



Evaluation of the strengths, weaknesses, threats and opportunities associated with EU efforts to combat environmental crime

D6.2: Evaluation of the role of the EU and SWOT analysis



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Abstract

The EFFACE project has researched many different aspects of environmental crime. In order eventually to produce policy recommendations, it has been necessary to draw together the results of this research. This has been undertaken in the framework of a SWOT analysis (analysing strengths, weaknesses, opportunities and threats). The results of a SWOT analysis provide the platform for subsequent policy formulation. However, it was decided across the project that to undertake a SWOT analysis, it was necessary to identify critical issues for which results from EFFACE research would provide critical information. Nine themes were identified:

1. Data and information management (MS/EU)
2. Further harmonisation of substantive environmental criminal law at EU level (excluding sanctions)
3. System of sanctions (administrative vs. criminal vs. civil proceedings (MS/EU level)
4. Functioning of enforcement institutions and cooperation between them (MS/EU level)
5. Trust-based and cooperation-based approaches: environmental crime victims and civil society
6. External dimension of environmental crime – what can EU do (EU only)
7. Use of environmental liability (EU/MS)
8. Organised environmental crime
9. Corporate responsibility and liability in relation to environmental crime

A common structure and approach to a SWOT analysis was conducted for each theme. Each of these themes has its own conclusions. However, it is also important to note that the conclusions for each theme interact and, therefore, it is important that taking forward the conclusions consider the themes as a whole and not in isolation. The authors also concluded that the best way to bring the conclusions of the analysis together was through the identification of key opportunities. It is these opportunities which allow specific strengths to be built on, weaknesses addressed, etc.

The opportunities identified were found to be at three governance levels – European Union, Member State and International. These are set out below:

EU Level

- Review of the Environmental Crime Directive
- Review of data/reporting by DG ENV
- Co-operation and co-ordination
- Defining priorities
- Support for civil society

Member State level

- Implementation of the Environmental Crime Directive and increasing focus on the implementation of EU environmental law
- Capacity building for the institutions available
- Political priorities
- Implementation of Sustainable Development Goals
- Corporate responsibility



International level

- Concluding Treaties on co-operation between EU and third countries
- EU has a voice
- Enlargement and European Neighbourhood Policy
- Single customs frontier of EU
- Development co-operation

The way in which these opportunities can be used to address the issues identified in the SWOT analysis is explored in this report. However, they are to be further developed within the project and the specific policy recommendations will be proposed in a subsequent project deliverable.

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LIST OF ABBREVIATIONS

BAN	Basel Action Network
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CWIT	Countering WEEE Illegal Trade
DEFRA	Department for Environment Food and Rural Affairs
EEA	European Environmental Agency
ENPE	European Network of Prosecutors for the Environment
EC	European Commission
ECD	Environmental Crime Directive
ELD	Environmental Liability Directive
EJO	Environmental Justice Organizations
EU	European Union
EUROJUST	European Union Agency
EUROPOL	European Union
FERMA	Federation of European Risk Management Associations
ICCWC	International Consortium on Combating Wildlife Crime
IED	Industrial Emissions Directive
IMPEL	European Union Network for the Implementation and Enforcement of Environmental Law
INTERPOL	International Police
JIT	Joint Investigation Team
MEA	Multilateral Environmental Agreements
MS	Member State
NGO	Non-governmental organisation
OCG	Organised crime groups
OECD	Organisation for Economic Cooperation and Development
SOCTA	Serious and Organised Crime Threat Assessment
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership Agreement between the EU and the USA
TWIX	European Union Trade in Wildlife Information eXchange (EU-TWIX)
UN	United Nations
UNEA	United Nations Environment Assembly
UNEP	United Nations Environment Programme
UNODC	United Nations Office on Drugs and Crime
UNTOC	UN Convention on Transnational Organised Crime
WEEE	Waste Electric and Electronic Equipment
WP	Work Package

1 Introduction

This report presents an evaluation of the strengths, weaknesses, threats and opportunities associated with EU efforts to combat environmental crime, including an analysis of the strengths and weaknesses of current actors, instruments and institutions to co-ordinate and/or harmonise measures to combat environmental crime across the EU and beyond.

Although this report examines the strengths, weaknesses, threats and opportunities associated with fighting environmental crime, it does not make specific policy recommendations based on these conclusions, as this is the subject for further analysis within WP7 of the EFFACE project.

A SWOT analysis addresses:

- **Strengths** identified in understanding and/or combating environmental crime (such as good data management, good enforcement strategies, etc.). Clear identification of these strengths can lead to policy recommendations based on best practice.
- **Weaknesses** identified in understanding and/or combating environmental crime. If such weaknesses are identified in a clear and appropriate way, then specific policy recommendations can be developed. For example, a general statement of a weakness that there are insufficient data does not lend itself to a clear policy recommendation. However, stating that specific data are lacking or specific actors are not collecting data can result in policy recommendations that can be acted upon.
- **Opportunities** are only appropriate for taking forward, or addressing, identified strengths and weaknesses. What are the forthcoming policy development agendas, etc., (at the appropriate governance level) that actions could be taken forward? Are there opportunities that could arise from non-governmental actors?
- **Threats** are the converse of the opportunities. What is either specifically (e.g. relating to a specific area of crime) or generally (economics, politics, etc.) known that could inhibit taking forward action on the area of environmental crime being reviewed.

2 Methodology

The project partners agreed that, in order to undertake a SWOT analysis, the themes and issues addressed across the EFFACE project should be analysed in a structured way. Further, this was best undertaken around the major issues and themes set out in the DOW and that have emerged during the research. It was agreed, therefore, that the SWOT analysis would be structured according to the following subjects:

1. Data and information management (MS/EU)
2. Further harmonisation of substantive env criminal law at EU level (excluding sanctions)
3. System of sanctions (administrative vs. criminal vs. civil proceedings (MS/EU level)
4. Functioning of enforcement institutions and cooperation between them (MS/EU level)
5. Trust-based and cooperation-based approaches: environmental crime victims and civil society
6. External dimension of environmental crime – what can EU do (EU only)
7. Use of environmental liability (EU/MS)
8. Organised environmental crime
9. Corporate responsibility and liability in relation to environmental crime

An individual partner was responsible for undertaking the SWOT analysis for each of these eight areas. Further, the SWOT analysis followed a comment structure:

- Introduction: a short explanation of the area being reviewed and why it is important.
- Strengths: key strengths identified in EFFACE for the area being reviewed.
- Weaknesses: key weaknesses identified in EFFACE for the area being reviewed.
- Opportunities: any opportunities that may be forthcoming to address issues identified in EFFACE for the area being reviewed.
- Threats: any threats that may be forthcoming to address issues identified in EFFACE for the area being reviewed.
- Conclusions: include here any limitations of the SWOT analysis (e.g. if the area addressed within EFFACE covers some issues and not others).

The analysis drew on the relevant outputs of EFFACE. However, additional literature was used where pertinent.

3 Area 1: Data and information management (MS/EU)

Author: Andrew Farmer, IEEP

3.1 Introduction

Good information and data on environmental crime is important in order to help understand the extent of environmental crime, its impacts and where action to tackle that crime may be most effective. Data and information is central to evidence-based enforcement. Without good evidence, resources can be poorly deployed. Further, without information it is not clear what instruments are effective and why. As a result, it may be difficult to design the most suitable mix of instruments to tackle particular types of environmental crime. Thus smart enforcement and development of smart instrument mixes requires information throughout the policy cycle (developing, enforcing and revising the instruments). However, research on environmental crime and enforcement by authorities is hampered by key data and information not being made available.

This chapter examines the lessons from the examination of data and information on environmental crime identified in the course of the research in EFFACE. A specific Work Package on impacts of environmental crime has surveyed information availability for the impacts in different areas of environmental crime¹. Further, some of the case studies undertaken within the project have also identified problems, good practice, etc., with regard to data and information². Research has also examined information on efforts to tackle environmental crime³. They provide examples of the use of information and data on environmental crime, the role of such information and limitations of such information. The work within EFFACE has also highlighted the wide range of different types of information that are needed to understand environmental crime. This information includes that on the extent of illegal activity, the impacts of the environmental crime – environmental, social and economic. The information necessary to reach an understanding of the importance of a particular environmental crime and of targeting of control measures varies for each type of environmental crime. However, in most cases there are significant challenges to gathering the necessary information.

The problems of gathering and interpreting data on environmental crime have been recognised by researchers, enforcement authorities and stakeholders for many years, in many different subject areas and across the globe. For example, authors have identified problems such as incompleteness of data collection, complexity of data, problems of comparability, etc., as issues in environmental crime data.

¹ Illes, A., Newman, S., Watkins, E. Farmer, A. M., Porsch, L., Germani, A.R., Reganati, F., Imbriani, C., Morone, P., Lucifora, A., Bianco, F., Philipsen, N., Kubovicovam K., Rigamonti, A. and Faure, M. (2015). Understanding the damages of environmental crime: Review of the availability of data. Study in the framework of the EFFACE research project, Berlin: Ecologic Institute. Available at www.efface.eu. Also: Farmer, A.M. (2015). Qualitative and monetary analysis of the impacts of environmental crime: Overview. Study in the framework of the EFFACE research project, Berlin: Ecologic Institute. Available at www.efface.eu.

² Farmer, A.M., Germani, A.R. and Sollund, R. (2015). Conclusions of the EFFACE Case Studies. Study in the framework of the EFFACE research project, Berlin: Ecologic Institute. Available at www.efface.eu. Also for individual case studies see: <http://efface.eu/wp4-environmental-crime-case-studies-0>

³ Faure, M., Gerstetter, C., Sina, S., Vagliasindi, G.M. (2015). Instruments, Actors and Institutions in the Fight Against Environmental Crime. Study in the framework of the EFFACE research project, Berlin: Ecologic Institute. Available at www.efface.eu.

(Bricknell, 2010), for example, noted that “the incomplete nature of published data and analyses cannot be used to accurately describe trends in the prevalence of environmental crimes”. Gibbs & Sampson (2008) examined environmental corporate crime and stated “the problem of corporate crime rates has been the subject of debate, speculation and operationalization for decades, largely stemming from the complexity of measuring this type of crime.” White (2010) highlighted the problem of comparability of consistent information across jurisdictions making analysis problematic.

Having noted the problems in gathering data and information, Shover & Routh (2005) have otherwise noted that “The strength of the environmental movement and the attention paid to environmental crime are belied by the paucity of systematic data on its extent and distribution, its perpetrators, and responses to it.”. However, the ‘strength’ of the environmental movement should not be interpreted as strength in tackling environmental crime, for which accurate information is a key prerequisite.

Basic enforcement approaches are data driven. Intelligence-led investigations require intelligence, which is information. Research within EFFACE⁴ has noted the pressures on enforcement institutions for various reasons, but lack of data preventing intelligence-led policing is a specific identified problem.

The key issues in undertaking a SWOT analysis of the result of EFFACE research regarding data and information are:

- For which environmental areas is there information and data on the impacts of environmental crime?
- For which areas of environmental crime is there information of actions to address environmental crime?
- What evidence is there to understand why there are strengths or weaknesses for the above questions, which can help to pinpoint potential opportunities and threats?

3.2 Strengths

Conclusions from EFFACE research has found a number of examples of strengths of data and information for the extent and impacts of environmental crime. The survey of data sources found, for example, the following strengths:

- With regard to the data review for soils, there are data on environmental quality and on social impacts. There is good availability of data at national level where contaminated sites management is centralised.
- With regard to the data review for waste shipment, the key impacts for which information/data are available to some extent are the environment. There are interesting positive developments, including shared systems for tracking waste movements, co-operation and data sharing between MS.
- With regard to the data review for pollution incidents, there are some good data on the quantity of polluting materials dumped or released into the environment, but not on the consequences. An interesting strength on illegal dumping is the creation of systems allowing for citizen reporting of individual incidents across the EU. Citizen-based data is an interesting development.
- With regard to the data review for fisheries, the revision of enforcement of the Common Fisheries Policy by the creation of the European Fisheries Control Agency has strengthened data collection and, importantly, consistency across Member States. Fisheries data has also been enhanced with remote vessel monitoring, so that data on vessel positions is now detailed and robust. This illustrates the opportunities satellite systems provide.
- With regard to logging, there are sources of data that provide information on the number of people arrested and the amount of confiscated timber, data on fluctuations in illegal logging, monetary

⁴ European Union Action to Fight Environmental Crime (EFFACE). 2014. Policy Brief 1: Limitations and challenges of the criminal justice system in addressing environmental crime.

data on loss of government revenues (tax evasion) and the value of imports and exports of illegal timber and the scale of deforestation.

The EFFACE research on fires shows a key strength for data gathering and analysis on this issue at EU level. This is driven by having legislation on the issue. In order to establish a EU-level scheme for harmonised, broad-based, comprehensive and long-term monitoring of European forest ecosystems Regulation (EC) 2152/2003 was enacted. Following its expiration at the end of 2006, the actions provided in that regulation were included in the LIFE+ Multi-Annual Strategic Programme as part of the LIFE+ Regulation (EC) 614/2007. They provide for the implementation of measures that aim to:

- collection, processing and validation of harmonized data;
- a better assessment of data at Community level;
- the improvement of the quality of the data and information collected;
- the development of forest monitoring activities;
- the study of the wildfires and their characteristics;
- the definition of indicators and methodologies to assess the wildfire risks and causes.

The result is a series of MS reports that are consistent with each other that have led to the European Fire Database, which is an important component of the European Forest Fire Information System (EFFIS), containing four types of information: about the time, location, size and cause of the fire. This allows for the identification of fires which are criminal in origin and the ability to compare these to other causes. This level of consistent data at EU level on an area of environmental crime in its wider context is unusual.

The EFFACE research on institutions has produced evidence of information on a variety of capacity determinations of enforcement institutions in Member States and levels of enforcement activity. These studies have not systematically sought to gather all information on these activities, but do provide an initial picture. Transparent information is important to help guide stakeholders in understanding whether sufficient resources are directed at tackling environmental crime. However, it is difficult to interpret some of the data as capacity information has to be compared with information on crime levels to be fundamentally useful.

The EFFACE case studies⁵ demonstrate key elements of good data systems for environmental crime, such as tracking systems (e.g. for waste shipment) or systems for data sharing (e.g. CITES). The cases found that current data management systems can allow the potential for rapid data sharing (e.g. between third countries and EU). Overall, a wide range of different types of information that are needed to understand environmental crime. Examples of good practice found by the cases include:

- The ILVA steel plant case study⁶ illustrated the strength of examining data on the different impacts of environmental crime, including environmental impacts, health impacts and effects on the agriculture sector, alongside data on the economic 'benefits' from the steel plant.
- The illegal wildlife trade case study⁷ found that there are strengths in developing systems to share information between developing and developed countries.
- The Armenia case study⁸ shows the strength of gathering data on the economic context of environmental crime as this is critical for understanding the drivers of crime.

⁵ Farmer, A.M., Germani, A.R. and Sollund, R. (2015). Conclusions of the EFFACE Case Studies. Study in the framework of the EFFACE research project, Berlin: Ecologic Institute. Available at www.efface.eu.

⁶ Lucifora, A., Bianco, F., and Vagliasindi G.M. (2015). Environmental crime and corporate and corporate mis-compliance: A case study on the ILVA steel plant in Italy. Study in the framework of the EFFACE research project. Catania: University of Catania. Available at www.efface.eu.

⁷ Sollund, R. and Maher, J. (2015), The illegal wildlife trade. A Case Study report on the Illegal Wildlife Trade in the United Kingdom, Norway, Colombia and Brazil. A study compiled as part of the EFFACE project. University of Oslo and University of South Wales. Available at www.efface.eu

3.3 Weaknesses

Conclusions from EFFACE research has found a number of examples of weaknesses of data and information for the impacts of environmental crime. The survey of data sources⁹ found, for example, the following weaknesses:

- With regard to the data review for soils, there are few data on quantitative impacts or economic impacts. Data collection the EU level has generally been limited to the collection of “country level” information for local contamination. There is also a large heterogeneity in the gathered data at country level as well as at the higher spatial detail. Further, not all Member States have established a national inventory of contaminated sites. There are even still different and inconsistent definitions across the Member States.
- With regard to the data review for waste shipment, data weaknesses include the geographic spread of data, limited by year, etc.. For example, the limitation concerning the geographic spread of data, is that they are mainly collected on a Regional/ Country level (e.g. UK, Italy). The diversity of data collection systems raise questions on quality and consistency. Data issues on illegal waste activity are internationally recognised to be a problem. EU Member States do not have the means available to estimate the volume of legal waste movements, let alone the illegal percentage. This is largely to do with the fact that most movements are not subject to any pre-notification requirements, which means that the authorities are not consistently informed about this type of activity.
- With regard to the data review for pollution incidents, many of the information sources lack quantitative data, in particular data on costs. There is also a lack of information on whether organised crime is suspected in many cases of pollution incidents, and in some cases the information sources do not delineate between criminal and non-criminal activity.
- With regard to the data review for ozone depleting substances, there are weaknesses as there are no reliable sources of data on international environmental crime. Analyses rely on indicators, such as data on seizures or outcomes of court cases. It is not clear if wide variations between different countries’ statistics indicate illegal trade differences or data gathering differences.
- With regard to marine incidents, there are no systematic studies relating to a large area, and data appears to be available only for brief periods in particular regions. Qualitative data appears to be more abundant than quantitative data.
- With regard to logging, while its was noted above that there are studies with data on a range of issues, these are individual studies and comparability is difficult.

The EFFACE case studies¹⁰ demonstrate a number of weaknesses regarding data and information on environmental crime:

- The localised pollution incidents case¹¹ found that information on landfills that do not conform with the requirements of the EU Landfill Directive has been collected by the European Commission

⁸ Stefes, C. and K. Weingartner (2015). Environmental crime in Armenia: A case study on mining. A study compiled as part of the EFFACE project. Berlin: Ecologic Institute. Available at www.efface.eu

⁹ Illes, A., Newman, S., Watkins, E. Farmer, A. M., Porsch, L., Germani, A.R., Reganati, F., Imbriani, C., Morone, P., Lucifora, A., Bianco, F., Philipsen, N., Kubovicovam K., Rigamonti, A. and Faure, M. (2015). Understanding the damages of environmental crime: Review of the availability of data. Study in the framework of the EFFACE research project, Berlin: Ecologic Institute. Available at www.efface.eu.

¹⁰ Farmer, A.M., Germani, A.R. and Sollund, R. (2015). Conclusions of the EFFACE Case Studies. Study in the framework of the EFFACE research project, Berlin: Ecologic Institute. Available at www.efface.eu.

¹¹ Watkins, E. (2015). A case study on illegal localised pollution incidents in the EU. A study compiled as part of the EFFACE project. London: IEEP. Available at www.efface.eu.

but other data sources are rather informal in nature (e.g. citizen-led initiatives) and, therefore, should not be seen as wholly scientific or representing a completely accurate picture.

- The waste shipment case study¹² found that the extent of information is patchy. There are issues in capturing information on waste along the disposal chain and estimates of the extent of illegal waste shipment are based on leakage estimates, rather than on quantification of what occurs in third countries.
- The Kosovo case study¹³ found severe limitations on basic data collection in Kosovo on the extent and distribution of illegal waste dumps due, for example, to basic capacity problems.

3.4 Opportunities

There is no coherent, overarching opportunity to improve data and information in relation to environmental crime. However, there are a number of specific and cross-cutting opportunities that could deliver significant improvements and so help in the fight against this type of crime and deliver protection of health, environment and social and economic interests.

Perhaps more important than specific legal and policy initiatives, the principle opportunity relating to data and information are the developments in information systems. Recent software and hardware developments enable far better tracking of objects, real-time data transmission and extremely rapid exchange of information across the globe. Further, data management systems increasingly allow the processes of vast and complex amounts of data. Within the EU, developments in IT opportunities is leading to new ideas for information exchange.

These developments can help overcome barriers to effective control of environmental crime, such as:

- Rapidly moving information from detection to enforcement.
- Exchange of information between developing and developed countries
- Being able rapidly to analyses large databases to seek out identifiers of criminal organisations, activities, etc. (e.g. shipping manifests).
- Changing enforcement strategies and deployment of resources quickly in response to changing criminal patterns.
- Providing information for businesses and consumers to help avoid activities and products sourced from criminal activity.

The EUTR CITES and money laundering EFFACE case study¹⁴ illustrates the opportunities from data sharing. Where EU Member States have statistically significant CITES imports, there are relatively well managed flows of information/activities between relevant enforcement departments. The case illustrates it is the establishment of databases in Member States that can be shared with enforcement bodies in other Member States that presents a major opportunity to share timely data on companies, etc., operating in those countries and importing to the EU, thus providing the basis for tracking and monitoring.

¹² Geeraerts, K., Illes A. and J-P Schweizer (2015). *Illegal shipment of e-waste from the EU: A case study on illegal e-waste export from the EU to China*. A study compiled as part of the EFFACE project. London: IEEP. Available at www.efface.eu

¹³ Fajardo, T. (2015), *The EU's promotion of environmental protection in Kosovo. A Case Study on the Protection of the Environment through Criminal Law in Kosovo*. A study compiled as part of the EFFACE project. Granada: University of Granada. Available at www.efface.eu

¹⁴ Saunders, J. and J. Hein. (2015). *EUTR CITES and money laundering: A case study on the challenges to coordinated enforcement in tackling illegal logging*. A study for the EFFACE project. Chatham House: London. Available at www.efface.eu

The lessons of, for example, the last decade are that it is very hard to predict where information systems development might lead even in the near future. However, opportunities to address weaknesses in data and information through such developments are very likely to arise.

The opportunities at a policy level do not seem to be particularly around legal change, but about implementation decisions and support systems. For example, the forthcoming review of Directive 2008/99/EC on the protection of the environment through criminal law (Environmental Crime Directive, ECD) is focused on the scope of the directive, role and harmonisation of sanctions, etc. It is not about the detail and coherence of data collection and reporting.

The European Commission DG ENV is taking a serious look at the nature of reporting across the environmental acquis, alongside the European Environment Agency. This is not specific to environmental crime, but will encompass at least some key environmental crime issues. There are various strands to this, such as the spatial dimension (driven by the cross-cutting INSPIRE Directive¹⁵) as well as simplification concerns to reduce an increasing information burden. INSPIRE establishes an “infrastructure for spatial information in Europe to support Community environmental policies”¹⁶. It does this by requiring (in secondary EU law) Member States to adopt common Implementing Rules (IR) are adopted in a number of specific areas (Metadata, Data Specifications, Network Services, Data and Service Sharing and Monitoring and Reporting) to “ensure that the spatial data infrastructures of the Member States are compatible and usable in a Community and transboundary context”. The rules are built around 34 ‘themes’, which cover administrative structures, subject areas, etc., although there is no specific crime theme.

A key issue is what information is to be required by EU law on state of environment and on pressures. This is of importance for environmental crime as an incorrect balance of data collection can lead to an understanding of crime levels, but not their impact, or evidence of environmental damage with poor understanding of the criminal activities driving this.

The likely outcome of the current debate at EU level is to promote systems to enhance data sharing between Member States and between Member States and EU institutions. The lessons from EFFACE research are that improve data sharing is a critical factor for success in understanding environmental crime. For example, the illegal wildlife trade case study found that the complexity of the illegal wildlife trade has raised a number of challenges for data gathering and sharing and some actions have been taken to address this. Shared information systems (rather than sharing of information between separate systems) are a further opportunity and a single system to track waste movements shared by several Member States is a good example of this.

3.5 Threats

The section above identifies a number of weaknesses in relation to data and information on environmental crime. Clearly, the continuation of such weaknesses would constitute significant threats.

There is a key overarching threat to data and information gathering on environmental crime in Europe – that of continuing public budget constraints. Data gathering, analysis, systems development, etc., are resource intensive activities. The weaknesses described above highlight that some data problems are due to insufficient data gathering. Thus not only are budget cuts a threat to current levels of data collection, the cuts threaten cases where data gathering is already insufficient.

It is to be noted that some IT systems developments do provide opportunities for efficiency gains in data gathering, processing and storage. For example, inspectors can now record inspection conclusions directly

¹⁵ Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE).

¹⁶ For information on INSPIRE see: <http://inspire.ec.europa.eu/index.cfm>

onto tablets during inspections, with the data being directly uploaded into data systems, rather than doing this on return to the office, so saving costs. However, in many cases efficiency gains are more than offset by budget reductions.

It is also important to note that the Aznalcollar and Kolontar mining accidents EFFACE case¹⁷ found that several important documents relating to the case have been classified by the Hungarian Government as confidential. The Hungarian authorities have stated that they will provide these documents once the courts adopt their decisions on the case. However, the failure to provide such information to the public at this stage is a threat to open data and information.

3.6 Conclusions

Good data on levels of crime, causes, impacts, change over time, etc., is necessary in order to focus enforcement activity and to understand the importance of criminal pressures on the environment compared to other pressures. However, the research within EFFACE has found severe limitations on delivering this. Often good data are limited to examples and cases and are rarely systematic. There are possible opportunities to improve this situation. However, data gathering is resource intensive and the current pressures on public budgets will hamper the direction of additional resources to this issue. The strengths, weaknesses, opportunities and strengths are summarised in the table below.

Strengths	Weaknesses
<ul style="list-style-type: none"> • The importance of data and information is well understood by enforcement authorities • There are some examples of good data for crime levels and some impacts • There are precedents for working EU level data bases on environmental crime and its impacts 	<ul style="list-style-type: none"> • There are major data gaps in most areas of environmental crime • Data on many aspects of impacts are often lacking • Shared data systems at EU level are not available for many areas of environmental crime • For most areas there is no legal obligation for transmission of data on environmental crime to the EU level
Opportunities	Threats
<ul style="list-style-type: none"> • Developments in IT software and hardware will improve efficiency, ability to share data, etc. • Current review of EU information and reporting may allow for greater emphasis on data for environmental crime. 	<ul style="list-style-type: none"> • Reductions in public budgets threaten data gathering, investment in information systems, etc. • Occasions where analyses of events are not made publicly available

¹⁷ Fajardo, T, Fuentes, J. (2014), The Aznalcollar and the Kolontar Mining Accidents: A case study on mining accidents and the criminal responsibility of operators and administrations. A study compiled as part of the EFFACE project. Granada: University of Granada and University of Jaen. Available at www.efface.eu

4 Area 2: Further harmonisation of substantive environmental criminal law at EU level (excluding sanctions)

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4.1 Introduction

The European Union has developed a comprehensive system of criminal law harmonisation with regard to defining criminal offences in the field of environmental crime. Following two landmark rulings by the Court of Justice of the European Union (the rulings on the legality of EU third pillar law on environmental crime and ship-source pollution), where the Court stated expressly that the protection of the environment is an essential objective of the European Union, two Directives- on environmental crime and ship-source pollution- have been adopted and are currently in force. The Directives introduce the criminalisation of a wide range of conduct related to environmental crime and at times extend criminalisation beyond the remit of international law. This is in particular in the case of the ship-source pollution Directive, which has extended criminalisation to negligent conduct. Such criminalisation goes beyond international standards in the field (in particular the requirements of the MARPOL Convention). The Court of Justice has confirmed in its landmark ruling in *Intertanko* that the EU approach is legally justified and confirmed the emergence of the European Union as a strong global actor in the field. The introduction of an EU criminalisation framework is backed up by detailed EU rules on environmental liability (including the Environmental Liability Directive) and by the inclusion of environmental crime- as a form of serious crime- within the remit of key EU agencies in the field of criminal justice including Europol, Eurojust, and- to the extent relevant- OLAF.

Notwithstanding these developments, which have resulted in the strengthening of the EU criminal law framework in the field of environmental crime, there is room for improvement. The introduction of new legal instruments in the field of environmental criminal law raises questions of consistency and coherence between these instruments and pre-existing legal instruments in the field of environmental protection and in particular the environmental liability Directive. Focus must be placed in this context on the implementation of these instruments in EU Member States, and whether such implementation results in consistent outcomes in national law and legal certainty. The lack of legal certainty may also be a weakness in the specific EU Directives on environmental crime which define criminalisation by reference to other secondary law instruments (this is in particular in the case of the Directive on environmental crime). There is also a need to take a 'big picture' approach and address existing gaps and inconsistencies in EU law on environmental crime. Key areas of priority in this context are: the strengthening of the legal framework on the links between environmental crime and organised crime (in particular by considering the introduction of express criminalisation at EU level of wildlife trafficking and organised trafficking in waste); making an express link between environmental criminal law and anti-money laundering law; and clarifying the relationship between criminal and administrative law in the field of the protection of the environment. In addition to the need to address these weaknesses at the level of substantive criminal law, effort must be made to raise awareness of environmental crime and enhance the effectiveness and efficiency of work in the field within EU criminal justice agencies, and in particular Eurojust. The entry into force of the Treaty of Lisbon provides a number of opportunities to address these weaknesses.

4.2 Strengths

The European Union has developed a comprehensive system of criminal law harmonisation with regard to defining criminal offences in the field of environmental crime.

- EU criminal law harmonisation

Following two landmark rulings by the Court of Justice of the European Union (the rulings on the legality of EU third pillar law on environmental crime and ship-source pollution), where the Court stated expressly

that the protection of the environment is an essential objective of the European Union,¹⁸ two Directives- on environmental crime and ship-source pollution- have been adopted and are currently in force. The Directives introduce the criminalisation of a wide range of conduct related to environmental crime.¹⁹

- The EU as a global actor

The Directives at times extend criminalisation beyond the remit of international law. This is in particular in the case of the ship-source pollution Directive, which has extended criminalisation to negligent conduct. Such criminalisation goes beyond international standards in the field (in particular the requirements of the MARPOL Convention). The Court of Justice has confirmed in its landmark ruling in *Intertanko* that the EU approach is legally justified and confirmed the emergence of the European Union as a strong global actor in the field.²⁰

- The combination of EU criminal law with non-criminal law (including administrative law) measures

The introduction of an EU criminalisation framework is backed up by detailed EU rules on environmental liability (including the Environmental Liability Directive).

- The inclusion of environmental crime within the scope of the work of EU criminal justice agencies

Environmental crime is included- as a form of serious crime- within the remit of key EU agencies in the field of criminal justice. The annex to the Europol 2009 Decision includes within the areas of competence of Europol environmental crime, but also more specific areas of crime including illicit trafficking in endangered animal species and illicit trafficking in endangered plant species and varieties. These areas of crime also form part of the competence of Eurojust (Article 4(1)(a) of the Eurojust Decision).

4.3 Weaknesses

Notwithstanding these developments, which have resulted in the strengthening of the EU criminal law framework in the field of environmental crime, there is room for improvement.

- Inconsistency and lack of coherence between EU criminal law and EU administrative law on the protection of the environment

The introduction of the two Directives on environmental crime and ship-source pollution raises questions of consistency and coherence between these instruments and pre-existing legal instruments in the field of environmental protection and in particular the environmental liability Directive. A key question in this context is the relationship between criminal law and non-criminal law enforcement avenues to achieve effective implementation of the objective of environmental protection.

- Lack of legal certainty

The question arises of whether the implementation of the EU enforcement instruments in the field of the protection of the environment results in consistent outcomes in national law and legal certainty. The lack of legal certainty may also be a weakness in the specific EU Directives on environmental crime which

¹⁸ See V. Mitsilegas, *EU Criminal Law*, Hart Publishing, 2009, chapter 2.

¹⁹ Mitsilegas V. Fitzmaurice M. and Fasoli E. (2015) *Analysis of Legal Instruments Relevant to Fighting Environmental Crime*. Study in the framework of the EFFACE research project, London: Queen Mary University of London. Vagliasindi, G.M. (2015), *Directive 2008/99/EC on Environmental Crime and Directive 2009/123/EC on Ship-source Pollution*. Study in the framework of the EFFACE research project, Catania: University of Catania.

²⁰ Mitsilegas V. Fitzmaurice M. and Fasoli E. (2015) *Analysis of Legal Instruments Relevant to Fighting Environmental Crime*. Study in the framework of the EFFACE research project, London: Queen Mary University of London.

define criminalisation by reference to other secondary law instruments (this is in particular in the case of the Directive on environmental crime).

- Gaps in the law- substantive criminal law

There is also a need to take a 'big picture' approach and address existing gaps and inconsistencies in EU law on environmental crime. A key gap in this context is the lack of an express link between measures addressing environmental crime and measures addressing organised crime more broadly- including the lack of express criminalisation at EU level of wildlife trafficking and organised trafficking in waste; the absence of an express link between environmental criminal law and anti-money laundering law; and the lack of clarity the relationship between criminal and non-criminal (including administrative) law in the field of the protection of the environment.

- Weaknesses in investigation and prosecution of environmental crime at EU level

In addition to the need to address these weaknesses at the level of substantive criminal law, effort must be made to raise awareness of environmental crime and enhance the effectiveness and efficiency of work in the field within EU criminal justice agencies, and in particular Eurojust.

4.4 Opportunities

The entry into force of the Treaty of Lisbon provides a number of opportunities to address these weaknesses. In particular:

- Use of Article 83(1) TFEU to address gaps in the law

Article 83(1) TFEU confers upon the European Union competence to define criminal offences and adopt criminal sanctions in the field of conduct related to 'securitise' criminal law including organised crime. Article 83(1) can be used as a legal basis for the development of further EU criminal law measures on wildlife trafficking and organised trafficking in waste. It can also be used in conjunction with Article 83(2) TFEU, which introduces a model of 'functional criminalisation' at EU level, to introduce a list of aggravating circumstances related to organised crime in the general EU instruments on the protection of the environment in the field of criminal law.²¹ Both paragraphs of Article 83 TFEU can be used as legal bases for the development of further EU criminal law on environmental crime.²²

- Clarifying the relationship between environmental criminal law and anti-money laundering law- internal aspects

As has been argued forcefully in the case-study on illegal logging, one of the key gaps in the current legal framework is the lack of an express link between environmental criminal law and anti-money laundering law.²³ This hinders the effectiveness of environmental criminal law both within the EU and at the level of law enforcement co-operation with third states, as it is not always clear that proceeds from environmental offences are considered to be proceeds of crime for the purposes of anti-money laundering law. These gaps can be addressed by revising EU anti-money laundering law to include express references to specific environmental offences as money laundering predicate offences. This move would enhance legal certainty in the implementation of anti-money laundering law at national level among EU Member States.

²¹ On the development of EU competence to criminalise under Article 83(2) TFEU see V. Mitsilegas, 'EU Criminal Law Competence After Lisbon: From Securitised to Functional Criminalisation' in D. Acosta and C. Murphy (eds.), *EU Security and Justice Law*, Hart, 2014, pp.110-129.

²² See Grasso, G., Sicurella, R., Scalia, V. (2015). Articles 82-86 of the Treaty on the Functioning of the European Union and Environmental Crime. Study in the framework of the EFFACE research project, Catania: University of Catania.

²³ Saunders, J. and J. Hein, *EUTR CITES and money laundering: A case study on the challenges to coordinated enforcement in tackling illegal logging. A study for the EFFACE project*. Chatham House: London.

- The European Union as a global actor in clarifying the relationship between environmental criminal law and anti-money laundering law

These internal EU developments should be coupled with the emergence of the EU as a global actor in the field, by lobbying for the amendment of international hard and soft law instruments (in particular the 40 Recommendations of the Financial Action Task Force (FATF)) to require states to include specific environmental offences as predicate offences in domestic criminal law on money laundering. These developments would ensure a global level-playing field which would contribute towards effective international co-operation.

- Ensuring legal certainty in EU law on environmental crime

The current EU Directives on environmental criminal law have introduced criminalisation in a complex manner. This is the case in particular with the environmental crime Directive, which introduces criminalisation by reference to a plethora of other instruments of EU secondary law on the protection of the environment. From a criminal law perspective, this approach presents challenges for legal certainty and the principle of legality as enshrined in Article 49(1) of the Charter of Fundamental Rights.²⁴ It also renders the task of transposition of the criminal law provisions in Member States complex and may lead to inconsistencies in implementation. The entry into force of the Lisbon Treaty- and in particular Article 83(2) TFEU- enables the Union legislator to revise the relevant Directives in order to introduce greater legal certainty. This can be done following the evaluation of the implementation of the Directives by the Commission.

- Clarifying the relationship between EU criminal law and EU administrative law on the protection of the environment

The current EU legal framework on the protection of the environment consists of new criminal law instruments (the Directives on environmental crime and ship-source pollution), which apply in addition to extensive EU administrative law provisions in the field, including in particular the environmental liability Directive. The entry into force of the Lisbon Treaty, and in particular the introduction of Article 83(2) TFEU, provides a first-class opportunity to consider and clarify the relationship between EU criminal and administrative law in the field of environmental protection, and make choices as to which conduct should be treated most appropriately as criminal and which conduct should be treated most appropriately as non-criminal (including administrative) infractions at EU level. This clarification could ensure consistent approaches on the protection of the environment in Member States and contribute towards the respect of the principle of proportionality in criminal offences and sanctions enshrined in Article 49(2) of the Charter.²⁵ EU institutions have embarked on a similar exercise post-Lisbon in the field of market abuse, where two parallel legal instruments- an administrative law Regulation and a criminal law Directive- have been adopted.

- Strengthening the role of Eurojust in the fight against environmental crime

The importance of the need to ensure effectiveness in the enforcement of environmental criminal law has been highlighted by Eurojust in a recent Report.²⁶ There is further scope to enhance the role of Eurojust in the fight against environmental crime. One way forward is the prioritisation of the fight against

²⁴ On the principle of legality, see V. Mitsilegas, 'Article 49 - Principles of Legality and Proportionality of Criminal Offences and Penalties', in S. Peers, T. Hervey, J. Kenner and A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart/Beck, 2014, pp.1351-1373.

²⁵ On the principle of proportionality, see V. Mitsilegas, 'Article 49 - Principles of Legality and Proportionality of Criminal Offences and Penalties', in S. Peers, T. Hervey, J. Kenner and A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart/Beck, 2014, pp.1351-1373.

²⁶ Eurojust, Strategic Project on Environmental Crime, Report finalised in October 2014.

environmental crime by Eurojust itself, a trend which can be discerned in the development of the workload of Eurojust in recent years. The Treaty of Lisbon provides further opportunities more broadly by providing a legal basis- Article 85 TFEU- which enables the strengthening of the powers of Eurojust, most notably in empowering Eurojust to initiate investigations in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases (Article 85(1)(a)). Environmental crime would fall within this scope. Negotiations on a post-Lisbon Regulation on Eurojust are currently under way, but these are conducted in parallel (and potentially in the shadow of) negotiations to establish a European Public Prosecutor’s Office (EPPO).²⁷

- Clarifying the role of the European Public Prosecutor’s Office (EPPO) in the field of environmental crime

A key element of EU post-Lisbon action in the field of criminal justice has been the tabling by the Commission of a proposal for a Regulation for the establishment of an Office of a European Public Prosecutor (EPPO), which has resulted in lengthy negotiations in the Council. Although its precise form and structure is yet to be determined, the establishment of an EPPO will be a major innovation in EU criminal law in transferring powers of investigation and prosecution from the national to the supranational level. The mandate of the EPPO will consist in the investigation and prosecution of offences related to fraud against the Union’s financial interests. Aspects of environmental crime may be included in the scope of the EPPO if they are considered to be ‘ancillary offences’ related to fraud – however the definition and scope of such ‘ancillary offences’ is currently under negotiation. At a later stage, Article 86(4) TFEU allows for the extension of the mandate of the EPPO to include serious crime having a cross-border dimension. It is thus likely that, if this provision is used, that environmental crime will fall expressly within the mandate of the EPPO.

4.5 Threats

The main threat for the future development of EU criminal law responses for the protection of the environment is the persistence of legislative and policy inertia in the field of EU criminal law more broadly. Following the ambitious Stockholm Programme on Europe’s Area of Freedom, Security and Justice, its successor Conclusions of June 2014 were markedly less ambitious, focusing largely on the transposition of EU criminal law rather than on the adoption of new EU criminal law measures.²⁸ This approach may reflect a legislative fatigue from the part of Member States, but may be detrimental in resulting in a lack of prioritisation of concrete EU legislative action to tackle specific gaps and deficiencies in EU environmental criminal law. The Commission seems to have attached great priority in the negotiations on the establishment of a European Public Prosecutor’s Office (EPPO) and there is the danger that other developments on substantive criminal law- but also proposals on the future development of Eurojust, which can play a decisive role in the fight against environmental crime- are overshadowed in this context.

