



EUROPEAN POLICY BRIEF



THE EU'S STRENGTHS AND WEAKNESSES IN TACKLING ENVIRONMENTAL CRIME

Policy Brief 16: January 2016

INTRODUCTION TO THE RESEARCH

The EFFACE project has researched many different aspects of environmental crime, the results of which have been presented in previous policy briefs. In order to help produce overall policy recommendations, the results of this research were drawn together using the framework of a SWOT analysis (analysing strengths, weaknesses, opportunities and threats) of the measures in place to tackle those crimes. The results of the SWOT analysis provide the platform for subsequent policy formulation.¹

Synthesising the findings of the EFFACE project required a structure approach as it covered a wide range of different types of environmental crime, across different governance levels at Member State (MS), EU and international scales and from the perspective of different academic disciplines. The synthesis was, therefore, structured around nine themes, some looking at both MS and EU level issues and some at EU level only:

1. Data and information management (MS/EU level)
2. Further harmonisation of substantive environmental criminal law at EU level (excluding sanctions)

¹ The Policy Brief is based upon the EFFACE deliverable "Evaluation of the strengths, weaknesses, threats and opportunities associated with EU efforts to combat environmental crime", available at <http://efface.eu/swot>

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 level only)
7. Use of environmental liability (MS/EU level)
8. Organised environmental crime
9. Corporate responsibility and liability in relation to environmental crime

This policy brief describes the strengths and weaknesses identified in the SWOT analysis and provides a baseline from which the conclusions of the project regarding the policy opportunities at EU, Member State and international level to improve how environmental crime are developed. It is important to note that this particular aspect of the research did not result in specific policy recommendations, as its results were fed into further analysis aimed specifically at developing such recommendations. These recommendations will, therefore, be summarised in a subsequent report.

UNDERTAKING A SWOT ANALYSIS

For each of the nine themes, structured around specific objectives and questions, the SWOT analysis examined the following:

- **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 to address them.
- **Opportunities** 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.

The following brief focuses on the strength and weaknesses; opportunities are dealt with in a later policy brief which presents the EFFACE overall conclusions and recommendations.

RELEVANT ISSUES

Area 1: Availability of Data and Information:

Quality information and data on environmental crime (e.g. number of infringements, sanctions, social economic and environmental impacts of infringements, efforts deployed for enforcement, etc.) is central to understanding the extent of environmental crime, its impacts and where action to address it may be most effective. Good data systems underlie evidence-based enforcement and the selection of appropriate policy mixes to tackle and prevent particular types of crime. One of the recurring findings within EFFACE was that understanding of environmental crime and enforcement are held back because data either does not exist or is inconsistent and incomplete.

Strengths: Researchers and enforcement authorities alike agree that robust and good quality data that are systematically organised and consistent are important and necessary for the effective enforcement of environmental crime. There is agreement by researchers and enforcement authorities alike on the importance of data and information and that improved systems of data and information are needed. Data quality and availability varies considerably depending on the type of environmental crime. However, there are some examples of good practice within certain areas such as tracking waste shipments and data sharing in CITES. The EFFACE case studies also highlighted some good practices in data availability.

Weaknesses: Data availability varies depending on the type of environmental crime. Unfortunately, there are major data gaps in relation to most areas of environmental crime. In particular, the impacts of environmental crime on social, economic and environmental systems is not well understood or quantifiably verified by data. For some areas of environmental crime important data tools have been developed, such as the EU-TWIX database on seizures of illegally traded wildlife. However, such shared systems at EU/MS level are not easily shared externally; this affects international cooperation, such as is often the case in transnational issues. Moreover, there is no legal obligation for MS to compile data on environmental crime as a specific category of reporting, let alone provide consolidated data on environmental crime to the EU. Smart enforcement and the development of smart instrument mixes require a constant influx of information, but without robust data such approaches can hardly be developed. Often good data are limited to examples and cases of a specific area of environmental crime and good systems of data collection and sharing are lacking.

