Guidance for Prosecutors of Waste Crime

Date: 27.04.2020

Version: 2.0

Work Package 4: International Operational Networking in EU - Asia Pacific Region

Deliverable 4.3: Guidance on Prosecuting Waste Crime

The WasteForce project is funded by the European Union's Internal Security Fund – Police (ISFP/2017/AG/ENV/821345)

FOREWORD

This Guidance has been developed in collaboration between the United Nations Environment Program (UNEP) and the United National University (UNU) under the project on 'Deterring and disrupting illegal trade and management of Waste by developing Tools for Enforcement, Forensics and Capacity Building' ('WasteForce' project). The Waste Force project is funded by the European Commission for 2 years and commenced in December 2018.

The WasteForce project aims to boost the operational activities and capacities of authorities involved in the fight against illegal trade and management of waste through:

- Creation of new practical tools and methodologies;
- Implementation of multi-stakeholder capacity building activities; and
- Support of operational networking among practitioners in Europe and with their counterparts in the Asia Pacific region.

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Acknowledgements

The authors would like to express significant appreciation to the WasteForce Partners and the participants at the WasteForce training on prosecuting of waste crime that was organised in Lisbon in November 2019. This guidance material benefited from the inputs collected at a dedicated Consultative meeting organised by UNEP in Bangkok in December 2019 that gathered together 21 participants representing prosecutors, legal training institutes and environmental protection and customs agents from seven countries in the region and also included representatives from partners international organizations. The authors would also like thank the European Network of Prosecutors for the Environment (ENPE), and in particular Mr. Rob de Rijck, for providing valuable input and support with the development of the Guidance.

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INTRODUCTION

1. Overview of environmental and waste crime

There is no universally agreed legal definition of environmental crime. Environmental crime has been defined as "*an unauthorised act or omission that violates the law and is therefore subject to criminal prosecution and criminal sanction. This offence harms or endangers people's physical safety or health as well as the environment itself. It serves the interest of either organizations—typically corporations—or individuals."* (Situ and Emmons, 2000). Others conceive an environmental crime as "*an act committed with the intent to harm or with a potential to cause harm to ecological and/or biological systems and for the purpose of securing business or personal advantage*." (Bricknell 2010).

Ultimately, Bricknell observed that:

> *The recognition and acceptance of environmental crime as a genuine criminal offence (or rather array of offences) has perhaps been more problematic than other crime types. Traditionally, harmful practices against the environment were not viewed with the same moral repugnance as offences directed against the person or property. To some extent, this reflected the reality of the age in which they were being committed, by whom and why. With an increasing awareness and appreciation of the environment came a re-evaluation of what the environment can and cannot sustain and an acknowledgement of the need to regulate, and in some cases, criminalise these harmful practices.* (Bricknell 2010).

UNEP and INTERPOL adopt a working definition of environmental crime that encompasses any illegal act or omission that causes environmental harm that provides some benefit, either personal or financial. Environmental crime can be understood as "*a collective term to describe illegal activities harming the environment and aimed at benefitting individuals or groups or companies from the exploitation of, damage to, trade or theft of natural resources, including serious crimes and transnational organized crime"* (UNEP/INTERPOL 2016, p.7).

While this definition encompasses any illegal act or omission that causes environmental harm, environmental crime and particularly waste crime also include breaches of environmental legislation that do not (immediately) cause environmental harm. For example, a misclassification of a waste export does not (directly) cause environmental harm, but is a breach of legislation that is intended to protect the environment, and thus it is still a crime.

Like other forms of commercial crime, a primary incentive for committing environmental crimes is personal gain. These gains are obtained directly through benefits achieved from performing a specified act but also through the resources saved by ignoring standardised codes as to how certain practices should be performed. Others have proffered that 'greed' and 'ignorance' are the foundations of environmental crime. For some business enterprises, such as logging, the illegal version is preferred as it can be more lucrative than the legal form (UNEP 2018,

UNEP/INTERPOL 2016).

The attractiveness of these illegal profits is enhanced by the often minimal investment that is needed to commit environmental crimes and the relatively low risk of getting caught and prosecuted. Many forms of environmental crime are not easily observed or detected, do not make an obvious impact and are not always a constant on the law enforcement radar. Regulatory loopholes and weaknesses, the lack of political will to enforce those crimes, combined with the sometimes inefficiency or corruptibility of investigating officials, either reduces the chances of being detected or actually assists the criminal behaviour to continue (UNEP/INTERPOL 2016).

The growth of environmental crime has been recognized as being one of the most significant dangers facing the environment today. Effective enforcement of the laws governing environmental protection and waste management are critical to the development of a strong environmental rule of law. (UNEP 2019)

The prosecution of environmental crimes is as important as for other crimes. Prosecution not only promotes respect for the law, but also discourages violations of the rule of law. The impact of environmental crimes is not confined to human health and damage to the environment. Economic crime, and thus economic harm, are usually associated with environmental crimes. INTERPOL has concluded that initial evidence links pollution crimes with organized crime, and that in some cases links to terrorism were found to exist. (INTERPOL 2006). INTERPOL has further emphasized the importance of prosecuting environmental crimes in its advocacy memorandum of 2007, which states that: “The far-reaching impacts of environmental crime underscore the importance of adequate sentencing for such crimes. In order to deter environmental crime effectively, sentences, including incarceration and monetary penalties, must exceed the economic advantage gained by the defendant as a result of its non-compliance. Sentences must also be high enough to at least cover the costs of mitigating the damage inflicted” (INTERPOL 2007).

Waste crime, as a category of environmental crime, represents a significant environmental and legal challenge as the growth of the legal trade in waste is mirrored by a growth in the illegal trade in waste. The global waste sector takes several forms. Firstly, a legal industry sustaining business and environmental protection, secondly an unregulated sometimes even informal business, that is important for recycling and job creation as well, but with health risks and challenges of monitoring the safety and sound management and thirdly, trafficking in hazardous waste and chemicals by organized crime. (UNEP/INTERPOL p.62).

Illegal transboundary movements of chemicals and wastes are an increasing environmental concern globally. Over 200 million tonnes of hazardous and household wastes are generated worldwide annually, of which at least 9.3 million tonnes move across national borders each year. The high costs of treating and disposing hazardous and other wastes, together with weak environmental regulations, weak enforcement and low environmental awareness, have resulted in many developing countries becoming destination of illegal shipments of hazardous wastes and harmful chemicals with serious health and environmental consequences. (UNEP 2015).

Waste trafficking originates mainly in developed countries, with the EU, North America (the US and Canada), Japan, and Australia being commonly identified as the main exporters of illegal waste. The main destination countries for illegal waste trafficking in Asia (Indonesia, India, Malaysia, Pakistan, and Vietnam). Illegal waste trade routes depend on the type of waste, with e-waste usually shipped to South-east Asia, used-cars part and end-of-life vehicle to Eastern Europe and Africa, and plastic to Asia (DOTCOM Waste Project, 2017a, UNEP 2019)

The drivers and incentives of engaging in illegal trade and disposal of hazardous waste and chemicals include profit, weak enforcement systems, the complexity of rules and range of actors involved in the global chemicals, and waste trade chain (Basel 2017, p.10-11). The incentives are largely supply-driven, firstly by the desire of waste producers to avoid high disposal costs and secondly by the profit motive on the part of the waste broker, who receives money from the waste producer and the buyer seeking to recycle or recover waste. It has been suggested that the increased cost of legal and safe waste disposal has contributed to the development of an export trade to many of the world's least developed countries, using exploitable gaps or weaknesses in waste trade and waste disposal regulatory frameworks. It is widely believed that illegal waste imports cross national borders easily, particularly to countries that have weak or non-existent inspection systems and technologies available (UNEP 2018 Crimes).

2. Scope of the Guidance

Waste Crime Enforcement officers including customs, police, environmental inspectors and prosecutors play a key role in preventing and controlling illegal trade in chemicals and waste, by ensuring effective enforcement of national environmental laws and compliance with national commitments to multilateral environmental agreements. UNEP has developed a handbook to help enforcement officers detect, inspect and identify chemicals and waste regulated by multilateral environmental agreements and national laws. (UNEP 2015, p10)

This Guidance is intended to provide guidance and practical information for authorities involved in the prosecution of cases of illegal traffic in hazardous or other wastes. Whilst the scope of the illegal transboundary trade in waste in is a focus of the Guidance, it is also intended to provide guidance in the prosecution of waste crime in general. Whilst the main audience for this Guidance are the prosecutors of waste crime, the Guidance should also be valuable for customs officials, investigators and relevant Ministries involved in waste related prosecutions.

As has been stated before:

> "*The ultimate objective when prosecuting cases of illegal traffic in hazardous and other wastes is to protect communities and the environment from the harmful consequences of improperly managed transboundary movement and disposal of hazardous and other wastes by punishing such crimes, and thus providing a deterrent.*" (Basel 2012, p.7)

This Guidance does not aim to duplicate other existing materials unnecessarily although it is designed to be a stand-alone document. It is also intended to link with existing materials and future on-line training materials. References will be made to other materials that will provide assistance to the prosecution of waste crime and other environmental crimes. In particular, the Basel Convention Secretariat published in 2012 an "*Instruction manual on the prosecution of illegal traffic of hazardous wastes or other wastes*" which provides an understanding of the practice of prosecuting cases of illegal traffic in hazardous wastes or other wastes within the scope of the Basel Convention. The current Guidance complements and integrates the Secretariat's Manual by providing recent updates, specific information on prosecution practices in the European Union and South East Asia, and on investigation and evidence collection.

For the purpose of this Guidance, "enforcement" is defined as meaning:

> *the range of procedures and actions employed by a State, its competent authorities and agencies to ensure that organizations or persons, potentially failing to comply with environmental laws or regulations, can be brought or returned into compliance and/or punished through civil, administrative or criminal action*.

"Compliance", by contrast, can be defined as meaning:

> *the state of conformity with obligations, imposed by a State, its competent authorities and agencies on the regulated community, whether directly or through conditions and requirements in permits, licences and authorizations.* (UNEP 2014)

The Guidance contains five chapters. After the Introduction, Chapter 2 provides an overview of the Legal Framework. Chapter 3 looks at the concepts of environmental enforcement policy and proceedings for offences. Proceedings for offences are categorised by administrative, civil and criminal proceedings. Chapter 3 focuses on investigation and evidence collection and includes information on financial investigations and technological challenges. Chapter 4 deals with determining liability for waste offences. Chapter 5 looks at sentencing and reporting. Finally, in the Annexures additional information can found on International Instruments (Annexure 1), Definition under the Basel Convention (Annexure 2), European Waste Legislative Framework (Annexure 3), Waste legislation by country (Annexure 4), Case Studies (Annexure 5) and Sampling and Analysis (Annexure 6).

3. Types of waste crime

Waste crime may result from act or omission harming the environment or from the avoidance of protective measures and take many forms generally falling into one or more of the six categories, including: (Eunomia, ESEAT, 2017)

- Illegal waste sites (which may operate for a short or a long period);
- Illegal burning of waste;

- Fly-tipping (or illegal disposal of waste);
- Misclassification and fraud;
- Serious breaches of permit conditions, including the abandonment of waste; and
- Illegal shipment of waste (import, export and transit).

In addition, there can be cross-over with other crime types such as corruption and money laundering.

Illegal Waste Sites

Sites where waste is managed without an environmental permit or registered exemption in place are illegal. Without the necessary controls to manage waste in a safe manner, they have the potential to cause damage to the environment and human health. By tonnage, illegal waste sites are most commonly engaged in receiving construction and demolition waste, but a wide variety of wastes may be handled. Sites can range from large landfill-type operations through to the storage of tyres in warehouses or sheds. (Eunomia, 2017, p.7). Illegal waste sites are often located out of plain sight, making them hard to detect. This difficulty is exacerbated by a general lack of awareness of waste regulation within the population – few people could readily differentiate a legal site from an illegal one. Waste professionals are, therefore, more likely than the general public to report illegal sites. Nevertheless, there have also been important cases where illegal waste sites were reported by citizens or environmental associations.

Illegal Burning of Waste

The uncontrolled burning of waste, whether deliberate or accidental, is one of the most visible illegal waste activities. Such burning often occurs in oxygen-poor, low temperature conditions, and emissions are not monitored or controlled. Waste fires impose a significant risk to public health and the environment. The open burning of waste is often a breach of a site's permit and undertaking this deliberately might constitute a criminal offence under national law. (Eunomia, 2017, p.10).

Fly-tipping or illegal disposal of waste

Fly-tipping is a wide-ranging offence, which entails the illegal disposal of household, industrial, commercial or other 'controlled' waste without a waste management licence. In many instances it is an opportunistic, one-off occurrence, with perpetrators seeking to avoid waste treatment or disposal costs. But in aggregate, such activities cause significant economic, social and environmental harm.

Misclassification and Fraud

Proper record keeping is essential within the waste system, but there can be substantial financial rewards to falsifying paperwork and records. Some criminals have sought to

defraud producer responsibility schemes and claim payments for non-existent recycling. Others have sought to claim that material has attained end of waste status when in fact it has not. However, cases of misclassification of waste appear to be the most prevalent. A misclassification is a wrong declaration of the waste, for example when hazardous waste is declared as “non-hazardous waste”. It can occur at any point in the waste management chain. It typically occurs when organisations and/or individuals (either accidentally or deliberately) misclassify waste at the point of transfer. The financial implications of misclassification can be significant (Eunomia, 2017, p.11).

Illegal Shipments of Waste

Illegal shipments can be an attractive option for waste criminals, as waste recovery and disposal in less developed countries tends to be cheaper due to less stringent environmental regulations. Needless to say, when waste is not managed properly in the country that receives it, this can result in significant environmental damage and harm to human health (Eunomia, 2017, p.12). The illegal shipment of waste is defined at international level by the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, detailed below.

