

COMPLIANCE OF THE CRIMINAL LEGAL FRAMEWORK FOR ENVIRONMENTAL PROTECTION IN KOSOVO WITH THE STANDARDS OF THE EU ENVIRONMENTAL CRIME DIRECTIVE: ACHIEVEMENTS AND CHALLENGES

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ABSTRACT

*Due to the grave consequences that are being caused to the environment, criminal law has been given special importance as an effective tool for preventing and further combating environmental damage. The EU through Directive 2008/99EC by setting a minimum mandatory threshold for environmental protection through criminal law aims to unify the rules between member states, in order for environmental protection to be effective, convincing, and proportionate to the whole community. In this respect, Kosovo has obligations to the *acquis communautaire* arising from the Copenhagen Criteria and the SAA. The paper focuses on addressing the two main objectives, namely the analysis of the Compliance between the criminal legal framework for environmental protection and the standards contained in the Directive in terms of a criminal offense, sanction, and liability of legal persons, as well as identifying gaps in the legal framework. criminal protection for the environment. The paper uses two main methods, namely literature review and qualitative methods of legal and comparative analysis. As a general conclusion of the findings of this paper it can be concluded that although the criminal legal framework for environmental protection has considerable compliance with the standards contained in Directive 2008/99/EC, it needs some intervention to achieve full compliance as required with the standards of Directive 2008/99/EC.*

KEYWORDS: *Environmental protection, criminal law, compliance, *acquis communautaire*, Directive 2008/99/EC*

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1. INTRODUCTION

Due to the great and irreparable damage that is being caused to the environment, and especially since these damages have already crossed the national borders, at the international level important steps have been taken to set the minimum standards that will serve as an important basis for transpose these standards into the national legal framework, to effectively protect the environment. In this regard, the protection of the environment through criminal law is one of the important mechanisms that states are paying special attention to prevent and successfully fight environmental crime that is producing serious, long-term, and irreparable consequences.

To this end, the Directive 2008/99/EC on the protection of the environment through criminal law issued by the European Union (hereafter: EU) also serves as an important mechanism that aims to set minimum standards of environmental protection through criminal law, so that this protection is effective, proportionate and convincing to the subjects causing the environmental damage and has a practical uniformity for the manner of environmental protection in the Member States. Although this instrument by virtue of Article 8 obliges to implement only EU member states, in this regard in general terms are not excluded the obligations of third countries such as Kosovo. Kosovo's obligations towards EU instruments derive from its political and legal obligations, respectively its obligations to harmonize policies in the respective scope with the EU, including the approximation of its environmental legislation with the *acquis communautaire*, which oblige the criteria of Copenhagen for EU membership, as well as the Stabilization and Association Agreement (hereafter: SAA).¹ The SAA stipulates that Kosovo needs to align its legislation with the *acquis communautaire* in several areas², including the approximation of environmental legislation. Although this agreement does not explicitly emphasize Kosovo's obligation to harmonize its criminal legal framework for environmental protection with EU standards for environmental protection through criminal law, this issue is implied by the fact that the protection of law through law Criminal law is one of the tools that the state has to protect the environment from serious and irreparable damage.

¹ Kosovo and the EU signed the Stabilization and Association Agreement on October 27, 2015, in Strasbourg. This agreement was approved by the Government of the Republic of Kosovo on October 30, 2015 with the approval of decision no. 01/55 on the approval of the Draft Law on ratification of the Stabilization and Association Agreement between Kosovo, on the one hand, and the EU and the European Atomic Energy Community, on the other, and was ratified by the Assembly of Kosovo on November 2, 2015, with approval of Law no. 05 / L-069 on ratification of the Stabilization and Association Agreement.

² *Ibid.*, article 1.

Despite the fact that over the years a legislative and policy framework for environmental protection has been built, as well as responsible institutional mechanisms have been set up to manage and implement environmental policies, the environment still poses the greatest challenge facing Kosovar society in terms of overall strategy towards European integration and implementation of standards to be met in the environmental sector.³ Despite the work done, there is still a need to improve the policies and legal framework for environmental protection, stepping up efforts to provide a more effective solution, to ensure an appropriate level of environmental protection. Aligning policies and the legal framework, including environmental protection through criminal law, with the standards proclaimed by the EU, is an important guide on how to effectively improve environmental protection.

At the European Union level, at the end of 2021, the Commission proposed to Parliament and the Council that the current directive be replaced by a new directive. Parliament and the Council will negotiate the proposed draft of the Commission. The proposed draft of the Commission has not yet received its final form with the necessary approvals to be published in the Official Journal and will be subject to review by the relevant authorities according to standard protocols in the field of drafting and adopting legislation, and therefore the study will focus on analyzing and comparing the compliance of Kosovo's criminal legal framework with the standards of Directive 2008/99 / EC, which is currently in force.

EU states that have an obligation to comply with the obligations arising from this directive have not followed a unique way of incorporating Directive 2008/99/ EC into their legal framework, as this instrument itself has not defined a specific way to do so. For this reason, in all EU member states we can find four different approaches to transposing the Directive: a) transposing through the Criminal Code; b) transposition through environmental legislation; c) combined transposition through sectoral legislation and the Criminal Code; d) transposition through a particular act in an almost verbal manner.⁴ Kosovo's legal framework, whether it is the sectoral legal framework for environmental protection or the criminal legal framework that provides for criminal offenses against the environment, does not explicitly refer to Directive 2008/99/EC, nor its standards, much less

³ Kosovo Strategy for the Environment (2013-2022). Ministry of Environment and Spatial Planning. Prepared by the Ministry of Environment and Spatial Planning (MESP) in cooperation with SWECO, Sweden and EPTISA International, Spain. A project funded by ASHNS, the Swedish International Development Agency.

⁴ European Commission: Commission Staff Working Document - Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, 2020, p. 25.

to a methodology. specific to include these standards within the legal order in Kosovo. Thus, most of the standards of the Directive are present in some acts that are applicable in Kosovo, without following a certain way of their inclusion within the legal framework for environmental protection in Kosovo.

