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Analysis of gravity factors to be used to evaluate offences and list of standardised/harmonised gravity factors

- FINAL -

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SUMMARY

Differences among Parties in their understanding of the 'gravity factors' listed in the Tunis Action Plan 2013 – 2020 ('TAP') for evaluating bird and other wildlife crime had emerged which could affect the implementation of the TAP as a unified code and thus jeopardise the full achievement of the aims of the Convention. As it is desirable to assist Parties to implement the TAP in a similar way, it may be desirable to add some amplification to the factors presented as a list in the TAP.

The gravity factors listed are not a fully comprehensive 'tick list' but a basic guide to case evaluation, Parties being free to add other factors deemed relevant on a case by case basis. Accordingly, points aimed at explaining or amplifying each factor together with some examples are proposed for the Parties' consideration in an attempt to make the list more 'user friendly' and allow it to be interpreted in a similar way. In addition it may be helpful to cross-link 'gravity factors' to the recently established 'criteria' for identifying national policing/investigation priorities.

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1. Central to all three sections of the TAP is the desire to see a better understanding both by all those involved in wildlife law enforcement and by the general public of the damage done by criminal activity to biodiversity. Elements of both the 'Biological and Institutional Aspects' and the 'Awareness Aspects' clearly address what is a serious and widespread deficit in both knowledge and understanding. The contribution of the 'Enforcement and Legal Aspects' section ('ELA') is to seek to create a science-based, logical and objective method, or pathway, to target most effectively what will always be the limited resources available for wildlife crime investigation and enforcement. The thread that runs through this method and unites it is the concept of the proper evaluation of wildlife crime both generally and case by case.

2. Thus the first step in the ELA is to establish national wildlife crime priorities, ie. to identify where criminal activity is most prolific and causing the most damage, so as to target enforcement activity to maximise the benefit to biodiversity through crime reduction. The next step is to promote the use of 'conservation impact statements' ('CISs') which would 'improve the evidence base' and 'identify the species conservation status eg, IUCN listing, relevant conservation measures being taken, the ecological damage the type of offending does… to show the importance of the case in terms of its impact on conservation priorities and ecological damage'. The third step is to identify and standardise 'Gravity Factors that may influence prosecution and sentencing decisions', with the objective that 'Investigators and Judiciaries (to) be familiar with National wildlife crime priorities, the purpose of CISs and offence gravity factors, and Judiciaries be encouraged to use these to inform sentencing guidelines'.

3. From the foregoing it will be apparent how crucial a place in the operation of the ELA method is the concept of 'evaluation', in identifying both national priorities and understanding each crime. Correct identification and use of gravity factors, for case by case evaluation, is fundamental to the successful use of the ELA method.

4. The proposal relating to the identification of national wildlife crime priorities in the ELA did not include any criteria in establishing these. It was regarded as a process unique to each Party given the wide variety of species across the Parties, the variation in resources available and the varied types of criminal activity (although there are some common forms that frequently appear). Conversely, the ELA did seek to identify possible gravity factors because it appeared essential that a similar process of case evaluation should be undertaken within all Parties' jurisdictions to ensure that the Convention was properly applied across all jurisdictions.

5. To that end a list of factors was included. It aimed to be a basic list of frequently encountered aspects of wildlife crime or points which flow from the analysis of wildlife crime as 'sui generis' (because it is, uniquely, 'species focussed') to be found in the comments earlier in the ELA (eg.'Recognising that wildlife is to be conserved for both its own intrinsic value and its socio-economic benefits' and 'Recognising that the species comprising the ecosystem are the 'beneficiary' of wildlife conservation legislation, and thus that changes in human behaviour towards wildlife may have to occur'). The list of factors was not intended to be full, complete and exclusive. It was intended

to provide an objective, reasonably comprehensive, preliminary basis or framework for both investigators and prosecutors, and also the judiciary, to use to begin to evaluate, and thus understand, wildlife crime in a similar way.

6. Each point on the ELA list of factors was intentionally short, intending to point out possible aspects to be found in bird or any wildlife crime. Because of the need for the TAP as a whole to be 'user friendly' within a wide range of (sometimes very different) national social structures and judicial systems, the factors were not defined in any detail. However, nothing in the TAP is intended to be used without adaptation to local circumstances, or precludes elucidation or amplification should these become advisable.

7. Following the formal adoption of the TAP by the Bern Convention Standing Committee in December 2013, the Secretariat took steps to assist Parties with implementation. In February 2014 the Secretariat circulated a questionnaire to seek 'the identification of criteria for establishing national policing/investigation priorities and gravity factors to be taken into account when combating illegal killing, trapping and trade of wild birds' (the replies being compiled in T-PVS/Inf (2014) 9).

