

The Creation of an Autonomous Environmental Crime through the New EU Environmental Crime Directive

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ABSTRACT

On 11 April 2024, the EU adopted a new environmental crime directive to replace Directive 2008/99 of 19 November 2008. This article discusses why a new Directive in the area of environmental crime had become necessary. It particularly argues that the introduction of an autonomous environmental crime and a qualified offence of ecocide constitute important changes. The article points out other novelties, e.g. with regard to minimum sanctions and the collection of statistical data. They may substantially improve the enforcement of European environmental law through criminal law.

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I. Why a New Environmental Crime Directive?

The European Union already had a directive on the protection of the environment through criminal law: Directive 2008/99/EC of 19 November 2008.¹ The 2008 Directive forced the EU Member States to impose criminal sanctions for nine criminal offences, provided they were committed unlawfully, intentionally, or at least with serious negligence. Art. 5 of Directive 2008/99 obliged the Member States to impose effective, proportionate, and dissuasive penalties.

An evaluation of the 2008 Directive by the European Commission showed that there were serious problems with the criminal enforcement of environmental law generally within Member States.² In addition, two reports were commissioned by the European Parliament that both suggested a revision of the 2008 Directive. One report dealt with the liability of companies for environmental damage;³ the other one dealt with “Tackling environmental crimes under EU law: the liability of companies in the context of corporate mergers and acquisitions”.⁴ This led the European Parliament to ask the Commission to revise the ECD 2008.⁵ Moreover, in a research project labelled “European Union action to fight environmental crime” (EFFACE), commissioned by the European Commission⁶ several suggestions were also formulated to revise the 2008 Directive.⁷ Moreover, academic studies had been formulating various types of criticism on the 2008 Directive.⁸ A first point of criticism addressed the definition of unlawfulness⁹ in Art. 2(a) of Directive 2008/99:

‘unlawful’ means infringing (i) the legislation adopted pursuant to the EC Treaty and listed in Annex A; or (ii) with regards 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).

Thus, the provision referred to a violation of either national legislation adopted pursuant to EU law (environmental directives or regulations contained in Annex A or Annex B) or domestic (administrative) – environmental law implementing European environmental directives. In other words, the 2008 Directive offered no room for an autonomous approach to environmental crime, meaning that criminal liability could occur even in the absence of a violation of administrative obligations. Furthermore, the consequence of this definition of unlawfulness was that no criminal liability could be established as long as the conditions of an (administrative) permit are met.¹⁰

A second point of criticism of the 2008 Directive pertained to the fact that criminal law was considered the only means for an appropriate remedy for environmental harm; thus, the Directive completely ignored other remedies, such as administrative measures (including sanctions) or civil enforcement. Recital 3 of the Directive explicitly indicated that only criminal penalties “demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or compensation mechanisms in the civil law.” As a result, the 2008 Directive was silent on administrative sanctions. This runs counter to a practice in many EU Member States to introduce the commonly known as “toolbox approach”, i.e. making available a wide variety of different remedies to deal with environmental crime outside of the criminal law.¹¹

A third point of criticism concerned the goal of the 2008 Directive to establish the Member States’ obligation to criminalise the violation of national legislation implementing EU environmental law. This was considered important in order to deal with the “implementation deficit”. The term describes the fact that a Member State could transpose environmental directives into its national law but could still do very little to guarantee an effective application of that national legislation. As a result, no information was made available at the European level, for example, on the capacity available to monitor compliance with domestic environmental

law implementing the European environmental *acquis*. Furthermore, information on the number of violations as well as the number of criminal cases dismissed, prosecuted, and adjudicated has also not been made available at the EU level. In other words: a Member State could opt for a formal transposition of EU environmental law into national law but there could subsequently be a huge difference between the Member States concerning the actual application of EU environmental law in practice.¹²

The new 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 (hereinafter Environmental Crime Directive – ECD)¹³ responds to these points of criticism. It is not merely an amendment of its 2008 predecessor but also brings about fundamental changes. In some respects, one can say that it even marks a revolution. In the following, sections II-VI, I will illustrate the most important changes before conclusions are drawn in section VIII.

