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The Utopia of the Harmonization of Legal Frameworks to Fight against Transnational Organized Environmental Crime

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Abstract: This paper aims to reflect on the challenges faced by the harmonization of legal frameworks as a strategy to globally address transnational organized environmental crime, taking into consideration the difficulties experienced at a regional level, in the EU. The focus will be specifically on the harmonization of sanctions, due to the impact that this issue has on the application of UNTOC (United Nations Convention against Transnational Organized Crime). With this aim, the implementation of Directive 2008/99/EC on the protection of the environment through criminal law is analysed to check the extent to which the harmonization of sanctions was reached five years after the due date for the transposition of the Directive. This paper also highlights that, beyond political will and European criminal competences, harmonization is a matter of legal culture, which renders the challenge even more complex.

Keywords: transnational organized environmental crime; harmonization; legal frameworks

1. Introduction

In 2015, the Global Initiative Against Transnational Organized Crime, in collaboration with the World Wildlife Fund (WWF), published a report entitled “Tightening the Net: Toward a Global Legal Framework on Transnational Organized Environmental Crime” (onwards, the GI Report) [1]. This report, the lead author of which is Amanda Cabrejo, is one of numerous reports written by experts in the framework of international organizations, inviting stakeholders from different fields to engage in a broader global conversation on this topic.

This paper aims to delve into some of the legal issues covered by the GI Report. More specifically, this paper critically analyses from a European Union (onwards, EU) perspective, the harmonization of national legal frameworks as a means to address transnational organized environmental crime.

Addressing environmental crime is key to sustainability as it seriously threatens environmental quality, natural resources and biodiversity. In fact, environmental crime can be broadly defined as any illegal act related to the exploitation of natural resources that causes harm to the environment. In this broad sense, the term is internationally used regardless of the nature of the legal response that such activities receive (administrative, civil, criminal). It encompasses (1) wildlife crime (illegal fishing; trafficking of specimens of protected species of fauna and flora; illegal logging and trade of timber products); (2) pollution crime (illegal transportation and dumping of hazardous waste, and illegal production of and trade in ozone-depleting substances); and (3) illegal mining.

For the most part, this classification follows the GI Report, adding only illegal mining to it. As Spapens and Huisman point out, “To green criminologists, however, the concept of environmental crime is still too narrow because it does not include equally harmful acts to the environment that have not (yet) been criminalized” [2]. In this sense, according to White, “In its more expansive definition,

as used by green criminologists, transnational environmental crime includes: (a) transgressions that are harmful to humans, environments and non-human animals, regardless of legality per se; and (b) environmental-related harms that are facilitated by the state, as well as corporations and other powerful actors, insofar as these institutions have the capacity to shape official definitions of environmental crime in ways that allow or condone environmentally harmful practices" [3] (3).

The threat to sustainability is becoming more and more serious as environmental crime is increasingly transnational. Offenders, victims, execution, and impacts can involve more than one nation. According to article 3(2) of the United Nations Convention against Transnational Organized Crime, signed in Palermo in 2000, "an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State".

In turn, the concept of transnational organized environmental crime refers to cross-border environmental crimes involving organized criminal groups, syndicates and networks, which act in concert to obtain, directly or indirectly, a financial or another material benefit. Transnational organized environmental crime, like any other form of transnational organized crime, involves, in practice, a wide range of associated offences such as money laundering, tax evasion, fraud and corruption, thus having serious short- and long-term economic, social, political and environmental local and global impacts. On 21 November 2016, the UN General Assembly recognized, for the first time, environmental crime as a type of transnational organized crime [4].

Data shows that the European Union is one of the major waste producers in the world as well as one of the largest global markets for wildlife trade, becoming hereby an ideal setting for environmental crime [5,6]. Despite the significant EU policy commitments and the efforts made regarding regulation and law enforcement over recent years, the EU is still an important origin, transit and destination market for different types of illegal trade that threatens peace, security, biodiversity, sustainable development and regional stability [7–11].

Transnational environmental crime as a research topic is gaining interest from academics across the world [12,13]. There is a strong consensus on the need for a holistic approach and a coordinated international response. In this regard, specific attention needs to be given to the legal strategies that international and European environmental agencies and organizations recommend to best address this issue. These are characterized by a transnational and highly valuable practical perspective of the issue, as they involve both non-legal and legal experts, some belonging to different environmental crime investigation and prosecution services.

The GI Report identifies two main ways of implementing a global criminal law perspective to address the issue of transnational organized environmental crime. A bottom-up approach would focus on fostering renewed legal frameworks at the national level, with the aim to fully include environmental crime in the scope of application of the United Nations Convention against Transnational Organized Crime (onwards, UNTOC). As UNTOC applies only to "serious crimes" as defined in article 2 of the Convention, in practice this would mean that all countries should consider environmental crime as an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. The top-down approach would instead focus on global legal frameworks impacting on national laws. This option refers specifically to the possibility of passing a new protocol to the Convention, which would place obligations on States parties that they would have to implement through their national legislation.

The GI Report stresses that whatever the choice, a global criminal law approach should entail the following: a wider criminalization of the issue; harmonization of national laws; reinforced international cooperation; and expansion of national jurisdictions [1] (33). In turn, when it comes to harmonization, the report points out that a global criminal law approach should aim at harmonizing national laws by promoting internationally agreed definitions, requiring specific legislative and other measures,

creating guidelines or requirements for harmonized and appropriate penalties, and providing for harmonized treatment of ancillary offences [1] (34).

This paper aims to reflect on the challenges faced by the harmonization of legal frameworks as a strategy to globally address transnational organized environmental crime, taking into consideration the difficulties experienced at a regional level, in the EU. The focus will be specifically on the harmonization of sanctions, due to the impact that this issue has on the application of UNTOC.

With this aim, in Section 2, I will use the Directive 2008/99/EC on the protection of the environment through criminal law as a case study [14]. Its implementation has been part of a project supported by the Programme for Criminal Justice of the EU, a framework on which I conducted a comparative analysis of criminal sanctions across the EU. The results are a valuable example of the feasibility of the harmonization of sanctions in practice.

To put into context the findings reached in Section 2, in Section 3, I will stress some of the theoretical challenges of harmonization. In doing so, I will highlight the principles of criminal law that are potentially threatened in such a process, as this is a critical point in the European scholarly debate.

2. The Feasibility of the Harmonization of Criminal Sanctions at the Regional Level. Case Study: The Directive 2008/99/EC on the Protection of the Environment through Criminal Law

In 2008, the European Union passed the Directive 2008/99/EC on the protection of the environment through criminal law. The due date for the transposition of the Directive was 26 December 2010.

The Directive intended to respond to two concerns related to environment protection: (1) the rise in environmental offences, the effects of which extend beyond the borders of the States in which the offences are committed; (2) the insufficiency of penalties in the existing national systems to achieve complete compliance with the laws for the protection of the environment.

The Directive obliges Member States to enforce criminal law for serious infringements of provisions of European Union law on the protection of the environment. The Directive specifies this obligation by describing, in article 3, nine conducts that constitute criminal offences when unlawful and committed intentionally or with at least serious negligence:

- (a) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- (b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- (c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;
- (d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- (e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- (f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a

- negligible impact on the conservation status of the species;
- (g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
- (h) any conduct which causes the significant deterioration of a habitat within a protected site;
- (i) the production, importation, exportation, placing on the market or use of ozone-depleting substances.

Additionally, the Directive obliges Member States to ensure that inciting, aiding and abetting those intentional conducts will also merit a criminal sanction and that legal persons can be held liable for those same offences. In particular, legal persons must be able to be held liable where such offences have been committed for their benefit 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 on the following: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person. Member States will also ensure that legal persons can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in articles 3 and 4 for the benefit of the legal person by a person under its authority.

In order to avoid that hazardous activities or businesses can benefit from the legal disparities between states, criminal sanctions should be harmonized. However, the Directive does not specify the typology of criminal sanctions and does not establish a minimum or a maximum level for them. Consistent with the pre-Lisbon legal basis used to pass the Directive, it just underlines in article 5 that penalties have to be “effective, dissuasive and proportionate” (a notion held by the European Court of Justice in the so-called Greek Corn Case) [15,16].

2.1. Materials, Methods and Limitations

A comparative analysis of the criminal sanctions introduced by the 28 EU Member States when implementing the Directive 2008/99/EC has been undertaken in the framework of the Project to create a European Network against Environmental Crime coordinated by SEO/BirdLife. Data was obtained from (1) the national reports on the implementation of Directive 2008/99/EC sent to the European Commission in December 2012; (2) a report for Croatia prepared by Milieu Ltd. (Brussels, Belgium) available in December 2015; and (3) 14 questionnaires on implementation of Directive 2008/99/EC (Bulgaria, Czech Republic, Germany, Greece, Hungary, Lithuania, Luxembourg, Malta, Portugal, The Netherlands, Italy, United Kingdom, Spain and Sweden).

The comparison takes into account two indicators: the typology and the severity of criminal sanctions described for offences committed intentionally.

