



Conclusions and recommendations

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ABSTRACT

This report presents the conclusions and policy recommendations formulated in this document are based on earlier research done in the 40 months EU-funded research project on “European Union Action to Fight Environmental Crime” (EFFACE), which included legal analysis, data analysis, various case studies, and an analysis of the strengths, weaknesses, opportunities and threats (SWOT) of the current approach of the EU to combating environmental crime. Nine different policy areas¹ were selected for the SWOT analysis. Based on the results of the SWOT analysis and a discussion of these results among the EFFACE partners, an in-depth analysis of possible policy options was made for each of the nine areas. Those reports constitute the basis for the current recommendations which are addressed at both EU level and Member State policy makers. In addition to these recommendations, questions for further research are identified.

¹ The areas discussed were: further harmonization of substantive environmental criminal law at EU level, the systems of sanctions, functioning of enforcement institutions and cooperation, data and information management, the role of NGOs and victims, the (EU) external dimension of environmental crime, environmental liability, organized crime as well as corporate liability/responsibility. The SWOT analysis is available at http://efface.eu/sites/default/files/publications/EFFACE_SWOT%20Analysis.pdf.

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LIST OF ABBREVIATIONS

| | |
|-------|--|
| EPPO | European Public Prosecutor's Office |
| ICCWC | International Consortium on Combating Wildlife Crime |
| IMPEL | European Union Network for the Implementation and Enforcement of Environmental Law |
| JIT | Joint Investigation Team |
| NGO | Non-governmental organisation |
| SWOT | Strengths, weaknesses, opportunities and threats |
| TFEU | Treaty on the Functioning of the European Union |
| UNODC | United Nations Office on Drugs and Crime |

1 Brief background on EFFACE research

The policy recommendations formulated in this document are based on earlier research done in the 40 months EU-funded research project on “European Union Action to Fight Environmental Crime” (EFFACE), which included legal analysis, data analysis, various case studies, and an analysis of the strengths, weaknesses, opportunities and threats (SWOT) of the current approach of the EU to combating environmental crime. Nine different policy areas² were selected for the SWOT analysis. Based on the results of the SWOT analysis and a discussion of these results among the EFFACE partners, an in-depth analysis of possible policy options was made for each of the nine areas, resulting in nine ‘policy area reports’. Those reports constitute the basis for the current recommendations.³ However, the following text is not a mere compilation of what is in the reports, but a result of the discussion among EFFACE partners as well.

The draft of these conclusions and recommendations was discussed with academic experts and practitioners at a workshop in London on 22 October 2015 on “Enhancing the EU’s efforts to combat environmental crime – the path ahead”.⁴ The current document hence incorporates the feedback received during the workshop by experts and stakeholders.

In order to keep the conclusions and recommendations readable, they will be formulated in a brief manner. In some cases an explanation will be provided in italics of why a particular recommendation is formulated. In most cases the recommendations have a basis in the work done on these specific nine areas and in earlier EFFACE research. To the extent possible references will be made in footnotes to allow the reader to find further rationales for the recommendations.

² The areas discussed were: further harmonization of substantive environmental criminal law at EU level, the systems of sanctions, functioning of enforcement institutions and cooperation, data and information management, the role of NGOs and victims, the (EU) external dimension of environmental crime, environmental liability, organized crime as well as corporate liability/responsibility. The SWOT analysis is available at http://efface.eu/sites/default/files/publications/EFFACE_SWOT%20Analysis.pdf.

³ See the annex for an overview of the nine area reports.

⁴ A report of the workshop is available at <http://efface.eu/workshop-enhancing-eu%E2%80%99s-efforts-combat-environmental-crime-%E2%80%93-path-ahead>.

It should be stressed here that this document focuses on the main conclusions and recommendations of the EFFACE research. However, throughout the project many documents⁵ were produced, and several of those reports and studies also contain recommendations. As part of the project, nine workshops, a mid-term conference and a final conference were held, which also resulted in recommendations given by practitioners and academic experts on the topic of environmental crime; these are recorded in reports from the respective events. In some cases those recommendations are of a more detailed nature (for example resulting from case studies on a particular area) and are therefore not repeated here. The reader may hence wish to consult those specific studies as well.

2 Introduction: reflections on the functions of criminal law

One starting point for thinking about revising environmental criminal law and policy in Europe is that environmental crime has to be considered a potentially serious crime. Severe violations of environmental regulation can cause severe harm to the environment which in turn might endanger the basic conditions for human life. Given environmental crime's permanent and sometimes life-threatening effects, it has to be treated seriously by criminal law. Using criminal law as an instrument to prevent and sanction certain behaviour sends a signal that a society strongly disapproves morally of that behaviour. This starting point is important, inter alia, when envisaging sanctions for environmental crime as compared to sanctions for other equally potentially permanent or life-threatening situations.

Furthermore, environmental crime is often transboundary and may involve organized crime. However, the mere fact that environmental crime may cross borders (such as in the case of wildlife crime, air pollution, pollution of transboundary rivers, or trafficking of waste) does not as such make environmental crime a serious crime.⁶ At the same time, when environmental crimes are transboundary in nature, this is likely to make inspection, monitoring, and prosecution more

⁵ All available on the EFFACE website: <http://efface.eu>.

⁶ "Serious crime" refers to crimes that do not only violate administrative obligations (e.g. an administrative provision of a license), but also endanger environmental interests, for example through an unlawful emission.

complex and costly. Moreover, when this cross-border crime is committed in an organized manner, there is a large likelihood that it is serious crime as well.

However, an equally important starting point is that criminal law, as the most far-reaching remedy mechanism that the law offers, should be used sparsely, proportionally and as a last resort. Even though we mentioned as a starting point that environmental crime is potentially serious, that does not imply that each and every violation of an environmental regulation is serious. The approach towards criminalization of certain acts, sanctioning mechanisms and imposition of sanctions in practice should therefore always be proportionate to the way in which environmental and other (e.g. health, property) interests have been endangered, threatened or harmed.

It should also be recalled that using criminal law is never a goal in itself, but a means to reach certain objectives, in this case the goal of environmental protection. As a consequence, the intervention by the criminal law should be restorative, meaning that it should aim at restoring harm done in the past, and it should be preventative, i.e. preventing the occurrence of future harm.

