

Sanctioning practices and biodiversity

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1. Sanctioning obligations under EU law
2. Lack of knowledge regarding actual sanctioning practices
3. A 'mug shot' of one EU MS: actual sanctioning practices in Belgium
4. Essential findings

1. Sanctioning obligations under EU law

[core EU legislation:

Habitats Directive 92/43/EEC, 21 May 1992

Birds Directive 2009/147/EC, 30 November 2009]

A double set of sanctioning obligations in a gruyere relationship

Basic general obligations

- ECJ, based on Art. 4(3) TEU (principle loyal cooperation)
- Milestone case: Greek Maize case 1989 (case 68/88)
- Infringements of EU law (including national law transposing EU law) are to be sanctioned by sanctions that are “effective, proportionate and dissuasive”
- Choice of type: free
- Obligation for all enforcers in each MS

Specific obligations

- Eco-crime Directive 2008/99/EC
- Art. 3(a), (f), (g), (h): severe infringements of EU law involving habitats & species
- Type: criminal sanctions for natural persons
- Focus on “are punishable”
- “effective, proportionate and dissuasive (criminal) penalties”

2. Lack of knowledge regarding
actual sanctioning practices

A well known gap and handicap

- Most recently:
 - EFFACE, Synthesis report (2016) (e.g. 28-29)
 - LIFE-ENPE Report (2017)
- Lack of information on offences happening
 - QN: what how often
 - QL: who, how (modus operandi), why (motives), consequences (damages/costs), ...
- Further in the flow of events: responses, sanctions effectively imposed

3. A 'mug shot' of one EU MS: actual sanctioning practice in Belgium

- Flemish and Walloon Regions: common features of the sanctioning systems
- Sanctioning in the criminal track
 - Punitive and remedial
- Sanctioning in the administrative track
 - Punitive and remedial

Four core legislations: forests - protected habitats, vegetation and small landscape elements (connectivity) – protected species (fauna & flora) – hunting and fishing

3.1. Flemish and Walloon Regions: common features of the sanctioning systems

- 2009: codification environmental enforcement law
 - Public law enforcement systems: a criminal and an administrative sanctioning track, with a coexistence coordinated by law
 - Criminal track: more remedial sanctioning tools
 - Administrative track: introduction punitive sanctioning tools – administrative fines (and transactions)

3.2. Sanctioning in the criminal track

- Actual prosecution rates (2009-2016)
 - Environmental crime at large: 4-5%
 - Biodiversity crimes: 2,5-3,5%
- Civil society (environmental NGO's) claiming material and moral damages as a party to the case:
 - Fundamental relevance: Law & economics, internalisation of costs
 - A tiny fraction of cases prosecuted, focused on birds
- Punitive sanctions imposed: fines; fines with prison sentences; other (community service, forfeiture of illegal benefits, forfeiture of tools used)
- Remedial sanctions imposed: judges do it when possible (factual and legal context)

Punitive sanctions: cases + prison sentences

- 2017, protected grassland destruction with recidivism: 2 months (suspended 3 y) + 6000 €
- 2015, illegal possession of 59 passerines (Birds D) + manipulated rings and 189 CITES birds: 2 months (1 effective) + 15.000 € (7500 effective)
- 2012 (A), poisoning of birds of prey (11 buzzards, 1 hawk): 3 months + 11.000 € (+ more)
- 2014, illegal possession 2 finches + manipulated rings, with recidivism: 2 months (suspended) + 3000 €
- 2015, shooting 1 snipe: 2 months (suspended) and 6.000 € (3.000 effective)
- 2010, illegal trade of hundreds of passerines, geese and ducks: 7 months (effective) + 5.500 €; 6 months (suspended) + 5.500 € (2.750 suspended); forfeiture illegal benefits, 35.000 € x 2
- 2015 (FI+A), illegal trapping + detention 1 non ringed protected bird (Birds D): 2 months (suspended 3y) + (1.000 €); x 2
- 2010 (FI+A), illegal trapping and killing, mist-nets, for trade: 3 months + (400 € & 6 months + (200 €)
- 2004, frogs (1817+?+20) with recidivism: 2 months (suspended 3y) + (3 €); 1 month (suspended) + (3 €)

