

Zbornik Instituta za kriminološka
i sociološka istraživanja
2018 / Vol. XXXVII / 1 / 53-69
Pregledni naučni rad
UDK: 343.232:504.5/.6(4-672EU)
502.14(4-672EU)

CRIMINAL LAW PROTECTION OF THE ENVIRONMENT IN THE EUROPEAN UNION*

Ana Batrićević*

Institute of Criminological and Sociological Research, Belgrade

Through the past several decades, a growing concern for environmental problems among experts, stake-holders, law and public policy-makers as well as general public has encouraged the development of a large and comprehensive legislative framework on the level of the European Union, regulating various ecological issues in the European Union. The risks of environmental pollution and the awareness of the need to provide for efficient, adequate and universal protection of the environment in all European Union member states has led to the adoption of Directive 2008/99/EC on the protection of the environment through criminal law (Official Journal of the European Union, No. 328, 6.12.2008.). The aim of this paper is to analyse the key provisions of this legal instrument, the means of its implementation in national legislations as well as the mechanisms for its effective application. Moreover, the conditions that have to be met in order to facilitate successful transposition of this Directive's provisions through the alterations of the Criminal Code of the Republic of Serbia are also analysed.

KEY WORDS: *environment / environmental protection / criminal law / European Union / acquis*

* This paper is a result of research Project "Crime in Serbia: phenomenology, risks and the possibilities of social intervention" (47011), financed by the Ministry of Education, Science and Technological Development of Republic of Serbia.

* E-mail: a.batricevic@yahoo.com

INTRODUCTION

Environmental crime includes a series of acts that violate environmental legislation, causing significant harm or risk to both - the environment as well as human health. The illegal emission or discharge of substances into air, water or soil, the illegal trade in wildlife, illegal trade in ozone-depleting substances and the illegal shipment or dumping of waste are considered the most common forms of environmental crime (European Commission, 2018). Environmental crime damages the environment, causes great risks to the health and wellbeing of humans and animals as well as to the integrity of biodiversity. If committed in an organised form, environmental crime undermines the rule of law and sustainable development. Because of high profits produced, the relatively low risk of detection, and (very often) rather mild penalties, environmental crime is frequently linked to organised crime, in particular illegal trafficking or dumping of waste and trafficking in endangered species (Eurojust, 2014: 38). Environmental crime is frequently committed by organised crime groups and often has a cross border, i.e. transnational dimension, which makes it even more severe. All the aforementioned circumstances justify the treatment of environmental crime as a serious and growing problem that has to be tackled at the global level as well as through the European Union legal mechanisms (European Commission, 2018).

The issue of environmental protection was regulated for the first time at the European Community level within the Seventh Chapter of the Single European Act, adopted in 1986, that came into force in 1987 (Official Journal of the European Communities, No. L 169/1, 29.06.1987.). Articles 174-176 of this Act have determined the aims which member states are supposed to accomplish, as well as the procedure and the role of various bodies when it comes to adopting legal mechanisms relevant to environmental protection. Moreover, it emphasised that member states had been given the opportunity to introduce more stringent measures and higher ecological standards into their national legislations than the ones prescribed by the act (Batričević, 2013: 120). The Treaty on European Union, that was adopted in Maastricht in 1992 and that came into force in 1993 (Official Journal of the European Communities, No. C 191, 29.06.1992.), treats the environment as one of the most important areas when it comes to the activities of the European Union (Čavoški, 2007: 24). With the adoption of the Treaty of Amsterdam in 1997, that came into force in 1999 (Official Journal No. C 340, 10.11.1997.), a high level of environmental protection and the improvement of environmental quality were added to the goals of the European Union. According to Article 6 of this Treaty, the conditions for environmental protection have to be integrated in the procedure of defining and applying the policies and activities of the European Union. Article 37 of the Charter of Fundamental Rights of the European Union from 2000 (Official Journal of the European Communities, No. C 364/1, 18.12.2000.) emphasizes that high level of environmental protection and the improvement of its protection have to be integrated in the Union's policy in accordance with the principle of sustainable development. In Article 2 of the Treaty on European Union, adopted in 2007 and in force since 2009 (Official Journal of the

European Union, No. C 306/2, 17.12.2007.) and in Article 3 of the Treaty on the Functioning of the European Union, it is proclaimed that the sustainable development of Europe should be based on, *inter alia*, a high level of protection and improvement of the quality of the environment. In accordance with the aforementioned principles regarding environmental protection, a series of legal sources dealing with environmental issues has been adopted at the European Union level through the past couple of decades. The European Union environmental law existed for around 40 years and it comprises more than 200 directives, accompanied by a growing number of regulations and decisions (European Commission, 2018). Therefore, current environmental *acquis* can be described as rather broad and ambitious. It covers the topics such as: climate change, air quality, waste management, protection of water resources and biodiversity, controls on chemicals, and environmental impact assessment. Moreover, the environmental *acquis* sets up a wide array of techniques, including product standards, state-of-the-environment objectives, prohibitions and restrictions, economic instruments, sensitive area designations, plans and programmes, public participation and information provisions. Furthermore, the *acquis* has to be applied under diverse natural conditions, varied national and regional administrative arrangements, and in situations that often have a cross-border aspect (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementing European Community Environmental Law, Brussels, 18.11.2008 COM (2008) 773 final), which makes the unification of environmental protection at the European Union level a serious challenge.

