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Giulia Giardi

Fighting the European Ecomafia: Organised trafficking in waste  
and the need for a criminal law response from the EU

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Giulia Giardi

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## I. Introduction

In 1994 the Italian NGO *Legambiente* coined the term “*ecomafia*” to describe the link between organised crime and environmental harm.<sup>1</sup> Among the activities uncovered by *Legambiente*, in collaboration with Italian law enforcement authorities, was that of trafficking and disposal of waste. Today, twenty years later, the problem has not been solved: national and international law-makers have unsuccessfully attempted to tackle the issue. Existing international rules are fragmented and applied in an uneven manner across the globe. Definitions of the problem vary from one state to the other, as do enforcement measures and approaches. Organised crime groups (OCGs) continue to make billions of profit by exploiting legal loopholes and weak and uneven checks, resulting in enormous harm to both the environment and human health.<sup>2</sup> The transnational nature of this activity requires a correspondingly international response; however, existing international law instruments have not been ratified and applied.

The need for stringent rules for the protection of environment has been recognised by the European Union (hereafter EU or Union) for decades. The threat of harm organised trafficking in waste poses for human health and the environment makes it an issue of interest to the Union the aim of which, according to Article 3 Treaty on the European Union (TEU) is:

“to promote[...] the well-being of its peoples” and to “offer and area of freedom, security and justice [...] [including] the prevention and combating of crime [as well as] work[ing] for the sustainable development of Europe based on [...] a high level of protection and improvement of the quality of the environment.”

Nevertheless, as will be seen in the analysis in Chapter II, the international and European instruments adopted thus far have proven unsuitable to tackle the issue. With the entry into force of the Lisbon Treaty the European Union is finally able to enforce and monitor the implementation of directives which approximate definitions and levels of sanctions among its Member States in the field of criminal law. This provides the perfect opportunity to create an effective framework to tackle the issue of organised trafficking in waste. A common definition would enable better co-operation and understanding between enforcement authorities of the various Member States while also ensuring that the severity of the problem is recognised. It would also ensure the elimination of loopholes which make it possible to exploit “pollution havens”, and make monitoring and supervision of this activity a priority.

It becomes clear therefore, that there is a solid basis on which to build a new, more effective framework to tackle this issue at the European level. For these reasons, the following research question will be addressed:

***Should European criminal law become the main instrument to tackle the issue of illegal trafficking and disposal of waste?***

In order to provide an answer, the main research question is divided into three sub-issues, each focusing on a particular aspect of the problem at hand.

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<sup>1</sup> Legambiente, ‘Ecomafia’ (2014) <<http://www.legambiente.it/temi/ecomafia> > (last accessed on: 27.08.2014).

<sup>2</sup> European Environment Agency, *Movements of waste across the EU's internal and external borders* (2012), p. 6.

- a) **Is there a problem of organised trafficking in waste? Are existing and international instruments sufficient to tackle it?**
- b) **Is criminal law the right choice? (As opposed to soft law or administrative/civil law measures)**
- c) **Is there a legislative competence for the EU to deal with this issue, also taking into consideration the principles of subsidiarity and proportionality? Can such competence be used in this case?**

The first sub-issue concerns the existence of a societal problem: it will be explored in Chapter II in combination with an outline of relevant existing legislation. Chapter II will help in delineating the position of the issue within the international and European context. As will be demonstrated, the problem persists, and the legislation promulgated thus far has been ineffective in solving the issue. The second sub-issue explores the type of response necessary to tackle organised trafficking in waste. It is submitted that legislative intervention, specifically the formulation of criminal offences and possibility of use of related enforcement tools, provide the optimal means to deal with organised trafficking and disposal of waste. This will be discussed in Chapter III. Chapter IV will be dedicated to the third research question. The focus will be on the level at which criminal law provisions should be adopted, *i.e.* national, European or both. Finally, conclusions from the analysis of the findings discussed in the preceding chapters will be explored in Chapter V, where recommendations and possible avenues for future research will also be examined.

#### A. Definitions and Characterisation of the Problem

In order to answer the main research question it is first necessary to define its various elements.

##### 1. Waste

Waste is defined in various EU and international instruments as:

“[A]ny substance or object which the holder discards or intends or is required to discard.”<sup>3</sup>

For the purpose of this analysis the central concept will be that of “illegal waste” in the sense of waste handled in a manner contrary to EU or international rules (further discussed in Chapter II, below). These norms generally focus on ensuring that human health and the environment are safeguarded and for these reasons require specific processes to be undertaken in respect of waste. They have led to an increase in the cost of adequate waste

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<sup>3</sup> Article 3 (1) Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives OJ L 312, 22.11.2008, pp. 3-30; Article 2 (1) Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste OJ L 190, 12.7.2006, p. 1–98 read in conjunction with Article 41 Directive 2008/98/EC; Article 2 (1) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1673 UNTS 126; 28 ILM 657 (1989), entry into force: 5 May 1992.

disposal, given the need for appropriate treatment of the product, especially when in a hazardous or toxic form.<sup>4</sup>

Waste is that is part of our day-to-day lives, a component of most production. In economic terms waste transport and disposal are services having an *inelastic demand*: regardless of the fluctuation of the price of transport and disposal services offered, the demand for such services will not decrease.<sup>5</sup>

## 2. The Waste Cycle

There are three phases of the waste cycle during which there is a possibility of mishandling waste:

- ❖ *Origin*: when the waste is transferred from the waste producer to a specialised firm.
- ❖ *Transit*: when the waste is either being transported or temporarily stored.
- ❖ *Disposal*: at the time of final disposal, but also treatment and recycling.
- ❖ *Origin*: Directive 2008/98/EC defines 'waste producer[s]' as "anyone whose activities produce waste (original waste producer) or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste."<sup>6</sup> With regard to this phase, firms which do not have the capacity to deal with waste internally must choose how to transfer it, whether by taking it directly to disposal sites or involving specialised firms. This choice is a determining factor as to whether the waste will be disposed of adequately or not.

Market logic dictates that the firm will choose the company which offers the service at the lowest cost. Waste producers may or may not be aware of the illicit nature of the service which they are being provided. However, the difference in price is so extreme that any waste producer who compares the cost of appropriate and illicit services must be aware that the activities are not in compliance with the relevant rules and regulations.<sup>7</sup> It may, moreover, even be the case that the waste producer is complicit or even responsible for the illicit nature of the waste transfer. He may use false documentation; attempt to hide the actual (potentially hazardous) content of the waste; or choose a service provider which he knows will not dispose of the waste properly.<sup>8</sup>

- ❖ *Transit*: Often firms turn to an intermediary to transport the waste rather than organise final disposal themselves. These intermediaries provide collection, transport and storage services: any of these activities may be carried out illegally. It may be the case that the intermediary does not have the necessary permit or may have false documentation or that the waste is handled in violation of permit conditions.<sup>9</sup>

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<sup>4</sup> Nicholas Dorn, Stijn Van Daele and Tom Vander Beken, 'Reducing Vulnerabilities to Crime of the European Waste Management Industry: the Research Base and the Prospects for Policy' 15 European Journal of Crime, Criminal Law and Criminal Justice 23, p. 25.

<sup>5</sup> Ibid, p. 26.

<sup>6</sup> Article 3 (5).

<sup>7</sup> Interview with representative from EUROPOL, See Annex II.

<sup>8</sup> Monica Massari and Paola Monzini, 'Dirty Businesses in Italy: A Case-study of Illegal Trafficking in Hazardous Waste' 6 Global Crime 285 (2004), p. 291-292.

<sup>9</sup> The "invoice switch", for example, consists in transportation firms aggregating different types of wastes, making it possible to change the origin and the characteristics of the waste, for example from

- ❖ *Disposal*: Illicit disposal can include a number of activities: from the improper use of legal disposal sites; the use of recycling centres for waste which would not normally be recyclable by misrepresenting the characteristics of the waste through false labels or documents; use of incinerators for hazardous waste; or dumping outside of registered and authorised centres.<sup>10</sup>

### 3. Actors and Modus Operandi

The peculiarity of organised waste trafficking is that it is not what in criminal law is defined as *malum in se*, it is, rather, the *improper handling* of waste, thus a *malum prohibitum*. This activity is not one which necessarily needs to be performed entirely “underground”. Due to these factors new actors begin to emerge and interact. OCGs make use of waste brokers and legal business structures, and law-abiding companies begin to make use of illegal services.

- ❖ *Organised Crime Groups (OCGs)* – as discussed in Chapter II below, organised crime groups are very often involved in the trafficking and disposal of waste. OCGs exist in many forms. The most well-known are the Italian *mafia*-type organisations, but organised crime may take many forms depending on its territory of operation.
- ❖ *Waste brokers* – Directive 2008/98/EC describes waste brokers as “undertakings arranging the recovery or disposal of waste on behalf of others, including those brokers who do not take physical possession of the waste.”<sup>11</sup>
- ❖ *Legal Business Structures (LBSs)* - An increasingly important tool used by OCGs are legal business structures. These are often used where the activities undertaken by the OCGs can be carried out on the legal market - like in the case of waste trafficking- and through these OCGs have the possibility of dominating such markets. LBSs allow OCGs to create a façade of legitimacy and to make profit through complex activities.<sup>12</sup>
- ❖ *Corrupt public officials* - An important factor cited by EUROPOL as contributing to waste trafficking is corruption: in crimes such as this, local administrations are often aware of and/or complicit in the illegal activities. It is often the case that public officials provide permits; information; or award public contracts. It may also occur that they assist in the actual cross-border trafficking of illicit products, e.g. where those carrying out checks and inspections are corrupted.<sup>13</sup>

## B. Methodology

### i. Operationalization of the Research Problem

The focus of this dissertation is the need to develop specific EU criminal law provisions to tackle the issue of organised waste trafficking and disposal. Therefore, as a starting point, it is important to dissect the relevant provisions of the Treaties in order to understand precisely

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hazardous to non-hazardous. Often transporters simply dump the waste without bringing to disposal sites. (ibid, p. 293-294).

<sup>10</sup> Ibid, p. 295-296.

<sup>11</sup> Article 3 (8); Member States must keep a register of brokers (Article 26 (b)).

<sup>12</sup> EUROPOL, *EU Serious And Organised Crime Threat Assessment (SOCTA)* (2013), p. 14.

<sup>13</sup> Ibid, p. 13-14.



what needs to be investigated and how it should be evaluated to answer the central research question.

#### Article 83 (1) Treaty on the Functioning of the European Union (TFEU)

The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in *the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.*

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, *corruption*, counterfeiting of means of payment, computer crime and *organised crime*[emphasis added].

#### Article 5 TEU

1. The limits of Union competences are governed by the *principle of conferral*. The use of Union competences is governed by the *principles of subsidiarity and proportionality*.

2. Under the principle of conferral, the Union shall act only within *the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of *subsidiarity*, in areas which do not fall within its exclusive competence, *the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.* [...]

4. Under the *principle of proportionality*, *the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties* [emphasis added]. [...]

*a) Is there a problem of organised trafficking in waste? Are existing European and international instruments sufficient to tackle it?* [Descriptive]

This issue will be dealt with briefly for a number of reasons. Firstly, it is not the central focus of the dissertation. The question is merely descriptive - it serves to create a link between the legal analysis and an existing *societal problem*. Given the legal nature of the dissertation, only a small portion of space will be dedicated to this question.

*b) Is criminal law the right choice? (As opposed to soft law or administrative/civil law measures)* [Normative]

The aim of this sub-question is the identification of the best type of (state) response to tackle the problem of organised trafficking in waste. To do this a two-fold approach will be used. Academic theories on crime-prevention will be analysed taking as a starting point the criteria of “effective, proportionate and dissuasive” enforcement measures developed by the CJEU.<sup>14</sup>

The second approach will consist in reconstructing the intervention theories behind policies and legislative measures adopted at national level by different countries. The method chosen here is that of comparative case studies. The countries under analysis have been chosen for a number of reasons. Firstly, there is evidence of the problem of organised trafficking in waste in their territory. Secondly, the measures taken in respect of this problem are particularly interesting. As regards Italy, investigations on waste trafficking are automatically linked to those against *mafia*-type organisations. Anti-*mafia* legislation in Italy expands the powers of both the police and public prosecutors, making the measures employed particularly effective.<sup>15</sup> In England, improper handling of waste has been a criminal offence for over twenty years, yet enforcement measures have, until now, not been very strong. The reasons why a stronger approach has begun to be adopted will be explored.<sup>16</sup>

*c) Is there a legislative competence for the EU to deal with this issue, also taking into consideration the principles of subsidiarity and proportionality? Can such competence be used in this case? [Descriptive and Evaluative]*

This sub-question goes to the heart of the research undertaken in this dissertation. The analysis will depart from a critical discussion on the evolution of the Union’s competences in criminal matters in what, prior to the Lisbon reform, were known as the First and Third Pillar. This discussion will serve as a backdrop against which to evaluate existing EU instruments in the field of criminal law, which could be used in the fight against organised trafficking in waste. In the second part the issue of criminalisation at EU level will be discussed. From a theoretical standpoint, the general principles of criminalisation – especially the *ultima ratio* principle – will provide guidance. A link will be established between these theories and the wording of Article 83 (1) TFEU as well as Article 5 TEU. The need for *European* criminal law provisions will be further underlined also using reports and studies mandated by the Commission in this field and calling for a European solution to the problem as well as the results emerging from interviews with national and European actors.

## **ii. Data Collection and Interpretation**

The author has used a combination of desk-research and interviews.<sup>17</sup> The latter have been carried out by phone or via e-mail: some have included a more in-depth discussion with the interviewee; others consisted in the interviewee answering a questionnaire prepared by the author (see Annex II). The choice of carrying out interviews was made to ensure a more accurate picture of the situation as it exists in the two countries analysed in the case-studies and in the Union. The results of the interviews presented in the dissertation do, in fact, help

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<sup>14</sup> See Chapter II B. i.

<sup>15</sup> See Chapter II A. i.

<sup>16</sup> See Chapter II A. ii.

<sup>17</sup> For text of questionnaires used and the responses received, see Annex II.

to provide a well-rounded analysis of the problem; however, given the paucity of responses no generalisations can be made from the data collected.

The research carried out is interdisciplinary: the legal approach is dominant - interpretation follows the rules recognised in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.<sup>18</sup> In addition other disciplines have been used: the criminological approach on the one hand and law and economics perspective on the other hand are of fundamental value in ensuring that the hypotheses put forward in this dissertation could be useful and effective in order to solve the societal problem discussed. This is possible given that the theories employed are firmly grounded in empirical studies and experiments.

## II. The Status Quo

This chapter will address the first sub-question. The aim will be, firstly, to assess whether there is a problem, which has not sufficiently been dealt with by existing international and European instruments. In providing an answer, regard will be paid to existing international and European instruments which could be useful in the fight against organised trafficking and disposal of waste. The reasons why these measures have, so far, been insufficient in dealing with the problem will be explored.

### A. Existence of the Problem

Illegal trafficking and disposal of waste in the European Union is increasing. Destination countries continue to be prevalently located in Asia and Africa, but there appears to be a growing trend of dumping within the Member States themselves.<sup>19</sup> In a 2006 study commissioned by INTERPOL to assess the links between organised crime and pollution crime, 36 cases involving the illegal trafficking and disposal of waste were identified. All of these included organised crime groups in one or more phases of the waste cycle -the main countries involved in Europe were Italy and the United Kingdom.<sup>20</sup> The INTERPOL Pollution Crime Working group recently undertook a study into the links between organised crime and trafficking in electronic waste, specifically. Again the organised nature of the activities was underlines in the results.<sup>21</sup> In 2013 EUROPOL produced a Threat Assessment on Italian Organised Crime in which it also discussed the involvement of the *Camorra*<sup>22</sup> in environmental crimes, specifically in relation to the trafficking and disposal of waste in a

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<sup>18</sup> UNTS 1155/31, Entry into force: 27 January 1980– Rules of interpretation: ordinary meaning, contextual, preparatory works and historical circumstances.

<sup>19</sup> EUROPOL, p. 30; EUROPOL, *Threat Assessment 2013: Environmental Crime in the EU* (2013), p. 6-8.

<sup>20</sup> Pollution Crime Working Group INTERPOL, *Assessing the Links between Organised Crime and Pollution Crimes* (2006), p. 3.

<sup>21</sup> Pollution Crime Working Group INTERPOL, *Electronic Waste and Organised Crime: Assessing the Links* (2009).

<sup>22</sup> The term *Camorra* is used to indicate those mafia-type groups which operate in Naples and the surrounding Campania region (Alison Jamieson and Luciano Violante, *The Antimafia: Italy's fight against organized crime* (Macmillan 2000), p. 11).

number of European countries.<sup>23</sup> Although the *Camorra* has a dominant position in this field, all Italian OCGs profit from these activities.<sup>24</sup>

The current economic crisis, coupled with the high costs involved in adequate waste disposal, has led many businesses to search for more convenient prices for their waste disposal needs.<sup>25</sup> The provisions enabling free movement of goods and persons within the EU and abolishing border checks make it increasingly difficult to monitor and stop the movement of illegal waste from one country to another.<sup>26</sup> This coupled with loopholes in differing national legislation and different level of expertise of the various enforcement forces and agencies and their lack of co-operation, results in a system which is easy to cheat from the perspective of OCGs.<sup>27</sup> Finally, lack of public awareness and attitudes towards organised crime activities are considered to be an important factor in the proliferation thereof. This is especially the case for environmental crimes which most individuals do not consider serious - because of a lack of *direct* human victim - or do not see – it usually occurs outside those areas which are densely populated -, and even more those crimes from which they can profit.<sup>28</sup>

## B. International and European Law

### i. International Instruments<sup>29</sup>

- ❖ *The Basel Convention*: The issue of trafficking in hazardous wastes became one of the points of focus of the United Nations Environmental Programme (UNEP) in the 1980's. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (hereinafter "the Basel Convention") was adopted on 22 March 1989,<sup>30</sup> to address public concern regarding the shipment of waste to developing countries. The core aims of the Convention, as laid out in its Preamble, are the protection of human health and the environment. According to the drafters this is to be achieved by limiting as much as possible the movement of waste. Under Article 4 (1)(a) States Parties may prohibit the import of wastes for disposal into their territory. Sub-paragraph (b) requires States parties

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<sup>23</sup> EUROPOL, *Threat Assessment: Italian Organised Crime* (2013), p. 11.

<sup>24</sup> Royal Institute for International Affairs, *The Nature and Control of Environmental Black Markets (Project supported by the European Commission)* (2002), p. 8.

<sup>25</sup> OECD, *Illegal Trade in Environmentally Sensitive Goods* (OECD Trade Policy Studies, 2012), Chapter 2, p. 29.

<sup>26</sup> EUROPOL, *EU Serious And Organised Crime Threat Assessment (SOCTA)*, p. 16.

<sup>27</sup> Don Liddick, 'The traffic in garbage and hazardous wastes: an overview' [Springer-Verlag] 13 Trends in Organized Crime 134 (2010), p. 136.

<sup>28</sup> EUROPOL, *EU Serious And Organised Crime Threat Assessment (SOCTA)*, p. 14; IMPEL, *International Cooperation in Enforcement Hitting Illegal Waste Shipments - Project Report September 2004 - May 2006* (Seaport Project, 2006); p. 10.

<sup>29</sup> Prior to the adoption of legal instruments some soft law measures were adopted at international level, they will not be discussed here as they do not come within the scope of analysis, however, it is still important to remember that awareness of this issue was already raised in the early 1970s. To give an idea of which instruments were drafted at that time a brief, non-exhaustive list is provided: Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972); Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes adopted by the Governing Council of the United Nations Environment Programme (UNEP) by decision 14/30 of 17 June 1987; Recommendations of the United Nations Committee of Experts on the Transport of Dangerous Goods World Charter for Nature adopted by the General Assembly of the United Nations at its thirty-seventh session (1982).