Regarding the typology of the sanctions, the analysis focuses on imprisonment and fine. Information on other penalties such as probation, community service, disqualification, and so on, is mostly not contained in the national reports on the implementation of the Directive, and therefore could not be analysed and compared.

As a result of the flexibility that Member States have in the implementation of Directives and the existence of previous legislation on environmental crimes in many of them, some offences of the Directive are split into different national offences. When this occurs and the typology of criminal sanction used is not the same in all of them, the map in the next section will refer to the typology most used by that Member State for that group of national offences. If two options are used the same number of times, the most severe option is considered.

Regarding the severity of sanctions, the focus must be exclusively on imprisonment due to the lack of information in the national reports about the different systems used across the EU to calculate the criminal fine amount.

Since not all Member States prescribe minimum imprisonment penalties, only maximum imprisonment penalties can be compared. For this point, it is important to bear in mind that the study faces important limitations since a conclusive analysis should take into consideration the whole

criminal system of each Member State. Specific aggravating factors and other national sentencing rules applying to these offences are not always reflected in the national reports and can severely affect the outcomes. For instance, Member States describing the penalty that applies when the offence has been committed by organized crime or when the death of any person has been caused, can appear as much more severe than other Member States that do not reflect these circumstances when describing the offences, even though the same circumstances might exist in their criminal legislation, resulting in a more severe punishment.

When Member States split the offences defined in the Directive into different national offences, the analysis takes into consideration only the maximum penalty within each group of national offences.

2.2. Results

The analysis of the national reports shows that five years after the due date for the transposition of the Directive (2015), there was a high degree of compliance with the following main goal of the Directive: the use of criminal law to enforce legislation implementing environmental directives. Member States use criminal (or quasi-criminal) sanctions to punish the conducts described in article 3 of the Directive. However, in terms of harmonization, significant disparities, both in the typology and severity of the penalties, can be observed.

The following 18 maps—created with mapchart.net for the purposes of this paper—show the results for both indicators, offence by offence. The colours show the extent to which the harmonization of sanctions was reached. Diverse colours indicate less harmonization.

Regarding the typology of sanctions (Figures 1–9), Member States use six different options: (1) Only imprisonment; (2) Imprisonment and fine; (3) Imprisonment or fine; (4) Imprisonment and/or fine; (5) Imprisonment with or without fine; (6) Only (criminal) fine. Percentages of the use of each option have been added at the bottom of each figure.

Regarding the severity of the penalties (Figures 10–18), it can be observed that maximum terms of imprisonment can be notably different from Member State to Member State. It is important to recall that maximum terms of imprisonment of less than four years mean that UNTOC is not applicable.

Figures 1–9: Types of criminal sanctions:

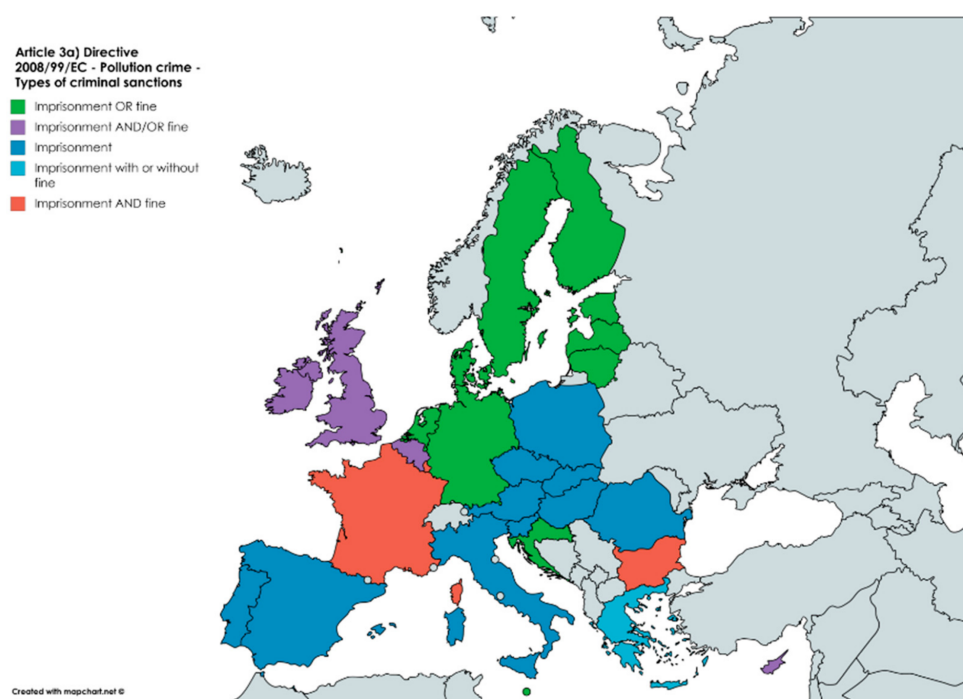


Figure 1. Article 3a). Results: Imprisonment or fine (36%); Imprisonment and/or fine (14%); Imprisonment (36%); Imprisonment with or without fine (3%); Imprisonment and fine (11%).

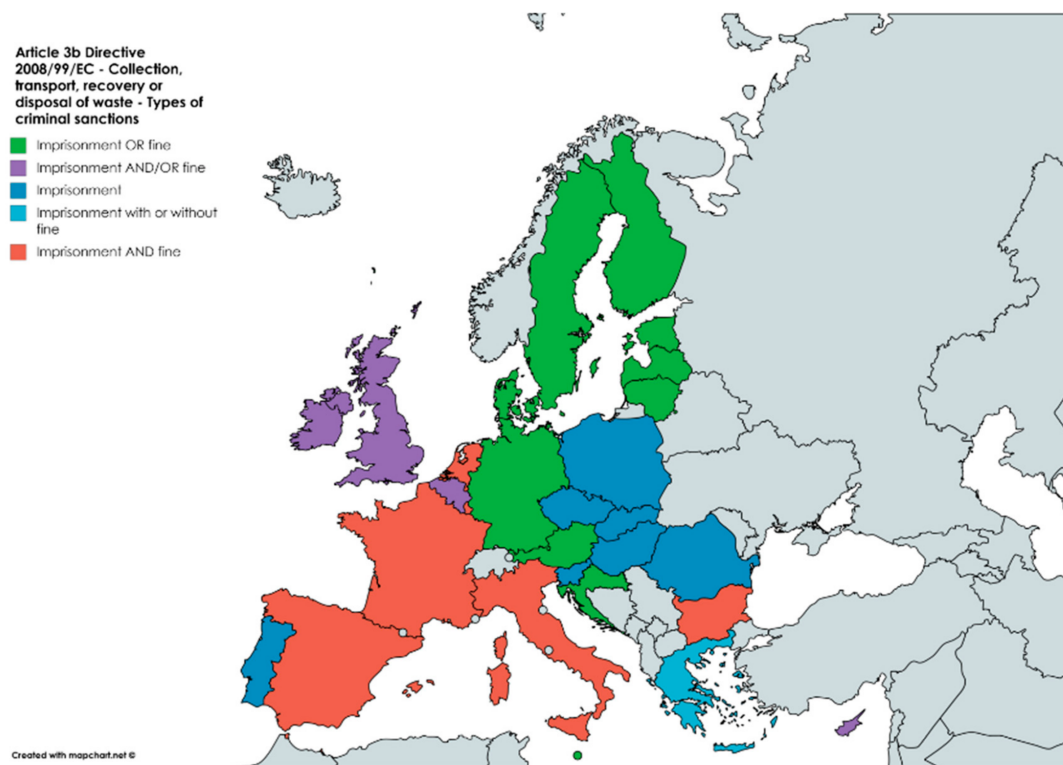


Figure 2. Article 3b). Results: Imprisonment or fine (36%); Imprisonment and/or fine (14%); Imprisonment (25%); Imprisonment with or without fine (4%); Imprisonment and fine (21%).