Areas 2: Harmonisation of Substantive Environmental Criminal Law at the EU Level

The EU has taken important legislative steps to strengthen the EU criminal law framework in the field of environmental crime through the Environmental Crime Directive and the Ship-Source Pollution Directive, following a decision by Court of Justice which recognised that the EU had the competence for harmonisation of environmental criminal law as part of its environmental obligation.

Strengths: The introduction of these two Directives requires MS to criminalise a wide range of conduct as environmental crimes, thereby prescribing the use of instruments for protection of the environment that had not previously been used at the EU level. Certain rules laid out at the EU level go beyond the corresponding international legislation thereby raising the standard of environmental law. For example, the EU Ship-Source Pollution Directive exceeds its international equivalent, the International Convention for the Prevention of Pollution from Ships (MARPOL) Convention by adopting stricter criminal provisions. Environmental crime is now dealt with directly by EU criminal justice agencies such as Europol.

Weaknesses: While the introduction of the Environmental Crime Directive and Ship-Source Pollution Directive are lauded as 'landmarks', these directives do not prescribe a certain level of sanctions, but instead state that sanctions need to be 'effective, proportionate and dissuasive'. Moreover they only cover certain types of behaviour.

An overarching weakness is a lack of coherence between various EU instruments aimed at protecting the environment (e.g. between the Environmental Crime Directive and the Environmental Liability Directive). A key gap is the lack of an express link between measures addressing environmental crime and measures addressing organised crime more broadly- including the absence of an express link between environmental criminal law and anti-money laundering law; and the lack of clarity in the relationship between criminal and non-criminal (including administrative) law in the field of the environment.

Area 3: The System of Sanctions

The EU legislative framework does not prescribe the use of specific sanctions to address environmental crime; therefore, MS are free to choose their own systems of sanctions, as long as these are effective, proportionate and dissuasive. The effectiveness of sanctions depends on whether there is an appropriate toolbox of instruments – criminal, administrative and civil – sanctions available; it also depends on who uses the toolbox.

Strengths: Overall, there has been a broadening in the variety of enforcement instruments that MS can use in their environmental criminal enforcement systems and improved flexibility in how they can be applied. The system of sanctions in most MS is made up of several types of law (administrative, criminal and civil) and thus, in principle, makes it possible to impose the sanction which is most appropriate to a particular type of offence. Therefore, one identified strength is the use by some MS, such as Germany, France and Sweden, of administrative sanctions in the instrument mix to avoid the expensive alternative of criminal law. At the MS level, there are also often “effective, proportionate and dissuasive” sanctions in statutes that include the possibility of sizeable fines and imprisonment. Many MS also have the possibility to impose complementary sanctions aiming at the restoration of harm done in the past or future harm.

Weaknesses: An overarching weakness is the low level of application of sanctions in MS despite the availability of enforcement tools from several types of law. In some cases the delineation between the various enforcement instruments particularly administrative and criminal is not clear. In some MS the ability to impose administrative sanctions in cases of environmental infringements is limited or rarely applied (e.g. Spain and Poland). At the EU level, the ECD and Ship-Source Pollution Directive focus on criminal sanctions and do not address administrative sanctions. Complementary sanctions (reparation/prevention) are applicable in some MS but not others, and are not mentioned in the EU Directives.

Area 4: Functioning of Enforcement Institutions and Cooperation Between them (MS/EU level)

Enforcement is a critical component to any successful fight against environmental crime particularly in the case of environmental crime which often occurs across state boundaries and requires cooperation between countries. The level of cooperation between MS enforcement institutions and EU enforcement institutions varies and is dependent on the countries involved and the type of crime.

