Better protection of the environment through criminal law in the EU

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Introduction

For many years, attempts have been made in Europe to in some way harmonise environmental criminal law. A first important step was taken by the Council of Europe, which created a convention on the protection of the environment through criminal law in 1998. The goal of that convention was to provide minimum standards for the decent protection of the environment using criminal law. It covered, inter alia, abstract endangerment crimes (mostly sanctioning the violation of administrative obligations), concrete endangerment crimes (sanctioning unlawful emissions into the environment) and truly autonomous crimes. The only problem was that, unfortunately, this convention never entered into force ([3]).

At the EU level, since the beginning of this century, initiatives have been developed to intervene in the domain of environmental criminal law. The goal of this EU intervention was different: criminal law was to be used mostly as an instrument to solve the implementation deficit. It was indeed established that the environmental laws of the EU (regulations and directives) were often not adequately implemented by the EU Member States or, in cases where they had been formally implemented, the domestic legislation implementing the environmental *acquis* was not properly enforced. The EU, therefore, wished to force Member States to impose criminal sanctions on the violation of domestic legislation implementing the EU environmental *acquis*. Originally, there was a debate about whether the EU legislator would have the competence to force Member States to issue rules with respect to criminal law. An institutional conflict in that respect between the European Commission and the Council of the European Union was settled in a judgment of the Court of Justice of the European Union of 13 September 2005 ([4]) (later referred to as the judgment of 13 September 2005). In that judgment, the Court made clear that, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislator can take measures

([3]) For further details, see Faure (2020a).

([4]) Judgment of the Court of Justice of 13 September 2005, *European Commission v Council of the European Union*, C-176/03, ECLI:EU:C:2005:542.

relating to the criminal law of the Member States that it considers necessary to ensure that the rules it lays down on environmental protection are fully effective. However, in a subsequent judgment, the Court also made clear that this did not entail a competence to prescribe the nature or the size of the sanctions.

After the judgment of 13 September 2005 paved the way for (environmental) criminal legislation on 19 November 2008, a directive was promulgated on the environment through criminal law ([5]).

There were quite a few problems with this 2008 environmental crime directive (ECD). The directive did not include autonomous environmental crime. Rather, it covered only criminal liability in the case of unlawfulness, which was defined as the violation of legislation adopted pursuant to the Treaty establishing the European Community and listed in Annex A; legislation adopted pursuant to the Treaty establishing the European Atomic Energy Community (Euratom) and listed in Annex B; or domestic (usually administrative) environmental law implementing these ([6]). This omission of any autonomous environmental crime has been criticised in the literature ([7]). There was a further criticism of the 2008 ECD: it relied completely on criminal law alone and did not refer to any other enforcement mechanism, such as, notably, administrative law. That was striking, as, in the years preceding the 2008 ECD, many Member States had followed suggestions in the literature to introduce a so-called toolbox approach, providing a wide variety of (both criminal and administrative law) instruments for the enforcing authorities ([8]). Moreover, it was also clear that the 2008 ECD might not be able to reach its objective of solving the implementation deficit. A Member State could, in theory, transpose all EU environmental legislation and follow the duty of the 2008 ECD to impose criminal sanctions, and, still, very little would have been done concerning the effective enforcement of the domestic legislation implementing the environmental *acquis*. The main problem was that the 2008 ECD did not impose any obligation on Member States to provide information on how environmental law was enforced (Faure, 2020a, pp. 260–261). An evaluation of the 2008 ECD led by the European Commission also showed that there were serious problems with the enforcement of environmental law within Member States ([9]). These problems led to several calls for a revision of the 2008 ECD. One such study, commissioned by the European Commission, was labelled 'European Union action to fight environmental crime' (Efface) ([10]). Efface made important recommendations, including to reconsider the relationship between environmental criminal law and administrative law, and to pay attention to data collection and sufficient resources for the enforcement of environmental crime. In addition, the European Parliament's Committee on Legal Affairs (JURI) demanded that the European Commission reform the 2008 ECD ([11]). This suggestion was made following two reports commissioned by the European Parliament that both called for a revision of the 2008 ECD. One dealt with the liability of companies for environmental damage ([12]); the other dealt with the liability of companies in the context of corporate mergers and acquisitions ([13]).

