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**Protection of the environment through criminal law considering the european
standards****

Introduction

The concept of protecting environment by criminal law is quite new and goes back to the seventies.¹ Since 1972, the United Nations Conference on the Human Environment (Stockholm),² many countries have been active in the protection of environment. There has been an important rise in the number of european/international documents.

In the European Union there are many common challenges including environmental crime. With due consideration to the european environmental criminal law, it is need to take concerted action to protection of the environment.

The recent Decision 1386/2013/EU of the European Parliament and of Council on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'(hereinafter: *the 7th Environment Action Programme*)³ expressively contains: Pursuant to Article 191(2) of the Treaty on the Functioning of the European Union (TFEU), Union policy on the environment aims at a high level of protection.⁴ Furthermore the 7th Environment Action Programme should support the implementation, within the Union and at international level, of the outcomes of, and commitments undertaken at, the 2012 United Nations Conference on Sustainable

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¹ Michael Faure: Law development of Environmental Criminal Law in the EU and its Member States, *Review of European Community and International Environmental Law*, 2017, 26/2, 139.

² United Nations Conferences on Environment were organized in every decade: United conference on Human Environment, Stockholm (1972), Stockholm plus ten Conference, Nairobi (1982), UN Conference on Environment and Development, Rio de Janeiro (1992), World Summit on Sustainable Development, Johannesburg (2002), Conference on Sustainable Development, commonly known as the Rio+20 UN Conference, Rio de Janeiro (2012).

³ Decision 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'.

⁴ Preamble (20).

Development (Rio+20).⁵ The achievement of the objectives set out in the Seventh Environment Action Programme therefore requires the full commitment of the Member States and the relevant European Union institutions and the willingness to take responsibility for the delivery of the programme's intended benefits.⁶

The 7th Environment Action Programme listed nine priority objectives. The first three objectives were determined as *thematic priorities*: (a) protecting, conserving and enhancing the Union's natural capital; (b) turning the Union into a resource-efficient, green and competitive low-carbon economy; (c) safeguarding the Union's citizens from environment-related pressures and risks to health and well-being.⁷

The main goal and task of the criminal law is the protection of the constitutional rights. Many countries have elaborated the right to a healthy environment in the framework constitutional provisions. As for the environmental protection is concerned at constitutional level, regulations can be found in the new constitution entered into force in 2012. One hand the Article XX of the Fundamental Act of Hungary⁸ is relevant: (1) Everyone shall have the right to physical and mental health. (2) Hungary shall promote the effective application of the right referred to in Paragraph (1) by an agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organising safety at work and healthcare provision, by supporting sports and regular physical exercise, as well as by ensuring the protection of the environment.

The right to a healthy environment is a part of the Fundamental Act of Hungary. The Article XXI is of great importance: (1) Hungary shall recognise and give effect to the right of everyone to a healthy environment. (2) Anyone who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided for by an Act. (3) The transport of pollutant waste into the territory of Hungary for the purpose of disposal shall be prohibited.

Hungary recognizes and validates the rights of everyone to the healthy environment.

1. Role of criminal law, administrative law and civil law in the protection of environment

Focusing on the aims of environmental criminal law we have to accept the fact the absolute protection of the environment and ecological elements can not be the object of criminal law, because certain forms of environmental risks are permissible. Therefore only a relative protection of such ecological interests is possible.

⁵ Preamble (32).

⁶ Preamble 5.

⁷ Art. 2 (1) points a-c.

⁸ Fundamental Act of Hungary (25 April 2011).

Criminal, administrative and civil law approaches to addressing environmental crime in comparison⁹

	Criminal law approach	Administrative approach	Civil law suits
Aim	Punishment and deterrence; sometimes restoration or prevention of future harm Expression of strong moral disapproval of action	Prevention of future harm and/or restoration; some deterrent effect	Compensation and/or restoration; deterrence; in some jurisdictions punishment
Who initiates proceedings	Public prosecutor	Administrative authorities	Victims of environmental crimes and in some cases NGOs suing those who caused damage
Length of proceedings	Up to several years	Often possible for authorities to react quickly	Depending on the complexity of case, up to several years
Possibility of participation for victims of environmental crime and NGOs	Typically certain procedural rights for victims as individuals; sometimes, possibilities to bring a civil liability claim in criminal proceedings or to trigger additional investigative measures for NGOs	Divergent approaches in Member States, whether judicial review of the administrative authorities' conduct can be initiated only by those whose interests are affected or also e.g. by NGOs	Full participation of victims as claimants in proceedings; NGOs can be claimants in some Member States for certain types of damage
Investigatory work	Primary responsibility for bringing evidence with prosecutor; investigation techniques that can be used (e.g. wire-tapping) depend on type of crime	Authorities need to be able to demonstrate that factual requirements of a legal norm allowing administrative action are fulfilled	Parties responsible themselves for producing evidence to support their claims; limited number of types of evidence accepted
Threshold of proof	Criminal proceedings usually require a high threshold of evidence for conviction ("in dubio pro reo")	Compared to criminal proceedings necessary threshold of proof is lower	Typically lower threshold of proof than in criminal proceedings
Costs	Costs of proceedings born mostly by state; relatively high costs for the state due, among others, to high threshold of proof and length/complexity of proceedings	Typically lower costs for the state than in criminal proceedings, among others because of less complex proceedings	Relatively low costs for the state, but often high costs for the parties, as they are responsible for producing evidence

⁹ Synthesis of the Research Project "European Union Action to Fight Environmental Crime" EFFACE European Union Action to Fight Environmental Crime, 2016, 31.

