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Review article
UDK 343.9:502.131.1(4)(477)
DOI: <https://doi.org/10.25234/pv/36170>
Paper received 23 April 2025
Paper accepted 17 October 2025

DIRECTIVE (EU) 2024/1203 AS A GUIDELINE FOR CRIMINAL LIABILITY FOR ENVIRONMENTAL OFFENSES IN UKRAINE*****

Summary: *This article examines the newly adopted Directive (EU) 2024/1203 and its role as a benchmark for reforming Ukraine's criminal legislation on environmental offenses. The authors analyze key provisions of this document, which set minimum standards for the criminalization of environmental harm, aggravating circumstances, and sanctions. Special attention is paid to the Directive's requirements for the inclusion of negligent acts, passive conduct, and unlawful actions involving hazardous substances or invasive species. It is argued that the current criminal legislation of Ukraine lacks several offenses required by the EU Directive, with additional gaps identified in the draft Criminal Code. Therefore, aligning national legislation with the Directive's standards is essential. The analysis outlines key elements that must be addressed, including criminalization of negligent and passive conduct, illegality as a core offense element, and the need for clear qualitative and quantitative thresholds. It emphasizes the importance of establishing liability for incitement, aiding and abetting, and differentiating punishment based on offense severity. The study supports recognizing unlawful handling of hazardous waste as a criminal offense regardless of scale and using property damage as a key indicator of environmental harm. It also finds that current sanctions fall short of the EU Directive's requirements and should be strengthened by combining imprisonment and fines to ensure fair and effective enforcement.*

Keywords: *criminal law, environmental offenses, punishment, criminalization, criminal liability*

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***** This research paper was made possible by the grant project "Improving Effectiveness of Criminal Law Protection of the Environment in Ukraine: Theoretical and Applied Principles", provided by the National Research Fund of Ukraine (Grant No. 0122U000803).

1. INTRODUCTION

Based on the European identity of Ukrainian people, the Ukrainian state has enshrined the fundamental principle of the irreversibility of its European course at the highest level—in the National Constitution. Not even the ongoing full-scale armed aggression by the Russian Federation, which has been going on for more than three years now, has compelled Ukraine to abandon its chosen strategic path toward European integration. On the contrary, two historic decisions have been made during the war: first, on June 23, 2022, Ukraine was granted candidate status for accession to the European Union (EU); subsequently, on December 14, 2023, a decision was made to launch accession negotiations, which officially commenced on June 25, 2024.

At the same time, it has been well established that one of the essential requirements for any country to complete the process of accession to the European Union is the incorporation of the *acquis communautaire*—the body of EU legislation—into its national legal system. In particular, given the global and systemic nature of the contemporary environmental challenges, it is hardly surprising that a significant portion of the relevant EU legal acts pertains specifically to ecological protection, combating climate change, and promoting a low-carbon, high-tech, resource-efficient economy.¹ As a result, the European community's profound commitment to environmental sustainability and protection has led to an unprecedented level of regulatory development at the EU level. Consequently, the EU Member States have emerged as internationally recognized leaders in environmental governance.²

One notable example of the EU's effective environmental policy is its "Europe 2020" strategy, the implementation of which contributed to a 20% reduction in greenhouse gas (CO₂) emissions (compared to 1990 levels), a 20% increase in energy efficiency across the Union (relative to 2010), and the achievement of 20% of total energy consumption from renewable sources.³ The strategy outlined by the European Commission (EC) at the end of 2019—the so-called European Green Deal⁴—sets forth the EU's most ambitious goals in the context of sustainable development. Among its primary objectives is the transformation of Europe into a climate-neutral continent by 2050.⁵

However, despite the positive impact of the environmental measures adopted by the European Union in recent years, Directive 2008/99/EC has already recognized that, on the one hand, adequate ecological protection can only be achieved through the existence of a robust

1 Ihor Yakymenko, Oksana Salavor, Yevheniy Shapovalov, *Ekolohichna polityka ta tekhnichne rehuliuвання Yevropeiskoho Soiuzu: navchalnyi posibnyk* [Environmental Policy and Technical Regulation of the European Union: Textbook] (NUKtT 2022) 26 [in Ukrainian].

2 Rafael Sanchez-Sevilla and Javier Cuairán García, 'La revaluación del compliance medioambiental a la luz de la reciente Directiva (UE) 2024/1203' (Dialnet, 2024) <<https://dialnet.unirioja.es/servlet/articulo?codigo=9612050>> accessed 12 April 2025.

3 Yakymenko, Salavor, Shapovalov (n 1) 26; European Commission, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth* COM (2010) 2020 final, Brussels, 3 March 2010; Michael Hametner and others, *Sustainable Development in the European Union: Overview of Progress towards the SDGs in an EU Context* (2019 edn, European Union 2019).

4 European Commission, *The European Green Deal* COM (2019) 640, Brussels, 11 December 2019.

5 Yakymenko, Salavor, Shapovalov (n 1) 26.

enforcement mechanism, and, on the other hand, acknowledged its low efficiency. Such ineffectiveness was partly attributed to the absence of a coherent policy in this area.⁶

The first step toward addressing this inconsistency has been the adoption of Directive 2008/99/EC on the protection of the environment through criminal law. This Directive provided a model list of environmental offenses that the EU Member States were expected to criminalize, along with establishing sanctions for the commission of certain environmental violations.

Over time, however, it became increasingly evident within the European community that the list of environmental crimes enumerated in Directive 2008/99/EC required substantial revision and expansion, with the inclusion of additional offenses into the law. It was also widely recognized that the penalties for those crimes should be made more stringent and that the efficiency of detection, investigation, prosecution, and sentencing needed significant improvement. One may assume that a contributing factor behind such reassessment was the persistently low number of successfully prosecuted cases in the Member States, which rendered environmental crimes as a rather “safe” tool for financing criminal activity. The data presented by Swedish researcher K. Olsen is particularly illustrative in this regard. He has reported that environmental crime cases constituted less than 1% of the total case volume handled by Eurojust during the period from 2014 to 2018.⁷

When taken together, all of these factors have catalyzed the long-awaited initiative of the European Commission, which, in December 2021, published its proposal for a revised Environmental Crime Directive (ECD).⁸ This proposal called to strengthen the implementation of the EU environmental legislation by harmonizing environmental criminal law across several Member States.⁹ In 2024, following two years of complex deliberations and negotiations, a new strategic and comprehensive document was finally adopted—Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law (hereinafter—the EU Directive), which replaces Directives 2008/99/EC and 2009/123/EC.¹⁰

This Directive stipulates that the EU Member States¹¹ are required to enforce laws, regulations, and administrative provisions necessary to comply with its provisions by no later than May 21, 2026 (Article 28(1), Article 30). At the same time, provisions of this document should be gradually implemented into the legal system of Ukraine—a country, which, as we previously mentioned, has clearly stated its European integration aspirations and is actively moving in

6 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 [2008] OJ L328/28.

7 Christina Olsen Lundh, “The Revised EU Environmental Crime Directive: Changes and Challenges in EU Environmental Criminal Law with Examples from Sweden” (2024) 2 *EU Crim* 164.

8 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 final, Brussels, 15 December 2021.

9 Ricardo Pereira, ‘A Critical Evaluation of the New EU Environmental Crime EU Directive’ (2024) 2 *EU Crim* 158.

10 Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC [2024] OJ.

11 Kostiantyn Zadoya refers to the Directive as a secondary source of EU law that is binding as to the result to be achieved for each Member State to which it is addressed, while leaving the choice of form and means to national authorities (Kostiantyn Zadoia, *Osnovy yevropeiskoho kryminalnoho prava: navchalnyi posibnyk* [Fundamentals of European Criminal Law: Textbook] (Fenyks 2024) 640 [in Ukrainian]).

this direction. Provisions of the Directive should be taken into account not only by members of the Ukrainian Parliament during the legislative process, but also by the Working Group on Criminal Law Reform. The Group has been established pursuant to Presidential Decree No. 584/2019 of 7 August 2019 and is currently finalizing the drafting of the new Criminal Code of Ukraine (hereinafter referred to as the Draft Criminal Code).

Therefore, the key research issue in front of us lies in identifying the specific amendments and additions that the criminal legislation of Ukraine must undergo with respect to the adoption of the EU Directive. The need to obtain a scientifically sound answer to this question has become the main reason for our elaboration on this paper.

2. REFORMS INTRODUCED THROUGH THE EU DIRECTIVE ADOPTION

As pointed out by Ukrainian commentator K. Zadoya, among the EU secondary law sources, EU criminal law exercises the most influence on the national criminal law of the Member States. It establishes minimum rules with regard to the definition of criminal offenses and sanctions¹². The EU Directive precisely establishes such minimum rules on environmental protection.

