Summary of the EFFACE Workshop

"Effectively Combating Environmental Crime – What Works Best?"

28 May 2015, Berlin

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, practitioners, as well as representatives of NGOs. This document summarizes the presentations as well as the most important discussions during the workshop.

Overview: Different instruments and approaches for combating environmental crime

Michael Faure, METRO, Maastricht University

The presentation focused on theoretical insights on the added value of criminal law. Different disciplines approach environmental crime in different ways. For example, is the starting point environmental crime or environmental harm and why would criminal law be needed to address environmental harm? From an economic perspective, instruments are to address market failure. For example, there are many approaches to internalise economic externalities using private law. An alternative is to use public law, either administrative law or criminal law. Other instruments (e.g. economic tools) are also possible. With all of these possible instruments, what is the added value of criminal law and what are the limitations of non criminal law instruments?

Private law instruments give victims incentives to act, have information on damage caused and liability rules can contribute to internalising externalities. But there are also weaknesses to such approaches. Most cases of environmental crime have widespread damage with many victims, leading to free riders and rational apathy by actors. There are also information problems in understanding the nature of violations of environmental law. There are problems of proof, time delays generating damage, etc. Also corporations enjoy limited liability. Rational criminals weigh costs and benefits. In private law, the risk of detection and the costs are low as there are no systematic monitoring and no punitive damages. Therefore on the basis of a cost/benefit assessment, there is no strong deterrence to the offender. To increase damages in civil law is very difficult (though possible in common law), so addressing this weakness is problematic. Hence, the use of private law is limited and there is, therefore, a need for public law.

Public law allows for standard setting. It allows ex-ante intervention (regulation) and ex-post intervention (liability). There can also be public control (monitoring and enforcement). However, there are also weaknesses in the use of public law. It is more costly (public authorities require funding), authorities may not be incentivised to act (e.g. corruption), 100% compliance is not possible, and public law is relatively static. So private law needs to provide a back up to public law.

With public law, it is possible to outweigh the low probability of detection. But if high fines are needed, then there is the problem of insolvency in particular in the case of corporate offenders. So there is a need for non-monetary sanctions which are provided by **criminal law**. However, criminal sanctions such as imprisonment need to avoid error costs, because the negative consequences of imposing a sanction wrongfully are high (e.g. wrongful imprisonment). So there is a need for a

procedure with an impartial judge with high thresholds of required proof. In sum, criminal law is needed in limited cases, where there is high social harm, high profit and danger of insolvency. Criminal law should keep its *ultima ratio* character, limited in scope, but using its full force when needed.

Against this background, it is important to use **smart instrument mixes**. This includes improving the functioning of private law, e.g. by allowing class actions, creating rules for standing for NGOs, improving access to justice, allowing punitive damages and public regulation supporting liability suits. A related question is who decides on the optimal combination of instruments. There are different possible models. One is that the legislator decides which offences are addressed via administrative or criminal law. Another is to criminalise all offences, but leave the decision on what to criminalise to authorities, e.g. a prosecutor. For example, in the UK, the Environment Agency can use criminal prosecution itself. Such a model, however, might lead to problems if authorities are corrupt. The trend is for a stronger focus on administrative fines as criminalisation alone is not a solution. The Environmental Crime Directive 2008/99 (ECD) however, does not contain provisions on administrative fines.

Discussion

In discussion, it was suggested that the strong EU focus in the ECD on criminal law has a strong symbolic value, allowing it to appear tough. It was also noted that there are two types of costs to the offender: stigma costs from criminal liability; and hassle costs. Both may act as a deterrence. Stigma costs, however, are only relevant to those actors who care (e.g. it does not apply to criminal organisations). Both costs can apply to administrative fines as well as criminal fines.

One distinction that was suggested was to deal with cases of simple negligence under administrative law and cases of gross negligence under criminal law. However, doing this presents problems of proof and intent. This is particularly the case in practice for species protection, where deliberate negligence is very hard to prove. Thus an approach based on simple negligence may be more practicable. It was also noted that seizing assets is important, but this is problematic is private law.

