

EUROPEANISATION OF ENVIRONMENTAL PROTECTION THROUGH CRIMINAL LAW

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ABSTRACT

This article focuses on the European legal framework for environmental protection, in particular through criminal law. Given the societal need to reconcile technological development with the protection of natural resources and the environment in general, this is a highly relevant issue. The aim of this article is to describe and examine the current European legislation in the field of the environmental protection through criminal law, employing descriptive, analytical and synthetic methods. The article first discusses the history of environmental policy in public international law and European law, where initially the legal instruments of criminal law were not used. Subsequently, the author examines the current legal framework and, finally, considers its future. In the last parts, the article addresses the secondary law of the European Union, namely the Directive of the European Parliament and of the Council on the protection of the environment through criminal law of 2008 and the new Directive of the European Parliament and the Council on the criminal law protection of the environment of 2024. However, other decisions, directives and case law relevant to the issue are also covered. Overall, this is a unique article mapping all the essential legal instruments in the field of European environmental protection through criminal law. The author highlights the importance of protecting the environment through criminal law, but also emphasises the necessity of applying one of its basic principles, i.e., *ultima ratio*.

Keywords: environment, criminal law, European Union, protection, directive

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INTRODUCTION

Although environmental policy is one of the European Union's most recent activities, it is regarded as one of its most important issues. It not only responds to acts of public international law, which have been addressing the subject for several decades, but also includes requirements perceived as common and specific to the Member States of the European Communities, or the European Union.

The article focuses on the European legal framework for environmental protection, which has determined the direction of criminal policy in the field of environmental protection in the EU Member States in recent years.¹

Given that this issue encompasses a wide range of activities, the result is a broad system of standards covering various areas, which is rapidly evolving through EU legislation. In particular, efforts to reconcile technological development with the protection of natural resources are reflected in many dimensions. Yet, over time, it has become clear that effective protection of the environment against destruction and pollution is not achievable solely through appropriate legal and civil regulations (tort liabilities); the use of criminal law is essential. Criminal law, however, addresses only the most pressing and socially harmful environmental offences and thus does not provide comprehensive environmental protection like administrative law. Therefore, in some cases, it may operate in a fragmented manner, stemming from its subsidiary nature (*ultima ratio*).²

Documents from the European Union institutions show that

'Environmental crime (...) grows at a rate of 5%–7% per year (...), generates \$110–281 billion of losses every year. (...) Environmental crime is one of the **world's most profitable organised criminal activities** and has a major impact not only on the environment but also on human health. This type of crime is highly lucrative but **it is hard to detect, prosecute and punish it**. These factors make it highly attractive for organised crime groups.' Currently, this crime is mainly focused on improper collection, transport, recovery or disposal of waste; illegal emission or discharge of substances into the atmosphere, water or soil; killing, destruction or possession of, or trade in protected wild animal or plant species; or the illegal trade in ozone-depleting substances. The consequences include 'increased levels of pollution, degradation of wildlife, reduction of biodiversity, disturbance of ecological balance and increased risks to human health.'³

¹ In this context, the EU has gradually adopted a number of secondary legislation acts which, however, have not had a direct impact on criminal law, such as Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora and Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds, which are also mentioned in the rest of the paper.

² The subsidiarity of criminal repression follows from the provisions of Section 12(2) of the Czech Criminal Code, which states that the criminal liability of the perpetrator and the associated criminal consequences may be applied only in cases that are socially harmful, where the application of liability under another legal provision is not sufficient.

³ See <https://www.consilium.europa.eu/en/infographics/eu-fight-environmental-crime-2018-2021> [accessed on 12 September 2024].

HISTORICAL EXCURSUS: LANDMARKS OF ENVIRONMENTAL PROTECTION IN PUBLIC INTERNATIONAL LAW AND EUROPEAN LAW

Before addressing the role of the European Union in combating environmental crime, it is worth pointing out that protection through criminal law has become a method of environmental protection relatively recently. It was preceded by a global effort to regulate environmental protection through means other than criminal law.

The United Nations Conference on the Human Environment, held in Stockholm in 1972 by decision of the UN General Assembly, significantly influenced the emergence and development of environmental protection in European law.

