

LEGAL INSTRUMENTS REGARDING AN ENVIRONMENTAL CRIMINAL LIABILITY IN EUROPE

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Abstract

Considering that the guarantee of a high level of environmental protection is a major objective and being convinced that the existing systems of sanctions have not been sufficient to achieve complete compliance with laws for the protection of the environment, this paper intends to describe the general framework regarding the criminal liability at international and European Union levels. From the very beginning we would like to outline that the first binding international convention, having as purpose the creation of an European criminal law, to criminalize acts causing or likely to cause environmental damage was adopted by the Council of Europe on November 04, 1998. Notwithstanding, the Convention on the protection of the environment through criminal law (hereinafter „the Convention”), is not into force, given that, up to this date, it has been signed by thirteen Council of Europe member states (Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Romania, Sweden, and Ukraine), and ratified only by one of these countries (Estonia).

Keywords: criminal law, environmental damage, protection

1. GENERAL FRAMEWORK

From the very beginning we would like to outline that the first binding international convention, having as purpose the creation of an European criminal law, to criminalize acts causing or likely to cause environmental damage was adopted by the Council of Europe on November 04, 1998.[12] Notwithstanding, the Convention on the protection of the environment through criminal law (hereinafter „the Convention”), [1] is not into force, given that, up to this date, it has been signed by thirteen Council of Europe member states (Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Romania, Sweden, and Ukraine), and ratified only by one of these countries (Estonia). [1]

Although states protect the environment through criminal law, from a global point of view, the criminal protection is disorderly because some cases of environmental criminality causes damages independently of the political or territorial organization of the international community. As the Convention

provides, [1] we consider that there is an important need to pursue a common criminal policy aimed at the protection of the environment.

After the adoption of the Convention, the European Council held in Tampere in October 1999 asked for efforts to agree on common definitions, incriminations and sanctions for a limited number of particularly relevant crime sectors, including environmental crime.

In February 2000, Denmark presented an initiative for a Framework Decision on combating serious environmental crime.

On 13 March 2001 the Commission adopted a proposal for a directive on the protection of the environment through criminal law, having as purpose to ensure a more effective application of Community legislation on the protection of the environment by establishing throughout the Community a minimum set of offences.

The European Parliament adopted its report on the proposal in first reading on 8 April 2002.

On 30 September 2002 the Commission adopted an amended proposal including several of the amendments proposed by the European Parliament.

The Council did not discuss the Commission's proposal, but instead adopted on January 27, 2003, on the initiative of Denmark, the Framework Decision 2003/80/JHA on the protection of the environment through criminal law.

The European Court of Justice annulled this Framework Decision in its judgment of September 13 2005¹ for infringing Article 47 EU, holding that on account of both their aim and content, articles 1 - 7 of that Framework Decision have as their main purpose the protection of the environment and could have been properly adopted on the basis of Article 175 EC.

On November 30, 2005 the Commission adopted a Communication outlining its views on the consequences of the judgment in case C-176/03, including the need to adopt a new legislative proposal on environmental crime.

In the light of the judgment it is necessary to withdraw the proposal of 2001 for a Directive on the protection of the environment through criminal law, and to present a new proposal making provision for the content of Articles 1 to 7 of the annulled Framework Decision. Certain offences will need to be modified, taking into account developments in the Community's environmental legislation. Furthermore, some additional elements considered necessary to ensure an effective protection of the environment have been included, notably the approximation of applicable sanctions for particularly serious environmental crimes.

Even though environmental legislation requires in various cases that member states adopt dissuasive, effective and proportionate sanctions for breaches of environmental law, there are no provisions that require member states to lay down specifically criminal sanctions for serious environmental offences.

Thus, on February 09, 2007, the Commission presented the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law (hereinafter "the Proposal"). [2] On November 2008, the European Parliament and of the Council adopted the Directive

2008/99/EC of the European Parliament and of the Council of November 19, 2008 on the protection of the environment through criminal law (hereinafter "the Directive") which modified the Proposal mentioned above. [3]

2. PROVISIONS OF THE CONVENTION AND THE DIRECTIVE

The Convention aims to penalize the damage on "protected monuments, other protected objects and property" due to "discharge, emission, or introduction of a quantity of substances" ("materials" in the Directive) or ionizing radiation. [3] Due to the existence of an opt-out clause, the Convention allows contracting parties not to punish this damage if it is caused by negligence. [3] The Convention is less strict than the Directive towards negligence, since it provides for an opt-out clause for punishing "significant risk of causing death or serious injury to any person" caused by negligence. [3] Art.4 of the Convention goes further than the Directive by requiring the parties to punish also certain acts without necessary (possible) damage. These acts are thus to be penalized regardless of the consequences. They can be penalized through criminal law and through administrative law.

