



EUROPEAN POLICY BRIEF



EUROPEAN UNION ACTION TO FIGHT ENVIRONMENTAL CRIME (EFFACE)

Policy Brief 1: Limitations and challenges of the criminal justice system in addressing environmental crime

NOVEMBER 2014

INTRODUCTION

Environmental crime is a growing challenge for the EU and the criminal justice systems of its Member States. Environmental crime undermines the achievement of long-term goals of EU governance. EUROPOL's Serious and Organised Crime Threat Assessment (SOCTA 2013) indicates that the environmental crime of **waste trafficking** is an emerging threat to the EU.¹ Other types of environmental crime, such as **trafficking in protected species**, also need to be closely monitored.²

EUROPOL points out the serious environmental and health consequences that these and other environmental offences have both within and outside of the EU. For example, mercury poisoning is a common side effect when people handle electronic waste without proper safety precautions.³ Serious health consequences also extend to those who participate in cleaning up environmental pollution as a result of an environmental crime. Numerous volunteers who helped with the clean-up of the 2002 Prestige⁴ oil spill off the coast of Galicia, Spain, seem to have suffered several health problems, including pulmonary, cardiovascular and chromosomal diseases.⁵

¹ The assessment is conducted regularly on the basis of information provided by enforcement authorities in the various EU countries. The reports are available at https://www.europol.europa.eu/latest_publications/31

² See EUROPOL, *Threat Assessment 2013: Environmental Crime in the EU*. The more specific aspects of environmental crime when committed in an organised crime manner addressed in EFFACE Policy Brief 2.

³ For more, see Institute for Environmental Security, *Case Study on Mercury* (EFFACE case study) (anticipated date of publication: February 2015, www.efface.eu).

⁴ Prestige was an oil tanker that sank in 2002 off the north coast of Galicia, Spain, polluting thousands of kilometres of coastline and is the largest environmental disaster in the history of Spain and Portugal.

⁵ "Un estudio detecta problemas de salud entre los voluntarios del 'Prestige'" (News article 2 October 2007), Antonio Ojea, accessed September 1, 2014, <http://www.elnortedecastilla.es/20071002/vida/estudio-detecta-problemas-salud-20071002.html>.

Wildlife trafficking has a serious impact on biodiversity and sustainable development. The EU remains one of the most important consumer markets and a major transit point for illegal trade between Africa and Asia. Target 6 of the EU Biodiversity Strategy to 2020 (including a 2050 vision) promises to “help avert global biodiversity loss”,⁶ and the EU has recognised that the business of wildlife trafficking is one of the most profitable criminal activities globally which attracts organised crime networks.⁷ As a Party to the Convention on International Trade in Endangered Species (CITES) and the Convention on Biological Diversity (CBD),⁸ the EU has a duty to fight this environmental crime.

Enforcement depends on political priorities and resulting capacities determining the number of prosecutions and convictions for environmental offences in Member States. According to Eurojust, this number remains low compared to more traditional crimes.⁹ In EUROPOL’s Threat Assessment 2013: Environmental Crime in the EU, illicit waste trafficking is found to remain under-reported and under-investigated. The importance of more effectively combating environmental crime has been recognised within the EU. The EU acknowledges the cross-border propensity of environmental crime and its link with organised crime. It also notes that existing systems of penalties have not been sufficient to achieve adequate compliance with the laws for the protection of the environment.¹⁰ **Directive 2008/99/EC** on the protection of the environment through criminal law (Environmental Crime Directive, ECD) requires Member States to criminalise certain types of environmentally damaging or endangering behaviour. The aim is to harmonise the criminal laws of Member States, whilst allowing them leeway to define the type and level of criminal penalties to be applied. The ECD lists nine offences which relate to the core elements of the environment (air, soil, water and fauna and flora) and the relevant industrial or economic activities. Such activities include the handling of hazardous waste, trading protected wild fauna or flora species, and the handling of ozone-depleting substances. The listed conduct should constitute a crime and be punished when unlawful and committed intentionally or with at least serious negligence. On the basis of Article 4, aiding and incitement to intentionally commit the activities above must also be punished.

