

Revision of the EU directive on the protection of the environment through criminal law - Analysis and recommendations

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Environmental crime is constantly increasing.¹ According to Interpol, environmental crime is the world's third most lucrative criminal business after drugs and counterfeit goods.²

Environmental harms, due to their collective and transnational nature, may be committed by organised criminal groups, but also multinationals unrelated to organised criminal networks. These companies often take advantage of the weaknesses of national legal systems in southern countries to harm the environment with total impunity, to the detriment of ecological balances and affected communities. The legal actions initiated by Sherpa³ and linked to environmental harms committed by multinationals abroad reveal that environmental criminal law lack effectiveness to sanction such harms.

In this context, the reform of environmental criminal law currently debated at the European Union (EU) level appears crucial. In May 2021, the European Parliament called on the Commission and Council to give priority to the fight against environmental crime.⁴ Indeed, the Directive on the protection of the environment through criminal law adopted in 2008⁵ (hereinafter “**the initial Directive**”) was considered ineffective in fighting environmental crime. In December 2021, the Commission published its revision proposal (hereinafter “**the proposal**”) aiming at improving the effectiveness of investigations and prosecutions and ensuring deterring sanctions.

As currently drafted, however, the proposal falls short of what is at stake. In its general approach adopted late 2022, the Council further reduced the text's scope. For example, it suggested lowering the level of sanctions applicable to legal persons for environmental offences, in contradiction with the objectives being initially pursued by the Directive. Last March, the Parliament adopted its position which presented significant improvements notably on the definition of environmental offences and the level of sanctions applicable to companies.

While negotiations between the Commission, the Council and the Parliament (“trilogues”) are underway, this note presents our analysis and recommendations on five key points: the definition of environmental offences, the liability of legal persons, the sanctions applicable to legal persons, the jurisdiction of European courts for crimes committed abroad and the legal action of associations and victims in environmental matters. Our recommendations are intended to encourage the adoption of an ambitious text that would meet both the challenges of protecting the environment and fighting against multinationals' impunity.



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Summary of our recommendations

1

Create truly autonomous environmental offences

The future Directive must cover not only violations of EU environmental law, but also more broadly all conducts causing or likely to cause harm to the environment. The effectiveness of the environmental protection through criminal law depends on the creation of truly autonomous offences that would not be dependent upon compliance with administrative requirements. Criminal environmental law therefore needs to be enriched with new offences: the offence of endangering the environment could criminalise potential impacts on ecosystems and their functions, the offence of damaging the environment could criminalise proven harms to the environment and the crime of ecocide could be an appropriate response to the most serious offences. These new offences could also facilitate multinationals' prosecution for environmental harms committed abroad.

2

Establish more flexible conditions for legal persons' liability

Environmental crime repression requires rethinking criminal liability as a collective responsibility, and not only as an individual one. A parent company should be held criminally liable more systematically, including for offences committed through its foreign subsidiaries. This implies reconsidering the requirement of identifying the body or representative who committed the offence on behalf of a parent company. In any case, the notions of representative and organ of the legal entity need to be broadened to take better account of the organizational and decision-making conditions in corporate groups.

3

Adapt the sanctions applicable to legal persons

The Commission's proposition to specify and broaden the types of sanctions applicable to legal persons must be maintained and strengthened. However, certain measures included in the proposal, such as the implementation of due diligence mechanisms, should not be referred to as sanctions. Additionally, strengthening the repressive arsenal involves developing mechanisms for confiscating more broadly the proceeds, including indirect ones, derived from the commission of environmental offences by companies.



4

Increase the amount of fines for legal persons

In order to strengthen the criminal justice response to environmental offences, the level of sanctions applicable to companies needs to be increased and must be proportionate to the seriousness of the offence as well as to the financial proceeds derived from the commission of the offence.

5

Remove obstacles to prosecution of environmental offences committed abroad

In order to ensure effective repression of environmental crime, remaining obstacles to the prosecution of multinationals acting as perpetrators or accomplices of environmental offences committed abroad must be overcome. European courts should have jurisdiction to prosecute and try companies conducting all or part of their economic activity in the EU territory. The future Directive should remove the existing limitations to extraterritorial jurisdiction of European courts, such as the requirement of a prior complaint by the victim, the principle of double criminality and the public prosecutor's monopoly.

6

Broaden the possibilities for associations and victims to initiate public proceedings and seek reparation

The effectiveness of environmental criminal law necessarily requires strengthening the role of associations in criminal proceedings. Such an evolution, called for by a group of international lawyers, stems from the Aarhus Convention and entails to enhance the right to participate in criminal proceedings for NGOs in cases of environmental offences. The right of victims to be a "civil party" and to obtain compensation for damage resulting from an environmental offence, such as harm to their health or livelihoods, must be guaranteed. The particularly restrictive conditions currently limiting the admissibility of NGOs' action in several Member States, including France, must also be waived.