For these reasons mentioned above, the main purpose of this study is the analytical treatment, namely the analysis of the measure of compliance that exists between the criminal legal framework for environmental protection, concerning the standards of Directive 2008/99/EC, identifying, on the one hand, the compliance, and on the other hand identifying gaps or non-compliance between the criminal rules for environmental protection and the standards of the Directive. The methodology followed in this paper is intertwined between literature review and the qualitative method of legal analysis. By browsing the literature, many scientific titles and other documents have been used for the purpose of more clearly reflecting the problem of the study, namely the treatment of aspects related to environmental protection through criminal law in the EU, in some member states, and Kosovo. While through the qualitative method of legal analysis is treated in a comprehensive manner all domestic legal acts that protect the environment through criminal law, as well as EU instruments and legal acts, reflect the measure of regulation of the protection of the environment through the criminal law in Kosovo and at the same time the comparison of the measure of compliance between the internal rules with the EU standards, respectively the Directive 2008/99/EC.

2. EU ENVIRONMENTAL CRIME DIRECTIVE

The issue of criminal law harmonization within the EU has a long and debated history. In 2000, Denmark initially as a member state launched a Third Pillar initiative aimed at framing serious environmental crime within the EU. Subsequently, the Council of the European Union issued a Framework Decision on 27 January 2003 on the protection of the environment through criminal law.⁵ In 2005 this decision was overturned by the Court of Justice of the EU, as it found that it was not within the competence of the Council to decide on these aspects.⁶ These important developments have preceded the issuance of the

⁵ Faure, M.G.: *The Revolution in Environmental Criminal Law in Europe*, Virginia Environmental Law Journal, 35 (2) 2017, pp. 321-356.

⁶ 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.

Environmental Crime Directive. The EU's main instrument of environmental protection through criminal law is Directive 2008/99/EC which was adopted on 19 November 2008 by the European Parliament in co-decision with the Council and entered into force on 26 December 2008. The Directive is structured in 10 articles containing the minimum standards for criminal offenses, sanctions, and criminal liability of legal persons.

Article 3 of the Directive describes the categories of unlawful conduct against the environment which should be criminalized, ie sets the minimum standards that states should include in their national legislation and qualify them as criminal offenses. The 'Unlawful' element contained in article 3 means infringing:

- 1) legislation adopted in accordance with the EC Treaty, listed in Annex A; or
- 2) "in relation to the activities covered by the Euratom Treaty, legislation adopted in accordance with the Euratom Treaty and listed in Annex B; or
- 3) a law, an administrative regulation, or a decision taken within a Member State giving effect to the legislation referred to in points one and two.⁷

According to the Directive, Member States must ensure that certain conduct, the elements of which constitute a criminal offense, provided that the action is "unlawful" and committed intentionally or at least by gross negligence. These elements as follows are required to be criminalized because they are related to some important aspects of protecting human health, namely the protection of damage that may be caused to water, air, soil, flora, and fauna. Paragraphs (a) and (b) of Article 3 of this instrument require that States criminalize such an act as to cause significant damage to the environment by hazardous materials, ionizing radiation, or hazardous waste, respectively physical injury or risk of loss of individual life, which is associated with the risk of exposure to materials or ionizing radiation.⁸

Paragraphs (c), (d), and (e) require Member States to criminalize acts such as those relating to the shipment of goods contained within the framework of Article 2 (35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006, respectively, it is required to include the issue of causing damage by plants which during their activities release hazardous substances, namely the criminalization of production, storage, transport or destruction of nuclear materials, all of which cause significant damage to the environment, respectively water, air, soil, flora, fauna, or cause death or

⁷ 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, OJ L 328, 6.12.2008, art. (2) (i) (ii) and (iii).

⁸ Ibid., Art. 3 (a) and (b).

serious bodily injury. Another important aspect is included in paragraphs (f), (g), and (h), which respectively provide for the protection of flora and fauna, sanctioning the killing, destruction, possession, or trade of protected species as provided for in Annex A and B, provided that the amount is not small, respectively negligible. It is also envisaged to criminalize actions that cause damage to habitat within a protected area as regulated by the internal acts of a state.⁹ While in paragraph (i) it is required that the state should criminalize all those actions that destroy ozone.¹⁰

The content of Article 3 relates to the implementation of the other 72 EU instruments protecting the environment, which are tax-listed in Annex A¹¹ and Annex B¹² of the Directive. The interconnection of all these instruments that have an important weight for the protection of the environment, plays an important role in strengthening the protection of the environment and provides a stronger model of environmental protection through criminal law.¹³

From what we noted above, the types of behavior covered under paragraphs (a), (b), (d), and (e) are criminalized provided they cause or are likely to cause death or serious injury to any person or significant damage to air quality, soil quality or 'food, or to animals or plants. While the types of behavior included under paragraphs (f) and (g) are criminalized provided that the amount is not small, respectively not negligible. In this case, it is not required to cause significant damage as required in the above paragraphs. However, the types of behavior covered under paragraphs (c) and (i) do not require any impact on the environment or people.¹⁴

According to Article 4, States should include such conduct as instigating or assisting in the commission of criminal offenses for such conduct under Article 3.

⁹ Ibid., Art. 3 (f), (g) dhe (h).

¹⁰ Ibid., Art. 3 (i).

¹¹ List of Community legislation adopted pursuant to the EC Treaty, the infringement of which constitutes unlawful conduct pursuant to Article 2(a)(i) of this Directive.

¹² List of Community Legislation adopted pursuant to the Euratom Treaty, the infringement of which constitutes unlawful conduct pursuant to Article 2(a)(ii) of this Directive.

¹³ Perini C.: The Influence of Directive 2008/99/EC on the Harmonization and Renewal of the Lexicon of Environmental Criminal Law, in: Ruggieri F. (ed): *Criminal Proceedings, Languages and the European Union*, Berlin, pp. 145-157.

¹⁴ European Commission: Commission Staff Working Document - Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, 2020, p. 11.

Whereas, under Article 5, States shall impose such criminal sanctions as to impose criminal penalties on the subjects.¹⁵ effective, proportionate, and persuasive. The directive also provides for liability for legal persons.

This responsibility is not specified what it should be, but it is related to the previous articles of the Directive, respectively to such behaviors that are required to be criminalized, respectively to the criminal sanctions that should be imposed on entities that violate these prohibited behaviors.

