Evaluation

of the

Directive 2008/99/EC on the protection of the environment through criminal law

on the basis of the

Manifesto for a European Criminal Policy

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1. On the requirement of a fundamental legal interest worthy of protection

a) What interest does the legal instrument in question aspire to protect?

The Directive is intended to protect the environment, more specifically the quality of air, soil and water (cf. Art. 3 (a), (b), (d) and (e), also (i)), certain wild fauna and flora species (cf. Art. 3 (f) and (g)), as well as certain habitats (cf. Art. 3 (h)).

Some definitions of offences also require that the respective act causes or is likely to cause death or serious injury to human beings (cf. Art. 3 (a), (b), (d) and (e)). To this extent also the physical integrity of humans is protected.

b) Is the protected interest fundamental in terms of its nature?

This is self-evident as far as the physical integrity of human beings is protected. But also the protection of air, soil, water and biodiversity ensures that humans can live in a healthy environment and that natural resources will be available to future generations; therefore their protection is to be deemed essential as well.

c) Is the protected interest anchored in the primary law of the EU?

Yes, especially in Art. 3 (3) TEU and Art. 11, 191 et seq. TFEU.

d) Is it possible to reconcile the protected interest with the constitutional traditions of the Member States and the EU Charter on Fundamental Rights?

Yes, cf. Art. 37 of the Charter on Fundamental Rights and – as an example for a national constitutional provision – Art. 20a of the German Constitution.

e) In what way is the impact of the proscribed conduct on the protected interest especially harmful to the society?

Without protection of the environment, the fundaments of life for future generations would be at risk. However, the Directive covers various types of conduct, not all of which are equally harmful:

Some types of conduct are highly harmful to society, in particular those that cause imminent damage to life or health of human beings (for instance the emission of strongly radioactive materials). This does not apply in the same way to acts that are only likely to cause damage to these interests. To the extent that the Directive covers acts causing “substantial damage” not to humans, but to animals or plants, the respective conduct must be deemed even less harmful. A fortiori, this holds true where acts that are just likely to cause substantial damage to animals or plants shall entail criminal punishment.

Furthermore, it needs to be taken into account that the Directive does not necessarily require the respective conduct to imminently cause (or be likely to cause) damage. At least according to the wording, it would also apply when only the emission of materials over a very long period of time would amount to a danger for the environment. In those cases, the level of harmfulness is rather low.

g) Does the EU legislator deal with the question of a legal interest worthy of protection, and is there any explicit and detailed justification as to whether a legitimate interest of this kind actually exists?

SEC (2007) 160, p. 4, mentions "significant damages to the health of human beings and animals and to the quality of air, soil and water" as the most important dangers entailed by environmental crime. Although a more detailed assessment of the interest worthy of protection is missing, this does not question the legitimacy of the present Directive because it is generally accepted that the protection of the environment is an indispensable prerequisite for the existence of mankind.

2. On the *ultima ratio* principle

a) Are there for the protection of the legitimate interest (according to 1) alternative protection mechanisms – unrelated to the imposition of criminal sanctions – available to the EU?

Alternative protection mechanisms could be intensive controlling measures by the administration for activities that entail risks for the environment. They could include forms of pre-emptive control, for instance through a detailed risk assessment before the operation of a plant is permitted.

Apart from these entirely preventive measures, administrative sanctions and liability rules of civil law nature, such as remedial measures according to Art. 7 of Directive 2004/35/EC, could achieve a repressive effect.

b) Can the European legislator demonstrate the inadequate effectiveness of alternative, non-penal/criminal measures in practice?

Other measures are available and provided for in EU law, such as requirements for the issuance of permissions for certain industrial activities that entail a high risk for the environment. See also Directive 2004/35/EC. However, their inadequateness is rather presumed than clearly demonstrated: "Criminal law has a much stronger deterrent effect because of the moral disapproval that is connected to it and the inclusion of judgments in criminal records. Moreover, if offences are not prosecuted in criminal proceedings, this limits the investigation techniques that are available to the police."[1] However, this is but one half of a convincing explanation for the need of criminal sanctions: before it can be concluded that resort to criminal law is necessary due to its stronger deterrent effect it needs to be established that the deterrent effect of the existing tools does not suffice. To that aim, the Commission staff working document accompanying the original Commission proposal for the present Directive only refers to vague figures and individual cases, and thus to the mere fact that

[1] SEC (2007) 160, p. 18.

environmental crime actually exists as a phenomenon. Furthermore, it concedes that reliable figures for this field of crime are barely available.

