



EU Environmental Law and Environmental Crime: An Introduction

WORK PACKAGE 2 ON “INSTRUMENTS, ACTORS, AND INSTITUTIONS”



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Abstract

This is a short presentation of EU environmental primary law, analysed with a special focus on environmental crime, in light of the new relevance that the Lisbon Treaty accorded to the European Union *acquis*. The examination of the history of the EU environmental provisions through EU Treaties shows that every reform of the Treaties has brought changes to the environmental provisions and decision-making procedures. The wide interpretation of these provisions by EU institutions and, in particular, the EU Court of Justice has made the protection of the environment through criminal law possible with the adoption of the EU Directive 2008/99. The Lisbon Treaty has made changes to the European environmental law that will be analyzed both in its internal and external dimension. The Seventh Environment Action Programme and its priority objectives are also presented.

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List of abbreviations

CITES	Convention on International Trade in Endangered Species of Wild Flora and Fauna
ECJ	European Court of Justice
ECT	European Community Treaty
EECT	European Economic Community Treaty
EU	European Union
7EAP	Seventh Environment Action Programme
MARPOL	International Convention for the Prevention of Pollution from Ships
UNEP	United Nations Environment Programme



Executive summary

This document contains a short presentation of EU environmental primary law that will be analysed with a special focus on environmental crime, in light of the new relevance that the Lisbon Treaty accorded to the European Union *acquis*.¹The examination of the history of the EU environmental provisions through EU Treaties will show that every reform of the Treaties has brought changes to the environmental provisions and decision-making procedures. The wide interpretation of these provisions by EU institutions and, in particular, the EU Court of Justice has made the protection of the environment through criminal law possible with the adoption of the EU Directive 2008/99. The Lisbon Treaty has made changes to the EEL that will be analyzed both in its internal and external dimension. The Seventh Environment Action Programme and its priority objectives will also be presented.

¹ See DOW EFFACE, FP7-320276 EFFACE, p. 22.

1 History of the EU Environmental Provisions through EU Treaties

The protection of the environment was not a European priority or a concern in the early 1950's. The first actions to protect the environment, dating from the mid-60s, were subordinated to the achievement of the goals of the internal market.

The Treaty of the European Economic Community (EECT) did not contain any specific provisions on the environment that would allow the EEC institutions to intervene in matters related to environmental protection before it was amended by the Single European Act in 1986. In those early years, the first specific environmental actions carried out by the Community were adopted under the extensive and teleological interpretation of the objectives set out in Art. 2 EECT in conjunction with Articles 100 and 235 on the common market and the clause of implicit powers respectively.

This broad interpretation would not have been sufficient for the Community to adopt environmental measures if it had not had the approval at the highest political level in the Community; this approval was obtained at the Paris Summit of Heads of State and Government of 19 and 20 October 1972. The summit took place 4 months after the Stockholm Conference, in which the Community had been present. The Summit recognized the need to include environmental protection as one of the tasks of the Community and instructed the Commission to prepare a programme for action in this field. The first 5-year programme was adopted on 19 July 1973. Since then these programmes have been renewed, the Seventh was adopted in November 2013 and will be in force until 2020.²

1.1. Single European Act

In 1986, the Single European Act introduced major changes in the Treaties, in particular, it included specific legal bases for the environment which codified the practice so far developed: an explicit mention of the environment in Article 100A regarding the internal market and a separate title on environment in Articles 130R-T that introduced the environmental objectives and principles, the principle of subsidiarity for the exercise of the new shared competence and unanimity for the decision-making procedure. Since then, every reform of the Treaties has brought changes to the environmental provisions and decision-making procedures.

1.2. Maastricht Treaty

The environmental actions became a Community policy with the Treaty of Maastricht, incorporating new objectives and principles, changing decision-making procedures. The principles of sustainable development and precaution were introduced under the influence of the Brundlant Report (1987) and the UN Conference on the Sustainable Development and the Environment held in R o in 1992. The cooperation procedure was incorporated as the regular procedure while unanimity was reserved for some sensitive fields such as water management, land use and planning, energy and fiscal measures.

² Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', *OJ L 354*, 28.12.2013, p. 171–200.

1.3. Amsterdam Treaty

The Treaty of Amsterdam (1999) introduced some changes regarding the environment. The principle of integration, formerly laid down in Article 130R ECT, was incorporated in Article 6 ECT and demanded that environmental protection requirements were integrated into the definition and implementation of the Community policies and activities referred to in Article 3 ECT. The codecision procedure was finally applicable to measures based on Art. 175 ECT (now Art. 192 TFEU) while unanimity was still applicable to some fields.

1.4. Treaty of Nice

In terms of environmental protection, no great changes were made by the Treaty of Nice. Unanimity could not, as intended, be changed to qualified majority voting, except for a minor change on ‘measures affecting...the availability of [water] resources’ that made possible that ‘measures concerning’ could be adopted by majority vote. This change was made possible subsequent to the case law *Spain v. Council of Ministers*.³

The EU Directive 2008/99 on the protection of the environment through criminal law, (Environmental Crime Directive hereinafter) was adopted in 2008 and the struggle for its adoption raised the question whether the Community could prescribe Member States criminal measures in order to enforce European environmental law. The European Court of Justice settled the conflict between the Member States and the Commission on the legal basis to be used for its adoption and the scope of the foreseen sanctions. In its case on *Environmental Crime* the Court resolved the conflict between Denmark’s Framework Decision 2003/80 adopted under the Third Pillar of the EU Treaty and the Commission’s proposal on the same topic under the First pillar, acknowledging that

“Criminal law and procedures are in principle (...) not within the sphere of competence of the Community. However, the latter finding cannot prevent the Community legislator, when the application of effective, proportionate and deterrent penalties by the competent national authorities is an essential measure for combating serious environmental offences, to take related measures considering the criminal law of the Member States and which it considers necessary to ensure the full effectiveness of the rules which it lays down on environmental protection”.⁴

The Court annulled the Framework Decision and opened the door to the possibility of using criminal law for the protection of the environment. In its subsequent judgment in the case of *Ship-source pollution*⁵, the Court streamlined the scope of the competence of the Community when applying criminal law to protect the environment. In this case, the Commission asked for the annulment of Framework Decision 2005/667 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.⁶ This time, the Court reiterated its previous position⁷ but established a clear restriction:

³ ECJ Judgment of 30 January 2001, C-36/98, *Spain v. Council*, regarding the Council decision approving the Convention on cooperation for the protection and sustainable use of the river Danube, available at <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-36/98&td=ALL>

⁴ Judgment of 13 September 2005, Case C-176/03, *Commission v. Council*, recital 47.

⁵ Judgment of 23 October 2007, Case C-440/05, *Commission v. Council*.

⁶ It was adopted on the basis of Articles 31(1)(e) and 34(2)(b) of the TEU, see Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, *OJ L 255/164*, 30.09.2005.

⁷ In this case, the Court declared again that the Community was competent in the field of criminal law:

“Although in principle criminal law and criminal procedure do not fall within the sphere of competence of the Community, nevertheless the Community legislator, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious

“By contrast, concerning the determination of the type and level of the criminal penalties to be imposed, it should be noted that this, unlike the Commission assumes, does not belong to the competence of the Community”.⁸

This restriction was reflected in the final proposal for the adoption of the Environmental Crime Directive that seeks for the Member States to criminalize violations of EU environmental law when committed intentionally or with at least serious negligence, under the menace of effective, proportionate and dissuasive criminal penalties that Member States will choose. As its Article 1 says it “establishes measures relating to criminal law in order to protect the environment more effectively”.

2 Lisbon Treaty

The Treaty of Lisbon came into force on 1 December 2009. It incorporates two Treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which suppresses the existing pillar structure. Co-decision becomes the ordinary legislative procedure. Art.194 TFEU introduces a competence in the field of energy which has to be carried out taking into account environment, internal market and solidarity between Member States. The only change to the provisions dealing specifically with the protection of environment is a small addition to art. 191 para 1 TFEU. That provision already stated that the EU can promote measures at international level to deal with regional or worldwide environmental problems, and Lisbon adds that such measures in particular can deal with climate change.

