

8 September 2015, The Hague

## Summary<sup>1</sup>

This document provides a summary of a workshop held in The Hague on 8 September 2015 in the framework of the EU-funded project “European Union Action to Fight Environmental Crime”(EFFACE, [www.efface.eu](http://www.efface.eu)). The workshop was organized by METRO<sup>2</sup> in cooperation with the Institute for Environmental Security (IES)<sup>3</sup> and hosted by Europol.

The workshop was centred on the question of whether it is feasible and necessary to further harmonise European environmental criminal law - taking into account the current legal framework and particularly Directive 2008/99 on the protection of the environment through criminal law. This document features a summary of the presentations delivered during the workshop and the discussions that followed. The key points of these discussions, in terms of policy recommendations and conclusions, will be presented in the last section of this document.

After words of welcome by Werner Gowitzke (Europol) and Wouter Veening (IES), Christiane Gerstetter (Ecologic Institute) briefly introduced the EFFACE project, which is in its fourth year and which will end in March 2016. The final stage of the project attempts to bring together the research carried out thus far, with the aim of formulating conclusions and policy recommendations.

### **Vanessa Franssen - Formal competences and desirability of further harmonisation of penalties at EU level**

Vanessa Franssen (University of Luxembourg and KU Leuven) took a legal perspective on the need for further harmonisation, with particular focus on the EU’s formal competences in these matters. The presentation also touched upon the form which such harmonisation should take - with an emphasis on finding a balance between criminal and quasi-criminal sanctions.

She illustrated existing instruments, specifically the sanctioning requirements set forth in Directive 2008/994 – taking this as a starting point to assess whether further harmonisation under Art. 83(1) or 83(2) of the Treaty on the Functioning of the European Union (TFEU) would be possible and desirable. She reiterated the need to adopt a coherent approach at the EU level, as highlighted during the EFFACE midterm conference in November 2014, while at the same time underlining the importance of collecting reliable evidence before embarking upon further harmonisation.<sup>5</sup>

To answer the question of desirability of EU intervention in the field, she took as a starting point the current obstacles to the effective implementation of the acquis of EU Environmental law.

After outlining the various possible purposes of criminal sanctions (e.g. deterrence, retribution, incapacitation and rehabilitation), Franssen discussed the need to adopt a risk-based approach grounded on empirical evidence, most notably with respect to sanctions aiming at prevention through deterrence.

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<sup>2</sup> METRO (Maastricht Institute for Transnational Legal Research (<http://www.maastrichtuniversity.nl/web/Institutes/METRO/AboutMETRO.htm>) is an EFFACE partner.

<sup>3</sup> IES <http://www.envirosecurity.org>) is an EFFACE partner.

<sup>4</sup> 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 328/28.

<sup>5</sup> EFFACE workshop on “Environmental Liability and Environmental Crime” of 6 November 2014, [http://efface.eu/sites/default/files/events/D2.4\\_EFFACE%20Report\\_Workshop%20Environmental%20Liability%20and%20Environmental%20Crime.pdf](http://efface.eu/sites/default/files/events/D2.4_EFFACE%20Report_Workshop%20Environmental%20Liability%20and%20Environmental%20Crime.pdf).

She also pointed out that the EU legislator currently interprets criminal sanctions in a formalistic way, i.e. by looking only at the labels a national legislator gives to certain sanctions, whereas the European Court of Human Rights (and more recently also the Court of Justice of the European Union) has taken a broader, more functional approach on the basis of Art. 6-7 of the European Charter for Human Rights.<sup>6</sup> Franssen stressed that both criminal and quasi-criminal (i.e. punitive administrative and/or civil) sanctions should be employed on a graduated scale, in accordance with the principle of proportionality, and with due regard to the symbolic function of criminal law.

Another issue addressed was the differentiation of sanctions between natural and legal persons. In particular, Franssen argued that the use of the criminal label matters for legal persons as well as natural persons in light of the expressive function of criminal sanctions. Franssen also explained that the deterrent effect of monetary sanctions is probably over-rated because they do not necessarily provide the right incentives for the right persons. By contrast, non-monetary sanctions for legal persons are often not labelled criminal, even though they may have a stronger deterrent effect. Hence, some of these sanctions should probably be considered 'criminal' too, at least from a functional perspective.

