

Challenges in Harmonising and Implementing the Environmental Crime Directive

Ieva Marija Ragaišytė

<https://orcid.org/0000-0001-7579-5360>

PhD Candidate and Junior Assistant at the Criminal Justice Department

The Faculty of Law, Vilnius University

Sauletekio ave. 9, I block, LT – 10222, Vilnius, Lithuania

Tel. (+370 5) 236 61 67

Email: ieva.ragaišyte@tf.vu.lt

The article analyses the harmonisation framework under TFEU of the Directive 2008/99/EC and the possible difficulties in implementing the document in national legislation. An inadequately chosen legitimate purpose and the lack of the prioritisation of environmental crime in the Member States result in harmonisation and implementation problems related to issues of the definitions of the offences, their differentiation and compliance with fundamental principles of the law.

Keywords: environmental crime, harmonisation, substantive criminal law, EU criminal law.

Nusikaltimų aplinkai direktyvos harmonizavimo ir įgyvendinimo iššūkiai

Šiame straipsnyje analizuojama, kaip harmonizavimo pagrindas pagal SESV galėjo paveikti Direktyvos 2008/99/EB derinimą ir kokius šio dokumento įgyvendinimo sunkumus tai galėjo lemti. Netinkamas harmonizavimo pagrindo (teisėto tikslo) parinkimas ir nusikaltimų aplinkai prioretizavimo trūkumas valstybėse lemia derinimo ir įgyvendinimo problemas, susijusias su nusikalstamų veikų apibrėžimų, jų diferenciacija ir suderinamumu su pagrindiniais teisės principais.

Pagrindiniai žodžiai: nusikaltimai aplinkai, harmonizavimas, materialinė baudžiamoji teisė, ES baudžiamoji teisė.

Introduction

The European Parliament and Council Directive on the protection of the environment through criminal law 2008/99/EC (ECD) could be considered one of the central pieces when discussing the implementation of the European Union (EU) Criminal policy. However, the document itself is not considered without flaws and even now EU rules on environmental crime are being reviewed by the European Commission (EC) (European Commission, 2020). Potentially, the work of the EC will result in the ECD amendments, further harmonisation (European Commission, 2015, p.18) establishing its legal framework under Art. 83(2) of the Treaty on the Functioning of the European Union (TFEU) (Council of the EU, 2019a; European Parliament, 2020).

Only the European Parliament (EP) openly stated that environmental crime, considering its seriousness, impact and convergence with other criminal activities, should be established as a serious crime

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area under Art. 83(1) TFEU and called upon the EC to take action (European Parliament, 2013; 2016a; 2016b)¹. Whereas Council of the European Union (Council) seems to be more comfortable following harmonisation framework established by the European Court of Justice (ECJ) before the adoption of the Lisbon Treaty (Council of the EU, 2019a, p. 4–5).

The EU academics began analysing the issue long before the adoption the ECD. The most comprehensive research on environmental crime was conducted by the European Union Action to Fight Environmental Crime in a number of studies (EFFACE, 2020).

However, the topic of environmental crime did not grasp exclusive attention in Lithuania. Some issues regarding the transposition of the EU legislation in the national criminal law before the adoption of the ECD was analysed by legal scholars (Abramavičius, *et al.* 2005), while compliance of criminalised offences with the *ultima ratio* was only briefly reviewed in the context of national legislation (Dambrauskienė, 2017). The ECD and its harmonisation and implementation issues are still left to the detailed examination.

Therefore, the purpose of the article is twofold: to examine if ECD approximation issues (such as definition and differentiation of environmental offences; the ECD compliance with fundamental principles) can be related to an inadequately chosen legitimate purpose; to assess if environmental offences of the ECD respect *ultima ratio* and *lex certa* principles, and to analyse if the ECD meets requirements for the implementation of the EU policies. For this reason, the existing and suggested (under Art. 83(2) of TFEU) legal framework of the ECD, environmental crime as a serious crime under Art. 83(1) of TFEU and Art. 3 of the ECD will be analysed.

Due to restrictions on article scope, problems regarding effectiveness of sanctions, compliance with other criminal law principles (principle of guilt, subsidiarity, etc.), the criteria for the differentiation of liabilities will be researched in the following publication. Similarly, in this paper a specific environmental crime topic (e.g., pollution or waste offences) and national MS case law related to it will not be examined.

To achieve a comprehensive assessment of the legal framework and the compliance of the ECD with the requirements of the EU institutions, historical, systemic and comparative methods are going to be deployed. Teleological, systemic and analytical methods were used to assess the compliance with fundamental principles of the law.

1. Legal framework

The ECD, as the first successful attempt at harmonisation of the Union criminal law, was adopted before Lisbon treaty and followed justification of the approximation laid down by the ECJ, which was based on criteria: “<...> indispensability of the application of harmonised criminal provisions in order to deter serious environmental offences and the necessity of such provisions in order to ensure the full effectiveness of the Community environmental legislation <...>” (Vagliasindi, 2012, p. 322).

