



Can the new EU Directive boost the fight against environmental crime?

Publication date:

November 2022

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Besides threatening our planet and health, environmental crime is one of the most lucrative activities, [according to Europol](#). Worldwide, it is the fourth-largest criminal activity in terms of value, growing at a rate of between 5% and 7% per year, says [Eurojust](#) in a report on its casework on Environmental Crime. The report also reveals that most environmental cases that it had to deal with between 2014 and 2018 were about: illegal trading in hazardous substances, pollution crimes, illegal trafficking of wildlife species, and of waste. The latter in particular, generated an estimated average annual income of €3.7 billion to €15.3 billion between 2014 and 2016, as reported in an [EPRS' briefing](#). However, [Eurojust's](#) case on environmental crime represent less than 1% of its total casework. One of the most critical issues identified in [Europol's threat assessment](#) is the low detection rate, due to a weak cross-border cooperation, which fails to deter criminal networks from these activities.

The 2008 Directive - Protection of the environment through criminal law

The [newly proposed directive](#) was published on 21 December, accompanied by an [impact assessment](#). It was the subject of a thorough evaluation and a public consultation. The outcome of the analysis revealed several shortcomings of the original text released in 2008: outdated scope, lax and inconsistent sanctions, and remarkable enforcement gaps.

Overall, the Directive failed to meet its objectives. In particular, the evaluation showed that the ECD did not have a positive impact on the number of convictions, nor on the level of imposed sanctions in Member States (MSs). According to the [Commission's impact assessment](#), the limited list of offences and the lack of homogenous definitions for environmental crimes hindered judicial cooperation between national authorities and encouraged perpetrators to act from countries with the most indulgent legislations.

Revamping the debate about environmental crime: the new EC's proposal

A revision of the ECD is necessary in the new framework of the European Green Deal, particularly with regard to the introduction of new objectives against criminal offences related to pollution, waste and threatening biodiversity and other natural resources. The [new version](#), based on [Art. 83\(2\) TFEU](#), aims to harmonise the legislative framework and ensure a better implementation compared to the results obtained by the previous Directive. An important change concerns the clarification of vague terms and more definitions that would allow effective criminal investigations and prosecution across MSs. For example, in Article 2, the Commission further clarified terms such as *unlawful*, *habitat within a protected site*, *legal person* and *public concerned*, with reference to the persons affected - or potentially affected - by these offences. Additional sectors for environmental crimes, such as illegal timber trade, illegal water abstraction, and violation of EU chemical legislation, were included. However, the proposal still lacks a general definition of *environmental crime*. Having such list of acts of secondary legislation would require frequent updates and could still leave out important offences, that do not fall within those specific cases.

The proposal reinforced the punishment system with more proportionate and disincentivising sanctions. Regarding legal persons, Member States must consider them as liable where such offences were committed either individually or as part of an organ of the legal person. Sanctions may be of a criminal or non-criminal nature and may impose a duty to close the business

and restore the environment. As to pecuniary sanctions, the proposal envisages fines between 3% and 5% of the total overall turnover of the legal person. In this respect, it still seems very little compared to the 10% foreseen for competition law infringements. However, aggravating circumstances, such as for serious damage and the impossibility of repairing the damage, are included.

Another crucial issue concerns the reinforcement of cross-border judicial cooperation and an improved system of data collection and information exchange. The proposal aims to enhance the enforcement chain, by supporting national prosecutors and judges with specific trainings and investigative tools. However, it entrusts Member States with the development of coordination and cooperation strategies. Nevertheless, the proposal should include some sort of collaboration with third countries as well to address cross-border crimes, such as illegal waste dumping and trafficking of chemical substances.

The road ahead: Next steps for the adoption of the proposal

Some insights of the EP's position: The Legal Committee draft report

The proposal is currently under revision by the JURI committee of the European Parliament, which should be voted on this year. Also other committees have or are expected to provide opinions, such as, [ENVI](#), [LIBE](#), [PETI](#) and [DEVE](#). The JURI rapporteur MEP Antonius Manders (EPP), presented his report on 27 October and endorsed a significantly improved proposal, in particular in relation to the extension of its scope of application. However, Manders would have preferred it to be a Regulation rather than a Directive and still hopes that it will be turned into a Regulation at a later stage. Therefore, there is still much work to be done to ensure greater effectiveness and homogeneity in its implementation. For example, to promote more cooperation across MSs, Manders proposed that the European Public Prosecution Office (EPPO) should take the lead in combating cases of cross-border environmental damage and environmental crimes, and if necessary, its competences should be further extended.

The rapporteur also emphasised the need to reinforce the “precautionary principle”, rather than focusing exclusively on punishment. In this regard, he would like the judicial and administrative authorities of Member States to have at their disposal a range of preventive methods and criminal penalties, in order to deal with different types of criminal behaviour more quickly and effectively. In addition, albeit on a voluntary basis, companies are encouraged to establish an environmental compliance officer to keep track of their environmental impacts; for virtuous companies, such mitigation efforts should be recognised. On the other hand, Manders is in

favour of making sanctions more proportionate and deterrent, and increased the minimum penalties to 10% of companies' annual overall turnover. In addition, in accordance with the 'polluter-pays' principle, the costs of environmental damage should be borne entirely by those responsible. With the revenue generated by targeted fines, governments should then cover, for example, the costs for preventive measures, investigative tools, and specialised trainings. Moreover, the statute of limitations for environmental offences has been extended, given the difficulty of detecting such crimes and understanding their proportion in a short time.

