

A Critical Evaluation of the New EU Environmental Crime Directive

2024/1203



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Article

ABSTRACT

After just over two years of negotiations, the EU Environmental Crime Directive 2024/1203 was finally published in April 2024. The Directive considerably improves on the text of the previous EU Environmental Crime Directive of 2008, which was introduced in the aftermath of the ECJ rulings on Environmental Crimes (2005) and Ship-Source Pollution (2007). The 2008 Directive has been subject to considerable criticism, including for the fact that it lacks detailed rules on criminal penalties or more advanced mechanisms for interstate cooperation to combat transboundary environmental crimes. In response, the 2024 Directive not only extends the number of environmental criminal offences in the EU Member States, but it also introduces specific types and levels of criminal penalties and specific rules on interstate cooperation in criminal matters. This article critically assesses to which extent the new EU rules improve the previous legal framework for combating environmental crimes, in particular with the expansion of criminal offences and the introduction of specific criminal and non-criminal penalties.

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I. Introductory Remarks

In December 2021, the European Commission published its long-awaited proposal on the recast Environmental Crime Directive (ECD).¹ This followed the consultation and evaluation of the 2008 Environmental Crime Directive² (hereinafter “2008 ECD”) with several stakeholders from 2020 to 2021. The Commission proposal aimed to strengthen the implementation of EU environmental law by further harmonising environmental criminal law in several key areas, including the following:

- Criminal offences which had not been envisaged by the 2008 ECD, such as, illegal timber trade, illegal surface water extraction, illegal ship recycling, circumvention of an operator’s obligation to conduct an environmental impact assessment (EIA), and introduction or spread of alien species;
- Specific types and levels of criminal penalties, including minimum–maximum prison sentences applicable to individuals³ and financial penalties applicable to individuals or corporations;⁴
- Inclusion of rules on police and judicial cooperation in criminal matters in the context of transnational environmental crime, including rules on prosecution and jurisdiction.

Therefore, the Commission aimed to adopt a more comprehensive and prescriptive approach to the harmonisation of environmental criminal law in the EU, claiming – on the basis of existing studies on the implementation of the 2008 ECD⁵ – the measures currently in place in the EU Member States to be insufficient to tackle environmental crime effectively.

After the Commission’s proposal, the legislative process (under the ordinary legislative procedure)⁶ continued as follows: the Council reached a general approach on the Commission’s proposal at its meeting on 9 December 2022.⁷ In turn, the European Parliament defined its position in April 2023.⁸ Trilogue negotiations started in May 2023, and the negotiators reached an agreement on the text after the fourth trilogue meeting on 16 November 2023.⁹ The European Parliament (at first reading session) adopted a legislative resolution on 27 February 2024 agreeing on the text of the Directive (with 499 votes in favour, 100 against, and 23 abstentions).¹⁰ The Council finally adopted the recast ECD in March 2024 (by qualified majority voting with 25 delegations voting in favour of the new ECD while one delegation (Germany) abstained). The Directive (hereinafter 2024 ECD) was published in the Official Journal of 30 April 2024.¹¹ It replaces the 2008 ECD.¹²

With regard to the geographical scope of application, it should be borne in mind, however, that Denmark and Ireland are not bound by the 2024 ECD due to their opt-out arrangements in the Area of Freedom, Security and Justice (AFSJ).¹³ This means that Denmark and Ireland will remain bound by the 2008 ECD, since their opt-outs do not apply to any legislation adopted under the pre-Lisbon first pillar.¹⁴

It is also noteworthy that the offence in relation to ship-source pollution, which had previously been included in a 2009 Directive,¹⁵ has now been incorporated in the 2024 ECD.¹⁶ As a consequence, the 2009 Directive on ship-source pollution crimes is replaced by the 2024 ECD as well, again with the exception of Denmark and Ireland.¹⁷

This article will examine key provisions of the 2024 ECD (particularly the new provisions concerning criminal offences and penalties) and critically assess the extent to which it may improve on the previous legal framework for combatting environmental crimes in the European Union.