Likewise, **Directive 2009/123/EC** on ship-source pollution and on the introduction of penalties for infringement, is aimed at the approximation and harmonisation of environmental criminal law. Similar to the ECD, it requires Member States to introduce criminal penalties that are “effective, proportionate and dissuasive”¹¹ for ship-source pollution committed either intentionally or as a result of gross negligence.

Despite these directives, there are still considerable **disparities** between the criminal justice systems of Member States in the area of environmental crime, among others because the provisions on sanction just provide broad guidelines. For example, French law provides for a maximum fine of EUR 9,000¹² for a CITES violation by legal entities whereas in the Netherlands the maximum fine is EUR 810,000.¹³ In Finland, a maximum of two years imprisonment¹⁴ can be imposed for the same violation whereas in the Czech Republic, the maximum is eight years.¹⁵

⁶ “Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Our life insurance, our natural capital: an EU biodiversity strategy to 2020”, European Commission, accessed October 16, 2014 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0244&from=EN>.

⁷ “The EU Approach to Combat Wildlife Trafficking”, European Commission, accessed September 22, 2014 http://ec.europa.eu/environment/cites/trafficking_en.htm.

⁸ Any successful regulation under CITES also helps to implement the CBD as the illegal trafficking of endangered species of flora and fauna is also a major threat to biodiversity.

⁹ See Eurojust, *Eurojust News: Issue No. 10 – December 2013*, 1, 3.

¹⁰ See 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* (hereinafter “ECD”), preamble paras. 2-3.

¹¹ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements. *OJ L 255, 30.9.2005, preamble para. 4*.

¹² “France Environment Code, as consolidated 2010”, WIPO, arts. L415-3 to 415-5, http://www.wipo.int/wipolex/en/text.jsp?file_id=180787.

¹³ “Beantwoording vragen inzake wildlife crime” (28 March 2014), Rijksoverheid, accessed September 1, 2014, <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2014/03/28/beantwoording-kamervragen-over-wildlife-crime/beantwoording-kamervragen-over-wildlife-crime.pdf>.

The level of sanctions that can be imposed for a certain offence can also influence the techniques of investigation that can be used.¹⁶ If legal provisions only provide for light sanctions against environmental offences, not all investigative measures can be used in certain jurisdictions. This could also hinder judicial cooperation between Member States.¹⁷ In a Commission Staff Working Document proposal for a directive against money counterfeiting, it was mentioned that “divergent level of sanctions may have a negative impact on judicial cooperation. If a Member State has low minimum sanctions in its criminal code, this can lead to low priority given by law enforcement and judicial authorities to investigate and prosecute.”¹⁸ The level of sanctions also has an effect on whether certain instruments of judicial cooperation can be used between Member States. For example, environmental crime is one of the types for crime for which a European Arrest Warrant (EAW) may be requested.¹⁹ The exception to double criminality²⁰ requirements for executing an EAW applies, if the offence is punishable in the issuing Member State by a custodial sentence or a detention order of at least three years.

EVIDENCE AND ANALYSIS

Obstacles to prosecution of environmental crimes

EUROPOL's threat assessment (SOCTA) and work by Eurojust reveal that environmental crime represents a minority of cases dealt with by judicial authorities. The leading Italian environmental NGO Legambiente estimates that as many as 80 environmental crimes are committed every day in Italy.²¹ Yet, many of these crimes are not prosecuted. There are a variety of reasons for this, which apply not only in Italy but also across the EU:

Firstly, **environmental crimes are often seen as “difficult” to prosecute.** Problems range from the unfamiliarity of prosecutors with environmental crimes, to the difficulties faced in the collection of evidence. As a consequence, enforcement bodies tend to focus on crimes that are often associated with environmental crime, but are seen as more “manageable” cases. Examples are fraud, corruption or document forgery. As a result, many breaches of environmental legislation do not advance into full-fledged criminal trials. In other cases, enforcement bodies prefer to take administrative actions such as the issuing of warning letters and cautions rather than aiming at bringing criminal charges.

