

Protection of the environment through criminal law

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CONTENT: Protection of the environment through criminal law

- **EU Environmental Crime Directive: concept, main elements and revision process**
- **Key obligations and main types of offences**
- **Interrelation between criminal and administrative enforcement**
- **Reform process of the Environmental Crime Directive**

ENVIRONMENTAL CRIME

- The social costs are very high
- High revenues from environmental crime (waste crime is very profitable)

= attractive line of business for business

= **reason** for the EU to be involved (fighting environmental crime); **the other reason** being the development of the environmental *aquis* and its lacking enforcement (solving the implementation deficit)

Could EU be involved in regulating environmental crime?

First attempt in the Council of Europe: The 1998 Convention on the Protection of the Environment through Criminal Law (not in force)



The Convention on the Protection of the Environment through Criminal Law (Strasbourg, 4 November 1998) is the first international convention to criminalise acts causing or likely to cause environmental damage and it is a very important event in the development of environmental criminal law.

Could EU be involved in regulating environmental crime?

- 2003: The Council had adopted a **Framework Decision** on the protection of the environment through criminal law
- **Case C-176/03** (Commission v Council): The CJEU upheld the opinion of the Commission and annulled the aforementioned Decision highlighting that the fact that the Community did not enjoy any direct power in the field of criminal law did not prevent the Community itself from taking measures which relate to criminal law of Member States
- **Case C-440/05** (Commission v Council): the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence
- 2008: **The Environmental Crime Directive** was adopted



The main difficulty in adopting such a piece of legislation was the disagreement of the European institutions as regards its legal basis. Namely, in 2003, the Council had adopted a Framework Decision on the protection of the environment through criminal law, with the intent to harmonize legislation of the Member States in the field. Arguing that the protection of the environment was a first pillar objective, the Commission challenged the legality of the legal basis of this Framework Decision before the Court of Justice. In [Case C-176/03 Commission v Council](#) the CJEU upheld the opinion of the Commission and annulled the aforementioned Decision highlighting that the fact that the

Community did not enjoy any direct power in the field of criminal law did not prevent the Community itself from taking measures which relate to criminal law of Member States, when the application of effective, proportionate and dissuasive criminal penalties are needed for combating serious environmental offences and given the essential character of environmental protection as a Community objective (para. 48).

The following judgment of the Court of Justice of 23 October 2007 in case C-440/05 *Commission v Council*, concerning the Framework Decision 2005/667/JHA on ship-source pollution, reaffirmed the conclusions of the previous decision, stating that the Community legislature may have the power to require Member States “to apply criminal penalties to certain forms of conduct”. However, the Court decided that “the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence. It follows that the Community legislature may not adopt provisions such as Articles 4 and 6 of Framework Decision 2005/667, since those articles relate to the type and level of the applicable criminal penalties”. Consequently, the Court of Justice stated that the Framework Decision 2005/667/JHA, in encroaching on the competence which Article 80(2) EC attributed to the Community, infringed Article 47 of the Treaty on European Union and must therefore be annulled.

In 2008 the [Environmental Crime Directive](#) was finally adopted with the aim of establishing measures relating to criminal law in order to protect the environment more effectively (Article 1). Under the Directive nine environmental crimes are considered as criminal offences, when unlawful and committed intentionally or with at least serious negligence (Article 3) or in cases of inciting, aiding and abetting the intentional conduct referred to in Article 3 (Article 4).

Environmental Crime Directive

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What is **unlawful**?

Art. 2(a):

'unlawful' means infringing:

- (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
- (iii) 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)

If you comply with administrative decision – no unlawfulness



The obligation of criminalization concerns:

1. 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;
2. 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;

3. 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;
4. 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;
5. 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;

6. 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;
7. 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;
8. any conduct which causes the significant deterioration of a habitat within a protected site; it has to be underlined that, according to Article 2(c) of the Directive, “habitat within a protected site” means any habitat of species for which an area is classified as a special protection area pursuant to Article 4(1) or (2) of Directive 79/409/EEC, or any natural habitat or a habitat of species for which a site is designated as a special area of conservation pursuant to Article 4(4) of Directive

92/43/EEC;

9. the production, importation, exportation, placing on the market or use of ozone-depleting substances

Environmental Crime Directive

Some of these environmental crimes include the condition of causing death or serious injury or harm to persons or the environment.

In these cases, the (non-) action alone is not considered to be a criminal offence. This aforementioned enumeration confirms that 'environmental crime' is a broad concept encompassing very different conducts, and not all of them are included Article 3.

For instance, crimes concerning food safety or animal welfare are not addressed in the Directive.

Many vague notions: What is non-negligible quantity?

Articles 5 and 7 require the imposition of "effective, proportionate and dissuasive sanctions" – criminal sanctions are limited to natural persons.