II. Key Reforms under the 2024 Environmental Crime Directive: the Expansion of Criminal Offences

Unlike the 2008 ECD, which contains a total of nine offences (including three pollution control offences,¹⁸ two waste management offences,¹⁹ three biodiversity offences,²⁰ and one atmospheric pollution management offence),²¹ the recast 2024 ECD not only retains these offences (with some modifications ranging from significant to modest)²² but introduces 12 new offences.²³ In addition, it introduces two new qualified offences for acts comparable to ecocide, largely thanks to the interventions of the European Parliament in the course of the ECD negotiations.²⁴ This extension largely reflects new developments in EU environmental law and policy, including new EU environmental legislation which was in the process of being adopted whilst the recast ECD was being negotiated.²⁵ Ultimately, this resulted in key amendments to the text of the 2024 ECD itself. In this regard, it should be noted that the 2008 ECD already provided for the option of that Directive being amended, taking into account new developments in EU environmental policy; yet this option was never exercised and no amendments in accordance with the 2008 Directive were made.²⁶

Overall, the new Art. 3(2) ECD lists a total of 21 offences dealing with a wide range of environmental policy concerns, in particular:

- Pollution control (including mercury pollution);²⁷
- Waste management;²⁸
- Dangerous activities in installations;²⁹
- Offshore installation pollution;³⁰
- Pollution by radioactive substances;³¹
- Invasive species;³²
- Project execution/environmental impact assessment;³³
- Waste shipment;³⁴
- Ship-recycling;³⁵
- Ship-source pollution;³⁶
- Operation of an installation;³⁷
- Radioactive materials;³⁸
- Placing on market of commodities/illegal timber trade;³⁹
- Ozone depleting substances;⁴⁰
- Fluorinated greenhouse gases;⁴¹
- Illegal water abstraction;⁴²
- Killing/possession of species;⁴³
- Illegal trade in species/CITES⁴⁴;

- Habitat deterioration.⁴⁵

The majority of these offences could be classified as “concrete endangerment offences” because they require that a specified threshold of environmental harm be met.⁴⁶ There are also “abstract endangerment offences,” which do not depend on a threshold of environmental harm being met.⁴⁷ Yet, despite the move to significantly expand the number of offences, it could be criticised that the 2024 ECD might have gone further and criminalised other activities with significant environmental or health impacts, in particular illegal, unreported, and unregulated (IUU) fishing,⁴⁸ fraud in the EU carbon markets,⁴⁹ illegal trade in genetically modified organisms (GMOs) and their deliberate release into the environment,⁵⁰ and the causing of forest fires⁵¹ – none of which are covered as separate offences under the 2024 ECD.

As regards the definition of the offences in the 2024 ECD, another significant reform relates to the non-inclusion of amended versions of the two Annexes (A and B) of the 2008 ECD. Indeed, the 2008 ECD contains Appendix (A), listing 69 pieces of European Community (EC) environmental legislation which relate to the environmental offences defined in that Directive, and Annex B, listing three pieces of legislation adopted in the context of Euratom.⁵² The fact that the 2008 ECD was adopted more than 15 years ago and considering the bulk of EU environmental legislation that has been adopted in the meantime⁵³ made a simple update of the list of EU environmental legislation in the two Annexes a less attractive option to the European Commission.

Yet, the deletion of the Annexes has neither led to a simplification of the criminal offences in the ECD nor to their “disentangling” from various pieces of EU environmental law legislative instruments.⁵⁴ In fact, through footnotes, cross-references, and sub-paragraphs, all of the 21 criminal offences in the 2024 ECD remain closely linked to and dependent on breaches of other pieces of EU environmental law.⁵⁵ This will result in a close interconnection between EU criminal law and EU environmental law, as the EU proceeds with its project of harmonising environmental criminal law. This reflects the choice of the legal basis for the 2024 ECD (Art. 83(2) TFEU). Art. 83(2) TFEU links the EU criminal-law powers to the effective implementation of a Union policy.

