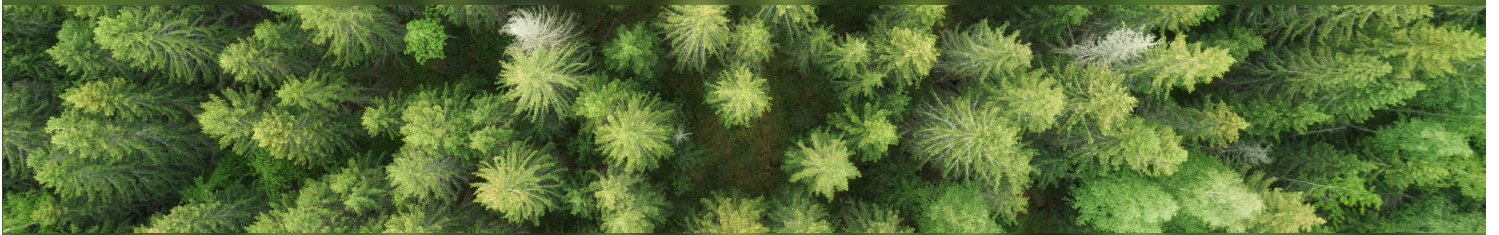


C L I F F O R D

C H A N C E



**THE ENVIRONMENTAL CRIME DIRECTIVE
A GAME-CHANGER FOR ECOSYSTEM PROTECTION?**

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Introduction and Background

According to a report by the European Union Agency for Criminal Justice Cooperation (“Eurojust”) dated January 2021¹, environmental crime has been expanding rapidly and endangering habitats and populations of wildlife as well as entire ecosystems, living environments and financial systems. It is considered one of the main sources of income for organised crime alongside drugs, weapons and human trafficking.² According to Eurojust, environmental crimes can generate very high profits, carry a relatively low risk of detection and are often committed by organised crime groups operating across the EU’s internal and external borders.

To combat this field of crime, after months of negotiations, the Parliament, Council and Commission of the European Union (“EU”) reached a provisional agreement in November 2023 on an update to the EU’s environmental crimes and sanctions rules to strengthen ecosystem protection. This proposal for a Directive on the protection of the environment through criminal law (“Environmental Crime Directive”, replacing the previous Directive 2008/99/EC³) is part of a wider package of initiatives under the European Green Deal, which fulfills an important commitment to combating environmental crime.⁴ The Environmental Crime Directive was adopted by the Parliament on 27 February 2024 and eventually approved by the Council on 26 March 2024. It entered into force on 20 May 2024 and has to be implemented by the Member States within two years (Article 28).

The Environmental Crime Directive aims at establishing minimum rules on the definition of criminal offences and penalties in order to improve the protection of the environment. It is viewed as a huge success by environmental activists, who had been campaigning for stricter rules against a so-called “ecocide” for years. The term “ecocide” refers to unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.⁵ While an offence titled “ecocide” was not introduced by the Environmental Crime Directive, the accompanying recitals refer to “cases comparable to ecocide”, which is seen as a clear signal that the EU intends to tackle “ecocide-level crimes”.

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- 1 European Union Agency for Criminal Justice Cooperation, Report on Eurojust’s Casework on Environmental Crime, January 2021 (accessible under: https://www.eurojust.europa.eu/sites/default/files/assets/report_environmental_crime.pdf).
 - 2 European Parliament, Environmental crimes: deal on new offences and reinforced sanctions, press release of 16 November 2023 (accessible under: <https://www.europarl.europa.eu/news/en/press-room/20230929IPR06108/environmental-crimes-deal-on-new-offences-and-reinforced-sanctions>).
 - 3 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 (accessible under: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0099>).
 - 4 European Commission, European Green Deal: Commission proposes to strengthen the protection of the environment through criminal law, press release of 15 December 2021 (accessible under: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6744).
 - 5 The term “ecocide” was discussed by an independent panel of experts who developed a definition at the request of the Stop Ecocide Foundation. Their aim is to provide the basis for an amendment of the Rome Statute of the International Criminal Court (ICC). Cf. Stop Ecocide Foundation, Legal Definition of Ecocide, June 2021 (accessible under: <https://www.stopecocide.earth/legal-definition>).

Key Elements

The Environmental Crime Directive defines environmental crime more precisely than under previous legislation and adds new types of environmental criminal offences. It also aims at harmonising the level of penalties for individuals and, for the first time, for companies across all Member States. In particular, the Environmental Crime Directive contains an updated list of actions related to the environment that qualify as criminal offences at EU level. It also contains specifics on the respective penalties to ensure a more effective enforcement of EU environmental legislation. The list of new offences (Article 3) relates to, *inter alia*, the import and use of mercury and fluorinated greenhouse gases, the import of invasive species, the illegal depletion of water resources, and pollution caused by ships.

The Environmental Crime Directive introduces so-called qualified offences (Article 3 para. 3), i.e., offences causing the destruction of, or widespread and substantial damage to, an ecosystem or a habitat within a protected site, or widespread and substantial damage to air, soil, or water quality. According to the accompanying recitals, this would include offences comparable to ecocide with catastrophic results, such as widespread pollution or large-scale forest fires.

Member States will have to ensure that they have in place effective, proportionate and dissuasive criminal penalties against individuals (Article 5). These will have to include a maximum term of imprisonment of at least ten years in the event that specific offences cause the death of any person. Qualified offences, i.e., cases comparable to ecocide, shall have to be punishable by a maximum term of imprisonment of at least eight years. Other criminal offences shall be punishable by a maximum term of imprisonment of at least three or at least five years, depending on factors such as the durability, severity or reversibility of the damage.

Other penalties under the Environmental Crime Directive, such as fines and an obligation to reinstate the damaged environment or compensate for the damage caused, may apply to individuals, but also to companies (Article 7). In addition, companies could face penalties such as the withdrawal of licences, bans on access to public funding, or closure (Article 7 para. 2). Most importantly, when implementing the Environmental Crime Directive, depending on the underlying offences, Member States will be able to choose maximum levels of fines against companies that are no less than (i) 3% and 5% of the annual worldwide turnover or (ii) fixed amounts of EUR 24 million and EUR 40 million (Article 7 para. 3). For qualified offences, i.e., cases comparable to ecocide, Member States will have to ensure that even more severe penalties are applicable (Article 7 para. 4).

