

# ENVIRONMENTAL CRIME, WITH PAR- TICULAR REFER- ENCE TO MALTA.

**CONSUELO SCERRI HERRERA**

In this article, Magistrate Scerri Herrera examines the state of Environmental legislation in a substantive, procedural and historical manner, while also comparing the Maltese situation with European Union legislation, International case law and more recent developments in the legal field.

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Environmental Protection is a subject very much debated about nowadays, and often finds itself on the agenda of many seminars. In fact, it is only recently that the 2017 edition of the European Union Serious and Organised Threat Assessment (SOCTA) Report pinned down environmental crime as ‘an emerging threat in the EU’. It is often observed as ‘victimless’ crime, because the damage caused is not always directly visible and it usually emanates after some time. At times such harm is incorrigible, and it may precipitate disease/death, environmental disaster, reduced life expectancy contamination of food and climate change.

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Despite such serious and grave residuum of such crime, its gravity is still not taken into cogitation. Since it is very difficult to enforce compliance, a number of criminals seem to be getting away with murder, though others might view this as being a simple perception. Environmental crimes encompass actions that broaden from careless demeanour (‘culpa’) to intentional thoughtful behaviour (‘dolus’). The traditional forms of compliance and enforcement, however, are not enough and more effective remedies are being resorted to, including the imposition of harsher fines, imprisonment and at times the withdrawal of licences. However, one may argue that the payment of administrative fines, instead of criminal prosecution, can have the adverse reaction to meeting out justice to the detriment of society at large. Criminal penalties may be costed to create a constraining act in deterring environmental crimes, in such a manner that the aversion to criminal prosecution and imprisonment may be more likely to deter

1 Environmental Crime Network Report on Environmental Crime (The Hague May 2016) < <http://www.envicrimenet.eu/EN/images/docs/envicrimenet%20report%20on%20environmental%20crime.pdf> > accessed 27 November 2017

the violation of Environmental law rather than the actual payment of a fine. One must not forget that such fines are subsequently also documented in one's criminal record.

Environmental liability is the holding of a person, legal or natural, legally responsible for causing harm or damage to the environment, or for having violated environmental law, whether it is a national law, an international treaty or a binding EU instrument. Environmental liability will ensue depending on the type of action that is committed. Currently there are namely three existing systems: namely **Administrative**, **Civil** and **Criminal**. Civil law is set to protect the interests of individual parties to the eventual case, whereas criminal and administrative laws are both directed to look after and protect the public interest. It is only when the illegal action committed is deemed to be an environmental crime, that criminal liability sets in.

The areas which are dealt with most in environmental crime are:

- a. the illegal emission or discharge of substances into the air, water, or soil;
- b. the illegal trade of wildlife;
- c. illegal trade in ozone depleting substances;
- d. and the illegal shipment of dumping of waste.

It is clear that environmental crime causes significant damage to the environment, and at times to the human being. concurrently they give rise to great profits to offenders due to the low risk of espial, and on account of the apparent low risk involved and the high earning that could result, this criminal activity seems to be attracting

the greater interest of organised crime groups. For example, the proceeds by trafficking in endangered species are estimated to be between €18 to €26 billion euros per year, with the EU the leading destination market in the world.<sup>2</sup>

In addition, illicit waste trafficking is often made easy as often, such an operation entails financial dealings and cooperation with justifiable business. For example, in 2008, the Italian government called back from the market the sale of mozzarella cheese, since it was associated to cancer causing dioxin contamination. It is understood that the cause was toxic waste, illegally disposed of by criminals in the region of the agricultural land in Campania<sup>3</sup> which was used for pasture. Police reports also comment on how the Naples mafia - known as the Camorra - is heavily involved in waste disposal, particularly the dumping and burning of industrial waste in the Campania countryside<sup>4</sup>.

Environmental crime is a serious and growing problem that also needs to be tackled at European level, which is why the Maltese presidency pushed the subject matter on the EU's agenda. In the opinion of the then-Maltese Minister for the Interior, Mr. Carmelo Abela, "*it maps out the priorities to tackle organised crime*"<sup>5</sup>. In fact, it was only recently that Member states decided to discuss environmental crime for the 8<sup>th</sup> Mutual Evaluation Round, however due to the broad range of offences covered by

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2 Judicial Cooperation in Criminal Matters in European Fight against environmental crimes - TRAINER Dr. Fazlı DOĞAN TEAM MEMBERS İsra TORUN UZUN Dilek DEMİREL Tuğrul UZUN 2012 <<http://www.ejtn.eu/Documents/Themis%202012/THEMIS%202012%20ERFURT%20DOCUMENT/Written%20paper%20Turkey%20Team%201.pdf>> accessed 27 November 2017

3 <<http://news.bbc.co.uk/2/hi/7318391.stm>> accessed 27 November 2017

4 <<http://www.reuters.com/article/2008/03/21/us-italy-mozzarella-idUSL2165847820080321>> accessed 27 November 2012, as cited in *ibid.* 2

5 Kurt Sansone, 'Malta pushing action on environmental crime in the EU' (Times of Malta, 3 February 2017) <<https://www.timesofmalta.com/articles/view/20170403/local/malta-pushing-action-on-environmental-crime-in-the-eu.644307>>

environmental crime, the evaluation narrowed the exercise down to focus on two specific areas, namely illegal waste trafficking, and illegal protection of handling of dangerous materials.

During the evaluations conducted in Brussels<sup>6</sup> during Malta's Presidency, in accordance with Article 191 of the Treaty on the Functioning of the European Union, it was held that *“the European Union should aim at achieving a high level of protection of the environment. It held that the EU policy should focus upon the precautionary and preventive aspects whilst ensuring that the environmental damage is rectified at source, and that the perpetrator is sanctioned for his/her illegal acts”*<sup>7</sup>.

