

EU Directive Significantly Strengthens Enviro Protection

By **Katharina Humphrey and Julian Reichert** (June 10, 2024, 10:47 AM BST)

On May 20, the European Union's revised directive on the protection of the environment through criminal law came into force.[1]

EU member states now have two years, until May 21, 2026, to transform it into national law.

The directive forms part of the EU's Green Deal and replaces the EU's former directive on the protection of the environment through criminal law of 2008.[2] Evaluations of the 2008 directive initiated by the EU Commission found that the former directive did not have sufficient effect.

In particular, the commission found that the number of environmental crime cases successfully investigated and resulting in a sentence have remained very low since the enactment of the 2008 directive, while at the same time, environmental crime has been constantly growing.[3]

With the revised directive, the EU significantly strengthens its legislation on environmental crime. The revised directive introduces 11 new criminal offenses and thus significantly broadens the scope of penalized environmental crime under EU law.

The revised directive further introduces severe maximum penalties with minimum imprisonment for individuals of not less than 10 years and corporate penalties exceeding 5% of the annual worldwide turnover in cases of particularly severe environmental damage.

The 2008 directive did not provide for specific penalties resulting in significant differences in the penalty amounts for environmental crimes across the EU.

The introduction of these severe penalties will increase the scrutiny of the national enforcement authorities and may lead to high-stakes enforcement cases where management is exposed to the risk of being held individually accountable for such offenses.

The revised directive further requires member states to implement measures to combat environmental crime more effectively, for example through sufficient resources and cooperation mechanisms between the member states, which will likely lead to more cases brought to the enforcement authorities and a higher number of successful enforcements, including cross-border cases.



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With these key changes, the EU will most likely achieve its goal with the revised directive of combatting environmental crime more effectively.

Environmental Offenses

The updated catalogue of criminal offenses under the revised directive now extends to all key areas of environmental damage known today. New offenses include, for example, illegal ship recycling, illegal water abstraction, illegal trade in timber, serious breaches of rules on introduction and spread of invasive alien species and illegal handling of fluorinated greenhouse gases.

Committing an offense requires unlawful conduct, i.e., a violation of EU environmental law or national environmental law giving effect to such EU law.

Importantly, the directive extends its concept of unlawful conduct to include environmental damage carried out under an authorization if such authorization was obtained fraudulently or by corruption, or if the authorization is in manifest breach of relevant substantive requirements creating a general uncertainty for industry players operating on the basis of environmental authorizations.

Relevant industry players are thus well advised to confirm that their environmental authorizations comply with relevant requirements and form a valid basis for their operations ahead of the implementation of the revised directive in the member states.

Generally, the offenses set out by the directive require intent. For most offenses serious negligence suffices. Attempts are penalized for some offenses. Inciting, aiding and abetting the commission of intentionally committed offenses is always penalized.

Qualified Offenses

The revised directive introduces the concept of so-called qualified offenses for cases of conduct comparable to ecocide that result in particularly severe environmental damage.

While the directive did not extend the list of criminal offenses to include the crime of "ecocide," as requested by multiple NGOs, the concept of the qualified offenses comes very close and ensure adequate penalization in cases of severe damage.

The directive does not set a maximum fine but requires member states to expect more severe penalties than those for nonqualified offenses.

Penalties

The directive establishes severe penalties including maximum terms of imprisonment for individuals of not less than 10 years and introduces two alternative fining methods for legal persons based on fixed amounts between €24 million and €40 million (\$26 million and \$43.3 million) or not less than 5% of the annual worldwide turnover.

The directive also establishes accessory measures such as the obligation to restore the environment or a withdrawal of permits and authorizations that may in individual cases have an even more severe effect than the main penalty as such.

Corporate Liability

Legal persons can be held liable for offenses conducted by any person holding a leading position within the legal entity. Importantly, legal persons can further be held liable where the lack of supervision or control by a person in a leading position has made possible the criminal offense.

Even if this broad concept of corporate liability is not new to the revised directive but also existed under the 2008 directive, it will become even more important to implement a robust compliance management system that ensures adequate supervision and control in light of the severe penalties introduced by the revised directive.

Notably, the liability of a legal entity does not preclude natural persons, including senior management or board members, from also being held liable.

Jurisdiction

The revised directive provides that member states will have jurisdiction if the offense was committed or if the damage occurred within its territory. In cases where the damage extends to more than one EU member state, this will lead to cross-border enforcement cases.

Notably, the revised directive provides that member states can extend their jurisdiction to include *inter alia* cases where the offense is committed for the benefit of a legal person established in its territory.

This may lead to jurisdiction of an EU member state where a criminal offense is committed and the damage occurs entirely outside the EU, as long as there is a nexus to an entity benefiting from the offense within the EU.

Outlook

With the revised directive, the EU significantly strengthens and harmonizes environmental criminal law in the EU. This will result in a higher awareness and scrutiny of the national governmental agencies charged with the enforcement of environmental laws and regulations.

The provisions set by the revised directive to combat environmental crime more effectively will put a high pressure on the respective agencies for their enforcement to be effective and to result in the indictment of offenders.

The introduction of the qualified offenses that the member states must designate in cases of conduct comparable to ecocide leading to very severe damage pose a particular risk for large industry players as large-scale environmental damage is more likely to occur as a result of industry operations.

With severe maximum penalties of more than 10 years imprisonment for individuals and more than 5% annual worldwide turnover for legal entities, qualified offenses are likely to turn into high-stake matters with the management exposed individually to the risk of being held individually accountable for such offenses.

Cases of qualified offenses may thus be the primary focus of the criminal enforcement agencies once the directive is transposed into national law.

By its legal nature, the revised EU directive only provides for the minimum requirements to be transposed into national law. It will therefore be important to closely follow the legislative processes to implement the revised directive across the EU member states.

Individuals and legal entities involved in operations resulting in an exposure to the environmental criminal law are well advised to use the time until the implementation of the revised directive to conduct a risk assessment with a focus on any operations that are exposed to environmental laws and regulations.

This should include a review of all environmental permits and authorizations. Based on the results of this risk assessment, relevant processes and controls of the compliance management system should be adapted to prevent any violations against environmental law. This should include making sure that adequate documentation is in place for any controls, processes and systems implemented as part of the compliance management system.

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[1] Directive 2024/1203. See https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=OJ:L_202401203.

[2] Directive 2008/99. See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0099>.

[3] See https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5817.