<sup>30</sup> 1673 UNTS 126; 28 ILM 657 (1989), entry into force: 5 May 1992.

to impede export to countries having exercised their right under (a). Generally, the importing state must consent to any waste entering its territory.<sup>31</sup> The Basel Convention requires Parties to minimise production of waste and to make available facilities which can ensure that the disposal of waste is carried out without danger to human health and the environment.<sup>32</sup> States must also make sure that those involved in the transport and treatment of waste perform their activities in such a way as to prevent pollution and to minimise the damaging effects where pollution occurs.<sup>33</sup> States are to reduce to a minimum the transboundary movement of waste;<sup>34</sup> in doing so they must ensure that the export of hazardous wastes occurs only when the State Party does not itself have adequate facilities to dispose of the waste safely or where the receiving state requires the material for recycling or recovery in its industries.<sup>35</sup> Furthermore, States Parties should not allow the export of waste to countries where there is reason to believe the waste will not be treated in accordance with the provisions of the Convention.<sup>36</sup> Persons involved in the transport and disposal of waste must be authorised and the waste itself must be labelled and packaged in accordance with the Convention.<sup>37</sup> Imports from and exports to non-Parties are prohibited.<sup>38</sup> Articles 6 to 8 lay down the details regarding transportation between states parties, through non-state parties, and rules on the re-import of waste, respectively.

States are to enforce the Convention through legal, administrative and other measures, also for the prevention of violations.<sup>39</sup> Importantly, Article 4 (3) states that States Parties must regard illegal traffic as criminal. Article 9 (1) defines illegal traffic as:

“any transboundary movement of hazardous wastes or other wastes:

(a) without notification pursuant to the provisions of this Convention to all States concerned; or

(b) without the consent pursuant to the provisions of this Convention of a State concerned; or

(c) with consent obtained from States concerned through falsification, misrepresentation or fraud; or

(d) that does not conform in a material way with the documents; or

(e) that results in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law.”

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<sup>31</sup> Article 4 (1) (c).

<sup>32</sup> Article 4 (2) (a-b).

<sup>33</sup> Article 4 (2) (c).

<sup>34</sup> Article 4 (2) (d).

<sup>35</sup> Article 4 (9) (a-b).

<sup>36</sup> Article 4 (2) (e) and (g).

<sup>37</sup> Article 4 (7) (a-c).

<sup>38</sup> Article 4 (5).

<sup>39</sup> Article 4 (4).

Criminal sanctions are encouraged to reduce the incidence of illegal behaviour such as that described in the preceding paragraph.

There is no mention in the Convention of OCGs or corruption and there is no approximation of levels of sanctions for infringing its provisions. Furthermore, being an instrument of international law it is difficult for the OECD to ensure compliance of States Parties.

- ❖ *The Council of Europe Convention on the Protection of the Environment through Criminal Law.*<sup>40</sup> This instrument has the potential of having a far-reaching, effective impact on environmental crime generally, but also on organised trafficking in waste. However, to date it has only been ratified by Estonia, which means it cannot enter into force, as at least three ratifications are necessary for this to happen.<sup>41</sup> Article 2 (1) (c) requires that States Parties make “the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;” a criminal offence when committed intentionally. Article 6 requires that sanctions reflect the seriousness of the infringement and states that both fines and imprisonment should be considered as appropriate. Article 8 obliges States Parties to make it possible to confiscate the proceeds of environmental crimes. It should be possible for the relevant authorities of each State Party to oblige offenders to reinstate the environment upon penalty of criminal sanctions if the order is not complied with.<sup>42</sup> The Convention requires that legal persons be held liable either through administrative or criminal law and that this should not impede prosecution of individuals.<sup>43</sup> The Convention also encourages allowing interest groups to participate in criminal proceedings if State Parties so desire.<sup>44</sup>
- ❖ *The Palermo Convention:* The United Nations Convention against Transnational Organised Crime entered into force on 29 September 2003.<sup>45</sup> Article 2 (1) (a) defines an “Organized criminal group” [as] a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;” and a “Structured group” [as] a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.”  
As further discussed in Chapter IV, the same definition has been adopted in the European Union. The Convention applies to situations having a transnational dimension.<sup>46</sup> It requires the criminalization of the intentional participation in a criminal organization as defined in

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<sup>40</sup> Adopted on 4 November 1998, CETS No. 172.

<sup>41</sup> For the signatures and ratifications of the Convention see:

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=172&CM=8&DF=18/06/2014&CL=EN>  
G (last accessed on: 27.08.2014 ).

<sup>42</sup> Article 8.

<sup>43</sup> Article 9.

<sup>44</sup> Article 11.

<sup>45</sup> Adopted by General Assembly Resolution 55/25 of 15 November 2000.

<sup>46</sup> Article 3.

Article 2 (1) (a). This participation is formulated in the language of both civil law and common law.<sup>47</sup>

There is no mention of environmental crime generally or waste trafficking specifically and no approximation of sanction levels across States Parties. It requires that legal persons be held liable but leaves to the individual States the choice how to do this under national law.<sup>48</sup> Importantly, it requires the criminalization of corruption, both active and passive, of public officials.<sup>49</sup>

## ii. Rules adopted by the European Union

The European Union has been actively legislating in the field of waste since the 1970s,<sup>50</sup> in this section an overview of such legislation will be given, however only some instruments, relevant for the present analysis will be discussed, other will only be listed without description. Relevant instruments from the field of European criminal law will also be discussed. Instruments are described in depth when they encompass provisions to limit or stop cross-border trafficking in waste. When they are only necessary to determine the unlawfulness of an act - because they indicate what waste is and how it should be classified and treated -they are only cited.<sup>51</sup>

### a. Framework Legislation on Waste

- ❖ *Directive 2008/98/EC* of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives<sup>52</sup> – this Directive aims to harmonise definitions of waste within the European Union and lays down the general framework on waste. With the central aim of protecting human health and the environment the Directive sets out the various ways waste should be handled.<sup>53</sup> Some basic principles underlie its approach: for example, the “polluter pays” principle, which ensures the liability of whoever holds the waste where this is not done in conformity with the Directive.<sup>54</sup> Importantly, the Directive

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<sup>47</sup> Article 5 (1).

<sup>48</sup> Article 10.

<sup>49</sup> Article 8.

<sup>50</sup> To give an idea of the large quantity of legislation in this field adopted by the Union some instruments will be cited from each decade. Directive 75/439/EC of 16 June 1975 on the disposal of waste oils OJ L 194, 25/07/1975, pp. 23-25; Council Directive 78/176/EEC of 20 February 1978 on waste from the titanium dioxide industry OJ L 54, 25/2/1978, p. 19–24; Council Directive 86/278/EEC of 12 June 1986 on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture OJ L 181, 4/7/1986, p. 6–12; Council Directive 92/112/EEC of 15 December 1992 on procedures harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry OJ L 409, 31/12/1992, p. 11–16; European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste OJ L 365, 31/12/1994, p. 10–23; Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste OJ L 332, 28/12/2000.

<sup>51</sup> The author has elected not to include rules on specific waste streams as they go beyond the scope of the present analysis. To find specific legislation in this area, please visit:

<http://ec.europa.eu/environment/waste/legislation/c.htm> (last accessed on: 27.08.2014). The same can be said of waste management operations:

<http://ec.europa.eu/environment/waste/legislation/b.htm> (last accessed on: 27.08.2014).

<sup>52</sup> OJ L 312, 22/11/2008, p. 3–30.

<sup>53</sup> Recital (6) Preamble.

<sup>54</sup> Recital (26) Preamble; Article 14.

requires Member States to ensure that its provisions are enforced by means of “effective, proportionate and dissuasive penalties”.<sup>55</sup>

- ❖ *Commission Decision 2000/532/EC* of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste;<sup>56</sup>
- ❖ *Regulation (EC) No 1013/2006* of the European Parliament and of the Council of 14 June 2006 on shipments of waste<sup>57</sup> – this Regulation is the main European-wide instrument which implements the obligations under the Basel Convention. Its aims, much like those of the convention, are the protection of human health in the environment through the limitation of movements of waste.<sup>58</sup> Even though the obligations under the Basel Convention are incurred by each State individually, the drafters of the Regulation thought it necessary to achieve coherence in the Union system.<sup>59</sup> The guiding principles are those of proximity, self-sufficiency and priority for recovery.<sup>60</sup> Action at the Union level is considered an essential component to the protection of the environment given the otherwise uneven playing field which would be created by the fragmentation of legislation among Member States.<sup>61</sup> Co-operation among law enforcement authorities is an essential aspect of creating such a level playing field.<sup>62</sup> The provisions of the Regulation mostly mirror those contained in the Basel Convention, adapted to the context of the European Union. Article 50 requires Member States to impose “effective, proportionate and dissuasive sanctions” against anyone who violates the rules contained in the Regulation.

#### b. Public Procurement

- ❖ *Directives (2014/23/EU; 2014/24/EU; 2014/25/EU)*<sup>63</sup> on public procurement each prohibit the awarding of public contracts to firms which have connections to organised crime.<sup>64</sup>

#### c. Relevant Rules of European Criminal Law

- ❖ *Council Framework Decision 2008/841/JHA* of 24 October 2008 on the fight against organised crime<sup>65</sup> – this instrument will be discussed extensively in Chapter IV.
- ❖ *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<sup>66</sup> – this instrument will be discussed extensively in Chapter IV.

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<sup>55</sup> Recital (45) Preamble; Article 36 (2).

<sup>56</sup> OJ L 226, 06/09/2000, p. 3–24.

<sup>57</sup> OJ L 190, 12/07/2006, p. 1–98.

<sup>58</sup> Recital (7) Preamble.

<sup>59</sup> Recital (13) Preamble.

<sup>60</sup> Recital (20) Preamble.

<sup>61</sup> Recital (22) Preamble.

<sup>62</sup> Recital (36) Preamble; Article 52.

<sup>63</sup> OJ L 94, 28/03/2014, p. 1–64; OJ L 94, 28/03/2014, p. 65–242; OJ L 94, 28/03/2014, p. 243–374.

<sup>64</sup> Article 57 Directive 2014/24/EU; Article 35 Directive 2014/23/EU; Recital (105), Article 53 (5) Directive 2014/25/EU.

<sup>65</sup> OJ L 300, 11/11/2008, p. 42–45.

<sup>66</sup> OJ L 328, 06/12/2008, p. 28–37.



## C. Concluding Remarks

It has been observed that, notwithstanding the adoption of international and European instruments discussed in the first section of this Chapter, a problem of (cross-border) organised trafficking and disposal of waste exists. It is clear, furthermore, that it has become a problem of such scale with transnational character to be an object of discussion in the *fora* of cross-border police co-operation. It follows that a transnational and repressive response is necessary. The optimal means to limit this activity and the level at which these means should be adopted will be discussed in Chapters III and IV, respectively.

### III. National Legal Frameworks and Types of Response

Having already seen that a problem of organised trafficking of waste exists, it is necessary to assess *how to limit* its occurrence. This Chapter will explore whether criminal sanctions are desirable to combat illicit trafficking and disposal of waste. Two main approaches will be followed. Firstly, the measures available to tackle this type of problem in two legal systems selected as case-studies will be described. Each case-study will include a brief overview of the problem of waste trafficking in the relevant country and the impact of the legislation. The legislation will also be analysed to determine the intervention theory behind its adoption: *i.e.* the rationale of the government in choosing a type of measure and its assumptions on the relationship between the measure and the achievement of the goal of reducing and eliminating illicit waste trafficking and disposal.

The second Part of the Chapter will look into academic theories regarding the appropriateness of criminal sanctions to tackle environmental issues. The jurisprudence of the CJEU, in particular the judgments in relation to “effective, proportionate and dissuasive sanctions” will be used as a starting point to outline the unit of analysis. Each term will then be interpreted on the basis of criminological and law and economics theories.

#### A. Case-studies

The analyses of the two case-studies presented below have the function of describing the problem of trafficking in waste as it exists in the selected countries and the measures which exist to combat this issue – in terms of legislation, powers of law enforcement authorities and policy choices. Given that the aim of the case-studies is to extrapolate the intervention theories behind the choices made, in other words to understand why criminal law was chosen as opposed to other means, the analysis will not be a legal one, rather it will focus more on the policy dimension and its effectiveness.

##### i. Italy

###### a. The problem of waste trafficking in Italy

The existence of a problem of trafficking in waste by organised crime groups is well documented in Italy. The Italian NGO *Legambiente* coined the term *ecomafia* and this very

same NGO has been collaborating ever since with law enforcement authorities to uncover the extent of these activities, their consequences and those responsible.<sup>67</sup>

### 1. Waste Trafficking in Numbers and Geographical Scope

The evidence from early enquiries and investigations by *Legambiente* and law enforcement authorities showed that industries in the North of Italy sent their waste to Southern regions through the *Camorra*.<sup>68</sup> However, it emerged over time that waste was coming and continues to come from other EU countries – e.g. France and Germany - and goes to other EU countries – e.g. Romania - with Italy being a zone of disposal and transit.<sup>69</sup> In this way, waste producers saved money and *Camorra* groups profited. The most important group involved in this activity was, and still is, the *Casalesi* clan from Casal di Principe.<sup>70</sup>

The total number of organised waste trafficking investigations having an international dimension and carried out in Italy between 2001 and 2013 was thirty-eight. These investigations have led to one hundred and thirty-nine arrests and one hundred and thirty-four companies being subject to judicial orders. Twenty-two countries were involved – ten European, five Asian and seven African.<sup>71</sup> In the course of the investigations which have been carried out, the amount of illegally disposed waste confiscated amounts to one hundred thousand tonnes for eighty-nine investigations – only half of the total one hundred and ninety one investigations carried out in the last ten years. As regards profit, *Legambiente* estimates that the *Camorra* made €3.3 billion in 2010 and €43 billion in the last ten years.<sup>72</sup>

As regards the costs for society, the population residing in areas surrounding dumping sites has been severely affected. Some estimates go as far as indicating a 400% increase in cancer.<sup>73</sup> Other researchers simply stress the link between these activities and a clear decline in the health of the local population, with certain cancers becoming more and more common.<sup>74</sup>

### 2. Actors and Modus Operandi

As opposed to more traditional areas of crime in the hands of *mafia*-type associations, waste trafficking requires the involvement of non-*mafia* born managers; i.e. professionals and lawyers who have technical knowledge in the field and could therefore, help in finding loopholes and opportunities in terms of disposal sites and waste producers.<sup>75</sup> These individuals are not formally part of the *mafia* group and do not undergo ritual initiation – this means that their link with the group is, in many cases, harder to prove.

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<sup>67</sup> *Legambiente*.

<sup>68</sup> The term *Camorra* is used to indicate those mafia-type groups which operate in Naples and the surrounding Campania region (Jamieson and Violante, p. 11).

<sup>69</sup> *Legambiente, Rifiuti Spa* (2012), p. 2; Commissione Parlamentare d'Inchiesta sul Ciclo dei Rifiuti e sulle Attività Illecite ad esso Connesse, *Dichiarazioni Carmine Schiavone 1997* (2013), p- 32, 38.

<sup>70</sup> Massari and Monzini, p. 288.

<sup>71</sup> *Legambiente, Rifiuti Spa*, p. 2.

<sup>72</sup> *Ibid*, p. 2.

<sup>73</sup> Massari and Monzini, p. 288.

<sup>74</sup> Kathryn Senior and Alfredo Mazza, 'Italian "Triangle of death" linked to waste crisis' 5 *The Lancet Oncology* 525 (2004).

<sup>75</sup> Commissione Parlamentare d'Inchiesta; Vincenzo South Nigel Ruggiero, 'Green Criminology and Dirty Collar Crime' [Springer] 18 *Critical Criminology* 251 (2010), p. 259.

Often the provision of the waste disposal service follows the awarding of a public contract by means of corruption.<sup>76</sup> This is possible due to the control and influence *mafia* groups have on politicians created by their capacity to ensure re-election by securing votes.<sup>77</sup> The use of forged documents is also fundamental - the type of waste and its toxicity can be masked behind false documentation.<sup>78</sup>

An often observed and denounced activity is the use of old quarries as landfills – the quarries themselves are created illegally. In these instances the criminals profit twice – by selling the illegally obtained material from the quarry and by collecting and disposing of the waste in that quarry. A double profit is also made through construction work by *Camorra*-run or infiltrated building firms in which (toxic) waste material is used.<sup>79</sup>

## b. Existing measures to tackle waste trafficking in Italy

### 1. Legislation

In the past, environmental harm was classified as a misdemeanour, there were not many convictions or imprisonment, and a short statute of limitations applied to such acts.<sup>80</sup> The first change took place in 2001 with Article 22 of law n. 93/2001, which created a specific crime of organised trafficking in waste.<sup>81</sup> This provision was replaced by Article 260 of legislative decree n. 152/2006:<sup>82</sup>

Article	260
(Organised activities for the illegal trafficking of waste)	
1. Whoever, in order to obtain an unfair advantage, employing more than one operation and through organised and continuous means and activities, hands over, receives, transports, exports, imports or otherwise improperly handles large quantities of waste is punished with imprisonment from one to six	years.

<sup>76</sup> Commission Parlamentare d’Inchiesta; Graziano Abrate and others, ‘The costs of corruption in the Italian solid waste industry’ University of Turin, Department of Economics and Statistics, WP series (2012).

<sup>77</sup> Commission Parlamentare d’Inchiesta.

<sup>78</sup> Elena Past, “‘Trash Is Gold’: Documenting the Ecomafia and Campania’s Waste Crisis’ 20 Interdisciplinary Studies in Literature and Environment 597 (2013), p. 598; Legambiente, *I mercati illegali* (2013), p. 13.

<sup>79</sup> Connesse; Legambiente, *I mercati illegali*, p. 17.

<sup>80</sup> Article 24 *Decreto del Presidente della Repubblica 10 settembre 1982, n. 915 “Attuazione delle direttive (CEE) n. 75/442 relativa ai rifiuti, n. 76/403 relativa allo smaltimento dei policlorodifenili e dei policlorotrifenili e n. 78/319 relativa ai rifiuti tossici e nocivi.” (GU n.343 del 15-12-1982 )*.

<sup>81</sup> Article 22 *Legge 23 marzo 2001, n. 93 “Disposizioni in campo ambientale.” (GU n.79 del 4-4-2001)* introduced Article 53bis into *Decreto Legislativo 5 febbraio 1997, n. 22, “Attuazione delle direttive 91/156/CEE sui rifiuti, 91/689/CEE sui rifiuti pericolosi e 94/62/CE sugli imballaggi e sui rifiuti di imballaggio” (GU n. 38 del 15-2-1997 – Suppl. Ordinario n. 33)*.

<sup>82</sup> *Decreto Legislativo 3 aprile 2006, n. 152 “Norme in materia ambientale.” (GU n.88 del 14-4-2006 - Suppl. Ordinario n. 96)*, see Annex I.

2. If the waste is highly radioactive the penalty will be of imprisonment from three to eight years.  
[...]

4. The judge can order the restoration of the environment and can make the granting of probation conditional upon the elimination of the damage or danger to the environment.

More recently, law decree n. 136/2013<sup>83</sup> – has made the illegal burning of waste a criminal offence.<sup>84</sup> Finally, in order to implement the obligations arising from Directive 2008/99 on environmental crimes, a legislative proposal is currently under discussion.<sup>85</sup> Should the bill become law it will criminalise environmental disaster and pollution, trafficking and disposal of nuclear waste, and it will allow for the extended confiscation of profits.<sup>86</sup> However, this proposal has been highly criticised for the gaps, loopholes and low levels of protection it has created. This due to the evidentiary thresholds imposed, which make it very difficult, if not impossible, to apply the rules to any realistic scenario.<sup>87</sup>

## 2. Law Enforcement Powers and Specialised Units

Since 2010 investigations in trafficking in waste have to be conducted by the *Antimafia* division of the relevant prosecutor's office even where no explicit link with *mafia* is identified.<sup>88</sup> This allows law enforcement authorities to make increased use of wire-tapping; to have access to the national organised crime database<sup>89</sup>; to apply stringent secrecy rules

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<sup>83</sup> *Decreto-Legge 10 dicembre 2013, n. 136 "Disposizioni urgenti dirette a fronteggiare emergenze ambientali e industriali ed a favorire lo sviluppo delle aree interessate."* (GU n.289 del 10-12-2013); *Legge 6 febbraio 2014, n. 6 "Conversione in legge, con modificazioni, del decreto-legge 10 dicembre 2013, n. 136, recante disposizioni urgenti dirette a fronteggiare emergenze ambientali e industriali ed a favorire lo sviluppo delle aree interessate."* (GU n.32 del 8-2-2014).

