

THE EU AND THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW

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1 GLOBAL ENVIRONMENTAL CRIME TREND VERSUS LOW NUMBER OF PROSECUTIONS AND SANCTIONS IN THE EU

According to UNEP and Interpol estimates in 2016 the annual loss caused by environmental crime is between USD 91 billion and USD 258 billion. This includes the loss of legal commerce and the loss of tax revenue. It does not include the economic value of natural ecosystems.¹ This makes environmental crime *the fourth largest criminal activity in the world* after drug smuggling, counterfeiting and human trafficking, growing at a rate of between 5 and 7 percent per year, two to three times the pace of global economic growth.²

In the EU, annual revenues from illicit non-hazardous waste trafficking are estimated to range between EUR 1.3 billion and EUR 10.3 billion, and for hazardous waste trafficking between EUR 1.5 billion and EUR 1.8 billion. Environmental crime negatively affects water, air, soil, habitats, the physical health and well-being of people, and flora and fauna. It transcends regions and national borders. It reduces the economic viability of businesses, which invest in often costly measures to comply with environmental standards and requirements, with job losses as the end result. Environmental crime is often committed by organised crime groups and networks operating transnationally.³

1. C. Nellemann, R. Henriksen, A. Kreilhuber, D. Stewart, M. Kotsovou, P. Raxter, E. Mrema & S. Barrat (Eds.), *The Rise of Environmental Crime – A Growing Threat to Natural Resources Peace, Development and Security. A UNEP-INTERPOL Rapid Response Assessment*, United Nations Environment Programme and RHIPTO Rapid Response – Norwegian Centre for Global Analyses, 2016; www.rhipto.org; Commission Staff Working Document, *Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Environmental Crime Directive)*, Brussels, 28 October 2020, SWD(2020) 259 final, p. 6; <https://op.europa.eu/en/publication-detail/-/publication/433ac4c4-1938-11eb-b57e-01aa75ed71a1/language-en/format-PDF/source-search>.
2. European Commission, 'Questions and Answers on the revised EU Directive on environmental crime', https://europa.eu/newsroom/content/questions-et-réponses-sur-la-directive-révisée-de-lue-sur-la-criminalité-environnementale_en.
3. Commission Staff Working Document, *Evaluation of the Directive 2008/99/EC*, 2020, p. 6.

In the EU, *Directive 2008/99/EC of the European Parliament and the Council of 19 November 2008 on the protection of the environment through criminal law*,⁴ the so-called 'Eco-Crime Directive' or 'ECD' provides for criminalisation of serious violations of more than 70 pieces (directives and regulations) of EU environmental legislation and requires effective, proportionate, and dissuasive sanctions⁵ to be introduced in Member States' legislation. In that respect the Directive defines environmental offences and Member States must criminalise the most serious infringements of rules aiming at protecting the environment. It requires liability of both natural and legal persons. The liability of legal persons can be of a criminal or a non-criminal (administrative) nature. It requires Member States to ensure criminal liability also regarding inciting, aiding, and abetting such offenses. The Directive seeks to approximate criminal sanctions levels by requiring effective, proportionate, and dissuasive criminal penalties for environmental crimes. The Directive does not contain more detailed requirements on the types and levels of the penalties.⁶ The Member States had to bring into force the laws, regulations, and administrative provisions necessary to comply with the Directive before 26 December 2010.⁷

The national approaches to the *transposition* of the ECD varied greatly from one Member State to another, reflecting the differences in national legal traditions and contexts. A comparison of minimum and maximum sanctions set in the legislation showed also significant disparities across Member States as to the level, range, and way of setting sanctions, and this regarding sanctions for natural persons and for legal persons.⁸