After the adoption of the Lisbon Treaty, and establishing EU competence in harmonisation (Art. 67, TFEU), approximation of the substantive criminal law can be based on one of the three legal grounds established in Art. 83 (1) and (2), Art. 325 (4) (Csonka, Landwehr, 2019, p. 262). The latter will not be discussed further as it is meant to protect EU’s financial interests, while environment is considered a supranational interest, and its protection extends beyond economic matters. While the framework established in Art. 83 (1) and (2) covers the minimum rules on definitions and sanctions, they differ on

¹ Even so, the EP did not initiate any procedures and the call was of a recommendatory nature only.

the grounds – Art. 83 (1) establishes serious or otherwise “Euro-crimes” and Art. 83(2) TFEU ensures the effective implementation of EU policies (Csonka, Landwehr, 2019, p. 262).

Art. 83(2) basically codified the aforementioned ECJ jurisprudence (See: ECJ, C-176/03; C-440/05) establishing indispensability and necessity to ensure criminal policy: “If the approximation of criminal laws <...> proves essential to ensure the effective implementation of a Union policy <...>”. As these ECJ criteria were established in the field of environmental crimes, the ECD “falls” within the scope of Art. 83 (2), even though it was passed earlier than the Lisbon Treaty.

Nonetheless, the legal basis set in the Art. 83 (2), has been criticized by a number of western scholars (Vagliasindi, 2012, p. 322). It has been stated that one of the undesirable practices of legislation is when the EU institutions try to “<...> answer every social problem with passing increasingly repressive acts and consider this as a value in itself <...>” (European Criminal Policy Initiative, 2009, p. 715). While it was also stated that “The European institutions making criminal policy decisions on a large scale have failed to acknowledge criminal policy as an autonomous European policy” (European Criminal Policy Initiative, 2011. p. 87). This is applicable to the ECD.

There is little difference in the outcome between Art. 83 (1) and (2) as both legal grounds have the same scope for minimum rules concerning the definition of criminal offences and sanctions. Nonetheless, is it essentially accurate and within compliance with the fundamental principles to use criminal law to ensure effective implementation of environmental laws? The critique on the lack of direct protection of environmental legal values through criminal law was long known before the adoption of the ECD and is still relevant (See: Faure, 2020).

The Communication on EU criminal policy does not bother with the establishment of such distinction and provides with the list of EU policies where *criminal law could assist in ensuring the effective enforcement* (European Commission, 2011, p. 9–10). “Environmental protection” is one of the policies mentioned in the Communication with the emphasis on the possible further strengthening *in this harmonised policy* (European Commission, 2011, p. 10).

The ECD falls within the notion of Art. 83 (2) formulating environmental policy as the reason for protection. This is in line with the ECJ judgement in the case *European Commission v. Council of the European Union* (ECJ, C-176/03) as it had to comply with the harmonisation rules established by the ECJ. Moreover, it is within that legal ground of holding Member States (MS) liable for damage resulting from the lack of implementation of the EU legislation “<...> that at the beginning of this century a variety of initiatives were taken to push Member States to use criminal law to enforce legislation transposing environmental directives” (Faure, 2020, p. 259–260). However, it seems that in following these rules and objectives the ECD fell short with the criminalisation requirements.

As seen in certain cases of the ECD Art. 3, offences were constructed in a way where minimal rules of the definition fell under the obligation of the environmental laws suggesting that legislators did not fully grasp the *modus operandi* of criminal conduct. For example, Art. 3 (c) of the ECD states “where the activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006”. Additionally, creating inconsistencies within legislation when considering equally problematic areas, e.g., the unlawful waste shipment (art. 3 provision c), is considered to be illegal in itself, but unlawful handling or trafficking in protected specimens constitutes criminal offence only when the impact is not negligible (Art. 3 provisions f and g).² Even though all three mentioned provisions are considered criminal when unlawful and undertaken in certain quantities, the discrepancy lies in the calculated impact.

² Environmental crimes related to waste and protected species are considered to be prevalent and were the main focus of the Eight round of mutual evaluations on environmental crime. These two crime areas not only largely profitable but also involve organised crime groups and are most common in the EU.

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).

Following the rationale of this case, even the slightest (from the perspective of criminal law) incompliance with the underlying 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).

As opposed, Art. 3 provisions f and g clearly state *has a negligible impact on the conservation status of the species*, which puts the emphasis not on the handled quantity of protected individuals or their parts itself, but rather the impact on the protected species³.

Naturally, criminalisation of illegal waste shipment in the ECD did not come out without a need. Growing tendencies of waste crime and its transboundary nature called for measures allowing to tackle it at “transboundary stage”, i.e., illegal shipment. Nonetheless, criminalisation of illegal waste shipment cannot be rationalised as “proportional” since a mere incompliance with the EU regulation does not constitute dangerousness to legal values (environment, human health) as it could be in cases where radioactive materials are handled.

Moreover, the ECD raised justified questions regarding the necessity of criminal law in the area (Zimmermann, 2008). Not only the possibility to use administrative or civil law for illegal acts and/or omissions was exempt from the document, but the legislator did not present with an autonomous offence – an offence which would be illegal in itself and would not require the breach of other legislation (See: Faure, 2020).

The example mentioned above suggests that criminal law was used not for the protection of environment as a supranational interest, but rather to secure the duty holder’s compliance with the existing environmental legislation, e.g. the ECD Art. 3 criminalised both intentional and offences committed with “serious negligence”, thus requiring *the breach of the duty of care* (ECJ, C-308/06, para. 77)⁴. This is a valid example of undesirable criminal law practice as it objects the purpose, function of criminal law to protect rights and legal interests from dangerous conduct.