Serious Breach of Permit and Exemption Conditions

Criminal activity is not just limited to those operating outside the regulatory framework. It can also be perpetrated by individuals or organisations through a breach of an environmental permit or failure to comply with the terms of a registered exemption, sometimes with no regard for its rules. Examples include deliberately accepting too much waste, storing waste in an inappropriate manner or accepting the wrong type of waste. Such breaches can, in some circumstances, pose a significant risk to human health and the environment; for example, where the waste creates a fire hazard or there is a risk of it collapsing (Eunomia, 2017, p.12).

Cross-over-crimes

The phenomenon of crime convergence or cross-over crime is very relevant in environmental crimes. It refers to the intersection between environmental crimes with other serious crimes, such as corruption and money laundering.

Corruption covers various acts, such as bribery, embezzlement, money laundering (see the UN Convention Against Corruption) and involves a variety of individuals, including border guards, customs officials and port operators (V.N. Palmeira et al., 2018 p. 53). As far as money laundering is concerned, environmental crime is considered as a predicate offence in the Financial Action Task Force (FATF) Recommendations and it has been suggested to focus on money laundering aspects of environmental organised crimes as an instrument to enhance the fight against environmental crime, given its profit-driven nature (ENVICRIMENET, 2016, p.8-9).

4. Principles of Environmental Law

There are a number of core principles of environmental law that are also relevant to waste crime. These principles have relevance when considering enforcement and compliance actions for waste crime. These principles may also be relevant when considering the potential sentencing options for waste offenders.

Polluter pays principle

The best known of the means of internationalisation of external environmental costs is the polluter pays principle. External environmental costs or "environmental externalities" refer to the economic concept of uncompensated environmental effects of production and consumption. These effects affect consumer utility and enterprise cost outside the market mechanisms. As a consequence of negative externalities, the costs of production tend to be lower than its "social" cost (OECD, 2003). Expressed in Principle 16 of the Rio Declaration on Environment and Development, the principle holds that those who generate pollution should bear the costs of pollution. In a broader interpretation the polluter pays principles would require that those who create pollution and waste should bear the costs of containment, avoidance or abatement. It requires the polluter to take responsibility for the external costs arising from its pollution. This can be done by the polluter cleaning up the pollution and restoring the environment as far as practicable to the condition it was in before being polluted. The polluter ought also to make reparations for any irremediable harm caused by its conduct, such as death of biota and damage to ecosystem structure and functioning. For environmental crime the system must be designed and implemented that those who cause harm to the environment must pay the costs associated in cleaning up that harm. It is a question of changing the equation so that compliance becomes the best option for both individuals and corporations.

The precautionary principle

There is no universally accepted definition of the principle. Principle 15 of the Rio Declaration states: "*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*". It is noted that Principle 15 also states that 'the precautionary approach shall be widely applied by states according to their capabilities'. The Basel Convention embeds the precautionary approach by allowing States to refuse to accept waste and by requiring a State of export to demonstrate that the wastes will be managed in an environmentally sound manner before any export. The burden is shifted to the proponent of the activity to satisfy not only importing States but also any transit States that the proposed waste movement will not cause environmental harm.

The principle of permanent sovereignty over natural resources and the duty not to cause transboundary harm

In the waste management context, the application of this principle means that while States are free to generate waste, they need to ensure that the relevant management and disposal does not cause any harm to the environment of other States or to areas beyond national jurisdiction.

The principle of preventive action

This principle obliges States to prevent environmental damage and to reduce, limit or control activities that might cause or risk to cause such damage. The obligation is that of due diligence including the adoption and enforcement of appropriate rules and measures, and the monitoring of activities undertaken by private and public actors.

The principle of cooperation between States

This principle stems from various international law instruments and soft law. Principle 14 of the Rio Declaration on Environment and Development (the Rio Declaration) calls only for effective cooperation 'to discourage or prevent the relocation or transfer to other states of any activities and substances that cause severe environmental degradation or are found to be harmful to human health'. The requirements of cooperation are also clearly stated in the Basel Convention provisions relating to, for example: notification to the Secretariat of national definitions of hazardous wastes; notification to other parties of decisions to prohibit imports; information exchange on transboundary movements and the potential and actual effects thereof on human health and the environment; dissemination of information on transboundary movements for the purpose of improving environmentally sound management and preventing illegal traffic; and information exchange on technical and scientific know-how, on sources of advice and expertise, and on the availability and capabilities of sites for disposal to States concerned.

The principle of sustainable development

The general principle that States should ensure the development and use of their resources in a sustainable manner has been known in international law since the 1893 Bering Sea Fur Seals arbitration. However, the specific term 'sustainable development' finds it origins in the 1987 Bruntland Report. Many countries incorporate definitions of sustainable development into national laws and policies. In the Gabčikovo-Nagymaros case the International Court of Justice (ICJ) held that new norms and standards, including the concept of sustainable development, had to be taken into consideration and given proper weight both when contemplating new activities and when continuing activities begun in the past.

CHAPTER 1 LEGAL FRAMEWORKS

1.1 International Instruments

In this section relevant international conventions and treaties that apply to waste crime are discussed. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), described in below, is the main international treaty to cover the transboundary movements of hazardous and other wastes. Key elements in the Basel Convention include the criminalisation of the illegal traffic in hazardous wastes and other wastes, the requirement to apply Prior Informed Consent control procedure for the transboundary movements of wastes controlled by the Basel Convention, the right of Parties to restrict/prohibit the import and export of hazardous or other wastes for disposal Parties , the right of Parties to define additional types of waste than those already controlled by the Basel Convention as hazardous under its national legislation. Although the provisions of the Basel Convention in respect of the definitions and classification of waste can be highly technical, the procedures are clear in respect of Prior Informed Consent.

In addition, the Stockholm Convention on Persistent Organic Pollutants 2001 (Stockholm Convention), the Rotterdam Conventions on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1988 (Rotterdam Convention), the Minamata Convention on Mercury 2017 (Minamata Convention) and the Montreal Protocol on Substances that Deplete the Ozone Layer 1987 (Montreal Protocol) can be relevant to the prosecution of specific types of illegal waste. A number of guidance documents and compliance tool have been developed, such as:

- The 2012 *Instruction manual on the prosecution of illegal traffic of hazardous wastes or other wastes* developed by the Basel Convention Secretariat
- The 2015 *Enforcement Handbook on Controlling Illegal Shipments of Chemicals and Waste - For Asia Enforcement Officers* developed by the UNEP for the Regional Enforcement Network for Chemicals and Waste.
- Several *training manuals* to assist customs officers and investigation officer developed by the Basel Convention Secretariat.

Each of these international conventions are required to be transposed into national laws, and it is the national laws that govern the definition of waste, the offences that may be prosecuted and the types of proceedings – administrative, civil or criminal – that may be undertaken by the competent authorities. The Basel Convention website provides an easy access to relevant waste legislation worldwide.

Basel Convention

This section will outline the Basel Convention and the legal requirements needed for the transboundary movements of hazardous and other wastes in accordance with this convention.

A number of amendments to the Basel Convention adopted by the Parties have resulted in more effective control of transboundary movements of both hazardous and other wastes.

In December 2019, the Ban Amendment entered into force, following the recent ratification by Croatia. The "Ban Amendment" provides for the prohibition by each Party (included in the proposed new Annex VII, Parties and other States which are members of the OECD, EC, Liechtenstein, of all transboundary movements to States not included in Annex VII) of hazardous wastes covered by the Convention that are intended for final disposal, and of all transboundary movements to States not included in Annex VII of hazardous wastes covered by paragraph 1 (a) of Article 1 of the Convention that are destined for reuse, recycling or recovery operations. (Basel Convention, 2019).

In addition, in 2019, Parties adopted an amendment to clarify the scope of the types of plastic waste within the scope of the Basel Convention and subject to its control procedure.

The box below outlines the definition of waste in the Basel Convention. Each national jurisdiction is required to implement the convention under national law. It is important that prosecutors and investigation officers are aware of any specific national definitions.

Is it Waste? Definition of wastes under the Basel Convention

The Convention defines "wastes" as substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law (Article 2, paragraph 1). The provisions apply to what are known as "hazardous" and "other" wastes. What is understood by the Convention as being **hazardous waste**s, in accordance with the above definition, is stated in paragraph 1 of Article 1 of the Convention, which provides that they are:

(a) Wastes that belong to any category contained in Annex I of the Convention unless they do not possess any of the characteristics contained in Annex III; and

(b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the party of export, import or transit.

Annex VIII of the Basel Convention (List A) describes the wastes that are hazardous.

Paragraph 1 (b) of Article 1 of the Convention is another example of the latitude expressly given to a party to expand the scope of application of the Convention to wastes defined as "hazardous" under its national legislation. Just as in the case of import restrictions, such domestic specificities need to be communicated to all parties, through the Secretariat, in accordance with Article 3 of the Convention, and should also be communicated to all relevant authorities at the national level, in particular competent authorities and enforcement entities, as they clearly affect the scope of application of the Convention's obligations.

The list of national definitions of hazardous wastes notified through the Secretariat is available online.

The second category of waste covered by the Convention, **"other wastes",** is defined in Annex II to the Convention and includes household wastes and residues arising from the incineration of household wastes.

Annex IX (List B) lists the wastes that will not be wastes covered by Article 1 (a) of the Basel Convention, unless they contain Annex I material to an extend causing them to exhibit an Annex III characteristic.

Wastes not covered by the Convention

Article 1 also provides that the following wastes are not covered by the Convention:

(a) Wastes which, as a result of being radioactive, are subject to other control systems, including international instruments, applying specifically to radioactive materials;

(b) Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument.

Basel Convention Annexes:

- Annex I lists the categories of waste to be controlled.
- Annex II are the categories of waste requiring special consideration.
- Annex III contains the list of hazardous characteristics, such as explosive, corrosive, poisonous or flammable.
- Annex IV is about the disposal operations.
- Annex V lists the information to be provided on notification (part A) and on the movement document (part B). Annex VI is arbitration and Annex VII is not yet entered into force.
- In Annex VII the parties will be listed that agreed to prohibit all transboundary movements of hazardous wastes which are destined for final disposal operations from OECD to non-OECD States (under the Ban Amendment).
- Annex VIII (List A) lists the wastes that are characterised as hazardous under Article 1, paragraph 1 (a).
- Annex IX (List B) lists the wastes that will not be wastes covered by Article 1 (a) of the Basel Convention, unless they contain Annex I material to an extend causing them to exhibit an Annex III characteristic.

Sources:

Secretariat of the Basel Convention and UNEP (2012). The Basel Convention: Instruction Manual on the Prosecution of Illegal Traffic of Hazardous Wastes or Other Wastes

UN Environment, The Basel Convention, 2018. http://www.basel.int/Portals/4/download.aspx?d=UNEP-CHW-IMPL-CONVTEXT.English.pdf

The Conference of the Parties to the Basel Convention has developed several Technical guidelines, especially Technical guidelines on e-waste, as well as a Glossary of terms and to clarify the terminology used in the Convention.

1.2 Prior Informed Consent Under the Basel Convention

Without the prior informed consent of the country of import and transit, if applicable, the waste export should not be permitted under the Basel Convention. As described below all waste covered under the Basel Convention should be accompanied by a movement document that indicates that consent has been granted for the transboundary movement of such waste and that the waste is as described in the documentation accompanying the container. Failure to comply with this requirement means that that waste would fall under the definition of 'illegal traffic' (see below).

The Basel Convention contains a detailed Prior Informed Consent (PIC) procedure with strict requirements for transboundary movement of hazardous wastes and other wastes. The procedures form the heart of the Basel Convention control system and are based on four key stages

(1) notification;
(2) consent and issuance of movement document;
(3) transboundary movement; and
(4) confirmation of disposal.

The important issue to remember is that the PIC procedures is to occur before the waste is transported. The competent authority of the country of import must give written consent of the shipment of waste prior to the export. How these provisions are applied will be determined by the national legislation of the country of import.

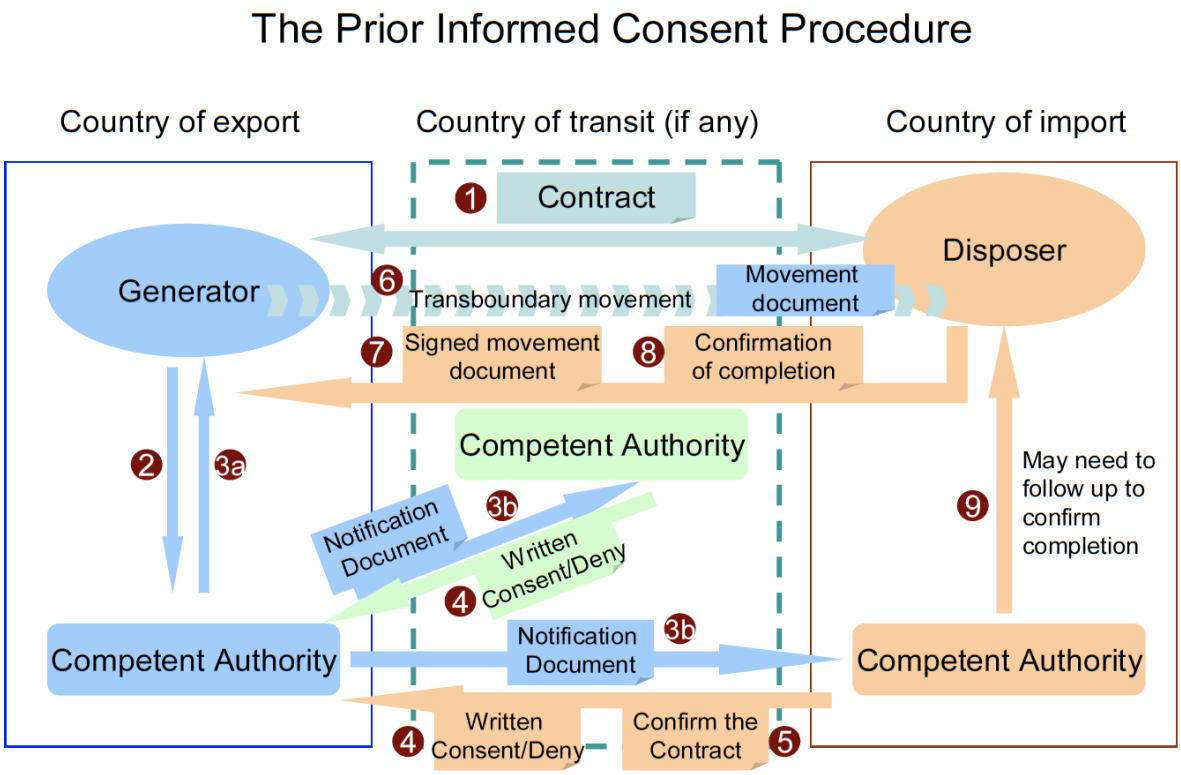

Figure 1 Prior informed consent procedure (UNEP, 2015). Note: the numbers and direction of arrows indicate the sequences of the appropriate steps to be followed.

