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French Climate and Resilience Law: What impact on environmental criminal law?

Law No. 2021-1104 of August 22, 2021 on combating climate change and strengthening resilience to its effects (the “Climate and Resilience Law”), adopted on July 20, 2021, was promulgated on August 24, 2021. Its provisions are inspired by the proposals of the Citizens’ Climate Convention. The final text includes 305 Articles in 8 Titles. Some provisions came into force as soon as the Climate and Resilience Law was promulgated, while other measures will apply in 2022, 2023, 2025, up to 2034.

This article provides a focus on the new developments in environmental criminal law.

The Climate and Resilience Law mainly toughens the scale of existing penalties in environmental matters (for example, marine pollution : Article L. 218-11; Article L. 218-34; Article L. 218-48; Article L. 218-64; Article L. 218-73 of the French Environmental Code) or illegal activities on protected sites (Article L. 331-26 and L. 331-27 of the French Environmental Code), and creates an offense of endangering the environment and an offense of damaging the environment.

Offense of endangering the environment

Article 279 of the Climate and Resilience Law created an offense of endangering the environment in situations of non-compliance with applicable requirements under special environmental policies.

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It should be recalled that the French Environmental Code already includes an article that punishes serious harm to the health or safety of people or serious harm that has caused a substantial degradation of the fauna and flora or the quality of the air, soil or water.

Specifically, Article L. 173-3 of the French Environmental Code provides that:

“When they have seriously harmed the health or safety of people or caused a substantial degradation of the fauna and flora or the quality of the air, soil or water:

1° The fact of building a structure, operating a facility, carrying out works or conducting an activity subject to an authorization, registration or declaration regime, without satisfying the requirements set by the administrative authority, is punishable by two years’ imprisonment and a fine of 75,000 euros;

2° The actions provided for in Article L. 173-1 and Article L. 173-2-I are punishable by three years’ imprisonment and a fine of 150,000 euros;

3° The actions provided for in Article L. 173-2-II are punishable by five years’ imprisonment and a fine of 300,000 euros”.

This concerns the offenses of operating a “classified facility for the protection of the environment” (*Installation Classée pour la Protection de l’Environnement* or “ICPE” in French) or “facilities, structures, works and activities” (*Installations, Ouvrages, Travaux et Activités* or “IOTA” in French) without authorization or in violation of a requirement (refusal, withdrawal of authorization, closure, etc.) or in the absence of remediation following the discontinuation of an activity (Article L. 173-1 of the French Environmental Code) or the offenses of continuing an operation or activity, operation of a facility or structure without complying with a formal notice (Article L. 173-2 of the French Environmental Code).

The Climate and Resilience Law includes three provisions allowing to impose criminal sanctions not for environmental damage but for the risk of environmental damage.

As such, it creates a new Article L. 173-3-1 in the French Environmental Code according to which:

“When they directly expose fauna, flora or water quality to an immediate risk of serious and lasting harm, the actions provided for in Articles L. 173-1 and L. 173-2 are punishable by three years’ imprisonment and a fine of 250,000 euros, this amount may be increased to three times the benefit derived from the perpetration of the offense.

Is considered lasting, within the meaning of this Article, any harm likely to last at least seven years.

The first paragraph of Article 131-38 of the French Criminal Code applies only to fines expressed in terms of absolute value.”

An identical provision is included in the criminal penalties for non-compliance with waste regulations (Article L. 541-46, X of the French Environmental Code) and for the transport of hazardous materials (Article L.

1252-5, II of the French Transport Code).

It is to be feared that this time-line requirement will make any attempts to characterize the offense useless, as it is likely to give rise to endless debates on the potential duration of the harm, whereas Article L. 173-3 only requires a substantial degradation.

Offense of damaging the environment

Article 280 of the Climate and Resilience Law created in Book II of the French Environmental Code devoted to aquatic environments a new Title III dealing with general damage to physical environments.

It should be noted that the insertion of this new Title III within the Book devoted to water is perplexing since it contains offenses that are not specific to this environment. Indeed, air, waste and even species – which are not physical environments – are also concerned.

The three new offenses defined under Title III concern the pollution of physical and biological environments, the abandonment of waste, and ecocide (where there is an element of intent).

General offense of polluting physical and biological environments

The Climate and Resilience Law creates a new general offense polluting of the environment (Article L. 231-1 of the French Environmental Code), which can lead to the qualification of ecocide if there is an element of intent (Article L. 231-3 of the French Environmental Code).

As such, Article L. 231-1 of the French Environmental Code targets:

“The fact, in manifestly deliberate violation of a particular prudential or safety obligation provided for by law or regulation, of emitting into the air, throwing, spilling or letting flow into surface or underground waters or into seawaters within the limits of territorial waters, directly or indirectly, one or more substances whose action or reactions result in serious and lasting harmful effects on health, flora, fauna, with the exception of the damage mentioned in Articles L. 218-73 and L. 432-2, or serious modifications of the normal water supply system”.