4. OJ L 328, 6 December 2008, pp. 28-37.

5. Referring in doing so to the formula used by the CJEU in describing the duty of the Member States regarding the enforcement of EU law, derived from Article 4 TEU (and before Article 10 EC): R. Meeus, 'De basishandhavingplicht van de lidstaten van de Europese Unie in het communautair milieurecht', *TMR*, 2007, pp. 411-459; R. Meeus, *Sanctionering van het Europees milieurecht. Tussen handhavingnood en sanctieverplichtingen*, Antwerpen-Cambridge, Intersentia, 2014, pp. 67-165 and pp. 331-455; L. Lavrysen, *Handboek Milieurecht 2020*, Mechelen, Wolters Kluwer Belgium, 2020, p. 127.
6. The Directive was adopted before the entry into force of the Lisbon Treaty on 1 December 2009 and could not harmonize the type and level of criminal sanctions (M. Faure (2017), p. 143). Meanwhile, the Lisbon Treaty has introduced an explicit legal basis in Article 83(2) TFEU setting out the Union's competence to establish minimum rules regarding the definition of criminal offences and sanctions in Union policy areas which have been subject to harmonisation measures, provided that this is necessary for effective enforcement (Lavrysen, 2020, pp. 85-87).
7. M. Angelov, 'Evaluation of Directive 2008/99/EC from a Commission Perspective', European Commission, DG Environment, Bolzano, EUFJE Annual Conference, 30-31 October 2015, www.eufje.org/images/docConf/bol2015/pres3%20bol2015.pdf; M. Faure 'The Development of Environmental Criminal Law in the EU and its Member States', *RECIEL*, 2017, pp. 143-144.
8. C. Dupont & N. Rass-Masson, *Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States*, Brussels, Milieu Ltd., https://ec.europa.eu/info/sites/default/files/milieu_implementation_report_2013.pdf.

Correct transposition of a Directive is one thing, full *implementation in practice* is another. The Directive seems to have had little impact on the prosecution and sanctioning practice of the Member States.

In 2020 the European Commission published an evaluation report on the ECD,⁹ after it has held a public consultation.¹⁰ The evaluation found that the Directive has not fully met its objectives and that – despite some progress – significant divergence remains between Member States. The evaluation showed that practical implementation is deficient in all Member States and along the whole enforcement chain.¹¹ The number of successfully prosecuted environmental cases was low, sanctions were too insufficient to be deterrent and cross-border cooperation was weak, in contrast to the rapid growth of environmental crime.

There has been growing attention for environmental crime not only from the EU institutions, but also from EUROJUST¹² and the various environmental enforcement networks. On the occasion of the adoption by the EU Council of Ministers of Justice on 3 December 2019 of the Final report of the Eighth round of mutual evaluations on environmental crime,¹³ IMPEL,¹⁴ ENPE,¹⁵ EUFJE and EnviCrimeNet¹⁶ released a joint statement in which they call on EU institutions and Member States to support the effective enforcement of environmental rules and to better protect the environment.¹⁷ The 4 Networks Day ‘Together in the fight against environmental crime’ on 21 May 2021 has led a Joint Statement of the 4 Networks on the revision of the Environmental Crime Directive and on the EU Multi-Annual Policy Cycle 2022-2025.¹⁸

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9. Commission Staff Working Document, *Evaluation of the Directive 2008/99/EC*, 2020, 256 p.
 10. ‘Environmental crime: reviewing the EU rules’, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1930-Environmental-Crime-Directive-Evaluation/public-consultation_en (last accessed: 31 August 2022).
 11. Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, 15 December 2021, COM(2021) 851 final, p. 15, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0851&from=EN>.
 12. EUROJUST, *Report on Eurojust’s Casework on Environmental Crime*, The Hague, European Union Agency for Criminal Justice Cooperation, 2021, 28 p.
 13. Council of the European Union, ‘Final report of the Eighth round of mutual evaluations on environmental crime’, <https://data.consilium.europa.eu/doc/document/ST-14065-2019-INIT/en/pdf>.
 14. www.impel.eu/.
 15. www.environmentalprosecutors.eu/.
 16. www.envicrimenet.eu.
 17. http://eufje.org/images/DocDivers/GENVAL_press_release.pdf.
 18. ‘4 Networks Day Joint Statement, Together in the fight against environmental crime’ (IMPEL, 21 May 2021) www.impel.eu/en/news/4-networks-day-joint-statement-together-in-the-fight-against-environmental-crime (last accessed 31 August 2022); www.eufje.org/images/DocDivers/4-Networks_Day_2021_Joint_Statement_-_signed.pdf.