Administrative and civil law must be the important tools in the protection of environment but they are not enough. Criminal law has also role to play in the field of protection of the environment as the ultimate tool (last resort). We often refer to the subsidiary role of criminal law. The XVth International Congress of Penal Law outlined in its Resolution on Crime against the Environment that ‘Consistent with the principle of restraint, criminal sanctions should be utilized only when civil and administration sanctions and remedies are inappropriate or ineffective to deal with particular offences against the environment’.¹⁰

In the area of environmental protection, especially criminal law and administrative law are generally linked. At international level three groups of environmental criminal offences exist regarding to the relationship between environmental criminal law and administrative law: (a) criminal offences absolutely dependent of administrative law, (b) criminal offences relatively dependent of administrative law and (c) criminal offences absolute independent of administrative law.¹¹

The administrative law makes determinations as to the extent of permissible pollution and acceptable risks in most environmental areas, frequently leaving to the administrative authorities the task of establishing the allowable level of pollution in individual cases. This connection of the environmental criminal law and the administrative law raises the problem, namely that the environmental offences will not be definite enough since they are also defined by the administrative law and the administrative authority actions. In some cases legislator only broadly determines the conditions for criminal liability, but leaves all the power to determine the detailed conditions to the administrative agencies. It seems problematic in the light of principle of legality. As far as the ‘lex certa’ principle is concerned it is the necessity to define criminal behaviour in a relatively precise way. There should be certainty in the definition of crimes against the environment. Conclusion: as far as possible, the criminal offences should be defined by criminal law and as far as possible the criminal law should function independently of the administrative law.

In cases of very serious pollution the link between the criminal and administrative law or decisions can be totally neglected. Administrative consent is irrelevant in those cases where environmental use causes death or serious injury to any person or which creates a significant risk of them. It is called *autonomous offence*. According to this third model serious environmental pollution can be punished even though the offender kept to the conditions of his licence.

¹⁰ Recommendation of Section I on Crimes against the environment, Application of the general part, in: XVth International Congress of Penal Law, Rio de Janeiro, 4-10 September 1994, *International Review of Penal Law*, 1995/1-2, 50.

¹¹ Günther Heine – Volker Meinberg: Environmental Criminal Law in Europe, in: Günther Kaiser – Hans-Jörg Albrecht (edit.): *Crime and Criminal Policy in Europe. Proceedings of the II. European Colloquium*, Freiburg, Max-Planck Institute for Foreign and International Penal Law, Vol. 43, 1990, 6-8, 22.

It can be found in different European documents, as well. For instance, in the Convention for the Protection of the Environment through criminal law.¹²

2. General features of the European standards in the field of environmental criminal law

It took eight years to elaborate *the Convention on the Protection of the Environment through Criminal Law*, (hereinafter: Convention) under the umbrella of Council of Europe, passed in 1998 and it could be also signed from this year.

The Convention illustrates the emergence of a common policy and seeks to harmonize national legislation in the particular field of environmental offences. Although the Member States did not want to ratify and incorporate the above European Convention in their internal legal systems but in an indirect way, it still formed the basis of the legislative endeavours of the European Union. Here, it should be noted that *framework decision 2003/80/JHA of the Council of the European Union on the protection of the environment through criminal law* (hereinafter: Framework decision) includes in the preamble a reference to the European Convention, which was taken into account in the formulation of the provisions of the framework decision.¹³

The five ranges of criminal offences specified in this convention were also essentially adopted in both the above mentioned Framework decision and *Directive 2008/99/EC on the protection of the environment through criminal law* (hereinafter: Directive).¹⁴

2.1. Difficulties of the EU legislation in the protection of the environment through criminal law

In 2000, at the proposal of Denmark, the *Council* elaborated a draft framework decision on the elimination of grave criminal offences of pollution.¹⁵ Parallel with this, the *Commission* also started elaborating legal statutes, and in 2001, it passed the (first) draft Directive on the protection of the environment through criminal law.¹⁶ The objective of the Commission was to ensure the more effective application of the environmental requirements through the community-level specification of the minimum list of criminal offences. This way, the issue of the protection of the environment through criminal law got into the focus of the competence debate between the Council and the Commission (struggle of 'pillars').

