

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.