



WASTE CRIME

KEY FEATURES AND MAIN
CHALLENGES

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Waste Crime: key features and main challenges

EU Environmental Crime Directive:
concept and main elements

Key obligations and main types of
offences/modus operandi

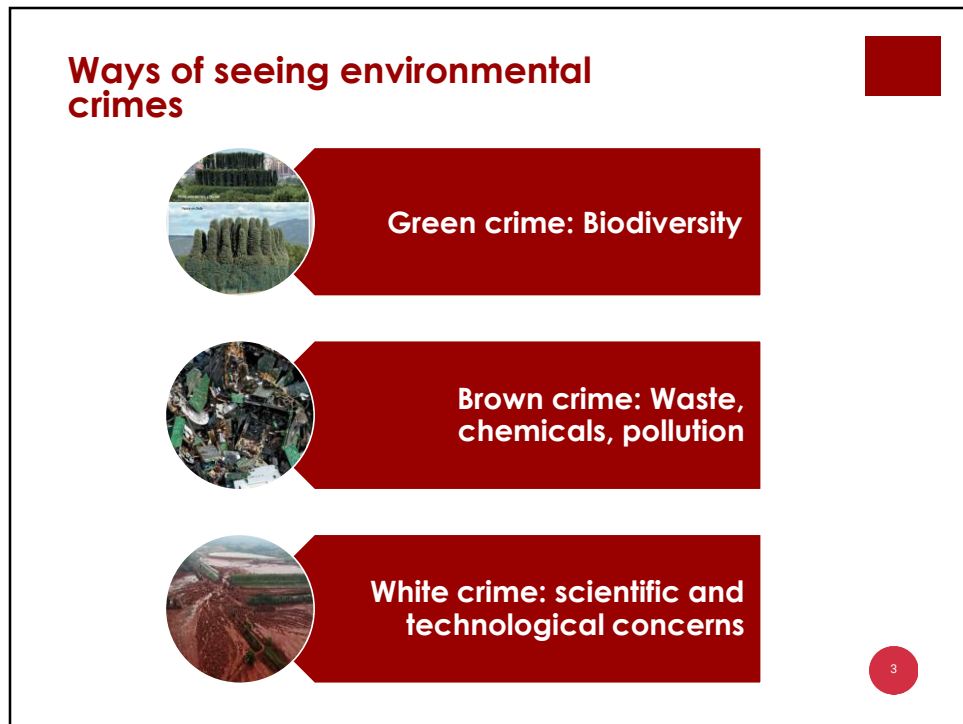
Interrelation between criminal and administrative
enforcement and sanctioning for waste crimes

Waste crime as a transnational, organized and
economic crime

Actors and impacts of waste crime



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In 2011, the father of green criminology, Rob White proposed that environmental crimes could be categorised into three groupings: white (scientific and technological concerns), green (ecological and environmental concerns)

and brown (waste, pollution and toxic concerns).

Which of these photos does not correspond to the type of environmental crime?

- a) the green crime
- b) the brown crime
- c) the white crime

The right answer is the c: The picture shows the Kolontar case scenario, the outburst of a

dam of waste that caused the death of 10 people and caused many injuries in Hungary in 2010. Thus this is case of brown crime.

The first picture shows a “parany”, a hand-made structure to trap birds with glue, which is used in Spain, France, Italy and Malta.

The second picture shows WEEE, waste of electrical and electronic equipment.

Environmental crime is still growing. The European Commission has pointed out that “In 2016, the UN and Interpol estimated the global economic loss related to environmental crimes at USD 91-259 billion, rising by 5-7% annually. Illegal trade in wildlife products alone accounts for USD 7–23 billion. This makes environmental crime the fourth largest criminal activity in the

world after drug smuggling, counterfeiting and human trafficking. In the EU, annual revenues from illicit non-hazardous waste trafficking are estimated to range between EUR 1.3 billion and EUR 10.3 billion, and for hazardous waste trafficking between EUR 1.5 billion and EUR 1.8 billion,

See the UNEP-INTERPOL Rapid Response Assessment: The Rise of Environmental Crime, June 2016,

<https://www.cms.int/raptors/en/document/rise-environmental-crime-une-interpol-rapid-response-assessment>

The struggle to adopt the ECD

In its case on *Environmental Crime*, the ECJ resolved the conflict between Denmark's Framework Decision 2003/80 (Third Pillar) and the Commission's proposal on the same topic under the First pillar. (Case C-176/03, *Commission v Council* [2005] ECR I-7879)

- "Criminal law and procedures are in principle ... not within the sphere of competence of the Community. However, the latter finding cannot prevent the **Community legislator**, when the application of effective, proportionate and deterrent penalties by the competent national authorities is an essential measure **for combating serious environmental offences**, to take related measures considering the criminal law of the Member States and which it considers necessary **to ensure the full effectiveness of the rules which it lays down on environmental protection**". (recital 47)

EU Directive 2008/99/EC on the protection of the environment through criminal law (Environmental Crime Directive hereinafter), was adopted in 2008 and the struggle for its adoption raised the question whether the Community could

demand that Member States should adopt criminal measures in order to enforce European environmental law. The ECJ settled the conflict between the Member States and the Commission on the legal basis to be used for its adoption and the scope of the foreseen sanctions. In its case on *Environmental Crime* the Court resolved the conflict between **Denmark's Framework Decision 2003/80** adopted under the Third Pillar of the EU

Treaty and the Commission's proposal on the same topic under the First pillar, annulling the Denmark Framework Decision and opening the door to the possibility of using criminal law for the protection of the environment.

The struggles to adopt the ECD

In the case of Ship-source pollution, the ECJ streamlined the scope of the EU competence when applying criminal law to protect the environment. The Court reiterated its previous position but established a **clear restriction**:

- “By contrast, concerning the determination of the type and level of the criminal penalties to be imposed, it should be noted that this, unlike the Commission assumes, does not belong to the competence of the Community”.

• (Case C-440/05, *Commission v Council* [2007] ECR I-9097, Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution) Recital 70)

In its subsequent judgment in **the case of Ship-source pollution**, the Court streamlined the scope of the competence of the Community when applying criminal law to protect the environment. Judgment of the Court (Grand

Chamber) of 23 October 2007,
Case C-440/05, *Commission v
Council* [2007] ECR I-9097.

In this case, the Commission asked for the annulment of Framework Decision 2005/667 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution because it was adopted on the basis of Articles 31(1)(e) and 34(2)(b) of the TEU, (see Council Framework Decision 2005/667/JHA of 12

July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, [2005] OJ L 255/164).

In this case, the Court declared again that the Community was competent in the field of criminal law:

“Although in principle criminal law and criminal procedure do not fall within the

sphere of competence of the Community, nevertheless the Community legislator, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious offenses against the environment, can oblige the Member States to

take such sanctions in order to ensure the full effectiveness of the rules laid down by him in this area”, recital 66.

But the Court established a **clear restriction** that was reflected in the final proposal for the adoption of the Environmental Crime Directive that seeks that Member States criminalise violations of EU environmental law when committed intentionally or with

at least serious negligence,
under the menace of effective,
proportionate and dissuasive
criminal penalties that Member
States will choose. As its Article
1 says, it **‘establishes measures
relating to criminal law in
order to protect the
environment more effectively’**.

EU Environmental Crime Directive: Goals

- Directive 2008/99 / EC on the protection of the environment through criminal law aimed at **improving compliance** with European environmental law through the criminalization of the most serious violations of national rules transposing the environmental *acquis*.
- The stigmatisation of such serious violations with a criminal sanction was meant to raise awareness and to change the **ways of seeing** environmental harm and risk caused by citizens and legal persons.
- Rob de Rijck: “**Believing in criminal law**. On how the European legislator of Directive 2008/99/EC deems strict criminal law necessary for the functioning of environmental legislation but Member States consider it an expression of their sovereignty”, 2013 .



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Directive 2008/99 / EC on the protection of the environment through criminal law is aimed at improving compliance with European environmental law through the criminalization of the most serious violations of national rules transposing this

legislation. Through the obligation to impose effective, proportionate and dissuasive criminal penalties provided for in Article 5 of Directive 2008/99 / EC, the European institutions and their Member States sought to raise awareness in European society about the seriousness of violations of environmental legislation as well as a call for cooperation for compliance to all responsible social actors: from individuals and legal entities, to the

administration, judges, prosecutors, law enforcement agencies and NGOs.

In its article “Believing in Criminal Law”, the Dutch Prosecutor points out : “The dual purpose of criminal law: The faith of the European legislator in what criminal law can achieve, does not only concern protection of the environment. It is true that Art. 1 of the Directive only mentions more effective environmental

protection as the purpose of the application of criminal law, but from the realization of the Directive comes forth that criminal law is equally meant to increase the effectiveness of Community Law. The regulator apparently is convinced that criminal law works in two ways: it protects the environment and enhances the effectiveness of Community law.”

EU Environmental Crime Directive: Goals

- Enhancing application of the existing Union environmental legislation through **criminalisation**, making of criminal law a tool of enforcement of environmental law.
- ☐ Approximation of environmental criminal offenses and sanctions in the Member States according to the ECJ case law.
- ☐ A sufficiently deterrent criminal sanctioning system



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As the European Commission has examined in the evaluation of the ECD:

“The fact that the Directive requires effective, proportionate and deterrent

sanctions has resulted in progress towards a level playing field by ensuring the existence of sanctions for the crimes concerned in all Member States. Some countries have raised their maximum sanction levels. Despite this progress, there is still a significant degree of variation in the levels of sanctions provided for in national legislation. Some EU countries have such low levels of sanctions that they do little or nothing to deter

environmental crime. This could result in the emergence of 'safe havens' for environmental crime in the EU.