According to legal scholars, in comparison with Directive 2008/99/EC, this new instrument introduces several significant innovations, including the expansion of the list of environmental offenses; the definition of unlawfulness; the criminalization of attempts to commit certain offenses; the introduction of criminal sanctions based on a stated intent; also, inserting a set of aggravating and mitigating circumstances that directly affect liability mode.¹³

All of the novelties introduced by the EU Directive can be grouped according to the three key criteria, which correspond to the minimum rules (standards) for criminal protection of the environment:

- 1) criminalization of environmental offenses;
- 2) formulation of basic and qualified elements of environmental offenses;
- 3) construction of sanctions in relevant criminal provisions and imposing criminal liability for environmental violations.

Given such a structured approach, the subsequent presentation of the research findings will proceed along these three key thematic axes, each examined through the lens of legal approximation.

¹² *Ibid.*

¹³ Paulo Farinha Alves, Joana Rosa Baptista, Raquel Freitas, 'Protection of the Environment through Criminal Law Directive (EU) 2024/1203 of 11 April' (Lexology, 2024) <<https://www.lexology.com/library/detail.aspx?g=1867ad16-0ba8-415d-9543-3896d9ce9fca>> accessed 15 April 2025; Alice Villari, Edoardo Maestri, 'New EU Directive on the Protection of the Environment Increases Offenses under Criminal Law' (DLA Piper, 2024) <<https://www.dlapiper.com/es-pr/insights/publications/derisk-newsletter/2024/new-eu-directive-on-the-protection-of-the-environment-increases-offenses-under-criminal-law>> accessed 10 April 2025.

2.1. CRIMINALIZATION OF THE ENVIRONMENTAL OFFENSES

According to Yu. Fidria, based on an analysis of the provisions of the EU Directive, the significant increase in environmental criminal activity has predictably resulted in a substantial expansion of the catalogue of environmental criminal offenses.¹⁴ However, despite such expansion, certain socially harmful acts against the environment remain outside the scope of criminalization by the Directive. Specifically, the following acts are not treated as distinct criminal offenses under the EU Directive: illegal, unreported, and unregulated (IUU) fishing; fraud in the EU carbon markets;¹⁵ illegal trade and deliberate release into the environment of genetically modified organisms (GMOs); and the act of causing forest fires.¹⁶

Paragraphs 5 and 6 of the Preamble to the EU Directive explicitly state that the list of environmental crimes covered by Directive 2008/99/EC required some serious revision and that EU Member States must criminalize new forms of environmentally harmful conduct. In support of this, Article 3 of the Directive provides a specific list of acts that must be criminalized both when committed intentionally (paragraphs 2 and 3) and, at a minimum, when committed with serious negligence (paragraph 4).

Such acts commonly can be grouped into five categories: 1) pollution and environmental damage; 2) improper waste management; 3) protection of species and habitats; 4) misuse of hazardous substances and products; 5) improper exploitation of natural resources.¹⁷ It should be noted that the EU Directive envisages criminalization of these acts through the mechanism of reference to several EU regulations that govern environmental matters.¹⁸

For example, criminalized conduct may involve: 1) violations of the restrictions under Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH); 2) non-compliance with Regulation (EC) No 1107/2009 on the placing of plant protection products on the market and the rules for their use and control; 3) breaches of Regulation (EU) No 528/2012 on the placing on the market and use of biocidal products; 4) violations of Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures, aiming to ensure high levels of human health and environmental protection; 5) the use of substances prohibited under Annex I of Regulation (EU) 2019/1021 on persistent organic pollutants, which calls for the protection of health and environment from those substances.¹⁹

14 Yuliia Fidria, 'Dosvid Polshchi u sferi kryminalno-pravovoi okhorony dovkillia [Poland's Experience in the Field of Criminal Law Protection of the Environment]' (2025) 1 *Yurydychnyi naukovyi elektronnyi zhurnal* [Legal Scientific Electronic Journal] 440 [in Ukrainian].

15 Katherine Nield, Ricardo Pereira, 'Financial Crimes in the European Carbon Markets' in S Weishaar (ed), *Research Handbook on Emissions Trading* (Edward Elgar 2016) 195; Katherine Nield, Ricardo Pereira, 'Fraud on the European Emissions Trading Scheme: Effects, Vulnerabilities and Regulatory Reform' (2011) 20(6) *European Energy and Environmental Law Review* 255–258.

16 Pereira (n 9).

17 'Directiva (UE) 2024/1203 relativa a la protección del medio ambiente mediante el Derecho penal' (Pacto Mundial Red Española, 2024) <<https://www.pactomundial.org/leyes-directivas-normativas-sostenibilidad/directiva-ue-2024-1203-relativa-a-la-proteccion-del-medio-ambiente-mediante-el-derecho-penal/>> accessed 18 April 2025.

18 Liliia Timofeieva, 'Kryminalni pravoporushennia proty dovkillia: proportsiinist v konteksti aproksymatsii aktiv Yevropeiskoho Soiuзу [Environmental Offenses: Proportionality in the Context of Approximation of EU Legal Acts]' (2024) 2 *Visnyk Asotsiatsii kryminalnoho prava Ukrainy* [Bulletin of the Association of Criminal Law of Ukraine] 265 [in Ukrainian]; Lundh (n 7) 164.

19 Directive (n 10).

As L. Tymofieieva observes, in the context of Ukraine, the significant volume of regulatory acts on environmental protection significantly complicates both the search for and the comprehension of legal provisions—especially given the fact that national legislation in this area also encompasses a large number of laws and by-laws.²⁰ At the same time, considering the imperative nature of the provisions of the EU Directive, Ukraine must abandon its traditional approach to the construction of norms within the Special Part, and must, in one form or another, reflect the fact that violations of the relevant EU regulations constitute criminally punishable conduct.

The drafters of the new Criminal Code fully acknowledge this necessity, as evidenced by their efforts to implement this approach in the new criminal legislation. Notably, this method has been specifically applied in the formulation of provisions related to offenses against the environment. For instance, the term “environmentally hazardous substance” (Art. 5.3.1) is explained in Section 5.3 of the Specific Part of the draft Criminal Code, titled “Criminal Offenses Against Environmental Safety.” The definition includes mercury, radioactive substances, ozone-depleting substances, fluorinated substances, and, importantly, any substance—whether on its own, in a mixture, or as part of a product—whose circulation is restricted or prohibited under the EU law.

Furthermore, the aforementioned section of the draft Criminal Code clearly establishes that manufacturing, producing, transporting, storing, or placing such environmentally hazardous substances on the market constitutes a criminal offense when such actions create a real danger of causing death, serious harm to health, major property damage, or severe environmental harm, or if such consequences have occurred (Articles 5.3.15, 5.3.16, and 5.3.17 of the draft Criminal Code, respectively).

In a manner that significantly simplifies the understanding of the essence of legal prohibition, the drafters of the Criminal Code have addressed the regulation of liability for the unlawful handling of invasive alien species as stipulated in point “r” of the EU Directive. Articles 5.3.18–5.3.20 contain a direct reference to the punishment of conduct whereby an individual, in violation of EU Regulation 1143/2014 of the European Parliament and the Council, undertakes actions involving invasive alien biological species.²¹

Within the context of several other acts, the criminalization of which is mandated by the EU Directive, particular support should be given to the Ukrainian drafters of the new criminal law, who, first, have established a single universal provision regarding environmental pollution (Articles 5.3.6–5.3.8), and second, have provided for liability not only for pollution caused by substances, waste, or other materials harmful to human life, health, or the environment but also by the release of energy into the environment. At the same time, considering clause “a” of Article 3(2) of the EU Directive, it would have been advisable to explicitly reflect the possibility of environmental pollution by ionizing radiation as well.

Consistent with the EU *Acquis* tradition, the discussed Directive regulates the issue of liability for the unlawful management of waste with exceptional thoroughness. In particular,

²⁰ Timofieieva (n 18) 264.

²¹ *Control text of the Draft New Criminal Code of Ukraine* (as of 17 February 2025) <<https://newcriminalcode.org.ua/upload/media/2025/02/17/kontrolnyj-tekst-proyektu-kk-17-02-2025-dlya-opublikuvannya.pdf>> accessed 20 March 2025.

it imposes an imperative requirement to criminalize the collection, transport, or treatment of waste, as well as supervision of such activities and subsequent maintenance of landfills.²²

Articles 5.3.9–5.3.11 of the Draft Criminal Code set forth a significantly broader list of criminally punishable acts involving waste or secondary raw materials compared to Article 268 of the CC of Ukraine (hereinafter referred to as the CC of Ukraine). This approach is fully aligned with the provisions of the analyzed EU *Acquis* act. In particular, it is proposed to criminalize the conduct of an individual who: (1) collects; (2) imports into the territory of Ukraine; (3) transits through the territory of Ukraine; (4) stores; (5) disposes of; (6) recycles; (7) restores disposal sites for waste or secondary raw materials; or (8) engages in dealing, brokering, or supervisory activities concerning waste or secondary raw materials.