1.3 Definition of Illegal Traffic

Convention definition of "Illegal Traffic":

For the purpose of the Convention, any transboundary movement of hazardous wastes or other wastes:

(a) without notification pursuant to the provisions of this Convention to all States concerned; or

(b) without the consent pursuant to the provisions of this Convention of a State concerned; or

(c) with consent obtained from States concerned through falsification, misrepresentation or fraud; or

(d) that does not conform in a material way with the documents; or

(e) that results in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law, shall be deemed to be illegal traffic.

> Subparagraphs (a)–(d) cover the conditions that constitute violations of the notification procedure, while subparagraph (e) covers the conditions that constitute a violation of the expected standards of waste disposal and the requirement of environmentally sound management.
>
> BASEL (2012)

The Conference of the Parties has developed Guidance with a view to achieving the objectives of preventing and combating illegal traffic.

1.4 Take Back Procedure

In case of illegal traffic, the provisions of the Basel Convention require the State of export to ensure that the wastes in question are taken back by the exporter or the generator or, if necessary, by itself into State of export within 30 days from the time of receiving information about the illegal traffic or such other period of time as States concerned may agree when the illegal traffic operation is the result of conduct on the part of the exporter or generator. However, the past experience shows that complications could occur, such as ownership of the waste.

Where there is a dispute between parties as to the legal ownership of the waste, the time taken to resolve the dispute could be lengthy, thus delaying the speedy return of the waste as required by the Basel Convention.

The national law of some countries requires a successful conviction before steps can be taken to reimport an illegal shipment. In such cases, if the company involved in the illegal shipment does not voluntarily agree to reimport the waste, the time taken to resolve the illegal traffic incident is likely to be lengthy. Because of these difficulties once an illegal shipment of hazardous has been intercepted, the country of import has been obliged to adopt measures for arranging the return of the waste to the country of export. To facilitate early return of the waste in accordance with the requirements of the Basel Convention, effective cooperation and liaison between the competent authority of the importing state and other relevant states should be a priority.

1.5 National legal frameworks

When it comes to prosecutions in national courts, it will be national legal frameworks that guide the approach to be taken by prosecutors and other agencies. In Europe there is a comprehensive legislative framework that include European Union Directives and Regulations as well as national laws and frameworks (see Annexure 3). In Asia national legal frameworks provide the basis for investigation and identification of offences (see Annexure 4). There is no ASEAN governing framework similar to the European Union, therefore investigators and prosecutors will need to rely on national definitions of “waste” and national frameworks to prohibit or restrict the transportation, storage, management, and final disposal of waste and waste products.

CHAPTER 2 ENFORCEMENT POLICY AND PROCEEDINGS

2.1 Environmental Enforcement Policy

The legislative framework of environment waste crime may be enforced in various ways, such as through administrative, civil or criminal proceedings. Various options may be available, depending on the nature and severity of the breach. Moreover, different jurisdictions will operate according to their own law, jurisprudence, practices and processes (UNEP "Instruction manual", 2012, p.26)[1]. Regardless of the specific entity responsible for preparing the case (e.g. police, specialised agency, prosecutor), similar activities to collect, collate and present evidence of sufficient quality and substance to prosecute a case will be required.

It would be useful for enforcement agencies to develop a comprehensive policy that will assist the prosecution and other investigation agencies in determining who should be prosecuted and for what offence. Consultation between all relevant agencies is important to maximise the compliance strategies for waste crimes.

An environmental enforcement and compliance policy should summarise the general approach of the agency to compliance and enforcement in relation to waste crime. It should list the details of the relevant national legislation and detail the roles and responsibilities of the prosecution agency and other investigation agencies. It would serve as an effective tool to guide the decision-making of the prosecution agency to ensure that its compliance activities and actions are consistent, fair and credible.

Also, in most jurisdictions, the environmental agencies and the prosecution authorities are responsible for regulating a diverse range of activities and monitoring compliance with legislation and statutory instruments covering air emissions, noise, waste, water quality, forestry, contaminated sites, dangerous goods, hazardous materials and pesticides. Because of these wide range of duties, it is important that these competent authorities exercise statutory authority and discretion, fairly and credibly. The following principles can be used as a guide to decision making on enforcement action:

- enforcement action will be proportionate to the seriousness of the contravention;
- decisions about enforcement action will be impartial, based on available evidence, and on the strategic objectives of the enforcing authority.

A good compliance policy can ensure that the prosecutor and the competent authority meet the community's and the courts' expectations that the prosecutor will conduct itself in a manner

[1] Identification of hazardous waste in one country may not necessarily provide a basis for enforcement in another. Even where there is general agreement, Parties' right to define non-Basel waste as hazardous wastes under national legislation, may make prosecution difficult. This highlights the importance of the Basel Convention's notification and consent procedures.

which exemplifies the principles of justice, and that the prosecutor's power will be used in the public interest.

Strong and appropriate regulatory action should be:

- Responsive and effective
- Targeted and with a clear objective
- Proportional
- Firm but fair
- Informed
- Consistent
- Transparent
- Ethical and accountable
- Collaborative.

In a number of jurisdictions, the compliance policy for environmental crimes adopts clear objectives to:

- guide the authority in the exercise of its enforcement and prosecution responsibilities;
- inform stakeholders how the department approaches its statutory enforcement responsibilities, including exercising the discretion to prosecute;
- explain how the appropriate accused person and the enforcement action to be taken, are determined in matters involving alleged breaches of legislation;
- outline the possible enforcement actions that are open to the department to pursue
- encourage a culture of positive action, accountability, consultation and cooperation with the department;
- foster consistent, integrated and coordinated enforcement action.

2.2 Proceedings for offences

Proceedings for offences will be governed by national laws dealing with waste crime and national civil and criminal procedure laws. This Guidance is designed to provide some general assistance in the approach for proceedings to the prosecution of waste crime, and in particular of illegal shipment of waste.

There are broadly three categories of possible proceedings: criminal, civil, and administrative. Though the definitions can vary per country, usually criminal law deals with crimes and their prosecution; offences range from minor infringements such as failure to stop at a red light to drug trafficking and murder. Civil law is the law governing the relations between private persons or organizations. Administrative law is the law regarding the rules or regulations made and enforced by governmental agencies, it regulates relations between governments and citizens (government, 2019). With waste law, all three types of law can be applicable depending on national legislation.

Administrative Measures				
Withdrawal of licence	Warning Letters	Monetary Penalties	Clean-up Orders	Return-back Provisions
Civil Proceedings				
Monetary Penalties		Enforcement Undertakings		
Criminal Proceedings				
Fines		Imprisonment		Restitution Orders

Table 1 Overview of Administrative, civil and criminal measures

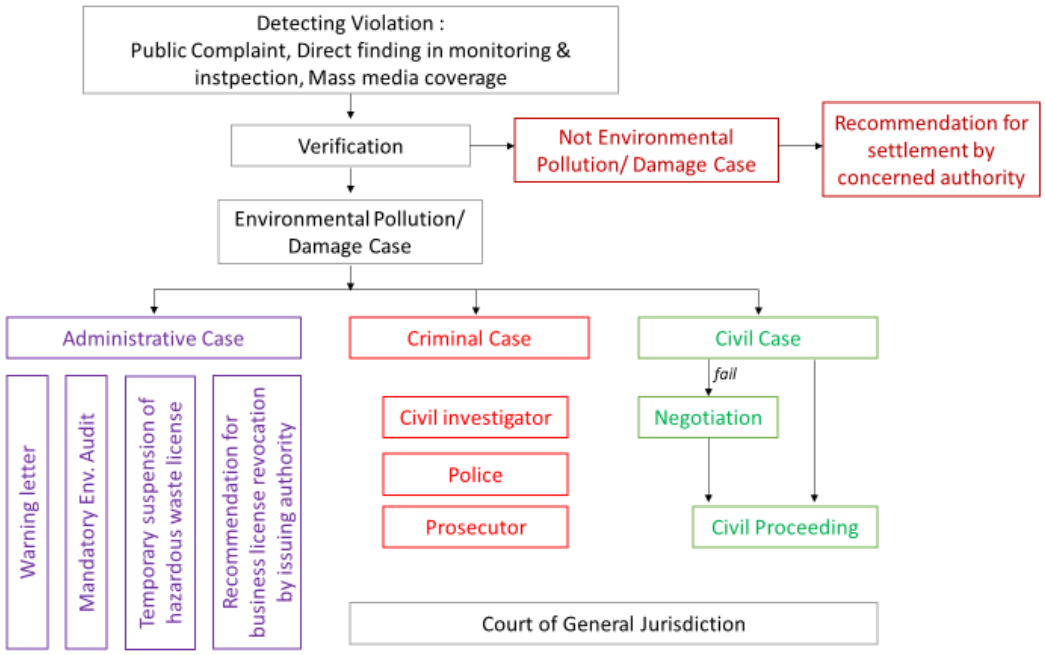

Figure 2: Outline of possible enforcement approaches (UNEP-UNU elaboration).

Criminal proceedings

Under national law, it can be decided if cases should be addressed by civil of administrative means or whether a case should be the subject of a criminal prosecution. To take this decision, authorities may weigh the extent of the damage against that of the culpable conduct and the reasonable chances of success of a prosecution. In international cases, it may also be considered which jurisdiction has the best chances of leading to a conviction. (Basel Convention and UNEP, 2012).

One criterion that may be used in the choice of proceedings is to determine the severity of the offence. In the case of waste offences, documentation-related offences may often appear as minor or moderate impact. However, consideration must also be given to whether the documentation offence was wilful or deliberate and if the offence had not been identified, would the illegal waste have been disposed of in an approval waste management facility or would it have been dumped illegally causing further environmental harm (See Table 1 above). A second criterion can be the general conduct of the offender and another criterion may be to determine the culpability of the offender.

Severity	Serious impact or risk of impact	Major impact or risk of impact	Moderate impact or risk of impact	Minor impact or risk of impact	Low impact or risk of impact
	• permanent, or potential for permanent, long-term impact • impact is on or potentially on a wide-scale, or of great intensity • widespread or high level of public concern or impact to public safety about the incident • where offence is of an administrative nature, it severely undermines the legislative scheme or the offender provides false or misleading information.	• medium to long-term impact, or potential impact • impact is on or potentially on a medium to wide-scale, or of medium to great intensity • high level of public concern or impact to public safety • where the offence is of an administrative nature, it undermines the legislative scheme or the offender conceals information or avoids liability for fees or taking necessary actions to prevent offence.	• temporary to medium-term impact, or potential impact • impact is on or potentially on a localised to medium scale, or is of a low to medium intensity • moderate level of public concern or impact to public safety • where the offence is of an administrative nature, it has a moderate impact on the legislative scheme, or the offender carelessly fails to comply with administrative requirement.	• transient impact, or potential impact • impact is on or potentially on a localised scale, or is of a low intensity • low level of public concern or impact to public safety • where the offence is of an administrative nature, it has no impact on the legislative scheme or is of an inadvertent nature.	• no impact, or potential impact • no public concern or impact to public safety • where the offence is of an administrative nature, it could not have been prevented.

Table 2: Criteria to be considered in determining severity of the offence.

Administrative proceedings

Commonly and widely employed by competent authorities, administrative sanctions can be applied to cases in which operators, companies or persons involved in transboundary movements are deficient in their application of the specific movement and notification process. A range of responses may be used, including notices to require actions to be taken (or ceased) and penalties, without recourse to the courts and in proportion to the scale of the

misdemeanour (the quantity of waste, hazardousness and lack of a proper description, among other things). The penalties need to be proportionate to the scale of the misdemeanor, including to the quantity of waste, hazardousness, lack of a proper description, among other things (Basel Convention and UNEP, 2012).

The availability of an administrative sanctions system is therefore important; administrative sanctions can be used in cases that would otherwise be dismissed without any formal remedy at all. The procedures for imposing administrative fines and the competent authorities diverge from country to country. The same applies to the relationship with the criminal law. Yet in most legal systems the threshold of proof and thus the costs of imposing the administrative fine are lower than those in criminal procedures. Therefore, administrative fines can be recommended for minor offences, but they serve as a valid tool in general.

It is important to avoid the situation that a serious environmental crime should be dealt with via a low administrative fine. There are various approaches for avoiding such issues. One model is to specify in the legislation, for which type of offences administrative fines can be imposed. Another possibility is for the Compliance Policy of the competent agency to give a key role to the prosecutor to make the determination as to the choice of proceedings. It would then be the prosecutor to decide whether the particular case will be prosecuted before the criminal court or sent to an administrative agency with the view on the imposition of an administrative fine.

