THE EUROPEAN UNION, ENVIRONMENTAL CRIME AND ECOCIDE

Noreen O'Meara*

1. INTRODUCTION

Questions about whether legislation has anthropocentric or eco-centric characteristics are increasingly salient in international environmental and climate law. Such questions are far less familiar in our reflections on EU law, where a common concern – with good reason – is to ask whether EU law is effectively enforced and delivers on its objectives. Environmental crime stands at the nexus of EU environmental, climate and criminal law, and EU legislation aiming to address it has a chequered history of partial implementation by Member States.

In recent years, environmental crime has risen from the fourth to the third most lucrative form of organised crime globally, behind drug crime and counterfeit goods,[1] and is a sector growing at a rate of 5–7% per year.[2] The deepening crisis of environmental crimes and instances of possible ecocide make the challenge of legislating to mitigate environmental crime greater than ever. Given that environmental damage can be irreversible, it should not be surprising that questions about the anthropocentric/eco-centric dimensions of legislation on environmental crime are becoming as relevant as concerns about incomplete implementation by Member States. The EU's recent adoption of a new Environmental Crime Directive (2024/1203) (ECD 2024) invites these questions. Given the radically expanded range of crimes included in the Directive's scope, it will demand much more of Member States and of the EU to secure effective enforcement.

* Noreen O'Meara is an Associate Professor (Reader) of Human Rights, European and Environmental Law at the University of Surrey.

1 'INTERPOL marks a decade of tackling serious organized environmental crime', INTERPOL, 23 November 2020.

2 Report on Eurojust's Casework on Environmental Crime, January 2021, 4, 20; UNEP-Interpol, The Rise of Environmental Crime – A growing threat to natural resources, peace, development and security, 2016, 17.

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2. ENVIRONMENTAL CRIME: WHERE GRADUAL AND RAPIDLY EVOLVING POLICY AREAS MEET

Over 15 years since the adoption of the original Environmental Crime Directive (2008/99/EC) ('ECD 2008'),[3] the areas of EU criminal, environmental and climate law have transformed. In the field of EU criminal law, the intervening years have seen this sub-field expand, enrich and mature following the constitutionalizing effects of the Lisbon Treaty, with the impact of the Charter of Fundamental Rights evident across all legislative and judicial activity on criminal justice. Constitutional and political sensitivities in this area remain as strong as ever. They are evident in the opt-in/opt-out arrangements in the Area of Freedom, Security and Justice (AFSJ) under the Lisbon Treaty for Ireland[4] and Denmark,[5] one factor among several that create internal imbalances in the AFSJ.

While the roots of EU environmental law and policy stretch back even further, the speed of recent developments in environmental and climate law has been rapid. Having played a prominent role in the legislative programme of the first von der Leyen Commission (2019–2024), the European Green Deal agenda aiming to make Europe the first climate-neutral continent has impacted many EU policy areas.[6] In addition to spearheading new legislation and policies in areas including energy, circular economy and nature restoration, the 'Fit for 55' package demanded a wholesale legislative re-evaluation to retrofit EU legislation to complement the EU's ambitious decarbonization goals.

Revising the Environmental Crime Directive in 2024 ('ECD 2024') was a part of this reforming wave to achieve the goals of the European Climate Law.[7] The passage of time since the adoption of the original Environmental Crime Directive in 2008, the accelerating global climate agenda and the EU's responses to it, and the increasingly lucrative nature of large-scale environmental destruction made it a timely moment to draft an Environmental Crime Directive 2.0.

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3 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.

4 Protocol 21, Lisbon Treaty.

5 Protocol 22, Lisbon Treaty.

6 European Commission, 'Green New Deal – Striving to the first climate neutral continent', < https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en> (accessed 29 November 2024).

7 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 31 June 2021 establishing the framework for achieving climate neutrality ('European Climate Law'), OJ L 243, 9.7.2021.

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3. CORE ENVIRONMENTAL CRIMES AND PENALTIES:

The revision process for the ECD 2024 recast the original Environmental Crime (ECD 2008)[8] and Ship-Source Pollution[9] directives, providing a refreshed and expanded legislative platform for tackling environmental crimes in the EU. Revising the Directive in the context of the Green New Deal agenda provided an impetus for redrafting it in a way that was more responsive to current climate, environmental and criminal justice challenges.

Following a consultation phase on the ECD 2008, the European Commission published its proposal for a new Directive in December 2021. Legislators reached a political agreement on the proposed ECD 2024 before COP28, followed by the adoption of the final version in April 2024 and its entry into force on 20 May 2024. There is a two-year deadline for transposition of 20 May 2026.