Member States will also have to ensure that persons reporting offences (whistle-blowers) will be provided with support.

Another important element of the Environmental Crime Directive is the increase in investigative resources and more effective enforcement of criminal proceedings: according to Article 17, the relevant authorities must be provided with a sufficient number of qualified staff and sufficient financial, technical and technological resources. Furthermore, under certain circumstances, Member States can prosecute criminal offences that did not take place on their territory (Article 12). The Environmental Crime Directive will also support the co-ordination of national and cross-border investigations and prosecutions. For example, specialised co-ordination bodies can be set up at national level (Article 19) and assistance can be provided at cross-border level by, *inter alios*, Eurojust, the European Public Prosecutor's Office and the Commission (Article 20).

Against this background, companies will need to review their compliance management systems and will likely have to make some adjustments. Companies should also be prepared for increased attention from the relevant authorities, which may present itself in the form of more investigative measures, such as dawn raids, information and document requests, etc. Therefore, it is crucial for companies, in particular in the industrial and energy sectors, to be aware of the pitfalls and legal implications of the Environmental Crime Directive.

Consequences and Challenges in Different Jurisdictions

Belgium

Belgium has actively supported the Environmental Crime Directive since the start of the EU Commission's initiative to strengthen environmental protection through criminal law. In parallel, there have been discussions at national level to introduce the crime of ecocide into Belgian law. These discussions materialised very recently when, on 22 February 2024, Belgium became the first European country to legally recognise ecocide as both a national and an international crime.⁶ Just a few days before the EU Parliament adopted the Environmental Crime Directive, the Belgian Federal Parliament adopted a new Belgian Criminal Code (which will enter into force in two years, in 2026), specifically addressing significant environmental damage and listing ecocide as a new crime.

The crime of ecocide is defined in Belgium as the deliberate commission, by act or omission, of an unlawful act causing serious, widespread and long-term damage to the environment with the knowledge that such act is causing such damage, and insofar as this act constitutes a breach of federal legislation or an international instrument that is binding on the federal authority or insofar as the act cannot be located in Belgium.

This definition, which is inspired by the consensus definition proposed in 2021 by the independent expert panel convened by the Stop Ecocide Foundation (*cf.* footnote 5), requires the following conditions to be fulfilled:

- "Serious damage" refers to harm that has significant negative effects on any aspect of the environment, including significant repercussions for human life, health, biodiversity, or societal natural, cultural or economic resources.
- "Large-scale damage" refers to harm extending beyond confined geographical boundaries, surpassing regional or state limits, or impacting entire ecosystems, species or a substantial number of individuals.
- "Long-term damage" refers to harm that is either irreversible or cannot be repaired naturally within a reasonable period.
- "Environment" is broadly defined to include the earth, its ecosystems, biosphere, cryosphere, lithosphere, hydrosphere, atmosphere, and cosmic space.
- The "moral element" requires intent to knowingly adopt the behaviour prohibited by law. It must be proven that a deliberate act has caused serious, long-lasting and large-scale damage, with the knowledge that such an act will cause such harm.

The requirement that the act also constitutes a breach of federal legislation or an international instrument that is binding on the federal authority, or that the act was committed abroad, stems from the division of responsibilities within the Belgian State: as the federal government is, in principle, not responsible for making, or competent to make, decisions regarding environmental matters, such responsibility belonging to the regions

⁶ Stop Ecocide Foundation, Belgium becomes first European country to recognise ecocide as international level crime, February 2024 (accessible under: <https://www.stopecocide.earth/2024/belgium-becomes-first-european-country-to-recognise-ecocide-as-international-level-crime>).

(Flanders, Wallonia and Brussels), the scope of the federal crime had to be limited. In practical terms, this means that ecocide can only possibly take place in three specific scenarios, as pointed out in the parliamentary works:

1. In the case of damage resulting from ionising radiation or radioactive waste.
2. In the case of damage in or to the North Sea.
3. In the case of damage resulting from actions that did not take place in Belgium. Indeed, if the necessary conditions under Belgian law for the extraterritorial application of the crime of ecocide are fulfilled, the Belgian federal government will have the authority to prosecute the crime when committed abroad, irrespective of the offender's nationality.

The crime of ecocide is applicable both to individuals as well as (private and public law) companies.

The penalties for committing the crime of ecocide under Belgian law are severe.

- For individuals, this involves imprisonment for a duration of 15 to 20 years or confinement involving the deprivation of liberty for a duration of 11 to 16 years.
- For companies, the penalty consists of a fine ranging from EUR 1,200,000 to EUR 1,600,000. Additional penalties for companies may include confiscation, fines or pecuniary penalties proportionate to the profit expected or obtained from the offence, professional prohibition, and closure of a facility. It is important to note, however, that in accordance with the transposition measures required by the Environmental Crime Directive, these penalties will need to be increased to ensure compliance with its enhanced standards.

Belgium's inclusion of ecocide as a criminal offence aligns with the Environmental Crime Directive's objective of harmonising legislation related to environmental protection and combating environmental crime. However, given the narrow scope of application of the offence at national level (resulting from the limited competences of the federal government in environmental matters), national transposition measures of the Environmental Crime Directive at regional level will be necessary to comply with the new EU law requirements. For example, at the regional level in Brussels and Flanders, the sanctions provided by the Environmental Crime Directive will have to be introduced (or reintroduced, in some cases) for the offence of discharging, emitting or introducing substances into the waters resulting in or likely to result in death or serious injury to individuals or considerable harm to the quality of air, soil, water, or to fauna and flora.

By implementing the "ecocide-comparable" qualified offences into their legal framework, the Flemish, Walloon and Brussels regions will contribute to the broadening of the scope of application of the national offence of ecocide.

Czech Republic

In the Czech Republic, environmental protection is provided primarily by the Czech Criminal Code ("**CCC**") and environmental regulations, such as the Environmental Protection Act. The previous Directive 2008/99/EC on the protection of the environment through criminal law has been fully transposed into the CCC through its amendments. The CCC has an entire chapter devoted to environmental crimes.

Czech law does not recognise the term ecocide, but many of its elements are already reflected in the CCC. Similarly to the Environmental Crime Directive, the CCC follows qualitative thresholds for the commission of a crime, such as serious injury or death to a person, substantial damage to the environment, disruption of the ecosystem, and

consequences that would incur substantial costs to remove. Offenders face a maximum term of imprisonment of up to ten years for committing environmental crimes.