## **Protection of Environment within the scope of Human Rights**

The Charter of Fundamental Rights of the European Union was signed in 2000 and introduced the concept of fundamental human rights into Union Law, with the subsequent signing of the Lisbon Treaty making the Charter an integral part of EU Law.

Article 37<sup>8</sup> of the Treaty mentions environmental protection as a fundamental right; the concept has also been mentioned in European Human Rights Court decisions, under the confines of Article 8 of the ECtHR. In the **Lopez**

6 25<sup>th</sup> January 2017

7 Report number 5406/17 eighth round of mutual evaluations held by the Working Party on General Matters.

8 Article 37: *A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*

**Ostra v. Spain**<sup>9</sup> decision, the Court ruled that: “*Naturally, severe environmental pollution may affect individuals’ wellbeing and prevent them enjoying their homes in such a way as to affect their private and family life adversely, without however seriously endangering their health*”<sup>10</sup>. There is not a mentioned right to environment in the ECHR<sup>11</sup> but as the Court states, if the individuals are affected by the pollution or noise, it might constitute a breach of Article 8<sup>12</sup>. However, in **Ivan Atanasov v. Bulgaria**<sup>13</sup>, the Court noted that Article 8 is not committed every time there is environmental degeneracy. Rather, Article 8 only comes to the floor when “*there is a direct and immediate link between the impugned situation and the applicant’s home or private or family life.*”<sup>14</sup>

By the same token, in the case **Öneryıldız v. Turkey**<sup>15</sup>, the Court considered the protection of environment in the background of Right to Life, and declared the inaction of the state as a violation of Article 2 of the Convention. The Court affirmed that the state was obliged to take necessary, concrete and sufficient measures to protect people

9 Decided by the European Court of Human rights on the 9<sup>th</sup> December 1994 -Application no. 16798/90. The ECHR found the State responsible for violating the right to respect for the home and private life, since serious pollution can impact an individual’s well-being and prevent him or her from enjoying his or her home in such a way that his or her private and family life is damaged.

10 See also ECtHR Decisions, **Taşkın v. Turkey**, 10 November 2004; **Dubetska and Others v. Ukraine**, 10 February 2011.

11 European Court of Human Rights.

12 RYLAND, Diane, The Evolution of Environmental Human Rights in Europe, 2005, Managerial Law, Vol. 47, Iss:3 pp. 117- 25

13 Decided by the European Court of Human rights on the 2<sup>nd</sup> December 2010 -Application no.12853/03

14 Para 66

15 Decided by the European Court of Human rights on the 30<sup>th</sup> November 2004 -Application no 48939/99. The applicant lived in a slum quarter of Istanbul surrounding a rubbish tip which exploded because of the decomposition of the refuse and killed 9 of his relatives. A report showed that the authorities failed to take any measures at the tip in question to prevent an explosion of methane. The applicant claimed that there had been a violation of Articles 2 (right to life), 13 (right to an effective remedy), 6 (right to a fair hearing within a reasonable time) and 8 (right to respect for private and family life) of the Convention, and of Article 1 of Protocol No. 1 (protection of property). The ECHR held that there had been a violation of articles 2, 1 and 13 of the Convention

living near to the waste zone, where a coal gas explosion had killed several people<sup>16</sup>. To highlight the importance accredited by the Court to the environmental pollution, cognizance must be given to the **Mangouras v. Spain**<sup>17</sup> case. The case concerned the environmental disaster that was caused when the oil tanker Prestige sank in front of the Galician coast in 2002. Upon the disaster, the Greek captain of the ship Mangouras was detained in Spain. His bail was set at 3 million euros and he was only released after 83 days, when the ship owner's insurers deposited his bail. The captain complained about the amount he was asked to deposit in that it was excessive, and his case eventually reached Strasbourg, where the Chamber held that Art. 5 of the ECHR had not been breached. In this case the majority of the Grand Chamber stressed that while in principle the amount of bail had to be assessed principally by reference to the accused and his assets, there existed exceptional circumstances that included significant environmental pollution and felt that it was suitable for the domestic courts to take into account the seriousness of the alleged offences and the scale of the penalties at stake, prior to deciding on the quantum that had to be deposited by Mr Mangouras for him to be released on bail. Of notable interest was the fact that the majority opinion held that new realities had to be taken into consideration in interpreting the requirements of Article 5 § 3, namely the growing and legitimate concern both in Europe and internationally in relation to environmental offences, and the tendency to use criminal law as a means of enforcing the environmental obligations

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16 DANIEL Garcia San Jose, *La Protection de l'Environnement et la Convention Européenne des Droits de l'Homme*, Editions du Conseil de L'Europe, 2005. For another interpretation of right to environment by the Court in the context of right to life: *Budayeva and Others v. Russia*, 2008.

17 Decided by the Grand Chamber of the European Court of Human Rights on the 8<sup>th</sup> January 2009- Application Number 12050/04

imposed by European and international law.<sup>18</sup>

Therefore, environmental protection is not only being considered as an obligation of the state, but also a fundamental human right, especially when considering that such offences do not threaten only one person, but all humankind. In fact, some authors believe that offences against the environment could fit into the existing categories of crimes against humanity as well<sup>19</sup>.

