

Opinion

JUDICIAL DISCRETION AND OPTIMAL ENVIRONMENTAL ENFORCEMENT

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Criminal sanctions play a crucial role in the enforcement of environmental regulation in the European Union (EU).¹ For instance, Article 5 of the Directive 2008/99/EC on the protection of the environment through criminal law ('Eco-crime Directive') requires EU member states to provide 'effective, proportionate and dissuasive criminal penalties' in their national legislation for a range of serious infringements of EU-based environmental law. Identifying such effective, proportionate and dissuasive penalties in an optimal way is clearly a challenge. While I will not be able to explore the full depth and width of this issue, I would like to highlight some of its complexities and to list several crucial aspects of the multidimensional problem that is environmental crime. In my opinion, following logically from the complex nature of environmental offenses and environmental crime in particular is then the need to allow enforcing authorities and especially judges a broad discretion in their decision-making processes.

In order to derive guidelines for optimal environmental enforcement, two approaches can be followed.² On the one hand, it is important to focus on the offense characteristics as such and, on the other hand, to consider that the characteristics of the enforcing authorities are also important factors. In the next paragraphs five of these aspects are briefly investigated.

¹ C.M. Billiet, 'Environmental Law Enforcement in the European Union: benchmarking sanctioning practices in the criminal track', in I. Tchotourian (ed.), *Company Law and CRS. New legal and Economic Challenges*, Brussels, Bruylant, 2018 in press.

² See, for instance, OECD, *Ensuring environmental compliance: Trends and good practices*, Paris: OECD Publishing, 2009; S. Rousseau, 'Empirical analysis of sanctions for environmental offenses', *International Review of Environmental and Resource Economics*, 2009-3(3), pp. 161-194.; W.B. Gray and J.P. Shimshack, 'The effectiveness of environmental monitoring and enforcement: A review of the empirical evidence', *Review of Environmental Economics and Policy*, 2011-5(1), pp. 3-24.

A first issue is related to the underlying type of offense. In practice, environmental offenses show a wide diversity from administrative offenses with minor or no direct impact on the environment – such as missing maintenance certificates or the lack of access to measuring points – to offenses with a clear and direct impact on the environment – such as illegal discharges of toxic pollutants in surface waters or soil contamination from heavy metals.³ This diversity of offense types implies a wide range of technical knowledge and experience from enforcing authorities and entails a challenge for determining effective enforcement rules and policies.

Secondly, the harm caused and particularly the type of victims affected by the crime are important considerations. While several types of environmental harm such as noise or odour pollution fit nicely within the traditional viewpoint dealing with criminals and victims, other types of environmental crime have been frequently labelled as victimless crimes.⁴ Recently, however, more and more we can claim that as citizens and as human beings we are all harmed by crimes such as biodiversity loss or climate change and, consequently, that we can all play a role as concerned parties in lawsuits. An additional concern when looking at the harm caused by environmental offenses is the difficulty of proving a causal link between offense and harm. For instance, an individual's health problems may be caused by exposure to hazardous substances on the workplace, but could also be the result of past smoking habits. The uncertainty about who is harmed and how are they harmed presents a clear challenge in determining optimal enforcement actions.

A third important aspect is why the environmental offense occurred and how it is motivated. Some offenses are due to ignorance. As a layperson, it is quite difficult to know all the applicable laws and changes to laws. For instance, something that in the past used to be allowed can over time become a prohibited practice, such as burning waste in your garden. As another example, when individuals collect a certain amount of scrap and waste on their private property in Flanders, they become a 'business' and, thus, they require an environmental permit. Some offenses are caused by technical failure of equipment, while other offenses are related to bad luck and are caused by extreme weather events. Obviously, some other offenses can be classified as intentional and wilful offenses with financial and economic gains as a main aim. In order to deter these different classes of offenses, a variety of soft and hard sanctioning instruments will be needed.

Besides offense characteristics, the enforcement authorities also play an important role in environmental enforcement. Looking at the toolbox of these authorities, we see that they have a wide variety of instruments, rules and procedures available.

