

## ARTICLE

# Environmental Criminal Enforcement in Poland and Russia: Meeting Current Challenges

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Environmental criminal law provides for measures targeting the most serious environmental offences and improving the enforceability of environmental provisions. In the article, environmental criminal law provisions in Poland and Russia are analyzed and compared. The changes introduced by the Council Directive 2008/99/EC on the protection of the environment through criminal law have a significant impact on the Member States' criminal law, promoting broader criminalization of environmentally harmful behavior and more severe sanctions. Although the Russian Federation is not an EU member and adopts its environmental legislation, it is still a party to several international treaties and therefore is obligated to provide an adequate level of environmental protection. There are several similarities between the criminal provisions in both countries concerning the classification of environmental crimes and the limbs of their legal definitions. Besides, both countries use a continental model of criminal procedure including their rules on evidence. It allowed us to compare national law enforcement practices. The authors analyze current law enforcement challenges and discuss possible solutions.

**Keywords:** environmental protection; criminal law; criminal procedure; law enforcement practice; Polish environmental law; Russian environmental law

## 1. Introduction

The consequences of environmental offences can easily cross the national borders requesting a mutual response. In the EU, the Member States' criminal law is expected to comply with the provisions of the Council Directive 2008/99 on the protection of the environment through criminal law.<sup>1</sup> The Directive promotes a common approach to the serious infringements of the Community's environmental protection requirements.<sup>2</sup> All 27 Member States (in 2008) intensified their actions in the areas commonly recognized as a priority, such as protected wild fauna and flora species, sites, radiation emission, waste disposal, etc. The Directive left the Member States certain freedom in choosing the way its provisions would have been implemented.

The Russian Federation with some exceptions has not participated in the European agreements (or such participation has been so far only formal). It has been adapting its environmental legislation. However, as a party to several international treaties e.g. the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989, the Stockholm Convention on Persistent Organic Pollutants (POPPs) signed in 2001 or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) signed in Washington DC on 3 March 1973,<sup>3</sup> the Russian Federation has been

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<sup>1</sup> Council Directive (EC) 2008/99 on the protection of the environment through criminal law [2008] OJ L328/28 (Directive 2008/99/EC).

<sup>2</sup> W Radecki, 'Prawo karne środowiska. Część I. Ewolucja polskiego prawa karnego środowiska' (2010) 14 Ecology Health 5, 215; M Szejnkowska and E Zębek, 'Environmental crimes listed in the Polish Penal Code since 1997' (2013) 13 International and Comparative Law Review 2, 109.

<sup>3</sup> See M. Micińska-Bojarek, 'Prawoustrojowe podstawy ochrony zasobów naturalnych Federacji Rosyjskiej' (2016) Studia Iuridica Toruniensia 19, 195.

obligated to provide an adequate level of environmental protection. There are similarities regarding the classification of environmental crimes and their definitions. Both countries are using a continental model of criminal procedure and have similar rules on evidence collection and preliminary proceedings. Thus, law enforcement officials in both countries meet comparable challenges.

The issue of environmental protection in Russia after the dissolution of the Soviet Union has been the subject of several studies at both national and international levels.<sup>4</sup> The fact is that the environmental situation in the Kaliningrad Oblast and other regions of European Russia has an impact on the entire Baltic Sea Region. Water, air and terrestrial pollution, as well as the problem of nuclear plant emissions (the two-unit Baltic-1 Nuclear Power Plant is currently under construction in the Neman District of the Kaliningrad Oblast), should be considered a matter of common concern. Nonetheless, there have been no comparative studies of this kind so far.

The aim was to determine whether existing national enforcement arrangements were adapted to the contemporary challenges of enforcement in the sphere of serious environmental offences. Considering this aim the following research questions have been formulated:

- (1) What are the effects of the 2008/99/EC Directive's implementation in the EU Member States, particularly in Poland?
- (2) What are the similarities between Russia and Poland regarding environmental criminal law? Are there any similarities in the way the law enforcement officials handle environmental crime cases?
- (3) What is the trend in environmental crime in both countries? Why there is such a trend? What could be done to improve the current situation?

## 2. The Implementation of the Directive 2008/99/EC

The Directive 2008/99/EC was aiming to achieve a high level of environmental protection. The premise for establishing its provisions was the growing concerns within the community over the rising environmental crime rates and their negative cross-border impact. There was a recognized need for more dissuasive penalties regarding environmentally harmful activities, which cause or were likely to cause substantial damage to the air (including the stratosphere), soil, water, animals or plants, including the issue of species preservation. Cross-border nature and impact of environmental offences, increasing crime trend fuelled by the profits and a low risk of detection, large disparities in sanctions in the Member States were (and still are) obvious shortcomings of environmental law enforcement. The experience showed that the penalties applied for the serious infringements of environmental law had been insufficient to achieve compliance with environmental protection laws.<sup>5</sup> The Directive prompted a change in a way the Member States define the most serious environmental offences and impose penalties. Although the matter of sanctions was left to the Member States, the Directive required for criminal penalties for both legal and natural persons to be 'effective, proportionate and dissuasive'.<sup>6</sup> According to the European Commission, the concept of 'environmental crime' should cover acts which 'breach environmental legislation and cause significant harm or risk to the environment and human health'.<sup>7</sup> The Directive 2008/99/EC was seen as a sign of consolidation of criminal law and 'Europeanization' of the protection of the environment.<sup>8</sup> Article 3 of the Directive contained the list of environmental offences which were expected to be the crimes: (1) illegal discharge of harmful substances or radiation into the air, soil, or water; (2) collection, transport, recovery or disposal of waste in an unlawful

<sup>4</sup> J P Newell and L A Henry, 'The state of environmental protection in the Russian Federation: a review of the post-Soviet era' (2017) 779 *Eurasian Geography and Economics* <<https://doi.org/10.1080/15387216.2017.1289851>> accessed 4 December 2018; See T Newburn, *Criminology* (third edn, Routledge 2017).