At the same time, those provisions do not cover the unlawful “transportation” (i.e., conveyance) of waste, as required by the Directive, but only the transit movement of waste. Given this, there is a strong need to supplement the corresponding list of criminalized acts with the transportation of waste. This proposal is supported by the study of the legislative practices in many European countries, where the list of illegal activities involving waste almost always includes “transportation” and often extends to the unlawful sale and management of waste (e.g., Article 181-b of the Austrian Criminal Code, Article 262 of the Andorran Criminal Code, several provisions such as Articles 153-b and 153-c of the Bulgarian Criminal Code, Article 328 of the Spanish Criminal Code, Article 452-4 of the Italian Criminal Code, Article 183 of the Polish Criminal Code, Article 302 of the Slovak Criminal Code, Article 331 of the Slovenian Criminal Code, Chapter 1 of Title 48 of the Finnish Criminal Code, § 326 of the German Criminal Code, Article 196 of the Croatian Criminal Code, and Article 298 of the Czech Criminal Code).

3. REQUIREMENTS FOR STRUCTURING BASIC AND AGGRAVATED ELEMENTS OF THE ENVIRONMENTAL OFFENSES

Having identified the main types of environmental offenses that the EU Directive requires to be criminalized, we now turn to the issue of which features should be regarded as crime-constituting elements (basic offenses) and which as aggravating circumstances (aggravated offenses). Those requirements can also be divided into several conditional subgroups.

3.1. REQUIREMENTS REGARDING THE NECESSITY OF CRIMINALIZING CERTAIN TYPES OF NEGLIGENT CONDUCT

L. Tymofieieva notes that one of the major innovations of the EU Directive is its stipulation to criminalize certain environmental offenses committed not only intentionally but also through negligence.²³ While agreeing that the Directive indeed introduces a requirement to

²² A closer look at Art. 268 of the current CC of Ukraine shows that it provides for liability only for such actions as importation into the territory of Ukraine or transit through its territory of waste or secondary raw materials without proper permission, which indicates the need to supplement this provision with an addition of other actions described in EU Directive.

²³ Tymofieieva (n 18) 263.

criminalize certain acts committed through gross negligence, it is unlikely that this constitutes a genuine novelty, given that Directive 2008/99/EC had already contained provisions requiring criminalization of certain types of environmental law violations committed with gross negligence (clause 7 of the Preamble, also Article 3).²⁴

However, the EU Directive introduces more general requirements, specifying that criminal liability for acts committed through gross negligence should arise if they: cause “death of, or serious injury to, persons, substantial damage or a considerable risk of substantial damage to the environment or is considered otherwise to be particularly harmful to the environment” (clause 9). Furthermore, Article 4 of the Directive provides an exhaustive list of offenses which must be considered criminally unlawful by the Member States even when committed through gross negligence (acts specified in clauses (a)–(d), (f), (g), (i)–(q), (r)(ii), (s), and (t) of Art. 2 of the Directive).²⁵

On the one hand, current provisions of the CC of Ukraine (Articles 239, 241–243), which define certain acts mentioned in the relevant provisions of the Directive, prescribe for criminal liability to be referred from negligent commission. On the other hand, unlike many European countries, Ukrainian criminal law has historically unified liability for both intentional and negligent environmental offenses—a practice, which has been repeatedly criticized by us²⁶ and some other Ukrainian scholars.²⁷

Ultimately, the relevant European experience and scholarly observations have been partly considered when drafting the new Criminal Code project. Within Section 5.3, differentiation between intentional and negligent environmental offenses causing serious harm has been introduced. While this approach is generally commendable, it should be acknowledged that in most European countries, less severe liability arises for negligent acts causing any environmental harm, not only serious harm, as proposed in the Ukrainian draft Criminal Code. In our view, European experience fully merits incorporation into the national legal framework.

3.2. REQUIREMENTS REGARDING THE NECESSITY OF CRIMINALIZING CERTAIN FORMS OF PASSIVE CONDUCT

Clause 7 of the EU Directive notes that the failure to fulfil a legal obligation to take action can have consequences for the environment and human health comparable to those caused

24 Directive (n 6).

25 Directive (n 10).

26 Roman Movchan and Dmytro Kamensky, ‘Criminal Liability for Soil Pollution in Western Europe and Ukraine: A Comparative Study’ (2024) 14 *Soil Security*; Roman Movchan and others, ‘Criminal Law Counteraction to Land Pollution in the EU Countries: Searching for the Optimal Model’ (2021) 10(42) *Amazonia Investiga* 15; Oleksandr Dudorov, Roman Movchan, ‘Pro napriamy vdoskonalennia mekhanizmu kryminalno-pravovoi okhorony dovkillia (na zamitku rozrobnykam novoho Kryminalnoho kodeksu Ukrainy) [On the Directions for Improving the Criminal Law Mechanism for Environmental Protection (For the Attention of the Drafters of the New Criminal Code of Ukraine)]’ (2020) 1 *Visnyk Asotsiatsii kryminalnoho prava Ukrainy* [Bulletin of the Association of Criminal Law of Ukraine] 92–125 [in Ukrainian].

27 Yuliia Riabcheniuk, *Kryminalna vidpovidalnist za umysne znyschennia abo poshkodzhenia terytorii, vziatykh pid okhoronu derzhavy, ta obiektiv pryrodno-zapovidnoho fondu* [Criminal Liability for the Intentional Destruction or Damage of State-Protected Areas and Objects of the Nature Reserve Fund] (PhD thesis, Kharkiv, 2018) 160–161 [in Ukrainian]; Yuliia Turlova, *Protydiia ekolohichnii zlochynnosti v Ukraini: kryminolohichni ta kryminalno-pravovi zasady* [Combating Environmental Crime in Ukraine: Criminological and Criminal Law Principles] (Doctor of Law thesis, Kyiv, 2018) 337, 340–341 [in Ukrainian].

by active conduct. Thus, where appropriate, the definition of criminal offenses should include both acts and omissions.

In Ukraine, relevant provisions of both the current and draft criminal legislation fully comply with this requirement. In particular, analysis of the CC of Ukraine provisions, which establishes liability for the pollution of specific natural resources (Articles 239, 241–243), demonstrates that those criminal offenses can be committed either through acts or omissions. The same is true for the draft Criminal Code, given the meaning of the terms used in its relevant provisions.

The next requirement set out by the EU Directive is *the illegality of the act as a mandatory element of an environmental criminal offense*. In order to be considered illegal, the conduct should breach the Union law which contributes to pursuing one of the objectives of the Union's policy on the environment as set out in Article 191(1) of the Treaty of the functioning of the European Union (TFEU), irrespective of the legal basis of such Union law, which could include, for example, Article 91, 114, 168 or 192 TFEU, or should breach laws, regulations or administrative provisions of a Member State, or decisions taken by a competent authority of a Member State, giving effect to such Union law (Clause 9 of the Preamble).²⁸

Relevant provisions of the current CC of Ukraine provide for liability only for the pollution of certain types of natural resources (land, air, water) resulting from the *violation of specific regulations*. At the same time, Articles 5.3.9–5.3.11 of the Draft Criminal Code explicitly state that criminal unlawfulness of conduct involving waste or secondary raw materials is conditional upon the person acting illegally.

Moreover, the meaning traditionally attributed to the concept of “illegality” in domestic criminal law doctrine and practice allows for the recognition of conduct as illegal even when it has been carried out under a permit issued by a competent authority, provided that the permit was obtained through fraud, corruption, extortion, or coercion, as required by Clause 10 of the Preamble to the EU Directive.

Thus, in this respect, both the current and the draft national criminal legislation of Ukraine already comply with the requirements of this document.

