Two Steps Forward, One Step Back with the Harmonisation of Substantive Criminal Law: The Environmental Crime Directive

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In 2008, the European Parliament and the Council adopted Directive 2008/99/EC on the protection of the environment through criminal law (hereinafter, the ECD), which not only provided minimum definitions on environmental offences but also was the first of its kind – the first directive to be adopted in the field of the EU criminal law. Being pre-Lisbon creation, the ECD was somewhat limited but progressive, nonetheless.

Recently, a finalised European Commission Evaluation on the ECD[2] (hereinafter, the Evaluation) identified that the Directive contributed to combating cross-border environmental crime, thus having added value beyond the national level (European Commission, 2020, p. 2). Nonetheless, the ECD did not fully meet its objectives due to the lack of coherence mainly through outdated and incomplete annexes (See: European Commission, 2020).

Interestingly enough, the Evaluation did not analyse or dispute the legal framework under which the ECD was established, "accepted" the legal framework under TFEU 83(2), yet continued to label environmental crimes as particularly serious, emphasizing the need to combat and improve certain areas of regulations.

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2 The European Commission conducted evaluation on the ECD with the purpose to establish the relevance, effectiveness and efficiency on the EU rules on environmental crime. The Evaluation was published on the 5th of November 2020.

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These improvements would not be a topic 12 years after the adoption of the ECD if the Lisbon Treaty had set the legal framework of the ECD under Art. 83(1) and the legislator had followed the example of the Convention on the Protection of the Environment through Criminal Law. Establishing an environmental crime area under serious (Euro) crime could have: brought public awareness a decade ago as well as imposed a certain obligation for prioritisation for all Member States (during the 2019 survey some Member States informed that there is no high need to combat these crimes); widened the scope of the ECD and would not have bound the scope of the annexes (which not only get outdated but also are bound to be amended, changed and loose relevance in time); enabled a wider institutional approach and required the gathering of statistical data (which to this day contributed to the lack of reliability and validity of scientific data).

Whereas the implementation of the toolbox approach could have strongly contributed to: 1) coherence (through wider scope of legal remedies in order to combat the same criminal phenomenon); 2) clearer definitions, *corpus delicti* and the need for criminalisation; 3) differentiation of liabilities (administrative, civil and criminal); 4) compliance with the fundamental criminal law principles (first and foremost principle of *ultima ratio*).

The current regulation provides reason to question whether minimum definitions established in the ECD comply with the criteria for serious crime under the TFEU 83(1). Art. 83(1) describes serious crime as particularly dangerous crime, transboundary in nature or damages and as a crime which rises need to combat it on common basis.

In theory, all environmental crime areas (wildlife and forest crimes, pollution, waste crimes, *etc.*) comply with the standards established in the TFEU. Most (if not all) environmental offences satisfy the element of dangerousness through the impact to human and the environment (serious injury or serious damage), *e.g.*, killing of highly endangered species might cause the extinction of certain species, while illegal or even negligent handling of ionising materials can cause lasting degradation of human well-being and the environment.

Cross-border nature of these crimes presents itself through the act or omission (*e.g.,* shipment, smuggling, trafficking, *etc.*) and / or through consequences (when negative effects of the illegal conduct cross the border of one stay), *e.g.,* pollutants spilled into a river get carried to a neighbouring country; ille-

gally killed endangered specimens are native to several countries and migrate between them.

While the global pandemic of 2020 emphasised the need to combat these crimes,[3] the aforementioned necessity arises from the impact of this crime area on human life and health, and the environment, as well as the potential to spread negative effects or be conducted in several countries. Moreover, this necessity stems from the interconnection of environmental crimes with other serious crime areas as organised crime, money laundering, corruption and even terrorism.

It is important to highlight that, in respect to *ultima ratio* principle, every serious environmental offence must have its counterpart as a less serious and / or administrative offence. This differentiation leads to the strong need for implementation of a toolbox in the ECD.

However, do all environmental offences, their minimum requirements, established under the ECD comply with the requirement of serious crime?

Most of the offences under Art. 3 of the ECD comply with the requirement of dangerousness through the utilised object (*i.e.*, ionising substances, hazardous waste *etc*.) and serious consequences, *i.e.,* offences established in para. "a" to "b", and from "d" to "h".[4] These criminal offences are constructed to display the dangerousness of certain substances, *i.e.,* ionizing radiation, nuclear materials, waste, other dangerous substances. On the other hand, the

[3] Although, it is not clear yet from which animal species SARS-CoV-2 originated it is a zoonotic virus. Thus, the global pandemic highlights the need to regulate human activity and to prevent crime which can contribute to the spread of such virus. This brings to thoughts on legitimacy of human involvement in the remaining ecosystems, consequences of our activities on the environment in general as well as global warming. Several facts lead to this question: a) zoonotic diseases are caused by human-animal interaction which would not occur on normal circumstances, i. e. a person in living in Lithuania would not have direct contact with pangolin or its parts; b) human activity strongly negatively impacts ecosystems through (il)legal activities, e. g. timbering, contributing to animal to human interaction, as well as animal to animal interaction increasing the risks of spread and mutation of zoonotic viruses.

