

Report on the final conference¹

Combatting Environmental Crime

Priorities and Opportunities for Further EU Action

17-18 February 2016, Brussels

Thursday, 17 February 2016

Session 1 Welcome and Introduction

Open the conference, Wouter Veening, Chairman and President of the Institute for Environmental Security (IES) extended a warm welcome to participants; his words of welcome were followed by welcoming remarks by Pablo Ballesteros-Pelaez from the Directorate General “Research & Innovation” of the European Commission. Subsequently Christiane Gerstetter, Senior Fellow at Ecologic Institute and EFFACE’s project coordinator, provided an overview of EFFACE.² Thereafter, Rob White, Professor of Criminology at the University of Tasmania and member of the EFFACE Advisory Board, gave his keynote speech to the audience.

In his speech, White introduced “ecocide” as a key concept for green criminologists, looking at the causes of ecocide at different governance levels and the various types of environmental crime society and nature encounter. White thereby directed the attention of the audience to the various levels and ways in which environmental crime should be analysed. In response to environmental crime, White recommended multiple measures such as social-legal, regulatory and social action involving legal reforms, environmental law enforcement, courts and adjudication, and social movements. Repairing the harm and reparative justice should also be considered through the creative use of criminal law sanctions.

Session 2: Parallel Working Groups

Group A: Wildlife-related Crime

The working group on wildlife-related crime was moderated by Rob White (University of Tasmania, EFFACE Advisory Board). Presentations were held by Ragnhild Sollund (University of Oslo) on wildlife crime, Alison Hoare (Chatham House) on illegal logging, and Andrew Farmer (IEEP) on illegal fishing.

¹ This report was compiled by Lucy Smith, Christiane Gerstetter, Christoph Stefes and Stephan Sina (all Ecologic Institute).

² Presentations held during the EFFACE final conference are available at <http://efface.eu/day-2-efface-final-conference-moving-forward-environmental-crime>

The discussion focused on three areas: improving enforcement, data gathering, and cooperation. Concerning enforcement, a participant suggested that further steps should depend on an assessment of the achievements of the Environmental Crime Directive (ECD) so far, and another discussant pointed to the report on wildlife crime to be published by the United Nations Office on Drugs and Crime (UNODC) due this year. Several participants highlighted the importance of an adequate inspection system with some kind of EU involvement (e.g. in view of the lack of enforcement of bird protection rules in Cyprus). A discussant noted that at the moment harmonization of inspections was rather to be expected through review of existing legislation than through new legislation. The problem of scarce resources was addressed, but also the lack of priority of combating wildlife crime in wealthy countries such as Norway. In the context of harmonization of approaches to tackle wildlife-related crime, the EU Action Plan against Wildlife Trafficking was mentioned as a possible way to improve not only enforcement within the EU Member States but also to include prevention and the global context. A participant recommended learning from local experience, e.g. by translating a handbook on prosecution that is so far only available in Spanish.

Concerning data gathering, the importance of standardization was stressed since data - if available at all - were often not comparable. A new project on data collection in the EU was mentioned in this context. A discussant stated that resources should also be allocated to work on the collected data. The right to access environmental data was also mentioned, as was the possibility to use data collected by military services. Concerning improvement of cooperation, participants stressed the importance of EU networks (such as the EU Wildlife Trade Enforcement Group) and EU support to enable Member States to participate in such networks. A discussant mentioned that Malta collaborated, for example, with CITES representatives to determine adequate sanctions for wildlife crime. Also the National Environmental Security Task Forces (NESTs) recommended to Member States by the INTERPOL Environmental Crime Programme were mentioned as a possible model to improve cooperation, including the hotline for assistance provided by National Central Bureaus in some countries. A discussant pointed to language barriers in some countries that hamper information exchange.

Group B: Mining and other Corporate Pollution Crimes

In the working group on mining and other corporate pollution crimes, presentations were given by Grazia-Maria Vagliasindi (University of Catania) on the ILVA steel plant in Southern Italy, Christoph Stefes (Ecologic Institute) on environmental crime in the Armenian mining sector and Teresa Fajardo del Castillo (University of Granada) on mining accidents in certain EU Member States. The working group was moderated by Christiane Gerstetter (Ecologic Institute).

Some of the issues discussed were the following:

In some respects a need was identified for improving the regulatory framework, notably on money-laundering when connected to environmental crime. Moreover, the need for better enforcement was also stressed. However, different models were suggested with some participants favouring EU-led inspections and others wanting to see EU legislation guiding Member State inspections. The Industrial Emissions Directive with its clause on inspections was mentioned as an example.