([5]) 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 328/28, 6.12.2008, p. 28).

([6]) Art. 2(a) of the 2008 ECD.

([7]) See, inter alia, Vagliasindi (2017, p. 41) and Di Landro (2022, pp. 283–284).

([8]) See in that respect Ogus and Abbot (2002).

([9]) Commission Staff Working Document – Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (environmental crime directive), SWD(2020) 259 final of 28 October 2020, https://commission.europa.eu/document/download/e9bc5c87-f34d-47da-b56e-4b65874093dd_en?filename=environmental_crime_evaluation_report.pdf.

([10]) https://efface.eu/index/index.html.

([11]) As a result, in its 2021 work programme, the European Commission announced a revision of Directive 2008/99/EC on the protection of the environment through criminal law (see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Commission work programme 2021: A union of vitality in a world of fragility, COM(2020) 690 final of 19 October 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0690.

([12]) Study requested by the European Parliament's Committee on Legal Affairs (see Faure, 2020b).

([13]) Study requested by the European Parliament's Committee on Legal Affairs (see Faure, 2021).

After the Commission presented a first proposal for a new ECD on 15 December 2021 ([14]), an intensive exchange of ideas took place between the European Commission, the Council and the Parliament, eventually leading to the new ECD, Directive (EU) 2024/1203 of 11 April 2024 ([15]).

In this contribution, some of the most important innovations of the 2024 ECD will be highlighted.

A new definition of unlawfulness

The 2024 ECD has taken an innovative, one may even say revolutionary, approach with respect to unlawfulness. First of all, unlawfulness is defined in Article 1 as breaching:

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

This is already an important step forward. In the 2008 ECD, unlawfulness was defined by reference to EU legislation contained in an annex to the directive, which was, of course, more complicated and cumbersome. The current formulation is substantially broader.

However, the EU legislator saw that it may be important to be able to impose criminal liability, even when the conditions of a permit are fulfilled. Therefore, Article 3(1) continues:

> Such conduct shall be unlawful even where it is carried out under an authorisation issued by a competent authority of such a Member State if such authorisation was obtained fraudulently or by corruption, extortion or coercion.

It is obviously to be welcomed that it is made clear that an authorisation that was obtained in an unlawful manner cannot be excused from criminal liability. On the other hand, one could argue that this is not very revolutionary, as fraud should normally remove the validity of the authorisation anyway. Moreover, it may be extremely difficult for the public prosecutor to prove that the authorisation was obtained fraudulently or through corruption, extortion or coercion. The practical importance of this passage may, therefore, not be that significant, but the symbolic value is certainly important.

However, Article 3(1) continues that the conduct shall also be unlawful when it is carried out under an authorisation 'if such authorisation is in manifest breach of relevant substantive legal requirements'. That can certainly be considered revolutionary. Indeed, the European legislator has introduced here nothing less than an autonomous environmental crime. The practical importance of this sentence cannot be underestimated. It practically means that even if an operator follows the conditions of an authorisation, criminal liability should still be possible 'if such

([14]) Proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, COM(2021) 851 final of 15 December 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021PC0851.

([15]) 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 (OJ L, 2024/1203, 30.4.2024).

authorisation is in manifest breach of relevant substantive legal requirements'. This could, for example, be the case when the authorisation would allow emissions that de facto lead to a concrete danger to human health.

Such a provision was included in Article 2(1)(a) of the previously mentioned 1998 Council of Europe convention. That imposed criminal liability in case of a:

> discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water, which: (i) causes death or serious injury to any person, or (ii) creates a significant risk of causing death or serious injury to any person.

However, as mentioned, this convention never entered into force, and such a truly independent environmental crime was, in fact, rare in Member States ([16]). Of course, it still has to be seen how national legislators will transpose this provision into domestic law, but the intention of the European legislator is clear: when an authorisation is in manifest breach of relevant substantive legal requirements (e.g. human rights), the operator can no longer hide behind the authorisation.