Admittedly, the fact that many member states do provide criminal sanctions for the most forms of conduct encompassed by the Directive can serve as an indicator for the ineffectiveness of alternative measures. However, that cannot lift the Union legislator's obligation to assure respect for the *ultima ratio* principle when it obliges the member states to provide for criminal sanctions. Therefore, a better explanation would have been needed.

c) Does the EU legislator deal with the question of alternative protective measures, and is there an explicit and detailed explanation as to whether resort to criminal law (of Member States, where appropriate) is necessary?

The Union legislator does deal with these questions to a certain extent, see SEC (2007) 160, pp. 14 et seq. However, the explanation given is not entirely satisfactory, see above.

d) Do the proscribed types of conduct indeed call for criminal sanctions as a last resort?

On the surface, the acts listed in Art. 3 of the Directive are of serious character and it is thus comprehensible that they shall entail criminal sanctions. Furthermore, it is to be welcomed that some provisions exclude minor cases from the member states' obligation to introduce statutory offenses. This applies to the illegal shipment of waste according to Art. 3 (c), which must be undertaken in a non-negligible quantity. Likewise, the killing etc. and trading in wild fauna and flora species according to Art. 3 (f) and (g) do not have to be criminalised in "cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species".

However, the devil is in the details and the recourse to criminal law measures is not convincing in all cases encompassed by the Directive.

First, an exception for minor cases is not as easy to deduce for all forms of conduct, particularly for the use of ozone-depleting substances, Art. 3 (i). The underlying regulation 2037/2000 – according to the definition of "controlled substances" in its Art. 2 – did not "cover any controlled substance which is in a manufactured product other than a container used for the transportation or storage of that substance, or insignificant quantities of any controlled substance […]". From this it followed that Union law at least does not require the criminal liability of a consumer who empties an old can of hairspray or an old fire extinguisher. This exception therefore satisfied the requirements of the *ultima ratio* principle. However, regulation 2037/2000 has meanwhile been replaced by regulation 1005/2009 (see also the comments regarding horizontal coherence), in which a comparable exception for insignificant quantities is apparently missing. Admittedly, Art. 5 (3) of this new regulation does provide that the prohibition of the use of ozone-depleting substances "shall not apply to controlled substances in products and equipment". But Art. 6 (2) of the new regulation, read in conjunction with Art. 13 and Annex VI, expressly declares prohibited the use of fire extinguishers containing halon. For fire brigades this applies as of 1 january 2014; whether it also applies to private persons remains unclear. Even if it was possible to exclude them from the scope of the prohibition, this is certainly an example for a lack of quality in criminal law making: this restriction is essential for

respecting the *ultima ratio* principle, yet much too difficult to find. In order to make the scope of the criminal law Directive clear for member states (when drafting implementing legislation) as well as for judges, prosecutors and ultimately also for citizens (who must take the Directive into account when interpreting national criminal law statutes) such an important restriction should have been included in the text of the Directive itself.

Second, some of the provisions of the Directive create an obligation for member states to criminalise a mere non-compliance with formalities. According to Art. 3 (c) of the Directive, illegal shipment of waste shall be made a criminal offense. When the shipment of waste is to be regarded as illegal is defined in Art. 2 (35) of regulation 1013/2006. This provision states that, amongst others, "'illegal shipment' means any shipment of waste effected (a) without notification to all competent authorities concerned pursuant to this regulation; or (…) (d) in a way which is not specified materially in the notification or movement documents". As a consequence, criminal liability according to the Directive, at least in some cases depends upon purely formal mistakes. What makes things worse is that the Directive requires criminal sanctions not only for intentional wrongdoing, but also in cases of gross negligence. But it can hardly be brought in line with the *ultima ratio* principle that negligent non-compliance with formalities – without actual harm or only dangers being caused – shall lead to criminal liability. Similar examples are conceivable with regard to Art. 3 (i) of the Directive because it also depends on various formalities whether the placing on the market or use of ozone-depleting substances is to be regarded a criminal offense.

3. On the principle of guilt

a) Does the punishment provided for the instrument relate in a proper way to the actual responsibility of the individual?