¹² Convention for the Protection of the Environment through Criminal law, Council of Europe, Strasbourg, 4 November, 1998.

¹³ Framework decision 2003/80/JHA on the protection of the environment through criminal law, par. (10) of preamble.

¹⁴ Directive 2008/99/EC of the European Parliament and Council on the protection of the environment through criminal law.

¹⁵ The legal base being the Treaty on the European Union, particularly, Art. 29, e, Art. 31 and section 2 b, Art. 32 thereof. By that time the European Convention of the Council of Europe was signed by 11 countries: Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Luxembourg, Sweden, Austria and Romania but no ratification had occurred as yet.

¹⁶ The legal base: Art. 175 (1) of the Treaty establishing the European Community.

On 27 January, 2003 the Council did not discuss the first draft Directive¹⁷ but it passed the framework decision on the protection of the environment through criminal law. On 15 April, 2003, with the support of the European Parliament, the Commission turned to the European Court of Justice in the issue of the division of competences between the first and third pillars due to the violation of Arts 174-176 of the Treaty on the European Community.

With respect to environmental criminal law, in the issue of the conflict and debate of Framework decision versus Directive, European Union versus European Community,¹⁸ that is, that of the two legal bases established simultaneously, with its ruling on 13 September, 2005¹⁹, the European Court of Justice annulled framework decision 2003/80/IB with reference to formal reasons and pursuant to Art. 175 of the Treaty on the European Community, due to the use of undue authority.

This decision of the European Court essentially marked the beginning of the period of 'no action' in the field of European environmental criminal law. Until the endorsement of the Directive, the basic rights debate on the protection of the environment through criminal law and the elimination of the conflicts of competence took another eight years.

The Directive was based on conservative regulatory philosophy and includes nine criminal offences. There is the substantial content difference from Framework decision, according to which Directive does not include an autonomous criminal offence against the environment, which represents a step back. Therefore, every state of affairs includes the illegality of conduct as an immanent element in addition to the introductory part of Art.3, that is, commitment with intention or at least, with grave carelessness [section a.), Art. 2].²⁰ In the Directive, in comparison with the Framework decision, the concept of illegality was extended with the reference to the Euratom Treaty.

¹⁷ Ligeti Miklós: Környezetvédelmi büntetőjog, in: Kondorosi Ferenc – Ligeti Katalin (edit.): *Az európai büntetőjog kézikönyve*, Budapest, Magyar Közlöny Lap- és Könyvkiadó, 2008, 621.

¹⁸ More details: Kovács Ágnes: A környezet büntetőjogi védelmének közösségi szabályairól, *Belügyi Szemle* 2005/5, 123-132; Laczi Beáta: „Irányelv kontra kerethatározat”, *Környezetvédelmi büntetőjogi szabályozás az Európai Unióban*, *Magyar Jog*, 2006/10, 577-590; Farkas Ákos: Az Európai Unió büntetőjog fejlődésének újabb állomásai, in: *Tanulmányok Dr. Dr.h.c. Horváth Tibor professor emeritus 80. születésnapja tiszteletére, Bűnügyi Tudományi Közlemények 8*, Miskolc, Bíbor Kiadó, 2007, 483-507; Kóhalmi László: Az európai környezeti büntetőjog fejlődési irányai és problémái, *Rendészeti Szemle*, 2009/1, 42-63; Görgényi Ilona: A környezetvédelmi büntetőjog megújulása az új évezredben, *Miskolci Jogi Szemle*, 2011/különszám, 94-105.

¹⁹ Case No. C-176/03 Commission versus Council (ECR, 2005, I-07879).

²⁰ Article 2 (a): 'Unlawful' means infringing:

- (i) the legislation adopted pursuant to the EC Treaty and listed in Annex A; or
- (ii) with regard to activities covered by the Euratom Treaty, the legislation adopted pursuant to the Euratom Treaty and listed in Annex B; or
- (iii) a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to in (i) or (ii).

In the field of conservation, the legal base of Community attitude concerning nuclear activities is Chapter III of the Euratom Treaty. The Directive had to be transposed by Member States by 26 December 2010.

Within two years, the European Court of Justice passed two relevant rulings in relation to the present issue had an impact on European criminal law, the whole of environmental criminal law and on the legislation of Member States.²¹

2.2. Environmental provisions in the EU Treaties

The Charter of Fundamental Rights of the EU²² has a legally binding value by means of Art.6 of the Treaty on European Union (TEU). In the light of the Article 37 of the EU Charter, a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