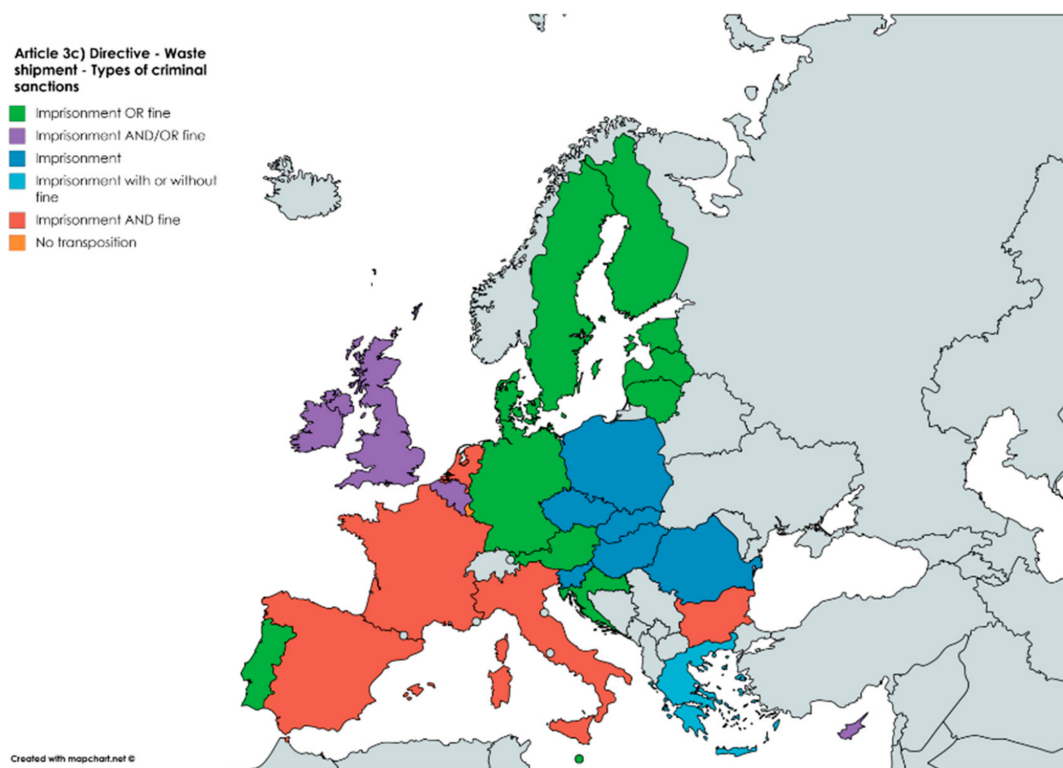


Figure 3. Article 3c). Results: Imprisonment or fine (39%); Imprisonment and/or fine (14%); Imprisonment (21%); Imprisonment with or without fine (4%); Imprisonment and fine (18%); No transposition (4%).

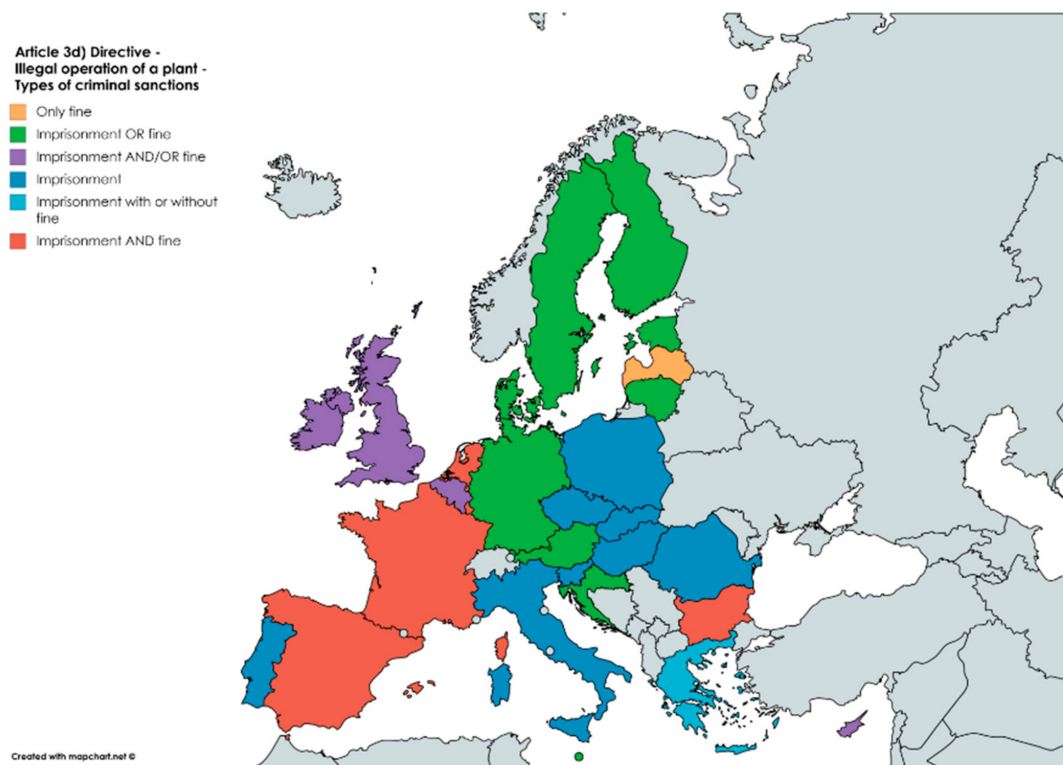


Figure 4. Article 3d). Results: Imprisonment or fine (32%); Imprisonment and/or fine (14%); Imprisonment (29%); Imprisonment with or without fine (3%); Imprisonment and fine (18%); Only fine (4%).

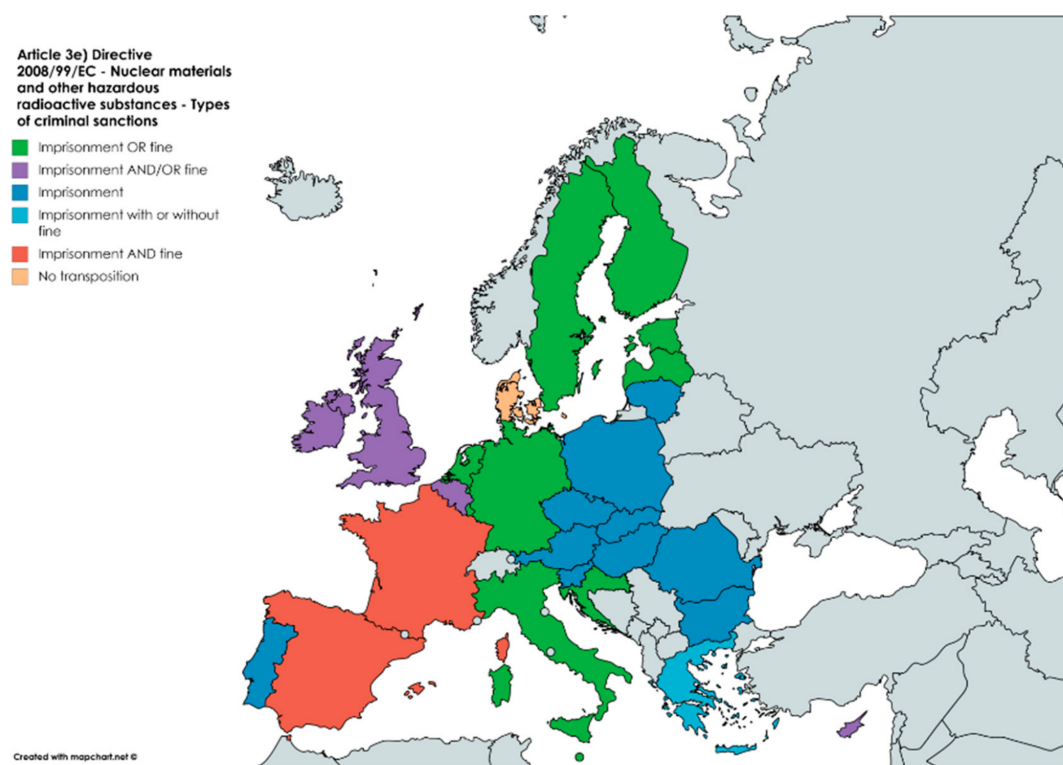


Figure 5. Article 3e). Results: Imprisonment or fine (36%); Imprisonment and/or fine (14%); Imprisonment (36%); Imprisonment with or without fine (3%); Imprisonment and fine (7%); No transposition (4%).

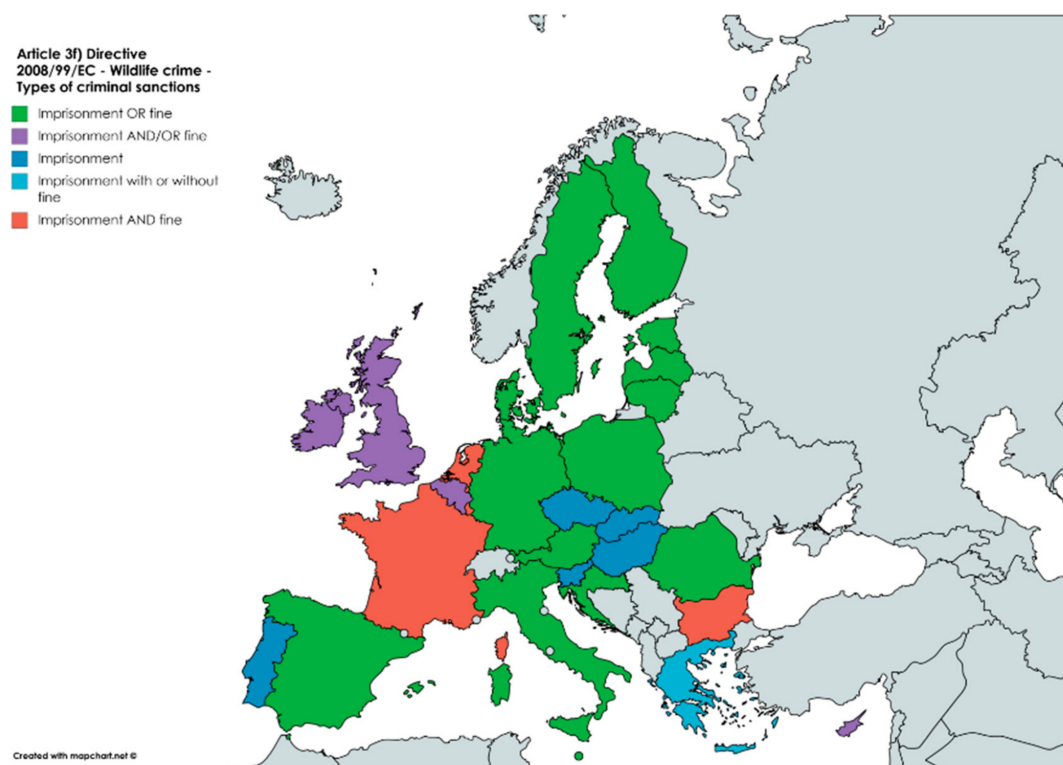


Figure 6. Article 3f). Results: Imprisonment or fine (50%); Imprisonment and/or fine (14%); Imprisonment (18%); Imprisonment with or without fine (4%); Imprisonment and fine (14%).

