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## **European Union requirements regarding criminal law and civil and administrative sanctions\*\***

**ABSTRACT:** Directive (EU) 2024/1203 on the protection of the environment through criminal law was adopted on 11 April 2024 and must be implemented into national law until 21 May 2026. It brings the obligation to introduce a lot of new criminal provision to protect the environment comprehensively. The Directive does not only contain provisions on minimum maximum penalties for natural and legal persons, but also other sanctions and measures aimed at prevention and restoration of the environment. It is the task of the courts and authorities to find adequate reactions to a conduct which damages the environment.

**KEYWORDS:** Directive (EU) 2024/1203, environmental criminal law, minimum maximum penalties, administrative and civil measures.

### **1. Protection of the environment as important legal interest**

The environment is – as hardly anyone would doubt given the climate crisis currently affecting the entire world population – an important legal interest to be protected, because we all want to and can only live in a healthy, intact environment. It is therefore necessary to protect this environment also by means of criminal law. Nevertheless, if one looks at most national legal systems, environmental criminal law plays a rather subordinate role. Often only minor cases – such as farmers who over-fertilise their fields or small production companies that spill chemicals – are actually prosecuted. In contrast, major environmental problems are very rarely prosecuted. The number of actual convictions is clearly disproportionate to the importance of environmental protection as a whole. Just to illustrate the situation in Austria: In the last years, there were never more than ten convictions

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because of environmental offences! Last year, there were five convictions for the central offense of intentional environmental damage and one conviction for the corresponding negligent offense. With a total of 26,500 convictions, this is a numerically insignificant group of offences, which begs the question of why we are even bothering with it. It seems that the law has not yet been fully implemented in practice by the law enforcement authorities. But it is clear that increasing environmental problems cannot be addressed without criminal law.

## **2. Directive 2008/99/EC on the protection of the environment through criminal law**

Recognising the necessity of an effective protection of the environment at the beginning of the 2000s, the EU had a major influence on the development of national environmental criminal law provisions. In 2008, the Directive 2008/99/EC on the protection of the environment through criminal law<sup>1</sup>, which replaced an initially adopted framework decision that had been declared null and void by the CJEU<sup>2</sup>. As can be seen from the explanatory memorandum, the European legislator's motivation was concern about the increase in environmental offences and their effects, which increasingly transcend the borders of the individual states in which the criminal offences are committed. In addition, the existing penalty systems were considered insufficient to enforce full compliance with environmental protection law. To this end, it was also considered necessary to increase the use of criminal penalties, which express a social disapproval of a qualitatively different nature than administrative penalties or civil damages.

The Directive contained a number of offences that had to be transposed into national law by the Member States, such as:

- the introduction, discharge or emission of a quantity of substances or ionising radiation into the air, soil or water which causes or is likely to cause death or serious injury to persons or substantial damage to the quality of the air, soil or water or to animals or plants;
- the collection, transport, recovery and disposal of waste, including the operational monitoring of these processes and the aftercare of disposal

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<sup>1</sup> Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, *OJ L 328*, 6.12.2008, 28.

<sup>2</sup> *C-176/03, Commission v. Council of the European Union*, 13 September 2005.

facilities, as well as actions undertaken by dealers or brokers (waste management);

- the shipment of waste in contravention of Union law;
- the operation of an installation in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used;
- the production, processing, handling, use, possession, storage, transport, import, export or disposal of nuclear material or other dangerous radioactive substances;
- the killing, destruction, possession or removal of specimens of protected wild animal or plant species;
- the trade in protected wild animal or plant species, parts or products thereof;
- any behaviour that causes significant damage to a habitat within a protected area;
- the production, import, export, placing on the market or use of substances that contribute to the depletion of the ozone layer.

With regard to the penalties for infringements of these provisions, the Directive only contained a general obligation for Member States to 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. No minimum maximum penalties were provided for. In addition, the Directive required that legal persons can be held responsible for the offences.

