



Protection of the environment through criminal law

Directive (EU) 2024/1203
of 11 April

Introduction

The Directive establishing minimum rules to be observed by Member States in the definition of environmental crime (the “Environmental Crime Directive”) was published on 30 April 2024. It repeals Directive 2008/99/EC of 19 November and Directive 2009/123/EC of 21 October¹.

This Directive introduces new environmental crimes that must now be incorporated into national law.


It is therefore important to carry out a comparative analysis with Directive 2008/99/EC and, where appropriate, with the Portuguese provisions currently in force.

1. What are the main changes introduced by the Environmental Crime Directive?

The Environmental Crime Directive introduces substantial changes to the current legislative framework with the aim of contributing to a high level of protection and improvement of the quality of the environment. Taking into account the repealed directives, the following changes stand out

- Widening of the range of environmental offences;
- Specific definition of the concept of unlawfulness, including conduct carried out under the terms of an authorisation where it is found to have been obtained fraudulently or through corruption, extortion or coercion, or where the authorisation manifestly fails to comply with substantive legal requirements;

- Attempts are now punishable for certain offences;
- Providing for specific criminal sanctions, with the stated intention that these sanctions have an effective deterrent effect;
- Providing for the existence of specific aggravating and mitigating circumstances;
- The intention to improve the effectiveness of detection, investigation, prosecution and judicial decision-making.



Esta nova Diretiva vem estabelecer novos ilícitos penais ambientais que terão agora de ser transpostos para o Direito nacional.

¹ Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 on ship-source pollution and on the introduction of penalties for infringements, amending Directive 2005/35/EC.

2. What new crimes are provided for?

The Environmental Crime Directive significantly broadens the range of acts that constitute environmental crimes. The following acts are now criminalised:

- The placing on the market, in breach of a prohibition or another requirement aimed at protecting the environment, of a product the use of which on a larger scale, namely the use of the product by several users, regardless of their number, results in the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation into air, soil or water and 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.
- The manufacture, placing or making available on the market, export or use of substances, whether on their own, in mixtures or in articles, including their incorporation into articles, where such conduct causes or is likely to cause the death of, or serious injury to, any person, substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants.
- The manufacture, use, storage, import or export of mercury, mercury compounds, mixtures of mercury, and mercury-added products where such conduct is not in compliance with the legal requirements and causes or is likely to cause the death of, or serious injury to, any person, substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants.
- The execution of projects subject to an environmental impact assessment, where such conduct is carried out without a development consent and causes or is likely to cause substantial damage to the quality of air or soil, or the quality or status of water, or substantial damage to an ecosystem, animals or plants.

- The collection, transport or treatment of waste (hazardous waste and non-negligible quantities of such waste, or waste which causes or is likely to cause death or serious injury to any person or significant damage to the quality of air, soil or water, or significant damage to an ecosystem, animals or plants), the supervision of such operations and the subsequent treatment of disposal sites, including activities carried out by dealers or intermediaries.
- The recycling of ships in breach of the legal requirements.

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- The ship-source discharge of polluting substances which causes or is likely to cause deterioration in the quality of water or damage to the marine environment.
- The construction, operation and dismantling of an installation, where such conduct and such an installation 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.
- The abstraction of surface water or groundwater within the meaning of the EU Water Directive, where such conduct causes or is likely to cause substantial damage to the ecological status or ecological potential of surface water bodies or to the quantitative status of groundwater bodies.

Inciting and aiding and abetting offences continue to be punishable, and attempts are now also punishable in certain cases.

- Placing or making available on the Union market or exporting from the Union market commodities associated with deforestation or forest degradation or products derived from certain agricultural products in breach of the prohibition laid down in the respective Regulation, except where such conduct concerns a negligible quantity.
- The bringing into the territory of the Union, placing on the market, keeping, breeding, transporting, using, exchanging, permitting to reproduce, growing or cultivating, releasing into the environment, or the spreading of invasive alien species of Union concern, where such conduct breaches restrictions or the condition of a permit granted under other EU rules and 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.
- The production, placing on the market, import, export, use, or release of ozone depleting substances, whether alone or as mixtures or the production, placing on the market, import, export or use of products and equipment, and parts thereof, containing ozone-depleting substances or whose functioning relies upon those substances, or the operation of such products and equipment.