Strengths: Enforcement institutions vary between MS, with some having specialised units dedicated to environmental crime and others do not. There are also differences in relation to the level of priority environmental crime has in the enforcement institutions of a MS, which can be influenced by the availability of resources, perceived priority, relevant expertise among personnel, and the degree to which a country operates in an impartial and corrupt free manner. Some MS such as France, Spain and Italy exhibit good practice with specialised police units responsible for environmental crime. Sweden has a specialised environmental prosecutors unit, while the UK has a decentralised network that champions prosecutors with specific expertise to take on the relevant cases.

The political prioritisation of environmental crime at the EU level has, to an extent, influenced its prioritisation at the MS level. The 2013 EU Serious and Organised Crime Assessment (SOCTA) was particularly influential in this regard. Following SOCTA, Europol did a specific assessment on environmental crime. In 2014, the European Parliament called for an EU Action Plan against wildlife crime and trafficking and the Commission launched a public consultation on wildlife trafficking. The Environmental Crime Directive of the EU was subsequently subject to an implementation review by DG Justice of the European Commission. Finally, there are flexible and voluntary associations of professionals working on environmental crime that are sharing information and best practice, with for instance, the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) and the European Network Against Environmental Crime (ENCE).

Weaknesses: One overarching challenge is that the implementation of environmental law is a responsibility that is left up to the individual MS. The EU itself does not have the authority to enforce the provisions outlined in the EU's legal framework and tools. As a result, the operation of enforcement institutions at the MS level varies and is uneven across the EU. Some MS have special investigative units while others have no environmental crime specialization. Evidence shows that many environmental crimes are not investigated or prosecuted by enforcement institutions for reasons of limited awareness, lack of resources and expertise, and complexity of establishing causality of environmental crime. The lack of financial resources is identified as a significant weakness or barrier to enforcement; this situation has become exacerbated in the recent financial crisis, at least in some MS.²

In EFFACE studies conducted on various MS, cross-border cooperation is found to be sub-optimal and MS authorities could make better use of provisions on mutual assistance and recognition in criminal matters, for example, by sharing information in a timely manner in the case of cross-border crimes. Enforcement institutions such as Europol and Eurojust are consistently mentioned by representatives at all governance levels as being useful entities; however, MS often do not inform or include these institutions in the investigation and enforcement process and thus miss important opportunities for better cross-border cooperation.

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

Individuals and communities have a role to play both as victims of environmental crime and as agents of prevention and enforcement through public participation. NGOs are also recognised as key actors in creating environmental democracy by informing, shaping and engaging directly in environmental justice.

Strengths: Engaging local communities and strengthening public participation in raising the awareness of environmental crimes is central to preventing crime and collecting information and evidence for prosecuting existing environmental crime. There have been several cases that illustrate the important role that individuals, communities and NGOs play in contributing to enforcement, for instance, by collecting and providing evidence to the prosecution. Communities and civil society are recognised as important actors to prevent crime because of their knowledge of local problems and capacity to reach vulnerable parts of society.³ The Aarhus Convention, to which the EU and its MS are parties, contains rules on access to justice on environmental matters for individuals and environmental NGOs; this is also relevant for preventing and acting on environmental crime.

Weaknesses: The rights of individuals and communities in situations of environmental crime are not yet well defined or understood. This prevents their effective public participation as well as potential recourse to restitution to individuals and communities that are victims of environmental crime. Low levels of awareness and unclear definitions of 'victimhood' can result in victims not being aware of their rights. Proving 'victimhood' in certain cases is also complicated, for example, impacts from an environmental crime may only be evident a long after the crime itself was committed. Determining an appropriate remuneration based on a 'quantification of damage' is not straightforward, particularly

² Fajardo, T., Fuentes, J., Ramos, I., and J. Verdú (2015) Fighting Environmental Crime in Spain: A Country Report. Study in the framework of the EFFACE research project. Granada: University of Granada. Available online: http://efface.eu/sites/default/files/EFFACE_Fighting%20Environmental%20Crime%20in%20Spain.pdf.