## Jurisdiction Problems

Most of environmental crime cases attribute supra-national personality, in that they may connect more than one national legislation system. Domestic law will often be inadequate for the prosecution of one party for a myriad of reasons. As a paradigm, one may look at the **Erika**<sup>20</sup> case (), where a vessel owned by a Maltese company, chartered by a Panamanian subsidiary of Total, controlled by two Liberian corporations whose shareholder was Italian, which was certified as seaworthy by an Italian shipping classification society, sank off the coast of France and caused an environmental disaster, severely damaging the surrounding environment. In this example, four states could have had jurisdiction: (i) France the country which sustained the damage (ii) Malta (being the flag state of the Erika) (iii)

<sup>18</sup> <https://strasbourgoobservers.com/2010/10/01/european-court-of-human-rights-goes-with-the-times-mangouras-v-spain/>

<sup>19</sup> MEGRET, 2011, p.207; see also: BASSIOUNI, M. Cherif, Crimes Against Humanity: The Case for a Specialized Convention, 9 WASH. U. GLOB. STUD. L. REV. 575 (2010), INGLEHART Ronald, Public Support for Environmental Protection: Objective Problems and Subjective Values in 43 Societies, 28 POL. SCI. & POL. 57 (1995).

<sup>20</sup> <http://curia.europa.eu/juris/celexjsf?celex=62007CJ0188&lang1=en&lang2=MT&type=TXT&ancre=>

Liberia (since the vessel was controlled by Liberian Corporations and (iv) Italy (since it was the country that certified the vessel as seaworthy).<sup>21</sup> Although the French authorities, as the country facing the main damage, were eager to prosecute, the French Courts' concluded that the case remains out of the French Jurisdiction since the loss of the vessel occurred outside the territorial waters of France and it held in addition that the flag state of the Erika was Malta. However, no prosecution could be initiated in Malta, unless the Maltese owners were found. The several aspects of this case highlight the need for rules of universal jurisdiction on transboundary environmental crimes, and on a European level, a high level of focus is being dedicated on resolving this matter.

### **The Directive 2008/99 on Protection of Environment through Criminal Law**

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21 David Hart QC, The Erika disaster – why we need an international environmental court, April 8, 2012 <http://ukhumanrightsblog.com/2012/04/08/the-erika-disaster-why-we-need-an-international-environmental-court/>

The Commission proposed this Directive so that environmental law will be implemented in an effective way. This Directive had to be transposed by Member States by December 2010, provided that Member States must establish criminal sanctions for the most serious environmental offences. This Directive builds upon Directive 2004/35/EC, which lays down rules on environmental liability regarding the prevention and remedying of environmental damage. To constitute a criminal offence, all the acts covered by the Directive must be unlawful, they must also be committed intentionally or “*at least with serious negligence*”.<sup>1</sup> The European Court of Justice gave the following definition of what constitutes “serious negligence”, namely:

*“an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation”.*<sup>2</sup>

The Directive establishes a set of nine illegalities that should be considered as constituting a criminal offence throughout the EU. The unlawful behaviours with negative impacts on human health and/or the environment that are subject to penalties include:

- discharge, emission or introduction into air, soil or water of dangerous materials;<sup>22</sup>
- collection, transport, recovery or disposal of hazardous waste<sup>23</sup>;
- shipment of noticeable quantities of waste<sup>24</sup>;
- operation of an industrial plant conducting dangerous activities or storing dangerous substances (e.g. factories producing paints or chemicals)<sup>25</sup>;

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22 Article 3a of the Directive 2008/99 on Protection of Environment through Criminal Law.

23 Article 3b of the Directive 2008/99 on Protection of Environment through Criminal Law.

24 Article 3c of the Directive 2008/99 on Protection of Environment through Criminal Law.

25 Article 3d of the Directive 2008/99 on Protection of Environment through Criminal Law.

- manufacture, treatment, storage, use, transport, import, export, or disposal of nuclear material / hazardous radioactive materials<sup>26</sup>;
- killing, possession or trafficking of noticeable amounts of protected animal and plant species<sup>27</sup>;
- damage to protected habitats<sup>28</sup>;
- production, trade in or use of substances that deplete the ozone layer (e.g. chemicals in fire extinguishers or cleaning solvents)<sup>29</sup>.

The information gathered by the author indicates that there are large differences between the criminal sanctions available for environmental offences in each Member State, and these are not adequately acrimonious to ensure severe environmental protection throughout the Community. By transposing this Directive, Member States would have to attach criminal sanctions only to these criminal acts, while also stating that the abetting, inciting and aiding in the commission of these offences must be likewise punishable as a criminal offence. These are just minimum standards, and thus, Member States are free to maintain or introduce more iron clad protective measures. No measures relating to the procedural part of criminal law, or touching upon the powers of the prosecutors or the judges in these cases, are addressed in this Directive.

However, it must be pointed out that the Directive applies to both natural and legal persons. The second are rightfully included, since they play a major role in envi-

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26 Article 3e of the Directive 2008/99 on Protection of Environment through Criminal Law.

27 Article 3g of the Directive 2008/99 on Protection of Environment through Criminal Law.

28 Article 3h of the Directive 2008/99 on Protection of Environment through Criminal Law.

29 Article 3f of the Directive 2008/99 on Protection of Environment through Criminal Law.

ronmental criminal offences. The Directive was accompanied by an impact assessment which referred to a study conducted in 2003: The results which stemmed out of this study concluded that in 73 % of the cases relating to environmental damage, companies or “*corporate-like structures*” were implied. The Directive provides that EU countries must ensure that both the individual and the legal person could be held liable in those instances where offences are committed by an individual person holding a primary position in the said legal person (such as a company). However, this happens only in those instances where it results that such a natural person did not fulfil his duties of supervision or control on the company. In such a situation the natural person will be held responsible conjointly with the legal person.

Depending on the legal system of EU countries, the liability of legal persons may be criminal or non-criminal. Article 2(d) of the Directive defines ‘*legal person*’ as “*any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organizations.*” Consequently, public organisations do not fall within the scope of the Directive and it is the opinion of the writer that such an exclusion ought to be reprimanded.