The goal of the new ECD 2024 echoes the objective of the original version, aiming to set 'common minimum rules and definitions on environmental crimes and penalties to protect the environment, prevent environmental crime, and enforce EU environmental law' (Article 1). While the goal is familiar terrain, the innovations and expansions in the new Directive reflect a substantially broadened reach of crime and stricter penalties. Although there is some evidence of a more eco-centric approach in the substance – illustrated most boldly by the inclusion of crimes comparable to ecocide – there are also lighter penalties attached to certain categories of crime, including biodiversity offences.

Notably, the definition of unlawfulness has changed in the ECD 2024 compared to the ECD 2008, and the new Directive no longer includes the Annexes listing relevant EU secondary legislation. Under Article 3(1) ECD 2024, conduct is unlawful when it breaches "(a) Union law which contributes to pursuit of one of the objectives of the Union's policy on the environment as set out in Article 191(1) TFEU; or (b) a law, regulation or administrative provision of a Member State, or a decision taken by a competent authority of a Member State, which gives effect to the Union law referred to in point (a)."[10] The text of Article 3(1) concludes the definition of unlawfulness, providing that: "Such conduct shall be unlawful even where it is carried out under an authorisation issued by a competent authority of a Member State if such authorisation was obtained fraudulently or by corruption, extortion or coercion, or if such authorisation is in *manifest breach of relevant substantive legal requirements*" (emphasis added).

While views differ on this point, Faure argues that this closing emphasised text fundamentally changes the relationship between administrative and crim-

[8] n 3.

[9] Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and the introduction of penalties for infringements, OJ L 255, 30.9.2005.

[10] Article 3(1)(a)–(b), ECD 2024.

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inal law in the EU due to the creation of autonomous environmental crimes.[11] This innovation is arguably as impactful as including crimes comparable to ecocide in the new Directive – complementing it by preventing permit-holders from engaging in unlawful criminal activity under the cover of their environmental permits. As such, it could have greater practical significance for national authorities and permit-holders. However, much depends on how EU Member States implement this element of the text.

A headline innovation of the new Directive is the significant rise in core criminal offences. Whereas the original Directive targeted nine offences, the revised Directive amends all of them by expanding their scope and through more precise drafting. The new Directive more than doubles the range of crimes covered (Article 3(2)), introducing core offences on mercury, ship recycling and ship source pollution, invasive species, fluorinated greenhouse gases, and several offences relating to placing products on the market, including items banned under the 2023 Deforestation Regulation.[12] While the original ECD 2008 imposed a general requirement for Member States to criminalise inciting, aiding and abetting core offences, the new Directive introduces the criminalisation of *attempts* for selected core offences (Article 4(2)).

The ECD 2024 does not yet comprehensively cover illegal activity in the environment or consolidate all such activity covered by existing EU law, with challenges such as illegal, unreported and unregulated fishing, for example, covered by other instruments.[13] Nonetheless, the list of offences covered by the ECD 2024 is radically expanded, with scope for future expansion – a prospect that Member States should monitor closely.

The new Directive's approach is also expansive and more precise on penalties, to enhance their deterrent effects. In relation to natural persons, Member States must implement effective, proportionate and dissuasive penalties against individuals (Article 5(1)) with varying maximum prison terms depending on the nature of the crime, ranging from 10 years imprisonment for pollution-related crimes resulting in the death of a person (Article 5(2)(a)) to a minimum

[11] Michael G. Faure, 'The EU Environmental Crime Directive 2024: A Revolution in EU Environmental Criminal Law?' (2024) 36(3) JEL 323; Michael Faure, 'The Creation of an Autonomous Environmental Crime through the New EU Environmental Crime Directive', (2024) 2 EU Crim 153.

[12] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, *OJ L 150, 9.6.2023*.

[13] Such as the IUU Fishing Regulation – Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, OJ L 286 29.10.2008.

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term of 3 years imprisonment for selected biodiversity-related crimes (Article 5(2)(e)).

For the first time, legal persons have liability for environmental crimes (Article 6). While Member States have some discretion when it comes to pitching financial penalties, the headline minimums are 5% of annual global turnover or a lump-sum fine of EUR 40 million, or 3% of annual global turnover or a lump-sum fine of EUR 24 million, depending on the nature of the crime (Article 7(3)(a)-(b)). The variability in prison terms and financial penalties creates an inherent prioritisation, with the lightest penalties attached to biodiversity-related offences. However, beyond traditional penalties, the ECD 2024 includes an array of additional optional penalties that Member States could use to enhance the deterrent effect for businesses. These include the prospect of judicial winding-up, closure of establishments, withdrawal of permits, obligations to implement due diligence schemes, restoration requirements if damage is reversible, or compensation for irreversible damage (Article 7(2)).

