

# CRIMINAL LAW ENVIRONMENTAL PROTECTION IN THE EUROPEAN UNION AND SERBIA IN THE LIGHT OF CHAPTER 27

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**Abstract:** Although environmental protection was only part of the European Union policy in the early seventies, it quickly became one of its most comprehensive and dynamic activities. In the first period of development of EU environmental law, environmental degradation was sanctioned by measures of administrative and civil law. Criminal protection only occurs later in response to the expansion of ecological crime, which poses a serious threat to the survival of the human species. Accordingly, in the paper, apart from the Council of Europe's Convention on the Protection of Environment through Criminal Law is also analyzed in detail the Directive 2008/99/European Community on the Protection of the Environment through Criminal Law. In the second part of the paper, the authors focus on the criminal law protection of the environment in Serbia, as well as on key legislative, institutional, economic and other challenges in the process of assuming obligations under Chapter 27 – Environment and Climate Change, and hence faster accession to the EU.

**Key words:** environment; criminal law protection; EU; Directive 2008/99/EC; Chapter 27; Serbia.

## INTRODUCTORY CONSIDERATIONS

At the time of the establishment of the European Coal and Steel Community (Treaty signed in Paris on 18 April 1951, came into force on 23 July 1952) and the European Economic Community - EEC (Treaty signed in Rome on 25 March 1957, came into force on 1 January 1958), due attention was not paid to the protection of the environment, so that all activities in this field took place on the national level. However, raising awareness of the global consequences of

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environmental destruction, perceived environmental legitimacy and the need to align human behaviour with them, as early as at the beginning of the seventies, unambiguously indicated the need to overcome such a situation. Accordingly, the Single European Act (Treaty signed in February 1986, came into force on July 1987) defined the role of the Community in the protection of the environment and normative rules of protection were standardized. The established contractual basis for the introduction of environmental protection policy at the Community level was gradually expanded and improved through successive contracts. The Maastricht Treaty, i.e. The Treaty on European Union - EU (Treaty signed on 7 February 1992, came into force on 1 November 1993) specifies that the task of the Community is to encourage a harmonious and balanced development of economic activities, sustainable and non-inflationary growth, taking into account environmental protection. The Treaty of Amsterdam (the Treaty signed on 2 October 1997, came into force on 1 May 1999), as the Community's objectives, provides a harmonious, balanced and sustainable economic development and the promotion of a high level of protection and improvement of the quality of the environment. The Lisbon Treaty - Treaty on the Functioning of the EU (Treaty signed on 13 December 2007, came into force on 1 December 2009), whose Chapter XX (Articles 191-193) is dedicated to the environment, has special significance for the development of EU environmental law. According to Article 191, paragraph 4, EU objectives in this area are: preserving, protecting and improving the quality of the environment; protection of human health; cautious and rational use of natural resources; promoting a global plan of measures to deal with regional and planetary environmental problems, as well as the fight against climate change. Although summarized, an overview of the most important primary sources indicates that the EU environmental law during this previous development sustained upward trajectory, which has significantly contributed to environmental protection in the EU and to the fight against climate change in which the EU is becoming a global leader.

At the earliest stages of the development of EU environmental law, the environment was protected by regulations adopted in the area of civil and administrative law, aimed at providing adequate compensation in cases of pollution, as well as the introduction of an initial regulatory scheme in order to avoid damage and enabling the protection of public health (Lukić, 2011: 238). However, accelerated scientific and technological development, more intensive use of nuclear energy sources, the construction of industrial capacities that often use "dirty" technologies, excessive exploitation of natural resources and uncontrolled urbanization have resulted in the true expansion of ecological crime that poses a serious threat to the survival of the human species. The main features of environmental crimes - above all, more dangerous forms of their manifestation, the fact that the environmental damage has effects beyond the borders of the country where the offense was committed, a significant profit for the perpetrators, minimal risk of detection and prosecution (extremely high "dark figure"), transnational character and connection with organized crime (Kostić, 2009: 175; Bjelajac, Dašić & Spaso-

vić, 2011: 574) - unequivocally point to the necessity of criminal law protection of the environment. A criminal law reaction is qualitatively different in nature in relation to administrative sanctions or a compensation mechanism of civil law. In this way, a stronger signal is sent, with a significantly greater effect of deterrence to potential perpetrators. For example, administrative or other financial sanctions do not have a disincentive effect if the offenders are free or financially powerful. Also, there is an additional guarantee of the impartiality of investigative authorities, since other authorities may be involved in the investigation, and not the same administration authorities that issued permits for the use or allowed pollution to the permitted level (Ibidem: 244-245).

