



European Union Action to
Fight Environmental Crime

Contribution to conclusions and recommendations on environmental crime: System of Sanctions



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List of Abbreviations

EU	European Union
EUFJE	European Union Forum of Judges for the Environment
IMPEL	European Union Network for the Implementation and Enforcement of Environmental Law
SWOT	Strengths, Weakness, Opportunities, Threats
WP	Work Package

1 Introduction

This contribution addresses the system of sanctions for environmental crime and will logically elaborate on the SWOT analysis that was executed for WP6. The focus here is on the various policy options that resulted from the SWOT analysis and a critical analysis of those options, finally leading to recommendations. Although we will limit ourselves to the domain of the system of sanctions (Area 3) there are, in some instances, obviously overlaps with other domains.

The structure of this contribution is as follows. After this brief introduction we will come back to the opportunities that were identified in the SWOT analysis (2). Next, we will deduce the various options for policy action from those opportunities. Those will be based both on the literature and on the earlier research done within the framework of EFFACE (3). After that, we will move to a critical analysis of the various options, by addressing the question which of the various options seem beneficial to implement and which options would not rank as high or would even be undesirable to implement (4). Section 5 will discuss alternative policy options. Specific attention will be paid to whether the policy options that we identified as desirable should be implemented within the framework of the criminal law or whether alternatives outside of the criminal justice system could equally solve the problem at hand. Section 6 will address whether a particular policy option that has been presented should be realized either at the European level or at the Member State level. Moreover, the question will be addressed whether particular options could be realized via soft instruments (such as guidelines) rather than through more formal legislation or regulations. Section 7 will ask the critical question to what extent the policy options that will be advanced are effective. Effectiveness in this respect links back to the SWOT analysis, by addressing the question whether the policy option provides an opportunity either to solve a particular weakness addressed in the SWOT analysis or to exploit particular strengths. An important aspect to be taken into account when assessing effectiveness in section 7 is whether the particular option will lead to regulatory action (norm drafting) or action at the implementation level. Moreover, the political feasibility (and hence the chances of being accepted) of various policy options will be critically reviewed. Section 8 will conclude.

2 Opportunities

In the SWOT analysis (presented again in Table 1 below) a variety of opportunities were introduced, following from particular weaknesses we identified. Here we will first address the opportunity of a review of Directive 2008/99 (2.1). We will then focus on the increasing use of administrative and/or civil sanctions in Directive 2008/99 (2.2). Attention will also be paid to the opportunity of making (more) use of guidelines in order to increase the effectiveness of sanctions (2.3). Another opportunity identified in the SWOT analysis was to increase the use of complementary sanctions (2.4).

In this section the opportunities will only be identified. They will be translated into particular policy options in the next section (3).

Table 1: Overview of Opportunities, Weaknesses and Strengths

Strengths	Weaknesses
<ul style="list-style-type: none"> Increasing use of administrative sanctions in instrument mix At least on paper, substantial sanctions are available in most MS Possibility for the judge to order complementary sanctions (reparation of harm and prevention of future harm) 	<ul style="list-style-type: none"> In some MS the possibility to impose administrative sanctions is limited EU focuses on criminal sanctions and does not address administrative sanctions in its directives Lacking information on sanctions and proportionality of sanctions in practice Complementary sanctions insufficiently developed in some MS and not addressed in EU directives
Opportunities	Threats
<ul style="list-style-type: none"> MS and EU regularly review legislation. The TFEU provides the possibility for the EU to issue rules concerning magnitude and nature of sanctions Make better use of administrative and civil sanctions to support criminal sanctions Introduce guidelines or databases to prosecutors or judges to increase the effectiveness of sanctions Increasing use of complementary sanctions where this is not yet the case 	<ul style="list-style-type: none"> Insufficient support of the enforcement actors within the sanctioning system, inter alia caused by budget cuts and low prioritization of environmental crime Lacking data on enforcement practice (what sanctions are imposed? by whom? what is the extent of the sanction?)

2.1 Review of Directive 2008/99

One opportunity is to review the Environmental Crime Directive 2008/99. More particularly, there is an opportunity to issue rules with respect to the magnitude and the nature of the sanctions, something which currently Directive 2008/99 does not do. This is due to the changes brought about by the Lisbon Treaty, now providing the possibility for the European legislator to prescribe also the type and the magnitude of sanctions - which was not possible at the time when Directive 2008/99 was enacted. At least from a formal legislative point of view, the changes brought by the Lisbon Treaty hence provide an opportunity for reviewing Directive 2008/99.

2.2 Increasing the use of administrative and civil sanctions

There is currently a strong focus in Directive 2008/99 on criminal sanctions. This is illustrated by the Preamble as follows: "Criminal law can demonstrate a social disapproval of a qualitative different nature compared to administrative penalties or compensation mechanisms under civil law." As a consequence, Directive 2008/99 relies strongly on the criminal law. The sanctions which the Directive prescribes should not only be "effective, dissuasive and proportionate", but they should - for the reasons just mentioned - also be of a criminal nature. As a consequence, other sanctioning mechanisms - such as administrative fines and civil sanctions - are not explicitly mentioned in the Directive. Introducing the use of administrative and/or civil sanctions, either explicitly in Directive 2008/99 or in any other form is therefore an opportunity that resulted from the SWOT analysis.

2.3 Guidelines to increase the effectiveness of sanctions

Another aspect of the sanctioning system that was mentioned in the SWOT analysis is that there are opportunities for further harmonization of sanctioning mechanisms and penalties via guidelines. Guidelines would in that respect constitute an alternative to formal (top-down) legislation and would be geared towards prosecutors and/or towards the judiciary, and would indicate appropriate sanction levels for particular environmental crimes.

2.4 Increasing use of complementary sanctions

A final opportunity discussed here is the increasing use of complementary sanctions. This not only refers to the possibility to prescribe the use of complementary sanctions in formal legislation, but also to the actual use of those sanctions in practice. Complementary sanctions are (unlike traditional sanctions such as fines and imprisonment) geared towards restoring harm done in the past and preventing future harm.