In order for a legal person to be held responsible for a certain criminal offense, the criminal responsibility of the responsible person who has acted within the legal person, whether the leader or the responsible person, must be ascertained in advance. The nature of the sentences requires that they must have the same characteristics as natural persons.¹⁶

2.1. THE IDEA OF REPLACING THE CURRENT DIRECTIVE WITH A NEW DIRECTIVE ON ENVIRONMENTAL CRIME

Environmental protection through criminal law is a very dynamic field that in recent years has taken on a special importance and has also grown and developed its unique identity. This trend has also affected EU legislation in this regard.¹⁷

Discussion is already open at the level of EU institutions and serious efforts are being made that the current directive on environmental crime should be replaced with a new directive in this field in order to adapt the standards of this directive to the new trends that are developed in the protection of the environment through criminal law but also aims to eliminate the current weaknesses and gaps that have been identified in the implementation of this act. This idea has been further reinforced following the publication of a report prepared by the European Commission on the implementation and impact assessment produced by Directive 2008/99 / EC. The European Commission through 2019 and 2020 has evaluated the directive, the results of which it has published in a separate report.

This document clearly reflects the applicability of the directive, ie the challenges, obstacles, gaps, and problems in the implementation of this act are identified. In general, the report shows that the implementation of the Directive

¹⁵ Directive 2008/99/EC, art. 4 & art. 5.

¹⁶ Ibid., art. 6 & art. 7.

¹⁷ Mitsilegas, V., Fasoli, E., Giuffrida, F., & Fitzmaurice, M.: *The Legal Regulation of Environmental Crime*. Leiden, 2022, p. 286.

did not produce any proper effect, as, during the ten years since the issuance of the Directive, the number of cases where environmental crime has been punished by a final judgment has remained extremely low, while for cases where a sentencing verdict has been imposed, extremely lenient and disproportionate sanctions have been imposed, which the sentences have not met the standard to be convincing.¹⁸

An identified issue was the lack of cross-border cooperation between EU countries, as well as at the national level law enforcement mechanisms, starting with the police, prosecution and courts, were not doing their job in the best way. Furthermore, it is noted that states have not developed any comprehensive strategy or action plan on how to respond effectively to such situations. There are also countries that have not yet clarified the issues between administrative offenses and criminal offenses for environmental damage, and there are still significant shortages of reliable and complete statistics on environmental crime in individual states.¹⁹

In line with the findings identified in this report, the Commission has made a concrete proposal to the European Parliament and the Council containing important issues related to supplementing and amending the current directive. Some general but also inaccurate terms found in the current directive, in particular the terms ‘substantial damage’, ‘likely’ to cause damage, and ‘negligible quantity’, have been clarified and specified in a way that provides law enforcement authorities with an opportunity to apply the law correctly, while providing legal entities with greater legal certainty. Article 3 which contains the types of criminal offenses has been supplemented with new proposals which include several new categories of new criminal offenses, such as illegal timber trade; illegal ship recycling; illegal water abstraction from the ground- or surface water; serious breaches of EU chemicals legislation; serious breaches related to dealing with fluorinated greenhouse gases; serious breaches of legislation on invasive alien species with Union concern; serious circumvention of requirements to obtain a development consent and to do environmental impact assessment causing substantial damage; source discharge of polluting substances from ships.²⁰

¹⁸ European Union: European Commission, Commission Staff Working Document, Evaluation of 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 (Environmental Crime Directive), SWD (2020) 259, 28.10.2020.

¹⁹ Ibid.

²⁰ European Commission: Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, COM (2021) 851, 15.12.2021.

Article 5 of the draft provides in an expanded manner the criminal sanctions against natural persons for criminal offenses against the environment. According to this draft, in addition to imprisonment and fines, for the first time other criminal sanctions are provided, such as the obligation to reinstate the environment within a given period; fines; temporary or permanent exclusions from access to public funding, including tender procedures, grants, and concessions; disqualification from directing establishments of the type used for committing the offense; withdrawal of permits and authorizations to pursue activities which have resulted in committing the offense; temporary bans on running for elected or public office; national or Union-wide publication of the judicial decision relating to the conviction or any sanctions or measures applied.²¹

There are also certain minimum penalties when dealing with elements of a criminal offense that cause serious or even irreparable consequences, such cases may be situations where death or serious injury of persons is caused. Other criminal sanctions are also envisaged against legal entities, which are explicitly stated in the draft, which reflects for the first time a concrete regulation, as the currently applicable directive remains silent in this regard. This draft also contains other important aspects which have not been included in the current directive and which have been identified as issues to be addressed in the new directive, such as: aggravating circumstances (Art. 8), mitigating circumstances (Art. 9), freezing and confiscation (Art. 10), limitation periods for criminal offenses (Art. 11), jurisdiction (Art. 12), protection of persons who report environmental offenses or assist the investigation (Art. 13), rights for the public concerned to participate in proceedings (Art. 14), prevention (Art. 15), resources (Art. 16), training (Art. 17), investigative tools (Art. 18), coordination and cooperation between competent authorities within a Member State (Art. 19), national strategy (Art. 20), data collection and statistics (Art. 21), implementing powers (Art. 22), committee procedure (Art. 23), evaluation and reporting (Art. 25), etc.

The proposed draft of the Commission will be negotiated by the Parliament and the Council.

Of course, this draft may undergo certain changes and may take a different form and content from what was originally proposed by the Commission.

3. COMPLIANCE OF CRIMINAL OFFENSES AGAINST THE ENVIRONMENT WITH THE STANDARDS OF THE EU ENVIRONMENTAL CRIME DIRECTIVE

²¹ Ibid.