In addition to these new offences, the Environmental Crime Directive also specifies conduct that is already considered to be unlawful and defines, by reference to other legal instruments, what constitutes an environmental offence.

3. Under what conditions are these offences punishable?

As was the case previously, all offences are punishable when committed intentionally, and some conduct is punishable even when committed negligently. Inciting and aiding and abetting offences continue to be punishable, and attempts are now also punishable in certain cases.

Offences are considered to be aggravated, with a consequent increase in the maximum applicable penalty, when they cause: the destruction of, or substantial and widespread, irreversible or lasting damage to, an ecosystem of considerable size or environmental value, a habitat located in a protected site; or substantial and widespread, irreversible or lasting damage to air, soil or water quality

4. What penalties apply to natural persons?

Under the previous legislation there were no specific penalties. However, the Environmental Crime Directive now sets minimum limits for the maximum penalties applicable. The recitals of the Environmental Crime Directive provide, as is already the case in Portuguese law, that the liability of legal persons is without prejudice to the liability of natural persons who are members of the board of directors of operators.

Provision is made for the possibility of imposing custodial sentences on natural persons, the maximum duration of which may not be less than 3, 5, 8 or 10 years, depending on the nature of the offence.

In addition to imprisonment, other criminal or non-criminal penalties or ancillary measures may also apply, such as reparation, compensation, disqualification from holding an office in a legal person, or the withdrawal of permits or authorisations to carry out activities.

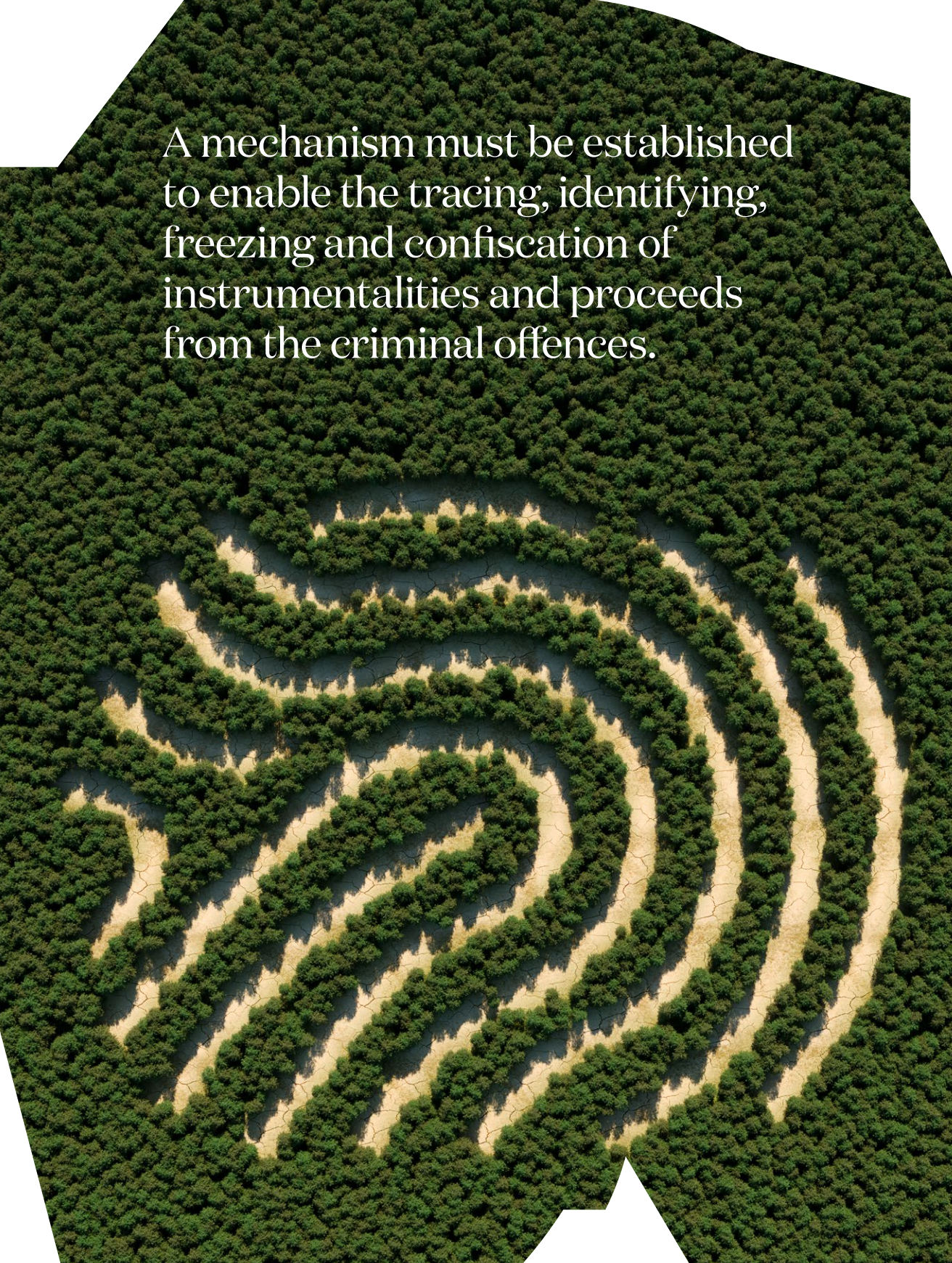
5. What sanctions are applicable to legal persons?

