

DEVELOPMENT OF THE PROTECTION OF ENVIRONMENT THROUGH CRIMINAL LAW: COMPARATIVE ANALYSIS OF THE DIRECTIVES OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2008/99/EC AND 2024/1203

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Annotation. The aim of the work is comparative analysis of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Directive 2008/99/EC) and 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 (Directive 2024/1203).

Results of researches focus on consideration of provisions of the Directive 2008/99/EC and Directive 2024/1203, and also an identification of main trends in development of the protection of the environment through criminal law.

It comes to conclusions that it combines trends of Directive 2008/99/EC and original ideas of environmental protection through the criminal law. As the Directive 2008/99/EC Directive 2024/1203 regulates minimal rules of environmental protection through criminal law. At the same time dissimilar to Directive 2008/99/EC Directive 2024/1203 contains new provisions and approaches to impact on domestic criminal law: 1) increasing of the number of kinds of unlawful conduct; 2) obligation to ensure more severe liability for «qualified criminal offences» included conduct is comparable to «ecocide»; 3) criteria for evaluation of damage as substantial – the baseline condition of the affected environment; whether the damage is long-lasting, medium-term or short-term; the extent of the damage; the reversibility of the damage etc.; 4) freedom of national discretion for liability for acts committed negligently; 5) approval of standards for penalties and criminal or non-criminal penalties or measures for natural persons and legal persons (an obligation to restore the environment within a given period, if the damage is reversible; pay compensation for the damage to the environment; withdrawal of permits and authorisations to pursue activities that resulted in the relevant criminal offence; temporary bans on running for public office; etc).

Key words: environmental directive, environmental protection through the criminal law, ecocide, EU legislation, EU Member state, domestic criminal law.

1. Introduction.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon Treaty) is one of the most important agreement for constitutional basis of European Union (EU). Lisbon Treaty divides the competences between the EU and the Member States. There are no provisions about criminalization and penalization of socially dangerous conduct, including criminal offences or about other institutions of criminal law in the Lisbon Treaty. Nevertheless, area of freedom, security and justice also area of environmental protection are conferred both the EU and the Member States as mutual competence. The fact is that the EU Member States are authorized to adopt the legally binding acts if the EU doesn't regulate the area.

According to art. 69B (1) of Lisbon Treaty the European Parliament and the Council may, by means of directives establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Some of these areas of crime are defined in the same article of Lisbon Treaty: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime [1]. However, on the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. The protection of the environment through criminal law is one of the area paying attention on importance of it. The issues of protection of the environment through criminal law in EU law are regulated by: 1) 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 (Directive 2008/99/EC); 2) 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 (Directive 2024/1203).

2. Analysis of scientific publications.

Protection of the environment through criminal law in the framework of EU have become the subject of researches by Ukrainian and other scholars, in particular, O. O. Dudorov, P. Fiala, M. I. Havronyuk, O. Krutílek, V. K. Matviychuk, P. V. Melnyk, R. O. Movchan, R. P. Oliynychuk, M. Pitrová, T. L. Syroid, L. Yu. Timofeeva, J. Tlapák - Navrátilová etc. At the same time, issues of the comparative analysis of Directive 2008/99/EC and Directive 2024/1203 hasn't been paid enough attention in these researches.

3. The aim of the work.

On June 23, 2022 the European Council granted Ukraine the status of a candidate country for EU membership. It causes necessity to adapt national legislation to EU standards and the adaptation is impossible without knowledge about the processes of their development. Protection of the environment through criminal law is not exception in this context because environmental protection is one of the topicalet issues of Ukrainian legal policy. Taking it into account the aim of the work is comparative analysis of the Directive 2008/99/EC and Directive 2024/1203 and identification of main trends in development of the protection of the environment through criminal law.

4. Review and discussion.

The content of the Directive 2008/99/EC are based on the provisions of Convention on the Protection of Environment through Criminal Law (ETS №. 172) and Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law. No wonder the reasons for the adoption of Directive 2008/99/EC are generally similar to the reasons for the adoption of the aforementioned Convention and Council Framework Decision: increasing of the number of environmental crimes; the international nature of their consequences and as results, needs to harmonize the domestic legislation of the EU Member States; insufficiency of sanctions for environmental crimes, including priority to criminal liability over administrative means or a compensation mechanism under civil law. At whole the Directive 2008/99/EC obliges EU Member States to enshrine criminal penalties for serious infringements of Community legislation, connecting the definition of the elements of the offence in national law to the infringement of EU legal acts from list which is given in the annexes to this directive. Consequently the scope of the Directive 2008/99/EC deals with the definition of the elements of a crime in domestic legislation as violations of regulatory norms of environmental law. Also the elements of a crime is associated with a violation only of EU legal acts that are enshrined in the list (69 acts of EU legislation, including mainly directives and regulations of the European Parliament and the Council) but neither EU acts that are out of it nor domestic legislation. At the same time preamble to the Directive 2008/99/EC declares that it provides for minimum rules and EU Member States are free to adopt or maintain more stringent measures regarding

the effective criminal law protection of the environment [2]. It means significant discretion of EU Member States both in determination of the methods of implementing obligations under Directive 2008/99/EC and in decision-making about criminalization of conduct that harms the environment but are not violations of EU legal acts from annexes to this directive.

