



EUROPEAN POLICY BRIEF

INTRODUCTION



ENVIRONMENTAL CRIME (EFFACE)

Policy Brief 17: Pros and cons of harmonising criminal sanctions on environmental crime

MARCH 2016

Prior to the Lisbon Treaty (Treaty on the Functioning of the European Union – TFEU),¹ which entered into force on 1 December 2009, the European Union (EU) had no express competence to enact rules to approximate substantive criminal law. Moreover, the EU did not have any competence to prescribe the type and level of sanctions for a certain criminal behaviour – it was up to the Member States to determine this.

The Environmental Crime Directive (Directive 2008/99/EC – ECD)² entered into force on 26 December 2008, a year before the Lisbon Treaty. The ECD was enacted under the EU's (then European Community's – EC) competence in the area of environmental policy. However, given the EU did not at that time have the competence introduced by the Lisbon Treaty to harmonise criminal sanctions, vague terms like "effective, proportionate and dissuasive" were used to describe the appropriate penalties in the ECD. As a consequence, Member States have the discretion to transpose the directive in a manner that suits their respective national contexts and existing legal cultures. This also means that there is plenty of room for divergent transposition and enforcement practices in Member States.

The EFFACE project has extensively discussed whether harmonisation of the rules on sanctions at the EU level, now formally possible, would be desirable or not. The researchers involved in EFFACE hold no uniform view on the matter and have therefore chosen not to come up with conclusions on the desirability of harmonisation of sanctions. However, EFFACE has taken the debate on the pros and cons forward. This policy brief summarises the debate as it stands at the end of the project.³ It goes without saying that further research is needed, also as more data about the impact of environmental crime in the EU and globally become available.

¹ Consolidated Version of the Treaty on the Functioning of the European Union. *OJ C 326/49*, 26.10.2012.

² 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 328/28*, 06.12.2008 (hereinafter "ECD").

³ The present brief is based on the respective section Faure M. et al., *Conclusions and recommendations*, 2016, <http://efface.eu/efface-conclusions-and-recommendations>.

Article 83 TFEU as a basis for harmonising sanctions

In theory, the harmonisation of sanctions at the EU level could take different forms. There could be EU rules on minimums sanctions in the form of “behaviour x should be punishable with a fine of at least y or at least z months in prison in Member States”. A different approach would be to harmonise minimal maximum sentences, in the form of “behaviour x should be punishable with a maximum sentence of no less than z months in prison in Member States”. Whichever approach towards harmonising sanctions is chosen, the question is whether Article 83 TFEU would provide a sufficient legal basis. The article contains two relevant paragraphs: Article 83(1) TFEU and Article 83(2) TFEU.

While the EU cannot adopt a general EU criminal code, by virtue of Article 83(1) TFEU, it can now, within limits, “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” (emphasis added). Article 83(1) TFEU lists ten crimes, the so-called Euro Crimes, which are deemed to have sufficient cross-border impact that the EU can set minimum rules in their regard. These are:

1. terrorism;
2. trafficking in human beings;
3. sexual exploitation of women and children;
4. illicit drug trafficking;
5. illicit arms trafficking;
6. money laundering;
7. corruption;
8. counterfeiting of means of payment;
9. computer crime; and
10. organised crime.

Environmental crime is not included in this list, but the article goes on to state that “[o]n the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified” in paragraph 1 of Article 83.⁴ While observations in the field of environmental crime would warrant a decision to include environmental crime in the list, one can also argue that it is already there. There are instances of “organised” environmental crime, which intermingles with, a few other offences listed such as terrorism, illicit drug trafficking and money laundering.⁵ Throughout the EFFACE project, researchers have emphasised that environmental crime often transcends borders and/or may involve elements of organised crime. Environmental crime may also involve corruption and bribery of authorities as well as money laundering as the illicit proceeds gained from it have to be laundered in some way or another.⁶

While recognising that the cross-border factor alone does not make environmental crime a serious crime *per se*, the EFFACE project calls for environmental crime to be considered a potentially serious crime.⁷ This is because violations of environmental legislation can have serious negative impacts of the livelihoods and health of the communities who are dependent on intact environments, lead to the extinction of threatened or endangered (iconic) species and irreversibly degrade the environment. For example, epidemiological studies have suggested that illegal waste disposal contributes to a high level of cancer mortality,⁸ and that illegal poaching leads to the loss

⁴ A 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.