3.3. REQUIREMENTS REGARDING THE QUALITATIVE AND QUANTITATIVE PARAMETERS OF THE CONSTITUTIVE ELEMENTS OF OFFENSES

Clause 13 of the Preamble to the EU Directive specifies that some offenses as defined in this document include a qualitative threshold for the conduct to constitute a criminal offense, namely that such conduct causes the death of, or serious injury to, a person or substantial damage to the quality of air, water or soil, or an ecosystem, animals or plants. In order to protect the environment to the fullest extent possible, that qualitative threshold should be understood broadly. It should include, where relevant, substantial damage to fauna and flora,

²⁸ Directive (n 10).

habitats, to services provided by natural resources and ecosystems²⁹ as well as to various ecosystem functions.³⁰

In some previous publications, we have concluded that the current approach of the Ukrainian Criminal Code, which describes the pollution of individual environmental elements as risk-creating offenses, is unfounded. Specifically, it was argued that such construction, rather than promoting a clear distinction between criminal and non-criminal conduct, often leads to situations where similar acts causing essentially identical socially dangerous consequences for the environment are, in some cases, labelled as criminal and, in others, as administrative offenses. Given this, it has been proposed that the CC of Ukraine should stipulate specific and formalized consequences for this category of offenses, such as minor bodily injury to one or more victims, moderate bodily injury to a single victim, or serious damage.³¹

Similar to the Directive 2008/99/EC, the current EU Directive imperatively stipulates that some infringements against the environment should constitute a criminal offense if they cause or may cause substantial damage to the environment or human health. Specifically, this requirement applies to actions such as the introduction into the environment of various forms of energy, as well as the placing on the market, in violation of prohibitions or other environmental protection requirements, of products whose widespread use results in the emission or introduction of substantial quantities of materials, substances, energy, or ionizing radiation into air, soil, or water (clauses 15 and 17 of the Preamble).³²

As previously noted, the EU Directive puts particular emphasis on the effectiveness of criminal law measures against illegal waste management. The justification for the criminalization of such conduct is provided in clause 18 of the Preamble, which states that illegal collection, transport, and processing of waste—along with insufficient oversight of these activities and the inadequate management of disposal sites after use, including actions by dealers or brokers—can severely harm both the environment and human health. This damage may result from unlawful handling of hazardous waste materials, including pharmaceutical waste, narcotic substances and their precursors, chemicals, acidic or alkaline waste, toxic substances, heavy metals, oil, grease, electronic and electrical waste, end-of-life vehicles, or plastic waste.³³

Given the heightened environmental danger posed by the illegal management of hazardous waste, a differentiated approach to criminalization is required. While illegal handling of hazardous waste should be criminalized even when the quantities involved are minimal, the illegal handling of other, non-hazardous waste should only incur criminal liability if such conduct has caused or could have caused significant harm to the environment or human health.

29 The analysed Directive defines an 'ecosystem' as a dynamic complex of plant, animal, fungal, and microbial communities and their non-living environment interacting as a functional unit, and should include habitat types, species habitats, and species populations. It should also include ecosystem services, through which the ecosystem contributes directly or indirectly to human well-being, as well as ecosystem functions, which are related to natural processes in the ecosystem. Smaller units, such as a beehive, anthill, or log, may be part of an ecosystem, but shall not in themselves be considered an ecosystem for this Directive.

30 Directive (n 10).

31 Oleksandr Dudorov, Roman Movchan, 'Zemelni zlochyny ekolohichnoi spryamovanosti: vid deliktiv stvorennia nebezpeky do optymalnoi zakonodavchoi modeli [Land-related Environmental Crimes: From Risk-Creation Offenses to an Optimal Legislative Model]' (2020) 1 *Yurydychnyi naukovi elektronnyi zhurnal* [Legal Scientific Electronic Journal] 120–130 [in Ukrainian].

32 Directive (n 10).

33 *Ibid.*

Unfortunately, the current criminal legislation of Ukraine and the proposed amendments adopt a uniform approach, whereby actions involving any type of waste are recognized as criminally punishable. Although the hazardousness of certain types of waste has been considered for the purposes of the differentiation of criminal liability for illegal waste management, this is only partially the case. For instance, based on the draft Criminal Code, the illegal management of hazardous waste—as defined in Article 3(2) of Directive 2008/98/EC of the European Parliament and of the Council—is recognized as a criminal offense under the same conditions as the illegal handling of other waste (i.e., the creation of a real danger of causing death, serious harm to health, significant property damage, or serious environmental harm). However, the liability for these acts is aggravated (paragraph 1, Article 5.3.2).³⁴

Nevertheless, the EU Directive does not merely recommend but rather imperatively requires that the hazardousness of waste be taken into account at the criminalization stage. Accordingly, it would be advisable for Ukraine to consider recognizing the illegal handling of hazardous waste or secondary raw materials as criminally punishable regardless of the quantity involved or the consequences of such conduct.³⁵

It is noteworthy that, as of today, in Ukraine, the environmental hazard posed by relevant substances is most clearly reflected in various methodologies that establish the procedure for determining material damage caused by the pollution of specific types of natural resources.³⁶ For example, based on the Methodology for Determining the Amount of Damage Caused by Pollution and Littering of Land Resources Due to Violations of Environmental Legislation,³⁷ it can be concluded that material damage may be considered an objective reflection of environmental harm, as it takes into account, among other things, specific “environmental” parameters such as the land pollution coefficient, which characterizes the amount of pollutant within the volume of contaminated soil depending on the depth of infiltration; the hazard coefficient of the pollutant; the ecological and economic value coefficient of the land, and so forth.³⁸

Upon analyzing the aforementioned indicators, which influence the determination of material damage resulting from the pollution of natural resources, it becomes evident that they

34 Similarly, the liability for these acts is differentiated in the current CC of Ukraine (part 1 and part 2 of Article 268).

35 In addition, the EU Directive requires that the hazardousness of the relevant substances (materials) be taken into account when criminalizing certain other environmental offenses. In particular, para. 22 of the preamble of the document states that where, under this Directive, conduct constitutes a criminal offense only if it concerns a non-negligible quantity, corresponding to the exceeding of a regulatory threshold, value, or other mandatory parameter, in assessing whether that threshold, value or other parameter has been exceeded, the hazardousness and toxicity, inter alia, of the material or substance should be taken into account because the more hazardous or toxic the material or substance is, the sooner that threshold, value or other parameter is reached and, in the case of particularly hazardous and toxic substances or materials, even a very small quantity can cause substantial damage to the environment or human health.

36 Roman Movchan, *Kryminalna vidpovidalnist za zlochyny u sferi zemelnykh vidnosyn: zakonodavstvo, doktryna, praktyka: monohrafiya* [Criminal Liability for Crimes in the Sphere of Land Relations: Legislation, Doctrine, Practice: Monograph] (TOV ‘Tvory’ 2020) 555 [in Ukrainian].

37 Approved by the Order of the Ministry of Environmental Protection and Nuclear Safety of Ukraine of 27 October 1997 No. 149.

38 The hazardous nature of pollutants is considered in several methodologies, including: 1) Calculating the compensation amount for damages to the state caused by excessive emissions of pollutants into the atmosphere. This methodology is approved by the Order of the Ministry of Energy and Environmental Protection dated April 28, 2020, No. 277; 2) Determining the damages caused by pollution and/or water pollution and unauthorized use of water resources. This is outlined in the Order of the Ministry of Environmental Protection and Natural Resources dated July 21, 2021, No. 252; 3) Calculating the compensation for damages to the state resulting from unauthorized use of water resources, which is also approved by the Order of the Ministry of Environmental Protection and Natural Resources dated July 21, 2021, No. 252.

largely correlate with the elements outlined in points 6–8 of Article 3 of the EU Directive, which must be considered when determining whether the damage is significant and whether the act may harm air or soil quality, water quality or condition, ecosystems, animals, or plants. Such elements include: the initial state of the impacted environment; the duration of the damage—whether it is short-term, medium-term, or long-term; the severity and scope of the harm; whether the damage can be reversed; the extent to which any legal limit, standard, or required value has been breached; whether the substance involved is deemed hazardous, dangerous, or otherwise harmful to human health or the environment; the number of organisms affected; the protection status of the species of plants or animals involved; and the estimated costs of environmental recovery, if such costs can be determined.

Thus, the indicator of material damage, which is not only the most objective but also a formalized expression of environmental harm caused by offenses against the environment, should be employed in relevant legal provisions as an element constituting a criminal offense. This approach would ensure compliance with the requirement outlined in the EU Directive that Member States must clearly define the scope of administrative and criminal offenses as prescribed by their national legislation (see Recital 46).

Regulation (EU) 2023/1115 draws attention to the commodities that constitute the largest share of deforestation caused by the Union: oil palm (34%), soy (32.8%), wood (8.6%), cocoa (7.5%), coffee (7%), cattle (5%), and rubber (3.4%). In this regard, as previously emphasized, the EU Directive requires the criminalization of placing or making available on the Union market or exporting from the Union market, the specified commodities or products linked to deforestation or forest degradation, when such actions are conducted in violation of the prohibition laid out in Article 3 of the abovementioned Regulation (EU) 2023/1115.³⁹

This, however, presents a significant challenge for the Ukrainian legislator, who must establish clear qualitative and/or quantitative criteria for the relevant offenses. Notably, Clause 20 of the EU Directive states that when determining whether the amount of a relevant product or commodity linked to deforestation or forest degradation, as defined in Regulation (EU) 2023/1115 of the European Parliament and the Council, is considered negligible, Member States may, for instance, evaluate the quantity based on net mass, or, where appropriate, by volume or number of units. They may also consider whether the overall scale of the activity is minimal in terms of quantity. In making this assessment, Member States could also factor in other criteria outlined in this Directive for specific environmental crimes, such as the conservation status of the affected species or the estimated cost of environmental restoration.⁴⁰

In our opinion, in order for the CC of Ukraine to be as predictable as possible in terms of defining relevant quantitative and qualitative indicators, it is necessary that: 1) these indicators have been developed by highly specialised experts and reflected in regulatory legislation rather than in criminal law; 2) they were related to and took into account the specifics of each of the above-mentioned items (oil palm, soy, wood, cocoa, coffee, cattle, rubber, etc.) to

39 Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L 150/206.