Independently of the Directive, and in addition to traditional sanctions for environmental crime, such as fines, the legal systems of most Member States provide for accessory sanctions to augment systems of administrative and civil sanctions. How this set of available sanctions works varies

across Member States. A lack of guidelines or clear delineations of different sanctioning systems can undermine their effectiveness. Nevertheless, the availability of a broad range of sanctions contributes to the overall deterrent effect of an environmental enforcement regime and may help develop a level playing field that takes account of different national legal traditions.”

EU Environmental Crime Directive: Means

- Through the obligation to impose **effective, proportionate and dissuasive criminal penalties** provided for in **Article 5** of Directive 2008/99/EC, the European institutions and their Member States genuinely believed that the European society would be convinced that the violations of environmental legislation must be taken seriously.
- As Michel Faure says: ECD rejects the notion of an independent and autonomous crime that would provide a protection of ecological values independently of the violation of a regulation or administrative decisions.
- Above all, the European institutions thought that this directive would be the right formula to **enhance cooperation for compliance of environmental law** among all responsible social actors: from individuals and legal entities, from NGOs to the administration, inspectors, custom agents, judges, prosecutors and other law enforcement agencies.



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EU Environmental Crime Directive: Means

- **Article 3 of the ECD on the offences foresees “Member States shall ensure that the following conduct constitutes a criminal offence, when committed intentionally or with at least serious negligence” .**
 - (a) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes death or serious injury to any person;
 - (b) the unlawful discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
 - (c) **the unlawful treatment, including disposal and storage, transport, export or import of waste, including hazardous waste**, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
 - (d) the unlawful operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
 - (e) **the illegal shipment of waste as defined in Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and Council for profit and in a non- negligible quantity**, whether the shipment is executed in a single operation or in several operations which appear to be linked;
 - (f) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
 - (g) the unlawful possession, taking, damaging, killing or trading of or in specimens of protected wild fauna and flora species or parts or derivatives thereof;
 - (h) the unlawful significant deterioration of a protected habitat;
 - (i) the unlawful trade in or use of ozone-depleting substances.



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Article 3 of the Directive lists the conducts that are criminalised when committed ‘unlawfully’. In most (but not in all) cases, the conduct must have caused damage or a risk of damage to the environment and/or to human health.

The European Commission says:

✓ "The types of conduct under paragraphs (a), (b), (d) and (e) are criminalised if they cause or are likely to cause 'death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants'.

✓ The types of conduct under paragraphs (f) and (g) are criminalised 'except for cases where the conduct concerns a negligible quantity of such

specimens and has a negligible impact on the conservation status of the species’.

✓ The types of conduct under paragraphs (c) and (i) do not require any impact on the environment or people.

Many of the terms used in the Directive, such as ‘substantial damage’, ‘negligible quantity’, ‘negligible impact’, and ‘dangerous substances’ are not further defined. This leaves considerable discretion to the

Member States, acknowledging the diversity of national criminal frameworks and the traditions in the Member States, but brings also a risk of inconsistencies in the practice on the ground.

The evaluation of the ECD of the European Commission has identified that Member States took different approaches to transposing the term ‘unlawful’.

❖ Many Member States transposed the Directive through their Criminal Code.

The term ‘unlawful’ is typically defined through the use of catch-all terms such as ‘contrary to legal regulations’, ‘contrary to legal provision or a decision of an authority’, ‘in breach of regulations’, or ‘in violation of the law’. This approach implies that any update or amendment to environmental legislation in the annexes to the Directive would be covered by this approach of national transposing legislation. Even new EU legislation

protecting the environment could be covered, as long as their breach falls under the definitions of offences in Article 3 of the Directive.

❖ The criminalisation of environmental offences through national environmental sectoral legislation highlights the link to administrative law and often provides a toolbox of tailor-made sanctions responding to the nature and gravity of the particular criminal offence. However,

fragmentation across a range of legal acts could make it difficult for law enforcement authorities and the judiciary to identify the relevant criminal provisions.

This may result in an increased risk of inconsistencies in the application of environmental criminal law, as has been underlined by several Member States. For example, in FR, numerous sources are relevant along with the Penal Code: the Town Planning Code, the Mining Code, the Forestry

Code, and the Public Health Code. The complexity of the legal framework requires specialised knowledge from practitioners, and where they do not have such knowledge it can undermine effectiveness. On the other hand, this sectoral approach could better capture particularities of a specific sector and provide more legal clarity to duty holders, i.e. persons and entities obliged by the legislation, as they are typically familiar with

environmental legislation concerning their activities.

❖ Three Member States transposed the Directive in one separate act, in a quasi-literal way. This approach does not lead to any precision of undefined terms used in the Directive (e.g. ‘substantial damage’) and in addition may lead to a lack of integration into the national overall legal framework of these Member States. The three Member States are among those where

there are no statistical data available for convictions and sanctions. EL and CY define 'unlawful' in their legislative acts by cross-referencing the national transposing environmental legislation. MT is the only Member State that transposed 'unlawful' literally, with a direct reference to the annexes to the Directive, thus creating the risk that its national legislation will become outdated as the instruments mentioned in the annexes are

amended or repealed. “

New approaches on Implementation and Compliance of Environmental Law: Shifting Strategies

- "Legislation on the statute book counts for little if it is not properly implemented and enforced. The EU has agreed an array of environment measures over the past 40 years, but the way these are applied can be patchy. To remedy this, the Commission is proposing to help Member States improve their implementation record".

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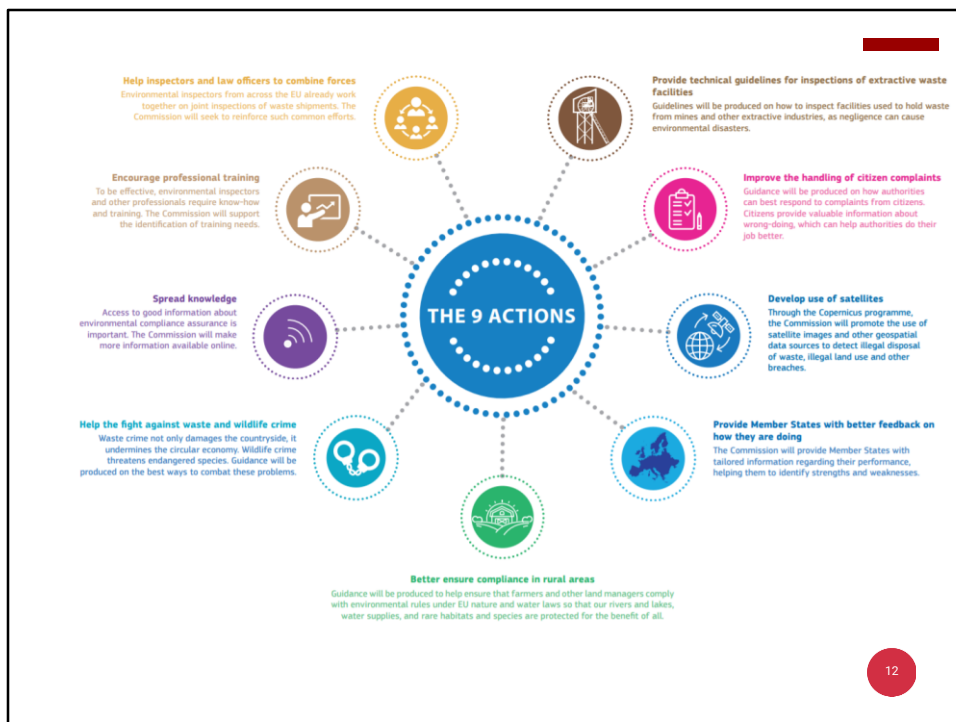
See the European Commission
information available at
https://ec.europa.eu/environment/efe/news/implementing-environment-legislation-2012-05-01_mt

New approaches on
Implementation and Compliance of Environmental Law: Shifting
Strategies

Environmental
Compliance Assurance



**Commission Action Plan on environmental compliance and
governance**



Key obligations of the EU ECD and main types of offences/modus operandi

- EU Directive 2008/99/EC as a background instrument for Member States:
 - Defines environmental offences that Member States must criminalise
 - Most serious infringements of environmental acts (intentional or seriously negligent behaviour)
 - EU legal acts set out in the Annexes
- Most European countries –both common law and continental law- have developed desegregated legal systems that combine both administrative and criminal laws and regulations.



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The Directive criminalises serious violations of obligations deriving from 72 pieces of legislation listed in the two annexes to the directive and requires effective, proportionate and dissuasive criminal penalties.

More precisely, the Directive:

- defines environmental offences that Member States must criminalise (based on the most serious infringements of rules aiming to protect the environment as set out in legal instruments in the annexes to the Directive);
- requires liability of both natural and legal persons. The liability of legal persons can be of a criminal or non-criminal nature;

- requires Member States to ensure criminal liability also with regard to inciting, aiding and abetting such offences;
- seeks to approximate criminal penalties by obliging Member States to ensure effective, proportionate and dissuasive criminal penalties for environmental crimes.
 - Penalties for legal persons, while required to be effective, proportionate and

dissuasive, do not
need to be criminal
penalties;

However, the ECD

- does not contain more detailed requirements on the types and levels of the penalties.
- does not contain provisions on cooperation, data collection and exchange, training, investigation and prosecution tools.

The implementation in the Member States of the EU Directive on the protection of the environment through criminal law has shown **a wide spectrum of problems** related with the environmental rule of law: the quality of the design of the laws, policies and governance at the service of compliance of environmental law.

Moreover protecting the environment is a shared task of administrative and criminal laws and administration and law enforcement agencies that require a multilevel system of norms and multi-layered governance.



