

Possibilities and Scope of Environmental Protection Through Criminal Law – the New Environmental Crime Directive

^[1]Zoran Stojanović¹, ^[2]Ivana Bodrožić²

^[1]University of Belgrade, Faculty of Law, Serbia

^[1]University of Criminal Investigation and Police Studies, Belgrade, Serbia

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Abstract: In a wider context of achieving European Green Deal objectives, seen through the prism of a new Environmental Crime Directive at the European Union level, the main purpose of this article is to examine, underline and prepare future changes within the national criminal law framework in terms of criminal law protection of the environment, so that it should be as efficient as possible, but at the same time constitute a rational system of criminal law provisions.

The paper is divided in two main chapters. The first chapter deals with issues of criminal law protection of the environment in general, the legitimacy of the environment as a separate protected value, the level of its social harmfulness and some legislative characteristics of the relevant elements of the offences which need to fulfil common standards of their normative shaping. The second is dedicated to the structure, aims and goals of the new Environmental Crime Directive in fighting environmental crime, as a part of fulfilling processes of the European Green Deal.

All common methods of researching process in the field of law are used, starting from the dogmatic method, normative and comparative method. The historical method is also used in a part of the research in which the distinction between prior legal documents from 1998 and 2008 and the new one is analysed, as documents that did not have sufficient effect.

The changes in the area that defines new environmental crimes at the European Union level, minimum common standards in prescribing criminal sanctions, and enhancing the existing ones, as well as setting brand new tools and mechanisms in strengthening and enhancing the effectiveness of the law enforcement cooperation in the field of environmental crimes have been brought about by the new Environmental Crime Directive aimed to crack down on environmental crime, and they can be seen and marked as an important contribution to criminal law protection of the environment, but only seen as the ultimate instrument of the state reaction to environmental crimes. Even though environmental crimes have their negative impact on human health, safety and economics in general, they have to be realistically conceived and seen only as an *ultima ratio societatis* in protection of the environment.

Keywords: environmental crimes, European Green Deal, Environmental Crime Directive, criminal law protection of the environment.

¹ profstojanovic@gmail.com

² Corresponding author: ivana.bodrozic@kpu.edu.rs • <https://orcid.org/0000-0001-5010-7832>



PURPOSE

INTRODUCTORY REMARKS

Contemporary criminal law is in *status semper reformandus*. It is like that, first of all, because the dynamics of the modern types of criminality set it as a goal that needs to be achieved. However, on the other hand, traditional criminal law is based on some inherent principles and on the idea of its subsidiarity.

Set on that basis, criminal law has to be a rational system of legal provisions, but at the same time a sufficiently flexible and highly adaptable system of criminal law norms, aimed at preventing and suppressing all types of criminal behaviour.

Its scopes and possibilities are the general theoretical questions, but they will be put under examination in this paper especially in the field of environmental crimes. Why have the authors chosen this specific subject, what is the expected goal of this type of research and what is its main purpose?

As a specific type of criminal behaviour, environmental crime became a modern legal question and a topical issue in the late 1970s and early 1980s, when the first provisions in criminal legislations worldwide were set. Since that time, a lot of changes have taken place in the field of criminal law reaction aimed at protecting the environment, but the overall results have failed to meet the projected expectations. The condition detected on the ground in this part of social life is far away from the desired results.³

Environmental law is on test. A lot of criminal behaviour is detected; new forms of illicit activity are constantly arising and their consequences are much more dangerous each and every day. The idea of protection of the environment only as a part of human life and health protection is completely unacceptable, seen both from the point of view of the legal nature of environmental crimes and from the point of view of the social reality. Nowadays, this right is recognized as a part of the corpus of fundamental rights and an independent part of normal functioning of the society, viewed globally.

States are united in the attitude that this type of crime is, in most cases, cross-border and transnational, and that it can be suppressed only through harmonized and coordinated cooperation of the authorities and law enforcement agencies.

That is why a brand-new legal document has been adopted on the regional level of the European Union (EU) and it can be seen as part of the continuous development of the criminal law provisions since 1998.

In April 2024, the new Environmental Crime Directive (ECD) was adopted, setting the principles to be followed by member and candidate states in the field of environmental criminal law. This is the major document that needs to be implemented by national state authorities at the EU level and its importance is recognized worldwide.

³ Susan Lea Smith (2024: 2–35) considers that some of the most important issues in defining, shaping and implementing the legal documents and norms in the field of criminal law protection of the environment can be separated in several main categories, such as: the issues in defining and sentencing environmental crimes, issues in defining them in terms of regulatory violations or as activities that threaten or cause environmental harm, the issues in drawing lines between civil and criminal enforcement, issues about the minimum culpable mental state for environmental crimes and the issues about the way the environmental crimes should be sentenced.



So, the main aim and purpose of this paper can be determined as providing answers to the following research questions: *What are the main dogmatic characteristics of the environmental protection through criminal law, what are its limits and boundaries so far and what can be expected from the new obligatory Directive?*

DESIGN/METHODS/APPROACH

The paper will examine, in two separate parts, first the legal nature and characteristics of the environmental crime in general, as a contemporary category of national criminal law provisions, shifting the focus in the second part to the effectiveness of the provisions of the new ECD, its relation with the former one from 2008, as well as the discussion of the developments in the area of environmental crime, in order to achieve better protection of the environment and the society through proposed criminal law response of the ECD, which is expected to strengthen and harmonize the protection of the environment through criminal law.