40 Directive (n 10).

the maximum extent possible, taking into account the recommendations set out in the EU Directive.

3.4. REQUIREMENTS FOR ESTABLISHING CRIMINAL LIABILITY FOR INCITEMENT, AIDING AND ABETTING, AND ATTEMPT

The EU Directive repeatedly emphasizes the necessity of criminal law responses to cases of incitement, aiding and abetting, and attempts to commit a range of environmental offenses specified therein (Recital 29, Article 4).

Under the CC of Ukraine, the possibility of such a response is fully ensured through the relevant provisions of its General Part (in particular, Articles 15, 27, and others). Moreover, regarding liability for aiding and abetting certain environmental offenses, the requirements of the Directive have, in some respects, even been pre-emptively exceeded in Ukraine. Specifically, some provisions of the CC of Ukraine establish liability not only for aiding and abetting (as a form of complicity) but also for related actions such as the sale, purchase, storage, transfer, shipment, transportation, and processing of amber whose lawful origin has not been confirmed by appropriate documentation (Article 240-1), as well as for the transportation, storage, or sale of illegally felled trees or shrubs (Article 246).

3.4. REQUIREMENTS FOR THE AGGRAVATION AND MITIGATION OF LIABILITY FOR SOME ENVIRONMENTAL OFFENSES

Paragraph 21 of the Preamble to the EU Directive emphasizes that the intentional criminal offenses listed therein may lead to catastrophic consequences, including mass pollution, industrial accidents with serious environmental impacts, or large-scale forest fires. Accordingly, when such offenses cause destruction or large-scale and significant harm that is either irreversible or long-term, particularly if inflicted upon an ecosystem of considerable size or ecological value, or upon habitats within protected areas, or when they result in widespread and serious damage to the quality of air, soil, or water that is irreversible or long-lasting, they have to be classified as qualified offenses and be subject to more severe sanctions than those applicable to other offenses under this Directive. These aggravated crimes may include acts akin to ecocide, which is recognized in the legislation of certain Member States.

In Ukraine, corresponding requirements have been duly reflected in the current CC of Ukraine (wherein Chapter VIII of the Special Part has strengthened liability for environmental criminal offenses, particularly those resulting in: severe consequences; mass death of fauna and/or flora species or mass death of animals; an environmental disaster; within territories or sites of the nature reserve fund, or in reserves or other specially protected forests, etc.), and in the Draft Criminal Code. The General Part of the Draft Code contains a universal provision recognizing, among various types of “serious harm,” damage to the environment in the form of long-term or large-scale harm (paragraph 6 of Part 1, Article 2.5.5).

The EU Directive also draws attention to other circumstances that may increase the severity of environmental criminal offenses. Thus, paragraph 28 of the Preamble stipulates that: 1) due attention must be given to the involvement of organized criminal groups in environmental offenses; 2) criminal proceedings related to environmental crimes should address issues such as corruption, money laundering, cybercrime, and document fraud, and, in the context

of entrepreneurial activities, the perpetrator's intent to maximize profit or minimize costs; 3) particular concern is expressed regarding environmental crimes committed with the tolerance or active support of competent administrative authorities or public officials in the course of exercising their official duties.

In light of such considerations, Article 8 of the Directive provides an indicative list of circumstances, which could be regarded as *aggravating factors* under national law: a) offense has caused destruction or irreversible or long-term significant harm to an ecosystem, closely aligned with the requirement articulated in paragraph 21 of the Preamble; b) offense was committed within a criminal organization; c) the offense involved the use of false or forged documents by the perpetrator; d) the offense was committed by a public official in the exercise of their functions; e) the offender had already been convicted by a final judgment for crimes of a similar nature; f) the offense resulted in or could have resulted in significant financial benefits or the avoidance of substantial costs (either directly or indirectly), provided that such benefits or avoided costs can be determined; g) the perpetrator destroyed evidence or intimidated witnesses or complainants; h) the offense was committed within an area classified as a special protection area pursuant to Article 4(1) or (2) of Directive 2009/147/EC, or a site designated as a special area of conservation in accordance with Article 4(4) of Directive 92/43/EEC or a site listed as site of Community importance in accordance with Article 4(2) of Directive 92/43/EEC.⁴¹

Despite the use of the milder word “can” in Article 8 of the EU Directive, Clause 1 of its Preamble contains an imperative requirement that Member States must ensure that at least one of the aggravating or mitigating circumstances (to be discussed further) provided for by the Directive is designated as a possible aggravating or mitigating factor.

Also, despite the use of the softened formulation “could” in Article 8 of the EU Directive, Clause 1 of its Preamble contains an imperative requirement that Member States must ensure that at least one of the aggravating or mitigating circumstances (to be discussed further) provided for by the Directive is designated as a possible aggravating or mitigating factor.

Analysis of the current CC of Ukraine reveals that, aside from the provision discussed above (clause “a”), aggravating significance has been attributed to the circumstances outlined in clauses “d,” “e,” and “h,” achieved by enhancing liability for specific environmental offenses committed: in protected areas or objects of the Nature Reserve Fund (Part 3 of Article 240, Part 2 of Article 240¹), or in reserves or other specially protected forests (Part 3 of Article 246); repeatedly (Part 2 of Articles 238, 239¹, 239², Part 3 of Article 240, Part 2 of Articles 240¹, 246, and Part 3 of Article 254); by a person previously convicted of a criminal offense provided for in the relevant article (Part 2 of Articles 248 and 249); by a group of persons acting as part of conspiracy (Part 2 of Articles 239¹, 239², 246, 248, and Part 3 of Article 254); or by an official abusing his or her position (Part 3 of Article 240¹, Part 2 of Article 248).

However, all these circumstances cover offenses that have not been the primary focus of the EU Directive and are instead related to the unlawful appropriation or destruction (damage) of specific types of natural resources. In the Draft Criminal Code, most of these acts are consolidated within Section 6.5, “Criminal Offenses Against the Order of Use of Natural Re-

⁴¹ *Ibid.*

sources”. In contrast, the EU Directive focuses primarily on acts that can be broadly classified as offenses against environmental safety, which T. Syroid includes under acts involving criminal environmental pollution.⁴² Under the current CC of Ukraine, liability for some of these acts is provided under Articles 239 and 241–243. However, it is notable that none of these provisions attributes aggravating significance to even one (except large-scale, irreversible, or long-term environmental damage) of the many circumstances listed above that, according to the drafters of the EU Directive, increase the danger of environmental offenses (such as commission by a criminal organization, commission by an official in the exercise of their functions, specific recidivism, significant financial gain or avoidance of substantial costs resulting from the criminal offense, or the special status of the territory affected).

On the other hand, in the context of incorporating recommendations of the EU Directive, the provisions of the Draft Criminal Code can be regarded as nearly exemplary. Specifically, the Draft Criminal Code designates certain factors that elevate the severity of offenses stipulated in Chapter 5.3, “Criminal Offenses Against Environmental Safety”, by one degree. Such factors include the commission of an intentional offense: (1) by a simple group; (2) through the use of official powers, professional duties, or related opportunities; (3) within territories or at sites that belong to Ukraine’s Nature Reserve Fund or other territories under special state protection; (4) in areas declared zones of an environmental emergency.

The heightened danger of the environmental criminal offenses outlined in the EU Directive, particularly those involving the use of false or falsified documents or cases where the offender destroyed evidence or intimidated witnesses or complainants, may appropriately be taken into account through the application of provisions from other chapters (sections) of the Special Part of the Draft Criminal Code. Moreover, the fact that an offense yielded or could have yielded substantial financial benefits or led to the avoidance of significant costs may influence the individualization of punishment. As emphasized in Clause 41 of the Directive’s Preamble, in any case, it should remain within the judge’s or the court’s discretion to determine whether to increase or to decrease the sentence, while taking into account specific circumstances of each individual case.⁴³

In addition to the aggravating circumstances, the EU Directive also establishes a list of specific mitigating factors. Article 8 states that Member States should ensure that, for the criminal offenses outlined in Articles 3 and 4, one or more of the following factors may be considered mitigating circumstances under national law: the offender takes action to restore the environment to its original state, provided this is not already required under Directive 2004/35/EC; or, prior to the initiation of a criminal investigation, takes measures to reduce the severity or scope of the harm, or to remedy the damage. Additionally, it may be considered mitigating if the offender supplies authorities with information they would not have

42 Tetiana Syroid, ‘Poniattia, oznaky ta vydy ekolohichnykh zlochyniv u mizhnarodnomu pravi [The Concept, Features, and Types of Environmental Crimes in International Law]’ (2024) 84(4) *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Seriya “Pravo”* [Scientific Bulletin of Uzhhorod National University. Law Series] 340 [in Ukrainian].