Civil proceedings

Civil measures may be applied for breaches for which criminal trials are not deemed appropriate. The flexibility of civil measures may help to improve compliance with regulations without involving legal requirements. The penalties can be dispensed more rapidly and may be more proportionate and cost effective. If civil measures should be applied depends on the objective and if it can act as suitable deterrent (Basel Convention and UNEP, 2012). There may also be the possibility of applying compensation measures, as envisaged in Article 12 of the Convention (the Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal is not yet in force), through domestic legislation.

2.5 Choice of Proceedings

The choice of proceedings can be influenced by a range of factors, including the severity of the offence and the evidence that is available to prove the commission of the offence. In some jurisdictions, the decision to commence criminal proceedings is generally made by the Deputy Director-General of the Environmental Agency; in other jurisdictions it may be made by the Prosecutors Office. In other jurisdictions, finally, criminal prosecution is mandatory with or without some levels of discretion.

The two questions for commencing criminal proceedings are:

- whether the available evidence provides reasonable prospects of successfully obtaining a conviction; and
- if so, whether it is in the public interest to exercise the discretion to commence a prosecution.

The determination of prospects of success of a proposed prosecution will consider whether:

- the available evidence is capable of proving each element of the offence beyond reasonable doubt;
- the admissibility of evidence;
- the credibility of available witnesses;
- the availability or strength of any expert evidence required to prove the offence; and
- any defences that are plainly open to the alleged offender.

The public interest can include many specified reasons but in the case of waste crimes one of the key reasons is the seriousness of the offence including the impacts or potential impacts caused by the alleged offence. Waste crimes, by their very nature, can have long term negative impacts on the environment and human health.

CHAPTER 3 INVESTIGATION AND EVIDENCE COLLECTION

3.1 Investigation

The first step in any investigation will be to determine if a breach of the law has been committed. In the context of waste shipments this will often occur at the point of exportation or importation. In most jurisdictions waste shipments will require approval and permits for the particular class and category of waste to be management, recycled or disposed of.

Documentation offences are likely to be the most easily identified types of offences. In these offences, criminals are avoiding measures that are intended to protect the environment. These are offences where there are errors, either negligent or deliberately false or fraudulent, in the description of the parties involved in the waste transaction, the description or quantity of the waste, or the legal authority of the waste management facility. All of these matters are required to be disclosed in the Prior Informed Consent provisions under the Basel Convention and if any are false or misleading this will create an offence under national laws.

The transportation and management of waste[2] requires lawful permits and approvals. These are also potential documentation offences but may also create a substantive offence when the transporter or manager of the wastes does not have the legal authority to transport or managed waste. The parties involved may also be part of an organised crime group. This provides an opportunity for enhanced investigation tools and also means that the offence may be treated as being more severe.

The final types of offences are those that cause environmental harm. These may arise from a legitimate and lawful activity but because of accidents, negligence or deliberate acts, may lead to a spill or disposal of waste that may cause environmental damage. These events are always covered under national law if the events happen in the national territory or jurisdiction of the recipient country. If the environmental harm occurs offshore it may be covered under relevant international law.

In respect of illegal waste shipment offences, it is likely that the first indication of an offences will be when customs officials or other border control agencies check the relevant documentation attached to the shipment of waste. Close cooperation between customs and other investigating and prosecution officials is vital to determine both the likelihood and the severity of the potential offence.

When it becomes clear that the documentation contains, or is likely to contain errors, and further investigations is required, customs officials should notify the relevant Ministries and prosecuting authorities to determine the next steps in the investigation.

[2] This may include the storage, treatment or disposal of waste.

Importantly custom officials are able to immediately access a range of data concerning the shipment and also be able to inspect the contents of the container to then determine what next steps should be taken.

Illegal waste shipments can often be detected by reviewing information contained in shipping manifests. Information received from partner agencies is also useful in building profiles for targeting illegal waste traders. For example, companies previously involved in illegal or problematic shipments are targeted for inspection as are shipments with profiles describe above. Often such shipments are identified in cooperation with overseas control authorities and provide an effective additional check to random inspections.

The interaction between the competent authorities of the country of export, country of import and countries of transit is necessary and could help in detecting, preventing and controlling the illegal traffic of hazardous wastes. Formal and informal communication could be used, including e-mail messages which facilitate quick interaction. The World Customs Organization initiated in July 2000 a network called Customs Enforcement Network (CEN). The aim of this network is to link all customs administrations for enforcement purposes and provide them with a common database and reference system. Any national customs administration should be connected to CEN through its National Contact Point. By using the CEN network, national customs administration can have immediate and direct access to the database of all previous cases of illegal traffic of hazardous wastes.

Another source of intelligence and useful information about past cases of illegal traffic of hazardous wastes and modus operandi could be obtained from Interpol through National Central Bureaus.

Often investigations will need to be carried out in co-operation with competent authorities, enforcement bodies, police and customs on the national and international level. This can give rise to practical issues both domestically and on the international level. When a shipment is destined for a distant country, the competent authority or other investigation body may require evidence from the authorities in the destination countries. In addition, it may be necessary to obtain evidence from these bodies, such as witness statements, photographs and or video footage, sampling (to prove the hazardous nature of the waste) and testing (to show that a particular item such as a fridge or television cannot work), which can add to the time, cost and complexity of preparing a case.

In some cases, it may be more convenient to inspect a suspected illegal shipment upon arrival at the importer's facility, rather than at a port or border crossing. In this case the inspectors may wish to also inspect equipment and processes at the facility, to assess whether they are consistent with the recycling and/or disposal operation(s) indicated in their licences/permits. Non-tariff requirements could be established so that at the border the environmental inspectors could verify the documents related to hazardous wastes (Conference of the Parties “Guidance Elements for Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes, p.17).

Illegal shipments to waste sites can be detected:

- during transport checks (port or road inspections)
- during checks of waste producer's documentation;
- during the supervision of waste treatment sites;
- during inspections of storage facilities/dock storage;
- in the context of accidents or problems on sites;
- on the basis of reports made to authorities or the police (IMPEL, 2008).

The investigative strategy (Dotcom Waste Toolkit, 2017), on waste related crimes entails:

- Identification of waste (categorization);
- Determine waste volume;
- Determine traceability (the responsible party, sources and destinations);
- Determine illegal profits or cost savings;
- Determine environmental damage if there has been a release.

3.2 Evidence Collection

It must always be remembered that proper procedure for evidence collection, document collection and witness interviewing are vital if a successful prosecution is to take place under the relevant jurisdiction. Evidence collection must be gathered in compliance with national laws and prosecutors have a vital role in assisting customs officials and other investigating authorities in providing guidance on the proper handling and collection of all evidence in relation to the offence.

Evidence collection and investigation for a criminal offence, can be a time consuming and expensive undertaking. It is important that prosecutors, customs officials and relevant authorities work together to make an early determination of the type and severity of the offence. Evidence can range from proving environmental harm to proving that a shipment is misclassified (as in other cases of avoidance of environment protection measures, where the harm to the environment is possible but not yet actual). Prosecutors should be familiar with the compliance policy for environmental crime so that if an offence is minor with limited environmental harm or there is an appropriate administrative remedy, then non-criminal proceeding may be appropriate. If the offence is part of an organised criminal activity, of widespread course of conduct, or was done deliberately or has the potential to cause significant environmental harm, then criminal proceedings are appropriate.

Collection of documents

Once there is the potential for a breach, the inspection procedure will begin with collection of all documents related to the transport or generation of wastes, related to plans of export/import, related to recycling activities, disposal facilities and any other documents which might be useful

(record information about exporter, carrier, importer, etc.). Many of these documents are available from the customs authorities and can be legally collected and inspected by the competent authorities.

The following steps are described in the INTERPOL, Pollution Crime Forensic Investigation Manual, 2014 (Volume 1 and Volume 2) to collect documents in case of suspicion of an offence or in case of a stated offence:

- Initiate administrative controls or orders allowed by local legislation to properly store, dispose or export the wastes.
- Establish a file review as soon as possible (within 24 hours) to determine if the case only involves local companies that sent or received the wastes. Or, establish whether the case involves foreign companies and additional checks have to be made abroad with the assistance of foreign governments and/or international organisations such as INTERPOL.
- Assess the applicable local legislation for any legal options (such as prosecution) or penalties or administrative measures such as directions or civil penalties.

Visual Inspection and Sampling

After the documents are gathered and checked, a visual inspection of the waste or the waste container is necessary. People undertaking inspections should always take appropriate precautions, and inspections should only be done authorised inspectors. For example, closed shoes with steel caps should normally be worn in cargo-handling areas. Care should be taken when opening containers in case cargoes have shifted in transit. Respiratory protection and gloves should be worn if there is a risk of exposure to hazardous dusts.

While in some cases visual inspections are sufficient, sampling could be necessary for determining the characteristics of the wastes. Sampling should always be done in accordance with any relevant guidance provided by the competent authorities and in accordance with any requirements from the prosecuting authority. An example on sampling is included in the Annexures from the *Guidance Elements for Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes* (COP Basel 6th Meeting). As with visual inspections, appropriate safety precautions must always be taken and samples should only be taken by authorised authorities.

The following steps are described in the INTERPOL, Pollution Crime Forensic Investigation Manual, 2014 (Volume 1 and Volume 2) to collect evidence on site, specifically related to hazardous waste disposal:

- Collect appropriate evidence to assess a violation and/or containment, storage and clean-up criteria. Obtain a record relevant to the waste and identify the type of waste.
- Identify the types of sample equipment and sample containers required.
- Instruct the person sampling (hazardous materials responder) on how and where to sample.

- Collect samples.
- Submit (waste, soil, water etc.) samples for specific analysis if the composition of the waste is known.
- GPS mark and photograph the scene and any evidence on containers, which could help identify the source of the waste, or current or past owners (For more information see the DOTCOM Waste webinar Using Remote Sensing Technologies When Fighting Illegal Waste Crime).
- Collect evidence of documents and papers that may have been left at the scene that may identify the contents of the waste or the ownership of the waste.
- Obtain copies of plant operating records.

The responsibility of the payment of the costs of investigating and prosecuting environmental crimes, including costs of scientific testing and analysis, depends on each national jurisdictions. While in some countries these costs are borne by the offending parties, in others, they are covered by the national authorities.

In all cases of inspection, if there are signs of potential offences, the investigators should remember that the purpose of inspection is to collect evidence to determine if a violation of the law was made. In many jurisdictions the courts will only admit into the prosecution case that evidence which was collected in accordance with the rules of evidence. Evidence from investigators will need to be as complete as possible. The use of phones to take evidence and record conversations can be very helpful to prosecutors but only if the recordings and photos are taken in accordance with the law.

3.3 Protection of Evidence

Evidence, including the waste material itself and the sampling records, must be protected during the course of the criminal trial. Once the competent authorities and the prosecutor have decided that the case has met the threshold test for civil or criminal action, the evidence will need to be secured.

If the waste (in particular recyclable material that has economic value) is still legally owned by the exporting or importing company, but if this company refuses to comply with requests to return the waste, government authorities may face legal difficulties in seizing the waste. Difficulties encountered by governments in seizing or moving waste be addressed through provisions in national law. It may be necessary to seek orders from the court to clarify who is responsible for the waste during the trail process.

It is important that the material is safely stored during an illegal traffic investigation. In particular, consideration should be given to protecting human health and the environment, safeguarding the chain of evidence and avoiding any claim by companies relating to damage to their waste material.

It is also important that when sampling has been conducted that this material may need to be stored separately from the rest of the waste. Sampling of different parts of a container may produce different results, due to mixing and uneven distribution of the waste content.

If the sample is to be used to base a factual finding about the composition of the waste, or the contamination of the waste, then that sample should be protected and secured.

3.4 Financial Investigations

The application of financial investigative techniques in environmental and waste crime cases can reveal to be essential for the build-up of successful investigative strategies.[3] Financial investigations may have two objectives: to prove a crime and/or to assess and identify the proceeds of the crime.

International organisation such as Europol can support cross-border cases of environmental crime in general, and in particular the financial intelligence, analysis and investigative steps, among others through the cross matching in datasets, analysis of suspicious transactions, organisation of cross-border operations, utilisation of innovative technological solutions like Universal Forensic Extraction Device and Europol Mobile Office etc.

A number of relevant steps in financial investigations are reported below.

- Analysis of a specific payment
- Analysis of the income and expenditures (indirect method for proving illegal income)
- Analysis of fraudulent financial transactions
- In-focus: asset recovery
- Analysis of significant differences between declared waste management costs and standard waste management costs
- Assessing the risks

3.5 Technological Challenges

It is important that investigators develop appropriate strategies to identify the existence of digital evidence and to secure and interpret that evidence. Irrespective of the size or complexity the investigator should consider five primary stages.

[3] Dedicated webinars have been organized on this topic by CEPOL, https://www.cepol.europa.eu/education-training/what-we-teach/webinars/webinar-302019-financial-investigations-environmental and DOTCOM Waste, https://dotcomproject.eu/pro-active-financial-investigation/

- Data Capture and search and seizure at crime scenes;
- Data Examination;
- Data Interpretation;
- Data Reporting;
- Interview of Witness and Suspects.

The gathering of digital data should be considered in the broader framework of a set of digital forensics best practices and chain of custody matters, in order to facilitate the cooperation between investigators and prosecutors in ensuring an actual development of the enforcement chain. In this regard, technology can also play an important role in ensuring the actual chain of custody – from gathering and actual use of evidences (as currently explored in European projects dealing with other illicit trafficking).[4]

Assessment of Environmental Damage

In cases of illegal waste shipment and management harming the environment, the assessment of environmental damage or harm can be an important step of the investigation and prosecution. Measuring and evaluating the impact on the environment and human health and the economic impact of non-compliance might help determining the level of fines and financial measures appropriate to recover the damage caused. Dealing with the impact of the environmental harm may require some expert assessment if there is actual harm or potential harm to the environment.