In the first chapter the following questions will be addressed: is the protection in accordance with the proven dogmatic principle of legality, especially its part *lex certa*: Does it respect subsidiary character of criminal law protection or it is too much accessorized to administrative protection of the environment, and finally how are those provisions applicable in practice?

The second chapter will be dedicated firstly to the comprehensive and up-to-date list of the environmental offences, which should help in achieving the overall European Green Deal political objectives. At the second place, several brand-new categories of the environmental offences will be examined, such as unlawful ship recycling, unlawful water abstraction, serious breaches of the EU chemicals and mercury legislation, serious breaches related to dealing with fluorinated greenhouse gases and other serious offences.

Special attention will be given to establishing the qualified offences, for which more severe penalties are prescribed when they lead to serious, widespread and substantial damage or destruction of the environment.

In the conclusion, the authors will express the realistic attitude to the possibilities of the criminal law reaction on harm to or endangerment of the environment. Through the new prescribed measures of the criminal law, the enhanced tool to act effectively against environmental crimes will be given to the law enforcement authorities and the judiciary and it is theoretically completely applicable from the point of view of the old Latin sentence *ius criminale semper reformandum est*, and its analysed development in the field of environmental crime should be expected.

GENERAL DOGMATIC CHARACTERISTICS OF THE CRIMINAL LAW PROTECTION OF THE ENVIRONMENT

After half of a century since incriminations aimed exclusively or primarily at criminal protection of the environment were introduced with a certain enthusiasm, there are more reasons to question whether criminal law is in general a suitable instrument of the state reaction to achieve, even if to a limited extent, the set of the specific goal (Ryland, 2009;



Steinzor, 2016; Ambos, 2021; Kharytonov et al., 2023). For a long time, the area of environmental protection has been cited as a paradigmatic example of an area in which almost all the weaknesses of modern criminal law have come to the fore (Hassemer, 1992: 378).

In this paper, emphasis is placed on the problem, which should be seen as one of the main weaknesses in the effort to provide the environment with adequate criminal law protection. For example, Thomas Fischer (2013: 31) states that criminal law protection in this area is “ridiculously ineffective” and proposals to give up efforts to protect the environment through criminal law are not rare. Among the numerous authors who advocate that position, Peter-Alexis Albrecht (2010: 16) should be singled out, who claims that the main goal of criminal legislation in this area is of a political nature, i.e. to create the impression among the citizens that it is possible to fight against the diffuse forces that destroy the environment, and not that in fact it is a question of unsolvable structural social defects.

It is all about the fact that criminal law uses numerous undefined terms in trying to provide protection to the environment.

VAGUENESS AND NON-APPLICATION OF LEGAL NORMS AS AN OBSTACLE TO THE ACHIEVEMENT OF CRIMINAL LAW PROTECTION OF THE ENVIRONMENT

The use of undefined concepts during the legal formation of incriminations aimed at environmental protection is not only unacceptable in principle, but also creates very serious problems in application (Hassemer, 1992). It is difficult to say with certainty whether this is one of the main reasons for the inefficient and ineffective application of criminal law in this area. Overbroad and vague incriminations, as a rule, facilitate the application, but they are unacceptable and even dangerous from the aspect of the rights and freedoms of citizens. However, it seems that certain imprecise concepts in the field of criminal law protection of the environment make the application of criminal law difficult. On the other hand, too much of the casuistry is opposite to the mentioned legislative principle, and the legislator in general should be sufficiently precise but also abstract enough to make the provisions as much applicable as it is possible. Stability of the criminal law system of provisions, which is in line with the principle of legality, means that the norm needs to be defined precisely enough to cover as wide a range of potential illicit behaviour as possible, and it is always correct to use general types of norms, not to go to the specific syndrome of intense casuistry – *expressio specialis onem ipmedit extensionem*, which means that what is listed by name (strictly) cannot be interpreted any further. Generalization is therefore a necessary technique (Bodrožić, 2022: 80).

The postulate of *lex certa*, which derives from the principle of legality, is questioned in this area more than in other areas where criminal law intervenes. This objection can be addressed not only to the national criminal legislation, but also to the current EU Eco-Directive (Directive 2008/99/EC). The same situation was present in the prior legal solutions of the criminal law protection of the environment, primarily in the Convention on the Protection of Environment through Criminal Law, adopted in 1998 by the Council of Europe (Bodrožić, 2014: 74). Thus, more than three decades ago, Zoran Stojanović, pointing out this problem, suggested that the law should not be too strict in this regard. He believed that there should be no insistence on the consistent implementation of the principle of certainty, because criminal law is a new area in which it has yet to act and provide pro-



tection to certain assets (Stojanović et al., 1991: 36). However, today, when the criminal law in this area has shown its impotence, despite tolerating broad and unspecified incriminations, there is no longer any justification for making an exception to this important criminal law principle.

This is one of many reasons for the revision of the 2008 Directive, about which more will be said in the next section. Of course, there are other reasons for this that were observed based on the evaluation of the application of the Directive. That evaluation showed that the Directive is barely implemented and lacks effectiveness, and that the number of people convicted of crimes against the environment in the last ten years has remained very low (European Commission, 2021).