3.1. CHARACTERISTICS OF THE CRIMINAL LEGAL FRAMEWORK FOR ENVIRONMENTAL PROTECTION IN KOSOVO

Environmental protection in Kosovo enjoys extensive legal protection and is included in several legal acts from the criminal and administrative fields. These legal acts reflect the combination of the characteristics of the two models of environmental protection in Europe and the USA, respectively the philosophy of the civil legal system (European-continental) and the Common Law system (Anglo-Saxon). According to these characteristics contained in the legal system in this area, there is no single law or general code for environmental protection, but there are a variety of environmental protection laws issued by various institutions, which provide sanctions for legal violations.²² Criminal offenses against the environment are sanctioned by the Criminal Code of Kosovo (hereafter: CCK) and are criminal offenses that are mainly drafted according to the technique 'blanket reference' or 'legislation by reference' because most of the issues that refer to the protection of the environment in the broadest sense are defined by sectoral legal provisions, so in certain cases, their non-compliance is considered a criminal offense.²³ In this way, criminal offenses against the environment defined by the CCK are not self-enforceable, as for their consumption the subject must in advance conflict with the sectoral legal rules that specifically regulate behavior towards the environment. Chapter XXVII of the CCK 'Criminal offenses against the environment, animals, plants and cultural objects' provides for 18 types of criminal offenses systematized according to special characteristics, which in addition to environmental characteristics, are also related to the characteristics of animals, plants, and cultural objects. The following are the relevant names and references for these works:

- Polluting, degrading, or destroying the environment (art. 338),
- Unlawful handling of hazardous substances and waste (art. 339),
- Allowing unlawful construction or unlawful operation of plants and installations that pollute the environment (art. 340),
- Damaging objects and installations for the protection of the environment (art. 341),

²² Fajardo, T.: *The EU's promotion of environmental protection in Kosovo. A Case Study on the Protection of the Environment through Criminal Law in Kosovo*. A study compiled as part of the EFFACE project. Granada, 2015, p. 25.

²³ Salihu, I.: *E drejta Penale – Pjesa e Posaçme*, Prishtinë, 2014, p. 504.

- Production, sale, and circulation of harmful substances for the treatment of animals (art. 342),
- Providing irresponsible veterinary assistance (art. 343),
- Unlawful practice of veterinary services (art. 344),
- Failure to comply with orders for suppressing diseases in animals and vegetation (art. 345),
- Abuse of Animals and the Pollution of food and water for animals (art. 346),
- Destruction of vegetation by harmful substances (art. 347),
- Devastation of forests (art. 348),
- Forest theft (art. 349),
- Unlawful hunting (art. 350),
- Sale or removal of wild animal trophies from the Republic of Kosovo (art. 351),
- Sale or removal of protected goods of nature, plants, or animals out of the Republic of Kosovo (art. 352),
- Unlawful fishing (art. 353),
- Damage, destruction, and unauthorized removal of protected monuments or objects out of the Republic of Kosovo (art. 354) and
- Unauthorized work and appropriation of cultural monuments (art. 355).

Chapter XV ‘Criminal offenses against humanity and values protected by international law’ also lists the criminal offenses ‘Unauthorized appropriation, reception, use, production, possession, transfer, alteration, disposal, dispersion or damage of nuclear or radioactive material’ (art. 170), which includes important elements of environmental protection.

3.2. COMPLIANCE WITH COMMON ELEMENTS OF CRIMINAL OFFENSES AGAINST THE ENVIRONMENT

Article 3 of the Directive defines the types of conduct, ie the elements of the figure that constitute a criminal offense, where previously those conduct are ‘illegal’ that comes as a result of non-compliance with an environmental obligation set by the EU or the states that apply this instrument and the offense was committed ‘intentionally’ or at least with ‘gross negligence.

All these offenses can not be applied in a way, as they do not have the characteristics to be included in the model of the definition of criminal offenses that can be consumed independently or autonomously.²⁴

In this case, three general elements must be met by the states implementing the directive, namely the element ‘unlawfulness’, ‘intentionality’, and ‘gross negligence’. The element ‘illegality’ is defined in Article 2 of the Directive which stipulates that for a criminal offense to be instituted, the subject must by his actions conflict with any of the acts which are listed in a taxative manner in Annex A and Annex B of this instrument. , or by an internal act determined by the State implementing the Directive. In this respect, CCK as the only legal act in Kosovo that sanctions criminal offenses against the environment contains the element of ‘illegality’ as a special element, namely as a necessary element for the formation of criminal offenses against the environment. Examples of this are criminal offenses:

- Polluting, degrading, or destroying the environment (art. 338);
- ‘Unlawful handling hazardous substances and waste’ (art. 339);
- Allowing unlawful construction or unlawful operation of plants and installations that pollute the environment (art. 340), and
- ‘Sale or removal of protected goods of nature, plants or animals out of the Republic of Kosovo’ (art. 352);
- ‘Unlawful hunting’ (Ar. 350);
- ‘Unauthorised appropriation, reception, use, production, possession, transfer, alteration, disposal, dispersion or damage of nuclear or radioactive material’ (art. 170)

All these works are drafted according to the technique ‘blanket reference’ or ‘legislation by reference’ to consume this work the subject must first violate the legal acts or certain decisions arising from the field of environmental protection defined according to laws in force in Kosovo. While art. 170 provides that the two instruments, the Convention on the Physical Protection of Nuclear Material of 3 March 1980 and the amendments of 8 July 2005 and the International Convention on the Suppression of Acts of Nuclear Terrorism of 13 April 2005, are elements of the figure of this criminal offense that must be violated in advance by the subject, to be consumed as a criminal offense. These are the only two international instruments to which the CCK refers directly and

²⁴ Faure M.G.: A Paradigm Shift in Environmental Criminal Law, in: Sollund R., Stefes C., Germani A. (eds): *Fighting Environmental Crime in Europe and Beyond. Palgrave Studies in Green Criminology*, London, 2017, p. 32.

which apply to these offenses, as one of the necessary elements of the criminal offense figure defined in Article 170.