³ United Nations Congress on Crime Prevention and Criminal Justice, Doha – (April 2015) The Role of the Public in Strengthening Crime Prevention and Criminal Justice. Available online: http://www.un.org/en/events/crimecongress2015/pdf/Factsheet_6_Public_participation_EN.pdf.

concerning health or loss of livelihood. Moreover, victims of environmental crime committed by the subsidiaries or subcontractors of companies based in the EU face legal obstacles when they wish to bring claims before EU courts against the mother companies (e.g. lack of jurisdiction of EU courts).

Area 6: External Dimension of environmental Crime – what can the EU do?

Environmental crime is frequently a transnational issue that transcends national borders as well as those of the EU; this is true for some types of environmental crimes (e.g. illegal waste shipments or illegal wildlife trade) more than for others. The EU is both a source, transit and destination area for environmental crime making cooperation with third (external) countries relevant to effectively addressing transnational environmental crimes.

Strengths: The EU is a party to most of the important international multilateral environmental agreements (MEAs) that seek to protect the environment against environmental crime and the EU has promoted the improved enforcement of those MEAs by providing resources, e.g. financial aid for development cooperation. EU legislation implementing international MEAs has sometimes incorporated criminal sanctions raising the bar for protection of the environment beyond what is called for in international legislation. The EU has also introduced internal trade-related measures to curb European demand for environmental products produced illegally abroad, thereby alleviating potential damage on the environment in third countries that are source countries (e.g. the EU's timber regulation). The EU has also offered trade incentives through its System of Generalised Preferences to those third countries that become parties to and enforce MEAs on environmental crime.

In its efforts to address transnational environmental crime, the EU has developed expertise in its instruments, tools, networks, NGOs and enforcement agencies that operate and are involved in both EU and transnational cases. EU enforcement networks and agencies, such as the European Network for Prosecutors (ENEP) and IMPEL, work at both national and transnational levels to combat environmental crime. The EU is also an important source of funding for specific initiatives in third countries as well as international cooperative partnerships, such as the International Consortium on Combating Wildlife Crime (ICWC).

Weaknesses: A recognised weakness in the EU's external action and cooperation is the fact that efforts are focused predominantly on wildlife trade and illegal logging which represents a narrow range of types of environmental crime. The trafficking of hazardous waste or WEEE for example, is inherently transboundary, increasingly problematic and a type of environmental crimes where the EU is often the source of the product that is disposed of illegally.

Markedly different legal systems and capacity (i.e. political will, financial resources, expertise) between countries around the world make the enforcement of transnational environmental crime extremely complicated and creates loopholes that criminal networks can exploit. It is even difficult for the EU to effectively implement rules for its own companies operating abroad. For example, EU companies doing business in third countries do not necessarily abide by the EU environmental standards but instead take advantage of the lax systems of local regimes and circumstances.⁴

Area 7: Use of Environmental Liability

⁴ 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.

In 2004, Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage was adopted. The Environmental Liability Directive effectively establishes the powers of the “competent authority” and introduces duties of the “operator” who caused environmental damage or the imminent threat so such damage thereof to remediate.

Strengths: The Environmental Liability Directive effectively introduced legal responsibility for damages to the environment by operators. Rules on remediation and compensation for damages to the environment did not previously exist at the EU level and the Environmental Liability Directive introduced the polluter pays principle. Through its implementation, economic and social evaluations of damages as well as ecosystem services improved as they were needed to evaluate the grounds of liability. The Environmental Liability Directive also increased public participation including access to justice by giving affected individuals or NGOs the right to press regulatory authorities to take action.