EFFACE SWOT analysis for combating environmental crime – an overview

Andrew Farmer, Institute for European Environmental Policy

The presentation provided a brief overview of the scope of the SWOT analysis in the EFFACE project. The analysis has been framed around the following themes (three of which were the subject of further presentations):

- Further harmonisation of substantive environmental criminal law at EU level (excluding sanctions)
- System of sanctions (administrative vs. criminal vs. civil proceedings (Member State (MS)/EU level)
- Functioning of enforcement institutions and cooperation between them (MS/EU level)
- Data and information management (MS/EU)

- Trust-based (non-repressive), cooperation-based approaches, address demand-side of environmental crime, assigning more value environmental crime in criminal justice system (MS/EU level)
- External dimension of environmental crime – what can EU do (EU only)
- Use of environmental liability (EU/MS)
- Organised environmental crime

In examining the results of the SWOT analysis, it is important to consider what is most important. In considering strengths, it is important to identify what is really behind the strength, so it can be built on and replicated. However, it is also important to identify the key weaknesses of a given approach, so that attention can be focused on remedying the weakness. However, when making policy proposals, it is necessary to think of timing, what is on the agenda, etc. – hence the opportunities and threats. Further, there are important interactions between the themes addressed and, therefore, it is necessary to synthesis the analysis. As a result, the project team has identified key opportunities at EU, Member State and international level to frame the results. The key opportunities identified at EU level are:

- Review of the ECD
- Review of data/reporting by DG ENV
- Co-operation and co-ordination
- Defining priorities
- Support for civil society

The key opportunities identified at Member State level are:

- Implementation of the ECD and increasing focus on the implementation of EU environmental law
- Capacity building for the institutions available
- Political priorities
- Implementation of Sustainable Development Goals
- Corporate responsibility

The key opportunities identified at International level are:

- Concluding treaties on co-operation between EU and third countries
- EU has a voice
- Enlargement and European Neighbourhood Policy
- Single customs frontier of EU
- Development co-operation

Different aspects of the SWOT analysis

Short presentations were given on different aspects of the SWOT analysis.

Sanctions

Niels Philipsen, METRO, Maastricht University

The analysis considered three issues relating to sanctions: the optimal mix of instruments; whether the sanctions are effective, proportional and, dissuasive and the presence of complimentary sanctions. The SWOT analysis distinguished between EU and MS level. The strengths identified are:

- Some MS have more administrative sanctions in the instrument mix as criminal law is costly, e.g. DE, FR, SE.
- There are often effective, proportionate and dissuasive sanctions in statutes and there is flexibility in the courts.
- There are often complementary sanctions, e.g. some MS judge can require restoration of environmental harm and the prevention of future harm.
- The strengths do not generally apply at EU level.

The weaknesses identified are:

- Some MS do not have an optimal mix of instrument: some MS do not have powers or rarely apply them (e.g. ES, PL). The EU level does not address administrative sanctions.
- There is a lack of information on proportionality in practice – a statutory maximum does not say much about what is actually imposed. At EU level, the Environmental Crime Directive does not specify the nature and extent of sanctions to be applied.
- Complementary sanctions (e.g. on confiscation of illegal gains) are not sufficiently developed in some MS.

The opportunities identified are:

- Actions can be taken at different levels.
- Increasing the use of administrative and civil sanctions, including the design of administrative sanctions, e.g. FR has a day fine, which could be used by other MS; guidance on delineation between administrative and criminal sanctions.
- Guidelines to increase the effectiveness of sanctions addressed at different legal actors. Also the generation of more information on actual sanctions imposed would be helpful.
- Increasing use of complementary sanctions, e.g. removal of illegal gain.

The threats identified are:

- Insufficient support of enforcement actors within the sanctioning system, e.g. from budget cuts and lack of prioritisation.
- Lack of data on enforcement practice: what sanctions are imposed, by whom and the extent of sanctions.

Trust-based/incentive based approaches

Anna Rita Germani, University of Rome, La Sapienza

The current debates focus on legislative and policy changes; improvement of law enforcement and inter-agency co-operation; law harmonisation; reducing consumer demand; and engaging local communities and strengthening public participation to raise awareness on environmental crimes.

Enforcement is a critical ingredient in any successful fight against environmental crime, but current approaches are often insufficient. Even when enforcement is successful, environmental crime may simply be displaced to other areas, e.g. where enforcement is weaker and where local communities are poor enough to be incentivised to engage in illegal activities.

Communities, victims and NGOs can be important positive drivers of change. However, their rights and responsibilities need to be better recognised and strengthened, e.g. through collective ownership of the issue. There is a substantial literature on criminology of victims. A problem is that victims may not always be aware they are victims and/or who is causing them problems. Also several victims may be affected and there may be repeat offences. NGOs may play an important role and do so in some MS, e.g. SE, UK. However, private prosecutions are relatively rare. There is a growing consensus that approaches based on trust building and empowerment of communities, NGOs and victims are just as vital as enforcement to tackle environmental crime.