¹⁴ Finland Nature Conservation Act (1096/1996), Section 58/59 of Nature Conservation Act, referring to Criminal Code Chapter 48, sections 1-5, <http://www.finlex.fi/en/laki/kaannokset/1996/en19961096.pdf>.

¹⁵ Tobias Garstecki, *Implementation of Article 16 Council Regulation (EC) No. 338/97 in the 25 Member States of the European Union* (2006 TRAFFIC Europe Report for the European Commission), 9-15.

¹⁶ Armelle Gouritin and Paul De Hert, “Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law: A new start for criminal law in the European Community?”, in *ELNI Review issue 1/2009* (hereinafter “Gouritin and De Hert, *Directive 2008/99/EC*”), 27.

¹⁷ See Eurojust, “Report of the Strategic Meeting towards an enhanced coordination of environmental crime prosecutions across the EU: The role of Eurojust” (report presented at strategic meeting organised by the European Network of Prosecutors for the Environment (ENPE) and Eurojust in The Hague, November 27-28, 2013) (hereinafter “Eurojust 2013 Strategic Report”); see also Gouritin and De Hert, *Directive 2008/99/EC*, 27.

¹⁸ European Commission, “Executive summary of the Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on the Protection of the Euro and other Currencies against Counterfeiting by Criminal Law, and replacing Council Framework Decision 2000/383/JHA” (Commission Staff Working Document 5.2.2013) 4.

¹⁹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. *OJ L 190/1, 18.7.2002*, art. 2(2).

²⁰ Double criminality means that the alleged conduct has to be considered a crime in both the surrendering and the requesting state.

²¹ It has been suggested that environmental crime is closely linked to the economic crisis. See “Rapporto Ecomafia 2014”, Legambiente, accessed October 27, 2014, <http://www.legambiente.it/contenuti/dossier/rapporto-ecomafia-2014>; EUROPOL, *EU Serious and Organised Crime Threat Assessment (SOCTA 2013)*; EUROPOL, *Threat Assessment 2013: Environmental Crime in the EU*.

Secondly, there may also be **reasons specific to the respective legal system that make severe criminal sentences for environmental crimes unlikely**. An EFFACE study on environmental crime in the UK notes that while all criminal cases start in magistrates' courts, cases will only go to trial and may transfer to the Crown Court if a defendant pleads not guilty.²² A very large proportion of environmental offences thus never advance to a full-fledged trial as most defendants tend to plead guilty;²³ as a consequence the sentences are relatively low. This is because most UK environmental crime offences impose strict liability, i.e. no intention or recklessness is required to prove the offence; simply proof that the relevant act has been committed is sufficient.²⁴

Thirdly, other factors leading to infrequent prosecution of environmental crimes include **insufficient number of controls, a lack of specialised police units and the impossibility of intelligence-led policing due to a lack of data**. Thus, even if there were a willingness to prosecute, the capacity to do so in Member States may be lacking. Countries like the Netherlands²⁵ and Sweden²⁶ have specialised environmental crime units, whilst other countries may lack the resources to build such units.²⁷ However, specialised units to fight environmental crimes and/or organised crime do not automatically lead to environmental crime being combated effectively; this ultimately depends on the capacity of each unit. In the Netherlands, the *Functioneel Parket*, a specialised unit designed to fight, investigate and prosecute fraud and environmental crimes, often deals with just a few major cases annually due to the amount of time needed for each of these cases.

Problems with definitions

The Environmental Crime Directive obliges Member States to come up with criminal and/or non-criminal measures for “unlawful” environmental activities for natural and legal persons respectively. The Directive defines the term “unlawful” in Article 2(a).