III. Criminal and Non-Criminal Penalties

In line with the ECJ rulings on *Environmental Crimes*⁵⁶ and *Ship-Source Pollution*⁵⁷, the 2008 ECD does not contain specific types and levels of criminal penalties. It only contains general provisions on penalties applicable to natural persons⁵⁸ and legal persons,⁵⁹ requiring that penalties are “effective, proportionate and dissuasive.”⁶⁰ Conversely, as per the legal basis post-Lisbon enshrined in Art. 83(2) TFEU, the 2024 ECD prescribes specific types and levels of criminal penalties for both natural and legal persons. Although there are significant improvements in the 2024 ECD relating to several other areas such as, for example, jurisdiction,⁶¹ crime prevention,⁶² public participation in criminal proceedings,⁶³ limitation periods,⁶⁴ the protection of environmental defenders⁶⁵ and cooperation between Member States and EU agencies,⁶⁶ this section will focus on the level of penalties that apply to the criminal offences in Arts. 3 (2) and (3) of the 2024 ECD.⁶⁷

1. Penalties for natural persons

The highest prison sentences for natural persons foreseen in the 2024 ECD is under Art. 5(2) lit. a). It requires Member States to introduce a maximum penalty of at least 10 years imprisonment “if [the offences] cause the death of any person.” These offences relate primarily to pollution control offences.⁶⁸ The second highest criminal penalty for natural persons envisaged in 2024 ECD is a maximum of at least eight years imprisonment for the “ecocide” qualified offences (Art. 5(2) lit. b)). Although this can be considered a reasonably high minimum-maximum prison sentence for offences comparable to “ecocide”,⁶⁹ it arguably in-

dicates an anthropocentric direction of the 2024 ECD. Whereas the qualified offences in Art. 3(3) take an eco-centric formulation, the higher prison penalties envisaged in Art. 5(2) lit. a) are dependent on the element “death of a person”. Yet, it is arguable that as offences “comparable to ecocide”, these qualified offences should entail prison sentences at least as high as 10 years imprisonment as foreseen in Art. 5(2) lit. a) of the 2024 ECD.

An additional concern are the applicable, much lower, criminal penalties for natural persons for most biodiversity offences⁷⁰; they are to be subject to a maximum term of imprisonment of at least three years.⁷¹ This is regrettable, as it signals a clear anthropocentric direction of the 2024 ECD. It is also inconsistent with various international instruments (many of which are endorsed or ratified by the EU itself) recognising the seriousness and urgency of the global biodiversity and climate crises.⁷² Lastly, we should consider the fact that some of these biodiversity offences tend to be committed in the context of criminal organisations.

2. Penalties for legal persons

Arguably the most significant provision concerning the liability of legal persons is Art. 7(3) of the 2024 ECD.⁷³ For the majority of the criminal offences in the 2024 ECD⁷⁴ the following minimum levels of fines are applicable to legal persons:

- (i) 5 % of the total worldwide turnover of the legal person, either in the business year preceding that in which the offence was committed, or in the business year preceding that of the decision to impose the fine,

or

- (ii) an amount corresponding to €40 000 000.

It is notable that the Commission’s 2021 ECD proposal did not include the option of payment of a lump sum of fines for legal persons and the only option available in that proposal would have been for fines to be calculated on the basis of a company’s worldwide turnover.⁷⁵ The introduction of the lump sum is likely because, in some Member States, fines are not generally calculated on the basis of a company’s total worldwide turnover or because the Council perceived that calculating fines only on the basis of turnover would entail particularly high (and potentially disproportionate) fines. Although the minimum maximum €40 million lump sum alternative fine is certainly high in absolute terms,⁷⁶ some observers might regard this approach as the Council’s attempt to weaken the text concerning the liability of legal persons as laid down in its November 2022 mandate in the course of the negotiations.⁷⁷

While the higher minimum-maximum penalties foreseen in Art. 7(3) lit. a) apply to most offences listed in Art. 3(2) of the 2024 ECD, in the case of five biodiversity and water resource offences⁷⁸ the minimum maximum penalties for legal persons only need to be “3 % of the total worldwide turnover of the legal person” or “an amount corresponding to €24 000 000” (Art. 7(3) lit. b) i) and ii)). This again illustrates the inappropriately low penalties for biodiversity crimes in the 2024 ECD.