Two EFFACE case studies in particular explore the role of communities. One is that of illegal waste in Campania (the 'land of fires'), where communities as victims have regained a sense of confidence to persuade the legislator to give a higher priority to this issue. The other is that of illegal mining in Armenia where NGOs have emerged as crucial defenders of the environment – monitoring damage and denouncing offenders.

Therefore, smart and effective enforcement requires active engagement of communities and can be the eyes and ears of state led enforcement.

Environmental liability

Grazia Maria Vagliasindi, University of Catania

This part of the SWOT analysis concerned the Environmental Liability Directive (ELD) and the MS national implementing provisions, i.e. examining if this legislation contributes to deterring environmental crime and remedying the damage caused.

A few strengths were identified. Transposition has raised standards in some MS that had limited liability rules before that, including issues concerning access to justice. The ELD is without prejudice to MS law, which is also a strength. Further, there is a consistency of approach on damage to biodiversity between ELD and the (ECD) with reference to the Birds and Habitats Directives.

In examining weaknesses, it is found that there are more differences than similarities between ELD and ECD. At the national level, the UK makes explicit links between damage under ELD and criminal law, whereas the other MS studied do not do this explicitly (although some cases are included in pre-existing legislation). Weaknesses on other directives (e.g. MS waste law) can limit the scope of

liability. There are also discrepancies between MS, e.g. on requirements for remediation. Finally, there can also be low awareness by some public authorities.

Regarding opportunities, the Commission has undertaken a review of the ELD, which could be used to address weaknesses and address coherence with ECD. Also revision of other directives could affect their effectiveness, e.g. that on the Birds and Habitats Directives and, in future, of the Water Framework Directive.

On threats, implementation is often slow. Also lobbying of some stakeholders is a threat, e.g. on mandatory financial security.

Discussion

One issue raised in the debate is the characterisation of offenders: it may be important to distinguish between certain categories of offenders, e.g. harm that crosses frontiers; small firms compared to big firms (e.g. awareness of law by small firms and small traders more responsive to threat of criminal law); and whether a first offender or a repeat offender.

A key weakness in many cases is determining priorities: budgets are limited. What is optimal in theory is one thing, but in practice resources are limited. To what extent should prioritisation be the subject of law or guidance? There may be pressures to make budgetary decisions that do not optimise addressing environmental harm.

There is also variation in the ability to take class actions across jurisdictions. It was noted that the US model (where there is much class action) is based on a different background than the European systems. The US has a strong tradition of private litigation. Class action is a key component of this. Within the EU, one issue limiting development of collection action has been resistance in some MS on further developing access to justice in line with the third pillar of the Aarhus Convention. Indeed, there is an issue for the EU in promoting Aarhus in countries such as Armenia when it itself does not fully comply with requirements on access to justice. Further, some class actions might not be representative of victims. However, NGOs could collect the necessary information and collect finance for cases from members.

It is also important to note that the deterrent effect of criminal law has some limitations – there are problems with large companies as they cannot be put in gaol. Thus deterrence should focus on individuals, as companies can avoid penalties through use of insolvency. Name and shame can also work, but the context is important. Further, for large companies, activity on stock markets requires compliance with rules, including criminal law, so this can serve as a deterrence. Also, with a criminal conviction, companies may be excluded from public procurement, so this can be a major deterrent.

Regarding trust, it was noted that IMPEL did a project on neighbourhood dialogue and related instruments to solve environmental conflicts. These approaches tend to be best for static medium and bigger enterprises that have a relationship to a group of people. There are other actors for which trust plays no role. It was also noted that trust is not just trust between actors, but also trust to norms and institutions.

Disrupting the market for illegal rhino horn and ivory

Susanne Knickmeier, Max-Planck Institute (based on a paper written by Mai Sato and Mike Hough of Birkbeck University).[1]

The FUDICIA project has proposed trust-based approaches to addressing crime. It examined trafficking of people, trafficking of goods and cybercrime as well as the criminalisation of migrants and ethnic minorities. The trafficking of a number of goods was investigated, including rhino horn as one example.

A distinction was made in the project between normative and instrumental approaches to combating crime. A normative approach is aimed at persuading people not to commit the offence as it is the right thing to do (trust based approach). An instrumental approach involves deterrence (the threat of punishment) and the use of structures (e.g. situational crime prevention techniques). There are hybrid approaches with elements of both.