The key weakness here is optionality. A more comprehensive framework with a range of practical implications for businesses could prove impactful and dissuasive for businesses in practice. As Pereira has noted, the Council resisted the Commission's original proposals on this point,[14] weakening the ECD 2024 by rendering the alternative sanctions optional rather than mandatory.[15] This dilution undermines the potential deterrent effect of the Directive's 'toolbox' approach. In its adopted version, ECD 2024 relies on Member States being proactive and voluntarily implementing the more stringent sanctions.

4. QUALIFIED OFFICES, CRIMES 'COMPARABLE TO ECOCIDE', AND PENALTIES:

A further major innovation is the inclusion of qualified offences under Article 3(3) of the Directive in a way that, for the first time, targets ecocide-level criminality at a regional or international level. Article 3(3) criminalises as *qualified* offences conduct related to activities listed in Article 3(2) causing (a) '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 (b) that type of damage to air, soil or water. Recital 21 to the Directive confirms that 'qualified offences can encompass conduct crimes comparable to "ecocide" with catastrophic results'. Crimes

[14] 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, COM/2021/851 final, Brussels, 15.12.2021.

[15] See, Ricardo Pereira, 'A Critical Evaluation of the New EU Environmental Crime Directive 2024/1203', (2024) 2 EU Crim 158, 160.

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with 'catastrophic results', such as large-scale pollution, industrial accidents and forest fires, are noted in the recital as potential examples of activities that could fall under Article 3(3). On setting penalties for qualified offences, including crimes comparable to 'ecocide', Article 7(4) provides that Member States must set prison terms of at least 8 years.

Calls for concretising ecocide as an international crime have had a striking and explicit influence on the text of Article 3(3) and Recital 21 of the Directive. The definition proposed by the independent expert panel convened by Stop Ecocide International in 2021[16] inspires the content of this element of the Directive. The goal at that time was to draft a potential definition of ecocide which could, in the future, inform the adoption of a fifth international crime in the Rome Statute of the International Criminal Court (ICC). That definition described ecocide as 'unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts'. This language has tangibly influenced the characterisation of qualified offences in the ECD 2024, including crimes comparable to 'ecocide'.

Although the drafting of the international expert group's definition of ecocide was important preparatory work to help introduce and embed ecocide in international and national criminal law, the inclusion of 'crimes comparable to "ecocide"' in the scope of the new Directive is a promising milestone in that long-term campaign. Given that nearly half of the States Parties to the ICC are EU Member States. The Directive had strong support in the Council (24 Member States in favour, Germany abstaining, Ireland and Denmark as non-participants);[17] this raises the number of potentially supportive states in any future amendment effort to integrate a new international crime of ecocide in the Rome Statute.[18]

In the meantime, the passage of the new Directive provided a fresh impetus for recognizing ecocide as a crime at the national level in EU Member States.

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16 'June 2021: historic moment as Independent Expert Panel launches definition of ecocide', Stop Ecocide International, <https://www.stopecocide.earth/legal-definition> (accessed 29 November 2024).

17 Council voting data for Directive 2024/1203 on 26 March 2024; <https://www.consilium.europa.eu/en/general-secretariat/corporate-policies/transparency/open-data/voting-results/?ActType=2&ActNumber=&DocNumber=&InterinstNumber=&Title=&DateFrom=2024%2F03%2F01&DateTo=2024%2F05%2F31&Session=0&CouncilAction=0&VotingRule=0&VotingProcedure=0&PolicyArea=0&Country=0&VoteFor=on&VoteAgainst=on&VoteAbstain=on&VoteNotParticipating=on> (accessed 29 November 2024).

18 Two-thirds of States Parties to the Rome Statute of the ICC would be required to vote in favour of an amendment. The Vanuatu-led proposal seeks to amend the Rome Statute by adding a new preambular paragraph 2 *bis*, add "the crime of ecocide" to a new Article 5(e), and relevant definitions in a new Article 8 *ter*. See: <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/66e34b2fd56f13659fd7a093/1726171951982/Proposal_9thSeptember_Vanuatu_RomeStatute.pdf> (accessed 29 November 2024).

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While French law introduced a *délit* for the offence of ecocide under article L.231-3 of the Environmental Code in 2021,[19] with penalties of up to 10 years imprisonment and fines of up to EUR 4.5 million, that provision would need further adjustments to comply with the new Directive. In February 2024, Belgium became the first EU Member State to criminalise ecocide under Article 94 of the new Belgian Criminal Code (adopted in 2024 and due to take effect in 2026),[20] with penalties of up to 20 years imprisonment for individuals and fines up to EUR 1.6 million for legal persons attaching to the crime of ecocide. However, full implementation in Belgium will depend on further action in the Belgian regional governments.