Ecocide

There has, for a while, been intense debate on the need to criminalise ecocide ([17]). A renowned independent international expert panel defined ecocide as 'unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts'. A similar definition can (with a few changes) also be found in the ECD. Article 3(3) of the 2024 ECD states that:

> Member States shall ensure that criminal offences relating to conduct listed in paragraph 2 constitute qualified criminal offences if such conduct causes:
>
> (a) the destruction of, or widespread and substantial damage which is either irreversible or long-lasting to, an ecosystem of considerable size or environmental value or a habitat within a protected site, or
>
> (b) widespread and substantial damage which is either irreversible or long-lasting to the quality of air, soil or water.

This provision clearly obliges Member States to directly criminalise ecocide as a qualified offence. Even though this particular provision does not mention the word 'ecocide', Recital 21 makes clear that 'those qualified criminal offences can encompass conduct comparable to 'ecocide', which is already covered by the law of certain Member States and which is being discussed in international fora'. This is also undoubtedly a revolutionary aspect of the 2024 ECD.

([16]) For other examples, see Di Landro (2022, pp. 292–297).

([17]) This is supported by, inter alia, the non-governmental organisation Stop Ecocide International, which is lobbying for a legal initiative to criminalise ecocide at the international level, more particularly to include it as a war crime in the Rome Statute (see https://www.stopecocide.earth, accessed 18 September 2024).

A reference to ecocide can also be found in Article 8, which contains the obligation on Member States to take the necessary measures to ensure that particular circumstances should, in accordance with national law, be regarded as aggravating circumstances:

> The offence caused the destruction of, or irreversible or long-lasting substantial damage to, an ecosystem.

The ecosystem is defined in Article 2(2)(c) as 'a dynamic complex of plant, animal, fungi and micro-organism communities and their non-living environment, interacting as a functional unit, and includes habitat types, habitat of species and species' populations'.

Although ecocide is not explicitly mentioned in the text of the directive, it clearly plays a crucial role, as, first, Member States are obliged to create a separate qualified offence of ecocide if any of the other criminal offences listed in the directive have been committed, and, second, ecocide should equally be considered as an aggravating circumstance, potentially leading to a more severe penalty.

New crimes

Being so enthusiastic about the introduction of autonomous environmental crimes and the sanctioning of ecocide, one could almost forget that the 2024 ECD includes many other important innovations. An important one is that the number of offences has substantially increased. While the 2008 ECD contained only 9 offences, the 2024 ECD contains 20, and some of them 'worth nothing'. The following are just a few:

- Article 3(2)(g): the shipment of waste where such conduct concerns a non-negligible quantity, whether executed in a single shipment or in several shipments which appeared to be linked;
- Article 3(2)(h): the recycling of ships falling into the scope of Regulation (EU) No 1257/2013;
- Article 3(2)(k): the construction, operation and dismantling of an installation, where such conduct and such an installation fall within the scope of Directive 2013/30/EU (on safety of offshore oil and gas operations) 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;
- Article 3(2)(s): the production, placing on the market, import, export, use or relief of ozone-depleting substances;
- Article 3(2)(t): the production, placing on the market, import, export, use or relief of fluorinated greenhouse gases.

It is clear that many of these specific provisions are currently not yet subject to criminal penalties in Member States' law. This will, therefore, require substantive legislative work within the Member States.

Minimum sanctions

Under the regime of the 2008 ECD, there was, given the case law of the ECJ ([18]), no scope to force Member States to introduce a particular type of sanction nor to issue rules with respect to the magnitude of the sanctions. That changed with the Treaty of Lisbon, with Article 83(2) of the Treaty on the Functioning of the EU providing a legal basis for the harmonisation of sanctions (Fajardo, 2017, pp. 6–7). The condition for the competence in Article 83(2) of the treaty is that the approximation proves essential 'to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures' (Grasso, 2017, pp. 19–21).

In Recital 30 preceding the 2024 ECD, the EU legislator held that 'penalties for the criminal offences defined in this Directive should be effective, dissuasive and proportionate ([19]).' To that end, the legislator sets minimum levels for the maximum term of imprisonment for natural persons and maximum levels of fines for fines to be imposed on legal entities.