Secondly, if the legitimate purpose is not met, how can other fundamental principles underlying the EU criminal policy be observed and respected? E.g., in the ECD case – can the *ultima ratio* be achieved if the criminal law is utilized to reach compliance with environmental regulations?

Although ECD states that other legal means proved to be insufficient (the ECD preamble para. 3), the minimum rules of criminal offences in the ECD are constructed mostly as regulatory offences. This is true even in the most serious cases, e.g., the handling of radioactive substances (Art.3 e), as “unlawfulness” is the necessary element of *corpus delicti*.

The ECD has been criticised for the incompliance with at least a few of the above-mentioned principles, e.g., legality, *ultima ratio* and guilt (European Criminal Policy Initiative, 2011, p. 99; Zimmermann, 2008; Faure, 2017a), and there is a strong interrelation between the critique on the matter of

³ Small quantities over time might have even greater impact to the protected species, yet it is not regulated under the ECD raising question regarding coherence in certain cases.

⁴ The ECD wording “serious negligence” calls for further analysis. Currently it’s not entirely clear whether the EU legislator intended to use this civil law notion as explained in the ECJ case-law or as a concept for *dolus eventualis*.

principles and protection of environmental policies. E.g., the critique of blanket norms can be justified by the protection of environmental laws; dissonance within construction of environmental offences, as in the example between offences in Art. 3 c and g of the ECD, portrays the lack of coherence in prioritisation of all policy areas equally.

Bearing in mind that EU has the highest environmental standards and legislation to back it up, Annexes I and II of the ECD mention only a fraction of it. Establishing “environmental policy” rather than “environmental” protection (especially when emphasis on higher harmonisation in the field is being stressed (See: European Commission, 2011, p. 10) might result not only in greater loss of autonomy for Criminal Policy, but undesirable practice when repressive acts are being adopted for almost every directive or regulation. Just for the sake of the protection of other EU policies. Not only it would prove to be highly unproportional, but it will create ineffective overregulation which in the end will prove to be nearly impossible (if at all) to implement.

Surprisingly, “the correct” legal framework could benefit by the quality of approximation and bring attention to the use of other legal instruments. Emphasis on the environment, rather than its policy should terminate (or at least greatly lessen) the reliance on administrative law and criminalisation of administrative obligations.

In the first case, theoretically, the autonomy of criminal law should be re-established as compliance with environmental legislation would reduce. If the need to comply with environmental or administrative regulation is removed or diminished, there is no need to criminalise administrative offences and the legislator is free to introduce autonomous offences. Consequently, this would benefit approximation and implementation through legal clarity of the purpose of criminalised offences.

The ECD did not follow recommendations on adopting the toolbox approach⁵ and focused merely on the use of criminal law (Faure, 2020, p.258) possibly due to different EU competence in environmental and criminal legislation before the Lisbon. Additionally, it was easier to reach MS compliance with environmental legislation using criminal law, rather than balancing the legal traditions of MS with different legal measures. The later might be the rationale behind establishing legal framework under the Art.83(2).

Nonetheless, outlining the protection of the environment as legal value, enables the legislator to take a broader perspective on the used measures for combating environmental crime. Not only it would allow to rationally protect the environment through criminal law, but also introduce other legal means for cases where no environmental harm was done or simply where there is a strong need to comply with formal requirements, e.g., illegal waste shipment, which could achieve the desired results through application of financial fines.

This might just seem like a theoretical issue, yet it portrays the lack of autonomy in EU criminal policy which leads to various issues. Moreover, in the ECD case it clearly shows how the protection of the “policy” rather than the legal value itself contributes to the challenge in the construction of the minimum rules of the offences, criminalisation and the reach of the approximation goals.

2. Environmental crime – serious crime?

Art. 83 (1) of TFEU provides an exhaustive list of ten serious or “Euro” crimes. As described in the communication towards an EU Criminal Policy, serious crimes are “crimes that merit, by definition,

⁵ “Toolbox” approach – an introduction of various legal instruments (civil, administrative, *etc.*) for the protection of the environment, even in cases of lesser environmental offences, while reserving criminal law as the means of last resort. See more: Faure, 2016, p. 25–27; Faure, 2017b, p.3 30–331, *etc.*

an EU approach due to their particularly serious nature and their cross-border dimension, according to the Treaty itself” (European Commission, 2011, p. 5).

Although environmental offences are not mentioned within the list of serious crime areas, they fall within its scope as they comply with the requirements of Art. 83(1) of TFEU. Environmental crime has a **transboundary** element, is a **serious crime**, and there is a **special need to combat** it on a common basis. Environmental crimes comply with all criteria brought by Art. 83(1).

The cross-border element is highlighted in the ECD preamble stating that the effect of the offence is increasingly extending beyond the borders of MS where an offence was initially committed (ECD para. 2). These offences can be committed not only in several countries but even continents, e.g., waste shipment is regulated by Regulation (EC) No 1013/2006 with an objective of the protection of the environment and regulation’s effects on international trade being only incidental (para. 1 or preamble). Thus, breaching this Regulation could constitute illegal shipment of waste (Art. 3 c, ECD), when shipping waste in, to or out of the EU.