Although the Charter of Fundamental Rights of the EU is only attached to the Treaty, it has a full and legally binding value by means of Art. 6 TEU. The EU Charter lays down a high level of environmental protection and improvement that should be achieved following the environmental policy integration principle and the principle of sustainable development (Article 37 EU Charter).⁹

Regarding environmental crime, it can be considered that the *acquis communautaire* has configured the environmental competence as comprehending criminal actions for their enforcement. As put by De Rijck “‘under Lisbon’ one could also conclude that the competence in EU policy areas such as environmental law, to some extent implies a power to prescribe specific actions, also criminal”.¹⁰ The Area of Freedom, Security and Justice legal bases now in the TFEU may serve in the future for the adoption of measures to fight environmental crime and organised environmental crime, if the unanimity required for expanding the list of crimes of Art. 83 is met.

Environmental Provisions in the EU Treaties	
<i>Treaty of the European Union</i>	
Art. 3, par 3 TEU (ex art. 2)	Aims of the EU (including sustainable development, high level of

offenses against the environment, can oblige the Member States to take such sanctions in order to ensure the full effectiveness of the rules laid down by him in this area”, recital 66.

⁸ Recital 70.

⁹ See Lee, M. (2008). “The Environmental Implications of the Lisbon Treaty”, *Environmental Law Review*, Vol. 10, p. 131-138.

¹⁰ See De Rijck, R.M.J. (2013). “Believing in criminal law. On how the European legislator of Directive 2008/99/EC deems strict criminal law necessary for the functioning of environmental legislation, but Member States consider it an expression of their sovereignty”, article originally published as “Geloven in het strafrecht” in *Tijdschrift voor sanctierecht & compliance voor ondernemingen*, Nr. 4, October 2013, Den Hollander Publishers, Deventer, The Netherlands, translation into English by Eurojust, p. 3.

TEU)	protection and improvement of quality of environment)
Art. 21 para 2 sub d and f TEU (ex art 36 TEU)	In external policies the EU shall foster sustainable development and participate to the promotion of international measures aimed at preserving the quality of the environment
<i>Treaty on the Functioning of the European Union</i>	
Art. 4 TFEU	Shared competence list, principle of sincere cooperation.
Art 11 TFEU (ex Art. 6 ECT)	Principle of integration, sustainable development.
Art. 13 TFEU (ex protocol 10 annex to the Treaty of Amsterdam)	Integration of animal welfare.
Art. 34 TFEU (ex Art. 28 ECT)	Prohibition of quantitative restrictions on imports
Art. 36 TFEU (ex Art. 30 ECT)	Exception to the prohibition of Art. 34 in relation to the protection of health and life of humans, animals and plants
Art. 114 TFEU (ex Art. 95 ECT)	Internal market
Art. 191 (ex Art. 174 ECT)	Protection of environment: Principles and Goals
Art. 192 (ex Art. 175 ECT)	Legal basis for decision-making in the environmental action
Art. 193 (ex Art. 176 ECT)	More stringent national measures and National funding of environmental measures.

2.1. The Environmental Competence and the principle of subsidiarity

The Lisbon Treaty introduces for the first time a list of competences in Article 4.2 of the TFEU that classifies the environment among the shared competences between the Union and the Member States. Its exercise is informed by the subsidiarity principle.¹¹

Now, the institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality, attached to the Lisbon Treaty. National Parliaments will ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

In the Treaties, the EU's powers are defined not only from the point of view of their content or subject, but especially from the functional point of view, leading to a process of dynamic definition of competences through an exercise inspired by aims and objectives without preset limits. In this dynamic process of defining the competence system the European Court of Justice has played a major role.

