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EU Enhances Protection of the Environment Through Criminal Law

Client Alert | May 2, 2024

The Directive extends the list of criminal offenses to the environment on EU level. EU Member States have two years to transpose the directive into national law after the its entry into force on May 20, 2024.

On April 30, 2024, the European Union (the "**EU**") published directive 2024/1203 on the protection of the environment through criminal law (the "**Directive**") in its official journal.[1] The Directive was adopted by the European Parliament (the "**Parliament**") on February 27, 2024[2] and by the European Council (the "**Council**") on March 26, 2024[3]. The goal of the Directive is to combat environmental offenses more effectively. To this end, it introduces (i) new environment-related criminal offenses, (ii) detailed requirements regarding sanctioning levels for both natural and legal persons and (iii) a variety of measures that Member States must take in order to either prevent or effectively prosecute offenses. The Directive will come into force on May 20, 2024[4], after which the Member States (with the exception of Ireland and Denmark[5]) will have 24 months to transpose it into national law.[6] Importantly, the Directive by its nature only establishes minimum requirements. Member States may choose to go beyond those minimum requirements and adopt stricter criminal laws when implementing the Directive.

Related People

Benno Schwarz

Katharina E. Humphrey

Key Takeaways

- The Directive provides for 20 environment-related criminal offenses.
- The Directive introduces "qualified offenses" with more severe punishment ir *the destruction of, or widespread and systematic damage, which is either irre ecosystem of considerable size or environmental value or a habitat within a p substantial damage which is either irreversible or long lasting to the quality o*
- Conduct shall be deemed unlawful even if it is carried out under an authoriza of a Member State if such authorization was obtained fraudulently or by corru authorization is in manifest breach of relevant substantive legal requirements
- The Directive stipulates severe penalties, including maximum terms of impris individuals and maximum fines for legal entities of not less than 5 % of the w
- Member States have jurisdiction if the damage is one of the constituent elem their territory. In cases where the damage occurs in a Member State other th causing the damage occurred, this may lead to prosecution in more than one further enhancement of the cooperation between enforcement authorities in
- The Directive stipulates a variety of measures that Member States must take effectively prosecute offenses. These include, among others, the provision o awareness-raising campaigns and education programs, the provision of train national strategy on combating environmental criminal offenses.

A. Background In its founding treaties, the EU has committed itself to ensuring a high level of protection of the environment.[7] To this end, in 2008, the EU adopted the Directive on the protection of the

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environment through criminal law, obligating Member States to criminalize certain environmentally harmful activities. A subsequent evaluation of the effectiveness of the Directive identified considerable enforcement gaps in all Member States. Further, it concluded that the number of cross-border investigations and convictions in the EU for environmental crime had not grown substantially as expected.[8] Since environmental crime is growing at annual rates of 5% to 7% globally[9], creating lasting damage for habitats, species, people's health, and the revenues of governments and businesses, the European Commission concluded the current directive to be insufficient and proposed a new directive. The Directive should be seen in the context of other recent EU regulations that have already been passed or are still in the legislative process, which aim at protecting the environment in the context of the EU's transition to a climate-neutral and green economy ("Green Deal"[10]). For example, the *Corporate Sustainability Reporting Directive (CSRD)*, which has come into force on January 5, 2023, requires certain companies to report on impacts as well as risk and opportunities related to sustainability matters.[11] On April 24, 2024, after lengthy negotiations and several postponements, the *Corporate Sustainability Due Diligence Directive (CSDDD)* which sets out due diligence obligations for companies regarding actual and potential adverse impacts on the environment and human rights in their value chains was finally passed by the Parliament.[12] **B. Environmental Crime Defined** The Directive provides for 20 basic criminal offenses addressing various ways of conduct.[13] Conduct in this respect relates, for example, to

- the harmful discharge, emission or introduction of materials or substances, energy (such as heat, sources of energy and noise)[14] or ionising radiation into air, soil or water.[15]
- the placing on the market of a product that is potentially harmful when used on a large scale, in breach of a prohibition or another requirement aimed at protecting the environment.[16]
- the manufacturing, placing or making available on the market, export or use of certain harmful substances.[17]
- the harmful collection, transport, recovery or disposal of waste, the supervision of such operations and the after-care of disposal sites, including action taken as a dealer or a broker.[18]
- trade with timber in violation of the EU Regulation[19] on Deforestation-free products.[20]