This category of offenses against the environment does not contain references to other international instruments, including any EU act. The element of ‘illegality’ as a necessary element that forms the figure of these criminal offenses, implemented in Kosovo with CCK is a limited ‘illegality’, as it includes only laws which are issued by the Assembly of Kosovo and some international instruments but does not include the acts which are set out in Annex A and Annex B to Directive 2008/99/EC. Whereas according to the definition of the Directive the element ‘illegality’ includes three sources of reference, namely the acts set out in Annex A and Annex B of the Directive and the legal framework of the State implementing the Directive. Thus, the presence of the element of ‘illegality’ contained in the CCK for criminal offenses against the environment is not in line with Article 3, in conjunction with Article 2 of the standards of Directive 2008/99/EC. On the manner of committing a criminal offense, the Directive covers actions and omissions.²⁵

In the same spirit, the CCK provides that the criminal offense can be committed by action or omission, respectively the criminal offense is committed by omission only when the perpetrator does not take the action which he was obliged to take.²⁶ In criminal offenses against the environment, most criminal offenses can be committed by omission, as the obligations deriving from the sectoral legislation are not properly fulfilled, respectively the appropriate actions are not taken so as not to cause consequences from the certain activity exercised by the subjects. Other general elements, namely the element of ‘intentionality’ and ‘gross negligence’ contained in the standards of Directive 2008/99EC are two of the forms of guilt that must be met in order for criminal offenses against the environment to take place. The CCK provides for the possibility that these offenses may be committed intentionally as one of two forms of guilt defined by law. In this regard, the notion of ‘intentionally committed’ is in line with the content of all criminal offenses against the environment, as for all these criminal offenses it is provided that they can be committed intentionally. On the other hand, even though the CCK recognizes ‘negligence’ as a form of guilt, providing that criminal offense can be committed with con-

²⁵ Gouritin, A., & de Hert, P. J. A.: *Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law: A new start for criminal law in the European Community?* Environmental Law Network International Review, 1, 2009, pp. 22-28.

²⁶ Code no. 06 / L-074 Criminal Code of the Republic of Kosovo, approved by the Assembly of Kosovo on November 23, 2018, published in the Official Gazette no. 2 on 14 January 2019, Article 8.

scious or unconscious negligence,²⁷ the content of criminal offenses against the environment does not specify the form of ‘negligence’, including actions committed with ‘unconscious negligence’.²⁸ In this respect, although the Directive requires that the minimum guilt for this offense should be at least gross negligence, this approach taken by the CCK is beyond the minimum standards set out in this instrument. This approach is in line with some EU member states, as many lawmakers have decided to extend criminal liability only to negligent conduct, exceeding the threshold of ‘gross negligence’ as required by the Directive.²⁹

3.3. COMPLIANCE OF THE CONTENT OF CRIMINAL OFFENSES AGAINST THE ENVIRONMENT WITH THE STANDARDS OF DIRECTIVE 2008/99/EC

The directive covers only serious environmental violations which have long-term, irreparable consequences, or cause great damage to the environment, while other types of violations remain under the authority of the states implementing the Directive on how to regulate them within the framework of the national legal framework.³⁰ This has been the main purpose of drafting this instrument to set the most important standards that states must implement within their national legislation. The standards of Article 3 of Directive 2008/99/EC reflect the inclusion of certain types of criminal offenses systematized in Chapter XXVII of the CCK ‘Criminal offenses against the environment, animals, plants/and cultural objects’ and Chapter XV ‘Criminal offenses against humanity and values protected by international law’. Figuratively the compliance of the standards of the Directive with the criminal offenses against the environment defined by the CCK is as follows:

²⁷ Ibid., article 23, paragr. 1.

²⁸ Ibid., article 338, paragr. 2, article 339, paragr. 3 dhe 4, article 340, paragr. 2

²⁹ Perilongo, G. F., & Corn, E.: *The ecocrime directive and its translation into legal practice*. New Journal of European Criminal Law, 8(2) 2017, pp. 236–255

³⁰ Vagliasindi, G. M.: *The European Harmonisation in the Sector of Protection of the Environment through Criminal Law: The Results Achieved and Further Needs for Intervention*. New Journal of European Criminal Law, 3(3-4) 2012, pp. 320–331.

Table 1: Compliance of articles of the Directive 2008/99/EC with articles of CCK

| Directive 2008/99/EC | CCK |
|----------------------|----------|
| 3 (a) | Art. 338 |
| 3 (b) | Art. 339 |
| 3 (c) | Art. 339 |
| 3 (d) | Art. 340 |
| 3 (e) | Art. 170 |
| 3 (f) | Art. 350 |
| 3 (g) | Art. 352 |
| 3 (h) | - |
| 3 (i) | - |

For the practical purposes of dealing with the problem, we will pursue their compliance with the standards of the Directive. The offense of ‘Polluting, degrading, or destroying the environment’ (art. 338) is even broader in content than required by the standards promoted in Article 3 (a) of the Directive. The degree of ‘substantial damage’ as a necessary element to form this criminal offense required by the Directive, in the CCK is expressed by the similar notion of ‘serious consequences’, but neither the CCK nor the Law on Environmental Protection provides explanations clear what actually constitutes the ‘grave consequence’ element, which remains to be consolidated by case law. While from an academic perspective, understanding the element of ‘serious consequence’ means that pollution must be carried out on a large scale or over large areas and this is a factual issue that must be ascertained in any concrete situation. In situations where large-scale damage has not been caused or does not endanger the health and life of people, such an act can be considered a misdemeanor or economic offense.³¹

Some EU countries have transposed the notion of ‘substantial damage’ verbatim, or with similar wording, usually relying on case law to determine the scope of application. For example, The Czech Republic and Slovakia consider the financial value of the damage caused in a situation where the notion of ‘substantial damage’ is met, while other countries focus on the ecological rather than financial impact of the damage.³²

The criminal offense of ‘Unlawful handling hazardous substances and waste’ (art. 339) has partial compliance with almost all the elements provided for

³¹ Salihu, I.: *E drejta Penale – Pjesa e Posaçme*, Prishtinë, 2014, p. 506.

