Tomas Girdenis
Law School, Mykolas Romeris University

III.1. ENVIRONMENTAL CRIME: LITHUANIAN CRIMINAL POLICY IN THE CONTEXT OF EUROPEAN REGULATION

Environmental crime and its regulation in the EU context

The European Union (hereinafter – the EU) has recently taken global leadership to ensure a safe environment. This can be seen in the European Green Deal, adopted by the European Commission in 2020. The European Green Deal "aims to protect, conserve and enhance the EU's natural capital, and protect the health and well-being of citizens from environment-related risks and impacts" (European Commission 2019). The "European Green Deal priorities include protecting our biodiversity and ecosystems, reducing air, water and soil pollution moving towards a circular economy improving waste management ensuring the sustainability of our blue economy and fisheries sectors" (European Commission 2022). To implement the European goals provided by the European Green Deal, "the Commission will also promote action by the EU, its Member States and the international community to step up efforts against environmental crime" (European Commission 2019). According to the European Commission, "in 2016, the UN and Interpol estimated the global economic loss related to environmental crimes at $91–259 billion, rising by 5%–7% annually. Illegal trade in wildlife products alone accounts for $7–23 billion. This makes environmental crime the fourth largest criminal activity in the world after drug smuggling, counterfeiting and human trafficking. In the EU, annual revenues from illicit non-hazardous waste trafficking are estimated to range between €1.3 billion and €10.3 billion, and for hazardous waste trafficking between €1.5 billion and €1.8 billion" (European Commission 2020). The fight against environmental crime started long before the European Green Deal, primarily commencing with the adoption of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (hereinafter – the Directive). After the evaluation of the Directive, the European Commission stated that "over the past 10 years the number of environmental crime cases successfully investigated and sentenced remained very low. Moreover, the sanction levels imposed were too low to be dissuasive and cross-border cooperation did not take place in a systematic manner" (European Commission 2021a). There is "a real need to strengthen the pro-

tection of the environment through criminal law" (European Commission 2021b), so the European Commission has delivered a proposal to revise the Directive (European Commission 2021a).

The European Union's right to tackle environmental problems

Environment crime is one of the EU's central concerns. The Tampere European Council of Ocotber 15 and 16, 1999, at which a first work program for EU action in the field of Justice and Home Affairs was adopted, asked that efforts be made to adopt common definitions of offences and penalties in several especially important sectors, amongst them environment crime (European Commission 2021b). However, despite this agreement, environmental criminal law has become the center of a serious institutional fight between the European Commission, supported by the European Parliament, on the one hand, and the Council, supported by the great majority of the EU Member States, on the other (Aghenitei and Boboc 2011). The main dispute relates to the distribution of powers between the European Commission and the European Council, so the Court of Justice of the European Union (CJEU) was the main figure solving these disputes in 2005 and 2007 (*Commission v. Council* 2005; *Commission v. Council* 2007). Those judgements of the CJEU were the basis for adopting two Directives based on the First Pillar competences – Directive 2009/123/EC on ship--source pollution, and Directive 2008/99/EC on environmental crime (Giardi 2015). Later, the Treaty of Lisbon, which amended the Treaty on the European Union and the Treaty establishing the European Community, was signed in Lisbon on the 13th of December 2007. This treaty, called the Treaty on the Functioning of the European Union (TFEU), codified and clarified CJEU judgements and changed the EU's powers in the field of criminal law. This change of powers was mainly implemented in Article 83. Part 1 of Article 83 of the TFEU states that "The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, 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." The same article names the areas in which the EU has the right to "establish minimum rules concerning the definition of criminal offences and sanctions (…) – 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 organized crime." Environmental crimes were not mentioned in the TFEU, but according to the same article "(…) the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph" (Consolidated version of the Treaty on the Functioning of the European Union 2012). Therefore, Article 83 gave the Council the right to identify other areas of crime which could be regulated by EU law if the Council was acting unanimously after obtaining the consent of the European Parliament (Consolidated version of the Treaty on the Functioning of the European Union 2012).

The main goal of the Directive was to improve the protection of the environment by reducing environmental crime. Before the Directive, existing systems of penalties in Member States had "not been sufficient to achieve complete compliance with the laws for the protection of the environment.

Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law" (Directive 2008/99/EC). Criminal penalties need to be more dissuasive "for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species" (Directive 2008/99/EC). According to the European Commission, the main goal (the improvement of the protection of the environment by reducing environmental crime) must be achieved through specific objectives: "to create a level playing field with respect to the offences criminalized and the relevant sanctioning systems, and to prevent safe havens (…); to ensure a system that is a deterrent, through criminal penalties (…); to protect fair-playing businesses and reduce illegal trade in environmentally harmful products (such as illegal waste shipments) and wildlife trafficking (…); to improve judicial cooperation (…)" (European Commission 2020).