4.6 Conclusions

The following table summarises the strengths, weaknesses, opportunities and threats

Strength	Weaknesses
<ul style="list-style-type: none"> • Comprehensive legal framework on EU criminal law harmonisation • Emergence of the EU as a global actor in 	<ul style="list-style-type: none"> • Inconsistency and lack of coherence between EU criminal law and EU administrative law on the protection of

²⁷ See Grasso, G., Sicurella, R., Scalia, V. (2015). Articles 82-86 of the Treaty on the Functioning of the European Union and Environmental Crime. Study in the framework of the EFFACE research project, Catania: University of Catania.

²⁸ European Council 26/27 June 2014, Conclusions, doc. EUCO 79/14, Brussels, 27 June 2014.

<p>the field of environmental criminal law</p> <ul style="list-style-type: none"> • Combination of EU criminal law with administrative law • Inclusion of environmental crime within the scope of the work of EU criminal justice agencies 	<p>the environment</p> <ul style="list-style-type: none"> • Lack of legal certainty • Gaps in the law- substantive criminal law • Weaknesses in investigation and prosecution of environmental crime at EU level
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Opportunities	Threats
<ul style="list-style-type: none"> • Use of Articles 83(1) and 83(2) TFEU to address gaps in the law • Clarifying the relationship between environmental criminal law and anti-money laundering law • Ensuring legal certainty in EU law on environmental crime • Clarifying the relationship between EU criminal law and EU administrative law on the protection of the environment • Strengthening the role of Eurojust in the fight against environmental crime • Clarifying the role of the European Public Prosecutor's Office (EPPO) in the field of environmental crime 	<ul style="list-style-type: none"> • Persistence of legislative and policy inertia in the field of EU criminal law • Danger that developments on substantive criminal law are overshadowed by negotiations on the EPPO

5 Area 3: System of sanctions (administrative vs. criminal vs. civil proceedings at MS/EU level)

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5.1 Introduction

This chapter presents a SWOT analysis of the system of sanctions that currently applies in several EU Member States and at EU level. Earlier EFFACE research²⁹ revealed that a variety of questions arise that can influence the effectiveness of a sanctioning system.

One relevant question is whether the sanctions are of an *administrative, criminal or civil nature*, and how the choice of the particular enforcement regime may affect the effectiveness of the sanctioning mechanism (1). A second question relates to the *nature and magnitude of the main sanctions*, and more particularly to the question whether they can be considered to be “effective, proportional and dissuasive”, as is often mentioned in the case law of the CJEU and in many directives and regulations (2). A third question relates to sanctions other than the main sanctions, more particularly the *complementary sanctions aimed at repairing past harm or preventing future harm*. This concerns for example a duty to remove waste that was illegally deposited or a prohibition to use a polluting installation further in the future. (3). Finally, when addressing strengths and weaknesses of the application of administrative and criminal sanctions for environmental crime, one may have to *distinguish between the EU level and the Member State level* (4). The three questions mentioned above (optimal mix of instruments; effective, proportional and dissuasive nature of sanctions; and presence of complementary sanctions) will be reviewed systematically in the following SWOT-analysis. The fourth element (whether the results are different for the EU-level or for the Member States) will not be discussed separately. When dealing with the three separate questions we will always start from the perspective of a Member State (based on the results of WP2); after that we will point out whether there are any particular issues as far as the EU-level is concerned.

These are four aspects of the sanctioning system that may crucially affect the effectiveness of an environmental criminal enforcement system, as was also stressed in the EFFACE report on ‘Actors, Instruments and Institutions’.³⁰ The SWOT analysis below will address the comparative advantages of criminal versus administrative sanctions, and to some extent civil remedies as well. The issue of environmental liability will be addressed separately in policy area 7 of the SWOT analysis. Furthermore, a crucial question throughout our SWOT analysis on the effectiveness of sanctions is whether, in the event that some weaknesses would be discovered at the Member State level, this would warrant a further harmonization of criminal sanctions at EU level.

The SWOT analysis performed here will review the strengths and weaknesses of sanctioning systems, and it will identify key opportunities to address those weaknesses and threats to do this, including legal opportunities, limits and views to harmonization of sanctions at EU level, as was just mentioned. The insights for our analysis mostly follow from earlier EFFACE reports, more particularly the country reports published in the context of WP2 and the case studies that were performed in WP4. In addition, where

²⁹ See Faure, M., Gerstetter, C., Sina, S., Vagliasindi, G.M. (2015). Instruments, Actors and Institutions in the Fight Against Environmental Crime. Study in the framework of the EFFACE research project.

³⁰ Faure, M., Gerstetter, C., Sina, S., Vagliasindi, G.M. (2015). Instruments, Actors and Institutions in the Fight Against Environmental Crime. Study in the framework of the EFFACE research project, 54-58.

appropriate, we consulted relevant literature and policy documents related to environmental crime to further refine the SWOT analysis.

After this introduction this report will identify the strengths (2), weaknesses (3), opportunities (4) and threats (5), according to a traditional SWOT analysis.

5.2 Strengths

5.2.1 More administrative sanctions in the instrument mix

When addressing the question of the optimal enforcement mix (administrative/criminal/civil), one could consider the fact that in many Member States enforcement of environmental regulation is no longer solely based on the criminal law a strength. The overview of legal systems shows that administrative authorities have the competence to impose measures aiming at a speedy remediation of a particular environmental problem. In countries such as Germany, France and Sweden administrative fines (or fees) can be imposed. This increasing move towards the use of administrative fines (referred to in the UK as civil sanctions) can be welcomed since it can contribute to decriminalization (making criminal law less necessary) and, moreover, it may enable some enforcement action also where the expensive criminal law (because of lacking resources) may not intervene. The enforcement via criminal law is costly, inter alia as a result of the high standard of proof and the costly procedure, but also because the penalties themselves may be costly (more particularly when imprisonment is used). The increasing reliance, not only on the criminal law, but also on administrative sanctions and more particularly administrative fines, can hence be considered as a strength in those Member States that show that trend.³¹ Moreover, this is largely in line with suggestions made in that respect in the literature.³²

It should be mentioned that this strength (i.e. equally recognizing the importance of administrative sanctions, more particularly fines, and reducing criminalization) is not available at the EU level. At the EU level, Directive 2008/99 on the protection of the environment through criminal law relies solely on criminal law.³³

5.2.2 Often effective sanctions in statutes

Another strength when addressing Member State law is the fact that in the legislative framework of most Member States, substantial sanctions are available (at least on paper) for those who commit environmental crime, which certainly can be considered “effective, proportional and dissuasive”. The legislator usually allows the court to choose between applying either a fine and/or imprisonment, which allows efficient flexibility to the court to adapt the sanction to the harm done and to the perpetrator and thus to make the sanction effective, proportional and dissuasive. In some Member States the legislator, moreover,

³¹ Concerning the sanctions mix in illegal shipment of waste matters, see the Project Report from the IMPEL-TFS Threat Assessment Project: the Illegal Shipment of Waste among IMPEL Member State, p. 28. Available at <http://impel.eu/wp-content/uploads/2010/02/2006-x-Threat-Assessment-Final-Report.pdf>. (Last visited on 15 March, 2015). The same type of analysis in relation to wildlife and forest offences is carried out in UNODC, “Wildlife and Forest Crime – Analytic Toolkit”, 23-34. Available at http://www.unodc.org/documents/Wildlife/Toolkit_e.pdf. (Last visited on 15 March, 2015).

³² See inter alia Macrory, R.B., “Regulatory Justice: Making Sanctions Effective”, Final Report, London, Cabinet Office, 2006 and Faure, M., Ogus, A. and Philipsen, N., “Curbing Consumer Financial Losses: The Economics of Regulatory Enforcement”, Law & Policy, 2009, vol.31(2), 161-191.

³³ Faure, M., Gerstetter, C., Sina, S., Vagliasindi, G.M. (2015). Instruments, Actors and Institutions in the Fight Against Environmental Crime. Study in the framework of the EFFACE research project, 22-23.

distinguishes between the various protected interests and adapts the statutory penalties accordingly, in compliance with the proportionality requirement.³⁴

The same can again not be said for the EU level, for the simple reason that Directive 2008/99 forces Member States to make criminal penalties available: Article 5 of the Directive provides that Member States shall take the necessary measures to ensure that the offenses mentioned in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties. Specific penalties, i.e. of a particular nature and magnitude, are not determined in the Directive.

5.2.3 Often complementary sanctions

An important element of the effectiveness of an environmental sanctioning system is whether the penalties also provide for the possibility to force the perpetrator to restore harm caused in the past or can prevent future harm.³⁵ There again, Member States' sanctioning systems show strengths in that they do allow the judge to order the reparation of environmental harm and the prevention of future harm. Hence, it is recognized in national law that environmental crime needs more than the 'traditional' sanctions (like the imposition of a fine or imprisonment). Given the specific nature of environmental crime, it is important that sanctions also aim at restoration of harm done in the past and at the prevention of future harm. The country studies conducted in the context of EFFACE show that this is to a large extent the case in Member State law.

Again, as far as the EU level is concerned, it can only be mentioned that Directive 2008/99 does not refer to specific types of (complementary) sanctions, but merely mentions that the offences referred to in Articles 3 and 4 have to be punishable by effective, proportional and dissuasive criminal penalties.

5.3 Weaknesses

To some extent the weaknesses in the sanctioning system are the mirror image of the strengths. The simple reason is that some of the strengths that are identified in particular legal systems are not available in all. Hence, weaknesses can be found at all three levels of the sanctioning system.

5.3.1 Enforcement instrument mix not always optimal

When addressing the optimal mix of enforcement systems (administrative/criminal/civil) at Member State level, an obvious weakness is that whereas some Member States do have possibilities for administrative authorities to impose specific measures, others report that these powers seem either to be missing or are rarely applied. For example, in Poland and Spain, legal doctrine considers the delineation between the administrative and the criminal sanction unclear.³⁶

The same is true concerning the system of administrative fines. In some legal systems, like Italy and Spain, administrative fines play a lesser role.³⁷ This potentially leads to a too high reliance on the criminal law. Moreover, some potential weaknesses of the administrative fining systems have been mentioned. The

³⁴ Although we focus here on the main sanctions, being imprisonment and fines, it should be recognized that many Member States do have alternatives, such as community service, suspended sentences, etc. We will discuss the relevance of complementary sanctions below.

³⁵ Faure, M.G., "Effective, proportional and dissuasive penalties in the implementation of the environmental crime and ship source pollution Directives: questions and challenges", *European Energy and Environmental Law Review*, 2010, 256-778.

³⁶ Faure, M., Gerstetter, C., Sina, S., Vagliasindi, G.M. (2015). Instruments, Actors and Institutions in the Fight Against Environmental Crime. Study in the framework of the EFFACE research project, 77.

³⁷ Faure, M., Gerstetter, C., Sina, S., Vagliasindi, G.M. (2015). Instruments, Actors and Institutions in the Fight Against Environmental Crime. Study in the framework of the EFFACE research project, 79.

danger exists that administrative fines lead to abuses, more particularly when there would be a collusive relationship between the agency and the operator.³⁸

Addressing the EU level, one could hold that the mere reliance of Directive 2008/99 on criminal law would be problematic. The Directive clearly holds in its recitals that only criminal law can “demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or compensation mechanisms under civil law”, but as a result the situations where administrative sanctions (more particularly fines) can also provide an effective deterrent (and hence be considered as effective proportional and dissuasive sanctions) are not addressed in the Directive.³⁹ This has been criticized in the literature in some Member States, like Germany, where legal doctrine held that the strong reliance on the criminal law could lead to an over-criminalization⁴⁰.

5.3.2 Lacking information on proportionality in practice

When addressing the second aspect of the sanctioning system, being the “effective, proportionate and dissuasive” nature of the sanctions, a weakness is the fact that the legislator in some Member States *does* link the sanctions defined in the law to the various protected interests (which was considered as a strength in section 2 above) while this is less clear in other Member States. It was also reported in earlier EFFACE research that there are substantial differences with respect to the statutory maximum penalties in the various Member States. However, it is less clear whether that needs to be qualified as a “weakness”. After all, the statutory maximum says relatively little on the sanctions that are effectively imposed by the judiciary. If in countries with low statutory maximum penalties, the judges would *de facto* impose sanctions close to the maximum, whereas in countries with very high maximum sanctions the judges would impose sanctions that are much lower than the statutory maximum, the end result would not be that different. Information on the sanctions effectively imposed by the judiciary, is, however largely lacking. That can certainly be considered as an important weakness. The problem is that if that type of information is lacking, it becomes very difficult to judge to what extent the entire criminal enforcement system can be considered as “effective, proportionate and dissuasive”.⁴¹

As mentioned, the EU establishes in Directive 2008/99 merely that offences have to be punishable by effective, proportionate and dissuasive criminal penalties, without specifying the nature and extent of the sanctions. Again, we would be reluctant to call this automatically a “weakness” of the sanctioning system at EU level since, as long as Member States do indeed impose effective, proportionate and dissuasive criminal penalties, the sanctioning system should as such not be considered as weak.

5.3.3 Complementary sanctions insufficiently developed?

Turning to the third aspect of an effective sanctioning system, being the complementary sanctions, a weakness could be seen in the fact that some Member States do have an elaborate system of

³⁸ More information on the comparative advantages of criminal and administrative sanctions or civil remedies can be found in UNODC, “Wildlife and Forest Crime – Analytic Toolkit”, 44-45, 135-139. Available at http://www.unodc.org/documents/Wildlife/Toolkit_e.pdf. (Last visited on 15 March, 2015).

³⁹ On the other hand, it is important to consider the action of the CJEU in opening up the possibility of harmonisation of criminal sanctions. An analysis of the Court’s action in these terms regarding waste management issues is available in Dorn N., Van Daele S., Vander Beken T, “Reducing vulnerabilities to crime of the European waste Management industry: the research base and the prospects for policy”. *European Journal of Crime, Criminal Law and Criminal Justice* vol 15(1), 2007, 23-36.

⁴⁰ Faure , M., Gerstetter, C., Sina, S., Vagliasindi, G.M. (2015). Instruments, Actors and Institutions in the Fight Against Environmental Crime. Study in the framework of the EFFACE research project, 58-59.

⁴¹ See on the importance of having information on the sanctions that are imposed in practice: Faure, M. and Svatikova, K., “Criminal or administrative law to protect the environment?”, *Journal of Environment Law*, 2012, 1-34.

complementary sanctions whereas other Member States (probably) do not.⁴² To the extent that particular Member States would lack the possibility to impose sanctions aiming at remedying harm caused in the past or explicitly addressing the prevention of future harm, that could certainly be considered a weakness. However, here also one has to be careful: it may be that in a particular Member State this possibility is not explicitly included in the criminal law, but is qualified differently (e.g. as an administrative or civil sanction). If that were the case, the mere fact that those sanctions are lacking in the criminal enforcement system, should not necessarily be considered as a weakness.

As far as the EU-level is concerned we can be brief: the Directive 2008/99 forces Member States towards criminalisation of specific acts and to impose effective, proportional and dissuasive sanctions. However, the Directive does not mention that this would have to imply sanctions that equally aim at restoration of harm done in the past or prevention of future harm. The notion of effectiveness, required in the Directive, precisely requires the introduction of those complementary sanctions. One could therefore hold that the Directive *implies* the need to have complementary sanctions, but one could consider it a weakness that the importance of complementary sanctions for environmental crime is not mentioned explicitly in the Directive.

5.4 Opportunities

5.4.1 Procedural: actions at different levels

In general, there are ample opportunities to deal with some of the weaknesses that have been identified above, either at the legislative level or through the judiciary.

Member States regularly review the legislation concerning criminal sanctions and may at that occasion take the opportunity of addressing some of the weaknesses identified in section 3. The same may be the case at the EU level. In that respect it is important to note that since the entry into force of the Lisbon Treaty, the EU (based on Article 82(2) of the TFEU) has the possibility to issue rules with respect to the magnitude and nature of sanctions. That may hence be an opportunity, for example when Directive 2008/99 is reviewed.

In addition to possibilities for legislative action, we can point at opportunities to deal with particular weaknesses at the level of the judiciary. For example, through developments in case law, the proportionality of sanctions can be improved, and (necessary and effective) complementary sanctions can be implemented.

In addition to this rather *procedural* perspective on opportunities, one could equally address a variety of options for how to deal with the weaknesses identified above in substance. We will do so by sketching the opportunities, without making recommendations as to how they should be translated into concrete policy options.⁴³ However, since some opportunities were already identified in earlier EFFACE documents (more particularly in relation to WP2), we will identify some specific opportunities as potential remedies for particular weaknesses that were established.

5.4.2 Increasing the use of administrative and civil sanctions

Turning again to the three different aspects of the system of sanctions, a few opportunities (to deal with the weaknesses identified above) could be addressed. Looking first at the choice between administrative,

⁴² Some caution is in place here: the country reports conducted in earlier EFFACE research provided some information on complementary sanctions, but did not have the ambition to provide a comprehensive overview. We therefore do not know with certainty whether particular Member States lack complementary sanctions. However, it is clear that there are substantial differences between Member States as far as the possibility to impose complementary sanctions is concerned.

⁴³ The reason is that this will be done at a later stage in EFFACE.

criminal and civil enforcement at Member State level, an opportunity would be to make (better) use of the possibilities to impose administrative sanctions and more particularly administrative fines. As mentioned before, administrative sanctions can constitute an integral part of an effective sanctioning system and in many Member States the possibility for administrative authorities to impose financial penalties already exists. Yet, another question is whether this should necessarily imply further harmonization at EU level or rather soft law instruments, such as guidelines explaining the opportunities that are provided by administrative sanctions.

When addressing the EU level, an opportunity (although not necessarily a policy recommendation) may be to devote more attention than Directive 2008/99 currently does to the possibility of administrative and civil sanctions to provide effective, proportioned and dissuasive sanctions.

There are also opportunities as far as the design of an administrative sanctioning system is concerned. For example, there is a possibility to impose a day fine (which exists *inter alia* in France), which is due as long as there is no compliance with measures issued by administrative authorities. This could be a particularly strong dissuasive mechanism, guaranteeing that administrative sanctions forcing a perpetrator to execute particular duties are also effectively complied with. Given the fact that some Member States referred to an unclear delineation between administrative and criminal sanctions, an opportunity could consist of providing further guidance (via legislation, guidelines or legal doctrine) on the precise circumstances where either the administrative or the criminal enforcement would be indicated.

Administrative fines have the strong appeal of providing sanctions at relatively low cost, when compared to criminal law. However, a potential danger is that administrative fines would be applied when in fact a criminal sanction would be necessary. An opportunity to deal with that risk consists in building in a control mechanism (as exists in France) consisting of a control by the public prosecutor of any proposal to impose an administrative fine.⁴⁴ Again, this is an opportunity, but not necessarily a policy recommendation. The advantage of such a control system is that the public prosecutor monitors and keeps control of the administrative fining system; the disadvantage is that it may slow down the administrative fining system and thereby also reduce its effectiveness. Whether this control of the public prosecutor is indicated for all situations where administrative fines are imposed, should therefore be subject of further study.

5.4.3 Guidelines to increase the effectiveness of sanctions

The second aspect of well-functioning sanctioning system, being the question whether the fines are effective, proportional and dissuasive, provides various opportunities for reform, largely in order to deal with the weaknesses that were established in section 3 above. To the extent that the main sanctions are low and diverging between legal systems, an opportunity (but not necessarily a policy recommendation) could simply be to increase the statutory sanctions in those legal systems where they are relatively low.⁴⁵ However, we feel some reluctance to consider this opportunity as a recommendation. After all, as mentioned before, the statutory maxima do not necessarily say anything on the sanctions that are imposed in practice. Making such a recommendation without data on the sanctions that are truly imposed (and such data are lacking) does not seem a wise route to go. One opportunity, already mentioned in WP2⁴⁶ is to provide guidelines either to prosecutors and/or to the judiciary, indicating appropriate sanction levels for

⁴⁴ See also Bianco, F., Lucifora, A., Vagliasindi, G.M., (2015), Fighting Environmental Crime in France: A Country Report. Study in the framework of the EFFACE project.

⁴⁵ The Eurojust Strategic Project on Environmental Crime identifies harmonisation of penalties as one of the factors which could improve the fight against environmental crime. See Eurojust, 'Strategic Project on Environmental Crime – Report', 36. Available at http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Strategic%20project%20on%20environmental%20crime%20%28October%202014%29/environmental-crime-report_2014-11-21-EN.pdf. (Last visited on 19 March, 2015).

⁴⁶ Faure, M., Gerstetter, C., Sina, S., Vagliasindi, G.M. (2015). Instruments, Actors and Institutions in the Fight Against Environmental Crime. Study in the framework of the EFFACE research project, 91.

particular crimes. It was equally suggested that similar guidelines could be developed for administrative authorities that impose administrative fines. The advantage of those guidelines would be on the one hand that they do not necessitate statutory change and that they do not bind the judge, but provide information on the range of sanctions that could correspond to the nature of a particular crime. Guidelines could for example relate to the dangerousness of the violation, the environmental harm caused, the intent of the perpetrator, the gain obtained, etc. Those guidelines could also allow the prosecutor or the judge to align the sanctions imposed for environmental crime better to the protected interest, and to correspond better to the proportionality (and effectiveness) of the main sanctions.⁴⁷

Another option, rather than introducing guidelines, is to create databases where prosecutors or judges could obtain information on sentencing practices. In that respect, an important role is to be played by environmental enforcement networks.⁴⁸

This brings us to the question whether such guidelines should be imposed at EU level. Again, that may be an opportunity, but not necessarily a policy recommendation. WP2 did establish that main sanctions are strongly diverging both within and between countries⁴⁹ but we do not know whether that divergence also relates to the sanctions effectively imposed in practice. One should hence be cautious with deducing from this divergence the necessity to either harmonize sanctions at EU level or to impose guidelines concerning the imposition of sanctions on EU level. The relative effectiveness of EU harmonization in this domain is not immediately clear.

5.4.4 Increasing use of complementary sanctions

When turning to the third and final aspect, the use of complementary sanctions, there are undoubtedly opportunities as well. One opportunity is for Member States to increase the possibilities to use complementary sanctions that can aim at additional deterrence (like publication of the judgement and forfeiture of illegal gains). To the extent that it is not the case yet, legislation at Member State level could introduce those complementary sanctions aiming at the restoration of harm done in the past or prevention of future harm. Moreover, the judiciary could be pointed at the importance of using those sanctions in practice. Again, in addition to legislation at Member State level (to the extent that it is needed), there may equally be an opportunity in using guidelines for the prosecutors and judges indicating which type of complementary sanctions should be required (or imposed) under which particular circumstances

5.5 Threats

There are two main threats that could endanger the effectiveness of the sanctioning system generally, and that could equally limit the possibilities to use the opportunities as identified before.

5.5.1 Insufficient support and budget cuts

A first threat is related to an insufficient support of the enforcement actors or institutions within the sanctioning system. This is a realistic threat, especially in times of budget cuts. This could for example lead either to administrative agencies receiving a lower budget for monitoring and inspection or to prosecutors no longer being able to specialize on the prosecution of environmental crime. Hence, environmental crime may no longer be a priority at the enforcement level. Since the entire enforcement chain is dependent on

⁴⁷ A good example of guidelines is the recent advice issued by the UK Sentencing Council, (“Environmental Offences: Definitive Guideline”), available at <https://www.sentencingcouncil.org.uk/publications/item/environmental-offences-definitive-guideline>.

⁴⁸ See on environmental enforcement networks M.G. Faure, P. De Smedt and A. Stas (eds.), *Environmental Enforcement Networks: Concepts, Implementation and Effectiveness*, Edward Elgar, Cheltenham, 2015.

⁴⁹ Faure, M., Gerstetter, C., Sina, S., Vagliasindi, G.M. (2015). *Instruments, Actors and Institutions in the Fight Against Environmental Crime. Study in the framework of the EFFACE research project*, 90.

the well-functioning of all institutions and stakeholders involved, a reduction of efforts at either level could endanger the imposition of effective sanctions at the end of the chain. The system of sanctions, as discussed in this area of the SWOT analysis, is in a way the last phase in the enforcement chain. But effective sanctions can obviously not be imposed if at the earlier phases (inspection, monitoring, prosecution and investigation) no possibilities are available to acquire the information necessary to impose effective, dissuasive and proportional penalties.⁵⁰

5.5.2 Lacking data on enforcement practice

A second threat is related to an issue already mentioned earlier, being the need to have adequate data for any enforcement policy. Earlier EFFACE research⁵¹ established that detailed information on the sanctions actually imposed is largely lacking. It may be clear that any discussion, also on the desirability of more harmonization at EU level, is to a large extent pointless if information on the sanctions effectively imposed by the courts is not available. As we repeatedly argued above, if one only envisages the statutory maximum penalties, this does not say anything on the penalties either imposed by the courts or (via plea bargaining) the prosecutor or the administrative agencies. If one wishes ultimately to analyse the effectiveness of a criminal enforcement sanctioning mechanism, a crucial first step is to obtain information on “what happens with environmental crime”, i.e.: how many crimes are discovered? Through which mechanism (administrative/civil/criminal) does enforcement take place? Which institution (agency? prosecutor? court?) imposes the sanction? What is the precise magnitude of the sanction? Are complementary sanctions imposed as well?

A substantial threat is that this information is currently not sufficiently available, at least not in a systematic manner that would allow a comparison between Member States. Answering the question whether further harmonization at EU level is desirable will hence be difficult. If the threat of lacking data continues to exist, this will not only seriously jeopardize the effectiveness of the enforcement system, but it will also make any further harmonization attempt purely symbolic.⁵²

5.6 Conclusions

From the SWOT-analysis presented in this report it appears that for the three key areas related to sanctions which we identified in section 1 (optimal mix of instruments; effective, proportional and dissuasive nature of sanctions; and presence of complementary sanctions), a number of strengths, weaknesses and opportunities can be discovered. Concerning the optimal enforcement instrument mix, a strength is that in many Member States environmental law enforcement no longer solely relies on the criminal law, but equally uses administrative and civil enforcement. More particularly, the use of administrative fines can be considered as an important alternative to using criminal sanctions. A weakness consists of the fact that this broadening of the enforcement instrument arsenal cannot be seen in all Member States. Moreover, in some cases the delineation between the various enforcement instruments (more particularly administrative and criminal) is not sufficiently clear. That creates an important opportunity as well, especially since at the EU-level there seems to be a (too) high reliance solely on criminalisation which is also criticised in some Member States.

As far as the second aspect is concerned, i.e. whether sanctions are dissuasive, proportional and effective, the analysis is more complicated and hence nuanced. A strength consists of the fact that, at least on paper,

⁵⁰ Note that this threat is strongly related to Area 3 that will address the functioning of enforcement institutions and the cooperation between them.

⁵¹ See Faure, M., Gerstetter, C., Sina, S., Vagliasindi, G.M. (2015). Instruments, Actors and Institutions in the Fight Against Environmental Crime. Study in the framework of the EFFACE research project. See also some of the case studies conducted in the context of WP4.

⁵² Note that this threat is strongly related to policy area 4 that addresses data and information management.

the sanctions that can be imposed in many Member States in relation to environmental crime are serious, consisting of both sizeable fines and imprisonment. However, it is not always clear to what extent the statutory maximum sanctions are related to the legal interests that are protected by the particular criminal provision. Even more problematic is the fact that a SWOT-analysis which would only be based on statutory maxima of sanctions would to some extent be pointless since it says little on the sanctions that are effectively imposed in practice. This leads to an important opportunity, but equally a threat. Surely, the proportionality of sanctions (relating the sanctions that are imposed in practice more strongly to the protected interests and the way in which they were infringed by the environmental crime) could be stimulated e.g. by the use of guidelines which would assist both public prosecutors and the judiciary. However, the threat consists of the fact that data on prosecution policy, the number of violations and the sanctions imposed, are basically lacking. That lack of data may hence endanger the effectiveness of any enforcement policy.

Concerning the third element, the need to impose complementary sanctions in order to have an effective sanctioning mechanism, for environmental crime a strength consists of the fact that many Member States do have the possibility to impose sanctions aiming at the restoration of harm done in the past or the prevention of future harm. The weakness is the mirror image, being that this may not be the case for all Member States. An opportunity would then consist of making a wider use of complementary sanctions. In legal systems where they have not yet been incorporated in legislation, that would be an opportunity for the legislator; in other legal systems guidelines for prosecutors and the judiciary may provide indications on where and in what form complementary sanctions may be an effective reaction against environmental crime.

One crucial threat for any sanctioning system is that sanctions are only imposed at the end of the enforcement chain. Whether sanctions will hence be effective in the total enforcement picture will to a large extent depend upon monitoring, control and inspection activities by the police and inspecting agencies, but also on the activities of (specialised) prosecutors and the judiciary. Especially in time of financial austerity, environmental crime may not receive the highest priority and environmental agencies tasked with enforcement and monitoring may suffer from budget cuts. That could constitute a serious threat to the entire enforcement system and hence also casts a shadow on the effectiveness of sanctions. An important criterion for sanctions to be effective is whether they take into account a high or low probability of detection. Sanctions that would, under normal circumstances (when a sufficient amount of environmental crime is detected) be considered as dissuasive probably are no longer dissuasive when (as a result of budget cuts and lower enforcement efforts) the probability of detection is substantially decreased. That in the end leads to a lower expected cost for environmental crime and hence potentially to underdeterrence. Again, that threat may lead to yet another opportunity, being to use the scarce resources in such a way that enforcement efforts are targeted on those activities where the results and benefits from enforcement may be expected to be the largest. In other words: there are strong opportunities for “smart enforcement”.⁵³

The following table summarises the strengths, weaknesses, opportunities and threats

Strengths	Weaknesses
<ul style="list-style-type: none"> • Increasing use of administrative sanctions in instrument mix • At least on paper, substantial sanctions are available in most MS • Possibility for the judge to order complementary sanctions (reparation of harm and prevention of future harm) 	<ul style="list-style-type: none"> • In some MS the possibility to impose administrative sanctions is limited • EU focuses on criminal sanctions and does not address administrative sanctions in its directives • Lacking information on sanctions and proportionality of sanctions in practice

⁵³ This was precisely the object of the workshop organised within the EFFACE framework jointly with the Flemish High Council for Environmental Enforcement in November 2014.

	<ul style="list-style-type: none"> • Complementary sanctions insufficiently developed in some MS and not addressed in EU directives
Opportunities	Threats
<ul style="list-style-type: none"> • MS and EU regularly review legislation. The TFEU provides the possibility for the EU to issue rules concerning magnitude and nature of sanctions • Make better use of administrative and civil sanctions to support criminal sanctions • Introduce guidelines or databases to prosecutors or judges to increase the effectiveness of sanctions • Increasing use of complementary sanctions where this is not yet the case 	<ul style="list-style-type: none"> • Insufficient support of the enforcement actors within the sanctioning system, inter alia caused by budget cuts and low prioritization of environmental crime • Lacking data on enforcement practice (what sanctions are imposed? by whom? what is the extent of the sanction?)

6 Area 4: Functioning of enforcement institutions and cooperation between them (MS/EU level)

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6.1 Introduction

One issue with the EU's role in implementing environmental law in general and provisions on environmental crime more specifically is that the EU itself does not have the authority to enforce these provisions. Rather, the competent authorities of the Member States perform this task. At the same time, the degree to which the EU's current regulatory framework on environmental crime is effective depends to a significant extent on the degree to which it is properly enforced.

EFFACE research as well as other studies have highlighted that provisions on environmental crime in the Member States are often not used as frequently or consequently as they could be used, reducing their effectiveness for purposes of combating environmental crime. For example, there is evidence that environmental crimes are often not investigated or prosecuted by enforcement institutions (police/customs, prosecutors' offices) and even where environmental crime cases make it into the court, sentences are lenient.⁵⁴

Against this background the present paper looks at the functioning of enforcement institutions and the cooperation between them. This topic has several sub-dimensions:

- 1) A first aspect is the functioning of the criminal enforcement institutions themselves, i.e. the police, prosecutors' offices and criminal courts.
- 2) Moreover, investigating and prosecuting environmental crime within the EU Member States in many countries and situations requires the cooperation between administrative institutions and those charged with investigating and prosecuting crime. The reason is that whether a certain behaviour constitutes an environmental crime is often dependent on whether environment-related administrative rules were complied with or not.⁵⁵ Notably, environmental criminal provisions often stipulate that no crime exists if the behaviour in question is within the terms and conditions of prior administrative permit or otherwise refer to administrative law as the benchmark for whether a certain action is to be considered an environmental crime. This structure is inherent, among others, in the EU's Environmental Crime Directive. Basically, the directive requires Member States to penalise certain types of behaviour that are already in breach of other rules of the EU's environmental acquis. Moreover, and maybe more relevantly, monitoring of environmental compliance is carried out by administrative authorities; therefore, these authorities rather than criminal enforcement institutions such as the police would normally be in the best situation to be aware of infringements and potential environmental crimes and need to pass on this information, for instance, to prosecutors. As a consequence, when looking at the functioning of enforcement institutions working on environmental crime in the EU, one aspect to be considered is the cooperation between administrative authorities and the criminal law enforcement institutions at the national level.
- 3) A third aspect to be considered is the trans-boundary cooperation between criminal enforcement

⁵⁴ Sollund and Maher, "The Illegal Wildlife Trade: A Case Study Report on the Illegal Wildlife Trade in the United Kingdom, Norway, Colombia and Brazil," sec. 4.5.

⁵⁵ Faure et al., "Instruments, Actors and Institutions in the Fight Against Environmental Crime," 71ff.

institutions of the different Member States.⁵⁶ Such cooperation can be overarching and independent of specific cases and consists notably of the involvement of officials in enforcement networks. The main networks of relevance to combating environmental crime at the EU level that currently exist are the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), the EnviCrimeNet, the European Union Forum of Judges for the Environment (EUFJE) and the European Network of Prosecutors for the Environment (ENPE).⁵⁷ Moreover, cooperation can also be more formal, relying on the EU's instruments for police and judicial cooperation, such as the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. A final aspect is the functioning of the EU's institutions for police and judicial cooperation (as far as related to environmental crime). The two relevant institutions in this context are Europol and Eurojust. EUROPOL is the policing agency for the EU with a focus on law enforcement, intelligence collection, analysis and information sharing. Its goal is to assist EU Member States in their fight against serious international crime and terrorism. As a result of the Lisbon Treaty, all EU Member States are automatically members of EUROPOL. Eurojust is an EU agency dealing with judicial cooperation. It facilitates cooperation in investigation and prosecution in criminal matters in all 28 EU Member States. Moreover, EU Member States are also involved in police cooperation as members of Interpol; Interpol is very active on environmental crime issues.

These three aspects will be discussed under the first two subheadings – strengths and weaknesses –, followed by a reflection on opportunities and threats. The first and second of these aspects, the functioning of criminal enforcement institutions and the cooperation between these institutions and authorities in charge applying environmental administrative law, requires a focus on the Member States when analysing the strengths and weaknesses of the current system, very simply because there are no genuine EU enforcement institutions. In this context, and in line with the overall approach of EFFACE, it will not be possible to address the reality of all 28 Member States; rather, the present analysis will mainly draw on the country reports compiled in EFFACE investigating the situation in France, Germany, Italy, Poland, Spain, Sweden and UK. By contrast, when opportunities and threats are analysed, the focus will be on the role of the EU, including the EU's competences. The third aspect – trans-boundary cooperation – will be discussed with a focus on the EU.

It should be noted that the focus of the present analysis is on how enforcement institutions function within a given legislative framework on environmental crime. This means that some aspects that potentially also influence the functioning of these institutions, but are outside their control, are not discussed. One example is the degree to which laws are phrased in a manner that can be easily applied by enforcement officials, e.g. because all relevant legal provisions are integrated in one consistent and coherent legal act rather than spread among many laws or because the definitions used can be easily applied. Another aspect not discussed here is the legal availability of certain procedural competences and investigation techniques (e.g. wire-tapping) and their influence on the effectiveness of preventing and punishing environmental crime. Finally, we do not discuss in this text cases where the regulatory and legislative framework is insufficient and weak in the first place, as has been found, for example, in a case study on environmental crime in the mining sector in Armenia.⁵⁸

⁵⁶ Obviously, there is and also needs to be cooperation between EU and Member State institutions on the one hand and institutions of third countries on the other. However, this is dealt with in the analysis of the EU's external dimension.

⁵⁷ Smith and Klaas, "Networks and NGOs Relevant to Fighting Environmental Crime."

⁵⁸ Stefes and Weingartner, "Environmental Crime in Armenia: A Case Study on Mining."

6.2 Strengths

6.2.1 Criminal enforcement institutions (Member State level)

Some of the parameters that have been identified in EFFACE research and other research so far influencing the performance of criminal enforcement institutions when combating environmental crime are the degree to which they are specialised on environmental crimes⁵⁹, the availability of sufficient resources, the priority given to environmental crime within these institutions, as well as the degree to which such institutions function in an impartial and corruption-free manner.

The issues of specialisation, resource allocation and political priorities are closely related. A consequence of a low political priority attributed to the problem of environmental crime can be a lack of resources allocated to the environmental enforcement system, which also decreases the probability of having specialised police forces, prosecutors and judges. The main EFFACE report on actors, institutions and instruments concludes that

“sufficient resources and specialisation are crucially related to the dissuasiveness and effectiveness of the environmental enforcement system. This can easily be understood. If insufficient capacity is made available for e.g. pro-active monitoring detection rates are likely to fall, and if no specialised prosecutors or judges are available, there is a higher likelihood of dismissals or (wrongful) acquittals. Both phenomena lead to lower probabilities of prosecution and sanctioning and (in case of lacking capacity building of the judiciary) to low imposed fines. Specialisation, so it is often repeated, is necessary at all levels of the enforcement chain (pro-active monitoring by either police or administrative authorities, prosecutor and the judiciary) and will increase the effectiveness of the environmental enforcement system.”⁶⁰

Looking at these parameters, there are some good practice examples within EU Member States:

Degree of specialisation: With regard to the degree to which enforcement institutions are specialised, specialised police forces exist in some of the Member States examined.⁶¹ One prominent example in this regard is France, which has established a specialised inter-institutional unit (OCLAESP) in charge of investigations of environmental crime, public health and doping, whose tasks include the coordination of criminal investigations, the centralisation of information, the exchange of information and to handle international requests for assistance by Europol or Interpol concerning environmental crime⁶². In Spain, there is also a specialised police force for environmental crimes of the Guardia Civil called SERPONA. It is in charge of the protection of soil, water and air, animal welfare and the conservation of fauna.⁶³ In Italy, there are also police forces specialised in certain types of environmental crimes.⁶⁴ Specialised police forces also exist in regions of some Member States with a federal structure where police matters are within the competence of the respective region. One example is the police in Berlin, Germany, which has two divisions

⁵⁹ Specialised knowledge is required, because proving the harmful and illegal nature of a certain activity (e.g. whether a certain substance detected by officials in a container destined for oversea shipment is in fact the declared legal substance or another substance whose export would be illegal), causality between a certain activity and the damage (e.g. in cases of large-scale, diffuse pollution of soil, air or water) as well as the degree of damage done will often require evidence that is scientific in nature, including laboratory analysis or specialist knowledge (e.g. for identifying a certain protected species).

⁶⁰ Faure et al., “Instruments, Actors and Institutions in the Fight Against Environmental Crime,” sec. 3.15.2.

⁶¹ For an overview see Eurojust, “Strategic Project on Environmental Crime,” 23ff.

⁶² Bianco, Lucifora, and Vagliasindi, “Fighting Environmental Crime in France: A Country Report,” sec. 12.

⁶³ Fajardo et al., “Environmental Crime in Spain: A Country Report,” 56.

