



## Manual of European Environmental Policy

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# Environmental crime

<b>Formal references</b>	
<a href="#">2008/99/EC</a> (OJ L328 6.12.2008)	Directive on the protection of the environment through criminal law
Proposed 9.2.2007 – <a href="#">COM(2007)51</a>	
<b>Legal base</b>	Article 192 TFEU (originally Article 175 TEC)
<b>Binding dates</b>	
Formal compliance	26 December 2010

## Purpose of the Directive

The emergence of transboundary environmental crime, for example, involving illegal trade in wildlife, ozone-depleting substances or radioactive waste, has attracted increasing attention internationally and in the European Union (EU). At the same time, a consensus has gradually emerged within the EU that there is a need for some degree of harmonization of national provisions on penalties for violations of key provisions of Community environmental law, even in situations where there are no transboundary implications, in order to ensure a level playing field for regulated actors within the internal market. Accordingly, the Directive seeks to ensure that Member States treat a number of acts contravening Community environmental law as criminal offences under domestic law and provide for criminal penalties whenever these acts are committed by individuals. Non-compliance by corporations also has to be subject to penalties under the conditions laid down in the Directive, though Member States retain a choice to impose either criminal or administrative penalties on corporate offenders.

## Summary of the Directive

Member States are to declare certain polluting activities as punishable under criminal rather than less punitive administrative law. Article 3 requires Member States to take the necessary measures to establish the following as criminal offences under domestic law:

- ‘the discharge, emission or introduction of a quantity of materials or ionizing radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants’;
- ‘the collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants’;
- ‘the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 (see section on [shipment of waste](#)) on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked’;
- ‘the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant,

- causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants’;
- ‘the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants’;
- ‘the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species’;
- ‘trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species’;
- ‘any conduct which causes the significant deterioration of a habitat within a protected site’; and
- ‘the production, importation, exportation, placing on the market or use of ozone-depleting substances’.

These acts are to be treated as criminal offences when unlawful and committed intentionally or ‘with at least serious negligence’. ‘Unlawful’ means infringing among others the legislation adopted pursuant to the EC Treaty and listed in Annex A. Member States are to ensure that unlawful conduct is punishable by ‘effective, proportionate and dissuasive criminal penalties’. ‘Inciting, aiding or abetting’ the conduct referred to in Article 3 is also to be ‘punishable’ as a criminal offence. The Directive, however, does not determine the type and level of the criminal penalties to be applied.

Sanctions have to be introduced not only to punish unlawful conduct by individuals, but also the same environmental offences when committed by legal persons. In the latter case, however, Member States have a choice between the use of criminal or administrative sanctions. Therefore, Member States need to ensure that legal persons – corporate legal entities under national law – can be held liable for intentional or negligent offences committed for their benefit by any person who has a leading position in the company. The ‘leading position’ will be inferred from the power to represent the company, the authority to take Decisions on its behalf or the authority to exercise control within the company. A company is also to be held liable where a lack of supervision by a leading person has made it possible to commit offences for the benefit of the company.

Member States have until 26 December 2010 to adopt the measures necessary to comply with the Directive, and are to communicate to the Commission, the text of the main provisions transposing the Directive into national law.

## **Development of the Directive**

### **Initial developments**

The competence of the European Community to legislate on environmental criminal law has long been the subject of legal and political struggle between the Commission and the Council. While there is political agreement on the need to achieve some measure of convergence in this area, both institutions were at odds over the question of whether this

should be done through the Community legislative method or through some form of intergovernmental cooperation under the EU Treaty's 'third pillar'.

Early intergovernmental cooperation was actually initiated under the auspices of the Council of Europe in the mid-1990s, resulting in the adoption of a Convention on the Protection of the Environment through Criminal Law in 1998<sup>1</sup>, referring in its preamble to 'the need to pursue a common criminal policy aimed at the protection of the environment'. Though signed by 11 EU Member States, this Convention was ratified only by Estonia and has not entered into force.

However, the Council of Europe Convention inspired Denmark to propose the adoption of a 'Framework Decision' under the provisions on judicial cooperation in criminal matters of the 'third pillar' of the EU Treaty. Such Decisions are legally binding on the Member States but can only be adopted unanimously. Moreover, the powers of the European Court of Justice to enforce 'third pillar' Decisions are severely limited compared to ordinary EC legislative acts, as the Commission cannot bring infringement proceedings against the Member States and the competence of the Court to give preliminary rulings is optional only.