The Directive 2008/99/EC consists of 10 articles. The content of it can be briefly described as follows:

1. Art. 1. Subject matter– measures relating to criminal law in order to protect the environment;
2. Art 2. Definitions («unlawful», «protected wild fauna and flora species», «habitat within a protected site») with references to *посиланням* EU legislation;
3. Art 3. Offences: this provision describes conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence: (a) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (6) and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked; (d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants; (f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species; (g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species; (h) any conduct which causes the significant deterioration of a habitat within a protected site; (i) the production, importation, exportation, placing on the market or use of ozone-depleting substances.
4. Art. 4. Inciting, aiding and abetting: it obliged the EU Member States to provide national legislation for criminal liability for inciting, aiding and abetting the intentional conduct referred to in art. 3 of Directive 2008/99/EC.
5. Art. 5. Penalties: EU Member States have to take the necessary measures to provide “effective, proportionate and dissuasive criminal penalties” for offences referred to in Articles 3 and 4 of Directive 2008/99/EC.
6. Art. 6. Liability of legal persons – EU Member States are obliged to ensure ensure liability of legal persons.
7. Art 7. Penalties for legal persons: EU Member States shall take the necessary measures to ensure that legal persons held liable pursuant to Art. 6 are punishable by effective, proportionate and dissuasive penalties.
8. Articles 8-10. Transposition, entry into force, addressees [2].

In 2023 the European Parliament prepared the report that both suggested a revision of the Directive 2008/99/EC. It was determined the needs for improvement of mechanism for achievement of purposes of the Directive 2008/99/EC. The Report propose to set six objectives to improve the effectiveness of criminal investigations and prosecution across EU Member States: 1) to clarify terms used in the definitions of

environmental crime; 2) to bringing new environmental crimes under its scope; 3) to define sanction types and levels for environmental crime; 4) to foster cross-border investigation and prosecution; 5) to improve procedure of collection and dissemination of statistical data for decision-making on environmental crimes; 6) improve the effectiveness of national enforcement chain [3].

Completely needs for creation of autonomous interpretation to environmental crimes and new approaches to definition of penalty, for updating of procedure and mutual cooperation in criminal matters about environmental crimes caused the issue about new Directive on the protection of the environment through criminal law. The new Directive must replace the Directive 2008/99/EC and Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (the Directive 2009/123/EC), that also has some provisions about criminal liability for ship-source discharges of polluting substances [4].

The Directive 2024/1203 establishes minimum rules with regard to the definition of criminal offences and penalties in order to protect the environment. It consists of 30 articles and the provisions of Directive 2008/99/EC are reproduced in some of them particularly in interpretation of some legal definitions, list of criminal offences and penalties.

To begin with art. 3 of Directive 2024/1203 regulates the obligation of the State to ensure that conduct listed in paragraphs 2 and 3 of this Article, where it is intentional, and conduct referred to in paragraph 4 of this Article, where it is carried out with at least serious negligence, constitutes a criminal offence where that conduct is unlawful. For the purpose of this Directive, conduct shall be unlawful where it breaches: (a) EU law which contributes to pursuit of one of the objectives of the Union's policy on the environment as set out in Article 191(1) TFEU; or (b) a law, regulation or administrative provision of a Member State, or a decision taken by a competent authority of a EU Member State, which gives effect to the EU law referred to in point (a). Moreover, the conduct is unlawful even if it was committed with the permission of the competent authority of the EU Member State, if such permission was obtained by fraud or corruption, by extortion or coercion, or if such permission is manifestly inconsistent with legal requirements. In this case the interpretation of unlawful conduct differs from this definition in the Directive 2008/99/EC: it covers both a breaches of EU law and the legal acts of the Member States, and not only for a violation of the provisions of the exhaustive list of EU directives and regulations given in the annexes to Directive 2008/99/EC.

The next otherness is that Directive 2024/1203 has a larger number of types of conducts constitutes a criminal offence where it is unlawful and intentional. Some of them has been already defined in art. 3 of Directive 2008/99/EC and were added to with new details, in particular, related to references to EU acts that determine the unlawful of conducts (for example, (a) the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation, into air, soil or water which causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants or (k) the construction, operation and dismantling of an installation, where such conduct and such an installation fall within the scope of Directive 2013/30/EU of the European Parliament and of the Council, and such conduct causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants. Also in art. 3(2) Directive 2024/1203 it is characterized unlawful conducts of that were not specified in Directive 2008/99/EC, but were substantively related to conducts specified therein: the placing on the market, in breach of a prohibition or another requirement aimed at protecting the environment, of a product the use of which on a larger scale, namely the use of the product by several users, regardless of their number, results in the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation into air, soil or water and causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants (b) etc.

