

Environmental Crime In Europe

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Editorial Preface

1. REASONS FOR THIS BOOK

Almost on a daily basis reports are presented on cases of illegal disposal of highly toxic waste, illegal dumping of waste water into rivers or illegal dumping and trafficking of hazardous waste. In addition, there are equally increasing reports on illegal transboundary shipment of waste and trade in endangered species. Notwithstanding the efforts that have been undertaken by many European Member States in combatting environmental crime it seems as if, at least in some Member States, environmental crime still flourishes. The criminogenic reasons explaining the origins of environmental crime are well-known: crimes against the environment are usually committed for monetary gain. Environmental crime can, to an important extent, be lucrative, as the probability of detection is relatively small and the reported sanctions imposed on the few that are caught and convicted do not seem to qualify as much of a deterrent. Few perpetrators are sentenced to gaol and the monetary fines imposed are often negligible compared to the profits made from environmental crime.

Environmental crime can create substantial damage to the environment as well as to human and animal life. Of course domestic environmental law has to an important extent aimed at combatting environmental pollution. This has resulted in an elaborate legislative and regulatory network of domestic environmental laws in the European Member States. However, already back in the 1970s the European policy-maker realised that a lot of environmental pollution in fact has a transboundary character. As a result it would have made little sense for example to regulate the quality of a transboundary river just in one country if for example an upstream country might have more lenient standards and were thus able to contribute substantially to transboundary pollution. Moreover, the European policy-maker equally realised that there would be a substantial danger that Member States could engage in destructive competition in order to attract industry, thereby lowering environmental standards below efficient levels. A so-called race-to-the-bottom might be the result. For those reasons the European policy-maker has developed an elaborate set of rules (both regulations and directives) which together form European environmental law.

The model of European environmental law largely consisted of a system whereby environmental standards were developed at the EU level (mostly laid down in directives), but where implementation had to take place via the Member States. However, by the end of the last century it was increasingly reported that (many) Member States had failed to execute their obligations to implement the

so-called environmental *acquis*. A large implementation deficit was the result, in the field of environmental law. Many initiatives have been taken, both at the legislative level as well as through case law, to remedy this implementation deficit.

Although it was originally held that the EU institutions did not have the power to require EU Member States to use the criminal law to enforce legislation implementing European legislation, a decision of the (then) European Court of Justice at the beginning of this century decided differently and opened the door for European legislative action in the domain of criminal law. The first directive in that domain was Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law (the Environmental Crime Directive).

Meanwhile Member States have implemented the obligations laid down in this Environmental Crime Directive. However, little was known of the way in which the Environmental Crime Directive affected the system of environmental criminal law in the Member States.

Therefore it was necessary to publish this book examining how environmental criminal law in Europe is shaped, explaining the involvement of Europe in fighting environmental crime by the approximation of environmental criminal law of the EU Member States. This book therefore aims at a careful analysis not only of the origins and contents of the Environmental Crime Directive, but also of environmental criminal law in some Member States, thereby paying attention both to the existing domestic system of environmental criminal law and to the question of how that domestic legal system has been affected by the Environmental Crime Directive.

2. HISTORY AND ORIGINS

This book is the result of a project that has been executed with European support under the EU 7th Framework Programme for Research and Innovation. The research project, which was coordinated by Ecologic Institute in Berlin,¹ was called ‘European Union Action to Fight Environmental Crime’ (EFFACE)² and lasted from December 2012 to March 2016.

EFFACE brought together researchers from 11 universities and research institutes in six European countries. They broadly addressed the issue of environmental crime in a multidisciplinary manner, representing several academic fields, such as criminology, law, political science and economics. One research strand of EFFACE dealt with an identification and analysis of the instruments, actors and institutions involved in the fight against environmental crime.

¹ See <http://ecologic.eu/>.

² See <http://efface.eu/>.

This book is a follow-up of the results of this research strand dealing with actors, instruments and institutions. The earlier research has been fundamentally rewritten according to a common structure with a view to providing an in-depth analysis of environmental criminal law in Europe wherein the Environmental Crime Directive obviously plays the most important role.

3. METHODOLOGY

As will be made clear below, the book consists of three parts, Part I dealing with the European legal background, Part II with the situation of environmental criminal law in individual countries and Part III providing a comparative analysis and concluding remarks.