No method of interpretation can solve that problem, and due to the non-application of incriminations, the fact that there are no developed and adopted positions in judicial practice regarding the understanding of certain concepts and the scope of certain legal provisions contributes to this.

Attempts have been made at solving the problem of using imprecise and broad concepts and notions by binding the application of criminal law to administrative regulations and decisions, which resulted in problems of another kind.

The first is a question of legitimacy, because the role of criminal law cannot be reduced only to the provision of sanctions by administrative regulations and acts, and the second is the coordination of administrative and judicial authorities and the harmonization of their work, which is different in many aspects. Accessoriness in relation to administrative law makes the application of criminal law very complicated, and in some cases even impossible, which leads to giving up on it in advance.

In foreign literature, it has been observed that it is very difficult to answer the question of whether it is possible to avoid some imprecise concepts during legal regulation, or whether it is an insurmountable goal that is set for the criminal law norm in this area. Thus, Regina Michalke represents a very sceptical position regarding this. She claims that criminal law in the field of environmental protection exists and lives precisely because of its vagueness and incomprehensibility (Michalke, 2017: 173).

It is certainly not the only reason for the failure so far. Some non-legal, broader problems paralyse possible operation of criminal law. Let us just state that the application of criminal law is usually expensive and that criminal law prohibitions in some cases require a restructuring of reality.

There are numerous examples showing that environmental protection is something that requires serious investments and costs.

Another significant problem is the non-application of criminal law in relation to crimes committed against the environment. This problem appears not only in relation to natural persons, but also in relation to legal entities. This turns out to be a paradox because one of the first international legal documents that envisage the responsibility of legal entities is the above-mentioned Convention on Environmental Protection of the Council of Europe from 1998.



VIOLATION OF CRIMINAL LAW PRINCIPLES IN PROVIDING THE ENVIRONMENTAL PROTECTION

Criminal law is the last resort in suppressing behaviour that endangers or injures the most important values that must be protected in a society. This principle, the principle that criminal law represents the *ultima ratio* in achieving the stated goal, should come to the fore especially in the area of environmental protection. There are a number of measures, some of which are of a systemic nature and concern the very organization of the state, society and some important segments of social life such as the economy, so that law itself, and especially criminal law, is indicated as a means of a subsidiary character.

Criminal law must be a last resort in this area, also because punishment cannot achieve a certain balance that must exist in society between justified and necessary encroachments on the environment and those that cannot be tolerated. For the majority of undesirable behaviours in this area, the opportunities provided by other branches of law should be used, while criminal law should rarely intervene, predominantly in the case of the most serious injuries in relation to which other forms of reaction are neither sufficient nor adequate. That, obviously, is not so.

And in practice, in cases where criminal proceedings are conducted for some of the criminal acts against the environment, instead of the most serious and capital cases, it is mostly about something that can be characterized as trivial compared to the serious damage to the environment. This has wider consequences on the awareness of citizens as well as on the realization of the principle of justice. There is no criminal law reaction to the incalculable harmful consequences for the environment caused by certain economic facilities, while in relation to the relatively trivial acts of individuals, proceedings are periodically conducted and legally binding judgments are issued.

Fischer pointed out this issue, citing as an example the discharge of 100,000 tons of wastewater containing surfactant, which can be considered permissible based on economic-political and administrative legal assessments of conflicting interests, as it serves to maintain the competitive ability of manufacturers of detergents, while the emptying of one bucket containing soap during washing cars on the river bank is considered a criminal wrongdoing. He notes that this in no way supports the realization of the principle of criminal law as an *ultima ratio*, nor that the intervention of criminal law in this area serves to achieve the ethical minimum (Fischer, 2020: 2441–2442).

One of the serious problems that arises in the application of criminal offenses against the environment and that cannot be solved by respecting the general rules that apply in criminal law in this respect is the problem of causation, and in connection with that, the question of guilt, that is, intent and negligence. Namely, it is known that the effect of cumulation and synergy makes it difficult, and in some cases completely impossible, to solve the issue of causation in criminal acts against the environment.

Considering that these criminal acts are, as a rule, set up as criminal acts that have a consequence in their normative body of the offence, it is necessary to determine the causal connection between the act of execution and the consequence. If several entities independently undertake the act of releasing, introducing or disposing of a certain substance into the air, water or soil, but in such a way that, viewed individually, their action cannot cause a consequence (and even, as a rule, it is a matter of that release, i.e. disposal in



accordance with the regulations in the field of environmental protection, i.e. it moves within the prescribed limits), and the sum of individual discharges or disposal exceeds the permitted limit and causes the consequence of a criminal offense, the problem becomes unsolvable under criminal law.

The same applies to the effect of synergy when it comes to the release or disposal of various substances that individually cannot cause a consequence, but whose combination leads to harmful compounds and effects that are eligible to cause the consequence of a criminal act. Even if it were possible to solve this problem in terms of causation, it is difficult to attribute guilt, especially premeditated guilt, to something the perpetrator was not aware of and did not want.

Kristian Kühl (2011: 1948) believes that this is not possible, that is, that such a solution could not be advocated within the framework of criminal law, which is based on the principles of the rule of law.