In response to the geometric progression of environmental crimes, on 19 November 2008 the EU adopted the Directive 2008/99/European Community (EC) on the Protection of the Environment through Criminal Law, which established the foundations of European ecological criminal law. Before the detailed analysis of the Directive, we will look at the most important aspects of the Council of Europe's (CoE) Convention on the Protection of Environment through Criminal Law (opened for signature on 4 November 4 1988 in Strasbourg), the aims of which are covered by the Directive.

## CONVENTION ON THE PROTECTION OF ENVIRONMENT THROUGH CRIMINAL LAW

Environmental crime is a serious and widespread problem at a global level. Accordingly, in addition to establishing civil and administrative liability for damage caused, in certain situations it is also necessary to apply criminal law protection as an *ultima ratio* in order to suppress behaviour most dangerous to the environment. The first attempt to establish a comprehensive environmental protection through criminal law at the international level is related to the Convention on the Protection of Environment through Criminal Law. The Convention (systematised in four sections with a total of 21 articles) was signed by 13 member states of the CoE and was ratified only by Estonia. In order to enter into force, it is necessary to deposit at least three signatures on the ratification of the member states.

The basic objectives of the Convention, as proclaimed in its Preamble, are: the need to conduct a common criminal policy for the protection of the environment; the requirement that the life and health of humans, flora and fauna, as well as other natural resources, be protected by all available means, including the criminal justice response; the need to contain the uncontrolled use of technology and excessive exploitation of natural resources, which pose a serious threat to the environment, to measures coordinated between SE member states; the necessity to treat violating the principles of environmental protection as a criminal offense subject to appropriate sanctions; encouraging international cooperation for the more efficient prosecution and punishment of perpetrators of environmental of-

fenses, as well as the introduction of criminal or administrative sanctions against legal entities for endangering the environment.

The Convention requires Member States to nationally standardize new crimes against the environment defined in the Convention, provide for clear sanctions in the event of intentional or negligent execution, as well as to criminalize incitement to commit, or aiding in the commission of these offenses. Depending on the severity of the criminal offense against the environment, imprisonment and fines may be imposed, as well as the measure of compulsory return of the environment to the situation in which they were before committing the crime. Also, the Convention establishes jurisdiction of national courts, norms the possibility for environmental organizations to be involved in criminal proceedings for acts against the environment, lay down the principles of liability of legal persons, principles of coordination, international cooperation, etc. It is undoubtedly that the innovative solutions contained in the Convention represent the first attempt to establish a unified and comprehensive environmental protection law on the European continent and a completely different approach to the liability of natural and legal persons for criminal and other punishable offenses in this field. Although it has not yet come into force, the Convention has served as an inspiration and a good starting point for Directive 2008/99/EC on the Protection of the Environment through Criminal Law.

## DIRECTIVE 2008/99/EC ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW

The most important source of environmental protection through criminal law in the EU is Directive 2008/99/EC (19 November 2008), which, as we already pointed out, is starting from the objectives proclaimed in the Convention on Criminal Law Protection. The Directive (made up of 12 articles and Annexes A and B) was adopted in response to EU member states' enormous increase in the number of ecological crimes and their consequences that are increasingly beyond the borders of the country in which they were carried out (Drenovak-Ivanović, Djordjević & Važić, 2015: 62). The previous Directives had a limited range, i.e. by their content did not address the issue of criminal acts and environmental damage. In other words, the system of sanctions that existed before the adoption of the Directive did not ensure full compliance with the environmental law. Such respect, as stated in the Preamble to the Directive, could have been strengthened by the existence of criminal sanctions which show a social conviction of a qualitatively different nature compared to administrative sanctions or remuneration mechanisms within civil law.

Directive 2008/99/EC provides for minimum substantive standards which must be incorporated into the national criminal legislation of the Member States, without prejudice to the matter of the procedural criminal law. Annexes A and B contain a list of already adopted EU legislation, the violation of which constitutes

unlawful conduct under the Directive, and which should be the subject of criminal-law protection at Member State level. Illegal behaviour is also a violation of the laws or decisions of the authorities of a Member State that have been adopted for the purpose of applying the legislation set out in Annexes A and B.

In accordance with the Directive, Member States have an obligation to ensure that certain acts are deemed to be a criminal offense, if they have been committed (or have been enforced incited or assisted) by unlawful and intentional, possibly consciously negligent. Those are:

(a) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;

(b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;

(c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;

(d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;

(e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;

(f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;

(g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;

(h) any conduct which causes the significant deterioration of a habitat within a protected site;

(i) the production, importation, exportation, placing on the market or use of ozone-depleting substances.

Under the Directive, Member States are obliged to take the necessary measures to ensure that perpetrators of these offenses are punished with effective, proportionate and dissuasive criminal penalties.