8. In respect of 'criteria' for national priorities, Parties were asked to rank in order of importance those factors that they felt were important. They were asked to do the same for case 'gravity factors' (something not specifically required under the ELA). In respect of 'gravity factors' a number of issues arose from this exercise, including different interpretations of the listed factors, variation in the rankings of factors, and differences in enforcement depending on whether the legislation was 'stand-alone' or part of environmental legislation, and whether it provided for penal (criminal) sanctions or merely administrative measures. (It should be noted that the document T-PVS/Inf (2015) 9) prepared for working session 3 at the 2nd meeting of the Special Focus Points analysing the replies from Parties contained a typing error, wrongly referring to 'gravity factors' on page 3 instead of 'criteria for national priorities').

9. The opportunity therefore arose to revisit and possibly re-define and harmonise the 'gravity factors', and thus the possible helpfulness in undertaking a comparison between the two lists appeared to suggested itself, to see whether it was helpful to the TAP as a whole to have some cross-connection between 'criteria' and 'gravity factors', or even an amalgamation to integrate them into a unified while. Working session 3 at the 2nd meeting of the Special Focus Points on illegal KTT of wild birds (24-25 February 2015) provided the opportunity for Parties' representatives to consider this.

10. Three questions were placed before the meeting to guide discussion namely: (1) *Does the list of factors need any additions? If so, what?* (2) *Does any of the list need amplification, clarification or re-definition? If so how?* (3) *Is acceptance and implementation of the TAP better served by restricting it to general objectives and actions or by detailed and prescriptive requirements?*

11. The broad conclusion from this working session is that some amplification of some of the listed gravity factors could be helpful and that some correlation with national priorities' criteria was practical. The need for clarity of terminology was, however, a principal theme of the discussion. My proposals are set out below.

12. *Does the list of 'gravity factors' need any additions?* None was suggested at the working session. As stated above, the TAP list was intended to be a basic list of frequently encountered aspects of wildlife crime and was not intended to be full, complete and exclusive. It was intended to leave scope for national jurisdictions to add matters that arose from local circumstances peculiar to that Party. However, it was intended to be used by all Parties as a whole and not 'cherry-picked', ie, that each case would be evaluated against all factors to see which applied. Selectively taking some only of this list to create separate national lists is not intended, but rather that any national lists would take the full TAP list and add additional factors to it if appropriate. Only in this way would the aims of the Convention be properly applied across all Convention Parties.

13. *Is acceptance and implementation of the TAP better served by restricting it to general objectives and actions or by detailed and prescriptive requirements?* This was not directly addressed by the working session as far as case gravity factors are concerned. However, at various points in the discussion on other topics the suggestion that matters should be kept 'simple and basic' was made. There was no discernible appetite for detailed and complicated methods.

14. Clearly, implementation by Parties should be full and complete: all aspects should be used, and used in a similar way. But given the widely differing social circumstances and government structures, financial resources and geographical sizes, and the varied forms of wildlife criminality to be found within Parties, detailed requirements of a 'one size for all' approach is most unlikely to ensure best the proper application of the Convention across all Parties.

15. Further, national 'ownership' of the TAP is vital, and that will best be achieved by allowing as much scope as possible for individual application as is consistent with achieving the aims of the Convention. It will also allow different practices to emerge, from which 'best practices' can be identified and shared. Accordingly, applying this to 'gravity factors' it is suggested that they should remain 'simple and basic', rather than become detailed and prescriptive in an attempt to list every possible factor in advance. However, the point made at the working session of the need for 'clarity of terminology' was well made, and suggests some clarification or amplification of some of the factors would assist in implementation and in making a sensible connection across to the criteria for national policing priorities.

16. *Does any of the list need amplification, clarification or re-definition?* If the answer to this question is a partial 'yes', the issue to be decided is 'how to do it?' Should this be a new, stand-alone descriptive document to be read with the TAP, or can it be done in the form of a table? Either way, possible amplifications would have to be read with the original factor to which each amplification was to be applied. The form should be that which bests assists the Parties, and is secondary to the substance. For the purposes of the Standing Committee a table may best present matters so that the substance of any change or amplification can most easily be read with the existing TAP gravity factors, and that is the method proposed.