<sup>5</sup> F Bianco, *Directive 2008/99/EC on environmental crime and Directive 2009/123/EC on ship-source pollution* (University of Catania 2015); EFFACE, *European Union Action to Fight Environmental Crime* (Report) <<https://efface.eu>> accessed 4 April 2018; M Faure and F Weber, 'The diversity of the EU approach to law enforcement – towards a coherent model inspired by a law and economics approach' (2017) 18 *German Law Journal* 4, 823.

<sup>6</sup> E Keene, *Compliance with the EU Environmental Crime Directive in the countries of southeast Europe and Moldova* (Themis Network Austrian Development Cooperation Report 2015) <<https://www.linkedin.com/in/elikeene>> accessed 4 December 2018; See A Farmer and others, *Environmental crime in Europe* (Hart Publishing 2017).

<sup>7</sup> P J Cardwell and others, 'Tackling environmental crime in the European Union: the case of the missing victim?' (2011) 23 *Environmental Law and Management* 3, 113; EUROJUST, *Strategic Project on Environmental Crime* (Report 2014) <[http://environmental-crime-report\\_2014-11-21-EN.pdf](http://environmental-crime-report_2014-11-21-EN.pdf)> accessed 4 December 2018; EnviCrimeNet – Environmental Crime Network, *Report on Environmental Crime* (2016) <<https://envicrimenet%20report%20on%20environmental%20crime.pdf>> accessed 4 December 2018; EFFACE, *Environmental crime and the EU. Synthesis of the Research Project European Union Action to Fight Environmental Crime* (Report 2016) <<https://efface.eu>> accessed 4 December 2018.

<sup>8</sup> A Gouritin and P de Hert, 'Environmental crimes: an overview' (2009) *Environmental Law Network International* 1, 22.

manner; (3) shipping waste in an unlawful manner; (4) operation of an industrial installation in which dangerous substances are stored or used in a way that causes or threatens environmental harm; (5) management or handling of nuclear materials or other hazardous radioactive substances in an unlawful manner; (6) illegal killing or transporting protected plants, animals, or specimens thereof; (7) illegal trading in specimens of protected plants and animals; (8) causing habitat deterioration on protected lands; and (9) production, trade, or use of ozone-depleting substances.

The Directive required the Member States to accomplish two primary tasks. Firstly, each Member State was prompted to incorporate the offences listed in Article 3 in the national criminal law. Secondly, each state was obliged to introduce effective, proportionate, and dissuasive sanctions. The Directive allowed the level of harmonization of the national penal codes to vary from state to state. Some countries have achieved full compliance with the Directive's requirements, while others penalized just some of the crimes against the environment such as water, air or soil pollution. As a result, some environmental crimes have been harmonized only 'partially' with the Member States criminalizing only some of the offences listed in the Directive. Besides, it appeared that a few Member States which had incorporated new crimes into their criminal codes had a problem with their proper enforcement, largely due to the weak monitoring and limited resources.<sup>9</sup> Consequently, the Directive's transposition has not introduced a reform of the environmental criminal law fitting the general aims of the document. It has been reduced to simple adjustments and partial complements on a national level. Nonetheless, the Directive has established a new legal framework and standards in the area of environmental protection, the diversification and aggravation of the penalties applied, and the expressed provision of the criminal environmental liability.<sup>10</sup> Poland has implemented the Directive by introducing new legal provisions regarding water, air, and soil pollution with a substance or the contamination of the water, air and soil with ionizing radiation. New criminal provisions have been introduced related to inadequate waste management.<sup>11</sup>

The researchers even today indicate relatively low effectiveness of law enforcement and criminal justice agencies regarding environmental crimes. Cited among the reasons are improper control over the environment and little deterrent effect of the sanctions imposed.<sup>12</sup> In many states, the low number of prosecutions is accompanied by an even lower number of successful convictions. Also, there is a deficiency regarding subject matter experts in wild animal life and the area of environmental damage caused by toxic substances.<sup>13</sup> Nonetheless, since the provisions of the Directive have only recently been implemented, any decisive conclusions on the practical impact of the Directive on the protection of the environment in Europe should be considered as premature. In the Member States where environmental offences had already existed before the Directive 2008/99/EC, it has promoted a more comprehensive approach. Since then a few Member States have adopted special programs to prepare law enforcement officials to deal with numerous problems related to the evidence collection, optimal investigative and prosecution strategies.<sup>14</sup>

### 3. Environmental Criminal Law in Poland and Russia

In Poland, the penal provisions for crimes against the environment are described in Chapter 22 of the Polish Criminal Code (*Kodeks karny*) 1997 (CC RP).<sup>15</sup> The chapter is entitled 'Environmental crimes' and it covers the most serious environmental offences.<sup>16</sup> There are 14 major and 12 qualified types of environmental

<sup>9</sup> Keene (n 6).

<sup>10</sup> M Duğu, 'European Union law. Environmental crime in the EU: is there a need for further harmonisation or for new enforcement tools?' (2016) 1 Law Review 1, 81.

<sup>11</sup> Radecki (n 3) 219; S Raniszewski 'Dyrektywa Parlamentu Europejskiego i Rady w sprawie ochrony środowiska poprzez prawo karne oraz jej implementacja do polskiego porządku prawnego' (2012) Przegląd Prawa Ochrony Środowiska 2, 82.

<sup>12</sup> Faure and Weber (n 5) 839; U Ćemalović, 'Harmonisation of Serbian national legal system with European Union acquis – the case of environment' (2016) Economics of Agriculture 3, 891; A Luttenberger and L R Luttenberger, 'Challenges in regulating environmental crimes' (International 7 Maritime Science Conference, Solin, April 2006); R Pereira, 'Towards effective implementation of the EU Environmental Crime Directive? The case of illegal waste management and trafficking offences' (2017) 26 Review of European Comparative & International Environmental Law 2, 147.

