Summary of the Workshop

"Environmental Crime and the Criminal Justice System"

23 June 2014, Catania, Sicily

The following is a summary of workshop held as part of the EU-funded research project "European Union Action to Fight Environmental Crime" (EFFACE, www.efface.eu). Workshop participants included academics, police officers and other practitioners, as well as representatives of NGOs. This document summarizes the presentations as well as the most important discussions during the workshop.

EFFACE research on instruments, actors, and institutions to combat environmental crime: an overview

Grazia Maria Vagliasindi, Researcher in Criminal Law at the University of Catania, introduced the relevant EFFACE research on instruments and actors; this includes an analysis of how they work and cooperate. This part of EFFACE research is to establish a factual baseline needed for later developing policy options for the EU on how to better fight environmental crime. She presented insight on the criminal justice system in various Member States, as contained in the national level country reports compiled by EFFACE. The countries covered are France, Germany, Italy, Poland, Spain, Sweden, and UK. Vagliasindi clarified that special attention has been given to the analysis of national legislation in the selected EU Member States before and after the adoption of the Directives on the protection of the environment through criminal law and on ship source pollution.

Vagliasindi also stressed the importance of clarifying the meaning and the scope of core concepts such as "environmental crime" and "criminal justice system". These are key concepts for understanding the core of the research. She gave an overview of the relevant literature on the topic highlighting that authors devote special attention to corporate environmental crime, organized crime against the environment, and environmental crime committed by individuals. She explained that the concepts of "crime" or "criminal" are used in the EFFACE national reports only when referring to conduct punishable by criminal sanctions. More specifically, the concept of environmental crime, as used in the EFFACE research on actors, instruments and institutions covers the criminal provisions related to the types of conduct listed in the Directive on the protection of the environment through criminal law and in the ship source pollution Directive, provisions related to crimes committed in an organized manner, the general criminal provisions used by the judiciary in order to protect the environment and environmental criminal law provisions introduced to comply with international law.

Experiences on criminal liability of collective entities for environmental crime - a perspective from Italy

Antonella Barrera, Public Prosecutor, Court of Catania with the anti-mafia unit, addressed the issue of "criminal" liability of collective entities for environmental crime with specific focus on waste management.

Barrera introduced the topic describing the Italian Code on the Environment (Legislative Decree 152 of 2006), which transposes, among others, the obligations deriving from Directive 2008/98/EC on waste. The Code on the Environment applies the waste hierarchy (which ranks waste management options according to what is best for the environment: first prevention, then recycling, reuse, recovery and finally disposal) and the precaution and prevention principles, as well as the polluter pays principle and the liability of the producer. In the Code on the Environment, the definition of waste (Art. 183) reproduces that contained in the waste Directive, which requires the "intention to dispose".

Barerra highlighted that Art. 260 of the Code on the Environment, dealing with organized activities connected to the illegal trafficking in waste, is one of the key provisions. It provides that "whoever, in order to obtain an illegal advantage, with more operations and through the preparation of media and organized continuing operations, sells, receives, transports, exports, imports, or otherwise improperly handles large quantities of waste shall be punished with imprisonment from one to six years". She pointed to the difficulties in considering certain activities as "illegal" under the Code. Quite often in fact companies operate with legal documents and legal authorizations while at the same time undertaking activities that are completely different from those authorized (e.g. type of waste not within the scope of permit, execute activities that are different from what it is authorized); this is often done for cost-reduction purposes.

The prosecutor also reported that recently the Italian Court of Cassation considered as environmental damage not only the damage caused by violation of specific environmental legislation, but also the damage caused to human beings.

She furthermore stressed that through Legislative Decree 231 of 2001 the Italian legal system introduced the "administrative liability of legal entities". This was considered a milestone as for the first time it derogated from the principle of *societas delinquere non potest*, i.e. the principle that a legal person cannot be held liable for an offence. Subsequently, Legislative Decree 121 of 2011, which was adopted in order to transpose the Directives 2008/99/EC and 2009/123/EC, introduced Art. 25-undecies, dealing with the liability of legal persons for environmental offences (and not anymore for offences in general). Previously, the prosecution of legal persons had mainly been done through the prosecution of the physical people having qualified connections with the entity. However, Barerra highlighted that difficulties still remain as to finding the link between the companies and the individuals acting for them.