II. Unlawfulness

First, the ECD provides for a different definition of unlawfulness. According to Art. 3(1) ECD, unlawfulness for the purpose of this Directive shall be conduct that breaches:

- (a) Union law which contributes to pursuit of one of the objectives of the Union’s policy on the environment as set out in Art. 191(1) TFEU; or
- (b) A law, regulation, or administrative provision of a Member State or a decision taken by a competent authority of a Member State, which gives effect to the Union law referred to in point (a).

This differs from the approach taken in 2008. References to a long list of directives and regulations in the annex to the former Directive have been replaced by a broader substantive definition referring to Union law, which corresponds to the pursuit of one of the objectives of the EU policy on the environment.

The question as to whether compliance with an administrative permit excludes criminal liability is answered in Art. 3(1) subpara. 3 ECD:

Such conduct shall be unlawful even where it is carried out under an authorisation issued by a competent authority of a Member State if such authorisation was obtained fraudulently or by corruption, extortion or coercion **or** if such authorisation is in manifest breach of relevant substantive legal requirements.¹⁴

This provision encompasses two situations in which an authorisation turns unlawful. The first situation pertains to a certain type of criminal behaviour (fraud, corruption, extortion, or coercion). Admittedly, it is questionable whether law enforcement authorities will actually be able to prove that the authorisation was obtained fraudulently in many cases.

The second situation will be more important in practice (when authorisation is in manifest breach of relevant substantive legal requirements). Such a clause could not be found in the original Commission proposal presented on 15 December 2021,¹⁵ but it was introduced following intense debate in the European Parliament and during the trilogue negotiations. Members of the European Parliament (MEPs) realised that it is important to have the possibility to impose criminal liability under exceptional circumstances, even when the conditions of an administrative permit are followed by an economic operator. The wording “in manifest breach of relevant substantive legal requirements” establishes the possibility to introduce a truly autonomous environmental crime and will be revolutionary for most EU Member States.¹⁶ An autonomous

environmental crime signifies that criminal liability no longer depends upon the violation of administrative provisions. Moreover, compliance with administrative provisions (such as the conditions of an authorisation) will no longer exclude criminal liability. However, this criminal liability (even in case of compliance with an authorisation) can only be established in exceptional circumstances. Recital 10 ECD clarifies in this regard:

“in manifest breach of relevant substantive legal requirements” should be interpreted as referring to an obvious and substantial breach of relevant substantive legal requirements and is not intended to include breaches of procedural requirements or minor elements of the authorisation.

III. Ecocide

Another important, novel issue is included in Art. 3(3) ECD. This provision obliges Member States to ensure that criminal offences relating to conduct listed in Art. 3 (2) constitute qualified criminal offences if the conduct causes one of the following:

- (a) The destruction of, or widespread and substantial damage, which is either irreversible or long-lasting, to an ecosystem of considerable size or environmental value or a habitat within a protected site;
- (b) Widespread and substantial damage, which is either irreversible or long-lasting to the quality of air, soil, or water.

Recital 21 ECD clarifies:

those qualified criminal offences can encompass conduct comparable to ‘ecocide’, which is already covered by the law of certain Member States and which is being discussed in international fora.

Without using the word “ecocide” explicitly in the main text of the Directive itself, the introduction of the qualified offence of ecocide stemmed especially from pressure on the part of the Greens in the European Parliament. This criminalisation of ecocide (as a qualified offence), together with the possibility of an autonomous environmental crime as explained in section II., can undoubtedly substantially enlarge the scope of criminal liability, which in turn will raise the effectiveness of environmental criminal law.

The issue of ecocide is implicitly referred to in Art. 8(a) ECD, which obliges Member States to regard as an aggravating circumstance whether “the offence caused the destruction of, or irreversible or long-lasting substantial damage to, an ecosystem”.

