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TACKLING ENVIRONMENTAL CRIME IN THE EU: TOWARDS 'CONDUCTS THAT ENDANGER THE ENVIRONMENT'?

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Environmental crime ranks as the fourth most profitable illegal activity worldwide, with a projected growth of 5-7% annually, resulting in estimated annual revenues ranging from US$91 billion to US$258 billion (Nelleman et al, 2018; Europol, 2022). This significantly erodes the health of ecosystems, the rule of law, and the social, economic and political fabric of the EU and its Member States (MS). The EU first adopted the Environmental Crimes Directive (ECD) to tackle environmental crime in 2008. However, this instrument has not been sufficient to ensure compliance with Union environmental law and to halt the rise of this criminal phenomenon (Eurojust, 2021; Legambiente, 2023). For this reason, following the adoption of the EU Green Deal, the European Commission, in December 2021, released a proposal (ECP) for the revision of the ECD to "help achieving the goals set by Article 191 of the TFEU, the Green Deal and the Biodiversity Strategy"(ECP, p. 47). On 27 February 2024, the European Parliament approved the compromise text of the ECP, which had previously been agreed upon in trilogue negotiations in November 2023. The final step is the formal adoption of the text by the Council, which, at this stage, should be a mere formality.

Assuming that the Council endorses the Parliament's text in April, how will this change the EU legal regime for environmental crimes?

The ECD currently mandates minimum common rules including "effective, proportionate and deterrent" sanctions for both natural and legal persons. It stands as the primary instrument harmonizing environmental offences in the EU, as the Council of Europe (CoE) Convention for the protection of the Environment through Criminal Law has not been ratified. Other international legal instruments in this field are the CITIES, the Basel Convention, and the MARPOL (Mitsilegas et al, 2022), of which the EU is a party.

Despite its innovative character (Faure, 2017), the ECD presents intrinsic limitations, partly because it was adopted prior to the Lisbon Treaty when the EU lacked explicit competence in criminal matters. Specifically, the ECD fails to offer interpretative guidance on severity thresholds or the types and degree of criminal sanctions, and does not provide adequate tools for judicial cooperation, data gathering, investigation and prosecution (Farmer et al, 2020; Eurojust, 2021). According to an evaluation study by the Commission, these shortcomings have prevented the ECD from effectively meeting its key harmonisation goals, namely creating a level playing field by preventing safe havens, ensuring deterrence, protecting fair-playing businesses and improving judicial cooperation.

Based on Article 83(2) TFEU, the ECP aims at addressing these shortcomings by introducing a far-reaching package of reforms.

To begin with, Article 3 ECP broadens the scope of harmonization beyond what is covered by the ECD. For one, it doubles the number of crime categories from 9 to 18, many transnational in nature. These include qualified penal statues sanctioning serious breaches of EU legislation on chemicals (c)(d); waste disposal and shipments (f)(g); ship recycling (h); ship-source discharges of polluting substances (i); water abstraction (m); wildlife and habitat protections (n)(o)(q)(r); harvesting and trade in timber (p); handling of fluorinated greenhouses gases causing ozone depletion (s)(t). It also greatly improves the interpretative clarity of these offences, which are directly defined in the text of the directive; instead, the ECD was

highly technical and fragmented, referring to 72 pieces of environmental legislation contained in its Annexes. Further clarity is offered by Article 3(1), which defines the meaning of unlawfulness, and Articles 3(6) and 3(8), which set out criteria to determine respectively the 'substantial damage' and 'negligible quantity' thresholds.

Furthermore, the ECP represents a significant improvement from the ECD by specifying the typology and the quantum of sanctions (Vagliasindi, 2020, p. 50), which is traditionally considered an exclusive prerogative of national legislatures (di Martino, 2018). In particular, the ECP introduces a toolbox approach to sanctioning (Faure & Svatikova, 2012; Öberg, 2011). Besides dictating specific terms of imprisonment for individuals and fines for legal persons, it also prescribes reparation duties for both legal and individual persons, in accordance with the polluter pays principle, recognizing that effective environmental protection requires both *ex ante* deterrent measures as well as *ex post* remediation (Faure, 2010). These duties fill a gap in the ECD's current regime

Another noteworthy innovation in the ECP is the obligation to adopt due diligence schemes to promote compliance with environmental standards, bridging the gap between the ECP's system of criminal liability and the regulatory dimension of the EU corporate social responsibility regime (Faure, 2022), eg. the long awaited Corporate Sustainable Due Diligence Proposal. The ECP also targets the capacity of individuals and legal entities to operate in the internal market, via withdrawal of permits and authorizations, bans on running for public office, disqualification from practicing of business activities, judicial winding-up, and closure of establishments related to the offence. The possibility to freeze and confiscate proceeds connected to environmental crime reinforces the message that within the EU, 'crime does not pay'.