Yes, individual responsibility is a necessary requirement for criminal liability as required by the Directive: according to Art. 3, Member States only have to provide for criminal sanctions where the perpetrator acted "intentionally or with at least serious negligence". However, it is questionable whether criminal liability for gross negligence really makes sense in all cases encompassed by the Directive, for instance where non-compliance with formalities is the essential element of the criminal offense (see above).

b) Do these sanctions correspond to individual guilt in terms of their type and gravity?

Due to the controversies regarding the former EC competence, the Directive remains silent on the type and level of criminal sanctions to be imposed. For that reason the member states enjoy a broad margin of discretion in this respect, which they can (and have to) use in order to provide for sanctions that correspond to the wrong actually done in the individual case. However, it deserves being criticised that the EU legislator has assorted conduct of quite different gravity and disparate dangerousness in one and the same group. For instance, Art. 3 (a) – and similarly Art. 3 (b), (d) and (e) – cover(s) certain acts "which cause[s] or [are] 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". This might create the impression that according to Union law the respective act is of comparable seriousness, no matter whether it affects the life or serious integrity of a human being or

causes “substantial damage” to plants. At this point, the EU legislator should have paid more efforts to distinguish between cases of different gravity.

c) Does the legislator explicitly deal with the question whether these sanctions are appropriate having regard to the guilt of the individual?

No.

4. On the principle of legality

a) If the proposed legislative act aims at the introduction of a supranational criminal offense:

aa) Do the elements of crimes (objective and subjective) clearly emanate from the text of the proposed Directive itself?

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bb) Are the sanctions provided for foreseeable?

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b) If the legislative act aims at harmonising national criminal law provisions:

aa) To the extent that the obligation to adjust national criminal law does not give any leeway for the implementation (and thus exhaustively defines the criminal offence): Are the objective and subjective prerequisites for criminal liability as well as the sanctions which could be imposed foreseeable (as *supra* a)?

The Directive has serious deficits in terms of legal clarity and foreseeability of criminal liability.

First, several notions used in Art. 3 and defining the conduct that member states have to criminalise are too unclear. When, for instance, is a conduct *likely* to cause damage? What is *substantial damage* to animals or plants – how many individuals have to be affected and in what way? What is the “significant deterioration of a habitat” according to Art. 3 (h)?

A second lack of clarity stems from the definition of unlawfulness in Art. 2 (a): according to Art. 2 (a) (iii), the conduct described in Art. 3 shall be regarded unlawful if it infringes “a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to in (i) or (ii)” (emphasis added). The problem is that it will not always be possible for the citizen to recognise whether a decision taken in a single case “gives effect” to EU legislation. This is an objective criterion for which it is irrelevant whether the acting authority indeed means to implement the underlying EU law – or whether the respective decision is taken for completely different reasons. But in the latter case, the citizen concerned will often not be aware of the EU law dimension and thus of the risk to become criminally liable.

bb) Do the national legislators have the possibility to implement each single prescription imposed by the European legislative act in such a concrete manner that this results in a strict and unambiguous provision of national criminal law (please give reasons for the answer using possible examples on how to formulate the implementing law)?

In this regard, one of the characteristics of the present Directive is particularly problematic: according to Art. 2 (a) the conduct prescribed in Art. 3 of the Directive shall be regarded as illegal if it infringes EU legislation or national law implementing EU legislation set out in the annexes. Thus, the decisive elements of the criminal offenses need to be picked together from various EU, national and international legal instruments. For instance, the illegality of a shipment of waste is defined by Art. 2 (35) of regulation 1013/2006. According to this provision, a shipment of waste shall be regarded as illegal – amongst others – if it is not in line with Art. 34, 36, 39, 40, 41 ad 43 of regulation 1013/2006. The first paragraph of Art. 36 further refers to Annex V as well as to notifications of national authorities under Art. 3 of the Basel Convention. The third paragraph of Art. 36 allows for exceptions if the hazardous wasted concerned does not display certain properties listed in Annex III to Directive 91/689 and takes into account the limit values laid down in Commission Decision 2000/532 and Council Decision 94/904. Those limit values themselves, according to footnote 2 of Commission Decision 2000/532, refer to Directives 67/548 and 88/379 and their subsequent (dozens of) amendments. Furthermore, Art. 3 of Commission Decision 2000/532 allows for further exceptions, referring to the requirements set out in Directive 91/689.