³ For Flanders see, for instance, S. Rousseau, 'Evidence of a filtered approach to environmental monitoring', *European Journal of Law and Economics*, 2010-29(2), pp. 195-209; C.M. Billiet, S. Rousseau, A. Balcaen, R. Meeus, K. Styns, G. De Meyer, T. Vander Beken en L. Lavrysen, 'Milieucriminaliteit in handen van strafrechters en beboetingsambtenaren: feiten uit Vlaanderen en Brussel', *Milieu & Recht*, 2009-36(6), pp. 342-349.

⁴See, for instance, G. Wright, 'Conceptualising and combating transnational environmental crime', *Trends in Organized Crime*, 2011-14(4), pp. 332-346.

Criminal sanctions are often combined with administrative sanctions and are viewed as being complementary. While criminal sanctions have a stronger stigmatising effect⁵, administrative sanctions are often imposed faster and with more knowledge of the specific details of the offense and offender.⁶ Besides monetary sanctions – such as fines –, non-monetary sanctions – such as prison sentences or remedial sanctions – are also available.⁷ While monetary sanctions typically lead to lower societal costs, non-monetary sanctions tend to have a more direct impact, by making further offenses impossible through the incapacitation of the offender or the closing down the offending facility. In addition, sanctions can be imposed as effective sanctions to punish the current offense, but also as suspended and conditional sanctions to deter future offenses.

A fifth and final issue is related to the objective function of the enforcing authority. Enforcers can pursue different goals. One possible aim is to make sure that the law is always obeyed and no offenses are tolerated. Alternatively, authorities may desire to maximise social welfare by following the proportionality principle and balancing social costs and benefits. Another objective can be to achieve justice by imposing just and fair sanctions on offenders, or by protecting the victims and making them ‘whole’ again.⁸ While enforcement authorities may pursue only one of these objectives, often a combination of different objectives plays a role in practice.⁹

In my opinion, sanctioning decisions can and should depend on the type of offense, the harm caused, the motivation of the offense, the available toolbox and the regulatory objectives. It is clear that different combinations of these aspects will lead to different optimal sanctioning decisions. For instance, offenses caused by ignorance may be remedied by better communication of regulation and by education and training of (potential) offenders, while repeat and intentional offenders may only be deterred from re-offending with certainty by putting them in jail. As another example, the sanction for cutting down a 200-year old tree can be

⁵ See, for instance, J. Waldfogel, ‘The effect of criminal conviction on income and trust ‘Reposed in the workmen’, *Journal of Human Resources*, 1994-29(1), pp. 62-81; R. Galbiati, and N. Garoupa, ‘Keeping stigma out of administrative law: An explanation of consistent beliefs’, *Supreme Court Economic Review*, 2007-15, pp. 273-283.

⁶ See, for instance, K. Svatikova, ‘Criminal or administrative law to protect the environment? Evidence from Western Europe’, *Journal of Environmental Law*, 2012-24(2), pp. 253-286; T. Blondiau, C.M. Billiet, and S. Rousseau, ‘Comparison of criminal and administrative penalties for environmental offenses’, *European Journal of Law and Economics*, 2015-39(1), pp. 11-35.

⁷ See, for instance, A.M. Polinsky and S. Shavell, ‘The optimal use of fines and imprisonment’, *Journal of Public Economics*, 1984-24, pp. 89-99; C.M. Billiet and S. Rousseau, ‘How real is the threat of imprisonment for environmental crime?’ *European Journal of Law and Economics*, 2014-37(2), pp. 183-198.

⁸ See, for instance, R. Macrory, ‘Regulatory justice: Making sanctions effective’, 2006, at: <http://webarchive.nationalarchives.gov.uk/20121205164501/http://www.bis.gov.uk/files/file44593.pdf> (accessed on 7 July 2017)

⁹ See, for instance, T. Blondiau and S. Rousseau, ‘The impact of the judicial objective function on the enforcement of environmental standards’, *Journal of Regulatory Economics*, 2010-37(2), pp. 196-214.

based on the gain obtained from the offense and reflect the timber value, while it can also be based on the harm caused and reflect the cultural and ecological value of this unique tree.

To conclude, it is virtually impossible to put forward a limited number of sanctioning rules since one size does not fit all. While it is convenient to use a limited and *ex ante* defined set of rules, this is unlikely to be optimal. However, a set of non-binding guidelines and principles such as harsher punishment for repeat offenders may still be useful. Thus, allowing enforcing authorities sufficient room for discretion and flexibility in their sanctioning decision processes is of vital importance.