The conference was a response to the accumulation of problems that had arisen over previous decades, resulting in environmental disasters such as the Great Smog of 1952 in London, in which several thousand people died due to fog, cold, emissions from motor vehicles, and increased use of solid fuels for heating, as well as issues related to pesticides contaminating large watersheds and agricultural areas.⁴

The meeting highlighted the need for a common framework to protect and improve the environment, recognising that contemporary society is reshaping its environment as never before, and that the natural and cultural components of their environment are fundamental to the well-being of people. Participants agreed on the need to protect the environment worldwide, while drawing attention to the problems of the contemporary environment (such as chemical pollution of its components, destruction and depletion of non-renewable resources, challenges faced by developing countries, and the threat of overpopulation) and the importance of preserving a healthy environment for future generations. The conference thus laid the foundations for the current concept of sustainable development.

The Conference resulted in a Declaration on the Human Environment containing 26 principles concerning environment and development, and adopted an Action Plan with 109 recommendations. The scope of the conference was very broad. The Stockholm Declaration addressed protection of human rights, conservation of natural resources, wildlife, Earth pollution, population policy, environmental education, balance between regional development and environmental development requirements, and the need to eliminate weapons of mass destruction.⁵

This Declaration became the primary and foundational document for the further development of international environmental law.

Influenced by the Declaration, the Council of Europe drafted a multilateral Convention on the Protection of the Environment through Criminal Law and

⁴ Along with the so-called socialist states, Czechoslovakia did not attend the conference in protest against the exclusion of the German Democratic Republic, which was not invited as it was not a member of the UN).

⁵ Available at: <https://web.archive.loc.gov/all/20150314024203/http%3A//www.unep.org/Documents.Multilingual/Default.asp?documentid%3D97%26articleid%3D1503> [accessed on 12 September 2024].

opened it for signature by the member states of the Council of Europe, as well as others, in 1998.⁶

The Convention seeks to improve environmental protection at the European level. Unlike the Declaration, the Convention proposed a much more radical approach, using criminal law to deter and prevent the most environmentally damaging behaviours.

This objective was to be achieved through bringing about measures to align national criminal legislation in this area. The Convention obliges States Parties to introduce specific provisions into their criminal law or modify existing provisions. It criminalises a number of acts committed intentionally or negligently, where a perpetrator (natural or legal person) causes permanent damage to the quality of air, land, water, animals, or plants, or causes death or serious injury to any person.

The Convention establishes specific grounds for criminal liability not only for natural persons but also for legal persons, specifies and imposes measures for the confiscation of the property of offenders, and regulates the conditions of international judicial cooperation.

A rather controversial provision permits non-profit environmental associations to participate in criminal proceedings concerning the offences referred to in the Convention.

However, the demanding nature of the requirements imposed on national legislation (with criminal law being an expression of the internal sovereignty of each state) ultimately led to doubts among the Signatories regarding the need to ratify the Convention. Due to the insufficient number of ratifications, the Convention has not yet entered into force. Currently, discussions are ongoing within the Council of Europe on the need for a new convention involving the European Union as a subject of international law.⁷

In public international law environment, numerous international conventions have been adopted to date, which to varying extents have influenced the position of the European Community, and subsequently the European Union, in the field of environmental protection.

These include, in particular, Convention on Biological Diversity (Nairobi 1992), Convention on Wetlands of International Importance, Especially as Waterfowl Habitats (Ramsar 1971), Convention on the Conservation of Migratory Species of Wild Animals (Bonn 1979), Bern Convention on the Conservation of European Wildlife and Natural Habitats (Bern 1979), Framework Convention on the Conservation and Sustainable Development of the Carpathians (Kiev 2003), Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington 1973),

⁶ Strasbourg, 4 November 1998, ETS No. 172; available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/172.htm>. 3 ratifications are missing, including the Czech Republic [accessed on 18 January 2024].

⁷ On 23 November 2022, the Committee of Ministers of the Council of Europe established a Committee of Experts on the Protection of the Environment through Criminal Law and mandated it to draft a new Convention to replace the 1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172) by 30 June 2024. The European Commission was mandated by the Council of the EU to participate in the negotiations on the new Convention on behalf of the EU.

Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris 1972), European Landscape Convention of the Council of Europe (Florence 2000), UN Convention to Combat Desertification in those Countries Experiencing Major Droughts and/or Desertification, Particularly in Africa (Paris 1994), and Antarctic Treaty (Washington 1959, along with subsequent protocols and conventions).

The European Union was founded as a political superstructure on the legal basis of the European Community, an international organisation, therefore, its first steps in the field of environmental protection also stem from the content of the Stockholm Declaration.

In 1973, the Commission of the European Communities initiated environmental activities through a well-established, but legally 'soft' instrument – the Action Programmes,⁸ which are strategic and conceptual documents representing the long-term intentions of the European Parliament and of the Council in specific areas. The first environmental action programme within the European Community was adopted following the Stockholm Declaration.

To date, eight programmes have been announced in this area.

In 1987, the Single European Act⁹ inserted Article 100a into the Treaty establishing the European Community, the third paragraph of which laid down that the EC Commission, in its proposals concerning, *inter alia*, environmental protection, will base its approach on a high level of protection.

Further changes to primary law in this area were introduced by the Treaty on European Union,¹⁰ which explicitly uses the phrase 'environmental policy' (Article 130). Thus, regulation in this area has evolved from addressing the most pressing priorities of the 1970s, including responses to industrial and agrarian pollution, to protecting water, birds, and other animal and plant species, managing waste, promoting environmentally friendly products, and integrating the principles of sustainable development into all Community policies.

The Sixth Environment Action Programme (EAP) adopted in Gothenburg for the period up to 2012,¹¹ had an even broader scope. It included the fight against climate change, the protection of nature and biodiversity, the protection of health, and the responsible management of natural resources and waste among the Union's key environmental policies. One of the agenda's items was the issue of the effectiveness of enforcement of the Union's legislative measures concerning environmental protection. This programme identified the need to adopt environmental liability

⁸ The first so-called European Action Programme was announced for the period 1973–1976, cf., e.g., Damohorský, M. (ed.), *Právo životního prostředí*, 3rd ed., Praha, 2010, pp. 102ff.

⁹ OJ L 169, 29.6.1987, p. 1. The aim of the Single European Act (SEA) was to revise the Treaties of Rome, which established the European Economic Community (EEC) and the European Atomic Energy Community, in order to create a single internal market.

¹⁰ Cf. consolidated version of the Treaty, OJ C 202, 7.6.2016, p. 1, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016ME%2FTXT-20240901> [accessed on 13 September 2024].

¹¹ Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002, on the Sixth Environment Action Programme, OJ L 242, 10.9.2002, p. 1, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002D1600> [accessed on 13 September 2024].

legislation and to start combating environmental crime. The programme was the main incentive to adopt subsequent secondary EU legislation. The Sixth EAP ended in July 2012, but many of the measures and actions it initiated continued to be implemented.

The final assessment of the Sixth EAP concluded that the programme had delivered environmental benefits and established an overarching strategy for environmental policy. However, despite these achievements, unsustainable trends were still observed in all four priorities identified in the Sixth EAP.

The Seventh Environment Action Programme,¹² followed with priorities set to protect nature and strengthen ecological resilience, stimulate growth in a resource-efficient, low-carbon economy, and reduce risks to human health and well-being from pollution, chemicals and the impact of climate change.¹³

The Eighth Environment Action Programme was adopted in 2022¹⁴ as a guideline for environmental policy up to 2030, with some visions extending to 2050. It aims to accelerate ecological transformation, mainly by reducing greenhouse gas emissions, adapting to climate change, promoting a regenerative growth model, achieving zero pollution, protecting and restoring biodiversity, and reducing key environmental and climate impacts related to production and consumption.¹⁵

Environmental protection has also been addressed in secondary EU legislation,¹⁶ where the objectives directly impact the application of criminal law.

Initially, the Council of the European Union presented a draft Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law.¹⁷ This Framework Decision regulated basic requirements for environmental protection through criminal law; however, the Court of Justice subsequently annulled the decision.