Article 5 defines the penalties for natural persons, making a distinction between various types of offences. The most serious ones should be punished according to Article 5(2)(a) by a maximum term of imprisonment of at least 10 years if they cause the death of any person. The qualified offence of ecocide should be punishable by a maximum term of imprisonment of at least eight years. However, other offences are punishable by a maximum term of imprisonment of at least five years if they cause the death of any person ([20]). Other offences are punishable by a maximum term of imprisonment of at least five and three years, respectively.

As far as legal entities are concerned, Article 7 provides the obligation to impose 'criminal or non-criminal fines, the amount of which shall be proportionate to the gravity of the conduct and to the individual, financial and other circumstances of the legal person concerned ([21]).' For particular offences committed by legal persons, the sanction should be 5 % of the total worldwide turnover of the legal person or an amount corresponding to EUR 40 million; for other offences the fine should be 3 % of the worldwide turnover or an amount corresponding to EUR 24 million.

The idea of the EU legislator is obviously to apply the highest level of fines to the most serious forms of criminal offences. Member States are also invited to regularly review the fine levels set with regard to rates of inflation and other fluctuations in monetary value ([22]).

The idea of introducing a maximum level for imprisonment and fines is that the EU legislator wishes to express that environmental crime is a serious crime. These relatively high fines and prison sanctions should, therefore, send an important signal to potential perpetrators. Obviously, judges in individual cases are still at liberty to take into account all the circumstances of the case in order to determine an appropriate sanction for a particular perpetrator and specific conduct ([23]).

([18]) In a second judgment (Judgment of the Court of Justice of 23 October 2007, *European Commission v Council of the European Union*, C-440/05, ECLI:EU:C:2007:625), the Court reaffirmed the conclusions of the earlier judgement of 13 September 2005, but decided that 'the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence'. For further details, see Vagliasindi (2017, pp. 38–39).

([19]) This is also repeated in Art. 5(1) with respect to the penalties for natural persons and Art. 7(1) with respect to the penalties for legal persons.

([20]) Art. 5(2)(c).

([21]) Art. 5(3) of the 2024 ECD.

([22]) Recital 35 preceding the 2024 ECD.

([23]) The EU legislator recognises the discretion of judges in Recital 36 preceding the directive: 'The establishment of the maximum level of fines is without prejudice to the discretion of judges or courts in criminal proceedings to impose appropriate penalties in individual cases. As this Directive does not establish any minimum

The idea of imposing minimum levels of sanctions was considered important to remedy the implementation deficit, but also to avoid a 'race to the bottom'. If in one Member State a violation of domestic legislation implementing EU environmental law was punishable with very high sanctions, whereas much lower sanctions applied in another Member State, this could obviously jeopardise the level playing field between those Member States and potentially lead to a race to the bottom (i.e. towards lower sanctions).

Obviously, simply imposing minimum sanctions in legislation does not completely remedy the problem, as there is no guarantee that a judge will apply a specific sanction in practice. Holding perpetrators criminality liable depends not only on the statutory sanctions available but also on the probability of detection, which is often a function of the capacity available for enforcement. However, assuming that all Member States have sufficient resources at their disposition and qualified staff to enforce domestic law implementing the environmental *acquis* (see the section 'Capacity building and enforcement' below), minimum sanctions can at least in theory contribute to creating a level playing field and thus avoid the danger of a race to the bottom.

A toolbox approach

In the literature, it has been stressed that an efficient enforcement system for environmental crimes needs a wide variety of instruments. Increasingly, administrative penalties are important, not just for prevention and reparation but also for sanctioning in a punitive manner via administrative fines. Administrative fines are very well suited to less serious offences (e.g. violation of administrative obligations). Many legal systems in the EU have recently moved to the introduction of administrative fines for environmental violations; as a result, there are fewer dismissals. Therefore, more environmental violations are provoking a reaction, at least ([24]). The previous 2008 ECD had too strong a focus on criminal law. There was even a sentence in the preamble that made it clear that only criminal law could provide a deterrent effect, which sanctions under private law or administrative law could not ([25]). As a result, there was no mention whatsoever in the 2008 ECD of administrative fines, which was strange to say the least, as this was contrary to the tendency of Member States to introduce administrative fines. It was also for this reason that the 2008 ECD was criticised (Faure, 2017, pp. 344–349).