<sup>84</sup> See Annex I for full text.

<sup>85</sup> *Disegno di legge n. 1345, Disposizioni in materia di delitti contro l'ambiente*, In August 2014 the text of the proposed bill was still under discussion in the Senate, for further information see: [http://www.senato.it/leg/17/BGT/Schede/Ddliter/comm/44045\\_comm.htm](http://www.senato.it/leg/17/BGT/Schede/Ddliter/comm/44045_comm.htm) (last accessed on: 27.08.2014).

<sup>86</sup> See Annex I for full text.

<sup>87</sup> Maurizio Santoloci, 'La legge sui delitti ambientali un giano bifronte: Nella prima parte aggrava e nella seconda parte (di fatto) estingue i reati ambientali' *Diritto all'ambiente* (2014) ([http://www.dirittoambiente.net/file/vari\\_articoli\\_295.pdf](http://www.dirittoambiente.net/file/vari_articoli_295.pdf)) (last accessed on: 27.08.2014); Thomas Mackinson, 'Reati ambientali, la legge che fa saltare i processi. E la grande industria ringrazia' *Il Fatto Quotidiano* (2014) (<http://www.ilfattoquotidiano.it/2014/04/26/ddl-reati-ambientali-la-legge-che-fa-saltare-i-processi-e-la-grande-industria-ringrazia/962184/>) (last accessed on: 27.08.2014); Alessandro Marescotti, *Stoppiamo il disegno di legge 1345 sui reati ambientali* (2014); Carlo Ruga Riva, 'Commento al testo base sui delitti ambientali adottato dalla commissione giustizia della camera' *Diritto Penale Contemporaneo* (2014) (<http://www.penalecontemporaneo.it/upload/1390314581RUGA%20RIVA%202014a.pdf>) (last accessed on: 27.08.2014).

<sup>88</sup> Article 11, *Legge 13 agosto 2010, n. 136, "Piano straordinario contro le mafie, nonche' delega al Governo in materia di normativa antimafia."* (GU n.196 del 23-8-2010).

<sup>89</sup> *Banca dati nazionale unica della documentazione antimafia.*

to the investigation; make more use of undercover agents; and apply stronger pre-trial custody measures.<sup>90</sup>

In terms of specialised units within the police force, it is important to mention the NOE (*Nucleo Operativo Ecologico* – Ecological Operational Unit), a special unit of the *Carabinieri* dedicated to environmental crime. Members of this unit receive special training in ecological matters as well as technical training for waste trafficking and other environmentally harmful acts. This unit has been under the supervision of the Minister for the environment since 1986.<sup>91</sup> Other enforcement agencies are also often involved in waste trafficking investigations, namely the *Corpo Forestale dello Stato*, a police unit of civil order, the task of which is to assist in the protection of the environment and landscape.<sup>92</sup> Other specialised units like the *Guardia di Finanza* (financial police) as well as customs and port authorities also frequently participate in these investigations.<sup>93</sup>

### 3. Policy Analysis and Concluding Remarks

The legislative changes which have taken place since 2001 are a direct response to the discoveries made by *Legambiente* and through information provided by what are known as “collaborators of justice” (*collaboratori di giustizia*<sup>94</sup>). The information derived from these and other sources was the basis for a specially designated Parliamentary Commission<sup>95</sup> to design rules on the criminalisation of organised trafficking in waste.<sup>96</sup> The Commission determined that existing sanctions did not have a sufficiently deterrent effect given the profits being made by the *mafia* groups. Therefore, its enquiries led to the conclusion that only through a regime which focused on repression through criminal law would the State be able to effectively combat those undertaking these activities.<sup>97</sup>

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<sup>90</sup> Article 11 *Legge* n. 136 /2010 junct. Article 51 (3 –bis) Italian Code of Criminal Procedure (*Decreto del Presidente della Repubblica* 22 settembre 1988, n. 447 “Approvazione del codice di procedura penale.” (GU n.250 del 24-10-1988 - Suppl. Ordinario n. 92 ). The more extensive powers granted in respect of antimafia prosecutions are found in *Legge* 12 luglio 1991, n.203 *Conversione in legge, con modificazioni, del decreto-legge* 13 maggio 1991, n. 152, recante *provvedimenti urgenti in tema di lotta alla criminalità organizzata e di trasparenza e buon andamento dell'attività amministrativa* (GU n. 162 del 12-7-1991).

<sup>91</sup> Arma dei Carabinieri, ‘Nucleo operativo ecologico dei carabinieri’ <<http://www.carabinieri.it/Internet/Arma/Curiosita/Non+tutti+sanno+che/N/14+N.htm>> (last accessed on: 27.08.2014).

<sup>92</sup> Corpo Forestale, ‘Il Corpo Forestale dello Stato’ <<http://www3.corpoforestale.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/2>> Carabinieri(last accessed on: 27.08.2014).

<sup>93</sup> *Legambiente, Rifiuti Spa*, p. 2.

<sup>94</sup> Members of *mafia* groups who decide to share with the authorities all details they are aware of in respect of the groups’ activities in exchange for lower penalties and insertion in witness protection programmes.

<sup>95</sup> *Commissione Parlamentare d’Inchiesta sul Ciclo dei Rifiuti e sulle Attività Illecite ad esso Connesse*, created in 1995 and expanded in 1996 to include both chambers of Parliament, the purpose of which is to identify the appropriate means to tackle the problem of organised trafficking in waste.

<sup>96</sup> Massari and Monzini, p. 290.

<sup>97</sup> Parlamento, *Illeciti ambientali ed ecomafie: Riflessione sulle problematiche connesse ai delitti contro l’ambiente* (2001 Parlamento, *I crimini contro l’ambiente e la lotta alle ecomafie* (1999).

The answers to the questionnaires sent to stakeholders provide further insight into the measures implemented by the Government and their consequences. A change in the activities of OCGs with regard to trafficking in waste since the criminalisation of waste trafficking has been registered. It has now become more common to see these groups disposing of waste through the black market of recycling or “fake” recycling<sup>98</sup>. Generally speaking, the strong criminal law approach adopted by the Italian Government has been praised, but a number of structural factors are indicated as not having been resolved. Such factors include a lack of adequate disposal facilities and incentives for proper management of dump sites.

From a law enforcement perspective, lack of stringent controls has been identified as being an on-going problem, which leads the actors involved to perceive low risks in pursuing the activity.

Very much stress is put on the preventive aspect, requiring rules on the movement of wastes even in with a national territory to be more stringent and measures to encourage proper recycling.

Finally, as a measure complementary to criminal sanctions, the interviewees have suggested that those discovered to be involved in criminal operations should no longer be allowed to engage in any activity related to waste through legal orders of the Courts, *e.g.* injunctions.

On a transnational level, the creation of a European criminal definition of the offence with accompanying common sanction levels has been advocated. Other suggested interventions are the global exchange of police intelligence and best practices and stronger confiscation measures being applied worldwide as well as incentives for adequate disposal.

## ii. England

### a. The problem of waste trafficking in England

#### 1. Waste Trafficking in Numbers and Geographical Scope

England, reports show, is affected by organised trafficking in waste. In most cases the type of waste involved is either household waste or deriving from construction sites. Inappropriate dumping often takes place within the country itself. However, an emerging threat is that of recyclable materials, mainly plastic, being shipped to China or India where higher profits can be made by selling waste which is then treated using sub-standard procedures resulting in damage to the local communities.<sup>99</sup>

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<sup>98</sup> Recycling operations which exist only on paper but which in the end mix all types of waste together.

<sup>99</sup> Environment Agency (England and Wales) and Jill Dando Institute of Crime Science, University College London,, *IMPEL-TFS Threat Assessment Project: The Illegal Shipment Of Waste Among Impel Member States* (2006), p. 23.

The most recent report of the English Environment Agency sheds some light on the incidence of the problem: the figures presented below refer to the period between 2012 and 2013 unless stated otherwise. Within England over one thousand sites where improper and illegal waste disposal occurred were identified and activities therein stopped. In terms of organised crime involvement, one hundred and seven serious instances of organised waste crime were identified. As regards waste exports, the Environment Agency reports that almost half of the containers inspected were found to be not in conformity with the applicable rules and the evidence gathered was then used for prosecution. The total number of successful prosecutions, including those for waste exports was one hundred and eighty-two, with an average fine of £7,137. Only five custodial sentences were imposed, with the longest amounting to 18 months.<sup>100</sup>

## 2. Actors and Modus Operandi

Even though waste dumping has been a criminal offence for a number of years,<sup>101</sup> reports and details on this type of activity have only recently started being published – the first specialised report of the Environment Agency is that of 2011-12.<sup>102</sup> This means that not much information is available to understand the *modus operandi* of those involved.

One of the most common offences reported is that of fly-tipping;<sup>103</sup> of more interest in the present dissertation are those instances where a number of individuals and firms are organised to set up illegal dumping sites or for the export of waste outside the UK and Europe.

What emerges from the data available is that the most common type of waste being mishandled in this context is that from construction and demolition sites. Other waste crimes include intentional misclassification of wastes to avoid higher taxation rates; permitted sites receiving wastes and performing procedures outside the scope of their permits; and sites for both storage and dumping without permits and in contravention of health and environmental standards. From an international perspective, a number of cases of exports of hazardous wastes, end-of-life vehicles and electronic waste to non-OECD (*i.e.* not adhering to the Basel Convention) countries have been discovered.<sup>104</sup>

### b. Existing measures to tackle waste trafficking in England

#### 1. Legislation

In England the legal rules applicable to illicit trafficking and disposal of waste are found in Section 33 of the Environmental Protection Act 1990 (EPA), which states:

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<sup>100</sup> Environment Agency (England and Wales), *Cracking down on waste crime: waste crime report 2012-2013* (2013), p. 13.

<sup>101</sup> Section 33 Environmental Protection Act 1990, c. 43.

<sup>102</sup> Environment Agency (England and Wales), *Cracking down on waste crime: waste crime report 2011-2012* (2012).

<sup>103</sup> Fly-tipping is the illegal deposit of waste on land contrary to Section 33 (1) (1) Environmental Protection Act 1990 (Jill Dando Institute of Crime Science, University College London, *Fly-tipping: Causes, Incentives and Solutions: A good practice guide for Local Authorities* (2006), p. ii).

<sup>104</sup> Environmental Services Association Education Trust, *Waste Crime: Tackling Britain's Dirty Secret* (2014), p. 11; John Henley, 'Waste crime: Britain's war on illegal dumping' *The Guardian* <<http://www.theguardian.com/environment/2012/nov/11/waste-crime-britains-war-illegal-dumping>> (2012) (last accessed on: 27.08.2014)

33. Prohibition on unauthorised or harmful deposit, treatment or disposal etc. of waste.

(1) [A] person shall not—

(a) deposit controlled waste [ or extractive waste], or knowingly cause or knowingly permit controlled waste [ or extractive waste] to be deposited in or on any land unless [an environmental permit] authorising the deposit is in force and the deposit is in accordance with [the permit];

(b) submit controlled waste, or knowingly cause or knowingly permit controlled waste to be submitted, to any listed operation (other than an operation within subsection (1)(a)) that—

(i) is carried out in or on any land, or by means of any mobile plant, and

(ii) is not carried out under and in accordance with an environmental permit;

(c) treat, keep or dispose of controlled waste [ or extractive waste] in a manner likely to cause pollution of the environment or harm to human health.

[...]

(5) Where controlled waste is carried in and deposited from a motor vehicle, the person who controls or is in a position to control the use of the vehicle shall, for the purposes of subsection (1)(a) above, be treated as knowingly causing the waste to be deposited whether or not he gave any instructions for this to be done.

(6) A person who contravenes subsection (1) above [...] commits an offence.

[...]

[(8) [Subject to subsection (9) below, a] person who commits an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding £50,000 or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding five years or a fine or both.[...]

[(9) A person (other than an establishment or undertaking) who commits a relevant offence shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; and

(b) on conviction on indictment, to a fine.<sup>105</sup>

Other relevant legal provisions are Regulations 12 and 38 (1), (2) and (3) of the Environmental Permitting (England and Wales) Regulations 2010.<sup>106</sup>

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<sup>105</sup> Full text can be found in Annex I.

<sup>106</sup> SI 2010/675.



It is also worth mentioning the Proceeds of Crime Act 2002 (POCA),<sup>107</sup> which in Parts 2 to 4 outlines the powers of the Courts to issue confiscation orders in respect of gains made through illegal acts. The Serious Organised Crime Act 2005 (SOCPA)<sup>108</sup> amended Part 6 of the POCA to include taxation powers of illegally made profits.

## 2. Law Enforcement Powers and Specialised Units

Differently to Italy, there is no specific police unit that deals with environmental crimes. Nevertheless, both the Environment and Health Agencies carry out investigations in their respective fields and furnish the information gathered to the relevant local police force.

In the field of organised crime, the Serious Organised Crime and Police Act 2005 increased powers available to the police by extending and simplifying the arrest process.<sup>109</sup> Through this act the Serious Organised Crime Agency was established: the role of the agency was one of support in investigations concerning serious and organised crime, as well as prevention through crime analysis.<sup>110</sup> The agency was dissolved at the end of 2013 and its powers merged into the National Crime Agency.<sup>111</sup>

## 3. Policy Analysis and Concluding Remarks

The Environment Agency provides insight as to the purposes of the chosen means of enforcement by stating that the measures provided for in the legislation:

- “aim to change the behaviour of the offender;
- aim to eliminate any financial gain or benefit from non-compliance;
- be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- be proportionate to the nature of the offence and the harm caused;
- aim to restore the harm caused by regulatory non-compliance, where appropriate; and
- aim to deter future non-compliance.”<sup>112</sup>

Furthermore, as already mentioned, waste crime has been receiving more attention than it did before from a crime analysis perspective, *i.e.* the Government has required that the Environment Agency undertake investigations as to the drivers of these activities, so as to formulate a proper response.<sup>113</sup> In this respect the Home Office has stated:

“The increase in offence numbers, coupled with significant cost to the UK economy through inconvenience, down time and cost of replacements and

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<sup>107</sup> C.29.

<sup>108</sup> C.15.

<sup>109</sup> Section 110.

<sup>110</sup> Section 1.

<sup>111</sup> Section 15, Crime and Courts Act 2013, c.22.

<sup>112</sup> Environment Agency (England and Wales), *Enforcement and sanctions statement* (2011), p. 3-4.

<sup>113</sup> Environment Agency (England and Wales), *Cracking down on waste crime: waste crime report 2011-2012*, p. 15.

the failure of non-legislative measures to tackle this crime necessitates a government response.”<sup>114</sup>

### iii. Concluding Remarks

From the case studies it has been possible to observe two different, yet similar approaches to the problem of trafficking in waste. While in Italy the organised dimension of the issue is explicitly recognised in the definition of the criminal offence – *i.e.* the organised nature of waste trafficking activities is a constituent element of the crime -, this is not the case in England, even though there is evidence of organised trafficking in waste taking place in the territory. Considering that in both countries organised crime receives particular attention from law enforcement authorities who, consequently, have been granted stronger powers in respect of these types of crime, it would be useful to highlight this link through criminal definitions and, thus, make accessible the deriving powers.

Another difference is the penalty attached to the criminal activity. Even though the legislation in England makes it possible to deprive offenders of their liberty or to impose a fine, the evidence gathered shows that prison sentences are rarely imposed and only for short periods of time. That notwithstanding, there are already disparities in the levels of sanctions in the legislation of the two countries under analysis. This is important to note from two perspectives: the first is that of disparity in sanctions across the European Union and the effect this has on waste trafficking – positive for the criminals who profit, negative for the general population. This aspect will be further explored in Chapter IV. The second perspective is that of deterrence; in other words, whether (low) prison sentences and fines offer the optimal means of deterrence – this matter will be discussed in more detail in the next Part of this Chapter.

Having seen that criminal law is preferred in the countries under analysis, it is now necessary to generalise the hypothesis that criminal law is the adequate means with which to combat organised trafficking in waste. Part B is dedicated to substantiate the hypothesis using academic theories of crime.

#### B. The Effectiveness of Criminal Sanctions

##### i. “Effective, proportionate and dissuasive” sanctions according to the European Court of Justice

As explained in Chapter II, European Union legislative instruments related to environment and waste require the application, by Member States, of “effective proportionate and dissuasive sanctions.”<sup>115</sup> Therefore, in order to understand which means should be considered optimal in order to ensure compliance with such legislation the definition of this concept is imperative. That of “effective, proportionate and dissuasive sanctions” is a European concept developed by the CJEU in the *Greek Maize* case<sup>116</sup> (discussed in Chapter

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<sup>114</sup> Home Office, *Impact Assessment: Tackling Metal Theft - prohibit cash payments and higher fines* (2012).

<sup>115</sup> See, for example, Article 36 (2) Directive 2008/98/EC; Article 50 Regulation (EC) 1013/2006.

<sup>116</sup> Case 68/88 *Commission v Greece* [1989] ECR 2965.

IV) and elaborated upon in later case-law. It refers to the obligations Member States have pursuant to the principle of sincere co-operation.<sup>117</sup>

From the analysis of the Luxembourg Court judgements and the Advocates General's Opinions containing the phrase "effective, proportionate and dissuasive", it emerges that in most cases these terms are left undefined. Often the sentence is included in preliminary rulings – thus, national courts are given the task of interpreting it in conformity with and with a view to coherence within their national legal systems.<sup>118</sup>

Advocate General Ruiz-Jarabo Colomer in the case concerning the annulment of the Eco-crime Framework Decision (further discussed in Chapter IV) explains the terms making specific reference to the aims of general and specific deterrence:

"The expression which the Court of Justice employs is not accidental, since, by referring to the effectiveness, proportionality and the dissuasive nature of the penalty, it alludes to the basic requirements for achieving full application of a Community rule, notwithstanding its infringement. Furthermore, in the light of the fact that any punishment pursues the dual objective of general and specific deterrence, punishing the infringer with the appropriate legal mechanism and threatening society with the same kind of punishment if similarly culpable conduct occurs, the range of possible sanctions appearing very broad."<sup>119</sup>

When taken individually, each one of the terms in this phrase is given some substance by either the Luxembourg Court or the Advocates General.

In the words of AG Geelhoed:

"[E]ffective enforcement means that offenders run a credible risk of being detected and being penalised in such a way as at least to deprive them of any economic benefit accruing from their offence. [...] [C]ontrol effort and the threat of repressive action must generate sufficient pressure to make non-compliance economically unattractive and therefore to ensure that the situation envisaged by the relevant Community provisions is realised in practice."<sup>120</sup>

Dissuasiveness is, for the most part, equated with deterrence, and, as has already been demonstrated above, deterrence, according the CJEU is calculated on the basis of a cost-benefit analysis.<sup>121</sup>

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<sup>117</sup> Article 4 (3) TEU requires Member States to "ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union."; See, also, Case 68/88 *Commission v Greece* [1989] ECR 2965, para.22-25.

<sup>118</sup> See, for example, Case C-418/11 *Texdata Software GmbH* [2013], para. 55.

<sup>119</sup> Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 26 May 2005 in Case C-76/03 *Commission of the European Communities v Council of the European Union*, para. 45.

<sup>120</sup> Opinion of Advocate General Geelhoed delivered on 23 September 2004 in Case C-494/01 *Commission of the European Communities v Ireland*, para. 28.

<sup>121</sup> See, for example, Case C-121/07 *Commission v France* [2008] ECR I-09159, para. 33, 69.