Remedial sanctions: issues in case law

Restoration of vegetation

- Restoration in need of specific management practices (grazing, mowing, pruning, no pesticides, no fertilizers, ...) over years: Court of Appeal Ghent >< Court of Appeal Antwerp
- Is it restoration or is it imposing to the offender a way of doing in the future?
- Restoration can ask for more than a momentous deed (e.g. re-sowing grassland), often asks for management too

How to remedy dead animals?

- Appeal case 2012 on the poisoning of 11 buzzards and 1 hawk: the offender was also convicted to finance a breeding and recovery program in a certified bird recovery centre, which had to result within 3 years in the release in the wild of 11 buzzards and 1 hawk
- Assorted with a penalty payment of 100 € per day delay
- It was done!

3.3. Sanctioning in the administrative track

- Sanctioning rates
 - Flemish Region: 2,5-2,5% + **23%**
 - Walloon Region: 2,5-3,5% + **[20 to 50%]**
- Civil society
 - No standing in punitive procedures
 - Flanders only: right to ask for remedial sanctions
- Punitive sanctions applied: transactions and fines (and a few forfeitures of illegal benefits)
- Remedial sanctions imposed: regularisation orders are the star tool

Punitive sanctions: features of practice

Flemish Region

- The law: administrative opportunity dismissal is not possible
- Highest fine ever: 15.125 €
 - From 1/1/2015 to 30/6/2016: 437.253 € (9036 €)
 - Highest transaction sum ever: 1.190 € (275 €)
 - Highest forfeiture: 40.000 €
- Policy development
 - Calculation tree > consistency in fining
- Transactions for fishes, not birds; + action rewarded; severe for recidivism, ...

Walloon Region

- The law: administrative opportunity dismissal is possible
- From 2009 to 2016: 2.738.750 € fines
- 2016: 2.346 fining decisions
 - Biodiversity crimes: from 20% (2009) to 40% (2016)
 - !: an explosion of the numbers of notices of violation regarding biodiversity crimes

Remedial sanctions: features of practice

Flemish Region

- Habitat destruction issue, woods & 'discrete nature' (small landscape elements creating connectivity)
- Law: another administration
- Regularisation orders: 85% imposed within 1 month of the notice of violation
- Implementation: ca. 90%
 - 50+% in original term
- Ill will: administrative penalty payment possible
- Reality check: ecological restoration >< feasibility considerations

Walloon Region

- Law: main actor is the fining administration
- Remedial order added to 1 fining decision on 2
- Transactions too pursue remedial action; lack of data

4. Essential findings

- 1) The new legislation has made a tremendous difference for the good
 - 1) A strong criminal sanctioning track together with a strong administrative sanctioning track
 - 2) Well-equipped toolboxes in both tracks
 - 3) Punitive and remedial tools in both tracks
 - 4) A smooth coexistence of both tracks
 - 2) Additional (specialised) man-/womanpower in the administrative track: new sanctioning administrations (to handle the punitive sanctioning tools)
- Perfect alignment with findings WG4 2016-17; see first interim report on ENPE website

Based on:

C.M. Billiet (ed.), *Biodiversiteitsmisdrijven in eigen land: in Vlaamse savannes en Waalse regenwouden – La criminalité en matière de biodiversité chez nous: des savanes flamandes et forêts pluviales wallonnes*, Bruges, die Keure, 2018, 567 p.

C.M. Billiet (ed.), K. Dimec, K. Weissová, M. Clément, F. Nési, W. Welke, A. Wüst, J. Cekanovskis, E. Van Die & L. Giron Conde, *Sanctioning environmental crime: prosecution and judicial practices*, LIFE-ENPE Project LIFE14 GIE/UK/000043, March 2018, 80 p. (see <https://www.environmentalprosecutors.eu/cross-cutting>)



Thank you!