The first European initiative on environmental crime took place in 1998 under the auspices of the Council of Europe, when the Convention on the Protection of the Environment through Criminal Law (European Treaty Series - No. 172., 4.11.1998) was adopted. On the basis of this Convention and having regard to the Treaty on European Union, and in particular its Article 31 and 34(2)(b), Denmark presented a proposal for the adoption of a Council framework Decision on combating serious environmental crime in 2000 (Official Journal of the European Communities, No. C 39/4, 11.02.2000.). However, The Commission did not agree that the aforementioned articles on cooperation in criminal matters in the European Union Treaty could be considered the acceptable legal basis for this act and adopted a Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law based on Article 175 of the European Communities Treaty on 13 March 2001 (Official Journal of the European Communities, No. C 39/4, 11.02.2000.). The European Parliament discussed both - the proposed framework decision as well as the proposed directive and, after that, the Commission presented an Amended Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law taking into account the proposals of the Parliament (Official Journal of the European Communities, No. C 20 E/284, 28.01.2003). However, the Council did not accept the Commission's proposal, but instead adopted the Framework Decision (Official Journal of the European Union, No. L 29/55, 05.02.2003.).

The European Commission decided to take action in the Court of Justice, asking the Court to annul the Framework Decision, claiming that its legal basis was not correct. On 13 September 2005, the European Court of Justice issued its judgment by which the Framework Decision was annulled because the measures it contained could have been adopted under the European Communities Treaty (European Court Reports 2005 I-07879). After that, on 23 November the Commission appealed to the Court of Justice for the annulment of the Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution as it also interrupted the competences of the Community (C-440/05 - Commission v Council). The European Court of Justice rendered its judgment on this issue on 23 October 2007, and annulled the Framework Decision because certain measures it contained could have been adopted under the EC Treaty. But, it is important to mention that in this judgment the Court stated that the Community's competence did not include the definition of types and levels of sanctions (Judgment of the Court (Grand Chamber) 23. 10. 2007 in Case C-440/05 Application for annulment under Article 35(6) EU, brought on 8 December 2005). In accordance with the aforementioned judgments, the European Union took appropriate measures to oblige member states to prescribe criminal penalties in their national legislations for serious violations of environmental provisions and 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, known as the Environmental Crimes Directive (Official Journal of the European Union, No. 328, 6.12.2008) was adopted.

1. THE AIM AND SCOPE OF ENVIRONMENTAL CRIMES DIRECTIVE

As it is proclaimed in its Preamble, the adoption of the Environmental Crimes Directive was instigated by the fact that the rise in environmental offences and their effects caused serious concern across the European Union. The extension of the consequences and risks of environmental crimes beyond the borders of the member states in which the offences are committed and their threat to the environment required appropriate response at the European Union level, since the existing systems of penalties had not been sufficient to achieve complete compliance with the laws for the protection of the environment. To be more exact, significant disparities regarding the definition of environmental crime and the types and levels of prescribed sanctions existed (and still seem to exist) among the national legislations of the member states. Therefore, the adoption of a legal instrument that would prescribe common rules on environmental criminal offences and make it possible to use effective methods of investigation and assistance within and between Member States appeared to be necessary. Moreover, the Directive was also seen as a means to achieve effective protection of the environment by obliging the member states to introduce more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air (including the stratosphere) soil, water, animals or plants (including to the conservation of species).

According to its Preamble, the Directive obliges Member States to provide for criminal penalties in their national legislations in respect of serious infringements of the provisions of Community law on the protection of the environment. However, it does not create obligations regarding the application of such penalties, or any other available system of law enforcement, in individual cases. But, the Directive only provides for minimum rules, which means that member states are free to adopt or maintain more stringent measures regarding the effective criminal law protection of the environment, as long as these measures are compatible with the Treaty establishing the European Community. It should be noted that if a member state adopts or maintains more stringent standards than the ones from the Environmental Crimes Directive, under Article 193 of the Treaty on the Functioning of the European Union (Official Journal of the European Union, No. C 326/47, 26.10.2012.), it is required to notify the Commission (Pereira, 2105: 240).