As a conclusion, Franssen stated that harmonisation is indeed technically possible in relation to criminal sanctions; however, it is not so clear whether the EU could also harmonise quasi-criminal sanctions on the basis of Art. 83(1) or 83(2) TFEU. Further harmonisation of criminal sanctions might be desirable because in doing so the EU would send a clear signal to Member States and, indirectly also to potential offenders, that environmental crime is not acceptable. However, by requiring Member States to criminalise certain environmental offences under the 2008 Environmental Crime Directive, this message was actually already given. Moreover, the approach of the EU legislator in other EU instruments harmonising criminal sanctions is not really satisfactory - in particular when looking at the divergence between the sanctions for natural and legal persons, and the limited 'creativity' in designing sanctions. When imposing minimum rules for sanctions, proportionality should be taken more seriously. To this end, a more functional interpretation of 'criminal' sanctions seems desirable. But the example of other policy areas rather shows that the EU legislator often establishes thresholds for sanctions in a politically contingent way. Last but not least, the harmonisation of criminal sanctions would not solve important problems such as lack of awareness and lack of specialisation of judges.

#### *Comments and general discussion*

The workshop participants recognised that a dual track approach (i.e. a mix of criminal and quasi-criminal sanctions) is necessary: 'formal' criminal law cannot always be used, and due regard must always be paid to proportionality.

It was further emphasised that administrative sanctions have the advantage of being less burdensome and costly and, at the same time, more expedient from the viewpoint of the authorities.

#### **Niels Philipsen – Harmonisation of environmental crime in the EU: a law and economics perspective**

Niels Philipsen – METRO Institute Maastricht – presented an overview of the economic theory of federalism (also called the economic theory of harmonisation) and applied it to EU environmental and criminal law.

The economic theory of federalism starts from a bottom up approach (Charles Tiebout's theory of local public goods applied to law making): differences between national laws represent different preferences and legal history/culture, and moreover provide opportunities for mutual learning between jurisdictions. The theory then focuses on the question whether there are reasons for moving from a national level to a transnational (e.g. EU) level, from the perspective of efficiency. Philipsen presented these criteria for harmonisation one by one, and then applied them to environmental law and criminal law within the EU.

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<sup>6</sup> Engel and Others v The Netherlands, ECHR 4, 5102/71, 5100/71, 5101/71, 8 June 1976.

Concerning *transboundary externalities and economies of scale*, it can generally be said that when such transboundary effects are present, harmonisation should be welcomed (unless bilateral negotiations between Member States can solve the problem at hand). The presence of transboundary externalities is regarded as the main economic justification for harmonisation of substantive environmental law.

Secondly, EU law can come into play in order to *prevent a race to the bottom*, which refers to a destructive competition between Member States in order to attract business e.g. by setting low environmental or safety standards. However, concerning environmental law, some empirical evidence seems to suggest that there is in fact a race to the top, which can be both in the interest of Member States and particular firms (those who already comply with high environmental standards).

When it comes to *reduction of transaction costs*, there seems to be little room for this argument in the field of environmental law. The costs of harmonisation, in fact, prove to be rather substantial, as earlier examples such as the Environmental Liability Directive and Product Liability Directive seem to suggest (where consensus on important issues like the regulatory compliance defence or causation could not be reached).

Another possible reason for harmonisation is the creation of a *level playing field*: corporations should be put under the same legal conditions. According to Philipsen there is not much room for this argument in the realm of environmental law, except when applied to issues of 'access to justice' (but then the justification for harmonisation is a non-economic one). For creating a level playing field for business, it suffices to enforce EU rules concerning the four freedoms.

*Private interest considerations* can be an alternative explanation for harmonisation. Interest groups may demand harmonisation of laws for private interest reasons, which may or may not be in line with the public interest. Such interest groups may include certain companies, the EU Commission and European Parliament, and lobbying groups.

*Minimum protection of consumers* does not seem to justify harmonisation, at least from an economic point of view. Setting European (average or minimum) standards for e.g. compensation of damage will result in consumers in some countries being better off while in other countries they are worse off. Questions of redistribution or justice are to a large extent outside the realm of efficiency analysis.

The economic theory of federalism has been applied mostly to substantive law and only to a lesser extent to procedural law. In this workshop, the question is rather how to make sure that the existing EU environmental acquis will be enforced at the Member State level. Philipsen concluded that the answer to the enforcement problem is not necessarily to criminalise. There are good economic reasons to criminalise some offences (discussed in a previous EFFACE workshop<sup>7</sup>), but it is essential to use an optimal mix of sanctions, which may be best decided at the local (national) level.

