

## EU Enviro Directive Compliance Must Be A Priority For CEOs

By **Marcus Navin-Jones and Ward Overlaet** (November 21, 2024, 3:12 PM GMT)

Following the 2021 European Commission proposal,[1] a new Environmental Crime Directive, or ECD, was adopted in April. It entered into force in May,[2] and European Union member states bound by the new ECD must adopt national measures transposing it by May 21, 2026.[3]

The new ECD essentially replaces the Environmental Crime Directive 2008, which, following evaluations in 2019 and 2020, was found to be insufficiently effective in certain aspects.[4] It generally applies without prejudice to other relevant EU and national law, and member states are commonly able to add additional criminal environmental offenses to the list set out in the new ECD.[5]

The new ECD is not intended to affect civil liability under EU or national law for harm or damage caused as a result of any act or omission constituting a criminal offense under the new ECD.[6]

There is currently a deluge of new EU law being finalized and adopted — particularly on environmental and sustainability issues. At times, it may seem overwhelming, with certain new EU laws being overlooked. However, when serious environmental problems come to light within companies, the first major concern is normally criminal liability. That includes potential criminal liability of the company itself, but also of the CEO, board members and other persons leading it.

With that in mind, ensuring compliance with the new ECD should be top of a company's to-do list.

### Core Requirements

The new ECD builds on the 2008 directive, adding new offenses, and strengthening and complementing the 2008 directive provisions in a number of areas.

The new ECD adds new categories of offenses e.g., the extraction of surface or groundwater where such conduct causes or is likely to cause substantial damage to the ecological status of water bodies — of interest following the high-profile Donaña cases, heard in the EU Court of Justice in 2021.[7] It also strengthens and clarifies provisions on, for example, the meaning of "substantial damage."

The new ECD requires EU member states to ensure that certain conduct, including acts, e.g., active



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conduct, omissions and failure to comply, constitute criminal offenses.[8]

For an act or omission to constitute an environmental criminal offense it must be "unlawful," meaning that the act or omission must, generally speaking, breach EU environmental law, or breach relevant EU member state law or acts that give effect to EU environmental law.[9]

The new ECD sets out conduct that is capable of constituting criminal offenses. Where that conduct is committed intentionally, it will generally constitute a criminal offense. These include, for example:

- Discharge of material or substances into air, soil or water that causes or is likely to cause death, serious injury to any person — generally excluding mental injury — or substantial damage to the quality of air, soil or water etc.; and
- Manufacture, placing or making available on the market, export or use of substances in breach of the reach restrictions, where such conduct causes or is likely to cause the death, serious injury to any person — generally excluding mental injury — or substantial damage to the quality of air, soil or water.

For most of the conduct listed in the new ECD, where those acts or omissions are carried out with at least serious negligence, it will also constitute a criminal offense. The meanings of "intention" and "serious negligence" are generally to be interpreted in accordance with national law.

The new ECD includes new provisions on so-called qualified criminal offenses. These are acts, omissions and conduct that have a particularly devastating or serious environmental impact, and that are akin, or comparable, to "ecocide." For the most part, EU member states must ensure that the criminal or noncriminal penalties for qualified criminal offenses are more severe than those applicable for other criminal offenses in the new ECD.

The new ECD sets out a number of aggravating and mitigating circumstances relating to environmental crime offenses. It also includes provisions requiring EU member states to ensure inciting, aiding and abetting, and attempts concerning environmental crimes are punishable as criminal offenses.

## **Penalties**

The new ECD requires EU member states to ensure that committing the criminal offenses listed in the new ECD; attempting to commit those offenses; and conduct inciting, aiding and abetting such offenses are punishable by effective, proportionate and dissuasive penalties.

EU member states are required to ensure certain penalties can be imposed on legal persons, e.g., companies that commit environmental crimes. Those penalties include:

- Criminal or noncriminal fines including, in some cases, 5% of the total worldwide turnover or an amount corresponding to €40 million (\$42.2 million);
- Obligations to restore the environment, the exclusion from public funding — including public tenders, exclusion of grants and concessions, and withdrawal of permits and authorizations — according to the new ECD, these accessory penalties or measures can be more effective than financial penalties;[10] and

- The ability to freeze and confiscate proceeds gained as a result of environmental crimes.

Perhaps most significant for CEOs and others leading a company is that the new ECD makes clear that criminal liability of a legal person, e.g., a company, does not preclude criminal proceedings being brought against individuals — such as corporate board members — who commit, incite or are accessories to the criminal offenses.[11]

Therefore, where a company is criminally liable, the CEO, corporate board members and others leading the company may also be criminally liable for the same or similar offense, e.g., aiding and abetting.

As criminal conduct includes omissions and failures to act, a failure of a CEO, corporate board member or another individual leading the company, e.g., a failure to stop or sufficiently monitor and prevent corrupt practices resulting in environmental crimes, may incur criminal liability in their personal capacity.

The new ECD requires EU member states to ensure certain penalties can be imposed on individuals — natural persons — who commit environmental crimes. This can include, in some cases, imprisonment of at least 10 years.