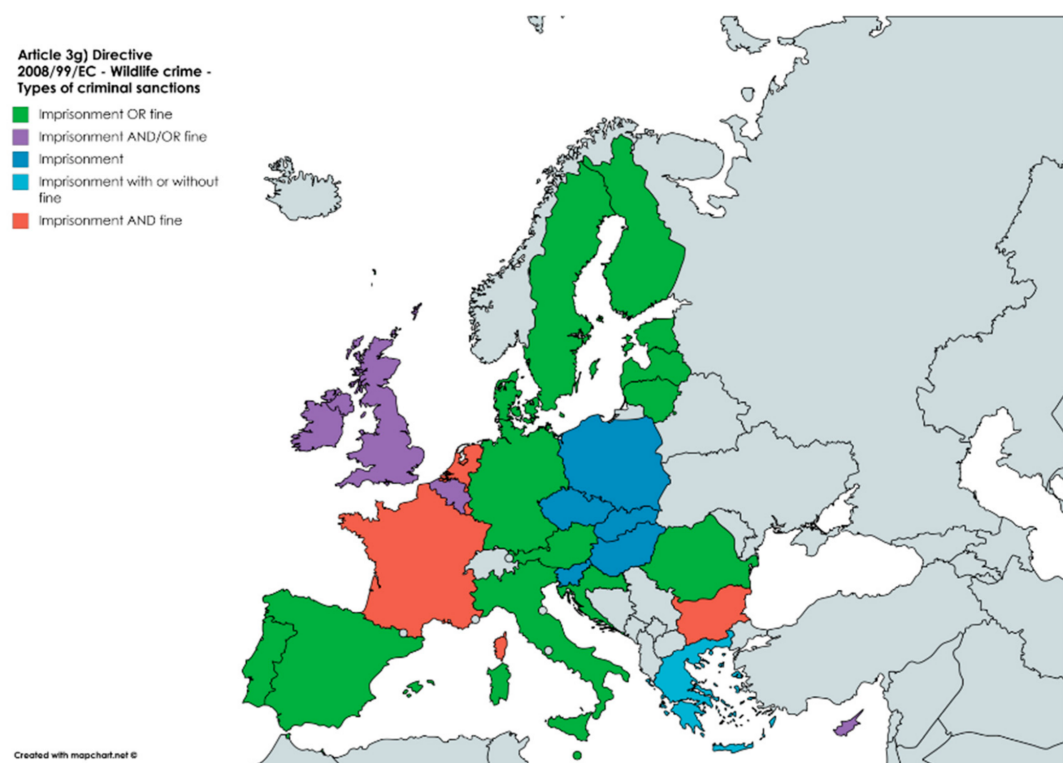


Figure 7. Article 3g). Results: Imprisonment or fine (46%); Imprisonment and/or fine (14%); Imprisonment (18%); Imprisonment with or without fine (4%); Imprisonment and fine (18%).

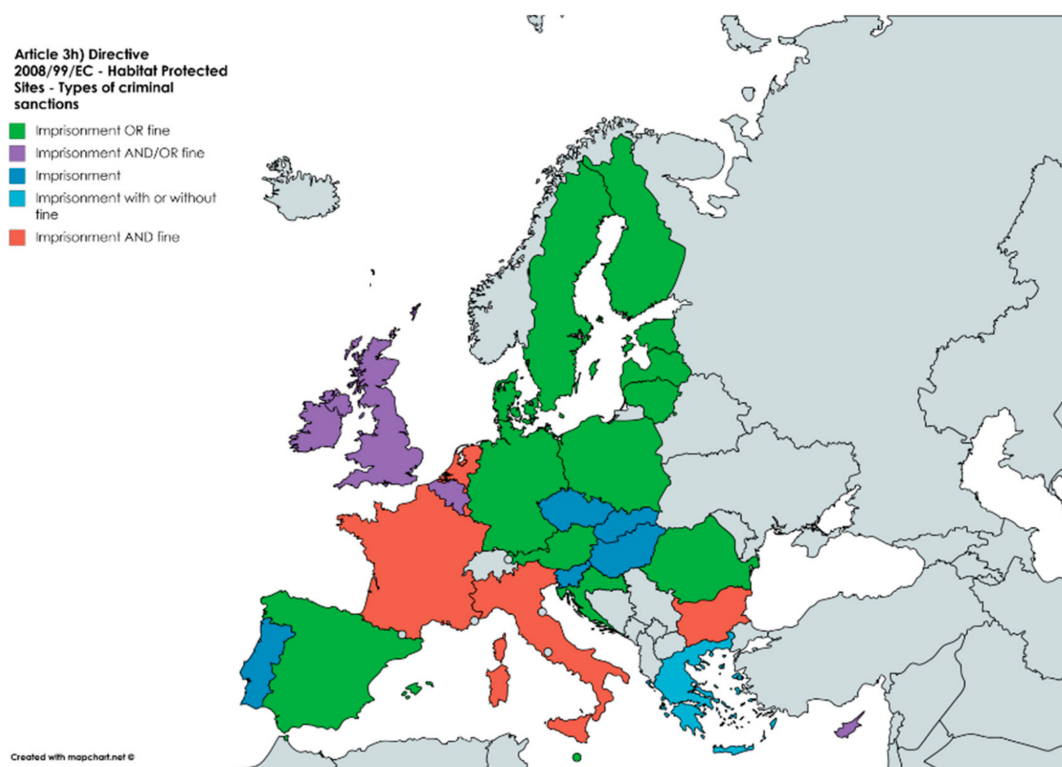


Figure 8. Article 3h). Results: Imprisonment or fine (46%); Imprisonment and/or fine (14%); Imprisonment (18%); Imprisonment with or without fine (4%); Imprisonment and fine (18%).

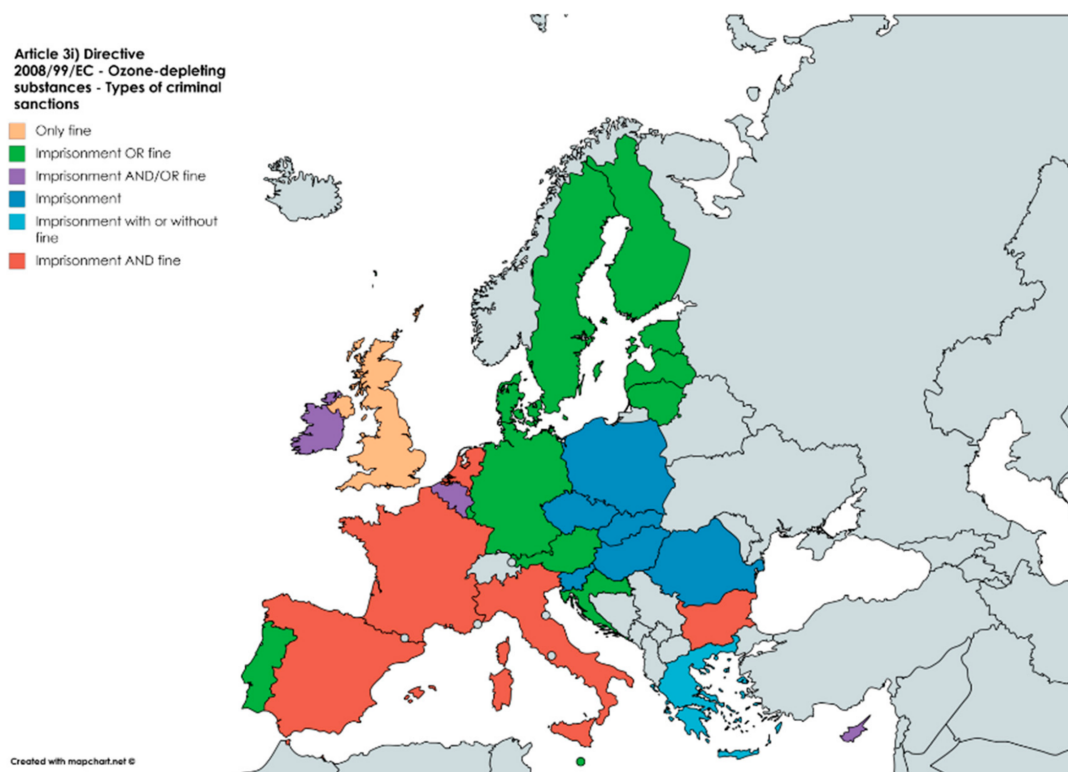


Figure 9. Article 3i). Results: Imprisonment or fine (43%); Imprisonment and/or fine (11%); Imprisonment (21%); Imprisonment with or without fine (3%); Imprisonment and fine (18%); Only fine (4%).