The implementation in Spain of the EU Directive on the protection of the environment through criminal law has shown a wide spectrum of problems related with the environmental rule of law: the quality of the design of the laws, policies and

governance at the service of compliance of environmental law. Moreover protecting the environment is a shared task of administrative and criminal laws and administration and law enforcement agencies that require a **multilevel system** of norms and **multi-layered governance**. The legal complexity of the legal system in Spain has made it more difficult to know and apply the basic legislation, both to citizens and the law

enforcement agencies.

The adoption of a much needed environmental crime

prevention policy requires as well an active cooperation among administrative and criminal spheres of intervention. This cooperation is required through all the iter of the implementation of the law, so environmental law has an intrinsic vocation to transit from administrative law to criminal law in the case of serious attacks to the

environment. However, this **accessoriness of criminal law to administrative law** needs to be reformulated to address the loopholes and shortcomings that the practice has shown.

EU Environmental Crime Directive

- EU Directive 2008/99/EC as a background instrument for Member States
 - I. Regulatory level
 - II. Enforcement
 - III. Assessment of the EU Environmental Crime Directive after 10 years



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In the last two years, the Environmental Crime Directive has been subject to a process of evaluation by both the European Commission and the Council.

“The Commission has conducted and finalised a thorough evaluation of the Directive in accordance with the Better Regulation criteria, concluding, among others that:

☐ the Directive helped unify the definition of environmental crime across the Member States, thereby creating an EU-wide legal framework for tackling criminal offences against the environment, but there are still differences between Member States as the

definition of crime in the Directive contains a number of terms that need further interpretation in practice.

☐ the Directive enabled progress towards a level playing field by ensuring the existence of sanctions for the crimes concerned in all Member States, but great differences remain with regard to the level of sanctions available in the Member States.

☐ the Directive's effectiveness is dependent on the practical

implementation on the ground where there are considerable shortcomings in most Member States and thus it has not led to a visible increase of costs for offenders in the Member States.

☐ the Directive remains relevant but should widen its scope to environmental crime areas currently not covered by the Directive (such as illegal logging and timber trade, illegal fishing, man-made forest fires) and the involvement of

organised crime groups is currently not adequately addressed by the Directive.

☐ the technique used in the Directive to define its material scope (through references to environmental instruments in its annexes) is not transparent and has resulted in inconsistencies which tend to grow over time.

☐ coherence with other Union criminal law instruments (Euro counterfeiting Directive, Market Abuse Directive, PIF-Directive)

could be improved.”

EU Environmental Crime Directive

- I. **Regulatory level:** Adopting or adapting legislation to transpose the ECD. Michael Faure made an aggregation of the EFFACE reports on the transpositions by the Member States.
- Abstract endangerment crimes
 - Concrete endangerment crimes
 - Concrete harm crimes.
 - Independent crimes
- Sanctions and Specific remedies:
- criminal sanctions for natural persons
 - **sanctions for legal persons** (not necessarily criminal, can be e.g administrative –Germany and Italy) Member States have autonomy to choose.



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The Environmental Crime Directive has also ensured that legal persons can be held liable for breaches of environmental law in the Member States. However, the decision as to whether liability should be criminal or non-criminal has

been left to individual Member States' discretion.

Administrative or civil liability lack the element of social disapproval inherent in criminal sanctions, and may therefore be viewed as a more lenient sanctioning system than that of Member States under whose laws legal persons can be subject to criminal sanctions. Moreover, non-criminalisation of legal persons could impede cross-border cooperation to pursue criminals.

The Dieselgate case has triggered a debate on this issue. As the European Commission has said “The Dieselgate case revives the debate on the need to introduce criminal liability of legal persons and with other recent white-collar cases, led the Government to propose a core reform of the German legal system to introduce criminal corporate liability.

This case illustrates the limits of a system of the lack of criminal liability for legal persons to

handle white-collar crimes and the impact of the discretion left on Member States when transposing the ECD into their national law regarding legal persons.

The Dieselgate case also illustrates how a similar offence can be apprehended through environmental criminal or consumer law, as multiple 'class actions' were introduced against Volkswagen across the EU, which raises the question of coherence of the ECD with

other legal instruments such as EU legislation on consumer's legal actions.”

The reports of the European Commission have shown:

“Generally, all Member States provide for criminal or non-criminal liability for environmental offences by legal persons (see above under Section 5.1.3 – ‘Sanctions

applicable to legal persons') and are thus compliant with the Directive.

However, given that legal persons are estimated to be responsible for up to 75% of environmental crime, the absence of criminal liability for legal persons in some Member States has the potential to undermine

the creation of the level playing field necessary for cross-border cooperation of judicial authorities for the most serious breaches of environmental law with the most serious, and therefore often cross-border, consequences. ”

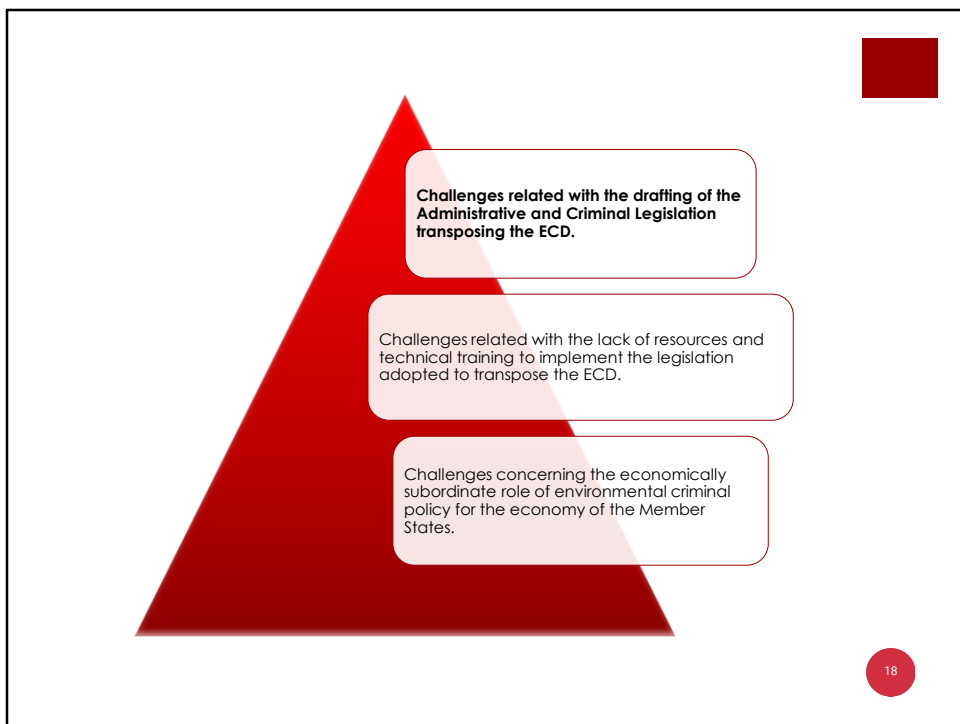
EU Environmental Crime Directive

I. **Regulatory level:** Michael Faure proposes an optimal model of environmental criminal law based on German legal dogmatics

- Abstract endangerment crimes: criminalisation enforces prior administrative decisions (permits, authorisations – unlawful shipment of waste)
- Concrete endangerment crimes: harm is not required, a mere presumed or actual endangerment is required (case of emissions, unlawful manipulation of waste).
- Concrete harm crime: unlawfulness and actual environmental harm are required (activities involving radioactive substances).
- Independent crimes: to punish very serious pollution regardless of whether there is an underlying regulatory violation. “The permit shield does not apply”



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**Challenges related with the
drafting of the
Administrative and Criminal
Legislation transposing the
ECD.**

