

Opinion of the European Economic and Social Committee on the proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC

(COM(2021) 851 *final* — 2021/0422 (COD))

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Referral	European Commission, 2.5.2022
Legal basis	Article 83(2) of the Treaty on the Functioning of the European Union
Section responsible	Section for Agriculture, Rural Development and the Environment
Adopted in section	8.3.2022
Adopted at plenary	23.3.2022
Plenary session No	568
Outcome of vote	
(for/against/abstentions)	215/3/6

1. Conclusions and recommendations

1.1. The EESC welcomes the Commission's proposal to review the Directive on the protection of the environment through criminal law and to replace Directive 2008/99/EC (ECD), as it addresses the main deficiencies of the current Directive and aims to tackle the rise in environmental criminal offences in Europe.

1.2. The EESC points out that the proposal retains its previous scope via a list of offences and lacks a definition of an autonomous general offence of harming or endangering the environment. The EESC believes that the list of offences should be extended to as many types of crime as possible so as to avoid having to revise the ECD again shortly after its entry into force and to prevent particular environmental criminal activity from going unpunished.

1.3. The EESC recognises the urgent need to improve the implementation of environmental criminal law in Europe and acknowledges that an ECD with clearer provisions would contribute to better implementation. The EESC believes that the proposed elements to take into account when assessing whether damage is substantial are unsatisfactory, that further guidance may be needed and that a self-standing definition of 'substantial damage' would be clearer.

1.4. The EESC welcomes the reference to 'ecocide' in the recitals. However, the EESC believes that it would be appropriate to include this term in the operational part of the Directive.

1.5. The EESC endorses the inclusion of minimum standards for setting maximum limits for penalties for private persons and maximum limits for sanctions for legal persons. However, the EESC believes that, in order for sanctions to be truly effective, proportionate and dissuasive, their limits should be substantially increased.

1.6. The EESC encourages the Commission to assess the possibility of extending the jurisdiction of the European Public Prosecutor's Office to environmental crimes, thereby creating a Green European Public Prosecutor's Office that would be able to support the fight against environmental crimes with known links to organised crime.

1.7. The EESC stresses the need for reinforcement of the enforcement chain and implementation of European environmental criminal law. It reiterates its recommendation in Information Report NAT/767 on *Evaluation on Environmental Crime Directive* ⁽¹⁾ for EU Member States to set up specialised police forces, prosecutors, judges and courts in the area of environmental crime. The EESC believes that the ECD can only be effective if coupled with adequate resources and training at Member State level.

⁽¹⁾ NAT/767 — Evaluation on Environmental Crime Directive (information report).

2. Background

2.1. Environmental crime is the fourth most lucrative crime category globally and has been recorded by Eurojust as increasing in the European Union ⁽²⁾. While cross-border convictions for environmental crime have not grown substantially, the rate of environmental crimes committed in Europe has.

2.2. On 15 December 2021, the European Commission published its Proposal for a revision of the Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC.

2.3. The objective of the Directive is to provide common minimum rules to criminalise environmental crime by addressing the shortcomings of the current Directive 2008/99/EC.

2.4. The Commission published the evaluation of Directive 2008/99/EC in 2020 ⁽³⁾. This evaluation identified significant deficiencies related to enforcement on the ground, the limitation of scope, the definition of criminal offences, the levels of sanctions, lack of clarity of legal terminology, the lack of cross-border cooperation, the system of liability for legal persons, and other areas of the Directive.

2.5. The proposed Directive aims to improve the effectiveness of investigations and prosecutions by updating the scope of the Directive and by clarifying or eliminating vague terms used in the definitions of environmental crime, to ensure effective, dissuasive and proportionate sanction types and levels for environmental crimes, to foster cross-border investigation and prosecution, to improve informed decision-making on environmental crime through improved collection and dissemination of statistical data, and to improve the operational effectiveness of national enforcement chains to foster investigation, prosecution and sanctioning.

2.6. The proposal is based on Article 83(2) TFEU which, unlike the previous legal basis from before the entry into force of the Lisbon Treaty, is more strongly anchored in the cross-border nature of environmental crime and grants the EU the competence to establish minimum rules with regard to the definition of criminal offences and sanctions.

2.7. The objective of this proposal is therefore to harmonise the use of criminal law as a last resort tool to enforce the entire EU environmental law *acquis*, including the European Green Deal, while respecting the EU's objectives of sustainable development, better environmental quality and the polluter pays principle.