⁵ See Luna, M. and Veening, W., *EFFACE Policy Brief 2 on Organised Environmental Crime* (November 2014).

⁶ *Ibid*, for examples of how various forms of crime may be combined, e.g. illegal fishing and illicit drug trafficking.

⁷ See Faure, M. et al, *EFFACE Conclusions and Recommendations* (March 2016), pp. 9-10.

⁸ See EFFACE Case Studies: D’Alisa, G. et al (2013), *Victims in the “Land of Fires”: a case study on the consequences of buried and burnt waste in Campania, Italy* and Geeraerts, K., Illes, A. and Schweitzer, J.P. (2015), *Illegal shipment of e-waste from the EU: A case study on illegal e-waste export from the EU to China*.

of natural capital through the loss of tourism and its associated income.⁹ Illegal wildlife trade and illegal waste dumping are two crimes that are currently of high priority on the political agenda. The EU is a major generator of waste (and has recently adopted a circular economy package to optimise waste management) and remains a crucial transit point for illegal wildlife products.

Under Article 83(2) TFEU the introduction of minimum rules on the definition of criminal offences and sanctions is possible if they are essential for ensuring the effectiveness of a harmonised EU policy or its enforcement. In practice, the EU has made use of Art. 83(2) TFEU once so far: the Directive on Market Abuse (Directive 2014/57/EU) requires Member States to ensure that certain offences are punishable with a defined maximum term of imprisonment; moreover, it obliges Member States to adopt certain rules on the liability of legal persons.

In the area of environmental crime, the ECD was adopted in reaction to the disparities present in the existing system within the EU for the protection of the environment.¹⁰ Article 83(2) TFEU could be used as a basis for harmonising sanctions on environmental crime if there is reason to believe that the prescribed criminal framework does not provide sufficient protection of the environment. An official review of the implementation of the ECD has not yet taken place.¹¹ However, some existing studies on the ECD point out some weaknesses of the implementation of the ECD by Member States affecting its effectiveness. In the Member States, there are different levels of penalties for the same offence (e.g. maximum fine of € 150,000 for a CITES violation in France compared to € 810,000 for the same violation in the Netherlands). On the enforcement side, there is a low number of prosecutions of environmental crime and an even lower number of convictions.¹²

ARGUMENTS FOR AND AGAINST HARMONISING SANCTIONS

The following paragraphs will explore the arguments for and against the harmonisation of criminal sanctions in so far as is legally feasible under Article 83 TFEU. Each argument will begin with a general description of the theme, followed by a summary of the arguments on the advantages of harmonising and then a summary of the arguments on the disadvantages.

Are harmonised criminal sanctions needed for effective deterrence and enforcement throughout the EU?

The incentive for committing environmental crimes is often profit. Perpetrators – whether individuals or companies – may break environmental laws if the expected profit is high and the risk of detection and/or substantial sanctions are low. In particular in cases where the cost of compliance exceeds the eventual penalty, companies may take the risk of absorbing an eventual penalty as ordinary business cost. Currently, penalties, even when imposed, are often low; the sanctioning systems of the Member States therefore have little “bite”.¹³

Against this background, one argument made in favour of harmonising criminal sanctions for environmental crime throughout the EU is that **environmental crime could be addressed more effectively if Member State were to impose more severe sanctions** for environmental crime. Obliging them through EU legislation to adopt stricter criminal sanctions on paper in their national

⁹ See Farmer, A., *EFFACE Policy Brief 15 on Quantifying the Impacts of Environmental Crime* (December 2015).

¹⁰ See Preamble 3 ECD.

¹¹ However, the Commission has commissioned an external assessment of the implementation of the ECD in the Member States. The reports are available at http://ec.europa.eu/justice/criminal/criminal-law-policy/environmental-protection/index_en.htm.

¹² Eurojust, *Strategic Project on Environmental Crime Report* (November 2014), p. 28.

¹³ For more examples of these factors, see Chin, S., Veening, W. and Gerstetter, C., *EFFACE Policy Brief 1 on Limitations and challenges of the criminal justice system in addressing environmental crime* (November 2014).

legal systems is seen as a first step in this regard. In this context, it is assumed that criminal sanctions will have a stronger deterrent effect on criminals than other types of sanctions.

It is argued that if sanctions are not harmonised, **businesses or other perpetrators of environmental crime may be inclined to “shop” for the Member State with the lowest level of sanctions** to set up business or to conduct the criminal activity. Eventually, this will encourage a race to the bottom, such as with “pollution havens”.¹⁴ A Member State with low statutory sanctions could appear as a very attractive location to do business for the less compliant.