Moreover, transboundary element is characteristic not only to the nature of the crime itself but can be linked to the perpetrators, e.g., organised crime groups or individuals trafficking wildlife (Sollund, Maher 2015, p. 6), and can cause the spread of the negative effect, such as consequences when the harm to the environment is done in several countries, e.g., contamination.

The seriousness of environmental crimes is defined by the abovementioned transboundary element, an interrelation with other criminal activities, and the impact of this crime on the main legal interests – human wellbeing, the environment, and the economy.

Environmental crime often occurs in convergence with other serious crimes such as organised crime, corruption, money laundering, *etc.*, and in some cases even terrorism and drug trafficking (EnviCrimeNet, 2015, p. 1). Moreover, this crime area cannot be identified as victimless due to actual or real threat of damage. Human wellbeing and /or environment are affected by these crimes directly (diseases, pollution) or indirectly – causing negative effects on environmental elements or through damaged ecosystems. Financial markets suffer gross losses in unpaid taxes due to illegal activities. For example, an illegal market placement of ozone-depleting substances not only causes direct negative effects on environment and human health through a potent greenhouse effect, but also disrupts the normal functioning of the market, as cheaper (and unsafe) products are fraudulently introduced or are sold in illegal markets, causing losses in governmental revenue.

In 2013, the UN Commission encouraged MS to acknowledge in their national legislation wildlife crime as serious, **when organised crime groups were involved** (CITES, 2013). This notion will fall short in cases where national authorities will fail to establish involvement of organised crime groups⁶. Nonetheless, wildlife crime in certain cases of trafficking endangered species should be considered serious due to the finite resources of endangered wild fauna and flora, and consequences that might be brought by smuggling of it.

Certainly, criminalisation of unknowingly unintentionally brought back “souvenirs” from vacation is not a practice that should be established or even considered criminal. Even certain sub-areas of environmental crime are diverse and should be differentiated accordingly to the impact it causes. However, the fact that even a subarea of environmental crime, such as wildlife crime (illegal trafficking, poaching, *etc.*), can have grave impact not only on eco-systems, finances, but humans as well, is indisputable. The causal link between the Huanan food market and wildlife crime forces to admit that certain cases of wildlife crime meet the element of seriousness.

⁶ Moreover, organized crime is listed as one of the serious crime areas under TFEU.

Not only did the 2020 worldwide pandemic originate in a food market where many trafficked species were sold, but the origins of SARS-CoV2 were linked to one of the most trafficked endangered and protected animal species – pangolins (Lam, *et al.*, 2020). Scientists analysed samples of Malayan pangolin⁷ tissues seized in an anti-smuggling operation by Guangxi Customs in China and found that the genome sequence of pangolin viral isolate showed very high similarity to the SARS-CoV-2, that caused the pandemic (Lam, *et al.*, 2020, p. 282–283)⁸. There can be no denying that there is a direct causation between illegal trade and trafficking in protected species and a worldwide calamity.

If the above mentioned is not reason enough to establish a firm need to combat environmental crime on a common basis, there are a few more arguments – growing awareness that certain environmental offences remain undetected and/ or “invisible” (Council of the EU, 2019b, p. 8) and increasingly widespread, e.g., wildlife trade is established as one of the fastest growing illicit trades worldwide (Sollund, Maher 2015, p. 1).

Environmental offences, especially related to waste and wildlife, are viewed as an international crime and even placed as a priority area for the EU Policy Cycle 2018-2021 (Council of the EU, 2018). While, the final Council report on mutual evaluation on environmental crime disclosed that not only the need to combat this control crime proactively exists, but also underlined that environmental crime is rarely self-evident and a high need for specialized investigators exists (Council of the EU, 2019b, p. 8, 11).

Be it waste, pollution, wildlife, or other environmental crime areas, most of them, even the local cases, can be serious. Therefore, the Art. 83(1) might be seen as more appropriate and logical legal framework regarding environmental crimes. Not only does it offer equal approximation of minimum rules as Art. 83(2), but also determines a firm EU Criminal law policy starting point, as most of the Euro-crimes were established under the third pillar, i.e., before Lisbon (Csonka, Landwehr, 2019, p. 263). Not only is ECD a pre-Lisbon “creation” it is also one of the first EU attempts at criminal legislation. Hence, it fits the serious crime profile perfectly and puts the wanted emphasis on prioritisation and seriousness in all MS from the perspective of criminal law, rather than protection of the EU policy.

Optimistically establishing environmental crimes under Art. 83(1) should benefit the prioritisation of these crimes on the national level, greater involvement and cooperation of governmental institutions, allocation of funds and creation of specialised investigators and prosecutors. Moreover, the areas of crime listed in subpara. 2 of TFEU Art. 83(1) are meant to be paradigmatic (Ambos, 2018, p. 320), therefore it would influence harmonisation through insights of environmental crime phenomenon, its structure and suitable approach to combat this crime.

However, establishing environmental crime as a serious crime area faces two problems:

Firstly, there is no definition of ‘serious crime’ in EU criminal law (Paoli, 2014, p. 3). The phrase, even though – used quite often since 2000, brings little clarity and is deemed to be inconsistent both in the EU policy documents and academic literature, the latter often confiding in the definitions proposed in their national legal systems (Paoli, *et al.* 2017, p. 280–281).

