



The Environmental Crime Directive

EU legislation on wildlife trafficking, deforestation and
illegal logging and combating associated crime

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1. Introduction

- ▶ Environmental law emerged in EU MS in 1970s
- ▶ Environmental crime had specific features:
 - ▶ Administrative dependence
 - ▶ Low priority
 - ▶ Only criminal law
 - ▶ With a few exceptions
- ▶ Later (in EU MS) important changes
- ▶ Not all followed in ECD (2008)
- ▶ But a new ECD (2024)

In practice, criminal law enforcement was not taking place.

Most prosecutors did not pursue environmental crime because of conflicting priorities.

Many notifications of violations were left without consequences.

Changes occurred in Member States where environmental law was modernised.

EU law did not take into account this modernisation in 2008.

With the new Environmental Crime Directive (ECD) this was finally done.

1. Introduction

- ▶ Goal of this talk:
 - ▶ Explaining the structure of environmental criminal law
 - ▶ Evolution in MS
 - ▶ ECD 2008 and its limits
 - ▶ ECD 2024

First we will look at the traditional structure of environmental criminal law.

2. Traditional enforcement approach

2.1 Place of environmental criminal law

- ▶ Primarily administrative laws
- ▶ With at the end: criminal provisions
- ▶ Obvious disadvantages:
 - ▶ Environmental criminal law scattered
 - ▶ Considered less important than penal code (some exceptions (Germany, Netherlands))

- One wonders if it makes a difference if environmental criminal law is codified in criminal as opposed to administrative law.
- Prosecutors have highlighted the disadvantages.

2. Traditional enforcement approach

2.2 Criminal law's dependence on administrative law

- ▶ Criminal law complement to administrative legal framework
- ▶ Criminalization of activity without a permit or violating permit conditions
- ▶ Administrative law provides the norms
- ▶ Ecological values not directly protected
- ▶ No absolute protection (like with other values (life, health, property))
- ▶ If no violation of administrative obligations: no criminal liability
- ▶ If administrative obligations fulfilled: no criminal liability

Administrative authorities were tasked with identifying these crimes.

2. Traditional enforcement approach

2.3 Criminal law as primary instrument

- ▶ Alternative mechanisms (administrative fines) not available in most countries
- ▶ No “pyramid” approach
- ▶ Only some EU MS had alternatives (Germany)

The criminal law was the primary enforcement instrument. The legislative technique was naive. A sentence imposing a sanction for violations of the administrative provisions was added at the end of a legislative text. This meant that there was no ‘toolbox’ approach to choose from in order to impose an appropriate sanction for the violations.

3. Two doctrinal moves

3.1 Environmental protection through criminal law?

- ▶ Need to have a balanced approach with:
 - ▶ Abstract endangerment crimes
 - ▶ Concrete endangerment crimes (unlawful emissions)
 - ▶ Serious environmental harm (autonomous crimes)
 - ▶ Optimal combination

- There was a big research project in the Max Planck institute for criminal law. There they found that we need different types of criminal provisions.
- This means that abstract and concrete endangerment crimes are necessary.

3. Two doctrinal moves

3.2 Do we have the right regime?

- ▶ Ogus/Abbot:
 - ▶ Too much criminal law
 - ▶ Ineffective
 - ▶ Need for a pyramid
 - ▶ Implemented in UK (Macrory)
- ▶ Need for a toolbox approach:
 - ▶ Civil penalties
 - ▶ Administrative fines
 - ▶ Criminal law

4. Policy change at MS level

4.1 Place of environmental criminal law

- ▶ Many EU MS: incorporations into penal code:
 - ▶ Germany 1980
 - ▶ Netherlands 1989
 - ▶ Finland 1995
 - ▶ Portugal 2006
 - ▶ Spain 1995

4. Policy change at MS level

► Or in environmental codes, examples:

- Denmark EPA 1991
- Sweden Environmental Code 1998
- UK EPA 1990
- Flanders 1995

The criticisms were incorporated:

- In some countries, we saw an incorporation of the environmental crimes into the penal codes. Symbolically this was important.

4. Policy change at MS level

4.2 Administrative dependence relaxed

- ▶ Criminalization of concrete endangerment
 - ▶ Portugal Arts. 278 ff.
 - ▶ Spain Art. 325
 - ▶ Sweden Art. 29
 - ▶ And more autonomous environmental crimes
 - ▶ No longer: absolute administrative dependence

Other countries proceeded with the nature of the sanctions started to change. In these examples we see that the way in which protection of the environment through changed by establishing concrete endangerment crimes.

4. Policy change at MS level

4.3 Toolbox approach

- ▶ First Austria/Germany
- ▶ Also UK (2008) regulatory enforcement and sanctions act
- ▶ Flemish and Walloon Regions

Definitely some MS introduced a toolbox approach.

5. ECD 2008

5.1 Environmental Crime Directive

- ▶ A long and winding path to EU environmental criminal law:
- ▶ ECJ decision 2005
- ▶ Enabled Directive 2008/99
- ▶ No toolbox approach. See Recital 3:
“Criminal penalties demonstrate a social disapproval of a qualitatively different nature to administrative penalties or a compensation mechanism under civil law”
- ▶ Administrative remedies therefore not mentioned at all in ECD!
- ▶ Art. 5: specific violations need to be regarded as criminal offences in national legislation implementing the ECD if committed unlawfully

Long road before the ECD 2008 was made. There were questions on the competence of the EU in this field. The CJEU in 2005 decided that criminal law can be used as a tool to ensure compliance with EU law.