To constitute a criminal offence, there must be a violation of environmental regulations. As required by the Environmental Crime Directive, gross negligence is sufficient for the commission of selected environmental crimes.

As Czech law recognises the criminal liability of companies since 2012, companies can be prosecuted for committing all environmental crimes. Under current law, companies then face the threat of fines of up to approximately EUR 58 million or even forced liquidation. However, high fines are not usual in Czech case law. Fines based on annual turnover do not exist under the CCC.

To comply fully with the Environmental Crime Directive, the Czech Republic will need to introduce a number of new criminal offences, such as trading illegally harvested timber, or at least widen the definitions of already established offences. Similarly, the types and levels of penalties under the CCC will need to be extended. For example, currently under Czech law, only judicial decisions in relation to offences committed by a company can be published, but not judicial decisions in relation to offences committed by an individual.

The Environmental Crime Directive has not yet attracted significant public interest in the Czech Republic, possibly due to a certain scepticism among those with a professional interest in this area that the Environmental Crime Directive will have any major impact in practice. Despite having the means to penalise environmental crime, the Czech Republic often fails to do so in reality. Cases are often dropped, or crimes are only partially punished, mainly due to insufficient evidence to convict. Part of the problem is that Czech law enforcement agencies do not have special units for detecting environmental crime, although certain police officers undergo special training. To meet the requirements of the Environmental Crime Directive, further training of staff and closer co-operation between law enforcement and environmental authorities will be required.

France

By adopting the Climate and Resilience Bill (“**CRB**”) in 2021, France transposed with a ten-year delay the previous Directive 2008/99/EC on the protection of the environment through criminal law into national law. This bill was also designed to respond to the proposals made by the “citizen convention on climate”, but some of its original goals were partially diluted.

The CRB introduced the notion of “ecocide” into French law. Such concept, however, remains limited in terms of scope and impact. In this respect, “ecocide” is not categorised as a “crime” *per se* under French law, but rather as an “offence” (*délit*), which is considered less severe in the hierarchy of possible misconduct. “Ecocide” under French law refers to the situation where pollution offences are committed deliberately and lead to serious and lasting effects on health, fauna and flora. Such effects must last at least seven years.

For companies, financial sanctions can increase to 50 times the gain derived from the misconduct (see Article L.231-3 of the French Environmental Code). Under French criminal law, both individuals and companies can be held criminally liable. Article 121-2 of the French Penal Code provides that companies are accountable for criminal offences committed on their behalf by their executive bodies or representatives.

The CRB has been widely criticised by environmentalists, primarily as it departs from already applicable European legislation. In particular:

- the seven-year time period to qualify the long-lasting effects of the environmental misconduct is considered prohibitive, considering the probatory difficulties to demonstrate the harm over such a long period of time. By contrast, the Directive 2008/99/EC required that the wrongful conduct causes a “*substantial damage*”. In this regard, the long-lasting effect of the damage is only one element among others in the assessment of whether a damage is “*substantial*”; and
- French law made ecocide a deliberate offence, setting aside the notion of negligence for ecocide.

The CRB also extended the possibility to avoid prosecution by settling cases concerning environmental offences with the French prosecutors (the so-called “CJIP”, i.e. *Convention Judiciaire d’intérêt public*). Twenty settlements on environmental offences were confirmed since January 2022. None of these cases involved “ecocide”; most of them concerned minor environmental offences and imposed low fines.

Although France has implemented legal mechanisms to tackle environmental violations from a criminal perspective, the results fall short of ambitions. In a report published in March 2022, the French agency in charge of tackling environmental infractions (OCLAESP) stressed the difficulty in precisely evaluating environmental damage and the fact that currently enforceable penalties are not dissuasive enough, stressing that the risk-benefit balance was advantageous for offenders.

Against this background, the Environmental Crime Directive is well received by French authorities, paving the way for broadening the scope of illegal behaviours, stiffening penalties and harmonising the criminal response to such behaviours within EU countries.

The key changes that the Environmental Crime Directive will likely introduce to French law include:

- A broader definition of environmental crime – To date, French criminal law mainly sanctions environmental damage when there is a violation of either European legislation, national law, or a prefectural authorisation. The transposition of the Environmental Crime Directive will sanction any actions that harm the environment when they are committed with intent.

Moreover, the French legislator will have to amend the current definition of “ecocide”, which means (i) abandoning the condition of the “seven-year lasting damage” and (ii) integrating the concept of gross negligence or reckless conduct when considering the intentional element of the offence.

- Preventive measures and remediation – New compliance requirements for companies to take preventive measures, or remediation measures, against environmental crimes will have to be introduced into French law.

Germany

The European legislative process was observed both enthusiastically and critically in Germany. Environmental organisations in Germany generally celebrated the Environmental Crime Directive, but also argued that it was not extensive enough. Both the German Federal Council (*Bundesrat*)⁷ and the German Bar Association (*Deutscher Anwaltsverein*)⁸ issued critical statements and spoke of “drastic consequences” and “disproportionate and vague regulations”. When the Environmental Crime Directive was approved by the Council

⁷ Federal Council, Committee recommendation of 8 April 2022 (accessible under: <https://www.bundesrat.de/SharedDocs/beratungsvorgaenge/2022/0001-0100/0027-22.html>).

⁸ German Bar Association, Statement of August 2022 (accessible under: <https://anwaltsverein.de/de/newsroom/sn-52-22-richtlinie-ueber-den-strafrechtlichen-schutz-der-umwelt>).

on 26 March 2024, Germany was the only Member State to abstain from voting (all other Member States voted yes). Although some of the criticised provisions have been diluted, it remains to be seen how the Environmental Crime Directive will be interpreted and implemented by German legislation as some significant changes will be necessary.

Current German environmental criminal law already contains a number of criminal and administrative offences. However, there has not yet been any national effort to create the crime of “ecocide”. The relevant 29th division of the German Criminal Code (“GCC”) contains several “offences against [the] environment”, such as water, soil, or air pollution, unauthorised waste management, and other offences (sections 324 to 329 GCC). Moreover, criminal and administrative offences in connection with environmental harms can be found in some provisions outside of the GCC, for example in the Federal Act for the Protection of Nature (*Bundesnaturschutzgesetz*) and the Act against Trade with Illegally Harvested Wood (*Gesetz gegen den Handel mit illegal eingeschlagenem Holz*).