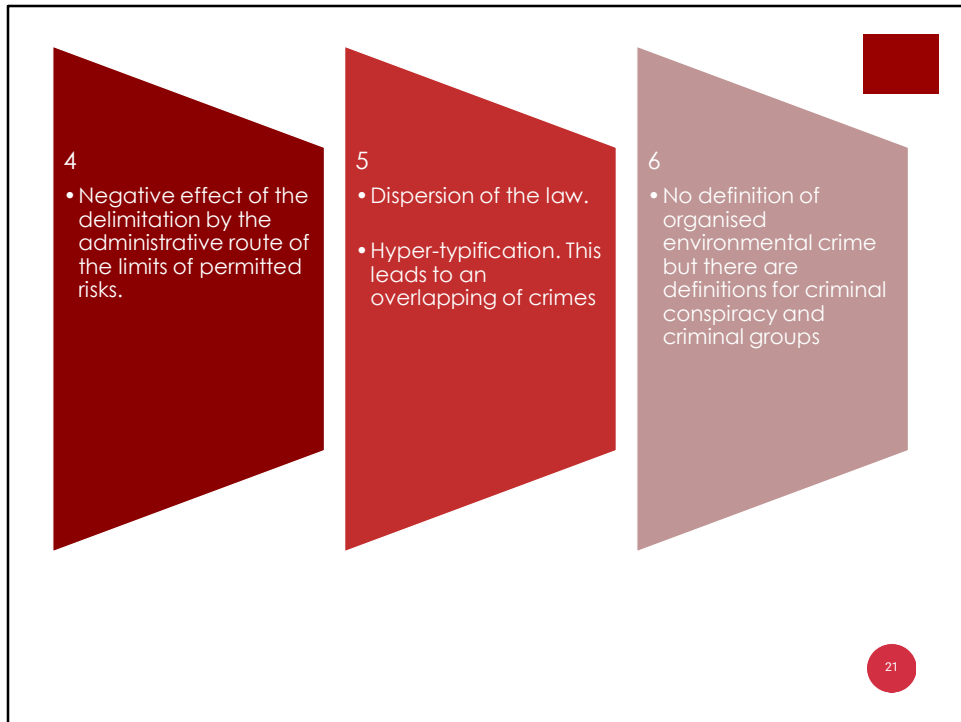


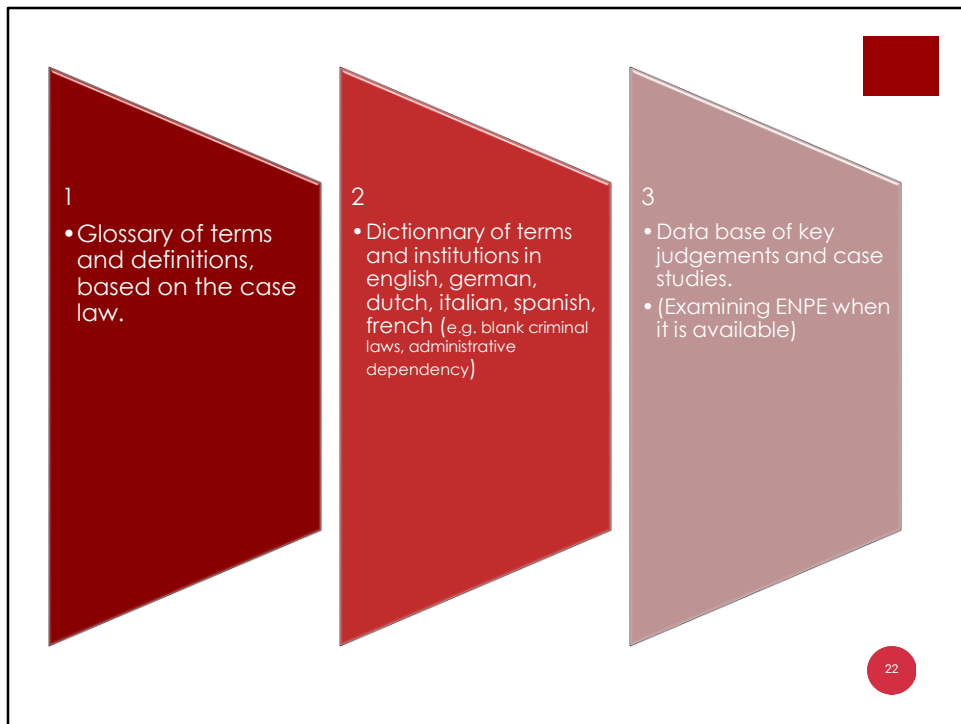
Practice shows the need to clarify **concepts and basic interpretation** of the Environmental Crime Directive. this should lead **to carry out a regulatory** reform of the legal framework of environmental crime in order to:

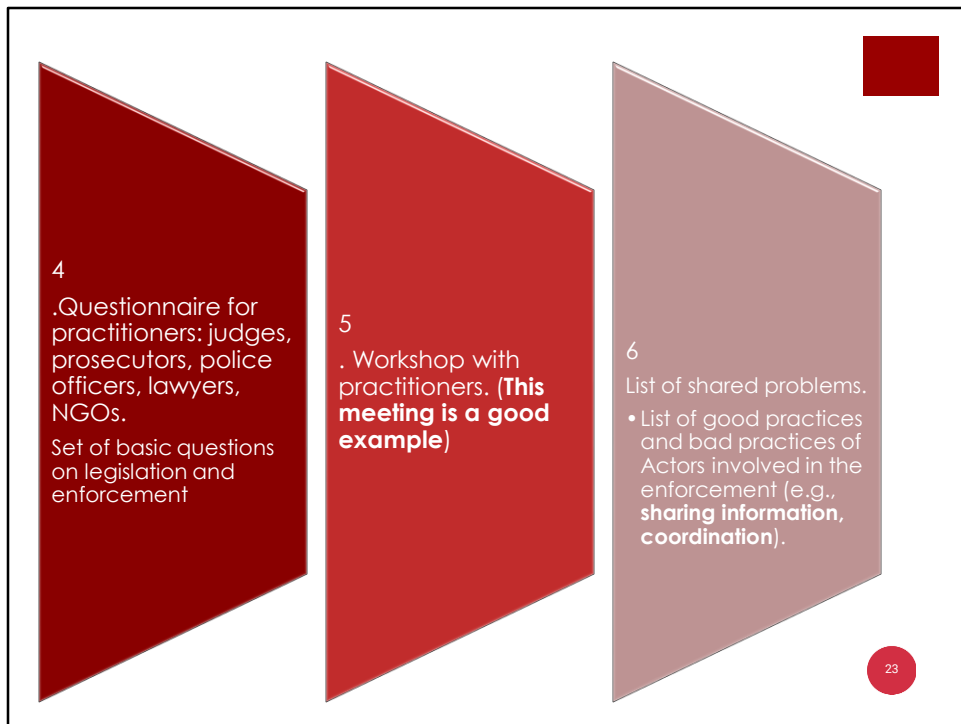
a) provide greater clarity in the drafting of criminal provisions,
b) as well as to provide certainty to the remissions of the blank criminal norms to the administrative norms, especially when they imply the remission to an autonomous or local norm.

c) Exceptions to the prohibitions provided by European Union law or international treaties must be subject to a basic state regulatory framework, which

should serve as a reference to the regulatory developments carried out by Ms.







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- Solutions being discussed:
- "No more regulation but harmonization of fines through a criminal policy to fight the environmental crime" (CWIT recommendations)

8

- Minor versus Major environmental crimes: Statistics and geographical context.

Consequences of the defects and loopholes of the legislation:

Permits lack of enforcement

Denying the harmful capacity of the conduct with regard to the environment.

Denying the harm or jeopardy to the environment or its resources and manifestations.

Denying the causal relationship with the damage caused.

Lack of evidence.

Permits active toleration of environmental crimes

Considering that the individual is respecting the administrative regulation.

Not updating administrative regulations.

Corruption

Illegal authorizations.

Hiding results of controls and inspections revealing infringement.



**Challenges related with the
lack of resources and technical
training to implement the
legislation adopted to
transpose the ECD.**



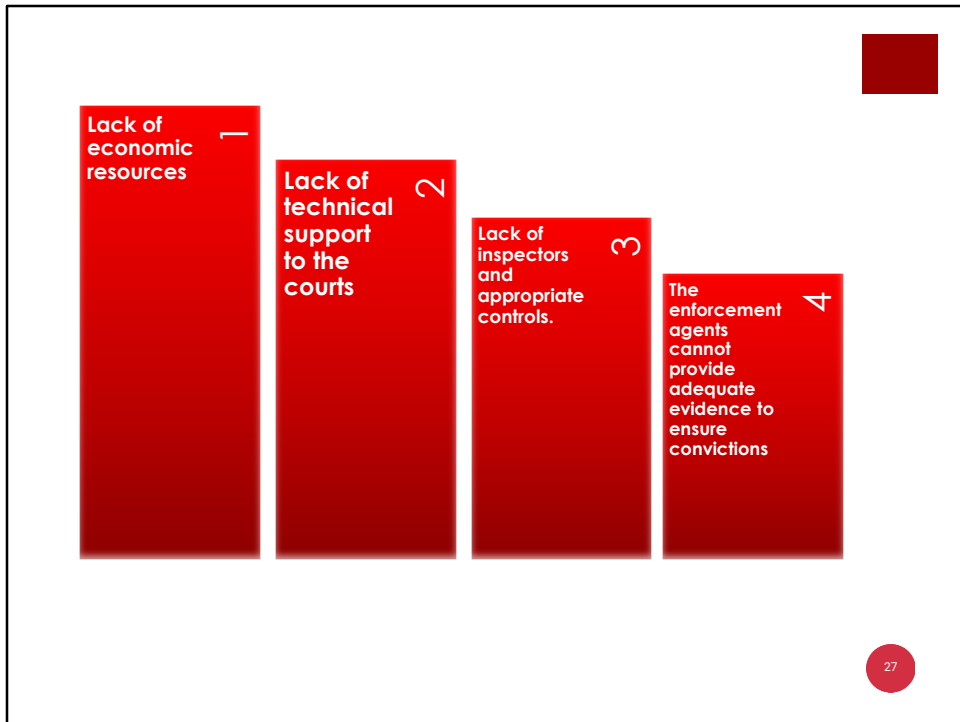
Providing the necessary funds
to combat environmental crime
is a major demand.

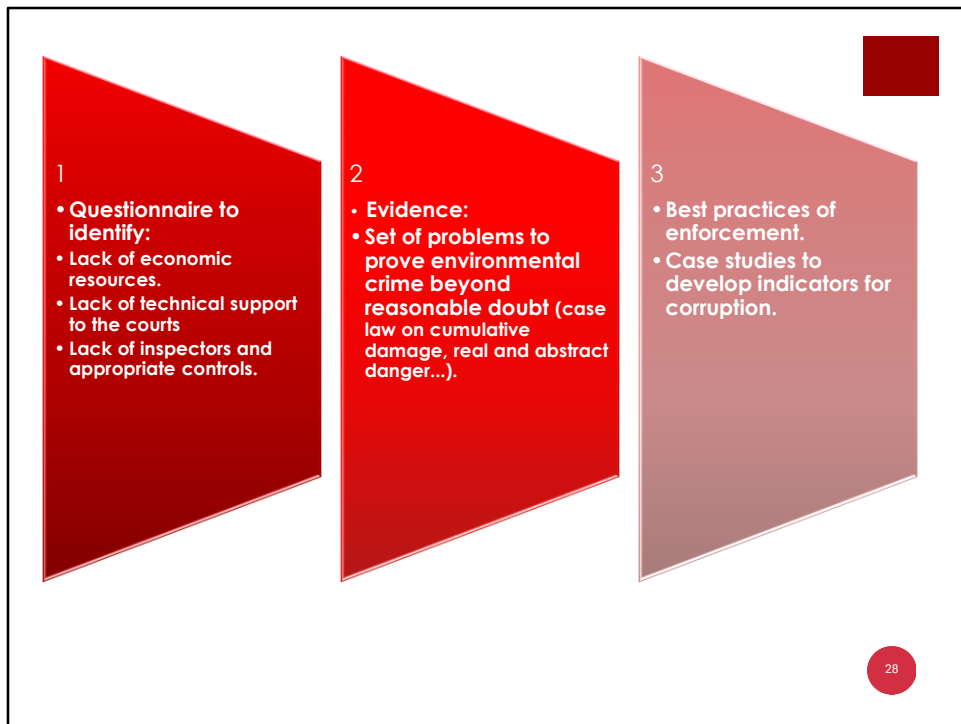
Although the principle of
legality applies, the
administrative authorities

implicitly or tolerantly apply a principle of opportunity whether or not to prosecute environmental crimes based on human and economic resources to combat this type of crime.