Furthermore, non-binding guidelines (e.g. aimed at prosecutors) containing indications on what sanctions were imposed in similar previous cases seem a better instrument to achieve harmonisation via a bottom-up approach (learning from experiences and best practices) than a top-down approach.

### **Claire Leger - Criminalisation at EU level and centralisation of norms setting: the example of insider trading**

Claire Leger – OECD and Paris West University Nanterre La Defence contributed to the discussion by applying the question of the need for criminal law to insider trading, a field in which recently many developments took place at EU level. She also addressed the follow-up question of the need for

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<sup>7</sup> See "Effectively combating environmental crime – what works best?", EFFACE workshop, 28 May 2015, <http://efface.eu/workshop-berlin-28-may-2015-effectively-combating-environmental-crime-%E2%80%93-what-works-best>.

harmonising (at EU level) criminal law in the field of insider trading. She critically analysed the Directive on criminal sanctions for market abuse 2014/57/EU.

Taking a law and economics approach, she came to the conclusion that criminal law was indeed necessary to combat insider trading, with specific references to principles of fairness and justice. However, in any case the ultima ratio principle should be respected.

In addressing the second research question, Leger acknowledged the differences that exist between Member States, identified by the Commission which warrant harmonisation in the field. The economic approach answers this question taking into account the problems of inter-jurisdictional externalities, jurisdictional competition, and transaction costs - as already pointed out in the presentation delivered by Dr. Philipsen. In the case of insider trading, there being no evidence of a race to the bottom, lack of transboundary externalities, and relatively small benefits, there is no sufficient evidence to justify harmonisation at the EU level.

Her presentation further addressed the Commission's legal perspective in adopting the 2014 Directive on criminal sanctions for market abuse, the first to be based on the Article 83(2) TFEU and questioned whether the directive could be based on the legal basis used. According to the Communication "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law"<sup>8</sup>, Article 83(2) TFEU calls for reliance on empirical data regarding the essential need of introducing criminal sanctions at EU level. Yet in the case of the Directive on criminal sanctions for market abuse, the Commission's motivation and arguments were mainly of an abstract and symbolic nature, essentially based on conferences and consultations. They neither provided empirical evidence of ineffective enforcement at MS level nor did they demonstrate that criminalization at EU level would remedy the alleged problems.

Finally, Leger questioned the consistency of the directive with the fundamental principles of criminal law and European law, such as the ultima ratio principle, the principle of subsidiarity, and the principle of coherence (Art. 4 and 5 TEU). She concluded that the economic theory casts doubt on whether there is effectively a need for imposing criminal sanctions at European level. She further added that it would have been preferable that the arguments of the Commission to criminalize insider trading at European level be completed by empirical data, demonstrating an essential need for adopting the Directive, is required by terms of article 83(2) TFEU.

### *Comments and general discussion*

Rob White – University of Tasmania and EFFACE Advisory Board – briefly introduced the findings from his recent work on reparative justice and penalties for the powerful. White underlined the importance of restoration and reparation - which are to be achieved through the application of a wide variety of sanctions (not only of a penal nature). He also touched upon the benefits of sharing best practices and learning from each other.

Harmonisation as a pre-requisite for cooperation was one of the points put forward during the general discussion. Some participants argued that EU Member States only start cooperating when forced to do so by harmonised legislation. Some participants supported the idea that harmonised sanctions are necessary, while others believed that less intrusive measures such as sentencing guidelines could be employed.

### **Andrew Farmer – Data for effective enforcement: harmonisation and flexibility**

Andrew Farmer – Institute for European Environmental Policy – in his presentation addressed the data dimension of harmonisation. Information is a cornerstone to both understanding problems and developing

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<sup>8</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law. COM(2011) 573 final

solutions. Smart enforcement relies on data. For example, risk-based and intelligence-led approaches can only be taken when sufficient data exists to orient such approaches.

Data at the EU level is necessary to encourage Member States to act; to provide information to the public and stakeholders; and to get a common approach across the Member States.

Farmer illustrated in which ways data collection could be harmonised at the EU level, focusing on the pros and cons of such action. He explained how similar data can be used for different purposes at different government levels, and how this influences the interpretation thereof.

The Commission has been developing common approaches on dealing with information over the years. Particularly interesting is the Better Regulation Communication of May 2015<sup>9</sup>, which states that the Commission will review reporting obligations, including on environmental law. Farmer concluded that the upcoming review should be, in the first place, an occasion to understand what kind of information is needed, for what purpose, and how it should be collected.