3. General comments

3.1. The EESC welcomes the Commission's proposal to review the Directive on the protection of the environment through criminal law and replace Directive 2008/99/EC, as it addresses the main deficiencies of the current Directive and aims to tackle the rise in environmental criminal offences in Europe.

3.2. The EESC emphasises the European Union's international leadership role in the fight against global climate change and the protection of the environment. The EESC is of the opinion that the fight against environmental crime and organised environmental crime at European level is a crucial element of this leadership role and emphasises the need to increase cooperation with EU neighbourhood countries and other third countries.

3.3. The EESC believes that the revision is a welcome step towards addressing the rise in environmental crime and organised environmental crime in Europe. The Committee appreciates the decision to fully replace the dysfunctional old Environmental Crime Directive rather than amend it.

3.4. The EESC recognises the urgent need to improve implementation of environmental criminal law in Europe and acknowledges that an ECD with clearer provisions will contribute to better implementation. Furthermore, the EESC strongly supports the concrete implementation obligations of national strategies, of reporting duties and of minimum requirements for resources, training and investigative tools.

3.5. The EESC welcomes the proposed extension of the ECD's scope. The Committee notes that the proposed revised definition of 'unlawful' eliminates a major cause of ambiguity and the proposed significant extension of the list of offences allows for much better protection of the EU environmental *acquis*.

⁽²⁾ Report on Eurojust's Casework on Environmental Crime — January 2021.

⁽³⁾ SWD(2020) 259 final of 28 October 2020.

3.6. The EESC points out that the proposal lacks a definition of an autonomous general offence of harming or endangering the environment. While significantly extending the scope of the ECD, the proposal still links the scope to those of several other branches of law and to secondary EU legislation, therefore making it dependent, inter alia, on administrative law and preventing it from being future-proof. The EESC notes that the proposed exclusive list of offences may require future legislative procedures in order to be updated.

3.7. The EESC welcomes the reference to ecocide in the recitals. However, the EESC believes that it would be appropriate to include ecocide in the operational part of the Directive. Furthermore, the EESC emphasises that any reference to ecocide needs to adhere to the wording proposed by the Independent Expert Panel for the Legal Definition of Ecocide in June 2021 ⁽⁴⁾. The EESC recommends that ecocide be referred to as unlawful or wanton acts committed in the full knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts. The EESC would welcome a mention of armed conflicts in the recitals and notes that those are practically always by definition ecocides. The EESC regrets that none of the suggested measures and rulings have been or are applicable to those cases.

3.8. The Committee laid out its recommendations for the revision of the Directive in its Information Report NAT/767 on *Evaluation on the Environmental Crime Directive*. In light of the published proposal, the EESC reiterates its past recommendations of using the ECD revision to create a general offence of endangering the environment, to establish a permanent dialogue between public authorities and civil society organisations and to extend the scope of environmental criminal law to cover environmental cyber-criminality.

3.9. Several investigations have shown that there is increasing use of environmental crimes as a means or link to corrupt behaviour or as a predicate offence for money laundering. As more resources from the EU budget are allocated to the green transition, we expect also to see an increased risk of such criminal behaviours associated with the implementation of such funds. While it is true that waste management is one of the high-risk sectors, many other areas that impact environment protection can be affected by corruption, money laundering or fraud. The EESC welcomes the inclusion of these risks in the recitals but draws attention to the need for more resources allocated to the identification and investigation of such offences, as well as in the training of law enforcement or access of civil society and journalists to information that can expose such behaviour.

3.10. In its Information Report NAT/824 on *Environmental protection as a prerequisite for respect for fundamental rights* ⁽⁵⁾, the Committee emphasised the urgent need for the EU to put forward a proposal on a Sustainable Corporate Governance Directive and an EU anti-SLAPP (Strategic Lawsuits Against Public Participation) law to protect environmental defenders, journalists, and whistle-blowers. The EESC reiterates these recommendations and welcomes the inclusion of a provision on the protection of persons who report environmental offences or assist the investigation.

3.11. The EESC welcomes the harmonisation of minimum standards for penalties and sanctions as well as the extension of criminal conduct to include serious negligence and endangerment crime, the inclusion of aggravating and mitigating circumstances, and the reference to additional penalties and sanctions.