In response to the Danish proposal, in 2001 the Commission proposed ([COM\(2001\)139](#)) the adoption of a Directive on the same subject matter under the environmental provisions of Article 175(1) of the EC Treaty, arguing that the use of the EU Treaty as a legal basis was inappropriate since the same measure could be adopted under the EC Treaty in view of its environmental protection objective. Notwithstanding the Commission's objections, which were supported by the European Parliament, the Council ignored the Commission proposal and instead adopted Framework Decision [2003/80/JHA](#) based on Denmark's proposal. The Commission then brought an action for annulment of this Framework Decision before the European Court of Justice on the grounds that the Council lacked competence to adopt it under the EU Treaty.

In an important judgment of 13 September 2005, the Court found in favour of the Commission and annulled Framework Decision 2003/80/JHA (Case [C-176/03](#), 13.09.2005). It held that the Community legislature has the power, under Article 175 of the EC Treaty, to take 'measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective'. Consequently, the Council's action under the EU Treaty amounted to unlawful encroachment on those powers.

## **The February 2007 proposal**

The Commission relied on the September 2005 judgment of the European Court of Justice to reintroduce an ambitious legislative proposal on environmental crime (COM(2007)51). In substance, the Commission proposal of February 2007 went beyond both the unsuccessful Commission proposal of 2001 and the 2003 Framework Decision. The Commission considered that the existing sanctions in the Member States were insufficient to ensure effective implementation of EC environmental policy due to disparities in the type and level of sanctions. Some Member States provide for administrative sanctions only, whereas the Commission considered that criminal sanctions should be introduced for all serious environmental offences.

The Commission accordingly proposed to define the most serious environmental offences and require Member States to ensure that these constitute criminal offences under their national law. Moreover, it also sought to achieve some measure of harmonization of the level of the sanctions for the most serious offences, by specifying that these should be punishable by imprisonment and laying down its minimum and maximum duration, depending on the nature and circumstances of the offence. Finally, the proposal defined the conditions of liability of legal persons and also prescribed the level of fines to be applied to them for the most serious environmental offences. In the case of legal persons, Member States would have the choice between criminal or non-criminal fines.

From the start of the negotiations, it became clear that several Member States were intent on watering down the substance of the Commission proposal, though the principle of adopting a Directive on the subject under Article 175(1) of the EC Treaty was no longer challenged. During the negotiations, the European Court of Justice issued its ruling in a case involving a ‘third pillar’ measure in the field of penalties for marine pollution from shipping, which dealt a serious setback to the Commission's approach and bolstered the position of opponents of harmonization of environmental sanctions in Council and Parliament.

### **Implications of the October 2007 European Court of Justice Judgment**

In its judgment of 23 October 2007 (Case [C-440/05](#)), the European Court of Justice ruled on the Commission's application for the annulment of a Framework Decision adopted by the Council on 12 July 2005 under the ‘third pillar’ of the EU Treaty, to strengthen provisions for criminal-law enforcement of Regulations against ship-source pollution. This Framework Decision [2005/667/JHA](#) supplements Directive [2005/35/EC](#) on ship-source pollution, which aims to approximate the legislation of Member States in this area pursuant to the provisions of the EC Treaty on the common transport policy.

Both acts were the result of a single Commission proposal for a Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences, tabled in 2003. The Council had decided to split the proposed provisions into two separate acts, one based on the EC Treaty and the other on the EU Treaty, to underscore that measures aimed at harmonization of criminal-law provisions and sanctions could only be adopted under the so-called ‘third pillar’. The Commission had strongly objected to this ‘double-text’ approach and subsequently delivered on its threat to take legal action against the Council for violating the provisions of the EC Treaty.

The Court ruled in favour of the Commission on most aspects of its claim, but did not go as far as to accept the Commission's argument that competence under the EC Treaty extends as far as to allow the harmonization of the type and level of the criminal sanctions to be applied by Member States. Confirming its earlier case-law, the Court reiterated that ‘although it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (...), the fact remains that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective’. Accordingly, most of the provisions of the challenged Framework Decision, ‘being essentially aimed at improving maritime safety, as well as environmental protection,’ could have been validly adopted on the basis of Article

80(2) of the EC Treaty and the Council's recourse to the provisions of the EU Treaty as a legal basis was held to be unlawful.