⁶⁴ Vagliasindi, Lucifora, and Bianco, “Fighting Environmental Crime in Italy: A Country Report,” 43.

that deal exclusively with environmental crimes and in addition has its own Scientific-Technical Department, a unit which is dealing with environmental crimes and supporting the investigating units. Thus, the Berlin criminal agency (LKA) has the awareness, the expertise, the equipment, the experience, and the time necessary to deal with environmental crimes in an appropriate way and therefore can be considered a best practice example, although it may be difficult to transfer these structures to other more centralized countries.⁶⁵

A full-fledged specialisation of the prosecution service exists only in Sweden, where specialised environmental prosecutors are brought together in one service unit which subsequently serves the entire country. Moreover, in the United Kingdom all public authorities, including environmental authorities, have a competence to prosecute environmental cases, meaning that they have specialised technical knowledge on the matters investigated.⁶⁶ In Spain, the Prosecutor's Office at the Supreme Court has a coordinator for environmental crime ("Fiscal de Medio Ambiente y Urbanismo"). It is responsible for the coordination and supervision of the activity of all public prosecutors in relation to environmental crimes.⁶⁷

With regard to the specialization of courts, none of the countries studied had a specialised (criminal) judiciary for environmental crime. Yet there are some examples from the judiciary realm that provide interesting lessons nonetheless: Sweden has a system of environmental courts. They typically try administrative enforcement and not environmental crime cases.⁶⁸ Yet a particular interesting aspect of the Swedish system is that environmental technicians (not necessarily lawyers) are appointed as judges in the court.⁶⁹ In France, within certain courts ("Tribunal de Grande Instance") of Paris and Marseille specialised sections with judges and prosecutors are tasked with examining certain public health cases.⁷⁰ A specific feature of these courts is also that they have specialised assistants (physicians, veterinaries, pharmacists). In the United Kingdom, the lack of specialisation of the courts is to some extent remedied by the fact that specialised environmental agencies are allowed to bring prosecutions directly to the criminal court. The Planning and Environmental Bar Association (PEBA) (an association of lawyers doing environmental and planning law cases) provides expertise in criminal cases to the judge or jury for testing the accuracy of their conclusions.⁷¹

Availability of sufficient resources: With regard to the availability of sufficient resources (financial, staff) among criminal enforcement institutions for dealing with environmental crime, little objective evidence is available; as has been argued in a previous EFFACE study it is also difficult to state in the abstract which amount of funding or resources would be adequate.⁷² Obviously, there is a tendency of institutions – and enforcement institutions present no exception – to feel understaffed, lacking financial resources etc. or at least convey this image publicly to prevent further budget cuts or similar. However, in many EFFACE reports on the situation in individual Member States, the issue of funding is mentioned as a serious issue, exacerbated by the recent financial crisis. A low priority of environmental crimes along the criminal enforcement chain is reported and that too few resources are allocated to the monitoring and investigation

⁶⁵ Sina, "Fighting Environmental Crime in Germany: A Country Report," sec. 12.1.

⁶⁶ Faure et al., "Instruments, Actors and Institutions in the Fight Against Environmental Crime," sec. 3.10.3.

⁶⁷ Fajardo et al., "Environmental Crime in Spain: A Country Report," 57.

⁶⁸ Philipsen and Faure, "Fighting Environmental Crime in Sweden: A Country Report," sec. 12.3.

⁶⁹ Ibid., sec. 16.1.4.

⁷⁰ Bianco, Lucifora, and Vagliasindi, "Fighting Environmental Crime in France: A Country Report," sec. 12.

⁷¹ Mitsilegas, Fitzmaurice, and Fasoli, "Fighting Environmental Crime in the UK: A Country Report," sec. 12.2.

⁷² Faure et al., "Instruments, Actors and Institutions in the Fight Against Environmental Crime," 125ff.

of these crimes within the police and prosecutors' offices.⁷³ With regard to courts, it is questionable whether a lack of staff or financial resources could be an important factor behind the observed lenient sentencing practices. Normally, the amount of work a criminal court needs to invest in a case would depend on the factual and legal complexity of the case, but not on whether the outcome in the end is a severe or lenient – after all a criminal procedure may also end in a finding that an accused person is not guilty. By contrast, a factor that may in some jurisdictions affect the amount of work a judge needs to invest in deciding a case is the maximum sanction stipulated in the law for a certain offence, e.g. because some procedural options for concluding a case that can be more easily implemented may only be available for less severe sanctions.⁷⁴

Environmental crime as a political priority: Obviously, the importance attached to combating environmental crime within the EU Member States is likely to be influenced by political priorities defined at the EU level besides national priorities. One of the objectives of the EU's cooperation on criminal matters is indeed aligning priorities through e.g. strategic documents such as the Stockholm Programme (2010 – 2014). Some aspects of environmental crime have been put higher on the EU's political agenda in recent years, related to the EU's policy cycle for organised and serious international crime.⁷⁵ In particular, the Serious and Organised Crime Assessment (SOCTA) of 2013 that identified environmental crime, notably waste trafficking and trafficking in endangered species, as an emerging threat⁷⁶, was influential in this regard. This was followed by a specific assessment of Europol on environmental crime, also in 2013⁷⁷ as well as specific analysis from both Europol and Eurojust on the enforcement of environmental criminal provisions. At about the same time, certain types of environmental crime received attention from political institutions within the EU. Notably, the European Parliament called in a resolution dating from January 2014 for an Action Plan EU action against wildlife crime and trafficking and proposed a number of measures in this regard.⁷⁸ The Commission, also early in 2014, launched public consultation on wildlife trafficking.⁷⁹ At the same time, the environmental crime directive of the EU was subject to an implementation review by DG Justice of the European Commission. Most recently, the Commission has referred to environmental crime in a Communication on the European Security Agenda, highlighting the importance of cooperation of enforcement agencies in different Member States and pledging support to enforcement networks.⁸⁰ The Commission has also funded several projects doing research on or building networks relating to environmental crime, such as EFFACE or a project to create a European Network against Environmental Crime (ENEC). Wildlife crime has also recently received a measure of political attention in the UK, where in 2014 a high-level conference was held on wildlife crime, resulting in the

⁷³ Ibid., sec. 3.15.2.

⁷⁴ For example, in German criminal law a so called "Strafbefehl" is available for crimes with a maximum sentence of one year imprisonment. The "Strafbefehl" is issued by a criminal court without an oral hearing. It can only impose certain sanctions, excluding a prison sentence of more than one year.

⁷⁵ See Europol, EU Policy Cycle EMPACT, <https://www.europol.europa.eu/content/eu-policy-cycle-empact>

⁷⁶ Europol, "EU Serious and Organised Crime Threat Assessment (SOCTA)," 30ff.

⁷⁷ Europol, "Threat Assessment 2013 Environmental Crime in the EU."

⁷⁸ European Parliament, Resolution on wildlife crime, 15 January 2014

⁷⁹ European Commission, DG Environment, Consultation on the EU approach against Wildlife Trafficking, http://ec.europa.eu/environment/consultations/wildlife_trafficking_en.htm

⁸⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: The European Agenda on Security, 28 April 2015, COM(2015) 185 final, p. 9f.

“London Declaration on the Illegal Wildlife Trade” as well as a follow-up process to this declaration.⁸¹ A country report on the UK also implies that the fact that the public is concerned about wildlife crime may be behind the fact that greater priority is given to this type of environmental crime within the police force.⁸² Altogether, a current strength of the EU’s approach to combating environmental crime is that a certain amount of political attention is given to the topic. However, this does not so far seem to have had much material effect on the work of criminal enforcement institutions, where environmental crime still tends to be considered a low priority (see below, section 3.1).

Impartial and lawful functioning of enforcement institutions: A final factor that may influence how effectively enforcement institutions deal with environmental crime is the degree to which they function in an impartial and corruption-free manner. Obviously, when enforcement institutions cooperate with those perpetrating environmental crime in an illicit manner, deciding either not to prosecute or to award lenient sentences for reasons not provided for in the law, this considerably reduces the effectiveness of enforcement.⁸³ The research conducted by EFFACE so far has not yielded insights that corruption is a decisive factor leading provisions on environmental crime not to be properly enforced within most EU Member States.

Overall, some of the Member States’ criminal systems have been assessed to be fit for purpose in detecting, prosecuting and preventing certain types of environmental crime. For example, existing laws and sanctions relating to fly-tipping/illegal waste dumping in the UK appear to be applied in a reasonably effective way. According to one of the case studies conducted in EFFACE, during the period 2007-2011, the number of prosecutions in England (UK) for this offence rose, with the percentage of successful prosecutions remaining stable over that time period. Based on the fact “that the perpetrators of fly-tipping appear to have been identified in around 51% of cases (based on the number of actions taken)”, the authors of the case study conclude that “it would seem that the system for identifying perpetrators has some degree of success. In addition, the number of fly-tipping incidents fell over the same time period, suggesting that the enforcement/deterrent measures in place have had an impact in reducing the incidence of fly-tipping/illegal waste dumping”.⁸⁴

While the good practice examples identified above are not representative of the majority of Member States, the fact that they exist means that there is scope for other EU Member States and the EU to learn from these examples. This is a strength of the current EU system for combating environmental crime. Equally, the fact that most Member States’ enforcement institutions and judicial institutions appear to function largely in a legal, rule of law manner is a strength of the EU’s system that further policy measure can build on. Finally, the fact that environmental crime currently receives a reasonable degree of political attention at the EU level is a strength; however, it is not clear how long this momentum will be sustained.

6.2.2 Cooperation between criminal and administrative institutions (Member State level)

The issue of cooperation between criminal enforcement and administrative institutions can be expected to exist predominantly in those countries where a clear distinction is made between administrative and criminal law and sanctions in the area of the environment. As noted in an earlier study, in some countries it is either predominantly criminal sanctions that are used or administrative sanctions that exist and/or are

⁸¹ “London Conference on the Illegal Wildlife Trade Declaration.”

⁸² Mitsilegas, Fitzmaurice, and Fasoli, “Fighting Environmental Crime in the UK: A Country Report,” 59f.

⁸³ As discussed elsewhere in this study, there may be good reasons for enforcement institutions not to impose the most severe sanctions, e.g. because they do not want to put a company out of business. Cases where authorities exercise their discretion in a lawful manner are not the situation meant here.

⁸⁴ Watkins, “A Case Study on Illegal Localised Pollution Incidents in the EU,” sec. 5.

used; notably a distinction has been noticed between the traditional approaches of common law systems (reliance on criminal sanctions) and continental law systems (predominant reliance on administrative measures).⁸⁵

In some other EU Member countries the division between administrative and criminal authorities and sanctions exists, but procedures for cooperation are very clear. For example, in France and Sweden administrative environmental authorities have a duty to report violations to the public (criminal) prosecutor.⁸⁶ In Spain, if administrative authorities find during inspections evidence that there may be a criminal activity, the case must be transferred to the criminal authorities.⁸⁷ The country report on Spain conveys a mixed picture, noting that in many areas the cooperation between the prosecutors on the one hand, and regional and local authorities on the other hand, has improved and is quite good and trustful in some areas.⁸⁸ From France, it is also reported that there is good cooperation between the different authorities involved in combating environmental crime.⁸⁹ In England and Wales, the problem of how administrative and judicial/criminal enforcement institutions cooperate appears to be less central, because the environmental authorities have been given the authority to impose criminal sanctions themselves.⁹⁰

A recent survey of Europol among enforcement officials or agencies also resulted in statements from several jurisdictions that there were no problems with cooperation between administrative and criminal enforcement authorities.⁹¹

Thus, it seems that some EU Member States have found ways to overcome or avoid the problem of cooperation between administrative and criminal enforcement authorities, which could be considered a strength of their approach to combating environmental crime. It should be noted that the EU's legislation does not contain obligations for Member States on what institutional arrangements they need to make, leaving this within the discretion of the Member States.

6.2.3 Trans-boundary cooperation

Trans-boundary cooperation is a pre-requisite for effectively combating environmental crime that is trans-boundary in nature, i.e. having links with more than one Member State. Such links can take different forms: they may be personal (i.e. a perpetrator from one Member State committing an environmental crime in a second Member State), they may be due to the nature of the crime (e.g. an environmentally harmful good being transported from one Member State to another or damage extending to several Member States) or may be a result of a perpetrator moving from one Member State to another after a crime has been committed. In principle, the fact that border controls between Member States have been significantly reduced facilitates trans-boundary environmental crimes. This has, in principle, been recognised by the EU and its Member States and institutions and instruments for cooperation have been created. As noted above in the introduction there are several institutions and instruments within the EU whose contribution to effectively combating environmental crime within the EU are important in this context: enforcement networks, formal cooperation on individual cases notably between police forces of different countries using arrangements and instruments for mutual assistances and recognition, and the functioning of the

⁸⁵ Milieu and Huglo Lepage, "Study on Measures Other than Criminal Ones in Cases Where Environmental Community Law Has Not Been Respected in the EU Member States," 8ff. The statement referred to the situation before the EU's Environmental Crime Directive came into force.

⁸⁶ Faure et al., "Instruments, Actors and Institutions in the Fight Against Environmental Crime," sec. 3.9.2.

⁸⁷ Fajardo et al., "Environmental Crime in Spain: A Country Report," 56.

⁸⁸ Ibid., 58.

⁸⁹ Bianco, Lucifora, and Vagliasindi, "Fighting Environmental Crime in France: A Country Report," 49.

⁹⁰ Mitsilegas, Fitzmaurice, and Fasoli, "Fighting Environmental Crime in the UK: A Country Report," 61ff.

⁹¹ EnviCrimeNet, "Intelligence Project on Environmental Crime," 12.

relevant supra-/international institutions for police and judicial cooperation (as far as related to environmental crime) that the EU has created or that EU Member States are actively involved in.

On the role of enforcement networks in strengthening the enforcement of environmental (criminal) law, one of the EFFACE studies states the following:

- “The main benefits of cooperation through environmental enforcement networks include the establishment and intensification of contacts between professionals and practitioners on the strategic, technical and operational level, operational aspects and the sharing of best practices.⁹² Network members have expressed that personal relationships established at network events improved cooperation between agencies both nationally and internationally. Regarding operations, network contacts are regarded as highly valuable, enhancing the ability to work together on cross-jurisdictional investigations and enforcement matters. For example, in cases of illegal waste shipment there is always at least one other country involved, which requires liaising with witnesses and making inquiries in other countries. In networks where prosecutors or judges already have established personal relationships, these relationships become highly valuable and create the trust that is needed on the operational level to conduct trans-national investigations and inquiries. Concerning the development of best practices and the production of guidance, IMPEL for example developed a practical guide on planning environmental inspections within the framework of the “Doing the Right Things” project, the main benefit of which is considered to be the exchange of ideas among inspectorates leading to joint solutions.”⁹³
- On this basis, it seems that a strength of the current EU approach of combating environmental crime is that the need for and added-value for creating such networks has, in principle, been recognised and funds have been made available by Member States and/or the EU for creating and maintaining at least some of these networks. IMPEL for example receives EU funds, and also the global network INECE receives funds from the EU Commission.⁹⁴
- With regard to formal cooperation of Member States authorities’ there are few insights on the degree to which the instruments for mutual assistance and mutual recognition (e.g. the European arrest warrant etc.) are used in the area of environmental crimes. The evidence so far suggests that it is rather not too frequent and there are problems in the cooperation (see below, section 3.1). So maybe the main strength of the EU’s current approach would be that there are, in principle, legal provisions on mutual assistance, cooperation and recognition in the area of criminal matters in place.
- Concerning coordination and cooperation at the EU level relating to organised crime, the UNODC Digest of Organised Crime Cases considers the cooperation systems of EUROPOL and EUROJUST a model to follow. In particular the establishment of joint teams that expand and speed up the investigation is considered an asset, especially because they simplify the activities that otherwise would have to go down the more circuitous way of mutual assistance.⁹⁵ The presence of prosecutors helped to determine the direction of the investigations in the various countries as well as the distribution of prosecutions so as to avoid double prosecution. It also facilitated subsequent mutual legal assistance and made it quicker. In sum, the coordination of multiple national activities fostered a genuine co-management of the case. Europol and Eurojust have been reported

⁹² Smith and Klaas, “Networks and NGOs Relevant to Fighting Environmental Crime,” sec. 2.1.3.

⁹³ Ibid., sec. 2.1.2.

⁹⁴ Ibid., sec. 2.1.1.

⁹⁵ Fajardo, “Organised Crime and Environmental Crime: Analysis of EU Legal Instruments,” sec. 2.2.6.

to have sufficient resources at their disposal to perform their functions with respect to combating environmental crime.⁹⁶

6.3 Weaknesses

6.3.1 Criminal enforcement institutions (Member State level)

The weaknesses of Member States' criminal enforcement institutions can be described by using the same indicators as were used for assessing the strengths of these institutions in section 2.1.

Degree of specialisation: In many Member States there are no specialised police forces, prosecutors' offices and judges to deal with environmental crime. This absence of specialisation in most cases means that the general police as well as prosecutors and judges have to deal with environmental crime in addition to many other crimes. This bears the danger that they will not develop the specialised knowledge that would be required to deal with environmental crimes in an appropriate way, given the complex and highly technical nature of environmental crime. The general police forces, with a lack of specialization, are unlikely to be able to adequately detect environmental crimes by proactive monitoring.⁹⁷ Also prosecutors who have to deal with environmental crimes along with many other types of crime may not grant environmental crime a high priority, which in turn can lead to frustration on the side of the environmental agencies that report the crimes, especially in countries where agencies cannot deal with cases themselves (by imposing sanctions or fines like in Germany) or bring prosecution actions themselves (like in Scotland). The frustration of environmental agencies then could lead to less monitoring, lower detection and thus lower dissuasive effect of environmental criminal law.⁹⁸ Also if non-specialised judges have to deal with environmental crimes and have no or little prior knowledge about environmental law, this bears the danger of more flawed and incorrect decisions.⁹⁹ Emphasising the importance of specialisation, the main EFFACE report on instruments, actors and institutions concludes that "there is undoubtedly room for improvement as far as this aspect is concerned", and proposes that "one could either consider the Spanish model of a specialised bench (but then obviously equipped with sufficient resources) or the Swedish model where technicians (with specialised knowledge on environmental issues) are added to the criminal court in order to inform the judges."¹⁰⁰

Lack of resources: As noted above, in several EFFACE reports on the situation in various Member States, the issue of funding is mentioned as a serious issue, exacerbated by the recent financial crisis.¹⁰¹ For example, the report on Spain notes that the prosecutors' lack of financial and human resources "explains the frequency of dismissed environmental criminal pre-trial investigations as well as some failures to prove the existence of criminal offences in the trial. The courts dismiss most environmental cases for lack of evidence."¹⁰² A survey conducted by EnviCrimeNet among law enforcement institutions yielded observations that a lack of technically capable staff and financial resources to use the most effective

⁹⁶ Chin and Veening, "Actors and Institutions Relevant to Fighting Environmental Crime," sec. 2.1.2, 2.2.2.

⁹⁷ Faure et al., "Instruments, Actors and Institutions in the Fight Against Environmental Crime," sec. 3.9.3.

⁹⁸ *Ibid.*, sec. 3.10.3.

⁹⁹ *Ibid.*, sec. 3.11.1.

¹⁰⁰ *Ibid.*, sec. 3.11.3.

¹⁰¹ *Ibid.*, sec. 3.15.2.

¹⁰² Fajardo et al., "Environmental Crime in Spain: A Country Report," 57.

investigation techniques or appropriate forensic services is seen as a problem in some, but not all countries.¹⁰³

In a broader, more global perspective, a lack of resources and adequate training has been described as an important concern affecting the effective functioning of criminal enforcement institutions, in particular when dealing with organised environmental crime. The following has been noted in a previous EFFACE study¹⁰⁴: “Concerning the enforcement of the CITES Convention ... officials are often under-resourced and inadequately trained, and establishing and implementing appropriate control mechanisms is a problem for all Parties, especially developing countries.”¹⁰⁵ Generally, the resources of CITES to fight environmental crimes have decreased in the last years due to the economic crisis and the COP has urgently requested Parties, donors and organizations to provide financial and technical support.¹⁰⁶ Also in relation to organised environmental crime, the most important problems shown by reports of UN institutions and international networks such as the International Consortium on Combating Wildlife Crime, are related to the lack of enforcement by States Parties due to the weakness of governance mechanisms and judicial systems as well as the lack of resources. One common problem is the fact that most actors fighting organised environmental crime are under-resourced, in clear contrast with the criminal environment where the smugglers, poachers, criminal groups and organizations have more financial resources than most local and international authorities.¹⁰⁷ The lack of adequate resources is also mentioned by the Executive Director of UNODC as one major factor leading to non-implementation of and non-compliance with the UN Convention against Transnational Organised Crime and the Environment and its protocols.¹⁰⁸ Also INTERPOL recognises that police resources committed to investigating environmental crimes are significantly less than resources used to combat more traditional crimes.¹⁰⁹

Environmental crime as a political and enforcement priority: Combating environmental crime is not as much of a priority in many Member States as combating other forms of crime. The EnviCrimeNet summarises the results of a recent survey among law enforcement institutions and practitioners as follows: “In only a few jurisdictions are environmental crimes a priority, in most they are not; in some jurisdictions environmental crimes have a low priority.”¹¹⁰ Concerning the priority given to dealing with environmental crime (as compared to other crimes), there is evidence (e.g. consisting of statements from practitioners) that often no high priority is given to such crimes within enforcement institutions. One potential factor behind this may be that environmental crimes are often victim-less, in the sense that there are no affected (human) victims that could rally and lobby in favour of better enforcement, leading resources to be used primarily for e.g. making urban streets safer. Another factor may be practical difficulties with finding enough evidence to bring a criminal case successfully to court or the amount of efforts this takes. When police institutions with limited resources are interested in showing clear-up rates, they might opt to invest limited resources rather in cases where prospects for success are higher.

While the EU has put environmental crime on the political agenda in some documents of strategic importance, references to environmental crime are missing in other such documents. For example, one of the EFFACE studies notes that the 7EAP “does not explicitly refer to environmental crime nor make any

¹⁰³ EnviCrimeNet, “Intelligence Project on Environmental Crime,” 15.

¹⁰⁴ Faure et al., “Instruments, Actors and Institutions in the Fight Against Environmental Crime,” sec. 2.2.4.

¹⁰⁵ Mitsilegas et al., “Analysis of International Legal Instruments Relevant to Fighting Environmental Crime,” sec. 4.11.

¹⁰⁶ Ibid., sec. 4.10.1.

¹⁰⁷ Fajardo, “Organised Crime and Environmental Crime: Analysis of International Legal Instruments,” sec. 1.

¹⁰⁸ Ibid., sec. 2.8.

¹⁰⁹ Chin and Veening, “Actors and Institutions Relevant to Fighting Environmental Crime,” sec. 1.1.2.

¹¹⁰ EnviCrimeNet, “Intelligence Project on Environmental Crime,” 12.

reference to the criminalisation of actions that can damage the environment”.¹¹¹ Moreover, it has also been noted that environmental crime is not among the EU priorities for the fight against serious and organised crime in the period 2014- 2017 as defined by the Council of the Justice and Home Affairs in its meeting in Luxembourg on 6 and 7 June 2013.¹¹² The respective study notes that “although environmental crime was mentioned in the introduction to the conclusions of the Council, it was not set as a Council priority for the 2014 to 2017 policy cycle”. In the view of the authors, this shows “an actual lack of political will not only at Member States level but also (probably as a consequence of that) at the EU institutions level”.¹¹³ A failure to prioritize environmental crime has been mentioned in other reports as well as a factor inhibiting effective enforcement at the national level. For example, the report on Spain notes that administrative authorities sometimes tolerate unlawful behaviour for the benefit of economic considerations, thus not giving priority to environmental concerns.¹¹⁴ The report on Sweden reports from interviews dissatisfaction among Swedish experts and practitioners over a lack of interest of higher-ranking policy officials with environmental crimes.¹¹⁵

Impartial and lawful functioning of enforcement institutions: As noted above, EFFACE research has not produced much evidence that enforcement institutions with the EU do not function in an impartial and lawful way. Some examples of corrupt officials are reported from Spain.¹¹⁶

In conclusion, there are also weaknesses in the functioning of the criminal enforcement institutions in several Member states, including the absences of specialised institutions, a failure to give adequate priority to environmental crime and a lack of financial and staff resources. By contrast, the impartial and lawful functioning appears to be a problem having a significant negative impact only in selected Member States.

6.3.2 Cooperation between criminal and administrative institutions (Member State level)

A recent EnviCrimeNet survey produced responses from 16 Member States that there were some types of problems with cooperation between administrative and criminal enforcement institutions.¹¹⁷

An issue that has been mentioned as a weakness in the cooperation between criminal and administrative authorities is that the later ones, which are responsible for monitoring and inspections, do not necessarily report violations to the public prosecutor to initiate criminal proceedings. This is, obviously, only an issue in those countries where the administrative authorities have no duty to report, such as in Germany. A certain reluctance of administrative authorities in Germany to report to the prosecutor has been observed and explained with the formers’ primary aim of achieving compliance via a cooperative strategy and hence wish to avoid repression via the public prosecutor.¹¹⁸ Similar issues have been noted in an earlier study for other EU Member States, such as Belgium.¹¹⁹ Also, interviewees in Sweden indicated a need to improve

¹¹¹ Fajardo, “EU Environmental Law and Environmental Crime: An Introduction,” sec. 2.4.

¹¹² Grasso, Sicurella, and Scalia, “Articles 82-86 of the Treaty on the Functioning of the European Union and Environmental Crime,” sec. 3.3.5.

¹¹³ Ibid.

¹¹⁴ Fajardo et al., “Environmental Crime in Spain: A Country Report,” 19.

¹¹⁵ Philipsen and Faure, “Fighting Environmental Crime in Sweden: A Country Report,” 32.

¹¹⁶ Fajardo et al., “Environmental Crime in Spain: A Country Report,” 59.

¹¹⁷ EnviCrimeNet, “Intelligence Project on Environmental Crime,” 12.

¹¹⁸ Faure et al., “Instruments, Actors and Institutions in the Fight Against Environmental Crime,” sec. 3.9.2.

¹¹⁹ Milieu and Huglo Lepage, “Study on Measures Other than Criminal Ones in Cases Where Environmental Community Law Has Not Been Respected in the EU Member States,” 60f.

cooperation between different authorities.¹²⁰ Eurojust in a recent report on environmental crime also concludes that in the area of wildlife crime a “lack of coordination between administrative authorities leads the public prosecutor, in some Member States, to a situation where s/he does not receive the proper and necessary information”.¹²¹

Eurojust (2014) reports that another problem in the cooperation between administrative authorities and prosecutors on illegal waste trafficking is that the quality of evidence delivered by the administrative authorities is not necessarily sufficient for prosecution purposes. Eurojust relates this lack of sufficient evidence to the fact that administrative authorities are mainly concerned with compliance with the regulatory framework. Moreover, the report also indicates that information available at one authority is not necessarily always shared with other authorities for whom it may be relevant (even though the report does not analyse the reasons for the observed phenomenon which could e.g. be data protection rules).¹²²

At a more global level, the report of the first International Chiefs of Environmental Compliance and Enforcement reports that many participants saw as main obstacle to national interagency communication and cooperation confidentiality laws and similar rules as well as different communication strategies.¹²³ However, at least some of the restrictions may be motivated by concerns over data protection and safeguarding fundamental rights – so even if perceived as an obstacle by practitioners, they do not necessarily amount to a weakness in the respective systems. A similar finding is made in a recent EnviCrimeNet report where both existing legal restrictions as well as the absence of clear legal rules on information exchange between various authorities are considered an obstacle to cooperation.¹²⁴

6.3.3 Trans-boundary cooperation

This section discusses trans-boundary cooperation in the same forms as in section 2.3. above, i.e. through environmental enforcement networks, through formal cooperation using instruments of mutual legal assistance and recognition and through the institutional framework of Europol, Interpol and Eurojust.

Enforcement networks: Although the value of environmental enforcement networks is widely acknowledged, some weaknesses of these networks are also reported both from members of the networks and from external observers. The dangers that members of several of these networks report include a free riding behaviour of member agencies that stay passive and only benefit from the existing material, an inability to maintain internal capacity over time and sometimes an inadequate information dissemination within the member agencies. A problem reported especially by IMPEL members working with the European Commission is the disparity of interests between the various DGs, e.g. different priorities of DG Environment from DG Justice; in addition, there is a high turnover within the Commission staff, making it difficult to identify the relevant contact person and creating a lack of consistent direction. External observers on the other hand accuse these networks of consisting of technocrats, lacking transparency and legitimacy and bypassing national democratic institutions.¹²⁵ While IMPEL and INECE, as mentioned above, receive funding inter alia from the EU, there are also some networks which operate even more informally and often suffer from a lack of resources.

¹²⁰ Philipsen and Faure, “Fighting Environmental Crime in Sweden: A Country Report,” 36ff.

¹²¹ Eurojust, “Strategic Project on Environmental Crime - Report,” 13.

¹²² Ibid., 18.

¹²³ INTERPOL and UNEP, “International Chiefs of Environmental Compliance and Enforcement. Summit Report,” 12.

¹²⁴ EnviCrimeNet, “Intelligence Project on Environmental Crime.”

¹²⁵ Smith and Klaas, “Networks and NGOs Relevant to Fighting Environmental Crime,” sec. 2.1.3.

The formal cooperation between police forces of different EU Member States after a cross-border environmental crime can take the form of a request for mutual legal assistance through a rogatory letter, mainly concerning with the interrogation of suspects or the hearing of witnesses and only on rare cases taking the form of a more thorough coordinated investigation. However, there are also many cases in which foreign authorities are not informed of the case because national authorities avoid the extra work that may follow the sought for legal assistance from another country. Overall, as Spapens (2011) states, the systematic sharing of information about cross-border environmental crime is random at best and investigations are rarely coordinated from the beginning. The problem this author reports concerning cross-border police cooperation is that police officers often see requests for mutual legal assistance as extra work and give it only low priority. Visits of police officers in other countries are costly in terms of money and time and therefore not regularly happening. Additionally, even simple requests for mutual legal assistance can require a complex and time-consuming administrative path through several agencies or ministries. This is confirmed by Eurojust analysis.¹²⁶ Spapens concludes that frustration and mishap in cooperation and joint investigations usually occur because of practical, not of legal constraints. The author therefore sees the expansion of the legal framework not as the primary solution for better cross-border police cooperation. Instead, most important are practical measures like a more rapid information exchange in case of detection of cross-border crimes.¹²⁷ The analysis of Eurojust also points to the fact that there are certain practical problems with mutual assistance, such as “ensuring that the quantity, type and form of evidence provided is satisfactory and that time limits under national legislation of the requesting Member State are complied with”.¹²⁸ Moreover, Eurojust notices that joint investigation teams¹²⁹ so far do not appear to be frequently used in investigating environmental crime.¹³⁰

With regard to cooperation through Europol, Eurojust and Interpol on combating transnational environmental crime, some problems have also been noted: With regard to Europol, a particular problem noted is that Europol “needs to be called upon by the Member States before it can act. However, Member States often use the infrastructure established by Europol to communicate amongst one another without directly contacting Europol. A difficulty with this arrangement is that by the time Member States identify the need to involve Europol, they would have been too far into their investigation to request financial or other assistance from Europol.”¹³¹

Eurojust appears to face a similar problem that it does not always get involved in cases it could get involved by its mandate.¹³² Eurojust itself in a recent report concludes that it found only a small number of cases of environmental crime where the assistance of Eurojust had been requested by national authorities. However, the report also indicates that this also may have to do with data protection rules according to which files are only kept for a limited amount of time.¹³³ However, the report also indicates that “many

¹²⁶ Eurojust, “Strategic Project on Environmental Crime,” 13 observing that “[g]enerally speaking, mutual assistance requests tend to be answered in a time frame that is too lengthy”.

¹²⁷ Spapens, “Cross-Border Police Cooperation in Tackling Environmental Crime.”

¹²⁸ Eurojust, “Strategic Project on Environmental Crime,” 17.

¹²⁹ The possibility to set up joint investigation teams is mentioned in Art. 13 of the 2000 EU Convention on Mutual Legal Assistance in Criminal Matters.

¹³⁰ Eurojust, “Strategic Project on Environmental Crime - Report,” 34 only makes this statement with regard to certain types of environmental crime - wildlife trafficking, waste trafficking and surface water pollution, but there is no reason to assume that the picture would be radically different on other types of environmental crime.

¹³¹ Faure et al., “Instruments, Actors and Institutions in the Fight Against Environmental Crime,” sec. 2.2.4.

¹³² Ibid.

¹³³ Eurojust, “Strategic Project on Environmental Crime - Report,” 7.

cases are not referred to Eurojust because national authorities do not always grasp the importance of tackling the case in a cross-border manner.¹³⁴

In conclusion, there appear to be a number of weaknesses in trans-boundary cooperation on environmental crime, including the complicated nature of mutual assistance and an under-utilisation of the possibilities offered by Europol and Eurojust.

6.4 Opportunities

Regarding the specialisation of police forces, prosecutors and judges, there is much room for improvement in many Member States. The constant challenge for Member States to allocate their resources in the best way provides an opportunity to do so, as more specialisation could not only increase the efficiency of the environmental enforcement system, but also re-allocate work from overburdened prosecutors and judges that have to deal with environmental crimes along with other crimes. Some models already exist which could present an example for other Member States to look at. For example they could consider the Spanish model of a specialised bench, which would however require sufficient resources; but also the Swedish model where technicians with specialised knowledge on environmental issues are added to the criminal court to inform the judges, or the British model where specialised environmental agencies are allowed to bring prosecutions directly to the criminal court, which somewhat remedies a lack of specialisation of the courts.

When discussing opportunities for measures and steps that the EU could take in remedying the situation, it is important to first understand what the competences of the EU are and what type of interventions it can adopt. Notably, the fundamental way that the judicial and administrative system of the Member States is organised cannot be modified by the EU – this is firmly within the competence of the Member States. While the EU can and does provide some funding e.g. for training measures, in support of environmental enforcement networks, in support of Europol and Eurojust, for research projects etc., it will not be able to remedy a lack of resources available for combating environmental crime at the national level.

Generally speaking, the EU's largest potential for additional interventions with regard to the weaknesses identified above appears to be in the area of transnational crime and fostering cooperation on combating these crimes. An opportunity in this regard is the fact that the EU already has institutions in place that are to facilitate such cooperation – Europol and Eurojust – several important legislative acts on mutual assistance and cooperation among EU Member States as well as several enforcement networks, some of them very well-established and active such as notably IMPEL. The EU could consolidate and build on these, e.g. by providing funding. Eurojust appears to be seen by practitioners as having great added value in the areas of gathering and sharing best practices.¹³⁵

Also for Member States, the existing provisions and institutions for cross-border cooperation provide an opportunity to increase their effectiveness. Member States could encourage their authorities to make more use of the provisions on mutual assistance and recognition in criminal matters and to contribute to improving their performance, e.g. by practical measures like a more rapid information exchange in case of detection of cross-border crimes. Also the way Member States cooperate through Europol and Eurojust is somewhat under-utilised. Although the usefulness of such networks is repeatedly mentioned by representatives of all governance levels, Member States do not often inform and include these institutions in the investigation and enforcement process. This constitutes a missed opportunity for better cooperation between Member States, for example through the establishment of joint investigation teams which expand and speed up the investigations considerably. So there might be a need for more awareness rising on Member States' level to encourage the active and frequent use of these institutions.

¹³⁴ Ibid., 13.

¹³⁵ Ibid., 33.

Another opportunity at the EU level is the potential evolution of Eurojust's mandate by the Treaty of Lisbon (Art. 85 TFEU)¹³⁶, and the following "Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust)"¹³⁷ presented by the Commission in July 2013 together with a proposal for a regulation on the establishment of the European Public Prosecutor's Office. The proposal aims to increase Eurojust's efficiency by establishing a new governance model and to improve its operational effectiveness through homogeneously defining the powers and the status of National Members. It also intends to streamline Eurojust's functioning and structure in line with the Lisbon Treaty and to increase the democratic legitimacy of Eurojust by involving the European Parliament and national Parliaments to a larger extent in the evaluation of Eurojust's activities. The proposed regulation is currently being discussed by the EU legislative bodies. Although it does not fully exploit all possibilities offered by article 85 TFEU, Eurojust itself states that it welcomes the explicit reference to the tasks to be carried out on its own initiative, confirming that Eurojust will play an even more proactive role.¹³⁸ Given that environmental crime is explicitly listed as an area of crime that Eurojust is competent to deal with, the possibility to enhance Eurojust's mandate envisaged by the Lisbon Treaty and the subsequent discussion of the Commission's proposal is an opportunity for an EU intervention in order to put a greater emphasis on fighting environmental crime.

Moreover, the EU has an important role in defining political priorities, which are likely to influence, at least to a certain extent, priorities at Member State level. The attention recently given to wildlife crime could be a good example; yet, it must also be noted that wildlife crime is probably one of the types of environmental crime that has created most public outrage, at least when such species as elephants or pandas are involved. So this may not be easily replicable for other types of environmental crime. However, ensuring that environmental crime gets mentioned as an important priority in all relevant strategic documents of the EU might help. Likewise, the current degree of interest in the topic of environmental crime at the EU level, as mentioned in the section on strengths, and further EU efforts in that respect also represent an incentive for Member States to reconsider their current position and interest in environmental crime and put this topic higher on the political agenda.

In addition, the EU can continue (and potentially expand) its efforts relating to training, networking, information exchange between relevant actors in the fight against environmental crime and also provide funding e.g. to enforcement networks or NGOs working on environmental crime. Eurojust noted, in particular, an interest in exchanges on relevant case law.¹³⁹

6.5 Threats

With regard to threats, an obvious threat, mainly at Member State level, is that shrinking public budgets in time of economic crisis would lead to a reduction of staff and funding allocated to enforcement institutions at the national level dealing with environmental crime. This is not an unlikely threat, given that environmental crime is not a top priority in normal times, either. In case the EU budget shrinks, there may be less money available for e.g. supporting environmental enforcement networks and other projects.

6.6 Conclusions

The most crucial points identified for the success of enforcement institutions in dealing with environmental crime are whether the topic of environmental crime has a certain priority on the political agenda, which determines the amount of resources that are allocated to the enforcement institutions, and

¹³⁶ Faure et al., "Instruments, Actors and Institutions in the Fight Against Environmental Crime," sec. 2.2.3.

¹³⁷ COM(2013) 535 final, 17 July 2013.

¹³⁸ Eurojust, "Seminar: The New Draft Regulation on Eurojust: An Improvement in the Fight against Cross-Border Crime?"

¹³⁹ Eurojust, "Strategic Project on Environmental Crime - Report," 34.

closely related the degree of specialization of the police forces, prosecutors and judges. Some countries provide good practice examples on these issues, but in many Member States there is both a lack of political attention as well as a lack of resources and specialization of enforcement institutions. However, although there seems to be little interest in the topic of environmental crime on the level of the Member States, on the EU level there is a certain degree of attention on which could be built.

Concerning the cooperation between Member States on cross-border environmental crime, there are instruments and structures for mutual recognition and judicial cooperation in place, but because the procedures for trans-boundary judicial cooperation are lengthy and complicated, they are rarely used. This is an opportunity for Member States to encourage their authorities to make more use of the provisions on mutual assistance and recognition in criminal matters and to contribute to improving their performance. Moreover, enforcement networks are crucial to enhance cooperation and coordination on cross-border crime, which has also been recognised by the EU which provides some funding for networks working on environmental crime.

Opportunities for EU interventions lay in the possibilities to further support already existing institutions and networks cooperating in the fight against transnational environmental crime. In particular, Art. 85 TFEU envisages an enhancement of Eurojust’s mandate, which has already been taken up by the Commission that has issued a proposal to strengthen Eurojust. A further opportunity is the EU’s role in defining political priorities including priorities concerning the enforcement of environmental law.

The constant challenge for Member States to allocate their resources in the best way provides an opportunity for more specialisation of police forces, prosecutors and judges, as such specialisation could not only increase the efficiency of the environmental enforcement system, but also re-allocate work from overburdened prosecutors and judges that have to deal with environmental crimes along with other crimes.

An obvious threat are shrinking public budgets in time of economic crisis leading to reduction of staff and funding allocated to enforcement institutions at the national level dealing with environmental crime.

