisor>. Accessed on 30 August 2015.
- Schlemminger, H. and Martens, C.-P. (eds.) (2004) *German Environmental Law for Practitioners*. 2nd Edition. Kluwer Law International.
- Sina, S. (2014). *Fighting Environmental Crime in Germany: A Country Report*. Study in the framework of the EFFACE research project, Berlin: Ecologic Institute. Available at http://efface.eu/sites/default/files/EFFACE_Fighting%20Environmental%20Crime%20in%20Germany_0.pdf Accessed on 10 August 2015.