However, **the harmonisation of sanctions is no guarantee that environmental crimes will be reduced in number or be avoided entirely in a given Member State.** There are more factors at play that can affect a business or person’s decision to circumvent the law than low statutory sanctions. As mentioned above, environmental crime is a low risk activity; detection rates could be low even when sanctions are harmonised at EU level. Without robust monitoring, minimum or maximum sanctions are of little concern.

Moreover, the fact that there is a certain level of sanctions on paper does not mean that these are actually applied in practice. **Harmonised rules on minimum sanctions could even have perverse effects.** In the US, where mandatory sentencing guidelines existed, those had devastating effects on the sanctions actually imposed for environmental crimes. Judges considered those minimum sanctions too harsh and thus avoided imposing the sanctions. Also, if prosecutors feel that those sanctions are considered as unfair or unreasonable, the consequence may be that no criminal prosecution at all takes place in order to avoid the minimum sanctions.¹⁵

Criminal law is a means of last resort, due to its severe consequences for those subject to criminal investigations and sanctions. The use of criminal law is subject to the principle of proportionality; according to this principle, criminal law can only be used if a certain type of behaviour is so serious or harmful that it can only be dealt with through criminal law. In practice, other tools than criminal sanctions are currently widely available to combat environmental crime and frequently used by law enforcement officials. Administrative fines and civil measures are relatively easier to handle and more cost-efficient. Those arguing against the harmonisation of criminal law at EU level stress **the equally deterrent effect that administrative and civil measures have on criminal behaviour.** In this perspective, a criminal law approach is only one instrument in the toolbox of environmental protection; the harmonisation of criminal sanctions need not be the “fix-it-all” solution to EU’s environmental problems.

Harmonisation of sanctions: a signal to take environmental crime more seriously?

Unlike more traditional crimes like money laundering, tax evasion and document forgery, environmental crime is yet to be seen as a serious crime. This is in spite of the fact that some environmental crimes are cross-border in nature and can cause significant damage to the environment and harm to the society.

As the use of criminal law usually demonstrates particularly intense social disapproval of certain problematic types of behaviour, it could be argued that environmental crime needs to be addressed through criminal law. Indeed, those in favour of harmonising criminal sanctions at the EU level argue that **the existence of harmonised criminal sanctions in different jurisdictions could be a sign that environmental crime is finally being recognised as a serious crime throughout the EU.** Not only could perpetrators be discouraged; harmonisation of sanctions for environmental crime could also send signals to the national legislators, prosecutors and other actors in the enforcement chain of Member States that they should take environmental crime more seriously.

¹⁴ Pollution havens are countries with weaker environmental standards and/or have lower costs of compliance with environmental regulations that may appear attractive to the more pollution-intense industries.

¹⁵ Faure, M. et al, *Conclusions and recommendations* (March 2016), p. 18.

However, **there are other ways in which the EU could recognise the seriousness of environmental crime**; in fact the EU is slowly recognising environmental crime to be of a serious nature, especially as regards waste and wildlife crimes. Recently, the Commission has published an EU-wide Action Plan against Wildlife Trafficking.¹⁶ What is important is not actual harmonisation of sanctions but awareness created over time. This should ultimately lead to environmental crimes to be taken seriously by national legislators, law enforcement officials and the judiciary alike.

Harmonised sanctions as precondition for use of certain investigative techniques?

In a criminal case, investigators have to dedicate time and resources to uncovering a criminal activity. Investigative techniques like electronic surveillance (e.g. wiretapping or videotaping) or search warrants would probably not be employed unless the criminal activity is rather serious. Moreover, the use of certain investigation techniques is in some jurisdictions only legally permissible if the crime under investigation is of a serious nature and/or has a certain maximum sanction. As a result, the level of sanctions to be imposed can be of great importance to which techniques of investigation can be used.