The following table summarises the strengths, weaknesses, opportunities and threats

Strength	Weaknesses
<ul style="list-style-type: none"> • Specialised police forces and prosecutors in some countries, possibility to learn from these examples in other Member States • Lawful functioning of enforcement institutions in many Member States • Currently a certain degree of political attention for topic of environmental crime within EU • Instruments and structures for judicial cooperation and mutual recognition in place • Enforcement networks exist, some well established 	<ul style="list-style-type: none"> • No specialised criminal enforcement institutions in many Member States • Lack of staff and financial resources of enforcement institutions • Environmental crime no enforcement priority in many Member States • Diverging interests and lack of cooperation between administrative and criminal enforcement institutions in some Member States • Procedures for transboundary judicial cooperation lengthy and complicated, therefore not used much • Under-utilisation of Europol and Eurojust
Opportunities	Threats

- MS consider (different models of) specialization of enforcement institutions as a means of better allocating resources
- MS encourage use of existing structures for judicial cooperation and of Europol & Eurojust
- EU Support for enforcement networks
- Potential evolution of Eurojust's mandate according to Art. 85 TFEU
- Use EU's power to define enforcement and political priorities
- Financial support for enforcement networks, creation of platforms for information exchange etc.
- Lack of funding for enforcement as result of financial crisis

7 Area 5: The role of the victims of environmental crime and civil society

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7.1 Introduction

Often perceived as “victimless” (Korsell, 2001), environmental crimes might not have immediate consequences and the harm may be diffused or go undetected for several years (Skinnidier, 2011). Environmental crime affects all of society (O’Hear, 2004). It can have negative consequences on the social and economic assets of a country, and for individuals and communities, it may impact health and livelihoods. The effects of a single offence may not appear severe in the short-run but the cumulative impact of repeated violations in the long-run can be irreparable.

Most of the current debates on tackling environmental crimes focus on legislative and policy changes, on improvement of law enforcement inter-agency co-operation, on law harmonization, on reducing consumer demand (in the case, for instance, of illegal wildlife trade or of illegal waste of electrical and electronic equipment) and last, but not least, on engaging local communities and strengthening public participation to raise awareness on environmental crimes. For effective crime prevention a strong cooperation within the community is in fact necessary. When victims and local communities work together, crime prevention can improve the quality of life of everyone else; community audits could be, for instance, a way through which the identification of problems and the understanding of the risks that communities face could be easier to assess. Williams (1996) defines environmental victims as those harmed by changes in their environment due to deliberate or reckless acts or omissions. Broadly defined, anyone or anything harmed by environmental disruptions may be seen as a victim (Skinnidier, 2011). However, the extent to which causing environmental harm is criminalized or sanctioned in law may have implications for who the authorities view as victims. Criminal law generally focuses on individual victims whereas environmental legislation often describes the environmental harm as an offence against public interest. Skinnidier (2011) discusses a number of ways to classify victims of environmental harm: by nature of wrongful acts; by extent of damages suffered; by scope of harm; by perpetrator and by nature of harm. In a social harms approach, Hall (2013) provides an extended definition of environmental victims, beyond restrictive legal categories (i.e., health impacts, economic impacts, social and cultural impacts, reduced security).

There is a growing consensus that approaches based on trust building and cooperation as well as engagement and empowerment of communities are just as vital as enforcement to tackle environmental crime. As the recent research project on “New European Crimes and Trust-based Policy” (FIDUCIA)¹⁴⁰ shows, trust-based measures may play a crucial role in tackling crime. The central idea behind the FIDUCIA project is that public trust (in latin, “fiducia”) in justice is critically important for social regulation, in that it leads to public acceptance of the legitimacy of institutions of justice, and thus to compliance with the law and cooperation with legal authorities. FIDUCIA builds on this idea and proposes a ‘trust-based’ policy model in relation to emerging forms of criminality.¹⁴¹ The FIDUCIA projects highlights that lack of confidence and trust in the work of the police may hinder the identification of victims. In fact, in some cases, in fact, victims may decide to cut their contact with the authorities due to their lack of trust in the justice system. There are documented instances of several victims of human trafficking who felt uncomfortable and unsafe when approached by police units. By increasing trust between victims and

¹⁴⁰ <http://www.fiduciaproject.eu>

authorities, victims can be encouraged to seek help and report their cases to the authorities. Overall, trust in the legitimacy of the system is viewed a central objective of democracy and social development.

Governments are increasingly partnering with communities and civil society organizations to prevent crime because of their knowledge of local problems and capacity to reach out vulnerable parts of society (U.N., 2015)¹⁴² and it is an acknowledged fact that for an effective and efficient criminal justice system, a basic condition is the presence of genuine trust and cooperation of public and victims. The involvement of civil society can play different roles and can lead to a greater trust in the justice system. Civil society and NGOs may partner with law enforcement authorities to develop programs of cooperation focusing, for instance, on increasing awareness and educating the public on crime prevention strategies and on how to recognize and address environmental risk factors. Moreover, they can hold offenders responsible for their actions helping to strengthen the rule of law and the accountability of criminal justice systems. Civil society and grassroots community groups can also enhance legal knowledge and literacy within affected groups, developing paralegal support mechanisms to inform communities and monitor decision-making; capacity building of civil society might strengthen enforcement especially whereas local communities have been co-opted in violations. Therefore, victims and civil society groups can take up roles bringing to the attention of the responsible authorities any environmental violation and take up cases to compel action for the implementation of the law or to secure rights and available remedies. In implementing environmental laws, the environmental responsible institutions are expected, on their side, to take up their roles ensuring adequate regulatory provisions.

Another recent research project that was based on this approach was EJOLT (Environmental Justice Organizations, Liabilities and Trade)¹⁴³. One of the main goals of the project was to empower environmental justice organizations (EJOs) and the communities they support to defend or reclaim their rights.¹⁴⁴ EJOLT was aimed at increasing EJOs' (environmental justice organizations) capacity in using scientific research methods for the quantification of both environmental and health impacts, as well as their knowledge of environmental risks and of legal mechanisms of redress. The overall aim of EJOLT is to improve policy responses to and support collaborative research on environmental conflicts through capacity building of environmental justice groups. The premise of EJOLT research project was that there is a need to unveil the unfair burden that communities and Environmental Justice Organizations (EJOs) bear because of the environmental damages that legal and illegal business activities might cause.

In most of the cases analysed by EJOLT project, states and multinational corporations share liabilities for serious environmental harm. The victims of environmental damages can use disparate strategies in order to reclaim their rights; they often choose a plurality of legal tools to increase the probability of success, recurring to both domestic and international laws and regulations. The litigations are set on environmental damages evidences and on the alleged violation of human rights. Communities and EJOs often met several difficulties to make the corporations responsible for violations of international laws, the most relevant of which are the following two: 1) national laws do often not allow often prosecuting legal persons; 2)

¹⁴¹ The FIDUCIA project attempts to shed light on a number of distinctively 'new European' criminal behaviors that have emerged in the last decade as a consequence of developments in technology and the increased mobility of populations across Europe.

¹⁴² United Nations Congress on Crime Prevention and Criminal Justice, Doha - April 2015; http://www.un.org/en/events/crimecongress2015/pdf/Factsheet_6_Public_participation_EN.pdf

¹⁴³ www.ejolt.org

¹⁴⁴ The EJOLT project was an FP7 Science in Society project that runs from 2011 to 2015. EJOLT brought together a consortium of 23 academic and civil society organizations across a range of fields to promote collaboration and mutual learning among stakeholders who research or use Sustainability Sciences, particularly on aspects of Ecological Distribution.

international tribunals could not have jurisdiction to enforce multinational corporations' liabilities.¹⁴⁵ EJOLT researchers investigated cases in which the conflict on the access to natural resources is coupled with prosecution of environmental defenders. Very often the first action of the victims is to turn to government authorities directly responsible for the authorization and the monitoring of the activities that comes to be harmful. If the appeal results ineffective, they resort to administrative, civil and/or, where possible, criminal environmental courts. If the victims realize that also the judicial avenues in the country where they suffer the damages are not effective, they can try to find norms and regulation favourable to them in the home country of the companies that produce (or produced) the damages.¹⁴⁶

Overall, according to EJOLT project, even when compensation to the victim is recognized, environmental injustices are perpetrated due to low indemnity. Victims' claims are often rejected, because multinational corporations' lawyers often use (mainly in common law systems) the principle of *forum non conveniens*, which allows them to avoid to be judged by the court of the parent company - often an industrial nation with stricter laws - in favour of a court of the country where the subsidiary company works - often a less industrialized nation with more permissive laws. This sort of double standard creates also imbalanced justice among victims of the same crime in different countries.

Victims cannot initiate proceedings before international courts such the International Court of Justice, However, they can ask to be listened to by committees under the aegis of the United Nations that monitor States' compliance with human rights treaty, if they can make a claim that there is a connection between a human right violation and an environmental crime committed. Moreover, there are regional human rights courts that accept individual and group claims. Regional courts oversee the States' compliance with obligations assumed to guarantee human rights; examples of regional courts are the European Court of Human Rights,¹⁴⁷ the Inter-American Court of Human Rights, and the African Court of Human and Peoples' Rights. They cannot punish directly who cause environmental damages, but they can judge if the State part of their system committed human rights violations and determined reparations for the victims. Thus, as long as connection between environmental damages and human rights can be proved, victims can file a petition directly to those courts, as the victims in Campania for the illegal dumping of toxic waste did¹⁴⁸ (see textbox below).

Obviously, victims do not use only legal avenues for claiming the respect of their rights. They can also seek to exert social and political pressure such as public statements of companies' shareholders or appeal to courts of opinion. Sensitive shareholders are targeted by the victims for their information campaign and NGOs could become themselves shareholders in order to raise their voice during the shareholder meetings. Courts of opinion are forums, funded by civil society organizations, with the scope to take public position on the violation of human rights in a specific context and within specific thematic. Victims can directly address their claims to opinion tribunals that make a decision offering specific recommendations distributed widely through NGOs, media and social networks.

¹⁴⁵ See also the analysis on area 9 below.

¹⁴⁶ See the analysis on area 9 on possibilities and practical obstacles in this regard.

¹⁴⁷ For more info on the European Court of Human Rights and environmental crime see: Scalia, V. (2015). The European Court of Human Rights and EnvironmentalCrime, available at: <http://efface.eu/european-court-human-rights-and-environmental-crime>.

¹⁴⁸ For a detailed presentation of the case study, see: D'Alisa, G., P.M. Falcone, A.R. Germani, C. Imbriani, P. Morone, F. Reganati (2015). Victims in the "Land of Fires": case study on the consequences of buried and burnt waste in Campania, Italy. Available at: <http://efface.eu/victims-%E2%80%99Cland-fires%E2%80%9D-case-study-consequences-buried-and-burnt-waste-campania-italy#overlay-context=case-studies>

The importance of civil society participation in international environmental law and policy has been recognized, most prominently in the “access principles” in Principle 10 of the Rio Declaration on Environment and Development. The United Nations Environment Programme’s “Draft Guidelines for Participation of Major Groups and Stakeholders in Policy Design” states that “Major Groups and Stakeholders can be substantive contributors to improving our understanding of the environment, and to developing innovative solutions to environmental challenges (UNEP, 2010). The starting point for access to justice is Article 9 of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters. These three concepts of i) public participation, ii) access to information and iii) access to justice, are the three main pillars of the Aarhus Convention, entered into force in October 2001, and administered by the United Nations Economic Commission for Europe (UNECE).¹⁴⁹

Campania Citizens filed a petition to the European Court of Human Rights¹⁵⁰

The European Court of Human Rights (ECtHR) is based in Strasbourg (France). The ECtHR decides individual and collective claims of violations of the European Convention of Human Rights (ECHR) by a Member State of the Council of Europe.

In 2008, 18 Campania citizens lodged the application with ECtHR.

The applicants complained that the Italian State caused serious damage to the environment in Campania as well as to the health of its citizens; moreover, they complained the lack of actions by national authorities to safeguard citizens and the enormous delays in prosecuting the guilty part. Thus, according to the petitioners, the Italian State violated Art. 2 (rights to life); art. 8 (right to respect private and family life); art. 6 (right to a fair hearing), and Art. 13 (right to an effective remedy). The Court held that had been partly a violation of Art. 8 and Art. 13.

More recently, in 2014, a new application was lodged. The applicants were initially 73; nowadays, there are more than 30.000 citizens associated to the application. They object that the Italian State has been failing for the last 30 years in protecting its citizens from the health consequences caused by the lasting contamination of illegal hazardous waste disposal in the region. In particular, the claimants refer to several scientific studies that correlate the increasing of cancer pathologies in those territories where the illegal practices of burning and burying hazardous waste has been ascertained by State authorities, at both regional and national levels. In this case, also, according to the plaintiffs, the Italian State violated Art. 2, Art. 8 and Art. 13 of the European Convention of Human Rights.

In addition to the three pillars, the most notable feature of the Convention is that it recognises the key role of NGOs in creating environmental democracy. The EU and all of its Member States have ratified this convention.¹⁵¹ The “third pillar” of the Aarhus Convention calls for a reasonable entitlement to access and reasonable conditions of access (i.e. fair and effective procedures in terms of time and costs). Article 9(2) of

¹⁴⁹ Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447

¹⁵⁰ The facts related to the 2014 application to ECtHR are described in an interview that G. D’Alisa, during his fieldwork in Campania, did to lawyer V. Centonze, Newspaper information (in Italian) available here: http://corrieredelmezzogiorno.corriere.it/napoli/cronaca/15_gennaio_29/terra-fuochi-pioggia-ricorsi-corte-strasburgo-9b975eb8-a7c3-11e4-a919-1a402233c54b.shtml. For the details of the 2008 case, see: Chamber judgment Di Sarno v. Italy 10.01.2012.

¹⁵¹ See list of parties at <http://www.unece.org/env/pp/ratification.html>

the Aarhus Convention provides that *“each party shall, within the framework of its national legislation, ensure that members of the public concerned (a) having a sufficient interest or, alternatively (b) maintaining impairment of a right, where the administrative procedural law of a party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6”*. What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law. Article 9(3) of the Aarhus Convention provides that in addition parties must also ensure that, *“where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”* However, it has been argued (Skinnider, 2011) that the application and interpretation of Article 9(2) still differs significantly in the Member States.

Access to justice provisions may be used by victims of environmental crime to seek redress or deliverance of justice; the application of access principles has led to an increased presence of civil society in courts, but there remains a significant gap between the expectations of civil society that are able to attend these courts, and the opportunities for them to inform, shape, and engage directly in decision-making (Werksman and Foti, 2011).

In 2011 the EU Council passed a “Resolution on a roadmap for strengthening the rights and protection of victims”¹⁵², in particular in criminal proceedings in which it welcomed the European Commission’s proposal for a package of measures on victims of crime. Since then, two main instruments have been adopted. The first one is the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime. The second one is the recently adopted Regulation 606/2013 on mutual recognition of protection measures in civil matters, which is designed to complement Directive 2011/99/EU on the European Protection Order in criminal matters.¹⁵³

Besides the victims of environment crime themselves, NGOs may also play an important role in court proceedings on environmental crimes. In Sweden, for example, NGOs which fulfil certain criteria, may argue their case in administrative courts. In addition, NGOs have the right to appeal decisions taken under the Environmental Code, and they have priority access to Land and Environmental Courts.¹⁵⁴ In the UK NGOs, have developed a leading role in challenging government and regulatory agencies through the use of judicial review actions. Although private prosecutions are relatively rare because the general right to bring a private prosecution is restricted by certain statutes, the threat of private prosecution by NGOs such as friends of the Earth and Greenpeace has acted as a trigger for action by the regulatory bodies and serves as a safeguard against unjustified or unfair prosecutorial decisions.¹⁵⁵ Also the Spanish legal system has incorporated laws that implement the Aarhus Convention, granting citizens the right to initiate proceedings in the case of administrative offences. However, a law on “Taxes and Charges of the Justice System is a major obstacle for NGOs establishing the obligation of paying different taxes to have access to the Administration of Justice. For most NGOs, this is a total hindrance and seriously limits the right to initiate proceedings and access to justice granted by the Aarhus Convention and EU directives”.¹⁵⁶

In addition to role that environmental NGOs play in the efforts to enforce rules against environmental crime, they are also active in educating the greater public and providing their members with information,

¹⁵² Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/122529.pdf

¹⁵³ The deadline for the transposition of the two abovementioned Directives (Directive 2012/29/EU and Directive 2011/99/EU) is 2015. The Commission is thus currently concentrating its activity on ensuring correct and timely transposition of these two instruments.

¹⁵⁴ See EFFACE report “Fighting Environmental Crime in Sweden: A Country Report”, section 12.5.

¹⁵⁵ See EFFACE report “Fighting Environmental Crime in the UK: A Country Report, section 12.4.

¹⁵⁶ See EFFACE report “Fighting Environmental Crime in Spain: A Country Report, section 12.4.

gathering popular leverage to lobby governments, shame companies and elicit interest on environmental issues to affect real change. NGOs with a strong network of members and supporters can exert pressure on governments, and in turn many governments and institutions rely on NGOs to inform decisions. This has created a niche for NGOs as influential actors in governmental decision-making.¹⁵⁷ NGOs might also be an important partner for the EU and its Member States, as the latter try to improve environmental protection in countries around the world, but especially in countries with which the EU maintains close cooperation such as the European Neighbourhood Policy partner states. In addition to outside diplomatic pressure, NGOs could lobby governments from inside and below to pass stronger environment legislation and put more efforts into fighting environmental crime.¹⁵⁸

The EFFACE project produced a range of twelve case studies on different types of environmental crimes:¹⁵⁹ two of them (i.e., “Victims in the Land of Fires: a case study on the consequences of buried and burnt waste in Campania, Italy” and “Environmental crime in Armenia: the case of Mining”) considered the role of local communities, victims and NGOs by showing the remarkable results reached (or in progress) at the grassroots level where governments have failed. Based mainly on the considerations offered by these two case studies, this brief report aims to provide some considerations on the strengths and weaknesses of empowering communities and victims as well as NGOs; even though their engagement cannot be by itself a solution, it can, however, be highly effective for tackling environmental crimes. Empowerment is a complex process. It goes beyond the traditional methods of information sharing and consultation such as public meetings, getting people to fill in questionnaires, tick lists or give feedback on services received. Instead, it involves a change in power relations, enabling people to have more control and responsibility for their own awareness, which can encourage them to be more active in the community (Gregson and Court, 2010).

The case study report titled *Victims in the “Land of Fires”: a case study on the consequences of buried and burnt waste in Campania, Italy*¹⁶⁰ analyses the effects of the illegal management of waste and shows the importance of engaging the victims in the implementation of environmental policies and the enforcement of laws. In the last 20 years, tens of thousands of citizens in the Campania region have been denouncing the disastrous results of the governmental implementation of the urban waste plan, the complete lack of intervention of the authorities against the illegal waste dumping, the lack of effective remediation of the thousands of contaminated sites and the superficial and unsatisfactory responses coming from the national healthcare system to the health alarm of the local population. This case study shows the important role that the victims are playing in implementing the socio-political and judicial actions aimed to combat the illegal waste practices. The findings show that the consolidation of grassroots organizations (most of those that fight against the waste related environmental crime formed a social coalition called “Stop Biocide”) has been increasing public awareness on the impacts of illegal waste disposal, thus, shedding light on the capacity of civil society to influence policy changes and decision makers at different institutional levels. The case study highlights the need in Italy for major changes to prevent future environmental injustices. Since the enforcement of waste control regulations remains weak, it is desirable that legislators and institutions make stronger efforts to i) increase public participation in environmental decision-making and ii) empower citizens by giving them greater access to pollution and health information. Public participation in environmental decision making could be encouraged for instance throughout the following actions: public hearings for environmental impact assessments, citizens’ control of tenders for remediation of contaminated land and waters, direct involvement of citizens in the implementation of the precautionary principle.

The second case study taken into consideration for this report which is on “Environmental crime in Armenia: the case of Mining” shows that the way mining is conducted in the Republic of Armenia (RA) has disastrous consequences for the country’s environment and the wellbeing of its citizens. Mining has led to

¹⁵⁷ See EFFACE report “Networks and NGOs Relevant to Fighting Environmental Crime”, section 3.1.2.

¹⁵⁸ See EFFACE report “Environmental crime in Armenia: the case of Mining”

¹⁵⁹ The full list of the case studies can be found at <http://efface.eu/wp4-environmental-crime-case-studies>.

¹⁶⁰ All studies produced in EFFACE are available at www.efface.eu.

widespread deforestation and the destruction of arable land. Moreover, heavily polluted tailings are discarded in ways that contaminate lakes, rivers and soil. Smelters pollute the air. Mining thereby endangers the health and the subsistence of RA's citizens. Since rivers often cross borders, mining-related pollution endangers the environment and citizens of neighbouring countries as well, namely Georgia and Azerbaijan. After a decade of violent conflicts, it thereby also undermines the fragile peace between the countries of the Southern Caucasus. Despite the fact that RA is signatory to several international environmental treaties and conventions, environmental laws are weak, contradictory, and rarely enforced. The victims of a lax regulatory framework and environmental crime are often ordinary citizens, the economy at large and even the country's national security. Common problem areas linked to environmental crime include RA's vast mining sector, the logging industry and the hydroelectric sector.

This case study emphasizes that in recent years, environmental non-governmental organizations (NGOs) have emerged as the crucial defenders of RA's environment, monitoring environmental pollution and denouncing offenders. Grassroots community movements have also been in vocal opposition to mining operations throughout the country. Under the current conditions, RA's civil society is the only credible champion of the environment. The study also suggests that the EU and the governments of its Member States should support RA's environmental NGOs in addition to the already existing technical cooperation projects that involve RA's state agencies and harness the diplomatic pressure the EU and Member States occasionally exert on RA's government officials.

7.2 Strengths

Besides repressive strategies based on tougher punishment and new stricter legislation, trust-based approaches have been slowly emerging (FIDUCIA, 2013). Individuals and communities know exactly what problems they face, and they often can be the most effective actors in establishing what is and what isn't acceptable in their neighbourhoods (UK Home Office, 2012). If victims of environmental crimes are recognized and protected as such, they are more likely to combat the crime and to contribute to investigations; if they are not, then the criminal justice system loses important evidence and the enforcement of laws against criminals becomes less effective.

As the EFFACE case study on the illegal management of waste in the Campania region highlights, the first waste-related environmental crime was introduced in the Italian legislation only years after environmental NGOs were reporting on the role of organized crime in environmental matters. The burning of waste has become an environmental crime only after years of complaints by activists and massive demonstrations in the city of Naples; a more pro-active role by activists and victims has introduced, thus, a more effective environmental crime legislation. In the Campania region, grassroots organizations and local associations, through support and encouragement, helped victims regaining a sense of confidence in their community and convinced governments to give a higher priority to responding to environmental crimes.

One strength of the current's EU system of fighting environmental crime is that through the Aarhus Convention and the legislation implementing at the national level, victims of environmental crime as well as NGOs (under certain questions) have access to the court system. Another strength of the EU's approach is that in most countries of the EU, there are active environmental NGOs that can denounce environmental crime and may contribute to enforcement. As the two considered case studies show, the activism of NGOs, victims and local communities have been posing the basis for a more conscious and mutually shared knowledge with promising results.

The recognition of environmental crimes at both European and international level could be more strongly driven by human rights perspective. Environmental crimes are often closely linked to human rights, in the sense that severe violations of the environment can also constitute a violation of fundamental human rights; for this reason, the protection of the environment against environmental crimes is also a condition for the effective protection of human rights. Victims in Europe have applied to the European Court of Human Rights to pursue remedies for violations to their right to a clean and healthy environment (Skinnider, 2013). The case law of the European Court on Human Rights has paved new ways to improve environmental protection through an expanded concept of human rights (Rest, 2004); through its ground-

breaking López-Ostra decision in 1994 (López-Ostra v. Spain, ECHR Series A, Vol 303/C) the Court has opened the door for the protection of human rights against *nearly all sources of environmental pollution*.

The simple possibility of claiming human rights violations stemming from environmental problems can become a new and powerful solution: “the outcomes of human rights decisions have notably further reaching effects than the outcomes of individual criminal and civil actions” (Verschuuren and Kuchta, 2011). However, as stated by Krämer (2012), until mid-2011 all applications to the European Court of Justice by environmental NGO’s were held inadmissible, with the argument that citizens or NGOs were not directly and individually concerned by environmental measures involving general interest.

7.3 Weaknesses

Jarrell and Ozymy (2014a) underline the difficulties that victims experience in proving the causality between pollution and health effects and believe that the majority of environmental crime victims will never be recognized as victims in a legal context or receive restitution for the harm caused by the environmental crime (Jarrell and Ozymy, 2014b). Given the difficulty to prove the causal relationship between environmental crime and the damage and/or the harm on victims, penalties are often minor, and this is not very motivating when launching a complex investigation (Spapens, 2014). A further aggravating factor is that few environmental victims will resort to the courts, as most environmental crimes will go undetected or will escape criminal prosecution.

Among some of the main weaknesses to address is the twofold problem of i) the identification of the victims (Goodey, 2005) and ii) the lack of victims’ self-identification (i.e., they do not self-identify as crime victims). As a result of the lack of victim self-identification, many forms of environmental crime are not reported by victims. Moreover, the fact that the damage may be difficult to identify (it might not be immediate or have a future impact), or may not be quantifiable in monetary terms, should be added to the lack of victim self-identification (Skinnider, 2013).

Moreover, there is an issue with how victims of environmental crime outside the EU can make their voices heard and can claim their rights in cases where there is link with an EU actor. Typically, such a link would either consist in demand from the EU market for certain types of illegally traded goods (e.g. in the case of wildlife trade) or in some kind of illegal exports (e.g. toxic waste exports) which is carried out or financially benefits and EU company. The participation of such victims within EU judicial proceedings is often made difficult by some hurdles, including a lack of knowledge on the situation, the legal independence of EU companies and their foreign subsidiaries as well as the costs involved in bringing legal claims or a complaint at the police in a different country.¹⁶¹

7.4 Opportunities

Empowerment of victims in environmental matters and of victims of personal injury cases could represent an opportunity to reduce barriers to access to justice: if there are social benefits resulting from this private litigation, measures supporting litigants in bringing claims should be economically justified (Tuil and Visscher, 2010).

Empowerment and engagement of victims and communities could lead to the adoption (as happened in U.K.) of a Community Trigger, which will give victims and communities the right to require action to be taken where a persistent problem has not been addressed (UK Home Office, 2012). Moreover, where specific NGOs are acknowledged as “third parties” that can report crimes on behalf of victims, they may make the initial criminal complaints of environmental crimes to public authorities. This could represent an opportunity to challenge the lack of action taken by enforcement institutions.

In areas where there has been a failure to identify the needs of the victims and where the right actions have

¹⁶¹ On access to justice of victims of environmental crime from outside the EU, see the analysis on area 9.

not been undertaken, empowerment of victims and communities could represent an opportunity for a decisive shift from top-down to bottom-up approaches. As the Campania case study shows, several Italian grassroots groups not only have been actively promoting environmental education and public involvement in environmental protection, but also have been pushing to involve the public in improving environmental laws. Perhaps, the most significant and recent example of victims' organizational activities is the Bill 1345 approved by the Italian Senate on March 4th, 2015 which represents a first step towards stricter sanctions against environmental crime. The new bill adds to the criminal code four new types of environmental crimes: environmental contamination, environmental disaster, traffic and abandonment of highly radioactive materials.

Some scholars advocate for the use of restorative justice approach (which involves a participatory approach) for a broader understanding of victims (Fisher, Heffernan, John, 2005). The community, victims and the offender could participate together actively in resolving matters arising from the offender's crime, remedying harm caused to the environment and other victims and preventing re-offending, thereby protecting the environment in the future (Wright, 2000).

Following the approach of analysis provided by Gemmill and Bamidele-Izu (2002) to strengthen the constructive participation of civil society and NGOs in the environmental governance, five key areas should be prioritized at European level: i) information collection and dissemination (i.e., opinion papers, policy documents, research documents that might facilitate the flow of the information network on the impact of environmental crime on humans and on the environment); ii) policy development consultation (i.e., notification to the public, governments and international organizations of critical new issues); iii) policy implementation (i.e., assuming operational functions and enhancing communication between local groups and governments); iv) assessment and monitoring (i.e., monitoring environmental conditions and collecting compliance data); v) advocacy for environmental justice (i.e., highlighting disparities in who bears disproportionate environmental burdens). The EU should prioritize the adoption of all measures able to facilitate and/or enable civil society, in particular NGOs, to fulfil these roles effectively. However, with regard to iii) it should be noted that it is mainly the EU Member States, not the EU itself, that are responsible for implementation of policies and enforcement. The EU in this regard can play a supportive role only.

7.5 Threats

The main challenges for victims include convincing the authorities that the harm has actually taken place, quantifying the entity and the level of harm, particularly the cumulative effect, and the causal link to the illegal action; basically one of the main problems remain the statute of limitations and the fact that the effects of contamination can occur many years after the crime was committed. Further thinking is needed to explore the feasibility of new approaches by criminal courts in dealing with collective victimization (Skinnider, 2013).

7.6 Conclusions

It is widely recognized¹⁶² that the systematic involvement of civil society improves environmental governance by providing the means for organized interests, that might not otherwise be represented by governments, to participate more directly in decision-making (Werksman and Foti, 2011). Through their participation, civil society organizations can: i) drive greater transparency by having access to documents

¹⁶² See for instance "How the European Union Works: A Citizen's Guide to the European Union" (European Commission, 2003), "Your Right to a Healthy Environment: A Simplified Guide to the Aarhus Convention" (UNECE and UNEP, 2006), UNEP's "Natural Allies" handbook (2009).

and meeting rooms; ii) improve the basis for decision-making by providing key scientific information and stakeholder perspectives; and iii) improve compliance by acting as watchdogs and whistleblowers (Hoare and Tarasofsky, 2007). Recognizing civil society a more prominent role could likely lead to greater public awareness and more effective administration of environmental laws and regulations at the national level.

As the case of the Campania region and the case of the Republic of Armenia show, civil society can effectively influence policy changes and decision makers at different institutional level through the promotion of environmental education and public involvement in environmental protection, leading eventually (as recently happened in Italy) to the introduction of new and stricter environmental laws. Further research is desirable to evaluate how the different legal regimes (criminal, regulatory, administrative or civil) conceptualize “victims” and which of them could provide wider protection for different groups of victims. This can contribute to the development of an environmental victimology, contributing to change criminal justice systems being more inclusive towards the victims of environmental crimes (Croall, 2007). Providing formal mechanisms for increasing the level and quality of civil society participation can enhance the quality of new environmental policies and their impacts (i.e., environmental, economic and social). However, we cannot deny that a number of difficulties remain; civil society participation requires a significant commitment of time as well as substantial financial resources from governments and intergovernmental bodies (Gemmill and Bamidele-Izu, 2002).

Overall, “stakeholder” engagement can be instrumental to induce social change and inspire law reforms; not only civil society, communities and NGOs have proven they have an important role to play for preventing and combating environmental crimes, but also the business community can play, of course, a critical role in preventing environmental crimes. As argued by Lyon and Maxwell (2008), NGOs have started to have major economic impacts on firms and are playing an increasingly influential role in shaping, through both public and private politics, their strategic CSR behaviour.

The following table summarises the strengths, weaknesses, opportunities and threats

Strength	Weaknesses
<ul style="list-style-type: none"> · More stringent and effective environmental crimes legislation · Regaining a sense of confidence (for victims and communities) and convince governments to give a higher priority to environmental crimes · Active environmental NGOs can denounce environmental crime and may contribute to enforcement 	<ul style="list-style-type: none"> · Difficulty in the identification of the victims · Lack of victims’ self-identification · Difficulty in the identification/quantification of damage · Difficulty to prove the causal relationship between environmental crime and the damage
Opportunities	Threats
<ul style="list-style-type: none"> · Decisive shift from a top-down to a bottom-up approach · Introduction of a Community Trigger to give victims and communities the right to demand that enforcement agencies take action · Introduction of a restorative justice approach 	<ul style="list-style-type: none"> · Convincing the authorities that the harm has actually taken place · Quantifying the entity and the level of harm · Proving the causal link to the illegal action

8 Area 6: External dimension of environmental crime – what can EU do (EU only)

Author: Teresa Fajardo, University of Granada, with thanks to Bridgit McQue, Former British Prosecutor and consultant on English translation.

8.1 Introduction

This report will assess the strengths, weaknesses, opportunities and threats associated with EU efforts to combat environmental crime through its external action. This external action reflects the EU's internal position on this matter and defends its goals. It is also conditioned by its limits. The fight against environmental crime and crimes related to the environment are not expressly foreseen in the international relations and agreements negotiated with Third countries and regional groups by the EU. However the EU has tried to promote the fight against environmental crime in the global scenario before the United Nations General Assembly and the United Nations Environment Assembly (UNEA hereinafter), its position on environmental crime is not shared unanimously by Third countries that consider that this is not a clear concept and that it could lead to interference with their policy of exploitation of their natural resources. The EU interest in obtaining these natural resources has also influenced the negotiations of its Economic Partnership Agreements seeking to facilitate European investments in mining and forestry, among other sectors.

Just a few multilateral environmental agreements (MEAs hereinafter) recommend criminal penalties to fight against environmental crimes, however most MEAs could address the possibility of criminalising activities highly harmful for the environment. Even though this possibility could increase efficient compliance of MEAs, it could impose an extraordinary burden on Third countries in order to adopt legal instruments and provide the required human and economic resources to fight against environmental crimes, particularly, transnational environmental crimes related with illegal trade of wildlife and illegal trafficking of hazardous waste and waste of electric and electronic equipment (WEEE). These environmental crimes strain the weak governance of these states and are linked with other serious crimes such as corruption, money laundering, and traditional forms of organised crime such as drugs and human trafficking. These circumstances have conditioned the approach of the EU to fight environmental crime beyond its borders. In the first place, the EU has promoted better enforcement of MEAs providing resources through cooperation to development and second, more relevantly, it has relied mostly on the adoption of trade related measures implemented by Member States to curb the demand for environmental products from Third States of origin that damage their environment. EU Member States are countries that demand endangered species of wildlife and illegal logging involving often organised environmental crimes. They are moreover countries of origin of transnational environmental crimes such as the illegal traffic of hazardous waste and WEEE.¹⁶³ It is not possible to assess the impact of the EU external action promoting the fight against environmental crime in Third countries of origin and destination of environmental crimes through economic aid for the enforcement and implementation of MEAs. However, for their part, the EU and its Member States have adopted and implemented EU internal market regulations to enforce these agreements regarding illegal wildlife trade, illegal logging and illegal trade of WEEE through trade related environmental measures.

Being both an origin and destination area for environmental crime, the EU needs to enhance international cooperation with Third countries and international institutions, as well as developing legal instruments for legal assistance and judicial cooperation. However, this cooperation with Third countries is still at an early stage of development and many legal and operational obstacles are hampering further results.

The EU has not yet assumed any role as an international power to fight environmental crime beyond its borders. The role has been played so far mostly by some of its Member States, for example, the UK in the

¹⁶³ See Geeraerts, K., Illes, A. and Schweizer, J-P. (2015). *Illegal shipment of e-waste from the EU: A case study on illegal e-waste export from the EU to China. A study compiled as part of the EFFACE project.* London: IEEP.

case of illegal wildlife trafficking, and previously France; the EU is still toying with the adoption of an Action Plan against wildlife trafficking.¹⁶⁴

8.2 Strengths

8.2.1 International instruments and their enforcement

The EU has promoted the fight against environmental crime before the United Nations and international institutions. Thus, in recent years, the EU has incorporated in its EU Priorities for the UN General Assembly, to “increase efforts against wildlife crime and illegal logging and promote improved forest governance, as well as the reduction of deforestation and forest degradation”.¹⁶⁵ The EU also promotes the protection of the environment through criminal law in the new United Nations Environment Assembly, however there is no consensus in the concept of environmental crime. The EU has also introduced this goal among those it promotes in its cooperation agreements with Third countries and regional groups and it is now part of its environmental conditionality. It has further developed it in its pre-accession agreements and in its stabilisation and association agreements with its neighbouring countries.¹⁶⁶

The EU is also a party in most important MEAs and plays an important role as a complying party and a sponsor of the enforcement of those MEAs that criminalize activities that damage the environment seriously. Some MEAs have recommended criminal sanctions¹⁶⁷ as a way to raise social awareness and condemnation of environmentally harmful actions as well as deterrence. The EU has implemented these agreements through the adoption of important instruments of its environmental and trade¹⁶⁸ *acquis* and its Member States have transposed into their domestic legislations those obligations imposing sanctions on environmentally harmful activities.¹⁶⁹ It has also offered trade incentives through its System of Generalised Preferences to those Third countries that became parties and enforced those MEAs. In some cases, such as the MARPOL Convention, the Convention on the Prevention of Pollution from Ships, the EU has raised the bar of standards of protection of the convention, criminalising its infringements and it has addressed conflictive issues such as the harmonisation of its Member States’ legislations in order to prevent distortions and improve enforcement.

¹⁶⁴ Working paper prepared by the Secretariat on Comprehensive and balanced approaches to prevent and adequately respond to new and emerging forms of transnational crime, Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, 27 January 2015, *A/CONF.222/8*, para. 51, p. 15.

¹⁶⁵ See EU Priorities for the 68th UN General Assembly, available at http://eeas.europa.eu/top_stories/2013/190913_eu_priorities_68th_unga_2013_en.htm

¹⁶⁶ See Fajardo, T. (2015), *The EU’s promotion of environmental protection in Kosovo. A Case Study on the Protection of the Environment through Criminal Law in Kosovo. A study compiled as part of the EFFACE project.* Granada: University of Granada.

¹⁶⁷ Thus CITES CoP11 specified that “Parties should advocate sanctions for infringements that are appropriate to their nature and gravity” and the International Consortium on Combating Wildlife Crime adopted a toolkit dedicated to wildlife and forest offences to help the States to comply with these provisions, see Mitsilegas, V., Fitzmaurice, M., Fasoli, E., Fajardo, T. (2015). *Analysis of International Legal Instruments Relevant in the Fight Against Environmental Crime, Study in the framework of the EFFACE research project*, London: Queen Mary University of London, p. 32.

¹⁶⁸ See Maher, J., Sollund, R., Fajardo, T. (2014) *Response to the EU Commission’s consultation on wildlife trafficking. Statement on behalf of the research project European Union Action to Fight Environmental Crime (EFFACE). Study in the framework of the EFFACE Project.* Berlin: Ecologic Institute, p. 3.

¹⁶⁹ See Mitsilegas, V., Fitzmaurice, M., Fasoli, H., Fajardo, T. (2015), *loc. cit.*, p. 11.

8.2.2 Actors and institutions

Regarding actors and institutions, the EU has several agencies to enhance judicial and police cooperation at European level such as EUROJUST and EUROPOL that serve to promote international cooperation, even though they have limited mandates that are now in the process of being reformed. Other networks built on voluntary bases among a group of Member States such as IMPEL or the European Network for Prosecutors ENPE, are working not just with national problems of implementation but also with transnational problems involving Third countries.

EU institutions and agencies are working closely with most important global institutions such as UNODC, Interpol¹⁷⁰ and the World Customs Organisation, and participate in their initiatives such as International Consortium on Combating Wildlife Crime linked to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES hereinafter) and the Green Custom Initiative. The European Commission provides resources for their pilot programmes to fight against transnational environmental crime as in the case of the Interpol's programme MIKES against illegal wildlife trade, or CWIT against illegal trade of WEEE, involving European stakeholders in the recycling sector and Interpol and UNODC. The EU also finances UNODC Global Programme for Combating Wildlife and Forest Crime, along with the United States, France, Norway, Australia, Sweden and the Development Grant Facility of the World Bank.

These agencies are cooperating to identify the new modalities of transnational crimes used to perform environmental crimes, that are now more sophisticated, use flexible networks and are connected with money laundering and corruption to get fake official documents and permits to facilitate illegal wildlife trade and illegal logging. Environmental crime can also be a collateral crime of organised and serious crime forms such as corruption, money laundering, drugs and arms traffic. They do not treat environmental crimes in isolation.¹⁷¹

Regarding NGOs, EU's cooperation to development aid supports NGOs in Third countries to promote environmental protection and further enhance environmental governance and rule of law related with environmental issues, among them, the fight against activities that threaten the environment, due to the depletion of natural resources and the destruction of habitats that harbour endangered species of flora and fauna.

8.2.3 Toolbox: Information, databases, legal assistance and judicial cooperation instruments, cooperation to development

The EU is developing tools to fight environmental crimes that can also be applied to transnational environmental crimes and extended to Third countries, in order to exchange information and to provide legal assistance and judicial cooperation:

- Intelligence based Reports: recently Europol and Eurojust have produced important reports that identify environmental crimes, focusing particularly on transnational and organised environmental crimes.¹⁷² EnviCrimeNet has produced its Report on Environmental Crime in Europe as a result of its Intelligence

¹⁷⁰ For a thorough and comprehensive Report on all actors and institutions with whom the EU cooperates see Chin, S. and Veening W., (2015). *Actors and Institutions Relevant to Fighting Environmental Crime*. Study in the framework of the EFFACE research Project, The Hague: Institute for Environmental Security.

