

EVALUATION OF IMPLEMENTATION OF THE ENVIRONMENTAL CRIME DIRECTIVE IN RELATION TO WILDLIFE CRIME

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Abstract: *Wildlife crime is one of main threats to biodiversity. It is often committed by organized criminal groups and generates them significant sums of money. Despite these facts, it remains underestimated by authorities that are responsible for enforcement of rules on environmental crimes. Efforts to adopt a common international legal framework within the Council of Europe have failed, also the EU's Environmental Crime Directive is being implemented in a very limited way. On the basis of various studies, the article provides evaluation of this implementation, describes main shortcomings and indicates also several recommendations for further steps.*

Keywords: *environmental justice, wildlife crime, nature conservation, implementation*

I. INTRODUCTION

Ten years ago has been adopted the Directive 2008/99/EC on the protection of the environment through criminal law (Environmental Crime Directive, ECD).¹ Although it was not a first piece of EU legislation in this branch of law² and individual Member States had their national legal regimes of environmental protection by means of criminal law, *experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment.*³ Therefore, the outspoken ambition of the newly adopted Directive has been *to establish measures relating to criminal law in order to protect the environment more effectively.*⁴

In the European Union, harmonisation of criminal law has long represented an area of particular political sensitivity for Member States and is widely considered to be an area at the heart of national sovereignty. After a failed Commission proposal for a (first pillar) Directive dealing with environmental crime from 2001,⁵ a (third pillar) Framework Decision was passed by the Council in 2003.⁶ In a controversial judgement, however, the Court of Justice of the European Union (CJEU) in 2005 held that, despite this, Article 192 TFEU constituted the proper legal basis for criminal penalties and annulled the Framework Deci-

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¹ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. OJ 2008 L 328, p. 28.

² Three years earlier has been adopted the Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements. OJ 2005 L 255, p. 11.

³ Recital 3 of Preamble of the ECD.

⁴ Article 1 of the ECD.

⁵ Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, COM(2001)139.

⁶ Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law. OJ 2003 L 029, p. 55.

sion.⁷ In its subsequent judgement,⁸ the CJEU followed this by emphasising that determination of the type and level of the criminal penalties to be applied did not fall within the Community's sphere of competence. As the Commission had, when the judgement was delivered, already proposed a Directive containing detailed provisions on precisely that, it was forced to remove this provision from the proposal.⁹ Reflecting this development and overcoming the obstacles, the ECD has been finally approved in November 2008.

Purpose of this article is to provide evaluation of implementation of the ECD in time of its tenth anniversary, while focusing in depth on the wildlife crime as one of topics covered by the Directive. It is based firstly on the analysis and evaluation of text of the Directive and its relation to other significant pieces of legislation on nature conservation, as a prerequisite of meaningful implementation. And secondly, it provides the analysis and evaluation of practical implementation itself, as recorded in numerous reports provided by criminal authorities – police, prosecutors, and judges, and their European associations. While doing so, also relevant results of academic research have been taken into consideration. And it takes into account also an international perspective of protection of environment through the criminal law and another anniversary, because it was exactly twenty years ago, in November 1998, when the Convention on the Protection of Environment through Criminal Law¹⁰ has been adopted under auspices of the Council of Europe.

II. ENVIRONMENTAL CRIME IN WIDER PERSPECTIVE

Generally, law is very much linked to the idea of justice which presents a substantive measure of human actions and interactions. However, law is not a privileged domain of justice and law does not give any absolute and clear justice *per se*. There are other normative orders in a society that have their own justice. We can speak not only about legal justice, but also about moral justice, social justice, political justice, economic justice, transcendental justice, communitarian justice and some other kinds of justice.¹¹ Since late 1970s there has been developed also the discourse on environmental justice. That includes wide scope of issues such as, *inter alia*, dimensions of justice in environmental law, international justice and environmental law, gender and environmental law and justice, public participation and the challenges of environmental justice, competing narratives of justice in North–South environmental relations, or distributive justice and procedural fairness.¹² And also, the boundaries of environmental justice can be expanded to the criminal

⁷ C-176/03 Commission v Council, ECLI:EU:C:2005:542.

⁸ C-440/05 Commission v Council, ECLI:EU:C:2007:625. Action for annulment of the Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.

⁹ KINGSTON, S., HEYVAERT, V., ČAVOŠKI, A. *European Environmental Law*. Cambridge University Press, 2017, pp. 213–214.

¹⁰ Treaty No. 172, Strasbourg, 4 November 1998.

¹¹ VEČEŘA, M. Law as a Form of Justice. In: D. Pavelková – J. Strouhal – M. Paseková (eds.). *Advances in Economics, Risk Management, Political and Law Science*. Proceedings of the 1st WSEAS International Conference on Economics, Political and Law Science. Zlin, Czech Republic, September 20–22, 2012. WSEAS Press, 2012, pp. 148–152.

