

Cefic views on the review of the Environmental Crime Directive¹

Cefic welcomes the opportunity to contribute to the public consultation² aimed at assessing various options to improve the Environmental Crime Directive ('ECD').

The current Directive obliges Member States to provide for effective, proportionate, and dissuasive penalties in their national law to sanction environmental crimes. The [Commission Evaluation Report of October 2020](#) shows that in practice large differences in available sanction levels remain across Member States. The Commission is therefore contemplating a series of options to improve the deterrent effect of sanctions, while acknowledging the absence of statistical data on enforcement and a deficient practical implementation of the ECD.

Effective enforcement of EU environmental legislation is crucial to the EU chemical industry. Member States' enforcement strategies should be designed in such a way as to eliminate situations of non-compliance. This is important to ensure a level playing field.

Effective sanction regime for a successful regulatory regime

Where non-compliance arises from 'rogue business behavior', i.e. businesses which persistently and knowingly break the rules, tougher penalties should be applied compared to situations of inadvertent/accidental non-compliance. This would be needed for these sanctions to have a deterrent effect and be effective. However, **offences criminalized under the Environmental Crime Directive do not seem to capture exclusively this type of behavior.**

An effective sanction regime plays a vital role in a successful regulatory regime³. Sanctions can fulfill different functions: ensuring that businesses that saved costs by non-compliance do not gain an unfair advantage over businesses that are fully compliant, repair damage or other costs to society or represent a societal condemnation of the regulatory breach. However, the **sanctions available need to be reasonable and proportionate.**

Overall, a **punitive approach may not always lead to improved environmental/safety outcomes** nor does it encourage a culture that promotes restorative practice. Hence, it is Cefic's view that to combat non-compliance situations, Member State enforcement strategies should be designed in such a way as to respond to different types of behaviors with different enforcement tools⁴.

¹ [Directive 2008/99/EC on the protection of the environment through criminal law.](#)

² [Commission public consultation questionnaire](#), from 8 February till 3 May 2021.

³ Professor R. B. Mcrory. '[Regulatory Justice: Making Sanctions Effective](#)', Final Report of November 2006, page 15.

⁴ Cf Richard Mcrory, *Ibid*, 'The Role of sanctions' on page 15: "*although criminal sanctions are in some circumstances an effective tool, too heavy reliance on criminal sanctions in a regulatory system can be ineffective.* In particular, where there has been no intent or willfulness relating to regulatory non-compliance a criminal prosecution may be a disproportionate response, although a formal sanction may still be appropriate and justified. On the other hand, too heavy reliance on criminal convictions for regulatory non-compliance may lead to these convictions losing their stigma.

Appropriate penalties

Concerning **penalty levels and accessory sanctions**, our view is that there is no abstract ‘one size fits all’ solution to the different types of offences criminalized under the Directive. Types and levels of sanctions should depend on a number of relevant factors that need to be considered on a case-by-case basis. **Thus, the nature, degree of culpability, frequency, harm caused, any previous warnings from a regulator and seriousness of non-compliance should all be considered to define the appropriate sanction.**

Appropriate penalties need to be considered on a case-by-case basis taking account of all the circumstances. A blanket approach based on the financial situation of companies, independent of the type of conduct involved would not be appropriate.

Cefic believes prosecutors should aim to remove the financial gain generated from illegal activity. In some situations, fines may not always deter ‘rogue business behavior’, e.g. where the fines handed down do not reflect the financial gain a company may have made by intentionally circumventing the rules⁵. This problem appears to materialize in the context of illegal import in the EU of HFCs or hydrofluorocarbons (greenhouse gases manufactured for use in refrigeration, air conditioning, foam blowing agents, aerosols, fire protection and solvents). The phase down introduced by the [F-Gas Regulation](#) in 2014, has limited the number of suppliers and caused a rise in the prices under the EU’s HFC quotas. As a result, illegal trade has soared to meet demand, with non-quota HFCs entering the EU directly from non-EU countries, leading to multiple non-compliances, including imports of sizeable quantities of illegal HFCs not compliant with the [F-Gas Regulation](#). However, offences criminalized under the Environmental Crime Directive do not only capture this type of conduct.

Avoid double sanctions

Finally, while accessory sanctions may be useful in some situations, we should nevertheless avoid situations where double sanctions are imposed on the same company for the same violation, if those sanctions have the same purpose. In this regard, we have observed that one of the suggested accessory sanctions (*remedy of damage*) would in certain situations arise as an administrative obligation under the [Environmental Liability Directive](#). Therefore, as this tool is available to date under EU Administrative Law, we wonder whether including the remedy of damage within the Environmental Crime Directive will result in an overlap in the applicable legislation.

⁵ Ibid, ‘Financial penalties sending the wrong signal’ on page 21.

Conclusion:

- There is a clear need to review sanction types and levels where criminal activity reflects clear strategies to willfully circumvent existing rules. A toolbox of sanctions depends on various elements, incl. intention, harm caused, frequency, etc., and should apply in a way which promotes “good business conduct” and/or “restorative practice”.
- The ECD will only work if sanctions are effectively enforced across Member States.
- A revised Directive should also strengthen the existing legal framework by way of allocating sufficient financial and human resources, including the training of judiciary actors, the introduction of specialized bodies on environmental crime and/or of better mechanisms for data collection on environmental compliance.

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About Cefic

Cefic, the European Chemical Industry Council, founded in 1972, is the voice of large, medium and small chemical companies across Europe, which provide 1.2 million jobs and account for 16% of world chemicals production.

Cefic Boiler Plate: Covid-19 Situation

While contributing to this consultation we are very aware we are still experiencing unprecedented times, with industry, governments and institutions around the world are taking major actions to address the Covid-19 crisis, and introducing large-scale policies which will have significant impacts for years to come. We will continue to support Europe’s Member State governments and institutions in their efforts to overcome the socio-economic impacts of the crisis.

When investing in the future, industry, governments and institutions will have to ensure investments align with the policy targets of a climate neutral Europe by 2050. All this also means that the attractiveness of Europe as a re-investment destination, and re-shoring industry back to Europe, will depend more than ever on a favourable policy framework that manages ever-growing differences between the world’s regions. We look to the European Commission to undertake the appropriate assessments and to include these wider considerations in the future framework that will be developed.