In the European region in 2024 alone, draft bills (in Italy,[21] The Netherlands,[22] Azerbaijan,[23] England & Wales,[24] Scotland[25]), close parliamentary votes (Sweden),[26] and calls from groups of elected politicians and businesses have raised the profile of ecocide on political and legislative agendas. In recent months, calls have continued to grow further afield in countries including Canada, Peru and the Democratic Republic of Congo, supporting recognition of ecocide as an international crime. This momentum has culminated in a formal proposal to amend the Rome Statute of the ICC, sponsored by Vanuatu, Fiji and Samoa, in September 2024.[27] Action at the EU level was an important

[19] Code de l'environnement <https://codes.droit.org/PDF/Code%20de%20l'environnement.pdf> (accessed 29 November 2024).

[20] Parliamentair Document 55K3518, <https://www.dekamer.be/kvvcr/showpage.cfm?section=flwb&language=nl&cfm=flwbn.cfm?lang=N&dossierID=3518&legislat=55> (accessed 29 November 2024).

[21] Proposal from the Green and Left Alliance, presented 24 July 2023; https://documenti.camera.it/leg19/pdl/pdf/leg.19.pdl.camera.1325.19PDL0047420.pdf> (accessed 29 November 2024).

[22] Following advice from the Raad van State (Council of State) issued in April 2024 (https://www.raadvanstate.nl/actueel/nieuws/april/advies-over-strafbaarstelling-ecocide/), the Ecocide Criminalisation Bill introduced in the House of Representatives on 30 November 2023 was due to be refined for clarity.

[23] Proposed amendment to the Criminal Code in Article 104-1 of the draft Bill, available at: <https://www.meclis.gov.az/news-layihe.php?id=2327&lang=az&par=0> (accessed 29 November 2024).

[24] A Bill to introduce the crime of ecocide; and for connected purposes. HL Bill 21, introduced 30 November 2023, <https://bills.parliament.uk/bills/3531> (accessed 29 November 2024).

[25] A proposal for a Bill to protect the environment in Scotland and deter environmental damage by introducing the crime of ecocide in Scots law; <https://www.parliament.scot/bills-and-laws/proposals-for-bills/proposed-ecocide-prevention-scotland-bill> (accessed 29 November 2024).

[26] 'Sweden: parliament votes on making "ecocide" an international crime', Stop Ecocide International, 28 May 2024; <https://www.stopecocide.earth/2024/sweden-parliament-votes-on-making-ecocide-an-international-crime> (accessed 29 November 2024).

[27] Vanuatu, Fiji and Samoa proposed the inclusion of an independent crime of ecocide in the Rome Statute to the ICC's Working Group on Amendments in September 2024. Proposal – Independent Crime of Ecocide, Explanatory Notes, <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/66e34b2fd56f13659fd7a093/1726171951982/Proposal_9thSeptember_Vanuatu_RomeStatute.pdf> (accessed 29 November 2024).

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political and legislative step in building momentum and has evident potential to complement efforts to criminalise ecocide nationally and internationally.

5. PROSPECTS FOR OPTIMISED IMPLEMENTATION?

The original Directive's most significant drawback remains the new Directive's fundamental challenge: effective enforcement. The lucrative nature of environmental crime in Europe is enhanced where there is a low risk of investigations and prosecutions – allowing scope for unchecked serious or irreversible destruction of ecosystems, habitats and wildlife.

Expert evaluations of the impact of the original Directive found abundant failings. By 2020, only seven Member States had successfully transposed the shorter list of nine offences into national law. This minimalist approach to compliance was also evident in a lack of coordination between criminal and administrative law and a stark resource deficit. According to the European Commission, there were 'major deficiencies in all Member States and at all levels of the law enforcement chain preventing criminal environmental law from being effective'.[28] Given the substantially greater ambition of the new Directive, how can Member States turn from failure to success?

By making one of the most interesting aspects of the Directive optional – the range of non-custodial and non-financial penalties for businesses, noted above – the Directive itself reins in the practical reach and deterrent effect of penalties. It is up to Member States to decide whether to implement a broader range of dissuasive penalties. In other respects, however, the new Directive provides a more holistic approach to the context surrounding enforcement. Its emphases on investigations (Article 13) and cross-border cooperation (Articles 18, 20), resources and training (Article 17, 18) and data-tracking and reporting obligations (Article 22) represent a more modern and comprehensive method of tackling environmental crime. Even with the benefits of harnessing new technology, sound implementation may be considerably more onerous and costly for Member States now compared to 2008. With the stakes ever-higher when it comes to threats to nature, the actions of the EU and its Member States will soon show whether they are more prepared to invest in protecting nature, ecosystems and human health from the threats of environmental crime.

[28] Commission Staff Working Document, 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), SWD (2020) 259 final, 28 October 2020, at 33.

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