### **Other Issues**

The new ECD also lays down rules on issues such as:

- Limitation periods;
- Whistleblowers;
- The protection and anonymity of individuals who report environmental crimes and assist with criminal investigations and proceedings;
- Organized crime and corruption;
- Cooperation between national enforcement authorities;[12] and
- Jurisdiction of EU member states over criminal offenses.

### **The Situation Now: Belgium As A Case Study**

EU member states affected now have until the second quarter of 2026 to transpose the new ECD requirements. Some EU member states are already making headway in not merely transposing the new ECD, but taking other action too. Belgium is a particularly interesting example in this respect.

Earlier this year, Belgium became one of the first countries in the world, if not the first, to recognize ecocide as a national and international crime.

One of the interesting aspects about Belgium is how the Belgian ecocide law, along with the new ECD, will apply in practice, in light of recent significant environmental problems.

One significant environmental issue in Belgium has been the per- and polyfluoroalkyl substance issue that came to light in 2021, when unusually high levels were measured in the soil and water samples that

were taken. It raises the question as to what extent company leaders would be criminally liable under Belgian ecocide law or the new ECD in the future, were there a similar situation.

### **What Companies Should Do Now**

Companies should:

- Appoint a person, or persons, as responsible for ensuring the company complies with all EU environmental laws — including, in particular, the new ECD. Indeed, the new ECD itself explicitly states that EU member states should "encourage [companies] to have compliance officers to help ensure compliance with union environmental laws." [13]
- Monitor transposition of the new ECD in the EU member states in which they operate, and also where their operations may cause environmental damage. Companies should also carefully monitor other developments such as developments on ecocide issues at the international level. [14]
- Ensure that they, and each individual forming part of their leadership teams, are protected, and the risk of financial loss and reputation damage caused by allegations, investigations and actions concerning EU environmental law is, where possible, excluded or limited.
- Ensure that they, and each individual forming part of their leadership teams, are insured for any possible administrative investigations, civil proceedings or criminal proceedings brought by third parties, involving alleged or actual breaches of EU environmental Law, including the new ECD. This should include insurance coverage of individuals in leadership teams, after that individual has left the company, until, for example, the limitation periods for bringing claims have expired.
- Ensure, first and foremost, that they have policies and procedures in place to monitor and verify compliance, as a minimum, with the core environmental requirements and provisions listed in the new ECD.
- Remain cognizant that an omission may constitute a criminal offense. Therefore, any policies and procedures must be capable of identifying not merely proactive acts that may potentially constitute a criminal offense — but also any failure to act.
- Have policies and procedures to exclude and limit liability for any act or omission by an employee, officer or representative of the company, involving or relating to environmental crimes including, for example, any potentially corrupt or improper dealings that may result in environmental damage.
- Exclude, limit and distinguish, where possible, between responsibilities and liabilities under extended producer responsibility schemes, for example, as opposed to criminal liability issues under the new ECD.

### **Conclusion**

As companies are swamped with new EU law, and having to ensure compliance with high-visibility EU laws, such as the Corporate Sustainability Reporting Directive and the EU Deforestation Regulation, other EU laws, such as the new ECD, can be forgotten or put on the back burner.

Companies, CEOs and leaders of companies may believe that they and their activities could never attract criminal liability. However, times are changing. Natural disasters connected to human activities are becoming more prevalent. Pressure on EU and governmental authorities to take more action against companies — and their CEOs and leaders — is growing.

As such, it is almost certain that, in the future, increasing numbers of CEOs and leaders of companies, and companies themselves, will face the unpleasant prospect of action and charges taken pursuant to the ECD. For that reason alone, the ECD should really be at the top of the priority list.

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[1] [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_6744](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6744).

[2] I.e., Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024L1203>.

[3] NB. Generally excluding Ireland and Denmark (Preamble paragraphs 69-70 new ECD). Member States not bound by the new ECD generally remained bound by the 2008 Environmental Crime Directive (Article 26 New ECD).

[4] i.e., 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 (Text with EEA relevance): <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0099>.

[5] Article 3(5).

[6] Preamble paragraph 43.

[7] Judgment of the European Court of Justice (First Chamber) of 24 June 2021, European Commission v. Kingdom of Spain (Détérioration de l'espace naturel de Doñana), C-559/19, EU:C:2021:512, etc.

[8] Preamble para. 7.

[9] Article 3(1).

[10] Preamble paragraph 31.

[11] Preamble paragraph 38.

[12] E.g. The Commission Expert Group on Environmental Compliance and Governance Forum: [https://environment.ec.europa.eu/law-and-governance/environmental-compliance-assurance/commission-support\\_en](https://environment.ec.europa.eu/law-and-governance/environmental-compliance-assurance/commission-support_en).

[13] Preamble paragraph 59.

[14] E.g., On Sept. 9, 2024, the Pacific Island States proposed an amendment to the Rome Statute to include the crime of ecocide, which was later endorsed by the DRC. See <https://www.stopecocide.earth>. and <https://www.ejiltalk.org/should-ecocide-be-an-international-crime-its-time-for-states-to-decide>.