Amending the definition of environmental offences

The Commission's evaluation of the Environmental Crime Directive highlighted gaps in its scope of application that have hampered the effectiveness of investigations, prosecutions and transnational cooperation.⁶ Thus, several areas of the environment are currently not covered by the European legislation.⁷

To address these shortcomings, the proposal creates new categories of environmental offences, among which:

- illegally marketing a product which causes or is likely to cause death or serious injury to any person or substantial damage to air, water or soil quality, or to animals or plants as a result of the product's use on a larger scale;
- violating the European legislation on chemical products causing or likely to cause substantial damage to the environment or the health of persons;
- placing on the EU market products violating the European Union Timber Regulation (EUTR).

However, the proposal follows an approach similar to the initial directive in defining the material element of environmental offences. **The scope of the new offences remains limited to "unlawful" acts.**

A conduct is deemed "unlawful" when it infringes:

- "(a) Union legislation, which irrespective of its legal basis contributes to the pursuit of the objectives of Union policy of protecting the environment as set out in the Treaty on the Functioning of the European Union;
- (b) 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 Union legislation referred to in point (a)."⁸

A conduct is also deemed unlawful when the administrative authorisation is obtained fraudulently or by corruption.⁹

According to the proposal's explanatory memorandum, the Commission initially considered a less restrictive approach in defining the material element of the new offences "without the requirement of a breach of relevant EU sectoral legislation." (Option 1c)

Therefore, in the proposal, environmental crimes remain limited to violations of EU environmental laws.

Yet, the dependence of environmental criminal law on administrative regulations has long been the subject of strong criticism by specialists.

Firstly, this way of defining environmental offences makes the characterisation of the offence dependent on administrative requirements.¹⁰ Environmental criminal law then appears to be "accessory" to administrative law.¹¹



It creates a legal vacuum in the field of prevention and prosecution of environmental crimes.¹² For example, pollution may create delayed damage to the environment or human health, even without formal notice from the administrative authorities or any damage at a given moment.¹³ This definition of environmental offences also raises the question of the administrative authorities' means, which are often limited, to fulfil their missions of inspection and control. Furthermore, judges are often reluctant to rely on offences that would require evaluating compliance with administrative requirements.¹⁴

Secondly, **the lack of criminal offences that would be autonomous from administrative laws makes it particularly complex to prosecute environmental crimes committed by companies abroad.** Indeed, EU environmental law application is often territorially limited to the territory of the EU. It then appears to be particularly difficult to apply environmental criminal law to crimes committed abroad, such as a water pollution associated with the industrial activities of a French company's subsidiary. Even though French courts may, under certain conditions, have jurisdiction to apply French criminal law to corruption (or to other criminal acts) committed for the benefit of a multinational abroad, they do not for environmental offences. Thus, the complaints initiated by Sherpa against the companies Rougier and Perenco for environmental harms related to their activities in Cameroon and Ecuador respectively were not based on environmental offences under the French Environmental Code but on offences against property under the French Criminal Code.

In France, gaps in current environmental criminal law resulted in several reform proposals in the last few years. The report entitled *Justice for the Environment* already recommended consolidating environmental offences under a dedicated chapter in the Criminal Code and creating autonomous general offences.¹⁵ In December 2022, the Prosecutor-General's Office of the *Cour de cassation* (French highest judicial court) called for the creation of an offence of "endangering the environment", judging that "(...) environmental crimes creating situations of endangerment are real, and environmental criminal law must be expanded to include an autonomous offence not stemming from environmental administrative criminal law, making it possible to sanction per se all acts committed intentionally or through severe negligence, likely to directly or indirectly expose the environment in its various components to an immediate risk of substantial degradation".

European lawmakers could draw inspiration from these recommendations to enshrine truly autonomous offences. In this respect, the text adopted by the Parliament last March includes significant progress. Members of the European Parliament (MEPs) have broadened the definition of "unlawful" acts.¹⁷ They also suggested creating a general offence that may cover conducts causing or likely to cause substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants. Furthermore, an amendment voted by the Parliament aims to sanction "any conduct causing severe and either widespread or long-term or irreversible damage" as "an offence of particular gravity". If the term "ecocide" is only mentioned in one of the text's recitals, the abovementioned definition seems directly inspired by the one proposed by an international panel of experts for the recognition of this crime.¹⁸ This is a valuable addition, that could fill the legal void in prosecuting the most serious environmental offences, particularly those committed abroad. However, as it stands, the definition appears to be dependent on the "unlawfulness" criteria, which may compromise its effective implementation for the reasons abovementioned.