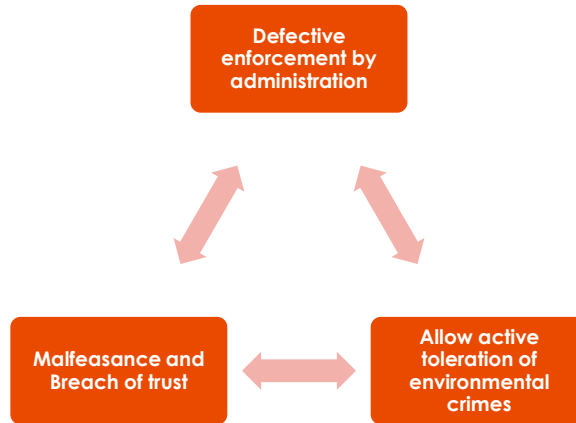
The lack of inspectors, specialized experts, economic resources are at the origin of an important part of what can be called active toleration of environmental crime

Data on environmental are also limited and we believe there is an unknown number of crimes that are generically sanctioned in the administrative level but not prosecuted for lack of agents or resources with which to carry out the prosecution: being the collection of evidence likely to prove guilt beyond any doubt one of the main problems due to the costs entailed.





Consequences of the lack of resources and technical training





**Challenges concerning the
economically subordinate role
of environmental criminal
policy for the economy of the
Member States.**

1
The economic crisis has accentuated the loss of political and social awareness of environmental protection

2
The economic interests are now pushing the permitted threshold of risk and damage higher.

Proposal for a
European
Environmental
Criminal
Policy:

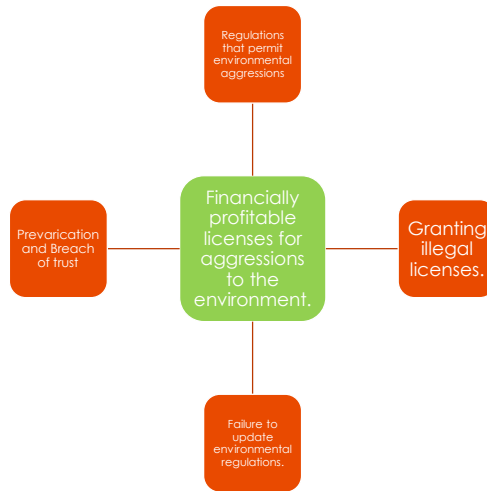
- "Soft law
instruments",
instead of
more
regulation?

1

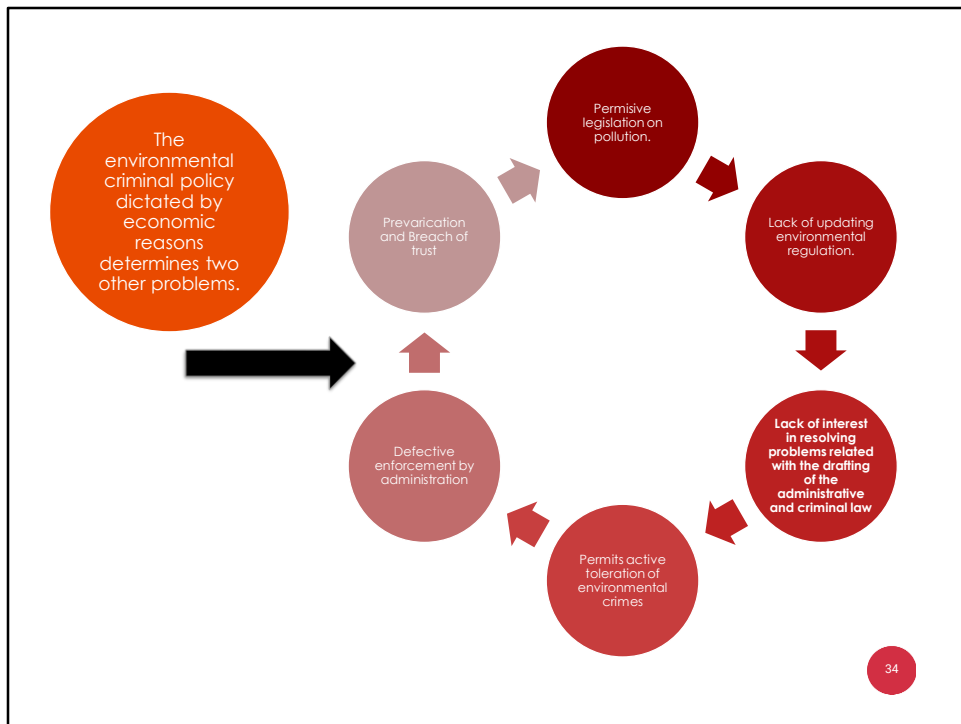
Case studies
to examine
some of the
problems
related with
the
economically
subordinate
role of the
Environmental
Criminal
Policy

2

Consequences of the Economically Subordinate Role of the Environmental Criminal Policy



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EU Environmental Crime Directive

I. **Regulatory level:** Every Member State has developed its own adaptation to the ECD requirements.

In the case of Spain:

- There is no specific Act containing all the sanctioning environmental regulations.
- Administrative sanctions are fragmented and laid down in different environmental laws.
- Crimes only appear in the Criminal Code and the Trafficking Act.
- Some authors have requested the creation of a **General Environmental Law** able to provide some systematic coherence and facilitate the work of criminal practitioners



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Most European countries –both common law and continental law- have developed desagregated legal systems that combines both administrative and criminal laws and regulations.

In the case of Spain, the complexity of its legal system is twofold: first due to the political decentralisation of the country, with 17 Autonomous communities with legal competences of different nature also shared with local authorities. Moreover **the fact that criminal law is merely an accessory to administrative law because most environmental dispositions are blank rules that refers to administrative laws, makes it complicated to**

**enforce it at all levels of
compliance.**

II. Enforcement

- Actors and institutions:
 - Specialised administrations and inspectors
 - Specialised law enforcement agencies.
 - Prosecutors.
 - Judges
- Enforcement in practice: challenges ahead



Environmental rule of law
requires **specialisation of the
law enforcement actors from
police up to the jurisdictional
spheres.**

Spain has achieved remarkable

outcomes thanks to the specialise prosecutors' office and the special service for the protection of nature inside the police corps, SEPRONA of the Guardia Civil as the main actor.

However, a similar process should be adopted in other areas, in particular, the judiciary. Specialization of the judges should be a main goal through:

- Training courses in

environmental law.

- Preparation of **a set of guidelines** at national level, so as to overcome the discrepancies between those adopted by different courts.
- Creation of mixed environmental courts with administrative and criminal jurisdiction.

Aspects that may influence the enforcement of environmental criminal law

- Problems of existence of authorization.
- Author identification problems.
- Lack of economic resources.
- Lack of inspectors and appropriate controls, which means that the enforcement agents cannot provide adequate evidence to ensure convictions.
- The specialization of the police and prosecution is considered as one of the **determinants in increasing prosecution of environmental crime**. (technical personnel is decisive in providing evidence to lead to conviction).
- There are no specialised judges.
- It is important to point out the role played by the administration in the context of attacks on the environment due to its lack of monitoring of compliance with the authorisations granted for the exercise of polluting activities and the lack of compliance with existing environmental regulations. This, in addition to not preventing criminal behaviour against the environment, makes the application of environmental legislation difficult due to lack of sufficient evidence and leads, in many cases, to the impunity of the polluter.
- Reduction of social concern for the environmental aspect when it collides with economic interests.



EU Environmental Crime Directive

III. Assessment of the EU Environmental Crime Directive after 10 years

- Effectiveness of the regulatory regime in the different MS: shortcomings, loopholes and need of new environmental crimes related with overfishing or illegal deforestation.
- Cooperation between actors and institutions and most-required specialisation.
- Specific issues of cross-border environmental crime and organised crime



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Interrelation between criminal and administrative enforcement and sanctioning for waste crimes

Environmental law has an intrinsic vocation to transit from administrative law to criminal law in the case of serious attacks on the environment.

2 Approaches to the same question:

1. Criminal law is merely an accessory to administrative law because most environmental dispositions are **blank rules that refer to administrative laws**, make it complicated to enforce it at all levels of compliance.
2. The administrative dependence of environmental criminal law. As Faure says administrative law aims at regulating the conditions under which ecological interest might be endangered



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The reports of the European Commission have shown that:

“Historically, the protection of the environment has been addressed by administrative law in most Member States.

The Directive pays tribute to this history by only criminalising conduct harmful to the environment if there is a breach of environmental legislation. Consequently, after the transposition of the Directive in the Member States, two parallel sanctioning systems exist for environmental offences. The Directive does not rule on the interaction between these two systems. Recital 11 explicitly states that the Directive 'is without prejudice

to other systems of liability for environmental damage under Community law or national law’.