The Environmental Crime Directive and its implementation in Lithuanian law

To achieve these objectives, all Member States had to criminalize unlawful acts committed intentionally or at least with serious negligence. Most of these acts are criminalized only if they cause or are 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. Taking this criterion into account, the Directive requires that the following acts are criminalized: "(a) the discharge, emission or introduction of a quantity of materials or ionizing radiation into air, soil or water; (b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management); (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; (e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances" (Directive 2008/99/EC). Three of the four offences, i.e., the offences mentioned in points a, b and d of the Directive, are criminalized in one single provision of the Criminal Code of the Republic of Lithuania (hereinafter – the Lithuanian CC, or the CC). These crimes were transferred to Article 270, which criminalized the violation of rules on the protection of the environment or the use of natural resources, or the maintenance or use of structures where hazardous substances are used or stored, or where potentially hazardous installations are located, or where hazardous activities are carried out. The offence referred to in Article 3(e) of the Directive is criminalized in Article 256 of the Lithuanian CC – Illegal disposal of nuclear or radioactive substances or other sources of ionizing radiation. This group of acts can also include those listed in Article 3(h) of the Directive, which are directly linked to the causing of environmental damage – "(h) any conduct which causes the significant deterioration of a habitat within a protected site" (Directive 2008/99/EC). This offence is provided for in Article 271 of the CC (Destruction or destruction of protected areas or objects of natural heritage).

Other acts related to specimens of flora or fauna are criminalized 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: "(f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species; (g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof" (Directive 2008/99/EC). These offences have been transposed into two norms of the Lithuanian CC. However, unlike the Directive, these offences are distinguished in the CC not on the basis of the acts, but on the basis of the subject matter of the offence, i.e., on the basis of what is affected – the flora or fauna. If the offence is against wildlife, Article 272 of the CC (Unlawful hunting or fishing or other use of wildlife resources) applies, and if it is against flora, Article 274 of the CC is invoked (Illegal collection, destruction, sale or other disposal of protected wild plants, mushrooms or parts thereof).

The other crimes provided in the Directive do not require any impact on the environment or people: "(c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked; (i) the production, importation, exportation, placing on the market or use of ozone-depleting substances" (Directive 2008/99/EC). Furthermore, these acts have been transferred to Article 270^2 (Illegal transportation of waste across the state border of the Republic of Lithuania) and Article 270^1 (Illegal disposal of ozone-depleting substances or mixtures thereof) of the Lithuanian CC.

An examination of the provisions of the Directive and the Lithuanian CC reveals that Lithuania has fully implemented the requirements of the Directive by prohibiting all of the required offences. Although the European legal regulation is fully transplanted into Lithuanian law, its implementation causes some problems.

The study of Lithuanian case law

Lithuania is formally considered to have implemented the Directive by criminalizing all of the offences set out in it, but the actual implementation of the Directive at the level of court practice remains unexplored. Therefore, there is a need to examine Lithuania's practical criminal policy in the implementation of the EU's commitment to combating environmental crime, both in terms of the incrimination of specific offences and the sentencing for them.

In order to reveal and assess the current Lithuanian criminal policy in practice in the implementation of the Directive, the most general norm related to environmental offences was chosen. Article 270 of the CC states that "violation of the rules on the protection of the environment or on the use of natural resources, or on the maintenance or use of structures where hazardous substances are used or stored, or where potentially hazardous installations are located or where hazardous activities are carried out." The first part of this study refers to a potential threat to human life or health, or which could have caused serious damage to air, land, water, animals or plants, or other serious consequences for the environment, while the second part refers to the actual occurrence of similar damage. The study consists of two parts: 1) in the first part, the case law of the Supreme Court of Lithuania was examined in order to investigate the main problems of the incrimination

of these norms; 2) in the second part, a comprehensive study of the verdicts (criminal orders issued by a court in a criminal case were examined alongside convictions) handed down by the Lithuanian courts of first instance was carried out for a 10-year period (from January 1, 2012, to January 1, 2022), examining the sentences imposed by courts. The period was chosen considering the fact that amendments to the law related to the implementation of the Directive were adopted on December 22, 2011, and entered into force on January 1, 2012.

In order to examine sentencing policy, all court sentences handed down during the period (a total of 9 sentences) in which individuals were convicted were studied:

1) in accordance with Paragraph 1 of Article 270 of the CC (a total of three convictions);
2) in accordance with Paragraph 2 of Article 270 of the CC (a total of six convictions).

The verdicts were selected using LITEKO, the publicly accessible information system of Lithuanian courts (Teismai.lt, n.d.). Cases were selected using the Criminal Case Classifier. In the analysis of the imposed sentences, both repeated convictions of the same person for separate criminal offenses and the convictions of separate persons in the same case were considered as separate convictions. Thus, a total of 10 convictions (sentencings) were investigated (according to Article 270(1) of the CC – four convictions, according to Article 270 (2) of the CC – six convictions).

The qualification of problems in Lithuanian case law

The problem of the abstractness of the consequences

One of the main problems encountered by case law is the problem of the abstractness of the consequences provided for in Article 270(1) and (2) CC. The abstract definition of consequences was a fundamental problem in this Article both before and after the adoption of the Directive. In one case examined by the Supreme Court of Lithuania (2K-96/2014, 2014), a person was tried in accordance with Paragraph 1 of Article 270 of the CC (redaction of the Law of June 23, 2005). According to this redaction, the liability was to be imposed on "anyone who has violated the rules on the protection of the environment, or the use of natural resources laid down by law, if this has endangered the life or health of a large number of people or has been likely to cause serious damage to fauna, flora or the environment or to have caused other serious environmental consequences" (Criminal Code of the Republic of Lithuania (2005 06 23 redaction)). Cases when the criminal act has caused not only the possibility of occurrence of danger to human life or health or damage to nature, but also real dangerous consequences, are classified in accordance with Article 270 (2) of the CC. Although this offence was committed before the adoption of the Directive, the definition of the consequences was very close to the future requirements of the Directive, so the analysis of that has not lost its relevance. In the present case, by the verdict of the Court of Appeal, E. B. was convicted under Article 270(1) of the CC for having, on June 2, 2008, in violation of the requirements of the Law of the Republic of Lithuania on Waste Management as well as of other legal acts related to environmental protection requirements, employed F. D., who, following the verbal

instruction of E. B., pushed and buried with a tracked tractor waste that had been illegally transported and dumped on the land by persons who have not been identified. A total of 54.5 m^3 of plant waste and tree stumps, 472.47 m^3 of construction waste, and 5 m^3 of household waste were dumped in pits dug on the land, which could have had serious consequences for the environment (2K-96/2014, 2014).

