IMPLEMENT FOR LIFE

CRIME AND PUNISHMENT

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IMPLEMENT FOR Life

EXECUTIVE SUMMARY

Environmental crime is one of the most profitable illegal trades in the world. Because the victim of environmental crime is typically voiceless, it is very convenient for criminals to make a lucrative business out of it. It is especially in the last few years that the seriousness and scale of the problem is more known, sometimes brought to light by NGOs and investigative journalists.

This report finds that vague legal definitions and gaps in enforcement allow for crimes to be perpetrated without a suitable punishment. The authors concentrate on three main factors explaining why this is the case: the problems in investigating the guilty parties, corporate liability of environmental crimes and the level of sanctions.

The report advises the Commission and Member States to do more to combat environmental crime. Actions can be taken to increase capacity building and resources to investigation units, enforcement bodies and prosecutors, and to provide clear EU sentencing guidance to judges.

The European Green Deal announced by the Commission in December 2019 clearly stresses on the fundamental importance of good implementation and enforcement of environmental law, without which, any ambition to address the environmental urgencies we find ourselves in is futile.

INTRODUCTION

Being the largest trading block in the world, the EU is a hub for the transit, origin and destination of illegal products and services from international environmental organised crime. UNEP and Interpol have estimated that environmental crime is now the fourth most lucrative illegal business in the world, worth up to $258 billion annually. This enormous turnover is increasing each year. In 2015 the EU Commission also identified that environmental crime was linked with other forms of organised crime such as smuggling, money laundering, and terrorism and is therefore a security threat in the EU.

But environmental crime does not only come in the form of organised crime. In the EU, the Environmental Crime Directive (ECD) indicates to the Member States what sort of illegal activity should be criminally sanctioned in their national laws. Environmental crime is generally considered to be any criminal act that is committed against the environment. In the Directive, an environmental crime needs to breach environmental legislation and cause significant harm or risk of harm to the environment, human health, or both. It is up to each Member State decide how to incorporate the Directive in their criminal law and to establish effective, proportionate and dissuasive sanctions, which may also be in the form of administrative fines.

The Commission's European Green Deal has called for better implementation and enforcement of environmental laws as without these all ambition under it is undermined, explicitly mentioning the review of the ECD: a possibility that began with a public consultation at the end of 2019. The patchwork of information available from the Member States on how the ECD has been implemented in the last 10 years shows that what constitutes an "effective proportionate and dissuasive sanction" has been open to varying interpretations with limited knowledge about how judges apply this condition in practice. The overall impression, however, is that to counteract the rise in environmental crime, there needs to be more guidance and uniform application of sanctions in the EU. The importance of having strong judicial cooperation is also reflected in Chapter 4 in the Treaty of the Functioning of the EU.

This report looks at three dimensions of enforcement of environmental crime relating to how illegal activity is sanctioned, using examples from different Member States and various environmental harms. The first part looks at the effectiveness of enforcement and whether this leads to any perceived risk by perpetrators of being caught and then punished for committing environmental crimes. Secondly, the report touches on some of the complications that are added to enforcement actions when the crime is committed by a company or corporation. Lastly, some explanation of what should be considered for sanctions to be "effective, proportionate and dissuasive" are explored. Each of these sections are accompanied by a set of recommendations.

1. CATCH ME IF YOU CAN

Detection, Investigations, Prosecution, and Capacity to Enforce

For any crime to be punished, it first needs to be detected. For many environmental crimes, there will be physical evidence of the environmental damage, for instance in the case of illegal fly tipping of waste, but it will be difficult to identify who the culprit is. In some cases, it is even difficult to know when crimes are being committed in the first place, as for instance with illegal trade.

The Illegal shipment of waste

The illegal shipment of waste is a significant problem, estimated to amount to around 25 % of all waste shipments. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Other Waste and their Disposal regulates the movement of waste between countries. The Basel Ban Amendment, which entered into force in December 2019, prohibits all export of hazardous waste which includes most Persistent Organic Pollutants (POPs), waste of electrical and electronic equipment (WEEE), obsolete ships, flammable liquids, and toxic heavy metals. It also includes plastic, scrap metal or paper waste if its contaminated with, or contains hazardous waste. The EU implemented the Basel Convention through the EU Waste Shipment Regulation (WSR).

The EU ships large amounts of toxic electronic waste to developing countries as an investigation by Basel Action Network (BAN) reveals. After a 2-year investigation, BAN estimates that the flows of WEEE total 352,474 metric tonnes a year. European recyclers have been circumventing this rule by allowing large quantities of scrap equipment to be exported under the guise of reusable products rather than waste. The investigation reveals that most of the equipment imported into Africa and Asia is in fact unusable, and that toxic material and parts are generally sent to local dumps where they are burnt, creating far more toxicity than the original material.

While the WSR distinguishes between waste and non-waste, the precise meaning of the term can be unclear in practice. Tronex, a Dutch electronics seller, argued that its exports to Tanzania were not waste, but defective goods meant for resale. Tronex's shipment included kettles, irons, fans, and shavers that had been returned by customers because of defects. The company argued that these items should not be considered waste because the electrical equipment could be repaired. The Dutch Criminal Court referred the question to the ECJ [Openbaar Ministerie v Tronex BV] which held that this shipment was unlawful because it took place without notification to, or consent of, the appropriate regulators. The. Dutch Criminal Court fined Tronex €5,000.

It is estimated that the value of global illegal wildlife trade is between €8 and €20 billion annually. In the EU, annual revenues from illicit non-hazardous waste trafficking range between €1.3 billion and €10.3 billion, and between €1.5 billion and €1.8 billion for hazardous waste trafficking. A lot of illegal trafficking passes through or comes from Europe every year, and yet most of this trade is not intercepted by enforcement authorities. In addition to the severe harm to wildlife and biodiversity, illegal wildlife trafficking is increasingly recognised as a further source of funding for terrorist and related activities.