Unlawful Conduct - Conduct in Breach of the Union's Policy on the Environment The offenses defined by the Directive require unlawful conduct, i.e. either (1) a breach of Union law contributing to the pursuit of at least one of the objectives of the Union's policy on the environment or (2) a law, regulation or administrative provision of a Member State or a decision taken by a competent authority of a Member State that gives effect to such Union law.[21] Pursuant to Article 191 (1) of the Treaty on the Functioning of the European Union ("**TFEU"**), Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilization of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Importantly, the Directive makes clear that conduct shall be deemed unlawful even when it is carried out under an authorization if such authorization was obtained fraudulently or by corruption, extortion or coercion, or is in manifest breach of relevant substantive requirements.[22] The recitals suggest that '*in manifest breach of relevant substantive*

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legal requirements' should be interpreted as referring to an obvious and substantial breach of relevant substantive legal requirements, and is not intended to include breaches of procedural requirements or minor elements of the authorization.[23] ***Common constituent element*** The majority of the offenses described by the Directive require that the conduct "*causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants*"[24]. While the Directive provides for elements that should be taken into account when assessing whether the damage to the quality of air, soil or water, or to an ecosystem or to animals or plants is "*substantial*"[25], the recitals stipulate that this qualitative threshold as well as the term "*ecosystem*" should be generally understood in a broad sense suggesting a possibly wide scope of application.[26] ***"Qualified Offenses"*** The Directive introduces "qualified offenses" with more severe penalties consisting of *(a) the destruction of, or widespread and systematic damage, which is either irreversible or long-lasting to, an ecosystem of considerable size or environmental value or a habitat within a protected site, or (b) widespread and substantial damage which is either irreversible or long lasting to the quality of air, soil, or water*".[27] In its recitals, the EU describes such offenses as "comparable to Ecocide".[28] The term "ecocide" was originally coined in the 1970s during the Vietnam war and was eventually recognized as a war crime under the Rome Statute[29].[30] The language of the Directive further resembles the definition of crimes against humanity.[31] ***Intentional or Serious Negligence Required*** As a general rule, the offenses set out by the Directive require that the conduct is intentional.[32] For 18 modalities, Member States must ensure that the respective conduct constitutes a criminal offense where that conduct is carried out with at least serious negligence.[33] ***Complicity and Inchoate Offending*** Pursuant to the Directive, Member States must ensure that inciting, and aiding and abetting the commission of an intentionally committed offense are punishable.[34] For 16 modalities of conduct, the Directive instructs that attempts be a crime.[35] ***Penalties*** Criminal penalties for individuals must be effective, proportionate and dissuasive.[36] The Directive stipulates that these must include maximum terms of imprisonment of at least ten, eight, five, or three years depending on the specific offense.[37] Accessory criminal or non-criminal penalties or measures may include the (a) obligation to restore the environment or pay compensation for the damage to the environment; (b) fines; (c) exclusion from access to public funding; (d) disqualification from holding, within a legal person, a leading position of the same type used for committing the offense; (e) withdrawal of permits and authorizations; (f) temporary bans on running for public office; (g) where there is a public interest, following a case-by-case assessment, publication of all or part of the judicial decision that relates to the criminal offense committed and the sanctions or measures imposed.[38] **C. Corporate Liability** The Directive not only addresses individual misconduct, but also criminal offending on behalf of legal persons. In this respect, Member States must ensure that legal persons can be held liable for offenses conducted by any person who has a leading position within the legal person concerned, either based on a power of representation, an authority to take decisions, or an authority to exercise control within the legal person.[39] Liability must also include the lack of supervision or control by a person who has a leading position when it has made possible the commission of an offense for the benefit of the legal person by a person under its authority.[40] In terms of sanctions, Member States must ensure that liable legal person can be punished by effective, proportionate and dissuasive criminal or non-criminal[41] penalties or measures.[42] This is supposed to include fines which shall be proportionate to the seriousness of the conduct and to the "*individual, financial and other circumstances of the legal person concerned*".[43] Member States are to ensure that the maximum level of fines is, depending on the specific type of offending, not less than