The last group of conducts are those acts for which criminalization was not previously required in domestic legislation. For instance there are the execution of projects within the meaning of article 1(2)(a), as referred to in art. 4(1) and (2), of Directive 2011/92/EU of the European Parliament and of the Council, where such conduct is carried out without a development consent and causes or is likely to cause substantial damage to the quality of air or soil, or the quality or status of water, or substantial damage to an ecosystem, animals

or plants (e); the ship-source discharge of polluting substances falling within the scope of Article 3 of Directive 2005/35/EC into any area referred to in Article 3(1) of that Directive, except where such ship-source discharge satisfies the conditions for exceptions set out in Article 5 of that Directive, which causes or is likely to cause deterioration in the quality of water or damage to the marine environment (i) etc [4].

Other novelty of Directive 2024/120 is the obligation of EU Member States to ensure in national law for provisions about qualified criminal offences. As qualified criminal offences are considered any of criminal offences relating to conduct listed in paragraph 2, if they cause: (a) the destruction of, or widespread and substantial damage which is either irreversible or long-lasting to, an ecosystem of considerable size or environmental value or a habitat within a protected site, or (b) widespread and substantial damage which is either irreversible or long-lasting to the quality of air, soil or water. Taking into account preamble and travaux préparatoires of Directive 2024/120 «qualified criminal offences» includes conduct comparable to «ecocide», which is covered by the legislation of some EU Member States. Nevertheless, Directive 2024/1203, in its current version of 15 April 2025 is lack of the word «ecocide» [4].

Comparing the provisions of art. 3 of Directive 2008/99/EC, it can be defined the obligations of states to criminalize intentional conduct, but limited of discretion of decisions about criminalization of acts committed negligently, with art. 3 (4) of Directive 2024/1203 we must note a change in the EU approach to the criminalization of acts committed in the absence of intent. Article 3(4) of Directive 2024/1203 enshrines clear obligations of EU Member States to criminalize the conduct defined in paragraph 2, points (a) to (d), points (f) and (g), points (i) to (q), point (r)(ii) and points (s) and (t), if such an act is unlawful and committed with at least serious negligence. The definition of only certain types of criminally unlawful conduct from the general list of acts provided for in art. 3(2) of Directive 2024/1203, and the wording “at least with gross negligence” means the establishment of a minimum standard for criminalizing an act at the level of gross negligence, which does not exclude the right of the state to establish criminal liability not only for these, but also for other acts provided for art. 3 (2) of Directive 2024/1203, including those that can be committed not only with gross negligence, but also with other types of carelessness (for example, according to the terminology of Article 25 of the Criminal Code of Ukraine with criminally unlawful recklessness) [5].

Dissimilar to Directive 2008/99/EC, which didn't contain provisions on criteria for evaluation of damage as substantial, art 3 (6) Directive 2024/1203 enshrines such criteria: the baseline condition of the affected environment; whether the damage is long-lasting, medium-term or short-term; the extent of the damage; the reversibility of the damage etc.

Also the Directive 2024/120 has provisions manifestly new standards of penalties for natural persons and legal persons. Pursuant to Directive 2008/99/EC EU Member States shall take the necessary measures to ensure that criminal offences are punishable by effective, proportionate and dissuasive criminal penalties but without defining minimum or maximum measures. The Directive 2024/120 enshrines standards minimum or maximum measures of penalties and imprisonment for natural persons. At the same time EU Member States shall take the necessary measures to ensure that natural persons who have committed criminal offences referred to in Articles 3 and 4 may be subject to accessory criminal or non-criminal penalties or measures which may include an obligation to restore the environment within a given period, if the damage is reversible; pay compensation for the damage to the environment; withdrawal of permits and authorisations to pursue activities that resulted in the relevant criminal offence; temporary bans on running for public office; etc.

Directive 2024/120 regulates liability of legal persons more meticulous than Directive 2008/99/EC by defining the list of criminal or non-criminal penalties or measures. It includes the standards of fines depending on the total worldwide turnover of the legal person [4].

5. Conclusions.

So, the provisions of Directive 2024/1203 have developed the main ideas of Directive 2008/99/EC about the protection of environment through the criminal law from one side. From other side the Directive 2024/1203 contains some new provisions and approaches to impact on domestic criminal law: 1) increasing of the

number of kinds of unlawful conduct; 2) obligation to ensure more severe liability for «qualified criminal offences» includes conduct comparable to «ecocide»; 3) criteria for evaluation of damage as substantial; 4) freedom of national discretion for liability for acts committed negligently; 5) approval of standards for penalties and criminal or non-criminal penalties or measures for natural persons and legal persons. At whole Directive 2024/1203 combines trends of Directive 2008/99/EC and original ideas of environmental protection through the criminal law.

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