Proportionality is the same as the general proportionality principle in EU law; it includes an assessment of whether a measure is necessary, appropriate, the least restrictive means available and proportionate *strictu sensu*.<sup>122</sup>

Although some light has been shed on the meaning of the concept of “effective, proportionate and dissuasive sanctions”, to provide an accurate answer to the issue of optimal means to limit organised trafficking in waste, there is a need for further substantiation. To do this the next section will use academic theories, some of which are also based on empirical evidence. Elements highlighted in the CJEU case-law and the Advocates General’s Opinions include the increase in risks of detection and sanction and the fact of making the costs of performing the activity high enough to outweigh the benefits. It follows that economic theories of crime and punishment are best suited to provide guidance as to what “effective, proportionate and dissuasive sanctions” are within the European Union given that such theories are based on the premise that offenders are rational and decide whether to offend by performing a cost-benefit analysis. Such theories will be examined in the following section.

## ii. “Effective, proportionate and dissuasive” sanctions through the lenses of criminology and law and economics

According to Faure, *effectiveness* concerns the relationship between the goals set by a particular policy and the means chosen to achieve such goals. It has an *ex ante* and an *ex post* dimension. It is also strongly linked with other elements: a combination of *proportionality and dissuasiveness* lead to more effectiveness.<sup>123</sup> Achieving the goals is possible through *ex ante* general deterrence – thus, dissuasion of society at large from undertaking the undesired activity. Whereas *ex post* features of (environmental) criminal law must ensure restoration of some kind and *specific* prevention (deterrence of existing offender) for the future.<sup>124</sup> We should be mindful that *dissuasiveness resembles notion of deterrence*, thus when referring to deterrence in this section we will also be discussing the dissuasiveness of the penalties.<sup>125</sup> In order to design effective sanctions in the field of organised trafficking in waste it is necessary to dissect the issue and uncover why and how it is possible that these acts occur. At the outset it may be said that given that the problem persists and the high rates of recidivism existing administrative and criminal sanctions are insufficient to deter.<sup>126</sup> Therefore, we must look beyond existing mechanisms and design new and more effective ones.

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<sup>122</sup> See, for example, Case C-210/10 *Márton Urbán v Vám- és Pénzügyőrség Észak-alföldi Regionális Parancsnoksága* [2012], para. 24.

<sup>123</sup> Michael Faure, ‘Effective, proportional and dissuasive penalties in the implementation of the Environmental Crime and Shipment Pollution Directives: Questions and Challenges’ *European Energy and Environmental Law Review* 256 (2010), p. 259.

<sup>124</sup> *Ibid*, p. 259-260.

<sup>125</sup> *Ibid*, p. 256.

<sup>126</sup> Wim Huisman and Judith Van Erp, ‘Opportunities for environmental crime: a test of Situational Crime Prevention Theory’ *British Journal of Criminology* 1178 (2013), p. 1188.

### a. Identifying the Problems

Dorn, Van Daele and Beken recently conducted an empirical study on the vulnerabilities to crime of the European waste management industry. They identify a number of offences committed in this sector amongst which crimes against the environment, corporate crime and offences against competition.<sup>127</sup> Their findings as to causes and drivers of such crimes will be inserted into a situational crime prevention (SCP) model along with evidence from other criminological literature on environmental crimes generally and waste trafficking specifically.

Situational crime prevention theories (SCPTs) concern the study of those opportunities and environments which provide prospects for the perpetration of criminal acts. SCPTs arise from the assumption that criminal actors are rational and self-interested: they belong to the branch of economic theories of crime. These theories are applicable to corporate and environmental crime given the profit-driven nature of the acts (or omissions).<sup>128</sup> Five characteristics of criminal opportunities are identified by SCPTs:

- (1) The effort required to carry out the offence;
- (2) The situational conditions that may encourage criminal action;
- (3) The excuses and neutralizations of the offence;
- (4) The rewards to be gained from the offence;
- (5) The perceived risks of detection.

In relation to environmental crime, some adaptations have been made on the basis of empirical studies to adapt the SCPT model, which was originally used to examine street crime. A first adaptation is that of the “target” – this is no longer an individual victim or object; rather it arises out of a process and is intrinsically linked to business activities and gaining maximum profit therefrom, which have as their effect harm to the environment. A second adaptation relates to physical location: whereas for street crime the dimly lit alleyway or particular neighbourhood is part and parcel of the opportunity, for environmental crime opportunities arise out of a transactional network.<sup>129</sup> This applies more to corporate actors than to OCGs – the latter do depend on the opportunities of physical location to an extent.

Given the profit-centred motivations driving individuals to engage in environmental crime it can be said that in these cases SCPTs are to be geared towards the *reduction of the rewards of crime* rather than curing offenders.<sup>130</sup> It should also be noted that the model remains applicable to the organised crime aspect of illicit waste trafficking in that OCGs and legal enterprises are not easily distinguished in this sector as both seek opportunities for profit.<sup>131</sup> Some authors go as far as to argue that business cannot survive without resorting to services provided by OCGs and that organised crime is intrinsic to the industrial system

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<sup>127</sup> Dorn, Van Daele and Beken, p. 25.

<sup>128</sup> Mark M. Lanier and Stuart Henry, *Essential criminology* (Westview Press 2010), p. 92-94.

<sup>129</sup> Huisman and Van Erp, p. 1181.

<sup>130</sup> Ibid, p. 1181.

<sup>131</sup> Ruggiero, p. 258-259.

given that there can only be satisfactory profit margins when legal and illegal actors interact and bring about mutual benefits from each other.<sup>132</sup>

- 1) *Effort*: in most cases of environmental crime harm is caused by omission – individuals or companies do not comply with environmental regulations or, in the case of waste disposal, do not diligently investigate whether the companies they engage undertake the services appropriately. It is easier to offend than to comply, therefore, effort can be considered minimal. From the perspective of OCGs or actors who actively engage in waste trafficking positive action is required in terms of falsification of documents and concealment of waste.<sup>133</sup>
- 2) *Situational conditions*: When waste is produced it has a negative value - waste producers generally need to pay to dispose of it resulting in their desire to pass it on at the lowest possible price. This negative value can be reversed into an incentive to process waste. Collection already entails profit, thus attracting firms who will then either maintain that profit by disposing of waste inappropriately and avoiding costly procedures; or will increase profit by reusing the waste in a way which results in harm to the environment and human health.<sup>134</sup> Waste, in fact, has a high level of integrity: it can be mixed with other substances, disguised or manipulated. At the same time it is stable in that it does not perish in the short term. Both of these characteristics make it possible to re-use the waste: an example being the Italian case-study where toxic waste was used for construction purposes. In addition to this the fact that waste is a product characterised as having inelastic demand leads to high profitability regardless of market conditions.<sup>135</sup>

At the meso-level, mobility and contacts with other countries are also important situational factors – they allow for the discovery of new opportunities with regard to dumping sites, or contacts with illicit firms. Networks in which individuals engage in criminal activities lead to their proliferation and the solidification of social relationships. This makes it unlikely that whistle-blowers will denounce criminal acts to monitoring or law enforcement authorities.<sup>136</sup> This blending of work and social relations results in no witnesses being willing to testify, maintaining the risks of detection quite low.<sup>137</sup> Often this is compounded by corporate culture which generally is geared towards profit maximisation rather than environmental protection. Economic efficiency is preferred over the principles of proximity and self-sufficiency which are vital for protecting environmental interests.<sup>138</sup>

An important situational condition at the macro-level is regulatory failure. Legislation is often unclear and inappropriate – there are differences and loopholes when comparing legislation from different Member States.<sup>139</sup> It has also been argued that environmental law has been developed in such a way as to ensure industrial growth while assuming that the free market would regulate itself if necessary.<sup>140</sup>

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<sup>132</sup> Andrew Szasz, 'Corporations, Organized Crime, and the Disposal of Hazardous Waste: an Examination of the Making of a Criminogenic Regulatory Structure' [Blackwell Publishing Ltd] 24 *Criminology* 1 (1986), p. 3-4.

<sup>133</sup> Huisman and Van Erp, p. 1184-1186.

<sup>134</sup> *Ibid*, p. 1189.

<sup>135</sup> Dorn, Van Daele and Beken, p. 30.

<sup>136</sup> Edward R. Van de Bunt Henk G. Kleemans, 'Organised Crime, Occupations and Opportunity' 9 *Global Crime* 185 (2008), p. 195.

<sup>137</sup> *Ibid*, p. 196.

<sup>138</sup> Dorn, Van Daele and Beken, p. 28, 32-33.

<sup>139</sup> *Ibid*, p. 30-31, 34.

<sup>140</sup> Ruggiero, p. 253.

- 3) *Excuses and neutralisations*: Denial of responsibility is one of the most common neutralisations: in environmental crimes. It is possible because many actors are involved, and most of the actors belong to some form of corporate or organised structure. Blame is shifted from one participant to all others. Denial of harm is also very frequently observed in environmental crime cases given that there is usually no immediate human victim. Often the ambiguity of environmental regulation, or its irrelevance, is used as an excuse.<sup>141</sup>
- 4) *Rewards*: Given that environmental crimes are most often crimes of omission there are generally less costs involved for non-compliant companies. Therefore they do not have to pass on the cost of adequate process to consumers leading to a competitive advantage on the market.<sup>142</sup> Moreover non-compliant firms save time avoiding compliance with rules. As regards the active crime of trafficking in waste rewards are gained by transforming a negative value into a positive one either by disposing of the waste improperly or by reusing it.<sup>143</sup> It is difficult to outweigh these benefits, in fact, it is posited that only through imprisonment can the reward be obscured by the costs, but this is the case only if the offender is caught.<sup>144</sup> The cost-benefit analysis of environmental crime will be discussed further below.
- 5) *Perceived risk*: when environmental crimes are perpetrated there are often no witnesses or no immediate public awareness of the illegal activities. Where witnesses are present they are likely involved in the crime. Therefore, the only means of detection is external monitoring; however, this leads to a low or completely absent deterrent effect because in most cases there is not a high chance of being caught or coercive measures being taken. This is combined with almost no moralising effect from the public. All together these factors lead to a low perception of risk. Another factor influencing exposure to risk is the frequent use of sub-contractors, making the processes of transport and disposal less transparent, thus resulting in more difficulty in assessing responsibility.<sup>145</sup>

Municipal authorities lack the necessary resources and expertise to uncover transnational organised networks.<sup>146</sup> Unless the investigation/prosecution of this type of crime receives high enforcement priority then there will not be enough checks leading to a lower perceived risk.<sup>147</sup> On a European and global level the risks are also assessed in terms of differences in levels of enforcement across various countries. Especially as regards developing countries - which are often the final recipients of (hazardous) waste - the fact that the economy is weak and wages are low result in lax and ineffective controls provide an economic incentive for the dumping of waste.<sup>148</sup>

Generally, there is low risk given that enforcement authorities generally lack the necessary resources and expertise to carry out investigations into organised waste trafficking activities. This is even more problematic where only administrative authorities are involved given the risk of corruption.<sup>149</sup> In a study on prosecutions for environmental crime in Sweden the importance of specialised training and experience in environmental matters of

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<sup>141</sup> Huisman and Van Erp, p. 1191-1192.

<sup>142</sup> Dorn, Van Daele and Beken, p. 34-35.

<sup>143</sup> Huisman and Van Erp, p. 1188.

<sup>144</sup> Ibid, p. 1189.

<sup>145</sup> Dorn, Van Daele and Beken, p. 34.

<sup>146</sup> Huisman and Van Erp, p. 1186.

<sup>147</sup> Ibid, p. 1188.

<sup>148</sup> Dorn, Van Daele and Beken, p. 27.

<sup>149</sup> Ibid, p. 28, 31.

enforcement authorities was underlined as a key factor in ensuring effectiveness of prosecution in this field.<sup>150</sup>

## b. Proposing solutions:

### 1. Dissuasiveness and Deterrence

In the literature on SCP a number of prevention strategies are discussed. Among these we find “target hardening”, which consists in making the target less vulnerable. In the case of waste trafficking this is difficult because the target is a transactional process and the “victim” is the environment. The only possible solution in this direction could be making workers on the ground aware of the health risks involved in the activities they perform. Nevertheless, it is thought that this would not be a sufficient deterrent as short-term profit from the work is often more attractive than avoiding long-term health damage.<sup>151</sup>

Another suggested strategy is restriction of access to the target. In environmental cases generally, legal firms commit crimes by violating permits and licences. Therefore, better screening of firms before licencing could be a possible solution.

A very important suggestion is also that of increasing inspection rates and imposing higher sanctions where crimes are committed – these would increase costs for offenders and lead to deterrence.<sup>152</sup>

Lowering the reward is also a possibility. A first option would be that of creating a higher reward for compliance with environmental regulations, thus reputation rewards, which would promote the firm among stakeholders. A problem with this approach, however, is that stakeholders may not be so interested or have enough influence to deter the firm from not complying with environmental standards.<sup>153</sup> This would especially be the case for OCGs given that they do not have a consumer base for which they need to uphold a certain reputation.

A further possible strategy is that of removing excuses: clear rules and guidance for compliance are possible avenues where non-compliance derives from not being able to navigate through complex regulations. On a more general level, communication of a clear moral message about the harm caused by this activity makes it impossible to deny the harm while at the same time making publicity sanctions more deterrent and effective.<sup>154</sup>

Law and economics may provide a more accurate answer as to what optimal deterrence is. *Dissuasiveness* and general deterrence: rational criminals base their decision on a cost-benefit analysis. This means that the penalty should be such that it outweighs the benefits from the illegal activity. The chances of being caught also represent an important factor, as highlighted above.

The formula used to represent this is:

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<sup>150</sup> Helena Du Réés, ‘Can Criminal Law Protect the Environment?’ [Routledge] 2 Journal of Scandinavian Studies in Criminology and Crime Prevention 109 (2001), p. 111-112.

<sup>151</sup> Huisman and Van Erp, p. 1193.

<sup>152</sup> Ibid, p. 1193.

<sup>153</sup> Ibid, p. 1193-1194.

<sup>154</sup> Ibid, p. 1194.



$C \geq B$

$C = P \times S$

$B \leq P \times S$

Where C are the costs incurred in undertaking a given activity and are calculated by multiplying the probability of detection (P) by the level of sanction (S). These must be equal or higher than the expected benefit (B) to deter offenders from engaging in criminal activities. It is thought that criminals can estimate the likelihood of being caught. Low probability of detection requires harsher penalties.<sup>155</sup>

It should, moreover, be noted that inspections and sanctions – as well as imposing different types of sanctions – each have a given cost which must be borne by the state and this is also important when determining what an optimal sanction is. In fact, fines should always be preferred over imprisonment if they have equal deterrent effect to the restriction of liberty – this because fines are less expensive for the state to impose.<sup>156</sup> *Proportionality* is also relevant for determining optimal sanctions. It essentially consists in the relationship between the harm caused and the consequent penalty. Marginal deterrence is affected by the proportionality of sanctions – where the penalty is too high for small violation, firms or OCGs may be encouraged to cause more harm because they will reap more benefits and in any case still receive the same harsh penalty.<sup>157</sup>

#### 2. Damages under civil law vs. criminal sanctions:

Civil law imposes a *price* for activities: as long as one is willing to pay this price the activity will be performed. One of the main aims of criminal law is to deter by means of a *sanction*.<sup>158</sup> Therefore, it can be said that an argument in favour of using criminal law measures is that where there is a high level of damage, but a low chance of being caught, it is possible to increase the severity of the sanction. Under tort one will only have to pay compensation in amount of damage caused.<sup>159</sup>

#### 3. Criminal vs. administrative sanctions

Where the same deterrence can be achieved through administrative procedures they should be preferred because they are less costly and require a lower threshold of proof than criminal procedures.<sup>160</sup> The speed of administrative procedures is also important. Furthermore, the error-cost of administrative sanctions is lower.<sup>161</sup>

It should be noted, however, that administrative authorities follow compliance strategies by co-operating with violators. Their aim is not to deter offenders but to ensure compliance. For this reason, rather than imposing a fine immediately, administrative authorities prefer to encourage non-compliant firms through dialogue and co-operation to follow relevant rules and regulations. It follows that, in these cases, the only consequence for non-compliant companies is that of complying and following the law – this is not deterrent enough to encourage polluters to abide the law in the first place. Nevertheless, in some cases a co-operative strategy may lead to better results - for example, where the offending company struggles to abide by or understand environmental rules.<sup>162</sup>

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<sup>155</sup> Faure, p. 260-261.

<sup>156</sup> Richard A. Posner, *Economic analysis of law* (Wolters Kluwer Law & Business 2007), p. 224.

<sup>157</sup> Faure, p. 264.

<sup>158</sup> F. Selvin Cooter and Thomas S. Ulen, *Law and economics* (Pearson 2014), p. 457.

<sup>159</sup> Michael G Faure and Marjolein Visser, 'Law and economics of environmental crime' in *New perspectives on economic crime* (Elgar 2004), p. 3-4.

<sup>160</sup> Faure, p. 266.

<sup>161</sup> Ibid, p. 268.

<sup>162</sup> Faure and Visser, p. 20-21.

An ideal system could imply a combination of both administrative and criminal law. If only criminal law is used this will only focus on most harmful events and disregard others.<sup>163</sup> The idea of the use of criminal law as an *ultimum remedium* also supports this. It could be the case that criminal law can reinforce administrative law, giving administrative authorities higher negotiation power through the threat of imposing criminal sanctions for continued non-compliance.<sup>164</sup> This is clearly mostly applicable to companies violating environmental law generally and which may apply for permits for their activities. As regards organised crime, the documentation used is often false and the nature of the acts makes it necessary to employ criminal law directly, foregoing the administrative predicate.

#### 4. Fines vs. imprisonment:

Monetary sanctions can be both criminal and administrative, whereas imprisonment is not possible under administrative rules. It has been argued that when economic crimes are involved a high fine is probably more deterrent than a prison sentence; however this is only the case where the offender has the money to pay the fine.<sup>165</sup> This insolvency problem means that a fine will not always have the desired effect.<sup>166</sup> This highlights a point in favour of corporate criminal liability given that there is a lower chance of insolvency level being reached: single individuals will have less means.<sup>167</sup>

A characteristic of corporate crime, however, is that companies are involved, but individual actors are actually engaging in the illegal activities. Economic theory is in favour of holding both liable. This also because monetary sanctions may exceed the assets of a firm which may be confiscated, therefore, imprisonment should apply to individual employees. It would also ensure that employees exercise more care *ex ante*.<sup>168</sup>

#### 5. Complementary sanctions:

Aside from imprisonment, damages and fines, complementary sanctions may be used, such as the publication of judgments leading to a loss of reputation for a firm and to awareness-raising amongst the public.<sup>169</sup> Specific duties can also have a highly deterrent effect.<sup>170</sup> These could consist in an obligation of restoration of the affected area: clean up can be exponentially more costly than benefits gained from the illegal activity. Another possible option is the removal of illegal gain. Knowing *ex ante* that there is a possibility of removal provides a strong incentive not to commit the crime.<sup>171</sup>

Nevertheless, where removal of illegal gains cannot be entirely justified as having a deterrent effect it could be considered as a means for restoration – thus contributing to a corrective function of criminal law not just a deterrent one.<sup>172</sup> Other avenues to be explored

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<sup>163</sup> Steven Shavell, *Foundations of economic analysis of law* (Belknap Press of Harvard University Press 2004), p. 510-511.

<sup>164</sup> Faure and Visser, p. 22.

<sup>165</sup> Posner, p. 223.

<sup>166</sup> Faure and Visser, p. 13.

<sup>167</sup> Faure, p. 270.

<sup>168</sup> Faure and Visser, p. 23-24.

<sup>169</sup> Harold Winter, *The economics of crime: an introduction to rational crime analysis* (Routledge 2008), p. 23.

<sup>170</sup> Faure and Visser, p. 14-15.

<sup>171</sup> *Ibid*, p. 16.