Recommendation n°1

Create truly autonomous environmental offences

The future Directive must cover not only violations of EU environmental law, but also more broadly all conducts causing or likely to cause harm to the environment. The effectiveness of the environmental protection through criminal law depends on the creation of truly autonomous offences that would not be dependent upon compliance with administrative requirements. Criminal environmental law therefore needs to be enriched with new offences: the offence of endangering the environment could criminalise potential impacts on ecosystems and their functions, the offence of damaging the environment could criminalise proven harms to the environment and the crime of ecocide could be an appropriate response to the most serious offences. These new offences could also facilitate multinationals' prosecution for environmental harms committed abroad.

Strengthening liability of legal persons

Environmental harms are mostly collective, whether they are perpetrated by organised criminal groups or multinationals unrelated to organised criminal networks but whose activities often harm the environment. Yet there is currently a "culture of impunity"²⁰ to which the legal system does not provide a satisfactory response. Indeed, the number of companies convicted of environmental degradation remains particularly low, in France and in other European countries.

In this context, the objective of the Commission's proposal is to ensure legal persons' liability for environmental offences "committed for their benefit".²² In addition, legal persons should also be held liable for a lack of supervision and control that has made possible the commission of an offence.

In practice, the conditions laid down by the proposal seem particularly restrictive.

However, in view of the different legal traditions in EU Member States, the Directive does not require companies' liability under criminal law.²⁵

The Commission's proposal lays down two conditions for holding a legal person liable (Article 6):

- The offence must have been committed "for the benefit" of this legal person;
- By a person "who has a leading position within the legal person, acting either individually or as part of an organ of the legal person, based on:
 - a) a power of representation of the legal person;
 - b) an authority to take decisions on behalf of the legal person;
 - c) an authority to exercise control within the legal person."



Thus, legal persons could only be held liable through their organs or representatives, who are necessarily natural persons. In the proposal, **legal persons' liability thus remains intrinsically linked to that of natural persons, which can be questioned, especially considering that the operation of corporate groups is characterised by an apparent dilution of activities between a multitude of legal and natural persons, and numerous decision-making bodies.** Furthermore, the necessity of identifying precisely the organ or representative who has committed an offence appears particularly complex in the case of international business groups.

Under French law, Article 121-2 of the French Criminal Code – which provides that to be imputed to a legal entity, an offence must have been committed, for their benefit and by one of its organs or representatives – has given rise to several practical difficulties. Jurisprudence has fluctuated on the identification of the organ or representative of the legal entity that committed the offence, particularly when it comes to holding a parent company liable for offences committed via its subsidiaries. Many authors highlighted the shortcomings of the existing legal framework, which appears ill-suited to increasingly complex corporate structures,²⁴ and suggested possible reform avenues.²⁵

Moreover, the proposal adopts a particularly narrow interpretation of the concept of “organ” or “representative” of a legal person. Indeed, it only refers to natural persons within the legal person, who occupy a leading position because of a power of representation or a specific role (individually or as a member of an organ of the legal person). This could set aside situations such as the commission of an environmental offence by employees of a subsidiary of the accused company, even though they may qualify as *de facto* representatives under French jurisprudence,²⁶ because of the Group's transversal organisation and their assigned missions.²⁷ More generally, the organisation of corporate groups is no longer linked solely to legal entities, but is very often based on transversal organisations by type of activity or geographical area. Criminal law must adapt to consider these economic realities. For example, the involvement of a parent company's internal committee made up of group managers may play a decisive role in the commission of an offence, even though the committee lacks legal personality.²⁸

As a result, the conditions set out in the proposal for legal persons' liability appear to be more restrictive than the ones under French law.

Secondly, the proposal also provides that a legal person may be held liable for a lack of supervision or control that has made possible the commission of an environmental offence for its benefit and by a person under its authority. This new provision could facilitate the attribution of the offence to the legal person, for example, convicting a parent company for acts of pollution caused by one of its subsidiaries. However, the text seems to require the natural person, who committed the offence (representative or member of an organ of the legal person) to be precisely identified. This is a substantial limit for the reasons outlined above.

Thus, the liability of legal persons remains particularly restrictive, without significant progress from the initial directive.



Recommendation n°2

Establish more flexible conditions for legal persons' liability

Environmental crime repression requires rethinking criminal liability as a collective responsibility, and not only as an individual one.²⁹ A parent company should be held criminally liable more systematically, including for offences committed through its foreign subsidiaries. This implies reconsidering the requirement of identifying the body or representative who committed the offence on behalf of a parent company. In any case, the notions of representative and organ of the legal entity need to be broadened to take better account of the organizational and decision-making conditions in corporate groups.