In 2017, a study was conducted on the use of the definition “serious crime” in the EU policy documents and academic literature (Paoli, *et al.* 2017). This study concluded that “<...> neither EU institutions nor academics have sufficiently defined serious crime to support a common understanding or consistent use of the term. Moreover, the difference in focus across EU institutions and academics could limit the value of the scientific literature as a source of insight for policymakers, if the concerns of policy-makers and academics are fundamentally different” (Paoli, *et al.* 2017, p. 281).

⁷ Malayan pangolins are one of the pangolins species accepted and protected by the international CITES. See more: <https://cites.org/eng/node/22831>

⁸ This doesn’t indicate that pandemic originated in the pangolins, rather that the smuggled animals were infected with the virus.

Nonetheless, the study showed that usually the definition is based either on legal criteria (referral to prison sentence with no certain consistency) and empirical criteria (established by impact and harm of the crime) (Paoli, *et al.* 2017, p. 280). The same research pointed out that only Euro-pol attempted “<...> to apply the two criteria analytically, but, because its definition of serious crime and methodology lack clarity, the attempt falls short as a generalizable mode <...>” (Paoli, *et al.* 2017, p. 280).

Art. 83(1) complies only with “empirical criteria” as it provides a certain emphasis on the impact and harm through its “cross-border” nature (prevalence of possible harm and scale of impact), “the nature and impact of such offences”, and the “need to combat on common basis”. The lack of a clear definition creates a situation where enlisting crime area within the list of Euro-crimes, at best becomes a political acknowledgement of the need of EU Criminal policy, and at worst – a simple state of the obvious. Therefore, listed crime areas which should have been paradigmatic can be considered a political consensus for a threat.

The second issue of “serious crime” is related to the extension of the Euro-crime list. Art.83(1) subpara. 2 presents an exhaustive list of serious offences. According to subpara. 3 of Art. 83(1) this list can be extended through the unanimous Council decision following the consent of the EP (Ambos, 2018. p. 320). Scholars have already criticised the procedure for unequal institutional role and deviation from the ordinary legislative procedure stating that: “The fact that such an important decision (as well as that one of extending the powers of the European Public Prosecutor’s Office) can be adopted with a procedure in which the role played by the EP is so limited (insofar it has only to consent to the text prepared by the Council) is blameworthy” (Grasso, *et al.* 2015, p. 24); and “It is just with reference to this very important issue that the “democratic deficit” – which has been finally overcome in the ordinary legislative procedure – continues to exist” (Grasso, *et al.* 2015, p. 24).

It is not only the lack of institutional ‘co-decision’ procedure but the requirement of unanimity (rather than qualified majority) making it an entirely political issue. Bearing in mind that some MS have met only the minimum standards of the ECD, whereas others have implemented more detailed and exhaustive regulation (Council of the EU, 2019b, p. 55), it is possible that one or more MS might oppose prioritizing environmental crime due to the costs it might have (re-evaluation of national criminal policy and system, allocation of funds, etc.) or simply because a MS does not see environmental crime as having serious impact (EnviCrimeNet, 2015, p. 21).

A recently finalized EC Evaluation on the ECD identified that ECD contributed to combating cross-border environmental crime, thus having added value beyond national level (European Commission, 2020, p.2). The evaluation identified that the ECD did not fully meet its objectives due to the lack of coherence (outdated and incomplete annexes), lack of provisions to support specific objectives like cross-border cooperation and ineffectiveness, firstly noticeable in the significant degree of variation in the levels of sanctions provided for in national legislation, as well as the lack of involvement of the law enforcement due to low level of prioritisation of environmental crime, etc. (See: European Commission, 2020).

It is highly possible that these improvements would not be a topic years after the adoption of the ECD if the legal framework was set under Art. 83(1), TFEU. Establishing environmental crime as Euro-crime could have brought public awareness a decade ago and imposed certain obligations for prioritisation for all MS; widened the scope of the ECD and wouldn’t have bound the scope to the legislation mentioned in the annexes⁹; enabled wider institutional approach and require the gathering

⁹ Legislation enlisted in the annexes is rarely reviewed, thus some of it is not only irrelevant and outdated, but due to changes in regulations and amendments, as will be described in the next chapter, creates further inconsistencies with the definitions of environmental offences.

of statistical data (which to this day contributed to the lack of reliability and validity of scientific data).

Despite complying with the empirical criteria of Euro-crime, establishing political consensus on an evident threat, and solving certain influential issues related to the approximation of national laws, it is unlikely that environmental crime is going to be recognised as serious. If the theoretical set back of the lack of unified definition is (hopefully) a matter of time, the real interference with the change in the legal framework is the procedure with “democratic deficit”.

3. Difficulties in implementing the ECD

Incompliance with the *ultima ratio* principle is one of the difficulties for the implementation process as it “obliges to criminalise wrongdoing of merely formal character” (European Criminal Policy Initiative, 2011, p. 95). This obligation to criminalise offences of administrative nature creates a potential issue with the distinction between administrative and criminal liability, as well as breaches the principle of proportionality through incompliance with the *ultima ratio* (European Criminal Policy Initiative, 2011, p. 95).