The Directive also introduces the liability of legal entities for the criminal offenses that exist if the offense was committed by any person holding a leading position in a legal entity, regardless of whether it operated on its own or on behalf of a legal entity and the offense was committed for the benefit of a legal entity. A legal entity shall be any legal entity that, in accordance with national law, has the status of a legal person, other than the bodies that perform the functions of state authorities and bodies of international organizations. Otherwise, the liability of a legal entity does not exclude criminal proceedings against natural persons who have committed or instigated the commission of environmental offenses. As in the case of natural persons, Member States are obliged to take the necessary measures to ensure that responsible legal persons are punished with effective, proportionate and dissuasive penalties.

## CRIMINAL LAW ENVIRONMENTAL PROTECTION IN SERBIA AND CHAPTER 27

Starting from the modern tendencies in the science of criminal law and comparative legal solutions, our Criminal Code (Criminal Code - CC, Official Gazette RS, 85/05, 88/05 - corr., 107/05 - corr., 111/09, 121/12, 104/13, 108/14 and 94/16) provides for criminal offenses against the environment within a special head. In Chapter XXIV, besides new criminal offenses and those from the secondary criminal legislation, some existing criminal offenses that were in the head of criminal offenses against the economy were - forest theft, illegal hunting and illegal fishing (Stojanović, 2006: 599). A protective object for environmental offenses is the right of a man to a healthy and preserved environment. The culpable environmental protection in our country rests on a biocentric concept, which treats the environment as a protected good per se, in contrast to the older and today transposed anthropocentric conceptions that defined the environment as a resource in the function of satisfying human needs (Lilić & Drenovak-Ivanović, 2014: 52). Otherwise, the right to a healthy environment, as well as the right to timely and complete notification of its condition, is guaranteed by Article 74, paragraph 1 of the Constitution of the Republic of Serbia (Constitution of the Republic of Serbia, Official Gazette RS, 98/06).

Starting from the CC and other laws, these offenses are usually divided into:

(a) general environmental offenses - environmental pollution (Article 260), non-implementation of environmental measures (Article 261), unlawful construction and putting into operation of facilities and installations that pollute the environment (Article 262), damage to facilities and devices for environmental protection (Article 263), environmental damage (Article 264), destruction, damage, removal abroad and the entry into Serbia of a protected natural property

(265) and violation of the right to information on the state of the environment (268);

(b) criminal acts related to hazardous substances, introduction of dangerous substances into Serbia, and unauthorized processing, disposal and storage of dangerous substances (Article 266) and unauthorized construction of nuclear installations (Article 267);

(c) offenses against plant and animal life - killing and abuse of animals (Article 269), transfer of contagious diseases to animals and plants (Article 270), negligent provision of veterinary assistance (Article 271), production of harmful means for the treatment of animals (Article 272), pollution of food and water for feeding or feeding of animals (Article 273), destruction of forests (Article 274) and forest theft (Article 275);

(d) offenses of illegal hunting and fishing - illegal hunting (Article 276) and illegal fishing (Article 277).

At this point, it should be noted that the negotiations on Serbia's accession to the EU started in the sixth year, but that Chapter 27 - Environment and Climate Change, despite numerous announcements, is still not open. Experience shows that the negotiating process regarding Chapter 27 is the most demanding because of its size and significant backlog of candidate countries in terms of environmental standards in relation to the EU. It has about one third of all EU acquisitions. The European Environmental Agency (EEA) estimates that close to 90% of national environmental legislation directly stems from over 500 secondary sources of EU environmental law (directives, regulations, decisions, recommendations and opinions) adopted by the European Commission, the European Parliament and the Council EU (Halpern, 2014: 215). The importance of the issue to which Chapter 27 applies is also confirmed by the fact that 20% of the procedures initiated by the European Commission before the European Court of Justice against Member States concern non-compliance with environmental regulations (Delivet, 2013: 227).

The EU expects Serbia to provide guarantees regarding the deadline and the way in which the full transfer, implementation and effective implementation of EU *acquis* in this area, and also Directive 2008/99/EC, will be ensured. Accordingly, in the working version of the negotiating position for the intergovernmental conference on the accession of the Republic of Serbia to the European Union for the negotiation chapter 27 - Environment and Climate Change, in the part referring to the Directive 2008/99/EC, points to the following:

(a) The Directive has been partly transposed into the Criminal Code, the Law on the Liability of Legal Persons for Criminal Offenses (Law on the Liability of Legal Persons for Criminal Offenses - LLPCO, Official Gazette RS, 97/08) and the Law on Nature Protection (Law on Nature Protection, Official Gazette RS, 36/09 and 88/10);

(b) The Ministry of Justice is the leading responsible institution for the harmonization of national legislation with the Directive. The Normative Affairs Di-

vision is responsible for monitoring the EU requirements and harmonizing domestic legal acts within the competence of the Ministry with EU acts. One person is in charge of the Directive;