In the course of an evaluation of the Directive in 2020<sup>3</sup>, the Commission found that the Directive had little impact in practice, as the number of cases of environmental crime that had been successfully investigated and prosecuted remained very low. Furthermore, in the Commission's view, the penalties imposed were too low to have a deterrent effect, and cross-border cooperation was not functioning satisfactorily. In addition, shortcomings in the areas of resources, expertise, awareness, prioritisation, cooperation and information exchange were identified and established in the Member States.

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<sup>3</sup> Commission Staff Working Document, Executive Summary of the 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), SEC(2020) 373 final.

### **3. Directive (EU) 2024/1203 on the protection of the environment through criminal law**

Against this background, the European Commission presented at the end of 2021 a proposal for a recast of the Directive on the protection of the environment through criminal law.<sup>4</sup> At the end of last year, the Council and the European Parliament had already submitted their opinions and proposed amendments.

On 11 April 2024 the directive<sup>5</sup> was adopted by the European Parliament and the Council. It has to be implemented into national law until 21 May 2026 (Article 28 para. 1).

#### ***3.1. Unlawful conduct***

Like the old directive, the new Directive stipulates that certain intentional and seriously negligent acts should constitute a criminal offence, if that conduct is ‘unlawful’. However, in contrast to the current legal situation, this unlawfulness is not only understood as a violation of Union law or national law, regulation or administrative provision, or a decision taken by a competent authority of a Member State, which gives effect to the Union law which is exhaustively listed in the annex to the Directive. But also such conduct shall be unlawful even where it is carried out under an authorization issued by a competent authority of a Member State if such authorization was obtained fraudulently or by corruption, extortion or coercion, or if such authorization is a manifest breach of relevant substantive legal requirements.

#### ***3.2. Criminal offences***

The list of acts to be criminalised (Art. 3(1)) was significantly expanded. The Directive contains a quite long list of acts which shall constitute a criminal offence where they are unlawful. For example, the following conduct which shall constitute a criminal offence is new:

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<sup>4</sup> 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, SEC(2021) 428 final, COM(2021) 851 final.

<sup>5</sup> Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law, OJ L, 2024/1203, 30.4.2024.

- the placing on the market of a product the use of which on a larger scale, namely the use of the product by several users, regardless of their number, results in the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation into air, soil or water and 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 (lit. b);
- the manufacture, placing or making available on the market, export or use of substances, whether on their own, in mixtures or in articles where such conduct causes or is likely to cause the death of, or serious injury to, any person, substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants and which is not in compliance with certain EU Regulations (lit. c);
- the manufacture, use, storage, import or export of mercury, mercury compounds, mixtures of mercury, and mercury-added products where such conduct is not in compliance with the requirements set out in Regulation (EU) 2017/852 and causes or is likely to cause the death of, or serious injury to, any person, substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants (lit. d);
- the execution of projects within the meaning of Directive 2011/92/EU where such conduct is carried out without a development consent and causes or is likely to cause substantial damage to the quality of air or soil, or the quality or status of water, or substantial damage to an ecosystem, animals or plants (lit. e);
- the recycling of ships falling within the scope of Regulation (EU) No 1257/2013, where such conduct is not in compliance with the requirements referred to in Article 6(2), point (a), of that Regulation (lit. h);
- the ship-source discharge of certain polluting substances which causes or is likely to cause deterioration in the quality of water or damage to the marine environment (lit. i);
- the construction, operation and dismantling of an installation used for offshore oil and gas operations, where 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 (lit. k);

- the abstraction of surface water or groundwater, where such conduct causes or is likely to cause substantial damage to the ecological status or ecological potential of surface water bodies or to the quantitative status of groundwater bodies (lit. m);
- the placing or making available on the Union market or the export from the Union market of certain commodities and products associated with deforestation and forest degradation, except where such conduct concerns a negligible quantity (lit. p);
- any conduct which causes the deterioration of a habitat within a protected site, or the disturbance of certain animal species, where such deterioration or disturbance is significant (lit. q);
- the bringing into the territory of the Union, placing on the market, keeping, breeding, transporting, using, exchanging, permitting to reproduce, growing or cultivating, releasing into the environment, or the spreading of invasive alien species of Union concern under breach of certain restrictions or conditions under EU law (lit. r);
- the production, placing on the market, import, export, use, or release of fluorinated greenhouse gases, whether alone or as mixtures, or the production, placing on the market, import, export or use of products and equipment, and parts thereof, containing fluorinated greenhouse gases or whose functioning relies upon those gases, or the putting into operation of such products and equipment.