<sup>13</sup> EUROJUST (n 7); M Faure, 'The development of environmental criminal law in the EU and its Member States' (2017) 26 Review of European Community & International Environmental Law 2 <<http://doi.org/10.1111/reel.12204>> accessed 4 December 2018.

<sup>14</sup> N T Rosell and M M Banqué, 'Study on the implementation of Directive 2008/99/EC on the protection of the environment through criminal law', European Network against Environmental Crime (ENEC) funded by the Criminal Justice Support Program of the European Union' (2016) <[http://Study-on-the-implementation-of-Directive-2008\\_99\\_ENEC\\_SEO\\_BirdLife\\_May2016.pdf](http://Study-on-the-implementation-of-Directive-2008_99_ENEC_SEO_BirdLife_May2016.pdf)> accessed 4 December 2018.

<sup>15</sup> Polish Criminal Code of 6 June 1997 [2019] L J 1950.

<sup>16</sup> R Zawłocki, 'Przestępstwa przeciwko środowisku przyrodniczemu' (2014) 14 Przegląd Prawa Karnego 1, 127.

crime, which can be divided into 2 groups: (1) environmental crimes of a general nature covered in Articles 181 (§ 1 – destruction of plant or animal life of considerable dimensions; § 3 – distraction of plants or animal life causing essential harm; § 4 – unintentional destruction of plant or animal life of considerable dimensions; § 5 – unintentional distraction of plants or animal life causing essential harm), 182 (the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water), 185 (the above mentioned criminal offenses with the aggravating circumstances) and (2) autonomous offenses covered in Articles 181 (§ 2 – destruction of plant or animal life in the protected area causing essential harm; § 5 – unintentional distraction of plants or animal life in the protected area causing essential harm), 183 (the collection, transport, recovery or disposal of waste), 184 (improper handling of nuclear materials or other sources of ionising radiation), 185 (the above mentioned criminal offenses with the aggravating circumstances), 187 (destructions or considerable damage or essentially reduction of the natural values of a protected area or an object), 188 (building of a new facility or extending an existing one, or conduction of business activity, which threatens the environment), 186 (lack of care for protective devices). Some crimes under the CC RP may also relate to environmental protection, as, for example, causing a life-threatening event (Article 163), immediate endangerment of a life-threatening event (Article 164), endangerment of a specific life-threatening event (Article 165), hindering an environmental inspection (Article 225) or timber theft (Article 290).

The severity of the penalties for the crimes defined in the Chapter underlines their seriousness. Depending on the crime, the penalty may be a fine, the restriction of liberty or even the long-term imprisonment (up to 10 years). Nevertheless, fines and suspended sentences are used more frequently. As the study on the enforcement of environmental protection legislation in Poland shows, the Directives 2008/99/EC and 2009/123/EC did not lead to a substantial increase in the number of people prosecuted, or more severe penalties imposed.<sup>17</sup> There is a wide disparity between the number of registered (suspected) crimes and the number of crimes confirmed (**Table 1**). Although the number of registered crimes is always higher than the number of prosecuted cases; in the case of environmental crimes in Europe those numbers are way below the average comparing to the other types of crime.<sup>18</sup>

The limitation period for environmental crimes is up to 5 years in the case of offences punishable by a maximum term of imprisonment of fewer than 3 years, 10 years in the case of offences punishable by a maximum term of imprisonment of more than 5 years but no more than 10 years, 15 years in the case of offences punishable by a maximum term of imprisonment of more than 5 years (Article 101 CC RP).

**Table 1:** Statistics on environmental crimes in Poland in 2009–2017. The number of recorded (suspected) crimes/number of confirmed crimes based on official statistical data of the Ministry of Internal Affairs (*Ministerstwo Spraw Wewnętrznych*) of Poland.

Year	Art.181	Art.182	Art.183	Art.184	Art.185	Art.186	Art.187	Art.188	Sum	%
2009	50/16	88/14	162/69	3/1	0/2	10/2	30/18	9/14	352/136	38.6
2010	61/17	68/12	191/52	1/1	1/0	9/4	28/8	18/18	377/112	29.7
2011	72/17	60/6	99/35	0/12	1/0	7/1	17/6	9/10	265/87	32.8
2012	50/13	95/8	172/42	1/0	0/1	12/2	18/5	5/2	353/91	25.7
2013	59/17	99/24	150/75	2/1	0/0	13/5	27/12	11/5	361/139	38.5
2014	80/17	91/14	172/56	3/0	0/0	12/2	28/12	9/14	395/115	29.1
2015	61/17	100/16	175/43	6/0	0/0	13/0	15/0	10/3	380/79	20.7
2016	68/31	109/19	224/48	3/0	1/0	15/0	25/0	5/3	450/101	22.4
2017	106/19	111/22	249/51	0/0	0/0	11/8	28/8	4/1	509/109	21.4

Source: Official statistical data of the Ministry of Internal Affairs of Poland (2009–2017) <<http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-3>> accessed 16 January 2018.

<sup>17</sup> EFFACE, *Fighting Environmental Crime in Poland* (Country Report 2018) <[http://efface.eu/sites/default/files/EFFACE\\_Fighting%20Environmental%20Crime%20in%20Poland.pdf](http://efface.eu/sites/default/files/EFFACE_Fighting%20Environmental%20Crime%20in%20Poland.pdf)> accessed 16 January 2018; Ministerstwo Spraw Wewnętrznych i Administracji, *Raport o stanie bezpieczeństwa w Polsce* (2016) <<https://bip.mswia.gov.pl/download.RaportostaniebezpieczenstwaPolsew2016roku.pdf>> accessed 12 April 2018.