2. OBLIGATIONS OF THE EU MEMBER STATES IN ACCORDANCE WITH THE ENVIRONMENTAL CRIMES DIRECTIVE

2.1. Obligations regarding the definitions of terms

According to Article 2 of the Directive, the member states are obliged to adopt certain definitions for the purpose of its implementation. For the purpose of the Directive, the term "unlawful" means infringing: 1) the legislation adopted pursuant to the Treaty establishing the European Community and listed in Annex A of the Directive; or 2) with regard to activities covered by the Euratom Treaty (Official Journal of the European Union, No. C 327/1, 26.10.2012.), the legislation adopted pursuant to the Euratom Treaty and listed in Annex B of the Directive or 3) 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 previously mentioned Community legislation (Article 2, Paragraph a). "Protected wild fauna and flora species" include the following: 1) for the purposes of Article 3(f), those listed in: Annex IV to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and Annex I to, and referred to in Article of, Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and 2) for the purposes of Article 3(g), those listed in Annex A or B to Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (Article 2, Paragraph b). Moreover, member states are obliged to define the term "habitat within a protected site" as any habitat of species for which an area is classified as a special protection area pursuant to Article 4(1) or (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, or any natural habitat or a habitat of species for which a site is designated as a special area of conservation (Official Journal of the European Communities, No. No L 103/ 1, 25.04.1979) pursuant to Article 4(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Official Journal No. J L 206, 22.07.1992.) (Article 2, Paragraph c). Also, for the purpose of the Directive, "legal person" is defined as any legal entity having such

status under the applicable national law, except for States or public bodies exercising state authority and for public international organisations (Article 2, Paragraph d).

2.2. Obligations regarding the incrimination of certain activities as criminal offences

By its Article 3, the Directive imposes the obligation on the member states to incriminate some conducts against the environment as criminal offences, when committed in an unlawful manner and intentionally or with at least serious negligence. These include the following: 1) 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; 2) 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; 3) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (6) and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked; 4) 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; 5) 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; 6) 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; 7) 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; 8) any conduct which causes the significant deterioration of a habitat within a protected site; 9) the production, importation, exportation, placing on the market or use of ozone-depleting substances. It should be highlighted that, according to recital 6 of the Environmental Crimes Directive Preamble prescribes that "failure to comply with a legal duty to act can have the same effect as active behaviour and should therefore also be subject to corresponding penalties".

Under the Environmental Crimes Directive, member states are required to criminalise a number of prohibited (unlawful) activities committed "intentionally" or with "at least serious negligence" (Pereira, 2015: 235). Criminalisation of negligent

conduct is treated as an exception in Council Conclusions on Model Provisions, guiding the Council's criminal law deliberations (Council of the European Union, 2009). Namely, the aforementioned document suggests that European Union criminal legislation should as a general rule only prescribe penalties for acts which have been committed intentionally (Article 6). On the other hand, it emphasizes that negligent conduct should be criminalised when a case-by-case assessment indicates that this is appropriate due to the particular relevance of the right or essential interest which is the object of protection (Article 7). This particularly refers to cases of serious negligence which endangers human life or causes serious damage (Article 7). Having in mind the characteristics of environmental criminal offences, especially their serious and long-lasting consequences, the incrimination of negligent commission of this type of crimes seems reasonable.

The Directive does not contain the interpretation of terms "intention", "negligence" and "serious negligence", which means that that these terms are supposed to be defined in accordance with member states' national legislations. It should be mentioned that under English criminal law, for example, the concept of "serious negligence" does not exist, but that the standard of criminal liability for negligent acts is "gross negligence" (Pereira, 2015: 235). According to Article 26 of Criminal Code of the Republic of Serbia, A criminal offence is committed by negligence if the offender was aware that by his action he could commit an offence, but had recklessly assumed that it would not occur or that he would be able to prevent it or was unaware that by his action he could commit an offence although due to circumstances under which it was committed and his personal characteristics he was obliged to be and could have been aware of such possibility. However, when incriminating negligent commission of a criminal offence, the Criminal Code of the Republic of Serbia does not make a distinction between the types of negligence, which means that it includes the cases gross or serious negligence as well as other, "less serious" forms of negligent conduct.

The Directive does not prescribe the exact type and measure of punishments that are supposed to be prescribed for the aforementioned activities by national criminal laws. This depends on the estimations and the circumstances of each member state. However, it does offer certain directions by prescribing (in Article 5) that the member states shall take the necessary measures to ensure that these offences are punishable by effective, proportionate and dissuasive criminal penalties. However, there still seem to be some differences among the European Union member states regarding the punishments prescribed for these criminal offences. For example, in France, a maximum fine of EUR 9.000 can be imposed for a the violation of violation of Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) by legal entities, whereas in the Netherlands the maximum fine is EUR 810.000 (Environmental Crime Network, 2016: 12). Furthermore, in Finland, for example, a maximum of two years imprisonment can be imposed for the same violation whereas in the Czech Republic, the maximum is eight years is prescribed (Environmental Crime Network, 2016: 12).

The Directive obliges member states to ensure that inciting, aiding and abetting the intentional conduct of the previously enumerated activities is incriminated in their

national legislations (Article 4). However, the Directive does not define inciting, aiding and abetting, leaving the precise description and definition of these terms to national legislations of the member states.