The use of complementary sanctions is at this moment not (explicitly)¹ mentioned in the Environmental Crime Directive. A stronger focus on the use of complementary sanctions can hence be considered as an opportunity.

3 Options

The different options for action at the policy level follow from the opportunities identified above, as well as from earlier research and doctrine. These options will now be briefly reviewed and illustrated in more detail. However, a normative position with respect to these options will not be taken yet. That will follow in section 4, where a critical analysis of the options is presented.

3.1 Review of Directive 2008/99

As mentioned above, the Environmental Crime Directive 2008/99 attempted to force all Member States to introduce criminal sanctions. The reason for this obligation has to be seen in the context of the implementation deficit with respect to the environmental acquis. For a long time the frustration with European policy makers has been that Member States may formally implement European environmental law, i.e. transpose it into their national legislation, but that subsequently the national legislation implementing EU law is not adequately enforced. There have been quite a few developments forcing Member States to seriously invest in the enforcement of national legislation implementing EU environmental law. However, one of the reasons for the creation of Directive 2008/99 was precisely the fact that it was felt that this national legislation should be enforced via criminal law since, as was already quoted above, “[o]nly criminal law can demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or compensation mechanisms under civil law.” The idea behind Directive 2008/99 is hence to force all Member States to impose criminal sanctions on the national legislation implementing the EU environmental law (at least the regulatory instruments mentioned in the Annexes to the Directive). The Directive provides that the sanctions imposed on the violation of national legislation implementing EU environmental law should not only be of a criminal nature, but should also be effective, dissuasive and proportionate. However, the precise nature and size of the sanctions has not been regulated. That follows from the fact that at the moment when the Directive was promulgated, formal competences to determine the size and amount of the sanction were lacking. Hence, while the Directive forces Member States towards the imposition (at least incorporation in legislation) of effective, dissuasive and proportionate sanctions, it does not specify e.g. whether these should be particular fines or prison sanctions, nor does it specify what the amount of the sanction should be related to a particular environmental crime.

¹ One could argue that it is part of the effectiveness required by the Directive.

Since the entry into force of the Lisbon Treaty, there is now a possibility at EU level to issue rules with respect to the magnitude and the nature of the sanctions. The EU has already used these powers, for example, with respect to the criminalization of market abuse and insider trading.²

One policy option would thus be to review Directive 2008/99. The most obvious focus of that review would then be to fix the type and magnitude of the sanctions in the Directive itself. Obviously this would, at least as far as the legislative level is concerned, further reduce differences between Member States, to the extent that such differences still exist today.

3.2 Increasing use of administrative and civil sanctions

As was also mentioned above, Directive 2008/99 now clearly relies on criminal sanctions as a reaction to environmental crime, while it does not mention administrative or civil sanctions. To the contrary: to the extent that the Directive refers to administrative and criminal sanctions it clearly holds that only the criminal law can demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or compensation mechanisms under criminal law. One first policy option would be to address, for example, administrative and/or civil sanctions explicitly at the EU level and hence to incorporate this in the review of Directive 2008/99. Changing the language in the Directive would imply that the policy maker would recognize that also administrative and/or civil sanctions can play an important role in the enforcement of environmental crime.

However, that policy option is relatively modest since it would only imply a change in the language of the Directive. A second, related policy option, could be to recommend (at Member State Level) the increasing use of administrative fining systems. This would imply that for particular environmental crimes (more particularly cases of abstract endangerment or where only administrative interests would be infringed) national legislators would not necessarily rely on criminal sanctions, but would rather impose administrative sanctions such as administrative fines.

A third policy option relates to an issue to be discussed further below, more particularly the use of complementary sanctions, and consists of the use of day fines or penalty payments. In particular legal systems, such as (*inter alia*) France, it is possible to impose a day fine which is due as long as there is no compliance with measures imposed either by administrative authorities or by the judge.³ The idea of such a penalty payment or day fine system would be that it provides deterrence and thus leads the violator to compliance with environmental law. Such a day fine or penalty payment system could hence be used as an enforcement mechanism to achieve further compliance with EU environmental law, more particularly with measures forcing polluters to e.g. stop environmental harm.

3.3 Guidelines

According to the literature and earlier EFFACE research, in some Member States sanctions effectively imposed for environmental crime are relatively low.⁴ Furthermore, there are large differences between Member States as far as the sanctions actually imposed are concerned. The policy option presented here is in a way related to the policy option discussed in section 3.1 above (under the review of Directive 2008/99), more particularly to fix the type and magnitude of particular sanctions in EU law. It could be considered in combination with such a fixing of

² Faure, M.G. and C. Leger, "Towards a Harmonization of Insider Trading Criminal Law at EU Level?" (December 30, 2014), available at SSRN: <http://ssrn.com/abstract=2543964>.

³ Bianco, F., A. Lucifora, and G. M. Vagliasindi. "Fighting Environmental Crime in France: A Country Report." Study in the Framework of the EFFACE Research Project. Catania: University of Catania, 2015.

⁴ Faure, M. G., Gerstetter, C., Sina, S. & Vagliasindi, G.M., *Instruments, Actors and Institutions in the Fight Against Environmental Crime*, Study in the Framework of the EFFACE Research Project, Berlin: Ecologic Institute, 2015.

the type and magnitude of the sanction or, as we would rather prefer to see it,⁵ as an alternative to a statutorily fixing of the type and magnitude of the sanction.

The policy option is to create guidelines for the prosecutors and/or the judiciary, indicating appropriate sanction levels for particular crimes. Differently from the top-down approach (via a formal definition of the type and magnitude of sanctions in a directive) this would rather constitute a bottom-up approach, whereby guidelines would be developed indicating which type of sanctions either prosecutors require or judges impose for similar environmental crimes in various Member States. On the one hand, such guidelines would have the important effect of providing information, and can hence lead to mutual learning; on the other hand they would still provide sufficient flexibility since they are not mandatory.

To be clear: these guidelines aimed at prosecutors and/or judges would be considered instruments of soft law, since they would principally be non-binding instruments. However, as we will argue below,⁶ that would not make them less important.