<sup>18</sup> EnviCrimeNet, *Intelligence Project on Environmental Crime* (Report on Environmental Crime in Europe) 11, <[http://www.envicrimenet.eu/images/docs/ipecc\\_report\\_on\\_environmental\\_crime\\_in\\_europe.pdf](http://www.envicrimenet.eu/images/docs/ipecc_report_on_environmental_crime_in_europe.pdf)> accessed 07 December 2019.

**Table 2:** Statistics on environmental crimes in Russia in 2009–2017. The number of recorded suspected crimes/number of confirmed crimes based on official statistical data of the Ministry of Internal Affairs of the Russian Federation (*Министерство внутренних дел Российской Федерации*).

Year	Art. 246	Art. 247	Art. 250	Art. 251	Art. 252	Art. 258	Art. 260	Art. 261	Art. 262	Sum	%
2009	6	40	19	9	10	1516	24932	2461	96	46607/24248	52.1
2010	5	21	19	4	12	1540	20826	2925	110	39155/20567	52.5
2011	4	25	17	2	5	1517	16077	2393	92	29151/14695	50.4
2012	7	51	15	4	5	1613	15795	1753	65	27583/14103	51.1
2013	5	23	13	5	2	1640	14640	861	47	24728/13398	54.1
2014	24	31	17	2	7	1615	14834	1381	65	25566/13414	52.5
2015	14	36	29	6	3	1928	14192	1063	58	24856/13055	52.5
2016	no data	no data	no data	no data	no data	no data	no data	no data	no data	23688/11910	50.3
2017	no data	no data	no data	no data	no data	no data	no data	no data	no data	24379/12013	49.3

Source: Official statistical data of the Ministry of Internal Affairs of the Russian Federation' (2009–2017) <<https://мвд.рф/folder/101762>> accessed 16 January 2018.

The limitation of the enforcement period is up to 15 years (Article 103 CC RP). Certain circumstances described in Articles 102, 102 CC RP such as starting of proceedings against a person, interrupt the limitation period. The length of the limitation period demonstrates that the impunity for serious environmental offences should be a matter of significant concern in Poland. Theoretically, a long limitation period allows for effective prosecution; however, the basic facts may have become obscured by the passage of time, and the punishment, as well as the issue of restitution, may become irrelevant.

In Russia, environmental crimes are defined in Chapter 26 of the Russian Criminal Code (*Уголовный кодекс*) 1996 (CC RF) entitled 'Environmental crimes.'<sup>19</sup> The chapter contains a wider list of environmental offences in comparison with the Polish Criminal Code. There are 18 major and 23 qualified types of environmental crimes, although as in the case of Poland other crimes could also affect the environment. For example, the violation of safety rules during the siting, designing, building, or operating of facilities of atomic power engineering (Article 215 CC RF), concealment or distortion of information about developments, facts, or phenomena endangering the environment (Article 237 CC RF) may harm the environment.<sup>20</sup>

The crimes defined in Chapter 26 of the CC RF can be divided into 2 categories. Firstly, there are environmental crimes of a general nature, which includes the crimes listed in Articles 246 (violation of the rules for environmental protection during the performance of works), 247 (violation of the rules for dealing with environmentally hazardous substances and waste), 248 (violation of safety rules in dealing with microbiological or other biological agents or toxins), 253 (contravention of the laws on the continental shelf and the exclusive economic zone) and 262 (violation of the regime of specially protected territories and objects). The second group includes autonomous offences, such as deterioration of land (Article 254), violation of the rules for the protection and use of mineral resources (Article 255), illegal procurement (catching) of aquatic biological resources (Article 256), rules protecting aquatic biological resources (Article 257), illegal hunting (Article 258), violation of the veterinary rules (Article 249), pollution of water (Article 250), air pollution (Article 251), pollution of the marine environment (Article 252), destruction of critical habitats for organisms listed in the Red Data Book of the Russian Federation (*Красная книга*) (Article 259), illegal felling of forest plantations (Article 260) and damage or destruction to tree stands (Article 261). The crimes described above can also be divided into 2 categories depending on the defendants' *modus operandi* – (1) the offences related to the illegal use of natural resources covered in Articles 253, 256, 258, 260 of the CC RF and (2) the

<sup>19</sup> Russian Criminal Code of 13 June 1996 [1996] L J 25/2954.

<sup>20</sup> А И Игнатов and Ю А Красиков, *Уголовное право России: Учебник для вузов. Том 2: Особенная часть* [Russian Criminal Law: Textbook for Universities] (Norma 1998); А В Бриллиантов, *Уголовное право России. Части Общая и Особенная: Учебник* [The Criminal Law of Russia. General and Special Parts: A Textbook] (Prospect 2015).

offences related to unlawful actions against the environment resulting in its deterioration and destruction (Articles 246–252, 254, 255, 257, 259, 261, 262, 246–252, 254, 255, 257, 259, 261, 262).<sup>21</sup>

The maximum penalty provided in Chapter 26 of the CC RF does not exceed 5 years imprisonment, with some exceptions (Article 185). The Russian courts tend to impose relatively mild sanctions. In 2016, only 301 of the 8,642 felons accused of environmental crimes were being sentenced to actual imprisonment. The freedom-depriving penalties, if imposed by the Russian courts, usually do not exceed 3 years.<sup>22</sup> A fine is the most frequently used penalty. In 2011, it was levied in 26.7% of all sentences. In 2012 it was 34.1%, 38.1% in 2013, 32.1% in 2014 and 31.2% in 2015. 38.5% of the fines levied in 2011–2015 did not exceed 5,000 rubles (approximately 72 euros), 38.1% of the fines were between 5,000 and 25,000 rubles (355 euros), and 21% were between 25,000 and 500,000 rubles (7100 euros). Only 2.3% of all fines levied in this period exceeded 500,000 rubles. The penalty of imprisonment was introduced only in 2.4–4.4% of cases, and in 20.6–26.9% of cases, the court imposed a suspended sentence.<sup>23</sup>

The limitation period for environmental criminal offences is up to 6 years in the case of intentional offences punishable by a maximum term of imprisonment of fewer than 5 years and careless offences punishable by a maximum term of imprisonment of more than 3 years; 10 years in the case of intentional offences punishable by a maximum term of imprisonment of more than 5 years but no more than 10 years (Articles 15, 78 CC RF). The limitation of the enforcement period is up to 10 years (Article 83 CC RF). The limitation periods in Russia, therefore, are not too much different from those in Poland.