*Environmental Provisions in the EU Treaties*²³

<i>Treaty of the European Union</i>	
Art. 3, par 3 TEU (ex art. 2 TEU)	Aims of the EU (including sustainable development, high level of protection and improvement of quality of environment)
Art. 21 para 2 sub d and f TEU (ex art 36 TEU)	In external policies the EU shall foster sustainable development and participate to the promotion of international measures aimed at preserving the quality of the environment
<i>Treaty on the Functioning of the European Union</i>	
Art. 4 TFEU	Shared competence list, principle of sincere cooperation.
Art 11 TFEU (ex Art. 6 ECT)	Principle of integration, sustainable development.
Art. 13 TFEU (ex protocol 10 annex to the Treaty of Amsterdam)	Integration of animal welfare.
Art. 34 TFEU (ex Art. 28 ECT)	Prohibition of quantitative restrictions on imports
Art. 36 TFEU (ex Art. 30 ECT)	Exception to the prohibition of Art. 34 in relation to the protection of health and life of humans, animals and plants
Art. 114 TFEU (ex Art. 95 ECT)	Internal market
Art. 191 (ex Art. 174 ECT)	Protection of environment: Principles and Goals
Art. 192 (ex Art. 175 ECT)	Legal basis for decision-making in the environmental action
Art. 193 (ex Art. 176 ECT)	More stringent national measures and National funding of environmental measures.

²¹ There was framework decision 2005/667/JHA of the Council on the strengthening of the criminal law frame necessary for the implementation of the legal statutes on pollution from ships, and Directive 2005/35/EK of the European Parliament and Council on the pollution from ships and on the introduction of sanctions to be applied to violations of the law. Council framework decision 2005/667/JHA, supplementing directive 2005/35/EC with criminal law measures, was annulled by the the European Court of Justice on 23 October, 2007.

²² Charter of Fundamental Rights of The European Union (2012/C 326/02).

²³ EU Environmental Law and Environmental Crime: An Introduction EFFACE European Union Action to Fight Environmental Crime, 2015, 9-10.

2.3. Hungarian environmental criminal law in the light of the european union standards

In Hungary, for the sake of compliance with the legal harmonisation requirements of the European Union and the provision in framework decision 2003/80/IB, the legislator amended the states of affairs of criminal offences against the environment, listed in the former Criminal Code, with Act XCI of 2005, becoming effective as of 1 September, 2005. Recodified the legal states of affairs of criminal offences named 'Damaging the environment', 'Damaging nature' and 'Violation of the order of waste management'. Among other modifications, the restorative approach entered the field of environmental criminal law.²⁴ In the lightest and medium severe cases of the criminal offence of Damaging the environment, the legislature established a cause eliminating punishability and a cause making possible the unlimited mitigation of punishment for the case of 'in integrum restitutio' by the offender. There is a much higher interest in the protection of the environment and the restitution of environmental damage than in actual punishment.²⁵

However, due to framework decision 2003/80/JHA, annulled with the ruling of the European Court on 13 September, 2005, and for the sake of the adoption of directive 2008/99 of the European Community on the protection of the environment through criminal law, the supplementation of the individual states of affairs of criminal offences became justified. Only additions were necessitated by the earlier conformity with the framework decision of the definition of criminal offences by the Act CLXI of 2010.

In the Act IV of 1978 on the Criminal Code offences of Damaging of the environment, Damaging of the nature and Violation of waste management regulation were listed in the Chapter XVI on Crimes against public order (Title IV: Crimes against public health). In the former Criminal Code offences of Poaching and Fish poaching were as parts of Cruelty to animals. Also Misuse of ozone-depleting substance was a form of Damaging of the environment. Besides them Misuse of radioactive materials, Misuse of the operation of nuclear facilities and Misuse of the application of nuclear energy could be found among crimes against public security (Chapter XVI, Title I).

Act C of 2012 as the new Hungarian Criminal Code came into force from 1 July, 2013. In the circle of domestic environmental criminal law, among others, a new regulative change has been taken. There is a separate Chapter (XXIII) on Criminal offences against the environment and nature, containing the following criminal offences: Damaging of the environment (Section 241), Damaging of the nature (Section 242-243), Cruelty to animals (Section 244), Poaching game (Section 245), Poaching fish

²⁴ Art. 280 (4) of Act IV. of 1978 on Criminal Code.

²⁵ Restorative Justice in criminal cases is a part of dual criminal policy. In Hungary the so called 'dual criminal policy' started in 2003. One hand is characterised by the preference for alternative sanctions, diversional solutions, mediation etc. The other hand the domestic criminal policy can be characterised by a neorepressive approach. In Hungary, both trends of criminal policy and law are present.

(Section 246), Organization of illegal animal fights (Section 247), Violation of waste management regulations (Section 248), Misuse of ozone-depleting substance (Section 249), Misuse of radioactive materials (Section 250), Misuse of the operation of nuclear facilities (Section 251), Misuse of the application of nuclear energy (Section 252).

3. Some issues of the criminal responsibility for environmental offences

Environmental compliance assurance is very important. It is need to enforce compliance through environmental criminal law liability. The title of Article 3 of the Directive is 'Offences' but only simply conducts are listed in nine points instead of defining of environmental offences.