3. Alternative penalties

In line with the need for a “toolbox” approach for the effective enforcement of environmental law,⁷⁹ the 2024 ECD recognises the need for further optional alternative penalties beyond the prison sentences for natural persons listed in Art. 5 or the financial penalties for legal persons listed in Art. 7. These *optional* alternative criminal or non-criminal penalties⁸⁰ include environmental restauration and compensation for environmental damage,⁸¹ exclusion from access to public funding,⁸² withdrawal of permits,⁸³ and other penalties which ap-

ply more specifically to legal persons such as placing under judicial supervision⁸⁴ and judicial winding-up.⁸⁵ It should be noted that it was largely thanks to the Council's insistence in the course of the negotiations⁸⁶ that these alternative sanctions – unlike the Commission's 2021 ECD proposal⁸⁷ – became optional rather than mandatory penalties and that they may be of either a criminal or non-criminal nature.⁸⁸ This is a clear indication that the Council acted to weaken the text of the recast ECD when it comes to the available framework of penalties for environmental offences – a point of considerable criticism by some observers in the course of the negotiations.⁸⁹

IV. Conclusion

Whereas the 2008 ECD only had limited success in establishing a broad supranational framework for the harmonisation of environmental criminal law,⁹⁰ the 2024 ECD adopts a much more comprehensive and prescriptive approach. It makes use of the extended criminal law powers under Art. 83(2) TFEU post-Lisbon. As a consequence, unlike its predecessor, the 2024 ECD is now firmly established as an EU criminal law instrument, even though it continues to largely rely on EU environmental law for its implementation (especially when it comes to the definition of offences). While many of the core provisions proposed by the Commission in 2021 still stood at the end of the negotiations, the Council's interventions can be regarded as having led to the weakening of the text (particularly regarding the types and levels of penalties applicable to natural and legal persons). Yet, the European Parliament's achievements in the legislative process will be best remembered for firmly inserting the "ecocide" qualified offences into the final text.

In light of the above analysis of the reforms concerning the expansion of criminal and non-criminal penalties in the 2024 ECD, there will be numerous challenges when it comes to its incorporation into the national legal systems of the EU Member States. Given its inherent complexities, the 2024 ECD will probably not be remembered as a model for future legislative drafting. However, there is no doubt that the 2024 ECD is likely to bring considerable improvements and important additional enforcement tools to the fight against environmental crime in the EU.

1. 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, Brussels, 15.12.2021, COM(2021) 851 final. ↪
2. 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, OJ L 328, 6.12.2008, 28. ↪
3. Art. 5 COM(2021) 851, *op. cit.* (n. 1). ↪
4. Arts. 5 and 7 COM(2021) 851, *op. cit.* (n. 1). . ↪
5. See further e.g. Commission 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, 28.10.2020, SWD(2020) 259 final; and Milieu (Law & Policy Consulting), Study to supply the Impact Assessment of the Directive 2008/99/EC on the protection of the environment through criminal law, JUST/2020/JACC/FW/CRIM/0122, 9 December 2021, available at: <https://commission.europa.eu/system/files/2022-02/study_final_report_en.pdf>. All hyperlinks in this article were last accessed on 30 October 2024. ↪
6. Reference: COD 2021/0422. ↪
7. See General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law – General Approach, Brussels, 16 December 2022, Council doc. 16171/22. ↪
8. See Report on the 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 - Amendments by the European Parliament, A9-0087/2023, 28 March 2023, available at: <https://www.europarl.europa.eu/doceo/document/A-9-2023-0087_EN.html>. ↪
9. See Draft Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, Council doc. 17114/23, 22 December 2023. . ↪
10. P9_TA(2024)0093. See also the EP's Press Release, "Environmental Crimes: MEPs adopt extended list of offences and sanctions", 27 February 2024, available at: <https://www.europarl.europa.eu/pdfs/news/expert/2024/2/press_release/20240223I-PR18075/20240223I-PR18075_en.pdf>. ↪
11. Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, OJ L, 2024/1203, 30.4.2024. ↪
12. Art. 26 of the 2024 ECD. Note: If not stated otherwise, references to provisions (Articles) in the following endnotes refer to the 2024 ECD, *op. cit.* (n. 11). ↪
13. See also Recitals 69 and 70 of the 2024 ECD. ↪