Provision is made for the criminal liability of legal persons, as already provided for in national legislation. The maximum amount of the fines may not be less than a certain fixed amount or a percentage of the total worldwide turnover, with the most serious cases being EUR 40 million or 5% of that turnover, depending on the nature of the offence.

There is also the possibility to impose additional ancillary penalties, such as (i) an obligation to restore the environment within a certain period of time (if the damage is reversible) or to pay compensation for the damage caused to the environment (if the damage is irreversible or if the offender is unable to restore it), (ii) exclusion from entitlement to public benefits or aid and from access to public funds, (iii) withdrawal of permits and authorisations to carry out the activities that led to the offence in question, or (iv) closure of the facilities used to commit the offence.

6. Are there any provisions for freezing and confiscation of assets?

The Environmental Crime Directive provides that a mechanism must be established to enable the tracing, identifying, freezing and confiscation of instrumentalities and proceeds from the criminal offences.



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7. Are there other specific aggravating and mitigating circumstances?

Yes. The following are now aggravating circumstances: (i) causing destruction or irreversible damage to an ecosystem, (ii) the commission of the offence within the framework of a criminal organisation, (iii) the commission of the offence using forged documents, (iv) the status of the offender as a public official, (v) the repetition of the offence, (vi) the fact that the offence resulted in (or could have resulted in) substantial financial gain, (vii) the destruction of evidence or the intimidation of witnesses or complainants, and (viii) the fact that the offence was committed in an area designated as a special protection area.

The Environmental Crime Directive is in line with the general view that there is a need to improve the preparation of authorities with environmental responsibilities

On the other hand, mitigating circumstances include (i) restoring the environment or minimising the impact and extent of the damage before criminal proceedings are initiated, and (ii) cooperating with the administrative or judicial authorities by providing them with information they could not otherwise obtain regarding the identity of the offenders and evidence.

8. The intention to improve the effectiveness of detection, investigation, prosecution and judicial decision-making

It is also clear from the Environmental Crime Directive that Member States must make every effort to provide judicial and investigative authorities with the means and expertise to detect and prosecute environmental crimes effectively. In this respect, the Environmental Crime Directive is in line with the general view that there is a need to improve the preparation of authorities with environmental responsibilities.

9. Protection of whistleblowers

Environmental crime whistleblowers are provide a service in the public interest.

As such, people who report environmental offences benefit from the protection afforded to whistleblowers by European and national legislation and cannot be subjected to retaliation, in particular in the workplace, while at the same time enjoying adequate legal protection.

10. When are these rules expected to enter into force?

The Directive enters into force 20 days after its publication and Member States must incorporate it into national law by 21 May 2026.

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