Original Gravity Factors listed in *Tunis Action Plan*	**Comments, any link to criteria for national priorities and any proposed expanded definition of TAP gravity factors: 'Amplified Version'**
1. Conservation status of species	'Conservation status of species' includes: consideration of any IUCN, Bern Convention, EU Nature Directives or other international listing which evaluates conservation concern; whether the crime targets or impacts adversely local, national or international conservation measures or places of conservation activity. Listed as a criterion for national priorities, and cf. to 'nature conservation hotspots' criterion.
2. Impact risk for ecosystem	'Impact risk for ecosystem' includes an assessment of: (i) the actual or potential damage to habitat; if reparable, the cost of actual damage or loss eg. of restoration, restocking, or whether damage was irreparable; (ii) the actual or potential impact on local, national or regional population(s) of the species affected by the offence(s); (iii) the potential or actual damage the type of offence, the way it was committed, has previously caused or could have caused. Listed as a criterion for national priorities.
Original Gravity Factors listed in Tunis Action Plan	**Comments, any link to criteria for national priorities and any proposed expanded definition of TAP gravity factors: 'Amplified Version'**
3. Legal obligation to protect under international legislation	Recognition should be given to 'international solidarity' in that the Convention objectives are sufficiently important to require binding commitments from national governments to achieve them and require mutually consistent enforcement across all Parties to be achieved.

4. Indiscriminate method used in committing offence	Consideration may be given to the actual damage to habitat or loss to populations or species the method has caused and any potential or actual damage or loss that method has previously caused.
5. Commercial motivation	'Commercial motivation' includes: any planned activity aiming for financial benefit whether of the offender or another person, as well as organised (especially serious) crime, particularly if trans-national.
6. Illegal gain/quantum	'Illegal gain/quantum': includes actual gain as well as potential gain had the offence been fully completed.
7. Prevalence of offence and need for deterrence	'Prevalence of offence and the need for deterrence' includes: whether the habitat or species is frequently targeted generally, or where the offence is prevalent in an area ('black spot'). These suggest a particular need for stronger deterrence by way of heavier sanction. Cf. list of criteria for national priorities.
8. Professional duty on defendant to avoid committing offence	'Professional duty on defendant to avoid committing offence' includes: persons (whether natural or legal) in the course of trade or business committing offence(s) to assist the business (eg. pet shop owner, property developer), those employed to carry out tasks for another's benefit who choose to do so in an illegal way against wildlife (eg. gamekeeper), as well as those granted licences, or exercising rights, to carry out activities in connection with wildlife which would otherwise be illegal (eg. licensed or other legal hunter) who commit offence(s) against wildlife.
9. Scale of offending (number of specimens involved)	Numbers can be assessed either in absolute terms, or relative to the species involved, ie. a small number of one species may have a greater impact on it (locally, nationally or internationally) than a greater number of a more numerous species, or if relevant, both can be used.
10. Intent and recklessness by defendant	This includes the culpability of the accused person, including the level of involvement in committing the offence and whether he/she was the ultimate 'beneficiary' of it.
11. History/recidivism	Consideration should always be given to whether the offender has committed wildlife offences previously and to the level of sanctions previously imposed. 'Repeat offenders' should usually receive heavier sanctions.

17. In applying gravity factors, as indeed with the criteria for national priorities, it must remembered that they are not simply a 'tick list'. Each factor found to apply needs to be evaluated, by asking to what extent does it apply to the case, and thus it is necessary always to ask how much weight should be given to it when evaluating the offence(s) alleged to have been committed by the suspected offender. For much the same reason it is not possible to rank gravity factors in a fixed order of precedence, pre-ordaining greater weight for one as against another. Some will undoubtedly to be found relevant more frequently than others, some will need to be assessed in every case. What is fundamental is that every case evaluation is undertaken objectively using similar factors, with due regard to the objects of the Convention, and that such a review is properly recorded on the file and presented to the official or court who is to decide the outcome of the case, so that investigators, prosecutors and those deciding sanctions all assess the seriousness of each case in a similar way.

ADDITIONAL CONSIDERATIONS FOLLOWING RESPONSES FROM CONTRACTING PARTIES AFTER THE 2ND MEETING OF THE SPECIAL FOCAL POINTS ON ILLEGAL KILLING, TRAPPING AND TRADE OF WILD BIRDS HELD IN MADRID, SPAIN, 24-25 FEBRUARY 2015, AND THE SUBSEQUENT SUBMISSION OF DRAFT LIST OF STANDARDISED/HARMONISED GRAVITY FACTORS TO THE PARTIES FOR THEIR CONSIDERATION

1. Environmental Liability Directive 2004/35/EC and environmental liability interventions – preventative and remedial actions: a broader concept to 'enforcement' than solely use of criminal/penal sanctions?