¹⁷¹ See Chin, S. and Veening, W., (2015), *loc. cit.*, p. 47.

¹⁷² For example the EUROPOL SOCTA, the Serious Organised Crime Threat Assessment and the 2013 EUROPOL Threat Assessment on Environmental Crime; see Fajardo, T. (2014), *EU Organised Crime Instruments and the Environmental Crime*. Legal analysis of EU instruments on organised crime in the perspective of fighting environmental crime. A study compiled as part of the EFFACE project. Granada: University of Granada.

Project on Environmental Crime that examined the situation in 26 Member States and 11 Third countries among them: Albania, Bosnia-Herzegovina, Canada, Colombia, Kosovo, Macedonia, Norway, Serbia or Russia.¹⁷³ Among other issues, it assesses the involvement of organised crime in environmental crime.

- Exchange of information: Databases such as the European Union Trade in Wildlife Information eXchange¹⁷⁴ (EU-TWIX, hereinafter) or IMPEL Transfrontier Waste Shipment Task Force are been developed to exchange good practices and case law. EU-TWIX is a database on wildlife trafficking created as an initiative of some Member states and has been developed to facilitate information exchange and international co-operation between law enforcement officials responsible for implementing trade controls across the European Union and has been also opened to Montenegro, Norway, Serbia, Switzerland and the Ukraine.¹⁷⁵ EUROPOL is also developing ENVICRIMENET to exchange information on environmental crime between Member States, experts and academy. At European level, the establishment of a Focal Point on environmental crime at Europol and the creation of international investigation teams have been envisaged, to enhance and improve international collaboration and the sharing of information.¹⁷⁶

- Legal assistance and judicial cooperation are foreseen in MEAs and in the UN Convention on Transnational Organised Crime (UNTOC, hereinafter) to request and provide assistance in obtaining evidence located in one country to assist in criminal investigations or proceedings in another country.

- To ensure promoting compliance with MEAs, the EU has a System of Generalized Preferences which provides a special incentive granted to those developing countries that have ratified and effectively implemented MEAs, including CITES and the Basel Convention on the Control of Transboundary movements of hazardous wastes and their disposal. States that have applied for and obtained this incentive system are Armenia, Azerbaijan, Bolivia, Colombia, Costa Rica, Ecuador, Georgia, Guatemala, Honduras, Sri Lanka, Mongolia, Nicaragua, Peru, Paraguay and El Salvador.

8.3 Weaknesses

8.3.1 International instruments and their enforcement

The EU fight against environmental crime in international institutions is mostly focused on wildlife trade and illegal logging, despite the growing problems that other types of transnational environmental crime pose such as the illegal traffic of hazardous waste or WEEE.

The EU has acknowledged and criticized the failure to comply with MEA requirements. In the case of CITES, the EU has proposed “strengthening enforcement and imposing truly deterrent sanctions against those involved in poaching, and that illegal trade should be the first priority in range States, transit States and

¹⁷³ EnviCrimeNet Intelligence Project on Environmental Crime. Progress Report on Environmental Crime in Europe, Doc. 5352/15, 20 February 2015.

¹⁷⁴ Initially a joint initiative of the Belgian Federal Police, Customs and CITES Management Authority, and TRAFFIC Europe, which co-ordinate the system.

¹⁷⁵ See Sollund, R. and Maher, J. (2015), The illegal wildlife trade. A Case Study report on the Illegal Wildlife Trade in the United Kingdom, Norway, Colombia and Brazil. A study compiled as part of the EFFACE project. University of Oslo and University of South Wales, p. 43.

¹⁷⁶ See EnviCrimeNet Intelligence Project on Environmental Crime., *loc. cit.*, p. 2.

States of final destination”.¹⁷⁷ However the EU has not followed the pattern of using the non-compliance mechanism foreseen in MEAs, but has just opened consultations with other Parties.¹⁷⁸

Some problems of enforcement at the international level are due to the differences in implementation of MEAs’ provisions criminalising environmental harmful activities. There is no harmonisation of sanctions of environmental crimes and the differences among the sanctions –administrative, civil and criminal- adopted in the EU Member States and in Third countries hamper enforcement as well as cooperation among them and Third countries. It has been highlighted that one of the major problems in relation to the enforcement of CITES is the fact that the penalties imposed by many Parties are insufficiently high and not much of a deterrent to illegal traders.¹⁷⁹ Regarding MARPOL Convention, the EU has adopted stricter criminal provisions and higher fines to solve problems derived from the low level of financial penalties, not set high enough to dissuade vessels from polluting, however, this problem is not solved at regional and global level, where Third countries can have systems of penalizing illegal discharges or just administrative sanctions with lower penalties.¹⁸⁰ In most cases, these problems have not been solved at the regional and global level, since most MEAs leave to the State parties the election between administrative or criminal measures to fight environmental crime. The adoption of criminal penalties implies a higher burden of proof and demand for resources. In some Third countries, the penalties may be very severe, even including death penalty, which is against the position sustained by the EU against the death penalty as defended in the recent Doha Congress of April 2015 on crime prevention and criminal justice.

On the other hand, the criminal approach to fight transnational environmental crime requires an administrative approach that has been neglected so far,¹⁸¹ as well as actions involving inspectorate and customs services. EnviCrimeNet has reported that “cooperation with Customs is difficult due to existing financial legislation, which makes the sharing of information complicated or not possible at all. This is similar for cooperation with environmental/regulatory authorities.”¹⁸² It has also been reported that there is lack of interplay between Customs, financial regulations and criminal sanctions in the case of the EU Timber Regulation and CITES.¹⁸³ The implementation of MEAs has also shown shortcomings and loopholes such as the lack of provisions regarding confiscation of profits and assets of crime both at EU level and in Third Countries, for example, in the case of CITES. At the internal level, the EU has missed the opportunity to regulate confiscation because its new EU Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union does not target environmental

¹⁷⁷ See Council Regulation (EU) No 57/2011, Council Regulation (EC) No 1224/2009 and Council Regulation (EC) No 1005/2008.

¹⁷⁸ The EU consults with Asian states, particularly China and Vietnam, on concerns over both elephants and rhinoceros and their derivatives and by-products, often sold to Asian Countries. See Mitsilegas, V., Fitzmaurice, M., Fasoli, H., Fajardo, T. (2015), *loc. cit.*, p. 47.

¹⁷⁹ CITES gives no guidance to States Parties as to the level of penalties that should be imposed on persons convicted of illegal trade or possession, with the result that there has been a considerable variation in the punishments inflicted. See Mitsilegas, V., Fitzmaurice, M., Fasoli, H., Fajardo, T. (2015), *loc. cit.*, p. 38.

¹⁸⁰ See Mitsilegas, V., Fitzmaurice, M., Fasoli, H., Fajardo, T. (2015), *loc. cit.*, p. 74.

¹⁸¹ See Fajardo, T. (2014), *EU Organised Crime Instruments and the Environmental Crime. A study compiled as part of the EFFACE project*. Granada: University of Granada, p. 35.

¹⁸² See EnviCrimeNet Intelligence Project on Environmental Crime., *loc. cit.*, p. 14.

¹⁸³ Saunders, J. and J. Hein (2015), *EUTR CITES and money laundering: A case study on the challenges to coordinated enforcement in tackling illegal logging. A study for the EFFACE project*. Chatham House: London, p. 11.

crimes.¹⁸⁴ The EU has not concluded agreements in the field of customs cooperation including environmental crimes related with illegal trade and trafficking among their provisions.

In the EU cooperation to development policy and in most cooperation agreements there are no express references to environmental crimes, but just to illegal activities related with the environment. Particularly serious is the fact that environmental crimes are not an indicator of environmental protection in the environmental profiles of countries used to plan cooperation.¹⁸⁵

8.3.2 Actors and institutions

At this stage of development of international environmental law, there is no international organization of the environment but a limited institutionalization of the MEAs that address their basic interstate cooperation needs through the Conferences of the Parties and the Secretariats of the Conventions, provided by the United Nations Environment Programme (UNEP). After UN Conference on Sustainable Development 2012, UNEP has started to be upgraded and is expected to play a more important role in enforcement as the new United Nations Environment Assembly (UNEA).¹⁸⁶ This deficit of environmental institutionalization has led to reliance for the enforcement of MEAs upon the international institutions as much as on municipal institutions at two levels of action: the international level where interstate cooperation is the main means of action and the domestic level where the weak governance may hinder the adoption of most basic environmental rules and the establishment of institutions to enforce them, as previous and necessary stages to fight environmental crime. Chronic lack of resources, corruption and economic interests at stake influence governments and institutions of all levels and branches, leading them to tolerate environmental harmful activities and, in some cases, to protect and promote them as part of their economic plans and alliances with economic sectors. The actions to change these endemic problems are limited by the principle of sovereignty and the EU has promoted environmental governance and the environmental rule of law as part of its cooperation to development policy, and as agreed with Third countries in its cooperation agreements.

Regarding multinationals and other economic actors, the practice of MEAs shows how frequently systems for enforcing international law have failed to keep up with companies that operate transnationally, and how businesses have been able to take full advantage of legal uncertainties and jurisdictional loopholes.¹⁸⁷ The lack of transparency and accountability to stakeholders has been criticized regarding CITES.¹⁸⁸ EU companies in Third countries are not abiding by the EU environmental acquis, but compete with other companies to obtain resources in political and legal circumstances where corruption and bribes contribute to adjudicating and obtaining exploitation permits.¹⁸⁹

¹⁸⁴ See the EU Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJUE 127, 29 April, p. 34.

¹⁸⁵ See, for example, the Overseas Countries and Territories Environmental Profiles 2015, available at http://ec.europa.eu/europeaid/overseas-countries-and-territories-environmental-profiles-2015_en

¹⁸⁶ See Fajardo, T. (2015). *International Environmental Law and Environmental Crime: An Introduction*. Study in the framework of the EFFACE research project, Granada: University of Granada, p. 15.

¹⁸⁷ In the case of the MARPOL and Basel Conventions, for carriers, cruise lines and oil companies, activities damaging the environment such as operational discharges of oil or sewage or transporting hazardous waste to developing countries, are profitable and are done to win or save money and increase their competitive advantage over other companies complying with international and domestic rules.

¹⁸⁸ See Saunders, J. and Hein, J., *loc. cit.*, p. 15.

¹⁸⁹ See Stefes, C. and K. Weingartner (2015). *Environmental crime in Armenia: A case study on mining*. A study compiled as part of the EFFACE project. Berlin: Ecologic Institute.

8.3.3 Toolbox: Databases, legal assistance and judicial cooperation instruments, cooperation to development

There are no studies on the complementarity between the criminal and administrative approaches to fighting transnational environmental crime. The best practices developed by Member States should be shared among the Member States and engaging Third Countries.¹⁹⁰

In the case of legal assistance and judicial cooperation instruments in the field of environmental crimes, the main obstacles derive from the different approaches to sanctioning through criminal or administrative measures, which have an impact on the possibilities of enacting international legal assistance. These differences will open or close channels of communication of information as well as international legal assistance since procedures to grant information or provide evidence will diverge if the activity is considered just an administrative infringement or a criminal one, and the dual criminality principle applies, mostly to deny cooperation. A number of countries also reserve the right to refuse requests that are considered disproportionate, that would harm the national interest, or which are made in the course of prosecution for offences that the state considers should not be criminalised. Geeraerts, Illes and Schweizer have pointed out the distortions caused by the differences in the way infringements are penalised in the case of illegal traffic of WEEE.¹⁹¹

EU cooperation to development has complemented the enforcement of CITES trade controls both at the point of import to the EU and in key producer/range states through capacity building investment. However, Saunders and Hein (2015) have reported that evidence of relevant national laws being used to prosecute CITES infractions is extremely limited; however, “it is not clear whether this is a failure of policy design or a failure of the institutional arrangements at EU member state level to investigate and prosecute the crimes in question using anti-money laundering powers. A trend away from expert environmental prosecutions teams towards investigation and prosecution being undertaken in larger police/prosecutions agencies may be one reason for the scarcity of such prosecutions. (...) It could also suggest that there is a tacit consensus among investigators/prosecutors that the sanctions regimes for CITES are relatively proportionate to the severity of the crimes in question. Since there have not yet been any EU Timber Regulation prosecutions it is too early to comment on the effectiveness of the relationship between it and anti-money laundering at policy or enforcement levels.”¹⁹²

On the other hand, and as a matter of fact, any ban or interdiction against any single source of production leading to the elimination of illegal activities in countries that react against environmental crime will displace environmental activities to those with weaker control.¹⁹³ In this respect, cooperation needs to be engaged with all countries involved or affected by environmental crimes.

Remedies for Victims outside Europe

¹⁹⁰ See the Handbooks on “Complementary approaches and actions to prevent and combat organised crime - A collection of good practice examples from EU Member States” adopted during the Hungarian and Lithuanian Presidencies and Fajardo, T. (2014). *EU Organised Crime Instruments and the Environmental Crime*. A study compiled as part of the EFFACE project. Granada: University of Granada, pp. 21 and 37.

¹⁹¹ Geeraerts, K., Illes, A. and Schweizer, J-P. (2015). *Illegal shipment of e-waste from the EU: A case study on illegal e-waste export from the EU to China*. A study compiled as part of the EFFACE project. London: IEEP, pp. 27 and 42.

¹⁹² See Saunders, J. and J. Hein (2015), *loc. cit.*, p. 29.

¹⁹³ See Santana, G. & Chin, S. (2015), *Can cocaine production in Colombia be linked to environmental crime?: A case study into the effect of EU legislation on the trade*. A study compiled as part of the EFFACE project. The Hague: Institute for Environmental Security, p. 26.

After the USA Supreme Court adopted a decision in the Kiobel Case, in which it refused to judge the case because of the lack of connection between the Royal Dutch Shell company and the USA, the European Commission has not proposed any measure to prosecute European stakeholders before European courts for damage caused in Third Countries. In my opinion, the possibility of delocalisation of European companies in case the EU or its Member States adopt a legal instrument taking as a model the USA Alien Tort Act plays against such an adoption.

The Trafigura case showed how the limited cooperation with Third countries and their refusal to provide evidence may result in the decision of prosecutors to decline to prosecute European companies causing environmental damage beyond European borders, based on the principle of opportunity.¹⁹⁴ The Ivory Coast authorities denied to provide evidence and judicial cooperation to the Dutch courts judging the case and preferred an extrajudicial agreement of compensation for damage with Trafigura, the owner of the Kobo Proala, the ship that brought a cargo of hazardous waste that caused the death of over 100 people.¹⁹⁵

8.4 Opportunities

8.4.1 International instruments and their enforcement

The EU should make the fight against environmental crime a diplomatic priority before international organisations and institutions and in its relations with Third countries and regional groups. To start with, in 2015, UN institutions are dealing with environmental crime in different fora and are adopting important measures that the EU should support. The first, regarding the adoption of new Sustainable Development Goals in June 2015, the EU should support the proposal of the Open Working Group on Sustainable Development Goals that envisages to fight environmental crime.¹⁹⁶ This proposal has been endorsed by the UN General Assembly in its Resolution 69/214 and it shall be the main basis for integrating sustainable development goals into the post-2015 development agenda. Its Goal 14.4 calls for effective regulation of illegal, unreported and unregulated fishing, and Goal 15.7 calls for urgent action to end poaching and trafficking of protected species of flora and fauna and to address both the demand and supply of illegal wildlife products.¹⁹⁷

Second, the EU should support the further developments on wildlife crime of the 13th United Nations Congress on crime prevention and criminal justice celebrated in Doha in April 2015, after it proposed, - supported by African countries-, to focus more on environmental crimes. Its Declaration of Doha on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation establishes that:

9. (e) To adopt effective measures to prevent and counter the serious problem of crimes that have an impact on the environment, such as trafficking in wildlife, including flora and fauna as protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, timber and timber products and hazardous waste, as well as poaching, by strengthening legislation, international cooperation, capacity-building, criminal justice responses and law enforcement efforts aimed at, inter

¹⁹⁴ See Mitsilegas, V., Fitzmaurice, M., Fasoli, E., Fajardo, T. (2015), *loc. cit.*, p.

¹⁹⁵ See Mitsilegas, V., Fitzmaurice, M., Fasoli, E., Fajardo, T. (2015), *loc. cit.*, p.

¹⁹⁶ The Resolution 69/214 adopted by the UN General Assembly on 19 December 2014 on the Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the outcomes of the World Summit on Sustainable Development and of the United Nations Conference on Sustainable Development, A/RES/69/214, 31 January 2015.

¹⁹⁷ Open Working Group of the General Assembly on Sustainable Development Goals Report, Doc. A/68/970, available at <http://undocs.org/A/68/970>.

alia, dealing with transnational organized crime, corruption and money-laundering linked to such crimes.¹⁹⁸

However, this Declaration avoids using the term environmental crime and uses the expression “crimes that have an impact on the environment”, which manifest the lack of consensus on the concept. In this same Congress, the UNODC Executive Director promoted the idea of “making wildlife crime a serious crime in accordance with UNTOC [that] will also facilitate international cooperation”.¹⁹⁹ The EU should consider supporting this proposal as well as that made during the consultation by a group of States to support the adoption of a new Protocol on Environmental Crime to the UNTOC.²⁰⁰

The EU should consider the possibility of criminalizing all the activities foreseen in new MEAs that could cause serious environmental damage. For example, in view of a future ratification of the Minamata Convention banning the trade on mercury, the EU has to enhance criminalisation of illegal trade and review Regulation No 1102/2008 that only foresees that “effective, proportionate and dissuasive penalties” should be applied by the Member States in case of smuggling mercury from the EU.²⁰¹

8.4.2 Actors and institutions

The EU should consider the possibility of taking advantage of the Green Diplomacy Network that now is part of the External Action Service. This diplomatic tool could orchestrate campaigns and demarches in international organisations and Third countries specifically focused on the fight against environmental crime. EU delegations in Third countries could also report on the status of environmental governance and rule of law and the existence of environmental crimes.

The EU should support the institutional system of the UNTOC by encouraging the upgrading of the role and competences of UNODC. This institution has a very limited operational capacity. It should be able to enhance cooperation among source states and states of demand and transit.²⁰² The EU enforcement

¹⁹⁸ See Draft Doha Declaration on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation, A/CONF.222/L.6, 31 March 2015, p. 11, available at http://www.unodc.org/documents/congress//Documentation/IN_SESSION/ACONF222_L6_e_V1502120.pdf

¹⁹⁹ Yury Fedotov, UNODC Director-General/Executive Director, Remarks at the High-Level Special Event on Wildlife and Forest Crime: A Serious Crime, 13th Congress on crime prevention and criminal justice, Doha, 13 April 2015, available at <http://www.unodc.org/unodc/en/speeches/2015/cc-wildlife-130415.html>

²⁰⁰ The EU and its Member States should propose to the Conference of the Parties of the UNTOC the adoption of a Fifth protocol on illegal wildlife trafficking addressing those serious environmental crimes such as illegal fishing, illegal logging and wildlife trade. This Convention that omitted all reference to the environment, introduces a wide definition of serious crime (Article 2, paragraph b), which enables the CoP to identify new forms and dimensions of transnational organized crime, with a view to facilitating a more uniform approach at the global level.

²⁰¹ Veening, W.J. et al., (2015). Mining gold and mercury pollution in the Guiana Shield: A case study on the role of the EU in fighting environmental crime. A study compiled as part of the EFFACE project. The Hague: Institute for Environmental Security, p.

²⁰² The mandate of the UNODC to fight against environmental crime and organised environmental crime was given in 2011 by the Economic and Social Council through its Resolution 2011/36 on crime prevention and criminal justice responses to trafficking in endangered species of wild fauna and flora. In the resolution, the Council requested UNODC to, inter alia, continue to provide technical assistance to States, upon request, particularly as regards the prevention, investigation and prosecution of trafficking in endangered species of wildlife, see Fajardo, T. (2014). The United Nations Convention on Transnational Organised Crime and the

agencies should consider enhancing cooperation with regional networks working with emerging forms of environmental crime, such as the Central American Network of Prosecutors against Organized Crime and the Network of West African Central Authorities and Prosecutors against Organized Crime.²⁰³

The EU should enhance cooperation with third countries engaged in the fight against environmental crime and follow their example when appropriate. For example, the USA has made a diplomatic priority of fighting against illegal fishing and has 73 bilateral Customs mutual assistance agreements.²⁰⁴ As reported by Saunders and Heine (2015), discussions between Member States and the European Commission about developing and financing a mutually-supportive platform for the EU Timber Regulation enforcement officials, and possibly those responsible for the US Lacey Act are ongoing, but there is consensus that such a system could have a transformative impact on the consistency and credibility of enforcement across the Union, by facilitating resource efficiency as well as encouraging peer oversight and accountability between national institutions. Instruments of international cooperation such as the EU Timber Regulation has led to informal networks and personal relationships established as part of the on-going Forest Law Enforcement Governance and Trade Action Plan (FLEGT) policy dialogue between the two countries.²⁰⁵

8.4.3 Toolbox: Databases, legal assistance and judicial cooperation instruments, cooperation to development

There are many opportunities ahead for the legal assistance and judicial cooperation with Third Countries. The EU could negotiate new legal instruments to enhance international cooperation to fight crimes, and in particular, environmental crimes after the UN Congress of Doha of April 2015 which positioned itself in favour of the adoption of treaty-based legal tools for international cooperation in criminal matters²⁰⁶ and mutual recognition.²⁰⁷ EUROJUST could promote legal assistance and judicial cooperation with Third countries affected by transnational environmental crime. EU Member States have negotiated agreements and memoranda of understanding with Third countries to cooperate in a wide range of issues related with legal assistance. Most of these agreements respond to the principle of dual criminality required for coercive investigative measures (such as search and seizure, restraint and confiscation of assets) and takes a “conduct” based approach. This means that the conduct underlying the alleged offence is considered

environment. Legal analysis of international instruments on organised crime in the perspective of fighting environmental crime. A study compiled as part of the EFFACE project, Granada: University of Granada.

²⁰³ See the website of UNODC which presents the networks dedicated to cooperation www.unodc.org/unodc/en/organized-crime/international-cooperation-networks.

²⁰⁴ See Presidential Task Force on Combating IUU Fishing and Seafood Fraud, Action Plan for Implementing the Task Force Recommendations, available at http://www.nmfs.noaa.gov/ia/iuu/noaa_taskforce_report_final.pdf

²⁰⁵ Saunder, J. and Hein, J., *loc.cit.*, p. 19.

²⁰⁶ See the Working Paper on International cooperation, including at the regional level, to combat transnational organized crime, prepared for the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, *A/CONF.222/7*, 22 January 2015. It says “For international cooperation practitioners, the legal basis employed, including the terms of the relevant bilateral or multilateral instrument, can have a significant impact on the success of individual requests for cooperation. Even where a State is able to provide assistance without a treaty, reliance on the agreed terms of a bilateral or multilateral instrument can assist in bridging diverse legal traditions and cultures and national differences in procedural law. In addition, the existence of legal rights and obligations within the bilateral or multilateral instrument provides a clear framework governing the manner in which the requested State should respond to requests”, para. 9, p. 4.

²⁰⁷ It points the EU as an example to follow after acknowledging that “in an attempt to adjust to ever more complex and sophisticated crime challenges, more recent initiatives at the regional level use the principle of mutual recognition, to go beyond arrangements for mutual assistance”, Working Paper on International cooperation, including at the regional level, to combat transnational organized crime, *A/CONF.222/7*, 22 January 2015. para. 29, p. 10.

when assessing dual criminality, rather than seeking to match the exact same term or offence category in both jurisdictions. However, some Member States do not require this principle adopting a case by case approach or apply it when it is required by international agreements.²⁰⁸ International cooperation should also comprise administrative aspects of transnational crimes.

EUROJUST's reform proposal still distinguishes as forms of crime between illicit trafficking in endangered animal species, illicit trafficking in endangered plant species and varieties and environmental crime, including ship source pollution.²⁰⁹ This proposal also envisages in its Section III on International Cooperation the possibility for EUROJUST to post liaison magistrates to third countries to improve judicial cooperation and to request judicial cooperation to and from Third countries.²¹⁰ However, environmental crimes are not among those triggering the exchange of information with Member States and between national members as foreseen in Article 21 of the proposal.

Customs cooperation in the fight against environmental crime is now the object of the mandate for Action 7.10 *To identify the fields for customs law enforcement cooperation such as joint operations, in the fight against environmental crime (e.g. hazardous waste, ozone, CITES, links to organized groups)* that was adopted in 2013 as part of the 7th Action Plan of the EU Policy Cycle (2014-2015), but initially only received participation from 6 Member States: Belgium, France, Germany, Greece, Hungary and UK. It is just at an early stage and so far has covered just the internal aspects of Customs cooperation among Member States.²¹¹

Regarding victims, the 13th Congress on Crime Prevention and Criminal Justice has proposed the expansion of the concept of victim, through recognition of distributed harm to habitats, environmental resources and communities and the EU should support any further developments on this issue.²¹²

8.5 Threats

8.5.1 International instruments and their enforcement

The EU as a normative power is losing leverage in many international fora. The EU needs to promote its position and win the support of a wider range of Third States to influence, for example, the new agenda of the Sustainable Development Goals of the UN General Assembly as well as the agenda of the UNEA. The cost of its inaction will delay the recognition of transnational environmental crimes as serious crimes and in some cases close a window of opportunity as in the case of the 13th Congress on crime prevention and criminal justice. The EU did not make a reference to the fight against wildlife crime in its statement in this Congress, only the USA did it. In this Congress, it was pledged to review and reform national criminal laws to consider serious crimes some illegal activities which in many cases are punished with less than four years of deprivation of liberty²¹³ or/and to harmonise national legislation and sanctions with the UNTOC.

²⁰⁸ See Saunder, J. and Hein, J. (2015), analyzing the practices of the UK, the Netherlands, Italy and the Czech Republic, p. 41.

²⁰⁹ See Article 3 and Annex 1 of the Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (First reading), Doc. 6643/15, 27 February 2015.

²¹⁰ See Article 43 of the Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (First reading), Doc. 6643/15, 27 February 2015.

²¹¹ Most documents regarding this Action are not accessible to public or have been just partially declassified, see the Note from Presidency to Customs Cooperation Working Party on the Progress Report on Action 7.10 *To identify the fields for customs law enforcement cooperation such as joint operations, in the fight against environmental crime (e.g. hazardous waste, ozone, CITES, links to organized groups)*, Doc. 16065/14, 27 November 2014, p. 2.

²¹² See A/CONF.222/8, para. 11, p. 5.

²¹³ See for example para. 6. of the Working paper prepared by the Secretariat on International cooperation,

At the EU level, this is not a settled question, since some Member States consider it legislatively intrusive to try to harmonise crimes by increasing their punishment nationally and so making it a serious crime.²¹⁴ In the final version of the Doha Declaration, the reference to illegal, unreported and unregulated fishing as a serious crime under UNTOC that was present in the first proposals has been removed, as some EU Member States desired. The unilateral position on this subject of the USA may change the treatment of this issue in the future.

EU instruments of cooperation to development do not address directly environmental crime but just consider illegal activities related with the environment as possible consequences derived from the poor performance of development programmes and plans that can reveal the fragility of states,²¹⁵ particularly when they suffer from “lack of administrative resources, collusion between private and public interests and the resulting lack of political will and outright corruption [that] are responsible for the lack of enforcement”²¹⁶ of environmental rules. These instruments do not raise the sustainable development, and the peace and security implications of wildlife trafficking. Moreover, EU cooperation to development actions should address environmental threats such as those derived from abandoned mining sites and tailings ponds that are in their vicinity, and in some of these cases with the involvement of European companies.²¹⁷

There are no EU legal instruments at the internal level dealing with money laundering or confiscation targeting environmental crime; the problem is aggravated by the different practices in the Member States and the lack of information on this respect. As criticised by Sollund and Maher (2015), the frequency of changes to what is already complex legislation (e.g. CITES) results in non-compliance, poor enforcement and prosecution, especially when changes are not communicated clearly to key stakeholders (e.g. commercial traders or front line customs officers). A clear communication strategy of changes in regulations and policy which includes all key stakeholders is required.²¹⁸

The EU does not take into account adequately the involvement of organised crime groups and the environmental crime even though the Progress Report on Environmental Crime in Europe prepared by EnviCrimeNet has shown that there is involvement of these groups with:

- Illegal collection, (cross-border) transport and storage including dumping of (hazardous and electronic) waste and recycling,
- Illegal shipping of (hazardous and electronic) waste,
- Illegal logging,
- Illegal hunting/poaching,
- Illegal trade in endangered species and related products (the most apparent area of OCG involvement) also on the Internet,
- Trade in counterfeit pesticides,
- Illegal activities in relation to fuel oil,

including at the regional level, to combat transnational organized crime that proposes that “The provisions of multilateral conventions such as the 1988 Convention, the Organized Crime Convention and the Convention against Corruption can play a key role in harmonizing obligations and addressing legal gaps in the field of international cooperation in criminal matters”, *A/CONF.222/7*, 22 January 2015, p. 4.

²¹⁴ This information has been obtained in an interview with EU Commission civil servants.

²¹⁵ See EuropeAid (2011), *Guidelines on the Integration of Environment and Climate Change in Development Cooperation*, available at <http://capacity4dev.ec.europa.eu/t-and-m-series/blog/guidelines-nr-4guidelines-integration-environment-and-climate-change-development-cooperation>

²¹⁶ See Stephe, C. and Weingartner, K. (2015), *loc. cit.*, p. 3.

²¹⁷ See Zoi Environment Network (2010). *Mining and Environment in the Western Balkans*, United Nations Environment Programme, available at http://www.unep.org/pdf/MiningBalkans_screen.pdf.

²¹⁸ Sollund, R. and Maher, J. (2015), *loc. cit.*, p. 3.

- Illegal fishing activities,
- Forest fires.²¹⁹

8.5.2 Actors and Institutions

There is a risk that the informal networks of information between the European authorities and Third parties counterparts do not develop further because of the lack of resources granted by the European institutions and because legal limits to cooperation. Regarding information and enforcement networks, Saunders and Hein (2015) report that “the European Commission is considering providing resources to establish a platform to allow EU Timber Regulation enforcement officials to communicate with each other and store data in a shared ‘institutional memory’, akin to EU TWIX, (...). Despite its lauded positive impact on enforcement however, EU TWIX is not financially secure. The financial instability of TWIX is being used as an argument to putting an EUTR platform on a less searchable/useable system, without an expert administrator”.²²⁰ There is also lack of communication among the agencies dealing with the different sectors of environmental crime, even those particularly close as in the case of CITES and EU Timber Regulation.²²¹

8.5.3 Toolbox

There are no EU tools regarding confiscation of assets of environmental crimes and the recent Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU does not target environmental crimes²²² or envisage any measure related with it, leaving it in the hands of Member States to adopt appropriate measures that can lead to criminals selecting the weakest system. However, confiscation is one of the cooperation measures that the Doha Declaration strives for “To develop and implement adequate mechanisms to manage and preserve the value and condition of frozen, seized or confiscated assets that are the proceeds of crime, as well as to strengthen international cooperation in criminal matters and to explore ways of affording one another similar cooperation in civil and administrative proceedings for confiscation purposes.”²²³

There is a lack of sufficient cooperation with neighbouring countries whose borders could serve as entry in the EU Member States and there are no instruments envisaging this cooperation. As Sollund and Maher (2015) report CITES and EU Wildlife Trade Regulations are implemented in many of the countries bordering the EU (e.g. Norway as an EEA member), yet these offences are given limited attention by law enforcement agencies, wildlife trade is not recognized as a priority and there is a general ignorance among law enforcement agencies.²²⁴ There is no Customs cooperation agreement with Third countries related with environmental crimes and illegal activities related with the environment. In the case of the EU

²¹⁹ See EnviCrimeNet Progress Report (2015), *loc. cit.*, p. 21.

²²⁰ Saunder, J. and Hein, J., *loc.cit.*, p. 30

²²¹ As Saunder and Hein argue “Coordination of enforcement staff and resources between EUTR and CITES teams is generally based on infrequent or ad hoc meetings of officials; with no systemic arrangements to coordinate with agencies or staff responsible for enforcing financial regulatory arrangements. Where coordination has been achieved between environmental and financial legislation, it has been at the point of investigation/prosecution”, Saunder, J. and Hein, J., *loc.cit.*, p. 16.

²²² See the EU Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJUE 127, 29 April, p. 34.

²²³ See para. 8.h of the Doha Declaration, p. 8.

²²⁴ Maher, J., Sollung, R., Fajardo, T. (2014), p. 3.

Member States, less than half of them have national Customs action plans providing specifically for environmental crime.²²⁵

There is no EU legal instrument addressing the possibility of prosecuting European companies abroad for environmental crimes or activities causing environmental damage. The EU does not have similar tools to those that allow the USA to fight against environmental crimes beyond their borders, such as the Alien Tort Act or their numerous mutual legal assistance agreements.

8.6 Conclusions

There is not a global consensus on the concept of environmental crime and its characterisation as a serious crime, however the international community as represented in the United Nations institutions, the UNEA and the Doha Congress on crime prevention and criminal justice have acknowledged the impact of environmental crime and illegal activities damaging the environment, particularly wildlife trafficking, in the sustainable development of developing countries as well as in the peace and security of fragile regions in conflict. The EU should be committed to the actions to follow and should make the fight against environmental crime a diplomatic priority of its agenda before these organisations and institutions and in its relations with Third countries and regional groups. The EU position should be grounded on clear and strong positions on key issues such as the harmonisation of sanctions, which is a obstacle to trigger judicial cooperation for those crimes that require a sanction of not less than 4 years, as foreseen by UNTOC. However, the EU has not settled this issue at the internal level. The EU is supporting at the moment a concept of environmental crime that excludes illegal fishing and argues about its connections with organised crime.²²⁶ The connections between environmental crime and organised crime are been considered after the Europol SOCTA 2013 asked for it.

The fight against crimes and activities damaging the environment should inspire the environmental conditionality to be applied to international agreements of the EU with Third countries. This requirement is already present in the negotiations with candidates to accession to the EU and the Stability and Association Agreements, and in the Neighbouring countries policy because when incorporating the EU environmental acquis these countries have to foresee the protection of the environment through criminal law when the damage caused is serious. The EU should incorporate this condition in the Economic partnerships agreements in the other areas of influence of the EU.

The following table summarises the strengths, weaknesses, opportunities and threats

Strengths	Weaknesses
<ul style="list-style-type: none"> • The EU is a party to most important MEAs seeking to protect the environment against environmental crime. There are mostly criminal sanctions under EU Legislation implementing MEAs • The EU considers as serious crimes most transnational environmental crimes. • EU networks of enforcement agencies such as EUROPOL, EUROJUST, ENPE and IMPEL promote international cooperation related with transnational environmental crimes. • The EU is developing tools to fight environmental crimes that can also be applied 	<ul style="list-style-type: none"> • Restrictive concept of environmental crime, mainly focusing on wildlife trade and illegal logging. • Lack of harmonization of sanctions. • The criminal approach requires a complementary administrative approach, as well as actions involving inspectorate and Customs services. • There is no agreement on Customs cooperation with third countries in the field of environmental protection. • Some legal proposals of the EU are not incorporating environmental crime among the

²²⁵ See Progress Report on Action 7.10, *loc. cit.*, these data have very limited scope because only 6 Member States have participated.

²²⁶ Some Member States deny it and the Europol and EnviCrimeNet report that ilegal fishing activities involve organised crime groups after three jurisdictions pointed it.

to transnational environmental crimes and extended to Third countries: exchange of information, legal assistance and judicial cooperation.

- The EU supports green NGOs in Third countries in order to promote environmental protection and fight against environmental crime.

crimes receiving more international cooperation and instruments.

- High cost of interventions against transnational environmental crimes and limited resources for them.
- Data bases are not accessible to NGOs or public opinion.
- EU companies in Third countries do not abide by the EU environmental acquis and act according to local regimes and circumstances of corruption and environmental crime.

Opportunities

- To promote a wider concept of environmental crime that includes wildlife trade and illegal logging, illegal traffic of hazardous waste and WEEE, and others.
- To make wildlife crime a serious crime in accordance with UNTOC to facilitate international cooperation.
- EU could support the UN initiatives to fight against environmental crime, in particular, the adoption of those Sustainable Development Goals that seek to fight wildlife crime.
- Transnational environmental crimes could be treated in connection with other serious crimes such as corruption, money laundering and drugs trafficking.
- International cooperation could be extended to administrative aspects of the transnational crimes.
- Inspectorate and Customs services should be involved to fight transnational environmental crimes.
- EU Networks of enforcement agencies should be extended to the rest of the Member States as well as to associated Third countries and should enhance further cooperation at different levels.
- To enhance cooperation with enforcement officials in the targeted Third States that have accepted the commitments and economic aid link to the EU agreements.
- Informal networks created by the practice of cooperation agreements such as EU initiatives on illegal logging should be consolidated and further developed.
- To support the adoption of a Fifth protocol on environmental crime to the Conference of the Parties of the UN Convention on Transnational Organised Crime.
- To promote that the new Sustainable Development Goals envisage to fight environmental crime.
- To introduce the fight against environmental crime in the environmental clause of the EU conditionality when negotiating international agreements with Third states.
- To promote custom cooperation agreements.

Threats

- EU Legal instruments incorporating legal tools to fight transnational crimes do not introduce environmental crimes.
- Environmental crimes cannot be treated in isolation from other serious crimes
- Lack of synergies between the different legal regimes: CITES, EUTR
- To prioritise economic interests over environmental protection promotion in the relations with Third countries.
- Not to incorporate environmental requirements in EPAs seeking to promote the EU investments in mining and logging sectors in Third countries.



9 Area 7: Use of environmental liability (EU/MS)

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9.1 Introduction

Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive, ELD) establishes a framework to prevent and remedy environmental damage.

The ELD establishes the powers of the “competent authority” and the duties of the “operator” whose occupational activity has caused environmental damage (or imminent threat of); the latter is defined as damage to protected species and natural habitats, damage to waters and damage to soil. ELD states that operators operating or controlling a dangerous activity (listed in Annex III) are subject to a strict liability rule, with exceptions and defences; in other cases (not listed in Annex III), when causing damage to biodiversity a fault based liability applies. Operators must take preventive action, if there is an imminent threat of environmental damage, and bear the costs of the remedial measures, if such damage has occurred.²²⁷

Within the discussion on instruments to tackle environmental crime, the question can be asked whether the ELD and the Member States (MS) ELD transposing provisions can play a role in relation to the fight against environmental crime at the European Union (EU) and MS level.

This analysis therefore identifies strengths and weaknesses relating to the use of ELD to address environmental crime. While liability regimes are at MS level, the review reaches conclusions in relation to the ELD itself (noting that MS can add liability requirements beyond those of the directive), also in relation to directive 2008/99/EC on the protection of the environment through criminal law (Environmental Crime Directive, ECD). Thus, the analysis only reviews information on the role of the use of liability (as per the ELD) as it affects environmental crime; the analysis does not address tort law. Alongside the strengths and weaknesses, this analysis identifies key opportunities to address weaknesses and threats to doing this.

The SWOT analysis has been based on EFFACE research outputs, and in particular on: the analysis of the ELD;²²⁸ national legislation on environmental liability and links, if any, with environmental criminal law (as documented in the EFFACE country reports);²²⁹ results of the EFFACE workshop on “Environmental

²²⁷ Salanito, U. (2015). Directive 2004/35/EC on Environmental Liability. Study in the framework of the EFFACE research project, 6, Catania: University of Catania. Available at www.efface.eu.

²²⁸ Salanito (2015).

²²⁹ As it concerns the national level, the scope of the EFFACE analysis included seven EU Member States: France, Germany, Italy, Poland, Spain, Sweden, UK. See (all available at www.efface.eu): Bianco, F., Lucifora, A., Vagliasindi, G.M. (2015). Fighting Environmental Crime in France: A Country Report. Study in the framework of the EFFACE research project, Catania: University of Catania; Sina, S. (2015). Fighting Environmental Crime in Germany: A Country Report. Study in the framework of the EFFACE research project, Berlin: Ecologic Institute; Vagliasindi, G.M., Lucifora A., Bianco, F. (2015). Fighting Environmental Crime in Italy: A Country Report. Study in the framework of the EFFACE research project, Catania: University of Catania; Mitsilegas M., Fitzmaurice M., Fasoli E. (2015). Fighting Environmental Crime in Poland: A Country Report. Study in the framework of the EFFACE research project, London: Queen Mary University of London; Fajardo, T., Fuentes, J., Ramos, I., and Verdú, J. (2015). Fighting Environmental Crime in Spain: A Country Report. Study in the framework of the EFFACE research project, Granada: University of Granada; Philipsen, N.J. and Faure, M.G. (2015). Fighting Environmental Crime in Sweden: A Country Report. Study in the framework of the EFFACE research project, Maastricht: Maastricht University, METRO; Mitsilegas, V., Fitzmaurice, M., Fasoli, E. (2015). Fighting Environmental Crime in the UK: A Country Report. Study in the framework of the EFFACE research project, London: Queen Mary University of London.