#### 4. Comparison of the Relevant Criminal Law Provisions

The general conditions for criminal liability in both countries are similar. Only a small number of environmental crimes are abstract endangerment offences, such as the offences listed in Articles 186 (Unperformed duty), 188 (Harmful activity) of the Polish CC RP and Articles 247 (Violation of the rules for dealing with environmentally hazardous substances and waste), 253 (Contravention of the laws on the continental shelf and the exclusive economic zone) of the Russian CC RF. Most environmental crimes involve (or pose a danger of) significant harm to the environment, human life, health, and well-being. In Poland, the courts assume that the resulting destruction must be severe enough to make the restoration impossible.<sup>24</sup> The resulting damage should be significant. The significance of the damage, in this case, is an evaluative hallmark not explicitly defined by the criminal law.<sup>25</sup> The CC RF also makes use of this term providing great discretion for law enforcement officials. In 2016, Articles 256, 260 and 261 of the CC RF were amended. The monetary equivalent of the damage was introduced to harmonize law enforcement practice. This, in turn, poses some further challenges: (1) an accurate monetary assessment in case of some types of environmental damage such as soil or water pollution is impossible; (2) monetary-based assessment method makes it possible for law enforcement officials to establish and prove only partial damage inflicted by the perpetrator. To some extent, the uncertainty was resolved by the Russian Supreme Court (*Верховный Суд*). In its ruling of 18 October 2012, the Supreme Court recommended environmental forensics experts to be recruited in each case to determine the extent of the damage. These experts should be selected among the staff of the Governmental Environmental Protection Agencies (*Государственные органы управления, контроля и надзора в области охраны окружающей природной среды*).

The need to establish and prove the causation link between the perpetrator's behavior and the damage is another challenge. The temporal remoteness of damage in some cases is often the issue. Plus, the liability in this type of criminal cases cannot be imposed without *mens rea*. The lack of full awareness and criminal intentions is a popular line of defense in such cases.<sup>26</sup>

<sup>21</sup> Э Н Жевлаков and Н В Сулова, 'Экологическая преступность в Российской Федерации в 1990–2000 гг.' [Ecological Crime in the Russian Federation in 1990–2000] (2000) *Уголовное Право* 3, 67; Д Н Джунусова, *Экологическая преступность и ответственность за экологические преступления* (Издательство ФГБОУ ВПО Саратовская государственная юридическая академия) [Environmental crimes and criminal responsibility] (Саратов 2013).

<sup>22</sup> Сводные статистические сведения о состоянии судимости в России за 2016 год, 10(1) *Отчет о числе привлеченных к уголовной ответственности и видах уголовного наказания* [Summary Statistical Information on the State of Criminal Records in Russia for 2016, 10(1) Report on Number of Persons Brought to Criminal Responsibility and Types of Criminal Punishment] <<http://www.cdep.ru/index.php?id=79&item=3834>> accessed 16 January 2018.

<sup>23</sup> Р А Забавко, 'Анализ практики назначения наказания за экологические преступления' [The punishment of environmental crimes: analysis of practice] (2017) *Адвокатская Практика* 3, 8.

<sup>24</sup> Case III KRN 98/93 Supreme Court [1993] OSNKW 9-10/64, Lex Polonica 302836.

<sup>25</sup> W Radecki, *Instytucje prawa ochrony środowiska. Geneza – rozwój – perspektywy* (Difin 2010).

<sup>26</sup> Case 21/2012 Russian Supreme Court's explanatory rulings [2012] *Обобщение Верховного суда Удмуртской Республики от 13 марта 2008 Справка по результатам обобщения судебной практики по уголовным делам и делам об*

In both countries, the indictment for an environmental crime must refer to the legal provisions violated by the perpetrator.<sup>27</sup> Given the complexity of environmental law, it can lead to a situation where the crime is not only difficult to prove but also difficult to detect. The law often changes before or even during the investigation. Thus, it may be difficult to reconstruct the legal situation in force at the time when the crime was committed. Environmental law is one of the least stable branches of Russian law. The same can be said about the Polish law.<sup>28</sup> It is estimated that in Russia there are more than 500 legal acts related to environmental protection including federal laws, codes and government decrees.<sup>29</sup> There are not only federal legal provisions. Every region can produce its regulations, as the environmental protection and environmental safety matters are subjected to the joint management of the federal and regional governments (Article 72 of the Russian Constitution [Конституция Российской Федерации]).<sup>30</sup> The interpretation of these legal may present a challenge on its own prompting the investigators to use environmental specialists.

Thus, the comparison of the criminal law provisions in Russia and Poland shows many similarities. However, there are also noteworthy differences. In Poland, penal provisions can be found in various acts on specific environmental subjects, such as the Environmental Protection Act 2001 (*Prawo ochrony środowiska*),<sup>31</sup> Hunting Law 1995 (*Prawo łowieckie*),<sup>32</sup> Act on the protection of animals 1997 (*Ustawa o ochronie zwierząt*),<sup>33</sup> Nature Conservation Act 2004 (*Ustawa o ochronie przyrody*),<sup>34</sup> Waste Law 2012 (*Ustawa o odpadach*).<sup>35</sup> The protection of the environment through criminal law in Poland is additionally enhanced by the imposition of administrative sanctions by the local authorities and specialized public institutions.<sup>36</sup> Actually, under Polish law, it is possible to establish administrative responsibility in parallel with the responsibility for environmental crimes and environmental petty offences administrative sanctions.<sup>37</sup> The latter could be even more severe (financially) than the criminal ones. It is also important that administrative responsibility is based on the objective criterion, there is no need in establishing the perpetrator's guilt.<sup>38</sup> Considering this, there is a tendency toward the further strengthening of the public authorities notably at the local level, as well as the decriminalization of environmental offences in favour of administrative liability.<sup>39</sup>