Finally, the ECP fosters effectiveness through several measures designed to strengthen cross-border investigative and prosecutorial cooperation, improve data collection and dissemination, and enhance the efficiency of national enforcement chains. It also stresses the need to ensure enforcement authorities have qualified personnel and adequate technical and financial means, coherently with CoE Opinion no. 17.

Overall, the ECP reflects a trend emerging at the international level towards the adoption of an autonomous environmental crime sanctioning any 'conduct that endangers the environment', even if the primary offenses are not environmental *per se* (Faure, 2023). The UN and CoE have endorsed this trend, which firstly emerged from the work of law enforcement agencies, to underscore phenomena of 'crime convergence' between traditional crimes, such as corruption, money laundering, and trafficking, and environmental ones, like wildlife smuggling and illegal deforestation (Interpol, 2015; Crosta et al, 2023). Offences under Article 3 letts. (n)(o)(p)(q)(r) ECP, as well as the aggravating circumstance under Article 8(b), respond to these phenomena, creating synergy with the EU policy against organized crimes and neighboring criminal law instruments, eg. the Framework Decision on Organized Crime.

Furthermore, Article 3(3) ECP introduces a qualified offence clause that, as declared by the Parliament shadow rapporteur Marie Toussaint, echoes the definition of ecocide provided by the Stop Ecocide Foundation. While maintaining the unlawfulness requirement, this clause expands the scope of criminalisation from criminal networks to the grey area of corporate crimes 'of the economy' (Ruggiero, 2013), i.e. those environmentally detrimental activities, such as pollution spills, which are etiologically rooted in systemic logics of production and consumption. Indicative of this expansion is also Article 3(4), which requires the criminalisation of the listed offences when carried out with at least serious negligence, thus imposing a duty for producers to address risks associated with their activities. This could be interpreted as a duty of care towards the natural resources being exploited.

Given the reach of this reform, it is no surprise that the revision of the ECP has not been simple. The compromise text stems from four rounds of trilogues involving, on the one hand, progressive positions advocated by the Parliament and, on the other, more lax provisions endorsed by the Council. These diverging positions could explain some shortcomings in the final text. For instance, uncertainty still surrounds the meaning of 'environmental damage', which is mentioned 74 times without being defined. This might be an obstacle to transposition, as the term 'damage'

is used indifferently for qualitatively different objects, eg. natural matrices and ecosystems, alongside similar yet distinct terms such as 'deterioration' and 'harm to the environment'. The absence of a definition of 'environmental victim' and of 'public concerned' also hinders systemic coherence with the Victim directive, the CoE Recommendation on Victims of Crime, and with the Aarhus Convention. Furthermore, the ECP does not criminalise illegal, unreported and unregulated fishing (IUU) as proposed by the Parliament, despite its relevant impact on maritime ecosystems. Similarly, the ECP falls short in assigning *ad hoc* powers to the European Prosecutor, which would have facilitated juridical cooperation significantly. Lastly, although introducing qualified offences, the ECP does not establish an autonomous harm-based penal statute. The unlawfulness clause still determines the scope of criminal relevance, in line with the ECD's conservative approach.

To conclude, it is difficult to predict whether the ECP will prove to be effective in the fight against environmental crimes. While its remit covers in principle the most severe crimes committed by organised and organizational actors, the aforementioned aspects, including the lack of an autonomous environmental crime, could hinder its general objective of improving nature protection. In any event, there is little doubt that the ECP's ultimate success will hinge on MS's ability and political will to adopt an organic toolbox approach, enabling a dynamic interplay of regulatory options responsive to the entire spectrum of environmentally harmful activities.