The 2024 ECD clearly refers to the importance of administrative penalties in the preamble. For example, Recital 45 states that 'the obligation provided for in this Directive to provide for criminal penalties should not exempt Member States from the obligation to provide for administrative penalties and other measures in national law for breaches of Union environmental law.' Recital 46 also mentions that Member States should define the scope of administrative and criminal law enforcement clearly with regard to environmental offences in accordance with their national law. The toolbox approach is represented most clearly in Recital 47, which states that 'Judicial and administrative authorities in the Member States should have at their disposal a range of criminal and non-criminal penalties and other measures, including preventive measures, to address different types of criminal conduct in a tailored, timely, proportionate and effective manner.'

levels of fines, the judges or courts should, in any case, impose appropriate penalties taking into account the individual, financial and other circumstances of the legal person concerned and the gravity of the conduct.'

([24]) For an overview, see Faure and Svatikova (2012).

([25]) Recital 3 preceding Directive 2008/99/EC reads: 'Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.'

This is also exactly what has been done in terms of penalties. For example, Article 5 (penalties for natural persons) provides a list of possible penalties going beyond the traditional fines and imprisonment, such as:

— an obligation to restore the environment within a given period;

— an exclusion from access to public funding;

— withdrawal of permits and authorisations;

— temporary bans on running for public office.

Similarly, Article 7 (penalties for legal persons) provides for a wide variety of penalties, which may be either criminal or non-criminal (again referring to the possibility of administrative penalties).

It provides, for example, for:

— an exclusion from entitlement to public benefits or aid;

— the temporary or permanent disqualification from the practice of business activities;

— the withdrawal of permits and authorisations to pursue activities that resulted in the relevant criminal offence;

— placing under judicial supervision;

— judicial winding up;

— closure of the establishment used for committing the offence.

This clearly shows that there is now a wide variety of criminal and administrative measures that can be imposed as a reaction to environmental crime, or in other words, a real toolbox with many instruments.

Capacity building and enforcement

Crucially, the ECD also makes explicit mention of the need to have sufficient resources for environmental law enforcement. Article 17 of the 2024 ECD holds that Member States shall ensure that national authorities that detect, investigate, prosecute or adjudicate environmental criminal offences have a sufficient number of qualified staff and sufficient financial, technical and technological resources for the effective performance of their functions related to the implementation of this directive. Obviously, it may be difficult to implement this notion very precisely or verify whether Member States have met this condition. However, the symbolic value of this provision is significant. It shows that the EU legislator is aware that merely providing for criminal sanctions does not solve the problem. If serious deterrence of environmental crime is to be achieved, it is equally necessary to have sufficient human capacity in the monitoring, investigation, prosecution and adjudication of environmental crime. Article 18 continues that it is equally necessary that specialised, regular training is provided to judges, prosecutors, police and judicial staff and to competent authorities with regard to the objectives of this directive. To the best of my knowledge, it is unique

in European criminal law that the EU legislator provides in such a detailed manner an obligation for Member States to take care of appropriate training and capacity building for the judiciary with respect to environmental crime.

The EU legislator is also aware of the fact that the entire 2024 ECD, of course, ultimately has the goal of achieving compliance with the environmental *acquis*, as implemented in domestic environmental law ([26]). In that respect, compliance assurance is also stimulated through Article 16, aimed at prevention. It holds that Member States shall take appropriate measures, such as information and awareness-raising campaigns targeting relevant stakeholders in the public and private sectors, as well as research and education programmes, that aim to reduce environmental crime and the risk of environmental crime. In the light of the empirical findings, this is a very wise strategy. After all, criminological research has indicated that a large percentage of environmental crime is not committed in an intentional, wilful, calculating manner but rather out of negligence and lack of information (Faure, 2012, p. 328; Huisman and Van de Bunt, 1997). Since, at the end of the day, compliance should be the goal of the entire enforcement exercise, it does make sense to aim for compliance assurance via the type of prevention campaigns mentioned in Article 16.