The criminal liability of legal persons is found in Article 6 of the Directive and this encompasses three conditions:

1. *First, that the offence committed is one falling under the ambit of either Article 3 or 4 of the Directive.*

2. *Secondly, the offence must have been committed “for their benefit”.*

3. *Thirdly, the offence must have been committed “by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person”, based either on.*

*(a) a power of representation of the legal person, or*

*(b) an authority to take decisions on behalf of the legal person , or*

*(c) an authority to exercise control within the legal person.*

Article 7 then provides for the penalties to be applied and states that “*legal persons held liable pursuant to Article 6 are punishable by effective, proportionate and dissuasive penalties*”. The issue here is whether Member States could be coerced to inflict criminal penalties to legal persons, since the legal systems of some Member States’ do not foresee such a possibility (e.g. Germany). The Directive thus leaves the choice of the sanctions’ nature (criminal or administrative) to each individual Member States. In the EU judgment of **the Commission of the European Communities vs Hellenic Republic**<sup>30</sup> it was held that whilst it is the discretion of the Member State to ascertain the penalty to be imposed by each Member State for infringements of community law, such penalties are to be determined in congruence with the respective rules that would provide effective, proportionate and dissuasive penalties.

30 Case C-68/88 of The Commission of the European Communities vs Hellenic Republic 1989

Effectiveness of an environmental penalty is achieved once these three functions result namely (1) Reaching a high level of environmental protection (2) Enabling *resitutio in integrum* and (3) To prevent future harm.

The prosecution of environmental crime is the responsibility of EU countries. Since legal systems differ amongst EU countries, criminals can take advantage of the lack of communication that exists between national authorities. Networks of environmental professionals, such as the EU Network for the Implementation and Enforcement of Environmental Law (IMPEL), the EU Forum of Judges for the Environment (EUFJE) and the European Network of Prosecutors for the Environment (ENPE) engage in an important role in interchanging best methods and emerging procedures and technique for effective enforcement.

### **Malta's sources of Environmental Legislation**

In Malta, up until our accession to the European Union, Environmental Law was an unregulated area of law. Reference to this subject could only be found in the Code of Police Laws, wherein there were several dispositions regarding cleanliness, sanitation and the protection of old trees. There was also a Clean Air Act<sup>31</sup> that was concerned with black smoke from bakeries and industries. Today Malta is faced with plenty of primary and secondary legislation, especially in view of the numerous Directives and Regulations that are being issued in the European Union from time to time.

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31 Chapter 200 of the Laws of Malta.

Until very recent, the law which was the capstone on the protection of the environment was the Environmental Protection Act, known as Chapter 435 of the Laws of Malta<sup>32</sup> as amended by Act II of 2006 and Legal Notice 426 of 2007. This law had substituted a similar Act known as Chapter 348 of the Laws of Malta, which basically contained an affirmation of principles not directly enforceable in any court of law, although they were, as stated in the same Act, *'fundamental to the Government'* and should be used in the *'interpretation'* of the law.<sup>33</sup> This Act had signalled out the responsibilities of the Minister for the Environment, and made references to provisions dealing with toxic substances, noise energy control, environmental impact assessments and other ancillary provisions.

This legislation, namely the Environmental Protection Act under its Preliminary part, provided for a definition to the term environment. It stated that:

*'environment means the whole of the elements and conditions, natural or manmade, existing on earth, whether together or in isolation, and in particular:*

- (a) The air, water and land;*
- (b) All the layers of the atmosphere;*
- (c) All organic and inorganic matter and all living organisms;*
- (d) All ecosystems; and*

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32 Act V of 1991

33 Section 5 of the Environment Protection Act.

*(e) The landscape;*

The law also stated that it “*shall be the duty of everyone together with the government to protect the environment and to assist in the taking of preventive and remedial measures to protect the environment and manage natural resources in a sustainable manner.*”<sup>34</sup>

In the year 2002, the Malta Environment and Planning Authority,<sup>35</sup> better known as MEPA, was set up, and this piece of legislation had to care for planning and environmental matters. This Authority, however, did not last too long since a reform was taken on by the previous administration, which focused to have more transparency and consistency in the processing of applications that regarded development.

In the year 2010, Malta had the nascence of another law, known at the Environmental & Development Planning Act (EDPA).<sup>36</sup> This brought about a number of administrative changes within MEPA; In particular, it provided for the creation of four independent Directorates *id est*: (i) The Planning Directorate, (ii) the Environment Directorate, (iii) the Enforcement Directorate and (iv) the Corporate Services Directorate. Besides the establishment of a Chief Executive Officer, the introduction of full time Planning and Environment Commissions, and the setting up *ex novo* of a Planning Review Tribunal which in fact succeeded the previous Planning Appeals Board. This legislation infused the Environmental Protection Act and the old Development and Planning Act into one new law in a travail to reconcile on the one hand the development planning and on the oth-

34 Article 3 of Chapter 345 of the Laws of Malta.

35 Act VI of 2002

36 Chapter 540 of the Laws of Malta.

er environmental protection. However, it appears that the approach to environmental protection remained the same as provided in the previous Environmental Protection Act, that of a basic framework that clenched together the plexus of subsidiary legislation that makes up for the corpus of Environmental Law in Malta. It included legal notices which concern waste, noise pollution, soil, erosion and loss of wildlife, which also gave the same definition to the term environment as provided for in the previous legislation.<sup>37</sup>

However, this legislation too was further repealed, since the current administration was keen on having a demerger between the planning and environment incumbency.