Several European experts divide this group into two subgroups: 1) pollution of natural resources, illegal handling of waste, secondary raw materials and other items hazardous to the environment; 2) improper waste management (Directive (n 10)).

43 Directive (n 10).

otherwise accessed, thereby assisting in: (a) identifying or prosecuting other offenders; or (b) uncovering evidence.⁴⁴

Neither the current CC of Ukraine nor the Draft Criminal Code contains special provisions, which obligate courts to consider these particular circumstances specifically when adjudicating environmental offenses. Nevertheless, it is important to recognize that such circumstances may reasonably be regarded as “general” mitigating factors, as provided for in the General Part of the Criminal Code. Those include “active assistance in the disclosure of a criminal offense” and “voluntary compensation for the damage caused or the elimination of the inflicted harm” (clauses 1 and 2 of Part 1 of Article 66 of the CC of Ukraine), and in the Draft Criminal Code as “assistance in the disclosure or investigation of a criminal offense, exposure of its participants,” and “voluntary restitution and compensation” (clauses 2 and 5 of Part 1 of Article 3.3.2).

3.5. REQUIREMENTS FOR SANCTIONS AND THE IMPLEMENTATION OF CRIMINAL LIABILITY

Beginning with the Preamble section, the text of the EU Directive provides quite a few provisions regarding the sanctions applicable to environmental criminal norms: existing environmental standards must be reinforced by the availability of effective, proportionate, and dissuasive criminal penalties, thus reflecting the seriousness of offenses and better expressing public disapproval than administrative sanctions alone (clause 4);⁴⁵ sanctions should be more severe (clause 5); Member States are required to harmonize the types and levels of sanctions (clause 6); and supplementary sanctions, particularly concerning legal persons, are to play a significant role (clauses 31 and 32).⁴⁶

Scholars have noted that the establishment of a rather repressive framework for punishing environmental harm has tentatively begun with the Directive’s 2008/99/EC entry into force. However, the provisions therein (applicable to both natural and legal persons) merely required Member States to introduce criminal sanctions that are effective, proportionate, and dissuasive. The excessively vague nature of this requirement ultimately hindered many Member States from implementing sufficiently robust and deterrent sanctions into their national legislation.⁴⁷

44 *Ibid.*

45 Experts rightly emphasise that the implementation of this provision is one of the main tasks of the new EU Directive (Michael Faure, ‘The Creation of an Autonomous Environmental Crime through the New EU Environmental Crime Directive’ (2024) 2 *EU Crim* 153–157).

46 Paragraph 33 of the EU Directive states that to achieve its objectives, Member States which laws provide for criminal liability of legal persons shall ensure that their laws provide for effective, dissuasive, and proportionate types and levels of criminal sanctions against legal persons for offenses committed, as those sanctions are set out in this Directive. Given that neither the current nor the draft criminal legislation of Ukraine provides for criminal liability of legal persons, this article will not address this issue.

47 Colombe Cissé, ‘La nouvelle directive européenne sur la criminalité environnementale : un espoir pour la préservation de la nature en Europe?’ (Actu-Juridique, 25 March 2024) <<https://www.actu-juridique.fr/environnement/la-nouvelle-directive-europeenne-sur-la-criminalite-environnementale-un-espoir-pour-la-preservation-de-la-nature-en-europe/>> accessed 19 April 2025.

In light of this, the 2024 Directive not only expands the range of environmentally harmful acts that must be criminalized under national laws but also introduces specific types and levels of criminal penalties, which are clearly defined in Article 5, “Penalties for natural persons”.⁴⁸

We have concluded that the EU Directive has significantly strengthened the penalties for environmental criminal offenses and differentiated the lengths of imprisonment for natural persons depending on the severity and consequences of the offense. This demonstrates the European legislators’ determination to combat environmental pollution and degradation and is expected to lead to enhanced environmental protection.⁴⁹

In particular, this conclusion follows from the provisions of Article 5(2) of the Directive, which stipulates that Member States shall take the necessary measures to ensure that: (a) criminal offenses covered by Article 3(2), clauses (a) to (d), and clauses (f), (j), (k), (l) and (r), are punishable by a maximum term of imprisonment of at least 10 years if they cause death; (b) criminal offenses covered by Article 3(3) are punishable by a maximum term of imprisonment of at least eight years; (c) criminal offenses covered by Article 3(4), where that paragraph refers to Article 3(2), points (a) to (d), and points (f), (j), (k) and (l), are punishable by a maximum term of imprisonment of at least five years if they cause death; (d) criminal offenses covered by Article 3(2), points (a) to (l), and points (p), (s) and (t), are punishable by a maximum term of imprisonment of at least five years; (e) criminal offenses covered by Article 3(2), points (m), (n), (o), (q) and (r), are punishable by a maximum term of imprisonment of at least three years.⁵⁰

Using a thorough examination of the relevant sanctions, some researchers have justifiably drawn attention to and expressed concerns regarding the fact that punishments for natural persons for most biodiversity-related crimes are significantly more lenient compared to those for pollution-related offenses (where the maximum term of imprisonment is limited to only three years). This reflects a clear anthropocentric orientation of the Directive and stands in contradiction to various international instruments – many of which have been endorsed or ratified by the EU itself – that recognize the seriousness and urgency of the global biodiversity and climate crises.⁵¹

Based on the analysis of the sanctions stipulated in both the current and draft criminal legislation of Ukraine, it can be concluded that many of them do not meet the established requirements and therefore require substantial revision, particularly through the enhancement of penalties.⁵²

Foremost this is related to sanctions for:

1. The deliberate pollution of natural resources and the illegal handling of hazardous substances resulting in human death and large-scale, irreversible environmental dam-

48 Pereira (n 9) 160.

49 Fidria (n 14) 440; Jana Tlapák Navrátilová, ‘Europeizacja ochrony środowiska poprzez prawo karne’ (2024) 18(3) *IUS NOVUM* 13.

50 Directive (n 10).

51 Pereira (n 9) 158–163.

52 According to Polish experts, a similar situation is observed in this country (Anna Barczak, ‘Odpowiedzialność prawna w ochronie środowiska ze szczególnym uwzględnieniem odpowiedzialności karnej’ (2024) 59 *Prawo w działaniu. Sprawy karne* 22–39).

age (under aggravating circumstances), for which the CC of Ukraine currently prescribes a maximum term of imprisonment of only up to five years (Part two of Articles 239, 241–243), whereas the Directive establishes maximum terms of 10 and 8 years, respectively.

2. The commission of similar intentional acts without aggravating circumstances, for which the CC of Ukraine does not envisage the possibility of imposing imprisonment at all, whereas the Directive requires that such offenses be punishable by a maximum term of imprisonment of no less than five years.

Although the draft Criminal Code of Ukraine provides for considerably stricter penalties for the commission of the corresponding environmental offenses, its sanctioning framework must also undergo several modifications to ensure consistency with the provisions of the EU Directive. In particular, it is necessary to increase the maximum terms of imprisonment for the offenses of environmental pollution, the unlawful handling of waste or secondary raw materials, hazardous environmental substances, and invasive alien biological species (in the absence of aggravating circumstances) to the levels established by the Directive – five and three years, respectively.

Against this background, it is noteworthy that the EU Directive also foresees the possibility of introducing sanctions or measures as alternatives to imprisonment aimed at promoting environmental restoration (clause 39 of the Preamble).

Indeed, it is important to recognize that the aspiration to strengthen criminal liability for certain acts by introducing a mandatory penalty of imprisonment may lead to a counterproductive effect. This phenomenon is already observable today, where almost all convicted individuals in Ukraine are released from serving their sentences instead of undergoing full-time imprisonment. Given this, alongside imprisonment for a specified term, it would be advisable to provide a fine, which could facilitate the implementation of the principle of individualized criminal liability, particularly considering the nature and severity of the harm caused. Moreover, in order to enhance the system of criminal law protection of the environment in Ukraine, it is necessary to substantially increase the amount of fines, which should serve as a reference point in constructing sanctions.⁵³ This proposal fully aligns with the recommendation set out in the EU Directive, which advises Member States to regularly review fixed-amount fines in light of the inflation rates and other fluctuations in monetary value, following the procedures established under national legislation.