Taking into account these reflections on the functions of criminal law, as well as the role the EU could play in this regard, two questions that guided the compilation of our policy recommendations are:

- Whether the recommendations should necessarily be implemented at the EU level or at a different level of governance (for example the Member State level) or for non-government actors (such as informal networks).
- Whether a particular policy recommendation should necessarily be implemented by using the criminal law or whether other instruments (more particularly civil remedies or administrative measures or sanctions) could reach the goal as well.

3 Methodology

3.1 Various recommendations

In the recommendations below, a distinction is made between recommendations considered as “core” and therefore essential for an effective environmental criminal law, and policy and recommendations that are “supplementary”. In addition, some recommendations for further research will be formulated.

The reason why recommendations for further research are formulated (below in section 9) is not that those areas would neither be “core” nor “supplementary”, but rather that EFFACE has

discovered some potentially important issues, such as the possibility to increase the role of victims in the criminal procedure, which were not studied empirically and in-depth in our research. In order to make solid recommendations concerning these issues, further and more detailed research is needed which was not the subject of EFFACE. In order not to lose these ideas, we therefore recommended to devote further research to them.

3.2 Multi-level governance

It was already made clear that recommendations can be formulated at different levels of governance and potentially also to non-government actors. In order to clearly identify the addressees, the recommendations below do not only distinguish between core and supplementary recommendations (and points for further research), but equally make clear whether the particular recommendation should be implemented at the EU level or rather by Member States or via other (potentially also non-state) actors or informal networks.

3.3 Limits

The reader should be aware that these recommendations do not pretend to provide a comprehensive answer on how an effective environmental criminal law and policy in the EU could be formulated. Some topics may potentially be interesting, but could not be further examined. One example is the desirability of criminal liability of legal entities and the specific question of the attribution of criminal responsibility within legal entities. Some other topics (like for example the external dimension of criminal responsibility or the role of civil society) were briefly touched upon, but were not the subject of more thorough research within EFFACE. It is precisely for that reason that recommendations are only formulated on those issues on which research could be done, thus providing a solid basis for those recommendations; for other issues, as mentioned above (3.1), suggestions for further research are formulated.

We will now turn to the recommendations, separating them in recommendations related to the EU (section 4), the Member States (section 5), guidelines (section 6), improving enforcement cooperation and data collection (section 7) and with respect to the external dimension (section 8). The topics for further research (section 9) conclude these recommendations.

4 Proposals concerning the EU level

4.1 Core proposals

Core Proposal 1: The fact that environmental crime has been committed in the context of organised crime should be considered an aggravating circumstance in the Environmental Crime Directive.

Several EFFACE studies have identified that in some cases criminal organisations engage in environmental crime.⁷ In some cases (but not always) this organised crime has a cross-border character. As indicated above, the mere fact of being transboundary does not make environmental crime more serious. However, the fact that environmental crime takes place within the context of organised crime does give it a more serious character. Examples are notably wildlife crime and illegal trafficking of waste. Hence, this element (environmental crime taking place in the context of organised crime) should be considered an aggravating circumstance in relevant EU legislation, which implies the possibility for the judge to impose an increased penalty.⁸ The possibility to impose higher sanctions when the environmental crime occurs in the context of organised crime should be made explicit in the Environmental Crime Directive. The notion of organised crime is a very vague one on which national interpretations may vary; therefore we do not define the term in these recommendations. In many international documents organised crime has already been defined; however, within the EU there is no uniform definition. For that reason the term may be subject to further development via guidelines (see section 6 below). It should be noted that the mere fact that we recommend to consider organised crime an aggravated circumstance does not imply that the EU also needs to prescribe minimum sanctions.⁹

Core Proposal 2: Rules on the confiscation and forfeiture of the proceeds of environmental crime should be adopted at the EU level.

⁷ See in that respect *inter alia* Fajardo del Castillo (2015a) and Fajardo del Castillo (2015b).

⁸ This was explicitly recommended by Vagliasindi (2016).

⁹ EFFACE does not take a uniform position on the need for minimum sanctions. See section 4.3 below.

Above (section 2) we mentioned that the need for restoration of harm done in the past is one of the crucial starting points of these recommendations.¹⁰ Restoration implies that “crime should not pay”. As a result, not only the environment, but also the perpetrator should be put back in the position (s)he was in before the crime. This is referred to as “restitutio ad integrum”. This does not only mean that for instance illegally deposited waste would have to be removed and any soil or water contamination resulting from it be cleaned up, but also that profits made as a result of environmental crime should be seized and forfeited. This is an important recommendation to be implemented at the EU level, since removing financial gains of a crime also constitutes an element of what makes penalties “dissuasive, effective and proportional”. Forfeiture of proceeds certainly adds to the effectiveness of sanctions and to their dissuasion. Since there still are considerable differences in this respect at the Member State level, harmonisation at EU level is indicated. Again, this could take place via a revision of the Environmental Crime Directive, but could also be implemented in other specific (eventually international) instruments addressing the proceeds of crime (e.g. the Money Laundering Directive or the Directive on the Freezing and Confiscation of Proceeds of Crime).¹¹

Rules addressing the proceeds of crime are already present in many sectoral directives and in other international instruments, usually in the context of money laundering, but our recommendation is to broaden the scope of this instrument in order to make it applicable to all environmental crimes.

Core Proposal 3: Impose an obligation on Member States to provide data on the number of violations, prosecutions and imposed sanctions for violations of national provisions implementing European environmental law, commonly referred to as the environmental *acquis*.

This obligation to gather data is a logical consequence of the fact that the Environmental Crime Directive itself imposes the obligation on Member States to have “effective, dissuasive and proportional” penalties for violation of the national legislation implementing certain parts of the environmental acquis. In order to be able to verify whether Member States implement the obligation to ensure that violations are subject to “effective, dissuasive and proportional” sanctions it is necessary that data on violations and sanctions is available. It would especially be important to

¹⁰ See more particularly Faure, Gerstetter, Sina and Vagliasindi (2015) and see Faure and Philipsen (2016).