¹² EBBESSON, J., OKOWA, P. (eds.). *Environmental Law and Justice in Context*. Cambridge: Cambridge University Press, 2009.

law.¹³ However, in the field of international environmental law, the cases of treaties which mandate State parties to punish environmental crimes which fall within their scope of application are still limited. Among the existing treaties which belong to this category, we could mention the Basel Convention on hazardous waste,¹⁴ the CITES Convention on endangered species,¹⁵ and the MARPOL Conventions on oil pollution.¹⁶ Other treaties encompassing clauses which oblige the Parties to enact criminal legislation aimed at sanctioning eco-crimes should be concluded and existing multilateral environmental agreements should be revised or amended to this end.¹⁷

Since 1980s, and then mainly during 1990s, the environmental criminal law has been developed also in national legal frameworks of European countries. Germany introduced such provisions into Criminal Code in 1980, followed by the Netherlands (1989), Finland (1995), Portugal (1995) and Spain (1995). In other countries, criminal provisions were incorporated into a code or special environmental law, aiming at the integration of environmental law. That was case of UK (1990), Denmark (1991), Ireland (1992) and Sweden (1998).¹⁸ On national level, the tool of protection of environment by criminal law is used in numerous jurisdictions and may be examined from various aspects. These are, among many others, utilisation of doctrine of public welfare and its relation to prosecution of unintended acts under a regulatory statute with minimal *mens rea* requirement, as analysed by Alex Arensberg on the example of the U.S. Migratory Birds Treaty Act,¹⁹ empirical measurements of effectivity of criminal legislation, as provided by Christian Almer and Timo Goeschl on example of the German Penal Code,²⁰ or in depth analysis and comparison of environmental crime regulations in particular countries, such as Brazil and the USA by Robert Blomquist,²¹ or China by Michael Faure and Hao Zhang.²²

It was also in 1990s, in November 1998, when the Council of Europe has adopted the Convention on the Protection of Environment through Criminal Law. According to its Ar-

¹³ HEAGERTY, M. F. Crime and the Environment – Expanding the Boundaries of Environmental Justice. *Tulane Environmental Law Journal*. 2010, Vol. 23, pp. 517–535.

¹⁴ Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1992.

¹⁵ Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973.

¹⁶ International Convention for the Prevention of Pollution from Ships, 1973, modified by the Protocol of 1978.

¹⁷ MARCHISIO, S. Environmental Crimes and Violations of Human Rights. Speech at conference Environmental crime - Current and Emerging Threats. Food and Agriculture Organisation, 29 October 2012. In: *United Nations Interregional Crime and Justice Research Institute* [online]. [2019-01-30]. Available at: <http://www.unicri.it/topics/environmental/conference/Thematic_Debate_-_Sergio_Marchisio.pdf>. See p. 2.

¹⁸ FAURE, M. G. The Development of Environmental Criminal Law in the EU and its Member States. *Review of European Community & International Environmental Law*. 2017, Vol. 26, No. 2, p. 142.

¹⁹ ARENSBERG, A. Are Migratory Birds Extending Environmental Criminal Liability? *Ecology Law Quarterly*. 2011, Vol. 38, pp. 427–448.

²⁰ ALMER, C., GOESCHL, T. Environmental Crime and Punishment: Empirical Evidence from the German Penal Code. *Land Economics*. 2010, Vol. 86, pp. 707–726.

²¹ BLOMQUIST, R. F. The Logic and Limits of Environmental Criminal Law in the Global Setting: Brazil and the United States - Comparisons, Contrasts, and Questions in Search of a Robust Theory. *Tulane Environmental Law Journal*. 2011, Vol. 25, pp. 83–98.

²² FAURE, M. G., ZHANG, H. Environmental Criminal Law in China: A Critical Analysis. *Environmental Law Reporter*. 2011, Vol. 4, pp. 24–42.

Article 2 (Intentional offences) and Article 3 (Negligent offences), each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law the enumerated acts. Those are for example discharge of ionising radiation which causes death or serious injury to any person, unlawful disposal, treatment, storage, transport, export or import of hazardous waste, 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*. Article 4 (Other criminal offences or administrative offences) then refers not only to criminal but potentially also to administrative liability in regard to *unlawful causing of changes detrimental to natural components of a national park, nature reserve, water conservation area or other protected areas, or unlawful possession, taking, damaging, killing or trading of or in protected wild flora and fauna species*. As for sanctions, according to Article 6 (Sanctions for environmental offences) they shall include imprisonment and pecuniary sanctions and may include reinstatement of the environment. The Convention refers also to liability of legal persons in Article 9 (Corporate liability), requiring each Party to 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 Articles 2 or 3 has been committed by their organs or by members thereof or by another representative. However, this treaty has been signed only by 13 countries (the last one was Ukraine in 2006) and ratified only by Estonia in 2002, and therefore it has not entered in force because for this step, at least 3 ratifications would be needed.²³

III. ENVIRONMENTAL CRIME DIRECTIVE AND ITS RELATION TO OTHER LEGISLATION ON NATURE CONSERVATION

Similarly, as the Council of Europe's Convention, also the EU's Environmental Crime Directive requires activities listed in Article 3 – such as discharge, emission or introduction of ionising radiation, or collection, transport, recovery or disposal of waste 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 – to be considered criminal offences. It shall be ensured that also inciting, aiding and abetting the intentional conduct described in Article 3 is punishable as a criminal offence (Article 4), and that the offences are punishable by effective, proportionate and dissuasive criminal penalties (Article 5). Articles 6 and 7 then refer also to the liability of legal persons.