<sup>172</sup> *Ibid*, p. 17-18.

are the closing down of offending companies and penalty payments where judgments are not complied with.<sup>173</sup>

In any case, legislation should allow judges flexibility in determining sanctions. *Ex post* the probability of getting caught is no longer a factor, thus, specific deterrence and the moralising effect of a judgement become more important – it is then up to the judge to undertake an economic analysis to determine which types of sanctions would be most suited for these purposes.<sup>174</sup>

In sum, it can be said that to ensure all interests are vindicated there should be a variety of definitions of environmental crimes. Even more importantly, differentiation on the basis of seriousness is necessary to respect the proportionality principle. This can also avoid overcharging or undercharging – making sanctions effective and deterrent.<sup>175</sup>

### C. Concluding Remarks

On the basis of the analyses in this Chapter the following concluding remarks can be formulated.

First, as regards the intervention theories, which were reconstructed in the two case-studies, even though there are differences in definitions, sanctions and approaches in general, a common feature is that of choosing criminal law to tackle the issue having seen that other measures were previously not sufficiently effective.

The exploration and application of academic theories to the problem also points in the direction of criminal law. In general, environmental crimes should be handled with a mix of administrative and criminal law because in most cases legitimate firms are involved which make use of permits and the use of administrative law allows for the application of the graduated punishment model which is the most respecting of proportionality and ensures optimal deterrence. However, waste trafficking is more about making a profit by choosing cheaper service provider on behalf of legitimate firms – thus, outside the realm of administrative permits - and transport and dumping by OCGs – therefore, it is better to respond with criminal law and leave administrative law for companies which violate permits. It should be noted that the theories explored in the preceding Section are not the only ones applicable to the issue at hand. They have been chosen because of the rational, profit-centred nature of the crime which is also reflected in the concept of “effective, proportionate and dissuasive sanctions” for environmental harm as interpreted by the CJEU. More in-depth analysis of this problem from different theoretical perspectives is warranted, but could not be included in this dissertation.

As already mentioned, even though both countries analysed use criminal law, the chosen case-studies show that penalties are substantially different – this is a clear example of the disparity in sanctioning which can create “pollution havens”, a problem which will be discussed in more detail in Chapter IV. The academic theories analysed also point towards the necessity to ensure uniform levels of punishment to achieve true effectiveness in the response against this problem. Therefore, having seen that criminal law is necessary to limit

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<sup>173</sup> Faure, p. 269.

<sup>174</sup> Faure and Visser, p. 14.

<sup>175</sup> Susan F. Mandiberg and Michael G. Faure, ‘Graduated Punishment Approach to Environmental Crimes: Beyond Vindication of Administrative Authority in the United States and Europe, A’ 34 Colum J Envtl L 447(2009), p. 493-494.

to occurrence of acts of organised trafficking in waste the issue of whether we need a common approach at the supranational level needs to be discussed.

#### IV. European Criminal Law

This Chapter aims to determine the best level to adopt criminal sanctions: national, European or both. It is not sufficient to deter firms, individuals and organisations from trafficking and disposing of waste inappropriately using national criminal rules. In 2012 the European Environment Agency (EEA) undertook an examination of shipments of waste across the Union. Here the importance of European intervention was highlighted along with the high risks to the environment and human health flowing from these activities.<sup>176</sup> The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) has also focused on the issue of waste shipments in a number of reports. Again these reports stress the need for a response at EU level in terms of co-operation between authorities, creation of databases, specific training and development of good practices.<sup>177</sup> Furthermore, in the course of a strategic meeting organised by the European Network of Prosecutors for the Environment (ENPE) and EUROJUST at the end of 2013, the workshop dedicated to the problem of illegal trafficking in waste led to the identification of a number of obstacles to its effective contrast. First among these were differing definitions and interpretations of the existing EU framework in terms of categorisation of waste and, especially the different levels of penalties and consequent levels of enforcement. Another point of difficulty is the concentration of prosecutions on waste producers with a purely

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<sup>176</sup> European Environment Agency, p. 29. This followed another study published in 2009 which looked into the implementation of international and European obligations by Member States and highlighted areas of deficiency. The 2012 study was, therefore, a follow-up to determine the extent and causes of these deficiencies (European Environment Agency, *Waste without borders in the EU? Transboundary shipments of waste* (2009) ).

<sup>177</sup> Environment Agency (England and Wales) and Institute of Crime Science; IMPEL.

national focus as well as the lack of identification of links with organised crime. Finally, mutual legal assistance and co-operation among enforcement authorities was found to be particularly troublesome because of the aforementioned disparities.<sup>178</sup>

It follows that the transnational nature of these acts means that true deterrence can only occur when definitions of the crime and accompanying sanctions are even across nations. If enforcement authorities are to co-operate effectively, this can only start from the creation of a common basis. Therefore, there is a need to go beyond the national level.

The first section of this Chapter will describe the evolution of the Union's competences in criminal matters. Particular attention will be paid to the institutional division which existed prior to Lisbon and how this was impacted by the institutional battle which took place between 2003 and 2007 before the CJEU. As discussed below, the Court's decisions shaped subsequent legislation adopted in the First Pillar, but requiring enforcement through criminal sanctions. The resulting instruments are argued to be inadequate to deal with cross-border environmental crime such as organised trafficking in waste. The reasons for this will be explored further below.

The second section of this Chapter explores the principles of criminalisation from a theoretical and European law perspective. By combining these two approaches it is possible to determine whether it is, in fact, appropriate to legislate at the European level.

#### A. European criminal law to fight environmental and organised crime

##### i. **The evolution of Union competences in criminal matters and the enforcement of Union law**

Over the past thirty years the European Union's involvement in criminal matters has gradually widened and deepened. The 1992 Maastricht Treaty created a pillar structure: different matters belonged to different pillars, each having its own decision-making and enforcement mechanisms.<sup>179</sup> With the entry into force of the Lisbon Treaty in 2009 this institutional division was eliminated: cooperation in justice and home affairs (JHA) has been transformed into an area of freedom security and justice (AFSJ) – already created in the Amsterdam Treaty in 1999-, which coincides with the borders of the Union.<sup>180</sup> According to Article 4 (2) (j) TFEU the AFSJ is a shared competence of both the Union and the Member States – where the Union has exercised its competence Member States are limited in their capacity for intervention.<sup>181</sup> The merging of the three pillars has led to the creation of a single Union in which European criminal law is an integral part of the national law of the Member States.

Pursuant to the principle of sincere co-operation Member States must enforce Union law: they are under both positive and negative obligations to ensure the attainment of the objectives of the Treaties.<sup>182</sup> However, this is an obligation of results, not means. It follows that Member States are generally free to choose how to enforce Union law. This freedom is,

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<sup>178</sup> Council of the European Union, *Strategic Meeting towards an enhanced coordination of environmental crime prosecutions across the EU: The role of Eurojust* (2014), p. 12-13.

<sup>179</sup> P. J. G. Kapteyn and P. VerLoren van Themaat, *The law of the European Union and the European Communities: with reference to changes to be made by the Lisbon Treaty* (Kluwer Law International 2008), p. 32.

<sup>180</sup> Article 3 (2) TEU.

<sup>181</sup> Article 2 (2) TFEU.

<sup>182</sup> Article 4 TEU.

nevertheless, circumscribed by some principles of Union law which have been developed by the CJEU and in any case must ensure its effectiveness.<sup>183</sup>

In its judgement in the *Greek maize* case the Court found that the principle of sincere co-operation meant that Member States had to enforce Union law in the same way they enforced similar provisions of national law (assimilation principle) and employing the same diligence; furthermore, the sanctions used had to be “effective, proportionate and dissuasive.”<sup>184</sup> (The latter three requirements are elaborated upon in Part B of Chapter III.) The assimilation principle requires that where a violation of, for example, national tax obligations is punished through criminal sanctions then criminal law must be used to sanction violations of EU rules related to tax as well.<sup>185</sup>

Between 1998 and 2001 a lot of discussion regarding inadequate enforcement of obligations under EU rules on the environment took place. Two proposals emerged following this debate. The first was tabled by the Danish representation and was to be a Third Pillar instrument. It provided for a common definition of serious environmental crime<sup>186</sup> as well as rules on jurisdiction<sup>187</sup> and cross-border co-operation.<sup>188</sup> Importantly, it also provided examples of specific measures against legal persons of a highly dissuasive nature,<sup>189</sup> and obliged Member States to make use of coercive and investigative measures.<sup>190</sup> In 2001 the Commission also submitted a proposal for the enforcement of environmental obligations through criminal law on the basis of then Article 175 EC Treaty (now Article 192 TFEU) arguing that the environmental provision was the correct legal basis as this was a matter of enforcement of EU rules not of approximation of criminal law. The two proposals were discussed by both the European Parliament and the Council and finally the Danish proposal was adopted in 2003 as Council Framework Decision 2003/80/JHA.<sup>191</sup> The Commission then brought a case against the Council before the CJEU claiming that the wrong legal base had been used.

The CJEU undertook its “centre of gravity” examination of the contested Framework Decision to determine what its main aim was. By analysing the title and preamble of the measure it determined that protection of the environment was the fundamental goal of the instrument.<sup>192</sup> It further went on to note that the fact that criminal law and procedure did not fall within the competences of the Community generally:

“[did] 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

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<sup>183</sup> Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para. 15.

<sup>184</sup> Case 68/88 *Commission v Greece* [1989] ECR 2965, para.22-25.

<sup>185</sup> André Klip, *European criminal law: an integrative approach*, vol 2 (Intersentia 2012), p. 73.

<sup>186</sup> *Initiative of the Kingdom of Denmark with a view to adopting a Council Framework Decision on combatting serious environmental crime (2000/C 39/05)* (2000), Article 1.

<sup>187</sup> *Ibid*, Article 4.

<sup>188</sup> *Ibid*, Articles 6-13.

<sup>189</sup> *Ibid*, Article 7.

<sup>190</sup> *Ibid*, Articles 2-3.

<sup>191</sup> On the protection of the environment through criminal law, OJ L 29/55, 27/01/2003.

<sup>192</sup> Case C-176/03 *Commission v Council* [2005] ECR I-7879, para. 51.

law of the Member States which it consider[ed] necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.”<sup>193</sup>

The Framework Decision was then annulled.<sup>194</sup>

A similar and related case was decided in 2007. Again the Council had adopted a Framework Decision under the Third Pillar providing criminal sanctions for violations of rules on ship-source pollution. The Commission had tabled a competing proposal on the basis of the First Pillar. Much like in the previous situation the Council instrument was adopted and the Commission brought the matter before the CJEU.<sup>195</sup> The Court reiterated the need to ascertain the main aim of the instrument to determine the correct legal basis and that where the aims came within the EC Treaty (transport policy and environmental protection) it would then be possible to adopt a Directive requiring enforcement through criminal law.<sup>196</sup> However, on this occasion the CJEU made clear that:

*“the determination of the type and level of criminal penalties to be applied does not fall within the Community’s sphere of competence [emphasis added].”*<sup>197</sup>

With the Lisbon reform the judgements have been codified and clarified. Article 83 (2) TFEU makes it possible to harmonise definitions and minimum levels of sanctions in order to ensure effective enforcement of existing Union policies. The confusion as to whether the competences discussed by the CJEU extend further than environmental protection has been dispelled and the Union has been given the power to determine sanctions as well as definitions of offences.

Nevertheless, two Directives were adopted following the judgements of the CJEU on the basis of First Pillar competences, within the limits of those competences and before the entry into force of the Lisbon Treaty: Directive 2009/123/EC on ship-source pollution<sup>198</sup> and Directive 2008/99/EC on environmental crime. Neither of these Directives provides for common minimum levels of sanctions – merely stating, for example in the Eco-crime Directive, that

“Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective proportionate and dissuasive criminal penalties.”<sup>199</sup>

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<sup>193</sup> Ibid, para. 48.

<sup>194</sup> Ibid, para. 55. For further discussion see: Roel Meeus, ‘Fill in the Gaps: EU Sanctioning Requirements to Improve Member State Enforcement of EU Environmental Law’ 7 Journal for European Environmental & Planning Law 13 (2010); Ludwig Krämer, ‘Environment, Crime and EC Law’ 18 Journal of Environmental Law 277 (2006).

<sup>195</sup> Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution, OJ L 255/164.

<sup>196</sup> Case C-440/05 *Commission v Council* [2007] ECR I-9097, Para. 63 and 66.

<sup>197</sup> Ibid, para. 70. For further discussion see: Martin Hedemann-Robinson, ‘EU and Environmental Crime: The Impact of the ECJ’s Judgment on Framework Decision 2005/667 on Ship-Source Pollution, The Analysis’ 20 J Envtl L & Litig 27 (2008); Meeus.

<sup>198</sup> Of the European Parliament and the Council of 21 October 2009 amending Directive 2005/25/EC on ship-source pollution and the introduction of penalties for infringements, OJ L 280, 27/10/2009, p. 52–55.

<sup>199</sup> Article 5 Directive 2008/99/EC; Article 1 (6) Directive 2009/123/EC.

Also, there is no obligation to impose criminal liability or any specific sanctions on offending legal persons.<sup>200</sup>

Thus far, much of the discussion on the decisions of the CJEU in these two cases has centred on its revolutionary character. In previous cases the Court had refused to extend the competences of the Communities in the First Pillar to criminal matters.<sup>201</sup> The Court has been, from the birth of the Communities, the driving force behind European integration and it can be assumed that the judgements are fruit of its desire to continue along this path, especially with a view to the historical context in which they were delivered, *i.e.* the then recent failure of the Constitutional Treaty. From a legal perspective regard must also be given to the tendency of the Court to favour the procedure which involves the European Parliament the most when determining which legal basis is appropriate as a tool to enhance democratic accountability.<sup>202</sup>

In my view, there is no added value to having adopted the instruments on the basis of First Pillar competences. Firstly, the direct effect Directives have upon the end of the transposition period is not of relevance for an instrument that proscribes certain conduct on penalty of criminal sanctions. Pursuant to the legality principle, a Directive may not be used as a basis for the finding of criminal responsibility: penalties must have an appropriate legal basis in national law.<sup>203</sup> Secondly, considering that the actors involved in this type of activity, specific sanctions against legal persons and private actors are more important than the possibility for the Commission to bring infringements proceedings against a Member State.

Therefore, even though the CJEU was correct in determining that the aim of the then contested Framework Decision was the protection of the environment, it overlooked the need for effective *criminal* sanctions by focusing instead on the notion of effectiveness of sanctions generally. It was the former, which was the real objective of the Framework Decision. The characteristics of environmental crime are such that it is not sufficient to affirm that criminal sanctions are an effective enforcement mechanism. The Court should have gone beyond this assertion to realise that disparity in existence and/or levels of sanctions between Member States is one of the enablers of environmental crime; that corporate entities often profit and perpetrate these acts and must be dealt with accordingly; and that the inherent cross-border nature of environmental crime requires co-operation between police and judicial authorities.

## **ii. Existing EU mechanisms: the need for better solutions to fight organised trafficking in waste**

Directive 2008/99/EC suffers from a number of deficiencies, which make it insufficient and unsuitable to tackle the problem of (organised) trafficking in waste. The biggest gap left in this instrument is that of common sanctions. In the absence of uniform rules in this respect, it remains possible for OCGs and firms to continue benefiting from the existence of “pollution havens” and uneven checks. Article 3 (b) and (c) criminalise collection, transport, recovery,

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<sup>200</sup> Article 6 Directive 2008/99/EC; Article 1 (6) Directive 2009/123/EC.

<sup>201</sup> See, for example, Cases C -203/80 *Criminal Proceedings against Guerrino Casati* [1981] ECR 2595; C-226/97 *Criminal Proceedings against Johannes Martinus Lemmens* [1998] ECR I-3711.

<sup>202</sup> Case C-300/89 *Commission v Council (Re: Titanium Dioxide Directive)* [1991] ECR I-2867.

<sup>203</sup> Case 80/96 *Kolpinghuis Nijmegen BV*, [1987] ECR 2982, para. 13.



shipment and disposal of waste in contravention of EU rules. However, no mention is made to OCGs or corruption. Articles 5 and 7 require the imposition of “effective, proportionate and dissuasive sanctions” – criminal sanctions are limited to natural persons. There is no indication of minimum or maximum sanctions leaving very wide discretion to the Member States. The lack of a uniform sanctions regime makes the Directive weak and ineffective: each Member State can interpret Article 5 differently, thus leading to the existence of “pollution havens”.<sup>204</sup> It has been argued that the rationale behind this limitation to what was then the Community’s competence is to avoid the fragmentation and inconsistency in national penal systems. The principle of subsidiarity is thought to bar such intervention in favour of a better assessment of what is to be considered “effective, proportionate and dissuasive” at national level.<sup>205</sup> However, the subsidiarity principle, as further discussed below, rests on the premise that action should be taken at the level of government *best placed*, to intervene effectively. As has been seen in Chapter II and the preceding part of this Chapter the issue of illicit waste trafficking and environmental crime needs to be tackled transnationally because the activities are inherently transboundary.

A second existing instrument which is of relevance to the issue of organised trafficking in waste is Framework Decision 2008/841/JHA on organised crime.<sup>206</sup> There is no mention of environmental crime generally or trafficking in waste specifically. Minimum penalties of imprisonment are laid down for individuals,<sup>207</sup> and “effective, proportionate and dissuasive sanctions” for legal persons are required under Article 6, with no obligation to impose criminal liability or any specific sanctions on them specifically. The discretion left to Member States in implementing these obligations may result in an uneven playing field across the Union creating gaps that OCGs can exploit.

Another weakness of this instrument is the definition of membership in a criminal organisation. Article 2 requires the criminalisation of:

“a) conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation’s criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organisation’s criminal activities;

(b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity.”

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<sup>204</sup> Eleonore Mullier, ‘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, The’ 6 Cambridge Student Law Review 94 (2010), p. 112.

<sup>205</sup> Norel Neagu, ‘Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law’ 15 European Law Journal 536 (2009), p. 546.

<sup>206</sup> OJ L 300, 11/11/2008, p. 42–45.

<sup>207</sup> Article 3.

The same approach was taken in formulating the offence in the Palermo Convention discussed in Chapter II – the aim is to include both civil and common law models of the material element. However, the result is a definition so loose as to make distinction between the *actus reus* of a principal difficult to distinguish from that of a participant.<sup>208</sup>

The concept of criminal organisation is defined in Article 1 of the Framework Decision:

- “1. ‘criminal organisation’ means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit;
2. ‘structured association’ means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.”

However, there is no obligation to adopt a uniform definition in all Member States. Although criminalisation in accordance with Article 2 would implicitly oblige Member States to include the definition within their criminal law, this may be still insufficient and inappropriate, especially given that it is a negative definition which leaves a great deal of room for interpretation. The desire to create a common definition expressed in Recital (3) of the Preamble, is therefore, not achieved. A further problem is that it seems there has been little concern on the part of the legislator in investigating what are the characteristics of organised crime according to criminological literature. For example the five features which are most frequently cited in such scholarly works are: continuity; violence; enterprise and immunity – none of these are adequately included in the definitions of the Framework Decision.<sup>209</sup> This means that many types of conduct, more or less serious in nature, will come within the definition laid down in the Framework Decision. This cannot be reconciled with the principle of legality, nor with that of proportionality when considering how, in some countries, investigations into criminal organisations allow for more pervasive enforcement powers to be used and harsher penalties to be applied.<sup>210</sup>

It follows that, to date, no European instrument has been adopted which sufficiently provides for a common basis of co-ordinated action against illicit trafficking and disposal of waste. Therefore, attention should be turned to adopting new rules at the European level and whether this would be possible and suitable according to theoretical and Union principles of criminalisation.

## B. Principles of Criminalisation and Article 83 TFEU

The concept of principles of criminalisation first emerged during the Enlightenment where state action and coercion began to require justifications beyond religious commandments

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<sup>208</sup> Francesco Calderoni, ‘A Definition that Could not Work: the EU Framework Decision on the Fight against Organised Crime’ 16 *European Journal of Crime, Criminal Law and Criminal Justice* 265 (2008), p. 277.

<sup>209</sup> *Ibid*, p. 272-273.