Access to justice and protection of whistle-blowers

The 2024 ECD also sees an important mention for victims affected by environmental crime and for non-governmental organisations (NGOs), who can be active in detecting and reporting crime. Article 15 mentions that victims, as well as NGOs, should have appropriate procedural rights in the case that those rights for the public concerned do exist in the Member State, for instance as a civil party. Article 15 also mentions that Member States shall ensure that the information on the progress of the proceedings is shared with the public concerned. The directive mentions explicitly that the public concerned should be informed of the results concerning a particular criminal offence.

Traditionally, it was often frustrating for victims or NGOs who, for example, reported an environmental crime and then would either not be involved in the proceedings that followed or would not be informed about them. Article 15 of the 2024 ECD aims to remedy that problem.

A specific provision also aims to protect so-called whistle-blowers, or, more generally, persons reporting criminal offences – in this case, the ones mentioned in the 2024 ECD. Article 14 is aimed specifically at the protection of persons who report environmental criminal offences or assist in the investigation thereof. The article holds that Member States shall take the necessary measures to ensure that those persons have access to support and assistance measures in accordance with national law.

Data collection

Probably one of the most important provisions (in addition to the new unlawfulness provision and the qualified offence of ecocide) is Article 22, imposing an obligation on Member States to put in place a system for the recording, production and provision of anonymised statistical data. Recall that one of the important criticisms of the 2008 ECD was that it largely failed to provide a level playing field because, basically, EU authorities had no idea what was going on as far as the monitoring and enforcement of environmental crime within the Member States were concerned.

([26]) It is for this reason that the European Commission has been strongly focusing on supporting operators and authorities in Member States to achieve environmental compliance assurance. See, inter alia, the guidance document concerning environmental compliance assurance to prevent environmental crime that has been developed by the European Commission (European Commission: Directorate-General for Environment, 2021).

Collecting this information is crucial for at least two reasons. First of all, a so-called smart enforcement strategy (Blanc and Faure, 2018, 2020) supposes that monitoring, inspection and investigation take place in an evidence-based manner. That supposes that authorities have information on the incidence of, for example, violations in a particular sector or by a particular enterprise so that they can concentrate further enforcement efforts on that particular sector or enterprise. Scarce enforcement resources should be used in an effective manner to make evidence-based enforcement possible. Secondly, an important goal of the ECD is to make sure that violations of domestic legislation implementing the environmental *acquis* are appropriately sanctioned. This is obviously necessary to establish a level playing field among the Member States and avoid a race to the bottom. This can only be verified if the EU authorities (particularly the European Commission) have at least some idea of the incidence of environmental crime within the Member State concerned and of the response to environmental crime.

There was, incidentally, an interesting EU document that already provided for such a duty, more particularly the recommendation concerning minimum criteria for inspections of environmental crime ([27]). However, the problem was that, as this was merely a recommendation, there was hardly any follow-up. The recommendation contained indications on how environmental inspections should be organised and carried out. The recommendation also included an obligation on the part of Member States to report to the Commission on their experience of the recommendation in operation, but that seldom happened. In addition, there was some sectoral legislation imposing an obligation on Member States to conduct inspections at regular intervals and report on inspections to the Commission. Such a duty to organise a system of inspections by competent authorities and report on these was, inter alia, provided for in the so-called Seveso directive ([28]). In addition, the directive on integrated pollution prevention and control (now referred to as the industrial emissions directive) contains monitoring obligations for the competent authorities and set up an effective compliance monitoring system for environmental inspections ([29]). However, these obligations were limited to the particular sectors to which they applied. The 2024 ECD now provides for a much more general obligation upon Member States to collect statistical data on, inter alia:

— the number of criminal offences registered and adjudicated by the Member States;

— the number of dismissed court cases;

— the number of natural persons who are prosecuted and who are convicted;

— the number of legal persons who are prosecuted and who are convicted or fined;

— the types and levels of penalties imposed.