Weaknesses: The introduction of liability was new and transposition into MS law occurred slowly with the Directive coming into force in 2004 and only being transposed into MS law in 2010.⁵ Several weaknesses were identified in relation to the practical implementation of the Environmental Liability Directive. Some MS had 95 cases annually while others had only 1. The length of time for remediation also varies considerably from 1 day to 6 years depending on the situation and the MS. These inconsistencies are likely to stem from different and generally low levels of awareness and expertise in some MS of liability matters. The nature of liability itself is challenging as it is extremely difficult in environmental crime scenarios to establish and confirm causality. Identifying that an operator has not complied with its obligations is difficult in practice and there are no mechanisms (i.e. insurance) in place to remedy large scale damage. Some of the terms used in the Directive remain ambiguous and an evaluation report undertaken by the Commission in 2012 stated that the transposition into national law did not result in a level playing field but a patchwork of liability systems due to procedural and substantive variations.⁶

Area 8: Organised Crime

Environmental crime has increasingly been tied to the coordinated activity of organised criminal networks or groups.⁷ Illegal wildlife trade, fishing, logging, waste disposal and shipment of hazardous waste are areas of environmental crime where organised crime is suspected to take place and this is acknowledged by international institutions such as the United Nations Environmental Programme, INTERPOL and United Nations Office on Drugs and Crime.⁸ However, as also acknowledged in EFFACE research, these crimes are not always committed in an organised manner.

Strengths: There is an overall increasing level of awareness of the links between environmental crime and organised crime, in particular with regard to wildlife trafficking, the transnational trafficking

⁵ Salanitro, U. (2015) Directive 2004/35/EC on Environmental Liability. Study in the framework of the EFFACE research project, Catania: University of Catania. Available online: http://ecologic.eu/sites/files/news/2015/efface_directive_2004_35_ec_on_environmental_liability.pdf.

⁶ Vagliasindi, G.M., et al., Workshop on “Environmental Liability and Environmental Crime,” 6 November 2014. Brussels, Belgium. Available online: http://ecologic.eu/sites/files/news/2015/d2.4_efface_report_workshop_environmental_liability_and_environmental_crime.pdf.

⁷ Luna M. and Veening W (2014) Organised Environmental Crime. The need for combating environmental crime as a serious and organised category of offense. A Policy Brief compiled as part of the EFFACE project. Available online: <http://efface.eu/policy-brief-2-organised-environmental-crime>.

⁸ See UNODC (2011) Transnational Organised Crime in the Fishing Industry: Focus on Trafficking in Persons, Smuggling of Migrants, Illicit Drugs Trafficking. Available online http://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf.

in waste (including WEEE) and illegal logging. In the literature and in case examples, organised environmental crime is linked to other types of organised crime such as drug trafficking, money laundering, terrorism, and corruption. This has increased awareness and the perceived seriousness of environmental crime. NGOs have come to play an important role in raising awareness and contributing to enforcement efforts by collecting evidence and information and working alongside enforcement agencies.

Weaknesses: Despite the increased understanding and recognition of organised environmental crime, there remains ambiguity in the definition of concepts of “organised crime”, “environmental crime”, “organised environmental crime”. Lack of clear definitions of these concepts makes it difficult to accurately identify organised environmental crime activity within the overall crime statistics. It also affects the awareness of organised environmental crime amongst policy makers and enforcement institutions, which influences the allocation of financial resources and political prioritisation. Moreover, relevant international legislation such as the United Nations Convention against Transnational Organised Crime does not address environmental crime explicitly. The same is true for the Council Framework Decision 2008/841/JHA on the fight against organised crime. The lack of adequate resources is identified as one major factor that leads to the non-implementation of and non-compliance with the Palermo Convention.

Moreover, legislative differences amongst MS create loopholes and opportunities for organised crime to take place and the current low level of sanctions in most MS make it difficult to consider environmental crime as a “serious offence” in regards to international legislation (Palermo Convention and the Council Framework Decision (2008/841/JHA)).

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

Corporate social responsibility (CSR) is a set of voluntary approaches adopted by corporations that are not only aimed at ensuring compliance with existing law, but that set standards to go further than what the law requires. Although voluntary, CSR approaches often include approaches such as due diligence and disclosure that help improve compliance and transparency indirectly and thus help identify and fight environmental crime.