14. For an analysis of the implications of Brexit for the implementation of the 2008 ECD in the UK, see R. Pereira "The development of environmental criminal law enforcement in the European Union: from institutional fragmentation to European environmental criminal justice governance?", in: R. Pereira, A. Engel and S. Miettinen (eds.), *The Governance of Criminal Justice in the European Union: Transnationalism, Localism and Public Participation in an Evolving Constitutional Order*, 2020, pp. 181 et seq. See also in the same collective book the article by V. Mitsilegas, "After Brexit: reframing EU-UK cooperation in criminal matters", pp 17 et seq., and M. Lennan, "Evaluating the effectiveness of the EU Environmental Liability and Environmental Crime Directives as implemented by Scotland and the rest of the United Kingdom", (2021) 24 (1), *Journal of International Wildlife Law & Policy*, 26-37. ↵
15. Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringement, OJ L 280, 27.10.2009, 52. ↵
16. Art. 3(2) lit. i. ↵
17. Cf. Art. 27. It should be noted though that Directive 2005/35/EC ("the ship-source pollution directive") remains in force for all EU Member States (yet without the Directive 2009/123/EC amendment, which only applies now to Ireland and Denmark). See Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, OJ L 255, 30.09.2005, 11. It should also be noted that the ship-source pollution directive is being revised at the time of writing, see Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences, COM(2023) 273 final. ↵
18. Art. 3 lit. a), d) and e) of the 2008 ECD. ↵
19. Art. 3 lit. b) and c) of the 2008 ECD. ↵
20. Art. 3 lit. f), g) and h) of the 2008 ECD. ↵
21. Art. 3 lit. i) of the 2008 ECD. ↵
22. Compare, for example, the waste management offences in Art. 3(2) lit. f) of the 2024 ECD and Art. 3 lit. b) of the 2008 ECD; the waste shipment offence in Art. 3 lit. e) of the 2008 ECD and the equivalent new offence under Art. 3(2) lit. g) of the 2024 ECD; the offence concerning the operation of a plant in which a dangerous activity is carried out under Art. 3(2) lit. j) of the 2024 ECD reflects the same offence in Art. 3 lit. d) of the 2008 ECD; the offence relating to killing/destruction/sale etc of species in Art. 3(2) lit. n) of the 2024 ECD largely corresponds to Art. 3 lit. f) of the 2008 ECD; and the offence relating to trade in endangered species in Art. 3(2) lit. o) of the 2024 ECD corresponds to Art. 3 lit. g) of the 2008 ECD. ↵
23. Art. 3(2) lit. b) (placing on market of product); Art. 3(2) lit. c) (the manufacturing/placing on the market of substance); Art. 3(2) lit. d) (mercury pollution); Art. 3(2) lit. e) (execution of projects carried out without a development consent); Art. 3(2) lit. h) (illegal ship recycling); Art. 3(2) lit. i) (ship- source pollution); Art. 3(2) lit. k) (pollution from offshore installations); Art. 3(2) lit. t) (fluorinated greenhouse gases pollution); Art. 3(2) lit. m) (water abstraction pollution); Art. 3(2) lit. p) (placing in market of relevant forest commodities); Art. 3(2) lit. r) (introduction/keeping etc invasive species) including two separate offences/restrictions ((i) and (ii)). ↵
24. Art. 3(3) lit. a) and b). On the European Parliament's position in the negotiations, see EP, A9-0087/2023, *op. cit.* (n. 8). ↵
25. This includes e.g. Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023, 206; and Regulation (EU) 2024/573 of the European Parliament and of the Council of 7 February 2024 on fluorinated greenhouse gases, amending Directive (EU) 2019/1937 and repealing Regulation (EU) No 517/2014, OJ L 2024/573, 20.2.2024. ↵
26. Recital 15 of the 2008 ECD states: "[w]henever subsequent legislation on environmental matters is adopted, it should specify where appropriate that this Directive will apply. Where necessary, Article 3 should be amended". Author's note: Art. 3 of the 2008 ECD defines the criminal offences. See further R. Pereira, *Environmental Criminal Liability and Enforcement in European and International Law*, 2015; R. Pereira, "The Legal Basis for Harmonisation of Environmental Criminal Law in the EU: Past and Future Challenges", in: M. Andenas and C. Andersen (eds.), *Theory and Practice of Harmonisation*, 2012, pp. 403 et seq. ↵
27. Art. 3(2) lit. d). ↵
28. Art. 3(2) lit. f). ↵
29. Art.3(2) lit. j). ↵
30. Art.3(2) lit. k). ↵
31. Art.3(2) lit. l). ↵
32. Art.3(2) lit. r). ↵
33. Art.3(2) lit. e). ↵
34. Art.3(2) lit. g). ↵
35. Art.3(2) lit. h). ↵
36. Art.3(2) lit. i). ↵
37. Art.3(2) lit. k). ↵
38. Art.3(2) lit. l). ↵
39. Art.3(2) lit. p). ↵
40. Art.3(2) lit. s). ↵
41. Art.3(2) lit. t). ↵
42. Art. 3(2) lit. m). ↵
43. Art. 3(2) lit. n). ↵
44. Art.3(2) lit. o). ↵
45. Art.3(2) lit. q). ↵
46. Under the 2024 ECD, the threshold of environmental damage for most offences is typically that the prohibited conduct causes or is likely to cause "the death of, or serious injury to, any person, substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants." See e.g. the offences in Art. 3(2) lit. a) and Art. 3(2) lit. b). ↵