Apart from the vague nature of crimes against the environment, which will be discussed separately in the next section, there is also the issue of general prevention. Without going into the numerous segments of this complex issue, it should only be pointed out that this vagueness also contributed to the barely present general preventive effect of criminal law in this area. If the potential perpetrators cannot conclude on the basis of the legal norm what constitutes a criminal offense, then a general preventive effect cannot be expected either. The same problem in this area also existed in criminal law of the former Yugoslavia (Stojanović, 1995a: 137).

Of course, the general preventive effect is mostly absent due to the non-application of incriminations. If there is *de facto* impunity, potential perpetrators will not take seriously the incrimination itself in the Criminal Code, especially if it is vague and imprecise.

Whether it is even possible to talk about any general preventive action is debatable. We can only rely on certain estimates, because it is almost impossible to obtain certain data based on empirical research undertaken in this regard. In those countries where there is some kind of application of criminal offenses against the environment in practice, it is likely that it would not be justified to completely deny a certain general preventive effect of criminal law.

In this sense, Haro Shall (2015) asserts that criminal law in this area is not just an ordinary alibi instrument that the legislator uses to show that he is doing something in order to protect the environment, but that there are certain facts and indications that support the fact that it is still possible to speak, with all the deficits, about the partial success of criminal law in terms of general prevention.

In order for the threat of punishment to have any effect on the potential perpetrator, it must be realistic, i.e. that there is a sufficient number of cases in which criminal law is actually applied. There are hardly any other areas in which criminal law declaratively shows such an interest and willingness to intervene on the legal level, without it being applied in practice at all, such as the area of criminal environmental protection

It is precisely for this reason that it is not superfluous to refer to Cesare Beccaria's famous words again. It is not the severity of the punishment that is an obstacle to committing criminal acts, but its certainty, and a very moderate punishment that is certain will always leave a great impression, because evil, even the smallest, when it is certain, always frightens human souls, he pointed out.



Finally, it should also be said that the high degree of dependence on administrative law also calls into question the division of power, because the decision of the administrative body is crucial and the borders of the criminal zone are set by laws. In this area, the criminal legislator has “disempowered” himself in numerous cases. In addition to the fact that there are incriminations in other areas that are of a blanket nature, it is a question of measure, that in the area of criminal law protection of the environment, administrative law has come to the fore. Of course, the justification of administrative-legal protection of the environment, which is perhaps the most important when it comes to legal protection, is not being questioned here, but rather the fact that criminal law is brought into a subordinate position in this way, which in fact only strengthens sanctions with its punishment and sanctions of administrative law and does not autonomously determine the criminal zone, but administrative law does that instead.

Depending on the degree of dependence of criminal law regulations on administrative ones differs in three ways in which this protection can be established: criminal protection which is completely accessory in relation to administrative law, criminal law protection that is relatively independent and criminal law protection that is independent in relation to the corpus of norms of environmental law contained in administrative legal norms (Stojanović, 1995b: 292).

ON THE UNDEFINEDNESS OF THE PROVISIONS PRESCRIBING CRIMINAL OFFENCES AGAINST THE ENVIRONMENT

As already pointed out, one of the basic weaknesses of prescribing criminal offenses against the environment is their vagueness. It is a universal phenomenon.

The legislator, both at the level of national legislation and at the European level, specifies the border of the criminal zone by referring to other regulations, i.e. he resorts to the use of a blanket criminal offense.

In the Republic of Serbia the specialization of criminal acts against the environment and the separation of the environment as an independent group protection object in a special chapter XXIV entitled *Criminal acts against the environment* was implemented with the adoption of the Criminal Code (CC) in 2006. The following criminal offenses are prescribed in this group of criminal offences: Environmental pollution, Art. 260 of CC, Failure to take measures to protect environment, Art. 261 of CC, Illegal construction and commissioning of facilities and plants that pollute the environment, Art. 262 of CC, Damage to buildings and devices for environmental protection, Art. 263 of CC, Damage to the environment, Art. 264 of CC, Destruction, damage, export abroad and import into Serbia of protected natural property, Art. 265 of CC, Bringing dangerous substances into Serbia and illegal processing, disposal and storage of dangerous substances, Art. 266 of CC, Unauthorized construction of nuclear facilities, Art. 267 of CC, Violation of rights on information on the state of the environment, Art. 268 of CC, Killing and abuse of animals, Art. 269 of CC, Transmission of infectious diseases in animals and plants, Art. 270 of CC, Unconscionable provision of veterinary assistance, Art. 271 of CC, Production of harmful means for the treatment of animals, Art. 272 of CC, Contamination of food and water for nutrition, i.e. feeding animals, Art. 273 of CC, Destruction of forests, Art. 274 of CC, Forest theft, Art. 275 of CC, Illegal hunting, Art. 276 of CC, and Illegal fishing, Art. 277 of CC.



Although the Republic of Serbia received a modern, codified, systemic law in the field of substantive criminal law with the adoption of the CC in 2005, it has been amended several times, in fact as many as seven times (Bodrožić, 2020). Although the first Environmental Crime Directive was adopted in 2008, followed by as many as five amendments to the CC, the first criminal response to environmental crime remained in line with the 1998 Convention of the Council of Europe.