Member States shall ensure that criminal offences relating to conduct listed in Article 3 para. 2 constitute qualified criminal offences if such conduct causes either 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 widespread and substantial damage which is either irreversible or long-lasting to the quality of air, soil or water (Article 3 para. 3).

In assessing whether the damage or likely damage is substantial, according to Article 3 para. 6 it shall be relevant:

- the baseline condition of the affected environment
- whether the damage is long-lasting, medium-term or short-term;
- the extent of the damage
- the reversibility of the damage.

### ***3.3. Intention and gross negligence***

Most of these acts shall only be criminalised if committed unlawfully and intentionally (Article 3 para. 1). For most of the acts listed in para. 2 also serious negligent conduct shall constitute a criminal offence. This shall be the case for the conduct listed in para. 2 lit. a to d, f, g, I to q, r (ii), s and t.

## **4. Sanctions against natural persons**

### ***4.1. Custodial sentences***

The provisions on sanctions contained in the Directive are particularly comprehensive. The Directive does not only provide for more extensive obligations with regard to custodial sentences, but also for a range of other penalties and sanctions.

First, Member States are required to take the necessary measures to ensure that the offences covered can be punished with effective, proportionate and dissuasive criminal penalties (Article 5 para. 1). In addition, the Directive contains a series of so-called minimum maximum penalties, i.e. EU legal acts set minimum limits for the maximum prison sentences for certain offences.

For more severe criminal offences according to Article 3 para. 2 lit a to d, f, j, k, l and r (as e.g., the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation, into air, soil or water which 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) a minimum maximum penalty of ten years is provided for, if they cause the death of any person (Article 5 para. 2). For (other) qualified offences according to Article 3 para. 3 (e.g. if the destruction of or widespread and substantial damage is irreversible or long-lasting to an ecosystem of considerable size)<sup>6</sup> a maximum penalty of at least eight years must be foreseen. If such more severe offences do not cause the death of any person, maximum prison sentences of at least five years shall be provided for.

Criminal offences committed seriously negligently which cause the death of any person are punishable by a maximum penalty of imprisonment of at least five years. For other (less severe) offences a maximum term of imprisonment of at least five years must be provided for.

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<sup>6</sup> See under 3.3.

#### ***4.2. Additional criminal or non-criminal penalties and measures***

However, the Directive does not stop at custodial sentences, but also provides for Member States to impose additional sanctions and measures (Article 5 lit 3). This list, which was already contained in the Commission's proposal, has been partially expanded by the Council (Council document of 22 December 2023). It includes:

- The obligation to restore the environment within a given period, if the damage is reversible, or the obligation to pay compensation for the damage to the environment if restoration is impossible or the perpetrator does not have the capacity to carry out such restoration;
- Fines that are proportionate to the gravity of the conduct and to the individual, financial and other circumstances of the natural person concerned and, where relevant, that are determined taking due account of the gravity and duration of the damage caused to the environment and of the financial benefits generated from the offence;
- exclusion from access to public funding, including tender procedures, grants, concessions and licences;
- disqualification from holding, within a legal person, a leading position of the same type used for committing the offence;
- withdrawal of permits and authorisations to pursue activities that resulted in the relevant criminal offence;
- temporary bans on running for public office;
- the publication of all or part of the judicial decision that relates to the criminal offence committed and the penalties or measures imposed, which may include the personal data of convicted persons only in duly justified exceptional cases, if there is a public interest, following a case-by-case assessment.

Regarding these sanctions, Member States are not obliged to introduce all of them, but some of them should be provided for.

#### ***4.3. Liability of legal persons***

As is known from a number of other directives on the harmonisation of criminal law, the Directive contains an obligation to establish a liability of legal persons (Article 6). However, what is new in the area of criminal law is that the Directive not only provides for the obligation to introduce effective, proportionate and dissuasive sanctions, but also a catalogue of sanctions against legal persons (Article 7).