While focusing on protection of nature, Article 3 ECD regulates three types of behaviour that are considered as wildlife crime. According to letter (f), it is *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*. Letter (g) defines as

²³ Details of Treaty No. 172. In: *Council of Europe* [online]. [2019-01-30]. Available at: <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/172>>.

a crime *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*. And finally, letter (h) refers to *any conduct which causes the significant deterioration of a habitat within a protected site*. As defined in Article 2 of the Directive, *protected wild fauna and flora species* are, for the purposes of Article 3(f), those listed in Annex IV to the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive, HD),²⁴ and those listed in Annex I to, and referred to in Article 4(2) of, the Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Birds Directive, BD).²⁵ And for the purposes of Article 3(g) ECD, protected wild fauna and flora species are those listed in Annex A or B to Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (CITES Regulation).²⁶ Further, according to the Article 2 ECD, the term *habitat within a protected site* means any habitat of species for which an area is classified as a special protection area pursuant to Article 4(1) or (2) of the Birds Directive, or any natural habitat or a habitat of species for which a site is designated as a special area of conservation pursuant to Article 4(4) of the Habitats Directive.

Scope of the ECD defined in this manner contains several gaps and inconsistencies. To describe them, it is needed to briefly remind the purpose and system of the Birds and Habitats Directives, two cornerstones of European legislation on nature conservation. First of all, both these directives distinguish between protection of sites (Natura 2000) on one hand, and protection of species (individuals and populations when located anywhere, not only in protected sites) on the other hand. Each of these approaches has its rules and specifics on scope – different lists of species and natural habitats that should be objects of protection, different procedures for establishment of protection measures or granting exceptions, different rules related to administrative tasks such as reporting to EU bodies, etc. But the ECD is mixing them, and not very reasonably.

When Article 2 ECD, while defining the *protected wild fauna and flora species* for the purpose of application of its Article 3(f), refers to Annex IV HD, and to Annex I and Article 4(2) BD, it is setting criminal liability in regard to strictly protected species according to HD (Articles 12-16 and Annex IV HD are legal basis for this tool) but in regard to birds, it refers to species which require designation of specially protected areas in the frame of Natura 2000. But then it means that the animal and plant species listed in Annex II HD, which also require designation of Natura 2000 sites, are excluded from the scope of ECD. Potential argument that many species are included in both annexes II and IV of the HD is not sufficient, simply because there are still many differences be-

²⁴ OJ 1992 L 206, p. 7.

²⁵ OJ 1979 L 103, p. 1. Replaced by the Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ 2010 L 20, 26/01/2010, p. 7.

²⁶ OJ 1997 L 61, p. 1.

tween those two lists.²⁷ And excluded from the applicability of ECD are also all naturally occurring bird species which do not require designation of Natura 2000 sites but are generally protected as individuals according to Article 5 BD. However, in this regard, the construction set by the ECD seems reasonable because it would be probably too strict to protect all bird species by criminal law. *Protected wild fauna and flora species* are defined also in relation to Article 3(g) ECD which requires criminalization of illegal trade in specimen of protected species. Here, Article 2 ECD refers only to species listed in Annexes A and B of the CITES Regulation. Then, there is no link to restrictions on trade in specimens of strictly protected species according to Articles 12 and 13 HD, or eventually of bird species according to Article 6 BD, although these provision are also relevant for regulation of wildlife trade.

Another aspect which may cause problems in implementation of the ECD in relation to wildlife crime is the reference to *negligible impact on the conservation status of the species* as mentioned in Article 3 ECD under letters (f) and (g). What does it mean and how to assess it? The term *conservation status* is legally defined by Article 1 of the Habitats Directive for species and also for natural habitats. The definitions are quite complex and contain also reference to criteria for evaluation whether the conservation status is seen as *favourable*.²⁸ This precise approach may probably serve well also as an inspiration for explanation and evaluation of ‘favourable environment’, general legal term often used in constitutional texts.²⁹ Monitoring, evaluation and reporting of conservation status of species and habitats is a core activity within implementation of the HD which shall be conducted by Member States. But in regard to birds, text of the Birds Directive doesn’t contain the term conservation status but is it referring to *level of populations* which is also subject of scientific and administrative work related to monitoring, evaluation and reporting. The results are reflected for both nature directives in reports published by the European Environmental Agency (EEA) every six years.³⁰ And then, the results show status and trends of bird populations, conservation status of natural habitats and other species, additionally also *pressures and threats*, and data quality and completeness. But there is nothing like an assessment of impacts on conservation status, neither significant or negligible. As for Article 3 (g) ECD and its link to the CITES Regulation, the Regulation also refers to conservation status in its Articles 3 to 5. It requires competent authorities to evaluate if

²⁷ For the 447 animal species listed in EU25 in 2007, the overlap between Annexes II and IV HD was 45 %. See Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, Final version, February 2007, p. 14.