In 2021 the Council of the EU decided to continue the EU Policy Cycle for organised and serious international crime, now called EMPACT 2022+. Environmental crime is one of the 10 EU's priority crimes in the period 2022-2025.¹⁹

2 TOWARDS A NEW ECO-CRIME DIRECTIVE

The European Commission did not sit still. Based on the results of the evaluation of the ECD and stakeholder's input, the Commission revised the Directive. An ambitious and comprehensive legislative proposal to replace the Directive was adopted on 15 December 2021.²⁰ The proposal is part of the wider package of initiatives under the *European Green Deal*.²¹

The proposal addresses *six objectives* aiming to improve the effectiveness of criminal investigations and prosecution:

- (a) Clarify terms used in the definitions of environmental crime that leave too much room for interpretation (e.g. 'substantial damage');
- (b) Update the Directive by bringing new environmental crime sectors under its scope, such as illegal timber trade, illegal ship recycling, serious breaches of EU chemicals legislation, illegal water abstraction;
- (c) Define new sanction types and -levels for environmental crime;
- (d) Foster cross-border investigation and prosecution;
- (e) Improve informed decision-making on environmental crime through improved collection and dissemination of statistical data according to common standards in all Member States;
- (f) Improve the effectiveness of national enforcement chains.

The proposal is accompanied by a Communication of the Commission.²²

The Council negotiations started in January 2022 and the European Parliament negotiations will go through the summer of 2022.

In a joint Position Paper, the environmental enforcement networks IMPEL, ENPE, EUFJE and EnviCrimeNet welcomed the proposal for a new ECD,

19. 'EU Policy Cycle – EMPACT' (EUROPOL, 20 January 2022) www.europol.europa.eu/crime-areas-and-statistics/empact (last accessed 31 August 2022).

20. Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, 2021.

21. Communication from the Commission, The European Green Deal, 11 December 2019, COM(2019) 640 final.

22. Communication from the Commission to the European Parliament and the Council on stepping up the fight against environmental crime, COM(2021) 814 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0814&from=EN>.

especially the provisions on resources, training, investigative tools and cross-border and cooperation.²³

The legal basis for the proposed Directive is Article 83(2) TFEU. The proposed directive establishes minimum rules concerning the definition of criminal offences and sanctions to protect the environment more effectively (article 1).

Article 2 contains various definitions of terms used in the directive, including a refined definition of 'unlawfulness' for the purpose of defining environmental criminal offences. 'Unlawful' means a conduct infringing one of the following: (a) *Union legislation, which irrespective of its legal basis contributes to the pursuit of the objectives of Union policy of protecting the environment as set out in the TFEU*; (b) *a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Union legislation referred to in point (a)*. The conduct shall be deemed unlawful even if carried out under an authorisation by a competent authority in a Member State *when the authorisation was obtained fraudulently or by corruption, extortion, or coercion*.

In practice, conduct is often carried out under an illegal authorisation, i.e. an environmental permit that has been granted but that is contrary to the environmental laws. The definition of 'unlawful' conduct should also include this situation. Such illegal permits are more common than authorisations obtained fraudulently, by corruption, extortion or coercion. In some legal systems judges, including criminal judges, are indeed obliged to check the legality of administrative acts and regulations and set them aside if they are contrary to higher legal norms. That is e.g. the case in Belgium pursuant to Article 159 of the Constitution.²⁴

Article 3 describes the criminal offences covered by the proposed directive. It is a very lengthy and complex provision. Article 3(1) provides that Member States shall ensure that different types of conduct – 18 types of conduct with subcategories are listed, 26 in total – mostly '*provided that it 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*', constitute a criminal offence when it is unlawful and committed intentionally. Article 3(2) provides that Member States shall ensure that most of that conduct – there are few exceptions – also constitutes a criminal offence, when committed *with at least serious negligence*. Some of the offences are from the current directive, while other are amended and clarified versions of existing ones, and some are new offences.

23. 'Position paper from practitioners of the 4 Networks – EUFJE, ENPE, IMPEL AND envicrimenet – on the proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law (ECD)', https://eufje.org/images/docPDF/PP_proposal_ECD_4NT32.pdf (last accessed 31 August 2022).

24. A. Alen, D. Haljan & W. Verrijdt (Eds.), *Constitutional Law in Belgium*, Deventer, Wolters Kluwer International, 2020, p. 31, p. 65, p. 111, p. 147.

Article 3 (3) (4) and (5) provides that Member States shall ensure that their national legislation specifies that a series of elements shall be taken into account, where relevant, when assessing whether for example the *damage or likely damage is substantial* for the purposes of the investigation, prosecution, and adjudication of offences:

- (a) the baseline condition of the affected environment;
- (b) whether the damage is long-lasting, medium term or short term;
- (c) severity of the damage;
- (d) spread of the damage;
- (e) reversibility of the damage (article 3(3)).