³² European Commission: Commission Staff Working Document - Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, 2020, p. 27.

in the standards proclaimed in Articles 3 (b) and (c) of the Directive. In one respect, this provision of the CCK is in some respects broader than the standards contained in the Directive, as in addition to the dumping, treatment, storage, transport, export, or import of hazardous substances or waste, radioactive substances, or wastes are also included. In addition to the notion of ‘substantial damage’ that we encounter in both the Directive and the CCK, we also encounter other unspecified notions such as ‘it pollutes the environment or territory on a large scale’ or ‘it takes a long time or a lot of money to repair it. However, this Article does not contain any reference as an element of illegality to the instrument Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste,³³ as required by Article 3 (c) of the Directive. The non-inclusion of this instrument or its incomplete inclusion is one of the challenges that has been identified in some reports regarding the fulfillment of obligations by some EU member states.³⁴

The criminal offense of ‘Allowing unlawful construction or unlawful operation of plants and installations that pollute the environment (art. 340) complies with almost all the elements set out in the standards proclaimed in Article 3 (d) of the Directive. The criminal offense of ‘Unauthorized appropriation, reception, use, production, possession, transfer, alteration, disposal, dispersion or damage of nuclear or radioactive material’ (art. 170) is compatible with all elements of Article 3 (e) of the Directive. Unlike the other offenses mentioned above, this provision of the CCK is systematized in Chapter XV ‘Criminal offenses against humanity and values protected by international law’. CCK has expanded the scope of incrimination of this offense, exceeding the standards required by Directive 2088/99/EC. This work, designed according to the ‘blanket reference’ technique, envisages several international instruments that are implemented through the CCK.³⁵

The criminal offense of ‘Unlawful hunting’ (art. 350) is not in full compliance with Article 3 (f) of the Directive, as this provision of the CCK provides only for the incrimination of illegal hunting against animals. This provision provides as a criminal offense prohibited hunting, without the relevant permit or authorization as provided by law, but does not criminalize the destruction of

³³ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste OJ L 190, 12.7.2006, p. 1-98.

³⁴ Dupont, C., & Rass-Masson, N.: *Evaluation Study on the Implementation of Directive 2008/99/EC on the Protection of the Environment through Criminal Law by Member States*, Belgium, 2013, p. 8.

³⁵ For example, Convention on the Physical Protection of Nuclear Material of 3 March 1980 as amended on 8 July 2005, as well as the International Convention on the Suppression of Acts of Nuclear Terrorism of 13 April 2005.

protected species of flora or the possession or sampling of protected species of wild fauna or flora, as well as provided in the Directive. The Directive states that the amount destroyed should not be ‘negligible’, but in this case, the CCK does not contain such or similar notions, as it establishes a strict rule independent of any addition of any particular element, defining criminal liability without exception. of ‘negligible quantity’. Some EU countries, Hungary and Slovakia, determine the ‘negligible’ amount of impact by linking it to the financial value of the specimen and the financial impact of the behavior rather than the number of specimens or the impact on the conservation status of the species.³⁶ “Hungary undertakes to assign values to species assuming that the value of a specimen of a protected species is 10 times less than the value of a specimen of a species under increased protection. It is unclear what value constitutes a negligible quantity.”³⁷

The criminal offense of ‘Sale or removal of protected goods of nature, plants or animals out of the Republic of Kosovo’ (art. 352) is not in full compliance with Article 3 (g) of the Directive, as this provision only covers the sale or release of wildlife trophies outside Kosovo, and does not include flora alongside wild fauna. On the other hand, the Directive provides for all types of trade, as well as the marketing of specimens of protected species of wild fauna or flora or parts or derivatives thereof, which CCK does not regulate in a comprehensive manner as it provides directive. However, the CCK in these cases which provides for a criminal offense does not contain the notion that the quantity should not be ‘negligible’ as provided by the Directive but provides for unconditional criminal liability.

Chapter XXIX of the CCK contains many other offenses which are not provided by the standards of Directive 2008/99/EC on the protection of the environment through criminal law, which are not typical criminal offenses having as object of protecting the environment, as most of them for the object of protection have animals, plants and cultural objects. On the other hand, there is a complete gap of non-inclusion of the standards of Article 3 (h) and (i) of Directive 2008/99/EC within the CCK, as in no provision of this act can be found elements included in Article 3 (h) and (i).

³⁶ European Commission: Commission Staff Working Document - Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, 2020, p. 29.

³⁷ Ibid.

3.4. COMPLIANCE OF CRIMINAL SANCTIONS FOR CRIMINAL OFFENSES AGAINST THE ENVIRONMENT WITH THE STANDARDS OF DIRECTIVE 2008/99/EC

The introduction of criminal law as a more penalizing mechanism, aimed at a stronger ‘prevention’ of further degradation of the environment. The main goal was that the damage caused should be compensated and at the same time, an effective, proportionate, and convincing criminal sanction should be imposed on the responsible subject. In the last instance, the purpose of criminal sanctions against criminal offenses against the environment is described by the words ‘polluter pays’, where the obligation and the costs of repairing the environmental damage fall on the subject, by whose actions the damage was caused.³⁸ Although the Directive stipulates that criminal sanctions against environmental offenses must be effective, proportionate, and persuasive, this instrument does not set a minimum or maximum limit, nor does it set out any aggravating or mitigating circumstances that States must meet the instrument.

Such a determination has certainly been influenced by many factors, including respect for the tradition of states in sentencing, which is related to many aspects, namely historical, economic, cultural, and other circumstances, which have a significant impact. to determine a certain type of punishment or the height of the punishment. Even in EU member states, it is difficult to compare criminal sanctions against environmental offenses, as there is no minimum threshold that would force states to comply.³⁹

The notions of ‘effective’, ‘proportionate’, or ‘persuasive’ are seen depending on the national perspectives that the states represent. The lack of a minimum standard has led to a differentiation of approaches across the EU, with some Member States having established a strict environmental responsibility regime, and most others opting for a ‘minimum implementation’ approach.⁴⁰ For criminal offenses against the environment, the CCK has provided for two types of criminal sanctions, namely imprisonment and fines, and depending on the circumstances established in court proceedings, the court may impose addi-