<sup>210</sup> *Ibid*, p. 275.

and the will of the ruler. More rational grounds became necessary: these grounds were to stem from the basic premises of the Enlightenment, namely emancipation of the individual and control of society. Essentially principles are not codified and legally binding, they are intertwined with the concept of rule of law (*rechtstaat*) and human rights given that they impose restraint on the state in favour of safeguarding the freedom of individuals. Not all principles of criminalisation will be dealt with in this Part: the principle of practicality has already been discussed in Chapter III to determine which means are best suited to tackle the issue of trafficking in waste.

#### **i. The Harm Principle and Evidence-based Policy-making**

The harm principle has its foundation in John Stuart Mill's essay *On Liberty*: the formulation of this concept was mainly negative so as to limit the possibility of the State in pronouncing itself on what was morally right by drawing a line where actual harm to others occurred. However, defining harm is inherently a normative exercise: it requires the identification of interests which, if violated, would result in harm.<sup>211</sup> A positive formulation of the harm principle then emerges: penal legislation is to be adopted when it can prevent or reduce harm.

The concept of wrongfulness is useful in defining what harm is: what is wrongful will depend on political, cultural and moral interests recognised in a given society. One view is that an act is wrongful when the reasons in favour of its performance outweigh the reasons against it, keeping in mind the entirety of the circumstances in the case.<sup>212</sup> Finally, it must be understood that the harm principle has a societal dimension; it is not simply what a single individual considers harmful that should be criminalised, but *public* harms and wrongs are the only ones eligible for criminalisation.<sup>213</sup> To determine what these public wrongs are, resort may be had to another principle of criminalisation: the need to protect welfare. This principle is rooted in modern communitarian theory and aims to protect collective goals.<sup>214</sup> It should further be noted that Article 83 (1) TFEU refers to "particularly serious crime [...] resulting from the nature or impact of such offences": this shows the need to adhere to the harm principle in order to make use of this provision.

In the European Union a new mechanism has been adopted which brings together policy-makers and field experts to formulate targeted policies against existing risks. One of the main criteria to determine what these risks are is the harm they entail for society. Collaboration between EUROPOL, Union institutions, and agencies occurs within the European Criminal Intelligence Model (ECIM). During the first phase EUROPOL brings together and analyses data it receives from the Member States – on the basis of this analysis it draws up a report, the Serious and Organised Crime Threat Assessment (SOCTA), including recommendations for Union-level intervention and a list of priorities to be

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<sup>211</sup> Andrew Ashworth, *Principles of criminal law* (Oxford University Press 2009), p. 27-28; Letizia Paoli and Victoria A. Greenfield, 'Harm: a Neglected Concept in Criminology, a Necessary Benchmark for Crime-Control Policy' 21 *European Journal of Crime, Criminal Law and Criminal Justice* 359 (2013), p. 361.

<sup>212</sup> Antje Bois-Pedain, 'The Wrongfulness Constraint in Criminalisation' [Springer Netherlands] 8 *Criminal Law and Philosophy* 149 (2014), p. 150; Ashworth, p. 28-29.

<sup>213</sup> Ashworth, p. 29.

<sup>214</sup> *Ibid*, p. 26.

achieved over a four year period. During the second phase Multi-Annual Strategic Action Plans (MASPs) are developed by the Council of Justice and Home Affairs to better define goals on the basis of the priorities highlighted by EUROPOL. From the MASPs yearly operational action plans (OAPs) are devised and monitored by the European Multidisciplinary Platform against Criminal Threats (EMPACT) and reviewed by the Standing Committee for the EU Internal Security (COSI). In the meantime EUROPOL continues scanning for (potential) threats and publishes an interim report to update, if necessary, the priorities included in its (most recent: 2013) SOCTA report.<sup>215</sup> The focus of the SOCTA report is the impact of certain activities – thus, the harm they cause.<sup>216</sup> Environmental crime is identified as an emerging threat: in respect of waste trafficking the SOCTA highlights the *harm* to human health and the environment that this activity causes.<sup>217</sup>

Therefore, it follows that the harm principle is satisfied in respect of illicit trafficking and disposal of waste also considering the characteristics of the problem discussed in Chapters I and II.

## ii. ***Ultima Ratio* and the principles of subsidiarity and proportionality**

The principle of *ultima ratio*, also known as the principle of last resort, has three dimensions. The first is that criminal law should only be used when no less restrictive means can achieve the same result. The second dimension considers that criminal law should be used to enforce only the *most serious* invasions of interests. Finally, in the European context, whether the European legislator is the best placed to intervene against this invasion of interests.

Article 5 TEU imposes limitations on the competences of the Union in the form of the principles of conferral, subsidiarity and proportionality. Conferral obliges the Union to act within the limits of the competences conferred upon it through the Treaties.<sup>218</sup> Subsidiarity requires that action be undertaken at the level of government which can best achieve the objectives sought: thus, action at Union level should only take place where the local and national levels are inadequate to tackle the issue.<sup>219</sup> This also entails the involvement of national parliaments in accordance with Protocol No. 2 to the Lisbon Treaty.<sup>220</sup> Proportionality is described as “not exceed[ing] what is necessary to achieve the objectives of the Treaties.”<sup>221</sup> There is clear overlap between these principles and that of last resort. The European Criminal Policy Initiative equates *ultima ratio* with the principle of proportionality: there must be a necessity to protect a fundamental interest and other less

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<sup>215</sup> EUROPOL, *EU Serious And Organised Crime Threat Assessment (SOCTA)*, p. 9; Letizia Paoli, ‘How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm’ 22 *European Journal of Crime, Criminal Law and Criminal Justice* 1 (2014), p. 2.

<sup>216</sup> Paoli, p. 4.

<sup>217</sup> EUROPOL, *EU Serious And Organised Crime Threat Assessment (SOCTA)*, p. 30.

<sup>218</sup> Article 5 (2) TEU.

<sup>219</sup> Article 5 (3) TEU.

<sup>220</sup> Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, OJ C 83, 30/03/2010; Article 69 TFEU.

<sup>221</sup> Article 5 (4) TEU.

restrictive means must have proved insufficient.<sup>222</sup> The latter requirement is also known as the external dimension of the principle in that it ensures coherence within the legal system of a state: more blameworthy activities receive more coercive responses moving along a continuum going from civil sanctions to criminal ones.<sup>223</sup> These aspects of the principle of last resort are discussed in Chapter III.

The “federal dimension” of the *ultima ratio* principle emerges when we interpret it using the principles of conferral and subsidiarity.<sup>224</sup> This becomes even clearer when looking at the requisites of Article 83 (1) TFEU. This provision requires that criminalisation at EU level take place where crimes have a cross-border dimension or where there is a special need to combat the offence in question on a common basis. It has already been shown in the preceding Chapters and Sections that among the driving factors of trafficking in waste are the loopholes created by disparity in legislation between Member States for the punishment of these activities. It has also been demonstrated that the routes used to carry out this activity involve a number of European countries. It follows that only a common definition can help reduce the gaps in legislation and can create a basis for co-operation between police and judicial authorities. Where a common definition of organised trafficking in waste exists this avoids the problem of assessing double criminality in using co-operation instruments. It also allows for data to be collected in a common way by all Member States allowing better EU-wide assessments and responses. The existence of common minimum sanctions removes the possibility of “pollution havens”. It follows that the European level is best suited to tackle this issue.

### C. Concluding Remarks

In this Chapter the EU dimension of finding a response to the problem of organised trafficking in waste has been explored.

It has been argued that existing instruments are insufficient and unsuitable because they are not specific to the problem or do not provide adequate definitions to combat the issue on a common basis.

The most specific instrument, the Eco-crime Directive of 2008 does not provide for criminal sanctions for legal persons, nor does it create common minimum sanctions and instruments for co-operation among police and judicial authorities. These gaps are a direct result of its adoption under the First Pillar and the preceding institutional battle between the Commission and the Council before the Court.

Having demonstrated the need for new measures to tackle the problem, theoretical principles of criminalisation and Article 83 (1) TFEU as well as the principles of subsidiarity and proportionality have been applied. The analysis has led to the conclusion that it is possible and necessary for organised trafficking in waste to be criminalised at EU level. Already evidence discussed in previous Chapters, *i.e.* the existence of a problem among a number of EU Member States and involving more Member States in single cases as well as

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<sup>222</sup> European Criminal Policy Initiative, ‘A Manifesto on European Criminal Policy’ (*Zeitschrift für Internationale Strafrechtsdogmatik*, 2009) <[http://www.zis-online.com/dat/artikel/2009\\_12\\_383.pdf](http://www.zis-online.com/dat/artikel/2009_12_383.pdf)> (last accessed on: 27.08.2014), p. 707.

<sup>223</sup> Melander Sakari, ‘Ultima Ratio in European Criminal Law’ [Oñati International Institute for the Sociology of Law] 3 Oñati Socio-Legal Series 42 (2013), p. 49.

<sup>224</sup> *Ibid*, p. 50.

cross-border effects of these activities, demonstrated the need to act supranationally rather than nationally. This necessity has been further underlined by demonstrating that existing rules have not eliminated “pollution havens” that allow the occurrence of this activity and make it profitable and low risk for OCGs.

## **V. Conclusion and Recommendations**

The purpose of the current study has been to determine whether European criminal law should be used as the main instrument to tackle organised trafficking in waste in the European Union. Organised trafficking in waste is a growing activity involving immense profits for companies and organised crime groups and tremendous, irreparable costs for the environment and our health. It is an issue of global dimension, concerning many, if not all countries, and having transnational character. The international response has, however, thus far not been sufficient.

When examining the issue from a purely legal perspective, a number of international and European instruments can be found which may form a basis upon which to intervene. Nevertheless, these instruments suffer from a series of deficiencies, whether in terms of not being specific enough in respect of the problem, not providing for a proper basis for co-operation, or not eliminating loopholes created by different or sometimes inexistent national approaches. It is clear that a problem exists; an existing solution is not as evident.

It has been shown that the activities at issue include the involvement of OCGs and corruption. These characteristics along with the danger posed to human health and the environment make it of European Union concern. Following the Lisbon reform, the EU treaties now finally provide an adequate legal basis to attempt remove the existing legal loopholes, which have permitted a continuation of these atrocities. Article 83 (1) TFEU makes it possible to approximate definitions of and sanctions attached to criminal conduct where organised crime and corruption are involved.

One of the issues discussed concerned the type of response which would be most adequate to ensure maximum effectiveness in contrasting this activity. Two approaches were followed. The reconstruction of the intervention theories behind criminalisation of trafficking in waste in two legal systems: Italy and England. These case-studies served as examples of legislation and enforcement measures while at the same time giving a glimpse of the disparities which exist among different countries in terms of definitions, links with organised crime recognised

within such definitions and, most importantly levels of sanctions. In both legal systems, criminal law was thought to be the only sufficiently deterrent response.

The second approach was more theoretical, taking into account law and economics and criminological theories of crime. Both EU legislation in the field of environmental protection generally and waste management specifically requires the adoption of “effective, proportionate and dissuasive sanctions” to ensure the realisation of the respective instruments. Therefore, the case-law of the CJEU, which defines and interprets this concept, was used as a starting point. From the analysis of Decisions and Opinions it became clear that an economic approach, which considers offenders rational and calculating, was necessary. For these reasons the law and economics approach and situational crime prevention theories were considered to be most useful in determining what means would ensure optimal deterrence. By applying these theories to the problem of organised trafficking in waste it became clear that only high risks of detection and high levels of sanctions would be sufficient to discourage the actors involved given the incredible profits made from this activity. These objectives can only be achieved by criminal law. This especially so because through its the application not only will penalties and detection probabilities increase, but it also becomes possible to remove the rewards of the crime. Criminal law is also essential in providing a response proportionate to the incredible damage caused. Consequently, it is clear that criminal law is to be the preferred response where organised trafficking in waste is concerned.

Nevertheless, a purely national-based response would not hinder companies and OCGs enough. In fact, one of the main driving factors behind this transnational activity is the disparity in levels of sanctions between the countries involved, which leads to the existence of “pollution havens”. Therefore, a correspondingly transnational response is advocated, one which can only be implemented at EU level given the competences and powers available in the treaties. Existing EU instruments do not yet eliminate the differences in levels of sanctions, this mainly due to their adoption under the First Pillar (Eco-crime Directive) or because not specific enough to create a common basis (Organised Crime Framework Decision). A combination of theoretical principles of criminalisation and Union competences in the field of criminal law were examined and applied to the evidence of the existence and characteristics of the problem. The result was that the requisites for approximation pursuant to Article 83 (1) TFEU were fulfilled. It follows that this legal basis can and needs to be used to tackle the problem at hand.

With a view to the results which emerged in analysis the various components of the main research question the answer to the latter is: Yes, European criminal law should be used as the main instrument in the fight against organised trafficking and disposal of waste.

In the course of the research undertaken a number of issues have emerged, which, although related to the topic discussed, could not be dealt with because outside the scope and limits of the present dissertation. In terms of case-studies, it may be useful to delve deeper into the systems already analysed and include a larger number of countries. It would be very interesting to identify a country where the problem does not exist or is very limited and to understand the mechanisms in place which allow this to be the case. In the course of such case-studies a more rigorous criminological approach and analysis may also be useful in understanding the dynamics of this activity to come up with more precise solutions, also at the micro-level.

One aspect of the problem which has not been touched upon in this study is that of prevention. Given the legal nature of the dissertation it has not been possible to explore this avenue; however, the importance of prevention cannot be stressed enough. Prevention should start at a socio-cultural level - not just by companies but also within each household waste reduction should be seen as a priority.

From a legal perspective, as was already explained in preceding chapters, existing international and European instruments are insufficient, therefore the possibility, desirability and feasibility of creating an international treaty dealing with the problem should be explored.

In the field of European law, instruments for co-operation between police and judicial authorities in environmental crime generally and organised trafficking in waste specifically should be designed and promoted.

Included in the data on the existence and characteristics of the problem was plenty of evidence of organised crime groups' involvement in environmental crime extending beyond waste trafficking such as wildlife trade and illegal logging as well as more specific waste streams proving to be highly problematic (*e.g.* electronic waste, radioactive waste and persistent organic pollutants) – more information should be gathered to delineate a better picture of these sectors both from a criminological and a legal point of view.

Environmental crimes generally and waste trafficking specifically pose a tremendous threat to the Earth and its inhabitants. What has happened so far should stop. If not to save ourselves then to affirm the concept that “the Earth is but one country and mankind its citizens”<sup>225</sup> and by not putting a stop to these activities we are destroying our home and our people.

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<sup>225</sup> Baha'u'llah, *Gleanings From the Writings of Bahá'u'lláh* (US Baha'i Publishing Trust 1990), p. 249-250.



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## VII. Annexes

### A. Annex I – Texts of National Legislation from Case-Studies

The texts included in this Annex are not those of every legislative provision cited in the case-studies. The provisions chosen are those which provide a definition of criminal conduct related to organised trafficking in waste and serve as examples of how such conduct is described in each jurisdiction and what penalties are attached thereto.

#### i. Italy

Original Text	English Translation
<b>Articolo 260 Decreto Legislativo 3 aprile 2006, n. 152 “Norme in materia ambientale.”</b>	<b>Decreto Legislativo 3 aprile 2006, n. 152 “Norme in materia ambientale.”</b>



<p>(attività organizzate per il traffico illecito di rifiuti)</p> <p>1. Chiunque, al fine di conseguire un ingiusto profitto, con più operazioni e attraverso l'allestimento di mezzi e attività continuative organizzate, cede, riceve, trasporta, esporta, importa, o comunque gestisce abusivamente ingenti quantitativi di rifiuti è punito con la reclusione da uno a sei anni.</p> <p>2. Se si tratta di rifiuti ad alta radioattività si applica la pena della reclusione da tre a otto anni.</p> <p>3. Alla condanna conseguono le pene accessorie di cui agli articoli 28, 30, 32-bis e 32-ter del codice penale, con la limitazione di cui all'articolo 33 del medesimo codice.</p> <p>4. Il giudice, con la sentenza di condanna o con quella emessa ai sensi dell'articolo 444 del codice di procedura penale, ordina il ripristino dello stato dell'ambiente e può subordinare la concessione della sospensione condizionale della pena all'eliminazione del danno o del pericolo per l'ambiente.</p>	<p>(Organised activities for the illegal trafficking of waste)</p> <p>1. Whoever, in order to obtain an unfair advantage, employing more than one operation and through organised and continuous means and activities, hands over, receives, transports, exports, imports or otherwise improperly handles large quantities of waste is punished with imprisonment from one to six years.</p> <p>2. If the waste is highly radioactive the penalty will be of imprisonment from three to eight years.</p> <p>3. Upon conviction the accessory penalties describes in Articles 28, 30, 32-bis and 32-ter of the Criminal Code with the limitation included in Article 33 of the same Code shall apply.</p> <p>4. The judge can order the restoration of the environment and can make the granting of probation conditional upon the elimination of the damage or danger to the environment when issuing a sentence in accordance with Article 444 of the Code of Criminal Procedure.</p>
<p><b>Art. 3 decreto-legge 10 dicembre 2013, n. 136</b></p> <p><b>Disposizioni urgenti dirette a fronteggiare emergenze ambientali e industriali ed a favorire lo sviluppo delle aree interessate.</b></p>	<p><b>Article 3 Law-Decree 10 December 2013, n. 136</b></p> <p><b>Rules to contrast environmental and industrial emergencies and to encourage development of the interested areas.</b></p>
<p><b>Combustione illecita di rifiuti</b></p> <p>1. Dopo l'articolo 256 del decreto legislativo 3 aprile 2006, n.152, è inserito il seguente: «Art. 256-bis. (Combustione illecita di rifiuti). - 1. Salvo che il fatto costituisca più grave reato, chiunque appicca il fuoco a rifiuti abbandonati ovvero depositati in maniera incontrollata in aree non autorizzate è punito con la reclusione da due a cinque anni. Nel caso in cui sia appiccato il fuoco a rifiuti pericolosi, si applica la pena della reclusione da tre a sei</p>	<p><b>Illegal burning of waste:</b></p> <p>1. After Article 256 of legislative decree 3 April 2006, no. 152, the following shall be included: Article 256-bis. (Illegal combustion of waste). 1. Unless the fact constitutes a more serious crime, anyone who sets fire to abandoned waste or waste deposited in an uncontrolled manner in non-authorized areas will be punished with imprisonment from two to five years. In the event that fire is set to hazardous waste, the penalty of</p>

anni.

2. Le stesse pene si applicano a colui che tiene le condotte di cui all'articolo 255, comma 1, in funzione della successiva combustione illecita di rifiuti.

3. La pena è aumentata di un terzo se i delitti di cui al comma 1 siano commessi nell'ambito dell'attività di un'impresa o comunque di un'attività organizzata.

4. La pena è aumentata se i fatti di cui al comma 1 sono commessi in territori che, al momento della condotta e comunque nei cinque anni precedenti, siano o siano stati interessati da dichiarazioni di stato di emergenza nel settore dei rifiuti ai sensi della legge 24 febbraio 1992, n. 225.

5. I mezzi di trasporto utilizzati per la commissione dei delitti di cui al comma 1 sono confiscati ai sensi dell'articolo 259, comma 2, del decreto legislativo 3 aprile 2006, n. 152, salvo che il mezzo appartenga a persona estranea al reato, la quale provi che l'uso del bene è avvenuto a sua insaputa e in assenza di un proprio comportamento negligente. Alla sentenza di condanna o alla sentenza emessa ai sensi dell'articolo 444 del codice di procedura penale consegue la confisca dell'area sulla quale è commesso il reato, se di proprietà dell'autore o del compartecipe al reato, fatti salvi gli obblighi di bonifica e ripristino dello stato dei luoghi.

6. Si applicano le sanzioni di cui all'articolo 255 se le condotte di cui al comma 1 hanno a oggetto i rifiuti di cui all'articolo 184, comma 2, lettera e).».

2. Fermo restando quanto previsto dalle disposizioni vigenti, i Prefetti delle province della regione Campania, nell'ambito delle operazioni di sicurezza e di controllo del territorio prioritariamente finalizzate alla prevenzione dei delitti di criminalità organizzata e ambientale, sono autorizzati ad avvalersi, nell'ambito delle risorse finanziarie

imprisonment shall be from three to six years. Those responsible will be held to restore the conditions of the premises, to pay damages, even by way of a civil suit, as well as expenses for reclamation.