The WasteForce project developed a *Methodology to measure environmental and economic damage of illegal waste transports*. The methodology describes an environmental footprint for illegal waste shipments and assists in calculating the costs of those illegal waste shipments by using the following parameters:

- Identifying if the waste is potentially hazard or not
- Hazard characterization
- An assessment of the exposure
- Risk characterization
- Risk assessment
- Life cycle impact assessment

A list of impact categories and damage pathways are identified in the methodology. These parameters, combined with environmental prices and weighing factors, lead to a monetization of the impact of the environmental damage done. In turn, these economic values can be used to calculate fines and the amount for economic damage caused by the illegal shipments.

[4] See for instance the project ANITA, www.anita-project.eu

CHAPTER 4 LIABILITY

4.1 Determining Liability for Waste Offences

One of the earliest decisions that needs to be taken is who should be prosecuted under the national legal framework. It is necessary to identify the responsible parties involved in the illegal transport and disposal of the waste.

For most waste crimes, both natural persons and legal persons involved in the illegal transport of waste across international borders can be the subject of prosecution. Anybody involved in illegal transboundary movements can, potentially, be prosecuted, including;

- the generator;
- the exporter;
- the importer;
- the transportation company;
- the individuals completing the paperwork (freight forwarder, broker, shipping facilitator or coordinator); and
- the disposer.

Under the Basel Convention is not specified who shall bear the cost of the repatriation (take back), while Article 25 the European Waste Shipment Regulation states that “It should also be made compulsory for the person whose action is the cause of an illegal shipment to take back the waste involved or make alternative arrangements for its recovery or disposal. Failing that, the competent authorities of dispatch or destination, as appropriate, should intervene themselves”.[5]
By making waste offences criminal offenses, national governments are seeking to deter both the offender and others from similar behaviour. A number of issues will depend on the specific national legislation in place in the prosecuting country, such as:

- Offences and penalties applicable to the various actors involved in an illegal shipment;
- Powers of the prosecutor and the jurisdiction of the court in case of actors physically or legally established in a foreign country;
- Whether aiding or abetting, attempting or conspiring to commit a crime leads to criminal liability as set out in national or regional legislation (e.g. see Environmental Crime Directive of the European Union);
- Whether criminal intent (mens rea) is a material element or not (strict liability) and to what extent (knowledge or wilfulness), as set out in the national or regional legislation. (Basel Convention and UNEP, 2012).
- Weather a legal person can be held liable or not.

[5] On the scope and interpretation of art. 25 of the Waste Shipment Regulation see “Frequently Asked Questions (FAQs) on Regulation (EC) 1013/2006 on shipments of waste”,p. 41-42, available at: https://ec.europa.eu/environment/waste/shipments/pdf/faq.pdf

4.1.1 Liability of corporations, directors and individuals

In some countries, corporations as well as individuals can be liable for offences against waste laws. The prosecutor, usually in consultation with the investigation authority or line agencies will need to have been taken on whether criminal or civil proceedings should be brought against a legal entity (a business or corporate organization), an individual or both. Most environmental legislation makes provision for legal entities or corporate liability.

Where it is sought to prosecute a corporation for an offence involving proof of a mental element, most environmental legislation provides that the state of mind of a corporation can be established by proof that an officer, employee or agent, acting in the scope of their employment, had that state of mind. This imputation can generally be refuted by showing that the corporation exercised due diligence.

It is also important to be aware of what the potential liability may be for directors of legal entities for environmental offences. In many cases criminal prosecution of responsible corporate officials provides a greater deterrent than administrative or civil enforcement alone (INTERPOL "Advocacy Memorandum", 2007, p.5).

National statutes may also limit or proscribe what entity may be prosecuted for. Offences in some jurisdictions may apply directly to companies – e.g. offences relating to breaches of licence conditions where the licence is held by a company. In other situations, it may be the acts or omissions of individual employees that could incur criminal liability. This raises the central question of corporate criminal liability and in what circumstances a company may be held to account for the acts of its employees, or vice versa.

In general, the actions of employees will create corporate criminal liability if it is clear that the relevant statutory purposes would be defeated if a company could not be prosecuted for the acts of its employees. (Bell 2008, p.283). In such a situation, it may warrant pursuing both the individual and the corporate body. Conversely a director or manager may not be responsible where it can be shown that his or her actions were not responsible for the corporate offending. For example, a financial director based 20 kilometres away in the company's head office responsible for non-operational decisions is unlikely to be considered part of the controlling mind of the company compared to a site manager or operations director, unless it can be shown that s/he was part of the decision making process particularly when considering the financial benefit of the offending to the corporate defendant.

When considering whether to charge both the corporate body and individual, the prosecutor may take into account the individual's position within the company at the time of the offence (such as the financial director example above).

Matters to consider in determining who to prosecute, these are dependent on national legislation:

- Position within the company and role in the offence, i.e. whether leader or organiser or a mere participant in the crime;
- Knowledge of the illegality of the offending and likely damage, harm or consequence caused by the offence (not applicable in all jurisdictions);
- Their conduct prior to the violation such as a prior history of offending, administrative and or civil enforcement actions for the same or similar violations;
- Their conduct after the violation such as purposefully concealed the violation, whether the breach was and ongoing activity or an isolated act); and
- Their conduct after the violation such as cooperation or lack of with the authorities, attending an interview with full and frank admissions.

Further, when deciding what to charge, the specific circumstances and facts of the case, including the nature of harm caused, should be examined, along with the consideration of other related charges, such as fraud, theft, assault, criminal damage, falsification of records or conspiracy or, even in very rare circumstances, corporate manslaughter may all have a bearing on the case as they may better encapsulate the circumstances of the offending rather than an illegal shipment alone.

It will be a matter of national laws that will determine how far the liability will extend to these participants. At some point in the enforcement process, the investigators and the prosecutors will also have to consider whether the enterprise is part of a criminal conspiracy or is part of an organised criminal enterprise. By extending criminal liability to many people, the law generates increased awareness and responsibility for legal obligations within corporate structures and throughout the community. Situations can arise where a number of people may be responsible for the commission of an offence and may therefore be liable for enforcement action.

In many jurisdictions, aiding or abetting, attempting or conspiring to commit a crime may also open the door to criminal liability. Whether criminal intent (*mens rea*) is a material element or not (*strict liability*) and to what extent (knowledge or wilfulness) is also a matter to be clarified in the national legal framework.

In determining who was responsible for an offence, the prosecuting authority will take the following considerations into account:

- Who was primarily responsible for the offence, that is:
    i. who committed the act?
    ii. who formed the intention (if relevant)?
    iii. who created the material circumstances leading to the alleged offence?
    iv. who benefited from the offence?
- What was the role of each alleged offender (where there is more than one alleged offender)?

Once it is determined which individuals are responsible for the offence, it is likely that there will also be a connection to a legal entity (such as a business or incorporated entity). This entity may be registered in the country where the offence has occurred or it may be a foreign legal entity incorporated in the country of export, or even a country not connected to the physical location of the waste. Whether charges are brought against a legal entity will usually depend on the national legislation and the relevant provisions in the waste law or criminal law.

In many cases it will be an individual who has committed a breach of the waste law, but that individual may also be a director of a legal entity connected to the offences. Some criminal laws make specific provisions on the limitation of liability for directors and other office holders. It may also be that proceedings for offences may be taken against those individuals most responsible for the offences.

But one matter for consideration is who may be made to pay the relevant penalties if convicted or which entity is most likely to be able to provide appropriate restitution in the relevant case.

Individuals may be able to pay fines or be sentenced to imprisonment, whilst legal entities may be able to pay fines, make provision for the return of waste or for the appropriate disposal or treatment of waste. A legal entity cannot be sentenced to imprisonment, but it may be suspended from activity or have its licence to deal with waste suspended. For legal entities the penalties following conviction can lead to significant adverse financial consequences.

Investigation officials and prosecutors should also consider the capacity of the legal entity to pay potential penalties or to provide restitution. In addition, the investigators should also consider pre-emptive orders to ensure that the legal entity (the subject of a prosecution) does not dispose of assets to frustrate any financial penalty.

Some jurisdictions provide for specific mechanisms for legal entities and individuals convicted of offences to forfeit the ‘proceeds of crime’.

Where an offence is committed by employees, agents or officers of a corporation in the course of their employment, proceedings will usually be commenced against the corporation. Where, however, the offence has occurred because the employee, agent or officer has committed an offence of their own volition, outside the scope of their employment or authority, proceedings may be instituted against the employee, agent or officer and not against the corporation. Another factor which will be considered is the existence and effective implementation of any training and compliance programs of the corporation.

Employees' obligations under the waste law cannot be overridden by an instruction from their employer—it is not a defence for an employee to assert that he or she was acting under direction from a supervisor, although this may be a consideration and a mitigating factor in sentencing or choice of appropriate enforcement action. This principle equally applies to contractors.

One guiding principle in deciding whether to pursue an employee or a contractor is their degree of culpability or responsibility.

IMPACT	Serious culpability	Moderate culpability	Low culpability
	• intentional or wilful acts • past non-compliances or convictions involving the same or similar legislative provisions • non-compliances of an ongoing or long duration • no attempt at clean-up or remedial action undertaken • motivated by profit or obtained a material benefit from the non-compliance • involves serious misleading conduct • failure to notify the department effectively or notification outside of reasonable timeframes • wilful ignorance of clear directions, warnings or administrative actions (from either employees, consultants, the department, or other government officers) which may have prevented or mitigated the impact	• careless acts • isolated prior non-compliances with legislation or similar legislation • non-compliance of medium duration • genuine attempt at remediation or remediation partially effective • attempt at notification of department of incident within reasonable timeframe • may have benefitted from the noncompliance • was aware of the risk of impact or the impact was foreseeable • the impact or risk of impact may have been prevented by following accepted industry standards	• inadvertent acts • no prior non-compliances with legislation or similar legislation • non-compliance of short-term duration • remediation effective • notification to department of incident within reasonable timeframe • did not benefit from the non-compliance • the impact or risk of impact was not foreseeable • the impact or risk of impact was not prevented by high standards of operation (greater than accepted industry standards).

	• the impact or risk of impact was obvious and/or preventable by implementing or following accepted industry standards.		

Table 2: Possible criteria to be considered in determining culpability of the offender.

Factors to be considered in assessing the degree of culpability include:

- whether the employee or contractor knew or should have known that the activity was likely to be illegal or inappropriate
- the seniority of the employee and the scope of their duties
- whether, having regard to the employee's seniority and employment duties or the contractor's contract, the employee or contractor had taken reasonable steps to draw to the attention of the employer or any other relevant person the impropriety of the practice
- whether the employee or contractor has taken reasonable steps to mitigate or prevent any impacts (if it was in the employee's or contractor's power to do so).

If the national waste law contains provisions extending liability for offences committed by a corporation to its executive officers the prosecutor will have to determine whether to take enforcement action against an executive officer in accordance with such a provision. The key consideration will be whether the person had actual control or influence over the conduct of the corporation in a relevant respect. Enforcement action under the executive officer liability provisions may be taken only where evidence links the person with the corporation's illegal activity.

That evidence may show, for example, that the executive officer:

- intended to engage in the action or omission
- was negligent or reckless with respect to the action or omission
- intended to deceive the department
- failed to monitor or periodically assess and manage risks associated with the corporation's relevant activities or review supporting systems and programs.

In many countries the executive officer will not be liable when the executive officer was not in a position to influence the corporation's conduct; or the officer took all reasonable steps to ensure that the corporation complied with the law.

In many cases the decision who to prosecute will depend on the evidence that has been gathered. Emails, letters and documents signed by individuals all provide evidence of connection to the activities that give rise to the offences.

4.2 Corruption and waste crime

Corruption can certainly be considered an enabler for the illegal transboundary movement of waste. It plays an important role in facilitating fraudulent trade, illegally obtained licenses and import/export certificates which deceive the legal system through corrupted officials and paperwork.

Corruption in such instances may involve a variety of actors, ranging from natural to legal persons to states, including: politicians, customs officials, landowners, police, shipping firms, and exporters/importers, amongst many others.

It is a complex process to engage in successful prosecution of suspected offenders of environmental crimes and corruption. The origin of such difficulty arises from the fact that the legislatures in many states are yet to accept the severity and the destructive nature of environmental crimes and corruption, not only on the environment but also on human health. In this regard, penalties, whether in terms of imprisonment or fines are not often appropriate nor sufficiently strict in order to induce deterrence on the part of the offender when weighed against the nature of the crime committed.

Furthermore, it can be stated that considering monetary penalties or imprisonment, should not just be based on the economic value of the resources, but instead it should also include the cost and time it takes to replace these resources and above all, the ultimate price for extinction together with the consequences, whether quantifiable or not, which this will have on human health. As a result of the lack of legislative strength, conviction rates are predominantly low due to the limited capacity of law enforcement agencies and the above-mentioned issues of corruption and limited political will.

In the context of prosecutions for waste crime the role of corrupt behaviour must always be considered especially that there exist various international conventions against organised crime and against corruption. Prosecutions for corruption, organised crime and money laundering are beyond the scope of this Guidance but are clearly matters for consideration by prosecutors. Relevant to the fight against corruption is the UN Convention Against Corruption, and also the UN Convention against Transnational Organised Crime.

4.3 Organised crime groups

According to Europol, cases of illegal trafficking in waste also show links to and the involvement of organised crime groups, (Europol Environmental Threat Assessment, 2013) incentivised by the rationale of maximising profits and minimising costs. Where possible, prosecutions aimed at dismantling criminal groups, should focus on identifying members and their roles in the commission of the crime, links with other possible serious crimes and the proceeds of crime.

In case of transnational cases involving organised crime groups,[6] the United Nations Convention against Transnational Organised Crime (UNTOC) suggests a number of valuable tools to enhance investigations and prosecution, including specialised investigative techniques, financial investigations, seizure and confiscation of illicitly acquired funds or property, the adoption of new frameworks for mutual legal assistance, law enforcement cooperation, and extradition.