3.1. Offences with result versus offences without result in the environmental criminal law

In case of offence with result, it is not enough to violate any forbidding regulation only, because for the fulfilment of the criminal offence result is also required (actual damage of the environment, pollution of the environment). There are some difficulties concerning application of the harm causing environmental criminal offence based on environmental damage.

Causing of the environmental damage is very often depends on the time and place, because it can be arised in the given time at the given place, but it would have not been fulfilled at the same place but in a different time or at a different place. Besides it can be cumulative criminal offence, for example the pollution of water. Because of the complex connections, accumulation and addition effects difficulties arise regarding proof of causality and proof of guilt (subjective elements) covering environmental harm and causality, too. It is not unusual either that the environmental damaging effect can only be proved by scientific analysis. At the same time it is also important to foresee the possible consequences of the environmental damaging behavior in case of *dolus directus*, *dolus eventualis* (intentional acts) and *luxuria* (gross negligence).

In case of offence without result it was intended to solve difficult problems regarding criminal guilty mind covering environmental harm and causality. These offences do not require the actual harm. In this model the harm is not a prerequisite for criminal liability. It is enough for the fulfilment of these offences if the perpetrator violates (with fault/guilt) the obligations described in the administrative law or the administrative decisions. The disobedience against them is considered to be of such degree by the criminal law that offenders are punished without respect to the harmful effect. Anyone who operates without licence or violates licence conditions can be criminally liable. It is criminalization of activity which has constituted administrative violations and which is typically dangerous for the environment. In these cases there are no problems in connection with the definition of damage and giving proof of evidence but the endangering offences creates a simpler situation only apparently. Because of connection between environmental criminal law and administrative law it is one of the most debated questions.

3.2. Subjective elements of environmental offences

There are number of problems associated with use of criminal law in the protection of the environment. Many difficulties exist in proofing in general and especially proofing of 'mens rea' (guilty). That's why in some nations, mainly in common law countries for example England, strict liability has been used as a means of overcoming these difficulties. The price is violation of the principle of guilt.

The purpose of the Directive is to establish the criminal liability for different groups of environmental offences committed: (a) intentionally or (b) with serious negligence. With due consideration to not serious negligence, there is a question how far environmental offences can be crimes of strict liability.

In England common law offences generally requires 'mens rea'.²⁶ Apart from it there are very few common law offences of strict liability, because most part in statute. Where strict liability is imposed, a person can be convicted without proof of a mental element. Crimes of strict liability require no 'mens rea'.

Relating to above mentioned statement, in England most crimes of strict liability are defined in statute and the courts interpret the statute to make a decision whether an offence of strict liability (no fault-offence) has been created.²⁷

The development of strict liability dates from the nineteenth century. After the industrial revolution a great deal of regulatory legislation was enacted dealing with the new areas, for example: traffic, consumer protection, control of drugs, protection of the environment and so on. Many of these activities cause serious harms. It was said that proof of 'mens rea' have raised problems of law enforcement and could have undermined the efficiency of law. If 'mens rea' needed to be proved, the law would become a dead letter.

According to the principle of the English criminal law when statute is silent, at the point of fault requirements, there is a presumption that 'mens rea' is required to be proved. This presumption may not always apply in the case of environmental offences. In many cases there is no need to prove the state of mind of the polluter, the mere fact that the pollution occurred is sufficient for responsibility for an environmental offence. Over the years the courts have had to interpret the provisions on many occasions, deciding whether or not to insert a fault requirement. However, no legislation clearly indicates that 'mens rea' is or is not required. Deciding whether a crime is a crime of strict liability falls to the judges.

There are basically three grounds that a court may conclude that 'mens rea' is not required:²⁸ (a) *The wording of the legislation*: Where a statute creates an offence of 'causing' something, the courts adopt a common sense approach: no 'mens rea' is needed. (b) *The subject matter of the legislation*: Where the legislation deals with a field of activity in which the public has little choice whether to buy food, drink and breath the air or not, there will be a greater chance to refuse the presumption of 'mens rea'. (c) *Sanctioning*: If the offence is punishable with imprisonment, particularly, if the

²⁶ Latin term 'mens rea' means guilty mind.

²⁷ Richard J. Stafford: *Private prosecutions*, London, Shaw and Sons, 1989, 17.

²⁸ Stafford 1989, 20-25.

maximum term is severe, this suggests that the Parliament cannot have intended it to be one of strict liability. The larger the penalty the less likely the court is to treat the crime as one of strict liability. But it is not true that all offences of strict liability are minor offences carrying lesser penalties. Certain offences of strict liability are punishable severe penalties including imprisonment.²⁹

Even in those jurisdictions where strict liability is accepted, it has been criticised. The traditional argue against strict liability is that it is unjust. Besides it is controversial and confusing. Trouble about strict liability is that nobody knows how strict it is. From utilitarian argument point of view there is little evidence that strict liability makes people more careful.