Inciting is commonly understood as a form of complicity in criminal offence by which another person is intentionally induced to commit a criminal act (Stojanović, 2016: 187). Therefore, it can be said that "the essence of the law of incitement is that a person (the "inciter") urges another person or persons (the "incitee(s)") to commit a criminal offence" (Jaconelli, 2017: 2) i.e. to persuade, encourage or command another to commit a crime (Clarkson, 2005: 27). Inciting can be committed by any activity that is suitable to make or encourage the incited person to commit a criminal offence including: persuasion, request, promise or giving of certain rewards or benefits, payment to the incited person to commit a criminal offence, advice, different forms of threat, delusion etc. (Stojanović, 2016: 188). Some authors claim that incitement encompasses two different but cognate actions: "encouraging" the commission of a crime but also the assisting in its perpetration (Jaconelli, 2017: 2). Moreover, incitement also includes various modifications of previously made decision of the incited person to commit a criminal offence (Stojanović, 2016: 189).

Aiding is also a form of complicity in criminal offence that consists of intentional contributing to the commission of a criminal offence (Stojanović, 2016: 194). However, it is not required that aiding plays a vital role in the commission of a criminal offence - it is sufficient that these activities have contributed to the commission of criminal offence in its actual form (Stojanović, 2016: 195). Some examples of aiding are enumerated in Article 35 Paragraph 2 of Criminal Code of the Republic of Serbia (Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016). These activities include but are not limited to: giving advice or instructions on how to commit a criminal offence, providing the perpetrator with the means for committing a criminal offence, creating conditions or removing obstacles for the commission of a criminal offence, making a promise to conceal: the commission of a criminal offence, the offender, the means by which the offence has been committed, the traces of criminal offence and the items obtained through the commission of criminal offence. Depending on the occasions, aiding and abetting can be either of physical or of psychological (intellectual) character (Stojanović, 2016: 195).

Most European Union criminal law instruments require the criminalisation of attempt. The examples of the latter include: 1) Article 3, Paragraph 2 of the Framework Decision on counterfeiting non-cash instruments (Official Journal of the European Communities No. L 149/1, 02.06.2001.), 2) Article 14 of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, (Official Journal of the European Union No. L 88/6, 31.3.2017.) and 3) Article 3 of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Official Journal of the European

Union, No. L 101/1, 15.4.2011). However, it should be mentioned that there is no requirement under the Environmental Crimes Directive for member states to criminalise an attempted crime against the environment (Pereira, 2015: 231).

2.3. Obligations regarding the liability of legal persons

Environmental Crimes Directive obliges member states to provide for the liability of legal persons for environmental criminal offences in their national legislations. The Directive defines a legal person in its Article 2 as any legal entity having such status under the applicable national law, except for states or public bodies exercising state authority and for public international organisations. Article 6 of the Directive prescribes that member states have to ensure that legal persons can be held liable for offences referred to in Articles 3 and 4 of the Directive where such offences have been committed for their benefit by any 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; or (c) an authority to exercise control within the legal person. Additionally, member states also have to ensure that legal persons can be held liable where the lack of supervision or control, by a person who has a leading position within the legal person, has made possible the commission of an offence referred to in Articles 3 and 4 for the benefit of the legal person by a person under its authority. It is particularly highlighted that the liability of legal persons in previously described cases cannot exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles 3 and 4 of the Directive. Finally, in accordance with Article 7 of the Directive, it is obligatory for the member states to take the necessary measures to ensure that legal persons held liable pursuant to aforementioned provisions are punishable by effective, proportionate and dissuasive penalties. Nevertheless, similarly to the cases of natural persons, the Directive does not offer any precise instructions regarding the exact type and measure of these penalties, leaving the regulation of this issue to national legislations of member states.

3. TRANSPOSITION OF THE ENVIRONMENTAL CRIMES DIRECTIVE IN SERBIAN LEGAL SYSTEM

The comparison between the provisions of the Environmental Crimes Directive and those of the Criminal Code of the Republic of Serbia confirms that the transposition of the Directive in Serbian Legal System requires the alterations of some of the provisions of Chapter 24 of the Criminal Code of the Republic of Serbia regulating criminal offences against the environment. The aforementioned criminal offences include: 1) Environmental Pollution (Article 260), 2) Failure to Undertake Environmental Protection Measures (Article 261), 3) Illegal Construction and Operation of Facilities and Installations Polluting the Environment (Article 262), 4) Damaging Environmental Protection Facilities and Installations (Article 263), 5) Damaging the Environment (Article 264), 6) Destroying, Damaging and taking

abroad a Protected Natural Asset (Article 265), 7) Bringing Dangerous Substances into Serbia and Unlawful Processing, Depositing and Stockpiling of Dangerous Substances (Article 266), 8) Illegal Construction of Nuclear Plants (Article 267), 9) Violation of the Right to be Informed on the State of the Environment (Article 268), 10) Killing and Wanton Cruelty to Animals (Article 269), 11) Transmitting of Contagious Animal and Plant Diseases (Article 270), 12) Malpractice in Veterinary Services (Article 271), 13) Producing Harmful Products for Treating Animals (Article 272), 14) Pollution of Livestock Fodder and Water (Article 273), 15) Devastation of Forests (Article 274), 16) Forrest Theft (Article 275), 17) Poaching Game (Article 276) and 18) Poaching Fish (Article 277). Moreover, the comparison between these two legal sources has also revealed that some new criminal offences or some new forms of currently existing criminal offences against the environment should be added in the Criminal Code of the Republic of Serbia.

