

The Environmental Crime Directives

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 (2023)

Environmental criminal law emerged in the 1970s with characteristics that were not entirely positive. Initially, there was administrative dependence, which meant that criminal liability only arose when administrative obligations were breached. In addition, environmental crimes had a low priority in practice and prosecution. Many countries relied solely on criminal law without considering alternatives, resulting in a lack of a toolbox approach with multiple instruments available.

As a result of the criticism in the literature, during the 1980s and 1990s Member States slowly made important changes to the structure of environmental criminal law. The long-awaited Environmental Crime Directive was adopted in 2008, but to the disappointment of many, it did not incorporate the changes suggested in the literature. This led to criticism of the directive. However, a new directive, tentatively called ECD 2023, has been agreed, although it has yet to be published. It is important to note that the text has been approved, so no changes are expected in this regard.

1. Introduction

- ▶ Goal of this talk:
 - ▶ Explaining the structure of environmental criminal law
 - ▶ Evolution in MS
 - ▶ ECD 2008 and its limits
 - ▶ ECD 2023

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))

In many jurisdictions, environmental criminal law was often found within administrative law. This meant that environmental regulations were primarily administrative statutes, and anyone who violated these statutes was subject to criminal liability. However, this traditional model had a number of disadvantages. Environmental criminal law was dispersed rather than concentrated, making enforcement difficult.

In addition, environmental crime was not seen as a priority by prosecutors, police and even judges. Because it was seen as regulatory rather than core criminal law, it was not taken as seriously, hindering effective enforcement efforts.

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

Another feature of environmental criminal law was its administrative dependence.

According to this model, criminal liability only arose in cases of actual administrative disobedience. For example, operating without a permit or breaching permit conditions constituted criminal behaviour. However, this approach meant that the norms governing environmental crimes were provided by administrative law and ecological values were not directly protected.

This led to criticism that the focus was on administrative interests in managing the environment rather than directly protecting ecological values. Unlike other values such as life, health or property, where any violation is immediately criminalised, environmental violations were only considered criminal if they violated administrative norms.

This created what is known in the literature as the "permit shield". In essence, as long as an operator complied with the terms of an administrative permit, it was protected from criminal liability. This administrative dependence of criminal law was both its core and its problem.

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)

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

The traditional enforcement approach to environmental criminal law had several shortcomings that led to criticism in the literature. At the end of the last century, two important doctrinal developments took place. Professor Gunther Heine of the Max Planck Institute for Criminal Law led a project called "Do We Need to Protect the Environment through Criminal Law?". His argument was that while criminal law is necessary, it should be used in addition to many other provisions.

According to Heine, an optimal enforcement approach requires a toolbox of different types of provisions. For example, if someone violates administrative law by acting without a permit or by violating permit conditions, he or she is only violating administrative interests, which is known as abstract endangerment. In such cases, administrative law should intervene.

However, if there is an emission and the emission is unlawful, there is a concrete endangerment that requires the intervention of criminal law. In addition, there may be cases where damage to the environment poses a concrete danger to human health. In such cases, the criminal law should intervene, even if the conditions of a permit are met.

Heine argued that autonomous environmental crimes should also be created to

address situations where environmental harm cannot be excused by administrative law. Ultimately, an optimal enforcement approach requires a combination of administrative, criminal and autonomous environmental laws working together.

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

Another important doctrinal move came from English colleagues, law and economics scholars Anthony Ogus and Carolyn Abbot. In thought-provoking articles such as "Do We Have the Right Regime?" published in the Journal of Environmental Law, they questioned whether the current regime was the right one.

According to Ogus and Abbot, everything in environmental law is being criminalised, overwhelming prosecutors who lack the capacity to handle all the cases. They argued for a more balanced approach, suggesting the use of a pyramid model. They were supported in their argument by environmental law professor Richard Macrory, who emphasised the need for a toolbox approach.

This approach would involve different types of responses for different types of offenders and offences, with criminal law being just one of the tools in the toolbox. The idea was to have a combination of civil penalties, administrative fines and criminal law, allowing enforcement authorities to choose the most appropriate response for each situation.

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

During the 1980s and 1990s, Member States became increasingly aware of the importance of protecting the environment through criminal law, which led to significant changes. One important change was the recognition that the location of environmental criminal law provisions was important.

Many countries began to incorporate environmental criminal law into their criminal codes or to enact specific environmental statutes. For example, countries such as Germany, the Netherlands, Finland, Portugal and Spain opted to include environmental criminal law in their criminal codes or environmental codes.

4. Policy change at MS level

- ▶ Or in environmental codes, examples:

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

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

At Member State level, other changes were also taking place. Criminal law not only provided protection against administrative offences, but also directly protected ecological values such as the environment, water, air and nature reserves with Portugal, Spain, Sweden as examples.

Germany, among others, introduced autonomous environmental crimes. This meant that the focus shifted from merely punishing administrative disobedience to directly protecting ecological values. These changes were reflected not only in the introduction of environmental provisions in penal codes, but also in the nature of these provisions, which became more in line with the recommendations of the literature.

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

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

The EU introduced the Environmental Crime Directive in 2008, which was a complex process as the EU legislature did not have the power to enact criminal law before the Lisbon Treaty. However, a landmark ruling by the European Court of Justice in 2005 made the directive possible by allowing the EU to use criminal law to enforce directives.