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административных правонарушений в области охраны окружающей среды и природопользования, а также о рассмотрении гражданских дел по искам о возмещении ущерба и другого вреда, причиненного в результате нарушения экологического законодательства [An overview of the practice of the Supreme Court of the Udmurt Republic in criminal cases and cases of administrative offenses in the field of environmental protection and environmental management, as well as on civil cases for claims for damages and other harm caused as a result of violation of environmental legislation of 13 March 2008] <[http://vs.udm.sudrf.ru/modules.php?name=docum\\_sud&rid=4](http://vs.udm.sudrf.ru/modules.php?name=docum_sud&rid=4)> accessed 19 December 2018; Обзор Кемеровского областного суда от 12 марта 2008 'Обзор судебной практики по рассмотрению судами Кемеровской области уголовных дел и дел об административных правонарушениях в области охраны окружающей среды и природопользования, а также о рассмотрении судами гражданских дел по искам о возмещении ущерба и другого вреда, причиненного в результате нарушения экологического законодательства [An overview of the practice of the Kemerovo Regional Court in criminal cases and cases of administrative offenses in the field of environmental protection and environmental management, as well as on civil cases for claims for damages and other harm caused as a result of violation of environmental legislation of 12 March 2008] <<http://www.garant.ru/products/ipo/prime/doc/7465314/>> accessed 19 December 2018.

<sup>27</sup> Н И Верченко, 'Объективная сторона экологических преступлений' [The *actus reus* of environmental crimes], 2016 Современное Право 10, 123.

<sup>28</sup> Such convoluted mirrors the complexity of the environmental protection itself and thus might be considered a general phenomenon, common to many modern states.

<sup>29</sup> Бриллиантов (n 21) 125.

<sup>30</sup> Constitution of the Russian Federation of 12 December 1993 [2020] L J 144/8198.

<sup>31</sup> Environmental Protection Act of 27 April 2001 [2019] L J 1396.

<sup>32</sup> Hunting Law Act of 13 October 1995 [2020] L J 67, 148, 695, 875.

<sup>33</sup> Act on the protection of animals of 21 August 1997 [2020] L J 638.

<sup>34</sup> Nature Conservation Act of 16 April 2004 [2020] L J 55, 471.

<sup>35</sup> Waste Law of 14 December 2012 [2020] L J 797, 875.

<sup>36</sup> A Wróbel, *Artykuł 189(b) Kodeksu postępowania administracyjnego. Komentarz*: VIII edn (Wolters Kluwer Polska 2018) <<https://sip-1lex-1pl-10000f4km0c1b.han.uwm.edu.pl/#/commentary/587762532/617487>> accessed 16 June 2020.

<sup>37</sup> D Danecka, *Konwersja odpowiedzialności karnej w administracyjną w prawie polskim* (Difin 2018); Criminal liability and administrative liability see Case II SA/Go 17/20 Provincial Administrative Court in Gorzów Wielkopolski [2020], LEX 2837728.

<sup>38</sup> K Gruszecki, *Article 3(i) Rybactwo śródlądowe. Komentarz* (Wolters Kluwer Polska 2018) <<https://sip-1lex-1pl-0000f4km0c1b.han.uwm.edu.pl/#/commentary/587822395/619835>> accessed 16 June 2020; Objectivizing administrative responsibility referred to in Article 88(1) of the law on nature see Case SA/OI 772/19 Provincial Administrative Court in Olsztyn [2019], LEX 2895554.

<sup>39</sup> W Radecki, 'Zastępowanie odpowiedzialności karnej odpowiedzialnością administracyjną na przykładzie prawnej ochrony środowiska' in A Michalska-Warias and others (eds), *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Bojarskiemu* (UMCS Press 2011); W Radecki, 'Kilka uwag o zastępowaniu

Russian criminal law is a codified one. Penal provisions regarding environmental crimes can be found only in the Russian CC RF. Another distinguishing feature is the place environmental crimes occupied in the internal structure of the law. In Russia, all environmental crimes are determined in Chapter 26 of the CC RF entitled 'Crimes against public safety and public order.' This is not a coincidence, as the public safety and public order have always been considered more important than the protection of the environment. The fact that these crimes have been incorporated in the chapter dedicated to public safety indicates that these offences should be treated from the perspective of the environmental safety of the population, not as a value in itself.<sup>40</sup> By contrast, in Poland, environmental crimes are separated from other crimes. The fact that there is a special chapter dedicated to them may suggest that the environment itself is considered to be the main object of protection.<sup>41</sup> However, it should be remembered that most of the crimes described in Chapter 26 of the CC RF relate directly to human life and health. Hence, the environment itself is also an object of protection. The Russian concept of 'environmental safety of the population' has a much broader meaning than it may appear giving the literal meaning of the legal provisions mentioned above. As it can be deduced from the provisions of Article 1 of the Federal Law on Environmental Protection (*Об охране окружающей среды*) 2002 the law equally protects both the environment and individual and societal well-being.<sup>42,43</sup> Some Polish researchers, in turn, note that the crimes against the environment defined in Chapter 22 of the CC RP follow immediately after the crimes against freedom. The Polish legislator thereby emphasizes a special significance of the 'public good,' that is the natural environment.<sup>44</sup> By contrast, Chapter 26 of the CC RF follows the chapters describing crimes against life and health (Chapter 16), personal freedoms (Chapter 17), economic crimes (Chapters 21, 22 and 23), crimes against public security (Chapter 24), public health and morality (Chapter 25). We suggest that this may be an issue concerning the guiding priorities for law enforcement. Relatively limited budget allocations for environmental protection activities in Russia are another proof of the long-lasting discrepancy between public interests and the interest of environmental protection.<sup>45</sup>