For particularly severe cases of criminal offences regulated in the GCC, increased minimum as well as maximum penalties can be imposed on the individual offenders. These offences can already now be punished with imprisonment of up to ten years under certain circumstances, e.g., when endangering public water supply or when acting out of greed for profit. In the event that one of these offences causes the death of any person, imprisonment of up to 15 years is possible, which even exceeds the requirements of the Environmental Crime Directive.

However, some of the conduct that Member States must ensure constitutes a criminal offence under the Environmental Crime Directive (Article 3 para. 2) is currently regulated only as an administrative offence under German law, such as the placing of environmentally harmful products on the market or the import of invasive species. Furthermore, while some relevant conduct is already a criminal offence when conducted intentionally, Germany will also have to ensure that seriously negligent conduct constitutes a criminal offence, for example in the case of timber trafficking. Finally, German law needs to implement various new criminal offences, in particular with regard to the “ecocide-comparable” qualified offences (Article 3 para. 3), along with new penalties, such as the obligation to reinstate the damaged environment or compensate for the damage caused. German environmental law already contains provisions for the restoration of environmental damage, enacted to fulfil the requirements of EU Directive 2004/35/EC⁹. However, it seems that the EU legislator intends that the obligations imposed by the Environmental Crime Directive exceed those stipulated in Directive 2004/35/EC.

While criminal liability of companies is not (yet) recognised under German criminal law, companies can, under certain circumstances, be sanctioned with a corporate administrative fine (*Verbandsgeldbuße*). The maximum amount of such fine is EUR 10 million per count in the case of criminal offences and EUR 5 million per count in the case of administrative offences (the so-called penalty part) but can be exceeded if this is deemed necessary to siphon off a higher economic benefit generated by the underlying offence (the so-called siphoning-off part). The German legislator will have to create provisions allowing for turnover-based fines for environmental offences when companies are held liable under the Environmental Crime Directive or, alternatively, ensure that the maximum amount of fines is not less than EUR 40 million or EUR 24 million, depending on the offence, and even higher for qualified offences, i.e., cases comparable to ecocide. Recently, Germany has created turnover-based fines as part of the national Supply Chain

⁹ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (accessible under: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02004L0035-20190626>).

Act (*Lieferkettensorgfaltspflichtengesetz*)¹⁰. Furthermore, the German legislator will have to ensure that other penalties against companies, such as reinstatement obligations, the withdrawal of licences, bans on access to public funding, or closure, will be implemented effectively.

In a comprehensive study commissioned by the German Federal Environment Agency (*Umweltbundesamt*) in 2019¹¹, the authors concluded that there is a lack of sufficiently qualified personnel in both the police and the environmental administration. Prosecutors and courts also lack sufficient capacity. Against this background, it is likely that Germany will need to provide more qualified staff in the administration and the justice system in order to meet the requirements of the Environmental Crime Directive.

Italy

The Environmental Crime Directive comes at a time of great turmoil for Italian environmental legislation.

In 2022, the Italian Parliament amended the Constitution (Article 9) and included environment, biodiversity and ecosystems on the list of the assets that the Italian State must protect, including for the benefit of future generations.

In January 2024, the Italian Ministry for the Environment set up an Environmental Commission made up of practitioners in the field of environmental protection (professors, lawyers, engineers and other technical experts) for the purpose of reshaping the existing environmental regulations and bringing them together into a single law consistent with the new constitutional, European and international principles, with a deadline of the end of 2024. The current plan to reform the environmental protection framework comes after the failure of a previous draft law on the matter in 2020 (the so-called "*Terra mia*" draft law). The *Terra mia* was not even presented to the Italian Parliament as it had come in for heavy criticism due to its lack of a systematic approach and the idea that a mere increase in penalties might not be an effective solution in the fight against the eco-mafia.

The Environmental Crime Directive might therefore have an important impact on the current process of reshaping the Italian provisions aimed at protecting the environment for both individuals and companies. Italian environmental NGOs welcomed the EU initiative with great enthusiasm, with Legambiente in particular underlining that the Environmental Crime Directive can play a key role in the fight against eco-criminality. Legambiente called on Italy to be the first Member State to implement it, given the high number of pending criminal proceedings for environmental crimes. According to Italian politicians, the Environmental Crime Directive is in line with the initiatives already taken at national level, though some doubts have been expressed about the actual impact of the significant increase in penalties for both individuals and companies in terms of reducing environmental crime.

The main feature of Italian environmental protection is that provisions are fragmented into a number of different laws, resulting in a lack of proper cohesion in a matter which is in itself particularly complex. The main piece of legislation is Executive Order no. 152 of 2006 ("**Code on the Environment**"), which lays down the legislative framework applicable to all matters concerning environmental protection. However, in terms of liability, the protection of the environment set out in the Code on the Environment is almost entirely

¹⁰ Article 24 para. 3 of the Act on Corporate Due Diligence Obligations in Supply Chains ("*Lieferkettensorgfaltspflichtengesetz*").

¹¹ Federal Environment Agency, Environmental Criminal Law - Status Quo and Further Development: Final Report (Compliance) of November 2019 (accessible under: <https://www.umweltbundesamt.de/publikationen/status-quo-weiterentwicklung-des-umweltstrafrechts>).

based on a series of administrative provisions and, from a criminal law perspective, misdemeanours, which provide for less severe penalties, a short statute of limitations, and the possibility of benefiting from alternative procedures to extinguish the crime based only on the payment of a fine (so-called “*oblazione*”).

Alongside the Code on the Environment, the Italian Criminal Code contains a separate section (Title IV-*bis*) entitled “*Crime against the Environment*”, introduced by Law no. 68 of 2015, which implemented the previous Directive 2008/99/EC on the protection of the environment through criminal law. This section provides for serious criminal offences (such as, for example, environmental pollution, environmental disaster, trafficking and neglect of highly radioactive material, activities organised for the unlawful trafficking of waste), which are punished with more severe penalties, restoration obligations, and a long statute of limitations.

Following the approval of the Environmental Crime Directive, Italy is first required to introduce a number of new environmental criminal offences (such as, for example, the depletion of water resources, serious breaches of EU chemicals legislation, etc.).