3.12. The EESC supports the Parliament's call in report 2020/2027(INI) on the liability of companies for environmental damage and encourages the Commission to assess the possibility of extending the jurisdiction of the European Public Prosecutor's Office to environmental crimes, thereby creating a Green European Public Prosecutor's Office that would be able to support the fight against environmental crimes with known links to organised crime. The EESC furthermore encourages the Commission to assess the possibility of extending the European Anti-Fraud Office's mandate to allow it to conduct administrative investigations of environmental offences.

4. Specific comments

4.1. Penalties and sanctions

4.1.1. The EESC endorses the inclusion of minimum standards for setting maximum limits for penalties for private persons and maximum limits for sanctions for legal persons. Additionally, the EESC appreciates the recognition of the need to allow for simultaneous administrative and criminal fines as well as freezing and confiscation measures, respecting the

⁽⁴⁾ Stop Ecocide Foundation, June 2021, Independent Expert Panel for the Legal Definition of Ecocide, commentary and core text.

⁽⁵⁾ NAT/824 — Environmental protection as a prerequisite for respect for fundamental rights (information report).

basic principle of not facing prosecution twice for the same offence. However, the EESC believes that, in order for sanctions to be truly effective, proportionate and dissuasive, their limits should be increased substantially. Setting sanction levels for breaches of environmental law lower than those in other areas of EU law, for example competition law, sends the wrong signal about the priority of the EU environmental law *acquis*, including the European Green Deal and the 2030 climate targets.

4.2. *Environmental offences*

4.2.1. The EESC supports the Parliament's call, in its report 2020/2027(INI) on the liability of companies for environmental damage, for the Commission to evaluate the possibility of including environmental crimes among the ten exhaustive categories of offences in Article 83(1) TFEU ⁽⁶⁾.

4.2.2. The EESC welcomes the extension of the list of offences in the ECD proposal. In particular, it welcomes the addition of breaches to Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

4.2.3. The EESC believes that the list of offences should be extended to as many types of crime as possible so as to prevent having to revise the ECD again shortly after its coming into force and to prevent particular environmental criminal activity from remaining unpunished. The EESC encourages the co-legislators to propose any expansions to the list of conduct that constitutes a criminal offence when it is unlawful and committed intentionally or with serious negligence.

4.3. *Definition of substantial damage*

4.3.1. Considering that the ambiguity of the term 'substantial damage' in the old ECD had been identified as a major obstacle to effective investigations and prosecutions, the EESC believes that the proposed elements to take into account when assessing whether damage is substantial are unsatisfactory, that further guidance may be needed and that a self-standing definition of 'substantial damage' would be clearer. This could substantially contribute to the much-needed full internal harmonisation of definitions, parameters and understandings within the ECD.

4.4. *Criminal liability for legal persons*

4.4.1. The EESC recognises that the regulation of company and parent-company liability varies significantly between the legal systems of the Member States but, nevertheless, regrets that the Commission's proposal does not review the original wording on liability for legal persons to strive for more harmonisation.

4.4.2. The EESC emphasises the Parliament's considerations, in its report 2020/2027(INI) on the liability of companies for environmental damage, that in accordance with the polluter pays principle, companies should bear the full costs of the environmental harm they have directly caused in order to incentivise them to internalise environmental externalities and avoid externalising the costs.

4.4.3. The EESC is concerned at the explicit exclusion of liability for State authorities and believes that there should be no obstacle to prosecuting environmental offenders, especially when permits and licences are obtained through the corruption of public authorities.

4.5. *Interaction with the public*

4.5.1. The EESC welcomes the inclusion of a provision on the protection of whistle-blowers and persons who report environmental offences or assist the investigation. The Committee stresses the role that the general public and civil society organisations play in detecting and reporting environmental crimes and emphasises the need for public authorities to strengthen the protection of and dialogue with environmental defenders. The Committee emphasises that the protection granted to persons who report environmental offences or assist the investigation needs to extend to natural and legal persons.

⁽⁶⁾ Parliament report 2020/2027(INI).

4.5.2. The EESC supports the attention given by the proposal to the protection of persons who report environmental offences or who assist with investigations. However, in recent years, not only whistle-blowers but also environmental activists and investigative journalists reporting on environmental crimes have been the victims of serious pressure or even violence. Thus, we call on the European Commission to make sure that adequate protection is put in place in all Member States for whistle-blowers, as well as for those that might help them with bringing their reporting to the public, such as activists or journalists.