Another important change has been the introduction of a proper definition of *environmental damage*. Taken from the [Directive on environmental liability](#), it now covers "any adverse effect on environmental media, such as air, water and soil, which is detrimental to everything that grows blooms, and lives." However, the ENVI and LIBE rapporteurs sought to make certain terms and concepts even clearer, by adding explanations, for instance, to *severe damage* and *long-term damage*.

The opinion of the Committee on Environment

For the time being, only the ENVI committee has officially adopted an [opinion](#), by MEP Sirpa Pietikäinen (EPP). In her amendments, an explicit reference to human rights was made, since the right to a healthy environment is now considered a human right, thanks to the development of the [European Court of Human Rights' jurisprudence](#). The intention of the ENVI rapporteur is to consider also the human and social aspect, instead of referring solely to economic damage.

Another main change suggested in the ENVI proposal concerns the request to the recognition of *ecocide*, as the most serious violation, quoting the definition of the [Independent Expert Panel for the Legal Definition of Ecocide](#). The JURI report also mentions *ecocide*, but Manders believes that a definition should only be introduced when the United Nations have established it (for more info on the ongoing debate, see [here](#)). Regarding the implementation, the report requests EU countries to establish specialised environmental courts or that national courts have "specialised chambers of judges to prosecute, investigate and judge" environmental crimes. As to crime prosecution, the ENVI opinion is aligned to JURI, as it envisages the extension of EPPO's mandate to serious environmental offences with an international dimension. EPPO's powers extension was already proposed last year in the [EP resolution on the liability of companies for environmental damage](#).

The question of corporate responsibility is also crucial for the ENVI rapporteur. According to the opinion, the responsibility must lie with the Chief executive officer or other Senior management officials, regardless of whether it is shared with the company's elected Board of

Directors. In addition, the committee has agreed on augmenting the maximum limit of fines to 15% in case of offences with aggravating circumstances.

The Council's partial general approach

At the moment, the Council adopted a [partial general approach](#). One significant progress is the extension of the Directive's scope of application, by including 20 offences under criminal law in total, compared to the 9 that were initially depicted. For example, the Justice and Home Affairs Ministers agreed on adding illegal recycling of polluting boats, serious breaches on the use of chemical substances, and timber trafficking, resulting from the large-scale deforestation that is occurring in many countries around the world. The harmonisation of sanctions, type and level, which differ significantly between Member States, was also highly discussed.

The Czech Presidency is committed to reach a general approach by December; however, it will not be easy, given the sensitive subject and the involvement of the national judicial systems. In particular, it might be difficult to agree on the harmonisation of sanctions, especially on maximum sentences for companies. In addition, some Member States are likely to be against the extension of the mandates of any EU bodies. At national level, only the Swedish Parliament submitted a [reasoned opinion](#), which, however, was before the general elections held in September 2022.

Initial policy recommendations for a socially- and environmentally-just ECD

At this stage of negotiations, the ENVI opinion seems to be the most ambitious and progressive. However, some far-reaching provisions will find resistance during the negotiations. Within ENVI, for example, Pietikäinen's opinion was supported by several political groups (S&D, the Greens the Left and most Renew Europe MEPs), whilst none of her own group fellows backed the report in the [roll call vote](#). The vote in JURI should occur soon and it is hoped that the current report will not be watered down. As expressed by ENVI, it would have been desirable that the competences for this dossier were divided between the two committees (ENVI and JURI). As the legislative process goes on, it will be more and more difficult to keep the most ambitious parts. On the other hand, the Council will be fierce in defending the sovereignty of its jurisdictions and it will even try to weaken the Commission's proposal. Commission officials, for its part, will probably warn against the introduction of "ecocide" into the environmental

crimes' list during the trilogues, as it considers it will take time to define such concept. It might also have some reservations about extending the EPPO mandate, as it would require a treaty change, thus unanimity within the Council.

While the European Parliament defines its position, our initial policy recommendations in this regard are as follows:

- Inclusion of a **definition of "environmental damage"** and substitution or clarification of **vague terms**, such as "substantial damage", which should be better defined with a more accurate specification of environmental consequences.
- The proposal still lacks a general definition of **environmental crime**. A harmonised definition of environmental crime does not exist at the moment, neither at European nor at international level, but list of acts of secondary legislation, as conceived by the Commission, would require frequent updates and could still leave out important offences, that do not fall within those specific cases.
- Expand **EPPO's mandate** with specific competences for the prosecution of environmental offences. Given its transnational dimension and current structure, EPPO is the most suitable European body to combat such crimes.
- Strengthen **cross-border judicial cooperation within the EU, and enhance** collaboration with third countries, in order to tackle more effectively cross-border crimes, such as illegal waste dumping and trafficking of chemical substances.
- Provide national courts with specialised trainings and expertise on environmental crimes, as well as develop specific instruments to improve **information sharing** and **collection of data**, as the lack of coordination between administration and sanction was indeed recognised.
- In terms of pecuniary sanctions, increase of **minimum and maximum levels** for all MSs (the latter, at least to 10% of businesses' annual overall turnover) and make them more dissuasive.
- Introduction of more **serious judgments** for crimes falling under the definition of eco-crime.

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