Figures 10–18: Maximum terms of imprisonment:

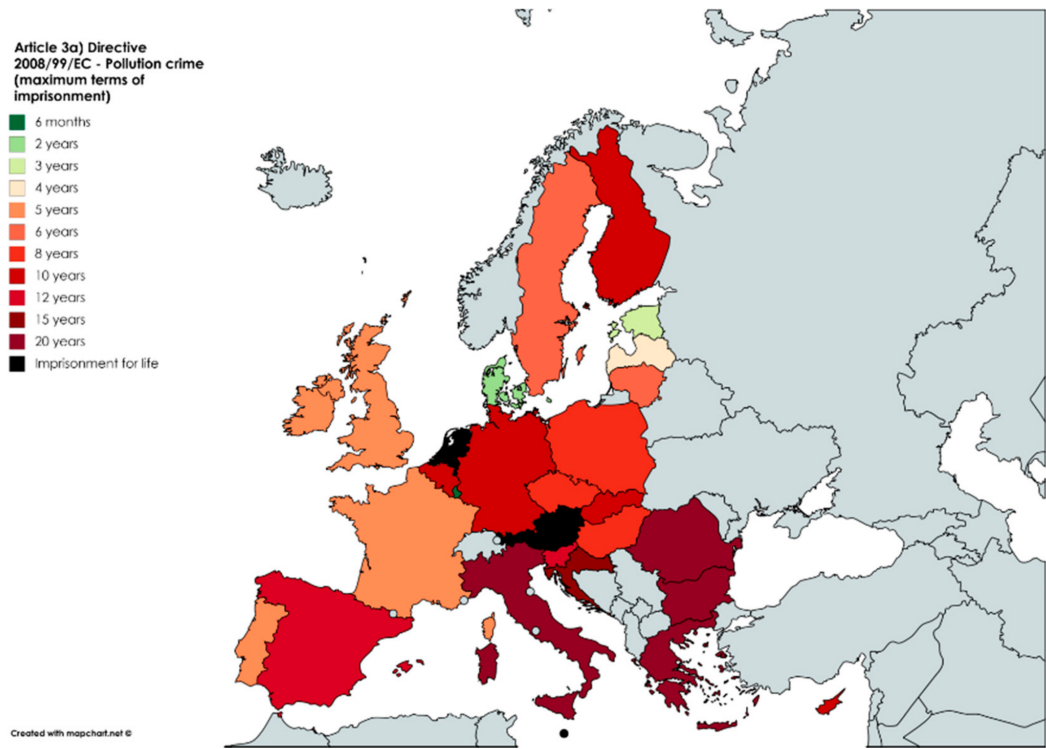


Figure 10. Article 3a).

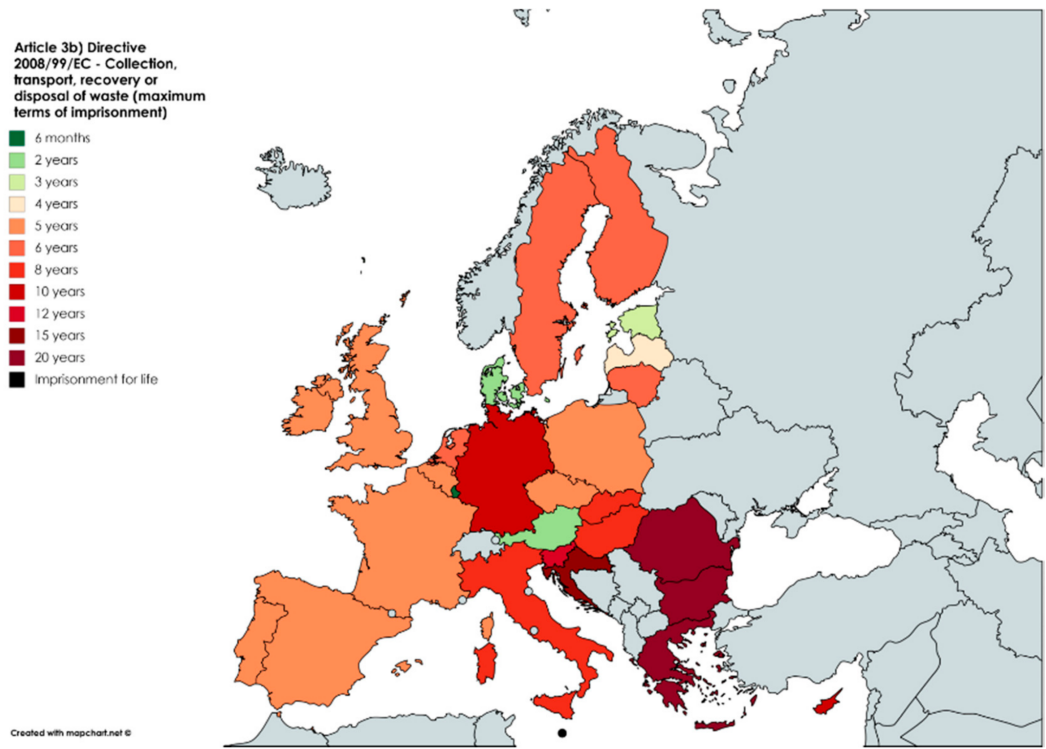


Figure 11. Article 3b).

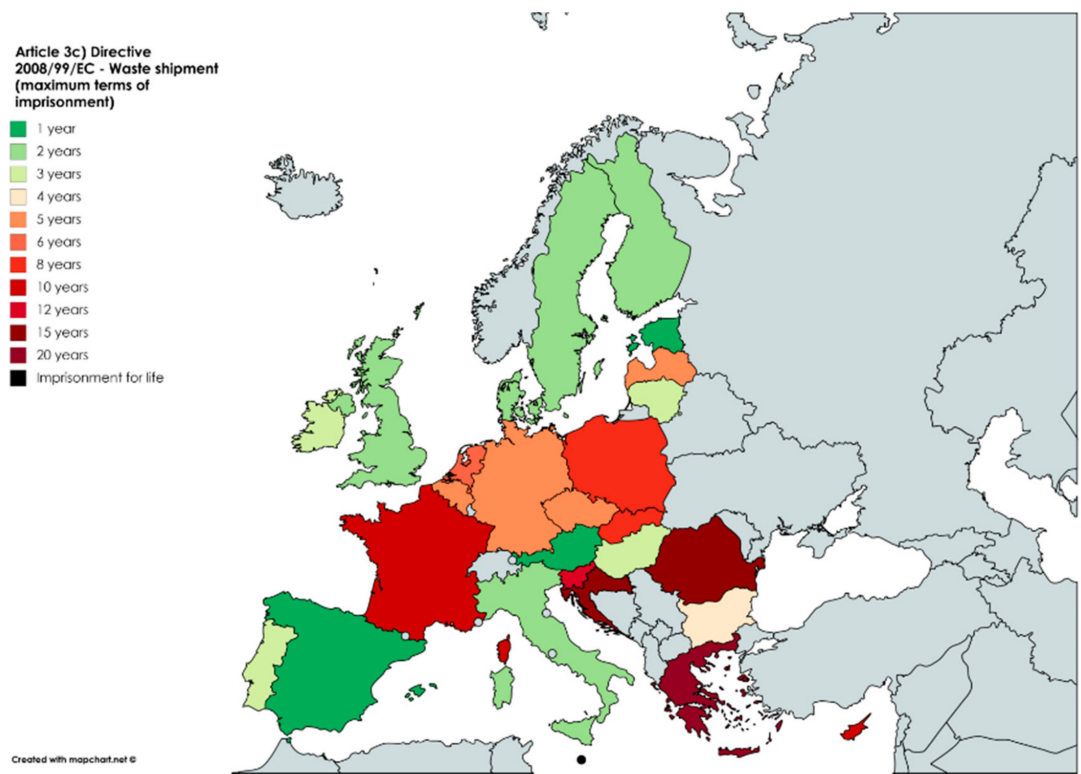


Figure 12. Article 3c).