### *Comments and general discussion*

Bob Elliot – The Royal Society for the Protection of Birds – commented that gathering information and data was extremely important when it comes to investigation in his field. Mr Elliot emphasised how data collection can seriously have an impact on the resolution of environmental problems.

In the discussion, the workshop participants shared the practical difficulties caused by lack of data, which oftentimes impairs both criminal investigations and policy making.

### **Jeroen Blomsma and Miroslav Angelov - Environmental compliance assurance and criminal enforcement**

Miroslav Angelov – European Commission, DG Environment – presented the perspective of DG Environment taking as a starting point the existing challenges in implementation and enforcement of EU environmental policies. Angelov pointed out that not all types of non-compliance have the same origin and therefore they need tailored responses.

Among the shortcomings currently present on the ground, Angelov mentioned the lack of strategic identification and planning for risks of non-compliance, poor data collection and sharing, and weaknesses in enforcement. The current legal framework presents a number of limitations in terms of scope, content and binding nature of the relevant instruments.

In response to existing problems, environmental compliance assurance plays a central role. This concept includes three main elements, namely compliance promotion, compliance monitoring (including inspections, surveillance and investigations), and criminal, administrative and civil law enforcement. Addressing the current shortcomings more effectively would require: a broader approach to responding to various types of non-compliant behaviour and to ensure the use of the most appropriate monitoring tools (including intelligence gathering), use of risk-based approaches at both strategic and operational levels to prioritise and target compliance assurance work, enhanced citizens' involvement, active dissemination of compliance assurance related information, structured mechanisms for cooperation and coordination, and strengthening the role of environmental enforcement networks.

Jeroen Blomsma – European Commission, DG Justice – considered the role of the European Commission in the criminal enforcement of environmental law. A distinction was drawn between the Member State's role on the ground, and the Union's task of standard setting and providing guidance while fostering cooperation.

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<sup>9</sup>Communication from the Commission on 'Better Regulation for Better Results - an EU Agenda' of 19 May 2014, Com(2015) 215 final.

In this context, Blomsma illustrated the ongoing conformity check of the implementation of Directive 2008/99 on environmental crime and Directive 2009/123 on ship source pollution, expressing satisfaction with the progress made in the majority of Member States since the Commission started dialogues with Member States on the implementation. Where no agreement could be found, the Commission may use its powers under the Treaty.

The conformity assessment as regards the concept of "effective, proportionate and dissuasive sanctions" described by Blomsma consisted of a threefold test. It entailed the comparison with similar offences in the same Member State, comparison with sanctions in the other Member States, and comparison with the type and level of punishment in the Framework Decisions preceding these Directives. Blomsma was positive about the impact the Commission's feedback had on many Member States.

The Commission is now considering whether it should intervene on the current legal framework for environmental crime.

### *Comments and general discussion*

**Roel Willekens – Europol EnviCrimeNet** – answered by stressing the importance of sharing data and best practices: this was the reason for starting the EnviCrimeNet, a network of European enforcement officers working on environmental crime. He expressed the need for a common definition of environmental crime, accompanied by common sanctions, but most of all stressed the lack of a proper platform for sharing of information between different agencies.

The participants discussed the role of detection both in terms of its deterrent effect and its importance for investigation and prosecution. The characteristics of a risk-based enforcement were also touched upon, with the sharing of experiences from participants having diverse backgrounds.

### **Final Discussion and Policy Recommendations**

The final discussion centred upon two questions: what should the EU harmonise, and what should not be harmonised.

Two patterns can be identified as to the first question. A number of participants advocated for harmonisation of data collection methods and systems. And while some participants believed in the necessity of a harmonised (minimum or maximum) level of sanctions, others supported the idea that more work should be done at Member State level to ensure compliance with existing legislation. Cooperation between authorities, agencies and experts was unanimously advocated for, with a strong focus on the adoption of a multi-disciplinary approach.

Concerning the second question, consensus could not be reached. Some participants suggested that, while sanctions of course need to be effective and dissuasive (in order to deter environmental crime), sanctions should not be specified at EU level, as this might in some Member States create the situation that violations of environmental law are not coherent with sanctions imposed in relation to other crimes such as murder or rape. Minimum sanctions defined at EU level may even lead to a lowering of sanctions in those Member States where sanctions are currently relatively high. Others, however, mentioned that they could not think of any specific issues at all that on which the EU should not harmonise.



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