

## Environmental Crime Directive assessment: Small step for legal consequences, big step for political change

In early December, the Council (on [6 Dec](#)) and the European Parliament's JURI committee (on [11 Dec](#)) approved the Environmental Crime Directive [agreement](#) reached during trilogue negotiations, which now only needs to be rubber-stamped before becoming law.

While [the final legal provisions are hit and miss](#), the revision of this law has been a major symbolic win, showing that the EU finally understands the extent of the damage caused by environmental crime. The fact that, 15 years after the original [directive on the protection of the environment through criminal law](#), EU member states (except Denmark and Ireland, which have opted-out of from the EU area of freedom, security and justice) succumbed to Parliament and Commission bidding and increased the reach of the law by more than double the offences, set minimum standards for sanctions and even [echoed legal definitions on Ecocide](#), is nothing short of a Christmas miracle.

What makes this law different from your standard revision of EU law is that it deals with an area at the very heart of national sovereignty. Coined the "State monopoly on violence" in political philosophy, imprisoning, revoking licenses, confiscating assets, and issuing bankruptcy inducing fines are powers that only the State has. Not surprisingly, the EU's competences in matters of national security, border control, asylum, and criminal law are infinitesimal compared to its harmonisation powers in the single market or trade agreements. In environmental criminal law, a case in point is [the Dieselgate scandal](#), which has been emblematic of the reluctance of sovereign states to share even the bare minimum of information with foreign police.

But before too much celebration, we set out to analyse what will the law actually change once it comes into force a little over two years from now.

### Calling a crime a crime

The new directive maintains the old system of defining environmental crime through a list of individual offenses. An autonomous definition of environmental crime such as exists, for example, for inflicting bodily harm or for fraud would have been preferable, but that would have required a whole new way of thinking about environmental damage. The new directive lists 20 instead of 9 offences which will constitute a criminal offence in each EU country. Notable additions are mercury usage, water abstraction, illegal logging, and habitats' destructions. The big missing piece is illegal (and highly profitable) fishing, a symptom of Member States' reluctance to scare traditional industry with potential criminal liabilities for wrongdoing. Tragically, a similar approach was adopted with regard to Environmental Impact Assessments. While construction without development consent made the list, the failure to carry out an Environmental Impact Assessment was deleted. In theory, double the list of offences now considered criminal should mean either double the convictions or double the deterrent effect, but much of that remains up to the national prosecutors and their toolkit.

### Tools for prosecutors

Generally, there are two conditions for an act to be considered a crime. Firstly, the act must be clearly pre-defined and, secondly, it must be established as unlawful. The ambiguous legal definitions in the 2008 text were identified in the [evaluation](#) of the directive as a major hinderance for national prosecutors to take the step of accusing environmental criminals. As established above, the list of

offences is now twice as long; it is also much more detailed. Regarding the second condition, the Directive's approach did not legally change from 2008 and still only criminalises conducts which are linked to a breach of EU law. However, it now refers to all of EU environmental policy and no longer limits itself to an impracticable list of enumerated EU legislations, which quickly become outdated. The new definition is much more workable and future-proof but may prove not to be enough. The proposed auxiliary clarifications on legal terminology such as "substantial damage" or "negligent quantity" are unlikely to provide national prosecutors with a significant increase in confidence when bringing their cases. Admittedly, an EU level directive will only go so far in reassuring police and prosecutors. After implementation of the directive, ultimately, EU Member States still need a copious amount of new case law instilling confidence in police and prosecution and effectively deterring would-be criminals. The jury is still out on whether future environmental crimes will be tried for criminal pollution, disturbance of animal species, and mislabelling of waste or whether prosecutors will stick to tried and true methods and indict environmental criminals rather on charges of economic crime or fraud.

Several supplementary enforcement chain provisions, albeit in typically watery EU law speak, deserve honourable mention. Investigative tools, prevention, resources, training, and national strategies on combating environmental crime are newly thematised in the Directive. And so is the role of civil society in reporting crimes and providing evidence. But the language in these articles is either non-committal or non-specific meaning that many countries will ultimately get away with making minimal or no changes to their enforcement chains and treatment of individual or NGO informants. Resources are the key to law enforcement and the words within the Directive will unlikely give rise to any legal consequences for States not installing specialised units or bolstering existing budgets. The legal implications of these support articles remain at the mercy of the national justice ministries' mood and courage, but they are amazing political wins and a strong symbolic recognition of the fight against environmental crime. They may yet inspire more legally binding commitments at national level in the future.