¹¹ See Mitsilegas (2016).

impose an obligation on Member States to provide data on output, i.e. the number of installations inspected, the number of violations discovered, results of those violations in terms of sanctions imposed, numbers of prosecutions, etc. This could also be linked to data on input in enforcement (e.g. the number of staff fulltime equivalent devoted to monitoring compliance with environmental legislation). Some best practices already exist in this respect, for example in Ireland and in the Flemish Region of Belgium.¹² These indicate that data on the relationship between input and output can be collected without imposing a significant additional burden on authorities. However, ideally information would not only be collected on output, but also on outcomes. The latter would imply that information is also available on whether specific enforcement actions lead to the consequence of fewer perpetrators engaging in environmental crime; ideally, improvements of environmental quality resulting from enforcement actions could be measured or at least be assessed in a meaningful way qualitatively. Although improving environmental quality should ideally be the consequence of enforcement actions, it is recognised that that may be too difficult to achieve on a short term.

4.2 Supplementary Proposals

Supplementary Proposal 1: Make clear in the language of Directive 2008/99 that not only criminal sanctions can provide “effective, dissuasive and proportional” sanctions.

In the current language of Directive 2008/99, more particularly in Preamble (3), it is held that criminal penalties “demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law”. As a consequence, Article 5 prescribes that the penalties should not only be effective, proportionate and dissuasive, but should equally be “criminal penalties”. This language suggests that effective remedies for environmental crime could only consist of criminal penalties. Given the starting point mentioned above that criminal law is a tool of last resort, it should be signalled in the Directive that, where possible and appropriate, other remedies (civil or administrative sanctions) could also be effective, proportional and dissuasive. This suggestion is especially important in the light of developments in Member States towards an increasing use of administrative sanctions¹³, more particularly administrative fines

¹² See the Environmental Enforcement Reports published on a yearly basis by the Flemish High Council for Environmental Enforcement, also available in English on: www.vhrm.be.

¹³ See Faure and Svatikova (2012).

for environmental crime. Two further comments should be formulated in this respect: first, the fact that attention should be paid not only to criminal sanctions, but also to administrative and/or civil sanctions, requires adequate attention to avoiding the so-called “double jeopardy” or “ne bis in idem” principle, especially in the light of the case law of the European Court on Human Rights in Strasbourg. According to this principle, one offence should in principle only receive one punitive sanction (either via criminal or via administrative law). Second, the fact that we recommend a “toolbox approach” to sanctioning does not mean that there is no scope for criminal law in specific cases. In the introduction (see section 2 above) it was stressed that environmental crime has to be considered a potentially serious crime. Moreover, in some cases criminal sanctions can have an expressive function of strong moral disapproval that other measures may lack; criminal law can also facilitate investigations by allowing investigators to use certain investigative techniques (like e.g. wiretapping) that may not be available when using other instruments such as administrative law. In sum: even though it is here recommended to make clear in the language of the Environmental Crime Directive that effective remedies for environmental crime can also consist of other instruments than criminal penalties, it is equally important to stress that for particular cases where criminal law really does have an added value, it should of course be available and be applied in an effective and appropriate manner.

Supplementary Proposal 2: Improve the Environmental Liability Directive

During the drafting of the Environmental Liability Directive a lot of central issues which crucially determine the scope of environmental liability (such as causation, attribution of loss, compulsory financial guarantees and the justificative effects of complying with a permit) were all excluded from the scope of the Directive. As a result, it is widely held in the literature that the scope of the Environmental Liability Directive is too limited.¹⁴ Since it was held that improving environmental liability and hence private enforcement can be an important tool in the fight against environmental harm, improving the effectiveness of the Environmental Liability Directive could also be considered an effective tool against environmental crimes. One issue to be considered in this regard is to make the Environmental Liability Directive and the Environmental Crime Directive more consistent with each other, e.g. in relation to what is considered an environmental damage. It is important to stress that appropriate environmental liability rules are an element of the toolbox approach which was advocated above. In that respect it is also important to stress that in some legal systems non-

¹⁴ See Vagliasindi (2016).

governmental organisations (NGOs) may be able to bring cases where a public prosecutor is unable to do so.

4.3 Harmonising Sanctions?

Article 83 of the Treaty on the Functioning of the European Union (TFEU) now explicitly allows the European legislator to “establish minimum rules with regard to the definition of criminal offences and sanctions”. In some areas, such as insider trading and market abuse, the European legislator has already made use of this possibility to define minimum sanctions.

The question whether minimum sanctions should be provided for in the Environmental Crime Directive, is an important issue which we have neither classified as “core” nor as “supplementary”. Several arguments in favour and against minimum sanctions can be advanced, but the EFFACE researchers have no uniform position and EFFACE has not produced evidence which would allow conclusive recommendations on the matter. Nevertheless, because this is an important and much discussed topic, we will discuss the various arguments in some detail below.

It should be noted that when discussing the harmonisation of sanctions, such harmonisation could take different forms. One option would be to harmonise minimum sanctions in the strict sense of the word, taking the form “behaviour x should be punishable with a fine of at least y or at least y months in prison”. However, it would also be feasible to harmonise rules on minimum maximal (“mini-max”) sanctions, taking the form of “behaviour x should be punishable with a maximum sentence of no less than y months in prison”.

When discussing the possible harmonization of sanctions, it should be recalled at the outset that three Member States (the United Kingdom, Denmark and Ireland) have opted out of the provisions on the area of freedom, security and justice of the Lisbon Treaty. The UK and Ireland – but not Denmark – are thereby allowed to decide on a case-by-case basis whether they want to adopt such provisions. If a harmonization of sanctions based on Article 83 TFEU were enacted, it would therefore not apply to at least one of those three Member States that have opted out.

4.3.1 Arguments in favour

- Disparities between sanctioning levels in Member States could lead to a race to the bottom and to so-called “pollution havens”. This would mean that if one Member State would for instance have very low statutory sanctions, it would be able to attract businesses that could relocate to that “pollution haven”. Minimum sanctions would hence be needed to avoid such a race to the bottom. This argument probably is less strong in the case of minimum maximal sanctions, because there is no guarantee that increasing the maximum sanction

for a certain crime will also lead to an increase in average sanctions and hence help avoid the creation of “pollution havens”.