1.1 The reasons prompting this Directive and its objectives are set out in the introductory paragraphs which refer to *'many contaminated sites in the Community posing significant health risks and the loss of biodiversity'* (para 1). It introduces 'the *'polluter pays' principle'* (para 2) and that *'an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable'* (para 2), so as to *'establish a common framework for the prevention and remedying of environmental damage'* (para 3). This includes (Art 2 1(a)) *'damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species.' 'Significant adverse effects'* are defined in Annex I. *'Conservation status'* is defined in Art 2 4. However only *'environmental damage'* caused by certain *'activities'* comes within the scope of the Directive. These '*occupational activities'* are listed in Annex III and referred to at Art 2 7 *as 'any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character'*, but in relation to damage to protected species or natural habitats (Art 3 1(b)) it includes *'any occupational activities other than those listed in Annex III whenever the operator has been at fault or negligent'*. Article 11 states that *'Member States shall designate the competent authority(ies) responsible for fulfilling the duties provided for in this Directive.'* These include taking 'preventative' as well as 'remedial' measures (Art 2). The aim of the Directive is to create a mechanism for restoring water areas, protected species or natural habitats to the original 'baseline' condition, and land to a condition that poses no threat to human health (see Annex II). Among the *'activities'* listed in Annex III are the *'use'* and *'release into the environment'* of *'plant protection products'* and '*biocidal products'*.

1.2 This Directive precedes the Environmental Crime Directive 2008/99/EC and is concerned with how individuals, businesses and companies (legal persons) conduct their economic activities, and thus with a limited section of society. It looks to intervene to prevent 'damage', and to remedy it if it occurs, the costs being paid by the legal or natural person causing it. It is essentially compensatory in its aims. It does not replace liability under penal or criminal legislation for causing such damage, but creates an additional, focussed liability, at the option of a specific national authority, providing an additional tool for enforcement directed at those involved in economic activities. As a means of encouraging good behaviour by businesses it is a helpful and necessary tool. Its operation is largely independent of the need for 'gravity factors' or guidelines for imposing sanctions, as the impositions available are solely financial and determined by the cost of restoration, or prevention. However, it should be noticed that the first two gravity factors in the TAP, 'Conservation status of species' and 'Impact risk for the ecosystem' connect directly with the definitions in the Directive concerning adverse effects on species and *habitats ('significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species'* Art 2 1(a)).

1.3 Accordingly no conflict is apparent between this Directive and the TAP but rather they can be seen as complimenting each other in terms of both aims and methods. Liability to action being taken under the Directive is essentially compensatory or restorative, and therefore such action should be seen as the bare minimum, the inevitable consequence of the actions taken which caused (or may cause) the environmental damage, the Directive providing a mechanism for achieving this. The necessity for additional action will then be judged according to TAP gravity factors. Further, it should be noted that the availability of 'preventative action' under the Directive allows for damage to species or habitats to be reduced or prevented, action being taken before the need for action of a penal or criminal nature arises.

1.4 Finally, the fact that this Directive provided only part of the answer to the problems of 'environmental damage' is shown by the need for the (later) Environmental Crime Directive 2008/99/EC, which states at introductory para 3 *'Experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.'* It is with such additional action that the TAP's 'gravity factors' and 'sentencing principles' seek to provide assistance.

1.5 The above comments are of potential relevance only to the EU and its Member States. The TAP has a much wider scope and as the Convention applies to all Parties equally all their enforcement regimes need to seek to implement the Convention similarly. The TAP seeks to provide a way that harmonises those national and jurisdictional regimes.

2. Regulatory sanctions' –What place do these have in enforcing wildlife crime especially killing, taking and trading of wild birds? This Section addresses the suggestion from the E U that the relationship of the TAP to these be considered in particular in the light of the proposals and analysis of Prof Richard Macrory.

2.1 How do the Enforcement Aspects of the TAP relate to national regulatory frameworks (where they exist) which may include the ability to impose sanctions outside the procedures for judicial civil or criminal (penal) law enforcement? In many countries government agencies or statutory bodies are given responsibility to oversee the provision of services or to monitor and encourage compliance with particular legislation, often of an economic nature or connected to economic activity. As this may, and sadly frequently does, impact negatively on the broad natural environment, including water and air quality and land use, the actions and policies of these bodies or authorities affect natural habitats and wildlife, for example in the area of biocide controls and the licensing of such products or the control of pollution. Impetus for the creation of such bodies, and giving them enforcement powers, was provided within the EU by the Environmental Liability Directive 2004/35/EC discussed above, which required that *'Member States shall designate the competent authority(ies) responsible for fulfilling the duties provided for in this Directive.'* (Art, 11). These enforcement powers have come to be known as 'Regulatory Sanctions' and are imposed by regulatory bodies for breaches of codes of practice or statutory requirements, or issued as orders aimed at controlling the behaviour of legal or natural persons so as to prevent such breaches. .