3.4 Increasing use of complementary sanctions

Again, we come back to the way sanctions are currently prescribed in Directive 2008/99. This Directive requires the nature of the sanctions to be criminal and “effective, dissuasive and proportional”. However, it does not specify what that precisely means. One policy option, already discussed, is to go further in the Directive by fixing the type and magnitude of the sanction. An alternative, presented here, is to make increased use of so-called complementary sanctions. With complementary sanctions we refer to sanctions different from the traditional main sanctions in criminal law, being fines and imprisonment. The concept of complementary sanctions refers to sanctions aimed at the restoration of environmental harm inflicted in the past or at the prevention of future environmental harm. Those complementary sanctions are different from traditional sanctions in the sense that they force a perpetrator to undo wrongs from the past or to prevent further wrongdoing. They hence take the form of an injunction. Of course the day fines or penalty payments we mentioned earlier would be an important instrument to accompany such a duty which would be imposed by the judge.

The potential importance of those sanctions is that they, differently than the traditional sanctions in criminal law, would be geared specifically to environmental crime and to the damage caused by environmental crime. In that sense, it has been argued in the literature that they would importantly enhance the effectiveness of sanctions in environmental law.⁷ At this stage the policy option is merely formulated as the possibility to increase the use of complementary sanctions. Of course, as will be further discussed below with respect to the specific implementation of such a policy option, there are many other possibilities as well. For example, the question could be asked whether the complementary sanctions should necessarily be formulated as sanctions in the criminal law to be imposed during the criminal trial by the judge, or whether alternative measures (for example imposed by administrative authorities) might be possible as well. Another question that can be asked is whether this is something to be imposed at the EU level (for example via a review of Directive 2008/99) or rather at the domestic level. These specific questions of implementation will be more critically reviewed later, after a more critical analysis of the various options.

⁵ See section 4.1 below.

⁶ See section 4.3.

⁷ Faure, M.G., “Effective, proportional and dissuasive penalties in the implementation of the Environmental Crime and Ship Source Pollution Directives: Questions and Challenges”, *European Energy and Environmental Law Review*, 2010, 256-278.

4 Critical analysis of options

We will now critically review the different policy options that we have just identified, by taking a personal position on whether we think it is advisable to follow those options. We will follow the same structure as in previous sections and hence in turn discuss the review of Directive 2008/99 (4.1), the increasing use of administrative and civil sanctions (4.2), the formulation of guidelines (4.3) and the increasing use of complementary sanctions (4.4). Later we will regroup those options, into three rather than four options, and we will then also pay explicit attention to the level at which particular options would be directed, at EU level or at the Member State level.⁸

4.1 Review of Directive 2008/99

The most important option in the review of Directive 2008/99 would be to use the opportunity now provided by the Treaty of Lisbon to fix the magnitude and type of the sanction. As mentioned before, this possibility has been used in the EU Directive on Insider Trading and Market Manipulation which forces Member States to use a particular type and size of sanction.⁹ Hence, from a legislative perspective this is now certainly a policy option; however, this does not necessarily imply that it is also desirable. At first blush an argument in favour could be made. It could be argued that, as also appears from earlier research,¹⁰ the legislative penalties, i.e. the statutory penalties prescribed in different legislations of the various Member States, still provide quite a few variations. Sanctions related to environmental crime are definitely not harmonized. In theory the problem of the implementation deficit would hence remain, a so-called level playing field between businesses across the EU would not exist and moreover, there would be a danger of a so-called race to the bottom, i.e. that industry would “race” to the Member State with the lowest sanctions for environmental crime. Those could all be strong (theoretical) arguments in favour of further harmonization, also of the type and size of penalties.¹¹ An implication would be that in a review of Directive 2008/99 minimum sanctions would be imposed for particular types of environmental crime.

However, notwithstanding those theoretical advantages we believe that imposing particular minimum sanctions in the Directive would not solve the problem at all. It would, so we fear, only lead to a symbolic harmonization and therefore constitute mere window dressing instead of solving a real problem.

A first important reason for our scepticism in this respect is that, even if the EU legislator would impose the type and form of sanction (for example prescribing a statutory minimum of e.g. six months imprisonment for a particular environmental crime), this would not say much about the sanction that will effectively be imposed. After all, the resources devoted to monitoring and enforcement activities between the Member States can differ enormously. In fact, data in that respect is not available.¹² But it may be clear that if in Member State A three hundred environmental inspectors are available whereas in Member State C there are only ten environmental inspectors, assuming a comparable amount of installations to be controlled, the probability of detection in Member State A would be substantially higher than in Member State C. Hence, if monitoring and detection (following from

⁸ This will be the focus of section 6 below.

⁹ Faure, M.G. and C. Leger, “Towards a Harmonization of Insider Trading Criminal Law at EU Level?” (December 30, 2014), available at SSRN: <http://ssrn.com/abstract=2543964>.

¹⁰ Faure, M. G., Gerstetter, C., Sina, S. & Vagliasindi, G.M., *Instruments, Actors and Institutions in the Fight Against Environmental Crime*, Study in the Framework of the EFFACE Research Project, Berlin: Ecologic Institute, 2015.

¹¹ See also the report of the EFFACE workshop “Environmental crime in the EU: Is there a need for further harmonisation?”, held in The Hague on 9 September 2015, notably the contributions by Niels Philipsen and Claire Leger. Available at: <http://efface.eu/efface-workshop-hosted-europol-0>.

¹² See on data, more generally, Farmer, A., *Qualitative and monetary analysis of the impacts of environmental crime: Overview*, Study in the Framework of the EFFACE Research Project, London: IEEP, July 2015.

investments in inspection activities) would still largely differ, a mere formal harmonization of statutory penalties would not change much, if anything at all.

A related problem is that even when statutory sanctions would be harmonized, this would not directly say anything about prosecution policy. The likelihood of prosecution can differ between and even within Member States.¹³ It may however be argued that higher sanctions on paper could also lead to higher sanctions in practice, or to a higher likelihood of prosecution. This would be the case if higher (minimum) statutory sanctions lead to a “change in thinking” from prosecutors and judges about the importance of environmental crime.¹⁴

Moreover, sentencing policy by the judiciary cannot be controlled by the European institutions. There is hence no guarantee that even if these types and sizes of penalties were harmonized, that they would be effectively applied.