The Supreme Court of Lithuania in this case devoted considerable attention to the analysis of the consequences provided for in Article 270 of the CC. As the court noted, "the constitution of the offence under Article 270(1) of the CC is somewhat unusual in that it is not the damage caused by the offence that is considered to be the consequence of the offence, but rather the threat of such damage that is considered to be the consequence that has to be proved for the purposes of Article 270(1) of the CC" (2K-96/2014, 2014). At the same time, the Court stressed that if the threat does not arise, a person may be held administratively liable for infringements of rules on the protection of the environment or the use of natural resources. Importantly, any violation of environmental rules may in principle jeopardize (but does not actually jeopardize) certain values protected by the criminal law (2K-96/2014, 2014). Given that the elements of danger and threat of serious harm or other serious consequences are not spelled out in the law, they are subject to assessment in the light of all the circumstances of each case. The consequences or threat of consequences are assessed on a case-by-case basis, which may lead to different interpretations, as it is difficult to identify and measure a specific hazard or risk of environmental damage (2K-96/2014, 2014). In such a case, the court must assess the species and part of the flora or fauna threatened, the nature, extent and seriousness of the environmental damage, the possibilities of restoring the affected natural resource, the monetary value of the damage, and other circumstances. The threat to the environment must be real (i.e., there was a specific or clear danger in the form of a real threat to the environment, or a reasonable likelihood of damage to the environment in the near future) and must have been recorded in the criminal case (2K-96/2014, 2014).

In the present case, although it was established that the defendants had dumped a relatively large quantity of various types of waste in an unauthorized place, no specific investigation was carried out as to the environmental impact of the waste dumped in the places referred to in the judgement. Thus, no consequences were identified. It should be noted that the Court of Appeal, in judgement, found that the illegal method of disposal and the very large quantity and type of waste could have had serious consequences for the environment and endangered the contamination of groundwater. However, this conclusion of the Court of Appeal was not sufficient, and the Supreme Court of Lithuania therefore did not recognize this threat within the meaning of Article 270 of the CC, as the absence of an investigation of the surface of the land plots and the deeper layers of its soil and groundwater does not allow for the establishment of the occurrence of damage (2K-96/2014, 2014). The Supreme Court of Lithuania, in denying the threat to the environment as an element of the consequences of Article 270(1) of the CC, has stated that the threat of damage to the environment and nature and the amount of such damage can only be established on the basis of the conclusions of a qualified specialist, and that it is not enough to presume that the threat to the environment has arisen, but that the threat has to be proved. The determination of the types of waste was not based on a hazardous or non-hazardous assessment, but simply on the fact that the natural soil had been mixed with the waste, which constitutes contamination as the

soil structure was destroyed. The threat of groundwater contamination was established throughout the criminal proceedings (2K-96/2014, 2014).

This case is also interesting because, in addition to the above-mentioned arguments, the panel of judges of the Lithuanian Supreme Court stated that it is undeniable that waste management is an important part of the EU's environmental protection policy, and also mentioned the importance of the Directive 2008/99/EC (2K-96/2014, 2014). It is very interesting that the panel of judges, after mentioning this Directive and recognizing its importance, interpreted the purpose of this Directive in a rather different way. Here, the panel of judges, referring to the Directive, concluded that the Directive does not require such a broad criminalization and punishment of the mere possibility of creating an environmental hazard. According to the Supreme Court, the mere presumption of endangerment is clearly not sufficient to render a person criminally liable (2K-96/2014, 2014). It is, in fact, very difficult to answer the question of why the Supreme Court of Lithuania came to such a conclusion, because Article 3 of the Directive is quite clear that for some offences, liability must be linked to cases in which the relevant violation of the rules occurs "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" (Directive 2008/99/EC). Moreover, the preamble to the Directive also states that "in order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species" (Directive 2008/99/EC). It is therefore clear from the text of the Directive that it is precisely aimed at combating not only environmental impacts that have already occurred, but also any threat of such impacts occurring. In other words, the aim is not to deal with the consequences that have already occurred, but to deal with the environmentally dangerous activity itself.

In addition, the Supreme Court noted that administrative liability is the main type of liability for environmental protection violations, including environmental pollution. In distinguishing between administrative and criminal liability for breaches of the rules on the protection of the environment or the use of natural resources, it is necessary to assess the act committed in terms of the content of the objective and subjective elements and their manifestation, and to be guided by the provisions of the principles of reasonableness, proportionality, fairness and other general principles of law. The scale of the intensity of the infringement is a key element of the distinction between criminal and administrative liability for environmental infringements. In this case, the determination of the potential threat of damage to the environment and the magnitude of the threat of such damage is a decisive criterion for the distinction between criminal and administrative liability for environmental offences. In such cases, the justification of the threat of damage to the environment becomes crucial. In the light of the foregoing considerations, the panel of judges upheld the acquittal of the Court of First Instance (2K-96/2014, 2014).