2.2 Professor Richard Macrory of the Centre for Law and the Environment, University College, London, has defined the aims of regulatory sanctions as *'.sanctions should: • aim to change behaviour • aim to eliminate financial gain if applicable • be responsive • be proportionate • restore the harm caused if applicable • deter future non-compliance. The most important are probably the first two.* ***The aim of a sanction in this area is not to punish*** *as such (although a punishment may be necessary in some circumstances),* ***nor is it to create a stigma, but rather to change behaviour and to judge the best way to achieve this.*** *Secondly, since* ***we are dealing largely with businesses engaged in commercial activity and who can make money by noncompliance*** *(rather than say the behaviour of individuals such as litter dropping or smoking in prohibited places),* ***it is very important that the penalty system aims to eliminate any financial gains.'*** His concern is with those businesses who *'through carelessness breach the law. But such a breach may have serious consequences, for instance a water pollution incident which could cause an injury to somebody. It is not possible – public interest will say it is not possible – just to warn that business not to do it again, or even issue a formal caution. And it is circumstances like these that must be addressed'*. However he points out that *'the range of options is limited. The only course generally open is a criminal prosecution, where financial penalties are effectively the only options available to the courts where businesses are concerned.'* He concludes that *'the imposition of a fine may not be the best way to achieve changes in behaviour'*, but accepts that *'it is clear that criminal law will continue to play an important part in regulation'*. He refers to it as *'unwieldly'*, which appears to mean rather slow and complicate: *'The problem was the process and the time it took to get to the criminal courts, and that the criminal courts often did not treat the case as the regulator had hoped.'* Hence he proposed fixed and variable financial penalties to be imposed administratively by the regulator, as well as *'enforceable undertakings'* by which a breach of the

relevant regulations may be remedied or imposed as a preventive measure, which would be monitored by the regulator. He describes these as *'a tool for rapidly resolving an issue without imposing a criminal conviction on the business concerned.* ***The important thing is that these tools are not meant as a substitute for the criminal law.*** *They are an added option.'* (All quotations from: 20 Environmental Law and Management: 'NEW APPROACHES TO REGULATORY SANCTIONS' (2008), UK Environmental Law Association: the use of bold font is additional. Reproduced with permission.)

2.3 Two points are clear. First, that these are extra-judicial, though Macrory requires that the regulator act only when the evidence is clear 'beyond reasonable doubt' ie. it satisfies the criminal or penal standard of proof. They are actions taken instead of judicial proceedings. The imposition of these sanctions requires the agreement of the 'offender': he can accept it, or take his chance with a prosecution. The use of these tools is limited to financial sanctions, and compensatory or preventative action, the level of financial penalty being less than the maximum available to the courts through criminal or penal proceedings, and less than might be expected, or there would be no incentive on the 'offender' to accept the sanction. They can be seen therefore as the bare minimum of a response. Macrory sees their use as widening the scope of enforcement action, particularly at the lower end of culpability, not as a substitute for criminal or penal action.

2.4 However, secondly, as a means of taking preventative action, or dealing with breaches of the relevant regulations that are not themselves penal or criminal offences, they provide the only 'remedy', the only means of 'enforcement' available. As such they are an effective tool, and a means of avoiding damage to natural habitats and wildlife, prevention being far better than trying to remedy it afterwards.

2.5 Thirdly, for the E U and its Member States they compliment, or can be a means of implementing, the E U's Environmental Liability Directive 2004/35/EC discussed above, when they are used to remedy or prevent 'environmental damage'.

2.6 However, there are a number of factors which can jeopardise the proper use of regulatory sanctions. First, because they are cheaper and less time-consuming to impose, and potentially are a financial benefit to the regulatory authority which is imposing them, very great care must be exercised in their use, to ensure that they are not used when, because of the gravity of the incident, a criminal or penal prosecution is appropriate, and thus the criteria for the use of each of these forms of action must be both objective and complimentary. Therefore, except for preventative measures and for those breaches of regulations which do not themselves have a criminal or penal sanction available, the same method of evaluating an incident which could be liable to either process must be applied. Use of the TAP 'gravity factors' would appear to be entirely appropriate to achieve this. Secondly, there must be clear rules restricting the imposition of regulatory sanctions in respect of repeat offenders. Thirdly, with the regulatory body being both investigator and judge in its own cause, the potential for corruption or 'undue influence' has to be confronted and rigorously guarded against.

2.7 Accordingly, the comments at para 1.3 above apply to regulatory sanctions as they do to the Environmental Liability Directive. The need for a common set of gravity factors such as the TAP provides is equally necessary. The necessity of criminal or penal prosecutions to deliver heavy and dissuasive sentences for the most serious offences, as the Environmental Crime Directive seeks to achieve, becomes even greater, since it will reinforce the effectiveness of the lesser sanctions imposed by the regulator, as well as providing *'a social disapproval of a qualitatively different nature'*, that is through punishment and creating a stigma, which Macrory, for example, accepts as being proper for those cases not suitable for regulatory sanction. It may be noted that the Law Commission for England and Wales which is currently reviewing wildlife law is expected to recommend that a regime of regulatory sanctions (termed 'civil sanctions') be made available to two government agencies responsible for wildlife (see Law Commission's 'Wildlife Law – Interim Statement', Oct 2013).