One argument made in favour of harmonising sanctions at the EU level is therefore that **harmonised sanctions are needed to ensure that investigators and law enforcers have access to various techniques of investigation**. Also, **divergent levels of sanctions may have a negative impact on judicial cooperation that is necessary in some cross-border environmental cases**. In fact the preamble of the ECD stresses that common rules on criminal offences make it possible to use effective methods of investigation and assistance within and between Member States. To elaborate, the harmonisation of sanctions facilitates the cooperation of police and judicial cooperation in criminal matters.¹⁷ For example, according to the Council Framework Decision on the European Arrest Warrant, such a warrant may only be issued for acts punishable by the law of the issuing Member State by a prison sentence for a maximum period of at least 12 months. When a sentence has been pronounced or a detention order has been made, this applies for sentences of at least four months. Moreover, the use of instruments of judicial cooperation often requires the so called “double criminality” of an offence. This means that for authorities to engage in international judicial cooperation an act must be punishable in both the state making a request for judicial cooperation and the state that the request is addressed to. However, this requirement is sometimes waived for particularly serious offences. For example, according the Decision on the European Arrest Warrant, double criminality – under certain circumstances – does not need to be verified if the European Arrest Warrant is issued for certain particularly grave offences (e.g. trafficking in human beings). In these circumstances the warrant can be executed without a certain behaviour being a crime in the recipient country. However, environmental crime is not among the offences where no double criminality is required by the Decision on the European Arrest Warrant.

However, others argue that such an argument for harmonised sanctions turns the logic of the system upside down. The very idea of making cooperation dependent upon the sanctions attached to a certain offence is, of course, that the sanctions say something about the seriousness of the offence in question. **This idea of harmonisation is “corrupted if one lets the need of cooperation affect the sanction attached to different offences”**.¹⁸

Would harmonised sanctions disregard Member States’ national identities and traditions?

¹⁶ See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region: EU Action Plan against Wildlife Trafficking, 26.2.2016.

¹⁷ In its comments on cross-border environmental crime, Eurojust stated that in the absence of strong EU-wide rules, including on the penalties for environmental crime, Member States “often struggle to use similarly coercive investigative techniques to those used in other serious crime areas”.

¹⁸ Asp, P., ‘Harmonisation of Penalties and Sentencing within the EU’ (2013), in *Bergen Journal of Criminal Law and Criminal Justice*, vol. 1, issue 1, p. 62.

The EU currently has 28 Member States, which means 28 different national identities and traditions. In fact, Articles 4(2) and Article 67(1) TFEU emphasise the uniqueness and territorial integrity of all Member States. Criminal sanctions are arguably an area where arguments based on these factors are particularly strong. Moreover, a question is sometimes also raised as to whether the harmonisation of criminal sanctions in only one area (e.g. environmental crime) would prevent Member States from maintaining the internal coherence of their legal system with regard to sanctions for different crimes.

According to those favouring harmonisation of sanctions at the EU level, if one considers (certain) environmental crimes serious enough, national identities and traditions should not stand in the way of the effective enforcement of criminal law.

However, **there is likely to be some opposition to further harmonisation in the area of criminal law.** The United Kingdom and Ireland can opt-out should there be a harmonisation of sanctions; Denmark has permanently opted out of such measures. Moreover, not all Member States are in favour of more stringent environmental legislation at the EU level, either. Thus, even though it is unclear whether national identities and traditions make a good theoretical argument against the harmonisation of sanctions, opposition from Member States may make harmonisation of criminal sanctions difficult in practice.

CONCLUSION

As the above overview shows there are good arguments for the harmonisation of criminal sanctions in the area of environmental crime, but also good ones against such harmonisation. Therefore, rather than advocating for such harmonisation, EFFACE has embraced the idea of a toolbox from which authorities can select different tools to prevent and fight crime and to remedy harm done. The toolbox would ideally include civil, administrative as well as criminal sanctions; the latter may be considered as a means of last resort, an *ultimum remedium*.

RESEARCH PARAMETERS

The research project “European Union Action to Fight Environmental Crime” (EFFACE) is aimed at providing policy recommendations to the EU on how to better fight environmental crime. Drawing on a combination of quantitative and qualitative approaches of different types of environmental crime and engaging in interdisciplinary research, EFFACE has provided the following:

- an assessment of the main costs, impacts and causes of environmental crime in the EU, including those linked to the EU, but occurring outside its territory;
- an analysis of the status quo in terms of existing instruments, actors and institutions;
- a number of case studies on various types of environmental crime of relevance to the EU; and
- an analysis of the strengths, weaknesses, threats and opportunities (SWOT) associated with the EU’s current efforts to combat environmental crime.

These research efforts will feed into overall policy recommendations. Stakeholder involvement in EFFACE promotes mutual learning with and among a broad range of stakeholders.

PROJECT IDENTITY

PROJECT NAME	European Union Action to Fight Environmental Crime (EFFACE)
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