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***Formal competences of the EU and  
desirability of further harmonisation of  
penalties at the EU level***

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# Outline

- Introduction
- EU competences to harmonise sanctions
- Takeaways from the EFFACE Conference on Smart Enforcement
- Desirability of further harmonisation
- Conclusions

# Introduction (1)

- Harmonisation of sanctions in the area of environmental law ≠ new
  - Several studies funded by the EU Commission
  - Recurrent assessment: enforcement of EU environmental law is not satisfactory
- Harmonisation of definitions of criminal offences = a fact
  - ⇒ 2008 Environmental Crime Directive
    - Link with landmark case law of the CJEU in 2005 and institutional fight about the scope of the powers of the EC & EU legislator
    - Legal basis = EC competence in the area of environmental policy
    - Trigger of later provisions in the TFEU expanding the Union's legislative powers

# Introduction (2)

- Harmonisation of sanctions - current situation:
  - 2008 Directive requires
    - For individuals: ‘*effective, proportionate and dissuasive criminal penalties*’ (Art. 5)
    - For corporations: ‘*effective, proportionate and dissuasive penalties*’ (Art. 7)
- Questions for this presentation:
  - Which further EU legislative action is legally *possible*?
  - Is harmonisation of (criminal) sanctions *desirable*, i.e. really necessary?

# EU competences to harmonise sanctions (1)

- Article 83 (1) TFEU:

‘1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, 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. (...)’

# EU competences to harmonise sanctions (2)

- Article 83 (1) TFEU (cont'd):

‘(...) These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and **organised crime**.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.’

# EU competences to harmonise sanctions (3)

- Article 83 (1) TFEU – evaluation:
  - ⇒ **Environmental crime not** mentioned in the foregoing list,
    - ⇒ Despite the fact that it ‘often has a **transboundary** nature or impacts [sic]’ (EU Commission’s Proposal for the Environmental Crime Directive);
    - ⇒ Despite the fact that it can be (very) **serious** crime;
    - ⇒ Despite the fact that both Eurojust and Europol are competent to deal with environmental crime.

# EU competences to harmonise sanctions (4)

- Article 83 (1) TFEU – evaluation (cont'd):
  - ⇒ **Unless** environmental crime would qualify as **'organised crime'**...
  - ⇒ *Cf.* Resolution of the EP of 25 October 2011 on organised crime in the EU: pointing out the clear link between organised crime and environmental crime
  - ⇒ *Cf.* Study on organised environmental crime funded by the EU Commission, 2003
- ⇒ Possibility to **include new types of crimes** in the future
  - ⇒ But how likely in the current political climate?

# EU competences to harmonise sanctions (5)

- Article 83 (2) TFEU:

‘2. 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**, directives may establish **minimum rules** with regard to the definition of **criminal** offences and **sanctions** in the area concerned.

Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.’

# EU competences to harmonise sanctions (6)

- Article 83 (2) TFEU - evaluation:
  - ⇒ *Cf.* CJEU's environmental crime case: obligation to use criminal law, and thus criminal sanctions
  - ⇒ Environment policy = Union policy
  - ⇒ Numerous harmonisation measures in the area of environmental law
    - ⇒ Substantive rules
    - ⇒ Civil liability (2004 Directive on Environmental Liability)
    - ⇒ Criminal liability (2008 Environmental Crime Directive)

# EU competences to harmonise sanctions (7)

- Article 83 (2) TFEU – evaluation (cont'd):
  - ⇒ *Essential* to ensure the effective implementation of this Union policy?
    - ⇒ Effective implementation is indeed a problem
      - ⇒ *Cf. supra*: results of studies funded by the EU Commission
      - ⇒ *Cf. EFFACE* Conference on Smart Enforcement (*infra*) and Workshop on Environmental Liability and Environmental Crime (6 Nov. 2014)
    - ⇒ But...will minimum rules for sanctions ‘effectively’ address this problem?

# Takeaways from the EFFACE Conference on Smart Enforcement (1) (3 November 2014, Brussels)

- Key concerns: smart, efficient and effective enforcement
- EU Commission:
  - Need to streamline and elaborate a coherent approach at the EU level
  - But reliable evidence is needed *before* introducing minimum rules for sanctions
  - *And*: criminal law = sensitive policy field

# Takeaways from the EFFACE Conference on Smart Enforcement (2)

- Main obstacles to effective enforcement:
  - Sanctions: law v. practice
  - Awareness of investigating authorities and judges
  - Cooperation between different actors
  - ...
- Central question: What works?
  - What drives (future) compliance and prevents reoffending?
- Empirical data – in general:
  - In general, highly interesting
  - But hard to collect and difficult to get an aggregate view ('biography of offenders')

# Desirability of further harmonisation (1)

- Question of desirability raises many sub-questions...
  - Purpose of sanctions?
  - Which sanctions?
    - Criminal v. quasi-criminal
    - Individuals v. corporations

# Desirability of further harmonisation (2)

- Purpose of sanctions?
  - Prevention through deterrence
    - General and special
    - Effectiveness of deterrence depends on
      - Celerity, severity and certainty
      - Real *and* perceived!
        - » Cf. 'Risk-based approach requires data'
        - » Data should be communicated in order to influence perception
    - = also basis of a L&E approach to sanctions/sentencing
    - But empirical research suggests that:
      - Compliance is 'not primarily driven by deterrence'
      - Rationality assumption is over-estimated (~information deficit)

# Desirability of further harmonisation (3)

- Purpose of sanctions (cont'd)?
  - Retribution
    - To punish for wrongdoing/harmful behaviour
    - ‘Retributive denunciation’:
      - Expressive function of criminal law
      - Core (even distinguishing) feature of criminal sanctions
  - Rehabilitation (reform)
    - In order to prevent reoffending
  - Incapacitation (restraint)
    - In order to take away the practical possibility of reoffending
  - Reparation? (restoration, restitution and compensation)