The renowned example of the criminalisation of administrative offence is the illegal waste shipment (Art. 3 (c) of the ECD). The ECD obliges MS to criminalise illegal waste shipment when in breach of the Art. 2(35) of the Regulation No 1013/2006 and it was undertaken in a non-negligible quantity. During the transposition some MS (Latvia, Czech Republic) were considered to have an incomplete transposition due to the lack of explicit cross-reference to Regulation No 1013/2006 or listing all activities specified in the Art. 2(35) of the document (MiliEU, 2014, p. 32).

However, as can be seen from the ECJ case C-487/14, it is not the lack of referral to the Regulation in question that constitutes a formal breach of the law, but the fact that even the slightest incompliance constitutes “illegal shipment”. Therefore, the criminalisation of formal incompliance with regulations is considered lacking in the degree of severity, as it is not dangerous enough to be considered criminal (Abramavičius, Prapiestis, 2014, p. 664).

The requirement of “non-negligible quantity” is of little help in the matter. Not only the definition is considered to be lacking clarity, it does not provide MS with the necessary criteria helping to establish the margin for criminal liability, resulting in two major trends – missing the requirement altogether (Belgium (Federal, Flanders), Cyprus, Czech, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, the Netherlands, Luxembourg, Poland, Portugal, Romania, Sweden, the UK) or using the similar (vague) wording of the ECD (Belgium-Brussels, Croatia, Estonia, Greece, Malta, Slovenia) (MiliEU, 2014, p. 40).

The Lithuanian legislator, on the other hand, took a creative approach to the matter and introduced a fixed requirement of 50 tons for illegally shipped waste to be considered criminal. Not only Lithuania is the only MS which actually provided a quantitative threshold, but during 2013 the evaluation was considered advantageous in terms of certainty (MiliEU, 2014, p. 40).

Nonetheless, introduced quantity hardly constitutes the required element of seriousness. In fact, the requirement was considered too rigid as it does not provide the necessary flexibility for all cases, e.g. where 49 tons could be considered non-negligible (MiliEU, 2014, p. 40).

The attempt to introduce “tangible” element to the obligation to criminalise illegal waste shipment ultimately dwells in an effort to meet the requirement of the principle of last resort and to introduce at least minimal chance to differentiate between administrative and criminal liabilities.

The EU institutions have similar approach towards harmonisation of criminal law which is the requirement to respect principles of subsidiarity, necessity and proportionality (European Commission,

2011; European Economic and Social Committee, 2012; European Parliament, 2012). Implemented criminal law measures must be necessary and proportional, as well as keeping up with principles guiding the decision on what kind of criminal law measures to adopt (European Commission, 2011).

With these rules for the EU legislator when ensuring effective implementation of EU policies (European Commission, 2011, p. 7), it is near impossible to justify the criminalisation of administrative offences. The requirement of necessity and proportionality is not met in the case of the ECD Art. 3 (c), and the same might be observed in respect of the Art. 3 (d). Offences in these provisions were criminalised without thorough investigation whether measures of criminal law are crucial, undoubtedly necessary and proportional in respect of the enforcement of EU policies.

There is no palpable evidence that other legal means prove to be insufficient when tackling ‘lack of licence’ when shipping waste, illegal use of any amount of ozone-depleting substances¹⁰ or dealing with illegal operation of a plant. Thus, it is hard to find a valid justification for the decision to criminalise these offences. It is evident that alternative protection mechanisms could be applied in these cases and it could achieve a repressive effect (Zimmermann, 2008, p. 3).

The discussed provisions do not face criticism equally. The lack of justified necessity in waste shipment or handling of ozone-depleting substances might be rooted in the absence of the requirement of consequences. For instance, during the transposition, Latvia and Czech Republic were obliged to make amendments in their national legislation when criminalising the offence related to ozone-depleting substances as both MS introduced the requirement of “substantial damage” (MiliEU, 2014, p. 37).¹¹ This is not the case of the operation of a plant, as it is clearly stated in the Art. 3 provision (d) of the ECD that causal link between the act (illegal operation of a plant) and the repercussions (e.g. injury, significant damage) has to be established.

Consequences of criminal offence remain one of the key *corpus delicti* elements allowing clearer distinction between administrative and criminal liabilities. As well as one of the most used legal techniques supporting compliance with the *ultima ratio*, proportionality and differentiation between administrative and criminal liabilities. However, it seems that it is not enough. Legal scholars still place emphasis on the difficulties differentiating liabilities and point out the benefits of the implementation of the toolbox approach (See: Faure, 2016; Faure, 2017b).

Strong reliance on the element of unlawfulness predetermines even further incompliance with the *ultima ratio* through extensive cross-referencing. Art. 2 of the ECD established that “unlawful” means infringing EU legislation and laws or administrative regulations of the MS. For this reason, the ECD provided with a list of the EU legislation in its Annexes A and B, making the harmonisation process of environmental crimes even more complex.

Even on the EU level, changing legislations can cause incompliance with the *ultima ratio* if blanket dispositions are used as was observed in the case of ozone-depleting substances. When legal changes in the underlying regulation were made, questions regarding criminal liability of a private person emerged (Zimmermann, 2008, p. 4). In this case, changes between underlying regulations mentioned in the Annex of the ECD made it so that the use of a fire extinguisher containing halon were prohibited.