These chains of references bring about serious problems for national legislators seeking to implement the Directive. Theoretically, it is of course possible to identify all elements that shall be decisive for criminal liability and formulate a statutory offense. However, this is not only tiresome because every part of that chain needs to be found, read and interpreted. The more serious problem is that national legislators would always run the risk to accidentally overlook something. This would result in a national criminal law provision that is either too broad (because it does not mirror exceptions allowed by EU law), and thus conflicts with constitutional rights and fundamental freedoms, or too narrow, violating the obligation to implement the Directive. As a consequence, national legislators are almost compelled to include references to the EU instruments in their implementing laws, thus adding one more part to the chain of references. In the end that means that citizens will be confronted with a statute that is not understandable without many additional materials. What makes things even more complicated is that all language versions of EU instruments need to be considered for the interpretation.

For these reasons it would have been preferable to consolidate the various provisions of EU environmental law to which Directive 2008/99 refers. Admittedly this would have required considerably bigger efforts on the part of the EU legislator, but for the sake of the clarity and quality of criminal law that price does not seem too high.

c) Does the proposed Directive introduce retroactive rules, or does it compel member States to introduce such rules?

No.

d) Is any potential retroactivity justified with reference to the principle of *lex mitior*?

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e) Have national Parliaments, organizations, and citizens been informed of the proposed Directive in a timely and comprehensive manner, and have they been given a reasonable possibility to voice their own opinion?

SEC (2007) 160, p. 22 et seq. refers to a number of expert meetings and hearings that were held for the preparation of the Directive. An involvement of national parliaments, however, is not indicated.

5. On the principle of subsidiarity

a) Why is it not enough with criminal law measures at Member State level?

As is rightly stated in SEC (2007) 160, p. 21, "offenders in the great number of cases with cross-border implications profit from the differences in national laws by committing offences in those Member States with the most lenient legislation and the lowest sanctions. Their possibility to find safe havens is facilitated by the free movement of goods and the abolition of border controls in the Schengen area. The consequence is that the environment in the Member States with the weakest sanctions will suffer particularly serious consequences, while from these Member States the goods can easily be transported to other Member States and be sold anywhere in the Community, thus putting in danger the environment all over the Community. These cross-border implications of environmental crime imply that a sole action by a Member State is not sufficient and therefore action at Community level is required."

However, the Directive also covers conduct that completely lacks any cross-border element (for instance a case where a German national pollutes a river in Germany without any consequences for neighbour states). For these cases the subsidiarity requirement would have called for a detailed explanation why it is not enough with measures at member state level.

b) Why is the objective of each measure – whether in terms of its scope or its impact – better served on a European level?

The need to take action on a supranational level is already indicated by several international conventions, such as the 1973 Washington Convention (CITES, endangered species), the 1987 Montreal Protocol (depletion of the ozone layer) and the 1989 Basel Convention (movement of hazardous waste). The differences in national laws can only be overcome through harmonisation on EU level. Furthermore it should be noted that the Union (and the Community before) has – uncontroversially – adopted legislation on the field of environmental law. Considering the annex character of the present Directive, this is an additional argument for the Union's possibility to require criminal sanctions.

c) Does the EU legislator deal with the question of subsidiarity and is there an explicit and detailed evaluation of the fulfilment of this requirement in Union acts – taking into account all the alternatives and weighing all circumstances?

Yes, see SEC (2007) 160, p. 21 et seq. However, an explanation is missing with regard to cases without cross-border element.

d) Have national Parliaments expressed their views as to the preservation of the subsidiarity principle and, if so, what was their opinion? Has the EU legislator explicitly considered these arguments?

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6. On the coherence of domestic criminal justice systems and the consistency with the EU frame of reference

a) Do the criminal law provisions of the proposed Directive undermine the coherence of the criminal justice system of one or more member States?

Generally speaking, the risk that the present Directive causes serious incoherencies in national criminal justice systems is low. This is due to the fact that the rules of conduct (i.e. the provisions of environmental law that shall be enforced through the present Directive) have undergone intense harmonisation before.

Furthermore it is positive that the obligation to penalise inciting, aiding and abetting only refers to intentional conduct, whereas an earlier proposal would have extended it also to negligent conduct. That would have caused serious problems for legal orders that limit these forms of participation to cases where an offence has been committed intentionally (such as Germany).