The following offences of the Convention are not mentioned in the Directive:

- the unlawful discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water;
- the unlawful causing of noise;
- the unlawful disposal, treatment, storage, transport, export or import of waste;
- the unlawful operation of a plant;
- the unlawful manufacture, treatment, use, transport, export or import of nuclear materials, other radioactive substances or hazardous chemicals.

Similar to the abovementioned, the parties to the Convention may use administrative law in order to punish "the unlawful causing of changes detrimental to natural components of a national park, nature reserve, water conservation area or other protected areas", [2]

and “the unlawful possession, taking, damaging, killing or trading of or in protected wild flora and fauna species”, [2] whereas the Directive regards similar conducts punishable through criminal law only.

The definition of offences corresponds largely to the definitions set out in the Framework Decision 2003/80/JHA while taking into consideration some amendments of the European Parliament made to the original directive proposal and accepted by the Commission after the first reading.

The majority of the offences are made conditional on the activities' result, i.e. that they cause or are likely to cause serious harm to persons or the environment.

In correspondence with the original proposal, an additional offence regarding the unlawful significant deterioration of a protected habitat has been added. Furthermore, a special offence regarding illegal shipments of waste has been included, taking into account new Community legislation. Illegal shipments of waste should be considered as criminal offences only in the serious cases, i.e. when they are carried out in a nonnegligible quantity and for profit.

Several offences contain relatively vague terms such as “substantial damage” or “serious injury”. Those terms are not defined and their appraisal is left to each member state to interpret in the light of its traditions and legal system.

The conduct described is to be considered a criminal offence when committed intentionally or with at least serious negligence, including the commission as participator or instigator.²

2.1. Intentional offences

Art.2 par.1 of the Convention indicates that: “Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law:

- a) the discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water which:
 - i. causes death or serious injury to any person, or

- ii. creates a significant risk of causing death or serious injury to any person;

- b) the unlawful discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water which causes or is likely to cause their lasting deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants;
- c) the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
- d) the unlawful operation of a plant in which a dangerous activity is carried out and which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
- e) the unlawful manufacture, treatment, storage, use, transport, export or import 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, soil, water, animals or plants, when committed intentionally”.

Besides, art.2 par.2 indicates that “Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law aiding or abetting the commission of any of the offences established in accordance with paragraph 1 of this article”.

2.2. Negligent offences

Art.3 par.1 indicates that “Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offence under its domestic law, when committed with

negligence, the offences enumerated in art.2, par.1 a to e” (intentional offences).

2.3. Other criminal offences or administrative offences

Art.4 provides that, insofar as these are not covered by the provisions of art.2 (intentional offences) and 3 (negligent offences), each Party “shall adopt such appropriate measures as may be necessary to establish as criminal offences or administrative offences, liable to sanctions or other measures under its domestic law, when committed intentionally or with negligence:

- a) the unlawful discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water;
- b) the unlawful causing of noise;
- c) the unlawful disposal, treatment, storage, transport, export or import of waste;
- d) the unlawful operation of a plant;
- e) the unlawful manufacture, treatment, use, transport, export or import of nuclear materials, other radioactive substances or hazardous chemicals;
- f) the unlawful causing of changes detrimental to natural components of a national park, nature reserve, water conservation area or other protected areas;
- g) the unlawful possession, taking, damaging, killing or trading of or in protected wild flora and fauna species.”

2.4. Offences provided by the Directive

According to art.3 “Member states shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence:

- a) 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;
- b) 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;

c) the shipment of waste, where this activity falls within the scope of art.2(35) of Regulation (EC) No.1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste [3] and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;

d) 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;

e) 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;

f) 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;

g) 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;

h) any conduct which causes the significant deterioration of a habitat within a protected site;

i) the production, importation, exportation, placing on the market or use of ozone-depleting substances.”