3.3. Sanctioning

In all of member states imprisonment and pecuniary sanctions are at least available as possible sanction. Pecuniary sanctions generally refer to the fine as a traditional criminal law sanction. We know from several investigations that potential fine often already part of the calculation of expenses.

Fines and prison sentences for offences mentioned in the Directive 2008/99/EC of the European Parliament and Council on the protection of the environment through criminal law (ECD) in various Member States³⁰

Member State	Art. 3 lit. b ECD	Art. 3 lit. d ECD	Art. 3 lit. g ECD
Estonia	<ul style="list-style-type: none"> – Imprisonment of up to three years – Fine (for natural persons: 30–500 daily rates; for legal persons: EUR 3 200 to EUR 16 mio) 	<ul style="list-style-type: none"> – Imprisonment of up to one year – Fine (for natural persons: 30–500 daily rates; for legal persons: EUR 3 200 to EUR 16 mio) 	<ul style="list-style-type: none"> – Imprisonment of up to five years – Fine (for natural persons: 30–500 daily rates; for legal persons: EUR 3 200 to EUR 16 mio)
France	<ul style="list-style-type: none"> – Imprisonment of up to seven years – Fine of up to EUR 150 000 	<ul style="list-style-type: none"> – Imprisonment of up to two years – Fine of up to EUR 75 000 	<ul style="list-style-type: none"> – Imprisonment of up to seven years – Fine of up to EUR 150 000
Germany	<ul style="list-style-type: none"> – Imprisonment of up to five years – Fine 	<ul style="list-style-type: none"> – Imprisonment of up to five years – Fine 	<ul style="list-style-type: none"> – Imprisonment of up to five years – Fine
Poland	<ul style="list-style-type: none"> – Imprisonment of up to five years – Restriction of freedom – Fine (for natural persons: EUR 25 to 175 000; for legal persons: EUR 250 to 1 210 000) 	<ul style="list-style-type: none"> – Imprisonment of between six months and eight years – Restriction of freedom – Fine (for natural persons: EUR 25 to 175 000; for legal persons: EUR 250 to 1 210 000) 	<ul style="list-style-type: none"> – Imprisonment of up to five years – Restriction of freedom – Fine (for natural persons: EUR 25 to 175 000; for legal persons: EUR 250 to 1 210 000)

²⁹ C. M. V. Clarkson: *Understanding criminal law*, London, Fontana Press, 1995, 112-113.

³⁰ Synthesis of the Research Project “European Union Action to Fight Environmental Crime” EFFACE European Union Action to Fight Environmental Crime, 2016, 32-33.

Slovakia	<ul style="list-style-type: none"> – Imprisonment of up to eight years – Fine (for natural persons: EUR 160 to 331 930; for legal persons: EUR 800 to 1 660 000) 	<ul style="list-style-type: none"> – Imprisonment of up to ten years – Fine (for natural persons: EUR 160 to 331 930; for legal persons: EUR 800 to 1 660 000) 	<ul style="list-style-type: none"> – Imprisonment of between six months and eight years – Fine (for natural persons: EUR 160 to 331 930; for legal persons: EUR 800 to 1 660 000)
Slovenia	<ul style="list-style-type: none"> – Imprisonment of between 30 days and twelve years – Fine 	<ul style="list-style-type: none"> – Imprisonment of between 30 days and twelve years – Fine 	<ul style="list-style-type: none"> – Imprisonment of between 30 days and five years – Fine
Spain	<ul style="list-style-type: none"> – Imprisonment of between six months and two years and – Fine from ten to 14 months 	<ul style="list-style-type: none"> – Imprisonment of between six months and two years and – Fine from ten to 14 months 	<ul style="list-style-type: none"> – Acts relating to flora: – Imprisonment of between six months and two years or – Fine from eight to 24 months Acts relating to fauna: – Imprisonment from six months to two years or – Fine from eight to 24 months
Sweden	<ul style="list-style-type: none"> – Imprisonment of up to six years – Fine 	<ul style="list-style-type: none"> – Imprisonment of up to six years – Fine 	<ul style="list-style-type: none"> – Imprisonment of up to six years – Fine

The European Convention offers the effective system of combination one hand the obligation to restore the environment and another hand the fine which is not or is not completely fixed in advance, such as the daily fine. The practical value of this pecuniary penalty is that an offender can be forced to perform court decision under the threat of daily fine which increases for every day's delay. Although the latter one is ambiguous. Returning back to the restoration of the environment, damages cause by environmental crimes are not immediately visible (accumulative results).

Besides the prohibition to exercise a certain profession or activity or revocation of licence may also be imposed. In the framework of alternative sanctions, community service may also be an example.

Confiscation as a criminal sanction is known in many countries too. Environmental crime is one of the most profitable criminal activity and criminal proceeds can be as high as in the case of drugs trafficking. Environmental crimes are combined with low detention rate and not serious sanction.