- The harmonisation of sanctions could be needed to signal what was mentioned as a starting point in the introduction - i.e. that environmental crime is serious crime. Minimum and minimum maximal sanctions would send an important signal towards the national legislator in the Member States, but also towards prosecutors and other actors in the enforcement chain such as the judiciary, that they should take environmental crime more seriously.
- Harmonised sanctions are needed to ensure that all Member States fulfil the formal pre-conditions for using certain instruments of judicial cooperation, where often a certain sentence is required for a certain crime as a precondition for using the particular instrument of judicial cooperation in investigating/prosecuting the crime in question.

4.3.2 Arguments against

- There is so far no convincing proof or evidence that the minimum statutory sanctions in Member States for environmental crime or the maximal sanctions are too low. Hence, it is not clear that there is a real problem to be solved with minimum or minimum maximal sanctions.
- Imposing minimum or minimum maximal sanctions through EU legislation may be problematic in terms of the internal coherence of the legal orders of Member States. Fixed minimum fines could have a different dissuasive effect depending upon, for instance, income levels in particular states and would, if adopted at, therefore have to be differentiated accordingly. Moreover, if EU-defined minimum or minimum maximal sanctions only exist in the field of environmental crime, this may lead to a situation where in a given Member State the sanctions for environmental crime may be disproportionately high as compared to those for other serious forms of crime.
- Harmonising minimum levels of sanctions in statutes would not necessarily be an effective solution to the race to the bottom as long as inspections and monitoring are not harmonised either and crime may therefore go undetected or not prosecuted. Moreover, prosecutorial discretion cannot be controlled either, nor can the freedom of the judiciary to determine the appropriate sanctions in a given case.
- There is hence a danger that minimum sanctions would merely constitute window-dressing, which could potentially have serious perverse effects. Experience in the US where

mandatory sentencing guidelines existed has shown that those had devastating effects for the sanctions actually imposed for environmental crime.¹⁵ Judges considered those minimum sanctions too harsh and thus avoided imposing the sanctions. Also, if prosecutors feel that those sanctions are considered as unfair or unreasonable, the consequence may be that no criminal prosecution at all takes place in order to avoid the minimum sanctions.¹⁶ Therefore, if some approximation of actual sanctioning practice in MS were desirable, the appropriate way to do this would be via bottom-up non-binding guidelines drafted by prosecutors or the judiciary (see section 6) rather than via top-down tools imposed by the European legislator.

- Since local specific circumstances in Member State may differ, so may specific sanctioning goals. This is rather an argument for leaving discretion to Member States. If anything is proposed with respect to harmonising sanctions at EU level, a wide range of sanctions should be provided for, leaving large discretion to Member States. Stronger minimum or minimum maximal sanctions for aggravating circumstances, for instance, when environmental crime is committed as organised crime, are a more flexible approach than to establish minimum or minimum maximal sanctions for any kind of environmental crime. It should also be kept in mind why certain sanctions are imposed (e.g. changing behaviour, eliminating financial incentives of crime, proportionality, compensation and deterrence).
- Increasing the statutory level of penalties does not automatically increase the level of deterrence; criminological literature has indicated that higher statutory penalties do not necessarily lead to more deterrence.¹⁷

4.3.3 Result

¹⁵ See e.g. Barrett (1992) and Babbitt et al (2004).

¹⁶ Also, in an EFFACE workshop the expectation was expressed that prosecutors might react in a similar way and simply drop charges in cases where they found the statutory sanction to be too high, see Report of the EFFACE workshop on "Enhancing the EU's efforts to combat environmental crime – the path ahead", held in London in October 2015, available at <http://efface.eu/workshop-enhancing-eu%E2%80%99s-efforts-combat-environmental-crime-%E2%80%93-path-aheadhttp://www.efface.eu/>.

¹⁷ See e.g. Andenaes (1974).

EFFACE does not take a position on whether imposing minimum or minimum maximal sanctions on environmental crime is warranted at this moment. There are good arguments for and against such an approach; it is ultimately a matter of political discretion. The argument in favour of minimum or minimum maximal sanctions for environmental crime may be stronger with some environmental crimes than with others. At the policy level minimum sanctions are often discussed in relation to illegal trafficking of waste or wildlife crime. From a more theoretical perspective there may, all aspects considered, not be a strong argument to impose minimum or minimum maximal sanctions specifically for these types of environmental crime. However, it is important to consider that these are areas which have high priority on the political agenda and consequently on the enforcement agenda as well. If the arguments above in favour of minimum or minimum maximal sanctions would hence be considered convincing, it is likely that this would apply more particularly to these two types of environmental crime. Generally, it has to be clear that a minimum or minimum maximal sanctioning mechanism makes no sense if no information is collected on sanctions that are actually imposed in Member States, allowing an evaluation of the effectiveness of such rules. That is why data collection by Member States, as mentioned above, is considered crucial (see section 4.1).

5 Member States

For the Member States, there are core proposals only.

In line with the 'bottom-up approach' to harmonisation advocated by law and economics scholars¹⁸, the legal principle of subsidiarity, and the fact that currently there are many differences between the legal systems of EU Member States, there are two core recommendations addressed at Member States rather than the EU level.

Core Proposal 1: Promote effective sanctions, including civil and administrative sanctions (also fines).

As was mentioned already, criminal sanctions should be considered an ultimum remedium. Hence, it is important that Member States are encouraged, as is already done in many Member States today, to use a variety of different instruments, among which criminal law has to be considered a

¹⁸ See e.g. Faure and Leger (2014).

last resort. Penalties should indeed be effective, proportionate and dissuasive; however, these requirements can to an important extent also be met by civil and administrative penalties. EFFACE research therefore supports a “toolbox” or “enforcement pyramid” approach whereby a variety of different instruments are made available to enforcers to react to specific environmental harm in an appropriate and proportionate manner.

An important aspect of making more use of sanctions that can be imposed by administrative agencies is that there may be a danger in providing too much power and discretion to administrative agencies. Public choice theory has pointed at the danger of administrative agencies being captured by industry, risks of collusion and lobbying. Those risks can to a large extent be avoided by providing guidelines to agencies and by requiring Member States to adopt a specifically defined enforcement policy and to publish it. This could also increase accountability and transparency of enforcement policy.