Regarding instrumental approaches to fighting wildlife crime, some countries have enhanced their legal frameworks and enforcement actions (e.g. South Africa). However, there is often difficulty in proving a poacher to be guilty beyond all reasonable doubt. Some countries also lack capacity/resources for sophisticated analysis and tracking. Further, poachers constantly renew their strategies, making instrumental strategies increasingly costly. There are differences between countries, e.g. on sentencing. This affects the priority given to the issue between countries. Some provide legal protection to rangers, e.g. allowing shoot to kill of poachers. There are also prevention techniques (e.g. de-horning).

Regarding normative approaches, the moral attitude to right and wrong is linked to the legitimacy of legal rules. There are three different approaches:

- International law instruments: through 'norm diffusion' as the norms are spread to states, officials and individuals. Conventions such as CITES are legally binding on signatory states, so norm diffusion occurs when a state decides to join.
- Soft power diplomacy is the ability to shape the preferences of others, e.g. the UK hosted a conference on illegal wildlife trafficking in 2014. It was an attempt to send a message. Problems can occur were there are tensions between agendas.
- Public campaigns: especially from NGOs to try to reduce demand, by making people aware that rhino horn is ethically wrong and to challenge the basis for the perceived benefits of rhino horn. Campaigns have to address fundamental values, but there is a danger that they may be viewed as the imposition of others' values in some countries. So there need to be willing and local actors who are not seen as stooges of outside forces.

Hybrid strategies have normative and instrumental elements. Examples include strategies targeting communities where poaching takes place. Such strategies include eco-tourism, environmental education, etc. The aim is to integrate the programmes so that they are profitable for the communities.

[1] The paper 'Disrupting the market for illegal rhino horn and ivory' is due to be published this year (2015) in Illicit Trafficking in Wildlife and Forest Resources in the Journal of Trafficking, Organized Crime and Security.

Discussion

In discussion it was noted that 'trust' is not always the best word to use. Acceptance of the legitimacy of norms, for example, may not be viewed exactly as 'trust'.

It is important to highlight the interaction between values, e.g. shoot to kill of poachers may be effective, but the EU cannot support this as it opposes the death penalty.

International NGOs, such as WWF, recognise the importance of both approaches, and work with a number of actors, such as communities, tourist companies, etc..

It was noted that a normative approach has limitations. For example, organised crime is best tackled through effective use of instruments (e.g. as seen in increased prosecutions in Southern Africa). Further, in tackling demand, a normative approach would only work in the short to medium term if demand is not much greater than supply (so that changing attitudes can have an impact).

General discussion

In the general discussion, workshop participants were asked to identify two key recommendations to address environmental crime.

Another set of recommendations addressed smart **policy mixes and enforcement strategies:**

- Mix of administrative and criminal law plus corporate liability plus increased resources for law enforcers
- Better complementarity between administrative and criminal law, improved co-ordination among different instruments, stronger reliance on administrative and complementary sanctions in the instrument mix.
- More complementary measures, such as seizing assets.
- Harmonising legal sanctions in the EU, while still giving Member States the option to have different sanctions.
- Giving victims and NGOs more rights and better resources.
- Prevention has to act on different levels – admin, info campaigns, etc.
- Facilitate diffusion of norms and best practice and do not harmonise – smart mixes vary in different contexts.
- To depend less on law and legal instruments to address environmental crime.
- Stronger financial incentives and disincentives including for corporations.
- Rationalise prioritisation in the use of enforcement resources.

Yet other recommendations related to the **cooperation between different actors**:

- Overcome barriers to allow for administrative bodies to work together/exchange information within a MS and between MS.
- Foster networks of trust and cooperation between state and non-state actors, including across frontiers
- Improve collaboration between or merge criminal enforcement and prosecution.

More recommendations were:

- Improve ability to collect evidence to determine extent of environmental crime activity.
- Increase public awareness.
- Taking account of characteristics of offenders in decision-making.
- Capacity building and specialisation for judges and prosecutors.
- Enhancement of monitoring systems.
- More money for enforcement.

This list showed some common themes among participants, such as to take action with regard to capacity building, providing more resources, improving co-operation and the mix of instruments. There is possibly, some disagreement on levels of harmonisation.

It was noted that, in discussing the harmonisation of sanctions, the aim is not to unify the system. However, in order to fight against transnational crime, there needs to be a level playing field. Some MS are against some common sanctions. Harmonisation could be a soft, not a hard approach. It was also noted that the level playing field may not be determined by common sanctions, if levels of detection varied across the EU. However, if one MS thinks an offence is administrative and another criminal, this makes co-operation more difficult, although information sharing should be possible.