In 2008, the Council adopted the Environmental Crime Directive, which aimed to unify criminal sanctions in the field of environmental protection. This Directive was a response to the increasing number of environmental crimes with a cross-border

¹² Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', OJ L 354, 28.12.2013, p. 171, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013D1386> [accessed on 13 September 2024].

¹³ Fiala, P., Krutílek, O., Pitrová, M., *Evropská unie*, 3rd ed., Brno, 2018, p. 589.

¹⁴ Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030, OJ L 114, 12.4.2022, p. 22, available at: <https://eur-lex.europa.eu/eli/dec/2022/591/oj> [accessed on 13 September 2024].

¹⁵ Council of the European Union, *Council adopts Eighth Environment Action Programme*, press release of 29 March 2022, available at: <https://www.consilium.europa.eu/en/press/press-releases/2022/03/29/council-adopts-8th-environmental-action-programme/> [accessed on 13 September 2024].

¹⁶ Several non-punitive regulations have been adopted within the EC/EU, such as Directive 2008/56/EC of 17 June 2008 establishing a framework for Community action in the field of marine environmental policy, OJ L 164, 25.6.2008, p. 19; or Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds, OJ L 20, 21.1.2010, but their listing and analysis would be beyond the scope of this paper, which is primarily concerned with criminal law.

¹⁷ The Council Framework Decision was the legal instrument of the Third Pillar of the European Union in the field of criminal law, OJ L 29, 5.2.2003, p. 55, available at: http://data.europa.eu/eli/dec_framw/2003/80/oj [accessed on 13 September 2024].

dimension. Existing national sanctioning systems were found to be insufficient, and there was a need to introduce sanctions that would serve as a greater deterrent to potential offenders.

In 2021, the Directive was amended, as it was determined that the existing regulation was not adequately fulfilling its intended purpose. While environmental protection should continue to be addressed through criminal law, it was established that Member States needed to harmonise national legislation more deeply.

Finally, in April 2024, a completely new directive concerning environmental protection through criminal law was adopted, which addressed some problematic areas of the directive of 2008. This directive led to the tightening of sanctions related to criminal offences impacting environmental protection.

The Lisbon Treaty included environmental policy among the areas of shared competence between the Union and the Member States.

EUROPEANISATION OF THE EC/EU CRIMINAL LAW IN THE FIELD OF ENVIRONMENTAL PROTECTION

EC/EU SECONDARY LEGISLATION ON ENVIRONMENTAL PROTECTION THROUGH CRIMINAL LAW

Efforts in the field of criminal environmental protection in the EC/EU, as mentioned above, began to emerge as early as the end of the 20th century.

The first proposal for a Directive on the protection of the environment through criminal law was drawn up by the European Commission in 2001.¹⁸ The purpose of the proposed legislation was to ensure more effective application of EC environmental legislation by introducing a minimum set of criminal offences in all EU Member States. The proposer believed that compliance with environmental legislation should largely be enforced through criminal sanctions, which alone would provide sufficient deterrence.

However, the proposal was not adopted by the Council, which in 2003 put forward its own solution in the form of Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law.¹⁹ This Framework Decision built on the aforementioned Commission proposal for a Directive of 2001 and set out the basic requirements for the protection of the environment through criminal law. The adoption of the Framework Decision raised the fundamental question of which mandate and which pillar of the European issue provided legitimacy to such an approach. This led the Commission to bring an action before the Court of Justice against the Council, proposing that the Council Framework Decision be annulled.

¹⁸ Document (2001/0076(COD)), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52001PC0139> [accessed on 13 September 2024].

¹⁹ OJ L 29, 5.2.2003, available at: http://data.europa.eu/eli/dec_framw/2003/80/oj [accessed on 13 September 2024].

The European Court of Justice subsequently annulled the Framework Decision on 13 September 2005,²⁰ precisely because it was adopted outside the EC legislative framework.²¹

In its decision, the European Court of Justice stated that

‘while it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence, this does not, however, prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.’²²

The Court of Justice further confirmed in its judgment that neither criminal law, nor criminal procedure law, as a general rule, falls within the Community competence.