Difficulties in the detection of illegal activities and identification of criminals can create impunity where an illegal activity that is harmful to the environment is de facto permitted as there is a very low chance of being detected and prosecuted. In the case of Tronex, the fine imposed by the Dutch court also shows that even when criminals do get caught, it often pays off to commit the crime when the fine is minimal compared to the potential profits (for more on sanctions see part 3). IMPEL has also stressed the need for more knowledge about environmental law within the environmental crime enforcement chain.

To ensure that there is no impunity for environmental crime, it is essential that enforcement bodies have enough capacity and the right tools to investigate, detect and prosecute environmental crime. For instance, some Member States are not using specialised investigation techniques, such as observation, infiltration or telephone tapping in severe cases of environmental crime. In other Member States, such as Spain or Sweden, there are special enforcement departments dealing only with environmental investigations who therefore have specialised knowledge – although not necessarily the adequate resources – to be able to detect and investigate instances of environmental crime effectively. Environmental crime has generally not been considered or categorised as a priority area or considered a serious crime in all Member States. This has led to a lack of resources and capacity for inspections and efforts to detect criminal activities that harm the environment. Considering that environmental crimes are estimated to be the fourth largest criminal activity in the world, amounting to an annual turnover between $91-258 billion, the detection and investigation of environmental crimes are woefully under-resourced. Evidently, whether resources are allocated to combat environmental crime is a matter of political priority.

Often, environmental crime is coupled with other types of criminal activity, such as illegal trafficking, money laundering, fraud and corruption. Such crimes are considered as serious crimes, allowing enforcement officers to use special investigation powers they would otherwise not be able to use. This means that the environmental damage, although it may be devastating and irreparable and potentially causing serious hardship to people, is conceptually only an accessory to the other crimes. For criminals themselves, the motivation for their involvement in environmental crime may not be a desire to damage nature, but rather the huge potential to make profits at the expense of the environment. Indeed, when it comes to environmental crime, the affected and damaged victim is perceived as voiceless, making it a prime target for exploitation.

IUU Tuna in Malta

In October 2018, Europol coordinated an operation leading to the arrest of 79 individuals and the seizure of more than 80,000 kg of illicit Bluefin tuna. Europol estimates that the network trafficked over 2.5 million kg of tuna a year, amounting to €12.5 million in illegal profits, based on the estimation of a €5 profit per kg traded. Overall, this illegal tuna trade was double of what is traded legally every year. The tuna was fished illegally in Maltese waters using documents from legal fishing and subsequently imported and traded illegally in Spain.

While this fishing and trading of bluefin tuna was clearly illegal and while IUCN lists bluefin tuna as endangered, the species is not protected under the Annexes of the Habitats Directive or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This means that illegal fishing and trading of bluefin tuna is not covered by the Environmental Crime Directive and must therefore be addressed through other crimes such as document fraud or food fraud.

Regrettably, it seems that this is not an isolated incident as loopholes and failures in the system to protect against Illegal, unreported and unregulated (IUU) fishing remain. Several NGOs have sent a joint letter to the European Commission, urging it to investigate and address the issue and to improve traceability in order to protect against IUU fishing.

This case also illustrates the profitability of environmental crimes, especially when they are not even recognised as such. When other opportunities are scarce, the probability of being caught low, the consequences not very severe and the activity very profitable, criminal activities are incentivised. Operating costs of IUU fishers are low, providing also an unfair advantage to legitimate fishers. Without adequate enforcement, it therefore pays to illegally fish tuna, to deplete stocks of a species, to negatively impact marine biodiversity and to endanger human health through unhygienic transport and trade conditions. A profit of €5 per illegal tuna may not seem as high, yet, given the scope and organisation of this activity, this profit quickly multiplies and becomes significant. Sanctions and fines must take such profits as well as the environmental impact into account.

Doñana

Doñana is one of Europe's most important wetlands, yet, with water levels reduced to less than 20% of its natural levels, it is at severe risk and at a conservation outlook of 'significant concern'. Over 1,000 illegal wells and an estimated 1,700 suspicious irrigation ponds, drilled to meet the increasing demands of intensified (and often also illegal) agriculture, exploit the underground aquifer. Greenpeace estimates the costs of this water theft in Spain to have been nearly €15 million between 2013 and 2017. Yet, enforcement mechanisms appear to be weak and the risk of being caught is low.

In 2016, about 60% of Spanish strawberries came from Doñana, having a severe impact on the quantity and quality of Doñana's water sources. About 50% of the water extraction used for the strawberry production is extracted illegally, through wells without permits or licenses and 30% of farms are illegal uses of land. In addition, the strawberry fields have fragmented the habitats surrounding the protected areas, hindering terrestrial wildlife to move in and out of the park through natural corridors.

A land use plan to address the illegal activities was approved in December 2014 and involves the closure of over 3,000 hectares of illegal farms. However, in 2016, this plan was still not implemented and during the period of 2015 to 2019 the area for intensive berry farming within the scope of the spatial plan increased by 552.5 hectares. The illegal and unsustainable agriculture practices and their related water usage have been a main driver in reducing water flows from the aquifer to the wetlands. This has significant bearings upon the habitats and their protected species, with Doñana already having lost important species like the sturgeon (Acipenser sturio) and the Andalusian hemipode or buttonquail (Turnix sylvaticus).

In January 2019, the Commission took Spain to Court for its failure to protect the Doñana Wetlands. It argues that Spain failed to take adequate measures to protect the groundwater bodies that feed the Doñana Wetlands, as required by the Water Framework Directive. In addition, Spain is also falling short of its obligations under the Habitats Directive by failing to take action to avoid the deterioration of natural habitats and the habitats of species in the wetlands. As Doñana is part of the Natura 2000 network, the illegal activities could also be covered under the Environmental Crime Directive to the extent that the conduct is causing the significant deterioration of a protected site. However, because illegal extraction itself is not covered by the Directive, exactly the same activity just outside of a Natura 2000 site, would not constitute an environmental crime under the Directive.