47. In particular, the waste shipment offence (Art. 3(2) lit. g); the ship recycling offence (Art. 3(2) lit. h); the trade etc in ozone depleting substances offence (Art. 3(2) lit. s)) and the trade in fluorinated greenhouse gases offence (Art. 3(2) lit. t). On the distinction between concrete endangerment, absolute endangerment and abstract endangerment offences, see further M. Faure and S.J. Lopik, "Methods for Environmental Criminal Law Research", in R. Pereira and T. Fajardo (eds.), *A Research Agenda for Environmental Crime and Law* (Edward Elgar, forthcoming in 2024/2025). For an analysis of the implementation challenges of those offences in selected EU Member States, see further A. Farmer, M. Faure and G. M. Vagliansindi (eds.), *Environmental Crime in Europe*, 2018. ↵

48. Although IUU fishing is not listed as a separate offence in Art. 3(2), Recital 8 of the 2024 ECD reads: "[i]n the framework of the common fisheries policy, Union law provides for a comprehensive set of rules for control and enforcement under Council Regulations (EC) No 1224/2009 and (EC) No 1005/2008 in the event of serious infringements, including those that cause damage to the marine environment" and it goes further to state that "certain intentional unlawful conduct covered by Regulation (EC) No 1224/2009 and Regulation (EC) No 1005/2008 should be established as a criminal offence." The European Parliament draft (*op. cit.* (n. 8)) proposed the inclusion of a new criminal offence (ra) linked to violations of EU fisheries laws adopted in the context of common fisheries policies, including Council Regulations (EC) No 1224/2009 and (EC) No 1005/2008. ↵

49. See generally, K. Nield and R. Pereira, "Financial Crimes in the European Carbon Markets", in S. Weishaar (ed.), *Research Handbook on Emissions Trading*, 2016, pp. 195-231; and K. Nield and R. Pereira, "Fraud on the European Emissions Trading Scheme: Effects, Vulnerabilities and Regulatory Reform", (2011) 20(6) *European Energy & Environmental Law Review*, 255-286. ↵

50. In this context, a notable reform is the following: While Directive 2001/18/EC on the deliberate release into the environment of genetically modified organism is listed in Annex A of the 2008 ECD in connection with some of the pollution control and biodiversity offences contained in that directive, Directive 2001/18/EC no longer appears listed as linked to any of the environmental criminal offences in the 2024 ECD. ↵