In another case, the Supreme Court of Lithuania, addressing the problem of definiteness of consequences and in order to establish a clearer distinction between criminal liability for violations of environmental protection rules and similar administrative offences, examined the case in an extended panel of seven judges (2K-7-57-489/2020, 2020. Emphasizing the importance of environmental protection, the Extended Chamber noted that even Article 53 of the Constitution of

the Republic of Lithuania establishes that the State and every person is obliged to protect the environment from harmful effects, and Article 54 provides that it is prohibited by law to destroy the land, its subsoil and waters, to pollute the waters and the air, to have a radiological effect on the environment and to impoverish flora and fauna. Moreover, according to the Court, these requirements of the Constitution are detailed in the Environmental Protection Law of the Republic of Lithuania. The Constitutional Court of the Republic of Lithuania has also stated that it is in the public interest to ensure the protection of the natural environment, fauna and flora, and the rational use and enhancement of natural resources, and that it is the constitutional duty of the State to guarantee this. Violations of environmental law are punishable by criminal or administrative penalties. The level of seriousness of the act depends on the damage to nature, which determines the distinction between administrative and criminal liability (2K-7-57-489/2020, 2020).

In the case before the Extended Chamber of Seven Judges, Mr A.P. was tried for violating the legal rules on the use of natural resources on his plot of land adjacent to a wetland. A. P., when preparing the land plot for housing and farm needs by excavating impermeable surface water bodies – a pond and a ditch – did not comply with the prohibitions established in the above-mentioned legal acts, as he mechanically dismantled the vegetation cover of 0.8248 ha, destroyed it, and transformed it into water bodies. In the present case, it has been established that A. P. did not destroy the entire wetland, but his actions caused damage to the natural environment in the amount of €113,245.04 (2K-7-57-489/2020, 2020).

In describing the legal assessment of analogous infringements, the Supreme Court of Lithuania stated that analogous cases usually resulted in administrative liability. Such offences were referred to in Article 51^{13} (1) of the Code of Administrative Offences of the Republic of Lithuania (the law in force before January 1, 2017). It was this article that first established liability for violation of the special conditions for the use of land, forest and water bodies (the current equivalent of the same administrative offence is set out in Article 256(3) of the Administrative Offences Code of the Republic of Lithuania). Subsequently, depending on the outcome of the administrative offence case, environmental damage is recovered from the perpetrators in civil proceedings under civil claims brought by the Department of Environmental Protection under the Ministry of Environment (2K-7-57-489/2020, 2020).

The panel of judges also notes that the amendment of Article 270 of the CC with effect from January 1, 2012, and the increase in the degree of dangerous consequences necessary for criminal liability under this Article (decriminalization of the elements of minor damage and minor consequences which qualified this offence) make it even more important to ensure the proper delimitation of administrative and criminal liability. Following the amendment, criminal liability for violation of the rules on the protection of the environment or the use of natural resources laid down in the legislation is imposed if such an act could have caused, or resulted in, serious damage to the air, land, water, animals or plants, or other serious environmental effects (2K-7-57-489/2020, 2020).

Thus, the main criteria distinguishing between the criminal offences laid down in Article 270 of the CC and the administrative offences laid down in Article 51^{13} of the Code of Administrative Offences in cases where the special conditions for the use of land are violated, are the following: 1) the infliction of (or threat of) serious damage to the air, the land, the water, or the animals; and 2) the infliction of (or threat of) severe damage to the environment. It is for the court to assess

the form and extent of the specific damage (or serious consequences) in each individual situation and to decide whether the damage (or threat of damage) to air, land, water, animals or plants is significant, whether the environmental consequences are serious, whether a breach of the rules on the protection of the environment or on the use of natural resources is a criminal offence, or whether the damage caused and the consequences of the damage are worthy of administrative liability only (2K-7-57-489/2020, 2020).

The Supreme Court has confirmed that significant damage to air, land, water, animals or plants, or other serious consequences for the environment, as a constituent element of the offence, is evaluative, and its determination is directly related to the seriousness of the violation of environmental protection rules. In assessing this element, account must be taken of the nature of the breach of the environmental rules, the extent of the material loss, the nature and extent of the damage to the ecosystem, the value of the natural objects damaged, the extent of the damage, the possibility of restoring what has been destroyed or damaged, etc. (2K-7-57-489/2020, 2020). However, the Supreme Court also held that the amount of material damage cannot be the sole criterion for determining serious damage. A necessary element of the objective part of the offence under Article 270(2) of the CC is real consequences, which implies not only an assessment of the actual damage, but also the need to identify the specific component of the environment that has been damaged. Serious damage occurs when a specially protected object of the State is completely destroyed or severely damaged or suffers substantial material loss. This is an evaluative element of the offence, the content of which is revealed by looking at the specific facts of the case. Moreover, in cases of this kind, the fact of adverse effects on the environment is a provable fact (2K-7-57-489/2020, 2020).

The Court found that the element of serious damage had not been proven in the case at hand, and that serious damage to the environment had been established solely on the basis of the amount of material losses calculated in accordance with the methodology (Order of the Minister of Environment 2002), contrary to the above-mentioned examples of cassation case law. In the present case, the formation of the extended Chamber of Judges concluded that, in the light of the foregoing considerations, the conclusion of the Court of Appeal that the unlawful acts of A.P. had caused significant damage to the wetland and to the plants was not based on proper legal reasoning. The acts of mismanagement by A.P. established in the case, which violated the special conditions for the use of land when he carried out excavation works on his land from April 1, 2014, to October 23, 2015, cannot be regarded as acts of the gravity of the seriousness of the crime under Article 270(2) of the CC, as such acts did not constitute the element of causing serious damage to the air, land, water, animals or plants. It is the imposition of administrative liability on A. P. for such actions that would be a proportionate legal measure (2K-7-57-489/2020, 2020).