[6] Organized Crime Group is defined by the United Nations Convention Against Transnational Organized Crime (UNTOC) as "a structured group of three or more persons, existing for a period of time acting in concert with the aim of committing one or more serious crimes and offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit" (Article 2(a)).

CHAPTER 5 SENTENCING AND REPORTING

Sentences are a matter for the relevant court or tribunal and may be delimited by a number of factors up to the maximum penalty provided for by the legislation and the practice of the country concerned.

Over the past decade a number of countries have adopted Sentencing Guidelines for environmental crimes to assist in the determination of penalties. The UK Environmental Offences Definitive Guidelines is one such example. The development of guidelines for penalties to deal with waste crime, including alternative sentencing provisions and restorative justice provisions, at national level must all be in accordance with the rules of Court in each national jurisdiction.

5.1 Penalties for Waste Crime

If prosecutions aim to ensure that the legislations on illegal waste transport are duly enforced, then the penalties need to be significant to act as a deterrence for those who transport and profit from illegal waste. Penalties are usually contained within the national waste legislation or may be fixed by references to the criminal law penalties relating to the seriousness on the offence.

The maximum penalties available are typically found in the relevant legislation. Mitigating and aggravating circumstances may be taken into account when sentencing. Some jurisdictions have extensive guidelines that list these circumstances, in accordance with established principles, to provide consistency and the desired or necessary level of punishment.

This is of particular value in giving effect to the obligation set forth in paragraph 4 of Article 4 of the Basel Convention: *"[to] take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention"*.

Approaches that use sentencing guidelines may be especially valuable for cases heard in non-specialist courts, which may see relatively few environmental prosecutions. In addition, for what concerns the European framework, examples of cases addressed by the European Court of Justice can be of great use as a tool to interpret and apply the national rules.[7]

Various useful principles to take into consideration when determining a sentence, based on frequently asked questions, may be applied to any sentencing considerations in relation to the illegal trafficking in waste. In this regard, article 3 of Directive 2008/99/EC, article 36 of the Waste Framework Directive and article 50 of the Waste Shipment Regulation provide that penalties for the mentioned offences must be "**effective, proportionate and dissuasive**."

[7] See for instance a compilaton of cases on waste shipments available at: https://ec.europa.eu/environment/waste/shipments/case_law.htm ; or consult the website of the EU Court of Justice available at: https://curia.europa.eu/jcms/jcms/j_6/en/

Those three concepts allow to link the severity of a penalty to the seriousness of an offence (see Annexure 3 for further details).

Sentencing considerations are the general factors that can be considered by a court/judge when deciding on a sentence. Usually they are prescribed under the relevant legislation. The following is a non-exhaustive list of factors which may be considered at the prosecution level, in preparing the sentence submissions:

- the impacts or potential impacts resulting from the offence, including:
  - the seriousness of the impact, or risk of impact, on the environment
  - or the potential for the impacts to be rectified or mitigated.
- the culpability of the offender, including:
  - the steps taken by the defendant to rectify or mitigate the impacts
  - the level of cooperation by the defendant with the department
  - any prior convictions of the defendants relevant to the matter currently being considered
  - any benefit or profit derived by the defendant due to the offence.
- the level of penalty sufficient to deter others from similar conduct
- the prevalence of the offence
- the availability and appropriateness of alternative sentencing orders
- the maximum penalty for the offence
- any relevant sentencing precedents or comparative cases

In addition to any penalties, fines or orders which may be made by the courts under the relevant legislation, some environmental crime legislation provides for additional specific orders upon sentencing an offender for certain offences. The availability of these additional orders is to provide the court with the flexibility to impose a penalty or order that:

- is proportionate and tailored to the particular circumstances of the case
- will enhance compliance with the legislation or achieve deterrence
- will allow for remediation or remedying of any impacts caused
- will provide for the recovery of any financial benefit received because of the contravention
- will restore or enhance for the public benefit.

Other jurisdictions around the world have incorporated these types of orders into their legislation and have been successfully applying them for some time. These may include payments into restoration funds, publication orders, and orders to change policies and practices to prevent further offences, including training for company staff.

5.2 Ancillary Penalties

Some waste legislation provides for a list of grounds for the suspension or cancellation of permits, licences or authorities. These grounds might include a failure to perform administrative requirements such as payment of fees or lodging of returns. They might also include the holder

being convicted of an offence under that legislation or not meeting specified suitability criteria for the permit, licence or authority.

Payment of fees due under legislation is a fundamental obligation of someone who holds a permit from the department. Operators who fail to pay fees obtain a commercial advantage over their competitors and can undermine the legitimacy of the regulatory regime. Where legislation administered by the department permits, the department may suspend or cancel the relevant permit, licence or authority of an operator with overdue fees. When deciding whether to cancel or suspend a licence, permit or authority, the requirements of the legislation must be complied with. The aim of cancellation or suspension of a permit, licence or authority is not punitive; rather it is based on the need to protect the integrity of the legislative regime, the environment and the community from unsuitable operators.

In addition to the above matters, the assessment of environmental damages as part of any criminal enforcement will need to be conducted in accordance with the relevant provisions of the national legislation. Some jurisdictions may have specific legislative provisions for the cancellation or suspension of licences or approvals that will prohibit or limit the ability of the convicted party to engage in the waste business. This can place a very significant economic burden on the party convicted of a waste crime and is a good application of the extended polluter pays principle (see also the relevant section in the Introduction).

Although not directly mentioned in the Basel Convention, it is commonly agreed that the party held responsible for the illegal shipment should be also be held responsible for the costs of take-back or repatriation. In the EU, article 25 of the Waste Shipment Regulation mentions that the repatriation has primarily to be paid by those arranging for the shipment. In cases where such persons are not available or insolvent, the country of origin has to pay the bill. It also gives a definition of the repatriation costs which include shipment fees, container rental and required treatment activities following on the return of the waste to its country of origin.

5.3 Reporting and Monitoring

Prosecution agencies should provide good reporting to the community on the activities undertaken to address environmental crime. Regular reporting on successes and failures can assist in the deterrence of environmental waste crime and to promote further reporting of waste crime.

In addition, the Conference of the Parties of the Basel Convention requested Parties to report any case or alleged case of illegal traffic to the attention of the Secretariat of the Basel Convention and to provide all necessary information to enable it to take any appropriate action. A special form is available on the Secretariat website.

Monitoring of administrative orders and remediation or clean-up orders are also important to ensure that the system of compliance and enforcement is functioning well.

Annexures

Annexure 1 – International Instruments

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention, 1989)

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES 1963)

International Convention on the Prevention of Pollution from Ships (MARPOL, 1973)

International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported And Unregulated Fishing (FAO, 2001)

Minamata Convention on Mercury (Minamata Convention, 2013).

Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol, 1987)

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention, 1998)

Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention, 2001)

Stockholm Declaration (1972)

Vienna Convention for the Protection of the Ozone Layer (Vienna Convention, 1985)

Annexure 2 – Definitions under the Basel Convention

Below are some of the relevant definitions under the Basel Convention (Secretariat of the Basel Convention and UNEP, 2012).

"Wastes" are substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law;

"Management" means the collection, transport and disposal of hazardous wastes or other wastes, including after-care of disposal sites;

"Transboundary movement" means any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement;

"Disposal" means any operation specified in Annex IV to the Convention;

"**Approved site or facility**" means a site or facility for the disposal of hazardous wastes or other wastes which is authorized or permitted to operate for this purpose by a relevant authority of the State where the site or facility is located;

"Competent authority" means one governmental authority designated by a Party to be responsible, within such geographical areas as the Party may think fit, for receiving the notification of a transboundary movement of hazardous wastes or other wastes, and any information related to it, and for responding to such a notification, as provided in Article 6;

"Focal point" means the entity of a Party referred to in Article 5 responsible for receiving and submitting information as provided for in Articles 13 and 16;

"Environmentally sound management of hazardous wastes or other wastes" means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes;

"Area under the national jurisdiction of a State" means any land, marine area or airspace within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment;

"State of export" means a Party from which a transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated;

"State of import" means a Party to which a transboundary movement of hazardous wastes or other wastes is planned or takes place for the purpose of disposal therein or for the purpose of loading prior to disposal in an area not under the national jurisdiction of any State;

“State of transit” means any State, other than the State of export or import, through which a movement of hazardous wastes or other wastes is planned or takes place;

“States concerned” means Parties which are States of export or import, or transit States, whether or not Parties;

“**Person**” means any natural or legal person;

“Exporter” means any person under the jurisdiction of the State of export who arranges for hazardous wastes or other wastes to be exported;

“Importer” means any person under the jurisdiction of the State of import who arranges for hazardous wastes or other wastes to be imported;

“Carrier” means any person who carries out the transport of hazardous wastes or other wastes;

“Generator” means any person whose activity produces hazardous wastes or other wastes or, if that person is not known, the person who is in possession and/or control of those wastes;

“Disposer” means any person to whom hazardous wastes or other wastes are shipped and who carries out the disposal of such wastes;

“Political and/or economic integration organization” means an organization constituted by sovereign States to which its member States have transferred competence in respect of matters governed by the Convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve, formally confirm or accede to it;

“Illegal traffic” means any transboundary movement of hazardous wastes or other wastes: (a) without notification pursuant to the provisions of this Convention to all States concerned; or (b) without the consent pursuant to the provisions of this Convention of a State concerned; or (c) with consent obtained from States concerned through falsification, misrepresentation or fraud; or (d) that does not conform in a material way with the documents; or (e) that results in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law, shall be deemed to be illegal traffic.

Annexure 3 – European Union Waste Legislative Framework

This section provides details on the legal framework applicable in the European Union[8]. As previously mentioned, whilst the scope of the Guidance is illegal transboundary trade in waste, it is also intended to provide guidance in the prosecution of waste crime in general.

In addition to this regional legal framework, Annexure 4 also provides a list of relevant national legislation. There have also been many changes in national waste laws and regulations that can impact on the investigation and prosecution of waste crimes.

Directive 2008/99/EC on the Protection of the Environment through Criminal Law

The Directive 2008/99/EC on Environmental Crime iterates the high level of environmental protection of the Treaty on the Functioning of the European Union (see especially articles 11 and 191). It makes it clear fact that "*the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment*" and that such compliance should be strengthened by the use of criminal penalties over and above administrative and civil penalties to properly reflect the level of social disapproval of environmental crimes. The Directive establishes minimum rules for criminal sanctions throughout the EU where the actions have been committed intentionally or with serious negligence and allows Member States to enact more stringent measures (such as strict liability), provided they are compatible with the provisions of the EC Treaty. In particular, article 3 includes illegal waste exports (if undertaken in a non-negligible quantity) in the list of offences that must constitute a criminal offence.

The Directive 2008/99/EC entered into force on 26 December 2008 with deadline for national transposition on 26 December 2010.

Waste Framework Directive (WFD)

The Waste Framework Directive 2008/98/EC establishes the basic concepts and definitions relating to waste management, such as definitions of waste, recycling and recovery. It explains when waste ceases to be waste and becomes a secondary raw material (so called end-of-waste criteria), and how to distinguish between waste and by-products. The Directive lays down some basic waste management principles: it requires that waste be managed without endangering human health and harming the environment, and in particular without risk to water, air, soil, plants or animals, without causing a nuisance through noise or odours, and without adversely affecting the countryside or places of special interest. It reiterates the "polluter pays principle" of the EU Treaty and introduces "extended producer responsibility" - where the design and production of goods should facilitate the efficient use of resources during their whole life-cycle including repair, re-use, disassembly and recycling without compromising

[8] Note: both regulations and directives regulate the waste Framework in the European Union. A regulation is directly applicable in all European Union Member States, while a directive requires transposition in national law.

the free circulation of goods on the internal market. The Directive contains the below definitions of waste and hazardous waste. According to Article 3, 'waste' means any substance or object which the holder discards or intends or is required to discard.

The Waste Framework Directive entered into force on 12 December 2008 with deadline for national transposition on 12 December 2010. Further information on the transposition is available on the EU website.

The List of Waste Decision 2000/532/EC[9] establishes a classification system for wastes, including a distinction between hazardous and non-hazardous wastes. Hazardous wastes are marked with an asterisk. The List establishes twenty categories of waste each with their own subcategories and each of these is allocated a 6-digit code. The List establishes a common classification scheme for wastes throughout Europe and assists in the monitoring of waste from cradle to grave. It is closely linked to the list of the main characteristics which render waste hazardous contained in Annex III to the Waste Framework Directive[10].

The Commission notice 2018/C124/01 on technical guidance on the classification of waste provides clarifications and guidance to national authorities, including local authorities, and businesses on the correct interpretation and application of the relevant EU legislation regarding the classification of waste, namely identification of hazardous properties, assessing if the waste has a hazardous property and, ultimately, classifying the waste as hazardous or non-hazardous.

Waste Shipment Regulation (WSR)

The Waste Shipment Regulation 1013/2006/EC (consolidated version) lays down procedures for the transboundary shipments (i.e. transport) of waste and implements into EU law the provisions of the Basel Convention and the OECD Decision. It includes a ban on the export of hazardous wastes to non-OECD countries, whether for disposal or recovery as well as a ban on the export of waste anywhere for disposal (the Basel Ban Amendment entered into force on 5 December 2019).

To ensure common understanding of how Regulation (EC) No 1013/2006 on shipments of waste should be interpreted, Correspondents' Guidelines have been agreed by the waste shipment correspondents of the EU Member States. The European Network of Prosecutors for the Environment (ENPE) has also published an instruction video explaining the basic principles of the Waste Shipment Regulation.

[9] Amended by Commission Decision (EU) No 2014/955/EU of 18 December 2014 amending Decision 2000/532/EC on the list of waste pursuant to the Waste Framework Directive 2008/98/EC (OJ L 370, 30.12.2014, p. 44–86).