Strengthening sanctions for legal persons

The initial Directive was only stating that the sanctions for legal persons should be “effective, proportionate and dissuasive”.³⁰

Evaluating the Directive, the Commission highlights that these vague provisions failed to harmonise the nature of the very heterogeneous penalties provided for in the legislation of Member States, and to raise their level.³¹

In environmental matters, penalties remain very low compared to other branches of criminal law, such as damage to property or persons.³² Another gap in the existing law is the amount of fines imposed on legal entities, which often appear too low in comparison to the potential benefits that may be gained from environmental offences.³³

Consequently, the proposal details both the *quantum* and the type of sanctions applicable to both natural³⁴ and legal persons.³⁵

First of all, the proposal provides an obligation for Member States to create several types of sanctions for legal persons: besides fines, obligation to reinstate the environment within a given period, exclusion from access to public funding including tender procedures, disqualification from the practice of commercial activities, temporary or permanent closure of establishments or judicial winding-up.³⁶

This is a significant step forward since **the use of complementary penalties in addition to fines contributes to the deterring function of criminal sanctions and seems better suited to corporate crime.** According to the French General Council for Environment and Sustainable Development (CGEDD), complementary penalties “(...) have a real deterrent effect insofar as they affect the litigious activity, whether private or professional, of the defendant, whether an individual or a company”.³⁷



Furthermore, the obligation to reinstate the environment (through measures that aimed at eliminating pollution, restoring damaged ecosystems, etc.) is particularly appropriate notably according to the nature of environmental offences. However, this measure should not be confused with the possibility for associations or any other interested person to request reparation of environmental damages.

Among this list of sanctions, the proposal also mentions an “obligation for companies to implement due diligence schemes for enhancing compliance with environmental standards”.³⁸ This provision is quite surprising. Indeed, if there is an offence, it proves that such internal mechanisms are inefficient. Expressly, this measure should not be under the title of sanctions, since the duty of vigilance must intrinsically intervene beforehand, in order to prevent any risk of harm. At a time when the European directive on the duty of vigilance is being debated, this provision appears to head in the opposite direction to the duty of vigilance as a general obligation for companies to take all necessary, appropriate, and effective measures to prevent environmental and human rights abuses occurring in their value chain or in their subsidiaries.

Second of all, the Commission created the possibility for Member States to freeze or confiscate “the proceeds derived from, and instrumentalities used or intended to be used in the commission or contribution to the commission of the offences as referred to in this Directive”.³⁹

This type of sanctions seems particularly efficient for environmental offences linked to economic activities. By taking away from the legal person the proceeds and benefits derived from the offence, the confiscation gains a moral and deterring aspect.⁴⁰ It is also complementary to fines. According to a governmental working group of Experts on Technical Assistance, “in some cases, a fine alone will not serve as an effective deterrent if not combined with the confiscation of proceeds of crimes and property, equipment and other instrumentalities used, or destined for use, in criminal offences”.⁴¹

According to the *Justice for the Environment* report abovementioned, confiscations and seizures are rarely used by French judges for environmental offences.⁴²

To easily implement these sanctions, adapting the current mechanisms need to be adapted to the characteristics of environmental offences. For instance, a report by the Prosecutor’s General Office of the *Cour de cassation* suggests extending the scope of the “general confiscation of assets”, provided for in Article 131-21 (al. 6) of the French Criminal Code to organised-criminal offences.⁴³

Furthermore, according to some experts, “to reinforce the repression of environmental harm, it seems particularly useful to carry out seizures and confiscations in cases where the activity conducted is legal but does not comply with the environmental protection regulation applicable, which gives the company a clear economic advantage”.⁴⁴



Economic actors can indeed benefit from environmental offences by not carrying out the work required to comply with environmental regulation, by discharging substances into the environment without prior treatment, etc. For example, the legal action initiated by Sherpa against the oil company Perenco S.A. for acts of pollution in Democratic Republic of Congo relies on several reports describing discharge of toxic substances into the environment without prior treatment or oil leaks due to the absence of protective tubes in rivers.⁴⁵ The report by the *Cour de cassation* suggests to use value confiscation, which would allow for the seizure and confiscation of the equivalent of the offence’s benefit in the company’s assets, even if such assets were acquired prior to the offence with licit funds.⁴⁶

The proposal could be improved to take the specific characteristics of environmental offences committed by economic actors into consideration. Instead of targeting only the “proceeds” and the “instrumentalities” used in the commission of offences, it could also more broadly cover the indirect proceeds of an offence and specify the possibility of confiscating by equivalent the amount of the economic advantage derived from the offence within the assets of the legal person.

In addition, the possibility to allow the confiscated assets to environmental agencies or to a compensation fund dedicated to the reparation of environmental damages might be considered.⁴⁷ Last March, the Parliament voted for allocating the funds to environmental restoration and compensation of the harms caused. This step forward must be strengthened during the upcoming trilogues between representatives of the Parliament, the Council and the Commission.