The comparison shows that the provisions incriminating the following criminal offences from Criminal Code of the Republic of Serbia are not completely in accordance with the requirements of the Directive: 1) Environmental Pollution (Article 260), 2) Illegal Construction and Operation of Facilities and Installations Polluting the Environment (Article 262), 3) Damaging the Environment (Article 264), 4) Destroying, Damaging and taking abroad a Protected Natural Asset (Article 265), 5) Bringing Dangerous Substances into Serbia and Unlawful Processing, Depositing and Stockpiling of Dangerous Substances (Article 266).

Moreover, the comparison has also confirmed that the full transposition of the Directive would require that the following activities are incriminated as new independent criminal offences against the environment within chapter 24 of current Criminal Code of the Republic of Serbia: 1) endangering the environment by 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 (in order to enable full transposition of Article 3, Paragraph d of the Directive), 2) endangering the environment by nuclear or radioactive substances (in order to achieve full transposition of Article 3, Paragraph e of the Directive), 3) causing the significant deterioration of habitats within a protected site (with the purpose to facilitate complete transposition of Article 3, Paragraph h of the Directive) and 4) endangering ozone layer the production, importation, exportation, placing on the market or use of ozone-depleting substances (with the aim to provide full transposition of Article 3, Paragraph i of the Directive). Moreover, existing criminal offence from Article 265. of Criminal Code of the Republic of Serbia "Destroying, Damaging and taking abroad a Protected Natural Asset" should be divided into two separate incriminations with the aim to allow full transposition of Article 3, Paragraphs f and g of the Directive. The first one should refer to 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, whereas the second one should include 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 (PLAC, 2014).

The definitions of some terms used in the Environmental Crimes Directive might cause some doubts when it comes to its transposition in Serbian criminal law. For example, the term "unlawful" is, for the purpose of the Directive, defined as infringing a set of legal documents enumerated in its Annexes A and B or violating the provisions of national legal sources giving effect to the Community legislation from Annexes A and B. The Criminal Code of the Republic of Serbia defines a criminal offence as an offence set forth by the law as criminal offence, which is unlawful and committed with guilt (Article 14, Paragraph 1). However, the term "unlawful" used in Article 14 is not defined in the same way as it is done in the Environmental Crimes Directive. Namely, the unlawfulness as one of four constitutive elements of a criminal offence (conduct, incrimination by the law, unlawfulness and guilt) is commonly defined in a negative way - as the lack of grounds that exclude unlawfulness (Stojanović, 2016: 93). The grounds that exclude unlawfulness include those prescribed by the Criminal Code, such as: an offence of minor significance (Article 18), self-defence (Article 19) and extreme necessity (Article 20) and those that are not prescribed by the Criminal Code but exist in theory (such as: performing official authorisation, the order of a superior etc.) (Stojanović, 2016: 93-94). Defined in such manner, the term "unlawful" can also refer to cases of violations of the provisions of laws other than the Criminal Code, especially in the cases of environmental criminal offences, such as: 1) Law on environmental protection (Official Gazette of the Republic of Serbia, No. 135/2004, 36/2009, 36/2009, 72/2009, 43/2011 and 14/2016), 2) Law on nature protection (Official Gazette of the Republic of Serbia, No. 36/2009, 88/2010, 91/2010 and 14/2016), 3) Law on game and hunting (Official Gazette of the Republic of Serbia, No. 18/2010), 4) Law on the protection and sustainable use of fish population (Official Gazette of the Republic of Serbia, No. 128/2014), 6) Law on animal husbandry (Official Gazette of the Republic of Serbia, No. 41/2009 and 93/2012), 7) Law on animal welfare (Official Gazette of the Republic of Serbia, No. 41/2009), 8) Law on national parks (Official Gazette of the Republic of Serbia, No. /1993 i 44/1993, 53/1993, 67/1993, 48/1994, 101/2005 and 36/2009 and Official Gazette of the Republic of Serbia, No. 84/2015), 9) Law on strategic assessment of environmental impact (Official Gazette of the Republic of Serbia, No. 35/2004 and 88/2010), 10) Law on environmental impact assessment (Official Gazette of the Republic of Serbia, No. 135/2004 and 36/2009), 11) Law on integrated prevention and control of environmental pollution (Official Gazette of the Republic of Serbia No.135/2004 and 25/2015), 12) Law on waste management (Official Gazette of the Republic of Serbia, No. 36/2009, 88/2010 and 14/2016), 13) Law on the protection from noise in the environment (Official Gazette of the Republic of Serbia, No. 36/2009 and 88/2010), 14) Law on air protection (Official Gazette of the Republic of Serbia, No. 36/2009 and 10/2013), 15) Law on waters (Official Gazette of the Republic of Serbia, No. 30/2010, 93/2012 and 101/2016), 16) Law on forests (Official Gazette of the Republic of Serbia, No. 30/2010, 93/2012 and 89/2015), 17) Law on agriculture and rural development (Official Gazette of the Republic of Serbia,

No. 41/2009, 10/2013 and 101/2016), 18) Law on agricultural land (Official Gazette of the Republic of Serbia, No. 62/2006, 65/2008, 41/2009, 112/2015 and 80/2017) and 19) Law on genetically modified organisms (Official Gazette of the Republic of Serbia No. 41/2009).