However, it can be criticised that the Directive calls for criminal sanctions also when an offense has been committed with serious negligence. First it is not self-evident that this is an established category in the criminal laws of all member states. Second the criminalisation of (serious) negligence in the field of environmental crime might also run counter to national criminal policies.

b) In terms of systematicity and substantive content, is the proposed Directive in line with other EU legislative acts (related to criminal law)?

Since the present Directive serves as a criminal law annex to legislation in the field of environmental law, problems with regard to the vertical coherence should – in theory – not exist. However, the technique of references used in the Directive entails one important question: what if one of the legislative acts to which the Directive refers is modified or even substituted entirely? Admittedly, it seems possible to interpret the reference to the legislation listed in the annexes as 'dynamic reference' which already comprehends amendments to those instruments. But that does not help if a legislative act is replaced and thus loses its legal force. For instance, regulation 2037/2000 on

ozone-depleting substances (listed in Annex A) has been replaced by regulation 1008/2009. However, the criminal law Directive has not been adapted correspondently. Since the new regulation of 2009 is not listed in the Annex, the wording of Art. 2 (a) – defining the unlawfulness – does not allow it to consider the new rules. This is a classic and well-known problem connected to such references and should have been foreseen by the EU legislator.

c) Does the EU legislator deal with the question of horizontal and vertical coherence, and is there an explicit and detailed explanation as to whether the proposed Directive does not undermine the coherence of domestic criminal justice systems or at least whether any such undermining is inevitable – particularly in view of the obligation to respect the national identity of each member State?

No.

OVERALL EVALUATION

❒ The legislative act **fully complies with** the requirements of the Manifesto on European Criminal Policy.

❒ The legislative act **satisfies essentially** the requirements of the Manifesto on European Criminal Policy. Alterations or improvements are required only on certain points (see recommendations).

☒ The legislative act meets **only partially** the requirements of the Manifesto on European Criminal Policy. Significant alterations or improvements are required (see recommendations).

❒ The legislative act **does not substantially meet** the requirements of the Manifesto on European Criminal Policy. Extensive and structural alterations are required (see recommendations)**.**

❒ The legislative act **does not meet at all** the requirements of the Manifesto on European Criminal Policy. The proposal/enactment of such a legal instrument must be wholly re-examined (see recommendations).

RECOMMENDATIONS FOR THE AMENDMENT OF SPECIFIC PROVISIONS OF THE PROPOSED DIRECTIVE:

An exception for minor cases should be introduced in all cases of Art. 3 – particularly with regard to Art. 3 (i) regarding ozone-depleting substances.

Member States should not be obliged to criminalise a mere non-compliance with formal requirements, at least not if committed without intent. That particularly refers to illegal shipments of waste according Art. 3 (c) and the use (etc.) of ozone-depleting substances according to Art. 3 (i).

As the various types of damage mentioned in Art. 3 (a), (b), (d) and (e) differ greatly, it should be made clear by the EU legislator that the penalty to be imposed must adequately reflect the gravity of the individual case. As Art. 83 (2) TFEU now also covers minimum provisions for the type and level of sanctions, there is no lack of competence for such a requirement anymore.

Several provisions need to be amended in order to comply with the principle of legality: it must be defined in a more concrete way when an act shall be considered “likely” to cause damage (Art. 3 (a), (b), (d) and (e)); what a “substantial damage”, particularly to plants and animals, shall be (Art. 3 (a), (b), (d) and (e)) and under which conditions it can be established that there has been a “significant deterioration” of a habitat (Art. 3 (h)).

Furthermore, the technique of cross references gives rise to criticism. It would be advisable that the EU legislator consolidate the prescriptions and thus formulate clear rules of conduct in the Directive itself instead of referring to various EU, national and international instruments. It shall not be neglected that this can be difficult when harmonisation measures are based on the annex competence. However, it is necessary to avoid problems with the implementation of the Directive and to make the resulting provisions of criminal law clear and previsible for citizens. To the extent that cross references are absolutely inevitable at least long chains of references should be avoided.

With regard to horizontal coherence, the EU legislator must adapt the annexes to the Directive in order to make sure that they do not refer to legislation that is not in force anymore.