Secondly, the new definition of “qualified criminal offences” and the set of penalties for individuals laid down by the Environmental Crime Directive might lead Italy to tighten the rules for some of the existing environmental offences, with regard to the maximum term of imprisonment, secondary sanctions (such as disqualification orders, bans, restoration duties, etc.) and statute of limitations. The consequences might be less disruptive for those criminal offences included in the Italian Criminal Code, which already provide for quite severe penalties – for example, under Article 452-*ter* of the Italian Criminal Code, death as a consequence of environmental pollution is punished with imprisonment of up to ten years, which corresponds to the requirement of Article 5 para. 2a of the Environmental Crime Directive. More significant consequences may affect, on the other hand, the environmental offences under the Code on the Environment, especially when committed with intent, as the possible increase in the maximum penalty will also have broader consequences in terms of, amongst other things, a (longer) statute of limitations and ineligibility for simplified procedure for the extinguishment of the crimes.

As regards the liability of companies in Italy, Executive Order no. 231 of 2001 (“**Executive Order 231**”) introduced vicarious liability for companies in relation to crimes committed by their employees under certain circumstances. The list of criminal offences that may trigger vicarious liability of companies set out in Executive Order 231 already includes a wide range of environmental offences among those provided for by both the Code on the Environment and the Italian Criminal Code (Article 25-*undecies* of Executive Order 231). However, this list and the relevant provisions are not properly harmonised because they are the result of amendments and additions, which tried to keep pace, not always successfully, with the continuous changes to both of these laws.

The Environmental Crime Directive might therefore be the driving factor for a full revision of the provisions set out in Executive Order 231 regarding environmental crimes and corporate liability in terms of widening: (i) the list of environmental offences which may trigger companies’ vicarious liability; and (ii) the set of disqualification orders, bans and obligations to restore the environment and compensate damages, which can be imposed upon companies liable in relation to environmental crimes (some of the new provisions of the Environmental Crime Directive are quite peculiar and can have serious consequences for companies, such as, for example, being placed under judicial supervision, judicial winding-up, or closure of the premises used to commit the criminal offence).

The Environmental Crime Directive might also lead to a significant increase in the fines applicable to companies as the amounts laid down at EU level are considerably higher than those provided for by Executive Order 231. Indeed, while the Italian provisions set out that fines can reach a maximum of up to EUR 1,549,000 (which can be increased by up to three times in light of the economic conditions of the company), under the Environmental Crime Directive the maximum level of fines must be significantly higher as referred to above (see section 2).

The Environmental Crime Directive might encourage Italian Public Prosecutors to focus even more on this area. Given the direction set out at the EU level, this may result in an increased number of cases in which allegations of environmental crimes are also made against companies. To date, the allegations have often only concerned individuals. Environmental criminal investigations already represent a steadily growing trend, as highlighted by recent studies carried out by some Italian non-profit organisations working for environmental protection.

Luxembourg

The previous Luxembourg government has shown support for the new Environmental Crime Directive, emphasising the need for harmonisation of penalties applicable to companies for environmental crimes across Member States. This stance is aimed at minimising the disparities in penalties.¹² The former Minister of Justice highlighted the significance of the directive, noting that it will establish appropriate punitive measures for environmental crimes.¹³ Other actors in Luxembourg have taken a more neutral position, mainly presenting the new directive.¹⁴ The Environmental Crime Directive establishes environmental criminal offences which are new to Luxembourg and will need to be integrated into Luxembourg law. However, some of the criminal offences provided for in the Environmental Crime Directive already exist under Luxembourg law, for instance the abstraction of water,¹⁵ as provided for in Article 3 para. 2(m) of the Environmental Crime Directive. Other relevant legislative reforms are already in motion, such as a bill of law on the recycling of ships.¹⁶

When it comes to environmental crime, Luxembourg law is split into a significant number of sectoral acts. According to the European Commission, offences are therefore more difficult to identify and implement. However, the European Commission notes that this also allows for penalties to be more tailored to each specific offence.¹⁷ It can be inferred that the implementation of the new Environmental Crime Directive will hence entail the amendment of many sectoral acts concerning environmental crime in Luxembourg, which may prove cumbersome.

¹² Communication of Luxembourg's Government, 9 December 2022 (accessible under: https://gouvernement.lu/fr/actualites/toutes_actualites/communiqués/2022/12-decembre/09-tanson-jai.html).

¹³ Communication of Luxembourg's Government, 13 October 2022 (accessible under: https://gouvernement.lu/fr/actualites/toutes_actualites/communiqués/2022/10-octobre/13-tanson-jai.html).

¹⁴ For example, the Luxembourg association for environmental law (*Association Luxembourgeoise pour le Droit de l'Environnement – ALDE*) hosted a conference to present the directive on 21 March 2024.

¹⁵ Article 61 of the Law of 19 December 2008 pertaining to water (accessible under: https://legilux.public.lu/eli/etat/leg/loi/2008/12/19/n17/jo#art_22).

¹⁶ Article 8 of Bill of Law n°8048 (accessible under: <https://wdocs-pub.chd.lu/docs/exped/0132/132/265321.pdf>).

¹⁷ Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States, pages 28-29 (accessible under: https://commission.europa.eu/document/download/5fe5a3b7-e6e6-4de2-8a8b-cca3f8f49844_en?filename=milieu_implementation_report_2013.pdf).

The Environmental Crime Directive also extends the scope of some criminal offences by including serious negligence in addition to intentional behaviour. This will have a lesser impact in Luxembourg, as it is a general principle of Luxembourg criminal law that a criminal offence can be constituted by intent or by negligence.¹⁸

Nevertheless, regarding the level of penalties to be imposed, Luxembourg currently has a comparatively low maximum level of fines when compared to the other Member States.¹⁹ In fact, the European Commission considers that, under the previous Directive 2008/99/EC: “*whereas the fines are high enough to address the most serious cases for Article 3(a) (EUR 3,000,000) and (b) (EUR 1,500,000), the fines for the offences of Article 3(d) (EUR 250 000) and (e) (EUR 50 000) would probably be too low in case of significant damage*”. It appears that based on the level of fines applicable under Luxembourg law, some of the penalties are not considered proportionate, dissuasive and effective.²⁰ For example, with regard to Article 3 (e) of the previous Directive 2008/99/EC, concerning the production, processing, handling, use, etc., of nuclear materials or other radioactive substances which cause damage to a person, the fauna, or flora, since a law enacted in 2019, current fines may vary from EUR 251 to EUR 500,000 under Luxembourg law²¹. Luxembourg will therefore need to increase the maximum level of the fines that sanction environmental offences.