¹⁰ For instance, Lithuania (Art. 270¹), Latvia (Section 98¹), Estonia (Section 368³) almost literally transposed Art. 3 (i) ECD with no indication or mention what quantity of ozone-depleting substances is considered sufficient for criminal liability. This raises questions regarding proportionality and legal certainty.

¹¹ The transposition was deemed to be incorrect and currently, both MS (Latvia in Section 98(1) provision 2, of Criminal Code; Czech in Section 298a, provision 2 of Criminal Code) acknowledge offences causing substantial damage as more dangerous. Although, Czech transposition of the offence still differs from original ECD text through the requirement of “extent not small”.

It remained unclear whether it was also applicable to private persons as the exception for insignificant quantities was missing (Zimmermann, 2008, p. 4).

During the period of implementation, cross-references entail the risk of missing a combination of references and put MS at risk of violation of their obligation to fully transpose the EU regulation to national laws. This was clearly demonstrated with the missing reference of the Regulation No 1013/2006 when transposing illegal waste shipment. Although, the obligation to list all activities of underlying regulation was missing not only in case of illegal waste shipment, e.g. Ireland transposing offence of ozone-depleting substances failed to name all key obligations arising from the Regulation No 1005/2009, while Wallonia (Belgium) did not make any cross-reference to the aforementioned regulation (MiliEU, 2014, p. 32). Thus, both cases resulted in gaps in transposition.

This might look like a simple legislation process; nevertheless, it can destabilise the legislation during the time of transposition, postpone implementation deadlines and even cause legal loopholes if underlying regulation is not transposed or implemented incorrectly. As stated the ECD “<...> describes punishable conduct by several cross-references and thereby practically forces the national legislator to repeat these in the implementing act” (European Criminal Policy Initiative, 2011, p. 99). Moreover, during the period of implementation cross-references not only entail the risk of missing a combination of references surrendering the MS in violation of its obligation to fully transpose the directive (European Criminal Policy Initiative, 2011, p. 99), but as well failing to transpose all necessary *corpus delicti elements leaving the provision ineffective*.

Another issue brought by the cross-reference is the establishment of too generic criminal provisions in national legislations, e.g. Art. 270 of the Lithuanian Criminal Code (the Code). The dependence on the environmental and administrative law of this provision is set in its title “Infringement of Regulations Governing the Protection of the Environment or Use of Natural Resources or the Maintenance or Operation of Structures wherein Hazardous Substances are Used or Stored or wherein Potentially Hazardous Installations are Kept”¹². This provision became a double-edged issue on one hand covering almost all possible infringements of three different fields of environmental law causing harmful impact. On the other hand, opening the critique to the undesirable legal technique, the possibility of loopholes and accessory use of criminal law.

It is highly doubtful that cross-reference could be avoided in the environmental crime area. However, the matter should be approached carefully, maybe even by differentiating blanket provisions in accordance to the environmental area, e.g. instead of Art. 270 of the Code, creating two provisions – one for the protection of the use of the environment and use of natural resources, and another one for the handling and operation of hazardous substances.

Even though the ECD boldly introduces cross-reference, blanket provisions should be used with extreme caution to reduce the risk of missing a construction of a reference. Although the necessary elements of *corpus delicti* should be established in the criminal provisions to avoid incompliance with fundamental principles of the law.

Another point of critique of the ECD is the incompliance with the legality principle (the *lex certa* principle) through the use of “vague notions”, i.e. concepts which are not defined, and give rise to certain questions of interpretation (See: MiliEU, 2014, p. 38; Faure, 2010), e.g. “substantial damage”. Vague notions contribute to the critique on over-criminalisation, e.g. Art. 3 (d) of the ECD does not comply in terms of clarity, hence when transposing into national law it would not be clear what precisely is criminalised (Faure, 2010, p. 166). Broad notions of the Art. 3 of the ECD and vague definitions, such as *non-negligible quantity*, *substantial damage*, *significant deterioration* created implementation challenge and possible collision with the fundamental legal principles after the transposition.

¹² Author’s translation.

Although, the case law of Strasbourg and the ECJ indicated that further specification of what is meant by those vague notions would be preferable (Faure, 2010, p. 166), most of the MS transposed these flawed definitions in their national laws (European Network of Prosecutors for the Environment, 2018; Faure, 2010). For instance, all three Baltic countries used similar notions of substantial damage (as provided by the ECD), but only Latvia provided legal definition in its criminal code of the concept, whereas Estonia and Lithuania relies on the interpretation of the case law (MiliEU, 2014, p. 38). This might lead to the lack of clarity of what is criminalised and the question of whether a person can and should foresee the consequences which are not established by law.

Regardless of theoretical dispute, the use of vague notions as a legislative exception, not as a rule, was validated in 1998 by the ECHR (*Case of Goodwin v. The United Kingdom*. Application No. 17488/90, para. 33). Moreover, vague notions assist during implementation, as in certain cases only abstract terminology can be used for harmonisation purposes (Veršekys, 2013). Although, from a practical perspective, a certain level of vagueness in legislation allows diverse case law and prevents formalistic judgements.