The Supreme Court ruled that the courts of lower instance had incorrectly applied and interpreted this provision of the Criminal Code, had failed to properly assess the seriousness of the violation of the rules on the use of natural resources, and had failed to consider the possibility of imposing administrative liability on A. P. Consequently, it concluded that the environmental damage in the amount of €113,245.04, in view of the lack of seriousness of the damage, did not constitute a criminal offence (2K-7-57-489/2020, 2020).

In addition, this ruling of the Extended Chamber of seven judges is significant in that it also addressed the issue of the assessment of the risk of environmental damage. Prior to this ruling,

the case law on the assessment of environmental risks was not consistent. In some cases, the court required a specific assessment of the threat of harm expressed in monetary terms (2K-155-693/2015, 2015), but in others, a more abstract, non-monetized assessment of the threat to the environment was sufficient for conviction (2K–114–696/2015, 2015). Here, a person was convicted under Article 270(1) of the CC for irresponsibly storing harmful substances and endangering the environment. In this case, the Supreme Court stated that "the threat to the environment has not been quantified in monetary terms in this case (…) the evidence in the case confirms that (…) 32 metric tons of contaminated soil, about 12 metric tons of contaminated water, 3 metric tons of waste lubricants, and about 0.15 metric tons of waste rodent poisons have been recovered and disposed of" (2K–114–696/2015, 2015). However, according to the Court, the elimination of these consequences does not constitute an assessment of the threat of damage, since "it is clear that no other consequences – the cure of human injury, the breeding or restoration of flora or fauna, the restoration of the natural environment to its original state, etc. – are included in the calculation, and that therefore the damage does not refer to the specific consequences of Article 270(2) of the CC, since they have not yet occurred, but have only threatened to occur" (2K–114–696/2015, 2015). However, the aforementioned recent ruling of the seven-judge chamber nevertheless upheld the practice which requires that the assessment of any of the consequences provided for in Article 270 of the CC must be quantified in monetary terms – "in cases of both the threatened (Article 270(1) of the CC) and the actual infliction of harm (Article 270(2) of the CC), the amount of the harm must be calculated in monetary terms" (2K-7-57-489/2020, 2020).

The timing of environmental damage

Another topical issue that has arisen in case law is the timing of environmental consequences. This issue is particularly important in environmental crime, as environmental damage following an unlawful act does not usually manifest itself as a one-off effect but tends to increase over time if the unlawful effect is not remedied. This naturally raises the practical question as to which point in time is the time of the damage. The answer to this question directly determines the question of criminal liability, as regards the calculation of limitation periods.

Here, the Supreme Court heard an appeal by R. P. and R. P., convicted under Article 270(2) of the CC. They were convicted of having illegally – i.e., without a permit from the Ministry of Environment, where a permit is required – installed a 1.70-metre-high dam on a state-owned river, in violation of the environmental protection regulations laid down in the legislation. Thus, they had partially flooded plots of land, which included a plot of forest land, in the period from August 22, 2007, to a date not precisely determined at the time of the preliminary investigation. These illegal actions caused damage to the environment in the amount of 65,169.50 LTL (€18,874.25) (2K-395-489-2016, 2016). In this criminal case, the issue of the statute of limitations for conviction became relevant, as it depended on the determination of the time of the commission of the act. The Court found that the offence committed by R. P. and R. P. was in essence of a continuous nature, since it is apparent from the circumstances established in the case that the infringement of the environmental protection rules was established by the environmental protection officers in an inspection

act of September 21, 2010, and that the consequences of this infringement, namely the specific damage to nature, were calculated on November 19, 2010. A re-inspection on June 6, 2011, found that the dam was partially washed out or dismantled and that water was already flowing. It was not established in the case file whether and when this action was carried out by nature or by man (2K-395-489-2016, 2016).

The Court concluded that the infringement of the environmental protection rules did not consist solely in the construction of the dam, but consisted both in the prohibited act of constructing a 1.70-metre-high dam across the river from August 22, 2007, to an unspecified date in 2008, and in the subsequent lack of measures taken to prevent the environmental hazard of flooding of the plots. By constructing the dam and using the ponds constructed, R. R. P. was indifferent to any harmful effects on nature. Moreover, according to the construction of the constituent elements of the offence (the significance of the consequences for the offence), the constituent elements of the offence committed by Mr R. R. P. are substantive, i.e., the consequences of the offence – the occurrence of significant damage to the environment – are a necessary feature of the offence. The consequences were of a lasting nature, since they did not occur immediately after the construction of the barrier, but over time. Therefore, in the absence of the possibility to establish the exact date on which the offence was interrupted, the Court of Appeal was justified in choosing, in the factual situation established in this case, to calculate the starting point of the limitation period for the conviction from the date on which the damage to nature was recorded. The calculation of the statute of limitations for the conviction from the time of the recording of the consequences led to the conclusion that the statute of limitations had not expired (2K-395-489-2016, 2016).