### **The Environment Protection Act – 2016.**

This brings us to the current legislation with regards to the environment, enacted in 2016. It is known as the Environment Protection Act, whose aim is *‘to protect the environment and to assist in the taking of preventive and remedial measures to protect the environment and manage natural resources in a sustainable manner.’*<sup>38</sup> This Act gave a new definition to the term ‘environment’ and encapsulates the following:

*‘environment’ means the whole of the elements and conditions, natural or man-made, whether together or in isolation, and in particular:*

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37 Environmental Protection Act -Chapter 435 of the Laws of Malta  
 38 Article 3 of the Environment Protection Act, 2016.

(a) *The air, water, land, soil and sea, including their bedrock, aquifers and subsurface features;*

(b) *All the layers of the atmosphere;*

(c) *All biodiversity; and*

(d) *The landscape and its features”;*

This legislation provides both for those rights which are enforceable in a court of law, and those which are not. The unenforceable rights are found in the Second Part of this legislation, and consists mainly of a list of duties of who is responsible to protect the environment. As a premise it provides that *“it shall be the duty of every person and entity, whether public or private, to protect the environment and to assist in the taking of preventive and remedial measures to protect the environment and manage natural resources in a sustainable manner.”*<sup>39</sup>

The Law provides for the establishment of an Authority to be known as the Environment and Resources Authority and amongst its myriad functions set out in the Law itself it has the function to *“permit, assess, investigate, audit, monitor, and take action on, any activity, intervention, project, operation or land use that may have an effect on the environment.”*<sup>40</sup>

## **Criminal Responsibility**

Like all other traditional crimes the prosecution has to prove the *mens rea* and the *actus reus* of an offender,

<sup>39</sup> Article 3 of the Environment and Protection Act 2016

<sup>40</sup> Section 8 (1) (g) of the Environment Act

even in crimes dealing with the environment. Whereas the *actus reus* might be easy to prove if the resultant harm or damage ensues from the act of the offender, the *mens rea* is much harder to prove, since here we are talking about high-end crimes, wherein the offender has to have a certain knowledge about what he is doing. It is important that the prosecution proves that the offender acted knowingly that his actions could result in the consequences that it led to. The offender must know that what he did was wrong, or should have known that it was wrong. It is necessary to prove the same diligence similar to that of a *bonus pater familias*. The law does not provide for the level of knowledge that the offender must have in what he is doing, but in general if for example an offender makes use of some chemicals, then it is expected that he knows the results that can ensue from such use.

The Act maintains that any person who contravenes any regulation set out in said Act shall be guilty of an offence, and establishes a penalty not greater than a fine (multa) of two hundred and fifty thousand euro (€250,000) **or** to imprisonment for a term not exceeding two years. It mentions Article 21 of the Criminal Code, which gives the possibility to the deciding Judge to go below the minimum punishment prescribed in the law should there exist grave and serious reasons, and also excludes the applicability of the Probation Act for any offence established under this same sub-paragraph.

However, should the person being sentenced be a recidivist of a crime or contravention ensuing from the same regulation within such time as may be prescribed, he shall be liable to pay a higher fine (multa), not exceeding double

the fine (multa) which would otherwise have been inflicted, and for the purpose of this proviso the maximum fine that may be established by such regulations shall be five hundred thousand euro (€500,000):

It is interesting to note that in such an eventuality, such fine shall be due to the Authority as a civil debt, and that “*where the person guilty of the offence is a director, secretary or manager of a body corporate for the economic benefit of whom the offence was committed, such body corporate shall be liable in solidum with the offender for the payment of the said civil debt*”;

In other *lex specialis*, for example the Customs Ordinance<sup>41</sup>, we find a similar provision regarding the payment of fines that are inflicted by the Court for criminal offences, where one-third of such amount is considered as a civil debt owed and payable to the Department of Customs<sup>42</sup>, however nowhere in the Ordinance is there any reference to corporate liability, and also to such payment being due *in solidum* between the legal and natural person who acted on behalf of the company.

## **Corporate wrong-doing**

This arises when a person who acts on behalf of a company commits a wrong. It means that it would be necessary for the prosecution to determine who committed the wrongful act, and therefore who would be held responsible for such act and the consequences ensuing from

41 Chapter 37 of the Laws of Malta.

42 Section 62 proviso to sub section (o) of chapter 37 of the laws of Malta.

such act: the natural person or the legal company? This is the only piece of legislation in Malta where, if it results that the person who has been found guilty of an offence occupies the position of a Director, Secretary or Manager of a body corporate, he will be fined together with the company he represents, and the fine will be considered as a civil debt due to the Authority and will be liable *in solidum* by himself, together with the body corporate he represents. Under the Criminal Code of Malta and also in other legislations *lex specialis*, we do not have this *in solidum* responsibility, not even in the scenario where the Criminal Code speaks of corporate liability for offences.<sup>43</sup> This is something very new in our criminal legislation.