In practice, however, it is **often hard to distinguish illegal from legal activities**. Often, it may not be easy to show that a certain activity is “unlawful”. In the area of waste-trafficking, an environmental crime of major importance for example in Italy, there are companies that operate with legal documents and authorisations while simultaneously undertaking unauthorised activities. In other words, the illegal activities are carried out under a legal pretence. This is also the case with illegal trafficking of electronic waste in the Netherlands. Investigators have found it hard to prove that shipments were illegal, because of the characteristics of the waste itself. It is also difficult to establish that the exporter acted with criminal intent.²⁸ However, Article 2 ECD provides some guidance to Member States on what is to be considered unlawful behaviour.

Difficulties remain in transposing the provisions of the Environmental Crime Directive into national legislation. This has to do with the much-debated **vague notions of the ECD** such as the terms “effective, proportionate and dissuasive”, “substantial damage”, “non-negligible quantities or

²² Queen Mary University of London, *Country Report on UK* (EFFACE report) (anticipated date of publication: February 2015, www.efface.eu).

²³ “Environmental Crime and the Courts”, House of Commons: Environmental Audit Committee (Sixth Report of Session 2003-04), accessed September 15, 2014, <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/126/126.pdf>.

²⁴ Whilst strict liability provisions can have a deterrent effect and make prosecution easier, a guilty plea may undermine the objectives of criminal sanctions, especially when magistrates close the case by imposing administrative fines and nothing more. There is no evidence to suggest that imposing strict liability makes any difference to compliance rates.

²⁵ “Functioneel Parket”, Openbaar Ministerie, accessed September 16, 2014 http://www.om.nl/organisatie/landelijke/functioneel_parket/.

²⁶ “Operative prosecution work”, Åklagarmyndigheten, accessed September 16, 2014, <http://www.aklagare.se/In-English/About-us/Local-public-prosecution-offices/>.

²⁷ For an overview of EU Member States' capacities to fight corruption and organised crime in the area of illegal trafficking, see Asser Institute, *Prevention of fraud, corruption and bribery committed through legal entities for the purpose of financial and economic gain: Comparative Overview* (26 October 2012), 95-102.

²⁸ Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, *Handhaving Electronica Afval 2009: milieustraten en handelaren* (published 6 May 2010), 20.

impacts”, “dangerous activities and substances” and “significant deterioration”.²⁹ The requirement in the ECD that sanctions imposed by Member States must be “**effective, proportionate and dissuasive**”, does not provide clarity as to the types and levels of sanctions imposed by Member States to ensure consistent application of the Directive. Gaps persist in the penalties imposed for environmental offences, as exemplified by the above-mentioned differences in fines and prison sentences within Member States for a CITES violation. Partially, the use of such vague terms is due to the (formerly) limited competences of the EU in the area of criminal law. On the other hand, the use of vague terms is to provide Member States with discretion to transpose directives in a manner appropriate to their respective national contexts and existing legal culture. A directive is after all, only binding in so far as results are concerned but not as to the methods and instruments chosen. Nonetheless, the use of such terms may lead to diverging transposition and enforcement practices in Member States.

Concerning liability of legal persons

One problematic area is the liability of legal persons for environmental misconduct. According to Article 6 ECD, Member States must ensure that legal persons can be held liable for offences contained in the Directive under certain circumstances; this is the case where such offences have been committed for the benefit of the legal entity by a person who holds leading position, acts as part of an organ of the legal person and has the power or authority to do so. Moreover, legal persons may be held liable under Member States’ national law where a lack of supervision or control by a leading person in a legal entity leads to an environmental crime.