The problem of competition between legal norms

Interestingly, sometimes the legislator's desire to strengthen the fight against environmental infringements, due to the interaction between the norms of the CC and the Penal Code, can have the opposite effect. On June 25, 2015, the legislator adopted a law replacing Article 273 of the CC. Prior to this amendment, Article 273 of the CC criminalized a person who "without authorization, cut down or otherwise destroyed an area of his forest exceeding one hectare or drained a swamp." The explanatory memorandum to this amendment justified this with the aim of establishing criminal liability, considering the nature and degree of seriousness of such acts and their prevalence, while at the same time reinforcing legal liability (Explanatory Memorandum on the Draft Amendment 2012). Following the amendments, Article 273 of the CC now provides for the liability of a person who "cuts down, destroys or damages more than 500 cubic meters of trees on forest land or drains a swamp without a permit." Interestingly, this amendment has substantially limited the applicability of Article 270 of the CC and has essentially decriminalized acts such as illegal deforestation causing damage to the environment.

In a case of the Supreme Court of Lithuania, it was established that K. B. had organized clear-cutting of a pine forest in an area of 0.3 hectares in a state-protected territory, and clear-cutting of a non-clear-cutting pine forest in an area of 0.4 hectares, with part of the cleared area, i.e., 0.3 hectares, falling in the area of the Merkiai ichthyologic reserve. A total of 209.803 cubic meters of

green trees were found to have been felled, causing significant damage to the stand and €102,065.39 in environmental damage (2K-280-689/2019, 2019).

The Court stated that, according to the legislation of the Republic of Lithuania, liability for the unauthorized felling, destruction or mutilation of trees and shrubs in private forests is laid down in Article 273 of the Code of Administrative Offences of the Republic of Lithuania, and liability for the unauthorized removal or disposal of illegally felled trees and shrubs that have been growing in the forest area is laid down in Article 274 of the Code of Administrative Offences. It should also be noted that Article 273(1) of the CC establishes criminal liability for anyone who, without a permit, cuts down, destroys or damages more than 500 cubic meters of trees on forest land. Therefore, the act of K. B. – the unauthorized felling of 209.803 cubic metres of trees in a private forest and their extraction and removal without a permit – fulfils the elements of the administrative offences laid down in Article 273(3) and Article 274(3) of the Code of Administrative Offences (2K-280-689/2019, 2019).

As the Court noted, "the unauthorized felling of forests and the extraction and removal of felled forests without a permit invariably violate the rules laid down by law for the protection of the environment and the use of natural resources, and cause damage to plants (the stand of trees) and the environment. The unauthorized felling of a forest may also cause significant damage to plants (stand of trees) or other serious consequences for the environment and may formally fulfil the elements of the offence referred to in Article 270(2) of the CC. This is how the consequences of K.B.'s act were assessed: the courts found that there had been significant damage to the stand of trees and €102,065.39 to the environment. However, as mentioned above, the felling of more than 500 cubic meters of trees without a permit on forest land is punishable under Article 273(1) of the CC" (2K-280-689/2019, 2019).

According to the court, cases in which several rules of law may be applied to a given legal fact are known in legal theory as a concurrence of norms. In the event of a concurrence of norms, only one norm must be chosen and applied to the legal fact in question. In order to decide which norm should be applied to K. B.'s act – the unauthorized felling of a forest on private land and the extraction and removal of the felled forest without a permit – it is necessary to compare the nature and scope of the relations governed by Article 270(2) of the CC with those of Article 273(1) of the CC. When comparing the legal regulation laid down in the aforementioned norms, it can be concluded that the scope of the relationship regulated by Article 270(2) of the CC is broader than the relationship regulated by Article 273(1) of the CC. As mentioned above, unauthorized deforestation and the extraction and removal of deforested trees without a permit always violates the legal rules on the protection of the environment and the use of natural resources, and causes damage to plants (stands) and the environment. Article 273(1) of the CC therefore contains all the elements of the offences set out in Article 270(2) of the CC. At the same time, it should be noted that Article 273(1) of the CC establishes a special matter of the offence (trees growing on forest land) and a special method of committing the offence – cutting down, destroying or damaging trees without authorization. Consequently, Article 270(2) of the CC is a general norm in relation to Article 273(1) of the CC. In the event of a conflict between general and specific norms, the specific norm, in this case Article 273(1) of the CC, must apply. In conclusion, the act of K. B. – the unauthorized felling of 209.803 cubic meters of trees in a private forest and their removal and disposal

without a permit – could not be qualified under Article 270(2) of the CC, as this act, in terms of the matter of the offence and the way it was committed, corresponded to the elements of the offence set out in Article 273(1) of the CC. By applying the general rather than the special norm, the courts misapplied the criminal law – Article 270(2) of the CC. However, K. B.'s act also could not be qualified under Article 273(1) of the CC because less than 500 cubic meters of trees were cut down, and therefore K. B.'s act does not have the necessary constituent element of the offence, namely the consequence (2K-280-689/2019, 2019).

It should also be mentioned that in the present case, if K. B.'s actions were found to comply with the elements of an administrative offence, they did not give rise to any real additional liability, as the Supreme Court of Lithuania found that the perpetrator's actions, which should have been regarded as an administrative offence, had been committed in the context of an ideal coincidence with the concurrently criminalized Article 271 of the CC. This is because neither the CC nor the Administrative Offense Code regulate the rules on the qualification of an act and the imposition of a penalty in cases where the perpetrator commits both a criminal offence and an administrative offence at the same time. Taking into account the fact that criminal offences are more serious than administrative offences, as well as the fact that in the case of an ideal coincidence of criminal offences, the sentences imposed for the individual offences are to be consolidated by means of consolidation of the sentences (Article 63(5)(1) of the CC), the following conclusion is to be made: in the case of an ideal coincidence between a criminal offence and an administrative offence, an act corresponding to the elements of an administrative offence should not be qualified individually under an article (part of an article) of the Administrative Offense Code, and this circumstance should be taken into account in the sentencing of the criminal offence (Art. 54(2)(1) of the CC). Consequently, K.B. was convicted only under Article 271(1) of the CC, while the sentence imposed was a fine of 120 MGL (€4,519.20) (2K-280-689/2019, 2019).