# Desirability of further harmonisation (4)

- Purpose of sanctions put forward by the EU legislator (in general and in the field of environmental policy)?
  - Deterrence
    - Prevention ~ effectiveness
  - Symbolic or expressive function of criminal law
    - ‘social disapproval of qualitative different nature compared to administrative penalties or a compensation mechanism under civil law’ (Preamble 2008 Directive)
    - = retributive denunciation
    - Link with stigmatising effects (*cf.* EU Commission Communication, *Towards an EU Criminal Policy*, 2011)

# Desirability of further harmonisation (5)

- Purpose of sanctions put forward by the EU legislator (in general)?
  - Rehabilitation and incapacitation not explicitly mentioned
    - But may be present in certain sanctions (e.g. prohibition of activities, closure of establishment)
    - And MSs of course free to pursue such aims, *as long as* the sanctions remain ‘effective, proportionate and dissuasive’

# Desirability of further harmonisation (6)

- Which sanctions: criminal v. quasi-criminal?
  - Art. 83 (2) TFEU refers to criminal law and criminal sanctions in the meaning of national criminal law (national label)
    - Formal approach
  - ⇔ broader meaning of ‘criminal sanctions’ under Art. 6-7 ECHR:
    - More functional approach
    - Based on *Engel* criteria
    - Functional definition also applied under EU law (e.g. CJEU *Bonda* and CJEU *Åkerberg Fransson*)

# Desirability of further harmonisation (7)

- Which sanctions: individuals v. corporations?
  - No one size fits all
  - Different approach needed
    - Corporations are different...
    - At least to some extent
  - What works?: need for more empirical data...
    - But not easy to get aggregate data (*supra*)
    - Individual approach always needed – legislative ('LG') tools should allow for such approach

# Desirability of further harmonisation (8)

- Which sanctions for **individuals**?
  - Custodial sanctions:
    - Still the iconic criminal sanction
    - Still the most favoured sanction by the EU legislator
  - Monetary sanctions:
    - Fines (fixed amount or income/asset-based)
    - Confiscation (but also covers non-monetary objects)
  - Non-monetary sanctions
  - ⇔ administrative LG instruments (e.g. Regulation on Market Abuse (MAR) 2014)!

# Desirability of further harmonisation (9)

- Which sanctions for **corporations**?
  - Monetary sanctions:
    - Main obligations for EU MSs in other LG instruments (e.g. Market Abuse Directive (MAD) 2014, ...)
      - Criminal *or* non-criminal
      - Does the difference matter?
    - Probably not the best option, unless in combination with other sanctions
      - Because monetary sanctions alone do not necessarily give the right incentives to the right persons inside the corporation
      - Empirical evidence shows that corporations which have been fined before are nevertheless likely to be future violators (e.g. due to the discrepancy between the expected fine and the fine that was eventually imposed, due to the fact that compliance is based on adherence to certain social norms) – *cf.* S. Rousseau, EFFACE Conference Smart Enforcement

# Desirability of further harmonisation (10)

- Which sanctions for **corporations** (cont'd)?
  - Non-monetary sanctions:
    - EU has made some suggestions in other LG instruments (e.g. Directives on human trafficking & child pornography):
      - Exclusion from entitlement to public benefits
      - Prohibition of certain activities
      - Judicial supervision
      - Judicial winding-up
      - Closure of establishments used for committing the offence
    - But never binding ('may include')
    - Criminal?

# Conclusions (1)

- EU harmonisation of minimum rules for sanctions in the area of environmental law legally possible?
  - Yes, Art. 83 (2) TFEU, and perhaps to some extent also Art. 83 (1) TFEU
  - But how about quasi-criminal sanctions?

# Conclusions (2)

- But desirable (= really needed)?
  - Yes, to the extent that...
    - The EU would send a clear signal to MSs (and indirectly, to potential offenders) that environmental crimes are not acceptable
      - *However*, such signal is already sent now by requiring criminal enforcement!
      - So how much added value?
    - *And* that MSs would be encouraged to actually use criminal sanctions

# Conclusions (3)

- But desirable (cont'd)?
  - However, the current approach of the EU legislator in setting minimum rules for sanctions is not really satisfactory
    - Different standard for individuals and corporations: desirable?
    - Little ‘creativity’ in designing sanctions, also due to limited appetite of the MSs
      - E.g. fines taking into account the financial situation of the offender or the actual damage rejected when adopting Directive Ship-source Pollution ⇔ bigger appetite now? E.g. MAD 2014
    - Proportionality of minimum rules for sanctions set by EU legislator? (i.e. relative severity of offences)
      - EU legislator as ‘a bull in a china shop’?
        - » Compare e.g. sanctions in MAD 2014 with fining guidelines in EU competition law
      - Are national legislators doing any better? Some might be...

# Conclusions (4)

- But desirable (cont'd)?
  - Moreover, aversion of MSs to minimum sanctions
  - Moreover, sentencing rules remain (largely) national
    - Flexibility = necessary in order to be able to individualise sanctions
    - EU sentencing principles to streamline the sentencing process?

# Conclusions (5)

- But desirable (cont'd)?
  - Setting minimum rules for sanctions *does not solve*:
    - Problems linked to the lack of awareness or specialisation of judges
    - Problems of monitoring
    - Problems of cooperation between administrative and (various) judicial authorities
    - Other problems linked to the administration of justice
      - E.g. deterrent effect depends on severity, *celerity and certainty*
    - ...

# Questions?

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