3. Environmental Crime Directive (2008/99/EC) – how to implement 'effective, proportionate and dissuasive' penalties for environmental crime, how does wildlife crime relate to environmental crime in terms of its commission and thus what factors bear on the enforcement of species protection legislation? Is the TAP relevant to the Directive? This Section addresses the suggestion from the E U that the relationship of the TAP to this Directive and the opinions and analysis of Prof Michael Faure be considered.

3.1 This Directive was intended to require E U Member States to provide penalties via the criminal law, at least as far as natural persons are concerned, for breaches of environmental legislation implementing E U directives, and the Nature Directives are specifically included. There has been academic discussion on the meaning of the Directive and of its aims, and on how its effectiveness in terms of its aims might be measured. This has included Professor Michael Faure of Maastricht University and has included comment on the effectiveness of types of sanctions especially against those legal persons undertaking lawful commercial activities but which breach regulations in their conduct of otherwise lawful commercial activities or providing lawful services. (See article 'Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Ship-source Pollution Directives: Questions and Challenges: M Faure, European Energy and Environmental Law Review, Volume 19, Issue 6, Dec 2010, Pages 256-278: Reproduced with the permission of publisher, Kluwer Law International.)

3.2 It is a fundamental principle of how the E U operates that, in general, while Directives specify the result intended to be achieved, Member States retain the right to choose the form of action or methods by which that result will be achieved. Further, specifying specific penalties or sanctions for breaches of regulations or Directives is not within the competence of the E U, hence the somewhat vague wording of the Directive that penalties must be 'effective, proportionate and dissuasive'. The goal of this Directive is thus compliance by Member States and their citizens with other Directives which aim to protect to 'the environment', to minimise damage to it and remedy damage when it is done through commercial activities who fail to comply with the relevant regulations.

3.3 While Prof Macrory identifies five aims for regulatory sanctions (see para 2.2 above), Prof Faure identifies three functions of the criminal law when it imposes sanctions or penalties in environmental matters: general deterrence, restoration of damage done and prevention of future damage. The first and the third of these are in effect two sides of the same coin. In respect of deterrence his perhaps surprising conclusion is that prosecution + low penalties may be less effective than no prosecution and thus no penalty, (though he refers later to possibility that if enforcement is infrequent resulting in only a low probability of any penalty being imposed, even a heavy penalty when it is imposed may have little of a deterrent value.) The logic here is that companies and businesses have some idea of the likely penalty level and that there is frequently a cost to the business of complying with regulations and avoiding environmental damage, and if the penalty is too low it may be 'cheaper' to run the risk of prosecution + likely penalty than comply, particularly if the risk of being prosecuted is low because of low levels of enforcement activity. Is it possible that if it becomes known that the penalties are low, any deterrent value may actually become negative, ie. actually encourage non-compliance, thus failing to meet both 'deterrent' and 'prevention of future damage' functions? There appears to be some evidence for this: *'Firms that were recently fined had a more accurate impression of true expected sanctions and, being aware that they were low, were not deterred any longer. This has an important policy implication: fining a polluter with a too low fine can have a perverse learning effect…. It is better not to impose any fine at all than a too low one…'*

3.4 He divides offences, or breaches of the regulations into four categories which correspond to the amount of damage or the likelihood of this. These may be described as purely administrative, eg. failing to obtain a permit for an activity which in fact caused no environmental damage, acting in a manner which threatened to cause harm ('endangerment'), causing some damage and finally causing a substantial amount of serious damage.

3.5 His conclusion in respect of his discussion of which type of sanction or penalty should be used and when is somewhat striking: *'…the fine should be used for environmental crime as primary penalty and non-monetary sanctions (like imprisonment) should only be used to the extent that an insolvency*

problem arises. This is more particularly the case when the optimal fine would be higher than the individual wealth of the offender. In that case the fine could still be used until the limit of the wealth of the offender and the imprisonment to reach still additional deterrence.' This appears to be advocating that one should imprison poor offenders in circumstances when one would otherwise fine a richer one, something that is entirely contrary to the European Convention on Human Rights. Deprivation of liberty is invariably deemed more serious than deprivation of financial assets.

3.6 Consideration of the issue of using 'administrative penalty or criminal prosecution' centres around the speed with which the former can be imposed and their relative cheapness to the enforcement authorities as opposed to the potential for higher penalties but with greater costs to the authorities if the latter course is taken. His conclusion that the functions of 'restoration' and 'harm prevention' can *'often more effectively be served by (penalties imposed under) administrative law than by criminal law'*. However this does depend on the type of penalties that the national law allows to be imposed administratively, and in particular whether it allows for 'clean up' orders or 'prevention' orders to be made and enforced. In many countries these appear to be more readily available only after a criminal conviction. One particularly effective penalty is the forfeiture of illegal gains and assets obtained from the proceeds of crime, which is only available on conviction. The conclusion is not too surprising, that lower level breaches of environmental legislation can be dealt with very effectively administrative financial penalties especially if this includes 'clean up' orders, and that an active use of this form of enforcement can significantly increase awareness and be an important influence on securing voluntary compliance by legitimate businesses.