The abstractness of the consequences both in the Directive and in the Lithuanian CC leads to a tendency of the case law to interpret the nature of environmental damage narrowly, thus limiting the application of criminal liability and giving priority to administrative liability.

Analysis of Lithuanian legislation and case law on sentencing

One of the main goals in fighting environmental crimes is to ensure that effective criminal responsibility is provided for by the national criminal laws of Member States. As stated in the Directive "experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law" (Directive 2008/99/EC). It is therefore obvious that administrative penalties and the compensation of damages caused to the environment should not be considered enough. Furthermore, the Directive emphasizes that "in order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water,

animals or plants, including to the conservation of species" and that crimes against the environment are "punishable by effective, proportionate and dissuasive criminal penalties" (Directive 2008/99/EC). Article 270 (especially part 2) of the Lithuanian CC is the main article in the criminal code tasked with punishment for substantial damage caused to the environment.

Article 270(1) of the CC establishes criminal liability for persons who violate the rules laid down by law for the protection of the environment or the use of natural resources, or for the maintenance or use of structures where hazardous substances are used or stored, or where potentially hazardous installations are located, or where potentially hazardous activities are being carried out, if such violation has resulted in a danger to life or health, or if such violation is likely to have resulted in serious damage to the air, the earth, the water, animals, plants, or to have caused any other serious damage or other serious environmental effects. The essential feature of this offence is that the threat of the foreseeable consequences is sufficient to incur criminal liability; the occurrence of serious consequences is not necessary for liability. The offence is not serious and is punishable by a fine or restriction of liberty, arrest or imprisonment for up to 3 years.

Of the four persons convicted under Article 270(1) of the Criminal Code, 75% (three cases) were sentenced to a non-custodial punishment of deprivation of liberty, with an average of 8 months of deprivation of liberty. Only one case (i.e., 25% of cases) resulted in a sentence of 10 months of imprisonment. However, this case stands out because in it a person with two previous convictions was convicted of two other offences in addition to environmental crimes. It can therefore be assumed that the sentence of imprisonment was essentially determined by the personality of the perpetrator, rather than by the seriousness of the crime.

Article 270(2) of the CC provides for criminal liability for persons who have committed an act referred to in paragraph 1 of the Article, or who have systematically violated the rules laid down by law for the protection of the environment or for the use of natural resources, or for the maintenance or use of constructions in which hazardous substances are used or stored, or in which there is a potentially hazardous installation, or where a potentially hazardous activity is being carried out, if as a consequence of such violation, serious damage has been caused to the air, the earth, the water, animals, plants or the environment or if any other severe environmental effects have resulted. Unlike paragraph 1, paragraph 2 provides for an aggravated crime, in which liability is limited to causing the aforementioned consequences. The offence is considered to be of a serious nature and is punishable by a fine or arrest or imprisonment of up to 6 years.

Of the six persons convicted under Article 270(2) of the CC, as many as 33% (two cases) were exempted from criminal liability (in one case, after reconciliation between the perpetrator and the victim (the forest authority) in accordance with Article 38 of the CC, and in the other case, after the application of Article 40 of the CC, they were exempted on the basis of bail). A fine was the result of 50% of convictions (three cases, with an average fine of €3,453), and only one case resulted in a prison sentence of 1 year and 9 months. However, in this case the person again had a previous conviction, was also tried for another offence, and his sentence was suspended under Article 75 of the CC. At the same time, it should be noted that, in addition to the penalties, the persons convicted under Article 270(2) of the CC were also ordered to pay an average of €27,586 in damages for damage to the environment, which suggests that the relatively large amount of civil damage may lead to less severe penalties for the offences themselves.

Lithuania does not stand out in the EU in terms of the maximum sanctions for the offences defined in the Directive, and appears to be rather average in this regard. This conclusion can be drawn from the extreme decisions of other countries, such as Greece, Bulgaria, Hungary, and Austria, to impose up to 20 years of imprisonment in their laws for offences of this kind, or Malta, which imposes a penalty of life imprisonment (European Commission 2020). However, while the Directive calls for a serious fight against environmental crime, Lithuania is only really fighting it at the level of law. A real analysis of case law shows that a significant number of persons are completely exempted from criminal liability for the offence under Article 270(2) of the CC, and that fines, which can be up to a maximum of €200,000, are actually imposed at levels extremely close to their minimum. It can only be assumed that case law does not impose higher fines in view of the relatively high amounts awarded for compensation for environmental damage. These amounts are as much as nine times higher than the average of the fines imposed. However, this approach is clearly inconsistent with the Directive's requirement that the fight against environmental crime be linked not only to civil, but specifically to criminal law measures.