Member States have taken different approaches to determining how administrative and criminal sanctioning systems should interact:

- parallel applicability of criminal and administrative sanctions in general;
- combination of criminal sanctions and administrative

sanctions other than fines;

- administrative and criminal sanctioning systems are mutually exclusive.

Independent of the approach taken, in many Member States the delineation and interplay of the two systems is unclear, with no clear criteria or guidelines.

Therefore, conflicts of competences, legal uncertainty and delays in proceedings that hamper effective law

enforcement are likely to occur.

Procedural safeguards to prevent double sanctioning are not always in place. Some Member States have communicated that in practice environmental criminal law is not applied in their country, but environmental offences are rather dealt with through the existing administrative sanction systems. The reasons are national systems where administrative sanction levels

are higher than criminal ones, lower requirements with regard to evidence, and less complicated and time-consuming procedures.

Administrative sanctions, however, do not contain the same degree of social disapproval as criminal sanctions, and the majority of the consulted stakeholders have confirmed that the availability of criminal sanctions is indispensable to complement

administrative sanction systems.

By contrast, a well-balanced and clearly regulated interplay of the two regimes can be mutually reinforcing and enhance the effectiveness of law enforcement with regard to environmental crime: the possibility to use administrative and criminal enforcement tools provides for flexibility and a tailored approach to different categories of offences;

administrative accessory sanctions can complement criminal sanctions to create a sanctioning system that is a deterrent overall (at least in national systems, which do not provide for accessory sanctions under criminal law). In many Member States, minor environmental cases are dealt with through administrative law only, thus relieving the criminal justice system (where proceedings are typically lengthier, more complex and

more demanding with regard to the level of proof required for a conviction) and leaving space for the most serious cases.”

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Interrelation between criminal and administrative enforcement and sanctioning for waste crimes

Accessoriness of criminal law to administrative law needs to be reformulated to address the loopholes and shortcomings that the practice has shown:

- Active toleration of environmental crime by administrations
- Lack of updating of the legislation or the standards of protection by administration –regional and local
- Lack of controls and inspections
- Lack of human resources and lack of specialization



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Interrelation between criminal and administrative enforcement and sanctioning for waste crimes

As defined by the Spanish Chief Prosecutor for the Environment, Antonio Vercher Noguera, *"active toleration of environmental crime by administration is when administrations, in the general pursuit of economic growth, decline to discipline anyone who breaches environmental regulations. Toleration is thus postulated to legitimise such offences and to avoid sanctions"*.

• Some of the purposes served by the illegal behaviour of the Administration are:

- **The general interest.** It is considered that priority should be given to economic and production factors, including providing employment in areas where there is considerable unemployment rather than the environment and that this will benefit the entire society. This behaviour may result in malpractice. E.G.: Authorisation of landfill in a natural park and Natura 2000 Network site.
- **The particular interest** may be obtaining a financial benefit by the public institution and the particular individual or company involved which may result in corruption.



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The lack of criminal liability of public administrations is at the root of the environmental law of compliance deficit, since this conditions their attitude precisely with regard to activities related to enforcement and compliance

and has led to the so-called active tolerance of environmental crimes.

However, an important aspect that has also been highlighted in the case law of the Court of Justice is the limited liability of public administrations, which are the main beneficiaries of the exceptions to the obligations that mainly concern natural and legal persons. Thus, in the case of Spain, the administrations are not

criminally liable for their infringements of environmental law.

On other occasions, such as the Environmental Liability Directive, it is the Directive that provides for the exoneration of the public administration from liability by establishing a concept of "normal management" of the protection of sites and habitats.

Chief prosecutor for the

environment, Antonio Vercher in his work - *Some Reflections on the Use of Criminal Law*- also said:

“It may also happen that in the discussion between the administrative authority and the public prosecutor, regarding the criminal character of the environmental infraction, if they do not reach an agreement there is always a risk of

passivity on both sides, which is not so rare, for instances, in Holland, as Fangman pointed out.

In other cases, if the administrative authority intervenes with an administrative act that entirely covers the relevant criminal activity, then the author has committed no offence, since one of the definitional elements of the crime is missing or

the administrative act is considered a defence justifying the author's action.

There are some other examples of this type of abuse and all them prove that in that sort of cases modern states – and their administrations – very often do not take a too «active» position in the protection of environment. Moreover,

they are occasionally capable of breaking the rules and of subverting the institutional order. Occasionally, as it is the case, in Germany the competent public authorities, following a purely utilitarian strategy and even knowing the existence of a serious infraction, may enter into «futile and endless negotiations with the

polluter (...) intervening for years. The motive of this strategy is to achieve better compliance with environmental provisions by imposing mutually agreed conditions than by the threat of punishment – the results often are poor nonetheless». This type of negotiations has been equally problematic in Spain

and in Holland, although
in the last case judicial
authorities may
participate in the
negotiations
themselves.”

More than a case of active toleration

Authorisation of landfill in a natural park and Natura 2000 Network site.

- The example concerns a protected area in Spain where the local authorities allowed the creation of an illegal waste deposit.
- The Public Prosecutor's Office requested two years in prison for the Mayor of Nerja for this illegal dumpsite.
- The space, without permits and in the heart of the Natural Park, holds 800,000 cubic metres of waste that pose a "high risk" to the environment.



The confusion between crimes and administrative offences makes it difficult for the police to determine which behaviours should be treated as crimes and which as administrative offences.

- As a solution, the completion of the crime could be when the conduct can cause serious damage, exceeding what is established by the administrative infraction, provided that it exceeds the limits marked in the administrative law by a fixed amount or a specific percentage (e.g. 100%).
- The necessary relation with the administrative regulations requires control of the activity of the administration. Subsequent legalization of previously committed criminal pollution and environmental destruction can be the problem, (eg. legalisation of illegal building construction).
- The failure of Administrations to update environmental regulations to meet scientific knowledge and EU Directives is another problem to consider.



Zaldibar – Landfill in Spain



Trabajos de extinción de los incendios del Vertedero de Zaldibar. EFE

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The accident at the Zaldibar landfill in Spain in which two workers lost their lives is an example of the damage to the environment and people's health that can be caused by an ineffective system of inspections to sanction

irregularities that would eventually be at the origin of the collapse of the landfill and the generation of air pollution caused by fires of dangerous substances.

Waste crime as a transnational, organized and economic crime

The CWIT Consortium



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The phenomenon of illegal waste trafficking as a result of failures in the chain of custody of the collection and recycling process of certain waste streams has been studied by European agencies and also by producers and recyclers in

Europe.

The Countering WEEE Illegal Trade (CWIT) project provides a set of recommendations to the European Commission to assist various stakeholders in countering the illegal trade of WEEE, also known as 'e-waste', within and from Europe.

Funded by the Framework Programme (FP7), this two-year security research project brought together a unique group of experienced

professionals from the WEEE industry, enforcement agencies, international organisations, lawyers, academia and consultants specialised in supply chain security. The project commenced in September 2013 and concluded in August 2015.

The consortium consisted of:

- Compliance & Risks Ltd.,
- Cross-border Research Association,
- INTERPOL (coordinator),
- United Nations Interregional

Crime and Justice

Research Institute (UNICRI),

- United Nations University (UNU) (scientific

coordinator),

- WEEE Forum, and, • Zanasi & Partners.

Organised environmental crime

- Organised environmental crime is a serious crime committed by organized crime groups that often has a transnational dimension that requires the cooperation of the EU institutions and their Member States with Third countries and international organisations.
- This organised environmental crime challenges the traditional definition of organised crime since it is now responding to a new market order.
- Organised crime criminals act as brokers providing highly specialized services to customers throughout the world, communicating through new technologies of information and escaping the traditional forms of crime prevention and repression.
- At the same time, these criminals are easily replaceable and not their structures that are challenging criminal and administrative approaches to dismantle their networks.

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The European Commission has acknowledged that “The Directive does not meet the particular challenges posed by the links between organised and environmental crime, nor does it contain any provisions addressing organised crime.”

“Academics and stakeholders have argued that environmental crime committed by, or with the involvement of, organised crime groups and networks remains an important issue that needs to be more effectively addressed.

Eurojust, in its November 2014 report on the Strategic Project on Environmental Crime stated that environmental crime is often linked to organised crime, in particular illegal trafficking or dumping of waste and

trafficking in endangered species.

The EnviCrimeNet along with Europol in 2015 issued a report on its Intelligence Project on Environment Crime with particular focus on the involvement of organised crime groups. “

Organised environmental crime

We need an adaptable definition of organised crime, leading us to explore new aspects of these crimes that are mostly transnational and at some point linked with the traditional forms of organised crimes but with **their own characteristics responding to market demands and brokering services for VIP clients all over the world.**

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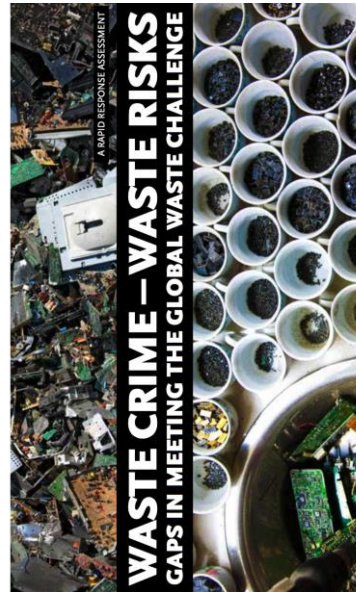
information and escaping the traditional forms of crime prevention and repression.

- At the same time, these criminals are easily replaceable and not their structures that are challenging criminal and administrative approaches to dismantle their networks.

Waste crime as a transnational, organized and economic crime

Even though the EU has not yet adopted concrete measures to combat organised environmental crime, the new Article 83 of the Treaty on the Functioning of the European Union allows the EU to adopt directives in areas of particularly serious crime with a cross-border dimension.