Another approach to addressing the issue would be to link the unit of measure for fines to the subsistence minimum for able-bodied persons or another financial indicator that is regularly updated. This progressive method is currently being adopted by the drafters of the new Criminal Code of Ukraine, who employ the concept of a “calculation unit,” defined as 1/30 of the statutory minimum wage as of January 1 of the year in which the criminal offense was committed.

53 Oleksandr Dudorov, Roman Movchan, ‘Pro napriamy vdoskonalennia mekhanizmu kryminalno-pravovoi okhorony dovkillia (na zamitku rozrobnykam novoho Kryminalnogo kodeksu Ukrainy) [On the Directions for Improving the Criminal Law Mechanism for Environmental Protection (For the Attention of the Drafters of the New Criminal Code of Ukraine)]’ (2020) 1 *Visnyk Asotsiatsii kryminalnogo prava Ukrainy* [Bulletin of the Association of Criminal Law of Ukraine] 92–125 [in Ukrainian].

In addition to the core requirements concerning criminal penalties, the relevant EU Directive establishes a comprehensive framework for the imposition of supplementary sanctions and corrective measures applicable to natural persons found guilty of the offenses defined in Articles 3 and 4. These provisions are designed to enhance the effectiveness of environmental criminal law and ensure proportionality, deterrence, and restorative justice. In particular, the Directive permits the application of the following measures:

1. an obligation to restore the environment within a specified timeframe where the damage is reversible, or to provide financial compensation where the harm is irreversible or the offender is unable to carry out the restoration independently;
2. the imposition of fines proportionate to the gravity of the offense, while also considering the offender's financial and personal circumstances, the duration and scale of environmental harm caused, and any economic advantage derived from the unlawful conduct;
3. disqualification from access to public funding, including but not limited to public procurement procedures, grants, concessions, and licenses;
4. a prohibition on holding managerial or representative functions in legal entities of the same type used in the commission of the offense;
5. revocation of authorizations or permits directly linked to the unlawful activity;
6. temporary disqualification from candidacy for or holding of public office; and
7. in cases where a legitimate public interest is at stake, the publication of the full or partial judicial decision and the penalties imposed—including, in exceptional and duly justified circumstances, the personal data of the convicted individual.

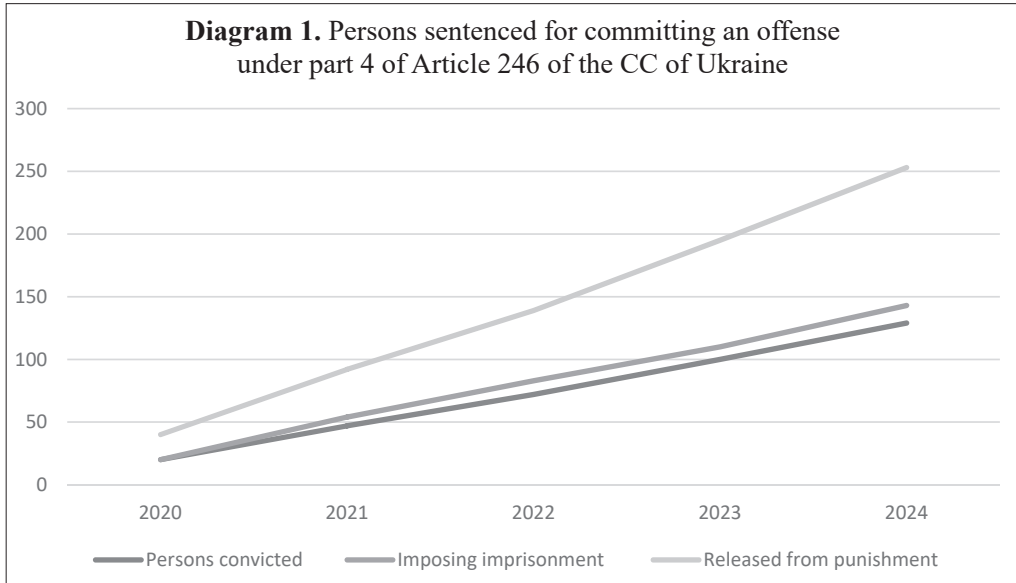
These supplementary measures reflect the Directive's underlying commitment to both environmental protection and the principle of proportionality, ensuring that sanctions extend beyond punitive dimensions to encompass preventive and restorative elements.

It is noteworthy that the EU Directive not only provides for specific minimum standards for sanctions but also contains a requirement to improve the efficiency of judicial proceedings in the cases of environmental offenses. This requirement is imposed not only on the legislative authorities but also on the judiciary (clause 5 of the Preamble). Unfortunately, as of today, such efficiency has not yet been achieved in Ukraine.

For example, based on the analysis of 50 randomly selected judgments from the Register of Court Decisions issued under Part 4 of Article 246 of the CC of Ukraine (illegal logging resulting in grave consequences)⁵⁴, it has been established that in none of the cases did the convicted individuals serve a custodial sentence. Instead, in the vast majority of cases, the courts: (1) released the convicted persons from serving the imposed sentence with probation under Article 75 of the CC of Ukraine; (2) recognized that the penalties prescribed by law were disproportionate to both the social danger and the legal nature of the committed acts, and at the same time were unwilling to release the convicted persons from serving their sentences, while imposing alternative, more lenient types of punishment. Notably, in all of the examined cases, a fine has been exclusively the alternative punishment imposed.

54 Sanction of Part 4 of Article 246 of the CC of Ukraine provides for a sentence of imprisonment for a term from five to seven years.

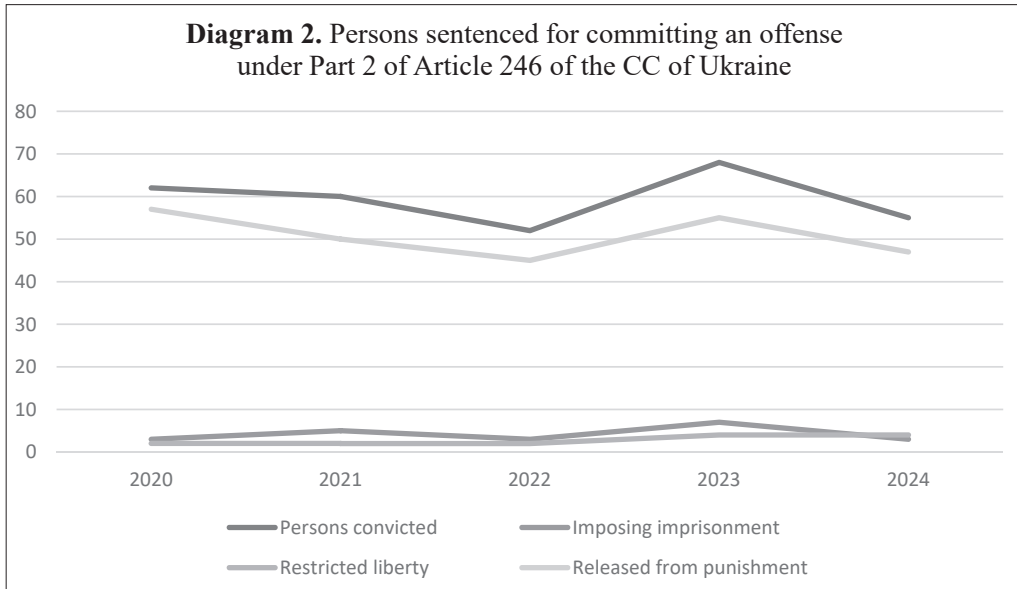
A quantitative analysis of judgments issued under Part 4 of Article 246 of the CC of Ukraine from 2020 to 2024 confirms the validity of the qualitative study of those decisions (Diagram 1).⁵⁵ In particular, in 2024, 110 out of 129 convicted individuals (or 85% in relative terms) were released from serving their sentences on various grounds.



A similar situation has been observed when analysing the first 100 judgments found in the Register of Court Decisions under Part 2 of Article 246 of the CC of Ukraine (illegal logging committed repeatedly or by a group of persons by prior conspiracy).⁵⁶ Among 100% of individuals who have been found guilty under this criminal provision: (1) not a single individual was sentenced to actual imprisonment; (2) only two individuals were sentenced to real serving of punishment in the form of restraint of liberty; (3) three individuals were sentenced to a fine; and (4) all other individuals were sentenced to deprivation or restraint of liberty for a certain period but were released from serving the sentence under Article 75 of the CC of Ukraine. Here the qualitative data also fully correlates with the results of the quantitative analysis (see Diagram 2). In particular, in 2024, out of 55 individuals convicted under Part 2 of Article 246 of the CC of Ukraine, 47 were released from serving the sentence on various grounds, which similarly to Part 4 constitutes 85% in relative terms.

