

Specific sanctioning requirements in EU environmental directives

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Road map

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 - No sanction without transposition
 - Obligation to sanction?

1. Introduction

- EU law enforcement deficit
- Enforcement norm-setting: EU requirements for MS enforcement of EU law
 - General sanctioning requirements: effective, proportionate & dissuasive sanctions (ECJ, *Greek Maize Case 68/88*)
 - Specific sanctioning requirements: sanctions determined at EU level
- Example of a specific sanctioning requirement: Art. 12(2) Groundwater Directive 80/68/EEC:
 - ‘Should the conditions laid down in an authorization not be complied with, the competent authority in the Member State concerned shall take appropriate steps to ensure that these conditions are fulfilled ; if necessary, it shall withdraw the authorization.’*

2. EU legislator's competence

- Pre-Lisbon – ECJ case law
 - *Case C-240/90*: (administrative) penalties that go beyond the mere refund of a benefit improperly paid, are lawful
 - *Eco Crime Case C-176/03*: EC can take measures which relate to the criminal law of the MS when necessary to ensure full effect of EC environmental law
 - *Ship Source Pollution Case C-440/05*: EC not competent to determine type and level of criminal penalties
- Lisbon Treaty – Art. 83(2), 1st sentence TFEU:
 - ‘*[i]f the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned*’

3. Specific sanctioning requirements in sectoral EU environmental directives (I)

- Research: systematic screening of EU environmental directives
- General findings
 - Presence: rather occasionally & set at random
 - Scope: limited to one or more breaches of the directive concerned
 - Nature: no explicit criminal or administrative nature, yet often implicit administrative nature
 - Margin of discretion: ranging from wide to almost absent

3. Specific sanctioning requirements in sectoral EU environmental directives (II)

- Types & examples
 1. Specific sanctioning requirement aimed at remediation
 - ✓ *E.g.: obligation to take back waste when transported illegally*
 2. Specific sanctioning requirement hitting the offender in his rights
 - ✓ *E.g.: withdrawal of an authorisation when the conditions are not met*
 3. Specific sanctioning requirement leaving MS the choice between 1 & 2
 - ✓ *E.g.: suspension of discharge when the authorisation conditions are not met*
 4. Monetary specific sanctioning requirement under the ET Directive 2003/87/EC (fine for excessive emission)
 5. Naming and shaming specific sanctioning requirement under the ET Directive 2003/87/EC

4. Criminal specific sanctioning requirements (I)

- Eco Crime Directive 2008/99/EC
 - MS must ensure that 9 defined conducts constitute a criminal offence when unlawful & committed intentionally or with at least serious negligence (Art. 3)
 - ✓ Nature & wildlife (3)
 - ✓ Waste (2)
 - ✓ Dangerous activities & substances (1)
 - ✓ Nuclear materials (1)
 - ✓ Ozone-depleting substances (1)
 - ✓ Discharge, emission or introduction of a quantity of materials or ionizing radiation into air, soil or water (1)

4. Criminal specific sanctioning requirements (II)

- Eco Crime Directive 2008/99/EC
 - Also inciting, aiding and abetting one of the intentional conducts (Art. 4)
 - Type and level of the criminal sanctions are not determined: MS must provide for effective, proportionate and dissuasive criminal sanctions (Art. 5)
 - Also legal persons can be held liable, but no obligation for criminal liability (Art. 6-7)

4. Criminal specific sanctioning requirements (III)

- Ship Source Pollution Directive 2005/35/EC
 - As amended by Directive 2009/123/EC
 - MS must ensure that ship-source discharges of polluting substances in referred areas constitute a criminal offence when committed with intent, recklessly or serious negligence (Art. 4 & 5a(1))
 - ✓ Minor discharges not deteriorating water quality are excluded, unless repeated minor discharges deteriorating water quality in conjunction (Art. 5a(2)-(3))
 - ✓ Some exceptions when certain Marpol requirements are satisfied (Art. 5)

4. Criminal specific sanctioning requirements (IV)

- Also inciting, aiding and abetting one of the intentional conducts (Art. 5(b))
- Type and level of the criminal sanctions are not determined: MS must provide for effective, proportionate and dissuasive criminal sanctions (Art. 8(a))
- Also legal persons can be held liable, but no obligation for criminal liability (Art. 8(b)-(c))

4. Criminal specific sanctioning requirements (V)

- Conclusion
 - Push towards criminal enforcement
 - ✓ Obligation to provide for criminal sanctions
 - ✓ Reflection in sanctioning practice (Blomberg)
 - Yet the consequences seem limited
 - ✓ Material element: limited to certain defined conducts + severity thresholds
 - ✓ Moral element: intent/recklessly/serious negligence
 - ✓ Eco Crime Directive 2008/99/EC: unlawfulness
 - ✓ Ship Source Pollution Directive 2005/35/EC: Marpol exceptions
 - ✓ Type & level of criminal sanctions not determined
 - ✓ No obligation for criminal liability of legal persons
 - ✓ No obligation for application in individual cases & without prejudice to other liability systems (Preambles)

5. Consequences for national legislators & enforcers (I)

- Consequences for national legislators
 - Obligation to transpose specific sanctioning requirements in national law: no sanction without transposition! (ECJ, *Luciano Arcaro Case C-168/95*)
 - Choice between criminal & administrative transposition, except when:
 1. Implicit administrative nature
 2. Eco Crime Directive 2008/99/EC & Ship Source Pollution Directive 2005/35/EC (natural persons!)
 - Margin of discretion depends on wording EU legislator

5. Consequences for national legislators & enforcers (II)

- Consequences for national enforcers
 - National enforcers will eventually have to apply the transposed sanctions
 - Obligation to sanction?
 - ✓ Margin of discretion: wording EU legislator?
 - ✓ ECJ case law: not only results in law, but also in fact!
 - ✓ ECJ case law: lack of enforcement action could breach Art. 4(3) TEU
 - ✓ Eco Crime Directive 2008/99/EC & Ship Source Pollution Directive 2005/35/EC: no obligation for application in individual cases
 - React to reported breaches & enforcement focus on results to be achieved!

Thank you!

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