Strengths: Within the EU, the 2011 Communication of the Commission regards CSR to be a field that should be led by enterprises themselves with the Commission playing a supportive role addressing corporations directly or by stimulating MS to act. In particular, the 2011-2014 strategy of the EU insists on implementing the UN Guiding Principles on Business and Human Rights which include the enforcement of human rights by states, the responsibility to hold enterprises accountable for abuses and the implementation of grievance mechanisms. There is no explicit mention of environmental crime within existing CSR initiatives, even though compliance with environmental standards is usually a part of them.

The EU has also used market incentives that go further than voluntary CSR approaches with for instance the revised Public Procurement Directives (to be transposed in 2016) including environmental factors in the set of common principles for public procurement within the EU.

The EU is also creating binding obligations for companies and their employees, management and supervisory bodies in regards to certain principles of CSR such as due diligence and reporting. The promotion of these measures may indirectly improve transparency and action to fight environmental crime. The most significant EU level approach in this regard is the 2014 Disclosure Directive that introduces mandatory disclosure requirements related to, among others, the environment for companies with at least 500 employees.

Weaknesses: Existing CSR initiatives including the EU 2011-2014 strategy, the UN Global Compact, the OECD Guidelines for MNEs and ISO 26000 do not explicitly mention the environment or

environmental crime, while mentioning environmental compliance more generally. Perhaps more importantly, CSR standards are voluntary and do not necessarily include mechanisms for independent third-party verification and/or sanctions. At the same time, victims of environmental crime perpetrated by EU-based companies or their subsidiaries outside the EU have few legal avenues available to receive damage and/or hold companies accountable. Transnational civil law suits are made difficult by the fact that EU courts may not hold jurisdiction, that such or that the parent company domiciled in the EU cannot be held legally responsible for the actions of subsidiaries or sub-contractors.

CONCLUSIONS

This policy brief presents an evaluation of the strengths and weaknesses associated with EU efforts to combat environmental crime examining current actors, instruments and institutions involved in combating environmental crime across the EU and the world. The identification of strengths herein can lead to policy recommendations based, among others on existing good practices, while the weakness identified provide clear areas where specific recommendations can be development.

As noted in the introduction to this policy brief, the specific policy recommendations arising will, be set out in a subsequent report.

RESEARCH PARAMETERS

“European Union Action to Fight Environmental Crime” (EFFACE) is a 40-months research project involving eleven European research institutions and think tanks. EFFACE assesses the impacts of environmental crime as well as effective and feasible policy options for combating it from an interdisciplinary perspective, with a focus on the EU. Project results include several case studies on the causes, actors and victims of different types of environmental crime as well as policy options and recommendations.

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PROJECT IDENTITY

PROJECT NAME	European Union Action to Fight Environmental Crime (EFFACE)
COORDINATOR	Scientific coordinator: Christoph Stefes, Senior Fellow, Ecologic Institute, Berlin, Germany General coordinator: Christiane Gerstetter, Senior Fellow, Ecologic Institute, Berlin, Germany, envcrime@ecologic.eu
CONSORTIUM	Chatham House – London, UK Ecologic Institute – Berlin, Germany Institute for Environmental Security – The Hague, the Netherlands Institute for European Environmental Policy – London/Brussels, UK/Belgium Maastricht University – Netherlands Sapienza - University of Rome – Italy School of Law, Queen Mary, University of London –UK University of Catania – Italy University of Granada – Spain University of Oslo – Norway University of South Wales – Treforest, UK
FUNDING SCHEME	FP7 Framework Programme for Research of the European Union – Collaborative project, SSH.2012.2.2-3, New types of offence in a globalised world: the case of environmental crime
DURATION	December 2012 – March 2016 (40 months)
BUDGET	EU contribution: EUR 2,318,600
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FURTHER READING	A. Farmer et al. (2015): Evaluation of the strengths, weaknesses, threats and opportunities associated with EU efforts to combat environmental crime, EFFACE report, http://efface.eu/evaluation-strengths-weaknesses-threats-and-opportunities-associated-eu-efforts-combat-environmental
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