- 5 % of the worldwide turnover[44] or EUR 40 million;[45] or
- 3 % of the worldwide turnover or EUR 24 million.[46]

Beyond that, the Directive obliges Member States to take the necessary measures to ensure that legal persons held liable for "ecocide" are punishable by more severe penalties or measures.[47] Further measures or sanctions with respect to legal persons

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may include (a) the obligation to restore the environment or pay compensation for the damage to the environment; (b) exclusion from entitlement to public benefits or aid; (c) exclusion from access to public funding, including tender procedures, grants, concessions and licenses; (d) temporary or permanent disqualification from the practice of business activities; (e) withdrawal of permits and authorizations to pursue activities that resulted in the relevant criminal offense; (f) placing under judicial supervision; (g) judicial winding-up; (h) closure of establishments used for committing the offense; (i) an obligation to establish due diligence schemes for enhancing compliance with environmental standards; and (j) where there is a public interest, publication of all or part of the judicial decision relating to the criminal offense committed and the penalties or measures imposed, without prejudice to rules on privacy and the protection of personal data.[48] **D. Jurisdiction** Member States have jurisdiction over an offense, (a) if the offense was committed either in part or in whole within its territory, (b) on board a ship or an aircraft registered in the Member State concerned or flying its flag, (c) the damage which is one of the constituent elements of the offense occurred on its territory or (d) the offender is one of its nationals.[49] In particular the establishment of jurisdiction when the damage that is one of the constituent elements of the offense occurred on the territory of a EU Member State, may lead to a wide applicability of the Directive and may even lead to multiple prosecution and in return to a further enhancement of the cooperation between enforcement authorities in different states.[50] By way of example, if a national of a non-EU Member State disposed waste illegally in a river that runs through both a non-EU Member State and one or more EU Member States and the waste killed a substantial part of the fish population, the Member State's jurisdiction could be triggered. In addition, a Member State may exercise jurisdiction if (a) the offender is a habitual resident in its territory, (b) the offense is committed for the benefit of a legal person established in its territory, (c) the offense is committed against one of its nationals or its habitual residents or (d) the offense has created a severe risk for the environment on its territory.[51] Where an offense falls in the jurisdiction of more than one Member State, those Member States are required to cooperate to determine which Member State shall conduct the criminal proceedings.[52] **E. Preventive and Other Measures** The Directive stipulates a variety of measures that Member States must take in order to either prevent or effectively prosecute offenses.

- **Freezing and Confiscation**: Member States shall take the necessary measures to enable the tracing, identifying, freezing and confiscation of instrumentalities and proceeds from the criminal offenses.[53]
- **Investigative Tools**: Member States shall take the necessary measures to ensure that effective and proportionate investigative tools are available for investigating or prosecuting offenses.[54]
- **Campaigns and Education Programs**: Member States shall take appropriate measures, such as information and awareness-raising campaigns targeting relevant stakeholders from the public and private sector as well as research and education programs, which aim to reduce environmental criminal offenses and the risk of environmental crime.[55]
- **Sufficient Resources**: Member States shall ensure that national authorities which detect, investigate, prosecute or adjudicate environmental criminal offenses have a sufficient number of qualified staff and sufficient financial, technical and technological resources for the effective performance of their functions related to the implementation of the Directive.[56]
- **Training:** Member States shall take necessary measures to ensure that specialized regular training is provided to judges, prosecutors, police and judicial staff and to competent authorities' staff involved in criminal proceedings and investigations with regard to the objectives of the Directive.[57]
- **Coordination and Cooperation:** The Directive stipulates that Member States take the necessary measures to establish appropriate mechanisms for coordination and cooperation between competent authorities within a Member State and between Member States and the Commission, and Union bodies, offices or agencies.[58]

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- **National Strategy:** Member States shall establish, publish, implement and regularly[59] review a national strategy on combatting environmental criminal offenses.[60]
- **Data Collection and Statistics:** Member States shall ensure that a system is in place for the recording, production and provision of anonymized statistical data in order to monitor the effectiveness of their measures to combat environmental criminal offenses.[61]