The Directive provides for the mandatory introduction of financial penalties, for which minimum maximum penalties are also provided, based on the total worldwide turnover of the legal person, either in the business year preceding that in which the offence was committed, or in the business year preceding that of the decision to impose the fine. For serious offences, the fines imposed on associations should amount to at least 5% of the worldwide annual turnover of the legal person; in less serious cases, the fine should be 3% of the worldwide annual turnover (Article 7 para. 3). Alternatively, Member States can also provide for minimum maximum fines of EUR 40 Mio respectively EUR 24 Mio.

The concept of fines referring to the worldwide turnover familiar from competition law and administrative criminal law – for example, from financial market law – is now incorporated into criminal law directives. These obligations could pose a challenge for at least some national criminal legislators to transpose these fines into national law, as their corporate criminal law follows different models for determining fines for associations. For example, the Austrian Corporate Liability Act provides for fines that are calculated according to a day fine system which refers to the company's returns and whose maximum amount is significantly lower (around EUR 5 Mio).

In addition to fines, other sanctions and measures are also envisaged for legal persons:

- the obligation to restore the environment to its previous state within a certain period of time or to pay compensation for environmental damage if the damage is irreversible.
- the exclusion from entitlement to public benefits or aid;
- exclusion from access to public funding, including tender procedures, grants, concessions and licences;
- temporary or permanent disqualification from the practice of business activities
- withdrawal of permits and authorisations to pursue activities that resulted in the relevant criminal offence;
- placing under judicial supervision;
- judicial winding-up;
- closure of establishments used for committing the offence;
- an obligation to establish due diligence schemes for enhancing compliance with environmental standards;

- the publication of all or part of the judicial decision that relates to the criminal offence committed and the penalties or measures imposed, which may include the personal data of convicted persons only in duly justified exceptional cases, if there is a public interest, following a case-by-case assessment.

In addition, Member States shall ensure that the illegal profits generated by the offence and the annual turnover of the legal person are taken into account when determining the appropriate level of a penalty.

## **5. Evaluation of the penalties and measures provided for in the Directive**

### ***5.1. A wide range of different penalties***

The Directive provides for a wide range of different sanctions and measures in response to environmental offences. Looking at these sanctions and measures, not all of them are of criminal or even penal nature, but can be classified differently as civil or administrative sanctions. The Directive says ‘does not specify who should be responsible for imposing these sanctions’. According to the recitals, such accessory penalties or measures are seen as being more effective and should be therefore available in the relevant proceedings.<sup>7</sup>

Prison sentences are clearly criminal sanctions. The obligation to restore the environment to its previous condition is a civil law consequence. Compensation for damage does not constitute a criminal sanction as long as it is limited to the restitution of the damage. If the amount to be paid exceeds the amount of the damage, they have also a penal character.

The exclusion from access to subsidies and permits, the withdrawal of permits and licences, and the temporary prohibition of candidacy for elected or public office are administrative sanctions. However, if they are of sufficient duration and intensity, they may also be considered criminal in nature. Exclusions from benefits (subsidies, grants) qualify as criminal sanctions if they are mandatory as a consequence of a violation of the norm, without a prior prognosis decision to assess the reliability of the applicant for the grant. Reductions in subsidies or grants constitute a criminal sanction if the person concerned is deprived of more than is necessary to reverse the

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<sup>7</sup> Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law (31), OJ L, 2024/1203, 30.4.2024.

granting of the subsidy and if the reduction exceeds the amount unlawfully obtained. In such cases, these measures fulfil not only a preventive and behavioural control function, but also a punitive function. Therefore, criminal law guarantees must also be observed when imposing them.

In principle, it is to be welcomed that the European legislator provides for sanctions other than mere custodial sentences and fines. In environmental criminal law in particular, mere sanctions in the form of fines and custodial sentences are not sufficient; appropriate preventive measures must also be taken. Therefore, for example, the obligation for companies to set up systems to fulfil their duty of care in order to improve compliance with environmental standards is a preventive measure that may be more effective in protecting the environment than imposing a prison sentence, which would result in a managing director being dismissed and replaced by another person who would continue the environmentally harmful behaviour.