A second problem is that one could question the desirability of a harmonized sanctioning system all over the EU. Income and wealth levels differ substantially, inter alia between the North and the South, but also between the West and the East. As a result, a fine of e.g. € 1.000,- may not be very impressive when imposed in Germany, but could constitute a serious deterrent when imposed e.g. in Lithuania or Portugal. Also for that reason one can question the desirability of a harmonization of sanctions all over the Union, since the dissuasive effect of specific fines may be very much related to local differences and income levels.¹⁵ Furthermore, we have to make sure that sanctions imposed in relation to environmental crime are and remain proportional to sanctions imposed in relation to other types of crime. European intervention only in relation to environmental crime may lead to the situation that environmental crime is punished much more severely than e.g. murder, rape or drug trafficking.¹⁶

A third problem is that it does not seem very useful to harmonize penalty levels as long as there is no mandatory data collection and information system with respect to environmental crime, inspections, prosecution and sanctioning. Research has shown that the way in which Member States now collect those data is largely diverging, if those data are available at all. In fact they are hardly comparable.¹⁷ As long as such a data collection system is not in place it seems that merely harmonizing the size and type of penalties will not add much as far as the desire to remedy the implementation deficit is concerned.

This is hence not a policy option that we would recommend.

4.2 Increasing use of administrative and civil sanctions

Three different policy options were distinguished under this heading.

¹³ See in that respect, *inter alia*, the various reports on the Flemish High Council for Environmental Enforcement which indicate that just in the Flemish region there are large differences as far as prosecution of environmental crime by the prosecutors is concerned between the different districts in the Flemish Regions (www.vhrm.be). See also Faure, M. G., Gerstetter, C., Sina, S. & Vagliasindi, G.M., *Instruments, Actors and Institutions in the Fight Against Environmental Crime*, Study in the Framework of the EFFACE Research Project, Berlin: Ecologic Institute, 2015.

¹⁴ See also the report of the EFFACE workshop “Environmental crime in the EU: Is there a need for further harmonisation?”, held in The Hague on 9 September 2015. Available at: <http://efface.eu/efface-workshop-hosted-europol-0>.

¹⁵ Introducing *minimum* sanctions at EU level rather than fully harmonized (fixed) sanctions is not necessarily a solution to this problem either. It may even lead to a different problem: minimum sanctions may in practice result in lower sanctions in those Member States that currently impose above-average sanctions.

¹⁶ Note that it is not our intention to claim that one type of crime is more important than another, but rather that this does not seem to be a matter that needs to be decided at EU level.

¹⁷ Faure, M. & Svatikova, K., “Criminal or Administrative Law to Protect the Environment?”, 24(2) *Journal of Environmental Law*, 2012, 253-286; Faure, M.G. & Svatikova, K., “Enforcement of Environmental Law in the Flemish Region”, 19(2) *European Energy and Environmental Law Review*, 2010, 60-79. See also the report of the EFFACE workshop “Environmental crime in the EU: Is there a need for further harmonisation?”, held in The Hague on 9 September 2015, notably the contribution by Andrew Farmer. Available at: <http://efface.eu/efface-workshop-hosted-europol-0>.

A first one was related to a stronger focus of Directive 2008/99 on administrative and civil sanctions, which are now, at least in the Preamble, considered of lower value than criminal sanctions.

Although one could recommend to the European legislator to change the language in the Preamble, that would merely represent window dressing, and would not change anything fundamentally. The more fundamental question is whether the European legislator should, as it does now, merely rely on the criminal law as an effective enforcement tool. It has been argued in the literature that the European legislator went against tendencies in domestic legislation, where more use is made of administrative fining systems.¹⁸ This is related to the third policy option, to increasingly make use of administrative fining systems. That policy option can, also from an academic perspective, certainly be supported. It has been held that especially for abstract endangerment crimes (when mostly administrative interests would be at stake), but also for smaller environmental crimes, administrative fining systems may be effective.¹⁹ The major problem, as identified in the literature, is that in the past an over-criminalization took place, as a result of which large percentages of environmental crimes were not prosecuted.²⁰ Empirical evidence showed that in many legal systems, e.g. in the Flemish Region, under a pure criminal law regime more than 65% of environmental violations were not prosecuted.²¹ One can also understand this from an economic perspective: the criminal law is a relatively complex and costly system that has a complicated procedure, also with the goal of the reduction of error costs.²² Given the high costs and the scarce resources of prosecutors, one can understand that prosecutors use their resources wisely and only focus on the most important cases. Many legal systems have now moved to introducing administrative fining systems for environmental criminal law and the first results indicate that indeed less environmental crimes are simply dismissed.²³ Hence, more deterrence can be achieved than under a system of pure environmental crime. The problem with the Directive in its current form is that it does not recognize these tendencies in domestic legal systems and seems to rely solely on the criminal law for the enforcement of environmental crime.

An important policy option is therefore to use both criminal law and administrative fining systems in the enforcement of environmental crime. This can at least be recommended for national legislations that do not yet have administrative fining systems, but attention to the benefits of administrative fining systems could potentially also be given in Directive 2008/99.

A third policy option mentioned under this heading was to advise legislators that do not yet have systems like day fines or penalty payments to make use of those in order to enforce specific measures that would be imposed upon polluters. Again, this policy option can certainly be recommended. Very often administrative authorities (depending upon the legal systems, in some cases judges as well) may impose e.g. safety measures (sometimes not related to environmental crime); in other cases they may impose administrative measures e.g. to bring a halt to continuing environmental pollution or to restore harm done in the past. If this would merely be an injunction without further sanctions to back this up, the risk of perpetrators not executing the measure imposed upon them is large. The advantage of either a day fine or a penalty payment is that it would impose a financial consequence

¹⁸ Faure, M.G. & Svatikova, K., "Criminal or Administrative Law to Protect the Environment? Evidence from Western-Europe", *Journal of Environmental Law*, Vol. 24(2), 2012, 253-286.