Whilst there is an explicit requirement in the Directive to impose criminal penalties on natural persons, there is **no requirement to impose criminal penalties on legal persons**. Member States are given the discretion to choose from civil, administrative or criminal penalties. This is related to the fact that in some Member States there is generally no criminal liability of legal persons. Germany is one example. The Czech Republic was the other EU Member State who was reluctant in recognising corporate criminal liability until 2012. Sweden, in contrast, not only recognises both individual and corporate criminal liability, it also recognises the liability of public authorities such as the State and municipalities.³⁰

In practice, it may be difficult to establish the link between a leading person and the environmental crime committed. The term “leading position” is not defined in the Directive. Subject to Member States’ traditions and legal systems, an individual in a leading position could be anyone in a management chain. Take for instance the Trafigura case of illicit dumping of hazardous waste from Europe in Ivory Coast. An employee was found guilty and received a suspended six-month prison sentence with two-years’ probation, in addition to a fine of EUR 25,000 for helping to ship the waste and then concealing the incident. The CEO and director were not punished. The court ruled that the CEO should be acquitted because there was an insufficient link between his personal actions and the crime, but this was challenged in the appeals court. The case against the CEO was eventually withdrawn in exchange for a EUR 67,000 fine to be paid by Trafigura. The director, who was initially found guilty of infringing Dutch environmental legislation, was later acquitted because it was explained that he merely trusted the municipal environmental authorities who allowed him to have the waste pumped back into the ship. The case against the municipal environmental authorities was declared inadmissible because under Dutch law government authorities cannot be prosecuted for their actions.

Similarly in the United Kingdom, a company is able to dissociate itself from the conduct of its local managers and thus avoid liability. This is because according to the delegation or identification

²⁹ See Michael Faure, “The Implementation of the Environmental Crime Directives in Europe”, in *9th International Conference on Environmental Compliance and Enforcement*, ed. J. Gerardu et. al., (Washington, INECE 2011). For possible guidance as to the challenges of implementation regarding these vague notions, see Michael Faure, “Vague notions in criminal law (April 20, 2010)”, in *Environmental Liability Vol. 4*, 119-33.

³⁰ Ari-Matti Nuutila, “Corporate Criminal Liability in Sweden – On the way to an alternative criminal liability in summary procedure”, in *Corporate Criminal Liability and Compliance Programs*, eds. Antonio Fiorella and Alfonso Stile (Rome 2012).

principle³¹ a company can only be held criminally liable if it can be established that the directing mind (i.e. individual in a “leading position”), was involved in an illegal activity. Leading individuals within a company tend to manage broader policy or strategic issues and often delegate operational work to others. Thus, although actions of individuals in leading positions can lead to company liability for environmental crimes, in practice evidence against such individuals is normally harder to assemble when compared to those in lower leading positions. However, in smaller companies, individuals in leading positions are likely to be involved in a broader range of company-related activities. As a result, it may be considerably easier to achieve convictions for illegal activities of smaller companies than for bigger companies.

Overlap between criminal and administrative provisions

Many environmental criminal provisions require that a certain conduct be “unlawful” or “unauthorised” to qualify as a crime. However, when a conduct fulfills these requirements is often defined in administrative environmental law. This is also acknowledged in Article 2(a)(iii) ECD which states that “unlawful” could also mean infringing “an administrative regulation of a Member State”. There is a **tendency for “formal” environmental crimes to be dependent on administrative violations**. Administrative provisions partially define when the requirements of environmental criminal provisions are satisfied. Simultaneously, administrative provisions often provide for sanctions of violations themselves.

Administrative penalties are more frequently imposed than criminal penalties,³² because the underlying procedures are usually faster, less costly and less complex than criminal proceedings. There are some administrative penalties that are more severe than criminal penalties,³³ such as the revocation of licences, suspension of business and prohibition notices.³⁴ In practice these extreme administrative powers are used sparingly.³⁵ As a result, the deterrent effect of such mechanisms may be weak. If severe administrative powers were used more frequently, there would be dangers that the substantive and procedural protections offered by the criminal process could be bypassed.³⁶ Critics have pointed out that administrative sanctions confer too much power on the regulatory agencies at the expense of the courts, thus diminishing the role played by criminal law in enforcing environmental law, which is strived for in the Environmental Crime Directive.³⁷