IV. The Toolbox Approach

Although the new ECD stresses the significance of criminal law to protect the environment, the Directive’s Recitals now also refer to possibilities of imposing administrative remedies.

Art. 3(1) creates an obligation for Member States to determine 20 types of conduct (compared to nine in the 2008 Directive) that now constitute a criminal offence when committed intentionally and, for particular conduct referred to in paragraph 4 of Art. 3, when it is carried out with at least serious negligence. The Recitals do not explicitly refer to alternatives to the criminal law. For example, Recital (43) mentions that the Directive should not affect civil liability under national law or the obligation to compensate for harm or damage caused as a result of a given criminal offence defined in the Directive. Recital (45) mentions that the

obligation provided for in the Directive to establish criminal penalties should not exempt Member States from the obligation to provide for administrative penalties and other measures in national law for breaches of Union environmental law. Generally, Recital (47) holds that judicial and administrative authorities in the Member States should have at their disposal a range of criminal and non-criminal penalties and other measures, including preventive measures, to address different types of criminal conduct in a tailored, timely, proportionate and effective manner. Moreover, the sanctions provided for in Art. 5 and Art. 7 include a wide variety of penalties for the judge to choose from. Art. 7(2) explicitly mentions that the penalties may include other criminal or non-criminal penalties or measures. The new Directive provides exactly the toolbox that was suggested in the literature. Art. 5 refers *inter alia* to the following penalties for natural persons:

- Obligation to restore the environment within a given period if the damage is reversible;
- Obligation to pay compensation for the damage to the environment if the damage is irreversible or the offender is not in a capacity to carry out such restoration;
- Exclusion from access to public funding, including tender procedures, grants, concessions, and licenses;
- Disqualification from holding, within a legal person, a leading position of the same type used for committing the offence;
- Withdrawal of permits and authorisations to pursue the activity that resulted in the relevant criminal offence;
- Temporary bans on running for public office.

Art. 7 also includes an impressive list of potential penalties for legal persons, some of which are similar to the ones for natural persons, but also including the following:

- Withdrawal of permits and authorisations to pursue activities that resulted in the relevant criminal offence;
- Being placed under judicial supervision;
- Judicial winding up;
- Closure of establishments used to commit the offence;
- Obligation to establish due diligence schemes for enhancing compliance with environmental standards.

Art. 10 ECD contains a provision on freezing and confiscation and holds that the Member States shall take the necessary measures to enable the tracing, identifying, freezing, and confiscating of instrumentalities and proceeds from the criminal offences referred to in Arts. 3 and 4.

V. Minimum Sanctions

An important objective of the new ECD is to guarantee that offences would be punished with effective, proportionate, and dissuasive penalties in an equal way in all EU Member States, so that the above-mentioned implementation deficit can be eliminated. For this reason, Art. 5(2) introduced a series of concrete minimum sanctions applicable to natural persons. Some criminal offences must be punishable by a maximum term of imprisonment of at least 10 years if they cause the death of any person. For ecocide (Art. 3(3), see section

III. above), the maximum term of imprisonment should be at least eight years; for yet other offences, it is either three or five years.

As far as legal persons are concerned, Art. 7(3) prescribes that when (either criminal or non-criminal) fines are warranted, the amount shall be proportionate to the gravity of the criminal conduct and to the individual, financial, and other circumstances of the legal person concerned. The provision continues that the maximum level of such fines may be no less than 5% of the total worldwide turnover of the legal person, either in the business year preceding the year in which the offence was committed or in the business year preceding that of the decision to impose the fine or an amount corresponding to €40 million. This applies to the criminal offences covered by Art. 3(2) points (a) to (l), and points (p), (s) and (t). For yet other offences (those covered by Art. 3(2), points (m), (n), (o), (q) and (r), the maximum level of the fine should be at least 3% of the worldwide turnover or an amount corresponding to €24 million. Above and beyond that, Member States can establish rules for cases in which it is not possible to determine the amount of the fine on the basis of the total worldwide turnover.