¹⁹ Heine, G., "Allemagne. Crimes against the Environment", *Revue Internationale de Droit Pénale*, Vol. 65, 1994, 731-759.

²⁰ Ogus, A. & Abbot, C., "Sanctions for Pollution: Do We Have the Right Regime?", 14(3) *Journal of Environmental Law*, 2002, 283-298; Abbot, C. & Ogus, A., "Pollution and Penalties", in: T. Swanson (ed.), *An Introduction to the Law and Economics of Environmental Policy; Issues in Institutional Design* (Research in Law and Economics, Volume 20), Bingley: Emerald Group Publishing Limited 2012, 493-516.

²¹ Faure, M.G. & Svatikova, K., "Enforcement of Environmental Law in the Flemish Region", 19(2) *European Energy and Environmental Law Review*, 2010, 60-79.

²² Faure, M.G., Ogus, A. & Philipsen, N.J., "Curbing Consumer Financial Losses: The Economics of Regulatory Enforcement", Vol. 31(2) *Law and Policy*, 2009, 161-191.

²³ Faure, M. G., Gerstetter, C., Sina, S. & Vagliasindi, G.M., *Instruments, Actors and Institutions in the Fight Against Environmental Crime*, Study in the Framework of the EFFACE Research Project, Berlin: Ecologic Institute, 2015.

upon the breach of a specific measure within the timeline set by the administrative authority or the judge. The advantage of those systems is that they clearly provide incentives to the perpetrators towards compliance and therefore can certainly be recommended.

4.3 Guidelines

The first policy option referred to the question whether it should be recommended to national legislators that currently have lower than average penalties to increase the level of sanctions. This policy option is strongly related to the option discussed in section 4.1 of harmonizing the type and magnitude of penalties in EU Directive 2008/99. As we already mentioned there: while this may seem attractive at first blush, in the end the statutory minimum or maximum penalties say very little about the penalties that are effectively imposed by judges, let alone about the general exposure to detection, prosecution and sanctioning in a particular Member State. For the same reason that we did not recommend fixing the type and magnitude of penalties within Directive 2008/99, we believe that the policy option to recommend to national legislators with lower than average statutory penalties to increase those, may not be very useful.

We do, however, believe that the policy option to direct guidelines towards prosecutors and the judiciary concerning appropriate levels of sanctions for specific crimes may be useful. Of course they should always be formulated with caution since prosecutors and judges will remain free in their discretion concerning which penalty to demand or to impose. It may, as an issue of information exchange and mutual learning, be extremely useful not to merely put forward a recommendation for a particular penalty for a specific crime (after all, we already mentioned that an appropriate financial penalty can be very location-specific), but rather, for example, to provide a catalogue of crimes and to indicate e.g. what prosecutors have asked or what judges imposed in different circumstances in differing Member States. Even though that type of information would certainly not be binding, it could provide interesting information to prosecutors and judges, especially to those who may not be specialized in environmental cases, to have some indication as to what may be adequate penalties. A disadvantage of guidelines is that they may be conservative: the fact that particular prosecutors or courts have demanded/imposed particular sanctions does not necessarily mean that those sanctions imposed were actually “dissuasive, effective or proportional”. Hence, it is important to mention that such a guideline would merely provide information on what has been done in the past; prosecutors and judges would have to apply those guidelines in a *dynamic* manner, by using them in a flexible way.

The advantage of such guidelines is that they should not necessarily come from the formal legislator at the domestic level, nor from the formal EU institutions. There are many informal networks, such as IMPEL or a European network of prosecutors, and as far as the judges is concerned EUFJE. Those informal networks of environmental prosecutors and judges, who have hence the perfect expertise on these issues, could be best placed to develop those type of guidelines.

4.4 Complementary sanctions

Also in that respect two policy options were mentioned. The first one was to provide guidelines concerning the desirable use of particular complementary sanctions. The importance of complementary sanctions can hardly be overestimated. Especially in the area of environmental crime it has often been argued that the traditional (classic) primary sanctions such as fines and imprisonment may have a dissuasive character, but may not necessarily lead to effectiveness. In literature addressing the criteria of “dissuasive, effective and proportional” penalties it has been stressed that in the area of environmental crime effectiveness would require sanctions that aim at restoring what has been done wrong in the past (e.g. removing illegally deposited waste) and sanctions aiming at the prevention of further harm. The problem is indeed that the mere imposition of e.g. a fine or a prison sanction may lead to dissuasion, but it does not necessarily lead to restoration of environmental harm done or to prevention of future harm.²⁴ Many Member State legislations already do provide for such complementary sanctions, but

²⁴ See further Faure, M.G., “Effective, proportional and dissuasive penalties in the implementation of the Environmental Crime and Ship Source Pollution Directives: Questions and Challenges”, *European Energy and Environmental Law Review*, 2010, 256-278.

certainly not all of them.²⁵ Also, those domestic legislations that do have the possibility of the imposition of complementary sanctions in some cases often do not even make use of it. As a principal matter, restoration of harm done in the past and prevention of future harm should in fact be imposed, when it is practically possible, in almost all, if not all, environmental crime cases. It may of course reach too far to formulate such a strong recommendation, but the two policy options mentioned above could certainly be supported in the following sense.

As far as domestic legislation does not yet foresee sufficient possibilities to have complementary sanctions, it could certainly be recommended to provide this to the national legislator. An option would even be, if the EU legislator were to say anything on minimum sanctions at all (which we did not recommend, but it is a policy option) it may be wiser to refer to the desirable use of complementary sanctions instead of merely focusing on the traditional imprisonment and fines (as was for example done in the Directive concerning the criminalization of insider trading and market manipulation).

The second policy option is easier: it merely contains the recommendation also to include a provision concerning the use of complementary sanctions in the guidelines mentioned earlier to prosecutors and the judiciary.

5 Alternative policy options

Many of the policy options we discussed above refer to policy options outside the criminal justice system. Hence, it does not seem useful to repeat them all here. We only provide a brief summary, indicating that some of the policy options focus on alternatives outside the criminal justice system.