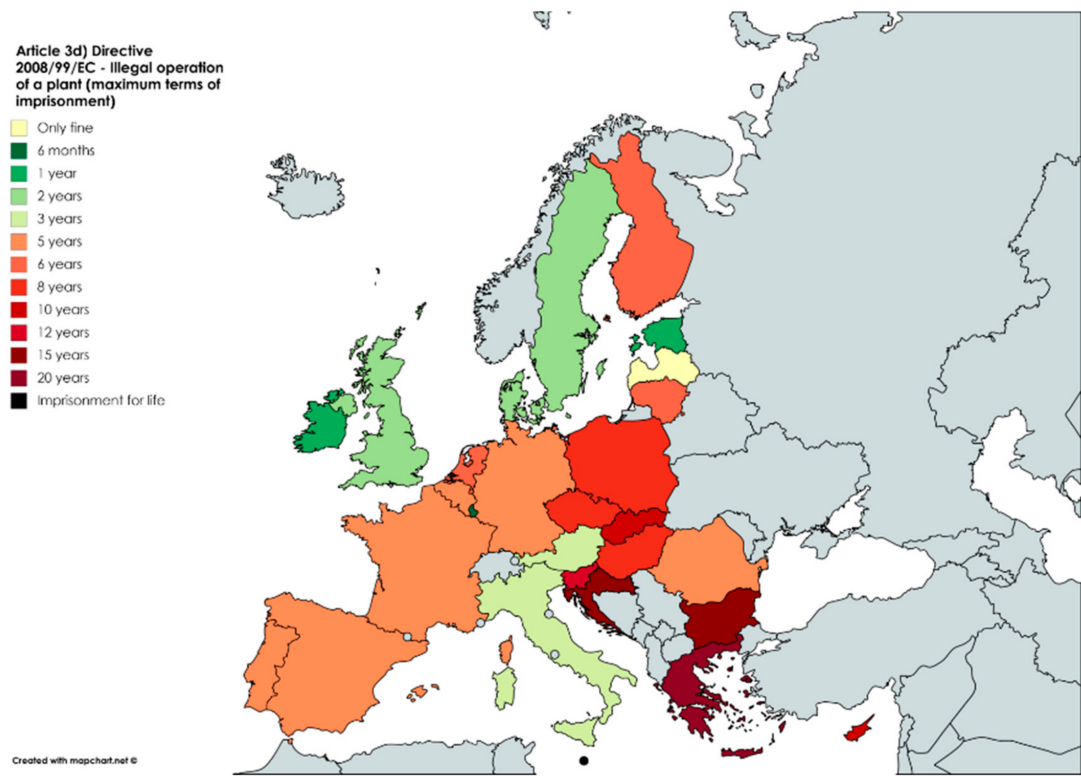


Figure 13. Article 3d).

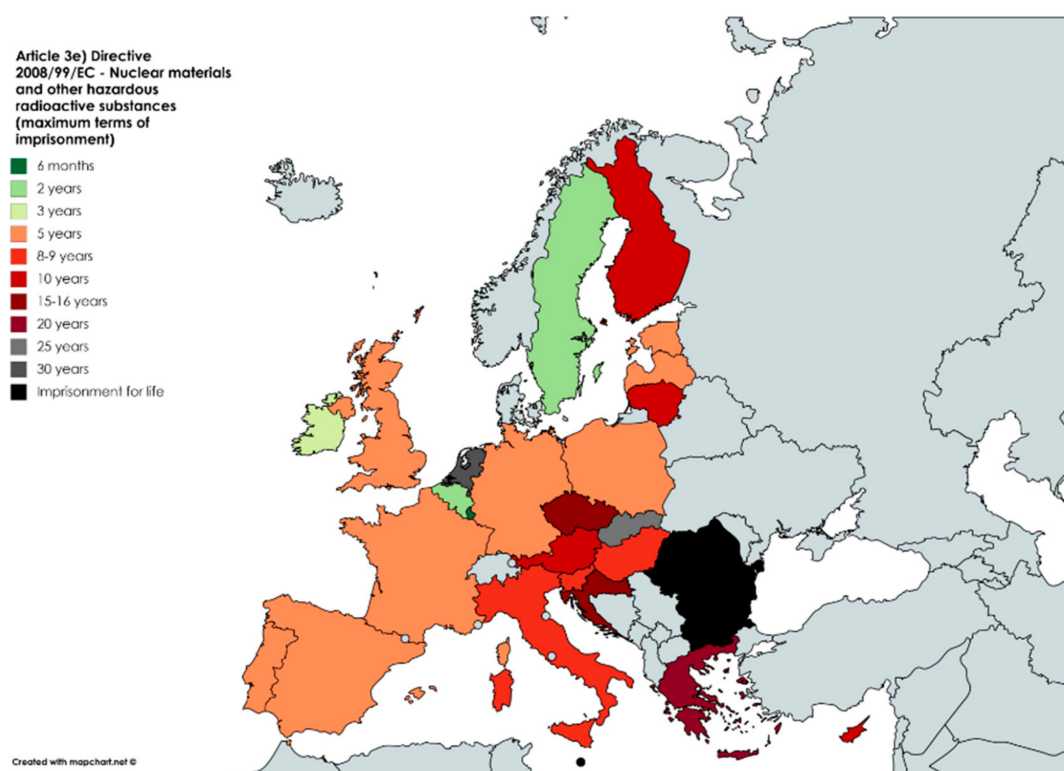


Figure 14. Article 3e).

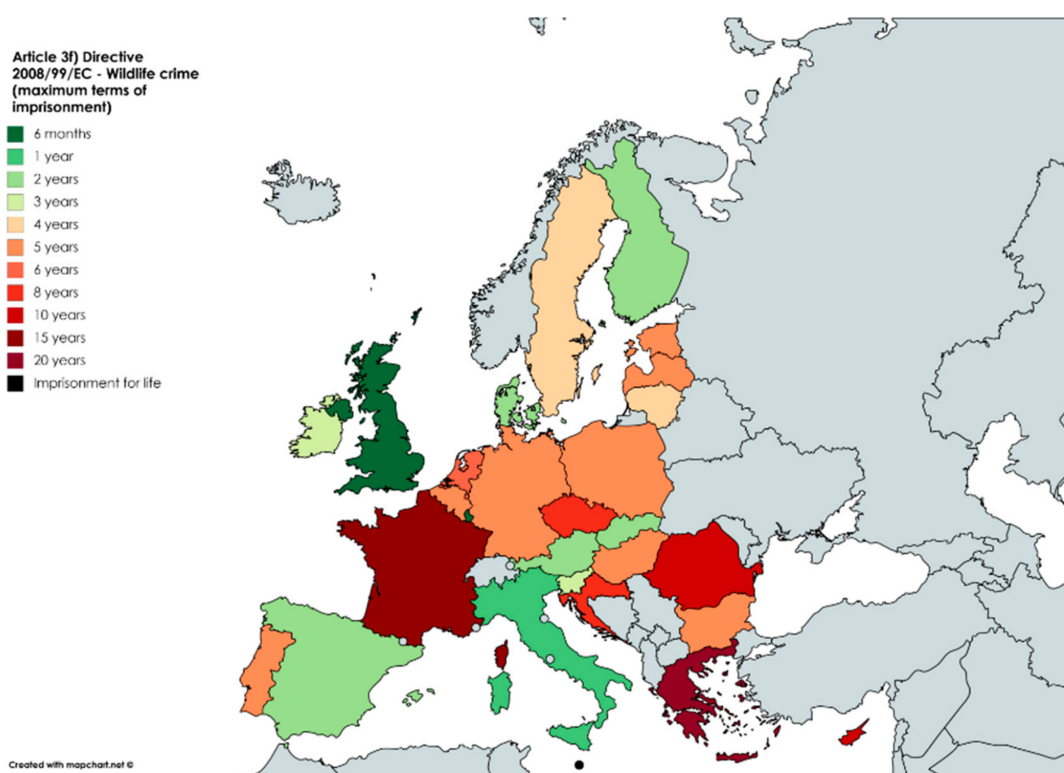


Figure 15. Article 3f).