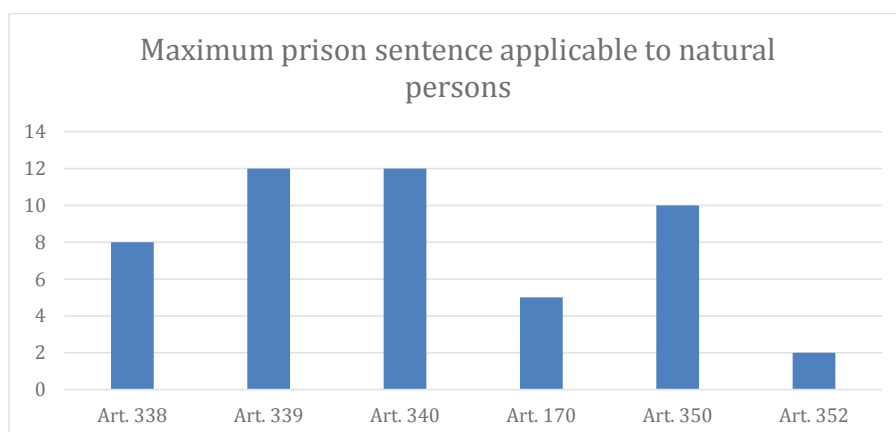
³⁸ Lennan, M.: *Evaluating the Effectiveness of the EU Environmental Liability and Environmental Crime Directives as Implemented by Scotland and the Rest of the United Kingdom*, Journal of International Wildlife Law & Policy, 24 (1) 2021, pp. 26-37.

³⁹ European Commission: Commission Staff Working Document - Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, 2020, p. 29

⁴⁰ Lennan, M.: *Evaluating the Effectiveness of the EU Environmental Liability and Environmental Crime Directives as Implemented by Scotland and the Rest of the United Kingdom*, Journal of International Wildlife Law & Policy, 24 (1) 2021, pp. 26-37.

tional sentences where deemed necessary, while for the main sentences such as Imprisonment and a fine may be determined as appropriate alternatives to be assessed by the court itself. The announcement of an alternative punishment will be justified when the subject commits a criminal offense against the environment in cases where there is no irreparable damage or serious consequences, or the offense was committed through negligence, or other circumstances that the court itself assesses as non-important to the subject. In the following, we will show figuratively the height, respectively the maximum punishment for their criminal offenses against the environment that are in full or partial compliance with the standards promoted by the Directive.

Figure 1: Maximum prison sentence applicable to natural persons



In general, the average total maximum sentence of imprisonment for all these criminal offenses is 3 to 5 years, while for individual criminal offenses the maximum sentence can go up to 12 years of imprisonment.⁴¹ Without prejudice to the effect that these sentences may have as required by the standards of the Directive, the low level of punishment in some criminal offenses creates obstacles to the effective investigation of these criminal offenses, as the possibilities for the application of appropriate techniques for the investigation of these offenses, are limited. offenses, as the application of covert and technical measures of surveillance and investigation, is a legal condition that they are

⁴¹ For example, in Article 339, para. 5 of the criminal offense 'Unlawful handling hazardous substances and waste' is punishable by imprisonment of three (3) to twelve (12) years.

punishable by five (5) or more years of imprisonment.⁴² In all criminal offenses, negligence is envisaged as a special category that can be committed in any of the criminal offenses sanctioned by this chapter and is sanctioned with a lower sentence than in situations where the offense is committed intentionally. In addition to imprisonment, natural persons may also be fined. This type of punishment does not apply to all offenses, but to certain criminal offenses, which also provide for the possibility of imposing a fine of up to 10,000 euros. Incitement and assistance as important institutes in substantive criminal law also apply to this category of criminal offenses, with certain exceptions for criminal offenses that do not affect the sentence of at least 5 years.⁴³ In this situation, the compliance with the standards of the Directive is partial, as to apply these institutes for criminal offenses is conditioned separately by years of punishment. This EU instrument, with regard to criminal sanctions, does not require a well-defined criterion that should be included in the national legal framework, but explicitly requires only that assistance, incitement, and push towards the commission or non-commission of these offenses criminal offenses provided for in this instrument should be sanctioned as criminal offenses.

3.5. COMPLIANCE OF THE RULES ON CRIMINAL LIABILITY OF LEGAL PERSONS WITH THE STANDARDS OF DIRECTIVE 2008/99/EC

The Directive applies to both natural and legal persons. Legal entities are rightfully involved in criminal liability as they play an important role in environmental criminal offenses.⁴⁴ According to the Anglo-American concept and the model of the Criminal Code of France, Slovenia, and some other criminal codes, even in Kosovo, a special law defines the responsibility of legal persons for criminal offenses, which the natural person (responsible person) I perform in the name and on behalf of the legal person.⁴⁵

Kosovo criminal legislation has embraced the model that provides for liability for criminal offenses for legal entities. This model of criminal liability is regulated by two basic legal acts, namely the CCK and the Law on Liability

⁴² Code no. 04 / L-123 of Criminal Procedure, approved by the Assembly of Kosovo on 13 December 2012, published in the Official Gazette of the Republic of Kosovo, no. 37 on 28 December 2012, Article 90.

⁴³ Code no. 06 / L-074 Criminal of the Republic of Kosovo, art. 32 and art. 33.

⁴⁴ Gouritin, A., & de Hert, P. J. A.: *Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law: A new start for criminal law in the European Community?* Environmental Law Network International Review, 1, 2009, pp. 22-28.

⁴⁵ Salihu, I.: *E drejta Penale – Pjesa e përgjithshme*, Prishtinë, 2015, p. 195.

of Legal Entities for Criminal Offenses. According to Article 37 of the CCK, criminal liability is also provided for legal entities, provided that the criminal liability for the criminal offense of the responsible person within the legal entity is established.⁴⁶

Article 112 of the CCK provides that the criminal liability of a legal person, the criminal sanctions which may be applied to the legal person, and the special provisions governing the criminal procedure applicable to the legal person are provided by the CCK or by a special law.⁴⁷ Referring to this legal basis, according to Law no. 04/L-030 on Liability of Legal Entities for Criminal Offenses provides that the provisions of the CCK and the Criminal Procedure Code of Kosovo apply to legal entities. Legal entities may be liable for criminal offenses under the separate part of the CCK for other criminal offenses provided by special laws if the conditions for criminal liability of the legal person are met.⁴⁸

In this regard, the law expands the basis of criminal liability by providing for the possibility that the legal person can be held accountable even in cases where the responsible person who acts and has authorizations in the name and on behalf of the legal person is not punished. However in article 5 para. 3 explicitly states that the liability of the legal person is based on the guilt of the responsible person, which determines the guilt of the responsible person becomes *condicio sine qua non* for the criminal liability of the legal person. The same approach is reflected in the standards promoted by Directive 2008/99/EC, as it expressly states that legal persons can be held liable when the offense is committed for the benefit of any person holding a managerial position within the legal person, acting individually or as part of a body of a legal entity, based on:

- a) the competence to represent the legal person;
- b) an authority to make decisions on behalf of the legal person; or
- c) an authority to exercise control within the legal person⁴⁹

The Directive does not hold that the liability of a legal person must necessarily be criminal liability, as its content does not explicitly state a specific liability.