²⁸ *Conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2. The conservation status will be taken as ‘favourable’ when: - population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and - the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and - there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;*

²⁹ As discussed e.g. by Hana Müllerová in regard to Article 35 of the Czech Charter of Human Rights and Freedoms; see MÜLLEROVÁ, H. Right to Environment, Balancing of Competing Interests and Proportionality. *The Lawyer Quarterly*. 2018, Vol. 8, No. 2, p. 138.

³⁰ The latest report published as State of nature in the EU: Results from reporting under the nature directives 2007 – 2012, EEA Technical Report No 2/2015.

an introduction, export or re-export may not have *harmful effect* on the conservation status of the species listed in Annex A and B of the Regulation, or for eventual inclusion in one of the Appendices to the CITES Convention. Then, similarly as in case of the BD and HD, the question is who and how assess the negligible impact on the conservation status of the CITES species, as required by the ECD.

When we are talking about an assessment of impacts, in environmental law it is linked to the procedures on environmental impact assessment (EIA) and strategic environmental assessment (SEA). The Habitats Directive has introduced another type, the appropriate assessment (AA) of plans and projects. Defined in Article 6(3) and (4) of the HD,³¹ it is considered as a main tool of protection of Natura 2000 sites. Beside the AA, Article 6(2) HD refers also to other protection measures, specifically the avoidance of *deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated*. Coming back to the ECD and its Article 3(h) which requires criminalization of *any conduct which causes the significant deterioration of a habitat within a protected site*, we may see that two aspects mentioned in Article 6(2) to (4) HD and very much used in protection of Natura 2000 sites - disturbance of species and appropriate assessment - are missing. Unfortunately. Because in practice both could be also relevant for criminal liability of natural and legal persons.

IV. IMPLEMENTATION OF THE ENVIRONMENTAL CRIME DIRECTIVE IN RELATION TO WILDLIFE CRIME

In 2011 has been published a comprehensive report on illegal killing, trapping and trade of birds.³² It concludes that the Birds Directive is rather well implemented in Member States, but enforcement remains an issue, especially in regard to illegal killing, trapping and trade of birds, which entails a number of inherent challenges for detection, prosecution and punishment. Common work by bird protection NGOs and hunters' associations, which have a common interest in reducing the issue, must continue to be promoted. Awareness-raising and training of all interested parties, including the public, hunters, farmers, fishermen, rural inhabitants and tourists, and also all links of the enforcement chain, including police officers, prosecutors and judges have to be increased.³³ However, the report pays no attention to role of the ECD.

³¹ *Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. ... If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. ...*

³² BIO INTELLIGENCE SERVICE. *Stocktaking of the main problems and review of national enforcement mechanisms for tackling illegal killing, trapping and trade of birds in the EU – Final Report*. In: *European Commission* [online]. 30. 12. 2011 [2019-01-30]. Available at: <http://ec.europa.eu/environment/pubs/pdf/BIO_BirdsIllegalKilling.pdf>.

³³ BIO INTELLIGENCE SERVICE. *Stocktaking of the main problems and review of national enforcement mechanisms for tackling illegal killing, trapping and trade of birds in the EU – Final Report*. p. 173.

In 2014 was finalized Strategic Project on Environmental Crime implemented by Eurojust, including the final report.³⁴ The project team has analysed the main issues in the prosecution and investigation of environmental crime, with a special focus on three topics: trafficking in endangered species, illegal trafficking in waste and surface water pollution. As confirmed by Michele Coninx, President of Eurojust, environmental crime is a serious crime, often committed by organised crime groups, that affects society as a whole, as its impact is felt not only in the health of humans and animals but also in the quality of air, soil and water. But despite the potentially grave consequences of environmental crime, particularly in the areas of illegal trafficking of waste and trafficking of endangered species, its seriousness is still often underestimated at national and international level.³⁵

Numerous facts and data are provided by Report on Environmental Crime which was prepared by Environmental Crime Network (EnviCrimeNet) and published in 2016.³⁶ According to authors, the main motivation in committing environmental crimes is to gain illicit profits, which can be as high as in illegal drugs trafficking, but with much lower sanctions (if those are applied at all) and a lower detection rate as well. As a consequence, the “high profit – low risk” nature of environmental crimes is highly attractive for organised crime groups (OCGs). Nowadays, their involvement in this form of criminality is a matter of fact, especially in the illegal trafficking of waste and in the trafficking in endangered species, whose proceeds may also have been used to finance terrorist groups in certain areas. In the case of organised environmental crime, it is not unusual that traditional OCGs (such as Camorra or Chinese groups) resort to the same modus operandi and the same routes they use for their other activities.³⁷ According to a study quoted in the report,³⁸ three out of the twelve most financially rewarding transnational criminal activities are linked to environmental crime: illicit wildlife trafficking (for an estimated annual value between 7.8 and 10 billion USD), illicit timber trade (7 billion USD) and illicit fish trade (between 4.2 and 9.5 billion USD).³⁹

To address questions related to environmental crime, the research project called “European Union Action to Fight Environmental Crime” (EFFACE) was implemented from December 2012 to March 2016. Its final report⁴⁰ provides also numerous observations re-

³⁴ EUROJUST. Strategic Project on Environmental Crime – Report. In: *Eurojust* [online]. 21. 11. 2014 [2019-01-30]. Available at: <[http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Strategic%20project%20on%20environmental%20crime%20\(November%202014\)/environmental-crime-report_2014-11-21-EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Strategic%20project%20on%20environmental%20crime%20(November%202014)/environmental-crime-report_2014-11-21-EN.pdf)>.