- It was considered a policy option to advise national legislators (but potentially also the EU in the light of a revision of Directive 2008/99) to have a system of administrative fines as an alternative for (or complementary to) the criminal justice system.
- The day fine and penalties payment options were meant as a backup to guarantee the compliance with (administrative) measures or injunctions that would be imposed upon perpetrators, also outside of the criminal justice system.
- Some of the complementary sanctions of which the increasing use has been recommended as a policy option (see section 4 above) could also be implemented via administrative or civil law. The one probably does not exclude the other. In some legal systems, for example restoration of harm done (e.g. removing waste that has been illegally dumped on a wet land) could be ordered as a civil measure or an administrative sanction. The only point is that, to the extent that these other systems have not yet taken measures aiming at restoration or at prevention of future harm, the criminal sentencing system should aim at reaching those goals as well. But to the extent that the goals served by the complementary sanction could equally be reached via civil or administrative means there is no objection against doing this outside of the criminal justice system. Whether that is possible will to a large extent depend upon national law; after all, the possibilities to impose those measures via either civil penalties or administrative measures may differ.

6 Harmonization and coordination

The questions whether the particular policy options that we discussed above should be realized at Member State level or at EU level, and whether they could be realized via soft instruments or need hard instruments, have already been briefly touched upon above. We will now address these issues more explicitly and also provide a classification of the policy options.

²⁵ Although this has not been examined in much detail.

6.1 Revising sanctions in Directive 2008/99

As explained above, we are not in favour of the policy option to harmonize the type and magnitude of penalties, because this would probably not remedy the implementation deficit. Hence, we will not further discuss this policy option.

Within the revision of Directive 2008/99 an option would be (if the Commission were to insist on a harmonization of the level of sanctions) to at least mention the importance of complementary sanctions and not (like in the case of the Directive on insider trading and market manipulation) use the opportunity to harmonize sanctions merely as a chance to harmonize the main penalties (imprisonment and fines), which may not be the most appropriate ones in environmental criminal cases. However, given large differences in this respect between Member States, we believe that a Recommendation concerning the increasing use of complementary sanctions should be addressed at the domestic (Member State) level than at EU level. This will be further explained below.

The third aspect concerning Directive 2008/99 was the importance of an administrative fining system. Within the revision of Directive 2008/99 it would be desirable to point at the fact that, differently than the Directive now signals, deterrence of environmental crime is equally possible through effective, dissuasive and proportional administrative fines. It may be important to signal this in the Environmental Crime Directive (which now solely refers to a strong belief in the criminal law) in order to support positive developments in Member State law in this respect (in the form of a stronger shift towards administrative fining systems that substantially reduce dismissal rates).

All those recommendations/policy options (in fact only one remains, concerning an explicit reference to the importance of administrative fining systems) apply to a revision of Directive 2008/99 and hence to the European level.

6.2 National/Member State legislator

A few of the recommendations/policy options that were positively assessed concern the domestic legislator.

First, Member States are suggested to introduce of a system of administrative fining as an alternative to the criminal justice system for cases that could be adequately dealt with via an administrative fine, to the extent that they do not have those systems yet.

The second recommendation made to the national legislator is to introduce complementary sanctions aiming at restoration of harm done and prevention of future harm, again to the extent that the particular Member State does not have those sanctions yet. It would be preferable to make this recommendation to the national legislator for the reason that in some national legal systems, those measures aiming at restoration of harm done or prevention of future harm could be imposed via instruments outside of the criminal justice system. The recommendation would hence not be to necessarily introduce those instruments via the criminal law, but to have these instruments in any form. Having complementary sanctions also in the criminal law system does, however, have the advantage that the judge could decide to impose those complementary sanctions in case prior decision makers (e.g. administrative authorities) would not have ordered these yet although they have a formal power to do so.

The third recommendation made to the national legislator is to make increasing use of some financial incentive system (day fines or penalty payments) to back up measures or any type of obligations imposed upon violators of environmental law in order to guarantee compliance with the orders imposed.

6.3 Guidelines

A third type of policy options was of a softer nature, namely guidelines. Those should address domestic prosecutors and judges with respect to adequate penalties for particular types of environmental crime, including complementary sanctions. The institution to create those guidelines would in a way be between the domestic level and the formal EU level. As argued above, there are already formal networks of environmental enforcers (IMPEL), of environmental prosecutors (European Network of Environmental Prosecutors) and of judges (EUFJE). Given the existence of those networks and the fact that they consist of the “peers” to whom the

guidelines would be addressed, we recommend to make use primarily of those networks and hence to realize this policy option via networking and coordination rather than via formal legislation or harmonization.

7 Effectiveness

In our earlier report on the SWOT analysis of the system of sanctions, specific weaknesses and strengths were identified. Obviously, the opportunities and policy options presented above built upon those weaknesses and strengths. We will now turn back to the strengths and weaknesses that we identified in the earlier SWOT analysis and assess to which extent the various policy options will be able to address them.

More specifically, we will examine the particular policy options again in order to analyse to what extent they might be able to solve a particular weakness or exploit a strength; in addition, it will be identified to what extent a policy option will solve a problem at the level of regulation (norm drafting) or at the level of implementation (practice). To the extent possible, we will also speculate on the political feasibility of some of the policy options addressed. For reasons of simplicity and clarity, we will review the policy options in the way we grouped them in the previous section, according to the institutions (EU, domestic or guidelines) to whom the particular options were addressed.

7.1 Revision of Directive 2008/99

One weakness identified in the SWOT analysis was that there are differing statutory maximum penalties. However, the SWOT analysis itself already made clear that that should not necessarily be qualified as a weakness since the legislative maximum penalty says relatively little on the sanctions that will be effectively imposed by the judiciary. The SWOT analysis, however, identified as a major weakness that data on sanctions effectively imposed are lacking.²⁶ It is precisely for that reason that we did not recommend to follow the policy option to fix the type and the magnitude of sanctions in Directive 2008/99.