Alternatively, some countries such as the UK use civil penalties to punish environmental offences.³⁸ Civil penalties are described as being hybrid administrative fines, of which the main objective is the enforcement of administrative regulation.³⁹ These penalties do not carry the same degree of moral condemnation as criminal prosecution, but are “harder hitting than enforcement notices by recapturing the costs of damage caused to the environment”.⁴⁰ Although civil penalties provide a more flexible approach, they may confer too much power on the regulatory agencies at

³¹ The delegation or identification principle is applied where “the acts and state of mind” of those who represent the directing mind will be imputed to the company. The principle acknowledges the existence of corporate officers who are the embodiment of the company when acting for it.

³² See Paul James Cardwell, Duncan French and Matthew Hall, “Tackling Environmental Crime in the European Union: The Case of the Missing Victim?”, in *Environmental Law and Management* (2011), 4; Eurojust 2013 Strategic Report: “The study of the implementation of the Environmental Crime Directive also revealed that national authorities seem to prefer to apply administrative law where possible or consider the application of criminal law rather as a last resort”.

³³ Stuart Bell, Donald McGillivray and Ole Pedersen, *Environmental Law* (OUP 2013) (hereinafter “Bell, McGillivray and Pedersen, *Environmental Law*”), 304.

³⁴ Woods and Macrory, *Environmental Civil Penalties*, 15.

³⁵ Bell, McGillivray and Pedersen, *Environmental Law*, 300.

³⁶ *Ibid.*

³⁷ Bell 2013, 307.

³⁸ Woods and Macrory, *Environmental Civil Penalties*, 19.

³⁹ *Ibid.*

⁴⁰ *Ibid.* 38.

the expense of the courts. The proposal to introduce civil penalties in the UK was criticised for its possible bypass of the judicial process, hence potentially leading to “sloppy regulation”.⁴¹

Low criminal penalties

Even if prosecution is brought before a court and is successful, empirical data have shown that relatively low monetary penalties are imposed. Imprisonment is used sparingly and less still, community service. A lack of **judicial experience** in dealing with environmental crimes may be one of the factors behind the low penalties imposed. Fines are by far most used by courts on legal entities. This is problematic as some companies may view fines as an “operational expense”; fines may thus not have a significantly deterrent effect.

Courts must take into account both **aggravating and mitigating factors** of each case. If a company can show that controls have been in place to prevent an environmental offence, penalties may be reduced. In the UK, where strict liability exists for most environmental offences, a guilty plea is already a mitigating factor. Cooperation with the investigation can also mitigate the penalties imposed. The totality of aggravating and mitigating factors could add up to a point where the final penalties imposed do not achieve the aim to deter the environmental offence in the first place. On the other hand, a penalty must commensurate with the level of “guilt” and criminal impetus behind a certain crime.

POLICY IMPLICATIONS AND RECOMMENDATIONS

EFFACE is an ongoing research project and cannot provide any definitive policy recommendations at this stage, but areas have been identified in which measures by the EU or Member States may be needed to more effectively combat environmental crime.

Institutional framework and cooperation of relevant actors

As EUROPOL pointed out, when dealing with environmental crimes, enforcement bodies often focus on associated criminal activities that are deemed more “manageable”, e.g. fraud or document forgery. This is due to problems faced by law enforcement bodies in the area of environmental crime. Such problems include insufficient number of controls, a lack of specialised police units and the impossibility of intelligence-led policing due to a lack of data. Partially, a lack of data and expertise could be compensated through better information exchange or training.

An improved judicial understanding of the impact and severity of environmental crimes across the EU is needed to fight environmental crimes more effectively. In terms of adjudication in the criminal justice system, ideas for enhancement include developing a platform for best practices to be shared. Existing case law and sentences for environmental crime are examples of platform topics. A platform could also help in identifying the differences in penalties imposed by Member States. Gaps that are identified could signal the need for specific judicial training and strengthen the awareness needed to effectively prosecute environmental crimes.