2. The same penalties apply to those responsible for conduct described in Article 255, paragraph 1, in function of the subsequent combustion illegal waste.

3. Punishment will be increased by a third if the offense referred to in subsection 1 is committed as part of the activities of a company or otherwise organized entity.

4. Punishment will be increased by one-third if the acts described in paragraph 1 are committed in territories which, at the time of the conduct or, in the preceding five years, are or have been involved in declarations of a state of emergency in the waste sector pursuant to Law of 24 February 1992, no. 225.

5. The vehicles used for the transport of wastes covered by the offense referred to in paragraph 1 of this Article, or incinerated in areas in unauthorized installations, will be confiscated pursuant to Article 259, paragraph 2, unless the vehicle is owned by a person unrelated to the conduct referred to in paragraph 1 of this Article and who can prove that use of the vehicle for commission of the offence took place without his knowing and that this lack of knowledge does not follow from his own negligent conduct. A conviction or judgment issued pursuant to Article 444 of the Code of Criminal Procedure leads to the confiscation of the land on which the offence is committed, if owned by those responsible for its commission, notwithstanding the obligations of reclamation and restoration of the area.

6. The penalties referred to in Article 255 shall be applied if the conduct referred to in paragraph 1 if the waste referred to in Article 184 paragraph 2, letter e is involved.

<p>disponibili, di personale militare delle Forze armate, posto a loro disposizione dalle competenti autorità militari ai sensi dell'articolo 13 della legge 1° aprile 1981, n. 121.</p>	
<p><b>Disegno di legge n. 1345, Disposizioni in materia di delitti contro l'ambiente</b></p>	<p><b>Draft Bill n. 1345 Crimes against the Environment</b></p>
<p><b>Articolo 1</b> <b>Modifiche al codice penale</b> 1. Al codice penale sono apportate le seguenti modificazioni: a) dopo il Titolo VI del Libro Secondo del Codice Penale, è inserito il seguente: «TITOLO VI-bis. DEI DELITTI CONTRO L'AMBIENTE»; b) dopo l'articolo 452, sono inseriti i seguenti: «Articolo 452-bis (<i>Inquinamento ambientale</i>) E' punito con la reclusione da uno a cinque anni e con la multa da cinquemila a trentamila euro chiunque illegittimamente immette nell'ambiente sostanze o energie cagionando o contribuendo a cagionare il pericolo concreto di una compromissione durevole o rilevante: a) delle originarie o preesistenti qualità del suolo, del sottosuolo, delle acque o dell'aria; b) per la flora o per la fauna selvatica. <i>Articolo 452-ter (Danno ambientale. Pericolo per la vita o l'incolumità personale)</i> Nei casi previsti dall'articolo 452-bis, se la compromissione durevole o rilevante si verifica si applica la pena della reclusione da due a sei anni e della multa da ventimila a sessantamila euro. La compromissione si considera rilevante quando la sua eliminazione risulta di particolare complessità sotto il profilo tecnico, ovvero particolarmente onerosa o conseguibile solo con provvedimenti eccezionali. Se dalla illegittima immissione deriva il pericolo concreto per la vita o l'incolumità delle persone, si applica la pena della reclusione da due anni e sei mesi a sette anni. <i>Articolo 452-quater (Disastro ambientale)</i> Chiunque illegittimamente immette</p>	<p><b>Article 1</b> <b>Amendments to the Criminal Code</b> 1. The Criminal Code is amended as follows: a) after Title VI of the Second Book of the Penal Code, the following is inserted: "TITLE VI-bis. OFFENCES AGAINST THE ENVIRONMENT "; b) After Article 452, the following is inserted: 'Article 452-bis (Environmental Pollution) Anyone unlawfully introducing substances or energy into the environment causing or contributing to a real danger of a lasting or significant impairment to: a) the original or pre-existing quality of the soil, subsoil, water or air, b) the flora or wildlife shall be punished imprisonment from one to five years and a fine ranging from five thousand to thirty thousand euro. Article 452-ter (Environmental Damage. Danger to life or personal safety) In cases under Article 452-bis, lasting or significant impairment takes place the penalty of imprisonment from two to six years and a fine of twenty thousand to sixty thousand euro will be applied. The impairment is considered significant when its removal is of particular technical complexity, is particularly onerous or achievable only through exceptional means. If the illegal introduction leads to a real danger to the life or health of individuals, the penalty of imprisonment of two years and six months to seven years shall apply. Article 452-quater (Environmental Disaster) Anyone who unlawfully introduces substances or energy into the environment causing or contributing to cause an environmental disaster, shall be punished</p>

nell'ambiente sostanze o energie cagionando o contribuendo a cagionare un disastro ambientale, è punito con la reclusione da tre a dieci anni e con la multa da trentamila a duecentocinquantomila euro. Si ha disastro ambientale quando il fatto, in ragione della rilevanza oggettiva o dell'estensione della compromissione, ovvero del numero delle persone offese o esposte a pericolo, offende la pubblica incolumità. La stessa pena si applica se il fatto cagiona una alterazione irreversibile dell'equilibrio dell'ecosistema.

*Articolo 452-quinquies (Alterazione del patrimonio naturale, della flora e della fauna)*  
Fuori dai casi previsti dagli articoli 452-bis, 452-ter e 452-quater, è punito con la reclusione da uno a tre anni e con la multa da duemila a ventimila euro chiunque illegittimamente: a) sottrae o danneggia minerali o vegetali cagionando o contribuendo a cagionare il pericolo concreto di una compromissione durevole o rilevante per la flora o il patrimonio naturale; b) sottrae animali ovvero li sottopone a condizioni o trattamenti tali da cagionare il pericolo concreto di una compromissione durevole o rilevante per la fauna. Nei casi previsti dal primo comma, se la compromissione si realizza, le pene sono aumentate di un terzo.

*Articolo 452-sexies (Circostanze aggravanti)*  
Nei casi previsti dagli articoli 452-bis, 452-ter, 452-quater e 452-quinquies, la pena è aumentata di un terzo se la compromissione o il pericolo di compromissione dell'ambiente: a) ha per oggetto aree naturali protette o beni sottoposti a vincolo paesaggistico, ambientale, storico, artistico, architettonico o archeologico; b) deriva dall'immissione di radiazioni ionizzanti.

*Articolo 452-septies (Traffico illecito di rifiuti)*  
Chiunque illegittimamente, con una o più operazioni cede, acquista, riceve, trasporta, importa, esporta, procura ad altri, tratta, abbandona o smaltisce ingenti quantitativi di rifiuti, è punito con la reclusione da uno a

with imprisonment from three to ten years and a fine of thirty thousand to two hundred and fifty euro. An environmental disaster occurs when the act affects public safety because of the objective danger created, or the extent of the impairment, or the number of people endangered or exposed to danger. The same penalty applies if the act causes an irreversible alteration of the balance of the ecosystem.

*Article 452-quinquies (Alteration of the natural heritage of flora and fauna)*

Except in the cases provided for in Articles 452-bis, 452-ter and 452-quater, anyone who illegitimately: a) removes or damages minerals or plants causing or contributing to a concrete and lasting impairment to the flora or natural heritage, b) removes animals or subjects them to conditions or treatments such as to cause concrete and lasting impairment to the fauna

shall be punished with imprisonment from one to three years and a fine ranging from two thousand to twenty thousand euro. In the cases covered by the first paragraph, if the impairment takes place, the penalties are increased by a third.

*Article 452-sexies (Aggravating circumstances)*

In the cases provided for in Articles 452-bis, 452-ter, 452-quater and 452-quinquies, the penalty is increased by one third if the impairment or risk of impairment to the environment: a) relates to a protected natural area or protected objects given their value in terms of landscape, environment, history, art, architecture or archaeology; b) derives from ionizing radiation.

*Article 452-septies (Illicit trafficking of waste)*

Whoever illegitimately, with one or more transfers, purchases, receives, transports, imports, exports, procures for others, treats, abandons, or disposes of large quantities of waste, shall be punished with imprisonment from one to five years and a fine between

cinque anni e con la multa da diecimila a trentamila euro. Se la condotta di cui al comma 1 ha per oggetto rifiuti pericolosi, si applica la pena della reclusione da due a sei anni e della multa da ventimila a cinquantamila euro. Se la condotta di cui al comma 1 ha per oggetto rifiuti radioattivi, si applica la pena della reclusione da due anni e sei mesi a otto anni e della multa da cinquantamila a duecentomila euro. Le pene di cui ai commi che precedono sono aumentate di un terzo se dal fatto deriva il pericolo concreto di una compromissione durevole o rilevante: a) delle originarie o preesistenti qualità del suolo, del sottosuolo, delle acque o dell'aria; b) per la flora o per la fauna selvatica. Se dal fatto deriva il pericolo concreto per la vita o l'incolumità delle persone, le pene previste dal primo, secondo e terzo comma sono aumentate fino alla metà e l'aumento non può essere comunque inferiore ad un terzo.

*Articolo 452-octies (Traffico di materiale radioattivo o nucleare. Abbandono)*

E' punito con la reclusione da due a sei anni e con la multa da 50.000 a 250.000 euro chiunque illegittimamente cede, acquista, trasferisce, importa o esporta sorgenti radioattive o materiale nucleare. Alla stessa pena soggiace il detentore che si disfa illegittimamente di una sorgente radioattiva. La pena di cui al primo comma è aumentata di un terzo se dal fatto deriva il pericolo concreto di una compromissione durevole o rilevante: a) delle originarie o preesistenti qualità del suolo, del sottosuolo, delle acque o dell'aria. b) per la flora o per la fauna selvatica; Se dal fatto deriva il pericolo concreto per la vita o l'incolumità delle persone, si applica la pena della reclusione da tre a dieci anni e della multa da quindicimila a centomila euro.

*Articolo 452-nonies (Delitti ambientali in forma organizzata)*

Quando l'associazione di cui all'articolo 416

ten thousand and thirty thousand euros. If the conduct referred to in paragraph 1 relates to hazardous waste, the penalty of imprisonment from two to six years and a fine of twenty thousand to fifty thousand euro shall be applied. If the conduct referred to in paragraph 1 relates to radioactive waste, the applicable penalty will be that of imprisonment from two years and six months to eight years and a fine of fifty thousand to two hundred thousand euros. The penalties referred to in the preceding paragraphs shall be increased by one third if the act results in a real danger or a lasting and significant impairment: a) to the original or pre-existing quality of the soil, subsoil, water or air, b) for the flora or fauna. If the act leads to a real danger to the life or safety of individuals, the penalties foreseen in the first, second and third paragraphs shall be increased by up to one half and the increase cannot in any case be less than one third.

*Article 452-octies (Trafficking of nuclear or radioactive material. Abandonment)*

Anyone who unlawfully sells, buys, transfers, imports or exports radioactive sources or materials shall be punished with imprisonment from two to six years and a fine ranging from 50,000 to 250,000 euro. The same punishment applies to the holder who disposes of a radioactive source unlawfully. The penalty referred to in the preceding paragraphs shall be increased by one third if the act results in a real danger or a lasting and significant impairment: a) to the original or pre-existing quality of the soil, subsoil, water or air, b) to the flora or fauna. If the act leads to a real danger to the life or safety of individuals, the penalty of imprisonment from three to ten years and a fine of fifteen thousand to one hundred thousand euro shall apply.

*Article 452-nonies (Organised Environmental Crimes)*

è diretta, anche in via non esclusiva o prevalente, allo scopo di commettere taluno dei reati di cui al presente titolo, le pene previste dall'articolo 416 sono aumentate di un terzo. Quando taluno dei reati previsti dal presente titolo è commesso avvalendosi delle condizioni di cui al comma terzo dell'articolo 416-bis ovvero avvalendosi dell'associazione di cui all'articolo 416-bis, le pene previste per ciascun reato sono aumentate fino alla metà e l'aumento non può comunque essere inferiore a un terzo.

*Articolo 452-decies – (Frode in materia ambientale).*

Chiunque, al fine di commettere taluno dei delitti previsti nel presente titolo, ovvero di conseguirne l'impunità, falsifica in tutto o in parte, materialmente o nel contenuto, la documentazione prescritta ovvero fa uso di documentazione falsa, è punito con la reclusione da sei mesi a quattro anni e con la multa fino a diecimila euro. Se la falsificazione concerne la natura o la classificazione di rifiuti, si applica la pena della reclusione da uno a cinque anni e della multa da cinquemila a ventimila euro.

*Articolo 452-undecies (Impedimento al controllo)* Salvo che il fatto non costituisca più grave reato, il titolare o il gestore di un impianto che, negando l'accesso, predisponendo ostacoli o immutando artificiosamente lo stato dei luoghi, impedisce o intralcia l'attività di controllo degli insediamenti o di parte di essi ai soggetti legittimati, è punito con la reclusione da sei mesi a tre anni.

*Articolo 452-duodecies (Delitti colposi contro l'ambiente)*

Se taluno dei fatti di cui agli articoli 452-bis, 452-ter, 452-quater, 452-quinquies, 452-septies e 452-octies è commesso per colpa, le pene previste dai predetti articoli è diminuita della metà.

*Articolo 452-terdecies (Pene accessorie. Confisca)*

When a criminal association as defined in Article 416 aims to, although not exclusively or as its primary purpose, commit any of the offenses referred to in this title, the penalties provided for in Article 416 shall be increased by one third. When the offenses referred to in this title are carried out by a criminal association as defined in the third paragraph of Article 416-bis or through an association as defined in Article 416-bis, the penalties for each offense shall be increased by up to one half and the increase can in any case not be less than one-third.

*Article 452-decies - (Fraud in Environmental Matters).*

Whoever, for the purpose of committing any of the crimes provided for in this title, or to carry them out with impunity, falsifies, in whole or in part, materially or content-wise, the documentation prescribed or makes use of false documentation, shall be punished with imprisonment from six months to four years and a fine of up to ten thousand euros. If the counterfeiting concerns the nature or classification of waste, the punishment of imprisonment from one to five years and a fine from five thousand to twenty thousand euro shall apply.

*Article 452-undecies - (Interference with checks)* Unless the fact constitutes a more serious offense, the owner or operator of a facility that denies access, by providing barriers or artificially changing the state of the sites, prevents or hinders the checking by entitled persons of the settlements or any part thereof, shall be punished with imprisonment from six months to three years.

*Article 452-duodecies - (Negligent crimes against the environment)*

If any of the acts referred to in Articles 452-bis, 452-ter, 452-quater, 452-quinquies, 452-septies and 452-octies is committed by negligence, the penalties provided by said articles are decreased by half.

La condanna per alcuno dei delitti previsti dagli articoli 452-*bis*, 452-*ter*, 452-*quater*, 452-*quinquies*, 452-*septies* e 452-*octies* comporta, per tutta la durata della pena principale: 1) la interdizione temporanea dai pubblici uffici; 2) la interdizione temporanea dagli uffici direttivi delle persone giuridiche e delle imprese; 3) la incapacità di contrattare con la pubblica amministrazione. La condanna per alcuno dei delitti previsti dal presente titolo, ad eccezione degli articoli 452-*decies*, 452-*undecies* e 452-*quaterdecies*, terzo comma, comporta la pena accessoria della pubblicazione della sentenza penale di condanna. Alla condanna ovvero all'applicazione di pena ai sensi dell'art. 444 del codice di procedura penale per il reato di cui all'articolo 452-*septies* consegue in ogni caso la confisca dei mezzi e degli strumenti utilizzati, ai sensi dell'art. 240, comma 2. Alla condanna ovvero all'applicazione di pena ai sensi dell'art. 444 del codice di procedura penale per il reato di cui all'articolo 452-*octies* consegue in ogni caso la confisca della sorgente radioattiva o del materiale nucleare. La sorgente o il materiale nucleare confiscati sono conferiti all'Operatore nazionale ovvero al gestore di un impianto riconosciuto secondo le modalità stabilite dalla normativa tecnica nazionale.

*Articolo 452-quaterdecies (Bonifica e ripristino dello stato dei luoghi)*

Quando pronuncia sentenza di condanna ovvero di applicazione della pena ai sensi dall'articolo 444 del codice di procedura penale, il giudice ordina la bonifica, il recupero e, ove tecnicamente possibile, il ripristino dello stato dei luoghi, ponendone l'esecuzione a carico del condannato e dei soggetti di cui all'articolo 197. L'eventuale concessione della sospensione condizionale della pena è in ogni caso subordinata all'adempimento degli obblighi di cui al primo comma. Chiunque non ottempera alle prescrizioni imposte dalla legge, dal giudice

Article 452-*terdecies* (Accessory penalties. Confiscation)

Conviction for any of the offenses provided for in Articles 452-*bis*, 452-*ter*, 452-*quater*, 452-*quinquies*, 452-*septies* and 452-*octies* entails, for the duration of the principal penalty: 1) the temporary disqualification from public office; 2) a temporary ban from the executive offices of legal entities and enterprises; 3) the inability to negotiate with the government. Conviction for any of the offenses referred to in this Title, with the exception of Articles 452-*decies*, 452-*j* and 452-*quaterdecies* third paragraph entails the penalty of publication of the judgment of criminal conviction. Condemnation or application of penalty pursuant to art. 444 of the Criminal Procedure Code for the offense under section 452-*f* follows in any case, the confiscation of the instruments and tools used, pursuant to art. 240, paragraph 2

Upon condemnation or application of penalty pursuant to art. 444 of the Criminal Procedure Code for the offense under section 452-*g* follows in each case the confiscation of radioactive sources or nuclear material. The source or nuclear material confiscated shall be conferred to the National Operator or the operator of a plant who has received approval in accordance with the procedures established by national technical regulations.

*Article 452-quaterdecies (Reclamation and restoration)*

When handing down a sentence a sentence of condemnation applying a penalty under Article 444 of the Code of Criminal Procedure, the court shall order the remediation, recovery and, where technically possible, the restoration of the areas affected by the conduct of the defendant, making the defendant or those covered by Article 197. The granting of probation is in any case subject to the fulfillment of the obligations referred to in the first paragraph.

ovvero da un ordine dell'Autorità per il ripristino, il recupero o la bonifica dell'aria, dell'acqua, del suolo, del sottosuolo e delle altre risorse ambientali inquinate, è punito con la reclusione da uno a quattro anni.

Articolo 452 – *quinqüesdecies*  
(*Ravvedimento operoso*)

Le pene previste per i delitti previsti dal presente titolo sono diminuite dalla metà a due terzi nei confronti di chi si adopera per evitare che l'attività delittuosa sia portata a conseguenze ulteriori, anche aiutando concretamente l'autorità di polizia o l'autorità giudiziaria nella raccolta di elementi di prova decisivi per la ricostruzione dei fatti, nell'individuazione o nella cattura di uno o più autori di reati, nell'evitare la commissione di ulteriori reati e nel consentire la sottrazione di risorse rilevanti per la commissione di delitti.

Articolo 452-*sexiesdecies* (*Causa di non punibilità*)

Non è punibile l'autore di taluno dei fatti previsti dai precedenti articoli del presente titolo, che volontariamente rimuova il pericolo ovvero elimini il danno da lui provocati prima che sia esercitata l'azione penale  
c) al Titolo VIII, Capi I, del Libro II del codice penale, dopo l'articolo 498, è inserito il seguente:

«Articolo 498-bis (*Danneggiamento delle risorse economiche ambientali*)

Chiunque offende le risorse ambientali in modo tale da pregiudicarne l'utilizzo da parte della collettività, gli enti pubblici o imprese di rilevante interesse, è punito con la reclusione da uno a quattro anni e con la multa da ventimila a cinquantamila euro».

## **Articolo 2**

### **Modifiche al decreto legislativo 8 giugno 2001, n. 231**

1. Dopo l'art. 25-*quinqües* del decreto legislativo 8 giugno 2001, n. 231, è inserito il seguente:

«25-*sexies* -(*Reati ambientali*).

Anyone who fails to comply with the requirements imposed by law, by the court or by an order of the Authority for the rehabilitation, restoration or remediation of air, water, soil, subsoil and other polluted environmental resources polluted, shall be punished with imprisonment from one to four years.