(c) The competent courts, the Public Prosecutor's Office and the Directorate for Inspection Affairs shall be responsible for the implementation. Criminal reports of criminal offenses may be filed by any person or inspection service to the competent public prosecutor's office, which is authorized to prosecute *ex officio*. Courts of general jurisdiction are competent to conduct criminal proceedings in relation to criminal offenses against the environment;

(d) Legal persons may also be prosecuted for criminal offenses, including criminal offenses against the environment. LLPCO stipulates that a legal person is liable for criminal offenses committed in favour of a legal person by a responsible person or for acts arising out of the lack of supervision or control by a responsible person who allowed the commission of a criminal offense in favour of a legal entity by a natural person which operates under the supervision and control of the responsible person. Criminal liability and sanctions for legal entities do not call into question the criminal liability of the responsible person;

(e) Public prosecutors and courts shall be responsible for the implementation of the provisions of the CC. These bodies also carry out systematic collection and analysis of statistical data on criminal prosecution and court proceedings for each environmental offense;

(f) A complete transposition will be achieved in 2020 through amendments to the CC. Amendments will transfer other offenses referred to in Article 3 of the Directive which are not currently covered by the CC, and will be in accordance with the Istanbul Convention and the Directive;

(g) Capacity building for environmental authorities responsible for enforcement of environmental legislation will be continued in order to provide for more effective implementation of judicial and administrative procedures related to environmental crimes. Institutional strengthening measures are foreseen in the National Judicial Reform Strategy for the period from 2013-2018 (National Judicial Reform Strategy for the period from 2013-2018, Official Gazette RS, 57/13). The Government of the Republic of Serbia adopted the National Judicial Reform Strategy 2013-2018 aimed at providing that the judicial system, with the effective management and use of judicial resources, management of the trial and cases within reasonable time, applying legally prescribed procedure and respecting the human and minority rights and freedoms guaranteed both by national and international regulations. The National Judicial Reform Strategy is supported by the Action Plan. One of the main goals of this strategy is to increase the quality of work of courts and public prosecutor offices and strengthen the independence and accountability of judiciary, aimed at strengthening of the rule of law, democracy, legal certainty, bringing the justice closer to citizens and regaining the public trust in the judicial system. The abovementioned changes will enable more effi-

cient implementation of regulations and the Directive 2008/99/EC in the cases involving environmental protection;

(h) The implementation of the requirements of the Directive relates to the further transposition of its provisions and the efficiency of the work of the courts, public prosecutor's offices and relevant inspection services. Therefore, amendments to some of the existing criminal offenses provided for in the provisions of Articles 260-277 will be amended CC. The training of representatives of the judicial system in charge of the implementation of criminal law will continue.

Exposed data on the current situation and plans for harmonizing the legislative and institutional framework with EU acquis in this area indicates that the complete transposition, implementation and effective enforcement of Directive 2008/99/EC are an extremely complex process, burdened with numerous problems. As a binding legal instrument of the EU and an extremely important segment of Chapter 27, the Directive defines the results to be achieved in the field of criminal justice protection of the environment, putting our country ahead of legislative, institutional, economic and other challenges that require an adequate and thought-out response. Undoubtedly, the Directive represents a good basis for the establishment of criminal law protection of the environment, but its ultimate reach depends on the quality of implementation and realization of defined standards, as well as the development of ecological awareness.

## CONCLUSION

The environment is primarily protected by civil and administrative law, but the expansion of environmental crimes has required the need for criminal-law protection of the environment. Therefore, in addition to establishing civil and legal liability for damage caused, in certain situations, it is also necessary to apply criminal law protection as an *ultima ratio*, in order to suppress behaviour most dangerous to the environment. In other words, criminal law protection is taken into account when certain environmental values cannot be protected against threats in any other way.

The autonomous ecological jurisdiction of the EEC, established at the beginning of the seventies of the 20th century, resulted in Directive 2008/99/EC on the Protection of the Environment through Criminal Law, which starts from the objectives proclaimed in the Convention on the Protection of the Environment through Criminal Law. The Directive, as we pointed out in its analysis, establishes the foundations of European ecological criminal law. As a part of the EU accession negotiations, Serbia will be opening the Chapter 27 - Environment and Climate Change, which important segment is Directive 2008/99/EC. The Directive defines the results to be achieved in the field of criminal justice protection of the environment, putting our country ahead of legislative, institutional, economic and other challenges. Undoubtedly, the Directive represents a good basis for the establishment of criminal law protection of the environment, but its ultimate

reach depends on the quality of implementation and realization of defined standards, as well as the development of ecological awareness.

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