A contrario, in Montenegro, the legislator made adjustments to the provisions of the 2008 Directive. This was done in Montenegro by adopting the Law on Amendments to the Criminal Code of Montenegro in Art. 53–63, which were amendments to the existing ones and some new incriminations were added within *Chapter XXV* of the CC of Montenegro, called *Criminal offenses against the environment*. It was all set and done in accordance with Directive 2008/99/EC. In the meantime, the title of this chapter has been changed to *Criminal offences against the environment and landmarking* and it currently contains as many as 30 incriminations.

However, even though the CC of Serbia was not harmonized with the aforementioned directive, nothing was lost because Montenegro will have to change its legislation in this area again in order to harmonize it with the revised directive.

The legal descriptions of criminal offenses from both criminal codes are full of vague terms. The legislator tried to specify the border of the criminal zone by referring to other regulations, i.e. he resorted to the use of a blanket criminal offense. A similar characteristic exists in relation to the legislative technique used in the provisions of the 2008 Directive. This unacceptable degree of vagueness of criminal law was one of the most important reasons why the revision of this 2008 Directive was undertaken at the EU level. As a result of the post-evaluation of the application of 2008 Directive and the need for its thorough revision, it is stated: “The Directive contains several unclear definitions used for the descriptions of environmental criminal offenses, which may hinder effective investigations, prosecutions and cross-border cooperation” (European Commission, 2021).

The peculiarities of the 2008 Directive, as well as the reasons for its amendment and adoption of the new one will be discussed in the second section, which will deal with the features, characteristics and possibilities of the new ECD from 2024.

NEW ENVIRONMENTAL CRIME DIRECTIVE AS A TOOL IN ACHIEVING THE OVERALL EUROPEAN GREEN DEAL POLITICAL OBJECTIVES

Bearing in mind the importance of the healthy environment and social danger and difficulties of the rapidly growing problem of national, transnational and international environmental crime, countries in Europe have adopted several documents in the field of criminal law protection of the environment so far, which established criminal offences and penalties to protect environment and to end impunity for environmental crimes. In a wider sense, those offences include incriminations of air and water pollution, unlawful mining and timber harvesting, and transnational trafficking in endangered species.

As the mentioned documents, in their chronological sequence, essentially follow the changes in the emergent forms of environmental crime, they can be marked with the epi-



thet of development, which in theory can be assessed as desirable. In terms of the criminal law regulation of environmental crime, it is important to mention and analyse two relevant ones, those from 1998 and 2008.

As the latest ECD was adopted in 2024, it can be stated that the changes were not too frequent and that they left enough time for the implementation of the previous provisions, which amounted to a decade and a decade and a half respectively. In comparison with too frequent amendments to the CC of the Republic of Serbia, which are not only partial, but take effect within the framework of such a systemic law document, and can be considered as continuous criminal law expansionism, this dynamic of changes at the level of European documents can be characterized as time-optimal (Bodrožić, 2020). It is interesting to note that in a series of amendments to the CC of Republic of Serbia, in the period that includes the adoption of the 2008 Directive, not a single revision of the provisions in the field of criminal environmental protection was undertaken, although there was space and time for this. A similar thing happened with the belated harmonization of criminal law regulations in some other areas, such as the prevention and suppression of terrorism in the provisions of the CC (Bodrožić, 2022: 59). On the other hand, criminal law legislation in Montenegro was harmonized with the aforementioned 2008 Directive, but now again the changes will take place. In conclusion, it can be stated that both national legislations will come to the same position, now when they have to improve and revise their provisions with the brand new 2024 Directive.

The development of the legal instruments of ecological enforcement also included a number of other documents and regulations, which together form the backbone of the adoption and implementation of the European Green Deal political document. This document was adopted in order to deal with the recognized existential threats such as climate change and environmental degradation. To overcome these challenges, the European Green Deal, adopted in 2020, can be seen as a package of policy initiatives, which aims to set the EU on the path to a green transition, with the ultimate goal of reaching climate neutrality by 2050 (Bak et al., 2024; Goncalves, 2023).

The new ECD is adopted as a legal tool to achieve European Green Deal objectives by fighting against the most serious environmental offences, which can have devastating effects on both the environment and human health, through means of criminal law.

What its predecessors were and what reasons were given in the process of imputation and revision of the immediately preceding 2008 Directive will be presented in the next section.

BRIEF CHRONOLOGICAL OVERVIEW OF THE CRIMINAL LAW DOCUMENTS IN PROTECTING ENVIRONMENT AND SUPPRESSING ENVIRONMENTAL CRIME THROUGH MECHANISMS OF CRIMINAL LAW

Convention on the protection of environment through criminal law was adopted within the Council of Europe on November 4, 1998. It was the first international convention to criminalise acts causing or likely to cause environmental damage and it was a very important event in the development of environmental criminal law. Only 13 countries signed it, but not one of them ratified it, so that it delayed entry into force, which was conditional on three signatures on ratification.



The goals of the convention were the creation of a common criminal law policy for environmental protection, the importance of inclusion and repressive protection mechanisms. In addition to other preventive ones, prescribing incriminations, which are considered as a criminal act, it foresees the violation of regulations on environmental protection and the realization of prerequisites for effective prosecution and punishment of perpetrators of crimes against the environment, which would strengthen international cooperation in this area.