Before the Lisbon Treaty, the ECJ case law in the Environmental Crime case opened the door to the EU to legislate on environmental crime within limits as mentioned above. In the Environmental Crime and Ship-source Pollution case law, the ECJ exercised its jurisdiction over conflicts of competence that were raised between Member States, the Council and the Commission over the EU competence and their scope regarding the protection of the environment through criminal law, as examined.

¹¹ The principle of subsidiarity was initially introduced by the Single European Act specifically for the exercise of the new environmental competence, before becoming a key principle inspiring the exercise of all shared competences in the Maastricht Treaty.

2.2. The Objectives and Principles of EU Environmental Law

As Kramer posits “the broad definition of objectives of EU environmental policy, as laid down in Articles 3 TEU and 191.1 TFEU, hardly leaves any area of environmental policy, as it is perceived in any one of the 28 Member States, outside EU competence. Measures to realise the objectives of the Union’s environmental policy may be based on any relevant article of the TFEU, although Arts. 191 and 192 remain the most relevant provisions for EU environmental action”.¹² Thus regarding environmental crime, future measures will be adopted using both provisions: those of the environment and those regarding the Area of Freedom, Security and Justice: Arts. 67.3, 82, 83 and 84. The choice of the legal basis is a key question, considering the often diverging positions of EU institutions and the Member States on the subject. It conditions the decision-making procedures to be applied and so the participation of EU institutions.

2.3. Decision-making procedures

The Lisbon Treaty streamlines the EU’s decision-making procedures. The Co-decision procedure has become the ‘ordinary legislative procedure’ after the Lisbon Treaty.¹³

From 2014, Council decisions will need the support of 55% of the Member States, representing at least 65% of the European population. This is known as ‘the double majority’. At least four countries will be needed to form a blocking minority. This system is considered to give double legitimacy to decisions, both that of Member States and that of their populations represented in this new requirement of the minimum 65%.

For the first time, national parliaments will have a direct input into the European decision-making process. Under the Lisbon Treaty, all proposed EU laws will have to be sent to national parliaments that will ensure that they comply with the principle of subsidiarity. Any national parliaments will have eight weeks to argue the case if it consider a proposal overstep EU competence in matters that can best be dealt with at national, regional or local level. If enough national parliaments object, the proposal can be amended or withdrawn.

In the case of the environment, unanimity is still reserved for some fields, while the ordinary legislative procedure is applied to most legislative measures and for the adoption of the Environment Action Programmes.

2.4. The Seventh Environment Action Programme

After the Lisbon Treaty, Art. 192.3 of the TFEU now envisages that:

“General action programmes setting out priority objectives to be attained shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions. *The measures necessary for the implementation author’s italics*)

Ever since 1973, European environmental actions have been guided by Environment Action Programmes that were adopted at first every five years and since the fifth by a period of 10 years. After a period of blockage, the Seventh Environment Action Programme (7EAP hereinafter) was finally approved in November 2013.¹⁴ It will be

¹² See Krämer, L. (2012). *EU Environmental Law*, Seventh edition, Sweet and Maxwell, p. 5.

¹³ Co-decision is the term for the European Parliament’s power to make laws jointly on an equal footing with the Council of Ministers. This means that EU decision-making will be based on the double legitimacy of the people (as represented by their MEPs in the European Parliament) and the Member States (as represented by the Ministers in the Council).

¹⁴ Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Environment Action Programme to 2020 ‘Living well, within the limits of our planet’, *OJ L 354*, 28.12.2013, p. 171.

in force until 2020 setting out the priorities for the environment that the European political leaders have to follow in times of economic crisis. However, the Lisbon Treaty has brought some changes that can be of great significance in the future. As Kramer considers: “the content of an EU action programme which was adopted under Art. 192.3 TFEU will constitute a source of law”¹⁵ and moreover “the interpretation of the subsidiarity principle will be influenced by decisions under Art. 192.3: where a decision under this provision explicitly provides for an EC measure on a specific item, it will normally not be possible to object such an EU measure by invoking the subsidiarity principle –though much depends, of course, on the exact content of the measure”¹⁶.