Finally, in a recent newsletter, the Luxembourg Commission of Surveillance of the Financial Sector (Commission de Surveillance du Secteur Financier, “**CSSF**”) addressed environmental crime in connection with the risk of money-laundering, stressing the conjunction of significant gains, limited law enforcement and low detection risk, and emphasising the role to be played by financial institutions in the revelation of environmental crime. Cross-referring to the Financial Action Taskforce (“**FATF**”)’s thematic reports on the subject matter, the CSSF further listed a series of red flag indicators suggesting unusual or suspicious environmental activity.²² Environmental crime is hence also an area where heightened Luxembourg regulatory focus can be expected.

Netherlands

The Dutch government commented favourably on the Environmental Crime Directive’s contents and objectives. Dutch legislation already provides tools and provisions to prosecute environmental crimes (see below), going beyond what was strictly required under the previous Directive 2008/99/EC on the protection of the environment through criminal law. We nevertheless expect the Environmental Crime Directive’s implementation to spark further attention in relation to companies’ adverse environmental impacts, with corresponding upticks in criminal enforcement efforts.

Dutch criminal legislation contains several penal provisions that serve to protect relevant environmental interests. For instance, the Dutch Criminal Code (“**DCC**”) criminalises – in brief – certain unlawful environmental emissions that could potentially have adverse health

18 See also Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States, pages 34-35 (accessible under: https://commission.europa.eu/document/download/5fe5a3b7-e6e6-4de2-8a8b-cca3f8f49844_en?filename=milieu_implementation_report_2013.pdf) in this respect.

19 Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States, page 11 (accessible under: https://commission.europa.eu/document/download/5fe5a3b7-e6e6-4de2-8a8b-cca3f8f49844_en?filename=milieu_implementation_report_2013.pdf).

20 Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States, page 90 (accessible under: https://commission.europa.eu/document/download/5fe5a3b7-e6e6-4de2-8a8b-cca3f8f49844_en?filename=milieu_implementation_report_2013.pdf).

21 Article 149 of the Law of 18 May 2019 relative to radiation protection (accessible under: <https://legilux.public.lu/eli/etat/leg/loi/2019/05/28/a389/jo>).

22 CSSF, Newsletter No 270, July 2023, p. 4 (accessible under: <https://www.cssf.lu/wp-content/uploads/newsletter270.pdf>).

effects (sections 173a and 173b DCC). Environmental legislation contains further provisions to regulate specific areas (e.g., waste management, water quality, crop protection, chemical substance regulation, ‘dirty’ fuels, etc.). The Dutch Environmental Act (“**Environment Act**”) further includes a rather controversial “catch all” section prohibiting “to carry out or omit an activity if its performance or omission causes or threatens to cause significant adverse effects on the physical environment” (section 1.7a Environment Act). Many of these environmental provisions – including section 1.7a Environment Act – can be enforced through both administrative and criminal law. Penalty maximums are typically higher in the case of intent, which includes conditional intent – i.e., knowingly accepting a substantial probability. Dutch criminal law allows for corporate criminal liability.

With the referenced provisions, Dutch criminal law already appears largely compatible with the Environmental Crime Directive’s material scope, with some amendments being required to ensure alignment. The same goes for the penalty regime, which applies to both companies and individuals. In summary, the Dutch government has claimed that existing Dutch criminal legislation already allows for severe penalties in environmental crime cases and that no significant changes to Dutch sentencing caps are expected to be required. The Dutch government has recognised that it may need to update enforcement policies to meet the Environmental Crime Directive’s objectives.

The Dutch Public Prosecution Service (“**DP**PS”) is tasked with the investigation and prosecution of environmental crimes, with investigative procedures typically being performed by specialised investigative agencies working under its supervision (depending on the relevant subject matters). The DP

PS has sole discretion to initiate criminal investigations into companies and individuals, and its decisions (not to prosecute or investigate) can be appealed in court. Relevant NGOs are increasingly trying to trigger (through such appeals or otherwise) criminal investigations into alleged “polluters”. Investigations can be resolved through criminal litigation or out-of-court; the DP

PS can impose out-of-court penalties (appealable by subjects) or reach settlements with subjects.

In November 2023, a bill of initiatives, the Ecocide Criminalisation Bill (“**Bill**”), was submitted to the Dutch Parliament with the aim to introduce an “ecocide” offence in the DCC. The Bill proposes to criminalise – in brief – intentionally causing serious and long-term or widespread damage to the environment. Any such act – also if government-licensed – would constitute an offence, according to the Bill. On 2 April 2024, the Council of State advised that the Bill needs further consideration, most notably due to insufficiently precise and defined language that could cause legal uncertainty and potentially problematic extraterritorial effects. The Council of State further advised the initiator to consider the Environmental Crime Directive in its (revised) Bill. Whether the Bill, or any similar bill, will make its way into the DCC thus remains to be seen.

Poland

The proposal for the Environmental Crime Directive received a positive response from the previous Polish Government.²³ The new Government has not presented its own view; however, it is not expected that it will be different.

Over the past few years, Poland has taken independent measures to expand protection of the environment through criminal law. In July 2022, Poland introduced several amendments to the Polish Criminal Code and the Petty Offences Code, which provide for more severe penalties for offences against the environment.²⁴

²³ Minutes of the meeting of the Foreign and EU Affairs Commission of the Polish Senate (upper house of the Polish Parliament) of 8 March 2022 (accessible at: https://www.senat.gov.pl/download/gfx/senat/pl/senatkomisjeuposiedzenia/9586/stenogram/098szue_2_egz.pdf).

²⁴ Act of 22 July 2022 on Amending Several Acts to Combat Environmental Crimes (Journal of Laws of 2022, item. No. 1726).

The implementation of the Environmental Crime Directive will still require further amendments; however, it does not seem that these amendments will be far-reaching. In particular, some of the criminal offences provided for under the Environmental Crime Directive appear to overlap, at least in part, with the regulations currently in force in Poland.

For instance, the Polish Criminal Code provides for a criminal offence of causing damage to the environment (Article 181 sec. 1) and stipulates that “*whoever causes damage to the plant or animal world in significant size shall be liable to imprisonment for a term of between 6 months and 8 years*”. Several offences which are stipulated under Article 3 para. 2 of the Environmental Crime Directive may fall under the above-mentioned criminal offence.