4. Evaluation of the Directive

The Directive and its history underlines the importance of harmonization of the environmental protection in the European Union. Environmental crimes can very often cause significant damage to the environment and they provide for high profits for offenders but relatively low risks of detection. That is why the environmental standards in the Directive need to be implemented in an affective way.

The preamble of the Directive includes the followings: In order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause *substantial damage* to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species.³¹ This vague notion of substantial damage is for instance used in the definition of first,³² second,³³ fourth³⁴ and fifth³⁵ environmental acts.³⁶

Another examples are the notion of *non-negligible quantities*,³⁷ *negligible quantities*,³⁸ *negligible impact*,³⁹ *dangerous activities*, *dangerous substances* or *preparations*⁴⁰ and *significant deterioration*.⁴¹ These vague notions in criminal law are against the '*lex certa*' requirement following from *the principle of legality*.

The Directive also includes subjective requirement: *committed intentionally or with serious negligence*.⁴² However, the termination of '*mens rea*' is not included. In other words it requires at least serious negligence for criminal liability.

Article 3 of the Directive lists nine circles of acts against the environment. Only the most common environmental conducts are listed. However, additional offences are also relevant. It would be advisable to include them in a possible revision of the Directive.⁴³

Further problems are that the environmental crime is part of hidden crime and usually lack of immediate victim, making it so-called victimless crime, causing a problem for the detection of environmental offence.

³¹ Preamble (5).

³² Article 3 (a).

³³ Article 3 (b).

³⁴ Article 3 (d).

³⁵ Article 3 (e).

³⁶ Michael G. Faure: The implementation of the environmental crime directives in Europe, in: J. Gerardu – D. Grabiél – M. R. Koparova – K. Markowitz – D. Zaelke (edit.): *Ninth International Conference on Environmental Compliance and enforcement*, Washington, INECE, 2011, 368.

³⁷ Article 3 (c).

³⁸ Article 3 (f), (g).

³⁹ Article 3 (f), (g).

⁴⁰ Article 3 (d).

⁴¹ Article 3 (h).

⁴² Preamble (3).

⁴³ EnviCrimeNet Intelligence Project on Environmental Crime Report on Environmental Crime in Europe, (The Hague, 20.02.2015), 25.

According to the preamble of the Directive the experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment.⁴⁴

The Directive does not harmonize sanctions. It only includes general standard, that Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by *effective, proportionate and dissuasive criminal penalties*.⁴⁵

Confiscation or forfeiture of the proceeds of environmental crime should be emphasised. The latter one certainly adds to the effectiveness of sanctions.⁴⁶ This should take place in the case of revision, similarly to other documents.

5. Challenges

For strengthening the environmental chain of policy makers, prosecutors, judges and police officers, there are four key European Environment Networks: (a) IMPEL, the Network for the Implementation and Enforcement of EU Environmental Law, (b) ENPE, the European Network of Prosecutors for the Environment, (c) EUFJE, the EU Forum of Judges for the Environment, (d) EnviCrimeNet, the network of police officers focusing on tackling environmental crime.

On 12 February 2018 the *LIFE multiannual work programme* was accepted for 2018-2020.⁴⁷ In the framework of environmental compliance assurance and access to justice the following crimes were underlined in interest of supporting environmental compliance assurance:⁴⁸ (a) wildlife trafficking, (b) wildlife and nature crime, including illegal logging, (c) waste crime, (d) water pollution and/or illegal water abstraction, (e) air pollution.

The above mentioned program consists of two parts: sub-programme for Environment and sub-programme for Climate Action. The sub-programme for Environment includes three priority areas, including biodiversity.

⁴⁴ Preamble (3).

⁴⁵ Article 5.

⁴⁶ Ragnhild Sollund-Faure – Michael-Niels – J. Philipsen-Veening: *Conclusions and recommendations from the EFFACE Project on European action to Fight Environmental Crime*, EFFACE, 2017, 13.

⁴⁷ Commission Implementing Decision (EU) 2018/210 of 12 February 2018 on the adoption of the LIFE multiannualwork programme for 2018-2020.

⁴⁸ Commission Implementing Decision (EU) 2018/210 of 12 February 2018 on the adoption of the LIFE multiannualwork programme for 2018-2020, 34.

(a) The targets of the EU's 2010 Biodiversity Strategy were not met. The targets of the EU Biodiversity Strategy to 2020⁴⁹ will not be met without substantial efforts. Member States are supposed that the EU legislation must be improved by, for example, the use of *proportionate, effective and dissuasive penalties*.⁵⁰

The main causes of *biodiversity* loss are habitat destruction and degradation. The restoration, preservation and enhancement of ecosystem are very important in Natura 2000 areas. It is stressed that 65% of EU citizens live within 5 km of a Nature site, and 98% live within 20 km.⁵¹

In the centre of this strategy are biodiversity and ecosystem services. The restoration of ecosystems can have a positive impact on the mitigation of climate change. At the same time there is serious concern about the continuing loss of biodiversity and illegal trading. It is to be feared that the sturgeon fish can be killed in the Danube river by the illegal caviar trade.