As far as the effectiveness of sanctions is concerned, the goal of a sanction may be to inflict costs (e.g. via an administrative fine) on a perpetrator in order to reach a behavioural change; however, inflicting such a cost (e.g. on a company) also may lead to costs to society. Since resources are limited choices will have to be made on the most effective way in which enforcement resources can be targeted. A targeted enforcement approach should ideally differentiate between enforcement actions in such a way that the sanctions imposed are effective, while at the same time corresponding to the type of environmental crime and the perpetrator. For example, a distinction should be made between different types of perpetrators (small versus large firms, repeat offenders versus first time offenders etc.).

Core Proposal 2: Introduce and use complementary sanctions and measures.

Since prevention and restoration are core features of an effective environmental criminal policy, the criminal penalty system should no longer only consist of the “classic” sanctions like fines and imprisonment. Other sanctions, aiming at restoration of harm done in the past or prevention of future harm can be as effective, dissuasive and proportionate as a fine or prison sanction. Hence, Member States should include those complementary sanctions within their sanctioning toolbox. The example of forfeiture of illegal profits obtained through environmental crime was already given (see section 4.1), but many other complementary sanctions can be envisaged as well. The way in which Member States have currently incorporated those complementary sanctions in their legislation varies strongly. Not only are there variations concerning the complementary sanctions that are available, but in some systems they are of a criminal nature; in others, they can be imposed as a civil penalty or as an administrative measure (e.g. a prohibition to further use a

polluting installation). The specific form of such remedies can of course differ. In some legal systems, they will be considered a sanction; in another a measure. This often depends on whether a specific complementary remedy (like e.g. an order to remove illegally deposited waste) will take the form of a civil penalty, an administrative measure, or will be imposed by the judge as the result of a criminal procedure. Given this variation between the Member States, harmonisation of those complementary sanctions at the EU level does not seem appropriate at this stage. It is merely recommended that Member States make more use of those complementary sanctions, either by providing for them in their legislation (to the extent that that is not yet the case) or by imposing them in practice. Obviously when imposed, a complementary sanction should also be accompanied by appropriate (financial) incentives, guaranteeing that the sanction will also be complied with. For example, a penalty payment, forcing the perpetrator to pay a certain amount for each day that the imposed measure has not been executed, may provide the required incentives.

6 Guidelines

On this topic, there is one core proposal only:

Core Proposal: Draft non-binding bottom-up guidelines concerning prosecution and sentencing policy that can be applied throughout the EU.

EFFACE suggests that non-binding bottom-up guidelines concerning prosecution and sentencing policy are formulated, to be used by prosecutors and judges and enforcement authorities in cases of environmental crime. These should ideally be developed bottom-up, building on existing efforts at collaboration between judges and prosecutors working in the field. Such guidelines could relate e.g. to the types of violations that would necessitate a prosecution via the criminal law rather than via other means (civil or administrative) as well as to the crucial role of restoration of environmental harm and how that could be achieved in specific cases. Moreover, guidelines could be formulated concerning particular types of penalties requested and imposed for particular types of environmental harm as well as in relation to what constitutes an “organised crime”. They could also include examples of sanctions applied in the existing case law in various Member States.

Those guidelines may have an important educational effect. They will allow prosecutors and judges to receive information on the available options and sanctions used in other jurisdictions. To repeat: the character of the guidelines (as the name suggests) is that they provide guidance on a voluntary basis and are not mandatory. That is also the difference between minimum sanctions (discussed

above under 4.3) and guidelines. Whereas a directive imposing minimum sanctions would be a typical "top-down" instrument, lacking flexibility and imposing mandatorily what enforcement authorities in Member States should do, guidelines are "bottom up": they are voluntary and are merely based on an exchange of information whereby the relevant enforcers themselves indicate which type of sanctions they would consider under particular circumstances adequate for a particular perpetrator and a particular type of crime. The advantage of non-binding bottom-up guidelines is that local specificities in particular Member States could be taken into account, thus allowing for an appropriate differentiation where necessary. The advantage of guidelines is, moreover, that they are not rigid, but can in principle be flexible and hence can also be dynamically adapted to changing circumstances in time and place.

Already today there is increasing collaboration between prosecutors of environmental crime (within the European Network of Prosecutors for the Environment, ENPE) and among environmental judges (within the EU Forum of Judges for the Environment, EUFJE). This collaboration is of crucial importance: first, some environmental crimes have a cross-border character and therefore require transboundary collaboration. Second, information exchange between prosecutors and judges can also lead to mutual learning and to a bottom-up process of approximation of for example prosecution policy but also sanctioning policy, culminating in the proposed guidelines. Those non-binding guidelines drafted by the experts in the fields could therefore constitute an important alternative to formal top-down minimum sanctions imposed by the European legislator.

Initiating and stimulating this process from the EU level by advocating that non-binding guidelines are formulated is important since those guidelines could contribute to the enforcement of the domestic legislation implementing EU environmental law. It would hence be a task of the EU level to stimulate that these guidelines would be created in a bottom-up manner (for example by financing the network of prosecutors). It may, moreover, be interesting to formulate bottom-up guidelines not only with respect to the sanctions that prosecutors solicit in the criminal court with respect to particular crimes, but also with respect to settlements they conclude with perpetrators of environmental crime. Settlements are also a reaction on environmental crime. However, the extent to which Member States allow prosecutors to conclude settlements may differ; and the decisions concerning those settlements may not be public in all Member States.

Moreover, in some Member States administrative authorities have the possibility to impose administrative fines as a remedy for environmental crime. To the extent that this is possible, one could equally envisage a bottom-up process whereby those administrative agencies would exchange information concerning the types of administrative fines they would impose for particular

types of environmental crime. This could also result in non-binding guidelines. IMPEL could be a potential forum for this.

Finally, it is important to stress that if such guidelines were drafted in English, translations in other Member State languages should be provided in order to make sure that those guidelines can be easily used by practitioners in all Member States.