Member States shall annually transmit the statistical data to the Commission according to a standard format that is further described in Article 23 of the directive. Moreover, Member States shall ensure that a consolidated review of the statistics is published at least every three years (Article 22(3)). The Commission shall, on the basis of the

([27]) Recommendation of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States (2001/331/EC) (OJ L 118, 27.4.2001, p. 41).

([28]) Art. 20 of Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances (OJ L 197, 24.7.2012, p. 1) (referred to as Seveso III). For further details, see Jans and Vedder (2012, pp. 357–359).

([29]) See, inter alia, Art. 70(f) of the industrial emissions directive (Directive 2010/75/EU) as most recently amended by Directive (EU) 2024/1785 of 24 April 2024 (OJ L, 2024/1785, 15.7.2024). For further details on the integrated pollution prevention and control and industrial emissions directives, see Jans and Vedder (2012, pp. 359–368).

statistical data transmitted by the Member States, publish a report at least every three years, again according to the format described in Article 23. Article 23 holds that this format should comprise:

— a classification of environmental criminal offences;

— counting units;

— a reporting format.

Obviously, this will have to be worked out in further detail.

The statistical data referred to in Article 22 can be extremely useful for a critical analysis of the effectiveness of an enforcement policy within a Member State. However, ideally, if one really wants to know the probability of detection (and thus the exposure to enforcement), one also needs to know:

— the number of installations/enterprises that have to be inspected, for example on a yearly basis;

— the number of staff (expressed in full-time equivalent) available to exercise these inspections.

On that basis, one would at least be assured that a particular entreprise would be inspected within a certain time period. Obviously, within the framework of smart enforcement, it is logical that particular enterprises (especially when prescribed by EU law, for example, with the so-called Seveso installations) will receive more frequent inspections than others ([30]).

However, as Article 22(2) prescribes that the statistical data shall 'at a minimum' contain the prescribed data, Member States could provide further information that would equally enable an assessment of the probability of detection.

Conclusion

The enforcement of environmental law in the EU has been problematic for a long time. Environmental crime is, according to the United Nations, one of the most prevalent environmental crimes worldwide and within the EU. Reports mention that environmental crimes create large losses within the EU ([31]) and also lead to substantial benefits for the perpetrators ([32]). These facts alone would be important reasons for EU legislators to address this issue. Moreover, harmonising the approach applied in the case of a violation of domestic law by implementing EU environmental law also makes sense if one wants to guarantee a level playing field for industry in Europe and prevent a so-called race to the bottom.

That was only partially achieved with the 2008 ECD. Many criticisms of that prior directive were voiced in the literature, and these criticisms have been addressed in the new directive. The EU legislator has to be applauded

([30]) For example, Art. 20(4) of Directive 2012/18/EU (Seveso III) provides that the competent authorities shall regularly draw up programmes for routine inspections and that the period between two consecutive site visits shall not exceed one year for upper tier establishments and three years for lower tier establishments.

([31]) See data reported by the United Nations Environment Programme in Faure and Kindji (2022, pp. 30–31).

([32]) For a summary of the gains made from environmental crime in the EU, see Faure and Kindji (2022, p. 32).

for having produced an excellent piece of forward-looking, progressive legislation that, including by international standards, stands out. Not that many jurisdictions have introduced autonomous environmental crime in the way that the 2024 ECD has done, nor have many domestic jurisdictions introduced a qualified offence of ecocide. Furthermore, the duty to provide statistical information on the enforcement of environmental crime is a very important step, as it can lead to a more effective evidence-based enforcement mechanism.

Obviously, the proof of the pudding is in the eating. There is an excellent piece of legislation that now has to be transposed by the Member States, and by 21 May 2026 at the latest, according to Article 28 of the 2024 ECD. It will be important to see how the Member States deal with, for example, the interpretation of autonomous environmental crime. It can be expected that the European Commission will assist Member States with guidelines and workshops to facilitate the implementation process. At the same time, implementing the directive will, unavoidably, also entail adapting its provisions to the local culture of the individual Member State.

Provided that Member States take up the spirit of the 2024 ECD and implement the directive in the same progressive spirit, one can optimistically argue that the EU legislator has now provided a legal framework for effective enforcement of environmental criminal law for the coming decades.

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