Rather than introducing institutional reform, cooperation within and across criminal justice systems could be enhanced by making use of existing institutions such as EUROPOL, Eurojust, the European Network of Prosecutors for the Environment (ENPE), the EU Forum of Judges for the Environment (EUFJE), and the European Network for the Implementation and Enforcement of Environmental Law (IMPEL). Providing networks with sufficient funding is an area in which the EU could make a valuable contribution.

⁴¹ Oliver Letwin, UK’s minister for government policy has expressed that allowing regulators to impose sanctions directly without recourse to the courts was “intolerable”; see “Civil sanction rules intolerable, says minister” (ENDS Report 435 April 2011), accessed 24 October 2014, <http://www.endsreport.com/28621/civil-sanction-rules-intolerable-says-minister>.

Role of NGOs

NGOs and individuals can contribute to identifying environmental crime sites and possible perpetrators. For example, IMPEL states in a 2014 report: “[t]his role of individual (and especially NGOs) in reporting environmental crime should not be underestimated, given the inherent limitations in the possibilities of detection with the police and with enforcing bodies. Since these cannot be everywhere every time, it is highly useful that citizens themselves function in their role of “watch dogs” of the environment as well”.⁴²

While the formal competences of NGOs to bring environmental cases to criminal courts vary widely across the Member States, organisations such as WWF, Greenpeace, and Friends of the Earth have chapters in various jurisdictions. They can easily communicate with each other, and have high-level in-house expertise.⁴³ They can also openly approach the media and the politicians to give higher priority to the fight against environmental crime. An important role can be played by the EU in granting access to environmental crime-related information. The EU is a Party to the Aarhus Convention which provides for public access to environmental information, participation in environmental decision-making and access to justice if environmental laws are violated.

Further harmonisation of EU legislation on sanctions?

At the heart of the Environmental Crime Directive is the call for “effective, proportionate and dissuasive” penalties for natural and legal persons. The same notion is also used in Directive 2009/123/EC on ship-source pollution. The reason for the use of this phrase is that at the time of the introduction the Directive, the EU did not have any competence for prescribing the level of sanction to Member States. However, according to Article 83 of the Treaty on the Functioning of the European Union (TFEU), the EU now has certain competences to set minimum provisions regarding the type and level of criminal penalties to be applied in certain areas under certain conditions.⁴⁴

EFFACE researchers argue that a harmonisation measure in the area of environmental crime could be adopted on the basis of Article 83(2) TFEU.⁴⁵ However, not everything that is legally permissible is politically expedient. An argument made in favour of further harmonising sanctions for environmental crimes is that diverging sanctions could lead criminals to move into jurisdictions where sanctions are lowest.⁴⁶ On the other hand, some of the current problems in addressing the problem of environmental crime may be unrelated to the lack of harmonisation of sanctions for environmental crime within the EU.

If the levels of criminalisation and sanctions on environmental crime within the EU were to be further harmonised or approximated, one important factor to keep in mind is that many instruments for judicial cooperation (e.g. EAW) require that the offence is punishable in the issuing Member State by a custodial sentence or a detention order of at least three years.

Using the penalty system

There are divergent views on the comparative advantages of using civil, administrative and criminal penalties for addressing environmental offences. Whilst civil actions are aimed at restoring the damage caused, administrative and criminal provisions seek to prevent and punish wrongful

⁴² See Michael G. Faure and Günter Heine, *Criminal Enforcement of Environmental Law in the European Union* (IMPEL Report July 2000) 53-4.

⁴³ The knowledge of the Environmental Investigation Agency (EIA) in London on the smuggling of ozone-depleting substances is a case in point.

⁴⁴ Article 83(2) TFEU stipulates that the EU has the power to establish minimum rules “if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures”.

