

# **Harmonisation of environmental crime in the EU:**

## **A Law and Economics perspective**

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# Introduction

- Structure of presentation:
  - Economic theory of federalism
    - Bottom-up approach
    - Criteria for harmonisation
    - Applied to environmental law
    - Applied to criminal law
  - Role of enforcement
  - Conclusions and some additional remarks

# Economics of federalism: bottom-up approach

- Starting from a local / national level
  - close to the (preferences of) people
  - Tiebout's theory of local public goods
    - example: culture vs sports
    - “voice” and “exit”
  - can also be applied to law (e.g. Van den Bergh, Frey, Revesz)
    - preferences for law differ: examples
    - competition between jurisdictions (full harmonisation creates a monopoly)
    - learning effect
- Harmonisation / federalisation can be efficient in case of specific problems

# Economics of federalism: criteria for harmonisation

- Economic arguments
  1. transboundary externalities and economies of scale
  2. race to the bottom
  3. reduction of transaction costs
  4. (creating a ‘level playing field’)
  5. private interest explanations
- Non-economic arguments
  - creating a ‘level playing field’
  - minimum protection of consumers
  - equal treatment and access to justice

# (1) Transboundary externalities

- Transboundary (negative) externalities
  - many examples in environmental law
  - there is no argument for harmonisation if the cross-border element is lacking
- Economies of scale of European legislation?
- Is it possible to solve these externalities bilaterally ('Coasean bargaining')?



## (2) Preventing a race to the bottom

- Lenient legislation in order to attract business?
  - prisoner's dilemma argument
  - examples include corporate taxes, consumer protection, and also environmental standards
- However: is there really a race to the bottom or perhaps a race to the top?
- Empirical evidence is important
- pollution / tax haven hypothesis
- New EU Member States and possible relation with the race to the bottom argument



## (3) Reduction of transaction costs

- lower transaction costs for market participants
  - because one law rather than many
  - transaction costs: costs of using the market (e.g. information, contracting, monitoring)
- however: also take into account the costs of harmonisation
  - Member States have to agree on the new (harmonised) law
    - note e.g. that many issues are not included in ELD and PLD!
  - influence of private interest groups / lobbying?

## (4) Creating a ‘level playing field’

- Harmonization of marketing conditions?
- Why would we do that? => likely to lead to less functioning of markets and to ‘sameness’ (in Dutch: *eenheidsworst*)
- In EU: internal market argument  
=> but we have the four freedoms!
- the argument may however apply in relation to access to justice for companies and individuals in environmental matters

## (5) *Private interest* explanations

- Corporate interests
  - lobbying at the regional, national or European level: where do corporations have the largest influence?
- EU interests
  - European Commission
  - European Parliament
- Key question: does regulation serve the public interest?

# Non-economic arguments

- Creating a ‘level playing field’
- Minimum protection of consumers
  - why at European level?
  - often conflicting with economic arguments (efficiency)
    - example: compensation of victims in Portugal is different from compensation in Germany
- Others, such as equal treatment and (related to the above) access to justice

## Role of enforcement

- ‘Economics of federalism’ theory has often been applied to substantive law, less to procedural law
- In reality the problem may not lie in the content of the substantive law, but in the way the law is enforced (including the procedures)!
  - this also applies to environmental law
  - criminalisation may not be the answer to the lacking enforcement of national law, including national criminal law

# Conclusions and some additional remarks

- Applying economic theory to (substantive) environmental law, the first argument applies; maybe also the second and third
  - also: a level playing field in relation to access to justice?
- Environmental *criminal* law: there are good reasons to criminalize some offenses, but harmonization of penalties seems far-fetched
  - does criminalization solve the (enforcement) problem?
- There are alternatives to full harmonisation, which are relevant to EFFACE
  - Regulations vs. Directives, Recommendations, etc.