Under Articles 6 and 7 the Directive introduces a system of liability of legal persons and requests the Member States to establish **effective, proportionate and dissuasive penalties**. The issue of criminal penalties was raised in the wake of the abovementioned [Case C-176/03 Commission v Council](#) questioning whether the Community competence in criminal law was limited only to the definition of criminal offences or extended also to the deflection of criminal sanctions. The problem was again solved before the CJEU after the Commission having challenged the legality of the adoption of a

third-pillar (instead of a first-pillar) instrument on ship-source pollution, where the Court again shared the opinion of the Commission by clarifying at the same time that the competence of the Community in the field of criminal law does not extend to the determination of the type and level of sanctions ([Case C-440/05 Commission v Council](#), § 70). Later on, however, the EU gained the competence to determine the sanctions and therefore the revision of the Directive (see below) proposes new provision on sanctions as well.

Article 3 (b) and (c) criminalise collection, transport, recovery, shipment and disposal of waste in contravention of EU rules. However, no mention is made to Organized Crime Groups (OCGs) or corruption. Articles 5 and 7 require the imposition of “effective, proportionate and dissuasive sanctions” – criminal sanctions are limited to natural persons. There is no indication of minimum or maximum sanctions leaving very wide discretion to the Member States. The lack of a uniform sanctions’ regime makes the Directive weak and ineffective: each Member State can interpret Article 5 differently, thus leading to the existence of “pollution havens”.

The Directive does not remove the practical problem that the mere decision to criminalize has no influence either on decisions of public prosecutors to dismiss particular cases of environmental crime, or on the discretionary powers of the judge to choose the applicable sanctions.

Relationship to administrative law

Many countries only had violations of environmental law prosecuted by criminal law (more than 80 % dismissed).

- no sense of criminalising everything if the system does not have capacity to deal with all the issues
- many Member States moved towards administrative sanctioning system and use the criminal law as ultima ratio (or not at all)
- however, the ECD does not speak about other sanctions than criminal penalties (no comprehensive approach is established)



The Member States, by transposing the Environmental Crime Directive have to attach to the existing prohibitions some criminal sanctions. Very often, they keep a combination of criminal and administrative punishment which should achieve that only the offenders who commit the most severe and harmful violations should be criminally prosecuted, while less serious offences can be dealt with using administrative enforcement.

Many countries such as Germany, Denmark, Austria or the Czech Republic apply comprehensive legislation detailing administrative sanctions for

environmental offences, alongside criminal penalties. Even several European countries that predominantly relied on criminal enforcement in the past recently moved towards more administrative enforcement. The overall picture emerging from these developments is a move towards combined criminal-administrative enforcement systems.

Collecting data

No duty in the ECD – not much information about implementation in the Member States

- **perfect transposition does not equal correct implementation**
- **application is crucial**
- **data is needed for comparison between countries**

What changed after 2008?

- The Lisbon Treaty provides for a separate legal basis for criminalisation (environment not listed)
- Regulation of type and magnitude sanctions is now possible

ECD

- absence of sanctions was not the main problem (lack of data was)

REVISION OF THE ENVIRONMENTAL CRIME DIRECTIVE

- The Commission proposed a revision in December 2021
- Toolbox approach (wide range of criminal sanctions and other measures)
- Art. 21: Data collection obligation to monitor the effectiveness of the enforcement system
- Harmonisation of the sanction (without prejudice to discretion of the judges)
- Broader concept of unlawfulness



The Commission proposed a [revision of the Environmental Crime Directive](#) in December 2021. The proposal intends to clarify some of the terms contained in the directive and includes an updated list of environmental crime offences, harmonised sanction types and levels, measures to strengthen international investigation and prosecution, improvements to the collection of statistical data and measures to improve national enforcement chains.

New categories of criminal offences proposed in the

revised Environmental Crime Directive are:

- illegal timber trade;
- illegal ship recycling;
- illegal water abstraction from ground- or surface water;
- serious breaches of EU chemicals legislation;
- serious breaches related to dealing with fluorinated greenhouse gases;
- serious breaches of legislation on invasive alien species with Union concern;
- serious circumvention of requirements to get a development consent and to do environmental impact assessment causing substantial damage;

source discharge of polluting substances from ships.

The proposal also clarifies undefined legal terms used to describe environmental crime in the current Directive, such as for instance 'substantial damage'. It suggests criteria that explain more precisely how to interpret these terms. This will lead to a more harmonised application of criminal law and understanding of environmental crime across the EU, and more legal certainty to duty-holders.

New provisions on sanctions are proposed. The main sanctions for criminal offences are prison sentences and fines. The proposal recognises that, in addition, other sanctions and measures may be appropriate and necessary. The new rules propose accessory sanctions, such as withdrawal of permits, disqualifications and exclusion from access to public funding. Accessory sanctions are often deemed more effective than financial sanctions, especially for legal persons. Particular attention is paid to the restoration of the damaged environment.

The proposal also includes obligations of the Member States to provide for adequate training, resources, cooperation, communication and information sharing among enforcers. It also strengthens the role of public: It includes measures to support and assist people who report environmental offences and cooperate with the enforcement. It also enables, at certain conditions, the public concerned to be present in proceedings linked to the prosecution of crime cases where appropriate, pursuant the rules set out in Member States.

THANK YOU FOR YOUR ATTENTION!