The applicable penalties are *“five years’ imprisonment and a fine of one million euros, which may be increased up to five times the benefit derived from the perpetration of the offense”.*

Some restrictions are provided for:

- With regard to discharges into water: It does not apply to the damage mentioned in Articles L. 218-73 and L. 432-2, i.e., respectively, aquatic pollution having an impact on aquatic fauna and flora or fish fauna;
- With regard to air emissions: It applies only if the emission limit values set by decision of the competent administrative authority are exceeded;

- With regard to authorized discharge operations and the use of authorized substances: It applies only in the event of non-compliance with the requirements set by the competent administrative authority.

Finally, it is specified that *“harmful effects on health or damage to flora or fauna that are likely to last at least seven years are considered to be lasting”*. And that the limitation period for prosecuting this offense *“starts running from the discovery of the damage”*.

Offense of abandoning waste

In the same way, a new offense specific to the abandonment of waste is created (Article L. 231-2 of the French Environmental Code), which can also lead to the qualification of ecocide if there is an element of intent (Article L. 231-3 of the French Environmental Code).

This offense targets:

“The fact of abandoning, depositing or causing to be deposited waste, under conditions contrary to Chapter I of Title IV of Book V, and the fact of managing waste, as defined in Article L. 541-1-1, without complying with the requirements concerning the characteristics, quantities, technical conditions for taking charge of the waste and the treatment processes implemented, as set out in application of Articles L. 541-2, L. 541-2-1, L. 541-7-2, L. 541-21-1 and L. 541-22, when they cause a substantial degradation of the fauna and flora or the quality of the air, soil or water.”

The applicable penalties are three years’ imprisonment and a fine of 150,000 euros.

The limitation period for prosecuting this offense *“starts running from the discovery of the damage”*.

Offense of ecocide

These two offenses – general pollution of physical and biological environments on the one hand and abandonment of waste on the other hand – are qualified as ecocide when they have been committed intentionally (Article L. 231-3 of the French Environmental Code).

It should be noted that the discussions on ecocide have been very lively.

The inclusion of ecocide into French law was initially defended by a bill presented in 2019. Ecocide, defined as *“any concerted and deliberate action tending to directly cause widespread, irreversible and irreparable damage to an ecosystem, committed with knowledge of the consequences”*, would have been punishable *inter alia* by a fine of 20% of the total annual worldwide turnover of the previous financial year.

This idea was taken up by the proposals of the Citizens’ Climate Convention, which had defined ecocide as *“any action having caused serious ecological damage by participating in the manifest and non-negligible overstepping of planetary limits, committed with knowledge of the consequences that were to result therefrom and which could not be ignored.”*.

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In the end, the definition was significantly reworked.

As such, Article L. 231-3 of the French Environmental Code provides as follows:

“The offense provided for in Article L. 231-1 constitutes ecocide when the actions are committed intentionally”.

“The offenses provided for in Article L. 231-2, committed intentionally, also constitute ecocide when they lead to serious and lasting damage to health, flora, fauna or the quality of the air, soil or water”.

The penalties are *“increased to ten years’ imprisonment”* and *“4.5 million euros, this amount can be increased to ten times the benefit derived from the perpetration of the offense”*.

“Harmful effects on health or damage to flora, fauna or the quality of soil or surface or ground water that are likely to last for at least seven years” are considered lasting.

Finally, the statute of limitations *“starts running from the time the damage is discovered.”*

Lastly, the limitation period for prosecuting this offense *“starts running from the discovery of the damage”*.

Conclusion

In the end, the scope of the offenses partially overlaps with that of certain existing offenses: For example, the offenses of water pollution and abandonment of waste in aquatic environments (Article L. 216-6 of the French Environmental Code) or the offense of abandonment of waste (Article L. 541-46, 4° of the French Environmental Code).

Regarding the general time limit for pollution of physical and biological environments, it is more a question of aggravating the previous offense of pollution of aquatic environments and extending it to air pollution, soil pollution being excluded.

The recognition of ecocide is mostly symbolic. Given the required duration of the effects (7 years) and the intentionality requirement (which will be hard to characterize), one can imagine that this offense will be difficult to establish.

It should be noted that for the offenses described above (provided for in Articles L. 173-3 and L. 231-1 to L. 231-3 of the French Environmental Code mentioned above), the court may, in addition to fine and imprisonment, also require the convicted person to proceed with the restoration of the natural environment within the framework of the procedure under Article L. 173-9 of the said Code (Article L. 231-4 of the French Environmental Code).

It should finally be added that Article 288 of the Climate and Resilience Law established a legal framework for the Bureau of Investigation and Analysis of Industrial Risks (*Bureau d’Enquêtes et d’Analyses sur les Risques Industriels* or “BEA-RI” in French) which had been created following the Lubrizol accident in September 2019.

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