As an overall assessment, she considered somehow minimalistic the approach taken by the Government. Legal commentators have observed that through these legislative modifications the system went from a complete indifference to the issue of liability of legal entities in the waste sector to a simple adjustment, not always consistent, of the existing legislation to the EU rules. Legislative Decree 121 of 2011 introduced offences that are different from the

original draft of the Legislative Decree; for example, the abandonment of waste (Art. 192 of the Code of environment) has been deleted. Furthermore, sanctions lack in effectiveness.

The Catanian prosecutor concluded her intervention highlighting the insufficiency of the current legislative framework in Italy and the need for the Italian legislator to do more in order to better implement the EU Directives, finding solutions that tackle waste crimes as these are incredibly profitable activities for criminals.

Discussion

During the discussion on the presentation, it was stressed that if different actors collaborate in favor of a company, the responsibility for committing the offence is with the company, provided that there is a qualified relation between the acting person and the company. Furthermore, prosecuting municipal authorities (and not only individuals) constitutes a more severe and effective punishment. As to the relationship between prosecutors and police (e.g. the Nucleo operativo ecologico) in these matters, it was stressed that in complex investigations, cooperation is crucial.

Environmental crimes and remediation in Italy

Andrea Di Landro, Professor of Criminal law at the University of Enna, addressed environmental crimes and remediation under the Italian experience.

He first presented some recent data (Legambiente, June 2014) regarding environmental crime and the economic crisis, showing that 80 environmental crimes are committed every day. He further showed that environmental crimes are often “formal” crimes overlapping with administrative violations (e.g. waste management without authorizations). The criminal law provisions punish the creation of a risk (presumption of offensiveness) and not the “production” of damage. They are often misdemeanors because of their administrative origins. They are less severe, usually sanctioned with fines.

Di Landro affirmed that a draft bill aiming at introducing new delicts in the criminal code is currently under discussion in the Parliament: environmental pollution (452bis), environmental disaster (452ter), unintentional delicts against the environment (452quater) and traffic and dereliction of radioactive material (452quinques). *Restitutio in integrum* (452decies), i.e. restoring the environment to the status it had before it was affected by an offence, is a new possible sanction; it can be used provided that traditional sanctions (such as imprisonment and fines) are not effective. Restitution can serve both preventive functions and the interests of the community affected by the crime.

Outside the area of criminal law there are other forms of remediation: the Ministry of the Environment (MoE) can order anyone responsible for an environmental damage to restore the environment to the previous status (this is a measure of administrative nature) or the MoE can start a civil action to claim compensation for the environmental damage (this is a measure of judicial nature). The former is an injunctive procedure more agile and faster than the criminal one although some concerns are linked to the guarantees of the subjects of the measures, such as low evidentiary standards. The latter is not a purely private action, but a “hybrid” one in so far as only the Ministry of Environment is entitled to act. This action is characterized by poor investigative powers and tools and by the fact that all acts related to

the proof of the environmental damage are secret because of the (usually) ongoing criminal process.

Usually the criminal proceedings address individuals, even though it is not easy to assess responsibilities especially when the pollution is spread, extended and stratified in time. A civil action in the context of criminal proceeding against legal entities is considered inadmissible.

Di Landro finally suggested converting some of what are currently mis-demeanours in Italian law into crimes, allowing civil action to be brought against legal entities in criminal procedures, and developing a better dialogue between Ministry of Environment and public prosecutors.

Criminal Justice System and Environmental Crime: the Perspective of Europol

Werner Gowitzke of Europol clarified Europol's role as supporting Member States' law enforcement agencies. Europol is a counter-measure to opportunities for crime that arise out of the removal of borders within the EU. It has about 700 staff members and is based in Den Haag. Of particular relevance is the EnvicrimeNet, a network of police officers dealing with environmental crime from the different Member States, for which Europol performs secretariat functions.