Also, the Polish Criminal Code provides for more severe penalties for the above-mentioned criminal offences in the event that they result in: (i) the destruction of the plant or animal world to a considerable extent or in a significant reduction in the quality of water, air, or the surface of the earth (imprisonment for a term of between two and 12 years); (ii) serious injury to human health (imprisonment for a term of between two and 12 years); or (iii) human death or serious injury to health of many people (imprisonment for a term of between three and 20 years). This stays in line both with Article 5 para. 2 of the proposed Environmental Crime Directive as well as with the aggravating circumstances provided for in Article 8(a).

However, so far, Polish criminal law does not directly recognise criminal offences of: (i) the placing on the market of a product, the use of which on a larger scale results in the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation into air, soil or water (Article 3 para. 2(b) of the Environmental Crime Directive); (ii) the recycling of ships violating rules stipulated under Regulation (EU) 1257/2013 (Article 3 para. 2(h) of the Environmental Crime Directive); (iii) the operation or closure of an installation in which a dangerous activity is carried out (Article 3 para. 2(j) of the Environmental Crime Directive); or (iv) the abstraction of surface water or groundwater which causes or is likely to cause substantial damage to the ecological status or ecological potential of surface water bodies or to the quantitative status of groundwater bodies (Article 3 para. 2(m) of the Environmental Crime Directive). Poland will have to amend relevant legislation in these fields, while criminal offences are very often stipulated under numerous acts of law covering given environmental aspects.

As far as the liability of collective entities, including companies, is concerned, many of the principles provided for in the Environmental Crime Directive (e.g., the threat of a fine or deprivation of the right to benefit from public assistance) are already in force in the Polish legal order under the Act on Liability of Collective Entities for Criminal Offences. However, the range of fines stipulated under the Polish Act (between EUR 2.5 thousand and EUR 1.25 million) is significantly lower than the range proposed under Article 7 para. 3 of the Environmental Crime Directive and will have to be increased. Also, the Polish Act does not work well in practice and each year there are only few investigations which are initiated against collective entities, particularly companies. There is still ongoing debate in Poland about the reform of corporate criminal liability: several proposals have been published in recent years, but none of them has been enacted.

The above-mentioned Act of July 2022 amending the Polish Criminal Code and the Petty Offences Code introduced significant change for the Polish legal landscape concerning liability of collective entities for criminal offences. In general, the liability of a collective entity (e.g., a company) for a criminal offence in Poland depends on the previous conviction of an individual (e.g., a member of the management board) for the same offence. The Act of

July 2022 introduced a significant caveat in this respect and allows liability of a collective entity for criminal offences against the environment without the need of a previous conviction of an individual.

Romania

In recent decades, Romania has seen a significant increase in environmental protection awareness, driven by high-profile issues such as illegal deforestation and pollution in major cities. The active involvement of environmental NGOs, particularly in relation to mining activities, shale and offshore gas explorations and hydropower projects, has been significant.

Romanian law criminalises a variety of actions as environmental crimes. The key pieces of legislation are the Romanian Criminal Code and the Government Emergency Ordinance 195/2005, the latter of which transposed the previous Directive 2008/99/EC on the protection of the environment through criminal law.

This legislation covers offences such as pollution, which includes the release of ionising radiation or hazardous substances that pose a risk of contamination or endanger human life, illegal logging, and damage to protected natural habitats. Additionally, in line with international standards, including those set by the Environmental Crime Directive, the production, trade and release of ozone-depleting substances is also penalised under Romanian law. While there is a degree of overlap with the offences outlined by the Environmental Crime Directive, the concept of “ecocide-comparable” offences is not recognised in Romanian legislation, nor are there any current legislative efforts to introduce it.

Environmental crime investigations in Romania are typically led by prosecutors and involve various authorities, including the Ministry of Environment, Waters and Forests, the National Environmental Protection Agency, and the National Environmental Guard. A recent legislative proposal for the creation of a specialised prosecutorial agency to investigate and prosecute environmental crimes was rejected by the Romanian Parliament in 2023.

Romanian criminal law recognises corporate criminal liability for offences committed within the scope of a company’s operations or for its benefit. Moreover, individuals involved in the commission of an offence may also face criminal liability. Companies can incur fines of up to approximately EUR 1.5 million. Other potential sanctions include judicial winding-up, suspension of operations, closure of facilities, or judicial supervision, in line with Article 7 para. 2 (d), (f), (g) and (h) of the proposed Environmental Crime Directive.

Following the approval of the Environmental Crime Directive, Romania would be required to take a number of steps to adapt national rules to the Directive. These steps would include introducing new environmental criminal offences, updating the scope of existing ones (to encapsulate the concept of “qualified criminal offences”) and aligning penalties for companies (see section 2).

Spain

In Spain, ecocide, commonly understood as “*the massive damage and destruction of ecosystems, i.e. serious damage to nature which is widespread and sustained over time*”²⁵, has not yet been incorporated into the Spanish Criminal Code (“**SCC**”). However, as explained below, there are some aggravated forms of environmental criminal offences which bear some similarities with qualified criminal offences (comparable to ecocide)

²⁵ This definition of ecocide has been provided by Stop Ecocide International (accessible under: <https://www.stopecocide.earth/new-breaking-news-summary/spain-making-ecocide-a-crime-in-the-penal-code-among-recommendations-of-citizens-climate-assembly>).

foreseen in the Environmental Crime Directive, although they do not reach the levels of penalties required in the Environmental Crime Directive.

In the past few years, ecocide has been an important topic amongst environmental NGOs in Spain, but the only legislative initiative to date is the process initiated by a broad political coalition in the Catalan Parliament in July 2023 which aims at including ecocide in the SCC.²⁶ In addition, in May 2023, the current Spanish Government replied, in relation to a formal question submitted by a representative of the Spanish Congress, that it is “*in favour of promoting initiatives at the international level that lead to the regulation and prosecution of the ecocide crime*”.²⁷

From a criminal law perspective, several crimes against natural resources and the environment are defined in the SCC. In this sense, European Directives 2008/99/EC and 2009/123/EC15 have greatly influenced the legal drafting of Spanish environmental crimes, i.e., in the use of vague terms such as substantial damage or negligible quantity, among others, and in the inclusion of illegal administrative behaviour as an element of environmental crime.