3.7 Comment is made on the lists of offences set out in Art 3 of the Directive in an attempt to grade them and fit them into the four categories listed above. It is here that specific reference is made for the first and only time to wildlife crimes affecting both species and habitats, Art 3 (f), (g) and (h). Whilst illegal killing/destruction of protected fauna and flora are fitted into category 3, actual harm done, illegal trading is down-graded to category 1, a merely administrative offence, or at best category 2, causing a threat only. To anyone involved in the investigation or prosecution of wildlife crime this will be at least somewhat controversial. It pays no heed to the scale of the international illegal trade in wildlife, its parts and derivatives, nor the devastation being wrought on wild populations (illegal trading will usually be either an unlawful killing or taking from the wild population), nor does it reflect the fact that this is a thoroughly illegal setup specifically dealing in prohibited articles just as is the illegal drugs trade. It is not an illegal act or omission taken within the business of a perfectly lawfully established commercial enterprise selling lawful goods and services, which is the position for the majority of pollution offences. Nor does it take into account the billions of dollars being made and funding criminal (and undoubtedly, sometimes terrorist) enterprises or untaxed personal enrichment. Reference to illegal killing and trading potentially being 'serious' and 'organised' crime is entirely absent from this analysis. The conclusion must be, therefore, that the categorisation is fundamentally flawed, unsound and entirely unreliable.

3.8 Prof Faure discusses much the same themes in a later article written with Katerina Svatikova in 2012 *'Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe'* using enforcement statistics from four jurisdictions in E U Member States. The general thesis is that administrative sanctions (by which is meant sanctions of a financial nature imposed by a government agency as opposed to a state prosecutor or a court of law) fill a gap in enforcement, especially in respect of less serious breaches of regulations, which are not being sanctioned by prosecutions under the criminal law. The statistics reveal that the number of prosecutions is but a small proportion of the total number of violations or breaches found during inspections of commercial businesses, whether legal or natural persons (though a much higher proportion of breaches with serious consequences are prosecuted, suggesting a targeting of enforcement resources to that end of the offending spectrum). The authors suggest that administrative sanctions are cheaper, quicker and a cost-effective addition to be used with enforcement through the criminal law procedures. They argue that the use of both means of enforcement will result is an increase in the actual number of breaches receiving some sanction thus increasing the likelihood that a breach by those termed 'polluters' will be sanctioned and thus providing an improved deterrent, even though the level of the administrative sanctions is usually less than could or would be imposed by a court. The starting point for their argument appears to be the comment: *'Assuming that potential criminals are rational utility maximisers who base their decisions*

to commit or not to commit a crime on an expected utility calculation, they will comply with the law as long as the benefits of compliance outweigh the costs of compliance.'(Michael G. Faure and Katarina Svatikova. Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe, J Environmental Law (2012) 24 (2): 253-286 first published online May 2, 2012 doi:10.1093/jel/eqs005, excerpt p.257 – Oxford University Press.)

3.9 Taking the articles together, it is apparent that the focus is on general environmental damage, including adverse effects on humans, and pollution in particular, which has occurred through the action or omission of individuals in the course of a legitimate business undertaking which will usually be in the form of a company, a legal entity or person. The aim is for the business to conduct itself lawfully in respect of its environmental impact just as it should comply with other relevant regulations governing eg. health and safety, financial matters and employment.

3.10 Wildlife crime, offences against species and habitats, is fundamentally different, though some, eg. bat crimes and some pesticide offences, may frequently or largely be committed by legitimate businesses failing to follow regulations governing how they should do business. Most wildlife crime consists of quite specific, illegal, acts targeting particular specimens which are of species that have quite specific legal protection, but which frequently are done with a commercial motive. The assumption that *'potential criminals are rational utility maximisers'* cannot be applied so easily to those who commit crime targeting wildlife, though the broader comment that the likelihood of being caught is a factor is true, but it is a factor in the commission of any crime. The motives for committing crimes against wildlife, especially the illegal killing and taking (which are fundamental and an inevitable precursor to most illegal trading), are much more varied.