Several methods have been followed in this book. The first part, providing the background for the book and the European institutional legal framework, strongly relies on European legal methodology, thus, *inter alia*, paying attention to the question of the competences of the EU in the domain of the criminal law. That part largely relies on the relevant case law, provisions of the Treaty and opinions in legal doctrine concerning the competences of the EU with respect to (environmental) crime.

The core of the book (both in terms of number of pages and in substance) undoubtedly consists of the second Part, which provides the analysis of environmental criminal law in seven countries; more particularly France, Germany, Italy, Poland, Spain, Sweden and the United Kingdom. The choice of countries was based on the fact that these are Member States in which environmental criminal law and also legal doctrine in this domain has been relatively well developed. It was obviously not possible to deal with all 28 Member States within the scope of this book. The selection of the seven Member States of course took into account different legal traditions (civil law and common law) and a reasonable geographical spread, for example including one typical outlier (the UK), one Nordic country (Sweden), two Southern countries (Italy and Spain), an Eastern European country (Poland) and two of the most 'traditional' Member States (France and Germany). This provides a strong representation of different Member States, also representing different levels of development of the institutional infrastructure with respect to the enforcement of environmental criminal law.

The goal of our book is obviously not to check to what extent the Member States we examined have correctly implemented the Environmental Crime Directive. The European Commission has ordered a detailed study which has exactly performed that task. The results of the implementation study have of course been taken into account in the country chapters, but this book is providing more than a technical implementation study. The idea is to study implementation within the much broader context of the functioning of environmental criminal law in the wider context of the entire system of criminal law in each particular country.

The country chapters have been drafted according to a common methodology. A clear guide was provided to the authors of the country chapters, instructing them to address specific issues such as, *inter alia*:

- The definition of environmental crime;
- Substantive criminal law principles;
- The structure of environmental crime;
- The transposition of the Environmental Crime Directive;
- Procedural provisions, the role of inspections, the prosecutor, courts and administrative sanctions;
- The applicable type and magnitude of sanctions.

Moreover, the authors of the country chapters have also been asked to address not only material environmental crime, but also the way in which environmental crime is dealt with in practice, thus paying attention for example to the types of penalties imposed, the number of prosecutions, administrative sanctions imposed etc. The country chapters therefore specifically relate to ‘the law in action’, in other words to the nature of the enforcement policy. Thus the authors of the country chapters were expressly asked to provide data on enforcement of environmental criminal law where available and to provide a judgement (again, of course based on reliable sources) on the effectiveness of the enforcement practices. This comprehensive approach provides information that can be useful, *inter alia*, in addressing the question of the relationship between environmental criminal law and compliance. Although this issue is a complicated one and to some extent goes beyond the scope of this book, the extent to which an environmental violation is penalised in practice has been taken into account as something that is not only inherent to environmental criminal law, but also relevant in assessing the effects of the latter on compliance.

The focus of this book is on environmental criminal law in general and more particularly on the relationship between the Environmental Crime Directive and domestic environmental criminal law. We decided on purpose not to focus on specific important areas of environmental criminality, such as for example trafficking in endangered species, habitat protection or illegal transport of waste. The main focus of the book is on which kind of instruments are available in environmental criminal law, how environmental interests in the particular Member States are protected and how environmental criminal law is enforced in practice. The clear focus therefore is on the structure of (domestic) environmental criminal law as well as on the question of how that structure has been affected by the Environmental Crime Directive. Obviously these findings also have their importance for specific areas of environmental criminality (like waste trafficking, habitat destruction, etc), but the clear purpose of the book is to focus on a discussion of environmental criminal law at a higher level rather than focusing on specific areas of criminality.

The third part of the book is concerned with a functional comparative legal methodology. The comparison of environmental criminal law in the

Member States takes place to an important extent according to a methodology that has been developed since the 1980s in the Max Planck Institute for Foreign and International Criminal Law in Freiburg im Breisgau (Germany), where a project was run under the title: ‘Environmental protection through the criminal law?’. That project asked critical questions on the ability of the criminal law to protect environmental interests, particularly in its relationship to administrative law. That particular way of looking at environmental criminal law (more specifically examining the ability of specific provisions to provide protection to environmental interests) has been shown to be a particularly useful method to critically compare criminal law in different legal systems. In that literature for example a distinction is made between the protection of environmental interests via so-called abstract endangerment, concrete endangerment and independent crimes, which distinction is also used for the functional comparison of the seven country chapters discussed in Part II.