The SWOT analysis did identify the lack of complementary sanctions in Directive 2008/99 as a weakness. That point has now been addressed, but on reflection, we are of the opinion that this should not necessarily be addressed at the EU level (unless the Commission were, contrary to our recommendation, to impose the type and magnitude of sanctions in the Directive). Given large differences in this respect (more particularly concerning the legal instruments used to reach this goal) the further development of complementary sanctions can better be addressed at the level of the national legislator.

The SWOT analysis equally identified the fact that Directive 2008/99 relies too strongly on the criminal law and does not pay attention to administrative fining systems as a weakness. That has been addressed by the option of including administrative fining systems in some cases in the Directive.

This policy option (referring to the revision of Directive 2008/99) would hence correspond with an identified weakness and would refer to the level of regulation (norm drafting). We moreover think that the political feasibility of our proposal may be high. To the contrary, if one were to suggest fixing the type and magnitude of sanctions in the Directive, this may precisely lead to a lot of opposition from Member States who could, calling on their national sovereignty, strongly reject to this and also debate the effectiveness of such a harmonization. Moreover, also our proposal to refer more explicitly to administrative fining systems may increase the political acceptability of the Directive. Some Member States (like Germany) have felt that the Directive 2008/99 in fact

²⁶ It would therefore also have been possible to include an option at this stage recommending an adequate collection of data on sanctions. However, since data collection is separately dealt with in area 1, this policy option is not developed further here. To be clear: from the perspective of the system of sanctions, the collection of adequate data on the way in which the entire enforcement chain in a Member State functions (including data on effective penalties imposed in practice) is obviously of crucial importance, also when judging the system of the effectiveness of sanctions.

led to an over-criminalization. By mentioning explicitly also the value of administrative fining systems, the Directive would become more in line with what is current practice in Member States which would hence even increase the political acceptability of the Directive.

7.2 National legislator

As far as the national legislator is concerned, our main recommendation was to make more use of administrative fining systems (to the extent the national legislator would not already have done so). This reinforces a strength (more administrative sanctions in the instrument mix) and tackles a weakness (the enforcement instrument mix not always being optimal). The policy options formulated at this level clearly address the level of regulation (norm drafting), but our assessment of the political feasibility of this proposal towards the national legislator again is positive. The reason is that already in many Member States in the past decades, we have seen an evolution away from a system of only environmental criminal law towards a more nuanced instrument mix, including civil penalties or administrative sanctions. Hence, those Member States that would not have such an administrative fining system yet, could via mutual learning benefit from experiences in other Member States, realize that this may in fact increase the effectiveness of the criminal enforcement system by allowing prosecutors only to focus on those cases that really merit the criminal law. Others, which would not be prosecuted via the criminal courts, would no longer be merely dismissed but would still receive an adequate remedy via the administrative fining system.

Also our recommendation to make more use of complementary sanctions in domestic legislation and to support specific measures imposed upon perpetrators (which could take the form of complementary sanctions) with financial incentives (like penalty payments) corresponds with particular strengths and weaknesses. The fact that many legislations in Member States already have complementary sanctions was identified as a strength; the fact that in some Member States complementary sanctions are not sufficiently developed was identified as a weakness. Our recommendation to the national legislator hence is directly in line with those identified strengths and weaknesses. Again, political feasibility of this policy option at the domestic level may be pretty good. After all, it is an easy tool for national legislators to increase the effectiveness of their enforcement system. There may be a potential for learning from other countries (e.g. the use of the day fines in France to enforce specific measures)²⁷ which provides scope for interesting legal transplants between the Member States.

7.3 Guidelines

Our third set of policy options refers to a set of guidelines concerning adequate penalties to prosecutors and judges. This directly corresponds to the identified weakness that there is little information on the proportionality of sanctions in practice and that merely harmonizing statutory penalties will not add to any level playing field. Precisely this type of “bottom-up harmonization”²⁸ will allow a spontaneous movement whereby prosecutors and judges will obtain information on types and amounts of penalties requested and imposed in other Member States. This may not only lead to mutual learning and information exchange, but may also lead to a “soft” harmonization whereby prosecutors and judges could spontaneously learn from practices in other Member States. This may in fact even be far more effective than a formal harmonization of statutory penalties (which we therefore also rejected). After all, formal statutory penalties do say very little on what is effectively imposed in practice; information provided by peers (prosecutors and judges) on which type of penalties are requested/imposed for specific types of environmental crimes provides in that respect far more important information to the decision makers involved. This type of information exchange could in the long run of course have some type of spontaneous harmonizing effect.

The tool used in this particular case is obviously not the level of norm drafting, but here we refer to the implementation (practice). Again, we believe that the political feasibility of this proposal must be high. The major

²⁷ See Bianco, F., Lucifora, A. & Vagliasindi, G.M., “Fighting Environmental Crime in France: A Country Report.” Study in the Framework of the EFFACE Research Project. Catania: University of Catania, 2015.

²⁸ To be contrasted with the “top down harmonization” via formal directives.

advantage is that it provides an alternative for a formal (top-down) fixing of types and size of penalties. That may on the one hand be ineffective and on the other hand lead to a lot of political opposition. What we propose, is rather a soft form of spontaneous harmonization via a (obviously non-binding) set of guidelines, not to be developed by formal regulators, but by peers who would for that reason obviously have a lot of support. This proposal can hence certainly be welcomed by the politicians in the Member States (since it avoids formal EU legislation and supports spontaneous harmonization) and by the stakeholders involved (the prosecutors and judges) since it in fact constitutes a form of “self-regulation” whereby the prosecutors and judges can, through spontaneous information exchange and drafting of guidelines, contribute to a spontaneous process of harmonization. A crucial element of this policy option is obviously that the organizations (such as IMPEL or EUFJE), if they would be commissioned to draft those guidelines, should also be sufficiently staffed and supported to undertake this important task. It is not because the guidelines are not drafted by the formal European institutions that it would necessarily require less work or capacity (and hence financing) to guarantee an adequate drafting of those guidelines.