[10] Amended by Commission Regulation (EU) No 1357/2014 of 18 December 2014 replacing Annex III to Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain Directives (OJ L 365/89, 19.12.2014).

The WSR entered into force on 15 July 2006 and is directly applicable in all EU member States.

Is it Waste? Definition of waste under EU regulation

For the provisions of the WSR (and Basel Convention) to apply, the material being shipped must be waste. Many prosecutions will stand or fall on whether an item or material is waste or not. Having established this most critical element, the next step is to determine whether the shipment is illegal or not. The WSR refers back to the Waste Framework Directive 2008 for all its major definitions. Therefore:

Waste is defined as "*any substance or object which the holder discards or intends or is required to discard";* and

Hazardous waste is any waste that has one or more of the properties listed in Annex 3 to the WFD.

There is an abundance of case law on the definition of waste, but the following main principles can be summarised:

The concept of waste cannot be interpreted restrictively. Each case must be determined on its own facts. For example, it is generally easier to establish whether discarded paper is waste than an electrical item or so-called by-product;

Discard means to get rid of something that ceases to be required for its original purpose, because it is unsuitable, unwanted or surplus to requirements and discard must be interpreted in light of the aims of the WFD, the EC Treaty, and therefore the WSR as well;

The fact that a discarded item has economic value does not prevent it from being waste;

Where an item is waste, has anything been sufficiently done to it that has changed its status from waste to non-waste. If not then the item remains waste. End-of-waste criteria are defined in Article 6 (1) and (2) of the WFD, and the European Commission prepared a set of end-of-waste criteria for priority waste streams.

Waste differ from "by-product", defined by Article 5 of the WFD as "a substance or object, resulting from a production process, the primary aim of which is not the production of that item". The European Commission developed a guidance on the issue of waste and by-products.

In addition to legislation and case law, guidance documents may exist that could assist in proving whether items are waste or not, such as national guidelines on tyre safety, guidelines published by trade bodies (e.g. for compost or waste paper) or the EU. For example:

EU Correspondents' Guidelines have been agreed by the waste shipment correspondents of the EU Member States and represent their common understanding of how WSR should be interpreted. These are not legally binding documents but do provide technical guidance on determining when items are likely to be waste or not.

All of this will be useful evidence (or lack thereof) to obtain when seeking to prove that items being shipped are waste and not working second hand electrical goods.

Besides the definition of waste, there are then a number of other relevant definitions within the WSR to consider along the way (See Article 2 WSR for a full list of definitions).

For example:

- "**recovery**" or "**disposal**" of waste is determined according to the definitions and categories of activities in the WFD and its Annexes;
- "**export**" means the action of waste leaving the EU;
- "**transport**" means the carriage of waste by road, rail, air or sea;
- "**shipment**" means the transport of waste destined for recovery or disposal that is planned or takes place;
- "**illegal shipment**" defines 7 distinct kinds of shipment that can be summarised into 3 main categories. A full description of these can be found in Module 1 Legislative landscape:

  Where there is an outright ban on the export whether for disposal or recovery because the waste is prohibited, hazardous, is household waste or it is not wanted by the country of destination;

  Where the waste is exported without the notification and or consent of all competent authorities concerned, where that consent is obtained through fraud or misrepresentation, or where there are material defects in the accompanying shipping documents; and

  Where the recovery or disposal of the waste results in a contravention of European or international law.

- "**notifier**" is any natural or legal person under the jurisdiction of the Member State who intends to carry out the shipment. There is then a top down list in order of ranking to determine who the notifier is, starting with the original producer and including a collector of waste who has assembled the waste to start from a single place, a registered dealer or broker authorised to act for the producer or collector. Where any of these are unknown or insolvent then the holder is deemed to be the notifier (Article 2(15) WSR); and
- "**holder**" is defined as the producer of the waste or the natural or legal person in possession of it.

Is there an illegal shipment?

Having established that the item or material is waste, then the provisions of the WFD and WSR apply. The WSR applies a "traffic light" approach to the shipment of waste depending on its classification, destination and whether the waste is going for recovery or disposal: these are

the Green and Amber controls of the OECD decision and the prohibition (Red) on the exports of hazardous waste. For example:

"Green-listed" waste such as waste paper or waste plastic sent for recovery within the EU and OECD does not require the consent of the authorities other than controls normally applied in commercial transactions. Shipments of green-listed waste for recovery need to be accompanied by information as required in article 18 and the document contained in **annex VII** of the Waste Shipment Regulation. Non-OECD countries can adopt green list controls for these types of waste provided they have notified the EU of this. If they have not done so then the default position is prior written notification and consent of all competent authorities of dispatch[11], transit and destination[12];

The shipment of hazardous wastes and of wastes destined for disposal within Europe and the OECD is generally subject to prior written notification and consent, so-called **Prior Informed Consent (PIC) procedure**, as stated under Chapter I and II of the WSR; and

The export of hazardous wastes (and household waste) to non-OECD countries is **banned**, whether for disposal as per article 34 or for recovery as per article 36.

Article 36 of the WSR provides information on exports for recovery to non-OECD countries

Article 36

Exports prohibition

1. Exports from the Community of the following wastes destined for recovery in countries to which the OECD Decision does not apply are prohibited:

(a) wastes listed as hazardous in Annex V;

(b) wastes listed in Annex V, Part 3 (waste collected from households);

(c) hazardous wastes not classified under one single entry in Annex V;

(d) mixtures of hazardous wastes and mixtures of hazardous wastes with non-hazardous wastes not classified under one single entry in Annex V;

(e) wastes that the country of destination has notified to be hazardous under Article 3 of the Basel Convention;

[11]'Competent authority of dispatch' means the competent authority for the area from which the shipment is planned to be initiated or is initiated (Article 2(19) WSR).

[12] Commission Regulation (EC) No 1418/2007of 29 November 2007 concerning the export for recovery of certain waste listed in Annex III or IIIA to Regulation (EC) No 1013/2006 of the European Parliament and of the Council to certain countries to which the OECD Decision on the control of transboundary movements of wastes does not apply (OJ L 316/6, 4.12.2007).

(f) wastes the import of which has been prohibited by the country of destination; or

(g) wastes which the competent authority of dispatch has reason to believe will not be managed in an environmentally sound manner, as referred to in Article 49, in the country of destination concerned.

Article 36(1) of the WSR lists 7 categories of waste that are prohibited from being exported from the EU to a non-OECD country for recovery[13]. These include hazardous wastes and mixtures of hazardous and other waste, household waste, wastes that have been notified by the non-OECD country as hazardous pursuant to Article 3 of the Basel Convention and waste, which the country itself has prohibited from being imported into its jurisdiction.

A shipment in breach of Article 36 falls into the categories of illegal shipment defined by Article 2 (35) of the WSR.

To establish a breach of Article 36 and therefore a suspected illegal shipment, the following elements will need to be considered:

Is the material waste? If yes, proceed to point 2. If no then the WSR (and WFD) does not apply and there is no breach.

Does the waste fall within one of the 7 categories listed in Article 36? If so, proceed to point 3.

Was there an export from the EU, bearing in mind the definition of export, shipment and transport? If so, proceed to point 4.

Was the waste destined for recovery? If so, proceed to point 5.

And was the waste destined for recovery in a non-OECD country?

If all of the elements can be established, then there is likely to have been an alleged breach of Article 36 and therefore a suspected illegal shipment. Having established an alleged illegal shipment, it then depends on the provisions of national legislation to determine whether an offence has been committed, if so by whom, what investigations to undertake and whether to proceed to prosecution (see next chapters). Ultimately, whether the item is waste and the shipment illegal will be decided by a court based on the facts and evidence of each particular case.

While Article 36 is dedicated to the export prohibition, many of the illegal waste shipments from the European to non-OECD countries detected in the EC relate to violation of **Article 37** WSR. In the case of waste which is listed in Annex III or IIIA and the export of which is not prohibited under Article 36, the Commission shall, within 20 days of the entry into force of this Regulation, send a written request to each country to which the OECD Decision does not apply,

[13] Article 34 prohibits the export of waste for disposal, save a few rare exceptions.

seeking a confirmation in writing that the waste may be exported from the Community for recovery in that country, and an indication as to which control procedure, if any, would be followed in the country of destination.

Each country to which the OECD Decision does not apply shall be given the following options:

a prohibition; or

a procedure of prior written notification and consent as described in Article 35; o

no control in the country of destination.

Countries' answers are listed in EU Regulation 1418/2007. When a country didn't answer, waste may only send with PIC.

Provisions for sentencing in the European Union

Article 3 of Directive 2008/99/EC, article 36 of the Waste Framework Directive and article 50 of the Waste Shipment Regulation provide that penalties for the mentioned offences must be "effective, proportionate and dissuasive." Those three concepts allow to link the severity of a penalty to the seriousness of an offence, therefore they are often dealt with together in the Court of Justice of the EU´s case law. Below is an indication of what the different terms mean in this context(ClientEarth, 2018):

An effective penalty ensures that the goal set by the legislator is reached, despite the infringement, and intends to prevent future harm from happening.

A dissuasive penalty is one that, because of its severity and the risk it represents for offenders, has a genuinely deterrent effect. A penalty is genuinely dissuasive when the threat of repressive action creates sufficient pressure to ensure that the situation envisaged under EU law is realised in practice and when non-compliance becomes economically unattractive.

A proportionate penalty allows to attain the objectives set by the legislation and does not go beyond what is necessary in order to attain these objectives. The first condition means that there is a certain minimum standard that a penalty set up for a breach of EU law needs to comply with.

(ClientEarth, 2018)

Determining whether the penalty is effective, proportionate and dissuasive requires taking into consideration the specific circumstances of the facts and the relevant national legislation applicable.

This is also described in the training package on EU Waste legislation criminal practice for judges, which consists in a set of training tools developed by the EC in support to all training structures with an interest in EU Waste legislation. In the European Union, the majority of criminal practice involving waste law has to do with unlawful transboundary shipments of waste and unlawful landfills. If the competent authorities of a waste shipments and of destination normally would not have consented the shipment, any attempt can only be unlawful. A criminal judge may have to characterize the unlawful transfer and decide which penalty should be applied. While determining the proportionality requirements, the court may have to take into account the level of adverse impact the unlawful transfer may have on human health and the environment (European Commission, 2019).

Annexure 4 – Waste legislation by Country in the European Union and South East Asia

Overview of national legislation related to Directive 2008/98/EC and Regulation 1013/2006/EC[14]

Country	Legislation
Austria	Austrian Federal Waste Management Act 2002 of 10 July 2007.
Belgium	Flemish decree of 23 December 2011 concerning the sustainable management of material cycles and waste (Belgian State Gazette, 28 February 2012); Decision of the Flemish government of 17 February 2012 (Belgian State Gazette, 23 May 2012; Err 8 June 2012); Walloon decree of 10 May 2012 (Belgian State Gazette, 29 May 2012) and by a decision of the Walloon government of 10 May 2012 (Belgian State Gazette, 4 June 2012); Brussels capital region ordinance of 14 June 2012 on waste (Belgian State Gazette, 27 June 2012); Law of the 9 July 1984, concerning the importation, exportation and transit of waste (in modification).
Bulgaria	Waste Management Act, promulgated in SG 53/ 13 July 2012
Croatia	Law on Sustainable Waste Management Official Gazette 94/13; Waste Act (Official Gazette No.178/04, 111/06, 60/08, 87/09; Regulation on Supervision of Transboundary Movement of Waste (Off. Gazette 69/2006 as amended).
Cyprus	Waste Law N.185 (I)/2011; Solid and Hazardous Waste Law 215(I)/ 2002 and regulation derived from this law.
Czech Republic	Waste Act N° 185/2001 latest amendment February 2008 (N° 34/2008).
Germany	Waste Management Act (KrWG) of 1 June 2012; AbfVerbrG (waste shipment law) of 19 July 2007.
Denmark	Bekendtgørelse om overførsel af affald (BEK nr 799 af 28/06/2007)

[14] Based on European Commission (2011), Assessment and guidance for the implementation of EU waste legislation in Member States, ENV.G.4/SER/2009/0027, https://ec.europa.eu/environment/waste/shipments/pdf/Annex%20VII.pdf; European Commission, Support to Implementation - Municipal Waste, https://ec.europa.eu/environment/waste/framework/support_implementation.htm; EEA (2018), Resource efficiency and waste, https://www.eea.europa.eu/themes/waste;

Estonia	Waste Act of 1 May 2004.
Spain	Law 10/1998 on Waste and Law 26/2007 on environmental responsibility.
Finland	The Finnish Waste Act (1072/93, latest amendment 1583/2009); Waste Decree (1390/93, latest amendment 1815/2009); Environmental Protection Act (86/2000) and Decree (169/2000).
France	Law 2010-788 of 12 July 2010 on national commitment for the environment; Ordinance 2010-1579 of 17 December 2010 laying down various provisions for adaptation to European Union law in the field of waste; Decree 2011-828 of 11 July 2011 laying down various provisions relating to the prevention and management of waste; Decree 2016-811 of 17 June 2016 relating to the regional waste prevention and management plan; Circulaire 2007 for enforcement of the WSR; Environmental code (articles L 541-44 ff ; modified by the ordinance from 24 July 2009).
Greece	Joint Ministerial Decision 13588/725/2006 (OJJ 383 B) - management of hazardous waste; Joint Ministerial Decision 50910/2727/2003 (OJJ 1909 B) - management of non - hazardous waste (regulate the collection and transport including the transfrontier shipment).
Hungary	Act CLXXXV/2012 on Waste; Governmental Decree No. 180/2007. (VII.3.) on transboundary shipment of waste (entry into force: 12.07.2007).
Ireland	Statutory Instruments No. 419 of 2007 Waste Management (Shipments of Waste) Regulations.
Italy	National Decree on Landfilling (d.lgs. 36/03) and subsequent integrations and modifications. The Waste Acceptance Criteria are currently transposed through D.M. (Decree of Ministry) 27/09/2010, that repeals and updates previous Decrees. (=LFD), Regulation 2150/2002/EC transposed into law; Ministerial decree 370/1998 on the calculation of the financial guarantee; Legislative decree (decreto legislativo) on environmental norms, n. 152 from 3 April 2006, and its amendments.
Latvia	Latvian Waste Management Act of 18 November 2010.
Lithuania	Law on Waste Management of 16 June 1998, Nr. VIII-787, as amended
Luxembourg	Act of 21 March 2012 on the management of waste and amending one law of 31 May 1999 on the establishment of a fund for the protection of the environment. 2 Act of 25 March 2005 on the operation and financing of SuperDrecksKescht action; Grand-ducal regulation of 7 December 2007 regarding certain application modalities of Regulation (EC) 1013/2006;