A suggestion was made that an avenue for making environmental crime a higher priority at EU and Member State level might be to consider environmental crime as a predicate offence, where relevant.³ Moreover, it was also highlighted that the EU could sometimes support domestic actors that were in favor of better regulation or enforcement at the national level, e.g. through infringement proceedings.

Participants also pointed to some good examples of cooperation, both between communities and authorities. In this regard, one idea was that cooperation needed to take place in particular between those that had already found more evolved answers to environmental crime with those that had not.

Group C: Waste

The working group on waste crime was moderated by Niels Philipsen (METRO, Maastricht University). Presentations were held by Anna Rita Germani (La Sapienza University of Rome) on waste-related crimes in Italy and by Andrea Illes (Institute for European Environmental Policy) on illegal e-waste exports from the EU to China.

Some of the issues discussed were the following:

Participants focused the discussion on action that could or should be taken at the production level. They described as an inherent problem (particularly for electronic products) that the economic environment encourages products with a short life span and requires accessories which are not interchangeable, compatible, and or easily reused. As the consumption of such products is likely to increase, stricter and more specific product standards were noted to be an important area of focus, particularly in terms of preventing e-waste.

Participants also tried to identify the underlying reason why electronic waste was being sent to China and Africa debating whether there was an economic incentive or the fact that those destinations are areas where remanufacturing takes place.

In terms of harmonizing waste regulation at the Member State (MS) level, participants agreed that the expected implementation of the amendments to the EU Waste Shipment Regulation (which have not yet been transposed into MS law) could encourage more uniform enforcement. However, the situation will always vary at the MS level, particularly, because different countries have different capacities and political commitment. Moreover, there is often resistance at the MS level when the EU proposes new binding rules on enforcement, for instance, as with environmental inspections.

One participant suggested that specific changes be made to Article 15 of the Waste Framework Directive on producer responsibility. Producers are now able to delegate responsibility to the next holder of waste thereby relieving themselves of responsibility, which creates significant weaknesses.

The discussion focused on how enforcement should take place and it was agreed among participants that it should not be a purely repressive or punishable sanctioned approach but a mix of command and control instruments.

³ A predicate offence is a crime that is a component of another criminal offence. In the context of money-laundering, the predicate offence is the offence the proceeds of which may become the subject of money-laundering offences. In other words, if profit is made from illegal wildlife trade and these profits are afterwards laundered, illegal wildlife trade could be the predicate offence of money-laundering.

Session 3: Insights from Research for further EU Action

This session was moderated by R. Andreas Kraemer (Ecologic Institute/IASS Potsdam) and Rob White, Niels Philipsen and Christiane Gerstetter reported on the results of the respective working groups.

Some of the issues raised in the following plenary discussion were the following:

Participants generally agreed on the importance of robust data, among others to make clearer why environmental crime needed to be given higher priority in enforcement. On the use of data one suggestion was made that EU administrators might actually learn from private companies working on “big data”. Some speakers suggested that in some areas (e.g. hazardous waste tracking) data gathering is working relatively well. One comment was also that resources had to be made available to process and interpret data, including at the national level. For the EU level, doubts were raised about whether the European Environmental Agency (EEA) would be the right agency to deal with these data; what was needed was data-sharing for enforcement operations; this was not at this stage the expertise of the EEA. Instead, Europol was mentioned as an agency that could collect such data, provided it was given resources. Practitioners and researchers also related that agencies were often not willing to share data for a number of reasons or were legally barred from doing so; sometimes the problem was not the collection of data, but knowing where data existed and getting access to them. A call was also made for more academic research on environmental crime figures and statistics, including through talking to perpetrators as part of qualitative research.

On better enforcement, the importance of achieving a level playing field was stressed. Sharing good and bad practices was one possible strategy mentioned.

Session 4: Moving forward on Environmental Crime – Perspectives and Recommendations

After words of welcome by Brendon Burns (European Economic and Social Committee) and Heiko Wagner (European Commission, DG Justice) Michael Faure (METRO, University of Maastricht) presented core conclusions and recommendations of EFFACE. This was followed by EFFACE recommendations for improving data gathering and communication to decision-makers presented by Andrew Farmer (IEEP). Finally, Helmut Scholz (Member of the European Parliament) commented on the EFFACE conclusions and recommendations.