Besides a lack of investigatory and local enforcement power, there also seems to be a lack of information about the number of illegal wells. Greenpeace unsuccessfully requested an inventory of illegal wells for years, as the last public data is from 2006, admitting the existence of 510,000 illegal wells that could extract up to 3,570 cubic hectometres of water per year, the equivalent to the average consumption of 58 million inhabitants. A 2017 leak from the Ministry of Environment now suggests there could be more than a million illegal wells and the Colegio Oficial de Ingenieros de Minas del Centro de España estimates that 60% of the wells are constructed illegally. The confederation of Guadalquivir processed 974 complaints for illegal water withdrawals over a period of five years, however estimates suggest that the Doñana-Almonte area alone already holds a thousand illegal wells.

The widespread impunity leads to a continuation and increase of illegal wells, posing significant risks for the entire habitat, those that depend upon it and the rule of law. In addition, illegal wells, that are essentially deep holes, often lightly covered up, can constitute public safety threats as recently demonstrated by the death of a small boy.

Illegal export of ozone-depleting substances by Organised Criminal Groups

Cooperation between different authorities within and between Member States is crucial. Europol and enforcement bodies of Spain and France have helped detect a complex case on ozone-depleting substances (ODS) where different authorities cooperated and exchanged information. ODS are used in electronic equipment, refrigerators, air conditioners, fire extinguishers, dry cleaning equipment, solvents for cleaning and agricultural fumigants. The unlawful production, import, export, placing on the market or use of ODS is a criminal offence under the Environmental Crimes Directive. ODS crime is an example of an environmental crime where breaches of administrative regulations, such as breaching the ban on export or placing on a market, are sufficient to be considered an offence. No harm to the environment needs to be established and handling of any quantity of ODS should be considered as a crime.

R-22 gas smuggling

In a joint cooperation effort of specialised Spanish prosecutors, civil guards French police forces and Europol, ten tons of the illegally traded refrigerant gas R-22 were discovered, leading to the arrest of ten people. €500 000 to €1 million of illegal profits were involved. The company repackaged R-22 refrigerant liquids that should have been sorted as hazardous waste. The recovered gas would have released 17 000 tons of CO2 into the atmosphere, as much CO2 as over 3,600 passenger cars driven for an entire year.

International and EU cooperation in stopping illegal handling of pesticides

The illegal trade and use of pesticides has been detected across Europe, with many criminal networks involved in this activity. Amongst the traded pesticides are plant protection products, biocides, as well as medicinal and veterinary products.

The trade of counterfeit pesticides products results in vast illicit profits and huge losses of tax revenues for the EU and its Member States. The smuggling of counterfeit products harms the European economy, damages legitimate business and stifles innovation, putting many jobs at risk in Europe and poses serious risks to the environment and health and safety.

Europol and the European Anti-Fraud Office (OLAF), in cooperation with national authorities, focus on the sale and market availability of counterfeit pesticides and target the illegal trade of pesticides. In 2019, 550 tonnes of goods were seized leading to the arrest of three individuals in an operation targeting the illegal trade of pesticides.

International cooperation of enforcement authorities is crucial to stopping organised criminal groups. Cooperation initiatives such as the EU-Twix database that facilitates information exchange on illegal wildlife trade in Europe are crucial, particularly in the context of transboundary crimes.

Impunity and Complicity

The Environmental Crime Directive only prescribes what should be considered an environmental crime, leaving it up to each Member State to implement according to their national penal tradition. Crimes must be explicitly prescribed in the law in order to guarantee that individual freedoms are not transgressed, ensuring predictability and legal certainty. It is therefore the responsibility of each Member State to ensure that what is considered a crime under the Directive is reflected in the national law as it is otherwise impossible for those activities to be criminally prosecuted.

Industrial waste disposal – Black Hill, Croatia

In May 2019, the European Court of Justice called on Croatia to take action over its failure to ensure an adequate level of protection of human health and the environment at the «Crno brdo» (Black Hill) landfill site in Biljane Donje, near the town of Benkovac, less than 50 meters from residential houses. This case was initiated by a complaint submitted to the European Commission.

The location is currently used as a depository of a large amount of industrial waste residue (ferromanganese and silicomanganese) from the rehabilitation of a factory site. As the Croatian authorities failed to classify this material as waste in line with Waste Framework Directive, approximately 140,000 tons of this potentially harmful stone aggregate were deposited directly on the soil, threatening local inhabitants and the environment. Under EU law, Croatia should have put in place measures for the protection of groundwater and the prevention of the dispersion of the harmful particles through the air.

However, by not declaring the material as waste, Croatian law did not recognise that this was an illegal disposal that harms the environment. As a result, it could not be prosecuted as an environmental crime. Croatia tried to solve the case through administrative measures. Environmental inspectors detected breaches of waste legislation, ordered covering of waste, removal of waste and pecuniary fines, but the measures were not effective and the "Black Hill" is still endangering the environment and the residents. The company running the site avoided any criminal liability for its illegal activity.

This infringement case against Croatia demonstrates that when a state fails to criminalise certain conduct, the only available alternative is to issue an administrative fine for non-compliance with the law. While administrative fines can be the most effective and efficient form of redress in some cases, when it comes to serious breaches committed intentionally, they can leave harmful and dangerous practices unpunished and unaccounted for.

Political slogans and aspirations need to be translated into action and proper structures that give results on the ground. For enforcement to work, investigators and regulators need more capacity-building, training, more awareness of environmental conditions and adequate resources to investigate thoroughly and in a timely manner.

Illegal Ortolan hunting/illegal hunting practices in France

The ortolan bunting (Emberiza hortulana) is a small bird, protected under Annex I of the Birds Directive but at the same time considered a delicacy in French cuisine. Between 2012 and 2015, 15,000 to 30,000 birds were killed yearly in France, significantly overpassing the 1% of the annual mortality of the population that could still fall within a derogation on the hunting prohibition of the Birds Directive.

In December 2016, the Commission referred France to the European Court of Justice as illegal practices relating to the deliberate killing or capture of the ortolan continued after the reasoned opinion, notably "despite earlier commitments by the French authorities". However, in November 2017, the Commission then withdrew the proceedings and closed the case. The main reason for this appears to have been a French press statement from August 2017, stating that environmental minister Nicolas Hulot gave instructions to the regions "to strengthen all surveillance measures, to reinforce all control and enforcement measures, both with respect to poachers and middlemen who engage in trafficking, and to grant, as last year, no tolerance to practitioners".