3.11 An analysis of the motives for illegal killing and taking of wild birds was carried out in 2011 by Richard Lia in a research report undertaken through the University of London, International Programmes at the Centre for Development, Environment and Policy at SOAS and entitled *'An investigation of the underlying factors that lead to the shooting of protected birds in the Maltese Islands: a prerequisite for in situ conservation and reintroduction programmes'*. (Copyright permission obtained.) In this report Mr Lia analysed hunters' motives or reasons for breaking the law protecting wild birds as revealed in interviews with a random sample of hunters and using a prepared questionnaire.

3.12 The term 'poacher' was used for any illegal killing or taking of protected birds, not the just the illegal taking of quarry species, and *four categories of 'poacher' were identified*, viz. 1. Collectors, 2. Opportunists, 3. Frustrated hunters, 4. Rebels. The following motives or reasons for hunters committing offences were identified, viz. 1. Taxidermy / trophy poaching, 2. Commercial gain, 3. Household consumption (not subsistence), 4. Recreational satisfaction / lack of hunting opportunities, 5. Thrill killing, 6. Poaching as rebellion (against all or any particular regulation), 7. Poaching as a traditional right (now illegal), 8. Disagreement with specific regulations, 9. Competition (with other hunters' 'successes'), 10. Corruption – perceived unequal enforcement, 11. Target shooting, 12. Captive rearing, 13. Protection of property (agricultural produce), 14. Ineffective deterrents. He concludes that *'...the motivations for poaching in Malta are manifold. A single poaching incident may be the result of any one of these 14 motives or a combination of two or more, although some are mutually exclusive.'*

3.13 The report includes the following explanatory comments and conclusions: *'There is strong evidence to suggest that hunters link tolerance of poaching with utilisation—they neutralise its adverse impacts if the shot bird 'serves a particular purpose' to the poacher.'* In other words, the killing or taking is done intentionally, for a purpose, it is not the by-product of a lawful operation or an 'acceptable route' to gaining another objective eg. the successful conduct of a business.

' the majority of hunters did consider poaching as a threat to the conservation status of at least some protected birds—their emphasis was invariably on raptors.'

'Although inherently difficult to eradicate, the ultimate key to clamp down on poaching is to uncover and effectively address its underlying rationales. The root cause of the problem thus becomes its own solution if properly tackled, provided there is a political will to do so.'

'Regardless of the motives, poaching only occurs when two qualifying elements are present: an innate desire to shoot at protected species and the likelihood of not being caught.' Proper and effective enforcement is identified as essential, but the motivations for committing illegal acts are equally important for any strategy for protecting wild birds (and other fauna and flora) at risk of illegal activity.

3.14 Thus, the failure to understand the essential nature and causes of wildlife crime and how it differs from the broader concept of 'environmental offences' renders the analyses of the Environmental Crime Directive by Prof Faure of limited value when applying their conclusions to wildlife crime enforcement. A number of more recent assessments on the status and effects of wildlife crime can be identified, eg. Eurojust's 'Strategic Project on Environmental Crime', report Oct 2014, or the Summary of the 'Key Outcomes of the Expert Conference on the EU Approach against Wildlife Trafficking' prepared by the D G Environment of the E U Commission, 2014. These identify much more accurately the true scale, complexities and seriousness of wildlife crime.

3.15 Where the two articles discussed above have value is in their comments (a) on the detrimental effects of penalties which are too low, and (b) on the relationship of the use of administrative penalties with criminal prosecutions, by identifying that there may be a gap in enforcement measures at the lower end of offending which administrative sanctions may effectively fill. As an example of the former, one may point to prosecutions for bat crime in the UK which invariably result in low financial penalties, despite carefully presented prosecutions. An example of a good attempt at 'marrying' the use of administrative penalties with criminal prosecutions may be found in Malta where the authorities can impose 'administrative fines' for some minor wildlife crime related offences, so as to focus police action and prosecutions on more serious offences (see Regulation 27A and Schedule VIII, Conservation of Wild Birds Regulations, S.L 504.71).

3.16 In conclusion, the above analysis, if accepted, would suggest that a common set of gravity factors is essential in any jurisdiction for the correct operation of an enforcement regime which includes both criminal or penal sanctions as well as administrative sanctions, whether imposed through a regulatory body or through the police or enforcement body as a 'fixed penalty'. **It is essential that the differences between the failure of commercial businesses to comply with 'environmental protection' legislation and the commission of illegal acts against wildlife, and particularly wild birds, is properly understood.** Thus the creation of national priorities and the use of the gravity factors under the TAP provide an objective, science-based way to achieve this. Accordingly, the TAP as a whole, and especially the 'Enforcement and Legal Aspects', provide an effective tool for the implementation of the Environmental Crime Directive (2008/99/EC) in so far as it applies to wild fauna and flora. It is intended to assist all Parties including the E U and its Member States to co-operate with each other and to fulfil their obligations under the Convention, thus addressing, in a harmonised, coherent, and coordinated way a problem which is of common concern to all Parties.

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