Whether the violations of the aforementioned laws will also represent the violations of the provisions of documents enumerated in Annex A and Annex B of the Directive depends on the level of harmonization of these laws with the *acquis*. Since the Republic of Serbia is currently passing through the process of harmonization of its legal system with the standards and requirements of the *acquis* and anticipating the opening of the negotiation chapter 27 dedicated to environment, it is obliged to facilitate the transposition of all relevant provisions of the *acquis* in its national legislation. This is predominantly achieved through alterations and amendments of existing environmental laws as well as through the adoption of sublegal acts necessary for their application (Office for European Integrations, 2016). Accordingly: the following terms used in the Directive should be defined more precisely in national environmental legislation: action taken as a dealer or a broker (waste management), action that 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; 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; 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; 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; any conduct which causes the significant deterioration of a habitat within a protected site and the production, importation, exportation, placing on the market or use of ozone-depleting substances.¹

CONCLUSION

Environmental Crimes Directive has contributed to the unification of the European Union member states' criminal legislations relevant to the environmental protection. However, there are still some of its aspects that could be improved in the future. In

¹ For further information see: Status and plans of transposition and implementation of the *acquis* for Chapter 27 - Environment and Climate Changes, http://www.pregovarackagrupa27.gov.rs/?wpfb_dl=69, 17.02.2018

spite of clearly opting for criminal law protection and criminal penalties, the Environmental Crimes Directive seems to be leaving much room for inconsistency between the different national legal systems because it does not prescribe any particular type or level of sanction to be imposed (Ligeti, Marletta, 2017: 146). So, despite the obligations prescribed by this legal instrument, there still appear to be significant differences between the European Union member states when it comes to the maximum periods of imprisonment and the maximum amounts of financial sanctions prescribed for environmental crimes (Eurojust, 2014: 38). Moreover, the principle according to which the perpetrators of environmental criminal offences should be punished "by effective, proportionate and dissuasive criminal penalties" does not seem to be adequately implemented across the European Union. Namely, it has been confirmed that applying only fines can be efficient in some minor cases, but that, in general, the deterrent effect of penalties in Member States is not sufficient (Eurojust, 2014: 38). In addition, the Environmental Crimes Directive does not provide for the possibility of the application of complementary measures, in particular reparatory and remedial measures that are supposed to eliminate or reduce the environmental damage, in the context of criminal procedure (Ligeti, Marletta, 2017: 147). Namely, the Environmental Crimes Directive does not seem to be coordinated with Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. The latter should be facilitated through a coherent European Union enforcement strategy allowing the adoption of "remedial actions" in the context of criminal procedure as well (Ligeti, Marletta, 2017: 147).

When it comes to the Republic of Serbia, it should be mentioned that it has not yet fully transposed the provisions of the Environmental crimes directive into its national legislation. This is planned to be done by the end of 2018 through the amendments and alterations of current provisions of the Criminal Code, as well as through the introductions of some new criminal offences against the environment (Office for European Integrations, 2016). Apart from the Criminal Code, some other laws and regulations dealing with the area of environmental protection will also have to be changed in order to provide for full transposition of the Directive. This particularly refers to those defining the terms such as: "habitat within a protected site" and "wild fauna and flora species", which need to be defined in the manner that allows them to include all habitats and species mentioned in the relevant European Union documents.

REFERENCES

- (1) Amended proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law (2003/C 20 E/26) COM(2002) 544 final – 2001/0076(COD) (Submitted by the Commission pursuant to Article 250(2) of the EC-Treaty on 30 September 2002), Official Journal of the European Communities, No. C 20 E/284, 28.01.2003., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002PC0544&from=EN>, accessed 02.02.2018.