The Convention provided for criminal acts and misdemeanours, which were divided in three groups depending on the degree of danger. The main issues were interstate cooperation in this area, issues of jurisdiction in cross-border cases of pollution, as well as definitions of terms of possible perpetrators, with special emphasis on the criminal responsibility of legal entities, principles of coordination, etc. It was all about the attempt to establish common frameworks for the effective cooperation of police and judicial authorities at the international level, as well as uniform regulations of the criminal law provisions in the field of the protection of the environment in national legislations (Bodrožić, 2014: 74).

The 2008 Directive aimed to harmonize national regulations in the field of criminal acts that protect the environment, which would lead to the creation of conditions for more efficient conduct of criminal proceedings, the use of effective investigative methods and assistance between member states to combat environmental crime.

Art. 3 of the Directive contains a list of incriminations that states should provide as punishable, namely: discharge, emission or disposal of solid material or ionizing radiation into the air, soil or water, which causes or is likely to cause serious injury or death to any person or substantial damage to the air, water or soil quality; killing, destroying, possessing or taking samples of protected wild species of flora or fauna, except in cases where such behaviour refers to a negligible amount of samples and has a negligible impact on the preservation of species status; production, import, export and marketing or use of substances that destroy the ozone layer; operation of a factory in which hazardous activities are carried out or in which hazardous substances are used and stored outside the factory that can cause death or serious injury to people or cause damage to the quality of air, soil, water or plants and animals, etc.

The Directive also obliged member states to provide criminal law liability of legal entities and adequate sanctions, which would deter legal entities from committing environmental crimes.

Although in 2008 the Republic of Serbia adopted the Law on the Liability of Legal Entities for Criminal Offences, it did not adopt the necessary changes within the existing chapter of crimes against the environment. Montenegro did it by creating a harmonized criminal law framework for abstract wrongdoing, which, however, did not lead to significant results in practice.

As the environmental crime is the fourth largest organized crime activity, with 5–7% annual growth and 80–230 billion Euros lost annually due to environmental crime, it is marked as a growing concern with the significant damage to the environment, citizens' health and the economy within the EU and worldwide.

Following evaluations in 2019 and 2020, the European Commission (EC) found that the 2008 Directive did not have sufficient effect. The number of environmental crime cases



successfully investigated and sentenced remained very low, sanctions were too low to be dissuasive and cross-border cooperation was insufficient. There were enforcement gaps in all member states and at all levels of the enforcement chain (police, prosecution and criminal courts). The lack of reliable data also hampered the monitoring of the effectiveness of environmental crime proceedings.

The evaluation found that the Directive had not had appropriate effect and EC noted that “there are major deficiencies in all member states and at all levels of the law enforcement chain preventing criminal environmental law from being effective” (Couvadelli, 2024).

The EC concluded that although some progress in protecting the environment through criminal law had been made, the rate of the prosecution of the environmental crime was too low in terms of the application of criminal penalties.

That was the main reason to make a Proposal of the new Directive in 2021 which included six main objectives: to clarify terms used in the definitions of environmental crime that leave too much room for interpretation (e.g. ‘substantial damage’), to update the Directive by bringing new environmental crime sectors under its scope, to define the types and levels of penalties for environmental crime, to foster cross-border investigation and prosecution, to improve informed decision-making on environmental crime through improved collection and dissemination of statistical data according to common standards in all member states and to improve the effectiveness of national enforcement chains (European Commission, 2021).

NEW ENVIRONMENTAL CRIME DIRECTIVE – CRIMINAL LAW MEASURES TO PROTECT THE ENVIRONMENT

As the final result of the aforementioned Proposal, the European Parliament and the Council reached political agreement on the Commission’s Proposal, so the Parliament adopted the new revised Directive on the protection of the environment through criminal law in February, after it was formally adopted by the Council on 26 March 2024. It came into force on 20 May 2024. Member states have to adopt it until 21 May 2026 and to take all necessary national measures to transpose the obligations and standards from the new Directive into their national criminal law system of provisions.

The main characteristic of the new Directive in general are: an expanded list of criminal offences, from prior 9 to 20 on the new list, the so-called “qualified offence”, which can be seen as an offence comparable with ecocide, further clarification of the used legal terms, tools for enhanced cross-border cooperation, enhanced support and resources and tougher penalties.

The Commissioner for the Environment, Oceans and Fisheries, Virginijus Sinkevičius said: “This landmark law is the first of its kind. It will ensure that the most severe breaches of environmental rules are considered as crimes and that the key role of environmental defenders is acknowledged. It will also give law enforcement authorities and the judiciary the tools to act effectively against environmental crimes across the Union”.