Liability and Environmental Crime” held in Brussels on 6 November 2014;²³⁰ EFFACE case study.²³¹ The above took into consideration the work of the European Commission on the ELD.²³²

9.2 Strengths

While the implementation of the ELD raised several concerns (see below, 3), it has to be mentioned that the ELD requires that damage to biodiversity, waters and soil is remediated or compensated (and action has to be taken when an imminent threat of damage occurs). In this respect, it has been stressed that the ELD provides for higher remediation standards that did not always exist previously (in particular, complementary and compensatory remediation) and it implements the polluter pays principle.²³³

The ELD also brought benefits in terms of economic valuation of damage, complementary and compensatory remediation and public participation including access to justice;²³⁴ as to the latter, access to justice and enhancing the role of victims is a key element of a modern approach towards the fight against environmental crime.

It has to be mentioned that, while the ELD does not foresee mandatory financial security (on the issue, see below, 3), eight MS (Bulgaria, the Czech Republic, Greece, Hungary, Portugal, Romania, Slovakia, and Spain) have already voluntarily implemented mandatory financial security (although with various criteria, exemptions and thresholds).²³⁵

The ECD “is without prejudice to other systems of liability for environmental damage under Community law or national law (whereas 11), therefore implicitly referring to ELD.

The ELD refers to EU secondary legislation which is relevant for determining the notion of “damage” relevant under the ELD; this is the case for the Habitats Directive²³⁶ and the Birds Directive²³⁷ as well as the Water Framework Directive.²³⁸ A commentator argues that, as biodiversity damage in the ELD has to be determined with reference to the criteria of the Birds and Habitats Directives, and water damage has to be determined with reference to the criteria of the Water Framework Directive, “the scope of the notion of

²³⁰ Vagliasindi, G.M., Bianco, F., Lucifora, A. (2015). Summary of the EFFACE workshop on “Environmental Liability and Environmental Crime” held in Brussels on 6 November 2014 (hereinafter: the EFFACE Workshop), and related presentations, both available at www.efface.eu.

²³¹ See Fajardo, T. and Fuentes, J. (2014). The Aznalcollar and the Kolontar Mining Accidents: A case study on mining accidents and the criminal responsibility of operators and administrations. A study compiled as part of the EFFACE project. Granada: University of Granada and University of Jaen. Available at www.efface.eu.

²³² Available at <http://ec.europa.eu/environment/legal/liability/>.

²³³ Vagliasindi et al., Summary, 8; Hans Lopatta, Presentation at the EFFACE Workshop.

²³⁴ Vagliasindi et al., Summary, 2. Within the EFFACE country reports, see e.g. Mitsilegas et al. (2015-UK) 74 f.: “A difference between the ELD, as implemented, and the existing national rules on pollution prevention and clean-up is that the former gives affected individuals or NGOs the right to press the regulatory authorities to take action. The regulator must then give its reasons for either choosing (or declining) to act and the NGO has the right to question on the basis of the regulator’s decision (either in a court or another competent body)”.

²³⁵ See Federation of European Risk Management Associations (FERMA), More demanding environmental requirements ahead? Seminar roundtable to discuss, 29 September 2014, available at <http://www.ferma.eu/blog/2014/09/demanding-environmental-requirements-ahead-seminar-roundtable-discuss/>.

²³⁶ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

²³⁷ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (codified version: Directive 2009/147/EC).

²³⁸ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

damage could then be read in a consistent way in both ELD and ECD²³⁹ (on the issue, see also below, 3). In particular, with regard to biodiversity it has been argued that – as the ECD encompasses “any conduct (such as killing, destruction, possession or taking of) that affects specimens of protected wild fauna or flora species, 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” and “any conduct which causes the significant deterioration of a habitat within a protected site” – the ELD and the ECD in this case “should be interpreted in a consistent manner, because both share the same purpose, namely to protect the favourable conservation status of protected species and habitats”.²⁴⁰ As to land damage, it has been argued that “the definition of land damage[in the ELD], as a damage that is relevant only if it creates a risk to human health, should be kept in mind in the interpretation of Directive 2008/99/EC on environmental crimes, which simply states the relevance of “substantial damage to the quality of soil””²⁴¹ (on the issues, see also below, 3).

Within the seven EFFACE country reports, the report on the UK documents direct links between the ELD implementing provisions and criminal law: “A breach of the national provisions implementing the ELD constitutes a criminal offence punished through a summary conviction (fine not more than £5000, imprisonment not more than 3 months (Scotland: not more than 1 year), or both; or through a conviction on indictment (unlimited fine, imprisonment not more than 2 years, or both). If the breach is committed by directors and officers they may be convicted if the company’s offence is committed with their consent or connivance or is attributable to their neglect (but in Scotland the partner of a Scottish partnership may be convicted if the partnership’s offence was committed with their consent or connivance or is attributable to their neglect. Equivalent provisions apply to the member or a person purporting to act as a member, or a Scottish limited liability partnership”.²⁴²

9.3 Weaknesses

The ELD entered into force on 30 April 2004. The drafting process was long (the European Commission issued a Green Paper in 1993 and a White Paper in 2000); the transposition process was slow too as it ended only in 2010.²⁴³

According to the 2010 Commission report on the ELD, there are diverging national transposing rules which could potentially create difficulties; for example, there is an uneven implementation of the permit and state of the art defences and an uneven extension of the biodiversity scope to cover species and natural habitats protected under domestic law. The European Commission has carried out an evaluation of the effectiveness of prevention and remediation of damage to the environment on the basis of gathered experience; the purpose is to suggest practical measures and/or legislative adaptations at EU level to increase effectiveness. The result is that the number of ELD cases per Member State varies considerably from 95 annual cases to less than 1 annual case; the duration of remediation varies between 1 day and more than 6 years (average duration approximately around 2 years). It has also been underlined that, following the MS reports, there are still some weaknesses, such as low awareness of operators and authorities; lack of expertise and resources in financial, economic and liability matters; difficulties in establishing causality and identifying liable operator; compliance with permit defence; no mechanisms (insurance etc.) in place to remedy large scale damage; use of undefined legal terms. According to the ELD

²³⁹ Salanitro (2015) 30.

²⁴⁰ Salanitro (2015) 11; see Lucas Bergkamp et al., “Sanctions and enforcement”, in *The EU Environmental Liability Directive. A commentary*, ed. Lucas Bergkamp and Barbara J. Goldsmith (Oxford: Oxford University Press, 2013), 327 ff.

²⁴¹ Salanitro (2015) 14.

²⁴² Mitsilegas et al. (2015-UK) 75.

²⁴³ Salanitro (2015) 7.

Implementation Study 2012, the transposition of the ELD into national law did "not result in a level playing field but a patchwork of liability systems" due to procedural and substantive variations.²⁴⁴

The enforcement of the ELD, and its potential to contribute to remedy the damage caused by environmental crime, can be also hampered by enforcement problems related to other directives. For instance, an EFFACE case study on mining concludes that "The Kolontar case shows that even though Hungary complied with the Environmental Liability Directive (ELD), the incorrect enforcement of the waste management directive undermined the enforcement of the former and other directives";²⁴⁵ the authors add that in the Aznacollar and Kolontar cases "the companies, Boliden-Apirsa and Magyar Alumina Ltd. did not pay for the total damage caused, raising many questions about the gaps of EU environmental liability legislation as well as its enforcement and the need to have a better and coordinated implementation of the EU directives".²⁴⁶

Different approaches exist between the ECD and the ELD concerning the identification of the "liable" person or entity: in the ECD the offender (who can be whoever, including under the conditions set out by Art. 6 and Art. 7, a legal person) is liable when the conduct, falling within the list of Article 3 of the ECD, is unlawful and committed intentionally or with serious negligence; in the ELD only the "operator" (natural or legal person) is liable, if he is in fault or the activity is dangerous for health or environment.²⁴⁷

The purpose of the ELD is to prevent and remedy environmental damage. The latter includes damage caused to protected species and habitats, water and land. The ELD, therefore, does not cover all natural resources.²⁴⁸

The term "significant" in respect of environmental damage in the ELD probably does not have the same meaning as "substantial" damage in the ECD. Both terms refer to result of an activity or conduct, but the term "significant" in the definition of land damage in the ELD refers to human health; on the contrary the ECD uses the term "death or serious injury" and not the word "substantial" in respect of human health. Moreover, the ELD includes criteria to determine whether the biodiversity damage is significant, while no criteria are provided in this respect in the ECD but references to specific environmental legislation. As to the scope of land (soil) damage - it is worth noting that term "land" in the ELD is not the same as term "soil" in the ECD; the ELD will rarely apply to agricultural land due to requirement for negligence, on the contrary, ECD specifically applies to agricultural land. Moreover, while the ELD requires a risk to human health, ECD requires a substantial damage to the quality of the soil itself. With regard to the scope of water damage, the ELD provides for severe limitations on liability for water damage in some Member States due to the requirement for damage to a "water body" not "waters"; as a consequence, the ECD has a wider application to waters than the ELD. Concerning the scope of biodiversity damage, the ELD does not include "animals" and "plants", but is limited to species and habitats protected under the Birds and Habitats Directives and, at the option of MS, equivalent national legislation. The ECD includes animals and plants as well as species and habitats protected under the Birds and Habitats Directives and provides more protection in Natura 2000 sites than outside them due to reference to any conduct causing their significant deterioration.²⁴⁹

²⁴⁴ Vagliasindi et al., Summary, 8; Hans Lopatta, presentation at the EFFACE Workshop. Within the EFFACE country reports, see for instance Philipsen and Faure (2015) 44: "The ELD was added as an extra layer into the existing liability regime in Chapter 10 of the Environmental Code, which creates serious delineation problems. According to Prof. Jan Darpö, there were only very few ELD incidents mentioned in the recent report from the SEPA to the Commission about the existence of ELD incidents in Sweden".

²⁴⁵ Fajardo and Fuentes (2014) 8.

²⁴⁶ Fajardo and Fuentes (2014) 8.

²⁴⁷ See Vagliasindi et al., Summary (2015), 1

²⁴⁸ Salanitro (2015) 7.

²⁴⁹ See Vagliasindi (2015), Summary, 2 f.; Valerie Fogleman, presentation at the EFFACE Workshop.

As to remedies, it has been stressed that in the ELD remedy is not a punitive one: “the operator bears the costs of remedial measures, which restore damaged natural resources or services to the baseline condition or to a similar level”.²⁵⁰

In sum, although the ELD and ECD have been referred to by commentators as “sister directives”, complementing each other, more differences than similarities are deemed to exist concerning their scope and application.²⁵¹ The need for a better synchronism between the two instruments has been stressed.²⁵² With regard to the application of the ELD in MS national law, concerning land damage and water damage liability exists in most MS; as to biodiversity damage, virtually all existing legislation imposes liability only when there has been an unlawful act, and is limited to primary liability except for complementary liability in Germany. As to the application of the ECD in Member State national law, the ECD complements /supplements administrative/ civil sanction regimes for environmental damage.²⁵³

At national level no explicit links are reported in the EFFACE country reports between the national provision transposing ELD and environmental criminal law;²⁵⁴ environmental liability regime is argued to play little or no role in environmental criminal law; however the reports document that failure to inform the competent authority on a damage or threat of damage and failure to comply with the order to carry out remedial measures can be punished under environmental criminal law (and/or administrative penal law in Germany), mostly on the grounds of pre-existing legislation on contamination.²⁵⁵

Weaknesses are shown when comparing the EU and the US systems. In particular, the provisions for notification in the ELD use the same definitions as the remediation standards with the consequence that the notification obligation threshold is too high to be meaningful, while the U.S. rule under CERCLA uses a “one pound” numeric standard for reportable releases under Superfund; the under-reporting of accidental discharges to the soil under the European Pollution Release and Transfer Registry (E-PRTR) illustrates that reporting obligations for potential contamination incidents have to be strengthened, including possible penalties.²⁵⁶

This said it has to be stressed that, together with the issues concerning causality and compliance with permit defence, a major weakness of the ELD is deemed to be related to underdeterrence in case of insolvency; this is linked to the issue of financial security.²⁵⁷ Art. 14 ELD merely states in respect of financial security: “Member states shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this directive”. It has been stressed, that “This is a dangerous approach since the directive introduces strict liability for many activities. If this strict liability is not accompanied by a mandatory financial guarantee or insurance, underdeterrence may arise. Moreover, it seems clear that environmental liability, given the serious insolvency risk, cannot exercise its compensatory function unless

²⁵⁰ Salanitro (2015) 30.

²⁵¹ See Vagliasindi (2015), Summary, 2; Valerie Fogleman, presentation at the EFFACE Workshop.

²⁵² See Vagliasindi (2015), Summary, 6; Elisabetta Rosi, presentation at the EFFACE Workshop.

²⁵³ See Vagliasindi (2015), Summary, 3; Valerie Fogleman, presentation at the EFFACE Workshop.

²⁵⁴ On the UK, see *supra*, chapter 2; on Poland, see Mitsilegas et al. (2015) 38.

²⁵⁵ See Bianco et al. (2015) 53; Sina (2015) 66 ff.; Vagliasindi et al. (2015) 47; Philipsen and Faure (2015) 44.

²⁵⁶ See Vagliasindi (2015), Summary, 5, documenting Randy Mott comments during the EFFACE Workshop.

²⁵⁷ With regard to Spain, see Fajardo et al. (2015) 76.

a regulatory intervention has taken place to impose a duty to seek financial coverage”²⁵⁸ (on the issue, see also below, 5). In addition, environmental liability is a difficult to assure risk.²⁵⁹ This situation can hamper the possibility that ELD contributes to remedy the damage caused by environmental crime.

9.4 Opportunities

After the Baseline Report obligation, introduced by the Industrial Emissions Directive (2010/75/EU, IED), the establishment of a common and comprehensive European framework on environmental liability for contaminated areas has now become a new and essential goal for Europe. The first step towards such a goal should be focused on the introduction of common technical standards for considering a site as contaminated under the law and for the identification of the remediation targets. As to environmental crimes connected to the omitted or delayed remediation of contaminated areas, although different approaches exist in MS criminal law, the diffusion at European level of the Baseline Report could indirectly help this difficult process.²⁶⁰

This said, it has to be noted that the comprehensive review of the ELD that is now underway could lead to a revision of this instrument. This is an opportunity to address (*inter alia*) the weaknesses highlighted above and to enhance the potential of environmental liability regime to contributing to deter environmental crime and to remedy the damage that environmental crime cause to the environment.

The new instrument could introduce new requirements for operators, possibly including mandatory financial security or alternative compensation mechanism.

The review and eventual revision of EU secondary legislation relevant under the ELD (Birds and Habitats directives²⁶¹ and Water Framework directive²⁶²) represent an indirect opportunity of improvement of environmental liability regime.

9.5 Threats

The length and difficulties which have characterised the drafting and transposition on the ELD lead to consider likely that a revision of the directive would be neither fast nor easy.

For industry, the review of the ELD raises several concerns which are likely to result in a lobby opposition to the enactment of a new instrument on environmental liability.²⁶³ In particular, stakeholders question whether mandatory financial security or an insurance scheme at EU level would help mitigate the consequences of an environmental damage in MS; they also ask what would be the consequences for

²⁵⁸ Faure M., “Regulatory Strategies in Environmental Liability”, in Cafaggi, F. and Muir Watt, H. (eds.) *The Regulatory Function of European Private Law* (Cheltenham-Northampton: Edward Elgar, 2009), 147.

²⁵⁹ See, with regard to tort law, Faure (2009) 147 ff.

²⁶⁰ See Vagliasindi (2015), Summary, 5; Luciano Butti, presentation at the EFFACE Workshop.

²⁶¹ February 2014: publication of the mandate for the Fitness Check on the Habitats and Birds Directives; Early 2016: publication of Commission report on the results of the Fitness Check. The information on review timetable mentioned here and in the next footnote was kindly provided in March 2015 by Katharina Klaas, Ecologic Institute.

²⁶² The Commission shall publish a report on the implementation of Directive 2000/60/EC at the latest 12 years after the date of entry into force of this Directive and every six years thereafter, and shall submit it to the European Parliament and to the Council. The Commission will review this Directive at the latest 19 years after the date of its entry into force and will propose any necessary amendments to it. Directive 2006/118/EC on the protection of groundwater against pollution and deterioration requires the Commission to review Annex I and II of the Directive every six years and come forward with legislative proposals, if appropriate; the Commission carried out the first review of those Annexes in 2013; the proposal is currently under scrutiny of the Council and European Parliament.

²⁶³ FERMA, 29 September 2014.

organisations of a mandatory financial security scheme regarding the coverage of environmental damages and what are the most suitable instruments (insurance, provisions, letter of credit, bonds) to demonstrate that European industry can cover its environmental liability.²⁶⁴ On this point, FERMA argues that introducing a mandatory financial security in all EU member states would: set another budget constraint on companies, affecting their development; divert investments with a negative impact on investment related to prevention and risk management; not solve local issues of governance regarding the implementation of the ELD and other environmental rules caused by lack of administrative resources, conflicts of rules etc.²⁶⁵

9.6 Conclusions

ELD provides for higher remediation standards that did not always exist previously (in particular, complementary and compensatory remediation) and it implements the polluter pays principle. The ELD also brought benefits in terms of economic valuation of damage, complementary and compensatory remediation and public participation including access to justice; as to the latter, access to justice and enhancing the role of victims is also a key element of a modern approach towards the fight against environmental crime. According to an opinion, the scope of the notion of damage could be read in a consistent way in both ELD and ECD with regard to biodiversity, because both share the same purpose, namely to protect the favourable conservation status of protected species and habitats.

However, although the ELD and ECD have been referred to by commentators as sister directives, complementing each other, more differences than similarities are deemed to exist concerning their scope and application. As to MS, with the exception of the UK no explicit links are reported in the EFFACE country reports between the national provision transposing ELD and environmental criminal law, and environmental liability regime is argued to play little or no role in environmental criminal law; however the reports document that failure to inform the competent authority on a damage or threat of damage and failure to comply with the order to carry out remedial measures can be punished under environmental criminal law, mostly on the grounds of pre-existing legislation on contamination. The transposition and implementation of the ELD raised several concerns, including diverging national transposing rules which could potentially create difficulties. Weaknesses are identified in low awareness of operators and authorities; lack of expertise and resources in financial, economic and liability matters; difficulties in establishing causality and identifying liable operator; compliance with the permit defence; no mechanisms (insurance etc.) in place to remedy large scale damage; use of undefined legal terms. The major weakness of the environmental liability regime is deemed to be that a liability without solvency guarantees does not offer any security that remediation or compensation will effectively take place. The transposition of the ELD into national law did not result in a level playing field but a patchwork of liability systems due to procedural and substantive variations. This overall situation hampers the enforcement of the ELD, and its potential to contribute to deter environmental crime and to remedy the damage caused by environmental crime.

As to environmental crimes connected to the omitted or delayed remediation of contaminated areas, although different approaches exist in MS criminal law, the diffusion at European level of the Baseline Report under the industrial emission directive could indirectly help this difficult process. The comprehensive review of the ELD that is now underway could lead to a revision of the directive; this is an opportunity to address (*inter alia*) the weaknesses highlighted above. The new instrument could introduce new requirements for operators, including mandatory financial security or alternative compensation mechanism. The review and eventual revision of EU secondary legislation relevant under the ELD (Birds and Habitats directives and Water Framework directive) represent an indirect opportunity of improvement of environmental liability regime.

²⁶⁴ FERMA, 29 September 2014.

²⁶⁵ FERMA, 29 September 2014.

However, the experience with the drafting and transposition of the ELD makes it likely that a revision would be not easy nor fast; moreover, the opposition of involved stakeholders appears as a threat to revision of the ELD.

The following table summarises the strengths, weaknesses, opportunities and threats

Strengths	Weaknesses
<ul style="list-style-type: none"> • ELD provides for higher remediation standards that did not always exist previously; • ELD brought benefits in terms of economic valuation of damage, complementary and compensatory remediation and public participation including access to justice; • Interpretative proposal to read the scope of the notion of damage in a consistent way in both ELD and ECD with regard to biodiversity. 	<ul style="list-style-type: none"> • More differences than similarities are deemed to exist concerning the scope and application of ELD and ECD; • as to MS, no explicit links are reported in the EFFACE country reports between the national provision transposing ELD and environmental criminal law (different situation is reported for the UK); environmental liability regime is argued to play little or no role in environmental criminal law; • ELD weaknesses: low awareness of operators and authorities; lack of expertise and resources in financial, economic and liability matters; difficulties in establishing causality and identifying liable operator; compliance with permit defence; no mechanisms (insurance etc.) in place to remedy large scale damage; use of undefined legal terms; lack of mandatory financial security.
Opportunities	Threats
<ul style="list-style-type: none"> • The diffusion at European level of the Baseline Report under the IED could play a role concerning environmental crimes connected to the omitted or delayed remediation of contaminated areas; • The comprehensive review of the ELD that is now underway could lead to a revision of the directive; • The review and eventual revision of EU secondary legislation relevant under the ELD represent an indirect opportunity to improve environmental liability regime. 	<ul style="list-style-type: none"> • The experience with the drafting and transposition of the ELD makes it likely that a revision would be not easy nor fast; • Opposition of involved stakeholders appears as a threat to the revision of the ELD.

10 Area 8: Organised environmental crime

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10.1 Introduction

Within the discussion on environmental crime, increasing interest in organised crime has recently arisen. The key questions to be asked are to what extent organised crime is involved in environmental crime and whether and how to take this into account at the legislative and enforcement level.²⁶⁶

In fact, evidence is mounting that environmental crimes frequently result from the coordinated activity of organised criminal networks or groups.²⁶⁷ Different types of environmental crime can be executed under the form or with the involvement of organised crime, such as illegal trafficking of flora and fauna, illegal waste disposal and illegal shipment of hazardous waste, illegal fishing. A peculiar criminal phenomenon (in Italy known as 'ecomafia') has progressively grown through the years: the organised criminality, for example, operates in the illicit trafficking in waste and in the illicit waste disposal, usually in connection with corporations or company-like entities as well as with public officers in charge for issuing permits or certificates.²⁶⁸

This study identifies strengths and weaknesses relating to understanding the extent and impact of organised environmental crime, and assesses the effectiveness of measures and enforcement efforts to tackle it; it also identifies key opportunities to address weaknesses and threats to doing this.

This SWOT analysis is based on the results of relevant outputs from EFFACE project. The analysis has been based upon:

- reports and policy documents on organised crime and environmental crime released by international and European Union (EU) actors and institutions (as specified in the footnotes of this study);
- EU legislation on cooperation in criminal matters and approximation/harmonisation of criminal law (Articles 82-86 TFEU);
- EU legislation on environmental crime (Directive 2008/99/EC on protection of the environment through criminal law);
- international, EU and national instruments on organised crime (the United Nations Convention Against Transnational Organized Crime, the Council Framework Decision 2008/841/JHA on the fight against organised crime, the national legislation as identified in the EFFACE country reports);²⁶⁹

²⁶⁶ Faure, M., in Faure, M., Gerstetter, C., Sina, C., Vagliasindi, G.M. (2015). Instruments, Actors and Institutions in the Fight Against Environmental Crime. Study in the framework of the EFFACE research project, 95, Berlin: Ecologic Institute. Available at www.efface.eu.

²⁶⁷ Luna M. and Veening W. (2014). Organised Environmental Crime. The need for combating environmental crime as a serious and organized category of offense (EFFACE Policy Brief 2), 1. Available at www.efface.eu.

²⁶⁸ Vagliasindi G.M., "La direttiva 2008/99/CE e il Trattato di Lisbona: verso un nuovo volto del diritto penale ambientale italiano", *Diritto del commercio internazionale* 24 (2010): 458 ff.; Vagliasindi, G.M., in Faure et al. (2015) 36; BfU-Max-Planck-Institute coordinated by Tania Fröhlich (2003). Organised Environmental Crime in the 15 EU Member States. Final report. Available at http://ec.europa.eu/environment/legal/crime/pdf/organised_member_states.pdf.

²⁶⁹ As it concerns the national level, the scope of the EFFACE analysis included seven EU Member States: France, Germany, Italy, Poland, Spain, Sweden, UK. See (all available at www.efface.eu): Bianco, F.,

- enforcement efforts by involved actors and institutions (as described in the EFFACE reports mentioned in the footnotes of this study);
- EFFACE case studies.²⁷⁰

10.2 Strengths

An increasing level of attention to the phenomenon of organised environmental crime and a consequential increasing level of understanding of its extent and impact is shown by different actors and institutions at international, European Union (EU) and national level (on awareness-related weaknesses see below, 3) as well in the approach of the media.

EUROPOL played and continues to play a key role in this sense.²⁷¹

The EUROPOL SOCTA 2013 estimates that 3,600 international criminal organisations are operating in the EU; of those “70% have a geographically heterogeneous composition and range of action, and more than 30% are poly-crime groups”.²⁷²

The SOCTA 2013 lists environmental crime as one of the emerging threats requiring intensified monitoring, with illicit trafficking in waste and illegal wildlife trafficking being regarded as the most prominent environmental crimes featuring the involvement of organised crime in the EU;²⁷³ illegal logging

Lucifora, A., Vagliasindi, G.M. (2015). Fighting Environmental Crime in France: A Country Report. Study in the framework of the EFFACE research project, Catania: University of Catania; Sina, S. (2015). Fighting Environmental Crime in Germany: A Country Report. Study in the framework of the EFFACE research project, Berlin: Ecologic Institute; Vagliasindi, G.M., Lucifora A., Bianco, F. (2015). Fighting Environmental Crime in Italy: A Country Report. Study in the framework of the EFFACE research project, Catania: University of Catania; Mitsilegas M., Fitzmaurice M., Fasoli E. (2015). Fighting Environmental Crime in Poland: A Country Report. Study in the framework of the EFFACE research project, London: Queen Mary University of London; Fajardo, T., Fuentes, J., Ramos, I., and Verdú, J. (2015). Fighting Environmental Crime in Spain: A Country Report. Study in the framework of the EFFACE research project. Granada: University of Granada; Philipsen, N.J. and Faure, M.G. (2015). Fighting Environmental Crime in Sweden: A Country Report. Study in the framework of the EFFACE research project, Maastricht: Maastricht University, METRO; Mitsilegas, V., Fitzmaurice, M., Fasoli, E. (2015). Fighting Environmental Crime in the UK: A Country Report. Study in the framework of the EFFACE research project, London: Queen Mary University of London.

²⁷⁰ See (all available at www.efface.eu): D’Alisa, G., Falcone, P.M., Germani, A.R., Imbriani, C., Morone, P., Reganati, F. (2015). Victims in the “Land of Fires”: case study on the consequences of buried and burnt waste in Campania, Italy. A study compiled as part of the EFFACE project. Rome: University of Rome “La Sapienza”; Geeraerts, K., Illes, A., Schweizer, J-P. (2015). Illegal shipment of e-waste from the EU: A case study on illegal e-waste export from the EU to China. A study compiled as part of the EFFACE project. London: IEEP; Fajardo, T. (2015). The EU’s promotion of environmental protection in Kosovo: A minor case study on the protection of the environment through criminal law in Kosovo. A study compiled as part of the EFFACE project. Granada: University of Granada; Santana, G. and Chin, S. (2015). Can Cocaine production in Colombia be linked to environmental crime?: A case study into the effect of EU legislation on the trade. A study compiled as part of the EFFACE project. The Hague: Institute for Environmental Security; Sollund, R. and Maher, J. (2015). The illegal wildlife trade: A case study report on the illegal wildlife trade in the United Kingdom, Norway, Colombia and Brazil. A study compiled as part of the EFFACE project. Oslo and Wales: University of Oslo and University of South Wales.

²⁷¹ See (all available at <https://www.europol.europa.eu>): EUROPOL (2013). Threat Assessment 2013 Environmental Crime in the EU; EUROPOL (2013). EU Serious and Organised Crime Threat Assessment (SOCTA 2013); EUROPOL (2015). Exploring Tomorrow’s Organised Crime.

²⁷² EUROPOL, SOCTA 2013.

²⁷³ EUROPOL, SOCTA 2013. On wildlife crime as organised environmental crime see also UNEP/INTERPOL (2014). The Environmental Crime Crisis – Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources. A UNEP Rapid Response Assessment. Available at <http://www.unep.org/unea/docs/rracrimemcrisis.pdf>; European Commission. The EU approach to combat

and illegal fishing are other remarkable areas where the involvement of organised crime in environmental crime is acknowledged by international institutions such as UNEP/INTERPOL and UNODC.²⁷⁴

In November 2014, Eurojust adopted the final report of the Strategic Project on Environmental Crime; the Report defines environmental crime as “a serious crime, often committed by organised crime groups that affects society as a whole, as its impact is felt not only in the health of humans and animals but also in the quality of air, soil and water”.²⁷⁵

At national level, it should e.g. be recalled that the UK Department for Environment, Food and Rural Affairs (DEFRA) has reported that “the nature of environmental crime is changing, with offences becoming more complex and serious, involving organised and geographically dispersed illegal activity. The Environment Agency has seen the number of such cases increasing in recent years, including: (...) evidence of more organised, career criminals committing environmental offences but also involved in other criminal activity”.²⁷⁶

Also NGOs play a relevant role in contributing to understanding the extent and impact of organised environmental crime and in effectiveness in fighting the phenomenon (on the latter, see also *infra*). In particular, it is worth recalling as a good practice the work undertaken by the National Environment and Legality Observatory (Osservatorio nazionale ambiente e legalità, hereinafter: the Observatory) of the Italian environmental NGO Legambiente.²⁷⁷ The Observatory carries out research, analysis and denunciation activities on the ‘ecomafia’ phenomenon and plays a junction role for information and activities of police forces, judges, competent public authorities (*Direzione Investigativa Antimafia, Direzione Nazionale Antimafia*, Minister for Internal Affairs, Europol, Eurojust, etc.), environmentalist associations and anti-organised crime associations, lawyers, comities and common citizens committed to the fight against environmental crimes, particularly when these crimes are perpetrated in an organised manner or otherwise connected to organised crime.²⁷⁸ Since 1997, the Observatory annually coordinates and publishes “*Ecomafia*”, a report providing relevant data and information on organised environmental crime also in its trans-boundary and global dimension. In particular, the report analyses actual trends and the impacts of violations of criminal environmental law when committed in a multi-individual or in a purely organised manner.²⁷⁹ The scope of the Report includes, among others, the illegal dumping of hazardous waste, the illegal trafficking of waste, the smuggling of proscribed hazardous materials, the illegal

wildlife trafficking. Available at http://ec.europa.eu/environment/cites/trafficking_en.htm; Sollund, R. and Maher, J. (2015).

²⁷⁴ See, respectively, UNEP/INTERPOL (2014); UNODC (2011). Transnational Organized Crime in the Fishing Industry: Focus on Trafficking in Persons, Smuggling of Migrants, Illicit Drugs Trafficking. Available at http://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf.

²⁷⁵ Eurojust (2014). Strategic Project on Environmental Crime Report. Available at http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Strategic%20project%20on%20environmental%20crime%20%28October%202014%29/environmental-crime-report_2014-11-21-EN.pdf. It is worth to mention that the project drew up, *inter alia*, on the results of a questionnaire to Member States that has also targeted organised crime.

²⁷⁶ DEFRA, *The Effectiveness of Enforcement of Environmental Legislation, Report No DEFRA 7208*, 2006, available at <http://archive.defra.gov.uk/environment/policy/enforcement/pdf/envleg-enforcement-report.pdf>; see also Mills, H., Skodbo, S. and Blyth, P. (2013). *Understanding Organized Crime: Estimating the Scale and the Social and Economic Costs Research Report*, Home Office, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246390/horr73.pdf; see Mitsilegas et al. (2015) 67 and 47 f.

²⁷⁷ Vagliasindi G.M., “Effective Networking, Formal v. Substantial Compliance, Conflicting Powers: Strengths and Weaknesses of Environmental Criminal Provisions Enforcement Networks in Italy”, in *Environmental Enforcement Networks. Concepts, Implementation and Effectiveness*, eds. Faure, M., De Smedt, P., Stas, A. (Cheltenham, UK/Northampton, MA: Edward Elgar, 2015): 442.

²⁷⁸ Vagliasindi, “Effective Networking”, 442.

²⁷⁹ Vagliasindi, “Effective Networking”, 442.

exploitation and trafficking of protected wildlife and other natural resources.²⁸⁰ The Report is the result of a network activity, and particularly of a collaboration between the Observatory, on one side, and police forces, a research institute, judges engaged in the fight against environmental criminality and lawyers, on the other.²⁸¹ According to the 2013 Ecomafia report, in 2012 in Italy the clans involved in the various branches of "Ecomafia" were 302 (6 more than in 2011) and their estimated turnover for 2012 reached 16.7 billion euros (an increase of 0.1% compared to 2011).²⁸²

Indeed, organised crime is widespread and can be found in any branch of economic activity including environmental-related businesses.²⁸³

Illegal waste trafficking has raised the interest of authorities at various levels. Waste traffickers exploit the absence of EU-wide standardised control regimes and use fraudulent documentation as key aspects of their *modus operandi*.²⁸⁴ In Italy, organised crime plays a significant role in the waste management industry, particularly in the area of illegal dumping and international illegal trafficking of hazardous waste; however, it is important to stress that organised mafia-type criminals are not the only players: although a simplistic view often prevails in the public domain according to which waste dumping is attributable only to mafia clans, "a more substantial explanation of the phenomenon is articulated around the interplay of mafia-like groups, businessmen, firms and administrative officers"²⁸⁵. The involvement of organised criminal groups in the waste sector is also found in other EU countries; the media documented that "In Scotland authorities are liaising with INTERPOL to crack down on Mafia-style gangs which have muscled in on the country's lucrative illegal waste industry, estimated to be worth about £ 27 million in 2013. About 20% of all criminal gangs, including some of the 'top tier criminals' in Scotland are linked to waste firms, according to the Scottish Environment Protection Agency. Gangs use violence to secure waste disposal contracts, cut corners and fiddle taxes using similar tactics to Mafia clans in southern Italy".²⁸⁶

With specific regard to e-waste trafficking, an EFFACE case study stresses that the link between illegal waste shipment and organised crime has been confirmed in recent years by many studies carried out by or on behalf of the United Nations, UNODC, Interpol, the EU and NGOs, adding that a recent report by Eurojust "reveals that organised crime groups are behind cross-border environmental crime including illegal trafficking of e-waste".²⁸⁷ According to EUROPOL, "OCGs are already heavily involved in the trafficking and trade in e-waste, which promises substantial profits and often only entails the low risk of being fined a modest fee if discovered. However, an exponential increase in the quantity of e-waste has the potential to result in the emergence of e-waste as a major illicit commodity rivalling the trafficking of drugs in terms of scale and profits".²⁸⁸

As to trafficking in endangered species, the surge of illegal wildlife trafficking has been well-documented in the media in recent years.²⁸⁹ The EU remains one of the most important markets for the trafficking in endangered species and it attracts highly specialised organised crime groups, with a lucrative market increasingly resembling that of other international serious crimes, with links established to EU organised

²⁸⁰ Vagliasindi, "Effective Networking", 442.

²⁸¹ Vagliasindi, "Effective Networking", 442.

²⁸² Vagliasindi, "Effective Networking", 438; data provided by Osservatorio Ambiente e Legalità (ed), *Ecomafia 2013* (Milano: Edizioni Ambiente, 2013).

²⁸³ D'Alisa et al. (2015) 8.

²⁸⁴ EUROPOL (2013) SOCTA.

²⁸⁵ D'Alisa et al. (2015) 3.

²⁸⁶ McLaughlin, M., "Crackdown on Scottish Mafia's illegal waste racket"; News article, *The Scotsman*, 12 August 2014, available at <http://www.scotsman.com/news/environment/crack-down-on-scottish-mafia-s-illegal-waste-racket-1-3507167>.

²⁸⁷ Geeraerts et al. (2015) 34.

²⁸⁸ EUROPOL (2015) 24.

²⁸⁹ Luna and Veening (2014) 5.

crime groups.²⁹⁰ From February to April 2014, the European Commission (EC) held a call for recommendations and a conference to see how wildlife crime can be best dealt with on EU and global levels.²⁹¹ The EC highlights how wildlife trafficking “is now a multi-billion Euro business, which attracts transnational organised crime networks and which resembles in character and scale other types of global criminal activities, such as trafficking in drugs, human beings, firearms and counterfeit goods”.²⁹² The international community has also shown signs of recognising the scale of illegal logging activity as a serious and organised operation.²⁹³

In addition, evidence is mounting that arms trafficking and financing terrorism, forgery of documents and bribing customs officials and issuers of permits and certifications, cocaine production and trafficking, ‘employing’ lawyers, notaries and bankers to launder criminal funds are linked to organised environmental crime.²⁹⁴

Thus, awareness exists that the consequences of organised environmental crime involve not only the environment, biodiversity and human health, but also economies, public order and good governance.²⁹⁵ Overall, an increasing level of understanding of the extent and impact of organised environmental crime exists within the media, enforcement actors and institutions and NGOs (but see also below, 3); also, positive examples of networking between enforcement actors and institutions, on one side, and NGOs on the other side do exist.

However, when evaluating the understanding of the extent and impact of organised crime in relation to environmental crime, as well as the effectiveness of the measures to tackle it, a relevant factor is the way the concepts of “organised crime” and “environmental crime” are interpreted.

While there is a lack of consensus on a definition of organised crime (on the associated weaknesses, see below, 3), there is consensus that the motive of financial gain is a common point,²⁹⁶ as well as that the phenomenon has frequently a transnational nature.²⁹⁷

This is confirmed by Art. 2(a) of the 2000 United Nations Convention Against Transnational Organized Crime,²⁹⁸ also known as the Palermo Convention, which defines “Organized criminal group” as a “structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”.

²⁹⁰ Sollund and Maher (2015).

²⁹¹ Luna and Veening (2014) 5.

²⁹² European Commission. The EU approach to combat wildlife trafficking.

²⁹³ Luna and Veening (2014) 6.

²⁹⁴ See European Commission. The EU approach to combat wildlife trafficking; Santana and Chin (2015); Luna and Veening (2014) 1.

²⁹⁵ See for instance, with regard to illegal wildlife trade, Maher (2015).

²⁹⁶ Luna and Veening (2014) 2; D’Alisa et al. (2015) 22; Geeraerts et al. (2015) 17.

²⁹⁷ Luna and Veening (2014) 1. Attempts to develop a common description have been made by various actors and institutions; see for instance, with regard to the UK, Mitsilegas et al. (2015) 45.

²⁹⁸ On the Convention, see Fajardo, T. (2015). *Organised Crime and Environmental Crime: Analysis of International Legal Instruments*. Study in the framework of the EFFACE research project, chap. 2, Granada: University of Granada. Available at www.efface.eu: in the following: Fajardo (2015-1). It is worth to mention that the European Union and all its Member States are now parties to the Palermo Convention, which was concluded, on behalf of the European Community, by Council Decision 2004/579/EC.