8 Conclusions

We have drafted detailed policy options and provided arguments to justify the policy options. Hence, our conclusions can be brief, summarizing what we precisely recommend at which level of governance. In this brief summary, we will also reflect on whether we consider specific options as core proposals or rather as supplementary.

As far as the European level is concerned, we in fact argue against using the option provided in the Lisbon Treaty of fixing mandatorily the type and magnitude of sanctions in the Directive. We only think that if the European legislator were to do anything as far as the type and level of sanction is concerned, it would be advisable to refer to the importance of complementary sanctions for the effectiveness of the fight against environmental crime. The only issue that could be added in the Directive is the recognition of the importance of the administrative fining system. However, we do not consider that as a core proposal, for the simple reason that we find it more important that those administrative fining systems are implemented at the Member State level. In sum, from the perspective of sanctions, we do not have very strong recommendations for changes at the EU level.

As far as the national legislator is concerned, we strongly recommend that, to the extent that it has not been done yet, the national legislators would have a system of administrative fines and adequate complementary sanctions. Both policy options we would consider as core proposals. The reason is that in the past we have seen in many Member States that where only the criminal enforcement was available, de facto very little happened and large proportions of environmental crime cases were dismissed.²⁹ Precisely because prosecutors (understandably) use their scarce resources to focus on the major cases, it is important that an administrative fining system is available to provide at least some remedy (and thus dissuasion) for cases that would otherwise be dismissed. An administrative fining system is hence crucial to back up the effectiveness of the criminal law.³⁰ It may also be clear why we consider the use of complementary sanctions core. By the end of the day, the entire goal of environmental criminal law should be to restore the environment or to stop further pollution from happening. Traditional sanctions may not serve that goal and this is something that legislators (but also practitioners) should of course recognize.

We equally made a recommendation to formulate guidelines to prosecutors and judges. Perhaps one would be tempted to consider that those guidelines would not be core proposals, precisely because they are non-binding

²⁹ See Faure, M. G., Gerstetter, C., Sina, S. & Vagliasindi, G.M., “Instruments, Actors and Institutions in the Fight Against Environmental Crime.” Study in the Framework of the EFFACE Research Project. Berlin: Ecologic Institute, 2015.

³⁰ Faure, M. & Svatikova, K., “Criminal or Administrative Law to Protect the Environment?”, 24(2) *Journal of Environmental Law*, 253-286.

recommendations. However, we tempt to still insist on the importance of those guidelines for a number of reasons. First, those are relatively easy to implement, low-threshold, flexible instruments which can easily be adapted and which provide peer to peer information. Second, differently than formal harmonization, they may lead to a soft form of spontaneous growing together of practices in Member States and thereby constitute a valuable alternative to further formal harmonization (of size and type of sanctions). Precisely because there are existing networks (like IMPEL and EUFJE), which would presumably be more than ready to take on those tasks, we consider this also a core proposal for the reason that it seems like one which is relatively easy to implement and could potentially lead to relatively quick win situations and thus to greater environmental effectiveness.

Finally, it should be stressed once more that also from the perspective of effectiveness of sanctions, it is crucial that adequate data are collected on inspections, violations, further actions and sanctions imposed in order to guarantee the effectiveness of the enforcement system. Data collection is dealt with in policy area 1.

Table 2: Overview of Policy Options for MS and the EU

Level	Option	Recommended	Political feasibility	Priority
EU	• Fix type and magnitude of sanctions	No	Easy	-
	• Mention administrative fines	Maybe	High	+/-
	• Mention complementary sanctions	Maybe	High	+/-
Member States	• Use or introduce administrative fines	Yes	High	+
	• Use or introduce complementary sanctions	Yes	High	+
	• Support execution of complementary sanctions	Yes	High	+
Other (EUFJE prosecutors)	• Guidelines on – <ul style="list-style-type: none"> ○ Type and magnitude of sanctions ○ Complementary sanctions 	Yes	High	+

References

- Abbot, C. and A. Ogus, "Pollution and Penalties", in: T. Swanson (ed.), *An Introduction to the Law and Economics of Environmental Policy; Issues in Institutional Design* (Research in Law and Economics, Volume 20), Bingley: Emerald Group Publishing Limited 2012, 493-516.
- Bianco, F., A. Lucifora, and G. M. Vagliasindi. "Fighting Environmental Crime in France: A Country Report." Study in the Framework of the EFFACE Research Project. Catania: University of Catania, 2015.
- Farmer, A.M. "Qualitative and monetary analysis of the impacts of environmental crime: Overview." A study in the framework of the EFFACE research project. London: IEEP, 2015.
- Faure, M.G., "Effective, proportional and dissuasive penalties in the implementation of the Environmental Crime and Ship Source Pollution Directives: Questions and Challenges", *European Energy and Environmental Law Review*, 2010, 256-278.
- Faure, M. G., C. Gerstetter, S. Sina, and G. M. Vagliasindi. "Instruments, Actors and Institutions in the Fight Against Environmental Crime." Study in the Framework of the EFFACE Research Project. Berlin: Ecologic Institute, 2015.
- Faure, M.G. and K. Svatikova, "Enforcement of Environmental Law in the Flemish Region", *19(2) European Energy and Environmental Law Review*, 2010, 60-79.
- Faure, M. and K. Svatikova, "Criminal or Administrative Law to Protect the Environment?", *24(2) Journal of Environmental Law*, 2012, 253-286.
- Faure, M, A. Ogus, and N. Philipsen, "Curbing Consumer Financial Losses: The Economics of Regulatory Enforcement", *31(2) Law and Policy*, 2009, 161-191.
- Faure, M.G. and C. Leger, "Towards a Harmonization of Insider Trading Criminal Law at EU Level?" (December 30, 2014). Available at SSRN: <http://ssrn.com/abstract=2543964> or <http://dx.doi.org/10.2139/ssrn.2543964>.
- Heine, G., "Allemagne. Crimes against the Environment", *65 Revue Internationale de Droit Pénale*, 1994, 731-759.
- Ogus, A. and C. Abbot, "Sanctions for Pollution: Do We Have the Right Regime?", *14(3) Journal of Environmental Law*, 2002, 283-298.