7 Improving Enforcement, Cooperation and Data Collection

7.1 Enforcement

Core Proposal 1: Make environmental crime a priority both at the EU and at the Member State level.

This barely needs any explanation: enforcement and prosecution policy always require choices being made, inter alia as far as capacity is concerned, but also concerning investments in human resources. When both the EU and the Member State level make clear that, as we stated as a starting point (1), environmental crime is a serious crime, this should also be reflected in the priority setting.

Core Proposal 2: Member States should provide for specialisation of prosecution and adjudication.

It has been shown that especially where enforcement officers and prosecutors are specialised in environmental crimes, reactions against environmental crime are more effective. Environmental crime needs specific expertise, also among the judiciary. Already in 1977, the Council of Europe recognised the importance of creating specialised courts and prosecutors for environmental crime.¹⁹ It is, moreover, important to stress that specialisation should not only exist among judges and prosecutors at the first instance level. It is equally important to have this in courts of appeal.

Core Proposal 3: The EU should set minimum criteria for inspections and monitoring.

¹⁹ Resolution 77/28 on the contribution of criminal law to the protection of the environment of the Council of Europe.

To prevent a race to the bottom (see section 4.3.1) it is crucial that Member States allocate sufficient resources to monitoring and inspection with the aim of detecting environmental crime. Minimum criteria should also be set with respect to the contents of inspections and monitoring. Otherwise, if one Member State has very few resources for environmental inspections or does not engage in risk-based monitoring, whereas other Member States have more capacity for environmental monitoring and have a smart, risk-based enforcement approach, perpetrators would choose the jurisdiction with the weakest enforcement. It is therefore essential that minimum criteria for inspection and monitoring efforts are developed at EU level.

This does of course not imply that the EU should, for example, harmonise the amount of resources to be devoted to inspections or the frequency of inspections. If Member States were not allowed any longer to use their discretionary powers in order to determine their enforcement policy this may even have a counterproductive effect. Different location-specific circumstances can require and lead to different enforcement strategies and Member States should retain the flexibility to pursue the locally appropriate enforcement strategies. Moreover, risk-based inspections are of course important, but in some cases random inspections (not necessarily based on ex ante risk assessment) remain important as well. If the EU harmonised the number of inspections, Member States' authorities might be left with too few resources for carrying out such random inspections as considered appropriate.

Two crucial elements play an important role in this respect: 1. An enforcement policy with respect to environmental crime should be developed by each Member State, making clear how inspections and monitoring will be executed. This enforcement policy should also be published in order to make it transparent and to make enforcement authorities accountable. 2. Data with respect to the execution of this enforcement policy should (in line with core proposal 3 concerning the EU level) be communicated to the EU level. That allows on the one hand for a differentiation taking into account the specificities of each Member State, while on the other hand it guarantees that there is at least within every Member State a transparent enforcement policy with respect to inspections and monitoring with the view of verifying compliance with environmental legislation.

7.2 Core: Cooperation

Core Proposal 4: Enhance the role of Eurojust, EPPO, Environmental Enforcement Networks and Europol, and stimulate networking at the domestic level.

Existing institutions like Eurojust and the JITs (Joint Investigation Team) Experts Network, as well as the establishment of the European Public Prosecutor's Office (EPPO)²⁰, can play an important role in the fight against cross-border environmental crime. Therefore it is important to either enhance the role of those institutions or simply make more use of the opportunities for trans-boundary cooperation already provided. Much of the attention as far as the need for cooperation and environmental networking is concerned focuses on the need for transboundary cooperation. However, it is often stressed by practitioners that cooperation between various actors (both vertical and horizontal) in the enforcement chain at the domestic level is of high importance as well.²¹

7.3 Supplementary Proposals

Supplementary Proposal 1: Improve capacity building for practitioners.

The need for capacity building as a crucial tool to improve the quality of environmental law enforcement has often been stressed. Hence, all stakeholders in the enforcement chain should receive state-of-the-art training and capacity building. This may sound like an obvious proposal. Yet it is important to understand that in environmental enforcement it is of crucial importance that all parts in the enforcement chain are strong and that capacity building is hence aimed at all levels. That requires a focus of capacity building both on the monitoring/inspection level, but also with prosecutors and the judiciary, both in first instance and at the appellate level.

Supplementary Proposal 2: Develop measures to assist NGOs in rising awareness of environmental issues.

Non-governmental organisations aiming to protect the environment may play a crucial role in raising awareness among the public at large as far as environmental issues are concerned. This awareness raising is of large importance since it can also stimulate the willingness of the public at large to support environmental enforcement actions.

Supplementary Proposal 3: Stimulate the role of NGOs in monitoring enforcement and compliance and reporting environmental crime.

²⁰ http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm.

²¹ See for the importance of environmental enforcement networks, both at the domestic as well as at the transboundary level the contributions in Faure, Desmedt and Stas (2015).

NGOs can, as part of civil society, play a crucial role in the environmental enforcement chain. Especially given limited capacity, the possibilities for public authorities to discover environmental violations may be limited. In this regard, NGOs can play a crucial role by monitoring the state of the environment and reporting environmental non-compliance that they have observed. Citizens and NGOs can often be the eyes and the ears of enforcement officers and hence play an important role especially as far as reactive enforcement is concerned: their technologies, databases and personnel are increasingly relied on by law enforcement authorities to detect and prosecute organised environmental crime; these forms of collaboration may even constitute a new form of environmental governance. However, to fulfil this role, it is important that there are accessible mechanisms by which citizens and NGOs can report on suspected crimes. Moreover, the inputs of NGOs, but also of ordinary citizens, must be taken seriously by authorities. As civil society is becoming more central in the identification, detection and prevention of environmental crime, legal provisions may need to be in place to ensure that civil society input is taken seriously by authorities; such provisions could be modelled on rules in other areas of law. For example, a community trigger, as in the UK, could give citizens and NGOs an opportunity to challenge a lack of action by enforcement institutions following complaints. Moreover, NGOs need adequate resources to fulfil these tasks, which could partially stem from grants provided by the EU and its Member States.

Supplementary Proposal 4: Support and finance environmental enforcement networks.