In his words of welcome, Heiko Wagner noted that the European Crime Directive (ECD) was the first directive to oblige Member States to introduce criminal sanctions. While some Member States have similar criminal provisions as the ECD, other Member States have more general or more specific provisions. General clauses may cause problems of predictability, while a multitude of specific sanctions may be difficult for prosecutors and judges as well for citizens and businesses concerned. The review of the ECD will start this year, with the aim to find out whether the directive needs to be amended. Based on the EU competence for criminal law introduced by the Lisbon Treaty the EU could harmonize specific sanctions, but this would not be valid for the three Member States with opt-outs in this area (Denmark, Ireland, UK). Moreover, Heiko Wagner pointed to the importance of training for, inter alia,

judges to be able to apply environmental crime provisions properly. He emphasized the importance of information (e.g. via inspections, within the competence of DG Environment) for the prosecution of environmental crime. Heiko Wagner pointed to the upcoming ECD review but doubted that raising the level of criminal sanctions was always the answer in combating crimes.

Session 5: How can the role of NGOs and civil society in combating environmental crime best be facilitated?

The afternoon session was moderated by Christoph Stefes, Ecologic Institute. The session focused on the role of NGOs and civil society in combating environmental crime. One of the important functions of NGOs was mobilizing populations to not only become aware of, but get involved in monitoring environmental issues. NGOs and networks play an important role in generating and sharing expertise.

In the discussion, the question was posed of what exactly made civil society and NGOs effective in their work. Elena Fasoli pointed out that the Aarhus Convention had empowered NGOs and the public by providing them with procedural rights in terms of access to justice on behalf of the environment. Yet how the Aarhus Convention was implemented and whether it went beyond procedural rights determined to a large extent its success.

Another member of the panel pointed out that geographic and political situations are also relevant, and the situation and capacities of European NGOs are much different than that of some other countries that are isolated or experience political obstacles to participation. Having extensive and strong networks was identified by panel members as being important for NGOs to capitalize on opportunities.

Actors and their strategies are heterogeneous and have, depending on context, varying rights and abilities. For example, in Armenia grassroots civic initiatives have been more capable and active in taking up anti-mining activities than environmental NGOs because they have more freedom and capacity to move and act. Civil society is also in different stages of development and ability, depending on the country context. Armine Ishkanian spoke about the hesitancy of individuals to take action in Armenia due to their fear of persecution and personal loss, for instance, of their jobs and livelihoods.

The discussion explored the tensions between economic and environmental interests and MC Mehta stated that environmental litigation inevitably ended up against the corporate complex of power. In such cases, having independent evaluations of situations was important for legitimacy, along with, legal instruments in place such as the polluter pays principle and distinct absolute liability principle. A participant from Hazardous Waste Europe explained that in his industry (which had not existed forty years ago), jobs were being created; protecting the environment can also create jobs which is part of the Commission's proposal on the Circular Economy.

The role of the Environmental Liability Directive was also discussed, as it gives NGOs the ability to request public authorities to act. However much depends on Member State transposition. For instance, France stipulates that NGOs can request damages to be repaired when a public authority does not take action in this regard. Local authorities do not always have the resources or capacity to undertake investigations. Perhaps if there was more data, NGOs could take action when public authorities do not. There are also avenues for NGOs to take action other than the ELD, such as tort law. However, on the basis of tort

law, NGOs can only claim damages directly incurred. Costs resulting, for example, from cleaning birds and habitats after an oil spill are not covered.

The international role of the EU was also discussed. While the EU is an important funder and also the “home” of many internationally influential NGO and civil society actors, it was mentioned that EU companies, consumer preferences and domestic markets are also fueling environmental crime. Armine Ishkanian of the panel pointed out that the EU could provide more support to civil society through education, sending independent journalists and conducting independent environmental impact assessments.

Speaking on behalf of Birdlife International Wouter Langhout answered a question about bird massacres across the Mediterranean, which he stated had been increasing in some countries.

MC Mehta made a final point that taking legal action on behalf of the environment should be a last resort, and avoided where possible given how expensive, time consuming and difficult it is to achieve legal redress. He stated that a wide scale social movement was necessary.

Session 6: What are the political opportunities and challenges for the EU to take further action to combat environmental crime

The session, moderated by Grazia Maria Vagliasindi (University of Catania) brought together a number of practitioners from the EU.

Roel Willekens, Chair of EnviCrimeNet, pointed out that both the diversity of institutions and legal rules as well as the lack of specialization of enforcement bodies posed difficulties for enforcement. He also stressed the need for giving higher priority to environmental crime, which was connected to various types of organised crime in the EU. He highlighted that explaining the reasons for why such priority-setting was required might become easier if more robust data was available. Better data was also needed for intelligence-led enforcement; the latter also required resources and the legal competences to use e.g. wire-tapping. He also pointed to the fact that many cases of environmental crime were dismissed and there was a lack of cooperation between authorities nationally and at the international level. In his view, data need to be gathered in a strategic way, on the basis of intelligence plans defining priorities. Moreover, enforcement strategies are needed, setting out when administrative, civil and – as a means of last resort – criminal law are to be used. He also recommended the use of National Environmental Security Task Forces (NESTs). He mentioned the importance of cooperation with NGOs, the need of training for enforcers, the need for streamlining the regulatory framework, following the money in investigations and an inter-disciplinary approach to investigations.