4.5.3. The EESC welcomes the recognition of the right for members of the public concerned to participate in proceedings. The Committee emphasises the importance of applying and interpreting this right in light of Article 2(5) of the Aarhus Convention ⁽⁷⁾. Furthermore, seeing as the environment can neither defend itself nor represent itself in court, the EESC stresses the importance of providing for adequate public access to justice as defined in Article 9(3) of the Aarhus Convention.

4.5.4. The EESC encourages the European institutions and Member States also to increase their support for environmental defenders outside the European Union, via diplomatic, United Nations Economic Commission for Europe (UNECE) and civil society channels.

4.5.5. The EESC recommends that civil society be involved in the implementation of the new ECD.

4.5.6. The EESC reiterates that that the 'Enforcement chain' is only the second half of the entire 'Supply chain' of the environmental crime phenomenon and its treatment (see: offences committed-discovered-reported-prosecuted-sanctioned). Studies prior to the EESC's NAT/767 Information Report showed huge cascading gaps in the first half of the chain, mainly due to society's varying knowledge and perceptions of environmental offences. Presenting the issue to the whole of society and raising awareness of it is key to developing social responsibility, the lack of which undermines the efficiency of the enforcement chain. Training and public communication is needed where the contribution of civil society is essential.

4.6. *Enforcement chain*

4.6.1. The EESC welcomes the provisions on prevention, resources, training, investigative tools, cross-border cooperation and national strategies. The Committee reiterates its recommendation in Information Report NAT/767 for EU Member States to set up specialised police forces, prosecutors, judges and courts in the area of environmental crime. As identified during the evaluation of the current ECD, in stakeholder consultations and by academia, the low levels of expertise and resources available to combat environmental crime and organised environmental crime in the Member States are posing major obstacles to detection, prosecution and enforcement. The EESC believes that the ECD can only be effective if coupled with adequate resources and training at Member State level. The EESC considers that the proposed ECD national strategies are a positive first step in the right direction.

4.6.2. The EESC considers that the inclusion of environmental information, including the commission of crimes by legal persons, in companies' annual non-financial part of the reporting could be an important component of Corporate Social Responsibility.

4.7. *Training and education*

4.7.1. The EESC highlights the need for education to include both training for national officials and awareness-raising among the public. The EESC welcomes the Commission's communication on stepping up the fight against environmental crime and calls on the Commission to give further support to Member States by providing professional networks, developing new detection and enforcement tools, and revising training programmes for judges and prosecutors. However, the EESC believes that training and education schemes should not apply exclusively to national officials' involvement in the enforcement chain but should be extended to a wider audience.

4.8. *Reporting of data and crime statistics*

4.8.1. The EESC welcomes the envisaged data collection and reporting duties. However, it highlights the Eurojust report, which notes and demonstrates that the lack of a universally agreed upon definition of an environmental crime presents challenges to the collection of meaningful data and crime statistics ⁽⁸⁾.

⁽⁷⁾ United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

⁽⁸⁾ Report on Eurojust's Casework on Environmental Crime — January 2021.

4.8.2. The EESC welcomes the Commission's commitment to issuing a biennial report on the data transmitted by the Member States and points out that the annual national crime statistics should inform and reinforce the biennial Environmental Implementation Review.

5. Transposition and financial implementation

5.1. Environmental crimes damage the environment and health first and foremost, but they also distort competition and circularity, deplete public resources through externalisation of reinstatement and remediation costs and hurt taxpayers' pockets by circumventing the polluter pays principle. Without adequate enforcement and sanctioning for damaging the environment, including through criminal law, environmental crimes undermine the effectiveness of the entire European Green Deal. The EESC therefore believes that the resources needed for the transposition and implementation of the ECD will be offset by its positive effect on the EU's and the Member States' public resources.

6. Regionality and subsidiarity

6.1. The EESC notes that the sources of environmental non-compliance are practically always local/municipal or small-/sub-regional ones, even if their impact can be widespread, e.g. pollution sources are not only specific, intensive or dispersed but also additive and cumulative.

6.2. The discovery and reporting steps should be reinforced and also follow a place-based approach. Technical equipment, human and skill resources, functional responsibility, budget and financing should be attributed to and mirror this regional challenge.

Brussels, 23 March 2022.

The President
of the European Economic and Social Committee
Christa SCHWENG