Real improvements do however seem to have occurred in the past years. The Committee Against Bird Slaughter (CABS) reports that in 2010, hundreds of sites were active for weeks, whereas nowadays only a few dozen operate for some days. While previously, the work of NGOs such as La Ligue pour la protection des oiseaux (LPO) and CABS were the only intervention of the illegal hunting with local officials ignoring or tolerating the unlawful capturing, inspections do seem to be carried out now.

This progress in the enforcement also seems to have made it to the courts, in May 2019, the Court of Cassation confirmed the conviction of 12 Ortolan poachers. However, the fines awarded appear too low with a compensation award of on average € 1,300 and additional € 500 to LPO for incurred costs. Gravity factors, as those suggested in 'Recommendation N° 177 (2015) on the Gravity Factors and Sentencing Principles for the Evaluation of Offences against Birds', should be taken into account when determining appropriate fines.

However, cruel hunting methods, such as the use of glue to catch birds, remain allowed based on a decision of 1989. After an unsuccessful application to the French Council of State, LPO brought its complaint to the European Commission in January 2019. In July 2019, hunting practices in France were thus again subject of infringement proceedings by the Commission.

In 2014, a study commissioned by the Environmental Services Association Education Trust (ESAET) outlined the need to increase and preserve budget lines dedicated to enforcement of environmental crime and estimated that waste crime leads to costs between £300 to £800 million per year in the UK. The report states that "the resources required for proper enforcement are small in comparison with the benefits, and the case for investment is strong." It estimates that for every £1 spent on enforcement, £5.60 return with over half directly returning through taxes and the rest benefitting legitimate waste sector businesses and wider society.

When considering the devastating health effects from air pollution and the amount of public spending on health, the lack of enforcement against the car industry for cheating on the emissions tests begs the question how authorities prioritise their enforcement action.

Dieselgate

A scandal broke out in 2015 when Volkswagen (VW) admitted to illegally fitting special software on 11 million of its cars to trick the emissions tests before placing them on the market. Subsequent investigations found that emissions from cars made by other brands also exceeded the levels that had been recorded by national regulators during the tests. The offices of PSA Group, the French manufacturer of Peugeot and Citroen, were raided in 2017 due to suspected fraud for installing similar 'defeat devices' in nearly 2 million cars. With this software, the vehicles tricked the regulatory testing, as once they were on the road, they released diesel emissions at a level exceeding the legal limit.

In their ground-breaking report in 2016, T&E claimed that it is the responsibility of national testing regulators to enforce the EU ban on 'defeat devices' but that they failed to do so because they lack independence. It now falls on special investigators to hold the responsible actors accountable for putting the health of people at risk and for misleading consumers into buying highly polluting cars. So far, VW individuals and the CEO of Fiat-Chrysler have faced criminal charges in the USA for committing environmental crimes. Criminal liability of VW as a company is currently not possible under German law, although a draft Corporate Sanctions Act was presented in August 2019. Given the widespread systemic failures in the regulatory system and the strong political influence of the car lobby, there is still a lot of enforcement action to be taken in the Member States against those responsible for endangering the health and ultimately lives of people by polluting the air we breathe.

RECOMMENDATIONS

- For the detection, investigation and prosecution of environmental crime, it is necessary for Member States to allocate more resources to the different enforcement bodies that are in charge of investigations, as well as to enhance cooperation between regulators and environmental agencies to share expertise and capacity, both within and between the Member States.

- The scope of what is legally defined as an "environmental crime" should be extended to include illegal extractive activities, such as illegal extraction of water or mining, whether or not it affects protected areas or species.

- To bring an end to the impunity of criminals and the perceived complicity of some public authorities in the occurrence of environmental crimes, it is fundamental that enforcement of environmental crime is made a political priority. The European Green Deal recognises the importance of tackling crime to step up compliance and to make sure that environmental ambition is not undermined.

2. BUSINESS AS USUAL, UNFORTUNATELY

Criminal law has developed around the idea that individuals (natural persons) should be held accountable for their wrong-doing. However, over the years, also companies ("legal persons") have started to enjoy some of the same rights as natural person. However, the way that criminal liability is applied to companies does raise questions, in particular with regard to sanctions in situations where the law might prescribe a prison sentence: how can a company serve a prison sentence? Similarly, what responsibility do managers have for the criminal conduct of an employee or for an activity that occurs within the company? Can an individual bear the criminal liability of a whole corporation? If so, which individual? As the Dieselgate investigations show, this will very much depend on how the criminal law in each jurisdiction defines corporate criminal responsibility.

In principle, the Environmental Crime Directive provides that Members States must ensure that legal persons (companies) should be held liable where an offence has been committed for their benefit by a person with a leading position within the company. Key factors that are relevant to determine whether the actions of an individual can be attributed to the legal person, the company, are whether the individual has powers to represent the company, has decision-making authority or exercises control over the company. In addition, the liability of a company does not preclude the parallel personal criminal liability of the individual.

Another factor which increases the complexity of corporate criminal liability is the transnational nature of many illegal businesses and criminal activities. There are limited liability companies, offshore companies, subsidiaries, holdings, incorporations all in different countries but formally under the control of a single business. Splitting up a company structure between countries and in different forms is a common way to benefit from generous corporate tax regimes; however, it also has the potential to shield the parent company from its responsibilities. In such cases different authorities from different jurisdictions have to cooperate.

Whose crime and what punishment?

Where jurisdiction exists but law enforcement only pursues the individuals directly implicated in a crime, there is little incentive for the corporate entity itself to create, reform or implement compliance programmes and to take measures to prevent future wrongdoing and harm. In such situations, if law enforcement focuses on prosecuting only low-level or mid-level individuals of the corporate entity, this may further permit impunity as senior officials and the corporate entity itself can escape accountability. On the other hand, where law enforcement only pursues claims against the corporate entity, individuals responsible within the entity are not held accountable for criminal actions. For this reason, it is crucial that both individuals and the corporate entity itself can be criminally liable, with particular responsibility of the executives as they should have oversight over the business and should ensure all operations and staff comply with the law.