The writer safely points out that this type of corporate wrongdoing only exists when such act or omission was done by a natural person on behalf of the company. The Criminal amercement imposed for that particular offence will be attributed to the natural person who at the time of the commission of the offence was a Director, Manager, Secretary or other similar officer of the company, or who pretended to have such nomenclature when acting. Malta's Interpretation Act<sup>44</sup> however provides for a defence for this circumstance, in that it gives the legal person an op-

43 Section 121D of the Criminal Code provides that “Where an offence under this title has been committed by a person who at the time of the said offence is the director, manager, secretary or other principal officer of a body corporate or is a person having a power of representation of such a body or having an authority to take decisions on behalf of that body or having authority to exercise control within that body and the said offence was committed for the benefit, in part or in whole, of that body corporate, the said person shall for the purposes of this title be deemed to be vested with the legal representation of the same body corporate which shall be liable to the payment of a fine (*multa*) of not less than twenty thousand euro (€20,000) and not more than two million euro (€2,000,000), which fine may be recovered as a civil debt and the sentence of the Court shall constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure:

*Provided that where legal representation no longer vests in the said person, for purposes of this article, legal representation shall vest in the person occupying the office in his stead or in such person as is referred to in this article”.*

44 Section 13 of the Interpretation Act Chapter 249 of the Laws of Malta.

portunity to prove that the offence in question took place without the knowledge of the company, and that it exercised all due diligence to prevent the commission of the offence, in which later case criminal responsibility will rest exclusively with the natural person alone. Wrong doing attributed to a company also has civil spin-offs, when once again the general principles will apply. In those cases where fault has been attributed to a natural person alone, then responsibility rests with him, and civil liability cannot be attributed to the company he holds office with.

However, if responsibility is attributed to accompany, then the natural persons making up this legal entity would be spared from prosecution in their personal capacity, since they would not have been acting as mandatories or representatives of the company. If however, such natural persons acted outside the scope of their competence, then they could still be held responsible civilly<sup>45</sup> for their wrong doing and resulting damages. In addition however, if it is proven that the company employed an incompetent person, then it can be held responsible for *culpa in eligendo*<sup>46</sup> or if it failed to assign or oversee tasks competently, there would be *culpa in vigilando*.

In Malta, unlike other forward-looking jurisdictions, we do not have regimes that regulate officer responsibility based on vicarious, if not strict liability, for corporate environmental damage like the US Federal Law, as opposed to more traditional forms of liability based on fault.

## **Functions of officers employed under the Environ-**

45 Section 1038 Civil Code of Malta.

46 Section 1037 Civil Code of Malta.

## **mental Regulatory Authority**

The officers appointed by the Authority to carry out their functions under this Act, may be authorised by the Authority to enter any premises, public or private, vehicle, vessel or any other place with the assistance of the Police Force, for various purposes stated in the law, particularly:-

(a) The making of investigations, inspections, surveys, tests or measurements, or lifting of samples;

(b) Ascertaining that nothing contrary to the provisions of this Act, to the regulations made thereunder or to any term, condition, limitation or specification attached to any authorisation issued under this Act is taking or has taken place, and taking any action accordingly;

(c) Ascertaining or reproducing such data or information as the Authority may require;

(d) Making plans of any premises, vehicle or vessel and taking photographs of the same after entry or boarding in accordance with this article; or

(e) Doing anything that is ancillary or consequential thereto.

Any person who obstructs, threatens, attacks or impedes any officer of the Authority in the exercise of his duties under the Act shall be guilty of an offence and shall, on conviction, be liable to imprisonment not exceeding three years or to a fine (multa) of not more than one hun-

dred thousand euro (€100,000) or to both such fine and imprisonment.

It is ironical to note that the legislator is giving more protection to officers who act in consonance with this Act than to other public officers. This is being said because the Criminal Code of Malta provides a lesser punishment in the case of vilification, threats or bodily harm against a public officer (naturally not being an officer employed by the Environment Protection Act). It provides that whosoever shall:

*“revile, or threaten, or cause a bodily harm to any person lawfully charged with a public duty, while in the act of discharging his duty or because of his having discharged such duty, or with intent to intimidate or unduly influence him in the discharge of such duty, shall, on conviction, be liable to the punishment established for the vilification, threat, or bodily harm, when not accompanied with the circumstances mentioned in this article, increased by two degrees and to a fine (multa) of not less than eight hundred euro (800) and not more than five thousand euro(5,000)”*.

Similarly even in the case of assault or resistance against a public officer lawfully charged with a public duty (not one ensuing from the Environment Protection Act) when in the execution of the law or of a lawful order shall, on conviction, be liable -

*(a ) Where the assault or resistance is committed by one or two persons, to imprisonment for a term from six months to two years*

*and to a fine (Multa ) of not less than four thousand euro (4,000) and not more than ten thousand euro (10,000);*

*(b ) Where the assault or resistance is committed by three or more persons, to imprisonment for a term from nine months to three years and to a fine (Multa ) of not less than five thousand euro (5,000) and not more than fifteen thousand euro (15,000).*

The Criminal Code provides for an aggravating circumstance when any of the offenders as mentioned in the last preceding paragraph shall use any arm proper in the act of the assault or resistance, or shall have previously provided himself with any such arm with the design of aiding such assault or resistance, and shall, on apprehension, be found in possession of any such arm, he shall be liable to imprisonment for a term from one year to four years and to a fine (multa) of not less than eight thousand euro (8,000) and not more than twenty thousand euro (20,000).

Act V of 2014 provided an important amendment to the Criminal Code due to the increase in offences against public offices being reported which states that likewise in these offences Article 21 of the Criminal Code shall not apply<sup>47</sup>. Similarly as provided in this Environment Protection Act any fine (multa) to which the person convicted has been sentenced to pay may be recovered as a civil debt and the sentence of the Court shall constitute an executive title for all intents and purposes of the Code of Organization

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47 Section 99A (2) of the Criminal Code.

and Civil Procedure<sup>48</sup>.