5. ECD 2008

- ▶ Unlawfulness (Art. 2(a)) is an act that violates:
 - “(i) the legislation adopted pursuant to the EC Treaty and listed in Annex A; or (ii) with regard to activities covered by the EURATOM Treaty, the legislation adopted pursuant to the EURATOM Treaty and listed in Annex B; or 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 community legislation referred to in (i) or (ii)...”
- ▶ So: no autonomous environmental crime, but “permit shield”
- ▶ Criminalization needed for 9 offences mentioned in Art. 3 ECD inter alia:
 - “a. the discharge, emission or introduction of a quantity of materials or ionizing 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”

5. ECD 2008

- ▶ Other problems:
 - ▶ No data
 - ▶ No level playing field
 - ▶ No remedy for the implementation deficit
 - ▶ Paper transposition possible
- ▶ Summary of the critics:
 - ▶ No toolbox approach
 - ▶ Administrative dependence
 - ▶ No autonomous environmental crimes
 - ▶ No duty to collect data

- It was supposed to create a level playing field. This way, it was meant to prevent a race to the bottom.
- The implementation deficit was not tackled. MS would transpose the legislation but without authorities and administrative support to deal with violations.

6. ECD 2024: a revolution

Many changes, inter alia:

6.1 Minimum sanctions

- ▶ Art. 5: penalties for natural persons
- ▶ Some offences: maximum 10 years of imprisonment if they cause death to any person
- ▶ Other offences: maximum imprisonment of at least 8 years
- ▶ Yet others: maximum imprisonment 3 years

6. ECD 2024: a revolution

6.2 Toolbox approach

- ▶ Reference to administrative remedies
- ▶ Wide variety of penalties, e.g.:
 - ▶ Natural persons:
 - ▶ Obligation to reinstate the environment
 - ▶ Fines
 - ▶ Disqualification from exercising a leading position within a legal person
 - ▶ Withdrawal of permits and authorisations

The withdrawal of permits is a death penalty for enterprises. It is de facto dissuasive and reaches the goal of reparation contrary to, for example, imprisonment.

6. ECD 2024: a revolution

- ▶ Sanctions for legal persons (Art. 7) inter alia:
 - ▶ Disqualification from the practice of business activities
 - ▶ Placing under judicial supervision
 - ▶ Judicial winding-up
 - ▶ Closure of establishment
 - ▶ Obligation of company to install due diligence scheme
 - ▶ Maximum fines of not less than 5% of worldwide turnover or an amount of 40 mio. or 24 mio. depending upon the offence
- ▶ Freezing and confiscation of assets (Art. 10)

6. ECD 2024: a revolution

6.3 Data collection: Art. 22

- ▶ Obligation to put in place a system for recording, producing and providing anonymized statistical data on inter alia:
 - ▶ Number of offences
 - ▶ Number of dismissed court cases
 - ▶ Number of natural persons prosecuted and convicted
- ▶ Allows evidence-based enforcement +
- ▶ EU control on what really happens in MS

There is an obligation for MS to make a report every 4 years.

Evidence-based is the basis of enforcement. Based on data the EC can start asking the right questions. This means that no crime detected will lead to uncovering the lack of prosecution.

6. ECD 2024: a revolution

6.4 Unlawfulness differently defined

- ▶ No longer (ECD 2008) reference to list in Annexes, but (Art. 3(1)):
- ▶ Conduct infringing Union law pursuing the objectives of the Union's environmental policy
- ▶ Or a law, administrative regulation of a Member State or a decision taken by a competent authority giving effect to EU environmental law

6. ECD 2024: a revolution

6.5 A true revolution: autonomous environmental crime

- ▶ From: Proposal EU COM 15.12.2021
 - ▶ Only unlawful when authorization obtained " fraudulently or by corruption, extortion or coercion"
- ▶ To: new ECD "manifest breach of relevant substantive legal requirements"
- ▶ Amounts potentially to autonomous environmental crime
- ▶ Can lead to criminal liability with authorization
- ▶ Breaking the permit shield

- Proving that the authorisation was obtained fraudulently is difficult for prosecutors.
- Human rights violations are also 'manifest breaches of relevant substantive legal requirements'. It could be argued that these breaches mean that the permit shield breaks.

6. ECD 2024: a revolution

- ▶ But how to transpose concretely (respecting *lex certa* principle)?
 - ▶ "causing or likely to cause human rights violations or substantial damage to the environment", as suggested by EP?
 - ▶ Problematic from *lex certa*
 - ▶ Or use examples of existing autonomous crimes, e.g. :
- ▶ Council of Europe Convention 1998, Art. 2(1)(a):

"The discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water, which: (i) causes death or serious injury to any person, or (ii) creates a significant risk of causing death or serious injury to any person"
- ▶ In other words: the real work starts with the transposition!

7. Conclusions

- ▶ Protection of environment through criminal law was theoretically and empirically problematic:
 - ▶ Overreliance on criminal law
 - ▶ But absence in penal code, low priority
 - ▶ Lacking effective toolbox approach
 - ▶ Administrative dependence
- ▶ Voices in literature advocated:
 - ▶ More direct protection of environment
 - ▶ Autonomous crimes
 - ▶ Toolbox approach

7. Conclusions

- ▶ Voices have been heard at EU/MS level:
 - ▶ Incorporation in penal code or EPA
 - ▶ Toolbox approach
 - ▶ More direct protection of environment
- ▶ But ECD 2008 ran counter to these developments:
 - ▶ Criminal law only
 - ▶ No toolbox approach
 - ▶ Absolute administrative dependence
 - ▶ No autonomous environmental crimes

7. Conclusions

- ▶ New ECD solves these issues:
- ▶ Toolbox approach
- ▶ Data collection
- ▶ Autonomous crime
- ▶ But transposition will be important
- ▶ But generally...

7. Conclusions

New ECD creates conditions for an effective enforcement of environmental law through the criminal law!