However, it should be noted that the other sanctions and measures provided for are also intrusive and, despite the desirability of using a variety of sanctions, care must be taken to ensure that a cumulation of sanctions does not lead to a disproportionate response to criminal offences. The relationship between parallel sanction systems in the EU needs to be clarified in order to avoid disproportionate multiple sanctions on the one hand and problems of double jeopardy on the other. National legislators will have to pay particular attention to this when implementing the directive.

## ***5.2. Minimum maximum penalties***

It is not surprising that the Directive provides for minimum maximum penalties. What is remarkable is the high level of these minimum maximum penalties, which exceeds that which we are familiar with from other directives. For example, Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children<sup>8</sup> provides for minimum maximum penalties of five years, while the Directive (EU) 2017/1371 on the criminalisation of fraud against the financial interests of the Union (PIF Directive)<sup>9</sup> provides for minimum maximum penalties of four years. The

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<sup>8</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, p. 1.

<sup>9</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, pp. 29.

high level in Directive (EU) 2024/1203 is justified to a certain extent by the importance and significance of the legal interest of the environment and the seriousness of the offences. Moreover, the Directive differentiates between the different offences and provides for four different levels of minimum maximum penalties depending on the gravity of the offences.

It is apparent that the prescription of minimum maximum penalties can lead to friction and systemic inconsistencies in the implementation of mandatory minimum maximum penalties, because penalties are envisaged that no longer fit into the national penal system because they are no longer proportionate to the penalties for other offences.<sup>10</sup> It can be seen that minimum maximum penalties of such a high level make the implementation of the Directive in the Member States much more difficult. E.g. in Austria, a maximum level of eight years is unknown and the legislator has to find solutions to fit the new criminal provisions of environmental criminal law into the penalty system of the Criminal Code.

Such breaches of the system can only be justified if they enabled cooperation in cross-border proceedings or if prosecution would otherwise be made more difficult or impossible. However, custodial sentences of at least ten years are not necessary to achieve this, because there are no rules on mutual assistance which require such a high level of penalties. For preventive reasons it does not appear necessary to harmonise and increase maximum penalties across the EU. Saying this, it does not mean that environmental crimes are trivialised and should not be punished adequately. On the contrary, for effective prevention and thus effective environmental protection, it is more important that environmental crimes are actually prosecuted as soon as possible after they have been committed. This requires, on the one hand, clear and comprehensible environmental criminal law provisions and, on the other hand, authorities that focus on prosecuting such crimes.

### ***5.3. Rights of the public to participate in proceedings***

The Commission's proposal for the Directive provided for expanded opportunities to claim damages from environmental crimes. It envisaged strengthening the procedural position of the public concerned. The public should be granted rights that enable it to participate in environmental criminal proceedings, for example as a civil party, and thus to assert claims for damages in criminal proceedings (Article 14 of the proposal).

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<sup>10</sup> Referring to the general problem see Kert, 2019, p. 13.

The Directive provides that persons affected or likely to be affected by the environmental criminal offences and persons having a sufficient interest or maintaining the impairment of a right, as well as non-governmental organisations that promote environmental protection and meet requirements under national law, have appropriate procedural rights in environmental crime proceedings. However, this obligation is limited in that the possibility only needs to be provided for if such procedural rights for the public concerned exist in national law of the Member State in proceedings concerning other criminal offences, e.g. as a civil party (Article 15).<sup>11</sup>

## 6. Conclusion

Directive 2024/1203 on the protection of the environment through criminal law is a comprehensive and innovative instrument for protecting the environment. The sanctions it provides for are not limited to imprisonment and fines, but also include a range of other sanctions and measures aimed at prevention and restoration of a healthy environment. However, whether and to what extent the penalties and measures provided for will actually contribute to improving environmental protection will depend primarily on how the measures are applied and enforced by the law enforcement authorities. There are still major shortcomings in the enforcement of environmental criminal law, which significantly reduces the effectiveness of environmental criminal law regulations. Eliminating these shortcomings will be crucial in determining the extent to which criminal law contributes to environmental protection.

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<sup>11</sup> Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law (58), OJ L, 2024/1203, 30.4.2024.

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