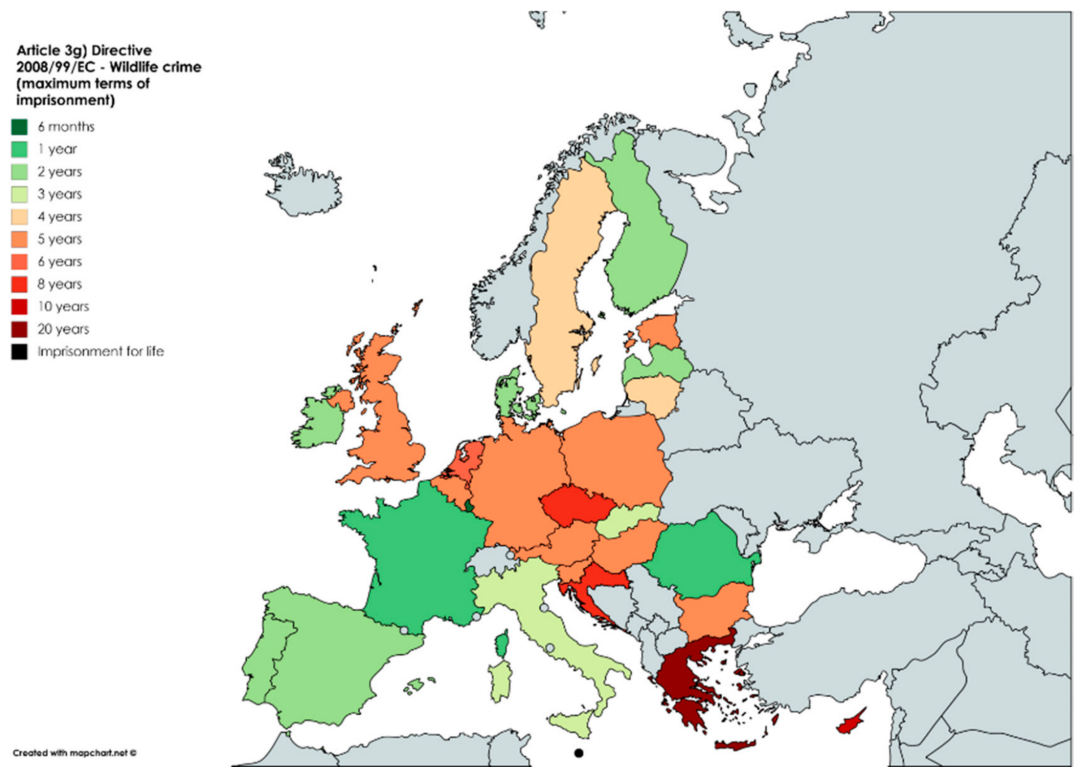


Figure 16. Article 3g).

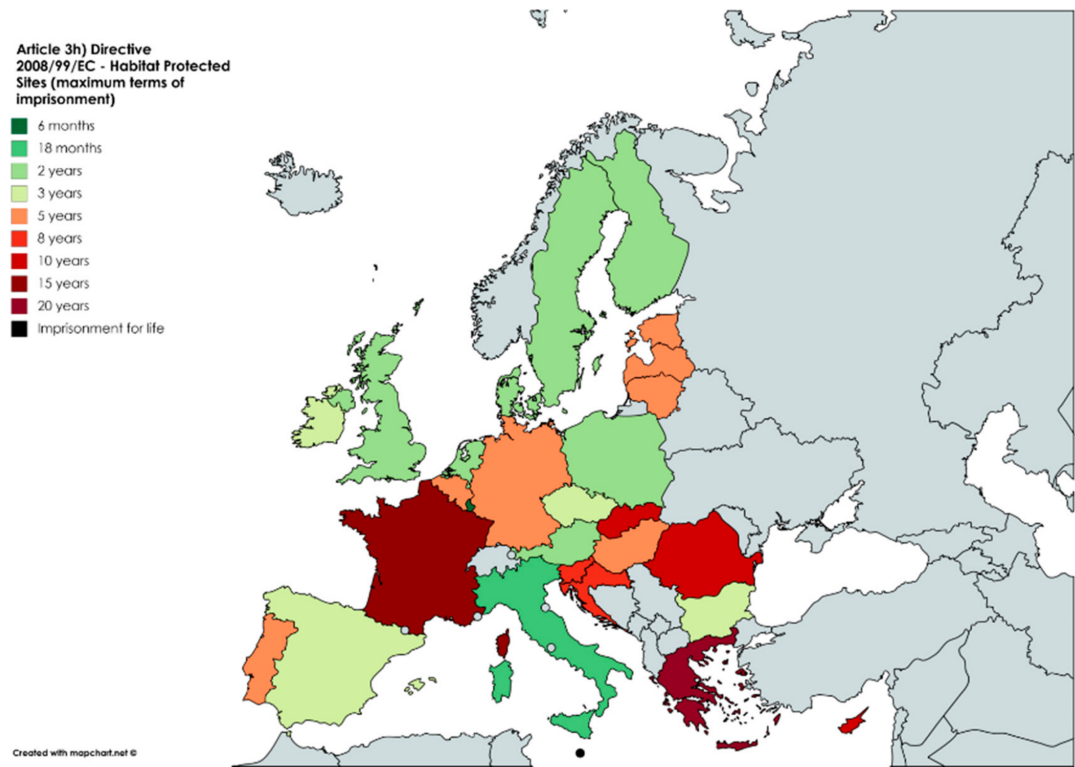


Figure 17. Article 3h).

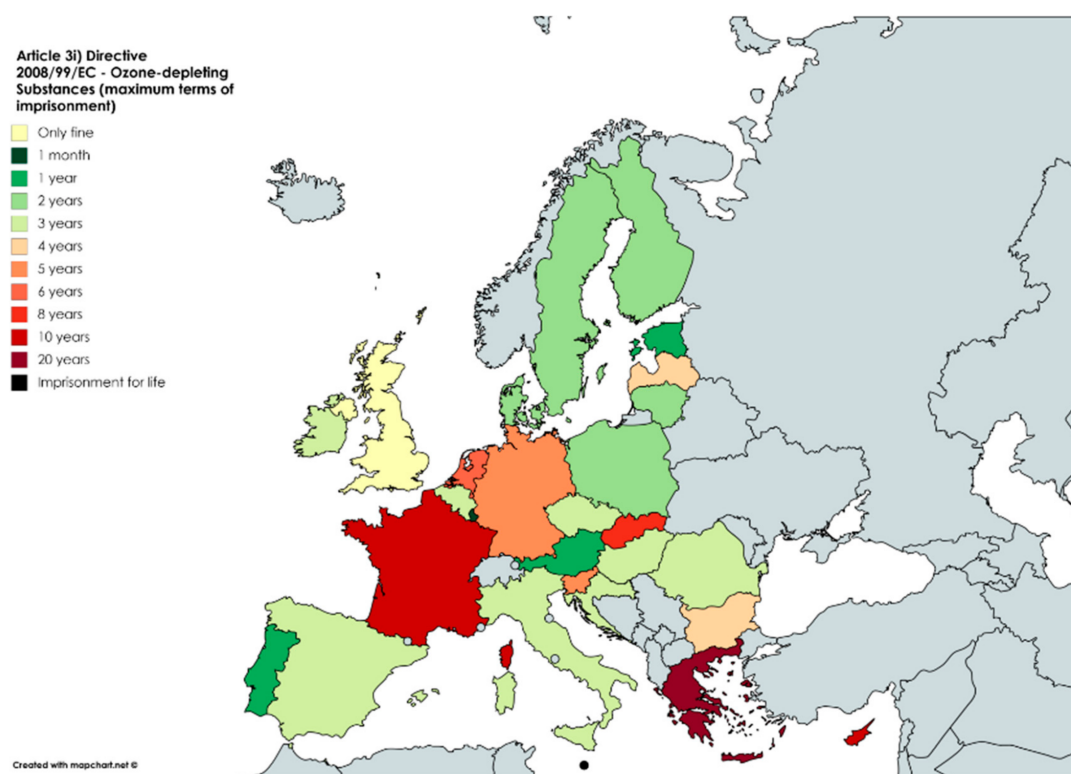


Figure 18. Article 3i).

3. Discussion: Harmonization of Criminal Law and the Fundamental Principles of Criminal Policy in the European Union

Directive 2008/99/EC is an example of the difficulties faced by the harmonization of legal sanctions in the EU. This might be regarded as a lack of proportionality when comparing the Member States. However, this is a problem that exceeds this Directive. Although a common framework would have facilitated a true approximation of sanctions, it is important to recall that the principle of proportionality must first operate within each national criminal justice system.

Some improvement could be observed with the enforcement of the Lisbon Treaty in 2009. Currently, there are two ways to establish minimum criminal rules under Article 83 of the Treaty on the Functioning of the European Union (onwards, TFEU). The first, foreseen in Article 83(1) TFEU, would correspond to the so-called “security criminalization”, already present in the Treaty of Amsterdam (1997) [17,18]. This concerns the possibility of the European Parliament and the Council establishing minimum rules regarding the definition of criminal offenses 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. The TFEU provides an appraised list of crimes (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 organized crime), albeit with an open clause that allows other criminal areas to be added depending on the evolution of crime.

Article 83(2) TFEU refers to the so-called “functional criminalization”. As a result of a long evolution, this article reflects the jurisprudence derived from the institutional conflict in the field of environmental crimes. It provides for the possibility of using Directives to establish minimum rules with regard to the definition of criminal offenses and sanctions, when the approximation of the laws and regulations of the Member States in criminal matters is essential to ensure the effective implementation of a Union policy in an area that has been subject to harmonization measures.

However, as has already been stressed, “since Article 83 TFEU only enables the establishment of *minimum rules* concerning definition of criminal offences and sanctions *by means of directives*, full harmonization of criminal definitions and sanctions is not possible based on it” [19] (319).

Subsequent to the Treaty of Lisbon, the European Parliament and the Council have passed directives based on Article 83(1) or 83(2) TFEU, which in terms of criminal sanctions, choose to establish a minimum in relation to the maximum penalty of deprivation of liberty. Such directives include the following: On the basis of Article 83(1) TFEU, the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. On the basis of Article 83(2) TFEU, the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law.