³⁵ EUROJUST. *Strategic Project on Environmental Crime – Report*. pp. 5–6.

³⁶ ENVICRIMENET. Report on Environmental Crime. In: *EnviCrimeNet* [online]. 27. 5. 2016 [2019-01-30]. Available at: <<http://www.envicrimenet.eu/images/docs/envicrimenet%20report%20on%20environmental%20crime.pdf>>.

³⁷ ENVICRIMENET. *Report on Environmental Crime*. p. 7.

³⁸ HAKEN, J. Transnational Crime in the Developing World. In: *Global Financial Integrity* [online]. 2011 [2019-01-30]. Available at:

<http://www.gfintegrity.org/storage/gfip/documents/reports/transcrime/gfi_transnational_crime_web.pdf>.

³⁹ This data is cited also on the Europol official website, see EUROPOL. Environmental Crime. In: *Europol* [online]. [2019-01-30]. Available at: <<https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/environmental-crime>>.

⁴⁰ EFFACE. Environmental Crime and the EU. Synthesis of the Research Project “European Union Action to Fight Environmental Crime”. In: *European Union Action to Fight Environmental Crime* [online]. 2016 [2019-01-30]. Available at: <<https://efface.eu>>.

lated to implementation of the ECD and describes main problems and shortcomings of the EU's efforts to fight environmental crime. In this regard, the EFFACE team has identified nine crucial areas: data and information management, the substantive legal framework on environmental crime at the EU level, the sanctions available, the functioning of enforcement institutions and cooperation between them, the role of victims and civil society in fighting environmental crime, the external dimension of EU action against environmental crime, rules on environmental liability, efforts to combat organised environmental crime and rules on corporate responsibility and liability.⁴¹

As for the data and information, those concerning the tracking of forest fires is available and shared between Member States, the same holds true for illegal fishing and wildlife trade. What is missing in particular is good data about the specific nature and consequences of environmental crime. For instance, little is known about the particular costs of environmental crime and the character of environmental crime (e.g., whether it is transnational or not; organised or not). Member States are rarely obliged to transmit information about environmental crime to the EU where this data could be centrally managed and shared.⁴² Importance of data is also subject of attention of the European Network of Prosecutors for the Environment which will be mentioned below.

While analysing the substantive environmental criminal law at the EU level, the EFFACE team comes to question whether the implementation of EU instruments in the field of the protection of the environment results in consistent outcomes in national law and legal certainty. The lack of legal certainty may also be a weakness in ECD which defines what constitutes an environmental crime by reference to a behaviour being unlawful under other (environmental) directives. The structure chosen implies that the definition of environmental crime depends upon the violation of national legislation implementing the environmental *acquis* which, to complicate things, is in constant change. Moreover, ambiguous terms and vague notions, such as “non-negligible quantity”, “significant deterioration” and “substantial damage”, are present in many environmental directives. To sum up, the approach towards criminalising environmental harm of the ECD makes it difficult to determine which behaviour constitutes environmental crime.⁴³ This is very much valid also in relation to legal rules defining wildlife crimes, as they were described in detail above in chapter III. of this article.

Various weaknesses can be found also in enforcement institutions and cooperation among them. In many Member States there are no specialised police forces, prosecutors' offices and judges to deal with environmental crime. This absence of specialisation in most cases means that the general authorities have to deal with environmental crime in addition to many other crimes. This may mean that they will not develop required expertise in an appropriate way, given the complex and highly technical nature of environmen-

⁴¹ EFFACE. *Environmental Crime and the EU*. p. 28.

⁴² EFFACE. *Environmental Crime and the EU*. p. 28–29. Then, while providing an example of wildlife crime, the report refers in detail not to a case from Europe but to illegal poaching of elephant and rhino in Africa, including numbers of poached animals, economic costs and other data; see pp. 16–18.

⁴³ EFFACE. *Environmental Crime and the EU*. p. 29.

tal crime. This in turn can lead to frustration on the side of the environmental agencies that report the crimes, undertaking less monitoring, lower detection and thus lower the dissuasive effect of environmental criminal law. However, there are also examples of specialised enforcement institutions in France,⁴⁴ Italy, Spain, Germany, Sweden and United Kingdom.⁴⁵ In regard to institutional framework, another aspect could be also a shift of powers from Member States to the EU level. As pointed out by Michael Faure, a fundamental problem is that Europe does not, as does the United States, have an Environmental Protection Agency which would have enforcement powers to verify, for example, environmental quality, or more simply, effective compliance with the environmental *acquis* in the Member States. With a bit of exaggeration one can hold that the only thing which is effectively controlled is whether Member States correctly transpose environmental directives on paper.⁴⁶ The role and competences of the European Environmental Agency in regard to environmental crime should be therefore a subject of further discussion.