The key significance of this decision is that, at the time of the adoption of the draft Framework Decision, there was no consensus on the form and scope of the sanctions proposed in the Framework Decision. The annulled Framework Decision required that the defined acts be punishable by ‘effective, proportionate and dissuasive criminal sanctions’ without further specification. It follows from this and the Court’s decision that the choice of the specific measure and the level of sanctions was left to the Member States.

Subsequently, in 2005, the Council adopted a Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.²³ This Decision was also challenged by the Commission before the Court of Justice.²⁴ The Court of Justice was called upon by the action to clarify the extent to which the Community is entitled to adopt measures relating to penalties under the criminal law of the Member States.

The Court eventually annulled the contested Framework Decision.²⁵ While it confirmed the principle of integrating environmental policy into transport policy

²⁰ Judgment of the Court of Justice of 13 September 2005, *Commission of the European Communities v Council of the European Union*, case C-176/03; OJ C 315, 10.12.2005, p. 2, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:C2005/315/03> [accessed on 18 January 2024].

²¹ On the new directive on environmental criminal law, see article: ‘K nové směrnici o trestněprávní ochraně životního prostředí’, *Právní zpravodaj*, 2008, Vol. 9, No. 6, pp. 9–10.

²² Pomahač, R., ‘EVROPSKÝ SOUDNÍ DVŮR: K pravomoci stanovit trestní sankce na ochranu životního prostředí’, *Trestněprávní revue*, 2006, Vol. 5, No. 2, p. 56; Smolek, M., ‘EVROPSKÝ SOUDNÍ DVŮR: Trestní sankce v oblasti životního prostředí – revoluce v trestním právu členských států?’, *Trestněprávní revue*, 2005, Vol. 4, No. 12, p. 329.

²³ Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L 255, 30.9.2005, p. 164, http://data.europa.eu/eli/dec_framw/2005/667/oj [accessed on 13 September 2024].

²⁴ Proceedings for annulment of Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.

²⁵ Judgment of the Court (Grand Chamber) of 23 October 2007, *Commission of the European Communities v Council of the European Union*, case C-440/05. Cf. also article ‘K nové směrnici...’, op. cit.

and the possibility of introducing offences at the Community level, it excluded the possibility of introducing specific types and levels of penalties. In light of this decision by the European Court of Justice, the Commission also modified the 2008 draft Directive on the protection of the environment through criminal law.²⁶

The issue of marine pollution was addressed in 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.²⁷

In parallel with developments at the European level in the first decade of the new millennium, the petrochemical company Total SA and others were on trial in France for the 1999 wreck of the tanker Erika, which polluted more than 400 km of the French coast. It was the first time litigation resulted in parties' conviction for environmental damage;²⁸ this was an important precedent of pan-European significance, and the proceedings undoubtedly influenced further development of the EU legislation.

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 2008 ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW

After several years of negotiation and litigation, an agreement was finally reached to introduce criminal penalties for those who intentionally or negligently cause serious damage to the environment. The Directive on the protection of the environment through criminal law²⁹ was adopted, seeking more effective, stronger and impartial protection of the environment.

The draft directive was part of a broader effort to protect the environment in the EU, which included not only the adoption of the European Parliament's report on maritime strategy – calling, among other things, for a reduction in shipping emissions and a decrease in the level of land-based marine pollution – but also a proposal for a greener approach to the decommissioning and disposal of old vessels, aimed particularly at protecting India, Pakistan, and Bangladesh from the offloading of toxic waste.

²⁶ Stejskal, V., 'Trestněprávní ochrana životního prostředí v evropském komunitárním právu těsně před cílem?', *České právo životního prostředí*, 2008, Vol. 8, No. 2, p. 66.

²⁷ Council Framework Decision 2005/667/JHA..., op. cit.

²⁸ The French oil company Total SA was found guilty of involvement in the sinking of the Erika oil tanker, which polluted the Breton coast in 1999. The Italian shipowner Giuseppe Savarese, who owned the Erika, Antonio Pollaro, head of the company that operated it, and RINA, which issued the seaworthiness certificate, were also named as accomplices. The Court sentenced Total and RINA to a fine of EUR 375,000 (10.1 million Czech crowns), and Savarese and Pollaro to a fine of EUR 75,000. All four perpetrators were collectively ordered to pay 192 million euros in compensation to those affected.