⁴⁶ Code no. 06 / L-074 Criminal of the Republic of Kosovo, art. 37.

⁴⁷ Ibid., art. 112.

⁴⁸ Law no. 04 / L-030 on the liability of legal persons for criminal offenses. This law was adopted on 21 August 2011, and was published in the Official Gazette of the Republic of Kosovo on 14 September 2011. The law entered into force on 1 January 2013 and repealed the Law on Economic Crimes ("Official Gazette of the SFRY" No. 10 / 86), article 3.

⁴⁹ Directive 2008/99/EC, art. 6, paragr. 1.

Consequently, states are not limited to determining the type of liability, be it criminal liability or civil liability. The Law on the Liability of Legal Entities for Criminal Offenses provides that the following criminal sanctions may be imposed on a legal person for criminal offenses:

- penalties;
- suspended sentences and
- security measures.⁵⁰

Whereas, the types of punishments that can be imposed for criminal offenses of a legal entity are:

- fine and
- termination of the legal entity.⁵¹

In the case of a fine, the law provides for escalated penalties, which stipulates that the minimum fine may not be less than one thousand (1,000) Euros and higher than one hundred thousand (100,000) Euros.⁵²

Probation is provided for non-execution of the sentence for a period of one to two years, provided that during the verification period the legal person does not commit another criminal offense.⁵³ Regarding the imposition of security measures, the law provides that for criminal offenses for which legal entities are responsible, the following security measures may be imposed:

- prohibition of performing certain activities and works;
- taking the item;
- confiscation of property and
- public announcement of the judgment.⁵⁴

These rules provided in the provisions of CCK and Law no. 04/L-030 on Liability of Legal Entities for Criminal Offenses comply with the standards required for criminal liability for legal persons of Directive 2008/99/EC.

⁵⁰ Law no. 04 / L-030 on Liability of Legal Entities for Criminal Offenses, art. 8.

⁵¹ *Ibid.*, article 8.

⁵² *Ibid.*, article 9, paragr. 1.

⁵³ *Ibid.*, article 12.

⁵⁴ *Ibid.*, article 13.

4. CONCLUSION

The results of this research reflect the level of compliance, respectively identify the challenges or gaps that exist between the criminal legal framework for environmental protection in Kosovo and the standards of Directive 2008/99/EC. The element 'illegality' is not in full compliance, as to consume this element is not included in the three aspects defined by Article 2 of the Directive, but only the violation of internal acts of the state of Kosovo is included. While the 'intentional' element is in full compliance with what the standards contain, the 'gross negligence' element is beyond the minimum standards set by the instrument. The standards of Article 3 of Directive 2008/99/EC reflect the inclusion of certain types of criminal offenses. The criminal offense of 'Polluting, degrading or destroying the environment (art. 338) is in full compliance with the standards contained in Article 3 (a) of the Directive, respectively contains more elements than required by the minimum standards. The criminal offense of 'Unlawful handling hazardous substances and waste' (art. 339) has partial compliance with almost all the elements provided by the standards of Article 3 (b) and (c) of the Directive, as among other things this article does not contain any reference as an element of illegality the instrument Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, as required by Article 3 (c) of the Directive.

The non-inclusion of this instrument or its incomplete inclusion is one of the challenges that has been identified in some reports regarding the fulfillment of obligations by some EU member states. The criminal offense of 'Unauthorized appropriation, reception, use, production, possession, transfer, alteration, disposal, dispersion or damage of nuclear or radioactive material' (art. 170) is compatible with all elements of Article 3 (e) of the Directive. The criminal offense of 'Unlawful hunting' (art. 350) is in part under Article 3 (f) of the Directive, as this provision of the CCK provides only for the incrimination of illegal hunting against animals, but does not also criminalize the destruction of protected species of flora or the possession or sampling of protected species of wild fauna or flora. The Directive states that the quantity destroyed should not be 'negligible', but in this case, the CCK does not contain such or similar notions, as it establishes a strict rule independent of any addition of any particular element, defining criminal liability without exception. of the element 'negligible quantity'. The criminal offense of 'Sale or removal of protected goods of nature, plants or animals out of the Republic of Kosovo' (art. 352) is in part under Article 3 (g) of the Directive, as this provision only covers the sale or issuance of wildlife trophies outside Kosovo, and does not include wildlife. On the other hand, there is a complete gap of non-inclusion of the standards of Article 3 (h) and (i) of Directive 2008/99/EC within the

CCK, as in no provision of this act can be found elements included in Article 3 (h) and (i).

In the case of criminal sanctions, in addition to the standard that penalties should be 'effective', 'proportionate', or 'persuasive', the Directive does not set a minimum threshold for how criminal offenses against the environment should be sanctioned, which in the criminal legal framework for the protection of the environment we note that the penalties are comparable to most EU member states implementing this instrument. In terms of assistance and incitement, it can be said that although these categories are provided by the CCK, they apply only to criminal offenses punishable by at least 5 years, and not all of these offenses are punishable by this amount, in conclusion, it can be said that in this respect it does not fully comply with the standards of the Directive.

The liability of legal persons for a criminal offense is in full compliance with the standards promoted by the Directive, as legal persons are legally held liable for all criminal offenses committed by a legal person, provided that the responsible person within the legal person must be found responsible for the consequence caused by the criminal offense. This is also comparable to the practices followed by EU member states in this regard. As a general conclusion of the findings of this paper it can be concluded that although the criminal legal framework for environmental protection has considerable compliance with the standards contained in Directive 2008/99/EC, it needs some intervention in order to achieve full compliance as required with the standards of Directive 2008/99/EC.

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