In the 2013 "Serious and Organised Crime Assessment" (SOCTA) produced by Europol environmental crime was identified as an "emerging threat" to the EU. The SOCTA is used to define political priorities and make decisions on the allocation of resources within the EU. One of the insights of Europol's research on the environmental crime is that environmental crime is frequently not prosecuted. Rather, enforcement bodies focus on other crimes associated with environmental crime, but seen as more "manageable", such as fraud, corruption, or document forgery.

There are two types of environmental crime or particular relevance to the EU, involving organized crime: waste trafficking and trafficking in endangered species, where often similar "techniques" as in drug smuggling are used.

Actors perpetrating environmental crime are mainly the following:

- traditional organized crime
- 'normal' companies (owners) in crisis & organized crime networks
- white collar organized crime
- large, established companies

With regard to the latter, it is unclear whether their involvement in a crime would already constitute an organized way of committing the crime.

Gowitzke identified some problems for law enforcement bodies in the area of environmental crime, including an insufficient number of controls, difficulties in prosecuting, the impossibility of intelligence-led policing due to a lack of data, and a lack of specialized units.

Generally, more information on environmental crime is needed. Europol has therefore initiated the Intelligence Project on Environmental Crime (IPEC) which is to improve the data situation on environmental crime within the EU. Generally, the reporting on environmental crime from the Member States needs to be improved, in Gowitzke's view.

The **discussion** focused on the added value and functioning of networks of police officers as well as the collaboration between police institutions and NGOs. Moreover, it was also discussed whether there was a need for more or improved legislation at EU level. Most discussants held the view that improving knowledge on environmental crime within the EU through improved reporting and better enforcement are more important currently. Another priority identified was raising awareness on the importance of environmental crime among enforcement officers.

The role of police forces in the fight against environmental crime

Sébastian Nochez from the French "Office central de lutte contre les atteintes à l'environnement et à la santé publique *(*OCLAESP) described OCLAESP as a specialized inter-ministerial agency, in charge of investigations on environmental crime, public health crimes, and doping. OCLAESP can work everywhere in France and has a network of 350 delegated investigators in the field. The tasks of OCLAESP are to conduct and coordinate criminal investigations, observe the behavior of offenders, centralize information, advise law makers, participate in training and information exchange on the issues, and to handle international requests relating to the areas of crime it covers. Nochez highlighted that a lot of environmental crime is perpetrated in the French overseas territories.

Nochez highlighted some of the strengths of OCLAESP, contributing to efficient enforcement: OCLAESP is a specialized, inter-institutional force, following INTERPOL's concept of "National Environmental Security Taskforces" (NEST). It is engaged in international cooperation and exchange with many countries. Moreover, in cases involving organized crime, it may draw on special investigation powers.

However, Nochez also pointed to some problems with enforcement in France. There are no dedicated judges for environmental crime cases, whereas there are such specialized judges for public health cases. The system of penalties for environmental infringements is weak, with relatively low penalties in many cases, except for infringements related to organized crime" after "low penalties in many cases. The penalties also influence investigation tools available; some techniques are only permitted when potential penalties for a crime are more severe. There is a lack of legal provisions in some areas. For example, "soil pollution" is no offence, so the pollution of soil can only be prosecuted in connection to water pollution or similar. Also, the applicable EU provisions are sometimes complex; sometimes it is difficult to know whether a product is legally on the market or not (e.g. counterfeit products).

In the **subsequent discussion**, some commentators expressed appreciation for OCLAESP's work and set-up. Among other, OCLAESP's willingness to engage in international cooperation was highlighted. Other questions related to the use of certain investigation techniques, such as intelligence-led policing and whistleblowers and the need for strong witness protection mechanisms.

European judicial cooperation in the fight against environmental crime

Lorenzo Salazar, Director for International Criminal Affairs, Ministry of Justice, Italy, first gave a historical overview of the approximation on criminal law provisions of relevance to the environment. He pointed to the 1990 Convention of the Council of Europe, the 1999 Tampere Council Conclusions devoted to justice and home affairs and mentioning environmental law, the 2003 Council Framework Decision on the protection of the environment through criminal law (later annulled by the EU's Court of Justice (CJEU) for lack of the proper legal basis), and finally the environmental crime and ship source pollution directives.