Kolontar Sludge Pollution

In October 2010, the western dyke of a Magyar Alumínium Zrt (MAL) reservoir filled with red sludge from more than 50 years of aluminium production collapsed, leading vast amount of alkaline sludge to flood settlements of Kolontar and Devecser through the Torna creek in Hungary. The sludge contaminated the Marcal, Rába and Mosoni-Duna rivers and water pollution reached the Danube River. The incident led to ten deaths and 286 injured persons. The Torna Creek's and Marcal River's ecosystems were severely affected, 365 houses were damaged and thousands of hectares of soil damaged. The main hazards posed by the sludge (besides the volume of the wave) were its alkalinity and the contamination with chrome, mercury, lead and nickel levels that significantly exceeded the maximum levels for soil and drinking water.

The disaster can be directly linked to negligence by MAL but also to failures on behalf of the national authorities licensing and monitoring the activity of the plant and the condition of the dam. Already in 2003, the Clean Air Working Group warned the government that the 30 million tons of red mud accumulated over decades poses high environmental and health risks. In 2006, a complaint was filed to the Prosecution Service that the red mud reservoirs endanger drinking water bases. Yet, no steps were taken to end storing red sludge in reservoirs even though this 'wet technology' was already outdated at the time of the incident. There were several checks and reporting obligations MAL failed to complete, including inspecting the quality of the wall every year and reporting on the excessive alkalinity of the reservoir water (pH of 12.3).

In September 2011, MAL was fined nearly €420 million, the maximum allowable by law, four times of what had already been spent on clean-up costs and the construction of new houses by then. Therefore, approximately €128 million were paid by the Hungarian Government and a compensation fund for victims established in 2015, to make up for this failure of the polluters pays principle, which is also a cornerstone of the Environmental Liability Directive.

In addition, the insurance policy of MAL was insufficient in terms of both quantity and scope as it was limited to €40,000 and only covered 'traditional damages (property damage and bodily injury) but not remediating environmental damage which would have cost around €65 million.

Following the incident, the executive director of the company was arrested and an enquiry into suspected professional misconduct leading to mass fatalities and harming the environment was launched. The investigation finished in November 2011 with fourteen employees being charged with causing public danger, damaging nature and infringement of waste management regulation, all qualified as crimes when committed with negligence.

Some industries and specific companies may appear too important for the state to want to pursue them for crimes, particularly when communities rely on their economic activity. In Italy, a series of government decrees exempted the industrial plant in Taranto, ILVA, to continue operating, even without the required impact assessments and even with the Court confiscating parts of the plant for serious violations of health and safety and environmental laws. Because the ILVA plant is of national importance – being the largest steel producer in Europe – the government feared that the operators would cease production and therefore leave a large number of workers without jobs. As such, the government prioritised pleasing a highly toxic and polluting industry, which has contributed to high rates of cancer and pollution-related illnesses. As a result, citizens brought Italy before the European Court of Human Rights for giving ILVA criminal immunity and failing to protect the citizens' right to private life and right to an effective remedy. This prolonged impunity is the result of the quick-fix solutions put forward by politicians to the industrial situation of the country rather than presenting a full-fledged industrial reform that would respect both occupational security and the lives of surrounding communities.

In Romania, illegal logging is a systemic problem met with inadequate enforcement measures, where different stakeholders are benefitting from the activity. As if illegal logging itself was not enough, foresters and activists have been attacked and even killed. Between 2014 and 2019, six murders and over 650 violent attacks have been registered by the Romanian Forestry Union. A long list of NGOs have condemned the violence and called for urgent action to protect the forests, ecosystems and their defenders.

Logging in Romania/Schweighofer

In 2015, the Environmental Investigation Agency (EIA) revealed that illegal logging is destroying Romania's ancient forests and national parks, including Natura 2000 areas. An Austrian timber company, Holzindustrie Schweighofer, profits from these illegal activities. The Romanian police raided Schweighofer's facilities and suppliers as part of an investigation for illegal logging, tax evasion and links to organised crime in May 2018, estimating the damage caused to be at €25 million. In early 2020, illegal logging in Natura 2000 areas and UNESCO buffer zones appears to continue. Data from November 2019 reveals that more than 20 million m3 are logged illegally each year, estimated to be worth at least €4 billion in the past four years. As a result, nearly two-thirds of Romania's Carpathian Mountains forests have been lost in the past decade alone.

Significant issues relating to the traceability of the timber stand in the way of effective corporate accountability and liability, allowing those profiting from the exploitation of ancient forests to hide behind the opaque practices of log yards and intermediate actors in the timber industry. As a result, depots are used to launder illegal logs to let them enter the timber markets. With over 1,000 independent log yards mixing and sorting logs across Romania without full traceability and transparency, buyers, such as Schweighofer who source from over 250 independent depots, cannot identify the origin, legality and sustainability of their purchase, and therefore act in violation of the EU Timber Regulation.

It further seems that illegal logging is met with a lack of criminal prosecution, suggesting significant enforcement gaps and a lack of political will, which is conducive to environmental crime. Agent Green further considers the weakness of the state institutions regarding law enforcement, the lack of a long-term strategy for sustainable forest management, but particularly the level of corruption in key institutions, as main reasons for the ongoing illegal logging and the resulting biodiversity loss.

After EuroNatur, Agent Green and ClientEarth submitted a complaint to the European Commission in September 2019, in February 2020, the Commission sent a letter of formal notice to Romania, urging it to properly implement the EUTR to prevent the placing on the market of illegally logged timber. The Commission agrees that Romania's forest management is in breach of the Habitats Directive as it allows for logging in protected Natura 2000 areas without carrying out the required appropriate assessments. Further systemic issues are a lack of prior evaluation as required under the Strategic Environmental Assessment Directive and shortcomings in the access of the public to environmental information in the forest management plans. This step is welcomed as it is for the Commission to be the guardian of the treaty and to be nature's last line of defence. With the involvement of companies from other Member States, such as Schweighofer, this is a cross-border issue that requires EU-level action to ensure that systemic transparency issues do not distort the internal market, particularly where this occurs at the expense of Europe's key biodiversity hubs.