	Grand-ducal regulation of 7 December 2007 regarding the procedural requirements of the WSR on national level.
Malta	Waste Management (Shipment of Waste) Regulations (S.L.549.65).
Netherlands	Environmental Management Act (Wet milieubeheer -. Wm); Act on Economic offenses of 1950.
Poland	Act of 27 April 2001 on waste (Journal of Laws of 2010, No. 185, item. 1243, with later amendments); Act of 29.06.2007 on waste shipments (OJ of 2007 no 124 item859).
Portugal	Portuguese Decree Law 73/2011 of 17 June 2011 amending the Decree Law 178/2006 of 5 September 2006 defining the conceptual framework for waste management; Decree-law No 45/2008 of 11 March 2008.
Romania	Law 211/2011 on waste, transposition of the Waste Framework Directive 2008/98/EC: Government Decision 788/2007 regarding the setting up of some measures for the implementation of the WSR, modified by Government Decision 1453/2008.
Sweden	Swedish Waste Ordinance (2011:927); The Swedish Ordinance on Transboundary Movements of Waste (SFS 2007:383); The Swedish Ordinance (1998:900) on Inspection and Enforcement - according to the Environmental Code.
Slovenia	Decree on waste (Official Gazette of RS, no. 37/15) of 30 May 2015; Decree on the implementation of the Regulation (EC) No. 1013/2006 on shipments of waste (OJ RS no. 71/2007).
Slovakia	Act No. 223/2001 Coll. on waste and on amendment of certain acts, as amended.
UK	The Waste (England and Wales) Regulations 2011 (S.I. 2011 No. 988); Waste Regulations (Northern Ireland) 2011 (SR 2011 No. 127); Waste (Scotland) Regulations[15].

Overview of national legislation related to waste and waste management in Asia

[15] Further information: https://www.isonomia.co.uk/wp-content/uploads/2018/09/UK-Waste-Framework-Directive-Implementation-Report-2016.pdf

Australia	Hazardous Waste (Regulation of Exports and Imports) Act 1989
Cambodia	Law on Environmental Protection and Natural Resources Management 1996 Sub-Decree on Solid Waste Management No 36 Environmental Guidelines on Solid Waste Management in Kingdom of Cambodia 2006
China	Law on the Prevention and Control of Environmental Pollution Caused by Solid Waste 2004
Indonesia	Law on Management and Protection of the Environment 2009 Regulation Indonesia on Waste Management of hazardous and toxic materials (No. 101 of 2014)
Malaysia	Environmental Quality Act 1974 Customs Act 1967 (as at 2016) Solid Waste and Public Cleaning Management Act 2007 Customs (Prohibition of Imports) Order
Myanmar	Environment Protection Law 2012
Philippines	Toxic Substances and Hazardous and Nuclear Waste Control Act 1990 (Republic Act No 6969) Ecological Solid Waste Management Act 2001 Revised Procedures and Standards for the Management of Hazardous Wastes 2013 (Revising DAO 2004-36) DNER AO 2013-22
Singapore	Hazardous Wastes (Control of Export, Import and Transit) Act and Regulations 1998
Thailand	Hazardous Substances Act BE 2535 (1992) Export and Import of Goods BE 2522 (1979)
Vietnam	The Law on Management of the Waste and Hazardous Toxic Materials, 1999 The Law on Water Resources, 1998

Annexure 5 – Case Studies

Case study 1: Waste giant guilty of exporting banned waste

The Environment Agency prosecuted Biffa Waste Services Ltd for sending to China waste collected from households, such as used nappies and food packaging, that the company claimed was wastepaper. The export of unsorted household recycling waste from the UK to China has been banned since 2006.

After a three-week trial, a jury at Wood Green Crown court found Biffa guilty of two breaches of the law in May and June 2015. Paper can legally be sent to the People's Republic, but heavily contaminated other waste cannot. The jury didn't accept Biffa's version of events that consignments leaving its depot in Edmonton four years ago complied with the law because they comprised of wastepaper. Evidence gathered by investigators at Felixstowe port clearly identified the contents of seven 25-tonne containers bound for China as including glass, plastics, electrical items and metal. In fact, when Environment Agency officers searched the cargo, they found everything from women's underwear and plastic bottles to metal pipes and even a damaged copy of a 12-inch record by 90s chart-toppers Deee-Lite. Instead of wastepaper, investigators discovered diverse discarded debris such as shoes, plastic bags, an umbrella, socks, hand towels, unused condoms, video tape, toiletries and electric cable. The nappies and sanitary towels gave off a pungent "vomit-like" smell when inspected by Environment Agency officers. Biffa was also trying to export laminate flooring, coat hangers, pet food containers, toilet wipes, latex gloves and, ironically, china.

Jurors heard Biffa used two companies, or brokers, to act as intermediaries to manage the deal to send the waste to two delivery sites in Shenzhen and Guang Dong on the South China Sea coast. The first broker took up a request from a Chinese client in April 2015 to arrange shipment of 5,863 tonnes of mixed wastepaper by contacting Biffa. A price of around £350,000 was agreed for the export, due to take place the following month. At the same time, Biffa agreed with a second broker to ship 4,992 tonnes of mixed paper in a contract worth almost £290,000. The Environment Agency prevented any of the seven containers from leaving Felixstowe.

Biffa pleaded not guilty at an earlier hearing to two counts of breaching regulation 23 of the Transfrontier Shipment of Waste Regulations 2007. It is an offence under the regulations to breach article 36 of the European Waste Shipments Regulation 1013/2006, which bans the export of waste collected from households to China. Judge Simon Auerbach deferred sentencing until 27 September. The court was told the Environment Agency and Biffa had agreed a figure of £9,912 to be paid for proceeds of crime.

Source: UK Environment Agency, Waste giant guilty of exporting banned waste, Press release, 24 June 2019.

Case study 2: Illegal export of waste from France

In 2012, two managers of a French recycling company were given suspended 1-year prison sentence, 6,000€ and 3,000€ of fines, permanent disqualification from being a director of any commercial or artisanal company and to clear the site. They were also ordered to pay 10,000€ damages to the French association which lodged the complaint.

The company, specialized in the transport, removal, handling, treatment and dismantling of e-waste had increased the amount of waste stored on its site and then transferred its activities without declaring it to the prefect as it was obliged.

The company was exporting e-waste abroad (in Belgium, Turkey, the United Arab Emirates, Vietnam, Hong Kong SAR China) without carrying out the many administrative formalities and declarations required by the regulations on cross-border shipments of waste. According to the defendants, it was not waste but "second-life products" that they treated for repair or reuse. It was actually waste recovered from many administrations that the company destroyed and sent to scrap dealers abroad.

Source: France Nature Environnement, Communiqué de presse (press release), 2012

Case study 3: Convicted waste criminal serve a total of 16 years

The waste criminal defrauded the electrical waste recycling industry of £2.2 million in 2016. The criminal falsified paperwork to make illegitimate claims that his firm collected and recycled 19,500 tonnes of household electrical waste during 2011. In reality this waste was never handled, while he did receive money from the Producer Compliance Scheme. The criminal also had previous convictions for fraud and illegally exporting banned hazardous waste Nigeria.

He was serving a record custodial sentence of 7 years and 6 months. Initially, the man was ordered to pay back more than £1.3 million of the £2.2 million he acquired through illegal activity, on top of over £79,000 from a previous Environment Agency prosecution for exporting hazardous waste to Nigeria in 2011 and over £17,000 from a VAT fraud in 2015.

Despite court orders, no payments were made.

Sentence: As there was no realistic prospect that he would pay the outstanding amount, he was sent to prison for an additional 8 years for falling to pay the orders of £1.3 million, and 16 months for other orders. Adding up in total to 16 years of custodial sentence.

Sources: https://www.gov.uk/government/news/convicted-waste-fraudster-has-more-than-9-years-added-to-jail-time-for-failing-to-repay-1-3-million-in-ill-gotten-gains

Annexure 6 – Sampling and Analysis

Guidance Elements for Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes (COP Basel 6th Meeting)

Sampling and analysis

A. Quality of Investigations

1. It is important that investigation officers are familiar with sampling and analysis procedures before proceeding with investigations. Improper collection of evidence may compromise the likelihood of a successful prosecution. Consequently, investigation officers should be trained in determining the chain of custody, retaining samples and security procedures that the sampling team and laboratory intend to follow.

2. Experienced government agencies that regularly deal with environmental crime will have the relevant background and expertise to carry out investigations to a high standard. However, if a less experienced local officer, the person in charge of the investigation, is taking samples will need to ensure that appropriate chains of custody procedures are followed.

B. Quality of Analysis

3. Similarly, it cannot be assumed that laboratories will necessarily follow appropriate procedures once samples have been taken. This is especially true for laboratories or personnel that are relatively inexperienced in collecting and analysing samples for use in criminal proceedings. Consequently, it is important to work with accredited or certified laboratories that are familiar with the relevant procedures.

C. Sampling Procedures

4. A number of questions may be asked to ensure proper handling of samples, as follows:

(a) Does the chain of custody form follow the samples from the time they are taken until the

time they are delivered to the laboratory for analysis?

(b) If sampling exceeds one day or samples require storage prior to delivery to the

laboratory, investigators should determine what the samples are intended to be used for and what security procedures are in place to protect existing samples. Procedures should ensure secure overnight storage for all samples which are to be used as evidence in criminal cases. For example, if the samples are to be stored in a locked vehicle, then the vehicle should be garaged in secure conditions. Where samples are being taken to determine clean-up costs for civil cases, secured storage is not required. They should also determine whether there are any other storage or packaging requirements relevant to the material being sampled and check how the samples will be packaged. For example, the samples may need to be stored at a

certain temperature, in a dark place and/or away from moisture until analysis is carried out to ensure their integrity. Ensure that all packaging and storage requirements are met.

(c) Is a chain of custody procedure or other record generated when the laboratory receives the samples?

(d) How does the laboratory store the samples prior to analysis?

(e) Will the samples be handled by multiple personnel during the course of analysis? If so, what records are maintained to track samples and procedures?

(f) What happens to the samples after analysis? Does the laboratory retain the samples? If so, how long are the samples retained and are the samples secure?

5. D. Capability of Laboratory

(a) Are approved testing methods used to analyse samples and are the correct methods used for the specific circumstance?

(b) Are appropriate quality assurance/quality control procedures strictly applied?

(c) Does the laboratory have a track record in providing high quality services for criminal

investigation? The experience and reputation of the laboratory undertaking the analysis will have a direct bearing on the quality of the analysis. Certification or accreditation should be a minimum requirement for all cases involving criminal investigations. To this end, consideration should be given to establishing a regional network of accredited laboratories that can be used for this purpose.

(d) Does the laboratory understand the objectives of the investigation?

E. Capability of Inspectors

6. A number of questions may be asked to ensure laboratory capability, as follows:

(a) Does the investigator understand the correct analytical procedures to be followed and

what information is required? As with sampling, it is important to furnish scientific personnel with as much relevant case history as possible prior to analysis to maximise the accuracy of the results.

(b) Can the investigator accurately interpret the results? If not, has he/she clarified any areas of confusion? It is important to obtain early clarification of results in areas where there may be confusion or a lack of understanding.

(c) Has the investigators asked the laboratory to retain the samples for the requisite period

of time?

F. Treatment of video and photographic evidence

7. As a general rule, photographic or videotaped evidence is not recommended for recording sampling or analysis procedures. However, should photographic or videotaped evidence be required,

the following measures should be taken:

(a) personnel undertaking sampling or analysis should not be videotaped or photographed.

(b) the sample area and sample jars should be videotaped or photographed before and after

sampling takes place as a record that correct procedures have been followed.

(c) where a videotaped record of sampling and analysis procedures is undertaken, a new

video cassette should be used, the sound turned off and the original tape retained by the investigator in charge.

(d) where a photographic record of sampling and analysis procedures is undertaken, a full

record of the photographic evidence should be kept including photo sequence numbers, a description of the photograph and the time and date of photography. As with videotaped evidence, films should be retained by the investigator in charge.

(e) should the company under investigation request the right to videotape or photograph

sampling procedures, permission should not be granted where there is a risk of interference with the sampling being undertaken.

G. Treatment of original documents

8. The sampling team and other technical staff involved in investigations should be informed that all original documents must be stored in a secure location until the investigator notified them that the documents are no longer required. These documents include chain of custody forms, field notes and reports.

9. Likewise, the laboratory responsible for analysing the samples should be requested to maintain all original documents relating to the analysis until otherwise informed. These documents include laboratory notes, chromatograms and final reports.

H. Treatment in the Laboratory

10. Treatment in the laboratory includes the following operations:

(a) Sample pre-treatment: homogenisation, subsampling, extraction, clean-up, purification,

irradiation, etc.

(b) Component separation, chemical and physico-chemicals.

(c) Component measure: detection, identification, quantification.

I. Results and Data

11. Reliability of analytical data means that it is precise and true. Precision is achieved when random errors are minimised. Accuracy is reached when systematic errors are eliminated.

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