Namely, the SCC punishes: “causing or generating substantial damages to the quality of the air, the ground or the water, or to animals or plants, directly or indirectly, by infringing any law or other general provisions concerning the preservation of the environment, by making emissions, spillages, radiation, extractions or excavations, grounding, noises, vibrations, injections or deposits, in the atmosphere, the ground, the subsoil, or surface waters, ground waters or sea waters, including the high seas, even those affecting cross border spaces, as well as the water catchment basins” (*Pollution offence (section 325 SCC)*).

When such actions cause serious damages to a protected natural space, meaning causing damages to any of the elements of the protected natural space that were used to classify it as such (*Damages to protected natural space (section 330 SCC)*), the penalties are higher.

All of the above listed criminal offences should be committed by wilful misconduct or gross negligence.

Similarly to the Environmental Crime Directive, the SCC includes a qualitative threshold for the conduct to constitute a criminal offence, namely that such conduct causes the death of, or serious injury to, a person or substantial damage to the quality of air, water or soil, or to an ecosystem, animals or plants, as well as where “*a risk of irreversible or catastrophic deterioration*” is generated or where the criminal conducts may cause “*serious harm to the balance of natural systems*”.

In terms of enforcement, the investigation of environmental crimes in Spain is entrusted to a specialised environmental prosecutor’s office and there are also specific police units dedicated to environmental wrongdoings. The Spanish Supreme Court used the environmental criminal offence with the aggravating circumstance of causing a catastrophic worsening committed with serious negligence in the Prestige case²⁸. This case concerned a natural disaster caused by the oil tanker Prestige when it sank off the

²⁶ To become law, the proposed bill must next be voted through by the Catalan Parliament, then again at the national Parliament of Spain.

²⁷ Formal query and reply can be found on: https://www.congreso.es/es/busqueda-de-iniciativas?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&iniciativas_mode=mostrarDetalle&iniciativas_legislatura=XIV&iniciativas_id=184/105160.

²⁸ Spanish Supreme Court Ruling 865/2015, of 14 January 2016.

coast of Spain, causing significant environmental damage to the northern coast of Spain and the southern coast of France in 2002.

In 2016, the Spanish Supreme Court overruled the ruling of the Provincial Court and held that the act was an environmental crime, sentencing the captain of the vessel to two years' imprisonment for reckless criminal damage to the environment with catastrophic effects, concluding that the captain's recklessness and disobedience to the Spanish authorities' orders generated a serious risk which finally materialised in a natural catastrophe.

In order to apply the qualified criminal offence, the Spanish Supreme Court took into consideration factors such as: (i) actual damages caused; (ii) intensity and extent of the spill; (iii) number of natural elements destroyed and of marine species affected; and (iv) the extent to which the economic activity in the region was disrupted.

Companies may also be held liable for the abovementioned offences as corporate criminal liability exists in Spain since 2010. Companies may be held criminally liable for criminal offences committed by: (i) their legal representatives, directors and managers on behalf of the company and in direct or indirect benefit to the company; or (ii) individuals, subject to the authority of the abovementioned representatives, directors or managers (e.g., employees) within the operation of the company's activity and on its behalf, and to its direct or indirect benefit when the company has breached its duties of supervision, monitoring and control.

Current penalties for companies under the SCC include a fine of up to EUR 9,000,000 or up to four times the value of the damage caused. Such penalties should therefore be significantly increased in order to meet the Environmental Crime Directive maximum penalties (see section 2).

Annex: The UK Perspective

Environmental law in the UK has historically been based largely on the imposition of criminal penalties for breach of regulatory requirements. The UK's current legal landscape is somewhat fragmented with various laws seeking to protect the environment from harm, prevent further damage, and impose penalties for non-compliance with a mix of criminal and administrative penalties and regulatory powers in place. While there is currently no crime of 'ecocide' in the UK, various environmental laws could be applied in cases of widespread damage to habitats and ecosystems, such as offences relating to harming protected species and habitats under the Wildlife and Countryside Act 1981, and causing environmental damage under the Environmental Damage (Prevention and Remediation) (England) Regulations²⁹ (EDR). However, these create a variable patchwork of prohibitions, that are narrower in reach, and with generally lower penalties, than those in the Environmental Crime Directive.

Although the UK has no obligation to implement the EU's Environmental Crime Directive, peer Baroness Boycott proposed an Ecocide Bill to the House of Lords in November 2023. It would introduce a new criminal offence targeting those who participate in unlawful or wanton acts or omissions that have a substantial likelihood of severe and widespread or long-term environmental damage. If passed, the Ecocide Bill would be the first of its kind in the UK and would potentially go beyond the reach of the Environmental Crime Directive as it would criminalise conduct causing significant harm to the environment even if that conduct was not otherwise unlawful. However, introduced as a "Private Members' Bill", the Ecocide Bill did not form part of the Government's legislative policy and, as such,

²⁹ And their equivalent in Wales, the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009.

did not benefit from Government support. Private Members' Bills are rarely passed into law, and indeed the attempt to pass this Bill has now failed since Parliament was dissolved on 30 May 2024. However, these types of Bills do usually highlight issues of public importance, which can indirectly influence future legislative policy and trigger public debate. It remains to be seen if legislation along the lines of the Ecocide Bill will be introduced again in Parliament by further Private Members' Bills or, indeed, by the next Government.

A more pressing challenge to environmental protection in the UK is not so much the absence of laws targeting environmental harms, but insufficient investment in infrastructure, low levels of enforcement (often caused by insufficient resourcing of regulatory authorities), inadequate penalties being imposed for environmental offences, and the difficulty of targeting individuals within companies for offending behaviour. However, new sentencing guidelines are gradually leading the Courts to impose higher penalties, and the new Office for Environmental Protection, established under the Environment Act 2021 following the UK's departure from the EU, is already beginning to perform a useful oversight role on regulatory action (or inaction), e.g., in relation to habitual sewage discharges by water companies. The creation by the English environment regulator, the Environment Agency, of a new Economic Crime Unit targeting financially oriented waste crime may also help improve enforcement in an area typically associated with widespread harm in the environment.

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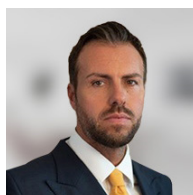
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