[4] Offences established under Art. 3 para. "d" and "h" could be questioned regarding their dangerousness, however, consequences foreseen by these illegal conducts as well as the impact (which in the case of the complete destruction of the habitat or illegal operation of nuclear power plant would be long-lasting) prompts to establish the compliance with the *ultima ratio* requirement.

construction of offences requiring consequences and describing them (death or serious injury to any person or substantial damage to environmental elements) leads to the conclusion that the offence complies with the *ultima ratio* principle through a carefully measured impact and can be identified as highly dangerous to various legal values.

Moreover, most of the offences established under Art. 3, such as the discharge, emission or introduction of a quantity of materials or ionising radiation ("a"); the collection, transport, recovery or disposal of waste ("b"); the operation of a plant in which a dangerous activity is carried out ("d"); the production and other use of nuclear materials or other hazardous radioactive substances ("e"); offences related to the protected fauna and flora species ("f" and "g") and any conduct which cause a significant deterioration of a habitat within a protected site("h") can be transboundary in its nature (*e.g.*, trafficking, shipping) or have a negative criminal transboundary effect, thus, satisfying the criteria of the need to combat them on a common basis under the TFEU 83(1).

From the look of it, the mentioned offences observe the serious crime criteria under the TFEU 83(1), even though all of them are considered criminal if conducted unlawfully.

Nonetheless, two of the offences and the way they are constructed within Art. 3 of the ECD raise doubts not only as a serious crime, but as a criminal offence in general. These are the illegal waste shipment (Art. 3, "c") and illegal production, importation, exportation, placing on the market or use of ozone depleting substances (hereinafter, illegal use) (Art. 3, "i").

First of all, these offences do not comply with the standard of dangerousness. The preconditional obligation to comply with the underlying regulation, especially in case of illegal waste shipment, results in a negative legislative practice where any deviation from the underlying regulations (mostly administrative regulation) results in unlawfulness[5] rendering the conduct "legible"

[5] In the case *SC Total Waste Recycling SRL v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség* the ECJ deemed that waste shipment in the country of transit at a different border crossing point than that stated in the necessary documentation constituted 'illegal' because it was executed 'in a way which is not specified materially in the notification', within the Art. 2(35) d of the Regulation (EC) No 1013/2006 (ECJ, C-487/14, para. 37; ECLI:EU:C: 2015:780). Following the rationale of this case, even the slightest (from the perspective of criminal law) incompliance with the underlying

for criminal liability. Therefore, the conduct itself does not have to be dangerous in itself, just illegal, to constitute a criminal offence.

Moreover, preconditioning on the underlying regulation (which, as mentioned above, is currently one of the main critique points) destabilises criminal legislation and hinders application of criminal legal rules. Not only the underlying regulations are prone to change, to be amended, but it also has the influence to change the *modus operandi* of a criminal offence, thus questioning the compliance with the *nullum crimen sine lege* and *lex certa*.

Both illegal waste shipment and illegal use of ozone depleting substances lack in consequences which leads to incompliance with *the ultima ratio* principle as it is not only clear what impact this criminal offence has, but also to what legal values can a harm be done. Certainly, one can understand that these criminal offences might result in serious injury, substantial damage, even the destabilisation of economics (through illegal introduction to market), yet the act itself does not undoubtedly condition possible consequences or harm (as could have been presumed with illegal use of nuclear material). Furthermore, this incomplete criminalisation impedes rational and proportional implementation of the ECD in national legislations, resulting in criminalisation differences. In short, the EU legislator cannot reach the wanted harmonisation results.

Does this mean that offences in the Art. 3 "c" and "i" should be decriminalised? Not necessarily. The reason for the criminalisation of illegal waste shipment or illegal use of ozone depleting substances is not irrelevant *per se*. However, it is important to have a clear differentiation between serious environmental offences and other environmental offences which could be criminal and administrative alike. These offences should be criminalised in different articles following the example of the 1998 Convention. Introduction of such a distinction would contribute to the clearer harmonisation goal, acceptance of certain environmental offences as "highly" serious (equal to serious crime areas under the TFEU 83(1), as well as reduce reliance on administrative legislation and provide some level of differentiation of liabilities.

regulation (in the case of waste shipment – Art. 2(35) of Regulation No 2013/2006) constitutes *corpus delicti* element – unlawfulness. Therefore, cases where large amount of waste is shipped with deviation from the formal requirement (than those stated in the documentation) are sufficient for criminal liability, as the dangerousness and the impact of the offence are derived from the compliance with environmental regulations (protection of the policy).

Bibliography

Legislation

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) OJ 2012 C326/01, p. 390.

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste OJ L 190, p. 1–98.

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, p. 28–37.*

Case law

SC Total Waste Recycling SRL v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség [CJEU], No. C-487/14, [2015-11-26]. ECLI:EU:C: 2015:780.

Practical material

European Commission (2020). *Evaluation of the Directive 2008/99/EC on the protection of the environment through criminal law (Environmental Crimes Directive). Summary report – public consultation*. Ref. Ares (2020)805070-07/02/2020. [online] Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1930-Environmental-Crime-Directive-Evaluation [Accessed 28 February 2021]

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