While it is true that in the near future it will be interesting to observe how this new legal scenario has impacted on the harmonization of criminal law by analysing the implementation of these directives, it should also be borne in mind that the harmonization of sanctions in the EU is not only a matter of political will and European criminal competences, but also of legal culture.

As stressed above, from a global perspective, the disparity of legal frameworks is seen as one of the reasons for the ineffectiveness in the fight against transnational organized environmental crime. The international legal landscape is defined as highly fragmented and incomplete, due to its diversity of scale (subnational, national, regional and global) and diversity of legal perspective (environmental law, criminal law, trade law) [1] (19–32). Inconsistencies and loopholes still allow criminal networks to operate successfully despite progress made to stop them. Effectiveness, used here in its common meaning, as the capability to achieve the expected outcomes, is thus at the basis of any strategy to improve law enforcement at the international level.

There are obviously no objections to the desire to achieve greater effectiveness. Greater effectiveness is a need and a common goal among those addressing the issue. Effectiveness is also a key EU Law principle, “used as a constitutional concept for the justification of legislation at the EU level” [20] (270). In the context of EU Law, “effectiveness” refers to the full implementation and enforcement of EU policies. However, when it comes to criminal law, it is also broadly accepted that effectiveness needs to be balanced with a set of principles to ensure full adherence to the rule of law and to avoid abuses on the restriction of fundamental rights and freedoms. As has been stressed, effectiveness can even lead to decriminalization “where EU law places limits on European criminal law, in particular in cases involving the intersection between criminal and administrative law” [21]. Furthermore, it is also known that an excessive use of criminal law may harm its deterrent effect. Overcriminalization has been, for decades, one of the main concerns of many European academics [22]. For this reason, criminal law initiatives at the EU level are also carefully analysed through the lens of the fundamental principles of criminal policy [23,24].

Such a concern is even more evident with the enforcement of the Lisbon Treaty. Article 83(2) entails a “functionalist view of criminal law” as “rather than assuming the status of a self-standing Union policy, criminal law is thus perceived as a means to an end, the end being the effective implementation of other Union policies” [17] (117). Nevertheless, it is a significant step forward in the construction of the EU area of freedom, security and justice that has led to renewed interest in the development of the fundamental principles of the “EU Criminal Law”, as part of a so-called “common EU legal culture”.

The idea of a common EU legal culture is, however, far from being a fully accepted theoretical framework due to the existence of different legal traditions across the EU. It is rather a work in progress in which, along with the European Court of Human Rights and the European Court of Justice, academics across the EU play a critical role by comparing, analysing and extracting, from national legal systems, those shared values and legal principles that emanate from the spirit of enlightenment and that are expected to inspire EU policies and legal provisions. The Manifesto on European Criminal Policy published in 2009 by the European Criminal Policy Initiative—an international group of academics from different Member States of the EU—is a good example of these cross-border academic initiatives

addressing EU Criminal Law [25]. At the institutional level, evidence of the development of the EU Criminal Law is the existence of groups of experts such as the group on EU Policy set up by the European Commission in 2012, aimed at advising the European Commission and contributing to the quality of EU legislation in the field of criminal law.

The European Parliament Resolution of 22 May 2012, on an EU approach to Criminal Law [26], which is significantly aligned with the Manifesto, reflects very well the complexity of the scenario. On one hand, the Resolution (1) recalls the particular relevance of principles of subsidiarity and proportionality, as mentioned in article 5 of the Treaty on the European Union, in the case of legislative proposals governing criminal law; and (2) reminds that key areas of criminal law must be left to the Member States, due to the fact that criminal justice systems of the Member States have evolved over centuries, each one having its own characteristics and special features, which are to be respected. As the Resolution underlines in letter C, the recognition that criminal law often reflects the basic values, customs and choices of any given society, albeit in full respect of international human rights law, explains the introduction in article 83(3) TFEU of an emergency brake procedure in the case of a member of the Council considering that the proposed legislative measure would affect fundamental aspects of its criminal justice system.

On the other hand, the Resolution (1) adheres to the principle of mutual recognition, in particular in relation to judgments and judicial decisions, which requires the establishment of minimum protection standards at the highest possible level; (2) recognizes the need for increased coherence in the EU criminal law provisions, often developed in the past on an ad-hoc basis; and (3) stresses that criminal law must constitute a coherent legislative system governed by a set of fundamental principles and standards of good governance in full respect of the EU Charter of Fundamental Rights, the European Convention on Human Rights and other international human rights conventions to which the Member States are signatories.

Accordingly, the Resolution recalls that criminal law must fully respect the fundamental rights of suspected, accused or convicted persons; and recognises the importance of the general principles governing criminal law such as the principle of individual guilt (*nulla poena sine culpa*); the principle of legal certainty (*lex certa*); the principle of non-retroactivity and of *lex mitior*; the principle of *ne bis in idem* and the principle of the presumption of innocence.

Even more interesting for the purpose of analysing the harmonization of legal frameworks as a strategy to combat transnational organized environmental crime, is that the Resolution particularly emphasises the need to avoid “referring to abstract notions or to symbolic effects”. This emphasis is stated as follows: “the necessity of new substantive criminal law provisions must be demonstrated by the necessary factual evidence making it clear that:

- (1) the criminal provisions focus on conduct causing significant pecuniary or non-pecuniary damage to society, individuals or a group of individuals;
- (2) there are no other, less intrusive measures available for addressing such conduct;
- (3) the crime involved is of a particularly serious nature with a cross-border dimension or has a direct negative impact on the effective implementation of a Union policy in an area which has been subject to harmonization measures;
- (4) there is a need to combat the criminal offence concerned on a common basis, that is, that there is added practical value in a common EU approach, taking into account, inter alia, how widespread and frequent the offence is in the Member States; and
- (5) in conformity with article 49(3) of the EU Charter on Fundamental Rights, the severity of the proposed sanctions is not disproportionate to the criminal offence.”

It is against this backdrop that the EU Parliament stresses in its Resolution “that harmonization measures should be proposed primarily with a view to supporting the application of the principle of mutual recognition in practice, rather than merely expanding the scope of harmonized EU criminal

law". This means that EU substantive criminal law provisions must fully respect the principles of subsidiarity and proportionality.

Thus, there is a lack of consensus on the use of criminal law to address environmental crime in the EU. With regard to Directive 2008/99/EC, along with recommendations for an improvement of the Directive, either in the description of the behaviors, or in the system of sanctions, experts insist on criticizing the abuse of criminal law in this area. It is enough to read carefully the interesting analysis and conclusions of EFFACE, a group of experts that analysed in depth this issue in the framework of a European interdisciplinary project on environmental crimes [27,28].

The will and need to foresee alternatives to criminal sanctions, whether civil or very significantly of an administrative nature, constitutes the so-called "toolbox approach" traditionally used by some Member States (significantly, Austria and Germany) [29] (323). In addition to the classic arguments against the use (or at least abuse) of criminal law, some authors refer to the available empirical data on the application of environmental crimes and their assessment from a perspective of the economic analysis of law. It is emphasized that in certain Member States—where the principle of opportunity applies—the Prosecutor Office tends not to criminally prosecute those less serious environmental crimes, due to the high cost of the criminal process [29] (338) [30]. Consequently, in the event that there is no alternative sanction, both the instrumental efficiency and the preventive effect of the sanction are put at risk, leading to the symbolic criminal law. "Symbolic measures" in EU Criminal Law are highly criticized. An example can be found in the harmonization of definitions of racist and xenophobic crime across the UE [31] (557).

On the other hand, it must be recalled that the need for a coordinated action to tackle organized crime has been one of the key drivers of harmonization in the field of Criminal Law in the EU since its inception [32]. It is also remarkable that a global perspective has been increasingly taken into consideration in the design of the EU policies in this regard. Since a comprehensive analysis of the EU Law falls beyond the scope of this paper, the European Parliament Resolution of 23 October 2013 on organized crime, corruption and money laundering, will serve as an example, in which the EU is encouraged "to not just look towards our most common allies and partners for cooperation, but to attempt to create a truly international and global response and solution to money laundering, corruption and the funding of terrorism" [33].

In sum, acknowledgment of the global scale of the issue and the need for greater international cooperation leads to a contested scenario that requires continued investigation into how to balance practical needs and theoretical frameworks when using regulatory and enforcement strategies.

4. Conclusions

Transnational organized environmental crime is a global threat for sustainability. The aim of this paper was to reflect on the feasibility of the harmonization of legal frameworks as a strategy to fight globally against this type of crime. In particular, the harmonization of criminal sanctions has been requested by many international organizations because of the impact it has on the applicability of UNTOC.

The analysis of the degree of harmonization reached five years after the transposition deadline of Directive 2008/99/EC has shown that harmonization faces great difficulties at the EU level. It has been observed that the viability of harmonization is not only a matter of political will or of EU criminal competences, which are still in evolution, but also of legal culture. If, at the regional level, the harmonization of criminal legal frameworks is still a challenge, on a global scale everything suggests that it is a utopia, at least in the short term.

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