Moreover, the inciting, aiding and abetting the intentional conduct referred to in art.3 above mentioned is punishable as a criminal offence.³

2.5. Punish without damage

The Convention criminalizes risk misconducts. Risk is inevitable in industrialized societies. However, it is necessary that economic activities must be developed in a framework of security. In this sense, an environmental risk criminal prohibition may be necessary because the environment requires an anticipated protection and because environmental damages may be the consequence of a reiteration of accumulative acts which, at the individual level would, be harmless. This option is corroborated not only by the preventive finality of criminal law, as by the precaution principle of international law of the environment. Principle 15 of The Rio Declaration indicates that "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

3. LEGAL CONSEQUENCES FOR ENVIRONMENTAL OFFENCES

3.1. Sanctions

The Convention only requires the penalties regarding criminalized offences to be appropriate and proportionate but demands that the available sanctions shall include "imprisonment and pecuniary sanctions.

Art.6 claims that "Each Party shall adopt, in accordance with the relevant international instruments, such appropriate measures as may be necessary to enable it to make the offences established in accordance with art.2 and 3 punishable by criminal sanctions which take into account the serious nature of these offences. The sanction available shall include

imprisonment and pecuniary sanctions and may include reinstatement of the environment".

3.2. Confiscation Measures

Confiscation is a measurement of simultaneous utility. Its purpose is to defend the collectivity, as a general prevention, and to express the concept of loss of control upon the instruments of offence. Furthermore, and in the framework of special prevention, its also serves to influence the author as via confiscation sanctions may appear to be harsher. In relation to confiscation, art.7 par.1 indicates that each Party shall adopt such appropriate measures as may be necessary to enable it to confiscate instrumentalities and proceeds, or property the value of which corresponds to such proceeds, in respect of intentional offences (art.2) and negligent offences (art.3). The Directive does not refer to confiscation measures.

3.3. Reinstatement of the environment

Principle 13 of Rio Declarations indicates that "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction". In this way and as consequence of its criminal policy orientation, the Convention permits criminal law to enter in the field which normally belongs to the realm of civil liability by an optional provision.

Art.8 states that: "Each Party may, at any time, in a declaration addressed to the Secretary General of the Council of Europe, declare that it will provide for reinstatement of the environment according to the following provisions of this article:

- a) the competent authority may order the reinstatement of the environment in relation to an offence established in accordance

- with this Convention. Such an order may be made subject to certain conditions;
- b) where an order for the reinstatement of the environment has not been complied with, the competent authority may, in accordance with domestic law, make it executable at the expense of the person subject to the order or that person may be liable to other criminal sanctions instead of or in addition to it”.

The Explanatory Report says that this article is inspired by the underlying philosophy of some existing legislations which recognize the advisability of solving litigations either by making use of different means of reparation, including the reinstatement of the environment, or the compensation of victims, before the prosecution of the offence or during the trial. [5]

The Directive does not refer to reinstatement of the environment.

3.4. Corporate Liability

Art.9 par.1 claims that “Each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in art.2 or 3 has been committed by their organs or by members thereof or by another representative”.

The Convention does not oblige states to request corporate liability through criminal law, but it indicates that such liability can be required through criminal law or administrative law. Moreover, art.9 par.2 indicates that: “Corporate liability under par.1 of this article shall not exclude criminal proceedings against a natural person”.

The Directive also aims to ensure that legal persons will be held liable. [5] As mentioned, the Convention uses the wording “by their organs or by members thereof or by another representative”. The Directive demands member states to look at crimes committed “by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person, based on:

(a) a power of representation of the legal person, (b) an authority to take decisions on behalf of the legal person, or (c) an authority to exercise control within the legal person.” If a state transposes the wording of the Directive into its national legislation, there would be no contradiction to the wording of the Convention and thus no need to opt-out at the moment of ratification. [7]

3.5. Sanctions provided by the Directive

Member states shall take the necessary measures to ensure that the offences referred to in art.3 and 4 and that legal persons held liable pursuant to art.6 are punishable by effective, proportionate and dissuasive criminal penalties. [6] Compared to the Proposal, the Directive does not provide the sanctions to be applied for the commission of the offences referred to in art.3. [7]

4. JURISDICTION

Unlike the Directive, the Convention allows for non-territorial jurisdiction (including places outside any territorial jurisdiction), unless the contracting party chooses to make use of an opt-out clause.