The Convention has been criticised because of the vagueness of the definition of organised crime (see below, 3).²⁹⁹ However, other scholars positively assess the flexible approach of the Convention, stressing that it results from preferences of the States Parties to the Convention that preferred it rather than a predetermined and rigid list of offences and highlighting that “the Convention is a very important instrument since it provides a legal framework for sanctioning organised environmental crime considered as a serious crime, offering the legal tools to criminalise as offences those activities related with the environmental crime under a rich variety of forms, to investigate and to bring to justice those criminals involved in different roles in criminal groups and criminal organisations”;³⁰⁰ it has also been stressed that “a loose crime description has the advantage that new elements of crime can easily be incorporated into working definitions as insights progress”.³⁰¹

In fact, the Palermo Convention does not contain any reference to the specific phenomenon of organised environmental crime (on associated weaknesses, see below, 3). However, it encompasses the fight against crimes like corruption which experience has shown are often connected to the commission of environmental crimes.³⁰² Moreover, according to some authors, the Convention provides for general concepts and definitions that can be applied to organised environmental crime.³⁰³ Among them, it is worth to mention Art. 2 (b), which gives an open definition of “serious crime” as a “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”: the wide concept of “serious crime” is deemed to be able “to include new forms and dimensions of transnational organised crime, such as organised environmental crime”.³⁰⁴

Similar considerations can be formulated with regard to the EU instruments on organised crime. In particular, the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime³⁰⁵ - which is built on the Palermo Convention³⁰⁶ and whose provisions are very similar to the ones of the Palermo Convention - does not address directly organised environmental crime; however, according to some authors, the principal EU instruments dedicated to fighting environmental crime “have left some room for an extensive interpretation of the goals to be achieved and have detailed in annexes the “other serious crimes” that could be addressed when required”.³⁰⁷

Soft law instruments at the International and EU level, in contributing to shape the concept of “organised crime” and in guiding courts, prosecutors and enforcement authorities, play an indirect positive role in the fight against organised environmental crime.³⁰⁸ For instance, in the Stockholm Programme (where there was no reference to environmental crime or to environmental organised crime, see below, 5), there are

²⁹⁹ See, for instance, Mitsilegas, M., “From National to global – from empirical to legal: the ambivalent concept of transnational organised crime”, in *Critical Reflections on the Concept of Transnational Organised Crime*, ed. Beare, M. (Toronto: University of Toronto Press, 2003), 55-87.

³⁰⁰ See Fajardo (2015-1) chap. 2.

³⁰¹ Luna and Veening (2014) 2.

³⁰² See Vagliasindi, in Faure et al. (2015) 37.

³⁰³ See Fajardo (2015-1) chap. 2.

³⁰⁴ See Fajardo (2015-1) chap. 2.1.

³⁰⁵ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime. *OJ L 300, 11-11-2008, p. 42-45*. For a comment see Mitsilegas, M., “The Council Framework Decision on the Fight against Organised Crime: What can be done to strengthen EU legislation in the field? Note”, 2011, available at <http://www.europarl.europa.eu/document/activities/cont/201206/20120627ATT47779/20120627ATT47779EN.pdf>.

³⁰⁶ Whereas 6 of the Framework Decision 2008/841/JHA.

³⁰⁷ See Fajardo, T. (2015). *Organised Crime and Environmental Crime: Analysis of EU Legal Instruments. Study in the framework of the EFFACE research project*, 34, Granada: University of Granada. Available at www.efface.eu (in the following: Fajardo (2015-2)).

³⁰⁸ See Fajardo (2015-1) chap. 1; Fajardo (2015-2) 19.

measures that are deemed to indirectly refer to these crimes, such as in its fourth part where it is reaffirmed that “focus should not only be placed on combating terrorism and organised crime but also cross-border wide-spread crime that have a significant impact on the daily life of the citizens of the Union”: it has been argued that “this statement allows crimes that are not expressively mentioned in the programme such as environmental crime to be covered”.³⁰⁹

At the national level, only a few explicit references to organised crime exists in the legislation concerning environmental crime (see below, 3); however, it has been noticed that “the substantive laws dealing with organised crime (more particularly participation in a criminal organisation) can in some circumstances also be applied to organisations engaging in environmental crime. In that case the specific procedures that could be applied to investigate organised crime could be applied to environmental crime as well”.³¹⁰ Authors argue that “The mere fact that the legislation on organised crime has usually not been drafted taking into account environmental crime does not seem to be a major obstacle to an effective enforcement of provision against organised environmental crime. There have at least not been reports from practitioners on substantial regulatory deficits in that respect”.³¹¹

As a partial exception to the above referred situation it is worth recalling Art. 260 of the Italian Leg. Decree No. 152/2006 (the so called Environmental Code). This is the first Italian environmental felony, introduced in 2001 (at that time, in Article 53-*bis* Leg. Decree No. 22/1997) in order to tackle the links between illicit trafficking of waste and organised crime.³¹² The qualification of this offence as a felony, and the range of sanctions, allow the adoption of effective investigative measures (i.e. wiretapping) as well as personal precautionary measures, which cannot be used for other environmental crimes because of their misdemeanour nature.³¹³ Unlike the crimes of criminal association and mafia-type association, respectively set out in Articles 416 and 416-*bis* of the Criminal Code, Article 260 Env. Code does not require the association of three or more persons; however, although the crime could be committed by one person able to manage large quantities of waste, the reference to the “establishment of means and continuing organised activities” seems to imply an organised structure (even a basic one), where several persons are involved.³¹⁴

Since 2011, Art. 260 is classed as an offence with a major social impact and thus dealt with by the District Anti-mafia Bureau and subject to the peculiar regulation provided for organised crime procedures, with specific rules as regards the secrecy of preliminary investigations, personal precautionary measures, exclusion of broadened plea bargaining, restrictions on the right to evidence and doubling of the period of limitation.³¹⁵

Good practices can be identified in the enforcement actions of international, EU and national institutions (on weaknesses, see below).

With regard to the just mentioned Art. 260 Italian Env. Code, it is worth recalling that, according to the 2013 Ecomafia report, between 2002 and 2013 4,055 people have been reported, 698 corporations have been involved, 1,367 persons have been arrested, and 19 regions and 26 EU and extra EU States have become involved.

At international level, “improved intelligence sharing among agencies has enabled INTERPOL to support countries in larger and more effective police operations, leading to larger seizures of illegal timber and wildlife products. In 2013, Operation Lead, under INTERPOL’s project LEAF, was conducted in Costa Rica

³⁰⁹ Fajardo (2015-2) 18.

³¹⁰ Faure, in Faure et al. (2015) 96.

³¹¹ Faure, in Faure et al. (2015) 96.

³¹² Vagliasindi, “La direttiva 2008/99/CE”, 475; Vagliasindi et al. (2015) 21 f.

³¹³ Vagliasindi, “La direttiva 2008/99/CE”, 475 f.

³¹⁴ Vagliasindi, “La direttiva 2008/99/CE”, 475 ff. and references therein; Vagliasindi, “Effective Networking”, 439.

³¹⁵ Vagliasindi, “Effective Networking”, 439 ff.; Vagliasindi et al. (2015) 39 f.

and Venezuela. It resulted in 292,000 cubic meters of wood and wood products seized – equivalent to 19,500 truckloads and worth about USD 40 million”.³¹⁶

INTERPOL launched a major initiative to target the illegal trade of e-waste. More than 240 tonnes of electronic equipment and electrical goods were seized and the launch took place of criminal investigations against some 40 companies involved in all aspects of the illicit trade: Operation Enigma saw the participation of police, customs, port authorities and environmental and maritime law enforcement agencies in seven European and African countries; the operation was aimed to identify and disrupt the illegal collection, recycling and export of electronic devices before being dumped in landfills or other sites where they could cause severe environmental harm.³¹⁷

The positive role of NGOs should be also underlined.

For instance, Italian Legambiente is reported to have actively assisted in the prosecution of the mafia clan ‘Ndrangheta in Calabria for charges of illegal radioactive waste dumping in the 1980s and 1990s: “Given the complexity of involved actors, Legambiente took upon itself to independently collect evidence over the course of a decade and provided the public prosecutor’s office with all data collected since 1994 concerning the disappearance and assumed sinking of some 40 ships in the Mediterranean”.³¹⁸

The role played by ‘key’ individuals in the criminal justice system and NGOs has been underlined also with regard to illegal wildlife trading.³¹⁹

The successful experience of some environmental enforcement networks also has to be highlighted, with some authors arguing that the reason for success is related, among other factors, to the fact that there is a stable number of members financing the network.³²⁰

The positive role of granting resources to support cooperation has to be mentioned. With reference to international wildlife trafficking it has been noted that “The EU response to the IWT involves regulation, enforcement, prevention and co-operation both within and outside the EU. The EU, for example, provides funding for conservation €500 million over the past 30 years and supports and works alongside key international organisations, including chairing the EU Enforcement Group Meetings in cooperation with EUROPOL, Eurojust, Interpol, the World Customs Organisation, and the CITES Secretariat and part-funding the International Consortium on Combating Wildlife Crime (ICWC). The EU has a strong international and influential voice, as was evident at the recent EU expert conference aimed at strengthening local and international responses to the IWT. The development of EU-Twix, an enforcer’s intranet, has provided a successful platform for MS co-operation and enforcement”.³²¹

10.3 Weaknesses

Environmental criminal law is only integrated to a very small extent into organised crime legislation at international, European and national level (with the exception, to some extent, of Italy with regard to organised illegal waste trafficking).³²²

³¹⁶ UNEP/INTERPOL (2014) *The Environmental Crime Crisis*.

³¹⁷ Luna and Veening (2014) 5; Fajardo (2015-1) chap. 5.2; Gerstetter, C. and Sina, S., in Faure et al. (2015) 61.

³¹⁸ Smith, L. and Klaas, K. (2015). *Networks and NGOs Relevant to Fighting Environmental Crime*. Study in the framework of the Efface research project, 23, Berlin: Ecologic Institute. Available at: www.efface.eu.

³¹⁹ Sollund and Maher (2015).

³²⁰ Smith and Klaas (2015) 15.

³²¹ Maher J. (2015). *Illegal Wildlife Trade: A Case Study (EFFACE Policy Brief 9) 2*, available at www.efface.eu.

³²² See the summary of EFFACE Workshop on “Organised Crime and Environmental Crime”, held in Catania on 24 June 2014, available at www.efface.eu; among the EFFACE country reports, see e.g. Sina (2015) 40.

In addition, neither an unanimous and precise definition of “organised crime”,³²³ nor a legal definition of “organised environmental crime” exist in international, EU and national instruments.

The lack of consensus on the definition of organised crime negatively influences the understanding of a not legally defined concept as “organised environmental crime”; the latter also suffers from the lack of consensus on the same concept of “environmental crime”. It should also be underlined that there may be an interest of the police to consider environmental crime as organised crime because of the more extended competences of the prosecution authorities in cases of organised crime, as allegedly cases of environmental crime were not prioritised by enforcement bodies if they are not related to organised crime;³²⁴ in a similar perspective, Italian National Antimafia Prosecutor lamented “the inadequate attention given to those cases where the mafia member is not present, even if those crimes imply criminal organization”.³²⁵

This situation causes difficulties in correctly identifying organised environmental crimes within the overall crime statistics (see also *infra*).³²⁶ The lack of an unanimous notion of organised crime and organised environmental crime also affects the effectiveness of the measures to tackle the phenomenon (see *infra*).

In the fight against organised environmental crime other weakness are related to the lack of enforcement of environmental legislation by States Parties or Member States.

The lack of adequate resources is mentioned by the Executive Director of UNODC as one major factor leading to non-implementation of and non-compliance with the Palermo Convention and its protocols.³²⁷ INTERPOL recognises that police resources committed to investigating environmental crimes are significantly less than resources used to combat more traditional crimes.³²⁸ At the EU level “while Europol and Eurojust reportedly have sufficient resources at their disposal to perform their functions with respect to combating environmental crime, they face the problem that Member States do not give environmental crimes priority as some struggle to allocate the relevant resources to deal with these environmental cases”.³²⁹ Some of the networks also suffer from a lack of resources, because not all of them receive direct financial support from their members.³³⁰

Eurojust and Europol also face the problem that they often do not get involved in cases to which they could contribute. “One reason appears to be the lack of an un-ambiguous definition of environmental crime at the

³²³ See Fajardo (2015-1); Faure et al. (2015); EFFACE Summary of Workshop on Organised crime and Environmental Crime; EFFACE country reports (see *supra*, footnote 4) chapters 7.

³²⁴ See the summary of EFFACE Workshop on “Organised Crime and Environmental Crime”.

³²⁵ D’Alisa et al. (2015) 26.

³²⁶ Luna and Veening (2014) 1.

³²⁷ See Fajardo (2015-1) chap. 2.8.

³²⁸ See Chin, S. and Veening W. (2015). *Actors and Institutions Relevant to Fighting Environmental Crime. Study in the framework of the EFFACE research project*, 12, The Hague: Institute for Environmental Security. Available at www.efface.eu.

³²⁹ Gerstetter and Sina, in Faure et al. (2015) 64. At national level, see e.g. Philipsen and Faure (2015) 24: “investigations in relation to environmental crime require special legal, chemical, biological and other competences. In Sweden, a lack of experts, competences, and resources results in the outcome that crimes other than those related to negligence are seldom discovered. The police and prosecution are not allowed to search premises (*husrannsakan*) on the basis of anonymous tips. There needs to be a reasonable suspicion. Organized crime is therefore not easily discovered since this generally requires tips from the public. Environmental inspectors (like the office of Dalhammar) can – and are even obliged to – investigate and act on anonymous tips, but lack proper resources. The environmental inspections nowadays are mostly financed through fees collected from the industries that are inspected – and it seems unlikely that fees can be collected from criminal organizations”.

³³⁰ Smith and Klaas (2015) 15.

European and the international level (...). One of the reasons for the very low number of cases of environmental crime registered by Eurojust (3 in 2012 and 8 in 2013) is the limited ability of national law enforcement authorities to recognize what constitutes environmental crime and to report it as such, and also to properly address and deal with initiatives/requests for judicial cooperation in this field. The other reason, partly related to the lack of resources mentioned above, seems to be the lack of the political will of national governments, but also to some extent of European Institutions, to give priority to the fight against environmental crime".³³¹

It cannot be underestimated that, in combating environmental crimes that are transnational, enforcement requires the coordinated operation of actors in various countries. Within the EU, the cooperation of the criminal justice systems of EU Member States or with outside jurisdictions may be required, if there is an EU dimension involved in the criminal activity: "if investigators, prosecutors and judges have to cope with vague or inconsistent definitions of the crimes they are addressing, there could be a considerable difference in how investigations and prosecutions are carried out. In such scenarios, the effectiveness of enforcement and judicial efforts is substantially reduced and OCGs have a greater advantage".³³²

EUROPOL recently stated that "legislative differences and a proliferation of legislation across the EU create loopholes and opportunities for organised crime".³³³

With specific regard to wildlife trafficking, the European Commission has underlined how "low levels of awareness about the problem, a low risk of detection and low sanction make it particularly lucrative for criminals".³³⁴ An EFFACE comparative case study on illegal wildlife trade notices a "lack of priority given to the IWT and complacency among enforcement and government agencies. While each of the case study countries addresses the IWT through international conventions and regulations and domestic legislation, their responses are complex and diverse, with varied effectiveness. Variations in effectiveness are associated with levels of: awareness of the serious negative consequences of the IWT; political interest; criminal justice system support and resources and punishment. While existing international regulations are identified as robust enough, national wildlife legislation, enforcement and punishment by EU Member States (MS) limit the effectiveness of these regulations and place all MS at risk as criminals exploit the EU's open borders. There is insufficient deterrent effect as punishment is seldom certain and rarely severe; the potential for profit outweighs the risk (...)".³³⁵

With regard to illegal e-waste shipment, an EFFACE case study states that "The current loopholes in enforcement and legislation also act as a motivation for the actors involved in the illegal activity".³³⁶ EUROPOL stresses that "Without the necessary legislative and law enforcement responses, the illicit trade in e-waste is set to grow dramatically in the near future both in terms of quantities traded and the quality of the methods used by criminal actors engaging in this activity".³³⁷

As already mentioned, the Palermo Convention on Organised crime and the Council Framework Decision 2008/841/JHA on the fight against organised crime do not deal directly with the phenomenon of organised environmental crime. The possibility of according relevance to environmental crime in light of the concept of "serious crime" used in both instruments is hampered by the fact that most States Parties of the Convention and EU Member States do not provide maximum penalties of at least 4 years imprisonment for environmental crimes as on the contrary is required by both instruments for the crime to be "serious".³³⁸

³³¹ Gerstetter and Sina, in Faure et al. (2015) 64.

³³² Luna and Veening (2014) 2 f.

³³³ EUROPOL (2015) 13.

³³⁴ See European Commission, The EU approach to combat wildlife trafficking.

³³⁵ Maher (2015) 1.

³³⁶ Geeraerts et al. (2015) 17.

³³⁷ EUROPOL (2015) 24.

³³⁸ Vagliasindi, in Faure et al. (2015) 131.

As it concerns the EU legislation on environmental crime, following the judgment of the Court of Justice of 23 October 2007 in case C-440/05 - where the Court of Justice stated that, in contrast to the establishment of the obligation for Member States to criminally sanctioning certain conduct, determining the type and level of sanctions, was not within the competence of the Community – Directive 2008/99/EC does not contain provisions concerning the nature of the criminal sanctions, the minimum levels of maximum sanctions for violations committed with aggravating circumstances, the same aggravating circumstances - and in particular those relating to environmental violations committed by or with the involvement of criminal organisations - and the accessory sanctions; these provisions were on the contrary contained in the original proposal of 9 February 2007.³³⁹

Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union does not include environmental crime within the criminal offences covered by the directive; the inclusion of the Framework Decision 2008/841/JHA is, for the reason mentioned above, practically unable to indirectly cover organised environmental crime.

10.4 Opportunities

The current Seventh Environment Action Programme (7EAP)³⁴⁰ does not address environmental crime (see below, 5); however, it adopts as its priority objective 4, i.e. the purpose of maximising “the benefits of Union environment legislation by improving implementation”.³⁴¹

Several resolutions adopted by the previous European Parliament address organised environmental crime under different perspectives.³⁴² The resolutions call to pool efforts at the EU level for a more effective joint action to prevent and combat organised environmental crime,³⁴³ through the enactment of new instruments and strengthening enforcement and cooperation.

As previously mentioned, EU instruments on organised crime and on environmental crime do not give consideration to the phenomenon of organised environmental crime. An opportunity to overcome this weakness lays in the approximation of sanctions at the EU level.³⁴⁴

³³⁹ See Vagliasindi G.M., “The European Harmonisation in the Sector of Protection of the Environment through Criminal Law: The Results Achieved and Further Needs for Intervention”, *The New Journal of European Criminal Law* 3 (2012): 327; Vagliasindi, “La direttiva 2008/99/CE”, 455 and 466 ff.; Vagliasindi, G.M. (2015). Directive 2008/99/EC on Environmental Crime and Directive 2009/123/EC on Ship-source pollution. Study in the framework of the EFFACE research project, 13, Catania: University of Catania. Available at www.efface.eu.

³⁴⁰ Decision No. 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Environment Action Programme to 2020 “Living well, within the limits of our planet”. *OJ L 354*, 28.12.2013, p. 171-200.

³⁴¹ 7EAP, para. 57.

³⁴² European Parliament Resolution of 25 October 2011 on organised crime in the European Union (2010/2309(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0459+0+DOC+XML+V0//EN>; European Parliament Resolution of 23 October 2013 on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken (final report) (2013/2107(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0444&language=EN&ring=A7-2013-0307>; European Parliament Resolution of 15 January 2014 on wildlife crime (2013/2747(RSP)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0031+0+DOC+XML+V0//EN>.

³⁴³ Luna and Weening (2014) 4.

³⁴⁴ Vagliasindi, in Faure et al. (2015) 131 f.

The adoption of the Lisbon Treaty has opened up new opportunities for increasing the effectiveness of EU measures against organised environmental crime by that explicitly introduced the competence of the EU in criminal matters,³⁴⁵ bearing in mind that it is an *indirect* criminal competence, which limits the discretion of the national legislator, but requires its intervention in order to introduce the criminal offences in the national criminal system.³⁴⁶

Art. 83 TFEU³⁴⁷ might therefore play an important role in the development of further EU instruments for the protection of the environment through criminal law, including tackling organised environmental crime. As stated by EUROPOL, “The harmonisation of criminal justice legislation would also make it increasingly difficult for criminals to escape prosecution by fleeing individual jurisdictions”.³⁴⁸

The harmonisation of the type and level of the criminal sanctions is now permitted on the basis of Article 83 (2) TFEU (on the one hand the environment is a legal interest of supranational importance, and, on the other hand, it has been subject to several interventions of harmonisation).³⁴⁹

Article 83 (1) TFEU permits to introduce provisions in order to better tackle environmental crimes committed by or with the involvement of organised crime³⁵⁰. It could be envisaged e.g. to propose aggravating circumstances linked to the involvement of the organised criminality in the commission of environmental crimes;³⁵¹ it could also be enacted a provision imposing Member States to criminalise “organised trafficking in waste”.³⁵² As to the latter, Art. 260 of the Italian Environmental Code represents a significant model also at European level, as shown in the European Parliament resolution of 25 October 2011 on organised crime in the European Union which, in point 42, calls on the Commission to “develop innovative instruments for the prosecution of those who commit environmental offences in which organised crime plays a role, for example by submitting a proposal to extend to the EU Italy’s positive experience with the offence of “organised illegal waste trafficking”, since 2011 classed as an offence with a major social impact and thus dealt with by the District Anti-mafia Bureau”.³⁵³

For the above mentioned reasons (see *supra*, 3), this can be considered as an opportunity in terms of enhancing the protection of the environment and addressing weaknesses in fighting organised environmental crime by eliminating discrepancies among national legislation and inefficacy of sanctions which facilitate organised criminal groups and creates obstacles to enforcement.³⁵⁴

Moreover if, following an evaluation undertaken in conformity with the principles which should guide the choices of criminalisation³⁵⁵ (e.g. principle of proportion) a maximum of at least three years imprisonment will

³⁴⁵ See See Krämer, L., *EU Environmental Law*, London: Sweet and Maxwell 2012, 413; Vagliasindi (2015) 17 f.; Vagliasindi, “La direttiva 2008/99/CE”, 467 ff.

³⁴⁶ Grasso G., in Grasso G., Sicurella R., Scalia, V. (2015). *Articles 82-86 of the Treaty on the Functioning of the European Union and Environmental Crime. Study in the framework of the EFFACE research project*, 22, Catania: University of Catania. Available at www.efface.eu.

³⁴⁷ Art. 83 TFEU lists the areas in which the approximation of laws can be realised and it distinguishes between the cases of “*particularly serious crime with a cross-border dimension*” (para. 1) and the ones in which the approximation proves essential “*to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures*” (para. 2).

³⁴⁸ EUROPOL (2015) 13.

³⁴⁹ Vagliasindi, “La direttiva 2008/99/CE”, 456 ff.

³⁵⁰ Vagliasindi, “La direttiva 2008/99/CE”, 464 ff.

³⁵¹ Vagliasindi, “La direttiva 2008/99/CE”, 474 ff.

³⁵² See Grasso, in Grasso et al. (2015) 31.

³⁵³ Vagliasindi et al. (2015) 30.

³⁵⁴ Vagliasindi, “La direttiva 2008/99/EC”.

³⁵⁵ On these principles see “The Manifesto on European Criminal Policy”, *Zeitschrift Für Internationale Strafrechts Dogmatik* 12 (2009): 707-716.

be foreseen for the most serious environmental crimes, mutual assistance instruments could be used, which might strengthen the tools against environmental crimes which are often transnational in nature.³⁵⁶

In addition, the provision of a maximum of at least four years imprisonment for the most serious environmental crimes would let these crimes to fall under the scope of the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (as well as, at international level, within the concept of “serious crime” as it is spelled in the United Nations Convention Against Transnational Organised crime).³⁵⁷

An instrument based on Art. 83 TFEU is also an opportunity to contribute to a better description of the concept of organised environmental crime.

As to cooperation, the Lisbon Treaty “has improved the competences of Eurojust by envisaging its competence to initiate investigations and to coordinate investigations and prosecutions, both competences that could be interpreted as implying that Eurojust can take binding decisions to be respected by national competent authorities. Such binding powers would allow Eurojust to evolve “from a player at horizontal cooperation level to a player at vertical integration level”. This potential evolution of Eurojust’s mandate gives an example how the EU may enhance the capacity of European actors and institutions including networks to efficiently contribute to fighting environmental law”.³⁵⁸

The role of the European Public Prosecutor in the fight against environmental crime in light of possible developments on the grounds of Art. 86 (4) TFEU should also be considered.³⁵⁹

At national level, it should be recalled the Italian Law of 22 May 2015, No. 68. In inserting new environmental felonies in the penal code - environmental pollution, environmental disaster, traffic and abandonment of highly radioactive materials, obstacle to controls – Law No. 68/2015 also foresees aggravating circumstances for organised crime groups (mafia-like and not).³⁶⁰ While the text is not without criticism, it represents an opportunity for a stronger fight against organised environmental crime Italy.

10.5 Threats

While there is “a greater need for a harmonised and clear definition of organised crime, as it relates to environmental offenses”,³⁶¹ this issue is likely to keep being a major challenge for legislators: “The difficulty lies in the diversity of activities carried out by criminal groups, and in differences in their structure (while some of them are highly hierarchical, others are very loose and flexible)”.³⁶² The search for a common denominator “is further complicated by differences in national criminal law. In the EU there are basically three types of approaches to addressing organised crime: 1) Civil law criminalising participation in a criminal association 2) Common law based on conspiracy to commit crime 3) the Scandinavian approach that relies on criminal law content, while rejecting the “criminal organisation” element”.³⁶³

³⁵⁶ Vagliasindi (2015) 17 f.

³⁵⁷ Vagliasindi (2015) 18; Vagliasindi, in Faure et al. (2015) 132.

³⁵⁸ Gerstetter and Sina, in Faure et al. (2015) 134 f.; Sicurella R., in Grasso et al. (2015) 37.

³⁵⁹ See Vagliasindi G.M., “Istituzione di una Procura europea e diritto penale sostanziale: l’eventuale estensione della competenza materiale della futura Procura alla criminalità ambientale”, in (eds.) Grasso, G., Picotti, L., Sicurella, R., Allegrezza, S. (eds.), *Le sfide dell’attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, Milano, Giuffrè, 2013, 189 ff.

³⁶⁰ See Vagliasindi et al. (2015) 15.

³⁶¹ Luna and Veening (2014) 3.

³⁶² Luna and Veening (2014) 2; Piotr Bąkowski, “The EU response to organised crime”, 2, EU Parliament Library Briefing, 6 September 2013, available at [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130625/LDM_BRI\(2013\)130625_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130625/LDM_BRI(2013)130625_REV1_EN.pdf).

³⁶³ Luna and Veening (2014) 2; Bąkowski, “The EU response to organised crime”, 2.

According to interviews with enforcement officials, a contributing factor to the ongoing presence of varied criminal activities in the areas of environmental crime is the lack of political priority given to addressing crimes against nature.³⁶⁴

This is confirmed by the fact that the current 7EAP does not address environmental crime.³⁶⁵ The absence of environmental crime among EU priorities between 2014 and 2017 for the fight against serious and organised crime set up by the Council of the Justice and Home Affairs in its meeting in Luxembourg on 6 and 7 June 2013 has to be mentioned.³⁶⁶ Here, although environmental crime was mentioned in the introduction to the conclusions of the Council, it was not set as a Council priority for the 2014 to 2017 policy cycle.³⁶⁷

This shows an actual lack of political will not only at Member States level but also (probably as a consequence of that) at the EU institutions level.³⁶⁸

Despite several proposals of the European Parliament, the adoption of a EU instrument on organised environmental crime is not in the current legislative agenda. The same is true for a further instrument on environmental crime replacing or integrating Directive 2008/99/EC.

It has been noted that “One of the reasons probably lies on the dramatic economic crisis affecting Europe, when the choices of competent authorities on allocation of resources are very much restricted by the limited budget at their disposal, so that they tend to use them in areas where they know such decisions will be more effective in terms of social/electoral consensus”.³⁶⁹

From this perspective, it should not be underestimated that the enactment, on the basis of Article 83 TFEU, of a further approximation instrument concerning the type and level of the criminal penalties for the conduct listed by directive 2008/99/EC and 2009/123/EC as well as the aggravating circumstances for environmental crimes committed by or with the involvement of criminal organisation, is likely to incur in several obstacles.³⁷⁰

First of all, criminal law is still perceived as a core element of national sovereignty; therefore, although the approximation of sanctions for environmental crime (e.g. establishing minimum level of maximum criminal penalties) would in any case be adopted in the form of a directive, as such needing the intervention of national legislator and not being of direct effect, a further EU intervention imposing Member States to limit their freedom in assessing the gravity of a criminal behaviour (also in comparison to the overall choices on penalties for crimes different from the ones considered by the eventual approximation instrument) might be perceived as a violation of the national prerogatives, and this particularly in those countries whose institutions stressed that criminal law ultimately remains a core domain of the Member States at the time of implementation of Directive 2008/99/EC.³⁷¹

Moreover, in those countries where a well developed environmental culture together with a good level of enforcement of administrative environmental provisions and an overall criminal justice system assuring the effectiveness of the application of criminal sanctions to the perpetrators of the offences lead to see as

³⁶⁴ Luna and Veening (2014) 7.

³⁶⁵ Vagliasindi, in Faure et al. (2015) 45.

³⁶⁶ See Sicurella R., in Grasso et al. (2015) 40.

³⁶⁷ See Sicurella, in Grasso et al. (2015) 40.

³⁶⁸ See Sicurella, in Grasso et al. (2015) 40.

³⁶⁹ Sicurella, in Grasso et al. (2015) 40.

³⁷⁰ Vagliasindi, in Faure et al. (2015) 132; Vagliasindi (2015) 18.

³⁷¹ Vagliasindi, in Faure et al. (2015) 132 f.; Vagliasindi (2015) 18.

questionable the use of high criminal penalties for environmental crimes³⁷², the harmonisation of criminal sanctions for environmental crimes might be perceived as lacking utility and therefore be difficult to be agreed upon.³⁷³

The circumstance that environmental crimes may seem “victimless” is likely to contribute to aggravate this situation.

As to cooperation, it “is also crucial in order to reach a level playing field with organised crime”.³⁷⁴ “However, there is a general concern that resources and adequate training is lacking. Partly related to the lack of resources is the lack of political will of national governments, but also to some extent of European institutions, to give priority to the fight against environmental crime. Judicial and police cooperation also appears to be hampered by the limited ability of national law enforcement authorities to recognize what constitutes environmental crime at the European and international level, due not only to a lack of adequate training but also to the lack of un-ambiguous definitions at these levels. Finally, the role and the capacity of a certain actor or institution to efficiently contribute to fighting environmental crime largely depend on its mandate. This may evolve, as in the case of Eurojust. While the cooperation structures that Eurojust and Europol developed have been taken as an example to follow world-wide by the Digest of Organised Crime of UNODC, both are still dependent on the good will of the competent national authorities”.³⁷⁵

Finally, as it concerns networks, “threats concerning networks are reported both from members within the environmental enforcement networks, and from external observers concerning networks in general. The threats that are identified by its members include the inability to sustain internal capacity, the loss of key staff due to a high turnover in the representative roles, and inadequate or non-existent information dissemination within the member agencies”.³⁷⁶

10.6 Conclusions

An overall increasing level of understanding exists relating to the extent and impact of organised environmental crime, particularly with regard to wildlife trafficking and trafficking in waste (including e-waste). Organised environmental crime is mainly profit-gaining motivated, has often a transnational dimension and is often facilitated by cooperation with legitimate business (e.g. those in the financial services sector, the import/export sector, and the metal recycling sector); permits are often acquired through cooperation with specialists engaged in document forgery or by bribing permit issuing bodies. Awareness exists that the consequences of organised environmental crime involve not only the environment, biodiversity and human health, but also economies, public order and good governance. As to effectiveness of measures and enforcement efforts to tackle it, examples of good enforcement experiences and/or cooperation are documented at the international, EU and national level. NGOs and individuals play a positive role in raising awareness and helping enforcement. The EU has played a relevant role in financing and assisting cooperation in the field of wildlife crime where organised crime is highly involved.

However, ambiguities in the concepts of “organised crime”, “environmental crime”, “organised environmental crime” affect awareness in national political and enforcement institutions; this affects allocation of resources to the fight against environmental crime and reliability in data concerning organised environmental crime, as well as the activation of cooperation instruments in transnational

³⁷² See, with reference to the Scandinavian countries, Elina Pirjatanniemi, “Desperately Seeking Reason - New Directions for European Environmental Criminal Law”, *Scandinavian Studies in Law* 54 (2009): 409 ff.

³⁷³ Vagliasindi, in Faure et al. (2015) 133; Vagliasindi (2015) 18 f.

³⁷⁴ Gerstetter and Sina, in Faure et al. (2015) 134.

³⁷⁵ Gerstetter and Sina, in Faure et al. (2015) 134.

³⁷⁶ Gerstetter and Sina, in Faure et al. (2015) 65.

cases. Environmental crime is only integrated to a very small extent into organised crime legislation. The Palermo Convention and the Council Framework Decision 2008/841/JHA do not address organised environmental crime; the low sanctions usually provided for environmental crimes by State Parties and Member States make it impossible to consider these crimes as “serious offences” with regard to the Palermo Convention and the Council Framework Decision 2008/841/JHA. Legislative differences across the EU facilitate organised environmental crime.

Art. 83 TFEU is an opportunity to introduce measures to tackle organised environmental crime, either in the form of aggravating circumstances or of specific provisions targeting specific form of organised environmental crime (e.g. waste trafficking or trafficking in endangered species). The Lisbon Treaty enhanced the role of Eurojust, providing an opportunity for increasing cooperation in the fight against organised environmental crime; in the future, the European Public Prosecutor could also play a role on the grounds of Art. 86 (4) TFEU.

The adoption of an EU instruments addressing harmonisation of sanctions for environmental crimes and organised environmental crime is not on the EU legislative agenda, most likely for the lack of resources which imposes EU institutions to locate resources on sectors where consensus exists among Member States. Thus, opportunities created by the Lisbon Treaty can be hampered by lack of concrete political will at the EU level towards approximation of legislation on organised environmental crime, opposition of some Member States towards further approximation, lack of resources.

The following table summarises the strengths, weaknesses, opportunities and threats.

Strengths	Weaknesses
<ul style="list-style-type: none"> • Overall increasing level of awareness on understanding the extent and impact of organised environmental crime • Cases of good enforcement experiences and/or cooperation documented at the international, EU and national level • Positive role of NGOs and individuals in raising awareness and helping enforcement • Positive role of EU in financing and assisting cooperation 	<ul style="list-style-type: none"> • Ambiguity in the concepts of “organised crime”, “environmental crime”, “organised environmental crime” affect awareness in national political and enforcement institutions, allocation of resources, reliability in data, cooperation in transnational cases • Environmental crime only integrated to a very small extent into organised crime legislation at international, EU and national level. • The Palermo Convention and the Council Framework Decision 2008/841/JHA do not address organised environmental crime. • Low sanctions for environmental crimes make it impossible to consider these crimes as “serious offences” with regard to the Palermo Convention and the Council Framework Decision 2008/841/JHA • Legislative differences across the EU facilitate organised environmental crime
Opportunities	Threats
<ul style="list-style-type: none"> • Calls by the European Parliament for adoption of instrument to tackle organised environmental crime • Possibility to enact new provisions on organised environmental crime as well as to on sanctions for conduct covered by Directive 2008/99/EC on the grounds of 	<ul style="list-style-type: none"> • Lack of concrete political will at the EU level towards approximation of legislation on organised environmental crime • Lack of resources • Opposition of part of the Member States towards further approximation

Art. 83 TFEU

- Possible enhanced role of Eurojust thanks to Art. 85 TFEU
- Possible future role of the European Public Prosecutor in the fight against organised environmental crime on the grounds of Art. 86 (4) TFEU

11 Area 9: Corporate responsibility and liability in relation to environmental crime

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11.1 Introduction

Corporate responsibility and liability regarding environmental crime exist under in forms, ranging from voluntary approaches like Corporate Social Responsibility (CSR) to administrative, civil and criminal liability.

11.1.1 Corporate social responsibility

Corporate Social Responsibility (CSR) is defined by the Commission in its 2011 Communication on a renewed EU strategy 2011-14 for Corporate Social Responsibility as “the responsibility of enterprises for their impact on society”.³⁷⁷ It is a set of originally voluntary approaches adopted by corporations, not only to ensure their compliance with existing law, but also to go further than what the law requires. International organisations play a growing role regarding CSR by creating their own CSR initiatives: five of them are cited in the Commission’s Communication.³⁷⁸ These initiatives generally comprise a set of standards and sometimes a membership system as is the case for the UN Global Compact.

However, CSR initiatives usually do not include an evaluation of a participant company’s commitment to its principles: for example, in the case of the UN Global Compact, is only possible to remove a company from the list of participants in extreme cases where the continued listing is considered to be detrimental to the reputation and integrity of the Global Compact initiative.³⁷⁹ The same applies for the OECD Guidelines for Multinational Enterprises: they include “specific instances” giving “good offices” focusing on “problem solving” and are based on “consensual and non-adversarial procedures” such as conciliation or mediation. These specific instances “can only proceed upon agreement of the parties concerned”.³⁸⁰

Even within this voluntary framework, CSR can be used by international institutions, the EU and state authorities to fight against environmental crime. This is especially the case when environmental crimes are already prohibited by law, but prosecution of such crimes is not effective enough. In such cases, CSR approaches can help improve compliance since they generally include approaches such as due diligence and disclosure. Following the same idea, the struggle against corruption and bribery was often explicitly included within the founding principles of CSR initiatives such as the UN Global Compact or the OECD Guidelines for Multinational Enterprises. However, there is no specific mention of environmental crime in the main international CSR initiatives mentioned in the Commission’s Communication.

In its 2011 Communication, the Commission largely recognizes the voluntary character of CSR, the development of which should be led by enterprises themselves. Thus, the primary role of the Commission (which was called on by the Council and the Parliament to develop its CSR policy) is to promote CSR based on the international principles already mentioned. This is done by addressing corporations directly or by stimulating Member States to act. The Commission’s actions include initiatives such as the European Multi-

³⁷⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM(2011) 681, 25.10.2011.

³⁷⁸ Five initiatives are explicitly cited in the EU 2011-14 strategy: the UN Global Compact, the OECD Guidelines for Multinational Enterprises, the ISO 26000 Guidance Standard on Social Responsibility, the United Nations Guiding Principles on Business and Human Rights and the ILO Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

³⁷⁹ www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html (page visited on May 4th, 2015).

³⁸⁰ mneguidelines.oecd.org/specificinstances.htm (page visited on June 19th, 2015).

stakeholder Forum launched in 2002³⁸¹, of which last edition in February 2015 was the occasion to present the evaluation of the 2011-14 strategy.

However, the 2011-2014 strategy also insists on implementing the UN Guiding Principles on Business and Human Rights, which include the enforcement of human rights by states, the responsibility to respect them and to track and remedy abuses by firms, and grievance mechanisms. Thus, the Commission goes further than purely voluntary approaches and promotes voluntary policy measures and regulation aimed at promoting transparency, creating market incentives and ensuring corporate accountability.³⁸²

This includes, among others, monitoring enterprises' commitments on a random basis, peer review of initiatives regarding CSR by Member States and promoting CSR in the field of trade and development. The Commission also intends to put emphasis on the issue of misleading marketing or "green washing" within the framework of the already existing Unfair Commercial Practices Directive³⁸³. More generally, it launched a debate on role and potential of business and surveys of trust in business³⁸⁴.

The EMAS Regulation³⁸⁵ is another specific initiative by the European Union related to a specific part of CSR, namely environmental management. It is a voluntary approach based on the ISO 14001:2004 environmental management standards. However, it also includes a registration system with a control by environmental verifiers; this goes further than usual CSR initiatives for which the requirements are lighter (as already seen above).

11.1.2 Market incentives

The EU 2011-2014 strategy also comprises market incentives that often go further than purely voluntary CSR approaches.

The most important initiative in that field is perhaps the inclusion of new provisions within the revised Public Procurement Directives.³⁸⁶ These Directives, which shall be transposed by 18 April 2016, set common principles for public procurement within the European Union. Some new provisions are related to the use of environmental labels, to the option to take account of environmental factors in the whole production process, and to the life-cycle costing approach for the identification of the most economically advantageous tender³⁸⁷. Another innovative provision is a 'horizontal' clause allowing contracting authorities to exclude an economic operator for which the contracting authority can "demonstrate by any appropriate means" a violation of applicable obligations of (inter alia) environmental law. Contracting

³⁸¹ www.corporatejustice.org/the-multi-stakeholder-forum,015.html (page visited on May 4th, 2015).

³⁸² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM(2011) 681, 25.10.2011.

³⁸³ See the Commission's Communication on the application of the Unfair Commercial Practices Directive, COM(2013) 138, 14.3.2013, and the Commission's first report on the application of Directive 2005/29/EC, COM(2013) 139, 14.3.2013.