²⁹ 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, p. 28, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0099> [accessed on 18 January 2024].

The Directive is relatively brief; it consists of an explanatory memorandum and 10 articles. After defining the scope of the regulation and the basic concepts, it lists the individual elements of environmental offences. The basic types of sanctions are then defined and the liability of legal persons is explicitly mentioned. The final articles set out the reporting obligations to the Commission and the deadline for transposition of the Directive. An annex then contains a list of Community legislation the infringement of which will lead to criminal sanctions.

The individual illegal acts follow from a compromise between the between the European Commission's position and that of the opponents of deeper integration of parts of criminal law. Only acts relating to cases of serious harm, death or serious injuries to persons are criminalised.

According to the Directive, the following acts are to be considered criminal offences:

- '(a) the discharge, emission, or introduction of a quantity of materials or ionising radiation into the air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, or the quality of water, or to animals or plants;
- (b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker (waste management),³⁰ which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants.
- (c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity whether executed in a single shipment or in several shipments which appear to be linked;
- (d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage of the quality of air, the quality of soil quality or the quality of water, or to animals or plants;
- (e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- (f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
- (g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
- (h) any conduct which causes significant deterioration of a habitat within a protected site;
- (i) the production, importation, exportation, placing on the market or use of ozone-depleting substances.'

³⁰ See, for example, judgment of the Court (Second Chamber) of 4 July 2019, *Criminal proceedings against Tronex BV*, C-624/17, in which the Court held that appliances suffering defects that require repair, such that they cannot be used for their original purpose, constitute a burden for their holders and must thus be regarded as waste, in so far as there is no certainty that the holders will actually have them repaired.

The Directive requires sanctions to be 'effective, proportionate and dissuasive'.³¹ In addition to fines and imprisonment, punishments such as prohibition of activities, publication of the judgment and obligations to restore the environment to its previous state will apply. Furthermore, incitement and complicity in the above-mentioned acts are to be made punishable. In terms of the subjective aspect, not only intentional conduct is required, but gross negligence is also sufficient.

The process of adopting the substantive legislation created by EU legislation has been greatly facilitated by the adoption of the Lisbon Treaty. According to Article 83(2) TFEU, if the approximation of criminal law and regulations of a Member State proves essential to ensure the effective implementation of a Union policy in an area that has been the subject of harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

In 2021, the European Commission announced that the Directive on the protection of the environment through criminal law (2008) needed to be revised, as in the opinion of a European Commission working group, the Directive had not fully achieved its intended purpose.

Subsequently, the Commission adopted a draft amendment on 15 December 2021.³² The proposal contains new categories of environmental offences, definitions of new aggravating circumstances as well as the minimum and maximum levels of sanctions.³³

There has been much debate about the specific shape of the directive, and more than 500 amendments have been tabled.³⁴ In March 2023, a consensus was reached on some areas of the new directive, with proposals to add new offences such as the growing of genetically modified organisms, illegal fishing or acts causing forest fires. There is also agreement on some of the sanction areas, where it is envisaged that offences causing death or significant damage to the environment should be punishable by a minimum of 10 years' imprisonment.³⁵

For legal persons, the penalties will be based on a certain average turnover of the legal person over the previous period. On 16 November 2023, a preliminary agreement was reached between the European Parliament and the Council on the draft Directive and subsequently the final version of the Directive, which was adopted

³¹ Vomáčka, V., 'Požadavky práva EU na účinné trestání v ochraně životního prostředí', *České právo životního prostředí*, 2019, Vol. XIX, No. 3, pp. 136–154.

³² European Commission, *European Green Deal: Commission proposes to strengthen criminal protection of the environment through criminal law*, press release of 15 December 2021, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_21_6744/IP_21_6744_EN.pdf [accessed on 13 September 2024].