Article 452 - *quinqüesdecies* (Repentance)  
The penalties for the offenses provided for in this Title shall be reduced by a half to two-thirds against those who seek to prevent the criminal activity from resulting in further consequences, even concretely helping the police or the judicial authority in the collection of evidence crucial to the reconstruction of the facts, the identification or capture of one or more offenders, to avoid the commission of further offenses and in allowing the subtraction of resources relevant to the commission of crimes.

Article 452-*sexiesdecies*

The author of any of the acts specified in the preceding articles of this Title who voluntarily removes the danger or eliminates the damage caused by him before the beginning of prosecution is not punishable.

c) Title VIII, Chapters I, Book II of the Penal Code, after Article 498, the following is inserted:

'Article 498-bis (Damage to the economic environmental resources)

Anyone who offends environmental resources in such a way as to jeopardize their use by the general public, public bodies or companies having a significant interest, shall be punished with imprisonment from one to four years and a fine ranging from twenty thousand to fifty thousand euro. "

## **Article 2**

### **Amendments to the Decree of 8 June 2001, n. 231**

1 After the art. 25-d of Legislative Decree June 8, 2001, n. 231, the following is inserted:



1. In relazione alla commissione di taluno dei delitti previsti dal Titolo VI-bis del Libro II del Codice Penale si applicano all'ente le seguenti sanzioni pecuniarie: a) per i delitti di cui agli articoli 452-bis, 452-ter, 452-quinquies, 452-septies, primo e secondo comma, 452-octies, primo comma, la sanzione pecuniaria da duecento a cinquecento quote; b) per i delitti di cui agli articoli 452-quater, 452-septies, terzo, quarto e quinto comma, e 452-octies, secondo e terzo comma, la sanzione pecuniaria da trecento a mille quote;

2. Nei casi di condanna per uno dei delitti indicati nel comma 1, lettera b), si applicano le sanzioni interdittive previste dall'articolo 9, comma 2, per una durata non inferiore ad un anno.

3. Se l'ente o una sua unità organizzativa vengono stabilmente utilizzati allo scopo unico o prevalente di consentire o agevolare la commissione dei reati di cui agli articoli 452-septies e 452-octies, si applica la sanzione dell'interdizione definitiva dall'esercizio dell'attività ai sensi dell'articolo 16, comma 3».

### **Articolo 3**

#### **Delega al Governo**

1. Il Governo è delegato ad adottare, entro diciotto mesi dalla data di entrata in vigore della presente legge, su proposta del Ministro dell'ambiente e del Ministro della giustizia, senza nuovi o maggiori oneri per la finanza pubblica, uno o più decreti legislativi concernenti il riordino, il coordinamento e l'integrazione delle disposizioni legislative concernenti illeciti penali ed amministrativi in materia di difesa dell'ambiente e del territorio, nonché la previsione di una procedura di estinzione agevolata delle violazioni contravvenzionali e amministrative in materia di ambiente.

2. Almeno sessanta giorni prima della scadenza del termine di cui al comma 1, il Governo trasmette alle Camere gli schemi

"25-sexies - (Environmental Offences).

1. In relation to the commission of any of the crimes provided in Title VI of Book II-bis of the Penal Code the following penalties shall apply: a) for the crimes referred to in Articles 452-bis, 452-ter, 452-quinquies, 452-septies, first and second paragraphs, 452-octies, first paragraph, a fine of two hundred to five hundred shares, b) for the crimes referred to in Articles 452-quater, 452-septies, third, fourth and fifth paragraphs, and 452-octies, second and third paragraphs, a fine of three hundred to one thousand shares;

2. In cases of conviction for one of the offenses indicated in paragraph 1, letter b) the sanction of disqualification under Article 9, paragraph 2, shall apply for a period of not less than one year.

3. If the institution or its organisational units are regularly only or for the most part used for the purpose of committing the offenses referred to in Articles 452-septies and 452-octies, the sanction of permanent disqualification within the meaning of Article 16, paragraph 3 shall apply. "

### **Article 3**

#### **Delegation to the Government**

1. The Government is authorized to adopt, within eighteen months from the date of entry into force of this Act, upon the proposal of the Minister of Environment and Minister of Justice, with no new or increased charges for public finance, one or more legislative decrees concerning the reorganization, coordination and integration of the laws relating to criminal and administrative offenses in the field of environmental protection and land, as well as the provision of a process of facilitated extinction of the administrative violations in environmental matters.

2. At least sixty days before the expiry of the period referred to in paragraph 1, the Government shall transmit to the Chambers schemes of the enactments referred to in

dei decreti legislativi di cui al comma 1 per l'espressione del parere da parte delle competenti Commissioni parlamentari. Ciascuna Commissione esprime il proprio parere entro trenta giorni dalla data di assegnazione degli schemi dei decreti legislativi. Decorso inutilmente tale termine, i decreti legislativi possono essere comunque emanati.

3. Nell'esercizio della delega di cui al punto 1, il Governo si atterrà inoltre ai seguenti principi e criteri direttivi: 1) abrogazione esplicita di tutte le norme incompatibili con quelle introdotte; 2) disciplina del principio di specialità tra sanzioni amministrative e le sanzioni penali introdotte dalla presente legge, nel senso che ai fatti puniti ai sensi del titolo VI-bis del Libro Secondo del codice penale si applichino soltanto le disposizioni penali, anche quando i fatti stessi sono puniti con sanzioni amministrative previste da disposizioni speciali in materia di ambiente; 3) previsione di una procedura di estinzione delle contravvenzioni e delle violazioni amministrative previste dalla normativa speciale in materia ambientale, fra cui le violazioni previste dal decreto legislativo 3 aprile 2006, n. 152, analogamente a quanto previsto dagli articoli 20 e seguenti del decreto legislativo 19 dicembre 1994, n. 758, in materia di prevenzione degli infortuni sul lavoro, con esclusione delle violazioni relative a sostanze pericolose ovvero delle fattispecie connotate da maggiore pericolosità.

4. Entro due anni dalla data di entrata in vigore di ciascuno dei decreti legislativi di cui al comma 1, nel rispetto dei principi e criteri direttivi stabiliti dalla presente legge, il Governo può emanare, ai sensi dei commi 4 e 5, disposizioni integrative o correttive dei decreti legislativi emanati ai sensi del comma 1.

5. Nell'esercizio del potere di delega, il Governo è altresì autorizzato ad apportare

paragraph 1 to obtain the opinion by the competent parliamentary committees. Each committee shall deliver its opinion within thirty days from the date of allotment of the draft legislative decrees. If that period should pass, the legislative decrees may be issued in any case.

3. In exercising the powers referred to in paragraph 1, the government will also adhere to the following principles and criteria: 1) the explicit repeal of all provisions incompatible with those introduced; 2) the principle of speciality including administrative penalties and criminal sanctions introduced by this law, in the sense that the acts punishable under Title VI-bis of the Second Book of the Criminal Code should apply only to the penal provisions, even when the facts themselves shall be punished with administrative sanctions provided by special provisions relating to the environment; 3) provision of a process of extinction of fines and administrative violations provided for by special legislation in environmental matters, including violations under Legislative Decree 3 April 2006, n. 152, as is provided for by Articles 20 and following of Legislative Decree 19 December 1994, n. 758, in regard to the prevention of accidents at work, with the exception of violations related to hazardous substances or of the cases characterized by greater danger.

4. Within two years from the date of entry into force of each of the enactments referred to in paragraph 1, in accordance with the principles and criteria established by this law, the Government may enact, pursuant to paragraphs 4 and 5, supplementary provisions or corrective legislative decrees issued pursuant to paragraph 1.

5. In the exercise of the power of delegation, the Government is also authorized to make the case introduced by Articles 1 and 2 of this Act, any amendments necessary to coordinate this legislative intervention with

alle fattispecie introdotte dagli articoli 1 e 2 della presente legge, tutte le modifiche necessarie a coordinare il presente intervento legislativo con l'assetto normativo previgente al fine di evitare duplicazioni, lacune e sovrabbondanze, anche alla luce della normativa europea eventualmente introdotta in materia di tutela penale dell'ambiente nel periodo intercorrente tra la data di entrata in vigore della presente legge e quelle di entrata in vigore del decreto o dei decreti delegati.

#### **Articolo 4**

##### **Clausola di invarianza**

1. Dall'esecuzione della presente legge non derivano nuovi o maggiori oneri a carico del bilancio dello Stato.

#### **Articolo 5**

##### **Entrata in vigore**

1. La presente legge entra in vigore il giorno successivo a quello della sua pubblicazione nella Gazzetta Ufficiale della Repubblica italiana.
2. Le disposizioni contenute negli articoli 1 e 2 della presente legge acquistano efficacia alla data di entrata in vigore del decreto legislativo emanato ai sensi dell'articolo 3.

the pre-existing regulatory framework in order to avoid duplication , gaps and redundancies, especially in light of European legislation which may be introduced in the field of criminal law protection of the environment in the period between the date of entry into force of this Act and the entry into force of the decree or decrees.

#### **Article 4**

1. New or greater burdens on the state budget shall not be incurred in executing the present law.

#### **Article 5**

##### **Entry into force**

1. This Act shall enter into force on the day following that of its publication in the Official Journal of the Italian Republic.
2. The provisions contained in Articles 1 and 2 of this Act shall take effect on the date of entry into force of the Legislative Decree issued pursuant to Article 3.

## ii. England

### **Section 33 Environmental Protection Act 1990 C. 43.**

#### **33.— Prohibition on unauthorised or harmful deposit, treatment or disposal etc. of waste.**

(1) Subject to [subsections (1A), (1B), (2) and (3) below] and, in relation to Scotland, to section 54 below, a person shall not—

(a) deposit controlled waste [ or extractive waste] , or knowingly cause or knowingly permit controlled waste [ or extractive waste] to be deposited in or on any land unless [an environmental permit] authorising the deposit is in force and the deposit is in accordance with [the permit];

(b) submit controlled waste, or knowingly cause or knowingly permit controlled waste to be submitted, to any listed operation (other than an operation within subsection (1)(a)) that—

(i) is carried out in or on any land, or by means of any mobile plant, and

(ii) is not carried out under and in accordance with an environmental permit;

(c) treat, keep or dispose of controlled waste [ or extractive waste] in a manner likely to cause pollution of the environment or harm to human health.

(1A) Paragraphs (a) and (b) of subsection (1) above do not apply in relation to a waste operation that is an exempt waste operation.

(1B) Subsection (1) does not apply in relation to the carrying on of any waste operation which is or forms part of an operation which—

(a) is the subject of a licence under Part 2 of the Food and Environment Protection Act 1985; or

(b) by virtue of an order under section 7 of that Act, does not require such a licence;

(2) Subject to subsection (2A) below, paragraphs (a) and (b) of subsection (1) above do not apply in relation to household waste from a domestic property which is treated, kept or disposed of within the curtilage of the property.

(2A) Subsection (2) above does not apply to the treatment, keeping or disposal of household waste by an establishment or undertaking.

(3) Subsection (1)(a), (b) or (c) above do not apply in cases prescribed in regulations made by the Secretary of State and the regulations may make different exceptions for different areas.

(4) The Secretary of State, in exercising his power under subsection (3) above, shall have regard in particular to the expediency of excluding from [the prohibitions in subsection (1)] —

(a) any deposits which are small enough or of such a temporary nature that they may be so excluded;

(b) any means of treatment or disposal which are innocuous enough to be so excluded;

(c) cases for which adequate controls are provided by another enactment than this section.

(5) Where controlled waste is carried in and deposited from a motor vehicle, the person who controls or is in a position to control the use of the vehicle shall, for the purposes of subsection (1)(a) above, be treated as knowingly causing the waste to be deposited whether or not he gave any instructions for this to be done.

(6) A person who contravenes subsection (1) above [...]commits an offence.

(7) It shall be a defence for a person charged with an offence under this section to prove—

(a) that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence; or

(c) that the acts alleged to constitute the contravention were done in an emergency in order to avoid danger to human health in a case where—

(i) he took all such steps as were reasonably practicable in the circumstances for minimising pollution of the environment and harm to human health; and

(ii) particulars of the acts were furnished to the waste regulation authority as soon as reasonably practicable after they were done.

(8) [Subject to subsection (9) below, a]person who commits an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding £50,000 or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding five years or a fine or both.[...]

(9) A person (other than an establishment or undertaking) who commits a relevant offence shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; and

(b) on conviction on indictment, to a fine.

(10) In this section, “*relevant offence*” means an offence under this section in respect of a contravention of subsection (1)(c) above consisting of the treatment, keeping or disposal within the curtilage of a domestic property of household waste from that property.[...]

(11) For the purposes of subsection (1)(a) above, the deposit of waste in or on land includes any listed operation involving such a deposit.

(12) For the purposes of subsection (1)(c) above, treating, keeping or disposing of controlled waste includes submitting it to any listed operation.

(13) For the purposes of this section, a “listed operation” is an operation listed in [Annex I or II of Directive 2008/98/EC of the European Parliament and of the Council on waste]

## B. Annex II – Interviews

### i. Interviewees

Below you can find a list of the stakeholders who kindly took the time to respond when presented with the questionnaire, the texts of which may be found below. Only a brief description of their role is provided given that permission to include the names of the respondents was not explicitly granted:

- ❖ a representative from EUROPOL was interviewed telephonically, the field of expertise of this individual is Italian organised crime. The interview was based on the questionnaire but went more in-depth;
- ❖ a representative from the Italian NGO *Legambiente* who focuses on trafficking in waste; and
- ❖ a member of staff from the Italian Ministry of Justice.

### ii. Texts of the Questionnaires

#### a. English

##### **Questionnaire for Stakeholders and Experts**

*Master Thesis investigating need to tackle issue of illicit transport and disposal of waste in EU with European Criminal law to be adopted on the basis of Article 83 (1)and/ or (2) TFEU*

##### **Section 1 – Existence of the Problem**

a. Is there a problem of illegal trafficking and disposal of waste in your country?

Yes.  No.

If yes, can you describe it?

b. Is there an involvement of organised crime groups in these activities at any of the three phases of waste disposal (origin, transport, disposal)?

Yes.  No.

c. What are the drivers leading to and facilitating this type of activity?

- Too much regulation.
- Not enough regulation.
- Lack of adequate and available facilities to dispose of waste appropriately.
- High economic burden of appropriate waste disposal.
- Lack of information.
- Lack of adequate enforcement by state authorities.
- Lack of expertise of state authorities.
- Lack of resources of state authorities.
- Low priority given to these offences.
- Other. Please elaborate.

d. Is corruption a contributing factor?

Yes.  No.

e. Who makes use of illicit waste disposal services?

- Public administration (disposal of municipal/household waste).
- Individuals.
- Chemical companies.
- Hospitals.
- Metal-works.
- Other entity producing toxic/harmful waste
- Other. Please elaborate.

f. Are these companies generally aware of the illicit nature of such activities and of the social and environmental harm caused by them?

Yes.  No.

## **Section 2 – National Legal Framework**

a. What legal rules are in place in your country which are/can be used to tackle this issue?

b. What is the system of sanctions in place?

- Administrative.
- Criminal.
- None.
- Other. Please elaborate.

c. In the case where criminal sanctions have been chosen, are general criminal law definitions of offences applicable or has a specific regime related to waste trafficking been implemented?

- General criminal rules.
- Specific criminal rules.

d. Can legal persons be held criminally liable in your legal system?

- Yes.  No.

If not, how is liability of criminal persons dealt with in your legal system?

f. Can legal persons be held responsible for illicit trafficking and disposal of waste?

- Yes.  No.

g. In your experience, are the measures available in your legal system effective in tackling the problem of illicit trafficking and disposal of waste?

- Yes.  No.

Please explain why.

### **Section 3 – European Legal Framework**

a. Do you think that there is a need for better implementation of European norms to tackle the issue of illicit trafficking and disposal of waste?

- Yes.  No.

b. Do you think the existence of new European rules creating a common definition of an offence of illicit trafficking and disposal of waste accompanied by common minimum sanctions would help in tackling the problem more effectively?

- Yes.  No.

c. Do you think specific European legislation addressing the involvement of organised crime groups in the illicit trafficking and disposal of waste is necessary?

- Yes.  No.

### **Section 4 – Final Comments**

a. What other measures do you believe could be useful in tackling this issue?

b. Do you have any other comments or suggestions?

***Thank you very much for your time and patience!***

b. Italian

**Questionario per Soggetti Interessati ed Esperti.**

*Tesi per il Master con oggetto la necessità di affrontare il problema del trasporto e dello smaltimento illeciti di rifiuti nell'UE con legge Penale europea .*

### **Sezione 1-Esistenza del Problema**

a. Nel Suo paese esiste un problema di traffico e smaltimento illecito di rifiuti ?

Sì.  No.

Se sì , può descriverlo ?

b. Esiste qualche coinvolgimento di gruppi criminali organizzati in queste attività in una qualsiasi delle tre fasi dello smaltimento dei rifiuti (origine, trasporto , smaltimento ) ?

Sì.  No.

c. Quali sono gli aspetti che conducono a e facilitano questo tipo di attività ?

Una regolamentazione eccessiva.

Una regolamentazione insufficiente.

Un'assenza di strutture adeguate e disponibili per disporre dei rifiuti in modo appropriato.

Elevato peso economico per uno smaltimento appropriato dei rifiuti.

Assenza di adeguate informazioni.

Assenza di adeguata attività di vigilanza da parte delle autorità statali.

Assenza di conoscenze specifiche da parte delle autorità statali.

Assenza di risorse da parte delle autorità statali.

Bassa priorità data a questo tipo di reato.

Altro. Per cortesia, specificare.

d. La corruzione è un fattore che contribuisce ?

Sì.  No.

e. Chi fa uso di smaltimento illecito di rifiuti ?

La pubblica amministrazione ( smaltimento di rifiuti municipali /domestici).

Singoli.

Aziende chimiche

Ospedali.



- Industrie metallurgiche.
- Altre entità che producono rifiuti tossici/dannosi.
- Altro. Per cortesia, specificare.

f. Queste aziende sono generalmente consapevoli della natura illecita di tali attività e dei danni sociali e ambientali da esse causati ?

- Sì.  No.

### **Sezione 2-Quadro Legale Nazionale**

a. Quali regole legali son in atto nel vostro paese che sono/possono essere usate per affrontare questo problema ?

b. Che tipo di sanzioni vengono applicate ?

- Amministrative
- Penali
- Nessuna
- Altro. Per favore, specificare.

c. Quando vengono scelte le sanzioni penali, vengono utilizzate leggi penali generali o viene messo in atto uno specifico regime relativo al traffico dei rifiuti ?

- Regole penali generali.
- Regole penali specifiche.

d. Le persone legali sono penalmente perseguibili nel vostro sistema legale?

- Sì.  No.

g. Secondo la vostra esperienza, le misure disponibili nel vostro sistema legale, sono efficaci per affrontare il problema del traffico e smaltimento illecito dei rifiuti ?

- Sì.  No.

Per cortesia, chiarisca perché.

### **Sezione 3 Quadro Legale Europeo**

a. Lei pensa che ci sia bisogno di una migliore attuazione di norme europee per affrontare il problema del traffico e smaltimento illecito dei rifiuti ?

- Sì.  No.

b. Lei pensa che l'esistenza di nuove regole europee che creino una definizione comune del reato di traffico e smaltimento illecito dei rifiuti, accompagnata da comuni sanzioni minime potrebbe aiutare ad affrontare il problema in modo più efficace ?

Sì.  No.

c. Lei pensa che una legislazione europea specifica e diretta a risolvere il coinvolgimento dei gruppi criminali organizzati nel traffico e smaltimento illecito dei rifiuti sia necessaria ?

Sì.  No.

#### **Sezione 4- Commenti Finali**

a. Quali altre misure crede possano essere utili per fronteggiare questo problema ?

b. Pensa di avere altri commenti o suggerimenti da dare ?

Un sentito grazie per il tempo che ha dedicato a questo studio e per il suo prezioso contributo!