Recommendation n°3

Adapt the sanctions applicable to legal persons

The Commission’s proposition to specify and broaden the types of sanctions applicable to legal persons must be maintained and strengthened. However, certain measures included in the proposal, such as the implementation of due diligence mechanisms, should not be referred to as sanctions. Additionally, strengthening the repressive arsenal involves developing mechanisms for confiscating more broadly the proceeds, including indirect ones, derived from the commission of environmental offences by companies.

As for the *quantum* of the fines, **the sanctions for legal person in the proposal are too low to be effective and deterrent.**

The Commission suggests introducing maximum rates which cannot fall below a certain percentage, calculated depending on the offence type:

- 5% of the total worldwide turnover of the legal person in the business year preceding the fining decision for a first “group” of offences (Art. 7§4)
- This rate is lowered to 3% for a second group of offences (Art. 7§5) but this distinction is not clearly justified by scale of seriousness⁴⁸



The Parliament's opinion brings this maximum rate to 10% of the total worldwide turnover over the last three business years preceding the fining decision for offences covered by the Directive.

However, these rates remain insufficient considering the seriousness of the offences covered by the Directive, some of them sanctioning conducts that had caused or had been likely to cause substantial environmental damage as well as death or serious injury to persons.

The Commission also provides for the obligation to link the level of fines to the financial situation of the legal person and the proceeds derived from the offence. This is undoubtedly a step forward as, to be deterring, the cost of a criminal fine should be higher than the proceeds expected from the commission of the environmental offence. Indeed, several reports highlighted the inadequate use of fines against legal entities and their low level in comparison to the potential proceeds that can be derived from environmental offences.⁴⁹

However, it would be preferable to go one step further and allow the maximum fine to be exceeded if it can be demonstrated that the environmental damage has generated, or could have generated, a proceed greater than this maximum fine.⁵⁰

Furthermore, unlike in taxation and corruption, regarding environmental damage, the notion of benefits derived from the offence may be open to interpretation since such benefits are rarely direct. Fines should not be limited to the costs related to compliance avoided by the company but should also include the amount of income derived from the business continuation that gave rise to the violations.

Recommendation n°4

Increase the amount of fines for legal persons

In order to strengthen the criminal justice response to environmental offences, the level of sanctions applicable to companies needs to be increased and must be proportionate to the seriousness of the offence as well as to the financial proceeds derived from the commission of the offence.⁵¹

Extending jurisdiction of Member States to offences committed outside of the EU

The question of the jurisdiction of Member States over conducts occurring outside of the EU is essential. Firstly, the effects of environmental offences are by nature transnational, such as the consequences of deforestation on worldwide biodiversity or the worsening of global warming. Secondly, multinational still escape accountability for offences committed abroad by their subsidiaries or within their value chain.



In many European countries, including France, the extraterritorial jurisdiction is subject to several restrictions. **The effectiveness of the future directive depends on the European courts ability to exercise jurisdiction over environmental offences committed abroad.**

In this regard, the proposal provides for the obligation for each Member State to establish its jurisdiction over offences committed in whole or in part on its territory (Art. 12§1 (a)), when the damage occurred on its territory (Art. 12§1(c)), or when the offender is one of its nationals or habitual residents (Art. 12§1(d)). These are traditional grounds for criminal jurisdiction over offences committed abroad.⁵²

Then, each Member State can, but it is a mere option, decide to extend its jurisdiction, notably when the offence is committed for the benefit of a legal person “established on its territory” (Art. 12§2 (a)).

The proposal therefore distinguishes between perpetrators who are natural persons, for whom States are obliged to extend their jurisdiction in accordance with the Active Personality Principle, and perpetrators who are legal persons, for whom States only have the option of extending it. This distinction seems unjustified. Several Member States,⁵³ including France, already recognize, under certain conditions, their jurisdiction over offences committed abroad by legal persons. This shortcoming was rightly corrected when the text was examined by the European Parliament last March.⁵⁴

Furthermore, the text only covers the hypothesis where the offence is committed for the benefit of a legal person established on the territory of a Member State. The MEPs could get inspiration from the French Criminal Code provisions regarding corruption that apply to any “person [...] conducting all or part of its economic activity in France”.⁵⁵ Indeed, the term “economic activity” might facilitate the prosecution of active multinationals within the EU, via subsidiaries or other establishments with no legal personality (such as commercial offices or branches).⁵⁶

Finally, the proposal aims at removing certain limitations on the extraterritorial jurisdiction of European courts. Its article 12§3 provides that, in some cases, “(...) Member States shall take necessary measures to ensure that the exercise of their jurisdiction **is not subject to the condition that a prosecution can be initiated only following a denunciation from the State of the place where the criminal offence was committed.**”

These provisions are relevant and could be reinforced to facilitate the prosecution of environmental offences committed abroad. The French legal framework illustrates the restrictive nature of the conditions governing court jurisdiction. In many cases, prosecution of offences is limited by the “monopoly of the prosecution” condition, establishing that public prosecution can only be initiated by the public prosecutor.⁵⁷



This monopoly is a major obstacle to access to justice for victims: in the two legal actions brought against Rougier in Cameroon⁵⁸ and Perenco in Ecuador⁵⁹ regarding environmental harms, the court only noted the lack of action by the public prosecutor's office terminating the proceedings and allowing these French companies to continue operating with utter impunity.