VI. Statistical Data

In order to make evidence-based enforcement possible, Art. 22(1) ECD prescribes that Member States shall ensure that a system is in place for the recording, production, and provision of anonymised statistical data on the reporting, investigative, and judicial stages in relation to the criminal offences mentioned in the ECD.

Art. 22(2) provides that these data shall, as a minimum, refer to:

- (a) The number of criminal offences registered and adjudicated by the Member States;
- (b) The number of dismissed court cases, including those on the grounds of expiry of the limitation period for the criminal offence concerned;
- (c) The number of natural persons that are:
 - (i) prosecuted;
 - (ii) convicted;
- (d) The number of legal persons that are:
 - (i) prosecuted;
 - (ii) convicted and fined;
- (e) The types and levels of penalties imposed.

Member States must also ensure that a consolidated review of their statistics is published at least every three years (Art. 22(3)). Each year, the Member States must transmit the data to the Commission (Art. 22(4)) in a standard format yet to be developed by the Commission in accordance with Art. 23 ECD.

VII. Other Elements in the Enforcement of Environmental Criminal Law

The ECD includes other important elements aimed at improving the effective enforcement of environmental criminal law. Among others, these include the following:

- Art. 11 obliges the Member States to take necessary measures to provide for a limitation period that enables an effective investigation, prosecution, trial, and adjudication of the criminal offences contained in the ECD. Art. 11(2) prescribes minimum limitation periods.
- Art. 12 obliges the Member States to take the necessary measures to establish jurisdiction over the criminal offences contained in the Directive. The ECD in principle only applies to acts committed within the EU territory, but Member States are free to go further and expand their jurisdiction also to environmental crimes committed outside of the EU.
- Art. 13 obliges the Member States to take the necessary measures to ensure that effective and proportionate investigative tools are available for investigating or prosecuting the criminal offences contained in the ECD.
- Art. 14 obliges the Member States to take the necessary measures to ensure that any persons reporting the criminal offences contained in the ECD, providing evidence, or otherwise cooperating with competent authorities (whistleblowers) have access to support and assistance measures in the context of criminal proceedings in accordance with national law.
- Art. 16 obliges the Member States to take appropriate measures, such as information and awareness-raising campaigns, targeting relevant stakeholders from the public and private sectors in order to reduce the number and risk of environmental criminal offences.
- Art. 17 obliges the Member States to ensure that national authorities which detect, investigate, prosecute, or adjudicate environmental criminal offences have sufficient qualified staff and sufficient financial, technical, and technological resources for the effective performance of their functions related to the implementation of the ECD. Taking into account the constitutional traditions and structures of their legal systems, Member States should also estimate the need to increase the level of specialisation of these criminal enforcement authorities.
- Art. 18 obliges the Member States to take necessary measures to ensure that regular, specialised training is provided to judges, prosecutors, police, and judicial staff and to competent authorities' staff involved in criminal proceedings and investigations.

VIII. Concluding Remarks

The new Directive on the protection of the environment through criminal law of 11 April 2024 can certainly be considered an important step in the development of environmental criminal law at the European level. The new Directive integrates a wide variety of suggestions put forward in the literature concerning the development of an effective environmental criminal enforcement system.

The Directive entered into force on 20 May 2024 (Art. 29 ECD); Member States have until 21 May 2026 (Art. 28 ECD) to implement the new regime. It will have important consequences for the effective application of environmental criminal law. The likely most revolutionary aspects are the introduction of a qualified offence

of ecocide and an autonomous environmental crime if administrative authorisations were issued in “manifest breach of relevant substantive legal requirements.” The Union legislature must be complimented for having resisted the undoubtedly strong lobbying by industry against the introduction of these provisions. Still, the new rule of “manifest breach of relevant substantive legal requirements” is, to some extent, only a first step, as these legal notions cannot simply be transposed into domestic legislation. The real work will now start at the level of the Member States, which must transpose the Directive into national law and, more specifically, turn these vague notions into a definition compatible with the legality principle. The ideal result will be a workable definition of an autonomous environmental crime.