The EFFACE team has come also to conclusion that environmental criminal law is integrated only to a very small extent into organised crime legislation at the international, European and also, with the exception of Italy, at national level. In addition, neither a unanimous and precise definition of “organised crime” nor a legal definition of “organised environmental crime” exist in international, EU and national instruments.⁴⁷ The Palermo Convention on Organised Crime⁴⁸ and the Council Framework Decision 2008/841/JHA on the fight against organised crime⁴⁹ do not deal directly with the phenomenon of organised environmental crime. The possibility of according relevance to environmental crime in light of the concept of “serious crime” used in both instruments is hampered by the fact that most States Parties of the Convention and EU Member States do not provide maximum penalties of at least four years imprisonment for environmental crimes; the latter is required by both instruments for the crime to be considered “serious”.⁵⁰ Also the Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union⁵¹ does not include environmental crime within the criminal offences covered by the Directive; the inclusion of the Framework Decision 2008/841/JHA is, for the reason mentioned above, practically unable to indirectly cover organised environmental crime. But it should be emphasized that there may be an interest of the police to consider environmental crime as organised crime because of the more

⁴⁴ As mentioned by Michael Faure, French Criminal Code was even amended by Article 421.2 on “ecological terrorism”. There is, however, criticism on the specific formulation of this crime as its scope of application is relatively limited. See FAURE, M. G. *The Development of Environmental Criminal Law in the EU and its Member States*. p. 142.

⁴⁵ EFFACE. *Environmental Crime and the EU*. pp. 34–35.

⁴⁶ FAURE, M. G. *The Development of Environmental Criminal Law in the EU and its Member States*. p. 144.

⁴⁷ EFFACE. *Environmental Crime and the EU*. p. 40.

⁴⁸ The United Nations Convention against Transnational Organized Crime adopted by General Assembly resolution 55/25 of 15 November 2000.

⁴⁹ OJ 2008 L 300, p. 42.

⁵⁰ EFFACE. *Environmental Crime and the EU*. p. 40, referring to VAGLIASINDI, G. M., LUCIFORA, A., BIANCO, F. *Fighting Environmental Crime in Italy: A Country Report*. Study in the framework of the EFFACE research project. University of Catania, 2015.

⁵¹ OJ 2014 L 127, p. 39.

extended competences of the prosecution authorities in cases of organised crime. Allegedly cases of environmental crime are not prioritised by enforcement bodies if they are not related to organised crime.⁵²

While referring to wildlife crime, the report prepared and published in 2017 by the European Network of Prosecutors for the Environment (ENPE)⁵³ states that there are indications that less of this kind of crime is being recorded across the EU compared to other categories of environmental crime, and many of the available reports on environmental crime do not cover it or do not have a dedicated section on it, whereas waste and water tend to get more attention. When this issue is dealt with directly, the links are usually emphasised with organised crime and other kinds of crime, including money laundering and terrorism. Trafficking is the main focus rather than other forms of wildlife crime. But trafficking is only one aspect of wildlife crime, out of those three conducts defined under Article 3 of the ECD. As evidenced by 24 in-depth country reports, the transposition of criminal sanctions has not taken place correctly or completely in all Member States.⁵⁴ The country reports have also provided an assessment as to whether the various approaches of the Member States in regard to penalties are in fact *effective, proportionate and dissuasive* (EPD), as required by Article 5 ECD. In summary, 4 countries are assessed as not having environmental legislation that is EPD, 6 are thought to have EPD legislation, another 3 are also potentially compliant, in 11 countries, it is unclear whether their legislation is EPD because there have not been enough cases to make the assessment and/or the legislation is too recently introduced.⁵⁵

However, these assessments and comparisons may be subject of discussions due to another aspect tackled by the ENPE report, similarly as previously by the EFFACE project mentioned above, and it is the availability and quality of data. Generally, the ENPE report states that the available data are very fractured and very difficult to compare in any meaningful way.⁵⁶ It is clear that sources of reliable, consistent and comparable data for environmental sanctioning are difficult to amalgamate. In addition, next to the usual problems of comparing EU crime statistics, the main issue is different in this case. Environmental crimes are control crimes, where the number of cases is in direct correlation to the number of (efficient) controls. If the work of controlling authorities is inhibited or the interface for transferring cases is ineffective, criminal environmental cases will not come to the attention of investigating bodies or prosecuting authorities. This is reportedly the case in the

⁵² EFFACE. *Environmental Crime and the EU*. p. 41.

⁵³ ENPE. *Environmental Prosecution Report – Tackling Environmental Crime in Europe*. In: *European Network of Prosecutors for the Environment* [online]. 2017 [2019-01-30]. Available at: <<https://www.environmentalprosecutors.eu>>.

⁵⁴ ENPE. *Environmental Prosecution Report – Tackling Environmental Crime in Europe*. p. 22. The referred in-depth country reports produced by Milieu Law and Policy Consultants are not available, however the ENPE report contains a table showing level of transposition of ECD in analysed 24 Member States, see p. 23.

⁵⁵ ENPE. *Environmental Prosecution Report – Tackling Environmental Crime in Europe*. pp. 85-88.