In its agenda, the 7EAP does not foresee expressly Environmental Crime nor make any reference to the criminalization of actions that can damage the environment. However, it adopts as its *Priority objective 4 the purpose of maximizing the benefits of Union environment legislation by improving implementation*. Improving the implementation of the Union environmental *acquis* at Member State level will therefore be given top priority in the coming years.¹⁷

Non-judicial dispute resolution will also be promoted as an alternative to litigation. By 2020, the EU should ensure that national provisions on access to justice reflect the case law of the Court of Justice of the European Union, promoting non-judicial dispute resolution as a means of finding amicable and effective solutions for disputes in the environmental field.

The external dimension of the Environmental policy is reinforced in its *Priority objective 9: To increase the Union’s effectiveness in addressing international environmental and climate-related challenges*. According to this priority objective, the EU will go on with its commitment to sustainable development and now on with goals and challenges accepted in the UN Conference on Sustainable Development of 2012, (Rio + 20 hereinafter). Moreover, “in addition to translating these commitments into action at local, national and Union level, the Union will engage proactively in international efforts to develop the solutions needed to ensure sustainable development globally”¹⁸. As well, many of the priority objectives set out in the 7EAP can only be fully achieved as part of a global approach and in cooperation with partner countries, and overseas countries and territories. That is why the Union and its Member States will engage in relevant international, regional and bilateral processes.

The Union and its Member States will continue to promote an effective, rules-based framework for global environment policy, complemented by a more effective, strategic approach in which bilateral and regional political dialogues and cooperation are tailored towards the Union’s strategic partners, candidate and neighbourhood countries, and developing countries, respectively, supported by adequate finance¹⁹. The Programme posits the time span it covers that “corresponds to key phases in international climate, biodiversity and chemical policy”. For that the EU will develop actions at different levels:

- In the legal and institutional framework of conventions covering those fields: Convention on Biological Diversity, Convention to Combat Desertification, and in the case of climate change, the EU will support the Durban Platform for Enhanced Action to reach “a comprehensive and robust agreement applicable to all to be agreed by 2015 and implemented as of 2020”²⁰.

¹⁵ Krämer exemplifies this effect saying that “where for example the Sixth Environmental Action Programme, requests in Art. 7.1. that ‘chemicals that are dangerous should be substituted by safer chemicals or safer alternative technologies not entailing the use of chemicals with the aim of reducing risks to man and the environment’ this clearly constitutes the recognition of the substitution principle in EU environmental law, which may influence the interpretation of Arts. 34, 36, 114, 192 or 193 TFEU”, Krämer, L. *op. cit.*, p. 7-8.

¹⁶ *Ibidem*.

¹⁷ Paragraph 57 of the Seventh Environment Action Programme.

¹⁸ Paragraph 96 of the Seventh Environment Action Programme.

¹⁹ Paragraph 97 of the Seventh Environment Action Programme

²⁰ Paragraph 95 of the Seventh Environment Action Programme.

- Supporting Rio+5 agenda initiatives. The outcomes of Rio+20 are fully integrated into the EU's external policies and the EU is contributing effectively to global efforts to implement agreed commitments, including those under the Rio conventions.
- Through the bilateral and multilateral actions that the EU will enhance and develop through trade and cooperation to development measures, "with a view to preventing environmental dumping".

One of the most important goals of the EU external environmental action will be to address the global problem of illegal logging. For this, the EU will explore and enhance:

- Provisions in its international trade agreements and the bilateral Forest Law Enforcement, Governance and Trade voluntary partnership agreements, which ensure that only legally-harvested timber enters the Union market from partner countries.
- Other policy options to reduce the impacts of Union consumption on the global environment, including deforestation and forest degradation.

In this particular field the fight against environmental crime will be carried on through the specific provisions of Conventions such as CITES.

3 EU Environmental Law External Dimension after the Lisbon Treaty

Yet again, the Lisbon Treaty makes no specific reference to environmental crime as one of the goals of its international action.