Activists who had challenged Schweighofer's activities have faced lawsuits by Schweighofer claiming compensation for legal costs incurred during administrative cases brought by the NGO Neuer Weg. The purpose of this retaliatory claim appears simply to be to silence the NGO so that it gives up the administrative case against a saw mill.

Offshore and out of sight

Even in situations where legal persons can be held criminally liable, company structures can come in many forms, adding to the complexity and challenges of enforcement. Setting up a company leads to the creation of a separate legal personality that can be located in a different jurisdiction than the owner of the company. As stated in the principles developed by the Commerce, Crime and Human Rights Project, launched by Amnesty International and the International Corporate Accountability Roundtable (ICAR), "*The issues of separate legal personality and limited shareholder liability present significant legal challenges for accountability where the case involves a parent company based in a home State that operates through a local subsidiary or joint venture in the host State.*" This enables corporate actors to be unaccountable for committing crimes through their offshore entities.

When international cooperation between regulatory and enforcement bodies is weak, or even non-existent, bureaucratically burdensome and lengthy, it becomes relatively easy and profitable to set up an offshore criminal business. Through subsidiaries, shell companies and holdings, it is possible to set up separate legal entities in different jurisdictions where the authorities are not able to detect the illegal activity in the first place. Even where criminal activity may be suspected, enforcement authorities of different countries will need to cooperate to investigate together. Tax havens, where setting up anonymous companies can be very easy, are prime hubs for corporate crimes that are also known as "white collar crimes". Gangs and corporations involved in criminal activities are able to launder money, falsify documents and trade in illegal goods, such as banned chemicals, waste, ivory and endangered species. Increasing transparency in supply chains and corporate structures would greatly help authorities uncover the identity of those engaged in such crimes.

Emission Trading Scheme Fraud

The EU carbon market was hit by a multi-billion VAT fraud in 2008 and 2009. This kind of fraud consisted in establishing shell companies only to buy and sell carbon quotas, to then move the quotas in question from one country to another. Setting up such companies and moving money between them is a typical and well-known way to launder money to hide the traces of criminal activity.

The complex pan-EU carbon market fraud, worth between 10 and 20 billion Euro across the EU, with 1.6 billion Euros in taxes stolen from the French state alone, was unveiled in 2016. This case involved individuals and companies based in Poland, France, Lithuania and Cyprus, buying carbon quotas VAT-free in various EU Member States and then selling them at a price that included VAT in France. In France, the EU's biggest trading platform, Bluenet, advanced the VAT automatically to the carbon quotas, thereby making it easier for the companies to withhold and not declare the VAT when the quotas were resold. In so doing, Ellease, the main company at the centre of the scam, profited by selling carbon quotas with French VAT effectively stealing from the French state and taxpayers.

Various holding companies were set up, including in Cyprus and Lithuania, where a Polish broker, Consus, moved the proceeds from the French sales to these various companies to launder the money. As well as other people involved in this organised crime, the founder of Consus, Jaroslaw Klapucki, was given a 7-year prison sentence in France for money laundering and fraud.

Shipbreaking: Seatrade Case, Netherland

In 2018, the Rotterdam District Court sentenced the ship owner Seatrade for illegally sending four ships to be scrapped on beaches in South Asia, in breach of the EU Waste Shipment Regulation. Such ships often contain large quantities of hazardous substances such as bunker oil, lubricating oil, polychlorinated biphenyls (PCBs) and asbestos. In this case, the ships in question were refrigerating vessels, therefore containing dangerous levels of hydrochlorofluorocarbon (HCFCs). The judgment set a precedent for making shipowners criminally liable for selling vessels for breaking outside the OECD to places where workers and the environment are put at risk. By not recycling the ships legally, Seatrade maximised its profits by disregarding human rights and environmental standards.

The four ships that were illegally exported ended up in India, Bangladesh and Turkey. They had been sold to the recyclers via unknown intermediary companies and the ships were flying the flags of different countries. Given the various jurisdictions involved, there were potentially many other enforcement bodies that could have investigated, yet the Dutch prosecutors were able to bring the case in the Netherlands because they were able to show that the decision to commit the crime happened at the Seatrade headquarters in the Netherlands.

After six years of investigations, seizing of computers and cooperation with different national and international enforcement bodies, Seatrade was charged with fines ranging between €50,000 to €750,000. Two of Seatrade's executives were also banned from exercising their positions in the company for a year. A prison sentence was not given as there were no previous criminal records, although it was considered and had been asked for by the prosecutors.

RECOMMENDATIONS

- All Member States need to implement Article 6 of the Environmental Crime Directive and extend criminal liability to corporations in their legal systems, so that both individuals and companies are criminally accountable, to guarantee that everyone has equal rights and obligations in the law.

- Corporate environmental criminal liability should take into account all of the profits generated by a company during the criminal activity so that the sanctions are proportionate to the harm caused.

- EU institutions and the Member States need to work on increasing corporate transparency to disclose beneficial ownership of companies to ensure that activities happening offshore in other jurisdictions are accounted for: new legislation on due diligence obligations could be an opportunity to address this.

3. IS IT WORTH IT?

Effective, Proportionate and Dissuasive Sanctions

The Environmental Crime Directive (ECD) prescribes that sanctions for environmental crimes must be effective, proportionate and dissuasive. The Directive itself, however, does not provide more detailed requirements on the types or levels of sanctions, leaving significant discretion to the Member States. This has led to disparities in both the type and severity of sanctions applied across the Member States.

Effective sanctions should contribute to the protection of the environment, the objective of the Directive. Thus, sanctions should restore the harm done to the environment, prevent future environmental harm caused by the activity in question and deter the offender, but also the broader public, from committing similar offences again. It is thus questionable to what extent a fine of €5,000 for the illegal shipment of electronic waste (see Tronex case above) is effective in this regard.

This ties in with the requirement that penalties must be dissuasive, meaning that they should deter the offender from recidivism, but also deter other potential offenders form committing similar environmental crimes. Economic gains must be removed, yet penalties should go further, adding a punitive element. The profitability of environmental crimes must be considered so that the expected costs outweigh the expected financial gain. This means taking into account the e.g. estimated profits of €5 per kg of illegally fished and traded tuna (see IUU tuna case above) as well as the context of IUU fishing being worth €10 billion every year worldwide when determining effective and dissuasive penalties.