There are currently other restrictions to the prosecution and trial of offences committed abroad. For example, a prior complaint by the victim or an official denunciation by the proper authority of the country where the act was committed may also be needed.⁶⁰ Moreover, according to the principle of double criminality, in some cases offences can only be prosecuted when they are punishable under both French law and the law of the country where they were committed.⁶¹ Under French law, complicity in an offence committed abroad usually requires the establishment of the offence by a foreign court's final decision.⁶² If some legislative developments under French law have progressively removed such constraints for certain categories of offences, they are still in force regarding environmental offences.

Recommendation n°5

Remove obstacles to prosecution of environmental offences committed abroad

In order to ensure effective repression of environmental crime, remaining obstacles to the prosecution of multinationals acting as perpetrators or accomplices of environmental offences committed abroad must be overcome. European courts should have jurisdiction to prosecute and try companies conducting all or part of their economic activity in the EU territory. The future Directive should remove the existing limitations to extraterritorial jurisdiction of European courts, such as the requirement of a prior complaint by the victim, the principle of double criminality and the public prosecutor's monopoly.

Facilitating legal actions for associations and victims of environmental offences

The proposal contains a new article entitled "Rights for the public concerned to participate in proceedings" stating that "Member States shall ensure that, in accordance with their national legal system, members of the public concerned **have appropriate rights to participate in proceedings** concerning offences referred to in Articles 3 and 4, **for instance as a civil party**".⁶⁴

The term of "public concerned" is defined as "**the persons affected or likely to be affected** by the offences referred to in Articles 3 or 4. For the purposes of this definition, persons having a sufficient interest or maintaining the impairment of a right **as well as non-governmental organisations promoting the protection of the environment** and meeting any proportionate requirements under national law shall be deemed to have an interest".⁶⁵

This definition seems to be directly inspired from the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.⁶⁶



These provisions, non-existent in the initial Directive, are welcome as they aim at recognising specific rights for victims and associations in criminal proceedings. **However, it is necessary to go a step further to remove the current obstacles to legal actions for associations.**

Exercised by associations to defend their statutory objective, civil actions are at the forefront of the fight against human rights violations and environmental harms resulting from economic activities.

In France⁶⁷, as in other European Member States, the principle of prosecutorial discretion prevails, which means that public prosecution is initiated and exercised by the public prosecutor, who decides whether or not to prosecute a perpetrator. Under French law, a public prosecution may also be initiated by injured parties when they bring civil action, by lodging a "civil party" complaint directly with an investigating judge, a magistrate whose independence from the executive is fully guaranteed. Civil action thus mitigates the arbitrary nature of the principle of prosecutorial discretion and provides necessary support to victims.

In environmental matters precisely, associations are crucial in criminal proceedings to ensure that environmental harms do not remain unpunished when there is no "victim" to seek redress for the damage caused by the offence.⁶⁸

However, there are increasing restrictions on associations' legal actions in criminal matters. Their admissibility to initiate public prosecution for environmental offences is currently limited even though their action could overcome the public prosecutor's inertia. Under French law, the associations' participation to environmental cases is, to a large extent, conditioned upon an express legislative provision⁶⁹ and prior executive "approval". Regularly declared associations whose statutory object includes the protection of the environment or the fight against pollution but who did not obtain the executive "approval" have very limited possibilities to take legal action. In addition to a five-year minimum existence criteria, they are only entitled to take legal action with respect to two specific types of offences: in the case of water pollution or breach of the legislation on classified installations.⁷⁰ This limitation to NGOs' action significantly reduces the number of NGOs able to act as a civil party in environmental criminal proceedings. The last report of the Prosecutor's General Office of the *Cour de cassation* on environmental litigation precisely states that "the role of civil parties in trials, and the effectiveness of civil party submissions in support of public prosecutions, also raise questions".⁷¹

However, the Council of the EU, in its evaluation report, recognized that "the procedural legitimacy of NGOs differs between the legal systems of the Member States; (...) In other Member States the national legislation does not allow NGOs to bring civil actions in criminal proceedings, that right being limited to the victims of the crime".⁷²



Therefore, the proposal should be strengthened on this specific question, allowing for the recognition of the right of NGOs to “participate” in criminal proceedings but also more importantly to initiate public proceedings, especially when the public prosecutor does not, and to exercise the rights of a civil party. The definition of “public concerned” should also allow for a broader recognition of the admissibility of associations whose statutory purpose concerns environmental protection and remove certain restrictions in national law that do not appear «proportionate», such as prior approval by public authorities.