## Compliance

Under the sub title of Enforcement and Control in the Environment Protection Act, the law provides that in order to ensure compliance, officers appointed by this Authority are given powers similar to those powers given to Police Officers under the Criminal Code.<sup>49</sup> They may order moving vehicles or vessels to stop, and they may open any cargo or goods area and displace goods as instructed to enable the officers to carry out immediate, on the spot inspections, investigations and monitoring<sup>50</sup>. This provision however may end up constituting the merits of a constitutional case, since such officers do not know the fundamental rights that wrong doers face prior to criminal trials, namely their right to silence, and their right against self-incrimination. Thus, should a transgressor be questioned by an officer of the Authority, and thus expose himself to self-incrimination without *a priori* being duly cautioned of his rights, which may lead to the whole investigation being nullified if contested in a court of law. Thus, it is the opinion of the author that it is more opportune that such officers assist the police in carrying out such duties and should not take the primary role of investigators, especially since the law provides further that such officers may also assist the police in the conduct of prosecution for offences under this Act, and to plead the case on behalf of

48 Section 99A (3) of the Criminal Code.

49 Section 351 and Section 355 of the Criminal Code.

50 Section 75 of the Environment Protection Act.

the prosecution.

## **Administrative Penalties**

The Environment Protection Act also provides for a special procedure which can be followed by the Authority, instead of proceeding with a criminal prosecution in that it may impose an administrative fine upon any person<sup>51</sup>, in lieu of taking such person to Court to face criminal charges. This can be done in all cases where the offender:

*(a) Infringes any provision of this Act, regulations prescribed thereunder or of any other law with which the Authority is entitled to secure compliance and to enforce; or*

*(b) Who fails to comply with any directive or decision given by the Authority whether under this Act, regulations prescribed thereunder or under any other law with which the Authority is entitled to secure compliance and to enforce; or*

*(c) Who fails to abide by any stop order or compliance order and the provisions therein; or*

*(d) Who fails to comply with any condition of any authorisation granted under this Act, including with failure to provide data or information required in authorisation conditions in a timely and/or appropriate manner:*

This special procedure can be applicable both on a

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51 Section 90 (1) of the Environment Protection Act.

natural person as well as, or together with, a legal person, if it is proven that the act was committed with the consent, or involvement of, or is attributable to any gross negligence on the part of a person being a director, manager, secretary or other officer. In such case, the natural person will be liable jointly and severally, together with the body corporate for the payment of any administrative penalty imposed by the Authority as a consequence of the said infringement. Such an administrative fine imposed shall not exceed one hundred thousand euro (€100,000) for each contravention or one thousand five hundred euro (€1,500) for each day of non-compliance, from the date of the notice of the imposition of the administrative fine given by the Authority.

The Authority, before imposing an administrative penalty shall give notice of the administrative penalty that may be imposed by the Authority, give notice of the specific reason why such penalty may be imposed, give notice of the amount of the penalty; and demand that the person concerned rectify the acts or omissions committed by such person and, or make submissions to the Authority within a specified time:

Provided further that the person against whom an administrative penalty may be imposed, shall be given a reasonable opportunity during such period of time as may be stipulated in the notice to make submissions to the Authority and to propose any remedies that rectify the acts or omissions required by the Authority to be so rectified.

Provided that if the person concerned, after having been bound in writing as stated above, fails to remedy the infringement to the Authority's satisfaction within the

period established by the Authority or fails to abide with any terms or conditions agreed to in writing, the Authority shall impose against such person an administrative penalty for such failure, in addition to the administrative penalty which may be imposed for the infringement itself.

Here again Officers of the Authority are given more authority than Police Officers with regards to the imposition of on-the-spot fines, since they can impose such fines provided that they do not exceed a maximum amount of one thousand euro (€1,000), for offences and to amounts as shall be prescribed in regulations issued by the Minister. The Police have no authority to impose any on the spot fines.

This provision of imposing an administrative fine , is similar to the provision that is found in the Customs Ordinance<sup>52</sup>, where:

*“the Commissioner of Customs may, only as far as the provisions of that Ordinance are concerned, and without prejudice to any other proceedings to which the offender may be liable under any other law, enter into an agreement in writing with the offender whereby the said offender pays a sum equivalent to the fine (multa) that would be due by way of penalty in accordance with the provisions of this Ordinance, and upon the signing of any such agreement by the Commissioner and the offender, all criminal liability of the offender under this Ordinance, with regard to the offences in relation to which the agreement has been entered, shall be extinguished: Provided that any*

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52 Section 63A (1) of the Customs Ordinance

*forfeiture contemplated in the Ordinance as a consequence to the offence to which the agreement relates, shall notwithstanding such agreement, still take effect unless the offender elects to pay also to the Commissioner, a sum equivalent to the value of the goods forfeited together with any amount of duty or levy due thereon.*

### **Out of court settlements.**

The Environment Protection Act, similarly to the Customs Ordinance, provides for an extinction of the criminal action in those cases where the offender has already been charged before a court in relation to the offence, but before final judgment is given. According to the Environment Protection Act, the Authority is still given the right to reach an out-of-court settlement<sup>53</sup> despite criminal action being instituted, notwithstanding any other law providing for the trial and punishment of offences. The Authority may enter into an agreement in writing with such person describing the offence of which the person is accused, indicating the steps to be taken to remedy the offence, and a penalty which is agreed to be paid in respect of that offence as shall be prescribed in regulations made by the Minister.

### **Offences**

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53 Section 83 of the Environment Protection Act.