Anne Brosnan, Chief Prosecutor of the Environment Agency in England, used recent cases to illustrate some successes in the Environment Agency’s prosecution activities. She highlighted the impact of the recently published Sentencing Guideline for environmental offences in the UK which has led to a considerable increase in fines being imposed on very large organisations. She pointed out the value of consistency of approach by the courts and the likely deterrent effect of bigger penalties. She explained how the Environment Agency approaches environmental crime where there may be significant gain to the operator, or

perpetrator in the case of wholly illegal activity. In such cases it is important to pursue the proceeds of crime to remove the benefit of the crime and to focus on remediation and reparation. She illustrated her presentation with a case example concerning the unlawful disposal of waste, where an offender has been sent to prison for an environmental offence and has since been returned to jail for failure to pay a compensation order under proceeds of crime legislation. She suggested that similar provisions across the EU might lead to greater deterrence in the fight against environmental crime.

Luc Lavrysen, Justice of the Belgian Constitutional Court and President of the EU Forum of Judges for the Environment, presented recent case law of the Belgian Constitutional Court. In one of these cases, the court decided that a bird protection organization could, in principle, claim compensation for moral damage for environmental destruction, reflecting the actual damage; the Court held that prior case law limiting such compensation to a symbolic amount was not constitutional. Luc Lavrysen also discussed the Volkswagen case, involving the use of devices leading to an incorrect measurement of car emissions and concealing the breach of European emission standards, arguing that the underlying offence could be prosecuted in several Member States in principle. However, there were barriers such as the lack of corporate criminal liability in some Member States (e.g. Germany). He concluded that the Volkswagen case showed that strategic coordination of prosecution efforts in various Member States were needed; he also indicated that the US Lacey Act might be a model to follow in the EU.

Pascal Leroy, representing the consortium that had carried out the Countering WEEE⁴ Illegal Trade (CWIT) project⁵, presented the main results of this project. The project did not find evidence of the involvement of organized crime in WEEE trade. Only one third of the WEEE waste generated in Europe is treated in a proper way. The project also proposed a roadmap including recommendations on collection, treatment, the legal framework and prosecution.

The discussion touched upon the following aspects, among others:

There were different views on whether EU harmonization of sanctions was desirable or one step too far. Priorities for action mentioned were, among others, training and better coordination; panelists also supported the idea of sentencing guidelines. Also, the idea of EU legislation modeled on the Lacey Act garnered some support. Moreover, strategies to ensure that environmental crime is taken more seriously were discussed. One proposal was working with the public that is often concerned about nature and the environment; another one was highlighting the links between environmental and organized crime. The importance of environmental crime being recognized as an EU priority in criminal policy for enforcement efforts was also highlighted. Some specific issues – such as the traceability of waste – were also raised.

Session 7: What is the way forward?

In her presentation, Monica Frassoni, Co-Chair of the European Green Party, pointed out that her home country Italy had indeed considerable experience with the Environmental Crime Directive (ECD). Frassoni considered the passing of the ECD a significant step for the

⁴ WEEE is short for Waste of Electrical and Electronic Equipment.

⁵ The final report and other results of the project are available at <http://www.cwitproject.eu/>.

European Union (EU), taking into account that the EU usually did not prioritize environmental protection in its legislation. That said, even with the passing of the ECD environmental crime routinely takes place in Southern and Eastern Europe. It shows the difficulties the EU encounters in securing the satisfactory implementation of the ECD under national laws.

In response to the steps that EFFACE considers vital to fight environmental crime, Frassoni considered the framing of environmental crime as organized crime an interesting and potentially very effective strategy. This would open new legal venues in some Member States to combat environmental crime such as the confiscation of illegal proceeds. However, Frassoni also argued that the system of sanctions against environmental crime was still not sufficient, especially in light of the many legal loopholes that existed at the national level. She therefore expressed strong support in favor of harmonizing minimum sanctions across the EU.

Following her presentation, several audience members further commented on EFFACE's recommendations. For instance, one conference participant pointed out that as part of Euratom, international expert teams were formed to inspect nuclear facilities. Collusion between inspectors and operators of nuclear facilities was thereby made more difficult. The participant recommended that international teams of inspectors should also be employed to investigate egregious cases of environmental crime to overcome poor enforcement of national laws. Another participant recommended that EFFACE's research and especially its recommendations should be spread as widely as possible among policy-makers at the EU and national levels and among the general public. Tapping into formal and informal networks that are built around the issue of environmental crime would help.