[1] *See* EU Official Journal April 30, 2024 and the legislative text. [2] See Press Release of the Parliament (February 27, 2024). [3] See Press Release of the Council (March 26, 2024). [4] Pursuant to Article 29 the Directive will come into force on the twentieth day following that of its publication in the Official Journal of the European Union. [5] Recitals 69, 70. [6] Article 28 of the Directive. [7] Art. 3 (3) of the Treaty on European Union and Art. 191 TFEU. [8] *See* the European Commission's Proposal for the Directive (COM (2021) 851 final), p. 1. [9] *See* https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5817. [10] *See* Communication from the Commission on the European Green Deal, COM/2019/640 final. [11] *See* European Union's Corporate Sustainability Reporting Directive — What Non-EU Companies with Operations in the EU Need to Know and European Corporate Sustainability Reporting Directive (CSRD): Key Takeaways from Adoption of the European Sustainability Reporting Standards. [12] *See* the Letter of the Chair of the JURI Committee of the European Parliament of March 15, 2024.. [13] Article 3(2) of the Directive. [14] Recital 15. [15] Article 3(2)(a) of the Directive. [16] Article 3(2)(b) of the Directive. [17] Article 3(2)(c) of the Directive. [18] Article 3(2)(f) of the Directive. [19] Regulation (EU) 2023/1115. [20] Article 3(2)(p) of the Directive. [21] Article 3(1) of the Directive. [22] Article 3(1) of the Directive. [23] Recital 10. [24] *See* e.g. Article 3(2)(a) of the Directive. [25] Article 3(6) of the Directive. [26] Recital 13. [27] Article 3(3) of the Directive. [28] Recital 21. [29] Rome Statute, article 8(2)(b)(iv); [30] European Law Institute – Ecocide. [31] Rome Statute, article 7(1). [32] Article 3(2) of the Directive. [33] Article 3(4) of the Directive. [34] Article 4(1) of the Directive. [35] Article 4(2) of the Directive. [36] Article 5(1) of the Directive. [37] Article 5(2) of the Directive. [38] Article 5(3) of the Directive. [39] Article 6(1) of the Directive. [40] Article 6(2) of the Directive. [41] Depending on whether the Member States' national law provides for the criminal liability of legal persons; *see* recital 33. [42] Article 7(1) of the Directive. [43] Article 7(2), (3) of the Directive. [44] Either in the business year preceding that in which the offense was committed, or in the business year preceding that of the decision to impose the fine. [45] Article 7(3)(a) of the Directive. [46] Article 7(3)(b) of the Directive. [47] Article 7(4) of the Directive. [48] Article 7(2) of the Directive. [49] Article 12(1) of the Directive. [50] Regarding the application of the double jeopardy-/ne bis in idem-principle between multiple jurisdictions, *see* also Extraterritorial Impact of New UK Corporate Criminal Liability Laws. [51] Article 12(2) of the Directive. [52] Article 12(2) of the Directive. [53] Article 10 of the Directive. [54] Article 13 of the Directive. [55] Article 16 of the Directive. [56] Article 17 of the Directive. [57] Article 18 of the Directive. [58] Articles 19, 20 of the Directive. [59] The intervals should be no longer than 5 years. [60] Article 21 of the Directive. [61] Article 22 of the Directive.

The following Gibson Dunn lawyers prepared this client alert: Benno Schwarz, Katharina Humphrey, Andreas Dürr, and Julian Reichert.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. If you wish to discuss any of the matters set out above, please contact the Gibson Dunn lawyer with whom you usually work, any member of Gibson Dunn's White Collar Defense and Investigations practice group, or the following authors in Munich.

Benno Schwarz (+49 89 189 33-110, bschwarz@gibsondunn.com) Katharina Humphrey (+49 89 189 33-155, khumphrey@gibsondunn.com) Andreas Dürr (+49 89 189 33-219, aduerr@gibsondunn.com) Julian Reichert (+49 89 189 33-229, jreichert@gibsondunn.com)

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