³⁸⁴ See also the implementation table of the agenda stated in the strategy: ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/csr_agenda.pdf (page visited on May 4th, 2015).

³⁸⁵ Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS).

³⁸⁶ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

³⁸⁷ See Commission's page on public procurement reform: ec.europa.eu/growth/single-market/public-procurement/modernising-rules/reform-proposals/index_en.htm (page visited on May 4th, 2015).

authorities may also not award a contract when the tender itself does not comply with these obligations. However, it is still unclear how these clauses will be applied in practice, and the effectiveness of these new provisions may largely depend on the transposition by Member States and interpretation by the European Court of Justice (ECJ)³⁸⁸. It could especially be difficult for contracting authorities to assess compliance with EU, domestic and international law requirements; the pre-existence of a final binding judgement or administrative decision would have been preferable according to certain authors³⁸⁹.

A 2014 Regulation³⁹⁰ also imposes requirements on investors to inform their clients about social and environmental targets, if any. Other initiatives aim at raising the awareness of consumers through the promotion of Sustainable Consumption and Production³⁹¹.

11.1.3 Binding approaches indirectly preventing environmental crime

Other approaches followed by the Commission and the Member States also go further than purely voluntary approaches by creating binding obligations for and liability of companies and their employees, management and supervisory bodies. These forms of liability remain bound to CSR by the concepts they are based on (such as due diligence and reporting). These approaches may help indirectly preventing the involvement of corporations in environmental crime.

The most significant of such approaches at EU level, which is included in the EU 2011-14 strategy for CSR, regards non-financial disclosure requirements. The 2014 Disclosure Directive³⁹² (amending a previous directive, and entering into force in 2017) introduces mandatory disclosure requirements regarding (large) undertakings' "development, performance, position and impact, relating to [...] environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including regarding their business relationships." These disclosure requirements are linked to liability for the members of the administrative, management and supervisory bodies of any undertaking, "at least towards the undertaking", for breach of the duty to follow the requirements.

At Member State level finally, a (controversial) law proposal is currently being discussed by the French parliament, which creates a disclosure requirement for large companies regarding their own activity and the one of their subsidiaries and subcontractors, linked to civil liability and the possibility of a "civil fine" if the requirements are not met. Unlike the more narrow minimal requirements of the Disclosure Directive, anyone who has an interest in taking legal action would be able to commence an action; moreover the law should be regarded as an overriding mandatory provision (*loi de police*) and thus be applicable before French courts even if the damage has occurred abroad³⁹³.

³⁸⁸ Graells, Albert Sánchez. "Public Procurement and the EU Competition Rules" Oxford: Bloomsbury Publishing, 2015.

³⁸⁹ Graells, Albert Sánchez. "Public Procurement and the EU Competition Rules" Oxford: Bloomsbury Publishing, 2015.

³⁹⁰ Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

³⁹¹ Communication from the Commission to the European Parliament and the Council: Building the Single Market for Green Products, Facilitating better information on the environmental performance of products and organizations, COM(2013) 196 final, 9.4.2013, and Commission Recommendation of 9 April 2013 on the use of common methods to measure and communicate the life cycle environmental performance of products and organizations, 2013/179/EU.

³⁹² Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

³⁹³ Potier, D. « Rapport n°2628 sur la proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. » Paris : Assemblée nationale. 2015.

11.1.4 Corporate liability for damages directly linked to environmental crimes (civil-like)

Several forms of liability for damages to the environment (among others in the case of environmental crimes) exist at EU level and in Member States. However, it should be distinguished between damages to persons and property, and non-personnel damages to the environment itself.

Regarding damages to persons and property and within the EU, the common rules of civil liability apply in every Member State. They generally ensure that any damage should be compensated provided that the existence all three following elements can be proven: a fault, damage, and a causal link between the two latter.

However, damage to the environment is often seen as victimless, resulting in the absence of an interest in acting for plaintiffs. To cope with this problem, the 2004 Environmental Liability Directive³⁹⁴ creates a new form of liability (of administrative nature) for environmental damage, which is not linked to the existence of victims and is discussed further in Area 7.

In addition to that, some countries recognize a similar form of civil liability. This is the case for example in France where several recent decisions, up to the *Cour de cassation* (supreme court for civil and penal matters)³⁹⁵, recognize, in various forms, a form of pure environmental damage on the basis of existing rules for civil liability. These decisions contain an extensive interpretation of the existing law which only explicitly allows for reparation of individual harm (here for environmental protection associations and local authorities). This is seen by one commentator as a danger for legal security.³⁹⁶ A planned legislative reform would introduce a new form of non-personnel liability regarding the environment, with a broader scope than the 2004 Environmental Liability Directive (for example, without a need for a fault) and the possibility of a “civil fine” in addition to the payment of compensation. Plaintiffs would have the choice to bring claims on the basis either of this new form of civil liability or of the administrative liability created by the Directive.³⁹⁷

11.1.5 Criminal liability for environmental crimes

Two directives also introduced at EU level new forms of criminal liability: the 2008 Environmental Crime Directive³⁹⁸ and the 2009 Ship-source pollution Directive³⁹⁹. The infringements concerned shall be regarded as criminal offences when committed by natural persons; regarding legal persons however, the nature of the liability (criminal or administrative) depends on each Member State’s legal system.⁴⁰⁰ These directives are already dealt with in detail in Areas 1, 2 and 3 of this report. In the following, we therefore only look at the criminal liability of companies for acts committed outside of the EU.

³⁹⁴ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

³⁹⁵ Cass. Crim. 25/09/2012 n°3439 « Erika ».

³⁹⁶ Augier de Moussac, B. et al. « Pour la réparation du préjudice écologique. » Paris : Ministère de la Justice, 17.09.2013.

³⁹⁷ Augier de Moussac, B. et al. « Pour la réparation du préjudice écologique. » Paris : Ministère de la Justice, 17.09.2013.

³⁹⁸ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

³⁹⁹ Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.

⁴⁰⁰ Faure, M., Gerstetter, C., Sina, S., Vagliasindi, G.M. “Instruments, Actors and Institutions in the Fight Against Environmental Crime.” Study in the framework of the EFFACE research project. Berlin: Ecologic Institute. 2015. Available at www.efface.eu.

Among the EU Member States, criminal liability of companies exists in several Member States such as France and the UK, but it is for example not the case in Germany.

The most common principle is then that the conduct shall have occurred on the territory of the State exercising jurisdiction. The law applicable is that of the court where the person is sued. However, in several EU Member States (especially of civil law) it is also possible to sue nationals of this state for crime committed abroad under certain conditions. One of these conditions can be the double criminality principle: the offense for which the person is sued should be regarded as a crime both in the State where it was committed and in the State where the court is located.⁴⁰¹

In France, it was thus possible to sue directors of the Total company on the basis of criminal law for crimes committed in Burma while building a pipeline. The case ended in settlement, which included compensation for the victims.⁴⁰²

There are also universal jurisdiction rules for the most severe crimes (e.g. war crimes, crimes against humanity, genocide), with restrictions such as that the person sued or the victim should be citizen or resident of the country where the court is located.⁴⁰³

For criminal law too, specific regulations can extend the liability of corporations, for example regarding corruption. In the United Kingdom (UK) the Bribery Act 2010 extends the penal liability of commercial organizations to bribery (intending to obtain or retain an advantage for the organization) committed by “associated persons” such as employees, agents or subsidiaries. The concerned organizations can defend themselves by proving that they had put in place adequate procedures to prevent these persons from undertaking such a conduct.⁴⁰⁴ However, these rules are only relevant so far if crimes such as corruption are associated with environmental crime.

11.1.6 Civil liability for crimes that occurred outside the EU

Liability of EU-based corporations for environmental crimes committed outside the EU is a complex topic since it is governed by several law sources. At EU level there are regulations jurisdiction and law applicable (with exceptions for certain Member States such as Denmark). At Member State level private international law is specific to each country. Finally, international conventions (which may concern only certain Member States) can play a role as well on jurisdiction, law applicable and specific cases of liability.

One key aspect here is that of the legal person which can be sued and its place of establishment. If the offence has been committed by a subsidiary of a given corporation, only the subsidiary can be in principle sued, following the doctrine of separate legal personality. This can have several consequences: it may be only possible to sue the subsidiary in its country of establishment, and the subsidiary may have no funds or assets.

In addition to legal obstacles to prosecution for environmental crimes committed outside the EU, there are procedural obstacles relating for example to time limitations, costs and evidence.⁴⁰⁵

⁴⁰¹ Augenstein, D. et al. “Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union.” Study prepared for the European Commission by the University of Edinburgh. Edinburgh: University of Edinburgh. 2011.

⁴⁰² Hennebel, L. « L’affaire Total-Unocal en Birmanie jugée en Europe et aux Etats-Unis ». CRIDHO Working Paper 2006/09. Louvain-la-Neuve : Université catholique de Louvain. 2006.

⁴⁰³ Baker, R. B. “Universal jurisdiction and the case of Belgium: a critical assessment.” *ILSA Journal of International and Comparative Law* 16: 141-167. 2009.

⁴⁰⁴ Bribery Act 2010, 2010 c. 23.

⁴⁰⁵ Augenstein, D. et al. “Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union.” Study prepared for the European Commission by the University of Edinburgh. Edinburgh: University of Edinburgh. 2011.

Jurisdiction

The first question for victims of crimes committed outside the EU is that of the possibility to sue the corporation which allegedly caused the damage before a court within the EU, instead of relying on sometimes defective local jurisdictions. Regarding jurisdiction of Member States' civil courts, the general principle is that the defendant should be sued in its country of establishment. The recently recast "Brussels I bis" Regulation⁴⁰⁶ follows this principle to determine where a defendant established in a Member State should be sued. If the defendant is not domiciled in a Member State, the law of the Member State where the court is located shall apply; this often leads to the application of the same principle as well.

Thus victims of environmental crimes committed outside the EU by a legal person domiciled outside the EU as well will generally not have the possibility to seek redress before a court in the EU. There can be exceptions to this principle, for example if the sued legal person has secondary establishments or assets within the Member State. In the Netherlands and Belgium, there can also be an exception if it can be proven that for legal or factual reasons the proceedings cannot take place abroad.⁴⁰⁷

In the case of a non-EU subsidiary of an EU based corporation, it is possible in a limited number of cases to hold the mother company liable for crimes committed by the subsidiary following doctrines such as "piercing the corporate veil". The application of this exception generally requires other conditions such as the parent exercising actual direct or indirect control, direction or coordination over the activities of the subsidiary. In Germany and France, the subsidiary must have entered into an insolvency process.⁴⁰⁸

Specific regulations can also broaden the liability for crimes committed outside the national territory. In the United States (US), the Alien Tort Claims Act allows (in a limited number of cases) foreign citizens to take civil action for compensation for severe violations of Human Rights.⁴⁰⁹

The recast of the Brussels I Regulation in 2012 could also have been an opportunity to "create [uniform] additional jurisdiction grounds for disputes involving third State defendants", according to the Commission's Green Paper.⁴¹⁰ However, the resulting Brussels I bis Regulation did not include such provisions. It also recognized the *forum non conveniens* principle allowing judges to stay or dismiss proceedings if proceedings are pending before a court of a third State.

Law applicable for civil liability

The second question regarding liability is that of the law applicable: here too, the "Rome II" Regulation⁴¹¹ (applying to non-contractual obligations) states that the law applicable shall be the law of the country in which the damage occurs. However, overriding mandatory provisions and *ordre public* ensure that the most important rules and principles of the Member State where the case is judged apply.

⁴⁰⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁴⁰⁷ Augenstein, D. et al. "Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union." Study prepared for the European Commission by the University of Edinburgh. Edinburgh: University of Edinburgh. 2011.

⁴⁰⁸ Augenstein, D. et al. "Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union." Study prepared for the European Commission by the University of Edinburgh. Edinburgh: University of Edinburgh. 2011.

⁴⁰⁹ Hennebel, L. « L'affaire Total-Unocal en Birmanie jugée en Europe et aux Etats-Unis ». CRIDHO Working Paper 2006/09. Louvain-la-Neuve : Université catholique de Louvain. 2006.

⁴¹⁰ Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final, 21.4.2009.

⁴¹¹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

A provision of the Rome II Regulation specific to environmental damage also states that the law of the country in which the event giving rise to the damage occurred might be applied; however this provision is unlikely to apply to a failure on the part of a European parent corporation to control or supervise a third-country subsidiary. There has been no jurisprudence of the Court of Justice of the EU (CJEU) on this specific provision until now.

11.2 Strengths

11.2.1 Voluntary CSR initiatives can help reinforcing compliance with existing law

All CSR initiatives mentioned in the EU 2011-14 strategy require, in general terms, that the firms abide by the existing law. According to McBarnet⁴¹², CSR can thus be seen as a way for firms to commit themselves (through their conduct codes) to compliance with the spirit of law, and thus as a way to restrain “creative [legal] compliance”, defined as “the use of technical legal work to manage the legal packaging, structuring and definition of practices and transactions, such that they can claim to fall on the right side of the boundary between lawfulness and illegality”⁴¹³.

11.2.2 Existing approximation at EU level on liability for environmental crime

The 2004 Environmental Liability Directive, the 2008 Environmental Crime Directive and the 2009 Ship-source pollution Directive ensure that administrative or penal liability exist at EU level for environmental crime and damage to the environment. Regarding the two latter Directives, they ensure that the breach of obligations created by a certain set of secondary legislative acts is linked to liability in every Member States.

11.2.3 Some actions for human rights violations committed abroad

Although it is generally very difficult for victims outside the EU to sue EU companies for crimes committed abroad, in the Total case already mentioned, a penal action in France by victims of severe human rights abuse in Burma while building a pipeline led to a settlement, which included compensation for the victims.

Such cases can impact the fight against environmental crime two ways:

- First, in some cases environmental crimes go hand in hand with human rights abuses. This is for example the case in the Amazon basin of Ecuador. Major pollution issues linked to oil production at that place (several tens of billions gallons discharged into the land and waterways over 20 years) also led to significant health effects among the local populations⁴¹⁴. However, there is not always such a correlation.
- Second, it may be possible in certain cases to use similar legal arguments in the environmental field as with regard to human rights. These legal arguments can for example be based on penal responsibility as in the Total case. However, there are also limitations to this option, mainly due to the fact that environmental crimes are generally regarded as less severe than human rights violations. For example, most of the EU Member States (including France and Germany) apply the principle of double criminality. According to this principle, the conduct must be criminal in both

⁴¹² McBarnet, D. “Corporate Social Responsibility Beyond Law, Through Law, for Law.” U. of Edinburgh School of Law Working Paper No. 2009/03.

⁴¹³ McBarnet, D. “After Enron: will ‘whiter than white collar crime’ still wash?” British Journal of Criminology 46: 1091-1109. 2006.

⁴¹⁴ San Sebastian, M. and Karin Hurtig, A. “Oil exploitation in the Amazon basin of Ecuador: a public health emergency.” Rev Panam Salud Publica 15(3). 2004.

the country where it is committed and in the country where it is judged, which may not be the case for all environmental crimes.

11.3 Weaknesses

Some weaknesses have already been discussed in other sections of this document, e.g. the absence of harmonization of sanctions at EU level (see Area 2) and the need for a better enforcement of existing environmental criminal law (see Area 3). The following analysis complements these other sections.

11.3.1 No explicit mention of environmental crime within existing CSR initiatives

Regarding CSR initiatives, the main documents analysed, such as the EU 2011-14 strategy, the UN Global Compact, the OECD Guidelines for MNEs and ISO 26000,⁴¹⁵ contain no explicit mention of environmental crime, unlike what is done for corruption and bribery. Explicitly mentioning environmental crime would help putting it in the forefront and tend to improve due diligence, disclosure and compliance.

11.3.2 CSR standards do not include certification by opposition to other voluntary initiatives

The absence of punishment by the law in case of non-respect of commitments linked to CSR is inherent to its voluntary nature. However, a specific characteristic of CSR is that there is not even a certification system by an independent third party. For example, the ISO 9001 quality management standards and the ISO 14001 standards on environmental management contain requirements allowing for such a certification, allowing for public initiatives such as the EU EMAS environmental management scheme, which includes a periodic evaluation of performance.⁴¹⁶ This is not the case for the ISO 26000 guidance on social responsibility, which cannot be subject to a control. This is a general weakness of CSR approaches, which could be tackled by institutions working on it.

11.3.3 It remains very difficult for victims from outside the EU to sue EU corporations for environmental crimes also committed outside the EU

Under the existing EU and national rules, the principle of separate legal personality as well as practical obstacles such as time limitations, costs and evidence make it very difficult to sue EU corporations for environmental crimes committed by their subsidiaries based outside the EU before Member States' courts.

11.4 Opportunities

Some opportunities have already been discussed in other sections of this document, e.g. the possibility to use Art. 83 TFEU to stipulate minimal sanctions for environmental crimes in EU law (see Area 1). The following analysis complements these other sections.

⁴¹⁵ Only the headers of this standard were analyzed, since the full text is not publicly available. Headers available on: www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en (page visited on May 4th, 2015).

⁴¹⁶ Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC.

11.4.1 Renewal of the EU strategy for CSR

The most obvious opportunity is the renewal of the EU strategy for CSR⁴¹⁷, following the end of the current 2011-14 strategy. This should be an opportunity to set more ambitious objectives that tackle the weaknesses identified. References to environmental crime could be included here.

11.4.2 The EMAS Regulation goes further than CSR initiatives

The aforementioned EMAS Regulation includes, in addition to environmental reporting, a control by a third party of the commitments made by the enterprises. Although this regulation only deals with strictly environmental aspects, the registration within the EMAS system ensures that certain requirements are met.

11.4.3 The new Public Procurement Directives contain new clauses relating to compliance with environmental law

The aforementioned Public Procurement Directives contain new horizontal clauses allowing contracting authorities to exclude an enterprises on the basis of compliance with (inter alia) environmental law. This initiative is classified as an opportunity since, as explained above, the efficiency of these new clauses largely depends on factors such as the way they are transposed by Member States and ECJ case law..

11.4.4 There are initiatives to create binding provisions associated with liability and linked to CSR

There are more and more initiatives creating new binding provisions associated with liability and linked to CSR. At EU level, such approaches include the struggle against “green washing” using the Unfair Commercial Practices Directive, and the disclosure requirements introduced by the (already passed but not yet effective) Disclosure Directive. In addition to that, the aforementioned French initiative aims at creating liability for not meeting disclosure requirements for “parent” companies regarding the activity of their subsidiaries or subcontractors, even abroad.

These requirements can be a way to discourage corporations from committing environmental crimes: this is for example the declared aim of the French law proposal.⁴¹⁸ The UN Guiding Principles⁴¹⁹ also underline “the state duty to protect human rights”. They mention as examples initiatives similar to the French one when encouraging states to ensure that enterprises within their jurisdiction comply with human rights, even regarding operations abroad.

An example for this approach (in California, regarding labour law) is the suit against the Nike Corporation for false advertising following an audit that revealed that its Vietnamese facilities were far above the standards sets by its own code of conduct; the case ended in a settlement⁴²⁰.

These initiatives can be an opportunity for feedback and examples to follow, along with the UN Guiding Principles, for a further action in that field.

⁴¹⁷ Mentioned for example as an introduction to the 2015 Multistakeholder Forum: www.csrmsf.eu (page visited on May 4th, 2015).

⁴¹⁸ Potier, D. « Rapport n°2628 sur la proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre. » Paris : Assemblée nationale. 2015.

⁴¹⁹ www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (page visited on May 4th, 2015).

⁴²⁰ Bell DeTienne, K. and L. W. Lee. “The Pragmatic and Ethical Barriers to Corporate Social Responsibility Disclosure: The Nike Case.” *Journal of Business Ethics* 60. 2005.

11.4.5 Existing examples in certain countries widening the liability of corporations for crimes committed abroad

In certain fields such as bribery and human rights violations committed abroad, certain countries have passed acts extending the liability of corporations. This is the case of the abovementioned UK Bribery Act 2010, which extends criminal liability to bribery committed by associated persons including subsidiaries and subcontractors. Outside the EU, the US Alien Claims Tort Act recognizes in a limited number of cases civil liability for severe human rights violations committed against foreigners. These examples could serve to get feedback and as a basis for further action by the EU in that field.

11.5 Threats

11.5.1 Risk of “creative compliance” regarding environmental laws

As already stated above, CSR can be seen as a way to restrain creative compliance. On the other hand however, it is possible to argue that internal CSR codes of conduct themselves can be a new elaborate form of creative compliance, and intentionally mislead other stakeholders⁴²¹. This threat can, for example, be tackled by reinforcing liability linked to environmental reporting.

11.5.2 Balance of interests may not play in favour of measures reinforcing liability

Another threat strong-willed governmental and EU policies are facing is the potential conflict with other interests such as economic concerns and employment. This is the case, for example, for the law project about a disclosure requirement for outsourcing companies currently being discussed by the French parliament. The fear is that the law project could lead to a loss of attractiveness of France for investors compared to other countries⁴²². Here global CSR principles also aiming at states, such as the UN Guiding Principles, are part of the solution as they could help level the playing field. The UN Guiding Principles explicitly quote “requirements on ‘parent’ companies to report on the global operations of the entire enterprise” as a way to improve compliance with human rights provisions by enterprises.⁴²³

11.5.3 Difficulties linked to the extension of jurisdiction

There was a very ambitious attempt to establish universal jurisdiction in Belgium from 1993 to 2003: a law granted Belgian courts universal jurisdiction for a series of serious crimes, even when they were committed abroad and when the defendant was not present. However, this law caused Belgium serious problems since it was used by NGOs to sue current or past foreign heads of government or officials.⁴²⁴ There are also theoretical arguments against an extension of jurisdiction: for example, the former US Secretary of State Henry Kissinger underlines (once again regarding human rights abuses) the risk of a universal “tyranny of judges”.⁴²⁵

⁴²¹ Nurse, A. “Creative compliance, constructive compliance: corporate environmental crime and the criminal entrepreneur.” In: McElwee, G. and R. Smith, editors. “Exploring Criminal and Illegal Enterprise: New Perspectives on Research”. Policy & Practice: 5 (Contemporary Issues in Entrepreneurship Research). London: Emerald Group Publishing Limited. 2015.

⁴²² See for example Torre, M. “Commerce : ce que le Rana Plaza a changé.” La Tribune 24/04/2015.

⁴²³ www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (page visited on May 4th, 2015).

⁴²⁴ Baker, R. B. “Universal jurisdiction and the case of Belgium: a critical assessment.” ILSA Journal of International and Comparative Law 16: 141-167. 2009.

⁴²⁵ Kissinger, H. A. „The Pitfalls of Universal Jurisdiction”. Foreign Affairs July/August 2001 Issue. 2001.

11.6 Conclusions

The conclusions are summarised in the following table:⁴²⁶

Strengths	Weaknesses
<ul style="list-style-type: none"> • Voluntary CSR initiatives can help reinforcing compliance with existing law • Existing approximation at EU level on liability for environmental crime • Some actions for human rights violations committed abroad 	<ul style="list-style-type: none"> • No explicit mention of environmental crime within existing CSR initiatives • CSR standards do not include certification by opposition to other voluntary initiatives • It remains very difficult for victims from outside the EU to sue EU corporations for environmental crimes also committed outside the EU
Opportunities	Threats
<ul style="list-style-type: none"> • Renewal of the EU strategy for CSR • The EMAS Regulation goes further than CSR initiatives • The new Public Procurement Directives contain new clauses relating to compliance with environmental law • There are initiatives to create binding provisions associated with liability and linked to CSR • Existing examples in certain countries widening the liability of corporations for crimes committed abroad 	<ul style="list-style-type: none"> • Risk of “creative compliance” regarding environmental laws • Balance of interests may not play in favour of measures reinforcing liability • Difficulties linked to the extension of jurisdiction • The recent Brussels I Regulation recast did not give more possibilities for victims of environmental crimes outside the EU to sue EU corporations

⁴²⁶ Some weaknesses and opportunities have already been discussed in other sections of this document, e.g. the absence of harmonization of sanctions at EU level (see Area 2) and the need for a better enforcement of existing environmental criminal law (see Area 3).

12 Conclusions

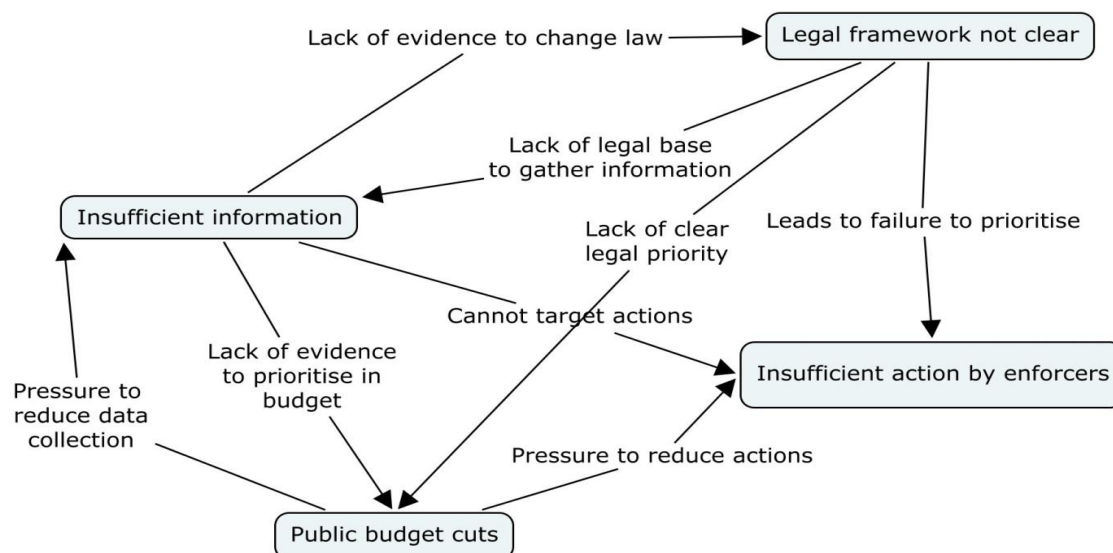
12.1 Introduction

As described in the introduction to this report, the SWOT analysis has been structured around specific themes. Each of these themes has its own conclusions and would be repetitive to bring these conclusions together here.

However, it is important to note that the conclusions for each theme may interact and, therefore, it is important that taking forward the conclusions consider the themes as a whole and not in isolation. This is illustrated by the following Figure. This explores the interaction between four weaknesses identified by different themes in the SWOT analysis:

- That the legal framework may not be clear
- That there is insufficient action by enforcers
- That there is insufficient information
- That there are threats to public budgets

If the legal framework is not clear, this provides an insufficient base for collection of information, a poor framework for enforcement agencies to prioritise their work and lack of guidance for the prioritisation of budget cuts. Information is needed to provide evidence for legal change, so this is a vicious circle. The impact on public budgets leads to further pressure on enforcement bodies to reduce actions. It can also lead to reduced resources for data collection. Again, with reduced information, there is less evidence to challenge public budget priorities. Thus overall, it can be seen how the interactions occur and feedback upon themselves.



12.2 Taking the SWOT analysis forward

The SWOT analysis in this report does not provide specific policy recommendations. This is the subject of further work within the EFFACE project. However, in considering the individual results of the thematic SWOT analysis and the interactions between these results, it is important to prioritise and determine which conclusions are most important. For example, for key strengths, it is important to determine what is driving that strength, so this can be built upon and replicated. Similarly, what is the main determinant of a weakness, so this can be addressed.

It is also important to take account of timing. Building on strengths and addressing opportunities should best take account of what is available on the agenda. This also helps to focus future policy recommendations in the work of the project.

12.2.1 Key opportunities

In synthesising the results of the SWOT analysis, the project team determined that this was best undertaken by focusing on the key opportunities identified in the SWOT analysis. These opportunities could variously be used to address a number of weaknesses identified across the different themes of the SWOT analysis. It was recognised that the analysis has considered opportunities at EU, Member State and International level. The following sections highlight the key opportunities identified at each governance level and how they can be used to address specific weaknesses. As stated earlier, this discussion does not lead to specific policy recommendations, which is the subject of further analysis in the EFFACE project.

12.2.2 EU level

There are a number of opportunities at EU level which could be used to address issues on environmental crime identified in the SWOT analysis in this report. Five key opportunities at EU level are considered below.

1. Review of the Environmental Crime Directive

The Environmental Crime Directive is subject to review. This presents a number of opportunities to address several of the weaknesses identified in the SWOT analysis across different areas. Specific issues that this opportunity affords are:

- *Opportunity to see if criminal law is effective:* the analysis within EFFACE shows the importance of criminal law in tackling environmental crime, but also where this is not effective and other instruments are useful. Understanding these issues should be central to review of the role of criminal law for environmental protection and, therefore, part of the review of the directive.
- *See if it delivers environmental protection:* a key determinant of effectiveness is that the directive should improve environmental protection and, therefore, that criminal law contributes to this. Understanding the strengths and weaknesses in the use of criminal law for the environment and building on/addressing these should be part of that review.
- *See if it provides for effective enforcement:* a specific issue in the application of criminal law for the environment is whether it can be effectively enforced. The SWOT analysis of EFFACE has identified strengths and weaknesses in this regard and addressing these within the review would allow for more effective targeting of the use of criminal law for environmental protection and better refinement of the directive.
- *Allows the examination of the role of sanctions:* a specific element of effective enforcement is the role of different types of sanctions in the application of criminal law for environmental protection, learning

from different approaches across the Member States. The issues addressed within the EFFACE research on sanctions can, therefore, be addressed within the review of the directive.

- *Review how relevant to non-criminal law:* the correct application of criminal law has strong benefits to delivering environmental protection, but it also has limits and other legal instruments have strengths, as EFFACE research has shown. Identifying these issues should be included within the review of the directive.
- *Links to wider implementation priority of the 7EAP:* the 7EAP places a high priority on improving the implementation of EU environmental law. However, it does not address the role of criminal law in supporting this. Review of the directive should examine the role and limits of criminal law in delivering this overarching objective and so better integrate the role of criminal law within the delivery of the environmental acquis.

2. Review of data/reporting by DG ENV

DG ENV is exploring the role of data and reporting to support application of EU environmental law and development and review of these policies. The exact nature of the review is still to be determined, but it provides a clear opportunity to address some of the weaknesses identified within the SWOT analysis in EFFACE. Specific issues that this opportunity affords are:

- *To take specific account of environmental crime – delivering the necessary evidence:* the review of data and information needs and systems should include explicit consideration of environmental crime (criminals, victims, distribution of crime, impacts, etc.) and efforts to address environmental crime. This would be an opportunity to address some of the data and information weaknesses identified in the SWOT analysis and ensure environmental crime is integrated into wider information systems thinking for the environmental at EU level.
- *Role of systems to support data collection, analysis, exchange, reporting:* a particular opportunity within any review of data and information is the systems used for collection, analysis and transmission of data. IT systems are developing rapidly, with opportunities for real time exchange of information between enforcement officials on the ground and shared systems between Member State and EU level. Identifying these opportunities and how the EU can support innovation in this regard to address environmental crime can be part of the opportunity afforded by the review.
- *EU added value:* The EFFACE research has identified strengths and weaknesses with data and information at both Member State and EU level. In particular, good (targeted) data systems at EU level can add value if designed correctly (or be a burden if designed poorly). Understanding the nature of EU added value for data and information regarding environmental crime and how to deliver this added value can be addressed within the review of data and information systems.

3. Co-operation and co-ordination

The EU supports co-operation and co-ordination between Member States across many different areas and in different ways. This presents a particular opportunity for EU level support to address some of the weaknesses identified in the SWOT analysis. Specific issues that this opportunity affords are:

- *Both European level co-operation and between EU level and Member State level co-operation:* it is important to note that the opportunity in this regard is to address weaknesses of co-operation between Member States (where EU level support can encourage such co-operation and provide systems to deliver this) and between Member State and EU level.
- *Funding for enforcement networks:* the EU does provide financial support for enforcement networks (e.g. LIFE+ funding for IMPEL) and such funding provides an opportunity for support to networks (or activities within networks) that can address weaknesses in tackling environmental crime and foster co-ordination and co-operation between relevant authorities between the Member States.
- *Toolbox for enforcement – analytical tools, guidance, etc.:* the EU is in a position to examine the effectiveness of different tools to support the tackling of environmental crime (e.g. guidance) based on experience in different Member States. This opportunity
- *Organisation of joint investigations:* a further opportunity at EU level is to consider the appropriate extent of, and support for, joint investigations and inspections. These are seen in various contents (e.g. fisheries, waste shipment), but this approach provides an opportunity both to tackle environmental crime directly and to enhance the capacity of enforcement institutions.
- *Legal instruments of Europol and Eurojust and being renegotiated:* A specific European level opportunity is the review of the legal instruments of Europol and Eurojust. These reviews can be used to improve the functioning of these organisations in supporting co-operation and co-ordination between Member State enforcement authorities.

4. Defining priorities

There are opportunities to take forward environmental crime issues as the EU reviews its overarching priorities – both at political level and working level. For example, currently, environmental crime is not explicitly address in the 7EAP or the EU Sustainable Development Strategy and reviews of these would be an opportunity to address some of the weaknesses.

5. Support for civil society

A further opportunity that EU level action affords is support for civil society. EU instruments, including funding, support civil society organisations and individual actions both within the EU and in third countries. These instruments are reviewed regularly or their support activities regularly determined. Addressing civil society roles in addressing weaknesses in tackling environmental crime can be included within such an opportunity.

12.2.3 Member State level

Each EU Member State will have individual opportunities to address the weaknesses that exist in addressing the problems in tackling environmental crime. However, there are also opportunities common to all or many Member States, as described below.

1. Implementation of the Environmental Crime Directive and increasing focus on the implementation of EU environmental law

The implementation of the Environmental Crime Directive provides an opportunity for Member States to address weaknesses in their approach to tackling environmental crime. Further, the support by Member

States for the 7EAP objective of improving the implementation of EU environmental law is an opportunity to consider the weaknesses

- *Review of Member State systems to address environmental crime (e.g. examining criminal and administrative approaches):* the increased emphasis on implementation of EU environmental law generally and the Environmental Crime Directive specifically provides an ideal opportunity to review national systems that address environmental crime and address specific weaknesses.
- *Smart enforcement – noting the choices for smart enforcement vary between Member States and for different environmental issues within a Member State:* the increased emphasis on implementation of EU environmental law generally and the Environmental Crime Directive specifically should allow for an examination of the optimum roles for criminal and administrative systems at national level and an opportunity to analyse and development smart enforcement strategies with appropriate smart mixes of instruments.
- *Data for enforcement – delivering evidence-based enforcement:* the emphasis on further implementation requires evidence upon which to take appropriate action. This, therefore, provides an opportunity to address weaknesses in data and information collection, analysis, systems and use at Member State level as explored in the SWOT analysis.
- *Victim liability:* the emphasis on further implementation also provides the opportunity to examine the role of liability and the role of victims in the identification and tackling of environmental crime.

2. Capacity building for the institutions available

Member States provide opportunities to address capacity building for enforcement institutions which, currently, is often considered within the threat of public budget cuts. Issues that can be addressed within this opportunity include:

- *Across the entire enforcement chain, from inspectors to judges:* the opportunity to address institutional capacity issues is appropriate to address weaknesses identified in the SWOT analysis across the entire enforcement chain, including inspectors, prosecutors, judges, etc.
- *Includes preparation of guidelines, e.g. for judges:* the opportunity to address institutional capacity issues can be used to build on strengths identified in the SWOT analysis, such as development of guidance, etc.

3. Political priorities

There are opportunities to take forward environmental crime issues as Member States review their overarching priorities for the environment.

4. Implementation of Sustainable Development Goals

There are opportunities to take forward environmental crime issues as countries implement the forthcoming Sustainable Development Goals. These provide the opportunity to identify how environmental crime impacts upon those goals as well as how implementing those goals can contribute to addressing environmental crime. Note that action at EU level and international level on supporting the Sustainable Development Goals can also be opportunities.

5. Corporate responsibility

A particular opportunity is afforded by companies taking increasing responsibility for their environmental performance. This is at national level, although for international corporations, the conclusions would apply also at EU and international level. Particular issues include:

- *Efficiency of compliance programmes*: as companies examine compliance with environmental objectives and programmes to deliver compliance and reduce environmental impacts of their activities, environmental crime issues can be integrated into these.
- *Change in perception of criminal law by business*: awareness campaigns with business are an opportunity to help raise awareness of environmental crime, how business can avoid criminal activities and how they have support reduction in environmental crime.
- *Non-financial disclosure by companies 2016*: the development of requirements for non-financial disclosure by companies. Such reporting provides the opportunity for greater transparency and the foundation for company management, regulators, communities, etc., to address environmental performance and any identified illegal activities.

12.2.4 International level

There are also a number of opportunities at International level which could be used to address issues on environmental crime identified in the SWOT analysis in this report. The key opportunities at international level are considered below.

1. Concluding Treaties on co-operation between EU and third countries

The EU concludes treaties with third countries on a range of issues. These treaties are opportunities to address various aspects of environmental crime, from commitments to tackle criminal activities to agreements on co-operative action. Particular issues include:

- *Address enforcement actions on transboundary environmental crime*: treaties are opportunities to identify actions to be taken on transboundary environmental crime (most obviously between the third country and the EU) and specific co-operative actions on enforcement, data sharing, etc.
- *Criminalisation of actions*: treaties are also opportunities to help identify specific activities as criminal and for the EU to support the development of law which criminalises those actions.
- *More powers to enforcement networks*: treaties are also opportunities for the EU to help identify enforcement needs and the support the introduction of sufficient powers for enforcement networks.

2. EU has a voice

The EU has a voice in the global community. The strength of this voice varies, but is based, variously, on economic power, moral and political leadership, etc. This voice presents several opportunities to address weaknesses relating to environmental crime in the international context:

- *Keep environmental crime on agenda of diplomatic work (green diplomatic work), e.g. ensuring it is a priority*: the diplomatic work of the EU (not just of the institutions' representations, but also that of individual Member States) presents many opportunities to take forward objectives on environmental crime in third countries. These opportunities include activities ranging from improving criminal law, identifying where the EU can support initiatives and working with other countries to garner wider support for objectives in international legal conventions.

- *Spreading the concept and/or use of criminal law for environmental offences*: the EU collectively and as individual Member States has the opportunity through its voice on the global stage to spread the concept and use of criminal law to address environmental offences, where this is most effective and the appropriate use of smart instrument mixes.
- *Using the EU's voice in negotiations on individual Conventions, e.g. the possible extension of the Palermo Convention*: a particular important opportunity is the role of the EU within the work of international conventions. Many of these are critical to addressing environmental crime and the respective meetings and networking within these conventions provide many opportunities for the EU collectively and as individual Member States to address weaknesses in tackling environmental crime.

3. Enlargement and European Neighbourhood Policy (ENP)

A particular area of opportunity for influence of the EU with third countries is through enlargement and the ENP. Enlargement includes a process for approximation with EU law and the ENP includes some elements of this as part of the improved economic ties with the EU. Specific issues include:

- *Including environmental crime in law codes of those countries*: the approximation processes are specific opportunities to ensure the criminal law of the countries includes relevant environmental offences.
- *Networking*: both processes also allow for increased support to networking. In particular they are opportunities to include relevant authorities of the countries in European enforcement networks and so spread best practices on tackling environmental crime.
- *Support to civil society*: as part of the support processes to ENP countries and those part of enlargement, the EU provides support to civil society. This provides an opportunity to help civil society to engage in relevant areas of environmental crime, to help empower victims, etc.

4. Single customs frontier of EU

A further point of engagement with third countries is the frontier of the EU. The single customs frontier acts as a common border for all Member States, which is critical for transboundary environmental crime. This also presents opportunities to address weaknesses identified in the SWOT analysis, including:

- *Customs co-operation*: various customs networks and co-operative processes exist. These are both within the EU and globally. These provide opportunities to tackle specific weaknesses for transboundary environmental crime.
- *Data exchange*: a particular opportunity concerns data and information exchange. There are opportunities to improve the efficiency of exchange of information between the customs services of different countries. There is also an opportunity to address the weakness in some countries to barriers to information exchange between customs authorities and environmental enforcement bodies.

5. Development co-operation

Another area of influence of the EU with third countries is via its financial support for development co-operation. This presents an opportunity to link aid with tackling environmental crime in the relevant countries (including support to civil society), including ensuring that environmental crime is addressed in guidelines for EU funds for individual countries.

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