- (2) Batrićević, A. (2013) *Zaštita životinja u međunarodnom pravu*. Beograd: Institut za kriminološka i sociološka istraživanja.
- (3) C-440/05 - Commission v Council,
<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-440/05>, accessed: 02.02.2018.
- (4) Čavoški, A. (2007) *Osnovi ekološkog prava Evropske unije*. Beograd: Pravni fakultet Univerziteta Union i Javno preduzeće "Službeni glasnik".
- (5) Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, No. C 364/1, 18.12.2000.,
http://www.europarl.europa.eu/charter/pdf/text_en.pdf, accessed 01.02.2018.
- (6) Clarkson, C. (2005) *Understanding Criminal Law*. London: Sweet & Maxwell.
- (7) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementing European Community Environmental Law, Brussels, 18.11.2008 COM(2008) 773 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0773&from=EN>, accessed 01.02.2018.
- (8) Convention on the Protection of the Environment through Criminal Law, Council of Europe, Strasbourg, 4.11.1998., European Treaty Series, No. 172,
<https://rm.coe.int/168007f3f4>, accessed 02.02.2018.
- (9) Council Conclusions on Model Provisions, guiding the Council's criminal law deliberations 2979th Justice and Home Affairs Council meeting Brussels, 30 November 2009,
http://www.consilium.europa.eu//uedocs/cms_data/docs/pressdata/en/jha/111543.pdf, accessed 07.02.2018.
- (10) Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, Official Journal of the European Communities, No. No L 103/ 1, 25.04.1979.
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31979L0409&from=EN>, accessed 02.02.2018.
- (11) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora , Official Journal No. J L 206, 22.07.1992.,
<http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:01992L0043-20130701&qid=1396439897249&from=EN>, accessed 02.02.2018.
- (12) Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, Official Journal of the European Union, No. L 29/55, 05.02.2003., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003F0080&from=EN>, accessed 02.02.2018.
- (13) Criminal Code of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016.
- (14) Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, Official Journal of the European Union No. L 88/6, 31.3.2017., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0541&from=EN>, accessed 07.02.2018.
- (15) 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, Official Journal of the European Union, No. 328, 6.12.2008, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0099&from=EN>, 02.02.2018.

- (16) Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, Official Journal of the European Union, No. L 20/7, 26.01.2010., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0147&from=en>, accessed 02.02.2018.
- (17) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Official Journal of the European Union, No. L 101/1, 15.4.2011., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=en>, accessed 07.02.2018
- (18) Environmental Crime Network (2016) *Report on Environmental Crime*. The Hague: Environmental Crime Network, <http://www.envicrimenet.eu/images/docs/envicrimenet%20report%20on%20environmental%20crime.pdf>, 27.03.2018.
- (19) Environmental Crime, European Commission, <http://ec.europa.eu/environment/legal/crime/index.htm>, accessed 01.02.2018.
- (20) Eurojust (2014) *Strategic Project on Environmental Crime Report*. The Hague: Eurojust, <https://www.actu-environnement.com/media/pdf/news-23861-rapport-eurojust.pdf>, accessed 02.02.2018.
- (21) Framework Decision on counterfeiting non-cash instruments, Official Journal of the European Communities No. L 149/1, 02.06.2001., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001F0413&from=EN>, accessed 07.02.2018
- (22) Initiative of the Kingdom of Denmark with a view to adopting a Council framework Decision on combating serious environmental crime, Preparatory Acts pursuant to Title VI of the Treaty on European Union, Official Journal of the European Communities, No. C 39/4, 11.02.2000., [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000Y0211\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000Y0211(02)&from=EN), accessed 02.02.2018.
- (23) Jaconelli, J. (2017) Incitement: A Study in Language Crime. *Criminal Law and Philosophy*, On-line first, DOI <https://doi.org/10.1007/s11572-017-9427-8>, str. 1-21.
- (24) Judgment of the Court (Grand Chamber) 23. 10. 2007 in Case C-440/05 Application for annulment under Article 35(6) EU, brought on 8 December 2005, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=70715&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=97306>, accessed 02.02.2018.
- (25) Judgment of the Court (Grand Chamber) of 13 September 2005. Commission of the European Communities v Council of the European Union. Action for annulment - Articles 29 EU, 31(e) EU, 34 EU and 47 EU - Framework Decision 2003/80/JHA - Protection of the environment - Criminal penalties - Community competence - Legal basis - Article 175 EC. Case C-176/03. European Court Reports 2005 I-07879, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62003CJ0176&from=EN>, accessed 02.02.2018.
- (26) Law on agricultural land, Official Gazette of the Republic of Serbia, No. 62/2006, 65/2008, 41/2009, 112/2015 and 80/2017.
- (27) law on agriculture and rural development, Official Gazette of the Republic of Serbia, No. 41/2009, 10/2013 and 101/2016.
- (28) Law on air protection, Official Gazette of the Republic of Serbia, No. 36/2009 and 10/2013.
- (29) Law on animal husbandry, 41/2009 and 93/2012.
- (30) Law on animal welfare, Official Gazette of the Republic of Serbia, No. 41/2009.
- (31) Law on environmental impact assessment, Official Gazette of the Republic of Serbia, No. 135/2004 and 36/2009.