5. CONCLUSIONS

Future contracting parties to the Convention who do not wish to go further than the Directive on certain points (e.g. confiscation measures, reinstatement of the environment, co-operation between authorities, and rights for groups to participate in proceedings) are given this possibility thanks to the flexibility provided in the Convention with opt-in and opt-out clauses.

Considering the compatibility between the Convention and the Directive, it would not be an additional burden for EU member states, which have the obligation to transpose the Directive, to ratify the Convention. It might be expedient, therefore, to keep the Convention high on the agenda and to co-operate with the EU institutions to call on EU member states to

ratify it. This should create a strong incentive for other member states of the Council of Europe to ratify the Convention, thus avoiding that it becomes a dead letter.

Given that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment, for an effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species.

To conclude, we may reasonably assume that should the legislation of the member states provide for criminal penalties in their national legislation in respect of serious infringements of provisions of Community law on the protection of the environment, the environment shall be better protected than it is at the moment.

6. REFERENCES

[1] C. Nègre, *Les atteints massives à l'environnement*, in *Droit international pénal*, Ed. A. Pedone, Paris, 2000, p.538; M. Duțu, *Tratat de dreptul mediului*, ediția a 3-a, Ed. C. H. Beck, București, 2007, p.483; *Idem*, *Drept internațional al mediului*, Ed. Economică, București, 2004, p.266-268.

[2]<http://conventions.coe.int/treaty/en/Treaties/Word/172.doc>

[3] According to its art.13.3 it shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three states have expressed their consent to be bound by the Convention

[4] Preamble, par.3.

[5]C-176/03; <http://eur-lex.europa.eu>

[6] *Ibidem*

[7] O. J. No. L 328, 06.12.2008, p. 28–37.

[8] The Convention, art.2, par.1.b

[9] *Idem*, art.3, par. 3

[10] *Ibidem*.

[11] The Convention, art.4.f

[12] *Idem*, art.4.g

[13] *Idem*, art.2 par.2

[14] O. J. No. L 190, 12.07.2006, p.1

[15] The Directive, art.4.

[16] *Explanatory Report of the Convention on the Protection of the Environment through Criminal Law*,

<http://conventions.coe.int/Treaty/EN/Reports/Html/172.htm>

[17] *Idem*, art.6 par.1

[18] Study of the European Committee on crime problems (CDPC), as of August 25, 2009, CDPC (2009) 07

[19] *Idem*, art.5 and 7

[20] The sanctions provided in the Proposal:

Par.2 - Member states shall ensure that the commission of the offences referred to in art.3 (b) to (h) is punishable by a maximum of at least between one and three years imprisonment where the offence is committed with serious negligence and causes substantial damage to air, soil, water, animals or plants.

Par.3 - Member states shall ensure that the commission of the following offences is punishable by a maximum of at least between two and five years imprisonment:

(a) the offence referred to in art.3 (a), where the offence is committed with serious negligence;

(b) the offences referred to in art.3 (b) to (f), where the offence is committed with serious negligence and causes the death of or serious injury to a person;

(c) the offences referred to in art.3 (b) to (h) where the offence is committed intentionally and causes substantial damage to air, soil, water, animals or plants;

(d) the offences referred to in art.3, where the offence is committed in the framework of a criminal organisation.

Par.4 - Member states shall ensure that the commission of the following offences is punishable by a maximum of at least between five and ten years imprisonment:

(a) the offence referred to in art.3 (a), where the offence is committed intentionally;

(b) the offences referred to in art.3 (b) to (f) where the offence is committed intentionally and causes the death of or serious injury to a person.

Par.5 - The criminal sanctions provided for in this article may be accompanied by other sanctions or measures, in particular:

(a) the disqualification of a natural person from engaging in an activity requiring official authorization or approval, or founding, managing or directing a company or a foundation, where the facts having led to his conviction show a high risk that the same kind of criminal activity may be pursued again;

(b) the publication of the judicial decision relating to the conviction or any sanctions or measures applied;

(c) the obligation to reinstate the environment.