1. OJ L 328, 6.12.2008, 28.↔
2. See European 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), SWD(2020) 259 final, 28.10.2020.↔
3. See [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651698/IPOL_STU\(2020\)651698_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651698/IPOL_STU(2020)651698_EN.pdf), accessed 23 September 2024. See M. Faure, *Environmental Liability of Companies* (Study requested by the JURI Committee, PE651.698 – May 2020). Also published as M. Faure, ‘Environmental Liability of Companies in Europe’, (2022) 39 *Arizona J Int Comp L*, 1-152.↔
4. M. Faure, *Tackling Environmental Crimes under EU Law: The Liability of Companies in the Context of Corporate Mergers and Acquisitions*. Study requested by the JURI Committee of the European Parliament, PE-693.182 – June 2021, [https://www.europarl.eu/RegData/etudes/STUD/2021/693182/IPOL_STU\(2021\)693182_EN.pdf](https://www.europarl.eu/RegData/etudes/STUD/2021/693182/IPOL_STU(2021)693182_EN.pdf), last accessed 23 September 2024.↔
5. As a result, in its 2021 work programme, the European Commission announced a revision of Directive 2008/99/EC on the protection of the environment through criminal law, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Union of Vitality in a World of Fragility*, COM(2020) 690 final.↔
6. See EFFACE, <https://efface.eu/index/index.html>, last accessed 23 September 2024.↔
7. See EFFACE, Conclusions and Recommendations, Deliverable No 7.4, *ibid.*↔
8. See inter alia M. Faure, ‘The Revolution in Environmental Criminal Law in Europe’, (2017) 35 *Virginia Environmental Law Journal*, 321-356; G.M. Vagliasindi, ‘The EU Environmental Crime Directive’, in: A. Farmer, M. Faure and G.M. Vagliasindi (eds.), *Environmental Crime in Europe*, 2017, pp. 31-55 and A. Di Landro, ‘Models of Environmental Criminal Law, between Dependence on Administrative Law and Autonomy’, (2022) *European Energy and Environmental Law Review*, 272-297.↔
9. G.M. Vagliasindi, ‘The EU Environmental Crime Directive’, in: A. Farmer, M. Faure and G.M. Vagliasindi (eds.), *Environmental Crime in Europe*, 2017, p. 41 and A. Di Landro, ‘Models of Environmental Criminal Law, between Dependence on Administrative Law and Autonomy’, (2022) *European Energy and Environmental Law Review*, 283-284.↔
10. This was criticised *inter alia* in M. Faure, ‘Environmental Criminal Liability: The Long and Winding Road towards an Effective Environmental Criminal Law System in the EU’, in: M. Peeters and M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, 2020, pp. 258-259 and in M. Faure, ‘The Revolution in Environmental Criminal Law in Europe’, (2017) 35 *Virginia Environmental Law Journal*, 349.↔
11. This toolbox approach was suggested *inter alia* as a result of an interuniversity research project financed by the European Union, ‘European Union Action to Fight Environmental Crime’ (EFFACE) (<https://efface.eu/index/index.html>).↔
12. M. Faure, ‘Environmental Criminal Liability: The Long and Winding Road towards an Effective Environmental Criminal Law System in the EU’, in: M. Peeters and M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, 2020, p. 260.↔
13. OJ L, 2024/1203, 30.4.2024.↔
14. Emphasis added by author.↔
15. 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, COM(2021) 851 final.↔
16. On the meaning of this autonomous environmental crime, see M. Faure, ‘Autonomous Environmental Crimes and Ecocide’, in: M. Luchtman et al. (eds.), *Of Swords and Shields: Due Process and Crime Control in Times of Globalization. Liber Amicorum Prof.dr. J.A.E. Vervaele*, 2023, pp. 195-204.↔

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