Penalties must also be proportionate to the gravity of the violation, the culpability of the offender and the harm caused to the environment and human health. Yet, this proportionality must also exist within the penal tradition of each Member State, taking the severity of the offence into account. Aggravating factors such as the duration and repetition of an offence, the reaction to an incident or its location, as well as mitigating circumstances such self-reporting, remedial action and cooperation, are relevant in determining proportionality. The financial gains, the level of organisation and the financial means of the offender should also be considered to determine a proportionate sanction.

Yet, sanctions do not exist in a vacuum. The effectiveness of detection and enforcement mechanisms play a key role in ensuring that sanctions are in fact effective, dissuasive and proportionate in practice. Where investigators are under-resourced or inadequately trained, the theoretical prospect of a high sanction is unlikely to deter a potential offender when the risk of being detected is low (see 'catch me if you can' above). Political will and prioritisation are also major factors contributing to adequate sanctions and appear to be missing in Romania given its failure to adopt penalty measures for breaches of the Regulation on fluorinated greenhouse gases, when penalties should have been in place since January 2017. A complete lack of measures clearly fails to provide for effective, proportionate and dissuasive penalties and is likely to create a safe haven for the illegal trade of hydrofluorocarbons. The Commission's reasoned opinion from February 2020 is therefore a necessary and welcomed step towards ensuring the implementation of this Regulation that governs gases with a global warming effect of up to 23,000 times that of CO2.

Types and Levels of Sanctions

For environmental crimes, fines constitute the most common sanction. The level of maximum fines varies a lot across the Member States, yet, overall, fines appear rather low. There is a lack of comparable data on the fines and sanctions imposed in practice. Data collected by RSPB on wild bird crime prosecution is thus very helpful, yet it is impossible for CSOs to fill this gap (nor should it be their task to do so) and centralised efforts to monitor fines and sanctions for environmental crimes are needed.

Where crimes are committed by natural persons, causing serious injuries or death and/or severe environmental harm, imprisonment can also be an effective and dissuasive tool. For companies as legal persons this is more complicated but falling-back to the personal responsibility of employees or CEOs can be an option (see 'business as usual' above). Therefore, it is particularly important that fines for legal persons are adequate, especially due to the potential profit a company may derive from illegal activities. However, the fines prescribed in the law appear not to always be applied in practice, where they may very well be too low already.

In addition, other sanctions, such as the restoration of the polluted site, the closing of the company, a prohibition of use, the removal of waste or other community-related measures, are possible. These should not be disregarded as they may often be very effective in remedying environmental harm and thus protecting the environment, as well as educating offenders.

The type of sanction also varies across Member States. For instance, in the context of waste-related crime, some Member States provide for the criminal liability of legal persons whereas others rely more on administrative fines with the levels of fines for corporate actors being considered too low. While administrative fines can be effective for small, singular incidences, the added weight of criminal sanctions for more severe illegal activities is necessary to reach the objectives of the Directive.

REACH enforcement

Under the Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), manufacturers, importers and downstream users need to ensure that the substances they manufacture, place on the market or use do not adversely affect human health or the environment.

A 10 year review of 2,000 chemical dossiers covering 700 substances found that 70% had missing safety data. The dossiers are supposed to detail the safety of a chemical before it can be placed on the market, in line with the "no data, no market" rule of REACH. Missing data therefore questions the compliance with that rule and also the actual safety of the substances.

Ensuring the effective implementation and enforcement of REACH is a joint responsibility between the European Chemicals Agency (ECHA) and Member States. While it is ultimately for ECHA to withdraw registration numbers for non-compliant dossiers, Member States can not only push for ECHA to take this step but also take enforcement measures at national level.

The enforcement measures available to National Enforcement Authorities vary across the EU: 42% of Member States only use administrative sanctions, 10% only criminal and 48% enforce through a mix of criminal and administrative sanctions. These sanctions entail e.g. fines, the withdrawal of permits, a suspension of an activity, closure of a company and also prison sentences.

However, even though Member States authorities have a broad range of enforcement measures available, they regularly only resort to soft measures such as oral warnings or letters, not even administrative fines. In order to meet the purpose of the Regulation, which is to ensure a high level of protection of human health and the environment, more dissuasive and stringent measures, are necessary. Member States should therefore make full use of the catalogue of measures available to them, including criminal sanctions.

Inadequate sanctions and low levels of fines continue to constitute one of the main overarching implementation challenges relevant across the different sectors and actors. Significant variations in types and levels of penalties also encourage forum-shopping, particularly of organised criminal groups.

Good example: England & Wales Sentencing Guidelines

Since July 2014, the England & Wales Sentencing Guidelines for environmental offences lay down definitive guidelines to establish the appropriate penalty for environmental offences. The new sentencing guidelines, distinguish between individuals and legal persons (companies and organisations) and include twelve steps to ensure that the sentence matches the seriousness of the offence. Step three involves determining the offence category by distinguishing between culpability categories (deliberate, reckless, negligent or low/ no culpability) and harm categories for which concrete offences are listed. For legal persons (such as organisations or companies), the guidelines contain different starting points and ranges for fines, depending on the turnover of the organisation and lays out aggravating (e.g. previous convictions, history of non-compliance, location and concealment) and mitigating factors (e.g. steps taken to remedy the problem, non-commercial motivation, self-reporting) to make sure that sanctions are proportionate. Step five ensures that the overall financial order (compensation, confiscation and fine) removes any economic benefit derived from the offending. This is an important step given the lucrative nature of many environmental crimes.

The Guidelines have led to higher fines for organisation. According to the UK Environmental Agency, the average fine per prosecution of an environmental offence increased by 30% between 2014 and 2015. The following two cases from the UK provide good examples of the implementation of the Environmental Crime Directive requirement of effective, proportionate and dissuasive sanctions.