Consequently, some legal scholars view vague notions as a method of legal technique that cannot be identified as legal loopholes or legislative mistakes (Veršekys, 2013, p. 49). The reasoning behind the use of evaluative terminology is based on a few aims: that criminal law provisions would be adaptive to changing life circumstances; to regulate the vast variety of factual circumstances; to ensure principle of justice and the aspect of the value dimension of criminal law (Veršekys, 2013, p. 49).

Observing these critique points of the ECD, it is fair to state that the current legislation on the protection of the environment through criminal law is imperfect. It lacks in the requirements of necessity and proportionality (Art. 3 c and d), brings incompliances with fundamental legal principles due to dependence on administrative laws, cross-referencing, and in some cases – vague notions. Moreover, not only does the ECD not meet legislative standards set by the EU institutions but predisposes implementation difficulties for MS through the critique points.

However, this critique should not be considered as a harmonisation failure, rather an opportunity to amend EU and national legislations to achieve legislation that could contribute to the fight against environmental crime, and the abolishment of safe havens or other legal benefits for illegal activities.

Conclusions

1. The existing legal framework of the ECD is established to secure MS compliance with EU's environmental regulations. The lack of the protection of the environment as a legal interest *per se* contributes to challenges in reaching approximation goals, e.g. coherence establishing minimum rules on the definition of the offences.
2. Choosing the legal framework for ECD under TFEU 83(1) is beneficial in several ways, despite the lack of a unified definition of "serious crime" in the EU criminal law. Establishing environmental crime as one of the Euro-crimes would determine the protection of the environment as a legal value, bring political consensus preventing MS from a "no priority" view, broaden the ECD scope, preventing current approximation challenges related to the minimal definitions, and enable a wider institutional approach. However, setting environmental crime as serious crime is highly unlikely due to the procedure requiring unanimous vote of the Council.
3. Present challenges in approximation can be attributed not only to the "insufficient" legal framework but to the ECD itself. Flaws within the Directive, such as the necessity of unlawfulness, criminalisation of administrative offences, and incompliance of the principle of last resort creates implementation hardships, making the approximation goals harder to reach.

4. Naturally, the implementation burdened with difficulties will hardly fall under priority for a legislator of a MS that does not prioritise environmental crimes, and in some way, it justifies the direct transposition of exclusive legislative techniques. This leads to a belief in a strong necessity for prioritisation and rise of the awareness of the negative impacts of environmental crime.

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Challenges in Harmonising and Implementing the Environmental Crime Directive

Ieva Marija Ragaišytė

(Vilnius University)

S u m m a r y

This article analyses how the harmonisation framework under the TFEU might have impacted approximation of the Directive 2008/99/EC on the protection of the environment through criminal law and possible difficulties implementing the document in national legislation. Bearing in mind that the Directive faces possible amendments with the establishment of legal framework of approximation under Art. 83(2) of the TFEU the article agrees with the suggestion of the European Parliament that the legitimate purpose and the seriousness of environmental crimes require to establish this crime area as serious under the Art. 83(1) of the TFEU. Inadequately chosen legitimate purpose and the lack of the prioritisation of environmental crime in the Member States result in harmonisation and implementation problems related to issues of the definitions of the offences, their differentiation and compliance with fundamental principles of the law.

Nusikaltimų aplinkai direktyvos harmonizavimo ir įgyvendinimo iššūkiai

Ieva Marija Ragaišytė

(Vilniaus universitetas)

S a n t r a u k a

Šiame straipsnyje analizuojama, kaip harmonizavimo pagrindas pagal SESV galėjo paveikti Direktyvos 2008/99/EB dėl aplinkos apsaugos pagal baudžiamąją teisę derinimą ir kokius šio dokumento įgyvendinimo sunkumus tai galėjo lemti. Atsižvelgiant į galimus būsimus Direktyvos pakeitimus, harmonizavimo pagrindą įtvirtinant pagal SESV 83 straipsnio 2 dalį, straipsnyje sutinkama su Europos Parlamento siūlymu, kad teisėtas nusikaltimų aplinkai tikslas bei šių nusikaltimų sunkumas reikalauja, kad ši nusikaltimų sritis būtų pripažinta sunkia pagal Lisabonos sutarties 83 straipsnio 1 dalį. Netinkamas harmonizavimo pagrindo (teisėto tikslo) parinkimas ir nusikaltimų aplinkai prioretizavimo trukumas valstybėse lemia derinimo ir įgyvendinimo problemas, susijusias su nusikalstamų veikų apibrėžimų, jų diferenciacija ir suderinamumu su pagrindiniais teisės principais.

Ieva Marija Ragaišytė yra Vilniaus universiteto Teisės fakulteto Baudžiamosios justicijos katedros doktorantė ir jaunesnioji asistentė. Pagrindinės mokslinių interesų ir tyrimų sritys – ES ir nacionalinė baudžiamoji teisė, materialioji baudžiamoji teisė, nusikalstamos veikos aplinkai.

Ieva Marija Ragaišytė is a PhD Student and Junior Assistant at the Department of Criminal Justice, Faculty of Law, Vilnius University. Her main areas of scientific interest and research include EU and national criminal law, substantial criminal law, and environmental crime.