

Cefic views on the revision of the Environmental Crime Directive

On 15 December 2021, the Commission published a [legislative proposal for a directive on environmental crime](#) replacing Directive 2008/99/EC on the protection of environment through criminal law.

Cefic welcomes the opportunity to comment on the Commission's proposal. Effective enforcement of EU environmental legislation is crucial to the EU chemical industry and this requires both adequate tools and resources to detect, investigate, prosecute criminal activity and effective coordination and cooperation mechanisms across Member States. **There is also a clear need to review sanction types and levels**, especially where criminal activity reflects clear strategies to willfully circumvent existing rules.

The directive aims to address the most serious breaches of environmental law, and to link those with penalties which demonstrate social disapproval of a different quality compared to administrative penalties. In this regard, we welcome the proposed criminalization of illegal imports of hydrofluorocarbons.

However, we think that (i) certain offences should be defined more precisely; (ii) especially where likelihood of substantial damage is proposed as a threshold, this should be linked to the defined breach of administrative law; and (iii) the minimum threshold for the maximum penalties should differ depending on whether it was committed intentionally or with serious negligence; and whether it caused damage or not. The same holds true for the differentiation between acting as a perpetrator on one side and participation or attempt on the other.

1. Clarify serious administrative breaches in scope

Although environmental crime continues to be linked to a breach of administrative law, the definition of 'unlawful' under Article 2(1) of the legislative proposal no longer refers to a closed list of EU acts. It now refers to "*legislation, which irrespective of its legal basis, contributes to the objectives of Union policy of protecting the environment*", and in that sense, is much broader than the existing provision under Article 2(a) of Directive 2008/99/EC.

We support the approach of the Commission to tie the breaches of administrative law to the offences listed under Article 3. In keeping with the need for precision of conducts that would trigger criminal prosecution, and consistent with the principle of legality of criminal offences and penalties, enshrined in Article 49 of the EU Charter of Fundamental Rights, **we propose to:**

- **define more precisely the breach of administrative law under the offences to chemicals legislation related to Regulation (EC) No 1107/2009 and Regulation (EC) No 528/2012, by linking it to the lack of substance approval or product authorization.**
- **clarify the breach of administrative law required under Article 3(1)(c)(v).**

2. Delineate endangerment crimes

Some offences listed under the proposal require, in addition to unlawfulness, that the activity “*causes or is likely to cause damage or serious injury to any person or substantial damage to the quality of air or the quality of water or to animals or plants*”.

In case no damage has materialized, certain elements would need to be taken into account to assess whether the activity is likely to cause damage. The proposal already refers to the risky or dangerous nature of the activity and of the material or substance, and the extent to which legal limits or values are exceeded. In addition, Cefic asks to clarify that **there should be a causal link between the identified breach of administrative law and the likelihood to cause damage**. This would ensure that criminal prosecution is limited to cases where the breach of administrative law directly results in a risk of damage.

3. Differentiate sanction levels

Cefic understands that Member States will remain competent to decide on elements where the proposal does not take any stance, with a view to ensuring legal certainty at national level.

However, consistent with the principle of proportionality of criminal sanctions, **crimes committed as a result of serious negligence should incur less stringent penalties than crimes committed intentionally, and crimes that caused no damage should incur less stringent penalties than crimes that did cause damage**. The same holds true for the differentiation between acting as a perpetrator on one side and participation or attempt on the other.

Also, whilst it appears legitimate to impose heavier penalties where an offender actively obstructs inspection, custom control or investigation activities, lack of assistance to inspection and other enforcement authorities should not be understood as such. Hence Cefic proposes to make this distinction more explicit in the list of aggravating circumstances. We also propose three additions to the list of mitigating circumstances.

Lastly, Cefic understands that the Commission wishes to link the level of fines with companies’ financial capacities by defining sanctions based on turnover. However, we would like to point out that companies with low margins will be much more impacted by such sanctions than companies with high margins. This regime will thus inevitably result in unfairness in the penalties imposed for comparable offences.

In our view, removal of illegal profits should be the key aim of an environmental crime penalty system. Therefore, **we suggest reconsidering alternative fining systems linking the level of fines to illegal profits**.

Cefic is open and ready to engage with policymakers and other relevant parties on the challenges and implications of the legislative proposal.

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About Cefic

Cefic, the European Chemical Industry Council, founded in 1972, is the voice of large, medium and small chemical companies across Europe, which provide 1.2 million jobs and account for 16% of world chemicals production.