17,000 tonnes of waste deposited and stored illegally

In 2016, Powerday Plc, one of London and South East England's biggest waste companies, was sentenced for the illegal receipt and storage of 17,000 tonnes of waste. This included approximately 14,500 tonnes of hazardous waste such as construction and demolition waste containing asbestos, contaminated concrete and treated wood.

The company exceeded the 10 tonnes of hazardous waste its permit allowed it to store and was also fined for treating, keeping or disposing of controlled waste in a manner likely to cause pollution or harm to human health. Overall, fines of over £1 million were imposed and Powerday Plc agreed to pay the Environment Agency's costs of £243,955.35 for the investigation and prosecution of the offences.

Thames Water Utilities Ltd - freshwater pollution

On March 2017, Thames Water Utilities, a private company responsible for UK water supply and wastewater treatment, was fined a record-breaking £20,361,140.06 for a series of pollution incidents on the River Thames caused by their negligence. The case combined six separate incidents, causing significant and repeated pollution from 2012 to 2014, making this the biggest freshwater pollution case in the Environmental Agency's 20 year history. The fines for the six incidents ranged from £150,000 to £9,000,000. In 2015-16, Thames Water made an operating profit of £742m, £2 billion revenue and paid out £82m in dividends.

Thames Water was fined for several incidents of illegal discharge of sewage which resulted in severe environmental damage, killing birds, fish and invertebrates as well as leading to 14km of visible sewage pollution along the river. Millions of litres of untreated sewage per day were diverted away from the treatment process so that less than half of the incoming sewage was treated despite the volume being within the capacity of the treatment process. This untreated sewage made its way to the River Thames, causing significant environmental harm and public disruption.

The Environmental Agency's (EA) investigations revealed several reckless failures by Thames Waters that disregarded warnings by its staff and ignored over 1,000 high priority alarms that alerted them of the problems. Overall, the EA stated that both the volume of sewage discharge (1.4bn litres) and the length of time over which the discharge occurred was unprecedented.

Aylesbury Crown Court therefore condemned this "disgraceful conduct" that was "entirely foreseeable and preventable", noting that this was a record fine for record-breaking offending. The judge further stressed that it was for Thames Water to pay the fine and that it should not be passed on to its consumers. Specifically, the judge stated "[i]t should not be cheaper to offend than to take appropriate precautions."

This fine was also made possible through the 2014 changes in the sentencing guidelines. With water companies in the past being persistent and frequent polluters of UK rivers and beaches, these changes and the severe penalties the guidelines now allow for, are welcomed as they contribute to ensuring that environmental crime does not pay. The new sentencing guidelines have indeed led to several high penalties for sewage leaks of water companies.

RECOMMENDATIONS

- There should be precise EU guidelines on awarding sanctions for environmental crimes to help judges determine what effective, proportionate and dissuasive penalties should be for environmental crimes. This should be coupled with trainings for judges about the harm caused by environmental crime and the profits criminals make from it.

- Court decisions from Member States should be made public and be available to other criminal courts in all Member States in a centralised system so that judges can consult rulings from other countries when they decide on effective, proportionate and dissuasive sanctions, thereby ensuring that punishments for environmental crimes are more aligned.

- Penalties should consider the earnings made from the illegal activity and should provide for confiscation of those illegal proceeds so that sanctions are proportionate to the crime.

- Penalties should include the obligation to restore the environment to its former state or include the public cost of restoration.

- In the Member States, administrative and criminal sanctions should form part of the same environmental enforcement process, so that criminal sanctions can be imposed for serious violations and there is less reliance on administrative sanctions by default.

CONCLUSIONS AND RECOMMENDATIONS

Enforcing environmental crimes sends a signal that environmental protection is important. To increase the public consciousness about the importance of the environment for our well-being we need a clear political commitment for having laws and procedures in place that can adequately punish criminals when they harm our environment. This is why the European Green Deal emphasises the need for proper implementation and enforcement in all its aspects. The EU and the Member States must ensure that there is a level playing field where the culprits are punished for their illegal activity. As well as being fundamental to guarantee justice, the lucrative nature of environmental crime affects the functioning of the EU's internal market.

- There needs to be a strong political commitment from the EU and the Member States to combat environmental crime for them to live up to the ambition of the European Green Deal.
- The EU should increase judicial cooperation to combat environmental crime and provide clear sentencing guidance for judges on what are effective, dissuasive and proportionate sanctions.
- Penalties should take into account the proceeds generated from a crime and should include measures to confiscate goods or equipment, obligations to restore the environment to its original state and the removal of a licence to operate.
- The EU and Member States should provide training to judges about the environmental effects of crime and the illegal profits it generates.
- The Environmental Crimes Directive should be amended to include a wider scope of what is considered an "environmental crime", for instance, by explicitly including illegal extractive activities, regardless of whether they harm a given protected area or species.
- We need more information about the occurrence and prosecution of environmental crime in the Member States to increase understanding about the nature of these crimes and how they are being tried in the courts. This can be done by creating a centralised system where rulings on cases involving environmental crime can be consulted by judges in all the Member States.
- The EU and Member States need to work together to increase corporate transparency to detect international environmental crimes.
- Member States have to make sure that companies can also be held criminally liable for committing an environmental offence and the Commission should take steps to take enforcement measures against Member States who do not implement this.
- Member States need to increase resources and capacity for regulators to detect non-compliance and illegal activity as this is necessary for early intervention.
- Capacity-building and more resources also need to be made available to investigation units and enforcement bodies so that they can tackle environmental crimes more efficiently.
- Each Member States should enhance cooperation between all its different environmental regulators, agencies, enforcement bodies and prosecutors to be able to investigate and pursue all environmental crimes more effectively.

CURRENT ISSUES

In 2019 the Commission started evaluating the performance of the Environmental Crime Directive and launched a public consultation at the of that year. The final report on its review is expected this year.

A Study on due diligence requirements through the supply chain was published on 20 February 2020 looking at the different regulatory frameworks and options on how to tackle environmental and human impacts of companies in their supply chains. By requiring companies to carry out due diligence, authorities and the public can benefit from increased transparency in corporate structures which will make it easier to hold companies to account when they commit a crime.

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