Conclusions

The abstractness of the consequences, both in the Directive and in the Lithuanian CC, leads to a tendency of the case law to interpret the nature of environmental damage narrowly, thus limiting the application of criminal liability. The case-law requires a financial assessment of both the threat to the environment and the damage to the environment, but the financial amount of the damage is no longer an essential criterion for assessing the seriousness of the criminal offenses. Lithuania's sentencing policy under Article 270 of the CC is not characterized by harshness, with priority given to non-custodial sentences, and the fines imposed are close to the minimum level.

The overall results of this study show that Lithuania has implemented the requirements of the Directive, both in terms of criminalizing the acts required by the Directive and in terms of the corresponding penalties. At the same time, however, it is necessary to state that the actual Lithuanian case law gives priority to administrative (in terms of criminalization) and civil (in terms of penalties) liability rather than criminal liability.

References

2K-7-57-489/2020, 2020. Supreme Court of Lithuania. Available from: https://liteko.teismai.lt/viesaspren dimupaieska/tekstas.aspx?id=651e0507-716e-445d-84f2-d84d9b5e05ae [Accessed 1 October 2022].

2K-96/2014, 2014. Supreme Court of Lithuania. Available from: https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=5a012d14-87a3-41a1-acf3-00af3df47f74 [Accessed 1 October 2022].

2K-155-693/2015, 2015. Supreme Court of Lithuania. Available from: https://liteko.teismai.lt/viesaspren dimupaieska/tekstas.aspx?id=a70ca064-2bd3-4d0b-86d3-400bbb61eccd [Accessed 1 October 2022].

2K-280-689/2019, 2019. Supreme Court of Lithuania. Available from: https://liteko.teismai.lt/viesasprendi mupaieska/tekstas.aspx?id=040e90e9-c80b-4b03-8263-215dbfd0fb66 [Accessed 1 October 2022].

2K-395-489-2016, 2016. Supreme Court of Lithuania. Available from: https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=1c5fa795-c828-458f-b493-d9bbf3698f2a [Accessed 1 October 2022].

2K–114–696/2015, 2015. Supreme Court of Lithuania. Available from: https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=3b1bc808-7894-40e6-af0e-10db3799ac96 [Accessed 1 October 2022].

AGHENITEI, M., & L. BOBOC, 2011. Environment criminal law in European Union. *Jurnalul de Studii Juridice*, 6 (1–2), 101–106. Available from: https://www.lumenpublishing.com/journals/index.php/jls/article/view/466/514 [Accessed 1 October 2022].

Commission of the European Communities v. Council of the European Union, 13 September 2005, CJEU [GC], No. C-176/03. Available from: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=64847&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=349584 [Accessed 1 Oct. 2022].

Commission of the European Communities v. Council of the European Union, 23 October 2007, CJEU [GC], No. C-440/05. Available from: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=70715&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3596174 [Accessed 1 October 2022].

Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012, p. 47–390. Available from: https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj [Accessed 1 October 2022].

Criminal Code of the Republic of Lithuania (2005 06 23 Redaction). Available from: https://www.e-tar.lt/portal/lt/legalAct/TAR.2B866DFF7D43/TAIS_259127 [Accessed 1 October 2022].

Criminal Code of the Republic of Lithuania. *Valstybės* žinios, 2000-10-25, Nr. 89-2741. Available from: https://www.e-tar.lt/portal/lt/legalAct/TAR.2B866DFF7D43/asr [Accessed 1 October 2022].

Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the Protection of the Environment through Criminal Law. OJ L 328, 6.12.2008, p. 28–37. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0099 [Accessed 1 October 2022].

EUROPEAN COMMISSION, 2019. *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal*. COM/2019/640 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576150542719&uri=COM%3A2019%3A640%3AFIN [Accessed 1 October 2022].

EUROPEAN COMMISSION, 2020. *Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Environmental Crime Directive). SWD(2020) 259 final*. Available from: https://ec.europa.eu/info/sites/default/files/evaluation_-_swd2020259_-_part_1_0.pdf [Accessed 1 October 2022].

EUROPEAN COMMISSION, 2021a. *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*. Available from: https://ec.europa.eu/info/sites/default/files/1_1_179760_prop_dir_env_en.pdf [Accessed 1 October 2022].

EUROPEAN COMMISSION, 2021b. *Questions and Answers on the Revised EU Directive on Environmental Crime*. European Commission. Available from: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_6745 [Accessed 1 October 2022].

EUROPEAN COMMISSION, 2022. *Protecting the Environment and Oceans with the Green Deal*. Available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/protecting-environment-and-oceans-green-deal_en [Accessed 1 October 2022].

Explanatory Memorandum on the Draft Amendment and Supplementation of Articles 47, 272, 273, 281, 284 of the Criminal Code of the Republic of Lithuania and the Amendment of Articles 176(1) And 273(1) of the Code. (2012). Available from: https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/TAIS.422913?jfwid=-eirz31xs [Accessed 1 October 2022].

GIARDI, G., 2015. Fighting the European Ecomafia: Organised Trafficking in Waste and the Need for a Criminal Law Response from the EU. *New Journal of European Criminal Law*, 6 (2), 229–257. https://doi.org/10.1177/203228441500600206.

Order of the Minister of Environment of the Republic of Lithuania on Approval of the Methodology for Calculating the Amounts of Compensation for Damage to the Environment. *Valstybės* žinios, 2002-09-25, Nr. 93-4026. Available from: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.186995/asr [Accessed 1 October 2022].

TEISMAI.LT. (n.d.). *LITEKO*. Available from: https://liteko.teismai.lt/viesasprendimupaieska/detalipaieska.aspx?detali=2 [Accessed 1 October 2022].