³³ Fabšíková, T., 'Změny v trestněprávní ochraně životního prostředí podle návrhu nové směrnice', *České právo životního prostředí*, 2022, Vol. XXII, No. 1, pp. 13–38.

³⁴ On 13 October 2022, as part of the Czech Presidency of the European Union, a report was submitted, which subsequently served as a basis for further discussion.

³⁵ Cf., for example, the information of the Minister of Justice of the Czech Republic on the course of the Council and European Parliament negotiations of 9 December 2022. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2022/12/09/council-agrees-its-negotiating-mandate-on-the-environmental-crime-directive/> [accessed on 13 September 2024].

on 11 April 2024 and published on 30 April 2024, replacing the 2008 Directive. The new Directive entered into force on the 20th day following its publication in the Official Journal of the European Union, i.e., on 20 May 2024.

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW OF 2024

Directive 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 is an entirely new directive that was adopted after long discussions in the European Parliament and the Council. This is a response to the shortcomings observed in the former Directive on the protection of the environment through criminal law of 2008,³⁶ as discussed in the previous part of this article. In addition to correcting the shortcomings of the previous document, the aim of this new one was to further strengthen environmental protection, particularly through criminal law. To fulfil the objectives of the Directive, new criminal offences against the environment were defined and introduced, and the types of sanctions for natural and legal persons were updated. Furthermore, the Directive also urges Member States to take necessary measures to ensure that specialised regular training is provided to judges, prosecutors and other entities involved in criminal proceedings and investigations, as the issue of crimes against the environment is a complex area that requires a multidisciplinary approach.³⁷

One of the most important areas of the new Directive is undoubtedly Article 3, which addresses criminal offences. Criminal offences and the conditions of their qualification and commitment are specified in much greater detail than was the case in the 2008 Directive. Similarly, existing criminal offences have been expanded by the addition of new offences, in response to the evolving criminal activities of offenders in the field of environmental crime, as this type of crime increases by up to 7% year-on-year.³⁸ The system of assessing criminal offences has also undergone a transformation, with a clearer distinction made between intentional conduct and conduct due to gross negligence. The consequences of the perpetrator's acts are now graded differently, particularly regarding conduct that causes destruction or widespread and substantial damage, which is either irreversible or long-lasting to an ecosystem of considerable size or environmental value, a habitat within a protected site, or the quality of air, soil, or water. At the same time, however, it is necessary to consider the baseline condition of the affected environment, whether

³⁶ Directive 2008/99/EC, *op. cit.*

³⁷ Article 18 of the Directive 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.

³⁸ Environmental Crime Directive, available at: https://environment.ec.europa.eu/law-and-governance/environmental-compliance-assurance/environmental-crime-directive_en [accessed on 5 August 2024].

the damage is long-lasting, medium-term or short-term, the extent of the damage and the reversibility of the damage. Compared to the previous directive, the new legal regulation of criminal offences in the field of environmental protection thus offers Member States much wider possibilities for applying criminal law instruments, which will undoubtedly lead to greater protection of the environment.

As already mentioned, the criminal acts themselves underwent significant adjustments, with several additional types of conduct now qualifying as criminal acts. Notably, there is a new criminal offence consisting of intentional illegal act, which is connected with the recycling of ships that can cause extensive, substantial or otherwise significant damage to the environment.³⁹ Another newly modified action, which will be qualified as a criminal offence, focuses on the protection of surface and underground waters: the illegal abstraction of water from natural sources, which causes or is likely to cause a substantial damage to the ecological status or ecological potential of surface water bodies or groundwater bodies, is now classified as a criminal act.⁴⁰

The Directive also focuses on tightening up actions against violations of the European Union legislation in the field of chemicals. There are stricter penalties for breaches of laws on mercury⁴¹ and fluorinated greenhouse gases.⁴² This approach strengthens the protection of human health and the environment, as the handling of these substances is highly dangerous and poses significant threats.

Lastly, the Directive introduces a criminal offence related to 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 animals, plants, fungi, and microorganisms that have a significant impact on the territory of the Member States.⁴³ Invasive non-native species pose a threat to biological diversity and the ecosystem, which is likely to result in the displacement of native species,

³⁹ Within the scope of Regulation No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC, OJ L 330, 10.12.2013, p. 1, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32013R1257> [accessed on 5 August 2024].