⁴⁵ See University of Catania, *Articles 82 – 86 of the Treaty on the Functioning of the European Union* (EFFACE report) (anticipated date of publication: February 2015, www.efface.eu)

⁴⁶ *Ibid.*

actions. Ideally, civil, administrative and criminal law should complement each other. Administrative enforcement and criminal law are already intertwined.

The wider context

Criminal justice systems do not operate in isolation. They are part of the larger social, cultural, economic and political systems of Member States, and differences are evident in these systems. There are various alternatives to using the criminal system for preventing environmentally harmful conduct.

Addressing the demand side of environmental crime may be as important as addressing the supply side. For example, policies providing for treatment facilities of hazardous waste against reasonable tariffs may prevent cases of illegal dumping. Research and development of more resource-efficient processes in industry could also reduce the problem of illegal waste dumping and illegal waste exports. Other examples for an alternative approach are education at schools and media campaigns demonstrating that it is unethical to buy wildlife products which lead to the poaching to extinction of species. This may reduce the demand for which the crime of wildlife poaching and trafficking is committed.⁴⁷

EFFACE primarily focuses on environmental criminal law; however, the project will also further explore the comparative strengths and weaknesses of various approaches and the role of the EU for the remainder of the project duration.

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 will provide 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.

⁴⁷ Such trust-based policies are in particular investigated by the FIDUCIA project (<http://www.fiduciaproject.eu/>).

PROJECT IDENTITY

PROJECT NAME	European Union Action to Fight Environmental Crime (EFFACE)
COORDINATOR	Scientific coordinator: Christoph Stefes, Senior Fellow, Ecologic Institute, Berlin, Germany General coordinator: Christiane Gerstetter, Senior Fellow, Ecologic Institute, Berlin, Germany, envcrime@ecologic.eu
CONSORTIUM	Chatham House – London, United Kingdom Ecologic Institute – Berlin, Germany Institute for Environmental Security (IES) – The Hague, The Netherlands Institute for European Environmental Policy (IEEP) – Brussels/London, Belgium/United Kingdom Maastricht University, The Netherlands “Sapienza” University of Rome – Italy Queen Mary University of London – United Kingdom University of Catania – Italy University of Granada – Spain University of Oslo – Norway University of South Wales – United Kingdom
FUNDING SCHEME	FP7 Framework Programme for Research of the European Union – Collaborative project, SSH.2012.2.2-3, New types of offence in a globalised world: the case of environmental crime
DURATION	December 2012 – March 2016 (40 months)
BUDGET	EU contribution: EUR 2,318,600
WEBSITE	http://www.efface.eu
FOR MORE INFORMATION	Contact: Christiane Gerstetter, envcrime@ecologic.eu Follow us on twitter: https://twitter.com/EnvCrime Subscribe to our newsletter: http://efface.eu/newsletter Join our LinkedIn Forum: http://efface.eu/interactive-tools-forum-workshops-contact-group
FURTHER READING	<ol style="list-style-type: none">1. Armelle Gouritin and Paul De Hert, “Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law: A new start for criminal law in the European Community?”, in <i>ELNI Review issue 1/2009</i>2. Eurojust, “Report of the Strategic Meeting towards an enhanced coordination of environmental crime prosecutions across the EU: The role of Eurojust” (report presented at strategic meeting organised by the European Network of Prosecutors for the Environment (ENPE) and Eurojust in The Hague, November 27-28, 2013)3. Michael Woods and Richard Macrory, <i>Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach</i> (London 2003)4. Paul James Cardwell, Duncan French and Matthew Hall, “Tackling Environmental Crime in the European Union: The Case of the Missing Victim?”, in <i>Environmental Law and Management</i> (2011)
AUTHORS OF THIS BRIEF	Shirleen Chin, Wouter Veening (Institute for Environmental Security, IES) Christiane Gerstetter (Ecologic Institute).