However, the Court further found that 'contrary to the submission of the Commission, the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence'. To that extent, the relevant provisions of the Framework Decision were properly based on the EU Treaty. But since those provisions were 'inextricably linked' to other provisions of the Framework Decision, the Court had no option but to annul that Decision in its entirety.

This ruling bolstered the position of those Member States which were objecting to similar provisions on the harmonization of the level and type of criminal sanctions to be applied to serious environmental offences in the 2007 Commission proposal under consideration in the Council's Working Party on Substantive Criminal Law. The policy implications of the judgment were discussed informally by Justice Ministers in November 2007, and the Working Party subsequently agreed to the deletion of those provisions from the draft. During a subsequent meeting of the European Parliament's Committee on Legal Affairs, the Commission indicated that it would no longer object to this deletion.

### **Final agreement on the Directive**

Following this European Parliament Decision, the Slovenian Presidency worked with the rapporteur MEP, Hartmut Nassauer, to achieve a first reading agreement between the Council and Parliament on a final version of the Directive that became considerably less ambitious than the original Commission proposal. The Commission had suggested that the Directive should apply not only to violations of Community environmental law and the relevant implementing provisions in Member States, but also to violations of national laws and Regulations aimed at protecting the environment. However, the Council, with the support of the European Parliament, decided to limit the Directive's scope to specific Community legislation listed in two annexes: one listing legislation adopted within the scope of EC environmental policy, and the other four Directives on nuclear safety and radiation protection adopted under the EURATOM Treaty.

### **Implementation of the Directive**

Member States need to bring into force the laws, Regulations and administrative procedures necessary to comply with the provisions of the Directive before 26 December 2010. Some Member States did not notify national implementing measures by this deadline. France on its part has notified the Commission that it does not consider national implementation measures necessary. The European Commission is currently evaluating the implementation measures taken and notified by the Member States. The study aims to assess whether and to what extent the provisions of the Directive have been transposed correctly into national law and to identify inadequacies in the national implementation measures.

### **Enforcement and court cases**

To date there have been no relevant cases concluded in the European Court of Justice concerning the enforcement of Directive 2008/99/EC. However, see above for case law relevant to the development of the Directive.

## Further developments

Member States are now required to make a series of serious environmental offences deriving from EC environmental law subject to ‘effective, proportionate and dissuasive criminal penalties’, but it still falls on them to determine the type and level of those penalties. As mentioned before it was not possible at the time of adoption of the Directive to determine the type and level of those penalties at the EC level, as the European Court of Justice had ruled (Case C-440/05) that the determination of the type and level of the criminal penalties do not fall within the Community's sphere of competence. These issues could only be dealt within the third pillar. However, since the entry into force of the Lisbon Treaty in December 2009 the pillar structure no longer exists thus enabling the EU to deal with these issues through a Directive. If the Commission still considers that effective enforcement of Community environmental law requires some harmonization of the stringency of criminal penalties applied by the Member States, the option of proposing a new Directive to complement this Directive remains open.

In this regard it should be noted that the Commission is currently considering how to (further) develop an EU criminal policy under the Lisbon Treaty, with clear definitions on what is an EU crime and the minimum criminal penalties to be applied across all Member States. In its Communication ‘Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law’ ([COM\(2011\)573](#)), the Commission mentions several policy areas in which (further) EU criminal law might be needed, including environmental protection and fisheries policy. The language used by the Commission is, however, very cautious, as it only states that the potential role of EU criminal law as a necessary tool to ensure effective enforcement could be explored further in these areas.

## Related legislation

The acts listed in Article 3 are to be treated as criminal offences when unlawful and committed intentionally or ‘with at least serious negligence’. This list includes currently 69 environmental legislative pieces, both Directives and Regulations. ‘Unlawful’ also means infringing legislation adopted pursuant to the EURATOM Treaty and listed in Annex B. These are:

- The basic safety standards Directive (96/29/EURATOM) (see section on [safety standards for radiation](#)).
- The Directive on control of high-activity sealed radioactive sources and orphan sources (2003/122/EURATOM)(see section on [safety standards for radiation](#)).
- The Directive on supervision and control of shipments of radioactive waste and spent fuel (2006/117/EURATOM) (see section on [shipment of radioactive substances and waste](#)).

## Reference

1 Council of Europe (1998) *Convention on the Protection of the Environment through Criminal Law*, Strasbourg, 4 November 1998, European Treaty Series, No 172, <http://conventions.coe.int/Treaty/en/Treaties/Word/172.doc>