Many case studies have indicated that lacking enforcement is often the result of a failure of effective collaboration and cooperation between the various actors in the enforcement chain. Environmental enforcement networks are crucial tools to stimulate this cooperation. Those networks can either be vertical (between the different layers in the chain) or horizontal and in some cases also transboundary.

It has already been stressed that there is always a strong focus on the importance of cooperation and networking as far as transboundary environmental crime is concerned (see section 7.2). This sounds logical since, especially when crime crosses national borders, the problems for effective cooperation and enforcement increase. However, it is equally important to also stress the importance of enforcement networks (both horizontal and vertical) at the domestic level. There are a few Member States (for example the Netherlands and Belgium) where national networks for environmental prosecutors do exist. To some extent those can constitute examples of best practice. It may be important to consider stimulating the creation of similar domestic networks in Member States where they would not yet exist.

Supplementary Proposal 5: Stimulate exchange and information as far as data collection is concerned.

The importance of data collection to strengthen the effectiveness of environmental enforcement has already been mentioned a few times (see inter alia core proposal 3 concerning the EU level). However, data collection may require specific expertise and technical input. Also in that domain mutual learning via cooperation and information exchange between Member States and EU institutions is of crucial importance.

8 External Dimension of Environmental Crime

Environmental crime is obviously not limited to the EU. Transnational environmental crime that is linked to the EU and its Member States includes the illegal trade of timber, endangered species, and hazardous waste. Furthermore, it should be highlighted that some of this trafficking is driven by demand from within the EU. While the EU and its Member States might be able to detect and stop environmental crime when it reaches EU territory, it is usually more efficient and effective to stop environmental crime where it starts (e.g., by combating illegal logging and poaching activities in third countries). Moreover, once environmental crime is committed in a third country, the damage might be irreversible and cannot simply be stopped at the EU border (e.g., water pollution and the depletion of fish stocks due to illegal fishing). With a view on combating transboundary environmental crimes the EU could therefore, in parallel with efforts to address those drivers of environmental crime that exist within its borders, encourage third countries to strengthen their environmental policies and regulations, improve law enforcement and hand down tougher penalties for behaviour in violation of these policies and regulations. The EU can achieve these goals through various measures.

Core Proposal 1: In international forums the EU should take a leading role in advocating for a tougher approach to environmental crime.

Leading by example in international organisations and conferences and by providing scientific evidence about the nature and consequences of environmental crime are just two ways to assume such a leading role.

Core proposal 2: The EU and its various agencies involved in the fight against environmental crime should seek close cooperation with national and international environmental and police agencies to coordinate the fight against environmental crime across borders.

International cooperation with source, transit and destination countries of environmental crimes should be enhanced through international institutions and networks such as UNODC, INTERPOL, ICCWC and IMPEL, and also on a bilateral basis by Member States.²²

9 Topics for Further Research and Consideration

Topic 1: Examine the possibility to formulate the concept of environmental crime in the Environmental Crime Directive in a different manner.

The Environmental Crime Directive has chosen a model of defining environmental crime whereby on the one hand unlawfulness is a condition of environmental criminal liability and on the other hand specific behaviour is described which the Member States should criminalise. The notion of unlawfulness itself is further defined by referring to violations of national legislation that implements a long list of environmental directives and regulations included in an annex. The Environmental Crime Directive thus relies on a relationship of criminal law with administrative law since without unlawfulness (as defined in the Directive) there is no environmental crime. The structure chosen implies that the definition of environmental crime depends upon the violation of national legislation implementing the environmental acquis (which, to complicate things, is in constant change). Moreover, for defining the behaviour that should be criminalised according to the Directive several vague notions are used. In order to comply with the lex certa principle, which stipulates that the criminal behaviour should be described as specifically as possible, the domestic legislator may have to translate the vague notions used in the Directive into its domestic legislation with more precision. To sum up, the approach towards criminalising environmental harm chosen by the Environmental Crime Directive makes it difficult to determine which behaviour constitutes environmental crime.²³ There are alternative ways of defining what an environmental crime is. For example the Council of Europe Convention on the Protection of the Environment through Criminal

²² See in this respect also the new EU flagship initiative B4Life: https://ec.europa.eu/europeaid/eu-biodiversity-life-b4life-flagship-initiative-leaflet_en.

²³ Mitsilegas (2016), p. 11.

Law of 1998 chooses a different structure whereby the behaviour that has to be criminalised is described in a more direct manner in the Convention itself.

There are undoubtedly advantages and disadvantages concerning those different modes of criminalising behaviour causing environmental harm. It merits further research whether the protection of environmental interests in the Environmental Crime Directive could take place according to a different model of criminalisation than the one currently followed in the Directive. This would more particularly imply a different approach towards defining the unlawfulness requirement and the behaviour which constitutes environmental crime. Specific attention in this regard would require the question to what extent it could be possible to describe environmental crime with sufficient certainty (in accordance with the requirements of the legality principle) and with sufficient clarity as far as the criminal behaviour is concerned.

Topic 2: Examine whether the environmental crime provisions in national legislation (equally beyond the Environmental Crime Directive) actually focus on environmental crime and are easy to apply and enforce by enforcement officials, prosecutors, and courts.

The reason for this recommendation is that in a few Member States there is a tendency that prosecutors experience difficulties in finding appropriate provisions for adequately reacting to environmental crime and that police officers find the legal framework difficult to apply. Since prosecutors in some cases cannot find appropriate criminal provisions really geared towards environmental crime, they tend to rely on broad and general provisions that are familiar and where evidence can more easily be established (such as fraud). That is undesirable since in that way the protection of environmental interests is insufficiently reflected in the particular prosecution and sanctioning policy. Hence, national legislation with respect to environmental crime should be further examined to verify whether (also beyond the scope of the Environmental Crime Directive) practically sufficient and usable statutory provisions are in place to enable a correct and proportionate reaction to environmental crime.

Topic 3: Examine possibilities to enhance the criminal and civil liability of corporations for environmental crimes committed outside of the EU.