Recommendation n°6

Broaden the possibilities for associations and victims to initiate public proceedings and seek reparation

The effectiveness of environmental criminal law necessarily requires strengthening the role of associations in criminal proceedings. Such an evolution, called for by a group of international lawyers, stems from the Aarhus Convention⁷⁴ and entails to enhance the right to participate in criminal proceedings for NGOs in cases of environmental offences. The right of victims to be a “civil party” and to obtain compensation for damage resulting from an environmental offence, such as harm to their health or livelihoods, must be guaranteed. The particularly restrictive conditions currently limiting the admissibility of NGOs’ action in several Member States, including France, must also be waived.



About Sherpa

Fighting new forms of impunity linked to the globalization

Sherpa carries out advocacy, strategic litigation, legal research and capacity building activities, in order to strengthen economic actors’ accountability and build up a legal framework that better protects the environment, communities and human rights.

To implement these activities, Sherpa brings together lawyers, legal experts, academics and many other experts who support its action by putting forward an innovative approach to law.

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4. European Parliament resolution of 20 May 2021 on the liability of companies for environmental damage (2020/2027(INI)).
5. 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.
6. See Explanatory memorandum of the Commission’s proposal, 15 December 2021, 1.
7. *Ibid.*, at 11.
8. Article 2(1) of the Commission’s proposal.
9. *Ibid.*
10. Julien Bétaille, « État des connaissances. Justice et écologie, panorama des principales recherches », Mission de recherche Droit & Justice, 21 March 2021, 34.
11. Coralie Courtaigne-Deslandes, « L’adéquation du droit pénal à la protection de l’environnement », Doctoral thesis, Université Paris II Panthéon-Assas, 2010, 13.
12. An author also underlines the weaknesses related to “accessory” offences: “Such a technique also reduces the legibility and accessibility of the offence: it is necessary to refer to several texts in order to determine the content of the offence. Moreover, the wording of the reference text does not always guarantee the clarity and precision expected from a criminal provision. It also reduces foreseeability, as the reference may also refer to future legislation, whereas protection under criminal law is conditional on the validity of the non-criminal provision (...)” Translated from French, Juliette Tricot, « Les infractions environnementales face au renouvellement des stratégies et des techniques d’incrimination », *Revue Energie, environnement, infrastructures*, n°17, December 2017.
13. Véronique Jaworski, « De nouvelles infractions de mise en danger de l’environnement pour un changement de paradigme juridique », *Revue Juridique de l’environnement*, 2021/3, vol. 46, 488.



14. *Supra note 10*, at 34.
15. French Ministry of Justice, General Council for Environment and Sustainable Development (CGEDD), « Une justice pour l'environnement, Mission d'évaluation des relations entre justice et environnement », October 2019, 70-71.
16. Translated from French, report of the working group on environmental criminal law, Cour de cassation Prosecutor General's office, « Le traitement pénal du contentieux de l'environnement », 2022, 66.
17. The Parliament has amended the definition of "unlawful" contained in Article 2(1) of the Commission's proposal to extend it to infringements of "union law" rather than "union legislation". A conduct is also considered unlawful when it infringes a provision of the administrative authorisation.
18. Independent Expert Panel for the legal definition of Ecocide set up under the aegis of the Stop Ecocide Foundation.
19. *Supra note 13*, at 493.
20. *Ibid.*, at 487.
21. *See, in particular*, the impact assessment accompanying the "European Public Prosecutor's Office and specialised criminal justice" bill, according to which only 139 legal persons were held criminally responsible in 2017, 143 and following.
22. *Ibid.*, at 18.
23. Other Member States, such as Germany, do not recognize the criminal liability of legal persons.
24. Laurent Saenko, « Affaire Alcatel : quand la responsabilité pénale des personnes morales dépend du fait et non (plus du tout) du droit », *Revue trimestrielle de droit commercial.*, 2022, 169.
25. Jean-Yves Marechal, « La responsabilité pénale des personnes morales à la croisée des chemins », *Le Quotidien du 26 août 2022 : Responsabilité pénale*, Lexbase, 25 août 2022.
26. Cour de cassation, Criminal chamber, « Alcatel », 16 June 2021, n° 20-83.098.
27. Notwithstanding the absence of a legal link or delegation of powers to their benefit.
28. Jacques-Henri Robert, « L'affaire Pétrole contre nourriture », Note on Cour de cassation, Criminal chamber, 14 March 2018, n° 16-82.117, *Revue des sociétés*, 2018, 459 ; and *supra note 24*
29. *Supra note 13*, at 487.
30. *Supra note 5*, Article 5.
31. European Commission, Commission staff working document, executive summary of the "evaluation of the 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", 28 October 2020, 2.
32. IUCN French Committee, « La protection de la nature par le droit pénal : des propositions pour une meilleure efficacité », November 2015,
33. Council of the EU, "Final report of the eighth round of mutual evaluations on environmental crime", 15 November 2019, 59.
34. Article 5 of the proposal.
35. Article 7 of the proposal.
36. Article 7§2 of the proposal.
37. *Supra note 15*, at 69.
38. Article 7 §2 (j) of the proposal.
39. Article 10 of the proposal.
40. Emmanuel Dreyer, « Sur les fonctions respectives de l'amende et de la confiscation », *Gazette du Palais* - n°133, 13 May 2014.