Environmental crimes threaten Europe's iconic wildlife. Illegal wildlife trade is against the biodiversity. The illegal harvesting of wild birds is a big challenge. Besides it the other danger to sustainability is the illegal logging.

(b) The European Union is committed to fight *illegal logging and related trade*, which continues to be a persistent problem worldwide. The EU adopted the Regulation 995/2010/EU (the timber regulation, hereinafter the EUTR).⁵² Illegal logging is a pervasive problem of major international concern. It has a devastating impact on some of the world's most valuable remaining forests as well, and it threatens biodiversity. Penalties for infringements of the EUTR: the range of sanctions varies across the different Member States because some of them have enacted only administrative sanctions while others have made the violation of some obligations a *criminal offence*. The EUTR requires Member States to adopt *effective, proportionate and dissuasive* for infringements.

(c) In 2016, the Member States adopted the EU Action Plan against Wildlife Trafficking. It aims to tackle wildlife trafficking more effectively by 2020. Wildlife crime is a serious and growing threat to the environment, biodiversity and sustainable development. It is needed to create effective deterrents by strengthening criminal investigation, prosecution and sentencing.⁵³ The EU is a significant destination market and transit route for illegal wildlife trade but also a source of trafficking in certain European endangered species of flora and fauna.

⁴⁹ Communication from the Commission to the European Parliament, the Council, The Economic and Social Committee and Committee of the Regions – Our life insurance, our natural capital: an EU biodiversity strategy to 2020, COM (2011) 244.

⁵⁰ European Parliament Resolution on the mid-term review of the EU's Biodiversity Strategy, 2015/2137 (INI), point 27.

⁵¹ European Parliament Resolution on the mid-term review of the EU's Biodiversity Strategy, 2015/2137 (INI), point L.

⁵² Regulation EU/995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation), COM (2016) 74.

⁵³ European Resolution on EU action plan against wildlife trafficking, 2016/2076 (INI), point 17.

6. Final remarks

The practice of the Court of Justice of the European Union reflected in its ruling falling in the scope of environmental criminal law and passed on 13 September, 2005 was institutionalised in the Lisbon Treaty. The Lisbon Treaty made the authorisation of the European Union for criminal legislation unambiguous, that is, that the Union had the right to oblige Member States to elaborate criminal law regulations. In the field of criminal law, the European Parliament and Council may determine regulatory minimums with Directives. From the point of view of unified community regulations, the range of criminal offences set forth in the Lisbon Treaty [section (1), Art. 83 of the Treaty on the operation of the European Union]⁵⁴ may be unanimously extended by the Council, thus promoting the further unification of European environmental criminal law.

It is need to introduce stronger laws threatening *illicit wildlife trafficking* as a *serious crime* as other forms of transnational organized crime,⁵⁵ becoming one of the biggest and most profitable forms of organized cross-border crime. Wildlife trafficking finances and is closely linked with other forms of serious and organized crime.⁵⁶

Similarly the UN Commission on Crime Prevention and Criminal Justice resolution⁵⁷ encouraged its member states to make *illicit trafficking in forest products, including timber, and protected species of wild fauna and flora involving organized criminal groups a serious crime*.⁵⁸ Placing it on the same level as human trafficking and drug trafficking.

The European Parliament also insisted on taking action in the field of environmental crime in the final report of the EP Committee on organized crime, corruption and money laundering.⁵⁹ Corruption fuels organized crime and is particularly rife with wildlife trafficking. However, there is a big challenge at international, regional and national level, because there is no unambiguous definition of organized crime, including organized environmental at this time.

⁵⁴ Terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.

⁵⁵ European Resolution on EU action plan against wildlife trafficking, 2016/2076 (INI), point 17.

⁵⁶ European Resolution on EU action plan against wildlife trafficking, 2016/2076 (INI), point A.

⁵⁷ The Commission on Crime Prevention and Criminal Justice-Resolution 23/1 (2014) Strengthening a targeted crime prevention and criminal justice response to combat illicit trafficking in forest products, including timber

⁵⁸ United Nations Convention against transnational organized crime: Article 2, paragraph (b): „Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

⁵⁹ The Committee on Organised Crime, Money Laundering and Corruption of the European Parliament – Report on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken (2013/2107(INI)).

The EU Agenda on security for 2015-2020⁶⁰ identifies *wildlife crime as a form of organized crime* that must be tackled at EU level by reviewing of the existing legislation on environmental crime and considering further *criminal sanctions*.

⁶⁰ Communication from the Commission to the European Parliament, the Council, The Economic and Social Committee and Committee of the Regions - The European Agenda on Security, COM(2015) 185, point 3.2.