In the future, the Council may unanimously decide to add serious environmental crimes to the list of organised crimes. Until then, the main responsibility for fighting organised environmental crime is with the Member States.



- **In many MS, there are no substantial provisions on organised environmental crime**

- In the case of Spain, there is a minor procedural provision (Art. 282 bis Criminal Procedure Act) concerning the possibility of using undercover agents in crimes of trafficking in endangered species of flora or fauna (Arts. 332 and 334 CrimC) and crimes of trafficking in nuclear and radioactive material (Art. 345 CrimC).
- The general rules on organised crime are used to prosecute criminal conspiracy and criminal groups (Art. 570 2-4). They are in themselves a crime which is added to environmental crimes.
- Organised crimes are prosecuted by the Anti-Corruption Prosecutor's Office.
- The present regulation is considered adequate, but the future assessment on the ECD might propose changes (European Commission report to be published soon).

The adoption of a legal instrument addressing organised environmental crime is not on the EU legislative agenda even though the European Parliament has made some proposals



- A package of non-binding instruments on organised crimes adopted by EU institutions is establishing the basic concepts for organised environmental crime. Moreover, it could be the basis for a future EU criminal policy on organised environmental crimes.

Actors for cooperation withing our borders and with third countries

Eurojust and Europol, with the European Network of Prosecutors for the Environment (ENPE) are the most advanced schemes of legal networks in the EU regarding the activities of

- (1) 'harmonization networks';
- (2) 'enforcement networks';
- (3) 'information networks'.

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EU level networks of environmental practitioners, such as ENPE (prosecutors), IMPEL (inspectors), EUFJE (judges) and EnviCrimeNet (police and other enforcement officers) facilitate sharing good practices, developing practical

tools for detection, and investigation and training. These networks now work together with the Commission's support.

EUROPOL and EUROJUST are promoting cooperation with international organizations, funding and participating in projects such as those led by INTERPOL and the International Consortium on Combating Wildlife Crime that form a powerful alliance to fight

wildlife crime effectively. This international cooperation produced one of the major wildlife crime operations, the Operation Cobra

- The Spanish Prosecutor Annual Reports take notice of the increased number of fires in landfills near forestal areas.
- Several cases have led to criminal procedures.
- An increase in the number of tire dumps led the Prosecutor Office to open an investigation on the possible participation of organised crime groups, but they could not find evidence on the organised nature of the crimes.



Incendio en el vertedero de neumáticos de Seseña. EFE

Intelligence based cooperation and action

More and better intelligence based cooperation and action is needed.

The growing concern about environmental crime is also due to the failure to identify it as a serious threat.

The initial test and enquiries responded to by Member States for the Serious Organised Crime and Threats Assessments –SOCTAs- showed the lack of intelligence based analysis as well as the lack of human resources destined to fight against it.

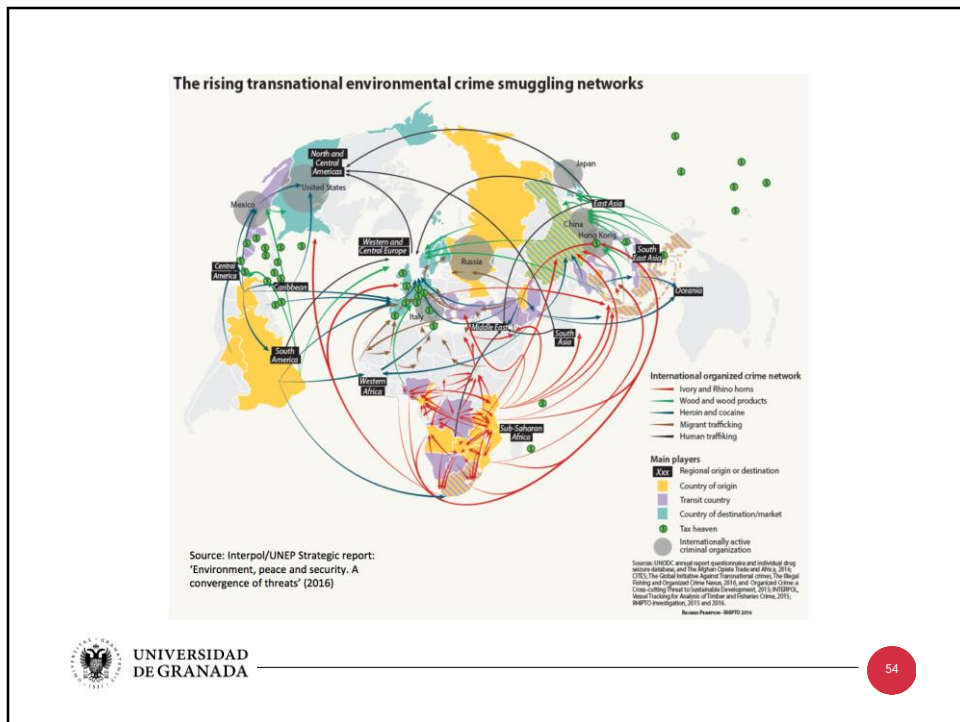
In recent years, Member States such as the UK, the Netherlands and Italy have taken the right steps: better intelligence, mandate and executive institutions such as the UK Agency

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One of the most important conclusions of the EFFACE project was to point out the lack of data and information on environmental crime.

Since then data collection has

been one of the most important tasks to be faced. Behind the operations led by Interpol there is a clear strategy to reveal the modus operandi of criminal groups involved in activities that take place on a day-to-day basis, that are part of normality and that run parallel to legal activities, due to the lack of knowledge and awareness, which facilitates the growth of environmental crime



The European Union is the destined of environmental crimes such as illegal wildlife trafficking and the origin of illegal waste trafficking. This map shows the different routes.

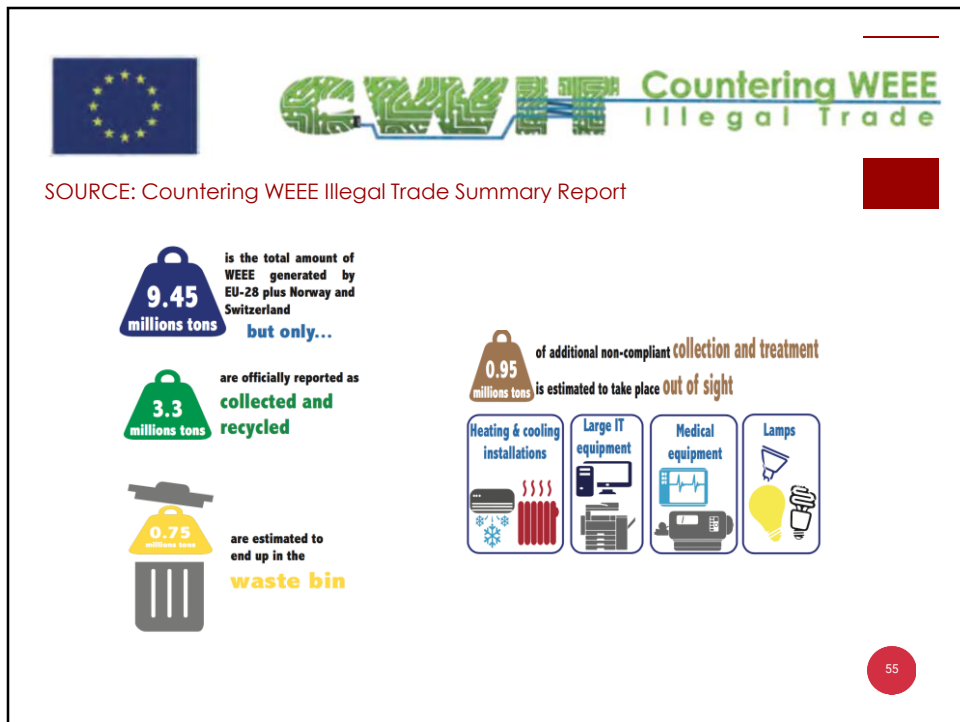
Wildlife and illegal waste trafficking are two sectors that are singled out due to their often-transnational nature and their connection with organised crime. Illegal, unreported and unregulated fishing is a sector that shows the possibility of complementing the administrative approach to fight against this type of environmental crime with criminal sanctions as a last resort, as foreseen in the new sustainable fisheries

agreements with third countries.

International cooperation is being developed with range , transit and destination countries of environmental crimes through international institutions and networks such as UNODC, INTERPOL, ICWLT or IMPEL and also on bilateral basis by Member States.

The UN Security Council has

linked wildlife crime and security and has adopted resolutions that demand states to adopt actions to fight against it.