The following up-to-date list of offence categories is given in Article 3 of the Directive:

- 1) The discharge, emission or introduction of a quantity of materials or substances, energy or ionizing radiation, into air, soil or water which causes or is likely to cause



- the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants;
- 2) The placing on the market, in breach of a prohibition or another requirement aimed at protecting the environment, of a product the use of which on a larger scale, namely the use of the product by several users, regardless of their number, results in the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation into air, soil or water and causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants;
 - 3) The manufacture, placing or making available on the market, export or use of substances, whether on their own, in mixtures or in articles, including their incorporation into articles, where such 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 plant;
 - 4) The manufacture, use, storage, import or export of mercury, mercury compounds, mixtures of mercury, and mercury-added products and 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;
 - 5) The execution of projects where such conduct is carried out without a development consent and causes or is likely to cause substantial damage to the quality of air or soil, or the quality or status of water, or substantial damage to an ecosystem, animals or plants;
 - 6) The collection, transport or treatment of waste, the supervision of such operations and the after-care of disposal sites, including action taken as a dealer or a broker, where such conduct: (i) concerns hazardous waste and it concerns a non-negligible quantity of such waste; or (ii) concerns waste other than that referred to in point (i) and causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants;
 - 7) The shipment of waste, where such conduct concerns a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;
 - 8) The recycling of ships;
 - 9) The ship-source discharge of polluting substances which causes or is likely to cause deterioration in the quality of water or damage to the marine environment;
 - 10) The operation or closure of an installation in which a dangerous activity is carried out or in which dangerous substances or mixtures are stored or used, and such conduct causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants;
 - 11) The construction, operation and dismantling of an installation, and such conduct causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants;



- 12) The manufacture, production, processing, handling, use, holding, storage, transport, import, export or disposal of radioactive material or radioactive substances, and such conduct causes or is likely to cause the death of, or serious injury, to any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants;
- 13) The abstraction of surface water or groundwater where such conduct causes or is likely to cause substantial damage to the ecological status or ecological potential of surface water bodies or to the quantitative status of groundwater bodies;
- 14) The killing, destruction, taking of, possession, sale or offering for sale of a specimen or specimens of a species of wild fauna or flora except where such conduct concerns a negligible quantity of such specimens;
- 15) The trade of a specimen or specimens, or parts or derivatives thereof, of a species of wild fauna or flora, and import of a specimen or specimens, or parts or derivatives thereof, of such species except where such conduct concerns a negligible quantity of such specimens;
- 16) The placing or making available on the Union market or the export from the Union market of relevant commodities or relevant products, except where such conduct concerns a negligible quantity;
- 17) Any conduct which causes the deterioration of a habitat within a protected site, or the disturbance of animal species where such deterioration or disturbance is significant;
- 18) The bringing into the territory of the Union, placing on the market, keeping, breeding, transporting, using, exchanging, permitting to reproduce, growing or cultivating, releasing into the environment, or the spreading of invasive alien species of Union concern, and causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants;
- 19) The production, placing on the market, import, export, use, or release of ozone depleting substances, whether alone or as mixtures, or the production, placing on the market, import, export or use of products and equipment, and parts thereof, containing ozone-depleting substances or whose functioning relies upon those substances, and
- 20) The production, placing on the market, import, export, use, or release of fluorinated greenhouse gases, whether alone or as mixtures, or the production, placing on the market, import, export or use of products and equipment, and parts thereof, containing fluorinated greenhouse gases or whose functioning relies upon those gases or the putting into operation of such products and equipment (Directive 2024/1203; Directives 2008/99/EC; Directive 2009/123/EC).⁴

⁴ This kind of blanket, i.e. referring dispositions, implies knowledge of a number of regulations governing the areas of water, air and soil protection, the number of which is exceptionally large. As an example, on the 26 October 2022, the EU Commission released its proposal for modifying three important water management Directives, which brings the legal framework in line with advancements in science and technology over the past few decades (Backhaus, 2023: 2).



All of the offences from the list must be unlawful and intentional, or in certain cases committed with the “serious negligence”, which is not precisely defined but its notion should be interpreted in accordance with national law, taking into the account relevant case law of the Court of Justice. The member states are not obliged to apply special definition of “serious negligence” in their national legislation, but the notion of “serious negligence” can be a relevant element of the criminal offence as in case of the terms “negligible quantity” or “likelihood”.

Some of the offences from the list above will be considered environmental crimes only in cases of causing death or serious injury to a person or substantial damage to air, water, soil, ecosystem, animals or plants.

In comparison with the 2008 Directive, new offences on the list are: unlawful ship recycling, unlawful water extraction, serious breaches of the EU chemicals and mercury legislation, timber trafficking, serious breaches related to dealing with fluorinated greenhouse gases and serious breaches of legislation on invasive alien species.

Additionally, the Directive calls on member states to criminalize the incitement, aiding to, attempt to commit any of the criminal offences from the above list.

The novelty in the text of the Directive is also the term of “qualified offence”. This can be defined as an offence committed intentionally which causes the destruction of, or widespread and substantial damage to, an ecosystem or a habitat within a protected site, or widespread and substantial damage to air, soil or water quality. Those types of offences can be seen as a category which can include and be comparable with the term of ecocide. Even though the revised text of the Directive does not explicitly refer to the term “ecocide”, for those types of offences member states are obliged to prescribe more severe penalties, for both natural and legal persons. Tougher penalties are the criminal law mechanism to show the higher level of social dangerousness, and they always have to be more severe than those for the other offences.

Penalties that are established have a special graded system of minimum-maximum imprisonment penalties and in case of a legal person, two separate, alternative fining methods. The first one is based on fixed amounts, and the second one is connected with the total annual turnover of the legal person concerned.

In the case of committing the crime by the natural person, the following penalties are prescribed:

- for intentional offences causing the death to any person, maximum prison term of at least ten years;
- for the qualified offence causing catastrophic results, a maximum prison term of at least eight years;
- for offences committed with at least serious negligence causing death to any person, a maximum prison term of at least five years, and
- for other intentional offences included in the legislation, a maximum prison term of either at least five years or at least three years.