In addition to addressing the country chapters from the perspective of German legal doctrine with respect to environmental criminal law, several other approaches are employed as well. To some extent insights from green criminology, indicating the limits of criminal law in protecting the environment are used. Finally, the economic approach to (criminal) law has been employed, for example to point to the importance of proactive monitoring of environmental crime, given the fact that most of environmental crime is victimless. That means that often no single victim can be identified that would have sufficient incentives to discover that an environmental crime has been committed and that would thus report the environmental crime to the police. This combination of approaches allows a critical benchmark in order to analyse the country chapters.

4. TOPICS AND STRUCTURE

The book is organised into three parts. The first part sketches the European legal framework. An introduction to European environmental law and environmental crime is provided as well as a critical discussion of the competences of the EU to legislate in matters of environmental crime after the entry into force of the Treaty on the Functioning of the European Union. This first part concludes with a detailed and critical discussion of the coming into being and contents of the Environmental Crime Directive.

The core of the book consists of the second part, which contains the country chapters. As was explained above, following a similar methodological framework, environmental criminal law in seven Member States is presented. The methodological framework takes into account elements which are relevant to analyse the quality of criminal law in its ability to protect the environment. Thus attention is, for example, paid to the definition of environmental crime, to the types of environmental crimes contained in domestic legislation, but also to procedural provisions, the role of the specific actors involved and the delineation between

administrative penalties and the criminal law. A core part of these country chapters of course deals with a critical review of the importance of the Environmental Crime Directive for their specific legal system.

Part III provides the comparative and concluding remarks. One chapter in this part analyses the evolution of environmental criminal law in the seven discussed Member States from a comparative perspective. The final chapter provides an outlook on the state of affairs as far as environmental criminal law in Europe is concerned and sketches future perspectives.

The three parts are strongly interrelated. Part I constitutes the foundations for the further analysis in the country chapters. Part I sketches the European legal background against which the Environmental Crime Directive, a core focus of this book, came into being. In Part II each of the country chapters analyses, *inter alia*, the way in which the Directive has affected environmental criminal law in their particular country. Specific attention is paid to the question whether on the whole the implementation of the Environmental Crime Directive in the specific country can be considered as having a positive effect on the effectiveness of the environmental criminal law system in that country. Part III then logically follows with a critical comparative analysis, addressing, *inter alia*, the question to what extent the implementation of the European legal framework has changed the effectiveness of the environmental criminal law in the specific Member States. The comparison equally provides indications on the particular strengths and weaknesses in the specific Member States. Finally, looking at the European legal background as a starting point in Part I and taking into account the experiences in the specific countries as presented in Part II, the final chapter in Part III summarises the state of affairs concerning environmental criminal law in Europe and indicates the main challenges for the future and equally formulates recommendations.

5. CONTRIBUTORS

As was made clear above, the contributors to this book all participated in the EFFACE project and come from various universities or other organisations in Europe. Two contributors come from the University of Granada in Spain: Teresa Fajardo del Castillo (who drafted Chapter one) and Juan Luis Fuentes Osorio (who is affiliated to University of Jaén and drafted Chapter eight on Spain). Several contributors come from the University of Catania. This is for example the case for Grazia Maria Vagliasindi, who is one of the editors of this book, the author of Chapter three (on the EU Environmental Crime Directive) and Chapter six (on Italy) and the last chapter (twelve). Giovanni Grasso (the author of Chapter two on EU harmonisation competences in criminal matters and environmental crime) also comes from the University of Catania as do Floriana Bianco and Annalisa Lucifora, who drafted Chapter four on France. Stephan Sina from Ecologic Institute drafted Chapter five (on Germany). Niels Philipsen and Michael Faure (from the Maastricht European Institute of Transnational Legal Research (METRO)

from Maastricht University) co-authored Chapter nine on Sweden. Michael Faure, one of the editors of this book, also authored the comparative conclusions in Chapter eleven and co-authored Chapter twelve. Several authors are connected to or come from Queen Mary University in London. This includes Carolina Jakovic who, jointly with Valsamis Mitsilegas and Malgosia Fitzmaurice, drafted Chapter seven on Poland as well as Elena Fasoli who drafted Chapter ten on the United Kingdom. Finally Andrew Farmer, from the Institute for European Environmental Policy is a co-editor of this entire book and co-author of the final Chapter twelve.

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The texts were finalised in February 2017 and for that reason developments after that date have not been included.

Andrew Farmer, Michael Faure & Grazia Maria Vagliasindi
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