## Business crime

Criminal liability of companies is where the Directive should have shown the true teeth of the law but instead hid behind the steadfast stubbornness of outdated national legal traditions. Article 6 on liability of legal persons was completely left untouched. Criminal liability for companies could have been made mandatory for all legal systems. The attentive reader will notice that corporate board members are mentioned in the recitals but nowhere to be found in the operational part of the text. Whereas the title of the directive implies criminal law, it becomes clear that regarding liability of companies we are likely to see [a continuation of administrative rather than criminal fines](#). There are many practical and legal benefits of using administrative law when trying companies, but none of them outweigh the societal symbolism a conviction labelled as criminal carries.

For the first time in EU criminal law, we see minimum levels of maximum fines, which can be of administrative nature or, most importantly, of criminal nature. This again is a massive symbolic win and a true recognition of the seriousness of environmental criminal damage. The new Directive even goes so far as to detail exact amounts of annual turnover or lump-sum fines. For this reason, it is even more frustrating to realise that the minimum thresholds given are [extremely low](#). Even within the context of EU law, they do not measure up to guidance for fines on breaches of competition law, the GDPR or the Digital Services Act. The question remains, when will we finally decide to protect our environment more seriously than we protect the single market?

## Ecocide

The political hot potato of the file has been the inclusion of the crime of Ecocide. In a remarkable win for the European Parliament, parts of the definition proposed by the [independent expert panel](#) for the legal definition of ecocide for the International Criminal Court statute, made it into the operational part of the directive. It is introduced in the form of a qualified offence, meaning that it is to be met with particularly severe sanctions. Strangely though, the minimum level for maximum sanctions for this most severe crime is lower than for some of the other crimes, which seems diametrically opposed to the intention set out in the recitals. In the bigger picture, the tribute to ecocide symbolises a huge political and deontological win that could inspire other international fora, such as the International Criminal Court, to prosecute ecocide.

## The role of civil society

National authorities have a tough time with environmental crime. Legislation is intricate, causality a nightmare to establish, and evidence gathering is highly technical. Civil society plays an essential role in supplementing the state's role by reporting on illegal activities and providing expertise and evidence where state resources are lacking. The new Directive recognises this role through two means. Firstly, through mentioning whistle-blower protection and secondly by hinting at third party access to criminal proceedings. The fact that civil society's role is explicitly singled out by a piece of criminal law is remarkable. However, most countries will not have to adapt their legislation to guarantee these two recognitions of civil society. Referencing the whistleblower Directive is a great acknowledgment but that directive's scope is limited to people who report on their employers and does not offer any protection to informants reporting on crimes outside of their work-based relationships.

The actual protection states are obliged to afford to people reporting a crime is a shadow of the original Commission proposal, which suggested a strong positive obligation to extend the same level of protection guaranteed to whistleblowers to informants. Regarding participation of defenders of the environment as third parties which would come with the possibility to represent nature's voice in front of a judge is limited to jurisdictions, where this is already possible anyway. The linked transparency obligations for those jurisdictions could, however, be far reaching in practice. Also in this area, the new Directive falls short of transforming Europe's legal traditions but does display a few astonishingly progressive ideas which catapult the outdated political debate around environmental crime into the present.

## Police cooperation

With a view at some of the biggest environmental crimes in Europe in recent years, such as Dieselgate, the Oder River mass fish die-off, and continuous illegal waste shipments, it is abundantly evident, that cooperation between different national law enforcement bodies is the only way to punish and deter a category of crime which is by definition cross-border. Europol does its part but only touches the [tip of the iceberg](#). The new Directive does require "necessary measures" for coordination and cooperation and hints at specialised coordination bodies and other formalised means of cooperation. What is missing is the institutionalisation of new mechanisms, new resources, or new bodies for cooperation. The [European Public Prosecutors Office could provide just that](#), but its current mandate is limited to crimes against the financial interest of the EU. Admittedly, the Directive would not have been the correct legal tool to increase the European Public Prosecutors Office's mandate, but it could have been the correct political tool to do so.

## Conclusion

When all is said and done, the new Environmental Crime Directive can be criticised for a lack of teeth towards companies and an uninspiring attempt at police and judicial cooperation. However, the text cannot be labelled as insipid or lacking in creativity. The Commission's original revision proposal was hugely ambitious, considering the area of law it operates in, and the EU legislators maintained much of that spirit. Once implemented, the new Directive does not guarantee better protection of the environment from criminals, but it does deliver a new set of sharpened tools to willing police and prosecutors, on the condition that the political backing for the fight against environmental crime is provided for.