Article 3 looks complex to implement in practice. It will not be easy to transpose it, as it stands now, correctly in domestic law – except in the case in which a ‘copy paste’ approach would be followed – and, more importantly, to apply the transposed legislation in practice. Public prosecutors will have to be very careful in qualifying facts they are willing to prosecute and debates before the courts on the correct qualification are likely.

Article 4 criminalises *inciting, aiding and abetting* the commission of the criminal offences provided for in the proposed directive. Also, *the attempt* to commit certain criminal offences, listed in Article 4, is punishable when committed intentionally. The latter is new compared to Directive 2008/99/EC.

Article 5 provides minimum standards to ensure that the environmental offences are punishable by effective, proportionate, and dissuasive criminal penalties. In addition – and this is also new compared to Directive 2008/99/EC – the proposal requires that Member States *introduce specific sanction levels and types for environmental criminal offences*, reflecting the seriousness of the offences.

For example, Member States shall take the necessary measures to ensure that offences referred to in Article 3 are punishable by a maximum term of imprisonment of *at least ten years* if they cause or are likely to cause death or serious injury to any person (article 5(2)). The mentioned sanction levels are minima.

Natural persons who have committed the offences may be subject to *additional sanctions or measures* which shall include: (a) obligation to reinstate the environment within a given time period; (b) fines; (c) temporary or permanent exclusions from access to public funding, including tender procedures, grants and concessions; (d) disqualification from directing establishments of the type used for committing the offence; (e) withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence; (f) temporary bans on running for elected or public office; (g) national or Union-wide publication of the judicial decision relating to the conviction or any sanctions or measures applied.

Article 6 of the proposal contains, as is the case with article 6 of the current ECD, obligations to ensure the *liability of legal persons* for offences where such offences have been committed for their benefit. It also provides that Member States

should make sure that legal persons can be held accountable for a lack of supervision and control that has made possible the commission of an environmental offence for the benefit of the legal person. Furthermore, the liability of the legal person should not exclude criminal proceedings against natural persons. Member States shall according to article 7 take the necessary measures to ensure that a legal person held liable is punishable by effective, proportionate, and dissuasive sanctions.

The liability of legal persons can still be criminal or administrative, but the preamble of the proposal states that where national law provides for it legal persons should be held *criminally* liable for environmental crime offences under the proposed directive. Member States whose national law does not provide for criminal liability of legal persons should ensure that their administrative sanctioning systems provide for effective, dissuasive and proportionate sanction types and levels. This includes taking into account the financial situation of legal persons.²⁵

Sanctions or measures for legal persons shall, and this is new compared with Directive 2008/99/EC, include: (a) criminal or non-criminal fines; (b) the obligation to reinstate the environment within a given period; (c) exclusion from entitlement to public benefits or aid; (d) temporary exclusion from access to public funding, including tender procedures, grants and concessions; (e) temporary or permanent disqualification from the practice of business activities; (f) withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence; (g) placing under judicial supervision; (h) judicial winding-up; (i) temporary or permanent closure of establishments used for committing the offence; (j) obligation of companies to install due diligence schemes for enhancing compliance with environmental standards; (k) publication of the judicial decision relating to the conviction or any sanctions or measures applied. Unlike the sanctions for natural persons, these sanctions need not to be criminal according to the proposed directive and can thus be administrative or civil sanctions. Of course, often they shall be considered as 'criminal' within the meaning of Article 6 ECHR according to the 'Engel-criteria' of the ECtHR, so that the relevant guarantees shall apply.²⁶

Pursuant to article 7(4)(5)(6) the *illegal profits generated from the offence and the turnover of the legal person* must be taken into account when determining the appropriate level of a fine.

25. Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, 2021, p. 24.

26. Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb), updated on 30 April 2022, pp. 10-11, pp. 13-14, www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf.

These are very important innovations which should contribute to more effective, proportionate, and dissuasive sanctioning, more deterrence and restoration of the environment.

The proposal contains various additional provisions, compared to Directive 2008/99/EC, that should increase the effectivity of the proposed new Directive.

Article 8 sets out a series of *aggravating circumstances* to take into account when sanctions are applied, such as (a) the offence caused the death of, or serious injury to, a person; or (b) the offence caused destruction or irreversible or long-lasting substantial damage to an ecosystem.

Article 9 provides for *mitigating circumstances for example when the offender restores nature to its previous condition.*

Article 10 makes sure that Member States give the opportunity to competent authorities to *freeze and confiscate* the proceeds derived from offences covered by the proposed directive.