⁵⁶ ENPE. *Environmental Prosecution Report – Tackling Environmental Crime in Europe*. p. 7. As an example may serve the Czech Republic. Czech version of website of the Ministry of Interior contains annual reports and statistics of criminality but they are not available in English version. The same holds true for the website of Supreme Public Prosecutor's Office. On the other hand, annual reports of the Czech Environmental Inspectorate are available both in Czech and English versions.

majority of EU Member States and makes an in depth analysis of available statistics practically obsolete.⁵⁷ But, as argued by Michael Faure, there is a legislative document which could to an important extent deal with this problem, namely the Recommendation 2001/331 providing for minimum criteria for environmental inspections in the Member States.⁵⁸ This document prescribes in detail how environmental inspections should be carried out, how site visits should take place and that specific plans for environmental inspections need to be developed. Moreover, it equally holds that Member States should report data *inter alia* on staffing, details of the environmental inspections carried out, an evaluation of the success or failure of the plans for inspections, etc. As such, this is an excellent document, but it is in practice barely communicated to the Commission. And again, in addition to this information, formal written reports as required by the Recommendation cannot be found.⁵⁹ And coming back to wildlife crime, it remains out of the scope and direct applicability of this legal act.⁶⁰

Another tool which can contribute to better exchange of data and experience among competent authorities, as well as to promotion of effective implementation and enforcement of environmental law, are environmental enforcement networks which operate at the national, regional and international level, as well as across these levels. As environmental crimes often affect more than one country and do not stop at national borders, cooperation between national authorities and enforcement agencies is as important as cooperation between different countries and governance levels. The most important international network is the International Network for Environmental Compliance and Enforcement (INECE), with a broad range of members from governmental enforcement agencies to NGOs and business.⁶¹ Some of the European networks, such as EnviCrimeNet and ENPE, were already mentioned above, another example is the European Network for the Implementation and Enforcement of Environmental Law (IMPEL) which is composed of officials from environmental ministries and agencies and covers also agenda related to nature protection.⁶²

V. CONCLUSION

It is obvious that environmental, eventually wildlife crime has numerous aspects, relations and dimensions. As mentioned above, one of the projects has identified nine crucial areas, and six of them (data and information management, the substantive legal framework on environmental crime at the EU level, the sanctions available, the functioning of

⁵⁷ ENPE. *Environmental Prosecution Report – Tackling Environmental Crime in Europe*. p. 83.

⁵⁸ OJ 2001 L 118, p. 41.

⁵⁹ FAURE, M. G. *The Development of Environmental Criminal Law in the EU and its Member States*. pp. 144–145.

⁶⁰ According to its Article 2, *this recommendation applies to environmental inspections of all industrial installations and other enterprises and facilities, whose air emissions and/or water discharges and/or waste disposal or recovery activities are subject to authorisation, permit or licensing requirements under Community law, without prejudice to specific inspection provisions in existing Community legislation*.

⁶¹ EFFACE. *Environmental Crime and the EU*. p. 23.

⁶² Role of IMPEL in implementation of EU law is described also in LANGLET, D., MAHMOUDI, S. *EU Environmental Law and Policy*. Oxford University Press, 2016, pp. 134–135.

enforcement institutions and cooperation between them, the role of victims and civil society in fighting environmental crime, efforts to combat organised environmental crime) were tackled by this article in closer detail. The three remaining (the external dimension of EU action against environmental crime, rules on environmental liability, rules on corporate responsibility and liability) would require another large sum of investigation and each of them could be a subject of separate research.

Although a lot of effort has been invested into adoption of the ECD, it is not perfect and contains several inconsistencies, also in regard to wildlife crime, as it was briefly shown in chapter III. Therefore, this substantive legal framework on environmental crime at the EU level would require improvement in terms of overall structure and harmonization with system and terminology of the most relevant sources of secondary wildlife law, i.e. the Habitats and Birds Directives and the CITES Regulation.

In analysed reports, and generally also among public and media, quite significant attention is paid to trafficking of endangered species under CITES. As shown by numbers, this type of crime generates high financial profits, similar to those gained by drugs trafficking. However, wildlife trafficking is usually imposed by much lower sanctions and a lower detection rate, and as such it is highly attractive for organised crime groups. This shows that another aspect for improvement of the ECD are sanctions and relation to rules related to organized crime.

But there are also other two conducts defined as wildlife crime under the ECD. Both, the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, and the significant deterioration of a habitat within a protected site remain almost untouched by the analysed reports, and therefore also most probably by implementation practise. Taking into account the fact that the two related nature directives (BD and HD) are considered as flagships of EU nature legislation, this seems to be an alarming situation.

In this regard are therefore accurate the observations of EnviCrimeNet. According to it, the legislation to tackle environmental crime is deemed to be inadequate in many countries. Usually, investigating environmental crimes is complex and requires specialist knowledge, which is not very common among the law enforcement agencies and the prosecution services. Therefore, specific training would be needed. Often, next to a lack of expertise in the field, the more serious problem is a lack of personnel. This is a consequence of the low priority of environmental crimes in most countries, which in turn is linked to the lack of data on detected and undetected cases.⁶³ It has been shown also by other cited reports that the quality and consistency of data are also a crucial aspect of implementation of environmental legislation, including the ECD.