The Russian Federation is not compelled to implement the provisions of the Directive 2008/99/EC regarding the criminal responsibility of legal persons. In contrast to Poland, Russian law does not recognize the responsibility of legal persons despite numerous studies showing the practical advantages of its introduction.<sup>46</sup> As of today, the legal persons in Russia can be held responsible for the environmental damage under the general civil law provisions. Nonetheless, it is necessary to keep in mind that in such a case the persons having a leading position within the legal entity's structure should be found guilty of a crime or petty administrative offence. In practice, the criminal investigators need to identify direct perpetrators – employees, and then to prove that they were acting at the employer's request. Therefore, the legal entities in Russia bear only limited responsibility. In Poland, the provisions on the criminal responsibility of legal entities require that an offence is committed by a natural person who acts on behalf of and in the name of the legal entity under the authority or duty to represent it, to make decisions in its name and to exercise internal control. Since there is always an excuse that the employee (if there is one) was acting independently without the employer's authorization, it is extremely difficult to establish the guilt of such a person. Studies show that there are considerable implementation problems regarding the prosecution of legal persons for environmental criminal offences.<sup>47</sup>

In both countries, environmental crimes are prosecuted *ex officio* as indictable offences, and law enforcement officials are obliged to investigate them. Unlike Poland, in Russia, there is a system of prosecutors' supervision concerning environmental protection laws established in 1986. There are 82 specialized

odpowiedzialności karnej odpowiedzialnością administracyjną' in M Bojarski (ed), *Współczesne problemy nauk penalnych. Zagadnienia wybrane* Wrocław (UWr Press 1994).

<sup>40</sup> С. И. Голубев, 'Экологическое преступление: в лабиринте определений' [Ecological crime: in the maze of definitions] (2017) *Lex Russica* 9, 134.

<sup>41</sup> W Radecki (n 25) 218.

<sup>42</sup> Federal Law of 10 January 2002 7-FZ on Environmental Protection [2002] L J 2/133.

<sup>43</sup> Н. Г. Жаворонкова and Ю. Г. Шпаковский, *Правовое обеспечение экологической безопасности в условиях экономической интеграции Российской Федерации: монография* [Assuring environmental security in the context of economic integration of the Russian Federation: monograph] (Prospect 2017).

<sup>44</sup> CC RP 1997, s 22.

<sup>45</sup> Newell and Henry (n 4).

<sup>46</sup> Э. Н. Жевлаков, 'К вопросу об ответственности юридических лиц за совершение экологических преступлений' [Criminal liability of legal entities for environmental crimes] (2002) *Уголовное Право* 1, 10; С. Т. Фаткулин, 'Уголовная ответственность юридических лиц за экологические преступления' [Criminal liability of legal entities for environmental crimes] (2012) *Законность* 11, 7.

<sup>47</sup> M Werbel – Cieślak, *Rola przepisów o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary w polskim systemie prawnej ochrony środowiska* (Difin 2014).



prosecutor's offices with more than 500 prosecutors currently employed.<sup>48</sup> Nonetheless, there are no specialized environmental units within the police forces. Environmental investigations are carried out by police investigators who often lack special training and considerable experience. It can be assumed that the lack of adequate preparation and specialization among criminal investigators affects the number of successfully prosecuted cases.

## 5. The Analysis of Publicized Investigative Activity and Adjudicated Cases

The number of environmental crimes being reported, investigated, and brought to trial in both countries is relatively small. Environmental criminal offences account for less than 1% of the total number of the reported crimes. There are also significant differences between the number of recorded (possible) offences and the number of confirmed crimes. The law gives broad discretion to law enforcement authorities. The act formally exhibiting the indicia of a crime can be categorized as a minor, administrative offence.<sup>49</sup> It is often in the law enforcement's best interest since under the administrative law there is no requirement to prove the offender's guilt, just the mere fact that there was a violation of the law. Such a selective approach should be considered when discussing official crime rates.<sup>50</sup> It should also be born in mind that an unknown number of environmental offences went unrecorded. In Russia, the number of unrecorded environmental crimes is estimated at 95–99%, though so far there have been no objective studies on the issue.<sup>51</sup> In Poland, there is no reliable data on the unrecorded crimes either. As **Table 1** shows, the intensity of police activity may increase the total number of known offences, as well as improve clearance rates. However, it is certainly possible that the 'universe' of environmental crimes in both countries is only in part described by the number of registered and confirmed offences.

At first glance, Russian criminal statistics indicate more efficient law enforcement, since it seems that every second recorded crime is confirmed. The dynamics of the number of recorded crimes appear positive (**Table 2**). However, these statistics should be approached with caution. In Russia, not all reported crimes are recorded, and the state officials confess that in its current state the Russian central crime register cannot provide reliable data. To an extent, this is indicated by the number of citizens' applications concerning environmental protection issues received by the Russian Commissioner for Human Rights (*Управомоченный по правам человека в Российской Федерации*). In 2015, 125 such applications were registered, thus, in 2016 the number increased to by more than 30% (399).<sup>52</sup> Some reported crimes remain unregistered or left recorded as petty offences. By contrast, every allegation of a crime in Poland is recorded, regardless of the police's knowledge of a person responsible and the prospects of successful prosecution. This can partly explain the difference between the number recorded offences and the number of confirmed environmental crimes in Poland.