Above it was mentioned that environmental crime often has an external dimension (see section 8). An additional problem is that subsidiaries or subcontractors of corporations with a head office in the EU can be involved in environmental crime committed in third countries. That raises the question whether those subsidiaries or their EU parent companies could be held civilly or criminally

liable within the EU for crimes committed outside of EU territory. This would likely require quite a few changes to jurisdictional rules in a variety of Member States and/or to the legal provisions on corporate criminal liability as well as civil liability. It is therefore an issue which certainly merits further research. Admittedly, some may consider this topic (concerning corporate liability) of such importance that it should be a core proposal. However, as explained in our methodology (see above section 3) we have on purpose only formulated recommendations concerning issues which EFFACE has researched in some depth, which is not the case for corporate liability. Also, if one were to formulate a recommendation in this respect, one should also be aware of the fact that promoting criminal and civil liability of corporations for environmental crimes committed outside of the EU may raise many political objections, but also practical issues, e.g. with respect to gathering of evidence. It is for those reasons that it is considered as a topic for further research rather than as a recommendation.

Topic 4: Examine the possibilities to promote access to justice in environmental matters.

*Again, we mentioned often that criminal law is the last resort and that one way of reducing the use of the criminal law is to stimulate the effectiveness of other tools e.g. private and administrative enforcement. More particularly in cases where damage is widespread, granting standing to non-governmental organisations may be an important tool to improve the effectiveness of environmental enforcement. NGOs could be given standing in administrative courts to force authorities to take action, to claim damage in civil proceedings or to become a civil party in criminal proceedings. This obviously also has links with the appropriate implementation of the access to justice rules of the Aarhus Convention within the EU context, which has been a (politically) controversial and debated issue. However, from a policy perspective, more particularly the improvement of enforcement of environmental law, access to justice for a broad public in environmental matters remains an important tool. Access to justice is undoubtedly a very important issue on which further research could be enlightening, also concerning interesting practices in Member States. Some Member States such as Spain and Portugal have, for example, experience with a so-called *actio popularis* in environmental matters which may be an interesting tool to fight against environmental crime for other Member States as well. However, the extent to which citizens in a particular Member State will make use of access to justice does not only depend upon formal rules on standing, but also on education, awareness of environmental issues, but also the socio-economic development level in the particular Member State and hence the preferences for environmental protection. This needs to be considered when devising rules and measures on access to justice. Finally, the promotion of access to justice in environmental matters is also related*

to the earlier mentioned importance of promoting awareness arising in environmental issues (also through the use of NGOs) (see in that respect supplementary proposal 2 concerning enforcement).

Topic 5: Examine possibilities to incentivize the governments of third countries to be tougher on environmental crime and to support their efforts, as well as the possibilities to support environmental groups in third countries.

Above we already mentioned (see section 8) that environmental crime committed in third countries (outside the EU) may be linked to the EU, e.g. because the EU is a demandeur of certain products. Therefore we formulated two core proposals suggesting the EU to take a leading role in advocating a tough approach to environmental crime in international fora. However, it could equally be examined whether structures and instruments could be developed to provide economic incentives to third countries (e.g. via preferential trade agreements) to be tougher on environmental crime. In that respect the question also arises whether it would be desirable for the EU to provide technical and financial support for public agencies tasked with environmental protection in third (in particular developing) countries. This issue merits a careful and balanced research, as involvement of the EU in environmental crime enforcement in third countries should principally be based on a demand from the developing country concerned. It hence merits further research to what extent those incentives towards third countries can be provided in a manner that respects the sovereignty of the third country concerned. For the same reason further research is needed on whether the EU could further stimulate the role of environmental NGOs in the fight against environmental crime for example via technical expertise, capacity building, financial transfers and diplomatic support. Since many governments of third countries may lack democratic traditions the role of environmental NGOs becomes even more important. However, some third countries may view NGOs with suspicion.

10 Concluding remarks

As was already mentioned in the introduction, the EFFACE partners believe that the conclusions and recommendations we propose can improve the quality of the enforcement of environmental criminal law and, more generally, the fight against environmental crime. On purpose we have kept the motivations for the specific proposals relatively short. The reader interested in a further basis for particular recommendations is therefore invited to consult the reports and studies published by EFFACE.

A draft of this document was presented at the final conference of the EFFACE project held in Brussels on 17-19 February 2016. During this conference the EFFACE team was happy to notice large support for the policy recommendations. Moreover, several other interesting suggestions to improve the fight against environmental crime were formulated by the conference participants. For example, one of the recommendations that came up at the final conference considered the introduction in Europe of legislation similar to the US Lacey Act which would facilitate the fight against transboundary crime.²⁴ Of course it was, at this stage of the project, no longer possible to consider new recommendations for which no basis in EFFACE research existed. However, the interesting ideas brought forward during the final conference showed that the question how environmental crime can be remedied in an adequate manner is a lively and topical issue on which much more research can be done, even beyond the topics for further research and consideration formulated above (see section 9). The EFFACE team will be glad to be part of this debate in the future.

²⁴ See the report on the final conference, available from April 2016 at www.efface.eu.

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Annex 1: List of EFFACE policy area reports

The following area reports on conclusions and recommendations were compiled as a basis for this report:

Area 1: Data and information management (MS/EU level). Author: Andrew Farmer (Institute for European Environmental Policy).

Area 2: Harmonisation of substantive environmental criminal law at EU level. Author: Valsamis Mitsilegas (Queen Mary University of London).

Area 3: System of sanctions. Authors: Michael Faure and Niels Philipsen (METRO, Maastricht University).

Area 4: Functioning of enforcement institutions and cooperation between them (MS/EU level). Authors: Katharina Klaas and Stephan Sina (Ecologic Institute).

Area 5: The role of the victims of environmental crime and NGOs. Authors: Christiane Gerstetter (Ecologic Institute) and Anna Rita Germani (University of Rome "La Sapienza").

Area 6: External dimension of environmental crime – what can the EU do? Author: Teresa Fajardo del Castillo (University of Granada).

Area 7: Environmental Liability. Author: Grazia Maria Vagliasindi (University of Catania).

Area 8: Organised Environmental Crime. Author: Grazia Maria Vagliasindi (University of Catania).

Area 9: Corporate responsibility and liability in relation to environmental crime. Authors: Nicolas Blanc and Christiane Gerstetter (Ecologic Institute).