The Countering WEEE Illegal Trade (CWIT) research project revealed that only around 3.3 million tons of the estimated total of 9.5 million tons of WEEE was officially reported to authorities as collected and treated across Europe in 2012

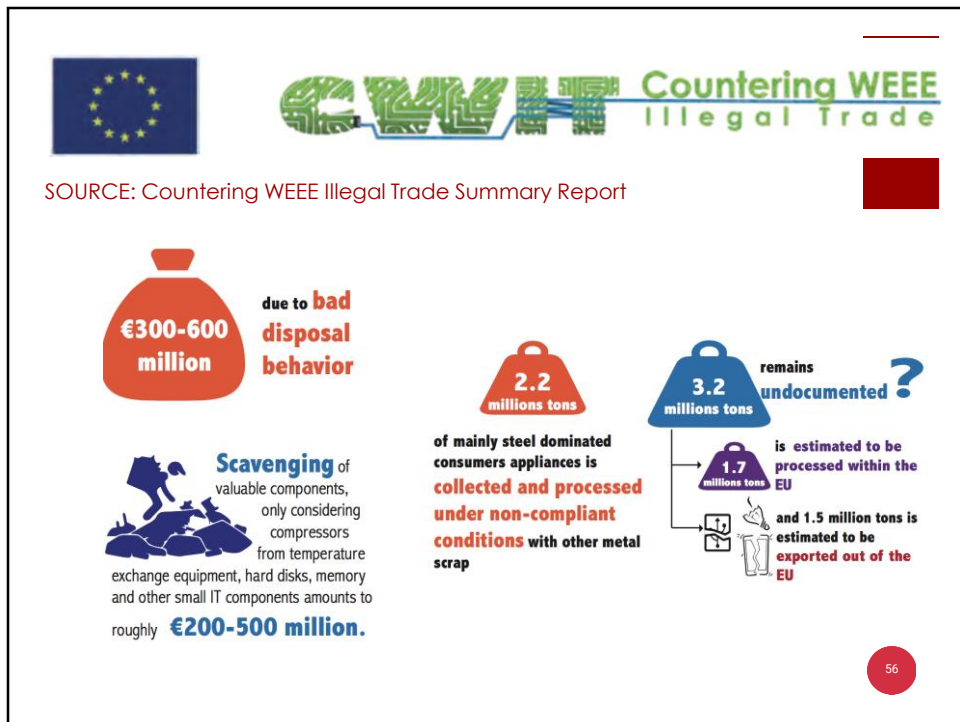
(see CWIT Deliverable 4.3, Economic drivers). This clearly points to the fact that the existing legislative mechanisms are not robust enough to address the growing problem of illegal WEEE trade.

The research undertaken during the course of the CWIT project identified several ambiguities, loopholes and gaps in the current legal framework that are not only exploited by offenders but also hamper the

ability of law enforcers and prosecutors to counter the WEEE flows outside the officially reported streams. The legislative ambiguities also prove to be unduly burdensome to legal operators involved in the WEEE chain. Additionally, the research findings identified a number of information gaps between stakeholders as well as vulnerabilities in the WEEE supply chain that can to a large extent be addressed by putting

in place stronger legislative requirements.

The EU is the main donor to the ICCWC which brings together Interpol, the UN Office on Drugs and Crime, the World Customs Organisation, CITES and the World Bank.



The research undertaken by the Countering WEEE Illegal Trade (CWIT) project found that in Europe, only 35% (3.3 million tons) of all the e-waste discarded in 2012, ended up in the officially reported amounts of collection and recycling

systems.

The other 65% (6.15 million tons) was either:

- exported (1.5 million tons),
- recycled under non-compliant conditions in Europe

(3.15 million tons),

- scavenged for valuable parts (750,000 tons)
- or simply thrown in waste bins (750,000 tons).

1.3 million tons departed the EU in undocumented exports.

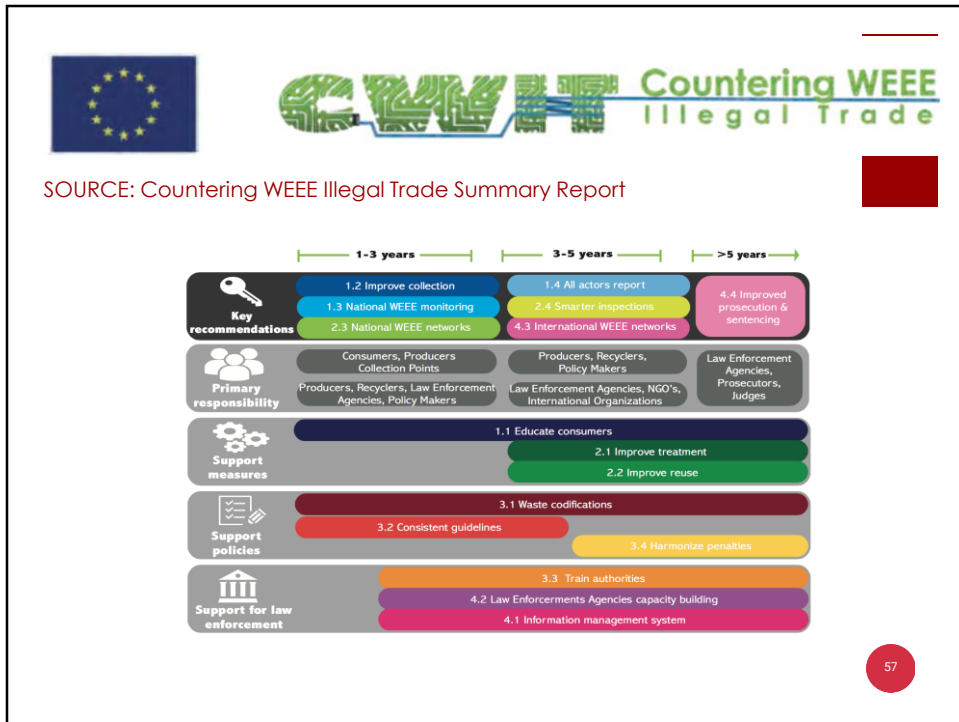
These shipments are likely to be

classified as illegal, where they do not adhere to the guidelines for differentiating used equipment from waste, such as the appropriate packaging of the items. Since the main economic driver behind these shipments is reuse and repair and not the dumping of e-waste; of this volume, an estimated 30% is e-waste. This finding matches extrapolated data from IMPEL on export ban violations, indicating 250,000 tons as a minimum and and

700,000 tons as a maximum of illegal e-waste shipments.

Interestingly, some ten times that amount (4.65 million tons) is wrongfully mismanaged or illegally traded within Europe itself. The widespread scavenging of both products and components and the theft of valuable components such as circuit boards and precious metals from e-waste, means that there is a serious economic loss of materials and resources directed to compliant e-waste

processors in Europe.



Recommendations:

Short term recommended actions:

Short-term actions are those envisaged to take between one and three years to develop and

implement. To achieve these measures, it is recommended to take the following specific additional actions:

1.Improving collection (cluster 1.2). Increasing both the amounts and the quality of the WEEE collected is the main aim of this cluster. Securing facilities to avoid thefts and scavenging, making collection points more easily accessible and more visible for consumers, increasing the number of collection points or their

territorial density and banning cash transactions are part of the proposed actions in this cluster. Supporting actions from cluster 1.1 will create efficient synergies with the recommendations in this cluster.

2.Developing national WEEE monitoring (cluster 1.3): The principal reason is that better data management helps decision makers to better allocate resources. Some participants also stressed that it

is important to ensure that all Member States have an independent national register in place where information such as “put on the market” volumes by producers, and treated WEEE volumes by recyclers, are also recorded to improve the harmonisation of such monitoring. Reporting on a national level is required to obtain better quality data to enable sound decision-making processes. This recommendation also provides

factual information to the following recommendation cluster.

3. Establishing the concept of the NEST and national WEEE networks (cluster 2.3). Building and strengthening national networks is necessary for information sharing and collaboration. Several experiences and best practices are identified, indicating that networking and bringing different types of stakeholders together is essential. This would

lead to a better exchange of experiences and best practices resulting in more efficient and expanded actions in tackling illegal trade. This ultimately would lead to better implementation and decision-making.

Medium term recommended actions:

For the medium term, between three and five years from now, the CWIT consortium

recommends to specifically invest in the following recommendations:

1.To implement the ‘all actors report-plus’ principle as a mandatory element for traders and processors when treating WEEE product flows. This should be included in the national transposition of the WEEE Directive in all countries (cluster 1.4). It should be noted that some Member States are already doing this or preparing to do this.

2.Smarter and targeted inspections: the previous clusters on improved monitoring, mandatory reporting, functioning WEEE networks and establishing NESTs should allow for smarter and more targeted inspections (cluster 2.4). The market assessment clearly highlights that there is not only a need for improved border inspections, but simultaneously also for inspections upstream at waste sites. This targeted approach

would help to prevent illegal activities going further downstream.

Some Member States report that many recycling companies are never inspected. As inspection resources are generally very limited, the word 'targeted' is essential: the previous clusters should generate sufficient information to use resources efficiently and effectively. Respondents also highlight that in later stages, others can use risk indicators

developed in some countries. This also indicates the relationship with the next recommendation cluster.

3. Establishing international WEEE networks as the basis for better international knowledge and data exchange (cluster 4.3). Much of the illegal trade crosses multiple borders. The current situation, specifically between Member States and receiving non-OECD countries, is regarded as very poor and requires improvement. This

positive step will also help to establish other recommendations and the sharing of information will result in the creation of best practices globally. One practical suggestion is to strengthen existing networks like INTERPOL, Envicrimenet, Europol and IMPEL TFS rather than developing new ones. The networks should specifically include police, prosecutors and customs. Beyond exchanging

information, also the exchange of modus operandi and if possible nominal data will lead to improved intelligence led enforcement.

Long term recommended actions

Finally, for the long term, between five to seven years from now, the CWIT consortium recommends that there should be investment in improving prosecution and sentencing

(cluster 4.4). The development of these measures can start as soon as there is a sufficient basis resulting from the previous recommendations.

1.Improved sentencing and prosecution is both a preventative and reactive measure to deter and counter crimes. It is important to inform potential perpetrators about the consequences of criminal actions. This however requires an effective enforcement regime, with specialised

prosecutors and judges who are educated on the issues around WEEE, in order to enable them to effectively deal with WEEE related offences. Most respondents classify this as the 'weakest link' in the law enforcement chain. Training should be provided on specific issues in this complex topic. Initiatives such as the IMPEL TFS prosecutors project, European Network of Prosecutors for the Environment, EUROJUST and

European Union Forum of Judges for the Environment need to be supported. It is important that efforts are made to harmonise prosecution, sentencing and penalties relating to WEEE crimes within the EU.

THANKS FOR YOUR ATTENTION

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