However, the Directive was less comprehensive than approaches at Member State level. Unlike the Member States, the EU did not believe in alternatives or a toolbox approach. The Directive focused exclusively on criminal law, without mentioning administrative remedies or fines.

There was a belief that criminal sanctions had a different social disapproval than administrative sanctions or civil compensation mechanisms. While this may be true, it didn't mean that criminal law should be the only response to environmental offences.

While Member States were moving towards a more balanced approach with alternatives in their toolbox, the EU Directive focused exclusively on criminal law, which seemed to be somewhat out of step with developments in Member States.

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”

The Environmental Crime Directive defines "unlawfulness" as violating national legislation, permits, or administrative decisions that implement regulations and directives listed in the annex to the directive.

However, the directive's approach to unlawfulness only allows for criminal liability in cases of administrative regulation violations. This formulation of unlawfulness does not directly protect ecological values, as advocated in the literature.

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

6. ECD 2023: 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

Many of the problems with the Environmental Crime Directive (ECD) have been addressed in the ECD 2023 or possibly 2024, pending formal adoption and publication. Although the trilogues (Commission, Parliament and Council) have agreed on a text, formal adoption is still pending. However, it is expected that there will not be many changes.

One important change is the introduction of minimum sanctions. This has been possible since the Lisbon Treaty. For example, ECD 2023 sets maximum terms of imprisonment for natural persons, including a maximum of 10 years if the offence results in the death of a person. This was not possible in the 2008 ECD due to a lack of competence at EU level.

6. ECD 2023: 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 ECD 2023 introduces a toolbox approach, referring to administrative remedies in the recitals and offering a wide range of sanctions and remedies from which enforcement officers can choose.

For natural persons, these include obligations to restore the environment, classical fines, disqualification from exercising a leading position within a legal entity, withdrawal of permits and authorisations, etc. This wide range of sanctions provides enforcement officers with a comprehensive set of tools to tackle environmental crime.

6. ECD 2023: 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 2023: a revolution

6.3 Data collection

- ▶ 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

Article 21 mandates the establishment of a system for recording, producing, and providing statistical data related to environmental offences. . This includes data on the number of offences, cases dismissed, individuals prosecuted and convicted, and the type of sanctions imposed.

This is an important development as it ensures that both the EU and Member States have a clear understanding of environmental law enforcement activities. Member States are now required to report on their enforcement activities, going beyond mere paper transposition.

Moreover, this data is essential for evidence-based enforcement strategies. Intelligent enforcement requires evidence and measurement. Knowing the number of companies, the frequency of monitoring and inspections, the effectiveness of remedies and their impact on future behaviour is crucial to designing effective enforcement policies. This development is therefore very welcome at both EU and Member State level.

6. ECD 2023: 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 2023: 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

The key point is that prosecutors should be able to go after companies that are causing real harm to the environment, even if they are complying with the terms of a permit. The European Court of Human Rights has ruled against states for human rights violations caused by pollution, even when companies comply with permits.

Initially, the ECD 2021 proposal included an exception for cases where permits were obtained fraudulently or through corruption, extortion or coercion. However, this wouldn't address cases where companies comply with permit conditions but still cause serious environmental damage.

Thanks to significant green lobbying, an aggravating circumstance was included in Article 8. This applies to situations of long-lasting, widespread environmental damage, and was called "ecocide" in the recital.

But this was not enough. It is argued that compliance with permit conditions should not shield companies from liability for causing serious environmental damage.

In the final version of the ECD, a critical change was made. Conduct will be considered unlawful, even if it is carried out under a permit issued by a competent

authority of a Member State, if there is a manifest breach of relevant substantive legal requirements.

This means that companies can no longer use compliance with permit conditions as a defence against environmental damage. Even if they have permits, they can be held criminally liable if there is a manifest breach of relevant substantive legal requirements.

It introduces autonomous environmental crimes at EU level for the first time. It's a groundbreaking development, breaking through the authorisation shield and ensuring that serious environmental damage is punishable even when committed under an authorisation.

However, this change was the result of a political compromise, as evidenced by the wording "relevant substantive legal requirements". Nevertheless, it's an important step forward.

It's important to note that this change has not yet been formally adopted, so we need to be cautious. However, the fact that there was almost no lobbying against it is promising. Normally, industry would strongly oppose such changes if they understood the implications.

Therefore, the apparently wishy-washy wording on "substantive legal requirements" at EU level is the result of a political compromise, but it marks an important milestone in environmental criminal law.

6. ECD 2023: 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!

The challenge now is to transpose the new Directive into Member States' legislation while respecting the principle of *lex certa*. Simply stating that individuals will be criminally liable if they breach substantive rules of law doesn't respect the principle of *lex certa*. However, there are ways to address this.

The 1998 Council of Europe Convention offers a solution. According to Article 2 of the Convention, a discharge, emission or introduction of substances that causes death or serious injury to any person or creates a significant risk of causing death or serious injury constitutes an environmental crime in its own right.

This means that criminal liability applies even if the conditions of a permit are met. There are several examples in Member State legislation where autonomous offences have been formulated in accordance with the "*lex certa*" principle.

Although the phrase "substantive legal requirements" may seem vague, it's clearer than "violation of human rights obligations". Winning this battle and including an autonomous environmental crime in the Directive is a significant step forward.

Now the real work of implementation begins. The directive must be transposed into the laws of the member states. How this will be done remains to be seen, but

this is an exciting step forward. This change is revolutionary at EU level and will empower prosecutors to tackle cases they couldn't in the past.

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!