41. Conference of the Parties to the UN Convention against Transnational organized crime, "Application of the Organized Crime Convention for preventing and combating transnational organized crimes that affect the environment", Background paper prepared by the Secretariat, CTOC/COP/WG.2/2022/3–CTOC/COP/WG.3/2022/3, 11 March 2022.
42. *Supra note 15*, at 68
43. *Supra note 16*, at 68
44. Translated from French, *Ibid.*
45. Report from the Congolese NGO Association Ressources Naturelles et Développement (RENAD), « Impact de Perenco REP sur le cadre de vie des communautés de Muanda en RD Congo », April 2022.
46. Report of the working group on environmental criminal law chaired by Mr François Molins, *Op. Cit.*, 69.
47. *Supra note 33*, at 62.
48. For example, the abstraction of surface water or groundwater which causes or is likely to cause substantial damage to the ecological status or potential of surface water bodies or to the quantitative status of groundwater bodies is punishable by a fine of up to 3% of the legal person's turnover.
49. *Supra note 33*, at 58.
50. *Supra note 15*, at 68.
51. *See* the recommendation of the European Environmental Bureau (EEB) in its report "Crime and punishment", March 2020, 21.
52. Active or passive personal liability when the perpetrator or victim is a national of the Member State.
53. For example, Belgium, Bulgaria, the Czech Republic, the Netherlands, Portugal and Slovakia ; see OECD, "The liability of legal persons for foreign bribery: A stocktaking report", 2016
54. The European Parliament voted to add to Article 12(1) (da) an obligation for Member States to extend their jurisdiction to offences committed by a legal person established on their territory, in addition to the jurisdiction already provided for natural persons who are nationals of the State or habitually resident there. It has also created an Article 12§1 (da) which provides for the case where the offence has been committed for the benefit of a legal person established on its territory.
55. Translated from French, Article 435-6-2 of the French Criminal Code.
56. Marc Segonds, « Ordonnance n° 2019-963 du 18 septembre 2019 relative à la lutte contre la fraude portant atteinte aux intérêts financiers de l'Union européenne au moyen du droit pénal », *Revue de science criminelle et de droit pénal comparé*, 2019, p. 890.
57. Article 113-8 of the French Criminal Code.
58. Cour de cassation, Criminal chamber, 12 April 2005, n°04-82.318.
59. Cour de cassation, Criminal chamber, 26 October 2010, n°10-81.342.
60. Article 113-8 of the French Criminal Code.
61. Article 113-6 of the French Criminal Code (for offences punished by less than 10 years of imprisonment).
62. Article 113-5 of the French Criminal Code.
63. French Law no. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, Article 21; Order no. 2019-963 of 18 September 2019 on the fight against fraud affecting the financial interests of the European Union through criminal law, Article 1.
64. Article 14 §1 of the proposal.
65. Article 2 (4) of the proposal.



66. Article 2 (5) of the proposal

67. Article 1, al. 1 and 31 of the French Criminal Procedure Code.

68. As mentioned in recital 26 of the Commission's proposal, "Since nature cannot represent itself as a victim in criminal proceedings, for the purpose of effective **enforcement members of the public concerned**, as defined in this Directive taking into account Articles 2(5) and 9(3) of the Aarhus Convention, should have the possibility to act on behalf of the environment as a public good, within the scope of the Member States' legal framework and subject to the relevant procedural rules."

69. Article L. 142-2 and following of the French Environmental Code.

70. Article L. 142-2, §2 of the French Environmental Code, provides that : "This right is also granted, under the same conditions, to associations that have been duly registered for at least five years on the date of the facts and that propose, through their statutes, to safeguard all or some of the interests referred to in article L. 211-1, with regard to facts constituting an infringement of the provisions relating to water, or the interests referred to in article L. 511-1, with regard to facts constituting an infringement of the provisions relating to classified installations."

71. Report of the working group on environmental criminal law chaired by Mr. François Molins, *Op. Cit.*, 12.

72. *Supra note 33*, at 64.

73. Isabelle Fouchar and Laurent Neyret, « 35 propositions pour mieux sanctionner les crimes contre l'environnement », summary report to the French Ministry of Justice, 11 February 2015, 75-76.

74. Article 9 §3 of the proposal.