Undefined terms are also clarified in order to achieve balanced application and higher level of clarity of legal text. Member states did not clarify those terms in their national criminal law provisions, but only transposed them literally or with the similar translation.



That is why the problems with the interpretation are present and one of the major problems that judiciary has in a cross-border cooperation. The definitions of key legal terms were provided and attached as an integral part of the Directive. For example, the term of “substantial damage” was not precisely defined in the 2008 Directive. In the new 2024 Directive it is defined that certain factors must be taken into account, with the mandatory existence of at least one of the several alternatively listed. Those factors are the baseline condition of the affected environment or the lasting nature of the damage or the extent of the damage and the reversibility of the damage (Directive 2024/1203).

It is also defined that the member states have to apply some kind of non-criminal penalties such as an obligation to restore the environment or compensate for the damage; fines, exclusion from access to public funding, etc.

The Directive also contains the provisions about the protection of whistleblowers, as the persons who report environmental criminal offences or assist the investigation thereof, and private enforcement, as well as the norms about the jurisdiction under the following situations: offence taking place within the territory of the national state, on a ship or aircraft with the registration in the country of origin, offence resulting in a damage occurring within the territory of the national state or if the perpetrator of the offence is a national of the state.⁵

In order to achieve higher level of efficiency in combating environmental crime the Directive prescribes the obligation for national states to ensure resources, to organize training for strengthening the capacities of the environmental inspectors, judges and prosecutors in order to secure better implementation and enforcement in national legislation.⁶

In the final articles of the Directive the measures for establishing the appropriate mechanisms of coordination and cooperation between competent authorities within member states are prescribed. Cooperation between the member states and the commission, and union bodies, offices or agencies, the definitions and application of the National Strategy and other questions are the integral part of the Directive.

All the elements of the policy of combating environmental crime according to the EU standards can be recognized in the Directive. However, much depends on the future application of the criminal offenses provided for in the Directive and their implementation in national legislations. “The ultimate goal of crime suppression policy is the more efficient protection of certain values and goods in society from harmful behaviour. In this regard, crime suppression policy is primarily a practical activity. Even when the requirements of *lex certa* are achieved to a high degree, incrimination remains an alive, dynamic entity that obtains its final form and precision only through interpretation and application” (Stojanović, 2023: 155).

What becomes of the practical applications of the provisions of the new ECD will be part of some later separate research work. However, in general, after analysing the major fundamental problems of the criminal law protection of the environment given in the first

⁵ More about the legal issues and the general importance of whistleblowers in the field of environmental crime prevention in Kostić (2024).

⁶ Even though the environmental crimes are not the core focus of the criminal justice systems, such as the traditional property and street crimes, the questions about the contemporary perspectives on environmental enforcement and the overall effectiveness of the judicial systems in dealing with the environmental crimes and offenders need to be raised (Nurse, 2022: 333–337).



section of the paper, its possibilities and scopes on the abstract level, in the concluding remarks the authors will evaluate its future application as an application with the considerable potential, and optimistic attitude towards an enhancement of the protection of the environment seen through prism of the ECDD and its mentioned and analysed provisions. Certainly, the successful transposition of the Directive into the criminal legislation of member states and candidate countries is a necessary prerequisite for that. Bearing in mind the numerous novelties introduced by the Directive, it will not be an easy task for the national legislator, who has a certain free space for some modifications, but which must not be of an essential character and call into question the achievement of the Directive's goals. However, it is a question of principle that always arises when obligations from ratified international treaties are implemented in national criminal legislation, or in the case of the EU member states when the EU law and their national laws are transposed, regardless of what criminal offenses are involved.

CONCLUSION

The importance of the paper is reflected in pointing out the problematic issues of criminal law protection of the environment, its legitimacy, and its place in an overall system of the criminal law provisions of the national states, in order to make the needed balance with the proven dogmatic standards of the criminal law protection, traditionally based on the respect of its fundamental principles of legality, legitimacy, guilt, and proportionality, and the needs of a contemporary criminal policy in order to provide a common regional framework that will be in line with the environmental needs and transnational character of the criminal offence in this category of criminality. Changes in the area that defines new environmental crimes at the EU level, minimum common standards in prescribing criminal sanctions, and enhancing the existing ones, as well as setting brand new tools and mechanisms in strengthening and enhancing the effectiveness of the law enforcement cooperation in the field of environmental crimes have been brought about by the new EU Environmental Crime Directive aimed to suppress environmental crime, and they can be seen and marked as an important contribution to criminal law protection of the environment, but only as the ultimate instrument of the state reaction to environmental crime. Even though environmental crimes have their negative impact on human health, safety and economics in general, they have to be realistically conceived and seen only as an *ultima ratio societatis* in protection of the environment. The provisions of the analysed directive mostly indicate that the legislator at the European level noticed and tried to correct all the shortcomings that were made in the part of the work that dealt with dogmatic issues of criminal law protection of the environment. The above gives the authors a basis for assessing the Directive as a promising step in using the possibilities of criminal law protection of the environment conceived in this way. Although much depends on the implementation of the directive and its future results in suppression of the environmental crimes, even now it can be assessed as a significant contribution to the further normative development of the criminal law regulation of this area.



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