Part VIII of the Act<sup>54</sup> lists the various offences that can be prosecuted before a court of law<sup>55</sup>. Namely

*(1) Any person who -*

*(a) Carries out any activity without an authorisation as in force at the time of such activity, or, if the activity is carried out with an authorisation, fails to comply or to cause compliance with any condition, restriction or other limitation to which the authorisation is subject; or*

*(b) Acts in contravention of any of the provisions of article 70 in respect of any protected area, or an emergency conservation order; or*

*(c) Having been served with a stop or compliance order or other order under article 76 fails to comply with any of the requirements of such notice within the time therein specified; or*

*(d) Attempts to hinder, obstruct, threaten, molest or interfere with, any officer of the Authority, or relatives thereof, or any police officer, or any public officer, or any officer of any department of Government or of any entity of Government or of any local council, in the execution of his duties under the law or fails to comply with any reasonable requirement demanded of him by any such person as aforesaid or otherwise to assist him in the carrying out of the said duties, or knowingly furnishes such person with false information or neglects*

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54 The Environment Protection Act

55 Section 84 of the Environment Protection Act.

*or refuses to give any information required for the purpose aforesaid; or*

*(e) Makes a declaration for any of the purposes of this Act which is false, misleading or incorrect in any material respect, shall be guilty of an offence against this Act and shall be liable, on conviction, to a fine (multa) of not less than one thousand five hundred euro (€1,500) and not exceeding two million five hundred thousand euro (€2,500,000), and in respect of an offence under paragraph (d) or, in the case of an offence under paragraph (c) if the offender persists in the offence for more than three months, also to imprisonment for a term of not less than three months and not exceeding three years”:*

The Court, besides awarding the punishment referred to previously, may confiscate the *corpus delicti* where applicable, and shall order the offender to remove the causes of the offence and to undo anything which was done without an authorisation, or to comply with the conditions imposed in the authorisation as the case may be, within a time sufficient for the purpose, but in any case not exceeding three months from the date of the judgment, to be fixed by the court; and, if the offender fails to comply with any such order within the time so fixed, he shall be liable to a fine (multa) of not less than fifty euro (€50) and not more than one hundred and thirty euro (€130), as the court may fix, for every day the default continues after the expiration of the said time and the Court may also order the modification, suspension or revocation of any authorisation.

This provision is similar to a provision found in the

Criminal Code<sup>56</sup> though which may appear less onerous which provides that:

*The court may, notwithstanding any punishment to which it may sentence the offender, order him to remove any nuisance or inconvenience to which the offence relates, or, according to circumstances, to conform with the law, within a time, sufficient for the purpose but in any case not exceeding three months from the date of the judgment, to be fixed by the court; and, if the offender fails to comply with any such order within the time so fixed, he shall be guilty of an offence and shall, on conviction, be liable to a fine (ammenda) of not less than four euro and sixty-six cents (4.66) and not more than twenty-three euro and twenty-nine cents (23.29) for every day during which the default continues after the expiration of the said time.*

### **Strict liability**

Similar to the situation under the EU Directive above mentioned 208/99EC, under the national laws which deal with the environment we have no provisions for offences which are of strict liability. Strict liability is imposed “ *in the absence of fault, knowledge, intent, negligence, breach of contract, or any other direct or indirect wrong doing by the person held responsible.* <sup>57</sup>” The idea behind strict liability would be that there will always be a person liable for

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<sup>56</sup> Section 377(3) of the Criminal Code.

<sup>57</sup> Smith Bruce C: Avoiding Environmental Liability (1992) [http://www.mmmlaw.com/publications/article-detail.asp? Serviced=10articleid=88](http://www.mmmlaw.com/publications/article-detail.asp?Serviced=10articleid=88).

the offence for example to carry out clean-up costs in case of a hazardous substance being disposed of. In which later case the only remedy for such a person may be to claim contribution from any other potentially liable persons. It is the author's opinion that this line of reasoning has two facets to the coin. On the one hand this concept is very severe and can be considered that it runs contrary to the principles of fairness and justice. Whereas, on the other hand it certainly strengthens the protection that is to be afforded to the environment. The purpose of such liability is not to find scapegoats to pay for the costs of the environmental damage should it occur but acts as a preventive measure.

## **Conclusion**

It is to be noted that despite the fact that Malta has set in motion a good law that can reduce environmental crime, due to the stringent fines the Courts can impose in case of guilt, it appears that it still has great problems in enforcing and monitoring its laws, possibly due to lack of personnel attached to the Authority. From an enquiry carried out by the author together with the prosecution unit of the Police force in Malta, it appears that so far not one person has been arraigned and charged with any of the offences mentioned in the Environment Act, contrary to what is the current position in a number of EU Member States. To this effect, it is of particular relevance for the author to refer to the empirical evidence gathered in the study carried out by Almer and Goeschi, in their paper dealing with the situation of Germany. The study analysed data to sustain

Environmental Criminal Law, and found that there was a similarity between the rate in environmental crime on the one hand, and the number of wrong doers brought to court on the other. It concluded that:

*an increase in the rate of tried offenders of one percentage point will decrease environmental crime at about 0.9% to 1%. In the case of the prison rate, the deterrence effect is even larger. An increase of the prison rate of one percentage point results in a decrease in reported environmental crime rate of 1.3% to 1.6%.”<sup>58</sup>*

Another reason which the author suggests could affect the poor number of environmental cases reaching the courts, is that prosecution in such cases is very expensive, especially when talking about the appointment of experts or the carrying out of scientific experiments. Thus, traditional crimes seem to take priority over those cases where environmental harm ensues.

It also appears that prosecution for environmental crimes calls for specialised public prosecutors and judges who are adroit in this field of law, and are thus in a position to appreciate the prosecution of such offences which demand suitable sanctions. Here again, although we may have particular police officers assigned to work related solely to the environment, still no specialised courts exist. So far, here in Malta we only have a Magistrates Court which handles an Administrative Law enforcement sitting and deals particularly with offences regarding fauna and flora, namely offences regarding bird hunting and trapping.

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58 Christian Almer and Timo Goerschi. Environmental Crime and punishment Empirical evidence from the German Penal Code. Land Economics (November 2010)

Thus, it is the belief of the author that for smooth running of this law, better compliance and enforcement is needed.