- (32) Law on environmental protection, Official Gazette of the Republic of Serbia, No. 135/2004, 36/2009, 36/2009, 72/2009, 43/2011 and 14/2016.
- (33) Law on forests, Official Gazette of the Republic of Serbia, No. 30/2010, 93/2012 and 89/2015.
- (34) Law on game and hunting, Official Gazette of the Republic of Serbia, No. 18/2010.
- (35) Law on genetically modified organisms, Official Gazette of the Republic of Serbia No. 41/2009.
- (36) Law on integrated prevention and control of environmental pollution br. 135/2004 and 25/2015.
- (37) Law on national parks, Official Gazette of the Republic of Serbia, No. /1993 and 44/1993, 53/1993, 67/1993, 48/1994, 101/2005 and 36/2009, which is no longer in force, apart from its provisions 6 and 7 and the "Description of the areas of national parks" and Law on National Parks, Official Gazette of the Republic of Serbia, No. 84/2015.
- (38) Law on nature protection, Official Gazette of the Republic of Serbia, No. 36/2009, 88/2010, 91/2010 and 14/2016.
- (39) Law on strategic assessment of environmental impact, Official Gazette of the Republic of Serbia, No. 35/2004 and 88/2010.
- (40) Law on the protection and sustainable use of fish population, Official Gazette of the Republic of Serbia, No. 128/2014.
- (41) Law on the protection from noise in the environment, Official Gazette of the Republic of Serbia, No. 36/2009 and 88/2010.
- (42) Law on waste management, Official Gazette of the Republic of Serbia, No. 36/2009, 88/2010 and 14/2016.
- (43) Law on waters, Official Gazette of the Republic of Serbia, No. 30/2010, 93/2012 and 101/2016.
- (44) Ligeti, K., Marletta, A. (2017) Smart enforcement strategies to counter environmental crime in the EU. U: De La Cuesta, J.L., Quackelbeen, L., Persak, N. & Vermeulen, G. (ur.) *The Protection of the environment through criminal law*. Antwerpen: Maklu, str. 133-150.
- (45) National programme for the adoption of the European Union acquis, Second revised version, Office for European Integrations, November, 2016, http://www.seio.gov.rs/upload/documents/nacionalna_dokumenta/npaa/NPAA_2016_revizija_srp.pdf, 07.02.2018.
- (46) Pereira, R. (2015) *Environmental Criminal Liability and Enforcement in European and International Law*. Leiden: Brill.
- (47) PLAC (Policy and Legal Advice Centre) (2014) Guidelines on Implementation of EC Environmental Crimes Directive. Belgrade: PLAC
- (48) Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law (2001/C 180 E/20) COM(2001) 139 final 2001/0076(COD) (Submitted by the Commission on 15 March 2001), Official Journal of the European Communities, No. C 180 E/238, 26.06.2001., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001PC0139&from=EN>, accessed 02.02.2018.
- (49) Status and plans of transposition and implementation of the *acquis* for Chapter 27 - Environment and Climate Changes, http://www.pregovarackagrupa27.gov.rs/?wpfb_dl=69, 17.02.2018
- (50) Stojanović, Z. (2017) *Komentar Krivičnog zakonika*. Beograd: JP "Službeni glasnik".

- (51) The Single European Act, Luxembourg, 17.02.1986., Official Journal of the European Communities, No. L 169/1, 29.06.1987., <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0027>, accessed 01.02.2018.
- (52) Treaty establishing the European Atomic Energy Community (consolidated version), Official Journal of the European Union, No. C 327/1, 26.10.2012., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012A/TXT&from=EN>, accessed 07.02.2018.
- (53) Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Official Journal No. C 340, 10.11.1997., <http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf>, accessed 01.02.2018.
- (54) Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal of the European Union, No. C 306/2, 17.12.2007. http://publications.europa.eu/resource/cellar/688a7a98-3110-4ffe-a6b3-8972d8445325.0007.01/DOC_19, accessed 01.02.2018.
- (55) Treaty on European Union, Maastricht, 07.02.1992., Official Journal of the European Communities, No. C 191, 29.06.1992., https://europa.eu/european-union/sites/europa.eu/files/docs/body/treaty_on_european_union_en.pdf, accessed 01.02.2018.
- (56) Treaty on the Functioning of the European Union (consolidated version), Official EN Journal of the European Union, No. C 326/47, 26.10.2012., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>, accessed 07.02.2018.

KRIVIČNOPRAVNA ZAŠTITA ŽIVOTNE SREDINE U EVROPSKOJ UNIJI

Tokom poslednjih nekoliko decenija, rastuća zabrinutost stručnjaka, donosilaca odluka, kreatora zakona i javnih politika kao i šire javnosti zbog problema zaštite životne sredine podstakla je razvoj obimnog i sveobuhvatnog zakonodavnog okvira na nivou Evropske unije posvećenog regulisanju različitih ekoloških pitanja. Rizici proistekli iz zagađenja životne sredine i svest o potrebi da se obezbedi efikasna, adekvatna i jednoobrazna zaštita životne sredine u svim državama članicama Evropske unije doveli su do usvajanja Direktive 2008/99/EC o zaštiti životne sredine kroz krivično pravo. Cilj ovog rada je da analizira ključne odredbe ovog pravnog instrumenta, načine za njihovu implementaciju u nacionalnim zakonodavstvima kao i mehanizme za njihovu delotvornu primenu. Pored toga, u radu su analizirani i uslovi koji moraju biti ispunjeni kako bi se omogućila uspešna transpozicija odredaba ove direktive kroz izmene Krivičnog zakonika Republike Srbije.

KLJUČNE REČI: životna sredina / zaštita životne sredine / krivično pravo / Evropska unija / acquis