Example of the Czech Republic shows that finding relevant data on environmental crime in English is not easy. But on the other hand, some data on administrative offences are well available. This fact and also statistic numbers also demonstrate where is the real focus in implementation practice – it is not criminal but the administrative liability which highly prevails. Whereas there have been registered in total 8 crimes against environment

⁶³ ENVICRIMENET. *Report on Environmental Crime*. p. 11.

(1 related to waste and 7 related to protected species) in 2017,⁶⁴ the numbers on administrative offences are much higher. The Czech Environmental Inspectorate (CEI) has issued in 2017 in total more than 2,600 decisions on fines that have entered into legal force.⁶⁵ And the CEI's Nature Protection Department made 3,143 inspection inquiries and issued 790 conclusive administrative decisions, including 580 on penalties, 49 on remedial measures and 18 on restriction or halting of operation.⁶⁶ And it is not only CEI who may impose administrative sanctions but there are also competent regional and municipal authorities. However, relevant data from these bodies are not available. The significant predominance of administrative offenses over criminal offenses is a long-term trend that had been occurring in the Czech Republic also prior to adoption of the ECD.⁶⁷

Czech experience also shows that, despite some optimistic expectations,⁶⁸ any significant change has not been yet brought either by the newly transposed EU legal rules, or by the newly introduced criminal liability of legal persons, as adopted in 2011. It was argued already in cited article,⁶⁹ that construction of new Act No. 418/2011 Coll. on Criminal Liability of Legal Persons, which was limiting such liability only to enumerated crimes, was not fully appropriate. This approach has been changed in 2016,⁷⁰ and since then all environmental crimes defined by the Act No. 40/2009 Coll. on Criminal Code are attributable also to legal persons. However, their practical applicability remained still very limited in 2017 as there were open only two cases of illegal disposal of waste and one case of illegal trade in endangered species.⁷¹ As for the transposition of the ECD itself, also the Criminal Code has been – on the basis of initiative of the European Commission within the EU Pilot procedure – slightly amended in 2015⁷² by inclusion of gross negligence in relation to crime of unauthorised production and other disposal with substances damaging the ozone layer. Following that, the transposition of the ECD into Czech legal order can be considered as fulfilled, and no further improvements of legal order seems necessary. But what still remains a challenge is the real implementation.

Then, coming to conclusion, we may raise several recommendations which have been provided also by the ENPE.⁷³ Firstly, wildlife crime should be escalated up the agenda as

⁶⁴ NEJVYŠŠÍ STÁTNÍ ZASTUPITELSTVÍ. Zpráva o činnosti státního zastupitelství za rok 2017. In: *Nejvyšší státní zastupitelství ČR* [online]. [2019-01-30]. Available at: <<http://www.nsz.cz/index.php/cs/udaje-o-cinnosti-a-statisticke-udaje/zprava-o-innosti>>. See Tabulková část. 4 NZN 601/2018, p. 389.

⁶⁵ CZECH ENVIRONMENTAL INSPECTORATE. Annual Report 2017. In: *Česká inspekce životního prostředí* [online]. 26. 7. 2018 [2019-01-30]. Available at <<http://www.cizp.cz/Annual-Report>>. See p. 6.

⁶⁶ CZECH ENVIRONMENTAL INSPECTORATE. *Annual Report 2017*. p. 57.

⁶⁷ JARMÍČ, L. Trestní právo a ochrana životního prostředí. *Trestněprávní revue*. 2010, No. 9, pp. 269–277.

⁶⁸ ZICHA, J., POKORNÁ, L. Nová úprava některých trestných činů proti životnímu prostředí. *Trestněprávní revue*. 2012, No. 4, pp. 79–85.

⁶⁹ ZICHA, J., POKORNÁ, L. *Nová úprava některých trestných činů proti životnímu prostředí*. pp. 84–85.

⁷⁰ Act No. 183/2016 on Amendments of Act No. 418/2011 Coll. on Criminal Liability of Legal Persons; see also Sněmovní tisk 304. In: *Poslanecká sněmovna Parlamentu ČR* [online]. [2019-01-30]. Available at: <<http://www.psp.cz/sqw/historie.sqw?o=7&t=304>>.

⁷¹ NEJVYŠŠÍ STÁTNÍ ZASTUPITELSTVÍ. Zpráva o činnosti státního zastupitelství za rok 2017. pp. 121–123.

⁷² Act No. 165/2015 Coll. on Amendments of Act No. 40/2009 Coll. on Criminal Code; see also Sněmovní tisk 358. In: *Poslanecká sněmovna Parlamentu ČR* [online]. [2019-01-30]. Available at: <<http://www.psp.cz/sqw/historie.sqw?o=7&t=358>>.

⁷³ ENPE. *Environmental Prosecution Report – Tackling Environmental Crime in Europe*. p. 7.

a genuine priority befitting of its wide implications, complexity and connection to organised crime. Secondly, dedicated wildlife crime units with specially trained and knowledgeable enforcement officers should be established in all Member States. Thirdly, criminal penalties should be considered more readily as the most meaningful and robust response to cases of wildlife crime. And finally, further analysis to investigate the lack of implementation of the EU Environmental Crime Directive should be undertaken.