The proposal lays down detailed and differentiated provisions on minimum *limitation periods* to allow the competent authorities to investigate, prosecute and adjudicate criminal offences covered by the proposed directive within a sufficient period of time after the commission of the offences (Article 11).

It also lays down provisions on *jurisdiction* to make sure that Member States establish jurisdiction for offences covered by the proposed directive and that they inform the Commission if they decide to extend this jurisdiction in specific cases where the offence is committed outside their territory (Article 12).

Another new element concerns the protection of persons such as *whistle blowers, environmental defenders and others reporting information or providing evidence to an investigation* relating to environmental criminal offences (Article 13).

Article 14 recognises *procedural rights to participate in criminal proceedings.*

Important for the effective application of the proposed directive are the following provisions that respond to the call made by amongst others the enforcement networks.²⁷ Member States shall ensure that *national authorities which detect, investigate, prosecute, or adjudicate environmental offences have a sufficient number of qualified staff and sufficient financial, technical, and technological resources necessary to perform their roles effectively* (Article 16).

Article 17 aims at enhancing training along the enforcement chain to ensure the necessary specialised skills and abilities to perform roles effectively.

Member States shall take the necessary measures to ensure that *effective investigative tools*, such as those which are used in organised crime or other serious crime cases, are also available for investigating or prosecuting environmental offences (Article 18).

27. Joint Press Release of IMPEL, EnviCrimeNet, ENPE, EUFJE, 3 December 2019 http://eufje.org/images/DocDivers/GENVAL_press_release.pdf, on the occasion of the adoption by the EU Council of Ministers of Justice on 3 December 2019 of the Final report of the Eighth round of mutual evaluations on environmental crime.

Member States shall ensure *coordination and cooperation at strategic and operational levels among all their competent authorities involved in the prevention of and the fight against environmental criminal offences*. Such mechanisms shall be aimed at least at: (a) ensuring common priorities and understanding of the relationship between criminal and administrative enforcement; (b) exchange of information for strategic and operational purposes; (c) consultation in individual investigations; (d) the exchange of best practices; (e) assistance to European networks of practitioners working on matters relevant to combating environmental offences and related infringements (Article 19). This provision should help cross-border investigation and prosecution as environmental crimes often impact several countries.

Member States shall establish, publish and implement *a national strategy on combating environmental criminal offences*. This national strategy shall have a minimal content e.g. the resources needed and how specialisation of enforcement officials will be supported (article 20 (1)(e)). Member States shall ensure that the strategy is reviewed and updated at regular intervals no longer than 5 years, on a risk-analysis-based-approach, to take account of relevant developments and trends and related threats regarding environmental crime.

As has been observed by many, data collection and statistics on environmental crime in the EU are lacking to a large extent. Article 21 is meant to fill that gap. It requires Member States to collect, publish and send annually relevant statistical data to the Commission, which in turn must regularly publish a report based on the data provided by the Member States. *Improved data collection and statistics* would assist in monitoring and evaluating the effectiveness of national systems to combat environmental criminal offences.

The Articles 24 to 29 contain provisions on transposition by Member States, reporting by Member States, evaluation and reporting by the European Commission, entry into force and replacement of Directive 2008/99/EC by the proposed new one.

3 A LOOK AHEAD

At the time of writing this contribution, the first round of negotiations in the EU Council and Parliament was ongoing.

As stated in the EC proposal for a new ECD,²⁸ more effective enforcement in the area of environmental crime would contribute to more fair competition between businesses, improve governance and the quality of life of EU citizens.

These mid- and long-term benefits greatly outweigh the costs of additional human and material resources for environmental law enforcement and judicial authorities in the Member States, necessary to make the new ECD work on the

28. Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, 2021, pp. 14-15.

ground. In addition, the budgetary implications for the Commission and for Member States²⁹ pale in comparison to the annual loss caused by environmental crime, mentioned in the introduction.

Whether the new ECD will live up to the expectations of protecting the environment more effectively and realizing the European Green Deal will depend of the final text that will come out of the EU Council and Parliament negotiations and finally, by the practical implementation by the Member States. If the EU succeeds in adopting the revised directive without watering it down, the time may be right to take the next step and to consider whether there is a need or not for minimum harmonization of administrative enforcement of environmental law, as that form of enforcement will still play an important role.

29. Calculated in detail on pp. 16-17 of the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, 2021.