51. It should be noted that Recital 21 of the 2024 ECD states: "Criminal offences relating to intentional conduct listed in this Directive can lead to catastrophic results, such as widespread pollution, industrial accidents with severe effects on the environment or *large-scale forest fires*." (emphasis added). ↵

52. Thus, no "autonomous" environmental offences (i.e. criminalising national environmental law, regardless of whether or not persons violated EU environmental legislation) are neither contained in the 2008 ECD nor in the 2024 ECD. See Art. 3 of the 2008 ECD and Art. 3 of the 2024 ECD. ↵

53. In relation to the new offences in the 2024 ECD, see e.g. Regulation (EU) 2017/852 of the European Parliament and of the Council of 17 May 2017 on mercury, and repealing Regulation (EC) No 1102/2008, OJ L 137, 24.5.2017, 1; Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species, OJ L 317, 4.11.2014, 35; Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, OJ L 178, 28.6.2013, 66; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, 1. ↵

54. See further, R. Pereira, *Environmental Criminal Liability*, *op. cit.* (n. 26). ↵

55. The references to EU environmental law in this article will be made to broadly also include environmental policy areas adopted on the basis of legal bases beyond the "environmental title" framework of Art. 192 TFEU, for example Art. 100(2) TFEU (common transport policy) and Art. 114 TFEU (internal market). ↵

56. ECJ, Case C- 176/03, *Commission of the European Communities v Council of the European Union*, ECR [2005], p- I-7879. ↵

57. ECJ, Case C- 440/05, *Commission of the European Communities v Council of the European Union*, ECR [2007] p. I-0909, para. 70. ↵

58. Art. 5 of the 2008 ECD. ↵

59. Art. 7 of the 2008 ECD. ↵

60. In line with the CJEU case-law, see e.g. Case 68/88 *Commission v. Hellenic Republic* [1989] ECR 2965; Case 265/95 *Commission v. France* [1997] ECR 6959. ↵

61. Art. 12. ↵

62. Art. 16. ↵

63. Art. 15. On the question of participatory governance in EU criminal justice, see further R. Pereira, A. Engel and S. Miettinen (eds), *The Governance of Criminal Justice in the European Union*, *op. cit.* (n. 14). ↵

64. Art. 10. ↵

65. Art. 14. ↵

66. Art. 20. On this question, see further V. Mitsilegas and F. Giuffrida, "The Role of EU Agencies in Fighting Transnational Environmental Crime: New Challenges for Eurojust and Europol", *Brill Transnational Crime* 1.1 (2017), 1-150. For a possible extension of the competence of the European Public Prosecutor's Office (EPPO) over environmental crime, see M. Jimeno Bulnes, "The European Public Prosecutor's Office and Environmental Crime - Further Competence in the Near Future?", in this issue; C. Di Francesco Maesa, "EPPO and Environmental Crime: May the EPPO ensure a more effective protection of the environment in the EU?", (2018) 9(2) *New Journal of European Criminal Law (NJECL)*, 191. ↵

67. On the deterrent effects of environmental criminal penalties, see further C. Abbott, *Enforcing Pollution Control Regulation: Strengthening Sanctions and Improving Deterrence*, 2009; R. Pereira, *Environmental Criminal Liability*, *op. cit.* (n. 26). See also more generally: P. Robinson and J. Darley, "Does Criminal Law Deter? A Behavioural Science Investigation" (2004) 24 (2) *Oxford Journal of Legal Studies*, 173; G. Becker, "Crime and Punishment: An Economic Approach" (1968) 76 *Journal of Political Economy*, 161. ↵

68. The offences subject to a minimum-maximum penalty of imprisonment of 10 years under Art. 5(2) lit. a) concern: pollution control (including the new mercury pollution offence – Art. 3(2) lit. a-d); waste management (Art. 3(2) lit. f); dangerous installations (Art. 3(2) lit. j)); offshore installation pollution (Art. 3(2) lit. k); pollution by radioactive substances (Art. 3(2) lit. l)); and invasive species (Art. 3(2) lit. r)). ↵