As mentioned, the Lisbon Treaty incorporates climate change among the objectives of the EU external actions when Article 191.1 specifies that the EU will promote "measures at international level to deal with regional or worldwide environmental problems, and *in particular combating climate change*" (author's italics). In real terms, it is just the expression of a political commitment which does not change anything since the competence to fight against climate change was implicit in the general goals and already being exercised by the European Union.

Concerning the EU legal personality and EU representation, the Lisbon Treaty created great expectations for the Commission because the external representation is now attributed to the European Commission and the High Representative/Vice-President of the Commission.²¹ The EU succeeded the European Community as party to the MEAs, and the Commission Delegations became the EU Delegations before Third States and the UN.²²

²¹ See Fajardo, T. (2010). "Revisiting the External Dimension of the Environmental Policy. Some Challenges Ahead", *Journal of European Environmental and Planning Law*, Vol. 7, num.4, p. 365-390.

²² In the case of the United Nations After the entry into force of the Lisbon Treaty, the Spanish Presidency led exploratory conversations to explain the changes and the conferral of new competences, which finally resulted in the Belgium Presidency's request for a new status before the General Assembly. The HR/VP presented itself before the Security Council, asking to strengthen the partnership with the UN to reflect "the potential for even stronger cooperation due to the new Lisbon Treaty arrangements". The Decision finally adopted by the General Assembly lowered the expectations, suppressing all references to the Lisbon Treaty and just revised EU's observer status:

"The representatives of the EU, for the purposes of participating effectively in the sessions and work of the General Assembly, including in the general debate, and its committees and working groups, in international meetings and conferences convened under the auspices of the Assembly, as well as in United Nations conferences, and in order to present positions of the European Union, shall be invited to speak in a timely manner, similar to the established practice for representatives of major groups, shall be permitted to circulate documents, to make proposals and submit amendments, to raise points of order,

In the case of the Conference of the Parties of the MEAs, the EU is still represented by its Member States acting on its behalf in those treaties where it cannot be a party such as the MARPOL Convention. In the case of CITES, the recent entry into force of the Gaborone amendment in October 2013 will permit the adherence of the EU as soon as the problems of representation are resolved both at the EU level and the CoP.

Most MEAs are mixed agreements, the EU and its Member States are both signatories of these agreements and after the Lisbon Treaty, they raise now the question whether the representation in their CoPs should be held exclusively by the European Commission or whether the old practice of double-hat representation should be respected as the Council of Ministers and the Member States wish. According to this practice, the Commission and the Member State holding the Presidency on behalf of the EU will share the representation. After a first confrontation between the Commission and the Spanish Presidency in the case of the representation before the UN Conference on Mercury, where the Commission withdrew the mandate of negotiation on the spot, the subsequent practice has been more pragmatic and the old practice is maintained when the Member States representatives before the international institutions are required because of their statutes or their special expertise.²³

Regarding the UN Agenda reform, the EU has strongly supported the strengthening of the UNEP. The EU considers that UNEP's tasks have "grown steadily over the years without being matched by status, mandate and adequate resources"²⁴ and has campaigned to transform it into a UN Environmental Organization, with a strong mandate, based in Nairobi, with stable, adequate and predictable resources that enable the organization to adequately deal with emerging issues and contemporary challenges.

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but not to challenges decisions of the presiding officer, and to exercise the right of reply, and be afforded seating arrangements which are adequate for the exercise of the aforementioned actions; the European Union shall not have the right to vote or to put forward candidates in the General Assembly".

²³ See Morgera, E. (Ed.) (2012). *The External Environmental Policy of the European Union. EU and International Law Perspectives*, Cambridge University Press.

²⁴ EU Presidency Statement - UN General Assembly: Environmental Reform, Informal consultations of the UN General Assembly on Environmental Reform; Statement by Counsellor Albert Graf, German Mission to the United Nations, on behalf of the European Union, 18 January 2007, available at http://www.eu-un.europa.eu/articles/en/article_6690_en.htm