## 6. Discussion

In both countries, law enforcement officials face many challenges pursuing environmental criminal offences. The national law gives them broad discretion in deciding whether the unlawful behavior constitutes a crime or petty offence. As a result, law enforcement can be selective. Of course, this does not necessarily mean that it becomes ineffective. Selective law enforcement may be provoked by the limited law enforcing resources, current statute limitations and individual quality difference of police staff. The situation is different when law enforcement officials select the rules they enforce according to their preferences, rather than the law. Then the quality of law enforcement suffers. Selective law enforcement can be manipulated

<sup>48</sup> The Prosecutor General's Office of the Russian Federation, Best practices of prosecutors dealing with combating environmental crime in Russia were discussed during the 22 Annual Conference of the International Association of Prosecutors <[https://eng.genproc.gov.ru/smi/international\\_contacts/news-1251704/](https://eng.genproc.gov.ru/smi/international_contacts/news-1251704/)> accessed 4 April 2018.

<sup>49</sup> M Werbel-Cieślak, 'Wybrane aspekty przestępstw i przestępczości przeciwko środowisku (w świetle danych statystycznych i badań aktowych)' in W Pływaczewski (ed), *Prawnokarne i kryminologiczne aspekty ochrony środowiska* (WSPOL Press 2012).

<sup>50</sup> А В Мелехин, 'Административно-правовой механизм обеспечения законности в сфере экологии' [The administrative and legal mechanism for ensuring legality in the sphere of ecology] (2016) *Lex Russica* 11, 33; Н И Хлуденева, 'Эффективность правового регулирования охраны окружающей среды в России: от конфликта целей к экологическому правопорядку' [The effectiveness of legal regulation in the sphere of environmental protection in Russia: from the conflict of objectives to environmental law and order] (2017) *Журнал Российского Права* 12, 141; Федеральная служба государственной статистики, *Правонарушения, Основные показатели по преступности* [Federal Service of State Statistics, Offenses, Key Indicators for Criminality] <[http://www.gks.ru/wps/wcm/connect/rosstat\\_main/rosstat/ru/statistics/population/infraction/#](http://www.gks.ru/wps/wcm/connect/rosstat_main/rosstat/ru/statistics/population/infraction/#)> accessed 12 April 2018.

<sup>51</sup> Жеваков and Сулова (n 22) 69.

<sup>52</sup> *Доклад Уполномоченного по правам человека в Российской Федерации за 2016 год* [Report of the Commissioner for Human Rights in the Russian Federation for 2016] <[http://ombudsmannf.org/www/upload/files/docs/appeals/doc\\_2016\\_medium.pdf](http://ombudsmannf.org/www/upload/files/docs/appeals/doc_2016_medium.pdf)> accessed 4 April 2018.

within rational limits by introducing monetary equivalent for the damage assessment. It has, however, its downsides when we consider the interests of environmental protection. The lines are often drawn arbitrary and do not always correspond to the needs of crime prevention. Plus, certain types of environmental damage cannot be assessed based on monetary value. In our opinion, wider use of administrative sanctions and simplified administrative procedures can be an effective remedy considering less significant environmental offences, such as the performance of a given activity without the required authorization, fail to meet certain requirements and fulfil other administrative duties. Exceptions should be made for the offences resulting in human death, significant health issues or permanent harm to the environment. An important element of legal environmental protection is the criminal responsibility of legal persons for environmental violations. The lack of pertinent legal provisions or their ineffective enforcement does not contribute to the due level of accountability of commercial enterprises. Legal entities should be subjected to financial sanctions in case an offence has been committed in the context of commercial activity without an element of personal guilt.<sup>53</sup> It should be noted that in Poland, there is a clear tendency to depart from criminal responsibility in favour of administrative responsibility, as the latter in certain situations can be more deterrent and proportional. At the same time, law enforcement authorities prosecute more serious environmental offences. It applies to both natural and legal persons. This practice can be regarded as an example.

The Russian experience, in turn, shows the necessity of establishing specialized investigative bodies within the police as a response to the development of this crime phenomena. It has proven to be the most efficient approach to deal with other crimes such as terrorism, organized crime, or money laundering. The staff within these units should be appointed based on qualifications and receive specialized training. Nonetheless, we should remember that other criminal offences may as well be related to environmental protection. So, it is necessary to provide for greater coordination between the police units.

Currently, most environmental crimes in Polish and Russia are consequential offences. This means that in each case law enforcement officials must establish a causation link between the alleged violation of environmental provisions and the defendant's behavior, which often constitutes a major challenge for law enforcement. There is usually a time lag between the damage and alleged activities. Nature itself is changing constantly effectively masking any traces of the crime. We suggest that instead, the risk-based approach may be a better alternative to avoid the difficulties relating to the issue of causation.<sup>54</sup>

## 7. Conclusions

1. The Directive 2008/99/EC has brought significant changes to environmental criminal law. Nonetheless, despite the resulting extension of criminal provisions and further tightening of the sanctions the law enforcement of amended provisions presents many challenges. The relatively low numbers of recorded crimes and successful prosecutions indicate that law enforcement officials experience difficulties dealing with this type of crimes. The complexity of such cases provokes selective enforcement which does not always correspond with the interests of environmental protection.
2. The sanctions provided for by criminal law indicate that environmental crimes in both countries are treated, at least formally, as serious criminal wrongdoings. A closer look, however, reveals inadequate treatment of the criminal offenders with fines and conditional imprisonment prevailing. This does not correspond with the interests of environmental protection either. Nonetheless, the introduction of administrative responsibility for the infringements of the national environmental law in Poland may compensate these shortcomings of the case-law.
3. The lack of corporate criminal liability or its ineffective enforcement is also the issue. Nonetheless, there should be a more selective approach. Legal persons should be held criminally liable for the serious environmental wrongdoings resulting in human death, serious health issues, as well as permanent and considerable harm to the environment, committed for their benefit by any natural person.

## Competing Interests

The authors have no competing interests to declare.

<sup>53</sup> M Hall and T Wyatt, *Environmental prosecution report tackling environmental crime in Europe* (LIFE-ENPE Report Environment Agency Horizon House 2017).

<sup>54</sup> M Hall, *Victims of Environmental Harm: Rights, Recognition and Redress Under National and International Law* (Routledge 2013).

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