69. Although it is lower than the prison penalties foreseen for "ecocide" in several former Soviet States that tend to range from 10-20 years imprisonment; and lower than the prison sentences available for "ecocide" in at least two EU Member States, i.e. Belgium and France. See further R. Killean and D. Short, *Scoping a Domestic Legal Framework for Ecocide in Scotland*, Report for the Environmental Rights Centre for Scotland (ERCS), March 2024, available at <https://www.ercs.scot/wp/wp-content/uploads/2024/04/Scoping-a-Domestic-Legal-Framework-for-Ecocide-in-Scotland_April24_online.pdf>. ↵

70. With the notable exception of the offence in Art. 3 (2) lit. p) relating to placing on Union market of relevant commodities or products in breach of Regulation (EU) 2023/1115 on deforestation-free products, which is subject to a minimum maximum imprisonment of at least 5 years (Art. 5(2) lit. c)). ↵

71. The biodiversity and water resources offences in Art. 3(2) relate to illegal water abstraction (lit. m); killing/possession etc of species (lit. n), illegal trade in species (lit. o), deterioration of a habitat (lit. q) and keeping/breeding etc of invasive species (lit. r).[↔]

72. See e.g. Convention on Biological Diversity, Kunming-Montreal Global Biodiversity Framework (CBD/COP/15/L25), December 2022. See also the Communications of the Commission of 11 December 2019 on "The European Green Deal" and of 20 May 2020 on "EU Biodiversity Strategy for 2030. Bringing nature back into our live." See further, L. Kramer, "Biodiversity Crime", in: R. Pereira and T. Fajardo (eds.), *A Research Agenda for Environmental Crime and Law* (Edward Elgar, forthcoming in 2025).[↔]

73. Arts. 6 and 7(1) largely follow the text of the 2008 ECD. They clarify, however, that criminal penalties applicable to legal persons may be of a criminal or non-criminal nature.[↔]

74. Offences listed in Art. 3(2) lit. a) to l), and lit. p), s) and t).[↔]

75. Art. 7(4) and (5) of the Commission proposal, *op. cit.* (n. 1).[↔]

76. This can be illustrated by the increased levels of criminal penalties following the publication of the Sentencing Council Environmental Offences Guidelines (2013) in the UK.[↔]

77. See Council General Approach, *op. cit.* (n. 7).[↔]

78. Art. 3(2) lit. m) (water abstraction), lit. n) (killing/taking etc of species), lit. o) (illegal wildlife trade), lit. q) (habitat loss) and lit. r) (keeping/breeding etc invasive species).[↔]

79. See further M. Faure, "The Development of Environmental Criminal Law in the EU and its Member States", (2017) 26 (2) *Review of European, Comparative and International Environmental Law*, 139.[↔]

80. The fact that these are optional rather than mandatory penalties is clear from the use of the terms "may" and "such as" in Art. 5(3) and Art. 7(2).[↔]

81. Art. 5(3) lit. a).[↔]

82. Art. 5(3) lit. c).[↔]

83. Art. 5(3) lit. e).[↔]

84. Art. 7(2) lit. f).[↔]

85. Art. 7(2) lit. g).[↔]

86. See Council doc. 16171/22, *op. cit.* (n. 7).[↔]

87. Compare with Art. 5(5) and Art. 7(2) of the Commission's proposal (*op. cit.* (n. 1)), which would have required Member States to introduce all of the alternative sanctions with the use of the term "shall include".[↔]

88. While this was to be expected in the case of legal persons (given the differences in the EU Member States concerning the possibility of holding corporations criminally liable), the 2024 ECD could have required that the alternative penalties for natural persons are of a criminal nature.[↔]

89. See e.g. WWF, "Member States against strong EU rules to penalise environmental crimes", 9 December 2022, available at <<https://www.wwf.eu/?8400366/Member-States-against-strong-EU-rules-to-penalise-environmental-crimes>>.[↔]

90. See also, R. Pereira, "Towards Effective Implementation of the EU Environmental Crime Directive? The Case of Illegal Waste Management and Trafficking Offences", (2017) 26 *Review of European, Comparative and International Environmental Law*, 147-162.[↔]

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