

The rights of third parties in criminal and administrative sanctioning

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ICEL EPA Environmental Law Conference
Dublin, 30 September 2016



U. Gent - K.U.Leuven

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4. To discuss

1. Public participation in environmental law enforcement ('ELE')

- **Civil society matters for ELE**
 - Initiate enforcement action when public authorities are failing to do so; inform sanctioning authorities / courts on harm caused; give support in the proof of facts and culpability; raise awareness with judicial and other enforcement actors; ...
- **Patterns**
 - NGO's & wildlife law enforcement
 - Nurse (2013) in SFEP July 2016: "vital role NGO's"
 - Species and habitat protection
 - Neighbours & hindrance: noise, vibrations, dust, waste littering, ...
- Aarhus Convention: realm Art. 9(3)-9(4)

- 9(3) "*...each party shall ensure that ... members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*"
- 9(4) "*... the procedures ... shall provide adequate and effective remedies, including injunctive relief as appropriate, and be ... not prohibitively expensive. ...*"

2. Civil society in criminal procedures

2.1. A comparative law perspective: Belgium

A. Legal setting

- Can become a party – ‘civil party’ (CP) – in criminal cases
 - Entry ticket/goal: *harm/restitutio* (fully, *in natura* &/or damages)
 - Procedural economy: case investigation includes the harm claim
- Two entrance doors
 - Start a case < direct summoning or complaint at investigation judge
 - *Join pending case* – Public prosecutor must alert ‘all known victims’
- Rights in
 - Pre-trial proceedings [ca. 2000 - policy empowering victims]
 - E.g. ask for additional investigation actions, access to the criminal files, attendance hearings of the investigation tribunal >> WATCHDOG to keep the investigation progressing
 - Trial proceedings
 - E.g. possibility to add evidence on the offence, the harm

News – Const. Court 07/2016: as CP’s acting for their collective interests, NGO’s are entitled to moral damages beyond 1 €

- Valuation *in concreto*, of the **full damages**

Builds on Supreme Court 11 June 2013

- Art. 3.4, 9.3 and 2.4 Aarhus
 - Judges have to interpret standing criteria in national law in conformity with 9.3 Aarhus
- > “According to the Criminal Procedure Code, the legal action to repair damages belongs to the **victims**. They shall demonstrate a **direct and personal interest**. When such an action is introduced by an **environmental NGO** and aims to challenge **acts and omissions that contravene environmental law**, such an environmental NGO has a **sufficient interest** to do so”

B. Practice

Facts: caseload 2003-07 resort Court of Appeal Ghent

- Data collection: focus grey offences (>< green offences)
- 15% (*first instance*) & 26% (*appeal*) of offenders
- Case-type *hindrance*: noise, smells, dust, vibrations, light, waste littering, burning of household waste in gardens
 - Some classic pollution: soil/groundwater, surface water
- CP profile: mainly individuals; local and regional authorities (clean-up costs waste (soil and water pollution); a few firms (waste and soil clean-up); a few NGO’s (waste clean-up)

Facts: analysis

- Third pattern: public authorities – clean-up costs recovery for waste and water/soil pollution
- Intervening as CP is essentially harm/remedy driven
 - It thus essentially matters for
 - Non-compliance cost internalisation – the polluter pays principle
 - Raising awareness of costs of non-compliance
 - NGO's against wildlife crime: economic valuation of habitats, flora, fauna (birds), ecosystem services
- Procedural economy of CP-option: win-win
 - Lower costs include time gains

C. Cases

The chicken farm Ct FI East-Flanders 14 June '16	And sleepless nights Ct FI East-Flanders 10 May '16
<ul style="list-style-type: none"> ▪ A farmer (NP) & her farm (LP), a chicken farm with 52.000 chickens (IPPC) ▪ Breaches exploitation conditions PP 2009: rainwater, groundwater, hygiene CPs 2009-15: hygiene: flies, odour ▪ Claim CP's and the court <ul style="list-style-type: none"> ▪ 2,500 € each moral damages; - ▪ 250 € each material -; >125 € ▪ ELA-expert AIR [>14/03/'17] ▪ Penalties <ul style="list-style-type: none"> ▪ Farmer: 12,000 € (6,000 prv) ▪ Farm: 18,000 € (9,000 prv) <p>> +5,500 €</p>	<ul style="list-style-type: none"> ▪ A small firm (LP) and its 2 managers (NP's), drifting from catering to wedding parties ▪ Illegal exploitation (no permit) and breach of noise conditions ▪ CP's: 10 neighbours (2004-14) ▪ Claim CP's and the court <ul style="list-style-type: none"> ▪ 1,500 € each moral -; ok ▪ 225 € each material -; ok ▪ 1x739 € medical-; 238 € ok ▪ + proceeding costs ▪ Penalties <ul style="list-style-type: none"> ▪ Firm: 30,000 € (18.000 prv) ▪ Np's: 12,000€ (6,000 prv) <p>> + 15,000 € +2,250 € + ...</p>

2.2. Connecting the picture to the European level

1998-2011 Aarhus

2000-2012-2015 EU

Framing 9(3) in environmental governance
Public participation in environmental governance

Empowerment of victims in criminal proceedings
Art. 82(2) TFEU >D 2012/29/EU
See BE – most MS

Synergies
‘victim’ “... person who has suffered harm”, physical, mental, emotional, economic, “directly caused by a criminal offence”