In its judgment on the Framework Decision on environmental crime, the CJEU also clarified that the EU could not stipulate types and levels of sanctions in its legislation, according to the primary law in force at that time. With the Lisbon Treaty, the different "pillars" of the EU were abolished; however, Salazar held that the EU is still not provided with full powers in the field of approximation of criminal law, as Art. 83 TFEU only gives the EU power to enact *minimum* rules on crimes and sanctions.

Important fora for judicial cooperation on environmental crime at the EU level are Eurojust and networks such as the EU Judges for the Environment. Instruments available include the European arrest warrant or other instruments of mutual assistance in criminal matters. With regard to the EU arrest warrant, environmental crime is one of the areas where the requirement for "double-criminality" does not need to be fulfilled, i.e. person may be surrendered by one state to another even if the act for which surrender is requested does not constitute an offence under the law of the executing Member State. However, so far the European arrest warrant has been used very rarely in the area of environmental crime.

Similarly, other instruments of mutual assistance also do not contain a "double-criminality" requirement in the area of environmental crime. However, a problem with executing mutual assistance instruments is that they often require a minimum of at least 3 years of imprisonment as a pre-condition. However, not all Member States have such laws in the area of environmental crime. Thus, Salazar opined that for the cooperation instruments to be effective, further harmonization of substantive EU legislation would be needed.

Salazar also highlighted the important role of Eurojust in coordinating national investigations; however, he also saw a need for an EU body that can make decisions on who can investigate and prosecute in cases of overlapping national competences. So far, decisions in these cases can only be made by the Member States themselves. Sometimes, there is successful coordination on this among Member States, such as in the case of the Prestige tanker ship accident. However, in other cases coordination was more difficult. Art. 85 TFEU, which provides for a role of Eurojust, has not yet been implemented.

Points highlighted in the **discussion** were how important legislative provisions not directly linked to environmental crime are important in combating environmental crime. Moreover, it was also pointed out that re-enforcing criminal procedure should accompany a further approximation of law, in order not to forget rights of accused.

Policy recommendations

In a final round, participants were asked to indicate what **policy recommendations** they consider most important. The recommendations given included the following:

Improving cooperation, information exchange and data gathering:

- Data and information should be collected and shared within the EU on the basis of a unified system
- Databases should be established for this purpose
- Multiple investigation should improve coordination and communication between them
- Create a group of environmental crime experts and national contact points at the EU level
- Create focal points in the Member States police forces reporting to Europol on environmental crime to improve quality of reporting

Enhancing the legislative framework:

There were divergent opinions on whether improved legislation was needed or the focus should be on better enforcement. Some cautioned that further harmonization should only happen where there is a clear, demonstrated need and it is not clear at present whether there is such a need in the case of environmental crime. Other participants, however, provided recommendations relating to the EU legislative framework:

- Ensure that sanctions are proportionate, effective and dissuasive; ensure minimum of three years of sanction to ensure that mutual assistance instruments can be used
- A tool should be created to prosecute EU companies and their local affiliates outside the EU for environmental crime
- Better integrate administrative, criminal and civil law of relevance for environmental crime

Enhancing investigation, prosecution, enforcement:

- More resources are needed for investigating and prosecuting environmental crime and to create the ability to properly respond
- Within Member States, adopt a multi-agency approach with a leading role for prosecutors & judges
- Improve cooperation with NGOs as watchdogs
- Create specialized environmental courts with judges trained not only in criminal law, but also in the assessment of forensic evidence brought in
- Better link environmental crime investigations with financial investigations: follow the money

Remedies and restoration:

- *Restitutio in integrum* should be a sanction in criminal law; gains from environmental crime could be confiscated to fund restoration
- On compensation for victims learn from past trials
- Empower victims to bring claims, e.g. against EU companies for acts committed outside the EU

Education, awareness raising & training

- Environmental crime should be made a priority in the EU policy cycle
- Better educate society on impacts of environmental crime
- Raise awareness among enforcement officials of the importance of fighting environmental crime and make work in environmental crime units more attractive
- Learn from best practices, where there are such

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