⁴⁰ Within the meaning of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0060> [accessed on 5 August 2024].

⁴¹ In accordance with Regulation No 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, p. 1, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0852> [accessed on 5 August 2024].

⁴² In accordance with Regulation 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, available at: <http://data.europa.eu/eli/reg/2024/573/oj> [accessed on 5 August 2024].

⁴³ In accordance with Regulation 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, p. 35, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R1143> [accessed on 5 August 2024].

transmission of diseases, and threats to human health and the economy. It is therefore appropriate that such conduct be more severely punished.

It is certainly worth highlighting the strengthening of the position of groups involved in nature protection, known as environmental defenders. Article 15 of the new Directive establishes the obligation for Member States to publish information in the public interest, thereby enabling access to justice for the public concerned. Member States are required to ensure that persons affected by crimes in the field of environmental protection have appropriate procedural rights, especially in relation to participation in criminal and civil proceedings and the exercise of claims within them. Entities should have access to information about the steps taken against perpetrators and the nature and extent of the crimes. Proceedings regarding criminal offences in the field of environmental protection should be more transparent, ensuring greater fairness, balance, and non-discrimination. Thus, a certain level of public oversight in the area of environmental protection will be ensured.

Finally, the regulation of sanctions imposed on legal persons cannot be overlooked, as there have been significant changes in the new directive, with sanctions now more extensive and stricter than in the previous directive. While the 2008 Directive contained only brief and non-specific provisions regarding sanctions for legal persons, the new directive specifies the exact types of sanctions that can be imposed for environmental crimes. This primarily involves determining the maximum and minimum levels of fines, with a maximum possible fine of up to EUR 40,000,000.⁴⁴ Furthermore, the new directive specifies the possibility of withdrawing licences and permits for business activities of a legal person or banning participation in public contracts. The stricter regulation of sanctions for legal entities aims primarily to act as a preventive measure to avoid danger and damage to the environment.

Member States have until 21 May 2026 to adopt or amend legislation to fulfil the obligations imposed by the new Directive. Given this deadline, for now it is impossible to predict the real effects this directive will have on environmental protection. However, the adoption of the Directive can be positively evaluated, since the previous Directive on the protection of the environment through criminal law of 2008 was already outdated and did not regulate the issue of environmental protection sufficiently and purposefully. The new Directive thus addresses and regulates a number of areas that were not adequately regulated in the previous one and punishes environmental crime more severely.

⁴⁴ For the criminal offences listed in Article 3(2)(a)–(l), (p), (s) and (t) of Directive 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.

CONCLUSION

The article discusses the development of Europeanisation of criminal law in the field of criminal protection of the environment. Following the increasing levels of pollution, degradation of wildlife, and reduction of biodiversity caused by environmental crime, there is a noticeable increase in the European Union's interest in protecting the environment through criminal law institutions. As already mentioned above, a new European Union directive to curb environmental crime was adopted in 2021, and a completely new directive on the protection of the environment through criminal law was adopted in 2024. This step fulfilled a key commitment of the European Green Deal.⁴⁵ The European Union seeks to make environmental protection more effective, particularly by obliging Member States to protect the environment through criminal law means. The regulation also aims to streamline the relevant investigations and criminal proceedings.

Last but not least, it is important to note that environmental crime is a global phenomenon and therefore the Directive also includes the Commission's support for international cooperation. It is indisputable that environmental protection is a priority, but we should ask ourselves whether increased pressure to criminalise acts against the environment is the right approach, and when criminal law should be the *ultima ratio*, the last resort in this fight. Of course, the most serious actions must be punished by means of criminal law, but other options should not be forgotten and, in my opinion, all available institutions should always be considered. The constant pressure for higher penal rates and the criminalisation of further acts will not in themselves ensure better environmental protection.

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⁴⁵ The European Green Deal was issued by the Commission in December 2019 and taken note of by the European Council at its December meeting. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal, COM(2019) 640 final, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2019%3A640%3AFIN> [accessed on 13 September 2024].

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