Rights of victims in criminal proceedings throughout the EU

Victim Status*	With active right-endowed status	Without active right-endowed status
Pre-trial stage	Austria, The Netherlands Belgium, Bulgaria, Estonia, France, Greece, Hungary, Luxembourg, Portugal, Romania, Sweden Czech Republic, Latvia, Lithuania, Poland, Slovenia, Slovakia, Spain, Finland	Cyprus, Denmark, Ireland, UK (England & Wales, Northern-Ireland, Scotland) Croatia, Germany, Malta
Trial stage	Austria, Belgium, Croatia, Latvia, The Netherlands Bulgaria, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia, Slovakia, Sweden Finland, Malta	Cyprus, Denmark, Ireland, UK (England & Wales, Northern-Ireland, Scotland)

https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings, consulted 24 September 2016

3. Civil society in administrative procedures

3.1. A comparative law perspective: Belgium

A. Legal setting

a. 1999-2009: evolution of ELE to a *public law enforcement system*, at the Federal level & in each Region

- Codification scattered enforcement provisions > 1 enforcement law
 - + strengthening administrative track: fines!
 - + strengthening criminal track: remedial sanctions
- System-approach
 - Categories of offences
 - Most offences (95%+) = "mixed offences", to punish in criminal courts or by administrative fines
 - Formal organization of the co-existence of both sanctioning tracks < priority rule
 - Notices of violation go to the public prosecutor

> *The public prosecutor as playwright between criminal and administrative sanctioning*

> Decision-making: no legal provisions – good practices

b. Administrative fining ignores civil society, victims

- Administrative fining procedures: no place whatever
- Judicial control on (non-)fining decisions?
 - Flanders, Green court: standing limited to *person fined*
 - Cannot initiate an appeal nor join a pending case
 - In theory: witness, expert
 - Brussels, Council of State: non-fining decisions?
- *Ne bis in idem*: criminal track closed
- In mitigation
 - Public prosecutors: Good Practices in referral decision
 - Flanders >< Brussels
 - Right to demand administrative remedial sanctions
 - Flanders only – 2009-2013, 8% of remedial sanctions
 - Access to civil courts to deal with harm
 - Obtain injunctive / monetary relief
 - Possibility of preliminary injunctive relief (NGO's: + extra option)

B. Practice

Facts: *a tremendous increase in sanctioning*

Flemish Region

- Prosecution rates for environmental offences
 - 1993-2002: 5%
 - 2009-2013: 4% + 21% referrals ('dismissal') to the fining administration
- Fining administration: profile of the caseload 2009-2013
 - Nature conservation/management: 23% (3) (52%)
 - Emissions air/water/soil/noise: 16% (5) (35%)
 - Environmental permits: 15% (2) (66%)
 - Manure: 5% (1) (90% of all dismissals)
 - Waste: 40% (4) (37%)

Brussels-Capital Region (1999-2005)

Offence type	Notices of violation	Prosecution decisions	Administrative fines
Waste littering	7,408	24 [0,3%]	880 [+ 12%]
Other	1,791	61 [3,4%]	919 [+ 51%]

Facts: analysis

- Non-compliance cost internalisation?
 - Fining amount: different objective function
 - Proportionality includes offender-linked characteristics (guilt, financial means)
- Awareness of costs of non-compliance?
- Procedural economy?
 - Limiting constraint for individuals and NGO's

- Art. 9(3)-(4) Aarhus-Convention?
 - Access to "administrative **or** judicial procedures"

C. Cases

More chickens
EE Ct Flanders, 7 March 2013

- A chicken abattoir (LP) (class 1)
- Breaches exploitation conditions during 48h – mainly waste waters
- Harm to local public waste water treatment
- **No CP**
- Fine 2.550 € confirmed

And more sleepless nights
EE Ct Flanders, 25 Sept 2014

- A quartz-composites producing plant (LP) (class 1)
- Breaches exploitation conditions – (nightly) noise and vibrations 2005-2013
- Harm to many neighbours (complaints since 2005-)
- **No CP**
- Fine from 5.500 € to 4.500 € (problem with nullum crimen sine lege for vibrations)

3.2. Connecting the picture to the European level

A. Public law enforcement as a new reality

- Today, all 28 EU MS can sanction infringements of (EU-embedded) environmental law by criminal as well as administrative sanctions
 - See http://ec.europa.eu/justice/criminal/criminal-law-policy/environmental-protection/index_en.htm
 - Increasingly both tracks are equipped with punitive (e.g. fines) and remedial (e.g. remedial order) sanctioning tools
 - Belgium, Portugal, England & Wales / Scotland, ...
 - Dominant traditional pattern: criminal track punitive, administrative track remedial (e.g. Denmark, Finland, Ireland, The Netherlands)
- A system approach emerges: 'public law enforcement'

B. With prospects

- Policy debate: a growing demand for a further development of such two-track systems
 - EC (2011)
 - Evaluation study Eco-crime Directive: 'Relations between the administrative and criminal sanctioning systems'
 - COM(2011) 573 final 'Towards an EU Criminal Policy': 'In many cases, administrative sanctions may ... be sufficient or even more effective than criminal sanctions'
 - EFFACE (2016), Conclusions and recommendations:
 - Proposal: make clear in the Eco-crime directive that not only criminal sanctions can provide effective, dissuasive and proportional sanctions
 - "This suggestion is increasingly important in the light of developments in MS to increasing use of administrative sanctions"
 - ENEC (2016), ... (Birds Directive EC Study (2011))
- Co-existence tracks: issue formal coordination mechanisms (infringement categories, priority rules, ...)
 - For instance Belgium. Maturity indicator

4. To discuss

- 1) The evolution of ELE in the EU towards public law enforcement impacts on the procedural action possibilities of civil society with regard to environmental crime
- 2) Extended reliance of punitive sanctioning on administrative fining systems on average weakens the possible input of civil society
- 3) Alternatives?
Alternatives in Ireland?