⁵⁵ Here and the following diagrams reflect the source, which is the authors' own compilation based on data by M. Karchevskiy (Mykola Karchevskiy *Protydiia zlochynnosti v Ukraini: inforhrafika (2013–2024): interaktyvnyi dovidnyk* [Combating Crime in Ukraine: Infographics (2013–2024): Interactive Reference Book] (CrimeDataLab 2025) <<https://crimedatalab.org>> accessed 22 April 2025).

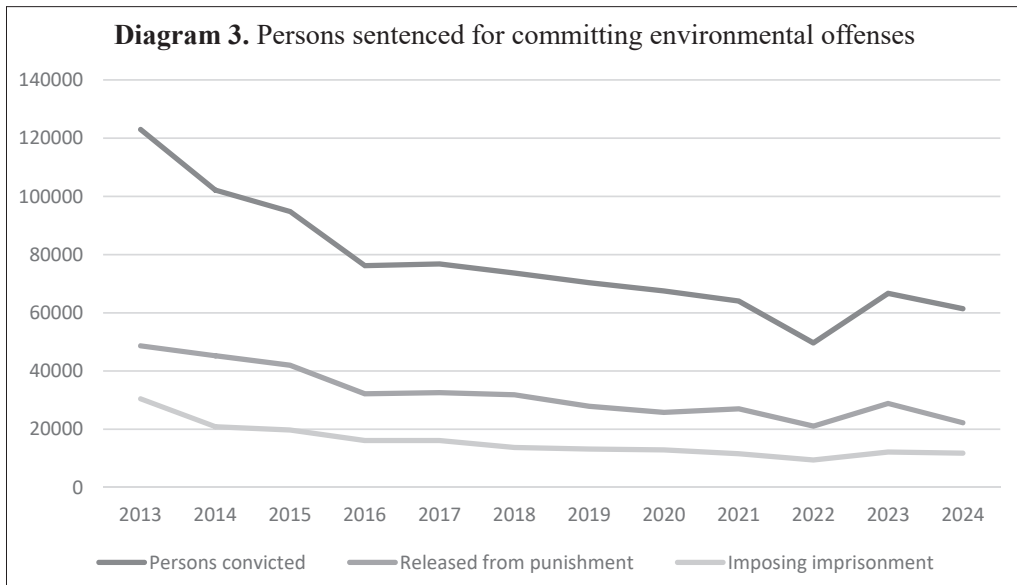
⁵⁶ Sanction of Part 2 of Art. 246 of the CC of Ukraine provides for punishment in the form of restriction of liberty for a term of three to five years or imprisonment for the same term.



The situation regarding convictions under Article 245 of the CC of Ukraine (destruction or damage to objects of the plant world) is even more extraordinary since during certain periods the number of individuals released from serving their sentences with probation for committing this crime has reached 100% of the total number of convicted individuals (such situation was observed in 2014, 2015, and 2018).⁵⁷

The overall data for all environmental crimes in Ukraine is less illustrative, as can be traced over the period from 2013 to 2024 (see Diagram 3). In particular, the highest proportion of individuals released from punishment was recorded in 2022, amounting to 42% of all convicted persons. Additionally, 2022 also saw the lowest percentage of individuals sentenced to imprisonment for environmental crimes, at 19%.

57 Oleksandr Dudorov, Roman Movchan, Yevhen Pysmenskyi, *Kryminalno-pravova okhorona lisu v Ukraini: monohrafiia* [Criminal Law Protection of Forests in Ukraine: Monograph] (Norma prava 2023) 520 [in Ukrainian].



In order to increase the effectiveness of the mechanism of criminal law counteraction to environmental offenses, it is necessary, first, to improve the sanctions of the relevant criminal law provisions, in particular, with due regard for the proposals made; second, courts should only in exceptional cases (instead of the massive scale of this practice which is typical today) release the perpetrators from serving the punishment.

4. CONCLUSION

Based on our research, a theoretically grounded proposal has been elaborated, aimed at classifying the policy innovations embodied in the EU Directive within the framework of the general theory of criminalization and European legal harmonization. This classification is structured according to three key criteria for establishing the minimum standards of criminal law protection of the environment: 1) criminalization of environmental infringements; 2) differentiation of liability for environmental offenses through the application of aggravating circumstances; 3) determination of sanctions for environmental crimes (in line with the principle of proportionality and effectiveness of criminal liability, as enshrined in EU legal doctrine).

It has been established that the current criminal legislation of Ukraine does not include a number of acts whose criminalization is mandated by the EU Directive. Certain gaps in this regard can be identified by referring to the draft Criminal Code of Ukraine. Consequently, it is necessary to align the norms of the criminal legislation with the relevant provisions of the aforementioned Directive through the systematic incorporation of EU legal principles into domestic criminal law.

Based on our analysis of the EU Directive, its requirements regarding the characteristics that should constitute elements of environmental crimes (basic offenses) and those that should act as aggravating elements (qualified offenses) have been identified and classified: 1) necessity of criminalizing a range of negligent environmental infringements; 2) necessity of criminalizing certain forms of passive behaviour; 3) illegality as a mandatory element of an environmental criminal offense; 4) qualitative and quantitative parameters of the constitutive elements of crimes; 5) establishment of criminal liability for incitement, aiding and abetting, and attempt; 6) differentiation of liability for certain environmental offenses.

With reference to research results, the need has been established, among other conclusions, for less severe liability to be imposed for negligent pollution causing any environmental harm (not only serious harm, as currently provided); the expediency of recognizing the unlawful handling of hazardous waste or secondary raw materials as a criminal offense in Ukraine, regardless of the amount or consequences of such acts, was substantiated; and it was also determined that the most objective expression of environmental harm resulting from infringements is the indicator of property damage, which should be used as a constitutive element of an environmental criminal offense. These conclusions are consistent with the principle of material criminal law justification, according to which criminal liability must be based on the real social harm caused.

The careful study of the EU Directive has revealed that the sanctions provided by Ukraine's current and draft criminal legislation are not always consistent with its requirements and therefore require substantial revision through their strengthening. At the same time, we have argued that punishments for environmental crimes should be alternative, providing for both imprisonment within the terms established by the Directive and the imposition of fines. Such differentiation is theoretically supported by the doctrine of individualized justice, ensuring proportionality between the gravity of harm, the form of guilt, and the applied sanction. Such an approach would ensure the proper level of punishment individualization, thus taking the nature of the caused harm into account.

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DIREKTIVA (EU) 2024/1203 KAO SMJERNICA ZA KAZNENU ODGOVORNOST ZA KAZNENA DJELA PROTIV OKOLIŠA U UKRAJINI

Sažetak

U članku se razmatra Direktiva (EU) 2024/1203 i njezina uloga kao mjerila za reformu ukrajinskog kaznenog zakonodavstva vezano uz kaznena djela protiv okoliša. Autori analiziraju ključne odredbe toga dokumenta, koje postavljaju minimalne standarde kriminalizacije počinjenja štete u okolišu, otegotne okolnosti i sankcije. Posebno se naglašavaju zahtjevi Direktive da kaznena djela obuhvate i radnje počinjene iz nemara, propuštanje te nezakonite radnje povezane s uporabom opasnih tvari ili invazivnih vrsta. U radu se polazi od tvrdnje da trenutačno kazneno zakonodavstvo Ukrajine ne predviđa kaznena djela prema Direktivi EU-a te da su dodatne praznine utvrđene i u nacrtu Kaznenog zakona. Stoga je ključno usklađivanje nacionalnog zakonodavstva sa standardima propisanim Direktivom. Rezultati analize ukazuju na ključne elemente koje je potrebno obraditi, uključujući utvrđivanje kaznene odgovornosti za nesavjesno i pasivno ponašanja, protupravnost kao temeljno obilježje kaznenog djela i potrebu za jasnim kvalitativnim i kvantitativnim standardima. U radu se također ističe važnost utvrđivanja odgovornosti za poticanje, pomaganje i razlikovanje kazni prema težini kaznenog djela. Istraživanje polazi od tvrdnje da se nedopušteno postupanje s opasnim otpadom treba smatrati kaznenim djelom neovisno o opsegu, dok se materijalna šteta smatra glavnim pokazateljem štete za okoliš. U istraživanju se također ističe da trenutačne sankcije ne udovoljavaju zahtjevima Direktive EU-a i da bi ih trebalo pojačati kombinacijom kazni lišenja slobode i novčanih kazni kako bi se osigurala poštena i učinkovita primjena.

Ključne riječi: kazneno pravo, kaznena djela protiv okoliša, kazna, kriminalizacija, kaznena odgovornost



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